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Notice of Appeal.

Filed June 13, 1945.

New Jersey Supreme Court

UNION COUNTY CIRCUIT

10

ACTION AT LAW.

MENTE BROS., INC., a corporation, SAMUEL BRAN-
HAM and ROBERT STICKEL,
Plaintiffs,

vs.

SHELTON PITNEY, *et al.*, Trustees of the CENTRAL
RAILROAD COMPANY OF NEW JERSEY,
Defendants.

20

To: DE VOE TOMLINSON, ESQ.,
744 Broad Street,
Newark, New Jersey,
Attorney of Defendants or
To Whom it May Concern.

SIR:

PLEASE TAKE NOTICE, that the plaintiffs in the
above entitled cause appeals to the Court of
Errors and Appeals in the last resort in all
causes in New Jersey from the whole of the
judgment entered in this cause.

30

HAROLD W. BORDEN,
Attorney for Plaintiffs.

40

Affidavit of Service.

State of New Jersey, }
County of Essex. } ss.:

EVELYN DE LUCA, of full age, being duly sworn according to law, upon her oath, deposes and says that:

- 10 On Monday, June 11th, 1945 I served a copy of the within Notice of Appeal upon De Voe Tomlinson, Esq., Attorney of Defendants by leaving copy of same with Martha Daly, young lady in charge of said office.

EVELYN DE LUCA.

Sworn and subscribed to before
me this 11th day of June, 1945.

Bernard Shurkin,

A Master in Chancery
of N. J.

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Grounds of Appeal.

Filed July 15, 1945.

NEW JERSEY COURT OF ERRORS AND APPEALS

ACTION AT LAW.

Sat Below: CLEARY, C. C. J.

10

MENTE BROS., INC., a corporation, *et als.*,
Plaintiffs,
vs.

SHELTON PITNEY, *et al.*, etc.
Defendants.

To: DE VOE TOMLINSON, ESQ., or
To Whom it May Concern.

20

SIR:

PLEASE TAKE NOTICE, that the following are the grounds of appeal from the Supreme Court to the Court of Errors and Appeals:

I. The Court erred in its charge wherein it limited the duty of the defendants, as follows:

“You see, this is a railroad accident case, which is distinguished somewhat from automobile cases at crossings, where each party involved has exactly the same obligation; the obligation to use reasonable care, to be careful, as reasonably prudent persons. But a railroad company has the duty to comply with what the law says it must comply with. And that is all. And when it does that, it has complied fully with its obligation. No more can be asked of it than what the law prescribes that it must do. And when the law gives to the railroad companies the right to lay their tracks and to

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Grounds of Appeal.

cross public highways, it specifies what? As a part of that contractual relationship that it must do certain things, under certain conditions. And that is what it must do. If it does that, that is all it has to do."

10

"The railroad was negligent if it failed to give the statutory signals which the law requires. The railroad was not negligent if it did not fail to give those signals. And hence the question, as far as the defense, or the defendant's negligence in this case, and the fact for you to determine is, did they give the signal, or didn't they?"

"If it has one or the other (bell ringing and whistle blowing), and operates it in the manner in which this statute requires, then it has complied fully with its duty, and no responsibility can be had for it afterward."

20

II. The Court erred in its failure to charge the defendants with duty to use due care in addition to a compliance with the statute, as follows:

30

"A railroad company, in the use of these public crossings, cannot exercise the same care, of the same nature as automobiles; it cannot swerve around somebody that it sees coming, it cannot stop at every railroad crossing that it comes to, and cannot stop and look around the corner to see if there are any more cars coming. It has a schedule on which it runs, and it knows what its duty is when it starts out. That duty is prescribed by law, and the law says when you start out on your run, wherever you begin, and wherever you end, during the course of that run, when you come to a crossing of this nature, this is what you have got to do. And this is what they know they have to do, and that is all they have to do."

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Grounds of Appeal.

III. The Court erred in eliminating from the consideration of the jury the element of the freight cars along the siding and the obstruction of the view of the crossing and its effect upon causing of the accident, as follows:

“Now, something has been said about cars being on the siding. A railroad company has absolute right to place cars as these freight cars were, otherwise, business could not be done. As long as they are only temporary, there is no negligence whatever in putting cars upon sidings to be unloaded, even though in placing them there temporarily they may to some extent obstruct the view of those using the crossing. Does not place any more obligation upon a railroad because of that, than if the cars were not there, because you see if it did, then every time they backed a car up on a siding at a manufacturing plant, or some other place, they would have to do something differently from what they do if that was not there.”

IV. The Court erred in distinguishing between permanent obstructions and temporary obstructions at the crossing and its effect upon the cause of the accident, as follows:

“Now, if they put a permanent obstruction there, if they put a building up, if they put something up there so as that obstructs it, then it may be, under certain circumstances, that the law will say that having created an extra hazardous condition at that crossing, that they then must do more than just what the law says they have to do under ordinary circumstances * * *. But that is not in this case at all. All that has been said here is that upon the siding there were railroad cars, for a purpose, directly for a purpose of unloading; that the railroad had a right, but that placed more obligation up-

Grounds of Appeal.

on the railroad than if it hadn't done so * *. But no penalty can be attached to the placing of cars upon the siding temporarily, and for the particular purpose of loading or unloading. And I again disabuse your minds of that as being a feature in the case as far as any obligation upon the railroad company is concerned at all."

V. The Court erred in eliminating from the consideration of the jury the effect of the signs, their condition and their significance and the fact that the crossing was protected at times by a watchman.

"There is a question as to a sign put up as a precautionary measure, so they say, a protection for those using the crossing. But the strange part of this situation to me, as I see it, is that there seems to be some suggestion that that was negligence in not having those signs so they were legible. Well, certainly if they were illegible, no one could be misled by them at all * * *. I don't see any significance of these signs in the case at all. They didn't have to be there. Any obligation to put them there I think could be limited to any extent to which the railroad wanted to limit them. No flagman was required there. If a custom existed whereby a flagman was put there, then people have a right to rely upon it. They could put a flagman there, they could limit the period they wanted to, and give notice of that. During those periods people would have a right to rely upon it. During other periods nobody has a right to rely upon it. I see no significance to that sign business at all, it has nothing to do with this case, and you will get back to the question involved here, was the railroad negligent?"

Grounds of Appeal.

VI. The Court erred in charging the jury not to consider the cost of the rental value of another truck for the time the truck involved in the accident was undergoing repairs.

“I charge you directly that you are not to consider, so as to make it perfectly clear, and have the record clear, the question of what it would have cost him if he had gone out and hired another truck for the one hundred and twenty-one days in which this truck was under repairs, you are to disregard and not take it into consideration. You cannot do it. I make it as clear as this, so as to make the record positive for counsel, as I have indicated, to take his own exception to it, and have his record clear. That is not an element of damages in a case of this kind, for a man to simply say ‘I didn’t hire.’ If, under a different set of circumstances, a man has a truck damaged, and proves, as they did here, that in the exercise of reasonable care it required him three months to get it repaired, and if in the meantime he shows that his business is of a certain nature, that he absolutely needs the truck and that during that period he went out into the market and hired one at a reasonable rate, whatever the market was, to do that work, and charge up the cost of that, that may be done, in mitigation of his damages, if he proves it. But to simply take the truck as here, have it in a shop, and come in and say I didn’t hire another, I didn’t pay for another, but I would like to be paid twenty dollars a day, or whatever the cost of a truck would be, if I had gone out and hired it. You are to disregard that entirely. It is not an element of damages. His damage, if he is entitled to any, would be the cost of the repair of his truck, the damage to the material on the truck and then the five days which it

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Grounds of Appeal.

cost him to hire another truck during that period, to take the place of the other."

10 VII. The Court erred in eliminating the rental value of a truck as testified to as an element of damage and thus prejudiced the mind of the jury to the effect that the plaintiff owner of the truck was attempting to recover for damages to which he was not entitled.

VIII. The Court erred in failing to charge that the defendants were duty bound to use due care under all the circumstances in compliance with the duty imposed by the statute.

20 IX. The Court erred in failing to charge that the defendants were duty bound to use due care in addition to the duty imposed by the statute.

Respectfully submitted,

HAROLD W. BORDEN,
Attorney for Plaintiff.

Service of the within copy of Grounds of Appeal is hereby acknowledged, within time, this 10th day of July, 1945.

30 DE VOE TOMLINSON,
Attorney for Defendants.

Transcript of Pleadings for Trial.

NEW JERSEY SUPREME COURT

UNION COUNTY

MENTE BROS., INC., a corporation, SAMUEL BRAN-
HAM and ROBERT STICKEL,
Plaintiffs, 10

vs.

SHELTON PITNEY, *et al.*, Trustees of the Central
Railroad of New Jersey,
Defendants.

HAROLD W. BORDEN,
Attorney for Plaintiffs.
WM. F. HANLON,
Attorney for Defendants. 20

Summons issued January 22, 1943.

Amended Complaint.

FIRST COUNT.

The Plaintiff, Mente Bros. Inc., a corporation
duly organized under the laws of the State of
New Jersey, having its principal office in the
Borough of Kenilworth, County of Union and
State of New Jersey, respectfully says that: 30

1. Defendant before and at the time herein-
after mentioned was a corporation organized un-
der the laws of the State of New Jersey; and
was the operator, and still is a common carrier
of passengers and freight by steam railroad oper-
ated and controlled by it throughout the State
of New Jersey. 40

Amended Complaint.

2. One of the courses of the road known, used and operated and controlled by the said defendant is through the Borough of Eatontown in the County of Monmouth and State of New Jersey, and through divers other places in said State.

10 3. That on May 11th, 1942, the defendant was the owner and operator of a certain railroad train running through the said Borough of Eatontown, County of Monmouth and State of New Jersey at grade.

20 4. Through the said Borough of Eatontown aforesaid, the tracks on which the train of the said defendant was operating are laid at grade and on a level with the public streets, roads and highways, and at those certain streets, roads, highways and grade crossings the defendant maintains signs and a watchman to announce and warn of the approach of its trains.

30 5. That on May 11th, 1942, the plaintiff corporation by its agents and/or duly authorized servants, while driving a truck in a westerly direction on Lewis Street in the said Borough of Eatontown, approached the tracks on which the train of the said defendant was running at or near that grade crossing, at a time when no warning was given by the defendant of the approach of a train in either direction, by bell, whistle, watchman, sign or other means.

40 6. By reason of the negligence on the part of the defendant and its agents or servants, in failing to give any notice or warning of the approach of a train, the plaintiff proceeded with its truck to cross the tracks on which the said defendant was operating its train, and the truck of the said plaintiff was then and there, while

Amended Complaint.

on the tracks, on which the said defendant was operating its train, struck by a passenger train of the said defendant running in a southerly direction at a great and excessive rate of speed.

7. The negligence of the defendant company consisted in this: (A) That it failed and neglected to give warning of the existence of the said train to cross the highway at that particular time to persons lawfully upon said highway; 10

(B) That it failed and neglected to equip the said crossing with proper warning lights or signals or other safety devices so as to warn persons using said highway of the existence of oncoming trains at that time across the said intersection;

(C) That it failed to have a watchman at the said crossing at the said time and place in accordance with the law in such case made and provided; 20

(D) That it failed to take safety measures for the protection of said persons using said highway by leaving several of its cars on the spur immediately adjoining the said right of way where it crosses the said highway, thereby seriously hindering and otherwise obstructing the viewpoint of such persons lawfully upon said highway. 30

(E) That the said defendant failed to sound the whistle or bell of the said train for the said crossing in accordance with the law in such case made and provided;

(F) That it failed to use reasonable care in the operation of its said train at the said time and place; 40

Amended Complaint.

(G) That it failed to use reasonable care to give proper signals and warnings of the movements of its said train.

8. That by reason of the negligence of the said defendant, plaintiff's truck was completely destroyed.

10

9. The within action is commenced within two years next after the cause of action accrued.

WHEREFORE, the plaintiff, Mente Bros. Inc., demands as damages on this count the sum of Twenty-Five Hundred Dollars (\$2500.00) together with lawful interest thereon.

SECOND COUNT.

20 Plaintiff, Mente Bros. Inc., repeats and reiterates all of the allegations contained in the First Count, insofar as they relate to this count, and further says:

1. That by reason of the said negligence of the defendants and of said accident and damage to the truck owned and operated by plaintiff, plaintiff lost the use of said truck for a considerable length of time, and was greatly damaged thereby.

30

WHEREFORE, the plaintiff, Mente Bros., Inc., demands as damages on this count the sum of Five Thousand Dollars (\$5,000.00) together with lawful interest thereon and costs of suit.

THIRD COUNT.

Plaintiff, Mente Bros. Inc., repeats and reiterates all of the allegations contained in the Second Count, insofar as they relate to this count, and further says:

40

Amended Complaint.

1. That by reason of the said accident and damage to the truck owned and operated by the plaintiff a considerable quantity of vitrified pipe was destroyed.

WHEREFORE, the plaintiff, Mente Bros. Inc., demands as damages on this count the sum of Two Hundred Fifty Dollars (\$250.00) together with lawful interest thereon. 10

FOURTH COUNT.

The Plaintiff, Samuel Branham, residing in the City of Newark, County of Essex and State of New Jersey, respectfully says that:

1. The plaintiff repeats and reiterates all of the allegations contained in Paragraphs 1, 2, 3, and 4 of the First Count and makes the same a part hereof. 20

2. That on May 11th, 1942 the plaintiff, Samuel Branham, while riding in a truck owned by Mente Bros. Inc. and operated by its agent or duly authorized servant in a westerly direction on Lewis Street in said Borough of Eatontown, approached the tracks on which the train of the said defendant was running at or near the grade crossing, at a time when no warning was given by the defendant of the approach of a train in either direction, by bell, whistle, watchman, sign or other means. 30

3. By reason of the negligence on the part of the defendant and its agents or servants, in failing to give any notice or warning of the approach of a train, the truck in which the plaintiff was riding proceeded across the tracks on which the said defendant was operating its train, and the truck in which the said plaintiff was riding was 40

Amended Complaint.

then and there, while on the tracks on which the said defendant was operating its train, was struck by a passenger train of the said defendant running in a southerly direction at a great and excessive rate of speed, and the plaintiff was struck, thrown out of the truck and severely injured.

4. The plaintiff repeats and reiterates all of the allegations contained in Paragraph 7 of the First Count and makes the same a part hereof.

5. As a result of the negligence on the part of the defendant said plaintiff was severely injured, cut, bruised and contused in and about the head, face, eyes, neck, body and limbs, all of the foregoing injuries being permanent in their nature and he was otherwise internally and permanently injured and further has undergone great pain and suffering, mental anguish, torture and his nervous system has been and will be greatly impaired; further he was compelled to be hospitalized for several weeks and thereafter for a further period of several weeks was compelled to remain at home as a result of the injuries sustained by him; he has been unable to attend his usual occupation and has been deprived of the means of earning a livelihood, which he otherwise would have been able to earn, and further he has been compelled to expend large sums of money for doctors, hospital, X-rays, medicines and otherwise in endeavoring to cure and relieve himself from his pain and suffering as aforesaid, and he has otherwise been damaged.

WHEREFORE, the plaintiff, Samuel Branham, demands damages against the defendant on this count in the sum of Ten Thousand Dollars

Amended Complaint.

(\$10,000.00) besides costs and disbursements of suit.

FIFTH COUNT.

The plaintiff, Robert Stickel, residing in the City of Newark, County of Essex and State of New Jersey, respectfully says that:

10

1. The plaintiff repeats and reiterates all of the allegations contained in Paragraphs 1, 2, 3, and 4 of the First Count and makes the same a part hereof.

2. That on May 11th, 1942, the plaintiff while driving a truck owned by Mente Bros. Inc. in a westerly direction on Lewis Street in said Borough of Eatontown, approached the tracks on which the train of the said defendant was running at or near the grade crossing, at a time when no warning was given by the defendant of the approach of a train in either direction, by bell, whistle, watchman, sign or other means.

20

3. By reason of the negligence on the part of the defendant and its agents or servants, in failing to give any notice or warning of the approach of a train, the plaintiff proceeded with the truck to cross the tracks on which the said defendant was operating its train, and the truck which the plaintiff was then and there driving, while on the tracks on which the said defendant was operating its train, struck by a passenger train of the said defendant running in a southerly direction at a great and excessive rate of speed, and the plaintiff was struck and severely injured.

30

4. The plaintiff repeats and reiterates all of the allegations contained in paragraph 7 of the First Count and makes the same a part hereof.

40

Answer.

5. The plaintiff repeats and reiterates all of the allegations contained in Paragraph 5 of the Fourth Count and makes the same a part hereof.

10 WHEREFORE, the plaintiff, Robert Stickel, demands damages against the defendant on this count in the sum of Five Thousand Dollars (\$5,000.00) besides costs and disbursements of suit.

WHEREFORE, the plaintiffs, Mente Bros. Inc., Samuel Branham and Robert Stickel, demands damages against the defendant on either or all of the counts in the sum of Twenty-Five Thousand Dollars (\$25,000.00) besides costs and disbursements of suit.

HAROLD W. BORDEN,
Attorney for Plaintiffs.

20

Answer.

Filed March 2, 1943.

30 Shelton Pitney and Walter P. Gardner, Trustees of the property of The Central Railroad Company of New Jersey, having their principal office for the transaction of business in the City of Jersey City, County of Hudson and State of New Jersey answering the complaint of the plaintiffs, say that:

1. They deny each and every allegation contained in the First, Second, Third and Fourth Count of the Complaint.

40 AS A SEPARATE DEFENSE to all counts, the defendants allege that the accident mentioned in the complaint was caused by the contributory negligence of the plaintiffs, thereby barring a recovery in this action.

Reply.

AS A SECOND SEPARATE DEFENSE to all counts, the defendants allege that the accident mentioned in the complaint was caused solely by the negligence of the driver of the truck involved in this accident, thereby barring a recovery to all plaintiffs in this action.

WILLIAM F. HANLON, 10
Attorney for Defendants.

Dated: February 26, 1943.

Reply.

Filed March 15, 1943.

Plaintiffs deny each and every allegation contained in the Answer.

HAROLD W. BORDEN, 20
Attorney for Plaintiffs.

Clerk's Certificate.

I, the undersigned, Clerk of the Supreme Court of the State of New Jersey do certify that the foregoing is a true transcript of the pleadings in the above stated cause as the same remain on file in my office.

In testimony whereof I have set my
hand and the seal of said Court
(Seal) at Trenton, this tenth day of
March A.D. nineteen hundred and
forty-four.

JAMES J. GAVIN,
Clerk.

Judgment.

Entered June 27, 1944.

NEW JERSEY SUPREME COURT

UNION COUNTY

10 MENTE BROS., INC., a corporation, SAMUEL BRAN-
HAM and ROBERT STICKEL,
Plaintiffs,

vs.

SHELTON PITNEY and WALTER P. GARDNER, Trus-
tees of the CENTRAL RAILROAD OF NEW JERSEY,
Defendants.

20 This case was tried before Honorable Frank L.
Cleary, Judge of the Circuit Court, to whom it
had been regularly referred, with a jury at the
Union County Circuit Court on June 14, 1944,
June 15, 1944 and June 19, 1944; the Jury ren-
dered a general verdict in favor of the defend-
ants and against all of the plaintiffs, of no cause
of action.

30 Whereupon it is adjudged that the complaint
of the plaintiffs be dismissed and that the defend-
ants, Shelton Pitney and Walter P. Gardner,
Trustees of the Central Railroad of New Jersey
do recover of the said plaintiffs, Mente Bros.
Inc., a corporation, Samuel Branham and Robert
Stickel their costs which have been
Costs \$95.50 taxed at the sum of ninety-five dol-
lars and fifty cents.

Judgment entered and signed June 27, 1944.

THOMAS J. BROGAN,
Chief Justice.

Substitution of Attorney.

Filed July 17, 1945.

**NEW JERSEY COURT OF ERRORS
AND APPEALS**

ACTION AT LAW.

ON APPEAL FROM SUPREME COURT.

10

MENTE BROS., INC., a corporation, SAMUEL BRAN-
HAM and ROBERT STICKEL,
Plaintiffs-Appellants,
vs.

SHELTON PITNEY, *et al.*, Trustees of the CENTRAL
RAILROAD COMPANY OF NEW JERSEY,
Defendants-Appellees.

20

I hereby substitute Stanley W. Greenfield, Esq.,
an attorney for the Plaintiffs-Appellants in the
above matter in my place and stead.

HAROLD W. BORDEN,
Attorney for Plaintiffs-Appellants.

Dated: July 5, 1945.

30

40

Testimony.

NEW JERSEY SUPREME COURT

UNION COUNTY CIRCUIT

MAY TERM 1944

10 MENTE BROS., INC., a corporation, SAMUEL BRAN-
HAM, and ROBERT STICKEL,
Plaintiffs,

vs.

SHELTON PITNEY, *et al.*, Trustees of the CENTRAL
RAILROAD COMPANY OF NEW JERSEY,
Defendants.

20 Transcript of stenographer's notes of evidence
in the above entitled cause, taken before Hon.
FRANK L. CLEARY, Circuit Court Judge, and a
Jury, at the Union County Court House in the
City of Elizabeth, N. J., on the fourteenth day
of June, A.D. 1944, at 1:30 P.M.

APPEARANCES:

HAROLD W. BORDEN, Esq.,
STANLEY W. GREENFIELD, Esq., (Present)
Attorneys for the Plaintiffs.

30 WILLIAM F. HANLON, Esq.,
DEVUE TOMLINSON, Esq., (Present)
JOHN T. GLENNON, Esq., (Present),
Attorneys for the Defendants.

A jury being empanelled and found satisfac-
tory, they were sworn.

40 Mr. Greenfield: I would like to introduce and
make part of the record an amended complaint
in this action: The amendment to this complaint

Colloquy.

being an addition of a cause of action asking for damages on behalf of Mente Bros., Inc., by reason of the loss of the use of their truck, resulting from this accident. It is stipulated by Mr. Tomlinson that his present answer to the original complaint is to stand in answer to this amended complaint, just the same as if he had, in fact, filed a full and complete new answer. May the record show that. So that this amended complaint will constitute part of the transcript. Is that satisfactory, Mr. Tomlinson? 10

Mr. Tomlinson: Yes.

Mr. Greenfield opens the case for the Plaintiffs.

Mr. Tomlinson opens the case for the Defendants.

Mr. Tomlinson: I think before alluding to the map before the jury, you should find out what the scale is, so that they will have some idea. 20

Mr. Greenfield: It shows on the map.

Mr. Tomlinson: No. I think the jury has a right to know what that map purports to represent, before you examine on it.

Mr. Greenfield: The only thing is this, if your Honor please, we don't have much time left, and I would like to get on with this witness. I have no objection to admitting in the record that that map has a scale of one inch to thirty feet, as Mr. Dodd testified. 30

Mr. Tomlinson: If your Honor please, this witness, or this person to whom counsel refers as a witness, is a plaintiff in this case, and he has a most distinct interest, and I don't think we should be curtailed in any way by the fact that for his personal reasons he desires to get away this afternoon. I certainly don't expect to be curtailed in my cross-examination, and I don't think that the 40

George S. Dodd—Direct.

trial itself should be curtailed because of some personal desire on his part. And I think that the jury—that Mr. Dodd should have a right to explain this map before the jury refers to it, because, obviously, they may not know what it means.

10 The Court: All right with me. It is entirely up to you men. If you want to use it, put Mr. Dodd on and prove it. If not, go on.

GEORGE S. DODD, a witness produced on behalf of the Plaintiffs, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Greenfield:

20 Q. Mr. Dodd, you have in your hand a map that you prepared, showing the scene of an accident at the crossing of Lewis Street by the railroad tracks of the Central Railroad in the Borough of—

Mr. Tomlinson: That does not purport to show the scene of any accident. It shows the crossing.

30 Q. All right. It shows the crossing and the surrounding environment, shall we say, the station, whistle board, and the physical location of tracks, where the tracks of the Central Railroad cross Lewis Street, in the Borough or Township of Eatontown, New Jersey? A. Yes, sir.

Q. Will you exhibit the map, please, and tell the jury the scale of the map, if you will, please? What is the scale of that map, Mr. Dodd? A. One inch equals thirty feet.

Q. And when was that map made, Mr. Dodd? A. February 14th, 1944.

40 Q. Now, this is north, indicating the northern—

George S. Dodd—Direct.

most end of this map, and this is Tinton Falls Road, is that correct, sir? A. Yes, sir.

Q. And the track runs roughly in what direction? A. North and south.

Q. And towards the southern end of the map is the station, is that correct, that is Eatontown station? A. Yes, sir. 10

Q. A short ways from Eatontown station would be the location of Lewis Street, running, that is northwest and southeast, is that correct? A. Yes.

Q. There is a whistleboard indicated by a "W," here, not far from the Tinton Falls Road bridge? A. Yes.

Q. And then there are two tracks here, on the westerly side "main track," and on the easterly side "passing track"? A. That is right.

Q. And then over here to the northeast, or running northeast, and merging into the passing siding, is a delivery track, correct? A. Yes, sir. 20

Q. And then I guess roughly parallel with the delivery track here there is a roadway, correct? A. Yes, sir.

Q. And over on the west side of all of the tracks there is an area marked "wooded area" and "U. S. Government"? A. Yes, sir.

Q. That "U. S. Government" is supposed to represent Fort Woods, or Camp Woods? A. I don't know exactly what it represents. The Government is in there. 30

Q. And you say that one inch is thirty feet? A. Yes, sir.

Mr. Greenfield: Thank you, sir. That is all.

You may cross-examine.

Mr. Tomlinson: I just want to ask one or two questions, and I will reserve cross-examination of him until later. 40

George S. Dodd—Cross.

Mr. Greenfield: Of course.

Cross-examination by Mr. Tomlinson:

Q. Mr. Dodd, this is the station here, isn't it, that is south of the crossing? A. Yes, sir.

10 Q. And on the east side of the passing siding, is that right? A. Yes, sir.

Q. Then the crossing itself is north of the station? A. Yes, sir.

Q. How far is the middle of that crossing from the nearest point of the station? A. It is approximately forty feet from the center of the crossing to this corner of the platform.

Q. To the nearest projection, is that right? A. Yes, sir.

20 Q. What is the distance from the whistleboard up here to the crossing? A. 1,196 feet.

Q. Now, that stretch of railroad is known as what? A. That is the Southern Division, Central Railroad Company of New Jersey. Southern sub-division, Central Railroad Company of New Jersey.

Q. Is that single or double track? A. It is a single track railroad.

30 Q. What is the passing siding, what is the function of that? A. The passing siding is used in conjunction with single track railroads, to permit trains that are running in the opposite direction to pass one another.

Q. In other words, for example, if an express was coming along the main track, and the train was going south, and a train was coming north, you would put the north bound train over on the siding? A. The passing siding, and the other train would go by.

40 Q. Or a freight train? A. Yes, sir.

Mr. Tomlinson: That is all.

George S. Dodd—Redirect.

Robert A. Stickle—Direct.

Redirect-examination by Mr. Greenfield:

Q. You don't know if all of the physical conditions on the day of this accident are shown on that map, do you? A. I believe they are all there. Everything that I could find is there. 10

Mr. Tomlinson: Does counsel offer the map? Does he now question the map?

Mr. Greenfield: All right. Yes, go ahead, offer it. I offer it in evidence.

(Map entered in evidence and marked Exhibit P-1.)

ROBERT A. STICKLE, one of the Plaintiffs, being duly sworn according to law, on his oath, saith: 20

Direct-examination by Mr. Greenfield:

Q. How old are you, Mr. Stickle? A. Fifty-three years old.

Q. Where do you live? A. 54 Lenox Street, Newark.

Q. With whom? A. With my wife.

Q. On May 11th, 1942, by whom were you employed? A. Mente Bros. 30

Q. In what capacity? A. Truck driver.

Q. Are you employed by them at the present time? A. No.

Q. By whom are you employed at the present time? A. Kuehne Chemical Company of Elizabeth.

Q. Were you driving the truck of Mente Bros. that was involved in the accident here? A. I was.

Q. Will you tell us, please, prior to the accident, 40

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if you worked in and about Eatontown and this railroad station? A. Yes. For about a week.

Q. About a week. And just where were you working? Will you take this pointer, please, and show the jury? Do you understand the map? A. Here is the delivery track. There were several cars on this delivery track. We had—

Q. What kind of cars? A. Freight cars.

Q. Yes. A. There was one car ahead of the car we were working on. We were working on the second car from Lewis Street.

Q. What were you doing on that car? A. We were unloading sewer pipe, and delivering it to Camp Woods. That night we were finishing up, about twenty after six. And as I said, there was—

Q. Where did you take that sewer pipe after you got your truck loaded? A. To Camp Woods.

Q. And when you got your truck loaded at the delivery track, will you show the jury please, what course you followed to get to Camp Woods? A. We came out of the freight yard this way, and across Lewis Street, and out to the camp that way (indicating).

Q. Now, prior to the happening of this accident, and just before you pulled away from the freight car at the delivery track, in what direction was your truck facing? A. It was facing south.

Q. Towards the station? A. Towards the station, yes.

Mr. Tomlinson: Don't lead, Mr. Greenfield.

Mr. Greenfield: I just wanted to make it clear.

Q. Had you made the same trip, before the happening of this accident? A. Yes.

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Q. How many times? A. Oh, average three times a day for the week that I worked there.

Q. Three times a day? A. Yes.

Q. Now, when you left the delivery track this last time was there anything on your truck? A. Yes. It was part of a load of sewer pipe, and some wood.

10

Q. Just how did you drive away from the freight car on the delivery track to get to Lewis Street, when this accident happened? A. Well, the freight cars were here, and I drove along parallel with the freight cars, about thirty feet from Lewis Street, in about the center of the road, in the freight yard there was a hole. I couldn't swing out and get to the—

Q. Don't tell us what you couldn't do. What did you do? A. So that I went straight out and crossed the tracks on an angle. I couldn't cross the tracks straight, due to the fact that I couldn't get around to straighten out. I had to come parallel with the cars, and cross on an angle, so that when I made the crossing the front of the truck was on the left-hand side of Lewis Street.

20

Q. Well, what side of Lewis Street were you on at the time this accident happened? A. I was on the left side of Lewis Street.

Q. Now, about how far from Lewis Street was the front of the first freight car? A. Oh, about thirty, thirty-five feet.

30

Q. And about how far was the door to the second freight car, the one that you were working on, from Lewis Street? A. About seventy-five feet.

Q. Now, as you went to cross the tracks, did you make any observation? A. Why, yes. As I made this turn I looked in both directions, but I didn't see anything coming.

Q. Did you hear anything? A. No.

40

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Q. Now, then, what did you do? A. Why, I continued across the tracks over, oh, possibly four or five miles an hour, I continued to go across the tracks, but just as I got to this track my helper—

Q. Which track? A. This last track.

Q. Main track? A. The main track.

10 Q. Yes. A. Just as I got to the main track my helper called me, he said, "For God's sake Bob, stop, stop." And I looked to see why, or what he wanted, and as I did I saw the locomotive through the cab window on his side.

Q. Well, what did you do then? A. Well, then I stepped down on the gas as hard as I could, to get across as far as I could before I was getting hit, because I knew that I couldn't get back, nor I couldn't get far enough to avoid it altogether.

20 Q. Well, when you made your observation and you looked to the right and the left, prior to crossing Lewis Street, how far north could you see from where you were when you made the observation? A. That is this way (indicating)?

Q. North, towards Red Bank? A. About fifty feet.

Q. Now, why, if you can tell us, couldn't you see more than fifty feet?

30 Mr. Tomlinson: I object to that. I object to the form of the question, if your Honor please.

The Court: He would have to tell what the circumstances were there. The jury will draw the conclusion.

Mr. Greenfield: All right.

Q. What were the conditions at the crossing at the time that you made your observation? A. Well, there was a freight car about thirty feet
40 from the corner, and as I came around the corner,

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I was at such an angle that I couldn't see more than fifty feet to the right, towards north.

Q. When you once get on the track, what were you doing? A. Well, when I crossed the track here, there is a ditch on this side of the track, made of—

Q. You are indicating now the south side of the— A. No. I am indicating the west side of Lewis Street, and the south side of the track— Lewis Street, and the west side of the tracks. 10

Q. All right. A. And right here, caused by the embankment of the road and the embankment of the railroad, there is a ditch; I call it a ditch; I don't know what the proper name is. And I had gone so far to cross the track that I had to watch that ditch, or see to make sure that I don't go off the road and down into it. So, therefore, when I was crossing the tracks I was watching that side through the cab window; in fact, I had my head out the cab window watching it. 20

Q. What direction were you looking? A. I was looking down.

Q. Right or left? A. Left.

Q. You had made that same crossing many times before? A. Yes.

Q. Just prior to attempting that crossing was there a watchman, or any signal at the crossing itself? A. No. 30

Q. Had you ever seen a watchman or a flagman, or any signal given at the approach of a train at that crossing at any prior time? A. Oh, yes.

Q. When was that? A. Well, every time the train went through, when I was loading the truck, the train went through, there was a watchman or flagman to flag the crossing.

Q. Did that watchman or flagman use any kind of signal? A. Well, he used a long pole or stick 40

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with a round sign that said "Stop" on to it. He used to hold that out in the center of the road.

Q. Can you tell us in the week, or the time that you spent down there at that location, how many times you saw a watchman at that crossing? A. No, I can't tell exactly. Possibly twice.

10 Q. Did you ever at any time see a train make that crossing, without a watchman there? A. No, I didn't.

Q. Are there any gates protecting that crossing? A. No.

Q. Is there a mechanical bell, or other warning device at that crossing? A. None, no.

20 Q. Now, I want to call your attention to the markings on this sign, there is a mark here on the west side of the main track marked "X sign," and there is—just a little bit to the north of that there is another marking marked "sign." Did you at any time during your stay down there in Eatontown see either of those signs there? A. I saw the signs there. I saw the sign there, but you couldn't read it.

Q. You saw what sign, but you couldn't read it? A. There was a sign right about in here (indicating).

Q. The place that is marked "sign"? A. Yes.

30 Q. And you couldn't read that, but there was a sign there? A. There was a sign there; yes sir.

Q. I point out to you a marking on this map "flagman's sign," and I ask you whether or not you saw a sign there? A. No, there was no sign there.

Q. Now, will you tell us, if you can, why you couldn't read the sign on the west side of that main track? A. Because it was so weather-beaten you couldn't distinguish the reading on it.

40 Q. Now, how far was the train from you when

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you first saw it, and before it actually came in contact with the truck, if you can tell us? A. Well, I can't tell you that, but it looked mighty close. It looked to be on top of me. I wouldn't want to say how far it was in feet, because I have no idea.

Q. Well, where did the train hit your truck? A. It hit the truck just back of the cab, just back of the driver's cab. In fact, one part of the locomotive, the rod, or something from the locomotive, went through the back part of the cab. 10

Q. And approximately how far from the crossing at Lewis Street there did the train go, before it came to a stop, after hitting the truck? A. About two hundred feet.

Q. And what was the condition of the truck at that time? A. Well, it was absolutely demolished.

Q. Where was it? A. It was hanging on the front of the locomotive. 20

Q. The truck itself? A. Yes.

Q. Were you hurt? A. Yes.

Q. You were driving? A. Yes.

Q. Mr. Branham, Sam here, was he hurt? A. He was hurt. He was taken to the hospital.

Q. Where was Mr. Branham sitting in the truck? A. He was sitting alongside of me.

Q. On your right or left? A. On my right. I sat on the left side, and he was sitting on my right. 30

Q. Now, will you indicate on this map here, as nearly as you can, approximately where the train was, the front of the train was, when it came to a stop? A. The front of the train? Why, it was, I think somewhere about here (indicating).

Q. You are pointing to a mark on this map marked "number 505," is that right? A. I don't know what that mark is for. But I would say about that place. 40

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Q. Was there anything done to the cargo of the truck? A. Well, it was completely smashed.

Q. And where was it? A. It was strewn all along the tracks, from Lewis Street to where the train stopped.

10 Q. About how wide, in your opinion, is Lewis Street at the railroad crossing? A. Right at the crossing it is about twenty-five feet.

Q. Does it get wider or narrower as you go north? A. As you go north it narrows down to, oh, I would say about eighteen feet.

Q. And what happened immediately after the accident? Were you able to get out of the truck?

A. I got out of the truck, we both got out of the truck; my helper got out of the truck and sat on the bank alongside of the tracks.

20 Q. What bank? A. There was an embankment alongside of the tracks.

Q. Will you indicate on the map, please, just where? A. Well, the bank from the tracks was right up this way somehow. It was really part of this wooded area. It come down.

Q. It was on the west side of the main track? A. That is right.

30 Q. All right. A. And I got out and I saw my helper was hurt, and he was bleeding, and I spoke to somebody and asked them if they could get an ambulance for him and send him to a hospital.

Q. What happened to you? A. Well, then I got the engineer's name, and the conductor's name and number, and the number of the locomotive. Then I telephoned to Mr. Mente later.

Q. Were you hurt? A. Yes, I was hurt.

40 Q. Just where were you hurt? A. Well, my left ankle was hurt and my right leg, well, just above the knee, or right at the knee, up above the hip, and around from the lower part of my back.

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Q. Anywheres else? A. Right around here (indicating), and down to the knee.

Q. Was there anywheres else that you were hurt? A. No. That was it.

Q. Did your injuries require medical attention, Mr. Stickle? A. Yes.

Q. Did you receive medical attention? A. Yes. 10

Q. From whom did you receive that medical attention? A. Doctor Emblau, in Union.

Q. How many times did you see him? A. Once.

Q. Were you able to come to work the next day?

A. No, I didn't go to work the next day.

Q. When did you go back to work? A. I went to work the following Monday.

Q. Well, how many days were you unable to work? A. Five days. Five working days.

Q. Five working days? A. Yes. 20

Q. What was your salary? A. It was six dollars a day.

Q. Did you receive any money as a result of compensation, or otherwise? A. No.

Q. What did your medical expenses amount to? A. Why, I don't know, to tell you the truth. I didn't see any bill or anything from the doctor.

Q. Is the doctor available to come to Court here now? A. No, he is not. He is in the Navy.

Adjourned until tomorrow, Thursday, 30
June 15th, 1944, at 9:30 A.M.

Colloquy.

NEW JERSEY SUPREME COURT

UNION COUNTY CIRCUIT

MAY TERM 1944.

10 MENTE BROS., INC., a corporation, SAMUEL BRAN-
HAM and ROBERT STICKEL,
Plaintiffs,
vs.

SHELTON PITNEY, *et al.*, Trustees of the CENTRAL
RAILROAD COMPANY OF NEW JERSEY,
Defendants.

20 Transcript of stenographer's notes of evidence
in the above entitled cause, taken before HON.
FRANK L. CLEARY, Circuit Court Judge, and a
Jury, at the Union County Court House in the
City of Elizabeth, N. J., on the fifteenth day of
June, A.D. 1944, at 9:30 A.M.

APPEARANCES:

HAROLD W. BORDEN, Esq.,
STANLEY W. GREENFIELD, Esq., (Present)
Attorneys for the Plaintiffs.
30 WILLIAM F. HANLON, Esq.,
DEVVOE TOMLINSON, Esq., (Present),
JOHN T. GLENNON, Esq., (Present),
Attorneys for the Defendants.

40 Mr. Tomlinson: May I say to your
Honor that this morning Mr. Glennon was
called to Trenton. Rather than ask for a
postponement, pending his return, we will
go on without him. I want the jury to know
why he is not here, and your Honor to
know why he is not here.

Robert A. Stickle—Direct.

ROBERT A. STICKLE, resumed:

Direct-examination (continued) by Mr. Greenfield

Q. Mr. Stickle, if I remember correctly, yesterday you testified that you made an observation as you were about to go across the track, and that you could see only so far, is that correct, sir? A. 10
That is right.

Q. About how far could you see, when you made your first observation? A. Looking north?

Q. Yes, looking north? A. Well about fifty feet, looking north.

Q. Why was that? A. Well, due to the angle at which I crossed the tracks, and the first freight car, I couldn't see any further up the track.

Q. The first freight car standing on the delivery track? A. Yes, sir.

Q. Well, if you were on the track itself, and your view was not obstructed by the cab of your truck, or a freight car, approximately how far could you see? 20

Mr. Tomlinson: I object to that as calling for speculation and surmise, if your Honor please. There is nothing to show that he knows. He says that his view was obstructed for two reasons: First, at the angle at which he was crossing the track; 30
that was of his own volition. Secondly, by box cars that were on the side track. Now, he has not eliminated all those factors which he says were present. How far could he have seen, I submit that is pure speculation.

Mr. Greenfield: This man has also testified that he had crossed those tracks on a number of other occasions, and I am now asking him, if his view were not obliterated, 40

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10 or obstructed, how far could he see. If he does not know, he will say so. But, certainly the fact that he is familiar with the scene, and that he made crossings at other times, puts him in a position to say whether or not he knows, and if so, he can answer the question.

The Court: I think probably that is so. I don't see what materiality that has, as long as it is a fact in this case that this was the condition on that day.

Mr. Greenfield: All right, sir. I will withdraw the question, if there is objection.

Q. You testified that you were hurt? A. Yes.

Q. Have any of your injuries healed at the present time? A. My injuries have healed, yes.

20 Q. What injuries have healed? A. Well, all my injuries have healed. I still have trouble with my back and the upper part of my leg, toward my hip.

Q. You still have trouble there? A. Yes.

30 Q. And in what way? A. Well, when I sit any length of time, when I am driving on a long trip, and I go to get out of the cab, why, I have trouble getting out. And also in bad weather, stormy, wet weather, cold weather, especially. And when I do any heavy lifting I have trouble with it.

Q. Just where do you have trouble? A. The upper part of my hip; right through here (indicating); and around the lower part of my back.

40 Q. How frequently do you have any trouble with your hip and your back? A. Well, as I say, it depends a lot on the weather. In dry weather I don't have so much trouble, unless I am on long trips. If I take a truck, say if I drive from here like to Philadelphia, why then I have to stop pos-

Robert A. Stickle—Direct.

sibly half way there and get out of the cab and walk around, and sort of get my leg limbered up.

Q. Does your work at the present time involve any long trips? A. Well, the longest trips I make now is either in New York and Brooklyn.

Q. Are you troubled in any way on any of those trips? A. Well, when I get over to Brooklyn, if I haven't stopped in the meantime, why, then I have trouble for a few seconds after I get out of the cab, I have trouble getting straightened out, as it were. 10

Q. Now, what was the condition of the weather on the day of the happening of this accident, particularly about six o'clock, or just prior to the happening of this accident? A. It was clear.

Q. Was it light or dark? A. It was light. Daylight. 20

Q. Was there any other traffic, any pleasure vehicles or other traffic, in this area marked "roadway," and parallel with the delivery track, other than people that had business with these freight cars at the delivery track? A. No.

Q. Had there been in any of the time that you were down at Eatontown at that place? A. No, there hadn't.

Mr. Tomlinson: I object to that, and move to strike out the answer, as purely irrelevant as to whether there had been other traffic at other times. 30

The Court: Objection sustained.

Q. Now, do you recall whether or not, prior to this accident, you had had any conversations with the station agent, or Mr. Ousterman, I believe his name is, or with his helper, Mr. Whitfield? A. No, I don't remember having any.

Q. Do you remember if you had any conversations with either Mr. Ousterman or Mr. Whitfield, 40

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after the accident, and that same evening? A. Yes, I did.

Q. Now, with whom did you have the conversations? A. Mr. Ousterman.

Q. Did you also talk to Mr. Whitfield, his helper? A. No. I don't remember talking to him.

10 Q. What was the substance of your conversation with Mr. Ousterman? What did you say to him, and what did he say to you?

Mr. Tomlinson: I object to that upon the ground it has not been shown that Mr. Ousterman had any authority to bind the Trustees of the Central Railroad Company by any statement he may have made. It may be, if I put Mr. Ousterman on the stand, as I intend to do, to testify to certain conversations, that this question will then be relevant. But at the present time it is not relevant, I submit, because Ousterman has not been shown to have any authority to bind the Central Railroad Company.

20

The Court: That is right.

Mr. Greenfield: I will wait for Mr. Ousterman.

30

The Court: I suppose the question was only predicated upon counsel's opening that he was going to show some conversation. But it is not relevant as yet.

Mr. Greenfield: I want to bring everything out in my case that I possibly can.

40

Mr. Tomlinson: If counsel proposes, sir, to bring out the details of the conversation that I referred to in my opening, I have no objection. But, if it is designed to bring out any alleged admissions, prejudicial to the railroad company, or the Trustees, of

Robert A. Stickle—Direct.

course, I do object. I didn't know what counsel had in his mind.

The Court: I just assumed it was predicated upon your opening, that this man, as I recall the opening, there was something said about what he said to Mr. Ousterman, and what Mr. Ousterman said to him. I may have the name wrong, as to why the train— 10

Mr. Tomlinson: The train being due, and so forth. If that is all counsel wants to elicit by this line of questioning, of course, I have no objection. But I didn't know just what counsel's purpose was.

Mr. Greenfield: Quite frankly, I don't recall the exact limitation of Mr. Tomlinson's opening, and I wouldn't want to get into something with this witness and then have him come in and say, Mr. Greenfield is going beyond the limitation. I am trying to bring out whatever I possibly can, and all of the facts that I have. If Mr. Tomlinson is going to object, then I will quit and wait for Mr. Ousterman. 20

Mr. Tomlinson: I object, unless counsel makes an offer at side bar. If he wants to make an offer at side bar, then I will know what he offers to prove. 30

Mr. Greenfield: Then I will ask the question.

Mr. Tomlinson: I object: If you want to ask it again, go ahead. I want to find out what you have in your mind. If you don't care to enlighten me, I will have to object.

Mr. Greenfield: All I want him to tell is what the conversation was. I assume you have no objection to that. 40

Robert A. Stickle—Direct.

Robert A. Stickle—Cross.

Mr. Tomlinson: I don't know what the alleged conversation was at all.

Mr. Greenfield: I don't know what it is either. He is going to testify, not I.

10 Mr. Tomlinson: You know what you are trying to bring out. I don't want to be too technical, but counsel gives me no alternative, and I will have to object on the grounds I have already advanced.

The Court: Objection sustained, as yet. It might conceivably lead into a field that would be highly objectionable, as yet.

Mr. Greenfield: Rather than cause any disturbance, I will withdraw the question.

20 Q. Is your salary greater or less today than it was at the time of this accident? A. It is greater today.

Q. What was the cost of the medical treatment rendered by Doctor Emblau? A. I don't know.

Mr. Tomlinson: That question was asked yesterday and this man said he never got a bill and he didn't know what it was.

30 Mr. Greenfield: If that is so, I will withdraw the question. I don't recall that. That is all. You may cross-examine, sir.

Cross-examination by Mr. Tomlinson:

Q. Do you deny, Mr. Stickle, that you went in the station before this accident? A. Do I deny it?

Q. Yes. A. No, sir; I don't deny it. I don't recall going in before the accident.

40 Q. Didn't you go into the station about six o'clock, and speak to the agent, either Mr. Ous-terman, or his assistant? A. I don't remember.

Robert A. Stickle—Cross.

Q. Just a minute and let me finish the question, please. And say you wanted to make a report on some damaged pipe that you were unloading out of these cars? A. I don't remember having done so; no, sir.

Q. You won't say that you didn't, will you? A. No, I won't say that I didn't.

10

Q. Now, you say that your back bothers you now? A. Yes, sir.

Q. Has it bothered you ever since the accident? A. Yes, sir. Off and on. That is, at the times I told you about.

Q. How many times did you go to a doctor? A. I went to a doctor once on that account.

Q. And when was that? How soon after the accident? A. That was the next day.

Q. And you have never been to a doctor since that time? A. Not for that injury; no, sir.

20

Q. That was in May, 1942, wasn't it? A. That is right.

Q. Now, you are sure that your back still bothers you A. Absolutely; yes, sir.

Q. Do you remember testifying in this Court on March 13th, 1944? A. Yes.

Q. And do you remember your counsel, your own counsel, Mr. Greenfield, asking you this question: "Have your injuries healed, Mr. Stickle," and you make this answer: "Well, all except that my leg bothers me once in a while up near the hip"? A. I don't recall just what my answer was at that time, but that is what I said now, that my leg bothers me up at the hip, and around the lower part of my back.

30

Q. Now, Mr. Stickle, if you will just be good enough to listen to my question: You have told this Court and jury, and repeated it several times, that not only your leg bothers you now, but your

40

Robert A. Stickle—Cross.

back bothers you, and I ask you whether you didn't make this response to this question that was put to you by Mr. Greenfield last March, in this very court room: "Have your injuries healed, Mr. Stickle? A. Well, all except that my leg bothers me once in a while up near the hip"?

10 A. I don't remember just what I answered before; no, sir.

Q. Do you deny that you made that answer? A. No, I don't.

Q. You were out of work five days, weren't you? A. Yes, sir.

Q. And after the expiration of those five days you went back to work, and you have been working there for Mr. Mente, or for some other concern, ever since? A. That is right.

20 Q. In what capacity? A. Driving a truck.

Q. Truck driver? A. That is right.

Q. Now, you had been working down around this locality, unloading these cars, for almost a week before the accident, hadn't you? A. For about a week; yes, sir.

Q. And when you unloaded the cars wasn't it customary for you to back your truck up to the cars? A. Yes, sir.

30 Q. So that your truck was sticking out like that, in other words, the front would come out from the car, and the back of your truck would be right up against the side of the car? A. Ordinarily, yes.

Q. Isn't that what you were doing on this afternoon? A. We had already unloaded the car, and we had all the pipe out of the car, and as we unloaded the car we throw the wood that they used for keeping the pipe in place, out on the ground.

40 Q. You call that cantling? A. I don't know whether you call it cantling. I call it wood. So we had all the pipe out of the car, and the wood

Robert A. Stickle—Cross.

was on the ground, and I pulled the truck around and placed it parallel with—or pretty near parallel with the cars, in order to get the wood that was laying on the ground. That is why the truck was parallel with the cars when I started out.

Q. My question is, while you were actually unloading that car, you had backed up to the car, hadn't you? A. Yes. 10

Q. Now, you say that after you finished backing you pulled your truck around parallel with the truck, is that right? A. After we finished unloading the car; yes, sir.

Q. During that day, and during the week that you had been working there, you had gone over that crossing at least six times a day, hadn't you? A. Well, about six, five, six, three, sometimes, that way; you can't set any set number of times per day. 20

Q. Hadn't you gone over it at least six times a day there? A. Well, sometimes you go over more than others. I wouldn't say for sure.

Q. Well, you were thoroughly familiar with the crossing? A. Yes, sir; I was familiar with the crossing.

Q. Perfectly familiar with the locality here? A. Yes, sir.

Q. And you had gone back and forth, you would load up your truck, go over the crossing, unload the pipe somewhere down here, and then come back for more? A. That is right. 30

Q. Now, on this night you were working later than usual, weren't you? A. Yes, we were working later than usual.

Q. You usually quit work around five o'clock, didn't you? A. Yes, in the neighborhood of five o'clock.

Q. And this accident happened around seven- 40

Robert A. Stickle—Cross.

teen minutes after six, didn't it? A. Well, in the neighborhood of twenty after six; yes, sir.

Q. Over an hour later than you usually worked?

A. That is right.

Q. But it was still daylight? A. Yes, sir.

Q. And clear? A. Yes.

10 Q. Nice weather? A. Yes.

Q. Now, as I understand your statement, you say that you started to pull out, and there was a hole around here somewhere, and you had to go to the right of it? A. I had to keep between the hole and the freight car; yes, sir.

Q. You had to keep to your right of the hole, is that right? A. Yes, sir.

Q. And that made you cross the crossing at an angle? A. That is right.

20 Q. Rather than straight? A. That is right.

Q. And because you were crossing at an angle you didn't have as good a view up the track as you would have had if you had gone straight over? A. That is true.

Q. And also because you were crossing at an angle as you were going over here, over this crossing, you had your head down, out of the left side window? A. That is right.

30 Q. Away from the train, on the side away from the train? A. Yes, sir.

Q. So that you were watching on your left-hand side of the truck, whereas the train was coming from your right side, that is true, isn't it? A. Yes, sir.

Q. Now, how close to the delivery track here was that hole that you speak of? A. Well, it was approximately in the center between the track and the edge of the road, or the edge of the yard there.

40 Q. How big a hole was it? A. Well, it was a good sized hole. I don't know exact. I couldn't

Robert A. Stickle—Cross.

tell by measurement just what size it was. It was a good sized hole.

Q. About how big? A. I don't know. I wouldn't want to say, because I don't—

Q. Well, now, if you had backed your truck up back, you could have come around the hole on the left-hand side, couldn't you? A. If I— 10

Q. You could have backed your truck up so as to come over to Louis Street, and entirely escape that hole, isn't that right? Here is Louis Street here, around like that? (Indicating.) You didn't have to go to the right of that hole, did you? A. Well, I suppose I could have backed some. It didn't even occur to me to do so.

Q. You could have done it, couldn't you? A. I could have done it, yes.

Q. If you had backed up you could have gone around the hole, and then you could have gone over that crossing straight, couldn't you? A. I don't know whether I could have backed up far enough to go—to let me go around the hole, or not. I couldn't tell you that now. 20

Q. Did you ever try it? A. No, I didn't. I never had to try it before.

Q. You went to the right of the hole because that was the shortest route over, isn't that true? A. I went to the right of the hole because of the position that I was in, yes. 30

Q. Well, isn't it because it was the shortest way over, that you went to the right of the hole? A. Well, because I couldn't go to the left of the hole from where I was.

Q. Why couldn't you? You had all this space, didn't you? Look at all this space here (indicating).

Mr. Greenfield: If your Honor please, I am sorry, I don't mean to interrupt, but it 40

Robert A. Stickle—Cross.

10 seems to me that this is all argumentative and immaterial. It is not what he could have done. It is what he did do. And Mr. Tomlinson there is assuming a lot of things that certainly have no foundation either in law or the facts, as brought out here at this time. Mr. Tomlinson has not established the width of that road, or whether there was sufficient room on the left of that hole, or how big the hole actually was, or anything like that. He is just assuming a lot of things, and asking this witness, isn't that so. And I think at this time it is entirely improper.

The Court: I think you have a right to ask him.

20 Mr. Tomlinson: May I say just one word in response to this lengthy speech of Mr. Greenfield's? His own witness has sworn already that he could have gone around the left of that hole.

Mr. Greenfield: He just said he didn't know if he could.

30 Mr. Tomlinson: He did a few minutes ago. And if there be any doubt about it, he said, I suppose I could have gone around the left of the hole.

40 The Court: I will permit the question. Of course, it is proper on cross-examination. A person is not limited to what a person does. The cross-examination is for the purpose of showing that he should have done something else. Whether that is so, or not, then it becomes argumentative. But counsel has a right to show—not limit himself to what a witness actually says he did. He has a right to ask, why didn't you do something else. That is the purpose of it.

Robert A. Stickle—Cross.

Mr. Tomlinson: He swears he went over this crossing at an angle, and that that angle partially obstructed his view. Now, I submit he could have gone straight over, and that is the purpose of my questioning.

The Court: I will permit it. You may go ahead.

10

Q. You had all this space here between the delivery track, this roadway here, and intervening ground in here (indicating)? Why couldn't you have backed your truck up, providing it was pointing towards the station, backed it up and go around to the left of that hole? A. You couldn't go around the way you just pointed because down where you pointed there is a deep embankment, and there wouldn't be room, there wouldn't be any place to go to around there.

20

Q. Well, I show you some pictures and ask you: How close to the passing track, this track, was that hole that you speak of? A. The passing track?

Q. The passing track, yes? A. I don't know how close it was to the passing track.

Q. How close was it to the delivery track? A. Well, it was right, I would say about possibly fifteen feet from the track.

Q. And how close to the crossing was it? A. About thirty feet.

30

Q. Now, I show you a photograph, which I will ask to have marked for Identification.

(Photograph marked D-1 for Identification.)

Q. Showing you D-1 for Identification, I ask you if that shows the hole that you speak of? A. No, I don't see it here.

Q. And how far away from the delivery track

40

Robert A. Stickle—Cross.

did you say that hole was? A. I imagine about fifteen. I didn't measure, I couldn't say exactly.

Q. I show you another photograph, which I will ask to have marked D-2 for Identification.

(Photograph marked D-2 for Identification.)

10

Q. And ask you if that shows the hole? A. No, I don't see the hole in that either.

Q. You can't give us any idea at all of the size of this hole that you are telling us about? A. No, I can't.

Q. You can't say whether it was three feet wide, or six feet wide, or ten feet wide, or fifteen feet wide? A. No, sir. All I can say is that I know if you went into the hole with a very heavy load, why, you would probably break a spring.

20

Mr. Tomlinson: I move to strike it out as not responsive.

The Court: It may be stricken. Ask the question.

(Question repeated by stenographic reporter.)

A. No, sir.

Q. Or thirty feet wide? A. No.

Q. Or forty feet wide? A. No.

30

Q. Or one hundred feet wide? A. No.

Q. And yet you plainly saw that hole? A. Yes, sir.

Q. You had seen it all the time you were there? A. Yes.

Q. And you can't say whether it was three feet wide or one hundred feet wide? A. I don't know how wide it was.

Q. I say, you can't tell us whether it was three feet wide or one hundred feet? A. Well, I know

40

Robert A. Stickle—Cross.

it wasn't one hundred feet wide, but I don't know whether it was three feet or two feet.

Q. Now, you say that when you started over that crossing you made observation, you looked. In which direction did you look? A. Both directions.

Q. And in which direction did you look first, to your right, north along the track, or to your left, south along the track? A. Well, all I can say is the natural way to look for a driver to the left first, and then the right. 10

Mr. Tomlinson: I move to strike it out, if your Honor please.

The Court: Try to answer the questions, and we will save time, Mr. Stickle.

Q. What I am asking you is what you did do, whether you looked first to the north to your right, or first to your left, towards the south? If you can't remember, say so. A. I looked to the left first, and then the right, I am sure. 20

Q. Now, are you saying that because you remember that, or because it was your custom to look in that fashion? A. Well, it is my custom to look in that fashion, and I am sure that I looked that way at that time.

Q. And then you had your head, as you have already said, out of the left, looking down at the left of your truck? A. That is right. 30

Q. And the first thing you know was your helper saying—what did he say? A. He said, "My God, Bob, stop, stop."

Q. What did you do? A. I looked to see what he wanted, and as I looked to see what he wanted, I could see through the cab window, I saw the locomotive was almost on top of me.

Q. You were in second gear, weren't you? A. Yes, sir. 40

Robert A. Stickle—Cross.

Q. You could have stopped your car just like that, couldn't you? A. If I stopped the car then, why, we wouldn't be here.

Mr. Tomlinson: I move to strike it out, if Your Honor please.

10 The Court: Yes. The question is, could you?

Q. Would you mind answering my questions? My question was, you could have stopped your car almost instantly, couldn't you? A. Yes, sir.

Q. And your helper yelled at you, "For God's sake stop," he yelled that at you, didn't he? A. Yes.

Q. But you didn't stop, did you? A. No, sir.

Q. You looked around? A. Yes, sir.

20 Q. And then you kept on going? A. Yes, sir.

Q. Now, you say that you heard no whistle or bell from the train? A. No, sir.

Q. You had both windows closed in that truck, didn't you? A. No, sir.

Q. Both windows open? A. No, sir.

Q. Which window was open, and which was closed? A. The right window was closed, and the left window was open.

30 Q. The window towards the train was closed? A. That is right.

Q. And you had a truck load of tile pipe? A. Yes, sir.

Q. And you had some wood on that too, wooden framework? A. Yes, sir.

Q. And that truck itself was making considerable noise, wasn't it? A. Oh, yes.

Q. Now, you don't say that this engine did not ring a bell, do you? A. No, I don't say that.

40 Q. It may have rung the bell, the bell may have been ringing, and you not have noticed it? A.

Robert A. Stickle—Cross.

If the bell was ringing on the engine I didn't hear it.

Q. I say the bell may have been ringing, and you not have heard it? A. That is right.

Q. And isn't the same thing true of the whistle? A. Yes, that is true.

Q. Now, Mr. Stickle, you had never been at this crossing before when the train which hit your truck came in, had you? A. No, sir. 10

Q. So that you don't know whether a flagman went out for that train, or not, do you? A. For the train that hit us?

Q. Yes. A. There was no flagman went out for that train; no, sir.

Q. Well, I will reframe my question. You don't know whether a flagman usually went out for that train? A. For that train; no, sir; I don't. 20

Q. And you say that you had noticed, on prior occasions, a flagman go out for trains that came over that crossing? A. Yes, sir.

Q. Now, those trains for which you noticed a flagman go out, were trains that went through this station without stopping, weren't they? A. Yes.

Q. And they were the only trains that you noticed? A. Well, they were the only trains that I saw. I never saw a train stop at the station while I was working there. 30

Q. But the trains for which you saw this flagman go out, were trains that went through, trains that didn't stop at Eatontown station? A. That is right, sir.

Q. You weren't able to judge, I suppose, what the speed of these trains were? A. No, sir.

Mr. Tomlinson: I think that is all.

Robert A. Stickle—Redirect.

Redirect-examination by Mr. Greenfield:

Q. About how fast were you going when you were crossing the Louis Street crossing? A. About five miles an hour.

10 Q. And you told him that when your attention was called by Branham, he yelled "stop, stop," you could have stopped almost instantly? A. I could have; yes, sir.

Q. Why didn't you?

Mr. Tomlinson: I object.

Q. At that time where was the truck? A. The front wheels of the truck were between the two rails of the main track.

20 Q. The front wheels of the truck were between the two rails of the main track? A. Yes, sir. About. As near as I can remember; yes, sir.

Q. Now, do you know, or can you tell us, or I think you testified that this was an embankment here? A. There is an embankment there; yes, sir.

Q. Can you tell us the distance to the left of this hole that you talk of, between the hole and the roadway? Do you understand my question? A. Between the hole and Lewis Street?

30 Q. No. Mr. Tomlinson asked you if you could back up and go to the left of the hole. Now, can you tell us the distance between the left of the hole and the — well, say the south side of this roadway? A. No, I couldn't.

Q. Do you know whether it was enough to permit your truck? A. I am not sure. No.

*Robert A. Stickle—Recross.**Recross-examination by Mr. Tomlinson:*

Q. Now, I have a question that I omitted. Where were you with reference to the passing track, and the main track, the second track over, when you made your observation that you say you made, looking to your right and to your left, or to your left and to your right? A. I made my observations before I started to cross the passing track. 10

Q. How far before you started over the passing track? A. Well, a few feet. I don't know exactly how far.

Q. Well, now, when you got to the passing track you had a much better view up the main track, didn't you? A. I don't know.

Q. From passing back and forth over that crossing that day, you knew what obstruction to your view those cars on this track presented, didn't you? A. Yes. 20

Q. And when you got on the passing track, you were away from those cars on the delivery track, weren't you? A. Yes.

Q. Well, then, why didn't you stop on the passing track, to make your observation along the main track, when, as you say, you knew your observation was limited because of these cars down here? In other words, why didn't you go by those cars on the delivery track, up to this siding, and then look to see to your left and to your right along that main track whether any trains were coming? A. Well, I didn't know that was a passing track. I didn't know but what that was a track the trains ran on too, and I wouldn't stop in the middle of the track there to see if anything was coming. 30

Q. You had been working down there a week, 40

Robert A. Stickle—Recross.

and you didn't know it was a passing track? A. No, I didn't.

Q. Well, the trains that you saw go by, that you told us about, they all went by on the main track, didn't they? A. That is true; yes, sir.

10 Q. Did you go right up to the edge of the passing track before you made your observations? A. Well, I was far enough away from it so that if the train had been coming on that track, why, it could have passed me.

Mr. Tomlinson: I move to strike it out.

Mr. Greenfield: That is an entirely responsive question.

The Court: No, that is a conclusion.

20 Mr. Greenfield: Or rather, a responsive answer. The answer certainly tells where he was.

The Court: The answer tells where he thinks he was, in his judgment. The question is, did he go up to the edge of the passing track, yes or no. Whether it is necessary or not is another thing, of course. It is simply a question of what he did, whether he went there or not, up to the edge. If he didn't, and has an explanation as to why, you may bring that out.

30 Mr. Greenfield: It is my recollection that he said he went up there, but there was enough room there, so that if the train were coming, the train would be able to pass by. In other words, he is saying, I went to the edge, or just near enough to permit a train to pass, and that is a perfectly responsive answer to that question.

Mr. Tomlinson: I press the motion.

40 (Question and answer repeated by stenographic reporter.)

Robert A. Stickle—Recross.

Mr. Tomlinson: It might have been a half a mile away.

The Court: That is right.

Q. Did you stop your truck before making these observations? A. Yes, sir.

Q. How far away were you when you stopped your truck? How far from that passing track? 10

A. Well, a few feet. I don't know exactly how far.

Q. You knew that the view was bad because of these cars, is that so? A. That is right.

Q. And also because of your angle? A. Yes.

Q. Now, did you stop your car, your truck, between the edge of the nearest car on the delivery track, and the passing siding, so that you could get a view up the main track? A. I don't think I understand what you mean. 20

Q. You don't know how close you were to the passing track when you stopped, do you? A. Not exactly.

Q. How long did you stop there? A. Oh, just a couple of seconds. Just long enough to make my observation.

Q. How big a truck was this, how many tons? A. Six tons.

Q. Now, about how far had you gone, after stopping as you say, before you heard the man, your helper on your right hand side, nearest to the train, say, "For God's sake stop"? A. Well, I had gone over to the — the front end of the truck was on the main tracks. 30

Q. I say, how far had you gone in feet, from the time you made your stop, as you say, for the purpose of looking? A. I don't know how far it is in feet.

Q. Now, when you heard that, your truck was in motion, when you heard your helper yell at 40

Robert A. Stickle—Recross.

you, your truck was going all the time, wasn't it, it was in motion? A. Yes, sir.

Q. And he said "For God's sake stop"? A. That is right.

Q. Then why didn't you take his word and stop? A. Because I looked around to see what
10 he said, or that attracted my attention, and I looked around when he spoke, and I saw the locomotive was so close to me that if I had stopped it would have hit me.

Q. All the time your truck was travelling? A. Yes, sir.

Q. He was there to help you, wasn't he? He was there to help you in all ways? He was your helper, wasn't he? A. Yes, yes.

Q. And yet when you got this warning from
20 him, you looked around to make sure for yourself what the situation was, is that the idea? A. I looked around to see what he was talking about, and I saw the train there; yes, sir.

Q. Instead of obeying him and stopping, as you could have done, right on the spot, you turned around to see for yourself what the situation was, isn't that true? A. I turned around and saw—

Q. I say, isn't that true? A. Yes, I saw what the situation was.

Q. As a matter of fact, isn't it true that you
30 never stopped your truck, from the time you left those cars on the siding, on the delivery track, up until the time you got hit? A. No, sir; it is not true.

Q. Isn't it true that you never stopped your car, or your truck, for the purpose of making any observations? A. No, it is not true.

Mr. Tomlinson: That is all.

*Robert A. Stickle—Recross.**By Mr. Greenfield:*

Q. Did you require any help to drive the truck?

A. No, sir.

Q. Why didn't you stop the minute that Sam yelled "Stop, stop"?

Mr. Tomlinson: I object to that. In the 10
first place, it calls for speculation. In the
second place, he tendered an explanation
six or seven different times.

Mr. Greenfield: That question was asked
by Mr. Tomlinson.

The Court: I think it has been asked
and answered, but if you want it, I will per-
mit it again.

Mr. Greenfield: Thank you, sir.

Q. Why didn't you stop immediately when he 20
yelled "Stop, stop," or whatever he said? A.
Because when he yell out I looked out and I saw
the locomotive through the cab window, and I
saw that it was so close to us that if I had stopped
instantly, it would have went right over the top
of us.

Q. What did you do when you saw the train
coming?

Mr. Tomlinson: That has been asked 30
and answered. Every time that I get fin-
ished with this witness Mr. Greenfield
wants to re-ask a lot of questions, so as to
get the last word in.

Mr. Greenfield: All right. I will let Mr.
Tomlinson have the last word. That is all,
thank you.

Mr. Tomlinson: I would like to ask an-
other question.

Samuel Branham—Direct.

By Mr. Tomlinson:

Q. You say you stopped to make an observation? A. Yes, sir.

10 Q. Do you recall being asked this question by your own counsel, here in this court room, in March of this year: "What if anything did you do with regard to observation, or anything else, as you approached Lewis Street and the railroad crossing?" "A. Well, as I came along and got to where I get almost to the crossing, I looked both ways, and I didn't see or didn't hear any whistle or bell, and I proceeded to cross the track." You said that, didn't you? A. Yes, sir.

Mr. Tomlinson: That is all.

Mr. Greenfield: Thank you, sir.

20

SAMUEL BRANHAM, one of the Plaintiffs, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Greenfield:

Q. Mr. Branham, you are the helper, or you were the helper of Mr. Stickle? A. Yes, sir.

30 Q. On May 11th, 1942, working down at Eaton-town, near the Lewis Street crossing? A. Yes, sir.

Q. How long had you been working down there at that location? A. Oh, about a week.

Q. And what was your job? A. Helper on the truck.

Q. What did you do? A. I brought the pipe from out of the car to the end of the tail board.

Q. From the freight car to the tail board of the truck? A. Of the truck; that is right.

40 Q. And when the truck was loaded did you accompany Mr. Stickle to Camp Wood? A. I did.

Samuel Branham—Direct.

Q. With the pipe? A. I did.

Q. And approximately how many times a day did you make that trip? A. Well, we go across, we make a trip sometimes three or four or five or six times a day.

Q. Each way? A. Each way, that is right.

Q. Did you at any time while you were down 10
working on those freight cars, ever see any trains
go past the Lewis Street crossing? A. I did.

Q. And did you at any time ever see a flagman
flagging traffic, or give any warning of the ap-
proach of a train? A. Yes, I see a flagman out
there.

Q. Did you at any time ever see a train stop?
A. No, I didn't.

Q. About what time of the day did this acci-
dent happen? A. About 6:20. 20

Q. What was the condition of the weather at
that time? A. Fair.

Q. Light or dark? A. Light.

Q. Wet or dry? A. Dry.

Q. Had you ever been down there that late be-
fore? A. No, I haven't.

Q. How late had you been there before? A.
About five, five-thirty.

Q. Where were you working with regard to this
delivery track just prior to making the last cross- 30
ing? Where were you? A. Where were I?

Q. Yes, where were you working? Were you
in the freight cars? A. I was in the freight car.

Q. What freight car were you working in? A.
On the second car.

Q. On the second car from where? A. Lewis
Street.

Q. Can you tell us, please, about how far the
entrance of that second freight car was from
Lewis Street? A. Between seventy and seventy- 40
five feet.

Samuel Branham—Direct.

Q. Can you tell us about how far the front of the first freight car was from Lewis Street? A. Between thirty and thirty-five.

Q. Now, when you, accompanying Mr. Stickle, were crossing this crossing, or immediately prior to crossing this last time, did you make any observations? A. I did.

Q. And what observation did you make? A. I looked to my right.

Q. Where were you with regard to your place in the truck, on the right or the left of Mr. Stickle? A. I was on the right of Mr. Stickle.

Q. Was your window up or down? A. My window was up.

Q. Approximately how far from the passing siding, that is the first track, were you, when you looked to your right to make an observation? A. Well, you could see about between seventy and seventy-five feet, I guess.

Q. No. I ask you, how far were you from the track? A. Oh, from the track?

Q. Yes. A. When I made the observation? I couldn't say just how far I was, but I know I make my observation look. I couldn't definitely say how far it was.

Q. How far could you see? A. When I made my observation?

Q. Yes. A. Oh, around between seventy and seventy-five feet.

Q. Was there anything to obstruct your view when you made that observation? A. The car was there when I made the observation. Couldn't see any further up the track.

Q. Did you see a train coming? A. I didn't.

Q. Did you hear anything? A. I didn't.

Q. Were you familiar with the surrounding conditions, and the signs, and so forth, at the crossing? A. Yes.

Samuel Branham—Direct.

Q. Now, on the east side of this passing siding, just about where the delivery track goes into it at Lewis Street, there is a sign here marked "flag-man's sign." Now, prior to the accident, and at any time during the week that you were down there, was that sign there? A. I didn't see no sign on the east side.

10

Q. Now there are two signs, two marks, one an "X" sign, and one just marked "sign" on the west side of the main track, and just to the south of Lewis Street. Were those signs there? A. Signs on the west side of Lewis Street?

Q. The signs on the west of the main track, and south of Lewis Street? A. Lewis Street?

Q. They were both there, or one of them? A. I only see the one there.

Q. Could you read what that sign said? A. No, I couldn't.

20

Q. Why couldn't you? A. On account of the weather beaten.

Q. At the time that you yelled to Mr. Stickle, can you tell us about how far the train was from you? A. I couldn't tell you definitely just how far it was. I got so frightened I couldn't tell you whether it was ten miles or fifty miles. Couldn't say just how far it was.

Q. Was it near, or far? A. It was near.

30

Q. Can you tell us how fast it was going? A. I couldn't just say how fast it was going.

Q. You were still in the truck? A. Still in the truck.

Q. At the time that the train hit you? A. At the time the train hit me.

Q. And when the train hit, where did it stop, if you know? A. How far it stopped down the track, do you mean?

Q. Yes. A. I couldn't say how far it stopped.

40

Samuel Branham—Direct.

I know I was hit. Just how far the train carried the truck I couldn't say just how far.

Q. Was there anything on the truck at the time? A. Some pipe, tile pipe.

Q. Do you know what happened to that pipe?

A. I know it got all busted up. I didn't know
10 what happened to it. I was hurt.

Q. Were you hurt? A. I were hurt.

Q. Where were you hurt? A. I was hurt on this right elbow, here in my mouth, and this lip here. I got a scar on this right elbow now.

Q. You have a scar on your right elbow? A. I have a scar on my right elbow where I was hurt. Right there. That is the scar (indicating).

Q. Let me see. I don't know if all the members of the jury can see that. Let me take your
20 hand. Now, here, that is the beginning and that is the end of the scar (indicating).

Mr. Tomlinson: I certainly don't think that is fair. Let him describe where the scar is, and don't you testify as to where it begins and where it ends.

Mr. Greenfield: Do you think the man could see the scar in that position?

Mr. Tomlinson: He can feel it, and the jury can tell for themselves.

30 Q. Where else were you hurt? A. My elbow, and my eyes, and inside of my mouth, and my whole lip down here was hurt.

Q. Did this injury to the elbow require any stitches? A. Sure it did.

Q. Do you know how many? A. Just how many I couldn't tell.

Q. Did the injury to your lip, or your chin, require any stitches? A. It did.

40 Q. And did the injury to the inside of your lip require any? A. That is right.

Samuel Branham—Direct.

Q. And did the injury to the inside of your mouth require any stitching? A. Yes, sir.

Q. Did the injury to your eye require any stitching? A. Yes, sir.

Q. Now, can you tell us at all how many stitches were required? A. I couldn't tell you just how many were required. 10

Q. Were you taken to the hospital? A. I was.

Q. How were you taken? A. Ambulance.

Q. What hospital? A. Oh, I can't — Long Branch, but I can't call the name of the hospital now.

Q. How long were you there? A. Nine days.

Q. At the end of nine days were you able to return to work? A. No, I wasn't.

Q. How long was it before you were able to return to work? A. Twenty-nine days. 20

Q. What was your salary at that time? A. Five dollars a day.

Q. Did you receive any money as the result of this injury? A. I had — I got compensation.

Q. How much? A. Sixty dollars.

Mr. Greenfield: Do you have any objection to this hospital bill going in evidence?

Mr. Tomlinson: \$58.20.

Mr. Greenfield: Yes. I offer the hospital bill, dated August 31st, 1942, in the sum of \$58.20, into evidence. There is no objection. 30

(Hospital bill entered in evidence and marked Exhibit P-2).

Q. Who was the doctor that attended you while you were at the hospital? A. I don't know his name either.

Mr. Tomlinson: I will agree it was Doctor Maher. 40

Samuel Branham—Direct.

Q. Did you require any medical attention, or did you have any medical attention after you left the hospital? A. I did. I had attention after I left the hospital.

Q. Who rendered that attention? A. Doctor Buckner.

10 Q. He is from where? A. Newark.

Q. How long did he give you medical attention? A. Around twenty days.

Q. Is there any other scar, or are there any other scars resulting from these injuries that you suffered? A. Not any more scar on my lips.

Q. I mean, other than your elbow? A. No. No other. The elbow pains sometimes.

Q. I don't think you understand my question. Do you have any scars, other than the elbow? A.

20 That on the lip, that scar there (indicating).

Q. Where does it begin and where does it end? A. Well —

Q. Use one finger and show the jury? A. It starts here and end over this side here (indicating).

Q. When the inside of your mouth was stitched, did that cause you any pain? A. It did.

Q. Did that interfere with your eating? A. I say it did.

30 Q. Does it bother you today, I mean the inside of your mouth? A. It don't bother me eating now.

Q. Does the inside of your lower lip bother you today? A. Sometimes.

Mr. Tomlinson: This is all pretty leading, if the Court please.

Q. Well, what else, or what bothers you today?

40 A. Well, this arm pains sometimes. This arm here pains sometimes.

Samuel Branham—Cross.

Q. Well, how often? A. Well, in bad weather, cloudy days.

Q. Does it interfere with your working? A. Well, not very much. Sometimes I have to have lights there.

Q. Are you making as much today as you did at the time of the accident? A. I am making more now than at the time of the accident. 10

Mr. Greenfield: That is all. Thank you, Mr. Branham.

Cross-examination by Mr. Tomlinson:

Q. You were making twenty-seven dollars a week, weren't you Sam, at the time of this accident? A. Twenty-seven dollars a week?

Q. At the time you got hurt? A. Making five dollars a day, that is right, making five dollars a day. 20

Q. Well, you were getting paid twenty-seven dollars a week, weren't you? A. Around twenty-seven dollars a week. Makes five days and a half.

Q. How much are you getting now? A. How much am I getting now?

Q. Yes. A. I am making a dollar an hour now.

Q. For an eight hour day? A. Eight hour day.

Q. And you work how many days a week? A. Oh, five and six. 30

Q. Some weeks you are making forty-eight dollars a week, right? A. Yes, some days make forty-eight dollars a week.

Q. Still working as a helper, or what is your job? A. Still working helper.

Q. Still working for Mr. Mente, aren't you? A. Still working for Mr. Mente.

Q. You remember testifying here before, don't you, Sam? A. I do. 40

Samuel Branham—Cross.

Q. Do you remember your lawyer — A. I do.

Q. Do you remember your lawyer, Mr. Greenfield, asking you this question: "Are you completely cured of all the injuries that you sustained," and you said, "Well, my arm pains me sometimes, like a pin sticking in it," do you remember saying that? A. I do.

Q. Do you remember his asking you then "Anything else wrong with you," and you saying, "That is all, no further that I know now," do you remember that? A. I say I may have said that.

Q. That is true, isn't it? A. Maybe I said it, but I don't remember saying it now. I wouldn't know whether that was the answer.

Q. Well, if you did say it, it was the truth, wasn't it? A. If I did say what?

Q. I will read it again to you: "Q. Are you completely cured of all the injuries that you sustained," and you said, "well, my arm pains me sometimes, like a pin sticking in it"; and Mr. Greenfield said "Anything else wrong with you," and you said "That is all, no further that I know now," that is true, isn't it? A. That is all, pain me in the arm.

Q. Once in a while you get a little pain in your arm, like a pin sticking in it? A. Yes.

Q. Otherwise you are all right? A. I am all right, but sometimes this elbow here it pain a lot.

Q. Some weeks you work six days a week? A. Some days make six days a week.

Q. Ever work seven days a week now? A. Not for a long while I haven't.

Q. Now, where were you, Sam, when the truck started out to go over the crossing, were you sitting alongside of Mr. Stickle then? A. I was.

Q. Now, just tell us what you did from the time

Samuel Branham—Cross.

you left the cars on that delivery track, up until the time that you got hit? A. Tell you what?

Q. Tell us what you know, what you did, what you saw? A. I made observation when I went to cross before the train, I look to the right, and I didn't see no train.

Q. Did you yell something to Mr. Stickle? A. 10
I did.

Q. What did you yell? A. I said, "stop, stop."

Q. What did he do? A. To tell the truth, what he done, I look at the train, I couldn't tell you just exactly what he did do. I couldn't say whether he speed up, or slowed down.

Q. Well, he kept on going, didn't he? A. Kept on going. I couldn't say whether he slowed up, or not. I looking at the train.

Q. Now, Sam, you told us about a hole — 20

Mr. Greenfield: I don't recall him saying anything about a hole.

Mr. Tomlinson: Didn't he? Well, if he didn't, then I —

Mr. Greenfield: You had better ask him.

Q. Was there a hole near those delivery tracks? A. There was.

Q. I show you a picture —

(Picture marked D-3 for Identification.) 30

Q. Does that show the hole, Sam? A. I am not so familiar with this picture. I don't see the hole.

Q. Do you remember making that pen mark on that picture? A. Over here, you mean?

Q. Now do you see it? A. Yes, now, I see it.

Q. That is the hole you are talking about, isn't it? A. That is the hole.

Mr. Tomlinson: That is all. 40

Mr. Greenfield: That is all, thank you.

John M. Mente—Direct.

JOHN M. MENTE, a witness produced on behalf of the Plaintiffs, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Greenfield:

10 Q. Mr. Mente, you are connected with Mente Bros.? A. Yes.

Q. Mente Bros. was the owner of the truck that was involved in this accident? A. Yes.

Q. Now, will you tell us when you first learned of the accident, and how? A. Stickle called the office from Eatontown, about 6:30 on the evening of May 11th, and told us that he had an accident.

Q. Did you go down to the scene of the accident? A. Yes, I did.

20 Q. About what time did you get there? A. Oh, about eight o'clock.

Q. What was the condition of the weather at that time? A. It was just getting dark, but the weather was nice, it was a nice evening.

Q. Did you see the train there? A. No.

Q. Did you see the truck there? A. Yes. It was across the track, it was away across the track, laying in the swamp.

Q. Did you see Sam there? A. No.

30 Q. Did you see Mr. Stickle there? A. Yes.

Q. Will you point out here to the jury, please, just where you saw the truck? A. Truck was down here, right on the railroad right of way (indicating).

Mr. Greenfield: The witness indicates here, for the purpose of the record, behind the —

40 Mr. Tomlinson: Of course, there is no proof that that is where the truck was left after the accident, the fact that that is where he found it. If that is connected up

John M. Mente—Direct.

later, I have no objection to Mr. Mente testifying where it was when he saw it, but it is certainly no proof as to where the truck was when it came to a stop, or when the train came to a stop.

Mr. Greenfield: All right.

Q. Now, will you tell us, do you know where the contents of the truck were? A. Well, from Lewis Street, oh, a couple of hundred feet up there, all along this railroad track there. It was on Lewis Street, it was all along the railroad track. 10

Q. About how far from Lewis Street? A. Two hundred feet, or probably more. It was just about two hundred feet.

Q. Now, what was the condition of the truck when you first saw it? A. It was demolished. 20

Q. Will you describe it? What do you mean by demolished? A. The train went right through the middle of it, and it was just like a chassis frame; the body was all smashed; the body is still laying down there, and it was just bent, the chassis frame was bent around the front of the engine, like a "U." Tires were blown. Cab was all smashed. Hood was off. Lamps were smashed.

Q. Was the truck subsequently repaired? A. Yes. 30

Q. Now, before going into that any further, let me ask you this: How long have you been in the trucking business? A. Twenty-five years.

Q. Are you acquainted with automobile mechanics? A. Yes.

Q. Have you done any repairing of automobiles or trucks yourself? A. Yes.

Q. And are you acquainted with the values of trucks? Have you bought any? A. Yes. 40

John M. Mente—Direct.

Q. Over what period of time? A. From 1918 to date.

Q. About twenty-six years. And in that course of time how many trucks have you bought? A. About forty.

10 Q. Did you buy the truck that was involved in this accident? A. Yes.

Q. What did that cost new? A. That cost sixteen hundred and a few dollars. The exact cents I couldn't remember.

Q. Is that a complete truck? A. Yes.

Q. What was the cost of repairing this truck? A. The total cost was just a little bit more than the original cost. A few dollars more than the original cost.

20 Mr. Greenfield: I am willing to stipulate that the actual figure was the figure we submitted in the bill of particulars. This gentleman is testifying from memory. If you want to read the bill of particulars into the record, it is quite all right.

30 Mr. Tomlinson: I am not going to contest any of your testimony in that regard. Mr. Mente testified at the last trial, I think the proof was that the repairs to the truck cost \$1,038., the body cost \$258., tires were \$204.75, and the tubes \$22.20, making the total \$1,514.95.

Mr. Greenfield: That is correct.

Mr. Tomlinson: If Mr. Mente wants to testify to that —

Q. Was this amount of \$1,514.95 actually paid for the repair of that truck? A. Yes. If that was the bill.

40 Q. Now, at the time this accident occurred, do you know what was on the truck? A. Load of sewer pipe.

John M. Mente—Direct.

Q. Do you know what the price of that was?

A. Somewheres around \$98.

Q. Well, I show you a bill —

Mr. Greenfield: I don't know if you have any objection to this going into evidence, or his testifying from it.

Mr. Tomlinson: I have no objection to his testifying from it.

10

Q. Now, I show you a bill here and I ask you what that is, what it purports to be? A. Well, this is a load of pipe that was lost, due to accident.

Q. And from whom is the bill? A. Brick & Tile Corporation.

Q. What is the amount of the bill? A. \$98.91.

Q. Is that the amount that was actually paid? A. Yes.

20

Mr. Greenfield: I offer that in evidence.

Mr. Tomlinson: For certain reasons I don't think it ought to go in evidence. I made the admission to you.

Mr. Greenfield: All right. Keep it out.

Mr. Tomlinson: He has something on there that is irrevelent, in my opinion.

Q. Now, Mr. Mente, where was that truck repaired? A. International Harvester plant up in Elizabeth.

30

Q. How was the truck brought back from Eatontown, if you know? A. My mechanic brought it back with a wrecker that we borrowed.

Q. How long was it before that truck was back in use again? A. Our records show one hundred and twenty-one days.

Q. Well, what do you mean by one hundred and twenty-one days? A. The truck lost one hundred and twenty-one days, it was undergoing repairs.

40

John M. Mente—Direct.

Q. Is that calendar days? A. No.

Q. Well, how did you compute one hundred and twenty-one? A. That is work days.

Q. One hundred and twenty-one work days? A. That is right.

10 Q. Now, Mr. Mente, have you ever had occasion to hire trucks? A. Yes.

Q. Of a similar type? A. Yes.

Q. Over what period of time have you hired trucks? A. Oh, for the last seven or eight years we have to hire trucks.

Q. And from whom have you hired trucks? A. wherever we can get them.

Q. And can you tell us, please, the rate, or the cost to hire a similar truck?

20 Mr. Tomlinson: Objected to as irrelevant, incompetent and immaterial. That evidence would only be admissible if Mr. Mente actually hired a truck, being required to hire it by reason of loss of use of this truck. But no such testimony has yet appeared.

30 Mr. Greenfield: I think that is an erroneous point of law that most people — most lawyers operate under. The law, as I have been able to learn it is that regardless of whether or not a truck was in fact hired, the fact that this plaintiff has been deprived of the use of it, wrongfully, entitles him to be recompensed for the loss of use of it. And in a similar situation in the case of *Noughton Mulgrew Motor Co. v Westchester F. Co.*, 173 N. Y. Supplement, 437, the plaintiff was engaged in a taxicab business, and instituted suit against the defendant for damages, as the result of negligence, which resulted in injury to one of
40 the plaintiff's taxicabs. The plaintiff in his busi-

Colloquy.

ness had a dozen or more of these cars on hand, and in the service, and after the accident did not hire another cab but took one of the cabs that were on hand. And the claim was made, of course, that he didn't go out and hire another taxicab. The Court said: "The practice has obtained in these damaged vehicle cases of allowing the cost of actual hire of another vehicle, similar to that damaged, and this custom has prevailed, we think, largely because that measure of damage is rarely objected to. The correct rule would be to allow the rental value of the car, irrespective of whether another car had actually been hired to take the temporary place of the car damaged and undergoing repairs." 10

(Further reading.)

That case, as I understand it, has been approved in the Court of Errors in this State. There is a notation in 1917 Annotated American Cases, page 124, Sedgwick On Damages, 9th Edition, paragraph 435 A: "Where an injury to plaintiff's property, which does not cause its total destruction, results in his losing the use of it for a time, either because it is rendered unfit for use, or because he is temporarily deprived of the possession of it, he may, in addition to the deterioration in value, recover the value of the use of it, during the time he lost the use." Joyce On Damages. 30
Meyers v. Bradford, 201 Pac. 471. And the same law applies in other states, and I think without any question we are entitled to recover the actual loss, regardless of the fact that these people did not hire another truck.

The Court: I have not the slightest quarrel with any of the law that was read there, or most of it. I think that is the law, whatever his loss 40

Colloquy.

was. But I never heard tell of a law which says that a man, without proving that because of his car being damaged he lost money, which he can do by one of two things, either prove what his losses were by reason of having no car, or by reason of having to hire another car. Of course, a man can prove whatever he lost because of his inability to have the use of his car. But in the absence of any such proof as that he cannot just sit back and say, my car was out, and it would have cost me so much a day to hire another. I never heard tell of any such rule.

Mr. Tomlinson: The rule has been declared time and time again in this State that on such a claim he has to prove that he had to hire a car, and he did hire it. And furthermore, that the repairs were made as speedily as possible.

The Court: If he could, and if he could not, by reason of being deprived of the use of that, or his inability to get another, he lost so much in the way of business, and so forth. Of course, he could prove that.

Mr. Greenfield: I will show this truck was repaired as speedily as possible. I then insist that regardless of whether or not Mente Bros. actually went out to hire another truck, the mere fact that they were deprived of the use of this truck, and that if in fact they had hired another truck, would have cost them so much, they are entitled to that as the measure of damages, and I submit this New York authority.

The Court: So you can get your record, I will say to you right now that I would not think of permitting it. I do not think that it even approaches being the law. I think that if they could get a truck, they must get it. The whole rule of damages is that you must mitigate the

Colloquy.

damage. I never heard of a law which says, if you could go out and get another truck and do the business with it, but did not, therefore I want to get what the other truck would have cost me, had I gone out and done it. The whole fundamental and academic rule of damages starts out first with the absolute requirement, for any damage conceivable, that it must be mitigated to whatever extent it may be. 10

Mr. Greenfield: That is true, sir.

The Court: And the way to mitigate it is to go and get another in its place, and get what it costs to get that other. If you cannot get another, and by reason of the inability to get it, you lose business profits, the use that you would ordinarily have, after having made an effort, then whatever that loss is, is the measure of damage. A person cannot be held, of course, and deprived of what he would have been entitled to, if a truck was put out of business for a month, and during that month he could have used it, and had business for it, and would have made so much out of it, and he does everything in the world that he can, and makes a reasonable effort to try to get another, and cannot, it could not be the law to say, well, you cannot have any damages because you did not go out and get another, of course. But if he can go out and get it, that is his measure of damages. 20 30

If he cannot, then what he is deprived of by his inability to get that other, and the inability to use the one he has, and whatever losses he has been subjected to by the fact that he has, during that period, been unable to use a truck, that, properly proven, is the measure of damages.

Mr. Greenfield: Well, if Your Honor please, I think without any question that is so, if we were suing for loss of profits. But we are not. We say 40

Colloquy.

merely that we have been deprived of the use of that truck, and we will show that the repairs have been made with every bit of speed that we could do it. So that in that situation we have done what we could to mitigate the damages. Now, I say to you, if these people didn't in fact, get another truck, it makes no difference, because they have been deprived of the use of this truck, and since we are not claiming that we lost fifty or one hundred dollars a day profits, that the measure of damages is the actual cost of the hiring of a similar truck, whether in fact they did or not, because of the fact, as I say, we are not claiming loss of profits; we just claim that we have been deprived of the use of that truck. And I say, therefore, that the question is entirely proper.

20 The Court: Is the question objected to?

Mr. Tomlinson: Yes.

The Court: I will sustain it, and you may have your exception. I do not conceive that to be the law at all. But I will give you your exception.

Mr. Greenfield: May I have that last question?

The Court: Yes. Perhaps that does not sufficiently set your record up. You may not have gone far enough. You will have to cover it.

30 (Question repeated by stenographic reporter.)

The Court: Maybe this is a preliminary question, and whether in the final analysis that would be the measure of damages; but I think perhaps your theory is that, putting the cart before the horse, he ought to first prove that he made an effort to, and could not, and then prove what it would cost? The question itself does not seem to me to be objectionable, if it is properly connected up. But we were just anticipating—

40

Colloquy.

Mr. Tomlinson: It seems to me at this present stage of the case the question is objectionable, because, as the case now stands, the rental value of another truck is not material. As your Honor put it, if they are going to pursue the course that I think they would have to, to come within the decisions, they are putting the cart before the horse. But I think Mr. Greenfield has, in his discussion, laid the foundation, so that the question is objectionable. 10

The Court: All I am anxious about is that you get your record in proper shape.

Mr. Greenfield: I would like also to call your Honor's attention to the case of *Hintz v. Roberts*, in 121 Atlantic 711. That is an opinion by the Court of Errors & Appeals of this State, which says: "Where through an injury to an automobile the plaintiff is" — 20

The Court: Are there any other citations?

Mr. Greenfield: Yes. 69 Atlantic 971; 114 Atlantic 94. And I think, I respectfully submit, Your Honor take a look at that New York case, which I think is comparable, 173 N. Y. Supplement, 437. In the case of *Barnwell Brothers Inc. v. Morris Stern, et als.*, in the United States District Court for the District of New Jersey, Judge Smith, in an unreported decision held what I have espoused here is in fact the law. 30

The Court: Have you got that?

Mr. Greenfield: I haven't the opinion here, but I can get it for you, though.

(Witness withdrawn from stand.)

Roscoe H. H. Buckner—Direct.

ROSCOE H. H. BUCKNER, a witness produced on behalf of the Plaintiffs, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Greenfield:

10 The Court: The other witness that was on the stand, regardless of this question that is now pending, would take considerable time, because you were not through with him?

Mr. Greenfield: That is correct.

20 The Court: And there was no cross examination at all. We have gotten to the point where it is time for recess. The Doctor has been kept here for the last hour or so, and not wanting to bring him back after lunch, with counsel's consent, and the Court's approval, the other witness was withdrawn just temporarily, so that the Doctor could testify now, and then he would not have to come back.

Q. Doctor Buckner, did you have occasion to treat Mr. Samuel Branham? A. I did.

Q. When was the first time that you had occasion to treat him? A. On the 21st of June, 1942.

30 Q. And where? A. At his home.

Mr. Tomlinson: Mr. Greenfield, I don't want to interrupt you, but I think the Doctor is mistaken. I think it is May 21st, 1942.

A. 21st of May, instead of June.

40 Q. You treated him how many times at his home, Doctor? A. I treated him from the 21st of May, daily, up and through the 29th. Then I treated him the 3rd of June — I mean the 1st of June, and the 3rd of June, the 5th of June, and the 8th of June.

Roscoe H. H. Buckner—Direct.

Q. How many times did you treat him altogether? A. Twelve times.

Q. What were the nature of his injuries for which you were called upon to treat him? A. He had an incised or cut wound on the inner side of the lower lip. He had an incised or cut wound on the inner side of both cheeks. An incised or cut wound on the right arm; this was five inches long. And shock. There was evidence of an old scar on the lower part of the cheek, on the outside, and on the forehead. 10

Q. Any other injury, Doctor? A. That was healed.

Q. Any other injury? A. No.

Q. Can you tell us how big the incised wound on the lower lip was? A. About three inches.

Q. How big were the wounds on the inside of the cheeks? A. About two inches. 20

Q. Each? A. On the inside?

Q. Yes. A. Two inches.

Q. On each side they were two inches? A. Two inches long.

Q. Did you know whether they were stitched or sutured? A. I know that the ones inside of the cheek were not sutured, and inside of the lip. In all probability the one on the arm may have been sutured, but they were not there, the sutures were not there when I saw the wounds. 30

Q. You discharged Mr. Branham on the 8th day of June, 1942? A. I discharged him on the 8th of June, 1942.

Q. What was the amount of your bill for treatment, sir? A. Forty-three dollars.

Q. Is that a reasonable bill for the services that you rendered? A. It was.

Q. What were the condition of the wounds when you first saw him? A. Condition of the wound? 40

Roscoe H. H. Buckner—Cross.

Q. Yes. The various wounds? A. Well, they had not healed. There was signs of infection in the wound on the right arm. And the ones in the cheek and the lower lip were not healed. Some signs of infection there.

10 Q. Did those wounds, could you tell whether they elicited pain, or discomfort? A. Could I tell what?

Q. Whether they caused pain or discomfort? A. Yes, assuredly I would say they caused pain.

Mr. Greenfield: That is all. Thank you, sir.

Cross-examination by Mr. Tomlinson:

20 Q. Doctor, you said something about finding some old scars? A. There were two.

Q. Two old scars? A. Yes.

Q. They were completely healed up? A. They were completely healed.

Q. In your opinion they bore no relation to this accident, is that it? A. I wouldn't say that they had any relation there to this accident.

Q. They were old scars, weren't they? A. They were healed scars.

30 Q. What was his condition, Doctor, when you discharged him on June 8th? A. As cured, or improved condition.

Q. He was in very good condition, wasn't he, when you discharged him? A. Very good condition, yes.

Q. And you found no permanent effects of his injuries, did you, Doctor? A. Nothing permanent.

40 Q. And when you discharged him on June 8th you told him he could go back to work? A. Nothing permanent.

Roscoe H. H. Buckner—Redirect.

Mr. Tomlinson: That is all, Doctor.

Redirect-examination by Mr. Greenfield:

Q. Doctor, if he complains of pains in his right arm, in the nature of pins sticking in him at the present time on occasions, is it probable that those pains are as the result of that injury to the right arm, resulting out of this accident? 10

Mr. Tomlinson: I object to that, if Your Honor please. He said the last time he treated him he found him in good condition, found no permanent results.

Mr. Greenfield: There is nothing here to indicate that it is a permanent result.

Mr. Tomlinson: He wasn't asked on his direct examination as to any prognosis. If Your Honor thinks it is all right. 20

The Court: I think it is all right, in view of the Doctor — this may be something that is hypothetical. The Doctor knows nothing about it, and at the time he discharged him he thought he was all right, but, if there is some result there now, that the Doctor didn't find at that time, if he can describe that, I think he could tell, hypothetically, whether or not he thinks it has any relation to the accident. I will permit it. 30

A. Will you ask that question again, please?

Q. Mr. Branham has complained of pains in the arm at times, in the nature of pins sticking in him. In the absence of any history of a subsequent or other injury, is it probable that this pain is as a result of the injury that he sustained? A. It is probable.

Mr. Greenfield: That is all.

40

Roscoe H. H. Buckner—Recross.

Recross-examination by Mr. Tomlinson:

10 Q. But when you discharged him at that time you considered there were no permanent effects from this injury, and that he had completely recovered, didn't you? A. So far as my treatment of the injury at that time I saw all signs of recovery. But, if I may explain, in a case of this kind, where there is a deep incision of the arm, or cut of the arm, there are nerves involved. Now, these nerve ends were cut. It takes a length of time before these nerve ends repair themselves, or grow back in. In all probability the trouble that he has now is from the fact that the nerve ends have not united completely.

20 Q. Do you remember testifying here in March? A. What is it?

Q. Do you remember testifying here in March? A. I did testify in March.

Q. Were you asked by Mr. Greenfield this question: "What was his condition about June 20th, or the last time that you examined him? A. Very good." You so answered, didn't you? A. I answered that it was very good.

30 Q. Just a minute. Will you please be good enough to answer the question? A. I did. I answered then that it was very good.

Q. "Q. In your opinion, Doctor, was there any permanent effect of his injury? A. There was none." And you so answered, didn't you? A. I did.

Mr. Tomlinson: That is all.

Mr. Greenfield: Thank you very much, Doctor.

Adjourned until 1:40 P.M.

John M. Mente—Recalled—Direct.

AFTERNOON SESSION, 1:40 P.M.

JOHN M. MENTE, recalled:

Direct-examination by Mr. Greenfield:

The Court: Do I understand that the plaintiff's contention is that that would be the measure of damages which this plaintiff would be entitled to, during the period when his truck was under repair, what it would cost him, what he would testify to as to cost of hiring another truck? 10

Mr. Greenfield: Yes, sir.

The Court: That is the limit to which you intend to prove that loss, by the proof of what it would cost him to hire another truck? I mean, I don't want —

Mr. Greenfield: Do you mean in money damages, or outside amount? Or his attempt to get another truck and recover those damages? I don't quite follow your Honor's question, when you attempt to limit — 20

The Court: You see this question, of itself, might be evidential if it was included in other proof; I mean, circumstances are such that I don't know, for instance, whether he did hire another truck, up to this point, on this question. And as I stated the rule as I understood it to be, a person would have a right to hire another truck, if and when it was for the purpose of mitigating damages; so that I do not want to shut something out, as a preliminary question. But if, as I stated in my thought of the matter this morning, that if the amount of damages, including the actual damage to his car, which is a different situation al- 30 40

John M. Mente—Recalled—Direct.

10 together, but if, in addition to that the plaintiff is claiming that his other damage, for the lack of use of the car during the period when it was under repair, is to be determined by what he is now offering in the way of proof as to what it would cost him to hire another truck, if he had hired one, if that is the theory, I am ready to rule on it. I do not know just how far you expect to go with that proof.

20 Mr. Greenfield: Well, in answer to your Honor's question let me say this: My understanding of the law is that, regardless of whether or not he in fact hires another truck, the mere fact that he has been deprived of the use of this entitles him to the same damage as he would have been put to, if in fact he went out and got another truck. Whether or not he does. And I may also say for your Honor's benefit, and for the benefit of the jury to, that we will, by subsequent testimony, develop the necessity for the truck being laid up for this length of time, and attempt to hire another truck during the time, and actual hiring of another truck for part of the time. But I
30 still think that, as a matter of law, the question whether or not he is entitled to damages, regardless of whether he hires another truck, should be resolved in our favor. And on the basis of the authorities that I have cited. There was no question, I think, that the law is that he need not go out and hire a truck, if he shows that he did everything in his power to limit the term for which that truck was laid up.
40 However, if your Honor wants to rule on

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this question, subject to being tied up, and subject to being objected to later on, I have no objection at this time.

The Court: Is it admitted in this case that they did not hire a truck during this period?

Mr. Greenfield: Nothing is admitted. 10

The Court: Then I will sustain the objection at this time until such time as there is proof to prove that he either did, made an attempt to, or found it necessary, not for the purpose of establishing damages, but for the purpose of mitigating the damages. The hiring or not hiring of a truck, as I said this morning, does not establish the damage. It mitigates it; it is for the purpose of mitigating; that is what it is for. But if this offer is made merely to see whatever he says a truck would cost him, that he didn't hire one, and rest upon that as his measure of damages during the period when his truck was laid up, then I am ready to rule that that is not material and is not evidential, and will sustain the objection to it. 20

Mr. Greenfield: As a matter of law, to keep the record straight, I take an exception, but I will, as I say, offer testimony to clear that point up. I just don't want there to be any misunderstanding on the part of the jury. 30

The Court: That is right.

Mr. Greenfield: All right. Thank you.

Q. Now, Mr. Mente, from time to time, in your experience in the trucking business, have you hired trucks at various times? A. Yes. 40

Q. Can you tell us, please, why it was neces-

John M. Mente—Recalled—Direct.

sary to lay up that truck for a period of one hundred and twenty-one days? A. Well, just prior to that the Government froze all parts and all motor equipment, and it took a lot of red tape to get it by the proper authorities, to get parts to replace parts that were necessary to be used in
10 this piece of equipment.

Q. Was any attempt made to get the parts? A. Yes.

Q. Were the parts finally obtained? A. Yes.

Q. And when the parts were obtained, was the truck repaired? A. Yes.

Q. Put back into use? A. Yes.

Q. Now, during the time that the truck was laid up, did Mente Bros., in fact, hire another truck? A. Yes.

20 Q. And will you tell us, please, when, and from whom, and at what cost another truck was hired?

Mr. Tomlinson: I think counsel should first develop the necessity for hiring another truck. I object to the question as put.

The Court: Objection sustained.

Mr. Greenfield: I take an exception, for the reasons already in the record.

The Court: That is right.

30 Q. During the time that this truck was laid up, was it at all necessary for you to replace it with another truck? A. Yes.

Q. And did you replace it? A. Yes. With a hired truck.

Q. With a hired truck? A. For days that we could get one.

Q. Now, when was that? A. May 15th there was a truck hired; May 18th there was a truck hired; September 1st there was a truck hired;
40 12th and 20th of September.

John M. Mente—Recalled—Direct.

Q. In 1942? A. 1942.

Q. Now, you said a moment ago when you could hire a truck. Was any attempt made to hire a truck at any other time between the day of the happening of this accident, or the day after, until the day that that truck was finally repaired and put back into use? A. Yes. 10

Q. Were you able to hire a truck? A. No.

Q. And why not? A. Because every operator seemed to have their hands full, and they couldn't let a truck out of their place.

Q. Was there any attempt made to buy a new truck? A. Yes.

Q. Or to replace it? A. Yes.

Q. And could you buy a new one? A. No.

Q. Could you replace it in any manner, shape, or form? A. No. 20

Q. Why not? A. Because the O. D. T. would not pass a certificate for at least two months.

Q. By O. D. T. do you mean the Office of Defense Transportation? A. Office of Defense Transportation.

Q. Had you had experience in renting and hiring trucks prior to this accident? A. Yes.

Q. And did you know what the prevailing rate for hiring a truck was? A. Truck this size is generally \$20. a day. 30

Q. From whom did you hire a truck on the five or six days that you mention? Harris — Shallcross Express.

Q. These papers that you are referring to are paid bills? A. That is right.

Q. You paid these bills? A. Yes.

Mr. Greenfield: I offer these in evidence. Is there any objection, Mr. Tomlinson?

Mr. Tomlinson: No. 40

John M. Mente—Recalled—Direct.

(Bills entered in evidence and marked Exhibit P-3.)

Q. I just call your attention to these bills once again and ask you the rate per day that you paid to hire these trucks?

10 Mr. Tomlinson: He has already testified, and the bills show it, \$20. a day. Why repeat and repeat?

Mr. Greenfield: All right, sir.

Q. You testified, Mr. Mente, that you visited the scene of this accident that night. Did you make any observations at the scene of this accident? A. Yes.

20 Q. I call your particular attention here on the west side of the main track there are two notations, one marked "X sign," on the west of Lewis Street, and another marked "sign", and ask you if you saw either or both of those two signs? A. Yes.

Q. Now, I call your attention to this notation or indication marked "flagman's sign," and that is on the east side of the delivery track here, east or north of Lewis Street, and ask you if you saw that sign there? A. No.

30 Q. Did you at any time subsequent to the time of this accident see a sign at this location marked "flagman's sign"? A. Yes, after the accident.

Q. When was it, if you can tell us, after the accident, that you saw that flagman's sign there, the one that I am referring to particularly is the one that you say wasn't there either the day of the accident, or the next day?

40 Mr. Tomlinson: I object to that question. Containing an incorrect recital of his testimony. He said he didn't see it. He

John M. Mente—Recalled—Direct.

didn't say it wasn't there the night of the accident. Counsel asked him whether he saw it, and he said no, I didn't see it.

Q The night of the accident was that sign there? A. No.

Q. When after the night of the accident did you see it? A. About a week later. 10

Q. Did you have occasion to talk to anybody at the scene of the accident, the night of the accident? A. No.

Q. Did you see Mr. Branham at the scene of the accident when you got there? A. No.

Q. When did you see him? A. About eleven o'clock that night.

Q. And where? A. Long Branch Hospital.

Mr. Greenfield: If Your Honor please, I am taking a little time. I don't want to repeat any of the questions, and yet I want to make sure that I have covered the territory here. 20

Q. Can you tell us, please, Mr. Mente, if this is a through street, this part marked "roadway" here? A. No, it is not.

Q. Is Lewis Street a through street? A. Yes.

Q. Now, I am not sure, and if there is any objection if I am repeating this, I will withdraw it: Could you tell—could you read what was on this sign over here on the west side of the main track? A. No. 30

Q. And why couldn't you? A. Because it hadn't been painted for darn knows when. You couldn't read the letters.

Mr. Tomlinson: I move to strike it out. This man certainly does not know when it was painted, or when it wasn't painted. 40

John M. Mente—Recalled—Direct.

John M. Mente—Recalled—Cross.

The Court: Yes, that feature may be stricken out. If he testifies he could not read it because of lack of paint on it at that time, or illegibility, or what not, that is as far as he can go.

10 Q. Why couldn't you read it? A. Because the letters wasn't painted so you could read it. It was weather beaten in such a fashion that you couldn't read it.

Q. When you were down at that crossing some time after the accident, did you see anything being done to or with the sign on the east side of that track, the one marked "flagman's sign"? A. Yes.

20 Mr. Tomlinson: That is objected to, and I move to strike out the answer. I object to that upon the ground that any conditions on premises involved in an accident, after the accident, subsequent to the accident, are not admissible or relevant.

The Court: Objection sustained.

Mr. Greenfield: All right. That is all. Thank you.

Cross-examination by Mr. Tomlinson:

30 Q. When, Mr. Mente, did you try to read the sign on the west side of the tracks, which you say is illegible? A. That night, and the next day.

Q. That is the sign over here (indicating)? A. That is right.

Q. And when you got down there that night it was getting dusk, wasn't it? A. Yes.

Q. There is no light around there, is there? A. No.

40 Q. You went down, I suppose, that night, pri-

John M. Mente—Recalled—Cross.

marily to see what had happened to your truck, and to the cargo on your truck? A. And my men.

Q. And your men, of course, naturally. In other words, your concern when you went down there was not so much the conditions at the crossing, or adjacent to the crossing, but first, the condition of your men, as to whether they were hurt; 10
secondly, your truck, what its condition was; and thirdly, the cargo on the truck, that is true, isn't it? A. That was the primary purpose.

Q. Had you been down there often before that time? A. Yes.

Q. Now, you say that about a week after the accident you noticed this sign, on the east side of the track, "flagman's sign"? A. Yes.

Q. What did that sign say when you saw it? A. I don't know. 20

Q. Did you try to read it? A. No.

Q. You didn't pay any attention to the lettering that was on there? A. There was new lettering on there.

Q. I say, you didn't pay any attention to the lettering that was on there? A. No.

Q. Well, then, if you tried to read the sign on the west side of the tracks, and found you couldn't read it because the letters were illegible, why didn't you try to read the sign on the east side of the tracks? A. When? Before or after the accident? 30

Q. Any time?

Mr. Greenfield: I must object to that, because the question itself is very ambiguous. The testimony is that he attempted to read the lettering on the sign on the west of the track, just after the accident, and that there was no sign on the east. Now, Mr. Tomlinson is asking a question which makes 40

John M. Mente—Recalled—Cross.

it appear that he attempted to read both signs at the same time, and I wouldn't know how to answer the question myself.

10 Mr. Tomlinson: You certainly wouldn't, if you didn't listen any more acutely than you did to my question. My question was this, if Your Honor please: This man testified that on the night of the accident he went down, after dusk, and he saw this sign on the west side of the track, and he couldn't read it because it was illegible. He says that on that night this flagman's sign wasn't there on the east side of the track. And in answer to his counsel's question he said that he first noticed that sign about a week after the accident. Now I said, when
20 you saw that sign, whenever it was, a week after the accident, or whenever you say it was, what was on that sign on the east side of the track. He said, I don't know; I didn't try to read it. Now my question is, —and I think it is perfectly proper,—why he didn't try to read it, if he would try to read the other sign, which he says was illegible.

30 The Court: I think counsel had in mind more that the question purported to ask him why he didn't read the sign at the time he said there was no sign there. If he said there wasn't any sign on this side, why ask him about why he didn't try to read it?

Mr. Greenfield: If he merely asks him why didn't he try to read it, and limits it to that, I will not object to that.

40 Mr. Tomlinson: I press the question. If you tried to read this sign which you say was illegible, why didn't you try to read

John M. Mente—Recalled—Cross.

this other sign, when you saw there was lettering on it?

A. Am I to answer it?

Q. Just answer the question. A. A week later the signs were painted, and you could read them, if you went up to them to try to see what was on them. 10

Q. Why didn't you read that sign on the east side to see what was on it? A. I had no interest what was on that sign.

Q. Why did you have sufficient interest in the sign on the other side of the tracks to go down there over the track, after the accident, go up to it and find it was illegible so you couldn't read it? A. It was dark, in the first place.

Q. Why did you try to read it? A. I wanted to see what was on it, and I couldn't find out. 20

Q. If you wanted to see what was on it, why didn't you, later on, when you found this other sign, as you claim, read that too? A. Well, I didn't read it.

Q. How old was your truck at the time of the accident? A. About seven months old.

Q. Have you got the bill from the International Harvester Company for the repairs to your truck?

A. Yes.

Q. When did they start the repairs on that truck? A. I could refer you to the bills. 30

Q. Refer to the bills, if you want to, Mr. Mente, what were you reading from then? A. When was this, the last trial?

Q. This morning.

Mr. Greenfield: It may have been just this bill, concerning the price of that bill, but I don't know of any other.

The Court: I think there was some con- 40

John M. Mente—Recalled—Cross.

troversy, that you found that the bills were, I don't know how much larger, and you said all right, we will be bound by the bill of particulars.

10 Mr. Greenfield: Yes, I believe what Your Honor has reference to, Mr. Mente started to testify in round figures, and Mr. Tomlinson said, here is your bill of particulars.

The Court: I thought he had the bills then.

(Further discussion.)

Q. Do you recall when the International Harvester started to repair your truck, Mr. Mente?

A. About three or four days after we brought it up.

20 Q. Do you recall,—and if you don't remember, just say you don't—do you remember when the whole job was finished? A. It went out on the road, according to our records, September 29th.

Q. But you don't know when it was actually delivered to you, do you? A. It was probably delivered the day previous. Then we had to hook up our arrow lights, and one thing another, up at our yard, to complete it.

Q. The chassis was rebuilt, wasn't it? A. Yes.

30 Q. And you had a brand new body put on there? A. No.

Q. Didn't you? A. No.

Q. Did you get a second-hand body? A. Second-hand body.

Q. You did have brand new tires put on? A. No.

Q. Didn't you? A. We couldn't get them.

40 Q. Where did you get the tires that you did put on there? A. Why, we picked them up here and there and all over.

John M. Mente—Recalled—Cross.

James C. Granton—Direct.

Q. Well, you paid for them, or didn't you pay for them? A. Oh, yes.

Mr. Tomlinson: All right. That is all.

Mr. Greenfield: That is all. Thank you, sir.

Mr. Greenfield: Now, at this time, with the consent of counsel, I am introducing into evidence a bill from Dr. John E. Maher, to Samuel Branham, for professional services, total \$52. I ask that be marked in evidence. 10

Mr. Tomlinson: I have no objection.

(Bill entered in evidence and marked Exhibit P-4.)

Mr. Greenfield: Plaintiff rests. 20

DEFENDANT'S CASE

JAMES C. GRANTON, a witness produced on behalf of the Defendants, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Tomlinson:

Q. Mr. Granton, where do you live? A. Eatontown, or rather, about a mile west of Eatontown, on a farm. 30

Q. What is your business? A. Farmer.

Q. You have this farm? A. Yes, sir.

Q. How long a time, Mr. Granton, have you lived in Eatontown, or near Eatontown, in that general section? A. Sixteen years.

Q. Before that where did you live? A. Delaware.

Q. Are you connected, or have you been con- 40

James C. Granton—Direct.

nected in any way with the Central Railroad Company? A. No, sir.

Q. Are you familiar with, and were you familiar in May, 1942, with the Eatontown station? A. Yes, sir.

10 Q. Did you go there frequently? A. Oh, quite frequently. I used to take eggs over there quite often, you know, and one thing another.

Q. You would ship stuff from the station, and to the station? A. Ship them to New York, yes.

Q. Did you know the agent over there, Mr. Ousterman? A. I did, sir; yes, sir.

Q. Did you know his assistant over there, the young man, what was his name?

Mr. Greenfield: Mr. Whitfield.

20 A. Whitfield, yes.

Q. Now, Mr. Granton, I show you a photograph which I will ask to have marked for Identification.

(Photograph marked D-4 for Identification.)

Q. I ask you if that shows the part of the station? A. Yes.

30 Q. Looking south from Lewis Street? A. You want me to tell you which is the southern part of this exposure?

Q. No. I say, does that show the station and the tracks looking in a southerly direction from the Lewis Street crossing? A. Yes, I imagine that is Lewis Street right here.

Q. Yes, sir. And over here is what, to the left? A. That would be to the south.

Q. What is that building there, Mr. Granton? A. Why, that is the freight station, I should think.

40 Q. Do you understand this map, Mr. Granton? A. Well, fairly. I have an idea. I wouldn't swear to that, either.

James C. Granton—Direct.

Q. One inch is thirty feet? A. That is the station, I imagine.

Q. That has been identified as the station, and this has been identified as Lewis Street here. A. I don't know. Is it?

Q. Yes, that is Lewis Street here, so identified. And this has been identified here as the passing siding, and this track over here on the west side as the main track? A. Yes, sir. 10

Q. Do you know where the Tinton Falls bridge is? A. Yes.

Q. Tinton Falls Road that has been identified as being up here (indicating)? A. Yes.

Q. On the day of the accident, Mr. Granton, and at the time of the accident, where were you? A. I was in the station house.

Q. What were you doing in the station? A. I was talking to Mr. Albert Wolcott; he is the second man on the first bench, on the far end, far side, rather. 20

Mr. Tomlinson: Will you stand up, Mr. Wolcott?

Q. What were you doing at the station? How did you come to be there? A. Oh, I was expecting a shipment of tomato plants.

Q. Coming on the train? A. Well, they were supposed to come from the South. Of course, that train comes earlier in the day, but sometimes they are missing, and they go further, and, of course, I thought they might come back again that night, and I was rather anxious to get them before they got too far gone, or to wilted, you know. 30

Q. You expected them, or you were looking — A. I was hoping they would show up before they would arrive in such condition they were worthless. 40

James C. Granton—Direct.

Q. In any event, as you were standing there talking to Mr. Wolcott, what train were you looking for then? A. That was the 6:17.

Q. That was the train that was involved in this accident, wasn't it? A. Yes, sir.

10 Q. Did you hear or see anything of this accident? A. No, I didn't see it. The only thing I heard, of course, I couldn't say that I heard the first whistle, because I was busy talking and, of course, I didn't pay no heed to that. The last whistle, of course, I did hear, you know.

Q. Suppose you tell us just what you did hear? You were busy talking to Mr. Wolcott. Were you outside of the station, or inside? A. No. I was inside.

20 Q. Just tell us what you saw or heard? A. Well, I didn't see nothing of the accident. I just heard the crash. I saw them after, but I don't care to look at such sights anyway. But I heard the train whistle good and loud, but I couldn't say how long it was before the crash. It was a little interval anyway. I couldn't just imagine how long it was before the crash after the whistle blew. There was an interval of time. Of course, I couldn't say just how much.

30 Q. Can you tell us how many times the whistle blew? A. No, I couldn't say to that.

Q. Did it blow once, or more than once, if you are able to say?

Mr. Greenfield: I object to that. The gentleman has already testified as to how many times.

Mr. Tomlinson: He hasn't either. He said he heard a blow.

40 The Court: He said he heard a blow, but he couldn't tell how many times. He is asked, was it more than once, or was it ten

James C. Granton—Direct.

times, or twenty times. He might not know the exact number, but he might know whether it was only once, or more than once, or what.

Mr. Greenfield: My recollection is that the gentleman testified he didn't remember — he didn't hear it the first time, but he heard it the second time. 10

Mr. Tomlinson: That does not mean the second time it blew that it blew only one blast.

Mr. Greenfield: I submit the question has been answered. I object.

The Court: I will permit it.

Mr. Greenfield: Exception.

(Question repeated by stenographic reporter.) 20

A. Well, I have an idea it blew more than once. I couldn't say how many times. But good and loud, though. That woke me up, that loud blast.

Q. And then after that you heard the crash? A. I heard the crash.

Q. Then what did you do? A. Well, I didn't go and investigate. I don't like to look at such things, anyway. I peeked around the corner of the south side of the station afterward and seen everything was all right, and then I want to get home, because I thought there would be a lot of people from Eatontown down there, and I had work to do, and I couldn't afford to stay around there. They would block the traffic. So I got out of there. 30

Q. Then you went home? A. Yes, sir.

James C. Granton—Cross.

George S. Dodd—Direct.

Cross-examination by Mr. Greenfield:

Q. Just a guess of your's that the whistle blew more than once, isn't it? A. Well, no —

10 Q. You are not sure, are you?

Mr. Tomlinson: Let him finish his answer.

A. Yes, I am sure it blew more than once the last time. Because then the engineer, he was bearing right down on to it. Good and loud.

Q. Have you seen more than one of these accidents down there? A. No.

20 Q. You heard the whistle, and then there was a short interval, and a crash, and that is all you know? A. Well, I couldn't state as to the length of the interval. Of course, there was an interval, but how long, or how short it was, I couldn't say.

Mr. Greenfield: All right. Thank you. That is all.

GEORGE S. DODD, recalled:

Direct-examination by Mr. Tomlinson:

30 Q. Mr. Dodd, you have already been sworn, I think, and have identified this map? A. Yes, sir.

Q. There are two or three things I would like to clear up about it. Up here, Mr. Dodd, towards the right of the map is a "W" in a circle. What is that? A. That is the whistle board.

Q. What is the whistle board? A. A whistle board is a disc made of wood, with a large letter "W" painted on it, and it is attached to a wooden post.

40 Q. Its function is what? A. Is to indicate to

George S. Dodd—Direct.

the engineer where to start to blow his whistle for the crossing.

Q. Is it or is it not the whistle board for the Lewis Street crossing? A. Yes, sir.

Q. How far from the Lewis Street crossing is that whistle board? A. One thousand one hundred and ninety-six feet.

10

Q. To the right of the map, between two parallel lines, are the words "Tinton Falls Road." A. Yes, sir.

Q. What is that meant to indicate?

Mr. Greenfield: I think he has already testified to that, Mr. Tomlinson. I don't have any objection.

Mr. Tomlinson: Not in reply to one of my questions.

Mr. Greenfield: No. I asked him that. 20

Mr. Tomlinson: I don't get it.

Mr. Greenfield: I have no objection.

A. That is an overhead highway crossing, over the railroad tracks.

Q. How far is that from the crossing? A. One thousand three hundred and nineteen feet.

Q. Now, Mr. Dodd, how far is Red Bank from this Lewis Street crossing? A. Three and one-quarter miles.

30

Q. And are you familiar with the station stops this train made? A. Yes, I know in general the stops the train makes.

Q. Well, after leaving Red Bank, three and one-quarter miles north of this crossing, coming south, you would leave Red Bank, then what would be the next station up? A. Shrewsbury.

Q. And how far is Shrewsbury from the Lewis Street crossing? A. One and eight-tenths miles.

Q. And then the next station south of Eaton- 40 town is what? A. Farmingdale.

George S. Dodd—Direct.

Q. How far is that? A. From Eatontown?

Q. Yes. A. Nine and four-tenths miles.

Q. Then the next station after that is Lakewood? A. There might be some smaller station, but Lakewood is the next given station.

10 Q. Now, Mr. Dodd, coming down to the crossing, will you tell us the width, between the rails, of the main track? A. Four feet eight and one-half inches from gauge to gauge, that is the inside part of the rail where the wheels of the locomotive or car contact it.

Q. The distance from the east rail of the main track to the west rail of the passing siding? In other words, the distance between the nearest points of those two tracks? A. Eight feet two inches between the—that is the westerly rail of the passing siding to the near rail of the main track?

20 Q. That is right. A. Eight feet two inches.

Q. In other words, there is an open space between those two tracks of eight feet and two inches? A. That is right.

Q. This spot designated as “roadway” here, Mr. Dodd, on the east side of the tracks, and north of Lewis Street crossing, alongside of the delivery track, runs where? A. It runs in a northeasterly direction along by that delivery track.

30 Q. How wide is that roadway, Mr. Dodd, at its most narrow point through there? A. Thirty-six feet.

Q. And at its widest point? A. Forty feet.

Q. And that runs how far down here? A. Down to that circle end.

Q. What do all these dots represent in there? A. That represents the top of the slope. The roadway there and track is elevated about five feet.

40

George S. Dodd—Cross.

Q. Up here looks like a small stream or brook?

A. Yes, sir.

Q. That is to the north of the crossing? A. Yes, sir.

Q. Is that a brook there? A. That is a brook, that blue shaded area there represents the brook under the track. 10

Q. How far is that from the Lewis Street crossing? A. About three hundred feet.

Q. Now, Mr. Dodd, coming east along Lewis Street, there is an "X" with the word "sign" on; will you tell us what that is, please? A. That is what we call a crossing buck. It is a wooden post, about eight inches square, and up at the top there are two diagonal boards on it, and it says "railroad crossing."

Q. Is there another similar sign on the west side of this track some place? A. Yes, sir. 20

Q. Where is that? A. Just to the west of the railroad track.

Q. That X sign? A. Where it says "X sign."

Cross-examination by Mr. Greenfield:

Q. Did I hear you right, that was on the east side of this track here, this crossing buck?

Mr. Tomlinson: He said on the west side. 30

Mr. Greenfield: Oh, I am sorry.

Q. This, as I understand it, represents an embankment, and brook there? A. That is a meadow in there, and the roadway and the track is about five feet above the ground.

Q. Right up here is about thirty-five feet wide? A. No, sir. At that point it is forty feet.

Q. What point? A. I can go down and show you closer on that. 40

George Morris—Direct.

Q. Will you do that? A. At this point the edge of this line, this black line adjacent to the track, is four feet from the near rail of the track, and then from this line across to the opposite line of the road it is forty feet.

10 Q. And then tapers down? A. Then you have a little slope in there, then it tapers down.

Mr. Greenfield: That is all.

GEORGE MORRIS, a witness produced on behalf of the Defendants, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Tomlinson:

20 Q. Mr. Morris, where do you live? A. Long Branch, New Jersey.

Q. What is your profession, or occupation? A. Photographer.

Q. Are you in business by yourself, or associated with some firm? A. By myself at present.

Q. You were formerly associated with what firm? A. I was with Underwood and Underwood, and Pach Brothers, for about thirty-five years.

30 Q. Mr. Morris, shortly after this accident, which occurred on May 11th, 1942, did you go down to the Eatontown station and take some photographs? A. I did.

Q. On what date was that? A. I am sorry. I left my envelope — I mean, I have the original films there. I have the date on there.

Q. Have you got your original films in there? A. Yes, sir. I made one stop on May 13th, 1942.

Q. How many pictures did you take on that day? A. Six different films.

40 Q. I will detach these slips, Mr. Morris, so that there won't be any cause for criticism. I show

George Morris—Direct.

John W. Ousterman—Direct.

you six prints and ask you if they are true prints of the pictures which you took at the Lewis Street crossing, Eatontown, on May 13th, 1942?

A. Yes, sir.

Q. And I ask you whether those photographs truly, accurately and correctly depict the conditions as you found them there on that day? A. They do. 10

Mr. Tomlinson: I ask to have these marked for Identification.

(Four pictures heretofore marked D-1, D-2, D-3 and D-4 for Identification.)

(Photograph marked D-5 for Identification.)

(Photograph marked D-6 for Identification.) 20

(Witness withdrawn from stand.)

JOHN W. OUSTERMAN, a witness produced on behalf of the Defendants, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Tomlinson:

Q. Now, Mr. Ousterman, you live where? A. 30
Long Branch, New Jersey.

Q. You are connected with the Railroad Company? A. I am.

Q. In what capacity? A. Train dispatcher.

Q. Located where? A. At Long Branch.

Q. In May, 1942, including the date of this accident, what was your occupation? A. Station agent at Eatontown.

Q. How long had you been station agent there? 40
A. About twelve years.

John W. Ousterman—Direct.

John W. Ousterman—Special Cross.

Q. Your office was where? A. In the station.

Q. Were you, or were you not familiar with the Eatontown station and the facilities and grounds adjacent to the station? A. Yes, sir.

10 Q. Now I show you, Mr. Ousterman, six pictures and ask you whether or not they truly, correctly and accurately represent the conditions shown therein, as of May 11th, 1942? A. Yes, they do.

Mr. Tomlinson: I offer these six pictures, which have been marked D-1 to D-6 inclusive, in evidence.

Mr. Greenfield: I would like to ask a few questions regarding these pictures, Your Honor.

20 *Special cross-examination by Mr. Greenfield:*

Q. Picture marked D-6 for Identification, and this one marked D-5, don't show any freight cars. 1, 2, 3 do show freight cars, is that correct, sir? A. That is right.

Q. Do you know if there were any freight cars on the siding at the time? A. At the time of the accident?

30 Q. Yes. A. Yes, there were.

Q. I show you some lettering on those signs. Was that lettering on that sign at the time of the accident, as shown in D-1, 2 and 3? A. Yes, that sign has always been there.

Q. I didn't ask you that. A. Lettering is there now, yes.

Q. I didn't ask you that.

Mr. Greenfield: I move those answers both be stricken as not responsive.

40 The Court: They may be stricken, yes.

John W. Ousterman—Special Cross.

John W. Ousterman—Direct.

Q. Was that lettering there at the time of the accident? A. Yes.

Q. Now, will you tell me, up on the right, on the embankment here, and on the right of the main track looking South, I believe this is, will you tell me what that is? A. Why, that is a mail catcher. 10
The Blue Comet, that did not stop at Eatontown, threw the mail off, and it was caught in that box like there.

Q. What is that object on the embankment there? A. That looks like part of the body of the truck.

Q. Are these the same freight cars that were on the siding? A. No.

Mr. Greenfield: I have no objection to those pictures. 20

(Photographs heretofore marked D-1 to D-6 inclusive, entered in evidence and marked Exhibits D-1 to D-6 inclusive.)

Direct-examination (continued) by Mr. Tomlinson

Q. Now, Mr. Ousterman, I show you another picture which I ask to have marked for Identification. 30

(Photograph marked D-7 for Identification.)

Q. Which is a composite photograph, and ask you whether or not this photograph correctly shows the conditions depicted therein, as of May 11th, 1942? A. Yes, they do.

Q. Now, I call your attention to some lettering on a sign on the west side of the tracks, and the south side of the highway, and ask you whether the lettering on that sign is the same in the 40

John W. Ousterman—Direct.

picture as it was at the time of the accident? A. No. That has been changed. It has been whited out. The times of the trains has been whited out. The two trains that we protected the crossing for have been whited out.

10 Q. The photograph was taken some time after the accident, wasn't it, if you know? A. Yes, that is right.

Q. Can you tell us the occasion for changing the lettering on the sign? A. Yes. Because the two trains that did not stop there before the accident, at the time this picture was taken they stopped at Eatontown.

Q. With that exception, this correctly shows the conditions? A. Yes.

20 Mr. Tomlinson: I offer this in evidence, D-7 for Identification. I will prove when that was taken, when I put Mr. Morris back.

By Mr. Greenfield:

Q. Well, is the lettering on this the same as the lettering on the other picture? A. The lettering is the same, except the times are whited out. 12:10 and 5:20.

Q. This is looking east across Lewis Street? A. That is right.

30 Q. Would you say that at the time these other pictures were taken, or rather, at the time of the accident, there was more or less foliage on the trees and weeds, or other growth anywheres in that area depicted by that picture? A. Have you one of the other pictures I could look at?

Q. All six of them, sir? A. Yes, there is more foliage when these were taken.

By Mr. Tomlinson:

40 Q. When which were taken? A. The first ones. There is no foliage here.

George Morris—Recalled—Direct.

By Mr. Greenfield:

Q. So that with respect to the foliage on the surroundings, this picture, the composite picture, does not truly represent those conditions? A. Not the foliage, no.

Q. Do you know when that was actually taken? 10
A. No, I don't.

Mr. Tomlinson: I will prove that in a moment by Mr. Morris.

(Photograph heretofore marked D-7 for Identification, entered in evidence and marked Exhibit D-7.)

GEORGE MORRIS, recalled:

Direct-examination by Mr. Tomlinson: 20

Q. Now, Mr. Morris, I want to show you this composite picture which has been marked Exhibit D-7, and ask you if you took this picture also? A. Yes, sir.

Q. Will you tell us whether that correctly shows the conditions as they existed on the day you took those two prints which you have formed into a composite picture? A. It does.

Q. And when was that picture taken? A. February 10th, 1944. 30

Q. Now, Mr. Morris, will you tell us where your camera was when you took that picture, and which way it was pointed? In other words, describe it? A. Camera was set up on south side of Lewis street, forty-five feet west of near rail of main track.

Q. That would be on the west side of the track? A. West side; yes, sir; showing general view of the crossing. That is, one-half of the picture. 40

George Morris—Recalled—Direct.

The other half the camera was set in the same place. One was directly looking east, and the other was northeast, and I made a composite.

Q. You started to tell us about the second one, and you stopped, Mr. Morris. You said the second one was taken where? A. At the same point.

10 Q. What point was that, how far away from the nearest rail? A. Twenty-five foot west of the near rail of main track. The first one was showing looking towards Eatontown station, general view of the crossing; and the other a general view showing car on delivery track, or looking northeast. I just swung the camera around, from the same point of view.

Q. That was taken on the other side of the track from the station, wasn't it? A. Yes, sir.
20 On the west side.

Q. Now we will get back to these pictures that you took on May 13th, 1942. I show you photograph marked Exhibit D-6, and ask you where your camera was placed when you took that picture, and in which direction it was facing, and what it generally took in? A. The camera was twenty-five foot, standing on the highway, on Lewis Street, twenty-five foot.

Q. Which side of the tracks? A. Twenty-five
30 foot from the near rail of the main track. Which is the far track in the photograph.

Q. On which side? A. I am on the east side.

Q. Over here on the station side, on the same side of the tracks as the station, or the other side?

A. I am on the station side, which would be the east side of the tracks.

Q. Yes. A. Only looking south, or towards Lakewood.

Q. Looking in the opposite direction than that
40 from which the train came, is that right? A. Yes, sir.

George Morris—Recalled—Direct.

Q. Now, I show you another picture marked Exhibit D-1, and ask you where your camera was placed when you took that, and in which direction it was pointed? A. The camera was thirty-five foot from the near rail of the main track, on Lewis Street and Railroad Avenue. View looking north.

Q. On which side of the tracks was it? A. On the east side of the tracks. 10

Q. Looking in which direction? A. View looking north towards Red Bank.

Q. How far from the main line track was it, the main track? A. Thirty-five feet from the near rail of the main line track.

Q. Looking north? A. Towards Red Bank.

Q. I show you a sign in the background of that picture and ask you if that sign was there when you arrived to take that picture on the 13th of May, 1942? A. It was. 20

Q. Now, I show you another picture marked D-2, and ask you where your camera was when you took that picture? A. Camera was forty-five foot on the east side of the near rail of the main track, which is the far rail in the photograph, camera center of Lewis Street crossing. View looking north towards Red Bank.

Q. I again invite your attention to that sign. You say that sign was there when you arrived to take these pictures? A. Yes, sir. 30

Q. Now, another picture, Mr. Morris, D-3. A. Camera was on the east side, forty-five feet from the near rail of the main track, looking towards Red Bank.

Q. Now, Mr. Morris, take D-6 and tell us about that? A. Camera on the east side of the near rail of the main track, looking —

Q. How far away? A. Twenty-five foot from the near rail, east. 40

George Morris—Recalled—Direct.

Q. How many? A. Twenty-five feet. Looking towards Red Bank.

Q. Now, do you know of your own measurements how far your camera was from the passing siding when you took that picture? Or didn't you make the measurement? A. I didn't make the measurement.

Q. But you were twenty-five feet away from which rail of the main track? A. The near rail. That is the east rail.

Q. And you took all these pictures the same day, did you? A. I took this the first day. These other two —

Q. I mean, with the exception of the composite picture, all the other pictures I have shown you were taken on the same day, weren't they? A. Yes, sir.

Q. Here is D-5? A. Camera was twenty-five foot from the east of the near rail, near the center of Lewis Street, view looking —

Q. Was that picture taken from the east or west side? A. On the west side.

Q. That is taken from the other side of the tracks then, was it? A. Yes, sir.

Q. Looking in which direction? A. Looking east towards Long Branch.

Q. In other words, it is looking right across the tracks? A. Yes, sir.

Q. These six pictures, not the composite picture, but the other six pictures that were taken by you, were they taken by you all at the same time, on the 13th of May, 1942, or did any time intervene? A. All taken the same morning, on the same day.

Q. Now, some of those photographs show the presence of freight cars on this delivery track. You know what I mean, don't you? A. Yes, sir.

George Morris—Recalled—Cross.

Q. Now, I want to ask you, from the time you started to take those six pictures, up to the time that you stopped, was any change made in the location of those freight cars on those delivery tracks? A. No, sir.

Q. And while you were taking those pictures, was any change whatsoever made in any of the conditions therein? A. No, sir. 10

Mr. Tomlinson: Cross-examine.

Cross-examination by Mr. Greenfield:

Q. You testified that the two prints, the composite picture, were taken on February 10th, 1944, Mr. Morris? A. Yes, sir.

Q. How many pictures did you take that day? A. Seven. They are right here. 20

Q. How many of those seven have you just identified, and how many of them were put into evidence here, if you can tell us? A. I only think two today.

Mr. Greenfield: Or did he identify?

Mr. Tomlinson: He has already identified six as having been taken on May 13th, 1942. He said he took the other two in 1944.

Mr. Greenfield: And I asked him how many were taken in 1944. 30

Q. And you say seven? A. Yes, sir; seven.

Q. And of those seven you have identified two? A. Yes, sir.

Q. Do you have with you the other five? A. Yes, sir.

Q. May I see them, please? 40

George Morris—Recalled—Cross.

Mr. Tomlinson: Here are the prints.

Q. May I see this composite picture that you have? A. It is there.

Mr. Tomlinson: I will put those other ones in, if you want me to.

10 Mr. Greenfield: If you don't, I will.

Mr. Tomlinson: If you are going to, go ahead and put them in.

Q. You took thirteen pictures altogether? A. Between the two different dates, yes.

Q. Eight of them are marked in evidence, and I have eight here, or seven of them here? A. Well, there may be a duplicate of the composite picture.

Q. Now, these other five were taken on February 10th, 1944? A. Yes, sir.

20 Mr. Greenfield: If you want them in evidence, I will let them go in. If not, I will have them marked and put them in myself.

Mr. Tomlinson: I don't care. I might as well put them all in. I thought it would add to confusion if I put them all in. That is the reason I didn't offer them all.

Mr. Greenfield: I think the jury ought to see them all.

30 Mr. Tomlinson: I will offer them.

(Five photographs heretofore marked D-8 to D-12 for Identification, inclusive, entered in evidence and marked Exhibits D-8 to D-12 inclusive.)

Q. Mr. Morris, at whose request were these pictures taken? I have two groups; I am going to refer to the first number as those taken in May of 1942, and the second group in February of this

George Morris—Recalled—Cross.

year? A. First group, May 13th, 1942, were made at the request of Mr. Hahn.

Q. Who is Mr. Hahn? A. The gentleman sitting there alongside of Mr. Tomlinson, who is connected with the Claim Department of the Central Railroad.

Q. Investigator?

10

Mr. Tomlinson: No, he is not an Investigator. He is Division Claims Agent.

Q. Was he with you on the day that you took the first batch? A. Yes, sir.

Q. Was there anyone else there? A. Not that I remember.

Q. All of these pictures were taken from the ground? A. Yes, sir. Tripod camera.

Q. Who was with you when you took the second batch? A. Mr. Hahn, and the surveyor Mr. Dodd, Mr. Tomlinson and myself. I mean only the four of us, I think.

20

Q. Was Mr. Ousterman there? A. No, sir.

Q. Was his helper, Mr. Whitfield? A. No, sir. Not that I know of.

Q. Do you remember testifying here in March? A. Yes, sir.

Q. Page 76, Mr. Morris, do you remember in answer to a question "Who was present at that time," referring to February 10th, 1944, Mr. Hahn, Mr. Dodd, yourself, referring to Mr. Tomlinson, and I, and I think Mr. Waldemayer.

30

Mr. Tomlinson: Ask the rest of it.

Q. "I am positive of the four, but I am not sure of the five." Who was this Mr. Waldemayer? A. To tell you the truth, I don't know now. I think at the time there was a Waldemayer, but

40

George Morris—Recalled—Cross.

I forget who he is now. That is the reason I am not sure he was there.

Q. Could it have been Mr. Whitfield? A. That I couldn't say.

Q. Could you describe the man? A. No, sir.

Q. Wouldn't know him if you saw him? A. No, 10 sir.

Q. Did you see Mr. Whitfield on the stand testifying at the last trial? A. I don't even remember that. I don't seem to recollect the man at all.

Q. Who told you where to set up the camera, and what views, and how many views to take? A. Mr. Hahn took me to the scene where the accident had taken place, and we walked over the ground, looked the situation over, and he asked me if I would illustrate it, the conditions as they existed, different views, for the company, which I did. 20

Q. Who told you how many views to take? A. He didn't tell me how many. He asked me to take sufficient to illustrate the conditions as they existed there.

Q. That was in May of 1942? A. Yes, sir.

Q. Who told you how many views to take in February of 1944? A. Well, Mr. Tomlinson was there, and he went over the situation again, and he requested additional views made at some other 30 points, which I did.

Mr. Greenfield: That is all.

Mr. Tomlinson: Now that Mr. Greenfield has put these other pictures in, or caused them to be put in, I will have to identify them on the map. I don't think we have time to do that this afternoon.

The Court: We will do that Monday. Now, ladies and gentlemen, we will take a recess until Monday morning; the reason 40

Colloquy.

being that tomorrow is my motion day. Friday of every week is motion day. I would postpone those motions to make an effort to finish this case, but the trouble is that I did that for somebody last week; last Friday I adjourned them, so that I have a double day of motions tomorrow. And if I keep on doing that, I will have all motions in two or three weeks. 10

I will postpone this case until Monday at 9:30, at which time come back directly to this box.

Adjourned until Monday, June 19th, 1944, at 9:30 a. m.

20

30

40

George Morris—Recalled—Redirect.

NEW JERSEY SUPREME COURT

UNION COUNTY CIRCUIT

May Term 1944

10 MENTE BROS., INC., a corporation, SAMUEL BRAN-
HAM and ROBERT STICKEL,
Plaintiffs,
vs.

SHELTON PITNEY, *et al.*, Trustees of the CENTRAL
RAILROAD COMPANY OF NEW JERSEY,
Defendants.

20 Transcript of stenographer's notes of evidence
in the above entitled cause, taken before HON.
FRANK L. CLEARY, Circuit Court Judge, and a
Jury, at the Union County Court House in the
City of Elizabeth, N. J., on the nineteenth day
of June, A.D. 1944, at 9:30 A.M.

APPEARANCES:

30 HAROLD W. BORDEN, ESQ.,
STANLEY W. GREENFIELD, ESQ., (Present)
Attorneys for the Plaintiffs.
WILLIAM F. HANLON, ESQ.,
DeVOE TOMLINSON, ESQ., (Present),
JOHN T. GLENNON, ESQ., (Present)
Attorneys for the Defendants.

GEORGE MORRIS, recalled:

Direct-examination by Mr. Tomlinson:

40 Q. Mr. Morris, I believe you said that you took
these pictures with the camera on a tripod, is that
correct, sir? A. Yes, sir.

George Morris—Recalled—Redirect.

Q. Now, will you tell us about how high off the ground that camera was? A. The height of my eyes: It is about five foot two from the ground.

Mr. Greenfield: That is all. Thank you.

Redirect-examination by Mr. Tomlinson:

10

Q. Now, Mr. Morris, on last Thursday you testified that you took another set of pictures on what date? A. February 10th, 1944.

Q. And five pictures were shown you and identified by you as having been taken on that date. That was the same date upon which you made the composite picture, wasn't it? A. Yes, sir.

Q. Now, I show you two more pictures, which I will ask to have marked for Identification.

(Photograph marked D-13 for Identification.) 20

(Photograph marked D-14 for Identification.)

Q. I ask you if you also made these two pictures at the same time as you made these other five which you spoke about, that is, in 1944, February, 1944? A. Yes, sir.

Q. These are the composite picture, is that right? A. Yes, sir. 30

Mr. Tomlinson: I offer them in evidence.

(Photograph heretofore marked D-13 for Identification, entered in evidence and marked Exhibit D-13.)

(Photograph heretofore marked D-14 for Identification, entered in evidence and marked Exhibit D-14.)

Q. Now, Mr. Morris, we will get out of the way 40

George Morris—Recalled—Redirect.

first D-13 and D-14, which I hand to you, at the same time as I hand to you the composite picture. Will you just take the composite picture, and these other two pictures D-13 and D-14, and stand up and show the jury how the composite picture was made? A. Camera was placed forty-five foot
10 west of the near rail of the main track, and just swung directly east and northeast, two different views, and I just put the two views together to make a continuous panorama of the whole lay-out, which is this picture here. It will give you, from the same point, just swinging ahead, you get that view, looking east and northeast.

Q. That is east across the crossing and northeast towards Red Bank, from which the train came, is that right? A. Yes, sir.

20 Q. Now, take D-8, please, and tell me where your camera was when you took that picture, and in which direction your camera was facing? A. Camera was set up on the easterly side of what is known as the "Y" track, forty foot east of near rail, showing crossing sign, a generally westerly view across the crossing.

Q. This is the "Y" track, is it, down here (indicating)? A. Yes, sir.

Q. You were east of that? A. East of that.

30 Q. Then you were looking towards the crossing? A. Right towards the crossing.

Q. Now, we will take Exhibit D-10, and ask you where your camera was when you took that, and in which direction it was facing? A. Camera was set up thirty foot west of near rail of "Y" track. View showing—

Q. West of the "Y" track? A. Yes, sir.

40 Q. That would be the station side of the "Y" track? A. Yes, sir. Thirty foot west of the "Y" track, view showing corner of Eatontown Station,

George Morris—Recalled—Redirect.

and northeast towards Red Bank, showing the Tinton Falls bridge in the distance.

Q. Now, I show you Exhibit D-11 next and ask you to tell us about that? A. Camera set up on center rail of "Y" track, fifteen feet south of Lewis Street, right there (indicating); general view north towards Red Bank, showing the over- 10
head Tinton Falls bridge.

Q. Was your camera east or west of the "Y" track, or on the "Y" track? A. Center rail of the "Y" track, right in between the tracks.

Q. South of Lewis Street? A. Yes, sir; looking towards Red Bank.

Q. Take Exhibit D-9, Mr. Morris? A. Camera set up on passing siding, thirty feet south of point of switch, which is the switch right there (indicating). 20

Q. Go ahead? A. Thirty foot south of point of switch of delivery track. General view north towards Red Bank.

Q. Was your camera south or north of the crossing itself? A. South. Looking north. I was on the delivery track.

Q. Your camera was right in the passing siding, wasn't it? A. Yes. Passing siding. Or delivery track, we call it.

Q. This is the delivery track in here (indicating)? A. South of that. 30

Q. This is the passing siding up here (indicating)? A. Yes, sir. They merge right there.

Q. Now, I show you Exhibit D-12, which is the last one, and ask you where your camera was when you took that, and which direction it was facing? A. Camera set up on south side of Lewis Street, that is, across the tracks, ninety feet west.

Q. You were on the other side of the track then from the station, is that right? A. Yes, sir. 40

George Morris—Recalled—Redirect.

Q. South of Lewis Street? A. On the south side of Lewis Street, ninety foot west of near rail of main track.

Q. Yes. A. Looking towards Red Bank.

By Mr. Greenfield:

10 Q. Mr. Morris, can you tell us the distance between this "Y" track, as you call it, and the passing siding here on Lewis Street? A. I couldn't say. Mr. Dodd was with me.

Q. When you made the pictures in February of 1944, the scenery was rather barren, wasn't it? A. Yes, sir.

Q. Now, on the west side of the main track, in May of 1942, what was the condition of the scenery at that time? A. Well, just low grass there. And open country there. It is just weeds.

20 Q. Foliage? A. No trees or nothing.

Q. No trees? A. Only away back. Not close to the railroad.

Q. I am asking you about the general condition there. Was there foliage on the trees? A. Yes, sir.

Q. And grass and weeds were up? A. Yes, sir.

Q. That is open area to the west of that track there, isn't it? A. Yes, sir.

30 Mr. Greenfield: That is all.

Mr. Tomlinson: That is all.

John W. Ousterman—Recalled—Direct.

JOHN W. OUSTERMAN, recalled:

Direct-examination by Mr. Tomlinson:

Q. Now, Mr. Ousterman, when was it that you left your position as station agent at Eatontown and became train dispatcher? A. May 26, 1943.

Q. And while you were agent at the Eatontown Station, what were your hours of service? A. From 6:20 A.M. until 6:25 P.M., and I had a lunch hour from 12:15 until 1:35. 10

Q. Will you tell us whether or not it was part of your job to meet the 6:17 train at night, that is, the train that was involved in this accident? A. Yes.

Mr. Greenfield: If your Honor please, I think that is highly leading. I think the man can testify what his duties were. 20

The Court: Well, it has been answered. I will permit it to stand.

Q. Where were you when the 6:17 train came in on May 11th, 1942, the night of this accident? A. In the office.

Q. And where had you been that day? A. Been on the job all day.

Q. Where on the job? I don't want to lead you. Whereabouts on the job?

Mr. Greenfield: If your Honor please, I must object to that as being too indefinite. If Mr. Tomlinson will fix a time, so that we know what part of the day he has reference to, then I think we can follow along. 30

Mr. Tomlinson: I think as time goes on it will be shown that that question is adequately competent. I want to connect that up with something else.

The Court: I think if it is limited to that day, the day in question. 40

John W. Ousterman—Recalled—Direct.

Mr. Tomlinson: That is what I have asked him, where he was on that day.

A. I was doing my regular duty, meeting the trains, out around the freight yard. All the duties that I usually do.

10 Q. Well, were you at the Eatontown Station, or somewhere else? A. I was at the Eatontown Station.

Q. Now, I show you a photograph which has been marked D-1, and direct your attention to a sign shown in that picture, and ask you to tell us whether that sign was in the position it is shown in on that picture, which was taken on May 13th, 1942, and ask you to tell us whether that sign was there on May 11th, 1942, the day of the accident?

A. Yes, it was.

20 Q. And will you tell us the lettering on that sign? A. "Crossing protected by flagman for trains at following scheduled times: Weekdays 12:10 P.M., 5:20 P.M. Saturdays 2:41 P.M. Sundays, no flagman on duty."

Q. That is the sign shown on the map as "flagman's sign" (indicating)? A. That is right.

30 Q. Now, will you tell us what there was on the other side of the track, if anything, with reference to signs? A. There was the same—a sign reading the same as this sign.

Q. And that is over here, is it (indicating)? A. That is right.

Q. Will you tell us whether that sign was there on the west side of the tracks, on the day of the accident? A. Yes, it was.

40 Q. It has been testified here, Mr. Ousterman, that the sign on the west side of the track, the other side from the station side, was, on the day of the accident illegible. Will you tell us what the

John W. Ousterman—Recalled—Direct.

condition of that sign was with regard to legibility, whether it was legible and capable of being read, or whether it was illegible? A. No. It was legible.

Q. Now, these two trains that were shown on that sign, will you come back to them again? A. 12:10 P.M., 5:20.

10

Q. The 12:10 P.M., was that a south bound train, or north bound? A. South bound train.

Q. What particular train was that? A. That was the Blue Comet.

Q. Did that Blue Comet make a stop at Eatontown at that time, or not? A. No, it did not.

Q. Now, go to the next train, was that the 5:20? A. 5:20 P.M.

Q. What train was that? A. That was the Blue Comet.

20

Q. Going in which direction? A. Going north.

Q. In other words, that was the Blue Comet coming back, is that right? A. That is right.

Q. Where did the Blue Comet go, where did it make its trip? A. To Atlantic City. New York to Atlantic City.

Q. And on its way back, on its way north, did it make a stop at the Eatontown Station? A. No, it did not.

Q. Now, you show a train in there on Saturday. What train is that? Will you give that to us again? A. That was 2:41 P.M. That was an express going to Lakewood, terminating at Lakehurst.

30

Q. In other words, that was a south bound train? A. That is right.

Q. Did that make a stop at Eatontown? A. No.

Q. This sign that you have referred to as being shown in D-1, will you tell us whether or not that is the same sign—and you identified it as being a

40

John W. Ousterman—Recalled—Direct.

sign over on the east side of the track,—tell us whether or not that is the same sign that is also shown in Exhibit D-6, D-3, and D-2? A. Yes, that is the same sign.

10 Q. Now, Mr. Ousterman, speaking as of May 11th, 1942, the date of this accident, what if any custom was there, or practice, at Eatontown, with respect to flagging—having a flagman out for trains going over that Lewis street crossing? A. We only flagged the through trains, that did not stop there.

Q. Were there any other through trains besides the Blue Comet going south, the Blue Comet going north, on weekdays, the Lakewood train on Saturdays, and an occasional freight train? A. No. Only an occasional freight train.

20 Q. What is that? A. No. There was just an occasional freight train.

Q. Did you flag any trains at that crossing, or had you flagged any trains at that crossing before May 11th, 1942, except those trains which were through trains? A. No.

Q. Now, the 6:17, which was the train involved in this accident, was that a through train, or not? A. It was not.

30 Q. That stopped at Eatontown, didn't it? A. It did.

Q. Had you or had you not observed Mr. Stickle, the driver of this truck, and Mr. Branham, around the station premises, in the vicinity of that crossing, on any day prior to the accident? A. Yes.

Q. And will you tell us whether or not you had ever observed them in the vicinity of that crossing, when a train came by, which stopped at the Eatontown Station? A. Yes, I have.

40 Q. And on those occasions was the crossing flagged by a flagman, or wasn't it? A. It was not.

John W. Ousterman—Recalled—Direct.

Q. Did you have a helper, or an assistant in the station? A. Yes, I did.

Q. What was his name? A. Lester Whitfield.

Q. Where is Mr. Whitfield now? A. Why, he is in the Army now.

Q. On the day of this accident where were you at the time of the accident? A. I was in the office, sitting in the bay window at the time of the accident. 10

Q. Maybe you can find a photograph here which will show that bay window, Mr. Ousterman? A. Yes, that shows the bay window right there (indicating).

Q. Will you point it out to the jury, please? A. It is right in here (indicating).

Q. Now, before the accident, shortly before the accident, did you have any conversation with the driver of this truck, or did you overhear any conversation which he had with somebody else? A. Yes, I did. 20

Q. And about what time was that, Mr. Ousterman? A. About six o'clock.

Q. This was Mr. Stickle that you overheard? A. Yes.

Q. Now, will you tell us, please, just what happened, what you overheard, if anything? A. Why, I spoke to him when he came in, and he came in to make a report of breakage in the car of tile pipe, which they were unloading. He came in to make that report about six o'clock, to my assistant, Mr. Whitfield; he took charge of that. And Mr. Stickle at the time mentioned that— 30

Q. Keep your voice up, please? A. Mr. Stickle at the time mentioned that it was unusual for a freight station to be open this late. Mr. Whitfield told him that we were open because the train was due at 6:17, and after that we closed. 40

John W. Ousterman—Recalled—Direct.

Q. And then what did Mr. Stickle do after that?

A. Why, he signed the freight bill, or delivery receipt. We notated the breakage on his copy, and our copy, and then he went out.

10 Q. Do you recall how long it was before this accident that this car containing the pipe had come into your station? A. Yes. It was May 8th.

Q. Now, while you were in the bay window, will you tell us whether or not anything attracted your attention to the fact of this train, as it approached? A. Why, I heard the train blow the usual whistle sign.

Q. I beg your pardon? A. At the usual whistle sign, by the overhead bridge.

20 Q. How many times did it blow then? A. It blew four times. And in a very few seconds it started to blow for the second time, for the crossing, and called my attention to look up. And at that time the head of the truck was on the passing siding, apparently stopped.

Q. Could you tell whether it was actually stopped or not? A. Well, I would say it was stopped.

30 Q. Well, go ahead? A. At that time the train was about fifty feet from the crossing, and I, thinking that the train was stopped, I resumed my duties of adding the column of figures for my daily reports. The next thing I heard was the crash.

Q. Now, at the time of the crash, had the whistle stopped blowing? A. No.

Q. Still blowing? A. Still blowing.

40 Q. And how long after that was it before it stopped blowing? A. Well, it seemed like it was still blowing when the wreckage stopped; when they stopped in front of the station.

John W. Ousterman—Recalled—Direct.

John W. Ousterman—Recalled—Cross.

Q. Now, where with reference to the door—I think there is a door leading out to the tracks, isn't there? A. Yes.

Q. Where with reference to that door was the engine with the wreckage on it, when it came to a stop? A. Well, at the south end of the station. 10

Q. That is down here (indicating)? A. Yes, right opposite that.

Q. What did you do then, Mr. Ousterman? A. Why, I went after—out to the wreck, and immediately came right back in and called the Eatontown ambulance.

Q. And as you went out did you notice whether the bell was or was not ringing at that time? A. Yes, the bell was still ringing.

Q. Still ringing? A. Yes. 20

Q. And you got an ambulance, did you? A. Yes.

Q. And had the colored man taken to the Monmouth Memorial Hospital? A. That is right.

Mr. Tomlinson: Cross-examine.

Cross-examination by Mr. Greenfield:

Q. Mr. Ousterman, did you tell us that there were other through trains, other than the Blue Comet, that passed the Eatontown Station? A. 30
An occasional freight train.

Q. What do you call by occasional? A. Well, possibly one, sometimes two a day.

Q. Sometimes more than two? A. Very seldom.

Q. Sometimes? A. Yes. Sometimes.

Q. Were those freight trains mentioned on that sign? A. No.

Q. Did you flag freight trains? A. Yes.

Q. Who did the flagging, you or Mr. Whitfield? 40

John W. Ousterman—Recalled—Cross.

A. Well, if I was busy, why, Mr. Whitfield. Or, if he was busy, I would flag.

Q. When did those freight trains go through, the through freight trains, I mean? A. There was usually one about eight o'clock in the morning, and the other going back to Red Bank was around
10 four to five, or six o'clock at night. They were not scheduled trains.

Q. So that they didn't come through at the same time always? A. No.

Q. Where was Mr. Stickle when some of these trains that stopped at Eatontown, do you know? A. Yes, he was at the crossing, waiting for that train to pull out of the station.

Q. When was that? A. 11:30, we had a train due to stop there at 11:30, and I have seen him
20 there waiting for that.

Q. Did you hear him testify the other day? A. I did.

Q. And did you hear him testify that in all the time that he was there, he never saw a train stop at Eatontown?

Mr. Tomlinson: Objected to. Immaterial.

The Court: Objection sustained.

Q. When were those signs painted, Mr. Ousterman, do you know? A. When we had a change of
30 timetable, that required the change of those signs.

Q. Well, when you had the change of the timetable, did the entire sign get a new re-painting? A. Sometimes it did, and sometimes it didn't.

Q. Well, the last time prior to the happening of this accident, did those signs get a new painting? Or was there just a change of the sign made? A. I don't just recall. It is quite a while ago.

40 Q. Well, how long before the happening of this

John W. Ousterman—Recalled—Cross.

accident was that sign last re-painted, or changed, do you know? A. Do you mean the whole sign, the entire sign?

Q. I don't care. When was the last time that that sign was changed, whether it was re-painted, or some of the letters changed, or what was done to it, and when, just before the happening of this accident? A. I don't recall just when it was changed. Whenever the change of timetable, that is when it was changed. I don't know the exact date. 10

Q. Would this refresh your recollection any? Do you remember Mr. Whitfield testifying and saying that it was at least six months before the happening of this accident?

Mr. Tomlinson: I object to that, whether he heard Mr. Whitfield testify to that, or not. 20

The Court: Objection sustained.

Mr. Greenfield: Well, I am asking if it refreshes his recollection.

Mr. Tomlinson: I object to the question.

The Court: Objection sustained. It is immaterial.

Q. Well, was it more than six months prior to the happening of this accident? A. I don't just recollect when they were last painted. 30

Q. Now, did you see the truck prior to the time it left the freight yard? A. No.

Q. When is the first time that you saw it immediately prior to this accident? A. I saw it when it was apparently stopped on the passing siding.

Q. Apparently stopped? A. Yes.

Q. And what part of the road was it? A. It looked to me like the middle of the road.

Q. Going which way, across? A. Across. 40

John W. Ousterman—Recalled—Cross.

Q. Well, what part of the road was it on, the right or the left side of the road? A. Well, I couldn't exactly tell from where I sat in the office.

Q. Where was the train with regard to the Tinton Falls bridge, if you can tell us, when you say the first whistle blew? A. Well, it was under the
 10 bridge, this side of the—the whistle board is this side of the bridge, and when I first saw it, it was probably one thousand feet down the track.

Q. Well, was it south of the bridge, or was it north? A. Yes, it was south of the bridge.

Q. How do you know that? A. Well, I know the territory there.

Q. Well, how could you tell whether it was north or south of the Tinton Falls bridge? A. Because I couldn't see north of the bridge. There
 20 is a curve there.

Q. Well, there is quite a curve all along that line? A. I can see this side of the bridge from where I sat in the office.

Q. Did you see the whistle blow? A. I heard the whistle blow.

Q. Did you hear the whistle blow before you saw the train? A. No. I heard the whistle blow first.

Q. So that actually you can't tell whether the
 30 whistle blew north or the south side of the bridge, because you heard the whistle blow first, and you didn't see the train, is that right? A. Yes, the train was south of the bridge when I heard it blow.

Q. How do you know? A. Because I saw it.

Q. Well, a minute ago you just said that you heard the whistle blow first, and then you saw the train? A. That is right.

Q. Now, how do you know that the train was
 40

John W. Ousterman—Recalled—Cross.

not on the north side of the Tinton Falls bridge?

A. Well, because I can't see north of the bridge.

Q. But you didn't see the train before the whistle blew, unless I misunderstand your testimony. Didn't you just tell me that you heard the whistle blow, and then you saw the train? A. That is right.

10

Q. So that actually how do you know, when you say that the train was this side, the south side of that bridge? A. Because I heard it blow the usual four blasts.

Q. Now, my friend, perhaps you don't understand me, or I don't understand you.

Mr. Tomlinson: Let him finish his answer.

Q. Go ahead and finish your answer. A. Because I heard the usual four blasts, which were this side of the bridge.

20

Q. Well, now, you didn't see the train until after the whistle had blown? A. Possibly a second.

Q. Right? A. Yes.

Q. And if you didn't see it until after the whistle blew, then, as a matter of fact, you don't know where the train was when the whistle blew, do you? A. Well, it was a matter of seconds between the whistle and the time I saw it.

30

Q. Seconds? A. That is right.

Q. Could it have been the north side of the Tinton Falls bridge? A. No.

Q. Well, how do you know that? A. Well, I heard it blow four times this side of the bridge, and I saw the train this side of the bridge.

Q. You heard it blow? A. Yes.

Q. But you didn't see the train before you heard the blow, is that right? A. Possibly seconds from the time.

40

John W. Ousterman—Recalled—Cross.

Q. Just answer the question, please? A. No, I didn't see the train until after I heard it blow.

Q. So that, as a matter of fact, without guessing, without conjecture, you don't know where the train was when that whistle blew, do you? A. Yes, I know where it was when I heard it blow.

10 Q. All right, tell me how you know? A. Because I saw it.

Q. Where was it? A. This side of the bridge, south of the bridge.

Q. Did you see the train before the whistle blew? A. No, I didn't see the train before I heard the whistle blow, no.

Q. All right, now. First you heard the whistle blow, and then you looked up, is that right? A. That is right.

20 Q. How far up that track could you see? A. All the way to the bridge.

Q. I thought you just told me there was a curve there. A. I couldn't see beyond the bridge. I can see up to the bridge.

Q. Well, how far, or just where was the train at the time that you saw it? A. Well, when I first saw it, it was this side of the bridge.

Q. How far? A. Oh, possibly one hundred feet. Maybe seventy-five feet this side of the bridge.

30 Q. Only seventy-five, and possibly one hundred feet this side of the bridge? A. South of the bridge.

Q. And it was seconds before, possibly, when you heard the whistle blow, is that right? A. That is right.

Q. But you don't know whether the train was north or south of that bridge when the whistle blew, do you? A. Yes. It was south of the bridge.

40 Q. Well, the only thing that I am sure of here

John W. Ousterman—Recalled—Cross.

is that when you looked up, after hearing that whistle blow, the train was possibly seventy-five to one hundred feet this side, south side of the bridge, right? A. That is right.

Q. How fast was the train going, do you know?
A. No, I don't know.

Q. When the train was down at the bridge did you hear the bell? A. No, I didn't hear the bell at that time. 10

Q. Now, do you know the distance between this "Y" track here and the passing siding here? A. I don't know the exact distance.

Q. Can you tell us approximately? A. It is about, oh, sixty feet.

Q. And Lewis Street crosses both the Y track and this—the two sets of tracks, the passing siding and the main track? A. That is right. 20

Q. Now, do you remember Mr. Stickle the night of this accident, prior to it? A. Yes.

Q. What was he wearing? A. Well, he had on work clothes. I wouldn't testify as to the color, or anything. But he had on his usual work clothes.

Q. Any different appearance that night than at any other time that you had seen him? A. No.

Q. Did you see Branham that night? A. Not before the accident.

Q. After the accident, do you remember who was at the scene there? A. I don't remember everyone that came down to that scene, because the place was filled there in about ten minutes. 30

Q. Did you see Chief Kirkegard? A. Yes.

Q. Did you see John Mente? A. Yes, I was just closing the station when he came down, about half past eight.

Q. Was Lester Whitfield with you all the time?
A. Yes.

Q. And the full engine and train crew, did you 40

John W. Ousterman—Recalled—Cross.

see all of them? A. I didn't see all of the train crew. I saw the engine crew, and the conductor, and the baggage master, but I didn't see the flagman on the rear of the train.

Q. Did you see Mr. Gaas, the man that was—
A. No, I didn't see him.

10 Q. He was the executive from the fire department? A. No, I didn't see him.

Q. What was the condition of the truck, did you see that right after the accident? A. Yes.

Q. What was the condition, please? A. I would say a total loss.

Q. Total wreck? A. Oh, yes. It was wrecked.

Q. Where was the truck with regard to the engine of the train when you first saw it? A. Well, it was a mass of wreckage, right ahead of the engine.

20 Q. How far ahead? A. Right on the engine. On the cow catcher.

Q. Right on the engine? A. Yes.

Q. Well, was it wrapped around it, or standing up? Can you tell us the position of it? A. It hit the truck right in the middle, it took the cab and just bent it and shoved it right ahead, until they came to a stop.

Q. Well, was it in the form of a "U" or a "V"?

30 A. Yes, a "V."

Q. Did you see any wreckage, or any of the remains of the cargo of that truck? A. Oh, there was pieces all over.

Q. Where was that cargo, or the pieces? A. Well, along the track.

Q. Did you see anything else, either immediately prior, or just after the accident?

Mr. Tomlinson: I think that is a pretty general question. I don't know just what

John W. Ousterman—Recalled—Cross.

counsel means. It is too general. "Did you see anything else?"

Mr. Greenfield: That is what I would like to know, if he did see anything else.

A. Do you mean while I was in the office, or just what do you mean?

Q. Yes, while you were in the office? A. I was busy on the telephone most of that time reporting the wreck to the train dispatcher, and all those things, you know.

Q. Right immediately before the accident? A. Oh, before the accident?

Q. Yes.

A. I was busy on my Western Union reports, and I had my eyes down on my work most of the time. I don't recall seeing anything else except the truck, prior to the accident.

Q. How long was it before the accident when you heard the whistle, you say the train was seventy-five to one hundred feet south of the Tinton Falls bridge, at the time of actual collision? A. Probably less than a minute.

Q. That takes in a lot of time. How much less? A. I can't truthfully answer, because I don't know how fast that train was going when I first saw it. I would have to figure out how long it would take to go one thousand feet in so many seconds.

Q. Well, how many feet was it travelling a second?

Mr. Tomlinson: He said he didn't know.

A. If it was going twenty-five miles an hour.

Q. What is that? A. I say, if it was going twenty-five miles an hour.

Q. Just a moment, please. A. All right.

Q. Don't suppose anything. Just tell us what you know. A. I don't know how long it would take.

John W. Ousterman—Recalled—Cross.

Mr. Tomlinson: He says he can't tell how fast it was going, because he does not know the speed of the train.

The Court: He has answered that. He has to suppose something, if he answers anything at all.

10 Mr. Tomlinson: I object to the question, as put. He has already said he couldn't answer it. And counsel knows it.

Q. How long was it, from the time the whistle blew the first time, and then you say it blew again?

A. I would say it was almost immediately.

Q. Between the first time, when you heard it blow again? A. The first four blasts of the whistle, and it was almost immediately they started the second.

20 Q. Do you remember testifying here at the trial in March? A. Yes.

Q. March 13th, Mr. Ousterman? A. I do.

Q. Do you remember being asked this question, page 112: "Q. How long did it take for the train to get from the point where the whistle first blew, to this point where it blew again?" And do you remember answering: "About thirty seconds."?

A. That is right.

30 Q. "Twenty or thirty seconds"? A. Well, it is very near immediately.

Q. Did you see the train between the time that you saw it seventy-five feet from the Tinton Falls bridge until the accident? A. Yes. When I looked up the second time the train was about fifty to seventy-five feet from the crossing, and the truck was apparently stopped on the passing siding.

40 Q. You are not sure that it was stopped? A. Yes. I would say it was stopped.

John W. Ousterman—Recalled—Cross.

Q. You are sure? A. Yes, it was stopped.

Q. Did you see the truck? A. Yes, I saw the head end of the truck.

Q. Did you see the wheels? A. Yes.

Q. Did you? A. Yes.

Q. Where were the wheels? A. In the usual place, right on the front of the truck. On the tracks. Stopped right on the passing siding tracks. 10

Q. Where were the wheels? A. The front wheels were stopped on the passing siding track.

Q. Where? A. On the crossing.

Q. What side of the crossing, north or south?

A. Why, in the middle of the crossing.

Q. Between the two tracks? A. That is right.

Q. What side of Lewis Street? A. Well, it was in the middle of Lewis Street. 20

Q. In the middle of Lewis Street, both ways?

A. Well, it was travelling in a westerly direction, the truck was.

Q. It was going across? A. That is right.

Q. And it was in the middle of Lewis Street?

A. Yes.

Q. And between the two tracks, so that it would be about center both ways? A. That is what I saw. I couldn't say sure.

Mr. Tomlinson: He didn't say between the two tracks. 30

Mr. Greenfield: I am talking about here on the passing siding.

Q. In the center of the two tracks, on the center of the street? A. From where I sat that is the way it appeared to me.

Q. Now, how long did it take for the train to cover the distance between the Tinton Falls bridge, or just South of it, to the Lewis Street 40

John W. Ousterman—Recalled—Cross.

crossing? A. I don't know how fast it was going at that time.

Q. I didn't ask you that. I ask you, how long did it take to cover the ground between seventy-five to one hundred feet south of the Tinton Falls bridge, when you first saw it, and when it got
10 to Lewis Street? A. I don't know.

Q. But the next thing you knew the train was about fifty feet from the crossing, when you saw it again? A. That is right.

Q. Now, did all of the signs, or both of those signs, carry the same timetable on them? A. Yes.

Q. Sure of that? A. I am.

Q. Both painted at the same time? A. Yes.

Q. Who painted them, do you know? A. The
20 painters.

Q. Do you know who they were? A. Well, they have had various painters there.

Q. Well, who painted them the last time? A. I don't just recall which painter it was, but a railroad painter painted them. It was a small job.

Q. Was there a sign around the railroad station anywhere over on the "Y" track, that is, this track that comes down here to the northeast?
30 Was there any sign anywheres around here, or at the station, or at either side of the main track, or the passing siding, or the delivery track, or anywheres else in this whole general area shown on this map that said "we flag only through trains"? A. No sign reading that way.

Q. Well, was there any sign to say that we flag trains in addition to those shown on that sign that you have read? A. No. It read "crossing protected by flagman for trains at following
40 scheduled times: Weekdays 12:10 P.M., 5:20 P.M.

John W. Ousterman—Recalled—Cross.

Saturdays 2:41 P.M. Sundays, no crossing watchman on duty, or no flagman on duty."

Q. So that actually you just flagged through freight trains, in addition to anything that was posted, and in addition to any notice that was given to the general public? A. Those freight trains are not scheduled trains.

10

(Question repeated by stenographic reporter.)

A. We only flag through trains. Trains not scheduled to stop.

Q. So that the public generally, however, had no notice that you were going to flag through freight trains, or any other trains, other than those listed on that schedule, is that right?

Mr. Tomlinson: Objected to. That is a matter of conclusion. Testimony has been given as to what was on the sign.

20

The Court: That is right. It is just a repetition of that. I will permit it.

A. That is why we flagged the crossing, to protect the public for trains that were not scheduled to stop there.

Q. Well, was there any schedule posted anywhere telling the general public, approaching that crossing, the crossing here, either at the "Y" track, or the passing siding, and the main siding, when any train stopped there, or didn't stop there, other than the three trains mentioned on the signs that you just read from? A. No. There was no sign reading to that effect.

30

Q. So that with the exception of those two or three trains, nobody knew when a train stopped there, or went through?

Mr. Tomlinson: I object to that.

40

John W. Ousterman—Recalled—Cross.

The Court: Objection sustained. That is about the fourth time.

Mr. Tomlinson: Plenty of people might have known it, and we say that these people knew it.

10 Q. Did you personally talk to Stickle or Branham after the accident? A. No, I don't recall talking to either one of them personally. My helper was out there.

Q. Did you see Branham there? A. Yes.

Q. And where was he? A. He was on the other side of the track from the station.

Q. Well, will you just point out to the jury, please, where Branham was? A. The wreck came to a stop about here, and he was on the west side of the track, about over here, on the
20 right of way (indicating).

Q. What was he doing there? A. He was sitting.

Q. Did you see his condition? A. Yes.

Q. What was it? A. He was bleeding from the mouth, and I think around the eye. Around the cheek. I don't know just whether it was the eye, or where it was, but it was bleeding along the cheek here.

30 Q. And you didn't talk to him? A. No, I didn't go all the way over across the track.

Q. When the train came to a stop, did I understand you to say that whistle was blowing? A. Yes, when the train was coming to a stop right there in front of the station, the whistle was still blowing.

Q. When it stopped, was the whistle blowing? A. I remember just before it came to a stop, when it passed the office, it was still blowing.

40 Q. The question was, when it came to a stop, was it still blowing? A. I don't know.

John W. Ousterman—Recalled—Cross.

John W. Ousterman—Recalled—Redirect.

Q. Well, when you ran out, had the train stopped? A. Yes.

Q. Was the whistle blowing at that time? A. No.

Q. Do you know when the whistle stopped blowing?

10

Mr. Tomlinson: He has already testified, if your Honor please, that he does not.

Mr. Greenfield: I don't believe that is so.

Mr. Tomlinson: I don't care whether you believe it. The record will show it. He has already testified to it. Counsel goes over, and over, and over, and over.

Mr. Greenfield: I am afraid, sir, that Mr. Tomlinson didn't listen carefully to the question.

20

Mr. Tomlinson: I listened carefully, and he said he didn't know when it stopped. Counsel asked him whether it was still blowing when the train stopped, and he said, I don't know.

The Court: I think he limited his testimony to what it was doing as it went by his station. He knows what it was doing then, that is all.

30

Mr. Tomlinson: He said that is all he knew.

Mr. Greenfield: That is all.

Redirect-examination by Mr. Tomlinson:

Q. When you saw the train as it got closer to the station, did you notice the speed then, Mr. Ousterman? A. When I last saw it, it was going about twelve miles an hour. It was coming to a stop. To the station stop.

40

John W. Ousterman—Recalled—Recross.

Q. Now, I just want to get two or three things clear in my mind. You told counsel that you were sitting in the station, and you heard the train blow up around the bridge somewheres, and you looked out and saw the train. Did you so testify? A. Yes.

10 Q. Now, when you saw the train up here, wherever it was, north of the crossing, when you saw it, when you noticed it, had the train then stopped blowing, or was it still blowing? A. Oh, it was still blowing.

Q. And then you said after it finished those signals, a very short time thereafter, it started to blow again? A. That is right.

20 Q. And after it started the second time, which you say was a very short time after the first time, did it continue to blow until after the crash, or was its blowing interrupted? A. No. It continued to blow.

Q. So, when you heard it blow up around here somewhere, you looked up and you saw it, and at that time it was still blowing? A. That is right.

Q. Then a short time after that, it started to blow again, and blew until after the crash, is that right? A. That is right.

30 Mr. Tomlinson: That is all.

Recross-examination by Mr. Greenfield:

Q. Wait a minute. I am not sure if I understand this. My impression is from your testimony, and as I understand it—

40 Mr. Tomlinson: If your Honor please, I don't care what counsel's impression is. I don't think it is fair to state that. Let him put a question or two.

John W. Ousterman—Recalled—Recross.

Q. Did you say that the whistle blew here, and then in a very short interval it blew again? A. Well, it blew the usual four blasts, which would take it pretty well down the track, to blow four whistles. Then almost immediately—I said twenty seconds in my last statement, I think, in March—but it was almost immediately, it started to blow again, and was still blowing when it went by the office. 10

Q. Well, didn't you just tell Mr. Tomlinson that it blew here, and then a very short interval it blew again and blew all the ways down until after the accident?

Mr. Tomlinson: That is what he says now.

A. Yes, that is what I say now. 20

Q. That is what you say? A. Yes.

Mr. Greenfield: All right. I just want to make sure I understood that. Thank you.

Mr. Tomlinson: I want to make sure—

By Mr. Tomlinson:

Q. You say when it blew up around here, it blew a crossing whistle? A. That is right.

Q. Four blasts? A. That is right. 30

Q. And after it got down the track a ways, a short time after it finished those four blasts, it started to blow again and blew until after the crash? A. That is right.

Mr. Tomlinson: That is all.

By Mr. Greenfield:

Q. What part of that station was your office at? A. About in the middle. On the west side. 40

Harold Warwick—Direct.

On the main track side. There is a bay window there.

Q. The middle? A. That is right. About there (indicating).

Q. Is that bay window shown on that map? A. It is shown on the picture here.

10 Q. I ask you— A. No, it is not on the map.

Mr. Greenfield: That is all.

Mr. Tomlinson: That is all.

HAROLD WARWICK, a witness produced on behalf of the Defendant, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Tomlinson:

20 Q. Mr. Warwick, where do you live? A. Long Branch, New Jersey.

Q. You work for the Central Railroad? A. Yes, sir.

Q. What is your job? A. Locomotive engineer.

Q. How long have you been a locomotive engineer, Mr. Warwick? A. Since 1914.

Q. Were you the engineer of the train that was involved in this accident? A. Yes, sir.

30 Q. And how long had you had this particular run that you were on this—operating this night? Was that your regular run, or not? A. No. It was not. That was extra for me.

Q. Beg pardon? A. I was extra on that run at that time.

Q. Had you run it before? A. Yes.

Q. Many times? A. Yes, lots of times.

Q. What was the number of your engine, if you remember? A. 176.

40 Q. Will you tell us what kind of an engine that was, or is it one of the long boilers with a cab

Harold Warwick—Direct.

at the rear, or is the cab in the center? A. Cab is more to the front of the boiler.

Q. The cab is on the side of the boiler, is that right? A. On the front. The cab is near the front of the boiler. Beyond the middle.

Q. What have you on your left hand side? A. I have the boiler on my left. 10

Q. Is the top of the boiler lower or higher than the top of your head? A. Higher.

Q. So that as you approach a crossing, or a given point, is your view to the left obstructed, or not obstructed by that boiler? A. Well, it is obstructed.

Q. You have a bell on that engine? A. Yes, sir.

Q. How did that bell operate? A. Operated automatically by air. 20

Q. How was it turned on, and how was it turned off? A. By turning an air valve, a small valve, with my left hand. Turned on, and turned off the same way.

Q. Do you know about how heavy that bell was? A. Between seventy-five and one hundred pounds.

Q. Now, did you make a stop at Red Bank on this afternoon, or early evening? A. Yes, sir.

Q. And what was the next stop after that? A. Eatontown. 30

Q. And while your train was standing in the station at Red Bank, was the engine bell on or off? A. The bell was off.

Q. After you started out from Red Bank, what, if anything, was done to the bell? A. I turned it on just before I left Red Bank.

Q. Now, as you left Red Bank and travelled towards Eatontown, what was your speed? A. Do you mean the top speed? 40

Harold Warwick—Direct.

Q. Well, just tell us the way you travelled from Red Bank to Eatontown? A. Well, it is only three miles, and the top speed would be about between forty and forty-five miles an hour.

Q. About where was it that you made that speed? A. That would be down there about at
10 Shrewsbury.

Q. And then after that what happened to your speed? A. After that the engine is shut off, we are not using steam, and the speed is cut down to make a station stop at Eatontown.

Q. Now, were you familiar, or not familiar with the whistle board up here for the Lewis Street crossing at Eatontown? A. I am.

Q. And were you at that time familiar with it? A. Yes, sir.

Q. And were you familiar with this crossing,
20 the Lewis Street crossing? A. I am.

Q. Were you at the time? A. Yes.

Q. And as you approached this crossing what, if any, signals did you yourself give of the approach of your train? A. I blew the crossing—usual crossing signal, whistle signal twice.

Q. About where were you with reference to that whistle board, or whistle post, when you first started to blow your first signals? A. Right at
30 the whistle board.

Q. How many did you blow, how many blasts did you blow? A. I blew four blasts.

Q. Well, were they all the same? A. Two long and two short.

Q. And then after that what, if anything, did you do? A. I blew four more.

Q. And about how long was it after you stopped your first set of four, before you started your second set? A. Immediately.

40 Q. At the time this collision occurred between

Harold Warwick—Direct.

your engine and this truck. had you stopped blowing? A. I was blowing as the engine passed over the crossing. When the truck was struck I was blowing the whistle.

Q. Still blowing? A. That is right.

Q. Now, at the time that you started to blow your first set of crossing whistles, about how fast were you going? A. I would say probably thirty-five to forty miles an hour. 10

Q. At the time that you hit this truck, about how fast were you going, if you know? A. It would be between twelve and fifteen miles an hour, at that crossing.

Q. Did you see the truck before the accident? A. Yes, sir.

Q. And will you tell us, if you please, just what you saw? A. Well, when I was fifty feet from the crossing I could see the truck moving at slow speed, approaching the crossing. The truck was about twenty feet from the crossing. And then I looked to my right side and I saw traffic stopped, and as I moved to the crossing the truck just—rather, just as I got to the crossing I could see the front wheels of the truck coming up over the rail, and it was struck just behind the cab of the truck. 20

Q. Now, at the time that the crash occurred, was your bell ringing, or not ringing? A. It was. 30

Q. From the time that you turned it on at Red Bank, up until the time of this crash, had your bell stopped ringing? A. It had not.

Q. When did you turn it off? A. Just before I got off the engine at Eatontown.

Q. Now, Mr. Warwick, tell us this, if you are able to: When you blew the first set of crossing whistles, two long and two short, which you say you started up around the whistle board up here, 40

Harold Warwick—Direct.

can you tell us approximately how close to the crossing that set of four whistles carried you?

A. I was five hundred feet from the crossing when I completed that first whistle. So I blew another signal.

10 Q. Who was your fireman? A. Edward Wilbert.

Q. When you saw this truck passing in front of you, what did you do? A. I put the brakes in emergency.

Q. How is that done, Mr. Warwick? A. By putting the brake handle all the way to the left—to the right, rather.

Q. Now, as you approached this crossing, could you see out on your right hand side, on the west side of the crossing? A. Yes.

20 Q. Will you tell us whether or not you saw any cars along that road? A. I did. I saw cars parked. They were stopped there.

Q. After you came to a stop about where was your engine with reference to the station? A. Right in front of the station.

Q. How many cars did you have, do you know? A. Four.

30 Q. Where was the rear, or middle of your train, with reference to the crossing? A. The middle of the train was on the crossing.

Q. Do you know which car it was, or which cars? A. The second—the rear of the second head car was on the crossing.

Q. The rear of the second head car? A. That is right.

Q. How about the head of the third car from the head end? A. That would be on the crossing too.

*Harold Warwick—Cross.**Cross-examination by Mr. Greenfield:*

Q. How far back from the crossing were those cars that you saw parked there? A. The cars on the highway? On Lewis Street?

Q. Yes. A. I wouldn't know exactly how many feet, but they were probably fifty feet back, at least. 10

Q. How high off the ground is your cabin—or your cab? A. Oh, about ten feet.

Q. The floor is about ten feet above the ground? A. No. I don't know just how far it is from the ground to the bottom of the cab. I am about ten feet above the ground when I sit in the cab.

Q. You are? A. Yes.

Q. What part of you? A. My head. Ten to twelve feet. I haven't got exact measurements on that. 20

Q. How far did you go past that station when you stopped, you say, the front of your engine? A. The engine was in front of the station.

Q. How far past Lewis Street had you gone? A. About two hundred and fifty feet.

Q. Two hundred and fifty feet? A. About two hundred, or two hundred and fifty.

Q. Did you say that the bell was ringing as you left Red Bank? A. The bell was ringing, yes. 30

Q. All the way? A. Yes.

Q. And it wasn't shut off until when? A. When I got off the engine at Eatontown after the accident, just before I got off I shut the bell ringer off.

Q. That was about two hundred to two hundred and fifty feet past Lewis Street? A. Yes.

Q. And none of that time in between Red Bank 40

Harold Warwick—Cross.

and two hundred to two hundred and fifty feet past the Lewis Street crossing was that bell shut off? A. No. It was not.

Q. Can you control the sound of that bell? A. No.

Q. I mean, you can't play a tune on it? A. No.
10 It is turned on by merely turning a valve, and it is an automatic bell ringer. It rings itself.

Q. How about the whistle? Can you control the sound of that? A. Oh, yes. You can blow it loud, or you can blow it so it can hardly be heard.

Q. And as you approached the Lewis Street crossing, what tone, or what strength did you give to that whistle? A. I blew it the usual way, usual crossing whistle.

Q. As you approached Lewis Street? A. That
20 is right.

Q. Now, when you got about fifty feet from the crossing, you saw the truck? A. That is right.

Q. And the truck was where? A. About twenty feet, I judge, from the track; they appeared to be coming to a stop.

Q. From what track? A. The main track, track I was on.

Q. Twenty feet? A. About that, yes.

Q. Was he moving at the time that you saw
30 him? A. Yes, moving slowly, as though he were stopping.

Q. Well, was he moving? A. He was moving slowly.

Q. Did you see who was in the truck? A. No, not at that time I didn't.

Q. Do you know what was on the truck? A. Not at that time I didn't.

Q. Why not? A. I couldn't see back of the
40 truck. I didn't notice what was in it.

Harold Warwick—Cross.

Q. Well, you said you couldn't see. Why couldn't you see? A. All I noticed is the truck moving. Not what the load was. A moving truck.

Q. Now, my friend, just try to answer the question, please?

Mr. Tomlinson: I submit he has answered it. 10

Q. You say you couldn't see the back of the truck. Why? A. I didn't try to see the back of the truck.

Q. Well, you just said you couldn't see it.

Mr. Tomlinson: He explained that by saying that he didn't notice.

The Court: He said he couldn't see, because he didn't try to see.

A. That is right. 20

Q. Well, if you tried, could you have seen it?

A. No.

Q. How far down this track could you see, when you were what distance from Lewis Street, where could you get a good view of that crossing? A. I would say five hundred feet. To see the crossing itself, the rails on the crossing, at five hundred feet, I should say.

Q. Could you see the back part of the station here, from five hundred feet? A. I could see Eatontown station, yes. 30

Q. The question was, could you see the back part of this station? A. I don't know about the back door. I could see Eatontown station.

Q. Well, do you know if there were any trucks right in the back here? A. At five hundred feet I didn't see.

Q. Could you? A. I didn't see.

Q. Well, could you see? A. I don't know. I didn't see any. 40

Harold Warwick—Cross.

Mr. Tomlinson: I object. This is argumentative.

Q. The first time you saw the truck was twenty feet from the crossing, or from the rails, is that right? A. Twenty feet from the track I was on.

10 Q. And how fast would you say that truck was moving, if you could tell? A. Well, it was moving very slowly. I wouldn't know how fast.

Q. Did you see any people on Lewis Street? A. No.

Q. Was there anyone in the cab with you? A. No.

Q. Now, when you left Red Bank, what time was it? A. 6:10 P.M.

Q. Is that the usual time? Were you on time at Red Bank? A. We were about two minutes

20 late.

Q. Late? A. That is right.

Q. That wasn't your regular run, was it? A. No, sir.

Q. Did you have any help on that run, up in the engine? A. None. No.

Q. Did you talk to any of the train crew before leaving Red Bank? A. At Red Bank?

Q. Yes. A. No, sir.

30 Q. Did you talk to any of them prior to reaching the Lewis Street crossing? A. Where do you mean?

Q. From Red Bank to Lewis Street crossing? A. No.

Q. Did you discuss this case with any one before coming to Court here today? A. Why I talked to Mr. Tomlinson.

Q. When? A. Last week, before we came to court.

40 Q. Any one else? A. No.

Harold Warwick—Cross.

Q. Who told you you were coming to court?
A. Mr. Tomlinson.

Q. Where did he tell you that? A. In his office.

Q. How did you get to his office? A. We were called there.

Q. Who called you there? A. Mr. Tomlinson. 10

Q. How did he call you? A. From the Central Railroad.

Q. On the telephone? A. By telegraph.

Q. Telegram? A. Yes.

Q. Is that what you said? A. Telegraph, yes.

Q. Do you know who the members of that train crew were? A. Yes, sir.

Q. Who were they? A. Conductor Jones, baggage master was Brower, brakeman on the front end was Ryan, the fireman was Wilbert. 20

Q. After the accident did you talk to anybody?
A. Of the crew, do you mean?

Q. Anybody? A. Oh, I probably have. I don't remember now.

Q. Did you look around to see what had happened there? A. Yes.

Q. Did you see Mr. Stickle? A. No, I didn't see Mr. Stickle.

Q. Did you see Mr. Branham? A. Yes.

Q. Where was Mr. Branham when you saw him? A. Sat up on the bank. 30

Q. Did you talk with him? A. No, I didn't talk with him.

Q. Did you notice his condition? A. Yes.

Q. What was his condition? A. Why, he was bleeding at the face when I saw him.

Q. Did you see Mr. Gaas there? A. No, I didn't.

Q. You know who Mr. Gaas is? A. I know now, yes. 40

Harold Warwick—Cross.

Q. The gentleman who was here and testified?

Mr. Tomlinson: I do not think that is fair, for counsel to refer to prior proceedings in this matter.

The Court: It is all right to ask him if he saw him.

10

Q. Who else did you see there? A. Oh, at the time I saw the station crew, the crew on the train. I saw—

Q. Who was the station crew? A. Mr. Ousterman and his helper were there, and I saw the Eatontown police chief there. There was other people I recognized. Outside of that I don't know. There were a lot of people around there.

20

Q. When did you start to blow the first whistle, when you approached the Tinton Falls bridge? A. No. I started to blow the crossing whistle at the whistle board. That is south of the bridge.

Q. That whistle board is marked "W" here, to the west of the main track, is that right? A. That is right.

Q. Do you know how far that is past the Tinton Falls road bridge? A. Well, it isn't far. It would be less than one hundred feet. A short distance from the bridge.

30

Q. Is it less than one hundred feet, or is that just your guess? A. Well, I don't know. That distance is just my guess. Just south of the bridge. After you pass under the bridge, the whistle board is there.

Mr. Greenfield: That is all.

40

Harold Warwick—Redirect.

Edward Wilbert—Direct.

Redirect-examination by Mr. Tomlinson:

Q. Mr. Warwick, you told us that you were an extra engineer, or on the extra list? A. Yes, that is right.

Q. What does that mean? A. Why, we are assigned to the extra work. In a case where a man is off, we cover that run. 10

Q. No matter where that run may be? A. That is right.

Q. Approximately how many times, if you can tell us, have you worked this same run that you were operating on this night? A. Well, for a period of thirty-five years I think I have been over it hundreds of times.

Q. Hundreds of times? A. Yes, that is right. 20

Mr. Tomlinson: That is all.

By Mr. Greenfield:

Q. As you approached that crossing, did you know whether or not it was protected in any way? A. I did not.

Mr. Greenfield: That is all.

EDWARD WILBERT, a witness produced on behalf of the Defendant, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Tomlinson:

Q. Mr. Wilbert, where do you live? A. Barnegat. 30

Q. Were you the fireman on this train? A. I was.

Q. That train went to Barnegat, didn't it? A. Yes, sir. 40

Edward Wilbert—Direct.

Q. Is this your regular run? A. It was.

Q. How long had you been a fireman? A. Since 1913.

Q. Where were you riding, after you left Red Bank and went towards Eatontown? A. In the tank.

10 Q. What is the tank? A. Where the coal is.

Q. That we sometimes call the tender? A. The tender, yes.

Q. In other words, you were not opposite the engineer, were you? A. No.

Q. In back of the engineer? A. Back of the engineer.

Q. Were you familiar with this Lewis Street crossing? A. I am.

Q. Familiar with the whistle board for it? A. Yes, sir.

20 Q. Were you, or were you not yourself a qualified engineer? A. Qualified engineer.

Q. After you left Red Bank, and as you approached the Lewis Street crossing, what were you doing? A. After we left Red Bank?

Q. Yes. A. I started to cover my fire over.

Q. Speak up, Mr. Wilbert? A. I was covering my fire over after we left Red Bank.

Q. Had you finished that, or not? A. Oh, yes.

30 Q. When the accident happened? A. Yes.

Q. What attracted your attention to the fact of this accident? A. Why, he was blowing the whistle so hard that I looked out just in time to see the accident.

Q. What did you see? A. Saw the front of the engine strike right in back of the cab of the truck.

Q. Had the whistle stopped at that time? A. It was still blowing.

40 Q. Where did he start to blow that whistle, so

Edward Wilbert—Direct.

Edward Wilbert—Cross.

far as you observed? A. Right after he passed the whistling board there.

Q. About how many times did he blow? A. He blowed two long whistles and two short. Then immediately he blowed again. That is what called my attention to look out. 10

Q. Now, from the time he started to blow at the whistle board, where you say he blew two long and two shorts, and then started to blow again, did that continue right up to the crash? A. Yes, sir.

Q. About how fast were you going, if you know? A. At the time of the accident?

Q. Yes. A. Oh, I imagine about twelve miles an hour. Between twelve and fifteen.

Q. Were you on the right hand side of the train, or the left hand side? A. On the left hand side. 20

Q. Did you notice whether the bell was or was not ringing? A. The bell was ringing continuously all the way from Red Bank.

Q. Do you know when it was turned off? A. After we stopped at Eatontown, after the accident.

Q. Who turned it off? A. The engineer, before he come down on the ground. 30

Q. Was Eatontown a scheduled stop for your train, or not? A. It was.

Cross-examination by Mr. Greenfield:

Q. Where did you say you were? A. In the tender of the engine. That is where the coal is, and where I work.

Q. I can't hear you. A. That is the tender where the coal is, and where I do my work, shoveling coal. 40

Edward Wilbert—Cross.

Q. And how far can you see from where you are in the tender? A. I couldn't see there. Where do you mean, close to the crossing?

Q. How far can you see? A. Oh, I can see quite a ways.

Q. Can you see in the front of the train? A. Yes.

Q. You can see in front of the engine? A. Yes.

Q. You are in back of the engine, aren't you? A. Yes.

Q. That is, in back of the boilers, and a position in back of the engineer? A. That is right.

Q. How far in back of where the engineer is? A. Oh, I don't know. I don't know just how far it is.

Q. Well, will you tell me how you can see in front of the engine? A. Lean out over the tank.

Q. Can you see the cow catcher, or the grille in front of the engine? A. No.

Q. Did you see the actual contact between the front of the engine and the truck? A. Well, when I looked, it looked as though the front of the engine just struck the back of the truck.

Q. Well, did you see them actually hit? A. No. I heard the crash.

Q. What was it you say that called your attention? A. Why, the excess blowing hard of the whistle.

Q. The excess blowing hard of the whistle, is that right? A. The blowing hard of the whistle.

Q. You don't look out every time you hear the whistle blow? A. I do when it blows so hard as he blowed for that crossing.

Mr. Greenfield: That is all. Thank you, sir.

Mr. Tomlinson: That is all.

Elton Roy Jones—Direct.

ELTON ROY JONES, a witness produced on behalf of the Defendant, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Tomlinson:

Q. Mr. Jones, where do you live? A. Barnegat.

Q. Did you live there at the time of the accident? A. I did. 10

Q. Were you the conductor of this train? A. I was.

Q. How long have you been a conductor, Mr. Jones? A. Since February, 1914.

Q. And will you tell us whether or not this was your regular train, or not? A. It was my regular brake job. I was extra conductor on that.

Q. In other words, sometimes you worked as brakeman, and sometimes you worked as conductor? A. That is right. 20

Q. On this particular night you were which? A. Conductor.

Q. What was the number of your train, Mr. Jones? A. 4229.

Q. What stops did that train make coming out of Jersey City? A. We stopped at Elizabethport on "C" stop, that is, to pick up passengers; Middletown, regular; Red Bank, regular; next stop was Eatontown, regular. 30

Q. And then after that? A. After that was Conley Park, a flag stop; Farmingdale, regular; Maxson, special stop; Lakewood, regular; South Lakewood, flag; Lakehurst, regular; Toms River; Beechwood; Pinewold, regular; Lanoka was a flag; Forked River; Waretown, and Barnegat was regular. Barnegat had to be.

Q. Barnegat you disembarked and went home? A. That was the last. That was the one I lay off over night. 40

Elton Roy Jones—Direct.

Q. How many cars did you have in that train?
A. Had a combination and three coaches.

Q. What is a combination car? A. Combination is a combine of smoker and baggage.

Q. Were those cars vestibule, or not? A. They were vestibule cars.

10 Q. Where was the combination car? A. Next to the engine. Head car.

Q. Then after that three other cars? A. Three coaches.

Q. Were you familiar with Eatontown? A. I certainly was.

Q. Familiar with the station there? A. Yes, indeed.

Q. And the Lewis Street crossing? A. Yes, sir.

20 Q. How about the whistle board, were you familiar with that? A. I was.

Q. With the Tinton Falls bridge? A. Yes.

Q. How many years had you run over that run? A. I have been on that one job thirty years.

Q. In which car were you, Mr. Jones, as your train approached that crossing? A. Well, I was in the second car; head coach.

Q. Second car from which end? A. From the engine.

30 Q. And what were you doing in there? A. I was collecting tickets.

Q. What, if anything, attracted your attention to the fact that something had happened? A. When sudden brakes, went on suddenly.

Q. Then what happened after that? A. Well, I come to a stop. Piled off of the rear end of the second car, on the crossing.

Q. Which car was on the crossing? A. I come out of the rear end of the second car.

40 Q. The rear end of the second car from the

Elton Roy Jones—Direct.

head end? A. That was on the south edge of Lewis Street crossing.

Q. How about the head end of the third car?

A. That was on the crossing.

Q. Where was your regular stopping place with reference to that? A. Down to the station.

Q. Clear of the crossing? A. Oh, yes. 10

Q. Before you felt these brakes go on hard in that application that you have mentioned, in emergency, did you notice any signals? A. I heard the whistle blow.

Q. Well, can you tell us about where your train was when the whistle started to blow? A. Well, it was after we left the overhead bridge. I wouldn't say how far. Just after we left the overhead bridge, I heard them blow the whistle.

Q. How many times? A. I heard him give the regular crossing whistle. 20

Q. Well, what is that? A. Two longs and two short.

Q. Then what if anything happened after that? A. Well, then I heard him blow again. I figured that he hadn't covered the crossing.

Q. You can't tell us what you figured. You heard him blow again? A. Yes.

Q. How soon was that after? A. It seems immediately. 30

Q. You heard him blow again? A. Yes, sir.

Q. How long did he blow that second time? A. Oh, I don't know how long he blowed. I suppose it was blowing until he hit the car.

Q. Well, do you know, and if you don't, say so, do you know whether or not he was still blowing at the time you felt the brakes go on? A. I couldn't say.

Q. About how fast were you going when you 40

Elton Roy Jones—Cross.

felt the brakes go on, if you know? A. I should judge about fifteen miles an hour.

Mr. Tomlinson: Cross-examine.

Cross-examination by Mr. Greenfield:

10 Q. You heard a crossing whistle blow? A. I did.

Q. And then you heard another whistle? A. Yes, sir.

Q. Did that second whistle stop at any time, from the point that it began, until the train stopped? A. The crossing whistle, he give the crossing whistle the second time.

Q. Please listen to the question? A. It has got to stop on the crossing whistle, sir.

20 Q. When the whistle blew the second time, had it stopped from the time that it began to blow until the train came to a stop, after it had hit the truck, if you know? A. I couldn't say.

Q. Did you know any of the people on the train at that evening? A. Oh, yes.

Q. Did you know Mr. Gaas? A. I knew Mr. Gaas; yes, sir.

Q. Did you see Mr. Gaas after that? A. After the accident?

30 Q. Yes. A. Oh, yes.

Q. Are you one that directed Mr. Gaas to the investigator, or anybody—

Mr. Tomlinson: Just a minute. There is no evidence at all that anybody directed any Mr. Gaas to any investigator.

Mr. Greenfield: I will withdraw the question.

Q. Mr. Gaas was on the train that night? A.
40 Yes, sir.

Elton Roy Jones—Cross.

Q. Now, you testified here on a previous occasion? A. Yes, sir.

Q. Now, do you remember being asked this question: "Q. How many times did he blow the whistle? A. He blew the crossing whistle and stopped, and started to blow it again, and was still blowing it when we stopped." A. I don't remember saying that; no, sir. 10

Q. You don't remember saying it? A. I do not; no, sir.

Q. Well, if you said it, was it true? A. If I said it?

Q. Yes. A. If I said it.

Q. Then it was true? A. If I said it.

Q. If you said it? A. Yes.

Q. Do you now say that you didn't say it? A. I couldn't say whether I said it or not, sir. 20

Q. But if you said it, it is true? A. Yes.

Q. How fast would you say, or did you say that train was going as it approached the Lewis Street crossing? A. I said it was going about fifteen miles an hour.

Q. Have you discussed this case with anybody prior to coming to court? A. I certainly have. Yes, indeed.

Q. With whom did you discuss the case? A. Mr. Tomlinson and Mr. Hahn. 30

Q. Was anything said with regard to your testimony at a previous trial, or on any previous occasions? A. Anything said about it?

Q. That is right. A. No.

Q. What is a vestibule car, please? A. It is an enclosed one. An enclosed platform car.

Q. Was the door open or closed? A. The doors was open.

Q. What was it that attracted your attention to anything unusual at this particular time? A. The brakes going on suddenly. 40

Elton Roy Jones—Cross.

Q. What did that do to the train, if anything?

A. Stopped suddenly. Made a sudden stop.

Q. Just like that (indicating)? A. Right.

Q. Did you hear the vibration or the noise, if there was any, of the brakes? A. I didn't notice any.

10 Q. Was there a bell ringing? A. I couldn't say.

Q. Did you hear any? A. I did not.

Q. What was that answer? A. I did not.

Mr. Greenfield: That is all. Thank you.

By Mr. Tomlinson:

Q. When brakes go on in an emergency, do they make any noise? A. Not necessarily. Slide the wheels along, probably.

By Mr. Greenfield:

20 Q. Did it cause the train to buck, or shimmy?

A. No.

Q. Or vibrate at all? A. No.

Q. Came to a nice, smooth stop? A. Just stopped. That is all.

By Mr. Tomlinson:

Q. You were only going about fifteen miles an hour? A. That is all.

30 Mr. Tomlinson: That is all.

Irving Brower—Direct.

IRVING BROWER, a witness produced on behalf of the Defendant, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Tomlinson:

Q. Mr. Brower, where do you live? A. Barnegat. 10

Q. Were you a member of the crew on this train? A. I was.

Q. What was your job on the train? A. Baggage master.

Q. Baggage master? A. That is it.

Q. How long have you been on this crew on this train? A. Somewhere near eleven years. About eleven years.

Q. Where were you riding, what car were you riding in when this accident happened? A. In the baggage car, in the head end, next to the engine. 20

Q. Were you familiar with the Eatontown Station? A. Well, by stopping there. I hadn't been out around there much. From stopping there.

Q. It is awfully hard to hear you, Mr. Brower. Won't you speak up, please? Did you know where the Lewis Street crossing was? A. Yes.

Q. Now, as you approached the Lewis Street crossing on this afternoon, or evening, was your attention called to anything out of the ordinary happened? What? A. The blowing of the whistle. The brakes applied. 30

Q. You felt the brakes go on? A. Felt the brakes go on.

Q. Now, you say that you heard the blowing of the whistle? A. That is it.

Q. Do you know, or do you remember how many times you heard the whistle blow? A. I heard them blow the regular crossing whistle.

Q. Yes. A. Right after we left the overhead 40

Irving Brower—Direct.

Irving Brower—Cross.

bridge. We blowed two long and two short. And right away after that it just started to blow a succession of whistles.

10 Q. Do you know whether he had stopped blowing the second set of whistles, when you felt the brakes go on, or was he still blowing? A. Still blowing.

Q. When you came to a stop what did you do, Mr. Brower? A. Well, when we came to a stop, I had been moving my stuff up to the door, see. I handle U. S. mail and express packages. Been moving them up to the door, getting ready to put it out. And found out that something had happened, so as soon as I got clear of that I went out to see what had happened. I saw the truck on the front of the engine.

20 Q. Did you notice where the engine was with reference to the station? A. Well, it was about, I should say, a car length and a half, fully a car length and a half by the crossing. Possibly two car lengths.

Q. Did you notice where the engine was with reference to the station building, or didn't you notice? A. Well, I think the engine was about a car length by the station.

30 Mr. Tomlinson: Cross-examine.

Cross-examination by Mr. Greenfield:

Q. Where did you say your car was, or the car that you were in was with regard to the engine, please, Mr. Brower? A. With regard to the engine?

Q. Yes. A. Well, that car was possibly—

40 Q. Was it the first, second? A. Do you mean from the crossing?

Irving Brower—Cross.

Q. No. From the engine itself. Was it hooked right on to the engine? A. Hooked right on to the engine; yes, sir.

Q. The first car after the engine, is that right? A. First car after the engine; yes, sir.

Q. Was your door open or closed? Was the door of your car open or closed? A. Well, I was opening the door, coming in the station. Moved stuff up and opened the door, getting ready to put that stuff off. 10

Q. When you came to the Tinton Falls bridge was the door open? A. The door was closed.

Q. Well, how far down the line was it before you opened the door? A. Well, about the time he started to blow the crossing whistle I started to open the door.

Q. That was just about the whistle board then? A. About the time that he got to the whistle board, when he started to blow the regular crossing whistle, I started to open the baggage car door. 20

Q. After he blew the crossing whistle, and before you heard any other whistle, was the bell ringing? A. I didn't notice it.

Q. Your answer, please? A. I didn't notice it.

Q. Well, when you came into the station, and when the train had stopped, what did you do? A. Started unloading the mail. 30

Q. Keep your voice up, please. A. Started unloading the mail and the baggage and express, the stuff that I had to go off there at that point.

Q. Well, up until the time that you had unloaded everything that was to be unloaded, did you know that anything was wrong? A. Yes, I knew there was something wrong on account of the succession of short whistles and the brakes applied in emergency. 40

Irving Brower—Cross.

Q. Did you testify here at a previous trial? A. Yes.

Q. Do you remember being asked this question: "Q. What did you do then after the train stopped?" And you answered: "Train stopped, I started to unload some of the baggage and stuff they had there, or push it up to the door to get it ready, and then I discovered that something was wrong ahead and I went out to see what it was," do you remember giving that answer? A. No. If you don't write these things down you certainly don't remember every word that you say, that is sure.

Q. Well, if you testified that way, was it the truth? A. Yes, if I testified that way, it was the truth.

Q. Well, would you say that you didn't testify to that? A. No, I wouldn't.

Q. When was it that he blew the whistle again, after the crossing whistle at or near the whistle board, if you know? A. Almost immediately, sir.

Q. Beg pardon? A. Almost immediately after the regular crossing whistle stopped.

Q. Well, now, do you remember being asked this question: "Q. How many times did he blow that, that you noticed? and you answered: "Well, he blowed two long and two short whistles, and if I remember, he started to blow again, just before he got to the crossing, or at the time," do you remember that answer? A. Yes.

Q. Was that the truth? A. That was the truth. That could be immediately after the crossing whistle was blowed.

Q. Well, now, do you remember being asked two questions that I have just read to you, and do you remember giving those answers? A. Well, I don't exactly remember what the exact words that I used, no.

Michael J. Ryan—Direct.

Q. Well, would you say, sir, that you did, or you didn't give those answers? A. If you have it down there in black and white, why, I certainly must have given those answers.

Mr. Greenfield: That is all.

Mr. Tomlinson: That is all.

10

MICHAEL J. RYAN, a witness produced on behalf of the Defendant, being duly sworn, according to law, on his oath, saith:

Direct-examination by Mr. Tomlinson:

Q. Mr. Ryan, where do you live? A. Lakehurst.

Q. What is your present job? A. Conductor out of East Long Branch.

20

Q. East Long Branch to where, Jersey City? A. No. To Matawan now.

Q. Were you a member of the crew of the train that was involved in this accident, Mr. Jones' train? A. At that date, yes.

Q. Were you familiar with the Eatontown Station? A. Yes, sir.

Q. Lewis Street crossing? A. Yes, sir.

Q. How about the whistle board for the Lewis Street crossing, were you familiar with that? A. Yes, sir.

30

Q. Now, on this date in what part of the train were you riding? A. I was rear man on this train.

Q. And in what car were you riding? A. The rear car.

Q. What were you doing there as you approached this crossing? A. I was coming forward to get on the platform between the two rear cars to open the traps for Eatontown Station to unload and load passengers.

40

Michael J. Ryan—Direct.

Q. Did you notice anything happen out of the ordinary? A. Well, I felt the brakes go in emergency, and I heard the whistle blowing loud.

Q. Then what happened after that? A. Well, the train stopped.

10 Q. Were you opening the traps on the left-hand side of the train, or right-hand side? A. On the station side.

Q. That would be your left-hand side, wouldn't it? A. Yes.

Q. And after the train came to a stop you found out about this accident? A. Well, I just stepped out and looked and I figured there must have been something wrong, so I went on back to the rear, with a flag, to protect the rear.

20 Q. Protect your train against some other train coming along on the same track? A. Yes, sir.

Q. Did you see what cars were on the crossing, what cars stood on the crossing? A. Well, the car I stepped off of was north of Lewis Street crossing, and I stepped off the platform of the rear car, on the south end.

Q. You stepped off of the south end of your car, or the north end of your car? A. The south end of the car, the end towards Eatontown, of the rear car.

30 Q. Now, where was your car with reference to the Lewis Street crossing, north or south? A. It was a little north of Lewis Street crossing.

Q. Do you know how much of the third car was on the crossing, or didn't you notice? A. Well, the steps hadn't reached the crossing. The steps on the north end of the third car hadn't reached the crossing.

40 Q. Now, as your train approached this crossing, just before you felt the brakes go on in emergency, can you tell us about what your speed was, or

Michael J. Ryan—Cross.

didn't you notice that? A. Well, I should judge I would have to estimate at it.

Q. Estimate it, yes. A. Twelve to fifteen miles an hour.

Q. And what if any signals did you hear before or at the time you felt the brakes go in emergency? A. Well, previous to that he had given regular crossing signal, two long and two short. 10

Q. Yes. A. After he had passed the whistle board.

Q. Yes. And then what did he do, anything? A. Well, he continued blowing the whistle.

Q. Continued for how long? A. Until after he had passed the crossing.

Mr. Tomlinson: Cross-examine.

Cross-examination by Mr. Greenfield:

20

Q. Did you say that it was after he passed the whistle board that he blew the crossing signal?

A. No. He starts blowing the crossing signal as he passes the whistle board. That is where he began.

Q. Well, didn't you just say that as he passed, or after he passed, he gave the crossing signal?

A. He begins giving the crossing signal, yes.

Q. Then where did he blow again, if you know? 30

A. Well, he was blowing as he went over the crossing.

Q. You felt the brakes being applied? A. Yes, sir.

Q. Did the train come to a smooth, normal stop?

A. Well, it didn't make a normal stop. A normal stop would be a station stop.

Q. Well, now, I mean normal stopping, did it stop in a smooth manner, or did it come to an abrupt stop, and was there a jar, or was there something out of the ordinary? A. No. 40

Michael J. Ryan—Cross.

Q. No what? A. It was a rough stop.

Q. Was there any jar? A. No.

Q. Were the doors of your car open? A. Yes, sir.

10 Q. Between the time that he blew the whistle at the whistle board, and the time that he approached the crossing and blew it again, was the bell ringing? A. I don't know.

Q. Did you hear it? A. No.

Q. Your doors were open? A. Yes, sir.

Q. What were you doing at the time that you felt the brakes go on? A. Well, I was standing there on the platform waiting to announce the station, to help the passengers on and off.

Q. Were you noticing the speed of the train? A. Well, that I couldn't say.

20 Q. Well, how do you say that the train was going fifteen miles an hour? A. Well, I estimate it.

Q. On what do you base that estimate? A. Well, going up and down the road so often, for years, you get used to judging speed. You may say a mile or so one way or the other.

Q. You could close your eyes and not pay any attention to it and still know how fast you were going? A. No.

30 Q. What causes you to say that you were going fifteen miles an hour?

Mr. Tomlinson: He said about fifteen.

Q. All right, about fifteen? A. Well, that is what I estimated it at.

Q. But you can't tell us how you estimate it?

Mr. Tomlinson: He already has.

40 Q. Can you? A. Well, you get used to riding along. You can estimate speed from an automo-

Michael J. Ryan—Cross.

bile or train. You may vary a few miles one way or the other.

Q. Well, did you have your head sticking out the window? A. No, I didn't have my head sticking out of the window. But I am there on the platform, and the platform is open. You can watch out there.

10

Q. Now, did you say that there was no jar when this train came to a stop? A. That is what I said, yes.

Q. You testified here in March? A. Yes.

Q. Do you remember being asked this question:

"Q. What did you hear, if you heard anything, and what did you see, Mr. Ryan? Just tell us what you know about this?" And then you answered:

"A. Well, after we passed the overhead bridge, I heard the crossing whistle given, two long and two shorts, and then as we neared the crossing the whistle started blowing again, and I felt the brake go on in emergency hard, and a jar, and we stopped." Do you remember that question? A. Yes, sir.

20

Q. And do you remember that answer? A. Yes, sir.

Q. Is this answer true? A. Yes.

Q. So that when you tell us now there was no jar—

30

Mr. Tomlinson: I object to that. He didn't say that. He said there was no rough stop.

Mr. Greenfield: I have not finished the question, for one thing.

Mr. Tomlinson: I don't know. You stood there as if you had finished it.

Q. When you say now that there was no jar—

A. I meant there was no rough stop.

40

Michael J. Ryan—Redirect.

Michael J. Ryan—Recross.

Q. Do you mean that because Mr. Tomlinson just testified to that? A. No.

Mr. Tomlinson: I didn't testify.

10 Q. Was there a jar, or wasn't there a jar? A. Well, the brakes sizzle and swirl like, and you hear them go on hard, if that is what you are referring to a jar.

Q. Well, you are the one that testified, and I am asking you if there was a jar? A. Well, if you want to call it a jar, you can say it is a jar, but there was no rough stop of the train.

20 Q. Well, let me ask you this: When you testified here in March, and when you said "I heard the brake go on in emergency hard, and a jar, and we stopped," what did you mean by a jar? A. Well, when the train stops quickly, sometimes the brakes goes in emergency, they kind of buck like.

Q. That is what you meant by a jar? A. Yes.

Redirect-examination by Mr. Tomlinson:

30 Q. Just one question. You probably answered this, but I want to make sure. Where did you say that you were with reference to the whistle board when the engineer first started to blow? A. As we passed—as we was passing the whistle board.

Q. As you were passing the whistle board? A. Yes.

Mr. Tomlinson: That is all.

Recross-examination by Mr. Greenfield:

Q. How far past the whistle board was it? A. As we passed the whistle board.

40 Q. What do you mean by that? A. As we was passing the whistle board, that is when the whistle starts, the engineer starts to blow the whistle.

Albert C. Wolcott—Direct.

Q. He didn't start before? A. No.

Q. Sure of that? (No answer.)

Q. Did he turn on the bell at any time after that whistle started to blow? A. I don't know about the bell ringing.

Q. You didn't hear the bell? A. No.

Mr. Tomlinson: He has already testified to that. 10

Mr. Greenfield: That is all.

ALBERT C. WOLCOTT, a witness produced on behalf of the Defendant, being duly sworn according to law, on his oath, saith:

Direct-examination by Mr. Tomlinson:

Q. Mr. Wolcott, where do you live? A. Eatontown, New Jersey. 20

Q. What is your business, or occupation? A. Mail messenger.

Q. Just what is that, please? A. Well, I carry the mail from the station to the post office.

Q. To Eatontown post office? A. Yes, sir.

Q. By whom are you employed? A. By the United States Government.

Q. Are you connected in any way whatsoever with the Central Railroad? A. No, I am not. 30

Q. Ever been in the Central Railroad Company's employ? A. No, I haven't.

Q. Do you know Mr. Granton, the gentleman who testified here last Thursday? A. I do.

Q. Are you familiar with the Eatontown Station? A. Yes, I am.

Q. And the Lewis Street crossing? A. Yes.

Q. And the Tinton Falls bridge? A. Yes.

Q. How long have you lived in Eatontown, Mr. Wolcott? A. All my life. 40

Albert C. Wolcott—Direct.

Q. So you have been familiar with those premises for some time, is that right? A. That is right, yes.

Q. Now, do you remember this accident happening down at Lewis Street crossing on May 11th, 1942? A. I do.

10 Q. Were you there at the time? A. Yes.

Q. Where were you? A. I was in the station.

Q. Were you talking to anybody in there? A. I was talking to Mr. Granton.

Q. What was your purpose or object in being at the station? A. Why, I was to meet that train that brings the mail in at 6:17.

Q. That is the train that was involved in this accident? A. That is right.

20 Q. And where were you, Mr. Wolcott, at the time the train came in? A. Well, I was in the station.

Q. Talking to Mr. Granton? A. That is right.

Q. Will you be good enough to tell us what you saw or heard of this accident? A. Well, I was talking to Mr. Granton when I heard the whistle blow.

30 Q. Yes. A. And, of course, then she will,—often I am in the station when the train is coming in, when I hear the whistle blow then I go out to get the mail and, of course, that is what I did that night. When I heard the whistle I left Mr. Granton and went out to meet the train.

Q. Did you see the accident at all? A. I didn't see the accident, no. I first saw the train in front of the station as I went out. The engine.

Q. Can you tell us how many times the engineer blew? A. Well, I couldn't say how many times, but he blew several times.

40 Q. Do you know where he was when he started to blow? A. Well, of course, I hear that whistle

Albert C. Wolcott—Cross.

so often, but it is always after they come under the bridge there, on the south side of the bridge, then is when they commence to blow.

Q. Do you know where he was when he stopped blowing? A. No, I couldn't say about the whistle. But I know the bell was ringing when I went out to the train, but I couldn't say about the whistle. But I heard the whistle several times before I went out. 10

Q. Could you hear them clearly and distinctly where you were at the station? A. Oh, yes.

Q. Did you hear the crash at all? A. I didn't hear the crash. Only the kind of a jam at the door when I went out.

Cross-examination by Mr. Greenfield:

Q. Did you see Mr. Branham before the accident? A. Before the accident? 20

Q. Yes. A. No, I didn't.

Q. Did you see Mr. Stickle before the accident? A. Well, I saw the truck down to the train when I went up to the station. But I didn't pay any attention to them. I saw the truck down there to one of the box cars.

Q. Where was it? A. What?

Q. The truck. A. Down to the box car. They were unloading. 30

Q. Did you see them working there? A. Well, I didn't go down, no. I just saw the truck down there.

Q. From where you were you didn't see anybody working on the truck? A. Oh, not in the station, no. But before I went in the station I saw the truck down there.

Q. Did you see anybody working about the truck? A. No. I couldn't say that I did. I just 40

Albert C. Wolcott—Cross.

happened to notice the truck when I went in the station.

Q. Did you see the truck drive up to the crossing? A. No, I didn't see that.

Q. Did you hear the crash of the train and the truck? A. No, I didn't notice that.

10 Q. Did you hear a whistle blow when the train came to a stop? A. No, I couldn't say about the whistle. The bell was ringing when I went out, but I couldn't say just when the whistle shut off.

Q. How do you know what side of the Tinton Falls bridge that whistle starts to blow? A. Well, of course, I have watched the train so many times, and then is when it commences to blow, when it comes under the bridge.

Q. Can you see it blow? A. See it?

20 Q. Yes. A. I can hear it.

Q. You say that you watched the train so many times? A. Yes, I have, coming under the bridge.

Q. Well, how do you know they blow under the bridge, and not before they get to the bridge? A. I generally see the train before I hear the whistle, if I look up the track.

Q. You can see the train before you hear the whistle? A. Well, yes, just about at the same time as it comes under the bridge.

30 Q. Well, do you know if they blow at all before they come under the bridge? A. Well, I never paid any attention to that. I know it is on this side before I hear it.

Q. Before you hear it? A. Before I hear it, yes.

Q. Did you see the train coming, before this accident? A. No. I was in the station.

Q. Do you know how fast the train was coming? A. No, I do not.

40 Q. Do you know where the train was when you

Albert C. Wolcott—Cross.

last heard the whistle? A. No. I couldn't answer that. I heard the whistle several times, but I couldn't say just where it was when it stopped.

Q. You were talking to Mr. Granton? A. Yes, I was.

Q. Kindly old farmer, is that right? A. Yes, sir. 10

Q. Was anybody else in the station while you were talking with him? A. Only Mr. Ousterman and Mr. Whitfield, that is all.

Q. Nobody in the station between the time that you got there and the time that the accident happened? A. I don't think so. I didn't notice any one.

Q. Did you see Mr. Branham after the accident? A. Yes.

Q. And where was he when you saw him? A. He was on the bank when I went out. 20

Q. What was his condition at that time? A. Well, he seemed to be bleeding around the mouth some.

Q. Did you see Mr. Stickle? A. Yes, I saw him.

Q. What was his condition? A. Seemed to be all right, I think. As far as I could tell. Really I didn't tarry long, because I got my mail and left.

Q. Did you see the truck? A. Yes. 30

Q. What was the condition of the truck? A. It was badly damaged.

Q. Where was it when you first saw it? A. On the cow catcher.

Q. Will you keep your voice up, please? A. On the cow catcher.

Q. On the cow catcher? A. Right in front of it.

Q. Of the train? A. Yes.

Q. Was there anything still on the truck when you saw it fastened to the cow catcher? A. Fastened? 40

Fanny Snyder—Direct.

Q. Well, when it was on the cow catcher? A. Well, it was a lot of—it was all damaged, the truck was damaged and was still on to it.

Q. Was there anything on the truck? A. No.

Q. Could you tell what had been on the truck?
A. Well, the truck was all covered with tile,
10 broken tile.

Q. And about how far from the Lewis Street crossing was that tile? A. Well, it was along the track from the crossing up to where the train stopped.

Q. Do you have any idea in feet where the tile was? A. I suppose fifty feet this side of the track, that is, of Lewis Street.

Q. Fifty feet? A. Fifty feet, or a little more.

20 Mr. Greenfield: That is all.
Mr. Tomlinson: That is all.

FANNY SNYDER, a witness produced on behalf of the Defendant, being duly sworn, according to law, on her oath, saith:

Direct-examination by Mr. Tomlinson:

Q. Mrs. Snyder, where do you live? A. I live in Colt's Neck, New Jersey.

30 Q. In Monmouth County? A. Yes, sir.

Q. How far is that from Eatontown? A. About seven miles.

Q. You have lived there for some time? A. Yes. Quite some time. Since 1909, I think.

Q. Did you have occasion, prior to this accident on May 11th, 1942, to go by the Eatontown Station very often? A. Yes.

Q. You were familiar with that, were you? A. Very familiar with it.

40 Q. Were you familiar with the Lewis Street crossing? A. Yes, I was.

Fanny Snyder—Direct.

Q. How about the Tinton Falls bridge, did you know where that was? A. Yes.

Q. Now, on the occasion of this accident, were you anywhere near the scene of the accident? A. Yes. My husband and I started to go to West Long Branch, and I wanted to stop to my sister's, and she lives in Eatontown, so we took that short cut across by the Eatontown Station. 10

Q. Were you driving, or was your husband driving? A. I was driving. And my husband, who was quite deaf, he said, there is a train coming. So I pulled up aside the road, but looked in the mirror, and I didn't see anything coming, and I pulled up at the side of the road and stopped.

Q. Just a minute. Which side of the tracks did you stop on? A. On the west side. I hadn't crossed the tracks. 20

Q. Do you recognize this photograph that I show you marked D-7, the composite photograph?

A. Yes. I stopped down here (indicating).

Q. You stopped in back of the point shown on here? A. Yes.

Q. Did you have somewhat the view that is shown in the picture? A. Yes, I had a clear view of the track, and over here. The truck was standing over here, facing the incoming train, and we sat there in the car looking at it, and Mr. Snyder spoke about the tile pipe that was in it. 30

Q. How far up the tracks towards Red Bank, or Shrewsbury, could you see? A. Well, when the train first started to blow I couldn't see it at all, but it blew and blew and blew, and it blew so hard I thought it was blowing for me, and it sort of peeved me, and I looked up at the train and said "Oh, come on, I am not going across"; and as I followed the train along, why, the train and truck came right together. I don't know 40

Fanny Snyder—Direct.

how the truck ever got there. I didn't see the truck move at all. But, as the train got up, it hid the view of the truck from us.

Q. How did you happen to stop at that crossing? A. Well, I heard the train blow.

Q. You didn't see it at that time? A. No, I couldn't see it at first, when it first blowed.

Q. Then you say you saw it coming along? A. After it got up close enough I could see it.

Q. Now, as it came down the track, you say it was blowing all the time? A. It seemed to be blowing all the time. Because I thought they were blowing for me, and as I said, it sort of peeved me, and I said, "Well, come on, I am not going across." And then I, of course—as I was looking at the train, why, the train and truck came together.

Q. At the time that the train and truck came together, had the whistling stopped, or was it still going on? A. No. They were blowing. They kept right on blowing.

Q. Then what happened after that, after the collision? A. Well, my husband got out of the car. I didn't. And he went down the track. And then after awhile I got out and stood there, and looked down the track, and I saw the colored man sitting on the bank, and he had some kind of a white rag, and I could see there was blood on it. And there was a little colored girl came along, and I said, "Did the man get hurt"? And she said, "Oh, only a colored man got hurt." And I said, "Didn't the white man get hurt"? She said "There was no white man." So when Mr. Snyder came back I said to him, "Didn't the white man get hurt"? He said, "I guess not." He was running around there, he didn't seem to be hurt. I didn't go up there at all.

Fanny Snyder—Direct.

Fanny Snyder—Cross.

Q. Mr. Snyder is deceased, isn't he? A. Yes.

Q. What was his name? A. Lewis VanDeventer Snyder.

Q. Had either you or he ever been employed by the Central Railroad Company? A. No.

Q. Did your husband hold any official position in Monmouth County? A. Well, he worked for the Monmouth County freeholders. 10

Q. In what capacity? A. Well, repairing, fixing bridges and culverts. But he was mostly at Atlantic, down there about six years before his death. He worked for them twenty-four years.

Q. You gave your name to somebody connected with the railroad, didn't you? A. No. I don't remember doing that at all. Maybe Mr. Snyder did. 20

Q. At least you talked to me about the case? A. Oh, yes, sir; yes. Oh, I thought you meant the day of the accident.

Mr. Tomlinson: Cross-examine.

Cross-examination by Mr. Greenfield:

Q. Mrs. Snyder, about how far up the road were you, from the crossing, when you say you stopped? A. Well, I don't go very close to a crossing when I stop. And the reason why I don't there, you sort of come up grade, and then you either have to hold your foot on the brake, or put on your emergency brake. 30

Q. Well, can you show us, please, can you point out? A. Well, there is a little culvert down there. It was about down by that.

Q. Will you point out to us here, please, where you were, particularly with regard to Lewis Street and the crossing? A. Well, about here 40

Fanny Snyder—Cross.

(indicating), where it says one hundred and fifty feet, well, I was about here.

Q. So that you were about one hundred and fifty feet from the track? A. Well, not quite. I suppose. I was just up from that sign.

10 Q. You are indicating here now right at where the sign is? A. I saw this sign, and there is where it was.

Q. About one hundred and fifty feet. From where you were here could you look in and see the truck at the tracks there? A. Very plainly, yes. There wasn't anything in the way at all. I didn't even notice the box cars. They must have been backing away from the box cars, because he wasn't near the box cars at all.

20 Q. Were the box cars on that track? A. Well, I couldn't say, because everybody has been saying that they loaded their truck from the box cars, so they must have been.

Q. You didn't see them? A. I didn't notice any. I was just looking at the truck.

Q. Were there any box cars on this delivery track, that you remember? A. I don't even remember. I wasn't looking for box cars. So I didn't even notice them.

30 Q. Do you know how far back from Lewis Street the truck was when you first saw it? A. Well, yes.

Q. About how far? A. Well, I really couldn't tell you. But it wasn't so far. It was facing the incoming train, I do know that.

Q. Facing the incoming train? A. Facing the incoming train.

Q. Was there anything on it? A. Yes, there was tile pipe.

40 Q. Could you see that? A. I could see it; yes, sir.

Fanny Snyder—Cross.

Q. Was that tile pipe above of below the top of the truck? A. Well, if it had been below I couldn't have seen it.

Q. It was over the level? A. Yes, they must have had them up, so I could see it, because the tile was up there where you could see it. I presume they had sticks, or something up there, so you could see it. Had it been away down in the bottom of the body I couldn't see it. But it was up where I could see it. 10

Q. Who was on the truck when you saw it? A. I saw the white man, and I thought that there were two white men, because I couldn't see the colored man's head. His head was up in the top of the cab. And I thought there were two white men. But after the accident I discovered that one of them was a colored man. 20

Q. Well, will you come down here, please, if you will, and just point out about where the truck was when you first saw it?

Mr. Tomlinson: I think the witness ought first to have the opportunity of becoming acquainted with the scale of this map. I don't know whether she knows anything about the map or not.

Q. This is Lewis Street, and you were parked up here, you testified. This is the station, on the southeast of the crossing. This is the delivery track, and this is the roadway, and, of course, this is the main track, and trains come in this way, and this is the passing siding (indicating)? A. He was in here, facing this way (indicating), and the back of the truck was to Lewis Street. 30

Q. Would you say how close to Lewis Street the truck was? A. No. I couldn't say that. I 40

Fanny Snyder—Cross.

don't think he was so very far, because I sat over here (indicating), and I could look right at him.

Q. Do you know how big the truck was? A. Well, it was a pretty good sized truck.

Q. Do you know how long it was? A. Well, now, I couldn't say to that. We had a truck of
10 our own. But I couldn't saw how long that was.

Q. How long was it from the time that you saw this truck, facing the incoming train, until the accident? Do you know? A. Well, we sat there looking at it, and we even spoke about the tile pipe, and I really couldn't tell you whether the man moved, or not, because I didn't see the truck move at all, but as I told you before, the train was blowing at such a rate, I thought he was blowing for me, because I was the only one there,
20 and I said, "come on, I am not going across." And as you look at the train, and followed him up, the cab of the truck came right across in front of the train, and hit right behind the cab.

Q. Did you see the truck crossing the tracks? A. No. I told you, as I followed the train along the whole thing come out there right in front of us.

Q. You don't know how the truck got on the crossing? A. No, I don't know how it even got there. I didn't even see it move. That was the
30 mystery.

Q. You didn't see any box cars on the delivery track? A. No, I didn't notice them at all. We were looking at the truck, and I really never noticed them. Probably Mr. Snyder did. I don't know whether he did or not.

Q. Do you know what side of Lewis Street the truck was when it was crossing the track, just before it was hit? A. Well, he was crowding the
40 left side. It seems that when it hit, that is where

Fanny Snyder—Cross.

they were coming was by that sign, where it says "stop, look and listen," or something, railroad crossing.

Q. On the other side of the track? A. Yes.

Q. Had he gone across the track? A. Well, he must have gotten his cab across, because it hit right behind the cab. 10

Q. Did you see him moving across? A. No. I couldn't. I was down the road.

Q. Was there anything obstructing your view? A. Well, you see, when you are on that road, you are going almost the same as the train, until you make the turn to go up over the tracks.

Q. Well, that is a straight road on down, isn't it? A. It might look so to you.

Q. Isn't it? A. Well, I don't know. It looks different when you are there riding on it, and you are sitting on that roadway, in a car, and the train comes along, it sort of comes along to your side. 20

Q. Do you mean to say then that you can't, from where you were, you couldn't see that crossing? A. Yes, you can see it. Mercy, yes.

Q. Why is it that you couldn't see the truck? A. Because the train had gotten up in front of me. You see, the truck was on the other side of the train, and I was on this side. I couldn't see through the train. 30

Q. Well, now, you say that the train hit the truck right behind the cab? A. Yes, I could see that, of course. Haven't you seen it in the movies? That is what it looked like.

Q. Can you tell us how long it was between the time that you first saw the truck facing the incoming train, until the collision? A. No, I could not. I wasn't there to time it. 40

Mr. Greenfield: That is all.

*Fanny Snyder—Redirect.**Redirect-examination by Mr. Tomlinson:*

10 Q. Mrs. Snyder, I show you Exhibit D-6, a photograph, and ask you if that shows the turn in the road, on the west side of the track, that you were talking about? A. Yes. See, I was here, by this culvert here, and you see when the train comes along there, he would see this high side that I was on, and I would see that side of this train.

Mr. Tomlinson: That is all.

20 Mr. Tomlinson: Now, if the Court please, that is our case, with this exception: That there is some testimony here concerning one Whitfield, who was the assistant to Mr. Ousterman, who, at that time, was the agent at the Eatontown station. As Mr. Ousterman has testified, Mr. Whitfield is in service, and not available. I have his testimony, which was taken at the last trial, and I offer it. I don't know whether counsel will object, or not. But, in any event, I offer it.

30 Mr. Greenfield: Just what do you mean by you offer it in evidence? Do you intend to put the transcript in evidence, and leave it in the jury room?

Mr. Tomlinson: No. I will read it into the record. That is what you usually do when you offer testimony.

Mr. Greenfield: That is what I want to know.

Mr. Tomlinson: I thought you knew.

Mr. Greenfield: I have no objection, sir.

40 (Transcript of testimony of Mr. Whitfield read to the jury by Mr. Tomlinson, and cross-examination read by Mr. Greenfield.)

Colloquy.

Mr. Tomlinson: That is all. We rest.

Mr. Greenfield: Well, if your Honor please, I would like to call Mr. Ziegler to prove the correctness of the statement, that was put to Mr. Jones, I believe.

Mr. Tomlinson: Mr. Jones said that that was so. 10

The Court: He said that if it was in the record, that is so.

Mr. Tomlinson: Of course, Mr. Ziegler gave us this transcript of evidence. There is no use of calling him. He has already furnished it. I do not question the authenticity of the record.

Mr. Greenfield: If counsel will admit the statement that I think is in this record, then, of course, I have no objection. But, as it stands now, there is nothing in the record to show what is actually here. 20

Mr. Tomlinson: Sure I will.

Mr. Greenfield: Then I will withdraw that.

Mr. Tomlinson: You haven't any rebuttal?

Mr. Greenfield: No, sir. We rest, your Honor.

ADJOURNED UNTIL 1:50 P.M.

AFTERNOON SESSION, 1:50 P.M.

Mr. Greenfield: I would like to offer the transcript of pleadings in evidence; I offer the original transcript of pleadings, and the amended complaint. 30

(Transcript of pleadings entered in evidence and marked Exhibit P-5.)

Mr. Tomlinson sums up the case for the Defendant.

Mr. Greenfield sums up the case for the Plaintiffs. 40

Court's Charge to Jury.

NEW JERSEY SUPREME COURT

UNION COUNTY CIRCUIT

January Term 1944

10 MENTE BROS., INC., a corporation, SAMUEL BRAN-
HAM, and ROBERT STICKEL,
Plaintiffs,

vs.

SHELTON PITNEY, *et al.*, Trustees of the CENTRAL
RAILROAD COMPANY OF NEW JERSEY,
Defendants.

20 Court's Charge to the Jury in the above
entitled cause, by HON. FRANK L. CLEARY,
Circuit Court Judge, as follows:

Ladies and Gentlemen of the Jury:

This is an action brought by these three plain-
tiffs against the defendant, seeking to recover
damages arising out of an accident that occurred
on May 11th, 1942, somewhere in the Borough of
Eatontown, down in Monmouth County, in this
State, at a railroad crossing down in Eatontown,
which I am not going to attempt to describe to
30 you because, in the first place, I don't know about
it, and you have pictures which you will take
in the jury room, and you have the map to show
you the exact location; you have had it described
by counsel and by the witnesses, so that you are
more familiar with the topography of it than I
am. Suffice it to say that on that day, some time
in the evening, a truck belonging to one of these
plaintiffs, and driven by another of the plain-
40 tiffs, and in which the third plaintiff was rid-

Court's Charge to Jury.

ing, was struck by a train of the defendant company, at this crossing, and as a result of that some damage was sustained by each of the passengers, the driver and the other rider, and also some damage to the truck; and for those damages the plaintiffs are seeking recovery.

Now, it may be that some of you have had experience heretofore on juries, it may be that you have not. To those of you who have it may be that what I say to you might seem like repetition, but for others of you who are serving perhaps for the first time, it seems to me important to try, as best I can, to simplify the issue that you have to determine, so as to relieve from you, as laymen, any thought that might exist in your minds that you have a very difficult problem to solve. You may think that this kind of a problem is curtailed and surrounded, if you will, by certain technicalities, which are above the layman's understanding. But when you get down to the vital issue in these cases you will understand what I mean when I say to you that this is a very simple problem, after all is said and done. You start out with certain law governing these kind of cases, and that law you take from the Court. You must take it, whether it is right or wrong, you must take it, because otherwise anything could happen; if you had the right to determine whether the law, as the Court gives it to you, is right or wrong, why, chaos would result. So we have a system whereby we try these kind of issues. Two people become involved in a controversy and they cannot get together on it, they cannot agree upon it, because their ideas of how it occurred, and what caused it, and so forth, are entirely different. And they

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Court's Charge to Jury.

go to the most logical place in the world to have it settled, that is to a court room; there they find two people, one a jury—and I speak of you collectively as one, for the purpose of what I am saying now—and the other a Court; and they go in and they get a Court and a Jury who are

10 both entirely disinterested, who know neither of the parties, who have never heard of the story before, and who are not personally interested in any way by the stories told by the different parties; and they get that jury selected carefully from men and women whom both counsel satisfy themselves are not to be embarrassed, even by being asked to serve, if and when they know any of the parties, and they select you carefully, and they find twelve men and women whom they are

20 satisfied will have no particular interest in the case, other than to determine what they think are the real facts in that case, and they select a jury. And then the Court is provided, or appointed, to sit and preside over certain questions of law; and then we have two entirely different functions, you being the sole judges of the facts, and the Court being the sole judge of the law. So when a question of fact is to be determined, the Court could not decide it if he wanted to;

30 it is not his prerogative. When a question of law is to be determined, the jury could not decide it. So when two separate, distinct, and entirely different stories are told by parties involved in a case, that raise a fact question, not a law question, the Court, if it wanted to, could not say, I think so and so is the fact; or, I think so and so is the fact, on the opposite side; any more than you could say, when counsel would rise and say "I object," the Court has to pass

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Court's Charge to Jury.

upon it, because that is his prerogative. So you are here as disinterested, total strangers, to decide what? Under your oath of office to decide what you honestly believe to be the facts of that particular case, regardless of who the parties may be involved in it. And the law, as I say, you must take, whether you agree with it or not, the law as the Court gives it to you, and my province is to tell you what the law is governing these kind of cases, and then submit the facts to you for you to determine which set of facts you believe to be true. 10

So you start out, and I said a moment ago that the issue, when you get down to it, stripped of all its verbiage, legalities, technicalities, and so forth, resolves itself into a very simple question, which you, as laymen, will have no difficulty in determining, I am satisfied. 20

You start out in this kind of a case with this idea in mind, that the mere happening of an accident, and its resultant damage, do not of themselves entitle anyone to recover; and you can readily see why that is, as laymen, you can see that if all that was necessary in order to justify a recovery was that there was an accident, and that as the result of that accident someone suffered damages, then there would never be any case to try, because nobody ever disputes, or hardly ever, certainly no one does in this case, that there was an accident; and if the mere proof of the happening of an accident, and the mere proof that as the result of that accident, someone suffered some damages, were all that were necessary, why, we would be through in the first two minutes in which a case starts; and it would result in the law being then that no matter what 30 40

Court's Charge to Jury.

caused the accident, no matter who was responsible for it, that its mere happening, and its mere damage, would justify a recovery. Well, of course, you can see, as laymen, that that could not be so. Those two things are necessary, of course, to exist; there must be an accident and there must be damage; but they are not of themselves of any importance, until the third and vital question in a given case is determined, and that is, who was responsible for causing the accident. Was the defendant, the party that is in court on the day in question, negligent, and was its, or his, or her, negligence the proximate cause of the happening of the accident? Now, you see, if that is not so, then there cannot be any recovery, regrettable as the accident may be, or the injury may be. In other words, if two people happen to get into an automobile accident, certainly the first one who runs into court to sue the other cannot recover, because if he could, it would mean the other fellow was an absolute guarantor of the safety of everyone on the highway. Before he can recover he has to do more than just prove that he had an accident; he must prove you were responsible for it, you caused it, you were negligent and, therefore, you are responsible. That is what the plaintiffs in this case have to do. Nothing peculiar to this case. It is the same in every case. Just the same question here as in every negligence case that has ever been tried; the person who seeks recovery has the burden placed upon him by law of proving to a jury's satisfaction, by the greater weight of the believable evidence, by a fair preponderance of the evidence, has to prove to that jury not only that an accident happened, because that is

Court's Charge to Jury.

conceded; not only that as the result of that accident he suffered damages, because that is conceded; but third, and most important of all, that that accident and its resultant damage were caused proximately by the defendant who is in court that day being negligent, and that negligence proximately causing the happening of the accident. 10

Now, I say to you, you have to prove it by a fair preponderance of the evidence, by the greater weight of the evidence. And you say to me, how do you do that? By the greater number of witnesses? Not necessarily so. We do not measure evidence by numbers, we weigh it by the credibility to be given to it. So, if it were not so, again, all that any party in a suit would have to do would be to have the greater number of witnesses, in order to have the greater weight. That could not be so. It might be so, but it does not necessarily follow that it is. But you have to determine that from the different witnesses on each side, all of them on each side of a given case. First of all, you observe their manner of testifying, their attitude, whether they are evasive, or whether they are willing to testify, and so forth, and you form an impression, and from that impression you give some weight, whatever it is, one way or the other. Then you take into consideration the interest of witnesses in a given case, and without attempting to question the integrity, or the opinion, you have a right to take into consideration the human equation, or interest in the outcome, so that as between two witnesses on each side of a given case, one vitally interested in the outcome, and the other disinterested, only in court because he or she has to 20 30 40

Court's Charge to Jury.

be, it may be that a jury, without questioning the interest or the truthfulness or the integrity of either one, may indeed say that one who has no interest whatever in the result, that more weight might be given to their testimony, because of the fact that the witness who has an interest
10 might honestly be somewhat prejudiced, and their version of it colored by that interest. Again you have to take into consideration, as you hear witnesses called on either side, the opportunity that those witnesses had to observe certain things. And in a given case you take two witnesses, both equally honest, both equally disinterested, if you will, neither one interested in the outcome, just unfortunate enough to be a witness of something which brings him into court; they are here be-
20 cause they have to be; they are both equally honest; but one happens to be in a position where his or her opportunity for observation of what happened is so much better than that of the other, that you say, well, we think they are both honest, but we think this one had so much greater opportunity to observe what was going on, that we think more weight should be given to it. And in all those things, taking that all into consider-
30 ation, then you weigh them, and you say, under the law as given to us by the Court, the burden is upon the plaintiff of satisfying us, by the greater weight of the evidence, that the defendant was negligent. And unless the plaintiffs have borne that burden they cannot recover. If you find yourselves in a position where you find you cannot tell where the weight is, where it is equally balanced, as it were, between the two parties, the plaintiffs would have failed in the duty imposed upon them, and could not recover. They must
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Court's Charge to Jury.

bear that burden, because that is what the law places upon them. If they do, they are entitled to a verdict. If not, they are not entitled to a verdict.

Now, we come down to the question of what is negligence. Negligence has been said to be the doing of something which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do; and that is measured in a case such as this, and is determined by what the duty and the obligation placed upon a defendant, under the law, is. You see, this is a railroad accident case, which is distinguished somewhat from automobile cases at crossings, where each party involved has exactly the same obligation; the obligation to use reasonable care, to be careful, as reasonably prudent persons. But a railroad company has the duty to comply with what the law says it must comply with. And that is all. And when it does that, it has complied fully with its obligation. No more can be asked of it than what the law prescribes that it must do. And when the law gives to the railroad companies the right to lay their tracks and to cross public highways, it specifies what? As a part of that contractual relationship that it must do certain things, under certain conditions. And that is what it must do. If it does that, that is all it has to do. If it fails to do that, and because of that failure causes an accident, then it is liable. And the reason for it is obvious. A railroad company, in the use of these public crossings, cannot exercise the same care, of the same nature as automobiles; it cannot swerve around somebody that it sees coming, it cannot stop at every railroad

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Court's Charge to Jury.

crossing that it comes to, at every road crossing that it comes to, and cannot stop and look around the corner to see if there are any more cars coming. It has a schedule on which it runs, and it knows what its duty is when it starts out. That duty is prescribed by law, and the law says
10 when you start out on your run, wherever you begin and wherever you end, during the course of that run, when you come to a crossing of this nature, this is what you have got to do. And that is what they know they have to do, and that is all they have to do.

Now, something has been said about cars being on the siding. A railroad company has absolute right to place cars as these freight cars were, otherwise, business could not be done. As long
20 as they are only temporary, there is no negligence whatever in putting cars upon sidings to be unloaded, even though in placing them there temporarily they may to some extent obstruct the view of those using the crossing. Does not place any more obligation upon a railroad because of that, than if the cars were not there, because you see if it did, then every time they backed a car up on a siding at a manufacturing plant, or some other place, they would have
30 to do something differently from what they do if that was not there. Now, if they put a permanent obstruction there, if they put a building up, if they put something up there so as that obstructs it, then it may be, under certain circumstances, that the law will say that having created an extra hazardous condition at that crossing, that they then must do more than just what the law says they have to do under ordinary circumstances. If such are the facts, it be-

Court's Charge to Jury.

comes a fact question for a jury to determine whether or not they have created an extra hazard, which, by the creation of it, makes it take more care than what the law requires ordinarily. But that is not in this case at all. All that has been said here is that upon the siding there were railroad cars, for a purpose, directly for a purpose of unloading; that the railroad had a right, but that placed more obligation upon the railroad than if it hadn't done so. If it placed any obligation upon anybody at all, and I do not say that now is upon anybody, it would be upon someone using the crossing, under those circumstances, to require that they perhaps, in the exercise of reasonable care, might have to be a little more careful than they would if the view was clear all the way down the track. But no penalty can be attached to the placing of cars upon the siding temporarily, and for the particular purpose of loading or unloading. And I again disabuse your minds of that as being a feature in the case as far as any obligation upon the railroad company is concerned at all.

There has also been something said about signs in this case. I do not see the significance of that, or the application of it in this case at all, because the signs which the law requires, there is no question about; that is the warning sign of the railroad crossing, stop, look and listen, whatever they say. There is a question as to a sign put up as a precautionary measure, so they say, a protection for those using the crossing. But the strange part of this situation to me, as I see it, is that there seems to be some suggestion that that was negligence in not having those signs so they were legible. Well, cer-

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Court's Charge to Jury.

10 tainly if they were illegible, no one could be misled by them at all. If a person comes into court and says, you put up a sign which misled me; I know you didn't have to put it up, but you put a sign up there, on which you said on that sign that this crossing would be protected and
 20 is protected at all times by a watchman; I read it and I relied upon it; and you didn't give that protection. You led me into a false sense of security and, therefore, you are liable. I agree with that, that would be so. But how anybody can be heard to say that I could not read your signs and, therefore, I was led into difficulty, I can't understand that at all. I don't see any significance of those signs in the case at all. They didn't have to be there. Any obligation to
 30 put them there I think could be limited to any extent to which the railroad wanted to limit them. No flagman was required there. If a custom existed whereby a flagman was put there, then people have a right to rely upon it. They could put a flagman there, they could limit the period they wanted to, and give notice of that. During those periods people would have a right to rely upon it. During other periods nobody has a right to rely upon it. I see no significance to
 40 that sign business at all, it has nothing to do with this case, and you will get back to the question involved here, was the railroad negligent? The railroad was negligent if it failed to give the statutory signals which the law requires. The railroad was not negligent if it did not fail to give those signals. And hence the question, as far as the defense, or the defendant's negligence in this case, and the fact for you to determine is, did they give the signal, or didn't they.

Court's Charge to Jury.

Not trusting to my own memory of what the statute is, let me read it to you: The railroad company is required by the law to meet certain requirements. The railroad has to do what the statute and what the law says it must, and when it has done that, it has done all that the law requires of it and, of course, it would be ridiculous to say that the law says this is what you must do, and you did it, but, nevertheless, we think you are responsible. You have to be practical about these things, and you have to do that, at railroad crossings, grade crossings of this nature, certain things, and that is all that can be done, and if they are done, well and good; if they are not, and because of their not having been done, you find that it was negligent not to have done those things, then it could be said that a recovery could be had. 10 20

The law says this is what a railroad company must do at this kind of a crossing: I am not going to read the whole section of the law, but only that part which is applicable: "A bell of the weight of not less than thirty pounds shall be placed on each engine, and rung continuously in approaching a grade crossing of a highway, beginning at a distance of at least three hundred yards from the crossing"—that is nine hundred feet—"and continuing until the engine has crossed such highway; or a steam whistle shall be attached to each engine and be sounded, except in cities, at least three hundred yards"—nine hundred feet again—"from the crossing, and at intervals until the engine shall have crossed the highway." That is what the law says a railroad must do. It must have a bell of this type, operated in the way I have explained to 30 40

Court's Charge to Jury.

you; or, it must have a whistle, operated in the manner in which I have outlined to you, under the statute; one or the other. Not both, not necessarily both; it does not have to have the bell ringing and the whistle blowing, other than is in this requirement. If it has one or the other,
10 and operates it in the manner in which this statute requires, then it has complied fully with its duty, and no responsibility can be had for it afterward.

Now, it is obvious, as I have told you, there must be some prescribed rule. Knowing that a railroad has to stay on the one pathway, knowing that during the course of that operation it will cross public highways, there must be a standard rule or law as to what its duty is. That is
20 fixed by statute. If it meets it, it would be ridiculous to say, that you having complied with the law, that because an accident happens, they have to pay for it. It would be just as ridiculous to say that having failed to comply with the law, and thus by that failure proximately caused an accident, it should not have to pay. It is just a strict, sensible, business proposition.

Because one party is an individual, and the other a corporation, cannot make a particle of
30 difference to you. You cannot find a verdict against a corporation because it is a corporation, on one side, or the other an individual; or you could not say, well, I am interested somewhat in corporations, I have some investments there, or some investments in a given corporation, I will not find a verdict against them. One would be just as bad as the other. If that were ever followed to any logical conclusion, there would be no justice at all. So you do not ever look as to
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Court's Charge to Jury.

whether or not a corporation, or individuals, are involved in a given action. You just take the facts and you say to yourselves, we don't know the parties, nor care anything about them, we will do our duty as we see it. That is all we can do. So when you go into the jury room your first question will be, from all the evidence in this case, do we believe this defendant was negligent? Your answer again will be, they were negligent if they failed in the duty which the law imposes upon them. They were not negligent if they complied with that law. We find they did, or did not, as the case may be. If you find they did comply with the law, then you must bring in a verdict in favor of the defendant and against the plaintiffs of no cause for action. If you find that the defendant failed in its duty, and was negligent, and that that negligence was the proximate cause of the happening of the accident, then you have another step to take, which is the second defense interposed here.

You see the first defense that the railroad offers is absolutely no negligence on their part, because of the fact that they complied fully with their duty and obligation. Secondly, they say that the plaintiffs themselves, even if they find that the railroad was negligent, if you should so find, which they don't admit, but they say, even if you should find that, the plaintiffs contributed to the happening of this accident by their own negligence; they didn't exercise the care that a reasonably prudent person would, they helped cause it, at the very best that can be said for them, they helped and contributed and, therefore, they cannot recover. Of course, under the law, in such a case there could not be any recovery,

Court's Charge to Jury.

because contributory negligence, if it is found to exist, is an absolute bar to recovery, in this State; and that regardless of the degree. For instance, if you find two people involved in an accident, and find that both contributed to its happening, but say one contributed to a greater degree than
10 the other and, therefore, we will give a verdict which represents the difference between those two degrees. You cannot do that. Any negligence of a contributory nature, that is a proximate cause of the happening, that is, without which it would not have happened, is a bar to recovery. So, if these plaintiffs were guilty of carelessness and of negligence contributing to the happening of the accident, they could not recover, even though the defendant was guilty of
20 negligence.

If you come to that question, then you take up the people in that car, what their responsibility was. One of them was the driver of the car; if he was guilty of contributory negligence, if he was guilty of negligence which contributed to the happening of the accident, that might not affect the other passenger in the car at all, because his negligence would not be attributable to the other man; but it would be absolutely attributable to
30 the owner of the truck, because he was the agent and servant of the owner. And the owner of this truck can recover only, under no circumstances, except and unless the driver of this truck can recover. Because the owner of the truck was not there; the owner of the truck was there only through his agent and servant, operating as such. If his agent and servant was responsible for the happening of the accident, obviously the principal could not recover. So that if the driver of
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Court's Charge to Jury.

this truck is found to have been guilty of negligence contributing to the happening of this accident, it would be an absolute bar to both himself and to the owner of the truck. But it might not be to the colored man, who was a passenger. It has been said here, as I recall it from hearing the argument, that under no circumstances could the colored man be said to be guilty of contributory negligence. That is not so. He, too, had a duty; not the same kind of a duty, of course, as the driver of the truck, not that he would be responsible for anything that the driver of the truck did, but everybody has to exercise reasonable care, and if he failed to do that, if observation on his part, if reasonable care on his part would have provided an opportunity to him, or to anyone else, to observe any danger that might exist, and which afterward developed, and he failed to exercise reasonable care in determining that danger, then he too, of course, could be guilty of contributory negligence; not as a matter of the other man's being charged to him, but solely upon his own account, as a party to the suit.

So your verdict might be one of three kinds, at least. It could be a verdict in favor of all three plaintiffs and against the defendant, because of the fact that you find the defendant to have been guilty of negligence, and the plaintiffs free of any contributory negligence. It could be a verdict in favor of one of the plaintiffs and against the defendant, because of the fact that you found the defendant guilty of negligence, and the one plaintiff not guilty of negligence. If such should be your verdict, you would have to find

Court's Charge to Jury.

in favor of the defendant and against the other two.

10 Or your verdict might be in favor of the defendant and against all three plaintiffs, of no cause for action, because of the fact that you found either of two things existing: Either that you found that the defendant was not responsible for it at all, in that it had complied fully with the duty which the law imposed upon it; or that you found that even if it had failed to some extent to do that, that the plaintiffs had contributed proximately to its happening, and that all were responsible for it. If such is your verdict, that would end your duty, of course. You would find a verdict of no cause for action, and that is as far as you would go.

20 If you find in favor of the plaintiffs, or any of them, if you find for all three plaintiffs, or even for anyone of them, then you have one more step to take in the case; because if the plaintiffs, or any of them, are entitled to a verdict, they are entitled to be compensated for what loss they sustained, for what damage they suffered, and you would have to take up each one individually. The driver of the truck would be entitled, if at all, to be compensated for the pain and suffering that he underwent, as a result of the accident, and I think that was rather trivial; I have forgotten it, and I will not quote upon it, because it has been since Thursday, and I have forgotten it. Counsel has called it to your attention. For any doctor bills that he may have had, if there were any, and for any moneys that he lost. The same thing is true of the colored man, if entitled to a verdict he would be entitled to be compensated for pain and suffering, for any losses that

Court's Charge to Jury.

he sustained in the way of wages during any period when he was out of work as the result of this accident, and for any doctor bills or hospital bills that he might have paid. I don't recall what they might have been.

The owner of the truck, if entitled to a recovery, would be entitled to be compensated for, 10
as a first proposition, what is not ordinarily and technically speaking the measure of damages in a case, but which is admitted here to be, the cost of the repair of his truck. The real measure of damages is the difference in value of a truck before and after the happening of an accident. What it was worth just prior to it, and what it is worth right afterward, in its damaged condition, that is the real measure of damages. But 20
if in a given case, counsel on both sides, for the purpose of mitigating damages, or otherwise, wish to submit that the measure of damages, if any, should be the cost of the repair, as here, that is the element, and that seems to be the sum of \$1,514.95. That is the cost. Now, in addition to that, upon the truck there was some material, which was destroyed, and that is agreed to be the sum of \$98.91.

And there is an element here upon the question of hiring another truck, during a period of 30
five days, to take the place of the truck that was under repair. I have permitted that, only if and when he is entitled to recover anything. I charge you directly that you are not to consider, so as to make it perfectly clear, and have the record clear, the question of what it would have cost him if he had gone out and hired another truck for the one hundred and twenty-one days in which this truck was under repair, you are to dis- 40

Court's Charge to Jury.

regard and not take it into consideration. You cannot do it. I make it as clear as this, so as to make the record positive for counsel, as I have indicated, to take his own exception to it, and have his record clear. That is not an element of damages in a case of this kind, for a man to simply say "I didn't hire." If, under a different set of circumstances, a man has a truck damaged, and proves, as they did here, that in the exercise of reasonable care it required him three months to get it repaired, and if in the meantime he shows that his business is of a certain nature, that he absolutely needs the truck, and that during that period he went out into the market and hired one at a reasonable rate, whatever the market was, to do that work, and charge up the cost of that, that may be done, in mitigation of his damages, if he proves it. But to simply take the truck, as here, have it in a shop, and come in and say I didn't hire another, I didn't pay for another, but I would like to be paid twenty dollars a day, or whatever the cost of a truck would be, if I had gone out and hired it. You are to disregard that entirely. It is not an element of damages. His damage, if he is entitled to any, would be the cost of the repair of his truck, the damage to the material on the truck, and then the five days which it cost him to hire another truck during that period, to take the place of the other.

I have spent a lot of time with you on this case, longer than I intended, and I don't know whether I have accomplished what I started out to accomplish, or not, namely, an attempt to simplify the issue for you, to show you what you had to do, to disabuse your mind of any thought that you had a difficult proposition. Maybe I have made it

Exceptions to Charge.

worse. Maybe I have made it seem more difficult, more complicated. I hope not. But I do know this, that when you go in, all you have got to do, starting out, is to say this: Forgetting all about every other thing in the case, except the question involved, was this accident caused by the negligence of the defendant? If yes, then they are responsible for it, unless the plaintiffs helped it themselves. If they were not negligent, then, regrettable as it may be, if they complied with what the law requires of them to do, then, regrettable as the accident may have been, no recovery can be had. That is your simple question. I am satisfied that you will do your duty, as you see it, and return a verdict which represents what your honest opinion of those facts may be. Now, when you have done that, you will have complied fully with your duty.

You may take the case and retire.

Mr. Greenfield: For the purpose of the record I would like to take certain exceptions.

(Jury retired.)

Mr. Greenfield: Your Honor spent a lot of time with regard to what the duty is, and what the statute says. I don't think that the statute is exclusive of the common law duty to use due care, and that the mere fact they blow a whistle does not discharge the duty of the railroad. I believe that in addition to blowing the whistle, or ringing the bell, as called for by the statute, there must also be the exercise of reasonable care. For example, I think that if a truck were stalled on the railroad tracks, and the engineer could, in ample

Exceptions to Charge.

time, stop the train, he could not be said to not be negligent merely by blowing a whistle. He has to do what he can in the way of using reasonable care.

The Court: I think that is right.

10 Mr. Greenfield: So, too, in this case, where the truck was approaching a crossing, according to the testimony, the railroad and the engineer are both chargeable with the use of reasonable care, and merely blowing the whistle, or ringing the bell, of and by themselves are not the discharge of the full duty of the railroad.

Mr. Greenfield: And I take exception, your Honor, to all those portions of your Honor's charge which state that the railroad is not negligent if it did give the necessary signal.

20 Mr. Greenfield: In addition thereto I take exception to those portions of your Honor's charge that specifically direct the jury not to consider what it would have cost to hire a truck for the length of time that this truck was laid up, in view of the fact that there is uncontroverted testimony that a truck was needed, that an attempt was made to hire one, that all the trucks seem to have been in use, and that it was impossible for the owner of the truck to hire a truck for more than 30 the five days that he actually did. And I might say, sir, that from your Honor's statement as to what your Honor would allow, it was my impression that upon merely showing that an attempt was made to hire a truck, that the jury could consider as part of the element of damages.

The Court: If that case you had is good law, you are right about it. That is the reason I wanted to make it clear. I do not agree with it, but

Exceptions to Charge.

that is the law, as you see it, from that case, and if you are right about that, if that case is good law in this State, you are exactly right. I do not agree with it, but it may indeed be. That is the reason I gave you an opportunity to get your exception on record, as squarely as I could put it.

Mr. Greenfield: All right, sir. And I think that your Honor has failed to charge the jury that in addition to merely blowing the whistle, or merely ringing a bell, as the statute calls for, they must use due and reasonable care, as they were chargeable with, or as anyone would be chargeable with under the common law, and I respectfully request that your Honor allow exceptions to those portions of the charge, and to your Honor's failure so to charge.

The Court: You may have your exception upon each point that you have raised in the case.

Mr. Greenfield: And that applies to the various portions of the charge governing the issue?

The Court: To each one, yes.

Mr. Greenfield: Thank you, sir.

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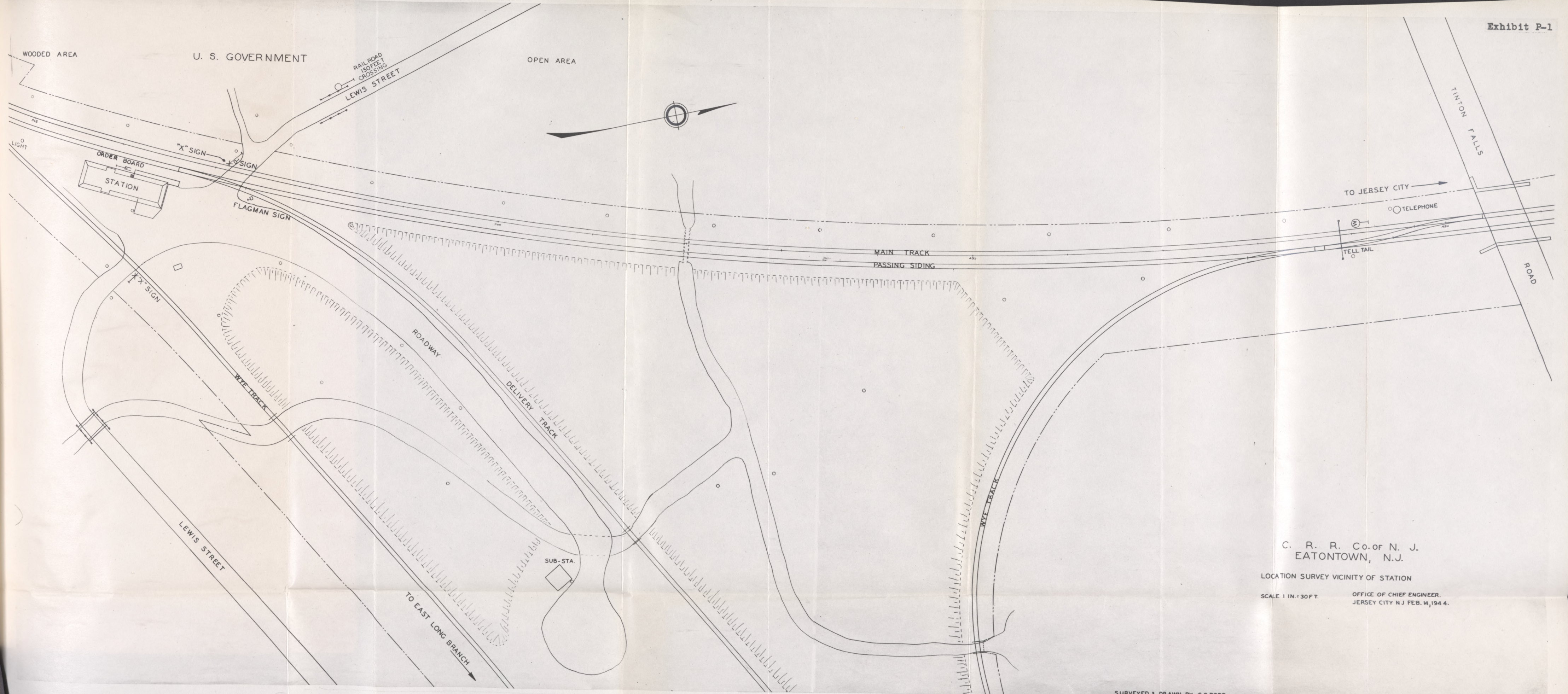
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Exhibit P-1.

Photostat—Inserted on opposite page.



C. R. R. Co. of N. J.
EATONTOWN, N.J.

LOCATION SURVEY VICINITY OF STATION

SCALE 1 IN. = 30 FT.

OFFICE OF CHIEF ENGINEER,
JERSEY CITY N.J. FEB. 14, 1944.

Exhibit P-2.

Bills Payable Weekly
In Advance

Long Branch, N. J.
August 31, 1942

Mr. Samuel Branham

10 To MONMOUTH MEMORIAL HOSPITAL, Dr.

To Services Rendered,
Board and Nursing 5/11/42 ti 5/20/42
7 days @ \$5.50 38.50
2 days @ \$5.25 10.50

Special Nursing
Operating Room Anaesthesia
Delivery Room
X-Ray

Laboratory Work XX 5.00
20 Miscellaneous Drugs 4.20

Total Charges \$58.20
Less Payments to Date
Balance Due

“Please Return This Form with Remittance.”

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Exhibit P-3.

Telephone
Unionville 2-2022

New York
New Jersey

HARRY SHALLCROSS EXPRESS

Box 45 Kenilworth, N. J.

M Mente Bros., Inc., Kenilworth, N. J.

Date Sept. 1942 10

Date	Name	Order No.	Wt.	Pcs.	Rate	Amount
9/1/42	Hired truck	1 day				20.00
12	"	"	"			20.00
20	"	"	"			20.00
						60.00

Paid
Harry Shallcross 20

Telephone
Unionville 2-2022

New York
New Jersey

HARRY SHALLCROSS EXPRESS

Box 45 Kenilworth, N. J.

M Mente Bros. Inc., Kenilworth, N. J.

Date May 31, 1942 30

Date	Name	Order No.	Wt.	Pcs.	Rate	Amount
5/15/	Hired truck	1 day				20.00
18	"	"	"			20.00
						40.00

Paid
Harry Shallcross

Exhibit P-4.

Dr. John E. Maher

MONMOUTH MEMORIAL HOSPITAL
Long Branch, New Jersey

Date Sept. 1, 1942

10 Name of Patient Mr. Samuel Branham
Room or Ward
Bill to
For Services Rendered

Date	Description	Charges	Credits	Balance
	Professional Services			
	May 11, 1942 to May 20, 1942			
	Emergency treatment	\$25.00		
	9 visits @ \$3.00	27.00		
20	Total	\$52.00		

Pay Last
Amount in
This ColumnAll Accounts Payable Weekly in
Advance Without Exception**Exhibit P-5.**

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This is the original transcript of pleadings and
the Amended Complaint printed at page 9.**Exhibits D-1 to D-16 Inclusive.**

Photostats—Inserted on opposite page.

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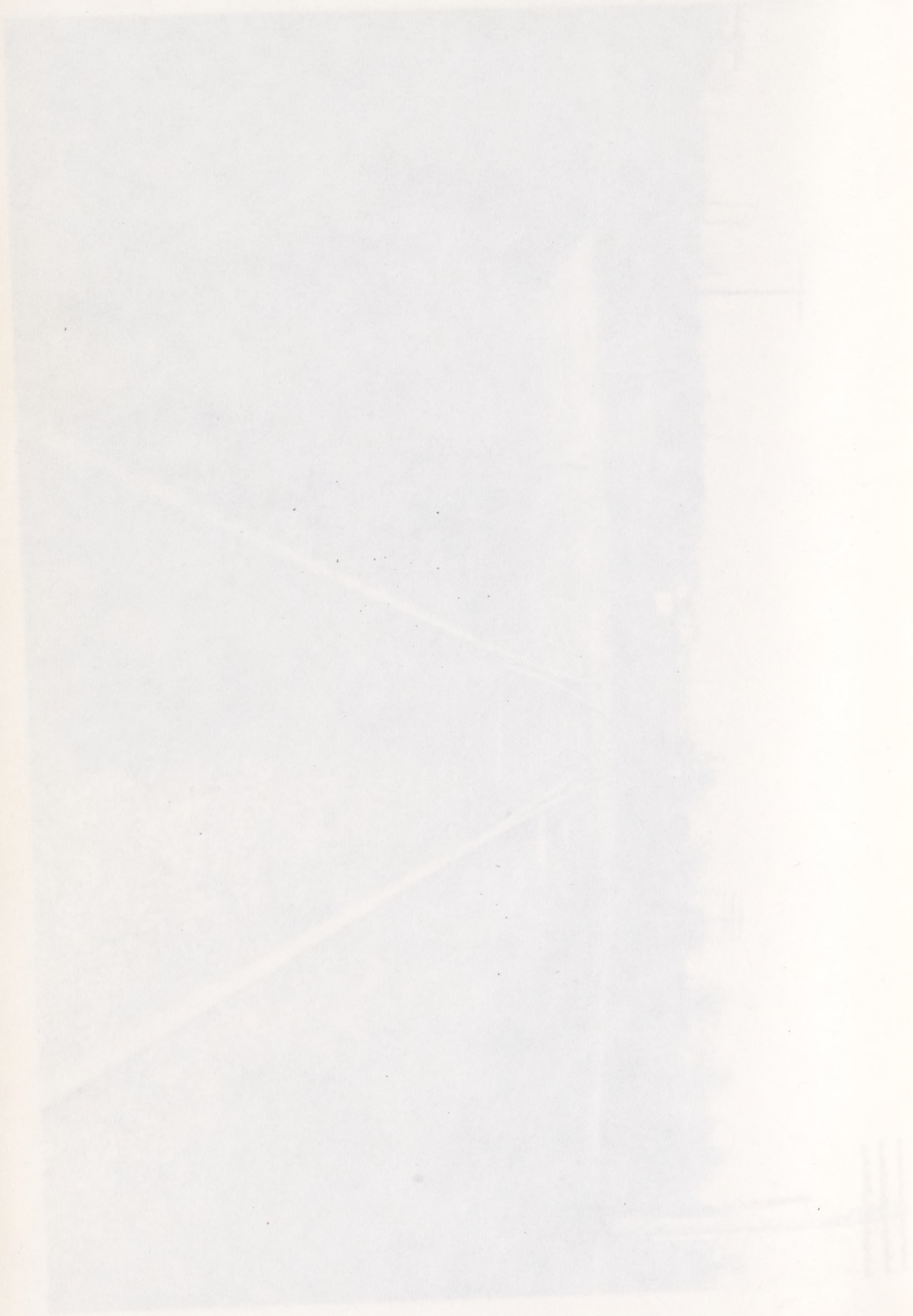
Exhibit D-7







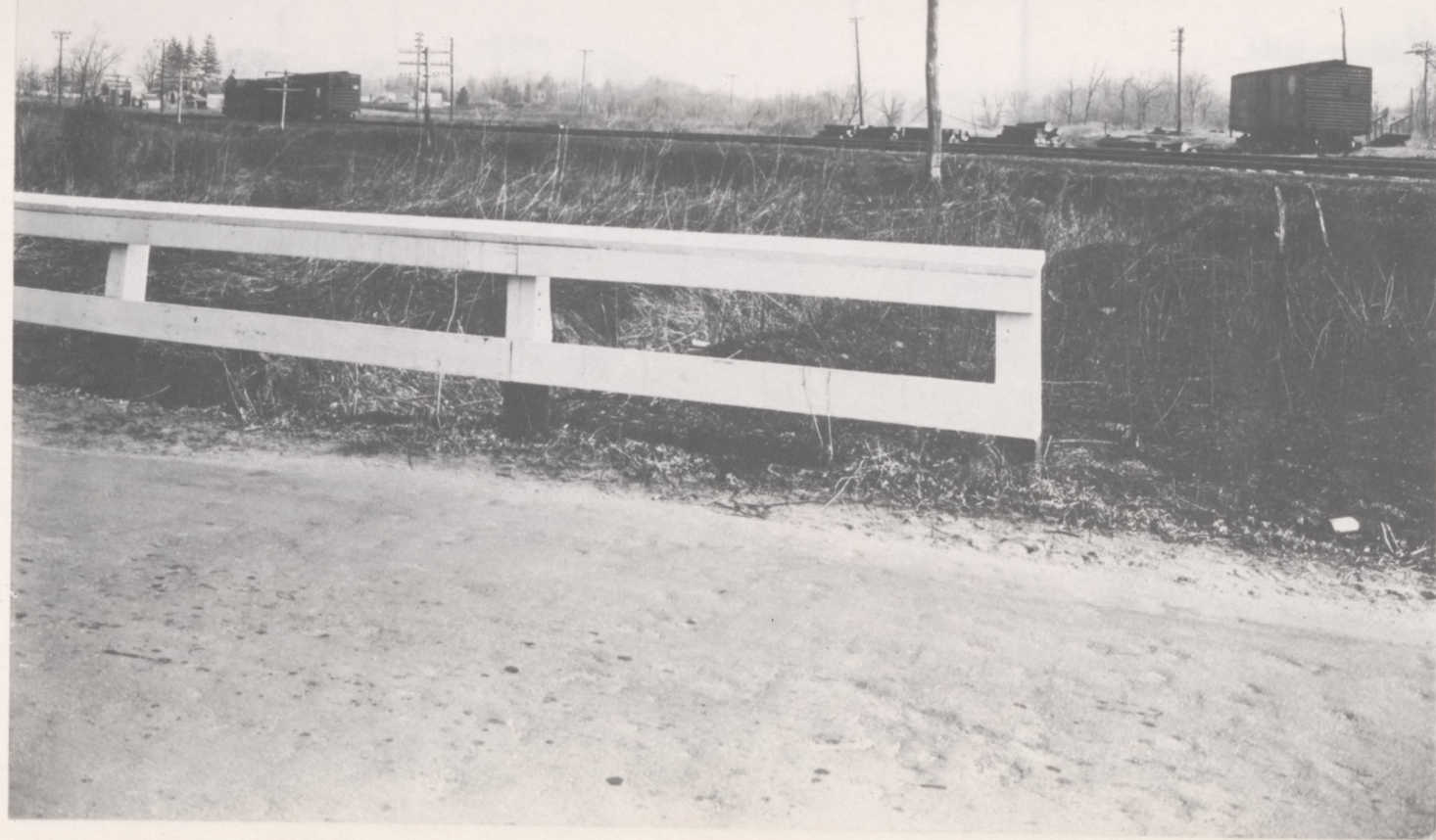
















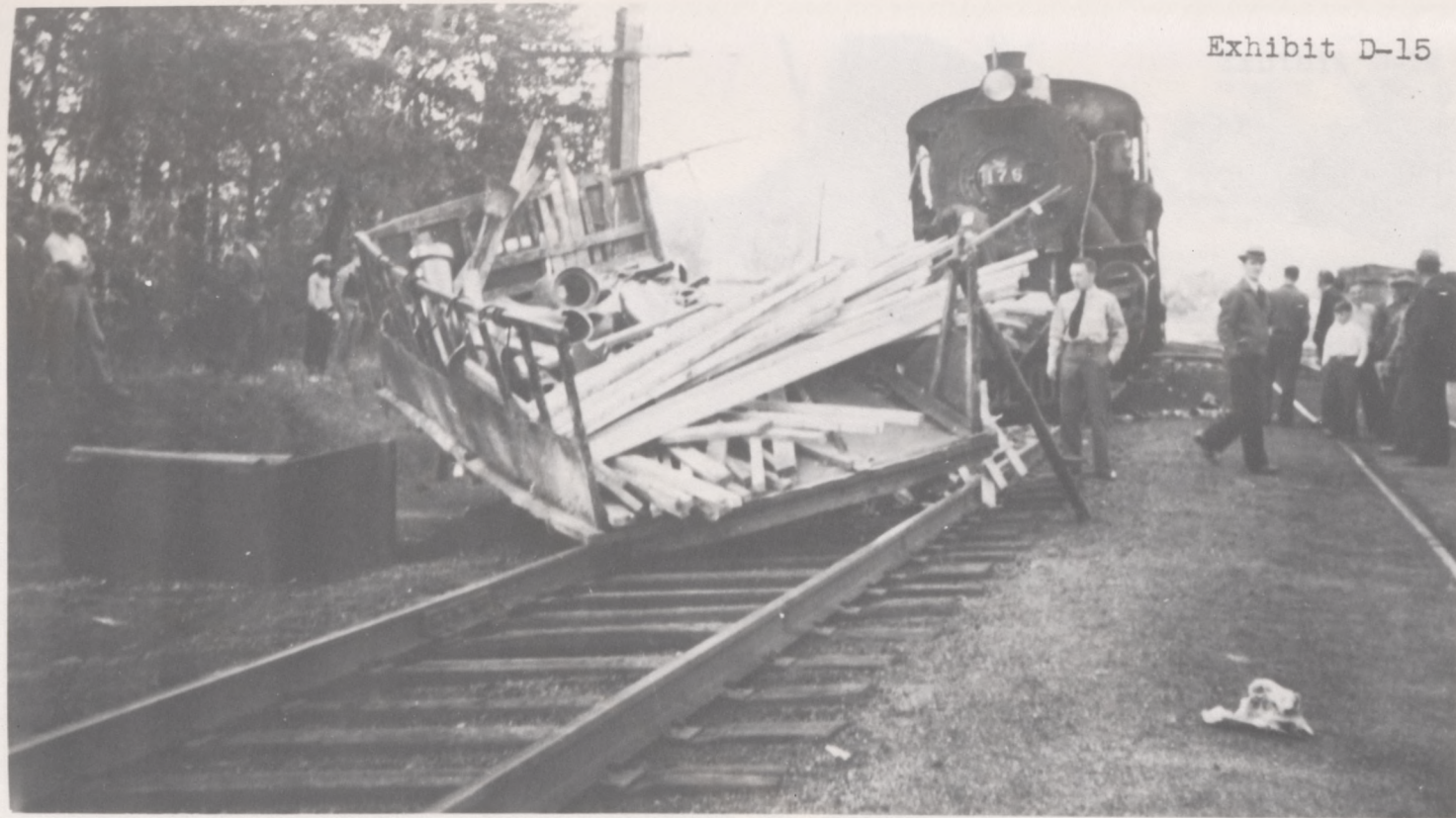
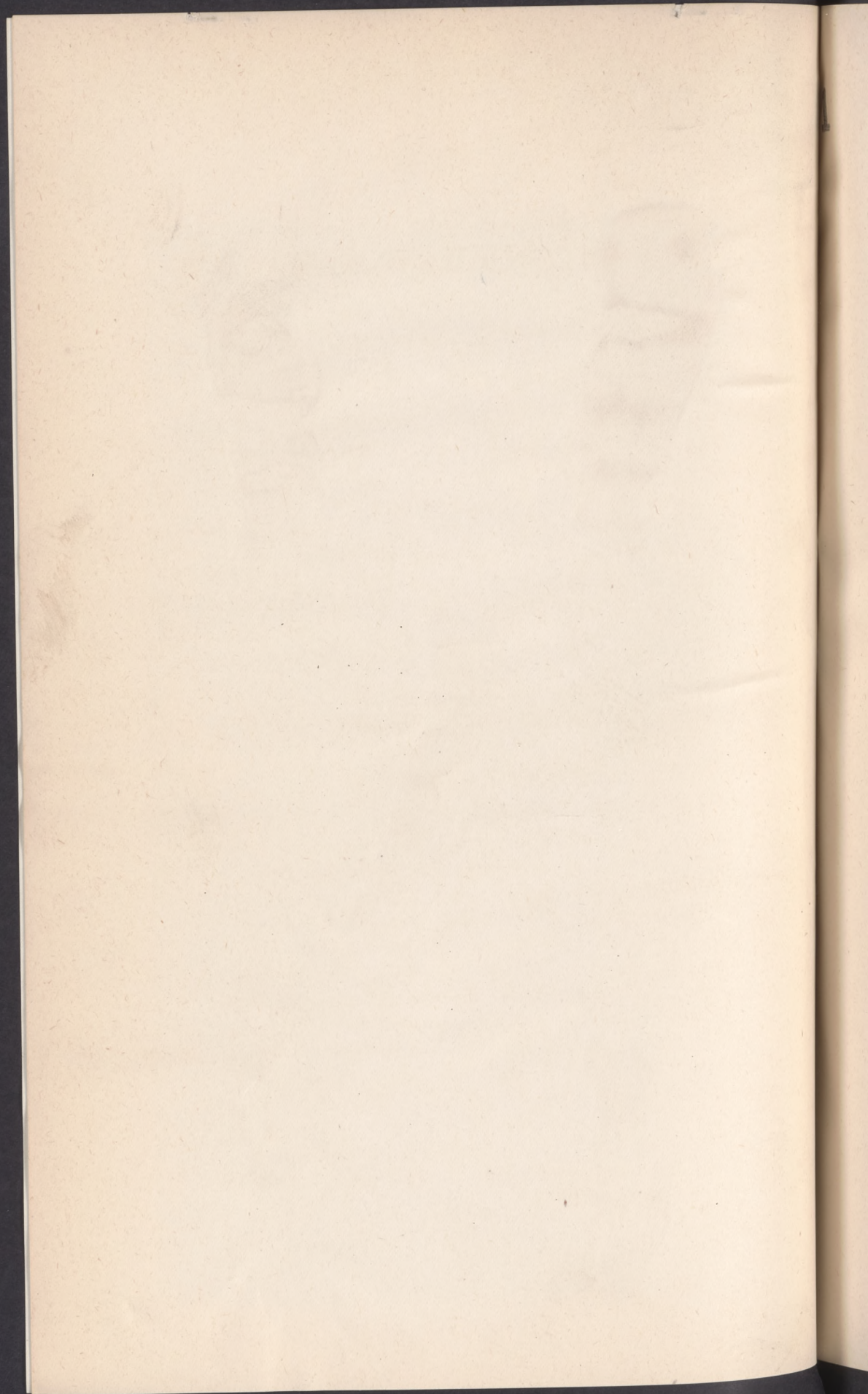


Exhibit D-15



Exhibit D-16





FEB T. 1946

New Jersey Court of Errors and Appeals

MENTE BROS., INC., a corporation,
SAMUEL BRANHAM and
ROBERT STICKEL,
Plaintiffs-Appellants,

VS.

SHELTON PITNEY, *et al.*, Trustees of the
CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Defendants-Appellees.

Action at Law.
On Appeal from
New Jersey
Supreme Court,
Union County
Circuit.

Sat Below:
FRANK L.
CLEARY, C. C. J.

BRIEF IN BEHALF OF PLAINTIFFS-APPELLANTS.

Preliminary Statement.

The matter was first tried before a jury on March 13, 14 and 15, 1944, before Honorable FRANK L. CLEARY, Judge of the Union County Circuit Court. The jury returned a verdict in favor of the plaintiff, Mente Bros., Inc. in the sum of \$5,500.00; in favor of Samuel Branham in the sum of \$1,000.00; and in favor of Robert Stickel in the sum of \$1,000.00. The *ad damnum* clause in the complaint asked damages in behalf of Mente Bros. in the sum of only \$2,500.00. The three verdicts were set aside on a rule to show cause and the cause was retried before the Honorable FRANK L. CLEARY and a jury on June 14, 15, and 19, 1944. A verdict was rendered in favor of the defendants, and against all plaintiffs, of no cause of action.

It is from the judgment entered herein that the plaintiffs, Mente Bros. Inc., Samuel Branham and Robert Stickel, appeal to this tribunal.

Facts.

On May 11, 1945, defendants' train collided with the truck of the plaintiff, Mente Bros. Inc., thereby injuring Robert Stickel, the driver and Samuel Branham, his helper, and demolished the truck and its load.

The collision took place at the Lewis Street crossing at Eatontown, New Jersey, where the tracks of the Central Railroad Company of New Jersey cross Lewis Street. The tracks run roughly north and south. There are two sets of tracks, the "main track" on which run the regular trains, and a "passing siding" that is used to allow one train to get off the "main track" while a train is approaching on the "main track" from the opposite direction. There is a "delivery track" which merges with the "passing track" right at the Lewis Street crossing.

For the plaintiffs-appellants, Robert Stickel testified that he and his helper, Samuel Branham, had been working in the freight yard at the Eatontown freight yard of the Central Railroad Company of New Jersey at the Lewis Street crossing; that there were several freight cars standing on the "delivery track"; that they were unloading tile sewer pipe from the freight cars on the truck and then he, accompanied by his helper, Branham, would drive from the railroad yard on to Lewis Street, thence across the railroad tracks to Camp Woods where the pipe was unloaded. They would then return over the same route to the freight cars for another load (S. C., p. 26, l. 10). The men

worked there doing the same work for about a week prior to the date of the accident (S. C., p. 27, l. 1). They made an average of three round trips across the crossing daily (S. C., p. 27, l. 1). Just prior to the accident they had completed unloading the second freight car on the "delivery track." The front of the first car was about 30 to 35 feet from Lewis Street (S. C., p. 27, l. 31). They had part of a load of sewer pipe and some wood on the truck and they drove along parallel with the freight cars; since there was a hole in the center of the freight yard, Stickel drove straight on to Lewis Street and as he was crossing the tracks he was on the left side of Lewis Street going toward Camp Woods (S. C., p. 27, l. 14). He stopped his truck a few feet from the "passing track" to make an observation (S. C., p. 55, l. 8). He looked in both directions but did not see anything coming and did not hear anything (S. C., p. 27, l. 37; p. 53, l. 11). When he made his observation to the north (the direction from which the train came) he could see only 50 feet since the first freight car was about 30 feet from the crossing and the angle at which he crossed together with the freight car would not allow a greater view (S. C., p. 28, l. 39). The window on his side was open and he had his head out of the cab looking down to his left (S. C., p. 44, l. 28). He was familiar with the crossing and had made the same crossing many times before (S. C., p. 43, l. 25). During the entire time that he worked at the freight yard there was always a watchman or a flagman to flag the crossing every time a train went through and each time the watchman used a long pole or stick with a round sign on it that said "Stop." The watchman would hold that out in the center of the road (S. C., p. 27, l. 17; p. 51, l. 21). When he approached the tracks and started across immedi-

ately prior to the accident there was no watchman or flagman around (S. C., p. 51, l. 16). Stickel did not know that the first tracks nearest him were a "passing siding" but thought they were both "main tracks" (S. C., p. 53, l. 34). He never saw a train stop at the crossing while he was there and never saw a train go through the crossing without a watchman or a flagman (S. C., p. 51, l. 24). There are no gates or mechanical bell or other warning at the crossing. There were two signs on the west side of the "main track," one an "X" and another sign which was illegible. There was no sign near the "delivery track" marked "flagman sign" as shown on Exhibit P-1 (S. C., p. 30, l. 9).

He was crossing the tracks at about four to five miles per hour and just as he got to the "main track" his helper called to him to stop; then he saw the train and attempted to get as far across the tracks as he could (S. C., p. 28, l. 10). At that time the train was mighty close and looked to be on top of him (S. C., p. 31, l. 2). Lewis Street is about twenty-five feet wide at the crossing, and narrows down to about eighteen feet beyond it (S. C., p. 32, l. 9).

Samuel Branham testified he was a helper on the truck driven by Stickel; that he had worked at Eatontown, near the Lewis Street crossing for about a week prior to May 11, 1942; that he had accompanied Stickel to Camp Woods each trip; that they made from three to six trips each way a day. He further testified that he never saw a train stop at the station but did see trains go through. That there was always a watchman flagging the trains he saw (S. C., p. 59, l. 3). Prior to the accident the first freight car on the delivery track was about 30 to 35 feet from Lewis Street; that when they started to cross the tracks

he made an observation and could see only between seventy and seventy-five feet to the right (the direction from which the train came); that the first freight car blocked the view and prevented a view beyond that distance. Branham was familiar with the crossing and saw no train and heard nothing (S. C., p. 60, l. 31). There was no "flagman sign" on the east side of the "delivery track" during the entire week he was there prior to the accident. On the west side of the "main track" and south of Lewis Street were an "X" sign and a "sign." That the "sign" couldn't be read because it was weather-beaten (S. C., p. 61, l. 22).

John Mente testified for plaintiffs that he was called to the scene of the accident and arrived there about 8 P.M. It was a nice evening and it was just getting dark at that time (S. C., p. 68, l. 20). There was no "flagman sign" east of Lewis Street on the night of the accident (S. C., p. 89, l. 9). About a week after the accident he did see one there (S. C., p. 89, l. 11). He could not read the "sign" on the west side of the "main track" because "the letters wasn't painted so you could read it. It was weather-beaten in such fashion that you couldn't read it" (S. C., p. 90, l. 10). They were painted a week later so you could read them (S. C., p. 93, l. 8). The train went right through the middle of the truck and the chassis was bent around the front of the engine, like a "U". The tires were blown, the cab was smashed, the body was smashed, etc. (S. C., p. 69, l. 24). It took 121 working days to repair the truck (S. C., p. 71, l. 39). The truck was finally repaired and put back into use (S. C., p. 86, l. 14). During the time the truck was being repaired, it was necessary to hire another truck. A truck was hired five days and it was impossible

to hire a truck the rest of the time (S. C., p. 86, l. 37). An attempt was made to buy a new truck but that was unsuccessful because of regulations of the Office of Defense Transportation. The rate for hiring a truck similar to the one damaged in the accident was \$20.00 per day. The repairs were made as speedily as possible.

George S. Dodd testified for defendants-respondents that the distance between the rails of the "main track" was 4 feet, 8½ inches and the distance between the east rail of the "main track" to the west rail of the passing siding is 8 feet, 2 inches.

John W. Ousterman testified for the defendants-appellees stated that the "flagman sign" was in place on the date of the accident and was legible, and that both the "flagman sign" and the one on the west side of the tracks read the same: "Crossing protected by flagman at following scheduled times: Week days 12:10 P.M., 5:20 P.M., Saturdays 2:41 P.M., Sundays no flagman on duty." (S. C. p. 124, l. 19.) The practice was that all through trains were flagged, and the trains that stopped at the station, were not flagged. In addition to the trains that were mentioned on the "flagman's sign" there were freight trains that also were flagged (S. C., p. 129, l. 39); that there were one and two through trains a day and sometimes more than two. They didn't come through at the same time each day. One was usually about 8 o'clock in the morning and the other at about 4 to 5 or 6 o'clock at night. They were not scheduled trains (S. C., p. 130, l. 4). There was no notice given that trains other than those listed on the "flagman's sign" were flagged (S. C., p. 140, l. 36). Stickel was told by Ousterman's helper that there was a train due at 6:17 P.M. that day (S. C., p. 127, l. 38). That train was two minutes late

leaving Red Bank, the station before Eatontown (S. C., p. 154, l. 19).

There was testimony in behalf of the defendants-appellees that the whistle and bell were both sounded.

This is substantially the posture of the facts upon which the case was presented to the jury on the judge's charge.

POINT I.

The trial judge committed reversible error when he limited the duty of the defendants to mere compliance with the statute.

(Grounds of Appeal 1, 2, 3, 4, 5, 8, 9.)

The complaint charges negligence on the part of the defendants in the failure to warn of the approaching of the train, the failure to have a watchman at the crossing, the failure to use reasonable care and the failure to comply with the statute.

The trial judge charged the law as it applies to the ordinary grade crossings under usual circumstances in open country, as was enunciated by this court in the early case of *Pennsylvania R. R. Co. v. Matthews*, 7 Vroom 531, (1873) wherein Chief Justice BEASLEY says:

“ * * * They are not called on to keep flagmen, under ordinary circumstances, at cross roads, nor to give any other notice of the approach of their trains than those signals that are prescribed by statute. * * *

“But while I thus say that these additional burdens cannot be imposed by the courts upon these companies, I also say,

at the same time, and with quite as much emphasis, that the companies may, by their own conduct, impose such burdens on themselves. * * *

“In the case of *Cliff v. Midland Railway Co., L. R., 5 O. B. 258*, all general liability in railway companies to provide gate-keepers or flagmen is entirely repudiated; but at the same time, their responsibility for not providing against unusual risks, of their own creation, is just as decidedly maintained.”

This case was again cited with approval by this court in 1891, in the case of *N. Y., etc. R. R. Company v. Leaman*, 54 N. J. L. 202, and has been cited and followed as the law of this state ever since. The statute requiring railroads to blow a whistle or ring a bell did not free the railroads from all further obligation to provide safeguards at highway crossings, nor has any other statute declared such freedom.

“The declaration that it exists is purely judicial, appearing for the first time in 1873 by the decision in the *Matthews* case. The exception to this rule of freedom of liability on ringing the bell or blowing the whistle by which, ‘When the railroad company has created extra danger it is bound to use extra precaution,’ is not declared in any statute. It is purely judicial in its origin and had its beginning in the same *Matthews* case. * * *

“The *Matthews* case thus appears to have defined the limits of railroad responsibility at railroad crossings, and to have declared the contingency in which additional safeguards at crossings must be provided by railroad companies. * * * *Palmyra v. P. R. R. Co.*, 62 N. J. Eq. 601, pg. 613.

“All cases which discuss the relations of railroad companies to highway crossings

from any point of view agree that where the conduct of the company has increased the danger at any particular highway crossing, this of itself charges the company with a duty to provide additional safeguards at that crossing shall afford protection commensurate with the increased danger." *Palmyra v. P. R. R. Co.*, *supra*, 615.

The decisions of this court have not limited the increased burdens of the railroad company to cases where the railroad company creates a hazard in the construction of permanent buildings in the path of its tracks.

This court has repeatedly held that where a railroad company assumes a duty, though not required by law so to do, it is bound to the exercise of due care in the performance of such duty. *Petit v. West Jersey & Seashore R. R. Co.*, 86 N. J. L. 298, (1914); *Wolcott v. N. Y. & L. B. R. Co.*, 68 N. J. L. 421; *Snuffin v. McAdoo*, 93 N. J. L. 231; *Passarello v. West Jersey etc., R. R. Co.*, 98 N. J. L. 790; *Hendrickson v. West Jersey etc., R. R. Co.*, 102 N. J. L. 310; *Brown v. Erie Railroad Co.*, 87 N. J. L. 487.

Justice PARKER speaking for this court in the case of *Passarello v. West Jersey etc., R. R. Co.*, *supra*, said:

"The trial judge followed the ruling in the Supreme Court case of *Wolcott v. New York and Long Branch Railroad Co.*, 68 N. J. L. 421, in which the head note, which accurately epitomizes the decision, reads as follows: '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 the

company is under no legal obligation to so protect the crossing.'

"The precise question considered in the Wolcott case has never, we think, been directly dealt with by this court; but if not, we have no hesitation in concurring in the rule there laid down. In fact, the existence of a long line of decisions in this court and the Supreme Court, prior to the enactment of the acts of 1909, in which, expressly or *sub silentio* the action or non-action of a flagman, or the open condition of crossing gates, or the like, have been treated as in effect an invitation to cross, points to the implication that under such circumstances the primary negligence of the railroad company was clearly inferable; the main discussion revolving around the matter of contributory negligence, which, of course, must have primary negligence to rest upon. An abstract of such decisions would be of interest, but is unnecessary and would unduly prolong this opinion; they are cited here for convenience. *New Jersey Railroad Co. v. West*, 32 N. J. L. 91; 33 Id. 430; *Colgan v. Pennsylvania Railroad Co.*, 48 N. J. L. 141; *Swanson v. Central Railroad Co.*, 63 Id. 605; *Smith v. Atlantic City Railroad Co.*, 66 Id. 307; *Tubello v. Delaware, Lackawanna and Western Railroad Co.*, 67 Id. 581; *Davis v. Central Railroad Co.*, Id. 660; *Siracusa v. Atlantic City Railroad Co.*, 68 Id. 446; *Napodensky v. West Jersey and Seashore Railroad Co.*, 85 Id. 336, where the failure of the crossing bell to ring is called a 'feature of liability.' *Petit v. West Jersey and Seashore Railroad Co.*, 86 Id. 298. * * *

"In *Brown v. Erie Railroad Co.*, 87 N. J. L. 487 (at p. 494), the Wolcott case is cited with apparent approval.

"The rule as enunciated in 33 Cyc. 946 is: 'Where a flagman is employed or a gate established, whether such a duty is im-

posed by statute or not, the person in charge is bound to perform his duties with reasonable care and prudence, and a failure to do so is negligence for which the railroad company is liable.' 'This is supported by the case of *State v. Boston and Maine Railroad Co.*, 80 Me. 530; 15 Atl. Rep. 36, cited in the note, and *Kissenger v. New York and Harlem Railroad Co.*, N. Y. 538. We need not multiply authorities.' "

It must be remembered that the testimony of the defendants' own witness was that they "flagged" through trains that were not mentioned on the "flagman's sign" and that these trains did not run at regular times or the same number of times each day.

The question of fact raised as to whether or not the "flagman's sign" was in fact present at the time of the accident and whether the other "sign" was illegible is of course for the jury. And they may have found the fact to be as was testified in behalf of the plaintiffs. This is elementary and needs no citation.

Assuming for the purpose of this appeal that there was no "flagman sign," and the other "sign" was illegible, what is the duty of the defendants? And what are the rights of the plaintiffs?

In *Berry v. Pennsylvania R. R. Co.*, 48 N. J. L. 141, (1886) this court stated:

"A flagman had been stationed there by defendants. * * * The plaintiff had frequently passed over the crossing and knew a flagman was habitually stationed there.

"*He had a right to presume that if a train was about to pass, the flagman would be at the crossing giving the customary signals of danger.*" (Italics mine.)

This court stated in *N. Y., L. E. & W. R. R. Co. v. Randel*, 47 N. J. L. 144 (1885):

“Nor was there error in the charge that it was the duty of the flagman to notify the traveler before he began to cross the tracks, and if led by the absence of the flagman and that he perceived no danger, the traveler drove upon the tracks * * * would not, under the circumstances, be attributable to him as negligence.”

Chancellor WALKER stated:

“The judge submitted it to the jury to say whether the ringing of the bell at the crossing where there were so many other noises and where the difficulty of seeing approaching trains was so great, was adequate warning on the part of the company. There was no error in the refusal to charge that under the circumstances the company had discharged its whole duty to those of the public who had occasion to cross the track at that place, merely by ringing the bell.

“The cases relating to maintaining gates at railroad crossings are in accord where the railroad company assumed the duty and burden voluntarily.”

This court held in *Hendrickson v. West Jersey, etc., R. R. Co.*, 102 N. J. L. 310 (1925):

“It is not disputed that the defendant railroad company, having assumed to install safety gates designed to protect the traveling public at this crossing, owed to travelers upon the public highway the duty of using ordinary care in the management of such gates. *Passarello v. West Jersey, etc. R. R. Co.*, 98 N. J. L. 790.

“We think * * * was entitled to assume, in the absence of notice to the contrary, that the way was safe, because the safety

gates were open and stationary. Snuffin v. McAdoo, 93 N. J. L. 231."

Speaking for this Court in the case of *Brown v. Erie R. R. Co.*, *supra*, Chancellor WALKER stated:

"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."

In *Rendino v. Davis*, 99 N. J. L. 213, (1923) Justice KALISCH, speaking for this Court said:

"It is no longer a debatable question in this state that where a railroad company has voluntarily installed a signal bell at a crossing as a notice to travelers of approaching trains, the company is under a common law duty to use reasonable care that such signal be properly operated, and that a failure to use such reasonable care constitutes actionable negligence. See *Pasarello v. West Jersey & Seashore R. R. Co.*, 98 L. 790, where cases touching the subject are collated.

"The trial judge refused to charge 'So long as a railroad Company maintains a crossing bell for the purpose of warning travelers of approaching trains, it is under a duty to use reasonable care to see that the same is operating.'

"It is manifest that the refusal to charge appellants' request and the instructions given by the trial judge to the jury, overlooked the law, as declared by this court,

in *Passarello v. West Jersey and Seashore R. R. Co.*, *supra*, and in the cases therein cited, and hence necessitates a reversal of the judgment."

In *Napodensky v. West Jersey, etc. R. R. Co.*, 85 N. J. L. 336, Justice MINTURN, speaking for this Court, said:

"The track was single, and there was an electric alarm bell at the crossing. Eight or ten feet from the track on the lefthand side as plaintiff crossed were coal sheds, and a railroad siding extending in the direction of the station, upon which stood some of defendant's cars. The testimony of the plaintiff was that he was familiar with the crossing, and that as he approached it he stopped his horse and listened for approaching trains. Hearing no alarm from the crossing bell and no sound to indicate the approach of a train, the plaintiff urged on his horse and met with the accident.

"If this situation presented the true state of facts the plaintiff was entitled to recover, since nothing in his concatenation of facts speaks of contributory negligence, or reflects the exercise of due care upon the part of the defendant."

Nor was it error to charge that the duty of the railroad was to use reasonable care. In the case of *Wilson v. Central R. R. Co.*, 88 N. J. L. 342, the lower court charged:

"The duty imposed by law upon a railroad generally speaking is to use reasonable care."

Justice KALISCH, speaking for this Court in the *Wilson v. Central R. R.* case, *supra*, said:

"But if it was meant that the railroad company was bound to use reasonable care in the performance of the duties imposed

upon it by law, then the declaration made by the court was most favorable to the appellant." (Railroad.)

On the other hand, if it were true that the signs were both present and legible the court's charge still constitutes reversible error.

The railroad company assumed the burden of flagging trains other than those listed on the signs. It did not accurately warn the travelers upon the highway the limits of the duty that they had voluntarily assumed. The plaintiffs were familiar with the crossing and were also familiar with the practice of the defendants in flagging trains for neither Stickel nor Branham had seen a train at the Lewis Street crossing that was not flagged. They, therefore, had every right to assume that the flagman would warn them of the approach of any train. *Wolcott v. N. Y. and L. B. R. R. Co.*, *supra*; *Passarello v. W. J. R. R. Co.*, *supra*; *Brown v. Erie R. R. Co.*, *supra*; *Berry v. Pennsylvania R. R. Co.*, *supra*; *N. Y., L. E. and Western v. Randell R. R. Co.*, *supra*; *Snuffin v. McAdoo*, *supra*; *Napodensky v. W. J., etc., R. R. Co.*, *supra*.

POINT II.

The trial judge committed reversible error when he charged the jury not to consider the cost of the rental value of another truck and eliminated the rental value of the truck as an element of damage.

(Grounds of Appeal 6, 7.)

The trial judge limited the amount of damages for the loss of the use of plaintiff's truck to the five days that they actually hired another truck. The undisputed testimony regarding the truck was that the truck was needed; that every attempt was made to rent one but that it was impossible to do so beyond the five days; that it was impossible to buy another truck, though that was attempted and that repairs were made as speedily as possible.

The complaint of Mente Bros. Inc., seek damages for the loss of the use of the truck. The truck was laid up 121 working days from the time of the accident until it was repaired and put back in service.

This Court, in the case of *Hintz v. Roberts*, 98 N. J. L. 768, stated:

"Where, through an injury to an automobile, the plaintiff is temporarily deprived of its use, the measure of his damages is the amount of the injury to the automobile together with the value of its use during the time required by the exercise of proper diligence to procure its repairs."

In *Graves v. Baltimore & N. Y. R. Y. Co.*, 76

N. J. L. 362, the New Jersey Supreme Court held that:

“The pertinent rule is that when personal property, in the actual use of the owner is injured by a trespasser, so that the owner is deprived of its use, the special damages necessarily and proximately attendant upon such privation may be proven to augment the damages beyond the diminution in value of the thing injured.”

In *Hawkins v. Garford Trucking Co.*, 114 Atl. 94 (Conn.), it was held:

“In addition to the damage to his car the plaintiff was entitled to recover the use of the car during the period necessary for its repair.

“Elements ordinarily essential to such a finding would be the value of the automobile, its market rental value, less the proportion of this rental value which covers the wear and tear and depreciation in the use of the automobile, and the period of necessary depreciation use.”

The plaintiff is entitled to damages for the length of time that the truck was laid up for repairs whether or not another truck was in fact hired.

In the case of *Noughton Mulgrew Motor Co. v. Westchester F. Co.*, 173 N. Y. Sup. 437:

The plaintiff was engaged in a taxi cab business and instituted suit for damages as a result of negligence which resulted in an injury to one of the plaintiff's taxicabs. The plaintiff in his taxicab business had a dozen or more of these cars on hand and in service and after the accident did not hire another cab but took one of the cabs that were on hand.

The questioned item of the award for the plaintiff was one representing the loss sustained by the plaintiff while the car was undergoing repairs, and was thus of necessity out of use.

"The practice has obtained in these damaged vehicle cases of allowing the costs of the actual hire of another vehicle similar to that damaged; and this custom has prevailed, we think, largely because that measure of damage is rarely objected to. We think the correct rule would be to allow the rental value of the car, irrespective of whether another car had actually been hired to take the temporary place of the car damaged and undergoing repairs. When a seller fails to deliver goods purchased of him, the measure of damages where the market rule applies, is based on the market itself, and not on whether the buyer goes into the market and buys; indeed proof of the latter must be excluded if objected to. We can see no reason why the rule in cases such as this should not accord in that respect with the rule in the sale of goods cases * * *.

"What the owner of a damaged car loses by being deprived of its use is what such a car can be rented for. What he pays for the hire of a car to take its place is propably, as a general thing, about what he could have obtained by letting his own car out before it was damaged, although proof of his actual hiring is technically incorrect. Surely it would be unjust to compel the owner of the car to hire another car in order to entitle him to claim compensation for the loss of the use of his own car. He might, for example, not be financially able, or have sufficient credit to hire a car. We are confirmed in our view that when one is deprived of the use of an article that has a provable rental value, the allowance for

such deprivation of use is to be measured by rental value. See Annotation 1917A, Am. Cases 124.

“Sedgwick on Damages, 9th Ed. Par. 435A, Where an injury to plaintiff's property which does not cause its total destruction results in his losing the use of it for a time, either because it is rendered unfit to use or because he is temporarily deprived of the possession of it, he may in addition to the deterioration in value recover the value of the use of it during the time he lost the use.

“Joyce on Damages, Par. 1040, Where personal property which has a usable value is injured, the plaintiff may recover as damages the value of its use during the time it is being repaired.

“Meyers v. Bradford, 201 P. 471 (Cal.), Plaintiff is entitled to recover the cost of hiring another car whether or not he actually hired one.”

The same rule of law is the prevailing opinion all over the country, although the subscriber has been unable to locate any case in New Jersey other than the *Hintz v. Roberts* case (*supra*). There are cases on point in the states of Arkansas, California, Louisiana, Oklahoma, Texas, Utah, Illinois, Missouri, South Carolina, West Virginia, Iowa, Michigan, Wisconsin, Canada, New York and any number of other states. The same law is applied to the Federal Court with reference to damages to boat and ship in the following cases, *Hoyt v. Fuller*, 104 F. 192 (8th Circuit), *Congueror*, 168 U. S. 110.

Conclusion.

For all of the reasons argued in the foregoing Points, it is respectfully submitted that the judgment from which this appeal is taken should be reversed.

Respectfully submitted,

STANLEY W. GREENFIELD,
Attorney for and of Counsel
with Plaintiffs-Appellants.

This matter to be
argued orally by
STANLEY W. GREENFIELD.

FEB T. 1946

New Jersey Court of Errors and Appeals

MENTE BROS. INC., *a corporation*,
SAMUEL BRANHAM and ROBERT
STICKEL,

Plaintiffs-Appellants,

vs.

SHELTON PITNEY, *et al.*, Trustees
of the Central Railroad Com-
pany of New Jersey,
Defendants-Appellees.

Action at Law.

On Appeal
from

New Jersey
Supreme Court.

**BRIEF ON BEHALF OF
DEFENDANTS-APPELLEES.**

(Italics ours, except where otherwise noted.)

On May 11, 1942 at approximately 6:20 P. M. and in broad daylight, the plaintiff, Robert Stickel, was operating a truck owned by the plaintiff, Mente Bros., Inc., and in which the plaintiff, Samuel Branham, was riding, in a westerly direction over the Lewis Street crossing, just north of defendants' Railroad Station at Eatontown, Monmouth County, New Jersey. At such time and place the truck collided with defendants' train which was proceeding in a southerly direction and which was scheduled to stop at such station.

Plaintiffs accordingly brought this action wherein Stickel and Branham sued for their personal injuries and Mente Bros. Inc. sued for its property damage. The case was tried before Honorable Frank L. Cleary, Judge of the Circuit

Court at the Union Circuit where the jury returned a verdict of no cause of action in favor of the defendants and against all of the plaintiffs.

From the judgment entered thereon, plaintiffs take the present appeal.

Statement of the Case.

The crossing and surrounding area are depicted and shown by the Map (Exhibit P-1), a copy whereof (to a reduced size) is attached to the State of Case, and the various photographs (Exhibits D-1 to D-16 inclusive), copies whereof are also attached to the State of Case.

As already indicated, Lewis Street runs approximately east and west.

This particular branch of Defendants' Railroad system is known as the Southern Division of The Central Railroad Company of New Jersey (S. C. 24).

Passing over the crossing are two tracks, the more westerly being known as the Main Track and the easterly being known as the Passing Sid-ing (S. C. 24).

The train in question was operating on the Main Track.

The Eatontown Station is located south of the crossing and on the east side of the tracks. The most northerly or nearest corner of the station building is approximately forty feet from the center of the crossing.

A whistle board for trains south bound (as was the train in question) is located at a point 1,196 feet north of the crossing (S. C. 24).

In addition to the Main Track and Passing Siding there is also a Delivery Track. This branches off from the Passing Siding at a point approximately on the crossing and runs in a northeasterly direction (S. C. 23). It is, of course, used for the delivery of freight cars, including the loading and unloading thereof.

On each side of the crossing, both east and west, there was situated the usual crossing sign bearing the words "Railroad Crossing" (S. C. 103).

In addition, there was what was known as a "flagman's sign" on each side of the track—one on the east side of the crossing and on the north side of Lewis Street; the other on the west side of the crossing and south side of Lewis Street, i.e. both being located in such manner that a traveler approaching from either direction would encounter such a sign on his right before he started to cross over the tracks (S. C. 124). These signs are clearly indicated on the Map.

The sign on the east side of the crossing at the northeast corner is shown on photographs (Exhibit D-1, D-2 and D-6), while the sign on the west side at the southwest corner is shown on Exhibit D-7.

The definite and positive testimony adduced on the part of the defendants was that at the time of the accident each sign was plainly lettered as follows:

"Crossing protected by flagman for trains at following scheduled times: Week days 12:10 P. M., 5:20 P. M.; Saturdays 2:41 P. M., Sundays, no flagman on duty" (S. C. 124).

The "12:10 P. M." train was the "Blue Comet" (Atlantic City Express) going *South* and the

"5:20 P. M." train was the "Blue Comet" going *North*. This train was a "through" train in both directions and did not stop at Eatontown either on its south bound or north bound trip (S. C. 125).

The "Saturday 2:41 P. M." train was an express or "*through*" train south bound and terminated at Lakewood. It *did not* stop at Eatontown (S. C. 125).

The train, which was involved in an accident, was not a "through" train and did stop at Eatontown, being due there at 6:17 P. M. (S. C. 126).

Besides the aforementioned "Blue Comet" trains and the Lakewood train, there were no other "through trains" except an occasional freight train (S. C. 126).

The prevailing custom or practice was solely to flag "through" trains. This was done either by the Station Agent Ousterman or his Assistant Whitfield. There was no custom or practice to flag any trains except "through" trains and, as stated, the train in question was *not* a "through" train. There was absolutely no custom or practice to flag the crossing for this train or for any other train which stopped at the Eatontown Station (S. C. 126).

There was not the slightest dispute with regard to the foregoing facts except in the following single particular—the plaintiffs deny that on the day of the accident the signs clearly bore the lettering, which has been described and contend that such signs were illegible through being weather beaten. However they did not contest or deny in anywise whatsoever the fact that only "through" trains were flagged at this crossing (S. C. 30-61-90).

Stickel was employed by Mente Bros. Inc. as a driver of the truck and Branham was his helper (S. C. 25-26-58).

For approximately a week prior to the accident Stickel and Branham has been engaged in unloading sewer pipes from a car or cars on the afore-said delivery track, and at the time of the accident were taking their last load over the crossing in question to Camp Woods which was situated westerly of the crossing (S. C. 26-27). It was while they were making this last trip that the collision ensued (S. C. 26).

Stickel testified that he did not "hear anything" (S. C. 27); that "just as he got to the main track, my helper called me, he said 'For God's sake Bob, stop', and I looked to see why, or what he wanted, and as I did I saw the locomotive through the cab window on his side" (S. C. 28). And further:

"Q. Now, you don't say that this engine did not ring a bell, do you? A. No, I don't say that.

Q. It may have rung the bell, the bell may have been ringing, and you not have noticed it? A. If the bell was ringing on the engine I didn't hear it.

Q. I say the bell may have been ringing, and you not have heard it? A. That is right.

Q. And isn't the same thing true of the whistle? A. Yes, that is true" (S. C. 50-51).

With reference to any alleged custom or practice to flag the crossing, he testified as follows:

"Q. Can you tell us in the week, or the time that you spend down there at that location, how many times you saw a watchman at that crossing? A. No, I can't tell exactly. Possibly twice" (S. C. 30).

And again:

"Q. Now, those trains for which you noticed a flagman go out, were trains that went

through this station without stopping, weren't they? A. Yes" (S. C. 51).

The pertinent testimony of Branham, the helper, was as follows:

"Q. Did you see a train coming? A. I didn't.

Q. Did you hear anything? A. I didn't" (S. C. 60). * * *

"Q. Did you at any time while you were down working on those freight cars, ever see any trains go past the Lewis Street crossing? A. I did.

Q. And did you at any time ever see a flagman flagging traffic, or give any warning of the approach of a train? A. Yes, I see a flagman out there.

Q. Did you at any time ever see a train stop? A. No, I didn't" (S. C. 59).

The foregoing was the extent of plaintiff's evidence as to the signals or warning of the approach of the train. It was, of course, merely negative testimony.

Eissing v. Erie R. R. Co., 73 N. J. L. 343;

Holmes v. P. R. R. Co., 74 N. J. L. 469;

Vincze v. N. Y. Central R. R. Co., 9 N. J. Misc. 1089.

The defendants, on the other hand, produced an abundance of evidence through the following witnesses to establish that such warning and signals were given in legal and ample fashion. John W. Ousterman, Station Agent, "whistle and bell" (S. C. 123, *et seq.*); Harold Warwick, Engineer, "whistle and bell" (S. C. 146); Edward Wilbert, Fireman, "whistle and bell" (S. C. 157); Elton Roy Jones, Conductor, "whistle" (S. C. 161); Irving Brown, Baggage Master, "whistle" (S. C. 167); Michael J. Ryan, Brakeman, "whistle"

(S. C. 171); Albert C. Wolcott, U. S. Mail Messenger and disinterested witness, "whistle and bell" (S. C. 177); Fanny Snyder, outside disinterested witness, "whistle" (S. C. 182), and Assistant Station Agent Whitfield, testimony given at the former trial was read into evidence—"whistle" (S. C. 190).

There was not a shred of proof in the case that the defendants by any act on their part had rendered this crossing extra hazardous or that in fact the crossing was extra hazardous. The proofs were overwhelmingly to the contrary.

The Grounds of Appeal

Plaintiffs assign nine grounds of appeal. They are confined to attacks upon the Court's charge. No trial ruling of the Court is challenged.

At the conclusion of the Court's charge, plaintiffs through their counsel took or attempted to take exceptions to various portions thereof. For reasons, which will be hereinafter discussed, we think it clear that all of such exceptions were legally insufficient and inadequate to bring before this Court for review any of the questions now sought to be argued. As reference to plaintiffs' brief will disclose, plaintiffs seek under Point I to challenge various portions of the Court's charge, which define the legal duty of the defendants with reference to the crossing in question; in Point II they seek to challenge various portions of the charge having to do with the question of damages.

Even if the Court should find that the exceptions were sufficient, there can be no doubt, we think, that the charge was in all respects proper and entirely free from error.

ARGUMENT.

POINT I.

The Trial Court properly charged the jury as to the legal duty of the defendants with respect to the crossing in question.

In the thought that it may be of assistance to the Court in deciding the preliminary question as to the legal sufficiency of plaintiffs' exceptions, we quote verbatim the proceedings at the trial in this regard (S. C. 211-212-213):

"Mr. Greenfield: Your Honor spent a lot of time with regard to what the duty is, and what the statute says. I don't think that the statute is exclusive of the common law duty to use due care, and that the mere fact they blow a whistle does not discharge the duty of the railroad. I believe that in addition to blowing the whistle, or ringing the bell, as called for by the statute, there must also be the exercise of reasonable care. For example, I think that if a truck were stalled on the railroad tracks, and the engineer could, in ample time, stop the train, he could not be said to not be negligent merely by blowing a whistle. He has to do what he can in the way of using reasonable care.

The Court: I think that is right.

Mr. Greenfield: So, too, in this case, where the truck was approaching a crossing, according to both chargeable with the use of reasonable care and merely blowing the whistle, or ringing the bell, of and by themselves are not the discharge of the full duty of the railroad.

Mr. Greenfield: And I take exception, your Honor, to all those portions of your Honor's charge which state that the railroad is not negligent if it did give the necessary signal.

* * * * *

Mr. Greenfield: All right, sir. And I think that your Honor has failed to charge the jury

that in addition to merely blowing the whistle, or merely ringing a bell, as the statute calls for, they must use due and reasonable care, as they were chargeable with, or as anyone would be chargeable with under the common law, and I respectfully request that your Honor allow exceptions to those portions of the charge, and to your Honor's failure so to charge." (S. C. 211, 212, 213.)

It is earnestly submitted that these exceptions are patently inadequate to warrant this Court in hearing the issues sought to be brought before it for its determination.

Griffin v. James Butler Grocery Co., 108 N. J. L. 92;

Johnson v. C. R. R. Co. of N. J., 111 N. J. L. 93;

Simons v. Lee, 117 N. J. L. 370.

In the *Griffin* case, the exception was as follows:

"I would like to take an exception to so much of your Honor's charge as deals with the application of the New Jersey Sales Act to food sold in sealed containers".

This Court held such an exception to be futile, saying: "Such an exception, as we have many times held, is without efficacy".

In the *Johnson* case the exception was as follows:

"We respectfully take exception to your Honor's charge relative to most approved safeguard, what your Honor said on that subject."

This Court said "the exception is futile, as not pointing out the alleged error intended to be reviewed."

In the *Simons* case, the exceptions were as follows:

"I did want to take exception to that part of your Honor's charge wherein your Honor did not read the traffic regulation concerning the duty of a motorist in approaching a stop sign."

"I also respectfully pray an exception to that part of your Honor's charge when, after calling that to your attention, your Honor called to the jury's attention the fact that that act had been repealed."

"I respectfully pray an exception to failure of your Honor to charge concerning the stop sign in the language which your Honor used".

This Court there said:

"We are unable to see how these instructions apprised the trial court in what respect he had erred, which is essential in order to have the exceptions considered by this Court. The record does not indicate that any request was made by the appellant that the jury be instructed as to any particular provision of the Traffic Act. It has been repeatedly held by our courts that in order to have exceptions considered on an appeal, it must appear that the attention of the trial court was specifically called to the matter challenged as erroneous."

In the instant case, as in the *Simons* case, no requests to charge were submitted by the Plaintiffs.

It is earnestly submitted, therefore, that the exceptions in question are legally insufficient and without legal efficacy.

Quite apart from this objection, however, we are certain that an examination of the charge will demonstrate its legal soundness in every respect.

As will be noted by reference to the record, the Trial Court charged the jury that a blowing of the

whistle or a ringing of the bell in the manner required by the Statute (N. J. S. A. 48:12-57) would constitute a full performance of the Defendant's duty (S. C. 199, 203, 204).

Plaintiffs attack this as erroneous contending that the Court should also have charged that the Defendants were charged with the duty of exercising "reasonable care". This contention is manifestly unsound and was definitely rejected by this Court in *N. Y. & etc. R. R. Co. v. Leaman*, 54 N. J. L. 202.

There the trial court after charging the duty of the Railroad Company to blow a whistle or ring a bell added the following:

"* * * It might be that under certain circumstances the law would require still more than I have already intimated from the persons running the trains. If, for example, it was very foggy so that the train could not be seen at a great distance by travelers on the highway, then it might be the duty of the persons having the train in charge, beyond the ringing of the bells and beyond those of looking out, to give additional signals with their whistles; for it may be that the jury will think that the mere ringing of the bells does not carry the sound far enough, especially in foggy weather, to warn travelers on the highway, and that, under these circumstances, an additional signal by blowing a whistle, even when danger is not apparent, should be given.

"* * * You are to say whether the exercise of reasonable care on that particular day and for that particular crossing in view of the condition of the weather, required additional signals to be sounded, but on this question I do not decide. I leave it for you to decide. You are to say whether the exercise of reasonable care required some further signals than the ringing of the bell for nine hundred feet and the looking out and the alarm given when danger was apparent."

This Court held such additional instructions to be clear error, saying: "When the legislature has said that audible signals of the approach of a train shall be given in a certain way, it cannot be left to the judgment of the jury whether other audible signals should have been given so as to accomplish the purpose designed to be effected by the legislative regulation. When prescribed audible signals are given in conformity with the statute, whether they are heard or heeded by a traveller crossing the track or not, the company is absolved from negligence so far as concerns this kind of audible warning of the approach of its trains."

See also to same effect:

Kosher Dairy Co. v. N. Y. S. & W. R. Co.,
et al., 81 N. J. L. 145;

Napper v. West Jersey & Seashore R. R. Co., 132 Atl. 654. 4 N. J. Misc. 346.

In *Tota v. P. R. R. Company*, 104 N. J. L. 330, this Court approved and affirmed the following charge of the Trial Court:

"You have nothing to do with gates, nothing to do with signal bells, nothing to do about a gateman or flagman; if they gave the statutory signals, then there can be no recovery."

See also:

Grover v. N. Y. S. & W. R. R., 1 Misc. 517.

In the case of *Swenson v. D., L. & W. R. R. Co.*, 99 N. J. L. 403, this Court discussed the duty of a Railroad Company with respect to a *private* road crossing. The Court in effect held that such duty was to exercise reasonable care but then proceeded to say:

"It goes without saying that the obligation of the railroad company with relation to the protection of a private crossing rises no higher than its obligation to protect a public crossing, and that the obligation with relation to the latter does not include extra statutory precautions against dangers arising from the ordinary operation of its railroad."

In that case this Court also held that the mere temporary obstruction of the view of a highway crossing by a freight car or cars on a side track (as was claimed to be the situation in the instant case) does not increase the statutory duties of the Railroad Company.

It is only in those instances where the Railroad itself by some act on its part has rendered the crossing extra hazardous that additional warnings or precautions are required.

P. R. R. Co. v. Matthews, 36 N. J. L. 531;
Siracusa v. Atlantic City Railroad Co., 68
N. J. L. 446;

Kyle v. Lehigh R. R. Co., 91 N. J. L. 186;
Dando v. Director General, 94 N. J. L. 285;
Ross v. Director General, 94 N. J. L. 295;
Swenson v. D., L. & W. Railroad, 99 N. J.
L. 403;

*Di Giendemonica v. Penn.-Reading Sea-
shore Lines*, 123 N. J. L. 296.

And as was said by this Court in the *Matthews* case:

"* * * Hence the fact that some obstruction to vision or to hearing has been created by the railroad company does not of itself dispose of the question; such fact is indeed relevant only in so far as it bears upon the crucial question whether the defendant has rendered the use of the public road so dangerous that

persons of ordinary prudence cannot use it in safety even if the statutory signals be given."

And as was said by the Supreme Court in the *Dando* case:

"A highway crossing over a railroad is not rendered extraordinarily hazardous by the mere multiplication of tracks upon the right of way."

In the case at bar there is neither allegation nor proof in any degree or of any character of any such act by the defendants.

The plaintiffs advance, however, the contention that there had been a custom or practice to maintain a flagman on this crossing and that since no flagman was protecting the crossing at the time of the accident, it was open to the jury to find negligence upon the part of the defendants in this regard.

While such contention is somewhat elaborately argued in plaintiffs' brief, we think it clear that the record is manifestly insufficient and inadequate to bring this question before this Court for review. No requests in this connection were submitted to the Trial Court. No exceptions were taken on any specific rulings of the Trial Court on this point, and the only exceptions taken to the charge of the Court in this connection, which could possibly relate or refer to this phase of the case were those which we have quoted on pages 8 and 9 of this Brief. Those exceptions were plainly inadequate to raise the question which plaintiffs now attempt to argue.

Griffin v. James Butler Grocery Co., supra;
Johnson v. C. R. R. Co. of N. J., supra;
Simons v. Lee, supra.

Overlooking, however, the question of adequacy or inadequacy of the exceptions, we feel that the contention of the plaintiffs in this regard is clearly devoid of merit.

There was no proof of any custom or practice to protect or flag the crossing for the train in question. The Plaintiff, Stickel, testified that he had observed the flagman on the crossing *twice* and that the trains which he had flagged on those occasions were "through trains" (S. C. 51). Branham did not say how many times he had seen the flagman but did say that the only trains, which the flagman had flagged were trains which "did not stop," i.e., "through trains" (S. C. 59). This was the extent of plaintiffs' proof on this phase of the case.

On the other hand, and as heretofore shown, defendants' proof was full and explicit in showing that the only trains which were flagged were the express and "through trains" and that the language on the crossing signs so indicated.

There can be no doubt as to the law in cases where a Railroad maintains a flagman to protect the movements of trains thereover. It was thus stated by the Supreme Court in *Wolcott v. N. Y. and Long Branch R. R. Co.*, 68 N. J. L. 421:

"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 flagmen; * * *"

And such statement of the rule was approved by this Court in *Passarello v. West Jersey & Seashore R. R. Co.*, 98 N. J. L. 790.

It does not follow, however, that the Trial Court in the case *sub judice* disregarded or failed to fol-

low such rule. On the contrary, quite the opposite appears.

In the *Wolcott* case it was conceded by all concerned that the Pennsylvania Railroad Company had *actually assumed* by its flagman to protect the crossing for the particular train there involved, and that in addition, at the time of the accident such flagman was actually on the crossing. The question presented was whether his actions at such time were negligent.

Similarly in the *Passarello* case, there was an *admitted custom* to flag the crossing for the train involved and in that case the flagman was actually present at the crossing.

In the case of *Berry v. Pennsylvania R. R. Co.*, 48 N. J. L. 141 (cited in plaintiffs' brief), the custom was admitted and the flagman was actually at the crossing. In that case the question was as to the contributory negligence of the Plaintiff. The Court held that such issue was for the Jury.

In *N. Y., L. E. & W. R. R. Co. v. Randel*, 47 N. J. L. 144 (also cited in plaintiffs' brief) the crossing in question was *admitted* to be extra hazardous. *The custom to maintain a flagman was admitted.* The flagman was actually at the crossing and the only question was as to plaintiffs' contributory negligence.

In the instant case, however, an entirely different situation exists. Here, as already pointed out, the custom was limited to the flagging of certain trains ("through trains"), of which the train involved was not one. Consequently plaintiffs had no right to rely upon any such rule or practice for their protection at the time of the accident. No flagman was on or at the crossing as the train approached and therefore plaintiffs

were not entitled to assume that they would be notified when it was safe for them to cross.

There being no custom or practice to flag the crossing for this particular train, it is clear that the only obligation on defendants' part was a compliance with the statutory requirement—*either to blow the whistle or ring the bell.*

In an apparent attempt to demonstrate that defendants' duty was that of "reasonable care", plaintiffs cite *Wilson v. C. R. R. Co. of N. J.*, 88 N. J. L. 342; this Court in that case, however, exploded plaintiffs' theory in the following language:

"A plain reading of the judge's charge negatives the assertion that the negligence of the defendant was predicated upon the non-exercise by it of reasonable care, *outside of any duties imposed upon it by statute.*"

POINT II.

The charge of the Court with respect to the measure of damages was correct and free from error; and in any event plaintiffs were not harmed thereby.

The plaintiff, Mente Bros., Inc., owner of the truck, as previously mentioned, by way of proof of the damages allegedly sustained by it, offered, first, evidence to show the cost of repairs to said truck (S. C. 70). Next, it offered evidence to show that the truck, while undergoing repairs, was out of service for 121 "working days"—this extraordinary length of time being due, it was claimed, to difficulty in securing new parts due to the War conditions (S. C. 71-72-86-87).

Following this, plaintiff offered evidence to show that on five of such 121 days, plaintiff actu-

ally hired, or rented, another truck at the rate of Twenty Dollars per day.

Plaintiff then sought to introduce evidence to show the so-called reasonable rental value of a similar truck for the balance of such period of 121 days (*i. e.* 116 days), contending that plaintiff was entitled to recover as an element of damage, if entitled to recovery at all, the rental value of a similar truck during the time that plaintiff's own truck was laid up, *regardless of whether plaintiff did or did not actually rent or hire another truck during such period* (S. C. 72-83-84-85).

The Trial Court excluded such testimony (S. C. 85), but following the rule laid down by the Supreme Court in *Graves v. Baltimore & N. Y. R. Y. Co.*, 76 N. J. L. 362 (also cited by plaintiffs in their brief) did offer to permit plaintiff to show its loss of profits, etc. resulting from its deprivation of its truck, if in fact, any such loss was sustained (S. C. 74). Plaintiff chose not to take advantage of such offer and relied upon his previously stated contention.

Plaintiffs do not bring the Trial Court's ruling in excluding such evidence before this Court for review on this appeal nor was it assigned as a ground of appeal.

Plaintiffs now attempt to raise the question solely by an exception to the Court's charge. This exception reads as follows:

"Mr. Greenfield: In addition thereto I take exception to those portions of your Honor's charge that specifically direct the jury not to consider what it would have cost to hire a truck for the length of time that this truck was laid up, in view of the fact that there is uncontroverted testimony that a truck was needed, that an attempt was made to hire one, that all the trucks seem to have been in use,

and that it was impossible for the owner of the truck to hire a truck for more than the five days that he actually did. And I might say, sir, that from your Honor's statement as to what your Honor would allow, it was my impression that upon merely showing that an attempt was made to hire a truck, that the jury could consider as part of the element of damages" (S. C. 212).

We submit that this exception is clearly insufficient and inadequate.

Assuming, however, that the exception is adequate, we insist that the Court's charge correctly stated the law.

It was, of course, plaintiffs' duty to do all within its power, acting as a reasonable man would do, to mitigate and minimize its damages.

Ramsey v. Perth Amboy Shipbuilding Company, 72 N. J. Eq. 165;

Stevens-Davies v. Peerless Service Laundry, 112 N. J. L. 304.

In *Hintz v. Roberts*, 98 N. J. L. 768, the Court, speaking through Justice Trenchard says that:

"The next point argued is that the trial judge erroneously ruled that evidence respecting loss of use must be definite and legal.

Manifestly, this ruling was correct. No doubt where, through an injury to an automobile, the plaintiff is temporarily deprived of its use, the measure of his damages is the amount of injury to his automobile, together with the value of its use during the time required, by the exercise of proper diligence, to procure its repair. *Graves v. Baltimore & Ohio Railway Co.*, *supra*. But when (as here) the plaintiff seeks to show the value of such use by the cost of hiring other cars, the proof of such cost must be definite and not mere conjecture. So the trial judge rightly ruled."

Where the owner of a truck, which has been damaged, actually goes out and rents or hires another truck to take the place of that which is out of service, he has thereby sustained a definite and specific loss for which he should be reimbursed in the event that he is entitled to relief at all. Similarly where he has sustained a distinct loss of profits or definite interruption of his business by reason of the loss of the use of his truck, this is also an element of damage for which he should and can recover. (Here the plaintiff ignored and refused the right to recover for such element of damage if it, in fact, existed in this case.) But where the truck owner without hiring another truck simply sits idly by and demands for each day that the truck is out of service that amount, which he would have paid if he had gone out in the market and actually hired a truck to take the place of that which is out of service and do the work which the damaged truck would have done, he is not seeking a definite ultimate of damage—he is not attempting to minimize and mitigate his loss, but, in effect is seeking a profit on the whole transaction. Such a claim savors of punitive rather than compensatory damages.

We feel that the trial court amply and correctly stated the law in its charge in the following language: (S. C. 210)

“* * * That is not an element of damages in a case of this kind, for a man to simply say ‘I didn’t hire’. If, under a different set of circumstances, a man has a truck damaged, and proves, as they did here, that in the exercise of reasonable care it required him three months to get it repaired, and if in the meantime he shows that his business is of a certain nature, that he absolutely needs the truck, and that during that period he went out into the market and hired one at a reasonable rate,

whatever the market was, to do that work, and charge up the cost of that, that may be done in mitigation of his damages, if he proves it. But to simply take the truck, as here, have it in a shop, and come in and say I didn't hire another, I didn't pay for another, but I would like to be paid twenty dollars a day, or whatever the cost of a truck would be, if I had gone out and hired it. You are to disregard that entirely. It is not an element of damages. His damage, if he is entitled to any, would be the cost of the repair of his truck, the damage to the material on the truck, and then the five days which it cost him to hire another truck during that period, to take the place of the other."

While certain authorities to the contrary in other jurisdictions are cited in plaintiffs' brief, the rule, therein stated, has never been followed in New Jersey and, in our opinion, does not represent the law of this State.

In any event, however, and even assuming the charge to be erroneous in law (which we deny), Plaintiffs were not harmed or prejudiced thereby.

The jury, having returned a verdict in this case of "No Cause of Action in favor of the Defendants and against the Plaintiffs," it is clear, of course, in so far as the fact issue in the case is concerned that the defendants' negligence was not proved to the jury's satisfaction or that the alleged contributory negligence of plaintiffs was. *Opdyke v. Halbach*, 123 N. J. L. 123.

Thus it was settled by the jury's verdict that there was no liability in any amount whatsoever on the part of the defendants in favor of the plaintiffs or any of them.

The alleged error relates entirely and solely to the question of damages. The question of damages could not be considered by the jury until it had

first found liability on the part of the defendants and in favor of the plaintiffs; and, in fact, the Court so charged the jury (S. C. 208).

Here, since the question of liability had been resolved by the jury in favor of the defendants and against the plaintiffs, any question pertaining to damages became wholly immaterial. Therefore, since the instruction complained of, dealt only with such question of damages it was, in view of the jury's said finding of non liability, immaterial and even, if erroneous, was harmless error in so far as plaintiffs are concerned. *Kargman v. Carlo*, 85 N. J. L. 632.

Conclusion.

For the reasons indicated it is respectfully submitted that the judgment of the New Jersey Supreme Court should be affirmed.

Respectfully submitted,

WILLIAM F. HANLON,
Attorney for Defendants-Appellees.

DeVOE TOMLINSON,
WILLIAM F. HANLON,
Of Counsel.

To be argued by

DeVOE TOMLINSON,
A Counselor at Law of New Jersey.

FEB T. 1946

New Jersey Court of Errors and Appeals

MENTE BROS., INC., a corporation,
SAMUEL BRANHAM and
ROBERT STICKEL,
Plaintiffs-Appellants,

vs.

SHELTON PITNEY, *et al.*, Trustees of the CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Defendants-Appellees.

Action at Law

On Appeal
from New
Jersey
Supreme
Court.

REPLY BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS.

POINT ONE.

Defendants question the sufficiency of the exception taken by the plaintiffs to the Court's charge. A reading of the exception shows clearly that it was specific and pointed out to the Court that the Court failed to charge that in addition to the statutory duty, defendants were chargeable with the exercise of reasonable care and that the Court committed error by failing to charge that the defendants' duty was not limited to merely blowing the whistle or ringing the bell and that the Court failed to charge that the defendants must also use due and reasonable care.

The cases cited by defendants set forth the law. But the cases have no applicability to the present case since the exception was clear and pointed out an error in the Court's charge.

Defendants admit that they assumed the flagging of trains but that these trains were only

“through” trains (Defs’. Brief, p. 4, l. 17). The testimony on behalf of the defendants shows that they assumed the flagging of freight trains; that they came through at different times; that they were not scheduled trains, and that they were not mentioned on the flagman’s signs. (S. C., p. 129, l. 39; p. 130, l. 4).

Defendants argue that since the train involved in this case was not a “through” train, but was to make a stop at the Eatontown Station, they are relieved of liability.

It must be remembered that the plaintiffs’ testimony was that the flagman’s sign on the west side of the crossing was weather-beaten and illegible (S. C., p. 30, l. 26; p. 61, l. 22) and that prior to the accident and at the time of the accident there was no sign on the east side of the crossing (S. C., p. 30, l. 32) and that the only trains that the plaintiffs saw were trains that were flagged by a flagman (S. C., p. 29, l. 35; p. 59, l. 13). Under the circumstances, there was no way for the plaintiffs to know to what extent the defendants assumed the burden of flagging trains, and of warning travelers upon the crossing. The train was due at 6:17 but was three minutes late. (S. C., p. 59, l. 19; p. 154, l. 19; Defs’. Brief, p. 1, l. 1.) Under the circumstances, the plaintiffs had the right to assume that in the absence of the flagman at the crossing, the crossing was safe for their use. *Wolcott v. N. Y. and L. B. R. R. Co.*, 68 N. J. L. 298; *Snuffin v. McAdoo*, 93 N. J. L. 231; *Passarello v. W. J. R. R. Co.*, 98 N. J. L. 790; *Brown v. Erie R. R. Co.*, 87 N. J. L. 487; *Berry v. Pennsylvania R. R. Co.*, 48 N. J. L. 141; *N. Y., L. E. and Western R. R. Co. v. Randel*, 47 N. J. L. 144; *Napodensky v. W. J. etc. R. R. Co.*, 85 N. J. L. 336. To hold otherwise, would be to hold that the defendants, after an accident

could then set up the extent of the burden assumed by them and of course in no case would there ever be an admission that a duty or burden assumed by them was ever overlooked.

The plaintiffs did not know which trains were flagged and had never seen a train stop at the crossing (S. C., p. 51, l. 24; p. 59, l. 17). Under these circumstances, how could the plaintiffs know the extent to which the defendants flagged trains? Even if the flagman's signs were present and legible, and if the plaintiffs had seen freight trains flagged, which were not listed on the flagmans signs, would they not be entitled to assume that the defendants had abandoned the schedules set forth on the flagmans sign?

Defendants attempt to show that the testimony by Stickel and Branham regarding the lack of signals given by the defendants were negative testimony. This Court, in the very recent case of *Ackerly v. Pennsylvania Railroad Company*, (1943) 130 N. J. L. 292 cites with approval *Cowell v. Pennsylvania Railroad Company*, 101 N. J. L. 507, wherein Chancellor WALKER, speaking for this Court (at page 510) said:

“ ‘The negative testimony of a witness who simply testified that he did not hear a whistle blow or bell rung is not in conflict with the affirmative testimony of credible witnesses whose testimony that the whistle was blown and the bell rung stands unchallenged.’ The Chancellor then added a very significant paragraph which may well be applied to the instant case; namely, ‘The cases of *Eissing v. Erie Railroad Co.*, 73 N. J. L. 343, and *Holmes v. Pennsylvania Railroad Co.*, 74 Id. 469, cited in the brief for defendant-appellant, do not apply where the facts (as in this case) are not parallel, and where one in a position to hear, hears

nothing. In such posture the question is for the jury. *Tischman v. Erie Railroad Co.*, 81 Id. 268, 270; affirmed, 83 Id. 793.' "

POINT TWO.

Again the defendants attack plaintiffs' exceptions to the charge on the question of damages. We submit that the exception was clear and pointed, so much so, that the trial Court replied:

"The Court: If that case you had is good law, you are right about it. That is the reason I wanted to make it clear. I do not agree with it, but that is the law, as you see it, from that case, and if you are right about that, if that case is good law in this State, you are exactly right. I do not agree with it, but it may indeed be. That is the reason I gave you an opportunity to get your exceptions on record as squarely as I could put it." (S. C., p. 212, l. 36).

It is, of course not denied that the plaintiff, *Mente Bros. Inc.*, did everything possible to mitigate and minimize its damages. The trial court overlooked the facts produced by plaintiff, that due to the critical war time conditions, it was impossible to even hire a truck beyond the five days that plaintiff did (S. C., p. 87, l. 2) and that plaintiff needed the truck badly in the operation and maintenance of its business. (S. C., p. 86, l. 30.)

Conclusion.

It is respectfully submitted that the judgment from which this appeal is taken should be reversed.

Respectfully submitted,

STANLEY W. GREENFIELD,
Attorney for and of Counsel
with Plaintiffs-Appellants.

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