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Complaint.

(Filed July 8, 1916)

Hudson County Circuit Court.

CHARLES J. BROOKS, Administrator &c. of FRANK BROOKS, deceased,

Plaintiff,

vs.

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY and PENNSYLVANIA RAILROAD COMPANY,

Defendants.

Action at Law.

10

Plaintiff residing at #43 Stuyvesant Avenue, Jersey City, New Jersey, says that:

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1. At all times herein stated, defendant New York, Susquehanna and Western Railroad Company was and still is a railroad corporation and was the owner, operator and possessor of certain railroad tracks and railroad right of way located and running in and through Jersey City and crossing a certain public street or highway in Jersey City commonly called Dey Street at grade—said Dey Street running generally in an easterly and westerly direction and said right of way with the railroad tracks running thereon generally in a northerly and southerly direction.

30

2. At all times herein mentioned, defendant Pennsylvania Railroad Company was and still is a corporation carrying on the business of steam railroading and in such business was the owner, possessor and operator of certain steam loco-

40

Complaint

tives and railroad cars over tracks of the said defendant in and through rights of way in Jersey City.

3. On the Fourth day of December, Nineteen hundred and fifteen and prior thereto, defendant Pennsylvania Railroad Company and defendant
10 New York, Susquehanna & Western Railroad Company had certain agreement or agreements whereby and whereunder said defendant Pennsylvania Railroad Company was permitted to operate and run its locomotives and cars over the tracks and right of way of the defendant New York, Susquehanna & Western Railroad Company and over such part of the same as crossed the said public street known as Dey Street, in Jersey City, for the mutual accommodation and convenience of
20 the said defendants.

4. On December 4th, 1915, defendant Pennsylvania Railroad Company, with the knowledge and consent of said defendant New York, Susquehanna & Western Railroad Company, operated a certain train of cars and a steam locomotive on a certain track of defendant New York, Susquehanna & Western Railroad Company upon its right of way at its intersection with Dey Street aforesaid.
30

5. In the operation of said train the said Pennsylvania Railroad Company separated the said train of cars into two sections so that one section stood upon the northerly side of said Dey Street and the other section stood upon the southerly side of said Dey Street, leaving an intervening space for the use and travel of pedestrians using said Dey Street in the passage and repassage along same.
40

Complaint

6. On December 4th, 1915, Frank Brooks, a minor about thirteen years of age, was lawfully walking along said Dey Street in a westerly direction in and about his lawful affairs and business and was crossing the said right of way of said defendant New York, Susquehanna & Western Railroad Company at the place where the said right of way crosses said Dey Street at grade, and while lawfully passing along said Dey Street and between the two sections of the train of the Pennsylvania Railroad Company the said Pennsylvania Railroad Company started its locomotive and cars across said Dey Street and caught the said Frank Brooks between the two ends of said divisions of the train and then and there so crushed him between the same and injured him that he then and there died. 10

7. Said defendant companies at and before starting the said section of said train, failed to give any warning by gates, flagmen, whistles, bells or other means of warning that the said train was about to start and totally failed and neglected to notify said Frank Brooks in any manner that the said train was about to start or to be so started. 20

8. The defendant New York, Susquehanna & Western Railroad Company failed and neglected to maintain any gates, flagmen, bells or other means of warning the traveling public of the approach or movement of trains at and across said crossing at grade and said defendant Pennsylvania Railroad Company failed and neglected to give any signal by bell or whistle or otherwise of the approach or intended movement of said train and failed and neglected to guard the ends of said train at said crossing by any watchman or by any other means to give notice of the approach or movement or intended movement of said train. 30 40

Complaint

9. The death of said Frank Brooks was caused wholly through the negligence of the defendants in failing to give any warnings or to provide any method of warning as above stated, and without any fault or negligence of the said Frank Brooks in any way contributing thereto.

10 10. Said Frank Brooks, at the time of his death was the infant son of Charles J. Brooks, the plaintiff herein, and died on the said 4th day of December, 1915, leaving him surviving his father, said plaintiff his next of kin.

11. Letters of Administration of the goods and chattels, rights and credits which were of said Frank Brooks, late of the County of Hudson, were
20 to said plaintiff Charles J. Brooks on the 12th day of January, 1916, to be produced by said plaintiff when and as this honorable Court may require.

12. The plaintiff brings this suit to recover damages for the pecuniary loss sustained by the next of kin of said Frank Brooks, deceased, through the negligent killing of said Frank Brooks by the said defendants as aforesaid, and said suit
30 is brought for the benefit of said next of kin.

13. This action is brought within two years after the death of the said Frank Brooks.

14. The damages sustained by said next of kin as aforesaid are the sum of \$5,000.

Plaintiff demands Five thousand dollars (\$5,000.) damages.

WARREN DIXON,
Plaintiff's Attorney.

Amended Answer of the Pennsylvania Railroad
Company.

(Served July 27, 1916; Filed July 29, 1916.)

HUDSON COUNTY CIRCUIT COURT.

CHARLES J. BROOKS, Administra-
tor &c. of FRANK BROOKS, de-
ceased,

Plaintiff,

vs.

NEW YORK, SUSQUEHANNA AND
WESTERN RAILROAD COMPANY
and PENNSYLVANIA RAILROAD
COMPANY,

Defendants.

10

Action at
Law.

20

The defendant, The Pennsylvania Railroad Company, a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, having an office and place of business in the State of New Jersey at No. 26 Exchange Place, Jersey City, Hudson County, says that:—

It denies the truth of the matters set forth in the complaint. 30

Second Defense.

The alleged injury to plaintiff's intestate resulting in his death, was caused by said intestate's failure to exercise a reasonable degree of care for his own safety in crossing the street at the time and place and under the circumstances set forth in said complaint.

40

*Amended Answer**Third Defense.*

Plaintiff's intestate, FRANK BROOKS, was a trespasser upon the railroad tracks over which defendant's cars and locomotive were being operated at the time of his alleged injury, to whom defendant owed no legal duty except to refrain from wilfully or wantonly injuring him, and defendant avers that it neither wilfully nor wantonly injured him.

Fourth Defense.

Plaintiff's intestate, Frank Brooks, was injured while walking, standing or playing upon the railroad tracks over which defendant's cars and locomotive were being operated, at a place other than at a lawful public or private crossing.

VREDENBURGH, WALL & CAREY,
Attorneys of Defendant,
The Pennsylvania Railroad
Company.

Reply.

(Filed July 29, 1916.)

HUDSON COUNTY CIRCUIT COURT.

CHARLES J. BROOKS, Administra-
tor &c. of FRANK BROOKS, de-
ceased,

Plaintiff,

vs.

NEW YORK, SUSQUEHANNA AND
WESTERN RAILROAD COMPANY
COMPANY,

Defendants.

Action at
Law.

10

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Plaintiff denies every allegation in the Answer
of defendant, the Pennsylvania Railroad Com-
pany.

WARREN DIXON,
Plaintiff's Attorney.

30

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Rule for Judgment.

HUDSON COUNTY CIRCUIT COURT.

CHARLES J. BROOKS, Administra-
tor &c. of FRANK BROOKS, de-
ceased,
Plaintiff,

10

vs.

NEW YORK, SUSQUEHANNA AND
WESTERN RAILROAD COMPANY
and PENNSYLVANIA RAILROAD
COMPANY,
Defendants.

Action at
Law.

20 This cause being regularly on the list of causes
for trial at the April Term, Nineteen hundred and
seventeen of this Court, and being called and
moved by the plaintiff in the presence of all par-
ties, and the jury being empanelled and sworn and
the evidence of the respective parties submitted
and the Court having directed a non-suit as to
defendant, New York, Susquehanna & Western
Railroad Company, and having charged the jury
as to defendant, Pennsylvania Railroad Company
30 and plaintiff, and the jury having retired to con-
sider of their verdict, came again into Court and
say that they find the defendant, Pennsylvania
Railroad Company, guilty and assess the plain-
tiff's damages at the sum of Three Thousand Dol-
lars against said defendant; and the Court having
granted the defendant, Pennsylvania Railroad
Company, a rule to show cause why said verdict
should not be set aside for reasons heretofore filed,
and said rule having been duly returned and
40 argued, and the Court having duly considered the

Rule for Judgment.

same and having discharged said rule to show cause— ,

Therefore, it is here now considered and ordered that judgment final be entered in favor of the plaintiff, Charles J. Brooks, Administrator &c. and against defendant, Pennsylvania Railroad Company, for the sum of Three Thousand (\$3,000.00) Dollars damages, besides his costs of suit to be 10 taxed.

Rule granted in open Court on motion of Warren Dixon.

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Notice of Appeal.

(Served April 13, 1918; Filed April 27, 1918.)

HUDSON COUNTY CIRCUIT COURT.

10	<p style="text-align: center;">CHARLES J. BROOKS, Administra- tor of FRANK BROOKS, dec'd., <i>Plaintiff-Respondent,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">THE PENNSYLVANIA RAILROAD COMPANY, Impleaded, etc., <i>Defendant-Appellant.</i></p>	<p style="font-size: 3em; line-height: 1;">}</p> <p style="text-align: center;">Action at Law.</p>
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To:

WARREN DIXON, ESQ.,
Attorney of Plaintiff.

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TAKE NOTICE:

That the defendant appeals to the Court of Errors and Appeals, in the last resort in all causes, from the whole of the judgment entered in this cause.

VREDENBURGH, WALL & CAREY,
Attorneys of Appellant.

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40

Grounds of Appeal.

(Served May 25, 1918; Filed May 27, 1918.)

NEW JERSEY COURT OF ERRORS AND AP-
PEALS.

CHARLES J. BROOKS, Administra-
tor of FRANK BROOKS, dec'd.,
Plaintiff-Respondent,

vs.

THE PENNSYLVANIA RAILROAD
COMPANY, Impleaded, etc.,
Defendant-Appellant.

10

Action at
Law.

And now comes the above-named Defendant-Appellant, The Pennsylvania Railroad Company, by Vredenburg, Wall & Carey, its attorneys, and assigns the following grounds of appeal from the judgment of the Hudson County Circuit Court, in the above stated cause: 20

1. Because the said Hudson County Circuit Court refused to grant a non-suit against plaintiff, when thereunto moved by defendant at the close of plaintiff's case.

2. Because said Court refused to direct a verdict in favor of defendant and against plaintiff, when thereunto moved by defendant at the close of the whole case. 30

Because the Court charged the jury as follows:

3. First, gentlemen, it seems to me that I ought to direct your attention to the question of whether or not Dey Street is a public street crossing the right of way of the Susquehanna Railroad. The plaintiffs have brought forward evidence by which they have sought to show that Dey Street is a public street crossing the right of way of the Susquehanna Railroad Company; they have brought to you proceedings taken upon the part of the au- 40

Grounds of Appeal

thorities of Hudson City, one proceeding being back in 1866 and the other, as I recall it, in 1870, which you will recall and which probably are focused and finally brought to a head by two maps, copies of which you will have before you; they are in evidence and they are known respectively as P-2 and P-3. So far as those proceedings are
10 concerned, and the maps to which I have just called your attention are concerned, they do show that Dey Street was opened as a public street to the side lines of the right of way of the Susquehanna Railroad Company, that is, they bring Dey Street up as a public street to the easterly boundary line of the right of way of the Susquehanna on one side, and the opening on the opposite side brings it up to the boundary line on that side, leaving an intervening space which is the width
20 of the right of way of the Susquehanna Railroad Company.

The plaintiffs have further sought to do this, by way of evidence introduced and produced before you, and that is to show that that intervening space, namely the width of the right of way of the Susquehanna Railroad Company between those two ends of Dey Street shown by these maps, has in fact and in law become a public street, irrespective of and outside of these proceedings to
30 which I have just referred; and they attempt to do that or seek to do that by showing what we call the establishment of a public street by user, or, as sometimes is said, by prescription, that is, they seek to show by this evidence that they have produced that that portion of a right of way, the width of the right of way of the Susquehanna Railroad Company, in fact and in law became a public street as Dey Street as much as those portions which are outside of the right of way, because
40 they say that the evidence shows that the public

Grounds of Appeal

uninterruptedly, continuously, openly and notoriously used and made use of that portion of the right of way of the Susquehanna Railroad Company adversely to the interests and the title of the railroad company for a period of twenty years prior to the time of this happening, which happening was on December 4, 1915, and that for that reason the width of the right of way, which would, 10 if the lines of Dey Street had been extended, be within Dey Street had become in fact and in law a public street.

Of course, gentlemen, as indicated to you before, it is not for me to pass upon the evidence that is produced before you: it is for you to pass upon it. The burden of establishing that thing which I have just spoken to you of is upon the plaintiff, and they must do so by a fair preponderance of the evidence. Therefore, taking the evidence, 20 weighing it and searching it out, taking all of the circumstances as they appear in this case as you find them, you are then to determine on that question, has the plaintiff by a fair preponderance of the evidence satisfied you that this strip across the right of way of the Susquehanna Railroad Company was so notoriously, so continuously, so uninterruptedly, and it must be absolutely without interruption, for a period of twenty years used by the public as a public highway adversely to 30 the interests and title of the Susquehanna Railroad Company that it has become a public highway by user.

Now some of these things I am about to read to you, gentlemen, may aid and assist you, and I am reading them to you for the purpose of assisting you, if they will, upon the question of user or the bringing about or bringing into existence of a public highway by user or prescription.

First, to establish a highway by prescription 40

Grounds of Appeal

the land in question—in this case it is that portion of the land which is the width of the right of way of the Susquehanna Railroad Company—to establish a highway by prescription the land in question must have been used by the public with the actual or implied knowledge of the landowner, adversely, under claim or color of right, and not

10 merely by the owner's permission, and continuously and uninterruptedly for the period of twenty years—in this case at least twenty years prior to December 4, 1915. To create a highway by prescription the user must be the public generally as a way common to all. A user by a few individuals as such is not generally sufficient. The word public as used in this connection means all those who have occasion to use the road, and the public character of a road does not depend upon

20 the extent or quantity of travel if it is open and in use by all who have occasion to go over it, nor is the fact that the public travel thereon bears an insignificant proportion to private travel necessary decisive against it becoming a highway. Occasional or desultory travel is not sufficient to create a highway by prescription. The user must have been continuous throughout this prescriptive period, namely, the twenty year period I have already spoken to you of. Furthermore, the road

30 must have been used without interference or interruption by the owner of the soil; in other words, the owner must have acquiesced in the adverse user. Hence, if a landowner obstructs free travel by means of gates or fences it ordinarily prevents the public from acquiring a highway by prescription. Mere user of another's land by the public as for a highway is insufficient of itself to establish a highway by prescription. The user must be adverse and hostile to the rights of

40 the owner and under color or claim of right to use

Grounds of Appeal

the land. A user by license or permission of the owner of the land sought to be impressed with the public easement of travel is not adverse and affords no basis for prescription where the landowner does not consent to the use of the land by the public as of right. In order to create a highway over private lands by prescription the public user must be exclusive, that is, it must be such as to show a claim of right to use the land as a highway to the exclusion of any individual right of the owner inconsistent therewith. And again, and finally, so far as this particular subject is concerned: In order that a highway over public lands may be established by prescription the owner must have had knowledge of the adverse user, especially where the lands are wild and unoccupied. If he has no actual knowledge of the user it must be open and of such a character and the facts and circumstances must be such as to put him on notice thereof, and of the fact that a public right of travel is claimed. As just intimated, however, actual knowledge is not necessary, but it may be implied from the character of the user and the facts and circumstances of the case. 10 20

So that upon that point, gentlemen, I cannot say anything more than what I have in fact already said. Taking the evidence in the case, taking the rules as I have given them to you and as I have read them determine whether or not the plaintiff has satisfied you thereunder that Dey Street across the right of way of the Susquehanna Railroad Company had become on December 4, 1915, a public street or highway by user or prescription. If the plaintiff has not shown that you need not go any further with your consideration of this case, because then if the boy Frank was upon that portion which they are so seeking to show was a public highway, if it was, if it has not 30 40

Grounds of Appeal

been shown so to be under the evidence and under the rules which I have given you,—then the boy was at best a mere licensee, and as I have already indicated to you the railroad company owed him no duty other than that it would abstain from wilful harm or injury to him—and I find nothing in this case, gentlemen, which shows such a situation as you could hold the defendant company for having exercised wilful and deliberate intention to do harm to the boy,—so I say when you arrive at that point and find that the plaintiff has not made out that matter or that issue, then your verdict must be for the defendant.

4. If it has made out, then you come to the next point in the case, and that is, where was this boy at the time he met with his injury and death. Was he upon that portion of the right of way of the Susquehanna Railroad Company which would have been within the confines, that is within the north and south lines of Dey Street if it were a public street across the right of way of the railroad company, or was he not? If he was not—and of course, there again, gentlemen of the jury, the burden is upon the plaintiff to satisfy you where he was; it is one of the allegations that they make; it is one of the issues that they start to raise and which is attacked by the defendant, therefore the law leaves the burden with him who alleges with him who asserts, and says that he must make out that assertion or allegation by a fair preponderance of the evidence. Therefore, putting it in another way to you, which is probably the proper way, has the plaintiff made out by a fair preponderance of the evidence that the boy Frank was upon that portion of the right of way of the Susquehanna Railroad which would have been within the north and south lines of Dey Street if it has been shown by them to have been a public

Grounds of Appeal

highway across the right of way of the Susquehanna Railroad Company? If they have not, then again your verdict must be for the defendant. On the other hand,—which is the other side of the statement which I have just made to you,—if it does appear that he was not upon that portion, why, then again your verdict must be for the defendant. But the proper way and the proper rule 10 for you to be guided by, gentlemen, is as I first put it to you, that is that the burden is upon the plaintiff to satisfy you where the boy was, and if they have failed to show you that, or if all of the evidence shows you that he was not on that portion, then there cannot be a recovery in this case, but your verdict must be for the defendant.

Now if the plaintiff has established by a fair preponderance of the evidence, first, that that portion of Dey Street, which would be as it crossed 20 the right of way of the Susquehanna Railroad Company, was a public street; if the plaintiff has satisfied you that the boy Frank Brooks was upon that portion of the right of way of the Susquehanna Railroad Company when he met this happening which injured him and caused his death, then the next question would be for you, has the plaintiff satisfied you by a fair preponderance of the evidence that that injury and that death was caused by negligence upon the part of the defend- 30 ant company.

5. Under those circumstances, gentlemen, if Dey Street across the right of way of the Susquehanna was a public street, and has been so shown, and if Frank Brooks was upon that portion of the right of way within the confines of the street, the defendant company had a duty which it owed to him.

6. There is evidence in the case that at the time of this particular movement the bell of 40

Grounds of Appeal

the engine was ringing. It is for you to determine whether or not that is so. If it is, then the next question is, was that reasonable care—was the doing of that reasonable under the circumstances so far as the defendant company was concerned. Even then the question is what would have been reasonable under the circumstances so far as the
 10 duty of the railroad company to use reasonable care was concerned towards such a person in such a position as I have just indicated; and then of course the question ultimately upon that point is, has the plaintiff satisfied you that that care which I have indicated was the duty of the railroad company to use, was not exercised.

7. And when you have determined that, then determine whether or not under the circumstances
 20 of an unprotected crossing

The following questions were admitted:

8. *To the witness Cecelia E. Brooks:*

Q. Have you walked down Dye Street and across the railroad crossing of the Susquehanna there?

Q. Did you ever see anybody else crossing—walking along Dye Street?

30 9. *To the witness Charles E. Wyddle:*

Q. Do you know where the New York, Susquehanna & Western Railroad tracks are? Q. The railroad tracks crossing Dye Street?

Q. Do you know where the railroad tracks cross that street, or if the railroad tracks do cross that street?

Q. Where were they separated with regard to Dye Street? Where was the separation?

40 Q. How long have you traveled up and down Dye Street? Across these tracks?

*Grounds of Appeal*10. *To the witness Nicholas D. Wortendyke:*

Q. Now, then, has the Railroad Company any tracks across that part of Dye Street which is within the boundary of the larger area of the right of way?

Q. Does it appear by any of the maps that there are railroad tracks on that portion of the buff-colored street way which is within the most westerly line of the right of way as appears on P-3 extended. 10

11. *To the witness Frederick Deitz:*

Q. How many years have you known of its use by the public?

Q. No gates or fence?

12. *To the witness Elizabeth Greenwalk:*

Q. Have you always done that since you lived there? 20

Q. Have you ever seen others of the public walking up and down?

Q. Do they station any flagman there, or is there any flagman? * * * * *

Q. When trains are moving?

13. *To the witness John Amen:*

Q. From what part of Dye Street to what part? 30

14. *To the witness Charles W. Brooks:*

Q. Now is there any flagman there at Dye Street, Jersey City? * * * * * Any kind of flagman?

Q. Would those men give any notice to pedestrians or do anything in regard to people crossing?

*Grounds of Appeal*15. *To the witness Philip Seaman:*

Q. Aren't your instructions that you shall stand where the couplings are to be made?

Q. So that you started the engine up before the flagman got in their proper places on the freight, is that so?

10 Q. Isn't that the reason why the rules require you to be at the place where the coupling is made until the pin does drop?

16. *To the witness Harry B. Chase:*

Q. The place where Dey Street and the railroad came together and cross one the other, or intersect each other.

20 Q. Now, isn't it a rule of your Company when you shift cars over a crossing that you should protect that crossing with one of your crew?

Q. There was no gateman or flagman stationed at that crossing, was there?

Q. How many tracks are there that cross Dey Street there?

The following testimony was admitted:

17. *By the witness Cecelia E. Brooks:*

30 Q. How long do the cars stay there? A. Oh, not so very long at a time. Sometimes they stand there, probably two cars, where people has a way to cross.

18. *By the witness Frederick Deitz:*

40 Q. Practically from one end of Dye Street to the other? A. Yes—well, not practically from Dye Street, but I come up the side streets as far as Charlotte Avenue or James Avenue and cross over that way and come up that way.

Grounds of Appeal

19. *By the witness Elizabeth Greenwald:*

Q. Ever go to Tonnele Avenue? A. Yes.

Q. How? A. Right across the railroad * *

A. My family also.

20. *By the witness Nicholas D. Wortendyke:*

Q. You say that Dye Street is a public street. Do you know how the city—how it becomes a public street, Mr. Wortendyke? A. By an opening map. 10

Q. By what proceedings? A. By opening maps.

Q. That is by condemnation assessment? A. By opening maps and paying for the property and settling for the property.

Q. Is that the only record which you have knowledge of in the City Department bearing upon the question of the city's action toward the opening of this street as a public street, or are there other maps? A. No; this is the only record that is on file. The property was paid for and assessed. 20

Q. In opening a street the first thing they do is to make an assessment map? A. Yes, now.

Certain testimony with regard to maps marked "P-2" and P-3", and Fowler's Map and Post Map. 30

21. *By the witness Frank A. Dolan:*

A. I found a record under date of October 3, 1865 * * * * * Minutes of Common Council, volume 4, City of Hudson, page 221.

"The report and maps of the Board of Commissioners of Assessment in the matter of the opening of Dye Street in this City were taken up, and having been duly advertised under date of August 14, 1866, and no remon- 40

Grounds of Appeal

strance received against the same, the report and maps were referred to the street committee."

On page 224, of the same volume:

10 "The City Clerk reported the following papers or publications filed with him: Ordinance for Dye Street opened;—that is line 13 of the report—and petition for Dye Street opened. Reports of the City Clerk were received and ordered filed."

The Court: All of that was under date of October 3, 1866?A. Yes. Under date of February 11, 1870, Volume 5, of the minutes of the Common Council of the City of Hudson, page 517: . . .

20 "Committee on Streets, by Alderman Hogan, reported back the reports and maps of the Board of Commissioners and Assessment in the matter of Dye Street extension, with the following preamble and resolution which were read:

30 "Whereas, the Board of Commissioners of Street Assessment have duly filed their report and maps of assessment in the matter of Dye Street opening, of the 14th day of January, 1870, and due publication has been made of said"—I can't get the word—"made of such opening according to law, and whereas no remonstrances or objections appear filed against said proposed improvement within the time limited by law, to wit, thirty days from date of filing; therefore, Resolved, that said report and maps of assessment be confirmed and a copy of such assessment list be handed to the Collector of Revenue for collection.

40 Resolved the City Treasurer shall tender and pay to the owners of land taken for said opening

Grounds of Appeal

of Dye Street the sum or sums set opposite their respective names and properties on said assessment list and report, taking their receipt therefor, and if the said owner or owners shall refuse to take such award and be an idiot or infant or in any way disqualified to receive a receipt for same, then said treasurer shall make an affidavit of said facts and file such affidavit with the City Clerk, 10 who shall report the same to the common council at their next meeting thereafter.

Adopted as follows on ayes and nays: Ayes, President McPherson, Aldermen Dahm, Elwood, Hogan, McNulty and McFadden.

Nays, none.

Absent, Aldermen Harrington and Martini."

A. This is Resolution Book number 6 of the Board of Street and Water Commissioners.

Mr. Dixon: Of Jersey City. It is regarding 20 the Fowler's Map.

A. On page number 758, under date of May 12, 1894 * * *

"RESOLVED, the map entitled filed Assessment Map, Jersey City, New Jersey, 1894, be and is hereby adopted as the official city map.

JOHN E. MATTHEWS, *President.*

P. F. WANSER, *Mayor.*

GEORGE T. BOUTON, *Clerk.*"

30

Grounds of Appeal

22. The Court admitted in evidence Rules 102 and 102A of the defendant Company.

23. The Court admitted in evidence:
 Fowler's Map.
 Post Map.
 Assessment Maps.

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Minutes of Common council, Vol. 44, p. 221.
 Minutes of Common Council, Vol. 5, p. 517.

Resolution Book No. 6, Board of Street and Water Commissioners, p. 758.

P-2.

P-3.

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VREDENBURGH, WALL & CAREY,
Attorneys for Defendant-Appellant.

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Testimony.

ARTHUR SCHIRRLER, SWORN.

Direct Examination by Mr. Dixon:

Q. Where do you live, Mr. Schirrle? A. 50 Broadway, Marion—Jersey City.

Q. What is your business? A. Conductor on the Pennsylvania Railroad—freight conductor.

Q. Passenger or freight? A. Freight. 10

Q. For how long have you been freight conductor for that railroad? A. Twenty-three years.

Q. Was your train the train that struck a boy named Brooks on December 4th? A. Yes, sir.

Q. 1915? A. Yes, sir.

Q. Was that a Pennsylvania Railroad Company train? A. Well, we get the train off the Erie—the cars delivered from the Erie Railroad to the yard.

Q. Who was operating the train? A. The 20 Pennsylvania Railroad was operating the train, but we get the train off the Erie Railroad property.

Cross Examination by Mr. Carey:

Q. Where do you say you were getting the train from? A. Off the Erie Railroad tracks

Q. Off of the Erie Railroad tracks? A. Yes.

Q. What was the date of the accident? A. In December the 4th. 30

Q. What year? A. 1915.

By Mr. Hobart:

Q. You were in charge of the train as the conductor, I understand? A. Yes.

Q. And the rest of the crew and yourself were employed by the Pennsylvania Railroad? A. Yes, sir.

Mr. Hobart: Want me any longer now?

Mr. Dixon: No; I will agree to take a non- 40
suit.

Charles J. Brooks, for Plaintiff—Direct

The Court: Voluntary nonsuit as to the New York, Susquehanna & Western Railroad. All right, it may be entered.

CHARLES J. BROOKS SWORN.

10

Direct Examination by Mr. Dixon:

Q. Mr. Brooks, you are the plaintiff in this case? A. How is that?

Q. You are the plaintiff in this case, and where do you live? A. 40 East Stuyvesant Avenue.

Q. You are the Charles J. Brooks to whom the Surrogate of Hudson County issued letters of administration on the 12th day of January, 1916, are you not? A. Yes.

20

Mr. Dixon: I offer the letters.
(Paper marked Exhibit P-1.)

Q. You are the father of Frank Brooks, deceased? A. Yes.

Q. When did Frank die? A. December the 4th.

Q. What year, 1915? A. 1915.

Q. Up to the time of Frank's death where did he live? A. He lived in Summit Avenue, six something—665 Summit Avenue, Jersey City.

30

Q. He was your son? A. Yes.

Q. Have you any other children? A. Yes, four more.

Q. What? A. Four other sons.

Q. What are their names? A. They live with their parents, me and my wife.

Q. Eh? A. They live with me and my wife.

Q. What are their names? Give me the oldest son's name and his age? A. Well, the oldest son is Charles Brooks.

40

Q. What is the age? A. And the next oldest—

Charles J. Brooks, for Plaintiff—Direct

Q. What is the age? What is Charles Brooks' age? A. Charles is twenty-eight years old.

Q. The next one? A. And Herbert is twenty-two, going on twenty-three.

Q. And the next one? A. And Willie is twenty-two, and I have a son in the army, Eugene, nineteen.

Q. Nineteen? A. Yes, going on twenty. 10

Q. Where? A. He is at——

Q. Talk to the jury. A. He is out in Massachusetts in the army, with the Fourth Regiment in Port Rodman, Massachusetts.

Q. Frank, how old was he when he died? A. He was nineteen when he enlisted.

Q. No, Frank. How old was Frank Brooks when he died? A. Thirteen years of age, going on fourteen.

Q. Did he go to school or work up to just before his death? A. Well, he was employed at the time he was killed. 20

Q. Where was he employed? A. Well, he was—I just can't think of the name of the place, but he was with a butter and cheese man, that sells butter and cheese, and he used to go around with the wagon and mind the wagon while he went and delivered the goods.

Q. How long had he been employed before his death? A. I should judge about seven or eight months. 30

Mr. Carey: May I have his previous answer repeated?

(Answer repeated by stenographer as follows: "Well, he was—I just can't think of the name of the place, but he was with a butter and cheese man, that sells butter and cheese, and he used to go around with the wagon and mind the wagon while he went and delivered the goods.") 40

Charles J. Brooks, for Plaintiff—Direct

A. Woolraven is the name.

Q. How long had he been working before his death? A. Well, I should judge about eight or nine months, I ain't positive about the time, but that is as near as I can get at it.

Q. What wages was he getting, do you know?

A. Well, he used to get paid nightly; seventy-five
10 cents every night.

Q. What did he do with that money? A. He gave it to his mother.

Q. Before that did he go to school? A. Yes, previous to that he went to school.

Q. How long a time did he go to school? A. About five years.

Q. What kind of a boy was he as to disposition and mentality? A. You will have to repeat that.

(Question repeated by stenographer.)

20

A. Oh, pretty bright.

Q. As to his health; how had his health been up to the time of his death? A. A No. 1, first class.

Q. Did you see him on the day of his death, before his death? A. No, sir. I seen him at about ten o'clock that morning and after that I was on some business and he went about his business; that is all I could say.

30 Q. Where did you see him last alive? A. At our home in Summit Avenue.

Q. On what day? A. On the 4th of December, Saturday the 4th of December, 1915, about ten o'clock in the morning.

Q. When did you next see him? A. The next time I saw him I should judge was when I was notified, it was about five o'clock in the evening, Saturday evening, I was informed of his death, laying over here in the shanty over there, killed
40 by a train.

Charles J. Brooks, for Plaintiff—Direct

Q. Where was that shanty? A. Well—

Q. Or did you go to see him? Did you go there?
A. Yes; I went direct there from 43 Stuyvesant Avenue as quick as I could get there and I found him in that coal yard shanty. They had carried him in there.

Q. Tell us where that shanty is? A. Well, Coughlin's coal office, St. Paul's Avenue. 10

Q. Is that in Jersey City? A. Yes, it is in St. Paul's Avenue and West Side Avenue.

Q. Near what other streets? A. West Side Avenue and St. Paul's; there is a junction there, is a coal yard—Coughlin's coal yard.

Q. Where is St. Paul's Avenue? A. The next avenue to Dye Street.

Q. How does St. Paul's Avenue run with regard to the points of the compass? A. Runs the same as Dye Street. 20

Q. How does Dye Street run? A. Runs up the same as St. Paul's.

The Court: Does it run north and south or east and west? A. North and south.

By Mr. Dixon:

Q. How does the railroad run? A. The railroad runs across West Side Avenue—what they call West Side Avenue.

Q. How does the railroad run with regard to St. Paul's Avenue? A. They both run the same way, but they are different sections. 30

Q. Does the railroad right of way—railroad tracks cross St. Paul's Avenue? A. Yes, sir.

Q. Then it don't run the same way, does it? A. No.

Q. No. Does it cross Dye Street? A. Yes, crosses Dye Street and Van Winkle Avenue.

Q. That is practically north and south, isn't it?
A. Dye Street is east and west. 40

Charles J. Brooks, for Plaintiff—Direct

Q. We will call the railroad right of way running north and south? A. Yes, sir.

Q. And Dye Street runs east and west? A. Yes, sir.

Q. Now have you got that in mind? A. Yes, sir.

Q. Now which is further north, St. Paul's Avenue or Dye Street? A. St. Paul's Avenue.

10 Q. Now where was this shanty that the body of your son was in when you saw it with respect to Dye Street, how near Dye Street was it? A. Well, it is north a block as far as I can understand in length, that is all I could tell you; I don't know how many feet there is in it.

Q. Which way from Dye Street, north or south? A. No, it is north.

Q. How near the railroad tracks is that house?

A. Why, about four feet from the railroad tracks.

20 Q. On which side of the street east or west, towards the Hudson River or away from it? A. On the west side.

Q. Was your boy dead when you got there? A. Yes, he was laying in this shanty when I seen him. He had been picked up and carried in the shanty.

Q. But he was dead? A. Yes.

Q. Then you took him home or had him taken home? A. Yes, took him home.

Q. Did you see his body at all? A. Yes.

30 Q. Where did you see that? I don't mean in the house, but I mean did you see—— A. After he was laid out.

Q. Did you see any marks on him at all? A. Yes, sir; I seen a mark where the coupling hit him right on the side over the heart; it was a kind of an abrasion there where the coupling hit him when he had walked through, it was just about his size, and hit him on the side.

40 Mr. Carey: I object and ask to have that part stricken out which states what hit him.

Charles J. Brooks, for Plaintiff—Direct

The Court: I think it ought to be, Mr. Dixon.

Mr. Dixon: I have no objection.

The Court: Mr. Carey was trying to object, but he couldn't get in. He may, of course, tell what he saw, but what did it and what he did not see of course he cannot tell us that.

10

Q. All I want you to do is to tell the court and jury what marks you saw on his body and where they were? A. Well, this mark over his heart, that is the only thing I saw, where he got hit.

Q. What was that mark; what did it look like? A. Looked like a dent in the side.

Q. Had it crushed the chest in? A. Crushed in, yes.

Q. That is the only mark that you saw? A. 20 That is the only mark I saw.

Q. How old are you, Mr. Brooks A. Me, I will be seventy-three the 22nd of next March.

Q. How old is your wife? A. My wife is forty-three.

Q. What is your condition of health? A. What's that?

Q. What is your condition of health? A. My condition of health is pretty bad.

Q. Pretty bad? A. Yes, failing every day, and 30 hardly able to get around.

Q. How long have you been that way? A. Well, for about two years I commencetd to fail, but since I lost my boy, why, it kind of crippled me, and my wife, all up. My wife has been in the hospital twice in six weeks since that time, through the loss of the boy.

Q. What is your business? A. I work at the asbestos business.

Q. How long have you been in that business? 40 A. Well, about twenty-seven years.

*Charles J. Brooks, for Plaintiff—Cross**Cross Examination by Mr. Carey:*

Q. How far had your son gone in school before his death? A. I can't hear.

(Question repeated by stenographer.)

A. He was in third grade B, I believe, at the time when he left school.

10 Q. Where was he in school? A. What?

(Question repeated by stenographer.)

A. In 23 school.

Q. 23 Jersey City School? A. Yes, sir.

Q. When did he stop going to school? A. Well, business was very dull—

Q. I asked you when? A. And it was pretty hard to get employment, and we put him to work.

20 The Court: When did he stop going to school and go to work?

A. Why, about nine months before the case of his death, your Honor.

Q. In the spring before his death? A. Yes.

Q. What month? A. Well now, I couldn't just exactly state the month, but I know it was about nine months before that, that is as near as I can get at it.

30 Q. When he left school for whom did he go to work? A. Yes, sir.

Q. For whom did he go to work? A. This milkman.

Q. Milkman? A. Or Woolraven—keeps the place down there and he used to take care of the wagon and watch the wagon and the milk while he delivered it.

40 Q. I thought you spoke of that as a butter store. Was it a milk store? A. No, sir; he has got a private place, a yard, and he buys his milk and then bottles it and delivers it.

Charles J. Brooks, for Plaintiff—Cross

Q. Did he work for this man all the time from the time he left school until the accident? A. Until the time he got killed.

Q. You say he was receiving seventy-five cents a day? A. Yes.

Q. How long had he been receiving seventy-five cents a day? A. From the first day that he went to work for about nine months. 10

Q. And he received those wages during the entire time that he worked there? A. Yes, sir.

Q. Before that time had he worked at any place? A. No, sir; that is the time he left school.

Q. About how tall was your boy? A. About four foot six or seven, I should judge.

Q. Four feet and a half? A. Something over, a little over that.

Q. You say his health had been good? A. Yes, sir, was in first class condition. 20

Q. How much did he weigh? A. I think he weighed a hundred and four or a hundred and five pounds the last time he got weighed.

Q. You saw him at ten o'clock the morning before? A. Yes, ten o'clock on that Saturday morning.

Q. And he was then at your home? A. Yes, sir.

Q. What time did he go to work usually? A. He had been done—Saturday is a short day with them in the milk business, delivering and that, and 30 he went home and his mother sent him down to the gas house, through my next eldest son, with his lunch.

Q. Yes. A. For he works nights.

Q. Wait a moment—

Mr. Dixon: You don't know about that. Don't tell. We will prove all that.

Q. He was at the house at ten o'clock in the morning when you saw him, and did you go to 40 your work then? A. How is that?

Charles J. Brooks, for Plaintiff—Cross

Q. Did you go to work then? A. Yes, I went to work and I don't know what happened after that, because I wasn't home.

Q. Did he usually get home by ten o'clock in the morning on Saturday when he was at work with this man who had the milk business? A. Well, only starts out in the morning about ten
10 o'clock and delivers butter. The milk is done early in the morning, before daylight, but my son wasn't on that end of it.

Q. What end of it was he on? A. On the day-time.

Q. What time? A. From ten o'clock in the morning he started out and delivered his butter.

Q. What time did he go to work in the morning? A. At ten o'clock every morning.

Q. At ten o'clock? A. Yes, sir.

20 Q. Then he had not gone to work that morning? A. He worked from ten to four in the afternoon.

Q. Had he gone to this work on this Saturday morning? A. Yes, he had gone out as I left that morning.

Q. He went out as you left? A. Yes.

Q. What time did you get back home on Saturday? A. Me?

Q. No, your son? A. My son used to get home about half past four—Saturday is a short day—
30 that is, a Saturday, a short day in the milk; they take enough to do them for Sunday, and so on—easy, that is the shortest day he had to work.

Q. What time did he get home other days? A. Well, from ten until five, and so on, sometimes a little later, according to how quick they made the route.

Q. Now in regard to these streets you speak of? A. A little louder.

Q. What streets are next to Dye Street on either
40 side? A. What did he say?

Mrs. Cecelia E. Brooks, for Plaintiff—Direct

(Question repeated by stenographer.)

A. Running the same way as Dye?

Q. Yes. A. One is Van Winkle Avenue on the Newark Avenue side, and the other is St. Paul's on the north side.

Q. Do you know about how far Van Winkle Avenue is from Dye Street? A. Well, I should judge it was about one hundred and fifty or sixty feet, the way it looks to me; I am not the best judge of it. 10

Q. There is no street between Van Winkle Avenue and Dye Street? A. No, only Newark Avenue, Van Winkle, and then comes Dye Street and then St. Paul's Avenue.

Q. Yes. How old do you say your wife is? A. Between forty-three and forty-four.

Q. And your age is seventy-three? A. I will be —mine is seventy-two; I am going on seventy-three years of age. 20

Q. What is the present condition of the health of your wife? A. Well, my wife is in very delicate health; she has had two paralytic strokes in the last twenty months, or eighteen or twenty months, and one right after my boy got killed. She has been ailing ever since.

Q. Is she at home? A. No, sir; I managed to get her ready, and she is in the court room here. 30

Q. That is all.

MRS. CECELIA E. BROOKS, SWORN.

Direct Examination by Mr. Dixon:

Q. You are the wife of the last witness? A. Yes, sir.

Q. You are the mother of Frank Brooks? A. Yes. 40

Mrs. Cecelia E. Brooks, for Plaintiff—Direct

Q. How old was Frank when he died? A. Thirteen years old.

Q. Up to his death he lived with you and your husband and brothers? A. Yes.

Q. What day was he killed? A. The 4th of December, on a Saturday, 1915.

10 Q. Did you see him on that day before the accident? A. Yes.

Q. When did you see him last on that day before the accident? A. Ten o'clock in the morning.

Q. Did you see him after that? A. He was going with his brother's lunch.

Q. What? A. He was going with his brother's lunch.

Q. Ten o'clock in the morning? A. Yes.

20 Q. When did you see him last on that day? What was the last time you saw him alive? A. When he left the house at ten o'clock.

Q. And didn't he come back to the house after that? A. No, sir.

Q. Not after that? A. No, sir.

Q. Where did he go that day, do you know? A. He was going with his brother's lunch down to the Public Service.

Mr. Carey: I object. She cannot know where he went.

30 The Court: Unless she knows he started from home.

A. I couldn't say where he went after that.

Q. No. You say he started with his brother's lunch at ten o'clock? A. Yes, sir.

Q. Who made up the lunch for his brother? A. I did.

Q. For which brother? A. The second oldest son.

Q. What is his name? A. Herbert Brooks.

40 Q. Where was Herbert to get his lunch, where

Mrs. Cecelia E. Brooks, for Plaintiff—Direct

was he to go? A. Outside the Public Service, the Wash House.

Q. Eh!

(Answer repeated by stenographer.)

Q. Where is the wash house? A. I am sure I couldn't tell you. I never was down there.

Q. That is the last you saw him alive? A. Yes, 10
sir.

Q. When did you next see him? A. When he was brought in dead.

Q. What time was that? A. Around six o'clock.

Q. Did you hear of the accident before he was brought in dead? A. I was only told he was hurt.

Q. What time were you told that? A. It was about five o'clock.

Q. Who told you that? A. A man that dropped dead on New Year's Eve. 20

Q. Who was he? A. His name was Mr. Hill, Mr. George Hill; he works for Coughlin Coal Company.

Q. Do you know where Dye Street is? A. Yes.

Q. How near Dey Street do you live, or lived then? A. I didn't live near it at all then; I lived up on Summit Avenue.

Q. How far away from Dey Street did you live? A. Before I moved up to Summit Avenue?

Q. No; at the time Frank was killed where did 30
you live? A. Summit Avenue then.

Q. How far was that from Dye Street? A. Well, it was a good way up.

Q. Eh? A. It was a good way up from Dye Street.

Q. Had you ever been up Dye Street? A. Yes, crossed there many a time.

Q. Travelled up and down Dye Street, did you? A. When I lived in the west end, yes.

Q. Eh? A. When I lived down west end. 40

Mrs. Cecelia E. Brooks, for Plaintiff—Direct

Q. Where is that? A. When I used to live down on James Avenue.

Q. When did you live down there? A. Down near St. Paul's Avenue.

Q. How long did you live down St. Paul's Avenue? A. Twelve years.

Q. How far away from Dye Street was that? A. 10 It was only about a block and a half or two blocks.

Q. And you say you used to go up and down Dye Street? A. Not to make a practice of it. If I wanted to go in a hurry I would make a short cut.

Q. How far along Dye Street would you walk?

Mr. Carey: Eh?

A. Just for a crossing—

Mr. Carey: I object to that. They have not as yet proved any crossing at Dye Street, and we are not here to answer a license, we are 20 called here to answer a public highway crossing.

The Court: That is my recollection of the pleadings.

A. Judge—

The Court: One minute.

Mr. Dixon: We have a crossing. We have Mr. Brooks who proved a crossing and said Dye Street was crossed by the railroad tracks at grade and he went up there, it was near 30 that—

The Court: I know, but your complaint is: "Defendant Susquehanna Railroad was and still is a railroad corporation," and so forth, "a railroad right of way, located and running in and through Jersey City and crossing a certain public street or highway in Jersey City commonly called Dye Street at grade." The third paragraph refers to the Pennsylvania Railroad and its use of the tracks. You say, 40

Mrs. Cecelia E. Brooks, for Plaintiff—Direct

“Defendant ran and operated its cars over the tracks and right of way of the Susquehanna and over that part of the same as crossed such public street known as Dye Street.”

Mr. Dixon: I will show it was a street, and I am showing it is a public street, because the public use it, and I am going to show pretty soon it was an acquired street by the city, because they condemned it and opened it and laid it out and all that sort of thing. 10

The Court: Mr. Carey’s objection directly goes to this, that you have declared it as a public street, and he now says you should not be permitted to show any right of the public in it other than as a public street, as I understand.

Mr. Dixon: That is right, and I am showing that the public used it as a public street. That is what I am proving by this witness. First she says it is a public street, and I will prove she knows, and prove it was used by the public. 20

The Court: If you are in the process of attempting to show it was a public street crossing the tracks of a right of way in this locality—

Mr. Dixon: Yes.

The Court: And you are attempting to show it either by user— 30

Mr. Dixon: I am going to show it.

The Court: Further, as you say, by the exercise of the public right by and through it, if that was done.

Mr. Dixon: Yes.

The Court: Your objection would not go to that, excepting the class of testimony that he is going to use for that purpose; is that right? 40

Mrs. Cecelia E. Brooks, for Plaintiff—Direct

Mr. Carey: Yes; my objection goes to the point that the mere fact that somebody crossed a railroad track there does not tend to show that this is a public highway.

The Court: No, of course it doesn't.

10 Mr. Carey: And unless it is connected with other evidence establishing the fact of the public highway it is not competent.

The Court: All right, sir.

Mr. Carey: That evidence is not in as yet.

The Court: I have that in mind, and of course he will have to make it up, of course. I would not let it stay in if that is so.

Mr. Carey: For the record I ask to have an objection noted.

20 The Court: You may note your objection. It is noted now together with my remarks upon it as to what the purpose is.

Q. Have you walked down Dye Street and across the railroad crossing of the Susquehanna there?

Mr. Carey: I object. My objection goes to this line of questioning.

The Court: Goes to all this particular line of questioning, yes.

30 A. I have crossed where the crossing was, not down the tracks I didn't.

Q. Along Dye Street? A. No; I crossed over Dye Street.

Q. I was asking you whether you had not gone through Dye Street, used Dye Street? A. Yes, I went through Dye Street, yes.

Q. On both sides of the railroad? A. Yes.

40 Q. And going from one side of Dye Street to the other how would you go—or one end of Dye Street, or whatever you call it, from one side of

Mrs. Cecelia E. Brooks, for Plaintiff—Direct

the railroad track to the other side of the railroad track? A. Straight along until I got to a crossing.

Q. Went across the railroad tracks at Dye Street, did you? A. Yes.

Mr. Carey: I object. Counsel is telling the witness what to swear to.

Mr. Dixon: Well, I didn't. 10

By the Court:

Q. The question is, as I understand it, this, Madam: You say that you have walked along Dye Street? A. Yes, sir.

Q. Now when you got to a certain point in Dye Street you came to a railroad track, did you? A. Yes, sir.

Q. Now what have you done when you walked along Dye Street and came to those railroad 20 tracks? A. I walked until I came to a crossing and then I would cross.

Q. You walked until you came to a crossing; what crossing do you mean? A. Where there was a place to go through, for the public use.

Q. Well, a crossing across Dye Street, or across the railroad or what do you mean? A. I never went across the tracks.

Q. Oh, you never went across the tracks? A. No. 30

The Court: I rather thought that when she was being examined.

Mr. Carey: I ask to have this testimony with respect to travelling along Dye Street, and all testimony subsequent to my objection, stricken out.

The Court: Well, it is not of any consequence, you see, Mr. Carey, whether it stays in or goes out, because the pertinent point that Mr. Dixon was reaching for, if it has any per- 40

Mrs. Cecelia E. Brooks, for Plaintiff—Direct

tinency at all, was her crossing the railroad tracks, and she says now absolutely that she never did cross it.

By Mr. Dixon:

Q. Did you ever see anybody else crossing walking along Dye Street? A. Yes, I seen them crossing, and I have got people here that crossed.

10

Mr. Carey: I object.

The Court: The objection is the same objection?

Mr. Carey: Yes, on the same ground.

The Court: I will rule the same way, and that is, unless it is connected up with the available testimony going to the point pleaded, I, of course, will strike it out or deal with it in any other proper manner.

20

Q. What is your answer to that question? Have you ever seen people walking along Dye Street?

A. Yes, sir.

Q. And crossing the railroad going over to the other part of Dye Street? A. Yes, sir.

Q. How often and during what period of time?

A. Working hours.

Q. Covering what period of time? Where were you living when you seen that? A. James Ave-

30

Q. How long a time have you seen people doing that—over what period of time have you seen them doing that? A. Between seven and twelve and one to six.

Q. That is the hour of the day, but how many months have you seen or years have you seen people doing that? A. For twelve years I lived down in that neighborhood.

Q. And they always did that while you were there? A. I seen them pass off and on.

40

Mrs. Cecelia E. Brooks, for Plaintiff—Cross

Q. Are there houses along Dye Street? A. Yes, sir.

Q. That's all.

Cross Examination by Mr. Carey:

Q. When your son left the house—when your son Frank left the house did he have the lunch for his older brother? A. Yes, sir. 10

Q. And did you say it was about ten o'clock in the morning? A. Ten o'clock in the morning.

Q. And so far as you know he was on the way to the place where your elder son worked? A. Yes, where the second oldest son worked.

Q. And he worked, you say, at the washhouse of the Public Service? A. No, he worked inside the building; he was a gas maker at the time.

Q. Inside of the building? A. Yes, sir.

Q. Where is this building located that this son 20 who was working for the Public Service Gas Company was then at work? A. St. Paul's and James Avenue.

Q. At St. Paul's and James Avenue? A. Yes, sir.

Q. How far away from the railroad tracks at Dye Street? A. About two blocks.

Q. About two blocks? A. Yes.

Q. That is if you were at the railroad tracks at Dye Street you would be then about two blocks 30 away from the place where this son was at work for the Public Service Gas Company; is that right? A. Yes, sir.

Q. Now where was the place that your son Frank was working just previous to the accident? A. He was working down in Woolraven's.

Q. Just where is that? A. Down at the end of James Avenue.

Q. The end of James Avenue? A. Yes.

Q. Now what time of the day did you see people 40

Mrs. Cecelia E. Brooks, for Plaintiff—Cross

crossing the railroad tracks in the vicinity of Dye Street? A. I couldn't say the special time, because I had other work to do. I couldn't watch the people going past all the time.

Q. Did you see anybody doing that? A. Yes, and I have got witnesses here.

10 Q. Can't you tell us about what time of the day that would be? A. Well, about seven o'clock, that is what I should judge.

Q. About seven o'clock, morning or night? A. Morning.

Q. Any other time? A. Coming home around six at night.

Q. Workmen, were they? A. Yes.

Q. Did you know any of them? A. No, sir, not then.

Q. Know any of them? A. They was strangers.

20 Q. Eh? They were strangers.

Q. All strangers to you? A. Yes, but the witness I have——

Q. You don't know for whom they are working, do you? A. No, I don't know whether they came from New York or where they were coming from, them people.

Q. You don't know where they were working or for whom they were working at all? A. Not those people, no, sir.

30 Q. Those were the hours of the day when you saw these people going across the railroad tracks? A. Yes.

Q. Now you say that you never went across the railroad tracks yourself? A. I never crossed the railroad tracks, no, sir; I always cautioned him not to cross it, and he was very careful when he went out with me not to cross it.

40 Q. You told him not to cross the railroad tracks there, did you? A. He was very, very careful, and I always told him not to cross any tracks.

Charles E. Wyddle, for Plaintiff—Direct

Q. You told him not to cross them, did you? A. Yes.

Q. You did not permit him to cross them there if you knew about it? A. No.

Q. You went to a place where there was a crossing across the tracks, didn't you? A. Yes.

Q. Where did you go to find a crossing? A. I always go to Newark Avenue or to St. Paul's Avenue. 10

Q. Either to Newark Avenue or St. Paul's Avenue? A. Yes; and the trains cross there at St. Paul's Avenue, too, so I had to go through there.

Q. I understand. Wait a minute now. Now at Newark Avenue there was a plank crossing of the railroad tracks, was there not? (No answer.)

Q. Regular crossing there, where you crossed? A. Please can I step aside?

The Court: Yes. 20

(The witness is assisted from the court room.)

The Court: Gentlemen, I suppose the best thing to do would be to go on with another witness?

Mr. Dixon: Yes.

CHARLIE E. WYDDLE, SWORN. 30

Direct Examination by Mr. Dixon:

Q. Where do you live? A. 387 Hoboken Avenue.

Q. How old are you? A. Fourteen.

Q. Did you know Frank Brooks? A. Yes, sir.

Q. Did you see him on December 4, 1915? A. Yes, sir.

Q. Do you know where Dye Street is? A. Yes, sir. 40

Charles E. Wyddle, for Plaintiff—Direct

Q. Do you know where the New York, Susquehanna & Western Railroad Company tracks are?

A. No, sir.

Q. The railroad tracks crossing Dye Street? A. Yes, sir.

Mr. Carey: I object, as it assumes a fact that Dye Street is a street.

10 Mr. Dixon: Well, I have a right to assume a fact.

The Court: Well, I did not take it that way myself, Mr. Carey, nor will I in considering the testimony that is introduced permit it to be considered that way.

Mr. Dixon: We will have that. It is a street laid out on maps as old as Jersey City.

The Court: We have not got that yet, Mr. Dixon.

20 Mr. Dixon: No, we have not.

The Court: The difficulty is the assumption that is in this question that it is a public street.

Mr. Dixon: No; I asked him if he knows Dye Street and he says he knows it. I cannot ask him do you know a piece of ground that is laid out in this fashion or that fashion.

30 The Court: Suppose that you ask him where the railroad tracks were with respect to Dye Street?

Mr. Dixon: Yes.

Q. You know a street that you call or called Dye Street, do you? A. Yes.

Q. How near to that street do you live? A. I don't live near it at all.

Q. Not near it at all. Do you know where the railroad tracks cross that street, or if the railroad tracks do cross that street?

40 Mr. Carey: I object.

Charles E. Wyddle, for Plaintiff—Direct

A. Yes.

The Court: For the same reasons as before?

Mr. Carey: Same reason.

The Court: I will overrule the objection. Take your exception.

Mr. Carey: Exception noted.

The Court: You have it noted.

10

Q. Now on this December 4, 1915, were you anywhere near the place where those railroad tracks crossed Dye Street? A. Yes, I was coming from the house.

Q. You were coming where? A. From the house.

Q. From what house? A. From my house.

Q. From your house? A. Yes.

Q. Well, how did you come from your house to get to the railroad tracks. A. I came down, down Newark, down to Tonnele Avenue and from Tonnele to Dye Street.

20

Q. I want to get that. You came from where? A. From my house.

Q. From your house, which is on—— A. 387 Hoboken Avenue.

Q. Hoboken Avenue. You went along Hoboken Avenue then? A. And went down Newark Avenue, I came from Newark Avenue and down Newark Avenue to Tonnele Avenue and over to Dye Street.

30

Q. And then along Tonnele Avenue to Dye Street? A. Yes.

Q. Which side of the railroad tracks did you come into Dye Street on, the east or west? A. The east.

Q. The east side of the tracks? A. Yes.

Q. Then you went along Dye Street toward the west, did you? A. Yes.

40

Charles E. Wyddle, for Plaintiff—Direct

Q. Walked along Dye Street? A. Yes.

Q. How far did you go? A. Down to the railroad.

Q. Down to the railroad crossing. Up to that time did you see Frankie Brooks that day? A. He was coming towards this way.

Q. Eh? A. He was coming towards this way.

10 Q. You saw him coming the other way? A. Yes.

Q. Coming towards you? A. Yes.

Q. Where was he when you first saw him? A. He was coming through the cars.

Q. You saw him crossing the—

Mr. Carey: He was what?

(Answer repeated by stenographer as follows: "He was coming through the cars.")

20 Q. He was coming in the direction facing you, was he? A. Yes.

Q. Going east? A. Yes.

Q. And the first you saw him was when he was passing between the cars? A. Yes.

Mr. Carey: I object. He didn't say it.

Mr. Dixon: Yes he did.

A. Yes.

Mr. Carey: He didn't say that.

30 Mr. Dixon: He said, "Coming through the cars."

Q. Where were the cars at that time, how were they standing? A. They were separated.

Q. Well now what kind of cars were they? A. Box cars.

Q. Where were they separated with regard to Dye Street? Where was the separation?

40 Mr. Carey: I object to that question which relates to Dye Street, on the same ground.

Charles E. Wyddle, for Plaintiff—Direct

The Court: I will overrule the objection, take your exception.

Mr. Carey: Objection noted.

The Court: You have it. Answer the question.

A. It was nearest St. Pauls Avenue, the cars.

Q. There were two ends of the train? A. Yes. 10

Q. Two ends of the train. Which side of Dye Street were you walking on? A. On the left hand side coming down.

Q. Left hand coming down. Left hand going west? A. Yes.

Q. Was the opening right in front of you or a little to the side or where? A. It was on—about that much from the side.

Q. About how far from the side was the opening? A. I don't know how far. 20

Q. Well, you said about so much, what did you mean? Do you understand my question? You say there was an opening between the train? A. Yes.

Q. How wide was that opening that— A. That he could get through?

Q. Yes, that he went through? A. That far. (Indicating.) More than that.

Q. Eh? A. About that far open (Indicating.)

Q. Hold your hands out and let's see what you 30 mean. I would say about four or five feet.

Mr. Carey: Eh?

Q. About as much as the length of your two arms outstretched? A. Yes.

Mr. Carey: Say four or five feet.

Mr. Dixon: Yes, say four or five feet.

Q. Now then suppose along this side of the paper is one side of Dye Street and that along the 40

Charles E. Wyddle, for Plaintiff—Direct

other edge of the paper is the other side of Dye Street. Do you understand? This is all Dye Street, the sheet of paper. A. Yes.

Q. And along the table here is the railroad tracks? A. Yes.

Q. They cross, don't they? A. Yes.

10 Q. Where was that opening as far as the sides of Dye Street were concerned? Where would that opening be, in the middle of Dye Street or the side of Dye Street or where? A. Right at the side.

Q. Which side? A. The left hand side.

Q. The left hand side going which way? A. East.

Q. Going east or going west? A. Going west.

Q. Would be on your left hand side? A. Yes.

20 Q. Was Frankie injured when you first saw Frankie that day? A. He was coming through there.

Q. Coming through there? Through that opening? A. Yes.

Q. Between these trains? A. Yes.

Q. Is that the first you saw him? A. Yes.

Q. Now as he came did you see anything happen? A. I seen the cars bunk.

Q. Eh? A. I seen the cars bunk.

Q. You saw them bunk? A. Yes.

30 Q. Which end of the train moved? A. The left hand.

Q. Eh? A. The left hand side of the train.

Q. That is your left hand side? A. Yes.

Q. Was it your left hand side? A. Yes.

Q. Would that be the side towards St. Pauls Avenue or towards— A. Towards Newark Avenue.

Q. Towards Newark Avenue? A. Yes.

Q. That was the side of the train that moved? A. Yes.

40 Q. Now when you saw Frankie get between

Charles E. Wyddle, for Plaintiff—Direct

those trains in the first place what were the trains doing, if anything? A. They were standing still, the cars were.

Q. Now when this part of the train started to move what if anything did it do to Frank? A. Crushed him right in the chest, right here. (Indicating.)

Q. Did it catch him? A. Yes. 10

Q. Could you see what struck him, what part of the train hit him? A. The bunkers.

Q. The bumpers? It was between the bumpers that he was caught, was it? A. Yes.

Q. At the time you saw Frankie coming through this opening, did you see any railroad men around there? A. No, sir, no men was there.

Q. Nobody was there that you saw? A. No, sir.

Q. Did you notice how far away from Dye Street the engine was that was on this train? A. 20
No, sir.

Q. Was it a long way off or near to Dye Street?
A. I don't know where it was.

Q. Eh? A. I don't know.

Q. Now when the train came together and pinched Frankie what then happened; did Frankie holler or anything? A. He hollered.

Q. Eh? A. He hollered, 'Take me out.'

Q. "Take me out." Then what happened? A. 30
I run away.

Q. Eh? A. I run away.

Q. You ran away? A. Yes.

Q. Which way did you run? A. Up Dye Street.

Q. In the same way that you had come? A.
Yes.

Q. From which you had come? A. Yes.

Q. Ran back again? A. Yes.

Q. So you didn't see them take Frankie out?
A. No, sir.

Q. How many tracks are there there about? A. 40
I don't know.

Charles E. Wyddle, for Plaintiff—Cross

Q. Well, are there more than one? A. Yes.

Q. About how many? A. It is about five or six there.

Q. Do you remember which track this train was on? A. No, sir.

Q. Was it on a track nearer the side you came from or the side that Frank was coming from? A. 10 The side Frankie was coming from.

Q. The side Frankie was coming from? A. Yes.

Q. Do you know whether it was nearest the track to the side that Frankie was coming from? A. No, sir.

Q. You don't know that.

Cross Examination by Mr. Carey:

Q. Where was Frank when you first saw him? A. Coming through the cars.

20 Q. What do you mean by coming through the cars? A. I don't know where he was coming from; he was coming through that way.

Q. Well, how many tracks were there between you and Frankie? A. I don't know.

Q. How near were you to the nearest railroad track to you? A. The first one?

Q. Eh? A. I was nearest to the first track.

Q. But how far away were you from the first track? A. I don't know.

30 Q. Well, can't you give us some idea? A. About here to the door from the first track.

Q. That is twenty-five feet? Were you standing or walking? A. I was walking.

Q. Now were there cars on the other tracks beside this track on which you saw the cars that you say struck Frankie? A. Yes, sir.

Q. On how many of the tracks were there cars? A. I don't know.

40 Q. Large number of cars or only a few? A. I don't know how many there was.

Charles E. Wyddle, for Plaintiff—Cross

Q. Eh? A. I don't know how many.

Mr. Dixon: Speak up. Talk up loud. Don't be afraid to talk loud, as if you were playing ball.

Q. You were there and saw the cars on the tracks, didn't you? A. Yes.

Q. Did you know Frankie? A. Yes. 10

Q. Did you know where he lived at the time?

A. Yes.

Q. How far did he live from where you lived?

A. He only lived a couple of blocks from where I lived.

Q. Now how long before Frankie was struck did you see him? A. The day before that.

Q. I mean at the time of the accident; did you see him coming down Dye Street? A. No, sir.

Q. Now did you see him only just at the time 20 he was struck? A. Yes, sir.

Q. Had not seen what he was doing before that time? A. No, sir.

Q. Did you see what he had in his hand? A. No, sir.

Q. Had he passed between any cars before he got to the cars that struck him? A. No, sir.

Q. Sure about that, are you? A. Yes.

Q. Did he have any more cars to pass between before he got over to where you were? A. Yes, 30 sir.

Q. On how many tracks were there cars between where he was struck and the side of the railroad tracks where you were? A. I don't know.

Q. Don't know about? A. No, sir.

Q. You didn't see the engine at all? A. No, sir.

Q. Do you know on which end of the train the engine was? A. Yes, sir.

Q. Which end was it? A. On the side towards Newark Avenue. 40

Charles E. Wyddle, for Plaintiff—Cross

Q. On the Newark Avenue side. Was it to the north or to the south? A. To the south.

Q. What street is next north of Dye Street? A. St. Pauls Avenue.

Q. What street is next south of Dye Street? A. Van Winkle Avenue.

Q. Van Winkle? A. Yes.

10 Q. Does Van Winkle run the same direction as Dye Street? A. Yes, sir.

Q. St. Pauls Avenue also? A. Yes, sir.

Q. When the bumpers struck Frank what happened? A. Frank was crushed.

Q. Yes; and did he drop to the ground? A. No, sir.

Q. Do you know what held him up? A. The bunkers.

Q. They were pressed against him? A. Yes.

20 Q. How long did you stand there after— A. I didn't stand at all.

Q. Eh? A. I didn't stand at all.

Q. You heard him call? A. Yes.

Q. When you went away he was just in that position, was he? A. Yes, sir.

Q. Now suppose this represents some railroad tracks there and probably more than that, and suppose this represents the side lines of Dye Street. (Indicating paper.) Get that idea? A. Yes.

30 Q. Now will you show us what direction you were coming on Dye Street? A. I turned down this way.

Q. You were coming down this way. I will put an arrow indicating the direction you were going. A. Yes.

Q. And that direction was west, you say? A. Yes.

Q. And you got down to about as far as from here to the door of these railroad tracks? A. Yes.

40 Q. Now will you show us on which side of the street you were walking? A. This side.

Charles E. Wyddle, for Plaintiff—Cross

Q. On this side? Sidewalk there? A. Yes.

Q. Does the sidewalk extend right down to the railroad tracks? A. Yes, sir.

Q. Now when you looked to see Frankie, which way did you look? A. This way (Indicating.)

Q. Towards your left or how. A. Towards my left.

Q. You looked towards your left? A. Yes. 10

Q. Are there any buildings along Dye Street here? A. Yes.

Q. Where you were going? A. Yes.

Q. On the same side as you were going? A. Yes.

Q. Now will you show us about how much you turned toward your left when you looked to see Frank? A. Just turned my head to see him.

Q. Well, turn your head— A. Like that (Indicating.) 20

Q. About like that? Just hold it there a minute. That is about half way between the front and the line of the shoulder.

The Court: About forty-five degrees it would be, wouldn't it?

Mr. Carey: Yes.

Q. You were on the sidewalk on your left side? A. Yes.

Q. Now will you indicate, if you can, on this little diagram which I have made here, about where the opening was between the cars through which Frank was going? Can you indicate here on this tract about where? A. No, sir. 30

Q. Can't do that? A. No, sir.

Q. Think you can do that? A. What, on the tracks where the train was?

Q. Yes.

Mr. Dixon: Can't you show on this diagram where Frankie was? 40

Charles E. Wyddle, for Plaintiff—Cross

Q. I want you to show. You say you looked toward your left? A. Yes.

Q. When you got down near the tracks here. Now will you show us about where the opening was? A. Right here (Indicating.)

Q. Right about there? A. Yes.

Q. All right. I will put an X mark there. Is
10 that about right? A. Yes, sir.

Mr. Carey: This boy's name is what?

Mr. Dixon: Wyddle.

Mr. Carey: I will put a W there by that cross to indicate your name.

Q. Now from this cross mark toward the right was this all blocked up with cars here? A. I don't know.

Q. Don't know about that? A. No, sir.

20 Q. How many cars were there that were attached to each other? A. I don't know.

Q. Don't know that? A. No, sir.

Q. Well did you see any cars here in front of you? A. Yes, sir.

Q. Were there two or three or four of those cars? A. There was a string of them.

Q. There was a string of them; more than four? A. I guess so.

Q. Was there any opening in front of you until
30 you got down to the point where you have made this cross? A. No, sir.

Q. No opening at all? A. No, sir.

Q. You say there were cars also on the tracks between you and where Frank was? A. Yes, sir.

Q. Were there any openings in those cars in front of you? A. No, sir.

Q. No openings at all in front of you? A. No, sir.

Q. The opening was off at the side? A. Yes.

40 Q. Towards your left? A. Yes.

Charles E. Wyddle, for Plaintiff—Cross

Q. Were there openings between those other cars between you and Frankie off toward your left? A. No, sir.

Q. No opening? A. Only where Frankie was.

Q. Now on this track between where you were and the track where Frankie was struck, you say there was some cars? A. Yes.

Q. A string of cars all along there in front of 10 you? A. Yes, sir.

Q. All along in front of Dye Street all the way? A. Yes, sir.

Q. Was there more than one track between you and where Frankie was? A. Yes, sir.

Q. That there were cars on all the way? A. There wasn't cars on all the tracks.

Q. Not on all of them, but was there any other cars? You have told us about one track between you and where Frankie was where there were cars, 20 and I understand you to say those cars extended all along in front of Dye Street without any opening? A. Yes, sir.

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

Q. Was there any other track between where you were and where Frankie was on which there were cars which extended all along in front of Dye Street? A. I don't know.

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

Q. Do you know if there were any tracks upon 30 which there were any cars between you and where Frankie was except this track you said had a string of cars on? A. No, sir; only where Frankie was.

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

Q. You say you did not see any railroad men working around there at all? A. No, sir.

Q. The engine of this train you say was between Dye Street and what other street? A. Newark Avenue.

Charles E. Wyddle, for Plaintiff—Redirect

Q. Between Dye Street and Newark Avenue?

A. Yes, sir.

Q. Was it nearer to Newark Avenue or nearer to Dye Street? A. Nearer to Newark Avenue.

Q. Nearer to Newark. What is this sidewalk along the street there that you were walking on, stone or what? A. Stone.

10 Q. Stone sidewalk? A. Yes, sir.

Q. Regular flagging? A. Yes, sir.

Q. You say that extends right down to the railroad tracks? A. Yes, sir.

Q. Now across the railroad tracks from where you were is there a sidewalk on that same side of Dye Street that you were on? A. Only by Gillispie's there is a sidewalk.

Q. Only by Gillispie's? A. Yes, sir.

Q. Who is Gillispie's? A. Harness maker.

20 Q. How near to the tracks does his place come? A. Seventy-five feet away.

Q. About seventy-five feet away. There is the sidewalk there only in front of Gillispie's place? A. Yes, sir.

Q. Now there is not any planking across the railroad tracks there in front of Dye Street, is there? A. No, sir.

Q. None at all? A. No, sir.

30 Q. The railroad tracks there in front of Dye Street are just the same as they are between Dye Street and St. Pauls Avenue, aren't they? A. Yes, sir.

Q. Just the rails and ties and ballast? A. Yes, sir.

Q. That is all.

Redirect Examination by Mr. Dixon:

Q. Is there a sidewalk on the other side of Dye Street? A. Only by Gillispie's.

40 Q. But I don't mean across the track, but on

Charles E. Wyddle, for Plaintiff—Redirect

the other side, opposite side from where you were?

A. Yes, sir.

Q. On both sides of Dye Street? A. Yes, sir.

Q. Is there a sidewalk beyond the track where you were on the other side of Dye Street, opposite Gillispie's? A. Yes, over by Gillispie's there.

Q. Is there one opposite, on the opposite side of the street? A. No, sir. 10

Q. Now you were going along towards Gillispie's? A. Yes, sir.

Q. Where were you going? A. Down for wood.

Q. Eh? A. For wood.

Q. For wood? A. Yes, sir.

Q. Where were you going? A. Dodge's.

Q. Where is that? A. Down James Avenue.

Q. Had you ever walked up and down, I mean through Dye Street before? A. Yes, sir.

Q. How long a time have you travelled that? 20

A. Used to come that way almost every day.

Q. Eh? A. Used to come that way every day.

Mr. Carey: I object to it as not re-direct examination.

The Court: Well, I suppose by permission of the Court he can re-direct.

Mr. Carey: I suppose so.

Mr. Dixon: I omitted to ask about it.

The Court: All right; go ahead. 30

Q. How long a time have you travelled up and down Dye Street?

Mr. Carey: I object to that.

Q. Across these tracks? A. A couple of weeks.

Mr. Carey: I object.

The Court: One minute. Do not answer.

Mr. Carey: I object to that on the ground that there is no evidence in the case as yet that Dye Street is a public street.

The Court: No. I take it, however, this 40

Charles E. Wyddle, for Plaintiff—Redirect

is a means, one means that Mr. Dixon is attempting to employ to show that it is a public street. Of course if that fails, why, well and good. I will overrule the objection.

Mr. Carey: Objection noted.

Q. For how long a time have you travelled up
10 and down— A. A couple of weeks.

Q. —Dye Street. A couple of weeks? A. Yes.

Q. Have you ever seen other people travelling up and down there? A. Yes, sir.

Mr. Carey: This is all under my objection?

The Court: Yes.

Q. You mean a couple of weeks before the accident? A. Yes, sir.

Q. Is that as long as you have used Dye Street
20 before the accident? A. Sir?

Q. Is that as long as you have used Dye Street before the accident? A. Yes, sir.

Q. Two weeks? A. Yes, sir.

Q. Now this opening where you first saw Frankie coming through, did you expect to go through that opening? A. No, sir.

Q. If it was not closed up? A. No, sir.

Q. Was that opening directly in front of you as you walked along there or to one side?

30 Mr. Carey: I object.

A. To one side.

Mr. Carey: I object. In the first place he has gone all over it on his direct examination and the question is leading.

The Court: Well, that is true, but I have heard the answer. Do you wish it to be stricken out?

40 Mr. Carey: I did not hear the answer. I was getting my objection on the record. What was the answer?

Charles E. Wyddle, for Plaintiff—Redirect

Mr. Dixon: I submit he cannot find out what the answer was.

The Court: Of course he has no right. I will overrule the objection, however.

Mr. Carey: What is the answer?

The Court: Do you want your objection to that?

Mr. Carey: I don't know. 10

The Court. Or I either. I am entitled to have it on the record one way or the other before the question is answered.

Mr. Carey: The objection is overruled?

The Court: Yes.

Mr. Carey: What was the question?

(Question repeated by stenographer.)

Mr. Carey: I will withdraw the objection and let the answer stand.

(Answer repeated by stenographer.) 20

Q. To one side; which side, your right or left?

A. Left.

Q. How far away from a place where you stood was the track in which you say this opening was to your left?

The Court: How far in front of him the track was?

Mr. Carey: How far away from him the track was on which the train stood in which 30 this opening existed.

By the Court:

Q. He does not mean by that how far it was from you where this opening was, but he calls your attention to the train that had the opening in it which was on a track in front of you somewhere, wasn't it? A. Yes, sir.

Q. Now he wants to know from where you stood on Dye Street how far the train was in front of 40

Mary Donahue, for Plaintiff—Direct

you, or as you looked right straight ahead how far away that train was from you? A. I couldn't see the train when I was on Dye Street.

Q. You could not see it on Dye Street? A. No, sir.

By Mr. Dixon:

10 Q. When you saw Frankie between the two ends of the train and before the train moved and Frankie was in the opening, how far away was Frankie from you? A. About here to the door.

Q. About from here to the door? A. Yes, sir.

Mr. Carey: Has that ever been measured?

The Court: It has been, but I forget. I think your estimate is fair, twenty-five feet approximately, from where he sits.

20 Q. And there were tracks between the track on which the train stood and where you were? A. Yes, sir.

Q. Do you know how many? A. No, sir.

Q. That is all.

By Mr. Carey:

Q. Did you see anybody else there in that vicinity besides Frankie? A. No, sir.

30

MARY DONAHUE, called.

By the Clerk:

Q. How old are you? A. Eight years old.

By the Court:

Q. Do you know what it is to tell a truth or an untruth? A. Yes, sir.

40 Q. Do you know that you must not tell untruths, do you know that? A. Yes, sir.

Mary Donahue, for Plaintiff—Direct

The Court: Shall we swear her or take her without her oath?

Mr. Dixon: I want her sworn.

The Court: All right; she may be sworn then. She evidently realizes—

Mr. Carey: If the Court pleases, this is an accident that occurred a year and a half ago. She was then of the age of six and a half 10 years.

A Voice: She is nine years old.

Mr. Carey: And I object to her being sworn as a witness in the case.

By the Court:

Q. How old are you now, Mary? A. Now I am nine.

Q. When was your birthday, do you know? A. No, sir. 20

The Court: Well, why do you object, Mr. Carey? The question now is whether or not she appreciates the taking of an oath. Of course the fact that she was a year and a half younger at the time is a matter which should be considered in determining what her recollection is because of that time having elapsed, and second, because of the fact at the time of the occurrence she was of that much more tender years, but it does not 30 affect the question as to whether or not she should be sworn, as I understand it.

Mr. Carey: It certainly has an important bearing upon the exercise of the Court's discretion as to whether this testimony or statement of this child should be taken; and it is evident that the child even now is of very tender years and not of the advanced intelligence of a child of her age. She has misstated her age, in the first place, and in the 40

..Mary Donahue, for Plaintiff—Direct

second place after her—some one has stated so that it could be heard at this distance, she corrects that statement and says she is nine, but she does not know when her birthday is.

The Court: Well, I will let her be sworn. Note your objection if you wish.

Mr. Carey: Objection noted.

10 (The witness is sworn by the clerk.)

Direct Examination by Mr. Dixon:

Q. Mary, how old are you? A. Nine years old.

Q. Where do you live? A. 204 Dye Street.

Q. With whom? Who lives there? You live on Dye Street? A. Yes, sir.

Q. With whom do you live? Who lives with you? A. Miss Greenwald.

A Voice: Ah!

20

A. Miss Greenwald lives next door to me.

Q. Who do you live with in the same house, your mother? A. Yes.

Q. Live with your mother? A. Yes, sir.

Q. Got any sisters? A. Yes, sir.

Q. Brothers? A. Yes, sir.

Q. Go to school? A. Yes, sir.

Q. How long have you been going to school?

A. I don't know.

30 Q. Don't know how long you have gone to school? Do you know where the railroad tracks are at Dye Street? A. Yes, sir.

Q. Where they cross Dye Street? A. Yes, sir.

Q. You know where they are, do you? A. Yes, sir.

Q. Did you know Frankie Brooks at all? A. Yes, sir.

Q. You knew him? Did you see him the day he was killed down there? A. Yes, sir.

40 Q. Where were you at that time? A. By Gillespie's.

Mary Donahue, for Plaintiff—Direct

Q. By Gillespie's? A. Yes, sir.

Q. Did you see Frankie going along the street that day, that afternoon? A. Yes, sir.

Q. Where was Frankie walking? A. There was a car on that side and a car on that side, and a space about that big, and he walked into the space, and then as he was in the middle of the space the two cars bumped. 10

Q. Did you see him walking through the space? A. Yes, sir.

Q. Did you see him before he got to the space? A. Yes, sir.

Q. Where did he come from? A. He came from down at the top of Dye Street.

Q. From the top of Dye Street? A. Yes, sir.

Q. Did he go by Gillespie's? A. No, sir.

Q. He did not pass by Gillespie's? Where did he come from? A. From the top of Dye Street. 20

Q. Did he walk along Dye Street? A. Yes, sir.

Q. As far as the railroad? A. Yes, sir.

Q. Then you saw him go, as you say, through the— A. Through the cars.

Q. Through the cars. How many cars were there there, more than one or two? A. There was only around two.

Q. Well, how long a train was it, do you know? A. No, sir.

Q. How far away from Frankie were you when the cars came together on him? A. I was around two tracks away. 30

Q. Eh? A. Two tracks away.

Q. You were in Dye Street, were you? A. Yes, sir.

Q. Where were you in Dye Street? What were you doing? A. Nothing.

Q. Eh? A. Nothing. I was sitting by the bench by the railroad.

Q. You were sitting by the bench by the rail- 40

Mary Donahue, for Plaintiff—Direct

road; what bench is that, do you know? A. Right outside the little shanty.

Q. Right outside the shanty?

Mr. Carey: Will you repeat that?

(Stenographer repeats answer as follows:

“Right outside the little shanty”.)

10 Q. Where is that little shanty, how near the railroad? How far from the railroad is the little shanty that you were sitting in? A. Around two tracks from the railroad; it is on Dye Street.

Q. On Dye Street? The shanty is on Dye Street. Did you see what they did with Frankie after the cars came together? A. Yes; two men came out of the little shanty and they carried him in and then he died.

Q. Two men came out of the little shanty? A. Yes; and they took him; I saw him in there and they took him out and brought him into the little shanty.

Q. And put him in this little shanty where you were sitting? A. Yes, I was outside the shanty. There was a bench outside.

Q. They brought Frank into this and there he died? A. And they laid him on a bench.

Q. Inside the little house? A. Inside.

Q. Inside the house. About what time was that
30 in the day? A. I don't know.

Q. Was it morning or afternoon? A. In the afternoon.

Q. When the cars came together did Frankie say anything? A. Yes, he said “Mary, Mary, pull me out.” I was afraid to go over there and pull him out.

Q. He was calling to you? A. Yes, sir.

Q. Now before the cars moved and while Frankie was going through this opening were
40 there any of the working men around the cars?
A. No, sir.

Mary Donahue, for Plaintiff—Direct

Q. At the opening? A. No, sir, there was none.

Q. Nobody there at all? A. Nobody, only two men in the shanty.

Q. Only the two men in the shanty. Did you see the engine on that train? A. No, sir.

Q. Did you know what kind of a shanty it was, what it was used for? A. No, sir.

Q. Was it a railroad shanty or a house? A. It was a little railroad shanty. It was like a little office. They was writing in there and all. 10

Q. How long have you lived there on Dye Street? A. For seven years.

Q. Have you gone up and down Dye Street and walked across the tracks? A. Yes, sir. Sometimes going to school, sometimes went up St. Paul's Avenue going to school.

Q. Sometimes go up St. Paul's and sometimes up Dye Street? A. Only when it was clear I went up Dye Street. 20

Q. Eh? A. Only when it was clear.

Q. You mean when there are not any trains? A. When there was no trains on there.

Q. Then you go across Dye Street? A. Yes, sir.

Q. Do you live on the same side of the railroad that the little shanty is or on the other side? A. On the side that the little shanty is on, down further—I live down further than the little shanty.

Q. Is that on the same side of the railroad that Gillespie's is on? A. Yes, sir. 30

Q. And you do not have to cross the railroad to get from your house to Gillespie's? A. No, sir; Gillespie's is a little down further than the railroad too, and down further than the shanty.

Q. Is your house nearer the railroad or is Gillespie's nearer the railroad? A. Gillespie's is nearer to the railroad.

Q. Than your house? A. Yes, sir.

Q. You saw Frankie walking down the street, 40

Mary Donahue, for Plaintiff—Cross

as you say coming down from the top of Dye Street? A. Yes, sir.

Q. Which side of the street was he on? A. This here side (indicating right hand).

Q. On the side towards the shanty or the other side? A. Yes, sir, on the side towards the shanty.

10 Q. Is there a sidewalk anywhere along that street on that side? A. Only by Gillespie's, it is asphalt like.

Q. Gillespie's, it is like asphalt? A. Yes.

Q. After you passed Gillespie's what is it then to get to the railroad? A. Then it is all dirt.

Q. All dirt. Was it along that dirt that Frankie was going? A. Yes, sir.

RECESS.

20

Cross Examination by Mr. Carey:

Q. Mary, how long have you lived in Dey Street? A. Seven years.

Q. How do you know that you have lived there as long as that? You don't remember when you came there, do you? (No answer.)

30 Q. You don't remember about coming there, do you, Mary, eh? Somebody told you that you lived there seven years? (No answer.)

Q. Who told you about it? A. My mother.

Q. When did she tell you that? A. I don't know.

Q. Eh? A. I don't know.

Q. Don't know when she told you? Do you know when your birthday is, Mary? A. On the 24th of September.

40 Q. Who told you that? A. I asked my sister one day.

Mary Donahue, for Plaintiff—Cross

Q. You asked your sister one day and she told you? A. Yes, sir.

Q. Anybody tell you to-day? A. No, sir.

Q. Nobody told you to-day? A. No, sir.

Q. Now did you after you saw this accident—

Mr. Dixon: Stand a little further away from the witness and perhaps we won't be so pressed and we can all hear what she says. 10

Mr. Carey: Mary and I will be good friends.

Mr. Dixon: Yes; ought to be.

Q. Mary, after you saw this accident where did you go? A. I went home.

Q. Where did you live then; A. On Dey Street.

Q. What number Dey Street? A. 204 Dey Street.

Mr. Dixon: Mary, you talk to this gentleman way over here. They want to know. 20
You talk to them. Talk loud.

Q. Did you wait until Frank had been brought over to the shanty? A. Yes, sir.

Q. How long was that after the accident before Frank was brought over there? A. About two minutes.

Q. About two minutes; and I understood you to say that two men went out of the shanty and got Frank and brought him over here; is that right? A. Yes, sir. 30

Q. Did you see the men go out of the shanty? A. No, sir.

Q. You did not see them go out of the shanty? A. No, sir.

Q. When they went after Frank? A. Yes; I saw them going out of the shanty.

Q. You saw them going out of the shanty? A. Yes, sir.

Q. Had you seen those men before? A. Yes, sir. 40

Mary Donahue, for Plaintiff—Cross

Q. Where had you seen them? A. In the office.

Q. In that office? A. Yes, sir.

Q. In that shanty office right there by the railroad? A. Yes, sir.

Q. Had you been in that office yourself? A. No, sir.

Q. Never went in there. Now you saw them go
10 out of the office? A. Yes.

Q. And get Frank? A. Yes, sir.

Q. And come back with him to the office? A. Yes, sir.

Q. Was he alive when they brought him back to the office? A. No; he was dead.

Q. He was dead then, was he? Were those two men men who worked in that office there? A. Yes, sir.

Q. What kind of a day was it that day? A. A
20 bright day.

Q. Bright day; you remember that, do you? A. Yes, sir.

Q. Was the weather cold or warm? A. Warm.

Q. Warm weather. What did you have on, what kind of clothes did you have on? A. Summer clothes.

Q. Summer clothes. Did you have anything on your head or were you bareheaded? A. Yes; I had nothing on my head.

30 Q. Eh? A. I didn't have nothing on my head.

Q. Didn't have anything on your head and just summer clothes on? A. Yes, sir.

Q. You remember that too, do you? A. Yes, sir.

Q. Was anybody sitting on the bench with you? A. No, sir.

Q. I think you said you were sitting on a bench there by the shanty? A. I was.

Q. What? A. I was sitting there all alone.

Q. Sitting there all alone, were you? A. Yes,
40 sir.

Q. Do you remember what colored dress you had on? A. Yes, sir.

Mary Donahue, for Plaintiff—Cross

Q. What was it? A. White.

Q. White dress; did you have long sleeves or short sleeves? A. Short sleeves.

Q. Short sleeves. You say the weather was warm. Did you have shoes and stockings on? A. Yes, sir.

Q. Eh? A. Yes, sir; I had slippers and stockings.

Q. Slippers and stockings. What kind of slippers did you have on? A. Black ones. 10

Q. Black slippers. Now can you describe those slippers to us? Tell us how they looked and whether they were high or low? A. Low, they were.

Q. Low slippers, were they? How low were they, down below your ankles? A. Yes, sir.

Q. Just little slippers, were they? A. Yes, sir.

Q. Black slippers? A. Yes, sir. 20

Q. Leather slippers? A. Yes, sir.

Q. Were they leather or cloth slippers? A. Leather.

Q. Leather slippers; was the leather thin leather or heavy leather? A. Thin leather.

Q. Thin leather. Those were slippers that you wore only in the summer time, were they? A. Yes, sir.

Q. Now the little dress that you had on, you say, was a white dress with short sleeves; did you have any little jacket over your dress at all? A. No, sir. 30

Q. Nothing at all. You remember all about that, do you, Mary? A. Yes, sir.

Q. What kind of stockings did you have on? A. White ones.

Q. White stockings; were your stockings thin stockings or thick stockings? A. Thin stockings.

Q. Very thin, were they? A. Yes, sir.

Q. Just such as you wore in the summer time? A. Yes, sir. 40

Mary Donahue, for Plaintiff—Cross

Q. Ever wear those stockings in the winter time? A. No, sir.

Q. Never in the winter time. Ever wear those slippers in the winter time? A. I wore the high black shoes.

Q. High black shoes in the winter time. You had nothing over your little white dress at all?

10 A. No, sir.

Q. How long had you been down there on that bench, Mary? A. For an hour around.

Q. Eh? A. For an hour around.

Q. Around an hour. How far was it over to your house? A. Around a block.

Q. Around the block; just one block away? A. Yes, sir.

Q. Where did you come from when you went to this bench in front of this shanty? A. I was pick-
20 ing flowers across the street.

Q. Picking flowers, where? A. On this here side, where the factory—

Q. On the same side of the street that the shanty was on? A. No, sir; on the other side.

Q. On the other side of the street. What kind of flowers did you pick? A. Buttercups.

Q. Buttercups. Did you pick any other kind of flowers beside buttercups? A. Daisies.

Q. Buttercups and daisies. Any other kind of
30 flowers? A. Butter and eggs.

Q. Eh? A. Butter and eggs flowers.

The Court: Butter and egg flowers.

Q. Butter and egg flowers? A. Yellow flowers.

Q. Those are flowers that grow on long stalks, don't they? A. Yes, sir.

Q. Yellow flowers? A. Yes, sir.

Q. Come out all around the stalk? A. And I picked blue bells.

40 Q. Picked blue bells there, this same day? A. Yes, sir.

Mary Donahue, for Plaintiff—Cross

Q. Now had you picked those flowers before the accident to Frankie or after? A. Yes, sir.

Q. Well, which? A. Before Frankie got killed.

Q. Before he got killed. Did you have those flowers when you were sitting on the bench there? A. Yes, sir.

Q. How many did you have? A. I don't know.

Q. Well, can you give us any idea? A. I had 10 a big bunch.

Q. Had a big bunch? A. I had cord tied around them.

Q. Eh? A. I had cord tied around them on the bottom of the stems.

Q. Cord tied around them at the bottom, and how long were the stems? A. That big (indicating).

Q. About three inches long? A. Yes, sir.

The Court: She probably is giving the size 20 around instead of the length.

Mr. Carey: Perhaps that is so.

Q. I wanted to know how long these flower stems were, not the size of the bunch you had, but how long? A. That big (indicating).

Q. About that long? That is about four inches, I suppose.

Q. Did you have all of these different kinds of flowers tied up together with that string? A. Yes, 30 sir.

Q. Where did you get the string? A. I found it.

Q. Where did you find the string? A. In a lot.

Q. In the lots? In the lots where you were picking flowers? A. Yes, sir.

Q. Were the flowers on the street or in the lots? A. They were growing in the green grass.

Q. Growing in the deep grass, were they? A. Yes, sir.

Q. How high was the grass? A. About that 40 high from the ground (indicating).

Mary Donahue, for Plaintiff—Cross

Q. About a foot high? Had anybody been picking flowers there with you? A. No, sir.

Q. You were all alone, were you? A. Yes, sir.

Q. Were you alone when you left home? A. Yes, sir.

Q. Did you ask your mother if you might go down there? A. No, sir.

10 Q. Did not ask her, eh? A. No, sir.

Q. Did she know you were going down there? A. No, sir.

Q. Didn't know anything about it? A. No, sir.

Q. You were going to surprise her with those flowers; is that what you went down for? A. Yes, sir.

Q. To get some flowers to surprise your mother? A. Yes, sir.

20 Q. So you got all these different kinds? A. Yes, sir.

Q. Now was it dark or light when you were sitting on the bench? A. Light; it was around half past four in the afternoon.

Q. About half past four in the afternoon. Now you remember about that, do you? A. Yes, sir.

Q. How did you find out what time it was? A. Man was passing the railroad and he told me.

Q. Man passing the railroad. Did he tell you what time it was without your asking him? A.

30 Yes, sir.

Q. Did he know you? A. No, sir.

Q. He didn't know who you were; did you know him? A. No, sir.

Q. You did not ask him what time it was? A. No, sir.

Q. But he told you? A. Yes, sir.

Q. Yes. When was that, before or after the accident? A. After—before the accident.

Q. Before the accident? A. Yes, sir.

40 Q. How long before the accident? A. A minute before.

Mary Donahue, for Plaintiff—Cross

Q. About a minute before? A. Yes, sir.

Q. Did the man say anything about your flowers? A. No, sir.

Q. Didn't say anything about the flowers at all? A. No, sir.

Q. Did you say anything to him about the flowers? A. No, sir.

Q. Now about how long had you been sitting there before this man came along? A. Around an hour.

Q. About an hour. What time did you leave home? A. Around six o'clock. (Laughter.)

Q. About six o'clock? A. No; around about half past three, and I went home about six o'clock.

Q. You got home about six o'clock? A. After the boy got killed.

Q. After the boy was killed? A. Yes, sir.

Q. Now after the boy was killed and they had brought him over to this little shanty, did you go right home then? A. Yes, sir.

Q. Didn't stop anywhere? A. No, sir.

Q. And right after they brought Frankie over— A. Then a lot of children came up and they wanted to see what was the matter.

Q. What? A. Then a lot of children came up and wanted to see what was the matter.

Q. A lot of children came up then, did they? A. Yes, sir. 30

Q. Did you stay there with the other children? A. No, sir; I went home.

Q. Went right home. Do you remember whether the sun was shining or not at the time the accident happened? A. Yes, sir.

Q. You do remember that, do you? A. Yes, sir.

Q. And could you see the sun from where you were sitting? A. Yes, sir.

Q. Do you remember whether the day had been 40

Mary Donahue, for Plaintiff—Cross

hot that day, or was it just a warm day? A. It was a warm day.

Q. Just warm. Now when you got home—or did you tell anybody about this accident on your way home? A. No, sir.

Q. Did you tell anybody about the accident when you got home? A. Yes, sir.

10 Q. Who was the first person that you saw when you got home? A. My mother.

Q. What was the first thing you said to her; spoke about the flowers first or about the accident first? A. About the accident first.

Q. Did you tell her who had been hurt? A. Yes, sir.

Q. Now you say that Frankie came from the top of Dey Street? A. Yes, sir.

20 Q. Is that what you said? What do you mean by the top of Dey Street? A. Way, way up that way. (Indicating.)

Q. By that way you mean in what direction? A. By Lorillards.

Q. He came from the direction of Lorillard's, did he? A. Yes, sir.

30 Q. Now, Lorillard's is on one side of the railroad tracks and the little shanty you speak of was on the other side, was it not? A. Yes, sir. The little shanty is on this side and our house is on this here side.

Q. Yes. Now! You spoke about Gillespie's place? A. Yes, sir.

Q. You know where that is, do you? A. Yes, sir; it is a big red brick house.

Q. Red brick house, is it? A. Yes, sir.

Q. Is it a house? A. Make all varnished things in there.

Q. Varnish things? A. Yes, sir.

40 Q. That is on the same side of the railroad tracks as the shanty, isn't it? A. Yes, sir.

Mary Donahue, for Plaintiff—Cross

Q. Now I have a picture here, Mary; I wonder if you can tell what that picture is. (Shows photograph to witness). A. That is my house.

Q. There is your house, is it? A. Yes, and there is the little shanty.

Q. Uh, huh! A. And there is Gillespie's.

Q. Yes. All right. Let's mark that. Won't you put your finger on your house again? A. Right 10
down there (indicating.)

Q. Yes. Now I will mark that with a cross and M. H.—that means Mary's house. Is that all right? A. And there is the tank.

Q. Wait a minute. That is all right, is it? That is right over your house there, that mark I made? Is that right? A. Yes, sir.

Q. Now will you point to Gillespie's place? A. Right there (indicating).

Q. This building here, this brick building? A. 20
Yes, sir.

Q. I will put a cross over that, right by the chimney, and I will mark it G. for Gillespie's place? A. Yes, sir. And there is the railroad where the boy got killed.

Q. There is the railroad? A. And there is where I was picking the flowers.

Q. Just a minute now. And across the street here is where you were picking the flowers, is it? A. Yes, sir. 30

Q. Right in here? A. Yes.

Q. Where that grass and other plants are shown? A. Yes, sir.

Q. Well now, how will we mark that?

The Court: Mark it flowers.

Mr. Carey: Mark that with a cross and flowers written out.

Q. Now did you pick all of your flowers over there across the street? A. Yes, sir. 40

Mary Donahue, for Plaintiff—Cross

Q. Now this little shanty here— A. There is the bench where I was sitting on.

Q. There is the bench you were sitting on, is it?

A. Yes, sir.

Q. Was that bench in the same place? A. Yes, sir.

Q. As it was when you were sitting there? A.
10 Yes, sir.

Q. All right.

The Court: S for shanty and B for bench.

Q. Mark a cross and S for shanty, and cross down here and B for bench. I guess that will do it all right. Now you were sitting on this bench here, weren't you? A. Yes, sir.

Q. You had been sitting there for about an hour?

A. Yes, sir.

20 Q. Had you been talking with anybody while you were sitting there for the hour? A. No, sir.

Q. Anybody come there and talk to you at all?

A. No, sir.

Q. Now you were facing, looking right across the railroad tracks, then, weren't you

Q. When you first saw Frankie was he coming towards you or going away from you? A. Coming.

Q. Coming towards you. Now on which side of
30 the railroad tracks is the Lorillard building? A.
Up this way.

Q. That is across from where you were sitting?

A. Yes, sir.

Q. Right across the railroad tracks from where you were sitting, wasn't it? A. Yes, sir.

Q. Straight across. If we were to draw a line right across there that would be pointing towards Lorillard's place, wouldn't it? All right. We will draw the line.

40 Mr. Dixon: That is not the way to draw

Mary Donahue, for Plaintiff—Cross

the line. You cannot draw the line on that perspective.

Mr. Carey: I am drawing it at right angles to the rails.

Mr. Dixon: How are you drawing it with the street?

Mr. Carey: Well, it is pretty near parallel.

Mr. Dixon: I submit that is not a proper way. 10

Mr. Carey: All right.

The Court: The question is whether it can be indicated from that description.

Mr. Dixon: She can't do it.

Mr. Carey: Does the court think it advisable to indicate?

The Court: I think not. I think it might mislead all of us.

Mr. Carey: All right. We will take that out then. 20

The Court: The other things are plainly shown upon the photograph and there cannot be an objection.

Mr. Carey: Well, there is an objection and I will stop.

A. And there is the oil tank.

Q. There is the oil tank. That is beyond Gillespie's? A. Yes, sir. 30

Q. That is pretty near opposite where you live?

A. Way, way down, further than our house.

Q. Looked as if it were pretty nearly across the street from your house, but it is further down?

A. By the Hackensack River.

Q. Way over by the river; how far is the river away from your house? A. I don't know.

Q. Quite a long ways, is it? A. Yes, sir.

Q. Well— A. It is about five blocks away from my house. 40

Mary Donahue, for Plaintiff—Cross

Q. As far as that? Five blocks. Well now, the Lorillard building— A. Lorillard building ain't on it. It is way, way up.

Q. It is on Dye Street, isn't it? A. Yes, sir.

Q. Across the railroad track from where you were sitting? A. Some part of it is on Newark Avenue.

10 Q. Some is on Newark Avenue? Well, it is a big building? Well, the back part is on Dye Street. The back part of Dye Street and the front part of Newark Avenue? A. Yes, sir.

Q. A large, long building, is it? A. Yes, sir.

Q. Now when you were sitting there and looking across the railroad tracks could you see the Lorillard building? A. Yes, sir.

Q. Is there any building between the Lorillard building and the railroad tracks on this side of
20 the railroad tracks? A. No, sir.

Q. No building at all. So that you could see the back part of the Lorillard building, could you? A. See the big pipe from the bench what I was sitting on.

Q. The big pipe. What do you mean by the big pipe? A. The big pipe on top what the smoke comes out of.

Q. The big smoke pipe. A smoke pipe something like this that is shown in this picture? A.
30 Yes. That ain't it, though.

Q. That is not it, but it is like that? A. Yes, sir.

Q. Now when you looked towards Lorillard's building you were looking straight across the railroad tracks, weren't you? A. Yes, sir.

Q. When you first saw Frankie where was he with reference to the Lorillard building; was he nearer the Lorillard building? A. No, sir.

Q. Was he further away? A. The tracks ain't
40 further than the Lorillard building.

Mary Donahue, for Plaintiff—Cross

Q. No, I know, but he was—was he coming—
A. He was up by Dye Street; on top of Dye Street he was by Lorillard building.

Q. Did you see him when he was way up on the top of Dye Street? A. No, sir; no sir; I saw him coming down that way.

Q. You saw him coming down that way. Was he on the same—you saw him coming down near 10 the Lorillard building, did you? A. Yes, sir.

Q. Is the Lorillard building on the same side of Dye Street as the Gillespie building? A. Yes, sir.

Q. On the same side, is it? A. Yes, sir.

Q. And is the Lorillard building on the same side of Dye Street that the little shanty is? A. Yes, sir.

Q. Now when you first saw Frankie coming down that way had he got in front of the Lorillard 20 building? A. Yes, sir; he was in front of it.

Q. He was right in front of the Lorillard building, wasn't he? A. Yes, sir.

Q. And then he kept on coming down the street toward the railroad tracks? A. Yes, sir.

Q. Now just look at this. Is this the door to that little shanty? (Indicating on photograph.) A. Yes, sir.

Q. That fronts right on the street there? A. Yes, sir. 30

Q. As you stand in the door and look straight ahead you are looking right out across the street? A. Yes, sir.

Q. Now did you see any other men there that afternoon excepting these two men who came out from the shanty? A. No, sir.

Q. They were the only ones that you saw? A. Yes, sir.

Q. After they had brought Frankie into the shanty do you know what they did? A. No, sir. 40

Mary Donahue, for Plaintiff—Cross

Q. Didn't you see them after that? A. No, sir; I went home.

Q. How did the men in the shanty know that Frank had been hurt? A. When they was coming out.

Q. Eh? A. When he was coming out.

Q. One of them was coming out at the time? A. 10 Yes, sir.

Q. Did he see it? A. Yes, sir.

Q. And then he told the other man? A. Yes, sir.

Q. And the two men went up where Frank was and brought him down to the shanty? A. Yes, sir.

Q. Now when those men went out from the shanty did they have their coats on or did they have their coats off? A. They had their coats off; they only had a thin coat on, a short coat.

20 Q. A thin short coat? A. Yes, sir.

Q. What color? A. I don't know—it was a blue.

Q. Blue coat? A. Yes, sir.

Q. Thin, short coat? A. Yes, sir.

Q. Did both of them have thin, short coats on? A. Yes, sir.

Q. Did they wear hats? A. No, sir.

Q. No hats on? A. No, sir.

Q. Now does this picture of the tracks look like 30 the tracks as they were on that afternoon when Frankie was hurt? A. Yes, sir.

Q. Same thing, is it? A. Yes, sir, only there is grass over there.

Q. Grass along there? A. Yes, sir.

Mr. Dixon: Grass along where?

The Court: Alongside of this first rail.

Q. Point it out again? A. All along there there was a lot of grass.

40 Q. All along there there was a lot of grass? A. And there was some buttercups too.

Mary Donahue, for Plaintiff—Cross

Q. Yes; now I am drawing a line there.

Mr. Dixon: You will have a picture, I think, pretty soon.

Mr. Carey: That is what I want.

Mr. Dixon: Well, I don't mind indicating things on the photograph, but when he comes to be an artist and fill it in—

Mr. Carey: My artistic abilities are not 10 under examination.

Q. Now, Mary, you see that line that I have drawn there? A. Yes, sir.

Q. From there over to there? A. Yes, sir.

Q. And you say there was grass all along there? A. Yes, sir.

Q. And some buttercups over there? A. Yes, sir.

Q. Had you picked any buttercups over there? 20

A. I didn't go over there at all.

Q. Didn't go there at all?

Mr. Dixon: Not very often, she said.

Q. I am going to put an X mark on each end of this line that I have drawn, and I am going to write on that line, "Grass and buttercups."

Mr. Dixon: I object to it if it is going to be offered in evidence as to grass and buttercups.

Mr. Carey: That is to indicate what the 30 witness testified to.

Mr. Dixon: The witness' perspective is one thing and testimony is a different thing. She said there were buttercups and grass along the side. She indicates that, but for counsel to draw a line from one point to another and say grass and buttercups along there, I think is improper, because this child and nobody else can tell what that distance is on perspective. Not even counsel can tell 40

Mary Donahue, for Plaintiff—Cross

it, let along a little girl nine years old. She says that the photograph itself—counsel says that the big tank there appears to be nearer the railroad than her house, yet she says the tank is down at the river.

The Court: Of course that is all true, but—

10 Mr. Dixon: I submit, if your Honor please, counsel has no right to put in the photograph anything that is not in the photograph. He is going to offer it in evidence. He has the right to have the witness pick out things that appear on the photograph, but not the right to insert into the photograph extraneous testimony.

20 Mr. Carey: I have inserted nothing but what the witness has pointed out and I have faithfully indicated where she pointed.

The Court: I will leave it stand, so you may take an exception to it if you wish, Mr. Dixon.

(Mr. Dixon did not enter an exception.)

Q. Now, Mary, how many tracks away from you was this track on which Frank got hurt? A. Two tracks.

30 Q. By that you mean that you count one track and the next track was the track on which he got hurt? A. Yes, sir.

Q. So he was on the second track from you, was he? A. Yes, sir.

Q. Between the day when the accident happened and the present time have you talked with anybody about this accident? A. No, sir.

Q. Haven't said anything to anybody about it at all? A. No, sir.

40 Q. Have you told anybody in the past week or ten days anything about this accident? A. Yes, sir.

Mary Donahue, for Plaintiff—Cross

- Q. Whom did you tell? A. Francis Eckstein.
- Q. Who is Francis? A. Little boy lives in the yellow house, St. Paul's Avenue.
- Q. Eh? A. On St. Paul's Avenue.
- Q. When did you tell him? A. Around a week after.
- Q. Eh? A. Around a week after.
- Q. A week after the accident? A. Yes, sir. 10
- Q. Have you told anybody else about it since that time? A. No, sir.
- Q. He is the only one, is he? A. Yes, sir.
- Q. Have you talked with anybody about it within a week of the present time? A. No, sir.
- Q. Nobody at all? A. No, sir.
- Q. Haven't you talked with your mother about it within three or four days? A. Yes, sir.
- Q. You have talked with your mother about it? A. Yes, sir. 20
- Q. Now you spoke of an opening between the cars? A. Yes, sir.
- Q. Won't you show us again about how wide that opening was? A. About that wide (indicating by spreading her hands.)
- Q. About that wide. About three or four feet?
- Mr. Dixon: I would say four feet anyway.
- Mr. Carey: Four feet.
- Mr. Dixon: At least. 30
- Q. Was there a long string of cars there? A. Yes, sir—three—three cars away.
- Q. Three cars? A. Yes, sir.
- Q. Is that all? A. Yes, sir.
- Q. And they were all on the second track from you? A. Yes, sir.
- Q. Were there any cars on the other track—on any of the other tracks? A. Yes, sir.
- Q. What kind of cars? A. Two box cars and the engine. 40

Mary Donahue, for Plaintiff—Cross

Q. Two box cars and the engine; what track were they on? A. They were on the fifth track.

Q. On the fifth track. Two box cars and the engine on the fifth track. Now how many engines were there around there? A. One.

Q. Only one engine? A. Yes, sir.

10 Q. And you remember that these two box cars that you speak of now are on the fifth track, do you? A. Yes, sir.

Q. How many tracks were there altogether? A. Six.

Q. Six altogether? A. Yes, sir.

Q. Then this was on the next to the last track, on the other side from you? A. Yes, sir.

Q. And where was the engine? A. With the two box cars.

Q. With the two box cars? A. Yes, sir.

20 Q. Which way was the engine headed, toward what street? A. This here side (indicating left hand.)

Q. Towards what street? A. St. Paul's Avenue.

Q. St. Paul's Avenue? A. Yes, sir.

Q. And the engine was which side from you, your right hand side or left hand side? A. Left hand side.

Q. On your left hand side? A. Yes, sir.

30 Q. Now were there any cars on the other tracks there besides the second track and the fifth track? A. No, sir.

Q. That is all the cars there were there, was it? A. Yes, sir.

Q. Now when Frank was struck with the car what happened then? A. He hollered "Mary, Mary, pull me out."

Q. Was he looking towards you? A. Yes, sir. And then after a while he didn't call me no more;
40 he died.

Mary Donahue, for Plaintiff—Redirect

Q. Did he fall down? A. Yes, sir.

Q. He fell down, did he? A. Yes, sir.

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

Q. When he fell down was he between the rails of the track or outside of the rails of the track?

A. Between them.

Q. Between the rails of the same track that the car was on? A. Yes, sir.

10

Q. Now when he called, "Mary, Mary, pull me out," where was this man that afterwards went and picked him up? A. In the office.

Q. He was inside the office, was he? A. Yes, sir.

Q. How long after Frankie called in that way was it before the men came out? A. It was after the men called him out—pulled him out.

Q. Eh? A. After the man pulled him out.

Q. After the man pulled him out? A. Yes.

20

Q. Who pulled him out, somebody who was over there near the car? A. Yes, sir.

Q. Then it was not the man who came out from the shanty that pulled him out? A. Yes, sir.

Q. Was it? A. Yes, sir.

Q. Well, where was this man who pulled him out when Frank called "Mary, Mary," to you? A. He was in the office.

Q. He was in the office. Now how long after that was it that the man came out of the office?

30

A. Around a minute.

Q. Around a minute. That is all.

Mr. Carey: I ask to have this photograph marked for identification.

(Photograph marked D1 for identification.)

Redirect Examination by Mr. Dixon:

Q. Mary, does this photograph show the shanty into which they took Frankie after the accident?

40

A. Yes, sir.

Mrs. Margaret Donohue, for Plaintiff—Direct

Q. Is that the shanty right behind the bench that you have shown us? A. Yes, sir.

Q. Do you know who this gentleman is that has been asking you questions? A. No, sir.

Q. Ever see him before to-day? A. No, sir.

Q. You know who I am, my name? A. No, sir.

Q. Eh? A. No, sir.

10 Q. Ever see me before to-day? A. No, sir.

Q. Ever say anything to me or did I ever talk to you before you got in the chair there? A. No, sir.

Q. Know who this gentleman is sitting here? A. No, sir.

Q. Ever see him before to-day? A. Yes, sir.

Q. Where did you see him? A. I saw him on the other day.

Q. In court? A. Yes, sir.

20 Q. Have you ever talked to him? A. No, sir.

Q. Has he ever talked to you about this case? A. No, sir.

Mr. Carey: I ask that this little sketch on which the former witness marked a cross be marked for identification.

(Paper marked D-2 for identification.)

30 MRS. MARGARET DONOHUE, SWORN.

Direct Examination by Mr. Dixon:

Q. Mrs. Donohue, you are the mother of Mary, this last witness? A. Yes, sir.

Q. Where do you live? A. 204 Dye Street, Jersey City.

Q. On which side of Dye Street do you live? A. Well, on the right hand side going down from the railroad.

40 Q. Going from the railroad? A. Yes, coming down from the railroad.

Mrs. Margaret Donohue, for Plaintiff—Direct

Q. Well, which; do you live on the side nearer St. Paul's Avenue or the other side? A. On the side nearer St. Paul's Avenue.

Q. How old is Mary? A. She will be nine in September.

Q. How long have you lived there? A. Seven years.

Q. Did Mary live there all her life practically? 10
A. Yes. She was not born there.

Q. No; she was very young when she came there? A. Yes, sir.

Q. Does she go to school? A. Yes, sir.

Q. Now during the time that you have lived in Dye Street have you seen people walking up and down through Dye Street? A. Yes, sir.

Q. Do you know where Dye Street and the railroad cross each other? A. Yes.

Q. Have you ever crossed there, walked across 20 there? A. I have been crossing for the last seven years while I am living there.

Q. Since you lived there? A. Yes.

Mr. Carey: If the court please, I do not want to renew my objection every time, but I assume that it would be understood that my objection goes.

The Court: I do so understand it.

Q. You have gone back and forth across there 30 for the last seven years? A. Yes, sir.

Q. Where does Mary go to school? A. She goes to St. John's on the Boulevard.

Q. Is that on the same side of the railroad that you were living on or the opposite side? A. Well, it is right straight up.

Q. Does she cross the railroad to go to school?
A. She always crosses when she—I can see the railroad from my door, so when it is clear I tell her to go up that way.

Mrs. Margaret Donohue, for Plaintiff—Direct

Mr. Carey: I object to any conversation with the child.

A. And if it is not clear she goes to St. Paul's Avenue.

The Court: I suppose it is only for the purpose of distinguishing the time that she does not. It cannot have any other effect in the case.

Q. Is the railroad crossing at Dye Street always clear or not? A. It is not always clear. Sometimes it is and sometimes it is not.

Q. When it is not clear what is there to obstruct the passageway of people going along Dye Street? A. When it is not clear?

Q. Yes. A. Well, when it is not clear, as far as I am concerned, I walk along the side.

Q. No, I mean—you say sometimes it is clear and sometimes not clear. When it is not clear what is there that makes it not clear? A. Well, it is a regular street for people to pass back and forth.

Mr. Carey: I object.

The Court: It is not responsive and it may be stricken out.

30 Q. That is not what I am asking you. I asked you when there is anything that prevents you from going across, going along Dye Street and crossing at that railroad crossing, what is there that prevents you from doing it? A. There is nothing to prevent me from doing it.

Q. No, but sometimes there is. A. Well, the trains would—

Q. The trains. All right. A. —would prevent me.

40 Q. So the trains did prevent you? A. Yes, sir, the trains.

Mrs. Margaret Donohue, for Plaintiff—Direct

Q. Did they stand there any time? A. Sometimes.

Q. What kind of trains are they that stand on there sometimes? A. Well, freight and box cars and all that.

Q. Are there any gates there? A. No, sir.

Q. Any fence there? A. No, sir, nothing.

Q. Any crossing bell? A. No, sir. 10

Q. Any flagman? A. No, sir.

Q. Well, when you have had occasion to go down Dye Street on both sides of the railroad, going from one to the other, where have you generally been going, what is your objective point? A. Why, you mean to cross up?

Q. When you have been going across? A. I go across to my church and when I go down to the city shopping I cross that way to get the car.

Q. Is Dye Street a paved street there? A. 20
Well, the upper part is and the lower part is a regular street way across that way; it is all trod down, it is no sidewalk, only on one side, the side we lived on.

Mr. Carey: Will you repeat that?

(Answer repeated by stenographer.)

Q. Sidewalk in front of Gillespie's? A. Yes, there is an asphalt sidewalk; that is on the other side. 30

Q. On the side of the street where you walked on, on both sides of the track, is there a sidewalk? A. There is down where we lived only on the block where we lived on, but not in the passageway up on the block, only on Gillespie's side.

Q. The side you have lived on have you during this period of seven years noticed other people going up and down the street? A. Yes, hundreds of people.

Q. Crossing the street? A. Yes, sir. 40

Mrs. Margaret Donohue, for Plaintiff—Direct

Q. Crossing the railroad? A. Yes, sir.

Q. At this crossing? A. Yes, sir.

Q. Do they do it daily? A. Daily, every day.

Q. What street does Dye Street run into on the east side of the road, that is, towards the Hudson River? A. Well—

Q. Towards the Boulevard. A. Oh, it runs up
10 only as far as Tonnele Avenue.

Q. Do you know what street it runs into on the other side? A. On the other side it runs to James Avenue.

Q. James Avenue and Tonnele Avenue run practically— A. Yes, run across it.

Q. Did you hear of the accident which caused the death of Frankie Brooks? A. Yes, sir.

Q. Hear of it on the day it occurred? A. Yes, sir.

20 Q. Who first gave you the information about it? A. My little girl ran home and told me.

Q. Eh? A. That little girl ran home and told me and then I went to the door and saw the whole thing.

Q. She came home and told you. About what time was it she got home then that evening? A. It was between five and half past, because I was cooking supper at the time and I ran to my front door and saw the whole thing. I could see the
30 whole thing from my door.

Q. You ran out when she came in and told you? A. When she came in all excited and told me.

Q. Then when you went to the front door just tell the court and jury what you saw? A. Well, I saw a crowd down by the office on Dye Street next to the railroad tracks and I inquired, because I thought it couldn't be possible a little boy would get killed.

40 Q. Never mind what you inquired about. Just tell us what you saw? A. Well, I saw the crowd by the office.

Mrs. Margaret Donohue, for Plaintiff—Direct

Q. Did you go down? A. Yes, I did, I went down.

Q. When you went down where did you go? A. Well, I went by the side of the office and there was a crowd there and the policeman told us to get away, that the boy was dead.

Q. Did you see the boy? A. No, sir.

Q. Where was he then? A. He was in the office. 10

Q. In the little shanty? A. Yes.

Q. Did you know what boy it was? A. Yes, I had heard it.

Q. Who told you what boy it was? A. Little Mary told me.

Q. Did you tell anybody—how did it come to the knowledge of Mrs. Brooks, if you know, that Mary knew anything about it?

Mr. Carey: I object to that as immaterial.

20

A. Well—

Mr. Dixon: One minute. If you object to it I will withdraw the question.

The Court: He does object to it.

Q. Did you ever see me before? A. No, sir.

Q. Ever talk to me about this? A. No, sir.

Q. Did you ever see this gentleman alongside of me before? A. No, sir.

Q. Ever talk to him about it? A. No, sir. 30

Q. Did Mary ever talk to anybody except you about it, to your knowledge? A. No, sir; she didn't know anything about it until I went to the school for her.

Q. She didn't know anything about it until you went to school? A. The little girl, she didn't know anything about having to come here.

Q. You went and got her out of school? A. I had to go up and explain the reason to her teacher.

Q. When did you do that? A. Monday or Tues- 40

Mrs. Margaret Donohue, for Plaintiff—Cross

day of this week, I don't just exactly know the day.

Q. The subpoena was served on you for her, was it? A. What's that?

Q. Some subpoena served on you for her? A. Yes, sir.

Q. That is the first, as far as you know, that she
10 knew she had to come to court? A. It is through me I got her, yes, that is all.

Q. Do you remember anything about the flowers Mary had that night when she came home? A. She had a bunch of weeds, as far as I know.

Q. A bunch of weeds? A. Yes; different kinds of weeds, which she thought was flowers—

Mr. Carey: I object to what she thought.

Q. She had a bunch of weeds, had she? A. Yes,
20 she did have.

Q. In her hand? A. Yes; she thought they were trees, and she brought them home to me.

The Court: Never mind.

Q. She had these things in her hand, what she called flowers? A. Yes, she called them flowers, but they were dead weeds. They were flowers once earlier in the season.

30 *Cross Examination by Mr. Carey:*

Q. Whom have you talked with about this accident, Mrs. Donahue? A. What is that, sir?

Q. Whom have you talked with about this accident? A. I talked to nobody.

Q. Nobody at all? A. Nobody at all, sir.

Q. Never said a word to anybody about it? A. No, sir.

Q. Until you took the witness stand to-day? A. No, sir.

40 Q. Never repeated to anybody what your daugh-

Mrs. Margaret Donohue, for Plaintiff—Cross

ter had told you? A. No, sir, I never—never thought of the accident any more after it happened.

Q. Never thought anything about it after it happened? A. No, in the time passed by I didn't.

Q. Did you know this boy? A. Yes, I did know him.

Q. Did you know his parents? A. Not much; I just knew them to see them pass back and forth. 10

Q. You did not have a speaking acquaintance with them? A. No, sir.

Q. You never said anything to the parents of this boy about the accident at all? A. No, sir.

Q. What time was it when you got down to the shanty? A. Well, I should judge about half past five.

Q. How far away is your house? A. Not quite a block. 20

Q. Not quite; and the Gillespie building is on the same side of the street with the shanty, isn't it? A. Yes, sir.

Q. This exhibit D-I for identification shows a brick building with an X mark over it and G alongside the X; is that the Gillespie building? A. Why, that looks like the Gillespie building, but this place in back looks like the power house; some gas works down there.

Q. There is a gas tank further down, isn't there? A. Yes. 30

Q. Toward the river? A. Yes.

Q. I notice this little building here next to the railroad tracks? A. Yes, sir.

Q. What is that? A. It looks like the little shanty.

Q. That is the building marked with a cross and the S over the top? A. Yes.

Q. It looks to you like the little shanty, does it? And is that the place where you went that night? 40

A. It might have been.

Mrs. Margaret Donohue, for Plaintiff—Cross

Q. Well, don't you know? A. I went to this certain little shanty where the body was.

Q. Well, is that the shanty shown in this picture? A. It seems to me it is.

Q. Yes. Now does this photograph show the street west of the railroad track correctly? A. Well, the railroad track.

10 Q. Eh? A. The railroad tracks is all right.

Q. The railroad tracks are all right, are they? That is the railroad tracks as you see them when you are on the Lorillard side looking over toward the side where you live? A. Yes, sir.

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

Q. Now where do you usually cross the railroad track from your side to the easterly side of the railroad? A. I walk up through Dye Street from my home up to the railroad. It is on the same
20 street, so I have to cross to take the car, you mean, further downtown, or to Newark Avenue?

Q. When you are going to Newark Avenue? A. Well, I cross over those tracks, I have to to get there, and I turn towards Lorillard's to Newark Avenue; it is right across the tracks.

Q. You mean that you cross these tracks at the end of Dye Street there? A. At the end of Dye Street, yes.

Q. You do that, do you? A. I do that whenever
30 I have had occasion to.

Q. Whenever you want to cross the tracks there? A. Yes, sir.

Q. What other place do you cross the tracks in that vicinity? A. Just there.

Q. Eh? A. Just there.

Q. That is the only place you ever cross them? A. Yes; if that part of Dye Street is thronged up with cars, why, I go around another block or two out of my way, to go to St. Paul's Avenue cross-
40 ing.

Mrs. Margaret Donohue, for Plaintiff—Cross

Q. Then you go to St. Paul's Avenue? A. And then I go up that way.

Q. What direction from Dye Street is St. Paul's Avenue? A. It is right to the left.

Q. Well, what direction north and south, east or west? A. I don't understand that, sir.

Q. Eh? A. It is right to the left hand side of where I live—to the left hand side of Dye Street 10 where I live, St. Paul's Avenue is.

Mr. Dixon: It is north.

A. I don't know whether you call it south.

Q. Eh? A. I don't know whether it is north or south.

Q. In which direction does Dye Street run, north and south or east and west? A. It runs straight just the same as Newark Avenue here.

Q. Well, what direction is that? A. It runs 20 from Tonnele Avenue down to James.

Q. No, I want the direction? A. I don't understand the direction of Newark.

Q. You don't understand the direction? A. No, I don't understand north and south, east and west.

Q. Well, you say you cross the railroad tracks sometimes at St. Paul's Avenue? A. Sometimes.

Q. Well now, that is the next avenue north of Dye Street, isn't it? A. Yes, sir.

Q. There is a plank crossing across the railroad 30 tracks there, is there? A. Yes, sir.

Q. Now is there any plank crossing across the tracks here from the end of Dye Street? A. No, sir.

Mr. Dixon: There are two ends to Dye Street.

Q. Well, both ends? A. Dye Street is cut off at the railroad just the same as St. Paul's Avenue is, just a continuation.

Mrs. Margaret Donohue, for Plaintiff—Cross

Q. Now from either end of Dye Street is there a plank crossing crossing the railroad track? A. Yes; there is, we go across there.

Q. I didn't ask you if you went across there. I asked you if there is a plank crossing? A. A plank crossing?

Q. Yes. A. No.

10 Q. Planks between the rails? A. We just go right over the tracks.

Q. Just go right over the tracks, and there are no planks for you to walk on? A. Yes, we step on planks.

Q. Do you see any planks there in that picture? A. No; it seems to be level ground.

Q. Do you say there are planks there at Dye Street? A. Well, there are pieces of board, logs of wood that I stepped on.

20 Q. Logs of wood? A. I don't know what you call them.

Q. Ties of the railroad? A. They seem to be.

Q. The things the rail— A. They are things on the railroad.

Q. They are things used by the railroad? A. Yes.

Q. They are the things that the rails are fastened to, aren't they? Eh? A. Yes, they might be, sir.

30 Q. Aren't they? A. I guess they are. They are used for the railroad anyway.

Q. Don't you know they are? Eh? A. Yes, they are, I guess.

Q. Yes. You say you guess. Don't know they are? A. I don't know, sir.

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

Q. Is there any pavement between the crossing and St. Paul's Avenue and the crossing which you speak of here at Dye Street? A. Yes; there is
40 crossing on St. Paul's Avenue is more level

Mrs. Margaret Donohue, for Plaintiff—Cross

ground than this. There is a board crossing on St. Paul's Avenue.

Q. They have planks between the rails, haven't they? A. Yes, sir.

Q. Do you know how many tracks there are there at Dye Street? A. I don't just exactly, but I am sure there are five or six.

Q. You say that cars frequently stand on those tracks? A. Yes, sir. 10

Q. They stand there a good deal of the time during the day, don't they? A. Sometimes you wouldn't see a car around there, and other times you would see them stand there for quite some time.

Q. Have you ever seen those tracks with a whole lot of cars on all of the tracks? A. Not on all, but there may be sometimes, but I know there is probably three or four tracks occupied some times. 20

Q. Three or four tracks filled with cars there? A. Sometimes, yes.

Q. How long do the cars stay there? A. Oh, not so long at a time. Sometimes they stand there, probably two cars, where people has a way to cross.

Q. Never mind what people have to do.

Mr. Dixon: I think that is proper. That answers the question.

Mr. Carey: I asked her how long the cars stay there, and she begins to tell me about people crossing there. 30

Mr. Dixon: She said people have to wait.

Mr. Carey: I ask that that part about people waiting to cross be stricken out.

The Court: I will leave it stand, and take your exception.

Mr. Carey: Note an exception. It is not an answer to the question.

The Court: The question is how long do 40

Mrs. Margaret Donohue, for Plaintiff—Cross

the cars stand there,—how long have you seen them stand there?

Mr. Dixon: What does it mean? What is the longest time you have ever seen them stand there or what is the shortest time? That is the question asked. That cannot be answered. It is impossible to answer that question, unless he wants to know what the longest time is.

(Question repeated by stenographer.)

The Court: Well, I suppose that calls for any answer she may make to it.

A. Why, sometimes cars may stand ten minutes and other times the cars may stand there the whole day.

Q. Yes. Have you seen cars standing on more than one of those tracks for a whole day at a time? A. Well, I didn't notice.

Q. Didn't notice is? A. No.

Q. And cars moving backward and forward over the tracks there at that place? A. All the time, yes.

Q. All the time, aren't they? And they make up freight trains there, do they not? A. I see freight trains there.

Q. Eh? A. I see them there sometimes.

30 Q. and they switch backward and forward there? A. Yes.

Q. A great deal, don't they? A. Yes.

Q. What time of day have you seen people cross that? A. Why, I have seen people cross there at all times of the day.

Q. When do you see most people crossing there, what time of the day? A. Well, people cross during the noon hour a good deal, back and forth.

40 Q. People whom you know? A. I know some and I don't know them all. There is people

Mrs. Margaret Donohue, for Plaintiff—Cross

crossed there for years and I wouldn't know them.

Q. What time did the little girl leave the house that afternoon? A. She had been out playing with other children. The first thing she came in and told me—

By the Court:

Q. No; what time did she leave the house, if you know, of course? A. That afternoon of the accident? 10

Q. Yes. A. She might have left probably two or three o'clock in the afternoon.

By Mr. Carey:

Q. Do you know about what time she left? A. Well, about two o'clock, I should judge. It is right near my home, so I did not get excited as to where she was; I knew she was out around the neighborhood. 20

Q. What day of the week was it this accident happened? A. I remember it was on a Saturday afternoon.

Q. Remember that? Now you have never talked with anybody about this accident from the time it happened? A. No, sir.

Q. Up to the present time? A. No, sir.

Q. And it had not been in your mind at all from the day it happened up to the present time? A. No, sir. 30

Q. Yet you are able to tell us that it was on Saturday and in the afternoon? A. Yes, sir.

Q. And about what time your little girl left the house that afternoon? A. Yes, sir.

Q. And about what time she got back? A. Yes, sir.

Q. Do you know Mr. and Mrs. Brooks to talk to them at all? A. No sir; I never—only just know them to see them to pass. 40

Mrs. Margaret Donohue, for Plaintiff—Redirect
Nicholas D. Wortendyke, for Plaintiff—Direct

Q. Never have spoken to them at all? A. Only to bid them the time of day.

Q. Eh? A. Only to bid them good morning or good evening, that is all.

Redirect Examination by Mr. Dixon:

10 Q. How many people on an average go up and down Dye Street that cross at this railroad crossing, cross the railroad tracks? A. Well, I really couldn't tell you, but I am sure there is from fifty to seventy people cross there different days.

Q. Where is this Lorillard factory? A. It is over on Newark Avenue, the front on Newark Avenue and in the back on Dye Street.

Q. And which side of Dye Street is it, the same side your house is on or on the same side Gillespie is on? A. It is on the same side as Gillespie's.

Q. Your house on the same side as Gillespie's? A. On the other side, down further.

Q. Is it on the same side of the railroad track that Gillespie's is on or on the opposite side? A. On the opposite side.

NICHOLAS D. WORTENDYKE, SWORN.

30 *Direct Examination by Mr. Nixon:*

Q. Mr. Wortendyke, where do you live? A. Jersey City.

Q. Are you connected with the government of Jersey City? A. Assistant chief engineer of Jersey City.

Q. How long have you been such? A. Since 1897.

Q. You are an engineer by profession? A. Yes,
 40 sir.

Nicholas D. Wortendyke, for Plaintiff—Direct

Q. Do you know regarding the public streets of Jersey City? Do they come under your jurisdiction in any way? A. Come under our department.

Q. In what way? A. The Bureau of Engineering and Survey of the department of public streets, Department of Public Improvements now.

Q. Now do you know Fowler's map of Jersey City—acquainted with the Fowler's maps? A. 10
Yes.

Q. County records? A. Yes, sir.

Q. Filed maps in the county. Is there any street in Jersey City known as—public street in Jersey City known as Dye Street? A. Yes, sir.

Q. Where is it located? A. Runs from Tonnele Avenue to Charlotte Street.

Q. Does it appear on the Fowler's map? A. Appears on the Fowler map and on the map of 9th, 10th, 11th and 12th Wards of Jersey City, 20
made by Levi Post.

Q. Have you the Fowler's map in court here and those other maps? A. Yes.

Q. Will you kindly refer to it and show us the map.

Mr. Carey: I object to the use of the Fowler's map. The evidence does not show as yet that that map shows the public streets of the City of Jersey City.

Mr. Dixon: Doesn't it show that the Fow- 30
ler's map is a filed map, a county record, and so appears on the face of the map?

Mr. Carey: It is a filed map, and I admit that.

Mr. Dixon: Adopted by the Water and Street Commissioners, and it is evidence under the charter.

Mr. Carey: That is not evidence of the extent of the public streets. You must have something else besides a delineation upon a 40

Nicholas D. Wortendyke, for Plaintiff—Direct

map to show a public street such as is contemplated by the railroad act. This, I suppose, is introduced in connection with the effect which it will have upon the case, provided is shown to be a public street, and the obligation of the railroad company with respect to a public street.

10 The Court: Upon what theory, Mr. Dixon, do you say that map is evidential?

Mr. Dixon: Why—

The Court: I am asking you if you are attempting to prove by it that Dye Street as it crosses or as it meets, not only meets the right of way of the railroad company at this point which we are concerned about, but also crosses its right of way as a public way? That is the purpose?

20 Mr. Dixon: Yes.

The Court: Upon what theory do you say a map is evidential of that?

Mr. Dixon: Well, it is one of the filed public records of the county and I think is made evident by the statute. I will go a little back of that, however, and I will withdraw the offer for the present and put it in later.

Q. You say that Dye Street is a public street.
30 Do you know how the city—how it became a public street, Mr. Wortendyke? A. By an opening map.

Mr. Carey: I object.

Q. By what proceedings? A. By opening maps.

Q. That is by condemnation, assessment? A. By opening maps and paying for the property and settling for the property.

40 Mr. Carey: If the court please, if it became a public street in that way, then he records of the transaction are the evidence of that fact.

Nicholas D. Wortendyke, for Plaintiff—Direct

Q. Have you the records, the city records, showing that fact Mr. Wortendyke? A. I have a blue print of the original which is on file in the Department of Streets and Public Improvements, the Bureau of Engineering.

Q. Have you that with you? A. I have, yes, sir.

The Court: He says that is a blue print of the original as they are on file in his department. 10

A. In that department.

Q. The blue print is the original assessment map? A. Blue print of the original.

Mr. Dixon: Do you insist upon having the original?

Mr. Carey: I want to see the records by which this is made a public street.

A. This is a blue print of the original on file in that office. 20

By the Court:

Q. Let me ask a question. Is this the only record, that is, that map, of which this is a blue print, Mr. Wortendyke? A. Yes.

Q. Is that the only record which you have knowledge of in the City Department bearing upon the question of the city's action toward the opening of this street as a public street, or are there other maps? A. No; that is the only record that is on file. The property was paid for and assessed. 30

Mr. Carey: I object. Just a minute.

The Court: He says it is the only record on file. I do not understand that you are objecting because this is a blue print of the map, but your objection is whether or not the original of this map was the only documentary evidence there was of the opening of the street. 40

Nicholas D. Wortendyke, for Plaintiff—Direct

10 Mr. Dixon: I do not think I am obliged to prove every step in a dedication or in condemnation, to show that it is a public street. I think, if your Honor please, if your Honor holds that I do, why, then I will ask permission to start in to prove that fact. I never heard of such a thing being proved in a case of this kind before.

The Court: It doesn't very often come up, Mr. Dixon, because so often a street is conceded a public street.

The Dixon: You will have to have the charter before you.

20 The Court: I think this is the first instance I have had in three years and a half where we have got to this sort of a juncture. Generally something has happened whereby the question was—

Mr. Dixon: In the case of Black vs. The Central Railroad Company, in that case it didn't make much difference whether it was a public street.

The Court: I think you pleaded differently there.

30 Mr. Dixon: No, I pleaded public street. I pleaded public street and they showed it was private property, and Judge Speer directed a verdict on the ground—I said that it was, and I claimed that it was a question for the jury to decide whether it was. I proved all the facts. I proved the laying of the paving of the street. I did not prove any dedication. I proved the paving of the street and proved the lighting of the street and I proved the use of the street, and I proved other things of that sort, and I contended that it was a question for the jury to say whether it was a public street.

40

Nicholas D. Wortendyke, for Plaintiff—Direct

The Court: Well, of course, if you prove a street by user by the public uninterruptedly and continuously for a period of twenty years, and show that in this case, I would say undoubtedly then you need not go any further.

Mr. Dixon: I am going to ask to show this property is a public street, because it has actually been taken as a public street. I am not going to stop here. I am going to show it has been used for over twenty years, but here is the proceeding under the statute and under the charter of Jersey City. I don't think I have to go back and show every procedure. 10

The Court: I ought to know what that charter is.

Mr. Dixon: Mr. Wortendyke can testify to it and he knows every step to be taken thoroughly. 20

A. At the time, yes.

Mr. Carey: If the court please, I object to the witness' statement.

The Court: You cannot talk. Is the charter here?

Mr. Dixon: I have not the charter here.

The Court: I don't know. There may be a very informal method by which the city authorities may be allowed to act. It may be the fact of the filing of the map with the data contained is all they are required to do. 30

Mr. Dixon: They have taken it and paid for it and opened it under the charter, and that is a record map, and as I recall—I have not looked at the law lately—as I recall the charter it is made evidential.

The Court: You see I do not know, Mr. Dixon. I have had to deal with that in some other respect, which just occurs to me now. 40

Nicholas D. Wortendyke, for Plaintiff—Direct

10 No, I think not. I think I am wrong. I think that was with respect to the ordinances or laws of Jersey City. A certified copy by the statute was made evidential. That is what I had in mind. You see, gentlemen, I don't know which way to proceed until I know what the charter provisions are, until I know what, if any, statutory authority there is given to this map which you are proving. I am in no position to pass upon it. I am presumed to know this, although it may be a special act, and then I would not be supposed to know.

Mr. Dixon: It was a special charter before the general act, when all of the charters were special.

The Court: I plead ignorance. I have no direct knowledge.

20 Mr. Dixon: Your Honor must take judicial notice of the laws respecting municipalities.

The Court: So I will, but I am entitled to have them called to my attention. I meant to say I have no personal knowledge of what they are. I will take judicial notice of them when they are brought to my attention. That is my difficulty.

30 Mr. Dixon: This street was opened, as appears from the records of the city, even before Jersey City was a city, that it was the old—

A. Old city of Hudson City.

Mr. Carey: Let us have the testimony suspended until we get a ruling on this.

The Court: I cannot rule, gentlemen, unless you give me something to rule on.

40 Mr. Dixon: I am stating the argument to the court. The street was dedicated,—was condemned—was taken by condemnation and assessments made and laid out before the con-

Nicholas D. Wortendyke, for Plaintiff—Direct

solidation of the present Jersey City, in 1872 or '71. This was laid out, taken in 1870 and '69—1866 or '69 and '70. The whole street was taken in two different portions, laid out as a street, and it was taken over by Jersey City as a public street in 1870.

The Court: At the time of the consolidation? 10

Mr. Dixon: Yes.

The Court: Now you see my mind is commencing to open up. I do remember a case in which you were for the plaintiff, some automobile case against the Public Service, where some of those same statutes were offered. That is the way I remember it now; there was shown a number of streets had been opened and taken and used as public streets by some municipality before their consolidation, when it became Jersey City, the larger, as it were. That much I remember, but of course that does not help me unless I have the charter. 20

Mr. Dixon: Here is a city record I produce. This is one of the filed records, the assessment map of Jersey City, filed in Jersey City on this property, showing the—

The Court: Well, of course, Mr. Carey, I don't understand that you are objecting to this paper that he has before him just because it happens to be a blue print of the original map, do I? 30

Mr. Carey: Well, I would waive that objection.

The Court: Yes. Now the objection is more particularly to the point because it does not and has not been shown that this is the only record going in the direction of the taking over or the opening up of this street as alleged. 40

Nicholas D. Wortendyke, for Plaintiff—Direct

Mr. Carey: That it is not a record of all of the proceedings.

The Court: That is what I meant.

Mr. Carey: Which were taken, if any were ever taken, to show that this locus in quo is a public street.

10 Mr. Dixon: How do you know that it is not all?

The Court: I was going to say this, that being your objection, what can be the objection to his going as far as he can with that which he produces. Now that is not all, and if the balance can be produced, why, of course, it must be.

20 Mr. Carey: He says himself that it was taken by condemnation, taken at a certain time. There must be some record of that taking, and that is merely—not a record of a proceeding.

Mr. Dixon: It is an assessment under the statute for laying out public streets. It is an assessment where the property was assessed for benefits.

Mr. Carey: Even that would not show that the property was not within the street line—

Mr. Dixon: How do you know that?

30 Mr. Carey: I am saying what I think I know.

Mr. Dixon: You don't know it.

Mr. Carey: You mean you think I don't know it.

Mr. Dixon: No, I know you don't.

Mr. Carey: I may know a whole lot.

(The Court examines the map and papers.)

The Court: I don't know how to treat this. My attention has been called to some thing in it.

40 Mr. Carey: What is the thing which purports to appear.

Nicholas D. Wortendyke, for Plaintiff—Direct

The Court: A resolution.

Mr. Carey: A map is not a resolution of a municipality. If there is a resolution let them produce it and not produce a copy of that resolution which somebody has made upon a map.

The Court: What I meant to say, that is no more than a certification, and scarcely that—
—simply signed by somebody I don't know who. 10

The Witness: Clerk.

The Court: It is attested by the clerk, yes, but whose signature the other is and what capacity I don't know. I cannot decipher it.

Mr. Dixon: Is it necessary that I should produce the resolutions of this kind, which sixty years ago were placed on the map itself, or is it sufficient to show the record, a public record? As I understand it, when you have public records kept in accordance with law— 20

The Court: Yes. Is this a copy of a public record in accordance with law?

Mr. Dixon: Yes. The statute requires that shall be done. That is the way you assess.

The Court: Show me the statute. We are getting right back to it again. If the statute says so, all well and good, then I know. 30

By Mr. Dixon:

Q. Do you know the procedure with respect to opening up streets, Mr. Wortendyke, in the City of Jersey City?

Mr. Carey: Yes or no.

A. Yes, today.

Mr. Carey: Yes, to-day.

A. That is in 1870. This is 1866. This is the other part of the street. 40

Nicholas D. Wortendyke, for Plaintiff—Direct

The Court: The question really is, do you know what the proceedings were in 1866 and 1870?

A. No, I do not, at that time.

10 The Court: I know I do not. Gentlemen, it seems to me the best suggestion I can make is to find out what the statutory authority was, what the proceedings were, so that we may have them the first thing Monday morning, so I may have something. For aught I know the statute may require nothing more than what has been produced here. I don't know, of course.

The Witness: May I say something?

The Court: To me, yes.

20 (The witness talks to the court in a whisper.)

By Mr. Dixon:

Q. In opening a street the first thing they do is to make an assessment map? A. Yes, now.

Mr. Carey: Just a minute. He says he knows now.

Mr. Dixon: The statute prescribes the duties.

30 (Counsel and court have a side bar discussion, which is not taken by the stenographer.)

The Court: I think we would better leave it in that position. We will take our recess now until Monday morning at ten o'clock.

(Adjourned to Monday, June 25, 1917.)

Nicholas D. Wortendyke, for Plaintiff—Direct

Jersey City, N. J.,
June 25, 1917,
10 A. M.

The Court: Juror Wickens, by consent of counsel, is excused.

Mr. Hartpence: The photograph D-1 for identification was taken by F. D. Pangborn on August 4, 1916, and he stood about twenty- 10
five feet east of the track in the center line of Dye Street looking west towards the Hackensack River. The large gas tank to the left of the photograph and back of the Gillespie property is located some distance away from the Gillespie property toward the river and does not immediately adjoin the Gillespie property. Mr. Pangborn is unable to state just how far away it is. Mr. Dixon will waive the formal proof of the photograph by Mr. 20
Pangborn. Mr. Dixon may have some further objection to it, but I wanted to waive formal proof of it, so Mr. Pangborn would not be held here.

Mr. Dixon: (At side bar) 1855 is the charter, page 791, section 45; 1864 is a supplement, page 447, section 14, 20 and 21; 1869, page 1367, section 19.

The Court: Let's go right through these. 30
(Further discussion at side bar not reported.)

(The jury returned to the court room at 11 A. M.)

The Court: I do not know whether the record shows it or not, Mr. Stenographer. Counsel have agreed that juror number four be excused from further service on the panel, and that they will proceed with ten jurors to 40

Frank A. Dolan, for Plaintiff—Direct

the same purport as if the entire twelve were in the box, they having previously agreed to proceed with eleven. In accordance with the stipulations of the court and counsel, juror number four is excused, and we now have a total of ten, with which both sides will proceed as if it had twelve in the box. That is true, isn't it?

10

Mr. Hartpence: We consent to that.

Mr. Dixon: Yes.

FRANK A. DOLAN, SWORN.

Direct Examination by Mr. Dixon:

Q. Mr. Dolan, you are City Clerk of Jersey City?

20 A. Yes, sir.

Q. Have been so how long? A. Since the 15th of May, this year.

Q. You were subpoenaed to produce all the records of your office respecting the opening and so forth of Dye Street, in Jersey City, were you not?

A. Yes, sir.

Q. The records of the old City of Hudson? A. Yes, sir.

Q. And those records are now kept in the City Clerk's office? A. Yes.

30

Q. As far as they are extant? A. Yes.

Q. Have you produced the records? A. I have the records here with me.

The Court: Right here, gentlemen—not for the purpose of raising any other obstacle, have you the act of consolidation, Mr. Dixon, that you have referred to?

Mr. Dixon: That is 1871.

The Court: Is it disputed that Hudson City was originally a distinct and separate municipi-

40

Frank A. Dolan, for Plaintiff—Direct

pality having an entity of its own and later was by act of the legislature in consolidation with other municipalities made a part of Jersey City?

Mr. Hartpence: I am sure I don't know anything about it.

Mr. Dixon: Yes, 1870 and 1871.

Mr. Hartpence: Mr. Dixon is thoroughly familiar with that.

The Court: I have a very hazy recollection of seeing such an act, because there was another case in which—

A. 1870.

Mr. Hartpence: I would like to reserve my right to verify it as a fact, with leave to object if it is not a fact.

Mr. Dixon: It is a municipal statute. 20

The Court: I thought possibly you had information as to it.

Mr. Hartpence: No, sir, I have not. If it is all right I have no objection.

Q. What records did you find in your office respecting the matter? A. I found a record under date of October 3, 1866.

The Court: What is the book from which you are about to read? 30

A. Minutes of Common Council, volume 4, City of Hudson, page 221.

Q. What is that? Reads as follows—

Mr. Hartpence: I object unless I have an opportunity to examine this book and see what it is. I do not think it has been offered in evidence.

The Court: Of course you may have the opportunity. 40

Frank A. Dolan, for Plaintiff—Direct

Mr. Dixon: I did offer it.

10 The Court: My recollection is, too, that this consolidation act or act of consolidation provides, if my memory is at all right, for the filing with the City Clerk of the City of Jersey City, of all of the records and minute books and so forth of the consolidated municipalities.

Mr. Dixon: Yes.

A. The act is the act of March 17, 1870, the consolidation act.

The Court: I presume I will have to send over to Mr. Gordon's office again and get the act or the Laws of 1870. Cannot we proceed?

20 Mr. Hartpence: I informally stated that I thought I can simplify it. Just what books, Mr. Dixon, do you expect to offer?

Mr. Dixon: All of the books that have anything to do with it.

Mr. Hartpence: Can I have those enumerated?

30 Mr. Dixon: I have not seen them. Minutes of Common Council, volume 4; and the other is the Minutes of Common Council, volume 6, on page 517. The third book is the records of the old Street and Water Board, which is not to be offered in evidence unless asked for.

40 Mr. Hartpence: If your Honor please, I am not going to insist upon formal proof of these as records. I am willing to take them as having been produced from the custodian of the City's records, and will not insist on formal proof beyond that, but I object to the admission of the books or any part of the record from the books on the ground that it is irrelevant, immaterial and incompetent. Now if I

Frank A. Dolan, for Plaintiff—Direct

may do that it will save objection each time the witness—

The Court: You may probably do it if you will tell me to just what your objection goes.

Mr. Hartpence: Well, because of this, first, that it is not competent evidence to prove the nature of the street as a public street, and secondly, because it is not competent to bind 10 this defendant, because the evidence already shows that the railroad at the point where this accident is said to have occurred, was Erie Railroad property, and hence the question of whether or not this was a public street would not in any way be binding upon the present defendant, the Pennsylvania Railroad Company.

The Court: Well, I understand your objection—Mr. Kelley, read me his first objection. 20
(Objection repeated by stenographer.)

The Court: What do you mean by that?

Mr. Hartpence: It is mere formal objection that it is not competent evidence to prove that it is a public street. It may or may not be. My objection is that it is not.

The Court: The second part I do understand. I do not know that I can say I agree, of course. If this is a public street it is immaterial, isn't it, as to whose property the 30 tracks were upon?

Mr. Hartpence: No, we think—

The Court: You were operating over these tracks and in operating you owed the public a duty, you must remember, and if you owed the public a duty with respect to a public street crossing, why, it would be entirely immaterial whose property it was upon which you were operating that train, wouldn't it?

Mr. Hartpence: It would be entirely imma- 40

Frank A. Dolan, for Plaintiff—Direct

terial to bind this defendant so far as the maintenance of the crossing in any way is concerned. That would be the first point. It is not our property, and we are under no obligation, no public duty or any other duty to maintain the crossing in any particular form.

The Court: Oh, no.

10 Mr. Hartpence: In the operation of our train then it would depend upon whether or not we had knowledge of the fact that it was a public street, it would depend upon whether or not we had user rights, it would depend upon whether or not the city was itself insisting upon its character as a public street, whether they were insisting upon it being maintained as a public street, it would depend upon what
20 we had been permitted to do there for a long period of time.

The Court: All right; I think we understand it then.

Mr. Hartpence: And those proofs would be incompetent, irrelevant and immaterial; and I do that so I will not have to object each time that Mr. Dixon asks the question. If your Honor is going to admit the record my objection goes.

30 The Court: Your objection does not go to the formality of the proof?

Mr. Hartpence: No, sir; I will not object to that; but it goes to the competency, relevancy and materiality.

The Court: So far as it would bear upon the defendant company?

Mr. Hartpence: The defendant company. If that may be at this time interposed to all of this evidence it will save the necessity of
40 objecting each time.

The Court: You may do so.

Frank A. Dolan, for Plaintiff—Direct

Mr. Hartpence: I would like to reserve the right also to any specific objection.

The Court: Of course, if what is to be read and offered does not reach the point which it is anticipated it will, why, of course it may be the ground of a specific objection. Now you had volume 4, Mr. Clerk?

10

A. Volume 4, page 221.

Q. Read it into the record. A. "The report and maps of the Board of Commissioners of Assessment in the matter of the opening of Dye Street in this City, were taken up, same having been duly advertised under date of August 14, 1866, and no remonstrance received against the same, the report and maps were referred to the street committee."

On page 224, of the same volume: "The City Clerk reported the following papers or publications filed with him: Ordinance for Dye Street opened—that is line 13, of the report—and petition for Dye Street opened. Reports of the City Clerk were received and ordered filed."

The Court: All of that was under date of October 3, 1866?

A. Yes. Under date of February 11, 1870, volume 5 of the minutes of the Common Council of the City of Hudson, page 517: "Committee on Streets, by Alderman Hogan, reported back the reports and maps of the Board of Commissioners and Assessment in the matter of Dye Street extension, with the following preamble and resolution, which were read:

"Whereas, the Board of Commissioners of Street Assessment have duly filed their report and maps of assessment in the matter of Dye Street opening, of the 14th day of January, 1870, and due

30

40

Frank A. Dolan, for Plaintiff—Direct

publication has been made of said"—I can't get the word—"made of such opening according to law, and whereas no remonstrance or objections appear filed against said proposed improvement within the time limited by law, to wit, thirty days from date of filing; therefore, Resolved, that said report and maps of assessment be confirmed and
 10 a copy of such assessment list be handed to the Collector of Revenue for collection.

Resolved the City Treasurer shall tender and pay to the owners of land taken for said opening of Dye Street the sum or sums set opposite their respective names and properties on said assessment list, and report, taking their receipt therefor, and if the said owner or owners shall refuse to take such award and be an idiot or infant or in any way disqualified to receive a receipt for
 20 same, then said treasurer shall make an affidavit of said facts and file such affidavit with the City Clerk, who shall report the same to the common council at their next meeting thereafter.

Adopted as follows on ayes and nays: Ayes, President McPherson, Aldermen Dahm, Elwood, Hogan, McNulty and McFadden.

Nays, none.

Absent, Aldermen Harrington and Martini."

Q. Have you any other records respecting Dye
 30 Street? A. That is all of the records I have except the assessment maps.

Q. Where are they? A. Which Mr. Wortendyke has, of the Chief Engineer's office.

Q. These are filed where? A. They were on file in the City Clerk's office more than forty years ago, and we have made those tracing of them there now, because of the—

Q. The old maps were so old that you don't like to handle them? A. They are old maps.
 40

Frank A. Dolan, for Plaintiff—Direct

Q. Have you those original maps? A. We have them on file in the City Hall.

Q. You have one of them here?

Mr. Wortendyke: I have one of the original maps here.

Q. Produce that one, please.

(Map produced.)

10

Q. Is this that I hand you one of the maps? A. Yes, that is the original map.

Q. And the other one, what about that? A. That is down in the office.

Q. It is missing? A. Mr. Wortendyke of course has all the copies.

Q. But the original; you haven't got the original? A. No, I haven't got the original in my file, but I have the copies.

20

Mr. Dixon: I offer this map in evidence. We have a copy of it.

Mr. Hartpence: I make the same objection as to the books.

Mr. Dixon: They do not like to leave these around.

Mr. Hartpence: If Mr. Wortendyke will say they are exact and correct copies, then I won't raise any objection to the formality of that proof.

30

The Court: I understand. I suppose your purpose, Mr. Dixon, was to make formal offer of these two records?

Mr. Dixon: And one of them is lost.

The Court: No, the two records from which he has read.

Mr. Dixon: Yes.

The Court: I suppose it was to that that Mr. Hartpence directed his objection. So it stands that formal offer of numbers four and five

40

Frank A. Dolan, for Plaintiff—Direct

have been made and was made by the reading of the witness from them in this evidence, which referred to that particular controversy.

Mr. Dixon: I thought I would find out all he had.

10 Mr. Hartpence: Your Honor permits my objection to be noted to the offer and the receipt?

The Court: I understand that is already entered.

Q. Did you find among your records any other papers or documents respecting Dye Street? A. No, sir.

20 Q. You have another record there, Mr. Clerk, what is that record? A. This is resolution book number six of the Board of Street and Water Commissioners.

Mr. Hartpence: Of Jersey City?

Mr. Dixon: Of Jersey City. It is regarding the Fowler's map.

A. On page number 758, under date of May 12, 1894, resolved, the map—

Mr. Hartpence: I desire my objection noted also to this record.

30 The Court: Yes.

A. "Resolved, the map entitled filed Assessment Map Jersey City, New Jersey, 1894; be and is hereby adopted as the official city map. John E. Marthews, President, P. F. Wanser, Mayor, George T. Bouton, Clerk."

Q. Mr. Bouton was the clerk? A. Clerk of the Street and Water Board at that time.

Mr. Dixon: Now I offer that book. Cross examine, Mr. Hartpence.

40

*Frank A. Dolan, for Plaintiff—Cross**Cross Examination by Mr. Hartpence:*

Q. You don't know whether there are any other records in your office pertaining to this matter?

A. These are the records that we have there that I have gone through; that is all we find.

Q. That is all that you found? A. Yes.

Q. Had you ever been connected with the City Clerk's office prior to your present incumbency? 10

A. No, sir.

Q. That is the extent of your experience there?

A. Yes, sir.

Q. Will you state the date of the consolidation of the City of Hudson? A. I have it in the records.

The Court: I think I have it here. 1870, he said.

Redirect Examination by Mr. Dixon:

20

Q. You have a record of that, Mr. Clerk, will you read that also. I will offer that. It appears from the minute book. Volume No. 5 of the minutes of the City of Hudson, dated April 30, 1870:

“Resolution offered by Alderman McNulty, unanimously adopted:

“Whereas by the act for the consolidation of the City of Bergen, Hudson and Jersey City, approved March 17, 1870, the services of the high officers of this city cease on Monday 30 May 22nd.” (Reads).

The Court: The first part refers to the statute?

A. Approved March 17, 1870.

The Court: All right. That seems to be the laws of that year. Page 1170 to 1250 inclusive.

Mr. Dixon: Does your Honor think we need these books? 40

N. D. Wortendyke (recalled), for Plaintiff—Direct

The Court: I do not see the necessity. Everything that you are depending upon has been read into the record as if we had the records now before us.

Mr. Dixon: Yes. I would like to have those Fowler maps sent for, your Honor, if your Honor please.

10 The Court: What office are they in, the Register's office?

Mr. Dixon: Register's office.

The Court: Send an officer down for them, Mr. Walker.

(The three city books considered in evidence but not marked by the stenographer, being official records.)

20

NICHOLAS D. WORTENDYKE, recalled.

Direct Examination by Mr. Dixon:

Q. You produced last hearing some blue prints of the assessment maps showing Dye Street? A. I did.

Q. Opening of Dye Street. What are those now that you produce? A. These are the tracings of the blue prints we made from tracings on file.

30 Q. On file in your office? A. On file in our office and also a copy in the tax department office.

Q. And they are tracings of what maps? A. They are tracings of the original maps of Hudson City.

Q. In the City Clerk's Office? A. They were in the City Clerk's office, but twenty years ago they ordered them upstairs to the engineering department on account of the maps being in such shape that they were breaking, and tracings were made
40 of them where they were tearing.

N. D. Wortendyke (recalled), for Plaintiff—Direct

Q. Was the map that was produced here by the city clerk the original? A. That is the original of one of these maps.

Q. One of the maps concerning the opening of Dye Street? A. Concerning the opening of Dye Street.

Q. How about the other original map? A. The other original we have hunted high and low for 10 it but it is actually missing.

Q. Have you a correct copy of that, the missing map? A. We have two copies and I compared each copy and they are exactly the same. We have one copy on file in our department and one in the tax department, and they are both the same, because I compared them.

By the Court:

Q. Do I understand, Mr. Wortendyke, there 20 were originally two original parts of the Dye Street opening? A. There were two openings, one opening from Charlotte Street to the railroad, and the other from Tonnele Avenue to the railroad, two distinct openings.

Q. Coming from both directions toward the railroad? A. Both directions, and different dates.

Q. This copy that you first had before you is what? I understood you to say it is a correct copy of the original which was produced this 30 morning? A. This is the one—just hand me that map, please. (Map handed witness.) This is a copy. This takes in from Tonnele Avenue to the railroad.

The Court: That is the one that is under, isn't it. That is a copy of this map?

A. That is a copy of that map.

Mr. Hartpence: May that be marked?

N. D. Wortendyke (recalled), for Plaintiff—Direct

A. These are records in the office.

The Court: It won't hurt you any. That tracing he is now offering or presenting, he says, I take it, you see, Mr. Wortendyke, is a correct copy of an original map entitled "Assessment Map and list for the opening of Dye Street, pursuant to an ordinance approved October 22, 1869.

10

A. It is.

Q. And it shows or purports to show the opening from Tonnele Avenue? A. To the railroad.

Q. Where are the points of the compass, easterly or westerly? A. From Tonnele Avenue westerly.

Q. Westerly apparently to Larch Street? A. Larch Street is only opened to here.

20 Q. This colored portion seems to be from Tonnele Avenue westerly to what appears to be the line of Larch Street? A. Larch Street was opened.

Q. Very well; and then from the westerly line of Larch Street to the easterly line of the railroad? A. Yes.

By Mr. Dixon:

Q. Now you say—

30 Mr. Hartpence: I object to any examination as to this map until I have a chance to interpose my objection to it.

Q. You say the easterly line of the railroad; what do you mean by the easterly line of the railroad?

Mr. Hartpence: I object, on the ground it is irrelevant, immaterial and incompetent.

The Court: Why do you say that?

40 Mr. Hartpence: On the same ground

N. D. Wortendyke (recalled), for Plaintiff—Direct

stated with regard to the books that were offered by the City Clerk a moment ago. My objection to these maps is precisely the same as the objection to the records which were offered.

The Court: Your objection does not go to the competency of this witness to state—

Mr. Hartpence: Does not go to the competency of this witness to state it is a map. I am not insisting upon any formal proof, but I object to these records just the same as the previous records, as incompetent, immaterial and irrelevant, and cannot bind the defendant Pennsylvania Railroad Company. 10

The Court: Now, Mr. Dixon, will you permit me to make a suggestion, so we will have both maps before us at the same time, during any examination that you may make. Now, 20
Mr. Kelley, suppose you marked that as an exhibit?

(Paper marked Exhibit P-2.)

Mr. Hartpence. Now, your Honor permits my objection to be entered on the record?

The Court: Yes.

By Mr. Dixon:

Q. What do you mean; you say the easterly line? A. To the westerly line of Tonnele Avenue. 30

Mr. Hartpence: Now, if your Honor please, if Mr. Dixon is going to examine on these maps I would like my objection to be noted, so I won't have to interrupt each question on the same line as previously.

The Court: It may be so noted.

Q. He said to a certain point, which I think he designated as the easterly line of the railroad. I want to know what he means by the easterly line 40

N. D. Wortendyke (recalled), for Plaintiff—Direct

of the railroad. A. East of the right of way of the railroad.

Q. The East line of the right of way of the railroad? A. Yes.

The Court: I do not want to interrupt, but I thought it would be better to have both of those maps before us at the same time, because apparently they will work together.

10

By the Court:

Q. Now this tracing, Mr. Wortendyke, that we now have before us, do I understand you to say it is also a correct and exact copy of an original map which was not upon the file in the city offices?

A. It is an exact copy of the duplicate map we have in our department. This map belongs to the tax department.

20 Q. I see; and which map was entitled the "Assessment map and list for opening of Dye Street in the City of Hudson, New Jersey, and purports to show in color Dye Street from where to where?

A. From the easterly line of Charlotte Street to the railroad.

Mr. Hartpence: What direction? Let me see. Let me get this in mind this morning. What I am showing here, this part, is the westerly side of this Exhibit P-2?

30

A. Yes.

Q. Then what you would say is that this buff colored portion of this last map spoken of purports to show Dye Street from the—that would be the westerly line of the right of way of the railroad—westwardly to the— A. To the easterly line of Charlotte Street.

The Court: All right. Now let this be marked P-3.

40

Mr. Hartpence: And your Honor will per-

N. D. Wortendyke (recalled), for Plaintiff—Direct

mit me the same objection to be noted to its admission and the examination upon it as the previous records.

The Court: Yes.

(Paper marked Exhibit P-3.)

By Mr. Dixon:

Q. Now, are those the maps that were made for 10 the original assessment and opening of Dye Street under the resolution that has been read? A. The same date and in accordance with those resolutions in that book, the Hudson City book.

Mr. Dixon: Now I offer them in evidence and I will go to this other part.

Mr. Hartpence: I ask that my objection be noted, if your Honor please.

The Court: Which are the same objections or is the same objection, whichever it may 20 be, whether singular or plural, that you offered to the minutes of the City of Hudson and the Street and Water Board of the City of Jersey City?

Mr. Hartpence: Yes.

The Court: That may be entered upon the record, and the maps are already marked respectively P-2 and P3.

By Mr. Dixon:

Q. Now, Mr. Wortendyke, do those maps in 30 conjunction show the assessment area or extent of Dye Street that was opened? A. It shows a line, showing the limit of the assessment.

Q. Limit of the assessment. What were the limits of the assessment as shown by the map? A. Limit of assessment was from the easterly line of Charlotte Avenue on this map—

Q. Referring to what? A. On this map P-3. Easterly line of Charlotte Street to the easterly 40 line of the right of way of the railroad.

N. D. Wortendyke (recalled), for Plaintiff—Direct

Mr. Hartpence: Easterly line?

A. Easterly line.

Q. From what line? Which is west? A. This is west and this going east.

Q. Then it is from where? A. This easterly line of the right of way of the railroad and this
10 is the westerly.

Mr. Hartpence: Don't you mean the westerly line?

A. No, the easterly line.

Q. That means across the railroad towards the east? A. Toward the east, yes, sir.

Q. What is the other area of assessment, referring to Exhibit P-2? A. The other part—all that covers is the number of the lots colored in
20 blue. No line of assessment—that is, placed on this map as there was on this map.

Q. That first map to which you referred then, carries the area of assesment to the point from which this second map refers to? A. That meant to the easterly line of the right of way.

Q. They together would make a complete— A. Would together make a complete opening from Tonnele Avenue to Charlotte Street, I take it.

Q. How does this area of assessment appear on
30 the first map to which you refer? How does it appear? What makes you say that? How does it show? A. On this map P-3.

By the Court:

Q. Now what, if anything, is there on the map which indicates to you the extent of the assessment as you have just testified to? A. That line drawn in and marked "Limit of Assessment."

Q. That line is how? A. That line is drawn—
40 a red line drawn from Charlotte Street to the

N. D. Wortendyke (recalled), for Plaintiff—Direct

easterly line of the right of way of the railroad.

Q. How marked? A. Marked in red and lettered "Limit of Assessment."

By Mr. Dixon:

Q. Do you know whether or not the railroad tracks as now laid out across Dye Street occupy the same width of right of way as appears upon that assessment map? A. That I can't say only from looking at the map—Fowler's map of 1894,—showing that railroad and the tracks. 10

Q. Where is Fowler's map of 1894? What is Fowler's map? A. Fowler's map of Jersey City. It is in book form.

Q. How was it made and where does it come from? A. Made by resolution of—

Q. Resolution of what? A. I think the City Clerk read the resolution. 20

Q. Yes. A. And the adoption of it as to street lines and streets.

Q. And used for what? A. Used for assessing purposes in Jersey City by the Tax Assessors.

Q. And that shows what? A. That shows the streets, lots, different lots throughout the city, and streets, railroads.

Q. Where is it filed? A. Filed—we have a filed copy in the Department of Streets and Public Improvements, and I think there is a filed copy in the Register's office of Hudson County. 30

Q. Now I produce here the Fowler's map of Jersey City—the Hudson City section—just produced from the Register's office of Hudson County. Will you refer to it. Now will you refer to this map, Mr. Wortendyke?

Mr. Hartpence: I will object to any reference to it unless it is first offered.

Mr. Dixon: I want to find out first whether it covers the locus in quo. 40

Mr. Hartpence: All right.

N. D. Wortendyke (recalled), for Plaintiff—Direct

Q. Will you refer to it and tell me whether this book or map which I have produced covers the locus in quo? A. That covers the portion from Tonnele Avenue to the railroad.

Q. That is on page 77? A. Page 77 and on 78, covers the other portion.

Q. Pages 77 and 78 cover the whole portion? A.
10 Page 78 covers the portion from Charlotte Street to the railroad, and page 77 covers from Tonnele Avenue.

The Court: How is that?

A. 78 from Charlotte Street to the railroad and 77 from Tonnele Avenue to the railroad.

Mr. Dixon: We offer this.

Mr. Hartpence: I make the same objection that I did to the previous record.

20 The Court: Same ruling. You may have your objection.

Q. What is this map? A. The title is in front. "Adopted by the Board of Street and Water Commissioners, Jersey City, November 12, 1894, and by the Commissioners of Adjustment for said city October 26, 1894."

Mr. Dixon: Your Honor admit it?

30 The Court: I understand the same objection is the formal one to the others and for the same purpose as the others, not because it is not the proper form of proof of the map, but because of its irrelevancy respecting the defendant company?

Mr. Hartpence: Same objection precisely.

The Court: Yes. I will permit it.

Q. Referring to this Fowler's map, can you state whether or not there are tracks laid across
40 this public street—or this street—this Dye Street,

N. D. Wortendyke (recalled), for Plaintiff—Direct

that were not in existence at the time of the opening of Dye Street? A. The opening of Dye Street maps show no tracks, but Fowler's map does.

Q. How many tracks does Fowler's maps show?

A. Well, the time Fowler's map was made four tracks across there—1894.

Q. Now what are these Post maps? What are the Post maps—the 10th? A. 9th, 10th, 11th and 12th wards. That is a map of Jersey City made by Levi W. Post, in 1870. The same surveyor made these opening maps.

Q. That antedates Fowler map? A. It certainly does, yes.

Q. Now, I produce the Post map from the Register's office of Jersey City, Hudson County. Will you identify them and look them over and tell me whether or not it shows Dye Street? A. It does show Dye Street. 20

Q. From what point? A. From Tonnele Avenue to within this territory, Charlotte Street.

Q. Can you state what the width of that street is? A. Dye Street?

Q. Yes.

Mr. Hartpence: I object, on the ground the map itself shows.

A. I think the Post map shows it. Our opening map shows it. 30

The Court: These other maps, P-2 and 3, do they show the width, Mr. Wortendyke?

A. Yes, sir, sixty feet.

The Court: It would be well, Mr. Dixon, if we should see that Post map.

Mr. Dixon: You are more accustomed to handling maps than I am, Mr. Wortendyke; I wish you would come down and try to exhibit this. It is a pretty large proposition. Show 40

N. D. Wortendyke (recalled), for Plaintiff—Direct

it to the court and jury and point out Dye Street.

Mr. Hartpence: Do you offer it?

Mr. Dixon: Yes, I offer it.

Mr. Hartpence: I make the same objection as to the previous records.

10 The Court: The same objection may be entered on the record.

(The witness exhibits the map.)

A. Dye Street is shown on this map—that is Map 9, 10, 11 and 12, from Tonnele Avenue to Charlotte Street.

Q. And marked Dye Street? A. Marked Dye Street.

20 Q. Show it to the jury? A. (Witness indicates to the jury.) Here is Dye Street running from Tonnele Avenue to Charlotte Street.

Q. Where is the railroad? A. This is the railroad, crossing here.

Q. And that map was made when, what year? A. That map was made,—“Map of the 9th, 10th, 11th and 12th Wards, formerly City of Hudson, made for the Mayor and Aldermen of Jersey City, 1871.

Q. The year after the consolidation? A. Yes, practically.

30 Q. All right.

Cross Examination by Mr. Hartpence:

Q. Now this tracing, Mr. Wortendyke, marked P-3, delineates Dye Street from Charlotte easterly to the railroad? A. Railroad.

Q. In buff or yellow, doesn't it? A. Yes.

Q. But it does not show any buff beyond the westerly side of the railroad on the map? A. Not in colors, no, sir.

40 Q. On the tracing P-2 it delineates Dye Street in pink? A. Yes.

N. D. Wortendyke (recalled), for Plaintiff—Direct

Q. From the easterly side of the railroad right of way to Larch Street and then from Larch Street easterly to Tonnele Avenue? A. Yes, sir.

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

Q. And neither of these tracings delineate Dye Street as crossing that railroad right of way, do they? A. The Post map of the—

Q. No; my question is neither of these two maps 10 delineate Dye Street as crossing?

Mr. Dixon: What do you mean by that, delineates?

Mr. Hartpence: Let the witness say.

Mr. Dixon: I think we ought to know.

Mr. Hartpence: He says it is delineated on the map.

Mr. Dixon: He says yes.

Q. My question is, neither of these maps de- 20 lineate Dye Street as crossing the railroad right of way? A. From the limits of the assessment—

Q. Answer the question.

Mr. Dixon: How can he?

(Questioned repeated by stenographer.)

The Court: You can answer that yes or no.

Mr. Dixon: According to what he means.

The Court: But you may answer it yes or no with an explanation.

A. One map is colored to the railroad line showing the opening to the railroad line and this P-3 is colored from Charlotte to the railroad line, but it has a red line limiting or fixing the limits of the assessment which goes across the railroad. 30

Q. Now my question is, regardless of the red line which marks the limits of assessment, the buff line on the one, on P-3, and the pink line on P-2, simply run to the respective lines of the 40

N. D. Wortendyke (recalled), for Plaintiff—Direct

right of way and do not cross it, do they? A. To the right of way which was a right of way. That was a right of way, and there was no need of coloring it.

Q. Yes, but my question is that the coloring does not extend across the right of way?

Mr. Dixon: That appears on the map.

10

A. Not on this assessment map.

Q. Or on either one of these two? A. On neither one.

Q. But you do say that the red line which is marked "Limits of Assessment" runs easterly from Charlotte Street to and across the railroad right of way? A. To the easterly line.

Q. To the easterly line of the railroad right of way? A. Yes.

20

Q. Now that is the red line at the bottom of this map? A. Yes.

Q. And near West St. Paul's Avenue? A. Yes.

Q. Now I call your attention on P-3 to another red line which is toward the upper part of the map and between Dye Street and Cherry Lane, which is also marked "Limits of Assessment." That runs from Charlotte Street, does it not? A. Charlotte Street.

30

Q. —easterly to the westerly line of the right of way of the railroad; isn't that right? A. That is what it limits, that is, on that side of the street.

Q. That shows the limits of assessment on that side of the street? A. Yes.

Q. Which side of the street is that, north or south? A. Which side of—

Q. Of Dye Street, is that north or south? A. That is south.

Q. South of Dye Street.

40

The Court: The first line spoken of is on the north side?

N. D. Wortendyke (recalled), for Plaintiff—Cross

A. Yes.

Q. P-2 does not show any mark indicating limits of assessment, does it? A. Only shows the lots numbered that were to be assessed.

Q. They are numbered in what color? A. In blue. This had been opened; there was no need of showing the line. This was opened previous.

10

By the Court:

Q. Let me get this right. You mean by that, Mr. Wortendyke, that the opening as alleged to be shown on P-3 had been made prior to the opening alleged to be shown on P-2? A. It had.

Q. All right.

By Mr. Hartpence:

Q. And P-2 opening was made subsequent to the opening referred to on P-3? A. It was, yes. 20

Q. But you say that these lots which are marked in blue were subject to assessment? A. Subject—

Q. On the opening of part of Dye Street which appears on P-3—or P-2? A. They were assessed on the line between the easterly line of the railroad—

Q. No, that is not my question? A. Or the westerly—

Q. Do these lots marked in blue on P-2 which you say were subject to assessment, were they 30 subject to assessment for the opening of part of Dye Street which appears on P-2 in pink or that part of Dye Street which appears on P-3 in buff? A. The lots lettered in blue, or figures in blue, on P-2, show the actual assessment for the opening between the railroad and Tonnele Avenue, and also these lots were assessed for the benefit for getting through to Tonnele Avenue, there was another small assessment.

Q. When you say, "these" you mean those to 40

N. D. Wortendyke (recalled), for Plaintiff—Cross

the west of Dye Street? A. West of Dye Street.

Q. The west of the railroad? A. West of the railroad. Simply for the benefit of opening that street to Tonnele Avenue, they paid two assessments.

By the Court:

10 Q. Let me ask you again: You speak of assessments, as you have just recently, as to the lots numbered in blue. A. Yes.

Q. Both to the east and the west on P-2—east and west of the railroad right of way on P-2. What assessments do you mean? Do you mean assessments for benefit accruing or alleged to accrue to the different properties from the opening, or do you mean assessments for damages for the taking of the land? A. Assessments for damages
20 for taking the land too, as well, and also for the benefit that this portion received for the opening of that street to the other.

Q. On that P-2?

By Mr. Dixon:

Q. When you say this portion— A. Of P-3.

Q. East or west of the railroad? A. West of the railroad.

Q. For the benefit of the opening the portion
30 to the east of it? A. That is it.

By the Court:

Q. Is there anything upon that P-2 which shows what properties were assessed for benefits and what properties had assessments for damages for land taken for the opening? Is there anything that distinguishes those lots or parcels? Understand my question, do you because you have spoken of two kinds of assessments. A. Yes.

40 Q. One for benefits? A. Yes.

N. D. Wortendyke (recalled), for Plaintiff—Cross

Q. And the other for damages for land taken. Is there anything on the maps which indicates those two? A. There is an assessment for damages for taking the property, and also for benefits after taking it, if there were any—if there are any benefits.

Q. That is shown how? A. That is shown on the map. Here is awards for land taken—benefits 10 and damages.

Q. That is a table or schedule which appears on the lower end of the map? A. Yes.

Q. And that also is true as to P-3, is it? A. That is not true as to P-3, as far as damages—as far as lands taken, for that had been opened.

Q. You don't understand me. P-2 now, by its schedule or table, shows the assessment for benefits and the assessment for damages to lands taken for the opening shown by that particular map? 20

A. By that particular map.

Q. Is that also true that there is a schedule of a like character that is attached or made a part of Exhibit P-3 which shows assessments for benefits and assessments for damages for lands taken in the opening of Dye Street shown by that map?

A. It shows awards for lands taken, also benefits.

Q. Now then by reference to those two schedules and those two maps can you tell what lands were taken for which awards for damages were made? 30

A. I can, because there is a seperate column.

Q. All right. That is what I want to know. Let's see. There appears in this schedule these heads, "Owner's name, block number, lot number, land taken, benefits, incidental, total." A. Yes.

Q. That is true also of P-2? A. That is true also of P-2.

By Mr. Hartpence:

Q. Now Mr. Wortendyke, this red line marked 40

N. D. Wortendyke (recalled), for Plaintiff—Cross

“Limits of Assessment” to the north of Dye Street, toward West St. Paul’s Avenue, simply indicates the extent of the property which was liable for assessment because of the opening or improvement to Dye Street, isn’t that right? A. Yes, sir.

Q. And on the south of Dye Street that extent
10 only ran from Charlotte Street easterly—to the westerly line of the railroad right of way? A. So the map shows.

Q. And nothing was assessed beyond that point?

The Court: Now, using the word “assessed” you mean assessed for benefits, do you?

Mr. Hartpence: My question is general. Nothing was assessed beyond that point as
20 far as the map shows for either purpose.

The Court: All right; in both senses?

Mr. Hartpence: Yes.

The Court: I have in mind what I have already asked the witness about, the two classes of assessment.

Q. Suppose this map shows, P-3, the area south of Dye Street only ran as indicated by this red line from Charlotte Street easterly to the westerly
30 line of the railroad right of way? A. That is what the map shows.

Q. And that area north of Dye Street ran from Charlotte Street easterly to the westerly line? A. The easterly.

Q. To the easterly line of the right of way of the railroad? A. Yes.

Q. And neither of those red lines has anything to do or doesn’t indicate in any way the actual extent to which Dye Street was opened, do they,—
40 neither of these red lines? A. Why, in my view

N. D. Wortendyke (recalled), for Plaintiff—Cross

of it—

Q. Never mind your view of it. My question is it does not indicate.

Mr. Dixon: That is not the question.

(Question repeated by stenographer.)

Mr. Dixon: Now he is going to tell him what he thinks about it.

Mr. Hartpence: That does not call for the expression of his opinion. My question is that neither of them indicates. 10

Mr. Dixon: And I think it certainly does call for that.

A. I don't think it was necessary to open a right of way where there was a right of way.

Mr. Hartpence: I move to strike it out.

The Court: Why can't that be answered yes or no, gentlemen? 20

Mr. Dixon: I do not think it is possible. That is an expert question to an expert witness.

Mr. Hartpence: He is produced here as an expert witness to interpret a map.

Mr. Dixon: Oh, no.

Mr. Hartpence: That is what you put him on for.

Mr. Dixon: He is one of the engineers of Jersey City. 30

The Court: I am inclined to think it may be answered yes or no.

(Question repeated.)

Mr. Dixon: I submit that it cannot. It might be, but I do not say it cannot be.

Mr. Hartpence: If it is might be (it is capable).

Mr. Dixon: Yes.

A. I can't say.

40

N. D. Wortendyke (recalled), for Plaintiff—Cross

Mr. Hartpence: All right.

Mr. Dixon: Cannot say yes or no?

A. No; only my judgment—

Mr. Hartpence: If Mr. Dixon wants to bring out his judgment on direct examination I cannot control that.

10 Mr. Dixon: I submit he is entitled to answer the question by his judgment.

The Court: I think it can be answered yes or no.

Mr. Dixon: He says he cannot answer it yes or no.

The Court: All right; he has answered it then.

By Mr. Hartpence:

20 Q. Now, Mr. Wortendyke, referring to Fowler's map pages 77 and 78—first to page 77, will you step down here just a moment please? I don't know whether it is possible for you to hold it up so the jury can see it. Referring to page 77, calling your attention to Dye Street where it intersects the railroad tracks; those railroad tracks are designated on this map as the tracks of the New York, Susquehanna and Western Railroad and the Paterson & Hudson River Railroad; isn't
30 that true? A. Yes.

Q. And the Pennsylvania Railroad tracks are down at the extreme left of the railroad tracks and run along Newark Avenue, do they not? A. No, sir; cross Newark Avenue, running around to Newark Avenue, to this side.

Q. The Pennsylvania Railroad tracks do not show in any way on this map as running north of Newark Avenue, do they? A. Not on that map.

40 Q. No. Now take map page 78, the same map, and I call your attention to Dye Street where it

N. D. Wortendyke (recalled), for Plaintiff—Cross

intersects the railroad; and there again at the extreme right on that map those railroad tracks that are designated as New York, Susquehanna & Western Railroad and Paterson & Hudson Railway Company—aren't they? A. Yes.

Q. And Pennsylvania Railroad tracks are at the extreme bottom of the map and do not run—are not shown to run north of Newark Avenue, 10 are they? A. No.

Mr. Hartpence: Can I see that Post map just a moment, please?

(Witness and the court examine tracing.)

Q. Now on this Post map, Mr. Wortendyke, will you point out Dye Street where it intersects the railroad?

(Witness complies.)

Q. And on this map the railroad at this point 20 is designated—bears no designation, does it? A. That is before the New York and Susquehanna was built. That is the New Jersey Railroad and Transportation Company and this is a branch—this road branches from that line and runs north.

Mr. Dixon: He said something about the railroad was not built.

A. New York, Susquehanna & Western was not 30 built at the time of the making of this map.

Q. Do you know when the New York, Susquehanna & Western Railroad was built there? A. I do not.

Q. And the New Jersey Railroad and Transportation Company ran along from the—what point did you start? A. This only covers Hudson City alone—old Jersey City and Hudson City.

Q. All right. Up to Newark Avenue? A. Yes.

Q. And then on westerly along Newark Avenue? 40 A. Across the Hackensack.

N. D. Wortendyke (recalled), for Plaintiff—Cross

Q. Crossing the Hackensack, which is the right of way of the Pennsylvania Railroad as shown on P-2 and P-3; is that right? A. Yes, sir, as shown on the Fowler map.

Q. On the Fowler map? That was wrong. Fowler map page 77 and 78? A. Yes.

10 Q. And at this point on Newark Avenue about opposite Corbin Avenue, the easterly side of Corbin Avenue, is where the line of railroads branches off from the line of New Jersey Transportation Company and turns north and goes up around by Dye Street; isn't it? A. Yes.

Q. And that is the right of way that is designated on the Fowler map as the New York, Susquehanna and Western and the Paterson and Hudson River? A. Yes, as the Paterson-Hudson.

20 Q. The New York Susquehanna was not built at the time this map was made? That is correct? A. Yes.

Q. Beginning at the point opposite Corbin Avenue? A. Yes. Running from the easterly line of Corbin Avenue produced northerly.

Q. And passing this point marked Dye Street is the railroad right of way which is designated on the Fowler map as being the tracks of the New York Susquehanna and the Paterson and Hudson River Railroad; isn't that correct? A. Yes.

30 Q. How do you know what railroad was there when this map, 1871, the Post map, was made, there at Dye Street? A. Well—

Q. Do you know? A. I remember when I was a little boy riding on that road. That was the Erie at the time and used to come in on the Pennsylvania road. There was no Erie Railroad built at this time; there was no ferry at that time.

Q. That is where the Erie trains used to come in? A. Yes, I remember I was quite small.

40 Q. But you have no direct knowledge of who

N. D. Wortendyke (recalled), for Plaintiff—Cross

owned or operated the line at that time, have you?

A. No.

Q. There was another question I wanted to ask you, Mr. Wortendyke, taking P-3 first, does that show the date when that portion of Dye Street was opened, which is delineated on P-3 westerly from the right of way? A. The resolution was adopted October 3, 1866, and the map was filed 10 August 14, 1866.

Q. Does that indicate that the assessment proceeding was complete at that time? A. After the map was filed, yes.

Q. Does P-2 indicate when that portion of Dye Street which is delineated in pink on that exhibit was opened? A. January 14, 1870.

Q. Map was filed at that time? A. Yes; one o'clock A. M.

Q. That shows that the— A. 11 o'clock, A. M. 20

Q. That shows that the assessment was then complete and that was filed? A. And collectible.

Q. And collectible? A. Yes.

Q. From your own knowledge of the situation there where the accident to Frank Brooks occurred and your experience as an engineer with that location, can you state how many tracks were there on December 14, 1915? A. I cannot.

Q. Or how long they had been there in their then form? A. I cannot, no, sir. 30

Q. Or whether the physical situation that exists there where Dye Street intersects the railroad tracks has changed any from 1866 to date? A. Oh, from 1866? I couldn't say that.

Mr. Dixon: Can't say whether it has changed any since that?

(Question repeated by stenographer.)

A. Since 1866?

(Question repeated by stenographer.) 40

N. D. Wortendyke (recalled), for Plaintiff—Cross

A. Yes; they have a street there now, an improved street, one portion of Dye Street.

Q. Which portion is that? A. That is from Tonnele Avenue to the railroad.

Q. To the railroad. That was opened in 1870, according to your map? A. Yes.

10 Q. Now has the physical situation with regard to the railroad right of way changed there since that time? A. The street has been graded, flagged and curbed to the railroad.

Q. That is the street? A. That is the street.

Q. To the railroad? A. Yes.

The Court: That is from Tonnele Avenue toward the railroad?

A. From Tonnele Avenue to the railroad.

20 Q. Has the railroad right of way changed at that point since 1870? A. There are more tracks there than there were.

Q. More tracks than there were? A. Yes; in that regard it has changed.

Q. Aside from that, it is about the same? A. About the same, yes.

The Court: For my own information, is Tonnele Avenue on the side of the railroad which Gillespie's is on?

30 Mr. Hartpence: No, it is on the opposite. Tonnele is on the easterly side.

The Court: My conception of the meridian is all gone, I think.

Mr. Hartpence: Tonnele Avenue, if your Honor please—

Mr. Dixon: Let Mr. Wortendyke put it on the record.

40 Q. Where is Tonnele Avenue with respect to the railroad right of way? A. Tonnele Avenue is east of the railroad right of way.

N. D. Wortendyke (recalled), for Plaintiff—Cross

Q. That is away, in the opposite direction, from the Hackensack River? A. Yes.

Q. Running towards the Hudson River? A. Yes.

Q. Where is Charlotte Street? A. Charlotte Street is between the railroad and Hackensack River, running in a westerly direction.

Q. Westerly end of Dye Street? A. Yes, sir. 10

By the Court:

Q. For my own information again, do you know where Gillespie's Varnish place is? A. Yes, I do.

Q. Which side of the railroad right of way is that on? A. On the westerly.

Q. Towards Tonnele Avenue? On the Tonnele Avenue side or the other side? A. Towards Charlotte Street.

Q. I see. 20

By Mr. Dixon:

Q. And Lorillard's place is on the east? A. Lorillard's factory is on Newark Avenue west of the railroad. Lorillard's—

Q. No; east of the railroad—it is up on— A. Covers a couple of blocks.

Q. East of the railroad, isn't it? A. It is north of the Pennsylvania Railroad and west of the right of way; fronts on Newark Avenue. 30

By Mr. Hartpence:

Q. Well, Dye Street is there and Lorillard's factory is there? A. Their building is, I think, up in the direction of Dye Street, I mean the main factory.

By the Court:

Q. The Dye Street end of the building, is that on the Tonnele Avenue side of the railroad right 40

N. D. Wortendyke, (rec'd) for Plaintiff—Redirect

of way or not? A. You mean Lorillard's buildings?

Q. Yes. You said there was a part of the Lorillard factory which was on Dye Street? A. I don't know whether it is on Dye Street or not. I know they bought property up in that direction. That I couldn't say. I haven't been down there
10 since Lorillard made the improvement, in that direction.

Redirect Examination by Mr. Dixon:

Q. You say more tracks have been laid during this period than were originally there in 1870?

A. Well, the Fowler map showed more tracks.

Q. That is what I want? A. Than the Post map.

Q. How many tracks does the Fowler map
20 show? A. I think that showed more tracks there before.

The Court: I think he said so before.

Q. How many do the Post maps show? A. The Post only showed a railroad line—a track.

Q. There is something about this map that I would like to have you clear up a little. I am referring now to P-3. You have spoken of the westerly right of way of the railroad company? A.
30 Yes, sir.

Q. Does this map show the width of that right of way in any portion? A. It does not.

Q. I notice that towards the bottom of the map and to the north of the buff colored street or roadway the right of way seems to be considerably wider than it does to the south of the buff colored roadway? A. It is shown so on this map P-3.

Q. I don't understand what that means? A. I don't exactly understand unless—

40 Mr. Hartpence: I object to his conjecturing, if he does not understand.

N. D. Wortendyke, (rec'd) for Plaintiff—Redirect

Q. What do you mean, which is the right of way of the railroad? A. The right of way of the railroad according to this map and south of Dye Street, the width is just shown narrower than it is north of Dye Street.

Q. Do you mean— A. Much wider north of Dye Street than it was south of Dye Street at that time. 10

Q. You mean to say according to this map the right of way appears to be of two different widths?

Mr. Hartpence: I object. Mr. Wortendyke has already stated it does not show the width of the right of way, and these maps were offered not for the purpose in any event of showing the width of the right of way, but merely for assessment purposes, and it seems to me therefore this witness is incompetent 20 now to conjecture what these lines and distances mean in that respect. I do not think it is competent. I do not think it can shed any real light on the situation.

By the Court:

Q. Does this map to which you are referring show a schedule? A. Yes, sir.

Q. At Dye Street? A. Yes, sir, at Dye Street.

Q. When you referred to buff line approaching 30 and coming to the right of way, to which of those two lines did you refer?

Mr. Hartpence: I object on the ground the map speaks for itself.

Q. You see it enters into— A. Yes, I see.

Q. All depends upon what he says is the right of way line? A. The right of way line on P-3 where Dye Street line comes in, is much narrower than it was north of Dye Street. 40

N. D. Wortendyke, (rec'd) for Plaintiff—Redirect

Mr. Hartpence: That is all right.

A. There was a break at this point.

Mr. Hartpence: The map shows it.

A. Break at that point.

10 By Mr. Dixon.

Q. Now then, has the railroad company any tracks across that part of Dye Street which is within the boundary of the larger area of the right of way? A. Fowler's map shows it has.

Mr. Hartpence: I object to that, if this witness is not going to testify from his own knowledge. He has already said that his knowledge is based upon this map, referring to the big Fowler map.

20 The Court: I am going to ask you: Is the Fowler map introduced and offered for any purpose at all of locating the tracks of the railroad? May it not be said it may be useful for that purpose?

Mr. Dixon: I think it is legitimate evidence for that purpose.

Mr. Hartpence: Does not refer to December 4, 1915, none of these maps.

30 The Court: Of course that is the pertinent inquiry.

Mr. Hartpence: That is the ground of my objection, it does not refer to that time.

40 The Court: What he says now is that the question, if it is pertinent, must refer to December 4, 1915, as to the location of the tracks, or any of the tracks of the railroad company at that time with reference to that portion of Dye Street shown in buff which seems to come into that break, I will call it, in the right of way.

N. D. Wortendyke, (rec'd) for Plaintiff—Redirect

Mr. Dixon: Here is the Fowler map. I want to show now and this witness only testifies to what perhaps we could figure out from the maps if we were skilled enough to figure out from the maps—

The Court: Pardon me. The difficulty is the Fowler map goes back to '94, while the time that we are concerned in, as far as the happening of any accident is concerned, is 1915. 10

Mr. Dixon: I can't do it all at once, your Honor; I expect to follow that up.

The Court: All right.

Mr. Hartpence: My objection is to the competency.

Mr. Dixon: I have more witnesses than you have here.

Mr. Hartpence: I do not object to the witness, but I object to Mr. Wortendyke testifying, because he is not competent as to the tracks at that time. 20

Mr. Dixon: Yes he is. You brought that out.

The Court: Yes; he says in one map, which was the earlier one, it only shows a line of tracks, and in the Fowler map it apparently shows four lines of tracks.

Mr. Dixon: In the picture it shows. 30

The Court: I don't remember.

Mr. Dixon: Six, I think.

The Court: I do not think Mr. Wortendyke has said at any time he has any knowledge of his own as to how many tracks there are.

Mr. Dixon: That is not my question. My question is whether or not, according to the Fowler's map or any of the maps, it appears that there are railroad tracks upon this portion. 40

N. D. Wortndyke, (rec'd) for Plaintiff—Recross

The Court: If you are insisting upon the question, take your exception. I do not think it is relevant. I do not see that you are connecting it up. If you insist upon it, take it over objection then, which may be entered.

10 Q. Does it appear by any of the maps that there are railroad tracks on that portion of the buff colored street way which is within the most westerly line of the right of way as appears on P-3 extended? A. Shows so on the Fowler map.

Recross Examination by Mr. Hartpence:

Q. You have no personal knowledge of it yourself, have you? A. Only comparing this map with the Fowler map.

20 Q. You have no personal knowledge of the conditions on December 4, 1915? A. None whatever.

Q. You are simply going by what you find on the map? A. What I find on the map.

Q. All right.

Mr. Dixon: I think perhaps we ought not to have these maps.

The Court: We shall certainly need them.

The Witness: These are records.

30 The Court: I can't help it. For myself I would not say that I would be willing to go with any degree of certainty and safety without having the maps here.

The Witness: We have blue prints?

The Court: Have you blue prints?

The Witness: I had blue prints made of them and I brought these up.

Mr. Dixon: There will be no objection to leaving the blue prints?

The Witness: I have blue prints on these, Mr. Hartpence.

40 Mr. Hartpence: Not if Mr. Wortendyke will say they are exact copies of them.

Frederick Dietz, for Plaintiff—Direct

The Witness: Same thing. Just made by the sun, that is all.

The Court: You referred to Dye Street on P-3 as shown in buff, and P-2 in pink.

The Witness: The colors will show better on these than on the blue prints. If I can get them back—

The Court: We will take care of it here. 10
Counsel will take care of them and see that they get back to the office.

The Witness: Very well.

Mr. Dixon: Leave them right here under his Honor's eye.

FREDERICK DIETZ, SWORN.

Direct Examination by Mr. Dixon: 20

Q. Mr. Dietz, what is your business? A. Barber.

Q. Where do you live? A. 387 St. Paul's Avenue.

Q. How long have you lived there? A. Since 1883.

Q. How near to Dye Street is that? A. About two hundred feet.

Q. Have you known Dye Street during the time you have lived there? A. Yes, sir. 30

Q. Have you traveled it? A. Yes.

Q. From where to where? A. Well, sometimes when I went across—came down Dye Street to go across to Gillespie's factory, or when I come up from the river, I used to cross over that way and come home.

Q. Practically from one end of Dye Street to the other? A. Yes—well, not practically from Dye Street, but I come up the side streets as far as Charlotte Avenue or James Avenue and cross 40
over that way and come up that way.

Frederick Dietz, for Plaintiff—Direct

Mr. Hartpence: I object and move to strike it out as incompetent, irrelevant and immaterial. Of course I couldn't tell what the answer would be. I do not think it is responsive to the question.

The Court: Oh, this last one?

Mr. Hartpence: Yes.

10 The Court: I don't know that it is. I do not think it was what Mr. Dixon was reaching for.

(Question and answer repeated by stenographer.)

The Court: Why isn't it competent or relevant or material?

Mr. Hartpence: Any one might travel from one end of Dye Street to the other, if your Honor please, but it could not be material to
20 bind the defendant in this case.

The Court: All right. Take your exception. I will overrule the objection.

Q. Have you known that Dye Street to be used by people walking up and down or going from one place to another?

Mr. Hartpence: I object to it on the same grounds.

30 A. Yes, sir.

The Court: Same ruling.

Q. During the time you lived there in St. Paul's Avenue? A. Yes, sir.

Q. For how many years have you known of its use by the public?

Mr. Hartpence: I object to it on the same grounds.

The Court: Same ruling.

40 A. Ever since I have been living there.

*Frederick Dietz, for Plaintiff—Cross**Cross Examination by Mr. Hartpence:*

Q. You mean by that, do you not, Mr. Dietz, you would come down the street or go up the street and you would walk right across the railroad tracks that you found there; is that right?

A. Yes.

Q. And there are a number of tracks there aren't there? A. Yes. 10

Q. Half a dozen or so? A. Well, I don't know as there is a half a dozen; I should judge about four.

Q. You would walk right across the ties and on across the other side? A. Yes.

Q. No sidewalk there across the railroad? A. No, sir.

Q. No planking there across the railroad? A. No, sir. 20

Redirect Examination by Mr. Dixon:

Q. No gates or fence? A. No, sir.

Mr. Hartpence: I object to it as immaterial, irrelevant and incompetent, and on the ground, if your Honor please, particularly that that would go to whoever might be the owner of the railroad right of way but certainly not to a mere user of it, which the testimony now shows this defendant is.

The Court: I will overrule that. Take 30 your exception.

Q. No gates?

The Court: He has answered "No, sir."

Mrs. E. Greenwald, for Plaintiff—Direct

MRS. ELIZABETH GREENWALD, SWORN.

Direct Examination by Mr. Dixon:

Q. Mrs. Greenwald, where do you live? A. 202 Dye Street.

Q. Are you married? A. I am married, yes.

Q. Live there with your family? A. Yes.

10 Q. How long have you lived there? A. Six years.

Q. Where is 302 Dye Street?

The Court: Two hundred and two.

A. Two hundred and two.

Q. 202, with reference to the railroad crossing, the Susquehanna Railroad crossing? A. Yes.

Q. Where is your house from that? A. West.

Q. West of that? A. Yes.

20 Q. How far west? A. Well, I should judge a block.

Q. On which side of the street? A. On the north side.

Q. How many have you in your family? A. Eight.

Q. How many houses are there along that street on your side? A. Well, there are six in the row that I live in.

Q. In that row? A. Yes.

30 Q. You walk up and down Dye Street, do you? A. Regularly.

Q. Have ever since you have lived there? A. Ever since I have lived there.

The Court: How long is that?

The Witness: For six years.

Q. The railroad is between you and Tonnele Avenue, isn't it? A. Yes, sir.

Q. Ever go to Tonnele Avenue? A. Yes.

40 Q. How? A. Right across the railroad.

Mrs. E. Greenwald, for Plaintiff—Cross

Mr. Hartpence: I object to it as immaterial, irrelevant and incompetent, and ask to strike it out.

The Court: I will rule the same way as I did before. Take your exception.

Q. Have you always done that since you lived there? A. Generally, yes, as a general rule. 10

Mr. Hartpence: Same objection.

A. My family also.

Mr. Hartpence: Same objection.

Q. Have you seen others of the public walking up and down—

Mr. Hartpence: Same objection.

The Court: Same ruling. Take your exception. 20

Q. Crossing that? A. Yes.

Cross Examination by Mr. Hartpence:

Q. You just walked across the tracks when you got there, is that right? A. Yes, sir.

Q. Over the ties? A. Yes.

Q. And the rails? A. Yes.

Q. Ever find any railroad cars there blocking your way? A. Very often. 30

Q. What did you do then? A. Why, I went and walked and walked along until I came to an opening and crossed over there.

Q. Came to an opening in what? A. The cars, where they were apart.

Q. Up to another street? A. Well, no, we don't generally have to walk that far. There is generally an opening before we come to the next avenue.

Q. Then you would go right in between the cars, would you? A. Yes. 40

Mrs. E. Greenwald, for Plaintiff—Redirect

Q. Ever find your way across there blocked?

A. Very often.

Q. Long enough to cause you to go to one of the other streets to get over? A. Why, yes.

Q. Which street is nearest Dye Street? A. St. Paul's Avenue.

Q. That is to the north? A. To the north.

10 Q. What street is nearest to the south? A. Newark Avenue.

Q. Big coal trestle right there at Dye Street, is there? A. Not on Dye Street.

Q. Right near Dye Street? A. It is near—south of Dye Street.

Q. Toward Newark Avenue? A. Toward Newark Avenue.

Q. Cars run up on that inclined trestle, do they not? A. Well, I have never noticed.

20 Q. About how high is the trestle there? A. I couldn't tell you, I am sure.

Q. That is all.

Redirect Examination by Mr. Dixon:

Q. Do they station any flagman there or is there any flagman? A. None whatever.

Mr. Hartpence: I object to it as immaterial.

30 Q. When trains are moving—

The Court: One minute. The question of gates or flagmen, Mr. Dixon, how can that have any relevancy as toward this defendant? Having in mind it is not clear now that this was the property of the present defendant company, they were simply operating over it.

40 Mr. Dixon: They are operating over it, therefore they may be charged with maintaining flagmen on it. It does not appear that they were not. Suppose it does appear that they do maintain a flagman on it?

James Amen, for Plaintiff—Direct

The Court: Take your exception to it then, Mr. Hartpence. I do not see the relevancy of it myself.

Mr. Hartpence: I pray an exception.

Mr. Dixon: Suppose it appeared that—and I think it may appear that when they are moving trains or about to move trains over this crossing, over this street, that they do 10
have a flagman out there.

The Court: You mean a train flagman, one of the train crew?

Mr. Dixon: Yes; somebody, a train flagman.

The Court: That is a different proposition. As I take your proposition, I thought you meant did they have a crossing flagmen?

Mr. Dixon: Even if they had a crossing flagman, would not that have a bearing on 20
another branch of the case? Might it not?

The Court: Well, I allowed it subject to his objection, which he has.

Q. Do you know whether or not when trains are moving there any flagmen?

Mr. Hartpence: Will your Honor permit the defendant an objection to the whole line?

The Court: Yes, you may have.

30

A. I don't know.

Q. Oh, you don't know? That is all.

JOHN AMEN, SWORN.

Direct Examination by Mr. Dixon:

Q. What is your business, Mr. Amen? A.
Wood dealer.

40

James Amen, for Plaintiff—Cross

Q. Where do you live? A. 37 James Avenue.

Q. And how long have you lived there? A. Fifteen years.

Q. How near Dye Street is that? A. One block.

Q. How long have you known Dye Street? A. Twelve or fifteen years.

Q. During that time have you used Dye Street?

10 A. Yes.

Q. From what part of Dye Street to what part?

Mr. Hartpence: I object on the same ground that I made in my previous objection.

Mr. Dixon: You said you were going to object in one objection.

Mr. Hartpence: If it is understood that it applies to each witness.

20 The Court: I understand to this line you are desirous of placing the objection that you had to each preceding one and to the same purport.

Mr. Hartpence: Yes.

The Court: I will so understand and I will overrule the objection, to which your exception may be noted.

Q. How have you used Dye Street? Where did you go? A. From James Street up to Tonnele.

30 Q. That crosses the railroad? A. Goes to the railroad, yes, sir.

Q. You have been doing that for how long a time? A. Oh, for about fifteen years.

Q. Seen other people walking or using Dye Street the same way? A. Once in a while.

Q. During the whole of that time? That is all.

Cross Examination by Mr. Hartpence:

Q. You mean when you got up to the railroad you go across the tracks; isn't that the idea? A.

40 Yes.

August Kloeber, for Plaintiff—Direct

Q. Walk across the ties and the rails there; isn't that right? A. Yes.

Q. There is another street, isn't there, just a little ways toward the river, St. Paul's Avenue, that you go across? A. Well, there is a street there, St. Paul's Avenue, but it is nearer for me to go up Dye Street than St. Paul's Avenue.

Q. Nearer for you to go up Dye Street? A. Yes. 10

Q. Short cut? A. Yes.

Q. Now you can go down south of Dye Street, down Newark Avenue and crossing Van Winkle, couldn't you? A. Well, Van Winkle Street there is the same as Dye Street.

Q. Same as St. Paul's Avenue? A. Well—

Q. Same as St. Paul's Avenue? A. They run the same way.

Q. Ever find any cars standing there on the railroad at Dye Street? A. Sometimes. Some- 20 times I do not.

Q. Sometimes there are a lot of them there, aren't there? A. Eh?

Q. Sometimes there are a lot of them there? A. Well, sometimes there is and sometimes not any.

Q. Sometimes they are moving back and forth, aren't they? A. Well, that has happened too, yes.

Q. What do you do when you find that situation? A. Well, then we have to wait there until they get through or take another road. 30

Q. Take another road. That is all.

AUGUST KLOEBER, SWORN.

Direct Examination by Mr. Dixon:

Q. Mr. Kloeber, what is your business? A. Carpenter.

Q. Where do you live? A. I live in Amelia 40 Street, back of James Avenue.

August Kloeber, for Plaintiff—Cross

Q. Amelia Street, what number? A. 14.

Q. Is that anywhere near Dye Street, Jersey City? A. Well, about two or three blocks.

Q. How long have you lived there? A. Eighteen years.

Q. During that time have you known—during all of that time have you known Dye Street? A.

10 Yes.

Q. And you used it? A. Once in a while.

Q. Well, once in a while? A. Yes.

Q. When you had occasion to go through Dye Street you have gone through it? A. For a short cut, maybe.

Q. Have you known other people using it during that time? A. Yes, lots of people go across.

Q. Eh? A. Lots of people walk across there.

Q. From what part of Dye Street—going over
20 what part? A. Around Dye Street—around from Howell Street over, you know.

Q. Crossing the railroad? A. Crossing the railroad.

Q. There has been that kind of use ever since you have lived in this place? A. Yes.

Cross Examination by Mr. Hartpence:

Q. How long had you lived there do you say?
A. Eighteen years.

30 Q. What did you say your name was, please?
A. August Kloeber.

Q. Eighteen years? A. Yes.

Q. What street do you live on? A. I live on Amelia, right back of James.

Q. When you want to make a short cut you walk across the railroad track at Dye Street? A. Not much—years ago.

Q. You have not done it recently? A. Well, I ain't got no business up there.

40 Q. How many years ago has it been? A. Oh, well, it was maybe six or eight years ago.

Edward Brooks, for Plaintiff—Direct

EDWARD BROOKS, SWORN.

Direct Examination by Mr. Dixon:

Q. Mr. Brooks, you are a brother of the deceased Frank Brooks? A. Yes, sir.

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

Q. Where do you live? A. I live in 43 Stuyve- 10
sant Avenue.

Q. Where did you live in 1915, December? A.
In 665 Summit Avenue.

Q. Did you live with your parents? A. Yes.

Q. What is your business? A. I used to be a
gasmaker, but I am a foreman now in the gas
company.

Q. Foreman of the gas company? A. Of the
gas company, the gas works.

Q. What were you in December, 1915? A. I 20
was a gas maker.

Q. Where were you located, where were you
working? A. Down in Duffield Avenue.

Q. Do you know Dye Street? A. Yes.

Q. How long have you known it? A. Well, I
have known it twelve years.

Q. You used it? A. Yes, sir.

Q. What part of it? A. Well, from the river
up as far as Tonnele Avenue.

Q. Used it going across the railroad? A. Yes, 30
sir.

Q. Seen other people using it? A. Yes, and
there is lots of people goes to work every day
used it.

Q. Going to work where? A. Well, they go
over Dye Street up as far as Tonnele Avenue, and
they go over Tonnele Avenue to get a car; some
work in New York and some work in other places.

Q. Are there houses along Dye Street? A.
Why, sure. 40

Edward Brooks, for Plaintiff—Direct

Q. Do you know this place or this building of Lorillard's? A. Lorillard's Tobacco Company.

Q. Yes. A. Yes.

Q. Where is that? A. They have a back end of it on Dye Street.

Q. What other street, near what other street?

A. And then they have the front on Newark Avenue.
10 nue.

Q. And near what other street is it? Which way is it from the railroad? A. It is east.

Q. East of the railroad? A. Yes.

Q. Did you see your brother Frank on this 4th of December, I think it was, 1915? A. Well, I seen him in the morning before I left home, and that was the last I have seen of him.

Q. Did not see him alive after that? A. No, sir.

Q. When did you next see him? A. I seen him
20 laying in the shanty at Dye Street and the railroad.

Q. About what time was that that you saw him?

Q. Well, I should judge half past three.

Q. Eh? A. About half past three.

Q. Dye Street in the shanty? A. Yes.

Q. Was he then living or dead? A. He was dead.

Q. Where is that shanty that you speak of?

A. Well, it is on the west side of the railroad on
30 Dye Street.

Q. On Dye Street, west side of the railroad?

A. Yes.

Mr. Dixon: Have you that photograph, Mr. Hartpence?

(Photograph produced by Mr. Hartpence.)

Q. I show you this photograph D-1 for identification, and ask you if that shanty appears there?
A. Yes, there it is (indicating.)

40 Q. Appears on the left hand side of the photograph? A. Yes.

Edward Brooks, for Plaintiff—Cross

Q. That is the shanty his body was in? A. That is the shanty where my brother was in.

Q. Where had you come from to go to this shanty? A. From the gas company?

Q. Where is that located? A. Well, it is located on Howell Street and Dye Street and St. Paul's Avenue, and takes the three blocks.

Q. Look at that photograph and tell me whether or not any part of that plant appears on the photograph? A. Yes. 10

Q. What part of the plant does appear? A. Well, there is the engine room and the generator house and then there is the coal yard.

Q. Of your plant? A. Yes, sir.

Q. Where is that big, what do you call it, that looks like a tank there? A. The tank?

Q. Yes. A. Well, that is on the—

Q. Where is that located? A. Well, that is on the Public Service grounds, below Charlotte Avenue. 20

Q. Towards the river? A. Yes.

Q. Beyond Charlotte Avenue? A. Yes; and this side is on Howell Street.

Q. This tank that appears on the picture is beyond Charlotte Avenue towards the Hackensack River? A. Yes.

Cross Examination by Mr. Hartpence:

Q. How is it you had not seen Frank before you left home in the morning? A. No, sir. 30

Q. Did you usually see him during the day? A. Yes, sir.

Q. When? A. Well, before he used—before he went to school I seen him. I will tell you, I used to work three shifts; there was the seven to three shift, then there is three to eleven, and then eleven to seven. So I used to see him at all times.

Q. Where would you see him? A. I seen him home lots of times. 40

Edward Brooks, for Plaintiff—Cross

Q. Did you ever see him after you went to work in the mornings during the day? A. No, sir.

Q. He did not come down to the gas works there to see you, did he? A. Lots of times he brought my lunch down there.

Q. What time in the day would he take your lunch down? A. Sometimes—it is according to
10 what shift I was on. If I was on three o'clock shift he would bring it down three o'clock or half past three. If I was out—

Q. What do you mean by three o'clock shift? A. Go on three o'clock shift and work until eleven at night.

Q. You would not go to work until three o'clock? A. I wouldn't go to work until three o'clock or I would leave.

Q. You would get your meal before you left
20 home? A. Yes, and I wouldn't see him until eleven o'clock at night.

Q. He wouldn't take your lunch down at three o'clock when you went to work at three o'clock?

A. I wouldn't leave the work at three o'clock. Lots of times I go out and have our lunch sent down to me instead of running back home again.

Q. When you had the other shift in the morning what time did that begin? A. Seven to three,
30 and I always take my lunch on the seven to three shift.

Q. You go home and get your meal after you get through your work? A. Yes, I would go home and eat.

Q. Didn't they have lunch taken down then by the brother? A. No, sir.

Q. What was the third shift? A. Eleven to seven.

Q. That was at night? A. Yes.

Q. Had your brother been to see you this after-
40 noon when he was killed? A. No, sir.

Edward Brooks, for Plaintiff—Redirect

Q. Had not taken your lunch down to you that day? A. No, sir.

Q. You say it was about three thirty when you saw him in the shanty? A. Well, I should judge—I couldn't just exactly say—I should judge about that time.

Q. Do you remember whether you were working—which shift you were working on that day? 10

A. Yes.

Q. Which one? A. Three to eleven.

Q. Well, how long had you been working before you heard of the accident to Frank? A. Well, I can't say within a half an hour or an hour's time.

Q. After you started? A. Yes.

Q. Well, it might have been a little later than three thirty?

Q. Might have been a little bit; I don't know just exactly the right time. 20

Q. Was it light? A. Why, certainly.

Q. Perfectly light when you got up there and saw him? A. Yes.

Q. Sun still shining? A. Well, if you please, I didn't take notice.

Q. What time of the year was it? A. Sir?

Q. What time in the year was it? A. What do you mean, the month or date or what?

Q. Yes? A. In December.

Q. 1915? A. Yes, sir. 30

Redirect Examination by Mr. Dixon:

Q. What was Frank's general condition of health? A. His health?

Q. Health? What was his general condition of health? A. He was pretty spry.

Q. Well, I mean was he well or a sick boy? A. He was always well.

RECESS.

40

C. J. Brooks, (recalled) for Plaintiff—Direct

CHARLES J. BROOKS, recalled.

Direct Examination by Mr. Dixon:

Q. Mr. Brooks, upon your original testimony you spoke of the place where you found your boy's body after the accident. You want to correct your testimony with regard to that—the name of the house or place that was described? A. Yes, sir.

Q. Where did you say it was? A. I said it was in this coal shanty, but I was excited at the time and I thought the matter out and I made a blunder, and it was in this railroad shanty.

Q. In the railroad shanty? A. Yes, on Dye Street.

Q. Look at this photograph. Does that show the shanty as you can see it? A. Yes, right on the end of this here.

Q. Left hand side? A. Yes.

The Court: That is marked in some way, isn't it?

Mr. Dixon: Yes.

The Court: The shanty itself.

Mr. Hartpence: It should be marked S.

The Court: Mr. Kelley, mark it. It is X-S.

Q. That is where he was lying? A. Yes, that is where he was lying when I was called over there.

(No cross examination.)

Mr. Dixon: Mrs. Brooks is here in court if counsel wants to further cross examine.

Mr. Hartpence: No.

The Court: Do not want her? All right? He says he doesn't care about it.

Charles W. Brooks, for Plaintiff—Direct

CHARLES W. BROOKS, SWORN.

Direct Examination by Mr. Dixon:

Q. Mr. Brooks, you are a brother of Frank Brooks, deceased? A. Yes.

Q. How old are you? A. Twenty-eight in March.

Q. Where do you live? A. 43 Stuyvesant Avenue. 10

Q. Where did you live December 1915? A. 665 Summit Avenue.

Q. With your father and mother and brother Frank? A. Yes, sir.

Q. What was the condition of Frank's general health? A. Well, he was in—splendid. Was in good condition.

Q. Do you know Dye Street in Jersey City? A. Yes. 20

Q. You ever go down there crossing the railroad crossing at Dye Street? A. Well, occasionally, yes.

Q. Have you seen trains operated across there? A. At times, yes, sir.

Q. Are there any gates or fences across Dye Street? A. None whatever, either at Van Winkle or Dye Street.

Q. I am speaking of Dye Street? A. No, sir.

Q. Now is there any flagman there at Dye Street, Jersey City? A. Well, what do you mean, stationary, or— 30

Q. Either, any kind of flagman? A. Well, at times when there is trains backing in there is—

Mr. Hartpence: I object. If this is going to the flagmen in the operation of the trains I will object to it on the ground further it is immaterial and irrelevant and incompetent.

Mr. Dixon: This is to the flagmen in the operation of the trains. 40

Charles W. Brooks, for Plaintiff—Direct

The Court: Why do you say it is incompetent.

10 Mr. Hartpence: Suppose it is offered for the purpose of showing there was a flagman there sometimes, or at times, and even though that be true, I cannot see how it has an relevancy as regards the time Frank was injured, unless it is shown he in some way knew of it or relied upon it or something of that sort. It is to be expected in the operation of trains that trainmen would be—would surely operate them.

The Court: I will overrule the objection.

20 Q. When trains were operated across there have you seen any flagmen? What have you observed with regard to that matter as trains are operated across—freight trains—across Dye Street? A. Well, at times I would see a train back down and sometimes the fellow jump off about a hundred feet from the corner and stop anybody from going over.

Q. With a flag or what? A. No, with his hand; another time they would run down ahead of the train and keep going like this to the train to come ahead (illustrating.)

30 Q. Would these men give any notice to pedestrians or do anything in regard to people crossing?

Mr. Hartpence: I object on the same ground.

The Court: I will rule the same way. You may have your exception to it. Go on and answer.

A. Sometimes they would and sometimes they wouldn't.

40 Q. These men that you say would do that, were

Charles W. Brooks, for Plaintiff—Cross

they men—could you tell whether or not they were men connected with the trains that were operating?

Mr. Hartpence: I object to it again as immaterial, irrelevant and incompetent, unless it is shown that they were Pennsylvania Railroad men. Nothing yet to show this young man knew that these were Pennsylvania Railroad men. 10

The Court: No, there has not been a word so far, I realize that.

Mr. Dixon: I will withdraw the question. That is all.

Mr. Hartpence: I move to strike out all the testimony with regard to that, because it doesn't show the Pennsylvania Railroad operatives did it.

The Court: No; I won't strike it out. You 20 have your exception to my refusal.

Cross Examination by Mr. Hartpence:

Q. You saw thains moving up and down there from day to day, have you? A. Yes, sir.

Q. How long ago? A. Well, maybe two days out of a week and maybe three days.

Q. How long ago? A. Well, to this very day you can see them at the present time.

Q. Yes; how long ago? How far back have you 30 seen them?

The Court: This goes to what you have seen, now.

Q. What you have seen? A. Well, for about a year or two years.

Q. Back? A. Back; from the time we lived down in our neighborhood there and around St. Pauls Avenue.

Q. When did you live on St. Paul's Avenue? 40

Charles W. Brooks, for Plaintiff—Cross

A. On James Avenue—James and St. Pauls, before we moved to Summit Avenue.

Q. How long ago was that? A. This period of a year—a year ago.

Q. Yes. Did you ever see any cars standing there not moving at all on those tracks at Dye Street? A. Yes, sir.

10 Q. See a lot of them there from time to time, haven't you? A. Well, on different tracks you would see a lot of them; sometimes you would see two, sometimes three and sometimes you would see one and they would be scattered around.

Q. Lot of tracks there, aren't there? A. There is quite a few, yes, sir.

Q. And down near Van Winkle Avenue there is a coal trestle, isn't there, leading into the Head-den coal pockets there? A. Van Winkle Avenue?

20 I think it is, yes.

Q. That starts quite near to Dye Street, doesn't it? A. It stops near Dye Street.

Q. Starts to rise quite near Dye Street, doesn't it, that trestle? A. Quite near?

Q. Yes. A. I should judge it is within a quarter of a block of Dye Street.

Q. Of Dye Street? A. Yes.

Q. When you get down to Van Winkle that blocks off Van Winkle Avenue entirely, doesn't it?

30 A. No, sir.

Q. Does not, eh? A. No, sir.

Q. Would you say you have crossed the tracks there at Dye Street? A. Well, not every day; on and off; on and off.

Q. You see any cars standing there you wouldn't go across? A. Well, I would wait. I would look at St. Paul's Avenue and if St. Paul's Avenue was blocked, why, I would wait there, and if St. Paul's Avenue was not blocked I would go

40 on the side and go to St. Paul's Avenue.

Charles W. Brooks, for Plaintiff—Cross

Q. If trains were moving up and down there then you would go up to St. Paul's Avenue, wouldn't you? A. If they were either towards Newark Avenue or towards St. Paul's Avenue, whichever way they were going to move first, I would then wait, but if they were a big, long string of trains, why, I would go to either Avenue, St. Paul's or Newark Avenue. 10

Q. Or Newark Avenue. Newark Avenue is a regular crossing there—pavement and sidewalks, planks, belgian block? A. Yes, sir.

Q. And up at St. Paul's Avenue there was a plank crossing crossing the tracks there? A. So was Dye Street.

Q. What say? A. So was Dye Street.

Q. What kind of planks were there there? A. Well, railroad tracks set on them.

Q. Ties, railroad ties? A. Call them a plank or whatever you want to call it. 20

Q. You mean ties that the rail is fastened to, don't you? A. Yes, the rail—railroad track is on it.

Q. The railroad track is right on these planks you talk about? A. The only thing, between Newark Avenue and St. Paul's Avenue, they are jacked up more, they are higher.

Q. They are higher, but the planks you refer to at Dye Street are the cross pieces that the rails rest on; is that right? A. Yes. 30

Q. Now did you ever count the number of tracks that are there? A. No, sir.

Q. Never did? A. No, sir.

Q. What time of day did you ordinarily cross there? A. Morning, afternoon,—I might say a couple of times, well, about twice in my life at night.

Q. You didn't care to go across very much at night, did you? A. Well, I wouldn't have any oc- 40

Charles W. Brooks, for Plaintiff—Redirect

casation—wouldn't have any occasion—in the day time maybe more than night time.

Q. Always kept pretty close watch when you went over, didn't you? A. Well, yes, I looked up and down the way they would have to do,—you could be walking across, the first thing you knew a train would back down on top of you; there may
10 be a fellow standing two tracks away or a mile away telling you to look out.

Q. And there might not be? A. And there might not be.

Q. There might be and then again there might not be? A. Most of the times not.

Q. So trains pass up and down there and they started suddenly, and you looked out for yourself; is not that right, most of the time? A. Yes, sir.

20

Redirect Examination by Mr. Dixon:

Q. Where did you work during the time? A. Well, a year ago last May I worked for the gas company myself?

Q. And before that time where did you work? A. I worked in New York City at my trade.

Q. Did you work for the Public Service at any time? A. Yes, the gas company.

Q. That is the gas company? A. Yes.

30 Q. How long did you work for the Public Service Gas Company? A. About nine months.

Q. Now during all that time what street did you use to go to and from your place of business and home? A. I have used Van Winkle Street a good many times; I used Dye Street as much as—frequently as I would Van Winkle Street or Newark Avenue. But I used Dye Street at times.

Recross Examination by Mr. Hartpence:

40 Q. Little further to go around by St. Paul's

Charles W. Brooks, for Plaintiff—Recross

Avenue or by Newark Avenue, wasn't it? A. Oh, no, no, no, sir; it would be the direction I would be on my way home—mostly I have been working down by the pusher house on Dye Street.

Q. I show you this photograph, D-1 for identification, and call your attention to the railroad tracks there right opposite this passage way leading down to the gas tanks. That is about the way Dye Street looks, isn't it? A. Well, it is similar, but they haven't got the shanty out where it ought to be. The shanty ought to be there on the picture. 10

Q. Little further out? A. Yes, and the gas tank ought to be direct on Dye Street, which it is not.

Q. But as far as the tracks themselves are concerned, the tracks are just the same as they were at Dye Street? A. I can't tell you by that picture. It looks too muddled up to me.

Q. It is not a very plain picture to you? A. No, not the way it ought to be. 20

Q. But now you say it is— A. This fence here, it will be into that tank if it keeps on running.

Q. You see these planks down here between the tracks or rails, those little marks? A. Yes, sir.

Q. Those are the planks you refer to, seeing them running along there? A. They have been all covered over of dirt. There is more planks than that, there is more space than that. About from—about a foot apart. 30

Q. All about a foot apart? A. Yes.

Q. But were they down there with the rails resting on them, that is what you mean when you said the planks there with the rails resting on them? A. I don't know if they was for the rails to rest on them or whether the cars rest on them or not, but they have them there; that is what I would step on,—I wouldn't step on any of the tracks.

Q. You would step in on these planks? A. Yes, sir. 40

*Charles W. Brooks, for Plaintiff—Recross
Motion to Non-suit*

Q. In between the rails? A. Yes.

Q. And the rails were fastened to those planks?

A. Yes.

Q. Those are the planks you refer to at Dye Street? A. Yes.

10 Mr. Dixon: I have another witness who was before Judge Speer,—I don't know whether he is here yet,—Mr. Kelleher. He made a map. Will you find out if he is in Speer's court? I only want to prove the number of tracks there and the map and the location.

The Court: Is that your last witness then?

Mr. Dixon: That is all, and then we rest.

The Court: Was he there?

A Voice: Not there, your Honor.

20 Mr. Dixon: We will rest without him.

PLAINTIFF RESTS.

DEFENDANT'S MOTION TO NONSUIT.

30 Mr. Hartpence: If your Honor please, we move for a nonsuit on behalf of the defendant Pennsylvania Railroad Company.

The Court: Let the jury retire for a few moments.

(The Jury retires to its room.)

Mr. Hartpence: On the following grounds:

1. No negligence has been shown on the part of the Pennsylvania Railroad Company which can be said to be the proximate cause of the injury and death complained of.

40 2. That the sole cause of the injury and death of the plaintiff's intestate was his own negligence.

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3. That his contributory negligence is so clear and conclusive as the proximating cause of the injury and death that the defendant ought not to be put to its defense.

4. That the deceased Frank Brooks was a trespasser on the railroad tracks of the New York, Susquehanna & Western Railroad at the time of his injury which resulted in his death, 10 and that this defendant, Pennsylvania Railroad Company, owed him no legal duty in operating this train at that point, except to refrain from wilful or wanton injury.

5. That the intestate, Frank Brooks met his death while walking, standing or playing upon the railroad tracks of the New York, Susquehanna & Western Railroad Company at a place other than the lawful public or private crossing, being a trespasser at that time 20 and place.

6. On the further ground that the place where Frank Brooks was injured, where he met his death, was a railroad yard rather than a thoroughfare, railroad thoroughfare, where cars were being drilled all the time back and forth, coupled and uncoupled, and that the defendant company was under no duty to the intestate to warn him during the process of such an operation or such operations, either 30 by flagman or through warning signals or devices.

7. Further, if your Honor please, upon the ground that the place, Dye Street, has not been shown to be a public street crossing of the railroad at the place where the two ends of the street intersect the right of way of the railroad; nor that it was ever used as a public crossing; and that it must be taken to have been a duly condemned or purchased right of 40

Motion to Non-suit

10 way of the railroad under the statute which could not be taken for further public use except upon specific proceedings for that purpose. None of the testimony shows that the street was ever used there except subject to the right of the railroad or railroads in the operation of their trains and in the use of the tracks at that point. No attempt to make it convenient or safe for public crossing in any sense. Merely the tracks resting upon the ties, which in themselves form a natural barrier to pedestrians or vehicles.

20 8. Lastly, on the specific ground that the testimony shows conclusively that Frank Brooks at the time he was injured was not on that portion of the street which if extended would have put the tracks within the limits of Dye Street, but at least some distance south thereof.

(Discussion.)

30 The Court: Gentlemen, the position I am going to take, I am going to decline the motion to nonsuit. At this time, Mr. Dixon, I am not willing to hold as far as you have asked me to hold. The jury may draw from these maps P-2 and P-3 that that street was properly opened as a public street across the right of way of the railroad company, but that, in connection with the evidence that you have produced on the question of user, is the thing that is directing me to decline to nonsuit. I want to say to you that I am not perfectly sure that the evidence upon the latter point is as it ought to be to warrant me send it to the jury, but as is usual in a case of this character, where I am in doubt, I give the benefit of the doubt to the plaintiff. It may be
40 that before the end of the case, without any

Defendant's Testimony

other evidence coming in on that score, I may conclude that that evidence which you have adduced on that question of user is not in law sufficient, and if it is not I would be inclined then at the end of the case, nothing else being adduced or produced on that point, to direct a verdict. I will decline, therefore, to grant the motion to nonsuit. 10

Mr. Hartpence: Then your Honor will permit me the appropriate exception or objection?

The Court: Yes, you may have an exception.

DEFENDANT'S TESTIMONY.

Mr. Hartpence: I will offer this photograph marked D-1 for identification, in evidence. 20

The Court: No objection?

Mr. Dixon: No.

(Photograph marked Exhibit D-1.)

Mr. Hartpence: I will offer the sketch or plan marked D-2 for identification.

Mr. Dixon: Objected to as being incompetent. 30

The Court: On what ground, Mr. Dixon?

Mr. Dixon: That the testimony does not show anything—asked a boy to define the lines of the street. Why, it is—

The Court: Yes, I know, but I will overrule the objection.

Mr. Dixon: An exception.

(Paper marked Exhibit D-2.)

Philip Seaman, for Defendant—Direct

PHILLIP SEAMAN, SWORN.

Direct Examination by Mr. Hartpence:

Q. Mr. Seaman, what is your business? A. I am employed by the Pennsylvania Railroad as brakeman.

Q. How long have you been so employed? A.
10 About four years.

Q. Four years last past? A. Yes.

Q. You were present on the day that Frank Brooks was injured? A. Yes, sir.

Q. Did you see him hurt? A. No, sir; nobody saw him hurt.

Q. When did you first see him? A. I was just passing the car when he fell out in front of me.

Q. When he fell out in front of you; fell out from where? A. In between the two cars—be-
20 tween the second and third car.

Q. What sort of cars were they? A. Two box cars. A piece of wood came out first and he came out afterwards; he fell directly in front of me.

Q. What direction were you walking at the time he fell out? A. North.

Q. Was there a locomotive there at the time? A. Three cars ahead there was a locomotive just coupling up to the head car.

Q. Was the locomotive to the north of you or
30 to the south of you? A. South of me.

Q. That was in the direction of Newark Avenue? A. Yes.

Q. You were walking up towards St. Paul's Avenue? A. Yes, sir.

Q. Well, where had you come from immediately before that? A. Well, we had been drilling cars in what we call number 3, and number 4. Our drill backed in number 4, to clear, on account of number 3—I had a load to cut in on number 3, and
40 I got down off the car and I opened the knuckle

Philip Seaman, for Defendant—Direct

between the first and second car, and then the engine had come in from number 3 on to number 4, and coupled up to the car, and when the engine went against the two cars, or made the first and second coupling, I kept right on walking back to the second and third car; just as I got there the cars hit and the third car rolled away and then this piece of wood came out and then this boy came 10 out afterwards.

Q. That was on number 4 track? A. Number 4 track, yes, sir.

Q. Just where was the boy when the body came out in front of you; where was he located? A. He fell in between the two tracks.

Q. Fell in between the two tracks? A. There is a little ditch there, I suppose a drain, that held water, I suppose.

Q. How near to St. Paul's avenue was he? A. 20 Oh, I guess a block and a half away from St. Paul's avenue.

Q. How near to Newark avenue was it? About the same distance.

Q. Was there any street anywhere nearby where he was? A. No; Dey street lays about 125 feet from where he was hurt.

Q. You know where Dey street is, do you? A. Yes, sir.

Q. And how far away from Dey Street was he 30 when he was hurt? A. About 125 feet.

Q. North or south? A. South of Dey street.

Q. Down toward Newark avenue? A. Yes, sir.

Q. What did you do with him when you saw him fall out there? A. I picked him up and turned him over. I had to put him back that way. I couldn't stand it. So I had to go up to the engine and get a drink of water. Two other brakemen carried him over to the shanty.

Q. Where was that shanty? A. On Dey street. 40

Philip Seaman, for Defendant—Cross

Q. Which side of it? A. On the west side of the railroad.

Q. West side of the railroad? A. Yes, sir.

Q. And on which side of Dey street? A. South side of Dey street.

Q. Did you go over there with the body? A. No, sir; I didn't go; no, sir.

10 Q. Did the boy say anything after you saw him? A. He didn't say a word; he just breathed his last when the other brakemen picked him up.

Q. Now, when he fell out in front of you on which side of the railroad tracks was he, the east side or the west side? A. He went in on the east side and fell out on the west side.

Q. He fell out on the west side? A. Yes, sir.

Q. That was on the same side as the shanty?

A. That is the side he came out on, by the shanty.

20 Q. You didn't see him go in yourself, did you?

A. No, sir.

Mr. Hartpence: That is all. Cross-examine.

Cross-examination by Mr. Dixon:

Q. How far apart were these cars before they came together, do you remember?

The Court: Which particular ones?

The Witness: The car that he was—

30 The Court: You have spoken of two different lots of cars that were separated. I do not know whether you had that in mind or not. He said the boy was between the second and third.

Q. In which separation was the boy? A. Between the second and third car.

Q. Between the second and third cars? A. Yes, sir.

40 Q. What was the size of that separation? A. I guess about a foot and a half.

Philip Seaman, for Defendant—Cross

Q. Before that came together? A. Yes, sir; between the two drawheads.

Q. Which was the moving end of the car—of that freight? A. The south end of it.

Q. It was moving in a northerly direction? A. Yes, sir; we were going to couple up.

Q. Sir? A. The south end of it.

Q. I don't understand that. A. The south end 10
of it.

Q. The engine was on the extreme south of the train? A. Yes, sir.

Q. And she was backing up—how many cars? A. To the head car; and we had to make the couplings for two cars.

Q. Frank went between the second and third? A. Second and third.

Q. And did you have a coupling to make between the first and second also? A. Yes; I opened those 20
knuckles when the engine went back, and one hit made those two couplings.

Q. One hit made both couplings? A. Yes, sir.

The Court: That is, between the first and second and the second and third?

The Witness: Yes, sir; but the second didn't couple up.

The Court: You intended it would?

The Witness: Yes, sir.

Q. It would have coupled up if Frank had not 30
been between the bumpers? A. Yes, sir.

Q. How many cars were there on the other side? A. There weren't any there. There was a space about—there was a little space there.

Q. How many cars were there on the other side of these two cars? A. I couldn't say; the freight was solid.

Q. What? A. The freight was solid. That means— 40

Philip Seaman, for Defendant—Cross

Q. I mean on this track. A. There was a solid track of cars there outside of this little space.

The Court: Let me see if I understand you, Mr. Witness. You say that car one, which was nearest the engine—

The Witness: Yes, sir.

10 The Court: —and car two were to be coupled together.

The Witness: Coupled together; yes, sir.

The Court: And you opened the drawheads for that purpose?

The Witness: Yes, sir.

The Court: Car two and car three, next in order, were to be coupled.

The Witness: Yes, sir.

The Court: And you had made preparations for that?

20 The Witness: Yes, sir.

The Court: Now, then, from car three on toward the north, up toward St. Paul's Avenue, how long a train of cars was it?

The Witness: Oh, I judge about fifteen cars.

The Court: Fifteen cars?

The Witness: Yes, sir.

30 The Court: Then were all the cars, starting with number four car, the rest of that train upward toward St. Paul's Avenue—were they coupled together already?

The Witness: No, sir; we hadn't gone back that far yet.

Q. How many men did you have on that freight?

A. Four car—four men.

Q. Consisting of what? A. Conductor, flagman, middle brakeman and head brakeman.

40 Q. What were you? A. I was what you call the middle man.

Philip Seaman, for Defendant—Cross

Q. You had a couple of engineers, didn't you?

A. Sir?

Q. You had an engineer or two? A. An engineer and a fireman.

Q. They are in the car? A. They are on the engine.

Q. Now, did you prepare all of these couplings for the contact with the cars? A. Sir? 10

Q. Did you prepare—did you prepare all couplings, open up the— A. Yes, sir.

Q. —couplings? A. Yes, sir.

Q. Between the second and third cars? A. Between the first and second, and second and third.

Q. You prepared them between the four? A. Yes, sir.

Q. Before you started the engine at all? A. Yes, sir.

Q. What was the space between the first and second? A. Oh, about a foot and a half. 20

Q. What? A. About a foot and a half.

Q. After the third car then all the rest of the freight was solid, wasn't it?

The Court: No; he says not.

A. There was a little space there, I should judge about ten feet; then the rest of that track was solid.

Q. Between the second and third? A. No, sir; between the third and the one on the other side. 30

Q. Between the third and the fourth? A. Yes, sir.

The Court: Pardon me once again so I can see if we have his testimony right.

Mr. Dixon: Yes, sir.

The Court: Between car one and car two you say there was a space of about a foot and a half?

The Witness: Yes, sir.

The Court: That you prepared the cou- 40

Philip Seaman, for Defendant—Cross

plings so that they would make one contact?

The Witness: Yes, sir.

The Court: Between car two and car three, if I remember correctly, you say again there was about a foot and a half of space?

The Witness: Yes.

10 The Court: And you had prepared the couplings there so that by this one push of the engine—

The Witness: Would make them all.

The Court: —those three cars would be coupled together?

The Witness: Yes, sir.

The Court: And between the rear end—north end, I believe, of car three and the nearest or front end of car four there was a space of about—

20 The Witness: Ten feet.

The Court: —ten feet?

The Witness: Yes, sir.

The Court: And then from car four onward to the end of your train they were all solid?

The Witness: All solid; yes, sir.

The Court: Now I think we understand you.

30 Q. Had you prepared the couplings between car four and car five? A. No, sir; I hadn't gone back that far yet.

Q. Well, did you intend to go back there? A. Yes, sir; I would after I made the other two couplings; I would have went back there.

Q. You were supposed to stand between the place—at the place where couplings were made, weren't you, under your rules? A. No, sir; we are not.

40 Mr. Hartpence: Objected to as immaterial.

Philip Seaman, for Defendant—Cross

Q. What? A. No, sir; sometimes we make four or five couplings at the one time.

Q. Aren't your instructions that you shall stand where the couplings are to be made?

Mr. Hartpence: Objected to as immaterial and irrelevant.

The Court: I will overrule the objection.

Q. Aren't those your instructions? A. No, sir. 10

Q. What were these other men doing on the train at the time of this accident? A. Why, the head man was backing the engine back and the flagman was on the south end of the engine. He had thrown the switch over.

Q. South end of what?

The Court: Engine?

A. In front of the engine; that would be the south of the engine; on the south steps of the engine. 20

Q. You weren't going south; you were going north. A. We were going north; yes, sir.

Q. What was he doing on the south end of the engine? A. He had thrown the switch and he got on there.

Q. So that you started the engine up before the flagmen got in their proper places on the freight; is that so?

Mr. Hartpence: That is objected to; it is assuming something entirely unborne out by the testimony. 30

The Court: I do not know yet where the flagman ought to be, Mr. Dixon.

Mr. Dixon: I am cross-examining the witness, and I have—

The Court: All right; take your exception if you except to it.

Q. Is it a fact that the train started before the 40

Philip Seaman, for Defendant—Cross

flagman got in the place where he should have been? A. No, sir.

Q. And he ought to have been behind the moving engine? A. He has to flag that engine in there; he is the flagman.

Q. To walk behind the engine? A. Yes, sir.

Q. That is his place? A. Yes, sir; that is his
10 place, to protect the rear end of the train.

Q. What do you mean by the rear end of the train? A. That was the rear end going in; we were backing in.

Q. Protect your engine on what? on the regular track or in the yard? A. In the yard; that was the yard there.

Q. So that all the trains there proceed with flagmen walking behind the engine to protect it from being run into by some other engine in broad day-
20 light? A. Yes, sir.

Q. That is his place? A. Yes, sir.

Q. Who was there walking ahead of the train to protect the other end of the train? A. I was.

Q. What? A. Me.

Q. What? A. Me.

The Court: "I was," he says.

The Witness: Myself.

Q. You were? Well, you weren't there, were
30 you, at the other end of the train? A. Yes; I was opening the knuckles; I was at the other end. One man stood—

Q. How many knuckles had you opened? A. Two.

Q. Had you gone on to open the next knuckle? A. No, sir.

Q. Well, then, the last knuckle you opened was the one between the third and fourth car, wasn't it? A. No, sir; second and third car.

40 Q. Second and third car. Had the train moved

Philip Seaman, for Defendant—Cross

before you left your place, or did it move after you left? A. After I had left that place. I had walked back to the first and second car and seen that coupling made, and when that was made I walked up north again. By the time I got up there he had backed and hit the third car, and this car released itself and then this piece of board came out, and then the young boy came out. 10

Q. So, as a matter of fact, you were going to the first coupling twice on your journey, were you? A. Yes, sir; to see it made.

Q. To see if the coupling made. What was the trouble? Did you expect it would not make? A. Well, sometimes the pins won't drop, and you have got to try them three or four times.

Q. Isn't that the reason that the rules require you to be at the place where the coupling is made until the pin does drop? 20

Mr. Hartpence: I object to that because this witness has specifically stated that the rules did not require him to stay there, and I do not think Mr. Dixon ought to inject these things into the case, unless he proves them.

Mr. Dixon: This is cross-examination.

The Court: I realize that he has said so. I am going to overrule the objection. Take your exception to it. 30

Q. Isn't that the reason you are required to be at the place where the coupling is made until it is made, to see that the pins drop? A. No, sir; not that I know of. Not with my knowledge.

Q. You have never been so instructed? A. No, sir.

Q. How long was this train altogether? A. How long? I guess about eighteen cars.

Q. How long have you worked in that neighborhood? A. Oh, I lived around there about nine 40

Harry B. Chase, for Defendant—Direct

years, up to the time I went railroading; and I railroaded around there four years.

Q. On Dey Street? A. No, sir; I lived on Giles avenue; the other side of the railroad.

Q. What? A. I lived on Giles avenue.

Q. How long have you worked on trains passing over Dey street? A. Four years.

10 Q. For the Pennsylvania? A. Yes, sir.

Q. Have the trains that pass over Dey street—Pennsylvania trains—passed over it four years to your knowledge? A. Yes, sir.

Mr. Dixon: That is all.

By Mr. Hartpence:

Q. You say there was about a foot and a half between the cars. Do you mean by that between the cars themselves or between the knuckle and the— A. Between the drawheads; between the
20 drawheads.

Q. Between the drawheads? A. Yes.

Q. Now, the cars themselves were wider apart than that, weren't they? A. I should judge about three foot.

Q. Yes. When you went up to open the knuckle between the second and third cars did you see this boy that you afterwards saw hurt there? A. No, sir.

30 Q. Now, after the boy fell out from between the cars did you observe anything lying there near him except this piece of board? A. No, sir; that was all I had seen. The piece of board came out first and he came out afterwards.

Q. And he had nothing else with him except that piece of board? A. No, sir.

Q. You didn't see anything of a lunch box or lunch basket there? A. No, sir.

Q. Was there any noise being made by this
40 engine as it backed up to couple the cars? A.

Harry B. Chase, for Defendant—Direct

Why, every time we made a move the bells rang.

Q. Was the bell ringing in this case at the time that coupling was made? A. Yes, sir.

By Mr. Dixon:

Q. You paid attention to the bell, did you? A. Yes, sir.

(Recess to 10:00 o'clock, June 26th, 1917.) 10

June 26, 1917.

TRIAL CONTINUED.

HARRY B. CHASE, a witness sworn on behalf of the defendant, testified as follows:

Direct Examination by Mr. Hartpence:

20

Q. Mr. Chase, what is your employment? A. I was flagman for Conductor Schirrle the day of the accident.

Q. On the Pennsylvania Railroad? A. Yes, sir.

Q. And you were there the day Frank Brooks was injured, weren't you? A. Yes, sir.

Q. Did you see him hurt? A. I didn't see him hurt; no.

Q. When did you see him first? A. When they made the coupling on the first car and engine; he come out from between the cars, the second and third car. 30

Q. Where were you at that time? A. I was about half a car-length from the engine at the time the boy come out from between the cars.

Q. And on which side of the railroad right of way were you at the time? A. Well, I was on the railroad property.

Q. You were on the railroad— A. On the west side of the track, of No. 4 track. 40

Harry B. Chase, for Defendant—Direct

Q. Yes; and what track were the cars on? A. On No. 4 track.

Q. Those were the cars where you saw the boy? A. Yes, sir.

Q. When he was hurt? A. Yes, sir.

Q. Now, what did you first see that called your attention to it? A. Why, the boy coming out from
10 between the cars.

Q. Yes. A. And—

Q. And in what manner did he come out? A. Well, his feet kind of come out like that and made about three steps, and he turned and fell, his head toward the—north.

Q. Yes. A. Clear of the rail, between what we call the main line Susquehanna and No. 4 track; nearest to the Susquehanna main line.

Q. Where is the Susquehanna main line located?
20 A. Right next to No. 4—

Q. Where? A. On the west—

Q. West or east of No. 4? A. West of No. 4.

Q. Is that the outside track there or the other? A. Yes, sir; that is the outside track.

Q. Now, when you saw him come out and fall in that way, just where was he located with regard to Dey street? A. Well, that is about—to the best of my judgment it is about 115 feet from Dey street, south.

30 Q. South? A. South of Dey street.

Q. Toward Newark avenue? A. Yes, sir.

Q. Now, at the point where you first saw him come out from the cars, what are the surroundings there? Is the ground flat, or level or what? A. Where the boy fell, yes, sir; it is level there; but on the outside of the main line track there is an abutment comes for a coal pocket.

Q. A what? A. Abutment, where the trestle work starts to go up.

40 Q. And that trestle work goes where? A. Up to Hedden's coal pocket.

Harry B. Chase, for Defendant—Direct

Q. And where is that coal pocket? A. Well, it runs to Newark avenue.

Q. Newark avenue. A. What they call "Cherry Lane;" it starts at "Cherry Lane" and then goes out to Newark avenue.

Q. Now let me ask you this: That trestle starts at about what point? A. Well—

Mr. Hartpence: I will withdraw that question. 10

Q. At what point does the incline start up that trestle? A. Well, as near as I can figure it out by looking, it starts about at Dey street—off Dey street, across the railroad. I don't know whether Dey street goes across the railroad or not; but it is about middle of Dey street and it starts to run.

Q. Starts to raise gradually to the pocket, and that runs all the way to Newark avenue, you say? 20
A. Well, to the sidewalk of Newark avenue; it doesn't run out on Newark avenue.

Q. And it blocks off all access to the tracks all the way to Newark avenue; is that right? A. No, not the elevation does not; because you can walk under the elevation part.

Q. But the trestle work itself extends all the way along Newark avenue? A. Well, there is a shed there where the cars go in and they unload there; there is a fence around that; you can't get 30
by there unless you go over the fence.

Q. Yes. Now, it is not built solid? A. The trestle work?

Q. Yes. A. No, only from this abutment—

Q. It runs from abutment to abutment; is that right? A. No; it runs down to the level; then it goes down; from these abutments it goes down.

Q. Now, what supports the trestle? A. These big bumpers.

Q. Big bumpers? A. About 12 by 12; some- 40
thing like that.

Harry B. Chase, for Defendant—Direct

Q. How far apart? A. Well, I guess about eight or ten feet apart; I should believe.

Q. I show you a photograph and ask you if you recognize what it portrays, and if you can point to the abutment—or trestle which you have referred to, on that. A. Well, here is the trestle here.

10 Q. Now, wait a moment. At the left of the photograph? A. This way. (Indicating.)

Q. Yes.

Mr. Hartpence: May I have that marked for identification, please?

(Marked D-3 for identification.)

Q. I show you another photograph and ask you if you recognize what that portrays and if you can point to the trestle on that one? A. Yes, sir; there
20 is the whole trestle, and there is the shed where the cars are backed in to be unloaded.

Q. And that is on the right of the photograph?
A. No; right here.

Q. Yes.

Mr. Dixon: Speak a little louder.

The Witness: Well, I was right here. I don't know whether it is right or left.

The Court: It is on the right-hand side of the photograph as it is before you.

30 The Witness: Yes, sir.

Q. Put an x up in the wide part of the photograph above the trestle. A. Well, that would be—

Q. Put a big one.

(Witness does so.)

Mr. Hartpence: I will ask to have that marked for identification.

(Marked D-4 for identification.)

40 Q. And on the photograph D-3 for identification

Harry B. Chase, for Defendant—Direct

put a large x in the white spot above the trestle.
(Witness does so.)

Q. Can you point out on exhibit D-3 for identification where it was that you first saw Frank when he fell out from between the cars? A. Well, here is the car right here, (indicating)—

Q. Now, will you just state whether you can point it out on that photograph? A. Right here. 10

Q. Can you or can you not point it out on that photograph? A. Yes, sir.

Q. Yes, sir. Well, now will you point out just where it was, and then mark that with the letter "f."

(Witness begins to mark and is interrupted.)

Q. Let me ask you this: Was it anywhere near where you see this man standing in the photograph D-3 for identification? A. Where Conductor Schirrle is standing now. 20

Q. Is that Conductor Schirrle standing there? A. That is Conductor Schirrle standing there.

Q. And that is where you first saw Frank come out? A. Right where Conductor Schirrle is standing. I—

Q. All right. Now I show you D-4 for identification and ask you if you can point out on that photograph where it was that you saw Frank come out. A. Same place. 30

Q. What do you mean by the same place? A. Just where Conductor Schirrle is standing.

Q. On that photograph? A. Yes, sir.

Q. That, you say, was about 115 feet south of Dey street? A. To the best of my judgment; yes, sir.

Q. Now, Mr. Chase, did Frank say anything after you saw him fall? A. No, sir. 40

Harry B. Chase, for Defendant—Direct

Q. Was he dead when you got there or was he still alive? A. Well, I felt his pulse and his pulse beat, and when I turned his head over his lips moved, and I put my ear down to his mouth to get any sound that I could, but he uttered no sound whatsoever.

10 Q. Was there anyone else there with you at that time? A. Well, the crew was there, two of the crew; but I don't know just what became of them; and I told them, I says, "Don't—"

Q. Never mind what you told them. Did you do anything yourself with the boy after? A. I went to the office of the Pennsylvania Railroad and got a board and brought it over, and rolled him over on the board and carried him to the office.

Q. Yes; and where was that office? A. On the south side of Dey street.

20 Q. On the south side of Dey street? A. Yes, sir.

Q. And on which side of the railroad tracks?

A. On the west side of the railroad tracks.

Q. On the same side where you were when you first saw Frank come out from between the cars; is that right? A. Yes, sir.

Q. Now, what office was that, do you know? The office of what? A. Pennsylvania Railroad.

30 Q. Well, is there any particular official stationed there that you know of? A. It is the interchange office.

Q. The interchange office? A. Yes.

Q. Now I show you exhibit D-1, photograph, and ask you if you recognize that photograph and if you can point out on that photograph the interchange office that you went to. A. Right here. (Indicating.) That is the office right there.

Mr. Dixon: What did he say? "Yes"?

Mr. Hartpence: Yes; he points out, Mr. Dixon, the building marked "x-s."

40 Mr. Dixon: The shanty?

Harry B. Chase, for Defendant—Direct

Mr. Hartpence: Shanty. He points to the building marked "x-s", the shanty.

Q. Now you say you got a board there? A. Yes, sir.

Q. Then you went over to where Frank was lying, did you? A. Yes, sir.

Q. Now, was he lying right where you saw him first when he fell? A. Yes, sir. 10

Q. In the same position? A. In the same position; yes, sir.

Q. And what did you do with him after that? A. We carried him to the office and we laid him on the bench in the office. And I sent for the ambulance—that is, Mr.—

Q. Did you do that alone or did some one help you? A. Carry him? A. No, Mr. Gattie.

Q. Mr. Who? A. Mr. Gattie, one of the brake- 20 men.

Q. Were there any cars on the tracks there aside from the ones that you spoke about, that you were coupling, at that time? A. There was six or seven cars on the rear end.

Q. Any other cars on any of the other tracks? A. Yes, sir.

Q. Well, to what extent were there cars on the other tracks? A. They were solid from St. Paul's avenue to the clear, towards Newark avenue. 30

Q. What do you call the clear? A. Well, so one car can pass the other on the switch.

Q. On all the tracks? A. On 2 and 3.

Q. On 2 and 3? A. Yes, sir.

Q. Now, how far south would that carry you? A. What is that?

Q. How far south? That is from St. Paul's avenue to the clear of the tracks; how far south of St. Paul's avenue would that carry the place where the cars were? A. Well, I should judge about 250 40 feet.

Harry B. Chase, for Defendant—Direct

Q. Never mind the number of feet; but would it carry you as far as Dey street? A. Oh, beyond Dey street.

Q. Well how far? As far as Newark Avenue?

A. No; they didn't go down as far as Newark Avenue.

Q. As far south as where you saw Frank? A.

10 Yes, sir; it extended beyond that; about seven car-lengths beyond that.

Q. How long did you work there, Mr. Chase?

A. In Marion yard?

Q. In Marion yard. A. Well, there isn't any crew that works in there regularly.

Q. Well, how long had you been working in that yard? A. Off and on for about fifteen years.

Q. Yes; drilling cars in and out? A. Yes, sir.

Q. What sort of a yard is it there? What do
20 they call it? A. Marion yard.

Q. What do they do in there? A. We put—the Pennsylvania people put trains in there, and take trains out, that the Erie shove up.

Q. And you make up trains in there? A. Yes, sir.

Q. What do you mean by making up trains? A. Well, we couple up the cars that is in there and drill out what drill backs is to be drilled back. If there is no control—probably there is something
30 wrong with the control and they send them in the yard.

Q. You put Pennsylvania trains in there and drill them? A. Yes, sir.

Q. What is the purpose of the yard? A. Interchange.

Q. What do you mean by that? A. Taking cars from one railroad to the other.

Q. Well, which railroad? A. To the Erie railroad.

40 Q. And from which? A. Erie Railroad.

Harry B. Chase, for Defendant—Direct

Q. And to which? From the Erie to which? A. To the Erie.

Q. To which? A. I mean to the Pennsylvania.

Q. And from the Pennsylvania to what? A. To the Erie.

Q. Where do the Pennsylvania tracks run? A. There ain't no Pennsylvania tracks in there, only two tracks the Erie has for delivering cars to the Pennsylvania. 10

Q. Well, how do you get from the Pennsylvania tracks on to the Erie tracks? A. We come in upon 3 freight track or 4 freight track, whichever—

Q. Well, to what point? A. Newark avenue.

Q. Newark avenue? A. Well, it is a little east of Newark avenue where the point of the switch is.

Q. Is that anywhere near the Heddon coal pocket? A. Well, it is right across the street; across Newark avenue. 20

Q. Are there any other buildings right there near Newark avenue? A. There is the Lorillard building on Newark avenue.

Q. On which side of the railroad tracks is the Lorillard Building? A. On the east side.

Q. Is that the same side as the Heddon coal pocket? A. No, sir.

Q. On the opposite side of the tracks? A. Heddon's coal pocket is on the west side of the tracks. 30

Q. Cars and engines passing back and forth a good deal of the time there? A. Yes, sir.

Q. Just before you saw Frank fall out from between the cars had you noticed any noise of any kind there? A. No, sir; none at all.

Q. Around? A. None at all.

Q. Had the cars moved at that time in any way? A. Well, what do you mean?

Q. Well, had they moved at all? You say you saw Frank fall out from between the cars. A. 40

Harry B. Chase, for Defendant—Direct

Why, when we made the coupling we coupled on—

Q. Had the cars moved when you made the coupling? A. When we made the coupling, yes; they hit the car.

Q. Now, which cars had moved? A. Why, when he made the coupling with the engine these cars only stood about eighteen inches apart or so, the
10 second and third car; and when he made the coupling from the tank of the engine to the head car, why, of course, that hit the third car, anyway, with the slack they rolled out of it.

Q. Now I am asking you what cars were there? Cars on No. 4 track? A. On No. 4 track.

Q. Were they cars on that track that Frank came out from? A. Yes, sir.

Q. So the cars had moved just before you saw Frank fall out? A. Oh, yes.

20 Q. How far had they moved? A. They could not have moved more than a foot or so.

Q. A foot or so? A. That is when you hit a car and go up against another car the car might move twelve to eighteen inches.

Q. Was he between the first and second cars? A. No, sir.

Q. Which ones? A. Between the second and third car was where he come out from between.

Q. Now, the first car moved up against the sec-
30 ond car? A. Well, I don't remember just how the first and second car was; the second and third car they stood about eighteen inches apart.

Q. Eighteen inches. Had you heard any noise from the engine at that time? A. Only the ringing of the bell.

Q. You did hear the bell ringing? A. Yes, sir; when they are moving they always have the bell ringing—in there.

40 Mr. Hartpence: That is all. Cross-examine.

*Harry B. Chase, for Defendant—Cross**Cross-examination by Mr. Dixon:*

Q. You were flagman on the train. What do you mean by the flagman? A. Well, he protects the rear end of the train when we are out on the running track.

Q. How many were there in the crew of that train on that day? A. Well, there were four in the train car and two in the engine car; six altogether. 10

Q. The engineer and fireman were in the engine and four others in the train car? A. Yes, sir.

Q. And of whom did they consist? What are they called? You were called the flagman. A. Their names: the engineer, fireman, conductor, head brakeman, middle brakeman, and flagman.

Q. And were you of those there at that time on that day? A. Yes, sir.

Q. Those four men? A. Yes, sir. 20

Q. And two engineers? A. Not two engineers.

Q. Well, engineer and fireman? A. Engineer and fireman.

Q. Two enginemen. Now, at the time you saw Frank fall out from between the cars just where were you? A. Just where was I? A. About the middle of the head car, next to the tank of the engine.

Q. Alongside of the car near the engine, alongside of the first car? A. Yes, sir. 30

Q. Or the last car? A. No, the first car.

Q. The first car? A. The head car we coupled up to.

Q. Would you call that the rear end or the front end of the train? A. Well, in the yard there, the way we were working there—

Q. On this train, do you call that the rear end or the front end of the train? A. Well, in there, yes, sir; that is the head of the train.

Q. It is the head of the train. And you were 40

Harry B. Chase, for Defendant—Cross

on which side of that train? A. On the west side.

Q. And was it from the west side that Frank came out? A. Yes, sir.

Q. Now, where was the rear brakeman? A. Well, I am the rear brakeman.

Q. What? A. I am the rear brakeman.

Q. You are the rear brakeman? A. I am the
10 rear brakeman or flagman.

Q. Where was the middle brakeman? A. The middle brakeman?

Q. Yes. A. Well, now, I can't say just where he was at that time.

Q. You saw him, didn't you? A. Yes, sir; I saw him.

Q. Who was he? A. Seaman is his name.

Q. What? A. Seaman.

Q. Where was he? A. Well, he had rolled a
20 car in on No. 3.

Q. Where was he at this time with respect to that train? A. I don't remember where he was right at that time.

Q. When had you last seen him before the accident? A. When he rolled this car in on No. 3.

Q. Rolled which car? A. The car that we cut off, and he rolled it in on No. 3 track, what you call the drill back.

Q. Well, was he on one of the cars on this train?
30 A. Yes, sir; not on the train that we were going to couple up; that was a car that we were going to drill out. We didn't want to take it with us; it was held in the yard for some reason.

Q. You don't know where he was at that time? A. No; I wouldn't say.

Q. Now, he is the middle brakeman. And where was the conductor? A. The conductor? He was at the head end of the engine; at the head of the engine.

40 Q. At the head of the engine? A. Yes, sir; he

Harry B. Chase, for Defendant—Cross

was out there at the end. He was not on the engine, but the head end on the ground.

Q. On the ground, alongside of the engine? A. Well, alongside of the engine.

Q. And who was the fourth man? Do you recall him? A. Well, I would be the fourth one, then.

Q. You have been two things; you have been 10 the brakeman and the flagman. Now, that is enough for you. A. Well, then you have got to go back to your engineer and fireman for the fourth one.

Q. No; we have four men in the car besides the engineer and the fireman. Now, you have counted yourself and the conductor; you don't know anything about the middle brakeman. Now—the front brakeman, I guess we call him, who was he? A. Gattie. 20

Q. Where was Gattie? A. He was right there at the coupling between the engine and tank, where he makes the coupling, standing.

Q. Standing between the engine and the tank? A. Well, that is where you make the coupling.

Q. Now, I want to know where he was. A. Standing on the ground where he made the coupling, between the tank and the car.

Q. Between the tank and the first car? A. On the ground. 30

Q. And the first car? A. Yes, sir.

Q. And he was nearer the engine than you were when Frank came out? A. Oh, yes, sir.

Q. So of all the crew over there you were the nearest to the place where Frank came out? A. As near as I can remember I was the nearest man to him.

Q. Did you see the middle brakeman after the accident? A. Yes, sir.

Q. Where did he come from? A. He come from 40

Harry B. Chase, for Defendant—Cross

—towards the engine; from the engine down to where we were.

Q. He came from towards the engine. Where he was you don't know, but after the accident he came from that direction? A. Yes, sir.

Q. Is Gattie the witness who was on the stand today? A. No, sir.

10 Q. Who was he? A. Seaman.

Q. So that the time Frank came out Gattie came running up from the engine—I mean Seaman came running up from the engine, did he? A. Well, that is where he was coming from the first I noticed him.

Q. He was back towards the engine when you saw Frank come out? A. Well, he come from that direction.

20 Q. Now, how many cars were there on that train? A. Well, we were going to get eighteen cars, I believe; I had the last number.

Q. How many were there up there? A. On the track?

Q. On that train; yes, sir; on that track? A. Well, I guess there must have been on that track about thirty-five cars, I should judge. We were only going to get eighteen cars or twenty cars; something like that. I had the last number.

30 Q. You mean there were thirty cars strung along that track? A. Not this side of the crossing, to St. Paul's avenue.

Q. No; on that track. A. On that track.

Q. Composing the train there were thirty cars, and you were going to uncouple twenty of them and take them away, were you? A. You can't uncouple them and drill them out, you know; you have got to couple them up.

40 The Court: Well, here is the question, as I understand it, Mr. Chase: Out of thirty cars or thirty odd cars that were on this track

Harry B. Chase, for Defendant—Cross

4, you went there for the purpose of taking out some eighteen or twenty, however you did it. You went there to take eighteen or twenty from those thirty or thirty odd cars; is that the situation?

The Witness: Yes, sir.

The Court: All right.

Q. And how long are those cars? A. About forty foot, some of them; some of them longer. 10

Q. The shortest were about forty? A. About forty, the shortest.

Q. And when coupled how large a space is there between the cars? A. Well, from end sill to end sill I guess about eighteen inches.

Q. Now, in order to get these twenty cars you coupled first your engine to the first, nearest car to it? A. Yes, sir. 20

Q. And then between that car and the next car there was another space with coupling to be made, was there? A. Well, now, I don't know whether there was or not between those two cars. I don't remember that. If there were it must have been pretty close together; because I didn't look.

Q. But you would have to know in order to make your couplings? A. I didn't make any couplings. I would have to know if I got back there. 30

Q. Wasn't it your business to make couplings or help make them? A. Yes, sir.

Q. Don't you know whether there was a space or coupling to be made between the first and second cars? A. No; I couldn't say that.

Q. Couldn't say it? A. But I know the coupling was between the second and third car.

Q. Well, did you go up to the second and third cars to find out if that was so? A. No; I was on my way. 40

Harry B. Chase, for Defendant—Cross

Q. What? No; I was on my way there.

Q. You were on the way? A. Walking toward it.

Q. But you knew the cars were apart at that place—second and third cars? A. Yes, sir.

Q. Were apart so that the coupling had to be made? A. The coupling had to be made there.

Q. Then the trouble was that the engine had
10 started without a signal, was it? A. No, sir.

Q. Then the trouble was that it made the other coupling so hard that it started the second car going, or the third car? A. No, sir.

Q. Well, you didn't intend to make that second coupling, did you? A. Did I? I didn't intend to make no couplings only as I come to them. When I come to a coupling and the car wants to be coupled, it may be that they are further enough apart so that I can open the draw head. I open
20 the drawhead and give a signal to one of the men, and the man he will take it from the head engine.

Q. You are supposed to stand there until they come together to see that the coupling is made secure? A. No, no; you ain't supposed to stand there.

Q. Aren't you supposed to examine it when you bring the cars together to see whether the pin drops and whether the couplings have knuckled? A. No; you don't have to stand there.

30 Q. Doesn't it often happen that you bring your cars together and the pin may drop and yet not knuckle? A. Oh, yes; lots of times that has happened.

Q. So you were obliged to stand there and find out if your couplings made? A. No; I ain't obliged to stand there and see whether they couple or not; because I have made eighteen or twenty couplings with one drive of the engine.

Q. With one drive of the engine? A. With one
40 drive of the engine—up—there—and you do it every night.

Harry B. Chase, for Defendant—Cross

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

Q. Do you get instructions to do it that way

A. No matter whether they are instructed, that is the way we have always worked.

Q. So that you are permitted to make a half dozen or more couplings with one drive? A. Yes; in the yards we are.

Q. Don't you have to fix your—what do you call them?—knuckles? A. Well, they go together and you set your knuckles. 10

Q. You set your knuckles before you make the coupling? A. We set the knuckles before we make the coupling.

Q. Did you set the knuckles between cars two and three where Frank came from? A. No; I didn't go there.

Q. You hadn't got that far when Frank came through? A. When this boy came through. 20

Q. You worked around there— A. Well, in the neighborhood off and on for the last fifteen years.

Q. You know this Dey street, do you? A. Yes, sir; I know Dey street.

Q. Know it all that time? A. Yes, sir; I know there was a Dey street there.

Q. You know where it is? A. Yes, sir.

Q. Do you know how wide it is? A. No, sir; I do not; but I should judge about forty foot from gutter to gutter. 30

Q. What? A. From curb to curb.

Q. But you don't know where the lines of Dey street are, do you? A. No, sir; I do not.

Q. And when you had made this particularly careful estimate of 115 feet as the spot that you say Frank was south of Dey street, what did you mean? From the curb? A. Well, that is what we call it.

Q. At or near Dey street? A. What we call Dey street. 40

Harry B. Chase, for Defendant—Cross

Q. What do you call it, Dey street crossing? A. No, sir.

Q. What do you call it? A. Don't call it anything.

Q. Call it Dey steet? A. Dey street we call Dey street.

Q. Well, now, what is the point from which you
10 made your measurement or calculation in Dey street which enables you to say that Frank came out from these cars at a distance of 115 feet from that point? A. Well, I can stand at Dey street, if Dey street comes to the railroad—I can stand at Dey street and look down there.

The Court: Yes,; but what Mr. Dixon is asking for is this: From what known thing, from what indicated thing on what you say is Dey street did you make this calculation here
20 of 115 feet? For instance, you have just spoken of the width of Dey street from gutter to gutter or curb to curb, your estimation being forty feet: there is an indicated thing—the curb line is an indicated thing that you know about on Dey street. Now do you understand what he is reaching for?

The Witness: Yes, sir.

The Court: I will give it to you more plainly. When you figured 115 feet did you
30 figure from the curb on Dey street or did you figure from some other indicated place?

The Witness: On the side I was standing on, on the west side I would not; but on the east side I could take the end of Lorillard's building, and that I suppose is a street which is about—on the west side of the railroad—is about, I should judge, 115 feet.

Q. Lorillard's building is blocks away, isn't it,
40 or a block or two away? A. No; that goes from Newark avenue to Dey street.

Harry B. Chase, for Defendant—Cross

Q. Yes, but it is not near the railroad, is it? A. The railroad is right—it is right across the railroad; the Erie Railroad has a track that runs right up in there.

Q. Yes; but how far is the building known as Lorillard's, which is on Dey street, from the railroad? A. From the railroad?

Q. Yes.

10

The Court: Along Dey street. How far along Dey street is the Lorillard building?

The Witness: I don't know just how long that building runs.

The Court: The nearest corner of Lorillard's building, the nearest corner towards the railroad, how far is that along Dey street from the railroad?

The Witness: Well, I don't know whether—

The Court: Well, about. Give us your idea of it. 20

The Witness: I should judge that building to be 200 feet long.

Mr. Hartpence: I don't think he understands it.

The Court: He is not asking the size of the building. Lorillard's building runs practically from Newark avenue to Dey street, doesn't it?

The Witness: Yes, sir.

30

The Court: Now, what we are asking you is, give us the distance from the railroad tracks along Dey street to the nearest point of the Lorillard building on Dey street. Is it a block away, or two blocks away, three blocks away, or 100 feet away, five hundred feet away? What distance?

The Witness: Well, let's see if I get you right. There is the railroad track here, and Lorillard's building here—

40

Harry B. Chase, for Defendant—Cross

The Court: The end that you are putting your finger on is Dey street. Here is the railroad running by you. This is Dey street here. Lorillard's factory is this book. Now, then, how far is it from the railroad along Dey street to this corner of Lorillard's?

10 The Witness: Well, it might be fifty or sixty feet from the railroad track.

The Court: Fifty or sixty feet from the railroad track?

The Witness: Up against the building—corner of the building; it might be that.

Q. What is the street east of the railroad and crossing Dey street? A. I know that there is a street in there, but I don't know what the name is.

20 Q. How close is Lorillard's to that street? A. On the south side of the street is Lorillard's building, and on the street that comes from Newark avenue—I don't know how far north it goes; I know that this street comes from Newark avenue about the end of Lorillard's property, that is to Dey street. I don't know what the name of it is.

Q. You are not much on the distances there except on this one particular distance there? A. No.

Q. Of 115 feet. Why didn't you make it 125 feet? Where did you get the fifteen feet from?

30 A. Where did I get it from?

Q. Yes. A. Well, I will tell you. A box car is about—we calculate about forty feet long, and I should judge it would fall a little short of three box cars.

Q. You think there were three box cars where? A. Would fit in between this place where the boy fell out from the car and Dey street.

40 Q. You think there were three box cars at that place—between that place and Dey street? A. Yes.

Harry B. Chase, for Defendant—Cross

Q. Where was the third car with respect to Dey street, counting that way? A. How near to it?

Q. Yes. A. Well, it was not anywhere near Dey street.

Q. The first car you counted? A. I didn't count any cars. I told you three car-lengths were about 120 feet, and it fell short about three feet of three cars-lengths. 10

Q. How did you know it fell short of three car-lengths if there were not three cars there? A. How do I know?

Q. Yes. A. I don't know; I am only telling you to the best of my knowledge.

Q. You don't even know where Dey street is? A. Yes; I do know where Dey street is.

Q. What part of it do you recognize as crossing the railroad or where you can see it?

Mr. Hartpence: I object. It is not competent. 20

Mr. Dixon: It is perfectly competent.

The Court: You are asking him by the question really to say that some portion of Dey street crosses the railroad track.

Mr. Dixon: Yes, and he gives it 115 feet from Dey street. Now, I have a right to know just what that monument is.

The Court: The objection, as I understand it, is to your incorporating in your question 30 words which would signify that there is a street crossing the railroad.

Q. (Repeated by the stenographer) What part of it do you recognize as crossing the railroad, or where you can see it?

The Court: He is objecting that you are assuming in the question that Dey street crosses the railroad.

Mr. Dixon: Well, if your Honor please, if 40

Harry B. Chase, for Defendant—Cross

10 you will hear me just a moment, I think it is perfectly proper on cross-examination. But this is the point and the reason: He says that this boy came out from between the cars at a point 115 feet south of Dey street. Now, then, he has made his estimates because, he says, he thinks there were three car-lengths between Dey street and the place where the boy came out, or something short. And then I asked him if that freight car was on or near Dey street, and he says he does not know. Then I asked him from what point, what crossing, what indication in Dey street—because he was on the railroad track—what thing there was that he started from and to which he applies 115 feet.

20 The Court: If the question is put in the way you last suggest there can not be any objection to it, because it is the same kind of question I was endeavoring to put to him to get him to indicate some physical thing on what he says is Dey street, from which he makes this measurement or calculation. Now, if you will frame it that way, Mr. Dixon, I can not see how there can be any objection to your question. The objection was because
30 you were including in your question a suggestion, at least, that Dey street crossed the railroad, and if he answered the question it might be said that he said Dey street crossed the railroad; not that you haven't the right to find out from him what thing, or place, or physical object he measured from—you have that right.

Mr. Dixon: Well, does your Honor rule there is a legal objection to my asking this witness if Dey street crosses the railroad?

40 The Court: Well, I do not know; that question is not before me.

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Mr. Dixon: Yes, it is.

The Court: I will sustain the objection to this question. I won't argue it any more.

Mr. Dixon: I take an exception.

Q. Don't you know that Dey street there is a crossing, and that the railroad crosses Dey street, or that Dey street crosses the railroad at that place? 10

Mr. Hartpence: I object to that as incompetent; it calls for a legal conclusion.

The Court: I will sustain the objection.

Mr. Dixon: Allow me an exception.

The Court: You may have it.

Q. Were there any of your trainmen to your knowledge guarding the crossing at Dey street?

Mr. Hartpence: That is objected to as immaterial. 20

Q. The place where Dey street and the railroad come together and cross one the other, or intersect each other.

Mr. Hartpence: That is objected to. It is simply injecting into the question the crossing of Dey street.

Q. (Last question repeated by the stenographer.) 30

Mr. Hartpence: In the first place it is irrelevant and immaterial, because it has not been shown that they cross each other, and there is no duty to guard. In the second place, this witness is incompetent to state whether there is a crossing at that point.

The Court: The gist of the question is whether there was a person guarding that point.

Mr. Hartpence: It can not be placed, of 40

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course, in that form. Then I limit my objection to the materiality and relevancy.

10 The Court: I will overrule the objection on those grounds, because I have not construed in my mind what the purport of the question is, and as to whether or not there was a crossing there; but as to whether or not there was any person at that point as indicated.

Q. (Repeated by the stenographer) Were there any of your trainmen to your knowledge guarding the crossing at Dey street, the place where Dey street and the railroad come together and cross one the other, or intersect each other? A. Well, there ain't any crossing there.

20 The Court: That is not what you are asked. You are asked, to your knowledge do you knew whether any of your trainmen were at that point indicated, guarding that point?

The Witness: No; there was not.

Q. What were you doing with this train, anyhow? Shifting? A. Well, we got through shifting cars and were going to couple up to make this pull of either eighteen or twenty cars, whichever it was.

30 Q. You were just finished the shifting and then were coupling up? A. Started to couple up.

Q. About to move—

The Court: Do I understand by that, Mr. Chase, that you had done all the manipulating, etc., to get the eighteen or twenty cars, whichever it was, to take them out of that place, so that they appeared on this track No. 4 one after the other? You had eighteen or twenty in a string ready to couple up?

40 The Witness: We were going to couple them.

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The Court: Yes, but you had them all ready to couple up, did all the drilling, all the manipulating to get those cars out of the thirty or forty, so that you did have eighteen or twenty on the track ready to couple up?

The Witness: Correct.

Q. Then you were going to move them in what direction? A. Well, we pull them toward the south, out on to whatever track we get permission to use, either No. 4 track or No. 3 freight track, or the Pennsylvania lines, and then back them back on No. 4 track. 10

Q. Then you were shifting? A. Were shifting?

Q. Yes. A. You asked me what we were going to do, and I am telling you we were going to make this pull and set these cars on the No. 3 freight track. 20

Q. And then shift some other cars? A. I don't know; I had the last one on this pull, the last number on this one that we were going to pull.

Q. Now, isn't it a rule of your company when you shift cars over a crossing that you should protect that crossing with one of your crew?

Mr. Hartpence: That is objected to as immaterial and irrelevant; not the proper method of proving the rule, if there is any such thing. 30

The Court: Well, if an employe knows the rules may he not state what they are?

Mr. Hartpence: Well, he has not yet shown that he knows.

Mr. Dixon: I only asked him if there was any such rule.

Q. (Repeated by the stenographer) Now, isn't it a rule of your company when you shift cars over a crossing that you should protect that crossing with one of your crew? 40

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The Court: Well, of course, you can say that you know or that you do not know, and if you do know you can say whether it is a rule or is not a rule. It is a dual question. It does not clearly ask him whether he knows of such a rule. Do you understand the question?

10 The Witness: Yes. At a crossing where there is no flagman or gateman stationed.

Q. There was no gateman or flagman stationed at that crossing, was there?

Mr. Hartpence: That is objected to on the ground that it again assumes a crossing.

The Court: Well, of course, if he has not made it out it is not of any use at all.

Mr. Hartpence: It gets in the question.

20 The Court: How am I going to keep it out?

Mr. Hartpence: It misstates a fact and calls for a conclusion.

30 The Court: The situation is one I can not control. If he has not established it as a crossing it is not relevant; but if he has established facts which warrant the jury in finding there was a crossing it would be relevant, wouldn't it? Now, until I know whether it is a question for the jury and know what the jury is going to say about it, if it is for the jury, I can not see where it is not relevant. It will depend entirely upon that. I will overrule the objection.

Mr. Hartpence: Allow me an exception.

The Court: You may have it.

Q. (Repeated by the stenographer) There was no gateman or flagman stationed at that crossing, was there?

40 The Court: At Dey street, he means.

Harry B. Chase, for Defendant—Cross

A. No; there is no crossing there.

Q. I didn't ask you that. I asked you if there was a gateman or flagman there. A. No.

Q. Is that rule to which you have referred a printed rule? A. Yes, sir.

Q. Is that rule— A. No. 102.

Q. 102-a, isn't it? A. Yes; 102—and 102-a; it takes in both of those, if I am not mistaken. 10

Q. Is that the book of rules? A. Yes, sir; that is the book of rules. I studied them long enough to know it.

Q. Now, will you read 102 and 102-a?

Mr. Hartpence: I object, if your Honor please, if he is going to offer the book in evidence.

Mr. Dixon: I am going to offer those rules in evidence.

20

Q. You say that is the book of rules. Now, look at the book of rules, Nos. 102 and 102-a, and tell me whether those are the rules to which you refer. A. 102 and 102-a; yes, sir.

Q. Now, what do those rules say?

Mr. Hartpence: I object if he is going to offer the rules. I ought to have an opportunity to object. To ask this witness to read the rules does not give me any opportunity at all.

30

The Court: Shouldn't you offer those rules?

Mr. Dixon: I can. I offer the two rules.

Mr. Hartpence: I ought to have a chance to look at them and see whether those are the rules.

The Court: Well, do you offer them or don't you?

Mr. Dixon: I offer these two rules when the time comes, but I ask him now to have them read.

40

Harry B. Chase, for Defendant—Redirect

The Court: No. I sustain the objection then.

Mr. Dixon: Your Honor will allow me an exception to that.

The Court: Now, let me understand that question. You were asking him to read aloud in the presence of the jury those two rules, weren't you?
10

Mr. Dixon: Yes, sir.

The Court: All right. I sustain the objection. You may have an exception.

Mr. Dixon: I guess that is all.

Redirect Examination by Mr. Hartpence:

Q. Mr. Chase, did you see Frank at any time that day before he fell out from between the cars?

A. No, sir; I never seen the boy before that time
20 at any time.

Q. I show you a photograph—

Mr. Hartpence: If your Honor please, I would like to identify two more photographs by this witness. I omitted to do it on the direct examination.

Q. I show you a photograph and ask you if you recognize that picture that is portrayed there? A. Yes, sir.

30 Q. Now, can you point out on that photograph the position where Frank fell from between the cars?

The Court: You may answer "yes" or "no."

A. Yes, sir.

Q. Now, will you point out and mark on this photograph with an x up in this white part, just above where it was, anywhere in there, indicating where Frank fell. A. I could do it better here—
40

Harry B. Chase, for Defendant—Redirect

The Court: You have asked him to do a very difficult thing—pointing out in the skyline; because that might be anywhere.

Q. Mark it with an x. A. (Witness does so) That may not be directly.

Q. Well, mark it as near as you can. A. That may not be directly over this abutment. I want 10 to get it right at the end of this abutment.

Q. Where was he with regard to these people whom you see standing there near the abutment—anywhere near them? A. Well, right here where I made this x.

Q. Well, make the x with a pen, will you please, and make it large and plain. A. (Witness does so).

Q. All right.

Mr. Hartpence: I offer it for identifica- 20 tion.

(Marked D-5 for identification.)

Q. And is that trestle that shows off to the right where you made that mark the Hayden Coal Company trestle? A. Yes, sir.

Mr. Hartpence: That is all.

By Mr. Dixon:

Q. Referring to this last photograph, D-5 for 30 identification, is that the train that appears upon a track in this picture on the same track that the train was on that killed Frankie? A. Yes, sir.

Q. That is track No. 4? A. That is track No. 4; yes, sir.

Q. And in which direction do you look from the foot of this photograph towards the men who appear standing in the picture? A. In which direction?

Q. Yes. A. This is towards the west—to the 40 south, here (indicating).

Harry B. Chase, for Defendant—Redirect

Q. Where is Dey street here, top or— A. Well, Dey street would come in over here.

The Court: If Dey street were shown on this picture here would it be on this side of the photograph nearest you, or further away from you?

The Witness: On this side here.

10

Q. Down towards the bottom? A. Down towards the bottom.

Q. So that in this photograph you are looking from Dey street south? A. From Dey street south.

Q. This photograph does not show the house into which you took the body of the boy, does it? A. No, sir.

Q. Where would that be? In which direction?
20 A. That would be here; it would come out to the end of this rail here towards the west (indicating on the bottom of the right of the photograph).

Q. You say this is track No. 4? A. Yes, sir.

Q. How many tracks are there that cross Dey street there?

Mr. Hartpence: That is objected to on the ground that it assumes a legal conclusion.

Mr. Dixon: That can not be so—a legal conclusion.

30 Mr. Hartpence: That is a conclusion of the law—

Mr. Dixon: It is not put to the witness as a question for his opinion.

The Court: Well, I understand that by the use of the language in the question, Mr. Dixon, you are not asking him to assume that Dey street crosses at all; nor is his answer to have any bearing on the question of crossing at all.

40 Mr. Dixon: Nor have I intended in any

Harry B. Chase, for Defendant—Redirect

of my questions to catch the witness; it is only for the purpose of locating the place; that is all.

The Court: On the right-of-way of the company to fix the number of tracks.

Mr. Dixon: That is all.

The Court: Very well. Then I will overrule the objection. 10

Q. How many tracks are there that go across that place that we know to be Dey street? A. From the east side to the west side?

The Court: Yes, sir.

The Witness: Up to this track here?

Q. No, no. How many tracks are there that cross that place that we call Dey street? A. If I ain't mistaken there are seven. This track here— 20
this track would lead in—

Q. Well, how many tracks appear on this photograph? A. I can only see—

Mr. Hartpence: The photograph will speak for itself.

A. This one here represents a track, and this one is a track, and here is a track; there is four.

Q. You think there are three other tracks that are not disclosed in the photograph? A. There 30
is three over that way from that track.

Q. Three then to the east of the train? A. No. 1, 2 and 3.

Q. You can not see them there? A. You can't see them there.

Q. And the 4 track means counting from the east towards the west? A. The nearest track to the east is there.

Q. The next is 2, and the next is 3 and the next is 4? A. Yes. 40

Harry B. Chase, for Defendant—Redirect

Q. What is the No. 5? What is that called? A. Well, that has always been called the Susquehanna main line; we call it main line track.

Q. What is the next track, No. 6? A. That is the track that we back in the Hayden's coal pocket there.

Q. What is the next track? A. Well, that is the
10 track of the Erie railroad, and there is an ice dock out there, and that is the freight house there that they unload some freight at. I don't know anything about that track there myself, only that I know it is there.

Q. Now, were there any cars standing upon any of these tracks that do show in the photograph besides where the trains were at the time of the accident? A. Well, not anywhere near here. It might have been down around the freight house
20 there.

Q. Not anywhere near Dey street? A. That is all on these tracks here.

Q. Not on those at all? A. Those are Erie tracks, and I don't know anything about them.

Q. Don't you know whether there were any cars standing on them? A. I know there was nothing to block your view.

Q. You know there was nothing to block your view? A. I know there was nothing to block your
30 view.

Q. Then when you walked with the body of the boy you didn't walk up alongside of the train to Dey street and then cross over the tracks, did you? A. This way. I took the body up just about where I met the cars there, and carried him off the track here. Here is an incline—

Q. You made the shortest line that you could to the— A. To the office.

Q. —office. That would take you nearly straight
40 across the tracks, wouldn't it A. No, sir.

Harry P. Mayell, for Defendants—Direct

Q. Not nearly straight across? A. No, sir; because if I went straight across the track or diagonally over the tracks I would come over this bank here.

Q. When you got to the house where you took the body, who was in the house? Anybody? A. There was Mr. Harding, the chief clerk, and Mr. Watson; I don't know just what his position is, 10 but he looks after the—looks over the cars, inspects the cars; he is the boss there.

Q. And they were in the shanty? A. Yes, sir; they was in the office.

Q. Quite a crowd collected, didn't they? A. Yes, sir; after the body—after we brought the body into the shanty.

Q. These two men didn't come out of the shanty before you took the body up? A. No, sir.

Mr. Dixon: That is all.

20

(Witness excused.)

HARRY P. MAYELL, a witness sworn on behalf of the defendant, testified as follows:

Direct Examination by Mr. Hartpence:

Q. You were the fireman on the train that day, weren't you, of the accident, Mr. Mayell? A. Yes, 30 sir.

Q. Did you see Frank hurt? A. No, sir.

Q. Did you see him at all after he was hurt? A. No, sir.

Q. How did you learn that he was hurt? A. One of the brakemen come up on the engine and told me about it.

Q. What had the engine been doing just before the man told you about Frank having been hurt? A. Just coupled up to the head car.

40

Harry P. Mayell, for Defendants—Direct

Q. Talk a little louder. A. Just coupled up to the head car.

Q. And you moved from what direction? A. We moved north.

Q. From— A. From the south.

Q. What is the street from the south end of the yard there? A. Newark avenue.

10 Q. You had come from that direction, had you, and moved up north to make the coupling? A. Yes, sir.

Q. What were you doing at that time? A. I was sitting up on the fireman's seat on the left side of the engine, looking back.

Q. What were you doing? A. Ringing the bell.

Q. Anything else? A. Just watching back.

Q. Did you see anybody back there? A. There was cars on the next track and I couldn't see back.

20 Q. There were cars on the next track? A. Yes, sir.

Q. Did you see Frank Brooks, this boy, at all that day? A. No, sir.

Q. Did you see anybody standing back there on the tracks as you looked back to make that coupling? A. No, sir.

Q. Are the tracks straight or on a curve? A. On a curve.

30 Q. You know where St. Paul's avenue is? A. No; I don't.

Q. Do you know where Dey street is? A. No.

Q. Do you know where the Hayden trestle is, leading into the Hayden coal pocket? A. I know where the coal pockets are.

Q. Now, going from the coal pocket down toward Newark avenue, going from the coal trestle leading up to the pocket down toward Newark avenue to go out on the Pennsylvania tracks, which way do the tracks curve, right or left? A.

40 Going out from the tracks?

Harry P. Mayell, for Defendants—Cross

Q. Going out from the yard and the trestle toward the Pennsylvania tracks—on the Pennsylvania tracks, going in that direction? A. They curve towards the east.

Q. Towards the east? A. To go on to the Pennsylvania tracks.

Q. Yes. And where does that curve begin? A. I don't know just how far in the yard it does 10 begin.

Q. Well, did the curve begin at a point south of where you made this coupling or north of where you made the coupling? A. That was north of where we made the coupling.

Q. You were making the coupling then on a curve, were you? A. On a curve.

Q. And you say there were also cars on the next track, too? A. Yes, sir.

Q. The next track which way? A. That was on 20 the left side of the engine.

Q. That would be what number track? A. I don't know.

Q. Don't know. You say you were ringing the bell at the time? A. I was ringing the bell.

Mr. Hartpence: That is all. Cross examine.

Cross Examination by Mr. Dixon:

Q. You don't know the place we have called Dey 30 street at all? A. No, sir.

Q. How long have you worked there? A. How long have I worked where?

Q. In that neighborhood where you were that day. A. Two days.

Q. Do you know how many cars you had on that track? A. No, sir; I do not.

Q. Do you know who gave the signal to move the engine? A. No, sir.

Mr. Dixon: That is all.

(Witness excused.)

James W. Donnelly, for Defendants—Direct

JAMES W. DONNELLY, a witness sworn on behalf of the defendant, testified as follows:

Direct Examination by Mr. Hartpence:

Q. Mr. Donnelly, you were the engineer on the train that day that Frank was killed? Weren't you? A. Yes, sir.

10 Q. Did you see him hurt? A. No, sir; I saw him when he came out from between the cars; second and third car.

Q. How did you learn that he had been hurt? A. What?

Q. How did you learn that he had been hurt? A. I seen him coming out.

Q. Oh, you saw him coming out from between the cars? A. Yes, and I stopped the engine as soon as I seen him coming out; I applied the air; 20 and he came sideways and stood on his feet for a second, then he dropped down on his head.

Q. He came out on the side you were on? A. Yes, sir; that is a straight line I was on.

Q. Now, then, just before you saw him coming out from between the cars what had you been doing with the engine? A. Coupling the first car and the second.

Q. What were you doing? A. We bumped that car up with the engine next to that coupling.

30 Q. You had been making that coupling? A. Yes, sir.

Q. Where had you been moving your engine from to make that coupling? A. The gate end facing out toward Newark avenue.

Q. Did you come out from that direction? A. Yes, sir.

Q. What had you been doing before that? A. I was doing some other work on the tracks this way (indicating).

40 Q. Shifting cars? A. Yes, sir.

James W. Donnelly, for Defendants—Cross

Q. As you came back to make that coupling, just before you saw Frank fall out from between the cars, did you see anybody on the track? A. No, sir.

Q. Had you seen this boy before you saw him fall out from between the cars? A. No, sir; didn't see anybody.

Q. Did you blow your whistle and ring the bell, 10 or anything like that? A. Rang the bell.

Q. Who was doing that? Who did that? A. Why, the fireman.

Q. On whose signal do you move that engine back and forth? A. On the brakeman's signal or the conductor's, whichever one of them you see.

Mr. Hartpence: That is all. Cross examine.

Cross Examination by Mr. Dixon: 20

Q. You didn't move it on the flagman's signal that day, did you? A. On the flagman's? No; I guess not.

Q. What? A. I don't know just who was the flagman that day.

Q. Do you know where he was? A. No, sir; I do not.

Q. Did you move it on the conductor's signal? A. The conductor was at the head of the engine.

Q. He was nearer to Newark avenue, was he— 30 A. Yes, sir.

Q. —than the engine was? A. Yes, sir.

Q. Then you didn't move it on his signal? A. No, sir.

Q. Well, whose signal did you move it on? A. On Seaman's signal.

Q. On Seaman's signal? A. Yes, Seaman; he came upon the back, riding, you know; coupled up.

Q. He was the one gave you the signal to back in? A. Yes, sir. 40

James W. Donnelly, for Defendants—Cross

Q. And he was standing, watching the coupling, between the tender and the first car? A. Yes, sir.

Q. And you didn't think that when you were coupling to this first car you were also going to make the coupling further down the train? A. No, sir.

10 Q. Didn't know that. So that when you ran your engine back to the car, back to the first car, you moved the first car back to the second car? A. Yes, sir.

Q. That moved the second car on back to the third car, and you were moving back all the time, were you? A. No, no. When you couple up to a car—here is the engine, here is the car. When you are coming up to a car to couple it up, we will say, why, as soon as you strike the car you apply your air, and that holds the engine.

20 Q. You are expected to couple only one coupling at a time, aren't you? A. That is all.

Q. And you didn't know that you were going to make one more coupling in that process of backing? A. No, sir.

Q. As a matter of fact, you did make two couplings; the other was unexpected? A. (No answer made by the witness.)

30 Q. But the fact is as you went back to make your couplings you went as far back as the train would go under the steam you had— A. No; as soon as you come up against them cars, you come up as easy as you can, and as soon as you are about to strike that car you put your air on and apply your air brake, and that holds her there, and if they want to do any more—

Q. Then if you want to make another coupling you go on and do the same thing? A. You go by the signals.

40 Q. Yes; but, as a matter of fact, what you did that day was to make two couplings at the one

James W. Donnelly, for Defendants—Cross

time? A. Well, I don't know anything about that.

Q. Well, you didn't move your engine back in the other direction again, did you, before Frankie came out? A. No; just as we struck them cars he came out. When I saw him first come out I thought he wasn't hurt. He came out on his feet.

Q. But he was crushed; his chest was all crushed in? A. I don't know; I didn't look at 10 him.

Q. You didn't look at him? A. No, sir.

Q. But you didn't move your engine in the opposite direction from where you were when the coupling was made, in order to release Frankie's body; did you? A. I was—he was on the ground. I didn't move the engine for—I don't know as I moved her at all after that. I stood right there.

Q. At the time he came out were you moving backwards? A. No; she was standing still when 20 he came out. The slack let him out—the slack of the train.

Q. What kind of a slack? A. Well, a space between them. You get hold of the head car, after that go back a little—you know, the slack ahead of you.

Q. You think you went with sufficient force against the third car to move the train still further? A. No; we might have just touched the third car—between the second and third car. 30

Q. That is where he came out? A. He came out from between the second and third cars.

Q. And you think you just touched it? A. I couldn't tell whether I touched it or not.

Q. Well, that is where he was killed. A. Yes.

Q. And you haven't any doubt as to what killed him, have you?

Mr. Hartpence: That is objected to; it is mere conjecture on his part.

Mr. Dixon: All right; I withdraw it. 40

James W. Donnelly, for Defendants—Cross

The Court: Now there has not been any contention as to how he met his death.

Mr. Dixon: No.

Mr. Hartpence: My only objection is to having the witness conjecturing on the witness stand. I do not think it is a legal question. I am going to object to it every time it happens.

10

Q. Now, were there any other cars on any other tracks near Dey street there? A. There might be, for all I know. I don't keep track of them, you know; we just keep track of where we go.

Q. Well, you know that place that they call Dey street? A. I don't know just about it. I don't belong around there at all.

Q. How long have you worked around there? A. I have worked for a good many years in and out.

20

Q. Do you know any of the streets around there? A. Very few of them.

Q. Do you know any of the streets there?

Mr. Hartpence: Objected to as not proper cross examination. I did not examine the witness as to anything at all about the locality.

The Court: It may be simply for the purpose of fixing the point or location as to which he is to be examined, on something that is proper.

30

Mr. Dixon: That is the purpose, sir.

The Court: All right.

Q. (Repeated by the stenographer) Do you know any of the streets there? A. Why, St. Paul's avenue.

Q. You know St. Paul's avenue? A. Yes, sir; that is the main street there.

40 Q. What? A. That is the main crossing there.

James W. Donnelly, for Defendants—Cross

Q. That is the main crossing there—St. Paul's avenue? A. St. Paul's avenue.

Q. Do you know "Howell" street? A. No, sir.

Q. Don't know that. Do you know Cherry Lane crossing? A. Cherry Lane is closed up a good deal.

Q. You know where it was? A. Yes, right there behind Heddon's coal pocket. 10

Q. Well, now, how far was your engine from St. Paul's avenue, which is the crossing you do know, at the time you saw Frank come out? A. Well, about three or four car-lengths, I guess.

Q. From St. Paul's avenue? A. Yes; we had hold of three cars; those two cars were not—there were three cars standing there.

Q. You know where St. Paul's avenue is, you say? A. Yes.

Q. And you think your engine was about two, 20 or three or four car-lengths to the south of St. Paul's avenue? A. It was more than that. We backed up on to it and made three cars; there is where we stopped.

Q. St. Paul's avenue? A. Way this side of it.

Q. I am asking you about how many car-lengths was your engine from St. Paul's avenue when Frank came out from between the cars? A. How many car-lengths?

Q. About nine car-lengths? A. I don't know 30 how many car-lengths she was. I didn't notice them.

Q. How far were you from St. Paul's avenue with your engine? A. Well, I don't know how you locate any more than that. They are all long switches there. What is the next street to that?

Q. Is there a street next to St. Paul's avenue? There is no street there at all.

Q. What? A. There is no street which you can see. 40

James W. Donnelly, for Defendants—Cross

Q. Well, why did you ask me what street it is?

A. Well, St. Paul's avenue is the first cross-walk there is there.

Q. All right; you know that. Now, tell me how far the engine was from St. Paul's avenue when Frank came out. A. I can't tell you that.

Q. Well, you have told me, haven't you? A. I don't recollect at all where she was. I told you when she came in against them cars, and that is all I can tell you.

Q. You saw Frank's body come out? A. Yes; I saw Frank's body come out.

Q. And you saw some of the men go up to him? A. And the head man come over the car and went up to him.

Q. Who? A. Seaman; Mr. Seaman, one of the brakemen.

Q. Was it Seaman who came and picked him up? A. Yes.

Q. And what did he do with him? A. Well, I don't know what he done. He come bye and bye and took him away. I didn't get off the engine.

Q. But you were looking to see? A. I was looking to see; when they took him out a little way out of there he was out of my sight.

Q. Well, where did they take him to take him out of your sight? A. I don't know where they took him.

Q. Couldn't you see where they took him? A. No, sir.

Q. Couldn't you tell where as far as— A. No, sir.

Q. How far was your engine from St. Paul's avenue when that happened? A. I can't tell you that.

Q. What? A. I couldn't tell you how far it was from St. Paul's avenue.

James W. Donnelly, for Defendants—Cross

Q. Well, about how far? A. Well, there is no use making a guess when you don't know.

Q. Three car-lengths or nine car-lengths? A. It was more than three car-lengths.

Q. Was it as much as nine? A. I don't know how many was on that track. I wasn't back there.

Q. Hadn't you been working on that track that day? A. No; I just came in on that track. 10

Q. You just came in on that track? A. Yes.

Q. You don't know how many cars were on the track? A. No; that is a very long track there.

Q. Well, when you say they took Frankie, he got out of your view before he was deposited in any house or anywhere? A. Yes. I didn't see where they took him. They come and took him away and went right away with him.

Q. They went right across the crossing? A. They went right across the crossing. When he went up there that shut me off; I couldn't see any more. 20

Q. Well, you said they went towards the crossing; which crossing do you refer to? A. St. Paul's Avenue.

Q. St. Paul's Avenue? A. Yes.

Q. They went out as far as St. Paul's Avenue? A. I don't know how far they went out. I couldn't see them.

Q. Did they go up right alongside of the train? 30

A. They crossed right over. I don't know whether they went up alongside of the train or not.

Q. Well, they first crossed the tracks at right angles? A. They went up like that, slanting up.

Q. Well, didn't they cross about at right angles and then go up?

Mr. Hartpence: I think this witness ought to know what a right angle is.

Mr. Dixon: What, an engineer?

Mr. Hartpence: Yes. Let us find out if he knows what a right angle is. 40

James W. Donnelly, for Defendants—Cross

The Court: Do you know what a right angle is?

The Witness: Why, yes; it is right straight across. They didn't go right straight across.

Q. (Repeated by the stenographer) Well, didn't they cross about at right angles and then go up?

10 A. No, sir; they went right up from where the boy laid there and took him right up towards St. Paul's avenue. They didn't go right straight across.

Q. Did they go right straight parallel with the train, right along between the tracks? A. They were this side of the cars that I had hold of; I couldn't say; I didn't follow them up just the road they went. They started to pick the boy up between the second and third car, and took him up in
20 a slanting position to wherever they took him, to St. Paul's avenue.

Q. Well, did they take him as far as St. Paul's avenue? A. I don't know; you know I can't see half a mile.

Q. You are an engineer? A. I know they took him right out.

Q. You are supposed to see? A. You have a good way to see; you can't see through box cars and one thing and another.

30 Q. Well, you don't know whether there were any box cars, do you? A. I don't know; I didn't see them.

Q. But you were looking at the boy? A. I was looking at the boy when he came out from between the cars.

Q. And when he fell? A. Yes.

Q. Now, what was it made him disappear from view? A. Why, them cars. There was cars on them other tracks, and it runs on a kind of a

40 slant—

James W. Donnelly, for Defendants—Cross

Q. Oh, there were other cars on the other track that interfered with your view? A. They aren't straight around there, you know. And another thing: I didn't follow them up. After the boy was picked up I followed them no further.

The Court: When you say they aren't straight around there, what do you mean?

The Witness: The tracks don't all run 10
straight; you can't see all around. Some
places you can see and other places you can't
see. It is on a curve.

Q. Well, you know where the shanty is, don't you? A. No, sir; I do not.

Q. Don't know that shanty? A. No, sir; I wasn't up around there at all, at the shanty.

Q. Can't you tell us what it was that lost to your view the body of this boy as they were car- 20
rying him away?

Mr. Hartpence: I object on the ground that Mr. Dixon has asked the question about six times, and this witness does not know.

Q. (Last question repeated by the stenographer.) A. Well, they took him up there around towards St. Paul's avenue; and that is the last I seen of him.

Q. Did they go into St. Paul's avenue? or into 30
a street with him? A. I don't know; they went right up alongside of the car.

Q. Did you see them get the boy off the tracks, beyond the tracks? A. The boy was laying there, and they picked him up right where he fell.

Q. Did you see them carry the boy beyond the tracks? A. No, sir; I didn't see where they left him at all.

Mr. Dixon: That is all.

*James W. Donnelly, for Defendants—Redirect**Redirect Examination by Mr. Hartpence:*

Q. I show you a photograph, D-5 for identification, and ask you if you recognize that, Mr. Donnelly. A. (Witness looks at the photograph.)

Q. Do you know what it is a photograph of? A. I ain't very well posted on that.

Q. Well, you either know or you do not know.
10 If you do not know, that is all there is to it; if you do know, say so. Does it look like anything familiar to you? A. Yes.

Q. What does it look like? A. There is no railroad cars there.

Q. What does it look like to you, Mr. Donnelly?
A. There is cars there; them is going into Lorillard's house there; that is Lorillard's there.

Q. Does it look like a photograph or the Statue of Liberty? A. It ain't the Statue of Liberty by
20 a long ways.

Q. No. Well, which does it look like? A. It looks like around Lorillard's there, around Marion there.

Q. Around the Marion yards? A. Yes.

Q. Well, now, I show you another photograph, marked D-4 for identification, and ask you if you recognize that. A. Yes; there is Lorillard's place there.

Q. Now, where is Lorillard's place? A. Over
30 here. (Indicating.)

Q. Where that big smokestack is? A. Yes.

Q. Now, what is this off here at the right of the picture? A. That is Heddon's coal yard.

Q. Heddon's coal yard. Is that a trestle leading up to Heddon's coal yard? A. Yes, sir; it has to have a trestle; it starts off on the ground—this side is St. Paul's avenue, and then comes the trestle work, and it goes in here, into the door.

Q. Now, can you point out on that photograph
40 about where your engine was at the time that the

James W. Donnelly, for Defendants—Redirect

boy Frank fell out from between the cars A.
Here. We stood about there on that trestle—

Q. All right. Now let us have it marked. A.
She was down about—I ain't sure—about between
two and three cars on that bank, and she stood
right over here.

Q. To the best of your opinion and best of your
ability you mark right there where your engine 10
was. A. Where the engine stood, it is about right
there, going up on that trestle.

The Court: You say where the engine
stood. What are you going to cover—the pi-
lot of the engine, or the part of the cab which
you were in, or what? Mark anything you
want to, but tell us what it is.

The Witness: Well, you can say the en-
gine stood clear. Put it there, about there.
(Indicating.) 20

Mr. Dixon: Put a mark, put a big "x," a
double cross.

(Witness makes a mark.)

Mr. Dixon: That is the front of your en-
gine? A. Yes—well—

Mr. Dixon: Well, where the cow-catcher
would be if there were one? A. Yes.

Q. What was your business there on the engine
that day? A. Why, running the engine and doing 30
the work.

Q. At whose direction did you run the engine?
A. Why, the conductor.

Q. You followed signals, didn't you? A. Yes.

Q. By the brakeman, some member of the crew?
A. Yes, sir.

Q. You backed and went forward as they gave
you the direction? A. Yes.

Q. And you didn't move unless they did? A.
Yes. 40

James W. Donnelly, for Defendants—Redirect

Q. And you were busy with your engine? A. We are not supposed to move without a signal anywhere.

Q. You are responsible for the engine? A. Yes, if it moves.

By Mr. Dixon:

10 Q. Is the track that you indicate by your double-crossing the track on which your engine stood? A. She is—she ought to be that one there, the second track.

Q. What? A. Second or third track.

Q. Well, which track was it that your engine was on? A. Engine was on No. 4 track.

Q. And that is No. 4 that you have indicated? A. No; that ain't No. 4; that is the old Susquehanna track there.

20 Q. You are beginning to recognize this photograph now? A. Yes; I don't know just about it; I never took a diagram of it.

Q. Then you mean to put this double cross practically in the same place on the other track? A. The engine was standing on that elevation, going up to Heddon's coal pocket.

Q. Then the engine practically was standing in about the place that this car in the middle of the photograph stands—

30 Mr. Hartpence: I object to that as calling for a conclusion. It is a matter of argument. He has stated where the engine stood, and I think that is the end of it.

The Court: Yes, but he is being asked now whether it was on the track which he has indicated by the cross.

The Witness: The engine was supposed to be on No. 4.

40 The Court: Now, do you know from that photograph which is track No. 4? Do you know whether it is shown on there or not?

James W. Donnelly, for Defendants—Redirect

The Witness: It runs right in by there.

Q. You have never seen that photograph before? A. No, sir; I don't know anything about it.

The Court: Now the question is, Can you tell from that photograph, from what you know of the locality there, whether or not track No. 4 is shown on there? 10

The Witness: Yes.

The Court: Well, if it is, which track is it that is No. 4 on there?

The Witness: I suppose—this is the Susquehanna, and No. 2 and 3—it is the fourth track over, I think.

The Court: Well, is it shown on that photograph?

The Witness: It is shown there, I guess; right in there. 20

Mr. Dixon: You point to what appears to be a car?

The Witness: Yes.

Mr. Dixon: Which is not on the track on which the two cars appear in the photograph; isn't that so?

The Witness: I don't know.

Q. Well, you see two cars on a certain track represented here in the photograph, don't you? 30
There is one full car and part of another? A. I don't understand that photograph.

Mr. Dixon: Then I move that all the testimony is excluded, your Honor. He says he does not understand it. He has twice said that he does not know anything about the photograph.

The Court: Is that the situation now, Mr. Donnelly, that you do not understand the photograph? 40

Frederick D. Panghorn, for Defendants—Direct

The Witness: I showed them where the engine stood.

The Court: Well, answer my question. After all the looking that you have done at this photograph, what do you say? Do you understand it or do you not understand it?

10 The Witness: I don't understand it thoroughly.

The Court: You do not understand it thoroughly?

The Witness: No.

(Witness excused.)

FREDERICK D. PANGHORN, a witness sworn on behalf of the defendant, testified as follows:

20

Direct Examination by Mr. Hartpence:

Q. What is your business? A. Commercial photographer.

Q. I show you a photograph marked Exhibit D-5 for identification and ask you if you took that photograph. A. Yes, sir.

Q. When did you take it? A. I took it on August 4, 1916.

30 Q. Where were you at the time it was done?
A. In Jersey City, do you mean?

Q. Yes. What is the location of the photograph? A. Why, it was taken in the center line of Dey street, between the old main line track and No. 4 track.

Q. Looking in what direction? A. Looking south.

Q. South down the railroad tracks at that point? A. Yes, sir; along the tracks in the direction toward Newark avenue.

40 Q. Now I show you—

Frederick D. Panghorn, for Defendants—Cross

Mr. Dixon: What is that photograph?

The Court: D-5.

Mr. Hartpence: For identification.

Q. I show you another photograph and ask you if you took that one? A. Yes, sir; I took that.

Q. And where did you take that? A. No. 5884 was taken in the center line of Dey street and 132 10 feet, more or less, north, from the north end of the trestle, and about forty feet west of the inner rail looking east.

Q. It is taken on what side of the railroad tracks? A. On the westerly side.

Q. And the trestle that you referred to is what trestle? A. Well, that is a coal trestle; it runs towards the south.

Q. Toward the south? A. Faces the south. The right of the photograph doesn't show. 20

Q. When did you take this one? A. August 4, 1916.

Mr. Hartpence: Mr. Dixon, I want to offer these photographs. Have you any objection? (No response by Mr. Dixon.)

Cross-examination by Mr. Dixon:

Q. How did you determine the center line of Dey street? A. How did I decide?

The Court: How did you determine the 30 center line of Dey street?

The Witness: Why, I just estimated from the two buildings on each side of the street about where the center would be.

Q. What? A. I estimated between the two buildings which I saw on both sides, had a general idea of the center, and stood in what I thought was the center of the street.

Q. What two buildings were they? A. Well, I 40

Frederick D. Panghorn, for Defendants—Cross

will have to see that photograph before I can answer that.

Q. I am showing you exhibit D-1. That you took, too? A. Yes.

Q. Now, what two buildings did you— A. Well, in the first place there is no two buildings in this particular place, but there is a fence that
10 runs along Dey street—this is on the westerly side of the track—and there are buildings on the southerly side of Dey street. Now, I calculated as near as I could the center between those two points, the general center. I didn't attempt to measure it, but simply estimated in a general way.

Q. You were in the middle of the track, weren't you, when you took some of these photographs. You didn't take it from Dey street?

Mr. Hartpence: I think he ought to be
20 shown this photograph.

The Witness: I have stated twenty-five feet more or less from the easterly track. I don't know whether I was actually standing at that point or not; I don't remember just how far back the curb line was.

Q. The way you took that D-5 your camera was in the right-of-way of the railroad, wasn't it, between the tracks somewhere? A. Yes; between
30 the tracks.

Mr. Hartpence: That one has not been marked.

(Marked D-6 for identification.)

Q. Where was your camera when you took D-6? A. That was placed in the center line of Dey street.

Q. On which side? A. On which side of the tracks?

40 Q. Yes. Placed on the south side—west side.

Arthur Schirrlle, (recalled), for Defts—Direct

Q. And what is it looking towards, east? A. Looking east.

Q. And how did you get the center line of Dey street in that picture? A. In a similar way as I did on the other side, by gauging between this house which appears above the box car—the back of the house, and also the Lorillard building.

Q. That is on the other side of the track? A. 10 That is on the east side of the track.

Q. So that, as I understand it, on this D-6 we are practically looking, and could see, down Dey street if it were not for the obstruction of the tank and the box car? A. Yes, sir.

(Witness excused.)

AUGUST SCHIRRLLE, recalled.

20

Direct Examination by Mr. Hartpence:

Q. What is your business? A. Conductor.

Q. You were there in the yard that day that Frank Brooks was killed, weren't you? A. Yes, sir.

Q. Did you see him when he was hurt? A. I did not see him when he was hurt.

Q. When did you first see him? A. When they called my attention—Chase called my attention 30 to it.

Q. Where were you when Chase called your attention to it? A. I was in front of the engine, towards Newark avenue.

Q. Yes. And had the engine moved in any way just before Chase called your attention to the accident? A. Well, they were backing up to make a coupling, to couple up the track, while I was on my way out to get orders from our despatcher.

Q. Now, had you seen the boy before that time? 40
A. No, sir.

Arthur Schirrlé, (recalled), for Defts—Direct

Q. Did you give the direction or order to couple the cars at that time? A. Yes; I gave him the order; I gave him the numbers of the last car.

Q. And to whom did you give the orders? A. Chase, the flagman.

Q. And who gave the signal to move the engine, do you know? A. Well, that I couldn't say, if it
10 was the head man or one of the brakemen that was there.

Q. You didn't give it yourself, did you? A. No, sir; I didn't.

Q. What had you been doing just before that coupling was made? A. We were shifting cars off No. 3 track on to No. 4.

Q. Making up a train? A. Yes, drilling out trains.

Q. And what were you going to do with the
20 train after you had drilled it and made it up? A. We were going to take it up to the Meadow yard.

Q. On the Pennsylvania Railroad? A. Pennsylvania Railroad.

Q. Now, you were in charge of the crew, weren't you? A. Yes, sir.

Q. They are subject to your orders? A. Yes, sir.

Q. And the train was made up under your direction, wasn't it? A. Yes, sir.

30 Q. How many cars did your train consist of? A. Well, at that day I would not exactly say; but sometimes we have as high as eighty or eighty-four cars we generally take out of the yard.

Q. Well, aside from what you sometimes have, how many did you have on that day? A. Well, we didn't complete any train.

Q. Well, you were making up a train? A. We were just starting to make up a train.

40 Q. And there were some cars standing on No. 4 track? A. Yes, sir; No. 4 track was full.

Arthur Schirrle, (recalled), for Defts—Direct

Q. What did you say? A. No. 4 track was full of cars?

Q. And full from what point? A. From—from the end of the switch down to the rear end of the track, which holds about forty-five cars.

Q. And where is that rear end of the track? Near what street? A. Oh, way down there—nearby—from the Erie—the D. L. & W. runs over 10 the main line; we are underneath.

Q. Now, back of where you were on the engine at that time there is a street with gates, regular crossing gates? A. Where is that?

Q. Well, is there one back there with crossing gates, in the yard there anywhere? A. There is only one crossing gate, and that is at St. Paul's avenue.

Q. And that is St. Paul's avenue? A. And that is St. Paul's avenue. 20

Q. Now, where was the rear end of your train with regard to St. Paul's avenue? How near to St. Paul's avenue? A. How near was I?

The Court: No, no, no. The rear end of the locomotive, how near was that to St. Paul's avenue?

The Witness: I should judge about twenty-five to thirty cars north of St. Paul's avenue. 30

Q. North? A. Yes, north of St. Paul's avenue—the rear end.

Q. And how far down did the train run toward Newark avenue? A. Newark avenue? We had about fourteen cars south of St. Paul's avenue.

Q. That would be south—toward Newark avenue; is that right? A. South from St. Paul's avenue.

Q. (By the Court) And that would be toward Newark avenue? A. That would be towards 40 Newark avenue; yes, sir.

Arthur Schirrlé, (recalled), for Defts—Direct

The Court: All right.

Q. Now, where did you see the boy after your attention was called to him? Did you go and see him? A. Yes.

Q. Where was he? A. He was lying between the second and third car; between the two.

10 Q. What do you mean? Second and third cars from what? A. From the engine.

Q. Do you know where Dey street is along there? A. Well, yes; I know where Dey street is.

Q. Do you know where the interchange office is? A. Yes, sir.

Q. The interchange shanty? A. Yes, sir.

Q. Now, when you saw Frank there was he lying on the ground? A. Yes, sir.

Q. And near what track? A. Between four and
20 five track; main line.

Q. Four track and the main line track? A. Yes, sir.

Q. How near was he, or where was he with regard to the interchange shanty on Dey street? A. Oh, I should judge he was about 100, may be 110 feet away from there.

Q. North or south of it? A. South.

Q. Toward Newark avenue? A. Towards Newark avenue.

30 Q. Do you know the Heddon trestle along there? A. Yes; I know where they shovel the coal.

Q. There is a trestle where they shove coal up ahead? A. Yes.

Q. Was he lying anywhere near that trestle? A. Well, right up at the abutment.

Q. What did you say? A. Right about at the abutment of that trestle there.

Q. Of the trestle? What do you mean by the
40 abutment of the trestle? A. Well, the abutment

Arthur Schirrie, (recalled), for Defts—Direct

is where they pile in these ties and timber, and from there on up this particular trestle work, above that.

Q. Now, he was right about where the trestle work came up to the fill; is that right? A. Yes.

Q. How high is the fill at that point? A. I should judge about four or five feet.

Q. Four or five feet? A. Between four and 10 five.

Q. And does that extend on up toward Dey street? A. Well, it runs on down towards Dey street.

Q. Gets lower and lower? A. Gets lower as it goes down toward the street.

Q. Do you know where the Lorillard building is over on the other side of the tracks? A. Yes, sir.

Q. Where do they extend? Where are they? 20
A. They are on the east side.

Q. And this was on the west side, then, wasn't it—the tracks? A. Yes, sir.

Q. Well, there is a building of the Lorillards on the corner of Dey street, isn't there? A. Well, I believe there is part of a building, warehouse.

Q. Big brick warehouse there? A. Yes.

Q. Now, the point where you said you saw Frank lying— A. Yes. 30

Q. Where was that with regard to the big brick warehouse on the other side of the tracks? A. That was a car-length from there. The warehouse is way over by your desk, and we were over here. (Indicating.)

Q. Was Frank anywhere—Was Frank nearer to Newark avenue than the warehouse? A. No; I don't think—

Mr. Dixon: I object.

Mr. Hartpence: I will withdraw it if it is 40 leading.

Arthur Schirrlle, (recalled), for Defts—Direct

Q. Had you observed just before you were told of this accident any noises made by the engine in any way? A. The only thing I heard was that I heard the engine ringing the bell and engine moving back; that's all.

Q. Were there any other cars in the yard? A. Yes; there were cars on 3, 4 and 2.

10 Q. Cars on 3, 4 and 2 what? A. Track.

Q. There are switches leading into the Lorillard plant? A. The switches are over on the other side; on the Erie.

Q. That is on the east side? A. On the east side, going into Lorillard's factory; yes.

Q. How long had you been in the yard prior to this accident? For how long a time have you been going in and out of the yard there? A. In and out of there? Oh, I should say twenty years.

20 Q. Twenty years. Been conductor all that time? A. Yes; I am a conductor twenty-four years.

Q. What did you do in that yard when you came in there? A. Well, we put a train—we leave the meadows—

Q. Leave the Meadows out. What do you do when you go in that yard?

Mr. Dixon: I object to calling it the yard all the time.

30 The Court: Well, we will call it this locality that has been spoken of.

Q. What do you call it in there, Mr. Schirrlle? What is it? A. Erie railroad yard.

Q. Now, what do you go in there for? A. Go in there to deliver and take cars out of there for the Pennsylvania Railroad.

Q. All right. Do you just take the cars as you find them when you go in there? A. Well, we have to drill them. There is cars sometime have
40 no bill, no interchange; we have no billing for

Arthur Schirrle, (recalled), for Defts—Cross

them; we don't know where those cars go, so we drill them back to the Erie yard.

Q. What do you mean by "drilling"? We may not understand what you mean. A. Where, say, we have fourteen cars we have to drill fourteen cars out and drill fourteen cars right in the other track, too.

Q. You mean moving cars from one place to 10 another, from one track to another? A. Yes.

Q. And make up your train in that way; is that right? A. Yes, sir.

Q. And that is being done there all the time? A. Yes; it is done every day.

Cross-examination by Mr. Dixon:

Q. You know this place that we have called Dey street, do you? A. Yes, sir; I know.

Q. What? A. Yes, sir. 20

Q. How many tracks are there that cross that place? A. Cross that track—about six—

Q. Cross Dey street? A. Six or seven.

Q. And do you know the tracks by numbers? Do you know the tracks by numbers? A. I know our tracks by numbers; yes, sir; what we use.

Q. What? A. We use 2, 3, 4 and main line.

Q. And which is No. 2? A. No. 2 is that delivery track to the Erie Railroad.

Q. Where is its location? Is it the east side 30 of the right-of-way? A. East side.

Q. The most easterly track is No. 1? A. The most easterly track is No. 1.

Q. And this is the next to the last and then they run on up to 4? A. And then the main line.

Q. And then the main line. And then after the main line there are other tracks to the west of that? A. Yes, sir; there is tracks there that the Erie Railroad uses for drilling up the coal dock and their delivery yard. 40

Arthur Schirrlé, (recalled), for Defts—Cross

Q. Now, were there any cars on those tracks on that day? A. I would not positively say; there might have been cars there.

Q. You do not recall? A. I don't recollect if there was any cars there or not.

Q. You know where the shanty is there? A. Yes, sir; I do.

10 Q. Well, were there any cars on those tracks at the—between the shanty and the place where Frank was found after the accident? A. I couldn't tell you if there was any cars on them tracks on the other side of the trestle or not

Q. Did you see them take Frankie away? A. I didn't see them take Frank away; no, sir.

Q. Where were you when they took him away? A. I went up to Newark avenue and telephoned for an ambulance—the train despatcher.

20 Q. They hadn't picked him up when you left? A. No; I went right out to Newark avenue to the telephone box.

Q. So you do not know who picked him up? A. Only what I heard. Chase and—

Q. I know you heard that. Did you see him when he lay on the ground? A. I saw him when he lay on the ground.

Q. Was he between the tracks? A. Out between 4 and the main track line.

30 Q. Out between 4 and the main line? A. Yes.

Q. He was not between the rails of the main line? A. Well, he fell out between the cars.

Q. (Last question repeated by the stenographer.) A. He was between—

The Court: Distinguish between track—4 track has two rails, hasn't it?

The Witness: Yes, sir.

The Court: When we are speaking of it we mean the two rails, and we speak of rails we mean rails.

40

Paul James Gattie, for Defendants—Direct
August Schirrlle, (recalled), for Defts—Direct

Q. (Repeated by the stenographer.) A. He was not between the rails of the main line? A. No, sir.

(Witness excused.)

PAUL JAMES GATTIE, a witness sworn on behalf of the defendant, testified as follows: 10

Direct Examination by Mr. Hartpence:

Mr. Hartpence: There is one question I forgot to ask Mr. Schirrlle.

(Witness withdrawn for the present.)

AUGUST SCHIRRLLE, recalled. 20

By Mr. Hartpence:

Q. I show you a photograph marked D-3 for identification and ask you if you recognize the person that is shown there by the freight car. A. No.

Q. Well, I show you a photograph marked D-4 for identification and ask you if you recognize that person who is standing there by the car. A. 30
 No, sir; I could not recognize that.

Q. You do not. All right; that is all.

The Witness: Without the glasses I couldn't see it.

(Witness excused.)

Paul James Gattie, (recalled), for Defts—Direct

PAUL JAMES GATTIE, recalled.

Direct Examination by Mr. Hartpence:

Q. What is your occupation? A. Head brakeman.

Q. And you were there the afternoon that Frankie was hurt, were you not? A. Yes, sir.

10 Q. Where were you at the time? A. On the step of the tender.

Q. Rear or the front? A. Rear.

Q. Did you see him hurt? A. Well, I seen him fall out.

Q. You saw him fall out from between the cars? A. Yes, sir.

Q. On which side of the tracks? A. On the west side of the tracks.

20 Q. And how far away from you was he? A. Why, he was two car-lengths away from me.

Q. Two cars? A. Yes, sir; two car-lengths away from me.

Q. Now, had you seen him before that? A. No, sir.

Q. Were you on that same step of the tender? A. Yes, sir.

Q. Had the engine moved before that? A. Well, I moved them up and made the couplings and it stopped. I gave the signal.

30 Q. To the engineer? A. To the engineer; yes, sir.

Q. What sort of a coupling was it? A. Why, I made the coupling from the tender to the first car; then outside of that it is not up to me.

40 Q. Well, was it—on this particular occasion do you remember anything about the coupling unusual, or out of the ordinary? A. No; I only remember when I made this car; I made the coupling, but I didn't know whether the third or second was coupled until I seen the boy fall out.

Paul James Gattie, (recalled), for Defts—Direct

Q. Your duty was to see to the coupling between the tender and the first car? A. Yes, sir.

Q. Was it a particularly violent coupling that day? A. Well, what do you mean by "violent"? Hard?

Q. Hard. A. No, sir; ordinary; same as I couple any other car.

Q. Just the ordinary coupling? A. Yes, sir. 10

Q. Well, did you see any of the other members of your train crew around at that time? A. Yes, sir.

Q. Whom did you see? A. I saw the conductor, the middle man, and the flagman.

Q. Who was the flagman? A. Mr. Chase.

Q. Where was he? A. Right alongside of me.

Q. Right alongside of you? A. Yes, sir.

Q. Where was the—whom else did you say you saw? A. Mr. Seaman. 20

Q. Mr. Seaman? A. Yes, sir.

Q. Where was he? A. He was standing right between the second and third car when I first saw him.

Q. Where was Seaman when you saw the boy fall out from between the cars? A. Right there where the boy fell out between the second and third cars.

Q. That was the first you saw Seaman? A. First I saw Seaman. 30

Q. You saw the boy at the same time? A. Yes, sir.

Q. What did you do when you saw the boy come through? A. I walked up to the—walked up towards the boy.

Q. Did you do anything with the boy? A. Well, Yes; I looked at him; didn't pick him up. Mr. Seaman did that. Then he walked away.

Q. Where was he lying at that time that you saw him? A. In the gully between No. 4 track and 40 the main Susquehanna track.

Paul James Gattie, (recalled), for Defts—Direct

Q. Do you know where St. Paul's avenue is?

A. Yes, sir.

Q. Do you know where Dey street is? A. Yes, the way it is spoken of.

Q. Well, you know where the interchange shanty is? A. Yes, sir.

Q. That is on Dey street, isn't it? A. Yes, sir.

10 Q. When you saw the boy fall out from between the cars, when you saw him lying there, where was he with regard to St. Paul's avenue? North or south of it? A. South.

Q. Where was he with regard to Dey street? A. South.

Q. How far? A. Well, to my estimation, about 120 feet.

Q. Yes. Now, there is a coal pocket in there, isn't there? A. Yes, sir.

20 Q. And a trestle leading up to it? A. Yes, sir.

Q. Where was he with regard to that trestle? A. Why, there is a sort of—don't know what you call—a bumper, one they put ties in to make it solid in order to build a trestle—right even with that bumper.

Q. Well, was there a fill there? A. Yes, sir.

Q. And it was filled in solid at that point right up to where it came level with the tracks? A. Yes, sir; it was solid all the way up to where it
30 came level with the tracks.

Q. Where was he with regard to the end of this solid filling and the trestle?

The Court: This bumper, as you have called it, where was the boy's body with relation to that?

The Witness: Right opposite.

Q. How far away from it? A. From that bumper? Well, there is the track—it was about—oh,
40 I should say from here to that table.

Paul James Gattie, (recalled), for Defts—Direct

Q. To this table (indicating the counsel table nearest the witness stand)? A. Yes, sir.

Q. How many tracks were there between where he was lying and the trestle? A. One track.

Q. One track? A. Yes, sir.

Q. And that is where you saw him come out from between the cars, right there? A. Yes, sir.

Q. At St. Paul's avenue—how far is that away from Dey street, do you know? A. Well, I have no idea; I should judge about ten or eleven car-lengths. 10

Q. How many? A. About ten or eleven car-lengths.

Q. About ten or eleven car-lengths? A. Yes, sir; about that.

Q. Do you have gates there at St. Paul's avenue? A. Gates—at St. Paul's; yes, sir.

Q. Gateman, flagman? A. Yes. 20

Q. Do you know whether there was any means of communication between Dey street and St. Paul's avenue on either side of the tracks? A. No, sir.

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

Q. You don't know? A. I don't know.

Q. Was the engine making any noise at the time this coupling was made? A. Why, the moving of the engine and the ringing of the bell were the only noises. 30

Q. The bell was ringing, was it? A. Yes, sir.

Q. I show you a photograph marked D-3 and ask you if you recognize that location? A. Yes, sir.

Q. And what is it? A. That is where we drill cars in the Marion yard there, as I call it—Marion yard.

Q. Now, this construction off to the left of the picture there, does that look familiar to you? A. Yes, sir. 40

Paul James Gattie, (recalled), for Defts—Direct

Q. What is that? A. That is Heddon's coal trestle.

Q. That is the coal trestle you referred to? A. Yes, sir.

Q. Now, can you indicate on that photograph where it was you saw the body of Frankie come out from between the cars? and where he was lying
10 when he fell out A. Yes, sir.

Q. Now, please indicate. A. Do you want me to point it out?

Q. Indicate it with the mark "F" with this pen and ink. Put a big "F." A. (Witness indicating as told) Right in there.

Q. Right alongside of where this man is standing? A. Right where this comes out, that is even with that line.

Q. Right about where the man is standing? A.
20 Yes, sir.

Q. Which is No. 4 track; can you tell from that photograph? A. This here is 4 track.

Q. When you say "this here" what do you mean? A. This track here where the car is.

Q. Where the single car stands? A. Yes, sir.

Q. And to the left of No. 4 track is what track?
A. New York & Susquehanna main track, as we used to call it.

Q. And right to the left of that is the Heddon
30 coal trestle; is that right? A. Right here; that is the Heddon coal trestle.

Q. Now, I show you D-4 for identification and ask you if you recognize that. A. Yes, sir; I recognize this.

Q. What is that a photograph of? A. That is the same yard looking south.

Q. Can you indicate on that photograph where it was you saw Frankie fall out from between the cars? A. I can't indicate as good on this as I can
40 on the other; because I was down at the south end.

Q. You were at the south end? A. Yes, sir.

Paul James Gattie (recalled), for Defts—Cross

Q. This photograph D-3 for identification—can you state whether or not that shows the conditions as they existed there on the day that Frankie was hurt? A. You mean in regards to the cars and everything there?

Q. No, in regard to the general location of the tracks and of the trestle. A. Yes, sir.

Q. Just as they were at that time? A. Just as it 10 was at that time; yes, sir.

Q. I show you D-5 for identification and ask you if you recognize that. A. Yes, sir.

Q. What is that? A. That is the same yard, looking south.

Q. And what tracks does that show? A. There it shows cars on No. 4 track, Susquehanna main track, and the trestle; and the tracks west of the trestle which run to the ice house.

Q. In what way does the physical condition 20 shown there compare with the physical conditions as they existed on the afternoon that Frankie was hurt? A. Same conditions.

Q. Same conditions? A. Yes, sir.

Mr. Hartpence: That is all. Cross examine.

(Recess to 2:00 o'clock p. m.)

30

AFTERNOON SESSION.

PAUL JAMES GATTIE, resumed.

Cross Examination by Mr. Dixon:

Q. What is your name again? A. Paul James Gattie.

Q. Have you talked with anybody about this matter since the accident, Mr. Gattie? A. No, sir. 40

Q. Nobody at all? A. No, sir.

Paul James Gattie (recalled), for Defts—Cross

Q. Not with your fellow brakeman? A. No, sir.

Q. Nor with any one? A. No, sir.

Q. Until you got on the stand? A. Yes.

Q. Make a report? A. Sir?

Q. Did you make a report? A. No, sir.

Q. So that nobody knew what your testimony would be until you got on the stand? A. Yes, sir.

10 Q. You are not a good judge of distances, are you? A. Not very well.

Q. Eh? A. Not very well.

Q. Do not feel that you are sufficiently versed in distances to even express an opinion? A. Sir?

Q. You do not feel that you know enough about distances, measurements, to express an opinion of distance? A. Well, to a certain extent.

Q. Well now, how long would you say one of those box cars is that were on that train? A.
20 How long? Forty feet.

Q. Were they all forty feet cars? A. Yes, sir.

Q. How do you know that? A. They are marked on the car.

Q. So that is the only way you know it? A. Yes, sir.

Q. And does that include the couplings? A. Well, from one end of the car to the other.

Q. Well, suppose there were two cars coupled together, what would be the distance from the one
30 end of one to the furthest end of the other? A. Well, say forty and forty is eighty and you allow about a foot and a half between the two cars.

Q. Now I understood you to say there were fourteen of those cars from St. Paul's Avenue to the south; is that correct? A. I said there was fourteen cars? I don't remember whether I did or not.

Q. Well, how many cars were there from St. Paul's Avenue to the south? A. I don't know.

40 Q. Do you know how many cars there were on that track? A. No, sir.

Paul James Gattie (recalled), for Defts—Cross

Q. I mean in connection with this train? A. No, sir, I do not.

Q. Do you know the place called Dey Street? A. Yes, sir.

Q. Did you ever see these photographs that were shown to you before you got upon the witness stand? A. No, sir; right here was the first I saw them. 10

Q. First you ever seen them? A. Yes.

Q. You were not present when they were taken? A. No, sir.

Q. Now can you fix that photograph D-3 as to locality? A. What do you mean, fix?

Q. Do you know what it refers to? A. Yes, sir, represents the yard and what we call Marion where I work.

Q. What part of the yard? That is a long yard? A. Well, that is between St. Paul's Avenue and Newark Avenue. 20

Q. How do you know that? A. Simple reason that I can tell by the trestle here and I know that this end here is Newark Avenue and up north is St. Paul's Avenue.

Q. What is there on the photograph to show you that that is between those two points? A. This trestle right here would tell it is between those two points.

Q. The trestle to the left? A. Yes. 30

Q. Now do you see Dey Street on this photograph? A. No; I don't see Dey Street on it—on that map. Let's see, have a close look at it.

Q. Look at it and see if you do not see Dey Street? A. No, I do not see Dey Street there.

Q. What is it that you do see coming there? A. Why, it looks just like an opening there.

Q. And what is that opening? Isn't that where Dey Street is? A. It doesn't look like Dey Street to me. 40

Paul James Gattie (recalled), for Defts—Cross

Q. Crossing the tracks? A. Don't cross the tracks there.

Q. Well, this I put my pencil on runs across the track or apparently across the track? A. Well, that just resembles like an opening the same as it would right here, wouldn't it? (Indicating) To me—that is my answer, it looks like an opening.

10 Q. Like an opening. Do you know of any opening there except Dey Street? A. No, sir.

Q. Which way does the trestle that you refer to run up—which way does the elevation run? A. From north to south.

Q. Eh? A. More north to south.

Q. The elevation goes towards the south? A. Towards the south, yes.

Q. Now then I indicate right at the end of that—the north end of that place, the elevation, where
20 it starts what you have called an opening— A. Yes.

Q. What is that? Isn't that Dey Street? A. Well, that don't look like a street.

Q. What is that, what does this building look like? A. That looks like a building, yes.

Q. What is it? A. Where you have your pencil there?

Q. Yes. A. That don't look like a building at all. That is a car where you have your pencil.

30 Q. What is this where I have my pencil? A. Looks like that coal chute up near St. Paul's Avenue, that other coal dealer there.

Q. Up near St. Paul's Avenue? A. Yes, sir.

Q. Do you see any buildings on there at all, near the center of the photograph? A. Yes, I see this building up here, but I wouldn't say—

Q. What is that? A. It looks like a car up there.

Q. Do you know what it is? A. No, I do not.

40 Q. Do you know where it was? A. I couldn't

Paul James Gattie (recalled), for Defts—Cröss

say only it looks to me as if it was on St. Paul's Avenue.

Q. The place you have indicated as where you saw Frank is just where a man is standing in the photograph, isn't it? A. Yes, that is where I made the mark, right there.

Q. You intend to put it where this man was standing? A. I wouldn't say just where that man was standing, but I am drawing a line with that bumper—so if that is within a right angle of that, that is where the spot is. 10

Q. Which bumper are you going from? A. This right here, this first one here, where the trestle starts from.

Q. What is the distance between these piers under the trestle? A. I should judge about eight or ten feet apart.

Q. What is the distance of this so-called bumper from north to south? A. About a hundred and twenty feet. 20

Q. One hundred and twenty? A. Yes, sir.

Q. Then you think that that bumper starts right at what we call Dey Street, does it? A. Well, it appears as if it starts right where you have that point there, a lead pencil there, if that is what you call Dey Street.

Q. What would you call Dey Street? A. I am going according to what you say. I ain't saying there is no Dey Street there. There is a street on that side as far as the tracks, but I am not saying it comes across the tracks, understand. 30

Q. Did anybody ask you not to say that? A. No, I don't say that you did, but I am just stating the way that I see it.

Q. Why did you make the remark it don't come across the tracks? A. Because you asked me what is the opening.

Q. You haven't talked with anybody about this case? A. No, sir, only when I appeared here. 40

Paul James Gattie (recalled), for Defts—Cross

Q. Why did you say it didn't come across the tracks? A. Because it don't seem as if it goes across to me.

Q. It is on both sides of the tracks, isn't it? A. On both sides, yes.

Q. You know it is Dey Street? A. Yes, sir, I know it is Dey Street.

10 Q. Does that bumper, as you call it, start then at Dey Street? A. Well, I couldn't just say it starts at Dey Street. Looks as if it starts there, but I should judge the level of that is beyond that bumper there.

Q. When did you ever measure that bumper to find it is one hundred and twenty-five feet? A. Well, I never measured it in fact, but I can judge that, just about three car lengths from that bumper to where the boy was laying.

20 Q. Three cars lengths from what? A. From that—from where that bumper—where you had your pencil—the north end of that—north end bumper there to the south end bumper.

Q. Is that three car lengths? A. Yes, I should judge.

Q. When did you measure that? A. I never measured it, I said.

Q. You never measured it? A. No, sir.

30 Q. When did you ever observe that fact? A. Well, I observed it oftentimes where trains of cars standing there, I can see. It just requires three car lengths to take that space in.

Q. You have often observed it? A. I have often noticed it, yes.

Q. Now on the day of the accident—it happened on November 4th—were there any cars on the tracks to the west of it?

Mr. Hartpence: I object.

40 A. Yes, sir.

Paul James Gattie (recalled), for Defts—Cross

Mr. Hartpence: I object on the ground that it misstates the fact. You say November 4th. It should be December 4th.

The Court: On the day of the accident. December 4th.

Q. I said on number 4, track number 4. A. Question, please?

Q. Were there any cars west of that track? A. I couldn't see. 10

Q. Didn't you just say yes? A. Well, I understood you to say cars west of that track.

Q. That is what I did say. A. That is on the west side of number 4 track, you mean?

Q. That is what I did say? A. I don't know. I don't remember.

Q. Didn't you just say yes? A. No. Did I say yes to that question? Then I misunderstood that question. 20

Q. What did you understand it to be? A. I understood on that west side—on this side of the—on the remaining track in that yard. That is what I understood. That is what I thought you were asking.

Q. What do you mean by that? A. The way I was understanding it was—I answered sooner than I ought to have answered—the way I thought you were asking me, there was other cars on other tracks in that yard, and the only tracks that I can remember there was any cars was on the east side of track 4. That would be on number 3 and 2. 30

Q. I didn't say anything about east; I said west? A. I understood that, and I answered your question too soon.

Q. Too soon? A. Yes, sir.

Q. You did not misunderstand the question; you only misunderstood— A. I did misunderstand it or I wouldn't answer it. 40

Paul James Gattie, recalled), for Defts—Cross

Q. Eh? You don't know anything about perspective, do you? A. What do you mean, perspective?

Q. I say you don't know what that does mean? A. No.

Q. Well now, I show you this same photograph and ask you what is the distance from the place
10 where this man stands as appears upon the photograph to the end of the rail as appears upon the bottom of the photograph? A. Well, about three car lengths.

Q. That is three car lengths too? A. About that.

Q. Eh? A. Appears to be about three car lengths, yes.

Q. So you think the place this man stands is about half way between Dey Street and the end—
20 the bottom of the photograph? A. The bottom of this photograph here, yes, sir.

Q. Didn't you on your direct examination say that the distance from St. Paul's Avenue to Dey Street was eleven car lengths? A. I probably said eleven or ten car lengths, if I remember well, yes.

Q. Ten or eleven? A. Yes, sir.

Q. Is that what you understand it to be? A. Well, that is my knowledge.

Q. That is your knowledge. You know that is
30 a fact? A. Well, I don't say as a fact. It is about ten or eleven car lengths. I would not swear to just that number of cars; it might be nine, for all I know.

Q. You might be as mistaken about that as you might be about the number of car lengths which would reach along this abutment? A. Well, it can be so exactly that, because when I coupled up with them cars there was just those three car lengths, and that is how I know.

40 Q. You did not line them up that day, did you? A. Sir?

Paul James Gattie, recalled), for Defts—Cross

Q. You did not line them up that day, did you?

A. I did not line them up that day, but I can see it just as if it happened to-day, that it was just three car lengths.

Q. You lined up between St. Paul's Avenue and Dey Street, didn't you? A. Sir?

Q. You lined them up between St. Paul's Avenue and Dey Street just as often? A. Yes, but I 10 never go to the hind end, I am on the head end,—on that end of it.

Q. You didn't notice that? A. No, sir.

Q. You only noticed about these three car lengths? A. I noticed the three cars I coupled up, but I mean did not go to the hind end of the train to couple up.

Q. You only noticed that on this day, did you, three car lengths? A. What do you mean?

Q. It extended as far as the abutment? A. No; 20 I noticed other times when we put cars on that middle end track right next to the that trestle.

Q. Why did you swear then it was ten or eleven car lengths from Dey Street to St. Paul's Avenue?

A. Well, I should judge it is about ten or eleven car lengths from St. Paul's Avenue to that.

Q. You think it was about five hundred feet, would you? A. Well, if that is the number.

Q. Well, which would you say? A. Well, the only way I can judge—I did not judge it by feet, 30 according to that distance. I would say about ten or eleven car lengths.

Q. Yes. That would be how many feet? A. Well, I would have to figure that out.

Q. Eh? A. I would have to figure that out.

Q. That's all.

Richard A. Walsh, for Defendants—Direct

RICHARD A, WALSH, SWORN.

Direct Examination by Mr. Hartpence:

Q. Mr. Walsh, what is your employment? A. Conductor, freight conductor on the Pennsylvania Railroad.

Q. Have been so for how long? A. About twenty
10 years.

Q. Ever work in the Marion yard there? A. Yes, sir.

Q. How long have you been in and around that vicinity? A. Well, I have been going in there ever since I was brakeman, before I was conductor, twenty years or over.

Q. Do you know where Dey Street is located there? A. We got an interchange office on the corner of Dey Street.

20 Q. That is on Dey Street, is it? A. Yes, sir.

Q. I show you a photograph, Exhibit D-6 for identification and ask you if that is familiar to you in any way, whether you recognize it and the location which it portrays? A. Yes.

Q. Well, what is it? A. Why, this is west of the track, that is a switch in the yard, New York, Susquehanna & Western yard.

Q. That switch right in the center of the yard is where? A. Is New York, Susquehanna & West-
30 ern yard, west of the—that is on the west side of the railroad.

Q. Speak a little louder? A. On the westerly side of the railroad.

Q. All right? A. This is Lorillard's building.

Q. Which is Lorillard's building? A. This one here.

Q. On the other side of the railroad cars? A. On the other side of the railroad tracks.

Q. Yes. Now, at what street is that? A. Why,
40 Lorillard's factory lies a block on Dey Street.

Richard A. Walsh, for Defendants—Direct

Q. On Dey Street. And this switch that you referred to or pointed to there in the center of the picture, what street is that? A. That is—that would be Dey Street on the west side of the track.

Q. Dey Street on the west side. And this telegraph pole at the extreme right of the photograph, what is that? A. Why—

Q. Where is that located? A. That is on the 10 south side of Dey Street.

Q. Of Dey Street. Do you see that little sign on the pole there? A. Yes, there is a sign there.

Q. Have you ever seen a sign on that telegraph pole that stands on the south side of Dey Street? A. Yes, sir.

Q. For how long a period have you seen that sign there? A. As long as I remember being, going in and out of that yard.

The Court: How long is that? 20

A. About twenty or twenty-two years.

Q. Can you state what that sign contains, what it says? A. "N. Y. S. & W. property." That is, New York, Susquehanna and Western property.

Q. Anything else that you recall? A. Yes; there are another sign at St. Paul's Avenue.

Q. Another sign at St. Paul's Avenue? A. Yes.

Q. Anything else on this sign that you remember, except what you have stated? A. That is all. 30

Q. All right. Did you know about the accident to Frank Brooks, the boy that was killed there? A. I heard about it.

Q. How soon after it happened did you learn about it? A. Well, I heard at the time it happened, but I wasn't in the yard at that time.

Q. No. Well, how soon after that did you learn it, regardless of where you were? A. How 40 soon after did I go in the yard?

Richard A. Walsh, for Defendants—Cross

Q. Yes. A. Probably next day or a day later. I was in and out there quite often.

Q. How did you learn about it? A. Why, I heard that he was killed there.

The Court: How did you learn?

Q. How did you learn? A. Why, I heard it off
10 of some of the men working there.

Q. Can you state whether or not the location of the tracks here and of the Lorillard building and the switch and this pole that you have referred to in this Exhibit D-6 are in any way different from what they were at the time that you learned of that accident? A. No, there hasn't been any change there, because I was practically in this yard steady from December—February,
1st of February, 1916, until April, 1917, steady,
20 stationed at that point.

Q. Before that time you had been doing what? A. I always going in and out there whenever we got a train.

Q. And since February, 1916, you have been stationed there steady? A. Steady at that point.

Cross Examination by Mr. Dixon:

Q. What did you say this sign contained? A. "N. Y. S. & W. property."

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

Q. Is that all it said, "N. Y. S. & W. property"? A. Yes; New York, Susquehanna & Western.

Q. Property? A. Yes.

Q. That sign is tacked on a pole? A. Telegraph pole.

Q. Telegraph pole? A. Telegraph pole.

Q. And that signboard is tacked on that pole in such way that the signboard parallels Dey Street, doesn't it? A. Yes, at the south side.

40 Q. Yes, but it runs parallel with Dey Street, doesn't it? Know what I mean by that?

Richard A. Walsh, for Defendants—Cross

Mr. Hartpence: He may not know what parallel means.

Q. Perhaps he doesn't. Take that bench in front of you to be Dey Street; see, this is Dey Street along here. Now the signboard on which was printed the words, N. Y. S. & W. is tacked on the telegraph pole in such way as to run in the same direction as Dey Street, isn't it? Doesn't go across Dey Street that way, does it? A. I think it is kind of a cat-e-cornered. 10

Q. No; isn't it exactly parallel? A. I am not sure about that. I wouldn't say for a fact.

Q. You don't know about that? A. No, I wouldn't say for sure that it is right straight direct with Dey Street.

Q. It is next to the tracks on the west side of the street, isn't it? A. West side of the street. 20

Q. Yes; and it would be observable by anybody walking south along that track, wouldn't it; that is, you could read it from that position? A. Yes, you could read it from any position on Dey Street.

Q. No; right in front of it you could on Dey Street, but you couldn't read the letters on that sign twenty-five feet away up Dey Street, could you, to the west? A. I don't think you could see it.

Q. Don't you know that it runs parallel with Dey Street? 30

Mr. Hartpence: I object, and I ask leave to examine this witness to see whether he knows what parallel means.

Mr. Dixon: Your witness don't seem to know the English language.

Mr. Hartpence: That is technical language.

Mr. Dixon: Well, he is the one who knows.

Richard A. Walsh, for Defendants—Cross

By the Court:

Q. Do you know what parallel means, Mr. Witness? A. Well, I think I do.

Q. What do you think it means? A. Well, parallel runs just direct—the opposite way.

The Court: Just directly wrong.

Mr. Hartpence: There it is.

10

Q. See if I can get that right. This ledge is Dey Street? A. Yes.

Q. This side towards you is one side of Dey Street, we will say the north side, and the other side is the south side of Dey Street. That makes Dey Street? A. Yes.

Q. How does this sign stand with relation to the side of Dey Street? A. My notion is it is—

Q. Which would be parallel with Dey Street, 20 or hanging that way, which would be right angles? A. As I remember now it is this way.

Q. Diagonally? A. Yes.

Q. With the lines of Dey Street? A. As near as I—

The Court: I think he knows now what parallel means and what transverse or at right angles means, so he apparently knows what diagonal means.

30 By Mr. Dixon:

Q. Diagonally in what direction, northeast and southwest or northwest— A. Why, it is west of the railroad tracks on the south side of Dey Street.

By the Court:

Q. That is true. You have told us this. But this sign has a length to it? A. Yes.

Q. Which way does that length point; does it 40 point directly east and west as Dey Street runs?

Richard A. Walsh, for Defendants—Cross

If it does not, and runs diagonally as you suggested, then which way does it run? Does one end point northeast and the other one southwest, or how? A. Well, between northeast and southwest, in the other direction, I should judge.

Q. All right. I understand you to say one end of it points northeasterly direction and the other in a southwesterly direction? A. Yes. 10

Q. All right. A. That is as near as I can remember.

By Mr. Dixon:

Q. You don't know much about that sign, do you, except the sign is there? A. Except the sign was there.

Q. You don't know what it says? A. "N. Y. S. & W. property." New York Susquehanna and Western property. 20

Q. Well, is the sign to which you refer to the sign that appears on this photograph marked D-6? A. Yes, that is the sign.

Q. Is that the sign you refer to? A. Yes, sir.

Q. Is it in the same position there it always has been? A. Well, as far as I can remember.

Q. Has it got the same lettering on it as always has been on there? A. I couldn't swear to that. Might have been changed from time to time, painted over. 30

Q. Well, the same words on it that have always been there? A. As far as I can remember, to the best of my knowledge.

Q. I guess that is all.

Edward Horan, for Defendants—Direct

EDWARD HORAN, SWORN.

Direct Examination by Mr. Hartpence:

Q. Mr. Horan, you are employed by the Pennsylvania Railroad, aren't you? A. Yes, sir.

Q. Where? A. West End, Dey Street office or shanty, or whatever you call it.

10 Q. Is that the interchange office? A. That is the interchange office.

Q. How long have you been employed there? A. Going on thirteen years.

Q. Been there all the time? A. All the time.

Q. In that capacity? A. Yes.

Q. On which side of the railroad tracks is that office? A. On the west side.

Q. Which side of Dey Street is it? A. South side.

20 Q. Well now, during your thirteen years experience there have you had occasion to observe the railroad tracks that pass by Dey Street there? A. Yes, sir.

Q. Have there during the past five years been any new tracks put in, to your knowledge? A. Only one to my knowledge going in to Coughlin's coal yard.

Q. Going into where? A. Coughlin's coal yard.

30 Q. Where is Coughlin's coal yard located? A. Up at St. Paul's Avenue.

Q. Where does that track start out from? A. Starts right from Dey Street.

Q. Right from Dey Street? A. That is the switch goes from there.

Q. The switch starts from Dey Street; is that on the westerly side? A. That is on the west side too.

40 Q. That is the extreme westerly track? A. Yes, sir, that is the extreme westerly track.

Edward Horan, for Defendants—Direct

Q. Have there been any other tracks added on there during the past five years to your knowledge? A. Yes; there has been a few tracks put in there, that is, at the transfer on the west side, too, running the transfer on the Susquehanna.

Q. Whereabouts was that? A. That is on the west side too.

Q. How near to Dey Street? A. To Dey 10 Street? Right to cross over there—run right along—switches as they call it, a ladder runs in there—they call them ladders, one track off from the other.

Q. How many tracks are there by you, on the west side of the railroad tracks there by your interchange office, and counting across to the east side of the tracks? How many tracks are there right there at Dey Street? A. Six—seven—counting the Susquehanna going up to the coal 20 trestle.

Q. Now to your knowledge how long have those seven tracks been in there? A. There is six tracks goes there.

Q. How long have the seven tracks been there? A. Six tracks.

Q. How long have the six tracks been there? A. Well, them six tracks has been there to my knowledge about seven or eight years.

Q. Before that how many tracks were there? 30
A. Well, there is an extra track gone in since. All them tracks was there. There is an extra track gone in on this side.

Q. Yes? A. Our shanty used to set right on the track, where the track is now.

Q. Where this seventh track is now? A. Where this seventh track is that comes in at the ladder.

Q. When was that removed? A. About four years, five years ago.

Q. About five years ago. Was that moved in- 40

Edward Horan, for Defendants—Direct

to its present position five years ago? A. Yes.

Q. Been there ever since, has it? A. Been there ever since.

Q. Up until that time it had been right where the seventh track now starts out from Dey Street?

A. Yes, sir, the sixth or seventh track. Where the last track over starts up. They took us out
10 of there to put that track in.

Q. How large a building is that? A. Our building, about twenty feet, I guess.

Q. Twenty feet what? A. Twenty feet long.

Q. About how wide? A. Well, about ten wide.

Q. One story or two story building? A. One.

Q. About how high? A. About ten feet high altogether or nine feet; nine or ten, I should judge.

Q. High as this room? A. No; nine or ten feet,
20 the whole roof, from the bottom up, about nine feet.

Q. Where did that building stand up until the time it was moved five years ago into its present position, in relation to that west side of Dey Street? A. It stood on that track, where I am telling you, right there at Dey Street? A. Yes, I know, but what was its position with regard to Dey Street itself, looking up from Charlotte Street to the railroad? A. Of our shanty?

30 Q. Yes. A. Well, it was right, you might as well—it reached about five or six feet, I guess, over into Dey Street,—what is supposed to be Dey Street.

Q. Yes. If you are coming up Dey Street—do you know where Charlotte Street is? A. From where?

Q. Charlotte Street? A. Charlotte Street?

Q. Do you know where the Hackensack River is? A. Yes.

40 Q. Coming up from the Hackensack River up Dey Street? A. Yes.

Edward Horan, for Defendants—Direct

Q. To the railroad tracks there where your shanty was? A. Now I understand you.

Q. As you walk up Dey Street where did your shanty stand? A. Well, that stood a little on the left hand side,—on the north side—little on the north side on Dey Street at that time.

Q. At that time? A. Yes.

Q. Out on Dey Street? A. In Dey Street, yes. 10

Q. About how far did it extend out on Dey Street? A. About five feet, I guess.

Q. Five feet. Was there anything else there? A. Yes, there was.

Q. In the line of Dey Street as you come up to the railroad tracks, besides your shanty? A. Well, McDermott's ice dock—McDermott's scale was there and McDermott had an office there.

Q. Did that stand on the line of Dey Street also?

A. The scale was right on that street. The scale 20 was on the street and the shanty was off from it about parallel from our shanty, where it is now, on Dey Street.

Q. How large a scale was it? A. Well, the scale would weigh about twenty or twenty-five ton. I saw the horses go on and off. Weigh ice, coal.

Q. A couple of horses go on with a wagon? A. Yes, sir.

Q. And stand on the platform of the scales? A. Yes. 30

Q. Was there anything else across Dey Street at that point? A. Not as I know of there then. That is all.

Q. You say they moved away about five years ago? A. Well, I should say it is around that—four or five years McDermott went out of there, maybe more.

Q. Now pass on over across the tracks beyond your shanty, still going east across the tracks,—what was the condition, the physical condition of 40

Edward Horan, for Defendants—Direct

the track there after you passed your shanty?

A. Physical condition of the tracks?

Q. Yes. A. What do you mean?

Q. What did it look like? You say there were six or seven of them there—six of them there.

What did it look like? A. That looked just the same as they are now, outside there was a ditch
10 on the other side of the street.

Q. Where was that ditch? A. On the east side of the tracks, of the Erie tracks.

Q. How near was that to Dey Street? A. That is right—runs right alongside of Lorillard's storehouse there, right along Dey Street at the end of it and goes right up towards St. Paul's Avenue.

Q. Running the same direction as the tracks?

A. Same direction as the tracks.

Q. How far across Dey Street did it run? How
20 long was the ditch? A. Oh, that didn't go across the railroad at all.

Q. What say? A. Don't go across the railroad at all. It runs parallel with the railroad.

Q. How far did it run? A. Eh?

Q. How far did it run parallel to the railroad?

A. Run all along down toward Newark Avenue. From that way down towards Newark Avenue to the south side.

Q. Did it cross all the way across Dey Street
30 on that east side? A. Yes; I believe it did run up as far as there.

Q. How deep a ditch was it? A. Well, some places two feet, a foot deep.

Q. Were there any switches or switch stands and lines across there? A. Not there. Not where the ditch was. They were up on the track, a few switches there, one or two.

Q. Any of them on the line of Dey Street? A. No, ain't any. There is a switch on the west side
40 of the line of Dey Street.

Edward Horan, for Defendants—Direct

Q. Taking now prior to the time you moved your shanty, I ask you to describe it? A. Yes, there was a switch stand there right on Dey Street.

Q. On Dey Street? A. On Dey Street, on the west side, though.

Q. West side? A. Yes.

Q. How long did that stay there? A. That was there for years until they took it down, when they went to put that switch in. 10

Q. When was that, about? A. About four or five years ago.

Q. I show you a photograph marked Exhibit D-1 and ask you if that is familiar to you in any way; whether you recognize the location? A. Yes.

Q. What is it? A. That is Marion yard.

Q. At what point? A. Unless—this is the west side here. 20

Q. At what point is that Marion yard? A. This is Dey Street.

Q. All right. Now can you state as you look at it whether it is the west side of the tracks or the east side of the tracks? A. This is the west side of the tracks. This is also the west side of the tracks.

Q. Yes. A. This is Max's factory.

Q. Off to the right? A. Max's factory.

Q. With the big smokestack? A. Smokestack on it, and that is the fence. 30

Q. Now I call your attention to this switch and ask you if that is the switch that you referred to as standing in the line of Dey Street? A. That is the switch. It looks to me the same—same height switch that was there.

Q. It was a switch similar to that? A. Similar, yes. Just the same—tall switch like that.

Q. Did it stand about like it does in that position, as it does in this photograph? A. Yes. 40

Edward Horan, for Defendants—Direct

Q. What is that smaller one in between the tracks? A. That is another switch.

Q. That is another switch. Did you ever see any planking across the tracks at that point? A. No, sir.

Q. Just simply the tracks on the ties as you see it there? A. Yes.

10 Q. That is the way it has always been as far as you seen? A. Yes.

Q. Was there any ditch on the west side of the tracks at Dey Street? A. No, sir, not there—wasn't on the outside of the track.

Q. Is there between the tracks? A. Little ditch down near the trestle; ain't much, just a little hollow that the water would lay in, that is all; all outside of that it is level.

Q. You mean it is tracks and ties? A. It is
20 alongside of the trestle work.

Q. Well now up at Dey Street—where is the trestle work with relation to Dey Street? A. The trestle?

Q. Yes. Where is the trestle with relation to Dey Street? A. Oh, the trestle is south of Dey Street.

Q. How far, about? A. I don't know, I should judge about a hundred feet, I guess.

Q. What leads up to that trestle? A. What
30 leads up to it?

Q. Yes. How do you get to the trestle? A. Why, there is a trestle work, wooden trestle work.

Q. How high is it? A. Well, I should judge it runs about twenty feet at the end going into the door, but it starts in at a grade.

Q. Where does it start in at the grade? A. Starts in at the grade about Dey Street and then it is on cinders, but it works up to a trestle work and the trestle work goes up on abutments.

40 Q. My question is about how far does the fill

Edward Horan, for Defendants—Direct

of cinders run up to the time it gets to the trestle?

A. Well, I should judge, I should say about a hundred feet from Dey Street. Might be ninety feet or a hundred feet, I never measured it.

Q. Well, in your best judgment? A. About a hundred feet.

Q. How long has that trestle been there to your knowledge? A. Since I have been there. 10

Q. In that same form it now is? A. Same form. They might have made a little repairs on it.

Q. But they have not changed its location in any way? A. No, sir.

Q. Do you know where St. Paul's Avenue is? A. Yes.

Q. Where is that with relation to Dey Street? A. That is about three hundred feet or so.

Q. North or south of Dey? A. North of it.

Q. Is there any and has there been any means of communication between Dey Street and St. Paul's Avenue on the west side? A. No, sir. 20

Q. Or east side? A. No, sir.

Q. How do you go from Dey Street to St. Paul's Avenue? A. Oh, communication?

Q. Yes. A. Why, right in from St. Paul's Avenue, alongside of that new Coughlin's coal yard, go in there where wagons come in.

Q. What is there that you can go in? A. Eh?

Q. What is there that you can go on? A. Dirt road. 30

Q. Dirt road? A. Yes.

Q. How much of that space is there between the tracks and the fence? A. I should judge about twenty-five or thirty feet.

Q. How is it on the east side of the tracks over there towards St. Paul's, opposite the shanty? A. About the same.

Q. Do wagons go up and down those places? A. Wagons, yes. 40

Edward Horan, for Defendants—Cross

Q. People? A. People, at times.

Q. Go through from Dey Street to St. Paul's?

A. Go through that way to Newark Avenue.

Cross Examination by Mr. Dixon:

Q. Do you know where that signboard is that the last witness spoke of? A. Yes, sir.

10 Q. It is on a telegraph pole? A. Yes, sir.

Q. Is that the telegraph pole right near the shanty? A. Yes; about forty feet away from it.

Q. Forty feet away from the shanty? A. Something around that.

Q. In what direction from the shanty? A. East.

Q. East of the shanty? A. East of the shanty.

Q. And north or south of the shanty? A. East of the shanty on a line with it, parallel with the
20 shanty.

Q. Does it appear in this photograph marked D-1, the pole?

Mr. Hartpence: Is that D-1?

The Court: Yes.

A. Not unless that is it there?

Q. Well, does he know? You say you are familiar with it? A. It is so very small I can't see it.

30 Q. You know the telegraph pole that it is on, don't you? A. Yes.

Q. Eh? A. That is the telegraph pole.

Mr. Hartpence: May I have that designated, please?

A. Telegraph pole from the shanty.

Q. That is the pole, isn't it? A. It looks so.

Mr. Hartpence: Isn't it the pole?

Mr. Dixon: There is only one there.

Edward Horan, for Defendants—Cross

Q. Is that the only telegraph pole appearing on that picture? A. Yes, sir. That is the pole right from the shanty. It is north of the shanty, or west of it.

Q. Do you know whether it is or not? A. I know that is the pole, yes.

Q. You know that is the pole. Now is the roadway that you say they used occasionally to go 10 from Dey Street to St. Paul's Avenue a roadway that runs just west of the track and parallel with the track from Dey Street to St. Paul's Avenue? A. Parallel with that fence.

Q. Yes; and if a wagon were proceeding in a southerly direction upon that road and crossed Dey Street, the driver would be faced, when he got across Dey Street with that notice on that pole, wouldn't he? A. Right facing it, yes.

Q. So that he would not go any further along 20 parallel with the tracks after he had crossed Dey Street to the south? A. That notice is there, but he can go right along.

Q. Yes, but he goes under the notice. If he does, he goes with the notice staring him in the face? A. Well, it says that on there, "New York, Susquehanna & Western. No thoroughfare."

Q. No thoroughfare; and that is directly opposite and faces the driver who is driving parallel with the track along the roadway that you have 30 spoken about? A. This runs parallel with the street and the pole.

Q. Runs parallel with the Dey Street and the pole? A. Up and down.

Q. And that telegraph pole stands how many feet south of the southerly end of the shanty, would you say? A. Southerly end? Stands just about forty feet east of the shanty on a line with it.

Q. On a line with the southerly end? A. No; a 40

Edward Horan, for Defendants—Cross

line with the front of it on Dey Street. Southerly end?

Q. What? A. Southerly end?

By the Court:

Q. Which way is the shanty? A. Front on Dey Street.

10 Q. Towards St. Paul's Avenue? A. Towards St. Paul's Avenue.

Q. Then that fronts towards the north, I take it?

Mr. Dixon: On that photograph fronted the other way.

By Mr. Dixon:

Q. Look at the photograph and state whether or not the shanty faces towards the east or towards the north? A. Well, this here—that shanty
20 faces right on Dey Street here towards the north.

Q. Towards the north. Is the doorway towards the north? A. Yes.

Q. What is that, a window? A. That is a window on the side and the bench is underneath.

Q. Well now with regard to that window, is the pole south of the window? A. The pole? Is even, runs on a parallel with the street, with the north end of the shanty, because it is even—even,
30 straight with it as you go along. It is about even as you look at the door on the east end of the shanty.

Mr. Dixon: Allow the jury to look at that picture with the testimony and see what kind of a perspective you have got there. (Hands photograph to the jury.)

Q. Then that picture is intended to show that that pole is on a line with the front of the shanty?

40 Mr. Hartpence: I object to the question.

Edward Horan, for Defendants—Redirect

The Court: I will sustain the objection to that.

A. That pole—this is the telegraph—

Mr. Hartpence: Mr. Horan, if you will kindly refrain from making any remarks until you are asked—

The Court: I will sustain the objection to 10 the question.

Mr. Dixon: Your Honor will allow me an exception?

The Court: You may have it.

Mr. Dixon: He identified it and tell us about the picture.

The Court: It has been passed on.

Mr. Dixon: That is all.

Redirect Examination by Mr. Hartpence: 20

Q. Now, Mr. Horan I show you D-6 for identification and ask you if that is the telegraph pole and the sign off to the extreme right that you referred to there at Dey Street? A. Yes; that is more bigger there than—that is the sign. You can see it better there than that, but I thought the mark on that thing was the sign.

Q. This is the sign on this picture D-6? A. There is a sign on there, on the pole.

Q. Off to the right? A. Off to the right. 30

Q. And this switch right here about the center of the picture, is that the switch that you said stood there in line of Dey Street? I understood you to say that a switch stood there? A. Yes; a switch stood there a good while ago. It is not the same switch there now.

Q. Where did it stand? When was it taken away? A. Right in line with—well, this switch was taken away three or four years ago, but there is one of them small switches put on lately, and 40

John H. Watson, for Defendants—Direct

this here switch, I don't know when it got taken down, but there was a switch there just like that.

Q. Was it off to the left of that that the shanty stood? A. Our shanty stood down here. You can't see our shanty.

Q. Before you moved it? A. Our shanty stood over here.

10 Q. Off to the left of this switch? A. Off to the left of them, towards St. Paul's Avenue.

JOHN H. WATSON, sworn.

Direct Examination by Mr. Hartpence:

Q. Mr. Watson, what is your business? A. Car inspector.

20 Q. Employed by whom? A. Employed by the Pennsylvania Railroad and Erie Railroad jointly.

Q. Jointly? A. Yes.

Q. Where are you employed by them? A. At Marion.

Q. What part of Marion? A. At Dey Street, where my office is.

Q. Your office is on Dey Street? A. Yes.

Q. What you call the interchange office there? A. Yes, sir.

30 Q. How long have you been employed there? A. Well, at that point I have been there about sixteen years.

Q. Had you been employed in and around that point in any other capacity before that? A. Not at that point, no, sir.

Q. Not at that point? A. I have been employed by the Pennsylvania Railroad at other points.

Q. Have you been located right at that point during the last sixteen years? A. Sixteen years
40 at that point, yes.

John H. Watson, for Defendants—Direct

Q. What is the business that is transacted in there? A. It is an interchange between the two companies.

Q. What do you mean by interchange between the two companies. What do they do physically in there? A. Well, transferring cars from one road to the other—diverting cars from one road to the other.

10

Q. That is done in what way? A. By drilling.

Q. By drilling, with engines? A. Pennsylvania Railroad brings a train in and the Erie delivers a train on different tracks.

Q. Shift them from track to track? A. Different tracks, yes, sir.

Q. How many tracks are there there at Dey Street? A. Well, the tracks that is used on the interchange, only about five.

Q. How many are there altogether? A. I guess 20 about seven, that is, on this side of the trestle work, but they ain't on interchange work.

Q. I can't hear you very well.

The Court: He says those are not on the interchange work. Now he wants to know how many tracks are there at Dey Street?

A. Six or seven tracks.

Q. Have there always been six or seven tracks there within your recollection? A. No, sir.

30

Q. When was the last one put in, about approximately? A. About four or five years ago.

Q. When was the one before that put in, as near as you can recall? A. Well, about seven years, I guess.

Q. Now prior to that time had there been any changes during your experience there? A. No, sir.

Q. Tracks been just the same? A. Just the same, yes.

40

John H. Watson, for Defendants—Direct

Q. What sort of a planking was there across at that point where Dey Street comes up? A. Dey Street? No planking there.

Q. Never been there in your recollection? A. No, sir, not in my time.

Q. Just the rails and ties? A. Just the rails and ties.

10 Q. How about your interchange office, where is that located? A. Right on Dey Street.

Q. What side of Dey Street? A. It is on the south side.

Q. On what side of the railroad? A. Sir?

Q. On which side of the railroad? A. On the south side of the railroad.

Q. On the south side of the railroad? A. Yes, sir—or west side, I should say—west side.

Q. Which way does the railroad run there?
20 What direction does the railroad run? A. North and south in our yard.

Q. Does it run directly straight across Dey Street and on out to Newark Avenue? A. Dey Street is perfectly straight.

The Court: No, the railroad, does that run perfectly straight north and south?

Q. Does the railroad run perfectly straight north and south there? A. Yes, at that point.

30 Q. Does it run directly straight all the way to Newark Avenue? A. No, sir, it does not.

Q. What does it do after it passes Dey Street? A. There is a curve down there toward Headen's coal yard near Newark Avenue, a short curve.

Q. What is on the opposite side of the railroad from your office between Dey Street and Newark Avenue? A. Lorillard's Tobacco Factory.

Q. Occupies the whole tract in there? A. Runs
40 out as far as Dey Street.

John H. Watson, for Defendants—Direct

Q. And south as far as Newark? A. Yes.

Q. How far east does it run, do you know, the Lorillard property? A. No, I couldn't tell you that. It runs up on the other block, I don't know what street that is.

Q. Do you know the name of that street? A. I do not.

Q. Where was your interchange office located 10 when you first went there? A. It was located right over facing Dey Street, right off to Dey Street.

Q. In the same position that it now is? A. Not in the same position, no, sir; it was over further, nearer the track.

Q. Nearer the track? A. It took in part of Dey Street.

Q. About how much? A. Well, I guess around about five foot over—about five or six foot, I 20 guess.

Q. Was there anything else there in Dey Street? A. Yes; there was McDermott's coal office there, and scales.

Q. Right in the line of Dey Street? A. The scales were, yes.

Q. How close to the railroad? A. Right close to the track, at that time.

Q. Now crossing over to the east side of the tracks, what was the condition of Dey Street on 30 the other side of the tracks, do you know? A. Well, that is where it connected there with the railroad, right there at the east side and runs as far as Lorillard's and runs all the way across.

Q. Were there any houses over there on the line of Dey Street? A. Yes, sir; a few houses there.

Q. On Dey Street? A. Yes, sir.

Q. What was the physical condition of the tracks over on that east side of Dey Street, or of the roadbed? A. The roadbed? 40

John H. Watson, for Defendants—Direct

Q. Yes. A. No roadbed, except there was a ditch running along there at that time.

Q. There was a ditch? A. Near Lorillard's, yes.

Q. Crossing over Dey Street? A. Crossing right over Dey Street.

Q. Any ditch on the east side where your office
10 was located? A. A short ditch down near the trestle work.

Q. That trestle work is what? A. Sir?

Q. What is the trestle work you refer to? A. That is Headden's coal trestle there.

Q. Where is that located with respect to Dey Street? A. Well, it starts pretty close to Dey Street—the foot of it, close up, as far as Newark Avenue.

Q. On an up grade all the way? A. Up grade
20 until it comes up to the building on Newark Avenue—or Van Winkle Avenue.

Q. How long has that trestle been there to your knowledge? A. Been there before I came there.

Q. That begins at about Dey Street, you say? A. Pretty close to Dey Street, not all the way up to Dey Street.

Q. Little bit south of Dey Street? A. Yes.

Q. Then gradually rises? A. Gradually rises up.

30 Q. Do you know where the fill ends and the trestle proper begins, the wooden part of the trestle? A. Yes, little ways from Dey Street.

Q. It is filled in with cinders, isn't it, for part of the way? A. No. You mean the trestle part? A. No; before you get to the elevation. I mean the elevation. A. Yes, cinders.

Q. How far is it filled in with cinders? A. From Dey Street?

Q. Yes; about? A. I couldn't exactly tell you
40 that. About—that is from Dey Street office, our

John H. Watson, for Defendants—Direct

office, about one hundred and twenty-five feet I should judge.

Q. The fill continues that far? A. That is from the Dey Street office.

Q. Then it strikes the trestle, the woodwork proper, is that right? A. Yes.

Q. And continues right on that, straight up 10 grade all the way to the coal pockets? A. Grade all the way up, yes.

Q. Were you there the day that Frank Brooks was injured? A. Yes.

Q. Did you see him hurt? A. I didn't see him, not until I went out of the office.

Q. Somebody called your attention to it, did they? A. Yes, sir; some one ran in and said that a boy was killed, and I immediately ran out there.

Q. Did you go to that person? A. I followed 20 them out, yes.

Q. Where did you go? A. I went to where the boy lay.

Q. Where was he lying when you saw him? A. He was lying between four track, what we call four track, and main line, close to the trestle.

Q. Close to the trestle. Is that the trestle that you just referred to, the Headden trestle? A. Yes.

Q. Was that south of your office or north? A. 30 South.

Q. How far south of Dey Street—your office—was it about? A. From where the boy lay?

Q. Yes. A. About one hundred and twenty feet or one hundred and twenty-five feet.

Q. Where was he with respect to the point where the cinders end and the trestle begins? A. He was right pretty near close to the beginning of the trestle, some distance.

Q. What did you do with him, anything? A. 40

John H. Watson, for Defendants—Cross

Well, the brakeman picked him up and carried him in the shanty and I followed along after them.

Q. Who else did you see there besides the brakemen? A. Well, I didn't see anybody there at that time, only Mr. Chase, the brakeman, and there was another brakeman came along and they picked him up.

10 Q. Are they the ones that carried him in? A. They carried him in and I came alongside of him.

Q. They took him in your office? A. Yes.

Q. See anything of a little girl sitting out on your bench in front of the office? A. No, sir, I did not.

Q. See anything of a little girl around there anywhere? A. No, sir, not that day.

Cross Examination by Mr. Dixon:

20 Q. What is your business? A. Car inspector.

Q. Car inspector? A. Yes.

Q. You are not a surveyor? A. No, sir.

Q. You have never surveyed Dey Street? A. No, sir.

Q. What monument did you refer to when you said that some years ago the house stood within five feet, inside of the Dey Street line? To what monument did you refer? A. That is before the shanty was moved. Laid over there near the rail-
30 road tracks.

Q. What? A. Laid over there close to the railroad tracks.

Q. What? A. Our shanty.

Q. You said it was within about five feet inside of the line of Dey Street. How do you know that. What monuments were there? A. Only guessing at that part of it.

Q. Only guessing? A. Yes.

Q. It might have been five feet outside of it then
40 as far as you were guessing? A. No, it was not. We could state it was on the street.

John H. Watson, for Defendants—Cross

Q. How did you know that? You don't know where the lines of the street were? A. Well, it was over the line of the street.

Q. How do you know where the lines of the street were? A. Well, you can tell by the fence there, Gillespie's fence there.

Q. Was there a fence there? A. Why, there is a fence there on both sides. 10

Q. On Dey Street? A. Yes, sir.

Q. Running along Dey Street there was a fence? A. Yes, sir, one on the opposite side to our shanty and then Gillespie's building there was fenced in all the way down below that.

Q. Did the fence run through your house? A. The short fence between our house and Gillespie's, which the Susquehanna put up.

Q. How did you know that was the line of Dey Street? A. Well, I have been told that by surveyors that came up there. 20

Q. They had told you about that? A. Yes.

Q. Eh?

The Court: Just one minute. (Interruption.)

Q. Who was it that carried the boy into the shanty? A. Mr. Chase, the brakeman, and another brakeman, I can't recall his name, but I know him by sight. 30

Q. What? A. I can't recall the other brakeman's name, but I know him by sight.

Q. Have you seen him here? A. Yes.

Q. And the brakeman's name whom you do remember? A. Mr. Chase.

Q. Chase? A. Yes.

Q. Did he carry his head or his feet? A. Well, now, I don't remember that part.

Q. Did one or two men carry him in? A. Two men. 40

William C. Harding, for Defendants—Direct

Q. Two? A. Yes, sir.

Q. Well, how did they carry him? A. Well, one had his head and one had his feet, the way it looked to me.

Q. You were right there? A. Yes; as well as I can remember, took his head and his feet.

10 Q. Is your memory a little vague about the circumstances? A. They had him on a board.

Q. Had him on a board? A. Yes.

Q. Where did they get the board? A. The board was laying where the boy was found.

Q. How do you know that? A. Well, because the board was out there when I went out there, and I followed the brakeman right out.

20 Q. You followed the brakeman up? A. I followed him out after he came into the office and told me and said, "We have killed a boy out here," and I jumped up off of my desk and went right out.

Q. Which brakeman came in and told you that? A. Mr. Chase.

Q. Then he went out and picked up the boy? A. He went out and the other brakeman and they carried the boy in on a board.

Q. You did not see the little girl at all, eh? A. I did not.

30

WILLIAM C. HARDING, SWORN.

Direct Examination by Mr. Hartpence:

Q. Mr. Harding, where are you employed? A. Interchange clerk at the Marion.

Q. By whom are you employed? A. By the Pennsylvania Railroad Company, for twenty-four years.

40 Q. How long? A. Twenty-four years last April.

William C. Harding, for Defendants—Direct

Q. How long have you been there at Marion?

A. Twenty-four years.

Q. By Marion you mean what? A. Marion interchange.

Q. Well, what is it, what sort of a place is it?

A. Oh, where we interchange cars between the P. R. R. and the Erie Railroad.

Q. Any tracks, any railroad tracks there? A. 10
Yes.

Q. How many? A. Well, there is five tracks we do business with.

Q. How many others? A. Delivering and receiving.

Q. How many all told at Dey Street? A. Well, I mean four tracks that we do—that is, used to have five—how many at Dey Street?

Q. Yes. A. Dey Street is not recognized on the Erie Railroad. 20

Q. Do you know where Dey Street is? A. Yes.

Q. How many tracks are there at Dey Street to your knowledge? How many tracks? A. Across that Dey Street, seven tracks with the switches that goes into the Susquehanna yards.

Q. Yes. Now how long have those six tracks been there to your knowledge? A. Well, I should judge since they put in—they used only to be out of the main line, Susquehanna main line, and then they put in a switch after the Susquehanna was 30
taken out of there and I guess it must have been five or six years.

Q. Five or six years. How many tracks there prior to that time? A. We used to use five tracks.

Q. Never mind how many you used to use. How many were there there? A. We got five tracks at that time. That is, with the main line.

Q. Then there were some switches? A. Yes.

Q. That was on the west side of the railroad, wasn't it, where this switch ran into the ice 40

William C. Harding, for Defendants—Direct

house? A. Ran into the west side, that goes into the N. Y. & S. & W. freight yards there.

Q. Freight yard? A. Yes.

Q. Were there any switches on the other side of the railroad, on the east side of the railroad?

A. East side?

Q. Yes? A. There wasn't then, but there is
10 now.

Q. What switches are there over there? A. I guess there is Lorillard's factory, there is one standing on what they call Dey Street.

Q. How long has that switch been there to your knowledge? A. Ever since Lorillard's building has been there.

Q. About how long is that? A. I don't know; about six or seven years, I guess.

Q. Are you employed in the interchange office
20 there with Mr. Watson? A. Yes, sir. Well, I am P. R. R. and he is joint.

Q. You are employed—— A. In the same office.

Q. You have your desk in the same office? A. Yes.

Q. Where is that office located? A. On Dey Street.

Q. Which side of Dey Street? A. The west side.

30 Q. What side of the railroad tracks? A. That would be west.

Q. West side of the railroad tracks, on the upper or lower side of Dey Street, which? A. It would be on the west side.

Q. On the side nearest Newark Avenue, or——
A. The west side—it was west Newark Avenue side.

Q. On the Newark Avenue side? A. Yes.

Q. How long has that been there? A. Oh, it
40 has been there—about six or seven years, I should

William C. Harding, for Defendants—Direct

judge. We shifted that shanty twice, or that office.

Q. Where was it before that? A. Why, laid on there right up by the railroad, the Susquehanna Railroad, partly on Dey Street.

Q. How far is it now from the railroad? A. Well, it is about twenty feet. I should judge about that. 10

Q. It is closer to the railroad tracks before than it is now? A. Yes.

Q. Where was it with relation to the line of Dey Street before it was moved back where it is now? A. Why, it was right on Dey Street, part of the shanty.

Q. And right on Dey Street? A. Yes.

Q. What do you mean by that? A. I was right on Dey Street, because I could look up and down Dey Street from my windows. 20

Q. Right up and down the middle of the street? A. Yes, right up and down the street, yes.

Q. Was there anything else out there in the line of Dey Street? A. Yes.

Q. What? A. McDermott's ice scales, used to weigh his ice on that in the street. I don't know where he got the permission, but he done it.

Q. What was the physical condition of the tracks then at that time; were they covered over with plank there? A. No, no plank ever was there while I was there. 30

Q. Never been any planking across there? A. No, sir.

Q. Just the rails and just as they now are; is that right? A. That is all.

Q. Always been that since you have been there? A. Always blocked by railroad cars there. There is no open space other there two hours of the week.

Q. You mean by that that there are freight 40

William C. Harding, for Defendants—Direct

cars there all the time? A. All the time, crossing the street—what they call Dey Street.

Q. What is done with the cars there? A. Well, we interchange, that is, we receive from the Erie and we deliver to the Erie. The P. R. R. deliver—one track is what we deliver cars on; that has a capacity of sixty car lengths, No. 2 track, No. 3
10 track is fifty capacity, and No. 4 track is forty-five capacity, what they load.

Q. That is right there in the yard? A. That is in the yard, yes.

Q. Get that many cars in there? A. Get that many cars in, yes.

Q. And work them? A. And work them, yes.

Q. That is the working capacity, then? A. That is the working capacity, yes.

Q. Are those cars being moved from time to
20 time? A. Moving night and day, that is, when we can get engines.

Q. You say sometimes that the whole day the cars— A. Sure.

Q. —the cars would be across that space where Dey Street comes out. A. Yes.

Q. Has that been the general condition? A. Yes, ever since I have been there.

Q. Were you there the day that Frank was hurt? A. Yes.

30 Q. Where were you at the time? A. In the office.

Q. Did you see him? A. I saw him when they brought him in.

Q. How long had you been—you did not see him outside then? A. No, sir; I telephoned—was working the telephone in our headquarters to tell them that there was a boy hurt, and of course then they brought him in and the crowd got around, and I didn't see the lad for some minutes
40 after he was inside.

William C. Harding, for Defendants—Direct

Q. Had you been outside your office? A. I went out afterwards, examining the place where he was killed.

Q. But you were not there, you didn't see where that was? A. No, sir.

Q. Had you been outside your office just before you learned that he had been hurt? A. Well, I just looking after, to see how the crews was working, that was all. 10

Q. See anything of a little girl sitting there on a bench? A. No, sir; didn't see no little girl sitting there, and I was sitting right in front of my window she would be sitting if she was there.

Q. That would have been right in front of your window? A. Yes.

Q. The bench was right out in front? A. It was at that time, yes.

Q. Didn't you see a little girl sitting there within an hour before this thing happened? A. No, sir, I didn't see it. Naturally I did see children sitting there, but not at that time. 20

Q. If she had been there you couldn't have helped seeing her? A. No, sir, I couldn't have helped seeing her.

Q. Are you familiar with the signboard there at Dey Street? A. Yes, sir.

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

Q. Where is that located? A. On the west side of Dey Street. 30

Q. West side of what? A. On the—close to our little office there.

Q. Is it the same side as your office or on the other side? A. Yes.

Q. Same side of Dey Street as your office? A. Yes.

Q. On the same side of the railroad tracks as your office? A. Yes.

The Court: Is it on the same side of the railroad tracks as your office? 40

William C. Harding, for Defendants—Cross

A. Yes, on the same side of the railroad, yes.

Q. Do you know what the sign says? A. Yes.

Q. What? A. I took a diagram of that (producing paper).

Q. Did you make a diagram of it? A. Yes.

Q. When did you do that? A. This morning.

Q. This morning? A. Yes; to make sure what
10 was on it.

Q. How long to your knowledge has it been just the same as it is this morning? A. Well, it has been there about four or five years to my knowledge, because there was some dispute about the running these right of ways of the city.

Q. Yes? A. At the time Lorillard's were build- there the city claimed the right of way over on that east side there, and then the Susquehanna and Erie fenced part of this property in and they put
20 this sign up on that board, and using it for their freight yards.

Q. What does that sign say? A. (Referring to paper) "N. Y. S. & W. Co.'s property. No thoroughfare."

Cross Examination by Mr. Dixon:

Q. This dispute you say about the thoroughfare, was the thoroughfare going parallel with the tracks, was it? A. Yes, sir, parallel with Dey
30 Street.

Q. Parallel with the tracks? A. Well, that would be—that would go—

Q. Same as the thoroughfare that goes through from St. Paul's Avenue to Dey Street? A. Yes.

Q. This is the other side of that thoroughfare? A. Yes, sir.

Q. And they did put a fence in there some where? A. They put a wire fence there.

Q. When they put up this sign? A. Then they
40 put up this sign, yes.

William C. Harding, for Defendants—Redirect

Q. That signboard is tacked on that? A. Telegraph pole.

Q. Runs parallel with Dey Street? A. Yes, sir.

Q. And faced anybody approaching? A. Coming from St. Paul's Avenue.

Q. Coming north from St. Paul's Avenue along that right of way? A. Yes, sir.

Q. What did you say your business was? A. 10
Interchange clerk?

Q. Clerk? A. Yes, interchange clerk. I look after all the cars and receiving. I have charge of all those cars, and that is why we make so many drills, they give us cars that do not belong to us and we drill those cars out, and that is what makes the shifting sometimes between cars.

Q. Now did you understand the import of counsel's question when he asked you this, if the little girl had been on the bench? A. Yes, sir. 20

Q. —or there at the time of the accident, would you have seen her? A. Why, she was right in front of my window.

Q. Did you look out to see if she was there? A. I didn't particularly look or I could swear she was there, but I didn't see her there.

Q. You did not mean to swear she was not? A. I didn't see her there.

Q. You didn't see her. That is all.

30

Redirect Examination by Mr. Hartpence:

Q. When were the McDermott scales moved, do you know? A. Well, he was taken out of there about—he bought the property there on Newark—

Q. When was it? A. About seven years ago; six or seven years ago.

Q. How long had it been there before that to your knowledge? A. Between four and five years.

Q. Is there any ditch along there on the side of the— A. Ditch comes away into the middle of 40
Dey Street now.

*William C. Harding, for Defendants—Recross
Thomas B. Hawthorne, for Defendants—Direct*

Q. How long has that been there? A. It has been there draining the Erie Railroad the street, because there is no sewerage there to let the water off.

Q. About how long has it been there to your knowledge? A. Been digging ditches there?

10 The Court: How long has it been there, that particular ditch?

A. This one, the particular one, I should judge ever since we made the change around there.

Q. By that change you mean the moving of your office and the scales? A. Yes.

Recross Examination by Mr. Dixon:

Q. You say that ditch goes to the middle of
20 Dey Street? A. Yes, sir.

Q. Which side, north or south? A. Why, on the shanty side, on the—

Q. South side? A. Yes, sir.

Q. That's all.

THOMAS B. HAWTHORNE, SWORN.

30 *Direct Examination by Mr. Hartpence:*

Q. Mr. Hawthorne, what is your business? A. Civil Engineer.

Q. Employed where? A. Pennsylvania Railroad.

Q. Division engineer's office? A. Not at this present time; I am in the New York office, 33rd Street.

Q. You examined and made some measurements over near Dey Street, on the Susquehanna tracks,
40 did you not? A. I did.

Thomas B. Hawthorne, for Defendants—Cross

Q. Are you familiar with the trestle over there leading into the Headden pockets? A. I am.

Q. Did you locate or determine where the incline up to the pocket begins? A. I did. z

Q. Where does it start from the level? A. Starts on the southerly—approximately the southerly line of Dey Street.

Q. Produced? A. Produced. 10

Q. If extended across the tracks? A. Yes, sir.

Q. What is it composed of as it starts there? A. Cinder fill.

Q. How far does that cinder fill run; did you measure it? A. Yes.

Q. How far does it run? A. One hundred and thirty-three feet.

Q. What takes the place of it at that point? A. Why, it runs to the breast of the crib.

Q. What goes on from that point? A. Trestle, 20 wooden trestle.

Q. And the distance from the southerly line of Dey Street if extended, is how much, did you say?

A. One hundred and thirty-three feet.

Cross Examination by Mr. Dixon:

Q. How did you fix the southerly line of Dey Street? A. By the buildings that were built on either side of the railroad.

Q. Is that the only way you fixed it? A. The 30 building line, yes.

Q. How do you know this was the building line? A. Because the buildings are built on it.

Q. That is the only way you know? That is not the surveyor's way of doing those things? A. Your technical training will teach you that way.

Q. What? A. Your technical training will teach you that way.

Q. You do not consult the old maps or anything of that sort in finding out the localities? A. If 40 you are going to make a survey.

Thomas B. Hawthorne, for Defendants—Cross

Q. Eh? A. If you are going to make a survey you do, yes.

Q. You did not consult Fowler's map, did you, to locate Dey Street? A. I did not.

Q. Know Fowler's map? A. I do not know what it is.

Q. Use it? A. I have used it.

10 Q. That's all.

Mr. Hartpence: I offer D-3, D-5 and D-6.

The Court: Any objection?

Mr. Dixon: No objection.

The Court: They may be marked.

Defendant rests.

20 Mr. Dixon: I have some witnesses in regard to that sign on that post. I do not suppose you will insist—you do not seriously contend that that sign on that post is in any other position than parallel with Dey Street, do you?

Mr. Hartpence: No. I will admit myself on the record, having seen it myself, that it runs parallel with Dey Street.

Mr. Dixon: I offer in evidence the rules, No. 102 and 102A.

Mr. Hartpence: May I see them?

30 Mr. Dixon: Yes. Identified as rules of the company.

Mr. Hartpence: I have no objection to the rules going in so far as the form of proof offered is concerned, if your Honor please, because the witness on the stand practically said the same thing, but I object to the offer on the ground that the rules themselves are irrelevant, immaterial and incompetent.

The Court: Why?

40 Mr. Hartpence: They pertain to the position of a trainman at a crossing.

Documentary Evidence

The Court: That is a street or public crossing?

Mr. Dixon: No; it don't say so.

Mr. Hartpence: Yes.

Mr. Dixon: That is not the rule.

The Court: Let me see that.

Mr. Hartpence: One refers to the crossing and the other refers to the movement of trains. 10
Neither of those situations is present in my opinion in this case on the evidence.

Mr. Dixon: Both are present in my opinion.

The Court: Which ones are offered?

Mr. Dixon: 102 and 102A.

The Court: Very well. They may be offered over your objection. I have no way of ascertaining their meaning without going all through them.

Mr. Dixon: Your Honor permits them? 20

The Court: The offer is accepted, subject to the objection of Mr. Hartpence, that is, they are not relevant and they do not apply to the situation before us.

Mr. Dixon: I want to put them on the record. Rule 102 reads as follows: "When cars are pushed by an engine a trainman must take a conspicuous position on the front of the leading car. If signals from the trainmen cannot be seen from the engine it must be 30
stopped immediately."

Rule 102A reads: "When a train is shifting over a crossing where there is no watchman, a trainman must be stationed on the crossing to give warning to persons using the same."

Both sides rest.

Motion to Direct a Verdict.

Mr. Hartpence: Defendant moves for a verdict in its favor to be directed on the same grounds as urged in behalf of the non-suit.

The Court: I will decline to direct a verdict for the reason I think all of the matters that are suggested and raised by those reasons are matters for
10 the jury to pass upon, Mr. Hartpence, unless there is some other matter that you wish to bring to my attention other than you already have.

Mr. Hartpence: I think the defendant's case has fixed the point of accident beyond any question; I do not think there is any controverting testimony, and I cannot see where, in the absence of proof shown on the injury, there is any negligence to be shown or any liability to be shown on the part of the defendant.

20 The Court: I will decline to direct a verdict and you may take your exception if you wish.

Mr. Hartpence: Note an exception.

Court's Charge to Jury.

Gentlemen of the jury:

This is an action brought by Charles J. Brooks
30 as the administrator of the estate of his minor son Frank Brooks, deceased, through which the plaintiff, as administrator, is seeking to recover damages for the death of the minor son, which death he alleges was brought about proximately, by the negligence which he charges to or against the defendant, the Pennsylvania Railroad Company.

It is true, as both counsel have said, gentlemen,
40 in summing up, this case has taken considerable time and has had many technicalities to be disposed of.

Judge's Charge

After all the real issues that I have to present to you or make known to you as those which are for your consideration and determination are not very numerous, nor in fact are they very difficult from the standpoint of what the law is upon the subject. My effort, therefore, shall be, gentlemen, to make them as plain and as concise as possible. I shall not refer at all, if it is possible for me to avoid it, to any part of the evidence. 10

Your right is to determine, first, what the evidence is as you recall it, secondly, it is for you to pass upon that evidence, to weigh it, to examine it, search out what is the truth in it, and determine which way the weight goes. That is your especial province under the law, that is your duty, and I am not going to usurp any of those functions which belong to you. That is one reason why I shall not refer to the testimony if I possibly can avoid it; the second reason I shall not is because it is possible always in stating evidence I may state it incorrectly, and then you would have to go back after all to what your recollection of the evidence is, because that is the measure by which you are guided. So, as I said, I shall try to lay before you the propositions or the issues that will come before you for your determination in as concise and simple manner as I am able to do. 30

In the first instance, you must keep in mind that in all actions that come before you there are two sides. We look first at what the plaintiff, who is seeking to recover, alleges as his reasons why, the evidence warranting it, he is entitled to have his verdict. That is one side of the issue or one of the things that go to make an issue. Then of course there is the other side, that of the defendants, what they say as against that which the plaintiff alleges has given him the right to have a 40

Judge's Charge

verdict. Now when you have an assertion on one side and a denial on the other, that raises what we call an issue.

The plaintiff says—and without reading his complaint in entirety—first, that this property, this right of way, as it has been called, was the property of the New York, Susquehanna & Western Railroad Company, and that the Pennsylvania Railroad Company was operating at the time of this occurrence its engines and manipulating cars and moving cars over the trackage of the Susquehanna on this right of way, and then it goes on in this language and says that the Pennsylvania Railroad Company was permitted to operate and run its locomotives and cars over the tracks and right of way of the defendant company, New York Susquehanna & Western Railroad Company, and over such part of the same as crossed the said public street known as Dey Street—having previously alleged that Dey Street was a public street crossing the right of way of the Susquehanna Railroad at this point—for the mutual accommodation and convenience of the said defendant, and then finally says this: “In the operation of said trains said Pennsylvania Railroad Company separated the said train of cars into two sections, so that one section stood upon the northerly side of Dey Street and the other section stood upon the southerly side of Dey Street, leaving an intervening space for the use and travel of pedestrians, foot passengers, using said Dey Street in the passage and repassage along the same”; and then goes on to allege, that in the movement of those cars and while the boy Frank Brooks was lawfully crossing the right of way of the Susquehanna Railway at Dey Street, the Pennsylvania Railroad Company, through its agents and servants, moving and operating such cars and

Judge's Charge

such trains and such locomotive was negligent, and that negligence is what caused, proximately, the happening to Frank Brooks, and ultimately his death. That is what the plaintiff says.

It is true, gentlemen, that the Susquehanna Railroad Company is no longer a party defendant to this action; a voluntary non-suit was entered as to that company early in the trial of the cause, 10 so we are proceeding now on the part of the administrator of the plaintiff against the Pennsylvania Railroad Company.

As to that allegation upon the part of the plaintiff, the defendant answers in several ways. First, it says as to the allegation that Dey Street was a public street crossing the right of way of the Susquehanna Railroad Company, that that is not so in fact or law. Secondly, it says that it was not negligent in the manner in which it operated 20 these cars or trains and it was not its negligence in law that brought about the death of Frank Brooks.

Furthermore, they say that Frank Brooks at the time that he met with the injury or his resultant death was not in a position or in that position which the plaintiff alleges he was, namely, on Dey Street, which the plaintiff in turn alleges was a public street crossing the right of way of the Susquehanna Railroad Company, but they do say that 30 if he was in that position which would be Dey Street extended across the railroad, that that is not a public street, and therefore Frank Brooks was a mere trespasser upon the property of the railroad company and they owed him no duty save that of not doing him wilful harm or injury. Again, they say that he was not in that position at all, irrespective of the question as to whether that was a public street crossing or not, but say that he was at some other point in the yards of 40

Judge's Charge

the Susquehanna Railroad Company, and under those circumstances was a trespasser—at the best a mere licensee, which simply removes him from the other degree, as it were, of being a trespasser, but the duty in law upon the part of the railroad company towards such a person is the same, that is, that they owed him no duty except to refrain
10 from wilful harm or injury to him.

First, gentlemen, it seems to me that I ought to direct your attention to the question of whether or not Dey Street is a public street crossing the right of way of the Susquehanna Railroad. The plaintiffs have brought forward evidence by which they have sought to show that Dey Street is a public street crossing the right of way of the Susquehanna Railroad Company; they have brought to you proceedings taken upon the part
20 of the authorities of Hudson City, one proceeding being back in 1866 and the other, as I recall it, in 1870, which you will recall and which probably are focused and finally brought to a head by two maps, copies of which you will have before you; they are in evidence and they are known respectively as P-2 and P-3. So far as those proceedings are concerned, and the maps to which I have just called your attention are concerned, they do show that Dey Street was opened as a public
30 street to the side lines of the right of way of the Susquehanna Railroad Company, that is, they bring Dey Street up as a public street to the easterly boundary line of the right of way of the Susquehanna on one side, and the opening on the opposite side brings it up to the boundary line on that side, leaving an intervening space which is the width of the right of way of the Susquehanna Railroad Company.

The plaintiffs have further sought to do this,
40 by way of evidence introduced and produced be-

Judge's Charge

fore you, and that is to show that that intervening space, namely the width of the right of way of the Susquehanna Railroad Company between those two ends of Dey Street shown by these maps, has in fact and in law become a public street, irrespective of and outside of these proceedings to which I have just referred; and they attempt to do that or seek to do that by showing what we call the establishment of a public street by user, 10
or, as sometimes is said, by prescription, that is, they seek to show by this evidence that they have produced that that portion of a right of way, the width of the right of way of the Susquehanna Railroad Company, in fact and in law became a public street as Dey Street as much as those portions which were outside of the right of way, because they say that the evidence shows that the public uninterruptedly, continuously, openly and notoriously used and made use of that portion of 20
the right of way of the Susquehanna Railroad Company adversely to the interests and the title of the railroad company for a period of twenty years prior to the time of this happening, which happening was on December 4, 1915, and that for that reason the width of the right of way, which would, if the lines of Dey Street had been extended be within Dey Street had become in fact and in law a public street.

Of course, gentlemen, as indicated to you before, 30
it is not for me to pass upon the evidence that is produced before you; it is for you to pass upon it. The burden of establishing that thing which I have just spoken to you of is upon the plaintiff, and they must do so by a fair preponderance of the evidence. Therefore, taking the evidence, weighing it and searching it out, taking all of the circumstances as they appear in this case as you find them, you are then to determine on that 40

Judge's Charge

question, has the plaintiff by a fair preponderance of the evidence satisfied you that this strip across the right of way of the Susquehanna Railroad Company was so notoriously, so continuously, so uninterruptedly, and it must be absolutely without interruption, for a period of twenty years used by the public as a public highway adversely to
10 the interests and title of the Susquehanna Railroad Company that it has become a public highway by user.

Now some of these things I am about to read to you, gentlemen, may aid and assist you, and I am reading them to you for the purpose of assisting you, if they will, upon the question of user or the bringing about or bringing into existence of a public highway by user or prescription.

First, to establish a highway by prescription
20 the land in question—in this case it is that portion of the land which is the width of the right of way of the Susquehanna Railroad Company—to establish a highway by prescription the land in question must have been used by the public with the actual or implied knowledge of the landowner, adversely, under claim or color of right, and not merely by the owner's permission, and continuously and uninterruptedly for the period
30 of twenty years—in this case at least twenty years prior to December 4, 1915. To create a highway by prescription the user must be by the public generally as a way common to all. A user by a few individuals as such is not generally sufficient. The word public as used in this connection means all those who have occasion to use the road, and the public character of a road does not depend upon the extent or quantity of travel if it is open and in use by all who have occasion to go over it, nor is the fact that the public travel there-
40 on bears an insignificant proportion to private

Judge's Charge

travel necessary decisive against it becoming a highway. Occasional or desultory travel is not sufficient to create a highway by prescription. The user must have been continuous throughout this prescriptive period, namely, the twenty year period I have already spoken to you of. Furthermore, the road must have been used without interference or interruption by the owner of the soil; 10 in other words, the owner must have acquiesced in the adverse user. Hence, if a landowner obstructs free travel by means of gates or fences it ordinarily prevents the public from acquiring a highway by prescription. Mere user of another's land by the public as for a highway is insufficient of itself to establish a highway by prescription. The user must be adverse and hostile to the rights of the owner and under color or claim of right to use the land. A user by license or permission of 20 the owner of the land sought to be impressed with the public easement of travel is not adverse and affords no basis for prescription where the landowner does not consent to the use of the land by the public as of right. In order to create a highway over private lands by prescription the public user must be exclusive, that is, it must be such as to show a claim of right to use the land as a highway to the exclusion of any individual right of the owner inconsistent therewith. And again, and 30 finally, so far as this particular subject is concerned: In order that a highway over public lands may be established by prescription the owner must have had knowledge of the adverse user, especially where the lands are wild and unoccupied. If he has no actual knowledge of the user it must be open and of such a character and the facts and circumstances must be such as to put him on notice thereof, and of the fact that a public right of travel is claimed. As just intimated, how- 40

Judge's Charge

ever, actual knowledge is not necessary, but it may be implied from the character of the user and the facts and circumstances of the case.

So that upon that point, gentlemen, I cannot say anything more than what I have in fact already said. Taking the evidence in the case, taking the rules as I have given them to you and as I have
10 read them, determine whether or not the plaintiff has satisfied you thereunder that Dey Street across the right of way of the Susquehanna Railroad Company had become on December 4, 1915, a public street or highway by user or prescription. If the plaintiff has not shown that, then I can say to you and do say to you that you need not go any further with your consideration of this case, because then if the boy Frank was upon that portion which they are so seeking to show
20 was a public highway, if it was,—if it has not been shown so to be under the evidence and under the rules which I have given you,—then the boy was at best a meer licensee, and as I have already indicated to you the railroad company owed him no duty other than that it would abstain from wilful harm or injury to him—and I find not¹ in this case, gentlemen, which shows such a situation as you could hold the defendant company for having exercised wilful and deliberate intention
30 to do harm to the boy,—so I say when you arrive at that point and find that the plaintiff has not made out that matter or that issue, then your verdict must be for the defendant.

If it has made that out, then you come to the next point in the case, and that is, where was this boy at the time that he met with his injury and death. Was he upon that portion of the right of way of the Susquehanna Railroad Company which would have been within the confines, that
40 is within the north and south lines of Dey Street

Judge's Charge

if it were a public street across the right of way of the railroad company, or was he not? If he was not—and of course, there again, gentlemen of the jury, the burden is upon the plaintiff to satisfy you where he was; it is one of the allegations that they make; it is one of the issues that they start to raise and which is attacked by the defendant, therefore the law leaves the burden with 10 him who alleges, with him who asserts, and says that he must make out that assertion or allegation by a fair preponderance of the evidence. Therefore, putting it in another way to you, which is probably the proper way, has the plaintiff made out by a fair preponderance of the evidence that the boy Frank was upon that portion of the right of way of the Susquehanna Railroad which would have been within the north and south lines of Dey Street if it has been shown by them to have 20 been a public highway across the right of way of the Susquehanna Railroad Company? If they have not, then again your verdict must be for the defendant. On the other hand,—which is the other side of the statement which I have just made to you,—if it does appear that he was not upon that portion, why, then again your verdict must be for the defendant. But the proper way and the proper rule for you to be guided by, gentlemen, is as I first put it to you, that is that the burden is 30 upon the plaintiff to satisfy you where the boy was, and if they have failed to show you that, or if all of the evidence shows you that he was not on that portion, then there cannot be a recovery in this case, but your verdict must be for the defendant.

Now if the plaintiff has established by a fair preponderance of the evidence, first, that that portion of Dey Street, which would be as it crossed the right of way of the Susquehanna Railroad 40

Judge's Charge

Company, was a public street; if the plaintiff has satisfied you that the boy Frank Brooks was upon that portion of the right of way of the Susquehanna Railroad Company when he met with this happening which injured him and caused his death, then the next question would be for you, as the plaintiff satisfied you by a fair preponderance of the evidence that that injury and that death was caused by negligence upon the part of the defendant company.

Now you will understand, gentlemen, that the situation is not that the defendant company was drawing a train along these tracks in the sense we usually speak of a railroad train being operated over tracks, but that it had been kicking the cars about and had been drilling cars at or about this locality, and as I remember one witness testifying, the number of cars that they were to take away from that locality had been gotten together but not coupled up, there were somewhere in the neighborhood of eighteen or twenty of them or thereabouts, which they were to take out, and what they were about doing and undertaking was the coupling up of these several cars which they were to draw out. Under those circumstances, gentlemen, if Dey Street across the right of way of the Susquehanna was public street, and has been so shown, and if Frank Brooks was upon that portion of the right of way within the confines of the street, the defendant company had a duty which it owed to him, and that duty was to use reasonable care under the circumstances in the manner in which it operated its trains, its cars, its engines, by the way of giving warnings or signals of some kind or class which under the circumstances of the case and under the situation under which the work was being done was reasonable. There is evidence in the case that at the

Judge's Charge

time of this particular movement the bell of the engine was ringing. It is for you to determine whether or not that is so. If it is, then the next question is, was that reasonable care—was the doing of that reasonable under the circumstances so far as the defendant company was concerned. Even then the question is what would have been reasonable under the circumstances so far as the 10 duty of the railroad company to use reasonable care was concerned towards such a person in such a position as I have just indicated; and then of course the question ultimately upon that point is, has the plaintiff satisfied you that that care which I have indicated was the duty of the railroad company to use, was not exercised. If they have satisfied you of that, then the next question, which is closely connected up with it, is, was the failure 20 to use that care the proximate or natural cause of this happening to Frank Brooks. The duty of satisfying you as to that is also upon the plaintiff. If he has satisfied you, why, then he may be entitled to recover, excepting for what I will further say to you. If those points have not been satisfied to you, then again your verdict must be for the defendant, because then he has not made out that which the law says he must and in the manner in which he must. If he has made all of those out, then again your attention must go to 30 what the conduct was, what the acts were of the boy Frank Brooks himself.

It is true, gentlemen, that he was a boy of about thirteen years of age; he was what we in law call a minor, and the rule as to minors and their conduct is this, that a jury such as you have a right to take into consideration the age of the boy in this case, what, if it has been shown by the evidence at all, was his mental ability, what his capabilities were, what his degree of thoughtfulness 40

Judge's Charge

was, and if it has not been shown, then of course what degree of care and thoughtfulness for his own safety a boy of that age would take; and when you have determined that, then determine whether or not under the circumstances of an unprotected crossing, of cars broken or uncoupled, the distance apart that these cars were into which
10 he attempted to make his passage, all other circumstances as to other trains or other locomotives being about the place,—whether or not this boy exercised that care which a reasonably prudent person of his age and his ability and capabilities would or should have used so as not to bring injury upon himself,—because it was the duty which the law placed upon him that he should use and must use that care which a reasonably prudent
20 person, considering his age, his ability his capabilities, would have used, so as not to bring harm upon himself. If you find that he was negligent himself,—and the burden of satisfying you of that is upon the defendant, they must do so by a fair preponderance of the evidence, because that is an issue which they raised, and therefore they must establish it,—if they have established that the boy Frank Brooks was himself guilty of negligence which contributed to the thing that happened to him, then even if the plaintiff has
30 established all these other things, gentlemen, that I have already spoken to you of, there cannot be a recovery in law for the plaintiff, but your verdict again must be for the defendant.

Now then if the plaintiff has satisfied you of all of these several issues that I have already placed before you and has done so by a fair preponderance of the evidence and you have not been satisfied by and through the defendant by a fair preponderance of all of the evidence that the boy
40 Frank Brooks was guilty of contributory negli-

Judge's Charge

gence, then there may be a verdict for the plaintiff, and if there is, then the question before you is what that verdict may be for.

This action is brought under what we know as the Death Act, and it is the only means provided by which a recovery in a case of this character may be had, so therefore, if it comes to a question as to what verdict the plaintiff may have, if 10
he is entitled to one, you will be guided absolutely by this statute, because there is no other guide for you. This statute says, so far as the amount of recovery is concerned:

“The amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and the next of kin in the proportion provided by law in relation to the distribution of personal property left by per- 20
sons dying intestate.”

I have been reading to you the text of the act just as it appears. In this case it appears that the boy, of course, was unmarried, that he has a father who survives him, and under the laws of this state existing at the time of this occurrence the father, under such circumstances, was the next of kin of this boy.

“In every such action the jury may give such damages as they deem fair and just with refer- 30
ence to the pecuniary injury resulting from such death to the widow and next of kin of such deceased person.”

Our courts have said of the act in construing that portion of it which I have just been reading to you:

“What the plaintiff is entitled to recover is a capital fund—” it is necessary, gentlemen, that you should pay particular attention to this in order to determine what the verdict is to be for— 40

Judge's Charge

“What the plaintiff is entitled to recover for 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 ascertained by taking into account all the probabilities. The intestate might have died by the course of nature
10 shortly after the accident.” (The intestate was Frank Brooks, the boy who was killed; he might have died but for this accident from natural causes shortly after the accident happened.) “He might, had he lived suffered financial reverses. The father (who is the next of kin) had the boy lived, might have died before the boy died. Nothing is to be added for loss of society or wounded feelings or anything else which cannot be measured by money and satisfied by pecuniary recom-
20 pense. The damages are to be determined by reference to the pecuniary injury (the money injury) resulting to the next of kin by his death. The injury to be recovered for has been defined to be the deprivation of a reasonable 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.”

To sum it all up, gentlemen, what it all means is
30 this,—making it as applicable as I can to this case without indicating to you what the testimony shows—if the plaintiff is entitled to a verdict he is entitled to a verdict for that loss, if any, which it has been shown, if it has, he has been deprived of,—that financial loss, that money loss which he has been deprived of, reasonably deprived of, because of the premature death or taking off of his son. Had the son lived and the father lived—the son being but thirteen years of age—unless there
40 be something in the case which I do not recall

Judge's Charge

whereby the father had emancipated him or set him free so far as his earnings were concerned,—the father was entitled to have the earnings of the son until the son became twenty-one years of age. I say, unless the father at some earlier period and before the son became twenty-one years of age, freed him of that duty toward him. Also, and as against that, there is an obligation resting upon 10 the father toward the son that until the son did arrive at the age of twenty-one years the father was under the legal obligation to care for and nurture, educate, clothe and provide for the son. So that while the son might be earning, if he did earn, and the father was entitled to those earnings, you see there was also the obligation upon the father to provide the means, the funds, the money with which to educate, clothe, feed, provide for the son until he did become of that 20 age; and of course if there is any recovery to be had for a period beyond the time when the son would have become twenty-one, if he would have become twenty-one, the father would be entitled to that sum which it may have been shown that he would have contributed to the father voluntarily. Of course, gentlemen, in this case upon this subject the burden is upon the plaintiff to satisfy you by a fair preponderance of the evidence of those facts upon which you can reasonably predi- 30 cate a verdict. If the plaintiff is entitled to a verdict under the evidence and the rules which I have given you, and the plaintiff has not satisfied you by a fair preponderance of the evidence and those a reasonable inference in awarding a substantial circumstances upon which you are warranted by verdict—if it leaves you in that position where it would be speculative upon your part—entirely speculative—as to what the loss of the father has been, then the father is entitled to a nominal ver- 40

Judge's Charge

dict only. If he has given you such substantial facts and circumstances upon which you can base, under the rules which I have given you, a substantial verdict, then it is to be based and is to be worked out and determined in the manner in which I have indicated, but with this further reservation. The father, if he is entitled to a ver-

10 dict, is not entitled to that gross sum which you may find by that means which I have just indicated to you, but as the statute says and as our courts have said, he is entitled to the present worth, the present day value of that sum which reasonably would have contributed to him by the son had the son lived. Now you see, if the son had lived for any given period, whether it be un-

20 til he was twenty-one or for some lesser period or for some greater period, and contributed, that contribution would have come to the father—and had the father lived, of course,—that contribution would have come to the father, not in one sum at one time—truly not at the present time—but would have come to the father, if it came at all, in sums as the son earned them or as the son was willing to contribute them after he became twenty-one, if he became twenty-one and contributed. So you see the contribution would have

30 been over a period of years and in sums in instalments as it were; so it is not that gross sum verdict may be for, but it is that sum brought to which would be found in that manner that the its present value, present day worth. That is the sum, if any, which the plaintiff is entitled to recover.

Gentlemen of the jury: I take it that out of all this evidence you understand, as I first intimated to you, that it is your particular province and duty—not only your right, but it is the duty which

40 the law places upon you—to determine what is

Judge's Charge

the fact or what are the facts and what is the truth and what weight is to be accorded to each and every part of the evidence. You also understand, gentlemen, I presume, that in all cases that come before you you are not to be, nor is your duty performed if you permit yourself to be, controlled by sympathy or passion or favor either to the one side or to the other. You are to be in that position, gentlemen, where you deal with the facts and law as hard, cold propositions. It is no concern or affair of yours to which way the result of your findings may bear down. All that you are concerned in is that you will pass fairly, under your oath, upon the facts presented to you and apply thereto the rules of law which are applicable thereto and find your verdict accordingly. I am sure, gentlemen, with the service that you have had here you already realize that and you will apply that rule and that knowledge to this case, and find your verdict accordingly. 10 20

With that you may take the case.

Mr. Dixon: May I ask your Honor to charge the jury in regard to the preponderance of evidence, that that does not mean merely the number of witnesses.

The Court: Yes. Gentlemen, I overlooked some of these things, it is true, because it is very difficult to know just what a jury may need to know and what it may not need to know. 30

Preponderance of evidence is not, gentlemen, necessarily dependent upon the number of witnesses. You are to determine what weight is to be given to evidence by applying several tests, and these which I am going to suggest to you are not the only ones. Your good common sense will probably dictate and indicate to you others. You have a right to consider the interest, if any, that any of the witnesses may have in the outcome or 40

Judge's Charge

result of the case in which they are testifying. You may also consider the reluctance with which a witness may testify or the over-freedom with which a witness may testify. You are also to consider, and should, what opportunity each particular witness has had to observe or know of that of which he or she testifies. As I have already said,
10 gentlemen, numbers do not necessarily make for preponderance. It may be that when you apply all of the tests that I have already indicated to you and such others as I say that your good common sense will dictate to you you may find that the evidence of one witness may bear greater weight with you and in your good judgment than that of two or more witnesses to the contrary upon the same point. Of course, if upon a given issue
20 several witnesses are produced, some testifying in substantiation of that issue or as to it being true and others testifying to the contrary, and you find that they have all had equal opportunities to observe and know of what they speak that they are all entitled to equal credibility and their testimony is entitled to equal weight, each being equal, then numbers will count.

Now weight or preponderance of testimony means simply this, gentlemen, where there is what I have already indicated and explained to you an
30 issue raised by the two parties and there is testimony both in favor of the issue as well as against that issue, you are to apply all of the tests I have given you and those which you will know and feel that you ought to apply in determining what weight is to be given to both lots of testimony, that is, that in favor of the proposition or issue and that which appears against it, and weigh up the two lots; if they are equal, then there is no preponderance of evidence upon that point; if one out-
40 weighs the other, then that which does outweigh

Defendant's Exceptions

preponderates. So that if I have told you in any instance, as I have in several, that the burden is upon the plaintiff to satisfy you of some particular issue by a fair preponderance of the evidence, after weighing up the evidence upon that point, if you find that the evidence weighs equally, both sides, the plaintiff has not made out that issue then, because then there is no preponderance of 10 evidence. If the weight of the evidence on the part of the plaintiff outweighs that which appears against it, then there is a preponderance and the plaintiff has made out that issue by a fair preponderance of the evidence. In that instance—I think there was only one in this case when I think the burden was upon the defendant to satisfy you by a fair preponderance of the evidence—apply the same tests, and if the result is that there is an equal balance as far as the weight is concerned 20 upon that proposition, then there is not a preponderance. If the preponderance or if the weight is in favor of the defendant, then the defendant has made out that issue by a fair preponderance of the evidence. It is rather a homely way probably to explain this case to you, but I think it is the best way, and in fact I know it is the best way in which I can explain it to you.

(The jury retired.)

30

DEFENDANT'S EXCEPTIONS.

Mr. Hartpence: There are one or two exceptions. First, to all those references in your charge where you leave it to the jury to say whether or not there was a public street at the intersection of Dye Street with the railroad. It is difficult to pick out each instance.

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Defendant's Exceptions

The Court: I understand. Wherever I refer to that question of whether or not the highway had been established by user or prescription.

Mr. Hartpence: Also where you charge the jury that if Dye Street did cross the railroad—that would go still further—and has been so shown, that there was a duty owed to Frank by the rail-
10 road company—simply because I feel that in my view of the case your Honor should not have left the question atg all to the jury.

The Court: The question of the street?

Mr. Hartpence: Yes.

The Court: Not that there wasn't a duty—that there was a street.

Mr. Hartpence: Also with regard to the charge pertaining to Frank's own contributory negligence, where your Honor charged that they should
20 take into consideration the circumstances of an unprotected crossing and the other surrounding conditions, as to whether he had to use that care which a person of his age and understanding should; that there again you have left to the jury to consider whether or not there was a crossing there.

The Court: Let me ask you one question. That brings to my mind the thought I did not have when I used that expression. Your objection does
30 not go to the idea that when I used the phrase "unprotected crossing" I had reference to gates or things of that kind. I did not. I did not use it in that sense.

Mr. Hartpence: No; I am willing to admit if there was an unprotected crossing in every sense of the word that perhaps under these circumstances we had sufficient knowledge of our situation to have guarded against it.

The Court: I only want to be careful on this.
40 If you took it in that sense and your objection went to that point—

Defendant's Exceptions

Mr. Hartpence: No, sir.

The Court: —I should want to correct that, because I did not use the expression “unprotected crossing” in that sense at all.

Mr. Hertpence: No, sir. There is another exception I desire to take to your Honor's charge where you left to the jury to say whether or not if the bell was ringing it was a reasonable precaution for the safety of the intestate at that point. Therewas one other matter. Early in the history of the case the defendant Pennsylvania Railroad was served with a demand for the admission of certain facts. Under the statute if we failed to admite those fact the cost of proving them can be charged to the party thus failing or refusing to admit, unless the court at the time of the trial will certify that the refusal was reasonable. It so happens, your Honor, that I am desirous of catching a train in a few minutes, and I did not want to take up your Honor's time late in the day by going into the reasonableness of these demands, and I though if I would present our reasons for refusing to admit and ask your Honor later on to certify they are reasonable, that would be taken as a presentation of the matter at this time, and perhaps on Friday morning—

The Court: Very little chaneve on Friday morning.

Mr. Hartpence: Or I am willing to leave them with your Honor and to pass upon them as they stand.

The Court: What point?

Mr. Hartpence: He calls upon us to admit that Dey Street was a public street at the time of the accident. I think that was unreasonable to do that.

The Court: Seems to have raised a very serious issue in the case. I think that has taken about two thirds of the time.

Defendant's Exceptions

Mr. Dixon: No. That Dey Street was a public street. We would have spent about a day and a half on this case.

The Court: Yes. I guess two-thirds of the time has been given up to that.

10 Mr. Hartpence: I set up that Dey Street crossed the yard of the railroad at grade. We have not in any way questioned the fact that Dey Street was a public street or avenue, and I do not think that is the real thing that is put by Mr. Dixon's question. The real question is whether it crossed the railroad.

The other is the running of certain locomotives and cars at the intersection of the right of way and the place commonly called Dey Street. I do not think he has been put to any expense to prove that.

20 The Court: I guess the very fact of it is, Mr. Dixon proved it by one of your own witnesses.

Mr. Dixon: Yes.

The Court: They must have been here at their own expense.

Mr. Hartpence: The other was, was the plaintiff's intestate killed by being crushed by two of the cars operated—

30 The Court: That was also proved by the same witnesses.

Mr. Hartpence: We can hardly be asked to admit the plaintiff's entire case. He said the Pennsylvania Railroad did not provide gates, flagmen, crossing bells or warning signals. You see, we didn't have any control over that.

Mr. Dixon: Why didn't you admit it?

40 Mr. Hartpence: If we admitted these demands we would have admitted his case. I do not think we are called upon to do that.

New Jersey Court of Errors and Appeals

CHARLES J. BROOKS, ADMR. OF
FRANK BROOKS, DECEASED,
Plaintiff-Respondent,

vs.

THE PENNSYLVANIA RAILROAD
COMPANY, IMPEADED, ETC.,
Defendant-Appellant.

Action at Law.

On Appeal 10
from Hud-
son County
Circuit
Court.

BRIEF OF DEFENDANT-APPELLANT.

20

I.

Statement.

This is a suit under the New Jersey "Death Act," and was brought by Charles J. Brooks, Administrator of Frank Brooks, deceased, against The New York, Susquehanna and Western Railroad Company, and The Pennsylvania Railroad Company, in the Hudson County Circuit Court. It came on for trial before Hon. Luther A. Campbell, Circuit Judge, with a jury, at the April Term, 1917. A non suit was granted as to the defendant, The New York, Susquehanna and Western Railroad Company (Case, p. 26), and a verdict was rendered in favor of the plaintiff and against the defendant, The Pennsylvania Railroad Company, for \$3000 (Case, p. 8). A rule to show cause why the verdict should not be set aside and a new trial granted was allowed by the Trial

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Court specially on the grounds that the verdict was (1) Excessive; (2) Contrary to the Weight of the Evidence; and (3) Contrary to the Charge of the Court. Certain exceptions were reserved to defendant, which are set forth in the rule. Inasmuch as the rule to show cause and the Court's memorandum discharging the same are not printed in the State of the Case, they are submitted herewith, as follows:

10

HUDSON COUNTY CIRCUIT COURT.

20	<p>CHARLES J. BROOKS, ADMINISTRATOR OF FRANK BROOKS, DEC'D, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>THE PENNSYLVANIA RAILROAD COMPANY, IMPEACHED, &C., <i>Defendant.</i></p>	<p>Action at Law. Rule to Show Cause.</p>
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Application having been made within six days after the rendering of the verdict in the above stated cause,

IT IS ORDERED that the above named plaintiff do show cause before this Court on Friday, the 27th day of July, A. D. 1917, at the Court House in
30 Jersey City, New Jersey, at the hour of 10 o'clock in the forenoon or as soon thereafter as the court may hear the same, why the verdict rendered in said cause should not be set aside and a new trial granted upon the following grounds:

1. The verdict is excessive.
2. The verdict is contrary to the weight of the evidence.
3. The verdict is contrary to the charge of the Court.

40 reserving to the defendant its exceptions or objections taken or noted upon the trial as follows:

(1) To the refusal of the court to grant a non-suit.

(2) To the refusal of the court to direct a verdict.

(3) To the admission of the testimony, documentary and verbal, pertaining to the alleged opening of Dey Street as a public street, across the railroad right of way, and to its character as a public street by user, prescription or otherwise.

(4) The exceptions taken to the Court's charge. 10

(5) To the admission of the testimony pertaining to lack of warnings, precautions or signals of the train crew of the defendant Company at the time of the injury complained of.

AND IT IS FURTHER ORDERED that meantime and until the further order of this Court execution be stayed.

LUTHER A. CAMPBELL,
Judge. 20

Dated June 29, 1917.

Entered July 3, 1917.

On motion of

VREDENBURGH, WALL & CAREY,
Attorney for Defendant.

HUDSON COUNTY CIRCUIT COURT.

CHARLES J. BROOKS, ADMINISTRA-
TOR,

vs.

10 N. Y., S. & W. R. R. Co., AND
PENNSYLVANIA R. R. Co.

On Rule, &c.

WARREN DIXON, ESQ., *Attorney for Plaintiff;*
MESSRS. VREDENBURGH, WALL & CAREY, *Attor-*
neys for Defendants.

Conclusions.

CAMPBELL, J.

20 Upon the reasons argued under this Rule, I
conclude that the verdict should neither be set
aside nor reduced.

The Rule is therefore dismissed with costs.

Dated February 21, 1918.

LUTHER A. CAMPBELL,
Judge.

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Upon the discharge of the rule to show cause, judgement final was entered (Case, p. 8), and it is from that judgment that the present appeal, upon the exceptions reserved, is taken.

II.

Facts.

Plaintiff's intestate, Frank Brooks, was killed 10
 on December 4, 1915, by being crushed between
 two freight cars in the process of drilling by the
 defendant The Pennsylvania Railroad Company,
 in the Marion Yard, in Jersey City, New Jersey.
 It is the yard of the New York, Susquehanna and
 Western Railroad Company, or the Erie Railroad
 Company, and the Pennsylvania Railroad Com-
 pany has no tracks there. The Pennsylvania
 Railroad Company simply goes in and out of the
 yard with its crews to deliver freight to or receive 20
 it from the Erie or Susquehanna. There are seven
 tracks at the point where plaintiff claims Dye
 Street intersects the railroad yard, and in the vi-
 cinity of which the accident occurred. There was
 no path or roadway across the tracks at that point,
 nor was there any planking between the rails.
 Neither were there any gates or watchman or
 flagman there, nor was it shown that there ever
 had been. Until about five or six years previous
 to the accident there had been located on the west 30
 side of the tracks the office of the Interchange
 Clerk and McDermott's scales, which occupied
 Dye Street on that side of the yard. On the east
 side of the yard, and running along the tracks and
 crossing Dye Street was a ditch about two feet
 deep. There is still a high switch on each side of
 the yard about in the middle of the lines of Dye
 Street, and on the west side, near the tracks, is a
 sign containing the words, "No thoroughfare-N.
 Y. S. & W. property." Commencing at about the 40

southerly line of Dye Street is a trestle leading into Hedden's coal pockets, which gradually rises as it approaches Newark Avenue, to the south, blocking off approach to the yard practically from Dye Street to Newark Avenue. The only regular street crossing, with planking, gates, and watchman, is at St. Paul's Avenue, which is the first block north of Dye Street. Newark Avenue also crosses a considerable distance to the south.

10 There was testimony to the effect that pedestrians crossed the tracks at Dye Street from time to time, and one witness stated that this had been done, to his recollection, since 1883. Trains were made up there; cars and engines were drilling incessantly; and the cars completely blocked passage at times, and sometimes the whole yard was full all day long. It was physically impossible for vehicles to cross the tracks at Dye Street.

The documentary proof of the existence of a
20 street at Dye Street crossing the tracks, failed. The Assessment Maps, D-2 and D-3, showed conclusively that the street was opened up to the tracks on each side, but not across them. *Case*, pp. 134-142, 308).

Plaintiff's suit is based upon the theory that Dye Street was and is a public street, crossing the tracks in question, and bases his right of recovery upon the fact that his intestate was killed by defendant's train, through the negligence of its train
30 crew, while lawfully on a public street crossing the tracks. The case presents no other issue, so far as intestate's presence on the tracks is concerned. Two witnesses were produced by plaintiff who claimed to have seen the accident. One was Mary Donohue, a little girl about nine years old at the time of the trial; the other was Charles Wyddle, a boy about fourteen at that time.

Mary Donohue testified that she had been picking daisies and blue bells and buttercups during
40 the afternoon, and had sat down to rest on the

bench at the Interchange office, when she saw Frank Brooks come through between two cars and get caught. She was then looking over toward Lorillard's, which is located entirely south of Dye Street, on the east side of the yard. The Interchange Office is on the West side of the yard, and on the south side of Dye Street.

Charles Wyddle testified that he saw the accident from the east side of the yard, while walking on the southerly side of Dye Street. He unequivocally placed the point of the accident south of Dye Street, in a line with his eyes with his head turned southerly at an angle of about forty-five degrees (*Case*, p. 55). 10

Twelve witnesses were produced by defendant, several of whom saw Frank fall; several of whom saw him lying on the ground before he had been moved; and one of whom was a civil engineer, who showed that the spot where the accident occurred was, by actual measurement, one hundred and thirty-five feet south of the southerly line of Dye Street if extended across the tracks. The train crew all testified that the engine bell was rung as the fatal coupling was made, but that otherwise no signals or warnings were given. 20

The Trial Court denied a motion for a non-suit and a motion for the direction of a verdict for defendant, and left it to the jury to say whether a public street existed at the intersection of Dye Street, across the tracks, expressly charging them however, that if such street did not so exist, there could be no recovery by plaintiff; and, further, that even if the street did so exist, unless plaintiff's intestate was within the lines of that street when killed, there could be no recovery. 30

III.

The documentary evidence did not establish the existence of Dye Street across the tracks, and the 40

evidence of a street by prescription did not show an uninterrupted adverse user by the public for the prescriptive period next preceding the accident. On the contrary D-2 and D-3 showed that the street had been opened up to the tracks on each side, but not across; and it was undisputed that the old Interchange Office and McDermott's scales had shut off Dye Street on the west side of the yard up to a period of not more than five or

10 six years next preceding the trial, and that a ditch two feet deep ran along the east side of the tracks; and that there was no planking between the rails, and that it was impossible for teams to cross there. There is no claim anywhere in the case that plaintiff's rights grow out of license or invitation to go on the railroad property, but it rests solely upon the issue of a public street at Dye Street, crossing the tracks, and Frank's presence within its lines, if extended, at the time he received his injury. It is respectfully submitted

20 that the evidence does not establish either proposition in a way that warranted the Trial Court in submitting the case to the jury, and that therefore the judgment under review should be reversed, set aside and for nothing holden, the case being ruled by *Section 55 of the Railroad Act*, which provides,—

30 "It shall not be lawful for any person other than those connected with or employed upon the railroad to walk along the tracks of any railroad except when the same shall be laid upon a public highway; if any person shall be injured by an engine or car while walking, standing or playing on any railroad, or by jumping on or off a car while in motion, such person shall be deemed to have contributed to the injury sustained, and shall not recover therefor any damages from the company owning or operating said railroad; provided, that

40 this section shall not apply to the crossing of

a railroad by any person at any lawful public or private crossing.”

and by,

Diebold v. R. R. Co., 50 N. J. Law, 478.

Powell v. R. R. Co., 70 N. J. Law, 290.

Barcolini v. R. R. Co., 82 N. J. Law, 107.

Erie R. R. Co. v. Hilt, No. 15 N. S. Adv.

Ops. 1918, p. 594 (July 1, 1918, issue).

Counsel for the Appellant have not overlooked **10**
the recent decision of this Court in—

Drelich v. Erie R. R. Co., 103 Atl. Rep.,
189,

but contend that that case involved a well-defined pathway across the track of the railroad company at the point indicated, which element is not present in the case at bar. The most that could be said in the case under discussion is that a “paper street” existed, but unless this was in some way **20** called to the attention of the train crew operating the Pennsylvania train over the Susquehanna or Erie tracks, it is difficult to understand how a duty could arise to regard it as a street by those who had no knowledge of its existence. If a public street is to be established by the trespass of those who use another’s property without the owner’s permission, it would seem as though the proof to thus establish it should be of the clearest and most convincing character; and even though **30** such user be shown as against the land owner—the railroad company owning the tracks—can it then be invoked as against one who merely uses that land by permission of the owner—as the Pennsylvania in this case—unless it is clearly shown that the crew had knowledge of the situation?

The Appellant contends that it was error for the Trial Court to deny the motions for non-suit and for direction of a verdict for defendant, and **40**

in charging the jury in the particulars set forth in the various Grounds of Appeal, all of which in effect rest upon the proposition here argued.

IV.

The judgment under review should be reversed,
10 set aside and for nothing holden.

Respectfully submitted,
VREDENBURGH, WALL & CAREY,
Of counsel with appellant.