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# New Jersey Court of Errors and Appeals

## Notice and Grounds of Appeal

NEW JERSEY SUPREME COURT

DAISY B. JAMES,

Plaintiff,

vs.

DELAWARE, LACKAWANNA &  
WESTERN RAILROAD COMPANY,  
MORRIS & ESSEX RAILROAD  
COMPANY, JAMES F. MOORE  
and JOSEPH I. CASE.

Defendants.

20

*To: Frederick B. Scott, Esq., Attorney of Defendants:*

TAKE NOTICE, That the plaintiff appeals to the Court of Errors and Appeals of the State of New Jersey from so much of the judgment entered in this cause as adjudges that the complaint of the plaintiff be dismissed as against the defendants Delaware, Lackawanna & Western Railroad Company, James F. Moore and Joseph I. Case, and that the said defendants recover of the plaintiff their costs, on the following grounds:

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40

## Notice and Grounds of Appeal

1. The trial judge directed the jury, before whom the case was tried, to render a verdict against the plaintiff and in favor of the said defendants, whereas the said judge should have submitted the issues framed by the pleadings to the jury to be determined by them, so far as the same related to the defendants Delaware, Lackawanna & Western Railroad Company, James F. Moore, and Joseph I. Case.

2. Under the evidence in the case the question of whether the said defendants Delaware, Lackawanna & Western Railroad Company, James F. Moore and Joseph I. Case, and each of them, were negligent and whether the said negligence was the proximate cause of the injury sustained by the plaintiff, and the question of whether said injury was caused by contributory negligence on the part of the plaintiff should have been submitted to the jury for determination.

ALEX. SIMPSON,  
Attorney of Appellant.

## Judgment Record

### NEW JERSEY SUPREME COURT

#### ESSEX COUNTY

DAISY B. JAMES, vs. DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, MORRIS & ESSEX RAILROAD Co., JAMES F. MOORE, and JOSEPH I. CASE.	}	Action at Law. 10 On Postea. Non Suit and Judgment for Defendant. Frederic B. Scott, Attorney.
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Delaware, Lackawanna and Western Railroad Company, Morris & Essex Railroad Co., James F. Moore and Joseph I. Case, the defendants in this cause, were summoned to answer unto Daisy B. James, the plaintiff therein, in an action at law, upon the following complaint:

(Summons issued June 7, 1917.)

County of Essex and State of New Jersey, says that:

1. The defendant, Delaware, Lackawanna & Western Railroad Company, is a foreign corporation, organized and existing under and by virtue of the laws of Pennsylvania, the Morris & Essex Railway Company, a corporation of the State of New Jersey, the defendant James F. Moore, is a resident of the City of Newark, in the County of Essex, and the defendant Joseph I. Case, is a resident of the City of Newark, in the County of Essex and State of New Jersey;

2. The plaintiff, on June 10, 1915, while law 40

## Judgment Record

fully crossing a public highway crossing of the defendant companies, known as Greenwood Avenue in Orange, in the County of Essex and State of New Jersey, where the rails of a railroad owned by the Morris & Essex Railroad Company, and operated by the Morris & Essex Railroad Company as hereinafter set forth; was struck by a locomotive in charge of the defendants, the Morris & Essex Railroad Company & the Delaware, Lackawanna & Western Railroad Company, and injured as hereinafter set forth by reason of the negligence of all of its defendants the Morris & Essex Railroad Company, the Delaware, Lackawanna & Western Railroad Company & James F. Moore, & Joseph I. Case.

20 The Morris & Essex Railroad Company, chartered; January 29th, 1835 LEASED; December 10th, 1869 State consents to Lease; February 9th, 1869, by act of Legislature of New Jersey of Morris and Essex Railroad Company to Delaware, Lackawanna and Western Railroad Co.

3. That on the 10th day of June, 1915, while the Morris & Essex Railroad Company was the owner of the said Railroad and responsible for injuries occurring as hereinafter set forth; and  
 30 for damages to persons injured by negligence of the operations of the said road, under its ownership and lease, the Delaware, Lackawanna & Western Railroad Company, was in the operation of the road under the lease aforesaid, through the said defendant James F. Moore, a locomotive engineer who was operating a locomotive thereon; and at the time the said James  
 40 F. Moore did not use reasonable care to propel

## Judgment Record

the said engine or give any signal of the approach in the same that is required by the Statute of the State of New Jersey, and did not use reasonable care to keep a lookout a proper distance from the said crossing by which lookout he would have seen the plaintiff in time to avoid injuries to her, but on the contrary he did not see the plaintiff until the said locomotive or engine, was a short distance away from the crossing and during all this time while he was acting although he could have stopped the said engine which was not proceeding a fast rate of speed, did not stop the same and continued and struck the plaintiff, and as he approached the said crossing he did not use reasonable care to observe that the crossing gates were up and it was likely the persons would be upon the said crossing and during all this time while he was acting as an engineer, he was operating the said train for the Delaware, Lackawanna & Western Railroad Co., and the Morris & Essex Railroad Company and the Delaware, Lackawanna & Western Railroad Company, also employed the defendant Joseph I. Case, who was the flagman at the said crossing and whose duty it was for the defendants to close the safety gates, and to warn persons upon the said crossing of the approach of the said train, and the said Joseph I. Case, in the line of his duty for the defendants aforesaid did not close the said safety gates, before the plaintiff was in a position of danger, although he saw or should have seen the plaintiff, although he knew the said locomotive was approaching which would endanger her, although he had ample

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## Judgment Record

time to warn her, and as a result of this negligence aforesaid of the corporations, aforesaid and individuals aforesaid acting in their line of duty for the said corporations, the plaintiff while lawfully upon the said crossing was struck as  
10 aforesaid, by a locomotive in charge of the said man James F. Moore, and severely injured so that her feet and portion of her legs were amputated.

4. By reason of this she lost wages she otherwise would have made and was forced to lay out money in medical expenses, and suffered great pain and is permanently prevented from filing her occupation that of a theatrical performer.

20 5. The plaintiff demands \$50,000.00 damages.  
ALEX. SIMPSON,  
Attorney for Plaintiff.  
(Filed June 30, 1917.)

The Delaware, Lackawanna and Western Railroad Company, one of the defendants in the above entitled action, protesting and objecting to being obligated to answer the plaintiff's complaint in the above cause in this Court, as will  
30 appear by the records in this Court, contrary to its petition for relief as set forth in and by its petition filed in this Court praying that the above cause be removed to the United States District Court for the District of New Jersey, nevertheless, without waiving any of its rights in the premises it herewith answers the allegations of the plaintiff's complaint as follows:

40 FIRST: It admits the allegations contained in the first paragraph of the plaintiff's complaint

## Judgment Record

with the exception of the allegation that James F. Moore is a resident of the City of Newark in the County of Essex and State of New Jersey, and as to this allegation this defendant says that the said James F. Moore is a resident of the City of Hoboken, County of Hudson and State of New Jersey. 10

SECOND: This defendant denies the allegations contained in the second paragraph of the plaintiff's complaint with the exception of the allegation therein contained that "The Morris and Essex Railroad Company, chartered January 29th, 1835 Leased; December 10th, 1869, State Consents to Lease; February 9th, 1869, by act of Legislature of New Jersey of said railroad to the Delaware, Lackawanna and Western Railroad 20 Company."

THIRD: This defendant denies the allegations contained in the third paragraph of the plaintiff's complaint.

FOURTH: This defendant denies the allegations contained in the fourth paragraph of the plaintiff's complaint.

For a first separate and distinct defense this defendant says: 30

FIFTH: That the plaintiff ought not to have or maintain her action against it because on the 22d day of June, 1915, the said plaintiff brought an action against this defendant in the Hudson County Court of Common Pleas of the State of New Jersey, which action was duly removed by this defendant to The United States District Court for the District of New Jersey in accord- 40

## Judgment Record

ance with the Act of Congress in such case made and provided, and that the said cause of action so brought in the Hudson County Court of Common Pleas and removed to said United States District Court for the District of New Jersey as  
10 aforesaid, was for the identical matters and injuries claimed by the above plaintiff in the above entitled action, and that thereafter said cause was duly tried in said Court, and on an appeal of the said cause to the United States Circuit Court of Appeals for the Third Circuit the said United States Circuit Court of Appeals for the said Third Circuit, as will by the record more fully appear, held and determined that the carelessness and lack of the use of her eyes by the  
20 plaintiff which the situation demanded at and prior to the time of her injuries alleged in said complaint, contributed to and caused the accident to the plaintiff for which said suit was brought.

For a second separate and distinct defense this defendant says:

SIXTH: That the plaintiff was injured while walking along the tracks of this defendant at a place where the same was not laid out upon a public highway, and that at the time of her said  
30 injuries the said plaintiff was not connected with or employed by this defendant, wherefore, by virtue of the statute in such case made and provided, the said plaintiff is barred from any recovery of damages from this defendant.

For a third separate and distinct defense this defendant says:

SEVENTH: That said plaintiff was injured while  
40 standing on the railroad property of this defend-

## Judgment Record

ant at a place other than a lawful public or private crossing, wherefore, by virtue of the statutes in such case made and provided, said plaintiff is barred from any recovery of damages from this defendant.

For a fourth separate and distinct defense this defendant says:

EIGHTH: That if then plaintiff was injured on the public highway crossing of Greenwood Avenue, she was guilty of contributory negligence in this that she entered upon said public highway crossing after the crossing gates were down for the protection of the traveling public from trains over said crossing.

For a fifth separate and distinct defense this defendant says:

20

NINTH: That said plaintiff, if she was injured on the public highway crossing of Greenwood Avenue, was guilty of contributory negligence in this that she entered upon said public highway crossing after the gates at said crossing had been lowered to protect the traveling public from the passage of trains over said crossing, and after she had been duly warned and cautioned not to enter thereon.

For a sixth separate and distinct defense this defendant says:

30

TENTH: That if said plaintiff was injured at the public crossing of said Greenwood Avenue, as alleged in her complaint, she was guilty of contributory negligence in entering upon said crossing under the crossing gates at said crossing when the said crossing gates were down for the protection of the traveling public from the pas-

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## Judgment Record

sage of trains over said crossing, which entry by the plaintiff was not at the invitation or solicitation or request of the servants or agents of this defendant, but wholly and solely voluntary upon the part of the plaintiff.

10 For a seventh separate and distinct defense this defendant says:

ELEVENTH: That said plaintiff was guilty of contributory negligence in this that she failed to heed the warnings and signals given of the approach of the engine which struck her.

For an eighth separate and distinct defense this defendant says:

20 TWELFTH: That if the plaintiff was an intending passenger at the time of her injuries, she was guilty of contributory negligence in this that she was endeavoring to approach the station premises of this defendant by way of a public highway crossing closed at the time to the traveling public by lowered crossing gates, on account of the passage of trains thereover, and which public crossing was not a part of the station premises of this defendant to which the said plaintiff alleges she was intending to go.

30 For a ninth separate and distinct defense this defendant says:

THIRTEENTH: That the said plaintiff was guilty of contributory negligence in that she failed to take any care or precaution whatsoever to observe the approach of the train which subsequently struck her.

40 Wherefore, this defendant prays *this* this Court do give judgment against said plaintiff in

## Judgment Record

favor of this defendant, together with its taxed costs in the premises.

FREDERIC B. SCOTT,  
Attorney for Defendant,  
Delaware, Lackawanna and Western  
Railroad Company. 10

(Filed Sept. 22, 1917.)

The Morris and Essex Railroad Company, one of the defendants in the above entitled action, answering the allegations contained in the plaintiff's complaint says:

FIRST: It admits that The Delaware, Lackawanna, and Western Railroad Company is a foreign corporation organized and existing under and by virtue of the Laws of the State of Pennsylvania; that this defendant is a corporation of the State of New Jersey; and that the defendant Joseph I. Case is a resident of the City of Newark, County of Essex and State of New Jersey. This defendant denies that the defendant, James F. Moore, is a resident of the City of Newark, County of Essex and State of New Jersey, but lives in the City of Hoboken, County of Hudson and State of New Jersey. 20

SECOND: This defendant denies the allegations contained in the second paragraph of the plaintiff's complaint, with the exception of the allegations that "The Morris and Essex Railroad Company, chartered; January 29th, 1835 Leased; December 10th, 1869 State consents to Lease; February 9th, 1869, by act of Legislature of New Jersey to said railroad by Morris and Essex Company to Delaware, Lackawanna and Western Railroad Company." 30 40

## Judgment Record

THIRD: It denies the allegations contained in the third paragraph of the plaintiff's complaint.

FOURTH: It denies the allegations contained in the fourth paragraph of the plaintiff's complaint.

This defendant, for a first and separate defense, 10 says:

That the plaintiff ought not to have or maintain her action against it because the said plaintiff undertook to cross the tracks of the railroad where she was injured without looking for the train which struck her, which carelessness and lack of use of her eyes which the situation demanded, and such lack of care on the part of the said plaintiff contributed to and caused the accident which she alleges to have injured her as 20 set forth in the plaintiff's complaint.

This defendant, for a second and separate defense, says:

That this plaintiff ought not to have or maintain her action against it because this defendant was not operating the railroad at the time and place of the accident complained of, and that the said plaintiff's complaint fails to set forth or disclose any violations by it to the plaintiff of its duties and obligations imposed on it by its charter. 30

Wherefore, this defendant prays that the action may be dismissed as against it with its taxed costs.

FREDERIC B. SCOTT,

Attorney of Defendant,

The Morris and Essex Railroad Company.  
(Filed Sept. 22, 1917.)

## Judgment Record

James F. Moore, one of the defendants in the above entitled action, answers the complaint filed herein and says:

FIRST: He denies that he is a resident of the City of Newark, County of Essex and State of New Jersey and admits that he is a resident of the City of Hoboken, County of Hudson and State of New Jersey, but he has no knowledge or information sufficient to form a belief so as to enable him to answer the other allegations contained in the first paragraph of the plaintiff's complaint. 10

SECOND: He denies the allegations contained in the second paragraph of the plaintiff's complaint, with the exception of the allegations that "The Morris and Essex Railroad Company, chartered; January 29th, 1835 Leased; December 10th, 1869 State consents to Lease; February 9th, 1869, by Act of Legislature of New Jersey of said railroad by Morris and Essex Company to Delaware, Lackawanna and Western Railroad Company," of which he has no knowledge or information sufficient to form a belief. 20

THIRD: He denies the allegations contained in the third paragraph of the plaintiff's complaint. 30

FOURTH: He denies the allegations contained in the fourth paragraph of the plaintiff's complaint.

For a first separate and distinct defense this defendant says:

That the plaintiff ought not to have or maintain her action against him because said plaintiff was guilty of contributory negligence in that she failed to take due and proper precaution and 40

## Judgment Record

observation of the approach of the train which struck her.

Wherefore, this defendant prays that the above action be dismissed as against him with his taxed costs.

10

FREDERIC B. SCOTT,  
Attorney of Defendant.  
JAMES F. MOORE.

(Filed Sept. 22, 1917.)

Joseph I. Case, one of the defendants in the above entitled action, answers the complaint filed herein and says:

20 FIRST: He admits that he is a resident of the City of Newark, County of Essex and State of New Jersey, but has no knowledge or information sufficient to form a belief so as to answer with respect to the other allegations contained in the first paragraph of the plaintiff's complaint.

30 SECOND: He denies the allegations contained in the second paragraph of the plaintiff's complaint, with the exception of the allegations that "The Morris & Essex Railroad Company, chartered; January 29th, 1835 Leased; December 10th, 1869 State consents to Lease; February 9th, 1869, by act of Legislature of New Jersey of said railroad by Morris and Essex Company to Delaware, Lackawanna and Western Railroad Company," of which he has no knowledge or information sufficient to form a belief.

40 THIRD: He denies the allegations contained in the third paragraph of the plaintiff's complaint.

## Judgment Record

FOURTH: He denies the allegations contained in the fourth paragraph of the plaintiff's complaint.

For a first separate and distinct defense this defendant says:

That the plaintiff ought not to have or maintain her action against him because said plaintiff was guilty of contributory negligence in that she failed to take due and proper precaution and observation of the approach of the train which struck her. 10

Wherefore, this defendant prays that the above action be dismissed as against him with his taxed costs.

FREDERIC B. SCOTT,  
Attorney of Defendant.  
JOSEPH I. CASE. 20

(Filed Sept. 22, 1917.)

The plaintiff who replies to the answers filed by the several defendants, denies the truth of the matters therein alleged as matters of separate defense.

ALEX. SIMPSON,  
Attorney of Plaintiff.

(Filed Sept. 25, 1917.)

30

This action was tried before Judge William H. Spier with a jury at the Hudson Circuit on December 20th, and 21st, 1917. On motion duly made the Court directed a nonsuit in favor of The Morris and Essex Railroad Company one of the above defendants, and against the plaintiff, Daisy B. James, with respect to the remaining defendants the Court, at the conclusion of the defendants' case, on motion duly made on their be- 40

## Judgment

half, directed a verdict in their favor and against the said plaintiff, Daisy B. James.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed  
Costs \$43.60 and that the defendants recover of  
10 the plaintiff their costs, which are  
taxed at forty-three dollars and  
sixty cents.

Judgment entered Jan. 16, 1918.

WM. S. GUMMERE, C. J.

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**Judgment**

## 20 NEW JERSEY SUPREME COURT

DAISY B. JAMES, vs. DELAWARE, LACKAWANNA AND WESTERN RAILROAD COM- PANY, MORRIS & ESSEX RAIL- ROAD Co., JAMES F. MOORE, AND JOSEPH I. CASE	}
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30 Whereupon it is adjudged that the complaint of the plaintiff be dismissed  
Costs \$43.60 and that the defendants recover of  
the plaintiff their costs, which are  
taxed at forty-three dollars and  
sixty cents.

Judgment entered Jan. 16, 1918.

WM. S. GUMMERE,  
C. J.

**Certified Copy of Judgment**

NEW JERSEY SUPREME COURT

DAISY B. JAMES,

vs.

DELAWARE, LACKAWANNA &  
WESTERN RAILROAD COMPANY,  
MORRIS & ESSEX RAILROAD  
COMPANY, JAMES F. MOORE  
and JOSEPH I. CASE.

Action at Law.                    10  
On Postea.  
(Judgment for  
Defendant.)  
Frederich B. Scott,  
Attorney.  
Costs \$43.60.

Judgment entered this sixteenth day of January A. D., nineteen hundred and eighteen, for the sum of forty-three dollars and sixty cents costs in favor of Morris & Essex Railroad Company on non suit; and in favor of the Delaware, Lackawanna and Western Railroad Company, James F. Moore and Joseph I. Case, on verdict; and against the plaintiff. 20

W. S. GUMMERE, C. J.

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 which said judgment is recorded in this office in Vol. 10 of judgments page 457. 30

In testimony whereof I have hereunto set my hand and the seal of said Court at Trenton, this sixteenth day of January, A. D., nineteen hundred and eighteen.

[Seal] WM. C. GEBHARDT,  
Clerk.

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**Testimony**

## NEW JERSEY SUPREME COURT

10	DAISY B. JAMES, vs. D. L. & W. R. R. CO.
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Tried December 20, 1917, before Speer, J. and a jury.

Alexander Simpson and Mr. Hobart for the plaintiff.

Frederich B. Scott and M. M. Stallman for the defendant.

20 WILLIAM G. ANDREWS, sworn:

Direct-examination by Mr. Simpson:

Q. Where do you live, Mr. Andrews? A. East Orange, New Jersey.

Q. On the 10th day of June, 1915, were you in East Orange? A. I was.

Q. And where were you in East Orange? That is, I mean, were you near Greenwood Avenue? A. At the time of this accident, yes.

30 Q. And which direction were you going on Greenwood Avenue? A. I was going north.

Q. As you arrived at the Greenwood crossing did you see anything; did you see an eastbound train approaching? A. Yes; I saw an eastbound train approaching just after I crossed.

40 Q. After you crossed; and as you saw it, was it east or west? A. It was in the vicinity of Grove Street station; I couldn't say whether it was just

## William G. Andrews—Direct

east or just west, but it was approaching east-bound.

Q. Coming towards New York? A. Yes.

Q. And then you crossed the crossing, didn't you? A. Yes, sir.

Q. After you had crossed the crossing did you see the lady standing on the crossing? A. Not at that particular moment, no. 10

Q. Where were you standing when you saw her? A. I continued on north on Greenwood Avenue and crossed Eton Place, and as I reached the corner, the north side of Eton Place, I turned around and then I saw her.

Q. Where was she standing when you saw her? A. Between the gates and the eastbound train. The east bound train by that time had crossed the crossing—was crossing the crossing. 20

Q. The east bound train was then on the crossing? A. Yes.

Q. At the time you got across—that is before you turned and saw her standing on the crossing, what happened with reference to the gates? A. Just as I crossed the gates were going down. I had to duck under the—dodge under the northerly gate to get over, yes.

Q. And when you turned around and saw her then, after you had gone forty feet, she was then on the crossing? A. Yes. 30

Q. What track was she on? A. West bound.

Q. And what was the next thing you saw? A. I saw the west bound train approach.

Q. How was it coming; fast or slow? A. Well, it was not coming very rapidly. It was slowing down as I saw it—slowing down very rapidly.

Q. How long before it struck her did you see it? A. Only a second or two. 40

William G. Andrews—Direct

Q. Where was she standing in reference to the crossing when it struck her? I mean was she in the centre of the crossing or more toward the west or more toward the east as you remember it? A. Approximately the centre; it may have been slightly east or west. It was practically in the centre.

10 Q. When it struck her what happened; did the engine go over her, or what happened? A. Well, the side of the pilot—there is a bar which is down close to the ground, within a foot of the ground—struck her and threw her over sidewise and possibly the bumper across the front may have struck her, but I could not tell exactly, it was so rapid, but that threw her sideways and I thought she was clear of the rack, but apparently it didn't throw her far enough and her legs still were on the track, but it threw her body clear of the rails.

20 Q. You did not go up to the scene of the accident, did you? A. Not for a few moments.

Q. Well, then what did you do? A. I looked at the crossing, noticed the condition of the crossing.

Q. And did you hear any bell of this approaching train from New York before it struck her? A. No.

30 Q. And did you hear any whistle given by this approaching train before it struck her? A. Yes.

Q. When was that; how soon before it struck her? A. That must—that was even before I saw it that I heard one whistle.

Q. That was the only whistle that you heard, was it? A. Yes.

Q. How long was that before it struck her? A. Well, probably two or three seconds; I could not say exactly.

40

William G. Andrews—Cross

CROSS-EXAMINATION by Mr. Stallman:

Q. Where are you employed? A. Crocker  
Wheeler Company.

Q. In what capacity? A. Sales Engineer.

Q. I understand you were going north on Green-  
wood Avenue? A. Yes. 10

Q. Where were you when you first observed the  
eastbound train headed toward New York? A. I  
was crossing the tracks.

Q. And there are two tracks there, are there  
not? A. Yes, sir.

Q. Do you remember which track you were on?  
A. I was walking—I was crossing the tracks and  
I noticed the gates coming down very rapidly.

Q. Well, what I was trying to get at was  
whether you were on the eastbound track or west  
bound track. A. No; I was on the west bound 20  
track as I noticed the train coming and the gates  
going down; I was on the west-bound track.

Q. I see; you had crossed one track, that is the  
track on which the trains go to New York? A.  
Yes.

Q. And then you were about on the west-bound  
track on which the trains come from New York?  
A. Yes, sir.

Q. When you saw the train going toward New  
York? A. Yes, sir. 30

Q. About how far away was that train? A. It  
was probably right about Grove Street Station.  
It was moving and I could not see the exact—

Q. Coming toward Greenwood Avenue? A. But  
it was right at Grove Street Station.

Q. A couple of hundred feet away? A. Yes,  
probably two or three hundred feet away, what-  
ever the distance of the station is. 40

## William G. Andrews—Cross

Q. And then you say as you stood there on that track and this train was coming, two or three hundred feet away, the gates came down? A. Yes. I was not standing; I was walking.

Q. I understand; you were walking. A. While  
10 I was walking I looked over and saw this train—  
looked around.

Q. Was there a gate on the north side of the tracks alongside of the west-bound track? A. Yes; that is the gate that I had to get under to get by.

Q. What do you mean, that you had to get under it? A. I had to hurry to get under it. It was coming down just as I passed under it.

Q. You saw that, did you? A. Yes.

Q. And at that time where was the west-bound  
20 train? A. I did not observe it at all that time. I  
paid no attention to it. It must have been some  
distance off; I would not have noticed it.

Q. And then you say you went under the gate?  
A. Yes, sir.

Q. And then you walked about forty feet? A. It  
is probably forty feet, yes.

Q. Yes; and then what caused you to halt or to  
look or to turn? A. I noticed this—the east-bound  
train—

30 Q. That is the train going to New York? A.  
Yes. I was formerly in the railroad business and  
I have a sort of a faculty of noticing trains—a  
fascination or something of that sort—and I  
turned and noticed this train, which was especi-  
ally—particularly different from the usual trains  
which pass our way; it was made up of vestibules  
and coaches which are used only on through  
trains.

40 Q. Oh! Something different from an ordinary

William G. Andrews—Cross

train? A. Yes; something which would attract my attention. I am familiar with the trains on the Lackawanna Road and this was different from the others in that respect.

Q. Not a local train? A. It was not a local train; it was a local train with through coaches that was made up special. It did not have the engine of a through train on it. 10

Q. At that time could you see the crossing? A. Yes.

Q. And where was this east-bound New York train with reference to the crossing? A. It was passing over it.

Q. Can you give us an idea of the length of the train in number of cars? A. No; I think it was five cars, but it might have been more or less; but the cars were passing over the crossing. 20

Q. The cars were passing over? A. Yes.

Q. The engine had already gone east beyond the crossing? A. Yes; it was travelling pretty lively.

Q. And was the west-bound train there at that time? A. Not when I first noticed, no.

Q. I mean when you turned around and looked at the crossing and saw the eastbound train crossing over, there was no westbound train there? A. No. 30

Q. And at the time this eastbound train was going over the crossing were the gates down? A. Yes.

Q. Well then at the time that you turned around and looked at this train going toward New York did you see the plaintiff? A. Yes, sir.

Q. And did you see the westbound train? A. Not at first. 40

## William G. Andrews--Cross

Q. How soon? A. Within two or three seconds.

Q. Just almost immediately then? Now you said something to Mr. Simpson about hearing a whistle. A. Yes, sir.

10 Q. What kind of a whistle was that? A. It was a long loud whistle and in my opinion it was the westbound train whistle because it was a long whistle and not a crossing whistle. The eastbound train could only have been whistling for the next crossing below, and that would have been a succession of sort blasts, and this was a long whistle such as that given in an emergency. I am familiar with the sound of the whistle; in an emergency they pull down hard on it and it is different from the ordinary service blast.

20 Q. How was it as to volume of sound? A. Extremely loud.

Q. Did you hear that whistle before you saw the engine? A. I did.

Q. How soon before? A. A second or two. The view was cut off by Muchmore's real estate office.

Q. There is a real estate office on the east side of the street? A. Yes.

Q. And on the north side of the track? A. Yes.

30 Q. Now you say that you saw this engine coming-- it was apparently slowing down very fast? A. Yes, as if the emergency brake was being applied.

Q. The brakes were being applied? A. I think so.

40 Q. And did you see this woman before you heard the whistle? A. Yes-- just at the same time-- as I turned and saw the woman I also heard the whistle. The two were together.

## William G. Andrews—Cross

Q. Then what did she do? A. She just stood where she was, and then the next instant the train struck her. She was still watching the eastbound train apparently; it seemed to me she was still watching the eastbound train.

Q. She seemed to be watching the eastbound train on the other track; is that right? A. Yes; she was faced toward it, yes. 10

Q. And at that time when you saw the woman standing there a second or so can you tell us how much of the eastbound train had cleared the crossing by the time the westbound train got there? A. I think the last car passed just as the engine struck her—approximately the same instant.

Q. The last car of the eastbound train just going over the crossing when the westbound train got there? A. Yes; just as the engine came up the last end of that train had either just gone over the crossing or was just passing it. 20

Q. Do you know where the gateman was at that time? A. He stood by his gate.

Q. That was on the opposite side of the eastbound train? A. Yes-- well, I could not see him because the eastbound train prevented me from seeing him; but he was standing there when he lowered it. That is the only place he could lower it from and presumably he was standing there. 30

Q. You saw him getting the gates down? A. He must have been there; they were going down; he must have been at his post.

Q. Then all this time that you saw the eastbound train going over the crossing and the westbound train approach you are sure that the gates were down? A. Yes. 40

## William G. Andrews—Cross

Q. You do not know where this woman came from? A. I did not notice where she came from. She was at the spot of the accident when I saw her.

10 Q. Do you know whether when the gates were coming down there was any—whether the gate bell was ringing or not? A. There is <sup>110</sup>—well, the little bell on the gate rang as the gates came down. There is a little bell there.

Q. You remember that, do you? A. I did not notice whether the gateman's bell was ringing. There is a bell in the gateman's house; I did not know whether that was ringing or not.

20 Q. You know on the gates there is a sort of ratchet arrangement that goes Ding-ding-ding as the gates come down? A. Yes; that was ringing.

Q. You heard that ringing? A. Yes.

Q. I understand you to say that this woman was a little to the east of the centre of the crossing? A. Yes; I think so.

30 Q. That is a little bit nearer the street of Greenwood Avenue? A. Yes, but I could not swear as to that exact spot because I did not measure it; but it seemed to me that it was just about in the middle.

Q. I see. A. Where the two gates come together. When they come down they come together and there is a space; that is the middle.

Q. When she was struck you say it threw her to the right? A. Yes to the right; to the north of the train.

40 Q. Did you observe sufficiently close, Mr. Andrews, so that you can tell us whether or not she was in the middle of this track or toward one

## William G. Andrews—Cross

side of it when she was struck? A. She was a little toward the north side; she was not in the middle.

Q. Nearer to the north rail? A. In fact when I first saw her I think she was not on the track at all. There is a space between the gate and the track and a person could stand there and a train could pass and they could still stand there safely. 10

Q. Eight or ten feet space? A. It is about the width of the track, whatever that is—six feet—but you can stand in between and still be safe; and I thought she was standing in that space, because people very often do on those crossings stand inside the gates.

Q. Where did the engine stop? A. The engine stopped—the engine was west of Greenwood avenue and the tender of the coal car was on the westbound crossing and the first truck of the baggage car was at a standstill across the limbs of the young lady. 20

Q. Then you mean the tender or tank of the engine was still on a part of Greenwood avenue?

A. Yes; that was a crossing and the engine was west of that.

Q. I see; so that the coupling between the locomotive and the tender was just about on the west sidewalk? A. Yes, just about. 30

Q. Do you know enough about the application of emergency brakes to say whether the emergency brakes were on? A. No; but it stopped more rapidly than I believe the service application stops a train; but I do not know enough about that to say positively. However, I was brakeman on a train and I know how they stop in service and how they stop in emergencies. 40

Walter W. Fehrs—Direct

WALTER W. FEHRS, sworn:

Direct-examination by Mr. Simpson:

Q. Where do you live? A. East Orange, New Jersey.

10 Q. What is your business? A. Florist.

Q. Were you in the florist business on the 10th of June, 1915? A. Yes.

Q. Where was your place of business? A. No. 4 North Nineteenth Street.

Q. Was that at the time near the Greenwood avenue crossing of the D. L. & W.? A. Yes about half a block.

20 Q. Were you in the vicinity of the crossing about six o'clock on the evening of the 10th of June, 1915? A. Yes.

Q. Where were you? A. Oh, just a few feet beyond the tracks, going north.

Q. I show you a picture and ask you if that is a correct picture of the crossing at the time, that you describe? A. Yes, sir.

Mr. Simpson: I offer that in evidence.

That was offered before—without any reference to the markings, I mean; there are some crosses—

30 Q. Without any reference to those crosses. A. Yes; I did not notice the marks.

Mr. Simpson: I would like to offer it.

Picture marked P-1.

Q. I understand you were in the vicinity of the crossing at the time this accident happened? A. Yes, sir.

40 Q. Where were you going? A. Returning to the store; going to the store.

Walter W. Fehrs—Direct

Q. Which direction would that take you, to the north or south? A. North.

Q. Toward Muchmore's or away from Muchmore's? A. Toward Muchmore's.

Q. Did you see this plaintiff on the crossing at any time while you were around the crossing? 10

A. Not until she was struck.

Q. Where were you then? A. Just past Muchmore's store.

Q. Where was she standing when she was struck? A. She was standing on the westbound track about in the centre of the crossing; that would be the centre of the street.

Q. Did you see any train proceeding east at the time she was struck? A. Yes.

Q. And where was that train at the time you first saw it? A. That was proceeding about to the Grove street station and possibly a little further to the east; somewhere in that vicinity. 20

Q. At the time you first saw it? A. Yes.

Q. And was that the time you saw the plaintiff struck? A. I believe it was, yes.

Q. What did you see? Will you describe to these men what you saw happen to the plaintiff when she was struck? A. When I saw the plaintiff on the track she was struck. At the time I saw her, she was standing in the centre of the street or the track facing toward the station, that would be north—that would be southwest. The train—the point of the cowcatcher or pilot struck her and it seemed the train was not going fast enough to throw her; it seemed to brush her alongside or hold her to the train; that would be the impression that I received at that time. 30

Q. And then what happened to her? A. Well, 40

## Walter W. Fehrs—Cross

as it brushed her it seemed to hold her to the train, or the train hold the plaintiff—or it seemed to me that the car—it was the coal car of the train she was injured by—it seemed to draw her to the trucks.

10 Q. What did you do after you saw her struck?

A. Well, I walked toward the accident or toward the crossing, and then I found that I would be of no assistance and I walked away again.

Q. Did you see her taken out from under the train? A. No; I did not stay that long.

Q. Where were you standing when you saw this?

A. Just beyond Muchmore's real estate office.

20 Q. How had you got there; had you crossed the crossing to get there? A. Yes.

Q. So that you had crossed the crossing to walk to the point where you were? A. Yes.

Q. At any time while you were crossing the crossing up to the time that you saw her struck did you or did you not hear any bell or whistle from this westbound train? A. No, sir.

Q. That is, you did not hear it? A. I did not.

Q. How far did the train go after it struck her?

A. A very few feet.

30

CROSS-EXAMINATION by Mr. Stallman:

Q. Now, Mr. Fehrs, at that time was your store in its present location? A. No; it was at 4 North 19th street at that time.

Mr. Stallman: Have you any objection to my referring to the map?

Mr. Simpson: No; go ahead; we will consider it in evidence.

40

Q. Now you are down on Greenwood Avenue

## Walter W. Fehrs—Cross

and Main now, as I remember it? A. Yes; that is right.

Q. On the west side of Greenwood avenue; and at that time your store was on the other side of Greenwood avenue? A. Right there (indicating point shown by Mr. Stallman on the map.) 10

Q. Then as I understand your testimony, you had come along the sidewalk on the east side of Greenwood avenue and going north? A. That is right.

Q. And you had got somewhere in front of Muchmore's coal office which is shown on the map by a yellow mark? A. Just a little beyond, say a few feet—right there at the line.

Q. I notice that in that same building there is a tailor shop, Cohen's tailor shop, about there (indicating). A. Just about there. We will say right there. 20 -

Q. Now as you crossed the crossing did you notice this train coming from New York? A. No, sir.

Q. What was it after you had gotten in front of Cohen's tailor shop, that caused you to turn around and see this woman on the track? A. Well, I guess there were screaming and whistling and enough noise to attract anyone's attention. 30

Q. I did not get the last. A. There was enough noise, enough unusual commotion to attract anyone's attention.

Q. By whistling do you mean the engine whistle? A. That I won't say, whether it was the engine whistle or what it was.

Q. You do not remember? A. Not quite.

Q. Then you turned around and you saw this 40

## Walter W. Fehrs—Cross

woman on the tracks? A. I saw the accident when I turned around.

Q. That is you do not have any recollection now of seeing the plaintiff standing there before the train struck her? A. No; I have no recollection  
10 of that.

Q. That is the first thing you saw, was the collision itself? A. Exactly.

Q. And at that time the plaintiff was facing somewhat in the direction of the station? A. Of the eastbound station, yes, sir.

Q. I call your attention to the meridian on the map which shows where the cardinal points of the compass are; do you see that from where you are sitting? A. Yes, sir.

20 Q. The arrow? A. Yes, sir.

Q. Now do you notice the east and west line up there? A. Yes.

Q. Is that about the direction that the plaintiff was looking or standing—something like the way I have the pointer pointed? A. Now the point of your pointer there is very near the way she was—

Q. The point of the pointer shows the direction in which she was standing at the time the  
30 accident happened? A. Yes, just about.

Q. And you do not know whether one second before the collision occurred she was walking or standing still? A. That I could not say.

Q. And then this engine you say stopped in a very short distance? A. Very short, yes, sir.

Q. Did you remember whether the gates were up or down? A. That I do not remember either.

Q. You remember testifying in this same case  
40 before, do you not? A. Yes.

Walter W. Fehrs—Re-direct

Q. Do you remember I asked you—page 46—  
 “And what caused you to turn around? A. Why,  
 I heard an unusual whistle and shriek—more of  
 a whistle”? Does that refresh your recollection  
 now as to what you heard at that time? A. If I  
 said it at that time I guess I must have said it. 10

Q. If you testified that way it was true? A.  
 Well, if that was the way I testified I guess that  
 is the way I testified. It is a year or more ago;  
 I do not just remember. I explained a moment  
 ago that it was an unusual commotion—whether  
 it was a whistle and shrieking that attracted my  
 attention, in answer to your question.

Q. If you testified that you heard an unusual  
 whistle that was true, wasn't it? A. If that was  
 the way I testified, why that is the way I 20  
 answered.

Mr. Simpson: Shriek more than a whistle,  
 it says.

Q. You testified to the truth, didn't you, the  
 last time you were called to the stand? A. I pre-  
 sume so.

Q. Yes; and your recollection was fresher then  
 than it is now? A. Yes, sir.

Q. And you did hear “an unusual whistle—a  
 shriek—more of a whistle;” you recall that, do 30  
 you? A. I believe I did say something like that.

RE-DIRECT EXAMINATION by Mr. Simp-  
 son:

Q. At the same trial also weren't the questions  
 and answers as follows: “Question”—

Mr. Stallman: I object to counsel cross-  
 examining his own witness.

Walter W. Fehrs—Re-direct

Mr. Simpson: I think I can show that he testified in a way that would qualify what Mr. Stallman says that he testified to. It is only part of the fact.

10 The Court: I will permit you to ask if he did not say at the time referred to by Mr. Stallman something else than what Mr. Stallman has referred to.

Q. Didn't you testify: "Just at the time that you saw the plaintiff on the crossing? A. I saw the plaintiff and heard the whistle and saw her struck at the same time. That is the only way I can put it, it was so quickly." Didn't you so testify? A. That is right.

Q. And that is the fact, isn't it? A. Yes, sir.

20 Q. Now when you were in this position—something I omitted to ask you—you had crossed this crossing yourself, hadn't you? A. Yes.

Q. When you went on that crossing to cross it and crossed it were those gates down? Not when you saw the accident but when you yourself were crossing the crossing? A. When I crossed the crossing the gates were up or I could not have gone across.

30 Q. About where in front of Muchmore's were you standing when you heard this shriek and turned? A. About, say, just the corner, about one or two feet may be beyond the point of the tailor's shop.

Q. Can you show me on this picture which has been offered in evidence where you had got to when you heard the shriek and turned? A. It does not show on that.

40 Q. How many feet do you say it is?

Mr. Stallman: Fifty feet.

William H. Crosby—Direct

Mr. Simpson: Fifty feet from the track  
Mr. Stallman says it is.

Q. It was where, do you say? A. Right there  
at the end of the tailor shop.

Q. Come down and mark it, will you, on the  
map? Here is the tailor shop right here. 10  
(Witness indicates.)

Mr. Stallman: Put "Fehrs" right across  
there

RE-CROSS-EXAMINATION by Mr. Stall-  
man:

Q. I wanted to ask you one question, Mr. Fehrs.  
Do you recall now when you saw the woman  
standing there where the eastbound train was?

A. It was approaching the crossing. 20

Q. That is the best you can say? A. That is  
the best I can say, yes, sir.

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WILLIAM H. CROSBY, sworn.

Direct-examination by Mr. Simpson:

Q. Where do you live? A. East Orange.

Q. What is your business? A. I am with Spen- 30  
cer Trask and Company, bankers and brokers.

Q. On June 10, 1915, were you in the vicinity  
of this Greenwood Avenue crossing of the Dela-  
ware, Lackawanna and Western Railroad? A.  
Yes, sir.

Q. About what time of the day? A. Around  
six o'clock, if I remember right.

Q. Did you see anything of this accident to the  
plaintiff? A. Yes. 40

## William H. Crosby—Cross

Q. Will you describe what you saw? A. I was standing inside of the garage, which is about 100 feet from the crossing, and I saw the plaintiff and the train at the same time. I saw the train hit her and knock her down, and as soon as I saw that I ran over to the crossing and assisted in taking her over to the doctor's office.

10

Q. Where was she taken from, what part of the train? A. Well, I—I should say the wheels of the baggage car had passed over her legs.

Q. And was she conscious or unconscious? A. Well, she was semi.

Q. Semi conscious? A. Yes.

Q. Where was she when you first saw her? A. In the centre of the track.

Q. At the crossing you mean? A. At the centre of the crossing.

20

Q. And did you notice the train approaching from the east at that time? A. No, sir.

Q. And how long had you been at your point of observation at the time you saw her; how long had you been at that place? A. I had been in there perhaps fifteen minutes.

Q. And did you hear this alarm whistle that has been testified to? A. No, sir.

Q. Did you hear any whistles sounded by this westbound train or any bell before the time of the accident? A. I do not remember hearing any whistle whatever.

30

Q. Or any bell? A. No bell of any kind.

CROSS-EXAMINATION by Mr. Stallman:

Q. You were not paying any attention to any signals, were you? A. No, sir.

Q. And as I understand it you were in the office

40

## William H. Crosby—Cross

of the garage which is shown on the map as "Garage, one story brick, Grove Taxi Co"? A. Yes.

Q. You were in a closed office? A. Yes large plate glass window.

Q. And the door of that office does not open right on the street, does it? A. No, sir. 10

Q. The rear of the office opens into the garage? A. The door may have been open at the time as far as I know.

Q. But you do not remember? A. I do not remember that.

Q. But there was no door open to the street right from where you were standing? A. No, sir.

Q. Big plate glass window there? A. Yes, sir.

Q. You did not notice the plaintiff at any time before the accident happened? A. No, not at any time. 20

Q. Do you know what it was that called your attention to that particular part of the crossing?

A. Well, as I remember right, there was a taxicab standing there at the station and my eye was focussed there as it pulled out of the station. Just at that time I saw the train and the plaintiff. At that time, that is when I saw her hit.

Q. You did not see her at any time before the actual collision took place? A. No, sir. 30

Q. What do you recall about the gates? A. I do not remember whether they were up or down.

Q. And you have not any recollection of the eastbound train at that time? A. None whatever.

Q. Did you notice how the westbound train stopped? A. Well, as I recall, it was running very, very slowly.

Q. When you saw it? A. Yes. 40

George B. Muchmore—Direct

Q. Yes; and then did it stop right away? A. I do not remember that, whether it did or not; it must have stopped, I guess.

Q. Do you remember when it stopped that the tender of the engine was still on the crossing? A. If I remember right, I think the engine was just  
10 past the crossing.

Q. I am speaking of the tender, the tank. A. Oh, the tender, the tank; I do not remember that.

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GEORGE B. MUCHMORE sworn:

Direct-examination by Mr. Simpson:

Q. You are in the real estate business near this  
20 Greenwood Avenue station? A. I am.

Q. And you were in business there on the 10th of June, 1915? A. Yes.

Q. Were you in your office at the time of the accident? A. Yes.

Q. Does this westbound railroad track run past your office? A. The side of our office.

Q. The side window of your office? A. Yes.

Q. Will you tell this jury what you saw of this  
30 accident? A. Well, I was sitting in the office. It was about closing up time—looking out of the window, when I heard this—I seen this young lady on the track and heard the whistle blow and the train rolled on up, going very slow, and knocked her over and ran over her legs.

Q. And where was the train with reference to your office window at the time that you heard this  
40 whistle? A. Well, we have a side window. It was below that, about the end of our forward approach to our building.

George B. Muchmore—Direct

Q. You saw it immediately after you heard the whistle didn't you, through the side window? A. Yes; saw the train coming, yes, sir.

Q. And it was going about how fast then in your opinion? A. Well, it was going slow.

Q. Could you give any estimate of the speed? You remember you made an estimate at the last trial as to how fast you thought it was going? A. Well, it was not going over—it kept slowing down all the time, and the fastest, I don't think it was going any more than ten miles an hour. 10

Q. Then what did you see happen to the young woman? A. Well, the train just grazed her and she rolled off the side and fell down. I thought the train had cleared her at first.

Q. Did you find out it had gone over her? A. Yes, sir. 20

Q. Now at the time when you first saw her where was she standing? A. Standing—in our office as you enter we have a rail about ten feet back from the window, and I was inside of that rail, looking out of the window.

Q. And what position was she in when you saw her first, that is with reference to the crossing? A. She was looking towards the southwest.

Q. Was she standing in the centre of the crossing or—A. She was standing about in the centre of the crossing, in the middle—about in between the two tracks, the westbound track. 30

Q. That is the two rails of the westbound track? A. Yes.

Q. You say she was looking southwest? A. Yes.

Q. Now from the southwest was coming a train at the time you first saw her? A. Yes. 40

## George B. Muchmore—Cross

Q. That is to that crossing, that is towards New York? A. Yes.

Q. Now this whistle that you heard, what kind of a whistle was it? A. It was a very loud whistle.

10 Q. A long, shrill whistle? A. Yes, sir.

Q. That was what attracted your attention, wasn't it, that shrill whistle? A. Well, I seen her on the track before the whistle.

Q. Well, there was not anything peculiar—I will withdraw that. But before you heard this long, shrill whistle had you or had you not heard any intermittent whistles? A. Not before that. The train was pulling in to New York—the east-bound train was going in.

20 Q. Did that whistle? A. No, sir.

Q. Did you hear any bell from the westbound train at all before you heard this shrill whistle? A. Not before I heard the—no, sir.

Q. How long did all this take that you have described—these happenings—in time, how long did they take, would you say? A. Oh, it was all done—well, what do you mean?

Q. From the time you heard the shrill whistle and you saw the woman struck, up to that time was that a matter of minutes or seconds or hours?

30 A. Oh, just a few seconds.

## CROSS-EXAMINATION by Mr. Stallman:

Q. Mr. Muchmore, I understand you to say that you heard the locomotive whistle before you saw it? A. Yes, sir.

Q. Now I am pointing to your office on the map. That is right, isn't it? A. Yes, sir.

40 Q. Marked "Muchmore Brothers' Real Estate and Coal"? A. Yes, sir.

## George B. Muchmore—Cross

Q. And I see on the map there is a gate right in the rear of your office—I mean a gate in the fence, and then the fence runs back to another fence about eighty feet from Greenwood Avenue. A. Yes, sir.

Q. Is the lot on which your office is erected about eighty feet deep? A. Well, it is about one hundred. 10

Q. And your building is about—part of it is about twenty-five feet long and then the tailor shop is about twenty-five feet further, isn't it? A. Yes.

Q. Now whereabouts was this engine when you first heard the whistle blow? A. Well, it was about in the middle of that—on the railroad side we have a window and it was below that.

Q. It was somewhere east of your window? A. Yes. 20

Q. It had not yet come in sight? A. No, sir.

Q. And then you say that you looked upon the crossing and you saw the plaintiff there? A. Yes.

Q. And she was looking in a southwesterly direction? A. Correct.

Q. Then when the engine went by your window you observed it was slowing down? A. Yes, sir.

Q. Now at the time that you looked out you could see the crossing gates, couldn't you? A. Yes. 30

Q. And in what position were they? A. The gates were down.

Q. And at that time you saw a train coming toward New York on the other track? A. Yes, sir.

Q. That is right, isn't it? A. Correct. 40

## George B. Muchmore—Cross

Q. And at the time you saw the plaintiff on the crossing how much of that eastbound train had gone over the crossing? A. Well, it was about in the centre—it was just passing over the crossing.

10 Q. The eastbound train was passing over the crossing and about half of it had already gone over; is that what you mean? A. Yes.

Q. And that was before the westbound train got to Greenwood Avenue? A. Yes.

Q. Did you at any time see the plaintiff turn and look toward the east? A. No, sir.

Q. And her back was practically turned toward you when you first saw her? A. Yes, her back was right—her back was towards me.

Q. Now she was not in your vision more than a second, was she? A. No, sir.

20 Q. You do not know how she got on the crossing? A. No, sir.

Q. And I understand you to say that when the engine struck her it sort of pushed her sideways? A. Yes, she kind of rolled standing up, and then she fell—fell down; she rolled along the cow-catcher—she fell back of the cow-catcher and then rolled and twisted around.

30 Q. Kind of spirally? A. Yes; it kind of twisted her, took her off her feet and rolled her along; then she fell.

Q. And you saw the westbound train stop, did you? A. Yes.

Q. And where was the engine when it stopped? A. Well, just about leaving the crossing at Greenwood Avenue.

40 Q. Do you remember that the tender of that engine was still on the crossing when the train stopped? A. Yes.

George B. Muchmore—Cross

Q. You often hear locomotive whistles, I suppose? A. Yes, sir; lots of them.

Q. How would you characterize that whistle that you heard from the locomotive before you saw it pass your office? A. Well, that was a different whistle.

10

Q. What? A. A different sound, a warning sound, a shrill whistle.

By the Court: Q. How much time elapsed between the time the shrill whistle blew and the woman was struck? A. Well, that was below our office the whistle blew, and the train rolling up, I don't know just how long.

Q. Well, can you give us some idea by clapping your hands and waiting a time and then clapping them again and tell us about how long? A. No; I do not believe I could.

20

By Mr. Simpson: Q. You said to me on direct that everything that you described happened in a few seconds. Now directing your mind to that and keeping in mind the Judge's question, can't you tell how soon it was from the time you heard the whistle until you saw the train pass your office and saw the woman struck? What would you say about that? A. Well, I should say it was about a minute—a few seconds.

Q. It was a very short space of time? A. Yes; very short.

30

By Mr. Stallman: Q. I would like to see what you consider a minute. Now when I touch this paper with my pencil you tell me when the minute is up. Now! A. (After a pause.) A minute!

Q. Well, it was eight seconds, Mr. Muchmore. That is all.

40

## Daisy James—Direct

Mr. Simpson: Mr. Maher. Mr. Maher is not here and they have agreed I might read his testimony. I have agreed they might read the testimony of any absent witness.

10 (Mr. Simpson reads the testimony of James J. Maher.)

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DAISY JAMES, sworn.

Direct-examination by Mr. Simpson:

Q. How old are you? A. Twenty-nine.

20 Q. On the 10th of June, 1915, what was your occupation; how did you earn your living? A. I was bookkeeper in a real estate office.

Q. But before that you had been in— A. I was in the Winter Garden.

Q. Chorus girl in the Winter Garden? A. Show girl.

Q. And in the summer season you were working as a bookkeeper?

Mr. Stallman: I object to leading.

The Court: She has already said she was a bookkeeper.

30 Q. On the 10th of June, 1915, were you in East Orange? A. I was.

Q. Will you please try and talk a little bit louder, because these gentlemen have got to hear. And where were you in East Orange in reference to the Greenwood Avenue crossing on that day? A. Well, I came up the path alongside of the tracks.

40 Q. How did you get on the path alongside the tracks? A. Through a lot at Eton Place.

## Daisy James—Direct

Q. From what street had you come? A. I do not know the streets.

Q. You had come from the street across some lots? I show you a picture—

Mr. Stallman: Is that in evidence?

Mr. Simpson: No

Mr. Stallman: It was used before. We will admit it. 10

Q. Calling your attention to this picture, can you point out where you came across the lot on the path which you say along the track? A. Is this the lot here?

Q. I do not know; that is what I am asking you. Here is a picture of a lot and a path.

Mr. Stallman: I object to counsel saying "Here is a lot and a path," because the picture does not show any lot 20

The Court: I sustain the objection to it.

Mr. Simpson: I withdraw that question.

Q. Can you tell by looking at the picture if that is a correct representation of the path which you refer to in your testimony, along which you walked? A. Well, I saw it so few times, Mr. Simpson, that I would not know.

Q. All right. Did you come out alongside of a path and walk on that path up along the track? 30

Mr. Stallman: I object as leading.

A. I went through the—

The Court: Objection sustained.

Mr. Stallman: Withdraw it.

Q. Just describe what you did. A. I went through the lot at Eton Place onto a path that runs parallel with the tracks and I walked up the track—up the path—alongside of the tracks.

Q. And where were you going? A. To Grove Street Station. 40

## Daisy James—Direct

Q. Were you walking in the direction of Grove Street Station on this path? A. Yes, sir.

Q. State where you arrived, if you did arrive, with reference to a street crossing? A. Greenwood Avenue.

10 Q. Just describe what you saw there, what there was at Greenwood Avenue. A. Well, there is a plank crossing.

Q. Yes, and what else? A. And a flagman and a house on the side that the station is on, and Grove Street Station is up further than the Greenwood Avenue.

Q. And were there or were there not gates there as you approached the crossing? A. Yes, sir.

Q. Now as you got onto this crossing what was the position of the gates; were they up or down?

20 A. The side I was on they were up.

Q. And did you see the flagman? A. Yes.

Q. Where was he? A. Standing in front of his house.

Q. Was there anything between him and you to prevent him seeing you? A. No.

Q. What did he do, if anything? A. Nothing.

Q. And what did you do when you got up to the crossing? A. Well, I was watching the train coming to New York.

30 Q. What was your intention in going in that direction; where were you going to? A. New York.

Q. To take a train? A. Yes.

Q. When you saw this train coming into the Grove Street Station where were you? I mean the train going to New York? Where were you with reference to the crossing? A. I was walking

40 up toward it.

## Daisy James—Direct

Q. How near to it when you saw the eastbound train, how near had you got to the first gate? A. Well, I was not to the crossing when I saw the train. I saw the train pass.

Q. Where was the eastbound train when you first saw it? Was it east or west of the Grove Street Station? A. It was coming into the station, going toward New York. 10

Q. Then how near were you; you were still walking all the time; you were still walking all the time; you were walking up towards the crossing, weren't you? A. Yes.

Q. Then how near were you to the crossing when you saw this eastbound train first? A. Well, I cannot judge distance, Mr. Simpson; I really could not say that. 20

Q. Then what did you do with reference to the crossing? A. I wanted to get—I thought that was my train and I tried to get it.

Q. Well, did you get on the crossing? A. I walked up on the crossing, and when I—

Q. And when you got on the crossing, how did you get on the crossing; I mean did you walk on the cobblestones or in between the rails or how did you get on the crossing? A. I went right in between the rail—between the gate and the track. 30

Q. The first rail? A. Yes.

Q. What is there between the gate and the first rail? A. A path.

Q. Aren't the cobblestones there between the gate and the first rail? (No answer)

Q. Well, you walked on—if you do not know—you walked on between the gate and the first rail, and did you keep going west? A. Yes, sir.

Q. How far west did you go before you started 40

Daisy James—Direct

to cross the crossing? A Well, as I remember, I was standing there near the centre of it when I saw the tr—the eastbound train pass.

Q. And did you hear any bell or whistle from the westbound train? A. No.

10 Q. Then what was the next that you knew? A. Well, the eastbound train passed by me and then that is all I know.

Q. You do not remember the westbound train hitting you at all? A. No.

Q. Where were you when you came to? A. In the Orange Memorial Hospital.

Q. And what was your condition? A. Both legs were amputated.

20 Q. Showing you a picture which has been admitted in evidence, which purports to be a picture of the crossing, can you point out where you entered on these cobblestones showing on the picture? A. Yes; right here (indicating).

Q. Will you make a cross where you say you entered on the cobblestones? A. Right there.

Q. Where I have made the lead pencil cross is where you entered on the crossing; and you then walked, you say, west? A. Yes.

30 Q. Were you standing, if you remember, or were you still walking when you were struck? A. I really do not know.

Q. You do not remember that? Well, did you have a return ticket of the Lackawanna Railroad in your possession for New York at the time? A. Yes, sir.

Q. And the last thing you remember where were you facing? A. Grove Street Station.

40 Q. Were you facing this train that was coming to New York, the train that was coming in? A.

## Daisy James—Direct

It was passing me; it went right in front of me while I was standing there.

Q. And you were looking towards it, were you?

A. Yes.

Q. In what direction? (No answer.)

Q. Up to the time that that train, the train coming to New York, came between you and the flagman that you have described, did you or did you not see the flagman do anything to you, in the way of warning you? A. He did not—I did not see him do anything. 10

Q. Were you watching him up to the time that the train cut him off? A. Yes.

Q. Did you see him do anything, either towards warning you or towards lowering the gates or anything else, up to the time the New York train cut off your view of him? A. No. 20

Q. How far away was he from you, would you say? A. The distance across the tracks.

Q. You could see him plainly? A. Yes.

By the Court: Q. Where were you when the New York train cut off your view of him? A. I was standing right on the crossing waiting for it to pass.

Q. On the crossing? A. Yes, sir.

Q. All right. And you were standing there waiting for the train to pass so that you might go where after it had passed? A. Over to the station. 30

By Mr. Simson: Q. What was your salary when you were working in the Winter Garden; how much did you earn? A. Thirty dollars a week.

Q. And have you been able to earn anything since your injury? A. No. 40

Daisy James—Direct

Q. How many months would you work in the theatrical season? A. From 1911.

Q. No. How many months would you work in the year?

The Court: What is the theatrical season, in time?

10 A. Well, when I have been on the road I have worked for a year.

Q. Do you work one month, a year, or two or three months a year? A. No; I worked all the time. I would go from one show to another. Mr. Shubert always employed me.

Q. I mean twelve months a year? A. Yes.

Q. And when you were traveling would you have to pay your own traveling expenses? A. Oh, no.

20 Q. That is, the thirty dollars you would get for yourself? A. Yes.

CROSS-EXAMINATION by Mr. Stallman:

Q. Had you ever been to East Orange before this day in question? A. Once before.

Q. You knew that Eton Place, the street on which you were walking this day, extended up to Greenwood Avenue, didn't you? A. I beg your pardon?

30 Q. You knew that Eton Place, the street on Greenwood Avenue? A. Yes.

Q. And then Greenwood Avenue runs north and south across the railroad; you knew that? A. I did not know it all then, no. I know it now.

Q. You say that on this day in question you got to Greenwood Avenue; that was not the first time you had been on Greenwood Avenue? A. No; I  
40 was there once before.

## Daisy James—Direct

Q. Now which side of this vacant lot were you when you turned into it; were you east of it or west of it on Eton Place? A. I don't know the directions at all, because I am not acquainted out there.

Q. All right; but you were walking along Eton Place and you came to this vacant lot? A. Yes. 10

Q. And you went through the vacant lot until you came to the railroad? A. Yes, sir.

Q. Then you turned west toward Greenwood Avenue? A. Yes.

Q. And you walked along the outside of the ties as I take it? A. The path, yes.

Q. There were railroad tracks there, weren't there, two tracks on that railroad? A. Well, away from me, yes, sir. 20

Q. What is that? A. It wasn't close to where I was walking.

Q. But then you walked along the outside of the track, didn't you, alongside the track? A. In this path alongside of the track.

Q. And you were about five or six or seven feet from the track itself, weren't you? A. Yes.

Q. And you kept going straight up in that direction until you got very near to Greenwood Avenue; is that right? A. M-m-m m-m-m. 30

Q. Then as you got near to Greenwood Avenue, as I understand it, you saw this train coming toward you, that is toward New York? A. Yes, sir.

Q. And you thought that that was the train that you intended to take, so that you hurried a little faster toward the crossing; that is right, isn't it? A. Yes.

Q. And then as you got very near to the cross- 40

## Daisy James—Cross

ing you discovered that the gate—the Greenwood Avenue gate—was just about in front of you, didn't you, so that you had to turn a little to your left in order to get up on the crossing? A. I know I went in on that side of the gate (indicating).

10 Q. On the left hand side of the gate? A. Yes.

Q. Which would be the inside? A. Yes.

Q. And then you immediately stepped on the track? A. Well, I know I was in the centre—I know I was on the crossing when this train passed me that was going to New York.

Q. All right. Now we will see if we cannot help out your recollection a little bit. Do you remember stepping up inside of this gate onto the street; do you remember that? A. Yes.

20 Q. And then what direction did you continue; did you keep straight on parallel with the track? A. Yes.

Q. And still some distance from it; is that right? A. I do not really remember that.

Q. Or did you turn your direction slightly so as to approach the track on an angle? A. I very likely did, because I intended crossing the track.

Q. Yes; and you started to cross just as soon as you struck the sidewalk on which you stepped?

30 A. I know I walked a little way before I started to cross.

Q. Now let me recall the situation to you. As you come up the track, alongside of the track, and you come inside of the gate, the first thing you come to is a sidewalk across the track there; isn't that right? A. Yes.

40 Q. Now as you got onto that sidewalk did you cross over the sidewalk into the street part—the driveway part of the street? A. I really could not tell you.

## Daisy James—Cross

Q. You do not remember that? A. No.

Q. But anyway you stepped from the space between the gate and the track up onto the street and you were then not on the track, were you? A. I really do not remember that, Mr. Stallman. I know I walked up the crossover to go to the station and I do not know whether I stepped on the track first or the plank first. 10

Q. I want to show you a photograph that Mr. Simpson showed you—P-1—and we are looking down the track in the direction from which you came. A. Yes.

Mr. Simpson: I object to that. You objected to my using it, didn't you? That is the photograph you objected to my using because it was not in evidence. 20

Mr. Stallman: Oh, no; this is the first one you introduced.

Mr. Simpson: All right.

Q. Now you came up the track in a direction toward us, where we are now standing? A. Yes.

Q. And you came first to the sidewalk? A. Yes.

Q. That is the first thing you did? A. Yes.

Q. And you do not remember now whether when you got on the sidewalk you turned directly to your left on the walk or whether you came out in the street a little ways and turned directly onto the walk; is that what I understand you to say? A. I do not remember that, no. I know I was right about there (indicating) when this New York train passed me. 30

Mr. Simpson: Mark that where she says she was.

A. I was right about there. 40

## Daisy James—Cross

Q. You mean when you came through the vacant lot? A. Yes.

Q. But after that you did not at any time turn to see if a train was coming from New York? A. I do not remember whether I did or not.

10 Q. But after you went in between the gatebox and the track you did not look to see if any train was coming on that track? A. I do not remember whether I did or not.

Q. Miss James, I want to refer you once more to Exhibit P-1. Does this photograph that I am showing you show what you call the path on which you walked? A. Yes.

Q. Is this the space on the outside of what appears to be ballast, crushed stone? A. Yes; it is right down in here.

20 Q. Yes; alongside of where those ties are piled up? A. Yes, sir.

Q. That is what I thought. Now do you remember how far it was from this vacant lot up to the street? A. I should judge it was about a block—a city block.

Q. A city block? A. I should think so.

Q. Well, in East Orange the city blocks are only two hundred feet. It was longer than that, wasn't it? A. I do not know; I could not tell you.

30 It looked to me as far as a city block.

Q. Now when you saw this train coming to New York you noticed it did not stop at the station? (No answer.)

Q. After you got nearer to Greenwood Avenue you noticed it was not going to stop at the station? A. Well, the station—I did not—I do not remember whether it was coming into the station or not. I saw it moving gradually toward me and

40 I stood there to let it pass.

## Daisy James—Cross

Q. Is that right where I am putting this cross?

A. Just about there, yes, sir.

Q. I will make a cross with a circle around it. As you stood there a train passed you on the right-hand track? A. Yes.

Q. And that train did not stop at Grove Street Station, did it? A. No. 10

Q. That was the train you expected to get, but it did not stop there and went right on to New York? A. Yes.

Q. And nearly all of that train went by while you were standing there? A. No, I do not remember that because I know I—

Mr. Simpson: Will you talk louder, Miss James? These gentlemen cannot hear you.

A. I know I stood there and watched that train—I remember it going by; I do not remember whether it all went by or what happened. 20

Q. That distance that you walked from the vacant lot up to the crossing is straight, isn't it? A. Yes.

Q. Straight path all the way? A. Yes.

Q. And the railroad track is straight for some distance toward Newark too, isn't it? A. Toward Newark?

Q. Yes. A. That is further down?

Q. Toward New York; I will put it that way. A. Yes. 30

Q. The track is also straight in the direction of New York? A. Yes.

Q. And while you were walking up this path and saw this train going toward New York, you did not at any time turn around to see if the train was coming from New York? A. I did when I started up the path. 40

## Daisy James—Cross

Q Well, you got to the crossing about the same time that the train did—the eastbound train? A. No; I got there a little before it.

10 Q. Well, when you stepped up on the sidewalk—from what you call the path up to the sidewalk—the engine of that train was just about on the opposite sidewalk, wasn't it? A. No.

Q. Had it still to pass a part of the street? A. It had not gone across at all. It did not cross until after I was standing upon the crossing.

Q. This was bright daylight, wasn't it? A. Six o'clock.

Q. On June the 10th? A. The 10th of June.

Q. You remember testifying in the other trial don't you?

20 Mr. Simpson: What page?

Mr. Stallman: Page 25.

Q. You remember testifying in the other trial? A. Yes.

Q. And didn't you testify this way: "When you were struck did you have any occupation at all; were you earning your own living? A. Yes; I was working in a real estate office." A. Yes.

Q. That was right, wasn't it? A. Yes.

Q. "Before that had you not been working in the Winter Garden? A. Yes." A. Yes.

30 Q. "What had you been doing in the Winter Garden? A. Dancing and show girl work. Q. How much had you earned? A. Twenty-five dollars." A. And thirty.

Q. You answered "twenty-five dollars," didn't you? A. Yes, sir.

40 Q. "When had your season ended at the Winter Garden? A. I left the Winter Garden show a year ago last September." You answered that way, didn't you? A. In 1914.

## Daisy James—Cross

Q. "That would be September, 1914? A. Yes."  
That is when you gave up your theatrical work?  
A. Yes.

Q. And this accident happened in June, 1915?  
A. Yes.

Q. "And after that, after September, 1914, 10  
where did you work? A. I worked in a real estate  
office." Is that right? A. I did work there, yes.

Q. You answered that way, didn't you? A.  
Yes.

Q. "What real estate office? A. Mr. Bachus'.  
Q. How much did you earn there? A. Well, he  
was a friend. Sometimes he would give me fif-  
teen dollars a week, and sometimes twenty." A.  
Yes.

Q. Now when you came up this, what you call 20  
path, Miss James, you did not observe how the  
gates were on the south side of the track? A.  
The side I was on?

Q. No; the other side. A. No; I did not.

Q. You do not know whether they were down or  
not? A. I did not notice.

Q. And on the side that you were going up—  
that side of the track—you could see the gate box  
standing up some distance ahead of you, couldn't  
you? A. Yes.

By the Court: Q. Well, was that the side that 30  
you would have approached from if you had come  
along the road instead of walking along the path-  
way? A. Yes.

By Mr. Stallman: Q. And that is where you  
walked inside of the gate? A. Yes, sir.

Q. Now you heard a whistle blowing just be-  
fore you were hurt, didn't you? A. I do not re-  
member whether I did or not—whether I did hear  
one. 40

## Daisy James—Cross

Mr. Simpson: Please talk up, Miss James. These gentlemen cannot hear a word you say.

By the Court: Q. Why did you look to see if that gate was up on the side that you say it was up on when you got on the crossing? A. Because  
10 if it had been down I would have stepped on the outside of it.

By Mr. Stallman: Q. You were still on this so-called path, as you call it, when you looked at the gate? A. Yes.

Q. Alongside of the railroad track? A. When I stepped up on the crossing it was up.

By the Court:

Q. You looked then to see if it was, when you stepped on the crossing, you looked at the gate?  
20 A. Yes; I know the gate was up when I stepped up.

Q. All right.

By Mr. Stallman: Q. Didn't you testify on the last trial that you heard a whistle and you thought it was the eastbound train?

Mr. Simpson: I object unless you point it out. I do not think she did. I think you ought to read it to her. What you want is on page 31 and 32—the bottom of page 31.

Mr. Stallman: No; that is not what I refer to. I think that is all. Oh, I want to  
30 ask one more question.

Q. Do you wear your artificial limbs? A. Yes.

By Mr. Simpson: Q. Can you or can't you wear them all the time, when the weather is like today? A. I do not wear them all the time. I have worn them.

Q. When the weather is like today what does it do to you? A. Then my limbs swell and I can-  
40 not put them on.

## Daisy James—Cross

Q. Mr. Stallman asked you about standing; you told him you stood at this point and waited while the other train went to New York, and you said you did not know whether it had all cleared you or not. Can you estimate in time how long you stood there before you were struck; was it a minute, two, three, four or five? A. I do not know. 10

Q. Was it some time though that you stood there before you—

Mr. Stallman: I object to counsel leading.

Mr. Simpson: Withdraw that.

Q. Was it or was it not; were you standing there— A. I remember standing waiting for the train to go by; while it was passing I was hit.

Q. But you do not know how long you stood there? A. No.

Q. Couldn't you say within a minute about how long you stood there? 20

Mr. Stallman: I object. The witness has stated several times that she cannot remember, she cannot tell how long it was. It seems to me this is very leading.

Mr. Simpson: Withdraw the question.

Q. Are you able or are you not able to make any estimate, I mean approximate the time you stood there, whether it was one minute, two minutes or three minutes? A. I cannot. 30

Q. Are you able to say how much of the train passed you while you stood there—going to New York? A. Well, I do not remember seeing it all pass me.

Q. Do you remember where the New York train was when you first saw it as you got on the crossing? A. On the other side of Grove Street station.

Q. And was it on the other side of Grove Street 40

## Daisy James—Cross

station or not when you stopped to let it pass?

Mr. Stallman: I object as leading.

The Court: I will sustain the objection.

Q. Where was the eastbound train when you stopped on the crossing, you say, to let it pass  
10 you; where was it with reference to Grove Street station? A. Just leaving Grove Street as if it had stopped and was leaving Grove Street.

Q. What portion of the station; I mean was it to the West of the station or the east of the station—that is the west being away from New York?

(No answer.)

Q. If you do not remember, say so. A. I do remember, but I do not know how to explain myself. I know I saw the train leaving that direc-  
20 tion and coming toward me and I stood there and let it pass.

Q. When you first stood there do you remember where the New York train was, what position it occupied in reference to the Grove Street station—when you first stopped and stood there in this point you marked? A. I should think it was then about in the front of the Grove Street station.

Q. The locomotive? A. No; the train; the middle of the train.  
30

By Mr. Stallman: Q. You saw that train just as soon as you turned out of the lot, didn't you—the vacant lot? A. Yes.

Q. And it was very near Grove Street station then, wasn't it? A. It seemed to me to be.

Q. Yes; and as you got nearer to Greenwood Avenue the train was getting nearer to Greenwood Avenue all the time too, wasn't it? A. Yes.

40 Q. So by the time you got to Greenwood Ave-

## Daisy James—Cross

nue or very close to it then that train was also very close to Greenwood Avenue; that is right, isn't it? A. I do not just understand you, Mr. Stallman.

Q. You understand that when you turned out of the vacant lot and started to go up the railroad tracks you saw that eastbound train coming? A. Yes. 10

Q. Toward New York? A. Yes.

Q. Then it took you some time to walk from that vacant lot up to the street, didn't it? A. Yes.

Q. And while you were covering the distance going west this other train was coming east all the time, wasn't it? A. Yes.

Q. That is right, isn't it? A. Yes. 20

Q. And you saw that the train did not stop at Grove Street station; you saw that, didn't you? A. Well, I was watching it and I wanted to catch a train and I was just noticing whether it stopped or what it did. I saw the train coming toward me and I stopped to let it pass.

Q. But you first saw it when you turned out of the lot. Now during all of that time the train kept coming nearer toward you, didn't it? A. Yes. 30

Q. And by the time you got to Greenwood Avenue that train was a good deal closer to Greenwood Avenue than it was when you first saw it? A. Yes.

Q. And when you got to Greenwood Avenue that train was also about to Greenwood Avenue, wasn't it? A. Well, Grove Street station is not such a distance from Greenwood Avenue, is it?

Q. Yes; now when you first saw the train you 40

## Daisy James—Cross

say it was near Grove Street station? A. It was coming toward Grove Street station.

Q. And when you got up to Greenwood Avenue then as you remember it the middle of the train anyway was passing Grove Street station; that is  
10 what your best recollection is? A. Well, you see, I was not looking directly at it; I was looking at it from an angle, so I know the train was passing the station; it was passing the station.

Q. When you first saw it? A. No; when I stepped up on the crossing.

Q. And then after that you walked a little bit further while the train was passing you? A. Well, to be explicit, Mr. Stallman, I stood on the crossing. When I stood there the train was coming and I stood there to let it pass.  
20

By Mr. Simpson: Where were you when you first saw the eastbound train, do you know—the train was going to New York—where were you when you first saw it? A. I was on the path.

Q. How near to the crossing; how near to the point that you stepped up on the crossing were you when you first saw this New York train? A. I had just about come out of the lot.

Q. Then when you got and stood on the crossing had the New York train or hadn't it reached the crossing, when you stood still? A. It hadn't.  
30

Mr. Simpson: I call Mr. Moore, the engineer. He has been subpoenaed. Do you object to my reading his testimony at the last trial?

Mr. Stallman: I do not think so.

Mr. Simpson: Page 58 and 59.

Mr. Stallman: No.

40 (Testimony of James F. Moore read to the jury.)

## Argument

Mr. Simpson: I want to read the testimony of the doctor, who is in the army. I cannot subpoena him.

Mr. Stallman: I think the medical testimony that was given at that time is hardly competent now. That is as to the condition. 10

Mr. Simpson: That is simply the condition at the time of the accident. I submit there is no force in that objection.

Mr. Stallman: My only point is that the diagnosis at that time might be different than now.

The Court: If it is not consented to I cannot require that it be read.

Mr. Simpson: The agreement made at the beginning of this trial was that I might read the testimony of whatever absent witnesses I might have and he might read the testimony of whatever absent witnesses he might have. 20

Do you consent to my reading it?

Mr. Stallman: Yes.

(Testimony of Dr. Douglas M. Campbell read to the jury.)

Mr. Simpson: That testimony was given on October 2, 1916. 30

Mr. Stallman: That may go on the record, may it not, the date this testimony was given?

Mr. Simpson: Yes; he has it there.

Now do you admit for the purpose of this case that the defendant Joseph I. Case was the watchman and the defendant James F. Moore was the engineer in the case? I 40

## Motion for Nonsuit

10 have proved that in the case. Then I want to preserve the right to exhibit to the jury these stumps after I can get the probation women to come in and help. That is my case, I think. You admit that the defendant Case was the watchman on the crossing?

Mr. Stallman: Yes.

Plaintiff rests.

Jury excused until 2:15 p. m.

20 Mr. Stallman: I move for a nonsuit in this case on the ground that the plaintiff has failed to establish negligence in any imposed duty toward her on the part of the defendant.

30 Your Honor will observe that this action is brought against the operating company, the Lackawanna, the owning company, the Morris & Essex, and James F. Moore, who was the engineer on the engine, and Joseph Case, who I believe was the gateman there at the time. I make this motion on behalf of all of the defendants. Particularly with reference to the railroad company defendants, I submit that the evidence does not show any facts from which negligence can be inferred with respect to any duty owing to the plaintiff under the circumstances developed by the case. By her own testimony she came upon the railroad property and traversed the railroad property as shown by the photographs and her

40

## Motion for Nonsuit

own evidence under such circumstances as bring her within the provision of the 55th section of the railroad law. She shows that she was walking in a place outside of the ties where she was in no danger and then as she got up toward this crossing she walked inside of a crossing gate and then onto the track where she was struck almost instantly after the blowing of alarm whistles were given. I submit that in walking along the track and inside the track and then in crossing inside the crossing gate the mere fact that she got access to within the lines of the public highway within that crossing gate does not relieve her from the status of those mentioned in that statute, that she was still then a trespasser. I say she is barred by that statute from a recovery under the facts that she has presented.

Then I submit that she was plainly guilty of contributory negligence on her own showing. She certainly owed to herself the duty of exercising a degree of care, in walking along this track and then in attempting to cross it on the inside of a crossing gate, she certainly owed to herself that duty of making some observation of the approach of a train.

The Court: What becomes of the observation that she says she made with respect to the gate?

Mr. Stallman: My point in that connection is that the gates are erected there for the benefit of travelers who must neces-

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10 sarily approach and cross a railroad on a public highway. That is, the law requires the gates to be placed there for the protection of those who in going along a highway come to a railroad where the presence of the gate would indicate to them—that is a lowered gate would indicate to them that there is a railroad there. Now there are cases in our state which hold that the fact that a gate was not lowered would not excuse a person from the exercise of reasonable care to ascertain whether a train was coming—

The Court: Those are cases before the statute.

'20 Mr. Stallman: Yes. That situation was changed by the Act, I think it was of 1909, and that Act your Honor will observe applies to travelers approaching railroad crossings. It does not in terms—and the legislature could not be presumed to have intended that that act should apply to persons who are approaching a highway crossing along a railroad. It is limited in its meaning and in its effect to persons who are traveling on a highway and thereby approaching a railroad. If your Honor will look at the enacting part of that statute and the title of it your Honor will see that that Act was enacted for the benefit of persons approaching a railroad crossing, travelers along a public highway.

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The Court: What becomes of the proposition that this woman when she got on the street, even though she were inside the

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gate, was not a traveler along a public highway, approaching the crossing? The crossing does not necessarily mean that the gates are a part of the crossing. It is the railroad crossing they are going over.

Mr. Stallman: Your Honor must take in- 10  
to consideration as I take it the photograph  
which is in evidence showing how this wo-  
man came up and that she came up the rail-  
road right of way and as she stepped onto  
this crossing she was inside the line of the  
gates, which is inside the right of way  
fences, inside the line of the fences; and  
my point is that she had no right—she was  
not of that status where she could rely upon  
that statute, and that statute was enacted 20  
for the benefit of a certain class of people.  
If your Honor will look at it carefully I  
think you will agree with me that the leg-  
islature contemplated persons walking  
down a highway. Necessarily in order to  
continue that journey they have got to cross  
railroad tracks, and the legislature said  
“If you have a gate there or if you have a  
flagman there the person who is approach-  
ing that railroad crossing on this highway 30  
will have a right to assume if a train is  
coming that the gate will go down—not be-  
hind them but in front of them, and that if  
a flagman is there and a person is ap-  
proaching that crossing he will give them  
warning, not after they get on the track  
but before they get on the track, so that  
that warning, whether by gate or by flag-  
man, will be given before they get into a 40  
place of danger.”

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10 The Court: What difference does it make whether a gate goes down behind them or in front of them, if the fact of the giving of the warning and the exculpation of the railroad company is accomplished if the gate goes down at the proper time? What difference does it make whether it is behind or before the person? And furthermore if a person is a traveler upon the public highway and has a right to rely upon those things as warning of the approach of a train, what difference does it make whether he looked at that gate from the front or whether he turned around and looked at it from the rear?

20 Mr. Stallman: I think that your Honor must take into consideration what class of people the legislature had in mind.

The Court: I do; and I think it was a liberalizing statute and the object was to warn passengers on the public highway. I do not think it requires anybody to be outside of the gate in order to advantage himself of the statute.

30 Mr. Stallman: Now there is another thing that should be considered in this connection, and that is that this statute in question provides that if a gate is out of order that there shall be a sign hung up somewhere—

The Court: Yes.

40 Mr. Stallman: Now you can gather the legislative intent as to the class of persons who are intended to be within that statute by considering that provision as to a sign.

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Such a sign if placed parallel with the track where it would be at right angles to persons on the highway would be absolutely illegible, it could not be seen by persons walking along the railroad.

The Court: What is the effect of putting 10  
it in the front where the people approach in the ordinary way from the outside of the gate? The effect is that if the gate is out of order and the sign is posted in a conspicuous place the railroad company is guiltless of negligence, if the sign is posted, even though the gate is not operated, so far as the right to have a presumption made that the party may go on without stopping, looking and listening. That is the only ef- 20  
fect of that.

Mr. Stallman: But I am arguing now that reference to the sign indicates what the legislature had in mind, that is the class of people that the legislature had in mind that that statute would apply to, because a sign of that kind to be effective must certainly be placed where people approaching the railroad on the highway could look at it and see it right in front of them; and yet 30  
a person walking along the railroad track could not see what kind of a sign because the plane of the writing would be in the same direction they were going, whether they were coming from the east or the west. In other words, if I were approaching a crossing and here was a sign which said "Gates out of order," I could not see it, walking right in the line of that sign, and 40

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it seems to me that shows what was intended and that the legislature intended that the provisions of the law should refer to the people on the highway who were approaching that crossing.

10       The Court: If that were so as a matter of practical application in many cases where the stations adjoin highways a party would be obliged to go out of the station and walk clear around, whereas the constant course of action is for the person to come down the platform and go over without going outside the station to see if they are going to drop the gates down, from the outside.

20       Mr. Stallman: But in a station situation we have a lot of different circumstances to consider.

The Court: What are the circumstances in that particular?

30       Mr. Stallman: The cases have held—there is a case against the West Jersey and Seashore Railroad Company in the Federal Court—Mr. Katzenbaugh was in it—where the Courts have held that where it is necessary to use the street as a part of the station grounds because you do not provide means to get from one track to the other that there is a different duty, that the railroad crossing is more than a railroad crossing, it is a part of your station ground.

40       The Court: In other words, you think the accidental physical fact of the location of the station changes the construction of a statute of the state? That is what your argument logically amounts to; and I do not think that is quite true.

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Mr. Stallman: No, I do not think your Honor gets me. There is no station involved in this suit.

The Court: No; there is no station. We are just arguing about certain physical conditions which might make it proper for a person to cross over without going outside of the gate first. 10

Mr. Stallman: Then I submit that the plaintiff shows herself to be guilty of contributory negligence in not—I think I have stated this point, but I do not know whether I have made it clear—in not making some observation to determine whether this west-bound train was approaching.

The Court: Of course that is your same point over again that you have argued, because if she were a person that did not have a right to rely upon the presumption then manifestly I must submit to the jury the question of whether she was contributorily negligent, or if it appears clear I must decide it myself. 20

Mr. Stallman: Then I submit that there is no evidence in this case that shows any wilful injury of this woman on the part of the defendant. 30

The Court: That rests on the theory that she was a trespasser or at best a licensee, because they do not have to wilfully injure her.

Mr. Stallman: The engineman—I merely mention that because the complaint might be construed to allege that she was wilfully run down by the engineman. I submit there 40

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10 is no proof of that, and the plaintiff could not recover on that theory. So that on the ground that the railroad company did not owe this woman any duty under those circumstances—the circumstances as shown by her case—that there was no negligence on the part of the railroad company, and that she herself is conclusively shown to be guilty of contributory negligence, both as a matter of common law in failing to look out for herself and also by reason of the statute, I submit that this motion should prevail; and of course I think your Honor has read Judge Buffington's opinion in this same case.

20 The Court: I have.

Mr. Stallman: And I submit that his observation that it was her violation of the state statute which brought her to the place where she was is a very pertinent observation, and does deprive her of the benefit which would accrue to her if she was a regular traveler on the highway. I think in general those are the principal points that occur to me at this time.

30 The Court: I do not think for the purposes of this case that I care to hear the other side, much as I am fond of their voices.

40 In the first place, I think that I am bound, as to at least many of the points that were argued by you, by the decision of the Supreme Court in the case of *Petersilge vs. N. Y. Susquehanna & Western Railroad Company*. There I had the ques-

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tion brought up—Mr. Hobart being then on the side that you are now on, representing the New York, Susquehanna & Western Railroad Company—as to whether or not a man who had come over from the West Shore Railroad company's station at Ridgefield and tried to pass the tracks of the N. Y. S. & W. R. R. Co., having walked out the right of way, and being a trespasser while doing that thing, or at best a licensee, and who then, in order to save the life of a young woman who was on the track in front of him, as he supposed, gave her a shove into the gate but himself lost his life in doing it—whether his representatives had a right to recover, first, upon the theory the defense urged that he was himself a trespasser or at best a licensee and had not been wilfully or wantonly injured; and on that point I went on at some length to show that if the man had been a trespasser while he was on the right of way but had entertained a design when he reached the crossing of using the crossing as a public highway, that he thereby ceased to be a trespasser; and I am very glad to see that that is the attitude that the United States Circuit Court of Appeals took in this case of D. L. & W. R. R. Co. vs. James, where the judge writing the opinion said: “In so walking along the track she was, by the New Jersey statute quoted in the margin (that is the 55th section of the railroad act) a trespasser; but while this was her then status it is clear that when she left the

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side path and entered on the street crossing and attempted to cross she ceased to be a trespasser; in other words, she became a passenger, and as such it would seem to me entitled to the rights of a passenger." Now then, the federal courts have not for the first time, in my judgment, differed from the state conception, as evidenced by its highest courts, of the state law. I think probably the most conspicuous illustration of that that I have any knowledge of is *Vreeland vs. Snare & Trieste Co.*, where the state courts of last resort had persistently negatived the adoption of the turntable doctrine and the federal court said "It is not settled in this state, so that we will take it up and settle it ourselves, and we will say it does not apply;" and they gave the plaintiff a recovery. I have a pointed recollection of that case because I tried one phase of it in the state court and the federal court disagreed very distinctly with what I had done, and then the Court of Appeals in this state when the next case of the same situation was tried stuck to its original ruling, and the result is an utter and hopeless confusion of opinion between the federal court and the state court. And so here I disagree very promptly with the very gist of the decision of the Circuit Court of Appeals where Judge Buffington in writing it says: "Nevertheless the fact of her"—I am reading now from page 346, 241 Fed. Rep.—"nevertheless the fact of her prior trespass is not to be overlooked,

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for by such precedent trespass she was enabled to reach the crossing inside the gates, which she would have had to pass had she come up by a proper approach on Greenwood Avenue." Now he says: "It follows, therefore, that by her violation of the statute of New Jersey she brought herself into a position where she had deprived herself of the protection which another statute of New Jersey also quoted in the margin (being the act requiring them to put the gates down and so on) was designed to give to those traveling on Greenwood Avenue as they approached such crossing." It seems to me that is exactly what does not follow. It may follow in his kind, but it does not in mine. I think that under the evidence in this case the jury might find that she would have been just where she was if she had come along the highway; and if the gate was up as she says it was she would have landed on exactly the geographical spot that she stood on when she was injured if she had pursued the law as you conceive it to be and have gotten outside the gate and then walked in, as she was in when, having come up the path and gotten on the public highway and gotten rid of the presumption of being a trespasser which attached because of the statute, she looked at the gate and saw that the gate was up and tells us on the stand here that if when she looked the gate had been down she would have gone outside of it.

Now of course I am perfectly well aware

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10 that my reasoning on this subject does not answer one phase of your argument, and that is that the statute was enacted for the benefit only of those who were travelers upon the highway and who approached the gates from the front. That is course is a subject matter upon which there is no judicial decision that I know of reported. In this state there surely is none.

Mr. Stallman: Justice Kalisch in one of those cases stated what the object of the statute was, but he did not state it with reference to any such state of facts as we have here.

20 The Court: No; and each case must be subdued to the situation that existed in that particular case and the ruling must be applied to those things. Now I think that the object of this statute is a broad and general and liberal object, to warn travelers upon the public highway, and if this woman was a traveler on the public highway and she relied, as she says she did, upon the fact that this gate was up and thereby warranted her in believing that she might cross without stopping, looking, and listening,  
30 that it is for me to say whether or not I will submit that case under those circumstances to the jury. There isn't any doubt about it at all that if she had approached that crossing from the street, in front, and this accident happened just as she says it did, that I would have been compelled by the very wording of the statute to submit this  
40 case to the jury.

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Mr. Stallman: I agree with you.

The Court: Precisely. And therefore the only question that arises is that the fact that she approached it from the pathway and got her observation of the gate from the inside of the gate rather than from the outside of the gate requires me to hold that the statute is entirely inapplicable and that she is relegated to her rights under the common law and you are entitled to have her held to those duties and obligations which arose under the common law and to have me say as a matter of law that because she did not approach in that way therefore the gate doctrine is not at all applicable and she, if she did not make the required observation, was guilty of contributory negligence—

Mr. Stallman: I also wanted to add that the facts which are brought out now at this trial being, well, the same as they were brought out at the last trial, so far as the evidence now shows it, we reserve all the rights that we may have under our plea of *res adjudicata*.

The Court: I do not know that there is any proof in the case yet what the former adjudication was. I think *res adjudicata* is a defense.

Mr. Stallman: Yes; I may have to put that in before I close.

The Court: Yes.

Mr. Stallman: But I do not want to waive, by making this motion and resting on that motion—I do not want to waive my rights—

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10 The Court: No. When the time comes  
you may put it in. I think the result of all  
that we have said, especially in the light of  
the fact that this precise question was  
raised and decided by me and passed upon  
by the Supreme Court in a rule to show  
cause in *Petersilge vs. New York, Susque-*  
*hanna and Western R. R. Co.*, requires me  
to deny the motion, and to that denial you  
may have your objection entered. And I  
may say, furthermore, that in deciding this  
motion I am deciding the motion not in any  
way controlled at this time by the judg-  
ment of the Circuit Court of Appeals of the  
United States, because that was a motion  
20 to direct a verdict after all the defense's  
evidence had been put in, and much of that  
is lacking here now.

Mr. Stallman: Yes.

The Court: So that I think I must, for  
the reasons I have given, deny the motion,  
and you may have an objection entered on  
the record.

30 Mr. Simpson: We consent to a nonsuit as  
to the *Morris and Essex*. There is no proof  
against them.

The Court: They are simply a holding  
company. I do not see how they are re-  
sponsible. I will determine now that they  
may be eliminated from the case and the  
motion in that particular is granted of  
course.

40 Recess.

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Mr. Stallman: There is another point I want to present for the record of the Court, and that is, inasmuch as the statute of 1909, that refers to the gates and flagmen, was enacted for the purpose of advising persons on the public highway of the fact that a train was coming, the fact that this plaintiff knew that a train was coming on the railroad before she got to this crossing deprives her of any benefit of that statute, because when she knew that the right of way was occupied by a train which she saw approaching in full view she then had no right to rely upon the lowering of a gate or the act of a flagman to advise her of that fact. 10

The Court: What do you say about that, Mr. Hobart? 20

Mr. Hobart: I do not think that that changes the situation in view of the provisions of the statute. It may be a matter for the jury to consider, of course—very properly so—as bearing upon the question of contributory negligence, but I do not think it changes the construction of the statute.

The Court: I think that this additional reason does not change my general impression. This is a motion for a nonsuit, and on this motion in my kind ultimately are but two questions. The first one is, Is the 55th section of the railroad act that has to do with a person being on the roadway a trespasser and so on, applicable? I think that that statute is not applicable for the reasons stated in this case in the Circuit 30 40

## Emma Ferguson—Direct

10 Court of Appeals and also for the reasons stated in Petersilge vs. N. Y. Sus. & W. R. R. Co. The next question is, is the other statute which has to do with flagmen and with gates applicable? I think it is. If this were a motion for a new trial I might be very much inclined to rule entirely differently from what I do now; and I do not say either that the fact that this woman approached the tracks for the purpose of crossing over is without significance in the case. I think it has significance, and very grave significance, but that significance does not require me to nonsuit but to bring the matter to the attention of the jury—

20 that is, I do not have to bring it there unless I am requested to—but my notion is that I am not interested with that proposition as a matter of fact and it will be considered by the jury and on the rule to show cause you will have an exception to the whole thing.

Mr. Stallman: I ask that my exception go to his Honor's additional reasons.

The Court: Yes; it goes to all of them.

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EMMA FERGUSON, sworn:

Direct-examination by Mr. Stallman:

Q. Where do you reside? A. Sixty-nine Springfield Avenue, Newark.

Q. What is your occupation? A. I am matron in the General Electric Lamp Works at Ampere.

40 Q. In East Orange? -A. Yes.

## Emma Ferguson—Direct

Q. Do you remember being anywhere near the Greenwood Avenue crossing of the Lackawanna Railroad in East Orange on June 10, 1915? A. Yes, sir.

Q. How did you approach that crossing? A. I came from work over Nineteenth Street into Greenwood Avenue. 10

Q. And going south? A. Yes, sir.

Q. Now do you know where Eton Place is, the street that runs the same direction as the railroad? A. Yes, sir.

Q. And about one hundred feet away, I should think: do you know where that street is? A. Yes.

Q. There is a store of some kind on that corner, isn't there? A. A drugstore one corner and a confectionery and paper store on the other. 20

Q. Which one of those stores is nearest to the railroad? A. The confectionery store.

Q. Is that a building which is wider in front than in the rear, do you know? A. No, sir, I do not know that.

Q. What is that? A. Wider in the front than the rear?

Q. Yes. I see on the corner of Eton Place and Greenwood Avenue, the southeasterly corner, is a stationery and confectionery store. A. Yes. 30

Q. Is that the one you have reference to? A. Yes.

Q. On the east side of Greenwood Avenue? A. Yes.

Q. Now did you pass that store on your way home? A. Yes.

Q. And you were walking in the direction of the railroad you say? A. Yes. 40

## Emma Ferguson—Direct

Q. Did you notice as you were near that store and going toward the railroad—did you notice the railroad gates? A. The railroad gates were down.

Q. At that time? A. Yes, sir.

10 Q. And then what did you do after you came around that corner or were near that store? A. I came around the corner, and as I got to the gate, the railroad gate, I rested my arm on the railroad gate.

Q. I see. Now did you see any train about that time? A. I heard the whistle of the train when I came around the corner of the confetionery store.

20 Q. Now I say when you got down to the gate did you see any train? A. Yes; I saw the train.

Q. In which direction was it going? A. Going toward up west—Orange.

Q. Toward Orange? A. Yes.

Q. Did you see any other train? A. Yes; there was a train going toward—coming in the depot toward New York.

Q. Now this train that you saw going to New York, did it pass you? A. Yes, sir.

30 Q. Where were you while it passed you? A. I was right at the gate.

Q. In what position was the gate then? A. The gates were down.

Q. And while you were standing there how much of this train passed you, that is the train going to New York? A. Well, I wouldn't—I cannot hardly say. It seemed to me it started out of the station just as I was coming up.

40 Q. Yes. Now you got up to the gate; while you

## Emma Ferguson—Direct

were standing at the gate how much of that train went by? A. Well, there were several coaches. Just how many I could not say.

Q. There was an engine on that train—a locomotive? A. Yes.

Q. And you think the locomotive and some of the cars went past you while you were standing there? A. No, yes. 10

Q. Now you say you saw a train coming from New York? A. Yes. sir.

Q. Now which of those trains was nearer to you, the one coming from New York or the one going to New York? A. The one coming from New York.

Q. That was on the nearest track? A. Yes, sir.

Q. And as you got down to the gate where was that train, how near to the crossing? A. Well, it wasn't very far away—the train was going slowly. 20

Q. Now let's get something of distance. Look down to the other end of the court room where the clock is and tell us whether or not it was that far away or nearer or further? A. It does not seem as if it was as far as the posts back there.

Q. Those white marble columns? A. Yes.

Q. The train seemed to be about that far away? A. Well, may be a little nearer. It might have been that distance. 30

Q. Did you see at any time Miss James, the plaintiff in this case? A. Yes.

Q. Where was she from you? A. When I saw the train I saw Miss James coming up the path beside the tracks.

Q. On which side, your left side or your right side? A. Well, as the train was coming this way 40

## Emma Ferguson—Direct

she was on this side, that would be the right-hand side.

Q. You say that you had your arm on the gate-

A. I rested my arm on the gate.

10 Q. Tell me this: Did she come from the direction in which the New York train was coming or the direction of the train coming from Orange?

A. The direction of the New York train.

Q. Yes; the New York train was west bound?

A. Yes; west bound.

Q. And she was coming west bound? A. West bound.

Q. In the ditch, you say? A. Sir?

Q. In the ditch? A. Yes—in the path alongside the track.

20 Q. Now when you saw her in the ditch—

Mr Simpson: I object to that. She says the path.

The Court: She says a path. You keep calling it a ditch; she says a path, and it may be a path; not all paths are ditches.

A. The path.

Q. In this place where you saw her coming—

A. The path.

30 Q. —about how far away was she when you first saw her? A. Well, she wasn't any further than she seemed to come along with the train, walk right with the—(answer not finished.)

Q. I mean in distance. About how far away would you say? A. I wouldn't judge it was any further than the train.

Q. About as far as the other end of the room?

A. Yes.

40 Q. And at that time what was the position of the gate? A. The gates were still down.

## Emma Ferguson—Direct

Q. How near were you to the gate at that time?

A. I stood right at the gate waiting for the trains to pass.

Q. Now did this lady come any nearer to the street while you were standing there? A. Walked right in front of me.

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Q. On which side of the gate? A. Between the gate and the train.

Q. Then which way did she go? A. She continued to walk with the train.

Q. Did you see her hurt? A. I saw her step in front of the engine.

Q. And how far away from you was that? A. I should judge in the middle of the crossing—middle of the crossing of Greenwood Avenue.

Q. Point out something here and tell us about how far away from you it was that she stepped in front of the train. A. Well, from the sidewalk to the middle of the street, I did not think it was—I cannot tell by feet.

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Q. No; just point out something here so the jury can see about how far it was. A. About as far as from here to the end of your table—to the end of the table here.

Q. This end or the other end? A. No, right, I should judge, to the edge of where you are sitting.

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(Mr. Stallman indicates.)

A. Yes; perhaps a little bit further, but not much.

Q. From where you are now? A. Yes; from where I am now to there.

Q. That must be twelve feet, I imagine.

Mr. Stallman: Does one of the jurors know how far that is?

40

## Emma Ferguson—Direct

A Juror: Ten feet.

Q. Did you hear anything in the way of a whistle? A. I heard the whistle of the engine as I—

10 Q. Which engine? A. The engine coming from New York.

Q. What kind of a whistle was it? A. An engine whistle; I can't—I only know an engine whistle. That is what it was.

Q. Can you tell us whether it was a loud or a soft whistle? A. Well, it was loud enough so that I heard it; and I don't hear real good.

Q. Do you know what Miss James did when that whistle blew? A. I suppose she was—whether she was walking when the—

20 Q. Not what you suppose. Did you see her do anything when that whistle blew? A. No; I wasn't to the railroad tracks, I heard the whistle blow as I came around the corner by the stationery store.

Q. While you were standing at the gate did you hear a whistle? A. No; I didn't hear the whistle then. I heard the whistle before.

Q. Did you see the train stop? A. Yes.

30 Q. Do you remember what part of the train was on the crossing when it stopped? A. The train was on the crossing.

Q. Do you remember where the engine was or the tank behind the engine? A. You will have to speak a little louder.

(Question repeated.) A. It was—it seemed right in the middle of the street.

Mr. Stallman: Cross-examine.

## Emma Ferguson—Cross

CROSS-EXAMINATION by Mr. Hobart:

Q. Was there anybody with you when you came around the corner of Eton Place and Greenwood Avenue? A. Yes, sir.

Q. Who were with you? A. Miss McDonald and Miss Burnet, the lady I came home from work with. 10

Q. Anybody else? A. Yes, sir; my daughter.

Q. Is that all? A. And another young lady was right back of us.

Q. Who was she? A. My daughter, Miss Adams, is a witness here, and the other young lady was never subpoenaed, I believe.

Q. Well, who was she? A. Well, I don't know her name; she was a stranger to me.

Q. Did you find out her name afterwards? A. 20  
I do not know the girl. She did not work there very long.

Q. Do you know where she lives? A. No, sir; I don't know anything about her.

Q. Is she here today? A. No, sir.

Q. Your daughter knows who she was, you think? A. Sir?

Q. You say your daughter knows who she was? A. No, sir; she doesn't know her either.

Q. Isn't there anybody who knows who she was? A. She was a strange girl who came up there to work. 30

Q. Came up where? A. Where I worked at the General Electric Company.

Q. Is she working there yet? A. No, sir.

Q. Now when you came around the corner there was not any train in sight, when you first got onto Greenwood Avenue, was there? A. No, sir. 40

## Emma Ferguson—Cross

Q. You could not see it if it had been in sight at that time? A. No, sir.

Q. The buildings were in the way so that you could not see it? A. Yes, sir.

10 Q. How close were you to the gates when you first noticed the train coming from New York? A. I was as close to the gate as I am to this—right by the gate.

Q. Standing right alongside the gate? A. Yes.

Q. Were you on the sidewalk? A. Yes.

Q. Or in the street? A. I was on the sidewalk.

Q. That is right near the gate post, is it not? A. Yes, sir.

20 Q. You were standing right close to the post, were you? A. Yes, sir; right at the gate. Here was the post, and I stood here.

Q. And that is where you were when you first noticed the train, is that right? A. Yes, sir.

Q. Now, how close to the crossing was this train coming from New York when you first saw it? A. Well, I should judge from here down the room to—I do not know the distance—in feet.

Q. About the length of this room? A. Yes; a little less than that.

30 Q. Now you saw another train also? You saw another train on the other track, going in the other direction? A. Yes.

Q. Was that train on the crossing at that time, or where was it? A. That train had seemed to start before—I saw that other train coming down before the New York train got up to the crossing, and the engine, and I did not know how many coaches had passed.

40 Q. By the New York train you mean the train going to New York? A. The train going to New York.

## Emma Ferguson—Cross

Q. Part of that had already got over the crossing, had it? A. Yes, sir.

Q. Now you heard the whistle blow, you have told us. Do you know where the engine was when you heard it blow? A. Down the road.

Q. Could you see it? A. I heard the whistle of the engine coming from New York. 10

Q. Up to that time you had not seen the train, had you? A. No, sir.

Q. You had not seen either train up to that time, had you? A. I saw the train going to New York.

Q. You had seen that one before? A. Yes; I saw that as soon as I—

Q. Did that one whistle? A. Because I could see up the track. 20

Q. Did that train whistle, the one going to New York? A. I did not hear that whistle. This was the New York train that whistled.

Q. You heard just the one whistle? A. Yes.

Q. That is all you heard at any time? A. That is all I heard.

Q. You did not hear any engine bell ringing? A. I might not hear it, because I am a little hard of hearing.

Q. Did you hear any engine bell ring? A. I did not hear the bell ringing. 30

Q. And you were standing alongside the gate post about ten or fifteen feet from the track? A. Yes.

Q. Were you—about ten or fifteen feet away from the track? A. Oh, no; I was right as close as I am here (indicating.)

Q. Now, you saw Miss James for the first time when she was walking along this path? A. Yes. 40

## Emma Ferguson—Cross

Q. How far was she from the crossing when you first saw her? A. Miss James was almost as far from the crossing as the train.

Q. Almost the length of this room from the crossing? A. Yes.

10 Q. And she kept right on walking along in the path? A. Yes.

Q. In the same direction as the train was coming? A. Yes.

Q. And was she walking as fast as the train? A. Well, the train was going very slow and she was walking about the same gait.

Q. About the same rate as the train? Who got to the crossing first, she or the train? A. Well, the train slowed up.

20 Q. Well, do you know which got to the crossing first? A. They seemed to get there not far apart.

Q. After Miss James got to the crossing did she go on the sidewalk? A. She walked on the track almost in the centre of the crossing.

Q. The centre of the street you mean, I suppose? A. Yes, the crossing—yes, the street.

Q. You know where the sidewalk is? A. Yes; I stood on the sidewalk.

30 Q. She had got beyond the sidewalk? A. Yes.

Q. And was about in the centre of the traveled road—the traveled highway? A. Yes.

Q. And where was the train when she got to the centre of the road? A. Well, she caught right up to the train; the train was going very slow to the station.

40 Q. Did she catch up to the train, or did the train catch up to her? A. Yes; she caught up to the train.

## Emma Ferguson—Cross

Q. She was going faster than the train, was she? A. No—the train was going so slow that she caught up to it.

Q. She was going faster than the train, was she? A. I do not say she was going faster than the train. I say she walked up and caught up with the train. 10

Q. All right. What part of the train struck her? A. She stepped in front of the engine.

Q. Was it the cowcatcher hit her or what? A. That I could not—she stepped right over and stepped, to my eyes, right in front of the cowcatcher.

Q. You saw her when she made the turn to take that step? A. I saw her when she made the turn.

Q. Did you call to her and try to stop her? A. 20  
No; I did not, because I was under the impression that she was going to step out under the gate. I could have reached out and saved her.

Q. You did not make any effort to save her? A. No, sir; I did not.

Q. At the other trial in this case did you say, on page 102, as follows: "Question 45: She turned then? A. She turned to the left. Q. 46: Where did she go? A. She stepped right on the cowcatcher of the engine"? A. That is where 30  
she stepped.

Q. That is correct, is it? A. That is correct; yes.

Q. Now, you have spoken of this whistle that you heard. Did you on this other trial testify with reference to the whistle as follows—page 101 — "Did you hear the whistle blow? A. There were two whistles I think there right of the same train. I heard two, not very shrill"? Did you 40

## Emma Ferguson—Cross

testify to that effect? A. I do not remember testifying two, because I only remember hearing one.

Q. You remember hearing one? A. Yes.

Q. And do you remember that the one that you heard was not very shrill? A. Well, as I tell you, I do not hear very good, and it did not sound so  
10 shrill to me.

Q. It did not seem that way to you? A. I am a little hard of hearing.

Q. All right. How did you happen to touch this gate or rest your arm on it, I believe you said—how did you happen to do that? A. Well, that was habit.

Q. Were you tired and wanted to take a rest, or what? A. I work ten hours a day on my feet, and I presumably am tired.  
20

Q. Did you rest your arm on the gate or on the gate post? A. On the gate itself, not the post. The post is down below—a little ways down—and I had my arm on the gate.

Q. You wanted to make sure the gate was down, did you? Is that the reason you touched it? A. No, sir.

Q. Didn't you so testify—question 54—“You wanted to be sure it was down? A. Yes.” Didn't you so testify? A. I still testify the gate was  
30 down.

Q. No; did you testify as follows—page 102—“Question 54: You wanted to be sure it was down? A. Yes.” A. Well, I answer yes.

Q. That is the fact, isn't it? Why did you have a doubt about whether or not it was down? A. Well, I did not have any doubts. I rested my arm on the gate because it was a habit, I tell you. I just came over that way three years, and I—  
40 every night and morning.

## Emma Ferguson—Re-direct

RE-DIRECT-EXAMINATION by Mr. Stallman:

Q. I just want to ask one more question that I forgot. During the time that you saw Miss James did she at any time turn around and look—A. No, sir.

Q. — back behind her? A. No, sir; I did not notice that she turned around at all.

10

RE-CROSS-EXAMINATION by Mr. Hobart:

Q. She had to turn to her left in order to walk toward the train, didn't she? A. I thought Mr. Scott meant coming up the path.

Q. When she got to the crossing she had to turn to her left, didn't she? A. She turned to her left this way, yes, right in front of the—

20

Q. You saw her do that? A. Yes.

Q. How far did she walk before she walked into the cowcatcher or into the train? A. Well, she only walked a short distance.

Q. Well, five or ten feet, or what? A. Well, a very short—perhaps as far as from here to the table there.

Q. About ten feet or so? A. Well, if that is ten feet.

Q. All right.

30

RE DIRECT-EXAMINATION by Mr. Stillman:

Q. How many steps would you say she took, if you can tell it that way? A. Steps? I don't know about the steps.

Q. All right.

## Edna Adams—Direct

EDNA ADAMS, sworn:

Direct-examination by Mr. Stallman:

Q. Where do you live? A. Springfield Avenue, Newark.

10 Q. Are you a daughter of Mrs. Ferguson? A. Yes, sir.

Q. In June, 1915, where were you employed? A. The Edison Lamp Works.

Q. In East Orange? A. Yes.

Q. Were you with your mother on her way home that evening? A. Yes.

Q. As you approached the railroad on your way home did you observe the gates at Greenwood Avenue crossing? A. Yes, sir.

20 Q. And about how far were you from those gates when you first noticed them? A. How far? About right around the corner at the confectionery store just where you could see as you come around the corner; I came right behind my mother, just in back of her.

Q. And did you continue to walk down Greenwood Avenue to the track? A. Yes.

30 Q. And while you were walking down toward the track was any change made in the position of the gates? A. No.

Q. Now when you got down to the railroad how close did you get to those gates? A. Well, I stood right in back of my mother, close to her.

Q. Yes; close enough to touch her? A. Yes.

Q. And at that time did you observe any trains? A. Yes.

40 Q. Well, did you see a train going toward New York? A. Yes, I did.

## Edna Adams—Direct

Q. And as you stood there did that train pass?

A. Yes.

Q. How much of it A. That I could not say.

Q. Any part of it? A. Yes; some part of it passed, but I do not know just how much.

Q. And which track was that on, the one nearest to you or furthest from you? A. Furthest. 10

Q. Now did you see any train on the nearer track? A. Yes.

Q. And where was that? A. That was a short distance from the crossing when I got there.

Q. Yes; And could you say how far or point out in the court room about how far that was? A. About to the end of that table.

Q. The end of the table at which we are sitting?

A. Right here (indicating). 20

Q. Did you hear anything in the way of whistle? A. Yes; I heard a whistle before—when we got to the corner.

Q. Did you see the plaintiff, Miss James, there at that time? A. Yes; when I got to the crossing I saw her.

Q. When you got to the crossing you saw her?

A. Yes.

Q. Where was she? A. Just a short distance; she was coming right with the train—right along-side of the train. 30

Q. And how far from the gate post? A. Miss James?

Q. Yes. A. She was between the gate and the train. The gate post? Well, I could not say just how far she was then.

Q. Well, was she on the street or not? A. No; she was in the path alongside of the train.

## Edna Adams—Direct

Q. I see; and at that time when you saw her in the path, how were the gates? A. Down.

Q. Did you see her struck? A. Yes.

Q. Just tell us how she was struck. A. She walked alongside of the train and when she got  
10 to the centre of the crossing she stepped right in front of the train and the cowcatcher threw her to one side. I thought that the train had gone on and had not hit her.

Mr. Simpson: I object to what she thought.

The Court: Objection sustained.

Q. Just what you saw, Mrs. James. How far did you say this woman walked before she got hurt? A. Just before she got to the crossing she  
20 walked to the middle of the crossing.

Q. Can you point out in this court room about how far it was that you saw her walk? A. About the length of the room, I should think.

Q. About the length of this room? A. Yes.

Q. During that time did you notice whether she at any time turned around? A. No; she did not turn around. She walked right with the train.

Q. When you were approaching this crossing do you know whether you got here before the east-bound train or not? A. No; I could not say that.  
30

Q. All you saw was the train going over the crossing? A. I saw the train going over the crossing. I was paying attention to Miss James.

Q. At that time what was your mother doing? A. My mother?

Q. Yes. A. Standing at the gate. She was resting on the gate.

## Edna Adams—Cross

CROSS-EXAMINATION by Mr. Hobart:

Q. Did she have both arms on the gate? A. Both arms, I do not know that; I could not say; She was resting on the gate.

Q. Did you know who this other lady was that was walking behind you? A. No. Miss Burnet 10 was with my mother and there was another lady with me.

Q. Who was that? A. I do not know who the lady was at that time.

Q. Was she walking with you? A. Yes, sir.

Q. You did not know who it was? A. No.

Q. Did you walk home from your business with her or what? A. Yes; to the trolley car.

Q. And did she work with you? A. No; she worked upstairs; I don't know her. 20

Q. With the same company? A. The same company.

Q. But in another department? A. In another department.

Q. You do not know what her name is? A. No.

Q. Didn't you hear it at the other trial? A. No.

Q. Didn't you hear Miss Burke say that her name was Joka? A. No; I do not remember it.

Q. Didn't you? A. No; I do not remember it.

Q. Well, was that her name? A. I do not know. 30

Q. Do you know where she is now? A. No.

Q. Have you ever seen her since? A. No.

Q. Did you ever see her after this accident? A. I do not think I did.

Q. Didn't she keep on working? A. She did not work very long. She left right after that, and I did not work there very long. I only worked there about a month. 40

## Edna Adams—Cross

Q. All right. Now where was Miss James when you first saw her? A. Just a short distance from the railroad crossing.

Q. And was she walking towards the street? A. Toward the crossing.

10 Q. In the path? A. In the path.

Q. Did you continue to look at her until she reached the sidewalk? A. Yes.

Q. And did you see her turn? A. No; I did not see her turn until she got to the middle of the crossing

Q. Well then there was a period of time when you did not observe what she was doing? A. Well, she walked right straight along with the train, all I could see, until she got to the middle  
20 of the track and turned into the train.

Q. Did you see her all of that time? A. Yes; I watched her.

Q. Or was there a part of the time when you did not see her? A. Well, that is all I saw.

Q. Did you testify at the last trial? A. Yes.

Q. And did you say—question 57—page 113—  
“When was it that she had been ahead of it?”—  
referring to the train—“A. I only remember  
when I first saw her and when she was turning  
30 my eyes were on her. I did not look at her after  
I first saw her.” A. I did not look at her after  
I first saw her?

Q. Did you so testify? A. I watched the woman from the time I first saw her.

Q. No; did you so testify at another trial? A. I do not know.

Q. What is that? A. I do not know. If it is  
40 there I must have testified that way, but—

## Edna Adams—Cross

Q. Well, was it true? A. I watched the woman and I do not remember her turning.

Q. No; was it true, what I have just read to you? A. Yes.

Q. Did you at the same trial testify as follows: immediately after what I have just read—"You are testifying to the first observation that you made and the last, and what happened between the two you do not know anything about?" and did you answer "No"? Did you so testify? A. Yes. 10

Q. That was true? A. Yes.

Q. Did the train hit Miss James? A. She stepped in front of the train.

Q. What was it that struck her or knocked her down or whatever it was? A. The side of the cowcatcher. 20

Q. Now, when you were walking along Greenwood Avenue after you had come around the corner was the train that was going towards New York then in sight? A. Yes, sir.

Q. And you saw that, did you? A. I saw it, yes.

Q. Did you see it pass over the crossing? A. Yes.

Q. Did you hear any whistle from that train?

A. I do not remember any whistle from that train. 30

Q. You only remember one whistle? A. Yes, sir.

Q. And do you know what train that came from? A. The one coming up the track.

Q. And how close was the engine to the crossing when that whistle was given? A. Well, that I do not know. 40

## Edna Adams—Cross

Q. Wasn't it very close? A. I could not say.

Q. Didn't you testify at the last trial as follows—"Question 44, page 112: How many whistles did you hear? A. One.

10 Q. And the locomotive was then within about thirty feet of the crossing; is that right? A. About as far as the end of that table.

Q. How far would you say that is? A. I could not say. (Colloquy between Mr. Simpson and Mr. Stallman)—What would you say, Mr. Stallman? Mr. Stallman: (After measuring it) 22 feet 6 inches." Did you testify to that effect at the last trial? A. Yes.

Q. That was correct? A. Yes.

20 Q. So that the whistle which you heard was within about 20 or 22 feet of the crossing when you heard it blow? A. Yes, sir.

Q. Up to that time you had not heard any signal at all from that train? A. No.

Q. Had not heard any bell? A. No.

Q. Or any other whistle? A. No.

Q. Had you heard any other whistle? A. No.

30 Q. The train that you had seen going towards New York, had that got past the crossing when you observed the train come along in the other direction? A. That I could not say; I remember knowing there was a train there, but I cannot tell you.

Q. Well, that train that was going toward New York, was that making some noise as it moved along? A. Yes.

Q. Was it making considerable noise? A. That I do not know.

40 Q. How fast was it going? A. Well, as fast as

## Joseph Case—Direct

a train would be that would leave the station; when it got there it was going, I could not tell you how fast.

Q. Well, it was going faster than the other one?

A. It was going a great deal faster than the other one.

10

Q. Much faster than the other one? A. Yes; much faster.

Q. The other one that was coming from New York was going very slowly? A. Yes, sir; very slowly..

Q. Hardly faster than a person would walk? A. Just about.

Q. And Miss James was walking about as fast as that train? A. Yes, about.

Q. And this other train that was coming from 20 was going a great deal faster? A. Yes.

Q. How much faster you do not know? A. No, I do not know; it was going faster, but I do not know how much faster.

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JOSEPH CASE, sworn:

Direct-examination by Mr. Stallman: 30

Q. Where do you live? A. 171 Sussex Avenue Newark.

Q. You were the gateman at Greenwood Avenue crossing in East Orange on June the tenth, 1915, were you? A. Yes, sir.

Q. Do you work now? A. No, sir.

Q. What is the matter? You seem to be laid up. A. Rheumatism. 40

## Joseph Case—Direct

Q. How long have you been out of the service?

A. Since last June.

Q. Now, do you remember this accident to Miss James, the plaintiff, on June tenth? A. Yes, sir; I do.

10 Q. Do you remember what time it was, what time of the day? A. Yes, sir; it was in the evening.

Q. Now, do you remember just before this accident happened, what if anything you did with the gates? A. What is that—was anything the matter with the gates?

Q. Did you do anything with the gates just shortly before this accident happened? A. No, sir, I did not. I lowered them down; they remained down and nothing had been done to them.

20 Q. You say you put the gates down? A. Yes, sir.

Q. For what train? A. The one going east.

Q. Going toward New York that would be? A. Yes, sir.

Q. And where was that train when you put the gates down? A. It was just coming into the Grove Street station.

Q. Do you remember now whether it stopped at the Grove Street station? A. Yes, sir, it stopped.

Q. You think it stopped? A. Yes, sir.

Q. And did it go over Greenwood Avenue crossing? A. It stopped, then started, and then went over Greenwood Avenue crossing, yes, sir.

Q. And you say that you had your gates down before it got to the depot? A. Yes, sir.

40 Q. How long did the gates stay down? A. I should judge about two minutes and a half to

## Joseph Case—Direct

three minutes. That is I shut them both ways, a train coming east to New York and the express I had noticed coming up from New York, and they remained down until that was clear, no train approaching.

Mr. Stallman: Do you hear that?—the 10  
last man on the jury.

The Juror: No.

Mr. Stallman: Will you repeat that  
answer?

(Answer repeated by the stenographer.)

Q. Can you tell us how much of the eastbound  
train had crossed over the crossing at the time  
the westbound train got there? A. Just at the  
verge of all crossing over—being all crossed  
over. 20

Q. I do not hear you at all. A. There might  
have been a coach of this eastbound train that  
had lacked it, somewhere not over twenty or  
thirty feet, that lacked of crossing, of the east  
bound train, as the other one came on it.

Q. About twenty-five or thirty feet of the last  
coach of the eastbound train? A. Yes, sir.

Q. Still had to go across? A. As this here  
westbound train came onto the crossing.

Q. Did you see anything of this accident? A. 30  
No, sir.

Q. Which side of the eastbound train were you  
on as it went by? A. On the south side—south-  
east.

Q. I understand; on the southeast corner of  
the crossing, you mean? A. Yes, sir.

Q. Your gate shanty is on the south side of the  
track? A. Yes, sir. 40

## Joseph Case—Direct

Q. Now before this eastbound train went over the crossing did you see the plaintiff on the crossing—this woman— did you see her on the crossing? A. I noticed somebody coming up, yes, sir; came up the railroad path and entered onto  
10 the crossing.

Q. No, I mean did you see anybody on the crossing—

Mr. Simpson: I object.

A. No, sir, I didn't. No, sir; I didn't.

Mr. Simpson: I will withdraw the objection.

Q. —at the time the eastbound train was coming? A. I noticed nobody, no, sir.

Q. Nobody there, you say? (Answer repeated  
20 by the stenographer.)

Q. What was the position of your gates when the westbound train arrived on the crossing? A. Clear down.

Q. You say the westbound train was an express train? A. Yes, sir.

Q. You call that an express train? A. Yes, sir.

Q. Did it stop at Grove Street station? A. No, sir.

Q. Do you remember where that train stopped  
30 after the accident, the westbound train? A. The westbound train stopped, just over the crossing that the engine was it stopped.

Q. How much of the train was over the crossing? A. About the locomotive and the tender—about one half of the tender.

Q. Did you hear anything of a whistle from that westbound train? A. Yes; it whistled when it was some forty or fifty feet from the crossing.

40 Q. Did you hear anything of the application of

## Joseph Case—Cross

airbrakes from that train? A. The air brake went right down then; they just come a little bit closer to me and instantly down the airbrake was.

CROSS-EXAMINATION by Mr. Simpson:

Q. At the day of the accident you were also suffering with this complaint, whatever it is you have now, weren't you? A. Very slightly at that time. 10

Q. You were suffering, weren't you? A. Slightly.

Q. You were in seemingly just as bad way at the last trial physically as you are now, weren't you, when you took the stand? A. Not quite.

Q. And weren't you asked this: "I notice that you are rather bad physical way. Were you as bad then as now?" and you answered, "Well, not quite." Did you so testify at the last trial? A. Yes, sir, not quite. 20

Q. That was the truth, wasn't it? A. Yes.

Q. So that you were sick, although you say not quite as bad. You were sick on the day of the accident with this same complaint? A. Slightly ailing, but not quite so bad, growing rapidly worse.

Q. If you were in the same condition at the last trial what did you mean by testifying at the last trial as I have read to you, that you were sick but not quite so sick, when you now say you were only slightly sick at the time of the accident? A. Well, I am still as bad or slightly worse at the present time. 30

Q. Now you said to Mr. Stallman you saw this woman come up the path and enter on the 40

## Joseph Case—Cross

crossing; is that a fact? A. I suppose it was her.

Q. Well, you saw some woman come up the path and enter on the crossing? A. Some woman.

Q. How far did she get on the crossing, onto  
10 your side? A. She got on the westbound side I should think about thirty or forty feet of the crossing.

Q. And did you do anything to warn her that a train was coming behind her? A. Yes, I hollered "Look out".

Q. You were asked about this at the last trial, weren't you? A. I do not know whether I was asked that or not. I am always when I run a crossing—I always yell "Look out".

20 Q. Did you testify—question 53—"what would you have done to guard this crossing, assuming that this woman had been on the crossing and you saw her? A. I would have simply yelled to look out.

Q. You did not say that to her? A. No, sir; I did not see her.

Q. Didn't you so testify at the last trial? A. I did not see her struck, no sir.

Q. Didn't you so testify at the last trial, what  
30 I have read to you? A. I did. I didn't see her.

Q. Now, is that true? Is that true, what I have read to you? A. Yes.

Q. Then how can it be true that you saw her and yelled to her, and you did not see her and did not yell to her? How can those both be true? A. She came up going west and I said to her, coming into the crossing as the gates were shut, "Look out," I said.

40 Q. You testified at the last trial that you did

## Joseph Case—Cross

not see her and did not yell at her, didn't you?

A. I always yell at them.

Q. Didn't you swear at the last trial: "You say you did not yell out to her? A. No, sir; I didn't see her." Didn't you so testify at the last trial?

A. It might be. I did not see her struck, certainly 10  
not.

Mr. Simpson: I ask that that be stricken out.

The Court: It may be. Answer the question.

Q. Didn't you so swear at the last trial, that I have read to you?

The Court: Now if you do not remember what it was that he read to you, we will have it read to you again. 20

A. That is it; I didn't see her.

Q. And you did not yell to her, did you? A. I yell to everybody who comes on this crossing.

Q. Did you yell to this woman? A. No, sir; I did not.

Q. Didn't you testify as follows—question 55—  
"You say you made an observation to see if there was anybody there? A. When my view was clear I did.

Q. Then before the eastbound train came in 30  
did you make an observation? A. Yes.

Q. You did not see anybody when you made that observation? A. No, sir, I didn't.

Q. Did you so testify at the last trial?

The Court: Well, what is the answer? A. No, sir; I did not see anybody.

Q. Did you testify this way that I have read to you? A. Yes, I did.

Q. You said that at the last trial—"There is 40

## Joseph Case—Cross

nothing to obstruct your view of the crossing"? And you answered "Nothing. Q. You have a perfectly clear view of the crossing? You did not see anybody before you put the gates down? A. No, sir." Did you so testify at the last trial? A. Correct.

10 Q. Now, I understand you to say you saw the woman come on the path and get thirty feet on the crossing; where did she stand when you saw her; where did this woman stand? A. She was fully thirty feet on the crossing, on the west-bound crossing.

Q. Now at the time you saw her standing thirty feet on the crossing where was the west-bound train; how far down towards New York? A. About forty to fifty feet—sixty feet, something like that; I did not measure it.

20

Q. How far was it down, the west-bound train, when you started to put down your gate? A. Let me see; well, that was about to the Roseville station, I should judge; I had shut off the one pulling east and remained shut up the one going west.

Q. Didn't you testify at the last trial, page 160, question 69, "When you saw this train coming in from the west, where was it when you started to put your gates down; how far was it from you? A. Oh, it was about four or five hundred feet from the crossing." Didn't you so testify at the last trial? A. Yes; I testified four or five hundred feet.

30

Q. That is the fact, that you did not start to put your gates down until this train was four or five hundred feet from the crossing?

40 Mr. Stallman: That was the west-bound train.

## Joseph Case—Cross

Mr. Simpson: I am talking about the west-bound train.

A. Yes; that was the west-bound train.

Q. Did this east-bound train stop at Grove Street? A. I think it did.

Q. And how long did it stand there? A. A 10 short time.

Q. And then it pulled out? A. Yes.

Q. Did you put your gates down before it started to pull out or before it came into the Grove Street station and stopped? A. Before it came in.

Q. So that you had them down while it stopped there? A. Yes, sir.

Q. And they remained down while it stopped and until it started to go to New York? A. Yes; 20 they passed me.

Q. When did you put your gates up? A. When the express going west passed me then I put my gates up.

Q. And was that express going west, this train which is supposed to have struck this woman? A. Yes.

Q. That is what you call this express? A. Yes.

Q. And when that passed you put your gates up? A. Yes, sir.

Q. How long did you say the east-bound train stood at the Grove Street station? A. It stood there about a—a very short time. 30

Q. Long enough to let on or off passengers? A. If there was any. It was a special train.

Q. Do you remember how many coaches it had on it? A. No, sir, not exactly. I should think about four or five.

Q. When it started to pull out of the Grove 40

## Joseph Case—Cross

- Street station where was the west-bound train, had it got on the crossing, do you remember? A. No, sir; it had not.
- Q. When it started to pull out the west-bound train had not got on the crossing? A. No, sir.
- 10 Q. Did the westbound get on the crossing before the eastbound cleared the crossing? A. They wasn't quite over the east-bound wasn't, as the west-bound just touched it. They were near on the crossing at the same time, but there was a little bit of difference, I think, it had just cleared, that east-bound.
- Q. Your recollection is the last coach was just clearing it as the west-bound entered the crossing? A. Yes, about that.
- 20 Q. Did you see two or three women, or one woman, standing on the other side, that is the west side, with their hands on the gates, or the hands of any one of them on the gate? A. I took no notice of it.
- Q. Well, did you see it? A. No, sir.
- Q. Were you trying to protect the crossing, that is looking over towards the north side of the crossing, when it was clear, just as the east-bound was pulling in? A. Yes; I was looking there,
- 30 looking all over the crossing.
- Q. It was your business to look at the crossing, wasn't it? A. Yes.
- Q. Looking over the crossing you say you did not see any women standing at the gates? A. Not to notice, because it was twilight at the time.
- Q. Twilight you say it was? A. About twilight, yes.
- 40 Q. It was about six o'clock on June 10th; that was broad daylight, wasn't it? A. It must have

## Joseph Case—Cross

been cloudy. It was growing dark at that time, that is turning a little dark.

Q. I see; turning dark at that time? A. Getting a little dark.

Q. Were the headlights lit on the engine? A. I do not know how that was, whether they were lit or not. 10

Q. You did not actually see the accident, you did not see the west-bound train hit the woman? A. No, sir.

Q. And what was the first you knew of the accident? A. When I heard the airbrake applied.

Q. And what observation did you make; did you look under the train? A. Just simply bowed my head down and seen somebody laid there.

Q. Was someone lying there? A. Yes.

Q. But you did not see this woman when she and the train came together? A. No, sir. 20

Q. Now, when you saw her standing there at the last time you saw her, was she standing between the two rails of the west-bound track or was she standing nearer to the east-bound track? A. I did not see her any more then she took the crossing and got in behind—my sight was obscured by that train.

Q. You said you saw her walk to a point thirty feet from the crossing? A. I saw her walking up the railroad path, I said, and just entering the crossing. 30

Q. But you told me you saw her come to the crossing and walk about thirty feet onto the crossing. She got about thirty feet; whether she was moving or stopped I could not say.

Q. You said—I want to clear this up; I do not want to confuse you—as I understand you you 40

## Joseph Case—Cross

told me you saw her walk to the crossing and go thirty feet on the crossing and stand; is that correct or not? A. I said nothing about the stand.

Q. Didn't you say you saw her standing there?

A. No, sir, I did not say I saw her standing there.  
10 I do not know whether she was moving or standing. She got about thirty feet; whether she was moving or stopped I could not say.

Q. You saw her for thirty feet? A. When the brakes was applied by the engine.

Q. But this thirty feet was west of the east gate post? A. Yes.

Q. Where was she when you saw her with reference to the rails; how near to the rails of that west-bound track was she? A. I thought she was  
20 just outside of it.

Q. Was she near enough to get hit by the train?  
A. She did not get hit.

Q. I say was she near enough in your opinion?  
A. My sight—I was obscured from a clear sight of it; I cannot make a statement very clear.

Q. You won't say that definitely? A. I cannot say that; I did not see that clear.

Q. Now you have flags in that little shanty of yours, haven't you? A. Yes, sir. There is a full  
30 set of flags there.

Q. Were those flags to be used by you—suppose you had seen this woman in a position of danger—to stop the train? A. If I had the opportunity.

Q. Is this little house in Exhibit P-2—is that your little house? That is where you stood? A. Well, it appears like it.

Q. How do you operate those gates; how are  
40 they operated, with a hand lever? A. With a crank.

## Joseph Case—Cross

Q. That is you are the only man on duty—on that crossing on the day of the accident you were the only man on duty? A. Just come on. The first train I shut for.

Q. Whatever was done you did, about the gates or watching or guarding, you did it? A. Yes, I did it. 10

Q. And it was your duty, it was part of your business if you saw a person in a position of peril, to warn them, wasn't it? A. Certainly.

Q. Now, these levers; did each side have one lever? I mean would one lever operate all four gates or two levers, one for each side of the gates? A. One lever one side and another lever the other side.

Q. So that you could have one side up and one side down? A. Yes. 20

Q. What kind of gates were they, these long gates that went up in the air straight and then came down again? A. Yes.

By the Court: Q. Did you say that you had one side up and one down? A. No, sir; I had them both down.

Q. Which did you put down first? A. I put them down even.

Q. Put them down at once, do you mean? A. A. Yes, sir. 30

By Mr. Simpson: Q. Were the levers together? A. They are put down with a pair of cranks as I call it.

Q. But were they both in the one place, these cranks? A. Yes, sir, so that you can get hold of them with one hand, right close together.

Q. But you can put them down together or separately if you like? A. Yes. I always put them 40

## Joseph Case—Cross

up together and down together. That was my mode.

Q. It would take a great deal of strength to simultaneously put both of those gates down together wouldn't it? A. No, sir, not a great amount, unless one of them had become uneven on  
10 account of the rain and freezing of them.

Q. And you were not very strong this day, if you had rheumatism? A. No, sir, not overly strong.

Q. You do not feel very strong today, do you? A. No, sir, not overly.

Q. And don't you think it would have been easier for you to put one down at a time then to attempt to put both down together? A. I was well able to put both down at the same time.

20 By the Court: Q. Where did you have this rheumatism, what part of you? A. It is all through me; muscular rheumatism.

Q. Is that the way it was at that time? A. It is worse now.

Q. Was it dispersed throughout your system at that time? A. Not like it is today, no, sir.

Q. As it was then, was it through your system generally? A. No, sir, I say it was not through my system as bad as it is at the present time.

30 Q. Where was it then? A. I had it—in my feet then. Now I have it more through my hands.

By Mr. Simpson: Q. At the last trial you were pretty much in the condition you are now; you had to be assisted to the stand and assisted off, at the last trial? A. Yes, sir.

Q. And didn't you say at the last trial that you were very slightly worse then than you were at  
40 the time of the accident; didn't you so testify at

## Joseph Case—Cross

the last trial? A. I said I was gradually growing worse, yes.

Q. At that time the rheumatism, at the last trial was all through your arms and through your body—the last trial, when you were at Trenton? A. Not so severe as it is now. 10

Q. Didn't you have to be helped to the stand? A. Certainly.

Q. And didn't you shuffle up to the stand, and wasn't the rheumatism all through your arms then at the last trial? A. Not so greatly through my arms as it is at the present time.

Q. But it was to some extent, wasn't it? A. Very slightly at that time.

Q. At the last trial? A. That was last June. It is gradually growing worse all the time. 20

Q. You were then, at the last trial, still employed as a gateman, weren't you? A. Yes.

Q. And you continued to be until when; when did you stop being a gateman there? A. About the first of last June.

Q. The first of this last June? A. About a few days in June; four days—four nights rather.

Q. Now this whistle that you heard, what kind of a whistle was it an alarm whistle? A. A shrewd whistle I would call it. 30

Q. A what? A. A shrewd whistle—a shrill whistle.

Q. That is the only signal you heard? A. Yes.

Q. And you heard nothing to attract your attention except the shrill whistle of the west-bound train, and at that time it was about forty feet from the crossing? A. Forty to fifty feet.

Q. Was it going fast at that time? A. No, sir; 40 slow.

John T. Drake—Direct

Q. How fast would you say it was going; about twenty miles an hour? A. Not over ten or fifteen miles an hour.

Q. And that is the only signal of any kind that you heard? A. Yes.

10 Q. What do you call this crossing where you were stationed; it is Greenwood Avenue, isn't it? A. Yes.

Q. It is a public street, in East Orange, is it? A. Yes.

Q. East Orange? A. It is East Orange.

20 Mr. Stallman: I want to correct a statement made on the record by Mr. Simpson—that cross question 69—I interrupted it there—about which train it was. The question is “When you saw this train coming in from the west where was it that you started to put your gates down?”

Mr. Simpson: Yes, from the west.

Mr. Stallman: That was an east-bound train, not a west-bound.

Mr. Simpson: I see what you mean. All right.

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30 JOHN T. DRAKE, sworn:

Direct-examination by Mr. Stallman:

Q. You are a civil engineer? A. Yes, sir.

Q. Employed by the Lackawanna Railroad? A. Yes, sir.

Q. Did you make the map hanging on the easel, an exhibit in this case? A. Yes.

40 Q. Does that map show the location of the first

## John T. Drake—Cross

vacant lot east of Greenwood Avenue, in June, 1915? A. Yes.

Q. Will you tell us how far that lot is from Greenwood Avenue? A. Can I scale it?

Q. Take from the middle of the sidewalk on Greenwood Avenue; that is a good place to measure from? A. Three hundred seventeen feet. 10

Q. That map is on a scale 1 inch equals 10 feet, as shown by the legend? A. Yes.

Q. Do you know whether the place you have marked Eton Place on the north side of the map is a street or not? A. It is a street.

Q. And it joins with Greenwood Avenue around the corner of the candy store there as it is shown? A. Yes.

Q. Have you indicated upon the map the boundary line of the right of way, Mr. Drake? A. Yes. (Witness indicates.) 20

Dot-dash line in red color.

CROSS-EXAMINATION by Mr. Simpson:

Q. What do you mean by boundary line? A. The limits of the railroad company property.

Q. The street that crosses the railway is Greenwood Avenue? A. Yes.

Q. A public highway there? A. Yes. 30

Q. What is the distance from the north rail of the east-bound track to the gate post? A. Which gate post?

Q. The easterly gate post.

Mr. Stallman: The one nearest Muchmore's coal office?

Q. Yes. A. From the north rail of the east-bound track to the gate post near Muchmore's office— 40

John T. Drake—Cross

Q. I mean the west-bound track? A. The north rail of the west-bound track to the gate post on the easterly side of Greenwood Avenue, is 9 feet.

Q. And what is the distance from the east gate post on the north side to the east end of the Muchmore building? A. About 6 1/2 feet clear.

10 Q. And what is the distance from the east gate post to the window in the side of Muchmore's on the south side of the building going east? A. That is the window in the south wall?

Q. Yes. A. Well, the window is not shown on the map, but it would be approximately the same.

Q. No; the window is in the centre. May be you and I are mixed up. I mean the gate post to the east end of the building right along. You see the building goes right along here. The gate post to here. A. Oh, I see. That is 25 feet.

Q. And the window is not shown? A. No.

Q. But if it was in the centre it would be about 12 feet from the gate post, wouldn't it? A. Yes, 10 or 12 feet.

Q. And what is the distance from the flagman's shanty to the north rail of the west-bound track in a straight line? A. Twenty-four feet.

Q. And what is the width of the crossing at Greenwood Avenue including the sidewalk? A. 30 The crossing you mean?

Q. It is cobblestones. From sidewalk to sidewalk what is the distance of the crossing? A. The cobblestones, 35 feet.

Q. That is it, 35 feet. And what would it be including the sidewalks? A. Over all?

Q. Yes. Forty-five feet—fifty-five feet

Q. Fifty-five feet? A. Yes.

40 Q. The Grove Street station, where is that, how

## Sheppard C. Kelsey—Direct

How far is the Grove Street station from the crossing?

A. About 300 feet.

Q. About 300 feet from the crossing? A. Yes, sir.

Q. I show you a photograph and ask you if this is the station that you refer to as being 300 feet? 10

A. Yes, sir.

Q. And does that mean 300 feet from the westerly end of the crossing? A. I believe I scaled that before (Witness scales it). Yes; that is right.

Mr. Simpson: We offer the map.

Map designated Exhibit P-1.

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SHEPPARD C. KELSEY sworn: 20

Direct-examination by Mr. Stallman:

Q. You are a Lackawanna Railroad conductor?

A. Yes.

Q. Do you remember being on a train in the neighborhood of Greenwood Avenue, East Orange, on the evening of June 10, 1915? A. Yes.

Q. In which direction was your train running? 30  
A. Travelling east.

Q. What sort of a train was it? A. Special.

Q. Did you make a stop of the train at Grove Street station? A. No, sir.

Q. Do you remember seeing a woman on the Greenwood Avenue crossing? A. Well, I would not say she was on it, no, but at the butt of the gate.

Q. You saw a woman near the crossing? A. Yes. 40

## Sheppard C. Kelsey—Direct

Q. And where were you when you saw her? A. If I remember correctly, I was between the second and third coach; there were five cars in the train, that would be three cars from the engine, or two from the rear end.

10 Q. On your train? A. On my own train, yes, sir.

Q. Going east? A. Going east.

Q. Now in what part of Greenwood Avenue crossing were you at the time that you saw this woman? A. I was directly on the crossing, you know, traveling east.

Q. You were moving I understand. A. Oh, yes.

Q. And it did not take very many seconds to cross over that street? A. No, sir.

20 Q. Then what did you see this woman do? A. Why, the best I could see from the observation I had from the observation car, apparently to me she looked as though she had stepped around the butt of the gate and was stepping onto the crossing. Now that is just the way it looked to me as as though that was what she had done.

Q. Now, at that time did you observe the gate? A. The gates were down.

Q. I am speaking specifically of the gates on the north side? A. Yes, on the north side.

30 Q. Did you observe the gates at any time before you saw this woman? A. Why, I could not say whether I had or not. Only that they were down and I see she was there.

Q. I see: Was there anything to cut off your view of her? A. No, sir; only the train coming west.

40 Q. There was a train coming west? A. It did not cut me off until after we had passed.

## Sheppard C. Kelsey—Direct

Q. What did you see this woman do until the other train cut off your view of her? A. Stepping up from, well, apparently from the ditch like, up onto the cobbles of the walk.

Q. You saw her step up there? A. She was just stepping up there as though she was stepping right onto the walk. 10

Q. Then what did she do? A. I could not tell you then. I was lost to view from that time.

Q. After that the west-bound train shut off your vision? A. Yes; also my own car, the observation that I stood in.

Q. At that time did you hear anything in the way of a whistle? A. Yes.

Q. Where did it come from? A. From the west-bound train. 20

Q. Did you hear anything in the way of application of air brakes? A. Yes.

Q. Where did that come from? A. The west-bound.

Q. About how far from the crossing was it when those things occurred? A. Well, pretty hard—I should think sixty—twenty—sixty—sixty feet, not over a car length; about sixty feet I should think, apparently to me; you know it was so quickly done; I was about sixty feet, a car length by their train; see? 30

Q. Then you heard what, or saw what? A. Heard the application; their engine had passed me.

Q. Which did you hear first, the whistle or the application of the air? A. The whistle.

Q. When you saw the gates were down— A. Yes.

Q.—was that before or after the west-bound engine came into view? A. That is before. 40

## Sheppard C. Kelsey—Cross

CROSS-EXAMINATION by Mr. Hobart:

Q. You say you were on that west-bound train in the observation car? A. East-bound train.

Q. The observation car? A. Yes.

Q. Was that the last car on the train? A. No, sir.

10 Q. What car was it? A. If I remember correctly, it was between the second and third car, there being five cars in the train.

Q. Were you taking up tickets or what were you doing there? A. No, sir; simply standing there in the observation.

Q. Standing on the observation part? A. It was a vestibule car.

Q. And you were standing in the vestibule? A. I was standing in the vestibule, looking out of the side window.

20 Q. Which side were you looking out of in the direction you were going, right or left? A. Left, in the direction I was going—headed east.

Q. How close was the car in which you were riding to this crossing when you first noticed this lady? A. We were directly on the crossing—shot on there so quickly, you know.

Q. Up to that time you had not seen her at all? A. No, sir.

30 Q. And up to that time you had not observed anything about the gates? A. No, sir; just as I shot by I observed the gates were down and she was apparently walking around the butt.

Q. You do not know anything about the gates before your train got on the crossing? A. Oh, no.

40 Q. You heard a whistle you say from the west-bound train? A. Yes, sir.

## Sheppard C. Kelsey—Cross

Q. Was it just one whistle? A. Well, we call it a blast.

Q. Just one long, continuous blast? A. Just one blow. That was all that there was of it, a danger signal as we give it.

Q. At that time the engine of that train was about 60 feet from the crossing, wasn't it? A. I should imagine so. It is hard to judge, shooting past so quickly. 10

Q. Had you seen that train at any time before you heard the whistle? A. No, sir.

Q. You did not hear that whistle before that from that train? A. No.

Q. You did not hear any bell ringing on that train? A. No, I did not notice any bell.

Q. When you passed the train you were still standing on the rear of this observation car? A. In the side door, yes. 20

Q. Door open? A. No, closed.

Q. At any rate, you passed within 3 or 4 feet of the engine of the west-bound train? A. Yes; that is the idea.

Q. And you did not hear any bell? A. No; no bell. I didn't think he had time to give any bell.

Q. At any rate, you did not hear any? A. I did not hear any. 30

Q. You know an engine bell when you hear it, don't you? A. Naturally.

Q. You are pretty sure this one did not ring? (Witness laughs.)

Q. Aren't you sure this one didn't ring? A. I would not swear it did or didn't; no.

Q. Are you sure you did not hear it? A. I did not hear it; I did not notice it.

Q. Now you heard the brakes put on on this other train, didn't you? A. Yes, sir. 40

## Sheppard C. Kelsey—Cross

Q. How close was the train to the crossing when the brakes went on? A. I could not tell you.

Q. Was it very close, within 6 or 8 feet of it?

A. He must have been on the crossing or close to it. Of course I could not see him; I could not see his front end.

10 Q. But as nearly as you can judge, the engine was actually within the limits of the crossing or very close to it. A. Yes.

Q. Within 6 or 8 feet of it, when you noticed the brakes applied? A. It must have been about there.

Q. Is that right? A. I do not know whether it is right or not. As far as my judgment goes, he must have been close or on the crossing.

20 Q. And before the brakes were applied did that west-bound train slow up? A. I would not say whether he was pulling when he went by me or not; I could not tell you.

Q. Well, you saw it, didn't you, for some considerable distance? A. Yes—no, I could not see him, only as he went by me.

Q. For how long a time or over how long a space did you see that west-bound train moving? A. About 10 or 12 feet.

30 Q. Well, weren't you looking out at the side of your train so that you could see it further than that? A. My side door is an enclosure. All I could see is what really I might gather from the space of a window.

Q. Just about as the trains were passing? A. Yes.

Q. And the same thing applies to the gates. You could only see them for that space of 10 or  
40 12 feet as you went by? A. That is all.

## James Moore—Direct

JAMES MOORE, sworn:

Direct-examination by Mr. Stallman:

Q. Mr. Moore, you were the engine man of this west-bound engine involved in this case, were you not? A. Yes, sir. 10

Q. How long had you been an engineer at that time? A. Eleven years, a little over eleven years.

Q. Did you see the palintiff before she got in front of your train? A. Yes, sir.

Q. Where was she? A. Walking parallel with west-bound track.

Q. On the track? A. No, on the path way.

Q. Whereabouts from the track? A. About 6 to 8 feet from it. 20

Q. On which side? A. The right-hand side.

Q. Yes. Now, was she clear of your train? A. Yes, sir.

Q. And as you approached Greenwood Avenue and as she approached Greenwood Avenue, what did she do? A. Stepped over to go across the west-bound track.

Q. Stepped from where to where? A. From this path way around the back end of the gates.

Q. Well, on which side of the gate did she pass to, inside or outside? A. Inside. 30

Q. Then what did she do? A. She started to go across.

Q. When that happened, what did you do? A. Oh, I had blown the whistle before that.

Q. I mean, when she started to go around the gate or around the track, what did you do? A. That is when I commenced to blow the whistle and applied the brake. 40

James Moore—Direct

Q. What kind of a brake did you apply? A. Used the emergency.

Q. Emergency? A. Yes, sir.

Q. Now, at that time, did you observe the gates at the Greenwood Avenue crossing? A. Yes, sir.

10 Q. In what position were they? A. They were down.

Q. On the north side? A. Yes, sir.

Q. And you applied your emergency brake—take that out—How far ahead of you was the plaintiff when she left the pathway, as you call it, and stepped over onto the track? A. About 30 to 40 feet.

Q. Then when you applied your emergency brake, how far did you run? A. About 125 feet.

20 Q. Twenty, you say? A. About twenty.

Q. What kind of a stop did you make? A. A good stop.

Q. Did you know that woman was going to step from the path in front of your train? A. How?

Q. Did you know that woman was going to from the path alongside of the track in front of your train? A. No.

30 Q. How far from Greenwood Avenue were you when you first noticed the gates were down? A. Well, eight or nine hundred feet.

Q. Can you tell us whether or not when she went around inside of the gate box, the plaintiff walked any closer to the track than she had been walking? A. No, apparently she was very close to the end of the gate box when she started.

40 Q. Now, when she went to go around the end of the gate box, I think you expressed it, did that take her any nearer or farther from the track?

## James Moore—Cross

A. I don't think there would be much difference, it is about in the one line.

Q. You mean if she kept going on straight ahead? A. About that, yes, sir; I will say that.

Mr. Stallman: Cross-examine.

10

CROSS-EXAMINATION by Mr. Hobart:

Q. Are you still in the employ of the Lackawanna? A. Yes, sir.

Q. Were you suspended at one time?

Mr. Stallman: I object to that as immaterial.

The Court: I think I will sustain the objection to that.

Q. You were running this train at a rate of about twenty miles an hour? A. About that.

20

Q. Where did you come from? A. From Hoboken.

Q. Where were you going? A. South Orange.

Q. Where was your last stop? A. We hadn't stopped since we left Hoboken.

Q. This was an express train, was it, or a special? A. It was one.

Q. An express train coming from Hoboken to South Orange? A. Yes, sir.

Q. How long had you been running this express train? A. Well, I most forget; I think that was the first time or second time I was on it.

30

Q. Had you run over that part of the road before? A. Oh, yes.

Q. On other trains? A. Yes, sir.

Q. Passenger trains? A. Yes, sir.

Q. You knew where the streets were located?

A. Yes, sir.

Q. You have spoken of giving a whistle—you

40

## James Moore—Cross

say you commenced to blow a whistle—how many whistles did you blow? A. One whistle.

Q. What kind of a whistle? A. Long sharp whistle.

Q. One long blast? A. Yes, sir.

10 Q. How close was your engine to the crossing when you did that? A. About thirty or forty feet.

Q. Did you know you were coming to any crossing? A. How?

Q. Did you know you were coming to any crossing? A. Yes, sir.

Q. Did you give any whistle before for that crossing? A. No, sir.

Q. No whistle before? A. No, sir.

20 Q. You didn't blow any crossing whistle for that crossing? A. No, sir.

Q. I see. At that time and any time, when you approached—you didn't at that time and never did when you approached that crossing? A. No, sir?

Q. Was there—was your bell ringing for that crossing? A. Yes, sir.

Q. Who had charge of the bell, you or the fireman? A. I had.

30 Q. How? A. I had.

Q. You had charge of that? A. Yes, sir.

Q. Did you have any order to blow a whistle for that crossing? A. No, sir.

Q. And you never blew any whistle at all for that crossing? A. We usually don't blow any when we were in the city.

Q. Was the whistle blown there at all at other times? A. No, sir.

40 Q. Why did you blow this whistle when you

## James Moore—Cross

were thirty to forty feet from the crossing? A. To try to avoid the accident.

Q. How is that? A. To try to avoid the accident.

Q. Then, you did expect this woman was going to get hit by the train, didn't you? A. Yes, sir; 10  
at the time I blowed the whistle.

Q. Then you put on the emergency brakes? A. Yes, sir.

Q. How fast were you going when you struck her? A. About twenty miles an hour.

Q. How fast were you going—A. Well, it would be less than that, you see, when she was about thirty or forty feet from the crossing when I first applied the brake.

Q. Yes. A. And by the time that the woman 20  
was hit we were perhaps going at eight or ten miles.

Q. So you think you had reduced speed to about nine miles? A. Yes, sir.

Q. By putting on your emergency brakes? A. Yes, sir.

Q. How many cars did you have on your train? A. Seven.

Q. Were they loaded cars? A. Yes, sir.

Q. Loaded with passengers, I mean? A. Yes, 30  
sir.

Q. How did you blow that whistle and put on your brake, all at the same time? A. Pretty close to it.

Q. At the same time, I asked you,—which was first? A. I couldn't tell.

Q. Didn't you blow your whistle first? A. No, I probably worked both together, both hands together as near together as could be. 40

## James Moore—Cross

Q. Did you or didn't you? A. I think that was the way it was done.

Q. As near as you can tell now, you did them both together? A. Both together; yes, sir.

10 Q. What part of your engine struck this woman? A. The pilot, as near as I could tell.

Q. Of course, you were riding on the right hand side of the engine? A. Yes, sir.

Q. And how far were you from the crossing when you observed that the gates were down, as you have told us? A. Eight or nine hundred feet.

Q. That was eight or nine hundred feet to the east of the crossing? A. Yes, sir.

Q. You were going west? A. Yes, sir.

20 Q. And how far were you away from the crossing when you first saw this woman, the one that you afterwards struck? A. Well, we was most half a mile away, pretty well past Roseville Station.

Q. So that you saw her when you were half a mile away from her, is that right? A. Yes, sir; pretty close to that.

Q. At that time she was walking alongside of the tracks, wasn't she? A. Yes, sir.

30 Q. Walking in the same direction that your train was moving? A. Yes, sir.

Q. With her back to your train? A. Yes, sir.

Q. And you kept on going after you had seen her? A. Yes, sir.

Q. And she finally got up to the crossing? A. Yes, sir.

Q. Did she get about to the middle of the crossing? A. Well, I couldn't tell how far she had got on the crossing.

40 Q. But anyway she did get on some part of the

## James Moore—Cross

crossing—you knew she had done that, did you?

A. Apparently; yes, sir.

Q. How far away from that crossing were you when she first got on the crossing—I mean, of course, at the first time that she was on the crossing? A. Well, I couldn't tell—she was walking—going toward the crossing when we were about thirty to forty feet away. 10

Q. But you just saw her back about half a mile off? A. About that.

Q. Why didn't you blow a whistle until you came right on top of her? A. She was clear of the track.

Q. How near was she to the track—eight or ten feet off? A. Yes, about that.

Q. How fast were you going about? A. About twenty miles an hour. 20

Q. I think that is all. Pardon me just a minute. You testified at the other trial of this case, I believe, Mr. Moore, on the 3d of October, 1916. At that time were you working for the Lackawanna Railroad, at the time of the last trial? A. Yes, sir.

Mr. Stallman: I object, if the Court please; I do not see the materiality of how he was employed at the last trial whatsoever. 30

The Court: Has there been any evidence offered yet of what he said at the last trial?

Mr. Stallman: No, sir.

Mr. Simpson: I read this man's testimony in my case, that was all.

Mr. Stallman: But he was called by the plaintiff at the last trial. 40

## James Moore—Re-direct

The Court: I do not see what relevancy this question has now.

10 Mr. Hobart: Of course, we want to show the fact, if we may, as to whether or not he was working for the company at the time of the last trial and the circumstances under which he has left its employ.

The Court: But you called him as your witness, that was the point, by reading his testimony; I don't see that you can offer it now.

Mr. Hobart: But he is now called by the defendant and he is one of the defendants.

20 The Court: That is all very well, but I do not see that it would have any other effect than to show bias or how it has any relevancy now, as well as the fact that the man himself is a defendant.

Mr. Hobart: That is all.

RE-DIRECT-EXAMINATION by Mr. Stallman:

30 Q. Where did you stop your engine? You said it was about a hundred and twenty feet, but I mean where was it when you stopped? A. The engine was just clear of the crossing, just west of the crossing.

Q. How about your tank? A. The tank and all cleared, the engine and tank cleared the crossing.

Q. That was the west side walk? A. Yes, just about that.

Q. How does your bell ring? Do you have to pull it or does it operate in some other way? A. Operated by air.

40 Q. How long had it been ringing? A. Since we passed Roseville Station.

## James Moore—Re-cross

Q. And you used the bell there instead of the whistle? A. Yes, sir; that is the rule.

By Mr. Hobart: Q. How far is that from the crossing, Mr. Moore? A. Which?

Q. Roseville Station? A. That is six-tenths of a mile, I think.

Mr. Stallman: It is six-tenths of a mile from Roseville Station. That is all, Mr. Moore.

The Court: I think we will adjourn until ten o'clock tomorrow morning.

Mr. Hobart: May I ask him one question?

The Court: All right; go ahead.

RE-CROSS-EXAMINATION by Mr. Hobart:

Q. Were you suspended or laid off—

Mr. Stallman: I object to that, if the Court please; I do not see any relevancy to the question whatsoever.

The Court: I will allow you to complete your question.

Q. Were you suspended or laid off by the railroad company as the result of or in consequence of this accident? A. Not that I know of; no, sir.

Q. Do you know—don't you know that you were laid off as the result of this very accident?

Mr. Stallman: I object to the question; the witness has already answered.

The Court: I think I will sustain the objection.

Mr. Hobart: May I put it this way?

Q. Is it not the fact that you were laid off partly as the result of this accident and partly for another cause?

Mr. Stallman: I object to that.

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## Argument

The Court: I will sustain the objection to that; it calls for this witness' conclusions as to what purpose he was laid off for.

Mr. Hobart: May I ask this question?

10 The Court: No, I think we will stop right now on that line; we have had enough, if that is the line you are going on.

Mr. Hobart: I was going to put it this--

The Court: If it is along this line, I do not see that it is relevant.

Mr. Hobart: Very well.

The Court: We will adjourn until ten o'clock tomorrow morning, gentlemen.

(Witness excused.)

20 Adjournment taken.

30 The Court: I have had a chance over night to give this case a very much more careful study than I possibly could have given it when I decided the motion for a nonsuit, and if I had been advised then as I am now about the matter I should have indubitably have granted that motion. And I want to tell you, Mr. Hobart, that that is my state of mind now, because when the motion for a nonsuit was made I told you that I did not care to hear from you at all, and I do not want you to be deprived of the opportunity to make the argument that you would have made on a motion for nonsuit, on the motion for a direction of a verdict, because I have given that thing, so far as I was awake, before I went to sleep, uninterrupted study during the night, and

40

## Argument

I have come to the conclusion that in the light of the evidence and of the questions of law—I took both briefs home and the cases and all that sort of thing—I do not see how it is possible for me to decide that this statute was applicable to this situation. And I was wondering whether in the light of that attitude of mind—unless you want to take the whole case up—whether you would think, after you had considered it, that you would rather have me decide the matter on the motion for nonsuit and go up on that, or whether you want to do that on the motion for a direction of a verdict. 10

Mr. Hobart: I think we would better put in the whole case. 20

Mr. Stallman: The rest of my evidence is merely cumulative now, and I think I will finish it right up. I have my motion all written out for a direction.

The Court: The more I look at it—and I have looked at it with great care—I have read the statutes to see their applicability from all angles; I have read that brief that you furnished me; I have read Mr. Hobart's very, very fine brief that he handed to the United States Supreme Court—I thought that was as good a brief on that subject as I have ever seen. 30

Mr. Hobart: But it did not convince you?

The Court: It convinced me that if this case were not circumstanced as it is there would be a much more delicate question than there is. That is the point. 40

Thomas H. Malay—Direct

Mr. Stallman: I will finish up what I have and will hand the judges my written motion.

10 The Court: We might as well have that point squarely raised. The statute is either applicable or it is not. If it is, this woman has a right of recovery; if it is not, she has not.

Mr. Hobart: Your Honor's thought is that the statute is not applicable?

20 The Court: Yes; and when we come to decide it I will indicate in a few words the ground on which that motion rests. Then you will have it written down. That point has got to be decided, and it might just as well be raised right here as to have it go up there and have it reversed there.

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THOMAS H. MALAY, sworn.

Direct-examination by Mr. Stallman:

Q. Where do you live? A. South Orange.

Q. And what is your business? A. Locomotive engineer.

30 Q. You have been promoted since I saw you last. What were you in June, 1915? A. Locomotive fireman.

Q. You were the fireman on this engine that was in collision with the plaintiff in this case? A. Yes.

Q. What was your engineer's name? A. Moore.

40 Q. Do you remember anything about the bell on the engine before you got to Greenwood Av-

## Motion for Verdict

enue, whether it was ringing or not? A. Yes; it was ringing.

Q. And from what point? A. Roseville Avenue Depot.

Q. And how far is that from Greenwood Avenue? A. I should judge about half a mile. 10

Q. East of Greenwood Avenue? A. Yes, sir.

Q. And what made it ring? A. It was rung by an automatic bell-ringer.

Q. As your train approached Greenwood Avenue do you know whether the train was stopped or not?

Q. Yes; did your train stop anywhere near Greenwood Avenue? A. No it was stopped after we got over the crossing—the engine.

Q. That is what I mean. A. Yes. 20

Q. And how was it stopped? A. It was stopped by an emergency application of the brakes.

Q. What kind of a stop did the engineer make?

A. Well, I considered it a good stop.

(No cross-examination.)

(Mr. Stallman reads the direct testimony of Fraser Burnett, given at the former trial, Mr. Simpson reserving the right to read the cross-examination in case the motion for a direction of a verdict is denied.) 30

Three photographs offered in evidence and marked D-1, 2 and 3.

Testimony closed.

Mr. Stallman: We ask for a direction of a verdict on the following grounds:

1. The plaintiff has not sustained her complaint. 40

## Motion for Verdict

2. No negligence is shown with respect to any duty owing to the plaintiff.

3. Plaintiff is barred by the 55th section of the railroad law.

10 4. The plaintiff is guilty of contributory negligence as a matter of common law.

5. The plaintiff is not entitled to the provisions of the act of 1909 for the reasons, among others, that she is not of the class of persons, travelers, mentioned in the act.

B. The railroad company owes the duty of operating gates and having flagmen only to persons approaching the railroad by the highway.

20 C. The statute is based upon the presumption that a highway traveler cannot observe the approach of the train as readily as the gateman, and in this case plaintiff had better opportunity to see the approach of the train than the gateman.

D. Before going on the crossing the plaintiff knew the railroad company was apt to occupy and did occupy the railroad crossing with its trains.

Next: As only the plaintiff testified the gates were up, and all the other witnesses both of the plaintiff and the defendant testified the gates were down, the great preponderance of the evidence is against the plaintiff.

30 The Court: I suppose you reiterate the grounds you made on your motion for a nonsuit?

Mr. Stallman: Yes; I reiterate the grounds I made on the motion for a nonsuit.

40 Mr. Hobart: In connection with this motion I desire to call your Honor's attention to one or two matters which I think may be proper to be considered.

## Argument on Motion for Verdict

In the first place, the motion seems to be based on the assumption that the only statute that applies is the act known as Chapter 96 of the Laws of 1909, because that is the act which has the provision that any person or persons approaching the crossing—the point I understand made by Mr. Stallman, or one of his points—. We submit for the plaintiff that another statute known as Chapter of the Laws of 1909 also applies, and that act provides that whenever a company has assumed to establish and maintain safety gates and a person is killed or injured on any such crossing being struck when attempting to cross the tracks at a time when such gates are not down, the question of contributory negligence should be for the jury, and so forth. Now in this case of course we do not concede that the first named act, chapter 96, which used the word “approaching” should be construed in the manner urged by the defendant. We think that “approaching” is broad enough to include anybody who approaches either along the highway or who approaches inside the line of the gates, as in this case, and is actually on the highway. In the next place, we say that chapter 35 is applicable in any event, and that is not limited to a person who is literally approaching, if approaching be construed to be applicable to a person who is approaching along the line of the highway instead of coming into the highway from an

## Argument on Motion for Verdict

10 angle. Chapter 35 applies to any person who attempts to cross the tracks at a time when the gates are not down. Now we say that chapter 35 applies as well as chapter 96 for the reason that the court of errors and appeals has so held in *Brown vs. Erie Railroad*, 87 Law, 487, and it has recently reiterated that holding in the case of *Pratz vs. Lackawanna*, 100 Atlantic, page 208, in both of which cases it was held that at a crossing where there are safety gates both statutes are applicable. In fact, the *Brown* case went so far as to say that chapter 35 although in its preamble was apparently limited to cities, applied to every crossing in the state equally with chapter 96; that they both applied. I confess it is a little difficult to figure out just how to construe them, if they both apply; nevertheless that is what the Court of Errors and Appeals has said in those two cases.

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30  
40 The next point that has been urged is that this statute is not applicable because there was another train passing over the crossing in the opposite direction at around the same time as the one that struck this plaintiff that therefore the plaintiff was aware of the fact entirely independent of the gates, that the crossing was occupied, and that therefore she had no right to assume from the mere fact that the gates were up that there would not be a train on the other track. That is the way I understand his point on that. Now our

## Argument on Motion for Verdict

answer to that is twofold. In the first place, the statute has no such limitation; neither chapter 35 nor chapter 96. It does not say that it shall not apply when a track is occupied by another train. And in the next place there happens to be a case in our Supreme Court in which circumstances almost identical happened, and the Supreme Court on the rule to show cause discharged the defendant's rule and held that chapter was applicable. I refer to the case of Hatch vs. Erie R. R., 88 N. J. L. 545. It happened to be one of the cases in which my friend appeared, and in that case the proofs showed that the plaintiff was walking along the street at a grade crossing. She did not come from an angle as in this case, but she was walking along the street. The defendant maintained safety gates at the crossing on either side. There were two lines of railroad tracks, one for east and the other for west bound trains. When she reached the crossing the train was passing over the westbound track, the one nearest to her. The safety gate was down. After the westbound train passed the crossing the gate next to which the plaintiff was standing was raised and she proceeded to cross the track until she had about reached the eastbound track, when she saw a train coming and tried to clear without being hit. Now the proofs showed that the second train got to the crossing almost simultaneously with the first train in the sense that

## Argument on Motion for Verdict

10 just as the first train cleared the crossing  
the other came right on the adjoining  
track. She saw the train coming and tried  
to clear the track. The crossbeam of the  
locomotive struck her, and so on. She re-  
covered a verdict and the verdict was sus-  
tained. The court in that case referred  
only to chapter 95. In the course of the  
opinion the court said: "Assuming the  
statutory signals were not given, we think  
the case was controlled by the statute. The  
defendant had established gates; they were  
being operated, (no notice, of course that  
they were out of order) and she had a right  
to assume under the statute that a traveler  
20 would be warned by the gate if there was  
any danger in doing so. The very object  
of the statute was to inform persons in-  
tending to cross the track whether they  
might safely do so by a raising of the gate  
under such circumstances." You see there  
is that difference, because the gate was  
raised just to a certain extent.

30 The Court: Yes; I just made a note to  
that effect. I think that is the differen-  
tiating circumstance in the Hatch case  
from this.

Mr. Hobart: Yes; it happened to be a  
case where two trains were going over the  
crossing at almost the same instant.

The Court: There they notified her, by  
the raising of the gate when the other train  
had gone by, that it was safe.

40 Mr. Hobart: I appreciate the difference,  
of course. I think, however, that it is not

## Argument on Motion for Verdict

sufficiently different to require any different ruling.

The Court: It is very proper to raise it, but I think that differentiates it.

Mr. Hobart: I think the question of whether the gate was raised or up does not make any difference. In either event it comes within the statute and amounts to an assurance to a person intending to cross, no matter where she came from—it amounts to an assurance that it is safe to cross and that therefore the statute is applicable.

Then of course we desire to raise the point I have already mentioned, that in any event there is no exception in this statute to circumstances like the present, where the train is either on or very close to the crossing on another track. The statute does not say that, neither chapter 96 nor chapter 35. On its face it is applicable to any condition when the gates are up, when the notice is not posted and the other requirements of the statute are fulfilled.

Then of course in addition to that so far as chapter 96 is concerned there is the consideration that that also applies to a crossing flagman. In this case we think there is proof to show that the crossing flagman, although he says it was part of his duty to tell or to warn persons whom he thought were in danger, admits that he did not in this case give any such warning; of course, his reason being that he did not see any; or at any rate he did not give it. So we

## Argument on Motion for Verdict

think in that view the case also becomes within chapter 96.

So that from all points of view we think that the question of contributory negligence is a matter that ought to be submitted to the jury.

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Mr. Simpson calls my attention to a part of the evidence to the effect that there was something to indicate—some evidence to indicate that this first train had stopped at Grove Street and that she was looking toward it, and therefore might from that assume, especially when the gates were up, that the crossing would not be occupied by a passing train, whether it be the first train or the train that struck her.

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Of course I do not think I need debate the question whether there is evidence to go to the jury. I do not understand that that is seriously urged.

The Court: You mean on the question of negligence?

30

Mr. Hobart: There certainly is plenary evidence to show that it is at least doubtful or debatable whether or not signals were given as is required by the statute. I refer more particularly to the crossing bell, because the whistle is not applicable in the city anyhow.

The Court: Yes; there is no question about that.

40

Mr. Hobart: I think that covers the point that we desire to raise, except I might hand your Honor the Petersilge opinion if you have not already seen it.

## Argument on Motion for Verdict

The Court: I remember that case very well. I tried that, you will remember, and I looked at it with great interest when it came down.

The Court: Well, after the decision by me on the motion for a nonsuit I had a pervasive notion, I might say amounting to a haunting suspicion that I had made an error in deciding the motion of nonsuit favorably to the plaintiff and against the defendant. It was clear that there was an error somewhere in my consideration of the matter, and I made up my mind that the thing for me to do was if possible to find out where it was; so last night I dedicated the evening to the investigation of the subject. I took home the briefs of Mr. Stallman and Mr. Hobart in this case as well as the decision of the Circuit Court of Appeals of the United States in this case, and this morning after I had last night settled the matter of what I considered the law to be so far as my consideration would permit me to settle it, I had the stenographer read over to me those portions of the evidence which I thought raised the most serious questions in this case; and after having considered the law and the facts in the matter I am satisfied now that my decision then—that is on the motion for a nonsuit—was utterly erroneous. I think, first of all, that I gave too little weight in my judgment on the motion for a nonsuit to the opinion of the court in *D. L. & W. R. R. Co. vs. James*—this particular case in the Cir- 40

## Argument on Motion for Verdict

10           cuit Court of Appeals. I do not agree entirely with the reasoning of the court in that case, but I agree entirely with the conclusion at which the court arrived. Now in the case of Erie Railroad Co. vs. Schmidt, 225 Fed. Rep. 513, 140 Circuit Court of Appeals, 655, a case quoted in D. L. & W. vs. James as that case is reported in 241 Fed. Rep. 346, amongst some things with which I do not agree the court says this: "The act does no more than declare as a rule of evidence that in certain situations the mere fact that the deceased did not stop, look and listen should not of itself defeat recovery; but it does not attempt to lay down a rule that every grade crossing case where contributory negligence is alleged must be submitted to the jury." With that proposition I entirely agree, and for these reasons:

20           First of all, the burden rests upon the plaintiff to make out by the greater weight of the evidence that the case is one where the statute is applicable, if it is sought to have the statute apply. Now it seems to me that in this case whether we consider chapter 96 of the laws of 1909 or chapter 35 of the laws of 1909, neither of them is applicable in this case under the evidence produced by the plaintiff. I may say, first 30           of all, that I think that statute chapter 96 where it says that "any person or persons approaching any such crossing so protected as aforesaid (that is, by gates, bells or other devices designed to protect the 40

## Argument on Motion for Verdict

traveling public on crossing) shall during such hours as posted notice at such crossing shall specify, be entitled to assume that such safety gate or other warning appliances are in good and proper order and will be duly and properly operated, unless a written notice bearing the inscription 'out of order' be posted in a conspicuous place at such crossing, or that the flagman will guard the crossing with sufficient care'' and so on—I think that the wording of that statute is too plain for very much argument. It requires, if a person is to be entitled to rely upon the assumption that crossing is practically safe for him or her to go over without stopping, looking and listening, or without looking and listening and doing those things which would make looking and listening effective, as the common law rule has it—I think that the person must approach that crossing to ascertain numerous things. First he must be on the outside of the gates to ascertain within what hours the gates are to be operated; and secondly, he must be upon the outside of the gates, because no one for a minute would hold it possible to suppose that if a notice that the gates were out of order were posted on the inside of the gates that such a posting would be held to be a posting in a conspicuous place. When it says approaching, the very derivation of the word indicates that the person is to come up to the crossing in order to pass over it. And therefore I think without

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## Argument on Motion for Verdict

10 looking at the evidence in this case, which I am going to advert to in a few moments as bringing the case conspicuously outside of the statute anyhow—I say, without adverting to the evidence I think the statute does not apply to a person who comes up on the crossing from a position as a trespasser on the right of way and then attempts to pass over without ascertaining what legend the gates or posts bear indicating whether reliance may be placed upon them or not.

20 Then with respect to chapter 35, I think that that chapter is conspicuously inapplicable because the statute says that the crossing must be made, in order to entitle the case to go to the jury on the question of contributory negligence, at a time when such gates are not down.

30 That brings me to consider now the evidence in this case, as I said I would consider it, with respect to chapter 96, because that evidence is applicable to both chapter 96 and chapter 35. This lady I think has conspicuously failed to make out that at the time she crossed over that crossing the gates were up. I have had the evidence looked at with great care, and the evidence establishes, in my judgment, that what she did and the observation she made was this. She came up the pathway, and her evidence is that when she stepped on the crossing she looked at the gate and the gate was up; and  
40 then we have to look at the evidence to

## Argument on Motion for Verdict

ascertain what happened after she looked and the evidence, in my judgment, establishes this beyond any question whatever and without any dispute whatever, that she preceded on that crossing a train which she permitted to pass her and that she stood on the crossing after she had made her observation to see whether the gate was up or down in order to let that train go by, and she said, if I recollect it correctly, that she stood there a minute in order to let the train pass. Then Mr. Simpson asked her on re-direct-examination whether by a minute she meant a short time, and she said "Yes;" but at any rate, she stood there long enough to let that train go by; and then without ascertaining by a further observation whether when she attempted to cross the gate was down or not, she passed over and immediately was struck—attempted to pass over. It cannot be lost sight of that this fact, that she had observed that the gates were up while another train was about the cross over the highway runs like a red thread through the whole fabric of the case.

Now under those circumstances there is no evidence in the case whatever to show that when she attempted to cross over that crossing the gates were not down and that the railroad company had not performed its duty in that particular, and there is no evidence to establish that she, because the gates were up, had a right to assume that she might without stopping, looking and

## Argument on Motion for Verdict

10 listening, safely pass over that crossing. So that whether we look upon the case as one to be determined by the rule laid down and the reasoning applied in the case of *D. L. & W. R. R. Co. vs. James* in the Circuit Court of Appeals, or whether we look at it as a case to be decided upon the grounds that I placed it on, on the theory that there is no evidence in the case to show that the statute was applicable, and that on the contrary the plaintiff has failed to bear the burden of showing that the statute is applicable—I say whether we look at it upon one ground or upon the other, it becomes manifest in my mind that the statute was not, and that 20 neither statute was, applicable. That being so, of course she crossed there subject to the common law duty and under the common law rule governing such a conjuncture, and that rule, or those rules, are these: that she was obliged before crossing where she had no right to rely upon the presumption afforded by the statute to look and listen and to do those things which would make looking and listening reasonably effective. 30 In this case it is perfectly manifest from the manner of the happening of the accident that that duty was not performed or attempted to be performed on her part, because if she had looked to the slightest degree she must have seen the train which struck her unless some temporary obstruction interfered with her view, and the rule is perfectly settled in this state that if 40 a temporary or errant obstruction in-

## Argument on Motion for Verdict

terferes with the view of a person caution requires that the person shall delay before crossing until the obstruction shall have been removed and the opportunity to make the required observation under the legal rule is re-established. 10

So I say for these reasons it seems to me that I must grant the motion to direct a verdict that has been made. I do this with the more satisfaction because the decision as I now make it and at this stage of the case will raise a question which is one of great importance and which in my judgment has not yet been passed upon in this state—the question of the applicability of these two statutes, the application of which the counsel for plaintiff in making his argument has very truthfully indicated is not clear to him and which I think I with equal truth might indicate is not clear to me, and I should like to write into this record—it simply means a postponement of this plaintiff's right to recover if she is entitled to recover—to write into the record the opportunity to have these questions determined definitively, so that when the case comes back here for a trial eventually that those questions will be settled, and then the only matter to be determined will be a matter for the jury to determine as to the weight of the evidence and the amount of the damage. 20 30

So for these reasons I grant the motion, 40

Argument on Motion for Verdict

and of course I want the plaintiff to have an objection entered on the record.

I hereby certify that the above objection in the nature of an exception was taken as allowed by me in the trial of the above cause.

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WM. H. SPEER.  
Atty.

## SUPPLEMENT TO STATE OF CASE

NEW JERSEY SUPREME COURT

*Court of Errors & Appeals*

DAISY B. JAMES,

vs.

D. L. &amp; W. R. R. Co.

10

**Testimony***Testimony of James J. Mahar read in evidence as noted on page 44 of State of Case*

JAMES J. MAHAR, sworn as a witness on the part of the plaintiff, testifies as follows:

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Direct-examination by Mr. Simpson:

Q 1. Where do you live? A. I live in East Orange.

Q 2. What is your occupation? A. Funeral director.

Q 3. Were you in the vicinity of Greenwood Avenue crossing on the night of this accident? A. I was; yes.

Q 4. Where were you? A. I was about twenty-five feet from the southwest corner; I was walking south on Greenwood Avenue, on the west side. 30

Q 5. What did you see or hear, if anything, of the accident? A. Why, the first I heard was the whistle of the locomotive. I paid little attention to that because my place of business is right nearby there and I happened to turn around and I didn't see anybody really, and the next thing there was a young man jumped out of an automobile and he put his hand over his heart. I asked him 40

James J. Mahar—Direct

what was the trouble and he said: "A woman has just been hit," and so I then saw the engine had stopped just the other side of the crossing where I was standing.

Q 6. You did not actually see the plaintiff hit?

10 A. No; I did not.

Q 7. Is that the only whistle that you heard, the one that you describe? A. I heard the blow of the whistle; I don't remember how many times.

Q 8. You heard a whistle blow? A. Yes.

Q 9. How long was that before you were aware there was an accident? A. Well, I should say it was about twenty-five feet the other side of the street where I was standing; it was down about the middle of Mr. Muchmore's office at his side window.

20 Q 10. That is the only whistle you heard? A. Yes.

Q 11. You think when you heard the whistle it was the train? A. All I know of the train was I heard the whistle and—

Q 12. That would be twenty-five feet east of Muchmore's office? A. Of the front of the office.

Q 13. What did you do? A. I didn't go over until after the lady was taken away.

30 Q 14. You did not see what her position was under the trucks? A. No; I did not.

Q 15. You did not see her standing on the crossing? A. I did not; no.

No cross-examination.

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40 *Testimony of Dundas M. Campbell read in evidence as noted on page 63 of State of Case*

## Dundas M. Campbell—Direct

DUNDAS M. CAMPBELL, sworn as a witness on the part of the plaintiff, testifies as follows:

Direct-examination by Mr. Simpson:

Q 1. You are a practicing physician and surgeon? A. I am. 10

Q 2. Where do you practice your profession? A. Newark, N. J.

Q 3. How long have you been practicing here? A. Ten years.

Q 4. Have you had this plaintiff under your treatment for the condition of the stumps of her legs? A. I have.

Q 5. Is she now under your treatment? A. She is.

Q 6. How long has she been under your treatment? A. For the past two months. 20

Q 7. In your opinion is it practicable for her to wear artificial feet at this time? A. It is not.

Q 8. Will you show the jury the condition of the stumps and tell them and explain to them what that condition is and whether the result is a good result? A. (Indicating.) There is some tenderness here along this scar tissue, and there will be for some time, but there is excellent results there. Notice here—you notice there is a great deal of sloughing in the scarred tissue, and the breaking down of the tissue, and there is a great deal of tenderness right around this part here and around there. It is very, very tender. 30

Q 9. In your opinion, how long a time will it be before she will be able to wear artificial feet? A. I would not be prepared to say how long it would be.

Q 10. In your opinion would it be possible for 40

Dundas M. Campbell—Cross

this lady to dance on the stumps with wooden feet? A. Absolutely not.

CROSS-EXAMINATION by Mr. Stallman:

10 XQ 11. I understand you to say that the stump of the left leg shows a good result? A. Yes.

XQ 12. And the other limb has a sore spot on it at the present time? A. An ulceration.

XQ 13. And you have been treating this condition for about two months? A. About two months.

XQ 14. Have you learned whether that ulceration was a recent or a chronic condition? A. It is chronic.

20 XQ 15. Do you come to that conclusion from the history or from your observation of it? A. From both.

XQ 16. Is there any reason why it should not heal up? A. There may be a great many reasons for it. I cannot define it at the present time.

30 XQ 17. The plaintiff is fairly well nourished, is she not? A. She is, I might explain that to you by saying the extra sensitiveness of that scarred tissue—as to the other scarred tissue showing that breaking down—there may be some nerve tissue endings in there, or it may be a sliver of bone that wants to come out. There are many reasons.

XQ 18. As far as you have knowledge you are not now prepared to say just what the trouble is? A. Absolutely not.

XQ 19. Without knowing just what the trouble is, then, of course, you cannot give any prognosis of the matter? A. No definite prognosis.

Mr. Simpson: It is admitted that the defendant is a common carrier?

40 Mr. Stallman: Yes.

Thirza Burnett—Direct

Plaintiff rests.

*Testimony of Thirza Burnett read in evidence as  
noted on page 137 of State of Case*

10

THIRZA BURNETT, sworn as a witness on the part of the defendant, testifies as follows:

Direct-examination by Mr. Stallman:

Q 1. Where do you live? A. In Newark.

Q 2. Were you in East Orange on June 10, 1915? A. Yes, sir.

Q 3. On Greenwood Avenue? A. Yes, sir.

Q 4. In which direction were you walking? A. I was walking south. 20

Q 5. South on Greenwood Avenue? A. Yes.

Q 6. Toward the railroad? A. Yes, sir.

Q 7. As you approached the railroad did you observe the crossing gates? A. Yes, sir.

Q 8. How were they? A. They were down.

Q 9. Just about where were you when you first saw that the gates were down? A. Right by Muchmore's office.

Q 10. You mean you were walking in front of his office? A. Yes, sir. 30

Q 11. Could you say about how many feet you were away from the gates when they were put down? A. I did not see them go down. They were down. There was a train passing.

Q 12. They were down? A. Yes.

Q 13. There was a train going in which direction? A. Towards New York, east.

Q 14. Did you see the locomotive of that train? A. The engine—no. 40

## Thirza Burnett—Direct

Q 15. Did you go up to the gate? A. Yes.

Q 16. When you got up to the gates where was the train going to, New York? A. Well, I do not know just where the engine was; I know there was a coach and a half to go yet or more.

10 Q 17. At the time you got up to the gate—is that it? A. No; there was more of the train; there was more of the train to go; there was more coaches, I guess, but I did not notice the engine.

Q 18. Did you go right up to the crossing gate? A. Yes.

Q 19. You say it was down? A. Yes.

Q 20. What did you do? A. Why, I looked down the track to see whether there was a west-bound train coming.

20 Q 21. Did you touch the gate? A. Yes; I put my hand on the gate.

Q 22. Leaning on it? A. No; I just laid my hand on it.

Q 23. Was there anybody with you? A. Yes; there was Mrs. Ferguson.

Q 24. Anybody else? A. Yes; there was another lady, her daughter and—

Q 25. (Interrupting) And somebody else? A. Yes; somebody else.

30 Q 26. You have not given me the name of the fourth party yet; have you? A. No, sir.

Q 27. When you got up to the gate and put your hand on it, did you look east, that is, in the direction in which the New York train was going? A. Yes.

Q 28. Did you see the westbound train coming? A. Yes.

Q 29. Did you see the plaintiff? A. Yes.

40 Q 30. What was she doing? A. She was walking up the track.

## Thirza Burnett—Direct

Q 31. Whereabouts was she when you say she was walking up the track? A. Well, I could not tell just whereabouts; it was below Muchmore's property—below there.

Q 32. That is, she was further east than Mr. Muchmore's real estate office? A. Yes.

10

Q 33. What I was driving at was whether she was walking in between the rails or somewhere else? A. I do not think she was in between the rails; I think she was on the side.

Q 34. On one side? A. Yes.

Q 35. Did you watch her until she got up to the crossing? A. Well, I passed the remark to the lady that was with me—

Mr. Simpson: Objected to.

Q 36. Never mind that. Just tell us what you saw. A. Well, I saw her walking up the track.

20

Q 37. And did you watch her until she came up to the gate? A. No; I did not. I did not look again until I heard the whistle blow.

Q 38. Now, when you heard the whistle blow, where was the engine? A. Well, then it was closer up to the property.

Q 39. Closer to what? A. Closer to Muchmore's property.

Q 40. You mean the rear end of Mr. Muchmore's real estate office? A. Yes.

30

Q 41. When the engine arrived there you heard the whistle blow? A. Yes.

Q 42. Now, did you see the plaintiff in this case pass in front of you as you were at the gate? A. Yes; she walked up—I thought she was coming out under the gate—

Mr. Simpson: I object to what she thought and move to strike it out.

40

Thirza Burnett—Direct

The Court: Strike that out.

Q 43. Tell how she walked. You saw the plaintiff. Did you see her come up on the planking?

A. Yes; I did.

10 Q 44. Did you see her when she came around the end of the gate, that is, when she passed the end of the gate? A. Yes; I did.

Q 45. She stayed on the crossing? A. Yes; she walked up on the crossing and directly in front of the engine.

Q 46. In about what part of the crossing was she when she was struck? A. It was not right straight in front of the pavement; it was cross-ways.

Q 47. On an angle? A. Yes.

20 Q 48. Would you come to the map and see whether you understand it or not? I want to call your attention to this yellow shaded part, to this part which is marked "Muchmore Brothers' Real Estate and Coal Office." I want to call your attention to the black lines which are marked "gates." Do you understand that that is the gate there? A. Yes; I know.

Q 49. And then you see the yellow shading which is marked "planking"? A. Yes.

30 Q 50. With the two black lines running towards it? A. Yes.

Q 51. To represent the railroad track? A. Yes.

Q 52. And do you see this other dark spot which is supposed to represent the crossing box, that is, the gate box? A. Yes.

Q 53. Do you see this place here marked "ditch"? A. Yes.

4) Q 54. Now, there is another portion I want to call your attention to, what is marked here as the

## Thirza Burnett—Direct

sidewalk that runs up to the planks. Do you remember that there is a stone sidewalk there running up to the planking? A. Yes, sir.

Q 55. Now, with these things in your mind that I call your attention to, could you take this pencil and just indicate on there how this plaintiff walked until she got hit? A. (Indicating) She came in here like this, until she got about there and then she turned like that. 10

Q 56. I wish you would draw a line. You see where it says "ditch"? A. Yes.

Q 57. Mark where you say— A. (Indicating) This is where I was when the train was going—

Q 58. Make a mark how you think she walked. A. (Witness makes a mark on map.)

Q 59. That is a green mark that you have made there? A. Yes. 20

Q 60. You saw the engine strike her, did you? A. Yes.

Q 61. Did you observe whether or not before she was struck she stood still for any length of time? A. No; she did not.

Q 62. What was she doing at the time she was struck? A. She had put her hand to her head in that position as if she was thinking.

Q 63. Or fixing her hair—that kind of a motion? A. Yes. 30

Q 64. Where was she with reference to the nearest rail? A. She was crossing over, when she went to put her hand that way; then I screamed, I thought I could save her.

Mr. Simpson: I object to that.

The Court: Strike that last part out.

Q 65. When you screamed did she pay any attention to you? A. No, sir. 40

Thirza Burnett—Direct

Q 66. While she was under your observation did she at any time look to see whether the west-bound train was coming?

Mr. Simpson: Objected to.

The Court: Objection sustained.

10 Q 67. At any time while she was under your observation did she look in the direction from which the westbound train was coming? A. No; she did not.

Q 68. When she passed you where you were standing behind the gate, how far away from the gate was she? A. I do not think she was any further than from here to you—not that far, I don't think.

By the Court: Q 69. Which is about seven feet?  
20 A. I don't think it was that far; I don't think it was any more than three or four feet.

By Mr. Stallman: Q 70. How far is that?

A Juror: About nine feet, I should judge.

A. It was not nine feet; it was less than nine feet; it was about four feet I should judge.

Q 71. You think it was about four feet? A. About four feet.

Q 72. In what direction was she moving at that time? A. She was moving like that (indicating).

30 Q 73. That does not mean anything on the record. A. She was moving to the west.

Q 74. Would that be parallel with the track or diagonal? A. Diagonal.

Q 75. She was then moving diagonally? A. Yes.

Q 76. You say you heard the engine blow a whistle? A. Yes.

40 Q 77. What kind of a whistle was it? A. A long whistle.

## Thirza Burnett—Direct

Q 78. Was it as far away as the length of the room? A. What do you mean—the engine?

Q 79. Yes; from the crossing? A. I did not see the engine before it blew for the first time; the first time I looked to see if there was a train coming.

Q 80. You saw the engine then? A. Yes; then when it blew I looked a second time. 10

Q 81. How far was it away from the crossing at that time? That is what I want to know. A. I do not know how far.

Q 82. Tell in terms of the length of this room? A. It was about the length of this room or a little more.

Q 83. From the crossing? A. Yes, sir.

Q 84. At that time where was the plaintiff and what was she doing? A. She was still walking up the track—not on the track—on the side. 20

Q 85. Did she change her walk or do anything when the whistle blew? A. No, sir.

Q 86. In what part of the crossing was she at the time the engine struck her? A. She was a little bit towards the east.

Q 87. East of the middle, do you mean? A. Yes.

STATE OF

APPENDIX

## New Jersey Court of Errors and Appeals

DAISY B. JAMES,  
*Plaintiff-Appellant,*

*vs.*

DELAWARE, LACKAWANNA AND  
WESTERN RAILROAD COMPANY,  
MORRIS AND ESSEX RAILROAD  
COMPANY, JAMES F. MOORE  
and JOSEPH I. CASE,  
*Defendants-Respondents.*

*On Appeal  
from  
New Jersey  
Supreme  
Court.*

### **Brief in Favor of Plaintiff-Appellant.**

#### **1.**

#### **Statement of the Case.**

This appeal is taken from a judgment entered on a verdict directed by the trial judge, in favor of the defendants, Delaware, Lackawanna and Western Railroad Company, James F. Moore and Joseph I. Case, in an action wherein the plaintiff brought suit to recover damages for personal injuries sustained by her on June 10, 1915, while she was in the act of crossing on foot a highway grade crossing of the defendant railroad company known as Greenwood avenue in the City of East Orange, New Jersey. There was evidence before the jury from which the following facts might have been found:

At the point where the railroad crosses Greenwood avenue there are two tracks, one known as the eastbound track, on which trains run to New York; the other known as the westbound track, on which trains run from New York. The

highway crosses the tracks at right angles. About three hundred feet to the west of the westerly line of Greenwood avenue is located what is known as the "eastbound station," where passengers board trains for New York. This station is located on the southerly side of the railroad tracks. There are crossing gates at the highway, one located on the northerly, the other on the southerly side thereof and extending all the way across the highway, including the sidewalks on either side thereof. At the time of the accident a flagman was on duty in charge of said gates. Plaintiff had a return ticket on the line of the defendant railroad, and on the day of the accident had been visiting at East Orange and was intending to return to New York. For that purpose she was on her way to the eastbound station when the accident happened. On her way to the station plaintiff crossed a vacant lot located on the northerly side of and adjacent to the northerly right of way line, about four hundred feet east of Greenwood avenue. After crossing this lot she turned to the west and walked along a path on the right of way, which ran parallel with the tracks and five or ten feet distant therefrom. She continued along this path in a westerly direction until she reached the public highway known as Greenwood avenue. When she reached said highway the crossing gates were up. She walked a short distance to a point almost in the centre of the highway and then turned to her left for the purpose of crossing the tracks proceeding west to the eastbound station. Just as the plaintiff turned to pass over the tracks she saw an eastbound train coming into the station, and thinking that this was the train which she was to take to New York she started to hurry over the crossing. While her attention was attracted

to this train a westbound train approached from the opposite direction, moving very slowly, towards and over the crossing. This westbound train gave no signal or warning of its approach until it was about thirty or forty feet away, at which time a sharp blast of the whistle was sounded. Plaintiff was struck by this westbound train while she was in the centre of the crossing. This train was moving not faster than eight miles an hour and could have been stopped within about twenty feet.

As a result of the accident plaintiff received very serious personal injuries, which subsequently required the amputation of both legs below the knee.

The defendant, Moore, was the engineer who was operating the locomotive by which the train was drawn; it was alleged that he was negligent in that he failed to give any signal of the approach of the train, as required by the statute of the State of New Jersey and did not keep a proper lookout. The defendant, Case, was employed by the Railroad Company as a flagman at the crossing, and it was alleged that he was negligent in that he did not close the gates or warn the plaintiff of the approach of the train.

At the trial there was no proof that the defendant, Morris and Essex Railroad Company, had anything to do with the operation of the train which caused the accident, and a non-suit was accordingly ordered as to that company (p. 78, l. 30).

As to the other defendants the trial judge directed a verdict in their favor on the ground that the plaintiff was chargeable with contributory negligence *as a matter of law* and that under the circumstances as shown by the evidence

neither of the crossing statutes of 1909, to wit, Chapter 35 or Chapter 96, was applicable and that therefore he was not required to submit to the jury the question of the plaintiff's contributory negligence as a matter of fact.

## 2.

### Grounds of Appeal.

1. The trial judge directed the jury, before whom the case was tried, to render a verdict against the plaintiff and in favor of the defendants, whereas the said judge should have submitted the issues framed by the pleadings to the jury to be determined by them, so far as the same related to the defendants, Delaware, Lackawanna & Western Railroad Company, James F. Moore and Joseph I. Case.

2. Under the evidence in the case the question of whether the said defendants, Delaware, Lackawanna & Western Railroad Company, James F. Moore and Joseph I. Case, and each of them, were negligent and whether the said negligence was the proximate cause of the injury sustained by the plaintiff, and the question of whether said injury was caused by contributory negligence on the part of the plaintiff should have been submitted to the jury for determination.

## 3.

**Brief of the Argument.**

## I.

THERE WAS EVIDENCE TO GO TO THE JURY ON THE QUESTION AS TO WHETHER THE ENGINEER OF THE TRAIN WAS NEGLIGENT.

The allegation in the complaint with respect to the engineer's negligence was that he did not use reasonable care to give a signal of the approach of the train in the manner required by the statute and did not use reasonable care to keep a proper lookout in time to avoid injury to the plaintiff. We submit that there was evidence from which the jury would be justified that the engineer was negligent in both of these respects.

## (a)

*Statutory Signals.*

The following testimony on this subject was offered in behalf of the plaintiff:

ANDREWS, sales engineer in Crocker-Wheeler Co., was walking north on Greenwood avenue and had passed over the crossing just before the accident. Saw an eastbound train going towards New York and then saw the westbound train approach (p. 19, ll. 30-40). Noticed the plaintiff standing on the crossing on the westbound track and saw her struck by the train.

“Q And did you hear any bell of this approaching train from New York before it struck her? A No.

“Q And did you hear any whistle given by this approaching train before it struck her? A Yes.

“Q When was that; how soon before it struck her? A That must—that was even before I saw it that I heard one whistle.

“Q That was the only whistle that you heard, was it? A Yes.

“Q How long was that before it struck her? A Well, probably two or three seconds; I could not say exactly.” (P. 20, ll. 27-40.)

The whistle was a “long loud” whistle; heard it a second or two before seeing the engine (p. 24, ll. 10-30).

FEHRS, florist; place of business about half a block from the crossing. Was returning to his store. Noticed plaintiff standing on the westbound track. Saw her struck. Shortly before the accident had passed over the crossing and at the time he saw the accident was standing “just beyond Muchmore’s real estate office” (p. 30, l. 18).

“Q At any time while you were crossing the crossing up to the time that you saw her struck did you or did you not hear any bell or whistle from this westbound train? A No, sir.

“Q That is, you did not hear it? A I did not” (p. 30, ll. 23-28).

\* \* \*

“Q What was it after you had gotten in front of Cohen’s tailor shop, that caused you to turn around and see this woman on the track? A Well, I guess there was screaming and whistling and enough noise to attract anyone’s attention.

“Q I did not get the last. A There was enough noise, enough unusual commotion to attract anyone’s attention.

“Q By whistling do you mean the engine whistle? A That I won’t say, whether it was the engine whistle or what it was.

“Q You do not remember? A Not quite” (p. 31, ll. 25-39).

\* \* \*

“Q Do you remember I asked you—page 46: ‘And what caused you to turn around? A Why, I heard an unusual whistle and shriek—more of a whistle.’ Does that refresh your recollection now as to what you heard at that time? A If I said it at that time I guess I must have said it.

“Q If you testified that way it was true? A Well, if that was the way I testified I guess that is the way I testified. It is a year or more ago; I do not just remember. I explained a moment ago that it was an unusual commotion—whether it was a whistle and shrieking that attracted my attention, in answer to your question.

“Q If you testified that you heard an unusual whistle that was true, wasn’t it? A If that was the way I testified, why that is the way I answer.

“*Mr. Simpson.* Shriek more than a whistle, it says.

“Q You testified to the truth, didn’t you, the last time you were called to the stand? A I presume so.

“Q Yes; and your recollection was fresher then than it is now? A Yes, sir.

“Q And you did hear ‘an unusual whistle—a shriek—more of a whistle’; you recall that, do you? A I believe I did say something like that” (p. 33, ll. 1-32).

\* \* \*

“Q Didn’t you testify: ‘Just at the time that you saw the plaintiff on the crossing? A I saw the plaintiff and heard the whistle and saw her struck at the same time. That is the only way I can put it, it was so quickly.’ Didn’t you so testify? A That is right.

“Q And that is the fact, isn’t it? A Yes, sir” (p. 34, ll. 12-20).

CROSBY, an employee of the banking house of Spencer Trask Co. was standing inside of a garage about 100 feet from the crossing; saw the train hit the plaintiff. At the time she was struck she was at the centre of the crossing.

“Q And how long had you been at your point of observation at the time you saw her; how long had you been at that place? A I had been in there perhaps fifteen minutes.

“Q And did you hear this alarm whistle that has been testified to? A No, sir.

“Q Did you hear any whistles sounded by this westbound train or any bell before the time of the accident? A I do not remember hearing any whistle whatever.

“Q Or any bell? A No bell of any kind” (p. 36, ll. 24-25).

On cross examination he said he was not paying any attention to signals but he happened to observe a taxicab that was standing at the station and at that time saw the train and the plaintiff (p. 37, ll. 20-30).

MUCHMORE, real estate business, was in his office near the crossing. Saw plaintiff on the track and heard the whistle blow (p. 38, l. 35). It was a very loud whistle (p. 40, l. 8). Saw the plaintiff on the track before this whistle was sounded. There was no other whistle before that one.

“Q Did you hear any bell from the westbound train at all before you heard this shrill whistle? A Not before I heard the —no, sir” (p. 40, ll. 20-23).

PLAINTIFF. Walked up on to the crossing and was standing near the centre of it. Saw the eastbound train pass.

“Q Did you hear any bell or whistle from the westbound train? A No” (p. 48, ll. 1-10).

MAHAR, funeral director, was walking south on Greenwood avenue on the west side. First he heard was the whistle of the locomotive; it was about twenty-five feet the other side of the street. This was the only whistle (pp. 153, 4 of Supplement to State of Case).

We therefore have six witnesses who say that no signal was given by the westbound train except that a sharp blast was blown just before it reached the crossing.

The defendant's testimony on this point was as follows:

MRS. FERGUSON, matron in the General Electric Lamp Works. Was standing on the crossing near the gate. Heard the whistle of an engine coming from New York (p. 86, ll. 1-10). She heard only this one whistle. Did not hear any bell ringing (p. 89, ll. 20-30).

MRS. ADAMS, daughter of Mrs. Ferguson, employed in the Edison Lamp Works. Heard a whistle "when we got to the corner" (p. 95, l. 22). She only remembered one whistle (p. 99, l. 32). The train was then within about 20 or 22 feet of the crossing. Up to that time did not hear any signal at all from the train. Did not hear any bell (p. 100, ll. 1-25).

CASE, gateman. Westbound train whistled when it was 40 or 50 feet from the crossing (p. 104, ll. 35-40). This was a shrill whistle. It was the only signal given by that train (p. 115, ll. 30-40).

KELSEY, conductor of eastbound train. Heard a whistle from the westbound train when it was about 60 feet from the crossing (p. 121, ll. 20-30). It was one blow—a danger signal. Did not hear

any other whistle from the westbound train and did not notice the ringing of any bell on that train (p. 123, ll. 1-20). Was riding on an observation car which was the second or third car on the eastbound train, and passed within three or four feet of the engine of the westbound train. Did not hear the bell of the latter train (p. 123, ll. 30-40).

MOORE, engineer of westbound train. Saw plaintiff on the crossing and commenced to blow the whistle (p. 125, l. 40). It was a long, sharp whistle. At that time the engine was 30 or 40 feet from the crossing. Did not give any whistle before that for the crossing. Bell was ringing for the crossing (p. 128, ll. 1-30). Bell had been ringing since train left Roseville station—about six-tenths of a mile from the crossing (p. 132, l. 20 to p. 133, l. 12).

MALAY, fireman. Bell was ringing from Roseville avenue (p. 137, ll. 1-10).

MISS BURNETT. Was walking south on Greenwood avenue towards the railroad tracks. Heard a long whistle blow. At that time the train was about as far from the crossing as "the length of the room" (p. 159, l. 30; p. 162, l. 38; p. 163, l. 15 of Supplement to State of Case).

It will be seen from this that the only witnesses called by the defendant who said that the bell was ringing were the engineer and the fireman of the train by which the plaintiff was struck. Four other witnesses called by the defendant, namely, Mrs. Ferguson, Mrs. Adams, Gateman Case and Conductor Kelsey (of the eastbound train), all say that they did not hear the bell ringing and that the only signal given of the approach of the westbound train was a long shrill danger whistle which was blown about

40 or 50 feet from the crossing. Of course, under Sec. 35 of the General Railroad Law, the defendant railroad company was not required to blow the whistle at intervals, as the accident was within the limits of a city, but there was abundant evidence to show that the engine bell was not ringing, as required by the statute, there being six witnesses called by the plaintiff and four called by the defendant who were in a position to hear the bell if it had been ringing, and all of whom say that they did not hear it. The question of negligence in this respect was therefore one of fact for the jury. *Materka v. Erie R. R.*, 101 Atl. 69 and cases cited.

## (b)

*Failure of engineer to keep proper lookout.*

There was evidence from which the jury would have been justified in finding that the train by which the plaintiff was struck was moving very slowly. Mrs. Ferguson saw the plaintiff walking on the path alongside of the train. At that time she was almost as far from the crossing as the train and she kept walking in the same direction, at about the same rate of speed; then the train slowed up and plaintiff walked on to the crossing beyond the sidewalk until she came about in the center of the travelled highway. Then she turned "right in front of the cow-catcher" (pp. 90 and 91). The train by which she was struck was going about as fast as a person would walk (p. 101, ll. 10-15). There was no whistle or other warning of the approach of this train until it was about forty or fifty feet from the crossing (p. 115, l. 35). The engineer saw the plaintiff walking on the path about six or eight feet from the track. He also saw her step over from the path and around the

gates to go across the westbound track. He then commenced to blow the whistle and applied his brake (p. 125, ll. 30-40). At that time the plaintiff was about thirty or forty feet ahead of the engine (p. 126, ll. 10-15). The engineer said that he reduced speed from about twenty miles to about eight or nine miles an hour, but the jury would have the right to find that he was mistaken about that in view of the other testimony that the train was not moving faster than a person could walk. He admitted that he had seen the plaintiff when he was half a mile from the crossing, and yet he blew no whistle until he was almost on top of her (p. 130, ll. 20-30; p. 131, ll. 10-20). If the train was going no faster than a person could walk the jury would have the right to find that the engineer was negligent in not stopping his train more quickly or in not giving a warning whistle until he was within forty or fifty feet of the plaintiff; in other words, the engineer was negligent either in failing to stop his train more quickly, or if he stopped as quickly as he could, then he was negligent in not giving the warning sooner than he did. From either point of view the jury could have found negligence on his part.

## II.

THERE WAS EVIDENCE TO GO TO THE JURY ON THE QUESTION AS TO WHETHER THE CROSSING GATEMAN WAS NEGLIGENT.

There was a question of fact as to whether or not the gateman was negligent in the manner in which he operated the crossing gates. The evidence on this subject was as follows:

ANDREWS: Was going north on Greenwood avenue. At that time the eastbound train was

approaching the station. After he had passed over the crossing he continued in a northerly direction, then turned around and saw the plaintiff standing on the crossing.

“Q At the time you got across—that is before you turned and saw her standing on the crossing, what happened with reference to the gates? A Just as I crossed the gates were going down. I had to duck under the—dodge under the northerly gate to get over, yes” (p. 19, ll. 22-28).

He afterwards stated that the northerly gate was coming down as he passed under it (p. 22, ll. 10-20).

FEHRS: Was in the vicinity of the crossing a few feet beyond the tracks going north (p. 28, l. 20). Did not remember whether the gates were up or down (p. 32, l. 38). Afterwards he explained that when he went on to the crossing to pass over it, as distinguished from the time when the accident happened, the gates were up (p. 34, ll. 20-30).

CROSBY: Did not remember whether the gates were up or down (p. 37, l. 32).

MUCHMORE: Was looking out of the side window of his office. Heard a whistle blow and looked out on the crossing and saw the plaintiff. Engine was slowing down as it went by the window; could see the crossing gates and at that time they were down (p. 41, ll. 20-30).

PLAINTIFF. When she got on to the crossing the gates on the side that she was on were up. The flagman was standing in front of his “house” (p. 46, ll. 15-30). Stood near the center of the crossing waiting for the eastbound train to pass and that was all she knew (p. 48, ll. 1-15). Up to the time the eastbound train passed between

plaintiff and the flagman he did not do anything either in the way of giving a warning or lowering the gates (p. 49, ll. 1-20). She then testified:

“Q Now when you came up this, what you call path, Miss James, you did not observe how the gates were on the south side of the track? A The side I was on?

“Q No; the other side. A No; I did not.

“Q You do not know whether they were down or not? A I did not notice.

“Q And on the side that you were going up—that side of the track—you could see the gate box standing up some distance ahead of you, couldn't you? A Yes.

“*By the Court.* Q Well, was that the side that you would have approached from if you had come along the road instead of walking along the pathway? A Yes.

“*By Mr. Stallman.* Q And that is where you walked inside of the gate? A Yes, sir.

“Q Now you heard a whistle blowing just before you were hurt, didn't you? A I do not remember whether I did not—whether I did hear one.

“*Mr. Simpson.* Please talk up, Miss James. These gentlemen cannot hear a word you say.

“*By the Court.* Q Why did you look to see if that gate was up on the side that you say it was up on when you got on the crossing? A Because if it had been down I would have stepped on the outside of it.

“*By Mr. Stallman.* Q You were still on this so-called path, as you call it, when you looked at the gate? A Yes.

“Q Alongside of the railroad track? A When I stepped up on the crossing it was up.

“*By the Court.* Q You looked then to see if it was, when you stepped on the crossing,

you looked at the gate? A Yes; I know the gate was up when I stepped up.

“Q All right” (p. 57, l. 20 to p. 58, l. 20).

Some of the witnesses called for the defendant said that the gates were down. Thus, Mrs. FERGUSON said that she came around the corner of Eaton place and Greenwood avenue and was walking south on Greenwood avenue in the direction of the railroad. There was a store at the southeast corner of Eaton place and Greenwood avenue and when she was near that store the railroad gates were down. “I came around the corner, and as I got to the gate, the railroad gate, I rested my arm on the railroad gate” (p. 82, ll. 10-15). She saw both trains approach the crossing and at that time the gates were down (p. 82, l. 30). She also saw the plaintiff walking in the path alongside the track and at that time the gates were down (p. 84, l. 18). She then saw the plaintiff walk in front of her between the gate and the train and saw her step in front of the engine (p. 85, ll. 1-20).

On cross examination she said that she was on the sidewalk near the gate post (p. 88, ll. 15-20).

Mrs. ADAMS: Was walking towards the railroad tracks with her mother, Mrs. Ferguson. Saw the plaintiff coming alongside of the train (p. 95, ll. 20-40). At that time the gates were down (p. 96, l. 1).

CASE, the gateman: Put the gates down for the eastbound train going toward New York as that train was coming into the Grove street station. Gates stayed down about two and a half to three minutes (p. 102, ll. 20-40). The gate shanty is on the south side of the track.

Did not see anything of the accident. Saw "somebody" come up the railroad path and enter on to the crossing (p. 104, ll. 1-10). When the westbound train arrived on the crossing the gates were clear down (p. 104, ll. 20-22). Saw some woman enter on the crossing. She got on the westbound side "about thirty or forty feet of the crossing" (p. 106, ll. 1-10). At first the witness said that he called "look out" (p. 106, l. 15), but afterwards he admitted that what he meant was that he yelled to everybody that came on the crossing, but he did not yell to this woman (p. 107, l. 25). He further admitted on cross examination that he had correctly testified at a former trial that he "started" to put down his gates when the westbound train was four or five hundred feet from the crossing (p. 108, l. 30, to p. 109, l. 4). He also said that he did not see any women on the westbound side with their hands on the gates and his explanation as to why he did not notice them was that it was "twilight" (p. 110, ll. 30-40). When his attention was called to the fact that the accident happened about six o'clock on June 10th—in broad day-light—he then said: "It must have been cloudy. It was growing dark at that time, that is, turning a little dark" (p. 110, l. 30, to p. 111, l. 10). He claimed that he did not see the accident as his view was cut off by the passage of the eastbound train over the crossing, but he finally admitted that he did see the plaintiff walk to a point thirty feet on to the crossing (p. 111, ll. 20-40). He also admitted that it was part of his duty to warn persons who were in a position of peril (p. 113, l. 12). The gates are operated by hand levers and can be moved separately. He claims that he "always" put them up and down together

but he admitted that it was easier to put them down one at a time, and that he did not feel very strong on the day of the accident due to the fact that muscular rheumatism was "all through" him (pp. 113-115).

KELSEY, conductor of eastbound train: Noticed that when that train passed over the crossing the gates were down. Saw a woman step on to the crossing. Did not observe the gates at any time before he saw the woman (p. 120, ll. 10-35). Does not know anything about the gates before the train reached the crossing (p. 122, ll. 30-40).

MOORE, engineer of westbound train: Saw the plaintiff step from the path around the back end of the gates on the inside and start to go across the track (p. 125, ll. 20-30). At that time the gates on the north side were down (p. 126, l. 10).

MISS BURNETT: Was walking toward the railroad track in a southerly direction; saw the gates down, as a train was passing in an easterly direction towards New York. Laid her hand on the gate, with Mrs. Ferguson (pp. 157, 8 of Supplement to State of Case).

Under the foregoing evidence it was clearly a question of fact as to whether the gateman was negligent in his manner of operating the gates. It is true that the gateman, the engineer of the westbound train, the conductor of the eastbound train, and three other witnesses said that the gates were down, but the plaintiff swore that the gates were up and in that respect she was corroborated by the testimony of Andrews, who said that the gates were going down just as he passed over the crossing and ~~at that time~~ the plaintiff was standing *on* the crossing; and by

*after he had gone  
forty feet  
the centre of*

the testimony of Fehrs, who said that when he went over the crossing the gates were then up.

Entirely without reference to the provisions of the crossing statutes of 1909, it is settled that if a railroad company undertakes to maintain crossing gates or other means of protection at a crossing other than the signals required to be given by the engine bell or whistle, the company is chargeable with liability for an accident proximately resulting from negligence in the maintenance or operation of such gates or other means of protection. The company is also responsible for the negligence of a flagman if he fails to discharge his duty of warning highway travelers of approaching trains.

In *Wolcott, Admr. v. New York & Long Branch R. R.*, 68 N. J. L. 421, the defendant was held liable in a grade crossing accident when it appeared that the jury were justified in finding that there was negligence on the part of the defendant's flagman in giving warning of the approaching train. We quote from the opinion as follows (*italics ours*):

“Whether or not a duty rested upon the Long Branch Company to protect this crossing by a flagman or not is immaterial. *It assumed that duty, and, having done so, was bound to perform it with due care.* Where the flagman stood and whether he waved his lantern or not as a signal that a train was approaching were matters in dispute. If he stood on the southern edge of the highway, not in the wagonway at all, as some of the witnesses say, and if he gave no signal with his lantern, as decedent's widow testifies, it cannot certainly be said, as matter of law, that he fully and carefully performed the duty which he had undertaken, of giving warning of the approaching train. It was for the jury to determine where he stood, and what he did; and, if they found that he

stood by the side of the road and gave no signal with his lantern, then to say whether he gave efficient warning to the deceased" (p. 423).

This case was cited with approval by this Court in *Brown v. Erie R. R. Co.*, 87 N. J. L. 487, and the principle was held applicable to a case of alleged negligence in the operation of crossing gates. This Court said (italics ours):

"The Supreme Court, in *Wolcott v. New York and Long Branch Railroad Co.*, 68 N. J. L. 421, decided that when a railroad company assumes to protect a highway crossing by a flagman, it is responsible for injuries received at that crossing, by a traveler on the highway, which have resulted solely from the negligence of such flagman; and that responsibility exists, notwithstanding that the company is under no legal obligation to so protect the crossing. *It is the same in reference to gates voluntarily installed*" (p. 494).

In the present case the flagman admitted that it was his duty to warn persons (p. 113, l. 15), and that it was his custom to "always yell" at persons on the crossing (p. 107, l. 2; p. 107, l. 22). He also admitted that he saw the plaintiff walking along the path and come on to the crossing for a distance of about thirty feet (p. 108, l. 15) and at that time the westbound train was within forty or sixty feet of the crossing (p. 108, l. 20). But he did not call to the plaintiff or give her any warning of the approach of the train (p. 107, l. 25). While it may be true that he did not see the plaintiff at the moment of the accident—his view being cut off by the eastbound train as it passed over the crossing—nevertheless the fact is that he had seen the plaintiff just before she reached the crossing and he saw her walking on to the crossing about

half way across it and at that time she was just outside of the rails of the westbound track (p. 112, l. 20). Notwithstanding the dangerous position in which she then was—a danger which was increased by the distraction necessarily incident to the passage of the eastbound train over the crossing—the flagman gave her no warning. Under these circumstances the jury would have been justified in finding that the flagman was negligent not only by reason of his failure to operate the crossing gates properly, but also by reason of his failure to warn the plaintiff of the danger in passing over the crossing.

### III.

UNDER THE CROSSING STATUTES OF 1909 IT WAS THE DUTY OF THE TRIAL JUDGE TO SUBMIT TO THE JURY THE QUESTION OF WHETHER THE PLAINTIFF WAS CHARGEABLE WITH CONTRIBUTORY NEGLIGENCE.

Under Point II we have cited the evidence with respect to the operation of the crossing gates and the action of the flagman in warning, or rather in failing to warn, the plaintiff. Under this evidence we urge that it was the duty of the trial judge to submit to the jury the question of whether the plaintiff was chargeable with contributory negligence. In deciding this point it must be remembered that there are *two* crossing statutes of 1909. For convenience we append to this brief copies of these statutes. It has been decided by this court in *Brown v. Erie R. R.*, 87 N. J. L. 487, that *both* statutes are applicable to every crossing in the State which is protected by crossing gates. In that case this

Court held that Chapter 35 of the Laws of 1909 was not limited to crossings in cities, but applied to all crossings within the State where safety gates were established and maintained. We quote as follows (*italics ours*):

“The enacting clause of chapter 35 of the Laws of 1909, which provides that when gates are not down as required by any statute giving a railroad the right to run its trains through an incorporated city at any rate of speed it may see fit, when read in connection with section 22 of the general railroad law, giving such right, provided the gates shall be closed at least half a minute before any train may cross the highway and until such train shall have passed by, *makes the question of contributory negligence, when a person is injured or killed at such crossing when the gates are up, a jury question*; the inference being that if the gates are up there is an invitation to persons to cross upon an assumption that there is no danger to be apprehended from an approaching train.”

The Court further held that Chapter 96 of the Laws of 1909 was applicable to such a case, even though there was no notice posted at the crossing specifying at what hour the gates were to be operated, saying (*italics ours*):

“As no notice was posted by the defendant at the crossing in question, giving information as to the hours when the gates were to be operated, the company will not be heard to complain that a person passing over the railroad tracks at the crossing was not entitled to assume that the gates were in good and proper order and would be duly and properly operated, especially as there was no notice present bearing an inscription that the gates were out of order. *This act may be said to be equally as strong for the plaintiff as the prior one*, because it provides that in the situation in which this

plaintiff's intestate found himself the action is not barred because of his failure 'to stop, look and listen before passing over such crossing,' while the former provides that whether he was or was not guilty of contributory negligence shall be a question to be determined by the jury."

In deciding whether the facts of any particular case bring it within the provisions of Chapter 35, it is necessary (as pointed out by this court in the *Brown* case) to read said statute in connection with Section 22 of the General Railroad Law of 1903. This section reads as follows:

"22. Any railroad company may erect a fence or other enclosure around its stations so as to prevent persons other than passengers from coming near its trains, and may exclude from such enclosures all persons except travelers; where any railroad company in any city shall maintain along its roadway where the same may adjoin a public highway, a fence or embankment four feet high sufficiently close and strong to prevent children and horses from going through the same, or where its track shall be laid in a cut at least four feet deep, and shall provide on each side of the track at any highway-crossing in such city a gate of like height and sufficiency, and cause the same to be closed at least half a minute before any train may cross such highway and until such train shall have passed by, in such case it shall be lawful for such company to run its trains in said city over the portions of its railroad thus protected and over the portions not adjoining or crossing any highway, at such rate of speed as it deems proper, but in the absence of such protection and safeguard, the company shall be bound by lawful and reasonable municipal ordinances regulating the speed of its trains along streets and at crossings."

It will be seen that Chapter 35 of the Laws of 1909, when read in connection with Section 22 of the General Railroad Law, requires a trial court to submit to the jury the question of contributory negligence "when such gates are not down, as required by any statute giving the railroad the right to run through an incorporated city," etc.—that is, when the gates are not closed "at least half a minute before any train may cross such highway and until such train shall have passed by." Even if the gates were down at the moment that the accident happened, nevertheless if they were not down for at least half a minute before that (as required by Section 22) then under Chapter 35 the plaintiff was entitled to have the question of her contributory negligence submitted to the jury. The closing of the gates for half a minute before the train crosses is obviously intended as a warning for a reasonably short time in advance of the approach of the train. In the present case the plaintiff, as she approached the crossing, observed that the gate on her side was up. Even if it was put down after she had reached the crossing and was in the act of stepping over the track, still the defendant would not be relieved of liability under Chapter 35, as the gates were not down for at least half a minute before the train crossed.

Under Chapter 96 of the Laws of 1909 the case is even stronger for the plaintiff, because under that statute it is arguable that in a case to which the statute applies a defendant is not even entitled to have the question of contributory negligence submitted to the jury. Of course, it is not necessary to urge that argument in the present case—it is sufficient if the court concludes that plaintiff was entitled to go to the

jury on the question of her contributory negligence.

The trial judge was of the opinion that Chapter 96 did not apply to the facts of the present case, for the reason that the plaintiff did not "approach" the crossing within the meaning of that statute. It is really not necessary to decide whether Chapter 96 applies or not; if Chapter 35 applies then the plaintiff was entitled to go to the jury. It will be observed that Chapter 35 is not limited to a person who is "approaching" the crossing. That statute applies to any person who is injured at any crossing "when attempting to cross the tracks." It makes no difference under that statute whether the plaintiff came to the crossing along the highway or whether she came to the crossing along the railroad right of way and then turned and "attempted" to cross the tracks. In either event she comes literally within the provisions of Chapter 35. But we do not agree with the conclusion of the trial judge that Chapter 96 does not apply to a case of this kind. Persons could "approach" this crossing from the path alongside of the tracks as well as from the public highway. The title of the statute is some indication of its meaning and shows that it is intended to all travelers who pass "*over railroad crossings* protected by flagman or safety appliances or both." Likewise in the body of the act reference is made to travelers "passing over" the crossing. The only excuse for suggesting that the statute would not apply to a case like the present is the use of the word "approach." But the act is clearly a remedial one and in every case in which it has been considered by this court has been liberally construed. We submit that there is no justification for the courts to

write into the statute after the word "approaching" the words "at right angles" or any similar expression whereby the clear intent of the Legislature would be changed. When a traveller has once come upon the crossing we submit that the statute applies, no matter whether the traveller reached the crossing by means of a public highway or by means of a path alongside the railroad track or by means of an aeroplane. The moment the traveller is on the crossing and is about to pass "over" the same, he is entitled to the protection of the statute. Whether the traveller comes to the crossing inside or outside the line of the gates, or whether his back is turned to the gates as he is about to pass over the crossing, makes no difference. In this respect the case resembles *David v. West Jersey & S. R. Co.*, 84 N. J. L. 685, which holds that Section 55 of the railroad law does not apply to a person who is engaged in crossing a railroad at a lawful public crossing and stops to wait for a train to pass. An illustration of the liberal construction given to the word "approaching" is the case of *Gifford v. Jennings*, 190 Mass. 54, 76 N. E. 233. In that case a statute required that the driver of an automobile, approaching any vehicle drawn by a horse, shall operate such automobile so as to exercise every reasonable precaution to prevent the frightening of such horse, and declares that every automobile shall be provided with a suitable bell or horn or other means of signaling. Held, that an automobile coming up behind a vehicle drawn by horses "was approaching" the same, and that the operator thereof was bound to give signals of his approach.

It may be argued that the fact that the statute requires the posting of an "out of order"

notice in a conspicuous place at the crossing (in the event that the gates or other appliances are not in good order) indicates that the statute is limited to persons who approach the crossing directly from a point outside of the gates, as otherwise such traveller would not be in a position to observe the "out of order" notice. But this argument assumes that such notice must be posted *on the gates themselves*. There is nothing in the statute which so requires; the notice is posted in a conspicuous place "at such crossing." In the present case it appears that travellers could readily come on to this crossing from the path alongside of the tracks without passing by the line of the gates. To say that the statute has no application to such a case is to write into it something that was not placed there by the Legislature, and amounts to judicial legislation.

In connection with this argument it is worthy of note that in the case of *Brown v. Erie R. R.*, 87 N. J. L. 487, the plaintiff's intestate had come to the crossing on foot and had passed within the line of the gates and stopped there a few minutes to talk with some friends before proceeding over the crossing. One of the claims of negligence on the part of the defendant was that there was negligence in the method of operating the crossing gates. The defendant urged, among other things, that the crossing statutes had no application, for the reason that the decedent was not approaching the crossing from outside the gates but had already come inside the line of the gates before the train was near the crossing and that consequently it made no difference whether the gates were up or down. The statement of facts in the report of the case is not sufficiently full to make this point plain, but it becomes readily obvious from an examination

of the brief filed in that case in this court by the defendant. See p. 14 of said brief; also Point V at p. 21 thereof.

Although this point was urged in this court in the Brown case as one of the grounds for sustaining the judgment of the Supreme Court (which had reversed a judgment entered in the Hudson Circuit in favor of the plaintiff) this court, in an elaborate opinion, discussed all the other points that were urged, but did not dignify this argument by even referring thereto.

Counsel for the defendants will probably urge that the evidence shows that the plaintiff did not look or listen for the approaching train by which she was struck and that therefore she was chargeable with contributory negligence *as a matter of law*. It is possible that this argument might be sound were it not for the provisions of the crossing statutes of 1909, although even without reference to those statutes it is arguable that the plaintiff was not so chargeable in view of the fact that her attention was attracted by the eastbound train as it approached and passed over the crossing and by the fact that the crossing gate was up and the crossing flagman did not warn her. But, however that may be, if Chapter 35 applies to the case she was entitled to have the question of her contributory negligence submitted to the jury; and if Chapter 96 applies, then it is well settled that she was "absolved" from stopping, looking and listening. *Brown v. Erie R. R. Co.*, 87 N. J. L. 487, 91 Atl. 1023; *Ferneti v. West Jersey & S. R. Co.*, 87 N. J. L. 268, 93 Atl. 576; *Hatch v. Erie R. R.*, 88 N. J. L. 545, 97 Atl. 38; *Schnackenberg v. Delaware, etc. R. Co.*, 89 N. J. L. 311, 98 Atl. 266.

That either or both of the crossing statutes of 1909 require the trial court to submit to the jury the question of a plaintiff's contributory negligence when there is evidence to go to the jury on the question as to whether or not the crossing gates were properly operated, or were not down, is further indicated by the construction that has been placed upon the cognate crossing statute of 1910. The three statutes together are evidently intended to comprise a complete scheme for procedure in grade crossing accidents—the two statutes of 1909 being applicable to protected crossings and the statute of 1910 being applicable to unprotected crossings. The last named statute provides that at unprotected crossings it shall be left to the jury to determine whether the person injured or killed was exercising due and reasonable care. (For copy of this statute see Appendix III.)

Under the statute of 1910 it has been decided that the trial judge must in the first instance submit the question of contributory negligence to the jury. In the case of *Waibel v. West Jersey & S. R. Co.*, 87 N. J. L. 573, 94 Atl. 951, this court in referring to the statute of 1910, said (*italics ours*):

“What it (the statute) does do is to require the trial judges, *as a matter of procedure, to submit the question of contributory negligence to the jury.* It is true that theretofore in this jurisdiction, in this class of cases, whenever the proof, measured by certain rules established by judicial decision, clearly showed contributory negligence, the trial judge was required to non-suit the plaintiff. But that rule is not universal in this country. It is denied, or modified in several jurisdictions, notably in those states where the comparative negligence rule has been adopted. But, even regarding it as a

rule of the common law, the right to a non-suit upon the ground of contributory negligence is not intrenched behind any constitutional provision, nor was it originally created by legislative action. It was a rule established by the courts."

The statute was further considered in *Lynch v. Pennsylvania R.*, 88 N. J. L. 408, 96 Atl. 395, where the New Jersey Supreme Court, on a rule to show cause, held that a verdict for plaintiff in a grade crossing accident at an unprotected crossing might be set aside as against the clear weight of the evidence, but that by force of the statute *the trial judge was bound in the first instance* to submit the question of plaintiff's contributory negligence to the jury. In the course of the opinion the court said (italics ours):

"At the close of the plaintiff's case there was a motion for a non-suit rested upon the ground that the evidence conclusively showed contributory negligence. The motion was denied because it appeared in the proofs that the defendant company had not installed at the crossing any safety gates, bell or other device usually employed to warn and protect the traveling public at crossings of that character, and consequently by force of chapter 278, Pamphlet Laws 1910, entitled:

"An act concerning the liability of railroads for injury to persons or property caused by running cars across public streets and highways at which crossings no safety gates, bell or other device to give warning to the traveling public have been installed."

"*The question of plaintiff's contributory negligence was one that must be left to the determination of the jury.* When the whole case was in the defendant moved for the direction of a verdict in its favor upon the same ground, the facts tending to show negligence upon the part of the plaintiff not having been varied or modified by any of the testimony put into the case after the refusal

to non-suit. This motion was also refused on account of the bar created by the act of 1910. The case having been submitted to the jury, a verdict was rendered in favor of the plaintiff, which necessarily contained a finding of no negligence on his part.

\* \* \* \* \*

“Chapter 278 of the Laws of 1910 not being constitutionally objectionable for any of the reasons suggested by counsel, *the trial court was right in refusing to direct a non-suit or a verdict in favor of the defendant.*

\* \* \* \* \*

“We conclude, therefore, that although the fact of negligence *vel non* on the part of the plaintiff is to be determined by the jury, its finding, like that of any other essential fact, is reviewable by this court on rule to show cause; and that when ascertained to be against the great preponderance of the evidence it is the duty of this court to set aside the verdict and direct a *venire de novo*.”

On the present appeal the only point to be considered, so far as relates to the plaintiff's contributory negligence, is whether there was sufficient evidence for the jury on the question of the failure to operate the crossing gates properly; if there was such evidence then it was the duty of the trial judge to submit to the jury the question of the plaintiff's contributory negligence. Whether a finding by the jury in favor of the plaintiff would be against the clear weight of the evidence is an entirely different question—which could only be considered on a rule to show cause.

The rule in the courts of this State relative to setting aside verdicts as against the clear weight of the evidence is entirely separate and distinct from the rule prohibiting a trial judge from *directing* a verdict. While, of course, a

verdict may be set aside as against the clear weight of the evidence (even in cases to which the crossing statutes apply) that is quite different from directing a verdict. The latter can be done only when there is no dispute in the evidence. But the weight of conflicting testimony must always be submitted to the jury for their consideration and determination. *Uvalde Asphalt Co. v. Central Union Co.*, 84 N. J. L. 297; *Dickinson v. Erie R. R.*, 85 N. J. L. 586; *Nell v. Godstrey*, 101 Atl. 50, and cases cited at p. 52. Moreover, it should be observed that in this respect there is vital difference between the rule of the courts of this State and the rule in the Federal courts. In the Federal courts a scintilla of evidence is not sufficient to justify the trial judge in submitting doubtful questions to the jury. The rule on this subject has been declared by the United States Supreme Court in *Patton v. Texas & Pacific R. Co.*, 179 U. S. 658, as follows:

“That there are times when it is proper for a court to direct a verdict it is clear. It is well settled that the court may withdraw a case from them altogether and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the Court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.”

In *Slocum v. New York Life Insurance Co.*, 228 U. S. 364, at p. 369, the Court said:

“As a preliminary to the consideration of the first question it may be well to repeat what this court often has said, that when, on the trial of the issues of fact in an action at law before a Federal court and a jury, the evidence, with all the inferences

that justifiably could be drawn from it, does not constitute a sufficient basis for a verdict for the plaintiff or the defendant, as the case may be, so that such a verdict, if returned, would have to be set aside, the court may and should direct a verdict for the other party. *Randall v. Baltimore & Ohio Railroad Co.*, 109 U. S. 478; *Delaware, &c. Railroad Co. v. Converse*, 139 U. S. 469; *Southern Pacific Co. v. Pool*, 160 U. S. 438; *Patton v. Texas & Pacific Railway Co.*, 179 U. S. 658."

It will be observed from these citations that in the Federal courts a verdict must be directed when the trial court decides that in the exercise of its discretion it would be compelled to set aside a verdict. No doubt it was with this rule in mind that the United States Circuit Court of Appeals for the Third Circuit set aside the verdict rendered for the plaintiff in the present case in the action brought by her against the railroad company in the Federal court. (See *Delaware, etc. R. Co. v. James*, 241 Fed. 344.) We do not concede that the decision of the Federal court was correct; we think the court should have recognized the construction placed upon the crossing statutes by the courts of this State and should therefore have held that on writ of error the appellate court had no power to reverse the judgment, if there was reasonable evidence from which the jury would have been justified in finding a verdict for the plaintiff. But however that may be, it is important to note the difference in the procedure of the Federal courts as compared with that in the courts of this State. Under the well-settled rule of this State we submit that the trial judge in the present case was bound to submit to the jury the questions both of the negligence on the part of the several defendants and also the question of contributory negligence on the part of the plaintiff.

## IV.

PLAINTIFF WAS NOT A TRESPASSER  
AT THE TIME OF THE ACCIDENT.

It is claimed by the defendants that plaintiff was a trespasser at the time of the accident. The foundation for this claim is that *before* the plaintiff came to the crossing she had admittedly been walking within the limits of the railroad right of way. Therefore, it is said that both at common law and under Section 55 of the general railroad law of 1903 she is barred of any recovery. This argument fails to take into consideration two important points, first, that Section 55 has a proviso to the effect that it "shall not apply to the crossing of a railroad by any person at any lawful public or private crossing," and secondly, that there is no dispute that at the time of the accident and for an appreciable period prior thereto the plaintiff had ceased to be a trespasser and was in the position of a highway traveller about to pass over a railroad crossing. It may be conceded for the purpose of the argument that if this accident had happened before the plaintiff reached the line of the highway she would be barred of recovery, but having once passed the highway line she was no longer either a trespasser or a violator of Section 55. There is no dispute that the plaintiff was in good faith intending to pass over the crossing by means of the highway. This important fact distinguishes the case from *Kelley v. Michigan Central R. Co.*, 31 N. W. 904 (Mich.). In that case the plaintiff went upon the defendant's railroad track at a point where he had no lawful right so to do and started to walk between tracks. While so doing he reached a public crossing and was proceeding over the same when he was struck by a stake that pro-

jected from an engine that was moving on an adjoining track. He was not using the street as a highway, but intended to follow along the defendant's right of way to his place of employment some distance the other side of the street. The Court held that he was a trespasser and by reason thereof was barred of recovery. In the present case the evidence shows without dispute that the plaintiff was not only intending to use the highway as a means of crossing, but she had proceeded halfway across the street and had actually turned in the direction of the railroad tracks for the purpose of crossing same. She was therefore in good faith using the highway for the purpose of passing over the tracks and had no intention of continuing to trespass upon the right of way after she had passed beyond the limits of the highway. The evidence therefore brings the case literally within the proviso of Section 55.

The precise point now under discussion was considered by the Supreme Court of this State in the case of *Petersilge v. N. Y. S. & W. R. R. Co.* (opinion filed June 11, 1917—not reported). In that case the plaintiff's intestate alighted from a train of the West Shore Railroad and after so doing passed across the station platform on to the defendant's right of way and proceeded along the same a short distance until he came to a public highway. While on the highway he was struck and killed by a train operated by the defendant which it was alleged did not give the statutory signals by bell or whistle. The defendant claimed that as the plaintiff's intestate was admittedly a trespasser before he came to the line of the highway he continued to be such trespasser after passing the line of the highway—especially as there was

no evidence to show that he intended to use the highway for the purpose of passing over the railroad right of way.

This contention was overruled by the Supreme Court and a verdict for the plaintiff was sustained. The opinion being unreported, we beg leave to submit a copy of same as follows:

*“Per Curiam:*

“This is the defendant’s rule to show cause why the plaintiff’s verdict for \$15,000 should not be set aside.

“Plaintiff’s decedent had been a passenger on the West Shore Railroad. He came in on their train and landed at the station used jointly by that railroad and the defendant company and walked through the station to or near a public highway adjoining the station and crossed the first of two of the defendant’s tracks, and when on the second track of the defendant company, he was hit by a train of the defendant.

“The defendant claimed that the decedent was a trespasser; that he was between the tracks on the railroad’s right of way. The plaintiff claimed that he was on the public crossing which is near the station, and was killed while trying to save the life of Mrs. Bourne, while in the act of shoving her off the track to a place of safety.

“The alleged negligence of the defendant was the failure to give the statutory signal by bell or whistle.

“(1) The evidence given by at least two of the plaintiff’s witnesses who were paying attention and in a position to hear, was that there was no signals given. We cannot say that the defendants’ evidence overcomes this proof, there being no evidence that either a whistle was blown or that a bell of 30 pounds was rung, which was of a character to clearly outweigh the plaintiff’s evidence.

“(2) There is evidence from which the jury might properly conclude that the de-

cedent was using this crossing on his way home, following after Mrs. Bourne, and that, while in a place of safety, he saw her danger and attempted to push her out of the way of the on-coming train. That being so the plaintiff's decedent cannot be said as a matter of law to have been negligent, nor can it be said on the evidence that the verdict, on the question of the decedent's negligence, was against the great weight of the evidence.

"(3) The verdict was for \$15,000. It is large, but we are unable to say that it is so excessive as to justify us in interfering with it. Decedent was a mechanical engineer, steady and thrifty, and was earning from \$25 to \$33 a week. He was 46 years old and left a wife and two children, 21 and 18 years old respectively. He turned his earnings for the most part over to his wife for saving and for the support of the family. He had, according to the tables, an expectancy of 24 years.

"We think the rule to show cause must be discharged."

V.

THE JUDGMENT SHOULD BE REVERSED  
AND A NEW TRIAL ORDERED.

ALEXANDER SIMPSON,  
*Attorney of Plaintiff-Appellant.*

GEO. S. HOBART,  
*Of Counsel.*

**Appendix I.**  
CHAPTER 96.

AN ACT WITH REFERENCE TO THE DEGREE OF CARE NECESSARY TO BE USED BY TRAVELLERS OVER RAILROAD CROSSINGS PROTECTED BY FLAGMEN OR SAFETY APPLIANCES OR BOTH.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Wherever any railroad whose right of way crosses any public street or highway, has or shall install any safety gates, bell or other device designed to protect the traveling public at any crossing or has placed at such crossing a flagman, any person or persons approaching any such crossing so protected as aforesaid, shall, during such hours as posted notice at such crossing shall specify, be entitled to assume that such safety gate or other warning appliances are in good and proper order, and will be duly and properly operated unless a written notice bearing the inscription "out of order" be posted in a conspicuous place at such crossing, or that the said flagman will guard said crossing with sufficient care whereby such traveler or travelers will be warned of any danger in passing over said crossing, and in any action, brought for injuries to person or property, or for death caused at any crossing protected as aforesaid, no plaintiff shall be barred of the action because of his (the) failure of the person injured or killed to stop, look and listen before passing over said crossing.

2. This act shall take effect immediately.

Approved April 14, 1909.

**Appendix II.**  
**CHAPTER 35.**

AN ACT RELATING TO ACCIDENTS AT RAILROAD  
CROSSINGS.

Whereas, By the provisions of the statutes of this State, it has been provided that whenever a railroad company shall have enclosed its right of way through any incorporated city of this State with a fence, wall or embankment, and shall have established and maintained gates at street crossings, as provided by the provisions of any statute of this State, that upon such compliance with such provisions the said railroad company could run over the part of their said so enclosed road through any incorporated city of this State "at any rate of speed they may deem proper, and that such speed should not, thereafter, be restrained by any city ordinance to regulate the same"; therefore,

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Whenever any railroad company shall have assumed to establish and maintain what are known as safety gates at any railroad crossing in this State, and a person is killed or injured at any such crossing by being struck by a locomotive or train when attempting to cross the tracks at a time when such gates are not down, as required by any statute giving the railroad the right to run through an incorporated city at any rate of speed they see fit, upon compliance with the provisions of such statute, that in all such cases the question whether the person so killed or injured, upon attempting to cross such railroad crossing, at a time when the safety gates at such crossing are not down, was

or was not guilty of contributory negligence shall be a question to be determined by the jury, in all actions brought to recover damages for such loss of life or personal injury.

2. All acts or parts of acts inconsistent with this act are hereby repealed, and this act shall take effect immediately.

Approved March 31, 1909.

### Appendix III.

#### CHAPTER 278.

AN ACT CONCERNING THE LIABILITY OF RAILROADS FOR INJURY TO PERSONS OR PROPERTY CAUSED BY RUNNING CARS ACROSS PUBLIC STREETS AND HIGHWAYS AT WHICH CROSSINGS NO SAFETY GATES, BELL OR OTHER DEVICE TO GIVE WARNING TO THE TRAVELING PUBLIC HAVE BEEN INSTALLED.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. In any action against any steam railroad company brought to recover damages for injuries or death occurring at any crossing of the right of way of such steam railroad company, where such company has not installed any safety gates, bell or device usually employed to warn and protect the traveling public at such crossing, which injuries or death are alleged to be due to the negligence of said railroad company or its agents, the plaintiff in such action shall not be non-suited on the ground of contributory negligence on his own part or on the part of the person for whom such suit is brought, but in all such cases it shall be left to the jury to determine whether the person in-

jured or killed was exercising due and reasonable care under the conditions existing at said crossing at the time of such injury or death, and if the jury shall determine that the person injured or killed was not exercising due and reasonable care under the conditions existing at the said crossing at the time of such injury or death, the verdict shall be against the plaintiff and in favor of the defendant.

2. All acts and parts of acts inconsistent with the provisions of this act be and the same are hereby repealed.

3. This act shall take effect immediately.

Approved April 12, 1910.



