

New Jersey Court of Errors and Appeals.

GUSTAVE KRATZ,

Plaintiff-Appellee,

vs.

DELAWARE, LACKAWANNA & WEST-
ERN RAILROAD COMPANY,

Defendant-Appellant.

Action
at Law

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BRIEF OF APPELLANT.

Statement.

This is an appeal from the judgment entered upon the verdict of a jury in the Morris County Circuit Court on May 10, 1916, in a railroad crossing accident, the facts giving rise to the appellee's cause of action being as follows:

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On the evening of June 24, 1914, after the appellee had finished his work at the stove works in Dover, he went home and washed up and subsequently proceeded from his home down to a house which he owned, located on Franklin Road. In going to his house on Franklin Road the appellee testified that he used the railroad crossing in question, which was located just east of its East Dover signal tower. The highway in question over which the appellee proceeded, was crossed at right-angles by four tracks of the appellant, the most northerly two of said tracks being its east and west-bound main tracks and beyond said main tracks were two siding tracks. The main tracks were protected by gates operated from the

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tower a short distance therefrom. After the appellee had visited his house up on Franklin Road and stayed there for some three-quarters of an hour, he claims he proceeded back to the crossing in question, and, after arriving at said crossing, crossed the side tracks and approached the gate nearest the east-bound main track of the appellant's road. This gate the appellee claims was up at the time he started to cross the appellant's

10 main tracks, and he proceeded across the tracks looking toward the east and was just about to step off the last rail of the appellant's west-bound track when he was struck by one of the appellant's trains coming from the east. Although the version of the appellant's case with respect to the accident was that the appellee approached the crossing in question within and upon the appellant's right of way and was therefore a trespasser, the finding of the jury leaves

20 that matter, so far as concerns this argument, in the position of having established that the appellee's version of how he was injured and how he approached the crossing in question to be established as was testified to by him. The sole ground of appeal in the present case is with respect to the application of Chapter 96, Laws of 1909, to the instant case, it being contended by the appellant that if any statute applied to the

30 case at bar it was Chapter 35, Laws of 1909, which is considered by the appellant to be essentially different and more beneficial to it.

ARGUMENT.**POINT I.****Chapter 96, Laws of 1909, did not apply to the instant case.**

There was no evidence in the entire case that the appellant was either operating under or had complied with Chapter 96 of the Laws of 1909, with respect to posting a notice at such crossing, specifying during what hours the gates would be operated, and in view of that fact it is contended that the act in question was not the act applicable to the situation shown by the instant case. 10

In view of the fact that Chapter 96, Laws of 1909, did not apply to the instant case, but, as called to the Court's attention when the appellant excepted to its charge, that Chapter 35, Laws of 1909, did apply to the instant case, the question for the consideration of the Court raised by this appeal is whether any substantial harm could have been done to the appellant by charging the latter statute rather than the former one. 20

That there is a material difference between the two statutes is apparent on reading the same. In the earlier statute, Chapter 35, Laws of 1909, the legislature has said:

"That in all such cases the question whether the person so killed or injured upon attempting to cross such railroad crossing at a time when the safety gates at such crossing are not down was or was not guilty of contributory negligence shall be a question to be determined by the jury in all actions brought to recover damages for such loss of life or personal injury" (pp. 54 and 55). 30

Chapter 96, Laws of 1909, we contend is much more drastic than Chapter 35, Laws of 1909, for the legislature in the latter statute has said that: 40

"In any action, brought, for injuries to person or property, or for death caused at

any crossing protected as aforesaid, no plaintiff shall be barred of the action because of his failure of the person injured or killed to stop, look and listen before passing over said crossing" (p. 138).

10 It is apparent on a comparison of the two statutes that there is a material difference between them. In the earlier statute the question of contributory negligence is always a question to be determined by the jury in all actions brought to recover damages, while in the second statute, Chapter 96, Laws of 1909, the contributory negligence or failure of the person injured to stop, look and listen before passing over said crossing does not bar him from his action at all, the result of which, we think it is plain, leads to the conclusion that the second statute does away with the right of the appellant to have the question of the injured person's contributory negligence, if it consists of his failure to stop, look and listen before passing over a crossing, submitted to the jury.

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It is the contention of the appellant that in charging Chapter 96, Laws of 1909, the Trial Court virtually precluded the jury from considering the contributory negligence of a plaintiff in causing injury, and that when the Trial Court charged the jury in the words of the statute that "no plaintiff shall be barred of the action because of his failure of the person injured or killed to stop, look and listen before passing over said crossing" (p. 128, ll. 15 to 18), such charge eliminated absolutely from the consideration of the jury the entire set of acts on the plaintiff-appellee's part with respect to his movements upon said crossing, to-wit, the care he exercised in looking for the train which subsequently hit him and the care with which he listened for the train which subsequently hit him.

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From another viewpoint it may well be said that the legislature, in enacting Chapter 96, Laws of 1909, forced upon the judiciary a rule of conclusive evidence as to non-contributory negligence of an injured party, and the Trial Court, in assuming that the statute in question applied to the instant case, forced upon the jury the same rule of conclusive evidence as to the non-contributory negligence of the appellee.

It is contended that the effective acts of contributory negligence in cases of the character embraced within the statute are the acts of the traveler just prior to or as he approaches and his acts in passing over the crossing, and that when the legislature has enacted a statute which is embrasive of the effective acts with respect to going over the crossing and gives to the injured person an entire freedom and absolution for a neglect to conduct himself in certain acts, such a statute as Chapter 96, Laws of 1909, is of an entirely different character than the earlier act of 1909, Chapter 35, which makes the question of contributory negligence a matter for the jury, for, as has been intimated by this Court in the case of *Hatch v. Erie Railroad Company*, 88 N. J. L., at pages 546 and 547:

“The argument that a person about to cross the track may rely upon an invitation to be implied from the raising of the gates and is not under any duty to listen for signals or any other noise which an approaching train might make, for the signal cannot well be noticed unless one listens to hear it, is not without force.”

One cannot tell to what extent the appellant was prejudiced by the Court's selection of the statute in question as applicable to the instant case, for if the jury, as we have a right to assume, did follow the Trial Court's instructions, that the plaintiff “shall not be barred of his ac-

tion because of his failure to stop, look and listen before passing over the crossing," then what the Court said thereafter in its charge, "that is, the care which a reasonably careful and cautious person would exercise when so crossing a railroad" (p. 128, ll. 23 to 25) must be considered to have been taken by the jury in connection with the statute which the Court had already charged it.

- 10 It is respectfully urged upon this Court that the effective parts of Chapters 35 and 96 of the Laws of 1909, are essentially different in character. In the former, as has been pointed out, the question of contributory negligence is one always for the jury, while in the latter statute if the contributory negligence consists in a failure to stop, look or listen, the appellant is forever deprived of having such contributory negligence submitted to the jury, under which circumstances
- 20 it seems too plain for argument, that where the essential facts with respect to the application of a statute are lacking the application of such statute to the case at bar works a substantial prejudice to the Railroad Company, in this instance the appellant.

- It is respectfully submitted that the Trial Court erred in the selection, application and charging of the jury of Chapter 96, Laws of 1909,
- 30 in the instant case, and it is, therefore, urged that a substantial injustice has been done to the appellant and the judgment of the Morris County Circuit Court should be reversed.

FREDERIC B. SCOTT,
Attorney of and Counsel for Appellant.

New Jersey Court of Errors and Appeals

GUSTAV KRATZ, Plaintiff-Appellee, vs. THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COM- PANY, Defendant-Appellant.	}	Action at Law. On Appeal.
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BRIEF OF PLAINTIFF-APPELLEE

The only reason given as ground for the appeal is, that the Court charged Chapter 96, p. 137, Laws 1909, as applying to the case, defendant claiming that the Court should have charged Chapter 35, p. 54, Laws 1909, but though defendant made several requests to charge, it did not request that the Court also charge Chapter 35, Laws 1909.

The Court did charge in substance the provisions of Chapter 35, Laws 1909; that is to say, that it was for the jury to decide from the evidence whether plaintiff was guilty of contributory negligence. And that was all that was required of the Court, as the act in question (Chapter 35, Laws of 1909) is not a legislative command to the jury, but to the Trial Court, saying that,

“whenever any railroad company shall have assumed to establish and maintain

what are known as safety gates at any railroad crossing in this State, and a person is killed or injured at any such crossing by being struck by a locomotive or train when attempting to cross the tracks at a time when such gates are not down, * * * that in all such cases the question whether the person so killed or injured was or was not guilty of contributory negligence shall be a question to be determined by the jury."

In such cases the Court shall not non-suit, is what the Legislature said

But, on the other hand, the Court very properly charged as a whole Chapter 96, Laws 1909, because it was admitted that there were safety gates at the crossing in question, but the evidence was quite conflicting as to whether the gates were up or down at the time of the accident, and as to whether plaintiff stopped, looked and listened before passing over the crossing.

Plaintiff submits that when the Court's charge is taken as a whole, in view of the theory of the case, and the evidence submitted, there was no error in the Court's charge.

Lynch v. Penn. Ry. Co., 96 Atl., 395;
 Waibel v. West Jersey & S. R. Co.,
 94 Atl., 951;
 Ferneti v. West Jersey & S. R. Co.,
 93 Atl., 576;
 Brown v. Erie R. Co., 91 Atl., 1023.

Respectfully submitted,

JAMES H. BOLITHO,
 Attorney for Gustav Kratz.

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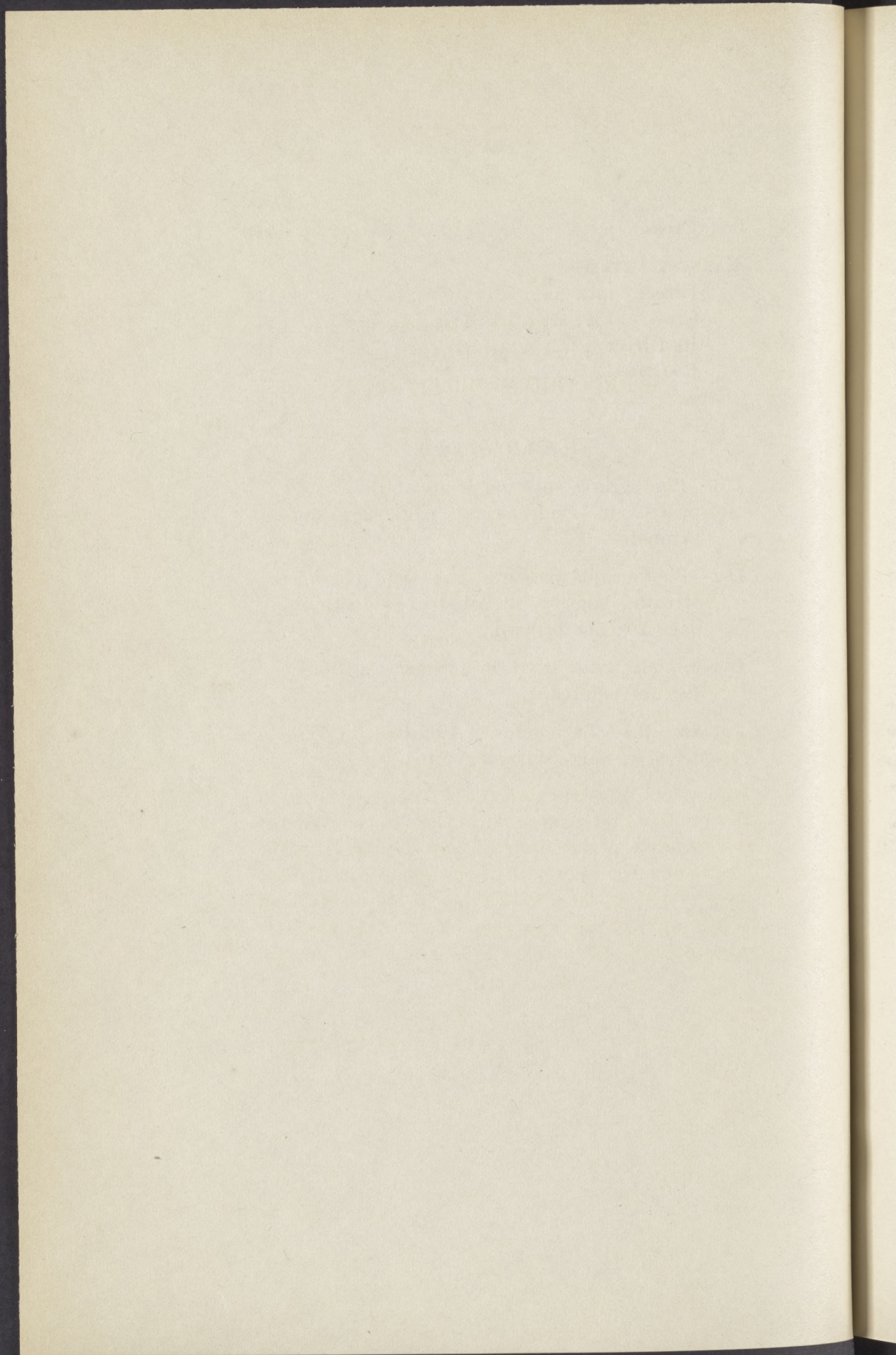
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EXHIBITS.

- D-1—Photograph showing heap of ties. Admitted in evidence at page 28; not printed.
- D-2—Photograph showing gates and portion of tower house. Admitted in evidence at page 29; not printed.
- D-4—Sketch. Admitted in evidence at page 49; not printed.
- P-6 and P-7—Two maps. Admitted in evidence at page 94; not printed.



Notice of Appeal.

(Filed Sept. 21, 1916.)

MORRIS COUNTY CIRCUIT COURT.

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GUSTAVE KRATZ, <i>Plaintiff,</i> <i>vs.</i> THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, <i>Defendant.</i>	}	Action at Law.
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JAMES BOLITHO,
Attorney of Plaintiff.

SIR:

The above defendant, The Delaware, Lackawanna & Western Railroad Company, hereby gives notice that it appeals to the Court of Errors and Appeals for the State of New Jersey, from the judgment and every part of the same in the above case entered on the Twelfth day of May, 1916, and that it will hereafter as prescribed by the law and rules of Court file and serve its grounds of appeal.

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Yours truly,

FREDERIC B. SCOTT,
Attorney of Defendant.

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Grounds of Appeal.

(Filed Oct. 3, 1916.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

10	GUSTAVE KRATZ, <i>Plaintiff-Appellee,</i> <i>vs.</i>	}	Action at
	THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, <i>Defendant-Appellant.</i>	}	Law.

The above appellant within the time required by law hereby sets down and files its reasons and grounds of appeal in the above entitled case to be as follows:

- 20 1. To that portion of the Trial Court's charge wherein the Trial Court said:

30 "Now another statute bears upon the conduct of Mr. Kratz if he was actually crossing the railroad right of way on the highway as he had a right to do and that statute is this: 'That wherever any railroad whose right of way crosses any public street or highway has or shall install any safety gates, bell, or other device, designed to warn the travelling public at any crossing or has placed at such crossing a flagman, any person or persons approaching any such crossing so protected as aforesaid, shall during such hours as posted notice at such crossing shall specify, be entitled to assume that such safety gate or other warning appliances are in proper order and will be duly and properly operated, unless a written notice bearing the inscription "Out of Order" be posted in a conspicuous place at such crossing, or that the flagman will guard said crossing with sufficient care whereby such traveler or the travellers will be warned of any dan-

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Grounds of Appeal.

ger in passing over such crossing, and in any action brought for injury to person or property or for death caused at any crossing protected as aforesaid, no plaintiff shall be barred of the action because of this failure of the person injured or killed to stop, look and listen before passing over said crossing.'

"That that statute you are entitled to consider in determining whether or not, if Mr. Kratz was crossing the highway and not merely trespassing upon the railroad's right of way, he exercised due care—that is, the care which a reasonably cautious and careful person would exercise when so crossing a railroad."

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FREDERIC B. SCOTT,
Attorney of Appellant.

THE STATE OF NEW JERSEY to the DELAWARE,
LACKAWANNA AND WESTERN RAILROAD COM-
PANY:

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You are summoned to answer the annexed complaint of Gustav Kratz in an action at law in the Circuit Court of the County of Morris, and take notice that unless you file your answer to said complaint with the Clerk of the Circuit Court of the County of Morris, at Morristown, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, CHARLES W. PARKER, Judge of the
Circuit Court of the County of Morris, at Morristown this fifth day of April, Nineteen hundred and Fifteen.

30

ELIAS BERTRAM MOTT,
Clerk.

WM. C. GEBHARDT,
Attorney.

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Complaint.

(Filed April 13, 1915.)

MORRIS COUNTY CIRCUIT COURT.

GUSTAV KRATZ,

Plaintiff,

vs.

10 DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY,
Defendant.

Plaintiff, Gustav Kratz, who resides in the Town of Dover, in the County and State of New Jersey, says that:

1. The defendant on the 24th day of June, 1914, was the owner and operator of a certain
20 steam railroad, with its equipments and appurtenances, extending from the City of Hoboken, in the County of Hudson, to Dover, in the County of Morris, and that said railroad crossed a public highway near the said Town of Dover, known as the Denville Road near a bridge known as Dickerson's Bridge.

2. The said defendant, by its servants, on the night of the said 24th day of June, 1914, ran and propelled a locomotive and train of cars on
30 its said railroad, over and across the said highway, at an extremely rapid rate of speed, without sounding any warning of its approach to said crossing, by either bell or whistle, or in any other manner giving notice of its approach to said crossing.

3. At said crossing the said railroad company then and there maintained gates, and customarily operated the said gates for the protection of the travelling public.

Complaint.

4. On the said evening the said plaintiff attempted to walk across the defendant's railroad tracks at said crossing, when the said locomotive and train of cars of the said defendant passed over said crossing as aforesaid without first having given warning or notice of the approach of said locomotive to said crossing, and without having first put down the said gates. Plaintiff further says that he was prevented from seeing the approach of said locomotive and cars by a long line of high gondola coal or freight cars that were allowed to stand on its tracks on the easterly side of said crossing, but close up to said crossing, and also by reason of its being a dark, foggy night. 10

5. By reason of the negligence of the said defendant, as above set forth, the said locomotive ran into and over the said plaintiff, cutting off one of his arms and otherwise severely injuring him. 20

6. By reason of the injuries so received as aforesaid, the said plaintiff has suffered and undergone great pain, and will in the future suffer and undergo great pain, and has been prevented from attending to his lawful business and affairs, and will in the future be prevented from attending to his lawful business and affairs, and has been deprived of great gains and profits, and will in the future be deprived of great gains and profits which he might and otherwise would have acquired. 30

Plaintiff demands \$10,000 damages.

WM. C. GEBHARDT,
Attorney of Plaintiff.

Answer.

(Filed May 3, 1915.)

MORRIS COUNTY CIRCUIT COURT.

GUSTAVE KRATZ,

*Plaintiff,**against*

10 THE DELAWARE, LACKAWANNA and
WESTERN RAILROAD COMPANY,
Defendant.

The above named defendant, answering the complaint herein, says:

1. It admits the allegations of paragraph "1" of said complaint.

20 2. It admits the allegation in paragraph "2" of said complaint, that the said defendant, by its servants, on the night of the 24th day of June, 1914, ran and propelled a locomotive and train of cars over its railroad over and across the said highway.

It denies all other allegations contained in said paragraph.

3. It admits the allegations of paragraph "3" of said complaint.

30 4. It denies each and every allegation contained in paragraph "4" of said complaint.

5. It denies the allegations contained in paragraph "5" of the said complaint.

6. It has no knowledge or information sufficient to form a belief as to the truth of the material allegations of paragraph "6" of said complaint, and in so far as the same shall be deemed material, it demands that due proof thereof be made.

40 FOR A SEPARATE AND DISTINCT DEFENSE TO THE PLAINTIFF'S COMPLAINT, THE DEFENDANT SAYS:

7. The plaintiff was warned and advised of the

approach of said train in sufficient time within which to withdraw himself to a place of safety and to avoid being struck by the same, but that notwithstanding said warning and advice the plaintiff thereafter, with knowledge of the approach of said train, negligently failed to withdraw to a place of safety and remained on the track of the defendant on which said train was approaching, whereby the defendant became and was guilty of contributory negligence. 10

WHEREFORE, the defendant demands that the plaintiff's complaint be dismissed with costs.

W. J. LARRABEE,
Attorney of Defendant.

Reply.

(Filed May 10, 1915.)

MORRIS COUNTY CIRCUIT COURT.

GUSTAVE KRATZ,	}	Action at law.
<i>Plaintiff,</i>		
<i>vs.</i>		
DELAWARE, LACKAWANNA & WEST- ERN RAILROAD COMPANY,		
<i>Defendant.</i>		

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1. Plaintiff denies every allegation in the answer. 30

2. Plaintiff denies that he was warned and advised of the approach of said train at any time and also denies that he was guilty of any negligence contributing to his injury.

W. C. GEBHARDT,
Attorney of Plaintiff.

Extract from Clerk's Docket.

At a Circuit Court holden at Morristown in and for the County of Morris, on Tuesday, the Ninth day of May A. D. Nineteen hundred and sixteen.

P R E S E N T

Hon. William H. Speer,
Judge.

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<p style="text-align: center;">GUSTAV KRATZ, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, <i>Defendant.</i></p>	}	<p>#26 Circuit Court Issue. Action at Law</p>
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JAMES H. BOLITHO, Attorney for Plaintiff,
W. J. LARRABEE, Attorney for Defendant.

This case being moved the following Jury was called and sworn:

- | | |
|-------------------|-------------------------|
| 1. Enos E. Earls | 7. William E. Baldwin |
| 2. George Earles | 8. Arthur R. Crane |
| 3. Lewis R. Brown | 9. Fern Hopkins |
| 4. Richard Davey | 10. Andrew J. Hilbert |
| 5. Miller H. Roff | 11. Henry B. Walker |
| 6. Clair Darress | 12. Charles N. Saunders |

Witnesses.

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1. Ernest Peterson
2. William C. Gebhardt
3. Charles W. Shaw

Court adjourned until Wednesday morning May 10th 1916 at ten o'clock.

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Extract from Clerk's Docket.

Wednesday morning May 10th, 1916, Court met pursuant to adjournment.

PRESENT

Hon. William H. Speer,

Judge &c.

<p style="text-align: center;">GUSTAV KRATZ, <i>Plaintiff,</i> <i>vs.</i> DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, <i>Defendant.</i></p>	}	<p>#26 Circuit Court Issue. Action at Law</p>	<p>10</p>
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Trial continued.

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Witnesses.

- | | |
|---|--|
| <p>4. Gustav Kratz
5. George Pappas</p> | <p>1. Charles E. Burns
2. Otto Kraff
3. John W. Bowlby
4. John Drake
5. John Madigan
6. Sidney E. Wilson
7. Harold Dolan
8. Augustus L. L. Baker
9. Ernest T. Peterson</p> |
|---|--|

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This case being closed, the Jury, after argument of Counsel and a charge by the Court, retired to a private room to consider their verdict with a constable sworn to attend them, after being out some time they returned into Court and say they have agreed upon their verdict and by their Foreman say they find a verdict in favor of the Plaintiff and against the Defendant and assess the damages of the Plaintiff in the sum of One thousand eight hundred and thirty-three dollars (\$1,833.00) and so say they all.

40

Therefore &c.

Judgment.**MORRIS COUNTY CIRCUIT COURT.**

No. 1823.

	GUSTAV KRATZ,	}	Action at Law On Trial
	<i>vs.</i>		
10	DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,		

Judgment in an action at Law on Trial and
verdict of Jury rendered in favor of the Plain-
tiff and against the Defendant above named for
the sum of One thousand eight hundred and
thirty-three dollars damages \$1833.00
and fifty-seven dollars and eighty-four
cents costs of suit 57.84

20 Whole amount of Damages and costs \$1890.84

On motion of James H. Bolitho
Attorney for Plaintiff.

Judgment signed May 10, 1916,

William H. Speer,

Judge.

30 Recorded in Book "C" of Abstract of Judg-
ments, page 188.

Testimony.**NEW YORK SUPREME COURT.**

GUSTAV KRATZ,

Plaintiff,

vs.

DELAWARE, LACKAWANNA & WEST-
ERN RAILROAD COMPANY,

Defendant.

10

Transcript of shorthand notes of testimony of proceedings taken at the trial of the above entitled cause, at the Court House in Morristown, N. J., on May 9th and 10th, 1916.

Before

HON. WM. H. SPEER,

Judge, and a Jury.

20

For the Plaintiff,

JAMES H. BOLITHO;

For the Defendant,

W. J. LARRABEE and FREDERIC B. SCOTT

with MR. KING.

30**40**

Earnest Peterson—Direct.
William C. Gebhardt—Direct.

EARNEST PETERSON, sworn for the plaintiff, testifies as follows:

DIRECT EXAMINATION BY MR. BOLITHO:

10 MR. KING: We have a map which Mr. Bolitho can use.

MR. BOLITHO: They can put it up and we can use it.

Q. Mr. Peterson, I show you a paper and ask you if that is your signature? A. Yes, sir.

Q. I show you another paper and ask you if that is your signature? A. Yes, sir.

NO CROSS EXAMINATION.

20 WILLIAM C. GEBHARDT, sworn on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION BY MR. BOLITHO:

Q. Senator, I ask you if that is your signature to this paper? A. Yes, sir.

Q. I ask you if you were present when Mr. Peterson signed his name to the paper? A. Yes, sir.

Q. I ask you if you were present when Mr. Peterson signed his name? A. I was.

30 Q. Did you take his affidavit to this paper? A. I did.

MR. SCOTT: I move to strike out that evidence as there is nothing to show that there is a record of these proceedings.

THE COURT: I don't know what it is going to be. They may offer the paper.

MR. SCOTT: What paper is it?

THE COURT: I don't know; it is not marked.

40 MR. SCOTT: I move to strike it out.

MR. BOLITHO: I offer that to be marked for identification.

William C. Gebhardt—Direct.

THE COURT: I have not heard that before.

MR. BOLITHO: I offer that now. The one paper I offer in evidence and the other I offer for identification.

MR. SCOTT: I am entitled to see it.

THE COURT: Yes; they are entitled to see it.

MR. BOLITHO: I don't want to speak of this before the jury, but I offer it to you and want to say it is not part of the case. 10

THE COURT: How do you conceive that it is permissible?

MR. BOLITHO: I want to get this evidence in at this time, because this witness is an adverse witness.

MR. KING: He is not in any way to be shown to be connected with the defendant company. You might just as well say that you could take all the evidence of any witness by affidavit and not subject him to cross examination. 20

MR. BOLITHO: I withdraw the offer at this time.

THE COURT: The only thing it would be admissible for, if admissible at all, would be to ask the witness whether he did not at another time say certain things which are contained in there and if he denies it, you could put that in. 30

MR. BOLITHO: We have a right to offer it any time before we close our case.

THE COURT: I don't think it is admissible at all in any way until after the witness is called and then if he says something that is contradicted by something in it, you would have a right to offer it.

MR. BOLITHO: I withdraw the offer of both of them at this time.

MR. KING: I move to strike out the evi- 40

William C. Gebhardt—Cross.

dence. Wouldn't we have a right to cross examine the man who took the affidavit?

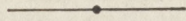
THE COURT: The difficulty is that the paper was not in before the Court while the witness was on the stand. If you want to have the paper properly marked and give them the opportunity of cross examining the witness as to the execution of it.

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MR. BOLITHO: I will offer them for that purpose.

THE COURT: If they want to cross examine, they can cross examine now with respect to the manner of the execution of that paper.

MR. KING: We will cross examine now.



SENATOR GEBHARDT, recalled to the stand for cross examination.

20

CROSS EXAMINATION BY MR. KING:

Q. Are you the Mr. William C. Gebhardt, who brought this suit against the railroad company?

A. Yes, sir.

Q. Did you test your complaint and summons the 5th day of April, 1915? A. I have no recollection—have you the original here?

30

(Showing witness a summons and complaint.)

WITNESS: I presume that is correct, the 5th of April, 1915.

Q. Were you the attorney of Mr. Kratz on the 29th day of March, 1915? A. Yes; I think I was.

Q. You are not the attorney of Mr. Kratz now? A. No, sir.

Q. When did you resign or cease to be his attorney? A. It was just before the case came up.
40 I think at the May Term, 1915.

William C. Gebhardt—Cross.

Q. Where did you see Earnest Peterson? A. In my office in Jersey City.

Q. How did he come to come there? A. I don't just exactly recall, but he came at my request. I told somebody, I don't know whether it was Mr. Bolitho, or whether I sent word to the boy to come down and meet me at my Jersey City office for the purpose of going over his testimony in the case. **10**

Q. Had you heard that Peterson had made an affidavit for the railroad company? A. I had not.

Q. Who gave you the name of Peterson as a witness? A. Mr. Kratz did—I don't know whether Mr. Bolitho did or not.

Q. What did Mr. Bolitho have to do with the case then? A. I think he recommended Mr. Kratz to come to me.

Q. Who came with Peterson to your office? A. I don't know; that part of it I don't recall. I don't know whether Mr. Kratz came or whether Mr. Peterson came alone. **20**

Q. Who did this typewriting? A. My stenographer.

Q. Who dictated the affidavit? A. I did in the presence of the boy.

Q. Is this his language or yours? A. Mine.

Q. This is what you say, it was what you dictated what he told you? A. Yes, sir. **30**

Q. Did he use the words that are used in this affidavit? A. Maybe not the grammatical language, not the exact words, but he gave me his story and as he dictated it to me, I gave it to my stenographer.

Q. In his presence? A. Yes, sir.

Q. How many offices have you? A. Three between two men.

Q. Did your stenographer take this in short hand or in typewriting? A. In shorthand. **40**

Q. In your room? A. Yes, sir.

William C. Gebhardt—Cross.

Q. What knowledge have you as to whether she typewrote it correctly? A. I think she did.

Q. What knowledge have you? A. It is exactly according to my recollection as to the manner I dictated it to her.

10 Q. Have you any means to ascertain that this was exactly as you dictated it to her? A. In this case particularly.

Q. What was particular about this affidavit that you can remember this affidavit? A. Because this boy and another one——

Q. I am speaking about this affidavit. A. That is what I am going to tell you if you will give me a chance.

20 Q. You are speaking about another boy. A. I am speaking about this particular affidavit. It was because these boys told me the story just as I took it down and it seemed to be so perfectly straight when I cross examined him in particular and took unusual pains to note just what he was saying because it seemed to me that the railroad company would not ignore a case such as this, but that they had ignored it if his story was straight.

Q. You believe that story to be true? A. Absolutely.

30 Q. And didn't you get up in Court and say that the facts were misrepresented to you and that you withdrew from it with Judge Silzer sitting on the bench? A. I did not.

Q. Didn't you, on June 8th, 1915, in this Court, say that Kratz had misrepresented the case to you and that you withdrew from it, and didn't you at that same time, withdraw a case against the Morris County Traction Company? Did you say that or didn't you? A. I did not.

Q. Did you withdraw from this case? A. Will you let me tell you the reason why?

40 Q. Did you withdraw from the case? A. I did.

William C. Gebhardt—Cross.

Q. Because you withdrew Mr. Bolitho took it up? A. Yes.

Q. At the time that you withdrew from the case, did you still believe that affidavit of Peterson or had you found out that his affidavit was not true?

A. I did not.

Q. Did Peterson's acts or doings in the case cause you to withdraw from it? A. Yes, sir. **10**

Q. Anything he did after that affidavit or before? A. That I cannot recall.

Q. Didn't you hear before you got this affidavit that Peterson had made an affidavit for the railroad company and you got him down to your office and permitted him to make this one? A. No, sir; I believe he was telling the absolute truth.

Q. You knew it was against the rule of all lawyers and against the rules of the Court for the attorney in the case to take the affidavit? A. No; **20** and it is not as long as you do not propose to use the affidavit.

Q. Did you propose to use this affidavit in this case? A. No; I did not.

Q. Did you turn it over to Mr. Bolitho? A. No.

Q. Did you know he was going to use it in this case and didn't you turn it over to him? A. No; I did not.

Q. When did you first learn he was going to use it? A. After turning the paper over to him. **30**

Q. Any surprise? A. No, sir; he told me this afternoon.

Q. Didn't you tell him that it was against all ordinary procedure? A. No, sir.

Q. Not your business? A. No.

Q. There were plenty of notary publics that could have made known to the boy the contents of that paper? A. No; for I signed it up myself and I did not regard it as any importance. I wanted his statement in writing. **40**

William C. Gebhardt—Re-Direct.

Q. Did you get the affidavit of any other people in this case? A. I did the other boy.

Q. How many did you get? A. I think only two.

Q. Did he come down to your office? A. Yes, sir.

Q. Did you read this over to the boy? A. Very carefully indeed, and explained it to him.

10 Q. Did you explain it to him? A. Yes.

Q. Did the boy read it? A. Yes, sir.

Q. And you read it to him? A. Yes.

Q. Why did you do that? A. Because I wanted to be sure he was telling the truth.

Q. Do you usually take the affidavit and read the affidavit over and then let them read it? A. I do in every case, and I did it in this case. I wanted to know where I was at.

20 Q. What sort of man does it require that makes you read the affidavit to him and then let him read it? A. I wanted to be sure in this case.

Q. Why the extra precaution? A. Because my experience with a company with a dead open and shut case and abundance of evidence against them, they make a proposition of settlement and they turned this down flatly.

Q. Did you find out the reason? A. Yes.

Q. And then got out; didn't you? A. Yes.

30 RE-DIRECT EXAMINATION BY MR. BOLITHO:

Q. What was the reason? A. I found the railroad company had evidence from these boys flatly contradicting the evidence given to me and I knew that someone was guilty of wrong doing in the case.

Q. You found that out after? A. I found it out the morning of the trial. I had a talk with them as is customary. In one case you had a case and in the other you did not. I called Mr. Larrabee's

Charles W. Shaw—Direct.

attention to the case and I said "if you will show me such an affidavit, I will get out of the case". He showed me that affidavit and I got out of the case.

CHARLES W. SHAW, sworn in behalf of the plaintiff, testifies as follows:

10

DIRECT EXAMINATION BY MR. BOLITHO:

Q. Where do you live, Mr. Shaw? A. Dover.

Q. How long have you lived there? A. Ten years, off and on.

Q. Do you know where this Dickerson Bridge crossing of the Lackawanna Railroad is? A. Yes, sir.

Q. Did you know where it was in 1914? A. Yes, sir.

20

Q. Did you know Mr. Kratz, the plaintiff? A. Slightly; I knew him when I met him.

Q. How long have you known him? A. About three years.

Q. Do you remember seeing him on an evening in June, 1914? A. Yes, sir.

Q. What was the date? A. June 24th.

Q. What time in the evening was it? A. Quarter after eight.

Q. What did you see with reference to Mr. Kratz? A. I saw a string of gondola coal cars standing on this double track behind the tower.

30

Q. Did you see Mr. Kratz on this crossing? A. Yes; saw him hit by the train coming west.

Q. Where was Mr. Kratz when he was hit? A. Outside of the rail.

Q. On the public road? A. Right alongside of the rail.

Q. Did you notice at that time the gates? A. Yes, sir.

40

Charles W. Shaw—Direct.

Q. Were the gates up or down? A. They were up but not all the way up.

Q. About how? A. About three quarters.

Q. Do you know whether or not the gates were in order? A. Yes, sir.

Q. How do you know that? A. Because the train came down and took him to a hospital and the
 10 gates went down.

Q. How long after the accident? A. About 15 or 20 minutes.

Q. You saw the gates work at that time? A. I saw the gates work then.

Q. Did you see where Kratz was thrown to by the train after he was struck? A. Yes, sir.

Q. About where? A. Within 25 feet of the crossing.

Q. On which side of the track, going toward
 20 Dover? A. Right hand side.

Q. What did you do after you saw Mr. Kratz get hit by the train? A. I ran down to him.

Q. Where was he then? A. Sitting on the platform of the tower.

Q. That was on the opposite side? A. Yes; on the opposite side of the track.

Q. Tell us, if you know, what was done with regard to Mr. Kratz after you got down to the tower—what was done with regard to Mr. Kratz? A.
 30 I don't know who sent for the doctor.

Q. What was done for him? A. I got some waste from the tower man and wiped the blood off his hand.

Q. You say you got some waste from the tower man? A. Yes, sir.

Q. Do you know the tower man? A. Yes, sir.

Q. What is his name? A. His name is Mr. Bowlby.

40 MR. BOLITHO: Don't answer until the other side has an opportunity to object.

Charles W. Shaw—Cross.

Q. Did the tower man at that time say anything with regard to the accident about Mr. Kratz?

MR. SCOTT: I object to that.

THE COURT: What do you conceive the competency of that to be?

MR. BOLITHO: The tower man was the man that had charge of the raising and lowering of the gates. I will withdraw that. 10

Q. Did or did not the tower man say anything to you in regard to whether the gates were down or not? A. Yes, sir.

Q. What did he say?

MR. SCOTT: I object.

THE COURT: I will sustain the objection. The whole matter has been determined in this case by the case of somebody against the Public Service in 39 Vroom, page 1. The rule there announced is that it is not part of the *res gestae* when an employee talks to another person unless it was following up the transaction and illustrating it. 20

Q. Did you help put Mr. Kratz on the engine when they took him to the hospital? A. Yes, sir.

Q. Did you see the engine go away with him? A. Yes, sir.

Q. In which direction did it go? A. East. 30

Q. That is towards Rockaway? A. Yes, sir.

Q. Going back to the time that Mr. Kratz was struck by the train, did the train that struck Mr. Kratz stop or go on? A. It went on.

CROSS EXAMINATION BY MR. KING:

Q. What was your name? A. C. W. Shaw.

Q. Where do you live, Mr. Shaw? A. Dover.

Q. Where in Dover? A. Bollyville Road. 40

Charles W. Shaw—Cross.

Q. Where did you live the time the accident occurred? A. About 400 yards from the tower.

Q. Which way? A. Very nearly west; it is a little offset from the track.

Q. Did you live on this road that passes over the railroad? A. There is no main road down into this house.

10 Q. I asked if you lived on this road? A. Right alongside the east bound track.

Q. About 400 feet, you say? A. About 400 feet.

Q. Towards Dover or Rockaway? A. Towards Dover.

Q. I show you a photograph and ask you if that shows the crossing and from below the crossing, looking to Dover? A. Yes, sir.

20 Q. That is your house? A. My house is right up behind this coal pocket. You see this coal storage here (showing)?

Q. How far is that from the crossing? A. About 500 yards.

Q. So your house was not behind this coal storage? A. Yes, sir.

Q. There are four houses there? A. Yes, sir.

Q. From whom did you rent? A. Theodore Canfield.

Q. How long did you live there? A. Four years.

30 Q. When did you move away? A. I moved away this October, past.

Q. What day of the week did this accident occur on? A. I don't remember what day it was; it was on the 24th.

Q. What day was it? A. I don't know.

Q. How about Sunday? A. I don't know what day it was.

Q. How do you remember it was the 24th? A. I marked it down.

40 Q. What did you mark it down on? A. I drew a map of the place and marked it down there.

Charles W. Shaw—Cross.

Q. You drew a map of the place? A. Yes.

Q. Where is the map? A. In my pocket.

Q. Let us see it. A. Yes, sir.

Q. This is the map you drew of it? A. Yes, sir.

Q. Does this portray the scene as it was? A. Yes, sir.

Q. You drew this that night? A. The next day. 10

Q. You drew it the next day? A. Yes, sir; June 25th.

Q. Why did you draw it? A. I thought there would come some trouble and that I would be called as a witness, and wanted to tell the truth.

Q. Did you see the railroad? A. No, sir.

Q. Who told you? A. Mr. Kratz.

Q. Did he come to see you? A. Yes, sir.

Q. Did you go to see him? A. He came to see me a long time afterwards. 20

Q. If you knew Mr. Kratz, why didn't you tell him that you saw it that night? A. I drew it so that I would be sure.

Q. If you were enough interested to draw this map and knew that you would be called as a witness and knew Kratz and knew he was the fellow that was hurt, I should think you would have gone to see him and say that you knew all about it? A. I was——

Q. I thought you said he never came to you until a year afterwards? A. I—— 30

MR. BOLITHO: I object; I think the witness should have time to answer.

The case is adjourned this morning until the next morning at 10 o'clock.

Charles W. Shaw—Cross.

Q. Did you say that you had not given notice and that no one had spoken to you about this case until about a year after the accident; is that true?

A. Yes, sir.

Q. And yet you expected to be called as a witness and therefore you prepared the little diagram which you produce; is that right? A. Yes, sir.

10 Q. At the time of the accident, you knew who it was that had been hurt? A. I did not know until I saw him afterwards.

Q. When did you see him afterwards? A. Right after he was hurt.

Q. Knew who he was? A. I knew him by sight. I never knew his name before.

Q. Knowing the man and knowing there might be a suit, and knowing you might be called as a witness, why didn't you tell him that you knew all
20 about the accident? A. I told him.

Q. When? A. After he came out of the hospital.

Q. When was that? A. About a year afterwards.

Q. The night after the accident he was unconscious, wasn't he? A. He was conscious, but didn't know what you were saying to him, he was in such pain.

Q. Did you know where he lived? A. Dover.

30 Q. On what street? A. I don't know what street he lived on.

Q. Did you know he had a little place he conducted below this crossing? A. I know he lived there at one time.

Q. How long was he in the hospital; do you remember? A. I don't remember.

Q. Did you attempt to find him when he came out of the hospital? A. I met him on the way to the railroad when he was on the street.

Charles W. Shaw—Cross.

Q. What was the date, to the best of your recollection? A. I could not tell the date.

Q. Was it summer? A. I think it was; I am positive.

Q. What year? A. 1915.

Q. What time in the summer? A. I could not say that.

Q. Sure of the year, are you? A. It was about a year afterward, as near as I could judge. **10**

Q. And then you and he had a talk about it? A. Yes, sir.

Q. Did you have your little plan drawn then? A. Yes, sir.

Q. Did you show it to him? A. No, sir.

Q. Where was your plan? A. It was home.

Q. Did you see this man before he was struck? A. Yes, sir.

Q. Where were you; on which side of the crossing? A. I was up above the tower sitting on a heap of ties. **20**

Q. Up above the tower? A. Yes, sir.

Q. Where was the tower? A. West of the tower.

Q. What were you doing there? A. I often went over there.

Q. What were you doing? A. Sitting down and having a rest. I had been out for a walk.

Q. Where had you been? A. I had been west of the tower and back again over on the river bridge. **30**

Q. Who did you see on the river bridge? A. I did not see anybody.

Q. Was there anybody there? A. No, sir.

Q. Were you on the same side as the river bridge? A. No, sir.

Q. Look at this map (showing). Here is the Rockaway River running over this way (showing).

A. I don't know anything about that map.

Q. Assuming that this is the Rockaway River, **40**

Charles W. Shaw—Cross.

here is the bridge over the Rockaway River; here is the signal tower and here is the crossing and from here (indicating) do you remember a little stream of water going down this way and running under the track and falling in the Rockaway River?

A. I know where that stream is, but that is not the way you are pointing it out to me.

10 Q. Aren't the trolley tracks up there? A. Yes, sir.

Q. There is a road that comes down along the trolley track and there is a path that goes along here (indicating)? A. Yes, sir.

Q. This is the east bound track and west bound track that goes along here (indicating)? A. Yes, sir.

Q. There are the switch tracks? A. Yes, sir.

20 Q. Over here is the signal tower over toward Dover? A. Yes, sir.

Q. Show me where you were sitting? A. Right in here (indicating) west of the tower.

Q. Here is marked by a telegraph pole? A. I sat west of this tower and it was 277 feet from this crossing to where I sat.

Q. From the westerly side of the west bound track to the point at which you were sitting was how many feet? A. 277 feet.

30 Q. How many feet was it west of the signal tower? A. It was 117 feet west of this platform.

MR. KING: Mr. Drake, will you please come here and point out 117 feet on this map?

Q. The engineer has marked 117 feet on this map which brings it a little bit beyond the oil house; is that right? A. Yes, sir.

Q. Is that to the best of your recollection where you sat on the heap of ties? A. That is where I sat on the heap of ties.

40 Q. How far were you back from the west bound

Charles W. Shaw—Cross.

platform? A. Straight across from here (indicating.)

Q. From that track? A. I should judge about 20 feet from the nearest track. From the east bound track. I will just give you an estimate on that point.

Q. And you was 20 feet beyond—how many feet from here? A. 277 feet. 10

Q. Could you see the crossing? A. Yes, sir; plainly.

Q. Where was this man, Mr. Kratz, when you first saw him? A. Coming right here (indicating).

Q. I will mark that point "XX"? A. Yes, sir.

Q. Which way was he going? A. Going this way (indicating).

Q. I will mark that with a sign that he was going across by the river? A. Yes, sir. 20

Q. You sat up there? A. Yes, sir.

Q. Did you see him when he passed under that gate? A. That was three quarters of the way up.

Q. Was it up when he passed? A. Yes. It was on a pitch that would allow a horse and wagon to pass under it.

Q. Did he pass through the gate or around it? A. Went right straight through the road.

Q. May I take out that "X" and put it down here where he says it is; is that about right? That new "X" I put there; is that about right? A. If it is 20 feet, that is all I know. 30

Q. Were you sitting up there when this man passed up the roadway? A. Yes, sir.

Q. Did you see him pass under that gate or around it? A. He went up the roadway; the gates were partly up.

Q. Tell the jury how you could see that man through the oil house and through the signal tower, 40

Charles W. Shaw—Cross.

looking straight across that way (indicating)? A. That oil house stood away to one side of the ties.

Q. You say it stood away to one side? A. I could take you there and show you.

Q. How about the signal tower? A. That stands to one side. I sat in line with the tracks.

10 Q. How far away was the signal tower; was it different than the marks on this map? A. That tower runs—

Q. Is the signal tower as shown on this map as it was when you saw it that night? I show you this photograph and ask you if that is the same signal tower that was there that night? A. Yes, sir.

20 MR. KING: I want to use the photograph and ask you if you will consent to put it in now and discuss it if you consent, otherwise I will mark it for identification.

MR. BOLITHO: I think it is all right.

MR. KING: I offer it in evidence as a part of our case by the consent of the other side.

Received and marked Exhibit D-1.

Q. I show you that photograph, D-1, and ask you if this little building as shown, is shown just to the right of the tower? A. That is the oil house.

30 Q. As you sat just behind the oil house? A. Right in here (indicating).

Q. Doesn't that show the heap of ties right by my finger (indicating)? A. Yes, sir.

Q. Won't you come down and show the jury where that heap of ties is? Just the mark where that heap of ties is?

Witness shows the jury on the photograph and then remarked:

40 A. And I was right there.

Charles W. Shaw—Cross.

MR. KING: Don't do that; I don't want you to explain. I just want you to show where the heap of ties was. Mr. King addresses the jury: gentlemen, there is where the heap of ties are, and where that little house is (showing).

Q. And that tower is the same tower as shown on that picture and at the same place, is it? A. Yes, sir. 10

Q. I show you another photograph which shows the gates and shows a portion of the tower house; is that the crossing? A. Yes, sir.

Photograph marked Exhibit D-2.

Q. I also show you another photograph and ask you if that is taken from the bridge looking toward the tower house, and does that correctly represent the conditions that night, that is, coming down from the trolley tracks? A. From the trolley tracks. 20

Q. Yes; in that direction, that correctly shows it; doesn't it? A. Yes, sir.

MR. KING: If you will look over this other I will put that in so that the jury can be looking at that as we go on with the case.

Q. Taking that photograph offered over here, if you will look at that, isn't it true that you could not see the gate because it is directly behind the tower house, and isn't it shown so on the map? A. You can see this gate. 30

Q. I am speaking about behind the tower house; I point out this gate behind the tower house and ask you if you could see that man go underneath that gate and if you could see whether that gate was open, and doesn't this photograph also show that you could not see that gate? A. You will not let me explain myself. 40

Charles W. Shaw—Cross.

Q. What I want you to explain is this; that if you could not see the gate, why you said you could see him go under? A. I did not say that.

Q. Did you see the man go under this gate to which I point, which is the most westerly side of the crossing? A. I said the gates were open, didn't I?

10 Q. That is what you did say. A. I stick to it.

Q. And you saw the plaintiff pass underneath that gate when you sat at this point? A. I did not see him.

Q. So that if you did say that you did see him pass underneath that gate, you want to withdraw it; is that right? A. Yes.

20 Q. Where did you first see him from the place where you sat, where I have marked "X"? A. There was a string of cars here (marking an "X").

Q. Was he walking? A. Yes, sir.

Q. Have anything on his back? A. A couple of little sticks.

Q. How long were the sticks? A. About 6 feet long.

Q. Were they small or large? A. About that size (witness indicates about 2 inches in diameter).

Q. You could see this from where you sat? A. Yes, sir.

30 Q. Did he have these sticks on his back as he passed over the second crossing or the main line crossing? A. Yes, sir.

Q. Do you know where he came from? A. No, sir.

Q. Hadn't he come from this place which was located south of the railroad tracks and towards Denville? A. I don't know where he came from.

Q. That was the first you saw him? A. Yes, sir.

Charles W. Shaw—Cross.

Q. You could plainly see the bridge on the other side? A. Yes, sir.

Q. Did you see anybody on the bridge? A. I did not see anybody.

Q. Did you see these two boys that night? A. No, sir.

Q. You did not see them that night? A. No, sir.

Q. From the point at which you sat, you saw this man struck? A. Yes, sir. 10

Q. What struck him? A. A bar of iron.

Q. What part of the engine? A. I don't know what part of the engine—it was where they stick the flag staff; down on the side, they have a little stick standing in. I think they call it the beam.

Q. The beam just behind the cow catcher? A. Yes, sir.

Q. Did it strike him or strike these poles? A. I could not say that; I seen him knocked down. 20

Q. On which shoulder did he carry the poles? A. He had them on his left shoulder.

Q. Which way was he facing when he was struck? A. Facing the bridge—facing Dover.

Q. Which way do you mean; facing Dover or the bridge? A. The bridge.

Q. Why did you say Dover? A. It was on the way to Dover.

Q. Was he facing Dover? A. He was facing Rockaway and his home was in Dover. 30

Q. Speaking of the gate next to the Rockaway River, was that up or down? A. Thret quarters of the way up.

Q. Did he go under or past the gate? A. No, sir.

Q. Did he have the poles over his shoulder as I indicate? A. Yes, sir.

Q. Where was he in relation to the rail nearest the river, when he was struck? A. He had just crossed over the rails. There goes a plank outside of the rail and he had just cleared it. 40

Charles W. Shaw—Cross.

Q. And could you see that from where you sat?

A. Yes, sir.

Q. See it plainly? A. Yes, sir.

Q. Could you see his foot off this other rail?

A. Yes, sir.

Q. How high was your face above the nearest rail to where you sat? A. The ties were about
 10 piled up 6 or 7 feet high.

Q. Where did you sit? A. I sat on the top of the heap of ties.

Q. And so plain you could see away down there? A. Yes, sir; I could see.

Q. You saw his feet were off the guard bar alongside the rail when he was struck? A. Just cleared the track. Just merely cleared the train when it hit him.

Q. When it struck, did it strike him or the poles?
 20 A. I could not say.

Q. Did you see that? A. I saw him get knocked, but I don't know whether it hit him or the poles.

Q. Which way did it knock him? A. Towards Dover.

Q. How far did it roll him? A. Pretty nearly 25 feet.

Q. When it struck him could you see him rolling? A. Yes, sir.

Q. How could you see when the engine passed
 30 between you and the man? A. The engine knocked him ahead.

Q. Faster than the engine was going, is that what you say; how about it? A. I saw the engine knock him down.

Q. You don't mean to tell this jury that when that engine struck him, it threw him ahead? A. If the engine did not strike him, what did?

Q. Do you mean to tell the jury that when you
 40 saw the engine strike him it knocked him ahead of the engine and rolled him 25 or 30 feet? A. Yes, sir.

Charles W. Shaw—Cross.

Q. And you saw him roll ahead of the engine?

A. Yes, sir.

Q. How fast was the engine going? A. I could not say that.

Q. Did you see him roll over and over on the ground—did you? A. I did not see him roll over and over; no, sir.

Q. Did you see him roll on the ground until he stopped? A. I saw him rolling after the engine had passed by and went over to where he sat down, when I got up to him. **10**

Q. Was he still rolling when you got there? A. He was trying to get up.

Q. Did you say he was rolling until after he was struck by the railroad engine until he finally stopped when he was picked up? A. Not then.

Q. I thought you said that? A. I saw him roll when the engine hit him. **20**

Q. Didn't you say you saw him rolling about 25 to 30 feet? A. I saw him knocked that distance.

Q. Did you see him knocked that distance? A. Yes, sir.

Q. Didn't you say you saw him roll 25 feet? A. Not 25 feet; no, sir.

Q. The engine passed him when he quit rolling so that the engine and train was between you and him? A. The engine passed right by him.

Q. Did it stop? A. No, sir. **30**

Q. Until he stopped rolling, was he ahead of the engine so that you could see? A. No, sir.

Q. I want to show you a photograph marked D-2, and want you to look at that culvert and tell me whether he rolled past the culvert as you saw? A. He was hit on this crossing and knocked to this culvert.

Q. And then what happened? A. Somewhere in between here and that culvert is 25 feet from the crossing. **40**

Charles W. Shaw—Cross.

Q. Did you measure it? A. Yes; exact measurement, and there is a cement block 2 feet west of that culvert.

Q. And where did you find him when you picked him up? A. He had gone over and sat down on the tower.

Q. He had sat down before you got there? A.
10 He had gathered himself up and sat down where the steps go up in the tower.

Q. You measured it from the crossing? A. Yes, sir.

Q. Why did you do that? A. I measured it a couple of days ago, because Mr. Kratz told me I was going to be called again as a witness and I wanted to measure it.

Q. You never have been called as a witness? A. Yes, sir.

20 Q. When? A. When this trial came up before.

Q. Were you down here then? A. Yes, sir.

Q. You were not sworn? A. No, sir.

Q. The trial did not take place? A. No, sir.

Q. What other measurements did you make? A. I measured the distance between the east bound track and the coal pocket.

Q. How did you find that? A. 36 feet.

Q. Why did you measure that? A. I thought you would ask me.

30 Q. I have not, so far as I have gone? A. I thought you would before you got through.

Q. What was there on these tracks? A. Cars.

Q. And the distance over to here is 26 feet? A. Yes, sir.

Q. Why did you measure that, had you any reason when you made that sketch, that I might ask you? A. I thought you might ask me how far that was.

40 Q. What else did you measure? A. I measured the distance from the Rockaway River bridge to the crossing.

Charles W. Shaw—Cross.

Q. How far did you find that to be? A. 5 feet.

Q. From the road to the crossing? A. Yes, sir.

Q. What else did you measure? A. I measured the distance from the crossing to the platform of the tower.

Q. How much did you find that to be? A. 60 feet.

Q. From the nearest point of the road over to the tower? A. Yes, sir. **10**

Q. Why did you measure that? A. Because I was afraid I would be called on as to the distance.

Q. What other measurements did you take? A. That is all.

Q. What did they have to do with the case? A. A whole lot.

Q. What? A. You asked me how far I could see from where I sat.

Q. When did you measure that? A. A couple of days—I put the distance on a few days ago. **20**

Q. Did you put the measurements on the map a few days ago? A. Sunday.

Q. You got the map and tracks on Dickerson Bridge, 14 feet? A. Yes, sir.

Q. Didn't you tell me you made the map the next day? A. Yes, sir; I made the map the next day, but not the measurements.

Q. Where are the measurements on this map? A. 5 feet from the bridge to the crossing and from the crossing to the platform, 60 feet; and the distance between the east bound track and these coal tracks is 36 feet; and from the tower over to the heap of ties is 217 feet; that makes 277 feet from over there. **30**

Q. Did you work for the company at one time? A. Yes, sir.

Q. Weren't you the man that had charge of the coal dumps up there, that watch the coal dumps **40**

Charles W. Shaw—Cross.

near the crossing? A. No, sir; I never watched them.

Q. Do you work for the company now? A. No, sir.

Q. When did you quit? A. I could not just say when I quit.

10 Q. About how long ago? A. The first time, about a year ago, I guess. Maybe more.

Q. Why did you quit? A. I was laid off.

Q. Discharged? A. No, sir.

Q. Laid off for what? A. Had no use for me, so they said.

Q. Is that all they told you? A. That is all they told me.

Q. That is about a year ago? A. As near as I can judge; maybe a little longer.

20 Q. Was it before or after this accident? A. After.

Q. You were laid off after the accident? A. Yes, sir.

Q. And while you were in the employ of the company, you made this map? A. I was not an employee of the company when I made that map.

Q. You said you made it June 25th? A. Yes, sir.

Q. Were you an employee of the company at the time the accident occurred? A. No, sir.

30 Q. You had been discharged prior to that time? No, sir; I was braking on the road.

Q. The last work you did for the company was when you were at the coal pockets? A. Yes, sir.

Q. Had you been released from the company or discharged prior to the time of this accident? A. I don't remember.

Q. You must know whether you worked for the company at that time or had been discharged? A. I was laid off.

40 Q. At the time this accident occurred? A. I don't remember about that.

Charles W. Shaw—Cross.

Q. Give me the best recollection you have about it? A. I never kept it in my head.

Q. Try and get it in your head now. Can you figure back? You know what you are doing now and what you have done before—don't you know as a matter of fact, you had been discharged or dismissed or laid off or you had resigned from the company prior to this accident. You do remember it now; don't you? A. I don't remember. 10

Q. Why not? It is quite important whether you were or were not. Just tell us your best recollection about it? A. (No answer.)

Q. How soon did you move out of the house after this accident? A. About two years.

Q. How long have you been living away from this house? A. I moved away in October.

Q. The accident occurred in 1914? A. Yes, sir.

Q. You say two years; that would bring you back to—July 20th was the accident? A. June. 20

Q. You see it will not be quite two years yet. Now, basing your recollection on the time that you lived in the house after that time, does that help you to fix whether you were working for the company on June 20th, 1914? A. As near as I can recollect, I worked for the company since the accident.

Q. What is your best recollection? A. Yes, sir.

Q. What fixes that in your mind, anything at all? A. No sir, nothing more than that I worked at the coal storage. That was the last place I worked. 30

Q. Were you dismissed from the company before you talked to Kratz or Kratz met you and you told him about this case a year after the accident? A. I was not working for the company at the time of the accident.

Q. At the time you told Mr. Kratz, were you working for the company? A. No, sir. 40

Charles W. Shaw—Cross.

Q. Did you show Kratz this little sketch? A. No, sir.

Q. Did you show it to Mr. Bolitho? A. No, sir.

Q. Did you show it to Mr. Gebhardt? A. No, sir.

Q. Showed it to anybody? A. Nobody except my wife.

Q. Where did you get this paper from which you made this sketch? A. School paper.

Q. Children go to school? A. Yes, sir.

Q. What did you lay it on when you made the sketch? A. The table.

Q. What was on the table? A. Tablecloth.

Q. What kind of a tablecloth? A. Just common oil cloth.

Q. And you laid it on that? A. Yes, sir.

Q. When did you make it in reference to the time of the accident? A. The next day.

Q. In the day time or the evening? A. The next evening.

Q. Where were you working then so that you could not make it at the time? What is your recollection about that? Can't you answer? A. I cannot just tell you where I was working. Work was kind of slack and picked up jobs where we could get them.

Q. If you were picking up jobs you were not working for the company? A. No, sir.

Q. Then you were not working for the company at the time of the accident? A. No, sir.

Q. Looking at the little sketch, you have some coal storage tracks marked there, are these the two storage tracks to which you refer, I am pointing to on the map? A. Yes, sir.

Q. Were there cars on these tracks? A. Yes, sir.

Q. Where were they, looking at your sketch and

Charles W. Shaw—Cross.

this map, where were these cars located, East or West of this crossing? A. Across on both sides.

Q. Across from here and over there? A. Yes, sir.

Q. On each of these tracks? A. Yes, sir.

Q. How many feet West of the crossing do you think these cars were? A. About 10 feet.

Q. That would not permit cars to go on it; do you mean that they were across the crossing? A. They were cut good and clear of the crossing. 10

Q. How many cars were there? A. I could not tell you, generally a big string up to the coal storage.

Q. There were cars along here on these two sidings? A. Yes, sir.

Q. The man that was struck was headed Easterly? A. Yes, sir.

Q. This engine was coming from the West going toward Dover? A. Yes, sir. 20

Q. So far as the cars on these two tracks were, that had nothing to do with the man being struck? A. No, sir.

Q. These cars did not interfere with his sight? A. He could not see through these cars whether a train was coming from the West.

Q. He was over here (indicating). They were on the other track, could not he see a train approaching? A. He was coming up that road. 30

Q. You said when you first saw him, he was there, did you see him down here (indicating)? A. No, sir.

Q. Why did you just say then that he was coming up this road? A. I understood he came up the road.

Q. Did you see him? A. No, sir.

Q. How do you know where he came from? A. I don't know.

Q. You say you saw him where I got these two crosses? A. Yes, sir. 40

Charles W. Shaw—Cross.

Q. He had passed these two switches on which these two cars were located? A. Yes, sir.

Q. As he approached North to go over this bridge, these cars down here did not interfere with his sight of engines and trains on the main line? A. Not after he passed here (indicating).

10 Q. Why did you put on this map cars on these two tracks. What had that to do with this accident? A. He was 36 feet—

Q. After the man had passed these two sidings on which these empty cars or flat cars were located, what had the crossing on these sidings to do with an accident occurring way over there (indicating)? A. If he came up this road I was speaking about—he could not see that train coming on account of the steel cars.

Q. As he came up there? A. No, sir.

20 Q. He could not see the train coming here (indicating)? A. No, sir.

Q. How fast was he going? A. Could not say, moving along some.

Q. A first-class passenger train? A. Yes, sir.

Q. That is the point you saw him first where I put the two crosses? A. Yes, sir.

Q. When he got here these cars did not interfere with his sight as to the train coming up here (indicating)? A. No, sir.

30 Q. Why did you put it on your map? A. I put what I was sure was there.

Q. Didn't you put it there for some purpose? A. No, sir.

Q. Were you consulted before this suit was brought? A. No, sir.

Q. This suit was brought the 5th day of July, 1915, weren't you interviewed before this suit was brought? A. No, sir.

40 Q. You said it was about a year after the accident you called on Mr. Kratz? A. Yes, sir.

Charles W. Shaw—Cross.

Q. In this complaint plaintiff further says that he was prevented from seeing the approach of said locomotive and cars by a long line of high gondola coal or freight cars that were allowed to stand on these tracks on the Easterly side of said crossing, close up to said crossing. Now so far as your opinion, these cars did not have anything to do with seeing the approaching engine during that interval from the first time you saw him? 10

A. No, sir.

Q. He had passed way beyond that point? A. Yes, sir.

Q. And when he got over this point, he could see up and down the track and there was nothing to interfere except the tower house and oil house, and that heap of ties or anything else that was there? A. Yes, sir.

Q. So in your opinion, there was nothing to interfere with him after the time you first saw him? A. Yes, sir. 20

Q. By reason of it being a dark night? A. It was scarcely dark.

Q. You could see from where you were this two hundred and odd feet? A. Yes, sir.

Q. And you could see so well that you could see he was off the rail, the rail nearest to the river and off the plank that is beside the rail? A. Yes, sir. 30

Q. Was it foggy? A. A little, not much.

Q. Was it so dark or foggy that he could not have seen the approach of the train if he had looked? A. He could have seen it.

Q. Was the head-light burning? A. No, sir.

Q. Was it dark enough to have a head-light? A. No, sir.

Q. After you made this map, where did you put it? A. I had it home in the drawer in my desk. 40

Charles W. Shaw—Cross.

Q. Folded up? A. Yes, sir.

Q. Folded up as it is now? A. Yes, sir.

Q. When did you begin carrying it in your pocket? A. About a year ago.

Q. Ever since then? A. No, sir; ever since a week ago.

10 Q. Didn't you say to Mr. Bolitho, "It won't do you any harm?" A. No, sir.

Q. And Senator Gebhardt never saw it? A. No, sir.

Q. You and your wife were the only two? A. My wife and I were the only two.

Q. You did not see any boys sitting on the bridge? A. Did not take notice.

20 Q. If there had ben boys on the bridge, you would have seen them—suppose there had been boys on the bridge over on the river side, would you have seen them? A. I could not see them through the wire-work of the bridge.

Q. You could not see them through the wire-work of the bridge—is that the bridge (indicating)? A. I could not see them through here (indicating).

(Addressing the jury.)

I want you gentlemen to look at that bridge.

30 Q. Do you tell this jury that you could not see these boys through the railing of this bridge? A. Not from where I sat.

Q. Not from where you sat you could not see them? A. No, sir.

Q. Let us get the place; it was almost at right-angles and there was nothing except the wire lattice on the side of the bridge? A. That was what prevented me.

40 Q. And does this photograph show the lacing or lattice-work of the bridge? A. Yes, sir.

Charles W. Shaw—Cross.

Q. So if these two husky boys were as a matter of fact on the bridge you could not have seen them? A. No, I did not see them.

Q. Isn't it true that you did not get up to that place of the accident until after Doctor Parker had come down? A. I was there before Doctor Parker.

Q. How much before Doctor Parker was there did you come to the place? A. A few minutes. **10**

Q. How many minutes do you think? A. Ten or fifteen minutes as near as I could judge. Maybe a little more or a little less.

Q. What hour? A. I did not take out my watch, I was taking care of the old man.

Q. You did not see this accident? A. I did.

Q. You did not see it sitting up on those ties? A. Sitting up on those ties.

Q. For a whole year you didn't tell the man? A. I didn't see him for a year; I was not acquainted with the man. I only saw him on the street. **20**

Q. Isn't there a foot bridge over the river up near the cold storage track that is marked "Cold storage"—isn't there a foot bridge right there? A. Yes, sir.

Q. And that foot bridge is between the cold storage and the crossing just below? A. No, sir.

Q. The foot bridge over the Rockaway River is not between the cold storage and crossing? A. No, sir; between the cold storage and car shops by the Morris County Traction Company power shop. **30**

Q. I passed it for 27 years and I thought I knew something about it? A. Yes, and I passed it fifteen years or more.

Q. Well, this map shows a crossing in there, doesn't it? A. Of some sort.

Q. You say there isn't a crossing between the **40**

Charles W. Shaw—Cross.

cold storage and the foot bridge? A. No, sir.

Q. What is it between? A. Right in front of the car shops.

Q. Is there a crossing there, a public road crossing? A. Not a public crossing; just a little crossing made for the employees to get across and that has been made lately.

10 Q. Yes, I will take it all back, here is the crossing (indicating). Here is the coal storage and there (indicating) is the crossing right there is the Traction Company's power house and there is the crossing right there (indicating)? A. Yes, sir.

Q. Hadn't this man come up to this crossing from this place up to these tracks (indicating); went over that crossing and then started up along the railroad track to get to that bridge? A. No, 20 sir.

Q. Hadn't he left the railroad crossing when he was struck? A. Yes, going to the river bridge.

Q. How far? A. He just cleared it.

Q. Hadn't he turned up the railroad track? A. Yes, sir.

Q. Are you sure of that? A. As near as I could see.

Q. Will you say on your oath that he had not turned up the railroad track for this foot bridge?

30 A. Yes, sir.

Q. Isn't that true? A. To the best of my knowledge.

Q. Can you say that this is true or isn't it true? A. It is true.

Q. What is true? A. That he was going to the river bridge.

Q. Hadn't he turned from the river bridge there when he was struck? A. No, sir.

Q. That isn't true? A. No, sir.

Charles W. Shaw—Cross.

Q. What did you get for testifying? A. Nothing.

Q. Hadn't you made any arrangement? A. No, sir.

Q. Haven't you a grudge against the railroad? A. No, sir.

Q. Have you made an application to get back? A. No, sir. 10

Q. Weren't you discharged for stealing coal?

MR. BOLITHO: I object to that.

THE COURT: I think if he was discharged for stealing coal or on a charge of stealing it, that it might effect him as to his testimony against the railroad.

Q. Were you? A. No, sir.

Q. Any charge preferred against you? A. No, sir. 20

Q. Was there a light in the head-light in the engine that struck this man? A. Head-light.

Q. Was it lighted? A. No, sir.

Q. I think you said it was not dark enough to be lighted? A. No, sir.

Q. After the accident how soon did you come down towards this shanty or tower? A. I ran right down there as soon as I could get down there.

Q. And the man had come across from the other side? A. He had wandered across the track. 30

Q. Wandered across the track? A. Walked.

Q. Where did you find him? A. On the platform.

Q. When you got there, who else did you see? A. Quite a crowd.

Q. Did you see these two boys at that time? A. I don't remember. This is the only time I saw the boys in my life. This is the third time I saw one and the second time I saw the other. 40

Charles W. Shaw—Cross.

Q. You say they were not there, either of them?

A. I don't say that either; I might have missed them.

Q. Who else did you see? A. I saw others, I don't know who, and I saw the tower man.

Q. When you got there, had the doctor come there? A. No, sir.

10 Q. When did he come? A. Shortly afterwards.

Q. How long? A. Ten or fifteen minutes.

Q. What did you do for this man? A. I asked the tower man for a piece of waste.

Q. What did you do? A. I took a piece of waste and wiped his arm off.

Q. Did you look for these pieces of sticks? A. No, sir.

Q. Did you see them afterward? A. No, sir.

20 Q. Do you go over the crossing? A. I go over it every once in a while.

Q. When you made that measurement, did you see these sticks? A. No, sir.

Q. Did you see these sticks when you measured it a few days ago? A. I did not see them.

Q. Would you say that they were not lying there for eight or nine months? A. I would not say.

30 Q. And eventually gathered up by the city of Jersey City and burned when they cleaned up the property? A. I would not know that.

Q. How was the man's arm injured as you saw it? A. His coat was down; I could not see his arm.

Q. You could not see that at all? A. No, I did not see that, but wiped the blood off his hand.

Q. Was his arm fastened to the shoulder? A. I could not say that.

Q. Was his arm loose in the sleeve? A. It had

Charles W. Shaw—Cross.

not been cut off then. It must have been. His hand was there. I could see it.

Q. Were you there when the doctor came? A. Yes, sir.

Q. What did the doctor do? A. I don't remember what the doctor did.

Q. What did you see the doctor do? A. I don't think he did anything for him any more than flagging the train. 10

Q. Did you help put the man on the train? A. Yes, sir.

Q. Then what did you do? A. I got up on the engine on the tender and got him by the two shoulders. The doctor and someone else got him up on the tender of the engine and I got off.

Q. Didn't you see these two boys come with a man from the river to the platform? A. No, sir. 20

Q. Did not see that? A. No, sir.

Q. Will you say that they did not do that? A. I will not say that because I did not see the boys I told you.

Q. You say the gate nearest to the river was up how high? A. Three-quarters of the way.

Q. Why do you say three-quarters? A. It was not straight up; it was more on a pitch like that (illustrating).

Q. Why do you say about like that? A. I saw it at the time. 30

Q. Was it usually that way? A. Generally stood that way more or less all the time.

Q. You thought that was a pretty bad thing to do? A. Yes, when an approaching train came along.

Q. And when a fellow could go underneath? A. Yes, sir.

Q. When you made your little sketch why didn't you put the gates on that sketch? A. I did not know how to mark them. 40

Charles W. Shaw—Cross.

Q. Didn't know what? A. Aren't the gates there?

Q. Are the gates here, what do you think about it? A. I think I have them marked.

Q. You think you marked the gates; did you mark them up or down? A. Marked them up.

Q. Pretty sure about that, aren't you? A.
10 Yes, sir.

Q. I wish you would look at that map and see whether that is so or not? A. Yes, sir.

Q. Where are those gates? A. Right here (indicating).

Q. Over the crossing? A. As near as I could mark them. I marked them like that.

Q. What are these (indicating)? A. These are single gates.

Q. You have got the gates over the railroad?
20 A. I had to mark them up if I marked them this way (illustrating).

Q. Why didn't you put the gates parallel right alongside of the railroad track? A. They are shown up; if you mark them this way, they would be shown down.

Q. Why didn't you mark them so that they were over this public highway instead of over the railroad? A. Haven't I got those gates over the railroad? That is the way they are marked.

30 Q. Say yes or no? A. Yes.

Q. Was this the end of it? A. Yes.

Q. And you not only got them crossing both railroads, but the steps between? A. No, sir; this here mark here (indicating) that shows a signal tower down below the gate.

Q. That shows the signal tower? A. The signal tower.

Q. Then what is this over here (indicating)?
A. That marks the gates. This is on the West of
40 the track.

Charles W. Shaw—Cross.

Q. You have these both on the railroad track. They were not standing practically straight up and down? A. No, sir.

Q. Why did you put them straight up and down? A. That is the best way I knew to mark them.

Q. Why did you put them as if they were raised; why did you put them that way? A. That is the only way I knew to mark them. 10

Q. Don't you know they were on an angle right through here? A. That is the way they were.

Q. Why didn't you mark them that way—? Then this here (indicating) represents the gate, doesn't that right there (indicating)? A. Yes, sir.

Q. And so that is the tower, that end line over there (indicating)? A. That is the signal.

Q. Signal tower? A. It ain't any tower; it is an overhead signal. 20

Sketch offered in evidence marked Exhibit D-4, by consent.

Q. The tower is way down here (indicating)? A. That is one.

Q. You had them standing straight up and down? A. They weren't straight up and down; it shows them crossing the track.

Q. They were not standing straight up and down as you have them? A. No, sir. 30

Q. Now I have another photograph here which I wish you would look at; does that fairly show the tracks? A. Yes, sir.

Q. How far away are the tracks on the side below the main track? A. Which tracks do you mean?

Q. The side tracks. A. 36 feet.

Q. How far are they lower than the main track? A. 2 feet of a drop probably. 40

Charles W. Shaw—Cross.

Q. 2 feet off the other grade? A. They are on a lower grade.

Q. What is the distance? A. I could not tell you exactly.

Q. This fairly represents the side track, doesn't it? A. Yes, sir.

10 Q. I want you to look at this D-3, and I ask you whether that man was shoved beyond that culvert or not? A. No, sir.

Q. He was alongside the culvert? A. Between the culvert and crossing.

Q. And that distance you say is how much? A. 5 feet.

Q. How long had you been sitting on these ties before this accident occurred? A. Probably 15 or 20 minutes.

20 Q. Where had you been? A. Down the road a ways; I went down looking for my boys.

Q. Where did you go looking for them? A. They used to go over to the canal swimming.

Q. I thought you told me you took a little walk around the tower house? A. I did and sat down.

Q. Were you looking for your boys then? A. I did and then sat down.

Q. Why didn't you tell the jury that you were looking for your boys in swimming? A. I told them I took a walk.

30 Q. As a matter of fact, did you go to look for your boys or did you just happen to think of it? A. I went looking for the boys.

Q. Then when you said yesterday you took a walk, it was not quite true; you went to look for your boys? A. Yes, sir.

Q. Where did they go? A. I told them to go home.

Q. Which way did they go? A. Went up the track.

40 Q. And you went along the track? A. No, I sat still.

Charles W. Shaw—Re-Direct.

Q. Below the crossing? A. We came up to the crossing.

Q. Were they swimming in the canal or river?
A. Canal.

Q. I thought you said you went to look for your boys? A. To see if I could see the boys.

Q. Why didn't you go over there? A. I sat down and waited for a while, and they came along. 10

Q. Is that the way you looked for the boys?
A. I went down to take a walk and look for them.

Q. As a matter of fact, did you take a walk or did you look for the boys? A. I went for both.

Q. Had you been working that day? A. I don't know.

Q. Why did you need a walk if you were not working that day? A. I always take a walk after supper. 20

Q. You knew the boys were over that bridge and the canal is only a little way from the bridge?
A. Yes, sir.

Q. Why didn't you go over when you got to the tower? A. I didn't want to; I sat down there.

Q. You came from the tower to the heap of ties?
A. I did not go down to the tower.

Q. Didn't you go around the tower? A. I went down to the tower and then came back to the heap of ties. 30

Q. Why didn't you go to the canal? A. I knew they must be there; I heard them hollering.

Q. Could you tell your boys hollering from any other boys? A. (This was not answered.)

RE-DIRECT EXAMINATION BY MR. BOLITHO:

Q. You say the light was not lighted in the head-light of the engine that night? A. No, sir. 40

Charles W. Shaw—Re-Direct.

Q. About what time was it when this accident happened? A. About 8:15.

Q. Did you hear this engine blow a whistle? A. No, sir.

Q. Did you hear the bell ringing on the engine? A. No, sir.

10 MR. SCOTT: I object. It is not proper re-direct examination.

THE COURT: It is not proper re-direct. Did you forget?

MR. BOLTHO: Yes, sir.

THE COURT: I will permit you to ask it now then.

Q. Did you hear the bell ringing on the engine that night? A. No, sir.

Q. Did you hear the whistle blow? A. No, sir.

20 Q. I show you this photograph marked D-1, where the pin is stuck in and I ask you to look at it and tell us whether the gates on that evening were up as they are shown in that photograph? A. No, sir.

Q. They were not up as high as that? A. No, sir; they stood a little on a pitch of this one, maybe a little lower.

Q. A little lower, the one nearer the tower? A. Yes, sir; like the one nearer the tower.

30 Q. I ask you also if on that night you noticed whether there was any freight cars on this track—the East bound track toward Rockaway from the crossing. Did you notice whether there were any freight cars there on that night at that time? A. No, sir.

Q. Are you sure that Mr. Kratz was not knocked beyond this concrete block? A. Yes, sir.

Q. You say he was knocked somewhere near this culvert that goes under the track to the river? A. 40 Yes, sir.

Charles W. Shaw—Re-Cross.

Q. Between the river bridge and the concrete block? A. Yes, sir.

Q. But on the other side of the concrete block nearest the crossing? A. Yes, sir.

Q. And so at the time he was struck by the train, he was on the public road on this crossing? A. Yes, sir.

Q. And was he going toward the bridge? A. 10
Yes, sir.

Q. Did you or did you not look to see whether these boys were on the bridge? A. I don't know whether there was anybody on the bridge.

Q. Did you look to see if there was anybody? A. No, sir; paid no attention to the bridge.

RE-CROSS EXAMINATION BY MR. KING:

Q. What were you paying attention to? A. I 20
was looking at the train coming.

Q. Were you paying particular attention as to whether the bell was ringing? A. Yes, sir.

Q. Centering all your attention on the fact as to whether it was ringing? A. I know that it did not ring.

Q. Centering all your attention on the fact as to whether it was ringing? A. I know I did not hear it ringing, so my attention must have been upon it.

Q. How far before the train reached the cross- 30
ing was it that you saw it? A. I saw it when it came around the bend.

Q. How far away was that? A. A couple of hundred feet below the crossing.

Q. Did you merely start to pay attention to whether the bell was ringing? A. I did not notice any bell or whistle.

Q. I asked you, as soon as you saw the train, did you start to pay attention or listen for the 40
ringing of the bell? A. Yes, sir.

Charles W. Shaw—Re-Cross.

Q. You say it was not ringing? A. Yes, sir.

Q. Had you heard the whistle of No. 3 before you saw it? A. No, sir.

Q. Then you say it did not blow before you saw it? A. Yes, sir.

Q. Positive of that? A. Positive of that.

10 Q. From the time when you first saw No. 3 coming along, did you pay particular attention to the blowing of the whistle? A. Yes, sir.

Q. And you say it was not blown from the time it came into your sight until when? A. It never blew.

Q. From the time it first saw you until it passed you? A. Yes, sir.

20 Q. Mr. Bolitho showed you photograph D-1, and pointed to a track on the side of the picture, what track is that? One of the main tracks? A. That is the East-bound track.

Q. You say there were no freight cars on that track at that time? A. Not that I noticed.

Q. Were there any freight cars there? A. I think not.

Q. Could you have seen them if they were there, from where you were sitting? A. No, sir.

Q. Could not have seen them? A. No, sir.

Q. Why? A. The tower stopped the view.

30 Q. The tower obstructed your view from where you were sitting, up the East-bound track? A. Yes, sir.

Q. After the accident did you go up to the crossing? A. I went to the tower there.

Q. Were there any freight cars on that East-bound track at that time? A. I did not notice it.

Q. Didn't pay particular attention? A. No, sir.

Q. Don't know anything about it? A. Nothing.

40 Q. These cars that were on the storage track, what kind were they? A. Coal cars.

Charles W. Shaw—Re-Cross.

Q. All coal cars? A. I am not positive.

Q. Did you pay particular attention to these cars? A. No, sir.

Q. How many cars were there. Were there more than ten on that side of the crossing? A. Somewheres about ten.

Q. Did they block the crossing? A. No, sir.

Q. How do you know? A. They were cut. **10**

Q. How do you know they were cut? A. I went across the crossing after the accident.

Q. How far apart had they been cut? A. About 10 or 12 feet, I should judge. They were clear of the crossing.

Q. The entire width of the crossing? A. Yes, sir.

Q. Were the cars that were on these cold storage tracks on both sides of the crossing—were they coal cars? A. Yes, sir; to the best of my knowledge. **20**

MR. BOLITHO: Mr. Kratz is not a very good witness. He does not understand English very well and I think we will get along faster if we have an interpreter.

THE COURT: What does he talk.

MR. BOLITHO: German.

THE COURT: We will try him in English first.

30

Charles Kratz—Direct.

CHARLES KRATZ, sworn in behalf of the plaintiff, testifies as follows:

DIRECT EXAMINATION BY MR. BOLITHO:

Q. Where do you live, Mr. Kratz? A. I live in Dover.

10 Q. How long have you lived in Dover? A. About two years; a little over two years.

Q. Where in Dover do you live? A. Sayler Street, number 64.

Q. Did you live there in June, 1914? A. No, sir.

Q. Where did you live in June, 1914? A. Franklin Road between Dover and Denville.

Q. Do you remember in June, 1914, when you had an accident at the railroad crossing? A. Yes, sir.

20 Q. Where did you live then? A. In Dover, King Street, number 64.

Q. Where were you working the day you had the accident? A. On the stove works.

Q. The stove works at Dover? A. Yes, sir.

Q. What time did you get through work? A. Half-past 5 at night.

Q. After you got through what did you do? A. I went home and washed myself and then went to my home on Franklin Road.

30 Q. Went down to where on the Franklin Road? A. To my home.

Q. What do you mean by that? A. I had a house there.

Q. Did you own a house there? A. Yes, sir.

Q. Do you own a house there? A. Yes, sir.

Q. And you mean you went from your home to your house on Franklin Road? A. Yes, sir.

40 Q. How did you go to your house on Franklin Road? A. On the main road where the trolley

Charles Kratz—Direct.

car runs and over the Franklin Road, right straight on.

Q. Did you go over the same crossing that you had the accident on? A. Yes, sir.

Q. About what time did you get to that crossing? A. I came about a quarter after 6 and went away about a quarter to 7.

Q. When you got down to the crossing, did you see the gates across the crossing? A. The gates were closed when I came down. 10

Q. Tell us if you notice anything with regard to the gates when you went over? A. A Peterson train came from the East and I let the train pass and then I goes over when the gateman lifted the gates.

Q. When you went over, did you say that the gates were down? A. Yes, sir.

Q. To leave the train go by? A. Yes, sir. Then the gates go open and then I go over. 20

Q. You went right on past this crossing? A. Yes, sir, on the Franklin Road.

Q. Where did you go? A. To my place on the Franklin Road.

Q. That is beyond this? A. Yes, sir; on the Franklin Road.

Q. How long were you over there? A. Three-quarters of an hour or half an hour; something like that. I didn't look at the clock. I don't know exactly. 30

Q. Do you know what time it was when you went there? A. About a quarter after 7.

Q. I mean from the house on the Franklin Road; what time did you come away from there? A. Quarter after 7.

Q. Do you know what time it was when you got back to this crossing? A. A little after 8; about that.

Q. When you came back, did you come up this same road? A. Yes, sir, the same road. 40

Charles Kratz—Direct.

Q. When you got to this railroad crossing coming back, tell us what you saw? A. When I came there, on the crossing there was a big lot of cars there on both sides. On the east-bound track, and the gates were open, and when I came over the first crossing, I hollered to the gateman—he is a good friend of mine—and I was hollering to him and he hollered nothing and I kept going on, and when I was on the middle track, I heard something and when I was about across, the train come from the East and catches me in the back and throws me about 20 feet.

10 Q. Look at this photograph P. 1, and tell us which track those coal cars were on? A. Right here (indicating).

Q. Just make a mark on the track where you say those coal cars were? A. There (indicating).

20 The witness made a mark on the photograph on the main track going East, on the East-bound track.

Q. Where were you when the train struck you? A. Right there, the same place.

Q. On that railroad? A. On that track there (indicating) and knocked me about 15 feet.

Q. Which direction was the train coming from? A. From the East, from Rockaway.

30 Q. Look at the gates on that picture and tell us if the gates were down on that night, any further than they are there? A. A little further down; yes, sir, standing about this way (illustrating).

Q. Was this crossing open here? A. The crossing was open and you could pass through.

Q. These cars were down this way from the crossing? A. Yes, sir.

40 Q. How far did they run? A. It was a big string; I think it was a long train, I could not see the end.

Charles Kratz—Direct.

Q. Before you went on this crossing to go over the tracks that the gates were on, did you speak to anyone? A. Yes, sir.

Q. What did you do? A. I hollered to the gate-man.

Q. Did you listen? A. Yes, sir, and he answered me and then I go ahead.

Q. Did you hear anything? A. I heard something from Dover coming down—coming East. 10

Q. What did you hear from Dover? A. Kind of a blowing; I thought it was a train coming down from Dover.

Q. When you proceeded to go across the track, did you look in any other direction, did you look toward Dover or Rockaway? A. I was looking to Dover.

Q. Did you see or hear the train that struck you? A. No, sir, he came still; no noise at all and fast. 20

Q. Did you know what happened to you after you were hit? A. Yes; I lost my arm.

Q. When after you were hit did you first know that you had been struck by the train? A. Sure I knew it; the train caught me and my coat was all tore in pieces. I think the train caught me in the back.

Q. That is what I thought; when did you first find out you had lost the arm? A. I found it out the next day. 30

Q. Where were you then? A. The Memorial Hospital in Morristown.

Q. How long were you there? A. I was in the hospital about two weeks.

Q. You were there about two weeks? A. Over two weeks.

Q. Did you pay anything to the hospital? A. Yes, sir.

Q. How much was the hospital bill? A. \$19. 40

Charles Kratz—Direct.

Q. Is that the bill (showing witness a piece of paper)? A. Yes, sir.

Q. Did you pay this bill? A. Not all of it yet; I paid \$15 down and owe \$4 yet.

Q. How old are you Mr. Kratz? A. 52 years old.

Q. What is your occupation? A. Weaver—silk
10 weaver.

Q. As a silk weaver, what was your rate of wage that you received per day when you were last employed as a silk weaver? A. \$2.50 or \$3.

Q. Which was it, three dollars or two-fifty? A. \$2.50 or \$3; \$2.50 if working all the time.

Q. That was the regular wage? A. Yes, sir.

Q. At the time you were injured, you were not working at that? A. No, sir; in the stove works.

Q. How much were you making? A. \$1.85 a
20 day.

Q. After you were injured, how long was it before you were employed? A. About 8 months.

Q. Where did you get work? A. In the print shops, Liondale at Rockaway.

Q. How much wages did you get there? A. \$1.25.

Q. That is what you are getting to-day? A. Yes, sir.

Q. Did you pay out any money besides this
30 money to the hospital? A. For medicine.

Q. Do you know how much you paid out for medicine? A. About \$10 or \$15; I don't know exactly. I never marked it down. About \$10 or \$15.

Q. Do you suffer any pain? A. I suffer to-day. I have to go through a new operation now. Here is a witness (witness showed a paper).

Q. Do you suffer pain in your arm? A. The
40 longer I wait, the more pain I get.

Charles Kratz—Cross.

CROSS EXAMINATION BY MR. KING:

Q. I would like you to look at this map, Mr. Kratz, so that you and I can understand it better?

A. I have not had much to do with maps.

Q. This here (indicating) shows the railroad crossing and the road? A. Yes.

Q. And these (indicating) are the two main tracks? That is one main track, that is one main track and here is another (indicating)? A. Yes. 10

Q. And this here (indicating) is the tower? A. Yes, sir.

Q. And these two tracks are the storage tracks or side tracks? A. Yes, sir.

Q. And these marked here (indicating) are the crossing gates? A. Yes, sir.

Q. This direction here (indicating) as I understand it, is toward Dover? A. Yes. 20

Q. And this direction here (indicating) is toward Rockaway? A. Yes.

Q. Did you have a farm in the neighborhood of Rockaway at any time? A. Yes, sir.

Q. About how far from the crossing was that farm? A. From the crossing to my farm about 25 minutes' walk.

Q. Did you live there at the time of the accident? A. No, sir.

Q. Did you own it at that time? A. Yes, sir, I own that to-day now. 30

Q. For how long a time before the accident did you own it? A. For about 7 years.

Q. And travelling from that farm on down toward Dover, did you ever walk down the railroad track to the crossing? A. Sometimes.

Q. And from your farm out to the railroad property, there is a little path there—I say there is a little path from your farm out on the railroad property? A. Yes, sir. 40

Charles Kratz—Cross.

Q. And when you wanted to walk down the railroad track from your farm toward Dover, you walked down this little path and got on the railroad tracks? A. I never walk on the railroad tracks.

10 Q. How many times before the accident to you, had you walked down from your farm to the crossing by the railroad tracks? A. Not many times.

Q. How many times? A. Only in the morning and when I wanted to sleep a little longer.

Q. Had you done it a number of times before the accident? A. Yes, when I overslept I got up late—everybody does that.

Q. Where did you live with reference to the crossing at the time of the accident? In Dover? A. Not Dover, East Dover you call it.

20 Q. Where were you returning from? Where had you been when you walked out that evening? A. From the factory or from my home?

Q. When you went out that evening about 7 o'clock, where did you go to? A. When do you mean?

Q. After you got home from work? A. I walked down to my place; I had a man working on my farm and I walked down the main road to my place.

30 Q. Did you go to the farm that night? A. Yes, sir.

Q. That is the farm you have been telling us about? A. My home.

Q. What time did you get up to the farm? A. I think about quarter to seven o'clock; I no look at the clock about that time.

Q. How long did you stay there? A. I stayed maybe till a quarter after or half-past seven; maybe later than that. I no look on the clock; I no think of any accident.

Charles Kratz—Cross.

Q. What did you do at the farm? A. I had a carpenter putting a fence in and there was a man down there that had some wire which I thought he would sell cheap, and I went down to look at that wire.

Q. When you went down there, did you have a saw in your pocket? A. Yes, sir.

Q. When you started to come back, did you have a couple of poles with you? A. Yes, sir. 10

Q. Did you cut those poles up there? A. Yes, up at my place.

Q. How long were those poles? A. I wanted to use them on some trees; 4 or 6 feet high. I was going to use them on some small, young trees.

Q. You had two of them? A. Two of them.

Q. As you started to come back from the crossing to your farm, can you show us just how you came back on that map there (indicating)? A. I will look at it, but I don't understand nothing from maps; I had no schooling. 20

Q. Here (indicating) are the railroad tracks up toward that farm? A. Yes.

Q. And here (indicating) is the railroad crossing and the railroad; how did you start to come back from your farm? A. Came back the Franklin Road.

Q. This road here? A. Yes, from Denville.

Q. How far is it from your farm up to the Franklin crossing? A. About twenty or twenty-five minutes. 30

Q. Isn't it a fact, Mr. Kratz, that on the night of the accident you walked down the railroad track from your farm to the crossing? A. No, sir.

Q. Sure of that? A. Yes, sir.

Q. As you walked to the crossing, you carried these poles over your shoulder? A. Yes, sir.

Q. When you got to the crossing, came to these 40

Charles Kratz—Cross.

side tracks, were there any cars on the side tracks?

A. On both sides were cars.

Q. On both tracks? A. Yes, sir.

Q. Did they block the crossing? A. No, sir.

Q. What kind of cars were they? A. Coal cars, freight cars and a big string.

Q. Gondola cars? A. Coal cars.

10 Q. Gondola cars? A. I don't know.

Q. You don't know what gondola cars are? A. Iron cars and wood cars.

Q. When you got to the crossing, you say there were freight cars on both tracks? A. Yes.

Q. Before you started to cross over, did you stop and look? A. Yes, I hollered to the gateman; I knew him well.

Q. Before you started to cross the first side tracks, you stopped? A. Yes, sir.

20 Q. Were there freight cars along the crossing toward Dover? A. Both.

Q. Take the track nearest the tower, were there freight cars there? A. Yes, sir.

Q. How many? A. I cannot tell you.

Q. On the Dover side? A. I could not tell you; I no think of accident.

Q. Were there a half a dozen or a dozen? A. I no kept my eyes on them.

30 Q. On the first side track; were there a number of cars there, freight cars toward the Dover side; just look at the map where I am pointing, as you came up the road? A. The cars were on these tracks on both sides of the crossing.

Q. Before you started to cross the tracks at all, you stood still? A. Yes, sir.

Q. How far from the first railroad track did you stop and stand still? A. There is a little free ground there, about 15 or 18 feet, and in the middle of that ground I hollered up to the gate-

Charles Kratz—Cross.

man. He knew me well; I stopped in the night time.

Q. How far was it that you stopped from this track? A. About 4 feet.

Q. How long did you stay there? A. Oh, I stayed no so long there; I stayed maybe a couple of minutes; maybe a half a minute and the gateman did not look out once. 10

Q. While you were standing there, was that the time you hollered to the gateman? A. Yes, sir, you can ask him; he is here.

Q. You waited for a couple of minutes after for him to answer you? A. Yes, sir.

Q. Were the gates down at that time? A. No, sir, the gates were up.

Q. Fully up or how? A. I cannot say that They stand up all the time like that; never stand straight up like that. 20

Q. About how high were the gates from the ground at the time you stopped and hollered? A. They stand like this all the time.

Q. How many feet from the ground, 5 or 6 feet? A. I don't know.

Q. Higher than your head? A. Two times higher than I am. They stand all the time like that.

Q. Why did you holler to the gateman if the gates were up? A. I wanted to say hello to him; to know if he come down and see me once again. 30

Q. And your only reason to holler to him was to bid him the time of the day? A. Friends; yes. And friends say "hello."

Q. When he did not answer you, what did you do? A. I go on then.

Q. Did you walk fast or slow? A. The way a man walks. I no got to hurry.

Q. Did you walk fast or slow? A. The way I walk all the time. And when I was in the middle of the track I hear something— 40

Charles Kratz—Cross.

Q. When you started to go, you say you started to walk fast? A. Yes, sir.

Q. Did you look in any direction? A. Yes, I looked up and down.

Q. After you passed the second side track, where was it that you looked first? Did you look towards Dover? How far had you gone? A. I no understand; say that again.

10 Q. After you crossed this second track nearest the tower, how far had you gone before you started to look down towards Dover? A. About here. And I looked over that way (indicating) and when I was here—

Q. We will bring it all out in just a minute. You walked from the side track that was nearest to the tower towards the gate and up to the crossing before you looked toward Dover? A. Yes.

20 Q. How far were you from the railroad track, the main railroad track when you looked toward Dover? A. About 5 or 6 feet.

Q. Did you stand still at that time? A. Yes.

Q. How long did you stand still? A. About half a minute.

Q. During that time while you were standing still, did you look down towards Dover all the time? A. Yes, and I heard something like that (witness illustrating a noise) and I kept my eyes toward Dover and walked faster than I had.

30 Q. At the time you were standing still you heard some noise? A. Yes.

Q. That noise was in the direction of Dover? A. Yes.

Q. As soon as you heard this noise, what did you do? A. I go a little faster then.

Q. And as you walked over the crossing a little faster, did you continue to look down toward Dover? A. Yes, I no tell nothing else.

Charles Kratz—Cross.

Q. As you kept walking over the crossing, you kept looking down toward Dover? A. Yes, sir.

Q. Was there anything in looking toward Dover to obstruct your view? Was there anything to obstruct your view? A. I see nobody there.

Q. Was there anything on the track or cars on the track to obstruct your view? A. Cars. Down there before you came on the main track. All coal cars on both sides. 10

Q. When you got within 5 feet of the first track, you heard a noise toward Dover? A. Yes.

Q. And you looked down? A. Yes, sir.

Q. How long did you stay there? A. About half a minute.

Q. After you heard this noise, you started to go faster across the tracks? A. Yes.

Q. As you were going faster across the tracks, were you still looking down towards Dover? A. Dover. 20

Q. On either of these tracks, was there anything to block your view? A. Nothing.

Q. Could you see down the track? A. As far as I could.

Q. How far could you see? A. You cannot see to Dover, but there is a long ways that you could see.

Q. How far could you see? A. I walk it maybe in 6 or 7 minutes down there. 30

Q. About from here (indicating) down to the park, could you see? A. Yes, when you look to Dover and then it turns in.

Q. When you were looking down towards Dover, could you see as far as from this court house down to the park down here in Morristown, could you see that distance—you know where the park is? A. No, you cannot see so far. There is a curve and the railroad comes this way (indicating) a little bit. 40

Charles Kratz—Cross.

Q. About how far could you see? A. When you come on the street to the Court house, you could see about as far as that.

Q. When you were going over that crossing, you still had the poles over your shoulder? A. Yes, sir.

10 Q. Which shoulder? A. On this shoulder (indicating).

Q. Your left arm? A. Yes.

Q. When you were going across these tracks Mr. Kratz, where was the engine that struck you when you first saw it? A. When I saw the train he was so close to me I cannot say. He was coming so fast.

Q. About 5 feet from you? A. Yes, and then I run quick and they catch me in the back.

20 Q. When you saw the train had you gotten off the track? A. Pretty near; not quite. Maybe I say that table edge from the gateway.

Q. You were about a foot from the track? A. Yes.

Q. When you saw the train? A. Yes.

Q. And you still had these poles over your shoulder? A. Yes, sir.

Q. When you saw the train, did you get off the track? A. Pretty near; not altogether.

30 Q. At the time you were struck Mr. Kratz, will you tell the jury why you were facing toward Dover; were you walking down toward Dover when you were struck? A. I walked on the main road, the Franklin Road.

Q. I ask you, when you were struck, you had turned down toward Dover, is that the fact? A. This road that comes over from the bridge you know.

Q. At the time you were struck, you were facing the train which struck you? A. I don't know.

Charles Kratz—Cross.

when the train struck me. I was looking the other way. I know nothing after that anymore. I know he slid me about 15 or 20 feet when I fell in a ditch.

Q. When you were going over that crossing Mr. Kratz, did you see anybody on the bridge? A. No, sir.

Q. Did you hear anybody holler at you? A. 10
No, sir.

Q. Could you have heard anybody if they had hollered at you? A. No, no one hollered. Nobody hollered. I seen nobody.

Q. Did you pay any particular attention as to whether anybody was on the bridge when you went over the crossing? A. I could not have missed. You would have to have seen them. I know no one was on the bridge.

Q. You have seen these two boys in court, Peterson and Dolan? A. Never before. 20

Q. You know them now? A. Yes, I know them now.

Q. How soon after you was struck by the engine did you see them? A. Peterson?

Q. Saw these two boys? A. When I came out of the hospital.

Q. Is that the first you saw them? A. That is the first time I saw them in my life.

Q. You did not see them on the night of the accident? A. No, sir. 30

Q. Do you remember telling these boys that you had been up to the farm on the night of the accident? A. I don't know.

Q. Did you tell them that? A. I no got it; I no got that.

Q. Did you tell these two boys, Peterson and Dolan, that you had been up to the farm on the night of the accident? A. When I came out of the hospital. 40

Charles Kratz—Cross.

Q. Is that the first time you told them where you had been? A. Yes, sir.

Q. After you were struck, do you remember where you finally landed? A. No, sir.

Q. Look at this photograph D-2, can you tell us where you found yourself after the accident? A. This (indicating) is a little stone. The man stands there (indicating) a little cement stone.

Q. This is the crossing? A. Is that the stone there?

Q. And here (indicating) is the bridge and here (indicating) is the tower house. A. I no get hit on the tower house; I get hit on the up-track. There was a little stone cement and I fell in that ditch.

Q. You fell in the ditch on the side toward the bridge? A. Yes, sir.

Q. And this cement place is where you found yourself? A. That cement saved my life.

Q. When you found yourself were you beyond that cement place? A. I don't remember that.

Q. Where were you lying, which side of the cement, between the bridge and the cement? A. I was sitting on that block. That is all what I know. I had that in my mind; I think that saved my life, that block there.

Q. Did the engine hit you? A. I don't know; I don't want to swear to that. I think the engine hit me.

Q. Or did the engine strike the pole and turn you around? A. I was looking all the time that way (indicating) and when I heard something, I carried them all the time straight up, the poles. Could not have been hit. It looked like to me in the hospital my coat was all torn in pieces.

Q. Just before you were struck, were you carrying the poles over your shoulder like I have this stick? A. Yes.

Charles Kratz—Cross.

Q. You don't know whether the train struck you? A. I think the engine struck me. That is what I think. I no swear to that for I don't know. I am sure the train struck me, that is all I know.

Q. I show you a photograph marked D-5, Mr. Kratz, and ask you after looking at that photograph, is that the view up in the direction in which your farm lay from the crossing? Is that the main road? A. Yes, that is the main road. Then I live down there by Denville. **10**

Q. Is that where the farm was? A. Yes, if that is where the main road was.

Q. The farm was located down in this direction? A. Yes.

Q. The direction of this signal brake? A. In the curves there you know.

Q. You had gone over this crossing before, Mr. Kratz? A. I had to go over that crossing to get to Dover. **20**

Q. How often had you gone over? A. Every day, twice.

Q. Both day-time and night-time? A. The morning and night-time.

Q. You were familiar with this crossing, you knew all about it? A. I no got it.

Q. Did you know about this crossing? A. Yes.

Q. And the direction in which the trains would come? A. Yes, I know every stop there; when you live down on the place, you know it well. **30**

Q. What did this noise that you heard sound like when you got near the track? A. It sounded to me like steam.

Q. Like a train moving; steam from a train? A. Like an engine, like that (illustrating) you know.

Q. Was it quite loud? A. Yes, pretty loud. And that is why all the time, I kept my eyes to Dover; I no want to be caught. **40**

Charles Kratz—Cross.

Q. Did it get louder as you kept going across the crossing? A. No, I cannot say that.

Q. Did it stop altogether? A. No, not any stop.

Q. Did you find out what that noise was? A. I go there the other day and I heard the same thing there again, and I saw then what it was; it was the steam where they put the coal in the coal yard.

Q. Was that the noise of steam from an engine? A. Yes.

Q. When you came down to the crossing, did you see this man, Shaw, around? A. No, sir, I know when I lay there, he came up and put a handkerchief on my arm. I never seen that man before. He was the first man seen me.

Q. Did you know him before the accident? A. No, sir.

Q. Did he give you his name at that time, at the time of the accident? A. No name.

Q. Did Shaw tell you who he was? A. Not before I came out of the hospital.

Q. The night of the accident, Shaw did not tell you who he was? A. No, sir.

Q. Had you ever seen him before? A. No, sir.

Q. When was the first time you ever saw Shaw? A. When I came out of the hospital. I seen the gateman one morning, he say: "Pop, how are you making out."

Q. When was that? A. Two or three days after I came out of the hospital.

Q. When did you come out of the hospital? A. The 9th.

Q. The 9th of when? A. It is on that paper (indicating).

Q. You came out of the hospital the 9th of July? A. That was the first time.

Charles Kratz—Cross.

Q. When you came out of the hospital, how long after that did you see Shaw? A. Three or four days.

Q. Three or four days after that? A. Yes, sir.

Q. If you looked at this bill from the hospital, could you tell me when you came out of the hospital? A. I think so.

Q. Look at that bill and see if you can tell us when you came out of the hospital? A. No, it does not say on there. **10**

Q. On this bill it says, "Paid on account July 9th, 1914." Did you come out of the hospital on that day? A. I was in the hospital two weeks and four or five days.

Q. You were in the hospital two weeks and three or four days after the accident? A. Yes.

Q. You got out of there some time in July, 1914? A. Yes. **20**

Q. Mr. Kratz, where was it you met Mr. Shaw? A. It was in Dover on the street; on the sidewalk; I was walking there. My woman sent me to the store to fetch something for her on the butcher store on the sidewalk.

Q. Who was with him? A. He was alone; all alone when I saw him.

Q. Did he speak to you first or you to him? A. He said hello to me and shook hands with me and said to me if I knew him. **30**

Q. Up to that time, you did not know his name, did you? A. No, sir.

Q. When did you see him again? When was the next time you saw him? A. I tell you now.

Q. Just tell us when you saw him the next time? A. I don't know the date.

Q. How long after? A. That day he told me how he was that man.

Q. Just tell me when you saw Shaw again the second time? A. When I brought him to the lawyer the second time. **40**

Charles Kratz—Cross.

Q. Who was that, Mr. Gebhardt? A. No, sir.

Q. Did you ever take him to Mr. Gebhardt? A. Mr. Bolitho.

Q. Did you ever send him to Mr. Gebhardt? A. I have only sent Peterson.

Q. You took Peterson to Gebhardt? A. Yes, sir, that is all.

Q. Did you send Mr. Shaw to Gebhardt?

10 MR. BOLITHO: He thinks you are talking about Peterson.

Q. Did you send Mr. Shaw down to Mr. Gebhardt's office? A. No, sir.

Q. Do you know whether Mr. Gebhardt came to see Mr. Shaw? A. I don't know.

Q. Did you tell Mr. Gebhardt Shaw was a witness for you? A. Yes, I had him up here the first time.

20 Q. When did you tell Mr. Gebhardt Shaw was a witness? A. I think a couple days after that when I had Mr. Peterson down.

Q. After you had Mr. Peterson down to Mr. Gebhardt's office? A. In Jersey City.

Q. It was a couple of days after that that you told him? A. Yes, sir, a couple of days after that I told him.

30 Q. The first time you found out Mr. Shaw was a witness was a couple of days after you had Mr. Peterson down to Mr. Gebhardt's office, is that right? A. No.

Q. When you sent Peterson down to Mr. Gebhardt's office, did you know about Shaw? A. No.

Q. Did you take Shaw to see Mr. Gebhardt? A. Yes, he saw him.

Q. When did you take Shaw to see him? A. In a hotel that morning. They had that morning Mr. Peterson, Mr. Dolan and Shaw at the Park Hotel.

Charles Kratz—Cross.

Q. Going over the case then? A. Yes.

Q. Did Shaw have his map with him that day?

A. I don't know. Ain't sure that day.

Q. Did Shaw have this paper (indicating)? A. He no show me that.

Q. Did you see Shaw show that to anybody? A. No, I never seen him any more since that. He came up here.

10

Q. How long were you down in the Park Hotel?

A. About 10 minutes.

Q. Who was there? Peterson and another fellow? A. Dolan and Shaw.

Q. Was Shaw there? A. Yes, sir.

Q. Who else? A. That is all I know.

Q. Do you remember when that was? A. That day when they had a trial in this Court House.

Q. Last June? A. I think it was.

Q. Do you know when it was? A. I cannot tell you when for sure. The last day before this.

20

Q. You have told us you marked on this photograph D-1, this photograph I show you Mr. Kratz with a cross, that at the time you got at the crossing, there were a lot of coal cars on this main track here (indicating)? A. The main track that runs here.

Q. Are you sure of that? A. Yes, sir.

Q. Don't you mean that there were coal cars on the side track? A. Here (indicating) on this track.

30

Q. On this photograph, you have got a picture of the main track, the two tracks? A. This (indicating) is the main track.

Q. This (indicating) is the main track? A. Yes, and this is the track.

Q. You mark where the coal cars were there? A. This mark a cross on this track here (indicating).

40

Charles Kratz—Re-Direct.

Q. So. A. Yes.

Q. Do you know Doctor Baker? A. Yes, sir, he is my lodge doctor.

Q. Do you remember telling Doctor Baker about this accident that you had two sticks on your shoulder and you heard a train coming and you turned around to see and you were struck? A. Doctor Baker?

10 Q. Yes? A. I no see Doctor Baker at all.

Q. Do you remember telling Doctor Baker that? A. No.

Q. Do you remember telling Doctor Baker that you did not know how the accident happened? A. Yes, sir.

Q. Is that a fact? A. That is a fact. I do not know whether the engine caught me or the train caught me. I don't know what caught me. I cannot say that.

20

THE COURT: Is there anything further with this witness?

MR. SCOTT: I am at a trifle of a disadvantage with this witness in suggestions. I think we are through with this witness.

RE-DIRECT EXAMINATION BY MR. BOLITHO:

Q. You do know when you were struck by this train that you were on this crossing, weren't you? A. Yes, sir.

Q. So that there won't be any confusion about where these cars were, where were you when you were struck by the train? A. Right here (indicating).

Q. Right on that crossing (indicating)? A. Yes.

Q. Which track is that of the railroad? A. That is the up track.

Charles Kratz—Re-Cross, Re-Direct.

Q. Nearest the bridge? A. Yes.

Q. That is coal cars on this nearest track to that? A. Yes.

Q. And toward Rockaway? A. Yes, sir. A big string so far as you could see.

Q. On the next track to the main track which you were struck on? A. Yes.

RE-CROSS EXAMINATION BY MR. KING:

10

Q. Was there anything aside from the signal tower and this building here (indicating) to obstruct your view towards Dover as you walked over to cross the crossing outside of the tower—as you walked over to the crossing, was there anything else to obstruct your view, any cars or anything after you passed the cars on the side track? A. No, I think not. I cannot remember that. What I cannot remember I don't want to say.

20

RE-DIRECT EXAMINATION BY MR. BOLITHO:

Q. You say you used that crossing for a long while? A. Yes, sir.

Q. And you knew there were gates there? A. Yes, sir.

Q. And you had seen these gates raised and lowered that night? A. Yes, sir.

THE COURT: He has already sworn to that.

MR. BOLITHO: That is all Mr. Kratz.

30

George Pappas—Direct.

GEORGE PAPPAS, sworn in behalf of the plaintiff,
testifies as follows:

DIRECT EXAMINATION BY MR. BOLITHO:

Q. Where do you live? A. Dover.

Q. Do you know Mr. Kratz? A. Yes, sir.

10 Q. How long have you known him? A. I have
known him since 1908.

Q. Did you live down on his place at any time?
A. Yes, I did.

Q. Do you remember the night he was injured
in 1914? A. Sir?

Q. Do you remember the night he was injured
in 1914? A. I don't know it, but I know where
he was hurt. I was in Dover.

Q. You remember the time when it was? A.
Yes, sir.

20 Q. Were you at that time, on that evening, were
you down in the vicinity of this crossing? A. No,
I was in Dover till quarter to eight o'clock. In
a store and I got my horse and started to go to
Franklin Roads and I stopped my horse to drink
water down above the crossing to the Dickerson
place. I don't know what you call that road.

Q. You know where this crossing is that he was
hurt on? A. Yes.

30 Q. Were you down at that crossing that night?
A. No.

Q. Were you any where near so you could see
the crossing? A. Yes, sir.

Q. What time was it? A. From 8 o'clock. The
horse can make it in about five minutes to come
down there.

Q. Were you down there by it about 8 o'clock?
A. I was at the Richard's Corner.

Q. Could you see this crossing? A. Yes, sir.

40 Q. Did you or did you not see any freight cars

George Pappas—Cross.

on the crossing? A. Yes, I saw these freight cars and saw a man walking, but I don't know who it was.

Q. Did you see the freight cars? A. And I didn't go more than 10 or 15 yards with the horse and I seen the train coming.

Q. At the time you saw the train passing there, were these freight cars strung along the track to Rockaway? A. They were towards Rockaway and Dover—both sides. **10**

Q. You saw them there? A. Yes, sir.

CROSS EXAMINATION BY MR. KING:

Q. What is your business? A. I was a farmer and all kinds of business.

Q. Where do you live? A. I live at Dover.

Q. How long have you lived there? A. I have lived there now for a year or over. **20**

Q. Whereabouts in Dover? A. In Dickerson Street.

Q. What number? A. I don't know what number.

Q. Are you married? A. No, sir.

Q. Who do you live with? A. Some friends of mine.

Q. What is his name? A. Kostibas; he has got a store there.

Q. He has got a store there now? A. Yes, sir. **30**

Q. Where is the store located? A. On Dickerson Street.

Q. What kind of a store is it? A. Grocery store.

Q. How long have you lived with him? A. About five or six months, and then I moved from there to a shoe man.

Q. Who do you work for at the present time? A. The powder works. **40**

George Pappas—Cross.

Q. Are you here under a subpoena? A. Yes, sir.

Q. How did you first come to learn that you were looking up towards that crossing on the night Mr. Kratz was hurt? A. I lived down there for six years.

10 Q. How did you come to learn that Mr. Kratz was hurt at that crossing? A. Mr. Kratz was hurt.

Q. How did you come to learn that Mr. Kratz was hurt at that crossing? A. Mrs. Kratz told me the things, but I don't know when he was hurt.

Q. Did Mrs. Fratz come down and see you the next day? A. I saw her in Dover.

Q. Did you see Mrs. Kratz before the accident? A. Yes; know all the peoples.

20 Q. And Mrs. Kratz told you the next day that he had been hurt? A. Yes, sir.

Q. What were you doing on the night that Mr. Kratz was hurt, around 8 o'clock? A. I was peddling in the morning from 10 to 2 o'clock.

Q. Did you own your wagon? A. Yes, I had vegetables to sell, and George Richards gives me an order.

Q. Around 8 o'clock you were there? A. At a quarter to 8.

30 Q. Where did you stop? A. To friends of mine at a fruit store across the way from the post-office.

Q. In Dover? A. Yes, sir.

Q. Did you stop your wagon there? A. I stopped there in the morning too.

Q. Right near the railroad track? A. Yes, sir.

Q. How near? A. Just about a couple of hundred yards near.

40 Q. Then you stopped at his store or house? A. His store; he don't have no house. He went out and I helped him in his store until he came back again.

George Pappas—Cross.

Q. You say his place is about how far from the railroad track? A. About 200 yards.

Q. Did you go up to the railroad track and look down for any reason? A. No, sir.

Q. What direction was this crossing where Mr. Kratz was hurt from where you were? A. What do you mean?

Q. What direction was it, East or West from where you were? A. I was in Dover; I was on the right side. I will show you on the map if you want to. 10

Q. Can you point out on the map where you were? A. I was on this road here (indicating). Right here on the corner about 300 yards to here (indicating).

Q. You were on the very road that Mr. Kratz was on—you were on the same road? A. Yes; is this coming from Dover? Probably it is right over here (indicating). I came right here to the corner and a good many times I come to the Dickerson bridge and I come over this road, but most times I come over the Dickerson place. 20

Q. And this night you were on this road here, the Dickerson Road? A. No, sir.

Q. You had been around it on that night? A. No, sir.

Q. Not on it the night Mr. Kratz was hurt? A. No, sir. 30

Q. What kind of cars did you say were standing on the track? A. Coal cars and freight cars; I don't know what they were.

Q. Coal cars? A. Yes.

Q. Are you sure of that? A. Yes, sir.

Q. How many were there? A. I did not count them.

Q. Which track were they on, the main track? A. Second track. You know I cannot see so extra way down there. 40

George Pappas—Re-Direct, Re-Cross.

Q. Do you know whether these cars were being drilled or moved around at the time you saw them?

A. No, sir.

Q. Were they being drilled? A. I did not see them being drilled.

Q. Do you know as a fact that they were just standing stationary? A. Yes.

10 Q. About how many cars did you see? A. Well, I don't know. I could not say how many was down there.

Q. Were they blocking the crossing when you saw them? A. No, sir.

RE-DIRECT EXAMINATION BY MR. BOLITHO:

Q. The crossing was open, wasn't it? A. Yes, sir.

20 RE-CROSS EXAMINATION BY MR. SCOTT:

Q. You say you live in Dover, you did not give me the number? A. Nine and a half—I do not know exactly; I live there (witness looked at a card) showing a letter to Mr. King.

MR. BOLITHO: That is all the evidence I have, but I want to reserve the right to introduce the exhibits that were offered for identification later in the case if necessary.

30

PLAINTIFF RESTS.

Charles E. Burns—Direct.

CHARLES E. BURNS, SWORN in behalf of the defendant testifies as follows:

DIRECT EXAMINATION BY MR. SCOTT:

Q. Mr. Burns, what is your business? A. Train dispatcher.

Q. For the Lackawanna Railroad? A. Yes.

Q. And as such train dispatcher, you keep a record of trains passing by what is known as the Dover Tower? A. No, sir.

Q. Keep track of the trains on the main line? A. Yes, sir.

Q. With reference to trains running from Denville and Rockaway to Dover and beyond, do you keep a record? A. At Denville Tower.

Q. Have you your record with you for June 24th, 1914? A. Yes, sir.

Q. Will you tell me record of train number 7? A. Yes.

Q. Tell me what is the nearest point to Dover that you have a record of the movement of that train? A. Denville Tower.

Q. What is the nearest point West of Denville Tower that you have a record of it? A. Dover Tower.

Q. Will you tell me what time No. 7 passed Dover? A. Arrived at Dover at 8.13 and left at 8.15.

Q. And with respect to the same train at Denville? A. Left Denville 8.07.

Q. Prior to that time will you tell me for a half hour previous to the movement of No. 7, what trains moved West or in the same direction as Number 7? A. We had train No. 37 that left Denville at 7.40 and arrived at Dover 7.47 and terminated there. The next train was train No. 469.

Charles E. Burns—Cross.

Q. 496? A. No, 469.

Q. What time did that go? A. Left Denville 7.57; arrived in Dover 8.07. Left at 8.08. That train runs via Rockaway.

Q. After 469, what train passed West from Denville to Dover? A. The next one after that was No. 7.

10 Q. What train passed East about the time that No. 7 was travelling West from Dover to Denville? A. No. 42 arrived at Dover at 8:05 and left at 8:06 and passed Denville at 8:14.

Q. And the next? A. Do you mean that—

Q. The next one that followed that? A. The next was helper engine 881; passed Dover 8:10 and Denville 8:18.

Q. Does your record show the number of the engine drawing train No. 7? A. Yes, sir.

20 Q. What does that show? A. Engine No. 1112.

Q. Does it also show the engineer? A. Yes, sir.

Q. Who was he? A. J. Madigan.

CROSS EXAMINATION BY MR. BOLITHO:

Q. Have you a record showing the regular time of No. 7 on the 24th of June, 1914? A. Yes, sir.

30 Q. What was the time when it was due at Dover if it was running regular? A. It is scheduled to get in Dover at 8:13.

Q. What time did it leave there that night? A. 8:13.

Q. So that it was on time according to your records? A. He left there 8:15. Two minutes late.

Q. What time did it arrive there, was it 8:13? A. 8:13 he is scheduled to leave there, 8:13.

40 Q. Have you a record of any trains running on that evening through East or West, between 6 and 7? A. Yes; several of them.

Charles E. Burns—Cross.

Q. Running both ways? A. Yes, sir.

Q. What was this engine 1112 that you refer to? A. That was on No. 7.

Q. That is the train we claim struck Mr. Kratz, isn't it—engine 881; you say that passed over 8:10 and passed Denville 8:18, that was the other track? A. Going East.

Q. Have you a record of any other engines that night going from Dover to Morristown, after 8 o'clock? A. My territory did not go toward Morristown at that time; it just covered the Main line. 10

Q. Does not cover Rockaway? A. That is not in my territory.

Q. Have you any record of an engine passing Dover and going East past the tower in Denville between 8 and 8:30 that night besides this engine you mention, 881? A. You don't mean a regular train, just an engine? 20

Q. Have you a record of anything going that way? A. No. 42, that is the one I gave you.

Q. What time did that pass the tower at Dover? A. Left Dover at 8:06.

Q. Was that just an engine? A. That was No. 42.

Q. Was that a regular train at that time? A. Yes.

Q. Have you a record of an engine going past the tower at Dover between 8 and 8:30 that evening, going towards Denville? A. Just a light engine? 30

Q. They say they took him to a hospital on an engine, have you a record of that? A. No, sir; I have a train which left Dover 8:32.

Q. That is after 8:30? A. That is a first-class train.

Q. Mr. Burns, I want to know have you a record of the time when this engine took Mr. 40

Otto Kraft—Direct, Cross.

John W. Bowlby—Direct.

Kratz to Morristown? Have you any record of that? A. Engine 885 left Dover at 9:17 and Denville at 9:30; that is all I have.

OTTO KRAFT, sworn in behalf of the defendant, testifies as follows:

10

DIRECT EXAMINATION BY MR. SCOTT:

Q. Mr. Kraft, you are connected with the Lackawanna Railroad? A. Yes, sir.

Q. In what capacity? A. Machinist.

Q. At our request did you weigh the bell on engine 1112? A. Yes, sir.

Q. What did it weigh? A. 75 pounds.

20 CROSS EXAMINATION BY MR. BOLITHO:

Q. When did you weigh that? A. About a year ago.

JOHN W. BOWLBY, sworn in behalf of the defendant testifies as follows:

DIRECT EXAMINATION BY MR. SCOTT:

30 Q. Mr. Bowlby, what is your business? A. I worked at tower at East Dover.

Q. And for how long a time have you been a tower man? A. I have been in that tower since February 3rd, 1912.

Q. Do you know Mr. Kratz? A. Yes, I know him when I see him.

Q. For how long have you known him by sight? A. For the last four years by sight.

Q. Do you remember an accident happening to him in June, 1914? A. Yes, sir.

40 Q. And prior to that time, had you ever seen Mr. Kratz? A. Yes, sir.

John W. Bowlby—Direct.

Q. Had you seen him travelling in the neighborhood of the crossing near the tower? A. Yes, sir; saw him travelling up and down the tracks several times.

Q. I show you a photograph marked D-2, for identification, and ask you if you know what does that refer to; what view does that represent? A. That represents the tracks at East Dover. **10**

Q. In what direction from your tower? A. That is Easterly from the tower; from where that signal bridge is.

Q. Did you ever see Mr. Kratz travel over the ground of the railroad property shown in that photograph before the accident? A. Yes, sir.

Q. Where did you see him travelling? A. I saw him travelling right up this side track here (indicating). This is the East bound track here going towards Dover over that road crossing and that is where our branch left in here and also the coal storage track, this side track (indicating) to that foot bridge over by the switch and power house. **20**

Q. You are sure he went down one side of the track and then crossed the crossing to go down on the other side? A. Yes, sir; and I saw him go all the way down one side and across the Rock-away bridge. **30**

Q. How often had that occurred before the accident in count? A. Two years that I know, I saw him go down that track mornings.

Q. Did you ever see him use the highways? A. I don't know as I ever saw him leave the track and go down on the Franklin Road since I was there.

Q. What is this road? A. It is called the Franklin Road.

Q. Did you ever see him use the road as long as you have been tower man? A. Not as long as I **40**

John W. Bowlby—Direct.

have been there; he may have done it once. I am only there nights.

Q. On June 24th, 1915, what was the first that you knew that anything had happened to Mr. Kratz? A. When I heard these two boys hollering after number 7 passed by. Peterson and Dolan sat on the end of the bridge. They had
 10 been sitting there singing and they had come over and asked me for matches and I threw them out a box; they wanted to light their cigarettes. We had half a dozen things to do there, just before these two trains came in; one is due at 8:05 and the other 8:10.

Q. What was the train that was due to pass your tower before number 7? A. Number 469, due their at 8:05 on the Rockaway branch.

Q. What kind of a train is that? A. Passenger
 20 train, first-class.

Q. About how long after 469 passes is number 7 scheduled to pass? A. Just five minutes; 8:10.

Q. With respect to the passenger train 469, on the day in question, will you tell the jury what was the condition of the gates? A. They were down.

Q. For what train? A. They were down for 4:10, that went by on the Rockaway branch, and they were down for 371 and 366 and 467 coming
 30 out of Rockaway and at 7:40 they were down for all them trains.

Q. How about being down for 469? A. Down for 469 when she came out of Rockaway at 8:05.

Q. How soon after 469 did number 7 arrive? A. On time at 8:10 just five minutes between them.

Q. Had you raised the gates for 469 before number 7 passed? A. Had no occasion; nobody wanted to go across and did not raise them.

40 Q. On this night in question, will you tell us

John W. Bowlby—Direct.

what was the condition of the two side tracks as to having cars located there East or West of the crossing on either one of the side tracks? A. They are storage tracks; they are not side tracks. I don't remember about the cars, there is generally a lot of cars standing there when they are unloading coal.

Q. On this night? A. I think there were cars there but I don't know in what condition they stood there. The East and West bound side tracks had no cars on them. 10

Q. What kind of a light was it when Mr. Kratz was hurt? A. A very nice clear night. Had been as bright as day as a man could have seen.

Q. Before you learned that Mr. Kratz had been hurt, had you seen this man Shaw in the neighborhood of your tower? A. No, sir; not that night. 20

Q. How long after the accident was it before he put in any appearance at all? A. The first I seen him was after Doctor Baker was there, and he came up in the tower for a piece of waste; that is the first I saw of Mr. Shaw.

Q. Where was Mr. Kratz at that time? A. Sitting right along by the coal box on a box of wire we had to build a fence with.

Q. After number 7 passed, did you hear some body holler? A. Yes, these boys. 30

Q. Did you see both boys? A. Yes; and one had hold of each side of that man, Mr. Kratz bringing him across the track.

Q. Whereabouts were those boys with Mr. Kratz when you first saw him? A. Coming straight across the West end of the rail.

Q. Is that on the East or West bound track, where you first saw them? A. Coming across the West bound track. 40

John W. Bowlby—Direct.

Q. Had they started across toward the tower then? A. Yes, when I saw them.

Q. When did you raise your gates after number 7 passed? A. When Doctor Baker arrived with his automobile.

Q. Do you know how the doctor came to come there? A. Yes, sir.

10 Q. How? A. I called for him over the telephone. I called Dover and got Dover tower to call his office.

Q. How about how long after you had heard that Mr. Kratz had been hurt was it that Doctor Baker arrived? A. Not over 12 minutes.

20 Q. Can you find out on this photograph D-2, where the boys were with Mr. Kratz when you first saw them? A. The boys—you have only got the East side of the tower here; the boys were at the West end of the tower. You have got the East end of this tower in this picture. This (indicating) is the signal bridge and that is East of the tower; you have not got anything West of the tower on here.

Q. With respect to the bridge in this picture, how far away? A. The wagon road bridge.

30 Q. The wagon road bridge over the crossing, how far were the boys down from the crossing? A. Right West of this concrete block where the gate chains run through.

Q. Can you point out or mark where you saw the boys first with Mr. Kratz? A. Right on the track about here (indicating). You see here (indicating) you have got a side track and the main track, and they were just coming across the main track.

Q. Just mark where you saw them? A. Right about there (indicating) as near as I could tell you where they were, about in that position.

40 Q. Right at that point that you have indi-

John W. Bowlby—Cross.

cated? A. Yes, sir; that is about where they were when I first saw them.

Q. After the boys hollered and you looked out, what did they say to you if anything? A. One boy said that a man got struck with an engine. I said "Is he hurt much?" They said his arm was smashed.

Q. Did they bring him over? A. Yes. I said 10
bring him over and put him at the bottom part of the tower until I got chance to get down there. I did not know who he was then.

Q. Did you see Mr. Shaw at that time? A. No, he was not there at that time.

Q. Did they bring Mr. Kratz in the car? A. Yes, but he got up and walked outside; he would not stay in there.

Q. When you put your gates down, how do you keep them down? A. Pull them down with a 20
lever and the same as you do with the signals, latch the lever.

Q. How do you latch them? A. That prevents anyone from operating them from the outside.

Q. And is that operated from the tower? A. Yes.

Q. After you put the gates down for number 469, will you tell us whether you latched the gates or not? A. Yes, I latch them always when I put them down. 30

CROSS EXAMINATION BY MR. BOLITHO:

Q. You say there is a road running out to cross this road running down here (indicating) —to cross this road running along there? A. Sure; if you know anything about East Dover, you know that.

Q. Do you know it? A. Yes, I know it.

Q. What time did you go to work that night? 40

John W. Bowlby—Cross.

A. I came there at—410 was due there 6:49 and I get off her and go to work.

Q. You locked the gates down first for what train? A. They were down there when I got there and I hoisted them.

Q. You did not hoist them? A. If anybody wants to go across if they are down; they were down on the Rockaway branch and I left them down.

Q. What time does the 410 go down? A. 6:49

Q. What time does the next train go up or down? A. The next train is due there 7:02 to the East and 7:03 going West.

Q. Was it your habit to leave the gates down until someone wanted to come along the road? A. That is always my habit.

Q. You are only on nights? A. Yes.

20 Q. When did you first see Kratz that night? A. After he was hurt.

Q. Had you worked there the night before? A. Yes, sir.

Q. What time did you leave work in the morning? A. 7 o'clock, when the day man arrives, I am done. I don't always leave at 7 o'clock, but I am done work at that time.

30 Q. When did you first see these boys that you talk about? A. I first saw them—they come up in the tower when they first came down there for a drink of water.

Q. About what time was that? A. Right after I got there; it was only a few minutes after 7. I did not look at the exact time they were there. They were there before all these others arrived. They were sitting on the bridge when both 469 and number 7 went through.

Q. They were there an hour? A. Yes, sir; something like that.

40 Q. On this bridge? A. Yes, smoking cigarettes and singing.

John W. Bowlby—Cross.

Q. Did you see them? A. Yes, and talking to them the biggest part of the time.

Q. What were your duties? A. To attend the tower and switches and signals, and the gates on the crossing if anybody wanted to go across the crossing, and lower them for other trains going East or West. Attend to siding work if anyone wanted to go on the side track or main line.

Q. In that time, are you pretty busy? A. Yes, when you have two trains going every two or three minutes. 10

Q. What time did you have to ascertain whether the people were going over the bridge? A. Only the peoples here.

Q. You did not keep on the lookout for people? A. No, sir; I attend to my own business.

Q. Did you look particularly to see what if any coal cars were on these other tracks? A. No, I did not look to it. 20

Q. Shaw did come there that evening? A. Yes, after Doctor Baker came there.

Q. What time did Doctor Baker get there? A. About 12 minutes.

Q. What time did you telephone him? A. Just as soon as I saw he was hurt. I telephoned him at 8:10.

Q. And Doctor Baker was there before half-past eight? A. Yes, he was ready to take him to Morristown at 8:25. 30

Q. Did he treat his arm there? A. I could not tell you; they were down-stairs and I was up in the tower.

Q. That was down-stairs? A. Yes.

Q. And that was done by Doctor Baker? A. Yes.

Q. And Shaw was there about the time that you was there? A. Shaw was there about that time. 40

John Drake—Direct.

MR. BOLITHO: Do you want me to prove the map?

MR. SCOTT: No, I don't think so.

MR. BOLITHO: Then we offer as exhibits both maps, marked Exhibits P-6 and P-7.

JOHN DRAKE, sworn in behalf of the defendant,
10 testifies as follows:

DIRECT EXAMINATION BY MR. SCOTT:

Q. Mr. Drake, you are a civil engineer? A. Yes, sir.

Q. And you have prepared the maps? A. Yes, sir.

Q. Will you indicate on these maps—the right hand map, the property line of the railroad company toward Denville? A. The edge of the river.
20

Q. The edge of the river on the near side? A. The South bank of the river is railroad property.

Q. And the North side of the track? A. Yes.

Q. And on the other side, on the South side; where are the property lines located there? A. Along the property lines runs a fence to be shown for a short distance here (indicating) and then crosses under the main track.

Q. Will you mark that in pencil? A. Approximately the property lines runs along this pencil mark.
30

Q. I show you photographs marked D-2 and D-5 and ask you if the fence shown by the white post to the right or East of the picture as you look at that, is that the property line fence of railroad? A. Yes, sir.

Q. Will you tell me the distance between the nearest side track and the main track? A. 37 feet.

Q. What is the distance between the rails of
40

John Drake—Cross, Re-Direct.

the East and West bound main tracks? A. 8 feet.

Q. And the track itself from one rail to the other is what? A. 4 feet 8½ inches.

Q. Did you ever make any observation to ascertain what view one would have from the crossing in question down toward Denville and Rock-away? A. Yes.

10

Q. Will you tell us what the result of your observation was? A. From a point just north of the northerly storage track there are two X's there now. At that point one can see a train approaching the West bound track from Denville direction for a distance of 1310 feet.

Q. Did you make any other observation? A. No other.

Q. What have you to say as to whether a view got better or less as one approached the crossing? A. It would be approximately the same thing.

20

CROSS EXAMINATION BY MR. BOLITHO:

Q. Did you make this map? A. Yes, sir.

Q. What is this block here? A. That is a concrete block containing a pulley wheel upon which the chain which operates the gate passes.

Q. How far is the edge of that block, the edge nearest the rail from the rail? A. 2½ feet.

30

RE-DIRECT EXAMINATION BY MR. SCOTT:

Q. How far from the crossing is that block, Mr. Drake? A. 37 feet.

John Madigan—Direct.

JOHN MADIGAN, sworn in behalf of the defendant, testifies as follows:

DIRECT EXAMINATION BY MR. SCOTT:

Q. Mr. Madigan, you are an engineer employed on the Lackawanna Railroad? A. Yes, sir.

Q. And you have been for how many years?
10 A. Very nearly 40 years.

Q. On June 24th, 1913, did you have your attention called to the happening of an accident near East Dover? A. Yes, sir.

Q. And by whom was it called? A. By the conductor.

Q. Where was your attention first called to the matter? A. At Hackettstown.

Q. And prior to having your attention called to this accident, by the conductor, had you any
20 previous knowledge of that accident happening?
A. No, sir.

Q. As the result of the accident did you do anything as a result of the information from your conductor? A. He came over and spoke to me about it.

Q. As a result of what he told you, did you do anything? A. I got down with a torch and examined my engine; looked around the front end and he also went with me and I think one of the
30 firemen, I ain't sure about that, but I found nothing and so I said I didn't think we struck anything. "I cannot find a mark upon the pilot anywhere." So he went back and at Washington he came over again and said that we had been reported striking a man West of East Dover Junction. He asked me if I seen anything and I said no I did not see anybody and we also looked around the engine again.

Q. On the night in question, as you passed
40

John Madigan—Cross.

East Dover Junction, can you tell us what engine you were running? A. No. 1112.

Q. Will you tell us, whether at that point, at East Dover Junction or thereabouts, you had your head-light lit? A. I had the head-light lit.

Q. Have you any recollection about your bell being rung on the night in question in the neighborhood of where it was reported this accident took place? A. Yes, sir; my bell was ringing. 10

Q. How do you recollect that? A. I recollect stopping the bell when I stopped at Dover.

Q. I almost always let the bell ring right through as we have another road crossing at Dover and as I make the station stop at Dover, I stop my bell and remember stopping it that particular night.

Q. For how long a time had your bell been ringing prior to reaching Dover? A. I cannot just say that because I start the bell sometimes at Morris Plains and don't shut it off again until I get to Dover. 20

Q. From Denville to Dover? A. Yes, sir; we have road crossings around Denville and West of Denville before we come to East Dover Junction.

Q. Do you know whether you blew your whistle for the crossing in question on the night in question? A. Yes, sir. 30

Q. When did you blow it? A. At what we call the whistling post. We have got whistling posts for most of these road crossings about a thousand feet from the road crossing.

CROSS EXAMINATION BY MR. BOLITHO:

Q. When did you first remember that you stopped ringing the bell on that night at Dover? A. What?

Q. When was your mind first directed to the 40

John Madigan—Cross.

fact that you had stopped ringing the bell that night in Dover? A. Long practice; I always stop it before I get down off the engine or just before we make the stop at the water block.

Q. Is that the reason that you say now that you stopped ringing the bell at Dover? A. I always recollect that I stop it there.

10 Q. Is that the reason you say you did it that night? A. I don't know as I say that is the reason that night any more than any other night.

Q. What is the reason? A. No more than that I do right along, I don't use the bell anywhere standing around.

Q. You say that because it is your custom?

A. Yes.

Q. That applies likewise to the whistle? A. Yes, sir; I always blow the whistle on the road crossing.

20 Q. The first you knew about anyone being stuck at that road crossing was when you got to Hackettstown? A. Yes, sir.

Q. About what time was that? A. I was due there 8:47 and I was about on time.

Q. Which side of the engine do you ride on coming from Rockaway or Denville to Dover? A. The right side.

30 Q. That was the side nearest the river going to Dover? A. Yes, sir.

Q. Is it your custom to be on the lookout as you come to crossings? A. Yes, sir.

Q. Did you or did you not see anyone that night as you approached the crossing? A. No, sir.

Q. Did you see these boys on the river bridge that night? A. No, sir.

Sydney E. Wilson—Direct.

SYDNEY E. WILSON, sworn in behalf of the defendant, testifies as follows:

DIRECT EXAMINATION BY MR. SCOTT:

Q. Mr. Wilson, what is your business? A. Travelling fireman.

Q. And as such, what are your duties? A. Instructing new firemen in their duties and riding engines that are not properly driven or making sufficient steam to get over the road and looking after the engines generally. 10

Q. On June 24th, 1914, were you riding on Mr. Madigan's engine No. 1112? A. Yes, sir.

Q. On that night was an accident called to your attention in anyway? A. Yes, sir.

Q. About at what place? A. At Hackettstown.

Q. By whom? A. The conductor came over with a message for the engineer reporting that someone had been struck at or around Dover. I got down and looked the engine over with the engineer. 20

Q. Do you remember the trip in question as you were riding in the vicinity of East Dover Crossing? A. Yes, sir.

Q. Will you remember the trip in question as the whistle was blown before you reached that crossing? A. Yes, sir; the whistle was blowing. The engine we had that night was not steaming properly and this was the first the fireman had been on that engine for some time, and that was how I happened to be riding there, and I was talking to the fireman, telling him what to do, and was interrupted in our conversation at that point, by the blowing of the whistle. 30

Q. On which side of the engine were you riding? A. On the left side.

Q. How far back were you from the front of 40

Sydney E. Wilson—Cross.

the engine of that style? A. I was right opposite the engineer.

Q. How far back from the engine is that? A. About the length of the boiler.

Q. How far is that from the front to that point? A. 36 feet I should judge.

Q. You were on the opposite side of the engine? A. Yes, sir.

CROSS EXAMINATION BY MR. BOLITHO:

Q. What do you mean when you say the engine is not steaming properly? A. The super-engines—they sometimes get leaks in the super-heater union in the front end and it causes the draught to get blocked and they won't steam as good.

Q. Was that the trouble? A. She has been reported not steaming and I was riding her on that account.

Q. How far had you come on her? A. From Scranton to Hoboken and was on the return trip.

Q. You had come down and was going back? A. Yes, sir.

Q. Same fireman and same engineer? A. Yes, sir.

Q. Your attention was directed mainly to ascertaining what the trouble was with the steam? A. Yes, sir; that is my duty.

Q. Did you hear the whistle blow for other crossings? A. Yes, sir.

Q. And do you as a rule, travel on the engines, breaking in these firemen? A. Yes, sir.

Q. Did it before that time and since, didn't you? A. Yes, sir.

Q. Over this same run? A. Yes, sir.

Q. You don't remember this crossing that night? A. I remember. Our attention was called to it. I remember talking to the fireman. It is at a point just before the engineer shuts his en-

Sydney E. Wilson—Cross.

gine off to drift into the station stop, and I was directing the fireman to fix his engine so as to make the trip from Dover, which is an up grade.

Q. Don't you do that on most engines? A. Not always.

Q. There was nothing to call your attention when you went past this crossing? A. We passed the train just before we got to the whistling post and I was talking to this fireman and I distinctly remember him blowing the whistle and interrupting our conversation. 10

Q. Where was that train you passed? A. Down under the overhead bridge between Den-ville and Dover.

Q. Before you came to this crossing? A. Yes, sir.

Q. And that train was proceeding on the East bound track? A. Yes, sir. 20

Q. What kind of a train was it? A. I did not notice—there was a noise of an engine and I had my back to the train.

Q. You did not see the train? A. No, the noise interrupted our conversation.

Q. You did not know anybody had been struck or hurt by your train until you got to Hacketts-town? A. No, sir.

Q. You say that the only thing that was unusual that called your attention to the fact that the bell was ringing and whistle blowing, was the passing of another train? A. And the interruption to our conversation when I was talking to the fireman. 30

Q. The other whistle? A. No, sir; our whistle.

Q. You said the other train made considerable noise? A. Passing there, the engines make rather a loud alarm but it does not sound the same as it does on the train which you are on.

Q. And above that sound was the whistle of the engine? A. Yes, sir. 40

Sydney E. Wilson—Cross.

Q. Are you sure it was the whistle of your engine instead of this other train? A. Yes, sir.

Q. Didn't you say it was the other train? A. I said the noise of the train and the whistle interrupted our conversation.

Q. You in these trips, often pass trains? A. Yes, sir.

10 Q. And they often make noise? A. Yes, sir.

Q. Since and before that time? A. Yes, sir.

Q. What was there particular in this instance, that caused your attention to be directed to the whistle blown on that train? A. It was the conversation I was having with the fireman about the condition of the engine that he was firing.

20 Q. What was the conversation? A. I said when the engineer shuts off going into Dover, put a good fire into your back end and let the fire burn good in her front end, then we can clean her as quickly as possible before going into Hacketts-town.

Q. On other trips you are giving these directions to firemen? A. Yes, but it depends upon the fireman.

Q. You often gave these directions? A. Yes, sir.

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Harold Dolan—Direct.

HAROLD DOLAN, sworn in behalf of the defendant, testifies as follows:

DIRECT EXAMINATION BY MR. SCOTT:

- Q. Mr. Dolan, how old are you? A. 19.
- Q. Where do you live? A. 180 Orchard ave.
- Q. With your parents? A. Yes, sir.
- Q. Are you working at present? A. Yes, sir. 10
- Q. For whom? A. The trolley company.
- Q. How long have you been working? A. Working there for about 10 weeks.
- Q. Do you know Mr. Kratz? A. No, sir.
- Q. By sight? A. No, sir.
- Q. On June 24th, 1914, did you see an accident happen to some man up near the bridge over the Rockaway River? A. Yes, sir.
- Q. Who was with you that night? A. Mr. Peterson. 20
- Q. How did you come to be in the neighborhood of the Dickerson bridge? A. Had an engagement on.
- Q. Both you and Mr. Peterson? A. Yes, sir.
- Q. What time did you go down there? A. Around half-past six.
- Q. When you got down to the bridge what did you do? A. Went up and got a drink off Mr. Bowlby.
- Q. After that where did you go or stay after you got this drink? A. Went over and sat on the bridge. 30
- Q. About what time did this accident happen that you saw? A. About 8:10.
- Q. Before the accident happened to this man, had you seen him walking any place? A. Coming up the track.
- Q. I show you Exhibit D-5, and ask you to step down here and show the jury where you saw him? A. I saw him here (pointing). 40

Harold Dolan—Direct.

Q. Show the jury where you saw this man first? A. Coming around the side track, down well past the signal bridge.

A JUROR: Where is the bridge these boys were sitting on?

WITNESS: Cannot see that here.

10 Q. You saw him coming up the road, near the side track inside of that wooden fence that is shown in the picture? A. Yes, sir.

Q. Was he carrying anything at the time you saw him? A. Yes, sir.

Q. What was it? A. Two bean poles.

Q. When he came down, you have indicated on the photograph that you saw him walking down inside of this wooden fence? A. Yes, sir.

20 Q. When he came down, will you tell us just how he travelled down to the crossing; did he walk down toward the crossing? A. Yes, sir.

Q. Did you observe what he did then? A. Came across the crossing.

Q. Came across the crossing? A. Yes.

Q. After he came across the crossing, what did he do? A. Started up the track.

Q. Were you sitting down or standing? A. Sitting on the bridge.

30 Q. Can you point out where you were sitting? I have marked a cross where you were sitting, is that about it? A. Yes, but on this other side.

Q. Sitting on the side nearest Denville? A. Yes, sir.

Q. Who was with you at that time? A. Mr. Peterson.

Q. What was he doing? A. Sitting there with me.

40 Q. And this gentleman that you say came across the crossing, did you hear any trains? A. No, sir.

Harold Dolan—Direct.

Q. After he got across the crossing, did you hear any train? A. We heard one coming up.

Q. In what direction was that coming? A. Coming West.

Q. Do you know what train it was? A. It goes up around the crossing 8:10.

Q. What is it, a Buffalo train? A. I don't know. 10

Q. As this train came, did you say anything to Mr. Kratz or this gentleman that you saw? A. No, sir; never spoke to him.

Q. Did you call to him in any way? A. What do you mean, when he was hit?

Q. Before he got hit? A. No, sir; we did not say anything to him.

Q. After he got across the crossing, which way did he turn? A. Turned and went up towards Dover. 20

Q. As he went towards Dover, where did he go with respect to the track? A. On the ties.

Q. How far did he walk, Mr. Dolan? A. About 15 feet.

Q. After he had walked about 15 feet, did you see anything happen to him? A. He stepped on this concrete block and stepped on the tracks to go to the other side and no more than he stepped on the tracks than the train struck the bean pole and spun Mr. Kratz around. 30

Q. Where did it throw him? A. Threw him down the bank.

Q. Did you do anything to help him after the accident? A. Yes, sir; went down there and picked him up, me and Mr. Peterson.

Q. Where did you help him to? A. Over to the tower.

Q. After you helped him over to the tower, did you see anybody there? A. No, sir; the only ones there was me and Mr. Peterson. 40

Harold Dolan—Cross.

Q. That was when you first went over there?

A. Yes, sir.

Q. Did you see Mr. Shaw from the time of the accident until the time you got him over to the tower? A. No, sir.

10 Q. About how far away was this gentleman up the track toward Denville, when you first saw him? A. Towards Dover?

Q. Towards the crossing, how far away was he when you first saw him? A. I don't understand what you mean.

Q. You say you saw this man before you came over the crossing walking towards the crossing? A. Yes.

Q. About how far away was he when you first saw him? A. He was down by that signal bridge when I first saw him.

20 Q. Down near the signal bridge when you first saw him? A. Yes.

Q. Have you got any recollection as to whether the headlights were burning or not? A. The headlight was burning.

CROSS EXAMINATION BY MR. BOLITHO:

Q. Where do you live, Mr. Dolan? A. No. 180 Orchard Avenue.

30 Q. How far is that away from this road crossing? A. I could not say how far it was; it was up quite a ways. 180 Orchard Avenue.

Q. Is it up in Dover? A. East Dover.

Q. Did you work that day? A. Did I work that day?

Q. Yes? A. Yes, sir.

Q. What time did you get through work? A. About 6 o'clock.

40 Q. Where did you work at that time? A. On the Lyndale.

Harold Dolan—Cross.

Q. In Rockaway? A. Yes, sir.

Q. You say that you went home, I suppose to get your supper? A. Yes, sir.

Q. And then where did you go, Mr. Dolan? A. I went down to the house for Peterson.

Q. Down to what house? A. Down to his house.

Q. Where did he live? A. I don't know the name of the street; over by the canal. 10

Q. What time do you think you got to Peterson's house? A. I got to Peterson's house about quarter past six.

Q. Will you show us on this map, Dolan, where you found Kratz after he got hurt with that engine; have you seen this map before? A. No, sir.

Q. Do you understand it? A. No, sir.

Q. Maybe you can show us better on the photograph. Here (indicating) is the photograph; come down here and show us if you can or show the jury where you and Peterson picked Kratz up after he got struck? A. Down the bank here (indicating). There is a little ditch that goes through there and a concrete place there. 20

Q. You say you found him down the bank by a ditch near this concrete? A. Yes, down over the concrete in here (indicating).

Q. And who was with you when you found him? A. Mr. Peterson. 30

Q. What did you do when you found him? A. Picked him up and walked him across the track.

Q. Where did you take him? A. To the tower house.

Q. Did you see Shaw at the tower house that night? A. No, sir.

Q. Not at all that night? A. No, sir.

Q. How long did you stay there after you got him there? A. Stayed there until Doctor Baker and some other fellow put him on the engine. 40

Harold Dolan—Cross.

Q. Do you know who the other fellow was that put him on the engine? A. No, sir.

Q. You don't know whether it was Mr. Shaw or not? A. No, sir.

Q. Didn't you come down to my house with Mr. Kratz and make a statement in this case? A. Yes, sir.

10 Q. I show you this (indicating) and ask you if that is your signature to it? A. Yes, sir.

Q. How were the gates when you saw him? A. About half and half.

Q. What do you mean by that? A. Slanting this way (illustrating).

Q. Half way up? A. Half way up.

20 Q. And you say you sat on this river bridge—is this a photograph of the bridge, that is the other end toward the trolley track—where did you say you sat there? A. See these rails—we were sitting right over there (indicating).

Q. That is the side of the bridge nearest this little brook that runs under the track? A. Yes, sir.

Q. And you found Kratz right near the bridge that goes along the track? A. Found him down here by the little brook.

Q. Isn't that the brook there (indicating)? A. Yes.

30 Q. Is that where you found him? A. No, we didn't find him there.

Q. I ask you now, if you didn't tell the jury when you saw the other photograph, that you had found Kratz down by the brook down the bank? A. Yes, we found him there by the bank. Ain't that down by the brook? That is what I said in the other photograph.

Q. You won't say you found him by the brook that is in the photograph? A. Certainly I will.

40 Q. Did you find him by the brook that is

Harold Dolan—Cross.

shown in the photograph? A. Found him right this side of the brook.

Q. Show us where? A. On the bank here (indicating).

Q. Come down and show the jury where you found him? A. Right here (indicating). There is the brook and here is the bank and here is where he got hit. And that is where he got hit by that concrete block. 10

Q. Did the whistle blow that night before the train approached the crossing? A. Did not take notice of it.

Q. You marked on this photograph didn't you, about where Mr. Kratz stood when he got struck, isn't that your mark on that rail? A. No, sir.

MR. SCOTT: That is Mr. Bowlby's.

Q. Will you take this pencil and mark on this photograph, about where Kratz was when he got struck by the train? A. There is a light there and he stepped over there — 20

(Witness marks on this photograph an X on the rail directly opposite the cement block—the nearest rail to the block.)

Q. Dolan, I will call your attention to this statement, which you say you signed at my office, that was in July after the accident, wasn't it? A. Yes, sir. 30

Q. And I ask you now, do you say that Kratz was not on this railroad crossing when he was struck by the train? A. No, sir.

Q. I ask you if you did not say that Kratz was about to step off the railroad crossing and was facing towards a square post of concrete near the railroad track when the train struck him and knocked him about 50 feet; didn't you say that then? A. Say that Mr. Kratz was hit on the crossing? 40

Augustus L. Baker—Direct, Cross.

Q. Listen; Kratz was about to step off the railroad crossing and was facing toward a square post of concrete near the railroad track when the train struck him and knocked him about 50 feet; did you say that? A. No, sir.

10 AUGUSTUS L. BAKER, sworn in behalf of the defendant, testifies as follows:

DIRECT EXAMINATION BY MR. SCOTT:

Q. Doctor, did you see Mr. Kratz on June 24th, 1914? A. Yes.

Q. Where? A. East Dover tower.

20 Q. At that time, or at any subsequent time, did Mr. Kratz say to you with reference to how this accident happened, that he had two sticks on his shoulder and that he heard the train coming and turned around and he did not know how it happened? A. That is what he told me that night; he did not tell me just exactly how the accident happened.

CROSS EXAMINATION BY MR. BOLITHO:

30 Q. How long after the accident was it that you were talking with him? A. I cannot tell you just exactly; it was not over a half an hour, I don't think.

Q. Do you know what time in the evening it was? A. Between 8 and 9 o'clock.

Q. And you went down to the tower, answering to a call to come there, didn't you? A. Yes.

Q. What condition did you find Kratz in? A. Well, he was in considerable pain. He had his arm injured and bleeding quite profusely and suffering from more or less shock.

40 Q. Did you administer an anesthetic to him? A. Yes.

Augustus L. Baker—Cross.

Q. How soon after you got there? A. Just as soon as I could get it ready.

Q. Do you remember what you gave him? A. Morphine.

Q. What else did you do for him? A. I fixed up his arm so as to treat it as well as I could right there.

Q. Did you see that he was taken away from there somewhere or assist in getting him away from there? A. Yes, I did. 10

Q. Where did you send him? A. There happened to be a light engine coming East and I flagged that and took him to Morristown.

Q. Before you sent him to Morristown, you asked a statement how it happened? A. I asked him while I was fixing him up there.

Q. What do you mean? A. I had to bandage his arm and put a tourniquet on to suppress the hemorrhage. 20

Q. That was after you gave him the anesthetic? A. I think it was.

Q. You think it was? A. I cannot tell you for sure.

MR. SCOTT: There was one question I forgot to ask Mr. Dolan; I will ask it now in re-direct if you will let me?

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Harold Dolan—Direct, Cross.

HAROLD DOLAN, recalled on re-direct examination.

Q. Did anybody ever ask you to testify that this accident happened on the railroad crossing or intimate that anybody wanted you to testify that the accident happened on the railroad crossing? A. Mr. Gebhardt had us down at the hotel and said if we did not say Mr. Kratz was hurt on the railroad crossing, he would give it up. He did not say that. He said, "To hell with the case" and gave it up.

CROSS EXAMINATION BY MR. BOLITHO:

Q. Prior to that time, hadn't you been down to the railroad office? A. Yes, sir.

Q. Who did you see there? A. Mr. Kyle.

20 Q. Where did you make this trip from with Mr. Kyle? A. From Dover.

Q. How long before this time, that you had the conversation that you say you had with Senator Gebhardt was it that you went down with Mr. Kyle? A. I don't understand.

Q. You say you had a conversation with Senator Gebhardt about this case that was about to be tried before? A. Yes.

30 Q. How long before that time was it that you went down to the railroad office with Mr. Kyle? A. I do not understand what you mean.

Q. Was it a week before then, before you were talking to Senator Gebhardt that you went down to the railroad office? A. About four days.

Q. About four days before this, you were down in the railroad office and talked with them and gave them a statement about the case? A. Yes, sir.

40 Q. And that was the first statement that you

Harold Dolan—Cross.

gave to them? A. You were the first one that got the statement.

Q. That was the first statement you made to them? A. Yes, sir.

Q. It was some time last May? A. I could not say.

Q. It was about a year after the accident? A. It might have been. 10

Q. Was it? A. I ain't sure whether it was or not.

Q. Was it six months after the accident? A. I ain't sure it was in the Summer.

Q. Was it the next Summer after the accident? A. I cannot say for sure whether it was then or not.

Q. How do you know when it was that Senator Gebhardt made this statement you say he made to you? A. Down to the hotel here? 20

Q. How do you know when it was? A. When Mr. Kratz was first going to fight his trial.

Q. When he was going to have the trial first? A. Yes, sir.

Q. That was about a year ago? A. Yes, sir.

Q. And four days before that you made this statement to the railroad company, didn't you?

A. No, I made it before that.

Q. How long before that? A. About three months; two or three months. 30

Q. It was after you made this statement to me wasn't it? A. Yes, sir.

Q. How many conversations did you have with the railroad company about this case since you made this statement to me? A. One.

Q. They have not talked to you since about it and no one for them? A. No, sir.

Q. Then you have not heard a thing about it except that one time and the conversation with Senator Gebhardt? A. Yes, sir. 40

Earnest Peterson—Direct.

EARNEST PETERSON, sworn in behalf of the defendant testifies as follows:

DIRECT EXAMINATION BY MR. SCOTT:

Q. Mr. Peterson, where do you live? A. East Dover.

10 Q. Do you live home with you parents? A. Yes, sir.

Q. Do you work for a living? A. Yes, sir.

Q. Did you work in June, 1914? A. Yes, sir.

Q. Do you know Mr. Dolan, who has just testified here? A. Yes, sir.

Q. Did you ever see Mr. Kratz before to-day, this gentleman here (indicating)? A. No, sir.

Q. Did you see an accident happen to Mr. Kratz? A. Yes, sir.

20 Q. Where? A. East Dover tower.

Q. Who was with you when you saw that accident? A. Mr. Dolan.

Q. What kind of a day was it when this accident happened? A. A clear day; a nice day.

Q. What time was it? A. 8.10.

Q. Where were you—were you in the neighborhood of the Dickerson bridge when this accident happened? A. Yes, sir.

30 Q. What time did you go down there? A. About half-past six—something like that.

Q. When you went down there, you went down with Dolan? A. Yes, sir.

Q. What did you go down there for? A. We had an engagement on.

Q. Did you see Mr. Bowlby, the tower man? A. Yes, sir.

Q. See him before the accident or after? A. Saw him before.

40 Q. Did you go over to the tower for any reason? A. Yes, sir.

Earnest Peterson—Direct.

Q. What for? A. To get a drink of water.

Q. After you went over to the tower to get a drink of water where did you go? A. Over on the bridge.

Q. When you went over on the bridge, did you see this gentleman Mr. Kratz? A. Yes, sir.

Q. Where was he coming from? A. Came from towards Dover, down by the signal bridge. 10

Q. From Rockaway and Denville direction? A. Yes, sir.

Q. I show you a picture, Mr. Peterson and ask you whether the picture which is marked D-5—and ask you when you saw Mr. Kratz—will you point out to the jury where you first saw him? Where he was, walking down towards the railroad crossing? A. Yes, sir.

(Witness points out on picture to the jury.) 20

Q. Mr. Peterson, did Mr. Kratz walk down to the crossing? A. Yes, sir.

Q. And then what did he do? Did he come across? A. Came across the crossing.

Q. Did he get all the way across the railroad tracks? A. Yes, sir.

Q. Then what did he do? A. Started up.

Q. Started in what direction? A. Started west.

Q. Toward where? A. Dover.

Q. As he started—did I ask you whether he was carrying anything? A. No, sir. 30

Q. Was he carrying anything? A. Yes, sir.

Q. What was it? A. Two poles.

Q. Was he carrying these poles when you saw him start towards Dover? A. Yes, sir.

Q. Was he walking; had he gotten over the crossing? A. Yes, sir.

Q. How far did he proceed down toward Dover before anything happened to him? A. Oh, about a rail—about a hundred feet. 40

Earnest Peterson—Cross.

Q. About how far? A. About a rail.

Q. Will you tell us if anything happened to him then? A. Yes, the engine hit him.

Q. How was he hit? A. His poles swung him right around and hit him.

Q. You say he was by the rails north from the crossing? A. Yes, sir.

10 Q. On this path that runs along the railroad track? A. Yes, sir.

Q. After he was struck what became of him? A. He got knocked down the bank.

Q. Who helped him up? A. Me and Mr. Dolan.

Q. When you helped, what did you do with him? A. Took him across to the tower.

Q. After you came across to the tower, what happened? A. I went up and told Mr. Bowlby and Mr. Bowlby telephoned for Doctor Baker.

20 Q. There is a concrete well box or something shown in this picture D-2, that when you look at the picture is nearer to you than the bridge, was he struck by the engine beyond or near that concrete well box? A. Near the concrete box.

Q. Thrown down the bank? A. Yes, sir.

Q. About how far above the track did you see Mr. Kratz, this gentleman, before he got down to the crossing? A. Down by the signal bridge down there.

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CROSS EXAMINATION BY MR. BOLITHO:

Q. You said first Mr. Peterson, that you never saw Kratz before, what do you mean now? A. I did not see him before he was hit.

Q. You mean you did not see him before he was hit? A. Not before that night.

Q. You have seen him since then? A. Yes, sir.

40 Q. And you came to my office and made a statement; this statement? A. Yes, sir.

Earnest Peterson—Cross.

Q. And you went with him to Senator Gebhardt's office to make a statement? A. Yes, sir.

Q. You say he was walking along this track near this concrete block when he was struck by the train? A. Right there (indicating).

Q. He was struck by the train? A. Yes, sir.

Q. Where did you find him after he was struck?
A. Right down there (indicating). 10

Q. He was struck by the train? A. Yes, sir.

Q. I want to read to you. You stated before that time that you saw Kratz coming up the railroad track? A. Yes, sir.

Q. Are you sure about that? A. Yes, sir.

Q. You were in my office in July, after that accident, about a month ago? A. I know I was in your office but I don't know the month.

Q. It was since the accident, wasn't it? A. Yes, sir. 20

Q. I am going to ask you if you made this statement at that time? "I was in the river bridge the night Kratz got hurt. The gates were about half way up." Did you say that? A. Yes, sir.

Q. Were the gates half way up? A. Yes, sir.

Q. And Kratz was on the crossing or just going over the crossing— A. Just off the crossing.

Q. Did you meet him just going off the crossing? A. Yes; just going off the crossing. He was off that crossing when he was hit. 30

Q. Kratz looked for the train just as it struck him, is that true? A. Well he turned around when he got hit.

Q. The statement "We didn't see Kratz before that" is that true? A. No, sir, we did not see him.

Q. You also made a statement to Senator Gebhardt, didn't you? A. Yes, sir.

Q. And you went up to this office with Mr. 40

Earnest Peterson—Cross.

Kratz, didn't you—I am going to ask you if you stated that Mr. Kratz was struck while crossing the railroad right on the public highway when he was going in a northerly direction, did you say that? A. No, sir.

10 Q. Did you say in the statement that you made in Senator Gebhardt's office that Mr. Kratz was struck while crossing the railroad tracks of the said company right on the highway and was going in a northerly direction? A. No, sir.

Q. You were down to the company's office with Mr. Dolan, weren't you? A. Yes, sir.

Q. That was when? A. I don't remember.

Q. Was it a year ago? A. About a year ago.

Q. It was somewhere near the time of the other trial, wasn't it? A. I could not say just when it was.

20 Q. Wasn't it a fact it was before the other trial was going to be had? A. I don't know.

Q. And after that time, sometime in August or September, that same year, weren't you digging fishing worms one night with a boy by the name of Lester Thornhill? A. No.

Q. Do you know him? A. Yes, sir.

Q. Didn't you, when you were digging fish worms one night show him some money that the railroad had given to you? A. No, sir.

30 Q. Didn't they give you some money? A. They gave me my day's wages.

Q. For what day? A. The day I had off and went to Jersey City.

Q. That was before the last trial was to be had, wasn't it? A. Yes, sir.

Q. That was before you and Mr. Dolan met Senator Gebhardt down in the hotel here, wasn't it? A. Yes, sir.

Earnest Peterson--Re-Direct, Re-Cross.

RE-DIRECT EXAMINATION BY MR. SCOTT:

Q. How much did they give you, \$2.50 or something like that? A. Yes, sir.

Q. And this statement in Senator Gebhardt's office, was that read over to you? A. No, sir.

Q. Will you tell the jury how you signed that? A. Senator Gebhardt said he had just made a statement out for us to sign. 10

Q. Did he read it over to you? A. No, sir.

Q. Did he tell you what the contents of it was? A. No, sir.

Q. What did he tell you to do, just sign it? A. Yes, sir.

Q. Do you know what the contents was? A. Yes, sir.

Q. Did he explain what it was? A. No, sir.

Q. Did he read it to you? A. No, sir. 20

Q. After he got you to sign it, did he start to talk about it? A. Yes, sir.

Q. Did he tell you what was in it? A. Yes, sir.

Q. Do you know what was in that statement outside of your signature? A. If he has got what I told him, I know.

Q. What did you tell him at that time? A. I told him I saw Mr. Kratz coming up there and he crossed and started to go up the railroad track.

Q. You told the Senator that Mr. Kratz started to go up the railroad track? A. Yes, sir. 30

Q. If that is not in there, all that you said is not in there? A. No, sir.

RE CROSS EXAMINATION BY MR. BOLITHO:

Q. Who did you go with to see Senator Gebhardt? A. With Mr. Kratz.

Q. And you went there as you came to me? A. Yes, sir.

Q. Mr. Kratz was not in Senator Gebhardt's 40

Earnest Peterson—Re-Direct, Re-Cross.

office when he explained the statement to you? A. Yes, sir.

Q. Right there? A. Yes, sir.

BY THE JURY:

Q. Will you tell us where Kratz walked when he was turning on the track; where was he walking to? A. Toward Dover.

10 Q. Did Kratz walk on the ties? A. He was walking by the two rails, the siding and main line.

Q. Was he walking between the two tracks? A. Yes, sir, between the two tracks.

BY MR. BOLITHO:

Q. You meant now—did you understand the jury to mean where he was walking before he came to the crossing? A. Yes, sir.

BY MR. SCOTT:

20 Q. After Mr. Kratz crossed over the crossing, you say he turned towards Dover? A. Yes, sir.

Q. And he walked down the side of the railroad track? A. Yes, sir.

Q. And when he got down to this concrete block, it was at that place that he was struck? A. Yes, sir.

DEFENDANT RESTS.

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Gustav Kratz—Direct.

GUSTAV KRATZ, recalled in behalf of the plaintiff.

BY MR. BOLITHO:

Q. Mr. Kratz, you know Peterson, do you? A. Yes, sir.

Q. Did you bring him to my office after the accident? A. Yes, sir. 10

Q. And were you present when he signed this statement? A. Yes, sir.

Q. Did you or did you not hear me read that statement to him? A. Yes, he read it. You gave it to him to read and then he signed his name.

Q. Were you there at Senator Gebhardt's office? A. The same day he told it to Senator Gebhardt and Senator Gebhardt wrote it with a pencil and before he gave it to the typewriter, he gave it to him to read and he read the statement and the Senator said, "Are you satisfied with that" and he said, "O. K." and he brought the two office girls in and myself as witnesses and he made them swear. 20

Q. And Senator Gebhardt gave him this to read before he signed it? A. Yes, before he signed it.

MR. BOLITHO: I want to offer these statements in evidence. 30

MR. SCOTT: I object to the yellow statement but not to the affidavit taken before Senator Gebhardt.

THE COURT: What is your objection to the other one?

MR. SCOTT: Because Mr. Peterson has not been specifically asked regarding this entire statement.

THE COURT: That is true Mr. Bolitho, if you want to open the case I will permit you 40

Gustav Kratz—Direct.

to. If you want to contradict the man by something he said somewhere else than in the court room, you must point out where he said it, the time he said it and the person he said it to, otherwise you could not offer this statement in evidence. If you want to call him back for that purpose I will permit you to do so.

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MR. BOLITHO: I read a part of this statement to him.

THE COURT: You have a right to offer so much of that statement as contradicts him here.

MR. BOLITHO: That is what I desire to do.

THE COURT: That you may read.

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MR. BOLITHO: The part of this statement that we offer in evidence is where it says; "Peterson was on the river bridge the night Kratz got hurt. Kratz was on the crossing and just going off the crossing. Kratz looked for the train just when it struck him. We did not see Kratz before that."

MR. BOLITHO: That is the part of the statement I want to offer in evidence.

(NOTE. Substance of Court's Charge as agreed to by the respective parties to this suit.)

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Charge.

Gentlemen of the jury, this suit is brought by Gustav Kratz, against the Delaware, Lackawanna & Western Railroad Company and the complaint by the plaintiff against the defendant in essence is that the defendant company, being a carrier of passengers and operating a railroad over a highway or crossing a highway in Dover, in this County, which is known as the Denville Road and which is near a bridge known as Dickerson Bridge, by its servants and agents on the night of the 24th of June, 1914, ran and propelled a locomotive and train of cars across said highway at an extreme rate of speed and without sounding either a bell or whistle or giving any notice; that the railroad company maintained gates to protect the crossing; that on the evening or night above mentioned, the plaintiff attempted to walk across the railroad tracks at the railroad crossing; when the locomotive passed over the crossing without having given any warning of the approach of said locomotive to the crossing and without having put down said gates. The plaintiff further says that he was prevented from seeing the approach of said train, by a line of cars standing on a track alongside, and also by reason of its being a dark and foggy night. And he says that because of the negligence, he was struck by the train and received the injuries for which he claims and seeks to recover damages.

You must bear in mind the plaintiff claims that he was injured while crossing over on a public crossing, the railroad right of way and that, of course, he must establish together with the other elements, by the greater weight of the evidence before he is entitled to recover. In this case, I direct your attention especially to the fact that he alleges that his injury was received while crossing over the public highway, because that is the

Charge.

particular point that counsel for defendant urged in summing up before you. I don't mean to say that the other points should not receive consideration and I do not mean to infer that the other points are not as important in arriving at a conclusion, but I mean to say that that is the particular point that counsel have discussed before
10 you; and I say that without drawing your attention away from the other points which plaintiff must sustain before getting a verdict.

The negligence relied on is that the defendant company ran its train at a high rate of speed, without giving warning by bell or whistle, by and over this highway. Of course the railroad company has a right on its own right of way to run its trains at a high rate of speed, if it sees fit and the demands of the travelling public in this respect,
20 require that they shall run at a high rate of speed, so that the mere fact of a railroad running its trains at a high rate of speed is no evidence of negligence at all, and would not furnish ground for the recovery in this case. The theory is that it, the defendant company, ran its train over a crossing without giving notice. In our State, the legislature has passed a statute which lays down the rule, which determines what kind of notice a
30 railway company shall give before one of its trains shall pass over a public highway and the statute is as follows:

“A bell of a weight not less than thirty pounds shall be placed on each engine and rung continuously approaching a grade crossing of a highway, beginning at a distance of at least 300 yards from the crossing and continuing until the engine has crossed such highway, or a steam whistle, shall be attached
40 to each engine and be sounded, except in cities, at least 300 yards from the crossing and at

Charge.

intervals, until the engine shall have crossed the highway."

That is the rule of law that is laid down by the statute and that is all that a railroad company is required to do with respect to giving audible signals. The legislature has prescribed and the law has determined that if there is a bell of the statutory weight on the engine and that is proved without any contradiction in this case, that this bell was of statutory weight, because the evidence is that it weighed 75 pounds, and it is rung in the manner required, then so far as the fact of the giving of audible signals is concerned, the company has performed its duty, whether the signal so given, is heard or heeded or not by the person crossing a railroad track on the highway. That being the law, gentlemen, this is what the plaintiff has to establish in order to entitle him, on the ground of the defendant's negligence, to recover. He must show by the greater weight of the evidence, that he was upon the public highway; that he was crossing upon the public highway, where the highway runs over the right of way of the railroad company, and that while he was so crossing, this railroad train had given no notice either by bell or whistle, of its approach; that is, no notice of the required legal character. In other words, he must show that the railroad company neither rang a bell, commencing at a point at least 900 feet from the crossing and continued to ring that bell until the engine had passed over the crossing, nor blew a whistle commencing at a point 900 feet from the crossing, and at intervals, blew it until the crossing had been passed by the engine.

Now, if the plaintiff has made out, by the greater weight of the evidence, that the defendant

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Charge.

did neither one of these things—because if it did either of them it complied with the law, and in that particular, would not be responsible— if, I say, the plaintiff has made out, by the greater weight of the evidence, that the defendant did neither one of these things and that his injury resulted proximately from such neglect, on the

10 part of the railroad company, then he would be entitled to a verdict unless the defendant shall have made out that he was contributorily negligent, because of what he did while approaching that crossing or on that crossing. I want to say this before talking about his negligence, that if Mr. Kratz was travelling along the right of way of the railroad company when he received this injury, he was a trespasser, and as such, the only duty which the railroad company owed to him was

20 to refrain from wanton or wilful injury of him; and in this case, there is no evidence of wanton or wilful injury. If he was a trespasser there, he has no right of recovery here at all; and as bearing on that subject, I want to say this, that if a man starts to travel along a track of a railroad, and while he is travelling there and designing to continue further in that direction he passes over a highway and while he is on the highway, he is struck the fact that he is then on the highway, does not give

30 him a right of action, because he having started out as a trespasser, and while continuing in that line, he is injured, and still continuing in that line, he is still a trespasser. That does not depend upon a decision of the Court, but rests upon the statute of the legislature of the State of New Jersey, which is as follows: “It shall not be lawful for any person other than those connected or employed upon the railroad to walk along the tracks of any railroad, except when the same

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Charge.

shall be laid upon a public highway; if any person shall be injured by an engine or car while walking, standing or playing on any railroad, or by jumping on or off a car while in motion, such person shall be deemed to have contributed to the injury sustained and shall not recover therefore, any damages from the company owning or operating said railroad.”

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That is the law as the legislature has laid it down and the Courts in construing that law, have said; that the right of the public in a highway crossing a railroad is simply a right of passage crossing a railroad. Neither the public nor any individual thereof, has the right to commit a trespass upon the railroad company's property, within the limits of the highway crossing, so that if a man starts out along the railroad track, no presumption of ignorance of this statute will be any excuse, but pursues his way along a railroad track or railroad right of way, and while he is there pursuing his way whether it is on a highway crossing or outside, he has contributed to his injury and cannot recover. Is that is what Mr. Kratz was doing he would not have any right of action because the statute provides that he is guilty of contributory negligence, which would debar him from any right of recovery.

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Now another statute bears upon the conduct of Mr. Kratz, if he was actually crossing the railroad right of way, on the highway, as he had a right to do, and that statute is this: "Wherever any railroad whose right of way crosses any public street or highway, has or shall install any safety gates, bell or other device designed to protect the travelling public at any crossing, or has placed at such crossing a flagman, any person or persons approaching any such crossing so protected as

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Charge.

aforesaid, shall, during such hours as posted notice at such crossing, shall specify, be entitled to assume that such safety gate or other warning appliances, are in good and proper order, and will be duly and properly operated unless a written notice bearing the inscription, "Out of order," be posted in a conspicuous place at such crossing, or that the flagman will guard said crossing with sufficient care, whereby such traveler or travelers will be warned of any danger in passing over such crossing, and in any action, brought for injury to person or property, or for death caused at any crossing protected as aforesaid, no plaintiff shall be barred of the action because of his failure of the person injured or killed, to stop, look and listen, before passing over said crossing."

That statute you are entitled to consider in determining whether or not, if Mr. Kratz was crossing the highway and not merely trespassing upon the railroad's right of way, he exercised due care. That is the care which a reasonably careful and cautious person would exercise when so crossing a railroad.

If the defendant has made out by the greater weight of the evidence, that Kratz was negligent in such a way as to contribute to his injury whether in whole or part, he cannot recover, even though the defendant may have been negligent in the operation of its railroad.

That brings us to inquire what was the duty of Mr. Kratz in passing over this highway, and the law has laid down the rule that it was his duty to use reasonable care for his own safety or such care as a reasonably prudent man would use. If he is proven not to have used that, and it is for you to settle, but if he is proven not to have exercised reasonable care, he cannot recover. If

Charge.

he has proven that the defendant company was negligent and it has not proven that he was contributorily negligent, he can be assessed his damages.

I charge you these requests as a matter of law :

If you find in the matter of fact, that the plaintiff, while pursuing his way along the railroad track, was injured at the crossing, he cannot recover. I charge you that if he was not, in any proper sense, using the street or highway to cross the railroad, under such circumstances, the only duty the railroad company owed to the plaintiff, was not to wantonly injure him, and as there is no such injury proved he cannot recover. 10

I charge you that persons who walk along the right of way of a railroad company, even if there is no fence, are to be regarded as trespassers, and the only duty of the railroad company is to abstain from wilful or wanton injuries and the mere fact such person reaches the public highway does not make him any less a trespasser. 20

I am requested to charge you further, that it is the right of the jury to believe that a witness who testifies falsely in a material and vital point of evidence, to entirely disregard the whole or balance of his testimony.

I am requested to charge you that if you believe the plaintiff was injured in the manner testified to, by the witnesses, Dolan and Peterson, that your verdict must be for the defendant company. 30

I charge you that for the obvious reason that if you believe the testimony of Dolan and Peterson, he was a trespasser upon the railroad property, and if you believe that under the rules I have stated and recited, to be such trespasser, he has no right of recovery, in the absence of proof of wilful and wanton injury. 40

Charge.

If you find for the plaintiff, you can assess the damages in accordance with these rules:

The plaintiff is entitled to recover for injuries which proximately resulted from this accident. Entering into this would be pain and suffering, which he has undergone in the past and such as he will probably undergo in the future for so long as he will probably undergo them, and

10 Second, for the loss of time or loss of wages, during the time and while he has been incapacitated from labor.

And third, he would be entitled to recover for impairment of his earning capacity.

And fourth, he would be entitled to recover for any expenditures that he has been put to, to recover from the injury inflicted upon him.

20 You will take the case under these rules and decide it.

MR. SCOTT: I desire to note an exception to your Honor's charging that Chapter 96 Laws of 1909 apply to this case. My thought being that if any statute applies it is Chapter 35, Laws 1909, which to my mind is essentially different and more beneficial to the defendant.

THE COURT: Your objection will be noted.

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