

New Jersey Court of Errors and Appeals

HELEN MINGOS, Administratrix of Leonard Mingos, Deceased, <i>Plaintiff-Appellant,</i>	}	<i>On Appeal from Hudson County Circuit Court.</i>
vs. CENTRAL RAILROAD COMPANY, <i>Defendant-Respondent.</i>		

Brief in Favor of the Appellant.

(1)

Statement of Case.

The appeal in this case brings before this Court for review a judgment entered in the Hudson County Circuit Court in favor of the defendant and against the plaintiff in an action wherein the plaintiff brought suit to recover damages for the death of Leonard Mingos which the plaintiff alleges was caused by the negligence of the defendant, on November 2, 1910, in blowing a locomotive whistle which frightened a horse drawing a carriage in which the plaintiff's intestate was riding, and the horse as a result ran away and threw the plaintiff's intestate out of the carriage, killing him. (State of case, p. 4).

This appeal is from the second trial, the first trial having resulted in a verdict in favor of the plaintiff for \$14,000.

The defendant appealed from the first trial and the decision of the trial court was reversed on the ground that the trial judge should have non-suited the plaintiff. (See 84 N. J. L. 677).

The question presented at that time was whether there was any evidence from which an inference of negligence could be drawn, and this Court held that there was not. Upon the re-trial additional evidence was offered which in the opinion of the trial judge showed that there was a jury question whether defendant was negligent and he therefore submitted the case to the jury, and a verdict was given in favor of the defendant (p. 7).

This appeal by the plaintiff is based solely on alleged erroneous ruling of the trial judge in regard to the admission and exclusion of certain evidence at the second trial.

(2)

Grounds of Appeal.

The following question was overruled:
To the witness, Dr. Joseph M. Rector:

1. Doctor, suppose a man 66 years of age on July 29, 1910, had a convulsion; suppose that in August of the same year he also had a convulsion; suppose that on the 29th of October, that year, he was suffering with chronic uraemic intoxication, calcification of his cerebral blood vessels, and had a blood pressure of 196; that he had a profound loss of memory; that his judgment was faulty, and that his mental processes were decidedly perverted because of the calcification of his blood vessels and the uraemic intoxication; in other words, the two physical conditions have brought about a mental state and that his judgment is bad because he has a profound loss of memory; suppose that this man, in this condition that I have described had a convulsion in July and in August, 1910, in your opinion, what would be his mental condition on the 2d of November, 1910; that is, in November following the two

convulsions, assuming that he was in the condition described here on the 29th of October, 1914.

Mr. Smith. I object unless Mr. Simpson can definitely state the nature of the convulsions which this man had.

A Suppose they were convulsions of an epileptic nature.

Mr. Smith. I object on the ground that Mr. Simpson cannot ask Dr. Rector to form an opinion on the opinion of another person. That is not a hypothetical question at all. It is not proper evidence, and it is nothing but hearsay. Also, there is only proof of one convulsion, that was in July, 1910.

Mr. Simpson. We will limit it to one convulsion. We will limit it to one convulsion in July, 1910. And I won't call it an epileptic convulsion, but I will say that he had a convulsion, and at that time he was suffering with epilepsy.

Mr. Smith. I object on the ground that it is not rebuttal; second, there is no proof in this case, so far as this man is concerned, that this patient was suffering with epilepsy.

The following question was admitted:

To the witness, Russell Harper:

2. Did you tell him, at that time, that whistle, as blown, was of the same kind that you had heard on other days there?

The following answer was not stricken out:

By the witness, John A. Rider:

4. Well, of course, everybody has their opinion. He seemed to be a very sure man, in my eyes. I took him as a model, (pp. 1-3).

(3)

Brief of the Argument.**I****THE TRIAL JUDGE ERRONEOUSLY EXCLUDED CERTAIN EVIDENCE OFFERED BY THE PLAINTIFF.**

Dr. Joseph M. Rector, a well known physician and surgeon of Jersey City for the last twenty years, who had made a study of brain conditions such as would be involved in epilepsy and uraemic poisoning, was called by the plaintiff and asked the following question, (p. 158, l. 32 to p. 159, l. 40):

“Q Doctor, suppose a man sixty-six years of age, of July 29, 1910, had a convulsion; suppose that in August of the same year he also had a convulsion, suppose that on the 29th of October, same year, he was suffering with chronic uraemic intoxication, calcification of his cerebral blood vessels, and had a profound loss of memory, that his judgment was faulty and his mental processes were perverted because of the calcification of his blood vessels and the uraemic intoxication, in other words, the two physical conditions have brought about a mental state, and that his judgment is bad because he has profound loss of memory, and judgment is based upon memory; and suppose that this man in this condition that I have described had a convulsion in July and in August, 1910; in your opinion what would be his mental condition on the 2nd of November following the two convulsions, assuming that he was in the condition described here on the 29th of October, 1914?”

Mr. Smith. I object unless Mr. Simpson can definitely state the nature of the convulsions which this man had.

Q Suppose they were convulsions of an epileptic nature?

Mr. Smith I object on the ground that Mr. Simpson cannot ask Dr. Rector to form an opinion on the opinion of another person. That is not a hypothetical question at all. It is not proper evidence, and it is nothing but hearsay. Also there is only proof of one convulsion; that was in July, 1910.

Mr. Simpson. We limit it to one convulsion, July, but I will say he had a convulsion, and at that time he was suffering with epilepsy.

Mr. Smith. I object on the ground that it is not rebuttal; second, there is no proof in case so far as this man is concerned, that this patient was suffering with epilepsy."

The question was objected to as shown in the foregoing quotation; the trial judge sustained the objection; and an exception was taken by counsel for plaintiff and duly allowed by the court (p. 159, l. 40 to p. 160, l. 5).

It will be noted that the first objection to the question was because it did not definitely state the nature of the convulsion (p. 159, l. 15). The question was hereupon made definite and limited to "convulsions of an epileptic nature" (p. 159, l. 20).

The next objection was that an expert witness could not be asked to form an opinion on the opinion of another person; that such a question is not a hypothetical question for that reason; and the evidence showed that the person in question (the engineer) had had only one convulsion (p. 159, ll. 20-30). In order that there might be no doubt as to whether the question was based on the opinion of some one else, the question was then further

limited to the one admitted convulsion (p. 159, ll. 30-35).

The question so amended was again objected to because (1) it was not in rebuttal, (2) there was no proof that the person in question was suffering from epilepsy (p. 159, ll. 35-40).

These were the two objections that were sustained by the trial judge (p. 159, l. 40).

(a)

The question was in rebuttal of testimony offered by the defendant.

In order to properly understand the significance and materiality of the question it is necessary to refer to the testimony offered by both parties. The plaintiff on her direct case called as a witness Mr. Forrester, the engineer, who blew the whistle that it is alleged frightened the horse that plaintiff's intestate was driving (p. 68). He was 66 years of age (p. 68, l. 5). He testified, "I had an attack of *epileptic seizures* and liable to throw me down at any time" (p. 68, ll. 15-20). He was taken off the railroad because he had these "spells" (p. 69, ll. 1-10).

The defendant on its direct case called as an expert medical witness, Dr. William J. Arlitz (p. 95). He testified that he had examined Mr. Forrester, the engineer, on October 29, 1914, and found that he was suffering with chronic uraemic intoxication, calcification of his cerebral blood vessels, and that he had a blood pressure of 196. He also was suffering from a profound loss of memory, his judgment was faulty, and his mental processes were decidedly perverted (p. 96, ll. 1-20). The symptoms that he manifested showed that he suffered from uraemic intoxication, etc., with profound loss of memory and repeated attacks of convulsions (p. 98, ll. 1-10). This witness further testified that

the engineer never had had "epilepsy" (p. 97, ll. 5-15). He said the engineer had "uraemic convulsions" (p. 97, ll. 15-20). It was impossible to say how long the chronic uraemic intoxication had existed, but being chronic it must have existed for some time. The engineer may have had albuminuria twenty years (p. 103, ll. 1-20).

The plaintiff in rebuttal called Dr. Frederick W. Flagg, a practicing physician and surgeon, who had been a witness in the first trial for the defendant (p. 142, ll. 20-30). He was employed at the time he treated the engineer in 1910, as a physician by the defendant (p. 151, ll. 25-35). The witness was still in the employ of the defendant at the time of the second trial. On his direct examination by the plaintiff he testified that he first examined Mr. Forrester *in July, 1910*, and that Mr. Forrester had his first attack *at that time* so far as he knew (p. 143, ll. 15-20). (The accident was November 2, 1910, p. 4, l. 30). He said he was called to treat Mr. Forrester on the night of July 29, 1910, and that he had had a convulsion on that night (p. 143, ll. 30-40). This witness testified that he treated him at that time for uraemic convulsions (p. 145, ll. 30-40). He thought the convulsions might be due to a good many things (p. 146, ll. 10-20). He stated that he thought at the time of the first trial, January 9, 1913, that Mr. Forrester was suffering from epilepsy and he so testified at that time (p. 147, ll. 30-40). At the time of the second trial he still believed that Mr. Forrester had epilepsy in July, 1910 (p. 147, ll. 30-40).

He further testified that he had only treated Mr. Forrester twice, July 29, 1910, and August, 1910 (p. 148, ll. 1-10), but on re-direct he corrected his statement and said he had examined him a third time a few days before January 9, 1913, and that he was still suffering from epilepsy at that time

(p. 150, ll. 10-20). In his opinion, Mr. Forrester had epilepsy in *July, 1910* (p. 150, ll. 35-40).

The foregoing summarizes the testimony in the case when Dr. Rector took the stand as a witness in behalf of the plaintiff. He was not called on plaintiff's direct case but was put on in rebuttal. He had been asked no questions except preliminary ones qualifying him as an expert when plaintiff's counsel put the question which was overruled.

If we analyze the question we find that all the facts contained in the question were testified to by previous witnesses. Mr. Forrester testified that he was 66 years of age (p. 68, l. 5); Dr. Flagg testified that Mr. Forrester had a convulsion on July 29, 1910 (p. 143, l. 45; p. 148, l. 15); Dr. Flagg also treated Mr. Forrester in August, 1910, but whether he had a convulsion at that time does not appear. However, the question was subsequently limited to *one* convulsion (p. 159, l. 30). Dr. Arlitz testified that he examined Mr. Forrester on October 29, 1913, and found that he was suffering with chronic uraemic intoxication, calcification of his cerebral blood vessels, and that he had a profound loss of memory, that his judgment was faulty and his mental processes were perverted, etc. (p. 96, ll. 10-20). The question contains the language used by Dr. Arlitz verbatim. It will also be noted that the question contains *all* the facts in the testimony in regard to Mr. Forrester's condition. Counsel for defendant objected on the ground that it was not rebuttal. It is clearly rebuttal, for Dr. Arlitz testified that Mr. Forrester had *never* suffered from epilepsy (p. 97, ll. 10-20). He said that Mr. Forrester was suffering from uraemic convulsions (p. 97, l. 20). Dr. Rector testified that a uraemic convulsion is the same as an epileptic convulsion (p. 163, l. 20).

This was not denied by defendant's witnesses. This question was strictly rebuttal, and therefore defendant's objection on this ground ought to have been overruled.

(b)

There was evidence that Mr. Forrester was suffering with epilepsy.

The second objection has no merit. The question sets forth the facts as testified to by Mr. Forrester, Dr. Flagg and Dr. Arlitz, and then asks, "In your opinion, what would be his (Mr. Forrester's) mental condition on the 2nd of November (date of accident), following the convulsion?" (P. 159, ll. 10-15).

There can be no doubt that the question was a vital and material one and, if answered, would have assisted the jury in determining just what Mr. Forrester did on November 2, 1910, when he blew the locomotive whistle that frightened the horse that was being driven by the intestate of the plaintiff. The first effect of an epileptic seizure is spasmodic. If the engineer had hold of the whistle cord when he was attacked with one of these fits, his fingers would contract, and there would undoubtedly be a jerk on the cord which would cause the whistle to blow louder and longer than ordinarily. If his mental condition was such that he did not realize what he was doing, the jury might well have found that such fact would account for the negligent manner in which the whistle was blown, as alleged by the plaintiff.

The materiality of this question is apparent when we consider the fact that the trial judge charged the jury that it should disregard whether or not the engineer was suffering from epilepsy (p. 175). If the question was allowed and an-

swered favorable to the plaintiff the court should not have so charged the jury.

If we assume for the moment that the objection that there was no proof that Mr. Forrester was suffering from epilepsy is material, then we attack that statement and say that there was evidence of that fact for Mr. Forrester himself stated that he suffered from epileptic seizures which were liable to "throw him down" at any time, and that that was the reason why he was taken off the railroad as an engineer (p. 63, ll. 10-20; p. 69, ll. 1-10). Also Dr. Flagg throughout his testimony testified that in his opinion Mr. Forrester had epilepsy. Dr. Airlitz is the only witness who says that Mr. Forrester did not have epilepsy, but uraemic convulsions (p. 97), but Dr. Rector testified that uraemic convulsions were the same as epileptic convulsions and this was not denied by Dr. Airlitz (p. 163, ll. 15-20).

We therefore find that counsel for defendant did not correctly state the evidence when he said that there was no evidence that Mr. Forrester suffered from epilepsy, if this inquiry is material.

We therefore submit that the trial court erred in sustaining defendant's objection.

Counsel for the defendant may raise the point that this testimony is not material because it is not within the pleadings. However, there is no merit in this contention for the complaint alleges (p. 5, par. 5).

"5. That the negligence aforesaid of the defendant by its servants and agents consisted in this: that it did not use reasonable care to blow the said whistle at a lawful place and did not use reasonable care to blow the said whistle in a reasonable way, but on the contrary, the defendants by its servants and agents blew the said whistle at

an unlawful place and carelessly and negligently caused the said whistle to sound in a loud and unusually long and frequent manner, knowing that the horse aforesaid was being frightened thereby and continued so to sound the said whistle after it knew the said horse was being frightened thereby.”

In Vol. 4, in *Thompson on Negligence*, Sec. 4898, that well known author says:

“4898. Unfitness in Consequence of Disease, such as Epilepsy—Where the incompetency of a brakeman arose, not from the fact that he was habitually inattentive to his duties, but because his physical condition was such, from liability to epileptic fits, that he was likely at any moment to become unable to perform his duties, the fact that he had never been guilty of *carelessness* did not prevent the jury from finding that he was an improper person to entrust with important duties, when his failure might produce just such results as happened at the time of the accident in controversy.”

And he cites for this proposition:

Baird v. N. Y., etc., R. Co., 64 App. Div. (N. Y.) 14, 71 N. Y. Supp. 734.

This statement is very much in point and shows that negligence on the part of the defendant may be predicated upon just such facts as appear in the case at bar.

Furthermore, without any objection by defendant's counsel, other testimony as to epileptic fits was adduced, and the case was tried on that theory. This court in the late case of *Schulz v. N. Y. S. & W. R. R. Co.*, decided at the June Term 1915, through Kalisch, *J.*, held:

“These legal principles are applicable to the facts and circumstances of the present

case, and the plaintiff was therefore entitled to have had the negligence charged against respondent, and the negligence attributed to the deceased submitted to the jury for determination.

“There is no real force in the contention of counsel of respondent that the theory of the appellant that the decedent was drawn to the train by suction was not raised by the pleadings. The pleader in the complaint has grouped together, in a rather unscientific way, a number of causes conducing to the decedent being struck by the train.

“After stating that the train came through at a high rate of speed, without notice or warning to the passengers on the platform, and that the train was of such width as to strike any person standing near the edge of the platform, he proceeds to state that the train ‘did with great force and violence strike, draw to it, and drag along the said Carl Schulz,’ etc. But it is quite apparent that if the words ‘draw to it’ had preceded the word ‘strike’ it would have been a clearer statement that the decedent was drawn to the train and struck by it.

“We think, therefore, that there was enough in the complaint to have warranted the plaintiff to have based her claim for damages on the suction theory.

“Besides all this, we cannot overlook the fact that without any objection by the respondent, the case was tried out on that theory.”

It may be urged that Dr. Rector did not, at any time, examine Mr. Forrester, the engineer, but that is immaterial for the rule is well settled that where the facts upon which an expert opin-

ion is to be formed are not controverted, the witness can base his opinion on what the other witnesses in the case have testified,

State v. Powell, 7 N. J. L., 244.

Shoemaker v. Elmer, 70 N. J. L., 710.

Daggett v. North Jersey St. Ry. Co., 75 N. J. L., 630.

We may even go a step further for a hypothetical question to an expert; the assumption of facts in accordance with the theory of the party asking it, which the evidence tends to prove, is proper where, though the facts are disputed, there is evidence tending to support every phase of the question, and sufficient to justify submission to the jury, *Daggett v. No. Jersey St. Ry. Co.*, 75 N. J. L., 630. In the case at bar the question asked by counsel for the plaintiff was supported, word for word, by the testimony in the case and being so supported, he had the right to ask Dr. Rector his opinion on the facts as proved.

We submit that the trial court erred in sustaining this objection of counsel for the defendant.

II.

THE TRIAL JUDGE ERRONEOUSLY ADMITTED CERTAIN EVIDENCE OFFERED BY THE DEFENDANT.

On the defendant's case counsel for the defendant asked one of his witnesses the following question (p. 139, ll. 25-35):

"Q Did you tell him at that time that whistle as blown was of the same kind that you had heard on other days there?"

Counsel for plaintiff objected to the question on the ground that it was leading, and the Court over-ruled the objection. An exception was duly noted (p. 139, ll. 30-35).

Counsel for the defendant in the question was referring to Mr. Simpson (counsel for plaintiff) when he used the word "him." This witness was called by the defendant to testify as to how loud the whistle blew that frightened the horse of the plaintiff's intestate. On his direct examination he testified that he heard the whistle and that it blew in the same way as it always blew. He was also asked on his direct examination whether he had not been subpoenaed in the former trial by the plaintiff, and if he had not at that time told plaintiff's counsel the same thing. On cross examination he was asked whether he did not at that time state that he did not know anything at all about the accident; that he did not hear the whistle because he did not get to the place where the accident happened until it was all over, and he answered, "Yes" (p. 133, ll. 20-40). On his re-direct examination he was asked whether he did not tell counsel for the plaintiff in the court room at the former trial as to how the whistle blew in comparison with the whistles that he had heard on other occasions; over objection of counsel for the plaintiff the question was allowed to be answered and the witness said, "Yes, sir" (p. 139, ll. 1-20). He was then asked the question set forth at the beginning of this point. There is doubt under the circumstances that the question is leading. The proper question would have been, "What did you tell him?" The question undoubtedly suggested to the witness the answer desired by counsel for defendant; it could be answered by a simple yes or no. He was asked whether he did not tell Mr. Simpson, counsel for the plaintiff, at that time, that the whistle as blown was the same kind that he had heard on other days and he, of course, said yes, notwithstanding the fact that on his cross examination

he testified that he did not know because he did not reach the place of the accident until after it was all over. Some allowance must be made for this witness, who was only a school boy (p. 137, ll. 20-30). But for this very reason counsel for the defendant should not have been allowed to lead him on this vital point at issue.

III.

THE TRIAL JUDGE ERRONEOUSLY REFUSED TO STRIKE OUT CERTAIN EVIDENCE.

The defendant on its case in rebuttal recalled a witness by the name of John A. Rider and asked him (p. 170, ll. 25-40):

“Mr. Rider, while you were with him (the engineer) did he appear to you to be a bright or a dull man?”

He answered:

“Well, of course, everybody has their opinion. He seemed to be a very sure man in my eyes. I took him as a model.”

The answer was objected to and counsel for plaintiff requested that that part of the answer which dealt with an opinion and a conclusion be stricken out. The Court refused to strike out the answer and allowed an exception..

The question was whether the engineer was a “bright or dull man.” The witness said he was a “very sure” man and that he, the witness, took the engineer as a “model.” Of course that part which deals with the engineer as being a model was not competent and whether the engineer was a sure man or not means nothing and is not the subject of an opinion of a lay witness. The only ground upon which a witness may give an opinion as to matters of ordinary knowledge is that they

not only come within his personal observation but that they come into proof so blended with the opinion to which they give rise that it is receivable in proof as a substitute for a specification of the host of circumstances that called it forth. The Supreme Court in the case of *Koccis v. State*, 56 N. J. L., 44, 47, said:

“A failure to observe this distinction results at times in the offer of an ordinary witness to give an opinion calling for special knowledge merely because he has had actual observation of the facts. * * *”

This is just what happened in the case at bar. Merely because Mr. Rider had been a fireman on an engine on which Mr. Forrester had been an engineer did not qualify him to give an opinion that Mr. Forrester was a very sure man. A bald statement such as this without referring to any particular matter surely was not competent. He might be a sure man with regard to some things and not with regard to others. The witness ought to have stated the facts and the jury should have been allowed from those facts to draw the conclusion whether or not Mr. Forrester was, or was not, a very sure man.

Conclusion.

We respectfully submit that the judgment of the trial court should be reversed and a *venire de nova* awarded.

ALEXANDER SIMPSON,
Attorney of Plaintiff.

GEORGE S. HOBART,
Of Counsel.

Dated March 3, 1916.

New Jersey Court of Errors and Appeals.

HELEN MINGOS, Administratrix
of LEONARD MINGOS, de
ceased,
Plaintiff-Appellant,

vs.

THE CENTRAL RAILROAD COM-
PANY OF NEW JERSEY,
Defendant-Appellee.

On Appeal.

BRIEF FOR THE CENTRAL RAILROAD COM- PANY OF NEW JERSEY, DEFENDANT- APPELLEE.

This action was instituted to recover damages sustained by the next of kin of Dr. Leonard Mingos, who met his death on November 2, 1910, at Hibernia, New Jersey. At that time he was riding in a carriage drawn by a horse along a public road parallel with and a few feet from a single track branch of the Central Railroad of New Jersey. As the result of the blowing of a whistle attached to one of the railroad company's locomotives, the horse became frightened and ran away. Dr. Mingos was thrown from the carriage and sustained injuries resulting in his death.

It was alleged in the complaint that the whistle was negligently blown in:

“That it (the defendant) did not use reasonable care to blow the said whistle at a lawful place and did not use reasonable care to blow

the said whistle in a reasonable way, but on the contrary the defendant by its servants and agents blew the said whistle at an unlawful place and carelessly and negligently caused the said whistle to sound in a loud and unusually long and frequent manner, knowing that the horse aforesaid was being frightened thereby and continued so to sound the said whistle after it knew the said horse was being frightened thereby" (Rec., p. 5).

The case has been tried twice. The first trial resulted in a verdict for the plaintiff, but the judgment entered thereon was reversed by this Court upon the ground that the evidence was insufficient to justify an inference of negligence (*Mingos vs. Central R. R. Co.*, 84 N. J. L. 677). The second trial resulted in a verdict for the defendant. By this appeal the plaintiff seeks to have the judgment entered thereon reversed because of the admissions and the exclusions of evidence set out in the grounds of appeal (Rec., pp. 1-3).

POINT 1.

The first ground of appeal deals with a question put to Dr. Joseph M. Rector, a witness called by the plaintiff on rebuttal. On her main case the plaintiff called Charles R. Forrester, the engineer who operated the locomotive which caused the accident (Rec., p. 68). Forrester testified that his memory was entirely gone; that he had an attack of epileptic seizures just after this accident occurred, but as he remembered, did not have epilepsy while working as an engineer (Rec., pp. 68-69). The defendant called Dr. W. J. Arlitz, who examined Forrester about a month before the trial. Dr. Arlitz testified that at the time of his examination Forrester was suffering from a profound loss of memory, that he

had chronic uræmic intoxication, calcification of the cerebral blood vessels and a blood pressure of 196 (Rec., p. 96). He also testified that the purpose of his examination was to determine whether or not Forrester's mental condition would permit him to testify as a witness, and that in his judgment it did not (Rec., pp. 99, 100).

The defendant's purpose in producing this testimony is obvious. Forrester had blown the whistle which was alleged to have caused plaintiff's intestate's death. An unexplained failure to produce his evidence before the jury would have unquestionably prejudiced its case. Dr. Arlitz was called to explain the failure to produce him.

On rebuttal, the plaintiff called Dr. Frederick W. Flagg, who testified that he had treated Forrester in July, 1910, that is, prior to the accident, for a convulsion (Rec., p. 143); that at that time he came to the conclusion that the man had epilepsy, and that he still had reason to believe he had epilepsy (Rec., p. 147).

Dr. Rector did not examine Forrester. He was called as an expert. The record discloses the following (p. 159):

Q. Doctor, suppose a man sixty-six years of age of (*sic*) July 29, 1910, had a convulsion; suppose that in August of the same year he also had a convulsion, suppose that on the 29th of October year (*sic*) he was suffering with chronic uræmic intoxication, calcification of his cerebral blood vessels, and had a profound loss of memory, that his judgment was faulty and his mental processes were perverted because of the calcification of his blood vessels and the uræmic intoxication, in other words, the two physical conditions have brought about a mental state, and that his judgment is bad because he has profound loss of memory, and judgment is based upon memory; and suppose that this man in this condition that I have described had a convulsion in July and in August, 1910; in your opinion what would be his mental condition on the 2nd of November following the two convulsions, assuming that he was in the condition described here on the 29th of October, 1914?

Mr. Smith: I object unless Mr. Simpson can definitely state the nature of the convulsions which this man had.

Q. Suppose they were convulsion of an epileptic nature?

Mr. Smith: I object on the ground that Mr. Simpson cannot ask Dr. Rector to form an opinion on the opinion of another person. That is not a hypothetical question at all. It is not proper evidence, and it is nothing but hearsay. Also there is only proof of one convulsion; that was in July, 1910.

Mr. Simpson: We limit it to one convulsion, July, but I will say he had a convulsion and at that time he was suffering with epilepsy.

Mr. Smith: I object on the ground it is not rebuttal; second, there is no proof in case so far as this man is concerned, that this patient was suffering with epilepsy.

The Court: I will sustain the objection."

The obvious purpose of this testimony was to create the impression that the defendant had employed an unfit engineer, an epileptic, and this was sought to be done, not by direct proof that the engineer at the time the accident occurred was actually sick or that he performed his duty improperly, but indirectly, and in such a way that the conclusion that he did would be suggested without any foundation on which to rest.

The issue as to the engineer's physical condition at the time the accident occurred was not raised by the pleadings. There is no allegation that defendant had employed an improper engineer. This testimony was, therefore, irrelevant.

But even if the fact sought to be elicited by the testimony had been a proper one for the consideration of the jury, the strict rules of procedure required plaintiff to prove it on her main case. It was entirely within the discretion of the trial Court, therefore, to determine whether or not to admit proof of it on rebuttal, and the exercise of that discretion is not reviewable on appeal (*Crosby vs. Wells*, 73 N. J. L. 790).

If this evidence was not properly part of plaintiff's main case, because it did not tend to establish a fact relevant to the issue, the burden of proving which rested upon plaintiff, the trial Court was clearly right in excluding it on rebuttal. The only evidence as to Forrester's condition introduced by defendant related to the time of the trial in November, 1914. This question related to his condition at the time of the accident in November, 1910. Instead of seeking to contradict the evidence introduced by defendant, it assumed the facts established thereby. It was not, therefore, evidence which the plaintiff was entitled to offer on rebuttal as of right, for it was not evidence made necessary by the defendant's case (*Wigmore on Evidence*, § 1873).

But if the question was *proper*, and the exclusion of the answer technically erroneous, it is clear that the error did not affect the substantial rights of the plaintiff. Dr. Rector was permitted to contradict Dr. Arlitz's diagnosis of chronic uræmic intoxication, and to testify that the symptoms exhibited by Forrester showed that he was suffering from epilepsy (Rec., pp. 161, 162). Forrester himself testified on the plaintiff's main case that he suffered from epilepsy (Rec., p. 69). Dr. Flagge testified that Forrester's epilepsy had manifested itself prior to the accident (Rec., p. 147).

POINT 2.

The witness Russel Harper produced by the defendant was asked the following question on re-direct-examination: "Did you tell him, at that time, that whistle as blown, was of the same kind that you had heard on other days there." Objection was made that the question was leading, but the objection was overruled (Rec., p. 139). The overruling of this objection is made the basis of the second ground of appeal.

On his direct-examination, Harper testified that he heard the whistle which was alleged to have caused the accident and that compared with whistles of the same train he had heard on other days there, it sounded just the same (Rec., p. 137, 138). It also appeared that he had been subpoenaed by the plaintiff on the previous trial but had not been placed on the stand (Rec., p. 138).

On cross-examination his attention was directed to a statement made to the person who had subpoenaed him for the prior trial on behalf of the plaintiff. This statement was consistent with that made on his direct-examination, and he admitted that he had made it (Rec., p. 138).

On redirect he was asked whether he had told Mr. Simpson, plaintiff's counsel, in the court room, at the prior trial, that the whistle as blown was of the same kind that he had heard on other days. The objection was made that the question was leading, and the trial Court overruled the objection (Rec., p. 139). The witness answered that he had. That the substantial rights of the plaintiff were not injured by this answer is clear. The witness had already testified that in fact the whistle was the same as he had heard on other occasions. The jury, moreover, could have inferred that since the witness had been in court at the previous trial and was not placed on the stand by the plaintiff, then or at the present trial, that he must have told counsel that the whistle was similar to others that he had heard.

But even if he had believed that there was a difference between the whistles he had heard before and the one which he heard on the day of the accident, even if he believed that the one on the day of the accident was louder, that fact would have been insufficient to justify the inference that the whistle was negligently blown. When he heard the whistle he was at the Hibernia store (Rec., pp. 137, 138). The store is approximately 1,700 feet from where the whistle was blown (Rec., p. 106). *Mingos vs. Central R. R. Co., supra.*

But since the only objection to the question was that it was leading, the action of the trial Court in permitting it to be answered is not reversible on appeal. The permission of leading questions to a witness, on direct-examination is in the discretion of the Court, and no ground for reversal (*Chambers vs. Hunt*, 2 Zab. 552; *Trenton Passenger Ry. Co. vs. Cooper*, 60 N. J. L. 219; *Wigmore on Evidence*, § 770).

POINTS 3 AND 4.

The Court permitted the witness John A. Rider to answer the following question:

“ Mr. Rider, while you were with him did he appear to you to be a bright or a dull man?”
(Rec., p. 170).

The question related to Forrester, the engineer and was asked on surrebuttal, after the evidence showing an epileptic seizure, prior to the accident had been admitted. Rider was the fireman on the locomotive. He had worked with Forrester, on and off, for a period of three years and steadily for over two years prior to the accident. The manifestation of Forrester's illness at the time of the trial was mental. It, therefore, became natural for the defendant to show whether or not the convulsion in July prior to the accident had affected his condition so as to impair his ability to perform his duty as an engineer.

There was no objection to the question and the witness answered, “ Well, of course, everybody has their opinion. He seemed to be a very sure man, in my eyes. I took him as a model.” After the question had been answered, counsel for plaintiff said:

“ I object to that, and ask that he took him as a model be stricken out as not competent

testimony, and that a sure man means nothing, and is not the subject of an opinion, under the *State vs. Koccis*" (Rec., p. 170).

Since there was no objection to the question prior to its being answered, there was no error in permitting it to be answered.

Moreover, the evidence sought to be elicited by the question was competent. The witness was asked to state an inference drawn by him from facts within ordinary knowledge occurring in his presence. This is permissible under our cases (*Koccis vs. State*, 56 N. J. L. 44; *Castner vs. Sliker*, 33 N. J. L. 507; *Murphy vs. North Jersey St. Ry. Co.*, 81 N. J. L. 706). The Court, therefore, was justified in refusing to strike out the answer.

But even if the question had called for testimony which would have been inadmissible over prompt objection, the failure to object until after it was answered justified the refusal of the trial Court to strike out the answer (*State vs. Hummer*, 73 N. J. L. 714; *State vs. Murphy*, 87 N. J. L. 515, 523).

Whatever effect this answer may have had upon the jury, however, was destroyed by the Court's charge. The only bearing upon the case which the answer had was in regard to the effect of the engineer's epilepsy. The Court charged the jury not to take that into consideration at all in determining whether or not the defendant had been guilty of negligence (Rec., pp. 175, 176).

It is submitted that the judgment below should be affirmed.

CHARLES E. MILLER,
GEORGE HOLMES,
Counsel for Defendant-Appellee.

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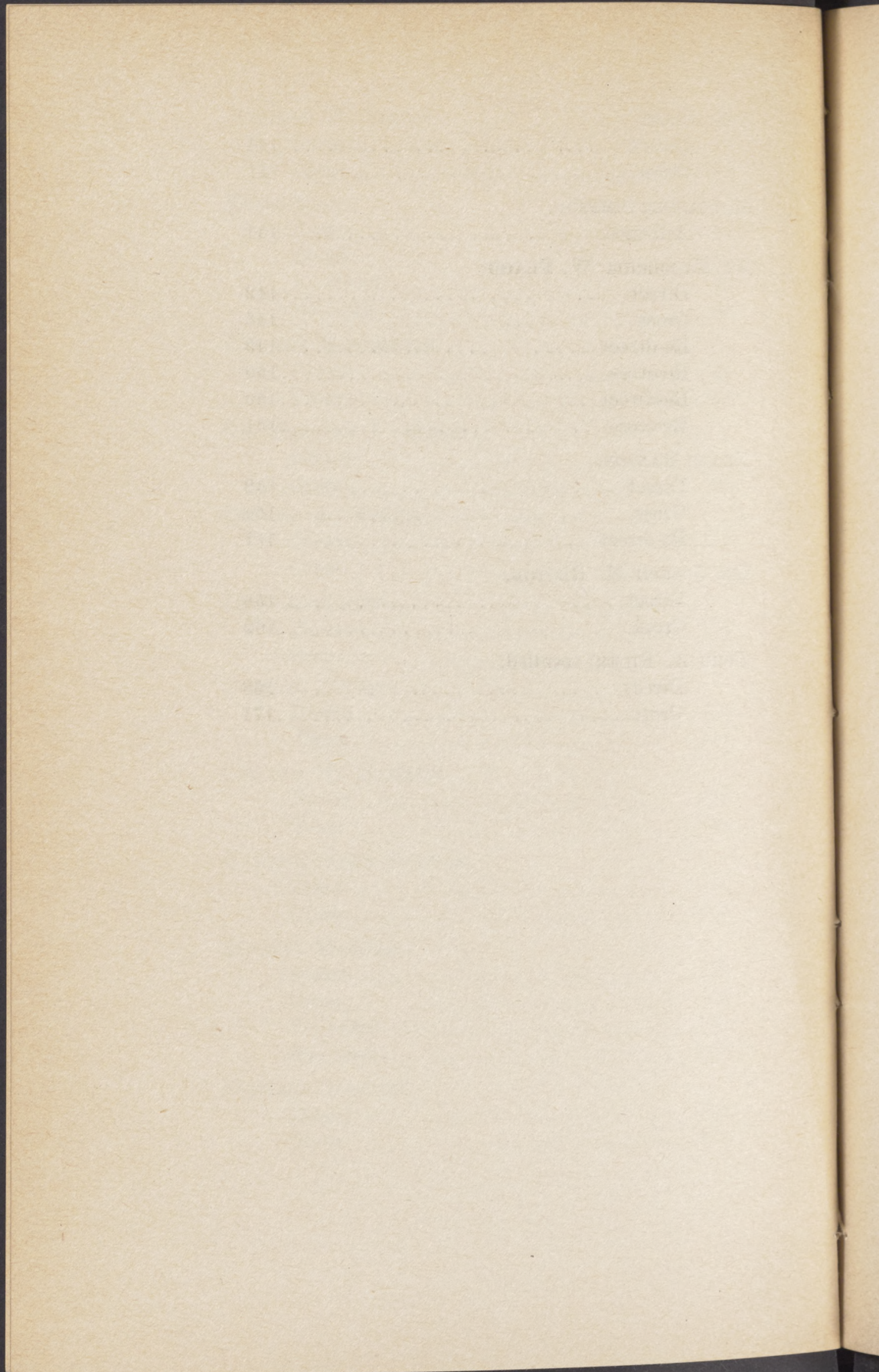
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Notice and Grounds of Appeals.

(Filed Nov. 5, 1915.)

Hudson County Circuit Court.

10

HELEN MINGOS, ADMINISTRATRIX,
&C., OF LEONARD MINGOS,
Plaintiff-Appellant,

vs.

CENTRAL RAILROAD COMPANY OF
NEW JERSEY,
Defendant-Respondent.

*On Appeal from
Hudson County
Circuit Court.
Notice and
Grounds of
Appeal.*

20

To George Holmes, Esq., Attorney of Defendant.

Take notice, that the plaintiff appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause, on the following grounds:

The following questions were overruled:

To the witness, Dr. Joseph M. Rector:

30

1. Doctor, suppose a man 66 years of age on July 29, 1910, had a convulsion; suppose that in August of the same year he also had a convulsion; suppose that on the 29th of October, that year, he was suffering with chronic uraemic intoxication, calcification of his cerebral blood vessels, and had a blood pressure of 196; that he had a profound loss of memory; that his judgment was faulty, and that his mental processes were decidedly perverted because of

40

NOTICE AND GROUNDS OF APPEALS

10 the calcification of his blood vessels and the
uraemic intoxication; in other words, the two
physical conditions have brought about a men-
tal state and that his judgment is bad because
he has a profound loss of memory, and judg-
ment is based upon memory; suppose that this
man, in this condition that I have described
had a convulsion in July and in August, 1910,
in your opinion, what would be his mental
condition on the 2d of November, 1910; that
is, in November following the two convulsions,
assuming that he was in the condition described
here on the 29th of October, 1914.

20 Mr. SMITH—I object unless Mr. Simpson can
definitely state the nature of the convulsions
which this man had.

Suppose they were convulsions of an epileptic
nature?

30 Mr. SMITH—I object on the ground that Mr.
Simpson cannot ask Dr. Rector to form an
opinion on the opinion of another person. That
is not a hypothetical question at all. It is not
proper evidence, and it is nothing but hearsay.
Also, there is only proof of one convulsion
that was in July, 1910.

Mr. SIMPSON—We will limit it to one con-
vulsion. We will limit it to one convulsion in
July, 1910. And I won't call it an epileptic
convulsion, but I will say that he had a con-
vulsion, and at that time he was suffering with
epilepsy.

40 Mr. SMITH—I object on the ground that it is
rebuttal; second, there is no proof in this case,
so far as this man is concerned, that this pa-
tient was suffering with epilepsy. ^{not}

NOTICE AND GROUNDS OF APPEALS

The following questions were admitted:

To the witness Russel Harper:

2. Did you tell him, at that time, that whistle, as blown, was of the same kind that you had heard on other days there?

To the witness, John A. Rider:

3. Mr. Rider, while you were with him, did he appear to you to be a bright or a dull man?

The following answer was not stricken out:

By the witness, John A. Rider:

4. Well, of course, everybody has their opinion. He seemed to be a very sure man, in my eyes. I took him as a model.

COLLINS & CORBIN,
Attorneys of Plaintiff-Appellant.

Nov. 1, 1915.

ENDORSED:

Service of a copy of within notice and grounds of appeal acknowledged this first day of November, 1915.

CHARLES E. MILLER,
Attorney of Respondent.

10

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30

40

COMPLAINT.

(Filed Oct. 21, 1912).

CIRCUIT COURT OF THE COUNTY OF
HUDSON.

10

HELEN MINGOS, Administratrix of
the Estate of Leonard Mingos,
Deceased,

Plaintiff,

vs.

CENTRAL RAILROAD OF NEW JER-
SEY,

20

Defendant.

The plaintiff who resides in Denville, Morris
County, New Jersey, says that:

1. The defendant is now and was at all times
hereinafter mentioned a corporation existing un-
der and by virtue of the laws of the State of New
Jersey.

2. The said defendant on the second day of No-
vember, 1910, at Hibernia, in the County of Mor-
ris, operated a steam railroad in which it used
locomotives and cars.

3. That the defendant by its servants and agents
on the date aforesaid by blowing a locomotive
whistle frightened a horse drawing a carriage in
which Leonard Mingos, intestate of the plaintiff,
was riding, at Hibernia, aforesaid, and the horse
by reason thereof ran away and threw the said
Leonard Mingos out of the carriage and he was
then thereby killed.

COMPLAINT

4. That the defendant by its servants and agents negligently blew the said whistle which frightened the said horse and caused the said horse to run away.

5. That the negligence aforesaid of the defendant by its servants and agents consisted in this: that it did not use reasonable care to blow the said whistle at a lawful place and did not use reasonable care to blow the said whistle in a reasonable way, but on the contrary the defendants by its servants and agents blew the said whistle at an unlawful place and carelessly and negligently caused the said whistle to sound in a loud and unusually long and frequent manner, knowing that the horse aforesaid was being frightened thereby and continued so to sound the said whistle after it knew the said horse was being frightened thereby.

6. That the plaintiff brings into Court Letters of Administration granted on the Estate of the said Leonard Mingos by the Surrogate of the County of Hudson and makes profert of the same.

7. That the said Leonard Mingos left him surviving Helen Mingos, a widow, and the following named children: next of kin, Leah Aronstein, Bessie Mingos and Joseph Mingos, who have suffered pecuniary loss and damage by reason of the death of the said Leonard Mingos.

8. That the within action is commenced within two years from the date of the death of the said Leonard Mingos.

The plaintiff demands twenty-five thousand (\$25,000) damages.

ALEX. SIMPSON,
Attorney of Plaintiff. 40

ANSWER.

(Filed November 7, 1912).

CIRCUIT COURT OF THE COUNTY OF
HUDSON.

10

HELEN MINGOS, Administratrix of
the Estate of Leonard Mingos,
Deceased,

Plaintiff,

*vs.**Answer.*

20

THE CENTRAL RAILROAD COMPANY
OF NEW JERSEY,

Defendant.

The answer of The Central Railroad Company of New Jersey, a corporation of the State of New Jersey, having its principal office for the transaction of business in the City of Jersey City, County of Hudson and State of New Jersey, says:

- 30 1. It admits the allegations of Paragraphs 1 and 2 of the complaint.
2. It has no information as to the matters and things contained in Paragraph 3 of the complaint.
3. It denies that its servants, agents or employees negligently blew a whistle as set out in the fourth paragraph of the complaint.
4. It denies the allegations contained in Paragraph 5.
- 40 5. It has no information as to the matters and things set out in Paragraph 7.

RULE FOR JUDGMENT

6. As a separate defense this defendant says that this is an action by an administratrix for injuries caused by the wrongful act, neglect or default of a railroad company owning and operating a railroad within the State of New Jersey resulting in the death of her intestate and that said action was not commenced and sued within one year next after the death of her intestate. 10

GEO. HOLMES,
Attorney of Defendant.

 RULE FOR JUDGMENT.

This action was tried before Judge Luther A. Campbell with a jury at the Hudson Circuit, on November the 24th, 1914. 20

This cause having been heard and submitted to the jury they returned their verdict as follows:

They say they find for the defendant and against the plaintiff.

Whereupon it is adjudged that the defendant recover of the plaintiff its costs which are taxed at fifty-nine dollars and ninety-nine cents (\$59.99).

Judgment entered November 28th, A. D. 1914. 30

LUTHER A. CAMPBELL,
Judge.

Attest:

JOHN J. MCGOVERN,
Clerk.

RETURN.

Filed Nov. 29, 1915.

10 The answer of Luther A. Campbell, Esquire,
Judge of the Circuit Court, holden in and for the
County of Hudson, and within named, the record
and proceedings of the plaint whereof mention is
within made with all things touching the same, I
send to the Judges of our Court of Errors and Ap-
peals of the last resort of all causes at Trenton,
N. J., at the day and year within contained, in a
certain schedule to this appeal annexed as within
I am commanded.

LUTHER A. CAMPBELL,
Judge.

20

30

40

WILLIAM HARGRAVE—Direct

TESTIMONY.

WILLIAM HARGRAVE, sworn.

Direct examination by Mr. Simpson.

Q. Mr. Hargrave, what is your occupation? 10
A. Photographer.

Q. And your office and place of business is across the street, isn't it, from the Court House? A. Yes, sir.

Mr. SMITH—You mean here, in Jersey City?

Mr. SIMPSON—Yes.

Q. Did you make this picture? A. Yes, sir; that is made by myself.

Q. Do you remember the date you made it? A. 20
I can refer to my memorandum and give you that, yes, sir.

Q. What date was that? A. September 4, 1914.

Q. And does this picture correctly portray the scene at the place that you took it—I mean by that, has the plate been doctored or fixed up in any way? A. Not anything done from it whatever.

Mr. SIMPSON—Just mark that for identification. 30

Picture marked A for identification.

Q. Is this also a picture made by you at the same time? A. Yes, sir.

Q. Does that correctly portray the view as taken by you, without any doctoring or altering of the plate or anything of that kind? A. Correct print from the plate without any alterations whatever.

Picture marked B for identification. 40

MRS. LEONORE AARENSTEIN—Direct

Q. I ask you this same question about that picture? A. Same answer.

Picture marked C for identification.

10 Q. Showing you still another picture, did you make that picture? A. Yes, sir.

Q. And does that correctly represent the scene as taken by your camera, without any alteration of the plate or— A. Direct from the plate as it is made.

Q. Now, when you took this picture did you have your camera on the railroad track directly opposite the point where the animal is? A. Yes.

Picture marked D for identification.

20 Mr. SIMPSON—That is all.

Mr. SMITH—As long as the pictures are not offered in evidence I have no questions.

MRS. LEONORE AARENSTEIN, SWORN.

Direct examination by Mr. Simpson.

30 Q. Mrs. Aarenstein, you are the daughter of the late Dr. Mingos? A. Yes, sir.

Q. You are a married lady? A. Yes, sir.

Q. Living with your husband? A. Yes.

Q. Now, in November, 1910, where were you living? A. In Denville, New Jersey.

Q. Denville, in Morris County? A. Yes.

Q. Was your father visiting with you? A. Yes, sir.

Q. Were you out driving on the 2nd of November with your father? A. Yes, sir.

40 Q. Did you go to a place called Hibernia? A. Yes.

MRS. LEONORE AARENSTEIN—Direct

Q. What were you driving, what kind of a rig?
A. Horse and runabout.

Q. And did you turn back from Hibernia? A.
Yes.

Q. To go to Rockaway? A. Yes, sir.

Q. Now, what road did you go on? What road
did you drive on, the road from Hibernia to Rocka- 10
way? A. Yes, sir.

Q. Dirt road? A. Yes.

Q. Are the Central Railroad tracks near that
road? A. Very near most of the way.

Q. I show you a picture marked A for identifica-
tion and ask you whether that correctly portrays
the road and the railroad track as it was on the day
that you were driving, with the exception of the
foliage on the trees? A. It does, exactly. 20

Mr. SIMPSON—I offer this in evidence.

Mr. SMITH—I do not object now. You can
go ahead. I am satisfied.

Photograph marked Exhibit P 1.

Q. I show you a photograph marked B for iden-
tification, and ask you whether that correctly por-
trays the situation in the vicinity of the point that
you were driving at the time of the accident? 30
A. It does.

Mr. SIMPSON—I offer that in evidence.

Photograph marked P 2.

Q. I show you a photograph marked D for iden-
tification, which has been referred to by Mr. Har-
grave as having been taken when his camera was
on the track directly opposite the point where the
animal shows on the picture. Does that correctly
represent the road and vicinity on which you were
driving? A. It does, exactly. 40

MRS. LEONORE AARONSTEIN—Direct

Mr. SIMPSON—I offer it in evidence.

Photograph marked Exhibit P 3.

Q. Now, Mrs. Aarenstein, can you by referring to these photographs, point out which direction you came along with your horse that day? A. Yes, sir; I was coming from there down towards this way.

THE COURT—Can you not talk louder, I don't know that the jury can hear you. I cannot hear. Does the jury hear the witness?

A JUROR—I do not hear.

Q. From this point which I have marked C to the point which I marked D, that is the direction you were going? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. Now, did anything happen as you were driving along the road from the point C toward the point D—anything happen? A. Yes, sir.

Q. Well now, what is the condition of the road? is it level, is it high there, a slight incline, or a steep incline, or a steep decline or a slight decline, or does the road run level from the point C to the point D? A. A slight decline.

Q. A slight decline? As you got anywhere along this road did anything happen? A. Yes, sir.

Q. Where were you? Can you point out on this photograph where you were when you say something happened? A. Exactly where that car is.

Q. Where this automobile is—right there? A. Yes, sir.

Q. What happened as you got to the point where the automobile is? A. When I got just before that point I saw the train coming down there (indicating).

MRS. LEONORE AARENSTEIN—Direct

Q. Saw the train coming from the direction of D?
A. Yes, sir.

Q. Now, just a moment. You gentlemen will take these and follow this with some degree of intelligence. (Hands three photographs to the jury.) While the gentlemen are looking at those I will show you a photograph, which I evidently overlooked, marked C, and ask you whether that correctly represents the condition at the time of the accident?
A. Very good, yes, sir.

10

Q. And how about these ties? A. These ties were not there, nor the leaves were not there; it was quite empty.

Photographed Exhibit P 4 and handed to the jury.

20

Q. Now, Mrs. Aarenstein, you said that as you got to a certain point which you marked something happened? Who was driving the horse? A. I was.

Q. Was your father sitting on the right hand or left hand side? A. On the right hand side, I think.

Q. Who was nearer to the railroad, your father or yourself? A. I was.

Q. Now, what happened, as you say? A. Pardon me?

30

Q. As you say you got on the top? A. I don't quite remember whether I was—on which side of the carriage I was on, because I drive on the right hand side and sometimes on the left, and I don't remember that.

Q. What did happen on that day? Just describe what happened? You say something happened?
A. When I was just—before I got quite to the top of the hill I saw the train coming along slowly—I

40

MRS. LEONORE AARENSTEIN—Direct

saw it, that was all; and when it was directly opposite the whistle blew, long and loud.

Q. Well, did you look when the whistle blew? Did you look towards the train? A. I did, because it was very long and it was unusually long, and I looked and I saw the man's face looking out of the cab window to me.

Q. After it blew loud and long and it attracted your attraction and you looked at the train and saw the man looking at you, what if anything did your horse do, after that first blast? A. Stopped trotting and just stopped, startled.

Q. How did it show this being startled? What did it do that you say it was startled? How did it act? A. *Crouched*.

Q. What do you mean by crouched; did it throw up its head?

Mr. SMITH—I object.

Q. What do you mean? You will have to tell these gentlemen what you mean by crouched. You say it did something. Now will you describe to them what it did? A. Pulled itself together as a horse does when it is very much startled.

Q. After that did anything happen?

Mr. SMITH—I object and ask that the last part of the answer be stricken out as a conclusion on the part of the witness.

THE COURT—I will not strike it out.

Q. Did anything happen different than what you have described? Did anything else happen? A. There was another very long, very loud blast of the whistle.

Q. What happened if anything after that second blast and after you say what occurred after the

MRS. LEONORE AARENSTEIN—Direct

first blast? A. Why, the horse jumped, reared and plunged ahead.

Q. What did you do? A. Held on.

Q. What happened? A. She went tearing down the road and threw us out.

Q. How far did it go? A. Around two curves—perhaps one block or two blocks, I don't know. 10

Q. Then what happened; who was thrown out of the carriage? A. Both of us, my father and myself.

Q. Where was your father thrown? A. Along the road, in the rocks.

Q. Eh? A. By the side of the road, in the rocks.

Q. In the rocks? A. Yes.

Q. Was he conscious or unconscious? A. Unconscious. 20

Q. Now, how long had you owned this horse that you were driving that day? A. About five years.

Q. What was the name of the horse? A. Jet.

Q. Had you ever driven it in the vicinity of railroads before, where there were railroad trains passing and whistles being sounded? A. Always.

Q. Did it ever show any signs of fear before? A. Always drove him all over—no, sir.

Q. Had you ever heard railroad trains whistle before this train yourself? A. Yes. 30

Q. Frequently? A. Yes, sir.

Q. Well, now, will you describe this whistle that you heard this day, as to whether it was like the other railroad whistles that you heard, or whether there was any difference in it? A. It seemed very much longer and very much louder.

Q. Than what? A. Than any whistles I had ever noticed before.

Q. What was its characteristic as to length and 40

MRS. LEONORE AARENSTEIN—Direct

loudness; was it a continuous or interrupted whistle or what kind of a whistle was it? A. I don't know, it was so piercing.

Q. Piercing? A. Yes.

10 Q. Now, after the accident, after you were both thrown out what then happened? A. Well, after I came to and I saw my father laying there I went out in the road to see if I could find anybody, and by that time the horse was out of sight, and after a while two women came along and I asked them if they would take us to a doctor, and they said no, and then they went away.

Q. And then what happened? A. Then the next thing the train evidently had gone to Hibernia and come back.

20 Mr. SMITH—I object to it and ask to have it stricken out.

Mr. SIMPSON—I consent.

THE COURT—It may be.

30 Q. It came back? A. The train came back and the trainmen came up, and I asked them if they would take my father down to Rockaway. They refused, but they did take the robes of the carriage that were thrown out and left those at the station.

Mr. SIMPSON—I am willing to have that stricken out.

Q. How was your father transported home? A. By private automobile.

Q. Where was he taken when he was taken? A. To Dr. Flagg's office, Rockaway.

Q. From there where was he taken? A. To my home in Denville.

40 Q. Did he ever regain consciousness? A. No, sir.

MRS. LEONORE AARENSTEIN—Direct

Q How long after did he die? A. The next day at 12.30.

Q. Did you have any other physician besides Dr. Flagg? A. Dr. Abbey from New York.

Q. As a surgeon? A. Yes, sir.

Q. What time of the day was it when the accident happened? A. About half past three. 10

Q. With reference to the trees, were the leaves on the trees or were the trees bare? A. No, sir; it was bare.

Q. No leaves on the trees? A. No, sir; very few.

Q. Was it a clear day or was it a cloudy day or a foggy day? A. It was a clear day.

Q. How plainly could you see the engineer or the man that was leaning out of the cab looking directly at you—how plainly could you see him? A. As plainly as I see you. 20

Q. Could you estimate how far away he was from you when these whistles sounded, in distance? A. Not very far. I don't know distance, but just a little way.

Q. Just a little way? A. Yes.

Q. You would not attempt to estimate any distance? A. I could not.

Q. What was your father's profession? A. He was a physician. 30

Q. He was just visiting you, wasn't he? A. Yes.

Q. At the last trial you were asked by the Court: "as I understand at the time the whistles were blown (page 11) when you say your horse was opposite the locomotive, how far was the locomotive from the horse, that is, how near did the railroad run to the carriageway on which you were driving on that point?" Now, you have said now that you would not attempt to estimate distances. At that time 40

MRS. LEONORE AARENSTEIN—Direct

you answered: "I am no judge of distances, but I should think about thirty feet perhaps, or twenty feet." Does this refresh your memory at all as to what the distance was between the locomotive and your horse? A. I think so.

10 Q. Well, I mean could you tell us—could you tell these gentlemen how far that locomotive was away from you when the whistle blew? A. A little further than across this room—twice as far.

Q. As across this room. You mean from where you sit to that wall? A. Yes.

Mr. SMITH—Twice as far.

Q. Now, after the horse bolted, you were trying, of course, to control your horse, weren't you?

20 Mr. SMITH—I object to it as leading.

Mr. SIMPSON—I will withdraw it.

Q. After the horse bolted what did you do? I am asking you particularly in reference to any observation you made of the train. Did you see where the train went, whether it stopped or whether it continued, or anything of that kind? A. After the horse bolted? No, I was watching the horse.

30 *By the Court.*

Q. Which direction was the train going, Mrs. Aarenstein? You are showing on the photograph from C to D. Let us have that photograph. Where you marked C, D?

Mr. SIMPSON—Yes.

Q. As I understand you say you were proceeding from C to D? A. Yes, sir.

40 Q. Which way was the train proceeding? A. This way.

MRS. LEONORE AARENSTEIN—Cross

Q. The opposite direction — from D to C? A. Yes, sir.

Cross-examination by Mr. Smith.

Q. Mrs. Aarenstein, you were driving from Hibernia to Rockaway? A. Yes, sir.

Q. Is that right? Now, the road from Hibernia crosses the railroad twice, doesn't it, right in the town? A. I don't know, sir. 10

Q. You say you are so familiar with the scene of this accident that you can identify all these pictures as showing the true condition at that time; don't you know about the road?

Mr. SIMPSON—I object to it as being argumentative, and second, on the ground it misstates the evidence. She does not say she is familiar with the vicinity; she is familiar enough to identify these pictures, and none of these photographs show it crosses the track twice, and I object to the question as assuming a fact not in evidence. 20

THE COURT—I will permit the question.

A. I think the roads where the pictures are taken is this side of Hibernia, where the crossings are supposed to be, and I don't know how it is in Hibernia. These pictures are considerably this side of Hibernia; I mean toward Rockaway. 30

Q. How far? A. A half a mile, or a mile.

Q. Just outside of the town? A. I don't know the distance, outside.

Q. How far is it from the store? A. I should judge a half mile, or a mile.

Q. You passed the store? A. Yes, four years ago. 40

MRS. LEONORE AARENSTEIN—Cross

Q. Certainly. You saw this place of the scene of this accident, four years ago? A. Yes.

Q. Yet you can identify, and say that these photographs truly represent the scene of the accident. Now, if you are so familiar with them as to say they truly represent the scene of the accident, 10 couldn't you remember back as to whether or not the road crosses in front of the store? A. I have been up where the pictures have been taken, since then, but not where the crossings are.

Q. You can see the crossings from that place? A. No, sir.

Q. Why? A. I don't know why, but you can't; at least I did not.

Q. Why? Are they too far away? Are they hidden? A. I think they are too far. 20

Q. You think they are too far? A. I think so; yes, sir.

Q. Really do. I show you a picture and ask you from your memory if that correctly represents a scene up there?

Objected to. Objection withdrawn.

Q. That shows the view of the road running from the point of the accident to Hibernia, doesn't it? A. Where is the crossing? 30

Q. The crossing? I didn't ask you about that. I ask you again; see if you can answer my question; this shows, doesn't it, a view of the road from the point of the accident toward Hibernia? A. Yes, sir.

Q. Sure of that, are you? A. There is the church.

Q. There is the church? A. Yes, sir.

Q. Because there is a church on the picture? Is 40 the church in Hibernia? A. I hope so.

MRS. LEONORE AARENSTEIN—Cross

Q. I don't want you to hope, madam. I want you to know. Recognize it, don't you? A. It is the picture, yes.

Q. Yes. Do you see the railroad tracks there? A. Yes, sir.

Q. They curve now. Does the road cross the railroad tracks just the other side of this red building, as you come towards Rockaway? A. I cannot see that. 10

Q. I ask you, to your memory, does it? A. I don't know.

Q. Well, do you think, Mrs. Aarenstein, that you really recall the scenes of this road so that you can testify that these pictures truly represent the scene there? A. I certainly do where the horse was frightened and where I was thrown out, I know perfectly. 20

Q. And the rest of it your mind is sort of blank? A. I have not been there for two or three years, and then only once or twice in my life.

Q. Taking the time you were there in four years, how many times have you driven over this road?

A. Once or twice.

Q. You testified at the last trial, didn't you, Mrs. Aarenstein? A. Yes, sir.

Q. You testified truthfully, didn't you? 30

Objected to as not proper cross-examination. Question allowed.

A. Yes, sir.

Q. Do you know how far this crossroad is from the point of the accident?

Mr. SIMPSON—I object to it on the ground that there is no proof that there is any crossroad.

Mr. SMITH—I will withdraw the question. 40

MRS. LEONORE AARENSTEIN—Cross

Q. Mrs. Aarenstein, this horse that you speak of, was the horse at all afraid of trains? A. No, sir.

Q. Not at all? A. No, sir.

Q. I show you a paper and ask you if that is your signature?

10 Mr. SIMPSON—I object. Don't answer that unless the whole paper is shown to the witness.

Mr. SMITH—I didn't ask her.

Mr. SIMPSON—I object to that. The way to prove a document is to show the witness the whole paper, not to show them something at the end. She is entitled to have the whole document. He cannot ask a witness about a part of a document.

20

THE COURT—Show me upon what you base that. I did not know that was the rule, being asked as to whether what appears to be a signature is her signature. She is not asked whether the paper is what it purports to be or not; she is asked whether it is her signature.

30 Mr. SIMPSON—My reference is to Wigmore, and I will have to send over to get it. You can admit it and strike it out later if I show you that reference.

THE COURT—I will take that position. I will overrule the objection, subject to being stricken out if counsel shows me it is not proper cross-examination.

40 Q. I ask you if that is your signature? A. I think it is—very poor, but I think it is.

MRS. LEONORE AARENSTEIN—Cross

Q. I show you this paper and ask you if you have seen that before?

Mr. SIMPSON—I object to that as not proper cross-examination, unless it appears that it is in some way relevant to her examination. She is not a party, you see, to this suit, simply a witness, and I object. I cannot tell now—I have not seen the paper—whether it is for the purpose of contradiction. 10

THE COURT—Neither can I, but certainly if she does not identify it it could not be used at the present time. I will admit the question.

Mr. SMITH—She identifies the signature. I am asking the whole paper.

Mr. SIMPSON—Just read that before you answer that. 20

THE COURT—One minute. I object to Mr. Simpson telling the witness what to do.

Mr. SIMPSON—I object to his asking—

THE COURT—I am not going to have any more of this argument. When there is objection to be made it will be made and the Court will rule on it. We are spending time of Court and jury with argument between counsel on these questions. Now, gentlemen, proceed, and proceed in an orderly manner. 30

(Question repeated).

Mr. SIMPSON—I object to the witness answering that question until she had an opportunity to see what the paper is, the paper being held in counsel's hand, and he simply showing—

Q. I show you the paper.

THE COURT—She is entitled to have the 40

MRS. LEONORE AARENSTEIN—Cross

paper to make that examination which will permit her to answer that question.

Mr. SMITH—Absolutely no doubt of that, sir, and I never held it in my hand; I handed it to her.

10 THE COURT—Suppose you hand it to the witness and let her make such inspection of it as will satisfy her, so she may answer the question.

(Paper handed to witness and she examines the same).

A. I cannot read all of it.

20 THE COURT—Take your time, madam, and satisfy yourself to that extent, whether you can answer the question one way or the other.

A. I can only read about one in three words.

Q. That is not what I asked you. I asked you whether you had ever seen it before? A. I don't know until I have read it.

Q. You don't know until you have read it? Then go ahead and read it.

30 THE COURT—Try and read it. If you can read it, then answer the question; if you cannot read it then you may have to answer that way. (Witness examines paper.)

THE COURT—Now you understand the question?

A. There is one paragraph I cannot read.

(Question repeated).

40 A. Yes, sir.

MRS. LEONORE AARENSTEIN—Cross

Mr. SMITH—I asked it be marked for identification.

A. You say that I say I have seen all of that before?

THE COURT—You may answer just exactly the way you ought to after making the examination. 10

A. All right, then.

THE COURT—Mr. Kelley, as soon as you have marked it hand it to the witness.

Paper marked E for identification.

THE COURT—Repeat the question again, and pay attention to the question, keep in mind the examination that you made of that paper and your answer. 20

(Question repeated).

A. All except the last paragraph.

Q. All except the last paragraph? A. Yes.

Q. And that is the paragraph right over the signature? A. I don't remember that. Yes, it is over my signature.

Q. How do you know then you have not seen the last paragraph? A. Because I never made a statement like that in my life to any one. 30

Q. Did I ask you that, Madam?

Mr. SIMPSON—I object to what he asked her.

That question is objected to. It is not proper cross-examination.

Mr. SMITH—I ask that the answer be stricken out as not responsive. 40

MRS. LEONORE AARENSTEIN—Cross

Mr. SIMPSON—I ask that it should not be.

10 THE COURT—Again I am going to try and have the thing clear in the witness' mind. Now, read the question again, Mr. Kelley, and Mrs. Aarenstein pay as close attention as you can to the wording of the question and answer it the best you can after having made an examination of the paper. Answer the question directly.

(Question repeated).

Q. The paper? A. The paper, all except the last paragraph.

20 Mr. SMITH—I ask that it be stricken out.

Mr. SIMPSON—I object.

THE COURT—I do not see why I should strike it out.

Mr. SMITH—I am not asking if the things contained in that paper are true. I asked her—

A. Empty then.

30 THE COURT—I will not strike it out. I will let the answer stand.

Q. Have you seen the last sheet of that, the one that you admit contains your signature, before? A. Yes; empty, and written without the last paragraph.

Q. Is that your signature there? A. I think so, but it is very poor.

40 Q. Well, you think so? Don't you know your own signature, Madam? A. Yes, sir.

MRS. LEONORE AARENSTEIN—Cross

Q. Well, it is your signature, isn't it? A. I think it is. Would not be my signature to-day, though.

Q. It would not be your signature to-day? You mean you do not write the same as you did then? A. No, sir.

Q. Now, Mrs. Aaron—or Aarenstein, is it? A. Aarenstein, yes. 19

Q. You remember signing that paper, do you?

Mr. SIMPSON—I object to that as not proper cross-examination. He is offering that paper, I suppose, for the purpose of contradiction. So far, of course, I have no objection to it, but whether she remembered signing it or does not remember signing it certainly is of no evidential force whatever. The thing is, did she make such a statement as that, not whether she remembers making it now. 20

THE COURT—The purpose now, I take it, is simply to adduce from this witness that testimony which can be adduced by it, to put the paper in such shape it may be fully marked for identification.

Mr. SIMPSON—He has done that. He has proved the signature and he has proved the paper, and he could have it marked for identification. Certainly it is in shape to be offered, but the question is whether she remembers signing it. That won't help this paper, because it is her act whether she remembers it or whether she don't remember it, if she did it. 30

THE COURT—I will sustain the objection. You may have your objection. 40

MRS. LEONORE AARENSTEIN—Cross

Q. Mrs. Aarenstein, do you remember the time that you signed this paper? A. Yes, sir.

Q. When was it? A. The old man forced himself into the house—

Q. I didn't ask you that. I ask that it be stricken out.

10

THE COURT—Strike it out. Repeat the question.

(Question repeated).

A. The hour, you mean?

Q. The date?

THE COURT—The date, the month and the year, if you can tell.

20

A. It was in November, I think it was the third, in the morning, early.

THE COURT—The third of November, what year?

A. 1910.

Q. Where? A. My home in Denville.

Q. Your home in Denville? A. Yes.

30

Q. And at that time were questions asked you as to the happening of the accident and as to the animal.

Mr. SIMPSON—I object to that on the ground that it is not proper cross-examination. The paper has been proved—no objection whatever to the paper. What was asked her at the time she signed it—

THE COURT—Let me ask you, Mr. Smith, what is the relevancy of that question?

40

Mr. SMITH—Why, if your Honor please, the relevancy is this: I intend to prove that

MRS. LEONORE AARENSTEIN—Cross

this witness has not told the truth on the witness stand when she says that this horse was never afraid of trains, by the fact that over her own signature she has said that the horse was afraid of trains.

10

THE COURT—Very well. You are asking to have and have had that paper marked for identification. Now, apparently, when it is marked that way you are not to use it until it has been admitted in evidence.

Mr. SMITH—I cannot offer it in evidence until it comes in my case, but I have a right to cross-examine the witness.

20

Mr. SIMPSON—I am objecting to this on the ground it is not cross-examination, whether anyone asked her questions. Suppose she says yes. How does that help us? Or that she said something. I have no objection to that; but that she was asked questions certainly is not evidential.

THE COURT—I suppose it amounts to nothing, Mr. Simpson, if she says she was asked questions, if she did not answer them. I suppose it amounts to nothing.

30

Mr. SIMPSON—That is the reason it ought not to be asked, and I object that it is not proper cross-examination.

THE COURT—Maybe it is not strictly. I will permit it, however.

A. I don't remember the question. I was frantic

40

MRS. LEONORE AARENSTEIN—Cross

with grief because my father was dying just at that time.

Mr. SMITH—I object and ask that it be stricken out.

10 Mr. SIMPSON—I object to the striking out. She says: “I don’t remember, because my father was dying, and my mind was full of grief.”

THE COURT—I should think it should be stricken out, because it does not seem to be responsive. She is asked if questions were asked her.

A. Yes, sir.

THE COURT—Yes, that is the answer.

20 Q. At this road, Mrs. Aarons, you say you thought it was about twice the distance across this room from the point where you were to the railroad track. As a matter of fact, don’t you know it is one hundred and seventeen feet from the railroad tracks to the point where you were? A. I don’t know the distance.

Q. Don’t know that? A. No.

30 Q. Don’t know the distance? You know that point, where you were, is up on top of a hill, don’t you? A. It is up the grade, yes.

Q. Up a grade, and the railroad is down below the grade? A. Yes, sir.

Q. You say, Mrs. Aarons, that you saw this train. Was that when you were up at the top of the hill? A. Yes, sir.

Q. You saw the train coming towards you, did you? A. Yes, sir.

40 Q. You did not notice anybody on the train, at all, did you? A. When it was coming toward me, I noticed just the train.

MRS. LEONORE AARENSTEIN—Cross

Q. The train? A. Yes.

Q. And at any time you didn't see anybody on the train, did you? A. Yes.

Q. Did you? A. Yes, sir.

Q. Then I call your attention now, Mrs. Aarenstein, to your testimony at the last trial. You will find it on page 21, Mr. Simpson— 10

Objected to as not the proper method of examining.

Q. You remember, Mrs. Aarenstein, this question being asked you, and your answer: "Did you see anybody on the train at all?" and your answer: "I did not notice. I saw the train coming and we were talking. We were talking about the people." You so testified, didn't you? A. He didn't let me finish then. I was going to say—somebody told me to stop right then. 20

Q. Why, Mrs. Aarenstein, don't you know that is not true? A. No, sir.

Q. And there is not a word of that in the evidence, and I ask Mr. Simpson to read on the page.

Mr. SIMPSON—I am not on the stand.

Q. Don't you know that is not true? A. It is true. 30

Q. Don't you know that the evidence contains absolutely no stop or no remark by any one at that time?

Mr. SIMPSON—I object to that on the ground—well, I won't object. I will withdraw my objection.

Question repeated.

A. I know nothing of the sort. 40

MRS. LEONORE AARENSTEIN—Cross

Q. Don't know anything of the sort, do you?

A. No, sir.

Q. Isn't it true, Mrs. Aarenstein, that since the last trial and since you have been supplied or read the decision of the Court of Errors and Appeals, that you have changed your testimony? A. No, sir.

10

Q. Well then, why is it that at the last trial you said you did not notice anybody at all on the train?

Mr. SIMPSON—I object, if your Honor please, because the question misstates a fact. He is assuming that this witness stated at the last trial that she did not see anybody on the train at any time. The evidence that he reads is this: “Did you see anybody on the train at all? A. I did not notice. I saw the train coming and we were talking.” That is at the time the train is coming. Now, he incorporates in his question all the time. He does not limit his question to the time the witness saw the train coming, but to all the time. That is not the evidence. This question simply refers to the time the train was approaching.

20

30

THE COURT—I will permit the question and I will give the witness ample opportunity to make the answer.

A. Didn't give me an opportunity to answer.

Q. Did you ask for an opportunity? A. Not when people told me it was not required to answer.

Q. Who told you it was not required? A. Probably you. I don't remember.

40

MRS. LEONORE AARENSTEIN—Cross

Q. In other words, I asked you a question and then told you it was not required to be answered?
A. Same as to-day, that you didn't let me finish.

Q. Any time I don't let you finish you stop me. I want to know who at the last trial told you not to answer the question. A. You would not let me finish giving the answer.

Q. To that particular question; is that it. A. To many particular questions.

Q. Will you show me those? A. I can't remember them now. I know you would not let me finish talking. I never had been in Court before.

Mr. SIMPSON—Page 23, line 30, look at that.

Mr. SMITH—I don't see where I stopped anything. I asked that it be stricken out.

Mr. SIMPSON—No; there, these five words, "I didn't ask you that."

Mr. SMITH—Is that stopping her? That is having a question answered.

THE COURT—You are getting right back to what I cautioned you against some time ago.

Mr. SMITH—I guess your Honor is right.

Q. Mrs. Aarenstein, did you not testify as follows: (page 20): "And then as you got opposite where the train was you were jogging along quietly?"

A. Yes, just going along.

Q. How fast was the train going, swiftly? A. No, just poking along.

Q. Did you see anybody on the train at all? A. I did not notice. I saw the train and we were talking; we were talking about the people.

Q. As you went along talking with your father you heard this whistle? A. Yes, sir."

MRS. LEONORE AARENSTEIN—Cross

Q. Now, isn't it true that that question was asked you directly as to whether or not when the train was opposite you you saw anybody at all on the train?

10 Mr. SIMPSON—I object on the ground that he is asking from her an opinion which she cannot give. He is asking on the question what the evidence shows, how it was asked.

THE COURT—It strikes me so.

Mr. SMITH—I am just reading it to her.

THE COURT—Then you are asking her opinion on that.

Mr. SMITH—Yes.

20 THE COURT—I will sustain the objection on that ground.

Q. Mrs. Aarenstein, if at the last trial you testified that you did not notice anybody on the train at all, were you testifying truthfully?

Objected to as not proper cross-examination.

Objection sustained.

30 Q. Did you testify at the last trial in this case to this question (page 21): "Did you see anybody on the train at all?" And your answer: "I did not notice, I saw the train coming and we were talking; we were talking about the people."

Mr. SIMPSON—I object to that on the ground that he has asked her about this same question, and it has been answered.

40 THE COURT—I will exercise my discretion and let her answer.

MRS. LEONORE AARENSTEIN—Cross

A. Yes, sir; I said that.

Q. Did you also testify at the last trial that at the first whistle the horse merely shivered and drew up her skin?

Mr. SIMPSON—I object to that unless such an answer is pointed out to her, it being a conclusion of counsel. 10

THE COURT—I will overrule the question.

Q. Did you say this (page 21): “Then when you heard these two, the first one you say the horse shivered, is that right? A. She stopped; it startled her, because it startled me, because it was so shrill and so long.” Did you so testify? A. Yes, sir.

Q. And this question: “Q. And then the second one she started to run? A. She just came up and down, reared up and then plunged ahead.” Is that right? A. Yes, sir. 20

“Q. (Page 24) Now this action on the part of the horse, that you speak of, this shivering or pulling up of his skin, or whatever it was you called it, could you see that plainly? A. She just stopped, just like a horse would when they are frightened; she just stopped.” Did you so testify? A. Yes, sir. 30

“Q. She stopped? A. Yes, sir.” Q. You so testified? A. Yes, sir.

Q. “Q. What else did she do that was apparent when she stopped? A. Nothing at all, just stopped.” A. She had been trotting.

Q. Is that what you said? A. Yes, sir.

Q. You answered: “Nothing at all, just stopped. Q. Throw her head back? A. No, sir; she just stood stock still.” So testified, didn’t you? A. Yes. 40

MRS. LEONORE AARENSTEIN—Cross

Q. "Q. And for how long a time did that last?
A. Until the second whistle." That is true, isn't
it? A. Yes, sir.

Q. So that when the first whistle blew she
stopped? A. Yes.

10 Q. "Q. And she did not start to move again until
the second whistle had blown? A. No, sir." Is that
right? A. Yes, sir.

Q. "Q. And then it was that she reared and
plunged forward?" Is that true? A. Yes, sir.

Q. Then as I understand you now when the first
whistle blew the horse simply stood still? A. Yes,
sir.

Q. Stock still? A. Stopped.

Q. Just stopped and stood still? A. Yes.

20 Q. When the second whistle blew—when it had
blown the horse reared and plunged; is that right?
A. Yes, sir.

Q. Now, Mrs. Aarenstein, where was this man
that you say you saw on the train? A. In the win-
dow of the engine?

Q. Eh? A. In the window of the engine.

Q. In the middle of the engine? A. Window.

THE COURT—Window.

Mr. SIMPSON—Window.

30 Q. What was he doing? A. Looking out, facing
out.

Q. Did you see his eyes? A. I don't think I saw
his eyes. I saw his face.

Q. Did you see his full face? A. Yes.

Q. Straight face, did you, or a side face? A.
Almost straight.

Q. Almost straight? A. About like this, yes,
sir.

40 Q. As a matter of fact you don't know where he

MRS. LEONORE AARENSTEIN—Cross

was looking, do you? A. He was looking at me.

Q. How do you know he was looking at you?

A. Because he was direct enough so he would have had to look at me.

Q. How do you know he was not looking straight along the track? A. Because the face was pointed toward me, not down front.

10

Q. Where was he when you saw him? A. In the window.

Q. Opposite you? A. Directly opposite after the first whistle.

Q. Staring right straight at you? A. Yes.

Q. Sure of that, are you? A. Well, I think he was staring very particularly at me; he was not looking straight ahead down the track.

Q. Wasn't he staring ahead? A. No, sir; not down the track.

20

Q. Was he looking before the whistle blew? A. I didn't notice before the whistle blew.

Q. When did you first notice it? A. I looked at the engine after the first shriek of the whistle.

Q. The first shriek? A. Of the whistle, yes.

Q. Then you saw him looking at you, is that right? A. Yes.

Q. And then your horse stopped? A. It had already stopped the first whistle.

Q. Already stopped when you saw him looking at you? A. The first shriek stopped it and then I looked at the engine and I saw the man.

30

Q. Saw the man? A. If he had not blown I would not have looked.

Q. Is that true? A. Yes.

Q. Then the second whistle came? A. Yes.

Q. Then the horse started to run? A. Yes.

Q. Then you did not pay any attention, further attention, to the man at all? A. Well, no, sir.

Q. The horse went about two miles before you

40

MRS. LEONORE AARENSTEIN—Cross

went out of the carriage, didn't it? A. No, I don't think so, it was two miles, it was just around two curves.

Q. Down hill? A. Down—the first curve was a grade and the second curve was a level again.

10 Q. You have not been refreshing your memory since the last trial at all, have you? A. What do you mean?

Q. You have not been refreshing your memory?
A. I have been over there to that road where we were thrown out, yes.

Q. Have you been talking to anybody about seeing this man in the window of the engine cab? A. No, sir.

Q. Have not? A. No, sir.

20 Q. Have not said a word? A. To any one? No, sir.

Q. Have not read the opinion, have you, of the Court of Errors? A. The opinion?

Q. Yes. A. I have read that book that you have.

Q. Is that all? A. That is all.

Q. Haven't you read the opinion of the Court of Errors? A. No; that is all I have read.

30 Q. Haven't you talked it over with your counsel as to the—

Mr. SIMPSON—I object.

Q —to the opinion of the Court of Errors.

Mr. SIMPSON—I object to that. I am not this lady's counsel at all.

Mr. SMITH—I will withdraw the question.

40 Q. Haven't you talked it over with Mr. Simp-

MRS. LEONORE AARENSTEIN—Cross

son? A. No, sir; I have talked about it to no one at all.

Q. You have not talked to anybody about this case since the last trial, have you? A. Even to my mother. We very seldom mentioned it.

Q. Haven't you been down to see Mr. Simpson about it? A. I have only been in his office once, the other day, to find out exactly when to come here. 10

Q. I suppose when you got in there you did not say a word about your case at all? A. I asked him what chance he thought we had, that is all.

Q. Then you talked about it? A. I made that remark.

Q. You talked about the opinion of the Court of Errors and Appeals, didn't you? 20

Mr. SIMPSON—I object to it as not proper cross-examination.

THE COURT—I will permit it.

(Question repeated).

A. No, sir.

Q. You have never even asked Mr. Simpson at all as to the reasons the Court of Errors had for sending the case back, have you? A. No, sir. 30

Mr. SIMPSON—I object. It should not be stated to the Court that this case has ever been tried before.

THE COURT—She says no, she has not.

Mr. SIMPSON—I am willing to have that go in, if Mr. Smith is.

Mr. SMITH—I am willing to have it go in. 40

MRS. LEONORE AARENSTEIN—Cross

THE COURT—Very well then, both sides are satisfied.

10 Q. Well, Mrs. Aarenstein, you have testified a few minutes ago that you don't know whether this was one long whistle or whether it was an interrupted whistle—didn't you, just a few minutes ago?
A. Yes, sir.

Q. Well, if you don't know whether it was long whistle, why is it that you then say there were two whistles? A. There was one whistle and the horse stopped.

Q. Why did you say just a few minutes ago that you could not say whether it was one continuous whistle or whether it was an interrupted whistle?

20 Mr. SIMPSON—I object to that, if your Honor please, on the ground that she did not so testify. What she said was — she was asked about the first whistle, whether that was a long whistle or an interrupted whistle, and she said she could not tell. She has at no time said that she could not tell whether that whole series of whistles was one whistle or interrupted.

30 THE COURT—If it is a question of whether she has so testified, of course I will have to refer back to the stenographer's notes to find out what it was.

Mr. SMITH—I am willing.

(Stenographer repeats previous testimony.)

40 “Well, now, will you describe this whistle that you heard this day, as to whether it was like the other railroad whistles that you heard, or whether there was any difference in it? A. It seemed very much longer and very much

MRS. LEONORE AARENSTEIN—Re-direct

louder. Q. Than what? A. Than any whistles I had ever noticed before. Q. What was its characteristic as to length and loudness; was it a continuous or interrupted whistle or what kind of a whistle was it? A. I don't know, it was so piercing. Q. Piercing? A. Yes." 10

Mr. SIMPSON—It does not mean what Mr. Smith thinks.

(Last question repeated).

Mr. SIMPSON—I object on the ground he does not specify now which whistle he means. He says whether it was, as if it was one whistle.

THE COURT—The witness has had her attention called to the testimony to which she is referred, and with that in mind I will permit the question. Now read the question once again to the witness. 20

(Question repeated).

A. Yes, sir.

Q. Then I presume you meant that—

Mr. SIMPSON—I object to that as not proper cross-examination, whether she meant that or not. It is what she said. Her intentions and her meanings certainly have no relevancy. 30

THE COURT—Yes, I think you are right about that.

Re-direct examination by Mr. Simpson.

Q. When you testified at the last trial were you asked this question (page 25): "When you described to me on your direct examination the action of that horse at the first whistle, as I remember it, you 40

MRS. LEONORE AARENSTEIN—Re-direct

said something about a crunching up?" A. It was like that (illustrating) of her skin." A. Yes, sir.

Q. Were you asked this question: "Do you mean drew her body together?" And did you answer: "A. Sort of ke that." (illustrating). A. Yes, sir.

10 Q. And were you asked: "Then she drew her body up like a horse does when frightened;" and did you answer: "Yes, sir; but she did not move her feet or do anything bad?" A. Yes, sir.

Q. Were you asked: "Did she crunch, take her body up together? A. Yes, her body; I should think so." You so testified, didn't you, at the last trial? A. Yes, sir.

20 Q. Were you asked by Mr. Smith, on further cross-examination: "When you described that, you said you shivered; that is what you meant; you think her skin crinkled and she shivered? A. Just like that (illustrating); she just sort of drew herself together and she stopped." Did you so testify? A. Yes, sir.

Q. When you illustrated at the last trial these answers, what did you do—what illustration did you give as to what you meant? A. I don't—

Q. Don't you remember how you showed? A. No, sir (illustrating); only hunching together.

30 Q. So, as a matter of fact she did something besides merely stopping at the first whistle? A. Yes, sir; she drew herself together.

Q. As you have described? A. Stopped from trotting and drew herself together.

Q. As you have described? A. Yes, sir.

Q. In the testimony that I read you? A. Yes, sir.

40 Q. What were the circumstances surrounding the placing of your signature on that piece of paper which Mr. Smith has shown you—when was it that

MRS. LEONORE AARONSTEIN—Re-direct

your signature was put there? A. The morning my father died; when he was dying.

Q. What time did he die? A. He died at half-past twelve.

Q. What time was your signature put on the paper? A. About, I guess; I don't know—during the morning.

10

Q. Who was the man that produced the paper before you? A. Some old man that came to the door; came in and said he had to see me and would see me.

Q. And did he write any of this paper while you were there; did he talk to you and write? You will have to describe what happened. I don't know. You will have to tell us what happened? A. He kept talking and I told him I could not talk to him, my father was dying, and I must sit with him and—he said I must take that, I must just answer some questions that were very necessary, and he kept on talking, and he was writing along as he was talking, and just talking, and finally he sat down at the dining-room table, and I stood between the door to the room where my father was, and just answered his questions and he wrote.

20

Q. Now, did he ask you to sign the paper? A. I believe he did; yes, sir.

Q. Did you read it through before you signed it? Did you read the paper before you signed it? A. I just looked over it. I was crying.

30

Q. And you read it through before you signed it. You did or you did not? Did you read it or didn't you read it before you signed? A. I don't know; I think I did.

Q. You don't remember?

Mr. SMITH—She said she thinks she did.

40

MRS. LEONORE AARENSTEIN—Re-direct

Q. You have said something about the last sheet being in a different condition when you signed it. What do you say was not on that last sheet when you signed it? A. "He is a little afraid of trains"—because I never said that to any one.

10 Q. It is in above you signature? A. Yes; I went over it. I cannot read it.

Q. Went over here? A. Yes.

Q. That you did not read? You don't know that? A. I don't know what it is at all. I did not see him write that, because I was standing up in the doorway.

Q. Are you quite sure that this has been written in since you signed the paper: "He is a little afraid of trains?"

20 Mr. SMITH—She doesn't say that. I object.

Q. Well, was this on the paper when you signed it? A. I would not have signed my name underneath that; no, sir.

Q. If that had been on? A. If I had seen it; no, sir.

Q. Now, this man that came, did he tell you who he was; was he a claim agent? A. He said he was from the railroad.

30 Q. Did he tell you what he was? A. No, sir; he just said he wanted to get a report to send in for—I don't know—to send in to the railroad company a report.

Q. Did you tell him that your father was dying? A. Yes, sir.

Q. And to come again? A. Yes, sir; and he said—

Mr. SMITH—I object to it as leading.

Mr. SIMPSON—I will withdraw the question.

40 Q. Just tell us all the conversation?

MRS. LEONORE AARENSTEIN—Re-direct

THE COURT—I am wondering what value that may be.

Mr. SIMPSON—I want to show the circumstances, the surrounding circumstances of putting the signature on paper. I think I have a right to do that.

10

THE COURT—Well, that is a question in my mind, whether it is evidential, or whether it has any effect upon the paper. The question is whether she read it or not. Since the witness is one who is capable of reading and writing—whether if she even failed to read it will in any way relieve her from what may be in the paper, if she signed it.

Mr. SIMPSON—She is not a party to this action. She is not to be relieved, and I think I have a right to show what circumstances surrounded the manufacture of this document, that is all, to show what her state of mind was, what the condition in the house was, how this man acted and how she acted, so that when the jury takes this paper they have a right to say whether this woman signed it under ordinary circumstances or under extraordinary circumstances.

20

30

THE COURT—I don't know what the witness will say, but if what you succeed in getting does not match up with what the law is on the subject, of course, it would not be of any value to you, and I would have to strike it out.

Mr. SIMPSON—I think I have proved as much as I want to about that paper. I do not think I will take any more time with that paper.

40

MRS. LEONORE AARENSTEIN—Re-cross

Q. Now, Mr. Smith asked you whether you had read the opinion of the Court of Appeals, and you said you had read the book. By the book did you mean the book in his hands, a book of testimony?
A. Yes, the yellow book.

10 Q. That book does not contain any opinion of the Court of Appeals, does it? A. No, sir, I don't know anything about that.

Re-cross examination by Mr. Smith.

Q. Mrs. Aarenstein, didn't you tell that man "the horse is a black and about eight years, he is a little afraid of trains?" A. I never said she was afraid of trains to any one.

20 Q. Well, you are an educated woman, aren't you?

Mr. SIMPSON—I object to that as entirely irrelevant and of no consequence, whether she is educated or not, in this inquiry. He has gone all through this paper now. He has had it marked for identification, I have had my redirect on it, and I submit it is not proper re-cross examination.

30 Mr. SMITH—If your Honor please, Mr. Simpson has examined her as to all the surrounding circumstances with relation to this paper, but I must be shut off.

THE COURT—No; that is not the Court's thought, however. The question is as to your present question, Mr. Smith. What do you propose to show by that?

Mr. SMITH—I am proposing to show she is able to read and write.

40 Mr. SIMPSON—We admit she can read and

MRS. LEONORE AARENSTEIN—Re-cross

write. I can see its purpose. I admit she can read and write English.

Mr. SMITH—I do not take that admission.

THE COURT—Put it that way.

Mr. SMITH—That may not satisfy me. Many people can read and write, but they are not educated people. 10

Question repeated.

A. Yes, sir.

Q. You have had dealings with the world, have you not?

Mr. SIMPSON—I object on the ground that it does not mean anything, that question, and also on the ground that it is not proper re-cross examination. The question is framed to get in evidence that is of no value at all. “Dealings with the world” means absolutely nothing. 20

Mr. SMITH—I do not mean that man; I mean the world.

Mr. SIMPSON—I do not understand what his sarcastic comments mean, either.

THE COURT—Do you understand what is meant by having dealings with the world? 30

THE WITNESS—No, sir.

Q. You don't understand that? A. No, sir.

Mr. SMITH—I will withdraw the question.

Q. Have you had dealings in affairs of importance? A. Never.

Q. Never? A. No, sir.

Q. Never had any dealings in any affairs of importance at all? A. No, sir. 40

MRS. LEONORE AARENSTEIN—Re-cross

Q. Manage your own house. A. I manage my house.

Q. Have you ever executed any papers? A. I made a will.

Q. Did you read it? A. I don't think I did.

10 Q. Don't even know whether you read your own will or not?

Mr. SIMPSON—I object to it as not proper re-cross examination.

A. My lawyers made it for me.

Q. To you?

Mr. SIMPSON—I object to that as not proper cross examination.

20 A. To me? I told them what I wanted and they wrote it down.

Mr. SIMPSON—I object to it as not proper cross-examination, as to whether she had made a will or not.

THE COURT—I do not see the relevancy of it. I will sustain your objection, Mr. Simpson.

30 Q. Is it your practice, Mrs. Aarenstein, to sign papers at the behest of men that you do not know, without reading them?

Mr. SIMPSON—I object to that as not proper re-cross examination.

A. No, sir.

Mr. SIMPSON—I object. She admits that she signed this paper.

40 Mr. SMITH—The relevancy, sir, in my opinion, is this: Here is a woman who says she

MRS. LEONORE AARENSTEIN—Re-cross

signed a paper at the behest of a perfect stranger, and she did not know what was in it. Now, I want to know is it her usual practice to sign papers at the request of strangers without knowing what is in them.

Mr. SIMPSON—I object.

10

Mr. SMITH—In order to show that she would not sign a paper in that condition, a woman of her education.

Mr. SIMPSON—My position, if your Honor please, is this: simply that she does not say that she signed the paper without reading it at all. She says she signed this paper and that the last line was not in it when she signed it. She does not say she did not read it. She makes a flat charge that it has been interlined in there.

20

Mr. SMITH—She did not.

Mr. SIMPSON—So it is not proper re-cross examination.

THE COURT—I don't know what she actually said on the question, whether she read it or whether she did not read it, or whether she don't know whether she read it or not. Of course if she says she did read it your question would not be of value. Mr. Kelley, will you read her testimony?

30

(Testimony repeated by stenographer.)

THE COURT—I will overrule the objection.

(Last answer repeated.)

THE COURT—The answer was no, sir.

Q. When you signed that paper did you sign it 40

MRS. LEONORE AARENSTEIN—Re-Cross

right under the writing that he had made?
A. I don't remember.

Q. Don't remember that at all? A. No, sir.

Q. Was the horse a black? A. Black horse.

Q. Was it about eight years old? A. Yes, sir.

Q. That is true, isn't it? A. About eight years
10 old, yes.

Q. I see.

THE COURT—Is that all?

Mr. SMITH—That is all.

By the Court.

Q. I want to ask the witness: At the time that
you heard the first whistle where were you with re-
spect to the locomotive of the train? Now I mean
20 with respect to it. Was the locomotive of the
train towards the direction D, which you have
marked on this photograph, or was it opposite you,
or was it in the direction of C? A. It was oppo-
site.

Q. Directly opposite? A. Opposite, yes, sir, the
engine was.

Q. With respect to the man you say you saw in
the cab, what was his position with regard to you
as seated in the wagon; had he reached the point
30 opposite you, or was he opposite you, or had he
gone beyond you, at the time of the first blast
of the whistle? A. Just about opposite, not be-
yond—if anything, not quite opposite; I think it
was just about directly opposite.

Q. At the time of the second blast where was he
with respect to you, the man in the cab? A. The
second blast was when it was just there, because it
came immediately after the first. The train was
40 going slowly, and my horse had stopped.

MRS. LEONORE AARENSTEIN—Re-cross

By Mr. Smith.

Q. Well, at the time, Mrs. Aarenstein, when this first blast was given, as you say, and the horse just stopped, the second followed it immediately, didn't it?

Mr. SIMPSON—I object on the ground that there is a misquotation of the evidence. He says, at the time of the first blast when the horse just stopped. That is not the evidence at all. The evidence in this case is, if there is any dispute at all, the other way, that the horse stopped, crunched, and showed every evidence of fear, so he had no right to assume that all the horse did was just stop, and I object to that assumption in his question. 10

Mr. SMITH—With those few remarks of interest upon my question— 20

THE COURT—What is the purpose of the question, Mr. Smith? Is it to determine the interval of time that elapsed between the first and the second blast?

Mr. SMITH—Exactly.

Mr. SIMPSON—I have no objection to that. I am objecting to the question, the substance of which is at the time the horse just stopped. That is not the evidence. The evidence is that the horse stopped and showed every manifestation of fear; crunched up. 30

Mr. SMITH—That is not her testimony.

THE COURT—I don't know whether there is any such assumption, but I will sustain the objection and allow the question to be put in a way that does not assume any facts, except the blowing of the first blast and the second blast. 40

MRS. LEONORE AARENSTEIN—Re-direct

Mr. SMITH—I ask an exception.

THE COURT—You may have it.

Q. Was the train moving all the time, Madam?

A. Yes, sir.

10 Q. Going right along, was it? A. Going slowly.

Q. Still moving? A. Yes, sir.

Q. Was it going as fast as your horse had been going? A. My horse was just trotting.

Q. Was it going as fast as your horse had been trotting? A. I don't know.

Q. Don't know that? A. It was going slowly.

Q. Was it going two miles an hour or ten miles an hour? A. I have no idea.

Q. Haven't any idea? A. No, sir; I don't know that.

20 Q. As I understand you, the second whistle followed the first one immediately, did it? A. I think you could count four, perhaps.

Q. One, two, three, four; is that what you mean?

A. One, two, three, four; yes, sir.

Q. Then you could count four? A. Yes, sir, I think so.

Q. Then the second one came right away, did it, as soon as you could count four? A. Yes, sir.

30 Q. After the four? A. That is what I remember it—as I remember it.

Re-direct examination by Mr. Simpson.

Q. Can you estimate what interval of time there was between the first and second blast of the whistle, in time? Can you tell what you think in time elapsed between the first and second blast of the whistle? A. I cannot be exact. It was so long ago I cannot remember exactly.

40 Q. Cannot give an exact estimate in time? A. Not to be exact, no, sir.

GEORGIA HOSMER—Direct

Q. Are you sure that there was a perceptible space of time between the first and second whistle?

A. Absolutely.

Mr. SMITH—I object.

A. Yes, indeed.

10

Q. Are you sure whether or not there was a perceptible space of time between the first and the second blast? A. I am sure, yes, sir.

Q. Was there or was there not a perceptible space between the first and second blast? A. Yes, sir.

Mr. SIMPSON—The defendant has consented. I read the testimony of the witness, Georgia Hosmer, called at the last trial.

20

“Georgia Hosmer, called and sworn on behalf of the plaintiff, testified as follows:

Direct examination by Mr. Simpson.

Q. Where do you live? A. In Boonton, New Jersey.

Q. In 1910, prior to November, 1910, did you know Mrs. Aronstein? A. Prior?

Q. In the year 1910, before November, 1910? A. Yes, I did.

30

Q. You had known her for some time, hadn't you? A. A great many years.

Q. Did you know this horse that she drove, that she called Jet? A. Jet; indeed I did. I rode beside her every day for about seven months.

Q. Before November? A. Before the accident.

Q. Where did you ride beside it? A. I rode in Central Park and across to Riverside Drive, and I have driven behind it, or I have ridden it in the country, in Denville and Rockaway.

40

GEORGIA HOSMER—Cross

EDGAR HOPLER—Direct

Q. Have you seen it in Denville in the presence of locomotives that were whistling? A. Yes; she drove me to the station one day and the train whistled when it came in, and I jumped out and caught the train, because it came in late.

10

Q. Have you seen it in the presence of automobiles in New York when they were blowing their horns and whistles? A. Yes, sir.

Q. At any time when you were with the horse did you ever see it show signs of fear or starting? A. I have never seen it in fear or unmanageable, or anything of the sort.

20

Q. Have you seen it when you were driving with it when your horse kicked it? A. My horse kicked it almost every day and she never seemed to resent it in any manner, shape or form.

Q. Never started? A. She never started or ran or plunged or anything of that sort.

Cross-examination by Mr. Smith.

Q. How is it your horse used to kick it every day; didn't she like it? A. Every day we rode together. She had a playful habit of sidling up to Jet and kicking her with one foot, but Jet never seemed to object to it.

30

Q. Saddle horse, you mean? A. Saddle horse and driving horse combined."

EDGAR HOPLER, sworn.

Direct examination by Mr. Simpson.

Q. Where do you live, Edgar? A. I live at Rockaway, now.

Q. Rockaway, New Jersey? On the second of November, 1910, did you go to school at Hibernia?

40

A. Yes, sir.

EDGAR HOPLER—Direct

Q. You lived in Hibernia then, didn't you? A. I did, yes.

Q. On the second of November was your attention attracted by a railroad whistle? A. Yes, sir; it was.

Q. About what time was that? A. Just after school was out. 10

Q. You were coming out from school? A. Yes, sir.

Q. What did you hear? A. I heard the whistle blow.

Q. Well, how many times did it blow? A. It blew two times—the first time being long and shrill, and, well, I should say it was about two seconds later the other whistle blew just as shrill as the other one.

Q. Was there anything about the whistles which was unusual to you? A. Well, it seemed so sharp and shrill to me; I never heard them that way before. 20

Q. Never heard it that way before? A. No

Mr. SMITH—I object.

Mr. SIMPSON—I will withdraw the question.

Q. Had you heard locomotive whistles before? A. Yes. 30

Q. This was different you say? A. Yes.

Mr. SMITH—I object.

Mr. SIMPSON—I will withdraw it. It is simply the result of what he has already testified to. It is not new testimony.

THE COURT—It is objectionable.

Q. Now, could you tell how long these whistles 40

EDGAR HOPLER—Cross

lasted when they blew—how long they continued, these two whistles? A. I couldn't tell.

Q. Was it a short time or a long time? A. Well, rather long.

Q. Where were you? A. I was coming home from school.

10 Q. Where were you; you know this road from Hibernia that has been pointed out, don't you? A. Yes, sir.

Q. Do you recognize this picture at all in connection with—excuse me; showing the witness B for identification—do you recognize that in connection with picture C, as a picture of the vicinity of the railroad and the road in Hibernia? A. Yes, sir.

20 Q. Where were you? Can you show us on this picture where you were when you heard the whistle? A. Very near this white house coming home from school.

Q. Had you crossed the railroad yet? A. No, sir.

Q. You were near that white house? A. I was near that white house.

Q. How near to that white house were you? A. Oh, probably one hundred feet.

30 Q. Where I marked in the photograph, is that the white house here, where I marked with an X? A. Yes, sir.

Q. What did you do after you heard the whistle? A. I kept going right home from school.

Q. Did you see any of the accident? A. No, sir.

Cross-examination by Mr. Smith.

Q. How long had you lived in Hibernia? A. About fourteen years.

40 Q. Fourteen years? A. Yes, sir.

EDGAR HOPLER—Cross

Q. Is that right? A. Yes, sir.

Q. Now, you say you were very near that little white house; is that near the store? A. Right near the store, yes, sir.

Q. The road, as it comes down, crosses the railroad about at the store, doesn't it? A. Yes, sir.

Q. And then turns around in a semi-circle and crosses it again at the little red chute, doesn't it? A. Yes, sir.

Q. And the railroad curves around the red chute, doesn't it?

Mr. SIMPSON—I object to it as not proper cross-examination. I have not asked him anything about the situation; I asked him about the whistle, that is all, and this is not proper cross-examination, to prove out of the mouth of this witness the physical situation of the place. I have not asked him anything about that.

THE COURT—I do not know that it is for that purpose. It may be for another, and that may be that he is trying to show the exact location of this witness with respect to the point of the happening of the accident. I will permit the question.

A. Yes, sir.

Q. This road after it passes or crosses that red chute runs up a hill, doesn't it? A. A slight incline, yes.

Q. About seventeen feet from the top of the hill to the railroad? A. I think it is.

Q. You say on this day you were coming home from school? A. Yes, sir.

EDGAR HOPLER—Cross

- Q. Where is the school in relation to the store?
 A. The school is directly west from the store.
 Q. West of the store? A. Yes, sir.
 Q. Then you came around to the store, and follow
 the road around, do you? A. Yes, sir.
 10 Q. On this occasion you were by the store? A.
 Yes, sir.
 Q. Had you seen the train? A. No, sir.
 Q. Eh? A. The train, as I was coming home
 from school, the train was coming up.
 Q. Coming up where? A. I was about even with
 the train as it came near the store.
 Q. Even with the train as it came near the store?
 A. Yes, sir.
 Q. Is that right? How near the store?

20 THE COURT—What do you mean? Was he
 or the train?

- Q. How near the store was the train and him-
 self? A. Well, the train was right opposite the
 store, just stopped, and I came up to the crossing.
 Q. How far is the store from the station? A.
 No station there.
 Q. No station there? A. No, sir.
 30 Q. Any station in Hibernia? Where does the
 train generally stop, right opposite the store? A.
 Right opposite the store.
 Q. You say that is where it was when you saw
 it? A. Yes, sir.
 Q. Is that where it was when you heard the
 whistle? A. No, sir.
 Q. Had you seen it before that?

40 Mr. SIMPSON—I object unless you mean that
 day.

EDGAR HOPLER—Cross

THE COURT—Of course I am assuming that day.

Mr. SMITH—I do not. I mean had he seen it before that time, of course on that day, not before that day.

A. No, sir. 10

Q. The first time you saw the train? A. Was when I got up by the store, near it.

Q. When you got by the store? A. Yes, right near the train.

Q. Had you heard the whistle before you saw the train? A. Yes, sir.

Q. Then didn't you see the train before it came from behind the red building? A. No, sir; there is a slight hill before I get to the store, the way I come home from school. 20

Q. You were standing at the store when you heard the whistle, weren't you? A. No, sir; I was coming from school near the white building when I heard the whistle.

Q. Where is the white building in relation to the store; right near the store, isn't it? A. Well, slightly in a northerly direction.

Q. How far? A. I don't know.

Q. You don't know? A. No, sir.

Q. Was it ten feet? A. Probably five hundred feet. 30

Q. Probably five hundred feet; is that so? And that is where you were when you heard the whistle. A. Yes, sir.

Q. And you say it sounded longer than an ordinary whistle to you? A. Yes, sir.

Q. You had not heard any whistles in Hibernia, before, had you? A. No, sir.

Q. You had never heard any whistles except away down at Beach Glen, had you; and Beach Glen is 40

EDGAR HOPLER—Cross

over a mile away; isn't that so? A. It is a mile away, yes, sir.

Q. You compare this whistle with the whistles you heard way down at Beach Glen, didn't you? A. Well, I heard other whistles at other places.

Q. In other places? A. Yes.

10 Q. Didn't you testify at the last trial that you compared this whistle with the other whistles that you heard at Beach Glen?

Mr. SIMPSON—I object.

A. Yes, sir.

Mr. SIMPSON—I object on the ground that it is not the proper way to contradict the witness.

20 THE COURT—You did not put the testimony in question and answer.

Mr. SMITH—He has already answered it.

Mr. SIMPSON—I objected to it before he answered it.

THE COURT—The witness does not understand, probably, that he should not answer when an objection is placed. The answer was simultaneously, practically.

30 Q. As a matter of fact you are comparing this whistle with other whistles that you heard at Beach Glen when you spoke as to its loudness and shrillness, aren't you? A. Yes.

Q. The time you heard these whistles at Beach Glen you were in Hibernia? A. Not always.

Q. Didn't you so testify?

40 Mr. SIMPSON—I object unless it is put to him question and answer.

EDGAR HOPLER—Cross

THE COURT—That is my ruling, and it will be now unless I am shown that I am wrong.

Q. Didn't you testify as follows:

Mr. SIMPSON—Page ?

10

Q. Page 33: "Have you ever heard a whistle at Beach Glen like this before? A. No, sir. Q. Never heard one before? A. No, sir. Q. How often had you heard these whistles at Beach Glen? A. Probably every day. Q. What were you doing down there? A. I could hear it at that distance." A. Yes, sir.

Q. Didn't you mean from Hibernia to Beach Glen?

20

Mr. SIMPSON—I object to that, if your Honor please, on the ground it is not his intention as to what he meant, it is what he said.

THE COURT—I will permit the question.

A. Yes, sir.

Q. "A. You could hear it at that distance? A. Yes. Q. What kind of whistles were they? A. Why, they seemed to be low whistles. Q. How far is Beach Glen from Hibernia? A. Probably a mile. Q. A mile? A. Yes, sir. Q. Then the whistle that you heard at Beach Glen,—and you were then in Hibernia, were you? A. Yes. Q. Had carried a mile, and you had heard it? (No answer)." As a matter of fact, you were comparing this whistle that you heard on this occasion, as you say, with whistles that you had heard on other occasions at Beach Glen, while you were in Hibernia? A. Yes, sir.

30
40

EDGAR HOPLER—Re-direct and Re-cross

Q. Yes. Have you been talking to anybody?

A. No, sir.

Q. You do not wait until I have finished, son. Have you been talking to anybody as to whether or not you should say this whistle was such a long, loud whistle? A. I have not.

10 Q. Have not talked to any one, have you? A. No, sir.

Re-direct examination by Mr. Simpson.

Q. Just a minute. In the course of your young life, prior to the second of November, 1910, had you heard railroad whistles at other places besides Beach Glen?

Mr. SMITH—I object.

20 (Question repeated).

Mr. SMITH—I will withdraw the objection.

A. Yes, sir.

Q. Where have you heard those other whistles?

A. At Rockaway.

Q. How close were you to the locomotives when you heard them? A. Well, I happened to be sometimes right near them.

30 Q. You mean right near them? Now, then, how did this whistle that you heard on this day compare with the whistles that you heard on the locomotives when you were right near them; was it louder or softer, or what kind of a whistle was it? A. It was a good deal more sharp and shrill than those.

Q. Even when you had been right close alongside of the other locomotives? A. Yes.

Re-cross examination by Mr. Smith.

40 Q. You don't know what kind of whistles they had on the engine, do you?

EDGAR HOPLER—Re-cross

Mr. SIMPSON—I object, unless he fixes the engines that he means.

Q. The engine at Rockaway. You don't know what pitch they were tuned to, do you? A. No, sir.

Q. You don't know how much pressure of steam was given to them, do you? A. No, sir. 10

Q. You don't know what kind of whistle they had on these engines at Hibernia, do you? A. No, sir.

Q. You do not know what pitch that was, do you? You don't know how much steam was given to it, do you? A. No, sir.

Q. Don't know any of those things, do you? A. No, sir.

Q. When did you hear these whistles at Rockaway? A. Well, I can't exactly tell when, but through my younger life. 20

Q. Through your young life? I didn't ask you anything about your young life. Mr. Simpson wants to get that facetiously from you. I just want to know—

Mr. SIMPSON—I object to any comment.

The COURT—I am going to hold both of you gentlemen strictly to it, especially from this time forward. 30

Q. When did you hear those whistles at Rockaway? A. When did I hear them?

Q. Yes. A. The exact date, you mean?

Q. No, I don't mean the exact minute, son; I want to know about, approximately.

Mr. SIMPSON—I object, unless the time is fixed before the accident, because it cannot be of any value. 40

EDGAR HOPLER—Re-direct

THE COURT—Of course. How long before the accident, how many months before, how many years before, how many days before, or how many hours before the day of the accident had you heard these other whistles at Rockaway.

10

A. Several days before the accident.

Q. Several days? A. Yes.

Q. Were they particularly impressed upon your mind? A. Only the dull, low sound of them, is all.

Q. Well, now, let me ask you, son, while you were there standing right alongside of these engines did the whistle blow?

20

THE COURT—You mean Rockaway?

Mr. SMITH—Yes, exactly.

Q. Did the steam whistle blow? A. Yes.

Q. And it was so very low and soft that you could hardly hear it? A. I could hear it all right.

Q. Could you hear it? A. Yes.

Q. This steam whistle, and you really heard it? A. Yes, sir.

30

Q. Why, isn't it just like a gentle, soft tone, almost like a whisper, as compared with this whistle that you heard up at Hibernia? A. Well, no, it was a little louder than what you—

Q. Little louder than a whisper? A. Yes, I thought so. That's all.

Re-direct examination by Mr. Simpson.

Q. When you say a little louder, what do you mean by a little louder, in referring to the whistles at Rockaway? A little louder than what? A.

40

Than what he said to me.

MRS. HELEN MINGOS—Direct

Q. That is louder than if it was low, soft, gentle? A. Yes, sir.

Q. It was louder than that at Rockaway? A. Yes, sir.

Q. Still it was not as loud as this one you heard on this day? A. No, sir.

10

By the Court.

Q. What kind of a day was November 2, 1910, a clear day? A. Clear day, yes.

Q. What about its being cold or warm? A. Well, it was medium.

Q. You do not know how cold it was at that time? A. No, sir.

MRS. HELEN MINGOS, sworn.

Direct examination by Mr. Simpson.

20

Q. Mrs. Mingos, you are the plaintiff in this suit?

A. I am.

Q. What was your husband's name? A. Leonard.

Q. How old was he when he died? A. Fifty-six.

Q. What was his occupation? A. Physician and surgeon.

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

30

Q. Your husband supported you, of course, during his life time?

Mr. SMITH—I object.

Q. Did your husband support you during his life time? A. He did.

Q. Are there any children living, the issue of the marriage? A. Three.

Q. Mrs. Aaronstein, of course, is your daughter?

A. Yes.

40

MRS. HELEN MINGOS—Direct

Q. She did not depend on your husband in any way at his death, did she? A. No.

Q. She was supported by her husband? A. Yes.

Q. What other children were there? A. Joseph and Bessie.

10 Q. Joseph did not depend on your husband? A. No.

Q. But Bessie did depend? A. Yes.

Q. She lives with you? A. She lives at home with me.

Q. Can you tell us what amount of money your husband supplied to you and the daughter Bessie at the time of his death? How much was he supplying? How much money? A. A week, you mean?

20 Q. Well, about a year, about a year, say? A. Well, I don't know; I would guess from twenty to thirty, forty, fifty—just as it happened, you know, but I averaged twenty dollars a week, and Bessie would get about the same.

Q. That is, your daughter would get about twenty and you would get about twenty? A. About the same.

THE COURT—Was that per week?

A. A week.

30 Q. Then that twenty, did you run the house or did he run the house outside of that? A. He run the house.

Q. He paid the bills? A. Paid all the bills.

Q. Did you have your own house or was it rented? A. We owned our house.

Q. He paid the housekeeping bills? A. Everything.

40 Q. Were there any servants? A. Some of the time.

Q. Did he pay the servant? A. Always.

MRS. HELEN MINGOS—Cross

Q. How much did he pay for the upkeep of that home that you and your daughter Bessie lived in, do you know? A. Oh, I couldn't really tell.

Q. Do you know how much he earned a year. A. Well, I don't know exactly; I should say twenty dollars a day, more or less.

Q. As a physician? A. Yes, sir; and probably more most of the time. 10

Q. Was he out— A. Depending on what he did.

Q. Was he busy? A. All the time.

Q. How long had he been practicing in Tonowanda? A. Over twenty years.

Q. That is the place you lived? A. Yes.

Q. Did he keep a horse and carriage? Did he make his calls? A. Oh, yes.

Q. He did not leave any books? You haven't any books, have you, to show what his earnings were? A. Well, no, I don't think I have, not now. 20

Q. You know whether you have or not? A. No, I have not.

Q. Your daughter Bessie is living with you, isn't she? A. She is.

By the Court.

Q. How old is the daughter Bessie? A. She is twenty-eight. 30

Cross-examination by Mr. Smith.

Q. Bessie still living with you? A. Bessie? Yes, she is.

Q. Not married? A. No.

CHARLES R. FORRESTER—Direct

CHARLES R. FORRESTER, sworn.

Direct examination by Mr. Simpson.

Q. Mr. Forrester, how old are you? A. About sixty-six years old.

10 Q. Were you the engineer of the train that went into Hibernia on the 2nd of November, 1910? A. My memory has left me, and I don't know anything about those things at all now.

Q. Well, you are working for the Central Railroad? A. No, sir; I am pensioned.

Q. When did your memory leave you; how long ago? A. I had an attack of epileptic seizures and liable to throw me down any time.

20 Q. I mean when did your memory go? You say your memory has gone? A. I cannot tell you the time, see.

Q. Don't know how long ago it went, eh? A. No.

Q. Was your memory bad on this day that you were an engineer?

Mr. SMITH—I object. There is no foundation for the question.

30 Q. Your memory is entirely gone, eh? A. No good; no.

Q. How long have you been a railroad engineer? A. Well, I don't know about that either.

Q. You know you are sixty-six though, don't you? A. Yes, sir.

Q. Remember that? A. Yes, sir.

Q. Do you remember where you live? A. Yes, I remember where I live.

40 Q. You live in—where do you live, Rockaway? A. Yes, sir.

Q. Do you remember when you were an en-

CHARLES R. FORRESTER—Direct

gineer at any time—that you were a railroad engineer—do you remember that far—you remember that you were an engineer? A. Yes, I was one time and I was taken off because I got these spells.

Q. You don't know when you were taken off?
A. No, sir; I don't remember that time.

Q. Don't know whether you were taken off—that is, you don't remember whether you were taken off on the 3rd of November, 1910, or not? A. No, sir.

Q. How long have you had these epileptic seizures? A. Well, I cannot give you the date.

Q. Five years; have you had them for five years?
A. I had them just after this accident occurred they were talking about here this morning.

Q. You remember there was an accident occurred then, don't you, because you heard them talking about it? A. I heard you talking about it this morning.

Q. You say you had the epilepsy shortly after that accident, so you must remember the time of the accident, don't you? (No answer.)

Q. Did you have epilepsy while you were working as an engineer, do you remember? A. Not as I remember.

Q. Don't remember whether you did or not? A. I don't remember.

NO CROSS-EXAMINATION.

Mr. SIMPSON—You do not admit by your answer that the Central Railroad was operating this train. Do you admit it now?

Mr. SMITH—Yes, I admit it. It is admitted in the answer.

THE COURT—So there will be no question, it is now admitted upon the record, that the Central Railroad, the defendant in

MOTION TO NON-SUIT

this action, was operating the train in question; is that correct?

Mr. SMITH—Yes.

PLAINTIFF RESTS.

10

MOTION TO NON-SUIT.

Mr. SMITH—If your Honor please, I move for non-suit, on the ground there has been no evidence of negligence upon the part of the defendant company in this case. There is no proof of a negligent act. (Discussion.)

20 THE COURT—The motion for non-suit, gentlemen, is declined.

30

40

WILLIAM R. BEERS—Direct

DEFENDANT'S TESTIMONY.

WILLIAM R. BEERS, sworn.

Direct examination by Mr. Smith.

Q. Mr. Beers, where do you reside? A. Phillipsburg, in the County of Warren, this State.

Q. How old are you? A. I was eighty-six years old on the 29th day of last month, September. 10

Q. Are you employed by the Central Railroad Company? A. Yes.

Q. How long have you worked for them? A. About forty years.

Q. Were you employed by them in 1910? A. My hearing is a little defective this morning, if you will kindly—

Q. Were you employed by them in 1910? A. Yes, sir. 20

Q. Did you in November, 1910, see Mrs. Aarenstein? A. I did; yes, sir.

Q. Where? A. At her residence.

Q. At that time did you have any conversation with her relative to the happening of the accident to her father? A. Yes.

Q. And as to the horse they were driving? A. Yes, sir.

Q. Did you at that time write down what she told you? A. I did. 30

Q. And can you tell me whether she signed it or not? A. She did.

Q. I show you the paper marked E for identification and ask you if that is the paper you wrote, what she told you, and if that is the signature she made to it?

Witness examines five yellow sheets of paper.

Q. Look all through it? A. Yes; that is the statement she made to me and I took down in my handwriting and read it over to her after I had taken it 40

WILLIAM R. BEERS—Cross

down and asked her if she had any objection to signing it, and she said no, and she did.

Q. And is what is stated in that paper what she told you? A. Yes, sir.

10 Q. I call your attention particularly to the last paragraph thereof, which says: "The horse is a black and about eight years old; she is a little afraid of trains." And ask you if she told you that at the time? A. She did, sir, and I put it down just as she told me, with neither the crossing of a *t* or the dotting of the *i* made to that statement after she signed it.

Q. Is that statement in the exact condition it was when you wrote it and she signed it? A. Except from the wear or use of it.

20 Q. Well, I know— A. I am looking over it from time to time. It was taken in pencil as you will observe there.

Mr. SMITH—I offer the statement in evidence.

THE COURT—Any objection?

Mr. SIMPSON—No.

Paper marked Exhibit D 1.

Cross-examination by Mr. Simpson.

30 Q. Why did you go to the house? A. I don't understand you.

Q. Why did you go to this house? A. If you will kindly step a little farther I would be better able to hear the questions.

Q. Are you deaf? A. Sir?

Q. Are you deaf? A. No, sir; I am not deaf, but my hearing is a little defective and I have a little cold.

40 Q. Well, you could not hear what I said when I was over there, could you? A. I did not.

WILLIAM R. BEERS—Cross

Q. Now do you hear me? A. I do, very plain, too.

Q. Don't fight about it? A. All right; you appear to be hasty.

Q. Oh, I don't think I am hasty.

THE COURT—Mr. Witness, and counsel, both, it is not proper to have an argument of that sort on the stand. 10

Q. Why did you go to this house? A. The accident was referred to me for investigation by the proper authority of the company, and I took the train on November 3, 1910, and went direct by D. L. & W. train as far as I could, and then to Denville to the residence of Mrs. Aarenstein. I introduced myself to her as a representative of the company after inquiring the condition of her father. 20

Q. I didn't ask you that. I asked you why you went to the house, not what you did. A. I am telling you.

Q. Why did you go to the house? A. I am telling just why I did.

Q. You did not go to the house because of something that occurred after you got to the house, did you? A. No, sir; I went—

Q. I didn't ask you— A. I went to ascertain what occurred in the accident. 30

Q. All right. She told you that her father was dying and she would prefer to have you come at another day, didn't she? A. No, sir.

Q. Didn't she say her father was injured and dying. A. I inquired about her father and she said he was seriously injured and they were expecting a specialist from New York to perform an operation.

Q. Didn't she ask you that because of that fact that she would prefer you to go away and come 40

WILLIAM R. BEERS—Cross

back at another time? A. No, sir, she did not. I say absolutely she did not.

Q. Did you make any memorandum of the conversation outside of this that you produce. A. No, sir, I did not.

10 Q. Was her hand bandaged up, the hand with which she wrote? A. She had some injuries about one of her hands, and I disremember what it was. I think it was a thumb, if I am not mistaken. The statement will state.

Q. Well wasn't that the hand that the signed the paper with, that was bandaged? A. I don't remember that.

Q. Don't remember that? A. No, sir.

20 Q. What time of the day did you get there? A. I got there during the forenoon. I took the train from Phillipsburg, left there about seven o'clock and went direct there.

Q. Were you, at the time you called, connected with the claim department of the Central Railroad Company? A. I was connected with the special agent's department.

Q. Is that the department which investigates accidents? A. Yes.

30 Q. How long have you been connected with the department which investigated accidents? A. At least twenty-five years and upward.

Q. You knew what was essential to prove to exculpate the company from liability, didn't you?

Mr. SMITH—I object to it as not proper.

A. I knew enough to take—

Mr. SMITH—Wait a minute. I object to it as not proper cross-examination.

40

Mr. SIMPSON—The line of cross-examination

WILLIAM R. BEERS—Cross

is directed to this point, the argument being that that line was interlined, and I desire to show by this witness that he knew it was important to show that this horse was frightened by the trains, and was subject to being frightened by the trains and because of that fact it is a legitimate inference that he himself, with the knowledge of the witness or either without the knowledge of the witness, wrote in the line which is now disputed at the end of the statement; in other words, to show his motive in going there and his knowledge at the time he was there. 10

THE COURT—I will permit the question. 20

Question repeated.

A. I know enough to take the statement as it was given to me, independent of what the result might be.

Q. Did you know that the company would not be liable if this was a horse that was easily frightened, a horse that had been often frightened by trains, and that ran away when simple, ordinary signals of the company were being given? 30

Mr. SMITH—I object.

THE COURT—I will overrule the objection.

Mr. SMITH—On the ground it is immaterial and irrelevant.

THE COURT—I will overrule the objection.

Question repeated.

A. I don't know whether I would be able to decide that matter. I might have an opinion. 40

WILLIAM R. BEERS—Cross

Q. Well, after twenty-five years in the department which is connected with the investigation of accident claims, do you say that you do not know that the company would not be liable if the horse was an easily frightened horse and ran away?

10 Mr. SMITH—I object to it on the ground that it is not proper cross-examination.

THE COURT—I will overrule the objection.

Question repeated.

A. That would depend upon what frightened him.

Q. But you were trying to get a statement at the time such as would free the company from liability, weren't you? A. No, sir; I was trying to
20 take just such a statement as Mrs. Aaronstein gave me.

Q. Did you ask her questions? A. I don't remember particularly. It has been about four years since I took that statement, and the statement will show whether I asked any questions or not. I said before: It is a verbatim statement of what she made to me in reference to the accident, and she did not
30 hesitate neither; she done that very ladylike and intelligently.

Q. Did you ask her if the horse was an easily frightened horse? A. I asked her if the horse was afraid of trains, and she said he was.

Q. Why did you ask her that? A. Because I wanted to know.

Q. Well, what did she say? What was the question you asked her—I withdraw that—why did you want to know? A. I wanted to know whether
40 the horse was afraid of trains or not, as a matter of course.

WILLIAM R. BEERS—Cross

Q. Why did you want to know that. A. If he was, perhaps it was one cause of his running away.

Q. That is one cause wasn't anything that was the fault of your company? A. Well, I did not think, from the fact of a whistle having been blown for a crossing at the place fixed was calculated to do anything except what he was required to do—
the engineer—for the protection of the people passing over the crossing. I had enough experience for that. I knew he was required to do that by the rules of the company and also, I understood, by the laws of the state. 10

Q. Where did you find out where the accident happened? A. I found out from making inquiry.

Q. Where? A. Went upon the ground.

Q. Who did you make your inquiries from? A. The crew. 20

Q. Of the train? A. Yes, sir.

Q. Now, what was the question you asked Mrs. Aarenstein about whether the horse was frightened? A. I asked her if the horse was afraid of trains.

Q. What did she say? A. She said he was a little.

Q. He was a little; is that what she said? A. I could tell better by looking at the statement to see whether the word little was added to it. She said he was afraid of the trains, but whether she remarked little or not. 30

Q. How did she give you the information, did she say he was a little or he was a little afraid of trains, or he was afraid of trains, or what did she say to you? A. Whatever the statement there shows in reference to that matter. As I said before it has been about four years since that statement was taken. I have not rehearsed the statement to repeat it word by word. 40

WILLIAM R. BEERS—Cross

Q. You haven't any— A. If I look at the statement I can tell just what she said.

Q. Can you tell without looking at the statement? A. Perhaps I could not add the word little.

Q. You would not add the word little? A. I say perhaps I could not.

10 Q. Perhaps you could not. What would you do without the statement, would you use the word little or wouldn't you use it?

Mr. SMITH—I object. The statement speaks for itself.

Mr. SIMPSON—I am cross-examining the witness as to his statement that he made.

20 THE COURT—He has made the very flat statement. So far he is not depending on his recollection, he is depending on the statement.

A. Your Honor, I wrote down the statement just as she made it.

THE COURT—Yes, I know you told us that.

Q. Are you still employed by the Central Railroad Company? A. I am, sir.

30 Q. Where? A. I live in Phillipsburg, and go where the accidents occur for the purpose of making investigations.

Q. How old did you say you are? A. I was eighty-six years old on the 26th day of last September.

40 Q. When did your hearing begin to fail? A. It is not—I am not deaf at all. I am suffering a little from a cold, and when I get a cold it interferes somewhat with my hearing. Ordinarily I hear perhaps as well as you do at a reasonable distance.

WILLIAM R. BEERS—Cross

Q. You asked me to come here from that table and talk to you here? A. The sound of your voice was such that I did not understand distinctly, and I wanted to know exactly what the questions were you put to me.

Q. Your hearing is impaired? A. No, sir; only in certain circumstances. 10

Q. What are those circumstances? A. That I have got a little cold.

Q. Did you have a little cold when you took this statement? A. I don't know anything about my condition then particularly, and I have no recollection of being under the weather in any way particularly I think I was perhaps at that time—more especially ready to hear—perhaps a little more so than I am now.

Q. Well, why did you take this statement on this day? Why didn't you go away and come back after the operation was performed on this man? A. My instructions— 20

Mr. SMITH—I object.

was to investigate this case as soon as possible. I took the train on the next day, on the 3rd of November, 1910, and went direct to Mrs. Aarenstein's residence and took her statement, and she did not hesitate to make the statement, and I read it over to her after I did make the statement, and asked her if she had any objections to signing it, and she said she had not, and she signed it voluntarily without any trouble or hesitation. 30

Q. She did not ask you to come again? A. No, she did not.

Q. You did not insist upon having the talk with her then? A. When?

Q. At the time you went? A. I did. 40

WILLIAM R. BEERS—Cross

Q. Oh, you did insist? A. Yes; I insisted in this way. I said to her that I had been instructed to make an investigation of the accident, and I asked her how it occurred, and she said—went on to tell me, and I took a seat by the side of her, and took down her statement just as she give it to me, as near as I can tell, word by word.

10 Q. You did insist on getting it then, did you? A. I did, yes; I wanted the statement then. That is what I went there for.

Q. What was it she said to you that made you insist upon getting the statement that day? A. She did not say nothing to insist me. I insisted on her giving me—making the statement to me.

Q. You forced your way in? A. No, I did not force my way in, sir.

20 Q. You did not? A. I went in like a gentleman.

Q. You did not insist upon going in when she asked you not to come in? A. She did not ask me not to come in.

Q. She asked you to come again? A. She was very ladylike and invited me in and took a seat at the table and I took her statement just as she gave it to me, sir.

30 Q. Did you get a statement from Dr. Mingos at the same time?

Mr. SMITH—I object.

A. No.

Mr. SMITH—I object. The question is silly.

40 Q. Eh? Did you get a statement from Dr. Mingos at the same time? A. No. I did not take any statement from him any time. You know better than that.

WILLIAM R. BEERS—Cross

Q. I don't know anything about what you did.
A. Yes. Well—

THE COURT—Now, gentlemen!

Q. Is this last sentence here in your handwriting? The last sentence? A. Everything upon that paper as far as— (examines paper) I can remember it. It has been out of my hands for a few days only. Every word is in my handwriting, sir. 13

Q. You did not produce this paper at the last trial, did you? A. I produced—produced a paper. I made a statement—I made a report of the accident at the time, and that statement was contained in my report.

Q. But you were not here, were you, as a witness in the last trial? A. Yes, I was here. 20

Q. Were you called? A. No, sir. That statement was gotten—went to the company by request last week, and it has not been out of my hands since—until then.

Q. Well, would it be out of order for me to ask this witness to read that statement? It is very difficult for me to read it, and it is his handwriting, and I would like to get the contents of it, unless you have a typewritten copy?

Mr. MILLER—I have a typewritten copy. 30

A. I would like somebody else to read it that can see better than I can.

Q. Can't you see good? A. Well, my eyes are wanting a change of glasses as my age increases. Perhaps I can read it.

Q. Well, just see, will you, if you can read a page of it. I would like to see, perhaps? A. Very well. "Eleanore Aarenstein. November 3, 10. I am the wife of Mr. Sidney Aarenstein, of Denville, 40

WILLIAM R. BEERS—Cross

and on November 2, 1910, I and my father, Leonard M. Mingos, who is visiting me, were on our way from Hibernia toward Rockaway. At Denville by way of Rockaway, in a one-horse carriage. One passenger—”

10 Q. When passing by— A. “When passing a passenger train between Hibernia and Rockaway.”

Q. Near Beach Glen, is that in parenthesis? A. At Beach Glen.

Q. At Beach Glen? That is all I want you to read. A. “When we saw a passenger train coming toward us. There was—”

Q. That is all you need to read for me, unless you want to read it for your own entertainment.

20 Mr. SMITH—He is reading it for your enlightenment.

Mr. SIMPSON—The question asked by me simply was for the purpose of seeing how good sight the witness had. That is all I want from him.

Q. Now, do you remember whether it was morning or the afternoon that you saw Mrs. Aarenstein? A. It was during the forenoon.

30 Q. And the date? Have you any recollection of it besides that upon the paper? A. No, sir.

Q. I think that is all.

Mr. SMITH—I will read the paper in evidence, if I am allowed by Mr. Simpson.

40 “I am the wife of Mr. Sidney Aarenstein, of Denville, and on November 2, 1910, with my father, Leonard M. Mingos, who was visiting me, we were on our way from Hibernia to our residence in Denville, by way of Rock-

WILLIAM R. BEERS—Cross

away, in a one horse and carriage, and when passing by a passenger train between Hibernia and Rockaway near Beach Glen is when we saw a passenger train coming towards us. There was a space between the public highway and the railroad. When we stopped the horse opposite the train or thereabouts and when the whistle of the engine was tooted twice the horse then started to run, giving one plunge and followed the road when he started to run, running for two to five miles before we were both thrown out at the same time and were thrown out of the carriage to the right of the road among the rocks. The horse continued to run, but I cannot say how far, perhaps three miles. He was returned subsequently by Mr. Best's young man to me at my husband's residence. I was injured but not seriously. My thumb to my right hand was put out of joint and the flesh torn from the inside of the thumb. My right knee is in a condition that I can hardly walk on and the knee is bruised; below the knee there are two contusions in the leg, but my left leg hurts me a little, and my nose is scraped on the bridge of the nose slightly. But my father's injuries are serious; he is attended by Dr. Flagg of Rockaway. Dr. Abbey, of New York, is expected here at twelve o'clock, noon, to perform an operation on my father. His injuries are two cuts on the right side and near the top of the head. The cuts are deep and the skull broken.

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EMMA POST—Direct

One eye, the right one, is closed and bleeding, and the face bruised. The horse is a black and about eight or nine years old. He is a little afraid of trains. Signed, Mrs. Leonore Aarenstein. Witness to the signature, W. R. Beers."

10

Mr. SMITH—I will read, by agreement, from the testimony of two ladies, a Mrs. Emma Post, who was sworn and testified at the last trial, page 52—

Mr. SIMPSON—This is the one that passed out.

Mr. SMITH—One of them is dead. Mrs. Post is dead, isn't she?

20

Mr. MILLER—Yes, Mrs. Post is dead. Mrs. Henderson is sick.

Mr. SMITH—(reading):

“EMMA POST, called and sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. Smith.

30 Q. Mrs. Post, where do you live? A. I live in Morris County, and the little village I live in is called Morrisilia, on the borders of Hibernia.

Q. Did you live there in 1910? A. Yes, sir; I lived there twenty-seven years.

Q. Do you remember the day of this accident? A. I certainly do, but I could not tell you the date.

Q. Do you remember the occasion of it? A. Yes, sir.

40 Q. Were you driving on the road from Rockaway to Hibernia at that time. A. I certainly was.

EMMA POST—Direct

Q. Was any one with you? A. There certainly was.

Q. Who was it? A. Mrs. Aaron Henderson.

Q. As you came along the road there, getting near the turn of the road as it goes up the hill toward Hibernia, did you see Mrs. Aronstein and her father in their carriage? A. I saw an object, but I do not know who they was. 10

Q. But afterwards you found out who they were? A. Yes, sir.

Q. Now, as you saw this carriage coming towards you it was coming towards the direction you were coming from. A. Yes, sir.

Q. You were going in opposite directions? A. yes, sir.

Q. Will you tell us what you saw, if anything, out of the ordinary, as their horse came towards you? A. Well, I made a statement at the present time, that has been two years ago and I do not want to make any flaws. On that day I had been to Dover, and in coming home the train had passed me at Beach Glen before I— 20

Q. Which way was the train going then? A. Going to Hibernia; and before I saw the horse I saw the train go around the curve and it was out of sight, and then I saw this horse, and I could not tell whether they were men or women in the wagon, and when I first saw the horse it looked to me as if it was on a trot and then the next thing it gave a plunge, and before I had time to say to the lady with me, "I believe that horse is running away," the horse passed me, and there was no one in the wagon, and the reins were dragging. 30

Q. And as the horse went by you did you keep on driving? A. Then I turned back in the road, and it did not seem to be more than a couple of minutes before I seen Mrs. Aronstein. 40

Q. And what was she doing? A. She met me in the road and she was working her thumb like that (illustrating), and she says to me, "Did you see my horse?" I said, "I saw a horse." She said, "I wonder if any one will catch him." I said, "I couldn't say."

10 Q. And then did she say anything to you about what caused the horse to run? A. No, sir; she told me no particulars at all; and the next thing she said to me, "Would you take me to Dr. Flagg at Rockaway? My father has got a weak heart." And I said, "Why, it would be impossible, my dear, for me and you to pick up that lifeless body and put it in this little wagon, but I will get you aid right away."

20 Q. And what did you do? A. Then I drove on, and the train was just pulling out from Rockaway to Hibernia, and I threw my hands up, but they paid no attention. I threw the lines to Mrs. Henderson and I jumped out of the wagon, and I ran up the bank, and I stopped the train and I told them that there was an accident, and for them not to pass it, to go to Mrs. Aronstein's, or to the lady's aid, I didn't then know who it was, but I learned afterwards, because she was to my house; and then, of course, I went on to my home.

30 Q. You learned afterwards what?
(Answer repeated).

Q. Now, at the time that you saw this horse as you say start from a trot to a run, did you at that time hear any unusual or loud whistle? A. I did not hear no whistle at all.

Cross-examination by Mr. Simpson.

40 Q. Where were you with reference to this road when you saw this horse first? A. I was in the road going to my own home.

EMMA POST—Cross

Q. But where in the road, how far from Hibernia?
 A. Well, I should say—I am not a very good judge—but I might have been a quarter of a mile from Hibernia.

Q. That is, you were down on the Rockaway side of the curb, weren't you? A. Yes, sir.

Q. Where was the horse when you first saw it run? A. Up at the top of the hill. 10

Q. Past these two curves? A. It had to pass them two curves before it come to me.

Q. Before it came in your sight? A. No, no.

Q. Where was he when he was in your sight?
 A. Right at the top of the hill.

Q. Was he in motion then? A. Yes.

Q. And you saw him, you say, start into a jump? A. Into a jump, as though he—

Q. Were you listening for a railroad whistle then? A. No, sir. 20

Q. You were not paying any attention to a railroad whistle, were you? A. None whatever.

Q. You were about how far from Beach Glen then? A. Well, as I said before, I am not very good to estimate, but I should think a couple or three hundred feet.

Q. And Beach Glen is about a mile from Hibernia, isn't it? A. I should think so.

Q. So that you were a couple of hundred feet from Beach Glen when you saw this horse start? A. Well, somewheres near that. 30

Q. And that would be a mile less a couple of hundred feet; and were you listening for a railroad whistle? A. No, sir.

Q. And you do not spend your time when you are driving home listening for railroad whistles, do you? A. No, or runaways.

Q. You made a statement of this accident at the time of the accident, did you? A. I certainly did. 40

EMMA POST—Re-direct

Q. Do you remember who you made it to? A. Yes, sir.

Q. Who did you make it to? A. Mr. Best.

Q. Who? A. A gentleman by the name of Mr. Best.

10 Q. Who is Mr. Best? A. If he is here I can show him to you.

Q. And your recollection was fresher, wasn't it? A. I think it ought to have been.

Q. At the time of the accident than it is now? A. I should think it ought to be.

Q. Have you read that statement over before you testified to-day? A. No, sir; nor haven't seen it.

Q. You haven't seen it either? A. No, sir.

20 Q. Was this train running backwards? A. That I could not say, if I hoped to die.

Q. Did you see the lady and gentleman thrown out? A. No, sir.

Q. Then you did not watch the carriage from the time you first saw it until the time you met Mrs. Aronstein? A. I could not, because the cars bothered me. I could not see it.

Q. Oh, you saw it up on top of the hill? A. I saw it up on top of the hill.

Q. And then you lost sight of it? A. Yes, sir.

30 Q. What you saw on the top of the hill was the horse seeming to be on a trot and then suddenly jump and run? A. Yes, sir.

Q. At that time you were not listening for any railroad whistle, were you? A. No, sir.

Q. You do not say as a matter of fact that you are positive that there was not any railway whistle blown? A. No, sir; I could not; I could not say that.

Re-direct examination by Mr. Smith.

40 Q. Were you in such a position that if a whistle

EMMA POST—Re-direct

had been blown by a train just opposite the high point of the hill you would have heard it where you were? A. Well, I—

Mr. SIMPSON—I object. It is a matter of opinion; it seems to me that is for the jury to say, because she has described her distance, the topography has been described, and I do not think she is allowed to give a matter of opinion on that, and I object on the ground it is incompetent. 10

THE COURT—I think the objection must be sustained.

Mr. SMITH—I ask an exception. 20

THE COURT—You may show how far she was away from the train, and so on, but whether she would have heard it or not contains so many elements—

Mr. SMITH—I asked her if she was in such a position.

THE COURT—What do you mean by that? Do you mean whether she was on the road or underneath it, or what? 30

Q. What I really want to find out—A. I am not nervous; I can answer any question. I am here to tell the truth.

Q. What I want to find out is this: How far were you at the time you saw Mrs. Aronstein on the top of the hill, how far were you from her?

A. Well, now, that would be pretty hard for me to say.

Q. Well, about; give us your estimate. 40

EMMA POST—Re-cross

Mr. SIMPSON—I object as not proper re-direct examination.

THE COURT—I will permit it.

10 A. Well, it might have been a hundred feet, probably a little more.

Q. One hundred feet or probably a little more.

Re-cross examination by Mr. Simpson.

Q. Where did you meet Mrs. Aronstein with reference to the body of this man or had she passed the body? A. She had passed the body just a little ways.

Q. Coming towards you? A. Towards me.

20 Q. Where did the body lie with reference to the curve; was it past the second curve from Hibernia? A. Yes, sir.

Q. And she asked you to put her father's body in the carriage? A. In my wagon.

Q. And take him to the doctor? A. Yes, sir.

Q. You did not? A. No, sir.

Q. And the reason you did not was that you said you could not put that lifeless body in the carriage? A. I certainly did.

30 Q. And she was pretty much excited? A. Well, she actually did act it.

Q. And as if she was suffering from a great strain of some kind? A. Yes, sir.

Q. And you said that you told them to stop the train and they would not stop? A. I threw my hands up and they did not stop. And then I jumped from my carriage and went and stopped the train and told them how—

Q. I do not care what you told them."

40 Mr. SMITH—The next witness is Mrs. Emeline Henderson: (Reading.)

EMELINE HENDERSON—Direct

“EMELINE HENDERSON, called and sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. Smith.

Q. Where do you live? A. Morrisilia, Morris County.

Q. Were you with Mrs. Post on the day she was driving along the road at the time of this accident? 10

A. Yes, sir.

Q. Do you remember seeing the horse of Mrs. Aronstein and her father coming towards you? A. Yes, sir.

Q. Now, at the time you saw it where was that horse? A. On the top of the hill.

Q. The top of the hill? A. Yes, sir.

Q. At the time you saw the horse coming toward you about how far was your carriage from that horse? A. The length of two telephone poles. 20

Q. The length of two telephone poles? A. Yes, sir.

Q. And about how far apart are the telephone poles? A. I cannot tell you; I did not measure it.

Q. You cannot give us an estimate of that? A. No, sir.

Q. When you saw this horse at the top of the hill what did the horse do that you noticed? A. Well, he was—started right off on a jump and come right down the hill. 30

Q. Coming down the hill? A. Yes.

Q. As they came down the hill did you continue to see him all the time or did you lose sight of him for a time? A. No; we did not see him all the time.

Q. After that what did he do; pass you? A. Yes, sir.

Q. As the horse passed you was there anybody in the carriage? A. No, sir. 40

EMELINE HENDERSON—Direct

Q. What did you and Mrs. Post do then, drive n? A. We drove right along.

Q. After that did you meet Mrs. Aronstein on the road? A. Yes, sir.

Q. And Mrs. Post; and did you have some talk with her? A. Yes, sir.

10 Q. Then did you drive on up to where the father was? A. Yes, sir.

Q. Now, at the time you saw this horse on the top of the hill make this jump as you call it, did you hear any whistle— A. No, sir.

Q. —or loud whistle of a steam whistle? A. No, sir.

Q. Had you seen this train before that? A. Yes, sir.

20 Q. And where were you at the time you saw it before that? A. This side of Beach Glen.

Q. What is that? A. This side of Beach Glen.

Q. Did it go by you? A. The train, yes.

Q. Had you seen the train go around past the curve and in this cut before you saw Mrs. Aronstein on the top of the hill? A. Yes.

Q. And about how long had that train disappeared around the curve and in this cut before you saw Mrs. Aronstein? A. Not but a few minutes.

Q. H'm? Not but a few minutes.

30 Q. Not but a few minutes? A. No, sir.

Q. Now, after you left Mrs. Aronstein and rode over and went toward Hibernia, did you see the train? A. Yes, sir.

Q. Where was it then? A. By the store on the upper crossing.

Q. Was it coming or leaving? A. Just moving along.

40 Q. And in what direction? A. West, toward Rockaway.

EMELINE HENDERSON—Cross

Cross-examination by Mr. Simpson.

Q. How far were you from Beach Glen towards Hibernia when you first saw the Aronstein horse, how far was Beach Glen behind you? A. Oh, I could not tell how many—it was quite a little piece.

Q. How much was it; were you half way to Hibernia or quarter way to Hibernia? A. Yes, we were over half way. 10

Q. How much more than half way were you? A. Not much more—that is, to the store.

Q. And do you know how far the store is from Beach Glen? A. No, I never—

Q. Now, at that distance that you saw this horse jump in the air and start to run were you listening for a railroad whistle? A. No, sir.

Q. Your attention was attracted by the horse, wasn't it? A. I was looking at that horse. 20

Q. But the first thing that attracted your attention was the jump of the horse, wasn't it; you were not paying any attention to that neighborhood, were you? A. Well, I seen the train go.

Q. You saw the train pass you; the train was then out of sight when you saw the horse jump, wasn't it? A. Yes.

Q. The train was not in your sight when you saw the horse jump? A. No, sir; it was on the other side of the hill. 30

Q. You could not see it; there was a hill between you and the train. Now, what I want to get in your mind is this: The thing that attracted your attention was this jump of the horse and his dash down the hill, wasn't it? A. Yes, sir, at that minute.

Q. Were you talking to Mrs. Post, as you drove along? A. Yes, sir.

Q. And you were interested in your conversation, weren't you? A. It was about the horse coming. 40

EMELINE HENDERSON—Cross

Q. You were interested in your conversation, weren't you? A. I suppose we were.

Q. And you could see the horse then, from where you were, couldn't you? A. Yes.

Q. And the railroad tracks were on the level with you there, weren't they, on the road. A. Yes, sir.

10 Q. And this horse was then high up in the air, where he was in plain sight, and you were then, you say, a little more than a half mile from Beach Glen, towards Hibernia, is that right? A. I do not know how far it was, but I—

Q. Now, this is two years ago? A. Yes.

Q. And you were not paying any attention, listening for railroad whistles? A. No, sir.

Q. They were not the kind of musical instrument you are particularly interested in, are they?
20 A. No.

Q. You won't swear, as a matter of fact, that immediately before this horse jumped there was not a railroad whistle blown? A. I did not hear it.

Q. You will not swear that there was not? A. No, no.

Q. And you say, at the time you saw the horse jump, there was a hill between you and the train, the train had disappeared around the hill, and you were paying no further attention to it? A. No; it
30 did not disappear around the h—

By the Court.

Q. What was there about the horse that you saw that caused you to talk to Mrs. Post about it? A. Mrs. Post spoke to me first about it.

Q. What was there about the horse that you saw that caused you to talk about it? A. It started to run down the hill.

40 Q. But before it started to run, did you say anything to Mrs. Post, or she to you—anything about

DR. WILLIAM J. ARLITZ—Direct

the horse? A. Mrs. Post said to me: "That is a runaway horse."

Q. But before it started to run did she talk to you, or you to her about the horse before started to run? A. No.

Q. What were you talking about before the horse started to run? A. I could not tell you that. 10

Q. You were talking about something, I suppose, weren't you? A. Yes; it might have been; but I do not remember that.

Q. Then, until the horse started to run, neither you nor she started to talk about it? A. No; not about the horse.

Q. And there was not anything about the horse to speak about, before he started to run, that you saw? A. No; I did not see anything. 20

Dr. WILLIAM J. ARLITZ, sworn.

Direct examination by Mr. Smith.

Q. Doctor, are you a practicing physician and surgeon of this county? A. I am, sir.

Q. How long have you been practicing? A. Twenty four and one-half years.

Q. Are you connected with any institutions? A. I am.

Q. What? A. St. Mary's of Hoboken, and North Hudson. 30

Q. Have you made any special study of the nervous system? A. I have.

Q. And do you hold any position relative thereto? A. I am the neurologist of St. Mary's Hospital and the consulting neurologist of the North Hudson Hospital.

Q. Doctor, have you examined Mr. Forrester, the engineer of this train? A. I did, sir.

Q. Who was on the stand this morning? A. I did. 40

DR. WILLIAM J. ARLITZ—Cross

10 Q. What have you to say, Doctor, as to his physical condition at the present time? A. I examined him on the 29th day of October, of this year, and found, at that time that he was suffering with chronic uramic intoxication, calcification of his cerebral blood vessels, and had a blood pressure of 196. I found that he had a profound loss of memory, that his judgment was faulty, and that his mental processes were decidedly perverted, because of the calcification of his blood vessels and the uramic intoxication; in other words, the two physical conditions have brought about a mental state. His judgment is bad, because he has a profound loss of memory, and judgment is based upon memory.

20 Q. What would you say as to his ability to remember things that happened, say four years ago? A. He would have a very poor knowledge of events occurring at that time. He would have a considerable knowledge of things that had happened in his early life. His condition is now that which has been designated senium; his brain is not sufficiently nourished, and because of that lack of nourishment he has this loss of memory and faulty judgment.

Cross-examination by Mr. Simpson.

30 Q. When did you examine him, Doctor? A. On the 29th of October.

Q. This October? A. Yes.

Q. Did you get any history of his case? A. Yes.

Q. But you are testifying on what you learned—that is your opinion is formed partially on what you learned of the history of his case as well as objective symptoms, isn't it? A. In a measure, yes.

40 Q. Did you learn that a Doctor Flagg was his physician? A. Whose physician, Mr. Forrester's?

DR. WILLIAM J. ARLITZ—Cross

Q. This man Forrester's physician? A. I don't recall that.

Q. Did you learn that he had been treated for an epilepsy in July, 1910?

Objected to After the discussion the objection was withdrawn.

10

A. Well, my examination—part of my examination was in the line of interrogations, and in addition to that I took the objective manifestations, and I arrived at a conclusion. Now, in response to your question, I do not believe he ever had an epileptic fit.

Q. Do not think that? A. No; I think he has uræmic convulsions.

Q. Well, did you ascertain how long he had been suffering with this complaint? A. From his wife and from him—he said he had been ill about two years.

20

Q. That is the wife said two years? A. Yes, and he said that.

Q. You did not make any other inquiries to find out? A. None whatever.

Q. This man's memory was very bad; he remembered things in his early life better than he would things in his later life. What value was it for a man of a bad memory to tell you that he had been ill for two years, if his memory is not good? A. It was of no value; it was a circumstance surrounding the examination.

30

Q. Could you tell by the objective symptoms how long this man had been sick with the complaint that you found? A. Positively not.

Q. You could not tell that? A. No.

Q. What were the symptoms that he manifested of this poisoning which would affect his judgment

40

DR. WILLIAM J. ARLITZ—Cross

and his memory? A. What were the symptoms then?

Q. Yes? A. His profound loss of memory, the repeated attacks of convulsions.

Q. You saw him in the convulsions? A. I did not.

10 Q. Well, how do you know anything about his convulsions? A. I was told so by his wife, whom I interrogated, and I was told so by him.

Q. But his memory is manifestly poor and his judgment manifestly poor, isn't it? A. I believe so.

Q. So that this judgment and his memory as to his convulsions would not be of any evidential value to you, would they? A. Only if it was corroborated by those in attendance.

20 Q. Well, suppose it was not corroborated and you simply had that alone, that is of no evidential value, is it? A. Yes, it would be, if I take into consideration the other symptoms in the case, with regard to his—to the various acts he performs daily, with regard to his general orientation. I know all of the man's responses were slow, sluggish; he could not recall—as a matter of fact I did not question him about this accident—I knew nothing about it, but about his daily life, things that had transpired a year or two ago.

30 Q. Is his wife in Court? A. I do not see her.

Q. Now, I understand your testimony is, crudely put, that because of his bad memory and because of his lack of judgment, he would be valueless as a witness. That is the thing, crudely put, isn't it? His testimony would not be of any value? A. Would not be.

40 Q. Haven't you used him as a witness to testify for you to make up your opinion of his condition? A. Absolutely not.

DR. WILLIAM J. ARLITZ—Cross

Q. All right. Then what he told you, what he said to you, you paid no attention to, did you? A. Not—only that which was corroborated by those in attendance. In the first place, I had a number of things to go by before I arrived at a conclusion. One was a blood pressure of 196. Secondly, I found a quantity of album. 10

Q. Don't go so fast. Let us take these things one by one. We do not live among these things—at least I do not, so I am not familiar with them. A blood pressure of one hundred and how much? A. One hundred and ninety-six.

Q. How long had that blood pressure been there, could you tell by any objective signs? A. Could not.

Q. He had a physician for this complaint before you examined him, didn't he? A. I don't know; I suppose so. 20

Q. Did you go and interrogate the attending physician? A. No, I did not.

Q. You did not try to find out from the attending physician? A. No. I don't know if he had one. He perhaps may have had one or more.

Q. You say you don't know. Who employed you to go to examine him? A. The Central Railroad.

Q. Did they tell you that Mr. Flagg, a Dr. Flagg, a witness who had testified at the last trial of this case—a man named Frederick W. Flagg, of Rockaway, New Jersey, had been the attending physician of this man? 30

Mr. SMITH—I object.

A. No; they told me this. They told me that they wanted to produce in court a witness, a very essential witness, whose mental state they had some 40

DR. WILLIAM J. ARLITZ—Cross

question to doubt, and I went to Rockaway on the morning of the 29th of October, and examined Mr. Forrester, and I made my report to them to the effect that I did not consider his judgment good.

10 Q. What is his condition now as to any mental life at all? Has he got any mental life? A. Oh, yes; he has for events that transpired in his early life, but he has for events that occur today—he would remember them for perhaps forty-eight hours, and if you asked him about those same things a week hence, he would know very little about it.

Q. You interrogated him especially to find out whether he had any memory of this accident or alleged accident? A. No, I never put a question to him about accidents.

20 Q. You knew the Central Railroad wanted to know whether or not he had sufficient intelligence as to be a witness as to an accident, didn't you? A. No; I didn't question him about—

Q. You knew that fact? A. No; I knew it was about—

Q. An accident case? A. No; I had no idea about it.

Q. You knew they wanted to use him as a witness in court? A. Yes, that I knew.

30 Q. You did not ask him anything about the subject matter which it was supposed he would be a witness about, did you? A. No, I just went into his general orientation.

Q. What is orientation? A. Means with reference to time and place.

40 Q. Well, did you ask him whether on the second of November, 1910, he blew his whistle and saw that that whistle frightened a horse and then blew another whistle? A. No.

Q. Didn't ask him anything about—A. Oh, I

DR. WILLIAM J. ARLITZ—Cross

questioned him in regard to his actions in general; about his family, about his daily life, about what he did daily, where he was born, how many children he had, and who his father was, and a great many other things. Now, things that had transpired a great many years ago he had a knowledge of those things. That you would expect because that is characteristic of his condition. 10

Q. What did you ask him about what happened recently? A. Oh, I don't just recall what, but what he did daily, and where he had been a week prior to that time, and if he went to church, and what church he attended, and a great many other things in that line, and to do simple sums in addition and subtraction, and all that sort of thing.

Q. Well, do you know what church he had gone to or if he had gone to any church? A. As I recall he said he had gone to the Methodist Church, and that answer was—he arrived at that conclusion after giving it considerable thought. 20

Q. I am not asking you what he said. I asked you if you knew? A. No.

Q. Whether he had gone to any church? A. No.

Q. So you could not judge whether his answers were true or false, could you, if you had no independent knowledge? A. Yes, I think I could.

Q. Well, how could you judge if this man told you he had been to the Methodist Church and you didn't know whether he had been there—how could you judge whether that answer was true or false? 30

A. Because that answer was corroborated.

Q. Well, then, you continually— A. By a witness.

Q. You continually depend upon what some one else says? A. No, on the contrary, I am not. I am depending on what my analysis of things that are told me—things that anybody tells me, and the 40

DR. WILLIAM J. ARLITZ—Cross

circumstances surrounding the life of the individual whom I am examining.

10 Q. Well, that is splendid as a general statement, but coming down to specific details, you say that you do not credit what this man says, except so far as somebody else tells you that it is so. Now, do you or don't you depend on what that somebody else tells you? A. In a measure, certainly.

20 Q. Then, in what measure? A pint or a quart, or what measure do you depend on? What do you mean by measure? A. I am placing it in this light, if I may. In the examination of any individual we expect to find a normal person, that is to say that the man is of average mentality or the woman is of average mentality. We find cases where the mentality is considerably below the average, and still the people are not insane, and sometimes we find people above the average, whom we call clever people—if we find a person whose mentality is considerably below the average, with a decided loss of memory, with a decided apathetic manner, with a history of attacks of unconsciousness, with albumen in the urine, with the high blood pressure, I must arrive at some conclusion, after having conversed with this patient for a prolonged period, and find that his responses are not proper.

30 Q. Is this man below what you call normal mentality? A. At this time, yes, decidedly.

Q. He is? A. Yes.

Q. How much below? A. Oh, very much.

Q. And the first time you saw him was when? A. I only saw him once, on the 29th of October.

Q. Where? A. At his home in Rockaway.

Q. How long a period of time did you spend there? A. About an hour.

40 Q. What is this condition that he is suffering

GEORGE A. MORRIS—Direct

with? Has it a name, as a disease? A. Yes.

Q. What? A. Yes, chronic uraemic intoxication and calcification of his blood vessels.

Q. Does that mean, the chronic, that it has been established for some time? A. Yes.

Q. How long you don't know? A. Have not the slightest idea. 10

Q. Now then, in the history of medicine or in the science of medicine, is there any knowledge at all as to the usual period of time it takes to develop this condition? A. No.

Q. There is not any? A. He may have had albuminuria ten or fifteen or twenty years ago; I don't know anything about it.

Q. It is not a condition that arises suddenly, however, is it? A. No, it is not. 20

GEORGE A. MORRIS, sworn.

Direct examination by Mr. Smith.

Q. Mr. Morris, what is your business? A. Photographer.

Q. Where do you live? A. Long Branch, New Jersey.

Q. I show you several photographs and ask you if you made them? A. Yes, sir. 30

Q. When did you make them? A. On December 14, 1912.

Q. Can you tell me where you took them? A. Well, in a town or in the vicinity of a town known as Hibernia.

Mr. SMITH—I ask that they be marked for identification.

Photographs marked F, G, H and I, for identification. 40

GEORGE A. MORRIS—Cross

JOHN A. CASEY—Direct

Cross-examination by Mr. Simpson.

Q. When did you take these? A. December 14, 1912.

Q. Were you familiar with the location at all?
10 A. No; I simply have been there once or twice before, that is all.

Q. When was the first time you were there? A. Oh, it was about six or eight years ago.

Q. Six or eight years ago? A. Yes.

Q. Well, were you there for the Central Railroad?
A. Yes, just to make some views.

Q. To make some photographs? A. Yes.

Q. And the second time was how long before December 14, 1912? A. I could not say.

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

Q. Did you take more pictures than these or only these? A. No, sir.

Q. These are all you took, these four? A. Yes.

JOHN A. CASEY, sworn.

Direct examination by Mr. Smith.

Q. Mr. Casey, where do you live? A. Somerville.

30 Q. What is your business? A. Supervisor of the New Jersey Central.

Q. Are you familiar with this railroad at Hibernia? A. Yes.

Q. Been up there frequently? A. Yes, sir.

Q. Are you familiar with the road that runs along the railroad there? A. Yes, sir.

Q. I show you a picture and ask you if that correctly represents the condition of that place on the road from Hibernia to Rockaway, and if it did, if the place was in that condition in December, 1912?

40 A. Yes, sir; that looks like it.

JOHN A. CASEY—Direct

Q. Can you tell me which direction the road is running? A. The wagon road or the—

Q. Yes; this road, which direction is that, where we are looking straight at the picture?

(No answer.)

Q. What I want to know is that towards Rockaway or Hibernia? A. Why, that would be toward—towards—I am kind of mixed up on that track. The wagon road is on the left hand side of the track.

19

Q. Yes? A. Going to Hibernia?

Q. Yes. A. This would be going to Rockaway.

Q. I show you another picture and ask you if that correctly represents the scene there on the road running toward Hibernia on the continuation of the other picture? A. Yes, sir. I am more familiar with that picture.

20

Q. I show you another picture and ask you if that represents the railroad track as it approaches the first crossing in Hibernia, at the little building there? A. Yes, sir.

Q. I show you another picture and ask you if that represents the other end of the tracks as it goes towards Rockaway? A. Yes, sir.

Q. Mr. Casey, how does the railroad run in relation to the road at the highest point near Hibernia? Does the road go up hill or down hill? A. It goes on a up hill.

30

Q. Can you tell me what is the height at the highest point of the road above the railroad track? A. Seventeen feet above the rail.

Q. Did you make that measurement? A. I made that measurement, yes.

Q. At that point how far is the railroad from the road? A. The highest point? It is one hundred and thirty-five feet.

40

JOHN A. CASEY—Direct

Q. Is there, taking a point right opposite the center of the high point of the road—can you tell me within what distance there is a crossing from that point, the first crossing at Hibernia? A. Why, about seven hundred feet.

10 Q. Is there another crossing there? A. Another crossing west of that point, yes, sir.

Q. About what distance? A. The crossing now you refer to at the store?

Q. The crossing at the store? A. Well, I never measured that distance; I should judge it was probably seventeen hundred feet.

Q. And the first crossing, as I understand, is by the little red house there? A. By the little red house, yes, sir.

20 Q. Approaching the red house from Rockaway can you say whether or not the view of the track is obstructed as it turns around the red house? A. Yes, it is.

Q. Speaking now of this picture showing the red house, I ask you whether or not the road turns around the red house? A. The road bears to the right around the red house going towards Hibernia.

30 THE COURT—You refer to the road; you mean the railroad or wagon road?

Mr. SMITH—The railroad.

Q. At the red house does the wagon road cross the railroad? A. Yes.

Q. And then re-crosses the railroad at the store? A. Re crosses the railroad at the store.

Q. Now, as the road runs from Rockaway or Beach Glen to Hibernia, does it parallel the railroad, all the way? A. It parallels all the way.

40 Q. Is it always the same distance from the railroad? A. No, it varies.

JOHN A. CASEY—Direct

Q. Did you make any sketch of the scene up there? A. I did; yes, sir.

Q. Have you got it with you? A. A little paper sketch; yes, sir. (Produces paper.)

Q. Did you measure the distance on that? Have you got the distances on that? A. I noted the distance on this sketch.

10

Q. At the time? A. At the time I took the measurements.

Q. Will you tell me now the exact distance between this point at the center, which is opposite the highest point of the hill and the first road, that is, the road at the little red house?

THE COURT—Is that the direction in which this train was proceeding?

Mr. SMITH—Yes; toward Hibernia.

20

A. The distance at the highest point is 135 feet from the center of the wagon road to the center of the main track.

Q. Now, then, taking a distance from that point measured on the railroad, how far is it to the nearest crossing in the direction of Hibernia? A. How far is it to the nearest crossing? It is—that would be 268 plus 170 feet to a private crossing—that is, the crossing nearest Rockaway—private crossing.

30

Q. From where? A. From this point here. This is a point, and I give that distance. This is the high point on the road. This is the apex in the road, and there—that would be one hundred and fifty—two hundred and sixty-eight—and one hundred and seventy.

Q. Now taking—

THE COURT—That is—

40

JOHN A. CASEY—Cross

Q. Now, taking the crossing from that point toward Hibernia—not toward Rockaway—toward Hibernia, and tell me the distance? A. The distance from this private crossing here?

Q. No, no; from the point where you measured to the public crossing? A. 792 feet.

10 Q. 792 feet? A. Yes.

Q. Now take the distance from that point to the second crossing, the crossing at the store, and tell me what is that distance? A. Well, I have not got that distance.

Q. You haven't got that distance down? A. No, sir; I did not measure that.

Cross-examination by Mr. Simpson.

20 Q. How many tracks are there, railroad tracks, in this locality you have been describing? A. Why, at that point, along there, there are three tracks.

Q. When you say that, as I remember, it is 135 feet from the highest point in the wagon road to the railroad, you refer to the nearest rail or to the center of the three tracks? A. I refer from the nearest rail of the main track to the center of the travelled portion of the road.

Q. Do you mean the middle track? A. That is the middle track.

30 Q. From the nearest rail to the middle track to the center of the travelled road is 135 feet? A. 135 at the apex, at the highest point of the public road.

Q. What is the distance between the edge of the road nearest the railroad and the nearest railroad track? A. Why, I don't know.

Q. Don't know that? A. No. These tracks are about twelve feet centers.

41 Q. But you cannot tell us what is the distance between the side of the road at the extreme edge

JOHN A. CASEY—Cross

nearest the railroad and the first railroad track or rail? A. No, sir.

Q. Cannot tell me. Now, what is this seven hundred and ninety-two feet. You say that is from a point opposite the apex of the road, in the center of the railroad to the first crossing, is seven hundred and ninety-two? A. Seven hundred and ninety-two feet, yes.

10

Q. What is that crossing there, a public road or a private crossing? A. Public way.

Q. How many trains—when did you make these measurements, near the date of the accident? A. No; some time afterwards.

Q. So the situation had not changed at all, had it? A. No; the situation had not changed.

Q. Between the time of the accident? A. No, sir.

20

Q. At the time of the accident how many trains were there that ran on this road? A. Why, there was one train, I believe, at that time.

Q. One in the morning and one at night, is there, or only one in the afternoon? A. One in the morning and one in the afternoon.

Q. And that is all that was on that branch, wasn't it? A. That is about all.

Q. That train was composed of passenger cars and some freight cars, wasn't it? A. Well, generally passenger cars—two coaches generally.

30

Q. Sometimes they carried a freight car? A. At that time I think they did carry a freight car at times.

Q. There was no station at Hibernia? A. No, nothing more than a store.

Q. It is a very small place? A. Hibernia is a small town.

40

JOHN A. RIDER—Direct

JOHN A. RIDER, sworn.

Direct examination by Mr. Smith.

Q. Mr. Rider, where do you live? A. Rockaway, New Jersey.

10 Q. What is your business? A. At present I am employed as a locomotive fireman.

Q. What was your business in 1910? A. What position?

Q. 1910. A. Locomotive fireman.

Q. And after, any time subsequent to 1910, did you ever run as an engineer? A. Been promoted three years.

Q. Were you the fireman on the train on the day of the accident? A. Yes, sir.

20 Q. What time does that train reach Hibernia in the afternoon? A. It is due there at 3.30 P. M.

Q. On the day of this accident were you on the engine? A. I was.

Q. How near is your railroad to the highway at the highest point of this hill towards Hibernia? A. How near is the railroad where the tracks, the engine is on?

Q. Yes. I will withdraw that question. Which track were you running on? A. The main track or middle track.

30 Q. Is there any other track between that and the road? A. One siding of the road.

Q. One siding. That is what I thought. On this day which way was your engine faced? A. The engine was backwards, going backwards, ahead of the coaches.

Q. Where were the cars? A. Behind the engine.

Q. Was your engine pulling the cars or pushing them? A. Pulling them.

40 Q. On which side of the engine were you? A. Left side.

JOHN A. RIDER—Direct

- Q. Left side? A. Left side.
- Q. As you went toward Hibernia were you on the left side? I was.
- Q. Would that bring you nearest the road or away from the road. A. Away from the road.
- Q. Does the road, the roadway, cross the railroad at Hibernia? A. It does. 10
- Q. How many times does it cross the railroad? A. Twice.
- Q. Where is the first crossing, coming from Hibernia, we will say? A. Coming from Hibernia?
- Q. Yes. There is one road at what we call Hibernia supply store, and then one about six hundred feet east, that they call the crossing by the coal chute—it formerly was a coal chute, but it is down now.
- Q. That is what they call the little red building? 20
A. Red building.
- Q. As the engine, Mr. Rider, got to the highest point of this hill nearest to Hibernia, can you tell me whether or not any signals were given by the engineer? A. Yes; there was four regular crossing signals, whistles.
- Q. How do those go? A. Well, the two firsts are just a little bit longer than the two last ones.
- Q. Is that the recognized crossing signal on the road? A. That is a standard whistle. 30
- Q. At that time do you know whether those signals were given within the distance required to the crossing? A. Well, a rough guess we were within the proper distance, about eight hundred feet to the crossing.
- Q. Did you have anything there to mark the distance,—I mean of this proper point? A. My mark was a couple of big boulders, stones.
- Q. Can you tell me whether the signal was given at that point? A. It was. 40

JOHN A. RIDER—Cross

Q. As you were coming, what have you to say as to the condition of the bell; was it ringing or not? A. It was ringing automatically.

Q. What do you mean by that? A. Rung by compressed air. The engineer has control of that, and he turns a little valve and causes the air to rush
10 through and work a little plunger, and rings the bell automatically.

Q. Where did you start ringing? A. Rockaway.

Q. Was it ringing all the way up? A. Continuously.

Q. What first called your attention, Mr. Rider, to any accident on this day? A. Why, I saw an elderly lady jump out of a carriage there below Hibernia supply store and run toward the engine, and I called to the engineer to stop the engine, the
20 woman wanted to get on.

Q. Which way were you then going? A. We were headed back to Rockaway, just started.

Q. Had you gone into Hibernia? A. Yes, sir.

Q. And then turned around to come back to Rockaway? A. No; we did not turn the engine, we just went around the coaches, down through the side track, down on the other end of the coaches and started back.

Q. Then did you stop? A. Mr. Forrester stopped
30 and waited until I found out what the trouble was.

Q. On this occasion, Mr. Rider, when you got opposite this hill, was there any other signal given by your engine save the regular crossing signal? A. No, sir.

Cross-examination by Mr. Simpson.

Q. You were a witness at the last trial, weren't you? A. Yes, sir.

40 Q. Did you testify as follows: "Have you seen Mr. Forrester since the time of this accident? A.

JOHN A. RIDER—Cross

Yes. Q. When did you last see him? A. About three weeks ago. Q. Did you make any attempt to get Mr. Forrester here to-day? A. Yes." Did you so testify at the last trial?

Mr. SMITH—I object on the ground it is irrelevant, incompetent and immaterial, and it is not cross-examination. 10

Mr. SIMPSON—I want to show the interest of the witness, to show he was not testifying truly at the last trial, to show he did not make any effort whatever. He is an interested witness. He said at the trial he tried to get the engineer here but could not do it, and I want to show that it is not so, that the engineer is here to-day on my subpoena. 20

Mr. SMITH—That does not show anything.

Mr. SIMPSON—I want to show his interest, that he testified at the last trial that he tried to get the engineer here and could not do it, when as a matter of fact he never tried, and I got him here to-day without any trouble at all. It seems to me that shows his interest in the case.

Mr. SMITH—There has been no such testimony in the case, sir. 30

Mr. SIMPSON—I am asking him.

Mr. SMITH—You can only ask a question to contradict his testimony, and that is the law plain and simple, if a man has said anything which he wants to contradict now he can ask him didn't he say something at the last trial and then contradict that. 40

JOHN A. RIDER—Cross

THE COURT—That is what I understood to be the purpose.

Mr. SIMPSON—All right.

10 Q. You were a witness at the last trial? A. I was.

Q. Now, you were on the side away from the road, in the cab of the engine? A. I was.

Q. How fast was your train going? A. About eight miles an hour.

Q. Eight miles an hour, and you started the bell to ringing automatically at Rockaway? A. The engineer did.

Q. You know that it started? A. Yes.

Q. You know it continued? A. Yes.

20 Q. Up to the time you got over the crossing at Hibernia? A. Yes.

Q. Ringing all the time; and in addition to the bell you say there was a whistle given at a point where there were two boulders? A. Yes.

Q. That is the only mark, is it, for whistling there? A. No; there is a whistle board, but that was my mark on my side.

Q. Did you blow the whistle? A. No.

30 Q. What did you have to do with the mark for blowing the whistle if you did not blow the whistle? A. Well, I worked with the engineer so long that it was just like eating meals, everything mechanical; he was in the habit of doing the same thing over and over.

Q. You fixed a mark on your side of the engine which he could not see, for him to blow the whistle; is that it? A. I did not fix it for him, but I saw that is about the position that he blowed the whistle every day.

40 Q. You said to Mr. Smith that you knew there

JOHN A. RIDER—Cross

was a regular mark of two boulders which had been fixed for blowing the whistle; is that a fact?

THE COURT—He did not say that; he said he had a mark which was two boulders.

Q. You had nothing to do with blowing the whistle, did you? A. No; but if he didn't blow the whistle I am to call his attention to it. 10

Q. Did you ever have to call his attention to it? A. No, I did not.

Q. You never did? A. No, sir.

Q. But you fixed this mark and you had nothing to do with blowing the whistle? A. No, sir.

Q. But if he had not blown the whistle you would have drawn his attention to it? A. I would have called his attention to the whistle. 20

Q. That is the reason you had this mark? A. No; I did not have that mark for that purpose. 20

Q. Why did you pick out this boulder if you had nothing to do with blowing the whistle? Why did you pick it out. A. We just got around the curve and at the point of this curve there was those two boulders setting there, and it was at that point that he usually blew the whistle.

Q. Why did you pick it out if you had nothing to do with blowing the whistle? A. That is a conspicuous point, and I noticed that is where he usually blew the whistle. 30

Q. Although it had nothing to do with your duties? A. No.

Q. Now, as you came up towards this point where the whistle was blown you were on the right hand side of the cab, weren't you? A. Left hand side.

Q. Was the engine reversed, that it was going back forwards, cowcatcher in the direction it was not going; is that right? You were on the side away from the road? A. Yes, sir. 40

JOHN A. RIDER—Cross

Q. Had you ever gone up on the other side when the cowcatcher was pointing towards Hibernia, and your train was going towards Hibernia? A. Yes.

Q. In the cab? A. Yes, sir.

Q. Well now, as you approached that, the place of the accident was five hundred feet away from it; 10 could you see up the road as you came along from that side of the cab? A. You mean a certain part? Well, what part? That point where the grade is?

Q. Read the question.

(Question repeated.)

THE COURT—I don't know as I understand that question.

MR. SIMPSON—I will withdraw the question.

Q. From the side of the cab which would be the 20 left hand side of the cab if the cowcatcher was pointing towards Hibernia, could you see the road on the left hand side as you approached it?

MR. SMITH—From what point?

Q. Going towards Hibernia? A. The point where the accident is supposed to have happened?

Q. Yes; could you see that point in the road as you approached the road? A. Not until you got 30 right on top of it.

Q. Is this a good picture of it? (Handing witness photograph.) A. This don't show the descent. This is around the curve.

Q. Is this a good picture of the road and the tracks at this point? A. This is a curve and this is not a curve, and here would be a good view of the road, coming right here.

Q. You say you could not see it until you got 40 right on top of it? A. You could not see it until you got right around this curve.

JOHN A. RIDER—Cross

Q. That is where the train is now? A. Yes.

Q. You could not see it if the train was on the left of this ridge right here in the picture; you could not see this road at all? A. No, not that point.

MR. SIMPSON—That is the picture I am referring to.

10

(Hands picture to the jury.)

Q. How many times did the whistle blow this day, at the time, this afternoon? A. Four.

Q. Four blasts? A. I should say not quite a second.

Q. Do you know how loud a sound that whistle makes if it is blown to the extent of its sound producing qualities? A. Well, all whistles are not the same tone. It was a distinct and clear whistle.

20

Q. Could this whistle be heard a distance of a couple of miles if it was blown as loud as it could be blown? A. On a clear day.

Q. How far could it be heard? A. Well, you can hear a whistle—I have heard it myself three miles on a clear day.

Q. Was this whistle always blown while you worked with Forrester with the same degree of noise? A. Yes.

Q. Was it blown very loud? A. Well, blown clear and distinct, with what I could call regular—but an outsider might call it loud.

30

Q. But a railroad man might call it regular? A. Regular whistle.

Q. When was the first you knew there had been any accident? A. There had not been any.

Q. Eh? A. There had been one?

Q. Yes? A. When this lady got out of the carriage and told me.

Q. Where were you then? A. We were just

40

JOHN A. RIDER—Cross

starting to leave Hibernia on our return trip to Rockaway, just two car lengths from the crossing of the Hibernia supply store.

Q. Which was first, the engine or the cars then?

A. The engine.

10 Q. How had you turned the cars around so the engine was first? A. We had not turned the cars.

Q. How did you get the engine on the other side of the cars? A. Cut off from the end that we were on coming in and pulled out and came down to what I call the little side track, run around our coaches and backed up and coupled to the coaches.

Q. How many cars were there in the train this day? A. Going up?

Q. Yes. A. Three and a box car.

20 Q. What do you call up? Towards Hibernia? A. Yes.

Q. How many going down? A. Three.

Q. Three and the box car? Were they all passenger cars—the three cars? A. Well, one was called a combination; they carry a few passengers, it was a smoker and baggage car, and they had two coaches.

Q. Only two trains a day on that road, aren't there? A. Yes.

30 Q. Do you know, of your own knowledge, when the bell started to ring, before this accident, on the locomotive? A. As we left Rockaway station.

Q. It continued to ring all the time? A. Yes.

Q. And your train was going about eight miles an hour? A. Yes.

Q. Did you say how long you had been a fireman; tell Mr. Smith how long? A. Have I been firing?

Q. Yes. A. Eleven years and eight months.

Q. How long an engineer? A. Three years.

40 Q. How long were you working on this run

JOHN A. RIDER—Cross

with Mr. Forrester? A. Well, off and on, getting taken off the run—I was taken out, in 1907.

Q. When did you stop, or when did you cease being on the run, or are you still there? A. I am still on it.

Q. Who is the engineer now? A. A young fellow by the name of George F. Brannon. 10

Q. Are you an engineer also? A. No.

Q. You are fireman on there? A. Yes.

Q. How long has he been the engineer? A. Three years.

Q. Three years when? A. Last September.

Q. That is September, 1914. A. September or October; I ain't positive sure what month he got it.

Q. Well, there are points—as this railroad runs from Rockaway—where you could practically reach out from the railroad and touch the carriage on the road, aren't there, around it? A. As close as six or eight feet, some parts. 20

Q. Yes; I think that's all; now, that whistling post that you talked about; I will withdraw that question; this road to Hibernia, how does it run, east and west, or north and south? A. Well, how do we designate it?

Q. Yes. A. We class as going west when we are going to Hibernia.

Q. How far were these boulders west of the whistling post? A. West. 30

Q. Yes. A. Well, about around a hundred feet; they are not there now.

Q. I know; but at this time, I mean; I show you a picture; is this the whistling post? Is that what they call the whistling post? A. That is the clearance post.

Q. What does that mean? A. Cars on that side track have to be beyond that post—be put beyond that to clear this track. 40

GEORGE W. NICHOLS—Direct

Q. The whistling post does not show there? A. No.

Q. Where were these boulders; can you show me?

A. It should be there (indicating).

10 Q. About where this—this side of that switch? Is that switch this thing here? A. Yes, a little bit this side of it—should be there (indicating).

Q. About how far would you say east of the switch? A. Of course, I cannot tell.

Q. I mean approximate; five feet, or ten feet, or fifty feet? A. More than that.

Q. A hundred feet? A. About seventy feet.

Q. Seventy feet east of the switch? A. Yes, sir.

GEORGE W. NICHOLS, sworn.

20 *Direct examination by Mr. Smith.*

Q. Mr. Nichols, where do you live? A. Live at Berkshire Valley.

Q. What town? A. Wharton or Ardene.

Q. Did you see this man and woman in this wagon? A. I did.

Q. Where were you at that time? A. At the Hibernia store.

30 Q. Did you see them pass the store? A. I seen them going up and coming back, both.

Q. What kind of a horse? A. Had a black—a bobtail with a cutaway wagon.

Q. Who was driving? A. The lady.

Q. Now, as the horse and the wagon were going from Hibernia, did you see whether they went up the hill? A. They got to the top of the hill, and I heard a train blow, and the train blowed and they stopped.

Mr. SIMPSON—I object to what he heard.

40 Q. You cannot tell what they heard or what

GEORGE W. NICHOLS—Direct

they saw? A. They stopped; I heard the train blow and they stopped.

Q. Where was the train, if you saw it, when you saw the horse stop. A. The train just came around the curve, and they stood up on top of the hill.

Q. Then did you see the train; what did it do? 10
A. The train passed them then, and after the train passed them they started off down the hill.

Q. At the time the train, the whistle blew, could you see the horse? A. Yes; just getting to the top of the hill when the whistle blowed—that is when they pulled up.

Q. When they pulled up you could see the train pass them? A. Yes, the train passed them when they stood there.

Q. Then what did you see the horse do? A. 20
Didn't do nothing; kind of looked at the train; but it went on as usual, and after the train went past I didn't see nothing at the time, or hear about it.

Q. Then what did you next do? A. I didn't think no more of it after they went over the hill.

Q. Did you see it go over the top of the hill? A. I just seen them starting down over the hill.

Q. Now, at the time the whistle blew you say the horse did not do anything except they stopped? 0
A. No; kind of looked at the train sideways, but did not rear none.

Q. Was there anything at the time the horse stopped to indicate to you that it was frightened?
A. No.

Mr. SIMPSON—I object to it on the ground that it calls for a conclusion of this witness, and also that it is a leading question.

THE COURT—I think I will permit it. You may have an exception if you wish it. 40

Cross-examination by Mr. Simpson.

Q. You were not with us at the last trial, were you? A. No, sir.

Q. Where was you? A. I was home.

10 Q. Where did you live? A. I lived at Hibernia, at the time.

Q. Work for anybody? A. I worked for the government.

Q. What were you, a letter carrier? A. No, sir, an engineer—Picatinny Arsenal.

Q. Is Picatinny near Hibernia? A. About four miles.

Q. You lived in Hibernia? A. I did.

Q. At that time were you the engineer at Picatinny? A. No, sir, I was not at that time.

20 Q. What were you at that time? A. I was fireman for the Wharton Steel Company.

Q. These Central Railroad trains come into the Wharton Steel furnaces, don't they? A. They come in there to the store. I was down to the store.

Q. Did you know about this case before the last trial? A. Why, I know the man here, but I never thought nothing of it.

30 Q. You did not tell the Central Railroad people you knew anything about it? A. I did not. I don't know how they found it out.

Q. Who was the one you told you knew anything about this? A. The first one?

Q. Connected with the defendant, the Central Railroad? A. Oh, the first one I spoke to was Mr. Beers; he came to me. I don't know how he found it out.

Q. When did he come to you? A. Must be two years ago, very near.

40 Q. That is before this case was tried, isn't it?

GEORGE W. NICHOLS—Cross

Let's see—the case was tried— A. No; it was a year ago last summer, that is when it was.

Q. Last year ago, last summer? A. July or August.

Mr. MILLER—It was after the case was tried.
This is January, 1913. It was after the case. 10

Q. It was after the case. It was after January, 1913? A. Yes.

Q. He came to you and told you? A. Yes.

Q. Up to that time you had not seen anybody from the Central Railroad, and had not told anybody? A. No, sir.

Q. You do not know to-day how they found out that you knew anything about it? A. I do not. 20

Q. Now what day of the week was it that you saw it? A. I don't know—what day of the week—you mean the accident?

Q. Yes? A. I don't know; it was the afternoon; I was just working that day.

Q. Was it Monday, Tuesday, Wednesday or Thursday? A. It seems to me it was on Friday afternoon, I ain't sure.

Q. On Friday, the second day of November, 1910, sure about it? A. I ain't sure about it. 30

Q. Now, do you know that you saw this lady, that it was this lady's horse, and the gentleman with her? A. Well now, I seen them and after the train I heard about it afterwards, about a couple or two hours afterward, that the man got killed, down on the corner.

Q. Did you see the lady, Mrs. Aarenstein, from the time of the accident until you came into court to-day? A. I did not.

Q. All that you saw the horse do was sort of 40

GEORGE W. NICHOLS—Cross

look at the train? A. Yes; shied around like that (illustrating).

Q. What do you mean by shied; what did it do?

A. Just kind of look at the train, that is all; it did not prance or jump.

10 Q. Didn't do any tango, but what do you mean by shy? What did it do when you say shy? You are familiar with horses, aren't you? A. No, not very much.

Q. Don't drive them? A. No, sir.

Q. You did use the word shy, didn't you? You used that word? A. Yes, I did.

Q. You know what shy means? A. Yes.

Q. How many times did you hear this whistle blown? A. No, I didn't notice; I knew it does blow at the crossing; it does every day.

20 Q. Three or four whistles blown? A. I could not swear to that.

Q. Or two whistles blown? A. I know the whistle blew; I seen that horse go down.

Q. Do you know how many whistles were blown? A. I do not.

Q. You are sure it was after some whistle that you saw the horse shy around? A. I heard the whistle blow and I stepped out on the crossing to see whether the horse would be afraid or not.

30 Q. Why did you do that? A. It was a nice rig, and I thought maybe the horse was high spirited. I thought maybe he was afraid. That is how it drew my attention.

Q. You mean to say that you, without any reason or warrant, and having seen this horse and wagon, when you heard this whistle blow you stepped out to see whether it had any effect on the horse? A. It was train time, that is the reason.

40 Q. Was there anything about the whistle that made you step out? A. No, sir.

GEORGE W. NICHOLS—Cross

Q. To see whether it had any effect on the horse?

A. No, sir.

Q. You did not step out until after you heard the whistle, did you? A. I stepped out just about the the time the whistle blowed, to see whether they were going to stop the train.

Q. You said you stepped out after you heard the whistle blow; is that a fact? A. Yes; I stepped out on the porch. 10

Q. Where did you step from? A. Right by the railroad.

Q. Where were you before you stepped out? Where were you standing? A. By the store—the store stoop.

Q. From the position you stood in you could not see the horse, could you? A. Yes.

Q. Why did you step out then? A. Went up on top of the hill, and I was further from the top of the hill—up to the top. 20

Q. If you could see the horse from where you stood and you wanted to see him and you wanted to know whether he was frightened or not, why did you step out? A. So as to have a good view of it.

Q. Did you have a better view by stepping out? A. Yes, sir.

Q. When you stepped out where was the horse? A. Standing on the hill. 30

Q. On the very top of the hill? A. Right on the top of the hill.

Q. How soon after you got out did you see him shy? A. Just as soon as the train came along—came along in about a minute or two. About a minute afterwards.

Q. A minute after the train whistled you hear a train and saw the horse and then saw him shy? A. Yes, sir. 40

GEORGE W. NICHOLS—Cross

Q. Don't know whether you heard any other whistles blown or not? A. No, sir.

Q. But you lost sight of the horse; he went down the hill on the other side? A. He did not go down until after the train passed.

10 Q. He did go down, didn't he? A. He did go after the train.

Q. On the other side of the hill? A. Yes.

Q. When he went down you could not see him any more? A. No, sir.

Q. You did not know whether he was running away or not? A. I know he did not get started when the train blowed.

Mr. SIMPSON—I ask to have that stricken out as not responsive?

20

THE COURT—It may be.

Q. You don't know whether the horse ran away the minute he passed down the hill or not? A. No, I do not.

Q. You saw the train pass him before he went down the hill. How long was that train? A. Oh, three or four cars; I don't know exactly.

Q. How much of it passed him before he went down the hill? A. They had all passed him.

30

Q. The engine and the three or four cars? A. Yes.

Q. Where was he when you saw him shy—on the hill? A. On top of the hill.

Q. Where was the locomotive with reference to to him when you saw him shy? A. The locomotive was just coming to him.

40 Q. And he stood on the hill after he had shied until the locomotive got to him and all the cars passed him, and then he went on down the hill? A. Yes.

GEORGE W. NICHOLS—Cross

Q. He did not go down in a hurry at all; he was not frightened—did not seem to be frightened, did he? A. No, sir; not when I seen him.

Q. And you did not see anything out of the way about him? A. No, sir.

Q. Just waited there on top of the hill and then went on past the hill without any sign of fear? 10

A. As far as I know; I didn't see him, he just passed on down the hill.

Q. You say you are working for the government now? A. Yes.

Q. When this horse shied did he go to the right or to the left? A. No, he stood right in the middle of the road, kind of pulled himself around to look at the train—the train was right down under it.

Q. When he shied do you mean he pulled himself around and looked at the train? A. Yes, sir. 20

Q. Did you see his ears go up? A. I did not see—I did not look for his ears to go up.

Q. How far away were you standing? A. I was standing at the borough crossing.

Q. How far is that? A. Must be seven or eight hundred feet.

Q. You could tell from that distance that a horse shied and looked at the train? A. I could see it very plain.

Q. Did he keep looking at it until it passed him? A. Yes. 30

Q. You stood still and looked at it until he passed him? A. Yes.

Q. So you had no trouble from where you were standing in seeing that this horse shied, had you? A. No, sir.

Mr. SIMPSON—Will you let me ask your fireman one question which I omitted? 40
Was the whistling post that you have

DAVID GORDON FICHTER—Direct

been talking about there at the time of the accident?

Mr. RIDER—At the place where it is now?

Mr. SIMPSON—Yes, at the place where it is now?

10

Mr. RIDER—I could not say.

Mr. SIMPSON—All right.

DAVID GORDON FICHTER.

Direct examination by Mr. Smith.

Q. Where do you live, son? A. Beach Glen.

Q. How long have you lived there? A. About six years.

20

Q. Were you in Hibernia on the day of this accident? A. Yes, sir.

Q. Where? A. By the Hibernia Supply Company store.

Q. That is the place we have been talking about as the store? A. Yes, sir.

Q. Does the road run past the store? A. Yes, across the tracks there.

Q. On this day do you remember hearing the whistle of the train as it came in? A. Yes.

30

Q. What kind of a whistle was it? What have you to say as to whether it was like the ordinary whistle or whether it was any louder or longer? A. Same as it always was.

Q. Did you then afterwards hear about this accident? A. Yes, sir.

Q. About how long after you heard the whistle? A. Oh, we got down there before we heard about it, where the man and woman was thrown out.

Q. You went down there? A. Yes, sir.

40

Q. Who was with you? A. Some of my school-mates.

DAVID GORDON FICHTER—Cross

Q. Have you heard the train blow there other days? A. Yes.

Q. What have you to say as to this whistle as compared with the whistles you have heard there on the other days? A. About the same.

Cross-examination by Mr. Simpson.

13

Q. How loud did it blow? A. How loud did it blow? I cannot say how loud it blowed; it blowed four times.

Q. Do you know the measure of sound, can you tell how many vibrations in the air this whistle caused? A. No, sir.

Q. You are not an expert on sound at all, are you? A. No, sir.

Q. Well, do you listen every day that the whistle blows up there? A. I hear it blow every time.

20

Q. Do you pay attention to it? Are you enamored of whistles, that you listen every time you hear a whistle? A. I cannot say whether I do or not.

Q. Well, you went down to the scene of this accident, didn't you? A. Did not stop there; went right on.

Q. Well, did you go down because you knew there was trouble? A. No, sir; going home from school.

30

Q. You saw the trouble, did you? A. Yes.

Q. What did you see? A. I seen the lady up walking around and her father lying there.

Q. See the horse? A. No; that had gone.

Q. Did you see the horse before it went away? A. Yes, sir.

Q. Where did you see it? A. Over in front of the store.

Q. Did you see it when it shied at the whistle?

40

DAVID GORDON FICHTER—Cross

Mr. SMITH—I object to it as not cross-examination,

10 Mr. SIMPSON—I am trying to find out what he knows about it. He testified he was there at the time this whistle blew that caused this accident.

THE COURT—He has not testified anything before the accident.

Mr. SIMPSON—He testified he was out on this road at the time the whistle blew. I have a right to search his recollection.

THE COURT—All right.

20 Mr. SMITH—I object on the ground that I have not interrogated this witness on any of these questions and that it is not cross-examination. I am going to enter my objection, and I object on the ground it is not proper cross-examination.

(Question repeated.)

30 Mr. SIMPSON—He says he was there at the time when this whistle blew; he describes these whistles, and he tells us all about the whistle. I think that I have a right to find out where he was when he heard it, and find out whether he could hear it, what his opportunity for hearing was. In some places if he heard it he would have seen the horse, and others he would not. I want to find out where he was when he made this observation with his ears. It certainly is proper cross-examination.

40 Mr. SMITH—I haven't any objection—

DAVID GORDON FICHTER—Cross

THE COURT—If it is to draw his attention to something that he has not had his attention drawn to—

Mr. SIMPSON—I am cross-examining.

THE COURT—I will sustain the objection.

Mr. SIMPSON—Exception.

10

Q. Where were you when this whistle blew? A. Coming out of the post office.

Q. Did you see this road at the time you heard the whistle blow? Were you looking up this road? A. Started for home.

Q. See this horse at the same time you heard the whistle blow? A. The horse had gone before me.

Q. Did you see him? A. No, sir.

Q. He was before you? A. Yes, sir.

20

Q. Then you did not see him? A. No, sir.

Q. Where was he the last time you saw him? A. Right in front of the store, and I was in front of the post office.

Q. You did not see him after that at all? A. No, sir.

Q. You did not see where he was when the whistle blew? A. No, sir.

Q. Were you inside when the whistle blew? A. No, sir; I had come out.

30

Q. You were outside? A. Just came out on the stoop.

Q. Did you look at the train when you heard the whistle blow? A. Did not look at the train, could not see it.

Q. Could not see it when you heard the whistle? what kind of a blow was it; was it a short blow you heard or a long blow? A. The two first was a little longer than the two last ones.

Q. There were four of them? A. Yes.

40

DAVID GORDON FICHTER—Cross

Q. There were two of them long and two of them short? A. Yes, sir.

Q. How long were the first two that you heard?

A. I cannot tell you exactly how long they were.

Q. Was it a minute? A. Oh, no, not a minute.

Q. Half a minute? A. I could not say.

10 Q. Quarter of a minute? A. I don't know how many minutes it was.

Q. Was it a second? A. I cannot say.

Q. Was it ten seconds? A. I cannot say.

Q. You simply heard four blasts of a whistle on this day? A. Yes, sir.

Q. Now, do you know what day of the week it was? A. No, sir; I do not.

Q. But you do know there were four blasts of the whistle? A. Yes.

20 Q. What time had you got out of school? A. Half past three.

Q. Who was with you? A. These two boys back there and some other ones.

Q. You were not at the last trial either, were you? A. I was hree.

Q. Were you here under subpoena? A. Yes.

Q. You were not called, were you? A. No, sir.

30 Q. Who was the first that you told that you heard these whistles, these four whistles? A. First I told?

Q. Who was the first person you told that you had heard the whistles on the day of this accident? A. I don't know who the man was.

Q. Don't know who it was? You are sure they were not loud whistles? A. Yes, I am sure.

Q. You are sure they were not low whistles? A. Yes.

Q. Neither loud nor low? A. Yes.

40 Q. Have you ever heard the train whistle down at Beach Glen? A. Yes.

DAVID GORDON RICHTER—Cross

Q. Was this as loud as the whistle down at Beach Glen? A. About the same.

Q. About the same; and how far is Beach Glen from Hibernia? A. About a mile.

Q. When you were subpoenaed at the last trial were you subpoenaed by me or were you subpoenaed by the defendant, by the Central Railroad? A. By you. 10

Q. And you made some statement to me then, didn't you, about this? A. You came and took me in the back of the seat and asked me questions.

Q. Then you were subpoenaed— didn't you make some statement about this whistle? A. Who to?

Q. To an investigator who went up to Hibernia to see you? A. I guess so.

Q. Before you were subpoenaed, didn't you? A. Yes. 20

Q. What do you say your name is? A. David Gordon Fichter.

Q. David what? A. David Gordon Fichter.

Q. David Gordon?

Mr. SIMPSON—Now, if your Honor please, I have some statements, and I would like to reserve my right to cross-examine this witness with respect to simply these statements made. I cannot put my hands on them. 30

Mr. SMITH—I will object to that, unless he examines my witness now.

THE COURT—It is very close to the time for adjournment now, to-day.

Mr. SMITH—Let him look for his statements.

Q. What did you say your name is, Victor Gordon? A. David Gordon Fichter. 40

DAVID GORDON FICHTER—Cross

Q. You made a statement shortly after this accident, didn't you, on the 25th of September, 1912?

A. I don't know what date it was.

Q. Didn't you say that you were returning from school on your way home on the same road where the accident occurred, and that you heard Mrs. Post shout that some one had been killed, and that you all ran down the road and saw a man and lady there? A. She told us that, Mrs. Post did.

10

Q. Didn't you make that statement? A. I think I did.

20

Q. And that you could not give a single statement or any description that would shed any light on the matter as to whether the engine blew this whistle at that place or whether the engineer was on the right side of the cab or not? Didn't you say that? A. I didn't know where the engineer was.

Q. Didn't you say that you did not know whether the whistle blew at that time or not and you did not know where the engineer was? A. No, sir; I don't think I did.

Q. When you were subpoenaed by me I had a conversation with you, didn't I, in the back of the room? A. Yes.

30

Q. Didn't you tell me that you could not tell me whether the whistle blew or not and you did not know whether it was loud or not? A. I did not.

Q. What did you tell me? A. I told you it blowed.

Q. You told me it blowed? A. Same as it always did.

Q. Didn't you tell me you could not tell whether it blew or not? A. No, sir.

Q. After you came here under my subpoena did you have any talk with anybody from the Central

40

DAVID GORDON FICHTER—Cross

Railroad while you were in the court room? A. No, sir; I did not.

Q. Before you had a talk with me? A. No, sir.

Q. Have you had any conversation with Mrs. Aarenstein; you know this lady, don't you, sitting here in this front row? A. I seen her before.

Q. You had a conversation with her about whether this whistle blew or not, didn't you? A. I don't know whether I did or not. 10

Q. Don't know whether you did or not; what makes you so vague about whether you had any talk with Mrs. Aarenstein; why don't you remember the whistle was blown and don't remember whether you had any talk with Mrs. Aarenstein? A. I think she was up to school once to see me.

Q. You remember what you told her? A. Yes, I do. 20

Q. Didn't you tell her that you did not know whether the whistle blew or not, did not know whether it blew loud or not? A. No, sir.

Q. Did you have a conversation at the time of the last trial with Dr. Flagg, as you came in here? A. No, sir.

Q. Well, were you with a boy who did? A. No, sir.

Q. Have you made any statement in writing for anybody about this case? A. Who for? 30

Q. Anyone; made any statement in writing; signed any statement in writing about this case?

A. No, sir; I did not.

Q. Now, who else have you talked to about this case besides the investigator that you talked to on the 25th of September, 1912, I think was the date I called your attention to—talk to any one else besides this one man that you said you talked to? A. Another man there to see me.

Q. When was he there to see you? A. I don't 40

DAVID GORDON RICHTER—Cross

know what date he was there, but he was there.

Q. When was it that he saw you. A. Here a little while ago.

Q. How long ago? A. I can't say.

Q. Was he from the Central Railroad? A. Yes, he was.

10 Q. And he had a conversation as to whether this whistle blew any louder than usual on this day, didn't he? A. Yes.

Q. Now, do you remember what time of day it was when this whistle blew? A. It was about three thirty when the train was coming in.

Q. Three thirty? A. Yes.

20 Q. How far were you away from the locomotive when you heard the whistle? A. Not very far, the train was coming around that bend and we was by the store.

Q. How far is that away from the locomotive? A. I don't know how far it is.

Q. You don't know how far it is? A. No, sir.

Q. Is it a thousand feet? A. I cannot tell you.

Q. Is it two thousand feet? A. I don't know how many feet it was.

30 Q. And you say that you have never told any one from the time of the accident that you did not know whether the whistle blew or not? A. No, sir; I did not.

Q. And that you did not know how loud it blew? A. No, sir.

Q. And you do know how loud it blew, don't you? A. Yes.

Q. How loud did it blow? A. Louder than it ever did.

Q. Louder than it ever did? A. I say loud as it ever did.

40 Q. Did it blow louder sometimes than others? A. No, sir; not as I could notice it.

RUSSELL HARPER—Direct

Q. How many times did you hear it blow? A. Four times.

Q. I don't mean on this day. I mean ever? A. About the same length of time.

Q. How many times? A. Oh, why, it blowed every time it comes up.

Q. How many times is that? A. I never stopped to count it. 10

Q. How many years have you lived up there? A. I went up and down that road seven years.

Q. Every day of that seven years which the train ran, which was every week day, you heard a whistle blow? A. Yes.

Q. Every day for seven years they always blew the same? A. Yes, to me.

Q. Never varied? A. No, sir.

20

RUSSELL HARPER, sworn.

Direct examination by Mr. Smith.

Q. Where do you live, son? A. Beach Glen.

Q. How long have you lived up there? A. About five years.

Q. Did you go to school in Hibernia? A. Yes, sir.

Q. Were you with the young man who was just on the stand on the day of this accident? A. Yes, sir. 30

Q. Where were you coming from? A. Just getting—came out of the post office.

Q. Had you been to school that day? A. Yes.

Q. Were you going home to Beach Glen, is that it? A. Yes.

Q. Now, do you remember hearing the whistle of the train that comes there in the afternoon? A. Yes, sir.

Q. On that day? How was it, as to sound, com- 40

RUSSELL HARPER—Cross and Re-direct

pared with whistles you have heard of the same train on other days there? A. Just the same.

Q. You did not see this accident, did you? A. No, sir.

Q. I mean the happening of it? Did you afterwards go down with David towards Beach Glen?
10 A. Yes.

Q. You were subpoenaed to come down here at the last trial were you? A. Yes.

Q. By Mr. Simpson? A. Yes.

Q. Did you tell him then in the court room just what you have told now?

Objected to as incompetent, and not proper examination. Question overruled.

20 *Cross-examination by Mr. Simpson.*

Q. You were subpoenaed by this young man here, weren't you? A. Yes.

Q. Didn't you tell him that you did not know anything at all about the accident, that you did not get there until it was all over? A. Yes.

Q. Well, he was asking you about the whistle then; he wanted to find out whether you knew whether the whistle blew loud, or not, didn't he?
A. Yes, sir.

30 Q. He was asking you whether the whistle blew loud? Wanted you to come and testify the whistle blew unusually loud, and you said you could not do that, because you did not know anything about it, and you did not get there until it was all over, didn't you? A. Yes, sir.

Re-direct examination by Mr. Smith.

Q. And then after that Mr.—I have forgotten your name, young man—did you tell Mr. Simpson
40 in the court room as to how that whistle blew in

RUSSELL HARPER—Re-cross

comparison with the same whistles you heard on other days?

Mr. SIMPSON—I object. I think we are entitled to his conversation about it. He is their own witness. If there is any more of the conversation that is relevant, of course I have no objection to it, but I do not think Mr. Smith should be allowed to put it in the witness' mouth. 10

THE COURT—I suppose you are not allowed to ask anything in the way of a leading question any more than you are on your direct examination, but I will permit the question.

By the Court.

Q. Do you understand the question? A. Yes, sir. 20

(Question repeated).

A. Yes, sir.

By Mr. Smith.

Q. Did you tell him at that time that whistle as blown was of the same kind that you had heard on other days there?

Mr. SIMPSON—I object to that question as leading. 30

THE COURT—I will overrule the objection.

Mr. SIMPSON—I ask an exception.

(Question repeated).

A. Yes, sir.

Re cross examination by Mr. Simpson.

Q. You know you are under oath, don't you; you realize that, don't you? A. Yes. 40

BERNARD HARPER—Direct and Cross

Q. You know when I went back and asked you what you knew you said you did not know anything about it, didn't you? A. I don't remember.

Q. You don't remember what you said to me, do you? A. No, sir.

10 Q. Yet you are swearing to what you said to me, aren't you? That's all.

BERNARD HARPER, sworn.

Direct examination by Mr. Smith.

Q. Were you with your brother and young Fichter, on the day of this accident? A. Yes, sir.

Q. Do you remember the blowing of the whistle on that day? A. Yes, sir.

20 Q. What have you to say as to whether that whistle was the same as you heard on other days or was it in any way different?

Mr. SIMPSON—I object.

A. The same.

Mr. SIMPSON—I object as to what he has to say, as of no interest. What is the fact?

THE COURT—What do you say, I suppose.

(Answer repeated.)

30 Q. Were you subphoenaed to come here at the last trial, son? A. Yes.

Q. Were you subphoenaed by Mr. Simpson or this young man here? A. Mr. Simpson.

Q. You did not go on the stand, did you? A. No, sir.

Cross-examination by Mr. Simpson.

40 Q. I went out and served a subpoena on you, didn't I, in Hibernia? A. Yes.

ERIC JENTZ—Direct and Cross

Q. I came out and served it on you? A. Yes.

Q. You are sure about it. A. Yes.

Q. I came out with the subpoena and gave you money? A. Yes.

Q. You are just as sure about that as you are of anything, aren't you? A. Yes.

DEFENDANT RESTS.

10

PLAINTIFF'S TESTIMONY IN REBUTTAL.

ERIC JENTZ, sworn.

Direct examination by Mr. Simpson.

Q. You are employed by me as a clerk, aren't you? A. Yes.

20

Q. Did you serve subpoenas in this case on these boys? A. Yes.

Q. Did you serve it on this last boy? A. Yes.

Q. Did I at that time go out and serve subpoenas in Morris County, to your knowledge? A. Not to my knowledge.

Cross-examination by Mr. Smith.

Q. You do not know everything that Mr. Simpson does, do you? A. No, sir.

30

Q. You do not know the fact that he was out there at the scene of this accident with Mrs. Aronstein, do you? A. Not that I know of.

Q. Of course you don't. If he was there without your knowledge that simply shows you do not know everything he does. I think that is all, young man

ALEXANDER SIMPSON—Affirmed.

THE WITNESS—I am the attorney of record in this case. I never served any sub-

40

DR. FREDERICK W. FLAGG—Direct

poena on this boy in Morris County or any other place.

THE COURT—Cross-examine.

Mr. SMITH—I respectfully decline to examine Mr. Simpson.

10 Mr. SIMPSON—Quite delighted to have you, if you want the truth.

Mr. SMITH—Oh, no. I know you.

Adjourned to November 25, 1914, 10 A. M.

Jersey City, New Jersey, November 25, 1914, trial of the cause resumed at 10 A. M.

Dr. FREDERICK W. FLAGG, sworn.

20 *Direct examination by Mr. Simpson.*

Q. Dr. Flagg, you are a practicing physician and surgeon? A. Yes, sir.

Q. You were called as a witness by the defendant in the former trial of this case, weren't you? A. Yes, sir.

Q. And testified? A. Yes.

30 Q. Do you know Mr. Forrester, Mr. Charles Forrester, who was at one time employed as an engineer on the Central Railroad of New Jersey? A. Yes, sir.

Q. Did you treat him in July, 1910? A. Yes, sir.

Q. Did you treat him in July, 1910, for an attack of epilepsy?

40 Mr. SMITH—I object, if your Honor please, as to the form of the question. It is leading. I do not object to any information you can get from the doctor, but I do object to leading questions.

DR. FREDERICK W. FLAGG—Direct

Q. Doctor, you are in the employ of the Central Railroad, aren't you—the defendant? A. Yes, sir.

Q. Have done work for them and do work for them now, don't you? A. Yes, sir.

Q. You are the resident physician up there in Rockaway, aren't you? A. Yes.

Q. In July, 1910, what was he suffering with, in your opinion? A. I don't know what he was suffering with in July, 1910. 10

Q. Didn't you testify in the former trial, when called as a witness for the defendant, as follows:

Mr. SMITH—I object.

“Q When did you first examine this man? A. I saw him first in 1910, in July. Q. And was he then suffering with epilepsy?” And didn't you answer: “That was his first attack, as far as I know?” 20

Mr. SMITH—I object on the ground that he cannot impeach his own witness.

Mr. SIMPSON—I will withdraw the question.

Q. In July, 1910, you treated this man for convulsions, didn't you?

Mr. SMITH—I object on the ground it is leading. 30

THE COURT—Ask him what he treated him for.

Q. What did you treat him for? A. I was called to see him on the night of July 29th, and I got a history that the man had had a convulsion.

Q. A convulsion? A. A convulsion, Tuesday night.

Q. That was July, 1910? A. Yes.

Q. The 29th? A. Yes. 40

DR. FREDERICK W. FLAGG—Direct

Q. Where was he when you saw him? A. In his home.

Q. Was he unconscious? A. I believe not at the time.

Q. And did you treat him or do anything for him?

A. Yes, I prescribed for him.

10 Q. Now, what in your opinion was he then suffering with? A. He had a convulsion, from the history that we obtained from the family; what the cause of that convulsion was or what it was at that time I do not know; as far as I knew the man he had been a well, healthy man.

Mr. SIMPSON—I ask to have that stricken out as not responsive; I asked him in his opinion what was he suffering with; that is what I asked him.

20

THE COURT—That is the question. Can you answer?

Q. Testifying in this case here, what in your opinion was this man suffering with? A. Well, at that time?

Q. Any time that you treated him?

30

THE COURT—No; Mr. Simpson, are you changing that question to that question?

Mr. SIMPSON—No; I will limit it.

THE COURT—The question was directed to July 29th, 1910.

Q. Didn't he have an attack of epilepsy then, in July, 1910?

Mr. SMITH—I object.

40

THE COURT—Now you are getting down to leading questions.

DR. FREDERICK W. FLAGG—Direct

Mr. SIMPSON—Manifestly this is a hostile witness; he works for the Central Railroad; he is not going to give me any information if he can avoid it.

THE COURT—I am not satisfied of that yet; if you will take the Court's suggestion at this time—you have put a question, and probably the doctor did not understand it; the question was directed to what in his opinion this person was suffering from on July 29, 1910, and he evidently thought he was asked upon what he was basing that opinion; you were not, and if you will put the question again—and I will say to you, doctor, this, you must pay attention to the question and only answer that question which is put to you, and not volunteer anything.

10

20

(Question repeated).

Q. That is on July 29, 1910, when, as you have already testified, you treated him and prescribed for him? A. I would like a little explanation. Does that refer to what my opinion is to-day or what my opinion was on that night that I saw him?

30

Q. Your opinion on the night that you saw him?

A. The night that I saw him I did not know what the cause of the convulsion was.

Q. You treated him, didn't you? A. Yes.

Q. And for something? A. Yes.

Q. What did you treat him for? A. I treated him for an irritability of the nervous system, and I also treated him thinking it possibly might have been uræmic convulsions, but my notes say I gave him a bromide of quinine.

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DR. FREDERICK W. FLAGG—Direct

Q. Did you at that time have the opinion that he was suffering with epilepsy?

Mr. SMITH—I object.

Mr. SIMPSON—I will withdraw the question.

10 Q. Did you have an opinion at that time as to what he was suffering with besides what you have testified now—to anything besides that which you have testified now? A. Put that question again, please?

(Question repeated.)

A. Well, I felt that the convulsion might have been due to one of a good many things and I could not tell at that time from that history—

20 Q. What things might it have been due to?

Mr. SMITH—I object to what it might have been.

Mr. SIMPSON—This is part of his opinion.

Mr. SMITH—The doctor cannot testify to what might be.

Mr. SIMPSON—They do it every day.

30 THE COURT—I do not see the purpose of this testimony. How is this rebuttal of Dr. Arlitz's testimony?

40 Mr. SIMPSON—It is a rebuttal of Dr. Arlitz's testimony. He testified he had uræmic convulsions, uræmic poisoning, and he testified he had a lack of judgment, that he had no mentality at all, that it was a condition of slow growth. It was not a sudden condition. Now, I want to prove by this man that in July, 1910, he had his first attack of epilepsy, and that Dr.

DR. FREDERICK W. FLAGG—Direct

Arlitz is not right. Dr. Arlitz said yesterday the man was not suffering with epilepsy, and that if such a diagnosis had been made it was a wrong diagnosis. Now, I want to prove that it was not a wrong diagnosis; that the man was suffering with epilepsy. That is the immediate purpose of it. 10

THE COURT—Repeat the question.

Mr. SIMPSON—I will withdraw the question.

Q. Now, then, you asked me, when I asked you for your opinion, did I want your opinion then or your opinion now, and you gave me your opinion then. What is your opinion now as to what he was suffering with? I will withdraw that. What was your opinion when you testified, when this case was on trial before—I forget the date— 20

Mr. MILLER—January 9, 1913.

Q. January 9, 1913, that this man was suffering with in July, 1910—what was your opinion then when you testified at the last trial? A. I believed he had epilepsy.

Q. And you believed that he had—that this was epilepsy that you treated him for in January, 1910—that is, when you testified at the last trial? A. I believed at the last trial, but that time I had come to the conclusion that the man had epilepsy. 30

Q. Had epilepsy. That is when you testified, I mean? A. Yes.

Q. What is your opinion now that the complaint was that he was suffering from? A. I still have reason to believe that he has epilepsy.

Q. Epilepsy. How long have you treated him? 40

DR. FREDERICK W. FLAGG—Cross

A. I only met—have only treated him in July, 1910, and August, 1910, that I treated him.

Q. Then you did not treat him since that time?

A. I have not treated him professionally.

Q. Since that time? A. Since then, until Monday night, I think it was, the 23rd.

10 Q. When was it that you first came to the opinion that this condition that you treated him for was epilepsy? When did you first come to that conclusion? A. That was—I cannot give you the exact dates; I have no memorandum, but it was probably a year—perhaps a year after the first convulsion.

Q. The first convulsion was on July 29, 1910? A. Yes, sir.

20 Q. The convulsion you did not see, did you? A. No, sir.

Q. You had to take that from what some one told you? A. Yes.

Q. Well, have you any opinion as to the kind of epilepsy it was that he was suffering with; was it traumatic or congenital, or was it the products of disease? A. I don't know. It was not traumatic, for, as far as I know, there is no history of an injury. It is probably due to changes.

30 Q. How old was he when you treated him first? Have you got his age? A. I haven't got his age, no, sir.

Cross-examination by Mr. Smith.

Q. Doctor, you could not tell whether that was a convulsion due to epilepsy or a convulsion due to uraemic poisoning, could you? A. At that time?

Q. Yes? A. No, sir; I could not.

Q. You did not see him in the convulsion, did you? A. I did not.

40 Q. You don't know whether it was a short cou-

DR. FREDERICK W. FLAGG—Re-direct

vulsion or a long convulsion, do you—the duration of it? A. I do not.

Q. As a matter of fact that man at that time might have been suffering with uraemic poisoning, might he not? A. He might.

Q. There are lots of other things that bring on convulsions besides epilepsy, aren't there? A. Yes, 10
sir.

Q. How many times did you see him to treat him? A. July 29, 1910, twice at night, and the next day, during the day, July 30th; August 1st—this was at his house; and August 3rd, at my office, 1910.

Q. After that time, August 3, 1910, you did not see him, did you, and treat him? A. I saw him in the village, but I did not treat him.

Q. I mean to see him professionally—treat him? 20
A. No; I did not.

Q. Were you his family physician? A. No; I do not consider myself a family physician.

Re-direct examination by Mr. Simpson.

Q. Doctor, is not your memory a little bit bad about your not having examined him since the 3rd of August, 1910. Didn't you testify at the last trial, in answer to a question by Mr. Smith: "Did you examine him lately," and didn't you answer, "Yes." 30

Mr. SMITH—I object.

A. I examined him, but I did not—

Mr. SMITH—I object. He is trying to impeach his own witness.

THE COURT—No; he is on cross-examination, I take it, Mr. Smith.

Mr. SMITH—It is his witness. 40

DR. FREDERICK W. FLAGG—Re-cross and Re-direct

Mr. SIMPSON—It is new matter which you brought out, which tends to contradict the direct testimony.

THE COURT—I will overrule the objection. Exception.

10 Q. Didn't you testify that "Have you examined him lately," and didn't you answer, "Yes." A. I think the question was, did I treat him, and I said no, not since then. I did examine him.

Q. Well, then, you were familiar with his condition since August, 1910, were you, by examination? A. By examination a few days prior to the last trial, yes.

Q. Is he still suffering with epilepsy? A. From the history.

20 Q. In your opinion; isn't it a fact, doctor, that in your opinion, as a result of that epilepsy, the man's mind, memory and judgment have gone? A. Epilepsy tends to produce deterioration of the mental faculties, yes.

Re cross examination by Mr. Smith.

Q. I want to know this, doctor: In 1910, had he any deterioration of his mental faculties that you know of? A. That I saw in him? No, sir; 30 none whatever.

Re-direct examination by Mr. Simpson.

Q. He was suffering with epilepsy, though, wasn't he, in your opinion? A. In my opinion now, yes.

Q. In July he was suffering with epilepsy? A. Yes, sir.

Q. And epilepsy does produce, according to you, a deterioration of the mental faculties? A. I think 40 that was probably the first epileptic seizure he had.

DR. FREDERICK W. FLAGG—Re-direct and Re-cross

Q. But epilepsy does produce a deterioration of the mental faculties, doesn't it? A. Yes.

Q. Yet you say this man, who you treated in July and August, for what you now believe was epilepsy, did not have, in your opinion, any deterioration of the mental faculties, although he was suffering with epilepsy? A. At that time, because that was the beginning of the disease.

19

Q. Beginning of the manifestation, wasn't it? A. Yes; has to be a beginning of all things.

Q. The epilepsy might have existed a long time without any convulsion, may it not? A. No, sir.

Q. You think its incipency by convulsions? A. No, sir.

Q. Oh, one thing, doctor, I want to ask you? After you treated him and made up your mind—I will withdraw that. When you treated him were you treating him for the Central Railroad, the defendant, as their physician? Did they pay you? A. No, sir.

20

Q. You were employed by them, weren't you, to look after their locomotive engineers and firemen in that vicinity, and examine them? A. No, not in that sense, no. I was employed by the family.

Q. At that time—I don't mean in this case you were called by the company, but that was your work; you were doing that work at that time for the Central Railroad? A. I was physician for the Central Railroad, yes.

30

Q. Did you report to the Central Railroad between July 29th, and the 2nd of November, 1910, that they had an engineer who was suffering with convulsions? A. No, I did not.

Re-cross examination by Mr. Smith.

Q. Isn't it a fact that you did not report it because in your opinion it had absolutely no effect

40

NEALE RANSON—Direct

upon the man's mentality or ability to run an engine? A. At that time, yes, sir.

Q. Now, as a matter of fact convulsions or epileptic convulsions very often happen without the person who has it knowing anything about it, don't they? A. Yes.

10 Q. The original attack and the original attacks of epilepsy are night attacks? A. Are night attacks?

Q. Yes. A. Not always, no.

Q. Aren't they generally what is known as nocturnal attacks? A. They may be nocturnal attacks.

Q. Aren't the original attacks generally nocturnal attacks in epilepsy? A. Not to my recollection.

Q. You are not an expert on epilepsy, are you? A. No, sir; I am not.

20

THE COURT—Is that all of your case?

Mr. SIMPSON—No; I am waiting for Dr. Rector. He was to be here at ten o'clock.

Mr. SMITH—I will call Mr. Ranson.

NEALE RANSON, sworn.

Direct examination by Mr. Smith.

30 Q. Mr. Ranson, you are the official stenographer in the Circuit Court of Hudson County, are you?

Mr. SIMPSON—I will admit that he is the official stenographer.

THE COURT—That was at the time of the previous trial?

Mr. SIMPSON—Yes.

40 Q. Did you take the stenographer's minutes at the taking of the testimony? A. Yes.

NEALE RANSON—Direct

Q. Will you turn to the testimony of Lena Aaronstein, you have got it here, that part which begins with this question: "How fast was the train going, swiftly?" A. (reading from notes): "Q. How fast was the train going, swiftly? A. No, just poking along. Q. Did you see anybody on the train at all? A. I did not notice; I saw the train coming and we were talking; we were talking about the people. Q. As you went along talking with your father you heard this whistle? A. Yes, sir. Q. And was this a toot of the steam whistle? Is that what you mean? A. It was a long shriek."

Q. Now, Mr. Ransom, at any time in that testimony, is there any pause after the question, "Did you notice anybody on the train at all," or an interruption by myself or anybody else of the witness? A. Reads this way, "Did you see anybody on the train at all? A. I did not notice," then there is a space which indicates a pause like a comma or a semi-colon, "I saw the train coming and we were talking," another small space which indicates same kind of a pause, "we were talking about the people," period.

Q. When you say "pause" there, do you mean in relation to punctuation? A. It is a rhetorical pause.

Mr. SIMPSON—I object to what he means.

THE COURT—I think he explained it as he went along, that the pause meant a comma or some other punctuation.

Mr. SMITH—Why, certainly.

Mr. SIMPSON—I am quite content, but I do not think it is helped by Mr. Smith's sotto voce, "Why, certainly."

Mr. SMITH—That was not made, if your

NEALE RANSON—Cross

Honor please, until after Mr. Simpson had made some of his facetious remarks

THE COURT—Now, gentlemen.

10 Q. I want to know, Mr Ransom, whether or not there is anything there indicating a stoppage of the witness by anybody, the Court, myself, or Mr. Simpson in the answer to that question? A. Simply the period at the end of the sentence, indicating a starting of another sentence—another question.

Cross-examination by Mr. Simpson.

Q. Who was examining counsel at that trial, Mr. Ransom, in the testimony that you refer to? A. I do not recall, but I believe it was Mr. Smith.

20 Q. You have frequently taken examinations that Mr. Smith conducts, haven't you? A. Yes.

Q. Isn't it a very frequent occurrence that Mr. Smith will break in upon the answer of a witness—

Mr. SMITH—I object.

Q. —before the witness has finished his answer? A. Yes.

Mr. SMITH—I object.

30 A. Pardon—

Mr. SIMPSON—I want to show what was done.

Mr. SMITH—I withdraw the objection.

40 Q. You say yes; now, do you always, in your notes, when Mr. Smith breaks in on a witness, take what Mr. Smith says if he does not make a serious interruption of the answer? A. Yes, sir; like

NEALE RANSON—Cross

“Why, certainly,” and so on, and remarks of that kind; I always take them.

Q. Have you any interruptions of the— A. I was just looking.

Q. —of the witness by Mr. Smith.

THE COURT—In this part?

10

Mr. SIMPSON—In the testimony of Mrs. Aaronstein.

A. I think I can find you some; I find a number of dashes in the questions and answers; I do not find one of those interruptions in her testimony.

Q. What do the dashes indicate? A. They indicate a dash.

Mr. SMITH—I object; I have a right to object; I object because Mr. Ransom has just said he does not find any in her testimony.

20

Q. Did you say you did not find any dashes in her testimony? A. I find some dashes in the testimony of this witness in one of Mr. Smith’s questions, in the middle of a question, and they indicate a punctuation dash in those instances, and I will look, if you like, at every other witness and find where Mr. Smith interrupted.

30

Q. What does dash indicate? A. A punctuational dash.

Q. What’s that? A. A dash which in writing out in typewriting will be expressed by a double dash.

Q. Do you find in that testimony where Mr. Smith interrupts the witness following her answer with the question, “I did not ask you that?” Do you find that in the testimony? A. Yes, sir.

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Q. How does that appear on your notes? A. "Answer. I know I saw the train long before they got there and I know I saw it after the first toot. Question. I didn't ask you that. I asked you," and so on.

10 Q. Now, you—. A. There is no interruption whatever by the question "I did not ask you that." My notes show a completed sentence preceding it.

Q. You testify, as I understand it, that the particular part of the testimony that Mr. Smith asked you about is given in a continuous way—that is, no break in it? A. Except for those breaks in the middle, a rhetorical pause, which I indicate by a slight space.

20 Q. Well, they are in the question or in the answer? A. They are in the answer.

Q. Would those breaks be caused by—anything in your notes showing that those breaks would be caused by the attitude of counsel or they were voluntary breaks? A. Voluntary on my part entirely to show a rhetorical pause, to render the reading of my notes more facile, instead of putting the comma in the notes, which has to be done by a double comma, to differentiate it from shorthand characters, and I do it here solely through spaces between characters.

30 Q. I think that is all, Mr. Ransom, except I wanted to ask you when this testimony was taken? A. In January, 1913.

Q. And these are the original notes of the testimony? A. Yes.

Q. And they are in your handwriting? A. They are.

Q. And how much—how many pages do these notes cover of the testimony? A. All of it.

40 Q. Have you been requested by Mr. Smith to look at your notes before you testified this morn-

NEALE RANSON—Re-direct

ing? A. He came up while I was seated here and I showed him one page there.

Q. Did you look at any part of the testimony except this one portion in reference to the time the train was coming? A. Yes; when he called me up on the phone this morning he said he wanted me to testify. I asked him what he wanted—

19

Q. No; I didn't ask you that, Mr. Ransom. I asked you did you look at any part of your notes, not what Mr. Smith said to you, but did you look at any part of your notes except that which you have read, "Did you see anybody on the train at all? A. I did not notice. I saw the train coming and we were talking; we were talking about the people?" A. Yes, sir.

Q. Did you look at any other part? A. Yes.

20

Q. Of your testimony? A. Yes.

Q. I think that's all.

Re-direct examination by Mr. Smith.

Q. Mr. Ransom, as a matter of fact don't you in your capacity as stenographer put down every remark that is made to the witness or that the witness makes to counsel? A. Yes; and in the testimony I now find what he asked me for before, where you broke in. I find such an instance as that. I will have to correct my testimony in that respect where I said I did not find any place where Mr. Smith had broken in on the witness.

30

Q. Suppose you read it? A. "Question—" this is not on your testimony, by the way, it is direct examination by Mr. Simpson.

Q. By Mr. Simpson? A. So my first understanding is correct.

By Mr. Simpson.

Q. Who broke in? A. You did.

40

DR. JOSEPH M. RECTOR—Direct

Q. I broke in on the witness? I was not cross-examining my own witness, was I? A. No; you were direct examining.

Mr. SMITH—You were breaking in on your own witness on direct examination.

10

THE COURT—Gentlemen, are you satisfied?

MR. SIMPSON—Yes; I am satisfied.

DR. JOSEPH M. RECTOR, sworn.

Direct examination by Mr. Simpson.

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

Q. Do you practice in Jersey City? A. Yes, sir.

Q. How long have you been practicing? A. Since
20 1893, twenty-one years.

Q. Have you made any study of brain conditions such as would be involved in epilepsy or uraemic poisoning? A. Yes.

Q. To what extent have you studied it? A. As far as it affects my surgical relations—in the general condition of diagnosis necessary for the performance of surgical operations.

Q. In epilepsy is there any deterioration of the mind?

30

(Objected to on the ground it is not rebuttal.
Question withdtawn.)

Q. Doctor, suppose a man sixty-six years of age, of July 29, 1910, had a convulsion; suppose that in August of the same year he also had a convulsion, suppose that on the 29th of October year he was suffering with chronic uraemic intoxication, calcification of his cerebral blood vessels, and had a profound loss of memory, that his judgment was
40 faulty and his mental processes were perverted be

DR. JOSEPH M. RECTOR—Direct

cause of the calcification of his blood vessels and the uraemic intoxication, in other words, the two physical conditions have brought about a mental state, and that his judgment is bad because he has pround loss of memory, and judgment is based upon memory; and suppose that this man in this condition that I have described had a convulsion in July and in August, 1910; in your opinion what would be his mental condition on the 2nd of November following tho two convulsions, assuming that he was in the condition described here on the 29th of October, 1914?

10

Mr. SMITH—I object unless Mr. Simpson can definitely state the nature of the convulsions which this man had.

Q. Suppose they were convulsions of an epileptic nature?

20

Mr. SMITH—I object, on the ground that Mr. Simpson cannot ask Dr. Rector to form an opinion on the opinion of another person. That is not a hypothetical question at all. It is not proper evidence, and it is nothing but heresay. Also there is only proof of one convulsion; that was in July, 1910.

0

Mr. SIMPSON—We limit it to one convulsion July, but I will say he had a convulsion, and at that time he was suffering with epilepsy.

Mr. SMITH—I object on the ground it is not rebuttal; second, there is no proof in case so far as this man is concerned, that this patient was suffering with epilepsy.

THE COURT—I will sustain the objection.

40

DR. JOSEPH M. RECTOR—Direct

Mr. SIMPSON—Exception.

THE COURT—Yes.

Q. Doctor, is epilepsy followed by any mental deterioration?

10 Mr. SMITH—I object on the ground, if your Honor please, that it is not rebuttal. It does not rebut anything that Dr. Arlitz said.

THE COURT—I will overrule the objection.

A. It is.

Q. Does that mental deterioration affect the judgment and the memory and the perception?

20 Mr. SMITH—I object.

THE COURT—I will overrule the objection.

A. It does.

Q. Is epilepsy, the incipency of epilepsy, manifested by convulsions?

Mr. SMITH—I object to that on the ground it is not rebuttal.

30 THE COURT—You may have an exception.

A. One of the forms of epilepsy, it so follows.

Q. Does the epilepsy precede the convulsion or the convulsion precede the epilepsy?

Mr. SMITH—I object on the ground it is not rebuttal.

THE COURT—Overruled.

40 A. Epilepsy is merely a name for a group of

DR. JOSEPH M. RECTOR—Direct

symptoms of which convulsions is one of the prominent ones.

Q. Suppose you found a man on the 29th of October, 1914, suffering with a chronic uræmic intoxication and calcification of the cerebral blood vessels, and had a blood pressure of 196, that he had a profound loss of memory, that his judgment was faulty, and that his mental processes were decidedly perverted because of the calcification of his blood vessels and this uræmic intoxication; in other words the two physical conditions have brought about a mental state, and that his judgment was bad, because he had a profound loss of memory, and memory is based upon memory; that he would have a very poor knowledge of events occurring at that time; he would have a considerable knowledge of things that had happened in his early life; that his condition on the 29th of October, 1914, is one that has been designated as senium; that the brain is not sufficiently nourished: What would you say he was suffering with?

Mr. SMITH—I object to it on the ground it is not rebuttal.

Q. That is, the name of the disease he is suffering with?

THE COURT—I will overrule the objection.

Mr. SIMPSON—I withdraw that question in that form, and ask you:

Q. Could you say on those symptoms—could you give us the name of any disease, if he is suffering with any disease, could you do it?

Mr. SMITH—I object, How in the world can

DR. JOSEPH M. RECTOR—Cross

this man tell if this engineer is suffering from any disease or diseases?

THE COURT—What is the situation? Do you withdraw this entire question?

10 Q. Assuming that those things exist which I have asked you, is it possible for you as an expert to say whether or not this man whom I have described to you, was suffering with any disease? A. Yes.

Q. Has it a name?

Mr. SMITH—I object to it as not rebuttal.

THE COURT—I will overrule the objection.

20 Q. Has it a name? A. It has.

Q. What do you call it, a disease? A. A chronic disease, starting from this first manifestation in July, 1910, with a convulsion, which would nominate it as epilepsy.

Cross-examination by Mr. Smith.

Q. What kind of a convulsion did he have in 1910? A. I don't know.

30 Q. You never saw him, did you? A. No.

Q. They have convulsions in uraemic poisoning, don't they? A. Yes.

Q. You don't know whether this was uraemic convulsion or an epileptic convulsion, do you? A. There is no difference between uraemic and epileptic convulsions.

Q. I didn't ask you that. I say you don't know whether this was a uraemic convulsion or an epileptic convulsion?

40 Mr. SIMPSON—I object to that as having been

DR. JOSEPH M. RECTOR—Cross

previously answered. He said there was no difference between the two.

THE COURT—That was an answer which was not asked for by his question.

Mr. SIMPSON—It answers his question. He says you do not know, and he answers, there is not any difference. How can he distinguish? 10

THE COURT—I will permit the question.

A. Yes.

Q. You never saw him in it, did you? A. Makes no difference.

Q. Doesn't make any difference to you what kind of a convulsion it was? A. Not under those facts, because a uræmic convulsion and epileptic convulsion are the same. 20

Q. I suppose, then, epilepsy is the same as uræmic poisoning, isn't it? A. Well, epileptic convulsions are often a symptom of uræmic poisoning.

Q. Often a symptom of uræmic poisoning? A. We get epileptic convulsions in uræmic poisoning.

Q. Epileptic convulsions in uræmic convulsions? A. Epileptic in form, that is the convulsions of uræmia and the convulsions of epilepsy in their outward manifestations are the same, that is, the seizures or the clonic conclusions, that is, the intermittent convulsions, are the same. It is only the onrush of the disease. 30

Q. You do not know which disease it was, do you, whether it was epilepsy or uræmic poisoning?

A. Except from the first part of the question and the testimony which states he had a convulsion in 1910. This has been a progressive condition.

Q. How do you know? A. I can only tell that condition— Under those conditions that the pri- 40

DR. JOSEPH M. RECTOR—Cross

mary cause—that is my opinion, that the primary cause was epilepsy, that the secondary cause, or the continuation was a conclusion which has resolved from primary epilepsy.

Q. You have talked a whole lot—

10

Mr. SIMPSON—I object to that comment, on the ground your Honor said yesterday that there should not be any more such comment.

THE COURT—That ruling must be observed.

Q. You say epilepsy is progressive. These epileptic attacks are progressive, aren't they? A. Sometimes.

20

Q. If a man only had one attack since 1910, and no others, would you call it epilepsy. A. I might call it epilepsy.

Q. Assuming he had only the one convulsion, the measure of which, or the symptoms of which, you do not know anything about, and he has never had another one since 1910, you say he has epilepsy? A. Yes.

Q. You would? A. Absolutely.

30

Q. Do you have calcification of the blood vessels in epilepsy? A. Depends when the epilepsy starts. Depends on the age when epilepsy starts.

Q. Did you ever find calcification of the blood vessels purely in epilepsy? A. We find it in epilepsy. We find other diseases—

Q. You find it in persons of an age sufficient to have calcification of the blood vessels? A. Sometimes.

Q. And assume that person has epilepsy? A. Sometimes.

40

Q. I am speaking now purely of epilepsy? A.

DR. JOSEPH M. RECTOR—Cross

Epilepsy alone does not produce calcification of the blood vessels.

Q. Doctor, didn't you testify in the Eckert case here that you could not make a diagnosis of epilepsy unless you found a biting of the tongue or a stooling? A. Oh, no.

Q. You did not testify to that, did you? A. No, I said if I saw a biting of the tongue—the only way I can tell an epileptic convulsion by seeing it is the fact that one of the outward evidences of epileptic seizure is the biting of the tongue. That comes from the tongue being protruded between the teeth. If the tongue happens to be within the teeth they would not bite it, but they would have the epileptic convulsion just the same. 10

Q. Didn't you testify they would have to have one or the other, either stooling or the biting of the tongue? 20

Mr. SIMPSON—I object to the question. The doctor is entitled to have the testimony pointed out to him, because it call for a conclusion from him as to his own testimony. I think he is entitled to have the question and answer drawn to his attention.

THE COURT—Let me ask the doctor a question. 30

By the Court.

Q. Do you remember your testimony? A. No, I will just answer his question under a general condition. I do not remember that testimony. If he wants to go any further I want the testimony.

By Mr. Smith.

Q. Doctor, you never saw this man, did you? A. No. 40

DR. JOSEPH M. RECTOR—Cross

Q. Don't know anything about his condition at that time, do you? A. Not personally.

Q. Nothing at all? A. Not personally.

Q. You have made up your answer from the questions read by Mr. Simpson, haven't you? A. And the testimony I read.

Q. That is right? A. Yes.

Q. You expect the jury to believe that from that testimony you can honestly say this man had epilepsy?

Mr. SIMPSON—I object on the ground that what the Doctor's expectations are of the jury are not relevant or competent. He hasn't any right to ask them to believe anything. I object to the form of the statement.

THE COURT—Just one minute. Read his last answer.

(Last answer repeated by stenographer).

THE COURT—What testimony have you read?

THE WITNESS—A few minutes ago I read some of the testimony of Dr. Arlitz. That is it, that paper.

Mr. SMITH—Then I object and ask that it be stricken out.

THE COURT—One minute. Then the answer that you gave to this last or next to last question of Mr. Simpson, was not based upon the fact contained in that question alone, was it?

Mr. SIMPSON—I object to that on the ground that I read to him the same testimony.

DR. JOSEPH M. RECTOR—Cross

THE COURT—I am trying to find out whether he read more than that or not.

THE WITNESS—Why, the part I read was the testimony Mr. Simpson has just repeated, which is included in that question.

10

THE COURT—And no other testimony of Dr. Arlitz?

THE WITNESS—No other testimony; that is all I read.

(Question repeated.)

Mr. SIMPSON—I object to that on the ground it is an improper question; what he expects the jury to believe is not evidential. Certainly the witness' desire or the jury's credibility is not a legitimate subject of inquiry in this proceeding, what he expects the jury to believe.

20

THE COURT—I do not think it is a proper form of question, Mr. Smith. I suppose every witness expects the jury to believe him.

Mr. SMITH—Oh, no, he doesn't.

Mr. SIMPSON—I object to the comment.

30

THE COURT—Now, I will sustain the objection and you have your exception. Anything further?

Mr. SMITH—No.

Mr. SMITH—No; that is all.

Mr. SIMPSON—That is the case in rebuttal.

JOHN A. RIDER, recalled—Direct

DEFENDANT'S SURREBUTTAL.

JOHN A. RIDER, recalled.

Direct examination by Mr. Smith.

10 Q. Mr. Rider, you worked with Mr. Forrester, did you? A. Yes, sir.

Q. For how long a time? A. Well, off and on a period of the three years.

Q. How long did you work with him steadily, if you worked steadily with him, prior to July, 1910? A. Two years.

Q. And subsequent to July, 1910? A. Three months.

20 Q. Now, Mr. Rider, did you work with him in November, 1910? A. I did.

Q. And how long after this accident did you work with him? A. As near as I can figure it is about three months.

Q. During the time you worked with him — I suppose you worked every day with him—did you? A. Every week day; every week day I mean.

Q. During the time you worked with him did you ever at any time see him in any way unable to take care of his duties?

30 Mr. SIMPSON—I object. I do not object to it, but I would like a little information as to what period of time that question covers.

THE COURT—Two years prior to July, 1910, and he worked with him continuously for three months about, after July, 1910.

40 Mr. SIMPSON—As between July and Novem-

JOHN A. RIDER, recalled—Direct

ber he did not work with him—that is, the question does not cover it.

THE COURT—Yes, I understood it did—Let me ask this question:

By the Court.

Q. Do I understand your previous answer to be this: That for about two years prior to July, 1910, and from that time until about three months after November, 1910, you worked continuously with Mr. Forrester? A. That is two years previous, that is, altogether out of the three years it amounted to about two years out of the three I worked with him steady. 10

Q. That started a period of about two years prior to 1910, and went along continuously until about three months after 1910? A. In the middle three years—1910—I worked steadily but two years of the three years. The lawyer asked me the time before the accident. 20

THE COURT—Now, you ask the question.

By Mr. Smith.

Q. Now, Mr. Rider, how long did you work with Mr. Forrester prior to July, 1910, and down to what time? A. Well, I was off about seven months. I was assigned to the run in January. February 11, 1907. 30

Q. Yes. A. And I was off the run as near as I can judge about seven months; outside of that I worked with Mr. Forrester all the time.

Q. Now, for how long a period of time prior to this accident had you been working with him steadily? A. About two years, say.

Q. How long after the accident did you work with him? A. About three months. 40

JOHN A. RIDER, recalled—Direct

Q. During that time, during any of the time that you worked with him have you ever seen him in any seizure or fit on the engine? A. No, sir.

Q. Or any other place? A. No, sir.

Q. On these occasions that you were with him how was he as to his mentality, as you observed him—as to his mind?

10

Mr. SIMPSON—I object to it on the ground that under the law a lay witness cannot give an opinion as to the mental conditions unless he first tells the facts upon which such an opinion is made. I think it is the case of *State vs. Spencer*. I object on this ground, that he cannot give an opinion as to the mental condition of this man.

20

Mr. SMITH—I will withdraw the question.

Q. Mr. Rider, while you were with him did he appear to you to be a bright or a dull man? A. Well, of course, everybody has their opinion. He seemed to be a very sure man, in my eyes. I took him as a model.

30

Mr. SIMPSON—I object to that, and ask that he took him as a model be stricken out as not competent testimony, and that a sure man means nothing and is not the subject of an opinion, under the *State vs. Koccis*.

Mr. SMITH—Under that same case it is.

THE COURT—I will not strike it out. You may take an exception.

40

Mr. SIMPSON—Exception.

JOHN A. RIDER, recalled—Cross

Q. What have you to say as to his duties? How did he perform his duties?

Mr. SIMPSON—I object also on the ground that it calls for an opinion, and that it is not the subject of an opinion, especially of a lay witness.

13

THE COURT—I will overrule the objection.

Mr. SIMPSON—Exception.

A. Very carefully.

Q. You were with him on the day of this accident, weren't you? A. Yes.

Q. Well, now, on that day what condition was he in? A. Well, just the same as he ever was.

Q. Was he apparently healthy? A. Yes, in my knowledge.

20

Cross-examination by Mr. Simpson.

Q. Did you devote any time while working as a fireman or otherwise to the study of epilepsy? A. No, sir.

Q. What in your opinion are the symptoms of uræmic poisoning?

Mr. SMITH—I object.

30

(Question withdrawn.)

Q. You say you never saw him in an epileptic seizure, and that was the language Mr. Smith used?

THE COURT—No.

Mr. SMITH—No, I did not.

Q. What was it you said? You never saw him in a convulsion?

40

JOHN A. RIDER, recalled—Cross

Mr. SMITH—A seizure or fit.

Q. What was the symptom of a seizure that you never saw him in? What was it?

10 Mr. SMITH—I object on the ground that the question is absolutely unintelligible.

Mr. SIMPSON—I withdraw it.

Q. What do you mean by a seizure? A. Well, in the way I took the question was whether I seen him acting underneath or out of the way—that is the way I took the question, seizure or fit.

Q. What do you mean, underneath or out of the way? A. Well, a man observed sick or fidgetty, or nervous; that is what I took Mr. Simpson's question to be.
20

Q. That is what you mean by seizure; he did not appear to you to be sickly, or fidgetty or nervous? A. No.

Q. What do you mean by a fit? A. Well, I have only seen two people in fits, and they were on the ground.

Q. Yes; frothing at the mouth? A. That is all I know about it.

Q. You never saw this man on the ground frothing at the mouth? A. No.
30

Q. He was on the other side of the cab from you, wasn't he, when he was— A. He was visible.

Q. As an engineer? A. I could see him.

Q. Well, you could not see him without shifting out of your position? A. Yes.

Q. You can sit on your box where your usual position was and see him without looking around? A. Just like that.

Q. Turned to look at him? A. Yes.
40

Q. Did you turn to look at him on this day when

JOHN A. RIDER, recalled—Cross

the horse ran away as the second whistles were sounded? A. No.

Q. You did not? A. No.

Q. You did not make any observation of him in that day to see whether he was looking out as if he was in a trance without seeing anything, did you?

A. Well, a sick sort of a way—I would have noticed it right away if he was. 10

Q. Did you work with him on July 30, 1910? A. July 30?

Q. Yes. A. I would not swear to it?

Q. You remember about his having a fit on July 29, 1910, don't you? A. No, sir.

Q. Do you know how long he was away from work? A. No, sir.

Q. Do you know if he was away from work at all around that time, July 29th? A. I know he was reported off sick, but I don't know what for. 20

Q. How long was he off around that time? A. That I could not tell.

Q. Was it a month? A. No.

Q. Was it two weeks? A. It seemed to me it was only a couple of days.

Q. And he came back again? A. Yes.

Q. Did he report off again sick in August? You let me have that book— Where is Dr. Flagg? The entry of 29th. There is a reference I would like to have. 30

(No answer.)

Q. You don't know whether he was away from work from July 29th to August 3rd, or not, do you? A. I don't remember.

Q. Now, do I understand you to say that you ceased to work with him three months after the 2nd of November? A. To the best of my knowledge, yes.

MOTION TO DIRECT A VERDICT

Q. Where did you go away, or did he go away?

A. I went away. I was assigned to another job.

Q. And he was on that job? A. He was still on it.

BOTH SIDES REST.

10

MOTION TO DIRECT A VERDICT.

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MR. SMITH—If your Honor please, I move for a direction of verdict on the ground that it appears in evidence there was no negligence on the part of the defendant company, and that the overwhelming weight of the evidence, in addition to the proof of no negligence, is that there was absolutely nothing unusual in the blowing of this whistle or wanton or reckless.

(Discussion.)

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THE COURT—As the case stands I will deny your motion.

Counsel for the respective parties argued the case to the jury.

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COURT'S CHARGE TO JURY.

GENTLEMEN OF THE JURY:

This is an action brought by Helen Mingoës, as administratrix of the Estate of Leonard Mingoës, deceased, against the Central Railroad of New Jersey, for the purpose of recovering damages for the death of her husband under what we know as the Death Act, to which I will refer you more particularly later. The death, it is alleged, arose out of a happening, which occurred on November 2, 1910, at the place and in the manner you have had described to you in the testimony. I need go no further in opening to you than that, leaving it to your recollection as to what the events testified to were. 10

Before proceeding further with what I may have to say to you regarding the questions of law involved in this case, I wish to take up with you that which happened during the summing up of counsel for the plaintiff, in which he made reference to the epilepsy of the engineer and the effect that that would have or the consideration that you were to give to that in coming to a conclusion as to whether or not he was negligent in the manner in which he has designated him to have been negligent in his complaint. At that time counsel for the defendant objected, and I reserved what I should have to say on that matter until this time. I now have this to say to you as to that, and I wish you to give attention to what I have to say to you upon that subject. I say to you now that you are to disregard entirely what counsel for the plaintiff said to you upon that subject in his address; that you are not to take into consideration the question as to whether or not the engineer was suffering with epilepsy, nor are you to take into consideration that matter at all, in coming to a conclusion or determination as to 20 30 40

COURT'S CHARGE

whether or not this defendant company ^{is} chargeable with negligence. You are to disregard it, gentlemen, as totally as if it had never been said to you.

10 Actions of this character, gentlemen of the jury, are based upon negligence as the proximate cause of the injury, and a recovery in such an action is legal and sustainable in law only when supported by a finding of fact that the defendant was negligent and that such negligence was the proximate cause of the injury.

Now the plaintiff says in her complaint that the defendant company was negligent in this manner, as set forth in paragraph 5 of the complaint:

20 "That the negligence aforesaid of the defendant by its servants and agents consisted in this, that it did not use reasonable care to blow the said whistle at a lawful place and did not use reasonable care to blow the said whistle in a reasonable way, but on the contrary, the defendant, by its servants and agents blew the said whistle at an unlawful place, and carelessly and negligently caused the said whistle to sound in a loud and unusually long and infrequent manner, knowing that the horse aforesaid was being frightened thereby, and continued so to sound the said whistle after it knew the said horse was being frightened thereby."

30

Now, the burden of establishing the negligence as charged is upon the plaintiff, and the plaintiff must establish it by a fair preponderance of the evidence. In your consideration of the case, you ought, gentlemen of the jury, to keep that in your mind continuously, that the burden of satisfying you of the negligence complained of—and that negligence is as

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COURT'S CHARGE

I have read from the complaint—is upon the plaintiff, and she must so satisfy you by a fair preponderance of the evidence.

Now, the mere happening of the accident or any accident is no presumption of negligence. Negligence has been defined to be the omission to do something which a reasonable man guided upon the considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. 10

Now, in this case the negligence charged to the defendant is that the engineer of the locomotive negligently, needlessly and wantonly caused the whistle to be blown, causing the horse to run away; the running away of the horse caused the occupant of the carriage, Mrs. Aronstein's father, Dr. Min- goes, to be thrown out, causing injuries to Dr. Min- goes of which he subsequently died. 20

The defendant says that the blowing of the whistle was in compliance with its statutory duty, that such blowing was not unusual, that it was blown at the usual place, and with its usual volume and intensity, and that it was not blown negligently, needlessly or wantonly.

Now, the statute imposes upon such companies as the defendant company in the carrying on of its business and driving of its locomotives and its trains certain duties, especially as to crossings at grade—highway crossings at grade. The statute is this: 30

“A bell of a weight not less than thirty pounds shall be placed on each engine and rung continuously in approaching a grade crossing of a highway beginning at a distance of three hundred yards from the crossing and continu-

COURT'S CHARGE

ing until the engine has crossed the highway, or a steam whistle shall be attached to each engine and be sounded, except in cities, at least three hundred yards from the crossing, and at intervals until the engine shall have crossed the highway."

10

The engineer, in the exercise of a right and in the performance of a statutory duty had caused the bell to be rung continuously from the time the train left Rockaway and at the point of the alleged accident and within three hundred yards of the crossing, that is, the highway crossing at Hibernia, which he was approaching, caused the whistle to blow. My recollection of it is four blasts were blown, two of which I believe were known as long ones and two of which were shorter ones. He was approaching a highway crossing and his duty was to keep a careful watch straight ahead, in order to safeguard the lives of passengers and possible travelers at the crossing, and he cannot be held to an obligation to look to one side for travelers at another point in the highway.

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Now, Mrs. Arenstein says that after the first blast of the whistle she looked and she saw a man in the window of the locomotive cab on the side of the locomotive toward her, and this man was looking toward her. Your first inquiry will be necessarily to determine whether or not you believe this testimony of Mrs. Arenstein; second, if you do, are you satisfied that he, that is, this man which she says she saw in the engine cab looking at her, saw, or by the exercise of reasonable care and prudence should have seen that the horse was frightened and that a further blowing of the whistle would cause it to become further frightened and possibly run away, or if looking and seeing the fright of the

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COURT'S CHARGE

horse, or if not seeing the fright of the horse, he should by the exercise of reasonable care and prudence, have seen it, then have you been satisfied by a fair preponderance of the evidence that what he subsequently did in the exercise of a right and a statutory duty was negligently, needlessly or wantonly done? 10

The Court has said: It must be that the defendant is bound to use reasonable care and prudence in giving statutory signals of the approach of a train or its existence at any given point where such signal may be allowed or required. Negligence in the exercise of a lawful right is actionable if it causes injury. It is no excuse or justification that an act occasioning injury was itself lawful or that it was done in the exercise of a lawful right, if the injury arose from the negligent manner in which it was done." 20

"Under our statute in this state the court will judicially know that the blowing of a whistle is one of the signals used in running a railway train, and that it is authorized and required, yet if it be done negligently or wantonly such negligence or wantonness is actionable." 30

Now, in determining whether or not the plaintiff is entitled to recover, gentlemen of the jury, and keeping in mind that the burden is upon the plaintiff to satisfy you by a fair preponderance of the evidence, the question in this case is, did the engineer look, as Mrs. Arenstein has testified he did, and if so, did he see, or if he looked, should he, with reasonable care, have seen the horse and that it was frightened and that it would probably run away; and if so, was the blowing of the whistle, after the 40

COURT'S CHARGE

first blast, negligent, needless and wanton under all the circumstances of the case, and did it cause the horse to run away? If to this the answer is no, then your verdict must be for the defendant, because then negligence has not been shown or those other elements entitling the plaintiff to recover. If to this question the answer is yes, then your verdict should be for the plaintiff. If you arrive at that point, gentlemen, where you conclude that your verdict should be for the plaintiff, then you will want to know what that verdict may be for.

This is an action brought under what we know as the Death Act, and without this act there would be no right of recovery for the death of any person. I will read to you that much of sections one and two of the act in question as I feel are pertinent to the matter before you. Section I is this:

“That wherever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, had entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.”

Section 2:

“Every such action shall be brought by and in the name of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin

COURT'S CHARGE

of such deceased person, and shall be distributed to such widow and next of kin in proportion provided by law in relation to distribution of personal property left by persons dying intestate, and in every such action the jury may give such damages as they may deem fair and just with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person." 10

This statute has been construed by our courts to mean—referring now to the damages that may be awarded—pecuniary loss and nothing else.

The rule as expressed by the Court is this: "What the plaintiff is entitled to recover"— and let me say, gentlemen, give this your best attention—"What the plaintiff is entitled to recover is a capital fund which shall represent the present value of the pecuniary loss which falls upon the widow and next of kin by the premature taking off of the intestate. That fund is to be ascertained by taking into account all the probabilities; the intestate might have died by the course of nature shortly after the accident: he might, had he lived, have suffered financial reverses; the wife, had he lived, might have died before he did, so might his next of kin. Nothing is to be added for loss of society or wounded feelings, or anything else which cannot be measured by money and satisfied by a pecuniary recompense. 20 30

"The damages are to be determined by reference to the pecuniary injury resulting to the widow and next of kin of the deceased by his death. The injury to be thus recovered for has been defined to be the deprivation of a reason- 40

COURT'S CHARGE

ble expectation of pecuniary advantage which would have resulted by a continuance of the life of the deceased. Compensation for such deprivation is therefore the sole measure of damages."

10 There is nothing I can say to you, gentlemen, upon the question of the amount which may be recovered, if a recovery is permissible in this case. There is no better language in which I can express it to you than that in which I have already expressed it, which is a reading from the opinion of courts upon that subject.

I do not know, gentlemen of the jury, that there is any other matter that I can lay before you which would be of assistance to you in arriving at a proper
20 verdict in this case. I have stated the law to you as I understand it, and as plainly as I am able to state it, and I trust that that has been sufficiently plain so that it will not trouble you in arriving at your verdict.

I will only say this much more to you, and it is something that I have always felt it my duty to say to every jury, and that is, that you are not to take the statements of counsel nor the statement of the Court as to what the testimony is. I have for
30 that reason carefully avoided making any statement of testimony to you in my charge except where I could not otherwise avoid it and yet be able to give you the principles involved. If I misstate any part of the testimony you are to disregard it, and if counsel has misstated any part of the testimony you are to disregard those statements. The duty is yours, the privilege is yours to determine what the testimony is. You are to determine that from your recollection of it as it was given on
40 the witness stand. You are then by the exercise of

COURT'S CHARGE

your good judgment to determine what of all of that testimony is the truth. That which you find to be the truth is the evidence in the cause. You are also the people, and the jury is the body to which the Court has delegated the power to weigh the evidence and determine what weight you are to give to each and every part of it. When you have done that you then have that evidence in front of you upon which you will found your verdict. To that evidence apply the rules of law which I have given you. The result will be a verdict which will be a legal verdict. You are not to be given to favor or pity or any other human emotion in the determining of the action before you. You are to deal with the cold, plain facts and propositions of law. Your duty is performed and only performed when you have dealt with it in that manner. When you have, gentlemen, and you have presented a verdict, or do present a verdict brought about and reached in that manner, you will then have presented a legal verdict. Any other verdict will not be legal. Therefore keep in mind what I have said to you as to the manner in which you shall determine what the testimony is, how you shall arrive at the evidence, and then that you shall apply to that evidence the rules of law as they are given to you and when you have, so arrive at your verdict.

