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**Summons.**

THE STATE OF NEW JERSEY to THE AMERICAN  
SMELTING AND REFINING COMPANY, a cor-  
poration:

(L. S.)

You are summoned to  
answer the annexed com- 10  
plaint of THOMAS PEDERSON  
in an action at law in the  
New Jersey Supreme Court  
and take notice that unless you file your answer  
to said complaint with the Clerk of the said  
Court, within twenty (20) days after the service  
upon you of this writ and the annexed com-  
plaint, the Plaintiff may proceed in the suit and  
judgment may be entered against you. 20

WITNESS, William S. Gummere, Judge of the  
Supreme Court of New Jersey, at Trenton, this  
29th day of February, 1924.

JOSEPH F. DEEGAN, Attorney.

30

40

**Complaint.**

NEW JERSEY SUPREME COURT,

MIDDLESEX COUNTY.

10	THOMAS PEDERSON, Plaintiff,	}	Action at Law. Complaint.
	vs.		
	AMERICAN SMELTING AND REFIN- ING COMPANY, a corporation, Defendant.		

20 The Plaintiff, Thomas Pederson, residing at 147 Lewis Street in the City of Perth Amboy, County of Middlesex and State of New Jersey, says:

30 1. On or about the 24th day of July, 1924, the Plaintiff was an employee of the John Paskie Construction Company, which company was constructing a coal conveyor in the plant of the defendant corporation, and Plaintiff was lawfully in said plant.

40 2. On or about the said date the defendant corporation was the owner of a certain engine and said engine was being operated by said defendant corporation or its servant or agent in such a negligent and improper manner as to lose control of the said engine, thereby causing it to collide and crash into the Plaintiff, who was lawfully in said plant.

*Complaint.*

3. The negligence of the defendant consisted in this:

- (a) Driving the engine at an improper and excessive rate of speed.
- (b) Driving the engine in such a reckless, careless and improper manner as to lose control thereof. 10
- (c) Failure to give notice of approach.
- (d) Failure to control the motion thereof so as to avoid striking persons in the vicinity thereof.
- (e) Failure to provide the proper appliances and brakes and to keep the same in proper condition. 20
- (f) Failure to keep proper look-out for persons inside the tank house.
- (g) Failure to propel the engine at such a rate of speed safe to persons in the vicinity thereof.

4. Plaintiff was always in exercise of due care for his safety. 30

5. By reason of the collision aforesaid, the Plaintiff was injured on and about the shoulders, hands, head, and sustained a fracture of the left leg and internal injuries, causing great pain and suffering which has continued from the time of the accident and will continue in the future.

6. By reason of said collision, the Plaintiff suffered and will continue to suffer great pain, 40

*Complaint.*

has become permanently disabled, has been compelled to spend divers sums of money in alleviating his pain in attempting to effect a cure and will be unable to work and has lost large sums of money which otherwise he would have made.

The Plaintiff demands as damages, \$15,000.00 and costs of suit.

10

JOSEPH F. DEEGAN,  
Attorney for Plaintiff.

20

30

40

**Answer.**

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY.

THOMAS PEDERSON,  
Plaintiff,

vs.

AMERICAN SMELTING AND REFINING COMPANY, a corporation,  
Defendant.

Action at  
Law.  
Answer.

10

The defendant herein in answer to the complaint filed by the plaintiff says that:

20

1. Defendant has no knowledge or information upon which to form a belief as to paragraph one, and leaves plaintiff to the proof thereof.

2. Paragraph two is denied.

3. Paragraph three is denied.

4. Paragraph four is denied.

30

5. Paragraph five is denied.

6. Paragraph six is denied.

FIRST DEFENSE.

The injuries sustained by the plaintiff as a result of the accident alleged in the complaint were due to and caused by the contributory negligence of the plaintiff.

40

*Answer.*

SECOND DEFENSE.

The defendant herein was not negligent.

THIRD DEFENSE.

10 Plaintiff at the time and place the accident occurred was a trespasser and defendant is not responsible for the accident nor liable for any injuries resulting to the plaintiff therefrom.

JOHN E. TOOLAN,  
Attorney of Defendant.

20

30

40

**Reply.**

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY.

THOMAS PEDERSON,  
Plaintiff,

vs.

AMERICAN SMELTING AND REFIN-  
ING COMPANY, a corporation,  
Defendant.

Action at  
Law.  
Reply.

10

The Plaintiff herein in reply to the Answer filed by the Defendant says that:

20

1. The injuries sustained by the Plaintiff as a result of the accident alleged in the complaint were neither due to nor caused by the contributory negligence of the Plaintiff.

2. The Defendant herein was negligent.

3. The Plaintiff at the time and place the accident occurred was not a trespasser.

30

JOSEPH F. DEEGAN,  
Attorney of Plaintiff.

40

**Postea.**

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY.

10	THOMAS PEDERSON, Plaintiff,	}	Action at Law. Postea.
20	vs.  AMERICAN SMELTING AND REFIN- ING COMPANY, a corporation, Defendant.		

This case was tried before the Honorable Peter F. Daly, Circuit Court Judge, with a Jury at the Middlesex Circuit on April 9th and 13th, 1925.

The said Judge directed the jury to return a verdict of no cause of action in favor of the defendant and against the plaintiff.

JOHN E. TOOLAN,  
Attorney of the Defendant.

30

40

**Notice of Appeal.**

NEW JERSEY SUPREME COURT

MIDDLESEX COUNTY.

10	THOMAS PEDERSON, Plaintiff,	}	Action at Law. Notice of Appeal.
20	vs.  AMERICAN SMELTING AND REFIN- ING COMPANY, a corporation, Defendant.		

To the AMERICAN SMELTING AND REFINING COMPANY, a corporation, or JOHN E. TOOLAN, Attorney:

PLEASE TAKE NOTICE that the Plaintiff, Thomas Pederson hereby appeals from the whole of the judgment entered in the above entitled cause in favor of the Defendant, American Smelting and Refining Company, against the Plaintiff, Thomas Pederson, from the New Jersey Supreme Court to the Court of Errors and Appeals.

Respectfully yours,

JOSEPH F. DEEGAN,  
Attorney for Plaintiff.

May , 1925.

Service acknowledged without prejudice.

JOHN E. TOOLAN,  
Attorney for the Defendant. 40

**Grounds of Appeal.**

COURT OF ERRORS AND APPEALS.

10	THOMAS PEDERSON, Plaintiff,  vs.  AMERICAN SMELTING AND REFIN- ING COMPANY, a corporation, Defendant.	}	Grounds of Appeal.
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ON APPEAL FROM THE NEW JERSEY SUPREME COURT

20 Now comes the Plaintiff-Appellant, Thomas Pederson, by his Attorney, Joseph F. Deegan, and sets down the following grounds of appeal from the judgment of the New Jersey Supreme Court, Middlesex County in the above stated cause.

The court erred in granting the motion for a direction of verdict made by the Defendant at the conclusion of the case.

30 The court erred in refusing to allow the jury to pass upon the questions of fact raised in the issues tried.

Dated: May 14, 1925.

JOSEPH F. DEEGAN,  
 Attorney for and of counsel  
 with Plaintiff-Appellant.

NEW JERSEY SUPREME COURT,

MIDDLESEX COUNTY CIRCUIT.

April Term, 1925.

10	THOMAS PEDERSON, Plaintiff,  vs.  AMERICAN SMELTING AND REFIN- ING COMPANY, a Corporation. Defendant.	}	10
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20 Transcript of stenographer's notes of evidence in the above entitled cause, taken before HON. PETER F. DALY, Circuit Court Judge, and a Jury, at Middlesex County Court House in the City of New Brunswick, New Jersey, on the eighth day of April, A. D. 1925, at 3.55 P. M.

APPEARANCES:

JOSEPH F. DEEGAN, Esq., JOSEPH C. PAUL, Esq.,  
 Counsel for the Plaintiff. 30  
 JOHN E. TOOLAN, Esq., Counsel for the Defendant.

A jury being empanelled and found satisfactory, they were sworn.

ADJOURNED UNTIL TO-MORROW, THURSDAY, APRIL 9TH, 1925, AT 10:00 A. M.

## NEW JERSEY SUPREME COURT,

MIDDLESEX COUNTY CIRCUIT.

April Term, 1925.

10

THOMAS PEDERSON,  
Plaintiff,

vs.

AMERICAN SMELTING AND REFIN-  
ING COMPANY, a Corporation.  
Defendant.

20

Transcript of stenographer's notes of evidence in the above entitled cause, taken before HON. PETER F. DALY, Circuit Court Judge, and a Jury, at the Middlesex County Court House in the City of New Brunswick, New Jersey, on the ninth day of April, A. D. 1925, at 10:00 A. M.

## APPEARANCES:

30

JOSEPH F. DEEGAN, ESQ., JOSEPH C. PAUL, ESQ.,  
Counsel for the Plaintiff.

JOHN E. TOOLAN, ESQ., Counsel for the Defendant.

Mr. Deegan: The complaint states that the accident took place in 1924. I move to amend that to read 1923.

Mr. Toolan: There is no objection on our part.

Mr. Deegan opens the case for the Plaintiff.

Mr. Toolan opens the case for the Defendant.

40

*Thomas Pederson—for Plaintiff—Direct.*

THOMAS PEDERSON, the Plaintiff, being duly sworn according to law on his oath, saith:

*Direct Examination by Mr. Deegan:*

Q. Mr. Pederson, you are the Plaintiff in this action? A. Yes, sir.

Q. You live in Perth Amboy? A. Yes, sir.

Q. How long have you lived in Perth Amboy? A. About eighteen years. 10

Q. How old are you? A. Thirty-nine years old.

Q. Married man? A. Yes, sir.

Q. Children? A. Yes, sir.

Q. How many? A. One.

Q. By whom were you employed on July 24th, 1923? A. John Pasky.

Q. What sort of a contractor is he? A. Iron worker. 20

Q. Where were you employed on that day? A. At the American Smelting & Refining Company.

Q. How long had you been employed out in the American Smelting and Refining Company plant before July 23rd, 1923? A. About five days, five to six days. On my second week out there. 30

Q. Who was your foreman on the job at the time? A. Fellow by the name of John Crancich.

Q. What were you getting at the time? A. Ten dollars a day.

Q. Can you tell the Court and jury what happened on July 24? A. In the afternoon of July 24 we were through riveting and we had—the rest of the gang had a few holes to drill; in the meantime I went over to the toilet. 40

*Thomas Pederson—for Plaintiff—Direct.*

Q. Where were you working while riveting?

A. At the coal pulverizing plant.

Q. What kind of building is that? A. That is a high brick building, brick and steel.

Q. Tell us how you went to the toilet? A. Why, from this building and over into the tank house.

10 Q. What building did you go through first before you went into the tank house? A. Blasting furnace, they call it.

Q. Who directed you to the toilet? A. The foreman.

Q. What foreman? A. My foreman that I worked under.

Q. Did anybody ever direct you to any other toilet? Did you know of any other toilet in the yard? A. No, sir.

20 Q. How did you go to that toilet? A. Had to come in through the door of a little office there, and there is one door open leading into the tank room; you have to cross two tracks inside of the tank room to get over on the left-hand path; there is a path that walks down to the toilet, away down to the other end of the building. When I went in there, there was an air locomotive standing in the doorway, so I had to come in through the office, to pass over in front of that engine, and I went back, and when I come back the engine was still there. I stopped just for a second to see if everything was all right to go through there, and before I knew anything, why, I was clipped in between two cars, the engine and two cars.

30 Q. How many entrances are there into the tank house? A. There is only one.

40

*Thomas Pederson—for Plaintiff—Direct.*

Q. What is just opposite the entrance as you go in on the left-hand side? A. It is a scale house.

Q. Is that enclosed? A. Yes.

Q. Were the doors locked? A. The door was locked. A lot of copper sheeting there, what they call anodes, were piled up in front of there.

10 Q. Was there any other entrance that you used to go in at that point? A. No.

Q. How wide is that entrance that you went through? A. That I could not say, how wide it is.

Q. What is on the ground as you go into the tank house? A. Switches.

Q. What kind of switches? A. Small switch for narrow gauge railroad track.

20 Q. How wide are those rails apart? A. I imagine about two and one-half feet.

Q. If an engine is going through that doorway is there enough room for a person to pass through? A. No, sir.

Q. When you went in there was room enough to go in? A. Yes.

Q. On what side? A. On the right-hand side by the office.

30 Q. On the right-hand side going in? A. Yes, sir. By the office.

Q. How much space did you go through on the right-hand side? A. Well, I had about four to five feet.

Q. How much was on the left-hand side? A. There would not be none there. I had to cross in front of that engine to out or in.

40

*Thomas Pederson—for Plaintiff—Direct.*

Q. So you passed in on the right-hand side of that entrance? A. Yes, sir.

Q. Did you have to cross the tracks to get to the toilet? A. Yes, sir.

10 Q. What direction did you pursue after you got into the tank house? A. Well, after I got into the tank house I had to turn to my left to get over the tracks, and then stay on the left side of these tracks in order to get down to the toilet.

Q. How long is this engine that was in the doorway? A. That was lying right in the doorway.

Q. How long was it, about? A. I imagine the engine is about ten feet long.

20 Q. Do you know what kind of an engine it was? A. An air engine.

Q. What was the distance between the engine and the two cars that you passed through? A. About four to five feet.

Q. Were there any cars farther down the same rail? A. Yes, sir. They were unloading them.

Q. Was that engine standing still when you went in? A. Yes, sir.

30 Q. How far a walk is it to the end of the tank room? A. I imagine about three hundred feet, maybe.

Q. Is the toilet at the extreme end of the tank room? A. Yes, sir.

Q. How long were you in going through the cars, on your way in, to the time you came back again? A. Couldn't have been more than five minutes.

40 Q. Was the engine in the same position when you came back, as when you went in? A. Yes, sir.

*Thomas Pederson—for Plaintiff—Direct.*

Q. Were the two cars in the same position as when you went in? A. Yes, sir.

Q. You say before that there was a scale house on the right-hand side as you went out? A. Yes, sir.

Q. Was that exit closed? A. Yes, that door was closed. 10

Q. What sort—is it just like an ordinary door that you go through? A. No. It is a sliding door.

Q. Where are the scales in the tank room, or outside of the tank room? A. Outside of the tank room.

Q. Is there any covering over the scales, as you come out? A. Yes. Sort of a shed, I guess.

Q. How long is that shed? A. That I don't know. 20

Q. Is it an addition to the tank room? A. Yes.

Q. Give us an idea roughly. Was it 100 feet long, or 20 feet long, or 10 feet long? A. I imagine about 10 feet long.

Q. The scales were to weigh these cars as they came out of the tank room? A. Yes, sir.

Q. Was that exit closed to you, the scale-house exit? A. Yes, sir.

30 Q. Why didn't you come out on the right-hand side of the engine and the door? A. I couldn't.

Q. For the same reason that you didn't go in? A. Yes, sir.

Q. Could you have crossed the tracks at a point other than the point you came out? A. No, sir.

40 Q. Why? A. Because there was no room. They have places where they dip the copper in, iron-like.

*Thomas Pederson—for Plaintiff—Direct.*

Q. You say you had been working there a week? A. Yes, sir.

Q. Have you used the same toilet ever since you have been employed out there? A. Yes, sir.

Q. How many times a day would you go to this toilet? A. Well, about twice a day.

13 Q. Did you see other members in and around the pulverizing building, other employees of the A. S. & R., and other employees of the casting building go into the same toilet? A. Yes, sir.

Q. Did anybody ever stop you going into that toilet? A. No, sir.

Q. Is there any sign on the door? A. No.

Q. Was there any sign in the pulverizing building that you were in, telling you what toilet to use? A. No.

20 Q. Did any official of the A. S. & R. Company tell you which toilet to use? A. No, they never did.

Q. You say that you paused, just as you were about to go through this opening between the engine and the two cars? A. Yes, sir.

Q. Did you see anybody on the engine? A. No, I didn't see anybody in the engine.

30 Q. Do you know where the engineer sits? A. Yes, he was sitting in the back of it.

Q. Was there any bell on this engine? A. No.

Q. Was there a whistle on it? A. No.

Q. Did you hear any kind of a bell or whistle at the time it started? A. No, no whistle or no bell was sounded. No warning was sounded.

Q. Do you know anything about air engines? A. Yes.

40 Q. Are they capable of getting up speed more quickly than gasoline?

*Thomas Pederson—for Plaintiff—Direct.*

Mr. Toolan: I object.

A. Yes, sir.

Mr. Toolan: I move that be stricken out.

The Court: It is stricken out.

10 Q. Did you see other people going through this opening between the engine?

Mr. Toolan: I object.

The Court: Why?

Mr. Toolan: Even if other people did go between that did not give him any reasons to go through. Two wrongs do not make a right.

The Court: I will allow it.

20 Mr. Toolan: Prays exception.

Q. Did you see other people passing through? A. Yes, sir.

Q. Is that why you followed this path?

Mr. Toolan: I object to why he followed it.

30 Mr. Deegan: I will withdraw the question.

Q. What side of the engine was the engineer on as you came out of the building? Was he on the near side or the far side? A. He was on the far side.

Q. In front or the back of the engine? A. He was—the back part of the engine was facing me and he was sitting in the front. He was backing up.

*Thomas Pederson—for Plaintiff—Direct.*

Q. How was this engine going into the building? A. He was lying there, going out. Where he is sitting that is the front part of the engine.

Q. And the rear was where? A. The rear was right in the tank room.

10 Q. Did he go forward or backward when the accident happened? A. He went backward.

Q. Did you see any brakeman or any men about the cars? A. No, I didn't.

Q. The only people you saw were people coming in and out this opening? A. Yes, sir.

Q. Was there anybody using the exit of the scale house? A. No. They couldn't. The doors was closed.

20 Q. Was there anybody using the exit between the front of the engine and the door as you come out? That is, as you come out was there anybody using the exit between the engine and the door on the right-hand side as you come out? A. No.

Q. Why? A. It was blocked up there. Couldn't get out.

Mr. Toolan: I object as to why. I move that answer be stricken out.

30 The Court: It is stricken out.

Q. Tell us then what happened after this. A. Well, when the car hit me, why, it left me with the left leg broken and the knee cap badly—the knee all bruised. And on my right foot took my toe nails off and injured my back, my spine.

Q. With what speed, do you know, did this engine back at the time you got caught? A. Very rapidly.

40

*Thomas Pederson—for Plaintiff—Direct.*

Mr. Toolan: I move that be stricken out.

The Court: No. I will not strike it out. It does not mean much.

Q. Did you become unconscious right away?

Mr. Toolan: I object.

10

A. No.

Mr. Toolan: Let him tell what his condition was. It is very leading.

Q. What was your condition at the time of this? A. After I got hit, why, I was standing up against the pile they had there by the door, and this man that was running the engine said, 20 "What is the matter? Are you hurt?" I said, "Yes." And after that they carried me in the office and I don't remember anything after that.

Q. Did you recognize anybody that picked you up that was there at the time the accident took place? A. Yes, there was a foreman.

Q. What is his name? A. John Crancich.

Q. Where were you taken from there? A. I was taken from there down to the doctor, and 30 from the doctor out to the hospital.

Q. How long were you in the hospital? A. I was in the hospital from July 24 to August 14, and then I went home.

Q. How long were you confined to your bed after you got home? A. Up until December, and then I got out on crutches, and I was on crutches from December away up around July, 1924.

Q. During this period what doctors attended you? A. Doctor Meinzer and Doctor Urbansky. 40

*Thomas Pederson—for Plaintiff—Direct.*

Q. What other doctors? A. Doctor Henry, Doctor McCormick.

Q. X-rays taken? A. Doctor Klein took the X-ray, and Doctor Silk.

Q. When were you first able to go to work after this accident? A. I went to work March 2, 1924.

10 Q. As what? A. I got a job on a bus, driving a bus.

Q. Why didn't you go back to your old job? A. I couldn't.

Q. Why not? A. I didn't have the strength.

Q. What did your old job require, that you didn't have after the accident? A. I had to climb up in the air, hang up on high beams, and go up ladders, which I can't do now.

20 Q. Why can't you do it now? A. No, I can't get up a ladder. I haven't got the strength in one leg.

Q. Tell us what is the matter with your leg? A. The leg is shrinking in, it is getting thinner than the other, and there is no strength in it.

Q. Anything else? A. Don't see as I can use it. The muscles are all shrunken in.

30 Q. What kind of job did you take up on March 2? A. I got a job driving the bus the last few weeks, and then I was taken off sick and I wasn't able to do anything up until July, 1924; then I got a job on a bridge, running a motorboat, where I can sit down and just take men back and forth across the river to work.

Q. How long did you work there? A. I worked there from July up to October 15.

40 Q. What happened after that? A. October 15 I was idle. I couldn't do anything up until

*Thomas Pederson—for Plaintiff—Direct.*

around November I got a job as a night watchman.

Q. Where? A. At Reynolds Brothers, Perth Amboy.

Q. What sort of place is that? A. It is a dry-goods store.

Q. How long did you work there? A. I worked there from November right up until Christmas. 10

Q. What year? A. 1924.

Q. And then what happened? A. Then I have been off since up until March, somewhere around the last part of March, March 23, and then I have been a carpenter helper up until now.

Q. What are you doing now? A. Carpenter helper.

Q. How long have you been working there? A. About a week and a half or two weeks. 20

Q. When you went to work as a bus operator how much a week were you getting? A. Twenty-seven dollars a week.

Q. What was your salary as an iron worker a week? A. Sixty-six dollars a week, twelve dollars a day.

Q. At this particular period? A. Yes, sir.

Q. What money were you making when working at the A. S. & R. plant for Pasky? A. Ten dollars a day. 30

Q. How many days a week did you work? A. Five and one-half days a week.

Q. That is fifty-five dollars a week? A. Fifty-five dollars a week.

Q. While you were laid up iron workers were getting fifty-five dollars a week? A. Yes, sir.

Q. When you worked for the bus how much were the iron workers getting? A. Fifty-five dollars a week. 40

*Thomas Pederson—for Plaintiff—Direct.*

Q. When did that rate change? A. May 1.

Q. When? A. 1924.

Q. What did they get then? A. Twelve dollars a day.

Q. How much a week? A. Sixty-six dollars a week.

10 Q. Are they getting that today? A. Yes, sir.

Q. On the bridge how much money did you get? A. Thirty-five dollars a week.

Q. When you worked for Reynolds how much did you get? A. Thirty dollars a week.

Q. And the iron workers were getting at that time— A. Sixty-six.

Q. What are you getting today? A. I am getting five dollars a day and I am working five and one-half days a week, \$27.50 a week.

20 Q. Have you figured out the loss in wages? A. Yes, sir.

Q. What amount of money did you lose from July 24, 1923, to March 2, 1924, the period you have testified already that you were laid up? Do you have those figures with you? A. Yes, sir.

30 Mr. Deegan: I would ask permission of the Court to have him refer to them for the sake of quick computation. They are already computed.

Mr. Toolan: I have no objection.

Q. Do you have with you the computation of the salary loss? A. Yes, sir.

Q. Will you refer to it then? A. Yes, sir.

Q. You have it in your possession? A. Yes, sir.

40

*Thomas Pederson—for Plaintiff—Direct.*

Q. Recite the amount of money you have lost as the result of this accident.

Mr. Toolan: I wish he would give us the figures.

Q. Explain the computation. A. \$5,134.75.

Mr. Toolan: I object to that.

10

The Court: That is stricken out.

Q. Explain item by item. A. From July 24, 1923, to March 2, 1924, 31 weeks at \$55 a week, \$1,705. March 2, 1924, to March 17, 1924, 2 weeks at \$27 a week, \$54. March 17, to July 20, 1924, 7 weeks at \$55 a week, \$385. 12 weeks at \$66 a week, that is from March 17 to July 20—

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Q. Explain why you charge \$55 for 7 weeks and \$66 for 12 weeks? A. Yes, sir. They went up, the price of union scale of wages went up.

Q. What date? A. May 1.

Q. What is the seven weeks' period? A. That is the \$55.

Q. What does that include? A. That includes from March up until May.

Q. And then the twelve weeks is from when? 30  
A. That is from May until July.

Q. The total of that item? A. \$1,177.

Q. Explain the next item. A. July 20 to October 15, 1924, twelve weeks at \$31, \$372. October 15, 1924, to November 22, 1924, five weeks at \$66, \$330. November 22, 1924, to December 24, 1924, five weeks' lost, \$36 a week, \$180. December 25, 1924, to March 27, 1925, fourteen weeks at \$66, \$924. March 27, 1925, to April 8,

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*Thomas Pederson—for Plaintiff—Direct.*

that is one and one-half weeks, that is \$38.50, \$57.75.

Q. What is the total loss? A. \$4,999.75; hospital bill \$105; medical expenses \$30.

Q. What is the total? A. \$5,134.75.

Q. What sort of period have iron workers had this period from the date of this accident to date, from the standpoint of employment? A. I don't understand that.

Q. Is there much work or little work? A. Lots of work.

Q. What big projects are under way now in Perth Amboy where iron workers are in demand?

A. The big bridge, and there are a lot of big jobs around. Schools.

Q. What schools? A. There is a big school out in Chrome, and there was some in Amboy. And there is lots of work outside of Amboy.

Q. You have had plenty of opportunity, have you, to go back as an iron worker? A. Yes, sir.

Q. There are some idle periods in here, particularly from March 17, 1924, to July 20, and from October 15 to November 22, and from December 25 to March 27, 1925, this year. Can you tell the Court why you didn't work during this period? A. Yes, sir; I couldn't get employment.

Q. Did you try to get employment? A. Yes, sir.

Q. Tell us what you did. A. I went from one place to another, and every place they asked me, "Well, what is the matter with your legs?" I told them. "All right, we will let you know, we will send for you." And I got that story all over.

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*Thomas Pederson—for Plaintiff—Cross.*

Q. Who told you this story? Name some place.

A. One place there I tried to get on the buses, Matuchis, and they put on four men since then.

Q. How old are you today? A. 39.

Q. You have always been in good health? A. Yes, sir.

Mr. Deegan: That is all. I would like to offer this in evidence as an exhibit, for the purpose of computation, to help the jury out. These are a mass of figures, and it is a form of testimony sworn to, and I would like to have it marked Exhibit 1 and have the jury consider it when they go out. It is impossible to keep it all in their minds.

Mr. Toolan: I do not think that ought to go in.

The Court: Do you object?

Mr. Toolan: Yes.

The Court: Objection sustained.

*Cross-Examination by Mr. Toolan:*

Q. You were working for John Pasky, weren't you, as an iron worker? A. Yes, sir.

Q. The building on which you were working for Mr. Pasky was known as the Coal Pulverizer, isn't that true? A. Yes, sir.

Q. That building was how far from the tank room, that is the building in which you were in? A. About 400 feet, I imagine.

Q. Do you think that you could, with these books here, show us the relative position of the building on which you were working, and the tank room? I mean, place those books about at

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*Thomas Pederson—for Plaintiff—Cross.*

the position the two buildings are in. A. Yes, sir. This is the coal pulverizing plant, and in here is a building where they take these castings out of the furnace, you come down through here, this is the tank room, and go over here and get into this door in the tank room, cross these two tracks and go down here on the left side down to the toilet. The toilet is down in here (indicating).

Q. The tank room is closer to the river than the coal pulverizing room, isn't it? A. Yes, sir.

Q. That is, the tank room is east of the coal pulverizer room, that is true, isn't it? The river is east? A. Yes, sir.

Q. You were going to the toilet this day, weren't you? A. Yes, sir.

Q. You had gone to the toilet and you were on your way back when you were hurt? A. Yes, sir.

Q. How did you get into the tank room? A. Through this door by the office.

Q. That is through the center of the tank room, isn't it, about the center? A. That I couldn't say.

Q. Through the wide doors? How wide is the door that you went in? A. I imagine about ten feet.

Q. Was that the same door you were going to get out of? A. Yes, sir.

Q. Where is that door located with respect to the sides of the tank room? Which side is it on? Which side of the tank room, the one you were in? A. It is in the center of the tank room.

Q. You have stated that this is the tank room, and that this is the coal pulverizer room, and

*Thomas Pederson—for Plaintiff—Cross.*

this is the building in which you were working? A. Yes, sir.

Q. Now, when you come out of this building the toilet that you had to go to was located on what side of the tank room, on the inner side or the far side? A. On the far side in the tank room.

Q. If this is the coal pulverizer room, then you had to go over on this side of the tank room, isn't that so, the far side? A. Yes, sir.

Q. When you say you went through the middle door of the tank room, where do you mean? Assuming that this is the tank room, will you show me about what position it will be in? A. Well, I imagine the door would be right here (indicating).

The Court: Have you any plans?

Mr. Toolan: Yes, we have them.

The Court: Why don't you put them in?

Mr. Toolan: I will put them in if counsel has no objection.

The Court: Let me look at them.

Mr. Deegan: This is the present lay-out. Do you have a blueprint showing it as of the date of the accident, July 24, 1923?

(Blueprint entered in evidence and marked Exhibit D-1.)

The Court: By agreement of counsel this map is admitted in evidence.

Mr. Toolan: I have a more detailed print showing the arrangements of more of the buildings. I will offer this. There seems to be no objection.

The Court: By agreement this exhibit marked D-2 is now admitted in evidence.

*Thomas Pederson—for Plaintiff—Cross.*

(Blueprint entered in evidence and marked Exhibit D-2.)

Q. Now, Mr. Pederson, will you step down here just a moment? I show you this building here marked in red outline here, and ask you whether or not that is the location of the coal pulverizer.  
10 A. I don't know. I don't understand that blueprint.

*By Mr. Deedgan:*

Q. Have you an idea of this now? A. Yes, sir.

*By Mr. Toolan:*

Q. Do you, Mr. Pederson, recognize this as the location of the coal pulverizer building here marked "X," and the tank room marked in red outline here, which I will mark as "Y," that the coal pulverizer building marked "X" and the tank building marked "Y" are the proximate location of the buildings there? A. I don't understand it.  
20

Q. Is that the location of the buildings about as they were on the day you were hurt? A. Yes, sir.

Q. I show you these white lines marked through a portion of the tank room and ask you whether or not that is about the lay-out of the track system through the center of the tank room. A. Yes, sir.  
30

Q. Will you please indicate through what door you went into the tank room? A. Yes, sir; I came from out of this door here and went up through here and over through here and went in here (indicating).  
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*Thomas Pederson—for Plaintiff—Cross.*

Q. You went in this door here, the door marked "Z," is that right? A. Yes, sir.

Q. You are sure about that, that is the door you went in? A. I went over to the door next to the office, that is all I know.

Q. Here is the office right here, is it not? A. Yes, sir.  
10

Q. Marked just below the point where I have marked the "Z." And you went in the door closest to the office, you remember that? A. Yes, sir.

Q. And then where did you go? A. Went over across here and went down this path here and down into the toilet.

Q. To the toilet, the point marked "B," is that right? A. Yes, sir.  
20

Q. And when you came out how did you come out? A. Come back the same way, come back and out and over, that is, I got as far as here when I got hit.  
20

The Court: Mark that where he said he was hit.

Q. Will you show us about where you got hit, can you show us on here? A. I got hit there in the door.  
30

Q. About here, marked "P"? A. Yes, sir.

Mr. Deegan: I would like to know the scale first, so that the man can locate better. You may ask him how many feet from the door he was hit, and then you could scale it out on the map.

Mr. Toolan: I will not hold him down to any definite point on that.  
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*Thomas Pederson—for Plaintiff—Cross.*

The Court: He says about there. The jury understands that.

The Court: What is the scale of the map, Mr. Toolan?

Mr. Toolan: Three thirty-seconds equals one foot.

19 *By the Court:*

Q. About how far were you from the door when you were struck? A. About four to five feet away from the engine. The engine takes up about—

Q. How far were you away from the door when you were struck? You say you were struck near the door. How far away from the door were you, about? A. I imagine about six or  
20 seven feet.

*By Mr. Toolan:*

Q. Now, Mr. Pederson, there is a switch on here where these two tracks come together, just before the door, is there not? Were you hit beyond that switch, or not? A. That I couldn't say.

Q. The engine, as I understand it, was in the doorway here? A. Yes, sir.  
30

Q. How many cars were along there in front of the engine? A. There was two cars there to my knowledge, what he hit me with.

Q. Those cars are about how long, Mr. Pederson? A. About eight or ten feet long.

Q. What kind of cars are they? A. Flat cars.

Q. When you say flat cars, how high from the ground is the flat bottom of the car? A. About two feet—about three feet, I imagine.  
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*Thomas Pederson—for Plaintiff—Cross.*

Q. About three feet, that is the flat bottom of the car is about three feet, is that what you mean? A. Yes, sir.

Q. Isn't the bottom only about a foot from the ground, of these cars? A. I never seen the cars unloaded. They were loaded up by coppers.

Q. Were they loaded the day you were struck? A. Yes, sir. 10

Q. Those cars are loaded with long strips of copper, are they not? A. They are loaded with square pieces of copper, with a hook on them, they lift them up.

Q. This strip of copper is about how thick, they are loaded with? A. I don't know.

Q. They are long slabs of copper, are they not, that are put in these cars and dropped down into them lengthwise? There are racks on the cars to hold these slabs of copper isn't that so? A. I don't know. 20

Q. What does the car look like when it is loaded? How high up is the car when it is loaded? A. The car is up about five feet, five and one-half foot.

Q. You could look over the top of the cars, couldn't you, when they are loaded? A. No, sir. 30

Q. You could not look over the top of the cars when they are loaded with copper? A. No, sir.

Q. How tall are you, Mr. Pederson? A. Six foot one.

Q. How high is the engine? A. That I don't know.

Q. Well, about how high? A. Higher than me.

*Thomas Pederson—for Plaintiff—Cross.*

Q. In other words, it is more than six foot high? A. Yes, sir.

Q. How much higher than six foot? A. That I don't know.

Q. Isn't it a fact, Mr. Pederson, that you could stand there and look over the top of that engine? A. No, sir; not that I know of.

10 Q. You say it is higher than six foot. Now, how much higher? I don't want to hold you down to inches, but approximately. Will you indicate on the wall here, so the jury can see, and we can stipulate about how high the engine is?

Mr. Deegan: I will admit, for the purpose of illustration, the picture of the engine and the cars. We will admit those

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Mr. Toolan: How about these?

Mr. Deegan: We will admit that.

(Photograph of engine and cars entered in evidence and marked D-3).

(Photograph entered in evidence and marked D-4).

(Photograph entered in evidence and marked D-5).

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Q. I ask you, Mr. Pederson, whether or not this photograph marked exhibit D-5 shows the two doors looking from the inside toward the outside of the tank room, that is the two doors shown on the blueprint "N" and "P," about that point. A. Yes, sir.

Mr. Deegan: I would like to have him identify each exit.

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*Thomas Pederson—for Plaintiff—Cross.*

Q. Now, Mr. Pederson, when you came in you went through this door marked "N," that is correct? A. Yes, sir.

Q. You testified on direct examination that the engine and cars were in the same position when you went in the building as they were when you attempted to come out, that is true, isn't it? A. Yes, sir. 10

Q. So that when that engine was standing in the doorway you were able to get by that engine into the tank room, weren't you? A. No, sir.

Q. What is that? A. I didn't understand that last.

Q. If you don't understand me, you ask me and I will repeat it. A. All right.

Q. I say that you testified on direct examination that the engine was in the same position when you went in the building as it was when you started to come out. A. Yes, sir. 20

Q. And you went in through that door marked "N" on the blueprint? A. Yes, sir.

Q. With the engine standing in the doorway, didn't you? Yes, sir.

Q. Why couldn't you go out that doorway when you got down to that point, with that engine standing in the doorway? A. I had to cross the track with the engine to get out through the doorway. 30

Q. Why did you have to cross the track? A. Because I couldn't get out through the door with the copper cars standing in the door, you would be squeezed on the side, and there was copper standing alongside of the door, on the left side of the door.

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*Thomas Pederson—for Plaintiff—Cross.*

Q. Which side of the track did you go in when you went into the tank room? A. On the right side.

Q. As you were traveling? A. Yes, sir.

Q. Wasn't there room enough also on the left side to get in? A. No, sir. Then I had to get in front of those cars going into the tank room.

10 Q. Will you step here just a second? When you went in, the engine, as I understand it, was standing in this doorway, is that correct? A. Yes, sir.

Q. You had room enough to go through there? A. Yes, sir; on this side (indicating).

Q. When you came down you came along this aisle that leads right along here, did you not?

A. Yes, sir.

20 Q. And then crossed over here? A. Yes, sir.

Q. Why didn't you come out that way? A. I couldn't, because the cars were standing there.

Q. Because the cars were standing where? A. Right in the doorway.

Q. Well, it was the same engine that was there when you went in, wasn't it? A. Yes.

30 Q. Well, if you had gone in on this side, why couldn't you leave on this side? A. No, because a lot of copper was standing there, laying there. A lot of pieces of copper was lying right there by that doorway, and if I went out through this way, the engine would have squeezed me. There was more room over here by the office to get in and go across there and then come back the same way and come out this way.

40 Q. In other words, you say there was copper here that would not permit you to go through, is that right? A. Yes.

*Thomas Pederson—for Plaintiff—Cross.*

Q. There was room enough between the track and the wall of the building, wasn't there? A. No.

Q. If there wasn't any copper there wouldn't there be room enough? A. If this car wasn't loaded with copper.

Q. Which car? A. There was a car by the engine there. 10

Q. On which side of the engine? A. On the right-hand side going out.

Q. Do you mean inside of the tank room? A. No. On the outside. Right by the—

Q. Will you show me where the car was that prevented you from going out? A. The car is supposed to be out here, but the door is here, and here is the car in there with the copper on. 20

Q. The engine was standing in the doorway, wasn't it? A. Yes, part of the engine here.

Q. The cars would not be standing in the doorway, too, could they? A. Well, part of them were standing there.

Q. What I want to know is, was the engine entirely outside the building? A. No, sir. Almost inside of the building.

Q. Was any part of the engine inside of the building? A. Yes, sir. 30

Q. How much? A. Almost the full length of it.

Q. Then, the only thing obstructing the doorway was the engine, wasn't it? A. Yes, sir. And then that copper there.

Q. Where was the copper? A. The copper was right here by this door here.

Q. In what? A. Lying on the floor.

Q. Piled how high? A. About five feet. 40

*Thomas Pederson—for Plaintiff—Cross.*

Q. Is that the reason that you could not go out of that door? A. Yes, sir.

Q. Why didn't you go out this door here? A. This door was closed.

10 Q. Now, as a matter of fact, Mr. Pederson, isn't this door, and both these doors in the tank room open all the time when they are doing business out there at the American Smelting and Refining plant? A. No, sir.

Q. And isn't it a fact that these doors and exists and these tracks are being used constantly, and they have to be kept open?

Mr. Deegan: I object.

The Court: I will allow it.

Mr. Deegan: Prays exception.

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A. That door was closed.

Q. Did you try to open it? A. No, sir.

Q. There were only two cars say about eight or ten feet long, that is true, isn't it? A. Yes, sir.

30 Q. Then, why didn't you Mr. Pederson, when you were coming down here, cross over these tracks and come along the aisle here? A. No, sir.

Q. Why didn't you? A. Because there was an overhead crane there and the crane was lifting up the slabs of copper and the men are working there with the stuff and there is no place for them to walk. There is a regular walking path right down to here (indicating).

Q. That path shown between this point on the tank and the track? A. Yes.

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*Thomas Pederson—for Plaintiff—Cross.*

Q. There is a wide aisle on this side, is there not? A. Yes. There is an aisle up to here and then there is something comes out in here, I guess a place where they dip it, or something.

Q. There is a path, is there not, that leads right here from the coal pulverizer, at the point shown "door," right on around here up to the toilet, isn't that so? A. I don't know. 10

Q. Did you inquire for such a path? A. No, sir.

Q. Nobody ever told you about it? A. No. The foreman took me over to the toilet.

Q. That was your foreman? A. Yes, sir.

Q. Nobody from the Guggenheim plant, you testified, ever told you to use that toilet, did they? A. No, sir.

Q. Did you try to find a path around to the toilet without crossing all these tracks? A. No, sir. 20

Q. This was the first time you had ever seen this air engine, wasn't it? A. Yes, sir.

Q. You never saw it operate? A. No.

Q. So you don't know anything about that air engine, do you? A. No.

Q. You don't know how fast it could go, or how fast it could not go? A. No, sir. 30

Q. So that when you said it could go very swiftly on cross-examination you didn't mean that because you didn't know, did you? A. Yes, sir. If it hadn't come so swift I would have got out of the way.

Q. The engineer, or the man who operates this engine sits where on this engine? A. He sits in the back here. 40

*Thomas Pederson—for Plaintiff—Cross.*

Q. Sits on the end nearest to the door shown on this photograph, exhibit D-3? A. Yes, sir.

Q. On which side of it? A. On the other side.

Q. On the right side as it is facing? A. Yes, sir.

Q. That engineer sits down low, doesn't he?

10 A. Yes, sir.

Q. It is not possible, is it, for the engineer to see anybody on the track from the position from which he operates this engine, is it? A. I don't know, Mr. Toolan.

Q. Well, he sits down low on a seat up at the front end of the engine, or back end, whichever you choose to call it, on one end of the engine, anyway? A. Yes, sir.

20 Q. Down low, is that it? A. I don't know whether he sits low.

Q. Didn't you see the engineer? A. After I was hurt, yes.

Q. He wasn't sitting in his seat, then, was he? A. No, sir; he was off.

Q. So you don't know where the engineer sits, do you? A. He sits on the end of it.

Q. You didn't see him there, did you? A. No. The engine come ahead.

30 Q. You never saw the engineer on this engine at all, did you, you never looked for him? A. Yes, sir; I looked to see if there was anybody—if the engine was in operation.

Q. You saw the engine was standing still, is that what you mean? A. Yes, sir.

Q. You never looked to see who was operating it, did you? A. I looked to see if the engine was coming ahead.

*Thomas Pederson—for Plaintiff—Cross.*

Q. Well, I say, you never looked to see who was operating it? A. I wouldn't know who was operating it.

Q. You didn't look to see whether there was any engineer on it or not, did you? A. I couldn't see the man from where I was at.

Q. You couldn't see any man? A. Couldn't 10 see anybody.

Q. And you didn't take any pains to look to see if there was anybody? A. Yes, sir; I looked in that direction.

Q. You were passing in front of that engine, isn't that so? A. Yes, sir.

Q. You couldn't see the man who operates it from where you were passing through? A. Before I passed in front of the engine I looked.

20 Q. Looked where? A. Looked in back of the engine there.

Q. Where did you look? Through the end that you were going to walk through? A. No, sir. Looked down towards the back part of the engine.

Q. Did you see anybody? A. No, sir; I didn't see anybody.

Q. Did you walk up the other end of the engine and stand there and look to see if there was anybody on that end? A. No, sir. 30

Q. Or you did from the position in which you were going to walk through, you looked? A. Yes.

Q. And didn't see anybody? A. No.

Q. So that you don't know whether there was anybody there to operate it or not? A. Couldn't see anybody.

*Thomas Pederson—for Plaintiff—Cross.*

Q. And then you took a chance on walking through? A. Yes, sir.

Q. Now, Mr. Pederson, you know it is dangerous for you to walk between ties, don't you? A. Yes, sir.

Mr. Deegan: I object.

10 The Court: Why?

Mr. Deegan: It calls for a conclusion.

The Court: Yes, this is a party who can be probed as to whether or not he had any conclusions. He can also be probed as to what his mental attitude was. Objection overruled. You may take an exception.

20 Q. You know that, don't you? A. Yes, I wouldn't go across if I thought it was dangerous.

Q. You know that whenever you walk in between open cars that you are taking a chance, don't you? A. Yes, sir.

30 Q. And especially you know you are taking a chance if you don't first look to find out if there is an engineer ready to operate the engine? A. Yes, sir. If you don't see anybody there you take a chance on going across.

Q. You didn't look to see whether there was anybody there, did you? A. Yes, sir; I did.

Q. Do you know which end of the engine the engineer sat on? A. On the right-hand side.

Q. The front end? A. No. The left-hand side going out.

Q. The end farthest away from you? A. Yes, sir.

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*Thomas Pederson—for Plaintiff—Cross.*

Q. From a position in which you could not see him from where you were, isn't that right? A. No.

Q. Isn't that right? A. Yes, sir.

10 Q. So that you started to walk through in between the engine and the car, without looking to see, or rather making an observation from a point where you could see whether the engineer was there or not, isn't that so? A. No, sir. I looked up to see that the car wasn't in motion and the engine was standing still.

Q. That is all you did look for, isn't that so, to see whether the car was in motion? A. No. I was looking to see if it was safe to go across.

Q. What did you look for besides that? A. See there wasn't anything in motion there.

20 Q. That is all you looked for, isn't it? A. I looked for danger.

Q. There was a brakeman on this train, wasn't there? A. Supposed to be one; yes, sir.

Q. Was there one there? A. I didn't see anybody.

Q. Did you look for any brakeman? A. No, I didn't look at anybody.

30 Q. You didn't look to see whether there was anybody giving any signals for this train to go ahead? A. There was no one in that path across there.

Q. You didn't look for anyone who was giving signals to have this train come ahead, did you? A. I didn't look for anybody; no, sir.

Q. This track is only two feet wide, isn't it, by actual measurement? A. About two and one-half feet, I guess.

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*Thomas Pederson—for Plaintiff—Cross.*

Q. Two feet, I said, twenty-four inches?

The Court: He said, "I think it is about two and one-half feet."

Q. Is that what you say, you think it is about two and one-half? A. Yes, sir.

10 Q. How far was the engine from the car when you started to cross? A. About four or five feet.

Q. You testified before in this case, didn't you, Mr. Pederson?

Mr. Deegan: I object.

The Court: Why?

Mr. Deegan: Because it is not material or relevant in this issue.

20 The Court: Why not?

Mr. Deegan: That is my grounds for objection.

The Court: I know, but that is no ground; you simply say it is not material. Why isn't it material?

Mr. Deegan: Different proceedings than in this case, and I don't think it concerns the issue today.

30 The Court: Suppose he made an admission of some kind on the outside, do you think that is not evidential? Anywhere in the proceeding?

Mr. Deegan: I will withdraw the objection.

Q. You were examined before trial, were you not, before Mr. Christopher in this matter? A. Yes, sir.

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*Thomas Pederson—for Plaintiff—Cross.*

Q. Didn't you then testify that the engine was about ten feet away from the cars when you started to cross? A. No, sir.

Q. "Q. What I want to know is this, at the time you started to cross the track, how far was the locomotive from the cars," do you remember that question? A. Yes, and I said four to five feet. 10

Q. Do you remember your answer: "I imagine about ten feet"? A. No, sir.

Q. Do you say you didn't say that, or you don't remember saying it, which? A. I wouldn't say I didn't say it because I never understood you right then if you put that question to me.

Q. Wasn't that question quite plain? A. I don't remember. 20

Mr. Deegan: I would like to look at those answers.

Mr. Toolan: I will offer them in evidence if you consent to it. I would like to have that question read in connection with another question in which he testifies as to the distance being three and four feet away.

The Court: I cannot direct counsel how he shall conduct his examination. You may bring that out later on. 30

Mr. Toolan: We will introduce the examination in evidence, if counsel does not object to it.

Mr. Deegan: I will admit it in evidence.

(Examination before trial entered in evidence and marked exhibit D-6). 40

*Thomas Pederson—for Plaintiff—Cross.*

Q. How far do you say now the engine was away from the cars? A. Four to five feet.

Q. Were you looking at the engine as you started across? A. Yes, sir.

Q. Looking at it up to what time? A. Looked at it to get by there.

10 Q. Mr. Pederson, didn't you stand there on the other side of that engine and car for about ten minutes? A. No, sir.

Q. Looking at this engine? A. No, sir.

Q. Before you started to cross? A. No, sir.

Q. Did you stop at all before you started to cross? A. Stopped for a second just to see that everything was all right to go across.

20 Q. What did you do when you stopped? A. Just looked around to see nothing wasn't coming either way.

Q. While there was only the one track there, wasn't there, for you to cross, just a narrow gauge track? A. Yes, sir.

Q. It only would take about a step, wouldn't it, to get across it, just one step? A. Yes. Two steps to get across it.

Q. You step about a yard every step, pretty near? A. Pretty near.

30 Q. It is only about two and one-half foot wide so that you would step across in a single step, as a matter of fact, only one leg was caught? A. Both legs.

Q. Both legs were caught? A. Yes, sir.

40 Q. So that you were evidently caught right in the middle of the track, weren't you, as your legs were crossing, as you were taking a step? A. No. I imagine that when he give the bump the right foot got it, and when he give it the second bump the left leg slid down.

*Thomas Pederson—for Plaintiff—Cross.*

Q. The train stopped immediately, didn't it? A. No, sir.

Q. How far did it go? A. Well, rammed freight cars up a ways.

Q. How far did it ram the cars up? A. Rammed the cars up—

10 Q. Isn't it a fact that you were caught right between them, and it was just the one shock and the brakeman yelled, "Hey," and the engineer stopped it immediately? A. No, sir.

Q. Now, Mr. Pederson, there are a number of other exits from this building, are there not? A. I don't know.

Q. Isn't there a door right here at the point shown as "C" on this print right here? A. I never seen it.

20 Q. And also another door shown as "D" here on this print? A. I never seen them.

Q. And aren't there aisles running down all through this tank room? A. Yes, sir.

Q. Couldn't you have crossed these tracks and taken any of these aisles down through at any time you wanted to? A. No.

30 Q. Isn't it a fact, Mr. Pederson, what drew you up to the point where you were standing was the fact that you were curious to see this air engine and see it work? A. No, sir.

Q. You never saw this engine operate before? A. Not this engine, no, but I seen a lot of others.

Q. Air engines? A. Yes, sir.

Q. If you saw a lot of air engines you ought to recognize an air engine when you saw one? A. Not that type.

40 Q. You didn't know this was a steam engine or an air engine? A. No, not until I was hit.

*Thomas Pederson—for Plaintiff—Re-direct.*

Q. You didn't learn it upon being hit, you learned it afterward? A. I learned it after I was hit.

Q. Notwithstanding you claim to be familiar with air engines, you didn't even know what kind of an air engine this was? A. No, I didn't bother.

10 Q. You never saw how slow these engines operated around there? A. No.

Q. You knew that you were taking a chance trying to step between those cars that day, didn't you? A. No, sir; if I had known that I would not have stepped between there.

Q. You know it is dangerous to walk between any cars, don't you? A. Yes, sir. I wasn't forced to come down through there, I would have never went in there.

20 Q. Did you inquire for any other way around? A. No, sir. My foreman took me down there the first day that I was on the job and showed me where to go, and that is the only place that we can get drinking water.

Mr. Toolan: That is all I have.

*Redirect Examination by Mr. Deegan:*

30 Q. Mr. Pederson, you say you had been out in that plant about a week or five days? A. Yes, sir.

Q. You had been in around this building two or three times a day during that time? A. Yes, sir.

Q. Did you ever go into any other part of that building? A. No, sir.

40 Q. The only part you are acquainted with on this blueprint is the course you have taken? A. Yes, sir.

*Thomas Pederson—for Plaintiff—Re-direct.*

Q. And you don't know about the tracks and the lay-out? A. No, sir.

Q. Other than the path you had taken? A. No, I was never there.

Q. Can you tell me if this is a door on this map (indicating)?

The Court: That does not mean anything on the record. 10

Q. I will call this—

The Court: The door to the right, as an exit.

Q. Is that a door or is it not? A. I believe it is a door.

Q. Does that bring you out into the open space, as that map would appear to show? A. It brings you into the tank room. 20

Q. On the way out where does it bring you, after you go through that aperture there? A. It brings you out to the open space where the tracks are.

Q. Can you tell me what this scale house is? A. That is a shed outside of the building.

Q. Is it attached or is it apart from the tank house? Do you know or do you not know? A. No, I do not know. 30

Q. You have testified these tracks are about two and one-half feet wide, and there is some question as to the number of steps it would require to go over those tracks and on the other side? A. Yes, sir.

Q. How many steps do you think it would take to go over those tracks? 40

*Thomas Pederson—for Plaintiff—Re-direct.*

Mr. Toolan: I object to what he thinks.

Q. Do you know how many it would take? A. It would take two.

Q. Why would it take two? A. Because it would all depend what position you would be in, too.

10 Q. Is there an elevation? How far are the tracks elevated above the ground? A. Three or four inches off the ground.

Q. That would, of necessity, require more distance to cover in your steps?

Mr. Toolan: That is argumentative. I object to it.

The Court: Objection sustained.

20 Q. I would like you to show the jury just the ordinary pace, to measure it.

Mr. Toolan: I object.

Mr. Deegan: It has been brought out that he would take a yard. The average pace, to my mind, is around eighteen inches.

Mr. Toolan: That is admitted he would take a yard and he is crippled now.

30 A. I can't take that now.

Mr. Toolan: I know you can't.

Q. What is the distance that you would take in one pace?

Mr. Toolan: I object. There is no time fixed; and he has already testified he could step about a yard.

40

*Thomas Pederson—for Plaintiff—Re-direct.*

Q. Show us your idea of the pace that you would take, if your leg were not injured.

Mr. Toolan: I object to that.

Mr. Deegan: We have to determine the distance of this pace. I maintain a man's pace is averaged eighteen inches, and not a yard.

Mr. Toolan: A pace in the army is thirty inches.

The Court: We are getting a great deal of evidence from counsel and not the witness.

*By the Court:*

Q. How far did you step, before this accident, in making your ordinary pace? A. Well, I would have to make three steps to get over that track.

Q. That is not the question. What was the length of your ordinary step? A. I don't know. I never measured it.

Q. Can you indicate? A. Yes, about twenty-four inches.

*By Mr. Deegan:*

Q. What would the length of your pace be going over the track?

Mr. Toolan: I object.

The Court: Objection sustained.

Q. Mr. Pederson, did you ever see that concrete path as shown on that map? A. No, sir; never.

Mr. Toolan: It is not a concrete path. It is a cinder path.

Q. Did you ever see anybody using that to go around the tank house? A. No, sir;

30

40

*Herman Herz, Jr.—for Plaintiff—Direct.*

Q. In this examination before trial you testified that the distance between the engine and the car was ten feet. Do you recall testifying to that? A. No. What I figure on is from the door.

10 Q. That is what you mean by ten feet? A. Yes, sir.

Q. What was the distance then between the end of the engine and the cars as you went through this opening? A. Four to five feet.

Q. This ten feet in this examination before trial, included the length of the engine? A. Yes.

Q. From the rear of the first car? A. Yes, sir.

20 Q. How far is the switch from the door, do you know, right here? A. I imagine about six feet, six or seven feet, inside of the door.

Mr. Deegan: Can we stipulate the distance from the door to the beginning of the switch?

Mr. Toolan: I do not know it myself.

Mr. Deegan: I will bring that out later on. That is all.

30 HERMAN HERZ, JUNIOR, a witness produced on behalf of the plaintiff, being duly sworn according to law on his oath, saith:

*Direct Examination by Mr. Deegan:*

Q. Mr. Herz, did you investigate this accident? A. I did, sir.

Q. Have you been down to this tank in the A. S. and R. plant? A. Yes, sir.

40 Q. Were you in the casting building? A. I don't know what they call the different buildings. I have an idea where they were located.

*Herman Herz, Jr.—for Plaintiff—Cross.*

Q. When was this? A. August 17, 1923.

Q. Shortly after the accident? A. Yes, sir.

Q. Did you notice any cinder paths from the pulverizing building over around the tank house?

A. I did not see any.

Q. Did you see the scale house indicated on the map? A. That is up on the left-hand corner?

Q. On the left-hand corner? A. Yes, sir. 10

Q. Is that attached, or isn't it attached to the tank house? A. I don't remember.

Q. Did you see any signs warning anybody of danger in the entrance on the right? A. No, sir.

Q. Did you see any fences through which employees were to walk? A. No, sir.

Q. Going in and out of that building? A. No, sir.

Q. On either side of the entrance? A. No, sir. 20

Q. At the point where this accident took place,—do you know where the accident took place?

A. Only from what Mr. Pederson told me.

Q. Did you see any signs on the toilet down at the other end of the tank room? A. No, sir.

*Cross-Examination by Mr. Toolan:*

Q. Who did you investigate this case for? 30

Mr. Deegan: I object as immaterial.

The Court: Can't show the interest of a witness? Objection overruled.

A. Attorney for the plaintiff.

Q. How long have you known Mr. Deegan? A. I don't remember just how many years.

Q. Well, about how long? A. This was for the attorney of the plaintiff, Mr. Paul. 40

*Herman Herz, Jr.—for Plaintiff—Cross.*

Q. Mr. Paul is not the attorney for the plaintiff. A. He is consolidated or connected with the case.

Q. Mr. Deegan, you know as well as I do, is the attorney of record in this case, don't you? A. I didn't see any of the papers.

10 Q. Now, you are giving me a technical answer. I say, you know that, don't you? A. Mr. Paul asked me to come up here and testify.

Q. You know that Mr. Paul is not the attorney of record? A. I do not.

Q. Where does Mr. Paul have his office? A. Newark.

Q. Where does Mr. Deegan have his office? A. Perth Amboy.

20 Q. Have you ever been in Mr. Deegan's office? A. Yes, sir.

Q. How many times? A. Three or four times.

Q. Your connection with Mr. Deegan in this case is most casual, isn't it? A. Yes, sir.

Q. You were investigating this case for somebody who had a substantial interest in it, weren't you? A. I was told to investigate it.

Q. By whom? A. By Mr. Paul.

30 Q. For whom? A. Mr. Paul, for the Zurich Insurance Company.

Q. Where did you go when you went down to the plant of the American Smelting and Refining Company? A. As I remember I was introduced to Mr. Connors, and either before I saw Mr. Connors or after I looked at the scene of the accident.

40 Q. That is as far as you went, wasn't it? A. And told Mr. Connors that we would hold him responsible for any payments we make.

*Herman Herz, Jr.—for Plaintiff—Cross.*

Q. Where did you go with Mr. Connors? A. I believe I left him in the office.

Q. Well, did you go out alone then? A. As I remember, I think I did, either before I saw Mr. Connors or after.

Q. What do you mean you think now? I want to know what you did, not what you think you did. A. I don't remember whether I went in with Mr. Connors or after. 10

Q. Did you go any place other than to the office to talk to Mr. Connors? A. No.

Q. You talked to Mr. Connors in the office? A. Yes, sir.

Q. Where? A. In the office.

Q. That is up in the front of the plant, isn't it? A. As you go in, yes.

Q. You never even got into the plant, did you? 20 A. Yes, sir.

Q. Other than to the office? A. I was in the plant.

Q. That is right at the entrance to the plant, isn't it? A. And you go through a yard to go into the office.

Q. You go down the yard about 100 feet to get into Mr. Connors' office, don't you, and there is a building there? A. Yes, sir. 30

Q. And that is where you were? A. Yes.

Q. After you got through with Mr. Connors you went out again, didn't you? A. No, sir. I looked at the scene of the accident.

Q. Who with? A. Alone.

Q. Did anybody escort you down there? A. No, sir.

Q. How did you know where the accident happened? A. From Mr. Pederson's statement as 40 to where it was.

*Herman Herz, Jr.—for Plaintiff—Cross.*

Q. Mr. Pederson's statement to you was so clear that you could go right to the point where this accident happened? A. Yes.

Q. Now, as a matter of fact, which side of the building did you look at? A. What building are you referring to?

10 Q. The tank house? A. The upper left side.

Q. Well, which is that, north or south? A. Which is the river here, east, this way?

Q. I am asking you, you were down there now. Which side of the building you went down there on? A. The upper left side.

Q. You were not talking about the upper left side of a building. How did you get to the building you went to? A. Up from the office.

20 Q. Where is the office? A. Somewhere down where the tack is. I should imagine it was down here somewhere (indicating on map).

Q. In other words, the office is toward Perth Amboy from the tank room?

Mr. Deegan: The witness has testified to what position the office is in, and from that map directions can be obtained.

30 Mr. Toolan: He has testified and I am trying to find out if he knows what he testified to.

The Court: Go on.

A. I don't remember. This is two years ago.

Q. You don't say there aren't any "no admittance" signs down there, and that there were at that time? A. I didn't see any.

Q. Did you look for any? A. Yes, sir.

40 Q. Was your attention called to it? A. No, sir.

*Herman Herz, Jr.—for Plaintiff—Cross.*

Q. You were not investigating this case from that point of view? A. I was investigating to find out if there was a third party element in it.

Q. You didn't go over to the toilet, did you? A. I walked within ten feet of it.

Q. Which way? A. I should say north on the map.

10 Q. By what method did you use to get to the toilet? A. I walked up from—I can show you on the map, walked up here somewhere, and down to one of these doors, I don't remember which, and down over there, some path, and down.

Q. You didn't look for any path, did you, from the clay filter room, did you? A. Other paths?

Q. Any path, yes. A. That is the only path I took notice of.

20 Q. You didn't look for any, did you? A. That is the only one I took notice of.

Q. You didn't look for any other, did you? A. That is the only one I could see.

Q. Did you look for any other one? A. I did not see any other one.

Q. Will you answer the question? You understand it. A. I looked around for all paths I could find.

30 Q. Who suggested that to you? A. No one suggested anything to me.

Q. You were in the plant once, is that right? A. Yes, sir.

Q. For how long a period? A. About half to three-quarters of an hour.

Q. This American Smelting and Refining plant is quite a complicated plant? A. It is, sir.

Q. Buildings scattered all over? A. Yes, sir.

*Herman Herz, Jr.—for Plaintiff—Cross.*

Q. And tracks running all over in all directions? A. Yes, sir.

Q. It is a complicated industrial yard, isn't it? A. Yes, sir.

Q. You are willing on your oath now to swear that there wasn't any other path and that you looked for it and couldn't find it, is that right? A. I did not see any other.

Q. Are you willing to swear that you looked for it and couldn't find it? A. I looked for whatever paths I could find and I didn't see any other one except this one.

Q. Did you ask Mr. Connors? A. No, sir.

Q. Did you ask anybody in the plant? A. No, sir.

Q. You were down there investigating, weren't you? A. Yes, sir.

Q. You wanted to get honest information, didn't you? A. Yes, sir.

Q. And you didn't ask anybody who might be able to give it to you, did you? A. I asked Mr. Connors for what he could tell me.

Q. Did you ask him to come down there and show you the paths? A. I did not, sir.

Q. Did you ask Mr. Miller here? A. No.

Q. Nor anybody else? A. I went to Mr. Connors.

Q. You wanted to make the kind of investigation you did in order to make the kind of report you wanted to make? A. Investigated in the interests of my client.

Q. And for their interest alone? A. Certainly.

Q. Not with a view of making a fair report for the A. S. and R.? A. I investigated to see whether there was a third party element in it, as I told Mr. Connors.

*John Crancich—for Plaintiff—Direct.*

Q. Your interests were antagonistic to the interests of the American Smelting and Refining plant? A. No, sir, they were not antagonistic.

Q. In other words, if you could stick them for what you had to pay, you wanted to do it, in plain language, isn't that right?

Mr. Deegan: I object.

The Court: Objection sustained.

Q. You wanted to load the responsibility of your company on the American Smelting and Refining, if you could? A. I told Mr. Connors that we were going to look to them to reimburse us.

Q. That means that they would have to pay what you paid Pederson, if you could make them pay it? A. Absolutely.

Q. So that your interests were not the same as theirs? A. I don't know what interest they had.

Q. Well, what would you suppose their interest would be in this case? A. I don't know.

Q. It would not be in paying \$15,000, would it? A. I don't know anything about that.

Mr. Toolan: That is all.

Mr. Deegan: That is all.

JOHN CRANCICH, a witness produced on behalf of the plaintiff, being duly sworn according to law on his oath, saith:

*Direct Examination by Mr. Deegan:*

Q. Do you live in Perth Amboy, Mr. Crancich? A. I do.

Q. What is your occupation? A. Iron worker.

Q. For whom? A. Well, I work for different concerns.

*John Crancich—for Plaintiff—Direct.*

Q. On July 24, 1923, for whom did you work?  
A. For Jake Pasko.

Q. Where were you working on that day? A.  
I was working in Guggenheim's.

Q. Was Mr. Pederson on the job with you? A.  
He was working for me at the time.

10 Q. What is your position on the job? A. I  
was a sub-foreman.

Q. Who was the foreman? A. Louis Gustavsen.

Q. What building were you working on? A.  
In the pulverizing building.

Q. How long had you been working there up  
to July 24, 1923? A. How long was I working  
there?

Q. Yes. A. Well, we went up there on the job  
on repair work, working there about two weeks.

20 Q. What toilet did you use during that period?  
A. Well, I was using one in the tank room.

Q. How did you go to the tank room? A. I  
went through on this side from the pulverizer,  
there is small doors.

Q. Will you show it on the map, Mr. Cran-  
cich? Where is the pulverizer building? A.  
Should be laying right here (indicating).

30 Q. This is the casting building and this is the  
tank house. Show us the course that you would  
take to the toilet. A. The course I took, there is  
small doors here, by going through here, and  
here is an opening, come up on the side, come  
right through here, in order to get out through  
here, and right straight down, and over this  
small bridge.

40 Q. What door would you go in? A. Used to  
take these doors and out this track here. This  
bridge here is not here. There is something  
wrong, at the time we worked there.

*John Crancich—for Plaintiff—Direct.*

Q. Then, you don't understand this map. What  
door would you come in to? A. Through these  
doors here, to get to the end.

Q. Then where is the toilet? A. Toilet is away  
down at this corner, on the south side of the  
building.

Q. How would you come back? A. Back  
through here on the side, cross over, and over a  
small bridge, and up the same way. 10

Q. Do you know any other way to the toilet?  
A. Well, perhaps there is another way.

Q. Do you know any other way? A. Oh, you  
could go all around, perhaps might take you a  
half an hour or three-quarters of an hour to get  
down. But we used to go down the same way  
there before we working there.

Q. Did all your men use that same toilet, Mr. 20  
Crancich? A. Well, there was only one that I  
used to use ordinarily like.

Q. Do you know what toilet the men in the  
casting building used to take? A. I don't know  
about them men, the copper casting men.

Q. That is the only toilet that you knew? A.  
That I knew at the time.

Q. And that is the one you used? A. Yes, sir.

Q. Did anybody ever tell you not to use that 30  
toilet? A. No, sir.

Q. Was there any sign on that toilet only for  
a certain department in the plant? A. No.

Q. Nobody ever stopped you? A. No.

Q. Did you get drinking water in that toilet?  
A. Only place you could get a decent drink of  
water was down there.

Q. How soon after the accident did you see  
Mr. Pederson? A. I seen Mr. Pederson when 40

*John Crancich—for Plaintiff—Cross.*

he was picked off the track, the men come up to me and said, "One of your men is hurt." So I rushed down and I see Mr. Pederson laying in the office, and a man come with the stretcher, they picked him up walk across tank room and rush him in Mr. Pasky's car, rush him to the doctor and up to the hospital.

10 Q. Did you see any cars or engines when you went into the office, in the tank house? A. On the track?

Q. Yes. A. Oh, there is all the time cars through there loading up and putting on to them and taking them out. Working all the time.

Q. In fact, that is one big mass of buildings right through there, is it not? A. There is buildings together, but it is including the one, but got different trusses to carry it to make it in one.

20 Q. What were iron workers making in 1923? A. Well, the workmen was getting ten dollars.

Q. What are they getting today? A. Twelve.

Q. When did that start? A. The twelve started May, 1924. No. In April.

Q. What part of April? A. Well, the 1st of April we went out for \$12.

30 Q. Did you get it as soon as you went out? A. Yes, sir.

*Cross-Examination by Mr. Toolan:*

Q. Is this a picture of the bridge that you mentioned that you used to go over? A. Picture of the bridge?

Q. Yes. A. That is the bridge on the outside of the building away around.

40 Q. Yes. Is that the bridge you say you used to go over to go to the toilet? A. No.

*John Crancich—for Plaintiff—Cross.*

Q. It is not? A. No.

Q. That is a bridge around the end of the building? A. Away around the building.

Q. That is the bridge that leads from the path, isn't it? A. There is a little path.

Q. There is a path around the end of the building, isn't there? A. Oh, there is, naturally.

Q. There is a path around the end of the building? A. Yes, there is a path around there.

Q. And that path leads from this other door out of the coal pulverizer, isn't that so? A. There is doors there. There is lots of doors.

Q. There is another door out of the coal pulverizer, other than the one you mentioned, isn't that so? A. Yes.

Q. Does not the path lead from the door marked "H," that I have just marked "H" here? A. Yes.

Q. Does not that path lead from that door right on around the end of the tank room over to the toilet? A. Yes, all around through there.

Q. That path is used by all the workmen going down into the plant, isn't that so? A. Well, used that path when working different departments going through there.

Q. And you used that path to get around to the toilet also? A. I never did.

Q. But it can be used? A. Oh, it could be used, perhaps, yes.

Mr. Toolan: That is all.

Mr. Deegan: That is all.

*By the Court:*

Q. Had you ever worked there before? A. Yes, I worked in there before; the first time I

*John Crancich—for Plaintiff—Cross.*

worked in there was 1917, and different times in the plant, for different concerns.

Q. How many men did you have working under you? A. I have five men.

Q. On this job at this time? A. On this particular job.

10 Q. Who told you where the toilet was? A. I know from before.

Q. Who told you in the first place? A. The first time when I was going that toilet was when I worked for the Communipaw Steel Company.

Q. Who told you? A. My foreman that I was working for.

20 Q. Did any one connected with the Guggenheim or the American Smelting and Refining Works, tell you how to get to that toilet? A. No.

Q. Why did you take this path? A. This path I was taking from before, that I said we worked in copper casting building, by my boss show me the way to go.

30 Q. Did you see any one take that path to go to the toilet, outside of you and your five men? A. I know lots of men work squeeze between them doors with the rigging and brass and stuff, and used for that work, using that door, and walk through there.

Q. To go to the toilet? A. Well, to use for the toilet from the copper casting building many a time.

*By Mr. Toolan:*

Q. How many doors were there there? A. In the copper casting building?

40 Q. Right at that point, or in the vicinity there, where you used to go in. A. There is two doors.

*John Crancich—for Plaintiff—Cross.*

Q. Those doors are always open? A. Only at the time, and before many times been closed, but this particular time I noticed it being closed, not used. That is the east door, on the east side.

*By the Court:*

10 Q. That is the right-hand side as you go out? A. Right-hand side coming out of the building, on the left going in.

*By Mr. Toolan:*

Q. You say on this day—do you remember how many doors were being used? A. On that particular day that I know coming through I see one doors open and another one was closed.

20 Q. When was that? A. That was in the morning.

Q. You don't know anything about the afternoon, when this accident happened? A. When the accident happened, when I take up Johnson in front of the office, the doors was still closed.

Q. After the accident? A. After the accident.

30 Q. Did you go down there to see whether they were open or closed? A. No, but was only way I could get in there.

Q. What? A. Was only way I could get into that building at the time, the way I rushed the man was hurt, there was only one doors open, and that is the door I take.

Q. Did you try the other door? A. No, because another doors is over down further, and there is no bridge to that door.

40 Q. There isn't any bridge to this door either, is there? A. Oh, yes, there is.

*Louis Gustavsen—for Plaintiff—Direct.*

LOUIS GUSTAVSEN, a witness produced on behalf of the plaintiff, being duly sworn according to law on his oath, saith:

*Direct Examination by Mr. Deegan:*

Q. Mr. Gustavsen, do you live in Perth Amboy?

A. Yes, sir.

10 Q. Were you working in the plant of the A. S. & R. on July 24, 1923? A. Yes, sir.

Q. In what capacity? A. I was working down in the lead refinery.

Q. For whom? A. For Mr. Pasky.

Q. What men were under you? A. I had Mr. Crancich, sub-foreman, underneath me, because I had two gangs.

20 Q. Who was in full charge of the Pasky work in the plant on that day? A. I was.

Q. Did you do any work around the pulverizing plant? A. Mr. Crancich was there with his gang.

Q. You were the overseer of that job? A. Well, I left all to him, because I couldn't take care of both. Do you see what I mean?

Q. Did you ever use the toilet that is in the tank house? A. Well, yes, I used to use that.

30 Q. What course did you take, Mr. Gustavsen? A. Well, I never did work over in that section. I was generally over on the boiler house.

Q. Did you ever start out for that toilet from the pulverizing building? A. Well, I never worked on the pulverizer. I was down on the other side, on the south side all the time.

Q. Did you work in the construction of the pulverizing building at any time? A. No, sir.

40 Q. What was the pay of an iron worker in July, 1923?

*Frank Courtney—for Plaintiff—Direct.*

Mr. Toolan: We do not contest that. It is simply cumulative.

Q. Were you present after this accident took place? A. Well, I come down there about the time that he was carrying the plaintiff to the automobile.

10 Q. Where did you see him at the time? A. I saw him over there by the track, they were carrying him up when I got over there. They had him on the stretcher.

Q. What is that? A. They had him on the road about a couple of hundred feet from the automobile when I come there. They had him up to the automobile.

Mr. Deegan: That is all.

Mr. Toolan: No questions.

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FRANK COURTNEY, a witness produced on behalf of the plaintiff, being duly sworn according to law on his oath, saith:

*Direct Examination by Mr. Deegan:*

Q. How old are you, Mr. Courtney? A. Twenty- 30 three.

Q. Did you work in the A. S. and R. plant at any time? A. Yes, on several occasions.

Q. You are a married man with a family? A. Yes.

Q. What parts of the A. S. and R. did you work in? A. I worked in the tank house; I worked in the copper casting, and the machine shop.

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*Frank Courtney—for Plaintiff—Direct.*

Q. Will you indicate on that map what part of the copper casting building you worked in? A. The office.

Q. How far is that from the pulverizing building? A. Why, the pulverizing building is west of the copper casting department, I should judge.

10 Q. For whom did you work? A. I should judge it is about between 300 to 325 feet from the office of the copper casting.

Q. Did you know any men who worked in the pulverizing building or the casting building? A. Yes.

Q. Do you know what toilet you used when you worked in the casting building? A. Tank room toilet.

20 Q. How would you go to the toilet?

Mr. Toolan: I object. My reason is that this man was an employee of the American Smelting and Refining Company. What he did, and the extent of his authority and invitation is certainly no test or criterion of what might be done by somebody else working for an independent contractor, upon the property of the American Smelting and Refining Company.

30 The Court: I will allow it.

Mr. Toolan: Prays exception.

The Court: Yes.

Q. What toilet did you use while working—

The Court: You should not limit it to what he did, but what the general custom of men, that is perfectly competent.

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*Frank Courtney—for Plaintiff—Direct.*

Q. What was the custom of employees in the copper casting and pulverizing buildings in regard to the use of toilets?

Mr. Toolan: Prays exception to this general line.

The Court: Certainly.

A. Why, the tank room toilet.

Q. How would the men go from the copper casting and pulverizing buildings to the tank house toilet? A. Why, across a bridge.

Q. What aisle would they come down? A. Why, there are several aisles to go down.

Q. What aisle would the men use on the west side of the copper casting building, the part of the casting building indicated on that map? A. Why, they would use the southern aisle.

Q. Will you show us on the map what aisle would be taken? Where is the pulverizing building, first, and the copper casting? A. (Witness indicates.)

*By the Court:*

Q. About how many men worked for the plant in that building? A. The tank room building?

Q. The one you just pointed to. A. Pulverizing?

Q. Yes. A. I haven't any idea.

Q. Well, more than one? A. Several.

Q. What is this building? A. Copper casting.

Q. How many worked in that? A. Oh, I should judge about two hundred men.

Q. When the men working in the copper casting and also in the pulverizing building, the men who worked for the plant itself, made use of a

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*Frank Courtney—for Plaintiff—Cross.*

toilet, which toilet did they make use of? A. Tank room's toilet.

Q. That is the toilet where? A. Up here (indicating).

Q. How would they get there? A. Why, they get there across that bridge there, or they could get up this way and cross through the aisle there. 10

*By Mr. Deegan:*

Q. Did anybody ever stop you from going into that toilet? A. No.

Q. Any signs telling you not to use that toilet? A. Not that I saw.

Mr. Toolin: I want an objection to all this on the ground that the rule applied to the employees of the plant would not be the same as to outsiders. 20

Q. Did you ever see any outside employees using that toilet? A. No.

Q. Did you ever see any outside employees working in the plant? A. No.

Mr. Deegan: That is all.

30 *Cross-Examination by Mr. Toolan:*

Q. You know about this path, don't you? A. Yes, sir.

Q. This path, in fact, leads from the office, does it not, right down through the plant? A. Yes, sir.

Q. It is a path about how wide? A. Why, the road path, do you mean? 40

*Frank Courtney—for Plaintiff—Cross.*

Q. The path that comes down through the plant, up over the ramp and so forth? A. That is a road.

Q. It is really a road, is it? A. Yes.

Q. About how wide? A. I should judge about eight feet wide.

Q. Leads on down through the plant? A. Yes, sir. 10

Q. Used by pretty near all the employees in going down through the plant? A. Well, some of them, and used by trucks and wagons and horses, and so forth.

Q. You can take that path, can you not, from the coal pulverizing plant, as indicated, around to the toilet, around the building? A. You can.

Q. If you took that path you would avoid crossing over any tracks at all, would you not? A. You would have to cross several tracks. 20

Q. Is not the only track that you would have to cross shown here and marked "standard gauge track"? A. Yes.

Q. Is not that the only track you would have to cross? A. No. Several tracks up here, the valley tracks.

Q. Do you cross them at grade, or over a bridge? A. At grade. Level with the tracks. 30

Q. They are the regular Lehigh Valley Railroad tracks? A. Yes, sir.

Q. You say you never saw any employees of contracting firms working in the plant use that toilet? A. No, I didn't.

*By the Court:*

Q. Were you working there at the time of this accident? A. I was. 40

The Court: That is all.

*John Daly—for Plaintiff—Direct.*

JOHN DALY, a witness produced on behalf of the plaintiff, being duly sworn according to law on his oath, saith:

*Direct Examination by Mr. Deegan:*

Q. Mr. Daly, you live in Perth Amboy? A. Yes.

10 Q. How many years have you lived in Perth Amboy? A. Thirty years.

Q. How long have you worked for the A. S. & R.? A. Sixteen years.

Q. When did you first start working in the A. S. & R. plant? A. 1908.

Q. When did you cease working in the A. S. & R. plant? A. May 15, 1923, was the last day I was in the plant. Excuse me, May 14. I received  
20 my pay on that day, that was the last pay I drew, and got my clothes, and I was through.

Q. You had no disagreement with the company that caused you to leave? A. No, nothing at all.

Q. What was the reason you left? A. My health got bad and it didn't suit me to work there, so I had to look for other employment that would suit me.

Q. You are not related in any way to the  
30 plaintiff in this action. What position did you hold with the A. S. and R. plant? A. I was shift foreman in the smelting department, that is the blast furnaces, for about twelve years.

Q. What other position did you hold? A. For the last three years I worked there I was general foreman of that department.

Q. General foreman of the blasting furnaces? A. Yes.

40 Q. How many men would you have under you?

*John Daly—for Plaintiff—Direct.*

A. Well, that varied according to the furnaces we were running. Sometimes it would be about 125 or 130, 150; sometimes they raise it up to 175; and less, down as low as 80.

Q. You were one of the high-salaried men? A. Well, the salary was according to the job.

Q. Boss work? A. No. Mostly man paid by  
10 the month.

Q. What were your wages? A. \$180 a month.

Q. You are thoroughly acquainted with the plant of A. S. & R.? A. Yes, sir.

Q. Would your work bring you up to the pulverizing building? A. Well, occasionally.

Q. Would it bring you to the copper casting building? A. Occasionally, too, yes.

Q. And the tank room? A. Yes.

Q. During the eighteen-year period you have  
20 been up and around these buildings practically every day?

Mr. Toolan: The witness ought to be able to testify. Let him tell how often he was there.

A. I would not say every day. That just depends on how my business would take me there.

Q. There was no gap during this long period  
30 of employment, was there? A. No.

Q. You worked there steadily? A. Oh, yes. I was out of there for one year. That is what you mean?

Q. Yes. A. I was out of there for one year.

Q. How many years have you worked there altogether? A. Well, I would say direct time working there would be about fourteen and one-half years.

*John Daly—for Plaintiff—Direct.*

Q. You are well acquainted with the conditions of the tank room and copper casting building, two months prior to this accident? A. Yes.

Q. What was the condition of the A. S. & R. plant when you left?

Mr. Toolan: I object.

10 The Court: Objection sustained.

Q. From the standpoint of safety.

Mr. Toolan: I object.

The Court: He was gone two months before this accident happened.

Q. Were there any plans under way for the reconstruction of the A. S. and R. plant, which  
20 would not be completed for several months after you left?

Mr. Toolan: I object.

The Court: Objection sustained.

*By the Court:*

Q. Did you go down there after you left? A. A. No, sir; I have not.

Q. Haven't been in the plant since? A. After  
30 May 14 I have not been in the plant.

Mr. Deegan: I pray an exception.

The Court: Certainly.

*By Mr. Deegan:*

Q. Will you go to that map, Mr. Daly, and tell us if that scale house was there two months prior to the accident, when you left?

Mr. Toolan: I object.

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*John Daly—for Plaintiff—Direct.*

The Court: I will allow that. He can say whether or not that map, which is admitted in evidence, as to the conditions that existed at the time of the accident, also truly portrays or delineates the conditions at the time that he left.

Q. Where is the pulverizing building? A. Right  
10 here.

Q. And the casting building? A. The casting is right here (indicating).

Q. Is there a door leading from the pulverizing building into the copper casting building? A. Yes. Right here (indicating). There is a little door right in this corner (indicating).

Q. Two months prior to the accident did you have any occasion to use the toilet in the tank  
20 room? A. No. We had our own private toilet.

Mr. Toolan: I object.

The Court: Yes.

Q. Was that scale house there in your time? A. No.

Q. How long was that scale house? What sort of building was it?  
30

The Court: You do not have to guess at those things. That map is admitted in evidence by agreement and can be scaled, and get it positively.

Mr. Deegan: It does not show the buildings.

The Court: Are you asking him to point out a building on that map that does not show there?

Mr. Deegan: Yes, sir; I am.

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*John Daly—for Plaintiff—Direct.*

Q. How long is the scale house? A. The scale house in length is about, I should judge, about fifteen feet long. I think about that.

Q. Is that a detached building or is it attached to the tank house? A. Well, you go in from the tank room, you would go into this building from the tank room direct through the wall of the tank room.

Q. I show you a picture and ask you if that is the picture as you go out of the—

The Court: The record is not informed as to what that picture is.

A. This is the office door looking sideways as you come from, where would I say, from the copper casting, I think, isn't it, going in those doors. There is the scale house and this is the office. Those are the office windows looking towards the copper casting.

The Court: The witness has referred to D-5.

Q. Can you read that sign there? A. Couldn't even see it, let alone reading it.

Mr. Deegan: It indicates the word "office."

Q. That sign indicates office and this indicates "watch your step." A. I can read that there.

Q. What is this building in here (indicating)? A. (No answer).

*By the Court:*

Q. What is it you could read? A. This "watch your step."

*John Daly—for Plaintiff—Direct.*

Q. Was that there? A. Yes.

Q. Was that there when you left? A. I don't know if that was there at that time. There were things I didn't take very particular notice of.

*By Mr. Deegan:*

Q. Can you tell on this picture, exhibit D-5, what building these windows are in? A. That is the scale room, ain't it?

Q. How long is the scale room? A. Well, I should judge that scale room is around fifteen feet, or something like that.

Q. Are there doors on the other end of this scale room that close? A. Yes, where the cars goes in there.

Q. Where are those doors on the end of the scale house? A. Yes, right on the end of the scale house.

Q. Is that an exit, or is it not an exit? A. That I can't tell you.

Q. Referring to the large map, exhibit D-1, is that scale house attached to the tank house? A. Yes. That is attached to the tank house as near as ever I knowed of it. I never went in and made a close investigation of it, but passing along.

Mr. Toolan: I would like to have the witness not guess at it. If he has been there eighteen years he ought to know.

Q. Mr. Daly, was there a path around the tank house at any time that you remember? A. No.

Q. Where was the detour when you were there, if any? A. Why, let me see, where would the

*John Daly—for Plaintiff—Direct.*

main office be? Came down around, this is the new path along the new construction. This is the new construction tracks installed about in 1922 or 1923, along here, when I was just about through there. This was the new system of track installed, and this road wasn't in at the time. The men was supposed to come down around the other way.

Q. What way would they come? A. They would have to come down to the main office door and down the old road alongside of the pond.

Q. Where is the pond? A. The pond is—

Q. Look at the map and refer to it. A. The pond is direct west of the tank room (indicating).

Q. What was the other course taken two months before this accident? A. Course to where, to the entrance to the plant?

Q. Into the entrance of the plant. A. Well, it came around the other way. That would be south of the coal pulverizer.

Q. That is north on the map.

The Court: That is not competent evidence.

A. We will make it south of the coal pulverizer.

Mr. Toolan: I object to this witness speculating.

The Court: You cannot ask this witness what path they took two months before the accident.

Mr. Deegan: I am bringing out the tracks that were under construction at that time to prove that they were there at the time of this accident, as has been

*John Daly—for Plaintiff—Cross.  
Thomas Pederson—for Pltff.—Recalled—Cross.*

testified previously. And it is corroborating former testimony.

The Court: All right. I will not allow it.

Mr. Deegan: Prays exception.

The Court: You may spoil your whole case, if you are entitled to a case, by that kind of evidence. You distinctly asked him what path these men took two months before the accident. The very statement of it shows that it is not admissible.

*Cross-examination by Mr. Toolan:*

Q. Mr. Daly, you were discharged from the plant of the American Smelting and Refining Company, were you not? A. I never knowed it. I had to leave there on account of having poor health.

Q. Are you related to Mr. Deegan? A. Nothing at all to him whatever.

Mr. Toolan: That is all.

Mr. Toolan: I would like to recall Mr. Pederson for a couple of questions.

THOMAS PEDERSON, recalled.

*Cross-examination by Mr. Toolan (Cont.):*

Q. Mr. Pederson, what physician attended you immediately after your injury? A. Doctor Meinzer.

Q. For how long a period? A. Oh, about six or seven months.

*Thomas Pederson—for Pltff.—Recalled—Cross.*

Q. That would be from about July up until January of 1924, is that right? A. Yes, sir.

Q. Then, after that what doctor took care of you? Did you require the attention of a doctor after that? A. Yes, sir. I went to try these osteopaths.

10 Q. Eliminating them as doctors, did you go to any medical men? A. Well, I went to Doctor Henry.

Q. How many times? A. Two or three times?

Q. When? A. Latter part of January.

Q. Who else? A. I had a doctor examine me, Doctor McCormick.

Q. How many times? A. Couple of times.

20 Q. Now, Mr. Pederson, you got a job working on the bridge between Perth Amboy and South Amboy, did you not? A. Yes, sir.

Q. You were on the job one or two days, isn't that so? A. No, sir.

Q. You were on the job how long? A. About an hour.

Q. Then what happened? A. I had to quit.

Q. Why did you quit? A. I couldn't stand it.

Q. What did you have to do on that bridge? A. Didn't have to do anything, just walk around.

30 Q. You could not hold down a job doing nothing, is that right? A. Yes, sir.

Q. When was that? A. I forget the month.

Q. Well, it was last summer some time, wasn't it? Well, about what time? What time in 1924 was it? A. Somewheres around in March, I believe. No, not in March.

Q. About when? A. I forget what time of the year it was.

*William H. McCormick—for Plaintiff—Direct.*

Q. You don't know whether it was summer, spring, or winter? A. No. It was a cold day.

Q. Well, was it late in the fall? A. I don't recollect.

Q. It was some time during 1924, isn't that so? A. Yes, sir.

Mr. Toolan: That is all I have. 10

Mr. Deegan: That is all.

*By Mr. Deegan:*

Q. Mr. Pederson, how many months did you work on the bridge in 1924? A. From July until October.

Q. How much did you get there? A. \$35 a week.

*By Mr. Toolan:* 20

Q. You went back to work there in July, is that it? A. No. This was not the bridge. I was running a motor boat.

WILLIAM H. McCORMICK, a witness produced on behalf of the plaintiff, being duly sworn according to law on his oath, saith: 30

*Direct Examination by Mr. Deegan:*

Mr. Toolan: The qualifications of the doctor are admitted.

Q. Doctor McCormick, have you examined Mr. Pederson? A. I have.

Q. How many times? A. Twice.

*William H. McCormick—for Plaintiff—Direct.*

Q. When was the last time you examined him?

A. This morning.

Q. What were your findings, Doctor, on his case?

10 Mr. Toolan: I think the Doctor ought to tell us what his condition is. His findings are rather an indefinite question.

A. I find that Mr. Pederson has an atrophy of the muscles of the thigh, and an atrophy of the muscles of the calf of the leg. He has a limitation of motion in the knee joint, a limitation in extension of the foot of about ten per cent. of normal, and a limitation inflexion of about fifty per cent.

20 *By Mr. Toolan:*

Q. Of what? A. Of normal.

Q. Of the ankle, or the knee? A. Of the knee.

*By Mr. Deegan:*

Q. What is the main injury in the leg, Doctor?

A. Well, I don't just understand.

Q. What are all these caused by? A. As the result of a fracture.

30 Q. A fracture of what part of the leg? A. Of the tibia.

40 Q. Will you indicate to the jury just where the injury extends on his leg? A. He had a fracture of the left tibia, that is the large bone here in the leg, a fracture which was an oblique fracture, about four inches long, that is, it ran up to a point about from here to within about a half an inch or three-quarters of an inch of the knee joint proper, that is where the thigh

*William H. McCormick—for Plaintiff—Direct.*

articulates or rolls on the lower leg. The fracture is what we term as a comminuted fracture, that is, it has several openings, it is not just a straight fracture. The X-ray pictures will show just what that is.

Mr. Deegan: I offer this as an exhibit.

Mr. Toolan: I object to it unless the 10 doctor who took it is present.

Q. What is the difference, Doctor, in the thighs? A. Due to the fact of this fracture there is a certain amount of wasting, which we term atrophy of the muscles, so that in measuring the circumference of the thigh above the knee and comparing it with the sound leg, there is about from three-quarters to one inch difference in 20 circumference. In other words, this leg is smaller or this thigh is smaller than the sound leg, below the knee there is a difference by measurement of about half an inch.

Q. Are those conditions visible? A. Yes. Noticeable to the naked eye.

Mr. Deegan: I would like to have his leg shown to the jury.

(Adjourned Until 1:55 P. M.) 30

AFTERNOON SESSION, 1:55 P. M.

*Direct Examination by Mr. Deegan (Cont.):*

Q. Do you think, Doctor, if a man received an injury July 23, 1923, such as has been received by Mr. Pederson, and his condition is as it is today, do you consider such an injury permanent? A. Yes. 40

*William H. McCormick—for Plaintiff—Cross.*

Q. Do you consider that an injury of that nature which happened July 23, 1923, would prevent Mr. Pederson from engaging in an occupation which required walking up ladders and walking on iron beams, would it keep him from engaging in that occupation of iron worker?  
A. Yes.

10 Q. Doctor, what is the expectancy of life of a man in good health at age 39?

Mr. Toolan: I object to the Doctor testifying to that. There are ways of proving that.

Mr. Deegan: I might ask him if that is a part of the medical profession to be acquainted with the expectancy of life of people at various ages.

20 Mr. Toolan: The doctor is not an actuary, I do not believe he is qualified as such.

The Court: It is not competent evidence. There is a way of proving that by a table you can put in evidence. He might have one opinion, and another doctor might have another opinion.

30 Q. Have you consulted any actuary tables showing the expectancy of life of a man at age 39, in good health?

Mr. Toolan: I object.

The Court: Objection sustained.

*Cross-examination by Mr. Toolan:*

40 Q. Doctor, what is it that causes the atrophy or withered condition of the limb that you have testified to? A. The character of the injury, fracture.

*William H. McCormick—for Plaintiff—Cross.*

Q. Injuring what specific part of the anatomy? A. The fractured tibia, when any bone is injured, not only the bone is injured but the surrounding tissue, muscles and nerves.

Q. Isn't it particularly the nerve injury that causes the atrophied condition? A. Yes.

Q. And, Doctor, isn't it a fact that atrophy generally develops below the point of injury, below the point of nerve injury? A. As a rule, yes.

Q. The nerves are feed from the center, which is above this particular injury, isn't that so? A. That is right.

Q. Can the atrophied condition of the limb above the injury, that is the thigh, be attributed to the nerve injury at the point where this leg was broken? A. No, it cannot.

Q. That condition, Doctor, is probably due somewhat to disuse, is it not? A. I would not say so in this case.

Q. The mere disuse of a physical member, Doctor, will cause it to wither or atrophy or stiffen, will it not? A. Yes.

Q. In other words, the muscles of the leg or arm or any other part of the body will not remain as rigid or robust if it is not used? A. That is right.

Q. May not this man's atrophied condition from the knee up, that is on the thigh, speed up and get back to normal by continued use of this member? A. Well, I should say such a thing might be possible, yes.

Q. Now, Doctor, the atrophy in this case is mostly above the knee, too, is it not? A. Well, no, I would not say so. I think it is about equal.

*William H. McCormick—for Plaintiff—Cross.*

Q. Have you measured the difference between the two thighs? A. Yes.

Q. What is the difference, Doctor? A. About three-quarters of an inch.

Q. It looks worse than that, does it? A. I mean it is rather deceptive in looking at the two legs. A. It looks more than three-quarters of an inch?

Q. Yes. A. Oh, I don't know about that.

Q. Now, Doctor, you didn't attend this man, did you, when he was first injured? A. No.

Q. When did you first attend him? A. I really never attended him professionally. I examined the man probably a month ago, six weeks ago, for the first time.

Q. That was the first time? A. Yes.

Q. So that you can't tell us whether in your opinion that injury, not knowing the history of the injury, was of such a nature that it would of necessity have incapacitated him from July 24, 1923, to April, 1925? A. Ordinarily, no, but in this case I could, because I was familiar with the accident, having seen the man in the hospital and also out of the hospital after he was discharged.

Q. That was merely from observation on the street? A. That is all, yes.

Q. Of course, that opinion of yours might be formed by the fact you saw this man going around the street with crutches? A. Exactly.

Q. Your opinion based on the assumption that he was carrying crutches because he had to? A. Yes.

Q. Your opinion is not based upon an examination of Pederson from time to time and closely

*William H. McCormick—for Plaintiff—Cross.*

following the development of the case, as you might if you were the attending physician? A. All I can say is that the statements I made are what I—were the opinions that I formed from the examination that I made.

Q. About a month or so ago? A. Yes, and today.

Q. Will you say from your examination today, and a month ago, or several months ago, that the conditions that you found would cause you to form the opinion that that injury was of such a nature that it would incapacitate Pederson for a period from July, 1923, up through April, 1925? A. Yes, I certainly would.

Q. When you say "incapacitate," just what do you mean, Doctor? A. Well, we knew that before the accident that he was an iron worker, and it incapacitated him to the extent that he could not certainly follow the occupation that he had before the time of injury.

Q. That is what you mean? A. Yes.

Q. You and I have different things in mind, so let us clear it up. How soon after this injury could Pederson go back and engage in other lines of occupation by means of which he might make a living? A. Oh, probably six months.

Q. You think from six months after the accident on that Pederson ought to be in condition to earn a living in some less vigorous line than iron worker? A. Yes, I should say so.

*By the Court:*

Q. What is the percentage of impairment, Doctor? A. Well, I testified that in my opinion that there was at least ten per cent. loss in ex-

*Frank C. Henry—for Plaintiff—Direct.*

tension of the leg, and fifty per cent. loss in flexion on the knee.

Q. In physical power and usefulness what is the percentage? A. Of the whole leg?

Q. Yes, as compared with a normal leg. A. Why, I should say at least twenty-five per cent.

10 The Court: That is all.

Mr. Deegan: That is all.

FRANK C. HENRY, a witness produced on behalf of the plaintiff, being duly sworn according to law on his oath, saith:

*Direct Examination by Mr. Deegan:*

20 Mr. Toolan: Qualifications admitted.

Q. Doctor Henry, you have examined Mr. Pederson several times? A. Twice.

Q. Will you tell us his condition? A. I examined him about a month ago and at that time there was some wasting of the thigh muscles, and also his leg, and he had some—in looking at the X-ray picture I found out that he had a fracture of the bone known as the tibia, or shin bone, a comminuted fracture that went up to the knee joint. He was unable to extend his leg fully, and he was unable to flex the leg from the knee. The muscles were flabby and soft, showing lack of tone. I think that is about all.

Q. Do you believe a man who received an injury July 23, 1923, such as Mr. Pederson has had, and with his condition as it is today, do you think that would be a permanent condition? A. Yes.

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*Frank C. Henry—for Plaintiff—Cross.*

Q. Do you think that he is in a position to resume his former occupation, that of iron worker?

A. I do not.

*Cross-examination by Mr. Toolan:*

Q. Doctor, how soon after this injury would you say that Pederson should have been able to go back and engage in some employment that would assist him in gaining a livelihood? A. I don't know. I couldn't answer that.

Q. You are not familiar with the history of the case? A. No.

Q. Your testimony is simply as to the condition that you find at the present time? A. Yes. And one month ago.

Q. Doctor, the atrophy above the knee, that is on the thigh, can that be attributed to nerve injury below the knee at the point where he sustained the injury? A. I don't know what caused it.

Q. Might it not be caused from merely failure to use the limb in the way that he had used it prior to the accident? A. Yes.

Q. Mere disuse of a member will cause flabbiness and an atrophy of the limb, will it not? A. Yes.

*By the Court:*

Q. What percentage of impairment as to physical power and usefulness of the leg, as compared with the normal limb, do you find, in your opinion? A. Your Honor, I would have to figure on what sort of work.

Q. Taking it generally, Doctor, for any kind of work that requires physical exertion and

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*Motion for Non-Suit.*

physical power? A. Why, I imagine about twenty-five per cent., that Doctor McCormick testified.

The Court: That is all.

Mr. Deegan: Plaintiff rests.

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MOTION FOR NON-SUIT.

Mr. Toolan: I desire at this time to move for a non-suit:

1. On the ground that the plaintiff was a mere licensee on the premises, and that the defendant owed the plaintiff no duty except to refrain from wilful negligence.

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2. That the defendant was in no wise negligent because in the situation developed here under the testimony, that they are under no duty to the plaintiff, under no obligation to give him any signal or warning of the motions of that train that injured him.

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3. That the risk that the plaintiff subjected himself to was an obvious risk; that he knew it was dangerous to walk between trains of this description; that he knew he was taking a chance, or should have known it, and that when he walked between there he took that chance of injury; in other words, that he assumed the risk.

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Finally, that the plaintiff was certainly careless, under his testimony, guilty of contributory negligence.

*Motion for Non-Suit.*

On those propositions I have some authorities. For instance, I suppose on the question of whether this man is a licensee or invitee on the premises, we will admit that the man was an invitee on the premises to the extent that he was permitted to be upon the premises to work as an iron worker for the Pasky Construction Company; that his invitation did not extend or go beyond that; that it is well-known rule of law that an owner of ground is liable only to the extent of his invitation. The mere fact that a man invites another upon his land to do some work does not by implication extend to him an invitation to use any toilets that might be on the premises, for the purpose of relieving himself. That, I think, was decided in the case of *Carey v. Gray*, 119 Atlantic, 176. (Citing case.)

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(Mr. Deegan replies to the motion for a non-suit.)

The Court: The rule as to the degree of duty of one to a mere licensee simply extends to refraining from wilful and wanton negligence. The duty of one to his invitee imposes a duty of exercising ordinary care and prudence, such as would be exercised by the ordinary prudent person.

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The first point raised under this motion is that while the plaintiff had an invitation to enter this plant, there was no invitation expressed or implied to use the toilet. The case particularly cited in support of that contention is that of *Carey v. Gray*. In that case Carey had the actual job of disinfecting an unoccupied house owned by Gray, and he went there in the nighttime to do that job, and while engaged in the

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*Motion for Non-Suit.*

work he needed the use of a toilet, and he finds that the toilet in the house is out of order, and he begins to explore for a toilet, which brings him into the yard, at night-time, and he reaches a privy which is in the yard, and it being dark he fails to see that there is no flooring to the privy, with the result that he falls into the privy and is injured. The Court held, in view of all of the circumstances of that case, and everything connected with this merely casual job, there was neither an implied invitation to use the toilet in the house, or toilet in the yard, and, therefore, the defendant was not responsible, because there was no evidence of wilful or wanton negligence. But, aren't the facts in this case radically different? Here is a very vast plant in area. This plaintiff was engaged as an iron worker by a contractor who was doing work for the owners of this plant. There is no comparison, from the standpoint of mere casualness, as to the character of the job in the case of *Carey v. Gray* and this case. Men are naturally assumed to know that which will probably happen. This man was engaged to work at a job that was to take considerable length of time, at least, that could be reasonably inferred from the evidence, and to work a full day, according to the terms of his employment, and the terms of that particular hiring, and it is right to assume that the owners were charged with the knowledge that the men employed by this iron-working concern would need a toilet; from their knowledge of nature they knew that; and the jury might find that it is reasonable to conclude that the toilet that these men who were

*Motion for Non-Suit.*

supposed to give them a full day's report, would be a toilet that would be right on the plant itself, and not outside of this plant, which was of such vast area; and the testimony is that the course of passage taken by this plaintiff to this toilet was the same course of passage which at least fifty men took in order to use the toilet, the men who were the direct employees of the owners of this plant; and the jury might find, even though he had never been told by any one, his boss or otherwise, of specifically where that toilet was, that it was reasonable for him to follow the same course in order to reach a toilet, to meet the demands of nature, that he saw the other men who were employed in the immediate vicinity taking. The young man who said he had worked in the office for a long period of time said there were at least fifty men in the building adjacent to where the plaintiff was working, he did not know how many men were working in that building, but at least one. I am positively of the conclusion that the circumstances and facts of this case leave it a question for the jury to say whether or not this man, who had an invitation to enter upon this plant, did not also impliedly have from the owners of this plant, an invitation to use that toilet.

But, what is deeply concerning me is this: If this man had exercised the care, caution, and prudence of a reasonably prudent man, would he not have avoided this injury? That has not been argued by you, Mr. Deegan, to my satisfaction. You simply say that he says he exercised due care. The question is, what did he do? Why did he not, as a reasonably prudent

*Motion for Non-Suit.*

10 person, have a duty of seeing whether or not there was a man on this locomotive? There had to be a man on that locomotive in order to make it move. He says there was a distance of four and five feet between the locomotive and the cars. He says he stopped and paused; did he exercise the observation that a reasonably prudent person should have exercised under the circumstances? Did he not have a clear duty from the standpoint of ordinary prudence to see whether or not this locomotive or engine was in the position that it might move, that there was a probability of it moving? That is what is worrying me. The other question I would leave to the jury. I am not positive about it and in these cases, unless you are positive about it, 20 these motions for non-suit are not granted, but it is worrying me, and the motion may be renewed subsequently, but for the present it is denied and you may taken an exception.

Mr. Toolan: Prays exception.

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*Martin S. Meinzer—for Defendant—Direct.*

## DEFENDANT'S CASE.

MARTIN S. MEINZER, a witness produced on behalf of the defendant, being duly sworn according to law on his oath, saith:

*Direct Examination by Mr. Toolan:*

Mr. Deegan: The doctor's qualifications are admitted. 10

Q. Doctor, you attended the plaintiff in this case, Thomas Pederson, did you not? A. I did.

Q. From the date of his injury? A. Yes.

Q. For how long a period, Doctor? A. I looked up my record this morning and it extended, I think, from July 24 to October 20, 1924. I might state that Mr. Pederson would occasionally drop 20 in my office and we would just have a talk about his work; but, as far as attending him professionally, that is the date.

Q. Well, had he reached a point after October 20, 1923, where no further medical attention was required? A. Yes.

Q. Doctor, how long in your opinion, with your knowledge of the history of this case as attending physician, would you say that Mr. Pederson 30 was laid up and unable to do any work of any nature whatsoever? A. About four months.

Q. Is it your opinion that at the end of four months that he could have gone out and gotten a job in some occupation that would not have required as strenuous use of the leg as iron-working? A. Yes.

Q. Doctor, you have atrophied condition of Mr. Pederson's leg both above and below the 40

*William E. Ramsay—for Defendant—Direct.*

knee? That is, both above and below the break, have you, Doctor? A. Yes.

Q. Doctor, can you attribute medically the atrophied condition of the leg above the knee to the breaking of this bone, or injury to the leg? A. In my opinion it is due to non-use.

10 Q. And not to the accident? That is, not to the injury sustained? A. No. Indirectly from non-use.

Q. In your opinion, Doctor, will Pederson's condition improve in that time, that is, his condition as revealed today? A. Yes, in my opinion.

Q. Do you think that the leg will improve with use? A. I do.

20 Q. Will that atrophied condition of the upper part of the leg, that is, above the knee, fill out and grow stronger and better with continued use? A. It will grow better with use.

Q. What would you say, Doctor, was the extent of the permanent disability of Pederson's leg? A. About twenty per cent.

Mr. Toolan: That is all. Cross-examine.

Mr. Deegan: No questions.

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WILLIAM E. RAMSAY, a witness produced on behalf of the defendant, being duly sworn according to law on his oath, saith:

*Direct Examination by Mr. Toolan:*

Q. Doctor Ramsay, you are the physician for the American Smelting and Refining Company? A. I am.

40 Q. Did you as such physician see the plaintiff, Pederson? A. Not as the physician for the American Smelting and Refining Company.

*William E. Ramsay—for Defendant—Direct.*

Q. When did you see him? A. On September 29, last year.

Q. Did you examine him at that time? A. I did.

Q. Have you seen him since that time? A. I have.

10 Q. How many times? A. I saw him for a subsequent hearing, I haven't got the exact date, but my impression is that it was around the latter part of January.

Q. Of this year? A. Of this year.

Q. How many altogether have you examined Pederson? A. I have examined him twice for hearings in the compensation bureau.

Q. And you saw him here today, did you not? A. I did.

20 Q. Doctor, are you able to state from the examinations that you made of Pederson, and what you know of the break, from your examinations, how long in your opinion that injury would incapacitate Pederson from doing any work of any nature whatsoever? A. Not over four months.

Q. Do you think after four months he ought to be able to do some kind of work? A. I do.

30 Q. You would not say that he could do iron work? A. No.

Q. Do you think that he is in condition now to work as an iron worker? A. At iron work, yes.

Q. Doctor, will his condition improve any in time? A. It will.

40 Q. What improvement may you anticipate now? A. Anticipate a great deal more motion to the knee with a taking up of the muscles, which are flabby and smaller on account of disuse. In

*William E. Ramsay—for Defendant—Cross.*

other words, it has been nursed too much. With use it will improve as all muscles which have been in disuse, as soon as he begins to use it.

Q. Do you think the leg has been catered to?  
A. What?

Q. Favored? A. Yes. I think he has not been using it at all. He has been saving it. 10

Q. What would you say was the extent of the permanent disability? A. Not over twenty per cent.

*Cross-examination by Mr. Deegan:*

Q. Doctor, you say that angle in his knee will straighten out in time? A. Materially, yes.

Q. Will it become normal again? A. That would depend on the use of it. I think under treatment. I think under massage and manipulation of that joint, and so forth, had that right along, it would have been all well now. 20

Q. Why do you say it is a permanent condition if it will get better again? A. I say it will improve.

Q. You say it will get normal again? A. It will improve a great deal. I can't tell the extent to which it would, because I don't know how well he would take care of it. If he would take no better care of it up until the present time, I can't see what improvement there will be. 30

Q. How long have you been the company physician? A. Twenty-five years.

Mr. Deegan: That is all.

Mr. Toolan: That is all.

*Carl Lindner—for Defendant—Direct.*

CARL LINDNER, a witness produced on behalf of the defendant, being duly sworn according to law on his oath, saith:

*Direct Examination by Mr. Toolan:*

Q. You are employed by the American Smelting and Refining Company? A. Yes, sir. 10

Q. In what capacity are you employed? A. Plant engineer.

Q. Are you familiar with the blueprints that are marked in evidence here? A. Yes, sir.

Q. Are you familiar with the engine and cars and so forth of the type that were used in the tank room on the 24th of July, 1923, the date of this accident? A. I wasn't at the plant at the date of the accident, but I have seen the equipment after it came there, which was in the fall of 1923. 20

Q. The same equipment? A. The same equipment.

Q. You are familiar with that equipment? A. Yes, sir.

Q. What is the width of the narrow gauge track that was used in the tank room? A. Twenty-four inches.

Q. Can you tell us from these blueprints the width of the doors marked "N" and "M" on the blueprints, that is, this door and this door (indicating)? A. This door about six feet, and this one about nine or ten feet. 30

Q. Have you got sketches here of those doors? A. Yes, sir.

Q. Is this a detail, this drawing I show you, a detailed drawing of that door? A. This drawing shows the exact openings at the door as they 40

*Carl Lindner—for Defendant—Special Cross.*

are today, and as they were at the time of the accident.

Q. That is a detail, is it not, of those two doors? A. A detail of this north door, of this door here (indicating).

10 Q. Which is the north door? A. This one here (indicating).

Q. The one marked "M." Have you got a detail of the door marked "N"? A. Yes, sir.

Q. Is this blueprint I have in my hand now a detail of the door marked "N"? A. This is not a detail of the door. This is merely the clearance between the center line of those two tracks.

20 Q. This blueprint that I hand you, what does that show? A. It shows both doors on the north side of the tank room, the two doors in question.

Q. Marked "M" and "N" on the blueprint, exhibit D-1? A. Yes, sir.

Mr. Toolan: I want to offer that blueprint.

Mr. Deegan: I would like to ask a few questions.

30 *Special Cross-examination by Mr. Deegan:*

Q. You have laid out a blueprint from this building? A. This is not a blueprint showing the building. It is merely a blueprint showing the distance between center line and center line of the columns; where the second print gives the exact dimensions between the center line of rail and face of building, face of column, which will give you the actual clearance dimensions between the track and building.

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*Carl Lindner—for Defendant—Direct.*

Mr. Deegan: I will not consent to it.

The Court: Have you any objection?

Mr. Deegan: Yes. It is not understandable by me. I can't make head nor tail out of it.

Mr. Toolan: I desire to offer it as a detail of the doors "M" and "N" shown on the large blueprint, exhibit D-1. 10

*By Mr. Deegan:*

Q. Are those columns of the tank house, or partitions? A. Yes, sir.

Q. Where are the partitions of the scale house? A. Outside. The scale house is out in this building here (indicating).

Q. You don't show it? A. Not on this drawing here; no, sir. 20

Q. But the scale house is right in this area, is it not? A. That is shown on that other drawing; yes, sir.

The Court: I will admit it.

(Blueprint entered in evidence and marked exhibit D-7.)

*Direct Examination by Mr. Toolan (Cont.):* 30

Q. I show you another blueprint here dated August 18, 1924, and ask you what that blueprint shows. A. This is a door of the tank room on the south side of the tank room building.

Q. Is that the door marked "N" on the blueprint, exhibit D-1? A. No, sir. It is on the opposite side of the tank room, Mr. Toolan.

Q. Over on this side (indicating)? A. Yes, sir.

Q. Then, I do not want that one. Can you tell me from the blueprint marked in evidence, 40

*Carl Lindner—for Defendant—Direct.*

exhibit D-7, the width of that narrow gauge track going out of those two doors "M" and "N"? A. Twenty-four inches.

Q. What is the width of the door marked "M" on blueprint, exhibit D-1, that is this door here (indicating)? A. Ten foot, three inches.

10 Q. What is the width of the door marked "N"? A. Six foot, six inches.

Q. How long have you been employed at the plant? A. Since December, 1923.

Q. Are the two doors marked "M" and "N" on the blueprint D-1 both open at all times? A. Not at all times.

Mr. Deegan: I object.

20 The Court: He says, "Not at all times." Besides that, he was not there at the time of this accident.

Q. I show you a photograph and ask you what that photograph shows. A. This photograph shows one of the doors into the tank room.

Q. Do you know which one? A. This is the south door.

30 Q. Is that the door marked "N" here? A. Yes, sir.

Q. What is in that door? A. An air locomotive.

Mr. Toolan: May I have that marked for identification?

(Photograph marked D-8 for identification.)

40 Q. How many exists are there on this end of the tank house, that is the end toward the bot-

*Carl Lindner—for Defendant—Direct.*

tom of this blueprint marked D-1? A. There are three doors.

Q. Are there any aisles passing from a point up along the narrow gauge track indicated on this drawing, out of those doors?

Mr. Deegan: I would like to enter upon the record an objection on the ground 10 that the witness is testifying to conditions not as of the date of the accident, and the time is not specified. On the further ground that this man, at the time of the accident, was not employed by the American Smelting and Refining Company.

Mr. Toolan: This witness was not employed at that time, and I cannot ask him to describe conditions at that time. All I 20 can do is to ask him to describe conditions from that time, and if we cannot show they are the same, I will consent it be stricken out.

The Court: If it is not connected up it will be stricken out.

Mr. Toolan: I will not press that line of examination any further for the time being, anyway. 30

Q. How wide are the doors that are used in the tank room to transport these anodes? A. About three foot to three foot six inches.

Q. How wide is this air locomotive or tank part of it? A. About three feet.

*By the Court:*

Q. That is its widest part? A. No, sir. Only through the tank part. The bumper part of 40 the air locomotive is somewhat wider.

*Carl Lindner—for Defendant—Cross.*

Q. How large is the widest part of it, that is the bumper part of it? A. About four foot three inches.

Mr. Toolan: That is about all I have of this witness.

10 *By the Court:*

Q. What is an air engine and how is it operated? A. An air engine is very nearly the same as a steam engine only they are operated by high-pressure air, one thousand pounds of air. It is a reciprocating engine and it is exactly like a small steam engine.

Q. Where does the operator sit? A. The operator sits low at one end.

20 Q. Which end, either? A. No. At the rear end.

Q. Rear end? A. Yes, sir.

Q. Then, if you are immediately in front of that engine you could not see the operator, could you? A. No, hardly, not if you were immediately in front; no, sir.

*Cross-examination by Mr. Deegan:*

30 Q. Will you indicate on this exhibit D-3 which is the front of that air engine? A. This is the front of the air engine (indicating).

Q. Where does the engineer sit on that air engine? A. Right at this end here (indicating).

The Court: Pointing to the rear.

A. To the rear; yes, sir.

Q. On the other side? A. Well, he sits as a rule on the other side.

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*Carl Lindner—for Defendant—Cross.*

Q. Isn't there any stationary place for him to sit? A. No sir; if he takes a right-hand curve he moves over on this side. If it is on a left-hand curve he sticks his head out on the left-hand side of the engine.

Q. There is no cab of any sort? A. No sir.

Q. He can either be on the right-hand side or left-hand side? A. Either side. 10

Q. Where are the controls of the engine? A. They are on the left and right. Brakes and control valves are distributed across the whole front or back of the engine.

*By the Court:*

Q. How high is the highest part of that engine? A. About five foot six inches.

Q. How high are the cars when loaded? Does that vary? With the normal load about how high are they? A. Slightest lower. About ten to twelve inches lower than the engine. 20

Q. Than the highest part of the engine? A. Than the highest part of the engine.

*By Mr. Deegan:*

Q. Might not the distance from the platform here to the top of this be five feet six inches to six feet high? A. That is not six feet. 30

Q. Five feet ten inches, about? A. I do know, Mr. Deegan, that the engine is not as quite as high as the top of my head.

Q. Is it higher than your eyes? A. About the same height.

Q. Then, you could not see on the other side of it? A. No, sir.

Q. How tall are you? A. Five foot eleven. 40

*Carl Lindner—for Defendant—Cross.*

Q. Is that going backward or forward, that is, going in this direction? A. Forward.

Q. (Indicating Exhibit D-4). What is the distance between the point marked "N," the entrance to the tank house, and the beginning of the switch? A. About from three to four feet.

10 Q. The switch then begins practically immediately within the door? A. Within three or four feet.

Q. You don't know the engine that was in use on this day? A. No, sir.

Q. These bumpers do not show any couplings. Is that the customary way of shifting cars about the yard? A. No, sir. These bumpers show a coupling on this slot here. You can take a car and hook it up to the bumper of the locomotive. You see a slot right on the front of the bumper, you take the draw bar of the car in order the car can swing going around a curve.

20 Q. Do you call that a draw bar? A. The draw bar from the car has to be held on the bumper. It can be held on the bumper.

Q. When they are making up trains do they back up with the draw bar connected? A. No, sir.

30 Q. They just bump together? A. They have to.

Q. Does the draw bar fly loose at times? A. It might at times.

Q. You have testified that the scale house door was the north side of the tank house, did you not? A. The scale house is on the north side of the tank room.

40 Q. Do you want to change that testimony now? A. I don't believe I said the scale house doors.

*Carl Lindner—for Defendant—Re-direct.*

I said the scale house. The door has to be north, because the whole thing is located north of the tank house.

Q. What direction is this? (indicating). A. This is south.

Q. Indicating the line of narrow gauge railroad through the tank house, what direction? A. South. 10

Q. Would not this door be the east door (indicating)? A. No, sir.

Mr. Deegan: That is all.

*Re-direct Examination by Mr. Toolan:*

Mr. Toolan: Counsel consents to these four photographs going in evidence. There was one other we had marked for identification. I will offer that one also. 20

(Photograph entered in evidence and marked exhibit D-9.)

Photograph entered in evidence and marked exhibit D-10.)

Photograph entered in evidence and marked exhibit D-11.)

Photograph entered in evidence and marked exhibit D-12.) 30

Mr. Deegan: I will admit all these photographs, stipulation on the record, however, that they were taken April 8, 1925.

(Photograph heretofore marked D-8 for identification entered in evidence and marked exhibit D-8.)

Q. This picture, exhibit D-8 shows what? A. It shows one of the doors on the north side of the tank room. 40

*Robert C. Miller—for Defendant—Direct.*

Q. Which one? A. It seems to be the lower door, with the single track.

Q. I show you another picture marked exhibit D-9 and ask you what that shows. A. This shows the air locomotive within the north wall of the tank room.

10 Q. Does it show the engineer? A. It shows the engineer; yes, sir.

Q. Is that the position from which the engine is operated? A. Yes, sir.

Q. Is that where the engineer sits when he operates this type engine? A. Yes, sir.

Mr. Toolan: That is all I have.

20 ROBERT C. MILLER, a witness produced on behalf of the defendant, being duly sworn according to law on his oath, saith:

*Direct Examination by Mr. Toolan:*

Q. Mr. Miller, you are employed by the American Smelting and Refining Company? A. Yes, sir.

30 Q. How long have you been employed there? A. Twenty-six years.

Q. You were employed there on the 23rd or 24th of July, 1923, were you not, the date of this accident? A. Yes, sir.

Q. I show you a picture and ask you what this picture shows. A. This is a picture of a coal pulverizer building.

40 Q. Is that the building that has been testified Mr. Pederson was working in on this day? A. Yes, sir.

*Robert C. Miller—for Defendant—Direct.*

Q. I ask you whether or not there is a pathway that leads from that building around to this toilet. A. Yes, sir.

Q. By which the toilet might be reached without going through the tank room? A. There is.

Q. Is the beginning of that path shown on that photograph? A. Yes, sir.

10 Q. When were these pictures taken? A. They were taken on the 7th.

Q. Of August? A. I beg pardon, no. I don't recall, but I have the photographer here to tell you the date, if you wish.

Q. About how long ago? A. I think about three months ago, December I think it was.

(Photograph entered in evidence and marked Exhibit D-13.)

(Photograph entered in evidence and marked Exhibit D-14.)

(Photograph entered in evidence and marked Exhibit D-15.)

(Photograph entered in evidence and marked Exhibit D-16.)

30 Q. Will you please trace that path in these photographs in the way around from the pulverizer to the toilet? A. That is the way it runs.

Q. Exhibit D-13 shows what? A. Shows the beginning of the entrance from the coal pulverizer building.

Q. Is that the path directly in front of the coal pulverizer? A. Yes, sir.

40 Q. What does Exhibit D-16 show? A. That shows a continuation of the path as far as the bridge over a small pond.

*Robert C. Miller—for Defendant—Direct.*

Q. What does Exhibit D-14 show? A. That is the continuation after you get over the bridge to a point near the entrance to the copper refining building.

Q. And what does Exhibit D-15 show? A. That is the entrance to the copper refining building where the toilet is located.

10 Q. Where is the toilet located on this picture?

A. Right at the entrance of this.

Q. Will you mark it with this lead pencil, please? Put an "X" mark. A. This is the building here, and this is the entrance (indicating).

Q. That place marked "X" in black ink?

A. Yes, sir.

Q. That path leads right around, does it?

20 A. Yes, sir; that is a path right around the building.

Q. Mr. Miller, you have examined all these photographs, have you not? A. Yes, sir.

Q. Were conditions the same when these photographs were taken as they were on the 24th of July, 1923, the date of this accident? A. In the building proper, yes. There has been some slight improvement on the pathway, but the pathway is merely an improvement on the original pathway.

30

Q. Was there any change in the pathway?

A. No, sir. No change.

Q. Simply an improvement of the pathway?

A. Yes, sir.

Q. Mr. Miller, you are familiar with the rules and regulations of the plant, are you? A. Yes, sir.

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*Robert C. Miller—for Defendant—Direct.*

Q. Was there any permission given by any person in authority of the plant or any one else, to your knowledge, to employees of Pasky, to use that toilet? A. No, sir.

Q. Was there ever any permission given for any one outside of the employees of the American Smelting and Refining Company to pass through the tank room on the line indicated by Pederson in his testimony this morning? A. No, sir.

10

Q. Are there any signs outside of the two doors mentioned on blueprint marked Exhibit D-1, marked doors "M" and "N," are there any signs? A. Yes. I think there is a "no admittance" over the door.

Q. Is this a picture of that doorway? A. That is a picture of the entrance to the western door; yes, sir.

20

Q. That is the door marked "N" on this blueprint, the lower one? A. Yes.

Q. Was that "no admittance" sign on there on the 24th of July, 1923? A. I am not prepared to swear to it, but it has been on there, I don't know when.

Mr. Deegan: I object.

30

Q. The scale house has been mentioned here. Is that shown on this photograph marked Exhibit D-5? A. Yes, sir.

Q. Which door or exit is the scale house? A. On the right-hand side.

Q. The right-hand exit? A. Yes, sir. The scale house.

Q. Is that scale house also shown on Exhibit D-7? A. Yes, sir.

40

*Robert C. Miller—for Defendant—Direct.*

Q. It is the right-hand exit, isn't it? A. The right-hand exit is the scale house; yes, sir.

Q. Is this Exhibit D-11 a closer picture of the scale house? A. That is the same thing.

Q. Can you walk out either of those exits and come out there into this open way in between these two buildings? A. Yes, sir.

10 Q. Can you walk out either of those doors and get down? A. Yes, sir.

Q. Are there doors on both these doors marked "M" and "N"? A. Yes, sir.

Q. Are those doors ever closed? A. Yes, sir; occasionally.

Q. How do they open, Mr. Miller? A. The swinging door opens towards the east.

Q. Which door? A. On the western.

20 Q. And the one marked "N"? A. Yes, the one marked "N." The other one swings towards the west.

Q. Are those doors ever locked during the day so that anybody coming in or out could not open them? A. Never locked.

Q. They are always kept so that anybody can push against them and get in or out? A. Yes, sir.

30 Q. Do you remember the day of this accident? A. Yes, sir.

Q. Were you down in this vicinity immediately after the accident? A. Well, shortly afterward. I don't know just how long.

Q. Was there any copper or iron or any metal piled up out about the point "P" that would prevent any one from walking out of the doorway marked "N" on that side of the track? A. No, sir.

40

*Robert C. Miller—for Defendant—Cross.*

Q. Is there ever any metal piled up around those doors? A. Not in that particular door there; no, sir.

Q. Those doors are in constant use, are they not? A. Yes, sir; they are only closed to keep the temperature right.

Q. That is the reason for closing the doors? A. Yes, sir. 10

Q. That is just closed temporarily when the doorways are not in use? A. Yes, sir.

Q. Is there an aisle, Mr. Miller, leading down through here and is that aisle shown on this blueprint to this door marked "C"? A. There is.

Q. Is there any way of getting from that point "C" over to the coal pulverizer? A. Yes, sir. 20

Q. Is that aisle shown on this photograph marked Exhibit D-4? A. Yes, sir. That is the aisle leading to the door in the western part of the building.

Q. The one closest to the pulverizer? A. Yes, sir.

Q. Is that another picture of that aisle marked on Exhibit D-9? A. That is the same one.

Q. Same aisle leading down through there? A. Yes, sir. 30

*Cross-Examination by Mr. Deegan:*

Q. Mr. Miller, is that scale house attached to the tank room? A. Yes, sir; on the outside.

Q. Are the doors from the scale house outside of the scale house? A. Yes, sir.

Q. Or are they in on the hinges of the tank house? A. No. The outside. 40

*Robert C. Miller—for Defendant—Cross.*

Q. You say it is customary to keep the temperature up in the tank room? A. Yes, sir.

Q. That is why the doors are closed? A. At time when it is cold weather outside they close the doors.

10 Q. Do you get better results when the temperatures are up than when they are down? A. I don't know.

Q. You say you are familiar with the rules and regulations of the plant? A. Yes, but not of the operations.

Q. Can you give me a reason for the rule and regulation of keeping the door closed? A. Yes, it is to keep the temperature of the tank room at a proper heat, for some particular reason in operating.

20 Q. You say to keep the temperature up? A. To a certain degree; yes, sir, but I don't know how much.

Q. Why didn't you have a picture showing the door in the tank room closed, to show the appearance? A. The door just happened to be open when we took the photograph, I guess that is the only reason.

30 Q. Did you open the doors to take this photograph? A. No, sir. The doors were open.

Q. This blueprint here would lead you to believe that this was an entirely separate building, wouldn't it, from this? A. I don't know whether it would or not.

Q. There is a space between the main tank room and the scale house, isn't there? A. No, sir. That is attached right to the tank room.

40 Q. But it is not attached on that blueprint, is it? A. I don't know.

*Robert C. Miller—for Defendant—Cross.*

Q. Can't you see? Is that scale house a part of the tank room? A. No. That is possibly something wrong, I will admit that. It is attached.

Q. That blueprint is wrong? A. That one particular part is.

Q. That door leading out of the tank room is in reality a door leading into another building? 10  
A. To another building, to a small scale house.

Q. How long is that scale house? A. I don't know. About ten or twelve feet long.

Q. Do you know how many windows it has in it? A. No, sir; I do not, unless I look at the photograph.

Q. Is that a sliding door or swinging door?  
A. Swinging door.

Q. When is that scale house used? A. I can't 20  
tell you how often.

Q. What is it used for? A. For a scale house, as far as I know.

Q. For weighing cars? A. Weighing copper cars.

Q. And nothing else? A. No, nothing else. Well, you can push the cars through, of course.

Q. Push them back and forth over the scale?  
A. Outside of the yard. 30

Q. Do they use that the same as they would any other track? A. No. Used just for weighing the cars.

Q. They just put the loaded cars in and weigh them and then weigh them one at a time? A. Yes.

Q. When it is not in use the door is closed in the scale house? A. Yes, at times when the temperature is low. 40

*Robert C. Miller—for Defendant—Cross.*

Q. How often do you get down into the plant?

A. Well, about twice a day I should think.

Q. How big is the plant? A. How big is our plant?

Q. Yes. About fifty-eight acres.

10 Q. How many buildings do you have? A. I can't tell you offhand.

Q. Approximately? A. Well, approximately, I should say we have about thirty buildings.

Q. Do you go into every one of these buildings every day? A. No.

Q. How many hours do you spend in your office a day, approximately? A. At the present time I spend practically all my time in the office. That is the present time for the last several months.

20 Q. How many hours did you spend in your office a day around 1923, the date of this accident? A. About an hour and a half.

Q. In the office? A. Yes, sir.

Q. Where would be during the other times? A. At that time I was out in the plant all the time. I was safety engineer at that time.

30 Q. Is it your custom to go to courts for the American Smelting and Refining Company? A. Compensation courts; yes, sir.

Q. Your duties take you outside of the plant? A. Yes, sir.

Q. There are periods during the week when you are not in the plant at all? A. Since last August; yes, sir. Before last August I was in the plant all the time.

40 Q. What do you know about men going from one building to another and using toilets wherever they find it most convenient, among

*Robert C. Miller—for Defendant—Cross.*

employees? A. Well, our employees know where the toilets are located, and nobody tells them where to go, they know just exactly where to go.

Q. Now about the men who are invited in your plant through independent contractors? A. Well, as a rule their foreman finds out where they are to go, and I suppose they follow the custom.

10 Q. That is a custom of the plant? A. Well, we have no regular custom. The foreman usually

Q. You let the independent contractors come in and do their work and find their way out as best they can? A. After they get accustomed to the place; yes, sir. The first day they go in they are shown around and shown what to do.

20 Q. Did you show these men around? A. To their work; yes, sir. Where they were supposed to go and let them there under the charge of their foreman.

Q. Did you show these people where to go? A. No, I don't think I did these people.

Q. Did you stop them from going through the tank room? A. No.

Q. You don't know whether they were going through or not, do you? A. No, sir; I do not.

30 Q. You don't know what the other men down at the other end of the plant, under Mr. Gustavsen, you don't know what toilet they were using? A. No.

Q. You just let them do their work and find their way out as best they could? A. Yes.

Q. Do you remember my going out to your office with Mr. Pederson? A. I will not forget that in a hurry; yes, sir.

*Robert C. Miller—for Defendant—Cross.*

Q. What request was made?

Mr. Toolan: I object as immaterial.

Q. Did you ever refuse to let us go into the plant to see the scene of this accident? A. I didn't refuse you; no, sir.

10 Q. Did you refuse Mr. Pederson going in? A. Yes, sir.

Q. Did you permit me to go in to see the scene of this accident? A. Yes, sir; under the assumption that you were going to go down and see a man to sell him an automobile or sell him some real estate.

Q. Then the idea of my going into the plant seeing this accident didn't enter your head, did it? A. No, it did not, I will confess that.

20 Q. Then you let me go in to see somebody I wanted to sell an automobile? A. Under misapprehension; yes, sir.

Q. That is the only way you could get into that plant? A. Yes, sir; unless you could give us some reason for it.

Q. I gave you the reason, did I not? A. Well, we have our attorney. I was going to refer you to our attorney, in the line of accidents.

30 Q. Do you know what date that was? A. No, I don't.

Q. Was it last December? A. I don't remember it.

Q. Could it be last December? A. It might have been. I don't know.

Q. Do you remember what happened when I went in the plant?

40

*Robert C. Miller—for Defendant—Cross.*

Mr. Toolan: I object. How is it material? We would not let them in there, no, if that is what he wants to know. He might get hurt and then we would have another law-suit on our hands.

Q. Mr. Miller, you show a diagram or a picture marked D-12 showing the entrance into an aisle in the tank room, but you do not show any picture of the exit? A. Here is the entrance.

Q. Do you have a picture of the exit? A. Of this here?

Q. Yes. A. I think there are some more pictures there.

Q. Is it in court today? A. Yes, sir; it is.

Q. Well, where is it? A. It is there, but that was taken a long time ago, and I didn't want to present that. I think it is there. Here it is (handing picture to counsel).

20 Q. Is this a picture of that exit? A. This is the picture of that exit there.

Mr. Toolan: I object to examination on that unless it is offered in evidence. He called for it.

Mr. Deegan: I will offer this in evidence.

30 Mr. Toolan: Let me see it.

The Court: You agree to it, do you?

Mr. Toolan: Yes.

The Court: You cannot offer an exhibit under cross-examination of the other side's witness, but if it is agreed to, all right.

Q. That exit is blocked, is it not? A. No, sir; that is not blocked. That is always open.

40

*Robert C. Miller—for Defendant—Cross.*

Q. Is this the anode yard? A. That is the western end of the yard. Yes, we call it an anode yard.

Q. How many tracks would there be for Mr. Pederson to cross if he came down this aisle?

A. Came down the aisle outside of the building?

10 Q. Came down the aisle shown on Exhibit D-9. A. He would not have to cross any tracks through the tank room. He would have to cross two small tracks here going from this building, but none through the tank room; there are no tracks in there.

Q. In other words, he would have to pass more tracks in going through the aisle illustrated in D-9, than he would if he just went out the doorway? A. No, sir. He would have to cross tracks  
20 here just the same coming across here, there are two tracks there. Same thing.

Q. Don't you indicate on that map more tracks than are shown up in the doorway? A. No. These two tracks are on the outside. No, sir; I think there are the same number of tracks. I think that is right.

Q. That is not an entrance or exit that is used very much, is it? A. Yes, sir. That is what  
30 it is used for.

Q. Is there an elevator there? A. No, sir. It is clear.

Mr. Deegan: That is all.

(Photograph entered in evidence and marked Exhibit D-17.)

Mr. Toolan: That is all.

(Adjourned until Monday April 13, 1925, at  
40 10:00.)

NEW JERSEY SUPREME COURT,

MIDDLESEX COUNTY CIRCUIT,

April Term, 1925.

THOMAS PEDERSON,  
Plaintiff,

vs.

AMERICAN SMELTING AND REFIN-  
ING COMPANY, a Corp.  
Defendant.

10

Transcript of stenographer's notes of evi-  
dence in the above entitled cause, taken before  
Hon. Peter F. Daly, Circuit Court Judge, and  
a Jury, at the Middlesex County Court House  
in the City of New Brunswick, New Jersey, on  
the thirteenth day of April, A. D. 1925, at  
10:00 A. M. 20

APPEARANCES:

JOSEPH F. DEEGAN, Esq., JOSEPH C. PAUL, Coun-  
sel for the Plaintiff. 30

JOHN E. TOOLAN, Esq., Counsel for the Defend-  
ant.

ROBERT C. MILLER, resumed.

*Direct Examination by Mr. Toolan (Cont.):*

Q. Mr. Miller, is there a path leading from  
the coal pulverizer to this toilet other than the  
one taken by Pederson? A. Yes, sir. 40

*Robert C. Miller—for Defendant—Direct.*

Q. Where is that path? Is it shown on the blueprint marked Exhibit D-1? A. Yes, sir.

Q. How is it shown on that blueprint? A. By a white chalk mark on the print.

Q. Mr. Miller, will you please take these photographs and tell me what Exhibit D-3 shows?

10 A. It shows the anode car and an air locomotive in the tank room.

Q. At or about the place where this accident happened? A. Yes, sir.

Q. This other photograph—what does that show? A. It is a similar picture. It shows the anode and the air locomotive in the tank room.

Q. Referring to exhibit D-10. And with reference to exhibit D-9 what does that show? A. 20 That is a similar picture only taken at a different angle.

Q. Showing what? A. The anode car and the air locomotive in the tank room.

Q. Anything else? A. Pathway leading to a door on the west end of the tank room.

Q. State whether or not that door is closer to the coal pulverizer than the door marked "N" on exhibit D-1. A. Yes, a little bit closer, not 30 very much, but it is a little bit closer than the other.

Q. The door you refer to is marked "C" on exhibit D-1? A. Yes, sir; that is the one.

Q. What does this exhibit D-4 show? A. The same picture only a different angle, it shows the anode car and the air locomotive and the aisle going towards the west end of the tank room building.

*Robert C. Miller—for Defendant—Direct.*

Q. And similarly exhibit D-12? A. Yes, sir; the same thing.

Q. Exhibit D-11 what does that show? A. That shows the two exits from the tank room at a point near where this man was hurt, two exits.

Q. Does that show the so-called scale house? 10 A. Yes, sir; the scale house is on the right-hand side of this picture.

Q. Can you walk through the doorway leading to the scale house and out of the scale house and come out into the open? A. Yes, sir.

Q. That is out through the door marked "M" on this blueprint exhibit D-1, this door here (indicating)? A. Yes, sir.

Q. In other words, you can gain access to and from the tank house building through the scale 20 house door, as well as the door marked "N" on the blueprint? A. Yes, sir.

Q. How long is that scale house? A. I don't know the exact dimensions of that. I can't tell you that.

Q. Well, what is the scale house? Will you describe it? A. It is a place where they weigh the copper on the cars, and after they weigh the 30 cars they just push them right on through.

Q. It is a little shed outside of the building with a scale, is it not? A. Yes.

Q. This exhibit D-5, what does that show? A. That is the same picture, it shows the two exits.

Q. Showing the scale house? A. Showing the scale house on the right; yes, sir.

Q. Does the exit from the scale house enter directly into another building or not? A. No, 40

*Robert C. Miller—for Defendant—Direct.*

sir; there is an opening on the north end of the scale house in the yard.

Q. There is an opening, is there, between the red lines, I will mark them "G" and "H" on this picture, between these two red lines, coming out of the scale house? A. There is an opening that goes into the yard.

10 Q. And I show you exhibit D-7 and ask you what that shows? A. That is the same picture.

Q. And exhibit D-8, what does that show? A. It shows the air locomotive in the exit of the west side of the two entrances.

Q. That is the entrance marked "N" on this exhibit D-1? A. Yes, sir.

Q. Mr. Miller, how wide is the tank house from the doors, measured at the point here marked 20 "N," the door over to the toilet? A. I don't know the exact dimensions.

Q. Well, about what is it? A. Oh, I judge about 250 feet, in my judgment.

Q. Mr. Miller, is there a passageway on either side of the tracks leading through the center of the tank room? A. Yes, sir.

Q. That is, leading from the door "N" to the toilet? A. Yes, sir.

30 Q. What are these square objects shown on this blueprint, for instance, the object marked "K" here? A. They are what they call squares of tanks.

Q. Do they rise above the level of the floor? A. Yes, sir.

Q. How high? A. I judge about four feet.

40 Q. Is there space to walk between the tracks through the center of the tank house to the objects or tanks marked "K"? A. Yes, sir.

*Robert C. Miller—for Defendant—Direct.*

Q. On either side of the tracks? A. Yes, sir.

The Court: That was not clear to me, Mr. Toolan. I do not know what that means.

Q. What I want to know, Mr. Miller, is this: Is it possible to walk from the men's toilet here 10 over to the door marked "M" without crossing any tracks at all? A. Oh, no. You have got to cross those tracks.

Q. Cross the tracks where? A. The toilet is on the other side of the track.

Q. The toilet is marked "B," is it not? A. Yes, sir.

Q. Where are there any tracks you would have to cross? A. Do you mean coming this way? 20

Q. No, I mean is it possible to walk along an aisle leading directly across in between the tracks to the tanks? A. Yes, there is on the east side; yes, sir; but you would have to cross the tracks on the outside of the building.

Q. You mean you could walk clear across the tank house without crossing any tracks? A. Yes, sir.

Q. Is that true also on the other side? A. 30 Yes, sir. It is also so on the west side.

Q. In other words, there is an aisle or passage way on either side of the tracks separating the tracks from the tank? A. Yes, sir.

*By the Court:*

Q. But you would have to cross the tracks at some point in order to get to the other side, so-called? A. Outside; yes, sir. But from the 40

*Robert C. Miller for Defendant—Cross.*

tank room in through the exit here you can come right out without crossing the tracks. You have got to cross the tracks outside of the building, but not inside.

10 Q. If you wanted to go through this door wouldn't you have to cross the track? A. No, sir. There is just a little space between that track and the door.

Q. These are the tracks, aren't they? A. Yes, sir.

Q. If the toilet is on the other side you would have to cross the tracks somewhere? A. On that side to get over; yes, sir; but not on the east side.

20 Mr. Toolan: That is all I have. Cross-examine.

*Cross-examination by Mr. Deegan:*

Q. How many paths, Mr. Miller, are there leading to the toilet? A. There is one on the outside of the building proper and you can take four different paths in the tank room.

Q. How many entrances are there to the tank room? A. Six.

30 Q. On the west side of the tank room, as shown on this blueprint, how many entrances? A. On the west side there are two.

Q. One is an entrance into the scale house, isn't it? A. The one entering the scale house, that is on the north side.

Q. You include that in those two entrances you just mentioned? A. No. There are two on the west side and two on the north.

40

*Robert C. Miller for Defendant—Cross.*

Q. Do you consider than an entrance to the toilet through the scale house? A. Yes, sir.

The Court: Which is west on that map; the top?

Mr. Deegan: The west is at the bottom.

A. The west is on the bottom.

10

*By the Court:*

Q. And the east is on top? A. Yes, sir.

Q. The left-hand side of the map is north and the right-hand side is south, is that right? A. Yes, sir.

*By Mr. Deegan:*

Q. Where were you when this accident happened, Mr. Miller? A. In my office.

20

Q. How far is your office away? A. About 500 feet.

Q. And you don't know whether the scale house door was or was not open? A. I don't know, sir, no.

Q. It is closed usually, isn't it? A. Not in the summertime; no, sir.

Q. Is that track used the same or as often as the other tracks? A. I would not want to say that; no, sir.

30

Q. It is not? A. I don't know.

Mr. Toolan: I object. The witness did not say it was not. He said he would not want to say.

A. I don't know for sure.

Q. You make the rules and regulations of the plant, do you not? A. As far as safety and welfare goes; yes, sir.

40

*Robert C. Miller for Defendant—Cross.*

Q. Does your province take you into the question of which shall be the entrances and which shall be used as the exits of the doors leading into the tank room? A. No, sir.

10 Q. Well, you know, as a matter of fact, Mr. Miller, that the plant does not permit or encourage cars and engines going over a scale and bumping through and going out of the plant, do you not? A. What is that question again?

(Question repeated by stenographer.)

A. They are not supposed to bump cars through there. They push them through.

Q. These scales are rather sensitive, are they not? A. No, they are very sturdily built.

20 Q. They are used for weighing what metal mostly? A. Copper anodes, scrap metal.

Q. You discourage any vibration, any unnecessary vibration on these scales, do you not? A. No, they are very sturdily built. The locomotive goes over them.

Q. You let them go over just as they would any other track in the yard, is that it? A. As far as I know, yes, sir. I have no jurisdiction over that.

30 Q. At the time of the accident was this path as improved as it is as shown on this map?

The Court: Which path?

Q. Leading around the tank house on the outside. A. It was not improved as it is at present, but it was used for a walk-way.

40 Q. It wasn't a thoroughfare from the gate house to the other parts of the plant? A. Yes, sir.

*Robert C. Miller for Defendant—Cross.*

Q. Mainly? A. Partly. The other parties used it between the tank room and copper casting for other departments.

Q. You told us before that you never stopped anybody going through the tank house to use that toilet, did you not?

Mr. Toolan: I object, unless it is shown 10 that he was there to do it.

The Court: Did he? He was in charge of the safety, he said.

A. No, sir; we never stopped anybody from going through there.

Q. I would like to see the exit to this aisle indicated in these Exhibits D-12, D-4, and D-9. Is that the exit to these aisles? A. That is the 20 exit on the western end.

Q. To the aisle indicated in these three photographs which I have just enumerated? A. Yes, sir.

Q. Is that an elevator in this Exhibit D-17? A. No, sir, that is just an entrance.

Q. How wide is that entrance or exit? A. Oh, I should judge about four feet.

Q. Is it a thoroughfare or widely used path? 30 A. Yes, it is a thoroughfare; yes, sir.

Q. Is it widely used? A. No, sir; not so widely used.

Q. Why isn't it widely used? A. Because the men go around the other way.

Q. Is it because the door, the aisle leads through the tanks and after you get out of the tank house it leads on to a platform? A. It leads on to a wide platform; yes, sir. 40

*Robert C. Miller for Defendant—Cross.*

Q. How high is that platform from the ground?  
A. Level with the ground.

Q. After you get off the platform must you cross these tracks? A. Yes, sir.

Q. Listed on the main blueprint. There is another scale house here? A. Yes, but not directly in front of the entrance. Well, I will take that back; it is at the entrance; yes, sir.

Mr. Deegan: I want to show this exit to this aisle.

Q. That exit is seemingly more dangerous than the exit marked "N"?

Mr. Toolan: I object.

The Court: Objection sustained.

Q. Is it more dangerous than the—

Mr. Toolan: I object.

The Court: Why?

Mr. Toolan: It calls for a conclusion in the witness' mind, for one thing. You can show the physical facts and then argue from them. The question is argumentative, I think, and it calls for a conclusion. It asks this witness to characterize the respective and relative dangers. What might be more dangerous in his mind might not actually be so.

The Court: He is a man, so far as his plant is concerned, he says he is in charge of safety. However, that is matter to be passed on by the jury. You can ask him what is the difference in the physical conditions and they will draw their own conclusions.

*Robert C. Miller for Defendant—Cross.*

Q. Were you safety manager at the time this accident took place? A. At that time; yes, sir.

Q. Can you tell me the weight of this air engine indicated on this photograph? A. No, sir.

Q. How many of these air engines are now in use in the plant? A. None.

Q. When did you discontinue the use of these air engines? A. I can't answer that. I don't know.

Q. More than a year ago? A. Yes, more than a year.

Q. They were in use at the time of the accident? A. Yes.

Q. When were these photographs taken?

Mr. Toolan: That is testified to.

The Court: Go on.

A. December 18, 1924, and then another batch taken April 7, of this year.

Q. If these photographs were taken in December and April of 1924 and 1925, respectively, where did you get these air engines from? A. I had those air engines; we had them, but not in use but I had them taken over there to take the pictures, exactly as the accident occurred.

Q. Did you get these air engines from the scrap pile, or the stock yard? A. No, sir. We had them in the building for use in case our gasoline locomotive give out.

Q. The chain by which you drew the air engines up to the tank house is not shown on these pictures, is it? A. No, sir.

Q. Did you get these into the tank house? A. They are in the tank house now.

*Robert C. Miller for Defendant—Cross.*

Q. How did you get them into the tank room?

A. They were in there from the time they were out of use. Lifted the locomotive up and brought it over to this point so as to take a picture of it.

10 Q. Did you use a gas engine to put— A. No, sir; we put a chain around the locomotive and lifted it up.

Q. These were brought into these positions by a crane and placed on the tracks, is that correct? A. For a picture; yes, sir.

Q. What kind of an engine are you using now?

A. Using gasoline locomotives.

Q. How many speeds has an air engine? A. I can't answer that. I don't know.

20 Q. How many speeds in a gas engine? A. I believe the same as a locomotive. I think there is three. I am not so sure. I wouldn't want to say.

Q. Can you tell us why you made these air engines obsolete? A. No, sir.

Q. You are the safety manager, are you not? A. Yes, sir.

30 Q. Wasn't that question ever brought up in your discussions? A. No. I believe it was due to better operations, that is, more efficient operation with a gasoline engine.

Q. An air engine is much heavier than the gas engine is it not? A. I don't think so. I can't answer that for sure, but I don't think so.

Q. Do you mean to tell us you don't know whether an air engine is not heavier than a gas engine? A. Yes, sir. I don't know. I don't think it is.

40

*Robert C. Miller—for Defendant—Re-direct.*

Q. Do you know what side of the air engine the engineer sits on?

Mr. Toolan: We have been all through that. There is no contest about it. It is definitely established and shown on those photographs.

Mr. Deegan: By one witness. 10

Q. What side of this air engine does the engineer sit on? A. He sits on the right-hand side, as I would call it, the back of the locomotive, just the same as a regular locomotive engineer.

Q. If this is the locomotive, what does he have his right hand on?

Mr. Toolan: I object. This is outside of the line of the examination and it is not cross-examination. We do not want to be bound by this man, because he is not an authority and we did not put him on for that purpose, and he may not know anything about it. If they want to call him as their witness on rebuttal, or something else, they can do so provided he knows anything about it. I do not think he does. 20 30

Mr. Deegan: I withdraw those questions. That is all.

*Re-direct Examination by Mr. Toolan:*

Q. Mr. Miller, how many accidents have you had in the tank room in the last three years?

Mr. Deegan: I object.

The Court: Objection sustained. 40

*Charles W. Hanson—for Defendant—Direct.*

10 Mr. Toolan: I think it is material under counsel's own examination, he has endeavored to show that there was a change made for reasons which have not been stated, but which is obvious, and I think we ought to be permitted to show just how this place is operated. This man is safety manager and there is considerable latitude allowed on that score. I think that we ought to be able to show how many accidents they had.

The Court: I will sustain the objection. You may ask him along the line of a change in the engines. That is all he has been asked in that respect.

20 Mr. Toolan: Prays exception.

Q. Do you know the reason, that is, if you know, tell us why there was a change made from air engines to gas engines? A. No, sir.

Mr. Toolan: That is all.

Mr. Deegan: That is all.

30 CHARLES W. HANSON, a witness produced on behalf of the defendant, being duly sworn according to law on his oath, saith:

*Direct Examination by Mr. Toolan:*

Q. Mr. Hanson, you are employed by the American Smelting and Refining Company? A. Yes, sir.

40 Q. And you have been how long? A. About nine years.

*Charles W. Hanson—for Defendant—Direct.*

Q. You were employed by them on the 24th of July, 1923? A. Yes, sir.

Q. What was your particular position at that time? A. Superintendent of lead refinery and parting plant.

*By the Court:*

Q. What does that mean? A. Parting silver 10 from gold.

*By Mr. Toolan:*

Q. Who was in charge of the tank room? A. Mr. Gross was in charge of the tank room at that time.

Q. Were you his superior or not? A. No.

Q. Are you familiar with the tank room? A. 20 Yes, sir.

Q. Who is in charge of the tank room now? A. I am.

Q. Have any changes been made in the lay-out of the tank room since July 24, 1923? A. No, sir.

Q. You were familiar with the tank room and its lay-out at that time? A. Yes, sir.

Q. Do you remember the date of this accident? A. I know the date of it approximately, while 30 we are in this case. July of that year.

Q. You were not present in the tank room when the accident happened? A. No, sir.

Q. Did you come upon the scene after the accident? A. No, I did not.

Q. You didn't come around after the accident? A. No, sir.

Q. Mr. Hanson, do you know how wide the tank room is? A. 270 feet. 40

*Charles W. Hanson—for Defendant—Direct.*

Q. That is measured across from the doors marked "M" and "N" on the blueprint?

The Court: That is from north to south, Mr. Toolan?

Mr. Toolan: Yes.

10 A. From north to south it is 270 feet and some odd inches.

Q. How many aisles through the tank room north and south? A. North and south there are four aisles.

Q. How many aisles through the tank room east and west? A. Three.

*By the Court:*

20 Q. Then, the aisles run at right angles with one another, do they? A. Yes, sir.

Q. Will you please describe the tank room, that is, how it is laid out? These tanks, what do they look like? What are they in appearance? A. Tanks are eleven feet six inches long and about approximately four feet in width, and tanks are put together in nests of seventeen tanks top and seventeen tanks bottom, through which the solution, which we call letrolite, is continuously circulated. We have forty-eight of those sections, each containing thirty-four tanks, and aisles run lengthwise between sections along the seventeen tanks, and also there are small aisles between each section of thirty-four tanks.

30

Q. The small aisles are the aisles that run from east to west? A. Those small aisles are only for men coming up to attend to the cir-  
40 culation. Those are secondary aisles.

*Charles W. Hanson—for Defendant—Direct.*

Q. Their direction is from east to west, is it?

A. Their direction is from north to south.

*By Mr. Toolan:*

Q. What is the width of these aisles that run east and west, about? A. The main aisles?

Q. Yes. A. I should say approximately fifty feet. I would not care to answer that question definitely. 10

Q. How wide are the aisles leading east and west? A. Oh, east and west? I beg your pardon. I thought you said north and south. The aisles leading east and west are about ten feet wide.

Q. How high are these tanks from the floor of the tank room? A. Approximately fifty inches. 20

Q. Do you remember the air engine that was operated about the plant in the tank room? A. Yes, sir.

Q. They no longer have the air engines? A. We have the air engines but they are not in use any more.

Q. What type engines are you using now? A. Gasoline locomotives.

Q. Do you know, Mr. Hanson, why there was a change made from the air engine to the gasoline engine? A. Yes, sir; I made the change. 30

Q. Why? A. Change was made on account of the small traction power of the air engine. We raised the weight of our electrodes, which we call anodes, from about 13,000 pounds a tank to 19,000 pounds, and in order to facilitate our work it was necessary to increase the traction power of our locomotives. 40

*Charles W. Hanson—for Defendant—Direct.*

Q. What increased the traction power? A. Weight and extra power.

Q. In other words the gasoline is a heavier and a more powerful engine than the air engine? A. Yes, sir.

10 Q. What are these engines used for about the tank room? A. Used for pushing in loaded rack cars of anodes, weighing about 19,000 pounds net, or about twenty-two or twenty-three thousand pounds gross, in trains of about two or three usually, and also for moving out scrap on flat cars, in which it is dumped when it is taken out of the sections. In the lower aisle we also move out cathodes, or refined copper deposit sheets, and move back empty cars into the tank room.

20 Q. Are those engines kept busy during the day? A. Yes, sir.

Q. Constantly moving about? A. Most of the time. They move so constantly we never shut the motor off during the day.

Q. Is there any means or method by which you can tell how long an engine that is separated from cars will remain separated? A. No way; no, sir.

30 Q. In your experience out there at the plant, did you ever know of an occasion where the train was separated from the cars alongside of an aisle, or any place, so that that passageway between the engine and the cars could be used as passageway for workmen or others in the plant? A. No, sir. We discourage that practice.

40 Q. That is, have you ever seen anybody passing between open trains? A. We do see people

*Charles W. Hanson—for Defendant—Direct.*

pass through at times, but we admonish them for it whenever we see them take that chance.

Q. You feel that it is a chance? A. I feel that it is rank carelessness; yes, sir.

Mr. Deegan: I object. I ask that it be stricken out.

The Court: Yes. That is a conclusion, 10 too.

It is stricken out.

Q. You are familiar, are you not, with the aisle that leads through the tank room north and south from the doors marked "M" and "N" on Exhibit D-1 to the toilet? A. Yes, sir.

Q. Is there room enough to walk north and south through that tank room along an aisle 20 between the track and the tanks? A. Yes, sir.

Q. On either side of the tracks? A. Yes, sir.

Q. That is, either on the east side of the tracks or on the west side of the tracks? A. Yes, sir.

Q. What is the temperature that is maintained in the tank room? A. We don't maintain any constant temperature in there. We try to maintain a temperature between ninety and one 30 hundred degrees. It is not essential. It is an economic factor.

Q. With respect to the two doors on Exhibit D-1 marked "M" and "N" are those doors usually kept open or closed? A. In winter time, from the 1st of November until the 1st of April, we try to keep them closed. There are no fastenings upon them, but in summer and spring and fall, from the 1st of April up to the 40 1st of November, we purposely keep them open.

*Charles W. Hanson—for Defendant—Direct.*

Q. Why? A. The reason being we have—it is necessary in any plant of that kind, where we have acid circulating, as we do, to change the air very often. We have three large fans which are driven by steam engines, which change the air about once in twenty minutes in that entire tank room. In the winter time we have those fans equipped with steam coils in order that we can heat the air as it comes in. In the summertime we can save power by not operating those fans at their full capacity, and we get the ventilation much more economically and much more safe, to leave all doors open, so we order all doors left open between April 1 and November 1. In fact, men see that they are kept open, because it is unpleasant to work if they are not kept open. The same applies to all of our skylights.

Q. All the doors and skylights are open out in the plant, are they not? A. Yes, sir.

Q. Are both those doors, the doors marked "M" and "N" on the blueprint available for entrance and exit to and from the tank room at all times? A. Yes, sir.

Q. What sort of doors are on these two openings? A. The door marked "M"?

Q. Yes. A. This door is a double door swinging on hinges from two sides attached to the building.

Q. Where is the door attached on the building, on the outside of the scale house? A. It is attached on the outside of the scale house, the scale house in turn being attached to the building. On the tank room itself there is no door. If this is an open passageway and the door is at this scale house, at this point (indicating).

*Charles W. Hanson—for Defendant—Direct.*

Q. What is the scale house, Mr. Hanson? Will you describe it? A. The scale house is a passageway with a large platform scale over which the track passes, on which we weigh scrap anodes coming out, usually at night. There is a scale into the house, the house equipped on one side, where a man can sit and weigh material passing to and fro. Usually the men who run the locomotives, in passing over the scale, the brakeman will go in and weigh the load and come out again and throw his switches. But the scale house itself is an open passageway with no doors inside of the tank room, and these two swinging doors on the outside. You might call it a vestibule attached to the tank room proper.

Q. Are those doors ever locked? A. There is no means of locking them.

Q. What sort of a door is on the opening marked "N" on Exhibit D-1? A. That is a sliding door with a small door on hinges in it. That is the sliding door which moves back on a rail, and there is another small door for egress and ingress, which opens on hinges, in the main door.

Q. Is that door ever locked? A. No, sir. Sometimes in the winter time there is a catch thrown over it, but never in the summertime.

*By the Court:*

Q. They attach the locomotive when they want to weigh the car, don't they? A. Sometimes, but not always. It makes a little difference in the approximate weight which we get on those things, but we don't always do so. In fact, in weighing scrap out of the tank room,

*Charles W. Hanson—for Defendant—Cross.*

which this scale is ordinarily used for, it is the practice not to disconnect them. The locomotive can be moved on beyond a break in the rail, and it makes very little difference in the weight of the car.

*By Mr. Toolan:*

10 Q. Mr. Hanson, did you ever see any scrap of any description piled in this opening between the two doors, the distance between the open door "M" and "N" in this point here (indicating)? A. I don't recollect that I ever did. It is against rules to pile scrap at that point and I don't recollect ever having seen it piled there.

20 Q. Never saw any metal of any kind piled there that would prevent any one from getting in and out of the doors?

Mr. Deegan: I object. He has already answered that he did not recollect.

Mr. Toolan: You may cross-examine.

*Cross-Examination by Mr. Deegan:*

Q. Mr. Hanson, how long is the tank house?

30 A. The length of the tank house which way? North and south, or east and west?

Q. You testified it is 270 feet in width, the other dimension would be. A. The other dimension is about 650 feet approximately.

Q. You don't know what time of the day this accident happened? A. No, sir.

Q. You didn't see the accident? A. No, sir.

40 Q. You don't know whether the door in the scale house was open or not at the time this accident took place? A. I know that the door in always open in the summertime.

*Charles W. Hanson—for Defendant—Cross.*

Q. Do you know whether it was open at this particular time? A. No, sir.

Q. Were you superintendent then? A. Not of the tank house. I was superintendent of another department.

Q. Isn't it possible, Mr. Hanson, when you are away down the other end of the tank room—

10

The Court: What do you mean by away down at the other end?

Mr. Deegan: I am just going to try and figure out the direction.

Q. The east end of the tank room, that you can't see what is going on between the scale house door and the toilet? A. Very easy to see it. I say it is very easy to see it, I mean by that it is very easy to see any movement of material going past there, because the height of the tank is that you can always see the cars and locomotives going past. 20

Q. Can you see people going back and forth? A. Yes, sir; there is a clearance of two feet between the top of the tanks and the average mans' head.

Q. At the time of this accident you were not in that scale house? A. No, sir. 30

Q. Do you mean to tell us, Mr. Hanson, that the A. S. & R., or Guggenheim's, permit the use of the scale house as entrance and exit for the tank room? A. That is the main entrance and exit.

Q. You permit traffic to go over back and forth over the scales? A. Do we permit traffic going over and back and forth? I don't exactly get your meaning what "traffic" means in that case. 40

*Charles W. Hanson—for Defendant—Cross.*

Q. People going in and out, cars going back and forth, whether they are going in for the purpose of being weighed, or whether they are just going from one building to the other?

10 Mr. Toolan: I object to traffic going in and out. There is not anything in the case that shows, as far as we are concerned, that there is any traffic, other than by foot, over that scale, and we are not interested in anything else. It is not evidential whether they do or whether they do not permit other cars to go in and out of there.

Mr. Deegan: I will qualify that question.

20 Q. Do you permit cars to go over that for the purposes other than weighing? A. If I can describe the function of that scale, it will answer your question better. The function of that scale is to weigh scrap anodes going out, and only early in the morning and during the afternoon shift, do we push scrap anodes out of the tank room. The rest of the time that scale is not functioning. I won't say that there aren't  
30 times during the day, when there is a great need for empty scrap cars, that they won't push one out, but it is very infrequent.

Q. You discourage the use of the scale house for anything other than weighing out cars? A. We don't discourage it; no, sir. Men coming in the tank room, that is the main thoroughfare coming to work, coming in that scale house. But we do not allow men from other departments  
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*Charles W. Hanson—for Defendant—Cross.*

to go in there, or any one from outside of the plant. They can come in any of the doors on the opposite side, but men coming into the plant on that side to work do come in that door.

Q. Do any men come in from the east side of the plant? A. From the east side of the plant?

Q. Yes. A. They come in from the east side or entrance; yes, sir. 10

Q. How do they get down around the east side of the plant, isn't that down along the waterfront? A. No, sir. There is a passageway, a main thoroughfare goes past on the east side of the plant between the pond and the tank room, there is a clearance of possible twenty feet between the tanks and the tank room on one side and it is ten feet between the tanks to the bank of the pond on the other side. In fact, that is one of the main thoroughfares into the plant. 20

Q. Mr. Miller testified, your employment manager, that this was the main thoroughfare, indicated in white on Exhibit D-1? A. That is the main thoroughfare. I said the other is one of the main thoroughfares. It is a connecting thoroughfare with that. That is a concrete roadway going down, concrete and ashes roadway. And this other is a connecting through roadway in connection with it. It is the main thoroughfare for men going to and from the tank room. Not going to other parts of the plant. 30

Q. Is not this entrance nearest to this main thoroughfare? A. No, sir. There are two entrances nearer than that at the east end of the tank room building.

Q. The east end is nearest the river? A. The west end of the tank room building. 40

*Charles W. Hanson—for Defendant—Cross.*

Q. You have testified that the scale house entrance is a main entrance for employees coming into the plant? A. I do not testify that. I testified it is used for men coming into the tank room from that side of the building.

10 Q. If they are in the building couldn't they use the aisles without having to come around the tank room? A. Use the aisles?

Q. Yes. A. How would they get into the aisles unless they come through an entrance?

Q. Well, from what position do you say these employees are coming that use the scale house?

A. This is the main thoroughfare down here (indicating). Men coming down would walk down between these two buildings and pass this tank room, that is, in through this scale house, 20 this scale house is connected through this building and into this main aisle. If they care to they can walk over past this scale house into either of these two entrances on this end. That is what I refer to, those two entrances on the other end, which give ingress to another aisle which would also allow them to approach this toilet from this other side.

Q. Why do they not use this first entrance?

30 A. Which one is that, this one (indicating)?

Q. Yes. A. Usually because it is a small door, and the traffic is mostly in and out through that door.

*By the Court:*

Q. You mean the car traffic? A. The car traffic is in and out through that door, that is the particular reason.

*Charles W. Hanson—for Defendant—Cross.*

*By Mr. Deegan:*

Q. How small is that door?

Mr. Toolan: I object. We have the exact dimensions from the engineer. He has given it to us by scale. It is not for someone else to speculate about it.

The Court: Go on. You have it by scale. 10 However, you can give your estimate.

A. I can refer to that. I believe I have exact dimensions. About 77 inches total width of the door.

Q. What is the width of the other door? A. The other door is much wider. It is 9 feet 10 inches. Width of this passageway is 9 feet 10 inches. 20

*By the Court:*

Q. That is the passageway marked what? A. That is the passageway marked "M." This is much the wider. This is the narrow one, and this is the wide entrance (indicating).

Q. Indicating that "M" is much wider than "N"? A. Yes, sir.

Q. You are around there all the time and were in July, 1923, weren't you? A. Around the plant. 30

Q. In this particular section of the plant? A. At times; yes, sir.

Q. This building marked "coal pulverizer central station," you are familiar with that? A. Yes, sir.

Q. I think you indicated that men in order to get into the tank house would go down this way? A. They could go either through this 40

*Charles W. Hanson—for Defendant—Cross.*

yard or through this passageway in the copper casting. Either down through here or down crossing this yard.

10 Q. Men working in the coal pulverizer central station, how would they reach the toilet? A. The best way to reach that toilet would be across this main thoroughfare, down here, and around the trestle here, past this pump house, follow this trestle right around. It is an open trestle with plenty of clearance. They would not have to pass through the tank room at all. Just inside of the tank room and step inside of this door. This is a main thoroughfare through here. They either could follow that passage or go across this bridge and in this way. Follow the main thoroughfare all the way around.

20 Q. That main thoroughfare was not concreted in July, 1923, was it? A. This thoroughfare past here was not concreted, but it was a permanent thoroughfare made of rolled ashes and some slag.

Q. About how many of your men were employed in that coal pulverizer central station as of July, 1923? A. The number of men employed there, I believe, is three.

30 Q. What is this building? A. This is the copper casting building.

Q. What is the number of men in that? A. The particular number of men employed there runs about 150 to 120.

Q. That was during July, 1923? A. Approximately; yes, sir.

40 Q. The men working there, what was their regular way to get up to that toilet? A. If they went to the toilet they always went through this scale house.

*Charles W. Hanson—for Defendant—Cross.*

Q. Those working in the copper casting building? A. Those working in the copper casting building; yes, sir.

*By Mr. Deegan:*

Q. Mr. Hanson, you have indicated a main thoroughfare on exhibit D-1 as along the easterly—or I will change that to westerly side of the tank room, have you not? A. Yes, sir. 10

Q. Isn't it a fact, Mr. Hanson, that there is an elevation there, or a platform? A. There is no platform. It is a built-up walk-way.

Q. In order to get to the built-up walk-way you would have to go through the anode scrap yard, would you not, which are shown on these narrow gauge tracks on the west side of D-1? A. To get in here you could follow directly where this mark is assumed to be. 20

Q. I am not asking you that question. I am asking you how to get to this built-up walk-way. A. That is exactly what I am saying. You can get up there by walking up what is called a ramp, simply an incline, a walk made there for that purpose, and walking over along here between the pond and this part, or crossing between the tracks, or walking between the tracks and the building. 30

Q. You would have to walk close to the pond or go across those tracks? A. No, sir; this is not close to the pond. This is a wide walk-way here. It is wide enough that an automobile could run through there.

Q. Ten feet wide? A. Probably. I don't know the exact scale of it.

Q. If a person used this built-up walk-way that you say, he would have to come around the tank 40

*Charles W. Hanson—for Defendant—Cross.*

room and go through a trestle and around the pump house and into the toilet, would he not?

A. He would not. I said this built-up walk-way includes all of the portion from the tank retaining wall over the bank of this pond. All of this district between here. This contains this walk-way and a number of storage tracks. These storage tracks possibly have ten cars of anodes on usually on this far track. All of this room between here and here is available as a walk-way, but the safest way to walk is to follow this permanent built-up roadway all the way across, over this bridge and down the pavement and over this other small bridge, into the room.

Q. It is a main thoroughfare to the rest of the plant, is it not? A. A main thoroughfare from this part of the plant to the rest of the plant; it connects with this roadway down here which is the main plant artery.

Q. Show us where the trestle is on the map. A. Right here. The trestle runs all across here. This is a trestle from here into the tank room.

Q. Do your men in the tank room use that way to get to the toilet? A. While going from their work?

Q. While at work. A. No.

Q. Do the men in the casting building use that road? A. The men in the casting building oftentimes use this road through here.

Q. Who uses that road that you say, around the main thoroughfare and trestle and along the tracks and the built-up walk-way? A. Any one from this portion of the plant going down to the main plant walk-way, going through here;

*Charles W. Hanson—for Defendant—Cross.*

anybody from this portion of the plant working outside of the casting building should use that walk-way; in fact, we don't countenance the use of any other walk-ways in the plant for the purpose of getting from the office to the concrete roadway which runs to the other departments.

Q. Then the rule is that the three men in the pulverizing building should come all around the main thoroughfare and around the trestle? A. No, sir. The men in the pulverizing building have no reason to go into that room. They have a coal pulverizing wash room for themselves.

Q. This door leads into the casting building, does it not? Yes, sir.

Q. The men in this part of the casting building come around to the scale and into the toilet on the other end, do they not? A. They come there; yes, sir. The point is that you bring up about the pulverizing men. Those men have a separate wash room of their own.

Q. Did you ever stop anybody from using that toilet? A. They are not allowed to use the other wash rooms.

Q. Did you ever stop anybody from using that toilet in the end of the tank room? A. We most certainly do. We allow no one to use that toilet except copper casting and tank room men.

Q. Do you ever stop them? A. Yes, sir.

*By the Court:*

Q. When you say that the men employed in the coal pulverizing room have a wash room of their own does that include toilet, too? A. Yes, sir; up on the aisle here, right up in this position.

*Charles W. Hanson—for Defendant—Cross.*

Q. How far away from that building? A. Possibly sixty feet; sixty to seventy feet.

Q. How far is the toilet used on this day, as testified to, away from the coal pulverizing room? A. Walking around this way, it would be probably six hundred feet to seven hundred feet.

10 Q. And walking through "N" or "M"? A. Very closely the same distance.

*By Mr. Deegan:*

Q. You said there was never any scrap inside of the entrance or outside of the entrance into the tank room, did you not? A. I did not. I said I didn't recollect ever seeing any scrap piled at this point right here.

20 Q. Do you ever recollect seeing any piled right outside of the entrance? A. I recollect seeing a pile away back from the track.

Q. Never any on this west side of the scale house? A. On the west side of the scale house over here?

Q. Yes. A. I don't recollect ever having seen any scrap piled there; no, sir.

30 Q. Were you out in the plant last week? A. Yes, sir.

Q. Is that a pile of scrap right outside of the entrance? A. No, sir.

Q. What is it? A. Copper ingots.

Q. Pretty close to the railroad track, is it not? A. Plenty of clearance for a man to walk through.

40 Q. I show you this picture, Mr. Hanson, exhibit D-5, where are the doorways in this picture? A. This was a doorway which—

*Charles W. Hanson—for Defendant—Cross.*

Q. The doors? A. Right out at this point (indicating).

Q. They are not shown on the picture? A. They are not shown because they are always open, folded back against the side of the building. If the picture was taken on the outside it would show.

Q. You said the doors were closed in the winter time, did you not? A. I did.

Q. What is behind the westerly door of the tank house? A. Which door do you mean, behind this point?

Q. Yes. A. Behind that point is a small railing possibly five feet long.

Q. Anything behind the railing? A. I believe that there is a little case there which shows the safety first sign.

Q. Don't you keep rubbish cans in back of this doorway? A. No, sir.

Q. Has this scale house a roof on it? A. Yes, sir.

Q. Tell us how long this scale house is. A. Twenty-one feet.

Q. Twenty-one feet long? A. Yes, sir.

Q. And the easterly door on exhibit D-1 is in reality an entrance into the scale house which is twenty-one feet long? A. The easterly door of what?

Q. Of exhibit D-1. A. This is an entrance into the scale house, do you mean?

Q. Yes. A. Yes, sir.

Q. The scale house is twenty-one feet long? A. Yes, sir.

Q. Quite a building, isn't it? Do you mean to tell us, Mr. Hanson, that you weigh cars attached to the engine? A. Yes, sir.

*Charles W. Hanson—for Defendant—Cross.*

Q. Do you know anything about weighing? A. Yes, sir.

Mr. Toolan: This line of examination is not relevant or helpful to this issue at all, as far as I can see. I do not care about it.

10

Q. Do you know anything about weighing? A. Yes, sir.

Q. Is it customary to weigh the cars while attached to the engine?

Mr. Toolan: I object.

The Court: I will allow it.

20 A. The weight only differs in that case about two and one-half per cent., which, for our purpose in weighing scraps, is negligible, and it is not worth the time to detach the cars from the engine to weigh any closer than that.

Q. How heavy is a draw bar? A. I couldn't say.

Q. Is it fifty pounds? A. At the present time we don't use any draw bar. We connect cars with chains.

30

Q. At the time of this accident you were using draw bars, were you not? A. I can't say.

Q. They use draw bars in air engines? A. Use either draw bars or chains, and the same with a gasoline locomotive. We have done away with the use of draw bars because of the great breakage in them. Coming around sharp radius curves they break very frequently.

40 Q. You used chains? A. Yes, sir.

*Charles W. Hanson—for Defendant—Cross.*

Q. When did you start to use chains? A. To my knowledge, chains have been used at least to some extent since 1917. How long before that I don't know.

Q. Do you know how heavy these chains are?

Mr. Toolan: I object.

The Court: I do not see any relevancy to this. However, I will allow it. Go on.

10

Q. You said, Mr. Hanson, that to get the most out of your copper or your tank room in the way of production you have got to keep the temperature between ninety and one hundred degrees? A. I did not say so.

Q. You said to keep it between ninety and one hundred degrees was an economical factor, did you not? A. Yes, sir.

20

Q. What do you mean by that? A. I mean this, that we use possibly \$6,000 worth of steam a month to heat our electrolite, and if we do not keep the tank room warm and keep as much heat in there as possible, the heat losses are great, that our steam consumption is a great deal more. Temperature of the building has nothing to do with our production, it is the temperature of the electrolite, which has to be kept between 130 and 140 degrees, for best results. In order to keep it at that temperature with as little loss as possible we keep the building at a temperature as high as the men can comfortably work at, which is between ninety and one hundred.

30

Q. Do you do that in the summer time? A. Yes, sir. In the summer time, the problem in

40

*Charles W. Hanson—for Defendant—Cross.*

the summer time is to keep the temperature as low as possible, because with all of this electro-  
lite circulating at a temperature of 135 to 140  
degrees, the temperature of the tank room gets  
above the point where we wish to keep it, so  
we have to get all the ventilation possible.

10 Q. Isn't it a fact that you get better results by  
keeping the temperature high? A. Up 140  
degrees, the temperature of the electro-  
lite up to 140 degrees, yes.

Q. The temperature of the tank room between  
90 and 100? A. Between 90 and 100 only as a  
point where it is—it is an economical point heat-  
ing the electro-  
lite.

20 Q. What is blood heat? A. I suppose blood  
heat would be the temperature of the blood. I  
don't know.

Q. On a day like today would not the air have  
a tendency to reduce the temperature of the  
tank room? A. No, sir. In fact, we have all  
of our steam coils cut off.

Q. You still keep the temperature between  
135 and 140? A. This morning in the tank room  
the temperature was 96 degrees, before I came  
out here.

30 Q. You said you abolished the air engines be-  
cause of their small tractive power? A. Small  
tractive power, plus the great economy of run-  
ning the gasoline locomotives.

Q. What do you mean by the small tractive  
power? A. I meant the gasoline engines which  
we have a present will pull about forty per cent.  
greater load than the air engine.

40 Q. In other words, an air engine starting out  
will not push a train of cars as quickly as a gas

*Charles W. Hanson—for Defendant—Cross.*

engine will? A. It is not the point at all. If  
the air engine were of equal power with the  
gasoline engine, it would, yes.

Q. Has there any change been made in the  
anode cars since the time of this accident? A.  
Only to strengthen up the anode cars with extra  
bolts, to allow them to hold this greater load with  
undue breakage. No change in dimensions of  
any kind. 10

Q. Isn't it a fact in the use of air engines,  
because of its small tractive power, that you  
have got to come back and get a start to get  
motion in your cars? A. An air engine will op-  
erate under the same conditions as any other  
engine of the same weight. Its tractive power  
is the same. The tractive power depends on the  
weight of the engine. It is the adherence to the  
rails. The only thing that gives tractive power  
is the combination of the power and the weight  
in order to prevent slippage of the wheels on  
the rail. 20

Q. Isn't it the practice in the plant, in order to  
start a train of cars moving, for the air engine  
to come back and go forward with a jump to get  
your motion in the cars? A. I have not seen  
that condition; no, sir. 30

Q. Do you know the weight of an air engine?  
A. Approximately, three and one-half tons.

Q. It would not be six tons, would it, Mr.  
Hanson? A. Six tons?

Q. Yes. A. I don't think so.

Q. You don't know? A. I won't testify as to  
the weight of the air engine; no, sir.

Q. You testified before that the gas engines  
are heavier? A. Yes, the gas engine weighs  
about seven tons. 40

*Charles W. Hanson—for Defendant—Cross.*

Q. Do you know how an air engine is run?  
A. Yes, sir. Do you want me to describe it?

Q. I want you to answer my question. Where is a cab on an air engine? A. There is no cab.

Q. Where are the levers on the air engine?  
A. At the control end of the main air holding cylinder.

10 Q. If this were the air engine, am I sitting in the position of the engineer on the air engine?  
A. If your engine is running towards me you would be; yes, sir.

Q. Where would my right hand be? A. Your right hand would be on the levers.

Q. What would my left hand be on? A. It would be free.

20 Q. Is there a throttle? A. Everything is on the right hand. Your control is on the right hand.

Q. How many speeds have you? A. Any number of speeds, depending on how wide the throttle is open. One main speed forward, and one main speed back, but your speed can be regulated by the degree the throttle is open, the same as a locomotive.

30 Q. It is not the same as a gas engine where you have three speeds? A, No, sir.

Q. You have one speed on the air engine? A. Yes, sir.

Q. Where is your whistle or bell on the air engine? A. The control of it is at the, I believe the right hand of the operator. I am not positive on that point.

Q. Do you have bells on the air engines? A. Whistles.

*Charles W. Hanson—for Defendant—Cross.*

Q. What for? A. Same reason they have whistles for any moving piece of mechanical equipment.

Q. Is it customary to give signals around the plant? A. It is customary to give signals for all moving machinery.

Q. Is that a rule that is rigidly enforced? A. 10 No, sir; not rigidly enforced.

Q. Why isn't it? A. Men become so used to working conditions that they don't—ordinarily they automatically take care of themselves in those cases.

Q. They avoid the ordinary precautions? A. What is that?

Q. In their ordinary day's work they avoid the ordinary precautions? A. I would not say so. I would say that the precautions are very well 20 followed out. We have been aiming to point to the men the danger of certain work.

Q. You say it is customary to blow whistles when you move, but sometimes they get so used to it that they forget they have a whistle?

The Court: That is not what he said at all.

A. I said there were times when the men got 30 used to working in the plant, that they knew the ordinary types of danger, and it is not always the policy to blow the warning signal, although it usually is. In other words, I will testify at times they do not obey our ruling as regards warning signals, although in the major portion of the time they do. I think that is true in any case.

*Charles W. Hanson—for Defendant—Cross.*

Q. It is a rule of the plant to blow whistles when making up trains and moving cars and connecting up, and so forth? A. I would not say that it is, because most of that work is done in a place where there is no danger attached to it, where men are not working back and forth.  
10 We have a brakeman who walks along usually in front of the engine. Sometimes the brakeman is fifteen or twenty-five yards ahead of the engine, is he not? A. I don't know. I suppose there are times when he might be.

Q. You don't know where the brakeman was on this day, do you? A. I don't know; no, sir.

Q. What is the pressure of air in the air engines? A. The main pressure, we have them connected two air compressors. Those air compressors usually run about 600 to 650 pounds for charging the main cylinder of the locomotive. Its working pressure is around 225 to 250 pounds on the working cylinder.  
20

Q. Did you ever know of any instances where these air engines, when being loaded with air, the pipes would burst?

Mr. Toolan: I object.

30 A. No, sir; I did not.

Q. Is that the only cab that is on an air engine?

A. There is no cab on it.

Q. Is that the only place where the levers are?

A. That is the only place.

Q. If I am turning around a curve then, Mr. Hanson, sitting here, and the curve leads over to my left, must I get around the curve before I see what is on the track ahead of me?  
40

*Charles W. Hanson—for Defendant—Cross.*

Mr. Toolan: I object as having absolutely no relevancy here whatsoever. There is no testimony in the case that any accident here happened on a curve. We are not trying all the possibilities of accidents in the plant of the American Smelting and Refining Company, but rather, how this accident happened. It certainly cannot help or enlighten the jury in the least bit.  
10

The Court: I think this part of the examination is entirely competent, how far the engineer can see the progress his engine is making.

*By the Court:*

Q. He is so located that he can see how far ahead under different circumstances? A. Moving straight ahead he could see ahead as far as he had a straight track on his right-hand side, and I believe that the man's movement of the body from his hips would allow him to see on the left-hand side by moving his head, on a straight track. On a curve going to the left he could very easily see what was ahead of him, I believe, if he was actually on the curve. If he was on the curve the position the engine would be such that the track ahead of him would be within his power of vision.  
20  
30

Q. How is he located as to the height of the engine itself? A. In sitting down I believe his head would probably be a foot and a half below the top of the engine.

Q. Then, he cannot see over the engine? A. He could not see over the engine; no, sir.  
40

Mr. Deegan: That is all.

*Charles W. Hanson—for Defendant—Re-direct.*

*Re-direct Examination by Mr. Toolan:*

Q. Mr. Hanson, how frequently are movements made with the engine in the tank room? A. We move about sixty-eight cars a day of loaded anodes in, and move out sixty-eight empty cars in the afternoon, and in the early morning we probably moved out ten loaded cars of scrap and push in ten empty scrap cars. In addition to that there is drilling from one track to another during the day, to allow the anodes which we are going to use that day to get to the point, the bay we call it, where we can take care of them with the crane, we wish to use.

Q. Does that work keep the engines going practically all the time? A. As I said it keeps them going to the extent we don't shut off the engine during the day, keep the motor running, except sometimes at noon hour when the men go for lunch.

Q. Otherwise the motors are kept running all the time? A. Yes, sir.

The Court: Do I remember the testimony of the plaintiff that he was working in the coal pulverizer station?

Mr. Toolan: Yes.

The Court: And that he left the station to meet an appointment of nature.

*By the Court:*

Q. You say there is a toilet in the coal pulverizing station? A. It is for the coal pulverizing station. It is just up a set of stairs.

Q. Within the enclosure of the building? A. No, sir. A set of stairs on the outside which

*Charles W. Hanson—for Defendant—Re-direct.*

run up to it from the coal pulverizer. It is put there for those men there. They have the wash room and toilet for men working in the coal pulverizer. People from the other part of the plant are not supposed to go there.

Q. Do you know what this man was working at? A. From hearsay only. He was working, I believe, for the Barnett Company, who put this system in, and they were making changes.

Q. Could anybody within this enclosure see where the toilet was? A. They could see the building by looking out the door on the north side, if they were looking for it.

Q. They would have to go outside of the building to get to it? A. Yes, sir; but not to cross any tracks or any dangerous ground.

Q. Is there drinking water there, too? A. Yes, sir.

Q. That is only sixty feet away? A. I should estimate sixty feet. It is up a set of stairs leading directly to it.

Q. It is meant just for the use of those working in this building? A. Yes, sir.

Q. That is why it was put there? A. Yes, sir.

*By Mr. Deegan:*

Q. Although there are only three men working in this pulverizer building? A. I say the force who operates the pulverizer are three men. At times it is necessary to have other men there to help clean up. The work is most all automatic, and it is done one man on a shift.

Mr. Deegan: That is all.

Mr. Toolan: That is all.

*John Pasky—for Defendant—Direct.*

JOHN PASKY, a witness produced on behalf of the defendant, being duly sworn according to law on his oath, saith:

*Direct Examination by Mr. Toolan:*

Q. Mr. Pasky, you are an iron worker and are in that business? A. Yes, sir.

10 Q. And you were on the 24th of July, 1923? A. Oh, yes.

Q. On that date was Thomas Pederson employed by you? A. Yes, sir.

Q. At the plant of the American Smelting and Refining Company? A. Yes, sir.

Q. For whom were you working that day? A. I think it was the Barnett Company.

20 Q. You were not employed by the American Smelting and Refining Company or paid by them? A. No, sir.

Q. You had a contract to do some structural work on the coal pulverizer, did you? A. It was a cost plus job.

Q. You were paid by the Barnett people? A. Yes, sir.

Q. And not by the American Smelting and Refining Company? A. No, sir.

30 Mr. Toolan: That is all.

Mr. Deegan: That is all.

*John Cesla—for Defendant—Direct.*

JOHN CESLA, a witness produced on behalf of the defendant, being duly sworn according to law on his oath, saith:

*Direct Examination by Mr. Toolan:*

Q. John, you are working for the American Smelting and Refining Company now? A. Yes, 10 sir.

Q. You were working for them on July 23, 1923, is that right? A. Yes, sir.

Q. What work were you doing on July 24, 1923, what was your job? A. I run air engine.

Q. How long have you been running the air engine, John? A. About ten months before.

Q. Do you remember the day of the accident in which Mr. Pederson got hurt? A. Yes, sir.

Q. Where did that accident happen, John? 20 Where was the engine at the time? A. That engine was up at the tank room.

Q. In the tank room? A. Yes, sir.

Q. With regard to the door going out of the tank room, John, where was it? How close to the door? A. From door was about eight foot.

Q. What? A. From door that engine was about eight feet.

Q. About eight feet from the door to the 30 engine? A. Yes, sir.

Q. What part of the engine do you mean? A. Air engine.

Q. John, you were an engineer on that engine, were you not? A. Yes, sir.

Q. Where did the engineer sit? A. On the right side.

Q. What part of the engine, front of the engine or back of the engine? A. On the back 40 engine.

*John Cesla—for Defendant—Direct.*

Q. Is this exhibit D-9 a picture of the air engine? A. Yes, sir.

Q. Is that where the engineer sits as shown on that picture? A. Yes, sir.

10 Q. When you say the engine was seven or eight feet from the door you mean the part of the engine where you sit, or some other part? Which part of the engine was closest to the door? A. In the front, from front.

Q. How close were you to the door, John, where you were sitting on the engine? A. About eight foot.

Q. You were about eight feet inside of the door? A. Yes, sir.

20 Q. Which way was the engine facing? Which way was it pointed? A. To door.

Q. Pointing inside? A. Yes, sir.

Mr. Toolan: I will ask the Court to let me use an interpreter with this witness in order to get his answers a little more intelligently. I do not think he has a sufficient comprehension of English to answer.

30 (Joseph Hamborsky sworn as interpreter.)

Q. How far inside of the door was the end of the engine on which you were sitting just before the accident? A. Eight feet.

Q. How many cars were in your particular train at that time just prior to the accident? A. Was two.

40 Q. Were they loaded cars or empty cars? A. One was loaded and one was empty.

*John Cesla—for Defendant—Direct.*

Q. Which one was loaded, the one nearest to the engine or the one further away? A. Last car was loaded.

Q. How many men are in the crew of the engine crew? How many men in the engine crew? A. Brakeman and engineer.

Q. You had a brakeman working with you this day? A. Yes, sir. 10

Q. What was the brakeman's job, what did he do? A. When the engine is about to move he blows the whistle and gives a signal with his hand.

Q. The brakeman blows the whistle? A. I do.

Q. The engineer blows the whistle? A. Yes, sir.

Q. What kind of a whistle? A. Air whistle on engine. 20

Q. Where do you operate the air whistle from, what part of the engine? A. Place where I sit.

Q. Did you see Tom Pederson, the man who got hurt, this day, before he was hurt? A. No, sir.

Q. You didn't see him? A. No, sir.

Q. Could you see a man in front of the engine from where you sat on this engine? A. I could see from the left-side of the engine. 30

Q. Which side of the engine did you sit on? A. Right side.

Q. You say you could see some on the left side? A. I could see on that side, and the side that I am sitting on.

Q. How far up on the left side could you see? A. About twenty-five feet.

Q. On the left side? A. Yes, sir. 40

*John Cesla—for Defendant—Direct.*

Q. How far up could you see on the right side? A. Same thing on the right side.

Q. Is not the boiler of the engine in your way on the left side?

Mr. Deegan: I object to arguing with the witness.

10 The Court: He is not arguing with the witness. Go on.

Q. Is not the boiler of the engine in the way, so as to obscure your vision on the left side? A. Can't see beyond the boiler.

(Question repeated by interpreter.)

A. I can see better on the right side than on 20 the left side.

Q. This exhibit D-12, this shows the place where you sit on that air engine, isn't that so?

A. Yes, sir.

Mr. Deegan: I object to that as being very leading.

The Court: It is explanatory.

30 Q. How far on the left side of the engine, on this side, could you see from where you sat on that engine? A. On the left side?

Q. Yes. A. About three or four feet on the left side.

Q. Did you see Mr. Pederson before he was hurt on that day? A. Yes, sir.

Q. Where did you see him? A. He was on the left side.

40 Q. You saw him before he was hurt? A. Yes, sir; before he get hurt.

*John Cesla—for Defendant—Direct.*

Q. How far was the engine away from the cars? A. About five foot.

Q. Will you please tell us what happened there that day? A. Car was standing on straight track, engine was on the front, brakeman gives me signal, he tell me, go ahead, he show me with the hand, signal, I started to blow whistle and start to push them car, he holler "Ho." I stopped the engine and brakeman holler "Somebody get hurt." I stopped the engine, jumped off the engine, and walk away from engine about ten foot more and stay up at the door. 10

Q. How soon did you stop the engine? How quickly did you stop the engine? A. That is quick just I shut the lever and put the brake on.

Q. What side of the engine was Pederson on when you saw him? A. On the left side. 20

Q. Did you see Pederson start to walk in between the engine and the car? A. No, sir.

Q. How often did you move your engine and cars around there that day? A. Every five or ten minutes.

Q. Keep busy all day moving cars? A. Yes, sir.

Q. Was there room to walk out behind the engine at the door? A. Yes, sir. 30

Q. The engine wasn't in the door? A. No, sir.

*By the Court:*

Q. How much room was there between the engine where you were sitting and the door? A. About eight feet.

Q. The door was open? A. Yes, sir.

*By Mr. Toolan:*

Q. Were both doors open, that is the door to the scale house, too? A. Yes, sir; on the scale house and the other door was open. 40

*John Cesla—for Defendant—Direct.*

Q. All the doors open? A. Yes, sir.

Q. How long are two cars, John, about, do you know? A. About twenty-one, twenty-two feet.

Q. Cars each about ten feet? A. Yes, sir.

Q. Were there any other cars farther down the tracks or were these the only cars on the track? A. From that car was two empty cars  
10 about thirty feet.

Q. About thirty feet in between? A. Yes, sir.

Q. Did you see Pederson start to walk in between the engine and the cars, John? A. No, sir.

Q. Did this air engine go fast? Does it start fast? A. Very slow.

Q. What happens if you open the throttle wide quickly? A. He blow out.

Q. What? That engine blow out from so  
20 much air.

Q. Does the engine move if you give it the air fast? A. Very slow.

Q. Suppose you give the air fast what happens? A. That air blow out right away.

Q. There is a valve on there, is there, or something? A. Yes, sir.

Q. Only start certain speeds? A. Yes.

Q. Does the air engine run slow? A. Yes, sir.  
30

Q. John, is there an aisle that runs up through the tank house, that is, towards State Street, small aisle? A. There is an office there.

Q. John, do you recognize this picture D-4? Do you recognize the aisle shown on this picture? A. This aisle here (indicating)?

Q. Yes. Is there an aisle there? A. That goes from the car?

40

*John Cesla—for Defendant—Cross.*

Q. Is there an aisle leading up between the tanks? A. There is a road.

Q. Is there a road between the tanks? A. Yes, sir.

Q. Where was your engine and car in the opening on this day with respect to that aisle that leads up through the tank room towards  
10 the west of the building? A. The engine was in front and the two cars were behind.

Mr. Toolan: That is all I have.

*Cross-examination by Mr. Deegan:*

Q. How high was the engine from the ground? A. About two foot and a half.

Q. How long have you been an engineer? A. Two years and a half.  
20

Q. How long did you work for Guggenheim's, or the American Smelting and Refining Company? A. Two years and a half.

Q. Engineer all the time? A. Yes, sir.

Q. Did you talk to anybody about this accident? A. No.

Q. Is your memory of the accident better now than it was before? A. I don't understand what  
30 you mean.

Q. Was your memory three months after the accident better than it is today? A. I remember about the same today as I did before.

Q. Did you ever talk to Mr. Pederson about this accident? A. I talk Mr. Pederson, I talk to you. You was in my house.

Q. How many times was I in your house? A. About five or six times.

Q. When was I there, and Mr. Pederson? A. 1924.  
40

*John Cesla—for Defendant—Cross.*

Q. What time in 1924? A. July 2, or something like that.

Q. Was I in your house three months after the accident? A. No. More than that.

Q. Was it six months after the accident? A. After six months.

10 Q. Six months or after six months? A. Maybe more than that. I don't know sure.

Q. Who else was in your house besides Mr. Pederson and myself talking about this accident? A. I don't know that.

Q. Do you know Randolph Kish? A. No, sir.

Q. Wasn't there another man with us at the time we talked to you? A. Yes, sir.

Q. Do you know who he was? A. No, sir; I don't know who he was.

20 Q. You lived, when we called upon you, at Harrington Street, did you not? A. Yes, sir.

Q. And you were the engineer at the time we called upon you, of the A. S. & R? A. Yes.

Q. And you were still working on the engines? A. Yes, sir.

Q. Your engine number was 3, wasn't it? A. Yes, sir; number 3.

30 Q. And the accident took place July 24, 1923, didn't it? A. Yes, sir.

Q. You told Mr. Pederson and me that he was injured by being caught between the engine and two cars on the first section of the tank room, did you not? A. Yes, sir. That was first section.

Q. That is where the accident took place? A. Yes, sir.

40 Q. You remember all this distinctly don't you, telling us just how the accident happened, as I

*John Cesla—for Defendant—Cross.*

have gone so far? A. I remember speaking to you, but you didn't have an interpreter and perhaps I didn't understand everything you asked me.

Q. You understand me now, don't you? A. Yes, sir, I understand you now, but not everything.

10 Q. Your knowledge of English is the same now as it was when the accident happened? A. I now understand everything. I understand English a little bit.

Q. You know what a bell is, don't you? A. Yes, sir.

Q. You know what a whistle is? A. Yes, sir.

Q. You know what an air engine is? A. Yes, sir.

20 Q. You know what the first section of the tank room is? A. Yes, sir.

Q. You know what the cars are, don't you? A. Yes, sir.

Q. Do you remember saying this, Mr. Cesla? A. Yes, sir.

Q. You spell that name out for me C-e-s-l-a? A. Yes.

30 Q. You understand me now, don't you, what I am saying? A. Not everything.

Q. You don't understand everything? A. No, sir.

Q. What don't you understand? A. I understand not much. Sometimes I understand, because you talk high language, I can't understand.

Q. Tell me when you don't understand me, will you? A. All right.

40 Q. You understand me today just the same as you understood me—

The Court: He said that all right.

*John Cesla—for Defendant—Cross.*

Q. Did you tell me that the accident happened in this way: I had my engine standing in the tank room six feet from two cars which were on the narrow gauge railroad, do you remember that? A. Yes, sir.

10 Q. "My engine was standing still for five minutes, maybe ten minutes," do you remember telling me that? A. Yes, sir.

Q. "I was on the right-hand side of the engine looking east," do you remember saying that? A. Yes, sir; I was on the right hand on the engine. I was looking ahead where the cars were.

Q. Looking east? A. Yes, that is looking east.

Q. The tracks run east and west? A. Yes, sir.

20 Q. That is what you told me. You understood me then. "My brakeman was about twenty yards same side of the track as myself," do you remember that? A. He wasn't twenty yards. About ten feet away from me.

Q. "After a wait of five or ten minutes my brakeman gave a signal to me to come ahead, from a position of about twenty yards in front," do you remember saying that? A. He gave me a signal to go ahead with the cars.

30 Q. Didn't you tell me that the brakeman was about twenty yards ahead, on the same side of the engine, and gave me a signal to go ahead? A. Yes, sir.

Q. You understand me, don't you? A. Yes, sir.

Q. "Both of us were on the right-hand side of the track? A. Yes, sir.

Q. "I did not blow my whistle"? A. Yes, sir; I believe.

40 Q. Did you tell me you did not blow your whistle? A. No, I don't say that.

*John Cesla—for Defendant—Cross.*

Q. You did not say that? A. No, sir.

Q. "There was no bell on the engine"? A. Was whistle.

Q. Did you tell me that? A. You asked me bell on the engine, I said no. Whistle. You asked me bell on the engine. I said no; was whistle on the engine.

10 Q. "I did not look to the left of the track"? A. I told you that time I see Mr. Pederson on the left side about before I start engine, maybe one minutes, maybe half a minutes, he was stay on the left side.

Q. Did you tell me you did not look to the left of the track? A. No, sir.

Q. "And all I did was to come ahead when the signal was given"? A. Yes.

20 Q. That is correct? A. Yes, sir.

Q. "I never thought of looking on the left side of the track," is that correct, John? A. Yes, sir. I started engine before about five minutes I see Mr. Pederson was on the left side looking engine. After he walk away some place.

Q. Is this statement correct: "I never thought of looking on the left side of the track"? A. I did not say that.

30 Q. "And all I did was to come ahead when the signal was given"? A. When the signal was given I went ahead.

Q. "I never thought of looking on the left side of the track and I did not realize that anybody could be passing between the engine and the first section," is that right? A. I don't understand it all.

The Court: Did he ever use the word "realize"? 40

*John Cesla—for Defendant—Cross.*

Mr. Deegan: He used probably the word—this is a statement that he signed.

The Court: He never used the word “realize,” did he?

Mr. Deegan: Yes, he did.

The Court: He knows the word “realize”?

10

*By the Court:*

Q. Do you know what realize means? A. No, sir.

Q. What nationality are you, Polish? A. Polish; yes, sir.

Mr. Deegan: I will permit Mr. Toolan to cross-examine on the balance, and I will go on the stand later.

20

*By Mr. Deegan:*

Q. “I saw a lot of other people pass between the engine and the two cars”? A. No, sir.

Q. Do you remember saying that? A. People walk on the side, not between engine and the car.

Q. You don’t remember telling me that you said that? A. No, sir; I don’t say that.

30

Q. “I saw a lot of other people pass between the engine and the two cars before the accident, but I just went ahead thinking everything was all right,” is not that right? A. Yes, sir.

Q. “From my position on the engine I could not see on the left side of the track,” is that right, John? A. I was on the left side on the track just from straight engine. Not far from engine.

40

*John Cesla—for Defendant—Cross.*

Q. Do you remember saying this? Do you remember saying that you could not see on the left-hand side of the track? A. I forget it. Maybe I say, but maybe not.

Q. “I was looking at the brakeman as I went forward”? A. Brakeman gave me signal.

Q. And you were looking at the brakeman? A. Yes, sir. 10

Q. “I did not see Mr. Pederson coming from the left and first I knew of the accident was when I heard the yell,” do you remember saying that? A. I don’t understand.

Q. Do you remember saying this: “I either caught him between my engine and the two cars, or the draw bar struck him,” do you remember that? A. Yes, sir. 20

Q. “I struck the first section with enough force to push them from the first section of the tank room to the second section of the tank room”? A. Yes, sir.

Q. Do you remember the diagram that was drawn at your house? Do you remember that piece of paper? A. Yes, sir.

Q. Did you say that “This was the first time that I did not look for people passing between the engine and the two cars,” do you remember that, John? A. No, sir. 30

Q. Is that your signature? A. Yes, sir.

Q. Do you know whether or not you signed that on January 2, 1924? A. Yes, sir.

Q. It was January 2, 1924? A. Yes, sir.

Q. And the accident took place the July before? A. Yes, sir.

Q. How did you come to sign this paper? A. You come in my house. 40

*John Cesla—for Defendant—Cross.*

Q. I was there five or six or seven times, you say? A. Yes, sir.

Q. Then I came with this paper? A. Yes, sir.

Q. Was this paper read to you before you signed it? A. It was read but I couldn't understand it all.

10 Q. Do you know the other man that was with me at the time? A. Yes, sir; you told me that time, "Sign my name," because I want to get that money from compensation loan. He said he get compensation loan from New York.

Q. Who said that? A. Mr. Deegan.

Q. This statement is true, is it not, as I have gone over it? A. Not in all.

Q. Did you ever see this written piece of paper before? A. Yes, sir.

20 Q. Where did I get it? A. You up in my house that time.

Q. Did you give me that piece of paper or your wife? A. I give you. You ask me how were car and engine, and how long was engine from car.

Q. And you told me? A. Yes, sir.

30 Q. And I put it down just like you told me, engine and two cars? A. Yes, but not everything.

Q. Tell me what is not right? A. Because I don't say that time was lots of people pass between car and engine that time. I don't say that.

Q. Is that the only thing that is not right? A. Yes, sir.

Q. Everything else is all right?

40 The Court: That is not fair to this kind of a witness. You have taken your state-

*John Cesla—for Defendant—Cross.*

ment in detail and asked him as to each statement, and he has given you what he has admitted, and he has given you what he does not admit.

Mr. Deegan: I will offer it in evidence.

Mr. Toolan: I object to it now.

The Court: You cannot offer it in evidence under cross-examination of the other side's witness. You can have it marked for identification, if you want to. 10

Mr. Deegan: I will do that.

(Statement marked P-1 for identification.)

Q. How heavy is an air engine, do you know?

A. About five ton and a half.

Q. How heavy is a gas engine? A. Gas engine is seven ton. 20

Q. There is only one speed on an air engine?

A. Yes, sir; one speed.

Q. Can you start a car up quickly with an air engine? A. No, sir.

Q. What do you have to do, go back to get a running start? A. No, sir. If I start it I open lever and start it easy, because if I give him too much air he blow out. Not pull, but just slide on the track. 30

Q. Do you like the air engine better than the gas engines?

Mr. Toolan: I object.

The Court: Objection sustained.

Q. When was the last time you drove an air engine?

Mr. Toolan: I object.

A. No place. 40

*John Cesla—for Defendant—Re-direct.*

Q. How many? A. I don't work before no place.

Q. When was the last time you handled an air engine in the plant? A. Before I didn't have any.

10 Q. When did they stop using this air engine after the accident?

Mr. Toolan: That has already been testified to.

The Court: I know it has. However, he may answer it.

Mr. Deegan: I will withdraw the question.

20 Q. Do you know the brakeman on the job that day? A. Yes, sir.

Q. How long was he on the job when the accident took place? A. (No answer.)

*By the Court:*

Q. How long had he been working there at that kind of work? A. He work about two weeks.

Q. A new man? A. New man, he works with me, brakeman.

30 *Re-Direct Examination by Mr. Toolan:*

40 Q. John, what did Mr. Deegan say to you when you signed that paper? A. Mr. Deegan told me, "Sign your name." I said, "For what?" "Well," he said, "he poor man, he wants to get money from compensation loan." He said you witness and the brakeman, if you sign his name, he get money from compensation loan. Is that right, Mr. Deegan?

*John Cesla—for Defendant—Re-cross.*

Q. What did he say would happen if you did not sign your name? A. He said you will have to sign, because you have got to help that man, because he is poor man, he said.

Q. Was Mr. Deegan up to see you the other night again? A. He was one night, but I don't sign my name, he comes next night.

10 Q. No, I mean lately, within the last week or so, was he up to see you again? A. No, sir.

Q. He wasn't up to your house? A. That time I sign my name he never come after.

Q. When he came up to your house that paper was all typewritten, wasn't it, John? A. Yes, sir.

Q. Just as it is there? A. Yes, sir.

20 Q. He brought it up to you and asked you to sign it? A. Yes, sir.

*Re-Cross-Examination by Mr. Deegan:*

Q. I didn't see you since January, 1924, John, is that right?

The Court: That is what he said. That is all.

Mr. Deegan: That is all.

30 Mr. Toolan: That is all.

*John Mazur—for Defendant—Direct.*

JOHN MAZUR, a witness produced on behalf of the defendant, being duly sworn, according to law on his oath, saith:

*Direct Examination by Mr. Toolan:*

10 Q. John, you were working for the American Smelting and Refining Company on July 24, 1923, when Mr. Pederson got hurt, were you not? A. Yes.

Q. What was your job? A. Brakeman.

Q. How long had you worked at that job? A. I work about three weeks.

Q. Will you please tell us whether or not you saw Mr. Pederson that day before he was hurt? A. No.

20 Q. Which side of the engine were you on? A. Which side?

Q. Yes. A. Left side. No, right side.

Q. Who was on the other side? A. Mr. Pederson, left side.

Q. So you did see him on the other side, did you not? A. Yes, sir.

Q. How long was he on the other side? A. Oh, he stay about five minutes.

30 Q. Where was the engine? A. Engine behind back.

Q. The engine was closer to the door, is that right? A. No. In the back.

Q. I will withdraw the question and put it this way: How close to the door was the engine? A. About six or seven foot.

Q. Inside of the door? A. Yes.

40 Q. How far was the engine away from the cars? A. About three or four feet.

*John Mazur—for Defendant—Direct.*

Q. Where were you standing? A. I stand about ten, nine feet behind engine.

Q. Do you mean in front of the engine? A. Yes.

Q. Did you give any signal to the engineer that day? A. Yes.

Q. What did you do? A. I say, "Go ahead." 10

Q. Did he go ahead? A. Yes.

Q. Where was Pederson then? A. He stay left side.

Q. When was he on the left side? A. He stand and look, look at the engine.

Q. Where was he when you gave the signal? A. He stay alongside beside rail.

Q. Then what did you do after you gave the signal? A. I do go ahead. I turn my head, I saw Mr. Pederson get hurt. 20

Q. You turned your head which way first? A. I throw my head as I see get signal push car a little ahead.

Q. Which way were you looking when you gave the signal? A. I look at the crane.

Q. Where was the crane? A. Crane behind.

Q. What were you going to do with the cars? A. I want push ahead a little.

Q. Push them down to the crane? A. Yes. 30

Q. The cars were facing across the tank room, is that right? A. Yes.

Q. What way did you look? A. I looked in the crane, in the car.

Q. That was the way the cars were going to be pushed? A. Yes.

Q. Was there anybody in front of the train when you gave the signal? A. No. Only myself. 40

*John Mazur—for Defendant—Direct.*

Q. Nobody on the track there when you gave the signal? A. No.

Q. Will you stand down here in front of the jury and show us just what you did? Suppose Mr. Pederson is opposite you, and suppose this is the track (indicating the railing in front of the jury) will you please show us where the engine was? A. Engine stay here, and cars stay here, and Mr. Pederson stay other side, stay here. I look on train, I tell—

Q. What happened? Will you tell us? A. I stay over here and I see Mr. Pederson other side, and Mr. Pederson I see, I give signal, come ahead, and train come ahead like that, I see Mr. Pederson on the track get hurt.

Q. Which way were you looking when you gave the signal? A. I look on the engine.

Q. Was the train in the direction that cars were going to be moved in? A. Yes, sir.

Q. And you had your head that way, is that right, toward the crane? A. Yes.

Q. Then when you turned around again what did you see? A. I see Mr. Pederson on the train.

Q. How many doors were open there that day? A. Two.

Q. Two doors? A. Yes.

Q. All the doors were open, are you sure of that? A. Yes.

Q. Was the engine standing in the door or away from the door? A. From door about six or seven foot.

Mr. Toolan: That is all I have. Cross-examine.

40

*John Mazur—for Defendant—Cross.*

*Cross-examination by Mr. Deegan:*

Q. Was the engine standing on the switch in the tank room? A. On the switch? Yes.

Q. Were the rear wheels of this engine, had they reached the switch? A. No.

Q. The front wheels of the engine were on one side of the switch and the rear wheels of the engine were on the other side of the switch, is that right, John? A. No.

Q. Were they standing on the switch? A. On the switch.

Q. The rear wheels or the front wheels? A. I don't know.

Q. But you do know that the engine was on the switch? A. Yes.

Q. You didn't see the accident, did you? A. No.

Q. You were looking at the crane? A. Yes.

Q. And the accident took place in back of you, didn't it, and the engineer? A. Yes.

Q. Did you see a boss standing by the engineer when you gave the signal to come ahead? A. Yes.

Q. Who was he, do you know? You don't know his name? A. No, I don't know his name.

Q. Was Cesla talking to the boss when you told him to come ahead, John? A. No, he sit on engine.

Q. Was he talking to the boss when you told him to come ahead? Do you remember? A. No.

Q. How far was the boss from the engineer? A. Oh, about six or seven foot.

Q. Were they talking before you gave them the signal, Cesla and the boss? A. No. He sit on the engine that time when I give signal.

40

*John Mazur—for Defendant—Cross.*

Q. Where was the boss when you gave the signal? About how far from Cesla? A. About six or seven foot, right by the office.

Q. Was the boss telling Cesla what to do? A. No.

Q. Was he telling you what to do? A. Yes, wait for cars.

10 Q. Did the boss walk between these tracks just before you gave the signal to come ahead? A. I don't see.

Q. Where did the boss come from, do you know? A. He going office.

Q. He was going from where, that side of the tank room, John? A. Yes.

Q. He was down the other side of the tank room? A. He goes in office, same place.

20 Q. He was going to the office? A. Yes.

Q. From what part of the tank was he coming? A. I don't know where he was coming from.

Q. You don't know whether he came between the engine and the two doors, do you, John? A. Yes, I know.

The Court: Who are you talking about now?

30 Mr. Deegan: The boss that he mentions.

*By the Court:*

Q. Did the boss walk between the engine and the cars?

(Question repeated through interpreter.)

40 A. No.

*John Mazur—for Defendant—Cross.*

*By Mr. Deegan:*

Q. Is your memory better today on how the accident happened than it was on December 31, 1923, John? A. I have forgotten it now.

Q. Do you remember what you told me December 31, 1923, John? A. I remember. I don't remember all.

Q. Where did you see me, John? A. You come my house.

Q. Who was with me? A. Mr. Dayko.

Q. Who else? A. Mr. Pederson.

Q. How many times was I at your house? A. One time, two times.

Q. Where did you live at that time? A. In the same place.

Q. What is that, what street, John? A. 725 Catherine Street, 721.

Q. Perth Amboy? A. Yes.

Q. Do you remember giving me this paper from a little book in your house? A. Yes.

Q. Did you understand me talking to you when I was in your house? A. I didn't understand all.

Q. Who explained it to you? Did you understand when I asked you to give me some paper? A. Yes.

Q. And you got me some paper? A. Yes.

Q. Did you give me a pencil? A. No, I don't give you pencil.

Q. You told me then, John, that you recollect or gave me this statement; "I am the brakeman and I saw the accident," is that right? A. Yes.

Q. Do you understand me, John? A. Yes, go ahead.

Q. "I am the brakeman," you told me that? A. Yes.

*John Mazur—for Defendant—Cross.*

Q. You told me "I saw the accident"? A. Yes.

Q. "In which Mr. Pederson was hurt. The boss, before going through the cars, the engine and cars were in the position as indicated on this paper," do you remember seeing that paper, John?

10 Mr. Toolan: This witness shakes his head to everything. I would like to have these questions put to him in his own language so as to give him a fair opportunity.

The Court: The jury fully understands the situation.

20 Q. You understand what I am saying, John, don't you? A. Yes.

Q. When you don't understand me you tell me, John, won't you? "Cesla was engineer"? A. Yes.

Q. You gave him a signal and he came back, he answered it two minutes ago—

Mr. Toolan: Is that the statement?

30 Q. "Cesla, the engineer, received the signal and responded about two minutes later," do you remember telling me that? A. No.

Q. "Cesla was talking to the boss," do you remember telling me that? A. No, he talk before.

40 Q. Did you say this: "Cesla was talking to the boss and kept talking after I gave the signal," do you remember telling me that, John, in your house on Catherine Street? A. Yes.

*John Mazur—for Defendant—Cross.*

Q. Did you tell me that, John? A. No.

Q. You don't remember all you forgot, which? A. Forgot it.

Q. Maybe you told it to me then? A. No.

Q. "I heard a yell and I turned around and I saw Pederson standing on the ground"? A. No. Yes.

Q. That is right, isn't it? A. No, not on the ground. Standing up. 10

Q. Standing up? A. Yes.

Q. There was no bell on the engine? A. No bell.

Q. Do you remember telling me that, John? A. Yes.

Q. "Cesla did not blow the air whistle"? A. I no remember that.

Q. You don't remember whether you told me? A. Yes. 20

Q. "After I gave the signal with my hand he continued talking to the boss," do you remember that, John? A. No.

Q. You wouldn't say that you didn't tell it to me? A. I give signal, he come away. Not talking with the boss.

Q. You say you don't remember telling me this? 30

Mr. Toolan: I do not understand that. Has he said that?

Q. Did you make this statement to me: "Cesla did not blow air whistle, and after I gave the signal with my hand he continued talking to the boss"? A. No.

Q. "I was a brakeman about one week at the time of the accident"? A. About three weeks, two weeks, like that. 40

*John Mazur—for Defendant—Cross.*

Q. Which is it?

The Court: Which is what?

Mr. Deegan: Two weeks or three weeks.

A. Three weeks.

10 Q. "The engineer, Cesla, couldn't see on the left of the engine"? A. No.

Q. You didn't tell me that. Did you say this: "Just before the accident happened I was looking at the crane but turned around in time to see the accident," did you tell me that? A. Yes.

Q. Before moving to couple up the cars were you standing about ten or fifteen minutes? A. About five or ten minutes.

20 Q. "Pederson's leg was broken by the draw bars," do you remember telling me that? A. Yes, with the coupling.

Q. By the coupling and not draw bars? A. No.

Q. Is that your writing, or whose name is that? A. Mine.

Q. Is that your writing? A. Yes.

Q. And you signed it? A. Yes.

Q. Who was there when you signed this? A. Mr. Dayko and Mr. Pederson.

30 Q. Where did you see that paper? A. I never see that paper.

Q. You never saw that paper before? A. Oh, yes.

Q. You saw it? A. Yes, sir.

Q. This was drawn out on your kitchen table?

A. Which?

Q. Of this engine. A. Yes.

Q. And those two loaded cars? A. Yes.

40 Q. And the four loaded cars down farther on the track? A. Only was three cars.

*John Mazur—for Defendant—Re-direct.*

Q. Is there a Spanish fellow over here? A. Yes.

Q. Cesla was sitting on this side of the engine? A. Yes.

Q. And the distance between the engine and the two cars you told me was three or four feet? A. Yes.

10 Q. The distance from the front of the engine and where you were standing was about thirty feet? About ten, fifteen feet.

Q. Do you remember telling me it was thirty feet? A. About ten, fifteen.

Q. Is that where the crane was, right in front of you? A. Yes.

Q. The cars were four feet high? A. Yes, about that.

20 Q. You remember going over this paper, didn't you? A. About four or three feet high.

Q. And you told me when you wrote this that you were a crane man and not a brakeman any more, didn't you? A. Well, yes.

Q. This picture is right, isn't it, John, of how the accident happened?

Mr. Toolan: I submit he has testified; he has got him down thirty feet ahead of 30 the engine, and he said ten or fifteen.

Mr. Deegan: I would like to have this marked.

(Paper marked P-2 for identification.)

*Re-direct Examination by Mr. Toolan:*

Q. Where do you work now? A. I work cable works.

40 Q. Was Mr. Deegan up to see you the last few days? A. Yes.

*Thomas E. Van Gilden—for Defendant—Direct.*

Q. What did he say to you? A. Oh, he asked me same questions what he ask me now.

Q. Tell me what he said to you. What did he say?

Mr. Deegan: I object. The question has been answered.

10

The Court: You may answer it.

A. He asked me to help the other fellow.

Q. Didn't tell you because you were not working for Guggenheim any more you did not have to testify for them? A. Yes.

Mr. Toolan: That is all.

20

THOMAS E. VAN GILDEN, a witness produced on behalf of the defendant, being duly sworn according to law on his oath, saith:

*Direct Examination by Mr. Toolan:*

Q. Mr. Van Gilden, you were employed by the American Smelting and Refining Company on July 24, 1923? A. Yes, sir.

30

Q. In the tank room? A. Yes, sir.

Q. What was your particular job? A. Lead burner.

Q. Were you in the vicinity of this accident at the time it happened? A. I was.

Q. Where were you? A. About thirty feet from the engine.

Q. Which direction? A. South.

40

Q. That is along the tracks in the direction in which these cars were being pushed? A. Yes, sir.

*Thomas E. Van Gilden—for Defendant—Direct.*

Q. Did you see Pederson? A. I did.

Q. Before the accident or after? A. At the time of the accident.

Q. Where? A. Standing on this side of the engine, on the east side of the engine.

Q. That is, before he attempted to cross through? A. Yes, sir.

10

Q. Did you observe how long he had been standing there? A. Approximately five minutes.

Q. The engine had been standing there about that time, had it not? A. Yes, sir.

Q. Was the engine inside of the door? A. It was.

Q. Entirely clear of the door? A. Yes, sir.

Q. How far? A. Eight feet.

Q. How many cars were in front of the engine? A. Two cars.

20

Q. Could you tell whether or not there was any passageway between the engine and the cars? A. Yes, sir. About four or five feet.

Q. Was there a brakeman there that day? A. There was.

Q. Will you please tell us just exactly what you saw? A. I was working on section 32, burning lead, in fact, I was standing there not working at the time, waiting for my helper to bring the gas cylinder up to hook up, and I was gazing around and I noticed Mr. Pederson standing there, and an engine and an empty and a loaded car. The brakeman gave a signal to come ahead and just as he gave the signal to come head Mr. Pederson stepped on the track and it caught him.

30

Q. Was it possible to see the brakeman over the cars? A. It was; yes, sir.

40

*Thomas E. Van Gilden—for Defendant—Cross.*

Q. Those cars were only about how high? A. About five foot.

Q. Were both doors open? A. They were.

*Cross-examination by Mr. Deegan:*

10 Q. You are an employee of the A. S. & R? A. I am.

Q. How many years? A. Three.

Q. Indicate on that map your position at the time of the accident.

The Court: Mark it with "V."

20 A. What part of the tank room is this? What section is this? These are the two doors. This is section 36, down below is 35, 34, 33. This must be 32, which is right (witness marks map).

Q. If you saw Mr. Pederson get hit why didn't you pick him up?

Mr. Toolan: I object.

The Court: I will allow it.

A. I wasn't right by his side.

Q. How many feet were you? A. Thirty feet, about, approximately.

30 Q. How many is the brakeman away? A. He was on the other side of the trip.

Q. How far was the engineer away? A. Sitting on his seat in the back of his engine.

Q. You are the only one that saw the accident? A. I do not know.

Q. Did you jump off the tank to pick him up?

A. I wasn't on the tank. I was standing down on the floor.

40 Q. Thirty feet away? A. Yes, sir.

*Thomas E. Van Gilden—for Defendant—Cross.*

Q. Did you rush up to help him? A. No, I didn't rush.

Q. You just let him lay there? A. He wasn't laying down.

Q. Did you offer any help or assistance to him? A. Not until after he got in the office.

Q. Do they burn lead in the tank room? A. 10 Certainly.

Q. What made you think that an accident was about to take place?

Mr. Toolan: I object.

The Court: Objection sustained.

Q. What made you look at that particular moment to the brakeman when he was giving the signal? A. Maybe I had been looking there before. 20

Q. Answer my question. What made you look at this particular time at that particular brakeman on the opposite side of the tank room? A. I was looking in that direction at that particular time. There was nothing.

Q. Were your eyes gazing at the brakeman? A. In that direction.

Q. That is forward, is it not, of the scene of the accident? A. Yes. 30

Q. Thirty feet? A. Yes.

Q. What were you looking at, the crane over there? A. Nothing in particular.

Q. But you saw the brakeman on the other side? A. Yes, sir.

Q. Thirty feet ahead? A. Yes, sir.

Q. And you were looking back. How soon after the signal did the accident take place?

A. Well, I couldn't state the exact time. 40

*Thomas E. Van Gilden—for Deft.—Re-direct.*  
*Russell H. Baggot—for Defendant—Direct.*

Q. How long were eyes fixed upon the crane and the brakeman?

Mr. Toolan: I object. There is no testimony it was fixed on the crane.

10 Q. How long were your eyes fixed in that general direction? A. Probably five minutes, ten minutes.

Q. You kept looking there all the time in that general direction for five or ten minutes? A. Yes.

Q. You didn't look to the side of you or you didn't look to the rear of you, just ahead where the brakeman was? A. Yes.

20 *Re-direct Examination by Mr. Toolan:*

Q. Did you see anybody else walking in between that train of cars? A. I did not.

Mr. Toolan: That is all.

RUSSELL H. BAGGOT, a witness produced on behalf of the defendant, being duly sworn according to law on his oath, saith:

*Direct Examination by Mr. Toolan:*

Q. Mr. Baggot, you are employed by the American Smelting and Refining Company? A. Yes, sir.

Q. Were you on the 24th of July, 1923? A. Yes, sir.

40 Q. In what capacity? A. Purchasing agent of the Perth Amboy plant.

*Thomas Pederson—for Pltff.—Recalled—Direct.*

Q. Are you familiar with the arrangements under which the work was being done in the coal pulverizing plant on this particular date? A. Yes, sir.

Q. Was John Pasky employed by the American Smelting and Refining Company? A. No, sir.

Q. Or paid by them? A. No, sir.

10

Mr. Toolan: That is all I have.

Mr. Deegan: No questions.

Mr. Toolan: We rest.

(Adjourned until 2:00 P. M.)

20

AFTERNOON SESSION AT 2:00 P. M.

PLAINTIFF'S REBUTTAL TESTIMONY.

THOMAS PEDERSON, recalled:

*Direct Examination by Mr. Deegan:*

Q. Mr. Pederson, did you know of any other toilet in the A. S. & R. other than the one that you used? A. No, sir.

30

Q. I show you Exhibit P-1 and ask you to explain what it is? A. That is a statement that we got from the engineer.

Q. What time? A. On the 2nd day of January 1924.

Q. How did you happen to get that statement?

40

*Thomas Pederson—for Pltff.—Recalled—Direct.*

Mr. Toolan: I object.

The Court: Objection sustained.

Q. Were you present when that statement was signed? A. Yes, sir.

Q. Was that statement read before it was signed? A. Yes, sir.

10 Q. Was it explained? A. Yes, interpreted.

Q. What do you mean by interpreted? A. A fellow that could talk his language.

Mr. Toolan: I object. Unless this man talked the language and knows what language he was talking. I do not believe he could understand the language.

20 Q. Is the interpreter living at this time? A. No. The interpreter is dead.

Q. What was his name? A. Rudy Kish.

Q. Was there any other conversation carried on in English with the man? A. Yes, sir.

Q. Did he talk in English? A. Yes, sir.

Q. Did he tell you how the accident happened? A. Yes, sir.

30 Q. Did he illustrate that in any way? A. Yes, sir; he explained how the thing happened from the start to the finish.

Q. Do you know whether that is the illustration that was used? A. Yes, sir; that is the drawing that he drew up for us to show us how the thing happened.

Q. Was there any promise or force used in getting that statement? A. No.

Q. Just a casual conversation? A. Yes, sir.

*Thomas Pederson—for Pltff.—Recalled—Cross.*

*Cross-Examination by Mr. Toolan:*

Q. Who drew the sketch on the back of that paper, Mr. Pederson? A. The engineer drew that.

Q. The engineer drew it himself? A. Yes, sir.

Q. You told him, did you not, that if he didn't sign the statement and didn't help you that you wouldn't get any compensation insurance? A. No, I didn't.

Q. You didn't say that to him? A. No.

Q. What did you tell him you wanted it for? A. I didn't tell him any reason what I wanted it for.

Q. How many visits did you make before you got that statement? A. I made two or three visits up there.

Q. Mr. Deegan with you each time? A. Yes, sir.

Q. That statement is typewritten, isn't it? A. Yes, sir.

Q. It was brought up to this man's home typewritten? A. Yes, sir; after the second night.

Q. In other words, you brought that statement up there already prepared? A. No. That statement was made overnight in the office. We had a statement written by lead pencil.

Q. He didn't sign any statement in lead pencil, did he? A. No. This thing was brought up to him.

Q. That was brought up already prepared and written out on the typewriter, isn't that true? A. Yes, sir.

Q. And he was asked to sign it? A. No. This man interpreted it for him—

*Thomas Pederson—for Pltff.—Recalled—  
Re-direct.*

Q. You didn't understand what he said, did you? A. No.

Q. You don't know what he was doing, do you? A. He explained in English and first—

10 Mr. Toolan: I move that be stricken out.

Q. What language were they talking? A. Hungarian.

Q. You don't understand Hungarian, do you? A. No, sir.

Q. So, you don't know what they were saying? A. No, sir.

20 Q. All you know is that they were talking to each other in Hungarian? A. We read it off in English first.

Q. Who read it off in English? A. This Kish. Read it in English and then interpreted it over—

Mr. Toolan: I move that be stricken out. He might say that he spoke in some foreign language but we don't want to be bound on the record with interpretation.

The Court: It is stricken out.

30 Mr. Toolan: That is all.

*Re-Direct Examination by Mr. Deegan:*

Q. How many languages was that explained in? A. Two of them, I imagine.

Q. I will show you this and ask you to explain to the Court and jury what that is. A. That is John Mazur, that is the conductor.

40 Q. Is that a statement signed by him? A. Yes, sir.

*Thomas Pederson—for Pltff.—Recalled—  
Re-cross.*

Q. Do you know where that paper was obtained? A. Yes. At his house in the kitchen.

Q. Who was with us at the time this statement was made up? A. A mail carrier, Joseph Dayko.

Q. Conversation carried on in English and explained to him in English? A. Yes, sir. 10

Q. Did he tell you how the accident happened in English? A. Yes, sir.

Q. What is that drawing attached to that statement? A. That is the drawing he showed how the accident happened and what he was doing at the time.

Q. Who explained it besides yourself, the statement? A. The brakeman. 20

Q. Who explained it to the brakeman besides yourself? A. Joseph Dayko.

Mr. Deegan: That is all.

*Re-cross Examination by Mr. Toolan:*

Q. In whose handwriting is that statement? A. Whose handwriting?

Q. Yes. A. Well, the drying—

Q. In whose handwriting is the statement? A. That is Mr. Deegan's. 30

Q. Didn't this man talk to you, when you and Mr. Deegan were up at his house, about the way he talked before the jury here this morning? He talk about the same way, didn't he? A. Yes. I was up to his house. Very friendly.

Q. I say he spoke English about the same as he did here this morning. A. No, he spoke English very good. 40

*Thomas Pederson—for Pltff.—Recalled—  
Recross.*

Q. Very good? A. Well—

Q. Mr. Deegan, I suppose, wrote down his exact language? A. That I couldn't say whether exact.

Q. You would not say that, would you? A. No.

10 Q. The fact is he didn't use hardly any of the words that are used in that statement, did he? A. Yes.

Q. Now, isn't it a fact, the way the statement was taken was this way: Mr. Deegan or you went on and said, "Now, this is the way the accident happened," you related and set forth the facts and said to him, "Is that so," and he shook his head yes and no? A. No. He explained the accident from one end to the other.

20 Q. Well, is that substantially in his language? A. Yes, sir.

Q. He didn't use the words that are contained in that statement, did he? A. Practically all of them.

Q. What? A. Practically all of them.

Q. Have you looked over some of the words? Let me look at it. This is in affidavit form, isn't it? A. Yes.

30 Q. You had him swear to it? A. Yes.

Q. Before whom? A. Why, in front of us.

Q. Before Mr. Deegan, didn't you? A. In front of the three of us.

Q. Did he use the word "paused"? A. No, I don't think so.

Q. Did he use the word "position"? A. No, he didn't use "position."

Q. Did he use the word "indicated"? A. No.

*Thomas Pederson—for Pltff.—Recalled—  
Re-cross.*

Q. Did he use the phrase "drawing attached?" A. No.

Q. Did he use the word "received"? A. That I couldn't say.

Q. Did he use the word "responded"? A. Yes, he used the word "responded."

10 Q. You are sure he used the word "responded"? A. Pretty sure.

Q. You would not swear to it, would you? A. No.

Q. The fact is that is Mr. Deegan's translation of what he thought this man was saying, isn't that so? A. No. The translation was what the man explained to Mr. Deegan.

*By Mr. Deegan:*

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Q. Is this the affidavit? A. Yes, sir.

Q. Sworn to by Mazur? A. Yes, sir.

Q. An exact explanation of his idea the way the accident took place?

Mr. Toolan: I object.

A. Yes, sir.

Mr. Toolan: That is calling for a conclusion absolutely. I move that be stricken out.

30

The Court: It is stricken out.

*Derza Dayko—for Plaintiff—Direct.*

DERZA DAYKO, a witness produced on behalf of the plaintiff, in rebuttal, being duly sworn according to law on his oath, saith:

*Direct Examination by Mr. Deegan:*

10 Q. Mr. Dayko, are you a mail carrier of the City of Perth Amboy? A. Yes, sir.

Q. You are a high school man, are you not? A. Two years.

Q. Were you present in Mazur's home with me and Mr. Pederson? A. Yes, sir.

Q. On the 31st day of December, 1923? A. Yes, sir.

Q. Did you see Mr. Mazur sign this affidavit? A. Yes, sir.

20 Q. Did you hear him tell Mr. Pederson that there was no bell on the engine?

Mr. Toolan: I object.

A. I don't remember that, but the statements that he made were—

The Court: He does not say there was any bell on the engine.

30 Q. Were those statements explained item by item to Mr. Mazur before he signed? A. Why, he answered every question that you, Mr. Deegan, asked him, and as he answered every question you asked him to sign the sheet.

Q. Did I ask him the question if there was a bell on the engine? A. I think you did. I don't remember.

40 Q. Did I ask him to explain the accident? A. Yes, sir.

*Derza Dayko—for Plaintiff—Cross.*

Q. Is that affidavit what he said?

Mr. Toolan: I object. He cannot remember it.

Q. Will you read that affidavit? A. All of it?

Q. Yes. Read it and tell the Court if that is what he said. A. Well, as far as I can remember, without reading it through, the sound of it seems to be alike. I can't remember it word for word. You could not really remember word for word what the statement was. 10

Q. Was that particular sheet read to him before he signed it? A. It was read to him twice. You read it once and I read it once. What he couldn't understand, he can't understand my mother's language, Hungarian language, he is Slavic, his wife can understand Hungarian pretty well and the words he couldn't understand, why, I told his wife the meaning and she explained it to him. 20

Q. Then he signed the statement? A. Then he signed the statement.

*Cross-examination By Mr. Toolan:*

Q. What language do you speak? A. I speak 30 Hungarian language.

Q. What language does this fellow speak? A. Slavic.

Q. What language does his wife speak? A. Slavic and Hungarian.

Q. Does she speak any English? A. Hardly any at all. Not as much as he can.

Q. Is not this what happened there, Mr. Deegan was asking questions, isn't that so? A. 40 Yes, sir.

*Denza Dayko—for Plaintiff—Cross.*

Q. And you put the question to his wife, isn't that correct? A. Most of it, that he couldn't understand in the American language.

Q. Well, the fact is, he does not understand very well any English? A. Well, some that he did, and some I would explain.

10 Q. When he would shake his head Mr. Deegan would write down a statement as the result of that question that he asked, isn't that so? A. I couldn't remember whether he shook his head or said yes or no.

Q. Well, anyway, Mr. Deegan asked a question and dependent upon what this man did, he wrote something down, isn't that so? A. Yes, Mr. Deegan did.

20 Q. The extent of this man's conversation was yes or no, and shaking his head? A. He explained any place where it had to be explained.

Q. In what language? A. If he could explain the answer in the American language he did so. If he couldn't, I got it through his wife.

Q. In other words, he would tell it to his wife, his wife would tell it to you, and you would tell it to Mr. Deegan? A. Yes, sir.

30 Q. So it had to go through four hands before it got down on that paper? A. Not all of it. The difficult words had to be explained.

Q. You yourself didn't appreciate the significance of some of the statements on that paper? A. I couldn't verify word for word, but the wording of it sounds to be alike.

Q. Just the general tone? A. The same as you did everything yourself you can't feel the life of it all but it seems to vibrate through you.

40 Mr. Deegan: That is all.

MOTION FOR DIRECTION OF A VERDICT.

Mr. Toolan: I desire at this time to move for a direction of a verdict and assign as my reasons:

1. That the plaintiff was a mere licensee on the property of the defendant, and the defendant owed him no duty except to refrain from wilful negligence. Particularly was he a mere licensee with particular reference to this passage-way that he used between the engine and the car. 10

2. That the defendant is not negligent because in this particular situation it owed the plaintiff no duty, no duty has been shown.

3. That it was an obvious risk that was assumed by the plaintiff. 20

4. That the plaintiff was guilty of contributory negligence.

(Argument by counsel.)

(Citing *Fury v. N. Y. Central Railroad.*)

(Mr. Deegan argues in reply to the motion.)

The Court: The situation in this case is just this: That there were at least three ways by which this man could have reached the toilet. I hold that he had a right to reach that toilet, that there was an implied invitation on the part of the defendant corporation for him to use the toilet to the same extent as they invited their own employees to use the toilet, because his work was not as merely casual as in the privy case, and that case does not control; but, that 30 40

*Motion For Direction of a Verdict.*

the invitation cannot be possibly construed, from any rational standpoint, or from even a standpoint of sanity, in view of all of the testimony in this case, as to embrace a passageway from where he was working that would necessitate going through the space between a car and an engine temporarily detached. No reason can justify a conclusion that the way provided by this company for its own employees, or impliedly for these iron workers, was such a way as that, and in view of the decisions along this line, and on the different points raised by counsel for the defendant, I am compelled to grant the motion for a direction of a verdict in favor of the defendant. You may take an exception.

Mr. Deegan: Prays exception.

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## New Jersey Court of Errors and Appeals.

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 THOMAS PEDERSON,

Plaintiff-Appellant,

vs.

AMERICAN SMELTING AND

REFINING COMPANY,

Defendant-Appellee.
 

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 On Appeal  
from the  
Supreme  
Court.

BRIEF OF JOHN E. TOOLAN,

Attorney for Defendant-Appellee.

20

### STATEMENT OF FACT

The accident that is the subject matter of this suit happened on July 24, 1923. The plaintiff, Thomas Pederson, was employed by one John Pasky as an iron worker. The Barnett Company had installed a coal pulverizer for the defendant company. The coal pulverizer is shown on Exhibit D-1 and is marked "X." Pasky was employed by the Barnett Company to make certain changes in the coal pulverizer plant (see testimony of John Pasky, page 166, and testimony of Russell H. Baggot, page 198). The plaintiff, Pederson, had been working for Pasky at the plant of the defendant company for five or six days before the accident (p. 13). On the date in question the plaintiff left his work at the coal pulverizer plant

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to respond to a call of nature. In order to reach the toilet he walked from the coal pulverizer plant down between the copper casting building and copper refining building, shown on D-1 in red outline, and entered the west door of the copper refining building, marked "N" on D-1, and proceeded across the aisle shown on said blue print to the toilet marked "B" on D-1. When Pederson entered the doorway marked "N" (according to his own testimony, p. 14), there was a small air locomotive in the doorway (see picture D-8 for illustration). Pederson returned over the same route and found the engine and cars in the same position as at the same time he entered the tank room (p. 16). The position of the air engine and cars at the time is clearly shown from different views on Exhibits D-3, D-4, D-9, D-10, D-11, and D-12. Pederson attempted to pass between the engine and car and was struck and injured (p. 14).

Exhibit D-7 is a detail of the doorways "M" and "N" shown on Exhibit D-1. The doorway marked "N" is six feet six inches wide; the doorway marked "M" is ten feet three inches wide (p. 104). The tracks shown on the blue print D-1 are narrow gauge tracks twenty-four inches wide (p. 101). The engine used at the time of the accident is shown in the various exhibits and on D-8 is shown in the doorway in the same position it was in immediately before the accident. This engine was an air engine five feet six inches in height (p. 107). The cars used were flat cars of the type shown in the various exhibits and when loaded were four feet six inches high (p. 107). The locomotive through the tank part was three feet wide (p. 105) and at its widest part, the bumper at either end, it was four feet three inches wide (p. 106).

The buildings that will be frequently referred to throughout the brief are the copper casting

building, the copper refinery (generally referred to as tank room), and the coal pulverizer central station, all of which are shown in red outline on exhibit D-1.

The plaintiff, Pederson, testified that at the time he entered the tank room the air engine was in the doorway "N" and that he walked between the air engine and the westerly wall of the building. Upon his return he testified that he had to go out the same way because there was copper castings or scrap piled in front of the easterly exit between the engine and the building. When asked why he did not use the exit "M" and avoid walking between the engine and cars, he replied that this door was locked. Under cross-examination however, Pederson testified (p. 38):

"Q. And isn't it a fact that these doors and exits and these tracks are being used constantly, and they have to be kept open?"

"A. That door was closed.

"Q. Did you try to open it?"

"A. No, sir."

The entrance "M" is referred to in the testimony as the scale house entrance. There were no cars or other obstructions to the free use of this exit. Pederson, however, elected to walk between the car and engine and use exit "N" without even attempting to try the exit marked "M." The two exits are clearly shown on Exhibits D-5 and D-7 as well as D-11. The defendant contended throughout the trial that both doors were open (see testimony of witness Robert C. Miller, pp. 114 and 129, and testimony of witness Charles W. Hanson, p. 142, testimony of witness John Cesla, p. 171, testimony of witness John Mazur, p. 186, and testimony of witness Thomas E. Van Gilden, p. 196). Plaintiff was the only one to testify that the exit "M" was not available to him. Aside from this there was no necessity for the plaintiff's crossing

the tracks between the engine and car because there is an aisle throughout the width of the tank house on either side of the tracks that could have been used by plaintiff, and he could have crossed the tracks at any point without imperiling himself because of this aisle is wide enough for persons to walk between the tracks and the tanks (see testimony p. 126). At the point of the accident there was only the engine and two cars (p. 168). Pederson's testimony, (p. 32):

10 "Q. Those cars are about how long, Mr Pederson?

"A. About eight or ten feet long."

The tank room is 270 feet wide and Pederson could have crossed the tracks at any time while coming across the tank room and walked on the westerly aisle and avoided the necessity of crossing between the engine and cars.

20 The plaintiff, Pederson, at the time he attempted to cross between the engine and car had no knowledge whether there would be any signal or warning given to him. He testifies on page 18:

"Q. Was there any bell on this engine?

"A. No.

30 "Q. Was there a whistle on it?

A. No."

Nowhere in his testimony is there a word to the effect that he knew that there was any custom to give a signal or warning, nor does he testify that he expected to receive any signal or warning before the train or cars were moved. In fact he testifies (p. 39) that this was the first time that he ever saw this air engine. He testifies (p. 41) that he did not see the engineer on the engine and that he did not make an observation from any point from which the engineer would be observ-

able to him. In other words he attempted to walk between the car and engine without making any inquiries as to the custom to give a signal or warning of the movements of the train, without making any observation to see whether an engineer was on the train, prepared to operate it, or without doing anything for his protection. His entire attitude is summed up on page 42:

10 "Q. And then you took a chance on walking through?

"A. Yes, sir.

"Q. Now, Mr. Pederson, you know it is dangerous for you to walk between ties, (trains) don't you?

"A. Yes, sir.

"Q. You know that whenever you walk between open cars that you are taking a chance, don't you?

"A. Yes, sir.

20 "Q. And especially you know you are taking a chance if you don't first look to find out if there is an engineer ready to operate the engine?

"A. Yes, sir. If you don't see anybody there you take a chance on going across."

There was no invitation from the defendant to the plaintiff, either expressly or impliedly, to use the pathway that he used on the date of the accident to gain access to the toilet, nor was there any invitation, expressly or by implication, to use the toilet. The fact is that no one from the defendant company ever gave him permission to use the toilet. Page 39 of the testimony:

30 "Q. Nobody from the Guggenheim plant, you testified, ever told you to use that toilet, did they?

„A. No, sir."

He testifies also (p. 39) that his foreman, John Crancich, (employed by Pasky) told him that he might use this toilet. Crancich (p. 64) testified that he learned of this toilet when he worked for the company on a previous job for another inde-

pendent contractor when his foreman told him (Crancich) to use this toilet. Crancich, whom the plaintiff relies on for authority to use the toilet, testified (p. 64):

“Q. Did any one connected with the Guggenheim or the American Smelting and Refining Works tell you how to get to that toilet?”

10 “A. No.”

If the defendant was under any obligation to provide toilet facilities or had invited the plaintiff, either expressly or by invitation, to use the toilet, there was certainly no invitation to use this particular route or path taken by the plaintiff on the date of the accident.

20 In Exhibit D-1 there is shown in white crayon a path extending around the outside of the tank room to the toilet (pp. 123 and 124). The photographs Ex. D-13, D-14, D-15, D-16 show this path. This path was the main path down through the plant and to this particular toilet.

30 Charles W. Hanson, one of the defendant's witnesses, testified (p. 153) that no one was to use this particular toilet except the men employed in the tank room. The path before mentioned was a perfectly safe route to the toilet in question and was equally short as the one used by the plaintiff. Aside from this there was a toilet in the coal pulverizer building within thirty or forty feet from the point where plaintiff was working (pp. 164 and 165). Instead of taking the toilet close at hand, plaintiff elected to go to the extreme end of the tank house, and the testimony (p. 144) shows that the tank house building is 270 feet wide and 650 feet long.

40 The trial court, under the facts developed at the trial, committed no error in taking this case away from the jury for the following reasons:

(1) At the time and place where the accident happened plaintiff was not an invitee and defendant owed plaintiff no duty except to refrain from wilful negligence.

(2) Plaintiff as a matter of law was guilty of contributory negligence that barred his recovery.

10 AT THE TIME AND PLACE WHERE THE ACCIDENT HAPPENED PLAINTIFF WAS NOT AN INVITEE AND DEFENDANT OWED PLAINTIFF NO DUTY EXCEPT TO REFRAIN FROM WILFUL NEGLIGENCE.

Counsel for plaintiff, on page 8 of their brief, refer to an admission made by counsel for defendant at the trial. We take the same position at this time. The full statement of counsel for defendant at the trial (p. 93, Case) is as follows: 20

“We will admit that the man was an invitee on the premises to the extent that he was permitted to be upon the premises to work as an iron worker for the Pasky Construction Company, that his invitation did not extend or go beyond that; that it is a well known rule of law that an owner of ground is liable only to the extent of his invitation. The mere fact that a man invites another upon his land to do some work does not by implication extend to him an invitation to use any toilets that might be found on the premises for the purpose of relieving himself.” 30

Perhaps the leading case in this State on the question of invitation is Phillips vs. Library Co., 55 N. J. L. 307. At page 315 the Court said:

“Granting that it appears that a plaintiff's entry upon premises was by the invitation of the owner, a question may also arise, whether, at the time the injury was received, the plaintiff was in that part of the premises into which he was invited to enter. The owner's liability for the condition of the premises is only co-extensive with his invitation. 40

A person on private grounds by invitation of the owner, going of his own volition into other parts of the premises, exceeds the bounds of his invitation, and if he does not thereby become a trespasser, goes out of the way to create a risk for himself."

10 In the case at bar there is absolutely no testimony to indicate that there was any express invitation on the part of the defendant company to use this toilet. If plaintiff's invitation on the premises extended to the use of the toilet, it must be spelled from the nature of his employment. The plaintiff himself testifies (p. 39) that he was told about this particular toilet by his foreman. He testifies expressly:

"Q. Nobody from the Guggenheim plant, you testified, ever told you to use that toilet, did they?

20 "A. No, sir."

The foreman referred to by the plaintiff was a man named John Crancich. This witness testified (p. 64):

"Q. Who told you where the toilet was?

"A. I know from before.

"Q. Who told you in the first place?

"A. The first time when I was going that toilet was when I worked for the Communi-

30 paw Steel Company.

"Q. Who told you?

"A. My foreman that I was working for.

"Q. Did any one connected with the Guggenheim or the American Smelting and Refining Works, tell you how to get to that toilet?

"A. No."

Mr. Miller, the safety engineer for the defendant company, testified (p. 113):

"Q. Was there any permission given by any person in authority of the plant or any one else, to your knowledge, to employees of Pasky, to use that toilet?

40 "A. No, sir.

"Q. Was there ever any permission giv-

en for any one outside of the employees of the American Smelting and Refining Company to pass through the tank room on the line indicated by Pederson in his testimony?

"A. No, sir."

Again on page 119 Mr. Miller testified:

"Q. You let the independent contractors come in and do their work and find their way out as best they can? 10

"A. After they get accustomed to the place; yes, sir. The first day they go in they are shown around and shown what to do.

"Q. Did you show these men around?

"A. To their work; yes, sir. Where they were supposed to go and let them there under the charge of their foreman."

We have been unable to find any authority in this State requiring the person who employs an independent contractor to do work on his property to provide toilet facilities for the employees. That there is no such obligation is indicated by the case of Carey vs. Gray, 98 N. J. L. 217. In this case the plaintiff, Carey, was employed by one Flynn, who was a lessee of Gray, to disinfect the house. Carey went to the house which was unoccupied at night to do the work. While thus engaged he desired to use the toilet. He found the toilet in the house out of repair and not usable. He then left the house and discovered in the yard a closet which in the darknes of the night he entered. There was no floor in the closet. Plaintiff fell into the uncovered vault and was injured. Suit was instituted to recover damages on the theory that defendants were under the duty to have the closet in a reasonably safe condition for his use. The Court held:

"That at the time of the accident Carey was pursuing a purpose of his own; that he was exceeding the bounds of his invitation; that his status was that of a licensee and not of an invitee." 30

In support of the conclusion reached by the 40

10 Court in Carey vs. Gray, supra, on page 222 the Court cites the case of Glaser vs. Rothschild, 106 Mo. App. 418. In this case the plaintiff by invitation had come to the defendant's place of business. While waiting for defendant to be at leisure, the plaintiff requested and obtained the key of a toilet located in the basement of the building. In going to the toilet he found the passageway blocked with boxes, and in going around them in a poor light, fell into an elevator pit. The court held that the plaintiff had become a licensee and the defendant was not liable. Likewise the case of Flanagan vs. Atlantic Alcatraz Asphalt Co., 56 N. Y. Supp. 18. In this case the plaintiff was employed to haul asphalt from a yard. He left his team, and without the owner's invitation went to another part of the yard to answer a call of nature. A gate fell, injuring him. It was held that 20 he could not recover. The Court said:

"He had a right to believe that all reasonable care had been used by the owner to protect him upon the portion of the premises where his work required him to go; but, when he left the portion of the premises upon which he was invited, and went over to this gate for reasons of his own, he went there at his own risk, and in that position he was not entitled to assume that the defendant would use all reasonable care to protect him."

30 The decision of this Court in the case of Ryerson vs. Bathgate, 67 N. J. L. 337, indicates the strict application of the rule that the responsibility of the owner of premises is only co-extensive with his invitation. In that case the plaintiff was giving a cat to the defendant. The cat was delivered and ran back home. The plaintiff returned home, got the cat, and came back to the defendant, saying, "Here you must put her (the cat) in a closet or she will run away again." The defendant replied, "Put her in here," and partially 40 opened the door. The plaintiff, instead of plac-

ing the cat inside the opening, walked inside herself in order to accomplish this result. The door opened to a cellar stairway down which the plaintiff fell. The decision rested on the question as to whether or not plaintiff had been impliedly invited to enter the opening for the purpose of depositing the cat. The Court held that the invitation was only for the purpose of placing the cat inside the door and when the plaintiff herself 10 walked in, she exceeded the limits of her invitation and thereupon became a licensee and consequently could not recover.

Notwithstanding the view that the Court might take with reference to the question as to whether or not plaintiff was an invitee to the extent that he was privileged to use the toilet, we feel that the case at bar is identical in principle with the case of Furey against New York Central Railroad, 67 N. J. L. 270. In order to disturb the verdict in this case this Court must decide: First, that Pederson by implication was invited to use the particular toilet that he did use; and Second, that there was an implied invitation to cross the tracks between the engine and the cars. Pederson testified that he saw several other men cross between the air engine and the car. Mr. Hanson, the witness for the defendant, testified (p. 140) that the opening between the engine and the car was a casual one and that it was not there for the purpose of permitting persons to walk from one side of the aisle to the other, but on the contrary that these engines are moving constantly. 20

"Q. Are these engines kept busy during the day?"

"A. Yes, sir."

"Q. Constantly moving about?"

"A. Most of the time. They move so constantly we never shut the motor off during the day."

"Q. Is there any means or method by which you can tell how long an engine 30

that is separated from cars will remain separated?

"A. No way; no, sir.

"Q. In your experience out there at the plant did you ever know of an occasion where the train was separated from the cars alongside of an aisle, or any place, so that that passageway between the engine and the cars could be used as a passageway for workmen or others in the plant?

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"A. No, sir. We discourage that practice.

"Q. That is, have you ever seen anybody passing between open trains?

"A. We do see people pass through at times, but we admonish them for it whenever we see them take that chance."

Again on page 164 Mr. Hanson testified:

"Q. Mr. Hanson, how frequently are movements made with the engine in the tank room?

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"A. We move about sixty-eight cars a day of loaded anodes in, and move out sixty-eight empty cars in the afternoon, and in the early morning we probably moved out ten loaded cars of scrap and push in ten empty scrap cars. In addition to that there is drilling from one track to another during the day, to allow the anodes which we are going to use that day to get to the point, the bay we call it, where we can take care of them with the crane, we wish to use.

"Q. Does that work keep the engines going practically all the time?

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"A. As I said it keeps them going to the extent we don't shut off the engine during the day, keep the motor running, except sometimes at noon hour when the men go for lunch."

Pederson testified (p. 32) that there was an engine and two cars standing on the particular point where the accident happened. The cars were about eight or ten feet long. The engine was about the same length or possibly a little shorter.

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The opening between the engine and the first car was about four or five feet (p. 16). Pederson

testified that there was no bell or whistle on the engine; no where in his testimony does he indicate that he had any knowledge of any custom to give any signal or warning before the train was moved. On pages 42 and 43 Pederson testified that he took a chance in going through; that he knew it was dangerous; that he made an observation before going through from a position that would prevent him from seeing the engineer so that he did not know whether there was an engineer on the train or not. At the bottom of page 43 he testifies:

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"Q. You didn't look for anyone who was giving signals to have this train come ahead, did you?

"A. I didn't look for anybody; no, sir."

As in the Furey case, supra, the plaintiff herein contends that he should have been given some warning of the movement of the cars. We agree that he might have been entitled to some warning provided he was using the opening in question by invitation of the defendant company.

20

In the Furey case the Court on page 273, after stating the conditions existing at the wharf where Furey was injured, stated that two propositions were evident:

"First, that there was a way by which the plaintiff could have gone to and from his work without passing between the cars, and second, that the openings between the cars resulted solely from the exigencies of the business transacted on the tracks, and had no relation to their use as passageways over the tracks."

30

In this case the defendant company provided a toilet in the building in which plaintiff was working. There was a path marked in white crayon on Exhibit D-1 around the building that would have avoided the crossing of these particular tracks. The photographs Ex. D-13, D-14, D-15, D-16 show this path. The door "M" was open

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on the day in question and could have been used by the plaintiff without endangering himself in any wise whatsoever. The opening between the air engine and this car was a most casual one indeed. More so than in the Furey case because this engine and the cars in the tank room were being constantly shifted. Plaintiff is chargeable with the knowledge that it was dangerous to attempt to pass between the engine and car. There is nothing whatsoever in the case to indicate that this opening was left for the purpose of being used as a passageway.

On page 274, Furey vs. N. Y. Central Railroad, supra, the Court said:

“Upon the case thus exhibited the paramount question is not whether the plaintiff was upon the defendant’s property generally by way of invitation, but whether, upon any aspect of the testimony, the defendant can be said to have invited the plaintiff to make use of the openings between the freight cars as crossings of the railroad tracks in its shed.”

Again on page 274 the Court says:

“The gist of the liability consists in the fact that the person injured did not act merely for his own convenience and pleasure and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but **that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be used.**”

“A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but if he directly or by implication induces persons to enter on and pass over his premises he thereby assumes an obligation that they are in a safe

condition, suitable to such use, and for a breach of this obligation he is liable in damages to a person injured thereby.”

There is not a single word of testimony in the entire case which justifies the inference that this space or opening was left for the purpose or with the design and intention that it should be used by persons to cross from one side of the aisle to the other. The burden to show these things is upon the plaintiff.

Quoting further from the Furey case, supra, the Court said on page 275:

“It is incumbent upon the plaintiff either to show that the opening between the cars was, in fact, designed to be used as he used it, or else to bring home to the defendant some act or conduct signifying that the place was so prepared or adapted which might naturally lead the plaintiff to suppose that he might properly and safely so use it.”

The plaintiff testified that he saw several other persons use this same opening. Every other witness who testified contradicted plaintiff’s statement in this regard, but notwithstanding this contradiction, the plaintiff’s testimony, even if true, would not place him in the position of an invitee.

Quoting further from the Furey case, the Court said on page 276:

“Knowledge is an element of invitation only when it is capable of throwing light upon the object with which a given use may have been permitted. Standing alone, it implies permission, but not invitation.”

We feel that the conclusion of the Court in the Furey case on page 277 is the only conclusion which the facts in this case warrant, namely:

“First, the condition of which the plaintiff took advantage was obviously part of an existing traffic system and presented no indications of being designed for any other pur-

pose; second, the fact that there were on the ground none of the ordinary indications of a crossing, or any sign of preparation or adaptation to induce the belief that persons not there employed were either provided for or expected; third, the temporary and constantly shifting character of the openings between the cars forbade any reasonable person from assuming without further assurance that provision had been made for his safe conduct between the cars of the broken train." 10

And finally we say that the risk in this case, as in the Furey case, was an obvious one and was assumed by the plaintiff.

PLAINTIFF AS A MATTER OF LAW WAS GUILTY OF CONTRIBUTORY NEGLIGENCE THAT BARRED HIS RECOVERY.

20 The plaintiff's own testimony indicates clearly that he was guilty of negligence as a matter of law that would bar his recovery because (a) plaintiff attempted to walk between the engine and car that were separated only about four or five feet (p. 16):

"Q. What was the distance between the engine and the two cars that you passed through?

"A. About four or five feet."

30 (b) This was the first time that plaintiff had even seen this particular engine. He did not know whether it had any whistle or bell to give a signal or warning of its movement (p. 39):

"Q. This was the first time you had ever seen this air engine, wasn't it?

"A. Yes, sir.

"Q. You never saw it operate?

"A. No.

"Q. So you don't know anything about that air engine, do you?

40 "A. No.

"Q. You don't know how fast it could

go, or how fast it could not go?

"A. No, sir."

On page 18:

"Q. Was there any bell on this engine?

"A. No.

Q. Was there a whistle on it?

"A. No."

There is no testimony in the case that Pederson made any inquiry to determine whether or not there was a bell or whistle on the engine or whether any signal or warning would be given before the train was moved. If there was a custom to give a signal or warning, Pederson did not testify that he knew of such a custom. 10

(c) Pederson neglected to make any proper observation for his own safety before crossing the tracks. Page 41:

"Q. You didn't look to see whether there was any engineer on it or not, did you? 20

"A. I couldn't see the man from where I was at.

"Q. You couldn't see any man?

"A. I couldn't see anybody.

"Q. Did you see anybody?

"A. No, sir; I didn't see anybody.

"Q. Did you walk up the other end of the engine and stand there and look to see if there was anybody on that end?

"A. No, sir.

"Q. So that you don't know whether there was anybody there to operate it or not? 30

"A. I couldn't see anybody."

On page 42:

"Q. And then you took a chance on walking through?

"A. Yes, sir.

"Q. Now, Mr. Pederson, you know it is dangerous for you to walk between ties (trains) don't you?

"A. Yes, sir.

"Q. You know that, don't you?

"A. Yes, I wouldn't go across if I thought it was dangerous. 40

"Q. You know that whenever you walk in between open cars that you are taking a chance, don't you?"

"A. Yes, sir."

"Q. And especially you know you are taking a chance if you don't first look to find out if there is an engineer ready to operate the engine?"

10 "A. Yes, sir. If you don't see anybody there you take a chance on going across?"

Again on page 43:

"Q. You didn't look for any one who was giving signals to have this train come ahead, did you?"

"A. I didn't look for anybody; no, sir."

20 The testimony of the engineer and brakeman on the train indicates that they both saw Pederson before the accident, standing on the left hand side of the train. The engineer, John Cesla, testified (p. 170) that he saw Pederson standing there before he was hit. Likewise the brakeman, John Mazur, testified (p. 184) that Pederson had been standing there for five minutes before the accident. Similar testimony is given by one Thomas E. Van Gilden (p. 195). The brakeman testified (p. 185) that Pederson was standing on the left-hand side of the engine when he gave the signal to go ahead; that he turned his head to look in the direction in which the train was traveling  
30 and the next moment he heard Pederson scream.

40 Pederson's testimony indicates clearly that he knew it was dangerous to cross between the open trains; that he made no proper observation; that he did not know whether there was an engineer on the train, ready operate it or not; that he did not see the brakeman, notwithstanding the brakeman was only a short distance from him; that he knew nothing about air engines, how fast or slow they could start; that he did not know whether there was a whistle or bell on the engine; in fact

he testified that there was no bell or whistle; that he did not know of any custom in the plant to give a signal or warning of the movement of these trains; and that he made no inquiry to ascertain whether there was such a custom. No more negligent course of conduct could be followed by Pederson than that indicated by his own testimony. See *Furey vs. New York Central Railroad*, supra; *Berley vs. Eastern Coal Dock*, 95 N. J. L. 517; *Vorrath vs. Burke*, 63 L. 188, where the Court lays down the principle on page 190: "Knowledge of the danger compels the assumption of the risk of the use in such a case;" *Saunders vs. Smith Realty Co.*, 84 L. 276.

The Court in *Berley vs. Eastern Coal Dock*, supra, on page 519 said:

20 "The danger to which the plaintiff was exposed in attempting to pass between the cars was obvious. The passageway was narrow; in fact so narrow that he had to enter sideways. He was unfamiliar with the premises. He made no inquiry as to why the cars were there or whether or not they moved. He did not even wait to see if they did move. He had no knowledge whether a warning signal would be given prior to their movement. He just took, as he said, the chance of going through. It is difficult to conceive of a stronger case of contributory negligence."  
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See also *Guse vs. Martin*, 96 N. J. L. 262; *Rooney vs. Siletti*, 96 N. J. L. 312.

The defendant herein provided a safe and equally close method to reach this particular toilet as shown on Exhibit D-1 where the path is marked in white crayon. In addition to this there was a toilet in the very building in which plaintiff was working, namely, in the coal pulverizer building (pp. 164 and 165). The door-  
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way "M" immediately adjoining the doorway used by the plaintiff was open and available to the plaintiff. Plaintiff testified that this door was closed, but he also testified (p. 38):

10 "Q. And isn't it a fact that these doors and exits and these tracks are being used constantly, and they have to be kept open?

"A. That door was closed.

"Q. Did you try to open it?

"A. No, sir."

There were no cars or engines in the entrance "M." The testimony of all the other witnesses indicates that this door was open and available for use. (See testimony pp. 114, 129, 142, 171, 186, and 196).

20 It is well established that where an employer furnishes a safe means of access to any particular part of his plant, the persons on the premises who decline to use this safe path, but on the contrary elect to use a way or path that is dangerous, they will be held to have assumed the risk and cannot recover. See *D. L. & W. vs. Trautwein*, 52 N. J. L. 169, on page 175, and *De Voe vs. New York A. & W. Railroad*, 63 N. J. L. 276.

30 All of the cases cited by plaintiff in their brief on the question of the obligation resting upon the defendant to give a signal or warning are cases against railroads for failure to give customary signals. We submit that there is no analogy between this class of cases and the case at bar; that plaintiff cannot avail himself and claim the benefits of a custom, the existence of which has not been brought home to him before the accident. Plaintiff did not expect any warning be-

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cause he had no knowledge of any such custom. The fact is that there was no such custom, as is indicated by the testimony of the witness Hanson on page 162 where he says:

"Q. Is it a rule of the plant to blow whistles when making up trains and moving cars and connecting up, and so forth?

10 "A. I would not say that it is, because most of the work is done in a place where there is no danger attached to it, where men are not working back and forth. We have a brakeman who walks along usually in front of the engine."

The plaintiff Pederson testified of no such custom.

The question of plaintiff's right to expect a warning is passed upon on pages 277 and 278 in *Furey vs. New York Central Railroad*, supra: 20

"The danger to which the plaintiff would be exposed in attempting to pass between the standing cars was not only a patent one, but its precise nature was obvious to him. It was that the opening might be closed without notice to him. To pass into such an opening with the understanding that no notice would be given of the movement of the cars would be the taking of a palpable risk; to engage in the same undertaking with a general expectation that some notice would be given, but without making inquiry as to its nature and extent, would be a scarcely less negligent act. Yet the plaintiff must be treated either as having taken the risk without inquiry, or else he must be charged with such information as inquiry upon his part would have elicited. Had he inquired he would have learned what the customary signal was and that no provision for any other notice had been made. The plaintiff must be deemed either to have inquired or not to have inquired. In the former case he would have learned what signal would be given, viz., the

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signal that was given. In the latter case he had no right to expect any notice, and hence cannot complain that he received none."

It is respectfully submitted that the judgment entered in the Supreme Court be affirmed and this appeal be dismissed with costs.

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JOHN E. TOOLAN,  
Attorney for and of counsel  
with Defendant-Appellee.

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## New Jersey Court of Errors and Appeals

THOMAS PEDERSON,  
Plaintiff-Appellant,

*v.*

AMERICAN SMELTING AND REFIN-  
ING COMPANY,  
Defendant-Appellee.

On Appeal from  
the New Jersey  
Supreme Court  
upon the direc-  
tion of a verdict.

### BRIEF OF PLAINTIFF-APPELLANT.

#### Statement of Fact.

This is an appeal from a judgment in favor of the defendant, entered in the Supreme Court, upon direction of the Circuit Court Judge sitting at the trial of issues in the Middlesex Circuit. The action was brought by Thomas Pederson, hereinafter referred to as the plaintiff, against the American Smelting & Refining Company, hereinafter referred to as the defendant, to recover damages for injuries which plaintiff claims to have sustained on July 24th, 1923 (the complaint erroneously stated the date as July 24th, 1924, but was amended without objection (Case, p. 12), through the negligence of defendant's servants.

This appeal is of vast importance to the plaintiff, in view of the fact that the trial of the case took place more than two years after the date of the accident, and of course, no new action can be begun.

The plaintiff was employed by John Pasky as an iron worker and riveter, upon a building which was being constructed on the premises of the de-

fendant at Perth Amboy, N. J. (Case, p. 166), which building was known as the coal pulverizer. Defendant's plant occupied about 58 acres of land (Case, p. 118). The plaintiff was directed by his foreman which toilet he was to use (Case, p. 14), and the manner of reaching it (Case, p. 39). This toilet also was the only place where drinking water could be procured (Case, p. 48; Case, p. 61). It was the custom at defendant's plant for workmen of independent contractors to follow the orders of their foreman (Case, p. 119). This toilet was located in the far corner of another building known as the tank house. There were two entrances to this tank house—one of these through which the plaintiff went on the day of the accident, referred to in the testimony and exhibits as Entrance N., and the other through a scale house entrance, referred to as Entrance M. The plaintiff knew of no other entrances through which to go in order to reach the aisle leading to the toilet (Case, p. 48). Upon entering the tank house through Entrance N., the workmen are obliged to cross three small gauge tracks running through the tank room, in order to get to the aisle on the far side of the tracks, and then walk down this aisle until the toilet is reached (Case, p. 14). Plaintiff had worked upon this building a little over a week (Case, p. 13), and was in the habit of using this toilet about twice a day (Case, p. 18).

The tank building houses a great many tanks, through which a solution circulates continuously in which copper is dipped (Case, p. 138), and through the center of this building run several narrow-gauge tracks. One pair of rails passes through Entrance N., and another pair through Entrance M. Upon these rails small flat cars used to convey copper anodes to and from the tank house are hauled by an air engine which is equipped with a whistle (Case, p. 160). The controls

of this engine are at the rear of the engine. The crew consisted of an engineer who sits low at the rear end of his engine (Case, p. 106), and in that position is about one and one-half feet below the top of the engine, and cannot see what is happening on the opposite side of the engine (Case, p. 163). The other member of the crew was a brakeman who had only been employed at that plant for about three weeks (Case, p. 184).

The facts in this case establish that it was a custom at that plant for the engineer not to move his engine until his brakeman gave him a signal with his hand, and then the engineer blows his whistle when he is about to move (Case, p. 169, also Case p. 161).

On the afternoon of July 24th, 1923, the date of the accident, plaintiff had to use the toilet. He went through the office door to reach the entrance to the tank room referred to as Entrance N. The air engine facing outward was standing in the entrance with its rear end in the tank room, and four or five feet away was an empty car, and next to it down the track another car was being loaded. Plaintiff testified that he had to enter the tank house on the right hand side of the standing engine, and in order to reach the aisle leading to the toilet, had to cross between the standing engine and the car four feet away. He could not enter on the left side of the engine because copper anodes were blocking the space between the engine and the entrance (Case, p. 35); nor could he use the scale house, entrance M., because the doors were locked (Case, p. 15, also Case, p. 17); nor could plaintiff have continued on the right side of the engine as he entered beyond the loading cars because there was a crane in operation (Case, p. 38), and numerous tanks blocked the way (Case, p. 17).

Plaintiff reached the toilet safely, and in about five minutes returned in the same way, in order to get to the coal pulverizing building upon which he was working. The engine and cars were in the same position as when he had first crossed. He stopped when he came to the track upon which stood the engine and cars, looked around, but saw no one in sight, and hearing no signal at any time, began crossing the track, when suddenly and without warning to him, the engine backed up, caught him on the track, and he was badly injured (Case, p. 18). He sustained a fracture of his left leg, which left him with a permanent injury. His loss of wages and doctor bills alone amounted to over \$5,000.00, (Case, p. 26).

The defendant endeavored to prove that there was another way to reach this toilet, by going all around the plant. And because of the existence of this other way, defendant's contention was that the plaintiff assumed the risk of going between the engine and cars, and in doing so, his status of an invitee upon defendant's premises was changed into that of a mere licensee, to whom the only duty defendant owed was refraining from wilful negligence. The testimony, however, discloses that that other way was unknown to the plaintiff (Case, p. 39); that in order to reach the toilet by that path which defendant described, the regular Lehigh Valley R. R. tracks must be crossed at grade (Case, p. 73), and it would take half to three-quarters of an hour to reach the toilet (Case, p. 61), and that the only way which plaintiff's foreman directed the plaintiff to use was the route taken by the plaintiff on the day he was injured. It was further proven that at all times the employees in the vicinity of the plaintiff all used the route taken by plaintiff to reach the toilet (Case, p. 61).

The Trial Judge withdrew the case from the jury, depriving the plaintiff of the right to have the jury pass upon disputed questions of fact, and from which facts we respectfully urge the jury could have found that the plaintiff was injured through the negligence of the defendant, by their failure to give the customary warning of blowing the whistle on the engine, or the jury might have found that the defendant was negligent because of the negligent manner in which the inexperienced brakeman had given the signal to the engineer to proceed.

The evidence further discloses that both the engineer and the brakeman saw the plaintiff on the left side of the engine before the engine began to back up (Case, p. 170 and p. 171, p. 184 and p. 185); that the brakeman, disregarding the plaintiff's position, gave the engineer the signal with his hand to move while he, the brakeman, was standing with his back to the engineer and looking in the direction of the crane, which was in the opposite direction from which the plaintiff was standing (Case, p. 186, lines 23-28); that the engineer followed the signal of the brakeman without taking any precautions to see whether the plaintiff was still near the track.

From these facts, the jury might have found gross negligence on the part of the defendant if the trial court permitted the case to be submitted to it.

#### **Grounds of Appeal.**

We will urge upon this appeal the following grounds:—

1. The court erred in refusing to allow the jury to pass upon the questions of fact raised in the issues tried.

2. The court erred in granting the motion for a direction of verdict made by the defendant at the conclusion of the case.

#### POINT I.

**The Court erred in refusing to allow the jury to pass upon the questions of fact raised in the issues tried.**

There is no doubt that the testimony which the plaintiff and his witnesses presented, established the following facts, as will appear from the excerpts from the testimony hereinafter set out:

Item A. That the plaintiff was lawfully upon defendant's premises as an employee of a contractor constructing a building for the defendant.

Item B. That it was the custom of the defendant to permit the men employed by independent contractors to follow the instructions of their own foremen, and then let them do their work and find their way as best they could.

Item C. That the plaintiff was directed and taken to the toilet in question by his foreman.

Item D. That plaintiff knew of no other way to get to the toilet other than the route which he pursued, and that all other employees in that vicinity used the same route.

Item E. That plaintiff had to enter the tank house on the right side of the engine because that was the only entrance available; the other side of the engine was blocked with copper anodes, and the doors of Entrance M. through the scale house were locked.

Item F. That plaintiff had to cross between the standing engine and the car in order to reach the

aisle leading to the toilet, because the operating crane and tanks blocked any other means of access to the aisle in question.

Item G. That upon his return, the plaintiff came back the same way in which he reached the toilet; that the engine and cars were in a similar position as when he first crossed; that Entrance M. was still closed and copper anodes were blocking the space between the left side of the engine and the entrance; that he saw other people cross between the engine and the cars; that before he crossed, he saw neither the brakeman nor engineer, heard no whistle or any other signal given, started to cross and suddenly, without any warning to him, he was struck down by the engine backing up.

Item H. That it was the custom at the defendant's plant to give a signal when apparatus moves, and for the engineer to blow his whistle when the brakeman gives him a signal to proceed.

Item I. That both the engineer and brakeman saw plaintiff before the engine began to move backward, and the brakeman, who was a new man, with his back towards plaintiff, signalled the engineer to back up, and the engineer immediately executed that order, plaintiff testifying that no whistle was blown before the movement.

The testimony in support of the above propositions is as follows:

#### Proof of Item A.

Plaintiff Pederson testified:

"Q. By whom were you employed on July 24th, 1923? A. John Pasky.

"Q. What sort of a contractor is he? A. Iron worker.

"Q. Where were you employed on that day? A. At the American Smelting & Refining Company.

"Q. How long had you been employed out in the American Smelting and Refining Company plant before July 23, 1923? A. About five days, five to six days. On my second week out there." (Case, p. 13, lines 18-30).

Defendant's counsel also admitted, upon his motion for a non-suit, that plaintiff was an invitee on the premises. To quote his admission:

"We will admit that the man was an invitee on the premises to the extent that he was permitted to be upon the premises to work as an iron worker for the Pasky Construction Company" (Case, p. 93 lines 3-10).

#### **Proof of Item B.**

Robert C. Miller, produced by the defendant, who was, at the time of the accident, the safety engineer, testified as follows:

"Q. Now about the men who are invited into your plant through independent contractors? A. Well, as a rule their foreman finds out where they are to go, and I suppose they follow the custom.

"Q. That is a custom of the plant? A. Well, we have no regular custom. The foreman usually—

"Q. You let the independent contractors come in and do their work and find their way out as best they can? A. After they get accustomed to the place; yes, sir. The first day they go in they are shown around and shown what to do.

"Q. Did you show these men around? A. To their work, yes, sir. Where they were supposed to go and let them under the charge of their foreman" (Case, p. 119, lines 3-23).

And again:

"Q. You just let them do their work and find their way out as best they could? A. Yes" (Case, p. 119, lines 35-36).

#### **Proof of Item C.**

Plaintiff Pederson testified as follows:

"Q. Who directed you to the toilet? A. The foreman.

"Q. What foreman? A. My foreman that I worked under" (Case, p. 14, lines 13-17).

And again:

"Q. Did you inquire for such a path? A. No, sir.

"Q. Nobody ever told you about it? A. No. The foreman took me over to the toilet.

"Q. That was your foreman? A. Yes, sir" (Case, p. 39, lines 11-15).

John Crancich, Plaintiff's foreman testified as follows:

"Q. That is the only toilet that you knew? A. That I knew at the time.

"Q. And that is the one you used? A. Yes, sir" (Case, p. 61, lines 27-30).

#### **Proof of Item D.**

Plaintiff Pederson testified as follows:

"Q. Did anybody ever direct you to any other toilet? Did you know of any other toilet in the yard? A. No, sir.

"Q. How did you go to that toilet? A. Had to come in through the door of a little office there, and there is one door open leading into the tank room; you have to cross two tracks inside of the tank room to get over on the left-hand path; there is a path that walks down to the toilet, away down to the other end of the building" (Case, p. 14, lines 18-28).

And again:

"Q. Did you inquire for any other way around? A. No, sir. My foreman took me down there the first day that I was on the job

and showed me where to go, and that is the only place that we can get drinking water" (Case, p. 48, lines 21-26).

Foreman, John Crancich testified as follows:

"Q. Did you see anyone take that path to go to the toilet, outside of you and your five men? A. I know lots of men work squeeze between them doors with the rigging and brass and stiuuff, and used for that work, using that door, and walk through there.

"Q. To go to the toilet? A. Well, to use for the toilet from the copper casting building many a time" (Case, p. 64, lines 25-35).

And again:

"Q. You went in and out of that door a good many times, you say, to the toilet? A. Many, many times.

"Q. That is the door marked 'N' on this plan, is that right, this door (indicating)? A. That is the door, there was a bridge different way, different position later.

"Q. You say you went in there often? A. I did" (Case, p. 67, lines 18-28).

#### **Proof of Item E.**

Plaintiff Pederson testified as follows:

"Q. What is just opposite the entrance as you go in on the left-hand side? A. It is a scale house.

"Q. Is that enclosed? A. Yes.

"Q. Were the doors locked? The door was locked. A lot of copper sheeting there, what they call anodes, were piled up in front of there" (Case, p. 15, lines 1-10).

And again:

"Q. Why did you have to cross the track? A. Because I couldn't get out through the door with the copper cars standing in the door, you would be squeezed on the side, and there was copper standing alongside of the door, on the left side of the door" (Case, p. 35, lines 32-40).

And again:

"Q. Well, if you had gone in on this side, why couldn't you leave on this side? A. No, because a lot of copper was standing there, laying there. A lot of pieces of copper was lying right there by that doorway, and if I went out through this way, the engine would have squeezed me. There was more room over here by the office to get in and go across there and then come back the same way and come out this way.

"Q. In other words, you say there was copper here that would not permit you to go through, is that right? A. Yes" (Case, p. 36, lines 29-41).

And again:

"Q. There was room enough between the track and the wall of the building, wasn't there? A. No" (Case, p. 37, lines 1-4).

And again:

"Q. Then, the only thing obstructing the doorway was the engine, wasn't it? A. Yes, sir. And then that copper there.

"Q. Where was the copper? A. The copper was right here by this door here.

"Q. In what? A. Lying on the floor.

"Q. Piled how high? A. About five feet" (Case, p. 37, lines 32-40).

Witness Cranish testified as follows:

"Q. Those doors are always open? A. Only at the time, and before many times been closed, but this particular time I noticed it being closed, not used. That is the east door, on the east side.

*"By the Court:*

"Q. That is the right-hand side as you go out? A. Right-hand side coming out of the building, on the left going in. (This refers to Entrance M.) Italics ours.

*“By Mr. Toolan:*

“Q. You say on this day—do you remember how many doors were being used? A. On that particular day that I know coming through I see one doors open and another one was closed.

“Q. When was that? A. That was in the morning.

“Q. You don't know anything about the afternoon, when this accident happened? A. When the accident happened, when I take up Johnson in front of the office, the doors was still closed.

“Q. After the accident? A. After the accident.

“Q. Did you go down there to see whether they were open or closed? A. No, but was only way I could get in there.

“Q. What? A. Was only way I could get in to that building at the time, the way I rushed the man was hurt, there was only one doors open, and that is the door I take” (Case, p. 65, lines 1-35).

**Proof of Item F.**

Plaintiff Pederson testified:

“Q. How much was on the left-hand side? A. There would not be none there. I had to cross in front of that engine to out or in” (Case, p. 15, lines 38-40).

And again:

“Q. Could you have crossed the tracks at a point other than the point you came out? A. No, sir.

“Q. Why? A. Because there was no room. They have places where they dip the copper in, iron-like” (Case, p. 17, lines 35-40).

And again:

“Q. Then, why didn't you Mr. Pederson, when you were coming down here, cross over these tracks and come along the aisle here? A. No, sir.

“Q. Why didn't you? A. Because there was an overhead crane there and the crane was lifting up the slabs of copper and the men are working there with the stuff and there is no place for them to walk. There is a regular walking path right down to here (indicating).

“Q. That path shown between this point on the tank and the track? A. Yes” (Case, p. 38, lines 25-40).

And again:

“Q. There is a wide aisle on this side, is there not? A. Yes. There is an aisle up to here and then there is something comes out in here, I guess a place where they dip it, or something” (Case, p. 39, lines 1-5).

**Proof of Item G.**

Plaintiff Pederson testified:

“Q. Was the engine in the same position when you came back, as when you went in? A. Yes, sir” (Case, p. 16, lines 38-40).

And again:

“Q. Were the two cars in the same position as when you went in? A. Yes, sir” (Case, p. 17, lines 1-2).

And again:

“Q. Was that exit closed? A. Yes, that door was closed” (Case, p. 17, lines 9-10).

And again:

“Q. Did you see other people going through this opening between the engine?

“Question objected to. Court allows it.

“Q. Did you see other people passing through? A. Yes, sir” (Case, p. 19, lines 10-22).

And again:

“Q. The only people you saw were people coming in and out this opening? A. Yes, sir” (Case, p. 20, lines 13-14).

And again:

"Q. Did you see anybody on the engine? A. No, I didn't see anybody in the engine" (Case, p. 18, lines 26-27).

And again:

"Q. Was there a whistle on it? A. No.  
"Q. Did you hear any kind of a bell or whistle at the time it started? A. No, no whistle or no bell was sounded. No warning was sounded" (Case, p. 18, lines 32-35).

**Proof of Item H.**

Engineer Cesla testified as follows:

"Q. How many men are in the crew of the engine crew? How many men in the engine crew? A. Brakeman and engineer.

"Q. You had a brakeman working with you this day? A. Yes, sir.

"Q. What was the brakeman's job, what did he do? A. When the engine is about to move he blows the whistle and gives a signal with his hand.

"Q. The brakeman blows the whistle? A. I do.

"Q. The engineer blows the whistle? A. Yes, sir" (Case, p. 169, lines 3-20).

Charles W. Hansen, the superintendent of defendant company, testified as follows:

And again:

"Q. Do you have bells on the air engines? A. Whistles" (Case, p. 160, lines 39-40).

And again:

"Q. What for? A. Same reason they have whistles for any moving piece of mechanical equipment.

"Q. Is it customary to give signals around the plant? A. It is customary to give signals for all moving machinery" (Case, p. 161, lines 1-9).

**Proof of Item I.**

Engineer Cesla testified:

"Q. Did you see Mr. Pederson before he was hurt on that day? A. Yes, sir.

"Q. Where did you see him? A. He was on the left side.

"Q. You saw him before he was hurt? A. Yes, sir; before he got hurt" (Case, p. 170, lines 35-40).

And again:

"Q. How far was the engine away from the cars? A. About five foot.

"Q. Will you please tell us what happened there that day? A. Car was standing on straight track, engine was on the front, brakeman gives me signal, he tell me, go ahead, he show me with the hand, signal, I started to blow whistle and start to push them car, he holler "Ho." I stopped the engine and brakeman holler "Somebody got hurt." I stopped the engine, jumped off the engine, and walk away from engine about ten foot more and stay up at the door" (Case, p. 171, lines 1-15).

And again:

*"By the Court:*

"Q. How long had he been working there at that kind of work? A. He work about two weeks.

"Q. A new man? A. A new man, he works with me, brakeman" (Case, p. 182, lines 23-30).

Brakeman Mazur testified as follows:

"Q. How long had you worked at that job? A. I worked about three weeks" (Case, p. 184, lines 15-16).

And again:

"Q. Who was on the other side? A. Mr. Pederson, left side.

"Q. So you did see him on the other side, did you not? A. Yes, sir.

"Q. How long was he on the other side? A. Oh, he stay about five minutes" (Case, p. 184, lines 23-29).

And again:

"Q. Did you give any signal to the engineer that day? A. Yes.

"Q. What did you do? A. I say, 'Go ahead.'

"Q. Did he go ahead? A. Yes.

"Q. Where was Pederson then? A. He stay left side.

"Q. When was he on the left side? A. He stand and look, look at the engine.

"Q. Where was he when you gave the signal? A. He stay alongside beside rail.

"Q. Then what did you do after you gave the signal? A. I do go ahead. I turn my head, I saw Mr. Pederson get hurt.

"Q. You turned your head which way first? A. I throw my head as I see get signal push car a little head.

"Q. Which way were you looking when you gave the signal? A. I look at the crane.

"Q. Where was the crane? A. Crane behind" (Case, p. 185, lines 4-28).

Plaintiff Pederson:

"Q. Was there a whistle on it? A. No.

"Q. Did you hear any kind of a bell or whistle at the time it started? A. No, no whistle or no bell was sounded. No warning was sounded" (Case, p. 18, lines 32-35).

From a reading of the Trial Court's opinion as to why he directed a verdict, it becomes apparent that he did not find that the evidence was insufficient to go to the jury, but he held as a matter of law that the plaintiff was not invited by the defendant to pass between the engine and the cars. The excerpts from the case above set out, however, disclose that not only was the Trial Court in error

as to that conclusion, but that the jury might well have found the plaintiff was expressly invited to take the route he pursued, that it was a way of necessity, and that the defendant was guilty of negligence in failing to give customary signals, resulting in the plaintiff's injury.

## POINT II.

**The Court erred in granting the motion for a direction of verdict made by the defendant at the conclusion of the case.**

It is well settled in this State that if a plaintiff produces testimony tending to show that there was a custom to give warning, and that matter is in dispute, a question of fact is presented to be passed upon by the jury.

*McNally v. Pennsylvania R. R., N. J. L., 277, at page 279.*

In that case, counsel for defendant insisted that the trial court should have directed a verdict because the proof was overwhelming in favor of the defendant, that customary signals were given, but this Court held that where the evidence is contradictory, the case must then go to the jury.

At page 279, the Court says:

"Whether such custom exists, or the notice was given, presents a jury question, and therefore the plaintiff having, in this case, produced proof tending to show that there was a custom to give warning, and the existence of that custom being denied by the defendant, a question of fact was presented to be passed upon by the jury and consequently there was no error in refusing the motions upon which the exceptions in this case are based. And for the same reasons the question whether the plaintiff was guilty of contributory negligence, under the circumstances shown, was for the jury."

Our Supreme Court has recently held that where a custom is proven, the fact that a decedent was working in a place where the custom prevailed, a jury could find that decedent had knowledge of that custom and was justified in relying upon the carrying out of that particular custom.

*Cowell v. Pennsylvania R. R.*, 2 Misc., 966.

"We think it would clearly have been error to nonsuit or direct a verdict upon either of the grounds urged. There was evidence from which it could have been found that due care upon the part of the engine driver would have caused him observe the presence of decedent's truck upon the crossing in time to bring his slowly moving engine to a standstill before reaching the truck. Again, there was evidence of a practice or custom of giving a signal of moving locomotives by bell or whistle, and from the fact that decedent had been in the yard on many occasions during a period of eight months, the jury could have found that he had knowledge of such custom or practice, and under such circumstances, he would be justified in relying upon the giving of such signals. *Coyne v. Pennsylvania Railroad Co.*, 87 N. J. L., 257; *McNaly v. Pennsylvania Railroad Co.*, 88 Id. 277.

In *Willever v. D. L. & W. R. R.*, 89 N. J. L., 697, at page 705, which reversed the opinion of the Supreme Court, the Court follows the law as laid down in *D'Agostino v. Pennsylvania Railroad Co.*, 72 N. J. L., 358, and holds,

"that where a system or custom of warnings under certain circumstances is established, the employees involved had the right to rely upon such warning being given, and that failure to give them, resulting in injury, constitutes a cause of action."

In the case *sub judice*, the defendant owed the plaintiff the same duty it owed to its employees,

for the plaintiff was upon its premises by express invitation.

In *Berley v. Eastern Coal Dock Company*, 95 N. J. L., 517, plaintiff was non-suited because not only was there lack of proof of a custom to warn, but the Court distinctly found (top page 519),

"that there was no evidence to show that it was customary to warn persons on the pier that empty cars were being drifted down the track which the plaintiff attempted to cross, and that there was testimony to show that it was not the custom to give a warning of the movement of cars upon the tracks."

In the case at bar, both the engineer and the brakeman themselves testified they saw the plaintiff before they attempted to move their engine and cars.

In *Girjnuk v. McAdoo*, 95 N. J. L., 256, an employee was removing lamps from an engine which was standing still near the bumper in the railroad company's depot. While engaged in that work, he was pushed against the bumper by the engine which backed up upon him. The court held that it was clearly a question for the jury, involving questions of disputed fact, and that the evidence indicated negligence in operation because the deceased had a right to assume that the train being in the depot at rest, would go forward rather than backwards.

Counsel for the defendant and the Trial Court relied upon the doctrine laid down in *Furey v. N. Y. C. & H. R. R. Co.*, 67 N. J. L., 270, and analogous cases, but we respectfully urge that the law in the *Furey* case is not at all applicable in the case *sub judice*, because the facts are entirely different.

In the *Furey* case, the accident occurred upon a railroad dock where movements of freight engines

and freight cars were continuous, and where, because of the exigencies of the situation, cars had to be disconnected from the engines in order that they may be properly unloaded, and that these openings between the cars could, under no stretch of the imagination, be considered by any reasonable person as a passageway over which anybody would be entitled to cross.

In the case *sub judice*, the rails ran through an aisle of the defendant's plant, which aisle was a main passageway through the tank house. The rails were embedded so that they were practically even with the floor of the tank house. They were narrow gauge-tracks, upon which a small engine and small cars were hauled. It was not a freight yard, but a plant which used this engine and cars for its own convenience to transport certain material. The movements of this engine and cars were not as continuous as described in the *Furey* case, and the opening between the engine and cars was not made by design in order to facilitate loading or unloading, but may have been made for the express purpose of leaving a space through which the plaintiff and other employees might pass and re-pass the aisle through which the rails ran, and in view of the fact that this engine and cars in the case at bar were upon the very path which plaintiff was obliged to use in order to reach the toilet, the jury, from the facts in the case, could have found it was reasonably intended that the plaintiff use this opening in order that he may proceed back to his place of employment. The opening between the engine and cars was not the result of a constant shifting nature, such as existed in the *Furey* case, which forbade any reasonable persons from assuming without further assurance that any provision had been made for the safe conduct of one passing between the cars and the

broken train, but was an opening between an engine and a car which was the only means of access to that portion of the aisle which led to the toilet in question.

Moreover, in the *Furey* case, the Court found, as a matter of law, that the evidence showed the customary signal for the movement of cars upon that dock was given. What plaintiff complained of in that case was that some other notice should have been given to him without making any inquiry as to its nature and extent, and the Court properly held that where plaintiff does not know of a customary system of warning, he cannot complain that such a customary warning was not given. In the present case, however, the testimony as to whether the customary warning was given, was in dispute. The plaintiff testified no whistle was blown, while defendant's witness testified the whistle was blown. It became, therefore, a jury question as to whether or not the customary signal was given. And the jury would have a right to infer, in the instant case, from the testimony, that the plaintiff had knowledge of that custom to warn, and had a right to rely upon the customary signal which would have insured safety to him.

Again, in the *Furey* case, the Court found as a matter of law that there was an absolutely safe way which the employee could have used to procure his street clothes. In our case, the evidence from the record conclusively proves that as far as the plaintiff was concerned, the only way the plaintiff could return to the place of his employment, was by passing between this engine and the standing cars.

The facts in the *Furey* case also led to the conclusion that every reasonable person would be obliged to assume that cars will, at sometime or other, come together. But the plaintiff in this case

cannot be charged with a duty of foreseeing that a standing engine would back up upon him without any warning. We might well argue that even if there was no customary warning proven, from the circumstances of the case as testified to by the witness, the law would cast a duty upon the engineer to give the plaintiff some warning that he was about to move his engine.

We, therefore, respectfully urge that the law in the *Furey* case is not applicable to the case *sub judice*, and that the Trial Court erred in granting the motion for a direction of a verdict which was made by defendant at the conclusion of the case.

Respectfully submitted,

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JOSEPH F. DEEGAN,  
Attorney for Plaintiff-Appellant.

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W. M. STREET

GET WISE TO SAFETY NOW

SAFETY

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COPPER  
STANDARD U

KEEP YOUR  
OUT BUTTON SIDE

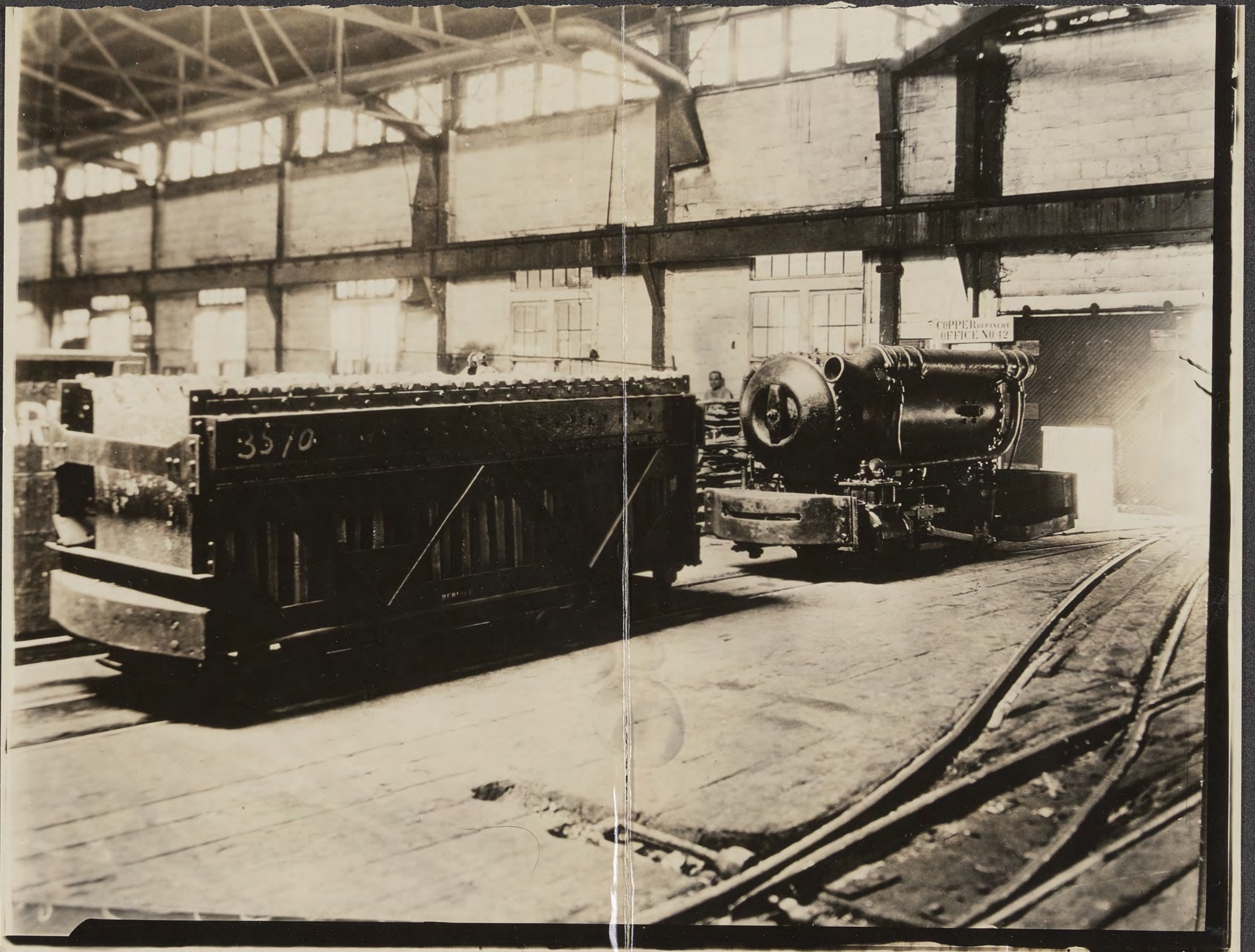
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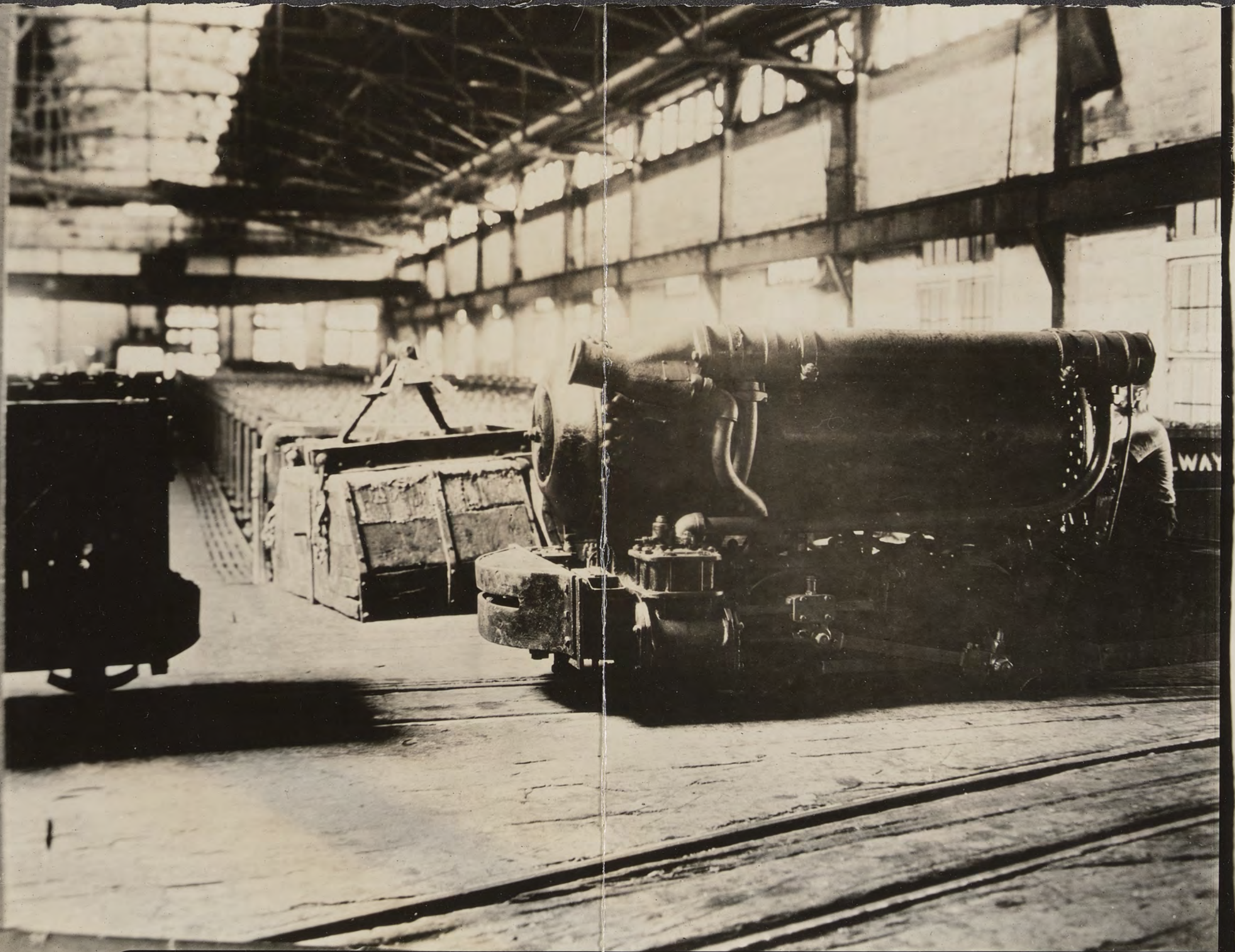
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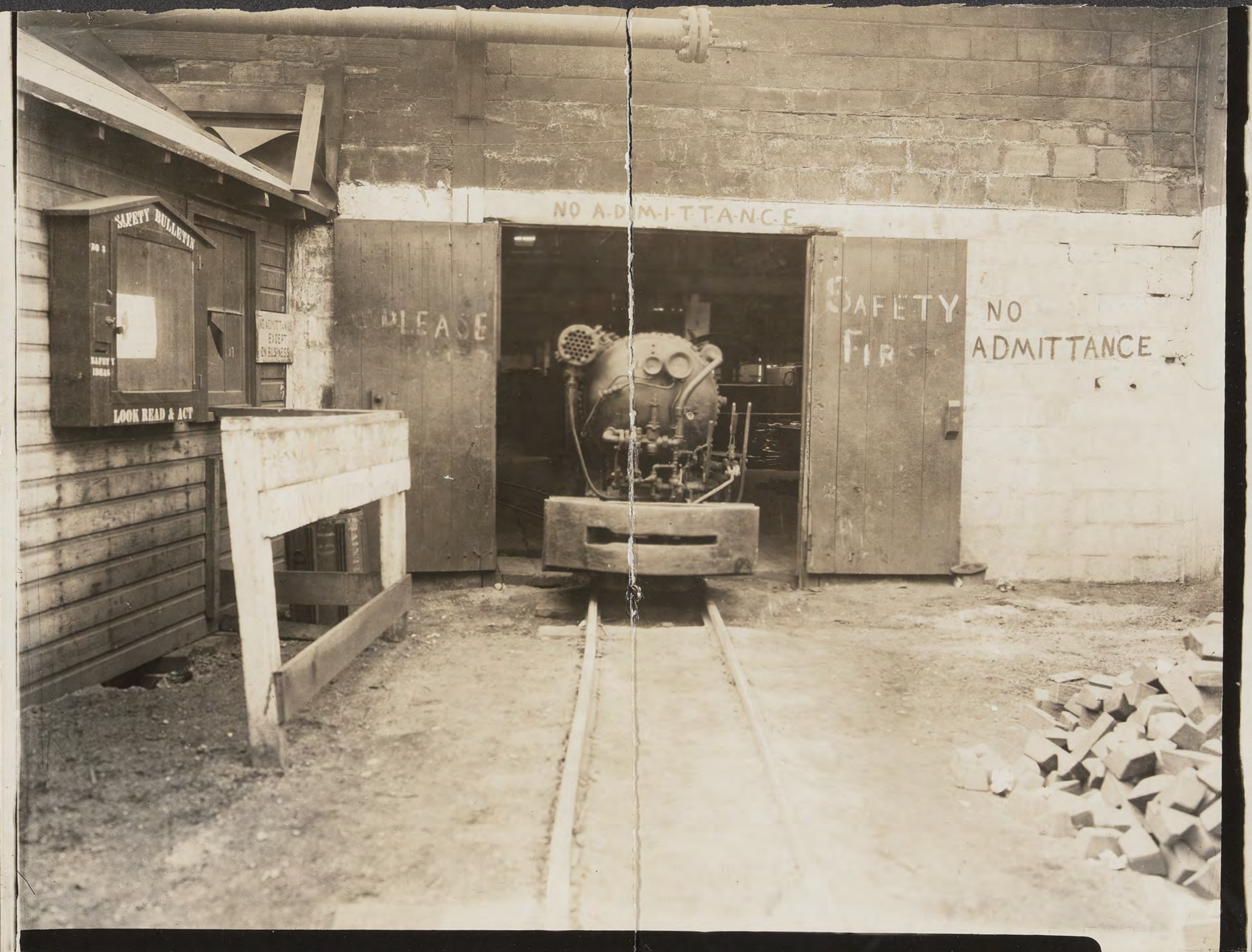
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NO ADMITTANCE

PLEASE

SAFETY NO ADMITTANCE FIRE

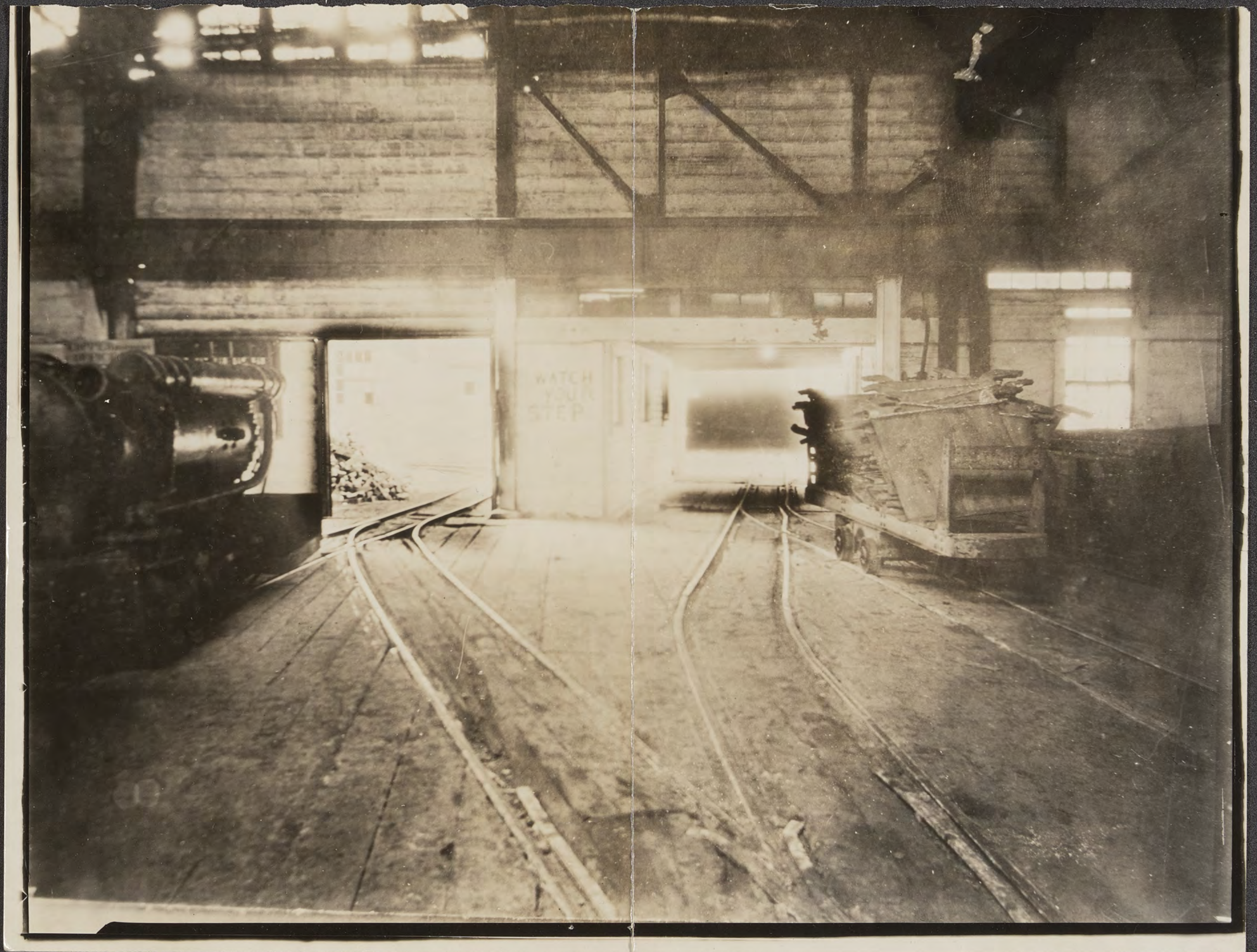
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LOOK READ & ACT

NO ADMITTANCE EXCEPT ON BUSINESS

D-8

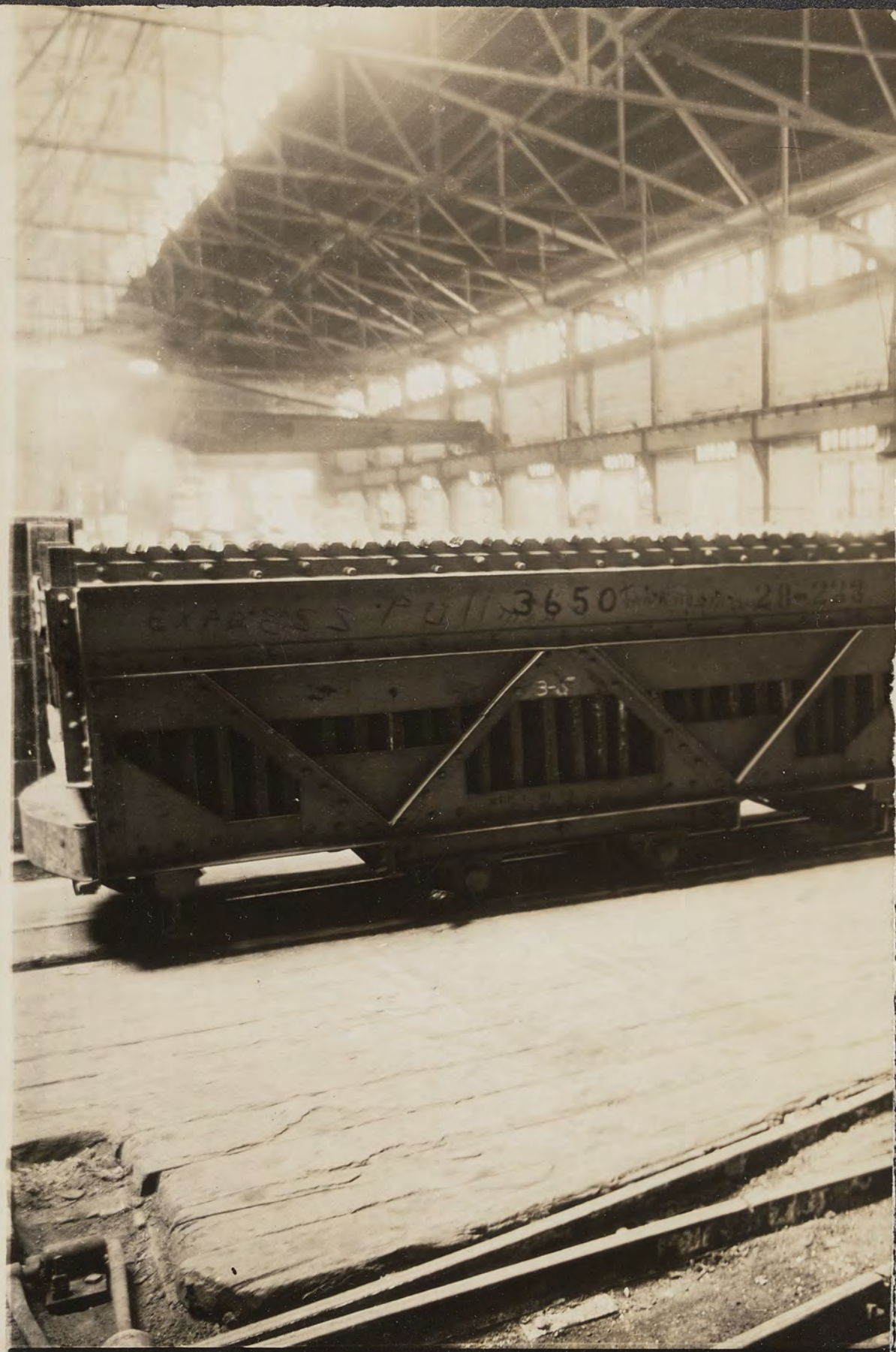
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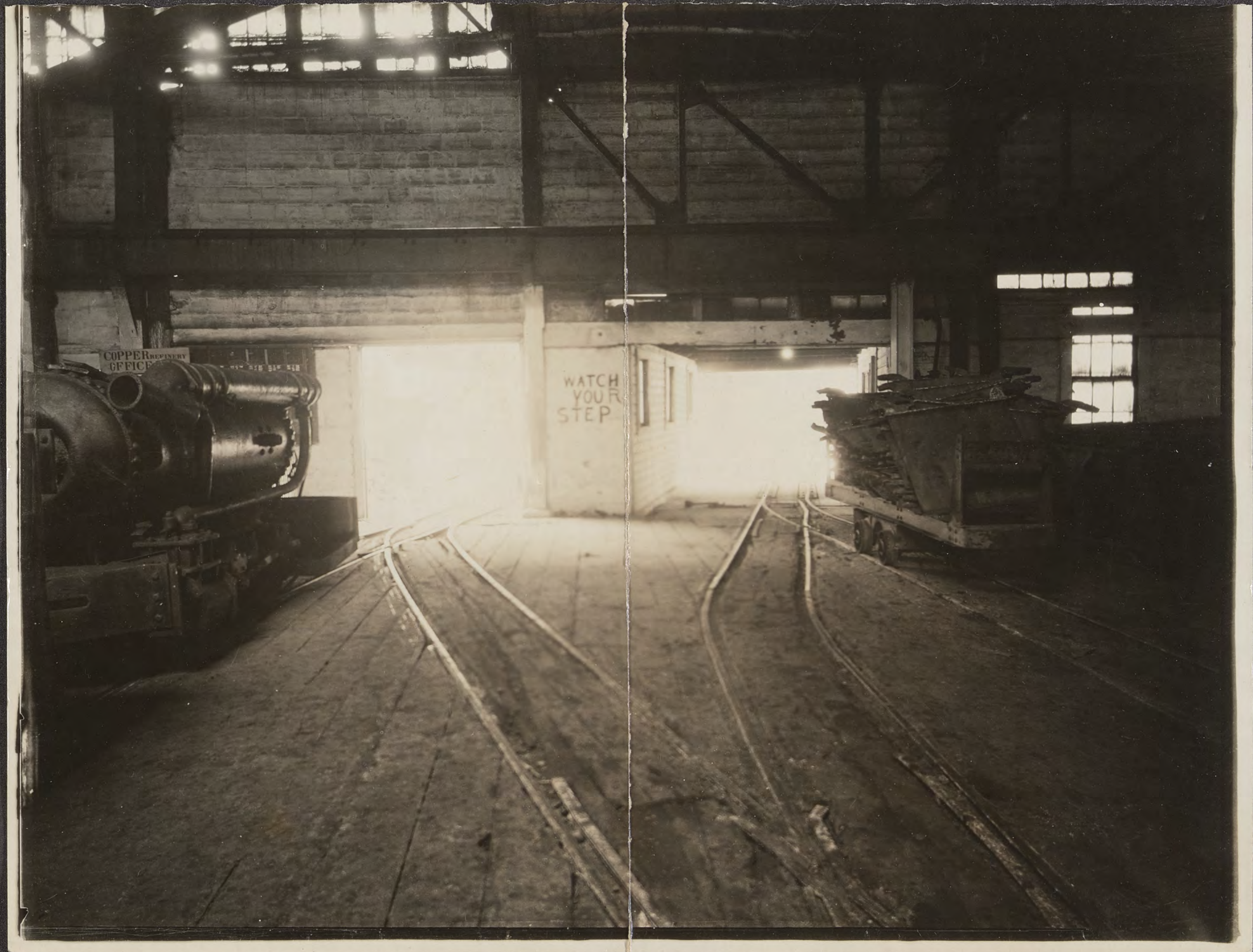
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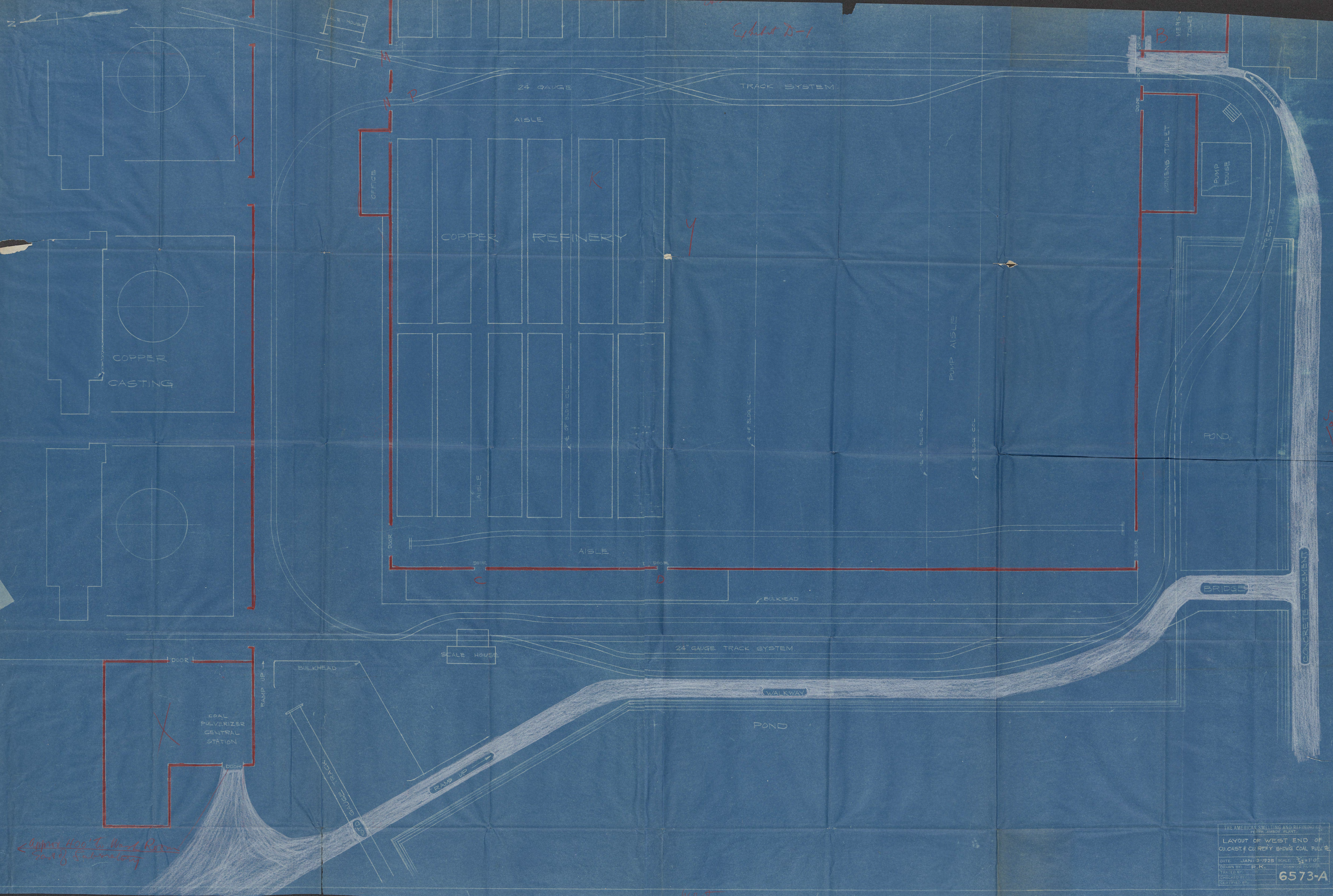


EXHIBIT-1

Approx. HOC To West River  
Sandy Substratum

THE AMERICAN SMELTING AND REFINING CO.	
PENTH ARBOY PLANT	
LAYOUT OF WEST END OF	
CU. CAST. & CU. REFY SHOWING COAL PULV. PL.	
DATE	JAN. 3-1925
DRAWN BY	ET. K.
CHECKED BY	
QUALIFIED BY	
SCALE	1/2" = 10'
6573-A	

11.3.07

D-7

P.S.

← NARROW GA. TRACK

⊕ NARROW GA. TRACK

⊕ NARROW GAUGE TRACKS

BLDG COL.

3x6 POST

P.S.

4x6 POST

BLDG. COL.

DWG. No. 5253-8

LOCATION OF N.G. TRACKS  
AND DOORS, NORTH SIDE OF T.H.

SCALE  $\frac{1}{4}'' = 12''$  A.F.G.

AUG. 18-24

4/7/25

TANK HOUSE  
OFFICE

