

INDEX.

PLEADINGS, ETC.

Notice of Appeal	I
Judgment Record	III
Complaint	III
Answer	V
Judgment	VIII
Replication	VII
Certificate of Clerk	IX
Motion to direct verdict	162
Motion to direct verdict granted	171

TESTIMONY.

Frank D. Livermore, direct	1
cross	4
Allen L. Le Barron, direct	10
cross	22
George H. Barnes, direct	38
Martha Ricker, direct	40
cross	43
Bryan C. Magennis, direct	46
cross	48
re-direct	53
Robert W. Rodman, direct	54
cross	56

James Gamble, direct	69
cross	71
James Ackerson, direct	73
cross	74
William W. McAlister, direct	76
cross	80
Grover James, direct	82
cross	87
Frederick D. Pangborn, direct	88
John Plumbhoff, direct	91
cross	95
John M. Keleher, direct	98
cross	100
George W. Kinney, direct	101
cross	108
Francis L. Kane, direct	111
cross	114
Frederick Daly, direct	118
cross	119
Thomas O'Hara, direct	125
cross	127
John S. Terwilliger, direct	131
cross	133
Thomas E. Banker, direct	134
cross	135
Patrick C. Donohue, direct	137
cross	142

Frank N. Vernon, direct	144
cross	144
Frank S. Becker, direct	147
cross	148
Samuel Jeffers, direct	153
cross	154
James F. Reynolds, direct	156
cross	158
Abraham Bender, direct	159
cross	162

EXHIBITS.

- P-1. Map of scene of accident; admitted in evidence on page 10.
- D-1 and D-2. Statements made by plaintiff; admitted in evidence and printed on page 86.
- D-3. Photographs of the scene of the accident; admitted in evidence on page 89.

New Jersey Supreme Court

ALLEN N. LE BARRON,

Plaintiff,

vs.

ERIE RAILROAD COMPANY,

a corporation,

Defendant.

Action at Law.

10

Notice of Appeal.

To Collins & Corbin, Attorneys of the above named defendant:—

Take notice that the plaintiff appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in this cause on October 23rd, 1916, on the following grounds:

20

1. Verdict was rendered in favor of the defendant and against the plaintiff by the direction of the court, whereas, under the evidence in the case the question of the defendant's liability was for the jury.

30

2. The judgment was entered erroneously because it represents the opinion of the court and not the finding of fact by a jury, whereas the questions involved are purely jury questions.

3. There was sufficient evidence to go to the jury on the question of the defendant's negligence and

II
Notice of Appeal

the court erred in taking from the jury that question of fact.

4. The judgment is erroneous, because entered on a verdict directed by the court on the theory that in case of verdict and judgment for the plaintiff, the
10 Appellate Court would set aside such judgment on the ground of its being contrary to the weight of evidence, whereas there was, in fact, a controverted question of fact as to the liability of the defendant.

5. The judgment was in divers other respects erroneous and illegal.

Hudson & Joelson,

Attorney for Plaintiff.

20 Dated November 11th, 1916.

III
Judgment Record

NEW JERSEY SUPREME COURT.

Bergen County.

ALLEN N. LE BARRON,

vs.

ERIE RAILROAD COMPANY,

10

Collins & Corbin, Attorneys.

Judgment Record.

Erie Railroad Company, the defendant in this cause, was summoned to answer unto Allen N. Le Barron, the plaintiff therein, in an action at law upon the following complaint:

(Summons issued September 9, 1915.)

20

Plaintiff, who resides in the Borough of Allendale, County of Bergen and State of New Jersey, says that:

1. Defendant is a corporation.
2. At the time within stated defendant operated a steam railroad upon tracks laid through said Borough of Allendale crossing a public street called Chestnut Street. 30
3. On August 19, 1915, defendant by its servants negligently operated a train of cars which were passing along said railroad over said crossing at a speed of sixty miles an hour and negligently failed to signal or give warning of the approach of said train

IV
Judgment Record

by ringing a bell or blowing a whistle or having upon the locomotive of said train or cars a head-light or guarding said crossing by gates, watchman, signal, bell, sign or alarm, or by giving sufficient warning of said approach in any manner whatsoever, and negligently failed to afford protection at said crossing to
10 persons making use thereof.

4. Because of said negligent omissions said train collided with the horse and wagon belonging to plaintiff and then being lawfully driven by plaintiff over said crossing of said railroad, whereby the said horse was killed and said wagon and harness were destroyed, and plaintiff who was riding in said wagon was thrown out and injured about head and body, bruised, cut and disfigured.

20 5. Plaintiff suffered injury by reason of said collision about his head and body and has ever since said accident suffered and been injured and has been permanently injured and disfigured about his head, face and body. The injuries which plaintiff suffered have caused and will continue to cause plaintiff great pain and suffering and are permanent injuries. Plaintiff has suffered other special damages as follows:

30 1. Plaintiff has been unable since said injury, by reason thereof, to follow his vocation of farmer and contractor and has been deprived of gain and earnings.

2. Plaintiff has been caused to expend a large sum of money in procuring and hiring workmen by reason of his disability and will be obliged to continue to employ such workmen hereafter.

V
Judgment Record

3. Plaintiff is now unable and will continue to be disabled so that he now does not and cannot follow his occupation of farmer and contractor.

4. Plaintiff has been compelled to pay out and expend a large sum of money for the use of horse and wagon by reason of the said horse and wagon being killed and destroyed, as aforesaid. 10

5. Plaintiff has been compelled to lay out and expend a large sum of money for medical services and treatment, medicines, hospital charges and other costs and expenses in connection with the said injuries and by reason thereof.

Plaintiff demands fifteen thousand dollars (\$15,000) as damages. 20

Hudson & Joelson,

Attorneys of Plaintiff.

(Filed September 13, 1915.)

Defendant, Erie Railroad Company, a corporation of the State of New York, having its principal office in New Jersey at the foot of Pavonia Avenue, Jersey City, says that:

First Defense. 30

1. It admits paragraph one.

2. It admits paragraph two, except that it has no knowledge or information sufficient to form a belief as to whether the street called Chestnut Street is a public street.

VI
Judgment Record

10 3. It admits that on August 19, 1915, its servants operated a train of cars along said railroad over said crossing; it denies that there was any negligence in the operation of said train; it denies that the said train was operated at a speed of sixty miles an hour; it denies that it failed to signal or give warning of the approach of said train by ringing a bell or blowing a whistle; it denies that it failed to have upon the locomotive a headlight; it admits that it did not guard said crossing by gates, watchman or crossing bell, but says that said crossing was in the open country and was not of such a character as to require the defendant to guard the same by gates, watchman or crossing bell; and it further says that said crossing was guarded by the usual crossing sign indicating the location of said crossing and warning highway
20 travelers to look out for trains. It denies that it failed to give sufficient warning of the approach of said train and says that on the contrary it gave all the warning required of it to be given by the statute and laws of the State of New Jersey; it denies that it negligently failed to afford protection at said crossing to persons making use thereof and says that on the contrary it gave warning and protection by means of a crossing sign as aforesaid.

30 4. It admits that there was a collision between said train and a certain horse and wagon on the date mentioned in the complaint, but denies that the said collision was in any way due to any negligence on the part of this defendant or any of its servants; it has no knowledge or information as to whether said horse and wagon belonged to the plaintiff or whether the same were then and there being lawfully driven by the plaintiff over the said crossing, or whether

VII

Judgment Record

the said horse was killed and the said wagon and harness were destroyed, or whether the plaintiff was thrown from said wagon and injured.

5. It has no knowledge or information sufficient to form a belief as to any of the allegations of paragraph five.

10

Second Defense.

The accident set forth in the complaint was due to contributory negligence on the part of the plaintiff in failing to look or listen or otherwise inform himself of the approach of the train by which he was struck.

Third Defense.

20

The accident set forth in the complaint was due to contributory negligence on the part of the plaintiff in driving upon and over said crossing without stopping or looking or listening, at such a time and place and under such circumstances that it was dangerous for him so to do.

Collins & Corbin,

Attorneys of defendant.

(Filed Sept. 30, 1915.)

30

Plaintiff replies to the answer of defendant and denies that the defendant gave all the notice required of it to be given by the statute and laws of the State of New Jersey.

Plaintiff denies the allegation contained in the second defense.

VIII
Judgment Record

Plaintiff denies the allegation contained in the third defense.

Hudson & Joelson,

Attorneys of Plaintiff.

(Filed Oct. 21, 1915.)

10

This case was tried before Honorable Luther A. Campbell, Judge of the Bergen County Circuit Court, to whom the same had been duly referred by Honorable Charles W. Parker, Justice of the Supreme Court holding the Bergen Circuit of the Supreme Court for Bergen County, with a jury, at the Bergen Circuit Court, on September 25, and 26, 1916, and both parties having submitted their evidence and the court being of opinion that a judgment should be directed for the defendant and against the plaintiff, directed the jury so to do whereupon the jury rendered a general verdict against the plaintiff Allen N. Le Barron, and in favor of the defendant, Erie Railroad Company.

20

Dated, October 9, 1916.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed and that the defendant recover of the plaintiff, its costs, which are taxed at Three hundred and Forty-eight dollars and Sixty-six cents.

30

Judgment entered October 23, 1916.

Wm. S. Gunmere, C. J.

IX
Judgment Record

I, William C. Gebhardt, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

(Seal) In testimony whereof I have set my hand and the seal of said Court at Trenton, this second day of February, A. D., nineteen hundred and seventeen. 10

Wm. C. Gebhardt,
Clerk.

20

30

1831

1831

NEW JERSEY SUPREME COURT.

ALLEN N. LE BARRON,

*Plaintiff,**vs.*

ERIE RAILROAD COMPANY,

Defendant.

10

Testimony.

Transcript of shorthand notes of testimony and proceedings taken at the trial of the above entitled cause, at the Court House in Hackensack, N. J., on 1916.

For the plaintiff, Hudson & Joelson.

For the defendant, Collins & Corbin.

20

FRANK D. LIVERMORE, sworn for the plaintiff, testifies as follows:

Direct Examination by Mr. Hudson:

Q. Mr. Livermore, you are an engineer and surveyor? A. Yes, sir.

Q. Prepared the map which is shown on the easel? A. Yes, sir.

30

Q. That map shows the time when it was made by you? A. I will look at it and see (referring). Yes, sir.

Q. Are you familiar with the location of Chestnut Street crossing on the Erie, as shown on that map? A. I am.

Q. Will you explain the arrangement of the tracks as you have them placed there—the tracks of the

Erie at Chestnut Street crossing? A. (referring) This man's vehicle, as outlined by counsel before, the vehicle came down the Turnpike along Chestnut Street, passing over the trolley tracks, and thence right on the track of the company, the first track is that of the switch track that leads from the main line down into Waldwick yards, which were
10 down below the crossing here (indicating); the next track is that of the west bound passenger track; this (indicating) is the west bound freight track, then the east bound freight track, and the last track, or the fifth track, being the east bound passenger track. The distance between the trolley track and the first rail of the latter track which goes into the switch yards is a matter of 166 feet, and a fraction. The entire distance across the tracks, in a straight
20 line, including the four main line tracks and the track leading down into the yard, is 97 feet and seven hundredths.

Q. How does Chestnut Street cross the railroad, straight or at an angle? A. (referring) At an angle of 35 degrees 59 minutes; less than half a right-angle; very acute.

Q. Chestnut Street is between Allendale and what other place? A. Allendale and Waldwick.

Q. Does your map indicate the other crossing besides Chestnut Street? A. The crossing just
30 above, Orchard Street.

Q. Orchard Street is closer to Allendale than Chestnut Street? A. Yes, sir.

Q. What is the distance between Chestnut Street and Orchard Street? A. 2,146½ feet; practically four-sixths of a mile.

The Court.—Orchard Street is in what direction?

Witness.—North. It is west according to the railroad; but I think it is north.

The Court.—What is the difference between Chestnut and Orchard Street?

Witness.—2146.65 feet from the center line of the street to center line of the street. 10

The Court.—What direction are they from each other?

Witness.—Well, Allendale is north from Waldwick.

Q. Will you indicate the house of one Plumbhoff on that map? A. It is the one back here, marked P.; back in the lots.

Q. How far is Plumbhoff's house from the railroad tracks? A. Well, at the crossing you mean? 20

Q. Yes, at the crossing? A. 406 feet.

Q. There is another house known as the house of Barnes on that map; will you point that out to the jury? A. That is right alongside of the tracks at the junction; marked B. on the map here.

Q. What is the distance between that house and the tracks? A. 45 feet.

Q. Is the width of the crossing greater than the width of the railroad at Chestnut Street? A. The distance across the tracks there, the entire width is 97 feet. It is considerably more than it would be square across. 30

Q. That is caused by the manner in which Chestnut Street crosses the track? A. Yes; an acute angle.

Q. Is this crossing on grade? A. Grade crossing, yes, sir.

Q. What is the scale of the map? A. 80 feet to the inch.

Q. When was it prepared by you with reference to the date which it bears? A. The data was taken at the same time and prepared on the same date, December 8th, 1915.

10

Cross Examination by Mr. Hobart:

Q. A person approaching railroad crossing along Chestnut Street from the east or from the bottom of your maps, would come first to the trolley track, would he not? A. Yes, sir.

Q. Is there any sign indicating the location of the trolley track? A. One sign right there (indicating).

20 Q. Just before you get to the track? A. Yes, sir.

Q. And is that sign elevated some distance above the level of the ground so that a person can see it as he approaches the railroad? A. My recollection is one of three or four signs up there.

Q. Do you remember what it said? A. I do not, no. I made a memorandum of it here, but I don't recall (referring). There is nothing here to signify to me one way or the other.

30 Q. Have you any recollection of it? A. I have not; as to whether it is a cross sign or plain square sign; I don't recall now.

Q. At any rate, it is a warning sign? A. It is a warning sign.

Q. Indicating to anyone approaching that he is about to pass over a trolley track or at least some kind of a track? A. Some kind of a track, yes.

Q. As a matter of fact, it is a trolley track, isn't it? A. Yes, sir.

Q. And there are poles running right alongside of the trolley track, are there not? A. There are, yes, sir.

Q. To which the wires are fastened? A. Yes.

Q. And those poles, are they also easily seen as one approaches them along Chestnut Street? A. I presume so; they are up where anybody can see.

10

Q. In plain sight; so that a man wouldn't have any difficulty in knowing he was approaching a trolley track or at least some kind of a track if he had his eyes open and looking for them? A. Yes.

Q. Even if it were quite a
A. Might have a light.

Q. You were not there? A. No, not there.

Q. After you pass the trolley track, the first railroad track you come to is a track that you call the lateral track, leading into the Waldwick yards, is it not? A. Yes, sir.

20

Q. And then there are these three or four tracks that you have mentioned; so that before a man comes to the east bound passenger track, he has to cross the trolley track and four other railroad tracks, is that right? A. Yes, right.

Q. This track that you have designated the east bound passenger track, I assume you mean by that to be the track on which the passenger trains run east on or go towards Jersey City? A. Yes.

30

Q. That is your understanding of that? A. Of the local trains, yes, sir.

Q. Is there also a sign at the railroad crossing towards the east — you have one marked there, haven't you, "Sign"? A. That is on the other side of the crossing.

Q. Tell us where it is? A. (referring) The bell post marked on there (indicating) with a pencil

mark, there (indicating), and on the outside track is the cross sign with a bell.

Q. It is the ordinary sign? A. "Stop, look and listen."

Q. Such as we have on the railroads all through the country? A. Yes, sir.

10 Q. That was there when you made the map? A. It is located here (indicating), yes, sir; it is on the opposite side of the track.

Q. On the opposite side of the track? A. On the westerly side of the track, yes, sir.

Q. Did you notice when you were out there whether those tracks were straight as you looked towards Allendale, towards the north? A. They are straight, yes, sir.

20 Q. How far are they straight? A. They are straight some distance beyond Orchard Street; I don't recall the exact distance.

Q. Orchard Street is over 2,000 feet, isn't it, about? A. Yes, sir.

Q. So that if that distance was at least 2,000 feet, those tracks are 2,000 feet? A. Yes, sir.

Q. So that those tracks are perfectly straight for 2,000 feet? A. Yes, sir.

30 Q. And it may be more than that? A. A trifle more than that, I think; or a trifle less, I am not sure which. The curve starts before you get to Orchard Street.

Q. That is a very small degree curve, is it not? A. I don't know the exact degree of curvature around there.

Q. The fact is that it is a very small curve, as you can tell by looking at that map? A. I don't know what it is.

Q. When you were there, did you notice whether there was anything at all to interfere with the view

of a train coming from the north on this east bound passenger track? There are no buildings there, no obstructions of any kind, are there? A. Well, you mean down here (indicating), somewhere? It depends on where you mean on Chestnut Street.

Q. Let us say right at the trolley track, looking north, as one is crossing the trolley track? A. None that I know of. 10

Q. Nothing to obstruct the view at that point? A. I don't know.

Q. You did not see anything? A. No; it was a snowy, drizzly day, and I did not pay any attention, but to get the information.

Q. If there had been anything there, you would put it on the map? A. Anything very close there, yes, sir.

Q. Anything between the trolley track and the railroad track would have been put on your map? A. It would. 20

Q. That is what you drew up, a survey of what the situation was. Your survey is not complete, of course, as far as those points are concerned? A. It is.

Q. You haven't indicated on the map? A. No buildings or anything that I know of.

Q. It is a fact that there isn't anything there. Let me show you a picture; here is the little sign before you got down there. This (indicating) is the trolley track, on the right-hand side, looking north towards Allendale; is that the general situation as you recollect it? A. About that, I guess. 30

Mr. Hobart : The picture referred to is number 5304.

Q. Now, how far is it back from the trolley

track — let us say from the westerly rail of the trolley to the rail nearest to the railroad? How far is it from there to the first rail of that east bound passenger track on which that train was supposed to be coming? A. (referring) about 255 feet.

10 Q. In other words, a person approaching those railroad tracks, when he was 255 feet away from the east bound passenger track, could see as far as Orchard Street, couldn't he? A. Might be able to see, yes, sir.

Q. There is nothing to prevent him seeing? A. Not that I know of.

Q. He has the same view all the way along, beginning 255 feet back; there is nothing whatever to interfere with it, is there? A. Nothing that I know of — unless a car or something was standing on the side.

20 Q. Unless a passenger car showed up there? A. If a car were standing there, it would obstruct the view for considerable distance.

Q. Assuming that the tracks were clear enough for a person to see at least 2,000 feet — A. No.

Q. When he is 255 feet away? Did you observe the situation between the house of Mr. Plumbhoff, which is marked here, and the railroad track? Is it open country or is it woods or what? A. It is under cultivation, I believe.

30 Q. Farm land? Practically farm land? A. There is a corn field or something of that nature there. It is under cultivation with something in there.

The Court.—Will you again give me the order in which the tracks appeared, travelling from east to west? The trolley track is first?

Witness.—The trolley track is first.

The Court.—And then the switch or siding ?

Witness.—The switch or siding track, yes, sir.

The Court.—Then next ?

Witness.—Is the west bound passenger track. 10

The Court.—Next ?

Witness.—West bound freight track.

The Court.—Yes?

Witness.—And then the east bound freight track.

The Court.—Yes?

Witness.—And the fifth track is the east bound passenger track.

By Mr. Hudson :

20

Q. Mr. Livermore, is there any warning sign between the trolley and the railroad tracks ? A. There is a bell mounted there (referring) ; a bell post.

Q. The warning sign that you mentioned, on which side of the railroad is that ? A. It is on the opposite side, on the west side of the track, over here (indicating).

Q. So that a man travelling along Chestnut Street that has been mentioned, in first crossing the trolley track, would not come in contact with the warning sign until after he crossed the track, would he ? A. No, sir. 30

Q. Across the railroad track ? A. No, sir.

By Mr. Hobart :

Q. How high is that railroad sign above the ground, do you remember ? A. That is on the opposite side ?

Q. Yes? A. I should imagine 7 or 8 feet, something like that.

Q. The usual elevation? A. Yes, the usual elevation.

Q. You had no difficulty in seeing it, had you?

10 A. No.

Mr. Hudson.—I offer the map in evidence. Marked Exhibit P. 1.

ALLEN L. LE BARRON, sworn in his own behalf, testifies as follows :

Direct Examination by Mr. Hudson :

20 Q. Where do you live? A. In Allendale.

Q. How long have you lived there in Allendale?
A. Well, about 22 years, 3.

Q. And you lived there on August 10, last? A. Yes, sir.

Q. How did you earn your living prior to August, 1910? A. I was farming, contracting, jobs of all kinds.

Q. Where was your farm? A. Well, it was about a thousand feet from the Franklin Turnpike, nearer the old gate house.

30 Q. What did you raise on the farm? A. Well, most everything — onions, celery, potatoes, corn — most anything that grows I could raise.

Q. You worked on the farm? A. Sir?

Q. Who did the work on the farm? A. Well, I done some of it; I had hired two or three men sometimes, three or four men.

Q. What part of the farm work did you do? A. Sir?

Q. What part of the farm work did you do?
 A. Oh, I done the team work — cultivating, ploughing, all such.

Q. What kind of contracting work did you do?
 A. Sir?

Q. What kind of contracting work did you do?
 A. Oh, I don't — well, I dug cellars and dug cess-pools, wells — done mowing, ploughing, everything for anybody that wanted it done. 10

Q. Now, on August 10th, the day that you were injured, what had you been doing? A. Well, I had been putting in a piece of celery that day; about half an acre.

The Court.—Is this August 10th or August 9th, as you allege?

Mr. Hobart.—August 10th, is the correct date. 20

The Court.—August 10th is the date?

Mr. Hudson.—August 10th.

Q. Where did you go in the evening? A. Well, I went down to Mr. Plumbhoff's to get him to help me.

Q. Where did Mr. Plumbhoff live with reference to your house? A. Well, he lived near to what we call Hatch's Crossing.

Q. Can you show in this map where Plumbhoff lived and the direction that you travelled? A. (referring to the map) Yes, he was right there (indicating). 30

Q. How did you travel to get to Plumbhoff's house? A. I rode in a buggy.

Q. I mean, along the roads there; show me by the road? A. This is Chestnut Street (indicating), right here (indicating), and I came down here.

turned off there; came to the trolley track and we stopped at the trolley track to see if there was a trolley coming, and—

Q. Then you went right across here (indicating), is that what you did? A. Yes.

10 Q. And this is Plumbhoff's house here (indicating)? A. Yes.

The Court.—Mark it with a P. on the map.

Mr. Hudson.—There is "P" there from the last marking.

Q. Who was with you at that time? A. My father.

Q. You say you were driving a buggy? A. Yes, horse and buggy.

20 Q. Whose horse was it? A. It was my horse and buggy.

Q. What kind of a buggy did you have? A. What kind of a buggy?

Q. Yes? A. Well, a good buggy; it was a top buggy.

Q. And was the top up or down or how was the top? A. The top was, yes, sir.

Q. The top was up? A. The sides were all off, open like.

30 Q. What time was it when you left your home? A. About half-past 7, I think.

Q. How long did it take you to go from your home to the railroad crossing at Chestnut Street? A. Well, probably about 15 or 20 minutes.

The Court.—Was that in the evening some time, 7.30 in the evening Mr. —

Q. Was that 7.30 in the evening? A. Sir?

Q. Was it in the evening? A. It was in the evening, yes, sir.

Q. You are familiar with this location of Chestnut Street Crossing, of the Erie, are you? A. Yes, sir, quite.

Q. You cross that frequently, go over it frequently? A. Oh, yes, sir.

10

Q. And when you went along Chestnut Street you knew just what you would find there, the trolley tracks first and then the railroad, didn't you? A. Yes, sir.

Q. When you got to the trolley track, what did you do if anything? A. Well, we stopped and looked for a trolley each way; saw none coming.

Q. And then what did you do? A. We drove on, of course, to the railroad track, and I saw on the track, as I was approaching, a switch engine, I supposed.

20

Q. Now, where was the engine? You were coming along Chestnut Street, where was this switch engine? A. The engine was on my left.

Q. That is, towards Waldwick? A. Towards Waldwick.

Q. And then what? A. And facing me, and that was moving, gradually coming up, and I stopped and waited a minute and I said to my father, "I guess they are not coming any further; I guess he saw us; maybe waiting for us to go over." Well, then, the next thing was, we looked up the track and down the track, and we saw no trains coming, and we listened and we did not hear any, and there was none coming; so I said to father, "We will go over." Well, we started over, and as we went over the first track, he said, "Well, look sharp," and we looked again, and we saw no trains coming; there wasn't any; and then we listened and—well, we went on

30

and we did not see any headlights at all; that is what I looked for, and we got over on the east bound track, about ready to turn off of the track—a short turn—and of course I was paying attention to my driving; father said something and I cast my eye to the road.

10 Q. That would be toward Allendale? A. Yes, sir, toward Allendale. I saw an engine coming, and I did not have time to say yes or no or anything; could not say anything; I just simply saw it (clap) like that, and it did not have no headlight, and I don't know any more about it.

Q. So that the engine struck the wagon in which you were driving, that is what you mean when you say that? A. Sir?

20 Q. Did the engine strike your wagon? A. Well, it hit us somewhere; I could not say where.

Q. What happened to you? A. Well, I was thrown; I don't know where; we went somewhere, and on the track; I could not tell you where. I was hurt very bad.

Q. What happened to your father? A. My father—he was there, too; I did not know where he was at the time. Well, they hurt me very bad; I did not know anything until I got to the hospital.

30 Q. Now, you say when you came to this railroad track, you stopped and you looked and you listened; what did you look for? A. I looked for a headlight, a train.

Q. What did you listen for? A. Listened for bells; there wasn't any; he did not ring any bell or blow any whistle; there wasn't any whistle blowed nor no bell rung, nor no headlight.

Q. Now, from where you were at the time you stopped to where you were struck, how far do you

say that was, how far did you travel? A. The train?

Q. No, you? A. How far I was from the train?

Q. How far did you travel from the time you stopped until the train struck you? A. Oh, I don't know; from the west bound track?

Q. Yes; on which track were you when you were struck, do you know? A. Oh, probably—well, I don't know; after I was struck— 10

The Court.—If he tells us where he was when he was struck, we will get it that way.

Q. Do you know which track you were on? A. On the east bound track; I did not understand.

Q. Well, it is indicated here east bound passenger and east bound freight; do you know which track of those tracks it was? A. The passenger track. 20

Q. What happened to your horse? A. Well, that was killed.

Q. And your wagon? A. The wagon was smashed. I never seen anything of it; the harness, that was gone.

Q. Now, when you saw this train coming, as you have described, how far from you was it? A. Well, I think probably 75 or 100 feet.

Q. Was there anything about the train that you remarked? A. Sir? 30

Q. Was there anything about that train that you remarked at that time? A. I don't understand what you say.

The Court.—Use the word noticed.

Q. Did you notice anything about that train? A. Notice anything? No, only the head of the engine; that is all I saw.

Q. What was there about the head of the engine?

A. Well, the light there, the switch engine shunting right across the crossing, and I could just see the head end of the engine; I did not notice anything particular, only the head end of the engine; but it did not have any headlight, and I noticed that.

10 That is I could not see any.

Q. Did you have a light on your wagon? A. Yes, sir, I did.

Q. Where was that light? A. On the dash-board.

Q. Was there a man, a watchman at this crossing, at the Chestnut Street crossing, at the time you crossed? A. No, sir, there was not.

Q. Was there any flagman there at any time? A. No, sir.

Q. Were there any gates there at that crossing?

20 A. No gates; no sign.

Q. Was there a warning bell at the crossing? A. No warning bell either.

Q. Now, after the engine struck your vehicle, what is the next that you remember? A. Why, when I was in the hospital, I remember my father was there.

Q. What hospital were you taken to? A. In the St. Joseph's.

Q. In Paterson? A. Yes, sir.

Q. Was your father also there? A. Yes, sir.

30 Q. What injuries, if any, did you receive at that time? A. What did you say?

Q. How were you hurt, if in any way? A. Well, we was bruised up pretty bad; I had one or two cuts here (indicating), and a cut along my eye there (indicating), and I had a big hole right in the head, right in there (indicating); the scar is there yet; and then this lip here was cut right out, right here (indicating). I did not have any mustache then,

and it knocked one tooth out, and I was hurt here on both sides, and my left foot, the right heel, right in the heel was hurt bad; it ain't well yet; I could not walk without limping, without a cane. My right side, that was hurt, and both elbows was skinned, and I was—right out of my ankle there, was a big gash and skin off; my back, right where my hips is was skinned off; I did not lay in bed for a week; not on my back. 10

Q. Now, this cut on your face, on your lip, is that entirely healed? A. Well, it isn't healed up yet; every little while it gathers up, and matter comes out of there. My head hurts me a great deal, up here (indicating) on the top.

Q. How does that affect you? A. Headache.

Q. How does that hurt you? How does that affect you? A. Well, I get a headache about every week, once or twice—about there (indicating), every two or three weeks I get a headache that I never had before. 20

Q. Have those headaches been with you since this accident? A. What do you say?

Q. Have you had those headaches ever since this accident? A. Yes, sir, have them frequently, three a week some times.

Q. Did you ever have those headaches before the accident? A. No, never had any headaches before that. 30

Q. Describe the sensation you have in your head?
A. What?

Q. Can you describe the sensation that you have in your head? A. I don't understand your question just right.

Q. Had you ever any other trouble with your head besides the headache? A. Well, no.

Q. Have you had any since you were hurt, up to this time? A. No, sir.

Q. Are there any of the other cuts on your head that cause you any trouble besides the headaches?

A. Well, I am slightly deaf.

10 Q. Were you deaf before you were injured? A. Well, slightly.

Q. What have you to say as to the effect of the injury upon your hearing? A. Well, I am a great deal deafer now than I was before; a great deal deafer. I could hear a common conversation in church before; I did not have have no trouble. Now, I am all off on that; I could not hear so well.

Q. Where was the injury to your arm? A. Where was that?

Q. The injury to your arm? A. The arm?

20 Q. Yes? A. Well, they was skinned here (indicating); both of my arms were skinned, the elbow.

Q. Did you have any injury in your right arm? A. Yes.

Q. What was there about that? A. I had a cut an inch and a half long, clear into the bone and in around my right arm there (indicating), and skin off each side of the body, all the way, and my back, right and left side was hardly a spot on it.

30 Q. Did you have any cuts about your eyes? A. Well, this here (indicating) was cut bad there, and this here, from here clear down to there (indicating).

Q. Do either of those trouble you now? A. Well, this here (indicating) troubles me, my head.

Q. In what way? A. Well, headaches.

Q. What about your side? Do you have any effect from your hurts there? A. Well, done some—my side does not hurt me now.

Q. How long after your injury did it hurt you?

How long after the injury to your side did it hurt you? A. Oh, I don't just remember exactly; three or four—two or three months, it hurt me.

Q. What about your foot? A. Well, my foot hurts me yet.

Q. Which foot? A. The left foot.

Q. In what way does it hurt you? A. Well, it pains me all the time, even in bed; I sometimes don't remember a minute, sometimes it hurts me terrible; I don't sleep. I have a lot of trouble to sleep. I have, ever since I have been hurt. 10

Q. How does it affect your sleeping? A. Well, I don't exactly know, only my nerves are very bad, ever since I have been hurt, my nerves are terrible bad.

Q. Well, do you have any pain? A. Well, over and above the foot; there ain't so much pain. 20

Q. Do you have pain in your foot? A. In my head, sir?

Q. Do you have any pain in the foot? A. Yes, sir, my foot is bad, and been very bad.

Q. Whereabouts in your foot do you have the pain? A. Well, I don't know; I have got it bruised some way, I don't know.

Q. What part of your foot hurts you? A. My heel; the heel of my foot, back of the heel.

Q. On the sole of your foot? A. On the bottom of the foot. 30

Q. Does it affect your travelling at all? A. Yes, sir, it does.

Q. In what way? A. I could not step my heel down hard; I can step down gently, but I don't dare to put my weight on it.

Q. Now, since this injury, what effect if any, have your hurts had upon your working? A. Well, I could not stand up and work and I could not travel

and work; I could not drive a team and work or do anything like that.

Q. Have you been able to do any farming since you were hurt? A. Well, I could not farm without driving a team or without travelling.

10 Q. Have you been able to do any contracting work? A. No, sir.

Q. What work, if any, have you been able to do since you were hurt? A. Well, I did get a job in Passaic in a machine shop.

Q. When was that? A. Sir.

20 Q. When was that? A. That is—well, in May, this May. I got a job that I thought I could do; got a job painting, and painting up machines; but I worked there a while and of course they did not have machines all the time, so they wanted me to work around the shop. Well, I could not do that very well, and then they put me on the drill press. I worked there a few days. I saw it was a concrete floor, and I could not stand it. So I told the boss—got pretty fair wages—told the boss that I could not stand it. I says, "I will have to quit;" so I did. Only worked there about three weeks altogether.

30 Q. Have you been able to do any other work? A. Well, yes, sir, I went to Ramsey and I got a job there, driving a team on a dump wagon; did not have anything to do; only ride and drive. Well, I worked there a little while, and then they wanted me to go—I was on a farm; they wanted me to go on the farm. Well, I said, "I will try it, but I don't think I am going to be able to stand it." So he put his boy on the wagon and I went on the farm. He knew that I could do that kind of work or heard of it. So I worked there one day or part of one day; he saw that I could not stand it; I had to cut it out. Well then, the next day or two, I did not work, only

the one day with the team or part of the day. The next day or two I quit there. Then I went from there to the shops of the American Brake Shoe Company. I have a job there now, of what they call painting the steel backs; all the steel backs that go into the back of the brake shoes—all of them. So I am doing that now, sitting at a bench. I don't have to walk any. I can sit there pretty near all day, with the exception of getting up once in a while to get my work a little around me. 10

Q. How long after you were injured was it before you were able to do any work? A. Why, about—well, it must have been betwixt 9 and 10 months.

Q. How long after your injury did you stay in the hospital? A. How long did I what?

Q. After you were injured, did you stay in the hospital? A. Well, only stayed I guess, a couple of days—two days and a couple of nights; a couple of days. 20

Q. Then you were taken to your home? A. Yes, sir.

Q. How long did you remain at your home? A. How long after I—

Q. How long were you confined to your home? A. Oh, about 3 months.

Q. Who attended you there? A. Doctor Rodman.

Q. Did you have anyone else attending you? A. No, sir. 30

Q. Did you have a nurse? A. Yes, sir.

Q. How long did the nurse stay with you? A. Well, she was with me 3 months, the biggest part of 3 months.

Q. How long did Doctor Rodman treat you? A. Well, he was there 6—5 or 6 months he doctored me.

Q. How long were you in bed? A. About 3 weeks.

Q. Did you pay Doctor Rodman any money for his services? A. I paid part of it.

Q. Did he send you a bill? A. Yes, sir.

Q. How much was his bill? A. \$62.00.

Q. You paid him part of that bill? A. Yes, I paid him part of it.

10 Q. How much did you pay him? A. I paid him half of it.

Q. How much did it cost you for the nurse? A. Sir?

Q. How much did it cost you for the nurse? A. Well, I ain't never figured that up just exactly; about in the neighborhood of \$100.

Q. Can you tell what money you spent for medicines and bandages, and so forth? A. I could not say that; I could not say just exactly what I have spent.

20 Q. You did buy some of those, did you? You did buy medicines and bandages, didn't you? A. Yes, sir.

Q. What was the value of the horse that you lost? A. Well, about \$150.

Q. What was the value of your wagon? A. About—it was a pretty good wagon, about \$50.

Q. And your harness? A. Well, I paid \$15 for the harness; it was pretty good harness; never been used much.

30

Cross Examination by Mr. Hobart:

Q. Did you own the farm where you lived at the time of the accident? A. Where it was?

Q. Did you own it yourself? A. Yes, sir.

Q. How far was it from the crossing? A. Well, I never knew; about a mile, I should think.

Q. On which side of the railroad track was it, on the east side or west side? A. On the east side.

Q. To get to the crossing from your farm you had to go along the Franklin Turnpike? A. Yes, sir.

Q. And then turn down Chestnut Street? A. Yes, sir.

Q. How many times had you been over that crossing before the accident happened? A. I could not remember it. 10

Q. You went over there quite often, did you not? A. Yes, sir.

Q. As often as perhaps once a week? A. Well, I don't know as to that; I could not say; I might; no, I don't believe it was once a week.

Q. Will you say it was once in two weeks on an average? A. I could not say.

Q. It was quite often anyhow, wasn't it? A. Quite often, yes, sir. 20

Q. What occasion did you have to go over the crossing? A. Well, I sometimes worked for Mr. Plumbhoff.

Q. Is that the only reason you went over there? Is that the only reason you passed over the crossing, because you worked for Plumbhoff every once in a while? A. No, I worked down below there sometimes.

Q. Well, it was when you had work over in that direction that you passed over the crossing? A. Yes, sir. 30

Q. How long had you owned that farm? A. About—well I guess 10 years anyhow.

Q. During those 10 years you used to work for Plumbhoff and for some of the other men on the other side of the track from time to time, did you not? A. Yes, sir.

Q. The crossing has been there all the time, has it not? A. Well, I guess so.

Q. Just the same as it was when the accident happened? A. I guess it was.

Q. You have sold your farm since the accident, haven't you? A. Yes, sir.

Q. How much did you get for that, do you remember? A. \$2500.

10 Q. Now, at the time of the accident you were on your way to see Mr. Plumbhoff, were you not? A. Yes, sir.

Q. You wanted to see him about doing some work on your farm, didn't you? A. Yes, sir.

Q. Why did you ask your father to go along with you? A. Well,—I did not ask him; he went along of course.

Q. Well, did your father own some of the farm, or was he just staying with you? A. He was just stopping with me.

20 Q. Did your father have some interest in the farm, in the crops? A. Some what?

Q. Was your father to get some of the money from the crops? A. No, he had nothing to do with my place; he lived in Binghampton when he was home.

Q. He was just visiting you then? A. He did not get none of my crops.

30 Q. Well, at the time of the accident, he just happened to be visiting you, is that the idea? A. Yes, he was visiting me.

Q. When you started out in this buggy, on which side of the buggy were you? A. I was on the left side.

Q. On the left-hand side? A. Yes.

Q. And you were driving? A. Yes, sir.

Q. And the horse was a horse that you had had for some time, was it? A. Yes, sir.

Q. How long? A. Oh, probably, well, I don't

know just exactly; a year and a half or two years, something like that.

Q. How much did you pay for that? A. Well, I bought it and it cost me about \$150.

Q. Did you pay cash or trade it in? A. No, I traded a pair of—two other horses for him.

Q. You figure that the horse was worth about \$150? A. Yes, cost me that, if I figured up my other horses that I had paid money in for, in the trade, and I thought that I made a pretty good trade, a good horse. 10

Q. When you turned from Franklin Street to go down into Chestnut Street, was the horse running or walking? A. Walking, yes.

Q. How fast was he walking? A. Well, walking right along, fair gait.

Q. About as fast as a man walks ordinarily? A. Oh, yes, probably about as fast as a man would walk. 20

Q. About 3 or 4 miles an hour? A. I don't know how fast a man would walk, but I suppose about that.

Q. Was he walking all the way from Franklin Street to the crossing? A. Yes, sir.

Q. He had not trotted at any time, or go on a jog? A. No, sir, never trotted at all.

Q. You were not in any hurry, were you? A. No, in no hurry. 30

Q. You had plenty of time? A. Yes.

Q. When you came to the trolley track, you saw a trolley sign there, didn't you? The sign that the trolley company has up at the crossing, did you see that? A. Sign?

Q. Yes? A. I did not see no sign.

Q. Didn't see any crossing sign at the trolley

track? A. Well, it was dark; I couldn't see that sign, you know; I see the trolley track.

Q. Did you see the trolley track? A. See the track.

Q. But you could not see the sign? A. Well, I did not notice.

10 Q. It is white on a board, isn't it? A. Sir?

Q. Isn't it a white board? A. Yes.

Q. Well, didn't you see it? A. I could not say that I did see it, but I saw the tracks.

Q. Saw the trolley poles, didn't you? A. Sir?

Q. Did you see the trolley poles? A. The trolley poles?

Q. Yes? A. Well, I did not look for those particularly there; I presume I did.

20 Q. What were you looking for? A. I was looking for cars, a car to come and go.

Q. You did not see any trolley cars? A. No.

Q. But you saw the shine of the track, did you, as you went by, or what did you see? A. I presume I did.

Q. At any rate, you knew you were coming to a trolley track, didn't you? A. Yes, I knew I was coming to a trolley track.

30 Q. And you knew that after you passed the trolley track, you would have to go a short distance and come to railroad tracks; you knew that, didn't you?
A. Yes, sir.

Q. As you came up towards the railroad tracks, did you see them? Did you see the tracks? A. Sir?

Q. Did you see the railroad tracks? A. Yes, I saw railroad tracks.

Q. Just the same as you saw the trolley tracks?
A. Yes.

Q. And you knew that there were 5 railroad tracks at that point, didn't you? A. I did.

Q. You knew that the first track was the siding track? A. The switch track.

Q. The switch track? A. Yes.

Q. You knew that? A. Yes, sir.

Q. That was the track on which this engine was? A. Yes, sir, that is the track this engine was on.

Q. And the engine was on your left, wasn't it? 10
A. On my left, yes, sir.

Q. Did you see that engine before you got to the track? A. Yes, sir.

Q. When you saw it, was it standing or moving? A. The engine?

Q. When you saw it first, was it standing or moving? A. It was moving.

Q. Slowly? A. Very slowly up towards me.

Q. Up towards the crossing? A. Towards me, yes.

Q. How far away was it from the crossing? A. 20
Well, about probably 75 or 100 feet, something like that.

Q. And was the engine coming to a stop? A. Coming to a stop; did stop.

Q. And after the engine had stopped, then you started to cross the track, is that right? A. Well, yes, I looked up and down the tracks to see that there was no cars coming. I said to father—

Q. Never mind what you said, if you stopped at all, after this engine had stopped, then you started to cross? A. Yes. 30

Q. And after the engine was stopped, then you started off across the tracks, is that right? A. Well, yes.

Q. How long did you stop? A. Well, probably not more than a minute or two.

Q. Well, you stopped, and did you keep looking at the switch engine all the time? A. No. I looked at it after the engine stopped. Why, then, I thought

of course I would wait for a minute to see whether it was going to move again or not. It didn't move, and then I looked up the track and down the track, and saw no train coming but the engine and—

10 Q. Now, when you looked up the track and down the track, had you at that time got as far as the switch track? A. Well, I had—no; we were probably 20 or 30 feet away from the switch track.

Q. That was the place where you stopped, was it? A. That is where we stopped.

Q. That is the place where you looked up and down? A. Yes, sir.

Q. After you looked up and down you started to cross, is that right? A. That is right.

20 Q. And the next thing you knew, your father said something about a train coming and you looked up and saw the engine, is that it? A. Of course we went on over on the eastbound track, yes, sir.

Q. You got as far as the eastbound track before you were struck? A. Yes, sir.

Q. The eastbound track was track number 5 of the railroad track, wasn't it? A. Yes, sir, passenger track going towards New York.

Q. Before you got to that, you had to pass over four other railroad tracks? A. Yes, sir.

30 Q. And you are sure that you passed the other four tracks before you got to the track where this train was coming? A. Yes, sir.

Q. That is right, isn't it? A. Yes.

Q. In other words, you are sure that you were hit on the eastbound passenger track? A. Yes.

Q. After you had got to a stop some 20 or 30 feet from the switch track and looked towards the switch engine, did you stop again after that? A. No, I did not stop after.

Q. Went right on after that? Did you look again

after that or go right across? A. We looked sharp, father said; my father said—When I said we looked up the track and down the track, we heard no train coming; did not see any.

Q. Your father looked? A. My father looked.

Q. He was on the right? A. He said, "Look sharp."

10

Q. Never mind what your father said. He was on the right, wasn't he? A. He was on the right.

Q. He looked to his right? A. He looked to his right.

Q. You were on the left? A. I was on the left.

Q. You looked to your left? A. I looked to the left and right, and he looked to the left and right.

Q. He was looking to his right? A. Sure he was.

Q. You had no difficulty in seeing them? A. No difficulty in seeing them, no, sir.

20

Q. It was a clear night? A. Yes, sir.

Q. And there was no light? A. No.

Q. Wasn't any storm or rain, anything like that?
A. No.

Q. A clear dark night? A. Clear night.

Q. Well, it was a very dark night? A. Yes, quite dark.

Q. Or very? A. Quite dark.

Q. You had no trouble in seeing the tracks, had you? A. Well, the switch engine stood there, and it shone like up over this room.

30

Q. That was the light of the switch engine? A. Yes.

Q. So that you had no trouble in seeing those tracks at all, had you? You had no trouble in seeing those tracks? A. No, sir.

Q. Now, after you stopped some 20 or 30 feet from the railroad track, and when you were looking at the switch engine, then you started up and went

right along; where were you when you looked again?

A. Well, we were just over the first track, the switch. We went over the switch then about the time that father said, "Look sharp."

Q. That is the way you looked? A. We looked both ways then; saw no train.

10 Q. Then you went ahead? A. Yes, we went ahead.

Q. So when you have told us that you looked up and down and your father looked up and down, you are speaking of the time when you were passing over the switch track, is that right? A. Well, it was before; we looked first, and looked the second time, and he said, "Look sharp," and we both looked again.

20 Q. The second time you looked, you stood just across the switch track, is that right? A. Yes.

Q. And then you drove right ahead to it? A. Yes, we did not see anything.

Q. Didn't look a second time after that? A. Well, I could not say to that particularly, but we looked again.

Q. You looked on the switch track? A. We were looking all the time.

Q. You are sure that you looked on the switch track, aren't you? A. Yes.

30 Q. You are not sure whether you looked after that, are you? A. Yes.

Q. Not sure about it? A. We looked after we passed over the switch.

Q. When did you look again? A. We was looking all the time until we looked there again.

Q. And you looked both ways at the same time? A. No, sir, couldn't see both ways at the same time.

Q. That is when you looked again, after you

passed the switch? A. Looked up to the right and looked to the left.

Q. That is when you again looked towards the north? A. Well—

Q. After you passed the switch track? A. I might tell you I was looking all the time.

Q. I am asking you when you looked towards the north. Do you know whether you did or not? Are you sure whether you did or not? A. Yes, I looked—towards what? 10

Q. Towards the north? A. I looked—yes, looked toward the north and looked toward the south.

Q. When did you look toward the north? A. Well, I looked to my right when I was coming over the tracks.

Q. Over the switch track, is that what you mean? A. Over the railroad tracks. 20

Q. Which track do you mean? Do you mean the four tracks or five tracks? A. Passenger track and freight track.

Q. There are four tracks, aren't there? A. Yes, sir.

Q. You say you looked when you were passing over the first track? A. I said I was looking all the time.

Q. Listen to my question? A. All the time I was going past. 30

Q. You can hear me all right? A. Yes, sir.

Q. Then listen? A. I want to talk about tracks.

Q. I will try to be slow. If you don't understand me, stop me? A. I want you to understand me.

Q. That is right; I want you to. There is no doubt about the fact that you looked when you were passing over the switch track, is there? No doubt about that? A. Yes, I said so.

Q. You are very clear about that? A. Yes, sir.

Q. Now, what is the next track marked on the map, the westbound passenger track, after you pass the switch track? The westbound passenger track comes next? A. After the switch?

Q. After the switch? A. Yes, sir.

10 Q. When you passed that track, did you look to the north? A. Yes, sir, we looked both ways.

Q. You did? A. We looked good both ways.

Q. The next track is the westbound freight track? A. Yes, sir.

Q. According to this map. When you passed that track, did you look to the north? A. Yes, sir.

Q. Now, the next track is the eastbound freight track; when you passed that track, did you look toward the north? A. Well, I don't know as — we was looking all the time.

20 Q. I am asking you about particular tracks now? A. Yes, sir, we did.

30 Q. Just before you got to the eastbound passenger track, where the train was coming, just before you got to that track did you look there? A. Well, I was busy driving, to see to danger there; my attention was called to the horse to turn to the right. It is the right (referring) right there (indicating); you go over the crossing and right on the point there is the turn for to go into Mr. Plumbhoff's. I was paying attention then, right at that moment, looking at the driving.

Q. Looking straight ahead, at your horse, weren't you? A. And looking at that time, yes, sir; right at that time.

Q. Now then, when did you again pay attention to your turning off? A. When did I again?

Q. Yes? A. Well, I don't know.

Q. Was it just after you passed the switch track?

A. I don't know; I was paying attention all the time for that matter.

Q. Was it just after you passed the switch track that you were thinking of turning off? A. No, no. When I got to it; when I got to it.

Q. You did not get to it, did you? You got hit before you got there? A. No, I did not get to it; that is right. I own it. 10

Q. What I want to know is, when did you first begin to pay attention to your turning off, where were you? A. I cannot tell you that. That is out of the question. I could not just tell you that.

Q. You knew that is was there? A. I knew that it was there.

Q. And you had to watch for it to see it? A. So I expect.

Q. I say that you had to watch for it in order to see it, didn't you? A. Well, it was dark, of course. 20

Q. There wasn't any lantern there, I mean, in the road, or anything to show you where to turn off? A. I had a lantern on the wagon, but it could not show ahead so very far.

Q. Did you see any train there that night outside of the switch engine and the one that struck you? A. Any other train?

Q. Any other train? A. There was no other train passed that point from the time I got to the switch after that one that hit me. 30

Q. From the time that you left the trolley track and was going over towards the railroad tracks, was there any other train that went by? A. No, sir.

Q. You are sure about that? A. Yes, sir, I am sure about it.

Q. This switch engine that you have spoken of, which you say stopped, did that make any kind of noise as it moved along the switch? A. Well, I

guess it did, some; I don't just remember. I did not pay much attention.

Q. The ordinary kind of blow-off or hissing noise of a locomotive? A. Well, I did not pay no attention to it after I started over.

10 Q. Did it make any noise, that is what I want to know? A. I could not say; probably it did; a kind of hissing sort of noise.

Q. Don't you know it did? A. I think probably it did.

Q. Well, aren't you sure it did? Aren't you sure it did? A. Sure it did?

Q. Yes? A. Well, I think it did.

Q. You said so the last time that you were in court. A. Well, I think it did, yes. You pinned me down, just like you do now. I told you I thought probably it did.

20 Q. Didn't you say on the other trial— A. I could not say what kind of noise it was, but I did not pay any attention after I went over the track.

Q. Now, just listen to my question. I am not trying to pin you down or anything of that kind. I just want to get the facts? A. I know, yes; that is all right.

Q. Listen to the question. This is the question taken from the last time that you were in court. A. Well—

30 Q. Listen to it: Did you testify at the last trial as follows: "Did the engine make any noise, letting off steam? A. Yes, that engine made some noise. Q. What kind of noise was it? A. Kind of a hissing noise. Q. Like letting off steam, wasn't it? A. Yes." Did you so testify? A. Yes. I say so now.

Q. All right. That is all I am asking you. Do you remember who it was that attended you at the hospital in Paterson? A. I could not say.

Q. Well, Doctor Rodman is your family doctor, isn't he? A. Yes.

Q. He attended you after you were taken home?

A. Yes, sir.

Q. He went to see you for several months? A. Yes, sir.

Q. Has he given up attending you now? A. Yes, 10
I doctored with him now.

Q. You are not doctoring with him now? A. No, sir.

Q. How long is it since he has been to see you?

A. Oh, probably 5 or 6 — 4 or 5 months anyway.

Q. Well, the last doctor you had, was that Doctor Rodman? A. Is he here to-day? Yes, I think he is.

Q. He lives in Allendale, doesn't he? A. He lives in Allendale. 20

Q. You have sent for him to come here, have you?

A. Well, I have not sent for him.

Q. Well, your lawyer; you have gone over the case with your lawyer, haven't you? A. Yes.

Q. Now, after the accident I understand that you worked a while at this machine shop in Passaic? A. I was about 9 or 10 months.

Q. What was the name of the place where you worked? A. Robins Conveying Belt Company.

Q. How long were you there? A. Oh, about 3 30
weeks.

Q. How much were you paid? A. How much was I paid?

Q. Yes? A. I only got twenty-two cents and a half an hour.

Q. How many hours a day did you work? A. I worked— we were working 9 hours; nine and one-half.

Q. Did you work there every day for the three

weeks that you were there ? A. No, I had to lay off a couple of days in 3 weeks.

Q. Outside of those two days, you worked every day, did you ? A. Yes, sir.

Q. What kind of work did you do ? A. Well, I painted; I painted machines.

10 Q. What kind of machines ? A. Well, sort of a sardine machine, to pack sardines. They were a feeding kind of machine that carry cans from one end to the other in some way.

Q. After that you did some work for this man at Ramsey on the dump wagon ? A. Some what ?

Q. You did some work at Ramsey ? A. Ramsey ?

Q. Yes ? A. Yes.

Q. Who was it that you worked for there ? A. Secor.

20 Q. Secor ? A. Secor is the name.

Q. Is he a plumber there ? A. Yes, he is doing plumbing.

Q. How much did you earn there ? A. How much did I earn ?

Q. Yes ? A. Well, I got \$2. a day.

Q. How long did you work ? A. Oh, I worked there about 3 weeks altogether; 2 or 3 weeks. That is, I was there; I did not work there all the time for the three weeks, but I was there that length of time.

30 Q. Then you worked for the American Brake Shoe Company and you are working there now ? A. Now, yes, sir.

Q. How much do you get now ? A. I get 25 cents an hour.

Q. For how many hours a day ? A. Nine hours.

Q. How long have you worked there ? A. I have worked there since about— pretty nearly 2 months now.

Q. Every day ? A. Sir ?

Q. Have you worked there every day ? A. Every day when I am home, yes, sir.

Q. Just what is the trouble with your foot now ?

A. Well, it is— hurts me all the time.

Q. You mean when you step on it, it hurts you ?

A. Sir ?

Q. Does it hurt when you step on it or press on it ? 10

A. Yes, sir, I could not step down hard and could not run at all.

Q. You haven't had any operation for it, have you ? A. No, sir.

Q. Did you hear Doctor Macginnis testify at the last trial that an operation would probably cure that ?

A. No, sir.

Q. You did not hear him testify to that effect ? A. I could not hear what he said.

Q. You never heard of that before, did you ? A. 20
Yes, I heard.

Q. You read it in a book ? A. I heard that he thought that an operation would help it, or would find out what it was.

Q. You never have had it done, have you ? A. No, sir.

Q. Did you hear Doctor Macginnis also say that he could probably cure this trouble that you have with your lip or mouth ? A. No, I did not hear what he said.

Q. Well, you read it in the book afterwards, didn't you ? A. I did not read it, no, sir. 30

Q. Well, did anybody tell you about it afterwards ? A. No, I did not hear that at all.

Q. Don't know anything about it; never heard that before ? A. Did not hear him say anything about that, no.

Q. Did anybody tell you about it afterwards ? A. Nobody told me about it that I know of.

Q. This is the first that you have heard, that I tell you now? A. I don't remember hearing anything about it.

Q. At any rate, you have not had anything done?

A. It festers up yet.

10 Q. You have not had any operation, have you?

A. No, sir.

Q. You haven't had any doctor for the last six months, have you? A. Doctor?

Q. Yes, you haven't had any doctor attend you for the last 6 months, have you? A. No, I haven't.

(Recess until 2 o'clock.)

GEORGE H. BARNES, sworn for the plaintiff, testifies as follows:

20

Direct Examination by Mr. Hudson:

Q. Mr. Barnes, you live at Allendale? A. Yes, sir.

Q. Near the Chestnut Street crossing of the Erie Railroad? A. Yes, sir.

Q. Will you look at this map and see if it indicates your home? A. (Referring — indicating).

Q. You live in that house? A. (Indicating).

30

The Court:—You see, your indication means nothing on the record.

Q. Indicated by a B, the letter B? A. (Referring.)

Q. Did you live in that house on the 10th of August last? A. Yes, sir.

Q. Do you know this plaintiff, Le Barron? A. Not personally; only when I see him.

Q. You know him when you see him? A. Yes.

Q. On the night of August 10th, did you learn of

an accident happening at that crossing? A. Yes, sir.

Q. In what way did you learn of the accident? A. By coming to the front door and saw a crowd gathered.

Q. Where were you at the time you saw the crowd beginning to gather? A. On the front porch. 10

Q. Could you see the crossing from that porch? A. Yes, sir.

Q. Then what did you do when you saw the crowd? A. Went over there.

Q. Went out to the crossing? A. Over to where the accident was.

Q. When you got to the crossing whom did you find there? A. Beg pardon, I did not go to the crossing; I went there to where the accident happened, where I wound up, rather, where the men were. 20

Q. Where were the men then at the time you were there? A. They were right—well, they were almost directly in front of my house.

The Court.—That is south of the crossing or north of the crossing, east of the crossing or west of the crossing?

Witness.—Well, what we call the east-bound — speaking of the east side; that is, towards the city; the side towards Waldwick, from Allendale. 30

The Court.—They were on the side of Chestnut Street crossing, toward Waldwick?

Witness.—Yes, sir.

The Court.—That would be south, as I recall it?

Mr. Hudson.—The south side.

Q. How far from Chestnut Street were they ?

A. That I could not say. I should judge they were about 50 feet, something like that.

Q. Now, just describe what you found when you got to this point ? A. When I went out there, the old gentleman was lying down.

10

Q. You mean Mr. Le Barron's father ? A. Yes. And Mr. Le Barron was coming around. I asked what had happened to his father — where was his father, rather.

Q. Did you see the horse ? A. Yes, later ; a little later I saw the horse.

Q. Where was the horse ? A. Down, further down towards the east, about two telegraph poles from where the thing happened.

20

Q. Where was the wagon ? A. Well, that was in splinters all the way along the road.

Q. What persons other than Le Barron did you see at the point ? A. Well, Mr. Plumbhoff and some of the railroad men.

Q. Did any of those parties have lights ? A. Yes, sir, there was — I don't just remember how many lanterns, but there was some in the crowd.

Q. You saw that the horse was dead, didn't you ? A. Yes, sir.

30

(No cross examination.)

MARTHA RICKER, sworn for the plaintiff, testifies as follows :

Direct Examination by Mr. Hudson :

Q. Where do you live, Mrs. Ricker ? A. At Oakland.

Q. Where did you live in August, 1915? A. Mr. Le Barron's.

Q. With Mr. Le Barron? A. Yes, sir.

Q. How long after August 10th did you stay with him? A. Three months.

Q. What happened to him on August 10th? A. Why, he got struck by a train.

10

Q. Did you do anything for him after that time?

A. Why, I stayed there and nursed him as the doctor said.

Q. Were you at his home when he came from the hospital? A. No, sir, I was down at the hospital.

Q. You went to the hospital? A. Yes, sir.

Q. Did you come home with him? A. No, sir.

Q. Well, how soon after he got home did you go there? A. Well, I should judge about a couple of hours.

20

Q. After he went to his home from the hospital, was he confined to bed? A. Yes, sir.

Q. For how long a time? A. About 3 weeks.

Q. What injuries did he have? A. Why, on his lip here (indicating) and his head was cut, and his spine here (indicating) was all hurt; his heel.

Q. You could see those bruises, could you? A. Yes, sir.

Q. Was he attended by a doctor? A. Yes, sir.

Q. Did the doctor come all the time that you were at Le Barron's house? A. Well, nearly all the time, yes, sir.

30

Q. And you say he was injured about his spine; how did that appear to affect him? A. Well, I just could not tell how it did affect him.

Q. What can you say about any of these injuries—take the injury to his face; what is there about that that you can tell us? A. Well, it breaks out once in a while.

Q. And about his side, the injury to his side? A. Well, his side seems to be all right now.

Q. But during the time that you were there nursing him? A. Well, he was constantly complaining a great deal about it.

10 Q. What about his foot? A. Well, his foot troubles him all the time.

Q. Do you know whether or not his walking was affected? A. Yes, sir, it is.

Q. Do you know whether or not any of these injuries affect his working? A. Yes, sir, it did.

Q. Was he able to work when you were there? A. No, sir, he did not do a thing.

Q. Do you know for how long a time he was unable to work? A. Well, as near as I can judge, about from 6 to 7 months anyway.

20 Q. What have you to say about his sleeping? A. He doesn't sleep good at all.

Q. What about his hearing? A. He could not hear so good now as he could before.

Q. You knew him before he was injured, did you? A. Yes, sir, I did.

Q. Knew him very well? A. Yes, sir.

Q. Was there anything else that you noticed about him while you were nursing him? A. Yes, sir, he was frightfully nervous.

Q. Very nervous? A. Yes, sir.

30 Q. What form did that take?

The Court.—How did that show itself, madam?

Witness.—Well, he could not sleep and he was very restless at night.

Cross Examination by Mr. Hobart :

Q. How long had you been living at Mr. Le Barron's house ? A. Well, I should judge about two years.

Q. Did you help him in the household work ? Is that what you were there for ? A. Yes.

Q. You are a house-worker ? A. Yes, sir. 10

Q. What did the family consist of ? A. Sir ?

Q. Of whom did his family consist ? Who were in his family ? A. Why, only just a little girl and I ; that is all that were there.

Q. Mrs. Le Barron, is she dead ? A. No, sir.

Q. Isn't she living there ? A. No, sir.

Q. Where was she ? A. She went away.

Q. Went away where ? A. I don't know where she went ; she left him.

Q. Oh, she left him ? A. Yes, sir. 20

Q. Well, she left him before you went to keep house for Mr. Le Barron ? A. Yes, sir.

Q. And then there was a little girl and Mr. Le Barron and someone else, his father ? A. Yes, sir.

Q. They comprised the household ; and you did the household work and ran the house for him, is that it ? A. Yes, sir.

Q. So you were the lady that nursed him after the accident ? A. Yes, sir.

Q. He did not have any other nurse, did he ? A. 30
No, sir.

Q. No one else outside of the doctor came to see him ? A. No one else came to see him.

Q. Were you paid for your nursing ? A. Yes, sir.

Q. How much ? A. About \$100.

Q. In cash, check or how ? A. Cash.

Q. When were you paid ? A. Well, I just don't know.

Q. Don't know? What? A. I could not tell you just when.

Q. How long ago? A. Oh, well, about 3 months ago.

Q. About three months ago? A. Yes, sir.

Q. Since the first trial? A. Yes, sir.

10 Q. You testified then? A. Yes, sir.

Q. Do you know what I mean by the first trial? A. Yes, sir.

Q. You were paid by Mr. Le Barron for your services in the household, weren't you? A. Yes, sir.

Q. How much were you paid? A. \$12.00 a month.

Q. And your living? A. Yes, sir.

Q. Board, lodging and so on. He did not pay you any more after that by the month, did he? A. No, sir, he did not.

20 Q. How did he come to give you this \$100.? A. Why, for nursing him. I worked for him, and then I nursed him at the same time.

Q. Well, at the time you were nursing him, you were also looking after the house? A. Yes, sir.

Q. He paid this to you extra for nursing? A. Yes, sir.

Q. Is that what he said? A: Yes, sir.

Q. How long did you have to nurse him? A. Well, about, anywhere from 6 to 7 weeks, anyway.

30 Q. And this \$100., was that for that period? A. Yes, sir.

Q. It was extra, was it? A. Yes, sir.

Q. Of course you did not stay on the farm after Mr. Le Barron sold it, did you? A. No, sir.

Q. When did he sell it? A. Well, about 3 months after he was hurt.

Q. And then you left the farm yourself and went to live somewhere else? A. Yes, sir.

Q. How long had you known Mr. Le Barron before you began to work at his house? A. Oh, I should judge about 3 years.

Q. You were a neighbor of his? A. Yes, sir.

Q. Now, before this accident he was somewhat deaf, wasn't he? A. Yes, sir, a little, but not much.

10

Q. Well, could he hear people talking in the ordinary tone of voice, such as we are talking now? A. You could sit across the room and talk to him.

Q. I did not ask you that. You heard what I asked you.

(Question read to the witness.)

A. Yes, sir.

Q. What was there about him that was deaf then? Can you describe it in some way so that we can form some idea of the extent of his deafness? That is what we want to know? A. I don't just know.

20

The Court.—You are not deaf, madam, are you?

Witness.—No, sir.

The Court.—Well, now, counsel has asked you whether, in talking to Mr. Le Barron as he is talking to you and has been talking to you, whether he could hear what was said. Now, he is asking you to describe, to tell us how deaf he was, to what extent he was deaf?

30

Witness.—Well, he was a little deaf, but not very much.

BRYAN C. MAGENNIS, sworn for the plaintiff, testifies as follows :

Direct Examination by Mr. Hudson :

Q. Dr. Magennis, you are a practicing physician and surgeon ? A. I am.

10 Q. And have been such for how many years ? A. 32 years.

Q. You practice in the city of Paterson ? A. I do.

Q. Are you connected with any institution there ? A. I am visiting surgeon of the Paterson General; and Barnert Hospital.

Q. You have examined Allen N. Le Barron ? A. I did.

Q. Can you tell when you made that examination ?

20 A. The first one was on December 11th, 1915, and the second one was September 9, 1916.

Q. At the first examination Doctor MacAlister was there ? A. He was, yes.

Q. You made a memorandum of what you found as the result of that examination ? A. I did.

Q. Will you please state what you found as the injuries of this plaintiff ? A. Found upon examination that he had two scars on the top of his head, or on his head, and one on the media line. He had a scar at the right angle of the mouth, or the angle of the mouth on the right side. He had a scar on his left instep, and I think there was a scar upon the right side behind.

30 Q. Did you make any examination of any of these injuries, any particular examination of any of these injuries ? A. Yes, I found the scar on top of the head was the one of which he complained most, and I found that was a scar about an inch or an inch and a half long, with some sensitiveness upon pres-

sure; and the scar on the instep was about an inch long, and upon examination of his heel, I found he was very sensitive to pressure upon the heel; complained of a great deal of pain upon pressure upon the heel, either in standing or by having me make the pressure.

Q. In regard to the left side of his thigh, what about that? A. He complained that the pain extended from the heel up to the thigh; but there were no objective symptoms there to indicate that there was any trouble. 10

Q. Now, that wound on the lip, doctor, did you examine the inside of his mouth regarding that? A. Yes, inside of his mouth is all right, but the hairy covering of the skin had been turned in, and interfered with the recovery of the wound.

Q. The scar which you mention, doctor, the media line of his head, what was his particular complaint regarding that? A. The complaint was that there was some feeling as if something was crawling underneath the scalp, and he had also complained, in relation to that wound, of headaches. 20

Q. Did he complain of any peculiar sensation in the head, do you recall? A. He said he was dizzy and could not sleep. That was one of his complaints.

Q. The pains that he described to you, throughout his left side, can you recall the nature of those pains? A. The pains were shooting pains which he said came from the heel. When pressure was made upon the heel, either by standing or by someone pressing upon it, the pain extended and shot up the leg. He also said he had these pains at night time. 30

Q. You applied pressure to his heel, did you not? A. Oh, yes, I tested him to see whether his statement

could be corroborated by pressure, by the various kinds of methods we use for determining that.

Q. You talked to Mr. Le Barron at the time you were examining him, did you? A. Yes, I got his history of his case and found out that his hearing was not very good, and tested his ears for hearing.

10 Q. But you and he conversed together at the time you made the examination? A. Oh, yes, I could make myself heard that much probably.

Q. What would you say as to the effect of this injury to his heel and to the side upon his work as a farmer? A. The injury to his heel would interfere with his walking, because it would give him pain. I should say it would interfere with that kind of work, unless it could be relieved.

20 Q. Now, the further examination that you made was lately? A. That was made on September 9, 1916.

Q. How did you find him at that examination? A. I found—he said he felt a little better generally speaking; speaking in a general way. He still had pain in his heel, and still complained of weakness, and inability to sleep.

Q. Did you apply pressure to his foot again? A. Yes, he had the same — I found the same symptoms that he had before.

30 Q. What would you say as to the probable continuance of this injury to his foot? A. I think it will continue. I feel quite sure that the nerve is involved in the scar that he has upon his instep.

Cross Examination by Mr. Hobart :

Q. Doctor, you did not know Mr. Le Barron before his accident, did you? A. No.

Q. Of course you have no way of comparing his

hearing now with what it was before the accident ?

A. No.

Q. You tested his hearing I presume ? A. I did.

Q. In what way ? A. With my watch.

Q. And with what result ? A. That he could not hear a watch tick; that is, by placing the watch against the ear on the right side, he could not hear it. 10

Q. So that so far as that ear is concerned, there was practically no hearing ? A. Practically no hearing.

Q. How about the other ear ? A. He could hear a watch held an inch from the ear.

Q. Did you make that same test when you examined him a week or so ago ? A. Yes.

Q. And you found the same condition ? A. About the same results, yes.

Q. There hadn't been any change for the worse so far as you could tell from what you found the last time ? A. I think he was a little worse; I think he was a little worse. 20

Q. How was he last year ? A. Well, I think he was a little worse, compared with last year.

Q. In your examination in September he had no hearing at all so far as the watch test was concerned ?

A. On the right ear ?

Q. On the right ear ? A. Yes.

Q. And that condition was the same as when you examined him last December ? A. The same way. 30

Q. When you examined him on this last occasion in September, the other ear had a hearing test of about an inch ? A. About an inch, yes.

Q. Wasn't it just the same as it was before ? A. The same as it was before, but I don't think he heard as readily and as well.

Q. So far as the test is concerned, the hearing was exactly the same ? A. Exactly as I have stated. I

qualified by saying that I did not think he heard as quickly.

Q. How do you know that? A. He told me so, and I tested him; by hiding his eyes so that he did not know whether the watch was in my hands or in my pocket or where it was.

10 Q. As a matter of fact, both this year and last year he heard the watch in that way, only one inch from his ear? A. Yes.

Q. That is the usual test, isn't it? A. That is one of the usual tests.

Q. A common test? A. Of aerial conduction; conduction by air.

Q. Is it not a fact that you determine the extent of the hearing by the distance that a man can hear the watch from a place near his ear or a little further away from the ear and so on? A. Yes. I think he qualified it a little different this time; although he heard it, he qualified it a little different.

20 Q. In what way? A. He said he did not hear quite as well, and from my observation he did not hear quite as well.

Q. He told you that he did not hear so well? A. Told me that he was not quite as quick to hear it as he was last year. It is only a trifle.

Q. Hardly worth talking about? A. Yes, only my observation about it.

30 Q. Such trouble don't appear by the usual test, so far as tests are concerned? A. It only appeared as my opinion, as my impression, that he did not hear quite as distinctly or quite as well.

Q. Where was this scar on the top of his head? A. Almost the media line, about here (indicating), I think.

Q. Do you know in what way that scar affected him if at all? A. I could not tell, only by pressure.

He said it was painful if I touched it. He complained of this feeling of something crawling underneath his scalp, and said he had headaches.

Q. Well, so far as objective conditions are concerned, aside from what he may have told you, was there anything about the scar which may account for his inability to hear? A. Oh, no; oh, no, not at all. 10

Q. There is no connection between that and his hearing at all? A. I don't think so, as far as the scar was concerned.

Q. Well, there was nothing else objective as far as the head is concerned than that scar and this trouble with his mouth? A. Those are the only objective symptoms, yes.

Q. Of course the scar on his mouth, that had nothing to do with his hearing? A. No. 20

Q. So far as the heel is concerned, doctor, was the condition about as you found it in December? A. I think about the same. He complained just about the same.

Q. Is that a condition in which you would advise an operation? A. I think I would, if it did not get better by time, and time did not heal it, I would advise him to —

Q. What kind of an operation? A. I should open that scar, open that and see whether there was any adhesion between the nerve and the wound itself. 30

Q. Your prognosis of it is then that probably the nerve is affected on account of the scar? A. It has been injured or might be disturbed in the healing up of this scar.

Q. Is there anything very difficult about an operation of that kind? A. Not very.

Q. You have performed such operations, have you, on other occasions? A. I have, yes.

Q. Frequently? A. Not very often; we don't find it very often.

Q. Those that you have performed, have they accomplished the desired results? A. Oh, yes; yes, unless the nerve were really injured; I mean, partially destroyed.

10 Q. You testified to that same effect the last time in court in this case? A. I think so, yes.

Q. Did you advise Mr. Le Barron to that effect? A. I am not his physician.

Q. Did you advise it? A. I said I did not know that I would. If there is any question as to what should be done—

Q. Did you advise his attorney? A. I don't think that I did.

20 Q. Perhaps I ought not to use the word advise. Did you inform either Mr. Le Barron or his attorney that such an operation as you now describe would probably be helpful, if not entirely successful? A. I think I understand now. Indirectly. I did not directly because I was not asked the question.

Q. Did you not testify to that effect in another hearing? A. I testified that I thought an operation might benefit him.

Q. Would probably benefit him? A. I think so.

Q. You still think so? A. I feel so, yes.

30 Q. So far as the trouble with his lip is concerned, that is a simple matter? A. Apparently a matter of knowing how to turn them out.

Q. What seems to be the difficulty, an ingrowing hair? A. Well, just a matter of having been turned in, instead of being turned out.

Q. That could be cured by a very simple operation? A. I think so, yes.

Q. That could be cured by the use of cocaine? A. I think it could be done under cocaine, yes.

Q. How much would both of those cost, altogether? In other words, how much would it cost to cure him? A. Cure him of those —

Q. I mean by these operations? A. Oh, \$250., \$200., something like that — I can do it for.

Q. That would be the normal price, I suppose?
A. Oh, yes. 10

Q. The price has not gone up any since last year, has it? A. Yes, sir, the high price of food has caused us to increase our fee.

Re-direct Examination by Mr. Hudson :

Q. If the nerve is affected, then the operation would not relieve that condition? A. If the nerve has been in any way partially destroyed or if it is destroyed or involved in the adhesion, in the wound, of course, you could not restore that part but you can liberate it so far as the pressure of it is concerned. 20

By Mr. Hobart :

Q. I want to make sure that I understand you clearly. Do I understand that the only inconvenience you now find that apparently causes any difficulty to Mr. Le Barron is this trouble in his lip and the trouble in the heel? A. Not the only thing that he complains of. 30

Q. That is all that appears objectively? A. That is all that appears objectively.

Q. Of course he complains of sleeplessness and headaches and so on? A. Yes.

Q. But that is a matter that is within his control?
A. Purely subjective.

ROBERT WILLIAM RODMAN, sworn for the plaintiff, testifies as follows:

Direct Examination by Mr. Hudson:

- Q. Your business is that of a physician, doctor?
A. Yes, sir.
- 10 Q. At Allendale? A. Yes, sir.
Q. A graduate of what college? A. Illinois.
Q. For how long a time have you been practicing?
A. 1902.
Q. Do you know the plaintiff, Le Barron? A. Yes.
Q. You attended him after August 10th, 1915?
A. Yes.
Q. At that time you attended him for some injuries which he had received? A. Yes.
- 20 Q. Was it shortly after his being injured that you commenced to attend him, doctor? A. Yes.
Q. Where did you attend him? A. At his home.
Q. You did not attend him while he was in the hospital? A. No.
Q. For what particular injuries did you give him attention? A. For the lacerations and contusions of the head and body, and ligaments.
Q. Now, he had cuts on his head, didn't he, on the top of his head? A. Yes; yes, sir.
- 30 Q. A cut somewhere— A. Over his eye; one down at the corner of his mouth, the right side.
Q. And did he also have a cut or bruise on his arm? A. Several.
Q. The right arm? A. Yes.
Q. What was the trouble with the left foot? A. He had a punctured wound, of the right foot.
Q. This cut at the side of his mouth, doctor, that healed up, did it? Did it heal up entirely? A. Not completely, no.

Q. It left a scar, did it? A. Yes, sir.

Q. Are you still treating him? A. No, I haven't treated him in probably—I could not tell exactly how long it has been; it has been a considerable time, though.

Q. Did you treat him for any particular injuries to his head? A. Why, bandaging and taking care of the injuries that he had, cuts and wounds. 10

Q. What complaint did he make concerning those injuries? A. Said that they hurt him.

Q. Did he describe any peculiarities about those injuries? A. Said that they pained; that is all.

Q. This cut on the top of his head, did he say it affected him? A. It hurt him.

Q. Did he say whether the pain was in one place or whether it moved throughout his head? Did he describe it in any way to you? A. I think he complained of pain in the region of the wound; that is all I recall. 20

Q. Now, you say that he had a puncture of the bone in his left foot; did he complain of pain there, do you remember? A. Yes.

Q. Did you reach any conclusion as to what injury he suffered in that foot? A. I considered that he had an injury to the nerve.

Q. And while you were treating him did it continue to show—give evidence of pain? A. Yes. 30

Q. Now, about his left leg and foot and his left side, did he complain of those parts to you? A. He complained of pain in his leg, coming down through his thigh, but looked to be from the injury to the foot, I concluded.

Q. While you were treating him there, doctor, what would you say as to his being able to work on the farm? A. During the time that I treated him, he was for four, five, or six weeks confined to

the house. After that, why, he wasn't able to—he was able to get up and go about town, but not to do any work.

Q. And did that injury of his left foot affect his walking? A. Yes, sir; he was lame.

10 Q. Did you render a bill to Le Barron for his services? A. Yes, sir.

Q. Do you know the amount of the bill? A. \$52.00.

Q. Well, he said it was \$52, is that right? A. Yes, sir.

Q. Did you know Mr. Le Barron for some time, doctor? A. Yes, sir.

20 Q. What have you to say as to his hearing before and since he was injured? A. Before his injury I knew him and while he was slightly deaf, he wasn't deaf to the amount that he has been since.

Q. Have you examined him lately? A. Yes, sir.

Q. When was the last you examined him? A. I think it was the 12th of September.

Q. Did you make an examination then as to his hearing? A. Yes, sir.

Q. What have you to say as to whether he was able to hear then when you were treating him? A. He was a little more deaf now than at that time.

30 *Cross Examination by Mr. Hobart:*

Q. Doctor, when you examined Mr. Le Barron—on the 12th, I think you said? A. Yes, sir.

Q. Did you make any test of his hearing? A. Yes, sir.

Q. How did you test it? A. Watch.

Q. At each ear? A. Yes, sir.

Q. How far could he hear with the right ear? A. He could not hear at all with the right ear.

Q. And did you examine him last December, another time, when we were in court? A. Yes, sir.

Q. Did you examine him in the same way? A. Yes.

Q. With the same result at this time? A. Yes, sir.

Q. So that his hearing is just the same as it was? 10

A. Yes, sir; he had no hearing, no; practically no hearing in that ear at all.

Q. Did you examine the other ear on September 12th? A. Yes.

Q. With a watch? A. Yes.

Q. With what result? A. Why, I don't just recall the distance that he could hear it from the head at that time.

Q. Did you examine that same ear last December with a watch? A. I thought you were asking me the first question about last December. 20

Q. No, I mean this September 12th. A. He could hear it just about an inch, an inch and a half.

Q. So that it was just about the same as it was last December? A. I thought it was a little bit worse.

Q. Why did you think so? A. Well, in a conversation with him; he would ask me questions and make me talk louder than at that time.

Q. So far as the watch test is concerned, it was practically the same? A. Practically the same, yes. 30

Q. That is the test that physicians use to test the hearing, isn't it? A. Yes.

Q. One of the tests? A. One of the tests.

Q. It is an accurate test, isn't it? A. Pretty accurate, yes, sir.

Q. At any rate, that is the only test that you made? A. With the exception of conversation, of course. I would have to judge more from that, per-

haps, because I have known him for 8 years, and as a comparative test, I would consider that.

Q. The difference between this year and last year is, as Doctor Magennis put it, a mere trifle? A. Very slight, yes.

10 Q. Now, you had been his family physician for some years, hadn't you? A. Yes.

Q. What have you ever treated him for? A. Him personally? I was in conversation with him personally; I don't think I ever treated him.

Q. You treated his family? A. Treated his family, yes.

Q. Before this accident, which was in August, 1915, is it not a fact that he was very deaf? A. Not very deaf, no sir; he was deaf.

20 Q. Well, how will you describe it? A. Well, he could hear a conversation if it wasn't—

Q. Doctor, was there any difference between his deafness before the accident and after the accident? A. Yes, sir, I think there was.

Q. Sure of that? A. I think there was, yes, sir.

Q. You testified in this case at the last trial, last December? A. Yes, sir.

30 Q. Did you testify as follows: "Q. You did know him before that? A. Oh, yes, yes, I did know him. He had done some work for me; I had met him in a friendly way. Q. That before the accident he was quite deaf, was he not? A. He was somewhat deaf, yes, sir; yes, sir. Q. So far as you know, he is no deafer now than before? A. I made no comparison or examination. Q. Have you talked to him? A. Oh, yes. Q. Recently? A. Yes. Q. Did he appear to be of any harder hearing than he was before that accident, or about the same? A. Why, that is a pretty hard question to answer. Q. You could not say that there was any difference, could you? A.

No. Q. Didn't notice any difference? A. No." Did you so testify? A. I suppose I did, yes, sir.

Q. Well, was it true, or wasn't it? A. I thought so; I thought it was, yes, sir.

Q. You still think so, don't you? A. Yes.

Q. You still think it was true? A. Why, I think that he is deafer now that he was before the accident. 10

Q. I haven't asked you that, doctor. I am asking you whether you would testify that that was true? A. Yes, sir.

Q. And it is still true, isn't it? A. Yes, sir.

Q. Doctor, you spoke of a puncture in the bone; won't you tell us a little more definitely just what that was? A. A bone was punctured.

Q. I beg pardon? A. A punctured wound.

Q. I misunderstood you then. Where was the puncture? A. On the foot. 20

Q. Well, in the bone or muscle or what? A. In the flesh; extending down to the bone.

Q. On the front of the foot or the heel? A. On top of the foot.

Q. And is that the place where the scar now appears, over the instep? A. Yes, sir.

The Court.—Counsel for the plaintiff also used that same expression, punctured bone. 30

Mr. Hudson.—I did; yes, sir.

Q. Well, do you find anything in the heel, doctor, which indicated any objective symptoms? A. Why, I think the injury—the complaint of the heel, the pain there, comes from the nerve injury in the punctured wound.

Q. In other words, the one wound in the foot was

the wound that is now represented by this scar at the instep? A. Yes.

Q. The heel itself, in other words, is not injured, so far as you observed? A. No, as far as I could see.

10 Q. You were present at the last trial when Doctor Magennis testified? A. Yes, sir.

Q. Weren't you? A. Not when he testified; no, sir.

Q. You were present anyhow? A. Afterwards.

Q. Afterwards. Did you know that Doctor Magennis advised an operation of this kind? A. I heard of it after.

Q. Shortly after the trial you heard, did you not? A. Yes.

20 Q. You heard the nature of the operation which he advised? A. Yes, I heard to-day.

Q. You heard to-day for the first time? A. Yes.

Q. The first time you heard it? A. From him; yes, sir.

Q. Did you hear it from anybody else? A. Yes.

Q. From whom? A. I don't remember from whom.

Q. You heard it from somebody? A. Not directly.

30 Q. You heard it from somebody, though, didn't you? A. Yes, sir.

Q. Did you advise the plaintiff to have an operation after the last trial? A. After I heard that, yes.

Q. You advised him to have the operation that Doctor Magen is recommended? A. Yes, sir.

Q. Your own judgment about it coincided with that of Doctor Magennis, didn't it? A. Yes, sir.

Q. That would be a wise thing for him to do? A. Yes.

Q. And probably would be successful? A. Probably.

Q. I am speaking now of the heel? A. Yes.

Q. Of the foot? A. You are speaking of the wound, aren't you?

Q. I am speaking of the wound in the foot? A. Yes.

Q. That is what you are referring to, isn't it? A. Yes.

Q. Did you advise Mr. Le Barron personally of that? A. I don't think I did personally, no.

Q. What did you advise? A. I think I just—well, now, I could not say.

Q. Well, surely you were still attending him, weren't you? A. At that time I did not advise him to have an operation.

Q. Don't you know, doctor, that the last trial was last December? A. Yes, sir.

Q. How long did you continue to attend this man? A. Why, I haven't attended him for anything, for his injury, since the time of the trial, since the other trial.

Q. Didn't you attend him up to 5 or 6 months ago? A. For stomach complaint; that was all; not for the injury.

Q. That had nothing to do with this accident? A. No, sir; it was simply the result of indigestion that he had.

Q. Nothing to do with the accident? A. Why, I think it was due to the nervousness from the accident.

Q. It was connected with the accident in that way? A. Connected with the accident, in that way, yes.

Q. Then you were treating him for the accident,

10

20

30

weren't you, to that extent? A. To that extent; yes, sir.

Q. How long did you continue to treat him, doctor? A. I could not tell you exactly.

Q. Well, up to within 5 or 6 months ago? A. 5 or 6 months ago, yes.

10 Q. How often did you see him? A. Why, toward the last I saw him every couple of weeks or ten days.

Q. During the time that you attended Mr. Le Barron, since last December up to the period of 5 or 6 months ago, did you ever advise him to follow the advice of Doctor Magennis? You say it coincided with your own judgment about it? A. I think probably I did; I don't recall now.

20 Q. Is it not a fact that your duty as a physician was to advise him, if you thought it would help him? A. Yes, sir.

Q. Have you any doubt that you performed that duty? A. No, sir.

Q. Why, no, of course not. You would personally perform that operation or have Doctor Magennis? A. Yes, sir.

Q. Doctor Magennis is one of the leading physicians and surgeons in this neighborhood? A. Yes.

Q. In fact, in the State? A. Yes.

30 Q. You personally have a good deal of confidence in his recommendation in a matter of that kind, haven't you? A. Certainly have.

Q. Did you inform the plaintiff of that, of the standing of Doctor Magennis? A. No, sir.

Q. Well, when you performed your duty as a physician and advised the plaintiff to have an operation, did he say anything about it, whether he would submit to it or not? A. I don't recall.

Q. Well, did he say he would not submit to it?

A. He did not.

Q. Did he say he was going to wait until after the trial was over? A. He did not.

Q. What did he say? A. I don't recall what he said; I really don't.

Q. Did he say anything about it? A. I really do not recall what he said. 10

Q. Well, did he say whether he would or would not? A. I don't recall.

Q. Don't you remember what he said? A. I don't remember.

Q. You are still of the opinion, doctor, that an operation such as we have been discussing would probably effect a cure, are you not? A. Yes.

Q. And you agree with Doctor Magennis as to the probable cost, about \$200 or \$250? A. That I have nothing to do with; I would not say. 20

Q. That depends on the surgeon? A. Entirely out of my jurisdiction.

Q. That would be reasonable— A. That is entirely out of my jurisdiction; I would not say.

Q. You say you could not tell us how much such an operation would cost to be performed by an experienced physician or Doctor Magennis? A. Certainly not.

Q. Do these prices go according to the— A. I do not know. 30

Q. —wealth of the patient or what? A. I do not know anything about that. Doctor Magennis fixes his own price.

Q. Couldn't you give us any idea what would be a fair price for such an operation? A. Doctor Magennis might suggest that it would be \$250, so that I say that the operation might be done successfully for \$250.

Q. Let us turn to the other thing: This ingrowing hair on the lip, did you know after the last trial that Doctor Magennis advised that it could be cured by a very simple operation? A. I don't think I heard that, no.

Q. It is a fact, it can be cured? A. Yes.

10 Q. You have never had any doubt about that, have you? A. What?

Q. You never have had any doubt about that, have you? A. No.

Q. Did you ever advise the plaintiff to have that operation? A. I don't know whether I did or not.

Q. How? A. I don't know whether I did or not; I don't think so.

20 Q. When did you first know or conclude that it would be a good thing for him? A. I could not say how long ago; it was when I found that it was not—we discovered that it was not healing properly and investigated; I found such was the case.

Q. Well, you agree with Doctor Magennis? A. Yes.

Q. That could be cured by a comparatively simple operation? A. Yes.

Q. A very simple case? A. Yes.

Q. Have you advised the plaintiff to have that operation? A. Yes.

30 Q. You have? When did you advise him? A. I could not recall the time.

Q. What did he say? A. I don't recall.

Q. Was it another case where he was going to wait until after the trial? A. He didn't say so to me absolutely.

Q. Did he say anything about it? A. No, sir.

Q. At any rate— A. I just made the assertion that it could be done, and should be done, and that was all that was said.

Q. At any rate, you called his attention— A. Yes.

Q. —to both these operations? A. Yes.

Q. And gave your own opinion, that that would be a good thing for him, did you not? A. Yes.

Q. As a matter of fact, he never has had either operation, has he? A. No, sir.

10

Q. Is there anything the matter with Mr. Le Barron now except his trouble with his heel and his trouble with the lip? A. He complains about headaches and nervousness and so on.

Q. That is all? A. Yes.

Q. He complains of headaches and nervousness? A. Yes, sir.

Q. When did he complain of that to you? A. Well, he complained of it off and on since the accident.

20

Q. The last time that you have seen him medically or to see him in a professional way was some 5 or 6 months ago? A. Yes, sir.

Q. This examination that you referred to a few days ago, I suppose that was in connection with this trial that was about to come off? A. Yes.

Q. Doctor, you saw Mr. Le Barron shortly after the accident, didn't you? A. Yes, sir.

Q. At his house, I believe? A. At his house.

Q. After he had been at the hospital? A. Yes.

30

Q. Some three or four days, wasn't it, after the accident? A. I don't recall how much it was before that, that he was brought home.

Q. You found him at his home? A. Yes, sir.

Q. You asked him about the accident, of course? A. Yes, sir.

Q. Did he tell you how it happened?

Mr. Hudson.—I object to that. I don't think it is proper testimony.

The Court.—For the purpose of contradicting the witness?

Mr. Hobart.—Oh, yes; I want to lay a foundation for another witness.

10 *The Court.*—For that purpose it would be proper.

Q. Did he tell you how the accident happened, doctor? A. He told me he was crossing the crossing and got struck.

Q. Is that all he told you? A. Why, it is all I recall; the details I could not recall.

20 Q. Let me refresh your memory a little. You know Mr. James, the representative of the defendant company? A. I have met him.

Q. That is the gentleman sitting alongside of me at the table? A. I don't know whether it is or not.

Q. Well, at any rate, you did say to Mr. James or you informed Mr. James what Mr. Le Barron had told you about the accident, did you not? A. I made no statement to Mr. James.

Q. Did Mr. James come to see you? A. Mr. James came to see me and talked to me friendly; that was all.

30 Q. Told you who he was, didn't he? A. Yes, told me who he was.

Q. Do you remember his asking you if Mr. Le Barron had told you how the accident happened? A. I think there was some conversation about the accident; yes, sir.

Q. You don't recall the date, do you, doctor? A. No, sir.

Q. Was it about the 31st of August? A. I don't know.

Q. Was it within a few weeks after the accident?

A. I don't know.

Q. Do you know when the accident was? A. I think it was the 10th of August, wasn't it?

Q. The 10th of August, that is right. Well, was it within a short time after that day? A. I should say it was within a month; I don't know.

10

Q. Now, did you on the 31st of August say to James, in substance, as follows: (This purporting to be a statement made by Mr. Le Barron to you, of the circumstances of the accident).

Mr. Hudson.—He made no statement, and I think under those conditions the statement should not be read at this time.

The Court.—There may be a distinction that the doctor is attempting to draw between a conversation and statement. I understand the doctor to say he had a conversation with James.

20

Witness.—Yes, sir.

Q. I don't mean a written, signed statement, but simply a conversation.

The Court.—The reason I am putting it to you in that way, doctor, is this: You said you made no statement to Mr. James, but, as I remember, you said you had a talk with him or had a conversation with him. What did you mean by statement, a written, signed statement?

30

Witness.—A written, signed statement, yes.

The Court.—As distinguished from a verbal statement or conversation that you had with him.

Witness.—From a verbal conversation.

The Court.—As distinguished from a verbal conversation?

Witness.—Yes.

Mr. Hobart.—My question was, perhaps, misleading in that respect. I will change it.

10

Q. You did have a conversation with Mr. James?

A. I did have a conversation with Mr. James, yes.

20

Q. Did you in that conversation with Mr. James say to Mr. James that Mr. Le Barron told you that the accident happened as follows: "We drove up to the crossing and stopped for the engine to pass; then we proceeded to go across. We did not see anything except a light way up the track, which looked like a lantern, until the train was just upon us, at which time I saw the headlight of the engine, and the next thing I knew I was in the car going to Paterson, N. J." Did you so state to Mr. James? A. I don't recall that I did use those words.

Q. You are not quite certain about it, however, are you, doctor? A. I could not recall the conversation that I had a year ago, a year and a half ago.

30

Q. Are you ready to deny that you said that to Mr. James in this conversation? You are not prepared to deny it, are you, doctor? Perhaps I ought to change the question. You are not prepared to deny that you stated that to Mr. James in this verbal conversation with him? A. I can't—I don't—I want to be frank about it, and yet I don't want to try to remember this conversation, like that, that I had a year ago; I could not deny it.

Q. I don't want you to tell us anything that you are not clear about, doctor. A. I certainly am not clear about that.

Robert William Rodman—cross
James Gamble—direct

Q. Then you are not prepared to deny that? A. I am not prepared to deny it; no, sir; I could not.

Q. If Mr. James says you did so inform him, you are not prepared to concede that his memory is better than yours on that subject?

10

Mr. Hudson.—I object to that.

Mr. Hobart.—I withdraw the question.

JAMES GAMBLE, sworn for the plaintiff, testifies as follows:

Direct Examination by Mr. Hudson:

Q. Mr. Gamble, where do you live? A. Alledale.

20

Q. How long have you lived there? A. 45 years.

Q. How long have you know Mr. Le Barron? A. Oh, some 15 or 18, 20 years.

Q. Ever worked with him? A. Yes, sir; done a little work with him, off and on, contracting.

Q. Do you remember this accident that he had? A. Yes, sir.

Q. Did you work with him before he had this accident? A. Well, I haven't worked in years.

Q. What? A. It is about 20 years since me and him used to work; I haven't worked with him since.

30

Q. What has been your relation with him lately? You say you have known him so long? A. I have helped him doing odds and ends, and he has helped me.

Q. Up to what time did that continue? Have you been doing that lately? A. Well, up to about a year ago I moved him, and then this Fall I moved him; that is about all the dealings.

Q. Well, you would call that working, wouldn't you? A. Yes, sir.

Q. When you said you had not worked with him, what did you mean, worked in the mill or a building, something of that kind? A. No, filling ice houses. When we used to work together, we used
10 to fill ice houses.

Q. But you have been in Mr. Le Barron's company? A. Yes, sir.

Q. And you talked about the matter to him? A. Yes, sir.

Q. You have been in his company since he was hurt? A. Yes, sir.

Q. What have you to say as to his hearing? How does it compare now with what it was before he was injured? A. I worked with him; he had a
20 little hard way of hearing; not bad at that time.

Q. Now, do you mean before he was hurt? A. Yes, sir; I mean before he was hurt.

Q. What have you so say about his hearing since he was hurt? A. Well, I have only worked with him like I told you, I moved him twice, and then I saw him and took notice that when I was hollering at him, talked to him three or four times at him, I could not make him hear. That is all the difference I seen.

Q. Before he was hurt, did you have occasion to
30 test his hearing, to find out whether he could hear? A. No, all that I have ever done, I hollered at him and if he did not hear me right away, I would holler again and he did hear me.

Q. So you say that he does not hear as well now as he did before the injury? A. I think the greater part of that is because of him getting hurt.

Cross Examination by Mr. Hobart:

Q. What is your business? A. Farmer.

Q. How long have you known Mr. Le Barron?

A. Why, I have known him 18 or 20 years.

Q. When did you first notice that he was deaf, how long ago? A. He was always a little deaf.

Q. Ever since you have known him he was a little hard of hearing? A. A little hard of hearing, yes. 10

Q. That is for the past 18 or 20 years? A. Yes, sir.

Q. Before the accident wouldn't you sometimes have to speak to him very loud in order to get his attention? A. Sometimes you would have to talk to him twice, and sometimes only once and he would hear.

Q. Sometimes he would hear better than others, apparently? A. Yes, sir. 20

Q. If he did not hear you the first time, you would speak to him again in a louder tone? A. Yes, sir.

Q. Were you here this morning when Mr. Le Barron testified? A. Yes, sir; I was.

Q. Did you notice that he seemed to hear what counsel said to him when he asked questions of him? A. Sometimes he did and sometimes he did not.

Q. Usually he did, didn't he, or weren't you watching closely enough for that? A. No. 30

Q. You noticed, for that matter, that plaintiff's counsel talked rather loud to him, a little louder than I am talking now? A. Yes.

Q. Was that about the way that you talked to Mr. Le Barron? A. I talked to him in a conversation, the same as me and you are talking; if I could not make him hear, I would holler at him.

Q. Sometimes he would hear and sometimes not ?
A. Sometimes not.

Q. Sometimes you would have to holler at him to make him hear ? A. Yes.

Q. Since the acident you have seen him how many times ? A. That is a pretty hard thing for me to tell you.

10 Q. You have spoken of two times especially, when you moved him ? A. Yes, I moved him from the son-in-law's to Ramsey ; I moved some of his furniture to his farm, down in Allendale, six years ago ; I moved him off the farm.

Q. That is two times that you remember that you have seen him in the last year or so ? A. Well, I have seen him about 3 weeks ago ; asked him how he felt ; he said, "Not very good."

20 Q. Did you speak to him in the ordinary tone of voice ? A. Very nice voice ; went in to see him.

Q. You spoke in the ordinary tone of voice, such as you are now speaking ? A. Yes, sir, just as I am talking now.

Q. He seemed to hear you all right that time, didn't he ? A. Yes, sir.

Q. When he comes in court, he cannot hear so well, can he ? A. Well —

Q. Is that right ? A. I don't know. He hears sometimes and sometimes he don't.

30 Q. It depends upon whether he wants to hear or not, to some extent ? A. Oh, no, I don't think that. When a little scaffold that I furnished on the barn gave away and I hollered two times, I could not make him hear, and my wife hollered at him.

Q. Did he jump or shout or yell ? A. Jumped, and it scared him ; he looked around and said, "Well, well."

Q. How long ago is that? A. Oh, that is 3 months ago.

Q. How far away from him were you when you hollered at him? A. Right in front.

Q. How far away? A. 24 feet, the width of the barn. He was in front of the barn and I was in the back. 10

Q. He did not hear you so well that time as he did this other time when you talked in the ordinary tone? A. No, sir.

JAMES ACKERSON, sworn for the plaintiff, testifies as follows:

Direct Examination by Mr. Hudson :

20

Q. You live in Allendale, Mr. Ackerson? A. No, sir.

Q. Where do you live? A. Mahwah.

Q. You know Mr. Le Barron? A. Yes, sir.

Q. How long have you known him? A. 15 or 16 years.

Q. You worked with him? A. A little, yes, sir.

Q. During that 15 or 16 years that you have known him, have you been much in his company? A. Well, no, sir; off and on; a day or so at a time. 30

Q. Have you ever visited at his home? A. Yes, sir.

Q. Did you have occasion to talk to him about different matters? A. Yes, sir.

Q. Do you remember this accident in which he figured? A. Yes, sir.

Q. Have you been in his company since that accident? A. A little, yes, sir.

Q. Well, would your being with him since the accident be of the same general character as your meeting with him before the accident? A. Yes, sir, and I think that he is a little harder of hearing now than he was before.

10 Q. What makes you think he is harder of hearing now than before? A. Well, I think I have to speak a little louder to him before he can hear me.

Cross Examination by Mr. Hobart :

Q. What is your occupation, Mr. Ackerson? A. Fireman.

Q. In what department? A. The American Brake Shoe.

20 Q. American Brake Shoe Company? That is where Mr. Le Barron is working now, isn't it? A. Yes, sir.

Q. You are doing the same line of work that he is? A. Yes, sir.

Q. How long has he been working there and you have noticed him? A. I would think probably a month.

Q. He has been working steadily, hasn't he? A. As far as I know; I don't go near his department. I have no time to go there.

30 Q. You don't have anything to do with his part of the work? A. No, sir.

Q. You have seen him from time to time? A. I have seen him once in a while when he came out of work; never seen him before work.

Q. How long have you known him altogether? A. Probably 15 or 16 years.

Q. Was he deaf when you first knew him? A. A little, yes, sir.

Q. Do you know if he is any worse? A. I think

he is worse since the accident; at least it seems to me that I have to talk a little louder to him before he can hear me.

Q. At the time of the accident, was he a little worse or better? A. I did not notice that, if he was.

Q. After the accident you think he is a little harder of hearing than he was before? A. Yes, sir. 10

Q. That of course doesn't help us very much. Is there any way by which you can explain that a little further? A. No, not that I know of.

Q. I don't suppose that they gave him any watch test at the place you are talking about? A. No, sir.

Q. Were you in court this morning when he was testifying? A. Yes, sir.

Q. You noticed that he heard counsel, Mr. Hudson and myself, fairly well, didn't he? A. Fairly well, but a little loud talking. 20

Q. Talking a little louder than now? A. Yes.

Q. Of course, there is nothing the matter with your hearing; was that about the way he was before the accident, or would you have to talk a little louder than ordinarily? A. A little. I know that since the accident you would have to talk a little louder to make him hear.

Q. In other words, before the accident, you would have to talk a little louder than ordinarily? A. Not much; only just a trifle hard of hearing; but now I think he is worse since the accident. 30

Q. Before the accident did you have to talk a little louder than ordinarily? A. A little, yes, sir.

Q. And after the accident, you would have to talk a little louder than you did before? A. It seemed so to me.

Plaintiff rests.

WILLIAM W. MAC ALISTER, sworn for the defendant, testifies as follows:

Direct Examination by Mr. Hobart:

- Q. Doctor, you are the company's surgeon in Paterson and vicinity, I believe? A. Yes, sir.
- 10 Q. Do you practice your profession in Paterson?
A. I do.
- Q. Are you an attending surgeon in one of the hospitals there? A. I am.
- Q. Which one? A. Paterson General.
- Q. How long have you been practicing medicine and surgery? A. Since 1899.
- Q. Are you a specialist? A. Not altogether.
- Q. Doing surgery? A. Doing more surgery than
- 20 general practice.
- Q. This plaintiff was brought to the hospital when you were a surgeon in Paterson? A. No, he was taken to St. Joseph's Hospital.
- Q. At any rate, you did not see him at the hospital? A. I did not see him at the hospital.
- Q. Do you remember when it was that you first examined him? A. The day I could not remember, it was with Doctor Magennis in the latter part of November or the early part of December; I could not remember just exactly the date.
- 30 Q. Was it in connection with another trial of this case? A. In connection with the first trial. Doctor Magennis and I met Mr. Le Barron at Mr. Hudson's office.
- Q. Just recently, right here in the court-room, or one of the ante-rooms, you made another examination with the consent of the plaintiff? A. Made another examination.
- Q. In the presence of Doctor Magennis and Doc-

tor Rodman? A. In the presence of Doctor Magennis and Doctor Rodman.

Q. Suppose we take the last examination first, the one just made, will you tell us what you found, doctor? A. Found Mr. Le Barron had a scar on the anterior part of his head, just to the left of the media line, about an inch or an inch and a half to two inches long. Then he has a slight scar over his right temple. He has a scar at the angle of his eye, here (indicating); he has a scar on his cheek and he has a scar at the angle of the right side of his mouth; over the instep of his left foot he has a scar, and has a tender spot over the ball of the left heel. He is deaf in both ears, and from the examination just made there seems to be no difference in the hearing in either ear. He could not hear a watch held close to the ear; that is, against it, in either ear. This examination was made by my watch and by Doctor Magennis' watch. 10 20

Q. So far as these scars are concerned, are they the same as those you ascertained when you examined them last year? A. The same as I examined last year, excepting the scar in the right angle of his mouth; just at that time the hair was short, and now it has grown out, and at the present time there is no evidence of any infection there at all, at the present time.

Q. It is apparently all right? A. It apparently is all right at this examination. 30

Q. Was there any indication, doctor, at this time of any ingrowing hair, or any similar condition? A. That I could not say, because I did not have the implements to go down in there and see. He may have an ingrowing hair there.

Q. If he has any such thing, is there any difficulty in curing it? A. None at all.

Q. How is that done? A. Simply by an incision and turning the ingrowing hairs out.

Q. Is that a simple matter? A. Very simple.

Q. A common operation? A. Yes.

Q. Almost as simple as shaving? A. Well, a little bit more so; a little bit more difficult, I should say.

10 Q. Well, barbers sometimes take out ingrowing hairs, don't they? A. Yes, we will have to cut for these.

Q. Now, these scars on the head outside of the wound at the mouth, is there anything about them which would account for the condition of his hearing? A. No.

Q. Is there any connection whatever between those scars or any condition that apparently results from those scars that would account for his present deafness? A. In my judgment, no.

20 Q. Assuming that he had been deaf for some 18 or 20 years, so that his friends and neighbors had to talk louder and louder all the time, and that condition continued so far as the deafness is concerned to the time of this accident, would that have any bearing upon the cause of the deafness? A. Yes.

Q. What bearing would that have? A. Why, it would show us that the man had had undoubtedly a chronic inflammation of the Eustatian tubes, which is the tube leading from ear to ear, commonly called a catarrhal condition.

30 Q. Quite a common condition? A. Quite common, yes.

Q. Liable to grow worse? A. Progressively worse, as a rule.

Q. Even if he did not get any relief? A. Yes, sir.

Q. Now, the condition of the heel that has been referred to, is there anything objective about that?

A. Nothing objective, because the pain that he complains of is on pressure.

Q. And the scar is not at the heel at all? A. The scar is not at the heel at all; it is over the instep.

Q. Are there any nerves around that section that would account for the trouble in the heel of which he complains of? A. In my judgment the trouble in the heel is not caused by any pressure on the foot; it is a little too far off to get the nerve that supplies the foot. 10

Q. The nerves do not go to that point? A. Say only filaments.

Q. What is your diagnosis of that condition? A. My opinion about that is the same as at the previous trial, that the condition is one produced from a bruise; either bruising the bone or stretching the ligaments which hold those bones together. 20

Q. Can that be relieved? A. Yes, I think it can.

Q. In what way? A. I should say that with a properly adjusted arch, it would probably take the pressure off it and allow this thing to become better.

Q. Is that very expensive? A. Probably would cost \$15.00 or \$20.00.

Q. So that even if Doctor Magennis' operation was not successful, he could still be relieved from it? A. I could not say so. My opinion is that if the scar remains there, he might have a resulting condition of that scar there. 30

Q. Do you recall whether, when you made this examination last November or early in December, whenever it was, you found this condition of deafness? A. Yes, sir.

Q. Do you recall whether you asked Mr. Le Baron if he had that affliction prior to the accident? A. Yes.

Q. What did he say about it? A. He said that he had it for some time, or all his life; I could not just recall exactly the statement.

Q. Do you remember whether at that time he said anything about having a cold? A. He said, at that examination, that he thought he was a little worse on account of a little cold that he had.

10 Q. Would a cold make a catarrhal deafness somewhat worse for the time being? A. Yes, a cold in the head.

Q. So far as the watch tests were concerned, you made those with Doctor Magennis to-day and also last year and with practically the same result? A. The first time I examined him with my watch, he could not hear at all; with Dr. Magennis' there was a distinction in the left ear, if I remember rightly.

20 Q. Was the doctor's watch a little louder than yours? A. A little bit louder. To-day apparently he could not make any distinction.

Cross Examination by Mr. Hudson :

Q. In your opinion, doctor, the operation spoken of by Dr. Magennis would not be proper treatment for Mr. Le Barron? A. I don't consider that it would.

30 Q. You testified at the last trial in regard to this treatment that you proposed, did you not? A. Yes, sir.

Q. And did you at that time say the first thing to do would be to take an X-Ray position of things? A. I did.

Q. You have not taken an X-Ray since the last trial, have you? A. I have not seen Mr. Le Barron since the last trial until to-day.

Q. You had the same facilities for testifying now that you had in December? A. Yes.

Q. You have had the same facilities for testifying in December that you now have? A. Yes.

Q. You say, doctor, that the cut which Mr. Le Barron got on the top of his head or near the media line as you describe it, would not affect his hearing? 10
A. In my judgment, no.

Q. I ask you if you would say it did not affect his hearing? A. I said, in my judgment, no.

Q. Did you notice any difference, doctor, between the condition of Mr. Le Barron's foot to-day from what you found it in December, 1915? A. I don't seem to notice any difference at all on examination.

Q. Would you advise Mr. Le Barron not to have an operation such as Dr. Magennis suggests? A. I 20
would.

Q. You would?

By Mr. Hobart:

Q. You could tell better about it if you had an X-Ray, I suppose? A. If you had an X-Ray you could tell, although you could not tell if there was a nerve caught in the scar without an X-Ray; even if you operated, it would be a very difficult matter, if there was a nerve caught up. 30

Q. So far as you know, there has never been an X-Ray taken? A. No.

Q. Of this wound? A. No, no one has taken an X-Ray.

GROVER JAMES, sworn for the defendant, testifies as follows:

Direct Examination by Mr. Hobart:

10 Q. You are claim agent of the defendant company, located in Jersey City, Mr. James? A. I am.

Q. And does your territory include Waldwick and the vicinity of this accident? A. It does.

Q. Did you receive a report of the accident? A. Yes, sir.

Q. Was it a part of your duty to make an investigation of it? A. It was.

Q. Do you know Doctor Rodman? A. I do.

20 Q. In the course of that investigation of this accident, was your attention called to the fact that Doctor Rodman had attended the plaintiff? A. It was.

Q. Did you go and see the doctor? A. I did.

Q. For what purpose? A. Find out something about the nature and extent of the injury; how Mr. Le Barron was getting along; and also find out if Mr. Le Barron said anything to the doctor as to how the accident happened.

Q. Do you recall when that was, the date? A. On August 31st.

30 Q. 1915? A. 1915, yes, sir.

Q. Did you make a memorandum of that conversation with the doctor? A. I did.

Q. On the same day that it took place? A. Yes.

Q. You may refer to that to refresh your recollection, if you so desire; what did Doctor Rodman say to you at the interview?

Mr. Hudson.—I would like to ask Mr. James if he wrote this paper at the time and

prepared it at the time that he talked to Doctor Rodman.

The Court.—In the first place, he has not said that he needs any paper at all. Do you, Mr. James?

Witness.—Well, I have refreshed my memory by looking that over here in the court to-day. 10

The Court.—Very well.

Q. Then perhaps you don't need to look at it again now? A. I don't think so.

Q. Didn't Doctor Rodman say to you, when you talked to him on this 31st day of August, 1915—

Mr. Hudson.—I object to the form of that question. If he is not going to use the paper, it seems to me that it is improper to ask him if he said thus and so, or ask him if that is what he said. 20

Mr. Hobart.—That would be very improper.

The Court.—You may remember, Mr. Hobart anticipating this in the examination of Doctor Rodman, was laying a foundation for this very question; laying a foundation as nearly as you can to the exact language, which is this question. Therefore it makes it proper to use the very language that he gave, or as near to it as possible. 30

Mr. Hobart.—I am using this to refresh my own recollection of the question asked.

Mr. Hudson.—That is what Mr. Hobart asked Doctor Rodman.

The Court.—I don't know what he is going to ask. Suppose we hear your question. Let me hear your question.

Q. When you talked with Doctor Rodman on the 31st of August, did the Doctor say to you— referring to Mr. Le Barron— that he, Le Barron, told him, the doctor, that the accident happened as follows: “We drove up to the crossing and stopped for the engine to pass; then we proceeded to go across. We did not
 10 see anything except a light way up the track which looked like a lantern, until the train was just upon us, at which time I saw the headlight of the engine and the next thing I knew, I was in a car going to Paterson, N. J.”

The Court.—That appears to be the exact language.

Mr. Hudson.—I make no further objection now.

20 A. He did.

Q. At the time you talked to Doctor Rodman, did you tell him who you were? A. Yes, sir.

Q. In the course of your investigation of this accident, did you see Mr. Le Barron? A. I did.

Q. At what place? A. At the St. Joseph’s Hospital in Paterson, N. J.

Q. Did you introduce yourself to him? A. I did.

Q. Did you tell him who you were and what company you represented? A. I did.

30 Q. Did you ask him how the accident happened? A. I did.

Q. What was his condition at the time you talked to him? A. His head was somewhat bandaged — I went to the hospital and asked one of the interns if I could see him, if there was no objection; he said no, he would call him out. He did call him out, and his head was somewhat bandaged — I forget whether

it was the right side or left side; I asked him if he would make a statement; he said he would.

Q. Did you have a paper and pen with you? A. I did.

Q. Did Mr. Le Barron make a statement? A. He did.

Q. Will you describe how it was made? A. By asking him questions and his giving the answers. 10

Q. Did you write down what he said? A. I did.

Q. And afterwards did you ask him anything about reading it over? A. I did; I asked him if he would read it over.

Q. Did he read it over? A. He did.

Q. Did you ask him if he was willing to sign it? A. I did.

Q. What did he say? A. He said yes.

Q. Did he sign it? A. He did. 20

Q. I show you two papers, both purporting to be signed by A. N. Le Barron, dated August 12th, 1915; also with your name at the bottom; were those papers signed by Mr. Le Barron? A. They were.

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

Q. Did he read them over before he signed them? A. He did.

Q. Did you ask him if he wanted you to make any changes? A. I did.

Q. Did he make any changes or suggestions himself of any kind? A. He did not. 30

Q. Were those statements signed on the date that appears on them, to wit, August 12th? A. They were.

Q. How long did it take you to talk with Mr. Le Barron, and put down what he told you and have him read it over what he signed? A. About three quarters of an hour.

Mr. Hobart.—I offer these two papers in evidence.

Admitted in evidence and marked Exhibit D. 1. and D. 2.

(*Mr. Hobart reads the statement.*)

10 "Allen N. Le Barron, being duly sworn, says, I live in Allendale, and am 58 years of age. I recall the cause of the accident to myself and father in Allendale, on August 10, 1915. I got through work on Tuesday night and I said to my father, I would like to have a man to help me to-morrow with the salads, and I said, I guess I will drive down to Mr. Plumbhoff's and see if I can get him to help me. There was a switch engine standing just east of the crossing. Father said, 'look sharp.'

20 We looked up and down the track and could see no trains coming. We drove across the track and when we got on to the last track, my father yelled, 'look out,' and I bent up and saw the engine right on us. The headlight was burning, but very, very dim. That is the last I remember. The top of the buggy was up, but not the side curtains. There was no train going west before we crossed. We did not hear any engine crossing whistle or engine bell. The weather was clear, but dark; time about 8 P. M. The horse and buggy were worth about \$150. It is double tracks at this point. I do general contracting. I earn about on an average \$500. or \$600. yearly."

30

Signed on each page, "A. N. Le Barron, in the presence of Grover R. James, August 12, 1915."

Cross Examination by Mr. Hudson:

Q. What time of day was it that you left the hospital? A. About 11 o'clock in the morning.

Q. Did you see Mr. Le Barron's father at that time? A. No, sir, I did not.

Q. Was there some conversation between you and Mr. Le Barron regarding his father at the time he signed the statement? A. There was. 10

Q. Who else was present besides Mr. Le Barron and you? A. Besides Mr. Le Barron and I?

Q. Yes? A. I believe there were two ladies that came in there shortly—that is, after I had taken the statement; I don't know who they were. I don't remember who they were— apparently relatives of Mr. Le Barron.

Q. They were talking to Mr. Le Barron at the time that you were taking the statement, weren't they? A. I think I had the statement already down when they came in. 20

Q. But while you were transacting your business with Mr. Le Barron, these two women were talking to him, isn't that so? A. Yes.

Q. Wasn't a part of the conversation about his father having just died? A. Yes, sir.

Q. That had happened just before you got there or while you were there, didn't it? A. As I recall, I was nearly through taking his statement when they came in. 30

Q. And told Mr. Le Barron that his father had just died? A. Yes.

Q. And they were there when you went away? A. Yes, sir.

Q. You got Mr. Le Barron to sign that statement? A. I did.

Q. You did not have Dr. Rodman sign his statement? A. Didn't take any statement from Doctor Rodman; that is, any written statement.

10 Q. Why not? A. Simply because I did not—he was a doctor, busy, and I did not want to take up his time.

Q. He wasn't as busy as Le Barron, was he, his father just dying? A. I could not say as to that.

20 Q. Why is it, Mr. James, that you did not have Doctor Rodman sign a statement and you did have this man, Le Barron sign a statement? Is there any reason for it? A. Simply because I wanted to get a statement from Mr. Le Barron; he was the man who was injured. I went to Doctor Rodman preliminarily to find out as to the nature and extent of the injury, and as to how he was getting along, and incidentally find out if he told him how the accident happened.

Q. But there is nothing in the statement of Doctor Rodman that you wrote down as to the nature and extent of Le Barron's injuries, is there? A. Nothing whatsoever.

30 FREDERICK D. PANGBORN, sworn for the defendant, testifies as follows:

Direct Examination by Mr. Hobart:

Q. You took some photographs of this crossing, Mr. Pangborn? A. Yes.

Q. I show you here pictures numbered 5296 to 5305; you took those pictures, did you? A. (referring) Yes, sir.

Q. And have you got on each of them a note on a yellow slip showing the date when you took them? A. Yes, sir.

Q. And the indications of the view? A. Yes, sir.

Q. Some were taken on August 11th and some on August 12th, 1915, according to these notes, is that correct? A. That is correct.

Q. And in each case a memorandum showing where your camera stood, in which direction you were looking and how far you could see? A. Yes, sir. 10

Mr. Hobart.—Mr. Hudson, are you willing to have me put in the photograph with this memorandum, to save the trouble of reading it?

Mr. Hudson.—Yes.

Mr. Hobart.—I offer these photographs with the memorandum attached to each one as stated by the witness, and I would suggest that they be marked as one exhibit. 20

Admitted in evidence and all marked together as one exhibit, D. 3.

Q. Without going into the details that appear on the memorandum, will you please state generally, Mr. Pangborn, if these photographs were taken in the line of Chestnut Street? A. Yes, sir; they are taken in the center line of Chestnut Street.

Q. And with your camera at what elevation? A. (Referring) 5 feet 3 inches. 30

Q. The ordinary height of one's eye? A. That is the usual height, of my own eye from the ground.

Q. These marks on each of the pictures which purport to show the location of the camera, are those all measured from the rail of the track? Which track was that from? A. Those are all measured from the one rail, of the eastbound freight track.

Q. Not the eastbound passenger? A. No, sir.

Q. But the eastbound freight. Of course the eastbound passenger is that much further away?

A. Yes.

Q. Going in that direction? A. Yes, sir.

10 Q. And these pictures were taken on the easterly side of the railroad track, were they not? A. Yes.

Q. Looking north? A. Looking north.

Q. So as to show a train coming from the north?

A. Yes, an eastbound train.

Q. The train was coming from the north? A. From the north.

20 Q. What was the extent of the view when you took those pictures, 2,000 feet, continuing all the way back on this picture which you have marked as 227 feet 9 inches from the rail? A. No, sir, I think it extends back as far as about on the photograph 5303, which would be 125 feet north, or east from the eastbound track.

Q. I want to get the thing accurate. If this slip is not right, let us make it right. 5305 is marked with a view of 2,000 feet? A. That is right, 2,000 feet.

Q. You had the same view even at that point?

A. Yes, sir.

30 Q. I think that is looking in the other direction, isn't it? A. That is looking north from the north rail of the eastbound freight track. No, that is from the trolley track.

Q. That is from the trolley track? A. That is from the trolley track looking north. Excuse me; that was my mistake.

Frederick D. Pangborn—direct

John Plumbhoff—direct

Q. Then the other indications on these yellow slips show the distances of the camera? A. Yes, sir.

Q. In every case a view of 2,000 feet or more? A. Yes, sir.

(No cross-examination.)

10

JOHN PLUMBHOFF, sworn for the defendant, testifies as follows:

Direct Examination by Mr. Hobart:

Q. Mr. Plumbhoff, I believe you live in Alledale? A. Yes, sir.

Q. I think you are the gentleman whose house has been shown on this map? A. Yes, sir.

Q. Offered in evidence by the plaintiff and marked with the letter P there, on the west side of the railroad track? A. Yes, sir. 20

Q. And not very far from the crossing of Chestnut Street? A. Yes, sir.

Q. About 400 feet from there, aren't you? A. Yes, sir.

Q. How long have you lived there? A. About a little over 4 years.

Q. You remember the night when this accident happened to Mr. Le Barron? A. I do.

Q. Had you known Mr. Le Barron before that? A. I did, sir. 30

Q. Known him for some years? A. I knowed him for four years, while I lived there.

Q. He lives not very far from you? A. No, about a mile.

Q. You have known him as a friend and neighbor and had business dealings with him from time to time? A. Yes, sir.

Q. The night when this accident happened, shortly before 8 o'clock in the evening, do you remember where you were? A. I was sitting on the front porch of my place.

Q. How long had you been there? A. Oh, possibly since 7 o'clock.

10 Q. Did you see him drive up towards the crossing before the accident happened? A. I did.

Q. Could you see the wagon from your porch? A. I could see the wagon, yes.

Q. You did not know at that time that it was Mr. Le Barron's wagon, did you? A. No, sir.

Q. A buggy wagon, was it? A. Well, I could not tell then.

Q. You could see that somebody was driving along the road? A. Yes, sir.

20 Q. Across the crossing? A. Yes, sir.

Q. On which side of the tracks was the wagon when you saw it, when you first saw it? A. On the east side.

Q. On the side opposite from where you lived, wasn't it? A. Yes.

Q. Did you keep looking at it? A. I did, sir.

Q. Could you see the wagon all the time or see the light? A. I seen the light on the wagon.

Q. You could see that the light was moving? A. Yes.

30 Q. Moving towards the crossing? A. Yes, sir.

Q. How fast was it coming, apparently? A. Coming on a slow walk like.

Q. Slow walk? A. Yes, walk.

Q. Do you remember its stopping on or before it got to the tracks? A. It seemed to stop before it got to the trolley tracks.

Q. You knew where the trolley tracks are of course? A. Yes, sir.

Q. About 160 feet from the railroad tracks? A. Yes, sir.

Q. How long did it stop? A. Well, not very long; it seemed to move right on again.

Q. Did it stop again? A. Well, when it came to the railroad crossing, it stopped.

Q. How long did it stop at that time? A. Well, I should judge half a minute; between half and a minute. 10

Q. Well, did you see him start up again? A. I did, sir.

Q. While you were looking at that wagon approaching the crossing, did you hear any train coming? A. I saw when it started up; I heard the train coming from Allendale.

Q. That would be from the north? A. Yes, sir.

Q. Allendale is the next station to the north on that point? A. Yes. 20

Q. Mahwah is the next station to Allendale? A. Yes, sir.

Q. What did you hear about the train? A. Well, I heard it coming, and then I heard the whistle.

Q. What kind of a whistle did you hear? A. Kind of a shrill whistle; fine, shrill whistle.

Q. How many whistles? A. I think it was four.

Q. At the time you heard those whistles, where was the wagon? A. The wagon was about—well, it was nearly half way across, I should judge. 30

Q. That is, nearly half—

The Court.—Half way across the railroad tracks?

Witness.—Half way across the railroad tracks.

Q. Did you hear or see the collision? A. No, I

only—of course the train came then and of course that is all I seen, until the train was away.

Q. Did it make any noise after it struck the wagon? A. I heard the crash; I could not see whether it was that or not; or whether it had passed over him.

10 Q. Did you run down to see what had happened?

A. After it was—the train had gone, I went down to see if anything happened; yes, sir.

Q. At the time those whistles blew, had Le Barron reached the crossing? A. No, sir.

Q. You could not see the train from your house, could you? A. No, sir.

Q. Could you tell from where the sound came, the direction in which it came? A. Yes.

Q. In which direction did it come? A. It came from the west side.

20 Q. Towards Allendale? A. North side, yes.

Q. When you got over to the crossing, after the accident, did you find that Mr. Le Barron had been hurt? A. Yes, I went over there and found him standing on the track there.

Q. Was that switch engine there that has been referred to? A. Yes.

Q. Was it making a lot of noise as of escaping steam? A. It did.

30 Q. How far away was that? A. Just about 25 or 30 feet from the crossing.

Q. Was it standing? A. Yes, sir.

Q. Did you help put the injured people on the train? A. I helped put Le Barron's father on the train; yes, sir.

Q. You said that you heard four whistles; were the whistles all the same, or were they different kinds of whistles? A. No, there was two long ones and two short ones, I think.

Q. Have you heard other crossing whistles for other crossings? A. Not at that time.

Q. Well, at other times, you have? A. Yes, sir.

Q. Was this the kind of crossing whistle that you heard at other times for crossings? A. Yes, sir.

Q. What they call a crossing whistle, isn't it? A. Yes, sir.

10

Cross Examination by Mr. Hudson:

Q. Where was Le Barron when you first saw him from your house? A. He was standing between the first eastbound passenger track and the freight track.

Q. Where was he when you first saw him and his wagon, Mr. Plumbhoff? A. Oh, he was on the other side—east of the trolley track, on Chestnut Street.

Q. It was dark, wasn't it? A. Yes, sir.

20

Q. Could you see across those tracks? A. I could not see by the lights.

Q. What lights? A. By the light on the wagon.

Q. Did Le Barron have a light on his wagon? A. Yes, sir.

Q. So that what you saw was a light on the wagon going across, was it? A. It was just light enough to see that there was some wagon; just light enough, but you could not make out what kind of a wagon; it was too dark for that.

Q. You could see that light stop and then go on again and stop and then go on again? A. Yes, sir.

30

Q. Is that it? A. Yes, sir.

Q. After the collision you found out that it was Le Barron's wagon that you had been watching? A. Yes, sir.

Q. Will you come here a minute, please (to the map): does that show your house where it is marked P., on the map? A. Yes, sir.

Q. Can you see from your house clear across those tracks on Chestnut Street to the trolley track?
A. I can.

Q. Is it all open there? A. Yes, sir.

Q. Nothing to hinder you from seeing if Le Barron came along there? A. No, sir.

10 Q. How great a distance up the road have you a clear vision of the railroad? A. Well, about up to here (indicating).

Q. You can see all the way up to Chestnut Street, nearly to Franklin Turnpike? A. Yes, nearly; not quite; not quite, about up to here (indicating).

Q. About to where the t comes in Chestnut Street? A. Yes.

Q. Was there any obstruction between your property and the railroad? A. Nothing.

20 Q. How far from your house, how far north from your house? A. About 500 feet.

Q. So that for 500 feet it is clear, 500 feet north of Chestnut Street? A. Yes.

Q. It is all clear? A. Yes.

Q. You had been sitting on your porch for an hour or so? A. Yes, sir.

Q. Had any trains gone north while you were sitting there, or west, as they call it? A. I think I did see a train.

30 Q. Now, do you recall whether or not there had been a train going west just before Le Barron crossed the tracks? A. I could not say for sure.

Q. Don't you remember your daughter getting off the train shortly before Le Barron went by? A. My daughter came from New York; she worked in New York and she came home on the 8 o'clock train. She got off at Allendale.

Q. At Allendale? A. Yes, sir.

Q. That train reaches Allendale before 8 o'clock, doesn't it? A. I think this time it was before 8 o'clock.

Q. Don't you recall that the train had gone up to Allendale before this accident occurred to Le Barron? A. I believe it did.

Q. You testified at the last trial. Do you remember being asked this question: "Were there any other trains in the vicinity at the time this one that you say struck Le Barron?" A. There was no train at that time; no, sir. Q. There was no other train? A. There was a train went up ahead of that. Q. In which direction did that train go? A. West, west." Do you remember testifying to that? A. Yes.

Q. Does that refresh your memory in any way as to whether or not the train had gone up to Allendale? A. It was that train; yes, sir.

Q. In which direction did the sound of this whistle come? A. Came from the north.

Q. That was the direction in which that train had gone to Allendale, wasn't it? A. Yes, sir.

Q. Did you see that train that struck Le Barron go by frequently? A. Yes, sir.

Q. You saw it go by frequently. On this night do you know whether or not that train was late? A. Well, I don't know exactly the time. The train is due there at 8 o'clock; unless he came later as usual.

Q. Can you state whether or not it was going very fast at that time? A. She was going fast; yes, sir.

JOHN M. KELEHER, sworn for the defendant, testifies as follows:

Direct Examination by Mr. Hobart:

Q. You are a civil engineer and surveyor and made the blueprint that has been used in this case?

10 A. Yes, sir.

Q. What was the date on which you made it?

A. (Referring) November 27th, 1915.

Q. And the scale shown on there is 20 feet to the inch? A. Yes, sir.

Q. When you made this print, did you make some observation of the extent of the view? A. I did.

20 Q. Will you kindly tell us what the result of those observations was? A. (Referring) Standing in the center of Chestnut Street, on the east rail of the eastbound freight track, looking in a northerly direction, the view is 2,200 feet; and going back in a westerly direction along Chestnut Street about 50 feet from the east rail of the eastbound freight track, I took another view, 2,700 feet to the north. I went back further, about 75 feet, had another view of 2,500 feet. Went back to 125 feet and got a view of 2,500 feet also.

30 Q. Did you go any further back than that? You did not go up to the trolley track, did you? A. No, sir; I did not.

Q. 125 feet was the limit of the view that you took? A. Yes, sir.

Q. Those were all measured from the eastbound freight tracks, weren't they? A. Yes, sir.

Q. It was the eastbound passenger track on which the train was coming, somewhat further away from the point where you stood? Yes, sir; it is.

Q. How much further? A. On the line of the street bed, about 22 feet away.

Q. So in order to get the view in reference to the eastbound passenger track on which the train was coming, you would add about 22 feet to each of these distances that you have given? A. Yes, sir.

Q. As your standing point? A. Yes, sir.

Q. From that point where you took your first observation back as far as 125 feet, is there anything whatever to interfere with the view of a train coming from the north? A. No, sir.

Q. Are the tracks straight for that distance? A. Yes, sir.

Q. In order that we may make sure of these tracks, will you kindly describe them to us by name and number, approaching the crossing from the east? A. Approaching the crossing from the east?

Q. Yes? A. The first track we come to is the siding.

Q. Is it marked on your map? A. Yes, sir.

Q. The next track? A. The next track is what we call No. 1, which is the westbound passenger track. The next track is track No. 3, which is the westbound freight track. The next track is No. 4, which is the eastbound freight track and track No. 2 is the eastbound passenger track.

Q. The eastbound passenger track, that is the west track as one approaches this crossing from the east? A. Yes, sir.

Q. Is there a sign at the crossing? A. There is.

Q. That is on that side of the crossing which is towards Mr. Plumbhoff's, isn't it? A. Yes, sir.

Q. You have got that marked, have you? A. "Crossing Sign."

Q. Is the highway at the same grade as the tracks? A. Yes, sir, I believe it is.

Q. Is there planking between the rails? A. Yes, sir.

Q. As one passes over the crossing, is it practically level? A. It is.

Q. Have you measured the distance of the whistle post from that crossing? A. 1350 feet from the center of the crossing.

Q. Now, this road which we have been calling Chestnut Street, is that an ordinary country road, dirt road, I mean? A. Yes, sir, it is, ordinary dirt road.

Cross Examination by Mr. Hudson:

Q. Who directs your operations when you go on a job of this kind? A. Why, there is nobody directing me; just merely notify me that they want a map prepared of a certain place; I go and prepare it.

Q. They told you where the accident happened and you go and bring in the data? A. They told me the accident was at a certain crossing, an eastbound or westbound train; they did tell me an accident happened, yes, sir.

Q. You do that frequently? You do that work frequently? A. As often as I can.

Mr. Hobart.—You get paid according to what you do?

Witness.—Yes, sir.

Q. This planking that you speak of, are you sure about that planking in this crossing? A. Yes, sir; there is planking on both sides of the rail, the day that I was there.

Q. But it is not entirely planked as crossings sometimes are? A. Oh, no, it is not an entire board

John M. Keleher—cross
George W. Kinney—direct

planking; no, sir; just a regular ordinary railroad crossing planking.

Q. There is a difference between a plank crossing, and crossings such as you found at Chestnut Street, isn't there? A. Well, I have seen lots of crossings; this is the most generally used over a railroad crossing. 10

Q. If they had been big planks, you would have indicated on your map more evenly than you have there, wouldn't you? A. I would have.

By Mr. Hobart:

Q. You say the crossing is an ordinary crossing out in the country; is the crossing sign the ordinary crossing sign? A. Yes, sir.

Q. Do you remember what it says? A. "Railroad Crossing — Danger." 20

Recess until 10 o'clock to-morrow morning.

Hackensack, N. J.,

September 26th, 1916, 10 A. M.

Counsel on both sides agree to continue the trial with 11 jurors instead of 12; one juror being excused on account of his membership on the election board. 30

GEORGE W. KINNEY, sworn for the defendant, testifies as follows:

Direct Examination by Mr. Hobart:

Q. Mr. Kinney, you are a locomotive engineer employed by the defendant railroad company? A. Yes, sir.

- Q. How long have you been an engineer? A. 26 years.
- Q. Before that were you a fireman? A. I was.
- Q. How long were you a fireman? A. 4 years.
- Q. I believe you were in charge of the train that ran into this wagon at Chestnut Street near Al-
10 dale on August 10th, 1915? A. Yes, sir.
- Q. Do you remember the train number? A. 84.
- Q. Was it an eastbound train? A. Eastbound.
- Q. What track was it running on? A. Track 2.
- Q. Is that the eastbound passenger track? A. Yes, sir, eastbound passenger track.
- Q. How long have you been running that train?
A. July 10, 1911.
- Q. Do you remember where you took charge of the train that day? A. Graycourt.
- 20 Q. Is that a division point? A. Division point where we change.
- Q. Was that a passenger train? A. Milk.
- Q. Had a number of cars containing milk on it, did it? A. Yes, sir.
- Q. About how many cars did it have, do you remember? A. I think we had about 17 milk and 2 coaches.
- Q. You were to run the train from Graycourt how far? A. Jersey City.
- 30 Q. Your engine number was what? A. No. 2072.
- Q. Kindly tell us what you know about this accident at Chestnut Street? A. Why, from the beginning time I got on the engine?
- Q. Yes, start right out from the beginning, tell it in your own way? A. Well, we left Graycourt and made one stop at Oxford Street; stopped at Monroe and loaded milk; there I examined the engine all over.

Q. What time did you leave that point, what time in the evening? A. I could not say now; a little after 6.

Q. All right, go ahead? A. And I examined the engine there; we did not make no stops from there to Waldwick, except for water, and then only for a minute or two; and I took particular notice of everything; the headlight, to see if it was burning properly. 10

Q. Was that headlight burning or not? A. It was.

Q. Where was it lighted? A. At Graycourt, as far as I know.

Q. Where did you first notice the headlight was burning? A. At Monroe.

Q. That is when you made this examination of the engine that you have spoken of? A. Yes. 20

Q. Was it burning when you left there? A. Yes, sir.

Q. Proceed and tell us what happened up to the time of the accident? A. Nothing happened until we struck the crossing west of the Waldwick Yards.

Q. You were intending to stop at Waldwick? A. I was.

Q. For what purpose? A. To transfer milk.

Q. How far below this crossing where the accident happened is Waldwick yard? A. Where we stop? 30

Q. Yes, where you were to stop? A. Two train lengths.

Q. How fast were you going as you approached the crossing at Chestnut Street? A. Oh, between 25 and 30 miles an hour.

Q. That is your usual rate at that point? A. Usual rate.

Q. Is the track level? A. Down grade and straight to the crossing.

Q. But somewhat down grade? A. Yes.

Q. To what extent, do you know what the grade is? A. No, I do not know.

Q. Had you slowed up to stop at Waldwick or hadn't you begun to slow up at the time of the accident? A. Usually blow or start to blow for the next
10 after going over the crossing.

Q. What did you do on this night? A. The same thing.

Q. Was there anything at all unusual about your method of running your train that night? A. Nothing at all.

Q. Is that the usual rate of speed that you passed over the crossing? A. Always done so.

Q. What signals did you give, if any, before you came to the crossing? A. You mean blocks?

Q. No, I mean in the way of bells and whistles
20 from your locomotive? A. Oh, I gave two longs and two shorts with the whistle, and the bell was ringing.

Q. Two longs and two shorts were given at what point? A. A thousand feet west of this crossing, or more.

Q. Is that the usual place? A. That is the usual place.

Q. When you describe the whistles as two longs
30 and two shorts, can you tell us a little more clearly how long the whistles blew? As a matter of seconds, or what? A. Oh, long whistles are probably a couple of seconds.

Q. And the short ones? A. Three seconds, four, and the short one no more than a second.

Q. Is that the usual kind of whistle for a crossing whistle? A. That is the way I blow.

Q. Well, you have heard a good many whistles blow, haven't you? A. All blow about alike.

Q. Where did you start to give those two long and two short whistles? A. About a thousand feet west of the crossing.

Q. Your train was moving, of course, all the time while you was blowing the whistle? A. Oh, yes.

Q. You have also referred to the bell; what kind of a bell did you have on your engine that night? 10

A. Well, a large bell, self-ringer.

Q. Automatic bell, it is sometimes called? A. Automatic.

Q. How is it run? A. By air.

Q. Will you please describe to these gentlemen how you operate it? A. Well, there is—we operate it from a valve from the cab.

Q. Is that valve located where your seat is in the cab? A. Right on the boiler head.

Q. How far from you after you have your position, about? A. Arm's length. 20

Q. All you have to do is to reach out your hand? A. That is all.

Q. After you turn the valve, what does the bell do? A. Rings automatically.

Q. How long does it keep on ringing? A. Until you shut the valve off.

Q. On the night of this accident, do you recall where the bell began to ring? A. Started the bell going at the first crossing west of Ramsey station and stopped when we got to Waldwick. 30

Q. Ramsey is north of Allendale, is it? A. Well, we call it west.

Q. At any rate you go to Ramsey before you go to Allendale? A. Yes.

Q. And before you come to Waldwick too, for that matter? A. Yes.

Q. Did you start your bell at Ramsey that night

yourself? A. The first crossing was in Ramsey, yes, sir.

Q. How far is that about in miles of this crossing where the accident happened? A. Oh, three miles.

Q. Now, from the time you started the bell west of Ramsey up to the time of the accident, was the bell shut off at any time? A. No, sir.

Q. Was it in proper working order that night? A. It was.

Q. About how large a bell was that? Would you describe that as a large bell, or about how large, can you tell us something further about that? A. Well, it would weigh—what do you mean?

Q. Well, what would it weigh? A. Probably 100 pounds.

Q. Is this a large engine? A. Yes.

Q. When was the first that you knew of anything wrong at the crossing? A. Why, the fireman called my attention; says, "There is something dragging."

Q. What did you do then? A. I said, "I don't hear anything dragging." He says, "Neither do I now." When the train came to a stop, he got off and examined the pilot, after we made the stop. He was the man to examine, after we had got to the switch.

Q. Did you go to the switch because of something the fireman said to you or were you going to stop anyway? A. Going to stop; could not stop much sooner anyway.

Q. You were expected to stop at that point anyway, but did you stay longer than you would have done otherwise? A. Well, we stopped that much sooner; maybe two or three car lengths. I stopped with the usual brakes; equipped with the usual brakes on that train, and you could not release.

Q. How far beyond the crossing was your train when it came to a stop? A. About two train lengths.

Q. Up to the time the fireman spoke to you, had you known of anything unusual at the crossing? Did you see the wagon before it was struck? A. I did not see nothing.

Q. You were on the right hand side of the engine, I suppose? A. I was. 10

Q. And looking ahead? A. Looking ahead.

Q. You also referred to some other signals; is there any semaphore signal? A. There is.

Q. In the neighborhood of that crossing? Where is the nearest semaphore? A. Just about 30 feet east of the crossing, I should think.

Q. High up like the average signal? A. Yes, sir.

Q. You say that the signal is about 30 feet east of the crossing; that would mean the side towards Jersey City, wouldn't it? A. Yes, sir. 20

Q. Not very far from the Waldwick yard? A. Well, just at the west end of the yard.

Q. Was that signal clear? A. Clear.

Q. After your engine stopped near the Waldwick yard, did you notice anything then about the headlight? A. I told the fireman to get off and see what was dragging; he came back and said there was some harness and a piece of wagon on the pilot. Then I told him to go up and notify the conductor. 30

Q. Did you personally at that time notice anything about your headlight? A. The headlight was burning; not at that time; not when I went back to the switch.

Q. When you got back on the switch? A. The headlight was burning, but I don't know how high it was burning.

Q. When was that, after the accident that you first noticed your headlight? A. After we backed into the switch, I got off and examined the engine to see if anything was broken, and also examined the headlight.

10 Q. Was the headlight burning at that time? A. All right, properly.

Q. How high above the ground about is the headlight? A. About 10 feet.

Q. Did you do anything with the bell after the accident—shut it off, anything of that kind? A. I stopped it in the switch; we stopped to do our work.

Q. After you had begun to shut it off at the switch, up to that time had you turned it off at all? A. No, sir.

20 Q. Was the bell stopped at any time from the time you turned it on west of Ramsey? A. No, sir.

Q. Can that bell stop unless you turn the valve, turn it off? A. No; that is, unless some accident happens to it. If it did, it would not go again until it was fixed.

Q. Can you hear the bell as you sit in the cab? A. Yes, sir.

Q. How far are you from it? A. Oh, 18 or 20 feet.

30 Q. Did you hear it that evening? A. I did.

Cross Examination by Mr. Hudson:

Q. How long have you been on that run, Mr. Kinney? A. Since July 10th, 1911.

Q. On the same train every night? A. Every night.

Q. You leave Graycourt and go to Waldwick, and go to Jersey City? A. Jersey City.

Q. What time do you leave Graycourt? A. Our leaving time is 6. I don't remember whether we left on time or not.

Q. You don't know that night whether you were on time or not? A. I think we were a little late.

Q. Do you know the time that you got to Waldwick? A. No, I don't remember.

10

Q. You don't recall now that you were a little late that night, do you? A. No.

Q. You go through the same routine every night in running that train, do you not? A. Yes.

Q. Your light is lighted at the same place every night; you ring your bell at the same place every night? A. Yes, sir.

Q. And blow your whistle at the same place every night; so that if you were asked as to any night, you would say that you blew your whistle at a certain point? A. I certainly would.

20

Q. And you would say the same thing as to your bell? A. I would.

Q. And you would say the same as to your light, wouldn't you? A. Yes.

Q. When you sit in your cab, can you tell whether or not the headlight is lighted? A. Yes.

Q. It is not necessary for you to go in front of the engine to see whether or not it is lighted? A. Not to see if it is burning; I go there to see if it is turned up properly.

30

Q. To what? A. To see if it is burning properly.

Q. To see if it is burning properly? A. Yes, sir, the proper height.

Q. You testified in the former trial of this case, and you testified as follows. — The question was asked, "Did you notice anything broken on the pilot?" You said, "A little casting." Then you

were asked, "Did you see anything about the headlight?" You said, "The headlight was lit" and you were asked, "How do you know that?" A. I looked up the first thing when we got off; noticed if it was lit or not." Is that true or not? A. That is true.

10 Q. So, as a matter of fact, it was necessary for you to get out of the engine and go in front of the car to see whether or not it was lighted? A. To see if it was turned up to the proper height.

Q. You did not light the light, did you? A. No, sir.

Q. How soon after this accident were you asked by any railroad people whether or not your light was lighted on that night? A. I could not say.

Q. You were asked that question? A. I was asked that question.

20 Q. Did you ever run the engine with the lights not lighted? A. Not without a light. Even on a night when the headlight wouldn't work, we put lanterns on.

Q. But you never run an engine without a light in front of it? A. No, sir, not at night.

Q. And these railroad people asked you whether or not you had the light lighted on this particular night, didn't they? A. They did.

30 Q. Also asked you if you gave the signals, didn't they? A. Yes, sir.

Q. Now, can you fix the time that they asked you those questions? A. No, sir.

By the Court:

Q. If I understand you correctly, Mr. Kinney, you have said that you can tell from the cab whether or not the headlight is lighted, is that correct? A. I can.

Q. Tell us how you can? A. From the reflection of the headlight which shows ahead.

Q. Along the track? A. Yes, sir. If the light is not at the proper height, it won't show as much one way as the other. We have to see that it is the proper height. If we get it too high, it probably would set the headlight afire, and we have got special instructions to see that the light is turned up the proper height and kept there. 10

FRANCIS L. KANE, sworn for the defendant, testifies as follows:

Direct Examination by Mr. Hobart:

Q. I believe you were the fireman with Mr. Kinney on the night of this accident? A. I was. 20

Q. Where did you get on the engine? A. At Graycourt.

Q. Did you have anything to do with the headlight of that engine on that evening? A. No, sir; only to see that it was lit; that is all.

Q. Where did you do that? A. At Graycourt, and Monroe.

Q. And you remember about what time that was in the evening? A. That would be at Graycourt; it was 6 o'clock. 30

Q. What occasion did you have to make any observation about the headlight at Graycourt? A. Well, if it wasn't lit, I would have to light it there.

Q. Is it a part of the fireman's duty to look at the headlight? A. It is.

Q. How long have you been on this run with Engineer Kinney? How long had you been up to

the time of the accident? A. A little over a year, I think.

Q. Kinney had not been on the run all that time, had he? Or don't you know about that? A. Yes, he had been on the run; that is, when he wasn't laying off. He was my regular engineer.

10 Q. You had been on it about a year? A. Yes.

Q. What is called the milk train, isn't it? A. Yes, sir.

Q. Does it carry any passengers? A. No, sir.

Q. What is the first thing that you knew of anything out of the way at the Chestnut Street crossing, where this accident happened? A. What is the first I saw?

20 Q. What is the first thing you noticed of anything out of the ordinary? A. I heard something striking.

Q. What did you do? A. I hollered across; I said, "George, there is something dragging," and he looked across and said, "I don't hear anything." I did not hear it any further, and I said, "Neither do I."

Q. Won't you tell us what this something was that was dragging? A. It sounded like a sand pipe or a cylinder top to me first.

Q. Some part of the engine? A. Yes, sir.

30 Q. And did you go on to Waldwick, up to the Waldwick yard? A. We did.

Q. You were going to stop there anyhow, regular stop? A. Yes, sir.

Q. For what purpose? A. To transfer milk.

Q. When was the first you knew that there had been an accident? A. After we stopped, I got down and looked at the pilot of the engine.

Q. What did you see there? A. I saw some marks on the pilot.

Q. What did you do? A. Went up and told Mr. Kinney, the engineer.

Q. When you observed these marks on the pilot of the engine, did you pay any attention to the headlight at that time? A. Not particularly; no, sir.

Q. Did you observe whether or not it was burning? A. I did; I know it was burning. 10

Q. How do you know that? A. I could see it all the way down, by the reflection ahead.

Q. Where was your last stop before you came to this crossing? A. Harriman.

Q. Is that sometimes called Monroe or is it near Monroe? A. That is near Monroe; yes, sir.

Q. And did you observe anything about the headlight at that time? A. Nothing only that it was burning. 20

Q. Did you observe anything else on the pilot outside of these marks that you have mentined? A. After, I did.

Q. How long after? A. Oh, I should judge about 5 minutes.

Q. Well, it was while you were at Waldwick, was it? A. Yes, sir.

Q. What did you notice? A. A piece of wagon and a piece of harness.

Q. Did you notice anything about the signals of the engine as you approached this crossing? A. I did. 30

Q. What signals did you notice? A. A whistle and a bell was ringing.

Q. What kind of whistle? A. Two long and two short.

Q. About where was the engine when that signal was given? A. At the whistling post, 2,000 feet from the crossing.

Q. About 2,000 feet? A. Yes, sir.

Q. The regular whistling post? A. It is.

Q. When did you observe the bell? A. The bell was ringing all the way down from about 2 miles and a half above the crossing.

10 Q. Did it stop at any time up to the time of the accident? A. No, sir.

Q. Do you recall whether or not the bell was shut off after the accident? A. It was shut off, yes, after we stopped.

Q. Who shut it off? A. The engineer.

Q. How far beyond the crossing did your train stop? A. About a quarter of a mile.

Cross Examination by Mr. Hudson:

20 Q. When you stopped, it was at the place that you usually stopped, wasn't it? A. Yes, sir.

Q. So that you did not stop because of the accident; you stopped to transfer milk, didn't you? A. Well, yes.

Q. You stop every night at the same place? A. Same place. We might have stopped a little short this night.

Q. A little shorter; but it was not necessary to move your train ahead again to transfer your milk, was it? A. No, sir.

30 Q. You came down from Graycourt on this train? A. I did.

Q. Come down every night on the same train? A. I do.

Q. Give the same signals? A. Yes, sir.

Q. For these various crossings? A. Yes, sir.

Q. Did you know what crossing is next west of Chestnut Street at Allendale? A. Why, I heard the name, yes.

Q. Do you know what signal to give for that crossing, on that night? A. I do.

Q. What were they? A. The bell was ringing and the whistle was blown.

Q. And those same signals are given for every crossing that you cross, are they not? A. Yes, sir.

Q. All the way from Graycourt down to Jersey City? A. Yes, sir. 10

Q. And if you were asked if the signals at any one of these crossings between Graycourt and Jersey City were given, you would say that the bell was ringing and the whistle blew, would you not? A. I would with that engineer; yes, sir.

Q. With that engineer? A. Yes, sir.

Q. Then there are some engineers who don't blow whistles, are there? A. I am not saying that; no, sir. 20

Q. Have you ridden with engineers who don't blow whistles? A. No, I don't think I have.

Q. Have you ridden with engineers who did not ring the bell? A. Not to my knowledge.

Q. Now, suppose that this automatic bell did not ring, what do you do? A. I pull the rope.

Q. Have you ever operated the bell? A. Yes, sir.

Q. So that there are times when the automatic bell doesn't ring? A. If they are broke, they won't ring; you could not ring with them. 30

Q. Do you light the light at Graycourt? A. If it is not lit, I am supposed to light it. As a rule, it was always lit.

Q. Does the time of the night have anything to do with whether or not you light it, Mr. Kane? A. No, sir.

Q. Sure about that? You remember when this accident occurred, don't you? A. Yes, sir.

Q. Well, now, are there not certain times of the year when you have to light the light oftener than at other times in the year? A. Not on that run, I don't think.

Q. Not on that run? Is it lit when you leave Graycourt? A. Why, in the summer it was, yes.

10 Q. And if it is lit, do you still put the light in in daylight? A. I do at Graycourt; yes, sir.

Q. You do at Graycourt? And you say this light gives a reflection so that you can tell whether or not it is lit? A. Yes, sir.

Q. You would not consider it necessary to go in front to look to see that it was lighted, would you? A. Not to see if it was lighted; I would look to see if it was up high, smoking.

20 Q. You would? Did you look on any of these nights to see whether it was burning right? A. I often cast my eye up; yes, sir.

Q. Did you ever find the light when it was not all right? A. I don't remember whether I did.

Q. On this particular engine, is there any reason why this light could not be hanging right? A. What is that question?

30 Q. On this particular night, on the night of this accident, was there any reason why this light could not be hanging right? A. I don't understand what you mean.

Q. Do you remember anything about this engine that you were riding on this night that made it unnecessary for you to examine the light to see whether or not it was lighted? A. Well, no; it wasn't necessary to examine it, because I knew what kind of a headlight I had.

Q. Now, at the last trial you were a witness: you were asked about this light, and you said—"Q.

Your attention was not called to it and you would not know whether the light was lit or not at Waldwick? A. I certainly would know it was lit. Q. Why? A. Because I had such a good reflector I could tell within a minute whether anything was wrong about it or not—or a second. Q. You would not have to wait until you got struck to find that out? A. No, sir; wouldn't. Q. So then, as I understand it, you did not make any examination at Waldwick? A. Not particularly on that account. Q. You did not make any at all, did you, at Waldwick? A. Whenever I went around the front end of the engine, I would cast my eye up to see whether it was too high or not; I guess I looked to see whether it was out—rather, I would know whether it was out or not." Now, if this engine which you had was so well equipped with this reflector, why was it necessary for you to cast your eye up at the light on this August 10th night? A. Well, I always did, to see if it was too high or not.

Q. Well, it isn't so, that you can tell from the cab whether or not the light is burning, is it? A. Yes, sir; you can tell from the cab.

Q. Even though you can see from the cab that your light is burning, why is it necessary for you to go out and look from the ground up at your engine? A. To see if it is too high or not.

Q. Then you would look for to see whether it is too high? A. Yes, sir.

Q. Did you look after you had this accident whether or not this light was too high? A. I think I looked at it; yes, sir. As a general rule, we do, yes.

Q. Are you sure whether you looked or not? A. Pretty sure I did.

Francis L. Kane—cross
Frederick Daly—direct

Q. How soon after the accident was it that some of the railroad people asked you about your light?

A. I ain't sure whether it was the next night or the night after.

10 Q. But it was shortly after, wasn't it? A. Yes, sir.

Q. And they asked you particularly about your light, did they? A. Well, not particularly; no, sir.

Q. Well, what did they ask you about the light?

A. Asked me if my headlight was lighted; I told them yes.

Q. They did not ask you whether it was too high or too low; they asked you whether or not it was lighted, didn't they? A. Yes.

20

FREDERICK DALY, sworn for the defendant, testifies as follows:

Direct Examination by Mr. Hobart:

Q. You are now employed by the Erie Railroad as engineer? A. Yes, sir.

Q. Were you formerly employed as fireman? A. Yes, sir.

30 Q. Were you employed as fireman on August 10th, 1915, when this accident happened? A. Yes, sir; I was.

Q. Were you the fireman in charge of the engine drawing train 84 as far as Graycourt? A. I was.

Q. Where did you get on the train? A. At Graycourt.

Q. You were fireman between what points on that train that night? A. From Graycourt to Pine Island and return to Graycourt.

Q. You came on 84 as far as Graycourt, did you?
A. I did.

Q. How far is that from Allendale? A. It is about 30 or 35 miles, somewhere around that.

Q. Did you have anything to do with the headlight of that engine that night? A. Yes, sir; I lit the headlight. 10

Q. Where did you light it? A. Well, sometimes lit it at Goshen and sometimes at the Creamery.

Q. Do you remember where you did do it that night? I think I lit it at the Creamery.

Q. How far is that Creamery from Graycourt?
A. That is about two miles and a half.

Q. Do you remember the engine number? A. 2072.

Q. That is the same engine that goes right on through to Jersey City? A. Yes, sir. 20

Q. But you change crews at Graycourt? A. Yes, sir.

Q. When you lighted that headlight, tell us what condition it was in? A. It was in good condition.

Q. How was the wick? A. The wick was all right.

Cross Examination by Mr. Hudson:

Q. You did not run into Allendale, did you? A. No, sir. 30

Q. Was the engine lighted when it left Graycourt? A. Yes, sir.

Q. Who took your place on that engine? A. Frank Kane.

Q. Did you and Frank have anything to do about lighting that night? A. No, sir.

Q. Did you have anything to say to anybody about lighting it that night? A. No, sir.

Q. Did you stop at this Creamery? Did you make a stop there? A. Yes, sir.

Q. Did you get on the engine to light the headlight? A. Well, I got out on the running-board, alongside of the boiler.

10 Q. Did you ever light the headlight while the engine was moving? A. When it is moving very slowly; as a general thing we don't.

Q. Do you remember what night of the week August 10th, 1915, was? A. I could not say as I do.

Q. Are you positive that you were on the run that night? A. Yes, sir.

Q. Had you been off at any time during August? A. I think I was off later.

20 Q. Well, now, were you off or not? A. I wasn't off at that time, because I noticed wood on the engine afterwards; after the accident. I was wondering what it was.

Q. That was after you saw that? A. Yes, a couple of days after I saw it; I saw and examined the wood; it was red pine.

Q. Was that after the railroad people came and asked you for a statement or before that you noticed the wood? A. That was before.

30 Q. Who told you about the accident? A. Why, I was talking to some of the men on the train; they said they hit a horse and wagon down at—

Q. You asked Kane? A. No, I asked—I was talking with our crew at the upper end.

Q. Why was it that you sometimes lighted the light at Arctic Hill Creamery and at other times at Graycourt? A. Well, just according to my work. If I was busy I wouldn't do it until—sometimes at Goshen and sometimes at the Creamery. I wouldn't

have to light it when I got to Graycourt. I would look at Graycourt to see if it was burning right. Sometimes it goes up too high when I first light it.

Q. You did not have anything to do with the train after reaching Graycourt, did you? A. Oh, yes, we did the switching there.

Q. What? A. We had a little switch there. 10

Q. It was lit when you were at Graycourt on August 10th, wasn't it? A. Yes, sir.

Q. Wouldn't the fact that it was lighted on August 10th have something to do with where you lighted your light? A. No, sir; I always lit it before I got off.

Q. Answer the question?

(Question read to witness.)

A. I don't think it would.

Q. Did you light that light at the same point at all seasons of the year? A. Oh, no. 20

Q. Well, what changes did you make in your routine concerning lighting? A. Well, as the season gets late, we light the lights for that road.

Q. Do you say the season is late on August 10, 1915, at 6 o'clock? A. Beginning to get a little late.

Q. Beginning to get a little late on August 10th, at 6 o'clock? When did you make your change? What time did you make your change in your lighting? A. Well, sometimes I wouldn't light it until we got to Graycourt. 30

Q. You testified as to that at the last trial, didn't you? A. Yes, sir.

Q. I ask you again, what time of the year you make your change in the lighting of your lights? A. What change I made?

Q. What time do you make the change? A. I don't make no time.

Q. So you light your lights the same hour all the year through, is that what you want us to understand? A. No, I don't light it all the time at the same time.

10 Q. Do you light the headlight any earlier in the summer time than you do in the winter? A. No, sir.

Q. Not a bit? A. Well, yes, sometimes.

Q. When do you make the change? What time of the year do you make the change? A. Well, on towards the Fall.

Q. On towards Fall? A. Yes, when the days get shorter, we light the lights earlier.

Q. When do you mean by on towards Fall? A.

20 Along towards Fall; that is what I mean.

Q. Is that in July or June? A. No, it is August.

Q. And would you say the 10th of August was on towards Fall? A. The latter part of summer.

Q. You say the 10th of August was on towards Fall? A. Getting that way, isn't it?

Q. I am asking you if you want us to understand that the 10th of August is on towards the Fall? A. Yes, sir, I do.

30 Q. When did you make the change with regard to the 10th of August in 1915? A. Made it along—well, I don't know; been lighting it quite a while at Goshen at that time, I know.

Q. You had been lighting it at Goshen? A. Goshen and the Creamery, both. Sometimes lighted it at the Creamery and sometimes—

Q. How far is Goshen from the Creamery? A. Two miles and a half.

Q. Well, did you light it this particular night at Goshen? A. I might have.

Q. You might have? A. Yes.

Q. As a matter of fact, you don't know where you lit the light on August 10th, do you? A. I do; I lit it either of those places as I told you. Them was my rules, to light it at those two places.

Q. Didn't you say positively that you lit the light at Arctic Hill Creamery? A. I said I wasn't sure which; quite sure; I think I did. I lit it at the Creamery. 10

Q. Do you have any recollection of lighting the light on your engine on August 10th, 1915? A. I had a rule to light it.

Q. Yes, but do you remember lighting it on this particular night, August 10th, 1915? A. I don't know as I do.

Q. You don't, do you? A. Not particularly; I lit it at one or two of the places; I am not sure just which one. 20

Q. If I asked you as to any particular night of your run, Mr. Daly, you would say that you lit the light, wouldn't you? A. I would, yes, sir.

By Mr. Hobart:

Q. Did you hear of this accident soon after it happened? A. Two days after, I think.

Q. Was that the only accident you had in the month of August, so far as your train is concerned? A. Yes. 30

Q. Of course, you did not have it yourself; it occurred in the running of that train? A. The first thing I knew, I saw the wood on the pilot.

Q. Are you sure that you lit the light at one or the other of those two places you have mentioned? A. Yes, sir.

Q. That is either at Goshen or the Creamery? A. Yes, sir.

Q. And they are how close together? A. Two miles and a half apart; just about that.

Q. How long does it take to make the run, 45 minutes? A. About.

10 Q. Can you tell us why the headlight was lighted before it was dark? Was there any custom or rule about that? A. Oh, well, we have always had it lit before dark quite a little while, so that we won't have to climb out and run around and so on.

Q. So that you won't have to light it when— A. Running, no, sir.

Q. While the train is moving? A. Yes; we don't, as a general rule, while it is running along. We don't want to take the risk.

20 Q. What time is that train due at Jersey City, if you know? A. I don't know just the time that it arrives there.

Q. What was the time that it usually got in, if you know that? A. Leaves Graycourt at 6 o'clock.

Q. How long a run is it? A. Well, takes 55 minutes, I think, from Graycourt.

Q. Then it would be dark before the train got into Jersey City under ordinary running conditions? A. Oh, yes; got in there about 9.30, I think, something
30 like that.

By Mr. Hudson :

Q. It isn't dark when you get to Graycourt, is it? A. No, sir.

Q. You stop quite some time at Graycourt, changing crews? A. At the switch there.

Q. You do change crews at the switch there? A. Yes, sir.

THOMAS O'HARA, SWORN for the defendant, testifies as follows:

Direct Examination by Mr. Hobart:

Q. You were a brakeman on this train 84, on the night of this accident, on August 10th? A. Yes, sir. 10

Q. Whereabouts were you riding on the train as it approached the crossing at which the accident happened? A. Between the tank and engine, right side.

Q. How did you happen to be at that particular part of the train? A. To see the condition of the switch at Waldwick, so that we could back in to do our work.

Q. Was it a part of your duty to look at this switch? A. Yes, sir. 20

Q. What was the first you heard of this accident? A. We were unloading milk at Waldwick.

Q. You did not see the accident yourself, did you? A. No, sir.

Q. Do you recall where that crossing is located? A. Yes, sir.

Q. It is very close to Waldwick yard, is it not? A. Yes, sir, about a quarter of a mile.

Q. Just a little west of the yard, according to the map, that is right, isn't it? A. Yes, sir. 30

Q. Did you hear any signals given by your train for that crossing? A. Yes, sir.

Q. What signals did you hear? A. Whistle and bell.

Q. And where was the train when the whistles were sounded? A. About a thousand feet west of this crossing.

Q. Where was the train when you noticed the bell

ringing? A. Well, I noticed the bell ringing, coming through Allendale.

Q. Allendale is how far from this crossing? A. Why, I should judge about a mile, probably; maybe not so much.

10 Q. When you came through Allendale were you standing in that same place on the train as when you crossed the crossing? A. Yes, sir; down there between—around by the Allendale station.

Q. How far were you from the bell as you sat there in that place on the train? A. Oh, I think about 15 or 18 feet.

Q. Did you have a fairly clear view in that position? A. Yes, sir.

20 Q. Did you notice whether the bell stopped at any time up to the time that you stopped? A. No, sir.

The Court.—What do you mean, that you did notice or did not? Which?

Q. Did the bell stop at any time? A. No, sir.

Q. After the train stopped, what did you do? A. I went back and cut off a portion of the train and backed into the switch to do our work.

30 Q. Did you notice anything about the headlight of the engine? A. Well, I could see the reflection of the headlight shining on the track ahead.

Q. When did you notice that? A. Well, noticed that when I got off at Allendale, and noticed it when I stood on the right-hand side of the engine, and see it shine.

Q. About how fast was the train going when you passed over the crossing where the accident

happened? A. I should say between 20 and 25 miles an hour.

Q. Is that the usual rate at that point? A. Just about.

Q. How long have you been on that run? A. 16 years.

10

Cross Examination by Mr. Hudson:

Q. Do you ride on the same one every night? A. Yes, sir.

Q. You testified at the last trial of this case? A. Yes, sir.

Q. You were a witness the last time this case was tried? A. Yes, sir.

Q. Have you had a copy of your testimony since then? A. No, sir.

Q. You were asked about the signals at the last trial? A. Yes, sir. 20

Q. On page 114 you were asked as to the following nights: "Q. And you would say that the bell rang, wouldn't you? A. Yes, sir. Q. And the whistle blew? A. Yes, sir. Q. And you hear that bell every time that it rings? A. Yes, sir. Q. And hear the whistle blow? A. Yes, sir. Q. How many times do they blow the whistle? A. Blow the whistle for the crossing? Q. Yes? A. Two long and two short. Q. Is that what they blow for every crossing? A. Yes, sir. Q. Are you willing to say that the whistle was blown four times on August 10th for this particular crossing? A. Yes, sir. What makes me think more of it is because on account of the accident. That is what makes me remember better about it. Q. You did not learn of the accident until after it happened, did you? A. No, sir. Q. You paid particular attention to the number of 30

toots of the whistle, did you? A. Yes, sir. Q. And also as to the bell ringing? A. Yes, sir. Q. When did you first learn of the accident? A. On the milk platform at Waldwick. Q. You did not feel anything when the wagon was struck? A. No, sir." So you paid particular attention to those things, did you? A. Well, yes, sir.

10

Q. Now, did you or not? You say, "Well, yes, sir;" did you? A. Yes, sir.

Q. Why? A. Well, I don't know why I paid attention to it.

Q. Did it blow last night? A. Last night?

Q. Yes? A. I don't know; I wasn't working.

The Court.—Did it blow last night?

Witness.—Yes, sir.

20

Q. How many times did it blow? A. Two long and two short.

Q. Did you pay particular attention to it that night? A. Yes, sir.

Q. Why? A. Well, I did not pay particular attention to it, but I hear the whistle blow every night, see.

Q. It blows the same way every night, doesn't it? A. Yes, sir.

30

Q. And you hear the whistle blow? A. Yes, sir.

Q. Count it every night it blows? A. Why, no, I don't count it; but I can hear it. I know just what places it blows every night.

Q. It blows the same every night, doesn't it? A. Yes, sir.

Q. And you hear it blow? A. Yes, sir.

Q. When you hear it once, you know that it blows four times, don't you? A. Yes—no, sir, when I hear it once, I don't say it blows four times. When it

blows once, it blows once; when it blows four times, it blows four times.

Q. When you hear the whistle, you know that the whistle blows four times? A. When I hear it whistle?

Q. Yes? A. When I hear it blow four times, I know that it blows four times. 10

Q. Does it blow in any other way when you are riding on the train but four times? A. Yes, sir.

Q. When a train is coming? A. Yes, sir.

Q. For what purpose? A. For approaching a station.

Q. You know when you are approaching stations, don't you? A. Sir?

Q. You know when your train is approaching a station? A. Yes, sir.

Q. You know when you are blowing for crossings too, don't you? A. Yes, sir. 20

Q. Did the whistle ever blow that you did not hear it? A. Did the whistle ever blow, you say?

Q. Did the whistle ever blow that you did not hear it? A. No, sir, I don't think so; not while I'm around the train, it don't.

Q. You hear it every time it blows? A. Yes, sir, when I am around the train—yes, sir.

Q. Does the whistle mean anything to you? A. Yes, sir; one whistle brakes; one short whistle, means brake. 30

Q. You don't pay any attention to the headlight, do you? A. No, only when I see the reflection of it shining on the track ahead.

Q. Could you tell from your recollection whether or not your headlight was all right? A. No, I could not.

Q. Which side of the engine is Kane cn? A. The

left side and down the tank, shoveling coal, when he is working. When he is firing the engine, he is down under the tank, shoveling coal. When he comes up there in the engine to rest, he goes up on the left side.

10 Q. Can Kane and the engineer see each other across the cab? A. Yes, sir; right across from one another.

Q. It is all open, is it, between them? A. Yes, sir; all open.

Q. Can Kane see what is going on on the right-hand side of the track? A. No, sir.

Q. Can the engineer see what is going on on the left-hand side of the track? A. No, sir.

20 Q. How long have you been riding on an engine such as was used on this particular night? A. Why, about three years.

Q. You say that the engineer cannot see what is going on on the conductor's side? A. On the right side?

Q. On the fireman's side, I say? A. No, sir, not unless he moves across on the left side to look.

Q. He must leave his compartment in the cab and go over to the fireman's side, is that right? A. Yes, sir.

30 Q. And the fireman must do the same to get to the other side? A. Yes, sir.

By Mr. Hobart:

Q. Was there anything that happened out of the ordinary on the night of August 10th, 1915, to enable you to remember that night? A. What do you say?

Q. (Read to the witness.) A. Why, not that I know of.

Thomas O'Hara—cross
John S. Terwilliger—direct

- Q. What? A. Only that accident; that is all.
- Q. Does your train have an accident every night?
 A. No, sir.
- Q. How many accidents have you had? That is, on trains that you have been on? A. Well, one is all; before this one, as I can remember. 10
- Q. One before this? A. Yes, sir.
- Q. Two altogether in 11 years? A. Two altogether; yes, sir.
- Q. So you remember those, don't you? A. Yes, sir.
- Q. You were asked about the station whistle; what kind of a whistle is that? A. For the station?
- Q. Yes, you were asked by Mr. Hudson something about the whistle for the station? A. That is one long whistle we blow for the station, approaching a station. 20
- Q. And then one short whistle means brakes, doesn't it? A. Yes, one short blast of the whistle.
- Q. And those two long and two short blasts you have described, what do they mean? A. Approaching a crossing.
- Q. What kind of a whistle did this engine have, this 2072? A. Why, I don't know what kind of whistles she has got.
- Q. How much noise do you make? A. Oh, make a noise that you can hear for miles. 30

JOHN S. TERWILLIGER, sworn for the defendant, testifies as follows:

Direct Examination by Mr. Hobart:

Q. You were the conductor of this milk train. Mr. Terwilliger? A. Yes, sir.

Q. How long have you been running this train?

A. Three years.

Q. Do you remember how many cars you had on the night of this accident, August 10th, last year?

A. Yes, sir.

10 Q. How many? A. 17 milk, coach and combined cars.

Q. 19 altogether? A. Yes, sir.

Q. Drawn by engine 2072? A. Yes, sir.

Q. Was that your regular engine that night? A. Yes, sir.

Q. Where were you riding as the train passed through Allendale and approached this crossing?

A. In the combined car.

Q. Is that in the rear of the train? A. The rear of the train.

20 Q. What was the first you knew of the accident?

A. When we arrived at the Waldwick station.

Q. You had to stop there, as you usually did, for the transfer of milk? A. Yes, sir, switched the car and transfer the milk.

Q. Who reported the accident to you? A. Why, the fireman.

Q. And then did you report it to the operator? A. Yes, sir, we stop and switched the cars.

30 Q. There is a tower or semaphore signal right near this crossing, isn't there? A. Yes, sir.

Q. Just to the west of it, I think, or just to the east of it? A. There is one east and one west of that.

Q. Is it the one marked on the map? A. Yes.

Q. At any rate, there is one just at the west end of the Waldwick yard, is there not? A. Yes.

Q. Now, when you heard of this accident, you were still at Waldwick? You had not gone on yet?

A. We was.

Q. Did you notice anything about the headlight while you were at Waldwick? A. After I switched the cars; I walked around the head end; the headlight was lit all right.

Q. Was it smoking, anything of that sort? A. No.

Q. Burning as it usually did? A. Yes, sir. 10

Q. How far can you see that headlight on a clear night? A. Oh, half a mile, mile.

Q. Was it a clear night? A. Yes, sir.

Cross Examination by Mr. Hudson:

Q. You examined the headlight where? A. In the switch yard at Waldwick.

Q. You had been riding on the train from what point? A. Graycourt.

Q. Did you know whether or not the headlight was lighted while you were coming from Graycourt? A. I did not; could not see; I was at the rear end. 20

Q. Where did you examine the headlight at Waldwick? A. Sir?

The Court.—Why did you examine the headlight at Waldwick?

Witness.—I always examine it after I backed in there; I go around and examine the train. 30

Q. You always examine it at Waldwick? A. Yes, sir; always do.

Q. Every night? A. Yes, sir.

Q. Do you ever find the headlight out? A. No, sir.

Q. Why did you look at the headlight on this

particular night if you have never found it out?

A. I always look at it.

Q. You always look at it? A. Yes, sir.

Q. Do you remember testifying in the last trial? I am reading from page 120. "Q. And did you inspect this particular engine at Graycourt on this night of August 10th? A. Yes, sir. Q. Then did you inspect it again at Waldwick? A. Yes, sir. Q. You did not inspect it at Waldwick on other nights? A. Very seldom, no, sir." Which is the true statement, that you do inspect it every night at Waldwick or that you do not? A. Every night.

THOMAS E. BANKER, sworn for the defendant,
testifies as follows:

Direct Examination by Mr. Hobart:

Q. Were you working on train 84 on the night of August 10th, when this accident happened? A. Yes, sir.

Q. What was your position? A. Milk handler.

Q. Do you recall where you were riding? A. Sir.

Q. Whereabouts on the train were you riding?
A. Before we stopped, at the hind end, combined car, combined coach.

Q. Were you told of the accident after you got into Waldwick? A. After we stopped; after they looked around the engine.

Q. Do you know where the crossing is? A. Yes, sir.

Q. It is near the Waldwick yards, isn't it? A. Yes, sir.

Q. Did you hear any signals for that crossing?
A. I did.

Q. What signals did you hear? A. Why, two long and two short; called the regular crossing.

Q. Given by whom? A. By the engineer.

Q. Of your engine? A. 2072.

10

Cross Examination by Mr. Hudson:

Q. Did they blow the whistle at any other time that night? A. Before it got down the road, they did.

Q. What kind of signals did they give at any other place? A. Regular crossing signals.

Q. What are they? A. Two long and two short.

Q. Did they blow the whistle in any other way on that night? A. I wouldn't remember that.

Q. What makes you remember that down the road they blew two long and two short? A. Probably on account of the accident.

20

Q. Well, was there any accident down the road that you speak off? A. Below that? I don't remember below that.

Q. Do you remember any point from the place that you got on the train until you stopped at the Waldwick yard, with the exception of Chestnut Street crossing where the whistle was blown two long and two short? A. Yes, on the upper end; further up.

30

Q. Where was that? A. Up maybe at Monroe, and it might be at Chester—different places along where there was crossings.

Q. What was the purpose of blowing at Monroe or at Chester on that night? A. They always do.

Q. I am asking you, Mr. Banker, for some place along the run which you can particularly remember:

now is there any such place? A. I can remember at Waldwick.

Q. You can remember at Waldwick? A. There may be others besides, because they blow so often at crossings—a good many crossings, you know.

10 Q. Well, are you saying that they blew at crossings because they always blow at crossings or because you remember that they blew at crossings? A. Well, they do always.

Q. Isn't that the reason why you are now saying that they blew at Chestnut Street? A. No, I heard it.

Q. You heard it? A. Yes, sir.

20 Q. When you were here before, Mr. Banker, I asked you: "Q. Where had they blown the whistle previous to that Chestnut Street crossing? A. I don't remember that. I know they blew it after they left Allendale. Q. How many times after leaving Allendale did they blow the whistle? A. I don't remember that. I know just before we got to Waldwick, it blew. Q. Well, you know where the Allendale station is, do you? A. Yes, sir. Q. Did they blow it after they left the Allendale station at any other point than the ones you have mentioned? A. Perhaps, I don't know. Q. What? A. There is two or three crossings, I believe, ain't there?"

30 Q. Do you know whether or not they blew the whistle on that particular night at any point other than the one you mention? A. I don't remember, no, particularly." Did you testify to that? A. What?

Q. Did you answer as I have read to you? A. Very likely if it is there.

PATRICK C. DONOHUE, sworn for the defendant, testifies as follows:

Direct Examination by Mr. Hobart:

Q. You are employed by the railroad as locomotive engineer? A. Yes, sir.

Q. How long have you been working for the company? A. About 24 years. 10

Q. Were you working in the Waldwick yard on the night of August 10th, 1915, when this accident happened at Chestnut Street? A. Yes, sir.

Q. What were you doing there? A. Running engine 719 in the Waldwick yard.

Q. What part of the yard were you operating just before the accident happened? A. The west end, about.

Q. About how far is that from the crossing? A. About 7 car lengths east of the crossing. 20

Q. A car length is about 50 or 60 feet? A. 75 feet.

Q. That would be in the neighborhood of a quarter of a mile from the crossing then, or not so much as that, perhaps?

The Court.—Seven car lengths?

Witness.—Yes.

Q. Around 500 or 600 feet, something like that? A. Around that. 30

Q. Did you have any cars attached to your engine? A. Yes, we had, I believe, five cars with it.

Q. Did you see the accident? A. I did, sir.

Q. Tell these gentlemen everything you saw and everything that you heard? A. I saw the switch engine coming up the track; I was on the left side, and I

seen a white light coming over the crossing. The night was dark, but it was a clear night, and it happened to show a white light, but I could not see any horse or wagon. I thought first that it was a man pushing a bicycle. I seen the headlight of this engine coming down the passenger track, and I said
10 to myself, better get going, or you will get it. He was going awful slow, just moving along, and the next thing I heard was the crash. I ran back and told the brakeman that there was a horse and wagon got hit on the crossing, and they pulled up at the crossing and they went over and found Mr. Le Barron and his father lying in the first track. The horse was down the bank on the right hand side and the wagon was broke.

Q. When you saw that, were you on your engine?

20 A. On the left-hand side, yes, sir.

Q. And your engine was headed which way? A. Headed west.

Q. And this train or this headlight that you saw was coming east, was it? A. Coming east.

Q. So that as you looked out of the engine, you were looking directly towards the approaching headlight? A. Yes, sir.

Q. And this light which you say was coming over the crossing, from which direction did that come? A.
30 It was coming down from the trolley crossing.

Q. Was that the only light that passed over the crossing along the road-way? A. That is the only light I saw.

Q. Do you know about any other wagon? A. No.

Q. Or any automobile, or anything else around there that night? A. No, sir.

Q. Could you tell where this white light was coming along the road? A. I think it was under-

neath the wagon, because it was jungling, you know, sideways.

Q. It was close to the ground, was it? A. Yes.

Q. When you first noticed the headlight of the train that was coming east, about how far was it from the crossing? A. Oh, I should judge about 10 or 12 car lengths west of the crossing.

10

Q. About how far was this white light coming along the roadway? How far was that from the railroad tracks when you first observed it? A. He was on the west of the passenger track when I seen him.

Q. That is the first you noticed it? A. Yes, sir.

Q. Did that light keep right on moving all the time while you saw it? A. It kept right on coming; I did not notice it stopped while I saw it.

Q. You have described it as moving slowly; about how fast was it moving? A. Just about walking along, very leisurely; wasn't in any hurry.

20

Q. Can you give us some idea of the rate? A. No, I don't know the pace.

Q. Would it be as fast as a man would ordinarily walk? A. A man walking slow?

Q. A slow walker? A. Yes, sir.

Q. When you saw this headlight coming along on this eastbound passenger, did it keep right on coming up to the moment of the crash? A. Kept on coming and went—

30

Q. Went right on by the crossing? A. You mean the engine?

Q. Yes? A. Yes, he went right on.

Q. Did you see him come to a stop afterwards?

A. What do you say?

Q. Did you see this engine come to a stop afterwards—the engine on which the headlight was? A.

No, she went way down to the semaphore, where it stopped down there.

Q. Down to the other end of the yard? A. Yes, sir.

Q. How long is that yard? A. It must be—you mean the yard where the cars are stored?

10 Q. Yes? A. Why, it must be close on—well, less than a quarter of a mile; must be about a quarter of a mile, around that.

Q. Did you have a headlight on your engine? A. I did; had two.

Q. This white light of this wagon, had that passed in front of the engine? A. It was going west, up toward our engine.

Q. Well, it would have to go in front of you in order to get on the crossing, wouldn't it? A. I did not get you.

20 Q. Perhaps I have not made myself clear. Let me put it in this way: What track was your engine on? A. She was on the switch freight track; there is a yard track in there.

Q. What is called the switch track? A. Yes, sir.

Q. Is that track next to the westbound passenger? That is the one that you were on, isn't it? A. Yes, sir.

30 Q. Then this white light of this wagon had to pass in front of your engine before it got to the point where it was struck? A. Yes, it had to pass that track there (indicating).

Q. Did it pass over the track which you were on? A. Yes, sir.

Q. When that light passed over your track, did you see it at that time, or had he already got over? A. I seen him when he was on the passenger train, or track one.

Q. He had already passed the track you were on?

A. Yes, sir.

Q. At that moment, about how far was your engine from the crossing? A. About 7 car lengths.

Q. Were you standing? A. We were moving back and forth; the fireman was handling it, running it.

10

Q. Could you tell, at the very moment when you first saw this white light, whether your engine was standing or moving? A. I could not tell you that.

Q. You could not be sure of that? A. No, sir.

Q. If you were moving, about how fast were you moving? A. Oh, slow; very slow.

Q. Just doing switching purposes? A. Yes, they don't make the cars move fast.

Q. Did the other engine coming on the eastbound passenger track go by you? A. Yes, sir, about four tracks away from me.

20

Q. Did you notice whether it had some cars? A. A lot of them.

Q. Did you notice anything about any bell on that engine when it went by? A. Yes, sir, the bell was ringing.

Q. Was your bell ringing? A. No.

Q. You were doing yard work? A. Yard work.

Q. You are not supposed to ring in the yard, are you? A. No.

30

Q. Did the train make any rumble when it passed you? A. Yes, sir, it did.

Q. How much of a rumble? A. Oh, you could not hear a fellow talk while she was passing.

Q. Was your engine making any noise when you saw this white light on the roadway? A. Not much, to amount to anything except a little steam.

Q. What is sometimes called exhaust? A. Yes.

Q. Do you remember about what time the accident happened? A. It must have been around 8 o'clock.

Cross Examination by Mr. Hudson:

10 Q. You knew that there was a train due from Allendale way, didn't you? A. Train due?

Q. Yes? Oh, I paid no particular attention to it.

Q. What made you think that Le Barron would be hit? A. I see the train coming on him.

Q. How far away did you see the train? A. Oh, that was about 20 car lengths from where I stood.

Q. Twenty what? A. Twenty car lengths.

20 Q. Now, tell the jury what you mean by car lengths? A. One car length is about 75 feet space, and twenty times 75, would be 1500 feet or so. I don't know the exact distance.

Q. Where was Le Barron when you first saw him? A. On track one.

Q. Will you indicate on this map track one, Mr. Donohue? A. Yes, sir, if I can. (Referring) This is the trolley track?

Q. That is the trolley track? A. Oh, yes; over here; here (indicating) is the freight track; right here. Here is the freight track.

30

Mr. Hobart.—Pointing to the switch track, or next to the switch track?

Witness.—Right here (indicating).

Mr. Hobart.—Pointing to the westbound passenger track?

Witness.—That is what you wanted, isn't it?

Q. I asked you where he was; is that track one?
A. That is right.

The Court.—What is track one?

Witness.—Westbound passenger track.

Mr. Hobart.—Is that right next to the switch track? 10

Witness.—Yes, sir.

Q. How many tracks did Le Barron cross before he was struck? A. You mean railroad tracks?

Q. Yes? A. He got hit on the fifth track.

Q. Which did you see first, the train coming from Allendale or Le Barron? A. Le Barron.

Q. Where was Le Barron when you saw the train coming from Allendale? A. He was going across between the passenger track and the freight track. 20

Q. Which number would that be? A. One and three.

Q. Did you see him hit? A. I did not see him; it was too dark, but I heard the crash.

Q. Then after the crash you went out to the place where the accident happened, didn't you? A. Went back and told the brakeman of that train crew.

Q. You did not go to the place at all? A. No.

Q. Did you see the men running to the place where the accident occurred, see them carrying lights? A. Yes, sir. 30

FRANK N. VERNON, sworn for the defendant, testifies as follows:

Direct Examination by Mr. Hobart:

Q. You were a fireman with engineer Donohue who has just testified? A. Yes, sir.

10 Q. Were you on engine 790 in the Waldwick yard? A. Yes, sir.

Q. What part of the yard were you just before the accident happened? A. Pretty well up in the west end.

Q. You were running the engine, I believe, were you, in the yard? A. Yes, sir.

Q. How far east of the crossing were you? A. I should judge about 6 or 7 cars.

20 Q. Did you hear anything of the train 84? A. I heard it go by.

Q. What did you hear? A. A rumbling noise and the bell ringing.

Q. At the time that 84 went by your engine, was your engine standing or moving? A. I think it was backing up.

Q. By backing up, do you mean away from the crossing? A. Yes, pushing cars away from the crossing.

30 *Cross Examination by Mr. Hudson:*

Q. How did you know that was 84? A. Why, about time for her to come down up there; that is all I know.

Q. You know the time that all the trains go by, do you? A. I do not.

Q. Had any other train gone by this point? A. I don't remember.

Q. You switch there every night? A. Every night.

Q. How long have you been switching at that point every night? A. I have been on from January every night.

Q. How long had you been on the job on August 10th, 1915? A. From the first of July, I think, up to the last of August. 10

Q. Didn't you know that a train had just gone by to go to Allendale? A. I did not pay no attention to it.

Q. Your business there was to cut cars off this particular train that stopped at Allendale just before 8 o'clock and leaves at Waldwick, is it not? A. Yes, cut cars off the main track.

Q. So that you know there is a train goes by at the point you were standing just about the time that this accident occurred? A. That was ahead. 20

Q. What? A. That train went by ahead of that accident.

Q. Well, did you hear that train ring its bell? A. I did not pay any attention to it.

Q. Did you hear it blow its whistle? A. Blows the whistle for that crossing when it was going by.

Q. Did you hear it? A. Yes, sir; I was right alongside of it.

Q. Why did you hear it blow its whistle if you did not hear it ring its bell? A. Because I was away down the east end of the yard when it went by me. 30

Q. When you heard it blow its whistle did you pay attention to it or not? A. No, I did not.

Q. Well, now, what do you want to say about the train that went to Allendale; did you hear it or not? A. I did hear it go by.

Q. You did hear it go by? A. When I was in the east end of the yard.

Q. Then did you have any purpose a few minutes ago in trying to make us believe that you heard no train except the one that went east? A. When I was in the west end of the yard, I did not.

10 Q. I am asking you about whether or not you had any purpose in attempting to make us believe that you heard only one train and that was the train going east? A. I did not.

Mr. Hobart.—I will have to object to that.

The Court.—He says, no, sir; he did not have any.

20 *Mr. Hobart.*—The thought I had in mind was that you asked him as to whether he heard it when he was at the west end of the yard. That was the thought I had. I am only suggesting that he might have understood it differently.

Q. The engine that you were on was making considerable noise, was it? A. When I moved it, yes.

Q. If it was standing still, it was making no noise? A. No, sir.

30 Q. Wasn't there more or less noise from the switch engine, emitting steam, when it was standing still? A. There is not.

Q. There is not? A. No, sir.

Q. And at this particular time your engine was not making any noise? A. No, sir.

Q. Was it making any noise when the train went towards Allendale? A. No, sir.

Q. Was it making any noise when 84 went by? A. But very little when I was driving back.

Q. Does it make any more noise when it is going

Frank N. Vernon—cross

Frank S. Becker—direct

than it does when it is standing still? A. It does when you are using steam.

Q. Were you using steam at the time it was going back or not? A. No, sir.

Q. So that you could hear very well in the car that you were in? A. Yes, sir. 10

Q. What was the next train that passed you on that particular night after 84? A. I don't remember

Q. What was the one before 84 that passed you? A. Which way?

Q. East? A. I don't remember of any.

By Mr. Hobart:

Q. When 84 passed you, you were in what you call the west end of the yard? A. Up near the crossing, Chestnut Street crossing. 20

Q. That would be the west end of the yard, wouldn't it? A. Yes, sir.

Q. When that other train that was lighted passed, you were then at the other end of the yard? A. The other end of the yard.

Q. The east end? A. Yes.

FRANK S. BECKER, sworn for the defendant, testifies as follows: 30

Direct Examination by Mr. Hobart:

Q. You were employed by the Company, I believe, as milk handler? A. Yes, sir.

Q. Were you working for the Company at Waldwick on the night of this accident? A. Yes, sir.

Q. Where were you working? A. On the milk platform.

Q. How far is that from Chestnut Street crossing?

A. Well, I should judge about a quarter of a mile.

Q. That is to the south, isn't it, or to the east?

A. Well, it is east.

10 Q. Did you hear of the accident that night? A. Yes, sir.

Q. Before the accident happened did you see the milk train coming? A. No, sir.

Q. Did you know that there was a milk train due about that hour in the evening? A. Yes, sir.

Q. Did you see the milk train after it had stopped? A. Yes, sir.

Q. Did you have anything to do with transferring the cars or milk? A. That was my duty, yes.

20 Q. Did you notice anything about the headlight of the engine of that milk train? A. I noticed it was burning when it got up there on the platform.

Q. That is when it went by you, you stood on the platform? A. Yes.

Q. Did it go by you before it came to a stop? A. Yes, sir.

Q. Could you see the headlight from your platform? A. Plainly.

Cross Examination by Mr. Hudson:

30 Q. Was it dark at the time the engine passed you? A. Yes, sir.

Q. What time was it when this engine passed the place where you were? A. It was about 7.50 or 7.55.

Q. How long had you been working at this particular place? I mean on that night? A. Well, we

had not commenced to work; I was waiting on the platform for the arrival of this train 84.

Q. How long had you been waiting there? A. Oh, perhaps 20 or 25 minutes.

Q. Why were you waiting there so long on this night? A. Well, we always go out there on a warm night and sit on the platform.

10

Q. Wasn't this train late that night? A. Not very late.

Q. Well, now, was it late? A. Well, I told you, really I don't know her arrival time there. I know her leaving time; her leaving time is 8.15. Her arrival time I don't know, how much they allowed there for the time to transfer this milk.

Q. How long have you been working at the Waldwick yard handling milk? A. Oh, I have been there for the past 12 years.

20

Q. How long has this particular train been running into the Waldwick yard with milk? A. Why, it has been running there ever since I have been there; I don't know that I have been there 12 years, to tell you the truth about it. I have been there fully 10 years.

Q. In all those 10 years you have been unloading milk from this particular train? A. That train and other milk trains.

Q. Now, can't you tell us the time of the arrival of that train? A. Why, that train—I have seen the train arrive there at 7.30 at night. I don't know what her schedule time of arrival is; I know the departing time.

30

Q. Was it later on this particular night than it usually is? A. Why, yes, perhaps; five or ten minutes, something of that kind.

Q. Was it later on this particular night? A. Well,

I would not say on account of the train not running regular. That is what I mean by that; the train varies in its arrival time at Waldwick; and as I say, I have seen it arrive there as early as 7.30. This night I think it was about 7.55. I would say that it was later than some nights.

10 Q. There is no reason why you should pay any attention to the train on this particular night, was there, whether it was later or not? A. Not necessarily, no, sir.

Q. Are you still working at this place? A. Yes, sir.

Q. If I asked you about the arrival of this train on any particular night during August just past, could you tell me or not? A. Could I tell you?

20 Q. Yes? A. Why, I could tell you whether the train was way late or not.

Q. If it was five or ten minutes late, as you say, you might know that particularly? A. No, don't know that I would.

Q. Did you ever see this train come into the Waldwick yard with its headlight out? A. Have I?

30 Q. Yes? A. Well, I don't know that I have. That is, I—what I mean by that, I have not been on the platform nights when the train arrived there; I have been in the caboose, up in the other end of the yard; that is, the upper end switching, and did not notice it. But I have noticed, after it backed into the switch, the headlight was burning.

Q. I will ask you if you ever saw this train coming into the Waldwick yard with the light not lighted? Every time you saw the train coming into the Waldwick yard, the light was lighted, wasn't it? A. Every time I have seen it come in?

Q. Yes, the light was lighted, wasn't it? A. The

light was lighted. I would not say that it was. I would not say that it was.

Q. Well, tell me one time that you have not? A. I don't know that it was every time the trains come in the yard; do you mean every time the train come in the yard did I see it come in the yard?

Q. Yes? A. Oh, well, I think it was.

10

Q. Well, I want you to tell me whether it was or not. Do you recall the time when you were in the Waldwick yard and saw this train coming in that the headlight was not lighted? A. I do not, no, sir; I do not.

Q. Were you working in the Waldwick yard on the 10th of August of this year? A. The 10th of August of this year?

Q. Yes? A. Yes, sir.

Q. Did you see the train come in on that night? A. I could not tell you whether I did or not. I don't know just where I was located that night; whether I was in the caboose or whether I was down on the platform.

20

Q. You have never seen the train coming in without any light in the headlight?

The Court.—That is the way I understand the testimony, Mr. Hudson.

Q. If you saw the train come into the Waldwick yard at 8 o'clock with the headlight not lighted, would you have any duty to perform in regard to that light? A. No, sir.

30

Q. It isn't your duty to know anything about the headlight on the train, is it? A. No, sir. The only reason I have observed the headlight, I can tell the train by the number of the engine. If the headlight

is burning, I see the number of the engine on the headlight.

Q. While you were on the platform did the train come around about that time? A. That I could not say.

10 Q. Did any train come there? A. I could not say. I was not interested in any of the other trains, only the milk train. When the milk train arrived there, my duty commenced.

Q. There were other trains going east besides the milk train having the number painted on the headlight, are there not? A. Yes, sir.

Q. And can you tell me the particular train that you wanted to see without looking at the number of the train? A. Without looking at the number of the train?

20 Q. Yes? A. Well, if it is time for the arrival of our train, why, I look at it.

Q. On this August 10th, the time of the arrival of that train had gone by, hadn't it? A. Yes.

Q. Now, then, had any trains gone east from the time that this milk train should have arrived until it did arrive? A. I would not say, for I don't recollect.

Q. You don't know? A. No, sir.

Q. Did any go west? A. I could not say.

30 Q. Did you look at the headlights of any of the trains going east that night? A. If there was any toward the east, I looked at the headlight. Those east I looked at the headlights, yes.

Q. What for? A. Well, to see if it was our train. But I don't recollect any other train.

Q. Those headlights were all lighted, weren't they? A. What headlights?

Q. The headlights of the other trains going east

that you looked at? A. I told you I don't remember whether I looked at any; whether any went west or not, or east. If they did, I certainly looked at them to see if it was our engine. But I don't recollect any others.

Q. At the time you were sitting at the platform in Waldwick, it was dark, so that if you looked at the headlight of an engine, it must have been lighted for you to tell whether or not it was burning? A. To see the number of the engine. 10

Q. Well, were there any that went by that were not lighted? A. Not that I know of, no, sir.

SAMUEL JEFFERS, sworn for the defendant, testifies as follows: 20

Direct Examination by Mr. Hobart:

Q. Mr. Jeffers, I believe you are also employed as a milk handler, are you not? A. Yes, sir.

Q. You were working on the milk platform at Waldwick yard on the night when this accident happened? A. Yes, sir.

Q. Do you remember the milk train coming in that night? A. I did notice the milk train when she was coming down by the platform. 30

Q. Were you on this same platform where the gentleman who just testifies was sitting? A. Yes, sir.

Q. Did you see any part of the headlight of the engine? A. Nothing as it went by the platform.

Q. Did you notice anything about the bell of the engine? A. I did not. He was then about stopping.

The Court.—You mean the train was about stopping?

Witness.—Yes, sir.

10 Q. How far away was the engine when you noticed the headlight? A. I think it was coming along by the platform, or the tower; the tower is at the west end of the platform.

Q. How do you know, or how did you know that that was the milk train? A. I saw the cars, the milk cars on the train.

Q. Did that same train make some changes to transfer the milk? A. Yes, sir; yes, sir; that is my duty.

Cross Examination by Mr. Hudson:

20 Q. Did you try to read the number on the headlight? A. I did not, no, sir; it generally has the same number. I think it had the same engine that night.

Q. So you can tell the engine? A. Well, I can tell the engine by looking at it and taking particular notice to it, yes, sir.

Q. Didn't you say a minute ago, by the cars you could tell? A. Yes, the milk cars, and milk on.

30 Q. How far away could you tell that was your train? A. He came along down there just west of the tower.

Q. How far is that from where you were? A. It isn't over 15 or 20 feet from where I was.

Q. Could you see the car 15 or 20 feet away? A. I say as it passed by me, as I said; passed by the platform.

Q. Why, then, you could not tell your train until it got right by you, could you? A. I knew about the

time for her, and when she got by me, I knew she was the milk train.

Q. You are sure that the headlight was lit? A. Yes, sir.

Q. Did you ever see the headlight when it wasn't lighted? A. I did not. If it wasn't lighted, they had a lantern there in place of the regular light. 10

Q. Did you ever see it when it had a lantern there? A. Yes, sir, seen them with a lantern on.

Q. When was the last you saw that? A. Oh, I seen that several times; could not tell you when the last was. Not on that train, I ain't.

Q. I am asking you about this particular train? A. I don't remember any lantern on that train.

Q. When you looked up and saw this train, you expected to find the headlight lighted, didn't you? A. I did not expect; I wasn't paying any attention to the headlight; that was not a part of my duty. 20

Q. What caused you to notice it? A. The reflection of the light on the train.

Q. Then you did notice the headlight? A. I noticed the reflection of the light, yes, sir.

Q. Do you look at the headlight every night? A. Not particularly, no, sir.

Q. Can you tell us any other night that you looked at the headlight? A. I noticed several nights when she went by the platform and I happened to be down there. 30

Q. Did you notice it last night? A. I wasn't there last night, no, sir; I could not tell you.

Q. When were you there last? A. Saturday night.

Q. She was burning then? A. I was in the ca-boose when she went by.

Q. Did you notice the lights on any other train besides this one? A. That night?

Q. Yes? A. I did not, of other trains.

10 Q. A good many trains go east and west at that point at that time of night? A. No, not exactly that time of night; sometimes they do and sometimes they don't.

Q. One had just gone up to Allendale, hadn't it? A. I don't remember. I was interested in the cars we were working on.

Q. How about the train before, that we have been speaking of where was that? A. 84 was backed in the switch then, the time you speak of.

20 JAMES F. REYNOLDS, sworn for the defendant, testifies as follows:

Direct Examination by Mr. Hobart:

Q. You are employed, I think, as a passenger conductor? A. Yes, sir.

Q. Were you in the Waldwick yard on the night of August 10th, 1915? A. Yes, sir.

Q. How did you happen to be there? A. Why, I lay over for 15 or 20 minutes every night.

30 Q. What train did you have charge of? A I run four trains; 136 I was supposed to start out with.

Q. What part of the yard was that train in? A. The west end of Waldwick yard.

Q. How far was that up from this crossing where this accident happened? A. I should judge about 90 or 100 feet.

Q. Did you hear of the accident shortly after it happened? A. A couple of minutes.

Q. Did you do anything in the way of assisting the men that were injured? A. Yes, sir, I help to load them in my car and took them to Paterson.

Q. Did you run specially to Paterson for that purpose? A. No, I left on time, 8.19.

Q. You were about to leave anyhow? A. Yes, sir, the ordinary time you've got to leave; time to leave, yes, sir. 10

Q. Shortly before you were informed of the accident, had you seen the milk train go by? A. Yes, sir.

Q. Did you hear anything of 84, the milk train, before it went by? A. Yes, I was sitting there in the car and heard her coming along, whistling and the bell ringing, and a rumbling noise.

Q. What kind of whistles? A. Two long and two short blasts of the whistle approaching the crossing. 20

Q. Did you notice anything about the headlight of the milk train? A. Why, I seen the headlight was properly burning as it came along. I could see it for a distance probably very near half a mile, about half a mile up the track.

Q. Now, there was another engine in the yard, I think, number 7 I know? A. Yes, that engine lay on the opposite side of my train on the main line track. 30

Q. Right here (indicating)? A. Right next to me.

Q. Was that about the same distance from the crossing as you were? A. Just the same distance.

Q. Was that engine making any noise? A. Well, at that time—as 84 went by, do you mean?

Q. Just as 84 went by? A. Well, she was switching there and on the run-around; probably just as 84

went by, she was; she stood there, cutting off cars on the run-around, picked up two cars or maybe more.

Q. Just before 84 went by was that engine 790 puffing or exhausting, making any noise of that kind? A. She pulled up to the run-around and
10 stopped, just before it happened.

Q. And before the accident, was that 790 standing or moving? A. She was working back; was not using any steam.

Cross Examination by Mr. Hudson:

Q. Did you see the headlight on this train 84?
A. Yes, sir.

Q. What caused you to notice it on that night?
A. I notice it every night; I sat there in the car.

20 Q. Did you notice it 10 days before August 10th?
A. Ten days before August 10th?

Q. Yes? A. Well, I notice it particularly every night. I sit there in the car when it goes by.

Q. Did you ever see 84 go past without having a headlight? A. 84?

Q. Yes? A. Well, now, I could not say in particular whether I did or not. I might in the middle of summer, in daylight.

30 Q. In the summer time you don't light the headlight as early as you do in the winter time, do you?

A. Whenever the light requires to be lit; might be in the middle of the day.

Q. You have a book of rules governing that, have you not? A. Yes, sir.

Q. And if you are asked as to any particular day of the year, whether or not the headlight was lit on that day, on 84, when she passed you, you would go according to your rules, wouldn't you? A. I would

James F. Reynolds—cross
Abraham Bender—direct

go according to what I saw; if I saw it lit, I would say so.

Q. I am reading now from page 137, where I asked you the question: "Well, was the light lit then on the 10th of August? A. I could not say about every night; on particular nights I noticed; if you asked me why— ask me on the 10th? Of course I don't remember every night, because I have no occasion to look at it every night." Which is true, the statement that you have just made that you did look at it every night or the other statement? A. As a general rule, every night, as I told you, I hear it coming out of Allendale; that is two miles up, when they whistle.

Q. Two miles away, you see what, the headlight?
 A. No, sir, I don't see that; I hear the whistle.

Q. You hear the whistle two miles up? A. Yes.

Q. That is up above Allendale? A. Well, from the Allendale crossing, I can hear a whistle; she whistles at every crossing coming along.

Q. Did you ever see a train coming by the crossing that did not ring its bell or blow a whistle? A. Did I ever see one?

Q. Yes? A. No, sir.

ABRAHAM BENDER, sworn for the defendant, testifies as follows:

Direct Examination by Mr. Hobart:

Q. You are employed as operator in the Waldwick tower, I believe? A. Yes, sir.

Q. Where is that located with reference to this crossing at Chestnut Street? A. About half a mile east.

Q. That would be toward Jersey City, would it?
A. Yes, sir.

Q. Where is that with reference to the Waldwick yard? A. It is right opposite part of the Waldwick yard.

10 Q. Were you working there on the evening of August 10th, 1915? A. Yes, sir.

Q. Did you hear of the accident on the same evening? A. Yes, sir.

Q. How did you hear of it? A. The fireman on the freight car came up and told me that he thought he struck something and suggested that somebody go up and investigate.

Q. Did you report it? A. Yes, sir.

Q. Did you know that the milk train was due about that time? A. Yes, sir.

20 Q. Had you seen that train before this report came to you of the accident? A. Yes, sir.

Q. Where was 84 when you first saw it? A. About a thousand feet west of the tower.

Q. Is the track straight there from the tower up to the point where you first noticed number 84? A. Yes.

Q. What did you notice about it? A. Noticed the headlight.

30 Q. Was the headlight moving or standing? A. Moving.

Q. Do you know what time that train reached Waldwick that evening, train 84, I mean, the milk train? I show you—what is this paper that I am showing you? A. That is the blotter for the leaving time of trains.

Q. Kept by you? A. Yes, sir.

Q. For the date of August 10th, 1915? A. Yes, sir.

Q. "W" that means Waldwick? A. Yes, sir.

Q. Is there a record of that for train 84? A. Yes, sir, right here (indicating.)

Q. Train 84? A. Here is the arriving time (indicating), and there (indicating) is the leaving time.

Q. The arriving time is what? A. 7.59.

Q. And that is the arriving time at what point? 10
A. Waldwick.

Q. Well, does that mean as it goes under your tower? A. As it passes the tower.

Q. You put it down at the time? A. Yes, sir.

Q. And this is the record that you keep, is it? A. Yes, sir.

Q. So that the time 84 passed under your tower then was 7.59? A. 7.59.

Q. There has been some reference to a passenger train going west that stopped at Allendale; was there 20
a passenger train about that time of the evening?
A. 189 left Waldwick that night at 7.59.

Q. What train is that? A. 189.

Q. That is a westbound passenger, is it? A. Yes, sir.

Q. That ran on track 3, according to your records?
A. Track 1.

Q. I beg pardon; on track 1. That left Waldwick at what time? A. 7.59.

Q. Meaning by that that it passed under your 30
tower at that time? A. Passed the tower.

Q. Five minutes before the other one passed you?
A. Yes, sir.

Q. Did that train stop at Waldwick? A. 189?

Q. Yes? A. Yes, sir, stopped at the station.

Q. How far is the station from your tower? A.
About a thousand feet east, or towards Jersey
City.

Abraham Bender—direct—cross
Motion to direct verdict

Q. Did you say that that train was also scheduled to stop at Allendale? A. No; I don't know whether it is or not.

Q. Is it not a fact that that was the only west-bound passenger train that passed shortly before 8 o'clock? A. Yes, sir, that is the only one.

Cross Examination by Mr. Hudson:

Q. Do your records show the time that that west-bound passenger train should have left Waldwick? A. Should have left? No, sir, it was 3 minutes late that night.

Q. In this tower that you operate, do you have indicators, automatic affairs which tell you when trains are coming? A. Yes.

20 Q. And you operate your signals according to those indicators? A. Yes, sir.

Q. Do you rely upon the indicators? A. Yes, we do.

Q. So you don't operate your trains and give your signals by looking out of the window to see the headlights of trains coming? A. No.

Q. You watch these automatic affairs? A. Yes, sir, depend on the indicators.

30

Defendant Rests.

Mr. Hobart.—I ask for a direction of a verdict in behalf of the defendant.

The Court.—Let the jury retire for a few minutes.

Mr. Hobart.—I make the motion for a direction of a verdict on the following ground:

First, there is not sufficient evidence to go to the jury on the question of the defendant's negligence.

Secondly, the evidence shows clearly that the accident was due to the contributory negligence on the part of the plaintiff.

Thirdly, both on the question of contributory negligence and of the plaintiff's negligence, the evidence is so overwhelming that any number of verdicts would have to be set aside if returned in the face of such evidence. 10

I respectfully ask your Honor's attention to the opinion of the Supreme Court, setting aside the first verdict in this case, wherein the Court said:

"The negligence alleged is the failure to give the statutory signals. The only evidence of failure is that of the plaintiff himself. He is shown to be very deaf. His evidence under the circumstances amounts to nothing. It could not be allowed to prevail against the evidence of several witnesses with normal powers of hearing. The rule must be made absolute." 20

When the Supreme Court goes so far as to say that the only evidence that is offered on the question of the defendant's negligence amounts to nothing, it seems to me that is a pretty plain direction. Unless there was some additional evidence in the event of another trial, there is nothing to be presented to the jury on the question of negligence. 30

The Court.—Permit me to ask a question of Mr. Hudson. Wherein, if anywhere Mr. Hudson, do you conceive that the testimony in this present trial is different from that in the previous trial? Wherein have you added any strength to the case as you made it at the

previous trial? As far as the number of witnesses is concerned, it is practically the same. You have offered nobody on your side as to the lack of giving of signals, except the plaintiff himself, as I remember. Isn't that true?

Mr. Hudson.—Unless it be Mr. Plumbhoff.

10

The Court.—Well, he was not your witness.

Mr. Hudson.—He was my witness .

The Court.—He was your witness on your direct case. The only witness you offered, whose testimony you submit for consideration, was that of the plaintiff himself, on those points. As far as the defense is concerned, as I have been able to follow the testimony of the previous trial, as well as the witnesses themselves, they have called all the witnesses that were called before, excepting Officer Gould, I believe, and his testimony did not go to that point.

20

Mr. Hobart.—Did not use it on the question of the accident.

The Court.—In addition, they have called the witnesses Bender and Jeffers, both of whom were witnesses testifying to the headlight. Otherwise, unless there is something you can show me, the case stands—at least so far as the evidence submitted to the jury is concerned—the same as it did upon the previous trial.

30

Mr. Hudson.—I raised that question before the jury, showed them just how deaf he really is, and it seems to me that is their province to judge whether or not he could hear those signals, those statutory signals.

The Court.—No question at all but what he

was deaf; the only question is as to the degree of deafness.

Mr. Hudson.—It seems to me that it would be for the jury to determine whether or not Mr. Le Barron could hear the statutory signals. That is the point upon which we appealed to the Court. There was nothing in regard to the quantity of testimony or the quality of testimony before; simply his incapacity. Now, that brings the question squarely up to the jury, to say is he injured and it is for them to say whether or not he is. We could have had witnesses to testify as to his condition here before the accident and after the accident. We have the medical testimony here, concerning that point. We have the testimony before the Court that the case is different than it was before.

The Court.—You have called my attention to the testimony or something about the testimony of Mr. Plumbhoff; what is there about that, Mr. Hudson?

Mr. Hudson.—What is there about that?

The Court.—Yes, you said that there was something about the testimony of Mr. Plumbhoff's; what is there about that which you say assists you or helps you in the establishment of your case?

Mr. Hudson.—His testimony is clear that Le Barron drove down Chestnut Street and stopped before he reached the trolley tracks. Plumbhoff could tell that was about where the trolley tracks were, or where Le Barron stopped; then Le Barron drove for a distance which seemed to Plumbhoff to bring him to

Motion to direct verdict

about the railroad where he stopped again ^{6c.} a few minutes. That adds to the testimony of Le Barron. He tells his story about coming to this point and stopping. Then there is in addition to that—that is so far as any lack of negligence on the part of Le Barron is concerned.

10

The Court.—That goes to the question of contributory negligence. Although that is one of the claims urged for a direction, I have not so far given any particular concern about that. My attention has been particularly so far directed to the question of whether or not you have established your case, your prima facie case, as to the lack of the giving of the statutory signals.

20

Mr. Hudson.—I have Plumbhoff on that point too. I am contending that Plumbhoff's testimony is that he heard a whistle, but he adds to that testimony, on cross examination, that there was a train which had gone West to Allendale, and that the sound of that whistle came from Allendale. Now, I submit to the Court that in view of that testimony, the jury has a right to say whether or not that was a statutory signal, which Plumbhoff testifies to, because he is the only one witness, when we come to get this case sifted down, aside from Le Barron. The jury has a right to say—

30

The Court.—The only witness as to what. Mr. Hudson?

Mr. Hudson.—As to the whole transaction, you might say.

The Court.—Why do you say so?

Mr. Hudson.—He is practically the only disinterested witness. The jury have a right to take Plumbhoff's testimony in connection with the story of Le Barron. Of course we have got to consider this point in this way: Here was a situation which arose, and to which nothing could be added; it is not like an accident which occurred in the day time when people could see it. Mr. one of the trainmen, said he could not see what happened. He simply could hear the crash. That being so, we have to take in then the other circumstances, and the other circumstances, it seems to me, are sufficient to go before the jury as borne out and brought forward by the statement of the plaintiff.

The Court.—Let me ask you another question, Mr. Hudson. In what respect do you say Mr. Plumbhoff's testimony differs now from his testimony at the previous trial? Does it in any way, any material, substantial way differ? As I say, I have tried to follow all these witnesses in their testimony on the previous trial, as compared with that upon the first trial. I don't recollect noting any substantial or material difference in this testimony. He was asked practically the same questions.

Mr. Hobart.—On page 144, your Honor, before you, you will see that it is almost exactly the same.

The Court.—If I am wrong, it is a matter that I should have my recollection corrected. I have tried, sincerely tried to follow all these witnesses and their testimony.

Mr. Hudson.—There is this difference: He was asked by me on the last trial if the whistle which he heard was from the train going West.

The Court.—Whereabouts is that?

Mr. Hudson.—That is on page 144. He said he did not think so.

10

The Court.—(reads) “Q. There was no other train? A. There was a train went up ahead of that. Q. In which direction did that train go? A. West, West. Q. How long before you heard the whistle was it that you saw that train going West? A. Well, that train had passed before. Q. It had passed when you heard the whistle? A. Yes, sir. Q. Now, can you say where that train was at the time you heard the whistle, the train that was going West? A. No, I could not say exactly whereabouts; it might have been to Allendale, that engine, I mean. Q. And was it that train that you heard the whistle? Was it the train going West that you heard the whistle of? A. I don’t think so. Q. From which direction did the sound of the whistle come? A. Come from Allendale side. Q. From the Allendale side? A. Yes, sir. Q. That was the direction in which the train that you lately saw had gone, wasn’t it? A. Yes, sir.”

20

30

Mr. Hudson.—Of course there he does say that was the train going West, the probability of its being the whistle on that train that he heard. He simply testifies to the hearing of a whistle.

The Court.—He says it came from the

North, and you asked him practically the same question, as to whether or not the train going West had not passed.

Well, Mr. Hudson, aside from that question which you raise as to Mr. Plumbhoff's testimony, we get back to the question of the degree of deafness of this plaintiff. Suppose this case were submitted to the jury and upon the idea or theory that it was up to them to pass upon the degree of his deafness and determine whether or not, when they found the degree of deafness, was it possible and probable that he could have heard the signals if they were given, as against the testimony of the other witnesses who say that they were given. He says they were not. Others say that they were. Would there ever be an end to a trial of this issue? If you succeeded and obtained a verdict, and again a rule to show cause was granted, and the verdict set aside for the same reason, there would be nothing to prevent you from coming back here again and attempting by certain further testimony as you could produce, to show again the degree of his deafness and again submit the question to the jury.

Mr. Hudson.—I think in time the court would come to believe that we were right.

The Court.—I hope so, either one way or the other.

Mr. Hudson.—It is a different situation where we have got to deal with negative testimony. We have positive testimony here about the situation; and it seems to me, in view of that, the Court is going to give the jury the benefit of the doubt.

10 *The Court.*—Can it reasonably be said that the question of the deafness of the plaintiff was not before the jury and likewise before the—of course it was before the appellate court before— was there anything in the case before which could by any possible way be said not to have been sufficiently clear, so that the jury and Appellate Court above, the Supreme Court, upon a rule to show cause, were misled as to the degree of deafness of Mr. Le Barron?

Mr. Hudson.—There was no argument before the Supreme Court as to the degree of his deafness.

20 *The Court.*—Then it must have been from the testimony as appears in the case. It must have been upon something, for they found that he was deaf.

30 The difficulty is as to whether or not you have presented a case in any wise different, or so materially different from that presented before as would warrant me in overriding the review as presented to me by the Supreme Court in this same case by a rule to show cause. I think you have not, and I therefore incline to direct a verdict upon the first ground. I do so direct, and my reason is upon the first ground urged by counsel, that is the lack of proof sufficient to go to the jury upon the question of the negligence of the defendant company.

Mr. Hudson.—The record will show that I have an exception, your Honor?

The Court.—You may have it, yes.

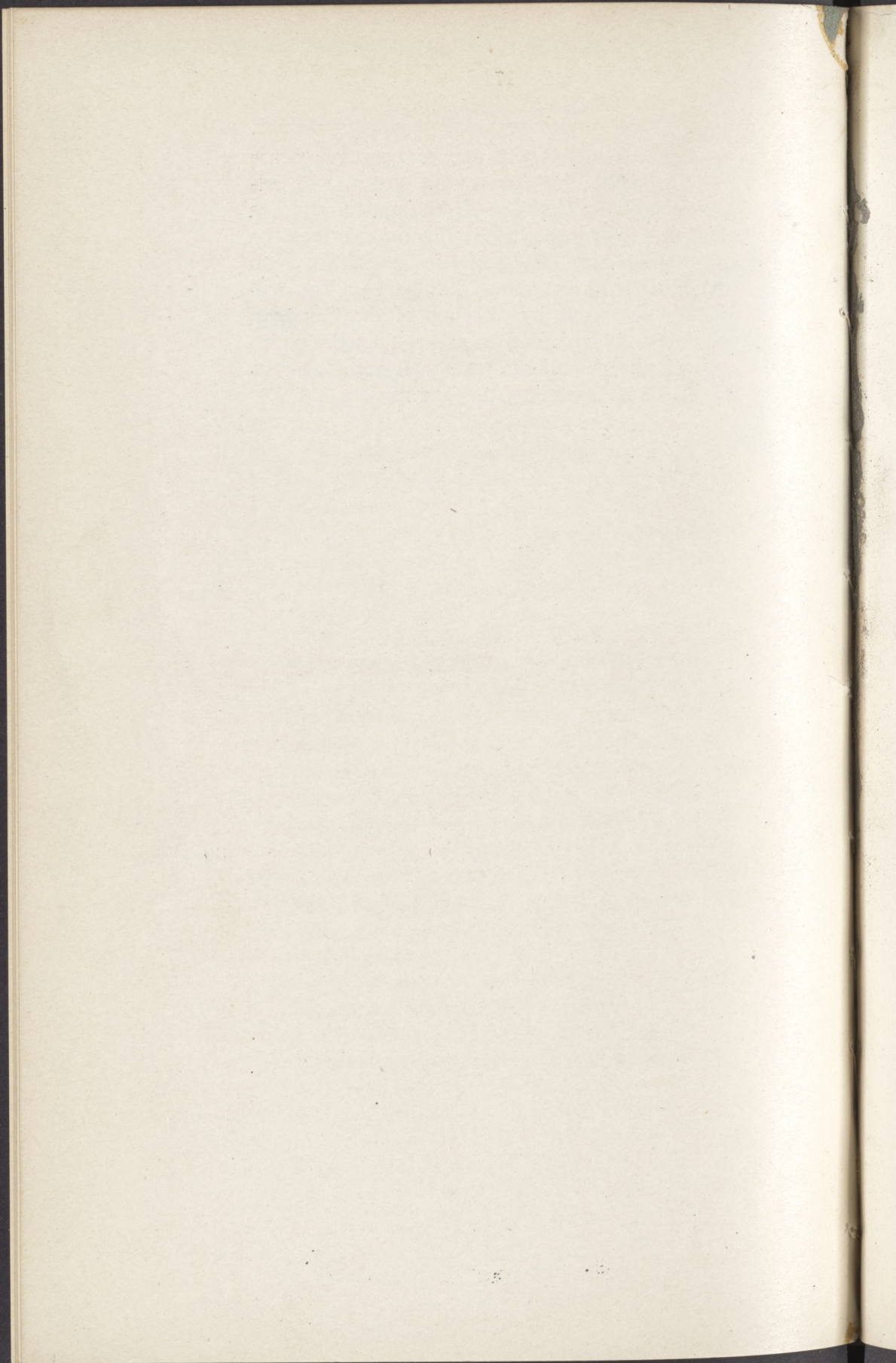
(The jury then returned to their seats.)

The Court.—Gentlemen of the jury, because of reasons that have been urged, and advanced, the Court is of the opinion, and has come to the conclusion, that in this case the motion upon the part of the defendant to direct a verdict should be obeyed. You will therefore find, by direction of the Court, in favor of the defendant and against the plaintiff, and you will so state your verdict to the Clerk as he proceeds to take it.

10

20

30



New Jersey Court of Errors and Appeals

ALLEN N. LE BARRON,
Plaintiff-Appellant,

vs.

THE ERIE RAILROAD COMPANY,
a corporation,
Defendant-Appellee.

Action at Law.
On Appeal.

BRIEF OF PLAINTIFF-APPELLANT.

This is an appeal from a judgment entered on October 23, 1916, in New Jersey Supreme Court, on a verdict for the defendant directed by Luther A. Campbell, Judge of Bergen County Circuit Court, to whom the case was referred for trial. At the trial of the case, after both plaintiff and defendant had put in their proofs and rested, the Trial Judge, upon motion of counsel for the defendant, took the case out of the hands of the jury and directed them to find for the defendant. This direction was based upon the reasoning that practically the same evidence was given in this trial as at a former trial of the case in the Bergen Circuit. At the former trial the jury rendered a verdict for the plaintiff and against the defendant for \$1,000. The judgment entered upon that verdict was taken up to the Supreme Court on the defendant's rule to show cause, and was set aside as contrary to the weight of evidence.

The action is one for damages for personal injuries and loss of property occasioned by a crossing collision.

The Court below, in directing the verdict for the defendant, seems to have done so upon his idea that if the case went to the jury and a judgment was again rendered for the plaintiff, such judgment would be set aside by the Court above. (State of Case, page 169, lines 10, &c.)

I.

We contend that even if the testimony and proof on the second trial had been identical, or substantially identical, with that of the first trial, the Court erred in directing a verdict, because the proof raised a controverted question of fact.

In the case of *Tilton v. Pennsylvania Railroad Co.*, 86 N. J. L., 709 (Court of Errors and Appeals, June Term, 1914), which was an action for damages, a verdict for plaintiff on a former trial was set aside by the Supreme Court *because it was against the great preponderance of the evidence*. On the second trial, by stipulation of counsel, *it was agreed that the testimony of all the witnesses, as it appeared in the state of the case on the rule to show cause, should be offered in evidence and accepted with the same force and effect as if the witnesses were personally present and sworn and testified as upon the former trial. This was done*. Whereupon counsel for defendant moved for the direction of a verdict in its favor, which the Court granted, because the Trial Court deemed himself bound by the decision of the Supreme Court on the

rule to show cause. To this plaintiff's counsel excepted. On appeal, the *Court of Errors* declared:

"As there was conflicting testimony in the record thus introduced in evidence, the ruling complained of was not justified. The weight of conflicting testimony should always be submitted to a jury for their consideration and determination."

In the case at bar the judgment on the first trial was, as in the case cited, set aside as against the preponderance of the evidence. If the Trial Court had been correct in his supposition that the evidence on the second trial was not substantially different from that of the first, the direction of a verdict for the defendant was unlawful.

That there was a sharp conflict between the testimony given in behalf of the plaintiff and defendant is obvious; *but the plaintiff's testimony states a case of negligence on the part of the defendant, and contains nothing pointing to any contributory negligence on his part.*

On page 13 of State of Case, beginning on line 18, plaintiff testifies:

"We (meaning himself and his father, who was killed in the accident) drove on, of course, to the railroad track, and I saw on the track, as I was approaching, a switch engine; I supposed.

Q. Now, where was the engine? You were coming along Chestnut Street; where was this switch engine? A. The engine was on my left.

Q. That is, towards Waldwick? A. Towards Waldwick.

Q. And then what? A. And facing me, and that was moving, gradually coming up,

and I stopped and waited a minute, and I said to my father, 'I guess they are not coming any further, I guess he saw us, maybe waiting for us to go over.' Well, then the next thing was, we looked up the track and down the track, and we saw no trains coming, and we listened and we did not hear any, and there was none coming; so I said to father, 'We will go over.' Well, we started over, and as we went over the first track, he said, 'Well, look sharp,' and we looked again, and we saw no trains coming; there wasn't any, and then we listened and—well, we went on and we did not see any headlights at all; that is what I looked for, and we got over on the eastbound track, about ready to turn off the track, a short turn, and of course I was paying attention to my driving; father said something and I cast my eye to the road.

Q. That would be toward Allendale? A. Yes, sir, toward Allendale. I saw an engine coming, and I did not have time to say yes or no or anything; could not say anything; I just simply saw it (clap) like that, *and it did not have no headlight*, and I don't know any more about it. * * *

Q. Now, you say when you came to this railroad track you stopped and you looked and you listened; what did you look for? A. *I looked for a headlight, a train.*

Q. What did you listen for? A. *Listened for bells; there wasn't any; he did not ring any bell or blow any whistle; there wasn't any whistle blowed, nor bell rung, nor no headlight."*

Page 16, line 10:

“Q. Did you have a light on your wagon?

A. Yes, sir, I did.

Q. Where was that light? A. On the dashboard.

Q. Was there a man, a watchman, at this crossing, at the Chestnut Street crossing, at the time you crossed? A. No, sir, there was not.

Q. Was there any flagman there at any time? A. No, sir.

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

Q. Was there a warning bell at the crossing? A. No warning bell either.”

Plaintiff's story was unshaken by cross-examination (pages 27, &c.).

Without setting forth the evidence of the other witnesses in the case, and assuming for the argument under this point that all the other witnesses contradicted the plaintiff and testified to his negligence and the defendant's entire freedom from negligence, we insist that, under the authority of the case above cited, the Trial Court had no right to take the case from the jury.

This well-known principle of law is tersely stated in the case of *Dickinson v. Erie Railroad Co.*, 85 N. J. L., 586, where the Court of Errors and Appeals declared:

“A Trial Judge is only justified in granting a non-suit, or directing a verdict upon court questions arising from the admitted or uncontroverted facts of a case, and the weight of conflicting testimony must always be submitted to a jury for their consideration and determination.”

II.

We further contend that the application to this case of the settled principle of law stated above, is in no wise affected by the reasoning and language of the Supreme Court in the *per curiam* opinion, making the rule to show cause absolute.

The Supreme Court, in setting aside the first verdict, said (Case, page 163, line 15) :

“The negligence alleged is the failure to give the statutory signals. The only evidence of failure is that of the plaintiff himself. He is shown to be very deaf. *His evidence under the circumstances amounts to nothing.* It could not be allowed to prevail against the evidence of several witnesses with normal powers of hearing. The rule must be made absolute.”

The appellate court has, under our practice, the power, on a rule to show cause in a matter of this kind, to review both the law and the evidence, and to determine whether a verdict is contrary to the weight of evidence.

Whether the plaintiff was so deaf as not to be able to hear the statutory signals was a pure question of fact. While the reviewing court on a rule to show cause may determine the fact, the trial court may not, but must leave it to the determination of the jury, with other questions of fact.

Furthermore, the record of the evidence of the first trial only showed that the plaintiff was somewhat deaf at the time of the trial, and not his capacity to hear at the time of the accident.

III.

We further contend that such additional evidence was produced on the plaintiff's behalf at the second trial, contrasting his capacity for hearing at the time of the accident and his increasing deafness afterwards, as to destroy the notion that his testimony touching the failure of the defendant to give the statutory signals is worthless because of his infirmity of ear at the time of the accident; and that at all events his capacity for hearing was purely a jury question.

This point was raised by the discussion before the Trial Court on the motion to direct a verdict, and the Court brushed it aside by saying (State of Case, page 169, line 21) :

“If you succeeded and obtained a verdict, and again a rule to show cause was granted, and the verdict set aside for the same reason (deafness), there would be nothing to prevent you from coming back here again and attempting, by certain further testimony as you could produce, to show again the degree of his deafness, and again submit the question to the jury.”

The evidence shows that at the time of the accident plaintiff was but slightly deaf.

On page 18, line 10, of Case, when asked whether he was deaf before the injury, he replied :

“Well, slightly.”

He further testifies (same page), as to the effect of the accident on his hearing:

“I am a great deal deafer now than I was before; a great deal deafer. I could hear a common conversation in church before; I did not have no trouble. Now, I am all off on that; I cannot hear so well.”

On page 34, line 30, he testifies on cross-examination that he heard the switch engine “hissing” as it was letting off steam.

On page 45, line 10, &c., Martha Ricker, plaintiff’s neighbor, testifies as follows:

“Q. Now, before this accident he was somewhat deaf, wasn’t he? A. Yes, sir, a little, but not much.

Q. Well, could he hear people talking in the ordinary tone of voice such as we are talking now? A. You could sit across the room and talk to him.

Q. I did not ask you that. You heard what I asked you. (Question read to witness.) A. Yes, sir.”

James Ackerson also testified (pages 74 and 75 of Case) that plaintiff is harder of hearing now than before the accident.

James Gamble (pages 70 and 71) testified that before plaintiff was hurt he had a little hard way of hearing, not bad at that time, but that since the accident witness has noticed that when he was hollering at plaintiff, talking to him three or four times, he could not make him hear.

Dr. Bryan C. Magennis, who never knew the plaintiff until long after the accident, testified that he did not think plaintiff could hear as well at the second as at the first trial.

A careful perusal of all the testimony as to the plaintiff's capacity for hearing at the time of the accident demonstrates that he could have heard either the bell or the shrill whistle of a locomotive sounding the proper statutory signals.

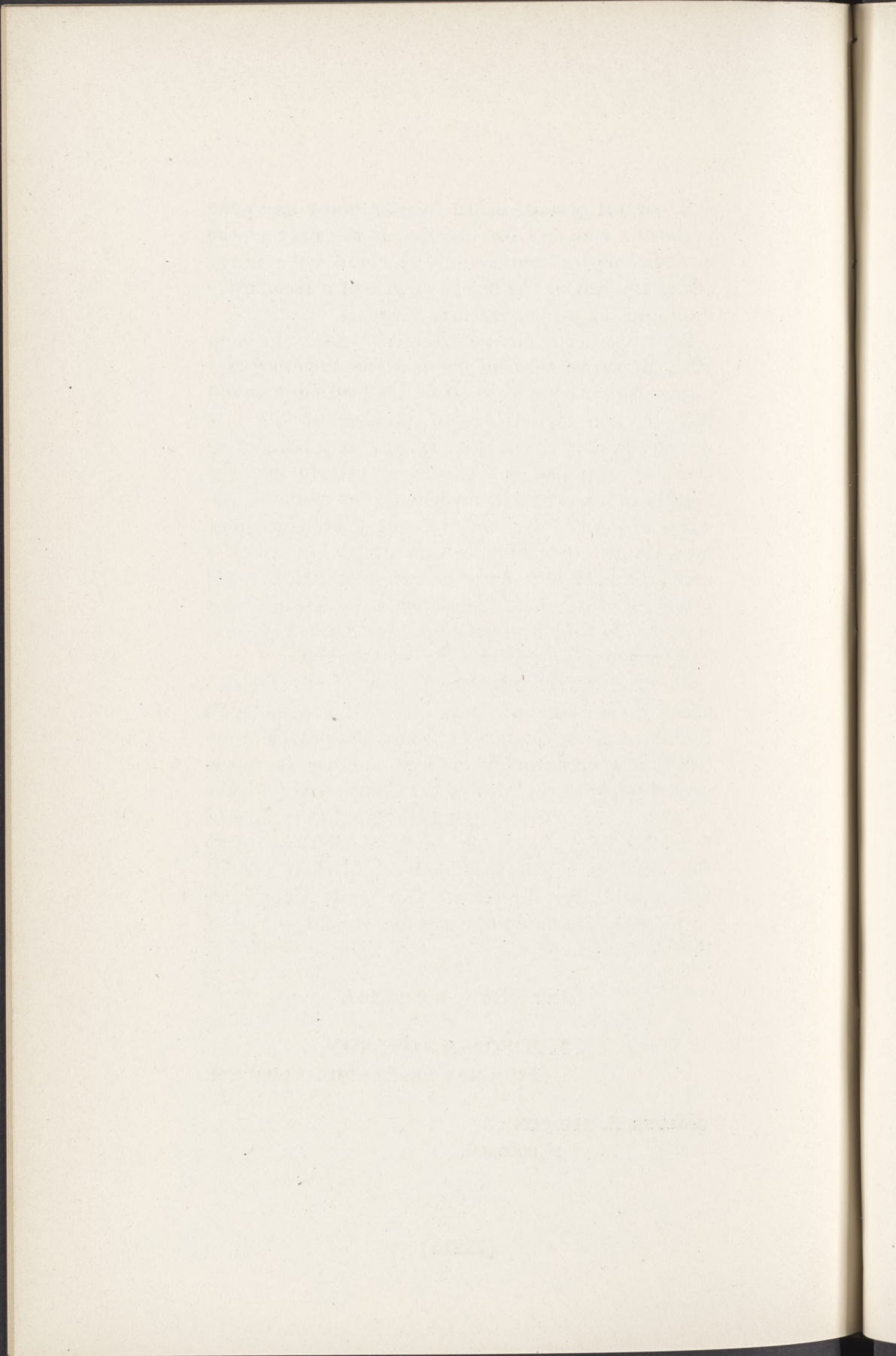
A case, indeed, may be conceived where, although plaintiff swore that he listened for statutory signals and that none were given, his testimony would fail to raise a controverted question of fact. It would be found in the instance of a man born stone deaf, or who had concededly so utterly lost the faculty of hearing that no echo of any sound of the outer world ever reached the seat of his consciousness. *In all cases like the case at bar, in which a man's hearing is to some extent impaired, but not utterly and admittedly destroyed, the issue of his capacity to hear a given sound is an issue of fact, and, as such, is unmistakably for the jury.*

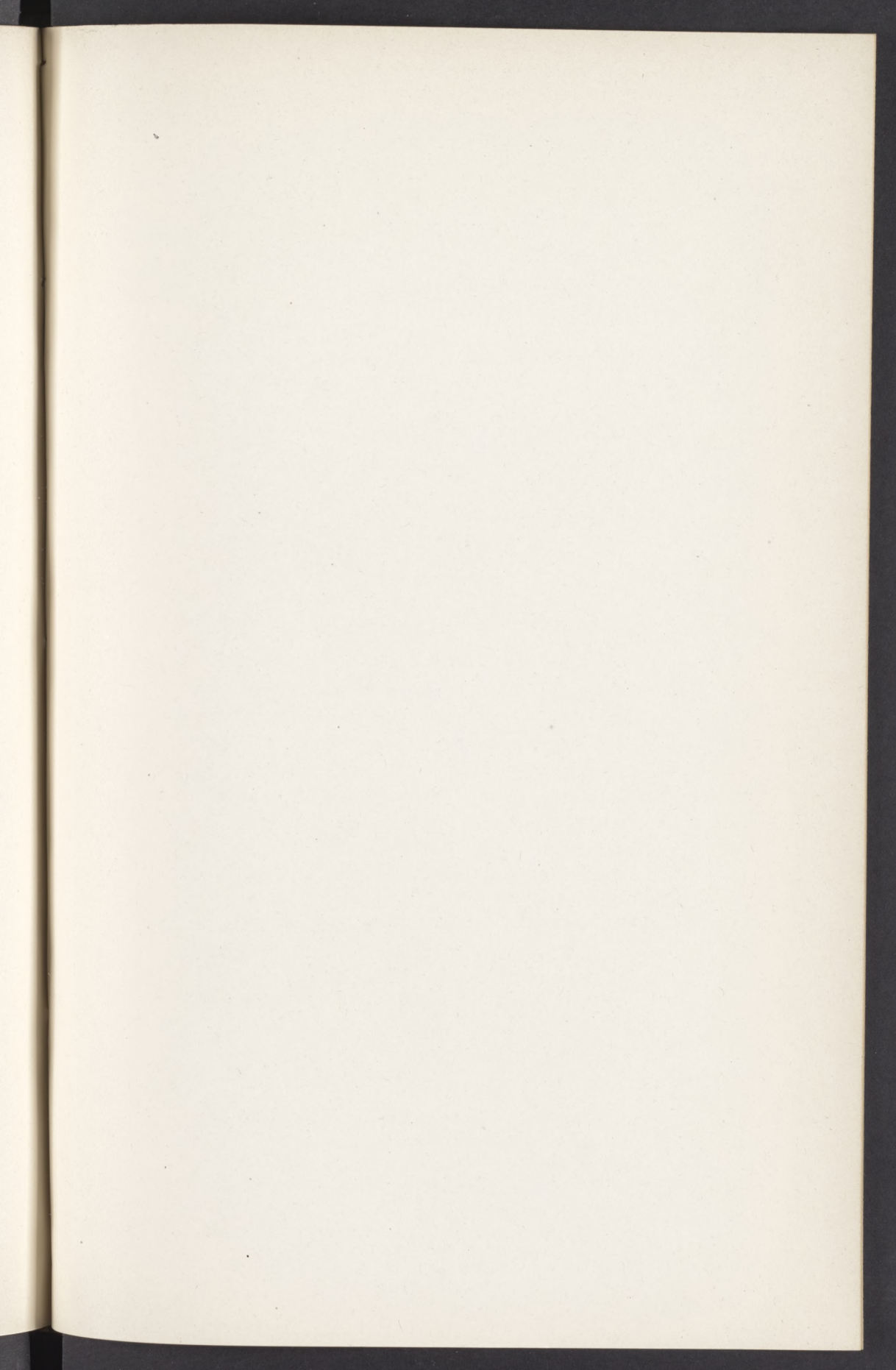
In conclusion, we insist (1) that, under the evidence in the case, the question of the defendant's liability was for the jury; (2) that the judgment entered was erroneously entered because it represented solely the opinion of the Court; and (3) that in such a case, involving controverted questions of fact, the Trial Judge had no legal right to usurp the province of the jury and mould their verdict by an arbitrary direction. Our contentions have so patently discussed our specific reasons of appeal that we have not formally quoted them in this brief.

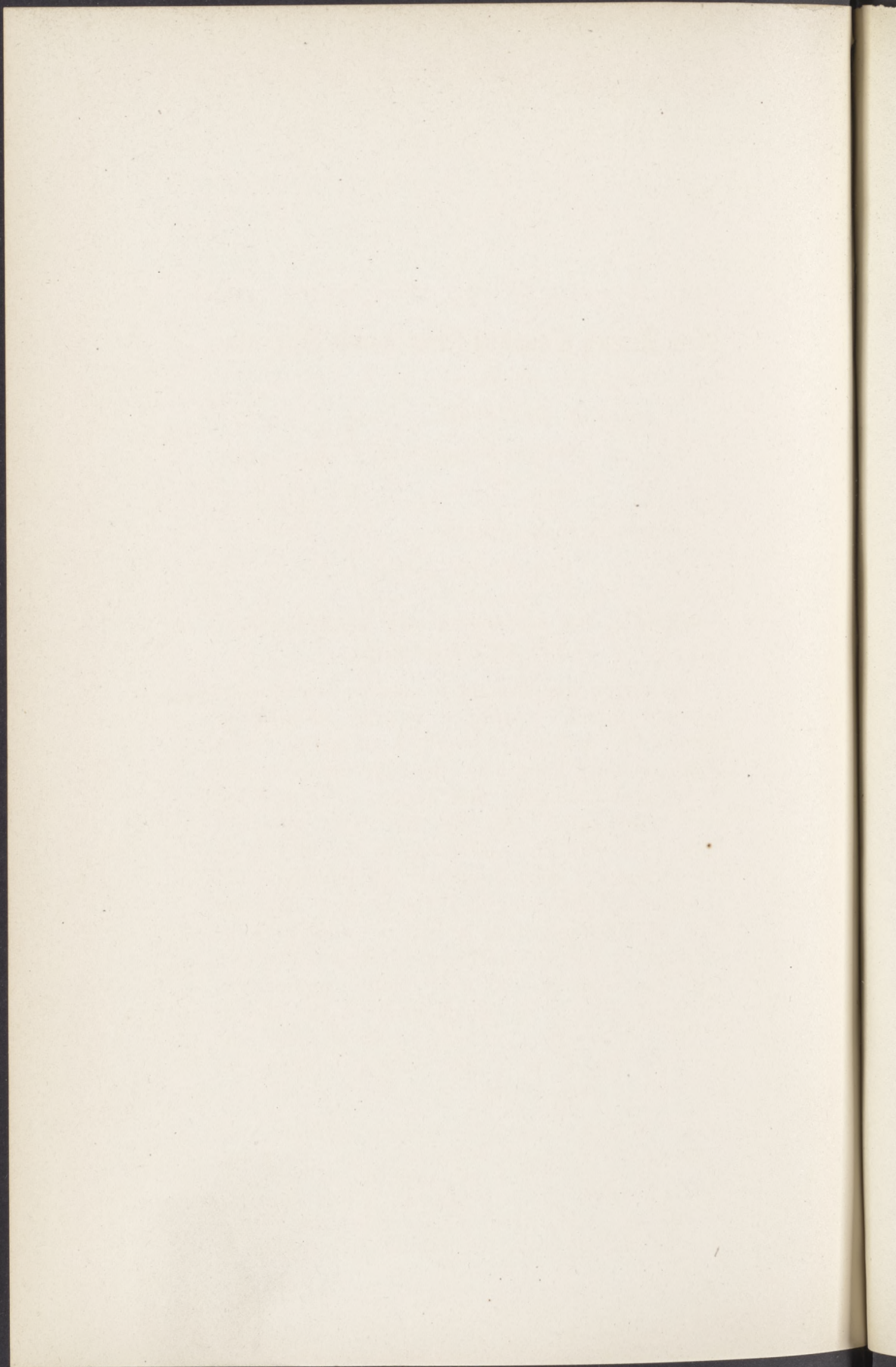
Respectfully submitted,

HUDSON & JOELSON,
Attorneys for Plaintiff-Appellant.

WALTER R. HUDSON,
of counsel.







New Jersey Court of Errors and Appeals.

ALLEN N. LEBARRON,

Plaintiff-Appellant,

vs.

ERIE RAILROAD COMPANY,

Defendant-Appellee.

On Appeal
from
Supreme
Court.

10

BRIEF ON BEHALF OF DEFEND- ANT-APPELLEE.

This action was brought to recover damages for personal injuries sustained by the plaintiff on August 10, 1915, as the result of an accident at a grade crossing known as Chestnut Street in the Borough of Allendale, New Jersey. The case has been tried twice. At the first trial the trial judge permitted the case to go to the jury upon the question of whether or not the defendant had complied with Section 35 of the General Railroad Law of 1903 requiring a bell or whistle to be sounded by the locomotive at a certain distance from the crossing. At that trial a verdict was rendered in favor of the plaintiff for the sum of \$1,000. Thereafter, on rule to show cause, the Supreme Court, in a *per curiam* opinion, set the verdict aside, saying:

20

30

“This is a case of a crossing collision. The negligence alleged is failure to give the statutory signals. The only evidence of failure is that of the plaintiff himself. He is shown to be very deaf. His evidence under the circumstances amounts to nothing and cannot be

40

allowed to prevail against that of several witnesses with normal powers of hearing. The rule must be made absolute."

At the second trial the defendant claimed that the evidence was substantially the same as at the first trial and the trial judge on the strength of the foregoing opinion directed a verdict in favor of the defendant. From the judgment entered on this verdict the plaintiff has taken the present
 10 appeal.

In the brief filed for the plaintiff on this appeal the principal point urged is that the testimony of the plaintiff that he did not hear the statutory signals was sufficient to require the trial judge to submit to the jury the question of whether or not such signals were given, notwithstanding the fact that the plaintiff was deaf. At the second trial (as at the first) there was no evidence what-
 20 ever produced by the plaintiff as to the alleged failure to give the statutory signals except the evidence of the plaintiff himself.

The defendant now submits:

(a) The plaintiff's testimony was not sufficient to require the trial judge to submit to the jury the question of the defendant's negligence.

(b) There was no substantial difference in the evidence at the second trial as compared with the evidence at the first trial so far as relates to the plaintiff's capacity to hear the signals if they had
 30 been given.

(c) If the plaintiff's evidence put upon the defendant the burden of showing the fact as to the giving of the statutory signals, then such burden was amply discharged, and the defendant's evidence demonstrated that the required signals were given.

(d) For the foregoing reasons there was no question of fact for the jury as to whether or not
 40 the crossing signals, or either of them, were given.

(e) Even if there was a question of fact for the jury as to whether or not the crossing signals were given, nevertheless the direction of verdict in favor of the defendant was correct for the reason that the evidence showed that the accident was due to contributory negligence on the part of the plaintiff.

I.

The evidence of the plaintiff was insufficient to require the Trial Judge to submit to the jury the question of the defendant's negligence.

10

The sole ground of negligence which the plaintiff claims should be submitted to the jury was whether or not the statutory signals were given. See argument on motion to direct verdict, pp. 162-171 of State of Case; Point II, p. 6, of plaintiff's brief. Plaintiff said that as he drove toward the crossing he stopped and waited a minute and listened for bells and that no bell or whistle was sounded (pp. 13 and 14).

20

Cross examination of the plaintiff shows that there were several excellent reasons why the plaintiff did not hear the signals of the train by which he was struck. In the first place his attention was attracted by an engine that was on a side-track near the crossing. This engine was on the plaintiff's left, or toward Waldwick, as he approached the crossing (p. 13, l. 25). This was the opposite side from that where the train approached by which plaintiff was hit. The engine was on the first track which the plaintiff had to pass (p. 27, ll. 1-10). As plaintiff approached the crossing this engine was moving slowly towards him about 75 or 100 feet away and it came to a stop just before plaintiff reached the tracks (p. 27, ll. 10-35). Plaintiff says that he saw this engine as it was moving, that he looked at it after it had

30

40

stopped and then "thought" he would wait a minute to see whether it was going to move again; at that time he was 25 to 30 feet away from the track (p. 27, l. 35, to p. 28, l. 5). This switch engine, the plaintiff said, made "a kind of hissing sort of sound" (p. 34, ll. 1-40). Another witness said that the engine made a noise as of escaping steam (p. 94, ll. 25-30).

The plaintiff's attention was further distracted
 10 by the darkness and by his effort to watch for the place where he was to turn off to his right in order to reach his destination (Mr. Plumbhoff's). He says the night was "quite dark" (p. 29, l. 25), and that as he was passing over the crossing his attention was called to his horse to turn to the right just after he left the crossing (p. 32, ll. 20-30). He said he was paying attention to this "all the time" as he moved over the crossing (p. 32, l. 30, to p. 33, l. 25).

20 Even if the hearing of the plaintiff was normal, the fact that his attention was distracted by the noise of another engine near the crossing and by his effort to locate a side road in the dark as he was passing over the crossing, would be sufficient to account for his not hearing the signals. But in addition to this there is the further fact that the plaintiff was deaf. The evidence on this subject is as follows:

30 PLAINTIFF. Was "slightly" deaf before the accident (p. 18, ll. 1-15).

MARTHA RICKER. "Q. What about his hearing?
 A. He could not hear so good now as he could before" (p. 42, l. 25). Before the accident "he was a little deaf, but not very much" (p. 45, ll. 30-35).

DR. MAGENNIS. Examined plaintiff Dec. 11, 1915, and Sept. 9, 1916 (accident was Aug. 19, 1915). Found his hearing was "not very good"
 40 and tested his ears (p. 48, ll. 1-10). (Is not

quite clear which examination the doctor refers to, but it was probably the first examination made on Dec. 11, 1915, as in his further testimony he refers to the second examination made in September, 1916.) Tested his hearing with a watch. In the *right* ear there was "practically no hearing" (p. 49, ll. 1-10). In the left ear could hear the watch about an inch from the ear. (NOTE: Train by which the plaintiff was struck was eastbound and approached the plaintiff from his right, as plaintiff was passing over the crossing.) Made the same test at the second examination and found the same condition except he was a "little worse" (p. 40, l. 22). The condition of the right ear was the same as at the first examination but with the other ear he did not hear as readily (p. 49, ll. 20-40). The difference in the hearing was "only a trifle" (p. 50, ll. 20-30). 10

DR. RODMAN. Attended plaintiff at his home shortly after the accident (p. 54, ll. 10-20). Knew plaintiff before the accident; he was slightly deaf before but not "to the amount" that he has been since. Examined him on Sept. 12; found he could not hear at all with the right ear. Also examined him in December previous and found the same result (pp. 56, 57). The difference between this year and the year before is "very slight" (p. 58, ll. 1-5). 20

On cross examination the doctor's attention was called to his testimony at the former trial to the effect that at the former trial he had said that the plaintiff was "somewhat" deaf *and that he did not notice any difference in his deafness after the accident as compared with the condition before the accident.* The doctor admitted that he so testified and that his testimony on that subject was true (p. 58, l. 20; p. 59, l. 10). 30

JAMES GAMBLE. Has known the plaintiff about twenty years; at times worked with him. "He 40

had a little hard way of hearing" before he was hurt (p. 70, ll. 15-20).

"Q. Before he was hurt did you have occasion to test his hearing, to find out whether he could hear? A. No; all that I have ever done, I hollered at him and if he did not hear me right away, I would holler again, and he did hear me" (p. 70, ll. 30-35). "He was always a little deaf" (p. 71, l. 10).

10 "Sometimes you would have to talk to him twice and sometimes only once and he would hear" (p. 71, ll. 10-20).

"If I could not make him hear I would holler at him" (p. 71, l. 40).

James Ackerson. Has known plaintiff fifteen or sixteen years. "He is a little harder of hearing now than he was before" (p. 74, l. 5). He was a "little" deaf when I first knew him (p. 74, l. 38).

20 Dr. MacAlister. At the last examination found plaintiff was deaf in both ears. Could not hear a watch held against either ear (p. 77, l. 20). There is nothing about the injuries to the head that account for the present deafness (p. 78, l. 20). If he had been deaf for eighteen or twenty years, that fact indicates that he had a chronic inflammation of the tube which grows "progressively worse as a rule" (p. 78, ll. 15-40). Plaintiff said he had had this condition of deafness for some time or all his life (p. 80, l. 5). On the first examination with the watch plaintiff could not hear at all.

30 With the watch of Dr. Magennis there was a distinction in the left ear (p. 80, ll. 1-20).

It will be seen from the foregoing evidence that the plaintiff was deaf for many years prior to the accident. There is some dispute as to whether after the accident he was deafer than he was before. Dr. MacAlister says, however, that there is nothing in the injuries resulting from the accident which would have any bearing on the deafness. It is very significant that Dr. Magennis, a specialist called in by the plaintiff to testify at

40

the trial, did not say that the injuries caused by the accident affected his hearing or increased his deafness. Referring to the head injury he testified as follows :

“Q. Where was this scar on the top of his head? A. Almost the media line, about here (indicating) I think.

“Q. Do you know in what way that scar affected him if at all? A. I could not tell, only by pressure. He said it was painful if I touched it. He complained of this feeling of something crawling underneath his scalp, and said he had headaches.

10

“Q. Well, so far as objective conditions are concerned, aside from what he may have told you, was there anything about the scar which may account for his inability to hear? A. Oh, no; oh, no, not at all.

“Q. There is no connection between that and his hearing at all? A. I don't think so, as far as the scar was concerned.

“Q. Well, there was nothing else objective as far as the head is concerned than that scar and this trouble with his mouth? A. Those are the only objective symptoms, yes.

20

“Q. Of course the scar on his mouth, that had nothing to do with his hearing? A. No.”
(p. 50, l. 35 to p. 51, l. 20.)

It is equally significant that Dr. Rodman, plaintiff's family physician, did not say that the accident increased the plaintiff's liability to hear,—indeed, Dr. Rodman admitted that there was no difference in his hearing before and after the accident.

30

On the argument to direct a verdict plaintiff's counsel claimed that there was a difference in the testimony at the second trial as compared with the testimony at the first, but this is not borne out by the record. All of the witnesses who were called at the first trial were called at the second trial, including Dr. Magennis and Dr. Rodman. It is true that two additional witnesses were called for plaintiff at the second trial, namely, Gamble and

40

Ackerson. But their testimony so far from proving that the plaintiff could hear at the time of the accident really strengthens the defendant's case on this point—particularly the evidence of Gamble who said that at times he had to “holler” at the plaintiff in order to make him hear, and that at times he would have to speak to him twice to make him hear. Hence, we submit there was no substantial difference in the evidence at the

10 second trial, so far as relates to the plaintiff's capacity to hear the crossing signals if they had been given.

In view of the fact that the plaintiff was suffering from deafness at the time of the accident (there being no hearing at all in the right ear—the side from which the train approached—according to plaintiff's own physician, Dr. Magennis), and in view of the further fact that even if his

20 hearing had been normal his attention was distracted by the engine on the switch track, which was letting off steam, and by his effort to find a side road (which was near the crossing), we submit that the evidence was insufficient to go to the jury. If, however, there was any doubt about this, the matter was cleared up by the evidence of the defendant, which proved conclusively that the signals were sounded both by bell and by whistle.

II.

30 **The evidence of the defendant demonstrated that the statutory crossing signals were given.**

Plumbhoff; neighbor of the plaintiff, living in Allendale about 400 feet from the crossing where accident happened, was sitting on the front porch of his house, saw plaintiff drive up toward the crossing but did not know at the time that it was

40 plaintiff. The wagon came from the opposite side;

saw the light on the wagon moving toward the crossing on a slow walk. It stopped before it reached the trolley tracks about 160 feet from the railroad tracks and then moved right on—stopping again when it came to the railroad crossing, then it started up. Heard the train coming from Allendale, that is, from the north.

“Q. What did you hear about the train? A. Well, I heard it coming, and then I heard the whistle. 10

“Q. What kind of a whistle did you hear? A. Kind of a shrill whistle; fine, shrill whistle.

“Q. How many whistles? A. I think it was four.

“Q. At the time you heard those whistles, where was the wagon? A. The wagon was about—well, it was nearly half way across, I should judge” (p. 93, ll. 23-31).

Heard the crash and went down to see what had happened. At the time the whistle blew plaintiff had not yet reached the crossing. The sound came from the north (p. 94, ll. 10-20). These whistles were different; there were two long and two short. It was what is called a crossing whistle (p. 94, l. 30 to p. 95, l. 10). 20

Kinney, locomotive engineer. Was running train 84 by which plaintiff was struck. Gave two long and two short blasts with the whistle 1,000 feet or more west of the crossing at the usual place. This was the usual crossing whistle. Engine had a large automatic bell which is operated by a valve from the cab. Bell was started at the first crossing west of Ramsey about three miles from the crossing where the accident happened. Bell was in proper working order and was not shut off at any time. It weighed probably 100 pounds (pp. 105, 106). Train was moving 25 to 30 miles an hour (p. 103, ll. 30-35). The long whistles took three or four seconds and the short one no more than a second (p. 104, l. 35). Bell kept on ring- 30 40

ing until it was shut off after train had stopped in order to go into the switch at Waldwick (this was some distance to the east of the crossing where accident happened). Bell is about 18 or 20 feet from engineer as he sits in the cab. Heard it ringing that evening (p. 108, ll. 20-30).

10 Kane, fireman of engine 84. Two long and two short blasts were sounded at the whistling post about 2,000 feet from crossing. Bell was ringing all the way from two and a half miles about the crossing. It was shut off after the accident when train was about a quarter of a mile beyond the crossing (p. 113, l. 30; p. 114, l. 15).

20 O'Hara, brakeman on train 84. Was riding between the tank and the engine. This was in order that he might observe the condition of the switch at Waldwick so train could back in to do its work at that point. Heard the signals by bell and whistle. Whistles were sounded about 1,000 feet west of the crossing. Noticed the bell ringing when train was coming through Allendale about a mile from the crossing. Was 15 or 18 feet from the bell. It did not stop at any time (pp. 125, 126).

Banker, employed on train 84 as a milk handler. Was riding in combined car at the rear end. Heard the regular crossing signal, two long and two short whistles (p. 135, ll. 1-10).

30 Donohue, locomotive engineer. Was in charge of engine 719 in the Waldwick yard. Was working at the west end of the yard 500 or 600 feet east of the crossing. Saw the switch engine coming up the track, saw the white light on the wagon, saw the headlight of the engine of 84 coming; went up to the crossing and found accident had happened. The engine of the east-bound train came on by the crossing and stopped at the other end of the yard. When this engine went by the bell was ringing. Bell of my engine

40

was not ringing as I was doing yard work and bell does not ring in the yard.

Vernon, fireman with engineer Donohue. Heard train 84 go by and heard the bell of that engine ringing (p. 144, ll. 1-30).

Reynolds, employed as passenger conductor. Was laying over in the Waldwick yard in charge of train 136. Was at the west end of the yard about 100 feet from the crossing. Heard of the accident shortly after it happened. Saw the milk train go by. 10

“Q. Did you hear anything of 84, the milk train, before it went by? A. Yes, I was sitting there in the car and heard her coming along whistling and the bell ringing, and a rumbling noise.

“Q. What kind of whistles? A. Two long and two short blasts of the whistle approaching the crossing” (p. 157, ll. 15-20).

It will be seen that there are eight witnesses who testified either to the bell or to the whistle, and some of them to both. As against this evidence there is nothing but the testimony of the plaintiff himself. So far as this point is concerned every witness who testified at the first trial testified at the second trial and the evidence with respect thereto was substantially the same at both trials. Under these circumstances we submit that this Court should agree with the conclusion of the Supreme Court to the effect that the plaintiff's evidence “amounts to nothing and cannot be allowed to prevail against that of several witnesses with normal powers of hearing.” 20 30

The evidence that at least one of the signals required by the statute was given is so clear that we submit that the trial judge was bound to direct a verdict for the defendant. 40

- Eissing v. Erie R. R.*, 73 N. J. L., 343;
Holmes v. Pennsylvania R. R., 74 N. J. L., 469;
Weiss v. Central R. R. Co. of N. J., 76 N. J. L., 348;
Stetson v. Baltimore, etc., R. Co., 77 N. J. L., 121;
Howe v. Northern R. R. Co. of N. J., 78 N. J. L., 683;
 10 *Blauvelt v. Erie Railroad Co.*, 81 N. J. L., 142.

On this point the remarks of Minturn, J., speaking for the Supreme Court in the case of *Closter Dairy Farms v. New York Central R. R.*, 88 N. J. L., 557, 97 Atl. 305, are pertinent. In that case the plaintiff was driving towards a crossing and before he reached the tracks he stopped his horse, went down from the wagon, looked up
 20 and down, saw no train and heard no signal and then proceeded to drive across. The wheel of his wagon was caught between the rail and the planks of the crossing. In the meantime a train was approaching and when the driver reached the crossing was only 25 feet distant. On appeal from the District Court the Supreme Court discussed the claim as to the sounding of the crossing signals, and said:

30 "We are unable to find in the case any evidence of a substantial character which will impose liability upon that ground."

Other evidence in the case led to an affirmance of the judgment for the plaintiff on the ground of negligence with respect to the maintenance of crossing, but so far as the giving of the signals is concerned the case is authority for the proposition that there must be evidence of a "substantial character" in order to impose liability upon
 40 the railroad by reason of the alleged failure to sound the crossing signals.

III.

Under the evidence in the case there was no question of fact as to whether or not the crossing signals were given.

Under Points I and II we have cited all the evidence on the point as to whether or not the crossing signals were given—that being the only ground upon which the plaintiff claimed that the defendant was negligent. Plaintiff argues that the Supreme Court set aside the first verdict on the ground that it was against the clear weight of the evidence, but this argument is based on a misconception of the decision of the Supreme Court. It is true that the Supreme Court *might* have set aside the first verdict on the ground that it was against the weight of evidence, but the court did not put its decision on that ground; on the contrary, the court took pains to point out that the evidence of the plaintiff “amounts to nothing.” This is equivalent to a statement that there was *no* evidence upon which the plaintiff was entitled to go to the jury on the question of whether or not the statutory signals were given.

Counsel cites the cases of *Tilton v. Pennsylvania R. R. Co.*, 86 N. J. L., 709, and *Dickinson v. Erie R. R. Co.*, 85 N. J. L., 586, as authority for the proposition that where there is “conflicting testimony” the issue must be submitted to the jury. It hardly required the citation of authority to support so self-evident a proposition. But it is equally true that where the testimony of the plaintiff (being all of the testimony in behalf of plaintiff on the particular point at issue) “amounts to nothing”, then the testimony is not conflicting and there is no question of fact for the jury to determine—and this is especially so when the defendant offers clear

and convincing evidence (in the present case from the mouths of eight witnesses), which demonstrates that the point sought to be established by the plaintiff's testimony is not in accordance with the facts.

It is quite true, as pointed out in the Dickinson case, supra, that the setting aside of a verdict by the Supreme Court on the ground of weight of evidence does not necessarily require the trial judge on a second trial to direct a verdict, but it is equally true that this principle is applicable only to those cases where, as said by this court in *Dickinson* case, there is "a substantial conflict of testimony."

We submit that in the present case there was no substantial conflict and that therefore the trial judge was right in directing a verdict in favor of the defendant.

20

IV.

The evidence clearly shows that the accident was due to contributory negligence on the part of the plaintiff, and the direction of verdict in favor of the defendant may be sustained on this ground as well as on the ground that no negligence was shown on the part of the defendant.

30

The motion to direct verdict in favor of the defendant was put not only on the ground that there was no negligence proven on the part of the defendant but also on the ground that the evidence showed contributory negligence on the part of the plaintiff (p. 162, l. 30 to p. 163, l. 10 of State of Case).

The reviewing court will affirm the judgment of the court below if correct on any legal ground even though the ground relied on by the court below is not well founded.

40

Gillespie v. Ferguson Co., 78 N. J. L.,
470-473;

Sadler v. Young, 78 N. J. L., 594-597;

Meisel v. Merchants National Bank, 85
N. J. L., 253;

Herrera v. Manhattan Electric Co., 85
N. J. L., 248.

There is no dispute as to the physical situation at the crossing. The maps of the plaintiff and of the defendant agree. There are five tracks; the plaintiff approached the crossing from the easterly side (according to the compass). Coming from that direction the railroad tracks are as follows:

First, switch track leading into the Waldwick yard—marked "Siding" on defendant's map;

Second, westbound passenger track, marked Track No. 1;

Third, westbound freight track, marked Track No. 3;

Fourth, eastbound freight track, marked Track No. 4;

Fifth, eastbound passenger track, marked Track No. 2.

The switch engine to which the plaintiff referred was on the siding, or the first track, that he passed. Train No. 84 (by which the plaintiff was struck) was moving east on the eastbound passenger track—No. 2. Hence, plaintiff had to cross the sidetrack and three main line tracks before he reached the track on which the accident happened. Before reaching the railroad tracks plaintiff also had to cross a trolley track (not shown on defendant's map but indicated on plaintiff's map). This trolley track is about 255 feet easterly of the track on which the train was coming by which plaintiff was hit. Plaintiff's surveyor, Mr. Livermore, said that be-

tween this trolley track and the eastbound passenger track (a distance of 255 feet) there was nothing to interfere with the view of the approaching train as far as Orchard Street, which was over 2,000 feet distant (p. 6, ll. 10-25; p. 8, ll. 1-30). The position of the trolley track with reference to the railroad tracks may be observed by examination of photos 5304 and 5305—being part of Exhibit D-3—a series of photos marked as one exhibit (p. 89, l. 20).

10 The testimony of defendant's surveyor, Keleher, was substantially the same as that of the plaintiff's surveyor. Up to a point 125 feet from the rail he said there was a clear view of 2500 feet. He did not go as far back as the trolley track. Up to that distance there was nothing whatever to interfere with the view of a train coming from the north. His observations were made in the centre line of the highway measured from the east rail of the eastbound *freight* track. As the crossing is diagonal, the distance to the corresponding rail of the eastbound passenger track (on which the train was coming) was 22 feet, so that the result of the witness' observation was that the view of 2500 feet and upwards extended to a point 147 feet from the nearest rail of the track on which the train was coming (pp. 98, 99).

20 30 The testimony of the surveyors is further verified by the photographs. These were offered as one exhibit—D-3 (p. 89; l. 20). They are numbered from 5296 to 5305 inclusive and on each of them appears a memo showing the point at which it was taken and the extent of the view. Attention should be particularly called to No. 5303; this was taken 125 feet north of the nearest rail of the eastbound freight track (or 147 feet north of the nearest rail of the eastbound passenger track). It shows a view of about 2,000 feet.

40

It is unnecessary to cite cases for the proposition that a highway traveler who has a clear view of an approaching train of over 2,000 feet up to a point when he is over 200 feet from the crossing must be held chargeable with contributory negligence unless there is some circumstance or some law which changes the rule.

It may be urged that the plaintiff's attention was distracted by the engine which stood on the sidetrack. It is quite true that his attention was distracted by that engine and, as we have previously shown, this fact may account for his failure to hear the crossing signals. But it is equally true that the plaintiff was crossing over the tracks slowly and had plenty of time to observe that the engine came to a stop; and after it had stopped he then started his horse and made an observation up and down the track.

The case in this respect is very different from *Corse v. Philadelphia & R. R. Co.*, 88 N. J. L., 348, 96 Atl., 53, wherein the evidence showed that there were several engines that were standing five or six feet from the highway and were blowing off steam and the driver of the wagon said that he kept watching them "for fear they would move."

It may also be claimed that there was evidence to show that the headlight of the engine of east-bound train 84 was not burning. It is true the plaintiff said that this engine had no headlight (p. 14, l. 15). But he saw it only a second before he was hit (p. 14, l. 15). Moreover, his testimony on that subject was impeached by previous statements which he had made to the effect that the headlight was burning. Thus, in a statement dated August 12, 1915 (two days after the accident) he had placed his name to a written document which said: "the headlight was burning, but very, very dim" (p. 86, l. 25). Plaintiff

10

20

30

40

had also stated to his physician, Dr. Rodman: "We did not see anything except a light way up the track which looked like a lantern, until the train was just upon us, at which time I saw the headlight of the engine" (p. 84, ll. 1-15).

Dr. Rodman admitted that he had had a conversation with the defendant's agent on this subject and said that he was not prepared to deny that he had so stated to the agent (p. 68, l. 10 to p. 69, l. 10).

Other evidence showed beyond question that the headlight was burning:

Engineer Kinney examined the engine at Monroe. He took particular notice that the headlight was burning (p. 103, ll. 10-20).

Fireman Kane observed the headlight at Graycourt (p. 111, ll. 20-40). He also observed the reflection of it as the train proceeded (p. 113, ll. 1-20).

Fireman Daly was working on the same engine as far as Graycourt—a station about 30 or 35 miles west of Allendale. He lighted the headlight that evening at the "Creamery" (p. 119, ll. 1-25).

Brakeman O'Hara saw the reflection of the headlight on the track ahead (p. 126, ll. 20-35).

Conductor Terwilliger got off the train at Waldwick after the accident and observed that the headlight was lighted "all right." It could be seen for half a mile or a mile (p. 133, ll. 1-15).

Donohue, engineer in the Waldwick yard, saw the headlight of the approaching engine from his position in the yard (p. 138, ll. 1-20).

Becker, milk handler in the Waldwick yard, noticed the headlight after the train arrived in the yard (p. 148, ll. 1-30).

Jeffers, milk handler in the Waldwick yard, saw the headlight as the engine came by the

tower at the westerly end of the platform where he was working (p. 154, ll. 1-20).

Reynolds, passenger conductor, on duty in the Waldwick yard, saw the headlight half a mile up the track (p. 157, ll. 20-25).

Bender, operator at the Waldwick tower, located about half a mile east of the crossing, saw train 84 approach when it was about 1,000 feet from the tower. He noticed the moving headlight (p. 160, ll. 10-30). **10**

It may also be claimed that plaintiff's view was obstructed by a westbound freight train which had passed over the crossing shortly before the accident on track No. 3. Plaintiff in his testimony did not mention this train and it is referred to in this brief only because some claim was made on that subject at the first trial. The evidence of the operator in the tower is that this train had passed the tower five minutes before the eastbound passenger train by which the plaintiff was hit (p. 161, ll. 30-40). It must therefore have been several thousand feet, and possibly a mile or more, west of the crossing before the plaintiff reached the crossing. **20**

There remains for consideration the crossing statute of 1910 (p. 490) which provides that in actions where the company has not installed any safety gates, bell or device usually employed to warn and protect the traveling public, it shall be left to the jury to determine whether the person injured or killed was exercising due and reasonable care. In the present case the evidence shows without dispute that there was erected at the crossing a certain device which was "usually employed" to warn the traveling public, to wit, a standard railroad crossing sign (see photo 5296; see testimony of plaintiff's surveyor, p. 6, ll. 1-10). **30**

It will be observed that the statute of 1910 does *not* apply to a crossing where there has been installed a "device usually employed" to warn the traveling public. If the ordinary crossing sign, such as was installed at this crossing, comes within the classification of such a "device," then it follows that the statute of 1910 has nothing to do with the case and the question of contributory negligence must be considered without
10 reference to that statute.

A crossing sign substantially similar to the one in use at the crossing involved in the present case is referred to in Section 35 of the General Railroad Law, under the terms whereof every railroad company is required to cause a sign to be maintained at each grade crossing, with the proviso, however, that such signs need not be maintained in any city, town, borough or village,
20 unless required by the municipal authorities. It is obvious from this statute that one of the devices "usually employed" to warn the traveling public was a sign such as was erected at the crossing in question. Evidently the legislature in passing the statute of 1910 contemplated that the company for the purpose of affording protection at crossings might install gates or bell or some other device—the only limitation being that it be such a device as is "usually employed." It
30 must be presumed that the legislature in passing the Act of 1910 had knowledge of the provisions of Section 35 of the Act of 1903 which prescribed a certain kind of device, to wit, a sign with a certain inscription thereon.

But even if such a sign (though it corresponds to those "usually employed") should not be considered as coming within the meaning of the word "device" as used in the statute of 1910,
40 still we submit that in a case as plain as this, the court has power to rule on the question of

contributory negligence as a matter of law notwithstanding the provisions of the statute. There can be no doubt about the power of the court in which the action is originally brought to set aside a verdict as against the clear weight of the evidence. This has been settled—at least so far as the New Jersey Supreme Court is concerned—by the decision in that court in *Lynch v. Pennsylvania R. R. Co.*, 88 N. J. L., 408.

True, the present case is not on rule to show cause. But suppose it were on rule to show cause? Can there be any doubt that the Supreme Court would set aside a verdict for the plaintiff as against the clear weight of the evidence when it appeared that there was a clear view of approaching trains for over 2,000 feet at all points up to 225 feet from the track on which the train was coming. Under such circumstances, can we not go one step further and say that the Supreme Court on rule to show cause would set aside any number of verdicts for plaintiff as against the clear weight of the evidence? If so, then this court on appeal should hold as a matter of law that the plaintiff was chargeable with contributory negligence.

Baldwin v. Shannon, 43 N. J. L., 596;
McCormick v. Standard Oil Co., 60 N. J. L., 243;
Loper v. Somers, 71 N. J. L., 657;
Crosby v. Wells, 73 N. J. L., 790.

V.

The judgment of the Supreme Court entered on the directed verdict should be affirmed.

COLLINS & CORBIN,

Attorneys of Defendant-Appellee. 40

GEO. S. HOBART,
 Of Counsel.

Telephone 1697 Worth THE WEIBEZAHL PRINT 25 Elm St., N. Y.

—1917—

