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Summons

(*Issued September* 9, 1927.)

The State of New Jersey to Pennsylvania Railroad Company:

You are summoned to answer the annexed complaint of Robert A. Kopenhafer in an action at law in the Hudson County Circuit Court. And take notice that unless you file your answer to said complaint with the clerk of the said Hudson County Circuit Court, at Jersey City, 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.

[SEAL]

Witness, Henry E. Ackerson, Jr., Judge of the Circuit Court, at Jersey City, this 9th day of September, nineteen hundred and twenty-seven.

JOHN J. McGOVERN,
Clerk.

FRANK M. HARDENBROOK,
Attorney for Plaintiff.

Complaint

(*Filed September* 13, 1927.)

HUDSON COUNTY CIRCUIT COURT.

ROBERT A. KOPENHAFER,
Plaintiff,
v.
PENNSYLVANIA RAILROAD COMPANY,
Defendant.

Action at Law.
Complaint.

1. That plaintiff is and was at all the times hereinafter mentioned and now is a resident of Wisconisco, in the State of Pennsylvania.

2. That at all the times hereinafter mentioned defendant was and now is a steam surface railroad corporation organized and existing under and in virtue of the laws of the State of Pennsylvania.

3. That at all the times hereinafter mentioned, and at the time of the commencement of this action, the defendant carried on its business in Hudson County, in the State of New Jersey.

4. That at all the times hereinafter mentioned, the defendant maintained a steam surface railroad over and upon various portions of the State of Pennsylvania, including the Municipality of Lykens, in said State.

5. That on the 17th day of September, 1926, plaintiff was an employee of the Susquehanna Coal Company at said Lykens, in the State of Pennsylvania, as a car remover.

6. Upon information and belief, that at the time and place aforesaid, the defendant carried coal for hire upon its cars and trains from the said Lykens, in the State of Pennsylvania, to other points in said State and other States, to which said coal might be destined, said coal being carried on behalf of the Susquehanna Coal

Company pursuant to a contract or arrangement made between the said coal company and the defendant.

7. That at the time and place aforesaid, the defendant had certain cars standing upon tracks, said cars being under the control of the defendant and engaged in the said work of carrying coal for hire for the Susquehanna Coal Company.

8. That at the time and place aforesaid, plaintiff, in the course of his work on behalf of the said Susquehanna Coal Company, and upon the invitation and with the knowledge and consent of the defendant was engaged in his work about the place where defendant's cars were standing.

9. That at the time and place aforesaid, and while plaintiff was so engaged in his work, through the negligence of the defendant, its agents and servants having the care, management and control of said cars and of an engine or locomotive under the control of the defendant used by the latter in the moving of said cars, the said cars were caused to be suddenly and without warning, negligently set in motion and so negligently operated by defendant as to be caused to strike plaintiff, throwing him to the ground, permanently injuring him internally and externally about the head, body and limbs; internally and permanently injuring him; permanently injuring the right leg and the nerves, sinews and muscles thereof; permanently injuring and impairing the use of the right ankle joint; so crushing and injuring his right foot as to necessitate the amputation of a part thereof; forever crippling plaintiff; forever preventing him from attending to his work and earning his wages, to his damage in the sum of fifty thousand dollars.

Wherefore, plaintiff demands judgment against the defendant in the sum of fifty thousand dollars, besides the costs and disbursements of the action.

FRANK M. HARDENBROOK,
Attorney of Plaintiff.

I hereby deputize Frank Wormann to serve the within writ. Witness my hand and seal this 10th day of September, 1927.

JOHN J. COPPINGER, *Sheriff.*
By Thomas Madigan, *Under Sheriff.*

Served within Summons and Complaint September 12th, 1927, on the defendant, Pennsylvania Railroad Company (a corporation), by delivering a true copy thereof to Ogden L. Carr, agent of the said defendant company.

JOHN J. COPPINGER, *Sheriff.*
By Frank Wormann, *S. D. S.*

Filed Clerk's Office, Sept. 13, 1927, Hudson County, N. J.

JOHN J. McGOVERN,
Clerk.

Notice to Dismiss

(*Filed October* 3, 1927.)

HUDSON COUNTY CIRCUIT COURT.

ROBERT A. KOPENHAFER,
Plaintiff,
v.
PENNSYLVANIA RAILROAD COMPANY,
Defendant.

Action at Law.
Notice.

To Frank M. Hardenbrook, Esq., Attorney for Plaintiff:
Sir—

Please take notice, that on Saturday, October 8th, 1927, at 10 A. M. or as soon thereafter as counsel may be heard, we will move before the above-named court, at the Hudson County Court House, in Jersey City,

New Jersey, to dismiss the above-stated cause, on the ground that on the face of the record the said court is without jurisdiction to hear and determine said cause, neither party being a resident of the State of New Jersey, and the alleged cause of action not arising within said State of New Jersey, and that to permit the further prosecution of said cause in said court and in said State would impose an unwarranted and substantial burden upon and interference with interstate commerce and the performance of the defendant's duties and obligations in such commerce under the constitution and laws of the United States of America.

Yours, &c.,

WALL, HAIGHT, CAREY & HARTPENCE.

Attorneys for Defendant appearing especially to move to dismiss.

Dated October 1st, 1927.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } *ss.*

William C. Egan, being duly sworn on his oath, says that he served a true copy of the within notice on Frank M. Hardenbrook, attorney for plaintiff, by leaving same at his office in Commercial Trust Company Building, 15 Exchange Place, Jersey City, N. J., with a person in charge thereof, on October 1st, 1927, at about the hour of 1:30 P. M.

WILLIAM C. EGAN.

Sworn to and subscribed before me this 1st day of October, A. D. 1927.

(SEAL) GROVER J. CAREY,

Notary Public of the State of New Jersey.

Filed Clerk's Office, Oct. 3, 1927, Hudson County, N. J.

JOHN J. McGOVERN,

Clerk.

Order Denying Motion

(*Filed October* 13, 1927.)

HUDSON COUNTY CIRCUIT COURT.

ROBERT A. KOPENHAFER,
Plaintiff,
v.
PENNSYLVANIA RAILROAD COMPANY,
Defendant.

A motion of the defendant to dismiss this action on the ground that this court is without jurisdiction to hear and determine the same, coming on to be heard before me, and after hearing John A. Hartpence, Esq., of counsel for defendant, in support of said motion, and Frank M. Hardenbrook, attorney for plaintiff, in opposition thereto, it is on this 10th day of October, 1927, on motion of Frank M. Hardenbrook, plaintiff's attorney,

Ordered, that said motion be, and the same hereby is denied.

Time of defendant to answer the complaint is extended for fifteen days after this date.

FRANK L. CLEARY,
Judge.

Filed Clerk's Office, Oct. 13, 1927, Hudson County, N. J.

JOHN J. McGOVERN,
Clerk.

Answer

(*Filed October 25, 1927.*)

HUDSON COUNTY CIRCUIT COURT.

ROBERT A. KOPENHAFER,
Plaintiff,
v.
PENNSYLVANIA RAILROAD COMPANY,
Defendant.

Action at Law.
Answer.

Defendant, a corporation of the State of Pennsylvania, says that—

First Defense—

1. Paragraphs 1 and 5 of the complaint are neither admitted nor denied, defendant not having sufficient knowledge thereof to form a belief.

2. Paragraphs 2, 3, 4, 6 and 7 of the complaint are admitted, except that defendant denies that said cars mentioned in paragraph 7 were under the control of defendant.

3. Paragraphs 8 and 9 of the complaint are denied.

Second Defense—

Plaintiff was a trespasser at the time and place when and where the alleged accident complained of occurred, to whom defendant owed no legal duty except to refrain from willfully or wantonly injuring him; and defendant avers that it neither willfully nor wantonly injured plaintiff.

Third Defense—

Plaintiff s own negligence contributed proximately to the alleged injuries complained of in voluntarily placing himself in a position where he was not obliged to be, and without taking reasonable precautions for his safety, or exercising reasonable care to avoid being struck or otherwise injured by moving or passing trains or other objects.

WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys for Defendant.

OBJECTION IN POINT OF LAW.

At, upon, or after the trial of this cause, defendant will renew (and hereby specifically reserves the right to do so) its motion to dismiss said action for lack of jurisdiction of this court to try the same (and hereby notes its objection to the court's denial of defendant's previous motion to so dismiss).

WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys for Defendant.

Filed Clerk's Office, Oct. 25, 1927, Hudson County, N. J.

JOHN J. McGOVERN,
Clerk.

Reply

(*Filed October 27, 1927.*)

HUDSON COUNTY CIRCUIT COURT.

ROBERT A. KOPENHAFER,
Plaintiff,
v.
PENNSYLVANIA RAILROAD COMPANY,
Defendant.
} Reply.

The plaintiff for a reply to the second and third defenses in defendant's answer contained, says he denies the matters therein alleged.

FRANK M. HARDENBROOK,
Plaintiff's Attorney.

Filed Clerk's Office, Oct. 27, 1927, Hudson County, N. J.

JOHN J. McGOVERN,
Clerk.

Notice of Trial

(*Filed October 27, 1927.*)

HUDSON COUNTY CIRCUIT COURT.

ROBERT A. KOPENHAFER,
Plaintiff,
v.
PENNSYLVANIA RAILROAD COMPANY,
Defendant.

Action at Law.
Notice of Trial.

SIR—Please to take notice, that the trial of the issue joined in this cause will be moved before said court, in the presence of such judge or justice thereof, as shall then be holding said court, on the 11th day of November, A. D. 1927, at the Court House, in Jersey City, in and for the County of Hudson, at ten o'clock in the forenoon, or as soon thereafter as the said court can attend to the same.

Your obedient servant,
FRANK M. HARDENBROOK,
Attorney of Plaintiff.

Dated October 26th, A. D. 1927.

To WALL, HAIGHT, CAREY & HARTPENCE, ESQS.,
Attorney of Defendant.

Service of the within notice of trial is hereby acknowledged this 26th day of October, A. D. 1927.
WALL, HAIGHT, CAREY & HARTPENCE,
Attorney for Defendant.

Filed Clerk's Office, Oct. 27, 1927, Hudson County, N. J.

JOHN J. McGOVERN,
Clerk.

Rule for Judgment

(*Entered April* 23, 1929.)

HUDSON COUNTY CIRCUIT COURT.

ROBERT A. KOPENHAFER,
Plaintiff,
v.
PENNSYLVANIA RAILROAD COMPANY,
Defendant.

Action at Law.
Rule for Judgment.

This action having been tried before Hon. Frank L. Cleary, Judge of the Hudson County Circuit Court, with a jury, in the presence of counsel on each side, and the evidence having been submitted to the jury, and the jury having retired to consider their verdict, and they having returned a verdict in favor of the plaintiff in the sum of seven thousand five hundred ($7,500) dollars, damages; it is on this 23d day of April, 1929,

Ordered that judgment final be entered in favor of the plaintiff and against the defendant in the sum of seven thousand five hundred ($7,500) dollars, with costs of the plaintiff to be taxed.

FRANK L. CLEARY,
Judge.

Rule actually entered this 23d day of April, 1929.
On motion of
FRANK M. HARDENBROOK,
Attorney of Plaintiff.

Judgment

(*Entered April 23, 1929.*)

HUDSON COUNTY CIRCUIT COURT.

ROBERT A. KOPENHAFER,
Plaintiff,
v.
PENNSYLVANIA RAILROAD COMPANY,
Defendant.

Judgment on verdict in the above-entitled cause was entered in this court on the 23d day of April in the year of our Lord one thousand nine hundred and twenty-nine in favor of the plaintiff, Robert A. Kopenhafer, and against the defendant, Pennsylvania Railroad Company, in a plea of action at law in the sum of seven thousand five hundred dollars damages and seventy-two dollars and twenty-eight cents, cost of suit.

Judgment entered and signed this 23d day of April, A. D. 1929.

FRANK L. CLEARY,
Judge.

Damages, $7,500; costs, $72.28; total, $7,572.28.

FRANK M. HARDENBROOK,
Attorney.

Notice of Appeal

(*Filed May* 10, 1929.)

HUDSON COUNTY CIRCUIT COURT.

ROBERT A. KOPENHAFER,
Plaintiff-Respondent,
v.
PENNSYLVANIA RAILROAD COMPANY,
Defendant-Appellant.

Notice of Appeal.
Action at Law.

To FRANK M. HARDENBROOK, Esquire,
PAUL KOCH, Esquire,
Attorneys of Plaintiff:

Take notice, that the defendant appeals to the New Jersey Court of Errors and Appeals, from the whole of the judgment entered in this cause.

WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys of Appellant.

Dated May 3d, 1929.

STATE OF NEW JERSEY,
COUNTY OF HUDSON, } *ss.*

Grover J. Carey, being duly sworn according to law, on his oath says that on May 3d, 1929, he served a true copy of within notice of appeal on Frank M. Hardenbrook, attorney of record for plaintiff, by leaving same at his office in the Commercial Trust Company Building, No. 15 Exchange Place, Jersey City, N. J., with a person in charge thereof, at about the hour of 3:40 o'clock P. M.

GROVER J. CAREY,

Sworn to and subscribed before me this 3d day of May, A. D. 1929.

WM. W. SHAW,
Master in Chancery of New Jersey.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } *ss.*

James Rabbitt, being duly sworn according to law, on his oath says that on May 3d, 1929, at about the hour of 4 o clock P. M. he served a true copy of the within notice of appeal on Paul Koch, at his office, No. 233 Broadway, New York City, N. Y., and that at that time said Paul Koch endorsed on the original of said notice of appeal, "Copy received May 3d, 1929, Paul Koch, Counsel for Plf."

JAMES RABBITT.

Sworn to and subscribed before me this 6th day of May, A. D. 1929.

CHAS. J. GORMLEY,
Master in Chancery of New Jersey.

Filed Clerk's Office, May 10, 1929, Hudson County, N. J.

JOHN J. MCGOVERN,
Clerk.

Recognizance, &c.

(*Filed May* 10, 1929.)

Whereas, Robert A. Kopenhafer lately recovered in the Hudson County Circuit Court, in the State of New Jersey, against the Pennsylvania Railroad Company, judgment for seven thousand five hundred dollars dam-

ages, besides seventy-two dollars and twenty-eight cents costs of suit, aggregating the sum of seven thousand five hundred and seventy-two dollars and twenty-eight cents ($7,572.28); and

Whereas, The Pennsylvania Railroad Company has taken an appeal from said judgment to the Court of Errors and Appeals of the State of New Jersey;

These are therefore to authorize Albert C. Wall, or John A. Hartpence, of Jersey City, New Jersey, to enter into and execute in our behalf, as attorney in fact, recognizance on appeal in the sum of sixteen thousand dollars, conditioned only that said the Pennsylvania Railroad Company shall prosecute said appeal with effect, and also pay and satisfy, if said judgment be affirmed, all damages and costs in the said judgment and upon appeal, and all costs and damages to be awarded for delay of execution, as fully and completely as we ourselves might do, and for so doing this shall be their and each of their sufficient warrant.

In witness whereof, said the Pennsylvania Railroad Company has caused these presents to be signed by its vice-president, attested by its assistant secretary, and its corporate seal to be hereto affixed this 6th day of May, A. D. 1929.

THE PENNSYLVANIA RAILROAD COMPANY,
By C. B. HEISERMAN,
Vice-President.

[SEAL]

Attest:
E. H. BROWN,
Assistant Secretary.

HUDSON COUNTY CIRCUIT COURT.

ROBERT A. KOPENHAFER,
Plaintiff,
v.
PENNSYLVANIA RAILROAD COMPANY,
Defendant.
Action at Law.
Recognizance on Appeal.

STATE OF NEW JERSEY,
COUNTY OF HUDSON, } *ss.*

Be it remembered, that on this 9th day of May, A. D. 1929, personally appeared before me, Pierre F. Cook, one of the Supreme Court Commissioners of the State of New Jersey, at Jersey City, in the County of Hudson, in said State of New Jersey, the Pennsylvania Railroad Company, a corporation of the State of Pennsylvania, by John A. Hartpence, its attorney in fact, on its behalf as principal, and Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland, by Richard J. Purcell, its attorney in fact, on its behalf as surety, who jointly and severally did acknowledge said corporation, respectively, to be indebted to Robert A. Kopenhafer, of Wisconisco, Pennsylvania, in the sum of sixteen thousand dollars, lawful money of the United States, to be made of their respective goods and chattels, lands and tenements and real estate, if default be made in the following conditions:

Whereas, said the Pennsylvania Railroad Company is about to prosecute an appeal from said Hudson County Circuit Court to the New Jersey Court of Errors and Appeals to review a judgment entered in said Hudson County Circuit Court on April 23d, 1929, in favor of said Robert A. Kopenhafer and against said the Pennsylvania Railroad Company, for seventy-five hundred

dollars damages, and seventy-two dollars and twenty-eight cents costs of suit, as by the record thereof will appear.

Now, therefore, the condition of this obligation is such that if the said the Pennsylvania Railroad Company shall prosecute its said appeal with effect and answer all damages and costs in the former judgment, and all costs and damages to be awarded for delay of execution, if it shall fail to make its plea good and said judgment shall be affirmed, then this recognizance to be void, otherwise to remain in full force and effect.

THE PENNSYLVANIA RAILROAD COMPANY,
By JOHN A. HARTPENCE,
Its Attorney in Fact.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.
By RICHARD J. PURCELL,
[SEAL] *Its Attorney in Fact.*

Taken and acknowledged this 9th day of May, A. D. 1929.

PIERRE F. COOK,
Supreme Court Commissioner.

Filed Clerk's Office, May 10, 1929, Hudson County, N. J.

JOHN J. McGOVERN,
Clerk.

CLERK'S CERTIFICATE

STATE OF NEW JERSEY, }
HUDSON COUNTY, } *ss.*

I, John J. McGovern, Clerk of the County of Hudson aforesaid, and also Clerk of the Circuit Court and Court of Common Pleas, holden therein—

Do hereby certify, That the foregoing is a true and correct copy of summons and complaint, notice, order denying motion to dismiss, action, answer, reply, notice of trial, rule for judgment, judgment record, notice of appeal and bond on appeal, in the case of Robert A. Kopenhafer *v.* Pennsylvania Railroad Company, as the same is taken from and compared with the original as filed and recorded in my office. This certificate is issued so that the said cause may be removed to the Court of Errors and Appeals of the last resort of all causes at Trenton, N. J., for adjudication according to law.

In testimony whereof, I have hereunto set my hand and affixed the seal of said courts and county, at Jersey City, this fifteenth day of May, 1929.

JOHN J. MCGOVERN,
Clerk.

[SEAL]

Grounds of Appeal

(*Filed May 29, 1929.*)

NEW JERSEY COURT OF ERRORS AND APPEALS.

ROBERT A. KOPENHAFER, *Plaintiff-Respondent,* *v.* PENNSYLVANIA RAILROAD COMPANY, *Defendant-Appellant.*	Action at Law. On Appeal from Hudson County Circuit Court. Grounds of appeal.

The appellant states the following grounds of appeal:

1. The said Hudson County Circuit Court denied defendant's motions to dismiss the cause.

2. The said Hudson County Circuit Court denied defendant's motion to direct a verdict in favor of defendant and against plaintiff.

3. The said Hudson County Circuit Court submitted to the jury the determination of the negligence of the defendant and the contributory negligence of the plaintiff.

Thefollowing questions were admitted:

To the plaintiff—

4. "What, if anything, at any time, has any brakeman, or other employee of the railroad company, told you to do or not to do at a time immediately before cars on the left-hand track are moved?

* * * "Brakemen or trainmen or anyone else?"

5. "Now, Mr. Kopenhafer, when you had worked there right along on the job which you have described as being that of car barrer, during all the time you worked, what have you observed to be done before empty cars on the left-hand track were moved?"

To the witness, William O. Morris:

6. "Now, when you worked right along there, Mr. Morris, on the job which you have described as that of car barrer, before you became a loader, during all the time you worked there, what have you observed to be done before empty cars on the left-hand track were moved?"

The following questions were overruled:

To the plaintiff—

7. "And referring to the record and the date of the issuance of the summons, which was September 9th, 1927, pretty nearly a year after the accident, will you state, Mr. Kopenhafer, how it was that you came to start this action a year after the accident happened, and that you didn't start it before?"

8. "How did you come to bring this suit in Hudson County Circuit anyway?"

9. The said Hudson County Circuit Court refused to permit defendant's counsel to cross-examine plaintiff to show all the circumstances surrounding the commencement of the suit, how and when and why and under what conditions and terms it was brought, and also to show the burden that it casts on the defendant railroad company, to defend the suit in this State, under the circumstances of this case, to bear out the motions made to dismiss the action as an unwarranted burden on interstate commerce.

WALL, HAIGHT, CAREY & HARTPENCE,
Attorneys for Defendant-Appellant.

STATE OF NEW JERSEY,
COUNTY OF HUDSON, } *ss.*

James Rabbitt, being duly sworn according to law, on his oath says that on May 28th, 1929, at the hour of 2:30 P. M., he served a true copy of within grounds of appeal on Paul Koch by leaving same at his office, No. 233 Broadway, New York City, N. Y., with a person in charge thereof.

JAMES RABBITT.

Sworn to and subscribed before me at Jersey City, N. J., this 28th day of May, A. D. 1929.

WM. W. SHAW,
Master in Chancery of New Jersey.

Service of within grounds of appeal acknowledged May 28th, 1929.

FRANK M. HARDENBROOK,
Attorney of Plaintiff-Respondent.

Testimony

ROBERT A. KOPENHAFER,
Plaintiff.
v.
PENNSYLVANIA RAILROAD COMPANY,
Defendant.

Jersey City, New Jersey.
April 18th, 1929.

Appearances—Paul Koch, Esq., for the plaintiff; Wall, Haight, Carey & Hartpence, Esqrs., for the defendant, by John A. Hartpence, Esq.

A Jury was duly empanelled; being found satisfactory, they were sworn.

Mr. Hartpence—Prior to opening, I have a motion to make in this case, and that is for dismissal for lack of jurisdiction, on the ground that the plaintiff is a resident of the State of Pennsylvania, the defendant is a resident of the State of Pennsylvania, the cause of action arose in the State of Pennsylvania, and that, to require the defendant to go to trial here in Hudson County, New Jersey, imposes an unwarranted burden upon interstate commerce, and that under the decisions of the United States Supreme Court on that point, this court should rule that it is without jurisdiction and dismiss the case.

The Court—Is there any authority you care to offer?

Mr. Hartpence—Yes, there has been one quite recently, in the case of Railroad Company *v.* Micks, U. S. Advanced Reports of the U. S. Supreme Court March 1st, 1929, No. 7, page 266.

The Court—I will refuse the motion, subject to the right to make the motion again at the end of the plaintiff's case, after I have looked over this case you speak of.

Mr. Hartpence—May I have an exception at this time?

The Court—Yes.

(Counsel opened to the jury.)

Robert A. Kopenhafer, sworn for the plaintiff.

Direct examination by Mr. Koch.

Q. Mr. Kopenhafer, where were your working on the 17th day of September in 1926?

A. Susquehanna Collieries Company.

Q. And where at?

A. Lykens, Pennsylvania.

Q. How long had you been working for them prior to that date, approximately?

A. About three years.

Q. What was your work?

A. Car barrer.

Q. Tell us what is the duty of a car barrer?

A. To put a bar under the hind wheel and work it up and down. That makes the car go.

Q. What kind of cars do you move?

A. Railroad cars.

Q. What particular kind of railroad cars?

A. Coal cars.

Q. Where did you move these cars?

A. Into the breaker.

Q. And into what portion of the breaker?

A. At the loaders platform.

Q. Does the track on which these cars run, run under the loaders platform?

A. Yes, sir.

Q. Approximately what distance do you move these cars?

A. About two feet at a time.

Q. What is the whole distance that you move a car?

A. The length of a car; about thirty feet, I imagine.

Q. And before your cars are moved under the loaders platform, where are they?

A. They are up in the yard, and the car runner brings them down to the safety block. There they hold them until asked for.

Q. How are they brought down to the safety block?

A. Four and two at a time.

Q. On the 17th day of September, 1926, did you have any cars that required to be moved in the afternoon of that day?

A. Yes, had cars.

Q. Along towards three o'clock in the afternoon, how many cars did you have to move?

A. Two cars.

Q. Were they in the safety block at that time?

A. Yes, sir.

Q. Now, did you move them?

A. Yes, sir.

Q. Did you move them both, or did you move just one of them?

A. Moved the two at a time; they were coupled together.

Q. Where would you get to move these cars?

A. I got in between the two cars.

Q. At what point would you get on a car?

A. At the hind wheel.

Q. Now, the track on which these cars that you were moving were placed, is that a level track, or is there a grade?

A. No; there is a slight grade down.

Q. And if you stand and face the grade, that is, look up the grade, on which side of you is the breaker?

A. On the right, looking up.

Q. Which way does the grade extend, towards the breaker or away from it?

A. I don't understand you.

Mr. Koch—I withdraw it.

Q. Now, are there any other tracks at that point?

A. There is a track right aside.

Q. On which side?

A. There is railroad tracks to your left, and smaller tracks to your right.

Q. And these smaller tracks, what are they used for?

A. They are used for slate cars the mines has there.

Q. The larger tracks to the right, the railroad tracks, what are they used for?

A. To the left.

Q. Or to the left?

A. They are used for putting empty coal cars in.

Q. From where are they brought, from a point above or below the breaker?

A. They are brought in and pushed up to the yards and then they bring them down grade to the breaker.

Q. So that before a car is barred by you under the breaker, it has first come up that track on the left and then come back?

A. Yes, sir.

Q. And where is the switch at that point?

A. About sixty or seventy feet from the end of the breaker.

Q. Now, what can you tell us about the breaker platform; does it extend over the track?

A. No, it is right even with the car and then there are shoots coming down to fill the cars and unload.

Q. How do you get to the breaker platform?

A. By steps.

Q. Where are these steps?

A. They come down between the two tracks.

Q. By that you mean the track on which the cars were that you were moving?

A. Yes, sir.

Q. And the other track leading up?

A. Yes, sir.

Q. Can you tell us approximately the distance between the two tracks at about the point where the stairway comes down from the breaker platform?

A. I imagine about eight feet.

Q. Now, after you had moved the car which you described under the breaker platform, what did you find out?

A. Someone said it was quitting time; I had better put the tools away.

Q. About what time was it?

A. Was about 25 after three; quit at half past.

Q. What time did you quit at the mines?

A. Half past three.

Q. When you heard it was quitting time, what, if anything, did you do?

A. I picked up my bar.

Q. Which bar was that?

A. Car bar.

Q. Is that the bar you had been using?

A. Yes; put it against the steps.

Q. What else did you do?

A. I saw a hatchet lying in between the two tracks and I picked that up.

Q. Was that lying between the rails of the two tracks?

A. No, in between the tracks.

Q. In the place where this stairway comes down?

A. Yes, sir.

Q. Whereabouts; can you tell us, in the space, with respect to the stairway you have described?

A. I don't know.

Q. Was it near the stairway or where was it?

A. Yes, sir.

Q. About how close was it to the stairway?

A. About four feet.

Q. Now, where had you taken these tools after you have finished with them for the day?

A. Take them in and put inside the breaker.

Q. When you get to the point where you stored these tools, how did you proceed?

A. You have to go in under the step, go in through the door and lay them inside the breaker.

Q. Is it necessary for you to cross the tracks on which the cars that you bar are riding?

A. No; you can go right aside the cars.

Q. Is that where you were taking these tools this day?

A. Yes, sir.

Q. Now, you say you had put the bar against the step, and you saw a hatchet. Now, what did you do about the hatchet?

A. I picked it up.

Q. As you picked the hatchet up, do you recall which way you were facing, were you facing upgrade, or were you facing downgrade, or weren't you facing either way?

A. I don't remember how I was facing.

Q. What is the next thing you do remember?

A. I went to go around these steps and all of a sudden there was a terrible crash.

Q. Where was the crash, was that upgrade or downgrade?

A. Downgrade further.

Q. From which point did it seem to come; can you tell me?

A. It seemed downgrade.

Q. By the way, tell me about this track on which the empty cars were pulled up; is that a straight track all the way down?

A. No, there is a big curve in it.

Q. About how far below is there a curve, approximately; give us your best figure?

A. I should say about 500 feet.

Q. Now, what can you tell us about the track to the left on this day; were there cars on it, or was it empty?

A. There was cars on it.

Q. About how many cars were there on it?

A. About seven or eight.

Q. How long had those cars been there?

A. All day.

Q. When you say all day, do you mean they were there when you got to work in the morning?

A. Yes, sir.

Q. What time did you start work in the morning?

A. Seven o'clock.

Q. Did any movement take place with respect to these cars during the day?

A. No, sir.

Q. Were they in the same position at the time when you picked up your hatchet as they had been when you got there at seven o'clock in the morning?

A. Yes, sir.

Q. Now, as you heard this crash, what, if anything, happened?

A. Knocked me to the rail.

Q. What knocked you to the rail?

A. The end of the car.

Q. Which car?

A. The first car.

Q. On which rail?

A. On the "empty" track.

Q. Were you struck by a car on the left hand rail; is that what you say?

A. Right in the rail of the left hand track.

Q. That is the track on which the seven or eight cars were standing?

A. Yes, sir.

Q. Do you remember what portion of the car struck you?

A. The corner.

Q. Which corner, the front or the rear?

A. The front corner.

Q. Was this the first car, or was it some other car in the line?

A. The first car.

Q. Now, as it struck you, you say you fell?

A. I fell.

Q. Can you tell us how you fell?

A. I fell down the track backwards.

Q. In which direction did your head fall?

A. Upgrade.

Q. In which direction was your feet?

A. Downgrade.

Q. Was any portion of your body on the rail?

A. I fell over the rail with my arms across it.

Q. And then what did you do?

A. I tried to scramble off and my foot got caught.

Q. As you were scrambling off, did the movement of these cars cease or did it continue?

A. Kept on.

Q. What else did you do?

A. I hollered; I tried to get loose. I could not get loose. The cars kept pushing.

Q. Why did you say you could not get loose?

A. My foot was pinched between the wheel and the rail.

Q. Which foot?

A. My right foot.

Q. And then what happened?

A. The cars kept on going and I tried to keep after them, and I kept after until they came to a joint, there my foot stuck and the wheel went over. I had such terrible pain and everything went black.

Q. At the time you were moving, trying to keep up with this train, were you standing up or how were you?

A. Lying down.

Q. On your face or on your back?

A. On my back.

Q. How were you trying to move yourself?

A. With my hands; I was trying to keep after it.

Q. Were you moving your hands or elbows?

A. I was on my hands and elbows.

Q. You say that at that point you felt pain and everything went black; what is the next thing you know?

A. I was over in a little shanty and they had taken off my shoe.

Q. Did you see your foot?

A. No; there was a stocking on it yet, but the blood was coming through.

Q. What did they do then?

A. They carried me up to the engine room and administered first-aid.

Q. Now, tell me this, did you hear any other sound immediately, or at any time, before you heard the crash down below?

A. No, sir.

Mr. Hartpence—I object to that as immaterial and irrelevant, whether he heard any other sound prior to the time of the crash.

The Court—Sustained; the answer may be stricken out.

Q. Did anyone call to you just before or after you heard this crash?

Mr. Hartpence—That is objected to as immaterial and irrelevant, as to whether or not anyone called to him.

Mr. Koch—That I think is material; it goes towards notice or warning.

Mr. Hartpence—If he wants to make it specific——

The Court—I will sustain the objection as to form.

Q. Immediately before the collision, did any member of the crew of the train and the cars which were on the

left hand track call to you or warn you that some were to be moved?

Mr. Hartpence—That is objected to as immaterial and irrelevant. There is nothing in the case to show that there was any duty on the part of the train crews to warn him or to show that they had knowledge of his presence or anything to show that they should anticipate the presence of the plaintiff at that point. Of course, if there was no duty upon them, then there would be no negligence in the performance of such duty.

The Court—I will hear you on that. That would only be negligence in case they were called upon to give a signal and did not give a signal.

Mr. Koch—Then I shall offer testimony on that point.

Q. Mr. Kopenhafer, did your work require you to work only on the right hand track or on both tracks?

A. Both tracks.

Q. What work did you do on the right hand track?

A. Right hand track, I barred cars, railroad cars.

Q. Can you tell us whether there was or was not a custom with respect to the giving of notice or a warning before cars on the left hand track were moved?

Mr. Hartpence—I object to that as immaterial and incompetent; calls for a conclusion in the first place as to whether there was a custom. That involves too many elements as to what was done.

(Question withdrawn.)

Q. Before you moved a car, did you receive instructions to do so?

A. The man up on the car tells me to move it.

Q. Who was the man on the car; is he a Susquehanna Coal Company man?

A. You mean on the loaded cars.

Q. No, you said before you moved a car, the man on the car tells you to do it; who is the man that tells you to do it?

A. On the loader?

Q. When you move a car on the left hand track who tells you to move it?

A. Sometimes the loaders used to bring them down there; sometimes a car runner.

Q. Did you move them without instructions?

A. No.

Q. Did you move them to the point where you are expected to move them?

A. Yes, sir.

Q. In the course of moving these cars, is it necessary for you to go on the left hand track?

A. Yes, sir.

Q. Did you go on the left hand track?

A. Yes, sir.

Q. Have you been on the track and moved cars at a time when employees of the Pennsylvania Railroad Company were there?

A. No.

Q. Have you ever seen brakemen of the railroad company at the left hand track at a time when you moved the cars?

A. No, sir.

Q. But before you moved the car you received an instruction from some one?

A. Yes, sir.

Q. In your concern?

A. Yes, sir.

Q. Which way did you move these cars on the left hand track, upgrade or downgrade?

A. Downgrade.

Q. Is there a switch at that point?

A. There is a switch above.

Q. Have you seen the brakeman of the railroad company go to that switch?

A. Yes, sir.

Q. And have you been there when empty cars which were standing on the left hand track have been moved?

A. Yes, sir.

Q. And how many times do you say?

A. When I saw them moved?

Q. Yes.

A. Why, I could not really tell you how many.

Q. Is it a common occurrence?

A. Yes, sir.

Q. And before the cars are moved, what have you observed the employee brakeman of the company do?

A. Come ahead. . .

Mr. Hartpence—That is objected to as immaterial and irrelevant. I submit that there isn't any evidence to show that this gentleman was required to be in the position where he says he was.

The Court—I will permit the question and allow you an exception.

Mr. Hartpence—Exception.

Q. Now, tell us what you have observed the brakeman to do?

A. The brakeman came ahead and sees that the switches are all right, sees if there are cars there.

Q. What else do they do?

A. Give them the signal when they are ready.

Q. To whom do they give the signal?

A. To the other brakemen in the cars.

Q. Do they give any signal of any kind to you?

A. No.

Q. Have you ever been on the track at such a time?

A. Sometimes if a fellow standing around, they say they are going to move the cars.

Q. Have they said that to you?

Mr. Hartpence—That is objected to.

The Court—I will sustain that, that fellows around there said they are going to move cars.

Mr. Koch—Exception.

Q. Do not answer this question until the court has ruled. What, if anything, at any time, has any brakeman, or other employee of the railroad company told you to do or not to do at a time immediately before cars on the left hand track are moved?

Mr. Hartpence—That is objected to on the same ground; immaterial and irrelevant.

The Court—I will permit it as long as it is limited to the brakemen or trainmen.

Q. Brakemen or trainmen or any one else?

Mr. Hartpence—I pray an exception.

The Court—I will allow you an exception.

A. Brakemen, if there was anyone standing around—

Q. What have they said to you?

A. I was to watch, that they are going to move cars.

Q. What would you do when you were told to watch out that cars were going to be moved?

A. Get out of the way.

Q. Do cars overhang the track?

A. Yes, sir.

Q. How much do they overhang the track, can you tell us?

A. About eighteen inches.

Q. Now, you have told us that after your accident, you were in the shanty and your shoe removed; what was done then?

A. They carried me up to the engine room.

Q. What did they do for you at the engine room?

A. Gave first-aid until the doctor came.

Q. What was done for you then?

A. He bandaged it up and carried me to the ambulance and took me home, and they washed me a little and then took me to the Harrisburg Hospital.

Q. How far away is the Harrisburg Hospital?

A. About 43 miles.

Q. You were taken there in the ambulance?

A. Yes, sir.

Q. Now, can you tell me how your foot felt at this time?

A. Terrible pain in it.

Q. Where was the pain localized?

A. To my foot.

Q. What did they do when they got you to the Harrisburg Hospital?

A. Put me in bed. Some doctors came and said they would operate on me in the morning.

Q. What day of the week was that, by the way?

A. This happened Friday.

Q. What did they do Saturday morning?

A. Operate.

Q. On what part of you did they operate?

A. On my foot.

Q. Which foot?

A. Right foot.

Q. What did they do?

A. Cut it open and took some bones out. I think they took some bones out. It was all cut open and they took dead flesh off.

Q. What was the condition of your foot before this accident?

A. It was all right.

Q. Did you have five toes?

A. Yes, sir.

Q. Could you use your foot freely?

A. Yes, sir.

Q. Could you stand on it?

A. Certainly.

Q. Bear your weight?

A. Yes, sir.

Q. Did you have any impairment or difficulty with your gait or anything?

A. No, sir.

Q. After this operation, how many toes did you have left?

A. I didn't have any.

Q. How many did they remove?

A. They took three the first time; then they took two off about a week later.

Q. There was an interval of a week between the two operations?

A. Yes, sir. They had left my toes on about five weeks.

Q. Now, in the interval between the time you first entered the hospital and the time when they removed the toes, what if anything did you observe about your foot?

A. The toes were turning black, and a terrible smell.

Q. Was it then that they operated?

A. Yes, sir.

Q. After they finished operating on you, did you leave the hospital?

A. I left on the 24th of November.

Q. What was the date you entered?

A. The 17th September.

Q. Then where did you go?

A. Went home.

Q. Did you walk home?

A. No, my uncle took me home.

Q. How did he take you home?

A. In an automobile.

Q. Could you walk?

A. No, sir; I had crutches.

Q. How many crutches did you have?

A. Two crutches.

Q. Now, when you got home, what did you do?

A. What do you mean by that?

Q. Did you have any medical care and attention when you got home?

A. Yes, sir.

Q. Who came to see you?

A. Dr. Bobb.

Q. How often did he come to see you?

A. Every day.

Q. What did he do for you?

A. He treated my foot.

Q. Changed bandages and things of that sort?

A. Changed bandages and everything.

Q. Were you using crutches all this time, or could you get along without them?

A. I was using crutches all along.

Q. Did your foot get better?

A. No, sir; he said I would have to go back and have a piece of bone taken out.

Q. When did you go back?

A. 31st of January.

Q. Where did you go?

A. Harrisburg Hospital.

Q. How long were you at the Harrisburg Hospital this time?

A. The 11th February.

Q. Did they perform any further operations on your foot in that time?

A. Yes, took that bone out.

Q. Now, when you returned to your home on the 11th of February, were you able to walk?

A. With just crutches.

Q. You still had two crutches?

A. Yes, sir.

Q. Did you get any further medical attention?

A. Dr. Bobb's attendance. I went to Harrisburg to get the Alpine light put on it twice a week.

Q. How often did you go?

A. Twice a week.

Q. This continued how long?

A. About two months.

Q. Did your foot get stronger and better during this time?

A. I had it clotted up one time. I had terrible pain and Dr. Smith in Harrisburg opened it up.

Q. What did they do for it then; did they keep you there?

A. No, I went home; they just put the Alpine light on it then.

Q. When did you go to the hospital for the last time?

A. 31st of January.

Q. I mean for your last treatment at the hospital?

A. I could not tell you the exact date.

Q. Can you tell us approximately when?

A. About May sometime I think.

Q. Now, was your foot better at that time, in May?

A. No, it was not better.

Q. Were you able to walk on it?

A. I went to one crutch and a cane.

Q. Did you use one crutch?

A. One crutch and a cane.

Q. How long did you use one crutch and a cane?

A. About a month or a month and a half.

Q. Then what did you do?

A. Carried a cane.

Q. How long did you carry a cane?

A. Until about August.

Q. When did you finally return to work?

A. On the first of the year 1928.

Q. Where?

A. Timber Bank.

Q. Is that a colliery company?

A. Yes, sir.

Q. Now, what were your wages at the time you were hurt?

A. $4.62 a day.

Q. That is how much a week?

A. $27.72.

Q. Were you paid your wages during this interval of time while you were ill?

A. No.

Q. What wages were you getting?

A. $4.62 a day.

Q. That is the same wages you had; you are not back at your old job?

A. No.

Q. Did you have any hospital expenses?

A. Why, I paid the last bill.

Q. Do you know how much that was?

A. $62.50 I think.

Q. Did you pay any of the doctor's bills?

A. No, that was——

Q. Now, Mr. Kopenhafer, tell us how much of your foot has been removed?

A. All the toes and past the big joint in the big toe; I think some of the other joints.

Q. Any part of this portion of the foot?

The Court—Any part of the instep gone?

The Witness—Some bones, I know, on the side.

Mr. Koch—Will your Honor permit the jury to view the foot.

Mr. Hartpence—I object to that. I don't think it is material or relevant.

Cross-examination by Mr. Hartpence.

Q. Where are you working now, Mr. Kopenhafer?

A. Up in the blacksmith's shop at the colliery.

Q. Of the Colliery Company?

A. Yes, sir.

Q. The same company you were working for before?

A. Yes, sir.

Q. How much did you say you were getting now?

A. $4.62.

Q. Per day?

A. Yes, sir.

Q. $27.72 per week?

A. Yes, sir.

Q. Just the same as you did at the time you were injured?

A. Yes, sir.

Q. Do you recall the date after you were hurt when you actually did go back to work, to resume your work and your pay from the Colliery Company?

A. From the first of the year; he told me I could go on the first.

Q. The first of which year?

A. 1928.

Q. You were injured in September, 1926?

A. Yes, sir.

The Court—A year and several months later.

The Witness—Yes, sir.

Q. A year and seven months before, you were injured?

A. Year and several months.

Q. I understand you to say you were not paid your wages during that period?

A. Not wages.

Q. You were paid compensation, though?

A. Yes, sir.

Q. Under the Pennsylvania Compensation Act?

A. I got that from the colliery.

Q. You got payment from the colliery?

A. From the colliery, compensation.

Q. How much was that?

A. $2 a day.

Q. $12 per week?

A. Yes, sir. That is what they had paid.

Q. And that was paid until you went back to work on the first of the year, January, 1928?

A. Yes, sir.

Q. Have you been working steadily ever since?

A. Yes, except lay-offs when we had fires at the mines.

Q. That is when everybody was laid off?

A. Yes, sir.

Q. How old are you?

A. 23 my next birthday, in October.

Q. What date is your birthday?

A. 25th.

Q. October 25th?

A. Yes, sir.

Q. You were 21 then on October 25th, 1927?

A. Yes, sir.

Q. That is right, isn't it?

A. Yes, sir.

Q. As I understand your direct examination, the cars that are on this left hand track, these are ordinarily empty cars?

A. Yes, sir.

Q. And as you face the upgrade, the breaker is to your right?

A. Yes, sir.

Q. And the breaker track itself is to the right of the track on which the empty cars stood?

A. Yes, sir.

Q. I also understand you to say that the cars that came in on that breaker track are underneath the platform of the breaker itself?

A. The empties come up one track and into the yard and then they bring them down to the breaker and load them.

Q. And they come down to the breaker to load?

A. They come down to the breaker and load them.

Q. The cars are then underneath the loader platform, or breaker platform?

A. Just level, platform level with the top of the car.

Q. But the car goes underneath that platform?

A. You see the platform extends out to the corner of the car; then there are shoots come down and loads the car; the platform is not over the cars. The shoots are over the cars, where they load them.

Q. The shoot is over the car, and the car itself is right then at the platform; is there any place between the platform and the side or corner of the cars as they stand there to be loaded?

A. You mean the top?

Q. How close does the car come?

A. It comes pretty close, I could not say exact.

Q. Then the coal is loaded down in through the shoots right into the car?

A. Shoots into the center, pulls a lever and then it goes——

Q. What becomes of the loaded car?

A. A man runs along, uses a bar and takes them downgrade. Takes them down to the breaker.

Q. What becomes of them after that go downgrade and down to the breaker?

A. The engine comes and takes them away when they come up at the end of the day, or whenever they get them.

Q. Is there any particular time during the day when they do that, or do they just come there from time to time?

A. They used to come in any time.

Q. Now, these empty cars, they are on the left hand track; how do they get there?

A. The train brings them up.

Q. And then, as a matter of fact, they go up that upgrade to a certain point where they cross a switch, and then they come down by gravity downgrade to the breaker house; that is the way it is done?

A. They have to start them up there. Sometimes; it just depends how they run.

Q. What do they start them with?

A. They use a bar; I didn't work up there.

Q. What is the man called that does that work up there?

A. What do you mean?

Q. That starts the car back?

A. There is a man runs them; then they have a man cleaning the track off and catching cars. Sometimes they cut them.

Q. They are working for the colliery?

A. Yes, sir.

Q. You say you were a car, what?

A. Barrer.

Q. Barrer; is that what you mean?

A. Car barrer, to start the cars.

Q. What is the car loader; you spoke of him?

A. He is a loader.

Q. Where does he work?

A. He works up on top of the platform.

Q. When did it become necessary for you to use this bar to move cars?

A. When the cars would not run.

Q. And then only?

A. Yes, sir.

Q. Only when the cars would not run?

A. Yes; it wasn't necessary when they started. Sometimes they would start themselves.

Q. Why wasn't it necessary to bar them then?

A. Well, they were already started.

Q. Started from what point?

A. From under the breaker there. Sometimes they would go and sometimes they would not; it would just depend on how, whether there is a break in the rail or something.

Q. When they came down to the breaker and were loaded, sometimes they would start because they were on that slight downgrade?

A. Yes, sir.

Q. And then they just went on their way, but if they did not start, you would go down and give them a push with the bar?

A. I had to start them with the bar.

Q. That was your business?

A. If I could not start them, I would get someone else to start them; sometimes it took three or four.

Q. Three or four men?

A. Yes, sir.

Q. I also understood you to say on your direct examination, you sometimes started cars in the same way on the left hand track, this empty track?

A. If they would be in the road.

Q. What do you mean by that?

A. Why, there was a path to go up to the other steps, go up into the breaker. If the cars were across there, instead of walking up around them, to start them up, they would have the loaders from the colliery would get on them and run them back a piece.

Q. Would run them on the downgrade, to get out of the way of this path you speak of?

A. Yes, sir.

Q. Then you say the only thing you——

A. Yes; they have to bring one—you put a crew on, they would not use——

Q. What was that path used for?

A. That would go back where we have the loaded cars from the breaker, up to the top of the breaker.

Q. What was up at the top of the breaker?

A. These bins that the coal goes in, the shaft it goes down the shoots and is loaded into the railroad cars.

Q. Was that on the left hand side of the two tracks or on the right hand side of the two tracks?

A. On the left hand side of the two tracks.

Q. The breaker platform, then, was on the right hand side of the two tracks?

A. Yes, sir.

Q. Of course, you were not obliged to go across these tracks and use that path to go up there into the breaker, not being your work, were you?

A. If there was a break-down or anything in there,

we would help to shovel, or anything like that, we would go up.

Q. You would go up if you were told to?

A. Yes, sir.

Q. In your operation and work as coal barrer, you were obliged to go up the tracks and to the breaker, were you?

A. No.

Q. How did these empty cars on the left hand track get up the upgrade to the point where they started back on the downgrade; how was that done?

A. How was that done?

Q. You said these cars, there were about seven or eight cars standing on the empty track, how did you get these cars up this upgrade and across the switch point where they came back on the breaker track on the downgrade; how was that accomplished?

A. Cars were standing down at the breaker; they had not taken them down——

Q. No, I mean how would they move these cars?

A. By the engine.

Q. In order to go on the downgrade to the breaker track?

A. With the engine; they put them in the yard up there.

Q. There was a yard up there?

A. Yes; I don't know how many tracks.

Q. Held how many cars?

A. A day's supply.

Q. And then how were they started out of that yard down the breaker track as you needed the cars?

A. Well, sometimes they would start themselves; sometimes they would use the bar on them, and then by a little engine pulled them if they got stuck.

Q. Who had the little engine?

A. A young fellow there that used to run the plane; he would go over and run the engine.

Q. That was one of these little donkey engines?

A. It is an engine on tracks, it is a stationary engine; they have a rope to it to a spool, like.

Q. That would wind a rope up on a spool, and that would give the car a start?

A. Yes, pull it.

Q. That was operated by the colliery?

A. Yes, sir.

Q. You said you were just about through your day's work when the accident happened?

A. I was just about getting through.

Q. Where had you been working for half an hour prior to the time you quit?

A. I was working right there.

Q. What were you doing?

A. Barring cars.

Q. In doing that, did you have to get down on the track?

A. On the track I was barring on, yes, sir. I had to put a bar back of the wheel and the rail and start it off.

Q. You put this in back of the car?

A. Push it in.

Q. It acted as a lever to push the cars out; you would put your bar right on the rail of the track to do that?

A. Yes, sir.

Q. You got up on the track, in order to put the car from the upgrade on to the downgrade?

A. Yes, sir.

Q. I am just trying to get it right, because I have never been there. I understood you to say it was 3:25 when you made up your mind it was about quitting time?

A. Someone said it was about quitting time, to put the tools away.

Q. Who was the someone, a fellow employee?

A. Someone around there. They used to say that in the evening.

Q. Whose direction did you take as to starting work and finishing work?

A. By whistle.

Q. Who was your boss?

A. Mr. Hearder.

Q. What is his position?

A. He is the breaker boss; Clinton was the main boss.

Q. You started and stopped by whistle, did you, but there was usually someone who would say when it was quitting time?

A. We would take the blocks out before quitting; we would put them all right and safe, and when we went up in the morning would take the blocks out.

Q. What blocks?

A. The blocks are about that long, went in between the wheels.

Q. To keep the cars from rolling downgrade?

A. So that it would not go ahead.

Q. Did you, at night, when you got through loading your cars, did you put the brake on so as to hold them overnight?

A. Yes, sir.

Q. Had you been doing anything like that prior to this accident?

A. Well, I just barred two in.

Q. So that there were no cars left on the breaker track that afternoon, were there?

A. There was just the front end of the one on the breaker, just the front end; I don't know whether it was loaded, whether there was any coal in it, or not. I don't know if they started it.

Q. Had you blocks the cars yet?

A. No, sir; it was running yet.

Q. Then what did you do then?

A. I put the bar up against the place where we always put it, and I saw the hatchet there.

Q. Where was the hatchet?

A. In between the two tracks.

Q. How near was it to this path that you said ran across the tracks?

A. Very near it.

Q. And you said there was how much space between the two tracks, loaded and empty?

A. About eight feet, you know, to the switch.

Q. So that between the right hand rail of the empty track and the left hand rail of the breaker track there was about eight feet?

A. Yes, sir.

Q. Well, then, you picked up the hatchet and what did you do then?

A. Started down these steps.

Q. Those steps were on the breaker, were they?

A. Yes, sir.

Q. And they were to the right of the right hand rail, were they?

A. The steps come down in the middle of these two tracks; there was one track, there was other steps came down between them.

Q. Steps that came down between these two tracks?

A. Yes, sir.

Q. Which side of the steps did you start to go down?

A. I started to go down the other steps; these cars on the breaker was moving. I just started them.

Q. That was on the breaker track, wasn't it?

A. Yes; I had started them.

Q. Then you started to go around the steps on the side nearest the empty track?

A. Yes, sir.

Q. How much space was there between the track and the steps?

A. About three or four feet.

Q. And then what happened?

A. The crash came and knocked me down, a terrible crash. I could not get out of the road in time and the cars knocked me down.

Q. Let us see; how far were from the steps was the nearest end of the cars when you started to go around the steps?

A. About half way between the steps and the end of the steps and the corner of the breaker.

Q. How many feet would you say that was about?

A. About ten feet I should imagine.

Q. About 10 feet?

A. I imagine it was something like that.

Q. Can you be a little more certain than that?

A. No, I can't.

Q. Was it as far as from you to me, for instance, or further than that?

A. About that or a little further. I don't know. I wasn't working out there so long.

Q. How long had you been working there?

A. Several months. I don't know how many it was.

Q. You had been working in the colliery how long?

A. About three years; somewhere around that.

Q. As I understand it then, you started to go around the end of the steps on the side next to the empty track, there was about three or four feet between the steps and the track and about ten feet between the steps and the nearest car?

A. Yes, sir.

Q. All of a sudden you heard a crash and you were thrown down?

A. Yes, sir.

Q. That is correct, is it?

A. Yes, sir.

Q. When you started to go around the steps, did you look to see whether there was anybody around, in the train crew or in the locomotive, to see whether these cars were all to be moved at that time?

A. I didn't see any.

Q. I say, did you look to see if there was anybody?

A. I looked down and I didn't take notice of any.

Q. Did you do that as a precaution before you went between the steps and the track, or did you just do it as a matter of course, or did you just do it?

A. I just looked and I didn't notice much of anything. I just stepped there and I didn't see down.

Q. Why not?

A. Why, I just stepped around there. I was looking down where I was walking.

Q. You were looking down?

A. I looked, you know how a person walks.

Q. There was seven or eight cars there?

A. I imagine; I don't know how many they were.

Q. I understood you to say there was a curve after you got downgrade a little ways?

A. Yes, sir.

Q. How far away would you say that curve was?

A. About 500 feet; I would not say how far it was.

Q. Let me ask you this way; was it a straight track down to the end of where these cars were standing or did the curve begin where the cars were standing; were the cars standing on the curve or standing on the straight track?

A. They were on the straight track.

Q. You didn't see anything moving?

A. No.

Q. You didn't see the locomotive coming?

A. No.

Q. You didn't see any cars moving up towards these others that stood there?

A. I didn't take notice, or I would not have been there.

Q. Did you get all the way around the corner between the steps and the rail before you were struck?

A. I really could not tell; it was so sudden that I didn't realize what happened.

Q. Now, as a matter of fact, didn't you go over to get in back of the car for the purpose of urinating?

A. No, sir.

Q. You were not standing there urinating at the time that the cars came along and you were thrown down?

A. No, sir.

Q. You know Mr. Kissenger, the railroad agent there?

A. Yes, sir.

Q. After the accident was over sometime, you told him that is what you were doing?

A. They said my clothes was open, and asked if I was doing that, my shirt was open too, and my pants tore.

Q. Didn't you tell him that?

A. Someone wanted me to sign something that I was, but I didn t sign it.

Q. I am asking you now whether you didn't tell Mr. Kissenger that is what you were doing?

A. No.

The Court—Is there a platform between the two tracks?

The Witness—Yes, sir.

The Court—A little platform?

The Witness—Yes, sir.

The Court—And it takes up the space between the two tracks so that it leaves about three or four feet on each side of the platform to the nearest rail?

The Witness—Yes, sir.

The Court—So that you can walk either side of this platform in the space of three or four feet from the rail on which the loaded cars are, or the track on which the loaded cars are, or the track on which the empties are?

The Witness—You see, inside the platform is high; there is just a wall between that and inside the breaker. It makes it more convenient——

The Court—I mean in between the tracks where the steps are, where the steps lead to, so that you can cross?

The Witness—No, just the breaker was right up these steps to the loader platform.

The Court—Go over the tops of the cars if there were any there?

The Witness—You just go up these steps into the breaker, and there is where you load.

The Court—Does the breaker go all the way over that one track?

The Witness—Yes, over the two tracks.

The Court—The breaker extends out over both tracks?

The Witness—The empty tracks is just sort of—there is no machinery on; like a bridge.

The Court—And extend out so that both tracks run underneath this building, what you call a breaker; is that it?

The Witness—The load tracks; the breaker runs over that track.

The Court—And extensions of what is known as the breaker go out over the empty tracks as well?

The Witness—Yes, sir.

The Court—And these steps go right up into that breaker, in between both tracks.

The Witness—Up to the loader platform, and if you want to get to the breaker, you have to go down and go across this track.

The Court—How wide are the steps that go up?

The Witness—Three feet.

The Court—There is no platform, it is just straight, right up from the center?

The Witness—Platform on the bottom.

The Court—Where the cars come, coming.

The Witness—Yes, sir.

The Court—Being pushed by the engine or pulled up?

The Witness—Pushed.

The Court—What way were you facing at the time you were hit?

The Witness—Facing towards the car.

The Court—Facing towards these approaching cars?

The Witness—Yes, sir.

The Court—You were facing in the same direction in which the cars came that struck you?

The Witness—Yes, sir; there was cars standing there. They bumped into these cars that were standing there.

The Court—You were facing towards the cars which were standing there and which afterwards hit you?

The Witness—Yes, sir.

The Court—The cars standing there were about ten feet away from you when bumped?

The Witness—No, it was not ten feet.

The Court—I thought you said so?

The Witness—No, I said it was half way between the corner of the breaker and the steps; the front point of the breaker and the steps was about ten feet. That was about half, about five feet.

Q. Well, in picking up this hatchet that you say you had, were you walking towards the cars or away from the cars?

A. Towards the cars.

Q. Where were you going?

A. Inside the door; they are always hidden at night, so that no one would take them.

Q. You say you worked at the colliery about three years?

A. Yes, sir.
Q. Where was the colliery located?
A. Lykens.
Q. Lykens, Pennsylvania?
A. Yes, sir.
Q. Did you live there?
A. Wisconisco.
Q. How far is that away?
A. About a half mile, or a mile.
Q. You still live there?
A. Yes, sir.
Q. Lived there all your life?
A. Yes, sir.

Redirect examination by Mr. Koch.

Q. You say that an engine was used to push the empty cars on the left hand track to the yard up above; now whose engine was that?

A. It was a Pennsylvania.

Q. Did you see that locomotive at the time?

A. No; it was around the curve; I didn't see it.

Q. That is at the time of the accident it was on the curve?

A. Yes, sir.

Q. And that was below you?

A. I didn't see the engine at all this side; it was below the cars.

(Adjourned to 11 A. M. April 20th, 1929.)

April 20th, 1929. 11 A. M.

The Court—Gentlemen of the jury:

Due to the fact that there are some 20 or 25 witnesses coming from Pennsylvania, and inasmuch as the case could not possibly be finished in one day, and it would have to go over until Monday, and both parties having to bring their witnesses from Pennsylvania, it has been agreed

by counsel not to continue the case today, but to have it go off until Monday morning.

(The court then warned the jury that during the week-end they were not to discuss the case nor permit anyone to discuss it with them.)

(Adjourned to Monday, April 22d, 1929, at 10 A. M.)

April 22d, 1929. 10 A. M.

Mr. Koch—I find I failed to ask the plaintiff one or two questions and I would like to ask him these questions. They are questions that should have gone in on his examination in chief, and I ask the permission of the court to recall him.

Robert A. Kopenhafer, recalled.

Direct examination by Mr. Koch.

Q. Now, Mr. Kopenhafer, I show you this picture and ask you to tell us whether or not that picture describes and shows the colliery and the surrounding conditions as they were on the day you met with your accident?

A. Yes, sir; that is the very same place.

Mr. Koch—I offer it in evidence.

Mr. Hartpence—Subject to verification, of course, or if it should turn out it is not a correct representation of it, I have no objection to its being offered.

Accepted and marked as plaintiff's *Exhibit P*-1 of this date.

Q. Now, with the number "1", will you please indicate on this picture, the stairway which you have described as coming between the two tracks?

Mr. Hartpence—Also put a circle around it.

(Witness complies.)

Q. And the track which you have described as being the track on which you bar the cars under the loader platform, will you mark that on plaintiff's *Exhibit P*-1 with a "2" and a circle?

(Witness complies.)

Q. Will you also mark the track on which the empty cars were standing immediately prior to the accident, with a "3" with a circle?

(Witness complies.)

Q. I see that in looking at the picture, in the right hand corner of it there is another set of steps that leads upstairs and into a passageway into the breaker; where does that lead?

A. This leads on to this passageway and into the breaker.

Q. And under what circumstances and on what occasions do you use this staircase and that passageway?

A. They get blocked up, and go up and shovel coal into the bins. If the bins get too full, you shovel away from the bins and use it to go up to the toilet and you go up for drinking water.

Q. Is that the only way to get into that portion of the breaker?

A. Yes, sir; you go up way up around.

Q. You mean on the other side, up around the hill?

A. Yes, sir.

Mr. Koch—With the court's permission, I will show the picture to the court and then to the jury.

Mr. Hartpence—Which is the so-called "empty" track.

The Court—That is No. 3.

Mr. Hartpence—For the purposes of the record, we admit that all the property at the scene of the accident, at the collieries, belongs not to the Pennsylvania Railroad Company but to the Colliery Company, except that the so-called "empty" track, on which these cars were standing and which moved at the time the plaintiff was injured, the track itself is built and maintained and owned by the railroad company, that is, the trackage itself.

Q. Now, on the day of the accident and just before, did a brakeman, conductor, or other member of the crew, say anything to you about the cars being moved?

Mr. Hartpence—That is objected to as immaterial and irrelevant; repetition.

The Court—I will permit it.

Mr. Hartpence—Exception.

A. We were not warned; no one came ahead and warned me that any cars were to be moved.

The Court—Is it for this purpose you put the witness back? You are going over the same thing you went over the other day.

Q. Now, Mr. Kopenhafer, when you had worked there right along on the job which you have described as being that of car barrer, during all the time you worked, what have you observed to be done before empty cars on the left hand track were moved?

Mr. Hartpence—Objected to as immaterial and irrelevant.

The Court—I will allow it, with an exception. I don't think that upon the case as presented, upon your theory, that it makes any difference, if he was where you say he was, whether or not he had any notice to him, or custom, or what not. If the man was not on the tracks or between them, as your theory is, it doesn't seem to me material whether there was any notice.

Mr. Koch—I have an authority.

The Court—I have already ruled upon it. I will allow it and give an exception.

Mr. Hartpence—Exception.

A. They always come ahead to see if the switches are all right and the track is clear and warn me or anybody around the track that they are going to move cars.

Q. Was that done on the day of the accident?

A. No, sir.

Recross-examination by Mr. Hartpence.

Q. Mr. Kopenhafer, that warning that you have just now referred to, would be given before they started to move the train itself up toward the storage yard; isn't that right?

A. Before they moved the cars right there, yes, sir.

Q. Now, on the day that you were hurt, you don't know whether they had started to move those cars along the tracks or not, do you?

A. There was no one around to warn me.

Q. I say, you don't know whether they had started to move the train or those cars in the way that they did move them when, you say, they usually did give warning?

A. The brakes was on them cars.

Q. The brakes were on the cars?

A. Once they were standing there, to hold them. It was downgrade.

Q. Otherwise they would not stand there?

A. No.

Q. So I say, you don't know whether they were getting ready to move that train of cars in the usual way or not, do you, at the time you were hurt, or whether it was moved because of some other occurrence?

A. Well, they didn't come ahead and warn me.

Q. That doesn't quite answer my question: I will ask the stenographer to repeat it:

(Question read as follows: "You don't know whether they were getting ready to move that train of cars in the usual way or not, do you, at the time you were hurt, or whether it was moved because of some other occurrence?)

A. I don't know what they were doing.

Q. This photograph, P-1, Mr. Kopenhafer, as you look at the photograph, that is looking downgrade?

A. Downgrade, yes, sir.

Q. And the storage track would be back here, to the left of the picture?

A. Yes, sir; around here is the switches.

Q. Here where you have marked the figure "2", that is the track that you call the "load track"?

A. Yes, sir.

Q. That runs underneath the breaker?

A. Yes, sir.

Q. And while the car is in there, it is loaded with the coal from the top?

A. Yes, sir.

Q. And that is the track you were working on when you barred the car forward?

A. Yes, sir.

Q. Calling your attention to this stairway which you have marked "1", with the cars standing to the right of that, there is some space between the car and the side of the breaker there, isn't that so?

A. Yes, sir.

Q. My recollection is that the other day you said there was about three feet?

A. Yes, sir.

Q. That is right?

A. About three feet.

Q. Of course, in the photograph, it does not show very much space?

A. No, it doesn't show so much.

Q. But there is three feet between the cars that stand there and the side of the breaker, as I recall your testimony?

A. Yes, sir.

Mr. Hartpence—I would like to ask one or two questions that occurred to me over the week-end, on cross-examination.

Q. Mr. Kopenhafer, do you know Mr. Fravel from the claim department of the railroad company?

A. I don't know him by name.

Q. You know the young man that came to see you?

A. There was several.

Mr. Hartpence—Is Mr. Fravel here?

Q. This gentleman, do you recall him?

A. Were you the man in the hospital?

Q. Yes, he went to the hospital?

A. I could not tell you for sure. There was a man in the hospital.

Q. Did you talk to Mr. Fravel, or someone from the claim department shortly after you had your accident, and say that you had gone in back of the car standing there to urinate, and that the cars had moved and that is what caused you to be hurt?

A. No; they wanted me to sign a paper that I was in the wrong.

Q. You didn't say that, did you, that I just asked you, to him or whoever it was?

A. No, sir.

Q. Shortly after you were injured, while there were some people standing around there, didn't you say at that time that you had gone there to urinate, and that is what caused the accident?

No, sir.

Q. Did you ever start suit against the railroad over near your home for this accident, Mr. Kopenhafer?

Mr. Koch—I object to that as incompetent, immaterial and irrelevant.

The Court—I will permit; it might show an entirely different allegation, or what not.

Mr. Hartpence—I feel it is competent and material. What I hope to bring out is, if it is a fact that he did not, coupled with the fact that he brought suit here in a given time, it would go to indicate that perhaps he felt he had no cause of action and that it would go to bear out facts which later on in the case I will bring in. That is one reason.

The second reason is in line with my motion, as to jurisdiction.

The Court—Yes, I think it follows in line with the motion that you made.

Mr. Koch—I think that is the only ground, if at all. I certainly object to the first ground.

The Court—I will permit the question.

Q. (Question read as follows: Did you ever start suit against the railroad over near your home for this accident, Mr. Kopenhafer?)

A. I don't know where it was started.

Q. Did you ever bring any other suit against the railroad company, this defendant, for this accident, except this one?

A. This is the only one.

Q. And referring to the record and the date of the issuance of the summons, which was September 9th, 1927, pretty nearly a year after the accident, will you state, Mr. Kopenhafer, how it was that you came to start this action a year after the accident happened, and that you didn't start it before?

Mr. Koch—I object to that as utterly incompetent, absolutely improper. As long as he started his suit within the time of the statute of limitations, that is all we are concerned with.

The Court—Objection sustained; with an exception.

Mr. Hartpence—Exception.

Q. How did you come to bring this suit in Hudson County Circuit, New Jersey, anyway?

Mr. Koch—The same objection. Under the ruling of your Honor and the decisions, he had a right to start the suit here.

The Court—I don't know whether he has not, but it will be tested out. I will sustain the objection, and allow an exception.

Mr. Hartpence—Exception.

Mr. Hartpence—In line with this question, it is my intention to cross-examine this witness to show all the circumstances surrounding the commencement of the suit, how and when and why

and under what conditions and terms it was brought, and also to show the burden that it casts on the defendant railroad company to defend a suit in this State, under the circumstances of this case, to bear out the motion which was made, on the ground it was an unwarranted burden on interstate commerce. I take it, in line with your Honor's ruling, it becomes unnecessary for me to proceed with the line of questioning, and I desire to put my object on the record, so that my exception will show what it is covered by it.

The Court—All right.

Q. You spoke, on this photograph P-1, of the outside stairway which led up to the top of the passageway there for the purpose of getting over to look after the coal if it clogged and to go to the toilet and for a drink of water; where was the toilet located?

A. Right here. (Indicating.)

Q. Right at the extreme right hand end?

A. Sort of little trough or whatever it was.

Q. That was right on top of the outside stairway?

A. Go in this way, a little extension out that way—you can't see.

Q. It was right near the end of that passageway where the outside steps go up?

A. You go in this door here. I don't know exactly how many feet up, there is another little thing——

Q. Was there any toilet near by where you worked, except that one?

A. Not that I know of.

Dr. Andrew C. Ruoff, sworn for the plaintiff.

Direct examination by Mr. Koch.

Q. You are duly licensed to practice medicine in the State of New Jersey?

A. I am, sir.

Q. Are you licensed to practice in any other State?

A. New York State.

Q. Do you practice in the State of New Jersey?

A. I do.

Q. Have you made any specialty in the practice of your profession?

A. I have; traumatic surgery.

Q. Will you tell the court and jury, please, precisely what is the layman's meaning of "traumatic surgery"?

A. Well, traumatic surgery is that field of medicine that deals with treatment, examination, and diagnosis of injuries resulting from blows or any accidental cause.

Q. Did you at my request examine the plaintiff, Robert A. Kopenhafer, in this case?

A. I did.

Q. Will you tell the court and jury, please, what your examination of him disclosed?

A. The examination took place the last day that this matter was on, I think last Thursday, in an adjoining room. I examined the man's right foot. I found on examination that he has lost approximately two-thirds of the foot. There is a marked scar that is semi-lunar in shape. It starts on the outer aspect of the remaining stump, goes forward, and extends inward to the inner aspect. The portion of the foot that makes up the right ankle joint is still intact.

Q. When you say there is a scar on the outer aspect and it runs through to the inner aspect, you mean that the scar extends from the outer side of the foot into the inner side?

A. I said it was semi-lunar.

Q. How far back does that scar extend?

A. About half way the distance of the remaining portion of the stump, that is, what remains of the foot.

Q. Does it go into the arch of the foot, doctor?

A. Well, the greater part of the longitudinal arch is gone because of the amputation. There is no more arch left.

Q. How much of the heel is left?

A. Well, the entire heel bone is still intact. The heel was not involved, as a matter of fact the man is today walking on his heel.

Q. What can you tell us as to the condition of the stump and the bones of the stump?

A. Well, there is a marked scarring on the base of ball of the foot, what remains of the ball of the foot. There is a bony protuberance that is feelable on examining with the fingers and is apparently the result of displacement of a portion of bone in this area, causing the man to be compelled to wear a soft patch on the bottom of his foot there, to prevent pressure on this protuberance.

Q. From your examination and experience, can you estimate for us what proportion, if any, of loss of the use of his foot there is, as a result of this accident?

A. Well, I think he is better off than if he had an amputation there at the ankle joint, which would give him a hundred per cent. loss of function of the foot. I think the disability is approximately 75 to 85 per cent. of loss of the foot.

Q. And the condition which you have found, is that a condition which would leave a patient free from pain, or is there a possibility or probability of further pain there?

A. Well, what remains of the foot, to operate in conjunction with the ankle joint, is not at this time producing any pain. The pain that he does have comes from the scar tissue that he has on the forepart, as I have described, the semi-lunar scar, plus the fact that there is a very irregular bone protuberance which is covered by soft tissue, and when he stands on same produced some degree of pain.

Q. Is that a condition which in your opinion is permanent, or can it be cured?

A. Operative intervention can easily remove part of the bone in irregular position.

Q. Would that have any effect on his condition?

A. He would then have a scar on the bottom of his foot. It is a question how much more pain that scar would cause than what he now has. It is a fifty-fifty proposition. He may be better off the way he is.

Mr. Hartpence—No cross-examination.

William O. Morris, sworn for the plaintiff.

Direct examination by Mr. Koch.

Q. Where do you live, Mr. Morris?

A. Lykens, Pennsylvania.

Q. Are you employed by the Susquehanna Colliery?

A. I am.

Q. Is that the same place where the plaintiff in this case is employed?

A. Yes, sir.

Q. How long have you been employed there?

A. About nine years.

Q. What is your type of work now?

A. Loader on railroad cars.

Q. Where did you work in the colliery?

A. On the bottom of the breaker, on the loader platform.

Q. Is that the platform under which the cars are barred by Mr. Kopenhafer?

A. Yes, sir.

Q. Before you worked as a loader on the platform, what was your job?

A. Car barrer.

Q. Where did you work as car barrer, at the same colliery?

A. Same colliery, Susquehanna.

Q. Did you, in fact, have the job that Mr. Kopenhafer has?

A. The same job.

Q. Now, when you worked right along there Mr. Morris, on the job which you have described as that of car barrer, before you became a loader, during all the time you worked there, what have you observed to be done before empty cars on the left hand track were moved?

Mr. Hartpence—That is objected to as immaterial, irrelevant and incompetent.

(Argued; objection sustained, with an exception.)

Mr. Hartpence—So long as my objection goes to whatever question is put along this line, and my exception is allowed, I don't like to be always objecting.

The Court—Your objection to the whole line will go, and an exception allowed you.

Mr. Hartpence—That will be all right.

A. It is always fitting and proper——

Q. No, answer the question. (Question read as follows: Now, when you worked right along there, Mr. Morris, on the job which you have described as that of car barrer, before you become a loader, during all the time you worked there, what have you observed to be done before empty cars on the left hand track were moved?)

A. To see the conductor or brakeman come ahead, see the switches are all right and warn all workmen around the place that they were going to move the cars.

Q. Now, on the day of the accident, were you working at the colliery?

A. Yes, sir.

Q. Will you point out for us in this picture, by marking it with the number "4" and a circle, where you were working?

Mr. Hartpence—Is that P-1?

Mr. Koch—Yes, P-1.

A. Where I was working or where I was at the time.

Q. Show us where you were working first?

A. Here, inside that door on the platform.

(Marking exhibit.)

Q. Will you tell us what, if anything, you saw on this 17th day of September in 1926?

A. On September 17th, 1926, about 3:25 in the afternoon, I had finished loading a car and had just walked to the top of the stairway there on the platform and put on my coat. It was just about five minutes to quitting time. While in the act of putting my coat on, I heard a terrible crash which drew my attention to the "empty" track, and looking down, I see Mr. Kopenhafer fall to the track in a rolling position, and fall to the track. He caught his right foot back by the heel and was dragged along the rail for a length, I judge, of about thirty feet or more. While being dragged, he hollered as if in terrible agony. As he hit the ground about thirty feet or more away, he was released and the car passed over his foot. Being on the top step, I rushed to his assistance, grabbed hold of him, because he seemed dazed.

Q. Let me ask you; when you grabbed him, where was his right foot?

A. His right foot was on the opposite side of the track; it was already released.

Q. Where was his head?

A. His head was lying toward the direction of the moving train.

Q. Where on this picture can you show us he was lying; mark it with a "5" and a circle?

A. About in here (indicating).

Q. That is, he was lying in that space between the "empty" track and the track which leads to the end of the loading platform?

A. Yes, sir.

Q. Now, when you ran to his assistance, what did you do with him?

A. Grabbed hold of him, and held him until some help came, more men.

Q. Where did you take him then?

A. Across our track which leads under the breaker, also the slate track, into the cement shanty on the opposite side.

Q. What did you do for him then?

A. Cut loose all his shoe and removed his shoe; it was full of blood.

Q. After you did that, what did you do?

A. From there, we carried him up over the hill to the engine house where first-aid was administered.

Q. Did you leave him there?

A. From there he was taken care of by the first-aid and carried out to the ambulance.

Q. And that was the last you saw of him at that time?

A. Yes, sir.

Q. You say when you saw Mr. Kopenhafer, he was lying on his back; is that correct?

A. Yes, sir.

Q. What was he doing?

A. At the time he was released?

Q. Immediately before that?

A. He was being dragged on his back.

Q. Was he doing anything or just lying still?

A. At first, when he was caught, he was on his feet trying to keep after it; the speed of the train was too much, it overcame and dragged him.

Q. By wiggling his body?

A. Yes, wiggling. He hollered as if in great agony.

Q. Now, when he got in the pumphouse, what was the condition of his clothes?

A. Pumphouse?

Q. The little cement shanty?

A. His clothes were in very irregular position; his shirt and trousers were tore; his shirt was open, also his trousers were open.

Q. What was the condition of his shoe?

A. The shoe was cut.

Cross-examination by Mr. Hartpence.

Q. Which foot was it that was injured?

A. Right foot.

Q. And I understand, when you saw him, he was on his back, with his head pointing towards the breaker, the loading track; is that right?

A. Toward the breaker, yes, sir.

Q. Well, that would put his left foot close to the car wheel, as it moved along, wouldn't it?

A. If he were lying straight it would be, but his feet were crossed.

Q. It was his right foot that was caught; you are sure of that?

A. Yes, sir.

Q. As he moved himself along and tried to keep away from the car, did you see where his left foot or left leg was?

A. His left leg was crossed under the right, doubled under the right.

Q. How far would you say that he was carried along on the ground or moved himself along with the car before he finally stopped at the place you have indicated on the photograph?

A. He helped to move himself, I would judge about five or six feet, when he lost his balance and was dragged the balance of the distance of 30 feet or more.

Q. Right on his back?

A. Yes, sir.

Q. What kind of material was there there between the two tracks?

A. No material of any kind.

Q. I mean between the rails of the "empty" track and the loading track; how was it filled in between?

A. Filled in with sort of dirt, ash.

Q. Was that dirt level with the ties, or the ties a little above the ash?

A. Just about level I should judge.

Q. You heard a terrible crash, as I understand you?

A. Yes, sir.

Q. And that is what called your attention?

A. Drawed my attention to the track.

Q. You looked out to see what was happening?

A. Yes, sir.

Q. Then it was that you saw Mr. Kopenhafer there in the position that you have described?

A. I saw him fall to the track.

Q. You saw him fall to the track?

A. Yes, sir.

Q. Well, was his foot caught then?

A. Not at the time he was knocked to the track and rolled in a rolling position and rolled over to the right track but didn't get far enough to clear. His right foot in the position he was, he was caught with the heel, the heel of his right foot.

Q. You saw him then, in the act of falling?

A. Yes, sir.

Q. How was he falling, backwards or forwards or sideways?

A. Backward.

Q. When he fell and struck the ground, did he land on his back?

A. Mostly on the back, yes, sir.

Q. Well, how else besides on his back?

A. On his back is practically the way he fell, in a rolling position.

Q. Did he fall towards his right side or left side?

A. Towards the right side.

Q. How much of his leg or foot extended over that nearest rail?

A. I can't say as any was over the rail.

Q. What did you say he was trying to do as he rolled himself over?

A. Tried to roll himself clear of the track, I imagine, and as he rolled over to get his body and everything on the outside of the track, but was caught by his right foot.

Q. Well, he was not clear of the track then, when he fell?

A. No, sir.

Q. When you first saw him, and you saw him falling, how far away from the little steps was he, these little steps leading up right alongside of the car or up into the breaker, which is marked "1"; how far up here along the track was he when you saw him fall?

A. He fell here, right at the steps, probably in from the steps a piece.

Q. What do you mean by in from the steps a piece?

A. Probably he was in the act of going around here.

Q. Now, when you first saw him, then, he was a little bit beyond the steps?

A. Yes, just right around the steps.

Q. And when you picked him up, he was up here where you have marked the number "5"?

A. Yes, sir; somewhere around there.

Q. Do you know what his duties were there: what was his work?

A. His duties were to bar cars; in other words, to start cars under the breaker and also start them under the breaker when they didn't run for the load.

Q. That was over on what you call the breaker track?

A. Yes, sir.

Q. That was after they had come down from your storage yard, to be filled at the breaker?

A. Yes, sir.

Q. Had you seen those other cars standing on the "empty" track that day?

A. Yes, sir, all day.

Q. Do you know why they were standing there, had been standing there?

A. Because the yard was filled at the time; there wasn't supposed to be space there. It was the usual thing to put them there, where they were, until the train

pushed up again and there is enough room in the storage yard to put them in.

Q. So that if cars taken from the storage yard to be loaded on the loading track, or breaker track, were not taken out fast enough to accommodate all the empties, that were pushed in, they were kept outside on this other track until there was room for them?

A. Yes, sir.

Q. That was your usual thing?

A. Yes, sir.

Q. Nothing out of the ordinary in that, at the time this accident happened?

A. No, sir.

Q. How long have you worked at the collieries, Mr. Morris?

A. About nine years.

The Court—Did you see this man before he was struck?

The Witness—I saw him off and on all day.

The Court—I mean just prior?

The Witness—No, sir.

The Court—He was in the act of falling when you first saw him?

The Witness—Yes, sir.

The Court—And you didn't see where he was standing just prior to this crash?

The Witness—No, sir.

Q. How much space was there, Mr. Morris, between the empty cars and the side of the breaker there at the steps, where you said he was when you first saw him, between the car standing on the empty track and the side of the breaker?

A. I judge about three feet. I never measured; I judge about three feet.

Q. Now, when he fell backward, then, he must have been beyond the edge of the breaker and the steps, or else he would have struck the building itself?

A. Well, he fell towards the tracks.

Q. You mean he fell in the direction of the "empty" tracks?

A. Yes, sir; here he fell (indicating).

Q. He fell on the "empty" track?

A. Yes, sir.

Q. So that when he fell on his back, he fell across the rails of this track on which the cars were proceeding?

A. Yes, sir.

Q. And then rolled himself completely off that track?

A. Yes, sir.

Q. Toward the breaker?

A. Yes, sir.

Q. Except the foot that was caught?

A. Yes, sir.

The Court—When you first saw him, the man was practically off the track?

The Witness—He was falling on his back.

The Court—Falling backwards on what you call the "empty" track?

The Witness—Yes, sir.

The Court—And could then walk off to safety?

The Witness—And get clear, but his right foot was what was caught.

Redirect examination by Mr. Koch.

Q. Did he fall between the rails of the "empty" track?

A. Yes, right over the rail on this side.

Q. When you say right over the rail, how do you mean?

A. The right track.

Q. That is, he fell over the right rail or the right track?

A. Right rail.

Q. The right rail of the left hand track?

A. Yes, sir.

Q. What portion of him?

A. The greater part.

Q. And did he fall in a line with the track or at right angles to the track?

A. Sort of right angles.

Q. And then when he began to drag, how did he drag?

A. His first position was on his hands while he was being dragged, to try and keep after it, but the speed of the train was too much that way and he lost control, or else became unconscious or dazed; it dragged him from his hands on his elbows and back along the track.

Q. And then was his position at right angles or practically parallel with the track?

A. Almost parallel.

Q. The angle was considerably slighter?

A. Yes, sir.

Q. Did you hear him holler?

A. Yes, he hollered as if in agony.

Q. The crash which you described; can you tell us a little more about it than merely it was a crash. Can you give us a description of it; was it a sound like an explosion or something else?

A. Sounded like a great crash of steel.

Q. Had you heard that kind of crash before?

Mr. Hartpence—I object to that.

Mr. Koch—I want to get a little more description of it.

Mr. Hartpence—Let him describe it as best he can.

Q. When you say it was the crash of steel, tell us what you mean, the crash of two steel bars crashing on one another, or what?

A. Seemed like a great crash of a steel building I would say.

Q. Where did you hear the crash?

A. Right at the foot of the steps.

Q. Had you observed the cars on the left hand track immediately before that crash?

A. I did not. The crash came there on the tracks and that drawed my attention to it.

Q. And what did you see?

A. Saw Mr. Kopenhafer fall to the track.

Q. What about the cars?

A. The cars started an upward movement.

Q. The movement of the cars started subsequent to the crash, is that correct?

A. Yes, sir.

Recross-examination by Mr. Hartpence.

Q. These cars as they stood during the day, were on the downgrade?

A. Yes, sir.

Q. What prevented them from going downgrade?

A. The brakes were on.

Q. Do you know how these brakes were kept on, air or hand brakes?

A. Hand brakes.

Q. So that when this crash came and the cars began to move, they were moving with brakes on, were they, upgrade?

A. Yes, sir.

Q. What kind of day was this, Mr. Morris, clear day, cloudy, rainy or what?

A. I am not able to describe the day.

Q. Was it light?

A. I really don't recollect.

Q. You say it was about 3:25 in the afternoon?

A. Yes, sir.

Q. Daylight then, wasn't it?

A. It was daylight.

Q. Do you know what Mr. Kopenhafer had been doing just before he was injured?

A. I do not.

Q. When had you last seen him before the accident, how long before?

A. I would say probably half an hour before, when he started a car on for me.

Q. What was he doing then?

A. Barring a car for me.

Q. On the breaker track?

A. On the breaker track, yes, sir.

Q. You were a loader, you say?

A. Yes, sir.

Q. Where are you stationed when you did your work?

A. Anywhere along the platform, the loader platform, just according to what bin was to be taken up.

Q. That was outside the breaker?

A. Yes, sir.

Q. Where is the toilet located there that the men use?

A. Toilet? Right in off the steps leading into the breaker extension.

Q. That is up on the high part?

A. Yes, sir.

Q. Did the men use that toilet regularly or did they go somewhere else?

A. Mostly the toilet.

Q. Where else?

A. Was over down on the bank, the ditch.

Q. Was there one at the corner of the breaker at the little space you say you were standing on?

A. Oh, no, there is no toilet there.

Q. Well, they would use it there, they would urinate there ordinarily?

A. Not that I know of.

Q. Never saw anybody do it?

A. No, sir.

Q. Where was this ditch located, that you speak of?

A. Right over the hump from the switches.

Q. Would that be upgrade?

A. Upgrade partly.

Q. How far away from where you were?

A. I would say about 200 feet.

Juror No. 9—I would like to know where the witness was at the time he put his coat on in reference to that photograph; how much distance he had to travel to get in sight of the accident?

The Witness—You want me to show you? Here, right here. (Indicating.)

Juror No. 9—How far?

The Witness—Right at the top place, there is a little platform. I was in there putting my coat on.

Juror No. 9—The reason I asked, it would seem the elapsed time was short between the crash and the falling man to put his coat on; it would seem he would hardly have time.

Roy C. Spangler, sworn for the plaintiff.

Direct examination by Mr. Koch.

Q. Now, Mr. Spangler, on the day of the accident, by whom were you employed?

A. Rhodes Contracting Company.

Q. You were not employed by the Susquehanna Collier?

A. No, sir.

Q. What were you doing?

A. Locomotive engineer.

Q. What kind of locomotive did you run?

A. Small locomotive, about 18 tons.

Q. What was it used for?

A. To haul dirt.

Q. Where were you hauling the dirt?

A. On the far side of the railroad.

Q. When you say the far side of the railroad, do you mean to the left of the left hand track?

A. To the left.

Q. How long had you been employed there?

A. About six months at that particular place.

Q. What were you doing?

A. In regards to what do you mean?

Q. What were you going to do?

A. I was standing to turn out the engine; I was getting my engine ready to fill up the boiler.

Q. For the night time?

A. 3:30 is my quitting time.

Q. Does that picture show the track where your engine was, plaintiff's *Exhibit P*-1?

A. No, sir; that picture does not show it right now.

Q. Can you mark there with a figure "6" in a circle, showing us where the track ran at that time?

A. (Indicating.) That takes up all the way along this track, see.

Q. Now, can you tell us, what, if anything, you saw at the time?

A. I saw several railroad cars standing on the track siding.

Q. Were they loaded or empty cars?

A. Empties.

Q. Do you know how long they had been standing there?

A. All day.

Q. Now, towards 3:30 in the afternoon, and as you were getting your engine ready, did you see anything happen?

A. I heard an awful crash.

Q. Where did you hear the crash?

A. Right to the left of me.

Q. Above or below you?

A. Right across from me.

Q. What was the crash like?

A. Well, it was a great sound, something I never heard that place before.

Q. Can you give us any description of it at all, better than that?

A. It was a real loud sound; you know when steel bumps together what it means.

Q. What kind of steel; where was the steel that you thought you heard bump?

A. Standing on the track.

Q. Was it steel rails or steel cars?

A. Steel cars.

Q. This sound you heard was the crashing of the steel cars?

A. Yes, sir.

Q. And the steel cars were empty cars?

A. Empty cars.

Q. And the sound that came to you was these empty cars?

A. Yes, sir.

Q. When you heard the sound, what else did you observe?

A. I heard the noise and I looked through under the cars.

Q. What kind of noise did you hear?

A. That great noise.

Q. Well, you heard this noise, this crash, and then what did you hear or see, if anything?

A. I looked across the track, that drawed my attention to the man, making the noise.

Q. As you looked across the track, what did you see?

A. First, I thought it was the safety block that was under the cars.

Q. Where was this, what you thought was the block?

A. It was about forty feet away from me.

Q. Where was it, on the rails?

A. It was between the two tracks.

Q. And between the two rails or between the two tracks?

A. Between the two tracks.

Q. Now, the two tracks are tracks for empty cars and cars loaded at the colliery?

A. Yes, sir.

Q. Were you satisfied that it was the block used for safety?

A. No, sir.

Q. What did you see it was?

A. I took a better look. First, I thought it was the block; then I saw it was a man.

Q. Did you know the man when you first saw him?

A. Yes, sir.

Q. When you saw it was a man, what did you do?

A. Ran down the tracks that I worked on and waved my hands for the train to stop.

Q. How far did you run?

A. Several car lengths.

Q. Now, the train that you say you ran down, was that an empty train of cars that was standing on the left hand track?

A. Yes, sir.

Q. Were you giving a signal when you waved your hands?

A. I was waving my hands that way. That is the way I thought would be to stop quick.

Q. Is that the railroad men's signal to stop?

A. I could not tell you that.

Q. After you ran for several car lengths, what, if anything, did you see?

A. Saw the brakeman on the cars.

Q. Where was he on the cars?

A. Just crawling down off.

Q. Where, these empty cars?

A. Empty cars.

Q. Were the empty cars in motion at the time?

A. Yes, sir.

Q. Did you know the brakeman?

A. Yes, sir.

Q. Did you know his name?

A. Yes, sir.

Q. What was his name?

A. Mr. Lenker.

Q. Do you see him in court?

A. Yes, sir.

Q. Mr. Lenker came down from the cars; what did you do then?

A. I told him not to move the train any more, there was a man fast on the upper end.

Q. Then what did you do?

A. I ran up the track.

Q. Did Mr. Lenker go with you?

A. Came behind me.

Q. Did you get to the place where the man was before Mr. Lenker?

A. Yes, sir.

Q. When you got to the place where the man had been lying, what, if anything, did you do?

A. Till I got up there, they had him over in the shanty.

Q. Did you go up to the shanty then?

A. Yes, sir.

Q. Is that the little concrete shanty here at the breaker?

A. Yes, sir.

Q. What did you do then?

A. I stood there until they removed him from the shanty.

Q. Did you go with him to the first-aid station?

A. No, sir.

Mr. Koch—Cross-examine.

Cross-examination by Mr. Hartpence.

Q. When you got back to where Mr. Kopenhafer was, were there any other people around?

A. Several men.

Q. Was Mr. Kopenhafer conscious then?

A. Well, he was in great pain; they were holding him.

Q. Was he conscious?

A. I would not say he was exactly conscious.

Q. Was he lying there unconscious?

A. I could not say that, because I am not a doctor. I would not know that. I know he didn't have altogether his right mind.

Q. Why is it you say he didn't altogether have his right mind?

A. Because I was helping hold the man; the way he was acting, I could see that.

Q. Well, how was he acting?

A. Throwing his body around and his arms.

Q. Was that because of the pain?

A. Yes, I think it was.

Q. How long did he remain there before they took him to the ambulance and hospital?

A. Well, I stayed there about ten minutes before they removed him.

Q. Were you there when they removed him?

A. Yes, sir.

Q. Did you hear him talk or say anything while you were there?

A. All he was doing was hollering with pain.

Q. Didn't you hear some one of these men ask him how the accident happened?

A. No, sir.

Q. Didn't you hear him tell how it happened?

A. No, sir.

Q. Did he ever tell you after that how the accident happened?

A. No.

Q. What condition was his clothing in?

A. The clothing was apart, his shirt was open, trousers were torn.

Q. How about the flyes?

A. Was open.

Q. I show you these two pieces of paper, Mr. Spangler, and ask you if that is your signature at the bottom of each one, Roy C. Spangler?

A. Yes, sir, that is my signature.

Mr. Hartpence—I will ask to have them marked for identification.

Marked—D-l-a and D-l-b for identification of this date.

Q. Where was Mr. Kopenhafer when you first saw him?

A. Being dragged by the train.

Q. Where you were located, was that up towards the storage yard away from the breaker?

A. No, sir.

Q. Below the breaker?

A. Below the breaker a small distance, not the whole part of the breaker, it is straight across from the loader.

Q. Were you above the loader or below?

A. Right across from the loader platform.

Q. You say there was a track ran out there?

A. Yes, we had small locomotive tracks there we used to use.

Q. This locomotive go back and forth on the track?

A. Yes, sir.

Q. You were in charge of it, were you?

A. Yes, sir.

Q. Had you been moving back and forth prior to the accident?

A. All day.

Q. Well, just before the time you heard this crash, had you been moving or been standing still there?

A. My engine was standing there. I was injecting water into the boiler.

Q. About how long had you been standing there?

A. Just a few moments.

Q. I show you another photograph, Mr. Spangler, and ask you if that correctly represents the scene of the accident there at the time it took place, with the breaker and the two tracks and stairways?

A. Yes, sir.

Q. That is looking downgrade, isn't it?

A. Downgrade.

Q. Can you point out on this photograph about where you were and where that track ran at the time?

A. Right in here somewhere, had a little turnout in there.

Q. Below the upright?

A. Our track went in between there, down through there.

Q. Were you below these two uprights or above the uprights?

A. I was right down in there. (Indicating.)

Q. Where I have marked the "x", right down in there?

A. Yes, sir.

Q. Did that track run down on this side that way?

A. Yes, down through there.

Q. Where I have marked this photograph?

A. We cut this dirt away from here and hauled it out. That is finished, the way it was after we completed it. You see it used to be closer to the railroad. We took a cut with the steam shovel.

Mr. Hartpence—I would like to have this photograph marked for identification.

Marked D-2 for identification of this date.

Mr. Hartpence—I don't want to put it in just now; it is not on my case, but you can use it.

Q. Does this photograph D-2 for identification show about where you saw Mr. Kopenhafer when he was hit?

A. When I first saw him, he was in front here. He had been dragged a piece when I first saw him.

Q. In front where?

A. In front here.

Q. Where I have marked with a circled "2"?

A. Yes, sir.

Q. I show you another photograph and ask you if that shows correctly the scene there where the accident took place, at the time of the accident?

A. That is about the way it looked to me where the cars were standing.

Q. Cars standing?

A. Went upgrade a little further.

Q. Can you point out there about where you were at the time any better than you could on the other photograph?

A. Over in here, on the turn out.

Mr. Hartpence—I will put an "x" there again.

Q. And you say these cars might have been a little further north?

A. I don't know just the exact place.

Mr. Hartpence—I will have this photograph marked for identification.

Marked D-3 for identification of this date.

Q. You ran down the rail to signal for the men on the cars to stop, is that right?

A. Yes, sir.

Q. You don't know how far the cars moved before they did stop?

A. They were moving while I was running down the track.

Q. Do you know about how far they moved?

A. I would say a rail length or 30 feet, by the way I saw them stop when I ran around them to go over to see the gentleman.

Q. That was after you came back?

A. Yes, sir.

Q. You think they were then about a rail's length further up the grade than they were when they first started to move?

A. Might have been more.

Q. Give us your best judgment?

A. I would say 30 feet.

Q. Under what circumstances did you sign these two sheets D-1-a and D-1-b for identification, Mr. Spangler; where were you and how did you come to do it?

A. I was asked to sign this by a man from the railroad.

Q. Mr. DeNeill?

A. I could not recollect the man, it has been so long.

Q. You read it before you signed the statement?

A. Some of it.

Q. You knew what was in there before you signed it?

A. I signed some facts.

Q. Well, now, you read it, didn't you, before you signed it?

A. Yes, sir.

Q. Both pages?

A. Both pages.

Q. You see it says: "Have you read this statement?

A. Yes.

Q. Is it true?

A. Yes.

Q. Does it contain all facts of accident, of which you have knowledge?

A. Yes."

Q. You signed that, didn't you?

A. Yes, my name is there.

Q. You say you didn't hear anybody talk to Mr. Kopenhafer while he lay there after the accident?

A. Not any particular thing.

Q. Did you hear him talk to anybody?

A. No, sir.

Q. Did you hear some one of these men ask how it happened and hear him say how it did happen?

A. No, sir.

Q. Did you hear him say to these men what he had been doing just before the accident happened?

A. No, sir.

Q. You told Mr. DeNeill and signed it in the statement: "I helped around that place and when someone asked him how it happened he said he was standing between tracks to urinate and while he was standing there the cars were bumped"?

A. No, sir; I didn't say that. That man insisted for me to say so, but I didn't.

Q. You read this before you signed it?

A. That is all right.

Q. You saw it in there before you signed it?

A. No, sir, not that particular point.

Q. You say you didn't say that?

A. Yes, sir.

Q. To this man, you say you didn't know it was in the statement when you signed it?

A. I signed the statement that he asked me, did I see him, or hear anybody say anything. I said "no, sir," but I said the appearance of his clothes, he might have been. That is what I signed.

Q. What about the appearance of his clothes?

A. He might have been urinating by the appearance of his clothes when I saw him.

Q. From the appearance of his clothes when you saw him, he might have been?

A. He might have been. I could not say, because I didn't see him.

Q. Where do you live?

A. Lykens.

Q. How long have you lived there?

A. All my life.

Q. How long is that?

A. 32 years.

Q. How long did you work there in the colliery?

A. Ever since I was 15 years, in and about.

Q. Still working there?

A. Yes, sir.

Q. What is your work now?

A. Inside the mines, loading coal.

Q. What was Mr. Kopenhafer's work?

A. Car barrer.

Mr. Koch—That is our case, if the court please.

William Cole, duly sworn for the defendant.

Direct examination by Mr. Hartpence.

Q. Where do you live, Mr. Cole?

A. Wisconisco, Pennsylvania.

Q. Where is that located?

A. About one mile from Lykens.

Q. How far is that from Harrisburg?

A. About 42 miles.

Q. Is that the main line of the Pennsylvania railroad or any other line?

A. The Pennsylvania railroad runs through.

Q. The main line of the Pennsylvania, running from Philadelphia to Pittsburgh and Harrisburg is Lykens located on it, or don't you know?

A. I do not know.

Q. Where did you work?

A. Nowhere now.

Q. Where did you work on September 17th, 1926, at the time Mr. Kopenhafer was injured?

A. On the breaker in the Susquehanna Coal Company.

Q. You do not work there now?

A. No, sir.

Q. How old are you?

A. Twenty nine.

Q. How long had your worked there on the breaker prior to the accident?

A. I would say eight years.

Q. What was your work there?

A. Well, in the last work I had there was testing coal.

Q. What was your work at the time of the accident?

A. Testing coal.

Q. And where did you do that with reference to the breaker itself at which Mr. Kopenhafer worked, how far away?

A. Right across the tracks from the pumphouse I have done all my testing.

Q. Did you see the accident happen to Mr. Kopenhafer?

A. Yes, sir.

Q. What time of the day was it?

A. About 3:25.

Q. What was the quitting time?

A. 3:30.

Q. Will you state just what you saw?

A. As I was coming across the tracks, ready to go home, that is across the tracks of the plain I saw Mr. Kopenhafer standing up again the cars, and by the time I got closer the cars made a bump, and I seen he got fast, partly holding on to the car at the time. I ran to the loader and tried to stop the cars.

Q. In what way did you try to stop the cars?

A. From pushing up.

Q. You say you tried to stop it?

A. I waved my hands.

Q. To the train men?

A. Yes; and then I ran back through again and about the time I got there, I seen that he was released. I would say not quite released at the time; as I got at the top of the step going out of the loader, they were pushing up a little point and I seen Mr. Kopenhafer on his back and helping himself with his hands, going up along the tracks, and then he got released and we carried him over into the shanty there and we cut his shoe off and carried him into the engine room, where the first-aid man took charge.

Q. When you speak of the end of the cars, what cars do you refer to?

A. The front of the cars.

Q. What cars?

A. The cars that were standing on the light track between this and the other side of the loaders, on the light track.

Q. When you speak of the light track, which track do you refer to?

A. The track that the empty cars are being pushed upgrade to be loaded at the breaker.

Q. Now, they go up that empty track to what point when they are pushed in?

A. Up in what I say is the yards there, where it is in sections of four if I am not mistaken.

Q. Then how do they get back to the loader?

A. They run down on then under it there.

Q. Had you seen those cars standing there before that day?

A. Before that day?

Q. Had you seen those cars standing there earlier in the day, that same day?

A. Yes, sir.

Q. On the "empty" track?

A. Yes, sir.

Q. Did you observe what Mr. Kopenhafer was doing as he stood there at the corner of the cars?

A. Why, only what he has told me.

Q. What did he tell you?

A. He told me when we were going over to the plane shanty, he said he wanted to urinate.

Q. What part of the track was he standing on; you say on the end of the car; was he standing on the track?

A. One foot on the track and the other end of the car.

Q. Did you notice which foot it was on the track?

A. Right foot.

Q. That is the one that was injured?

A. Yes, sir.

Q. Did the cars move?

A. Yes, sir.

Q. When the cars moved, what happened to Mr. Kopenhafer?

A. It pinned him fast.

Q. Did he stand upright or fall?

A. He caught hold of the car, see, and then I ran back through on the stairs to the loaders to get the attention of the brakeman, or whoever I caught.

Q. The last you saw him as you ran through the loader, what was his position then?

A. Holding on to the cars.

Q. Still upright?

A. Yes, sir.

Q. Then when you came back, you said he was sort of on his back feeling along with his hands?

A. Yes, sir.

Q. You don't know what happened to him in the meantime?

A. I do not.

Q. Did you notice whether these cars moved rapidly or slowly?

A. Slowly.

Q. Did you obseve how far they moved before they stopped?

A. Probably twenty feet.

Cross-examination by Mr. Koch.

Q. Now, what did you say was your job at that time?

A. Testing coal.

Q. You were in the pumphouse, you say?

A. Yes, sir?

Q. Will you look at plaintiff's *Exhibit P*-1 and will you show me, if the pumphouse is shown on that picture, and if it is, will you mark it with a "7" and a circle?

A. The pumphouse?

Q. Yes? (Witness complies.)

Q. You say it was practically quitting time within five minutes of quitting time?

A. 3:25.

Q. Were you in the house or outside the house?

A. Outside the house.

Q. Were there any cars on the track, leading under the breaker?

A. Not extending within the breaker.

Q. You say how many cars were there at the breaker?

A. I could not say.

Q. You say there was no cars?

A. Extending on the outside of the breaker.

Q. Where were you going, Mr. Cole?

A. Across the track.

Q. Where were you going to go, go home?

A. Home.

Q. Well, it was still five minutes of quitting time?

A. Yes, sir.

Q. Now, the empty cars that you say you saw, where were they with respect to that stairway that leads up to the loader platform?

A. On the lower side of the stairway.

Q. Were they below it or above it; do you know what I mean. Let me put it to you this way; you know the stairway that leads up to the loader platform?

A. Yes, sir.

Q. Now, I don't mean the back stairway that leads on to the trough?

A. I understand.

Q. The track that the empty cars were on goes right by that side, doesn't it?

A. Yes, sir.

Q. Now, the empty cars, where were they, as far as that step was concerned, were they downgrade from it, or were they flush with it, or upgrade?

A. They were a little below.

Q. As you stood there, or as you came by there, you say you saw Mr. Kopenhafer standing there?

A. I did.

Q. He had one hand on the rail of the car?

A. One hand resting on the car.

Q. And one foot on the car?

A. On the rail.

Q. And when you ran—by the way, where were you as far as this stairway was concerned, this little stairway that leads up?

A. Where was it?

Q. Were you above it or below it, were you upgrade from it, or downgrade?

A. Across from it.

Q. Had you crossed both tracks?

A. That is I had crossed one track, ready to cross over the other track.

Q. You say you crossed one track; you mean you crossed the track on which the loaded cars were?

A. No, sir; where the plain cars go.

Q. That is the cars without any coal?

A. Where they loaded slate and rock in.

Q. You had crossed that track. As we are looking upgrade that track is to the right of the track on which the loaded cars come; is that correct?

A. Yes, sir.

Q. Do you see that track in this picture?

A. Yes, sir.

Q. Now, will you mark that with an "1" in a circle?

A. Those are the tracks. (Marking.) These are the ones that loaded slate cars coming out and these are the ones where the empty cars go in.

Q. You had crossed the slate track, then you crossed the track where the loaded cars were on?

A. Ready to cross that track.

Q. Were you on the stairway or were you above the stairway or below the stairway?

A. Below the stairway.

Q. When you were upgrade, you were up towards the yard, weren't you?

A. Toward the yard? I was right across from it.

Q. I show you this picture, D-2 for identification, and I ask you whether that shows the slate track?

A. Yes, right here. That is the one coming out after they are loaded.

Q. This track here? (Indicating.)

A. Yes, sir.

Q. Will you mark that with a "3" in a circle?

(Witness complies.)

Q. You had that, then, crossed that track; is that correct?

A. Yes, sir.
Q. You were about to cross this track? (Indicating.)
A. Yes, only down in here. (Indicating.)
Q. You were down about here?
A. Yes, sir.
Q. Near to this stairway?
A. Yes, sir.
Q. Now, the yard is up on these tracks, isn't it?
A. Yes, sir.
Q. Towards that way?
A. Yes, sir.
Q. So that when I ask you whether you were up above the stairway, towards this yard, your answer is "yes"?
A. Yes, sir; that is where I mean.
Q. Mr. Kopenhafer was just a little below here?
A. Yes, sir.
Q. And the cars were a little below?
A. Yes, sir.
Q. You say when you saw the cars start in motion, that Mr. Kopenhafer's foot was pinned, but he still remained standing?
A. Hanging on to the car.
Q. Now, you then ran downgrade, didn't you?
A. To the loaders.
Q. Through the loader, and you ran down?
A. Yes, sir.
Q. So that you came in back of him?
A. Yes, sir.
Q. How far did you run?
A. I dare say about twenty feet or more.
Q. How long did you see him standing there?
A. I would say only a second. When I came across the tracks I seen him standing there.
Q. How long did you say it took you to go from the place where you first saw the cars start to move, until you had passed him on the lowest side of him?
A. About a second, because I ran.

Q. How far did you run?

A. All the way through the loader.

Q. What distance would you say that was?

A. I judge about twenty or more feet.

Q. You ran that in a second?

A. Well, I just don't know how long it took me.

Q. And then, when you came back, by the way, were the cars still moving all the time while you were running?

A. That I could not say. I didn't see them.

Q. Did you stop running when the cars stopped moving?

A. No, sir; when I thought I drawed the attention of the brakeman, I started back.

Q. Where did you see the brakeman?

A. I didn't see the brakeman; I seen somebody on the engine.

Q. Where was the engine?

A. In the back of the cars.

Q. Back of what cars?

A. The cars that were standing on the light track.

Q. How many cars were standing on the light track?

A. I dare say six.

Q. Did you see any other cars coupled to the engine?

A. Well, that is all the engine brought in.

Q. Was the engine running upgrade or backward?

A. They were in back of the cars.

Q. Which cars were in back?

A. The engine was in back of the cars, pushing upgrade.

Q. The engine was pushing the bunch of cars up?

A. Yes, sir.

Q. So that first we had the cars that had been standing still all day; then we had another bunch of cars; and then we had the engine?

A. Yes, sir.

Q. Did you see the brakeman on any of these cars?

A. I don't recall. I really don't.

Q. Did you see any brakeman or conductor up there?
A. I seen somebody on the engine.
Q. You signalled to the engine?
A. Yes, sir.
Q. Then you turned around and ran back?
A. Ran right back.
Q. He had already been moved by that time?
A. He had been already moved? Who is this?
Q. Who had been injured in this case; the young man who was injured?
A. Mr. Kopenhafer been removed?
Q. Yes?
A. No, I helped remove him.
Q. Where was he lying when you came there?
A. On his back across—the way, just how, I don't remember, because when I came to the loader I seen this coming down the steps, he was up, walking with his hands, like to guide himself.
Q. These cars were moving when you started to run?
A. I judge they were.
Q. And then they were moving when you were running back?
A. Yes, sir.
Q. When you found him lying there, where was he lying with respect to the light track and the loaded?
A. Between the light track and the loader track.
Q. And this place where this stairway from the breaker lies?
A. Yes, sir.
Q. You took him then with the others to the shanty?
A. Yes, sir.
Q. Was he moaning at the time?
A. He was.
Q. Was he bleeding?
A. He was.
Q. Were his eyes open or closed?
A. They were open.

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Q. Did you carry him or was he able to walk?

A. No, sir; we carried him.

Q. How many men carried him?

A. I dare say four.

Q. Did he give indication of being in pain?

A. He did.

Q. You say that he was dazed, that his condition was that of being dazed?

A. Why, when we carried him till we got him in this shanty he was.

Q. So that by the time you got him into the shanty, he began to wander, throw his arms about, kick about and you had to hold him?

A. Yes, sir.

Q. How many men helped to move him?

A. I dare say four.

Q. Do you know the names of any of these men?

A. I believe a young man by the name of Robins helped from the shanty up.

Q. Are any of the men who helped to move him here?

A. No, sir.

Q. You alone of the four or five men are here?

A. Yes, sir.

Q. Have you seen any of these men lately, these other men who helped you remove him?

A. You see, I just don't remember who they were.

Q. How much of a distance did you carry him from the track to this little shanty where you removed his shoe?

A. Probably forty feet.

Q. Were you the only one that was talking to him?

A. There was others talking to him.

Q. You asked him a question direct?

A. I just says to him, "What in the world were you doing there?"

Q. And he opened his eyes and looked at you?

A. Yes, he did. He had his eyes open.

Q. Where were you standing as you were carrying him?

A. I think I had him under the right arm.

Q. Aren't you sure now?

A. I am not positive.

Q. Isn't that as clear in your mind as some of the other details?

A. No, sir.

Q. Aren't you as sure of that fact as of the fact that he had his eyes open?

A. Not so sure.

Q. He didn't open his eyes, he had them open and he looked full at you?

A. Yes, sir.

Q. Then he told you what he was trying to do?

A. Yes, sir.

Q. And then when he got a few feet further into the shanty, why then, he didn't seem to know what he was doing?

A. It was pain, I judge.

Q. He didn't seem to know what he was saying?

A. No.

Q. Now, you are positive, are you that there was no car standing on the track that had not yet gone under the breaker; you are sure of that?

A. Well, I am pretty sure.

Q. Are you positive, or is there a possibility of your being mistaken?

A. There may be.

Q. May be?

A. The possibility that I may be mistaken. It has been so long that I just can't recall.

Q. How long do you estimate a car of that kind to be, roughly what was its length?

A. Maybe forty feet, maybe not that.

Q. So that if there was a car on the loaded track, then you would have to run around that car too, wouldn't you?

A. Yes, sir.

Q. And you would be that much further above this stairway?

A. Yes, sir.

Q. Now, you first saw him when you were standing there?

A. Yes, sir.

Q. You are positive he had his foot on the rail?

A. Yes, sir.

Q. There is no mistaking that?

A. No, sir.

Redirect examination by Mr. Hartpence.

Q. Mr. Cole, I show you another photograph, and ask you if that—if you can state what that depicts?

A. It shows the rails going down on the low side.

Q. Does it show the storage yard that has been referred to?

A. Yes, right at the end.

Q. Right where these cars are standing?

A. Yes, sir.

Q. That is the storage yard?

A. Yes, sir.

Q. And this is the right hand track that comes down over to the loader?

A. Yes, sir.

Q. And this left hand track is the one that they are upon when empty?

A. Yes, sir.

Q. The breaker would be below this photograph?

A. Yes, sir.

Mr. Hartpence—I will have that marked for identification.

Marked D-4 for identification of this date.

Q. Take this photograph that I show you; what does that show?

A. It shows where the loaders come out from the breaker and the empties get pushed up into the yard.

Q. Is that a fair representation of the breaker itself, looking upgrade?

A. Yes, sir.

Q. On the day of the accident?

A. Yes, sir.

Q. That is taken from below the breaker, isn't it?

A. Yes, sir.

Q. And this is the track you were running through and around the curve is the upgrade track leading up to the storage yard?

A. Yes, sir.

Mr. Hartpence—I will have that marked for identification.

Marked D-5 for identification of this date.

Q. Just one more I want you to tell me about, that shows the empty track looking downgrade again, doesn't it? (Handing witness.)

A. Yes, sir.

Q. And this stairway to the left, that is the stairway that runs up to the loaders' platform?

A. Yes, sir.

Q. What is the track off to the left of the stairway?

A. That is for loading empty cars to come in to get loaded.

Q. Was it on that track that Mr. Kopenhafer barred?

A. Yes, sir.

Q. Is that the track he worked on when he barred cars through?

A. Yes, sir.

Q. Which track was he on at the time he was injured?

A. This track.

Q. On the right hand track?

A. Yes, sir.

Mr. Hartpence—I will have that marked for identification.

Marked D-6 for identification of this date.

Q. Does the photograph accurately show the situation as it existed there on the day of the accident?

A. Yes, sir.

Recross-examination by Mr. Koch.

Q. Now, I show you this D-5 for identification and I ask you did the accident happen below this stairway or above it?

A. Up here. (Indicating.)

Q. At a point up on the other end?

Mr. Hartpence—May I have that marked where he says it happened.

Q. Mark that with a "x" if you please. (Witness indicates.)

Q. And then you ran through this stretch?

A. Yes, to come to the end.

Q. You came out that opening here?

A. Yes, right here.

Q. You came out through the door?

A. Yes, sir.

Q. So that you ran the entire stretch of that?

A. Yes, sir.

Q. How long did you say that stretch was?

A. Well, I said about 20 feet or 30; it may be more. I am just giving a rough guess.

Q. Is it possible it is 150 feet?

A. No, I could not say.

Q. You don't know; it might be 150 feet?

A. It may be, I don't know.

Dr. Harvey Smith, sworn for the defendant.

Direct examination by Mr. Hartpence.

Q. Where do you live, doctor?

A. Harrisburg, Pennsylvania.

Q. Your profession is what?

A. I am a physician and surgeon.

Q. Where are you now located specifically?

A. Harrisburg.

Q. What hospital?

A. Harrisburg Hospital.

Q. How long have you been there as surgeon?

A. About thirty years.

Q. What particular position do you occupy?

A. One of the staff surgeons.

Q. You are a graduate of what institution?

A. University of Pennsylvania.

Q. Do you know Mr. Kopenhafer, the plaintiff here, the young man who was injured?

A. Yes, sir, I do.

Q. Did you have anything to do with treating the injury to his foot at the time he was injured?

A. Yes, sir; he was under my care from the time of his admission until he was discharged from the hospital.

Q. In the Harrisburg Hospital?

A. Yes, sir.

Q. Can you state just what his condition was when he was brought in, how it progressed and his condition when he was discharged?

A. He was brought in late in the afternoon of September 17th, 1926, as a result of an injury to his right foot. Examination at the time of his admission showed that there had been a squeezing injury to the posterior part of the foot, by that I mean the heel.

Q. What do you mean by posterior part, in plain language?

A. Heel part.

Q. You say a squeezing injury; what do you mean by that?

A. I mean not exactly a crushing injury. It happened the wheels of the car had not gone over that foot. There was a lacerated wound on the inner side of the ankle, anterior, several inches long from which there had been pretty free bleeding. X-ray examination showed that

there was no fracture in the bones above the ankle. There was no fracture of the bones of the foot, except one bone in the ankle called the scaphoid bone, that was fractured, without much displacement of the fragments, and there was a dislocation of one of the other small bones in the ankle called the cuneiform bone. That was the only evidence of injury.

Q. Now, what was done with him there, how did the case progress and what finally became of it?

A. He was examined under anesthetic the morning following the injury, and we felt that the circulation on the upper side—you understand what I mean. I will call this the upper side. (Indicating.)

Q. Top of the hand you refer to to illustrate the upper side of the foot?

A. Yes, sir.

Q. The palm as the under side?

A. The sole of the foot. This injury was to the inside of the ankle. The circulation on the upper side had been destroyed. The blood vessel that comes down here at this point had been severed, which accounted for the stoppage of complete circulation to this injured surface, that had been destroyed, we felt that assured. We questioned the complete destruction of the under surface of the foot. After this examination under anesthetic in which the wound was thoroughly cleaned, we felt that that conservative plan of treatment would probably give him the best results. By that I mean that we would not amputate. Amputation of that would have meant the taking off above the ankle and an artificial leg.

We felt that if our judgment was correct, that we had complete destruction of circulation anteriorly, with partial preservation of the circulation below that, we could save the major part of the foot. As things developed, the circulation of the injured part was destroyed and we got bad gangrene of the toes, and a little portion of the foot just above the toes. We kept on that; cleansed the

wound and used artificial heat to help the circulation as much as possible, and simply waited for nature to determine for us the extent of the damages circulation. In other words, what is technicaly known as the line of demarcation. When that was confirmed, then the toes were taken off from the bones just above, saving the bones just beneath the ankle joint, or what furnishes the inner part of the arch. That treatment extended over a period of sixty or seventy days.

He was re-admitted to the hospital in February of the following year, at which time there was a little operation on the bone remaining that was diseased. That was simply curetted, the affected tissue removed, packed and allowed to heal.

Q. When you say curetted, what is that?

A. A portion of necrotic bone removed from this outside portion here. (Indicating.)

Q. Necrotic portion of what?

A. That bone.

Q. What was then done?

A. He was then discharged from the Harrisburg Hospital, and I think his home physician, Dr. Bobb, looked after him. That was followed up with the dispensary, and he was given light treatment and local treatment to bring back the function of the foot.

Q. How much of that foot would you say remained at the time you last had him under your charge?

A. He has somewhat more than half the foot left.

Q. How about the arch itself?

A. The arch was preserved. He had when he left movement of the foot, tendons were attached, and he can bend that foot so. (Indicating.)

Q. How about the ankle joint?

A. That was moving at the ankle joint; that is what I mean by ankle bending.

Q. So that the ankle joint was not stiff?

A. No.

Cross-examination by Mr. Koch.

Q. This movement that you have testified to, is that movement of the ankle?

A. Yes, sir.

Q. What we understand by the ball of the foot, the front part of the foot under the toes, that is gone?

A. That portion, anterior support.

Q. Right up practically to the point of the arch?

A. He has support though. I can illustrate again. He has to support the foot immediately back, probably to a point of an inch or two inches back to where the toes are attached.

Q. He has a heel and has a portion of the arch, or all of the arch, would you say?

A. Technically known as the metatarsal phalanges, they are gone. The tarsal bones are left and part of the arch forming the tarsal bones. I cannot give you any other way. They are left.

Q. Now he wears a pad under that; that is necessary?

A. Probably so.

Q. Over what period of time did your treatment of him extend, all told?

A. Between sixty and seventy days all told the first time. He was admitted on September 17th, 1926, and he was discharged on November 24th, 1926. He was admitted the second time on January 31st, 1927, and discharged on February 11th, 1927.

Q. Were all the toes removed at one time or two operations?

A. No, they were not.

Q. How many operations did you make?

A. He was in the operating room three times, if I recall. Twice during his first admission, once for examination and the second when finally cleaned up after the line of demarcation developed, and the third on his second admission when the necrosed bone was removed.

Q. Doctor, do you think there is any destruction of the function of the foot?

A. Now you are getting me where I am simply a matter of fact witness.

Mr. Hartpence—I don't like to interfere. I didn't ask this doctor an opinion as to the function there or anything of that sort. I simply brought him here as the attending physician.

Mr. Koch—I will make him my own witness.

Q. (Question read as follows: Doctor, do you think there is any destruction of the function of the foot?)

A. I have not seen him since he was finally discharged from the hospital until today and I cannot give you an opinion on that because I have made no examination.

Q. At the time when you discharged him, can you tell us whether in your opinion there was?

A. I can quite from an operation note made on the hospital chart, which was dated October 28th, when the line of demarcation was definitely made.

Mr. Hartpence—What year?

The Witness—October 28th, 1926. This was made on the chart, after the line of demarcation had definitely been made. My observation on the chart was that we would probably be able to save the posterior two-thirds of the foot, a good part of the arch and that we will give him a fairly good foot, much better than if we had amputated.

Q. And that is the extent to which you care to testify?

A. Yes, sir.

Redirect examination by Mr. Hartpence.

Q. Do you know who paid the hospital bills?

Mr. Koch—That is objected to as incompetent. This witness is not proper to testify to that. He cannot know of his own knowledge. Also objected to as improper.

The Court—It may be answered yes or no.

Q. Do you know who paid the hospital bills for Mr. Kopenhafer?

A. I do not.

Q. Who did pay them?

Mr. Koch—That is objected to.

The Court—You may cross-examine as to that.

Mr. Koch—I will take an exception.

A. It is my understanding and I got my information from the one who accepted the money at the hospital, it was paid by the Susquehanna Collieries Company.

Q. Did you have a bill of your own in addition to that?

A. Yes, sir, I did.

Q. Who paid that?

A. Susquehanna Collieries Company paid my bill.

Q. Where do you live?

A. I live at Harrisburg.

Q. You practice in Harrisburg?

A. Yes, sir.

Q. As I understand you practice there?

A. Yes, since I have finished my hospital interneship, after I graduated, I went to Harrisburg and have been there ever since.

Dr. M. D. Lehr, sworn for the defendant.

Direct examination by Mr. Hartpence.

Q. What is your profession, doctor?

A. I am a physician.

Q. Where do you live?

A. I live in Lykens.

Q. How long have you practiced?

A. 45 years.

Q. What institution were you graduated from?

A. Jefferson Medical College.

Q. Are there any other doctors practicing in Lykens?

A. Two more; Dr. C. C. Bobb and Dr. F. R. Perfect; both present.

Q. Did you have occasion to examine the plaintiff, Mr. Kopenhafer, sometime ago?

A. I was asked by the Pennsylvania Railroad Company to make an examination and I was asked to have Dr. Perfect assist me. I made the examination February, 1928.

Q. Where did you make that?

A. I made it at the plaintiff's home.

Q. Where was that?

A. Wisconisco, Pennsylvania.

Q. How far is that from Lykens?

A. About half to three-quarters of a mile.

Q. You did that for the purpose of testifying in this case?

A. Well, I didn't know whether I was to testify or not. We were to make an impartial examination of his injury.

Q. What did you find the condition of Mr. Kopenhafer to be at the time you made that examination?

A. May I refer to my notes.

Q. Did you make some notes?

A. Just a note we made. First, I can give the measurements of the right foot, compared to the left. The length of the right foot was 7 3-8ths inches and the left was 11 1-4 inches.

Q. That shows a difference of how much?

A. Not quite four inches, a quarter of an inch less than four inches. The circumference at the ankle malar, was 10 inches on both legs; and at the arch the right foot circumference was 11 inches and the left foot 10 inches. I can illustrate on my hand here. There was a loss of the phalanges, that is, of these fourteen bones here.

Q. You say "here"; that does not tell us which were the phalanges?

A. Well, they are in front of the tarsus bones.

Q. Where with respect to the toes; let me ask you in a little bit more ordinary language. The phalanges form part of the toes?

A. They do.

Q. You say the phalanges were removed?

A. They were; the phalanges were gone on those toes.

Q. That is the toes were all gone?

A. The toes were all gone, the three joints of the toes and two joints of the great toe.

Q. How much of the rest of the foot was on?

A. Got the tarsal bones, there is one-half of the fifth tarsal bone gone and just stumps of the other bones.

Q. How much of the arch?

A. Well, the arch is practically all there. Three bones, the cuneiform, cuboid and scaphoid were gone; all the rest of the bones were intact there; through the back, the bones back of this (indicating) were removed and the tarsal bones were intact and in place there.

Q. What about the heel?

A. The heel that was perfectly normal.

Q. What about the ankle; any stiffness?

A. No stiffness of the ankle; no functional disability there.

Q. What was the disability of the foot, in the way of the condition of the foot, any sore still remaining or had everything healed up?

A. Well, there was a slight discharge in a long scar, a scar about six inches long from the instep down.

Q. On the top of the foot or the bottom?

A. On the side of the foot.

Q. Inner side or outer side?

A. Inner side, extended over the side.

Q. Did you reach any conclusion as to the percentage of disability of the foot?

A. You mean functional?

Q. I thought you found disability?

A. Anatomically fifty per cent. of the foot remains and the functional disability would have been, he would have been impaired say about fifty or sixty per cent.

Q. That would be due to what?

A. Well, due to the loss of part of the foot and that scar on the foot.

Q. Loss of that portion of the foot?

A. Loss of that part of the foot. The patient can walk fairly well, except when on rough ground; we found it will hurt him a little when he walks upgrade, it will hurt him a little to carry a weight and he could not balance himself very well on rough ground.

Q. Did you observe his walk when you had occasion to see him?

A. At that time, that was over a year ago. I think he has improved some since. At that time, he limped.

Q. You have seen him walk since you have been here last week and today?

A. I saw him walk.

Q. What do you say about his gait and walk as you have seen him walk?

A. I think his gait improved. It certainly did improve in that time.

Cross-examination by Mr. Koch.

Q. You say the arch is practically all there. Is any portion of the arch gone?

A. I don't think so.

Q. Where does he rest his weight now?

A. He rests practically on the heel, perhaps a little bit on the side of the foot.

Q. That would tend to throw the movement of his foot somewhat and his leg somewhat?

A. Yes, sir.

Q. He would favor the side more or less than if he stepped normally on the heel and ball of the foot. Now, doctor, when you say there is functional loss of approximately 50 or 60 per cent.? Had you in mind all manners of occupations?

A. No; it would be a hundred per cent. if he would be a runner.

Q. How about a policeman?

Mr. Hartpence—That is objected to as conjectural, speculative. The testimony shows he was working as a laborer in a colliery, and that he is back there doing the same kind of work he did before.

Q. Does the percentage of loss to which you have testified vary with the kind of work, or with the kind of use to which he attempts to put his foot?

A. The percentage would vary then. I think it would.

Q. You have not seen him since February, 1928?

A. I didn't see him since.

Q. Did you find any scar tissue present when you examined him?

A. Scar from the results of the operation.

Q. Did you find scar tissue?

A. Scar tissue, yes.

Q. Scar tissue ordinarily becomes stiff?

A. No, not all scar tissue. There was a scar there to the foot; what was left in the front portion was quite soft, cold and clammy.

Q. The condition that you found there, would you say that he could, normally, today feel pain in that place?

A. I don't know whether he could feel pain or not. I don't know whether he could feel pain at that time.

Q. The only way you can tell is by taking the patient's word for it?

A. Yes, sir.

Q. Is his condition such as would warrant the statement that he feels pain?

Mr. Hartpence—That is objected to as conjectural.

A. I can't say whether he had pain or not.

Q. Would you expect to find pain in a condition of that kind?

Mr. Hartpence—That is highly objectionable.

Mr. Koch—I withdraw it.

Redirect examination by Mr. Hartpence.

Q. You said you had not seen him since February, 1928; you mean you haven't examined him since that time?

A. Yes, sir.

Q. You have seen him here at the trial?

A. I saw him walk here.

Dr. Fred Rolston Perfect, sworn for the defendant.

Direct examination by Mr. Hartpence.

Q. What is your profession?

A. General practioner of medicine, Lykens, Pennsylvania.

Q. You are graduated from what institution?

A. University of Toronto, 1922.

Q. Have you practiced at Lykens all the time of your practice?

A. Hospital experience three years and general practice for four years.

Q. All at Lykens?

A. No.

Q. Where was your hospital experience?

A. Toronto, Pottsville, Reading, London, England.

Q. Did you examine Mr. Kopenhafer with Dr. Lehr in February, 1928?

A. Yes, sir.

Q. Will you state briefly, doctor, what you found his condition to be in regard to the right foot?

A. I will have to repeat about the same testimony Dr. Lehr gave.

Q. Did you make some notes at the time you made your examination?

A. This is a joint report regarding the measurements of the foot.

Q. You need not bother going into those details, if you will just state briefly what you found the condition of the foot to be?

A. We found that he had a loss of between one-third and one-half of the injured part of the foot.

Q. What about the condition of the portion of the foot that remained?

A. There was a scar running from—suppose that is the stump there (indicating), a scar starting here, running around the end of the stump into this side.

Q. This was a post operative scar?

A. Yes, sir.

Q. What about the condition of the ankle and heel?

A. Examination of the ankle: we considered him unaffected by the injury, practically normal.

Q. Was there anything to indicate to you just what had caused the loss of the portion of the foot that was gone?

A. No, not unless you had all the history of the case.

Q. Did you reach a conclusion as to the percentage of disability of the foot from what had been lost?

A. Yes, we formed a pretty definite idea of that.

Q. What percentage would you say?

A. We concluded that he would never make a runner We concluded he might have a little difficulty balancing himself on rough ground, or where the function of the toes is required, since he is going upgrade.

Q. Can you reduce it to figures in what percentage?

A. It would depend a whole lot just on the occupation he was following. I think a general estimate would probably be that he lost about 40 or 50 per cent.

Cross-examination by Mr. Koch.

Q. You don't agree with Dr. Lehr, who examined with you, that the estimate was probably between 50 and 60 per cent.?

A. Is that functional loss or anatomical loss?

Q. That was functional loss?

Mr. Hartpence—I don't think I said anything about functional loss. I think I asked Dr. Lehr

the same question as I asked Dr. Perfect as to how much percentage of disability he found.

Q. The percentage of disability is determined from the functional loss?

A. Yes, sir.

Q. You say between 40 and 50 per cent.?

A. I think I will stick to that.

Q. Did you ever treat this plaintiff?

A. No, sir.

Q. The only time you saw him was this day when you were sent there?

A. Yes, sir.

Q. You have not examined him since?

A. No, sir.

Q. You have seen him here in court; and have you seen him in Lykens?

A. Oh, yes, very often.

Redirect examination by Mr. Hartpence.

Q. What have you observed about him as you have seen him in Lykens and in court with regard to his walk and the use of his foot?

A. Well, he seems to get along pretty good.

Recross-examination by Mr. Koch.

Q. He doesn't get along as good as if he had his foot?

A. I pretty nearly always see him in a car, so I can't tell you that.

Redirect examination by Mr. Hartpence.

Q. What do you mean, see him in a car?

A. In a roadster, I think it is.

Q. An automobile?

A. Yes, sir.

Q. Running it himself?

A. Yes, sir.

Dr. Clarence C. Bobb, sworn for the defendant.

Direct examination by Mr. Hartpence.

Q. What is your full name, doctor?

A. My full name is Clarence Curtin Bobb.

Q. Where do you live?

A. Lykens.

Q. How long have you resided there?

A. About eight and a half years.

Q. Are you one of the three physicians that are at Lykens that Dr. Lehr referred to?

A. Yes, sir.

Q. Have you had occasion to examine Mr. Kopenhafer, the plaintiff in this case?

A. I did.

Q. When and under what circumstances did you examine him?

A. As surgeon for the Susquehanna Collieries Company, I saw him the afternoon of the day Mr. Kopenhafer was injured. I was called to the collier.

Q. Is that the colliery where Mr. Kopenhafer worked?

A. Yes, sir.

Q. The Susquehanna Colliery Company?

A. Yes, sir.

Q. What did you do then?

A. First-aid dressing had been applied and he was ready to be moved to his home. In order to facilitate matters, I permitted him to be removed, without trying to make an examination there and made an examination after we arrived at his home.

Q. What did you find his condition to be?

A. Well, he had a tear that went inside back and below the ankle of the right foot, and he had been bleeding quite a bit on the front part of the foot, toes and the front part of the foot was very much blanched and cold to the touch and I made a diagnosis of disturbed circulation in the injured part of the foot.

Q. What special injured part do you mean?

A. The part the toes are on.

Q. Was there any injury to the toes?

A. No.

Q. The front part of the foot was not injured?

A. No.

Q. Where was the injury?

A. It was below the internal malleolus, diagonally across the hollow; it was back and below.

Q. What in your opinion caused this blanching and cold condition?

A. The circulation being cut off, the arteries were severed there.

Q. Did you examine the injured part closely enough to determine whether it had been crushed or whether it was an abrasion or squeezing or what it was?

A. The part was very painful. I could not go into detail on that because it was a matter of getting the man to the hospital and have him get exceptional care.

Q. Well, what did you finally find out was the exact injury that he had sustained, doctor?

A. Well, what I later found out was exactly what I had thought at the time I examined him.

Q. What was that?

A. That the arteries were severed there. There was a fracture and slight dislocation of one area, to all the bones; that really did not add to the injury.

Q. Would that indicate that the foot had been run over by a railroad car?

A. Something very heavy.

Q. Run over it?

A. No, could not have run over it; if it had run over it, it would have crushed the bone in the region.

Q. This loss of a portion of his foot, the front part of it, was due to what?

A. Was due to a disturbance of circulation. The front part of the foot was not getting proper nourishment to keep it alive.

Q. It was not due to specific injury to that part of the foot?

A. No.

Q. This gangrene set in?

A. Yes, sir.

Q. What was they due to?

A. It was due to the dying of the part.

Q. What causes that?

A. The reason that died was because it was not getting any nourishment.

Q. You mean no circulation?

A. No circulation.

Q. You see, we don't know. I am asking you to tell us what what causes gangrene?

A. Well, the blood was not flowing through the front part of the foot where the toes were and where they were attached. The result was that they died, became gangrenous.

Q. Did you have anything further to do with the treatment of the foot after that?

A. I visited him two or three times at the hospital during his first admission there.

Q. That was at Harrisburg?

A. At Harrisburg and saw the gangrene coming on and I also saw his chart during these visits and then I took care of him from the time he was discharged from the hospital until he was readmitted and again after he was discharged until he resumed work, plus the time he went to the hospital for lamp treatment. I kept in touch with him during that time.

Q. When did he go back to work?

A. I signed a clearance card to resume January 1st, 1928.

Q. At that time what was his condition in regard to recovery?

A. Well, he had recovered.

Q. Have you seen him since then?

A. Since I let him go to work? I have just seen him on the street, to talk to him.

Q. You kept observing him when you have seen him?

A. In a particular sense my interest in the case was gone then.

Q. What did you observe about his ability to walk after you had seen him?

A. Well, his walking was lame. You could see a limp as he walked along but I did notice that he grew stronger as healing took place.

Q. What grew stronger?

A. The foot and his gait.

Q. Grew stronger?

A. Yes, sir.

Q. It was part of your duty as the physician attending him to keep track of his condition until he was able to return to work?

A. Yes, sir.

Q. Who paid your bill?

A. Susquehanna Collieries Company.

Q. Did you at any time have occasion to talk to Mr. Kopenhafer or hear Mr. Kopenhafer tell anyone else as to what caused the accident?

A. The history was given while I was making the dressing or immediately after I was through, I can't recall just exactly what time—during my work there. But a statement was made that——

Q. By whom; and did you hear it?

A. Heard it.

Q. Who made the statement?

A. Mr. Kopenhafer.

Q. Whom did he make it to?

A. As I recall it, Mr. Kissinger.

Q. What did he say?

A. He said he stepped back of the car to take a leak; those were the words.

Q. And then what happened?

A. And he was caught by the train.

Cross-examination by Mr. Koch.

Q. You say you discharged him on the 31st of December, 1927?

A. Yes, sir.

Q. From the date of his accident until that date, the man was under your care and in your opinion he was not ready to return to his work?

A. No, sir.

Q. The condition which you originally found, was that a condition which would cause pain to the patient?

A. Indeed it did.

Q. The time spent at the hospital and the medical treatment he underwent there, is that painful?

A. I imagine it is.

Q. Did you have any complaint of pain from him after he had returned from the hospital?

A. Yes, sir.

Q. And in the second interval, as well?

A. Yes, sir.

Q. How long would you say those complaints continued?

A. Roughly until near the time that he resumed work. He made that complaint of some tenderness even when he resumed work.

Q. And from your observation or from your examination and treatment of him, you think these complaints were justified?

A. Yes, sir.

Q. Where was Mr. Kopenhafer at the time you say this statement was made?

A. In the kitchen of Mr. Kopenhafer's home.

Q. How long was that after the accident?

A. I was——

Q. Can you tell us what time it was when you were in the kitchen?

A. It was, approximately, some little time after four o'clock.

Q. You were getting ready then to move him to the hospital?

A. Yes, I put on the dressing.

Q. And waiting for the ambulance?

A. No, the ambulance was waiting.

Q. Who is Mr. Kissinger?

A. The yard master and station agent at Lykens.

Q. Is he employed by the colliery company or the railroad company?

A. By the railroad company.

Q. He was making a report of the accident?

A. Yes, that is what he was doing.

Q. And so he held up the profession to the hospital long enough to say, or get that report?

A. He didn't hold it up at all. He was asking him while I was working.

Q. And that was at a time when he was bleeding from the foot or at that time had it stopped bleeding?

A. Well, we had checked it some.

Q. But the boy was in pain?

A. Yes, sir.

Q. Who else was there besides you and Mr. Kissinger?

A. I can't recall anyone that was there.

Redirect examination by Mr. Hartpence.

Q. Doctor, did you find any other injuries besides these injuries to the foot?

A. I don't recall that I did.

Q. Now, while you and Dr. Lehr and Dr. Perfect were here testifying in this case, what happens out in Lykens with regard to medical attention out there?

A. I don't know.

Recross-examination by Mr. Koch.

Q. While you had him in the kitchen there and while you were dressing him, did you find it necessary to give him an injection?

A. I don't recall that I did. I may have. It has been so long ago that I don't remember.

(Recess to 2 P. M.)

(After recess 2 P. M.)

J. R. Kissinger, sworn for the defendant.

Direct examination by Mr. Hartpence.

Q. What is your business, Mr. Kissinger?

A. Agent and yard master.

Q. Of what?

A. Of the Pennsylvania Railroad Company, located at Lykens, Pennsylvania.

Q. How long have you been in that position?

A. I have been in that position twelve years.

Q. Where do you live?

A. I live at Lykens.

Q. Do you recall the accident to Mr. Kopenhafer?

A. I do, yes, sir.

Q. Were you there at the time it happened?

A. I was on the engine.

Q. Just what brought it to your attention?

A. Why, they were taking in a draft of cars into the breaker, to place them above the breaker and I was on the engine, when we picked up cars standing on the light track.

Q. Let me ask you, was the engine going up with the pilot forward or backing up or what?

A. The engine pilot was forward.

Q. Was there anything attached to the engine?

A. No, sir.

Q. The engine was running, pushing the cars?

A. The engine was shoving the cars towards the breaker.

Q. How many cars was it pushing?

A. Twenty.

Q. That is what I am saying, the cars ahead?

A. Pushing the cars ahead of the engine, yes, sir.

Q. That was on this light track, as they call it?

A. On the light track.

Q. Then what happened?

A. The brakeman gave the engine a signal to stop, which is done as a daily occurence, to pick up the cars standing out on the light track and of course the train was stopped and I got off the engine. While I was standing on the side of the engine, the brakeman came back and reported to me that they had caught a man at another end of the track and had taken him up above the breaker for first-aid treatment.

Q. These cars the engine was pushing, where did they come from?

A. They had come from Lykens.

Q. How far out to the colliery was it?

A. Well, it would be about a mile and a half; we have to switch back to get in there. We have to go above Wisconisco and come back in again; would be about a mile and a half, I guess.

Q. Were there any cars standing on the track?

A. Running track, we picked up six cars.

Q. How did that take place, what did you do as you came in pushing your twenty cars?

A. When we came in, we always approached the breaker prepared to stop on account of the cars that are setting up on the light track which is practically a daily operation and we were going in at this time, and of course the brakeman had given the engineer the steady up signal.

Q. What is that?

A. To reduce speed on his train and be prepared to stop. When he got, of course, close enough to the cars to make the coupling why, the stop signal was given and the train would naturally move then about half a car length until it came to a stop.

Q. Did they actually make the coupling?

A. They did.

Q. Did you notice what kind of coupling it was, whether it was violent or easy?

A. Oh, no, just an ordinary coupling, just hard enough to get against the cars and make the coupling.

Q. Then you say they ordinarily move a little bit?

A. About half a car length.

Q. Then what happened?

A. Then the slack would naturally run back into your train.

Q. Is that what happened that day?

A. That is what happened that day, yes, sir.

Q. Well, then, just let me get it clear; you say then someone came forward and said that someone had been hurt?

A. Yes, the brakeman reported to me that they had caught a man on the other end of the cars.

Q. In between the time that you made your coupling and the time that it was reported to you that someone had been hurt, had the engine back back in there?

A. No, the engine when it was stopped there, it remained until the brakeman had given him the signal to go ahead and that was after he reported to me.

Q. So that the thing that moved the cars was the coupling of the other cars to it?

A. Yes; going against, backing up against the six cars.

Q. And your train did not move after that until after the accident occurred?

A. After the accident occurred. It was really after he had reported to me, because the train was not taken care of until—he knew I was on the engine and he wanted to report the facts to me before he would go any further.

Q. Those cars, then, would be all pushed up in the storage yard?

A. Yes, sir.

Q. Did you have occasion to talk to Mr. Kopenhafer about the accident any time afterwards?

A. I did. The same day, right after it happened. I knew that they would bring him down from the tressel in the ambulance and I stayed on the crossing, at the road crossing, until the ambulance came down. I got on the ambulance and went along over to his home and then they had taken him in the kitchen and I waited possibly five minutes before I went in. I went in and when I was in there, Dr. Bobb was still dressing the foot.

Q. Was that the Dr. Bobb who testified here this morning?

A. Yes, sir; I asked Mr. Kopenhafer then—I says to him, "Bob, how did this thing happen?" "Why," he said, "I was standing behind the draft of cars urinating, and didn't see the engine.

Q. You had known Mr. Kopenhafer before that time?

A. I did, yes, sir.

Cross-examination by Mr. Koch.

Q. You were operating the engine, were you, Mr. Kissinger?

A. No, sir.

Q. So that just before the accident, your locomotive was pushing 26 or 27 cars?

A. Twenty empty cars.

Q. Well, how many cars did you couple up with?

A. Six; we picked up six.

Q. You had fourteen before?

A. We had twenty empty cars in the train, approaching the six standing out on the light track.

Q. And then you coupled up?

A. That would total 26 cars pushing up above the breaker.

Q. Is that much of a grade?

A. That is, I would judge it ran from five to—well, on up in the yard, ran about seven and then along down to about two per cent. grade.

Q. And that cars that are standing at the colliery, they are held by their brakes?

A. Yes, sir.

Q. Are these hand brakes or air brakes?

A. Hand brakes.

Q. Then when the connection is made, are the brakes released?

A. The operation is this: we pick up the cars there; the cars are picked up and then the man will walk ahead and he will couple up his air hose on to the cars that he has picked up. He will take his brakes, release his brakes and walk ahead, see that everything is all right, and set his switches. Then he will give the signal. Now, in some cases, he will be obliged to walk at least fifty to a hundred feet back to get his signal back to the engineer, because the switches lie above the breaker.

Q. When does he walk ahead, Mr. Kissinger?

A. Just as soon as the train is stopped and he had picked up the cars.

Q. Is that at the time when he makes the coupling or before that?

A. He will make his coupling and everything when stopped and then he will walk ahead, you see, he is on the first car in the draft being taken to the breaker, and he is also then on the first car in the draft of cars that he picks up, so that he is in a position to drop on the ground and on many occasions we have to put cars where they are where he can't give the signal; there is only two breakmen and when he is around the breaker, he is obliged to put the stop signal on, by turning near——

Q. So a man standing where Mr. Kopenhafer was at the time of this accident could not see any one of the brakemen, or the engineer?

A. He could see the approaching train where he stood, the way I understand he was standing. If he stood behind the draft of the cars, which he said he did, he would never see anything but what was in front of him.

Q. Where did you say he said he stood?

A. Behind the draft of cars.

Q. Between the cars?

A. No, sir; he says behind the draft of cars. He said he stood behind the draft of cars and urinated.

Q. Did he say he was standing between the rails?

A. He didn't say that. He just simply said he was standing behind the draft of cars.

Q. You stopped the ambulance and went to him solely for the purpose of determining where he was, did you not?

A. No, sir. My duties required when an accident happened, I must get the details of the accident.

Q. Those details are to be used in the subsequent defense of the case?

A. Not necessarily.

Q. If there is litigation?

A. Yes, they are, yes, sir.

Q. And so it is important for you to get the details as fast as you possible can get them?

A. The true facts of the case.

Q. And that was the activating motive in your mind at the time?

A. To get the true location of the man and what he was doing and so on.

Q. And for that reason, you stopped the ambulance and got aboard?

A. Yes, sir.

Q. Did you talk to him while he was in the ambulance?

A. No, sir.

Q. You said he was in the kitchen when you came in?

A. Yes, sir.

Q. Where was he lying?

A. Well, they had him propped up on a chair and had his foot on another.

Q. Was the doctor in attendance?

A. Yes, sir.

Q. What was he doing to his foot?

A. He was just about finishing putting the bandage on.

Q. Did you see him give the boy an injection to protect him against pain?

A. No, sir, not while I was there.

Q. Who else was in the kitchen?

A. I can't recall. There was some lady standing there with a basin in her hand. I can't say whether it was Mrs. Kopenhafer or not.

Q. What did you say to him?

A. To Bob, to Kopenhafer?

Q. Tell us what you said?

A. I says, "Bob, what were you trying to do; how did this happen?". "Why," he said, "I was standing behind the draft of cars to urinate and I didn't hear the engine coming."

Q. Did you say anything else to him?

A. Nothing else, outside of saying "That's bad luck," I was sorry and so on.

Q. Did he say anything else?

A. Not at that time, no. I recall one time after that.

Q. We are talking about this time. We want to know first about in that room at that time; did you say anything else to him at that time?

A. Not that I recall, other than just talking to him about his condition.

Q. How long after that was it when he was removed to the hospital?

A. Well, a very short time.

Q. Were you still there when he was removed to the hospital?

A. No, I don't think I was.

Q. Having that bit of information, your duty was through?

A. I was through; I had the facts that I was obliged to report in all cases, regardless of what they might be.

Q. That done, that was all your interest in the matter for all practical purposes?

A. It is my duty to see to the welfare of any person that is injured.

Q. I am not talking about your duty; I am talking about your interest in the case?

A. It was to my interest to see that the boy was taken care of.

Q. Had you talked to anybody else before you got to the house?

A. No.

Q. Did you talk to anybody between the time when you left the engine and the time you picked the ambulance up on the crossing?

A. No, none other than the brakeman.

Q. Did the brakeman tell you anything about how the accident happened?

A. No, sir; he told me that they had taken the man away. He says, when I got to the other end of the car, after I reached the end, why the men told me then that they had caught the fellow there and that they had taken him up for first-aid treatment.

Q. Did you ask him what he learned about how it happened, how he happened to be caught?

A. No, he didn't know how; he didn't have any information in order to give me.

Q. Now, after the coupling was made, you say the car moved how much?

A. About half a car length at the time the coupling was made; they drift about half a car length.

Q. Now, in order to move the six cars that are standing on the incline, such as you have described it, and to overcome inertia and move these six cars at least half a car length, which we will assume is 20 feet, it takes somewhat of force to push them, doesn't it?

A. Not necessarily at the point where these cars stood. The car is on about two per cent. of grade. You can hold the six cars there with two brakes.

Q. There would be a bit of a smash as the cars came together?

A. Would not be any more than if you were taking the slack on the train on empty steel cars.

Q. Now, tell me, would there or would there not be a crash when these cars came together?

A. Well, yes, there would be—not a crash, but there was noise such as there is in the handling of steel cars.

Q. Every car that starts forward?

A. Would make a noise.

Q. And so the sum-total reaching the man ahead would be a fairly resonant crash?

A. Well, would naturally be a noise, that you get constantly from the handling of steel cars.

Q. Now, is the coupling of the cars and the releasing of the brake simultaneous, or is it an act that requires still another step?

A. Still another step. A man will, as a rule, get down off the front end of the draft he is riding and couple up the air.

Q. So that at the time when these cars crashed and have moved a half car length, the brakes would still be set on the cars you picked up?

A. No, he would be on the train, he would be on the first car in the draft of 20, or the twentieth car from the engine.

Q. He would not change the brake actions while the cars are in motion?

A. No.

Q. And we are agreed that when the cars came together for the purpose of coupling, when the clash occurred, the force used to couple them was sufficient to move six cars at least half a car length?

A. Yes, sir.

Q. Then they stopped?

A. No, they drifted back.

Q. Then do I understand that the force of the blow sends them forward and then they roll back?

A. Yes. You see, you take an engine, when the brake is applied and you stretch up your train of twenty cars without brakes, why, naturally they will drop back on to the engine, which will give you slack on twenty car lengths, because the brakes are put on by the engine and not by the train line.

Q. Did you go to the scene of the accident, Mr. Kissinger?

A. No, sir.

Q. You don't know the position of the cars on the track immediately before the accident?

A. I do not, no, sir.

Redirect examination by Mr. Hartpence.

Q. Mr. Kissinger, leading up grade, up to the breaker to go up to the empty track, for how long a distance is the track straight below the breaker?

A. Why, I judge about 25 to 30 car lengths.

Q. This curve you speak of, where is that?

A. Well, the curve, of course, is below the breaker. That is, directly opposite the breaker, or do you mean the curve at that end or above the breaker.

Q. You spoke of a curve after you passed the breaker?

A. Oh, that is immediately on the other side, no more than 50 to 60 feet—about fifty feet. It makes a very sharp curve, in fact, it curves right into the load track. You can only leave two cars standing on the load track and one then is partly under the breaker.

Q. I show you this photograph, D-6 for identification, and ask you if that correctly represents the location of the track at the breaker and below the breaker?

A. Yes, sir.

Q. And the curve that you refer to?

A. This is where? (Indicating.)

Q. Above the breaker?

A. Yes, it curves into this track.

Q. Into the load track?

A. Yes, about fifty feet.

Q. My question is, how far down grade, do you look down grade?

A. Oh, 25 to 30 car lengths from here, from the end of the breaker.

Q. From where the steps are?

A. Yes, sir.

Q. This slack you referred to, whenever the locomotive pushes these 20 cars up and they coupled the six cars that were standing there, they kept right on moving as I understand?

A. Yes, they drift about half a car length.

Q. Now, when they drift, what does that do to them?

A. Well, that is due to the—you see, you have your train moving. The engineer will apply his brakes on the engine; at the time when you have twenty cars there without any brakes, they would travel about half a car length, or the slack on your train.

Q. I am trying to get this clear to the jury?

A. Just the slack running out of the train.

Q. These cars fasten right close up together and stay there?

A. They stay, you see, until he applies his brake.

Q. And then what happens?

A. Then, they will drift until each car is caught, and then——

The Court—About how much play is there between each car; how far can a car separate to keep its connection, six or eight inches?

The Witness—About a foot.

Q. That is what you call the slack?

A. Yes, about six inches on each coupler.

Q. That is what you call the slack?

A. That is what I would call the slack.

Q. And as far as coupling it, the slack you say runs out, on the down grade?

A. They all come back.

Q. The cars would all come back?

A. Naturally they caught the engine again.

Q. And that would pick up the slack?

A. Yes, sir.

Q. Did you have any other conversation with Mr. Kopenhafer about how this accident happened?

A. After he returned, I met him on the street corner in Wisconisco one night, and I asked him how he was getting along. He told me and I said "Well, I am very sorry for you and sorry it happened." He says "Well, it is bad enough, but he says, it is my own fault."

Recross-examination by Mr. Koch.

Q. Did you make a report of that too?

A. No, sir; that was a personal matter.

Q. When did you first tell Mr. Hartpence about that?

A. This is my first time.

Q. Just this time; all this time, since the action has been instituted, since the time of the accident, or rather since the time you had this conversation until now, you kept that severely to yourself?

A. I had no occasion to cite it.

Q. Did you think it was important to your employer?

A. I didn't think at the time, when we took the case, when I wrote up the case, which is a report you make on No. 75. I gave the facts of the accident and then as far as I am concerned, why, I am through with the case.

Q. When you inquired about it some more; you talked to the man again the first opportunity you got?

A. Not unless I am asked to get a statement or any further information required by the company.

Q. And that is all he said, just "It was my own fault;" is that right?

A. Yes, that was at that time.

Q. Do you know whether suit had been started at that time?

A. No, sir.

Q. That is, do you know, or don't you know?

A. I didn't know of any suit started at that time.

Q. When did you say that was you talked to him?

A. I could not tell you the date. It was after he returned from the hospital. The first time he was on crutches, standing by the Methodist Church corner in Wisconisco.

Q. Can you fix it with the respect to the Christmas holidays; was it before or after Christmas?

A. Well, that I could not say. I can't tell you any time it was. I just simply recall the conversation with him. I know it was at night.

Q. Had you ever talked to him before that time?

A. Not to my knowledge, other than the day of the accident.

Q. Did you ever see him working at the colliery?

A. No, I don't believe I did notice him working there. I knew that he had worked there. I saw him several times; of course, it may have been after or before. I don't remember. That is, as I would go to the freight station. I don't know whether that was after or before.

Q. You knew the manner in which cars were being moved there to the load track?

A. Yes, sir.

Q. You knew they were moved by the barrers?

A. Familiar with the operation, yes, sir.

Q. You are thoroughly familiar with the situation there, with the buildings and the stairways leading up into the breaker, as well as those at the place leading up into the loading platform?

A. Yes, sir.

Q. You have seen them there time and time again?

A. Yes, sir.

Q. Seen them working there, crossing the tracks?

A. To the loading tracks you mean?

Q. Yes?

A. Yes, sir.

Q. You have seen them crossing the empty tracks to get to the stairway that leads up into the breaker itself?

A. Yes, sir.

Q. You knew at the time when you brought up this load of cars it was just quitting time, didn't you, at the mines?

A. Well, I know. I didn't have——

Q. You knew what time the men quit?

A. Yes, sir.

Juror No. 9—Is there not any rule of the railroad that requires a brakeman to look on the end of the train when he is coupling up, to see if there are any obstacles in the way?

The Witness—Not on a siding, no, sir, and this is a siding. It is no main train track.

Juror No. 9—They are not supposed to?

The Witness—No, sir; these are tracks in yards; it is practically a yard.

Q. Have you your book of rules with you?

A. No, sir.

Q. Where do these tracks which you call a siding begin?

A. That begins at the junction.

Q. How far away is that?

A. That is about a mile away.

Q. Is that used exclusively for this colliery?

A. Yes, sir.

Q. It was one of your regular locomotives that was pushing these cars?

A. Yes, sir.

Walter H. Fravel, sworn for the defendant.

Direct examination by Mr. Hartpence.

Q. Where do you live?

A. Wiliamsport, Pennsylvania.

Q. What is your business?

A. I am an investigator, employed by the Pennsylvania Railroad Company.

Q. Claim department?

A. Yes, sir.

Q. Where is Williamsport, in relation to Lykens?

A. I should judge about 65 or 70 miles north of Lykens.

Q. Lykens is in your district, is it?

A. Yes, sir.

Q. Did you have anything to do with investigating the accident in regard to Mr. Kopenhafer?

A. Yes, I had business in Harrisburg and I was asked to step in the hospital at Harrisburg and get a report.

Q. By whom?

A. H. C. Stout, my superior officer.

Q. What is his position?

A. District claim agent.

Q. At Williamsport?

A. Yes, sir.

Q. Did you see Mr. Kopenhafer there?

A. Yes, sir.

Q. Do you recall when that was?

A. September 20th, 1926.

Q. Shortly after the accident?

A. Three days, I believe.

Q. Did you have any conversation there with him?

A. Yes, sir.

Q. Where was he at the time?

A. He was in a semi-private ward as I recall it.

Q. What was his condition?

A. He appeared to be normal.

Q. What did he say and do?

A. I asked him about the accident, how this accident happened, and he told me he had been working on loading car track and he had to urinate and so he walked over to the light car track, stood a foot behind the first car of the draft; he was urinating there when the draft was suddenly bumped and his foot, his right foot I believe it was, was run over by the wheel.

Cross-examination by Mr. Koch.

Q. What did you say your business was?

A. I am an investigator in the claim department.

Q. That is you go about and get information to be used in defense of claims, is that it?

A. Yes, sir.

Q. Are you instructed by your superior as to the type of information you are to get, as to what information you are to get, or are you left to operate freely yourself?

A. I am usually left to operate freely myself.

Q. How long before you got to Harrisburg had you been told to stop in there?

A. As I recall it, the 20th of September was a Monday. I got my orders on Saturday.

Q. You didn't go to Harrisburg particularly to make this investigation, did you?

A. No.

Q. Where were you at the time you got your orders?

A. Williamsport.

Q. How far was that from Harrisburg?

A. I believe about 65 or 70 miles from Harrisburg.

Q. When you went in, did you tell Mr. Kopenhafer that you were from the railroad company?

A. Yes, sir, I did.

Q. Did you tell him what you were there for?

A. I asked him to tell me how the accident happened.

Q. Did you have a regular form blank that you used for this information?

A. No, sir; we have a blank form we write out the information on.

Q. Did you have one of these blank forms at the time?

A. Yes, sir.

Q. You had the time and place and date of the accident?

A. Not filled in; I asked him that.

Q. What time in the day was it when you saw him?

A. I believe it was between 9 and 10 in the morning.

Q. Was he in bed?

A. Yes, sir.

Q. What did you ask him?

A. I asked him to tell me how this accident happened and he told me.

Q. How did he tell you it happened?

A. He had been working on the loaded car track and he had to urinate, he stepped across the light car track standing about a foot from the empty draft when the draft was bumped and his foot was caught by the wheel.

Q. Did he tell you whether he was standing between the rails or how he was standing?

A. He said he was standing on the track; that's all he told me.

Q. Did he tell you that, or did you hear the other witnesses testify to that?

A. No, he told me that.

Q. Did you make a written report?

A. I did.

Q. Have you your written report?

A. Mr. Hartpence has it.

Q. Did you say in your written report that he had his foot on the rail?

A. No, I said he was standing on the track.

Q. Well, what else did you put in your report that you want to change now?

A. I haven't changed anything.

Mr. Hartpence—I object to that; he has not changed anything.

The Court—Sustained.

Q. How long did you stay with him?

A. I should say between twenty and thirty minutes.

Q. What else did you ask him besides that?

A. Well, we had a general conversation. I talked to him. There was another man in the ward that I talked to at the same time.

Q. Did he seem to be in pain at the time?
A. No, sir.
Q. Absolutely no pain?
A. I don't think he was.
Q. Laughing and joking?
A. Yes, sir.
Q. Just as though nothing had happened to him?
A. He was not joking a whole lot.
Q. Bright and cheerful?
A. Yes, I would say he was.
Q. Sitting up?
A. Not sitting up.
Q. Glad you called up and entertained him?
A. He appeared to be.
Q. Did you ask him for any other details?
A. I asked him if he didn't see the other cars coming. He said he didn't see them.
Q. Did you ask him how long he had been standing there?
A. No.
Q. Did you ask him whether he had his hand on the car or whether he had not?
A. No.
Q. He didn't tell you that, did he?
A. No.
Q. Did he tell you which way he fell when he was struck?
A. No.
Q. Did he tell you what portion of the car struck him?
A. No.
Q. Did you ask him?
A. I don't believe I did.
Q. How long did you say the actual investigation of the case took?
A. Five or ten minutes.
Q. Did you ask him these questions direct or did you repeat them in among the conversation?

A. I asked the questions first; just as soon as I had the information I wanted, we started a general conversation.

Q. Are you still employed by the railroad company?

A. Yes, sir.

Q. How long had you been employed at that time?

A. Four years.

Q. You knew your investigation was to be used in defense of a claim if there was one?

A. Yes, sir.

Q. It is your business to prepare cases for the defense, is it not?

A. Yes, sir.

Q. You knew, did you not, that unless this man was standing on the track, your company was in danger?

Mr. Hartpence—Objected to as immaterial and irrelevant.

The Court—Sustained.

Mr. Koch—Exception.

The Court—Exception allowed.

Redirect examination by Mr. Hartpence.

Q. Part of your business also is to attend and report at the trial of the cases you investigate?

A. Yes, sir.

Q. Have you ever done that in Harrisburg?

A. No, sir.

Q. That is not in your district?

A. No, it is not.

William DeNeill, sworn for the defendant.

Direct examination by Mr. Hartpence.

Q. Mr. DeNeill, where do you live?

A. Williamsport, Pennsylvania.

Q. What is your business?

A. Claim adjuster and investigator of accidents, Pennsylvania Railroad Company.

Q. How long have you been in that position?

A. About four years and a half.

Q. In whose district are you?

A. Mr. H. C. Stout is the district claim agent at Williamsport.

Q. The same gentleman that Mr. Fravel is under?

A. Yes, sir.

Q. Now, did you have anything to do with investigation of this case of Mr. Kopenhafer's?

A. Practically all of it.

Q. Did you talk to Mr. Kopenhafer at any time about it?

A. Yes, sir.

Q. Did you talk to Mr. Roy C. Spangler about it, who was here testifying this morning?

A. Yes, sir.

Q. Where is Lykens, Pennsylvania?

A. I would say it is about 60 miles north of Williamsport. I believe that is where it is.

Q. Do you recall what county it is in?

A. Dolphin.

Q. What county is Harrisburg in?

A. Dolphin.

Q. What did you do in regard to the case with Mr. Spangler?

A. Why, it is our duty, of course, to go out and gather all the information we can pertaining to the case. Among the witnesses I saw was Mr. Spangler.

Q. Do you recall about when that was?

A. Yes, I saw him about the 4th of October, 1926.

Q. Where?

A. At the colliery at Lykens.

Q. Did you get a statement from him?

A. Yes, sir.

Q. I show you these two papers, D-l-a and D-l-b for identification and ask you if that is the statement?

A. Yes, that is the statement.

Q. I call your attention to his signature, Roy C. or

Ray C. Spangler at the bottom of each page; did you see him sign these?

A. Yes, sir, I did.

Q. Well, now, who wrote the body of the statement?

A. I did.

Q. That is your handwriting?

A. Yes, sir.

Q. Did you write anything in there except what he told you?

A. Not a thing, except the three questions at the end.

Q. What are they?

A. Have you read this statement? Is it correct? And, does it contain all the facts of the accident of which you have knowledge?

Q. Did he sign those?

A. Yes, sir, he did.

Q. Is there anything in that statement, written there by you or anyone else that he didn't say to you?

A. Not a thing.

Q. I mean in the body of the statement?

A. Everything that is in that statement is what Mr. Spangler told me.

Q. Now, do you recall what he said to you aside from the statement about how the accident had taken place?

A. Among other things, he said that he helped the man with others, and that someone asked him how it happened.

Q. Asked who?

A. Asked Kopenhafer. He said he was standing between tracks to urinate. While he was standing there, the cars were bumped.

Q. "I helped the man with others and when someone asked him how it happened, he said he was standing between tracks to urinate and while he was standing there, the cars were bumped"; Mr. Spangler told you that Mr. Kopenhafer had said that?

A. Absolutely.

Cross-examination by Mr. Koch.

Q. Where was it you say you met Mr. Spangler at the time you took this statement from him?

A. Up at the collieries.

Q. What time did you see him?

A. You mean the time of day? Well, that is pretty hard to say. I don't believe I can tell you the exact time of day.

Q. I don't want the exact time; morning or afternoon, do you remember?

A. Well, we usually get in Lykens before noon. I suppose I went there right from the station.

Q. Did you tell him who you were?

A. Absolutely.

Q. Did you tell him what your business was?

A. Yes, sir.

Q. Did you tell him what you wanted?

A. Just what do you mean?

Q. Did you tell him you wanted a statement from him?

A. That is what I said, in so many words.

Q. Did he seem reluctant to talk?

A. I had no trouble getting that statement from him. I just asked him what he knew of the accident, and that is what he told me.

Q. When you say you had no trouble getting a statement from him, do you mean it was easier for you to get it out of him, or he was half reluctant, or he was willing to give you a statement?

A. I usually don't have much trouble; still I don't gather your question. I had no trouble with him.

Q. You are experienced in the manner of taking statements?

A. Yes, sir.

Q. You know how to approach a man properly?

A. Yes, sir.

Q. You make sure that you won't be rebuffed?

A. We sometimes get rebuffed.

Q. Now, tell us how this statement was made; did you talk to him first and then write it down, or did you write it down as you talked?

A. I talked to him first. I always do get the general knowledge of it, as to what he knows about this particular accident.

Q. Then you cast it into this narrative form?

A. Yes, sir.

Q. Then after it is in the narrative form, you let him read it and sign it?

A. Yes, sir.

Q. Did you do that this time?

A. I did.

Q. There are two statements credited to Mr. Spangler in these two sheets of paper, are there not?

A. No, this is one statement.

Q. Now, did Mr. Spangler say this to you, "I did not see the man standing on the track just before the accident. I helped the man with others and when someone asked him how it happened he said he was standing between the tracks and urinating and while he was standing there the cars were bumped." Did he say that?

A. Yes, sir.

Q. And then, did he say this: "Roy Spangler. He didn't say he was standing between the tracks as above written, he was standing at the end of the cars, but I was about fifty feet away from the accident when it occurred"; when did you write that last paragraph in?

A. At the same time.

Q. Now, after this statement which I read, you have this: "Have you read this statement?

A. Yes, sir.

Q. Is it true?

A. Yes, sir.

Q. Does it contain all facts of the accident of which you have knowledge?

A. Yes, sir."

Q. Then it is signed "Roy Spangler." Then comes this other paragraph which I have just read. Now, suppose you tell us how you came to write in that last paragraph?

A. I wrote that right there when Mr. Spangler was present.

Q. That was because Mr. Spangler said the first statement did not exactly conform to the facts as he had related them to you?

A. Possibly so.

Q. Yes or no, sir?

A. Repeat your question.

Q. (Question read as follows: That was because Mr. Spangler said the first statement did not exactly conform to the facts as he had related them to you?)

A. That is only in respect——

Q. Yes or no is all that I require.

A. No, sir.

Q. But he did say something to you, didn't he, about that first paragraph?

A. Yes, he did.

Q. He did express dissatisfaction with it, didn't he?

A. I would not call it dissatisfaction exactly.

Q. Did he say in words or substance that did not correctly and properly relate it?

A. That particular part where he amended it later.

Q. Then you told him you would cure it by writing this last paragraph in, didn't you?

A. I must have or I would not have changed it.

Q. The fact of the matter is that he told you that all he knows about this thing is hearsay, isn't that so?

A. No; if he said that, it would be right in the statement, and he didn't have to have signed it.

Q. Nevertheless, he told you that something which you wrote in the statement and which he complained of subsequently as being incorrectly reported?

A. Yes, he had the sheets to read and after I wrote it.

Q. This statement was taken how long ago?

A. 4th October, 1926.

Q. You remember that detail better than the time you took it or the place where you took it?

A. Well, we have so many statements, it is hard to give you the exact time?

Q. Precisely; you take so many statements it is impossible for you to remember the details of them?

A. We put all the details we think necessary in the statement.

Q. You put in the details you think necessary?

A. And the man as well.

Q. The details that you think necessary are the details that you think necessary for the defense of the litigation?

A. We go further than that.

Q. How far do you go?

A. After we get our statements completed, we will ask the man, is there anything else he wants to add in the statement.

Q. And then when the man says your statement is not quite correct, you say "We will correct it by adding a paragraph"?

A. We want to have it agree with the man's own statement.

Q. Immediately, however, that you got through with Mr. Spangler, he and you agreed that this statement was correct?

A. To my best recollection.

Q. You had agreed, and when you got to the end of the first signature, Mr. Spangler did not agree with you that it was correct?

A. Evidently not so, or he would not have added that to it.

Redirect examination by Mr. Hartpence.

Q. Now, Mr. DeNeill, just look at these papers again; take the second sheet and I will ask you to look at the

part below Spangler's first signature, that is just above the part referred to on cross-examination, and I will ask you whether you changed that or whether Mr. Spangler changed it. You merely wrote it because he changed his story at that time?

A. This statement was changed to the satisfaction of Mr. Spangler. He has also signed that subsequent paragraph; it is over his signature.

Q. He signed the previous paragraph?

A. He signed everything I wrote in the statement.

Q. Then, after he signed that previous paragraph, he wanted to change the statement and you changed it for him?

A. Yes, sir.

Q. And then he signed that also, did he not?

A. Yes, sir, he did.

Q. You have been in court over in Pennsylvania, in Harrisburg?

A. No, I have not been in Harrisburg.

Recross-examination by Mr. Koch.

Q. But the change that did take place there took place because Mr. Spangler was not satisfied with what you had written in there?

A. Well, it may be that, or might have possibly been for the reason that he didn't think it clearly set forth what he wanted to tell me.

Q. Are you telling what you think, or what you remember about that fact?

A. After reading that statement I can, I believe, say what I put in there was at the direction of Mr. Spangler.

Q. Mr. Spangler told you that what you put in there as to what he said in there was not so?

A. That is why I put a subsequent paragraph, and that is why I had him sign it, so that it would agree with anything he put in the statement.

Q. You didn't give this statement to Mr. Spangler to write out for himself, did you?

A. No, I didn't.

Q. You didn't take down the statement as he gave it to you, did you?

A. You mean verbatim?

Q. You took his story and boiled it down?

A. Yes, sir.

Q. So then it is your version of what you think Mr. Spangler wanted to tell you?

A. No, I say it is both our versions, both his and mine.

Q. Can you tell me where your version ends and where his begins?

A. I only put in the statement what Mr. Spangler wished me to.

Redirect examination by Mr. Hartpence.

Q. Now, were you present in court here this morning when Mr. Spangler said he did not tell you that specific thing which I read to him from your statement?

A. Yes, I was.

Q. "I helped the man with others, and when someone asked him how it happened, he said he was standing between the tracks to urinate and while he was standing there, the cars were bumped"; did he tell you that?

A. He did.

Recross-examination by Mr. Koch.

Q. Is it your recollection of what he said, or is it your recollection of what you and he decided on afterwards?

A. It is in the statement as to his knowledge of the facts.

Q. Is that a joint version or what?

A. That is his statement. I have no right to put in there what he does not tell me.

Q. What you put in—you did put in something he didn't like before?

A. That is why I changed it.

Q. Did you change it?

A. Why, the paragraph shows.

Q. Or did you just tell him you were going to change it?

A. The last paragraph in the statement shows I changed it for him.

Mr. Hartpence—I offer the statement in evidence.

D-1-a and D-1-b now marked in evidence.

Hayden Stuppy, sworn for the defendant.

Direct examination by Mr. Hartpence.

Q. Where do you live, Mr. Stuppy?

A. Lykens, Pennsylvania.

Q. What is your business?

A. Timber inspector with the Susquehanna Colliers Company.

Q. Did you see the accident to Mr. Kopenhafer?

A. I didn't see it when it started. I saw him when he was being drug along.

Q. Where was he when you first saw him; what position was he in?

A. When I see him, he was back like this, on his hands, and had his right foot caught under the wheel and then he was going on until he was down on his hands.

Q. Where were you at the time?

A. I had went into the loaders to get a loader report. I was a breaker at that time, breaker clerk, and I went in there, well I generally go around a quarter after three, to get the loader reports and then I have to take them into the office at half past three, and the whistle blew, and I am in to get the report. As I was coming out, I heard Bob holler. I ran down right away to get him loose.

Q. You ran down?

A. Down the steps.

Q. That is the little steps leading down from the loader platform?

A. Yes, sir.

Q. It was the holler that first called it to your attention?

A. Yes, sir.

Q. You didn't see him before the accident really occurred?

A. I was there on the steps when I heard the holler, for the report.

Q. Right on the steps?

A. Well, I don't say I was on the first step. I was right around the steps.

Q. How long was that before you heard him holler?

A. That would be, well, I imagine about 25 or 30 seconds, I went for the report, and got back, until I got back and I heard him holler.

Q. You don't know how long he was hollering before you got back?

A. No, sir.

Q. Did he tell you how it happened?

A. No, sir.

Q. Did you help pick him up?

A. Yes, sir.

Q. He didn't tell you anything about how it happened?

A. Didn't talk about it.

Q. What was his condition, the condition of his clothing?

A. Well, when he got loose, I went to grab him. I was down, and when I went to grab him he just got loose and just at that time some other fellows came over; when we picked him up his flye was open and his cock was hanging out.

Q. Did you see what loosened him from the wheel, whether the cars kicked back on the wheel?

A. No, sir, just about I went to pick him up, he got loose himself.

Cross-examination by Mr. Koch.

Q. Did you help carry him to this little shanty?

A. Yes, sir.

Q. Who else helped you, do you remember?

A. No, sir, I don't remember.

Q. Was he groaning and crying?

A. He was moaning, hollering.

Q. All the time you carried him?

A. Well, the majority; he was still at it when we got him in the shanty.

Q. He gave all evidence of a man that was suffering?

A. Yes, sir; as soon as we got in the shanty, he started to holler, "I knew it." I don't know what he meant by it.

Q. He seemed like a man who was dazed?

A. Well, I would not think so, he was dazed. I think he was suffering, very excited and suffering from pain.

Q. He was acting like that all the while, while you were carrying him?

A. Well, it didn't take so long to get over to the shanty. He was making noises. He didn't say that all the time, "I knew it." After we got him in the shanty, I was only there a few minutes. I had to make my report.

Q. That is all you heard him say, "I knew it"?

A. Yes, moaning, you know.

Q. Where were you holding him when you were helping carry him?

A. I was on the right hand side, left hand side taking him over to the shanty.

Q. Did you have him by the arm or where?

A. Well, I don't know, but I had hold of him, I know that.

Q. Was any other part of his clothing disarranged outside of his trousers?

A. That's all I know of.

Q. The rest was all in apple-pie order?

A. That's all I noticed. I noticed "it" was out and I put it in for him.

George W. Hearder, sworn for the defendant.

Direct examination by Mr. Hartpence.

Q. What is your business?

A. Foreman at the breaker.

Q. Located where?

A. Short Mountain by the Susquehanna Company at Lykens, Pennsylvania.

Q. You live at Lykens?

A. Yes, sir.

Q. How long have you lived there?

A. About forty-five years or forty-seven.

Q. How long have you been foreman at the colliery?

A. Twenty-two years.

Q. Do you know Mr. Robert Kopenhafer?

A. Yes, sir.

Q. Do you remember the day he was hurt there?

A. Yes, sir.

Q. Did you see the accident?

A. No, sir.

Q. Were you on duty at the time?

A. Yes, I was in the top of the breaker.

Q. What was Mr. Kopenhafer's position there, what was his job?

A. Barring cars.

Q. What were his duties in that respect?

A. Well, he was supposed whenever a car was to be moved, to put the bar under and start it, what we call a car barrer.

Q. These were cars coming down from the yard to be loaded?

A. Yes, sir; empty cars that came from the yard to be loaded up.

Q. What part of the yard did the purpose of his duties take him?

A. Took him into the yard and no further than under the breaker a car length, perhaps a car and a half; sometimes they had to start outside of the breaker but not out in the yard.

Q. These cars came down to be loaded by gravity, didn't they?

A. Yes, sir.

Q. When they didn't roll down, or didn't come all the way they ought to go, he was supposed to press them on with the bar?

A. Yes, sir.

Q. How did he do that; how was that done?

A. Well, this bar is put under the wheel and where there is leverage and start the car. He just pushed down for leverage and this starts the empty car away.

Q. What time did your colliery close in the afternoon?

A. 3:30.

Q. Do you know what time it was that this accident happened?

A. Not exactly; it was almost quitting time. It must have been around 3:25 or 3:20.

Q. Did you go down where he was?

A. I went down as soon as they reported; they then had him in the shanty at the bottom of the plain.

Q. Did you know where the accident had taken place?

A. Yes, I seen where it had taken place.

Q. Which track was that on?

A. On the "empty" track.

Q. Well, now, the purpose of his duties as a car barrer, was he obliged to go on that empty track at that time to do anything there?

A. No, sir.

Q. Why not?

A. Well, because his duties didn't call him there. He had no work to do there on that track.

Q. His work was on the other track?

A. Yes, sir.

The Court—As I understand you, he had nothing to do with barring empty cars because they are going up hill?

The Witness—No, sir, empty cars stood outside the building, the ones that were going to be loaded. When they are ready, if they didn't start, he starts them but this track was the empty track.

The Court—That is you never do any barring on the empty track at all?

The Witness—No, sir.

The Court—They are all taken up by the engine?

The Witness—Yes, sir.

The Court—No cars on the so-called empty track are to go downgrade; they are all headed upgrade?

The Witness—Yes, sir.

The Court—When they go upgrade, they go on the breaker track?

The Witness—Yes, sir.

Cross-examination by Mr. Koch.

Q. Where were you?

A. On the tip of the breaker, or top.

Q. How soon did you learn of the occurrence of the accident?

A. Within a few minutes afterwards, because they had just carried him over when I got down to the plain.

Q. Did you see him in the plain shanty?

A. Yes, sir.

Q. Did you see when he was removed in the ambulance?

A. I seen him when they fixed him up in the engine house.

Q. Was the boy moaning?

A. Yes, he was moaning?

Q. Was he tossing about?

A. He was working his arms and moaning as though he was in pain.

Q. Are you his foreman?

A. Yes, I was at that time he worked; I am not now.

Q. You are the foreman in charge of what operations on the breaker?

A. On the breaker department, yes, sir.

Q. Where does he keep his bars when the day is over?

A. Well, sometimes come to the platform in the inside, or on the outside of the steps, right on the outside. It was standing right on the outside of the steps, some of them are in there. He has a couple of bars, so he don't always use the same bar.

Q. Are there any other tools there they used?

A. In the place, yes.

Q. But that are used in the business of the colliery?

A. Well, no, not exactly there; I don't think they are down where he works.

Q. Is that a regular place under the platform there for his bars?

A. They could stand anywhere along there, there is no particular place to stand them.

Q. So long as he puts them away and they are where he can find them when he needs them?

A. They are handy.

Q. And that is his job, as well as barring cars?

A. Yes, that is his job to keep his tools with him.

Q. Now, was there a loader boss?

A. Yes, there was, right there.

Q. Isn't it a fact that it is the loader boss that tells Mr. Kopenhafer when to bar his cars and where to bar his cars?

A. The loader man when loading cars will holler, call to him.

Q. What does the loader boss do?

A. Why, he takes the number of the cars, tells the loader what to load, what cars to load, which cars to be brought from the storage yard.

Q. Well, then it is the loader or the loader boss who directs the movement of the cars as far as Mr. Kopenhafer is concerned, isn't it?

A. Well, now, Mr. Kopenhafer moved the car when the car loader, the man that was loading the car, said, whether the loader boss did or not.

Q. When he gets the signal to move the cars, he moved the cars?

A. Yes, sir.

Q. It makes no difference on which track the car is, if he gets his orders to move it, why, he moves it?

A. He won't get orders to move——

Q. Answer my question.

Mr. Koch—I move to strike out the answer as not responsive.

Q. Does he move the cars in connection with the instructions he gets?

A. Yes, sir.

Q. And if the instructions are to move the car or bar the car which happens to be standing on the empty track, why, then it would be his duty to move it?

A. If he gets such a one, but he don't get none.

Mr. Koch—I move to strike out the last part as not responsive.

The Court—Yes, the last part may be stricken out.

Mr. Hartpence—Any objection to these photographs going in?

Mr. Koch—No objection.

Mr. Hartpence—I offer, then, in evidence the following:

D-2 for identification.
D-3 for identification.
D-4 for identification.
D-5 for identification.
D-6 for identification.
(Now marked in evidence.)

Wilbur N. Ritter, sworn for the defendant.

Direct examination by Mr. Hartpence.

Q. Mr. Ritter, what is your business?

A. Draftsman employed by the Pennsylvania railroad at Williamsport, Pennsylvania.

Q. How long have you been so employed?

A. About two years and a half.

Q. Where do you live?

A. Williamsport, Pennsylvania.

Q. Did you make a sketch of the scene of the accident to Mr. Kopenhafer, at Lykens breaker?

A. I did.

Q. Did you make the measurements yourself?

A. Yes, sir.

Q. Is this your draft of it?

A. That is it.

Q. Does it run to scale?

A. Yes, sir.

Q. Accurately to scale?

A. Yes, sir; one inch equals fifty feet.

Q. Is this prepared from your actual measurements?

A. Yes, sir.

Q. When did you make it?

A. February 10th, 1928.

Q. These measurements are all accurate and to scale?

A. Yes, sir.

Mr. Hartpence—I offer it in evidence. Is there any objection to it?

Mr. Koch—No objection.

Accepted and marked as defendant's *Exhibit D-7* of this date.

Q. Looking east on his sketch, will you tell me the distance from the westerly end of this, the little breaker steps between the tracks, the distance that you have a straight line view toward the east down the main running track; will you scale that off and tell me what that distance is?

A. Approximately 650 feet.

Q. Now, going westerly, at what point west of the breaker steps does the curve to the north begin; in other words, how far does that straight line run westwardly from the breaker steps?

A. Well, the curve really starts a little bit east of the breaker steps.

Q. How far?

A. Well, approximately, 15 feet.

Q. What is the space between what you have described as the main running track, the empty track, what is the distance between that track and the breaker track right at the steps; I mean right at the foot of the steps?

A. The distance there is 12.6 feet between rails.

Q. Right at the westerly end of the breaker itself, that would be at the top of this little space, what is the distance from there between the two tracks?

A. I will have to scale that.

Q. Scale it and tell us what would be the distance between the southerly rail of the breaker track and the northerly rail of the empty track?

A. This rail and this rail. (Indicating.)

Q. But at the westerly end?

A. I didn't understand. This measurement for this is 12.6, that is this distance here. (Indicating.)

Q. At the foot of the steps I asked you there?

A. You want this again?

Q. At the head of the steps, right at the end of the breaker building, at this point here? (Indicating.)

A. That is, approximately, 14 feet.

Q. What is the distance between the two tracks again at the easterly end of the breaker?

A. Approximately 16 feet.

Q. Now, can you state up at the westerly end of the breaker again, between the northerly rail and the empty track and the side of the breaker itself, the building?

A. That is this rail here.

Q. That rail on the side of the building itself?

A. That is 6.2 feet.

Q. And do you know the overhang of these steel cars?

A. Well, it is about eighteen inches, that is what they usually figure.

Cross-examination by Mr. Koch.

Q. At which point on this map do you fix the end of the 650 feet?

A. Why, approximately, the point of the curve, where the curve starts.

Q. What is the approximate length of a car?

A. Approximately 40 feet.

Q. So that that distance of 650 feet would be taken up roughly by 16 cars, would it not?

A. Yes, roughly.

Q. So that if there was three cars on the track or six cars and then you had sixteen cars more on the track, that would bring the locomotive around the curve?

A. Well, the locomotive, yes, sir.

Q. It would be around the curve?

A. Yes, sir.

Q. Can you tell me approximately the length of that breaker?

Mr. Hartpence—That is running east and west.

A. Why, about 127 feet.

Q. Now, did I understand you to say that from your map there that a point between these rails, where this platform comes down, the distance is 12 feet, or 12 feet 6 inches?

A. At the end of the steps 12.6. Twelve and six-tenths that is.

Q. Can you give us the distance between the end of the platform and that rail?

A. Yes, five and a half feet.

Q. What did you say the overhang of a car is, about a foot and a half?

A. About a foot and a half.

Q. Does your map show the pumphouse?

A. No.

Q. It just shows the breaker?

A. The breaker itself.

Q. What is that, do you know. (Indicating.) Is that this building?

A. Yes, that is supposed to be that building.

Q. Well, that building No. 7 is the pumphouse, isn't it?

Mr. Hartpence—The pumphouse.

Q. Can you tell me how long that pumphouse is?

Mr. Hartpence—I suppose that runs east and west?

Mr. Koch—Yes.

A. 40 feet, approximately.

Redirect examination by Mr. Hartpence.

Q. And the six cars standing on the empty track, at approximately forty feet each in length, they would run eastwardly about 240 feet or a little over 240 feet?

A. You mean over all?

Q. They would extend eastwardly 240 feet, plus the slack?

A. Yes, sir.

Q. So that cars pushed westwardly along that track, although the locomotive might be out of sight around the curve down here on the east, the cars would be, at the time they coupled the standing cars, only about 250 feet east of the steps of the breaker?

A. I should imagine so; yes, sir.

Q. Well, now, let us see; if there were seven cars at that point—by the way, from where did you compute your 650 feet?

A. Everything was taken from this point of switch. (Indicating.)

Q. See if you can tell me the distance from the step, foot of the step, down to the point where the curve begins?

A. That is what I gave you.

Recross-examination by Mr. Koch.

Q. What was that distance?

A. I have forgotten; I will scale it again. 650.

Q. Then that distance is 650 feet?

A. Yes, I thought you meant from where the measurement was taken; that is from the foot of the steps.

Q. That distance, allowing 40 feet per car, without allowing anything for the coupling, sixteen cars would fill that space?

A. Pretty close to it.

Q. And if there were twenty cars and an engine, at least three of the cars and the engine would be around the curve?

A. Yes, they would be on the curve.

Redirect examination by Mr. Hartpence.

Q. That would be on the curve; that would not necessarily be around the curve?

A. No, because that is a gradual curve all the way down. In other words, that is what is called a flat curve.

Recross-examination by Mr. Koch.

Q. Continuing that line straight, and taking a point 250 or 150 feet beyond the beginning of the cars, how far would that be off the perpendicular; can you roughly determine that for us?

A. 150, you say?

Q. Yes, take 150 feet?

A. Well, approximately 13 feet from the north rail of that main running track as I have it designated.

Q. The swing by that time would be 13 feet?

A. 13 feet approximately.

Q. Have you the grade beginning down there at the point of curve you spoke of; can you give the grade on up to the breaker, or up to the storage yard?

A. I have the grade.

Q. What is it, where the six cars are standing?

A. It is, approximately, two per cent.

Q. That means what?

A. That means fall or rise, about two feet in every hundred feet.

George S. Booker, sworn for the defendant.

Direct examination by Mr. Hartpence.

Q. What is your business, Mr. Booker?

A. I am a locomotive engineer for the Pennsylvania railroad.

Q. How long have you been a locomotive engineer for them?

A. Well, I have been an engineer about 11 years; fireman about seven.

Q. You have been working for them about eighteen years?

A. Yes, sir.

Q. Where do you live?

A. I live in the country above Northumberland-Milton, R. D. No. 3.

Q. Where did you live at the time of this accident?

A. Up at Northumberland. I was working at Lykens. That is about 40 miles on the wagon road, a little bit more by rail.

Q. You remember the accident to Mr. Kopenhafer, do you?

A. Well, I remember of it; I didn't see it.

Q. Were you the engineer in charge of the engine that day?

A. I was.

Q. Well, now, when did you learn of the accident; what brought it to your attention?

A. Well, I didn't learn of the accident until the cars which you folks have referred to were on the place above the breaker track and the last brake put on and the brakeman came to me and said that we had hurt a man. That is the first I knew of the accident.

Q. Well, just before that, where had your engine come from?

A. We had come from Lykens with a draft of empty cars and coupled on to these six on the siding and aside of the breaker.

Q. When you coupled on to these six that stood there, did anything unusual take place?

A. Nothing more than the regular operation when we coupled on to them. We stopped and waited for the brakeman to turn in, walk around the car and put his back up here on the other end and then give the signal to proceed up the hill.

Q. What do you recall about the coupling itself; anything violent or unusual about it?

A. The coupling of itself, was the same as usual. The signals were passed on the fireman's side, when we had that number of cars on account of me not being able to see on my side; it was transferred verbally by the fireman to me and of course, we knew when they generally tell me when there were cars setting opposite the breaker, knowing what the distance where twenty cars would be, so we come up feeling for the draft of cars.

Q. Now, after you coupled, how long a time about elapsed, would you say, before you got a signal and pushed the train on up into the storage yard?

A. Well, it has been so long that I don't recollect. It just slipped my mind. I paid no more attention after the accident was over, I suppose, however, it would be, with the draft of six cars, from three to five minutes till they got down, coupled up the air, turned the air in, and the cars bumped, the air turned in emergency and then turned into the other cars. Then the brakeman must walk ahead them car lengths and I suppose it is between 200 and 225

feet, something like that, according to the cars setting there, then crawl up top and get ready to proceed, five minutes anyway; three to five minutes it takes.

Q. Your recollection is that when you made your coupling you stopped?

A. Yes, sir; we stopped with the exception that has been stated before, of the slack running out, which it naturally will.

Q. What about your engine itself, that is what I am interested in now. Did you go ahead then until you got your signal from the fireman?

A. Not until I get the signal, but I always went out feeling for these cars, knowing about where they stood. Then I stopped with the air—it is used then on the engine, and finally the automatic air which is placed on the car, and on the engine, used the air, which stops the engine.

Q. Then, as a matter of fact, after you did get your signal, later on, and you pushed your cars up, it was not until after you had done that that you heard somebody was hurt?

A. It was sometime after that, because we had pushed them cars up in the yard, and if I recollect rightly I put on the brakes, three brakes; I think they have on the three brakes to accommodate that many cars in that number.

Q. When you came to couple up to these six cars, you didn't keep on pushing the cars?

A. No, we stopped there, went through the same operation which we had always did, probably consumed five minutes, probably more, according, but sometimes may be there had been a gasket taken out of the air hose that had to be replaced or something like that, that probably consumed ten minutes.

Q. There is some slack through the cars, isn't there?

A. There is, yes, sir. That is due to the tension spring in the draw head springs, that allows it to pull out and go back so that you don't let the cars, just like a more natural-like shock absorbers on an automobile.

Q. So that the cars don't fit absolutely tight to each other?

A. So, there is the tension springs and that opens and then comes together.

Q. After you made the coupling, the slack runs out and then what happens to the cars then?

A. Well, they go out, when the slack is run out on the cars, the steel cars being empties, there is a lot of space there, and the steel will jingle, no matter how hard nor how easy you hit the steel, there is the jingle to a piece of steel when it runs out and that is, I suppose the noise they heard.

Q. What about when the slack runs down, does the car come back?

A. The car pulls back down on the spring and pulls back in gradually.

Cross-examination by Mr. Koch.

Q. But you did couple up with these cars, didn't you?

A. We did.

Q. And when you pulled your engine in place and you applied it to the cars that you were pushing, they ran out just far enough ahead to hook into the cars that were standing there?

A. I can't say how far that run out. I wasn't able to see that. I was back 20 car lengths.

Q. You pushed them to the string——

A. Pushed them just to these cars which were standing on the side of the breaker.

Q. So that the coupling act could be completed?

A. Yes, sir.

Q. This distance is upgrade and you would have to move the whole line up?

A. Yes, sir.

Q. Do you remember how many cars there were?

A. We were pushing twenty cars brought up from Lykens, at least that is what I was told by the conductor.

Q. How many brakemen did you have in the cars?

A. Why, there was two brakemen on the crew, if I recollect right.

Q. You were so far in on the track that you could not see the signals at all as they were being transmitted?

A. I could not see the brakemen, no, sir.

Q. You took your signals entirely from the fireman?

A. I took my signals from the fireman. He is sitting there and his signals he gave to me verbally.

Q. Before you start a load of cars like that where does the brakeman take his position?

A. Before we start they like that?

Q. Before you start work upon the track upon which the cars were standing still, where did the brakeman take his position?

A. You mean from Lykens?

Q. No, any point for your engine to stop?

A. The brakeman takes his position where he can be seen, if he can possibly be on the engine side, if he can't be seen on the engine side, he has to take his position in a prominent place where he can be seen and the signals can be passed to the engineer.

Q. What about taking his position on the head of the train?

A. The cars, if they are pushed ahead of the train, he must be right by the head end of the cars.

Q. That is one of the rules in your book of rules?

A. Yes, sir.

Q. And it is the duty of that man to see that the track is clear?

A. Right.

Q. And that it is proper to give the proceed signal; is that correct?

A. Yes, sir, that is cars being pushed ahead of the engine.

Q. As they were in your case?

A. Yes, sir.

Redirect examination by Mr. Hartpence.

Q. That was when your cars were being pushed from Lykens up to the colliery, that the brakeman rides on the head end of the cars?

A. That is exactly it.

Q. That would mean that he would make the coupling to the various cars standing there, so that he can make the coupling?

A. Yes, sir.

Q. When it came his duty to go forward, he stands on the head end of the cars and coupled up?

A. After he had stopped the operation and coupled the cars, where one head end of the draft we were pushing, the rear end of the draft on the side there, after he had stopped that operation and turned in the air, released the hand brakes which were on the cars and found out that he had air in all these cars and was through, everything ready that he could stop me on top of the hill, then it was his place to go ahead and see that his switches is right and everything clear, to give the signal to back up.

Q. Clear at the rear end?

A. Yes, sir.

Q. At that time and not until that time did he give you the signal to proceed with your train?

A. No, he would not give me a signal, no. That signal was passed to me from the fireman. I can't say he gave the signal; or that is the time he would have given it.

Q. Whether he gave it or not, you could not tell, because you could not see him?

A. I could not see him.

Q. You would get it from the fireman?

A. On the opposite side of the engine; he can see around and relay it to me.

Q. Do you know Mr. O'Connell?

A. Mr. O'Connell.

Q. Was he on the engine with you, or on the train that day?

A. No, sir; not that I know of.

Q. Mr. Reichenback?

A. I could not tell who the brakemen were any more. The only one I can tell you was Mr. Lenker because he was the one that told me we had caught a man.

Q. Who was your conductor?

A. Mr. Young.

Recross-examination by Mr. Koch.

Q. Let me understand this; roughly the rule is this: before standing cars are moved, it is the duty of the brakeman to be at the front end of these cars that are to be moved and to make sure that everything is O.K. before he transmitted a signal to start the engine in motion?

A. Well, that is the general rule but there are exceptions to the rules.

Q. But, generally, that is the rule?

A. Generally that is the rule.

Q. It makes no difference whether the track of cars you are pushing is increased by adding new cars, or whether it is decreased by letting off cars?

A. Letting off cars?

Q. Supposing you run up to the point where you would uncouple two cars, shoot two cars and uncouple, shunt them, then you start forward again; it would be your duty to, or the brakeman's duty, to be at the head of the cars there, minus the two cars?

A. Yes, sir.

Q. And if you picked up two cars, it would be his duty to be on the head of the procession?

A. Yes, sir.

Redirect examination by Mr. Hartpence.

Q. It would be his duty to be there at the time?

A. It would not be, if that would be, because you would have to be all over the railroad.

Q. You would have to get off the train and go up to the head cars to couple up before you actually moved?

A. That would mean if we have a train of 100 cars, a man would have to walk a hundred car lengths and around three or four cars to pass the signal. Then imagine what you would do, walking all over the end of the train before you could make a move.

Recross-examination by Mr. Koch.

Q. That gives the practicability and not the everyday of it?

A. I don't know anything about that.

William Norman Young, sworn for the defendant.

Direct examination by Mr. Hartpence.

Q. What is your business, Mr. Young?

A. Conductor, Pennsylvania railroad, Lykens, Pennsylvania.

Q. Freight conductor?

A. Freight conductor, yard and freight conductor.

Q. How long have you been in that work?

A. You mean as yard and freight conductor?

Q. All told?

A. All told in the train service, since September 1st, 1906.

Q. How long were you there in the yard service at Lykens?

A. Since around December, 1915.

Q. You were in charge of the crew that day Mr. Kopenhafer was injured, September, 1926?

A. Yes, sir.

Q. Did you see the accident actually happen?

A. No, sir.

Q. What called it to your attention?

A. The crew came to where I was and told me they had injured a man.

Q. Where was that?

A. I was on another draft of cars, getting them ready, taking the numbers, to make repairs, getting ready to take that draft to that yards.

Q. Who were your crew?

A. Mr. Deckman, Mr. Lenker, Mr. Reichenback.

Q. Where is Reichenback?

A. I think he is furloughed. He was a young extra man.

Q. Where is he now?

A. I don't know. He was a man that came from Sunbury to work that day; on my regular crew, one of the men was off.

Q. Do you know a man named O'Connell that was there that day?

A. I don't recollect that part of it.

Q. Do you know O'Connell?

A. I probably might have known O'Connell. You see, we know a good many men that work there a few weeks or work there for a day or two and then they pass out of your life.

Q. They come and go?

A. No; in this particular branch of the service, they are not fixed like I am. I am fixed in one particular place; I can't come and go. These men come and they may be there maybe a week and then to go work somewhere else.

Q. And the next thing they are out of the service and gone?

A. The next they are out and gone, yes, sir.

Q. Then you don't know anything about this accident as to how it actually happened?

A. No, sir, I do not.

Q. You didn't make a coupling there?

A. No, sir, I didn't.

Mr. Koch—No questions.

Luther Lenker, sworn for the defendant.

Direct examination by Mr. Hartpence.

Q. Where do you live?

A. Williamsport, Pennsylvania.

Q. What is your business?

A. Brakeman.

Q. For whom?

A. Pennsylvania Railroad Company.

Q. How long have you worked for the railroad?

A. Working for them about twelve years, not at the present.

Q. Do you remember the accident to Mr. Kopenhafer?

A. Yes, sir.

Q. At the colliery?

A. Yes, sir.

Q. Did you see it happen?

A. No, sir.

Q. What were you doing?

A. I was riding the draft of cars in, to make a coupling against six that was setting out there.

Q. Where had the draft of cars come from?

A. From Lykens.

Q. Were you on the front end of the cars?

A. Yes, sir.

Q. As you came in there, were there any other cars standing on the "empty" track?

A. Yes, sir.

Q. Did you make a coupling?

A. Yes, sir.

Q. What kind of coupling?

A. Nothing unusual, like always. I got close to about the fourth or fifth car and I gave him the steady signal.

Q. I can't hear?

A. I gave the steady signal when I got close to about four or five cars lengths. When I got about that car length, I stopped and gave him the stop signal, and the engine stopped and the slack ran out and I couple on the

other ones and they moved up a little, possibly about half a car length they did.

Q. Was that the slack on the others?

A. Like running when the pushed pushed in and backs out.

Q. Did you make the coupling all right?

A. Yes, sir.

Q. Then what did you do?

A. Let off the hand brake that was right on top of the next car, coupled up, went and took another brake off, and then some fellow told me that we hit a fellow's foot.

Q. That is the first you knew about it?

A. Yes, sir. I says how did that happen. He was standing here in front of the car——

Mr. Koch—I object to that and move to strike it out.

The Court—Strike it out.

Q. That was the first you learnt about it when somebody told you?

A. Yes, sir.

Q. Where were you when he told you that?

A. Just coming up to the end of the cars, the end of the six cars that were standing.

Q. Well, after you made your coupling and fixed up your brakes, you went up back that way; what did you go back up there for?

A. Up to the end?

Q. Yes?

A. Well, then I lined up my switches and gave him the signal to go up.

Q. Did you give the signal to go up before you learned the man was hurt or afterwards?

A. Afterwards.

Q. Did your train move at all, did these cars move at all after you made that coupling?

A. What, these cars that stood there?

Q. After you made the coupling?

A. No, the engine didn't go only when I gave him the signal.

The Court—The jury can't hear you; talk a little plainer?

The Witness—The engine didn't move, no.

Q. Until you gave the signal?

A. No, sir.

Q. Was that after the man was hurt?

A. Yes, after he was hurt, yes, sir.

Q. Then what did you do with your cars?

A. Well, took them up and put them away.

Q. Where?

A. Up in the empty yard.

Q. What they call the storage yard?

A. Yes, sir.

Cross-examination by Mr. Koch.

Q. How far were you away from the cars on the track when you gave the signal to slacken up to your engineer?

A. About four or five car lengths.

Q. How far away when you gave the signal to stop?

A. About half a car.

Q. Then the slack ran out about half a car length; is that right?

A. Well, yes, the slack ran out and coupled on to move the other cars.

Q. How far did they move those they were ahead?

A. About half a car.

Q. So then the slack of your cars ran out and you came out—then it ran out about a full car length?

A. No, about half a car length.

Q. You told me that you were half a car length away when you stopped?

A. When I gave the signal.

Q. When you gave the signal to stop?

A. Yes, sir.

Q. How much further did you go after you stopped?

A. The engine?

Q. Yes, how far?

A. I don't know; he stopped. I could not tell you that because they were twenty cars away and the cars moved out——

Q. Did he use up that car length before he stopped?

A. Yes, sir, and then some more.

Q. So then, after he moved up that half car length and he finally stopped, this slack ran out?

A. He didn't move, but the cars moved up.

Recess to 10 A. M., April 23d, 1929.

10 A. M., April 23d, 1929.

Charles Martin Luther Deckman, sworn for the plaintiff.

Direct examination by Mr. Hartpence.

Q. Where do you live?

A. Lykens, Pennsylvania.

Q. Where do you work?

A. Pennsylvania Railroad Company.

Q. How long have you worked for the railroad?

A. Thirteen and a half years.

Q. How long have you lived at Lykens?

A. A little better than five years.

Q. What kind of work have you done for the railroad company?

A. Clerk for eight years and broke for the rest of the time.

Q. Brakeman?

A. Yes, sir.

Q. Were you a brakeman at the time that Mr. Kopenhafer was injured over at the Susquehanna Colliery Company?

A. Yes, sir.

Q. Were you there the day he was hurt?

A. Yes, sir.

Q. Did you see the accident happen?

A. No, sir.

Q. What was it that brought it to your attention?

A. Why, when I walked up after we stopped and we laid for a while, I walked up to see what the delay was and they told me we had knocked a man down and hurt his foot.

Q. Where did you come in from?

A. From where the accident was? Oh, from Lykens.

Q. Where had you come from?

A. From Lykens.

Q. You rode in with the draft of twenty cars?

A. Yes, sir.

Q. What was your position on the train?

A. I was the middle man.

Q. Middle brake?

A. Middle brake, yes, sir.

Q. Well, as you came up, your engine was pushing the cars in on that track there in the colliery yard; what took place?

A. Why, we pushed up there; when we got a few car lengths away, the head man gave the steady up signal. I passed it back and we steadied up.

Q. How did you pass it back?

A. Passed the signal to the next man so that he could pass it on to the engine man, and then he swung down and I passed his signal back and he stopped immediately.

Q. Did you make a coupling there?

A. Yes, sir.

Q. What did you couple up with?

A. Six cars.

Q. What kind of coupling was it?

A. It was a normal coupling.

Q. Nothing out of the ordinary?

A. No, sir.

Q. After you made the coupling, did your train go ahead or go back or move at all?

A. All it moved is the slack that ran out of the cars. The engine stopped and did not move until he got the signal from the head end.

Q. How long would you say that was that the signal came after you made your coupling, just approximately?

A. I judge it must have been about fifteen minutes.

Q. So that what led you to go up to see what the difficulty was, you said, was because of the delay in getting the signal back?

A. Yes, sir.

Q. That is all you know about it?

A. Yes, sir.

Cross-examination by Mr. Koch.

Q. Do you remember how many empty cars you brought in from Lykens?

A. Twenty.

Q. On what car did you say you were?

A. I judge I was about the seventh. I could not say for sure. On the seventh car from the head end, I could not say just exactly.

Q. Who was the brakeman on the head?

A. Lenker.

Q. Who was the brakeman behind you?

A. As far as I can remember, it was Reichenback.

Q. Do you remember who the fireman was?

A. No, I do not.

Q. How often had you made this run from Lykens into the colliery before this day?

A. Every day that I worked up there.

Q. Usually with the same crew?

A. It was the same crew, unless there was some off and they had extra men and different engineers, because we never had the same engineer very long.

Q. About how long would you have an engineer?

A. Well, that is hard to tell; just as they beat in and out.

Q. Did you usually pick up cars there at the colliery?

A. Most of the time there was cars setting out there. Once in a while there was none out.

Q. So whenever your train approached the colliery, you would expect to find cars there and you would watch for a signal for it?

A. Yes, sir.

Q. Did you know the plaintiff? Before this accident did you know Mr. Kopenhafer?

A. Yes, sir.

Q. Had you seen him in the yard before the accident?

A. I had seen him working up there the day before, a couple of days before.

Q. What did you see him doing when you saw him working?

A. Well, he was barring cars to the breaker.

Q. Were you running cars through at the time he was barring cars?

A. We were working around shoving a train up when I seen him at the time.

Q. So that your car movements would take place during the day while these boys were working along doing their work there?

A. Yes, sir.

Q. You saw the other men from the colliery come down and get into that place between the tracks?

A. I seen them working around there.

Q. Have you seen men cross the track to go up the stairway what would lead into the colliery proper?

A. I have seen men go back and forth across the tracks. I would not say they went up there or what they were doing.

Q. That was during the regular working hours of the day?

A. Yes, sir.

Q. It was a busy day?

A. Yes, they were working around there. I could not say what they were doing.

William DeNeill, recalled.

Direct examination by Mr. Hartpence.

Q. Have you made any effort to locate Mr. Connolly, the fireman and Mr. Reichenback, the brakeman?

A. Yes, sir, I have.

Q. Where did you find they were located?

A. We received information from our department which has charge of these men, and Connolly is in the State of Washington at the present time.

Q. Did you get the address of Reichenback?

A. Mr. Reichenback is a floater; we have been unable to locate where he is.

Cross-examination by Mr. Koch.

Q. Did you round up all these other witnesses?

A. No, sir, not all of them myself.

Q. How many men did you have working with you to get them all in here?

A. I would hate to tell you. We had quite a few.

Mr. Hartpence—Defendant rests.

Robert A. Kopenhafer, recalled in rebuttal.

Direct examination by Mr. Koch.

Q. Mr. Kopenhafer, when you were working at the colliery and before you would move a car, who would give you your instructions to move it?

A. The loader.

Q. Is that the man that we call the loader foreman?

A. No, that loads the coal cars.

Q. Who would that be, do you know his name?

A. Mr. Marsh was loading.

Q. Any other man?

A. Mr. Rowe.

Q. Did you ever get any orders directly as to the movements of cars from this gentleman who testified here, the breaker foreman?

A. No, sir, he never gave me orders to move cars.

Q. You knew that he was the chief boss of the breaker, is that it?

A. Yes, sir.

Q. As far as your work was concerned, you worked directly with the man on the loading platform; is that correct?

A. Yes, sir.

Q. Now, it has been testified here, Mr. Kopenhafer, that immediately before you were injured you were seen to be standing with your right foot on the rail of the empty track and your hand on the side of the car; is that where you were standing immediately before this accident?

A. No, sir.

Q. It has been testified that when you got into the plain shed, that you had a conversation with a Mr. Cole; did you have any conversation with Mr. Cole?

Mr. Hartpence—That is objected to as not proper rebuttal; I don't think there is any such testimony.

(Argued and objection withdrawn.)

Q. Do you recall having any conversation with anyone while you were in the shed?

A. No, sir; I was in terrible pain when I was in there.

Q. Do you recall having any conversations with anyone immediately after you were moved from the shed to the first-aid station and before you were removed to your home?

A. No, sir.

Q. Now, when you arrived at your home and you were taken in the kitchen, you remember Dr. Bobb being there?

A. Dr. Bobb was there.

Q. Did you see any other people there?

A. There was people around but I don't know who they were.

Q. Well, were they people who were strangers to you, or just at that time did these men mean nothing to you?

A. They meant nothing at all to me. I was in terrible pain.

Q. What did Dr. Bobb do for you immediately before he started to dress your foot?

A. Why, he gave me a shot in the arm.

Q. Do you remember talking to Mr. Kissinger or the fireman at that time?

A. No, I don't recall talking to anyone.

Q. Two days later, when you arrived at the Harrisburg Hospital, do you remember this young man, Mr. Fravel, visiting you?

A. I remember a man coming in but I don't know who he was.

Q. Did he ask you about the accident?

A. He asked me if I was the man that was hurt, and I told him that I was.

Q. Do you recall whether he had a memorandum pad or memorandum sheet with him?

A. He had some paper there.

Q. Did he make notes while you were talking?

A. Yes, he was writing something.

Q. Do you recall about how long he was with you at the time?

A. I really could not tell you how long.

Q. Well, have you any recollection concerning that period of time at all?

A. I had terrible pain. I was wishing that he would go.

Q. Do you recall what, if anything, you said to him?

A. He asked me if I had pain and I told him I had a lot of pain.

Q. Did he ask you how the accident happened?

A. He was asking questions. I remember sometimes I used to feel fainty.

Q. Did he show you the statement that he wrote?

A. He showed me some paper. I didn't even read over it.

Q. Did you sign anything?

A. No, sir; he said "Sign it so that I can catch a train." He said "Hurry up." I said, "I am not signing anything."

The Court—Did you sign it?

The Witness—No, sir.

Cross-examination by Mr. Hartpence.

Q. You didn't sign anything?

A. Not for the railroad.

Q. You signed it for somebody else?

A. Compensation, that's all I signed.

Q. Some months or a year or a day later, you signed a contract with a lawyer, didn't you?

A. Yes, sir.

Q. With regard to taking your case; how much compensation he was to get out of that?

A. Compensation, well, not compensation.

Q. What proportion of a verdict was to go to him?

A. Yes, sir.

Q. How much was it?

Mr. Koch—That is objected to, if the court please as utterly improper. I didn't ask counsel what his fee is. I will match him.

A. I didn't sign no papers for the railroad.

Mr. Koch—I move to strike it out.

The Court—It is harmless; he said he didn't sign any papers for the railroad.

The Court—Let me ask you one thing that I am not clear about: you testified as to your duties there; did you have any duties upon this so-called empty track?

The Witness—We used to bar them down when they were in the road, the crossing, yes, sir.

Both sides rest.

Mr. Hartpence—We renew our motion to dismiss the action on the grounds previous stated in the formal motion.

The Court—The motion will be denied with an exception.

Mr. Hartpence—Exception.

I now move for a direction of verdict in favor of the defendant on the ground that the negligence alleged in the complaint as the ground of action has not been established, and that there is not sufficient evidence of such negligence in the case as to make it a case to go to the jury; that the contributory negligence of the plaintiff is so clear that as a matter of law, the court should direct a verdict in favor of the defendant.

The Court—Denied; an exception will be allowed on each one of the reasons urged by defense counsel.

Mr. Hartpence—Exceptions.

Counsel summed up to the jury.

The court then charged the jury as follows:

The Court—Gentlemen of the jury:

This is an action brought by this plaintiff against The Pennsylvania Railroad Company to recover damages for an injury which the plaintiff alleges he sustained on September 17th, 1926, while he was in the employ of the Susquehanna Coal Company at Lykens in the State of Pennsylvania.

The plaintiff alleges that on the day in question, while he was engaged in his regular employment, that is, and if I use the wrong term, you will correct me, as coal barrer, a man whose duty it was to use what we will call a car-barrer, or something in the nature of that to move cars that were standing upon an incline and which sometimes become

stuck because of little indentations in the track, or perhaps a little rust from the wheels and what not. But, anyhow, cars ordinarily travel by gravity down an incline there, an open space where they are kept empty until such time as they are taken down to the loading bin for coal, an incline from the top, all the way down, out into a yard where they are finally taken away by engines.

That in the course of that process, it often becomes necessary to start them, because, as I say, they become temporarily stuck, and it was his duty to use this bar or instrument in prying them loose. That employment, you will recall, was in the yards of this Susquehanna Coal Company, out in Pennsylvania.

The plaintiff lives in a town called Lykens in the State of Pennsylvania.

In the course of the work of this coal company, the Pennsylvania railroad supplies them with cars which are shunted into this yard at the colliery for the purpose of being loaded and afterwards taken away.

On the day in question, this accident occurred and for the injuries which the plaintiff received out there that day, he brings this suit to recover against the railroad company.

If I am incorrect in my recollection of the testimony, you will correct me about the facts, because the facts are for you. As I recall the testimony, if I am incorrect, you will use your recollection only.

Incidentally, in case I should overlook it at some later part of the charge, let me emphasize the fact that any motions that might have been made and which were denied by the court, are not to be taken by you as indicative of any notion that

the court might have as to any right to recover in this case whatever. In order to have you more clearly understand what I mean by that, let me just say to you that questions of law are for the court to pass upon. Questions of fact are for the jury to pass upon. Sometimes, after a case is finished, it becomes a question of law as to whether or not the case should be submitted to the jury. If in the court's opinion there are divergent sets of facts, facts which might be interpreted by the jury one way or another, where it then becomes a fact question and is sent to the jury to determine which set of facts the jury believes, that is all that the denial of the motions in this case meant. Not that the court had any notion or any opinion and indeed would have no right to have any as to what the facts of the case were, but because the court merely thought that there were two different stories which raised a question of facts as to which story was correct, and therefore it was for you to say as the jury and not for the court. So much for that.

The plaintiff alleges that on the day in question, at the end of the day's work, when he was about finishing, he was going up to put away some of the tools he had been using there, and entered into this narrow passageway of about three feet between the side of this stairway which goes up into this loader bin of the colliery or what it might be called, and the railroad track on which the empty cars were brought up for the purpose of putting them into this yard, and as he got into this passageway, a number of cars, six or seven in number, that had been left standing, were suddenly started by an engine in the control and operation of this defendant company, and,

without giving him any warning that these cars were going to be moved, injured him in the manner he says he was injured.

I don't recall any evidence of any definite description of what caught him, but there is some statement that there was an overhang of some number of inches on these railroad cars over the track itself, and that in some way his foot became fastened in. There is no evidence of any defective condition, like the sticking out of a broken truck beam or broken beam, or broken rod in the case, so that just what the situation was and how he was caught, I don't recall, but he says that he was caught and thrown to the ground and dragged along for some distance and that then his foot finally was crushed, not cut off by the engine or train, not passed over by the wheels of the train, but caught and crushed in such a manner as to sever some arteries which prevented the passage of the blood to the injured foot and the foot then became affected with a gangrenous condition which caused the toes to be amputated and some part of the foot.

He alleged it was because of the negligence of the defendant company in starting their cars there at that time and while he was in the place where he had a right to be that this accident occurred.

Now, there is a question that you have got to think over very carefully and give your careful attention to when you go into the jury room, that is, the question of negligence, because upon your determination of the negligence question depends entirely what your verdict in this case should be. There is no dispute, as you will recall, that this man suffered some injury. The extent of it may be questioned, but the fact that the accident occurred is not in dispute. The defendant com-

pany does not dispute that and indeed, need not dispute it. But that in itself is not sufficient for you to find a verdict in favor of this plaintiff. The mere happening of an accident, regrettable as that accident may be and the result that follows from it may be, that is not sufficient to entitle a plaintiff in this kind of case to recover.

The burden of proof is upon the plaintiff to satisfy you by a preponderance of the evidence, not necessarily by the greater number of witnesses, but by the greater weight of the evidence, not only that the accident occurred, but that the accident was caused by the negligence of the defendant whom the plaintiff is seeking to hold in damages for the happening of the accident.

Now, negligence means that the defendant must have done something which it should not have done, or it must have failed to do something which it should have done. Measure the actions of the defendant on the day in question by that rule. It is for you to say whether or not you believe the plaintiff's version of how the accident happened. There is a controversy as to that, as you will recall, which I will come to later, but if you believe that the accident happened in the very way and at the point and place that the plaintiff says it did, you must measure that by the rule which I have just given you as to negligence, and you must say, "Did this defendant company do something when this accident did happen, if it did happen in that way, did they do something which they should not have done, or did they fail to do something which they should have done?" In order to know that, it will be necessary for you to know what the duty of the defendant was on the day in question.

The defendant was not an insurer of the plaintiff. The defendant's duty consisted only in using reasonable care to see that others who were lawfully upon that ground on the day in question, in the position where they had a right to be, were not injured by any act of negligence of the defendant. Now, did this defendant company use reasonable care?

Reasonable care is the care that a reasonably prudent person would use, not one of exceptional carefulness, not what you personally might have done, but what is stated as reasonable care, the care of a reasonably prudent person, the average prudent man, would under the circumstances, taking into consideration that these cars were standing there, had been standing there for some time, that this company came up to them with the rest of this train and coupled to them, and were going to take them up to this yard where they were to go. Did it require, that reasonable care, that they should anticipate that somebody would be in the way, is for you to say whether or not under all the circumstances, taking them all into consideration, whether this company used reasonable care on the day in question. If it did, that is all it was required to do under the law, and there could be no recovery, because in the absence of their failure to use such reasonable care, there could be no negligence.

And so, you have to determine this, without sympathy one way or another, but as a cold-blooded proposition, determine whether or not there was any negligence.

Now, if you should determine that this defendant company was negligent, you have got to go a step further, and find that that negligence was the proximate cause of the accident.

By proximate cause we mean the moving cause, the main cause, the one without which the accident would not have happened, the one which sets the others in motion. You can understand very readily the sense of that proposition when I illustrate it to you by saying that the mere negligence itself is not sufficient to entitle a plaintiff to recover, unless that negligence is the proximate cause, the main or moving cause of the accident. To illustrate that, you can readily understand that a defendant, no matter how negligent he might be in the operation of an automobile, in the operation of a factory, in the operation of a coal train, or what not, unless that negligence causes an injury, that negligence means nothing. If it was brought about by something else, if something else was the proximate cause, or if the negligence of the plaintiff himself was contributing and proximately the cause, there could be no recovery, because, in order to hold the defendant liable, the negligence of the defendant must be the proximate cause of the accident, and unless that is so, even though there was an accident, even though there was negligence on the part of the defendant, there could be no recovery.

And so, you must measure all of the evidence in the case, and in determining it, determine it, as I say, upon a cold-blooded business basis, under your oath as jurors, from the facts as you find them in the case.

Now, the defendant denies that the accident occurred in the manner in which the plaintiff says it did. The defendant says first, that this plaintiff was injured by being upon either the railroad track, in the center of it, or crossing one rail, in other words that he was leaning up against the end of one of these six cars, and that he was on

the track owned and controlled and operated by the defendant and in a position where he had no right to be whatsoever, in a place where the defendant company was not called upon to expect a man to be and in a position where his duty and his business did not call for him to be. In other words that he was a mere trespasser at that time upon the railroad property, and that they were not called upon, he being merely at the most a licensee, if not a trespasser, that they were not called upon to expect or anticipate that somebody would be upon their railroad tracks doing business that did not require him to be there, that they had no way of knowing he would be there. If you find that to be so, if you find as a matter of fact that this plaintiff was upon this railroad track at a time and place he had no business to be, that he had no right to be, that he was not called upon in the course of his duty to be, then he would be a mere trespasser, at the most a mere licensee, and then the duty of the defendant company to him would be less stringent than in the first instance which I have described. Then there would be no duty upon the defendant company to use any care in the protection of this man other than to refrain from a willful or wanton act or injury.

Now, that being so, there is no evidence in this case that would justify you in finding that there was a willful or wanton act on the part of this defendant that would cause this injury, and so, if you find that the contention of the defendant company is correct, and that this plaintiff was upon this property without any right to be there, and upon the evidence in this case as it is before you, I say to you as a matter of law, there is no evidence that would justify you in finding any

willful or wanton act which would justify a recovery under such conditions as that.

Now, the defendant in another defense sets up that this plaintiff was guilty of contributory negligence; that the negligence of the plaintiff, if not the sole negligence; they alleged first that it was the sole cause, and secondly they allege that the plaintiff's negligence, if not the sole cause, at least contributed to the cause, contributing and helping to cause this accident. They say, even if you should find that the defendant company was negligence, that nevertheless the position in which this plaintiff found himself on the day in question, with a view of the tracks for a considerable distance down as he had, that when he went into this position where he found himself, if he was in it and that the accident occurred as a result of his going in there, that his actions contributed to and helped cause the injury and that therefore he should have no right to recover. The law in this case is that contributory negligence is an absolute bar to any right of recovery and that, regardless of what degree that contributory may serve or result in the accident itself. In other words, there are no comparative degrees of contributory negligence. You cannot determine as a question of law under your duty as jurors that one side was guilty of ninety per cent. and the other side guilty of ten per cent. negligence, or one guilty of seventy and the other thirty, or what not, and give a verdict that would represent what in your judgment would be the difference between these degrees of negligence. You cannot do that in this kind of a case. If there was contributory negligence on behalf of the plaintiff which contributed to and which helped cause this accident, in no matter how small a degree that might have

been, it would be a bar to recovery and your verdict, under the law, under such a set of facts, if you find them to be so, must be for the defendant. If you find that both were guilty of negligence, there could be no recovery, and your verdict must be for the defendant.

Now, after determining all the evidence in the case, if you find that this defendant was negligent, and that negligence was the proximate cause of the accident, and that the plaintiff was free from contributory negligence, then, and then only, can the plaintiff recover.

If you come to that question, then you will have to consider the measure of damages. If he is entitled to recover at all, the plaintiff would be entitled to be compensated in such sum as would fairly compensate him, just as the term implies. Not in the way of punishment, not in the way of penalty, but in the way of compensation for the injuries and losses that he has been put to because of and as a result of this accident.

He would be entitled, if entitled at all, to be compensated in such sum as would fairly compensate him for the pain and suffering he has already suffered because of this accident, and for any pain and suffering, if any, which he will probably suffer in the future if there is any evidence in the case to justify you in finding that he will suffer.

He would be entitled to be compensated for any moneys he has been forced to expend in the way of doctor's bills, and otherwise, toward being cured of his injuries. I don't recall what the testimony in that line was. I think most of the doctor's bills were paid by the company for which he worked; but, if there is any evidence of any expenditure on his part, he would be entitled to be compensated for that.

Exhibits

EXHIBIT P-1

EXHIBIT D-1-a.

PENNSYLVANIA RAILROAD SYSTEM.

Statement of Roy C. Spangler. Occupation, engineer. Business address, Rhoads Cont. Co., Ashland, Pa. Home address, Lykens, Pa. Made to Wm. DeNeill, at work, on the 4th day of October, 1926, in the presence of S. F. Hasterman, with reference to accident at Short Mt. Colliery, Lykens, Pa., on September 17, 1926.

NOTE.—Have party making statement give names and addresses of all other persons he knows of who were witnesses or have any knowledge of the occurrence, and, if possible, have the statement signed by the person interviewed and attested by some person present other than the one to whom it was made.

On September 17, 1926, at about 3:25 P. M., at which time it was daylight and clear, I was running a dinky engine at Short Mt. Breaker. My engine was stopped at breaker, and I heard someone holler and I looked toward breaker, and I saw a man being pushed along by some freight cars, slowly. He was sort of on his back with his hands behind him, trying to get off the track. His right foot was on track and the heel was caught by wheel of freight car, and he was trying with his hands and left foot to keep going with cars, and when he did this about 15 feet, the cars stopped and he was released. The cars were bumped by some other cars which were pushed in. I did not see man standing on track just before accident. I helped the man, with others, and when someone asked him how it happened, he said, he was standing between tracks to urinate and while he was standing there the cars were bumped. When I saw the man after the accident his flye was still open, and from all appearances it looked as though he had urinated. The only injury I could see was to his heel.

Have you read this statement? Yes.

Is it true? Yes.

Does it contain all facts of accident of which you have knowledge? Yes.

ROY C. SPANGLER.

He did not say he was standing between the tracks, as above written, but was standing at the end of cars. I was about 50 feet away from accident when it occurred.

ROY C. SPANGLER.

Witness:

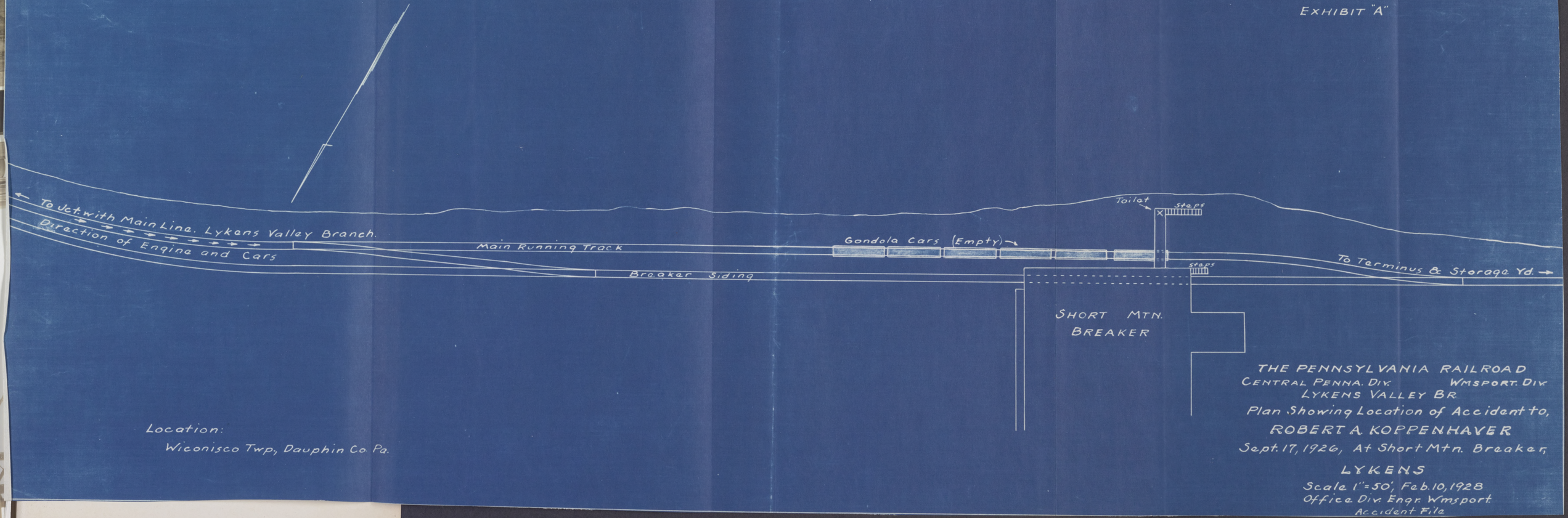
WILLIAM DENEILL.

New Jersey State Library

P.R.R.
724991
P.R.R.
167774

EXHIBIT D-7.

EXHIBIT "A"



Location:
Wiconisco Twp, Dauphin Co. Pa.

THE PENNSYLVANIA RAILROAD
CENTRAL PENNA. DIV. WMSPORT. DIV.
LYKENS VALLEY BR.
Plan Showing Location of Accident to,
ROBERT A. KOPPENHAVER
Sept. 17, 1926, At Short Mtn. Breaker,
LYKENS
Scale 1" = 50', Feb. 10, 1928
Office Div. Engr. Wmsport
Accident File

42

45 OCT.T.1929

New Jersey Court of Errors and Appeals

ROBERT A. KOPENHAFER, Plaintiff-Respondent, v. THE PENNSYLVANIA RAILROAD COMPANY, Defendant-Appellant.	Action at Law On Appeal From Hudson County Circuit Court.

BRIEF OF PLAINTIFF-RESPONDENT.

1.

Statement of the Case.

Plaintiff, Robert A. Kopenhafer, was employed by the Susquehanna Colliers Company at Lykens, Pennsylvania. He was employed as a car barer. His work required that he move certain empty coal cars by applying an iron bar under the rear wheel and thus forcing the car along on the track a few feet at a time until the same was in the place or position that it was required to be for his work.

On the 17th day of September, 1926, the plaintiff was so employed by his said employer. His place of work was in an open space between two railroad tracks in the yard of the colliery and near the loading platform of the breaker. The photographs which were placed in evidence clearly show the place where he was required to work.

New Jersey State Library

The one track, the "empty track" as it was called in the testimony, was used by the defendant railroad company to move its empty coal cars from a point below the colliery to a storage yard a short distance above the loading platform. It is the track on the right in the pictures D-2 and D-3. This track is the property of the defendant, which owns, built and maintains it (Case, p. 55). The other track, the so-called "loading track" as well as all the other property belongs to the Susquehanna Collierys Company (ibid.).

The loading track ran directly under the loading platform of the breaker. It was the duty of the plaintiff to "bar" the cars on the loading track under the platform, and once they were loaded to bar them further on down the track to a point where they were presently coupled into a train (Case, pp. 24, 41). He is also required to bar the cars on the "empty track" (Case, pp. 30, 43, 179). At times the cars which would be standing on the empty track would be in the way and he would then be required to move them by means of his bar.

The space between the two track, at the loading platform and where the plaintiff was required was approximately four feet wide. According to a draftsman who testified for the defendant the space was 6.02 feet wide, without allowing for an 18 inch overhang of the cars on either track.

The loading platform of the breaker, as shown on the exhibits extends over the loading track and comes within 18 inches of the "empty track." There is also a stairway which leads directly from the loading platform into the center of the space between the two tracks and which is about three feet from the track (Case, p. 47).

On the day of the accident, the plaintiff had barred two cars under the platform for loading

when he was told by some one that it was about 3:25 o'clock. Work was over at 3:30 o'clock. The plaintiff thereupon picked up his bar which had been resting against the steps and started to put it away in a place provided for that purpose under the loading platform. At the same time he saw a hatchet, belonging to his employer and which was lying near the "empty track." He started over to pick up this hatchet and to put it away with the other tools. As he did so, and as he came near the cars which were standing on the empty track, the same were suddenly, and without previous warning to him, set in motion. As they did so the overhang of the first car struck the plaintiff, throwing him to the ground and bringing his foot on the track near the wheel. Plaintiff tried to roll out of the way and attempted to twist his foot off the track. But the wheel had pinched the shoe and the foot was caught.

Plaintiff testified that it was customary before moving cars on the empty track for the brakeman to come on ahead, set the switch and warn the plaintiff and any other person in the immediate vicinity that the cars are about to be moved. No such warning was given to the plaintiff this time and he was wholly unaware of the fact that the cars on the "empty track" of the defendant were about to be moved. This testimony was admitted over objection and exception of the defendant. Its reception was set out as one of the grounds of appeal (Case, p. 33). It has not been argued however and thus it is deemed abandoned and is properly in the case.

As a result of the accident the plaintiff lost the toes of his foot and a portion of the arch. The record discloses the precise extent of his injury and the consequences of the same.

For the defendant it was contended that the plaintiff had gone on the track for the purpose of

urinating and that he was there when the cars were started, and that it was in this manner that the accident was caused.

Prior to the joining of issue and the trial of the cause a motion was made to dismiss the case on the ground that to require the defendant to defend the action in the Hudson County Circuit Court at Jersey City, New Jersey, imposed an unwarranted and unfair burden on interstate commerce. This motion was denied (Case, pp. 4, 5). It was renewed again at the opening of the trial, and at the close of the same. All the motions were denied.

A motion to direct a verdict in favor of the defendant was also made at the close of the trial, which was denied and the case submitted to the jury.

The jury returned a verdict in favor of the plaintiff and against the defendant in the sum of $7,500 and judgment was entered thereon. It is from this judgment that the defendant herein appeals.

ARGUMENT.

POINT 1.

The motions to dismiss the action were properly denied.

The defendant in its Grounds of Appeal Numbers 1, 7, 8 and 9 brings up for review the question whether the defendant should have been required to defend this suit in the Hudson County Circuit Court at Jersey City, in this State, urging that to do so constitutes an unwarranted burden on interstate commerce.

It is conceded that the plaintiff, at the time of the commencement of the action was a resident of the

State of Pennsylvania. It is so stated in the complaint (Case, p. 2). Nor was it denied that the defendant carried on its business of a steam surface railroad in the State of New Jersey, County of Hudson (Case, pp. 2, 7).

The complaint sounded an action in tort for negligence (Case, pp. 2, 3). Such an action is transitory in character.

> *Hale* v. *Lawrence,* 21 N. J. L. 714;
> *Ackerson* v. *Erie Railroad Co.,* 31 N. J. L. 309.

The test has been said to be found in the subject of the injury as differing from the means whereby and the mere place at which the injury was inflicted. The test is sound and under its application the action herein is to be classified as purely transitory in character.

Having a common law cause of action which is clearly transitory in character, the only questions remaining to be answered are these: Does any statute of the State of New Jersey or of the United States prohibit the plaintiff from bringing his suit in the State of New Jersey and require instead that he bring the same in the State of Pennsylvania?

The statutes of New Jersey provide as follows:

> "202. An action merely transitory *shall at the discretion of the court* be tried in the county in which the cause of action arose, or the plaintiff reside at the time of instituting such action, or if the defendant be a non-resident, in the county in which process was served upon him." (Italics ours.)
>
> *3 Comp. Stat. 4113,* Sec. 202.

In the case of

Ackerson v. *Erie Railroad Company* (supra).

The Supreme Court, by Haines, J., there held:

"Transitory actions are such personal actions as seek only the recovery of money or personal chattels, whether they sound in tort or contract. They are universally founded on the supposed violation of rights, which, in contemplation of law, have on locality." *1 Chitty's Pl.* 273; *1 Saunders* 241, b, note 6.

"Judge Gould in his work on Pleadings, ch. 3, Sec. 112, says:

"It will be found, as a general proposition, that actions *ex delicto,* in which a mere personalty is receiverable, are by common law transitory."

"If the action is merely transitory, the *venue* may be laid in the county where the cause of action arose, or where the plaintiff or defendant resides at the time of instituting the action; or if the defendant is not an inhabitant of this state, in the county in which the process shall have been served." *Nix. Dig.* 782, pl. 5.

It therefore clearly appears that neither by statute nor by decision of the courts of this state is the objection to the jurisdiction well taken. The court has jurisdiction of the action; whether it will exercise the same is wisely left to the discretion of the court. All other statutory requirements have been met. The action is transitory in character, the venue was laid in the County where the defendant was served with the process of the court, and the

service was in every respect a full and proper service. There is no suggestion that the court did not properly exercise its discretion in denying the application and in retaining jurisdiction of the action. Thus it clearly appears that the decision of the trial justice is proper and in accord with the law as the same is to be found in the statutory enactments and the decisions of the courts of this State.

There remains therefore only the question whether the court, in retaining jurisdiction violated any Federal statutory enactment having to do with Interstate Commerce and whether the New Jersey Statute granting jurisdiction to the New Jersey Courts (Sec. 202, supra) is invalid as placing an undue burden on Interstate Commerce.

At the outset it should be noted that the fact that the defendant is a railroad carrier and as such is engaged in interstate as well as intrastate commerce was not made a basis of the right which the plaintiff sought to enforce against the defendant. The action was brought as a common law action in tort for negligence, and it was tried on the same theory. The plaintiff did not base his cause of action on any Federal statutory enactment relating to interstate commerce. This is of importance in this matter.

The precise question presented herein was raised before Mr. Justice Ackerson while sitting in the Hudson County Circuit Court in the case of

Howard W. Steinert v. *Pennsylvania Railroad Company.*

The case does not appear to have been officially reported, but the decision is squarely in point with the contentions made herein and as the defendant in the cited case is the same as the defendant in this

case, the respondent respectfully submits that this court may properly be referred to that decision. (A copy thereof submitted herewith as Supplement A.)

In that case, as in the case at bar, the cause of action arose in a foreign jurisdiction, but the action was brought in the State of New Jersey. A motion was made to dismiss the action on the ground that the bringing of the action in the Hudson County Circuit Court constituted an unwarranted interference with interstate commerce. It further appeared that complaint was predicated on a violation of the Safety Appliance Act, and that the cause of action was thus predicated on a Federal Statute having direct relation to interstate commerce.

The defendant based his objection to the continued jurisdiction of the action on the same authorities relied on herein, viz., the cases of *Davis* v. *Farmers Co-Operative Co.*, 262 U. S. 312; 67 L. Ed. 996 and *A. T. & S. F. Ry. Co.* v. *Wells*, 265 U. S. 101; 68 L. Ed. 928.

In his decision, Judge Ackerson distinguished the cases cited from the case before him, pointing out that in each of the cited cases the same characteristic features were present. In each case it appeared that the defendant was not actually engaged in business in that state, that it had no tracks or rolling stock therein and it was not in any sense engaged in business in that state. This being so the United States Supreme Court held that the statute giving jurisdiction in such case was invalid for the reason that it gave rise to litigation which was an unreasonable burden on interstate commerce. Judge Ackerson however pointed out that in the case before him the defendant was actually within the jurisdiction of the court and not merely constructively so. He showed that the defendant was engaged in interstate as well as intrastate com-

merce in the State of New Jersey, County of Hudson. He pointed out that the defendant had tracks, cars, stations, carried passengers, made and carried out contracts and that its presence in the State and County was as real and as actual as that of any domestic corporation. This being so, the court denied the application of the rule laid in the *Davis and A. T. & S. F. Ry. Co.,* cases to the matter before him, and retained jurisdiction. This he did on the authority of the decision of the Supreme Court in the case of

> *Netcufskie* v. *Philadelphia and Reading Railroad Company,* 97 N. J. L. 100,

and the provisions of Sec. 202, 3 Comp. Stat. 4113.

The distinctions thus drawn are we, respectfully submit, sound and proper. They are indicated in the *Davis* and the *Wells* cases (supra). In the *Davis* case the Supreme Court says, *inter alia:*

> "But orderly, effective administration of justice clearly does not require that a foreign shall submit to a suit in a State in which the cause of action did not arise * * * *in which the carrier neither owns nor operates a railroad,* and in which the plaintiff does not reside." (Italics ours.)

In the *Wells* case, the United States Supreme Court said:

> "But the writ of garnishment is void because of the purpose for which it was invoked. The Santa Fe is a Kansas Corporation. *It had not been admitted to Texas as a foreign corporation. It did not own or operate any line of rail-*

road within the state, it had no agent there." (Italics ours.)

Clearly the cited cases are distinguishable on these important features from the *Steinert* case as well as the case at bar.

The distinctions thus drawn by Judge Ackerson in the cited case have been drawn by the United States Supreme Court, in varying degrees, in cases involving the same question as presented on this appeal.

So in the case of

Hoffman, Judge v. *Missouri ex rel. Foraker;* 274 U. S. 22,

it appeared that an action had been brought in the state courts of the State of Missouri on a cause of action which arose in the State of Kansas. The deceased was also a resident of Kansas at the time of his death. The action was brought in Missouri and a judgment was obtained in favor of the plaintiff. From this an appeal was taken and the judgment below was reversed on the jurisdictional question. The matter was then carried to the United States Supreme Court. In reversing the decision below and reinstating the judgment, the court said:

"These allegations remind us of *Davis* v. *Farmers Co-Operative Co.,* 262 U. S. 312. But other facts on which the decision rested in that case are absent in the case at bar. Here, the railroad is not a foreign corporation; it is sued in the state of its incorporation. It is sued in a state in which it owns and operated a railroad. It is sued in a county in which it has an agent and a usual place of business. It is sued in a state in which it carries on

> doubtless intrastate as well as interstate business. *Even a foreign corporation is not immune from the ordinary process of the courts of a state where its business is entirely interstate. Internationl Harvester Co.* v. *Kentucky,* 234 U. S. 79. *It must submit, if there is jurisdiction, to the requirements of orderly effective administration of justice, altho thereby interstate commerce is incidentally burdened.* Compare *Kane* v. *New Jersey,* 242 U. S. 167; *St. Louis, Brownsville & Mexico Ry.* v. *Taylor,* 266 U. S. 200." (Italics ours.)

In the case of *St. Louis, Brownsville and Mexico Ry. Co.* v. *Taylor,* (supra) the plaintiff, a Delaware corporation, having a place of business in the State of Missouri sued the defendant, a Texas corporation, in the state courts of Missouri. The cause of action arose possibly in Missouri. Objections to the jurisdiction were made. In sustaining the jurisdiction of the Missouri State Court, the United States Supreme Court said:

> "A corporation is engaged in transacting business in a district, in the sense of this venue provision, if it, in fact, in the ordinary and usual sense, to 'transact business' therein of any substantial character. *Eastman Kodak Company of N. Y.* v. *Southern Photo. Materials Co.,* 273 U. S. 359."

See also

Griffen v. *Seaboard Air Line Railway Company,* 28 Fed. (2) 998;

Harris v. *American Railway Express Co.,* 12 Fed. (2) 487;

La Porter Heinekamp Motor Co. v. *Ford Motor Co.,* 24 Fed. (2) 861.

In the case at bar, all the elements indicated in the Supreme Court decisions are present. The defendant railroad Company is lawfully in the State of New Jersey. It engages in all manners of business within the State. It sues and is sued in the New Jersey State Courts. It maintains offices, it has buildings which it owns, it owns miles of land which it has used for right of way alone. It has accepted the benefits which accrue to public service corporations, it has and does exercise the right of eminent domain, and it in every respect engaged in its business of operating a steam surface railroad in the State of New Jersey. Its offices may be found in the County where the process of the court was served upon it and where the action was tried. The process of the court was put to no strange, unusual and unintended use. In every way the process of the court was properly invoked, and thus the objection that the act of the court, in retaining jurisdiction constituted an unnecessary and unreasonable burden on interstate commerce is disproved. It is the unfair burden on commerce and not the convenience of witnesses which is the basis of the decision of the United States Supreme Court in the cases cited and relied on herein by the appellant.

Again, there is no compulsory feature in the New Jersey statute as there was in the statutes of the States of Texas and Minnesota, and which were rendered the same obnoxious. The New Jersey statute is, for all practical purposes, merely a codification of the common law decisions, not only of the State of New Jersey, but of all the states and of England.

What has been said hereinabove with respect to the *Davis* and *Wells* cases (supra) applies with equal force to the other cases cited by the appellant.

So, in the case of

> *Michigan Central Railroad Company* v. *Mix*, U. S. 73 L. Ed. 266;
> U. S. Adv. Opinions, March 1, 1929, No. 7, page 266 (1929),

the facts are in accord with the facts in the *Davis* and *Wells* cases, on the authority of which the same is decided. There again the defendant is sought to be forced to litigate in the courts of a state where it owns no property, has no place of business, maintains no tracks and is in no respect engaged in its business of railroading, and where it has not been admitted to do business. There is a single distinguishing feature in that the plaintiff, at the time of instituting the action had removed to the State of Missouri, where the venue of the action was laid. The ruling of the United States Supreme Court was precisely like that in the cited cases, which were named and followed. But all that has been said hereinabove with respect to those cases applies with equal force to the case under consideration and its non-application to the case at bar. The outstanding characteristic of the case at bar, and which is present in it, and absent in other cases relied on by the appellant is the fact that in the case *sub judice* the defendant is actually and not merely constructively in the territorial jurisdiction of the court, that it is engaged in business in the State wherein it is being sued, that it has a license to do business in that state and that it has enjoyed the privilege of litigating in the courts of this State and in every respect enjoys all the rights of a citizen of this State. This is a real, a substantial, and not a mere colorable distinction, and its worth is recognized by the United States Supreme Court and is set out in its decisions referred to hereinafter.

So with the case decided in the Jersey City District Court, cited and printed on pages 19 and 20 of appellant's brief. It was within the power of the court to reject the jurisdiction of the action under the provisions of the New Jersey Statutes herein referred to. The statement of facts is exceedingly meagre. We must therefore assume that the facts as set out in the briefs of counsel, and to which the court refers, brought the case within the facts of the *Davis* case as the court stated and on which case the court relies for its authority. If this assumption is correct, the decision is undoubtedly sound; if the facts were otherwise, we submit the decision can still be sustained as a proper exercise of the courts discretion. The decision thus neither adds anything to the law as we have it already stated, nor does it take anything away. The rule governing the cases is settled by the decisions of the United States Supreme Court. We do know that a defendant, which owns no property in a state, whose business is that of interstate commerce and which is neither a citizen of a state nor admitted to business therein and which has not consented to being sued, may not be sued in a state in which the cause of action did not accrue, apparently irrespective of the place of residence of the plaintiff at the time of the commencement of the action. But the decisions also lay down the converse of the rule and hold that if the defendant is permitted to business in the foreign state, if it owns property there, sues in the courts of the state, and actively engages in business therein, and if the action is transitory in character and the process of the court is properly used, then the right of the court to retain its jurisdiction so obtained over the defendant will be respected by the United States Supreme Court, whether that right of jurisdiction be taken under a statutory en-

actment or the broad principles of common law alone.

The case of *Di Santo* v. *Penna,* 273 U. S. 34; 71 L. Ed. 524, cited by appellants, does not apply to the case at bar. The fact situation is different in every respect. There a state statute affected interstate commerce directly. The quotation therefrom, printed on pages 21 and 21 of appellant's brief contains no new statement of the law. The general principle which is there stated is not open to argument. It is the specific proposition which is contained herein with which we are alone concerned, and as to that the decision contributes nothing.

So with the authorities cited under the 51st section of the Judicial Code. There is nothing in these which in any way is applicable to the case at bar. The action was brought in the district or county where the defendant could be served. No state policy was violated, no rights which the defendant possessed were flouted, and no remedies or relief to which it would have been entitled elsewhere or in any other court were taken away from the defendant. In fact, a careful examination of the entire case and of the argument of the appellant leads to this conclusion; the appellant has mistaken the convenience of its witnesses with a genuine, unfair, improper burdening of interstate commerce. Carefully examined that is the burden of the appellant's complaint. As was said by the learned Justice in the case of

Netcufskie v. *Philadelphia and Reading Railroad Company,* 97 N. J. L. 100:

> "While the courts of New Jersey will abstain from jurisdiction, where it is not clearly conferred by law, and whilst they will extend all proper courtesy to foreign courts and their

> decisions, they will not feel themselves at liberty to deny process and jurisdiction merely from considerations of courtesy to such courts or motives of convenience to themselves or suitors."

We therefore respectfully submit that it is clear that the trial court was within its rights when it denied the defendant's application to dismiss the action for the grounds stated. We submit that the case at bar is not within the application of the decisions of the United States Supreme Court in the *Davis, Wells or Mix cases* (supra). We respectfully submit that the decision of Judge Ackerson in the case of *Howard Steinert* v. *Penna. Railroad Co.,* and the cases which we have cited are directly applicable to and dispositive of the appellant's contentions, and that the decision of the learned trial court below in denying the application to dismiss the complaint was properly made and is sound in principle and that the provisions of Section 202 of *3 Comp. Stat.* 4113, are valid and proper legislation and are not in conflict in any respect with the Commerce clause of the Constitution. For this reason the judgment under review should be affirmed.

POINT 2.

The motion to direct a verdict in favor of the plaintiff was properly denied.

The defendant made a motion for a direction of a verdict at the close of the case, and upon the denial of the same properly preserved its rights by noting an exception to the ruling of the trial court.

The question of the propriety of the ruling is now presented to this court by grounds of appeal numbers 2 and 3 (Case, pp. 40 and 41).

The grounds set out are two, the first is that the refusal to direct a verdict in the favor of the defendant constituted error, and the second, that it was error to submit the questions of the negligence of the defendant and the contributory negligence to the jury.

We respectfully submit that a careful examination of the record will disclose that no error was committed by the trial court in these respects.

The case presented a contested question of fact. Almost every allegation made by the plaintiff, every bit of his testimony was contradicted and challenged. He testified that his work required of him that he bar cars on both tracks. The defendant offered testimony to the effect that this was not so, that he was required to bar cars on the "loading track" only (Case, p. 151). The plaintiff testified that he was thrown down and that his foot was caught on the track because he was picking up a hatchet which he wanted to put away with the other tools (Case, pp. 25, 46, 47). The defendant offered testimony that this was not the fact, that the plaintiff was in fact standing with one foot on the track and urinating, and that this was immediately before the cars started to move (Case, pp. 88, 89, 117, 123, 134). The plaintiff testified that before the cars on the "empty track" were moved that it was customary for a brakeman or other employee on the train to come on ahead, give a signal, set the switch and warn the plaintiff and any other person who was near by that the cars were about to be moved (Case, p. 33). This the defendant denied and testimony was offered to show that it was not to give a warning to the plaintiff or

other persons employed in the colliery yard, but for matters connected solely with the movement of the train that the trainmen came on ahead. Every vital, important assertion made by the plaintiff in support of his claim that the defendant negligently moved its cars without first properly warning him or taking precautions not to strike and injure him, was denied and controverted by testimony of the defendants witnesses who asserted the direct contrary. Thus the case presented a clearly disputed question of fact on all the issues involved.

The defendant now seeks to argue that the testimony is open to one interpretation only, viz., that the plaintiff left a safe place wherein to work and voluntarily placed himself in a position of danger, and at the same time became a trespasser. It is further urged that the defendant's train crew was not derelict in its duty towards the plaintiff in that it had no reason to expect to find him where he was (according to the defendant's testimony—on the track) and that the whole matter happened so quickly that no precautions could have prevented the accident. A strained and unwarranted interpretation is placed on the plaintiff's version of the manner in which the accident occurred (Appellant's Brief, p. 9) and it is sought to remove all conflicting evidence from the case by referring solely to the defendant's testimony.

That the record therefore presents a closely contested question of fact on all the material issues is a conclusion not to be avoided. This being so, it is clear that the ruling of the trial justice denying the motion to direct a verdict in the defendant's favor was properly denied.

It is the well settled law in this State that a trial judge is warranted in directing a verdict only upon

a court question arising from the admitted or uncontroverted facts of a case.

Dickinson v. *Erie Railroad Co.*, 85 N. J. L. 586;
Uvalde Asphalt Paving Co. v. *Central Union S. Co.* 84 N. J. L. 297;
Fulton v. *Grieb*, 72 N. J. L. 35;
Wilson v. *Central R. Co.*, 88 N. J. L. 342;
Martin v. *West Jersey et. R. Co.*, 87 N. J. L. 648.

And again, it is equally well settled that conflicting testimony is always for the jury.

Spargo v. *Central R. Co.*, 84 N. J. L. 251;
Fulton v. *Grieb* (supra).

Clearly therefore, the trial court properly denied the motions of the defendant to direct a verdict and to take the question as to the plaintiff's contributory negligence away from the jury. The jury were entitled to pass on these disputed propositions, they presented fact questions to be resolved from conflicting testimony, and it was the exclusive province of the jury to pass upon these.

Rand v. *Armn*, 74 N. J. L. 704;
Wilkins v. *Standard Oil Co.*, 78 N. J. L. 231;
Hartman v. *McClintock-Marshall Const. Co.*, 82 N. J. L. 734.

The rules of law, applicable to this proposition are so well settled that to cite further authority to this court is a work of supererogation.

We respectfully submit therefore that it is clear from the record of the trial herein that no error was

committed by the learned trial court below in submitting the questions of the defendant's negligence, and the plaintiff's contributory negligence to the jury in a carefully worded charge to which no objection was taken on the trial by the defendant. The questions presented to the jury were properly so submitted, and their verdict is supported by evidence. This being so, the verdict will not be disturbed by this court on appeal.

Specht v. *Central Pass. Ry. Co.*, 76 N. J. L. 631;
Lavin v. *Public Service Corp.*, 77 N. J. L. 217;
Lembeck v. *Harns*, 98 N. J. L. 95.

No error having been committed by the trial court below, with respect to the submission of the disputed questions of fact to the jury and the refusal to direct a verdict for the defendant, it follows that the judgment below should be in all respects affirmed.

POINT 3.

It is respectfully submitted that the judgment under review should be in all respects affirmed.

FRANK M. HARDENBROOK,
Attorney for and of Counsel
with Plaintiff-Respondent.

PAUL KOCH,
of Counsel.

Supplement A.

HUDSON COUNTY CIRCUIT COURT.

HOWARD W. STEINERT, Plaintiff, v. PENNSYLVANIA RAILROAD COMPANY, Defendant.	Memorandum.

ACKERSON, J.

This matter comes before me upon a motion to dismiss the above entitled action on the ground that this court is without jurisdiction to hear and determine the case because, the complaint shows on its face that the alleged cause of action arose in the District of Columbia, that the defendant is a foreign corporation, duly authorized, however, to conduct its railroad business in the State of New Jersey; that the plaintiff is a resident of the District of Columbia and that the defendant is a common carrier by railroad, engaged in interstate commerce and amenable to service in the District of Columbia where the plaintiff also resides.

The Notice of Motion does not specifically state as a reason for dismissing the action, that its prosecution in this jurisdiction would be an unwarranted interference with interstate commerce, although defendant relied upon this ground at the argument and in its brief, and realizing a possible deficiency in the Notice of Motion in this respect, asks leave in its brief to amend the Notice of Motion

to incorporate this specific reason for dismissing the action.

Inasmuch as counsel for the defendant stated at the argument of the motion, that he would rely upon the assertion that the bringing of the suit in the Hudson County Circuit Court would be an unwarranted interference with interstate commerce and at that time no objection was made that this would be outside of the scope of his main papers and the attorney for the plaintiff expressly asked for time in which to file a brief in answer to this contention. I am disposed to allow the amendment.

The facts which must be assumed as admitted for the purpose of this argument are as follows:

The plaintiff resides at Washington, D. C., defendant is a Pennsylvania corporation, has a registered office in the County of Hudson, in this State; has filed such reports, certificates, etc., in the Office of the Secretary of State at Trenton as are necessary to entitle it to operate a railroad within this state as a foreign railroad corporation and that it actually does operate such railroad within the State of New Jersey, as well as through the State of Pennsylvania and into the District of Columbia, where at Washington it maintains a freight yard for interstate commerce and trains. It must be further conceded for the purpose of this motion, that the plaintiff sustained personal injuries on April 17, 1926, in defendant's above-mentioned freight yard at Washington, D. C., through negligence on the part of defendant's agents or employees and by reason of certain defects or insufficiencies due to its negligence, in its cars, engines, etc., while the plaintiff was working for defendant in its business of interstate commerce by railroad and that the negligence complained of, in part at least, grew out of defendant's failure to comply

with the Federal Safety Appliance Act, and it must further be noted that the summons and complaint in this cause of action, were served upon a duly registered agent of the defendant corporation, who had charge of its office in Jersey City, in this State.

The validity of the service of the summons and complaint is nowise questioned, but upon the above state of facts the court is asked to dismiss the suit upon the ground that to permit its further prosecution would be an undue and unwarranted burden on interstate commerce and hence violative of the commerce clause of the Federal Constitution.

In the case of Netcufskie v. Philadelphia and Reading Railway Company, 97 N. J. L., p. 100, the Supreme Court on February 21, 1922, through an opinion written by Justice Black, decided that a suit to recover damages for personal injuries to the plaintiff who was a non-resident of this State, which were caused by the alleged negligence of the defendant railroad company, in the State of Pennsylvania, may be maintained in the courts of New Jersey, against a foreign railroad company authorized to do business and operate a railroad in New Jersey. And the court further held that such an action is transitory and the venue may be laid in the county in which the defendant was served with process. In the course of the opinion, the learned Justice had this to say:

> "While the courts of New Jersey will abstain from jurisdiction, where it is not clearly conferred by law, and whilst they will extend all proper courtesy to foreign courts and their decisions, they will not feel themselves at liberty to deny process and jurisdiction merely from considerations of courtesy to such courts,

> or from motives of convenience to themselves or suitors."

This case would seem to be dispositive of the question now sub judice, but the defendant relies upon the cases of Davis v. Farmers Co-Operative Co., 262 U. S. 312; 67 L. Ed. 996 and A. T. & S. F. Ry. Co. v. Wells, 265 U. S. 101; 68 L. Ed. 928, both of which cases were decided after the case of Metcufskie v. Philadelphia and Reading Railway Co., supra.

The case of Davis v. Co-Operative Co., supra, involved the constitutionality of a statute of the State of Minnesota designed to compel the technical or constructive presence of a foreign corporation in a state for the purpose of obtaining jurisdiction in actions brought by non-residents on transactions arising out of the state. The statute provided as follows:

> "Any foreign corporation having an agent in this State for the solicitation of freight and passenger traffic or either thereof over its lines outside of this state, may be served with summons by delivering a copy thereof to such agent."

Whether this statute, as constructed and applied violates the Federal Constitution was the only question for decision.

The plaintiff in that case was a resident of Kansas. The defendant railroad company was chartered in Kansas and operated no lines within the State of Minnesota, but maintained an office there, merely for the solicitation of traffic; the cause of action arose from loss of grain transported from one point in Kansas to another and service

was made on the soliciting agent, pursuant to the statute. In the course of the opinion, the court said:

> "The fact that the business carried on by a corporation is entirely interstate in character does not render the corporation immune from the ordinary process of the courts of a State. International Harvester Co. v. Kentucky, 234 U. S. 579.
>
> But orderly, effective administration of justice clearly does not require that a foreign carrier shall submit to a suit in a State in which the cause of action did not arise, in which the transaction giving rise to it was not entered; upon, in which the carrier neither owns nor operates a railroad, and in which the plaintiff does not reside."

The same court in an earlier case held:

> "A railroad company which has no tracks within the district is not doing business therein in the sense that liability for service is incurred because it has an office and employs an agent for the merely incidental business of solicitation of freight and passenger service. Green v. R. R. Co., 205 U. S. 530."

In the case of A. T. & S. F. Ry. Co. v. Wells, supra, the United States Supreme Court held that a Texas statute which permitted a resident of another state to prosecute in Texas a cause of action which arose elsewhere, against a railroad corporation of another state, engaged in interstate commerce, and which did not consent to be sued there. was invalid, basing the decision upon the authority of Davis v. Farmers Co-Operative Co., supra.

It is to be noted, however, that in both of the decisions of the United States Supreme Court hereinbefore referred to, jurisdiction of the state courts under the said statutes was attempted to be obtained upon the constructive, not the actual presence of the corporation within the State's borders, the statute imputing to the corporation a technical presence for the purpose of jurisdiction. As has been well stated in the case of Lipe v. Carolina C. & O. R. R. Co., 116 S. E. (S. C.) 101; 30 A. L. R. 246:

> "Where jurisdiction is attributed to such constructive presence, and is acquired by service of process upon one whose power to bind the corporation with respect process is derived solely from a state statute imputing such authority, the jurisdiction of the state's courts will not be extended to causes of actions based on transactions outside the state."

And that, as we apprehend, is as far as the authority of the decisions cited in the U. S. Supreme Court may be held to extend.

But we are not concerned in the case sub judice, with the constructive presence of the defendant corporation within the State of New Jersey, but with its actual presence in this State; not with the effect of service of process upon constructive agents, but upon an actual agent duly appointed by the defendant company itself, who was duly served at the office of the defendant company in Jersey City. The defendant was actually doing business within the state and operated its railroad over many miles of track in this state, carrying passengers from various stations along its line and since it was actually doing business in this state, its presence within the jurisdiction was as real as that of a domestic cor-

poration doing similar business. Lipe v. Carolina C. & O. R. R. Co., supra.

It will be seen at a glance that the situation thus presented is entirely different from the situation which existed in the case of Davis v. Farmers Co-Operative Co., supra, for there the railroad company never owned nor operated a railroad in the state where the suit was brought and the agent upon whom process was served was merely a solicitor of business to be carried on the lines of the railroad in another state. The statute of Minnesota which authorized the service of process under such circumstances, compelled every foreign interstate carrier to submit to the service of process in that state as a condition of maintaining a soliciting agent within the state.

It will be seen, therefore, that the statute itself virtually designated the agent upon whom process against the railroad company, which did not own or operate any railroad within the state, might be served. In the case sub judice the defendant railroad company not only operated a railroad within the State of New Jersey, but did so by filing the necessary papers to give it that right, and also voluntarily designated its own agent here for the purpose of service of process.

In my opinion, the defendant company by seeking and obtaining the right to do business in the State of New Jersey, and actually building and operating a line of railroad and maintaining stations and offices in this state, and by voluntarily designating an agent upon whom process against it might be served, thereby voluntarily consented to be sued in the courts of this state, to the same extent as domestic railroad corporations, and under such circumstances it cannot be stated that it is any more of an undue and unwarranted inter-

ference with interstate commerce to permit a resident of the District of Columbia to bring a suit in this state against a foreign railroad corporation actually operating a railroad here for a cause of action which arose in the District of Columbia, than to permit a similar suit by a resident of the State of New Jersey against such a foreign corporation for a cause of action arising in the District of Columbia.

Clearly the rule laid down in the case of Davis v. Farmers Co-operative Co., supra, was never intended to be extended to a situation as presented in the case sub judice, but is limited to a situation where the technical or constructive presence of a foreign corporation is compelled in a state for the purpose of obtaining jurisdictions in actions brought by non-residents on transactions arising out of the State, and for that reason this motion will be denied and an order may be presented in accordance with the decision thus reached.

....., Judge.

PRESS OF FREMONT PAYNE, 80 Washington Street, New York City.

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