New Jersey Court of Errors and Appeals

CHARLES PRICE, by Margaret Price, his next friend, *Plaintiff-Respondent,* vs. NEW YORK CENTRAL RAILROAD COMPANY, *Defendant-Appellant.*	At Law On Appeal.

BRIEF OF APPELLANT.

This action is based upon the Federal Employers' Liability Act.

The plaintiff, Charles Price, an insane person, by Margaret Price, his next friend, sues to recover damages for injuries alleged to have been received February 16, 1915, while plaintiff was acting as a fireman on an interstate passenger train. He alleges that his injury was caused by his being struck on the head by a fire hook carried on an engine which passed plaintiff's engine, going in an opposite direction.

The two engines passed each other on adjacent main line tracks a short distance west of the westerly portal of the Weehawken Tunnel at Weehawken, N. J.

The sole negligence charged is that defendant employees negligently *left* a certain iron bar (called in the evidence a fire hook), about 12 feet long, projecting so far beyond the side of the engine on which it was placed, that when this engine passed plaintiff's engine he was struck on the head

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by this iron bar, and thereby received the injuries complained of (Complaint p. 5, par. 4).

Defendant's answer denies—

(1) That plaintiff was injured in the manner alleged.

(2) That defendant or its employees were negligent. (Answer, first defence, p. 6, line 30.)

It also sets up—

(1) Negligence by plaintiff causing the injury.

(2) Assumption of risk. (Answer, 2nd Def. p. 7, line 10.)

The questions involved are:

(1) Is plaintiff's evidence sufficient to prove negligence against defendant?

(2) Was plaintiff injured in the manner and because of the negligence alleged in the complaint?

(3) Did plaintiff's injuries, if any, arise out of risks assumed by him?

These questions are raised by

(1) Defendant's motion for non-suit (p. 216).

(2) Defendant's motion to direct a verdict (p. 308).

(3) Defendant's requests to charge, Nos. 2, 3, and 4, which the court refused (p. 321, line 30; p. 322, pars. 2, 3, and 4).

The evidence as to the happening of an accident and as to defendant's liability is wholly circumstantial.

For about 12 years prior to February 16, 1915, plaintiff had been in the employ of the defendant company, and for about 11 years of that period he had been employed as a locomotive fireman (Mrs. Price, p. 55, line 38; p. 56, line 10).

For about six months prior to the alleged acci-

dent he had been a fireman on the passenger engine on which the accident is claimed to have taken place (Mrs. Price, p. 63, line 38; p. 64, line 10).

On February 16, 1915, plaintiff was acting as a fireman on this train on the regular run from West Haverstraw, New York, to Weekawken, N. J. He discharged his duties as fireman in the usual manner up to and including the calling of the signal near the westerly portal of the Weehawken Tunnel (Foster, p. 18, line 8; Ex. D-3, p. 326).

This signal was about 1400 feet west of the westerly portal of the tunnel (p. 29, line 38, to p. 30, line 5).

As plaintiff's engine approached the tunnel, and somewhere between New Durham Station and the westerly portal of the tunnel, his engine passed Engine 3189 west bound, hauling a long freight train. Engineman Lee and Fireman Hinckley were in charge of this engine (Foster, p. 18, line 25; p. 25, line 25; p. 29, line 17; Hinckley, p. 100, line 1; Lee, p. 135, line 35; p. 243, line 25). The two engines passed after Price had called the signal located west of the westerly portal of the tunnel (Foster, p. 26, line 5).

After Price called the last signal west of the tunnel, he had nothing to do until he reached the Weehawken Station (Foster, p. 22, line 35).

After calling that signal Foster, the Engineer, did not notice him or see what he was doing until he was bringing the train alongside the platform at the Weehawken Station (p. 18, line 37). He then noticed that plaintiff did not start to light the classification lights, as it was his duty and custom to do, and place them on the engine preparatory to going back through the tunnel (Foster, p. 19, line 4).

The station is about 1000 feet from the easterly end of the tunnel (Foster, p. 22, line 40).

When Foster was bringing his engine to a stop

at the station platform, plaintiff was standing with his back toward Foster with his arms on the seat box and his head erect (Foster p. 20, line 30).

Noting plaintiff's failure to light the lights Foster asked him what was the matter and received a reply which caused him to look at plaintiff's head. Plaintiff seemed to be in a weakened condition and to be growing weaker and to be somewhat dazed. He began to sag down. Foster drew him away from the boiler head and then called Riker, a trainman, to assist him in helping plaintiff to alight from the engine (p. 19, line 15, to p. 21, line 3).

After the plaintiff was helped to alight from the engine, Foster and Trainman Riker assisted him to the Trainmaster's Office in the station building. Plaintiff walked between these two men and was supported by them (Foster, p. 22, line 8; Riker, p. 213, line 35; Hicks, p. 212, line 3).

On arriving at the Station Master's Office he was first placed in an arm chair and later laid on some cushions (Seaman, p. 241, line 10).

While at this office, an examination of his face and head was made by some of the employees of the Railroad Company, and a cursory examination was also made by Dr. Fendrich. The results of these examinations will hereinafter be set out in detail.

After these examinations plaintiff was removed to the North Hudson Hospital in an ambulance owned by the witness Quinn, and driven by the witness Folk.

He arrived at the Weehawken Station about 7:30 P. M. and at the hospital about 8 P. M. (Foster, p. 36, line 15; p. 130, line 38).

Subsequently plaintiff developed insanity and his expert witnesses testified at the trial that he was still insane.

To sustain the negligence charged, i.e., that defendant's employees had negligently left a fire

hook projecting so far beyond the side of the engine on which it was placed, that it struck plaintiff on the head when the two engines passed, plaintiff relies upon the following circumstances which he claims the jury have a right to infer from the evidence:

(1) That plaintiff was in his normal condition on the run from West Haverstraw until a short time prior to passing engine 3189, just west of the Weehawken tunnel; that when he was next observed as the train was brought to a stop at the station platform, he was in a condition bordering on a collapse.

(2) That engine No. 3189 carried a fire hook. (This, according to the evidence of all the witnesses testifying on that subject, both for the plaintiff and the defendant, was placed and carried in its normal position on the tank of engine 3189 with the handle end projecting over the side of the tank not more than three or four inches.)

(3) That after plaintiff was taken from the ambulance at the hospital, blood was found on the pillow case on which his head rested while in the ambulance.

(4) That a cap, claimed to belong to plaintiff, was found in the engine cab or in plaintiff's possession which had a tear extending from a point near the front along the left side.

(5) That on the morning of the 18th of February, the second day after the alleged injury, a bruise was seen by Mrs. Price and her friend, Mrs. Masterson, on the left side of the head, about two inches wide, by three inches long (Mrs. Price, p. 50, line 21; Mrs. Masterson, p. 69, line 1).

(6) That after the removal to the hospital plaintiff became insane, and that his expert witnesses (none of whom saw him until weeks after the occurrence), testified that in their opinion he suffers from traumatic insanity.

From these circumstances, plaintiff contends

that the jury were justified in drawing the inference that plaintiff was injured in the manner and by the negligence set out in the complaint.

As to plaintiff's condition during the run until he called the last signal west of the tunnel, and when he arrived at the Weehawken Station, where his condition was next observed, there is no dispute.

Engine 3189 carried a fire hook. There is no conflict in the evidence that this fire hook was placed across the front of the tender in such manner that it projected not more than three or four inches beyond the side of the tender.

There is not in the evidence any dispute that plaintiff developed insanity, and that at the time of the trial he was insane.

Both Quinn, the owner of the ambulance, and Folk, the driver, testified that the pillowcase was clean when the ambulance left for the station to get the plaintiff.

Folk testified that when plaintiff was taken off the cot inside the hospital, there was probably a square foot of blood on the pillow case (p. 37, line 10); that the pillow was pretty well soaked with blood (p. 42, line 25), and that the blood was still damp (p. 43, line 20).

When Folk got back to Mr. Quinn's place, he (Quinn) called the witness's attention to the blood (p. 43, line 25).

When the case was tried as a compensation case more than a year before, this witness testified that he did not see the blood until he got back to Mr. Quinn's place, where he started from, and that Mr. Quinn then called his attention to it (p. 46, line 12; p. 293, line 20).

Folk testified that he assisted in placing plaintiff in the ambulance at the station, and in removing him therefrom at the hospital. On each occasion he was at plaintiff's head and his eyes were probably two feet from the plaintiff's head (p. 40,

line 10). Plaintiff had nothing on his head (p. 39, line 18). Neither when plaintiff was put into the ambulance nor when he was taken out was there any blood on his face, forehead or temple (p. 39, line 20; p. 41, line 24; p. 42, line 5).

He did not know where the blood came from (p. 42, line 30).

Quinn testifies that he was at the hospital when the ambulance arrived; that when plaintiff was removed from the cot inside the hospital, he first saw the blood. It was a circular spot on the sheet and pillow, about 8 inches in diameter, and had soaked through them (p. 131, line 1, to p. 135, line 20).

Although this witness saw plaintiff when he was taken from the ambulance, (p. 131, line 10), and followed him into the hospital (p. 134, line 25), he does not pretend to have seen any blood on his face or head or anywhere on his person.

That there was no blood, bruise or mark of any kind on plaintiff's face or head, and that there was no evidence of any external violence after his collapse on the night of February 16th, or at any time thereafter is established by the positive and uncontradicted evidence of all the witnesses who testified on this subject.

After arriving at the station and while still in the engine cab, plaintiff said something to Foster, the engineer, which caused him to look at plaintiff's head. (Foster, p. 19, line 35; p. 32, line 9). He saw no blood or mark of any kind (p. 32, line 9; p. 234, line 10). He also looked at plaintiff's head on the following day at the hospital and saw nothing (p. 33, line 20).

Seaman, the Station Master, made a careful examination of plaintiff's entire head and face when he was brought into his office, using an electric light and parting his hair. There was no blood, mark or bruise visible anywhere (Seaman, p. 241, line 10).

In this examination Seaman was assisted by

trainman Nearpass. He says there was no blood, bruise or mark of any kind. Everything seemed to be normal. (Nearpass, p. 263, line 20).

Conductor Hicks made a careful examination of plaintiff's head in the Station Master's Office, with a like result (p. 265, line 38).

Dr. Fendrich, the Railroad Company's surgeon, was called to examine plaintiff while he was at the Station Master's Office. He looked over his head and the rest of his body for injuries and found nothing.

He noted plaintiff's pulse, his eye reflex and general appearance, and they seemed absolutely normal (p. 216, line 30, to p. 218, line 15). There was no evidence of shock from a blow (p. 218, line 10).

Dr. Fendrich thereupon had plaintiff removed to the North Hudson Hospital.

Upon plaintiff's arrival at the hospital the hair was clipped close over the entire head and the left half of the head was shaved with a razor.

(Dr. Fendrich, p. 219, line 35; Dr. Bissing, p. 80, line 1; Dr. Kooperman, p. 301, line 15.)

After this had been done, Dr. Fendrich made a very careful and thorough examination by inspection, palpitation and pressure, seeking to discover any abrasion, bruise, swelling or evidence of injury to the head. He examined the eye reflexes, general appearance and symptoms, his pulse and respiration, and found no blood, no mark, bruise or abrasion and nothing to indicate external violence. The pulse and respiration were normal. There was no indication of concussion of the brain or fracture of the skull (p. 220, line 4, to p. 221, line 15; p. 229, line 37, to p. 230, line 10).

Plaintiff complained of tenderness over the entire head (p. 221, line 20).

Dr. Fendrich had him under observation every day for four or five weeks. During that whole time there was no evidence whatever of external

violence to his head, nor did any evidence of shock, or fracture of the skull, or of concussion of the brain at any time appear (p. 221, line 22, to p. 222, line 15).

When these two engines passed, plaintiff's engine was travelling at a speed of 20 to 25 miles per hour (Foster, p. 25, line 35) and the other engine was travelling at the rate of about 15 miles per hour (Hinckley, p. 112, line 38).

Dr. Fendrich testifies that in his opinion it would be impossible that plaintiff could have been struck by the end of the fire hook under such circumstances and fail to show evidences of external violence (p. 222, line 25, to p. 223, line 40; p. 226, line 1).

Dr. Albert G. Bissing, a physician of 20 years experience, was Superintendent of the North Hudson Hospital. Plaintiff was brought in by the assistance of some people, but he did not seem to require much assistance. He was able to walk in (p. 79, line 20).

Dr. Bissing gave directions with respect to clipping and shaving his head. After this had been done he examined him very carefully. He did not appear dazed or unconscious. He simply acted stupid. He found no mark, abrasion, contusion or anything indicating an injury to the skull or head. There was no bleeding from the ear or nose. He examined him by inspection, palpitation and pressure, and there was no evidence whatever of external violence. He saw plaintiff three or four times a day during the four or five weeks he remained at the hospital, and there was never any mark, blood, swelling, indication of concussion of the brain or fracture of the skull (p. 80, line 15, to p. 82, line 40; p. 94, line 35).

Plaintiff's condition was not due to a blow on the head (p. 82, line 31).

Dr. Bissing deemed it impossible that plaintiff could have been struck by a fire hook on a passing

engine without showing external evidences of the blow (p. 83, line 1).

Dr. Kooperman was the Interne at the North Hudson Hospital. He clipped the hair and shaved the left side of plaintiff's head. Dr. Fendrich and Dr. Bissing were present. Dr. Kooperman saw the examination made by them. They each examined plaintiff by inspection and palpitation of the head, and Dr. Kooperman did the same. He continued to do this during the first week plaintiff was there.

During the entire time there was no swelling, no blood around the head, face, ears, nose or mouth. He examined plaintiff's pulse and respiration and found them practically normal. There was never any indication of shock. The fact that the plaintiff was semi-conscious indicated to this witness that there might have been some concussion of the brain, but no indication of this was seen after he regained consciousness (p. 302, line 1, to p. 304, line 35).

This analysis of the testimony shows that six witnesses examined plaintiff's head carefully on the night of the alleged injury. Three of these were trained physicians who made the examination after the hair had been shaved from the left side of the head, and they were searching for evidences of external violence. They all swear positively that there was no such evidence either that night or at any time when he was under their observation. They all swear that there was no blood on his face or head at any time. No person testifies that there was ever any blood found anywhere at any time on plaintiff's person.

Two witnesses, Mrs. Price, plaintiff's wife, and her friend, Mrs. Masterson, testified to seeing a bruise on the left side of plaintiff's head on the morning of the 18th of February. (Mrs. Price, p. 51, line 5; Mrs. Masterson, p. 69, line 1). There is no evidence that such a bruise existed on the

night of February 16th. The evidence is all to the contrary. If this bruise ever had any existence, it must have been caused after plaintiff reached the hospital.

No blood could have come from this bruise because the skin was not broken, and it was entirely smooth and showed no evidence of having been scraped or roughened up in any way. (Mrs. Price, p. 61, line 23; Mrs. Masterson, p. 73, line 22).

On the night in question (Feb. 16, 1915), a cap was found which is claimed to have belonged to the plaintiff. There is much uncertainty in the evidence as to where the cap was actually found and who found it. Foster, the engineer, called by the plaintiff, on his first examination, testified that plaintiff had the cap when he was led out (apparently from the engine to the station master's office). He saw a slight tear on the left side of the cap. Witness last saw the cap at the station master's office (p. 21, line 10).

Plaintiff had worn a cap of that style during the two months he and the witness had worked together. He could not state whether it was the same cap he saw on the night of February 16th (p. 29, line 10).

When re-called by the plaintiff, Foster testified that he could not remember whether he took the cap off of plaintiff or whether plaintiff had it in his hand. He did remember that a cap went to the Station Master's office. He did not recall taking the cap off of plaintiff's head in the engine cab, nor could he recall whether he took it out of plaintiff's hand, picked it up from the cab floor, or whether he put it in the plaintiff's bag in the Station Master's office (p. 214, line 30).

Riker, the trainman who assisted Foster in taking the plaintiff to the Station Master's office, said that plaintiff had no cap on when he helped to take him to the office. He saw the cap in Mr. Foster's hands while they were going to the Station

Master's office. He says there was a slight tear over the left temple, as near as he could judge (. 213, line 35).

Hicks, the Conductor, saw the cap put in plaintiff's bag. He is not positive, but thinks Mr. Foster put it there. He noticed the tear (p. 212, line 20).

Seaman, the Station Master, testifies that plaintiff had no hat on when he came into the office. He never saw the cap (p. 138, line 40; p. 243, line 5).

Quest, a locomotive engineer, saw Price on the night of February 16th. He brought his bag from the engine to the Station Master's Office. He put a cap from the engine in plaintiff's bag (p. 279, line 10). He left the bag in the Station Master's Office (p. 279, line 30). He did not remember any tear in the cap (p. 281, line 10).

From this testimony it is not at all clear that the cap which had the tear belonged to plaintiff.

If it did belong to the plaintiff, there is no evidence whatever that he wore it at the time the two engines passed, nor is there the slightest evidence to show what the condition of the cap was prior to the time these engines passed. The tear might have been in the cap prior to that time. The tear in question, might have been caused by many things besides coming in contact with the fire hook.

We submit that the tear in the cap is not a circumstance which in any way tends to prove an injury to the plaintiff of the character set out in the complaint.

That the plaintiff was not and could not have been hit by the handle of the fire hook when the two engines passed is demonstrated by the uncontradicted testimony of all of the witnesses, both for plaintiff and defendant, who testified on this subject.

The fire hook consisted of an iron rod about

one-half inch in diameter, having a rake head with two prongs on one end and a handle formed by bending this rod into a loop on the other end. The length was approximately 10 ft. (Hinckley, p. 106, line 12).

On the night in question they had on Engine 3189 the ordinary fire hook—the only kind the Company supplied (p. 106, line 25).

When the fire hook is not being used by the fireman it rests across the front end of the tender or tank. The rake end, or hook end, as it is called in the testimony, rests on the deck of the tank on the engineer's side, and the handle end rests on the outside plate of the tank on the fireman's side.

The deck of the tank consists of a shelf attached to the inside of the outer plate of the tank, and extending inward toward the middle of the tank, a foot or more. It forms the top of a compartment, part of which is used for carrying supplies, and the remainder contains the water. One of these projections is on each side of the tank. The outside plate of the tank extends about a foot above this deck of the tank. The hook-end bears against the outside plate of the tank on the engineer's side (Hinckley, p. 107, line 5).

The loop forming the handle of the fire hook, and a portion of the rod with the handle end resting in its proper position on the outside plate of the tank, is shown in Ex. D-2, p. 325. The handle end resting in the same position is also shown in Exhibits D-4, D-5, D-6 and D-7, (pp. 327 to 330). When in this position the handle end of the fire hook is 12 or 13 inches higher than the hook end. Thus, between the handle end and the hook end there is a downward slant of 12 or 13 inches (Hinckley, p. 108, line 26; Lee, p. 246, line 8; Quest, p. 280, line 35).

On the night in question, Lee, the Engineer, and Hinckley, the fireman, took charge of the freight

engine No. 3189 at the Granton Round House. A soft coal fire had already been started on the engine. They took the engine to the New Durham Coal Pockets where they took on supplies including some hard coal. After doing this, they backed the engine through the Weehawken tunnel into the Weehawken Freight Yards, where it was coupled to the freight train (Hinckley, p. 104, line 35; Lee, p. 243, line 25).

Hinckley, the fireman, called by plaintiff, testifies that on the night in question, when he reached the New Durham Coal Pockets, he levelled off his fire with the fire hook to get it even over the grate, and then took on hard coal which he placed on the fire (p. 105, line 9).

After using the fire hook at the New Durham Coal Pockets, he placed it across the front end of the tank in its proper position as above described. That is the regular position for the fire hook when not in use. There is no other place for carrying it (p. 106, line 29; p. 107, line 38). Every fireman carries the hook in that position (p. 114, line 38). When he placed the fire hook in that position, the handle projected over the side of the tank about three or four inches (p. 101, line 3; p. 108, line 15 to line 25).

After putting the hard coal on the fire at the New Durham Coal pockets, the fire will last from twelve to twenty miles, according to the train (p. 102, line 20). The next point at which Hinckley tended his fire and used the fire hook on the night in question, after leaving the Weehawken Yards, was at West Nyack (p. 104, line 15 to line 30). At Dumont, about 12 miles from Weehawken, they were directed by a telegram to examine the train (p. 101, line 18; p. 101, line 38).

Hinckley, with Lee, the Engineer, examined the left side of the engine to see if anything was out of order or loose. He found the fire hook in the same position in which he had placed it after using

it at the New Durham pockets. He had not moved it at all after leaving the Weehawken Yards, until he examined it at Dumont (p. 109, line 23).

When he examined the fire hook at Dumont, there was nothing on the handle to indicate that it had struck anything. No hair or blood or anything of that kind (p. 113, line 1; p. 261, line 5).

The witness placed the fire hook for photographing in Exhibits D-4, D-5, D-6 and D-7. He placed it as nearly as possible in the same position as the fire hook was placed by him on the night of February 16th, 1915 (p. 108, line 37, to p. 114, line 20; p. 121, line 39, to p. 122, line 15).

Defendant's witness Lee testifies to taking the engine 3189 from the Granton Round House on the evening in question, and bringing it to the Weehawken Yards, where it was coupled to the train (p. 243, line 30).

Just before starting out with his train he noticed the condition of his engine in general and the position of the fire hook on the engine; that was a part of his duty (p. 244, line 10).

The fire hook was across the front of the tender, with the hook end on the engineer's side, and the handle end on the fireman's side, the handle resting on the wing or side plate of the tender. The handle projected not over four inches beyond the side of the tender (p. 244, line 20, to p. 245, line 5

This witness was present when photographs D-4, D-5, D-6 and D-7 were taken and the position of the handle of the hook, as shown in these photographs, was just about the same as its position on the night in question (p. 245, line 10).

When in position the rod of the handle bears, against the upright tubes shown in Ex. P-5, and this helps to hold the fire hook in position (p. 245, line 30, to p. 246, line 40). Force is required to move the fire hook from that position (Lee, p. 246, line 20).

In taking these photographs Engine No. 31[illegible]

was used instead of Engine 3189, but they are both of the same dimension (p. 245, line 20; Hinckley, p. 111, line 38).

In these photographs Engine No. 904 and 992 were used instead of Engine No. 907, the one on which plaintiff was riding on the night of the alleged accident. But these engines are also of the same class and of the same dimension (Hinckley, p. 110, line 30; Humpleby, p. 261, line 20, to p. 263, line 10).

After the train was stopped at Dumont, Lee examined the engine and the fire hook and found the fire hook in the same position as when the engine left Weehawken (p. 247, line 35). There was nothing to indicate that it had struck anything. There was no hair or blood or anything of that kind (p. 248, line 19).

The fireman had not used the fire hook between Weehawken and Dumont to the knowledge of this witness. He could see the fireman during the whole journey and frequently his duties required him to glance across the engine to the place where the fireman was sitting (p. 248, line 1; p. 251, line 1).

Harry Vaughn, defendant's witness, was head brakeman on the freight train. On that night he rode on the engine on the fireman's side from Weehawken to Dumont. He noticed the position of the fire hook just as the train was pulling out of the Weehawken Yards. He had come over the top of the cars and the tender of the engine to his position in the cab. In so doing, he stepped right over the fire hook. The fire hook was in the position where it was always carried. The handle projected over the side of the tender on the fireman's side three or four inches (p. 254, line 20, to p. 255, line 10). The position of the handle shown in Photographs Ex. 4 to 7, inclusive, is substantially the same as the position of the fire hook on the tender of the engine on the night in question (p.

255, line 12). The hook was carried in the usual and proper place and where all firemen carry them (p. 255, line 28). The rod of the fire hook bears against the pipe shown in Ex. D-5, and this helps to hold it in place (p. 255, line 32).

This witness rode on the seat box in front of fireman Hinckley from Weehawken to Dumont (p. 254, line 1). The fireman had not used the fire hook between Weehawken and Dumont (p. 260, line 1).

Charles E. Chase, Assistant Division Engineer of the defendant company (p. 208, line 1), made measurements to ascertain the clearance of engines of the type used on plaintiff's train on the night of February 16, 1915, and Engine 3189 used on the freight train. When these measurements were taken, the engines were located on the tracks as shown in the Exhibits D-4 to D-7, inclusive. The track centers at that point were 13 feet 4 inches, while the track centers just west of the tunnel are 13 feet 3 inches (Chase, p. 267, line 35, to p. 268, line 20). Between the outside of the arm rest of Engine 904 (the one in which the witness Hinckley is seated, Ex. D-6), and the handle of the hook on Engine 3189, the clearance was 2 ft. 9 in. Had the track centers been 13 ft. 3 in. as they are just west of the tunnel, the clearance would have been 2 feet 8 inches (p. 269, line 35).

As Hinckley sat in Engine 904 on the fireman's seat box, with his head just outside of the cab window, as shown in Ex. D-6, his forehead was 15 inches above the elevation of the handle of the fire hook on engine 3189, standing on the opposite track (p. 269, line 30). Had the fire hook been extended a distance of two feet eight inches, covering the clearance between the handle and the engine on the opposite track, Hinckley's forehead would still have been 9½ inches above the elevation of the handle of the fire hook (p. 290, line 10).

Hinckley is just about the same height as the plaintiff (p. 260, line 38).

The arm rest on engine 3189 projected a half inch further from the side of the engine than did the handle of the fire hood when placed by Hinckley in the position in which it was photographed, which he says was practically the same as its position on the night in question (p. 270, line 23).

Thus, the direct, positive and uncontradicted evidence of all the witnesses who testify on the subject shows that Hinckley placed the firehook in its proper position; that this was the only position in which fire hooks were carried; that the fire hook was found in the same position when the engine was examined at Dumont; that when in such position there was a clearance between the handle of the fire hook and plaintiff's engine of 2 ft. 8 in., and that there was a difference in elevation between the handle of the fire hook and plaintiff's forehead when sitting on the seat box of his engine, of 15 inches.

All this clearly negatives the alleged negligent placing of the firehook by Hinckley, and demonstrates the impossibility of plaintiff having been injured in the manner alleged.

I.

The evidence is insufficient to sustain the theory of plaintiff's case made by his complaint, or the theory upon which the case was submitted to the jury.

The sole negligence charged in the complaint is in substance that defendant's employees left the fire hook on Engine 3189 projecting out beyond that locomotive so far that when the two engines passed, the fire hook struck plaintiff on the head (Complaint, p. 5, par. 4).

The Court properly submitted this to the jury

as the only ground of negligence upon which defendant could be held (Judge's Charge, p. 320, line 30).

The judgment cannot be sustained on the theory that the fire hook was so placed on the engine that the motion of the engine caused it to project far enough to strike the plaintiff, nor can the recovery be sustained on the theory that the fire hook was improper, or longer than some in use by the defendant. No such issue was tendered by the complaint, and the court expressly charged that neither of these questions could be considered by the jury (Judge's Charge, p. 321, line 10).

Hence, any circumstance proved in the case which does not support the theory that the fire hook was so negligently placed on the engine by defendant's employees, that it projected far enough to strike the plaintiff when the engines passed, is immaterial, and cannot aid in sustaining the judgment.

In *Fielders* v. *N. J. St. Ry. Co.*, 68 N. J. L. 343, the negligence alleged was (1) that the car was brought to a stop at an unsafe and improper place; (2) that the conductor negligently directed plaintiff toward her destination; (3) that defendant had neglected to repair the street pavement as required by municipal ordinance.

The Trial Court withdrew the first and second grounds from the consideration of the jury and submitted the case solely on the third of the above grounds.

This court said—

> "The verdict and judgment, having gone upon this theory (i.e., a violation of a duty to plaintiff as a traveler on the highway), cannot be sustained upon the theory that the defendant's conductor had negligently misdirected the plaintiff about alighting from the car and reaching the sidewalk, or had negligently stopped the car at an unsafe and improper place."

In *Barnes* v. *Wallington & Co.*, 78 N. J. L. 490, plaintiff's case was rested on two theories, one only of which was submitted to the jury. This Court said:

> "Under the instruction permitting the jury to find for the plaintiff solely on the theory of a contract to pay in stock, the theory of a contract for payment in cash was necessarily excluded from the consideration of the jury, and hence the judgment for the plaintiff cannot be sustained on the ground that the evidence would have warranted a verdict for plaintiff on the latter theory."

Plaintiff raised no objection to the theory upon which the case was submitted to the jury, and no other theory can now be urged in support of the judgment.

That plaintiff was in a state bordering on collapse when taken to the station at Weehawken, is not disputed, but it is common knowledge that such condition might have arisen from many other causes beside a blow on the head by the fire hook.

It may be true that there was blood on the pillow, as testified to by Folk and Quinn, but if so, where this blood came from is not disclosed, and if it came from the plaintiff it is clearly quite as probable that it was caused by something other than a blow on the head, as that such a blow caused it. This is undoubtedly so in view of the uncontradicted testimony given by both lay and medical witnesses who examined plaintiff's head and face both before and after he was taken to the hospital, and found neither blood or mark of any kind on his face or head, nor any evidences of external injury. Add to this the fact that Folk testifies that there was no blood on plaintiff's face, forehead or temple when he saw him, and the fact that Quinn does not testify to seeing any blood anywhere on plaintiff's person, and there is left

no ground to support an inference that any blood on the pillow was due to a blow on plaintiff's head.

That Mrs. Price and Mrs. Masterson may have seen a bruise on plaintiff's head on the morning of February 18th is not sufficient to warrant an inference that this bruise was caused by a blow inflicted on the evening of February 16th, and is surely insufficient to warrant an inference that it was caused (1) by a blow from the fire hook; (2) that the fire hook struck plaintiff because defendant's employees left it projecting over the side o the tender far nough to strike plaintiff's head.

It is just as probable that this bruise, if it had any existence, was received while plaintiff was on the way to the hospital or after he arrived there.

The tear in the cap claimed to have belonged to the plaintiff, affords no support to plaintiff's case, because even if it was plaintiff's cap, he is not shown to have worn it when the two engines passed, nor is its condition prior to that time shown. Under the circumstances disclosed by the evidence the fact of a tear in the cap in no way sustains the theory of the improper placing of the fire hook by defendant's employees, or the theory that plaintiff was struck by the fire hook because of such improper placing.

Any support which any of these circumstances taken singly or all of them taken together, might be conceived to give to plaintiff's case is entirely negatived by the direct, positive and uncontradicted testimony of three witnesses, one (Hinckley) called by the plaintiff, and two (Lee and Vaughn) called by the defendant. All saw the fire hook in position immediately before the train left the Weehawken Yards, and all swear positively that it was in the regular and proper place on the engine; that it was where firehooks were always carried; that it projected not more than three or four inches over the side of the tender, and two of these witnesses likewise testified without con-

tradiction that on arrival at Dumont, 12 miles from Weehawken, the fire hook was found in the same position as it occupied when the engine left the Weehawken Yards.

The undisputed evidence further shows that the track centers of the main line tracks west of the Weehawken Tunnel are 13 ft. 3 in. (Chase, p. 268, line 1), and that the clearance between the end of the fire hook on engine 3189 and the engine on which plaintiff worked that night, was 2 ft. 8 in., when the handle of the fire hook extended four inches over the side of the tender (Chase, p. 269, line 35).

Furthermore, when fireman Hinckley sat in the fireman's seat on engine 904, as shown in Ex. D-6 (p. 329), his forehead was 15 inches above the elevation of the handle of the firehook on engine 3189 (p. 269, line 20). Hinckley was practically the same height as plaintiff (p. 260, line 40).

On the basis of this uncontradicted testimony, there is no ground for an inference that defendant's employees were negligent in placing the fire hook or that the fire hood improperly extended beyond the side of the tender, or that plaintiff's head was struck by the fire hook. If it was so struck, it must have been solely because the plaintiff negligently extended his head out of the cab window, a distance of 2 ft. 8 in.

All the evidence in the case is to the effect that when the fireman put his head out of the cab window for any legitimate purpose it would extend beyond the side of the cab only about 6 inches (p. 123, line 20).

The ordinary extension of the head is shown in Ex. D-6 (p. 329).

In *Rhobovsky* v. *N. J. Worsted Co.*, 76 N. J. L. 542, plaintiff was working underneath a machine which was presumed to be disconnected with the power so as to be immovable. It started under circumstances which were not disclosed by the evi-

dence and the plaintiff was injured. Judgment was recovered by the plaintiff and on writ of error this Court said:

> "The evidence left in doubt and did not explain what caused the machine to move. If it arose from a defect in the mechanism it should have been pointed out, but this was not done. If it was the result of human agency, then if it was the hand of a stranger which set it motion, the master would not be liable. I it was the act of a fellow-employe, in like manner no liability could be visited upon the master."

The Court cited with approval the Nugent case, and added:

> "There was no direct evidence as to what caused the injury, and the plaintiff, by *failing to exclude other possible causes* for which the master would not be responsible has simply left it to be conjectured by the jury that defendant was responsible."

In *Kennedy* v. *Netherlands American Steam Navigation Company,* 76 N. J. L. 618, plaintiff was killed while on board a steamer where he had been working. No one but the decedent was present at the time of the accident. The negligence alleged was that the passageway from the place of work to the upper deck was not sufficiently lighted, and that this condition arose because one of the hatchways which admitted light had been partially covered prior to the accident. The evidence did not disclose whether this covering of the hatchway had been done by order of the master or whether it was the act of a fellow servant. The Court held that if it were the act of a fellow servant, acting on his own responsibility, the defendant would not be liable. The Court said:

> "In order to support her contention that

> the death of her decedent was due to a failure on the part of the defendant of a duty which it owed to him, the burden rested upon her to do more than show the *possible responsibility* of the defendant therefor."

The Court cites the language of the Nugent case and held that in not excluding the idea that the accident may have arisen from the act of a fellow servant, instead of the act of the company, the plaintiff had not borne the burden of proof cast upon her.

A case closely analagous to the case at bar is *Smith* v. *Penna. R. R. Co.* 239 Fed. 103 (C. C. of A. 2nd Circuit 1917). In that case plaintiff, a brakeman in defendant's employ, while walking between 2 tracks in order to reach the cars on which he was working, was passed by a train running on one of the tracks. At this time he received injury and brought action to recover damages therefor. The court sets out the allegations of negligence and the evidence produced to prove the same in the following language:

> "The complaint alleges that, while plaintiff was proceeding along the roadbed as above stated, he was 'struck by a piece of iron which was negligently and carelessly allowed to project out beyond the side of a passing car or engine' of the moving train aforesaid. No one did, or apparently could, testify to the occurrences immediately before injury except Smith himself. The substance of his evidence is that as the train went by, he being distant from it less than 4 feet, something hard hit him on the head; he did not know what it was, though he thought it 'felt like iron.'
>
> "Testimony was offered tending to show that firemen of locomotives use an iron hook about 10 feet long wherewith to rake the engine fire, and that after so raking and getting

the end of the tool hot, they swing it outboard —i.e., over the side—in order to get it back into the body of the tender, where it lies when not in use. There was no evidence that this had occurred on the passing train."

The Court states the contention of the plaintiff in the following language:

"Plaintiff now contends that it was for the jury to say whether the rake hook was swung out on the train near which he was injured, and also whether he was hit by such hook; *there being no suggestion of any other possible projection that could have injured him.*"

On this state of the peadings and proof, the Court said:

"The plaintiff's difficulty in this case is that there is no proof that any definitely indicated thing wrought the injury, nor that the circumstances rendering it possible for the injuring thing suggested (i.e., the rake hook) to reach or touch him existed at the time and place of damage. A jury may in some cases presume the existence of a fact from the existence of other facts which have been proved; but the presumed fact must have an immediate connection with the established facts from which it is inferred. *Manning* v. *Insurance Co.*, 100 U. S. 697, 25 L. Ed. 761. But a presumption which the jury is to make is not a circumstance in proof, and is not, therefore, a legitimate foundation for a presumption. The circumstances must be proved, and not themselves be presumed. *United States* v. *Ross*, 92 U. S. 283, 23 L. Ed. 707. And, generally speaking, there cannot be a verdict based on inferences from inferences; one presumption cannot be built on another. *Looney v. Metropolitan, etc. Co.*, 200 U. S. at 488, 26 Sup. Ct. 303, 50 L. Ed. 564."

"Applying the foregoing: All that was shown below might justify an inference, from the habit of some firemen, somewhere, to swing rake hooks, that the fireman on the train passing Smith then and there did so; from which the further inference must be drawn that the hard substance which struck Smith was the rake hook so swung. This is inadmissible under the rules above referred to, and unreasonable in view of the one admitted fact in this case, viz. that Smith was walking or standing in a place where common knowledge teaches that objects quite heavy and hard enough to injure a man's face or head are caught up and thrown by rapidly passing trains."

In *Benedick* v. *Potts*, 41 L. R. A. 478 (Maryland Court of Appeals, 1898), cited with approval by this Court in *Paynter* vs. *Traction Co.*, 67 N. J. L. 619, plaintiff was injured while riding in a car over defendant's mimic railway. The tracks of the railway extended through a tunnel 150 feet in length. When the car entered the tunnel plaintiff was in it. When it emerged he was not. He was found within the tunnel unconscious with a wound on his head. A roof board running along the middle of the tunnel was found slabbed off at one point, but when this occurred was not shown. Neither the car nor the tracks were defective. Plaintiff recovered and defendant brought error. The Court of Appeals held:

(1) That the doctrine of *res ipsa loquitur* did not apply.

(2) That the evidence was not sufficient to sustain the judgment.

As to the doctrine of *res ipsa loquitur*, the Court said:

"The injury, without more, does not neces-

sarily speak, or indicate the cause of that injury. It is colorless . . . The maxim does not go to the extent of implying that you may, from the mere fact of an injury, infer what physical act produced that injury. . . . It permits an inference that the *known act* which produced the injury was a negligent act, but it does not permit an inference as to what act did produce the injury. Negligence manifestly cannot be predicated of any act until you know what the act is."

As to liability, the Court said:

"There is no evidence that the roof of the tunnel struck the appellant, or that the fact that a small part of the central plank of the tunnel roof had been slabbed off had the most remote connection with the accident. It is a case presenting not a single circumstance showing how, or by what agency, the injury occurred, and in which, with nothing but the isolated fact of the injury having happened being proved, it is insisted that the jury shall be allowed to speculate as to the cause that produced it, and then to infer from the cause thus assumed, but not established, that there was actionable negligence. It is not an attempt to infer negligence from an apparent cause, *but to infer the cause of the injury from the naked fact of injury, and then to superadd the further inference that this inferred cause proceeded from negligence.* * * * All that is certain is that he was injured in some way, and he asks that the jury may be allowed, in the absence of all explanatory evidence, to infer that some act of a negligent character, for which the appellee is responsible, caused the injury sustained by the appellant. No case has gone to that extent, and no known principle can be cited to sanction such a position."

In *Globe Accident Insurance Co.* v. *Gerisch,* 45 N. E. Rep. 563 (Ills. Supreme Court, 1896), decedent was under contract to carry out ashes and cinders to the street for one Jacobs. On the evening when it was claimed he received injuries while doing this work, from which he subsequently died, he was seen shoveling ashes and cinders into a wooden box in which he usually carried them into the street. No one saw him carry out the ashes, but the ashes were, in fact, carried out that evening. At 9:30 that evening he complained of pains in the lower abdomen. In a few days thereafter died. Prior to his death a surgical operation was performed. The doctors who attended him and performed the operation testified that in their opinion his condition was due to some strain or external violence.

The declaration charged that he was injured "by lifting a box of cinders and ashes."

Plaintiff having recovered judgment against the Accident Insurance Company which had issued an accident policy to the decedent, that Company took an appeal.

The Supreme Court held that from the facts and circumstances proved, the following presumptions were permissible:

> (1) That decedent lifted and carried out the ashes on the evening in question.
>
> (2) That decedent's condition was due to his being strained or injured by some external force.

The Court, however, held, that it was not permissible from the facts and circumstances proved, to draw the further inference that the strain from which he suffered arose from lifting the box of ashes, and said:

> "If, from the fact that he lifted a box of ashes, and from the further fact that he not long afterwards suffered from the effects of

a strain, it can be inferred that such strain was caused by so lifting said box of ashes, the missing link in the chain will be supplied. But this presumption cannot be indulged. As we have seen, the fact upon which it is sought to base this presumption, viz., that Gerisch lifted the box, is itself but a presumption, drawn from other facts in evidence. And the law is that a presumption cannot be based upon a presumption. For there is no open and visible connection between the facts out of which the first presumption arises and the fact sought to be established by the dependent presumption."

See also *Kremelling* vs. *So. Pac. Co.*, 170 Pac. 80.

The United States Supreme Court (the ultimate authority upon the question of liability and the sufficiency and competency of the evidence by which liability is proved in cases of this kind), has repeatedly held that when proof is attempted by circumstantial evidence, it is not permissible to draw inferences from other inferences, but that inferences can only be drawn from facts and circumstances established by direct evidence.

In *U. S.* v. *Ross*, 92 U. S. 281, the court in discussing certain inferences drawn in the Court below, which in turn rested on other inferences, said:

"These seem to us to be nothing more than conjectures. They are not legitimate inferences, even to establish a fact, much less are they presumptions of law. They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable, drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. *Starkie on Ev.*, p.

80, lays down the rule thus: 'In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by direct evidence as if they were the very facts i nissue.' It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury.

The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. *Best, Ev.*, 95. A presumption which the jury is to make is not a circumstance in proof; and it is not, therefore, a legitimate foundation for a presumption."

To the same effect is *Manning* v. *Insurance Company*, 100 U. S. 693; 25 L. Ed. 761.

In that case the Court said:

"The only presumptions of fact which the court recognizes are immediate inferences from facts proved."

See also *Looney* v. *Metropolitan R. R. Co.*, 200 U. S. 480, 50 L. Ed. 564.

In this case the Court says:

"One presumption cannot be built upon another."

In *Atchison T. & S. F. Ry. Co.* v. *De Seidello*, 219 Fed. 686 (C. T. of A. 8th Circuit), the Court uses the following language:

"The requirement that the legal inference styled a presumption of fact, should be a strong natural and immediate one brings as a corollary that no inference can be legitimately based upon a fact the existence of

> which rests upon a prior inference. In other words, there can be, in the great majority of cases, no presumption upon a presumption. On the contrary, the fact used as the basis of the inference, the *terminus a quo* so to speak, must be established in a clear manner devoid of all uncertainty. . . . . In order to find for defendant in error, it was necessary for the jury to infer at least six successive facts, having the first, dependent upon all that preceded."

To the same effect see *Re the Oakland,* 241 Fed. 66 (C. C. of A. 4th Circuit, 1914).

In order to sustain a judgment in this case successive inferences must be drawn, each after the first dependent upon those preceding, as follows:

(1) That plaintiff's condition is due to a blow on the head.

(2) That such blow was received while he was employed on his engine.

(3) That the blow was inflicted by a fire hook located on Engine 3189.

(4) That this fire hook came in contact with plaintiff's head because it was negligently placed by Hinckley, so that it extended far enough to strike plaintiff when the two engines passed.

These inferences are not permissible from the facts and circumstances proved; they are altogether too remote from these facts and circumstances. To draw them is violative of the fundamental principles of evidence and of the Rules prevailing in the U. S. Supreme Court.

If the jury had a right to, and in fact did, eliminate the evidence as to the placing of the fire hook by Hinckley, and its position when the engine arrived at Dumont, then there is no evidence in the case on this subject, and the legal presumption arises that Hinckley did his duty and placed the fire hook in its proper position.

Hummer v. L.V.R.R.Co.,
75 N.J.L. at p. 713 (bottom).

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These inferences are not permissible from the facts and circumstances proved; they are altogether too remote from these facts and circumstances. To draw them is violative of the fundamental principles of evidence and of the Rules prevailing in the U. S. Supreme Court.

It was urged at the trial and doubtless will be argued in this court that plaintiff's witness Hinckley and defendant's witnesses Lee and Vaughn, might have been mistaken as to the placing of the fire hook by Hinckley or that their evidence might have been untrue.

There is nothing in the record which would warrant the jury in reaching either one of these conclusions with respect to this testimony, nor is there anything apparent which would warrant the jury in disregarding this testimony.

The same argument might have been made with respect to the evidence negativing negligence which was produced in *Bobbink* v. *Erie R. R. Co.*, 75 N. J. L. 913 and in *Alcott* v. *Public Service Corporation*, 77 N. J. L. 110.

In each of these cases negligence was alleged in connection with the maintenance of a switching device in the public highway by the defendant.

In the Bobbink case, an expert called by plaintiff was asked on cross-examination if the device was not a recognized standard adopted by steam and street railroads in the United States. He replied: "I cannot say positively; I presume it is." This Court says:

> "It thus appears from plaintiff's witness that the frog used by the defendants was of a standard pattern in general use for the purpose to which it was applied by the defendants, and they were therefore guilty of no breach in using it."

In the Alcott case plaintiff turned with a view of leaving the railway track. Instead of leaving the track his wheel skidded along the track until it came in contact with what is called the "mate" in the switching device, when the wheel became locked and plaintiff was thrown from his seat. Defendant's evidence was to the effect that the switch was of standard make and was commonly used in street railway traffic; that it had been properly installed and was daily inspected by competent employees; that it was in good order upon the day of the accident, and upon the day before and the day after the accident. The Supreme Court held that the utmost that could be required

of defendant was "to exculpate itself by furnishing proof of the performance of its legal duty, which proof would be tantamount to negativing the existence of actionable negligence."

Continuing, the court said:

> "Such uncontradicted proof having been offered in this case, we are unable to perceive that any element of negligence existed upon which the verdict can be legally predicated or supported, and a verdict should, therefore, have been directed for the defendant."

So in the present case, the charge of negligence has been completely negatived by direct, positive and uncontradicted evidence, and defendant was entitledto prevail on its motion for a non-suit and for a directed verdict.

Innumerable cases might be cited in which uncontradicted evidence negativing the negligence charged has been held sufficient to warrant taking the case from the jury.

"Where the evidence of negligence is entirely inferential, and the testimony for the defendant is clear and undisputed to the effect that there was no negligence, the plaintiff's case is overcome as a matter of law, and it becomes the duty of the Judge to take the case from the jury".
Goss v. N.P.RY.Co., 48 Or.439;
S.C. 87 Pacific 149 (head note)

To the same effect see Christensen v. Railroad Company (Utah Supreme Court), 99 Pacific 676, S.C.20 L.R.A. (N.S.255.

Tremelling v. Southern Pacific Co., (Utah Supreme Court) 170 Pac.80.

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In *Stumpf* v. *D. L. & W. R. R. Co.*, 76 N. J. L., p. 153, the proof was to the effect that while plaintiff was passing beneath defendant's railroad bridge, a piece of coal came from above and hit him; that it was either thrown or fell from the bridge or from a coal car which was a part of a train of defendant. On this evidence defendant moved for a non-suit on the ground that no negligence was proved against the defendant. This motion was denied. The Supreme Court said:

> "We think the denial of the motion for a non-suit was erroneous.
>
> "It will be observed that the only proof in the case is that plaintiff was struck on the head by a piece of coal. Where it came from is not definitely shown. The testimony is that it came either from the bridge or from a car on the bridge. Whether it was thrown by some person with willful intent, as charged

in the demand, or fell from the bridge or from a car through some negligence, as alternatively alleged, is left to speculation. . . . .

"It may be stated as a general principle that the burden rests on the plaintiff to prove that the defendant was negligent, and that such negligence was the proximate cause of the injury. In other words, negligence is not presumed, but must be proved. *The difficulty of proving the negligence charged does not affect the principle.* 6 Thomp. Negl., par. 7695."

The evidence in the case as to the happening of an accident and defendant's liability therefor, is wholly circumstantial. In such cases the burden which the plaintiff must bear with respect to the quantum of proof which must be produced is laid down by this Court in *Suburban Electric Co.* v. *Nugent,* 58 N. J. L. 658, in the following language:

"It was incumbent upon him, in the absence of direct evidence of that fact, to show not only the existence of such possible responsibility, but the existence of such circumstances as would justify the inference that the death was caused by the wrongful act of the defendant, *and would exclude the idea that it was due to a cause with which the defendant was unconnected.*"

In *Austin* v. *P. R. R. Co.,* 82 N. J. L. 416, this Court said:

"The plaintiff must prove circumstances which rendered it *probable* and not *merely possible* that the defendant is at fault."

In *Cass* v. *Sanger,* 77 N. J. L. 413, the Supreme Court says:

"Where negligence is alleged and the proofs of it are circumstantial and not direct

> the evidence must be such as to exclude *all* theories of accounting for the accident which would be inconsistent with the defendant's negligence. *Suburban Electric Co.* v. *Nugent*, 29 Vroom 658. And where the plaintiff's evidence is equally consistent with the absence as with the existence of negligence, a nonsuit is proper. *Hummer* v. *Lehigh Valley Railroad Co.*, 46 *Id.*, 703."

The circumstances upon which plaintiff relies have no direct relation to the alleged placing of the fire hook by defendant's employee, and they have no tendency to prove that it was placed so as to project far enough over the engine to come in contact with plaintiff's head. On the contrary, the direct and uncontradicted evidence in the case is squarely contradictory of this contention.

If plaintiff had proved circumstances from which a probability of defendant's liability might be reasonably inferred, it would still have been necessary for him to exclude all reasonable probability of other causes for which defendant was not liable. This he failed to do.

From the testimony of Johnson, the track supervisor, it was at least as probable that if plaintiff sustained any injury to his head, it was due to being struck by boards, loose doors, or other projections from the sides and tops of the freight cars, or that he was struck by stones or by ice falling from the roof of the tunnel; or that plaintiff slipped and struck his head against some part of his own engine or that some object was thrown against plaintiff's head by the motion of the trains when passing (see evidence of Johnson, p. 283, etc.).

An effort was made to exclude the probability of injury by boards or anything else extending or falling from the freight train, but no evidence was produced to exclude probability of injury from

falling stones, falling ice or from objects thrown by the moving trains.

The evidence by which it was sought to prove that plaintiff was not struck by anything projecting or thrown from the passing freight train was not sufficient.

Trainman Vaughn examined the tops of the cars at Weehawken and did not find any loose boards. He did not examine the sides of the cars. (Vaughn, p. 294, line 20.)

Conductor Mabie examined the left side of the cars *after the train was stopped at Dumont,* but discovered nothing projecting at that time.

What the condition of the sides of the cars was before leaving Weehawken does not appear.

Taking this evidence as a whole, the utmost inference legitimately to be drawn therefrom is that plaintiff may have received some injury while on his engine, but the cause of the injury, if any, the means by which it was produced and the liability therefor, is left wholly to conjecture.

II.

The doctrine of Res Ipsa Loquitur does not apply in this case.

That doctrine only applies where the *"res"* has been proved. By *"res"*, is meant the thing which causes the injury. It is not permissible to infer the *res* from circumstances proved in the, case, and then make a further inference of negligence based on the first inference.

Moreover, this doctrine applies only to cases in which the plaintiff has produced all the evidence within his power, and the essential facts with respect to negligence are exclusively within the knowledge of the defendant. *Bahr* v. *Lombard Ayres & Co.,* 53 N. J. L. 233.

In this case all the facts were as available to the plaintiff as to the defendant. The case had already been tried as a compensation case, and all employees of the defendant engaged on both trains were known to the plaintiff, and could have been called by him. He did call many of them and he had the names of all the other possible witnesses.

Speaking of this doctrine the Supreme Court, in *Stumpf* v. *D. L. & W. R. R. Co.*, 76 N. J. L. 153, says that it is frequently applied to cases involving falling objects, especially upon a public highway, and adds: "But in all the cases where this principle has been properly applied, the proof was clear as to the source of the falling object. . . . . *But in the cases where the source of the falling object or the place from which it came is left in doubt, and other circumstances of its precipitation are simply conjectured,* the courts have uniformly refused to hold that the doctrine of *res ipsa loquitur* applied."

Many cases are cited in support of the rule thus laid down.

In *Paynter* v. *Bridgeton, Etc., Traction Co.*, 67 N. J. L. 619, this court says:

> "A fall while alighting from a street car is not such a fact, standing alone, as to authorize the application of the doctrine of *res ipsa loquitur.*
>
> "The thing that happened in no way can be said to prove that the defendant was negligent.
>
> "The only thing proved was the fall. Nothing was proved causing the fall, or any circumstances which could be in any way said to show that the defendant was negligent."

The syllabus of this case reads as follows:

> "The doctrine of *res ipsa loquitur* is applicable only when the thing shown speaks of the negligence of the defendant, *not merely of the happening of the accident.*"

In this case the circumstances proved speak only of the possibility of the plaintiff having met with some injury while on his engine. This is not sufficient.

Furthermore, this action is based upon a Federal Statute. The liability of the defendant must be established by evidence recognized by the Federal Courts as competent and sufficient. *Southern Ry. Co.* v. *Gray,* 241 U. S. 333, 60 L. Ed. 1030.

The doctrine of *res ipsa loquitur* is not applied by the U. S. Supreme Court to cases arising between employer and employee, unless the right of action arose out of the violation of the Safety Appliance Act or some similar statute. *M. & St. L. R. R. Co.* v. *Gotschall,* 244 U. S. 66; 61 L. Ed. 995, and cases cited.

III.

There is reversible error in the refusal of the Court to charge defendant's requests numbers 2, 3 and 4 (Judge's Charge, p. 321, line 30; p. 322, pars. 2, 3 and 4).

In cases under the Federal Employer's Liability Act, the rule of assumption of risk remains as at common law.

Boldt v. *P. R. R. Co.,* U. S. Supreme Court, October Term 1917, Adv. Ops. 1917—18, p. 168.

The fire hook on Engine 3189 was placed and carried in the usual and only place for carrying these implements.

All firemen carried them in this position (Hinckley, p. 100, line 38, p. 106, line 35; p. 114, line 38; Vaughn, p. 254, line 38; p. 255, line 28; Quest, p. 279, line 33).

Plaintiff was a fireman of 11 years experience and must have had full knowledge of the place and manner of carrying these hooks. Whatever dangers, if any, attended this practice were as well known to him as to defendant, and the risks thereof were assumed.

Furthermore, defendant was entitled to have Request No. 4 charged for the reason that if the fire hood was in the position testified to by Hinckley, Lee and Vaughn, when the engine left the Weehawken Yards, it was in a proper and entirely safe position. Plaintiff could not be injured by the hook while in that position, except solely by his own negligence in extending his head out of the cab window 2 ft. 8 in.

Under the pleadings and charge of the court defendant was not liable for any negligence except that of the improper placing of the fire hook by defendant's employees. Hence, unless moved from a safe position by defendant's employee, defendant was not liable.

On all the grounds above assigned, the judgment should be reversed.

Respectfully submitted,
VREDENBURGH, WALL & CAREY,
Attorneys for Appellant.

New Jersey Court of Errors and Appeals

CHARLES PRICE, by next friend,
Plaintiff-Appellee,
vs.
NEW YORK CENTRAL RAILROAD COMPANY,
Defendant-Appellant.

BRIEF OF PLAINTIFF-APPELLEE

This is an action founded upon the Federal Employers' Liability Act giving an action for injuries to employees engaged in interstate commerce while working upon interstate commerce trips against Common Carriers by railroad. The plaintiff, a fireman upon an interstate engine bringing a train from New York into New Jersey, was struck upon the head while leaning from his cab window, reading signals by a poker projecting from an engine passing in the opposite direction, which, had it been carefully placed would not have so struck him, but it projected so far that it struck him a blow on the head. By reason of this blow received by the plaintiff, he was made unconscious, taken to the hospital and finally became insane and is now confined to the Morris Plains Hospital for the Insane. The plaintiff sued through a guardian and recovered a verdict of $30,000. His injuries are permanent and he will never regain his reason.

Facts

The evidence in the case was circumstantial. There were no eye witnesses to the accident. It was upon the theory laid down in *Austin vs. Penn. R. R.,* 81 Atl., p. 739 and *Suburban Electric v. Nujant,* 58 Law, 658, that the case was tried. The testimony adduced was as follows:

A Digest Of The Evidence Giving Page And Line Follows

The plaintiff, a fireman upon the cab of the engine, called the signal at the approach of his train to the west end of the Weehawken tunnel of the West Shore Railroad. He was then in a normal condition. When his engine arrived at the terminal, about one-quarter of a mile away, he was found in a collapsed condition. The cap which he had worn had a tear on the side at about the point of the injury received. There was blood upon his head and he was in an unconscious condition; there were no other stationary projections from the point where he called the signal to the point where he was injured nor were there any transient projections. There was nothing between the point where he called the signal and the point where he was found at the time he passed, except a long iron poker, variously estimated from 9 to 12 feet long, which projected from the side of an engine which passed his engine shortly after he called the signal on the entrance to the tunnel. Some attempt was made to prove that ice frequently fell from the tunnel but the witnesses produced had not seen any ice in the tunnel for six months before this accident. Also there was evi-

dence to prove that sometimes pieces of board flew from trains of cars, but there was no proof of any train of cars in the vicinity carrying boards or that there was any board in the vicinity of this accident, nor was any found after the accident or any existing there before the accident, so that it was clearly for the jury to say whether or not there had been eliminated every possible cause of injury except the iron poker which admittedly was projecting from the engine which passed him. He passed the projecting poker when it was extended towards him on the east side of the engine. Although the witnesses for the railroad attempted to say that the poker was in a position where it was only projecting a few inches, yet this was a matter on which they might have been mistaken and so held by the jury, because if it was projecting over a certain distance, it could have struck the fireman on the head. The testimony of the engineer and fireman on the engine on which was the projecting poker did not bind plaintiff, if there was other testimony, (*Schrieber vs. Public Service,* 98 At 318,) and the fact of the injury, the presence of the poker and the absence of any other cause was evidence to contradict the fireman and engineer. The plaintiff was leaning out of the cab window where it was intended he should be, because there was a shelf under his cab window upon which he could place his arms to look out and see signals as he approached, the shelf being placed there by defendant.

Digest Of Testimony As To Cause Of Accident To Charles Price

Jacob Foster, State of Case, p. 17, p. 18, ll. 10 to

15, Engineer of locomotive on which Price was hauling a passenger train from Haverstraw, N. Y. to Weehawken, N. J. P. 18, ll. 20 to 28, Price called the signal 500 feet west of entrance to tunnel, in his usual manner before engine went into tunnel. Page 18, ll. 28 to 35, freight train going west passed them in tunnel, of which James Lee was engineer, and one Hinckley was fireman. Pages 19, 20, 21 & 22, to l. 25, p. 22, on arrival at Weehawken Terminal Price did not perform his usual duties of lighting the classification lights and Foster called his attention to it, and not meeting with compliance to his direction, he noticed that his fireman was acting dazed and asked if there was blood on his head; Foster lead him out of the cab so he would not burn himself on the boiler and into the station, he and another man sustaining him as he walked and they called for help for Price. When Foster left to go back to his engine, another man took his place to keep Price from falling; Price complained of his head hurting him. Page 21, ll. 10 to 20, Price's engineman cap had a slight tear in it on the left-hand side above the ear's position on his head. Page 23, ll. 9 to 12. Their train was engaged in interstate commerce from Haverstraw, N. Y. to Weehawken, N. J. Page 30, ll. 5 to 10, Price was on the left-hand side of the cab, toward the other engine. Page 29, l. 30, the two engines passed each other about 300 feet west of the tunnel. Page 25, ll. 35 to 40, Price and Foster's train was travelling about 20 to 25 miles an hour approaching the tunnel. Page 35, ll. 20 to 40, there are no permanent obstructions between the 2 tracks in the tunnel, *viz,* on the side of the cab Price was sitting. Page 36, ll. 18 to 20, Foster made no particular examination of Price's head on arrival at

Weehawken Depot about 7:30 (Feb. 16th) to see if there was blood on Price's head.

CHARLES FOLK, pp. 36 & 37, driver of ambulance which took Price from Weehawken Depot to Hospital. Page 37, when they got Price to Depot pillow was clean; when Price was taken out of ambulance there was a square foot of blood on the pillow case. Page 37, l. 30 *et seq.*, railroad employees carried Price out to ambulance. Page 39, ll. 18 to 20, Price had no cap or anything else on his head when he was taken to ambulance. Page 40, l. 12, Price's eyes were closed when he was put into the ambulance. Pages 42 & 43, ll. 10 to 25, p. 43, damp blood on pillow when Price was taken off stretcher.

MRS. PRICE. Page 49, wife of injured man. Page 49, when Price went to work the day of the accident he was in good health; had no marks on him. Page 50, when she first saw husband in hospital, he had ice bags on his head. Page 50, l. 20, she saw her husband and that his head has been shaved on the 17th of February. Page 50, l. 26 *et seq.*, she saw him on February 18th and saw a bruise on the left side of his head. Page 51, bruise was near junction of hair with his forehead. Also pp. 58 & 59. Page 52, ll. 10 to 20, bruise like a peach cut in half, rounded like an egg. Page 52, l. 20, his eyes were blood shot. Lines 22 to 25. He was raving. Page 52, l. 38 and p. 53, Price was 5 weeks in North Hudson Hospital. She saw him every day; he was entirely different from what he had been before he went to the hospital—erratic and irrational in his talk. Page 52, l. 30, Mrs. Masterson (her friend) was giving Price a glass of water and the ice cap slipped back and she saw the bruise. Page 55,, l. 25 *et seq.*, Mrs. Price had sent for the clothes

but she never got back his cap. Page 54, ll. 30 to 42. It took three days for swelling on Price's head to go down.

Catherine Masterson. Page 68, a friend of Mrs. Price for 20 years. Page 69, Mrs. Masterson discovered the bruise on Price's head and describes its location and its appearance. Page 71, l. 15, she says she saw the bruise next day after this.

Dr. John Nevin, of Jersey City, testified that he passed Price as a good Insurance risk in the Connecticut General Life Insurance Co. in the previous month of January 1915,—before Price's injury and that he was sound physically as well as mentally: this would be conclusive that he had no physical cause for paresis then or up until then.

Grant Hinckley, beginning p. 99, locomotive fireman on locomotive that which passed Price's locomotive just west of the west part of the tunnel, at p. 108, ll. 15 to 20, & p. 122, ll. 35 to 40 to p. 123 ll. 1-2 that the "hook" which is a poker normally 10 feet long and come ½ an inch in thickness with a round handle on the end of it. Where the rod has been turned and caused to meet in a circular manner to form such hook, protruded over at least 3 or 4 inches; this limitation of inches is defendant's testimony, capable of being rebutted by the inference that the man might have been hit by something having been a perfectly well man at the signal west of the tunnel and came out of the tunnel hit in the head; the first 2 lines of p. 123, show that any projection at all was unknown, unusual. Page 124 ll. 30 to 40 shows that in taking the curve just before the signal Price would have to lean out to a certain point in it in order that any

view could be had of the signal by either engineer or fireman. The Court is referred to the whole of this witness' testimony on the subject of the position of the "hook" on the evening in question. Page 101 & 102, show that the freight train was stopped at Dumont to find out what had, if anything hit Price on the head, on orders from the Train Dispatcher's office in Weehawken, and that this "hook" was immediately suspected of being the cause of Price's injury.

Dr. I. Lathrop Allem, p. 127, a physician passed Price for a life policy in the Metroplitan Life Insurance Company. One year and two months previous to the injury to Price and at ll. 39-40, p. 129, swore positively he did not have the disease which precedes paresis.

William G. Quinn, pp. 131-135, owner of ambulance, saw on the pillow cover which had gone out clean for to get Price, came back with a circular spot of fresh blood on it about 6 to 8 inches deep in diameter p. 132, ll. 10-15 and that Quinn observed this when the stretcher with Price on it had been carried into the Hospital, Quinn following Price and his stretcher bearers in p. 135, ll. 22-30.

Louis A. Seaman, Station Master of R. R. Co. at Weehawken, p. 138, saw Price brought in supported by two men and Price was kind of stooped over l. 36.

The Medical Testimony in the Plaintiff's Case shows distinctly that to get paresis a person must have a certain physical disease and that Price never had this disease and although examined thoroughly at Morris Plains did not have it at the date of the trial. Furthermore that the only way such symptoms of insanity as Price has today comes only from a fracture of the

skull and concussion of the brain. See Testimony of Dr. George W. King, p. 141, Dr. Britton D. Evans, p. 199, Dr. George B. McMurray, p. 205, the latter physician having assisted Dr. Evans at Morris Plains.

At pp. 297 and 298, ll. 25-30 respectively, Mrs. Price and Mrs. Masterson, contradict Dr. Fendrich by saying that the said Price, had a fractured skull. Whitfield Mabie, p. 176, conductor on west bound freight train the locomotive which passed Price west of the tunnel, tetsified that his train was stopped at Dumont, that he got orders to inspect the train; that he went up and down the left-hand side of his train to see if any projector was over; he did not go over the tops of the cars but along the lines and past the locomotive, but did not see or look for the fire hook.

George E. Chase, assistant division Engineer of the West Shore Railroad, p. 208 on p. 220 at ll. 1-14 testified that there was at the point where the two locomotives probably passed each other, a clearance of 2 feet and 8 inches between the sides of cabs.

Thomas W. Hicks, Conductor of Price's train, p. 211 and p. 212, ll. 30-32, swore that the cap Price had worn on the trip when he was hurt, had a tear in it on the side of the head fairly high up above the left ear. Substantiates Foster p. 21.

Richard Riker, p. 23 one of the crew of Price's train, helped taken Price into Station Master's office and at p. 241, ll 11-5, saw a tear in the cap over the left temple.

It was impossible to find out what ever became of Price's cap after it was left in defendant's possession.

On the above evidence the Court refused to non-suit.

The case after this was fortified by the following testimony from defendant's witnesses:

Jacob Foster p. 232, Price's engineer: Recalled for Defendant testified that when the engine went over the switches, there was not enough jar to hurt a man or throw him about in the cab, p. 233 l. 32 to p. 236 l. 11.

Also that it is customary for enginemen to lean out of the side window in the cab to look for signals and possible obstructions on the track ahead p. 237, ll. 35 to 40; p. 240, ll. 10 to 30.

L. A. Seaman, Station master, re-called, p. 241 at p. 242, ll. 34 to 38, testified that he was told at the time of the accident Price had been hit on the left side of his head.

J. H. Lee, re-called, p. 243 at p. 245, ll 1 to 5, testified that there was an overhang that night to the "hook" beyond the side of the tender. (Substantiates Hinckley, his fireman). At p. 250, ll. 18 to 40, asked Hinckley, his fireman when at p. 253, ll. 13 to 14, did not notice handle of hook for hair or blood. Hinckley re-called, p. they stopped at Dumont, how his "hook" was: 260, at p. 261, ll. 13-14, testified he did not make an inspection of the hook for hair or blood.

C. K. Humpleby, Road Foreman of Engineers, p. 261, at p. 263, ll. 1 to 10, arm rest in cab so engineman can lean out of window.

Nearpass, trainman on Price's train, recalled, p. 263, at p. 265, ll. 5 to 15, saw Price lying with hands on his head.

T. W. Hicks, p. 265 re-called at 266, ll. 35 to 40, says Price had a good crop of hair and at p. 267 says Price in Station master's office was "groggy."

Charles E. Chase, re-called, p. 267; his measurements would not apply if hook projected 2 feet beyond the side of the tender.

Hinckley, re-called p. 272 at p. 274, ll. 10 to 13, the unusual happened the night of accident to Price.

Harry Vaughn, re-called, p. 294, l. 20, no boards were loose on freight cars on passing freight train in Weehawken that night.

Humpleby, road foreman of engines, re-called p. 277 at p. 278, ll. 1 to 5, engine on which was the hook taken up to Syracuse Division in the month of December after accident to Price and still was there.

John Johnson, Supervisor of tracks of R. R. Co., p. 282, on cross-examination, p. 284, testified that he had no direct knowledge of alleged ~~assumed risks attended~~ condition described to by him on his direct testimony.

Chase, re-called, p. 290, at l. 30, limits his perpendicular computation of possibility of Price's head hitting handle of hook to Price's sitting upright in the cab.

Argument, Point I

United States vs. Ross, 92 U. S. 281, cited in *Manning vs. Mutual Life Ins. Co.* 100 U. S. p. 674, book 25 Lawyers Ed. p. 761.

Under these cases the test of circumstantial evidence was met. We did not presume any circumstances but proved the circumstances and it was from these circumstances that the inference was drawn upon which was founded the judgment of negligence against the defendant.

In the case of *Smith vs. Penn. R. R.,* 239 Fed., 103, cited in the appellant's brief, there was no

proof that there was an iron hook anywhere near the person injured; it relied on the custom; there was no engine proved to have been near the injured person nor any hook, but in the case at bar it was proved that shortly after the plaintiff had given the signal he was passed by an engine bearing an iron hook projecting, so that the question was how far it projected. If he was not struck by the iron hook, so far as the evidence in the case is concerned, the accident would have been impossible, because there were no other projections, temporary or permanent that could have struck him. The Appellant has not cited all of the Court's decision or the most relevant parts, in the case referred to *Austin vs. Penn. R. R.* 82 N. J. Law 416. Here the Court of Appeals said: "All that is required is that the circumstances should be so strong that the jury might properly, on ground of probability rather than of certainty, exclude the inference favorable to the defendant. The question arises only where the evidence is circumstantial and where probability may be is all that is obtainable." It is upon this principle of law that the correctness of the submission of this case to the jury is founded.

Minard vs. West Jersey R. R., 64 Atl. 1054;
Wiley vs. West Jersey R. R., 44 N. J. L., 247;
Goodman vs. Lehigh Valley, 74 Atl., 519; 75 N. J. L., 277.

So, in the *Wiley* case, 44 N. J. L. 249 Justice Dixon, says:

"The evidence tended to disprove the presence of any other cause, therefore it was of course, reasonable to believe this was the real cause."

Applying this test to the case at hand, the absence of all other causes, therefore it was reasonable to presume that the presence of the poker was the real cause.

This is not an argument on rule to show cause, but to succeed here appellant must show that there was no evidence upon which the probability of the condition alleged might be submitted to the jury; that is, that the head of the plaintiff was struck by an iron poker and injured; that the said iron poker projected more than it should have done. His head could not have been struck if the poker did not project more than it should have done. If it only projected 3 or 4 inches, his head would not have been struck, but that his head was struck by an iron poker is manifested by the fact that he was all right immediately before the engine bearing the iron poker passed him; that it passed him projecting some distance, and that there was nothing between the point where it passed him, either of a permanent or temporary nature, to wound him on the head. That there was a tear on his cap, about where the blow would be struck by this iron poker. Every other possible cause was eliminated so far as it was within the knowledge of the plaintiff. Of course, the plaintiff is insane and could not himself testify and all that could be done was to collect every possible fact and put it in evidence. Although some of the witnesses called by the plaintiff swore directly that the iron poker did not project more than 3 or 4 inches, yet if he was struck by the iron poker, either they were mistaken in their testimony or were not testifying accurately, and the plaintiff was not bound by any one witness. It was on the whole case that the inference should be drawn. (*See Schrieber vs. Public Service*, 98 Atl. Rep. p. 316. As to cases

of circumstantial evidence, see *Wigmore,* Volume 1, section 26.) *Moore on Facts* sec. 598. As to the cases cited by the Appellant, *Ross vs. U. S.* and *Manning vs. Mutual Life Ins. Co.,* these are relied upon by the Appellee because they hold it is sufficient if the circumstances are provable. While it is not permissive to put an inference upon an inference, yet it is permissible if all circumstances are proved to draw an inference from these circumstances. Here all the circumstances were proved, the condition of the plaintiff before the engine bearing the iron hook passed him, his condition afterwards, the absence of projections, either temporary or permanent which might have injured him, the fact that he was injured and the fact that he could not have been injured if the poker was properly placed, all these taken together were sufficient to warrant the inference that he was struck by the iron poker.

Requests of Defendant

As to the request of the defendant, No. 3, it was to charge that the plaintiff took the risk of the negligence of a fellow servant, which the Court of Appeals has held he does not.

> Grybowski vs. Erie R. R. Co., 95 Atl. Rep., 746.

A request of the defendant No. 2 asked the court to charge that if the hook was in its usual position there could be no recovery. This overlooked the fact that the usual position might be an improper position. It might be usual for the servants of the defendant to carry the hook projecting so far that it was liable to strike any person near it. This would not exculpate the defend-

ant if the usual position was a negligent position. The plaintiff would not assume the risk of the accident unless he knew the danger, or should have known it, and even then it would be a jury question. But this request asks instruction to the jury that there is no action if the hook was carried in the usual position. This overlooked the fact that it might be usual for the employees on this engine to carry their hook in an improper manner.

Request three, asked the Court to charge that the plaintiff assumed the risk of injury from a fire hook carried in the usual position on a passing engine but there was no proof in this case as to what was the usual position so as to bind the jury. The plaintiff did not assume the risk unless he knew of the position or should have known it, because it was not a risk incident to the employment, the incidental risks such as cannot be obviated notwithstanding the carefulness of those conducting the business, they are not those which arise out of the negligence of the master or under the Federal act, those of the fellow servant, but they are such as arise inherently out of the employment. These risks of course are assumed, so also the risks which are obvious, but this request left out the condition that the plaintiff must have known of the usual position, which he must have, because the usual position was not one inherent or incident to the business but depended upon the way the people on the engine carried the hook. See *Horton v. Seaboard R. R.* 233 U. S. 504.

Request number four, asked instruction to the jury that if the hook was in a proper position when the engine left the Weehawken Yards, and was not moved by any employee of the company until after it passed Price's engine, there could be no recovery. But this left out of consideration this

fact: that if the hook was placed as some witnesses testified in the Weehawken Yards before the engine passed Price by the employees of the company, but so improperly placed and left that by reason of that improper placing and leaving by the motion of the train it was put in a position where it would strike Price, that there was no action. It left out of consideration that the proper leaving and placing of the hook when the engine left the Weehawken yards might be the proximate cause of its unusual position when it passed Price, and yet, if this was a fact the appellant asks for direction of a verdict in its favor. There is the added objection to this request that a Court is not required to apply the law to facts.

See the following case: *Blackman v. Ellis*—70 N. J. L. 267; 82 N. J. L. 358; 84 N. J. L. 730; 85 N. J. L. 573; 85 N. J. L. 703: B. & O. v. Whitacre 242 U.S. Purcell v. E 244 U.S.

This request also asked the Court to apply the law to facts, which the Court is not required to do. There was no request to charge the law as to obvious risk or incidental risk or any broad principles of law applying to the case, but these three requests are for the purpose of having the Court apply the law to the facts, which the Court is not bound to do.

If the jury found from these requests that the plaintiff could not recover if he leaned too far out of the cab window, that would be a matter of contributory negligence and was covered by the Court in its charge to the jury. See page of printed case.

Resumé

The plaintiff therefore argues that the main question before this court is whether there was any evidence to submit to a jury upon which they

would have a right to infer that the plaintiff was struck by an iron poker. Keeping in mind the doctrine of Justice Dixon in the case of *Wiley vs. R. R.*, 44 N. J. L. 247, as the test, and remembering that the jury had a right under the proof to find that there were no permanent obstructions between the place where the plaintiff called the signal and the place where he was found to be injured; that there were no transient obstacles or obstructions which could have struck him; that at the time he called the signal he was in perfect health and acting normally, that shortly after an engine passed him bearing an iron poker 12 feet long; that there was nothing else which could have struck his head; that when he arrived at the terminal he had been injured; that those who examined his head said they found no mark, they made only a casual inspection and were not physicians except one who was a physician in the pay of the railroad company; that blood was found on the pillow where his head rested on his way to the ambulance; that his wife and another witness found an egg shaped mark on his head where the tear in his cap would be; that his cap was torn at about the place where he was struck and this cap was never produced by the company although it was in their possession when he was taken into the waiting room; that the physicians who testified with the exception of those in the employ of the railroad company all swore that his condition was due to violence—the jury could not, certainly under these circumstances, be deprived of their legitimate function, which was to say whether under all these circumstances they found it reasonable to say that he had been struck by this iron poker. If he had been struck with the iron poker, he could not have been struck by it if it had

not been left in an improper position, therefore the persons in charge of it, the employees of the railroad company knowing the distance between locomotives and leaving it in a position where it would strike any one on a locomotive passing in the opposite direction, could be found guilty of negligence, under the Act of Congress governing causes of action of this kind and there should not have been a direction of a verdict. As to the requests, it has already been argued that they did not properly state the law and therefore the court was not bound to charge these requests and the judgment below should be affirmed.

Respectfully submitted,

ALEX. SIMPSON,
Attorney for Plaintiff-Appellee.

A

The brief of the Railroad Company, at page 38, line 5, says that the sufficiency of the evidence of negligence, in an action to recover under the Federal Employers' Liability Act, must be judged by the standard established by the Federal courts. It is immaterial when a Federal Employers' Liability action is tried in New Jersey whether it be the standard of the State courts as to the sufficiency of the evidence tending to prove negligence be established under the New Jersey State decisions or under the decisions of the Federal Courts, inasmuch as precisely the same rule as was laid down by the Court of Errors and Appeals in Nugent, Admr. vs. Suburban Electric Co., supra., has been unanimously laid down by the Supreme Court of the United States in the case of Meyers vs. Pittsburgh Coal Co., 233 U. S. 184 (same case, 58 Lawyers Ed., 906), reversing the Circuit Court of Appeals for the Third Circuit, whose decision is reported 203, Federal Rep. 221. This was a death act case brought for decedent miner Myers against The Pittsburgh Coal Co. It was claimed in this case that because no one saw Myers killed that therefore the testimony as adduced at the trial was insufficient to establish the negligence of the defendant. The question in the case was: Was negligence sufficiently proved or was it not sufficiently proved? At the trial of the case a jury in the District Court of the United States for the Western Circuit of Pennsylvania gave a verdict in favor of the plaintiff against the coal company, which was reversed by the Circuit Court of Appeals on the ground that there was insufficient evidence to connect the defendant with negligence towards the decedent, its employee. On writ of crtiorari, granted by the Supreme Court of the United States to review the decision of the Circuit Court of Appeals for the Third Circuit at Philadelphia, Mr. Justice Day delivered

the unanimous opinion of the Supreme Court of the United States, wherein the decision of the Circuit Court of Appeals was reversed and the judgment for Myers' death against the coal company remanded to the District Court of the United States for the Western District of Pennsylvania, for enforcement.

At page 192, continuing to page 193, in volume 233, U. S. Reports, Mr. Justice Day, on the question as to the test in the Federal courts as to what was a sufficiency of evidence in cases of this kind where the injured man himself could not testify, enunciated the following test:

"The opinion of the Circuit Court of Appeals placed the reversal largely upon the want of definite proof as to the manner in which Myers came to his death,—whether by contact with the wire, or, if so, whether that merely disabled him or he was only injured or stunned by the fall, was seized with vertigo or other sudden sickness and fell from the car for that reason, or lost his footing by some unexpected movement of the train, or voluntarily got off the car and stumbled and fell upon the track, or became bewildered in the dark, and mistakenly supposed himself to be in a place of safety. The court held that all these situations were more or less probable, and, in the absence of some more accurate means of ascertaining the true condition in this regard no recovery could be had for the wrongful causing of his death, and that an examination of the testimony brought the court to the conclusion that the jury should not have been permitted to guess as to the proximate cause of death. This question, however, was submitted to the jury and found against the defendant in the trial court. Unless the testimony was such that no recovery can be had upon the facts shown in any view which can be properly taken of them, the verdict

and judgment of the district court must be affirmed.

"That there was ample testimony to carry the question of negligence to the jury we have already said, and in any case it cannot be said as a matter of law that there was no evidence tending to show that Myers came to his death by the negligence of defendant in one or more of the ways charged in the petition. Considering the testimony, as it must be considered in determining questions of this character in appellate courts, in its most favorable aspect to the plaintiff below, we think the jury might well have found, in view of the place at which the body of Myers was found near to the wire, with his cap gone from his head, that he came in contact with that wire and was thrown to the ground, and that he survived from contact with the wire, carrying the voltage which it did, and while in this situation was run over and killed by the approaching motor car, the operator being unable to see his body upon the track because of the want of efficient light in the entry or in the motor car. We think reasonable men, considering the testimony adduced, might well have come to this conclusion, and that it was error in the appellate court to set aside the verdict for entire absence of testimony upon this subject. In our opinion, the trial court properly left the question to the jury upon testimony which, when fairly considered, might sustain the verdict. See Humes vs. United States, 170 U. S. 210, 42 L. ed. 1011, 18 Sup. Ct. Rep. 602."

This test is precisely the same test as was laid down by the Court of Errors and Appeals of the State of New Jersey in Nugent, Admr. vs. Suburban Electric Co.

The doctrine of Hughes vs. Atlantic City Rwy.

Co., 89 Atl. 769-770, is directly contradictory of these Utah and Oregon cases and this is a case in our own State. Here the Court says:

"When there is such explanation it is for the jury to decide just as in the ordinary case of whatsoever kind what the actual facts are and what inference should be drawn therefrom."

So that even after explanation, there would be a jury question under this case.

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In Stumpf vs. D. L. & W. R. R. Co., no one could identify the piece of coal. It might have been thrown by a person on the bridge. There is no such situation here, where the poker which struck the plaintiff was put in possession of the defendant.

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Order.

Hudson County Circuit Court.

In the Matter of the Appointment of a Next Friend, for Charles Price, an adjudged lunatic.	Action at Law. Order.

Upon reading the petition of Margaret Price, in the above matter, it is on this 5th day of January, 1917,

Ordered, that Margaret Price be appointed next friend of Charles Price, an adjudged lunatic, to prosecute for him a cause of action in the Hudson County Circuit Court against the New York Central & Hudson River Railroad Company, a corporation, or New York Central Railroad Company, a corporation.

LUTHER A. CAMPBELL,
Judge.

Petition.

HUDSON COUNTY CIRCUIT COURT.

To Honorable LUTHER A. CAMPBELL,
Judge of the Hudson Circuit Court:

The petition of MARGARET PRICE, of the Town of New Durham, in the County of Hudson, respectfully shows:

1. That she has been appointed guardian of her husband, Charles Price, who is insane and now confined in the New Jersey State Hospital for the Insane at Morris Plains, New Jersey.

2. That the said Charles Price has a cause of action against the New York Central & Hudson River Railroad Company, a corporation, or New York Central Railroad Company, a corporation.

3. That suit has been commenced in the Hudson County Circuit Court in the name of said Charles Price.

Your petitioner therefore prays that she may be appointed next friend of said Charles Price to prosecute said suit.

Your petitioner will ever pray, etc.

MARGARET PRICE,
Petitioner.

Petition

STATE OF NEW JERSEY,
COUNTY OF HUDSON, } ss.:

MARGARET PRICE, being duly sworn according to law, upon her oath deposes and says:

I am the petitioner above named and the matters and things therein set forth are true.

Subscribed and sworn to before me,
this 30th day of December, 1916,
at Jersey City.

MARGARET PRICE.

CHAS. NEWKIRK,
Commissioner of Deeds,
for New Jersey.

I, MARGARET PRICE, the wife of Charles Price, named in the foregoing petition, HEREBY CONSENT to act as his next friend.

Dated December 30, 1916.

MARGARET PRICE.

Amended Complaint.

Filed Jan. 11, 1917.

HUDSON CIRCUIT COURT.

CHARLES PRICE, by Margaret Price, his next friend, *Plaintiff*, *vs.* NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, a corporation, or NEW YORK CENTRAL RAILROAD COMPANY, a corporation, *Defendant.*	Action at Law.

The plaintiff Charles Price, a lunatic who sues by Margaret Price, his next friend who resides at No. 927 Main Street, in the Town of New Durham, in the County of Hudson, says that:

1. The defendant is a common carrier by railroad engaged in transporting freight and passengers from the state of New Jersey into other states and territories of the United States, and was at all times hereinafter mentioned.

2. The plaintiff was an employee of the said defendant engaged as a locomotive fireman, and at all times hereinafter mentioned, fired a locomotive attached to a train of cars carrying freight and passengers from the State of New York into the State of New Jersey.

3. That on the 16th day of February, 1915, at Weehawken, in the County of Hudson, while the plaintiff was so employed as an employee of the defendant in operating a locomotive pulling a

train transporting freight and passengers from the State of New York into the State of New Jersey, and while he was in the State of New Jersey, on a line of the defendant railroad, at Weehawken, in the County of Hudson, in the State of New Jersey, he was injured by reason of the negligence of the employees of the defendant, in that he was by reason of the negligence aforesaid, struck upon the head with a certain iron bar.

4. The negligence of the defendant consisted in this:

That the employees of the said defendant upon another locomotive, in passing the locomotive upon which the plaintiff was, had a certain iron bar of the length of about 12 feet, which said iron bar was left by the employees of the defendant on the locomotive upon which they were projecting out beyond the said locomotive in such a manner that a locomotive passing said locomotive would strike the said iron bar or the said iron bar would strike the said locomotive or person thereon, and while the plaintiff's locomotive was passing the said locomotive upon which the said iron bar was so carelessly exposed, the said iron bar, without fault on the part of the plaintiff, came in contact with the head of the plaintiff and severely and permanently injured the plaintiff in and about his head.

5. The plaintiff was at all times in the exercise of due care for his safety.

6. By reason of said accident, plaintiff was compelled to expend money in endeavoring to obtain a cure, $1,000 and he has lost wages to the amount of $3,000 and will lose wages to the amount of $10,000, and the plaintiff was otherwise injured.

The plaintiff demands $50,000.

ALEX. SIMPSON,
Attorney of Plaintiff.

Answer.

Filed Jan. 26, 1917.

HUDSON COUNTY CIRCUIT COURT.

CHARLES PRICE, by Margaret Price, his next friend,
Plaintiff,

vs.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, a corporation, or NEW YORK CENTRAL RAILROAD COMPANY, a corporation,
Defendant.

} Action at Law.

The defendant, NEW YORK CENTRAL RAILROAD COMPANY (created by the merger of the New York Central & Hudson River Railroad Company and other railroad corporations), the defendant herein, answering the complaint of the plaintiff, says that:

FIRST DEFENCE:

(1) It admits the first paragraph and says that at said times it was also a common carrier by railroad engaged in intrastate commerce within the State of New Jersey.

(2) It admits that on the 16th of February, 1915, plaintiff was in the employ of the defendant as a locomotive fireman, and that during a part of said day he was acting as fireman on a locomotive attached to a train of cars carrying passengers from the State of New York into the State of New

Jersey, and also carrying passengers between points within the State of New Jersey.

(3) It denies the third paragraph.

(4) It denies the fourth paragraph, and says that neither the defendant nor its employees were negligent in the premises.

(5) It denies the fifth paragraph.

(6) It denies the sixth paragraph.

SECOND DEFENCE:

(1) The proximate and efficient cause of any injury sustained by the plaintiff was the plaintiff's negligence.

(2) Any injury sustained by the plaintiff arose out of the risks incident to his employment, which risks were assumed by the plaintiff.

THIRD DEFENCE:

(1) On the 22nd day of September, 1915, plaintiff by Margaret Price, his guardian, filed his petition in the Court of Common Pleas of the County of Hudson under the provisions of Chapter 95 of the Laws of 1911, and amendments thereof and supplements thereto, and in and by said petition he demanded compensation of this defendant under and pursuant to the provisions of said statute, for the same causes and the same injuries set out in the complaint herein; and thereupon such proceedings were had upon said petition and the answer of this defendant thereto, that the same was brought to trial in said Court before Honorable George G. Tennant, one of the Judges thereof, who after hearing the proofs produced by the parties, and considering the argument of counsel, found and determined that the relations between said Charles Price and this defendant at the time

of said alleged injuries were governed by the provisions of said statute; and that said plaintiff Charles Price was entitled to recover compensation pursuant to the provisions thereof. The proceedings on said petition for compensation are still pending, and the findings and conclusions of said Judge therein still remain in full force and effect, as by the record thereof appears, by reason whereof the plaintiff is barred from a recovery herein.

VREDENBURGH, WALL & CAREY,
Defendant's Attorneys.

Rule to Show Cause.

Filed Nov. 22, 1917.

HUDSON COUNTY CIRCUIT COURT.

CHARLES PRICE, by Margaret Price, his next friend, *Plaintiff,* *vs.* NEW YORK CENTRAL RAILROAD COMPANY, *Defendant.*	Action at Law.

Application for this rule having been made within six days after the return of the verdict herein,

IT IS, on this 22nd day of November, Nineteen hundred and Seventeen,

ORDERED, that the plaintiff show cause before this Court on the Fourteenth day of December, 1917, at the Court House in Jesrey City, at 10 o'clock in the forenoon, why the verdict herein should not be set aside and a new trial granted.

AND IT IS FURTHER ORDERED that the objections noted by the defendant to the refusal of the court to order a non-suit, the refusal of the court to direct a verdict in favor of the defendant, and the refusal of the court to charge as requested, be and the same are hereby expressly reserved to the defendant as grounds for appeal.

LUTHER A. CAMPBELL,
Judge.

Reasons.

Filed Jan. 18, 1918.

HUDSON COUNTY CIRCUIT COURT.

CHARLES PRICE, by next friend, *Plaintiff*, *vs.* NEW YORK CENTRAL RAILROAD COMPANY, *Defendant.*	Action at Law. On Rule to Show Cause.

The defendant states the following reasons for setting aside the verdict in the above entitled action.

(1) Said verdict is against the evidence.

(2) Said verdict is against the clear weight of the evidence.

(3) Said verdict is excessive.

(4) The verdict was the result of the jury's sympathy for the plaintiff, and their bias and prejudice improperly aroused against the defendant.

Dated January 10, 1918.

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant.

On Rule, Etc.

Order Discharging Rule.

Filed March 2, 1918.

A Rule to Show Cause having been allowed in the above cause, why a new trial should not be granted, Messrs. Vredenburgh, Wall & Carey, having been heard for the rule and Alex. Simpson, against the rule and the Court being of the opinion that the rule should be dismissed,

It is on this 21st day of February, 1918, ORDERED, that the said rule to show cause be and the same is hereby discharged.

LUTHER A. CAMPBELL,
Judge.

Entered
On Motion of
ALEX. SIMPSON,
Attorney for Plaintiff.

This action was tried before Judge Luther A. Campbell with a jury at the Hudson Circuit, November 21, 1917.

The cause having been heard and submitted to the Jury they returned their verdict as follows:

They say they find for the plaintiffs, and against the defendants and they assess the damages of the plaintiff on occasion of the premises at the sum of Thirty Thousand ($30,000.00).

Whereupon it is adjudged that the plaintiffs recover of the defendants the sum of Thirty Thousand Dollars damages ($30,000.00) and his costs which are taxed at Ninety-eight Dollars and Fifty cents ($98.50) making in the whole the sum of Thirty Thousand and Ninety-eight ($30,098.50) Dollars and Fifty Cents.

Judgment entered this 21st day of November, 1917.

LUTHER A. CAMPBELL,
Judge.

Attest:

Clerk.

On Rule, Etc.
Order Discharging Rule

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

LUTHER A. CAMPBELL,
Judge.

Notice of Appeal.

Filed March 2, 1918.

To Alexander Simpson, Esq.,
Attorney for Plaintiff.

Take Notice: That the defendant appeals to the Court of Errors and Appeals of the State of New Jersey, from the whole of the judgment entered in this cause.

Dated February 26, 1918.

Respectfully yours,
VREDENBURGH, WALL & CAREY,
Attorneys for Defendant.

Served February 28, 1918.

Recognizance.

Filed March 2, 1918.

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

Be it remembered that on this 1st day of March, 1918, personally appeared before me Pierre F. Cook, one of the Supreme Court Commissioners of the State of New Jersey, at Jersey City in said State, New York Central Railroad Company, a corporation of the State of New York, by William H. Carey, its Attorney in Fact, on its behalf as principal, and National Surety Company, a corporation of the State of New York, by Henry W. Runyon its resident Vice-president in its behalf as surety, who did jointly and severally acknowledge said corporations respectively to be indebted to Charles Price in the sum of Sixty Thousand, two hundred ($60,200) Dollars, to be made and levied of their respective goods and chattels, lands and tenements and real estate, if default be made in the following conditions:

Whereas, Charles Price by Margaret Price, his

next friend, lately recovered judgment against the New York Central Railroad Company in an action at law in the Hudson County Circuit Court for the sum of Thirty Thousand ($30,000) Dollars damages, besides costs to be taxed, as by the record thereof will appear.

And whereas the New York Central Railroad Company has taken an appeal from the said judgment to the New Jersey Court of Errors and Appeals in the last resort in all causes.

Now therefore, if said New York Central Railroad Company shall prosecute the said appeal with effect and also pay and satisfy, if said judgment be affirmed, all damages and costs in the former judgment, and all costs and damages to be awarded for delay of execution, then this recognizance to be void, else to be and remain in full force.

Taken and acknowledged this
1st day of March, 1918.
Pierre F. Cook,
Supreme Court Commissioner of New Jersey.

NEW YORK CENTRAL
RAILROAD COMPANY,
By Wm. H. Carey,
its Attorney in Fact.

NATIONAL SURETY COMPANY,
By Henry W. Runyon,
its Resident Vice-President.

Attest:
P. E. Wiles,
Resident Assistant Secretary.
[seal]

The foregoing recognizance is hereby approved as to form and sufficiency of surety.

PIERRE F. COOK,
Supreme Court Commissioner of New Jersey City.

Grounds of Appeal.

Filed March 27, 1918

NEW JERSEY COURT OF ERRORS AND APPEALS.

CHARLES PRICE, by next friend, *Plaintiff*, *vs.* NEW YORK CENTRAL RAILROAD COMPANY, *Defendant.*	Action at Law. On Appeal.

The Appellant states the following grounds of appeal:

(1) The Court overruled defendant's motion for a judgment of non-suit.

(2) The Court overruled defendant's motion to direct a verdict for defendant.

(3) The Court refused defendant's request to charge the jury as follows:

"2. If the fire hook on engine 3189 was in the usual position in which the hook was carried when not in use, when that engine passed the engine on which Price was employed, the verdict must be for defendant."

(4) The Court refused defendant's request to charge the jury as follows:

"3. Price assumed the risk of injury from a fire hook carried in the usual position on a passing engine, and if injured by a hook

carried in the usual position he cannot recover in this action."

(5) The Court refused defendant's request to charge the jury as follows:

"4. If the fire hook was in the position testified to by Hinkley, Lee and Vaughn, when engine 3189 left the Weehawken Yards and was not moved by any employee of the company until after the engine passed Mr. Price's engine, there can be no recovery in this case."

VREDENBURGH, WALL & CAREY,
Attorneys for Appellant.

Dated March 2, 1918.

Service of a copy of the within grounds of appeal is hereby acknowledged this 4th day of March, 1918.

ALEX. SIMPSON,
Attorney for Plaintiff.

Testimony.

HUDSON COUNTY CIRCUIT COURT.

CHARLES PRICE, by next friend, *against* NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.	AT LAW.

ALEXANDER SIMPSON, ESQ., *for Plaintiff.*

VREDENBURGH, WALL & CAREY (MR. CAREY), *for Defendant.*

The above entitled case was tried November 19, 1917, before Hon. Luther A. Campbell, Judge, and a jury.

MR. SIMPSON opened the plaintiff's case to the jury.

MR. CAREY opened the defendant's case to the jury.

JACOB FOSTER, sworn.

Direct Examination by Mr. Simpson:

Q. Where do you live, Mr. Foster? A. Haverstraw, New York.

Q. What is your business? A. Locomotive engineer.

Q. You were examined as a witness by me in the Common Pleas Court on the inquiry into the supposed injury to Mr. Price, weren't you? You remember being on the stand in the other room? A. Yes, sir.

Q. Now, on the 17th of February, 1915, what was your business?

Mr. Carey: 16th of February.

The Court: The 16th, the allegation is.

Q. On the 16th day of February, in the year 1915, what was your occupation? A. Locomotive engineer.

Q. And who was your fireman? A. Charles Price.

Q. And where were you coming from that night? A. From Haverstraw to Weehawken.

Q. What kind of a run did you have? A. Passenger train.

Q. Coming from where, Haverstraw? A. Coming from Haverstraw.

Q. After you approached the tunnel, Weehawken tunnel, did Price give you any signal in regard to a block? A. Called out the signal.

Q. Was that the customary thing to do, was it? A. Yes, sir.

Q. And where was that signal? How far west of the mouth of the tunnel? A. I should judge about between four to five hundred feet.

Q. And you got in the tunnel then. Were you passed by anything in the tunnel? A. Passed a train, just outside of the tunnel.

Q. Going where? A. Coming west.

Q. What kind of a train was it? A. Freight train.

Q. Do you know who the engineer and firemen were on it? A. Why, James Lee.

Q. And a man named Hinckley was the fireman? A. Yes.

Q. Now, then, after Price called out the block when did you next see him? A. Arriving at Weehawken, after we passed through the tunnel.

Q. Was there anything that attracted your at-

tention as the train came into the station at Weehawken? Anything that Price did or failed to do? A. Nothing whatever.

Q. Well, didn't he fail to light a light or something? A. He failed to perform his duties after we arrived.

Q. That is what I say. What was that? A. Lighting of the light; classification lights to return.

Q. Where should they be lit? A. Weehawken.

Q. After you arrived or before? A. After we arrived.

Q. When you saw that he did not light those lights what did you do? A. I asked him what was the matter?

Q. Well, did you see him? A. Yes, sir.

Q. Where was he? A. In the cab.

Q. And how was he acting? A. Standing up in the cab facing—he had his back towards me.

Q. What was his appearance? A. Well, nothing, only he didn't start to perform his duties the same as he used to, and I asked him what was the matter.

Q. Did you have some conversation with him which made you look at his head? A. Oh, he asked me if there was any blood running—

Mr. Carey: Wait a moment.

Q. I didn't ask you that. Didn't you have some conversation which cause you to look at his head? A. No, sir.

Q. You didn't have any conversation with him that caused you to look at his head? Price didn't say anything to you that made you look at his head to see whether he had an injury? A. Yes, he asked me—

Mr. Carey: Wait a moment.

The Court: That is the answer, "Yes."

You did have some talk with him?

The Witness: Yes.

Mr. Carey: The witness is not to state any conversation.

The Court: No.

Q. What was his condition after this conversation? Did you see that he got stronger or weaker, or how did he get? A. Why, he acted somewhat slightly weaker.

Q. Slightly weaker? A. Yes.

Q. Well, when you saw him act slightly weaker what did you do? A. I took him away from towards the boiler head of the engine so he wouldn't get no—wouldn't get burned.

Q. What did he do that caused you to do that, that made you think he might get burned if you didn't take him away? How did he act? A. Why he seemed to act in a sort of weakened condition.

Q. How did he seem to act as to his mind? Did he seem to be clear or to be dazed? A. Seemed to be dazed.

Q. Then what did you do? A. Led him out through the gangway between the engine and tank.

Q. Was he leaning against anything before you led him out? Q. Leaned against the seat box.

Q. In what position, generally? A. With his arms on the seat box.

Q. And where was his head? A. His head was erect.

Q. Leaning against anything? A. No.

Q. You led him out and then what did you do? A. Led him out the gangway and called for help to take him off the engine.

Q. How was it necessary? How was he acting that you had to call for help? A. Seemed to be acting in a weakened condition.

Q. Was he sagging down, going down? A. Yes, sir.

Q. Did you get the help? A. Yes, sir.

Q. Now, at the time you took him out he had a cap on his head, didn't he? A. Why, I don't— (answer unfinished by the witness).

Q. You saw his cap, didn't you? A. Yes.

Q. And when you led him out didn't he still wear the cap? A. He still had the cap, yes.

Q. And didn't you examine it in the station master's office after he took it off? A. Why, I didn't make no examining.

Q. You looked at it? A. I saw the cap.

Q. What did you see in reference to a tear on the side of the cap? A. I saw a slight tear on the side of the cap.

Q. Whereabouts on his head would that be, where the tear was? A. Well, we wear the peak forward; it would be on the left side of his head.

Q. That is about where on the left side of his head, above his ear? A. Above his ear, or up here, near his temple.

Q. Or where? A. Near about his ear.

Q. About his ear; and where was the last place you saw the cap? A. At the station master's office.

Q. Was he wearing it, or had some one taken it off him then? A. I don't remember whether he had it on his head or whether the train men had it then, because I had to leave him to return to the engine.

Q. Where was he when you left him? A. At the station master's office.

Q. Lying down or sitting up or standing? A. Standing up.

Q. And he was standing up when you went away, was he? A. Yes.

Q. How was he acting? Was he talking with

anybody or was he silent? A. Why, he made a few remarks to us, but—

Q. I don't want to know what he said. I want to know how he was acting. Was he dazed or stupified, or was he bright and clear? How was he acting? A. No, he was acting somewhat dazed.

Q. And you said he was sagging at the knees when you got somebody to help you. How did he stand up in the station master's office? Anybody have hold of him? A. He was resting on me and resting on the trainman.

Q. And when you walked out did you lay him down or was he put down by somebody, or what was the case? A. I couldn't say that, because I had to return to the engine.

Q. But when you last saw him, when you walked out, you have described the man leaning on you and then you walked out. Now, you didn't walk away from him and let him fall on the floor, did you? A. No; he was assisted by the other man that was with him.

Q. And you went out then? A. Yes; I went out.

Q. How long had he been a fireman on your train? A. About two months.

Q. And this block that he called out, on the west side of the tunnel, what was it he would do to call out that block? How would he call it out? A. To give the indication.

Q. What would he say? A. Clear signal.

Q. Clear signal, and was it a clear signal? A. Yes.

Q. And you went in the tunnel. Now, would he have to call any signal on the other side, the east side of the tunnel? A. No.

Q. He would have to do nothing until you got in the depot? A. Not until we got into the depot.

Q. And about how far is the depot from the

east mouth of the tunnel—about? A. Oh, I don't know exactly what that distance is; about a thousand feet.

Q. Very clear, isn't it? I mean from the east mouth of the tunnel to the station head is very clear? A. Between five and hundred feet.

Q. Your train was carrying passengers from Haverstraw to New York, wasn't it? A. Yes, sir.

Q. Haverstraw is in New York, in the state of New York?

Mr. Simpson: New York.

Cross Examination by Mr. Carey:

Q. Do you remember what engine you had on that night? A. Engine 907.

Q. I show you a photograph and ask you if that photograph is a photograph of the fireman's side on that engine 907 which you had that night? A. (After examining photograph) Yes, sir.

Q. And is that a correct representation of the fireman's seat, on the fireman's side of the engine? A. That is correct. There is the window and the seat.

Mr. Carey: I ask to have that marked for identification.

(Photograph marked D-1 for identification.)

Mr. Carey: I think you have seen this before, Mr. Simpson?

Mr. Simpson: Yes.

Q. I notice what appears to be the end of the boiler there? A. Yes, sir; that is the boilerhead.

Q. What is shown here is the end of the boiler? A. That is the end of the boilerhead.

Q. Extending across the picture? A. Yes.

Q. And the fireman's seat is just below the window there? A. Just below the window, and just as in the photograph there.

Q. I see down below the fireman's seat some little distance what looks like a board or footboard? A. That is the step in the back of the engine to get up on the runningboard, up on the seat.

Q. Is there a window in the front of the fireman's cab? A. Yes, sir.

Q. I show you another photograph which seems to be a photograph of engine 907 and ask you if that is a photograph of the exterior of engine 907? A. (After examining photograph) Yes, sir.

Q. And which side, engineer's side or fireman's? A. Fireman's side.

Mr. Carey: I ask to have that marked also.

Photograph marked D-2 for identification.)

Q. I notice in that photograph what appears to be a window in the front of the fireman's cab; is that right? A. Yes, sir.

Q. There is a window there? A. There is a door there.

Q. A door? A. A door.

Q. Which way does that door open? A. In.

Q. A glass door, is it? A. About half of it; the top part of it.

Q. You say the engine on your train, and the engine on the train going in the opposite direction passed outside of the tunnel? A. Outside of the tunnel.

Q. And between the tunnel and what did these two engines pass? A. Between the tunnel and the New Durham station.

The Court: That is between the west end of the tunnel and the New Durham station?

A. Between the end of the tunnel and the New Durham station.

Q. On which side of the engine are the signals

as you go through the tunnel? A. On the engineer's side.

Q. And who gets a view of the signals through the tunnel first, the fireman or the engineer? A. The engineer only.

Q. Is the fireman able to see the signals going through the tunnel? A. He is not—m-m—they are usually obstructed quite a little by smoke; it is quite a strain for the engineer to see them.

Q. And where are the signals? A. On the right hand side.

Q. And what are they fastened to? A. The side of the tunnel.

Q. The tunnel wall? A. Yes.

Q. And that is so all the way through the tunnel? A. Well, the signals are after you pass midway in the tunnel. They give you the indication.

Q. Where there are signals in the tunnel they are on the wall? A. On the right hand side.

Q. On the right hand side? A. Yes.

Q. In positions where the engineer sees them before the fireman; is that right? A. That is right.

Q. When your engine passed the engine of the train going in the opposite direction can you tell whether you were nearer the New Durham station or nearer to the west portal of the tunnel? A. About half way between the station and the tunnel.

Q. About half way? A. About half way.

Q. What kind of a train was this that went in the opposite direction? A. Freight train.

Q. And do you know whether it was a long train or short train? A. Well, I don't—I can't——

Q. If you don't know, just say so? A. No.

Q. At about what rate of speed was your train going as you passed the New Durham station and approached the tunnel? A. About twenty or twenty-five mile an hour.

Q. And is that the speed at which it was going at the time you passed the other train? A. Yes, sir.

The Court: And when was that engine passed, before your fireman called this signal that you have spoken of or afterwards?

The Witness: After.

The Court: That is, you passed this freight train——

The Witness: Between the signal and the tunnel.

The Court: So that, if you were right before, at that point where the signal was called was four or five hundred feet from the tunnel?

The Witness: Yes.

The Court: Then you passed this train within that four or five hundred feet of the west portal of the tunnel?

The Witness: Yes, sir.

Q. Now, Mr. Foster, you say four or five hundred feet. Do you know definitely how far that distance is? A. I don't know exactly; not exactly.

Q. And may it not be considerably more than four or five hundred feet? A. It may be more.

Mr. Carey: We will have the exact distance given.

The Court: You understand I was quoting him from his direct examination?

Mr. Carey: Yes, but I wanted to clear that up. I recall that fact.

Q. You didn't notice the cap until you got down to the station? A. No, sir.

Q. In the station master's office? A. In the station master's office.

Q. Did he have his cap on at that time when you

noticed it or was it off? A. No, it was off; the trainman had it.

Q. Then it was taken off? A. Yes, sir.

Q. Will you describe this cap? Describe the cap? A. The same black cap made of thin cloth.

Q. And it is material that would be easily torn? A. Very easily.

Mr. Simpson: I object to that on the ground that he is no expert on materials. He cannot testify as an expert on whether it be easily torn or not. They have the cap. Let them produce it and the jury will say——

Mr. Carey: Who says we have the cap?

Mr. Simpson: He says so.

Mr. Carey: No, he does not.

Q. You are familiar with caps of that kind, are you? A. I am.

Q. Is the material thick or thin? A. Thin.

Q. How thin? Oh, I could not give you the——

Q. Well, comparatively; thick as a sheet of paper? A. Oh, yes, a little heavier than newspaper.

Q. Little heavier than newspaper? A. Yes.

Q. But it is very light material? A. Yes.

Q. Very thin? A. Very thin material.

Q. Do you know what the name of the material is? A. No, I do not.

Q. Do you wear a cap of the same kind? A. No, sir.

Redirect Examination by Mr. Simpson:

Q. What kind of cap do you wear? A. Oh, mine is probably a little different material.

Q. How different? A. A little heavier.

Q. How different is it? A. Different shape.

Q. Have you examined both these caps, his and yours—— A. No; he used to wear a different shaped cap than I did.

Q. How about the material? Have you tested the material as against your cap? A. I know mine is heavier goods.

Q. How do you know? Have you weighed them in your hands? A. No.

Q. Just by looking at them? A. It would be by looking at them.

Q. You never were a cap maker, I suppose, were you? A. No.

Q. But you could tell just by looking at the cap he had on his head that it was thinner than the one you had on your head? A. No, it was different material.

Q. What kind of material was it? A. Black material.

Q. What was it, gingham, cotton, silk, ramie fibre? A. I couldn't tell you that.

Q. You don't know that? A. No.

Q. What was the material of your own cap? A. I don't know the name of the goods. I couldn't tell you that.

Q. How long have you worn the cap that you have now without it being torn?

Mr. Carey: I object to that.

Mr. Simpson: He has called him as an expert on caps. I want to show what he knows about caps.

The Court: I would not say that he has attempted to use him as an expert on caps.

Mr. Simpson: Your Honor has allowed him to prove it was light material; it was lighter than his; how easily torn it was.

The Court: Yes.

Mr. Simpson: Certainly I have a right to search this man to find out what he knows about caps.

The Court: All right; go ahead.

Mr. Carey: Objection noted.

Q. How long have you worn this cap? A. I couldn't tell you that.

Q. Don't know that? A. I wear it until it gets dirty and dispose of them.

Q. How long have you had this cap under observation of Price's which you testified about? A. How long?

Q. Yes; how long have you had it under observation, a year or a month? How long had he worn it that you seen it? A. The man only worked with me about two months.

Q. Had he the same cap all the time? A. To my recollection, the same style of cap. I don't know that it was the same one or not.

Q. Now, this signal,—do I understand you testified to his Honor Price had given the signal before you passed the freight train, had he? A. Yes.

Q. That was the last you knew of what he was doing until you saw him in the station? A. Yes.

Q. And the freight train you think you passed —your engine passed its engine when you were four to five hundred feet west of the tunnel, did it? A. Well, about half way between that distance and the station.

Q. What distance in feet was it? A. I couldn't tell you that because I haven't got the measurements of the tracks.

Q. Well, you did approximate it, didn't you? Isn't it about four or five hundred feet that you passed that freight engine, that your engine and that engine passed—four hundred feet west of the tunnel? Or, if you didn't testify that way, how far east of the signal was it that your engine and that one passed? A. I should judge about three hundred feet.

Q. East of the signal. The signal is about two thousand feet east of the tunnel, isn't it? A. I couldn't tell you that.

Mr. Carey: It is nearly fourteen hundred feet, we will show, by measure. We know what is the distance.

Q. Which side of your cab was Price on? Was he on the side nearest to the engine or were you nearest to the engine A. He was on the side toward the engine.

Q. And as he passed it would he pass the fireman nearest to him or the engineer nearest to him? A. The fireman.

Q. The fireman nearest to him? Now, these pictures that you have identified, this picture you have been asked about, is this the cab window here (indicating)? A. I was not asked about this one. I don't know anything about that one.

The Court: It was the interior or the cab of 907.

That is D-1.

Q. This shows no glass there. Is the glass out or is the window down? A. No; there is a slide window there; it slides forward; and you can pull that back to close it.

Q. You can open it and look out on the side? A. Yes.

Mr. Carey: Speaking of the side window.

The Witness: There is the cab door in the front there, and half the upper end has got glass in it.

Q. And this is the interior of the same, is it? A. That is the interior.

Q. And this seat box, the man sits on this, the fireman? A. That shows the fireman's seat box.

Q. Behind the window. And this window can be opened? A. Yes, sir.

The Court: This window you are speaking of; which window is that, on the side?

The Witness: On the side of the engine.

Mr. Simpson: These pictures have not been offered in evidence, but it is the one showing on the side of the engine. I cannot offer them or I would offer them.

Mr. Carey: I will offer them now.

Mr. Simpson: All right; put them in.

The Court: They will be marked for evidence, then, instead of for identification.

(D-1 and 2, for identification received in evidence.)

(RECESS to 2 o'clock.)

(After recess.)

Mr. Carey: If your Honor please, I would like to recall Mr. Foster for a question or two.

JACOB FOSTER, recalled.

Cross Examination by Mr. Carey:

Q. Mr. Foster, you testified to a block signal at the westerly end of the tunnel. I show you a photograph and ask you if that is a photograph of the westerly end of the tunnel, and if the block which you see there is the block signal which you spoke of in your former testimony? A. Yes; that is the one.

Q. And your train was on the right hand of the two tracks? A. On the right hand.

Q. Where that arrow is? A. Yes, sir.

By Mr. Simpson:

Q. What track were you on, Mr. Foster? A. On the eastbound.

Mr. Carey: He was on that; I just want to have it marked.

Mr. Simpson: Where the arrow is?

Mr. Carey: Yes; he was on the track where the arrow is. Shall I offer it?

Mr. Simpson: Yes; I have no objection.

(Photograph marked D-3 in evidence.)

Q. After you reached the station with Mr. Price did you look at his head? A. Yes, sir.

Q. Were there any marks on his head? A. I couldn't see any.

Q. Any blood that you saw at all? A. I couldn't see anything.

Q. Did you see him after the time that you saw him at the station? A. I saw him at the hospital; I went up there several times.

Q. Did you see any marks on his head? A. I did not.

Mr. Carey: That is all.

By Mr. Simpson:

Q. Why did you look at his head? A. How is that?

The Court: Why did you look at his head? I suppose you mean when he first looked at it.

Mr. Simpson: No; I just asked him when he looked at his head?

A. He complained of his head.

Q. Complained about his head? A. Yes.

Q. That is what made you look at it A. Yes.

Q. What did he say about his head?

Mr. Carey: I object to what he said.

Mr. Simpson: He has gone into the examination of his head. I have the right to find out why he examined his head, what it was this man said.

The Court: Well, if he complained of pain and things of that sort, why isn't that relevant, Mr. Carey?

Mr. Carey: I do not think it is relevant, if the court please. I have simply asked this man if he looked at his head, and what he found.

The Court: Yes.

Mr. Carey: I haven't asked him at all what was said, and what was said is simply hearsay; and, moreover, they say that this man is of unsound mind. What he said could not be evidence in this case to bind us in any event.

Mr. Simpson: I will withdraw it.

Q. You did examine his head. Where were you when you examined his head? A. At the hospital.

Q. And at the station master's office? A. No.

Q. You didn't look at it there at all? A. No.

Q. And how long afterwards that you went to the hospital? A. The following day.

Q. That was the first examination you made of his head, was it?

Q. You are not a physician, are you? A. No, sir.

Q. You have no experience in palpating the skull to find fracture or anything of that kind? A. No, sir.

Q. You simply looked at it and you saw nothing? A. I saw nothing.

Q. That excited your interest. When you looked at it in the hospital was his hair on or had it been shaved off? A. Well, I don't just recollect that, but as near as I can remember it was cut a little shorter than the usual amount of hair on his head.

Q. But it had not been shaved to his skull at all? A. No.

Q. As you remember it, the hair was a little bit shorter than usual. Now, what kind of an exam-

ination did you give his head? A. Only just looked at it.

Q. Well, did you take it with your hands and split the hair? A. No, sir.

Q. You just looked at it from where you stood? A. That is all.

Q. And as far as you could see there was nothing there? A. I couldn't see anything.

Q. And that is the first examination you made that you referred to? A. Yes, sir.

Q. And did you fix the time for that? That was the next day, you say. What time of day? A. I don't know what the hospital hours are, but whatever the hours are for admission.

Q. Was it afternoon or morning? A. I went about half past ten or eleven o'clock.

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

Q. How long were you up there? A. Oh, perhaps half an hour.

Q. Did you talk to him? A. No answer.

Q. When you left him in the station master's office who was in the room? A. Why, the station master and the trainmen. I don't remember whether the conductor was in there or not.

Q. What is the station master's name? A. L. Seaman.

Q. L. Seaman. Who took his cap? Who had Price's cap when you went out? A. That I don't remember who had his cap.

Q. It had been taken off when you saw the tear in it, hadn't it? A. Yes, it had.

Q. Now, you cannot tell us who had it when you walked out of the room, can you? A. What is that?

Q. You cannot tell us who had that cap when you walked out of the room, can you? A. No, I don't recollect.

Q. Don't know that. Now, who was present in the room when you walked out? You say the station master, Seaman; the conductor—what is his name? A. Well, I don't know whether the conductor was in there for positive or not, but the trainman that helped to escort him.

Q. What is his name? A. Nearpass.

Q. So to the best of your recollection there were only three people in the room when you went out, inclusive of him? There were three people and himself? A. Yes.

Q. And where is that office, on the ground floor or upstairs? A. On the ground floor.

Q. Is Seaman in the room to-day, the station master? Is he here? A. Yes, sir.

Q. Do you know him? And how about the trainman, is he here, who was in the room? A. I don't see him.

Q. Don't see him in the court. You say that you were on this track shown you in the picture; is that eastbound or westbound track? A. Eastbound track.

Q. And how many tracks are there going through the tunnel—— A. Two.

Q. Where this track is? A. Two.

Q. East and westbound? A. East and west.

Q. And you told Mr. Carey that the signals were all on your side, fastened to the wall of the tunnel? A. Yes, sir.

Q. None on the fireman's side? A. No, sir.

Q. And no poles between the tracks or anything of that kind? A. No, sir.

Q. Perfectly clear way? A. Clear way.

Q. And from the time you passed the freight until you got through the tunnel there were no signals on this side at all that could have struck him, were there? A. No, sir.

Q. And there were no poles on his side that could have struck him? A. No, sir.

Q. Just a clear track there? A. Clear track.

Mr. Simpson: I think that is all.

The Court: Is that all, Mr. Carey?

By Mr. Carey:

Q. Did you at any time see any blood on Mr. Price's head or face? A. I did not.

Mr. Carey: That is all.

By Mr. Simpson:

Q. What time was it you arrived at the terminal? A. About seven thirty.

Q. At night? A. Yes, sir.

Q. And you made no particular examination of his head and face to see if there was blood, did you? A. No.

Mr. Carey: That is all.

CHARLES FOLK, sworn.

Direct Examination by Mr. Simpson:

Q. Where do you live, Mr. Folk? A. Hudson Heights, New Jersey.

Q. And on the 16th of February, 1915, what was your occupation? A. Why, I was working for Mr. Quinn.

Q. And what was Mr. Quinn's business? A. Undertaker.

Q. Were you called to the West Shore station with an ambulance to get a patient that night, to get this man Price? A. Yes, I was.

Q. What time did you get to the station? A. Well, I couldn't say.

Q. Well, approximately? A. Well, I couldn't—I would not want to guess at it.

Q. Well, you got there anyhow at night? A. I got there.

Q. And you got Price, didn't you? A. Got Price.

Q. What kind of a wagon did you take him in? A. Ambulance.

Q. Did it have a pillow in? A. Pillow and cot.

Q. And cot. Before you put him in what was the condition of this pillow, the pillow case? Was that clean or not? A. Clean.

Q. You prepared, did you, for the trip? A. No, we prepare after we come back from each trip.

Q. Well, it was clean when you went out? Now, then, did you take him to the hospital? A. Took him to the hospital.

Q. Who put him in your wagon? A. Well, there were some men there gave me a hand to get him in.

Q. And you took him to the hospital? A. Took him to the hospital.

Q. Now, then, what was the condition of your pillow case after you took him out with reference to blood? A. Well, there was probably a square foot of blood there.

Q. A square foot of it? A. About a square foot.

Q. On the pillow case? A. On the pillow case.

Mr. Simpson: Cross examine.

Cross Examination by Mr. Carey:

Q. Did you help carry Price to the ambulance? A. Yes, sir.

Q. Where was he when you first saw him? A. Well, he was probably between the station master's office and the driveway there.

Q. What was his position when you first saw him? A. They were carrying him out.

Q. Who was carrying him? A. That I couldn't say, some employees there.

Q. You saw him as he was being taken to the ambulance? A. That was the first I saw of him.

Q. Did you see any blood on his head or face at that time? A. No, I didn't look.

Q. Did you see any?

Mr. Simpson: I object on the ground that he has answered that he didn't look for it. Of course he didn't see if he didn't look for it.

Q. Could you see his face? A. Yes; I could see his face.

Q. You saw his head? A. No; I didn't see his head.

Q. Didn't see his head; why not? A. His head was behind him, his face was just facing me.

Q. Feet first? A. No, face first.

Q. And how near were you to him before he was put in the ambulance? A. Well, I was right with him from once I got there.

Q. And you assisted in putting him into the ambulance? A. Yes, sir.

Q. Describe what you did in putting him into the ambulance? A. Why, I helped him up on to the cot and put him in the ambulance.

Q. You helped him up? A. Well, there was probably two or three others there.

Q. Was he walking as he came to the ambulance? A. No, he couldn't walk.

Q. He was being carried. In what way did you assist him in? A. Well, I opened the door and got the cot half way down.

Q. Yes. A. And then I got—he was being brought to the ambulance.

Q. And he was put in head first? A. Yes, sir, head first.

Q. So that as he was being put in you stood right there and assisted in putting him in? A. Yes.

Q. And then was when you saw his face, was it? A. No; I saw his face before he came there.

Q. Before he came there, and you saw his face when you were putting him in the machine? A. Yes.

Q. And he was put on—what do you call it—on a stretcher? A. The stretcher, yes.

Q. Did you help put him on the stretcher? A. I helped put him on.

Q. And you saw his head then, didn't you? A. Well, I didn't take no notice of it.

Q. You saw it, didn't you? A. Well, I can't say that I saw it, either.

Q. Can't even say that you saw his head? A. No, sir.

Q. Did he have anything on his head? A. No.

Q. What? A. No.

Q. You remember that, don't you? A. I remember that.

Q. Now, you didn't see any blood as you stood there assisting in putting him into the ambulance, either on his face or on his head anywhere, did you? A. Well, I saw no blood on his face and I couldn't see his head.

Q. Why couldn't you see his head? A. Because the man was lying down and I couldn't see his head.

Q. Well, did you see his forehead? A. There was none on his forehead and none on his face.

Q. None on his forehead and none on his face? A. No.

Q. Any on his temple? A. Well, no; not that I could see.

Q. You didn't see any at all, did you A. Not on him at all then.

Q. And you were right there where you could have seen blood if it had been on his face or on his temples, weren't you?

Mr. Simpson: I object. It is calling for a conclusion from this man. That is for the jury to say if he could see it.

The Court: That is strictly true. He can say what his position was, how he stood, where the party was, and all that.

Q. How far was his face from your eyes when he was put on to the stretcher? A. Probably two foot.

Q. About two feet away. Were his eyes opened or closed? A. Closed.

Q. Now, when he was put on to the stretcher there was a pillow on the stretcher, was there? A. (Witness shakes his head.)

The Court: Don't shake your head, Mr. Witness. Say yes or no, as the case may be.

The Witness: All right.

Q. In what position was he put on to the stretcher? A. He was carried out and laid down on the stretcher.

Q. Well,—— A. His back was on the stretcher.

Q. Well, with his back on the stretcher? A. Yes.

Q. Back of his head on the pillow? A. Back of his head on the pillow.

Q. Did the pillow come down under his shoulders at all? A. Well, probably a little bit, yes.

Q. Under his neck? A. As much as two inches or so.

Q. Now, when you reached the hospital did you assist in taking him out? A. Yes.

Q. Of the ambulance? A. Yes, sir.

Q. What position was he lying in as you took him out? A. Same position.

Q. Same position as when you put him in? A. Same.

Q. Eh? A. Same position.

Q. When you were going to the hospital with him was he in your sight? A. Well, there was a man alongside of him—there were two men alongside of him, I believe.

Q. Two men alongside of him? A. Yes, sir.

Q. And you were outside of the covered—was it a covered ambulance? A. A covered ambulance.

Q. And you were on the outside of the cover? A. Yes, sir.

Q. And you couldn't see when you were going with him to the hospital—you couldn't see him? A. Well, I didn't look; I could see; there is a glass there, but I didn't look.

Q. You didn't look. You helped take him out? A. Yes, I did.

Q. And take him into the hospital? A. Yes, sir.

Q. Who else helped you? A. Well, some railroad men; I don't know their names. I would not know them if I saw them now, either.

Q. When you took him out of the ambulance how close were you to his head and face? A. The same position as when I put him in.

Q. So he was right directly in front of you? A. Right in front of me.

Q. And you could see all there was on his face, his forehead and his temple, could you not? A. Yes, sir.

Q. Did you at that time see any blood on his face or forehead or temple? A. No, sir.

Q. Did you help carry him into the hospital? A. Yes, sir.

Q. And into the—what part of the hospital? A. Well, upstairs; took him right upstairs.

Q. Yes, and how many men were assisting you? A. Two men.

New Jersey State Library

Q. Two men. Now, as you went along you were assisting in carrying the stretcher, were you not? A. Yes, sir.

Q. And went into the hospital assisting in carrying the stretcher? A. Yes, sir.

Q. Now, did you at any time see any blood on his face, forehead or temple? A. No, sir.

Q. And it was dark when you received the call to go with your ambulance to the West Shore station, was it not? A. I don't remember that.

Q. Don't remember about that. Do you remember what time of the day it was? A. Well, it was late in the afternoon; I could not say exactly what time.

Q. But you don't recall whether it was before or after dark? A. No, sir.

Q. When did you discover this—what you call blood—on the pillow? A. As soon as we took him off the stretcher.

Q. While you were in the hospital? A. While I was in the hospital.

Q. You didn't feel of the man's head at all, did you? A. No, sir.

Q. Now, this spot of blood which you say was a foot square, was that a solid coating of blood or was it just little marks of blood? A. No; it was pretty well soaked with blood.

Q. You don't know where the blood came from? A. No, sir.

Mr. Simpson: I object to that on the ground he has already testified. It is for the jury to say where the blood came from. I asked him for the facts. He put the man in on a clean pillow, and he took him out and the pillow was not clean. That is for the jury to say.

The Court: I do not see that it makes much

difference one way or the other. He was very carefully examined both directly and indirectly as to what he saw.

Mr. Carey: That is all.

By Mr. Simpson:

Q. What was it drew your attention to blood as you had taken him off the stretcher? A. When he was taken off the stretcher I noticed the blood on it, because I happened to be at his head and I threw the blanket over the pillow.

Q. Were you at his head when he was put on the pillow? A. Yes; I was at his head.

Q. Did you notice that blood when he was put on the pillow? A. No; that was a clean pillow case.

Q. So that you were there when he was put up and when he was taken off? A. Yes.

Q. When he was taken off you noticed the blood. Did it look like fresh blood or not? A. Well, it was still damp.

Q. Still damp. That is all.

By Mr. Carey:

Q. Was your attention called by anybody to this blood on the pillow? A. Not at that time.

Q. When? A. When I got back to Mr. Quinn's. I had it covered, but he happened to see it, anyhow.

Q. You testified in the former hearing in this case, didn't you? A. Yes, sir.

Q. And did you on that occasion say that your father-in-law, Mr. Quinn brought your attention to the blood on the pillow?

Mr. Simpson: I object to that on the ground that he is entitled to have the testimony read to him, not to have it characterized, what he testified to—but to have the testimony read to him so that he can admit it or deny it.

The Court: That is, provided he has so testified about it, he is entitled to have the questions and answers that you are referring to.

Q. Were you asked the question on that examination: "Your father-in-law saw it too?" and did you answer: "Yes, he brought my attention to it because I didn't put no rubber blanket on it." Did you testify that way? A. I probably did.

Q. You didn't testify on the former occasion that you say blood on the pillow while you were at the hospital, did you? A. Probably I was not asked the same way, when I first saw it.

Q. Did you testify on the former occasion that you saw blood on the pillow when you were at the hospital?

Mr. Simpson: I object to that on the ground that he is entitled to have this testimony read to him. Here is the exact question and answer on that question, and it should be read to him.

The Court: He is entitled, gentlemen, I take it, to have the opportunity of examining his testimony if he says that he cannot answer that question without having his recollection refreshed.

Mr. Simpson: Here is a question and answer on the first page of his testimony, page 106. which is entirely on that point.

The Court: That is the only way I know, gentlemen. It is the same question that is coming up almost daily—— "You didn't testify in such a manner at a previous hearing." Now, if the witness has the recollection which would let him testify, "Yes", or "No", on that, all right. If he has not, then I have held that he is entitled to have the

testimony to let him refresh his recollection, so he can answer properly.

Mr. Carey: May I have the question read?

Q. (Repeated by the stenographer.) Did you testify on the former occasion that you saw blood on the pillow when you were at the hospital?

The Witness: Your Honor, could I ask if I was asked the same way as that——

The Court: Well, what is your recollection? Have you any recollection upon that score at all, Mr. Witness?

The Witness: I have recollection of answering that I noticed it at the store.

The Court: Have you any recollection as to being asked, or whether you answered anything about the condition of blood on the pillow at the hospital or any time before you got back to the store?

The Witness: I have no recollection of it being asked.

Q. Do you know whether you testified as to whether you saw blood on the pillow at the hospital or not?

Mr. Simpson: I object that he has already answered that. He has no recollection of having so testified.

Mr. Carey: Oh, he did not say that.

The Court: Well, I will give him the opportunity. Read the question.

Q. (Repeated by the stenographer.) Do you know whether you testified as to whether you saw blood on the pillow at the hospital or not?

The Court: Now, Mr. Witness, have you—if you have a recollection that you did, of course, you will say yes, that you did testify.

If you have a recollection that you did not so testify—you will say "No, I did not." If you have no recollection as to whether you did or did not so testify, then you will say you have no such recollection.

The Witness: I have no such recollection.

Q. Were you asked on your former examination this question: "When did you first notice that?" Referring to the blood on the pillow case.

Mr. Simpson: I object to his characterizing what it is referring to. If he is going to read, he must read the testimony.

The Court: Is there any question that that is what he has reference to?

Mr. Simpson: What is the page?

Mr. Carey: Page 106. I will go back and read further back as long as counsel is so particular about it.

Q. Were you asked on the former examination this question: "What was the condition of the pillow?" (A.) "The condition of the pillow—there was blood on it." "Q. After you removed it?" "A. After I took him out." "Q. Was there any blood on it before you brought him in?" "A. No, it was a clean pillow case." "Q. When did you first notice that?" "A. As soon as I got over to the house." "Q. When you——" "A. Over to the store." Did you testify that way on the former examination? A. Yes, sir.

Q. Were you also asked this question after you had given the answer, "Over to the store," "Q. The place you started out from? A. Yes." Did you so testify on the former examination? A. I don't remember.

Q. Well, do you say that you did not so testify?

Mr. Simpson: I object to that on the ground

that he says he did not remember. He is not entitled to any more than that, if he does not recollect. He can put this testimony in. If the man does not admit saying it he has the right to put the testimony in.

The Court: I suppose saying "I don't remember", is the same as if he said "No, I did not testify," and allows you to prove the fact, if it was a fact, from the previous testimony; doesn't it?

Mr. Simpson: Unless the witness says he said it, you can put the testimony in.

Mr. Carey: What is the question?

Q. (Repeated by the stenographer.) Well, do you say that you did not so testify?

The Court: You may answer the question.

The Witness: I have answered the question, your Honor, just the same now as I did before.

The Court: And what is that?

The Witness: Mr. Carey said when did I first notice this blood.

Q. (Repeated by the stenographer.) Were you also asked this question after you had given the answer: "Over to the store?" "Q. The place you started out from? A. Yes." Did you so testify on the former examination? A. (Repeated by the stenographer.) I don't remember.

Q. (Repeated by the stenographer.) Well, do you say that you did not so testify? A. No.

The Court: What do you mean by that, that you did not so testify?

The Witness: That I would not say that I did not or did?

Q. Were you also asked this question: "You

didn't notice it at the hospital?'' ''A. No.'' Did you so testify? A. If I did I contradicted myself.

The Court: Well, what is your recollection? Did you so testify or not?

The Witness: I cannot remember.

Mr. Carey: I will read this question from the former examination of the witness.

Mr. Simpson: I object. He has no right to make any such statement. I do not know what he is going to read. He has no right to say he is going to read it or make any statement of any kind. He is examining the witness now.

The Court: For the purpose of proving the record shows he did testify?

Mr. Carey: Yes.

The Court: This is not the time to do it, is it?

Mr. Simpson: It should be in his own case if he does it.

Mr. Carey: I take it your Honor is correct. That is all

By Mr. Simpson:

Q. You didn't make any physical examination of this man's head at any time, did you? A. No, sir.

Mr. Carey: I object to the question as leading.

Q. Did you or did you not make any special examination—take the man's head in your hands and open his hair to see if he was hurt in the back of his skull or anything of that kind? A. No, sir.

Mr. Simpson: That is all.

Mr. Carey: That is all.

MARGARET PRICE, sworn:

Direct Examination by Mr. Simpson:

Q. Where do you live, Mrs. Price? A. 927 Main Street.

Q. Charles Price is your husband? A. Yes, sir.

Q. When were you married to him? A. I was married the 28th day of April, 1905.

Q. And where did you live with him? A. At the time of the injury?

Q. Yes. A. 9—at 5383 Hudson Boulevard.

Q. And what did your family consist of? A. At that time I had two children.

Q. And what was his occupation on the 16th of February, 1915? A. He was a fireman of the New York Central.

Q. And how long had he been such a fireman? A. About twelve years, as near as I can remember.

Q. And as the result of a call did you go to the North Hudson Hospital on the 17th of February? A. Yes, sir.

Q. Now, on the 16th of February what time did Mr. Price leave the house to go to work? A. He left about two o'clock in the afternoon.

Q. And as far as you could see was his condition normal? A. Yes, he was known——

Q. Have any marks on his head or anything of that kind? A. No, sir.

Q. Now, when was it you next saw him? A. I saw him on the 17th of February at the North Hudson Hospital.

Q. Did you see any marks on him? A. No, sir, not that morning; not that day.

Q. Why didn't you? A. Why, I got word that Mr. Price was in the hospital and he had a fractured skull.

Mr. Carey: I object to what she heard.

Mr. Simpson: I withdraw that question.

Q. Just tell what happened when you went up there first. What was his condition, and what did you see? A. Why, he was in an unconscious condition.

Q. In the bed? A. Yes, sir.

Q. Well, did he have ice bags around his head? A. Yes, sir; he had ice bags around his head.

Q. Did they prevent you from seeing his head? A. Yes, sir.

Q. How long were you there that morning? A. I was there all day till eight o'clock that night.

Q. And during any of that day was he concious or could you talk to him? A. No; I could not talk to him at all.

Q. When did you next see him? A. The next morning about eight o'clock in the morning.

Q. Could you see on the 17th whether his head had been shaved or not? A. Yes; his head was shaven.

Q. I am talking about the 17th now, the morning—the first morning you were there? A. Yes, sir.

Q. You saw it was shaven then? A. Yes, sir.

Q. Then the next day what time did you go to the hospital? A. About eight o'clock in the morning.

Q. What did you see that morning? A. Well, Mrs. Masterson came with me.

Q. I didn't ask you anything about Mrs. Masterson. I asked you what you saw with reference to your husband's head that morning—what did you see? A. Why, I didn't see anything until we raised him up to give him a drink of water.

Q. I didn't ask you that at all. I asked you what you saw? A. Nothing whatever.

Q. You never saw anything that day at all? A. Yes; I saw the bruise that day.

Q. Well, why don't you say so? What did you see that day? What did you see? A. Yes; I saw the bruise that morning.

Q. When did you see the bruise—where did you see the bruise? A. On the left side of his head.

Q. Whereabouts on the left side of his head? A. Why, right about there, right here, (indicating).

Mr. Carey: Just a moment. Let's have it appear on the record where the bruise appeared.

Mr. Simpson: I object to being interrupted by Mr. Carey.

Q. (Repeated by the stenographer.) Where did you see the bruise? A. (Repeated by the stenographer.) On the left side of his head.

Mr. Carey: We ought to have that indicated.

The Court: How?

Mr. Carey: Put her hand where she says she saw the bruise, and then state it on the record.

The Court: All right, madam. Show it again, where it was you saw this bruise?

The Witness: Why, I saw the bruise right about here.

Mr. Carey: On the left side of the head near the junction of the hair with the forehead.

Mr. Simpson: I object to it as not being a true statement. There isn't any junction of the hair with the forehead. I object to that as not being a true statement.

The Court: We are not going to do any more than leave it as it is.

Mr. Simpson: I do not admit Mr. Carey's descriptive faculties are accurrate.

Mr. Carey: Well, if they need correction afterwards, they may be corrected.

The Court: Well, Mr. Simpson says it is not and you say it is. Who is going to decide it?

Mr. Carey: The court can decide it.

Mr. Simpson: Who can do this on his description? I don't think he has——

The Court: Take your exception.

Q. What kind of a bruise was it? A. It was a bruise, I should imagine, just like a peach cut in half, a round bruise.

Q. And which side of the peach would be at the top, the half which was flat or the rounded part? A. The round part.

Q. Something like an egg, then? A. Yes, sir.

Q. And what was the condition of his eyes? A. His eyes were bloodshot.

Q. How was he as to being conscious then? Was he conscious or unconscious? A. No; he was raving; he was raving.

Q. Talking? A. Yes, sir.

Q. Who was with you at that time? A. Mrs. Masterson.

Q. What were the circumstances under which you saw this bruise? A. Mrs. Masterson suggested that I get him a drink of water, and I went to get the drink of water and brought it, and she put her hand under his head and raised him up, and as she raised him the ice cap fell back.

Q. And who was there? Was there any one there? A. Yes, sir. Dr. Fendrich wasn't there, but Mr. Foster was there.

Q. Did you see Dr. Fendrich there afterwards? A. Yes, sir.

Q. Now, then, what happened? How long did Mr. Price stay in the hospital? A. He was five weeks in the North Hudson Hospital.

Q. And from there where was he taken? A. He was taken to the Hudson County Jail.

Q. And during the time he was in the hospital how often did you see him? A. Every day from eight o'clock in the morning until about eight o'clock at night.

Q. How did he talk? Did he talk like he used to do before he went out on his run on the 16th? A. No, sir.

Q. How was his conversation? A. Always erratic.

Q. Irrational? A. Irrational.

Q. Now, then, how long was he in the Hudson County Jail? A. He was taken there on a Tuesday about three o'clock in the afternoon, and I was told to come down—the next morning—and I was told to bring his clothes; that he was going to Morris Plains. He was there until—he was there from three one afternoon and all the next day until nine o'clock on Thursday morning, from Tuesday to nine o'clock Thursday morning he was there.

Q. How did they keep him, in a straight-jacket, or how did they keep him? A. I saw him in Dr. King's private office.

Q. And from there where was he taken? A. I insisted on taking home.

Q. And did they take him home? A. Yes, sir.

Q. How long was he at home? A. He was home five weeks.

Q. And who was caring for him during that five weeks? A. Mrs. Masterson helped me take care of him.

Q. What doctor did you have? A. Dr. King and Dr. Haskins.

Q. Observing him? A. Yes, sir.

Q. Why didn't you keep him home altogether?

A. Why, I couldn't keep him there, Mr. Simpson.

Q. Why not? A. I was afraid. He was always wanting a knife to do away with his family.

Mr. Carey: I object to any statements that were made.

Q. How did he act that made you consent to have him go away? How did he act? A. Why, about twelve o'clock every night he would take a spell. He always wanted to go home. He always wanted to go home.

Q. He would not keep any clothes on him? A. No; he would insist on going out and I would have to go out and walk the streets with him in that condition.

Q. And although he was in his own home he insisted on going home? A. Yes, sir.

Q. Finally he was taken up to the lunatic asylum in Morris Plains, where he now is? A. Yes, sir.

Q. He supported you and the children when he was working, didn't he? A. Yes, sir.

Q. What did he earn a month? A. He made seventy-five dollars every two weeks on this job

Q. And how old was he? A. He was about thirty-five years of age when he was injured.

Q. Thirty-five? A. Yes, sir.

Q. How long had he been a railroad man? A. Twelve years.

Q. And did you see his head again after that first time that you saw the egg-shaped on it? A. Yes; I used to raise that cap almost every morning.

Q. Well, what happened? Did that finally go down, that swelling? A. Yes, sir.

Q. Disappeared? A. Yes, sir.

Q. Could you tell how long it was from the first time you saw it until it disappeared? A. About three days.

Q. You have three children, haven't you? A. One nine, one seven, and a baby about two years old.

Q. How much do you say he earned a month? A. About a hundred and fifty dollars a month.

Q. That is average wages? A. Yes, sir.

Q. But on this particular job he was only earning thirty-three dollars a week, wasn't he? A. Yes; ——

Mr. Carey: I object to the question.

The Court: She has already said on this particular job he was earning seventy-five dollars every two weeks.

Mr. Simpson: Well, that would be about it, approximately.

Q. You said about seventy-five dollars every two weeks? A. Every two weeks.

Q. Now, did you get any word to go to the depot on the night he was hurt? A. No, sir.

Q. You didn't know he was hurt until the next day? A. About eight o'clock—about seven o'clock the next morning I got word.

Q. Did you get his clothes from the hospital? A. No; I didn't takes his clothes home for about a week.

Q. Well, you did take them finally? You took them? A. Yes.

Q. Was his cap ever given to you either by the railroad people or by the hospital people? A. No, sir.

Q. You never got the cap? A. Never got it.

Mr. Simpson: Cross examine.

Cross *Examination by Mr. Carey*:

Q. He had been working for the railroad company about twelve years? A. That is as near as I can remember.

Q. And all the time as fireman? A. No; he was working as a machinest's helper at first.

Q. How long did he work in that capacity? A. Why, I think about a year, or fourteen or fifteen months; something about that.

Q. And after that he began firing? A. Yes, sir.

Q. And continued as a fireman until this 16th of February, 1915? A. Yes, sir.

Q. You say you went to the hospital and saw him on the morning of the 17th? A. Yes, sir.

Q. And on that morning his head was shaved, was it? A. Yes, sir.

Q. All over? A. No, sir, just the half.

Q. Which half? A. The left side.

Q. What was done to the other half? A. Why, he had a big crop of hair on the other side; it was not touched.

Q. Hadn't touched that at all? A. No, sir.

Q. Are you sure about that, Mrs. Price? A. Yes, sir.

Q. What part of the head was the ice bag covering? A. The ice cap covered the whole of the front of the head.

Q. The whole of the front? A. Yes, from the forehead back.

Q. How far did it extend from the forehead up on the head? A. Well, the pillow was there; it covered to about the pillow.

Q. That is, he was lying on his back, was he? A. Yes, sir.

Q. And this cap covered from the forehead? A. Yes, sir.

Q. Back to the pillow? A. Yes, sir.

Q. And on the side of the head how far did the ice cap come down? A. Well, it was quite a large sized ice cap; it covered the whole top of the head.

Q. Did it come down to the ear? A. Yes—no, not to the ear.

Q. Not to the ear? A. No, not to the ear.

Q. How far above the ear was the ice cap? A. About an inch and a half.

Q. Did it cover also the right side of the head? A. Yes, sir.

Q. About the same as it covered the left side? A. Yes.

Q. And did it come down to the eyebrows on the forehead? A. No.

Q. How far above the eyebrows? A. It come to the top of the forehead.

Q. You say at the junction of the hair with the skin? A. Yes, sir.

Q. And that would be, say, three inches above the eyebrows? A. About that, yes.

Q. On the 17th, when you were there you saw no evidences of bruise on his forehead,—— A. No, sir.

Q. Or side of the head at all. On the 18th you first noticed it? A. Yes.

Q. And the ice cap had fallen off then? A. Yes, sir.

Q. Who called your attention to it? A. Mrs. Masterson.

Q. Were you right there when the ice cap fell off? A. Yes, sir.

Q. And you didn't notice it until Mrs. Masterson called your attention to it? A. I was giving him a drink of water, see——

Q. Answer the question, please, Mrs. Price? A. No, I did not.

Q. You were right there? A. I was giving him a drink of water.

Q. What? A. I was giving him a drink of water.

Q. Just a moment. You said you were right there when the ice cap fell off? A. Yes.

Q. Looking at it? A. Yes.

Q. And where was Mrs. Masterson when the ice cap fell off? A. She was holding Mr. Price, holding him up.

Q. Holding him up? A. Yes.

Q. Had the hair been shaved off this spot where you saw this bruise? A. Yes, sir.

Q. Now, won't you locate it just as nearly as you can? A. Locate the bruise?

Q. Yes, locate the bruise. A. Why, as near as I can remember it was about there (indicating.)

Q. Well, that was about one third of the way from the middle of the head down to the ear? A. Yes.

Mr. Simpson: I object to that on the ground that it appears to the jury what it is, and that Mr. Carey has no right to characterize it.

Mr. Carey: I have a right to get it on the record.

Mr. Simpson: There it is. She points it out; and of course, this lady has a lady's hat on.

The Court: She has a right to indicate, as she has, on her own head where it was. Mr. Carey, on cross examination, of course, by leading questions, can suggest to her where it is, and she, of course, can correct that if he is wrong. That is the best I can do for you, gentlemen.

What was the question?

Q. (Repeated by the stenographer.) Well, that was about one third of the way from the middle of the head down to the ears?

Mr. Carey: Strike that out. I withdraw that question.

Q. Now, if a line had been run up the middle of his forehead and over to the back of his head— A. Yes.

Q. —keeping the middle line all the way, which side of that middle line was this bruise that you have indicated? A. On the left side.

Q. On the left side? A. Yes, sir.

Q. Then it would be on the left of the middle line, wouldn't it? A. Yes, sir.

Q. Well, about how far do you think from the middle line? A. Why, I can show you on your head, Mr. Carey; that is as near as I can get to it, or I can show you on mine. It seemed to me to be just about here (indicating).

Q. Well, that would be about the left of the middle line? A. Yes, sir.

Q. Now, then, suppose you just locate as near as you can the middle line on your own head, and then tell us about how far it was from that middle line? A. Well, it must have been about there (indicating).

The Court: Well, now, in inches, can you tell us how far that is to the middle line of your head?

The Witness: No, I cannot, Judge.

Mr. Carey: Well, I should say it was about two inches.

The Court: Well, now, Mr. Carey suggests it is two inches. What do you say, Madam, that you are willing to accept that as proper designation, or not?

The Witness: No, I would not say it was about two inches.

Q. Well, about how far would you say, as near as you can? A. Perhaps half an inch or three quarters of an inch.

Q. Three quarters of an inch from the middle line? A. Yes.

Q. Now, if we were to run a line from the front of his ear right straight up to the middle of his

head, which side of that line from the ear to the middle of the head would this bruise have been? A. That would be just about it.

Q. It would just about have passed through it, would it? A. Yes.

Q. And how large was this bruise? A. Why, it was a large round bruise. I imagine like the half of a peach, as near as I can remember.

Q. Well, peaches are of such different sizes.

The Court: Give us some size.

The Witness: Well, about the size of an egg.

Mr. Simpson: May I suggest that eggs vary also in size.

The Court: Can you show us, Madam, with your fingers?

The Witness: Why, it looked like a large bruise, like the round of the top of my wrist.

The Court: What do you say, two inches in diameter, or three inches across?

The Witness: Yes, about two inches across and three inches in diameter.

The Court: She has described it now as being egg shaped, about two inches across and about three inches in length.

Q. And you think this line in the front of the ear would pass about through the middle of it? A. Yes, sir.

Q. What color was it? A. It was a bruise; it was red and blue.

Q. Red and blue? A. Yes.

Q. Noticeable, was it? A. Yes, sir.

Q. Were there doctors and nurses there at the time? A. No, sir.

Q. Was it puffed out or indented? A. No, it was puffed.

Q. Very much puffed? A. Yes, sir.

Q. Was there any swelling anywheres else except on that spot? A. And the neck.

Q. The neck was swollen? A. Yes, sir.

Q. And that was all besides this place where you saw the bruise? A. That was all that was swollen, yes, sir.

Q. Now, where was the neck swollen? A. On both sides.

Q. In front? A. No, on the side.

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

Q. And on both sides? A. Yes, sir.

Q. Was there any discoloration of the neck at all? A. Red.

Q. Red? A. And the veins extended.

Q. And those were the only two places where you saw any swelling? A. Yes, sir.

Q. Could you see the veins standing out in the neck? A. Yes, sir.

Q. On both sides? A. On both sides.

Q. Now, was the skin broken where you saw this bruise on the head? A. No, sir.

Q. No break in the skin at all? A. No break at all.

Q. Not even a roughening of the skin? A. No.

Q. How long was the ice cap maintained on his head? A. About all of a week; all of seven days.

Q. And did you ever see the ice cap off of the head on any other occasion than the one when it fell off, when you first saw the bruise? A. No; the ice cap was never off.

Q. So after that time you never saw the bruise? A. Why, I raised the cap every morning to see how the bruise was.

Q. Oh, you did raise it? A. Yes, sir.

Q. Have you had any experience in nursing? A. Yes, sir.

Q. Did you take a course in nursing? A. Yes, sir.

Q. And are a graduated nurse? A. Yes, sir.

Q. Did you feel of this bruise at all? A. No, sir.

Q. Did you call the attention of any of the doctors or nurses to it? A. No, sir; I saw his head was shaved, so I came to the conclusion that they knew all about it.

Q. And you didn't say anything about it at all? A. No, sir.

Q. What doctors attended him? A. Dr. Fendrich.

Q. When did you first notice the bloodshot eyes? A. Why, on the 17th of February.

Q. Did you say anything to the doctors or nurses about that? A. My husband was there from seven o'clock the night before——

The Court: No, the question is, did you say anything to the doctors or nurses about it?

The Witness: No, sir; I thought they knew about it.

Q. And you didn't make any inquiries of the doctors how serious this bruise was which you saw on his head? A. Yes, I did.

Q. Then you did say something about the bruise to the doctors? A. Yes; called Dr. Fendrich's attention to it.

Q. When did you call his attention to it? A. That morning when he came in.

Q. Which morning was that? A. The 18th.

Q. You told him about the bruise on the head, did you? A. Yes, sir.

Q. Now, Mrs. Price. you say that on this job he made seventy-five dollars every two weeks? A. Yes; he might have made more, Mr. Carey.

Q. Well, did he make any less? A. He didn't make any less, no sir.

Q. How long had he been running on that job? A. Six months.

Q. How do you know about the earnings of Mr. Price? A. Because Mr. Price gave me all he earned.

Q. And how often was he paid? A. Every two weeks at that time.

Q. And did he get the same amount every pay day? A. No; I don't think so, it depended on the days of the month. If there were thirty-one days, why, he got more; if there were thirty days in the month he got less.

Q. What time in the month was he paid? A. Why, he was paid between the 5th and the 7th and then he was paid between the 20th and the 22nd.

Q. And the payment which was made between the 5th and the 7th would be the one that would show the figures when the month was a shorter month? A. Yes.

Q. Because that included the end of the month? A. Yes.

Q. Now, is that all the difference there was in the amount of his wages,—depending entirely on whether the month was thirty days or thirty-one days? A. Yes. I think on this job it was a seven days job; he was on that every day, and I don't think there was any difference in the pay.

Q. Well, you know it, don't you, Mrs. Price? A. Well, he had his room to pay in Haverstraw, and sometimes the Y. M. C. A. came out of his pay; but ordinarily as long as he was on that job Mr. Price made an average of giving me seventy-five dollars every two weeks, after paying his room and whatever expenses he had.

Q. And how long had he been on that job? A. Six months.

Q. On this same run? A. Yes, sir.

Q. And this was what train, do you know? A. Why, it was a passenger train.

Q. Yes. Train 72, was it? A. Why, I don't remember, Mr. Carey.

Q. But it was, you recall, a six day run? A. No, it was a seven day run.

Q. Seven day run. I beg your pardon. Now, what did he pay for his room at Haverstraw? A. I don't know what he did pay.

Q. Did he go up one day and come back the next? A. No, he went up every day on that job.

Q. Well, was he keeping a room there at Haverstraw? A. Yes, sir.

Q. And what did he have a room there for if he came back every day. A. Why, he only came back to me at nine o'clock in the morning, and the same day at two he left.

Q. What time was his run, Mrs. Price? A. Why, I think he got through around ten o'clock in Haverstraw; that was the last—that was the last trip; so he stayed in Haverstraw all night and went on duty at six o'clock the next morning again.

Q. Let us see; when he left you in the morning— A. In the afternoon.

Q. Oh, he always left you and went in the afternoon, did he? A. Two o'clock in the afternoon.

Q. Two o'clock in the afternoon. And then he took a run from Weehawken to what point? A. From Weehawken to Haverstraw.

Q. To Haverstraw. And did he stay over night at Haverstraw? A. Yes, sir.

Q. And came back the next day? A. The next morning at nine o'clock.

Q. Well, how do you account for the fact that he was coming back at half past seven in the evening on this day? A. At half past seven?

Q. In the evening. A. I didn't say that.

Q. Well, it is in the testimony here that he came back that night at half past seven? A. No, I could not say that.

Q. That is not your understanding of his run, is it? A. No, he never came in only at half past nine every morning, and left at two every afternoon.

Q. So he would leave you at two o'clock in the afternoon and run to Haverstraw? A. Yes, sir.

Q. And remain in Haverstraw over night? A. Yes, sir.

Q. And came back on the following day? A. Following morning.

Q. Getting back at what time? A. Nine o'clock.

Q. And that was the run on which he was injured, was it? A. Yes.

Mr. Simpson: I object to that on the ground that she knows nothing about running. She was not there, wasn't sent for, wasn't there that night. She knows nothing about that and has testified nothing about that.

The Court: That is a fact, Mr. Carey. She has not testified as to the man's injuries so far as I know.

Mr. Carey: She has not, but she has testified as to the time of his runs.

The Court: Yes, but I do not understand her to testify as to any knowledge as to the time when he was hurt.

Q. Now, you say you don't know what he paid for his room in Haverstraw? A. No, sir.

Q. And what other expenses did he pay himself out of his earnings? A. There were no expenses he paid, only if he wanted a cup of coffee, perhaps, at either end. He came home at nine and got his breakfast. I think he did get his breakfast in

Haverstraw—yes, he got his breakfast there in the morning; then he came home to me and got his breakfast about nine, and at two he got his dinner, and I packed a pail.

Q. And the pail, was for what? A. Well, any time, for supper.

Q. For his supper? A. Yes.

Q. Did he buy his supper also in addition to what was furnished for him in the pail you packed for him? A. No, I don't think so.

Q. Do you know how much his monthly expenses for his own purposes were? A. No.

Q. Well, he had to pay for a room, you say? A. Yes.

Q. And he paid for meals? A. That was all.

Q. Well, do you know how much those things which he bought for himself—his room and meals and anything else that he bought for himself amounted to per month? A. I don't think it was any more than a dollar and a quarter a week.

Q. About a dollar and a quarter a week? A. Yes.

Q. Then for his clothing—how much did his clothing amount to? A. Oh, I don't know.

Q. For a year, would you say? A. I couldn't just tell you about that. Railroad men are hard on their clothes; they need lots of shoes and different things.

Q. Did he buy his clothes or did you buy them for him? A. No, I didn't buy his clothes.

Q. He bought his clothes? A. Yes.

Q. And you don't know how much they cost him per year? A. No; his shoes cost him about three dollars, I think—

Mr. Simpson: I object to this. This is not relevant or material. This is not a death case. This is suing for a man who lost his wages no matter how he spent them. His

wages are part of his injuries. His expenses are not to be taken out of it. If there is to be a recovery it is to be the wages. This is not a death case.

The Court: I have that in mind, Mr. Carey —this is for the benefit of Price himself; it is not for the benefit of the widow and next of kin.

Mr. Carey: After all, even in a case of that kind, what he spent in connection with his work on the road would be material.

Mr. Simpson: Well, I will withdraw the objection.

The Court: Well, it might be on the ground that he is not undergoing that expense; therefore, his loss would be the difference—it may be. All right; go ahead.

Q. Did he bring his monthly check to you or did he bring money? A. He brought money.

Q. And did he take out for his own expenses before he handed over anything to you? A. Yes, sir.

Q. And do you know approximately how much he took out of his semi-monthly wages for his own uses on the road? A. No, I don't know, Mr. Carey. Whatever Mr. Price gave me I was satisfied with it, because he was honest.

Q. You say that this bruise disappeared? A. Yes, sir.

Q. In about how long? A. About three or four days.

Q. You say his eyes were bloodshot? A. Yes, sir.

Q. And how long before that disappeared? A. Well, in about a week, I guess.

Q. Mrs. Price, you didn't see this bruise until Mrs. Masterson pointed it out, did you? A. No, sir.

Q. Where was she standing at the time she pointed to it? A. She was standing at the back of him.

Mr. Carey: I think that is all.

Mr. Simpson: That is all.

CATHERINE MASTERSON, a witness sworn on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Simpson:

Q. Where do you live, Mrs. Masterson? A. 431 West 34th Street, New York.

Q. Are you a friend of Mrs. Price? A. Yes, sir.

Q. And how long have you been friendly with Mrs. Price? A. Over twenty years.

Q. Did you go to the North Hudson Hospital with Mrs. Price on the day that her husband was hurt or the next day? A. Yes, sir.

Q. Now, when was it? Do you remember the day of the week you went? A. Thursday morning.

Q. And what time did you get there? A. Around eight o'clock in the morning.

Q. Where was Mr. Price when you got there? A. He was lying on a bed in the North Hudson Hospital.

Q. Was there anything on his head, an ice cap, I mean? A. Yes, there was an ice cap, and he was unconscious.

Q. He was unconscious? A. Yes, he was unconscious, laying perfectly rigid.

Q. How about his head? Was it shaved all off his head or only one side? A. Partly shaved.

Q. On which side—— A. Left side.

Q. Left side. What, if anything, happened

while you were there? A. Mr. Price looked feverish, and I suggested that Mrs. Price would get a glass of water. So she left the room and returned with a glass of water and a tube, and she tried to have him drink the water, but he wasn't able. So I put him—I put my arm underneath his head to raise his head to give him a drink of water—for Mrs. Price to give him the drink of water, and the ice cap fell off, and while Mrs. Price was giving the drink of water I happened to look at his head, and I saw the bruise, and I tapped her and pointed to the bruise on his head.

Q. Where was the bruise? A. On the left side.

Q. Could you describe the direction? You need not take your finger. Could you describe where it was, whether it was above the ear or below the ear? A. Above the ear.

Q. Could you describe what it looked like? A. It was purplish, and it raised, puffed up.

Q. Puffed up above the rest of the surface of the skull? A. Yes.

Q. And about how large would you say it was? A. Well, I should think two inches wide and about three inches long; very much puffed up.

Q. And it involved quite a part of the surface of the skull? A. Yes.

Q. Was that under the ice bag? A. Yes, sir. When I saw the ice bag fall off I saw it.

Q. How long did you stay there with him? A. Oh, I stayed about two or three hours that morning.

Q. Was he conscious at all—— A. No.

Q. ——during the time you were there? A. No, sir.

Q. How did he act? A. He was perfectly still the first morning.

Q. Well, laying in bed? A. Perfectly still the first morning I entered.

Q. When did you see him after that? A. I saw him there the next morning.

Q. Was he still unconscious? A. No; he was in a sort of semi-conscious condition. He was raving, asked to be taken home; he lived down near New York.

Q. Did he live down near New York? A. He said he lived down near New York.

Mr. Carey: I object to what he said.

Mr. Simpson: I think it is perfectly proper to show his condition. I am not putting this in to show what he said was true, but to describe his condition, so that hereafter doctors, taking that into consideration, may diagnose his condition.

The Court: I understand you object to it?

Mr. Carey: I object to it.

The Court: I will overrule the objection if it is only used for the purpose you suggest.

Mr. Carey: I ask an exception.

The Court: You may have it.

Q. What did he say? A. Why, he asked to be taken home. He said he lived down near New York, and he would like to get the fellow that hit him with the hammer, and all that time he kept his eyes closed and lay perfectly rigid in the bed.

Q. What was his manner? Was his manner like a normal person? A. No, sir.

Q. You had known him before this time, hadn't you? A. Yes, sir.

Q. Before the time you saw him at the hospital? A. I knew him about thirteen years before that time.

Q. Well, was his manner when he was talking the same as it was when you had known him outside of the hospital? A. No, sir.

Q. Can you describe what his manner was? A. Irrational.

Q. How many times did you see him at the hospital altogether? A. Oh, I saw him every day for the first three or four days until I was ordered not to enter the room. Doctor Fendrich came one morning——

Mr. Carey: I object to what Dr. Fendrich said.

The Witness: Well, I couldn't see him after that. I was forbidden to go.

Q. Who forbade you going in the room? A. Dr. Fendrich.

Q. During the times you went there up until the time you were stopped, did you see this bruise any time except the first day? Did you see it again? A. I saw it the second morning.

Q. What was its condition then? A. Well, it was not quite so much puffed, and I drew Mr. Foster's attention to it on the second morning I entered.

Q. That is the engineer? A. Engineer Foster.

Q. Then did you see it again? A. No, I didn't see it after that.

Q. Did you see Mr. Price in his house when he came out of the hospital? A. Yes, sir.

Q. How did he act there in the house? A. Why, he walked and walked and walked, and talked and talked; never sat down, never rested. He—oh, he talked silly.

Mr. Simpson: Cross examine.

Cross Examination by Mr. Carey:

Q. Will you locate as nearly as you can the place where you saw this bruise on his head? A. Right here, Mr. Carey; right about here. (Indicating.) Extended about—just about like this, on the left side of the head.

Q. On the left side of the head? A. On the left side of the head.

Q. And where with reference to a line drawn straight up in front of the ear? A. Why, the line would pass through the bruise.

Q. Through what part of it? A. Oh, almost central.

Q. Almost the central part? A. Almost central.

Q. How far from a line drawn across the middle of his head from the front to the back? A. You mean the space?

Q. Yes. A. Well, Mr. Carey, I could not say that, because he had a large head, and I couldn't tell you. He had quite a broad head.

Q. Would it be an inch or two inches or five inches, or what, from a line drawn from the front to the back across the middle of the head? A. Well, he had a large head, Mr. Carey, and I couldn't say that. I couldn't tell you the width of the top of his head.

Q. Well, was it all below the top of his head? A. It was right here on the side. (Indicating.) Right running through here.

Q. And how far do you say above the ear? A. Well, would that depend on the size of his head? I really can't say. It seemed to me—

The Court: Now, can't you tell us now? You said if a line were drawn around the head in front of the ear that that line would go through this bruise about the center of the bruise.

The Witness: Yes.

The Court: That locates it so far as the back or front of his head is concerned. Now, Mr. Carey is trying to find out if you can tell how far the lower part of that bruise was from the top of his ear on that side. Was it an inch above his ear, or a half inch—

The Witness: Oh, about an inch and a half.

The Court: The lower part of the bruise was about an inch and a half above the top of the ear?

The Witness: Yes, something like that.

The Court: That is what you wanted, Mr. Carey?

Mr. Carey: Yes.

Q. And you saw it the following day, did you? A. Yes; I saw it the following day.

Q. What color was this? A. Purplish, a deep, deep red.

Q. Deep purple? A. Yes.

Q. Was the skin broken? A. It didn't appear to be.

Q. Not at all? A. Not to my—it didn't appear to be broken.

Q. Did you put your hand on it? A. No; I did not.

Q. Never touched it? A. I never touched it.

Q. Was the skin roughened or scraped at all? A. It was puffed up, smoothly.

Q. What? A. It was raised; it was puffed up; smooth looking.

Q. I understand it was puffed up, but you say the skin was not broken? A. I didn't see; I didn't know; not to my sight.

Q. Was the skin roughed up at all, as if it had been scraped or anything like that? A. No; to me it looked smooth looking.

Q. Entirely smooth, did it? A. Yes.

Q. Was the hair shaved off— A. Yes.

Q. —where the bruise was? A. Yes, sir; yes, sir.

Q. Close to the head? A. Yes, sir.

Q. Shaved over the place where the bruise was? A. Yes, sir.

Q. Did you see any other place where there was

any swelling at all? A. Well, his face—his features looked distorted, and his neck was swollen.

Q. His face was swollen? A. His features looked distorted.

Q. Whereabouts on his face was it swollen? A. His cheeks were puffed up and his neck was swollen, and his veins were protruding from the neck.

Q. Both cheeks puffed up? A. Yes.

Q. Very much? A. Quite some the first morning.

Q. Very noticeable, was it? A. The first morning.

Q. The first morning it was? A. First morning, but not so much the second morning.

Q. Was his forehead swollen? A. I can't say.

Q. Don't recall that? A. I don't recall his forehead.

Q. Was the right side of his head swollen? A. I can't say; I don't remember.

Q. Did you put your hand along the left side of his head at all? A. No, sir.

Q. Where did you put your hand when you— A. Underneath his head, raised.

Q. Back of his head? A. Back of his head, right near his neck, right along his neck, and raised him in the bed.

Q. Was the back of his head swollen? A. I didn't see it.

Q. Did you put your hand on the right side of his head? A. No, sir.

Q. Sure about that? A. Positive.

Q. You testified on the former hearing in this case, didn't you, Mrs. Masterson? A. Yes, sir.

Q. When you testified before were you asked this question: "Was the back of his head swollen?" And did you answer, "Well, I cannot say that; his general head seemed swollen to me." A. Yes, sir.

Q. You testified to that? A. I testified to that; yes, sir.

Q. And that was the fact, was it? A. Yes, sir.

Q. What? A. Yes, sir.

Q. And were you asked immediately after what I have read: "Q. Seemed swollen?" And did you answer: "Yes, sir; it was swollen." A. The back of his head?

Q. I will read now the questions which I read before, and follow it with this one which I just read: "Q. Was the back of his head swollen? A. Well, I cannot say that; his general head seemed swollen to me. Q. Seemed swollen? A. Yes, sir; it was swollen." Did you testify that way? A. Well, I meant his face was swollen, the part I could see. I could not see the back of his head.

Q. Well, you testified that way, did you? A. Well, I misunderstood what you said.

Q. Did you testify—— A. Perhaps.

Q. Then were you asked this question: "Did you put your hand on the right side of his head? A. Yes, sir." A. I don't remember.

Q. You don't remember that? A. No, sir; I don't remember; I don't remember even doing it; I don't remember putting my hand—I put my hand under his head and raised it.

Q. Now, pay attention to my question, will you, please, Mrs. Masterson? You say you do not remember having had this question put to you: "Did you put your hand on the right side of his head?" "A. Yes, sir." You don't remember about that? A. I don't remember saying that.

Q. Do you say that you did not say that?

Mr. Simpson: I object to that on the ground that it is an improper method of examination. If she does not specifically admit the statement he has a right to prove it in contradiction.

The Court: Isn't that so?

Mr. Carey: I certainly have the right to ask her.

The Witness: Well, Mr. Carey—

The Court: Very well; I am not going to argue about it. I will overrule the objection. I am not consciously going to allow some technical error to creep into this case if I can overcome it.

Q. (Repeated by the stenographer.) Do you say that you did not say that?

Mr. Carey: I will change that question.

Q. Do you say that you did not so testify? A. I may have testified, but I don't remember putting my hand on his head at that time.

Q. Were you then asked this question? "And was that puffed out? A. Yes, sir." A. The right side?

Q. Was that question asked you and did you answer it that way? A. The left side of his head was puffed up.

Q. The question refers to the right side of the head. A. It must have been a misunderstanding, because the injury was on the left side.

Q. Were you asked this question: "How much of the right side of the head was swollen? A. Well, the side of his head here, the part that we could see. Q. What? A. The side we could see, the part we could see, right here, along here." Were those questions asked you and did you answer as I have read? A. I don't remember.

Q. What is it? A. I don't remember.

Q. Do you say that you did not so testify? A. His face was swollen——

The Court: Listen, Madam——

Mr. Simpson: Do you remember testifying to that?

Q. Do you say that you did not so testify? A. Perhaps I have testified.

Mr. Carey: That is all.

Mr. Simpson: That is all, Mrs. Masterson.

JOHN NEVIN, sworn.

Direct Examination by Mr. Simpson:

Q. Doctor, you are a practising physician and surgeon in Jersey City? A. Yes, sir.

Q. How long have you been in practice? A. About thirty years.

Q. And you have done a great deal of work in the way of examining persons who desire life insurance, to see whether they were good risks or not; that is a part of your professional work? A. Yes, sir.

Mr. Carey: Oh, he is qualified.

Mr. Simpson: All right. Thank you.

Q. Doctor, do you remember examining Charles Price at 5383 Hudson Boulevard, in January, 1915, for the purpose of passing him for a life insurance risk for the Connecticut General Life Insurance Company? A. I remember that, yes, sir.

Q. Now, what was his condition then? Did you pass him or not? A. First class risk.

Q. And as far as you could see his physical and mental health were good, weren't they? A. Yes, sir.

Mr. Simpson: Cross examine.

Cross Examination by Mr. Carey:

Q. What was the date, Doctor? A. I don't remember the date, Mr. Carey; it is two or three years ago.

Q. Do you remember the year? A. I think it was in 1915.

Q. And what part of the year? A. In winter; I don't remember exactly that; I see so many cases; the early part of the year.

Mr. Simpson: We will fix the time afterwards. I will fix the time.

Mr. Carey: All right. That is all.

Albert George Bissing, sworn on behalf of the defendant, by consent.

Direct Examination by Mr. Carey:

Q. Major, you are a practising physician? A. I am.

Q. And have been for how long? A. Twenty years.

Q. You are graduated from what institution? A. Columbia P. & S., New York.

Q. And hospital experience was where? A. In the Willard State Hospital, various sanitoria, and my last station was at the North Hudson Hospital.

Q. And at the other hospitals what character of practice did you have? A. I was stationed two years in the State service of New York, at King's Park, and there I had insane patients to take care of.

Q. Your experience there covered a period of two years? A. Two years plus.

Q. And at the other hospitals you had what kind of practice? A. General experience.

Q. You are now located where, Doctor? A. At Camp Dix.

Q. And your rank is what? A. Major.

Q. And you are a surgeon? A. Surgeon, yes, in the United States Army.

Q. How long were you stationed at the North Hudson Hospital? A. At the time this accident occurred, or altogether?

Q. Altogether? A. Three years and a half, I should say.

Q. And prior to the time of this accident you had been there how long, approximately? A. About two years, I should say.

Q. What was your position there? A. As medical superintendent of the hospital.

Q. Do you remember the case of Mr. Price? A. Very distinctly.

Q. Were you present at the time that Mr. Price was brought to the hospital? A. I was.

Q. And did you see him on the night that he was brought there? A. I did.

Q. Will you state—describe in your own way, Doctor, what occurred from the time you saw him until you were through with your examination that night? A. He was brought in partly with the assistance of people who surrounded him. I forget who were with him. He didn't seem to require the assistance very much, but they accompanied him.

Q. Was he brought in on stretcher? A. Not at all.

Q. Walked in with assistance? A. He was able to walk in. The elevator was not running and they didn't bring him up on the elevator; so he came up on the front stairs.

Q. Walking up the stairs? A. Walking up, yes. It was about eight o'clock at night, I should say, and we had heard that he had sustained an injury and we prepared for his examination and care. The house surgeon at that time I think was Dr. Kooperman, and the assistant interne was Dr. Kitay. I gave orders that they should immediately examine the man. It was reported that he had

received a head injury, and if I mistake not his head was clipped entirely and the left half was shaved.

Q. Now, were you present? A. I was present; in fact I gave orders to that effect that he should be so attended to make sure.

Q. You were supervising the examination and investigation? A. I was supervising the examination and investigation, and taking care of the patient through the house surgeon and the other interne.

Q. Now, go on and describe what you found after the shaving of the head? A. Well, we found the man in an irrational condition. I cannot say that he was dazed or unconscious at all; he simply acted stupidly. We had shaved the head, and I found no mark, abrasion, contusion or anything containing an injury to the skull. There was no bleeding from the ear or nose. His eyes were clear. His pupils somewhat contracted, but normal, it seemed to me; at least showing no evidence of injury to the skull. He showed no indications of either concussion or contusion of the brain, or fracture of the brain, though that was the history that was given outside.

Q. How thorough and careful was the examination which you made, Doctor? A. Well, most thorough. The skull was shaved for that purpose. We could have verified this without even shaving the man's head, but to make sure and doubly sure, the scalp was thus prepared, preparatory to any measures that might be needed for the suturing of a scalp wound, or any injury that might be there.

Q. Will you state whether or not your examination extended beyond the mere looking at the head? A. Oh, yes, palpation, pressure, and the man was thoroughly examined.

Q. Now, in connection with that examination

did you find anything indicating external violence to the head? A. Nothing whatsoever.

Q. Was there anywhere on the patient from the time that he was brought into the hospital until you had completed your examination—any blood, or blood marks, or anything of that kind? A. Not a drop.

Q. Do you recall about how long he remained at the hospital, Doctor? A. Well, I cannot say definitely; he stayed there overly long; I know that; because I didn't care to retain any patient of that character there.

Q. As to days or weeks? A. Well, it was some weeks; I cannot say now; I have forgotten the exact time.

Q. How frequently did you see him during the time he was there? A. Well, three or four times a day.

Q. On those occasions when you saw him after the time he entered, will you state whether or not you made examinations of him? A. Yes, very thoroughly; very, very frequently.

Q. And how thorough? A. Very thoroughly, indeed.

Q. And with respect to the head did you continue to make careful examinations? A. I did.

Q. Palpation and looking at it? A. Inspection and palpation, and also notations of any symptoms that might arise from the possibility of an injury.

Q. And did this continue during the whole time that he was in the hospital? A. Well, not every day, no; not as regards that injury, or the possibility of an injury.

Q. Now, when he was brought into the hospital were there any indications of concussion of the brain?

Mr. Simpson: I object to that as leading.

I think the Doctor should be allowed to testify.

The Court: I think he has already testified.

Q. How about the indication of fracture of the skull? A. Well, when I said fracture of the brain I really misused the word; it should have been fracture of the skull—absolutely none.

Q. Now, at any time—you have testified that when he was brought in he showed no indication of concussion of the brain or contusion of the brain —following that occasion when you first examined him did he at any time while there show any evidence of injuries of that character? A. None whatsoever.

Q. Now, with reference to shock, what have you to say, Doctor? A. None whatsoever, as far as I could see.

Q. No indication? A. Not at all.

Q. And is that true of the time subsequent to the first examination? A. Absolutely. Shock occurs at the time of the reception of the accident and diminishes the further you get from the time of injury.

Q. From the appearance exhibited by Mr. Price at the time he was brought into the hospital did you reach a conclusion as to what was the cause of his condition? A. I did.

Q. What did his appearance indicate to you? A. That he was the victim of a brain malady.

Q. And will you state whether or not in your judgment the malady with which he was afflicted was occasioned by a blow upon the head? A. It was not.

Q. And did you during the time that he was there change your view upon that subject? A. On the contrary, my view became increasingly more and more confirmed that it was not due to any trauma to the head.

Q. Doctor, it has been claimed by counsel in his opening that the condition of Mr. Price was due to being struck with a poker extending from a passing engine, so that it reached Mr. Price's head on the engine on which he was engaged, and the testimony in the case is to the effect that the train on which Mr. Price was riding was moving at the rate of twenty to twenty-five miles per hour, the poker being an iron poker. Will you state whether or not in your judgment an injury occasioned by a blow from a poker under such circumstances upon the head would produce external evidences of a blow? A. It certainly should and would.

Q. In your experience have you ever known of a blow of that character upon the head from an iron object sufficiently serious to cause the condition in which you saw this man, leaving no visible evidences of the blow? A. I never have.

Q. Have you ever heard of any such thing? A. I never have.

Mr. Carey: Cross examine.

Cross Examination by Mr. Simpson:

Q. Whom did you get the report from that this was a head injury case? A. It was telephoned to us that they were bringing us a man who had been injured on the West Shore, on the head.

Q. Who was it? Did you get the message or somebody else? A. I received the message in the office.

Q. And who was it gave it to you? A. I took it myself over the wire.

Q. But who was on the other end of the wire? A. I could not state as to that.

Q. The West Shore Railroad? A. May have; I couldn't tell you who it was.

Mr. Carey: I object to that.

Q. And did you find any tenderness when you went to his head at all—when you examined his head? A. That complaint of tenderness——

Q. Did you find any tenderness when you pressed his head, that he complained of? A. You mean any swelling at all?

Q. No, tenderness? A. Well, tenderness is a subjective symptom.

Q. Well, did you find that subjective symptom? A. In other words, did Mr. Price complain of tenderness when I made pressure? Is that what you mean to ask?

The Court: It must be, Doctor, when you say it is a subjective symptom, that is, one that you can only know and realize because the patient may give you some indication of pain or discomfort?

The Witness: Exactly.

Mr. Carey: I object to what the patient told the Doctor as hearsay.

Q. Don't you diagnose on subjective symptoms as well as objective? A. Exactly; hence I am repeating your question in a different form.

Q. (Repeated by the stenographer.) Did you find any tenderness when you pressed his head, that he complained of? A. Yes, sir.

Mr. Carey: That is objected to.

The Court: He is not asked what he complained, he is only asked what he found.

Mr. Carey: I withdraw the objection.

The Witness: He complained of neuralgic pains.

Q. Didn't you testify—don't let us get to neuralgic pains—on your last appearance on the witness stand weren't you asked: "Q. There was tenderness? A. There was tenderness, and he

complained throughout his entire course in the hospital." Did you so testify? A. That is correct, yes.

Q. Then you were asked: "Did you apply an ice bag to his head? " and you said, "I did not apply it, but there was one applied." A. Yes.

Q. And there was complaint of tenderness? A. He complained of pain.

Q. He was a crazy man, according to you, in the last trial you said he had paresis due to syphilis? A. He was insane.

Q. But you said he had paresis due to syphilis? A. Paresis is always due to syphilis, Mr. Simpson.

Q. Didn't you say that this man's condition was due to a paresis due to syphilis?

Mr. Carey: I object to the question. If he testified that way you will find the question and the answer there, Mr. Simpson, and he should have it.

Q. "You say in your opinion he was suffering from paresis; is that right? A. My diagnosis is paresis. Q. What is the cause of that, in your opinion? A. Paresis. Q. In this case syphilis, or what would you say is the cause? A. There is only one cause for paresis, and that is the disease you have mentioned. Q. Syphilis? A. Exactly." Did you so testify? A. I so did, Mr. Simpson, but I am going to be exact when I testify. When you ask me is this a case of paresis caused by syphilis, I am not going to say yes, because all cases are caused by syphilia. It would be redundant and tautological for me to say that case was caused by syphilis.

Q. That is true, but if it is the only case— A. Yes, but I am not obliged to repeat it.

Q. Then if it is the only case you are making a correct answer when you say "Yes." A. I say paresis is caused by syphilis.

Q. You say paresis is caused by syphilis exclusively? A. Yes, sir.

Q. Then this was caused by syphilis? A. But I am not going to say it is a case of paresis caused by syphilis. It is redundant.

Q. We are not trying the English dictionary? A. I am talking exactly, Mr. Simpson.

Q. I want to know what is the matter with Price? A. Well, I am not going to be redundant, I assure you.

Q. Doctor, you did find then, if this man was telling the truth, subjective symptoms of tenderness, didn't you? A. He complained of pain, yes.

Q. Well, if he complained truthfully you would have had the subjective symptom of tenderness, wouldn't you? A. Yes, sir.

Q. Now, would that be an indication that his skull had been injured if he complained of tenderness over the region of the skull? A. Not of necessity.

Q. No, could it possibly be? Would be as a symptom of an injury to the skull? A. Yes, pain would be a symptom of injury received on the head.

Q. Now, you were superintendent of the North Hudson Hospital for some time, Doctor, weren't you? A. Yes, sir.

Q. And there were some mistakes made up there about diagnosing fractured skulls, weren't there, before Price was brought in?

Mr. Carey: I object to the question.

Mr. Simpson: I want to show what the condition was.

The Court: I sustain the objection unless it is going to go—

Q. Isn't it a fact that a man named John Reilly who was brought to your hospital in January, 1916, suffering from a fractured skull, that his case was diagnosed as delirium tremens; that he was put out of the hospital, taken away on a load of fire hose as a delirium tremens patient, and died of fractured skull in Union Hill jail? A. Such is not the fact at all.

Q. Well, what are the facts? A. I didn't see that patient. I wasn't there at the time. The house surgeon and the assistant house surgeon handled the case. They diagnosed the case as alcoholism, and I believe their diagnosis was absolutely competent and just.

Q. Well, he died of fractured skull in the jail, didn't he? A. I don't know as to that.

Q. All you know is that they did make a diagnosis of delirium tremens, and that is all you know about it? A. I didn't even see the patient, Mr. Simpson.

Q. You had no anxiety to go outside and find out if it was—

The Witness: I think that is a little impertinent.

The Court: That may be stricken from the record.

Mr. Simpson: My question?

The Court: Yes.

Mr. Simpson: I ask for an objection.

The Court: Yes, and it will be stated on my account that you have it.

Q. Now, Doctor, in the history of this case did you get any facts which you used in making this diagnosis? In the history did you get anything—in the history of the case as to a head injury?

Mr. Carey: From whom?

The Court: Any one.

Q. From any one?

Mr. Carey: I object to that, if the court please. This man was under his care. He saw for himself the condition.

The Court: Yes, but where there is treatment by a physician he is entitled in his diagnosis to the benefit of the history of the case; is he not?

Mr. Carey: If he asks for it.

The Court: Well, if he had it, the next question would be did he use it or apply it when he diagnosed the case.

The Witness: I cannot recall any specific statement that the man had received the head injury.

Q. And you told Dr. King that this man was suffering from concussion of the brain from a fractured skull, didn't you? A. I did not; most absolutely did not.

Q. Did you have a talk with Dr. King about the condition of this man? A. After he had been removed from the institution.

Q. Well, did you have a talk with him? A. I say after he had been removed from the institution.

Q. You need not shout about it. A. Well, don't repeat your question.

Q. Now, let us see, Doctor. You say that you had no talk with Dr. King while the man was in your hospital? A. I did not.

Q. Isn't it a fact that you sent for Dr. King while the man was in your hospital, had the Doctor examine him, told the Doctor you thought he was an insane patient, and you didn't want him there, and you wanted him removed—all while the man was in your presence and in Dr. King's presence

and before he left the hospital? Isn't that a fact? A. I had him committed through Dr. King.

Q. (Repeated by the stenographer.) And you told Dr. King that this man was suffering from concussion of the brain from a fractured skull, didn't you? A. I did not; most absolutely did not.

Q. Did you have a talk with Dr. King about the condition of this man? A. After he had been removed from the institution.

Q. (Repeated by the stenographer.) Well, did you have a talk with him?

Q. (Repeated by the stenographer.) I say after he had been removed from the institution.

Q. (Repeated by the stenographer.) Now, let us see, Doctor. You say that you had no talk with Dr. King while the man was in your hospital? A. I did not.

Q. (Repeated by the stenographer.) Isn't it a fact that you sent for Dr. King while the man was in your hospital, had the Doctor examine him, told the Doctor you thought he was an insane patient and you didn't want him there, and you wanted him removed—all while the man was in your presence and in Dr. King's presence, and before he left your hospital; isn't that a fact? A. That is true.

Q. What did you mean by saying a moment ago that you had no conversation with Dr. King until after the man was taken out of your hospital? A. I will be glad to explain it. You asked me whether I told Dr. King that the man had suffered a blow on the head, and I said I had no conversation to that effect.

Q. I don't think I did ask you whether he had a blow on the head. I asked you whether you had told Dr. King this man was suffering from concussion of the brain from a fractured skull; nothing about a blow on the head. Did you have any conversation——

Mr. Simpson: I will withdraw that.

Q. What do you say now as to whether or not you had a conversation with Dr. King while the patient was still in your hospital and before he was removed? A. I had to have him committed and I did speak to Dr. King in regard to the case in that way, in that connection.

Q. Did Dr. King examine him in your presence at the hospital? A. I don't know whether I was present or not at the time.

Q. Did you have a conversation with Dr. King at this time while he was in the hospital? A. I must have done so, yes.

Q. Now, did you tell him then that the man was suffering from concussion of the brain due to a fractured skull? A. I did not.

Q. Anything like that? A. No, nothing of the sort.

Q. No conversation of that kind? A. No, I did not.

Q. Now, you are sure that the man had syphilis, aren't you? A. I am sure he must have had syphilis, because I think he has paresis.

Q. No; that his condition is due to syphilis? A. I believe so.

Q. If you are wrong about that you may also be wrong about your diagnosis as to a fractured skull; isn't that so? A. It does not follow.

Q. It does not follow? A. No.

Q. You might make a mistake as to one cause and not make a mistake as to another cause? A. That is a non sequitur the way you put it.

Q. Would you? A. It does not follow:

Q. I don't care for any lecture on logic. I simply want to know if it is a fact that you are mistaken, and every doctor in this case says you are mistaken—if they do say that—as to whether this

man had syphilis, the doctors on one side and the doctors on the other—would it still be possible that you made a mistake about your diagnosis of a fractured skull? A. No, it does not follow at all.

Q. What did you do to find out if the man had a fractured skull? A. Why, examined him thoroughly.

Q. In what way? A. We had to shave his head —his hair was clipped and his left side shaved. We looked for external marks of injury, and we examined his pupillary reflexes. We noticed whether there were motor or sensory disturbances that might be caused. We noted the absence of symptoms such as Jacksonian epilepsy by which they are frequently caused. We found no depression of the skull.

Q. Is it customary for you to make a report of these examinations in all cases? I mean for your own files? A. That is the duty of the house surgeon.

Q. Well, was that done in this case? A. I think it was; yes, sir.

Q. It would be in among your files then, would it? A. I think so.

Q. Was your attention ever called by Dr. Fendrich or anybody else to this mark on the head of this man—supposed mark? A. No, it was not.

Q. How long was the man in your hospital? A. I cannot say definitely, it was some weeks or months.

Q. How did he act,— A. Irrationally, insanely.

Q. Was he completely insane, in your opinion, when he was removed? A. Absolutely.

Q. And in your opinion is that condition permanent? A. Yes; I believe it to be permanent.

Q. Now, is it possible that the man could have had a fractured skull without any kind of a mark

of any instrument striking him such as has been described by Mr. Carey? A. No.

Q. Did you think that if this man in an engine cab was passing another engine and that his head came in contact with an iron poker, his own train going at the rate of twenty-five miles an hour,—that that would be sufficient force to fracture his skull? A. It depends on how he was hit. There might be a grazing blow; there are all sorts of possibilities, and I am not going to guess at them.

Q. No, is it a possibility?

Mr. Carey: I object to "possibility."

Q. Is it impossible in your opinion that a fractured skull could be produced in the way I have described? A. Repeat the previous question.

Q. (Repeated by the stenographer.) Do you think that if this man in an engine cab was passing another engine and that his head came in contact with an iron poker, his own train going at the rate of twenty-five miles an hour,—that that would be sufficient force to fracture his skull? A. I believe so.

Q. Did you have his hair clipped off? A. I had it done.

Q. Well, were you present when it was done? A. Yes, sir.

Q. And who did it? A. If I mistake not the house surgeon, Dr. Kooperman, at that time.

Q. Is he here to-day? A. I think he is, sir.

Q. You shaved it on the left side and not on the right side? A. It was clipped all over and shaved on the left side.

Q. Why did you shave the left side? A. Because it was stated indefinitely that the injury was there.

Q. That what? A. That the injury was there.

Q. Who stated that? A. The men who brought him, understand.

Q. The injury was on the left side? A. Yes.

Q. So you didn't shave the right side at all? A. The right side was not shaved; it was clipped.

Q. And you put ice bags after you found that he had no fractured skull—you kept ice bags on his head for some time, didn't you? A. We did.

Q. How long? A. I think for several days, if I mistake not.

Q. Are ice bags ever used in the treatment of fractured skull? A. They are used for a great number of things.

Q. Are they used for fractured skull? A. Yes, sir; oh, yes.

Q. What is their office? What are they supposed to do for a man with fractured skull? A. Well, they quiet nervous symptoms.

Q. At the last hearing you had the record here, didn't you—the record of the hospital? A. I think that was subpoenaed, yes, and brought up.

Mr. Simpson: I think that is all, Doctor.

By Mr. Carey:

Q. Doctor, did you notice any swelling at any time about the head of this man? A. No, sir; at no time.

Q. Or the forehead? A. No, sir.

Q. Nor the face? A. None whatsoever.

Q. You spoke of tenderness, complaint of pain, in what locality? A. Well, known as the superorbital nerve.

The Court: Show us.

The Witness: Emanating from the forehead and radiating back in the course of the nerve which comes from the right eyebrow, from the region of the right eyebrow.

The Court: Just show the jury as you showed it over here.

The Witness: Pain radiating from here.

He had many tender spots on both sides of his head, and they come largely from the super-orbital region.

Q. In your examination you traced it to that point, did you, to that place of origin? A. Yes.

Q. Was quite nervous while he was there? A. Well, nervous is an indefinite term. He was absolutely irrational. Walking up and down and showing great motor activity, great restlessness.

Q. And the right side of the head was clipped? A. The right side of the head had been clipped.

Q. How close was it clipped? A. So that you could hardly pull it; so that you could see the entire scalp very closely and plainly.

Q. What is your recollection about his exhibiting fever, Doctor, if you have any? A. Well, if I can recall aright, he had practically no temperature whatsoever, except that which was normal, so far as I can recall; normal temperature throughout.

Q. Did you tell anybody that Price had had a concussion of the brain? A. Never, sir.

Q. Or that he had had a fracture of the skull? A. Never. I was emphatic in the opposite direction. Had it been a surgical case he would have remained there. Being an insane patient I wanted him removed, and I had him committed.

Q. Have you seen Price since he left the hospital? A. No; I have never seen him.

Q. And that is something over two years ago; is it not? A. Yes; I should judge it would be fully that length of time, sir.

Q. Nobody ever called your attention to any swelling or red mark on the head, Doctor? A. There was no swelling or red mark to have one's attention called to—positively.

Q. For the first few days that he was there you saw him every day, I understand, Doctor? A. I

saw him every day throughout his entire stay at the hospital, many times a day.

By Mr. Simpson:

Q. This was a case of traumatic insanity—if this was a case of traumatic insanity, do I understand you would have retained him at the hospital? A. Yes, I would regard that as a surgical case, and as such I would have retained him there.

Q. Did you expect to cure his insanity if it was traumatic insanity by a surgical operation? A. I certainly think the possibility of cure of traumatic insanity is very possible by operation.

Q. Did you have anybody up there who knew anything about traumatic—brain surgery? A. Yes, sir.

Q. Who was recognized as a man who knew anything about brain surgery up in the North Hudson? A. I didn't say he was connected with the hospital. He was Mr. Hunt, a New York Specialist.

Q. Did he come over and perform operations for brain surgery at the North Hudson Hospital? A. I didn't say that, either.

Q. Well, what I want to know is what you would be doing keeping a man in your hospital when you were running the hospital, who was insane by reason of a trauma. You say if that was the fact you would have kept him there, you would not have had Dr. King take him. Why would you keep him there? A. Because I would regard it as a surgical case due to injury.

Q. Can you mention to me one person that I can identify who has been cured of traumatic insanity by an operation at your hospital while you were there? A. That you can identify?

Q. Yes, bring him here under subpoena. Tell me the name of anybody who has been cured of

traumatic insanity at your hospital by an operation in brain surgery. Give me his name and address? A. You are asking impossible questions.

Q. Of course I am asking impossible questions —not impossible questions, but questions which are impossible to answer. A. That is perfectly true, Mr. Simpson.

Mr. Simpson: That is all.

By Mr. Carey:

Q. Doctor, you have testified that in your judgment it would be impossible for a fracture of the skull or concussion of the brain to arise from a blow from an iron poker transmitted to a person when he ran against it at a speed of twenty to twenty-five miles an hour, without leaving external marks? A. Yes, sir, I have, most emphatically.

Q. Now, are there circumstances by which a fracture of the skull might be produced without leaving external evidences? A. Well, that question has to be carefully distinguished with regard to fractures at the base of the skull. Thus: I had a case of a little girl who was shot through the nose, the bullet penetrated the base of the skull through the nose. There was no external visible mark of such a fracture, but that was because of being within, understand, and not exposed as is the vault of the skull.

Q. And are there cases of fracture of the skull from falling when the immediate point of the injury is not the brain and not the head? You have heard of such instances as that? For example, a fall and a person striking on his buttocks, or on his feet, and a fracture of the skull resulting—the base of the skull? A. Well, personally I have had no such instance; I suppose it is possible, though

it would be a very peculiar chain of circumstances that would cause it.

Mr. Carey: That is all.
Mr. Simpson: That is all.

(Recess until to-morrow morning at 10 o'clock.)

November 20, 1917, trial of the cause resumed at 10 A. M.

GEORGE D. MEHRAHOF, sworn on behalf of the plaintiff.

Direct Examination by Mr. Simpson:

Q. You are the station agent at Weehawken, aren't you? A. Station master.

Q. And were you the station master on the 16th of February, 1915? A. Yes, sir.

Q. That is the day of this accident. You were not on duty, though, when Price was brought into the station, were you? You didn't see him? A. No, sir; I was not.

Q. When you came on the next morning did you see the cap that he wore? A. I don't remember seeing it, no sir.

Q. You don't know where it is? I mean you have never to your knowledge seen it? A. No, sir.

Q. It was not in the station so far as you know? A. Not so far as I know.

Q. And you came on duty what time the next morning? A. About eight o'clock.

Q. Eight o'clock. That is all.

Cross Examination by Mr. Carey:

Q. You never saw it at any time? A. No, sir, not that I know of.

Q. Never heard any report about it? A. No, sir.

Mr. Carey: That is all.

CAROLINE D. WITTPENN, sworn.

Direct Examination by Mr. Simpson:

Q. Mrs. Wittpenn, you are the Probation officer in this County, Chief Probation Officer? A. Not Chief Probation Officer.

Q. I thought you were? A. No; my brother is chief—

Q. Oh! You know Mrs. Price? A. Oh, yes, very well.

Q. For how long have you known her? A. Almost two years, Mr. Simpson.

Q. And what were the circumstances under which you knew her? A. She came to my house in Jersey City, I think about December or January—almost two years ago, it would be—and she told me that her husband had been hurt—

Mr. Carey: I object to what she told—

Q. What I want to find out is what you did for her. You went to her house and saw her condition then? A. Yes, several times.

Q. And since her husband has been in the hospital at Morris Plains she has practically been taken care of by you, hasn't she?

Mr. Carey: I object to that as incompetent and immaterial.

The Court: What is the relevancy?

Mr. Simpson: Well, it seems to me this: It may be argued that this whole thing is a fake, from what Dr. Bissing said yesterday, that the man wasn't an idiot; that it is a pretence, and I want to prove by Mrs. Wittpenn what her association has been with Mrs. Price, and that she has practically taken care of the family.

The Court: It is that part that seems to be objectionable. How are we concerned about

that at all? The whole question in that direction is, assuming the party has been injured and that the liability for that injury is chargeable to the defendant company, and by and through it he has been incapacitated and prevented from performing his previous occupation—the whole question left is what were his earnings at that occupation when he was able to perform his work; and that is all there is to it. The fact that a family had been the recipient of charitable donations and so forth—there is no relevancy in that in a case of this sort.

Mr. Simpson: In this aspect: It occurred to me that if I could produce Mrs. Wittpenn, who is known well in this community, who takes interest in this family, and show by her that this family was dependant on her, and that she was taking care of it, wouldn't that go to negative the idea that this was deceiving?

The Court: I do not think so, Mr. Simpson. I do not think it has any relevancy.

Mr. Simpson: Well, that is all, Mrs. Wittpenn. I am much obliged to you.

GRANT HINCKLEY, sworn.

Direct Examination by Mr. Simpson:

Q. Where do you live, Mr. Hinckley? A. 145 Fourteenth Street, West New York, New Jersey.

Q. Whom are you employed by? A. New York Central Railroad Company.

Q. Running on the West Shore branch? A. Yes, sir.

Q. And on the 16th day of February, 1915, what was your occupation? A. Locomotive fireman.

Q. And what time did you leave the terminal that night? A. Weehawken?

Q. Yes. A. 7.40.

Q. Did you pass this train that Foster was the engineer and Price the fireman on west of the tunnel that night? A. Yes.

Q. Which direction were you going? A. West.

Q. And had you emerged from the tunnel when you passed their locomotive? A. I believe we had.

Q. And you were on the left side of the cab, weren't you? A. Yes.

Q. Did you have a firehook on your engine that night? A. I did.

Q. What was the length of it? A. Why, approximately ten feet.

Q. And about what was its diameter? I mean its thickness? A. It is a little over a half inch.

Q. What was it used for? A. If there is any holes get into your fire you use the hook to knock the holes down, in, and break the coke, in case your fire is too heavy.

Q. You shove it in and turn the fire around with it; is that the idea? A. Just move it back and forth over the fire in order to level the fire off.

Q. It is like a poker; it is practically a poker? A. It is not.

Q. What is it? A. A poker is a straight bar. That is raked off.

Q. What is it? A. It is raked off; it has two forks on the end.

Q. It is like a rake? A. Yes.

Q. What is the end from the rake end? Is that the handle? A. That is a round ring handle; yes, sir.

Q. Which you take with your hand? A. Yes, sir.

Q. And when you are not using it where do you usually leave it? A. Always leave across the deck of the tank.

Q. That is the proper place for it? A. That is the proper place for it.

Q. And if it is in its proper place how much does it project on each side of the tank? A. Why, it should not project any, but this night it projected about three or four inches.

Mr. Simpson: I ask to have that stricken out as not responsive.

Q. (Repeated by the stenographer.) And if it is in its proper place how much would it project on each side of the tank? A. (No answer.)

Q. I didn't ask anything about this night. If it is in its proper place how much would it project on each side of the tank? A. Not any.

Q. Not any. When you got to Dumont that night you were stopped by a telegraph, weren't you? A. Yes, sir.

Q. And told that you had hurt a man? A. I don't know whether it said hurt him?

Mr. Carey: I object to what he was told.

Mr. Simpson: Well, it is part of the business of the company. If the company itself told him, "You injured a man," wouldn't that be an admission against interest?

Mr. Carey: If the board of directors met—

Mr. Simpson: The board of directors do not run locomotives.

Mr. Carey: —and took action.

The Court: As to whom the message came from, as to whether he was one in that position that his remarks and admissions would bind the company—the admissions of all servants do not bind the company.

Q. You were stopped at Dumont? A. Yes, sir.

Q. And how far west from the west end of the tunnel? A. I should think about twelve miles.

Q. Who got the message stopping you, you, the conductor or the engineer? A. Why, I don't know just—I don't just remember who got the message from the operator, but the engineer received it from the conductor.

Q. And you stopped? A. Yes, sir.

Q. And as the result of that message you stayed there how long? A. Why, I don't just remember how long we stayed there, but we backed in the middle to let a couple passenger trains by.

Q. And how long was it from the time that you emerged from the tunnel until the time you stopped at Dumont? A. Well, possibly thirty minutes.

Q. Now, what were you doing from the time you emerged from the tunnel until you got to Dumont? What were your duties? A. Why, when we leave Weehawken in order to bring—in order to prevent smoke we use a hard coal fire on all heavy trains; so that hard coal fire will last you twelve or fifteen or twenty miles, according to the kind of train you have; so this night I didn't have to get off the seat box,—just to keep my injector on, to keep water in the boiler; that was all I was doing, and watching signals.

Q. You didn't have to do anything after you made the fire, until— A. New Durham.

Q. New Durham? A. Yes, sir.

Q. Well, what did you do after leaving Weehawken? A. Why, you don't have to do anything. When you get your engine to Granton there is a soft coal fire in the engine; you put on the blower; that fans the fire and makes it burn bright. Then you use this poker we were speaking of to make your fire level; and even bed of fire over the grate; and at New Durham, the coal pockets, you take on a supply of hard coal first.

Q. Hard coal? A. Hard coal. You put all that

hard coal in the fire—the fire box—and while you are doing that, why, of course, the engineer is getting sand and oiling his engine around, doing whatever duties are necessary, and you back through the tunnel and hook on to your train. While they are pumping up the air you put the blower on again and get this hard coal burning up, and get the vacuum steam pressure up, and when you get the air pumped up, why, you draw your brakes and you are all ready to go, and you can't do anything more with that hard coal until it is burned out.

Q. That would be where, about twelve to twenty miles? A. That all depends on conditions, whether you are delayed or have a straight run, or heavy train.

Q. Well, were you on time at Dumont? A. No; we were late leaving Weehawken.

Q. Who puts the tools on the engine? Are they put on at the Granton roundhouse? A. They are put on at the Granton roundhouse.

Q. Who puts them on? A. A man that is assigned to that work.

Q. Fireman has nothing to do with putting the tools on, or the engineer (No answer.)

Q. And what are the tools that are put on? A. Why, the engineer usually has a tool box.

Q. I mean the big tools, or the fireman's tools, the shovel? A. The fireman's tools consist of two shovels, lever, and the fire hook.

Q. And you would not have any occasion to use that fire hook after it was put on until you had a soft coal fire? A. Right.

Q. So that you got your engine fully equipped, took it in with the engineer, hooked on the train, and went out? A. Yes.

Q. Do you remember what you were doing when your locomotive passed the locomotive on which

Price was? A. Yes, sir; I was sitting on the seat box.

Q. Well beside that were you looking for signals or doing anything particularly? A. Why, when you emerge from the west portal of the tunnel you always look for the signal and call it out.

Q. That is a part of your duties? A. That is a part of your duties.

Mr. Simpson: Cross examine.

Cross Examination by Mr. Carey:

Q. Do you remember where you first tended to your fire after hooking on to your train at Weehawken? A. Why, at Weehawken we did—I did nothing to the fire, except put the blower on.

Q. I understand that? A. But the next point—is that what you mean?

Q. You say that you hooked on to your train and left Weehawken? A. That was at West Nyack; that was the next point that I had to do anything with the fire. Of course, previous to the arrival at West Nyack I might have throwed in two or three shovels of coal; something like that; no more.

Q. Did you use that fire hook from the time you left the Weehawken yards until you arrived at West Nyack? A. West Nyack was the first point I used it after putting it in place at New Durham.

Q. Now, let us get this situation clearly in mind: There are two yards there—the New Durham yards and the Weehawken yards, are there not? A. Yes, sir.

Q. And you and the engineer go to the roundhouse in New Durham, or Granton yard? A. At Granton.

Q. At Granton roundhouse, and get your engine? A. Yes, sir.

Q. You then have your soft coal fire in the engine? A. Yes, sir.

Q. That has already been started and is burning when you take your engine? A. Yes, sir.

Q. Then you and the engineer back your engine down to the coal pockets, did you say? A. At New Durham, yes, sir.

Q. That is before you reach the tunnel? A. Yes, sir.

Q. And when you get to New Durham you do what with reference to taking on coal? A. I level off our fire, get it evenly over the grate with the firehook; then we take hard coal.

Q. Yes. And what do you do with the hard coal? A. Place it in the firebox.

Q. Turn around so the jury can hear you? A. Place it in the firebox in proper shape so it will burn evenly when you are with the train.

Q. And you did that, did you? A. Yes.

Q. As fireman that is the fireman's duty? A. Yes, sir.

Q. And at that point did you make use of the firehook? A. At New Durham?

Q. Yes. A. Yes, sir.

Q. When you are putting on hard coal? A. No, previous to putting on hard coal.

Q. Previous to putting on hard coal? A. Yes, sir.

Q. And after you have used the firehook you fill up with hard coal? A. Yes, sir.

Q. Then you back down into the tunnel? A. Yes, sir.

Q. Into the Weehawken yards? A. Yes, sir.

Q. And there on that night in question you hooked on to the train, or the engine was hooked on to the train? A. No, sir; when we backed through the tunnel at Weehawken the train wasn't entirely ready, so we laid at the "Y".

Q. Which side of the tunnel is that? A. On the east side of the tunnel.

Q. On the east side? A. Yes, sir; just in the freight yard.

Q. And you laid there until the train was ready? A. Till the train was ready and full boiler.

Q. When the train was ready the engine was backed down and coupled on to the train? A. Yes, sir.

Q. And you pulled out? A. Yes, sir, after trying our air.

Q. Now, will you describe this firehook as well as you can? A. Why, it is—it is a rod, might be a little over half an inch in diameter, and I think about ten foot long; and it has two prongs on the end that goes into the fire, shaped in rake fashion, and on the other end there is the round loop for putting your hand through. You always put your hand through the loop and let the back of the loop act as a guard, so in case you pull it back you don't hit your hands against the doors.

Q. And that handle is a part of the fire rod? A. Yes, the rod itself.

Q. That was the kind of firehook you had that night? A. Yes, sir.

Q. Did you have the ordinary firehook that night? A. Yes, sir; that is the only kind they supply.

Q. Now, after you had used the firehook at the New Durham yard and before you backed through the tunnel for your train, where did you place the firehook? A. Across the front deck of the tank in its proper position.

Q. Is that the regular position for the firehook when not in use? A. Yes, sir.

Q. On the style of engine which you had is there any other place to carry the firehook? A. No, sir.

Q. Now, when you placed the firehook in position after using it, will you describe its position; which way was the handle of the firehook? A.

Why, the handle of the firehook was next to me.

Q. It was on the fireman's side? A. The handle of the hook is always next to the fireman.

Q. And the hook end is next to the engineer, is it? A. Yes, sir.

Q. Now, the hook or rake end rests on what? A. Why, on both sides of the tank is what we call the deck of the tank, then it is flat, and on the outside there is—well, a wing, I would call it—that projects out, see? perpendicular, and that forms similar to a pan on that deck, and this rake of the hook was resting against that wing, and on top of the deck.

Q. Then, as I understand you if this were to represent the side of the plate of the engine tank, the outside plate, there would be a little shelf on the inside here on the engineer's side? A. Yes.

Q. And this rake was resting on this little shelf, the rake end of it? A. Yes, sir, and the forks were against this here plate.

Q. And the forks, how did they stand? Did they lie parallel with the face of this little shelf on which the fire hook was resting, or sticking up in the air? How? A. Well, I could not say about that, which way they were pointing.

Q. The wing is several inches higher than the prongs of the rake, is it not? A. Yes, sir; I believe this wing is about nine inches tall.

Q. Represents the outside, the outside plate of the engine tank? A. Yes, sir.

Q. Now, the natural position for your fire hook is for the fire hook to be resting on its head, and the prongs sticking up against this plate, is it not? A. Yes, sir.

Q. Now, when you were through using the hook that night did you place it back in that way? A. Yes, sir.

Q. Then the handle end rested on what? A. Why, rests—

Q. Similar plate on the other side? A. Just the same as this here—as the tank of the engine—

Q. Yes. A. And this sheet here represents the wing, (indicating) the hook—the prongs laid against the wing there, and on the tank—

Q. Yes. A. —and the handle of the hook lays somewhat higher across the pipes to the air squirt hose, as they call it. There is pipes there for squirting water on the deck.

Q. And does the handle of the hook reach to the outside plate on the other tank? A. This hook was just a trifle longer than the standard length, and it did project about three or four inches over the tank.

Q. Now, do you remember the position of the hook and the handle when you left—after you had used it at the New Durham yards? A. Yes, sir.

Q. And will you tell us how much the handle end projected over the plate, the outside plate of the engine? A. Just the width of that ring where you put your hand through. I call that about three or four inches; not over that.

Q. Now, which is higher, when the hook is in its proper place—which is higher, the handle end—I mean higher above the floor of the engine, or the tender,—the handle end or the hook end? A. Why, the handle end is about a foot, possibly thirteen inches higher than the hook end. It lays on an incline.

Q. So there is a slant of some twelve or thirteen inches in the length of the hook? A. Yes, sir.

Q. Now, I show you a photograph and ask you if you were present when that photograph was taken? A. (After examining photograph.) I was.

Q. And you notice there a loop, an iron loop. What is that? A. That is the handle of the fire rake, right there.

Q. That is the handle end, is it? A. Yes, sir.

Q. And was that such a handle as was on the rake that you used that night? A. Why, as far as I can remember it is almost an exact—exactly the same.

Q. Yes.

Mr. Carey: I want to offer that for identification.

Mr. Simpson: I have no objection. You can offer it in evidence if you like.

(Photograph marked D-4 in evidence.)

Q. Now, will you state whether or not the handle as shown in that picture is in the same position as the handle was on the night of February 16, 1915, when you went out on the train? A. It is, as near as I could possibly place it.

Q. You placed that yourself, did you? A. Yes.

Q. Now, when you examined the engine at Dumont, will you state in what position you found the fire hook? A. In the same position that I had left it after using it at New Durham—Dumont.

Q. Had you moved it at all from the time you left the Weehawken yards up to the time you examined it at New Durham—I would say at Dumont? A. I had not.

Q. I offer to show you another photograph representing the side of an engine. Were you present when that photograph was taken? A. I was.

Q. And is that the same style of engine which you had on the night of the 16th of February, 1915? A. Same engine, but, of course, it is a different number; it is the same class.

Q. Same class? A. Yes, sir.

Q. And is it a duplicate so far as dimensions

and construction are concerned? A. It is as close —as near as we can make it, perhaps.

Q. Do you remember the number of the engine you had that night? A. 3189.

Mr. Carey: I want to offer that, Mr. Simpson.

Mr. Simpson: All right.

(Phototgraph marked D-5 in evidence.)

Q. Which side of the engine is this that is shown in the photograph? A. The left side.

Q. And that is the fireman's side? A. Yes, sir.

Q. And you noticed the handle of the fire hook there? A. Yes, sir.

Q. And will you state whether or not that is in the same position that your firehook was on the night of February 16th, 1915? A. Yes; as near as I could place it.

Q. You placed that, did you? A. Yes, sir.

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

Q. I show you another photograph and ask you if you were present when that was taken? A. (After examining photograph.) There isn't much in that! (Laughing.) Yes, sir.

Q. You were sitting in the cab of an engine alongside, on an adjacent track, were you? A. Yes, sir.

Q. And what was the number of the engine on which you were sitting? A. 992.

Q. 992. And the evidence is that the engine on which Mr. Price was fireman on that night was engine 907. Do you know whether 992 and 907 are of the same class? A. I believe they are.

Q. And of the same dimensions? A. Yes, sir.

Q. You notice the firehook on that engine opposite the one where you are sitting? A. Yes, sir.

Q. And is that firehook in the same position as the firehook was when you left Weehawken and when you arrived at Dumont? A. Yes, sir.

Q. You placed this firehook handle, did you? A. Yes, sir.

Mr. Simpson: I won't admit this until I have a chance to cross examine him as to what he knows of 907.

The Court: Well, mark it for identification then.

(Photograph marked D-6 for identification.)

Redirect Examination by Mr. Simpson on D-6 for identification:

Q. Have you ever measured 907? A. No, sir.

Q. How do you know what the dimensions are then? A. Why, when our agreement came up between the engineers—I mean between the Railroad Company and the firemen, the rating of pay should be according to the weight of the engine and the class; so the Company put out a list of all engines of the same class and same weight into separate lists, and this 992 and the 907 comes under the same list; that is all I have to go by; other than I worked on both engines, and as far as appearance goes they were identically the same engines.

Q. They looked the same to you, and the other information you got from this classification published by the company? A. For our benefit, and according to our rating.

Q. But you have no personal knowledge of the dimensions outside of that, have you, of 907 and of this one? A. I made no measurements.

Q. What do you say this is? A. 992.

Q. Is that the one the man is looking out of or the other? A. That is me looking out.

Q. Is that 992? A. Yes, sir.

Q. What is the other one? A. 3195.

Q. Is that the one you had that night? A. No; it is the same class of engine.

Q. Same type of engine? A. Yes.

Mr. Simpson: All right, I have no objection to that classification so far as it goes in wage classification. I have no objection to them.

Mr. Carey: We will have the man who knows all about these next.

(D-6 for identification received in evidence.)

Q. This was the freight train you went out on that night? A. That I went out on; yes, sir.

Q. And you say that you have worked on both classes, the 3100 class and the 900 class of engines? A. Yes, sir.

Q. And you are familiar with them? A. Yes, sir.

Q. Now, do you know about how long that train was that you went out on that night? A. Why, I couldn't state just the number of cars.

Q. Well, was it a long train or short train? A. It was quite a long train.

Q. When you got to Dumont what examination did you make? A. Why, just saw my fire and the water in the boiler was in safe condition to leave, and I got down and looked over the left side of the engine to see if there was anything projecting, or loose, or blew off, and found everything in its proper condition.

Q. And the firehook in these pictures, in this condition represented by these pictures that I showed you? A. Yes, sir.

Q. You saw that particularly that night, did you? A. Yes, sir.

Q. You say that the two engines passed after your engine had passed through the tunnel? A. Yes, sir; I believe they did.

Q. About how fast were they going? A. I don't just remember, but possibly fifteen mile an hour; maybe a little more or less.

Q. Was there anything on the handle of the firehook which indicated that it had struck anything? A. No, sir.

Mr. Simpson: Wait a minute. Let me hear that question.

Q. (Repeated by the stenographer.) Was there anything on the handle of the firehook which indicated that it had struck anything?

Mr. Simpson: I object to that on the ground that it calls for a conclusion. What would there be on the hook that would indicate that it struck anything? If it hit a man's head as it passed it would not carry the top of his skull.

The Court: No, but it might have had some indication on it.

Mr. Simpson: Well, I will withdraw my objection.

The Court: You see, this is cross examination.

Q. Answer the question? A. There was nothing.

Q. No hair? A. No, sir.

Q. No blood? A. No, sir.

Q. Nothing at all— A. No, sir.

Q. —to indicate that it had hit him. I call your attention to D-5. You spoke about the firehook being alongside of some pipes. Are those pipes shown in the picture D-5? A. They are.

Q. And the handle of the firehook goes back of these pipes? A. Yes, sir.

The Court: Suppose he indicates those pipes by a letter of some sort? Otherwise we won't know what they are.

Mr. Carey: All right, we will put the letter "P" just above the pipe.

The Witness: Well, this does not take on this glossy surface.

(The stenographer hands witness pen and ink, and the witness marks as directed.)

Q. Will you state whether or not the firehook is easily moved after it is placed in position? A. It is not. Oftentimes it is in there so that you have to jerk, force to get it out.

Q. When you left Weehawken do you say this firehook was in proper position? A. Yes, sir.

Q. No change in it when you arrived at Dumont? A. No, sir.

Q. Did you make any examination of any other part of the train except the engine? A. I did not.

Q. Did you see Mr. Price at all after his injury? A. No, sir.

Q. Did you know him? A. I did.

Mr. Carey: That is all.

Redirect Examination by Mr. Simpson:

Q. Now, this hook, sloping the way you say it did, that is, slanting toward you, with the handle end lower than the other end, what would keep it from slipping down over the side? A. You just reverse that, Mr. Simpson.

Q. M-m? A. The handle end was thirteen inches higher than the hook end on the other side.

Q. And the position in which you say it was? A. Yes, sir.

Q. What would keep it from going the other way, then? A. As I said before, it was up against that wing of the tank.

Q. Up against the wing; that would keep it from going through, going over? A. Yes, sir.

Q. And was it always in that position? A. They were always—everybody carries them there.

Q. That is the normal position to put them? A. Yes, sir.

Q. If they were not put in that position, if the rake end was put the other way, what would happen? A. Why, if the rake end was put just the other way you would be working just backwards; it would be very inconvenient for the fireman; and as far as staying in position, why, it would stay there no matter which end was there.

Q. Suppose when you got through with this hook you put it back behind you with half of it projecting out over the left hand side towards you, what would happen in the motion of the train—

Mr. Carey: I object to that, if the court please. The evidence is he put it back in the position he described.

Mr. Simpson: The evidence is that the jury can find he put it back in a different position, if the case of Jersey City against the Public Service is the law. The evidence in this case would show this man was struck with something going by in this locomotive. It has been demonstrated that there was nothing else to strike him but this hook, and if the ground is that there was no evidence that the hook was in position to strike him—

The Court: You are assuming that he was struck.

Mr. Simpson: I am assuming that he was. I have a right to assume that, under Austin against the Public Service, and Jersey City against the Public Service, and Nugent against the General Electric. I am assuming that the jury has a right to assume that. If there is evidence as to that the jury have the right to infer. He has been examined by Mr. Carey; I want to show the normal position, how it would act, how it should act, and what changes there were in it. I am not

simply limited to any mathematical notion that I have to follow in Mr. Carey's footsteps. I can ask him anything; I can ask him how the hook would act. Mr. Carey has not asked him all about it. I want to know what would happen.

Q. (Repeated by the stenographer.) Suppose when you got through with this hook and put it back behind you, with half of it projecting out over the left hand side of you, what would happen in the motion of the train—(Mr. Simpson continuing)—to the hook?

Mr. Carey: Now, this is redirect examination.

Mr. Simpson: Yes; it is on matter brought out by Mr. Carey,—how it was fastened and all that sort of thing; new matter. I didn't ask him as an expert anything. I simply asked him as to physical facts. Mr. Carey brought out a lot of new stuff on cross examination qualifying this man as an expert, identifying pictures by him, showing him pictures of hooks, showing how hooks acted, showing measurements. Nothing like that did I ask him on direct.

The Court: What is the objection?

Mr. Carey: It is that it is not proper redirect examination, and that there is no evidence in the case that the hook was placed in any such position. It is merely speculative as to what might be the result if something had been done with the hook which has been shown not to have been done with the hook, so far as this witness is concerned. Now, he cannot proceed on all sorts of suppositions as to what might happen in certain events or under certain conditions. The evi-

dence which has been given and which he has the right to examine upon in redirect is as to the matters which I brought out on cross examination. Now, he brought out the location of the hook and its place on the engine, and the handle end in one direction and the rake end in the other; and also brought out the fact that this handle end at the time of leaving Weehawken and at the time of arrival at Dumont was in the position which the witness described—three, and perhaps four inches projection over the side.

Q. (Repeated by the stenographer.) Suppose when you got through with this hook you put it back behind you with half of it projecting over the left hand side towards you, what would happen in the motion of the train to the hook?

The Court: I will sustain the objection.

Mr. Simpson: I ask for an objection in the nature of an exception.

The Court: You may have it.

Q. This hook if it was not in its position which you describe, would the motion of the train jar it over the side of the tank? A. It could not.

Q. Why not? A. On account of the incline, the handle of the hook laying twelve or thirteen inches higher than the hook end, and laying behind those pipes, those water pipes, and also the hook end laying against the wing of this tank on the opposite side, so we would almost make it secure for any movement.

Q. That is what you assume, but that is not what I asked you. I said suppose you put it four or five inches over the side when you were through using it; that your rake wasn't near the wing, and you weren't near any water pipe—would the mo-

tion of the train jar it further over on the side?

Mr. Carey: I object to that. The court has already ruled upon it.

The Court: It is practically the same question.

Mr. Simpson: He makes an answer to the second question which manifestly does not answer the question, which assumes a condition which the rake is not in.

The Court: I will sustain the objection, however, on the ground that it is similar to the one I have already ruled on.

Mr. Simpson: I ask for an objection in the nature of an exception.

Q. If this hook was projecting, as you say, five inches over the side of the tank—

Mr. Carey: He didn't say five.

The Court: Three to four inches.

Q. Well, three to four inches over the side of the tank, what would be the condition as the train moved? Would it make any difference in the distance? A. In the distance of what?

Q. The loop or the hook over the side? A. No, sir; it would not. It would stay the same.

Q. And the motion of the train would not make any difference?

Juror No. 11: I want to know whether it is permissible at this time for a juror to apply for information?

The Court: You may ask. Whether I can permit it to be answered depends on your question.

Juror No. 11: There is certain evidence been offered there, on which certain evidence rests. I want to know whether the jury can see those pictures while that evidence is offered, in fairness to both counsel.

The Court: Yes. Rightly you should have seen it before any further evidence went in, Mr. Juror.

(Photographs handed to the jury.)

Mr. Simpson: And here is another thing I should have argued: Waiving the argument whether it is redirect, I have a right to find out anything of this witness. He is the fireman. Irrespective of it being redirect I have a right to ask him anything as to the method in which this hook would work. The other man is dead; manifestly because he has not so answered it on direct is no reason why we should be shut out on redirect.

We base our action on the fact that this dead man—he is mentally dead—was killed by the action of this hook. I have the right to find out anything about this hook under my complaint, irrespective of whether I asked him on direct or not. That is simply a matter of discretion.

The Court: You are putting in questions on supposition.

Mr. Simpson: I don't care about his direct positive evidence. I want to know something about the hook. He is the man had the hook. I want to know how it acted, what it did, so that the jury can say whether this theory is possible or not possible.

The Court: I do not see how it can help you, because if the distance between the two cabs is a certain distance, which is a matter which will probably be established, then it makes no difference if there was a distance of the handle projecting of a length sufficient to match up the distance between the two cabs; that there was the probability that a person in the other cab would be struck by it—

Mr. Simpson: I object to this little exordium by Mr. Carey.

The Court: Mr. Carey just give the pictures to them.

Mr. Carey: All I am doing is pointing out to them the handle in the picture.

The Court: Mr. Simpson objects to it.

Mr. Simpson: They can see the handle in the picture. Let them see it. You are not talking to an infant class.

Mr. Carey: I think, if the court please, that either the witness or some one ought to point out to the jury just the thing which has been called out in this evidence—the handle of the hook and those pipes.

The Court: Well, let me ask the jury: Are you able, from the testimony which has been given, and as you recall it,—are you able now to identify those things in the photographs?

A Juror: Yes.

The Court: Very well; then that is sufficient.

(The jury continues its examination of the pictures.)

Q. Now, from the time that you told Mr. Carey that you saw your hook at Weehawken—did you mean that, or did you see it at New Durham? A. Both places.

Mr. Carey: Just a minute, Mr. Simpson: There is D-6. (Handing D-6 to the jury.)

I want to ask the witness a question about another photograph.

By Mr. Carey:

Q. I show you another photograph, which is D-1. That shows what? A. The inside of the cab.

Q. On which side? A. Left side.

The Court: Fireman's side?

The Witness: Fireman's side.

Q. Fireman's side, and the seat which you see there is what? A. The seat which the fireman sits on.

Q. And the window, the window on the side? A. Yes, sir.

Q. What is this iron which you see back here? A. This?

Q. Yes? A. That is the boiler body.

Q. That is the boiler body.

(The jury examines D-1.)

Q. I show you also D-2, and ask you what that is a photograph of? A. Photograph of engine 907.

Q. Which side? A. The left side.

Q. Well, the fireman's side, is it? A. Fireman's side.

Q. And what is this in front of the fireman's cab? A. This opening here?

Q. Yes. A. That is a door. The upper half was glass and the other part wood.

Q. Which way does that door open? A. In, inside the cab.

Mr. Carey: This photograph of engine 907; witness has just pointed out this window on the side of the cab, and the door.

(The jury examines D-2.)

Mr. Carey: I would like to offer one more photograph.

Mr. Simpson: It is up to his Honor.

The Court: If there are any more let us have them right away.

Q. I show you another photograph and ask you if you were present when that photograph

was taken? A. (After examining the photograph.) Yes, sir.

Q. And the handle of the hook, the loop, is turned up a little different from what it is in the others? A. Yes, sir.

Q. So as to show the loop more fully. Are those the same engines—I mean the same positions as the other photograph where your picture appears? A. Yes, sir.

Q. And also D-4, the one in which the hook was down flatwise—or I would say the handle was down flatwise? A. Yes, sir.

(Photograph marked D-7 in evidence.)

(The jury examines D-7.)

By Mr. Simpson:

Q. You said to Mr. Carey that you looked at your hook at Weehawken and at Dumont. You had no occasion to look at it between Dumont and Weehawken? A. No, sir.

Q. You were not using it and had no occasion to look at it. Now, at the time of the inspection of the train, you say the inspection of the train was not made by you. Whom was it made by? A. What inspection?

Q. The one that was made at Dumont? A. Why, the train crew.

Q. And what caused you to inspect that hook at Dumont? A. Because the engineer drawed my attention to it.

Q. And did I understand you to say to Mr. Carey that this hook was longer than the ordinary hook? A. Why, the standard hook will not project.

Q. I see. A. This one here was flush against the wing on the right hand side of the tank, and it projected possibly three or four inches over the left side.

Q. But had it been a normal hook type it would not have projected at all? A. No, sir.

Q. Now, one other thing I want to clear up. The slant upward was toward you, wasn't it? A. Yes, sir.

Q. And the more it projected the more it would project forward? A. What is that.

Q. The more it projected the more it would slant forward? I mean if it projected only three inches it would not slant up so much as if it projected only three feet? A. Oh, no.

Q. One other question I want to ask you on direct? As a fireman looking for signals, is it necessary in this line for the fireman to put his head out of the cab? A. Why, at certain points it is.

Q. And how far does he go out of the cab as a rule? A. About six inches.

Q. That is, he puts his head out? A. Yes.

Mr. Simpson: I think that is all.

By Mr. Carey:

Q. Is it necessary for the fireman to put his head out of the cab going through the tunnel? A. No, sir; you are not supposed to.

Q. And as you approach the tunnel, between the signals, the block signal west of the tunnel, and the westerly end of the tunnel, is it necessary for the fireman to put his head out of the window at all? A. On approaching the block, west portal of the tunnel, is it necessary—

Q. After you have passed—

Mr. Carey: Strike out the question.

Q. After you have passed the last signal before entering the tunnel—you know where that signal is, don't you? A. Yes, sir.

Q. Which side is it on? A. It is on the right hand side.

Q. On the right hand side. Now, after you have passed that, after the engine has passed that block signal and is nearing the westerly portal of the tunnel, is there anything that requires the fireman to put his head out of the window at all? A. Not at all, no, sir.

Q. Ever? A. No.

Q. On which side are the signals in the tunnel? A. The engineer's side.

Q. Now, as you are west of this block signal, which is the last one before reaching the tunnel, is there a curve in the railroad? A. Yes, sir.

Q. And that curve is beyond the New Durham station, is it not? A. Well, it is west of the station.

Q. West? A. Yes, sir.

Q. West of the New Durham station? A. Comes around straight in front of the station.

Q. And continues straight from that point on down through the tunnel? A. Right through the tunnel.

Q. Now, as you approach the New Durham station, however, you are on a curve? A. Yes, sir.

Q. And that curve is quite a sharp curve, isn't it? A. Yes, sir.

Q. And curves to the left? A. Yes, sir.

Q. Now, who, then, sees that signal which is between the New Durham station and the westerly portal of the tunnel first, the engineer or the fireman? A. Well, I could not say exactly who would be the first one to see it, but the fireman can see it, I should think, quicker than the engineer.

Q. He can see it further away on account of the curve, can't he? A. Yes, on account of the curve.

Q. So the fireman usually sees that first, doesn't he? A. Yes, sir.

Q. You have had experience in that, haven't you? A. Yes, sir.

Q. And when he sees it he calls it out to the engineer? A. Yes, sir.

Q. And a little later the engineer sees it? A. Yes, sir.

By Mr. Simpson:

Q. You say the soft coal makes the windows dirty, doesn't it? A. Yes, sir.

Q. How do you see if the windows are dirty without putting your head out of the cab? A. Take a piece of waste and wipe them off.

Q. Didn't you say at a hearing before Judge Tennant sometimes the windows are so dirty you can't see through them; you have to stick your head out or you can't see? A. That is up to the fireman's own carelessness—

Q. I didn't ask you that. I asked you if you didn't say that? A. Yes, I said that; but it is due to the fireman's own carelessness.

Mr. Simpson: I ask to have that stricen out as irresponsive.

The Court: It may be.

Q. And this signal you told Mr. Carey it is not necessary for a man to put his head out or lean out from the signal to the tunnel, but would it enable him to see the signal if he looked, if his windows were dirty, as he approached it? A. If you didn't have any windows at all in front of your cab you would sit up upright on your seat, without sticking your head out of the cab at all, and see the block on account of that curve.

Q. Well, if the windows were dirty? A. If you didn't have any windows in front of you at all you could sit up on your seat and see out of the side window.

Q. Well, if your side window was dirty? A. The side window is open. I was ahead.

Q. As you approach it? A. I say you could sit up right on your seat, and if your windows were all boarded up in front you always have the side window open, so you could look out of that side window and see the block on a curve without sticking your head out.

By Mr. Carey:

Q. This window in the front opens in? A. Yes.

Q. If it gets dirty the fireman has waste to clean it off with, hasn't he? A. Yes, sir.

Q. But from a point beyond this signal, which is shown on this photograph D-3, and the tunnel there is nothing for the fireman to see, is there? A. No.

Q. Nothing for him to look at? A. Nothing at all.

Q. Nothing for him to watch out for.

(The jury examines D-3.)

By Mr. Simpson:

Q. You mean that a fireman shuts his eyes as he goes through the tunnel; there is nothing for him to watch for at all?

Mr. Carey: I object to the question; it is immaterial.

Mr. Simpson: I will withdraw that question.

Q. Has the fireman anything to do in looking out to see if there is anything on the track at all, any horse, wagon, or man? Has he anything to do except watch for signals?

Mr. Carey: I object to that because I questioned him in regard to this position between

the signal and the westerly portal of the tunnel.

The Court: I suppose these questions go to that.

Mr. Simpson: They do.

The Court: If they do it is perfectly relevant.

Q. (Repeated by the stenographer.) Has the fireman anything to do in looking out to see if there is anything on the track at all, any horse, or man? Has he anything to do except watch for signals?

Mr. Simpson: I will withdraw that question and reframe it.

Q. Do you mean to say that after a fireman passes this signal that has been described as west of the tunnel, that he has absolutely nothing to do in the way of observation until he gets into the terminal shed? A. Nothing.

Q. He doesn't have to look out at all? A. No, sir.

Q. On his side of the engine? A. No, sir.

Mr. Simpson: That is all.

I. Lathrop Allen, sworn.

Direct Examination by Mr. Simpson:

Q. Doctor, you are a practicing physician? A. Yes.

Q. Did you examine Charles Price, 5383 Boulevard, Weehawen—or is it North Bergen? A. North Bergen.

Q. North Bergen, for life insurance in 1914? A. I did.

Q. What date, Doctor? A. December 30th, 1914.

Q. December 30th, 1914; and what was his condition? A. He was in good health. I passed him for the insurance.

Q. What would you say as to his mental condition; was he an insane man or was he sane? A. No; he was perfectly sound.

Q. And what was his physical condition? Was that all right? A. Perfectly robust.

Q. And he was passed by you for a policy in the Metropolitan life? A. He was.

Q. And that policy subsequently issued to him? A. It did.

Cross Examination by Mr. Carey:

Q. What was the nature of the examination, Doctor? A. The usual medical examination for a policy of the Metropolitan, ordinary application.

Q. Any tests of the blood made? A. No.

Q. How long did you take in examining him? A. Well, the usual time is from twenty to thirty minutes on an examination of that kind.

Q. Did you test his reflexes? A. The knee reflex.

Q. That is all? A. And sometimes the eye.

Q. Knee and eye.

The Court: Of course, Doctor, I understand these questions to be directed to what your examination was as to Mr. Price, not what you usually do, but as to what it was as to Mr. Price. Now, as to the reflexes, what were the reflex tests that you did apply to Mr. Price? I am asking that, Mr. Carey, because I think he misunderstood your question.

The Witness: We simply test the knee. What you call the knee reflex.

Q. Did you test Mr. Price's knee reflex? A. Yes, and found it normal.

Q. And what test did you give to his eye? A. Why, light reflex, that is, we close—have the applicant close his eyes, and then open them on the light, and notice their reflex in the pupil, whether they come back evenly or not; and I found that normal.

Q. What examination did you make for the mental condition? A. General observation and talk; that is about all.

Q. You don't have that in mind particularly, do you? A. Not necessarily, no.

Q. And you didn't on this occasion? A. No.

Q. And you made no observation with respect to that situation, unless there is something arises in the general course of the examination which indicates that there is something wrong? A. That is it.

Q. Are you a specialist in mental diseases? A. No.

Q. No more than the general practitioner has along that line? A. That is all.

Q. Was the blood pressure taken? A. I believe not at that time. We do take them now, but I don't think it was at that time.

By Mr. Simpson:

Q. Doctor, you have had experience in examining numbers of persons for life insurance policies? A. Yes, I have.

Q. And there was nothing to put you on your question as to this man's mental condition? A. No.

Q. Seemed to be all right mentally and physically? A. Yes.

Q. Did you see any sign of syphilis about the man at all? A. No, not that I could observe.

Q. You would not have passed him, would you? A. No, positively not.

By Mr. Carey:

Q. You didn't make any examination with respect to that, did you? A. Nothing except the usual one of observation; didn't make any blood tests.

Q. That requires a careful and scientific test, doesn't it? A. It does to be positive, yes.

Mr. Carey: That is all.

Mr. Simpson: That is all.

MERRILL HILL, sworn.

Direct Examination by Mr. Simpson:

Q. Mr. Hill, you are a life insurance superintendent and agent? A. Superintendent Metropolitan Life Insurance Company.

Q. Where? A. Union Hill, New Jersey.

Q. And did you as the result of this examination of Dr. Allen's issue a life insurance policy to Mr. Charles Price of 5383 Boulevard, North Bergen, for the amount of three thousand dollars, about January, 1915? A. January 12, 1915, we did.

Mr. Simpson: That is all.

Mr. Carey: No cross.

Mr. Simpson: Do you know what time the ambulance got to the hospital? Can you tell by any record in the case?

Mr. Carey: In the neighborhood of eight o'clock.

WILLIAM G. QUINN, sworn.

Direct Examination by Mr. Simpson:

Q. Mr. Quinn, where do you live? A. 99 Clifton Terrace, Weehawken.

Q. What is your business? A. Undertaker.

Q. And on the 16th of February, 1915, were you in that business? A. I was.

Q. Did you have an ambulance? A. I have.

Q. And did you on that night go to the North Hudson Hospital and meet your ambulance? A. I did.

Q. Now then, on that trip did it convey Charles Price to the hospital? A. It did.

Q. And as soon as he was taken out—were you there when he was taken out of the ambulance? A. I was.

Q. And as soon as he was taken out did you examine the interior of your ambulance? A. I did in a minute or two afterwards.

Q. And what did you find the condition of the pillow on which his head was resting to be? A. I found it bloody.

Q. And about how much blood would you say—I mean not to the inch, but approximately? A. Well, it was probably about eight inches in diameter around on the pillow and sheet; had soaked through them.

Q. Did it look like fresh blood? A. It was.

Q. Now, when the pillow and sheet were put in the ambulance before it left your place to take Price or to get Price at the Weehawken depot, was it clean or not? A. It was clean; put on that day.

Q. Put on for that purpose.

Mr. Simpson: That is all. Cross examine.

Cross Examination by Mr. Carey:

Q. Who put it on? A. I did.

Q. How long before the ambulance went out did you put it on? A. About three o'clock I put it on.

Q. And you didn't know what the ambulance would be used for then? A. I did not, sir.

Q. How was this blood on the pillow? Was it circular in form? A. It was.

Q. And was it completely covering the pillow case? A. No, sir, not completely; probably from six to eight inches in the round, circle.

Q. I mean where it was, did it cover up the surface of the pillow case? A. It did, sir.

Q. Do you remember putting that pillow case on clean? A. Yes, sir.

Q. When did you next put a clean pillow case on there? A. Immediately after, after fetching my ambulance from the hospital to my store.

Q. After that when did you next put a clean pillow case on? A. Whenever it is dirty I always put one on, when I make a call.

Q. Where was the pillow when you saw it? A. On my ambulance, on my cot—in my ambulance on my cot.

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

Q. Were you there when the ambulance arrived? A. I was.

Q. And where was Mr. Price when you saw the blood on the pillow? A. On the cot.

Q. He was still on the cot? A. He was. He had not got in the hospital yet when I saw him.

Q. When you saw the blood, when you first saw the blood, where was Mr. Price, was he in the hospital? A. When I first saw it?

Q. Was he in the hospital? A. Yes, he was in the hospital.

Q. Who went in with him? A. Why, my man

went in with him. There was one or two other gentlemen from the West Shore, as I presume; I don't know who they were.

Q. Were they supporting him as he walked in? A. Yes—as he walked in?

Q. Yes. A. No, he didn't walk in.

Q. How did he get in? A. He went in on the cot.

Q. He went in on the cot, and the pillow was taken in with him? A. Why, everything was left on the cot.

Q. What? A. Everything was left on the cot. We never take it off when taking anything in like that.

Q. You saw the pillow after Price was taken off the pillow, didn't you? A. I did, sir.

Q. Was the pillow taken into the hospital? A. Why, it was on the cot.

Q. Well, did the cot go into the hospital? A. Why, yes.

Q. You saw the blood on the pillow while the pillow was in the ambulance, didn't you? A. Yes, sir; I did.

Q. Before Price went into the hospital? A. Yes; I was there at the time the ambulance drove up.

Q. Yes. A. Mr.—

Q. Well, now, the next thing that happened, Price was taken out of the ambulance, wasn't he? A. Yes.

Q. And taken where? A. In the hospital.

Q. Now, had you seen the blood up to that time? A. Up to that time?

Q. Yes? A. Why, yes.

Q. Was Price still in the ambulance and still on the cot when you first saw the blood? A. Yes, sir—now I will take that back, not when I first saw the blood now; he was not on the ambulance,

because that laid under his head, but as soon as he got off the pillow then I saw the blood there.

Q. As soon as he got off the pillow? A. Yes, that is, off the cot.

Q. Where was he when he got off the pillow? A. Why, where was he?

Q. Yes. A. Well, when they first moved him off of the cot that was the first time I saw the blood.

Q. When they first moved him off the cot? A. Yes.

Q. Where was the cot when they first moved him off the cot? A. In the hospital.

Q. Where in the hospital? A. Why, in the first room as you go in to the left.

Q. First room to the left as you go in? A. As you go in.

Q. First floor, is it? A. Yes, naturally in the basement, I would call it—at that time when they used to take them in there.

Q. And there is where he was taken off the cot, is it? A. Yes, sir.

Q. And did you help carry him in? A. No, I did not.

Q. Did you follow in after he was taken in? A. I followed in, yes.

Q. And up to the time he was taken off in that first room in the basement of the hospital, you hadn't noticed any blood? A. No, not until then; no.

Q. Who received him there? A. Oh, I don't know what nurse it was or anything.

Q. Any nurse or attendants? A. Dr. Bissing was there.

Q. That is the superintendent—he was the superintendent of the hospital at that time? A. I would naturally think that is what you call him, yes; the super.

Q. And what was done with him in that room, the first room to the left? A. I couldn't tell you.

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

Q. He was taken from the stretcher there? A. I was taken out immediately—took my stretcher and went out, and I don't know anything else after that.

Q. When they took him off the stretcher what did they do with him? A. They generally put 'em on to a cot there.

Q. Well, what did they do with him there? A. I don't know.

Q. You didn't see what they did? A. I don't know.

Q. They laid him down before you left, didn't they? A. Yes, sir.

Q. On what? A. Why, on a cot, I believe, as you would call it; a bed.

Q. And you went out? A. Yes.

Mr. Carey: That is all.

By Mr. Simpson:

Q. It was in the hospital you saw the blood, or when they got him out of the ambulance as they carried him in? A. In the hospital.

Q. And you went in with him? A. Yes.

Mr. Simpson: That is all.

JAMES H. LEE, sworn.

Direct Examination by Mr. Simpson:

Q. You were the engineer of this train upon which Hinckley was fireman on the night of February 16, 1915, weren't you? A. Yes, sir.

Q. Are you the man who got the order to stop at Dumont? A. Yes, sir.

Q. And you stopped, did you? A. Stopped.

Q. Did you examine the whole train? A. No.

Q. Who did the examination of the train? A. The train crew, I presume.

Q. Who was the conductor, Mr. Mabie? A. Mabie.

Q. Conductor of the train—that is all—he is still in the employ of the New York Central, isn't he? A. Yes.

Q. That is all.

Mr. Simpson: That is all.

Cross Examination by Mr. Carey:

Q. Mr. Lee, did you take the engine out of the Granton roundhouse, or from the Granton roundhouse that night? A. I did.

Q. And took it down to the coal pockets in the New Durham yards? A. I did.

Q. And from the New Durham yard after taking on coal and other supplies where did you go with the engine?

Mr. Simpson: I object to that as not proper cross examination; I just asked him if he was engineer of this train, if he got the order to stop, and if he stopped, and if he examined the train. That is all.

The Court: That is my recollection of it. There was no examination as to the examination of the train, the control of the train or the management of the train.

Q. What examination did you make at Dumont? A. Made a thorough examination and around the entire engine.

Q. And what did you find?

Mr. Simpson: I object to that. I didn't ask him anything about what he found. I didn't ask him if he examined the engine; I

asked him if he was the man who got the order to stop.

The Court: And you asked him if he examined the train.

Mr. Simpson: Yes, and he said no, he didn't examine it, didn't know who did.

(The direct examination of the witness was read at this point by the stenographer.)

The Court: How is this cross examination?

Mr. Carey: If the court does not think it is I will not pursue it.

The Court: It seems to me, Mr. Carey, it would be more an inquiry as to who made the examination of the train, and who the conductor of the train was, for some future purpose, I suppose.

(Referring to the direct examination of the witness.)

Q. You distinguish between the examination of the train and the examination of the engine, don't you? Make a distinction? A. Oh, yes.

Q. And when you speak of the train you refer to what? A. Well, the locomotive is part of the train.

Q. Well, what do you refer to— A. The locomotive.

Q. —when you said that you didn't make an examination of the train? A. That is the cars behind the locomotive.

The Court: That is, everything behind the tank; is that what you mean?

The Witness: Everything behind the tank.

The Court: When you say you did not examine the train you have in mind all that was behind, or at the rear of the tank of your engine?

The Witness: Right.

The Court: You consider the train everything behind them?

The Witness: Yes.

Mr. Carey: That is all.

Mr. Simpson: That is all.

LOUIS A. SEAMAN, sworn.

Direct Examination by Mr. Simpson:

Q. Mr. Seaman, you are the station master at West Shore— A. I was; yes, sir.

Q. And you were on the 16th of February, 1916, weren't you? A. Yes, sir.

Q. Was it into your office that this man was brought? A. Yes, sir.

Q. Will you describe his condition when he was brought into your office? A. Why, he was brought into my office through the door from the platform. There were two men bringing him in, and the remark was made—

Mr. Carey: No, never mind the remark which was made.

A. (Continuing) They were bringing him in, and I told one of my men to bring an arm chair over, something similar to that one there, with arms similar to the one I am sitting in, and sit him down in that chair; and I started to look over his head—

Q. I don't care for that examination. I only asked for the appearance when he came in the door. A. Well, he was kind of stooped over.

Q. Between two men? A. Yes.

Q. Now, did he have a cap on? A. No, sir; not when I saw him.

Q. Have you ever seen this cap described by

Engineer Foster as having been taken off by Price in your office and having a tear in it? A. There was no hat on him when he came into my office.

Q. And you have not got that cap now? A. No, sir.

Q. And have not seen it? A. Never saw the cap.

Q. Were you there when he was taken out of your office? A. Yes.

Q. Did he have any cap on— A. No, sir.

Q. —when he was taken out of your office? Who was in your office when he was brought into the office? A. Well, that I could not say, all that were in there.

Q. Well, you were in there? A. I was in there.

Q. His engineer was in there? A. Foster was in there.

Q. Who else was there? A. Tommie Hicks, my mail clerk Leffert, and—well, I couldn't say whether there were any more in there or not.

Q. Is there any rule of your company directing you as station master when any one is injured to save the wearing apparel; that is, the hat, or anything like that? A. No.

Q. There is no ruling about it? A. No rule about it at all.

Q. When this man walked into your office didn't he have his cap on? A. No, sir.

Q. You are sure about that? A. Sure.

Q. And you have never seen the cap he wore that night, have you? A. No, sir.

Q. Never found it in the engine or along the platform or in your office? A. I never made any search for it.

Q. I mean you have never seen it, searching or otherwise? A. No, sir.

Q. Were you the man in charge of the station? A. Yes, sir; I was.

Q. That is, you are responsible for the station and for the things around it? A. Yes, sir.

Q. And you have never seen this cap? A. No, sir.

Mr. Simpson: I think that is all. Cross examine.

Cross Examination by Mr. Carey:

Q. Has any inquiry ever been made of you by the other side up to the present time about that cap? A. No.

Q. Ever been asked for it? A. No, sir.

Q. Never been asked if you knew anything about it? A. No, sir.

Q. And you never saw it? A. No, sir.

Q. Did you see any of his wearing apparel on that occasion? A. I did; I did.

Q. What did you see? A. His jumper.

Q. Anything else? A. And his grip that he carried his stuff in; that was all.

Q. Do you know what was done with the wearing apparel as far as you saw it? A. No, sir.

Q. Do you know what was done with the grip? A. No, sir.

Q. Did you see anything put into the grip that night? A. No.

Q. You did make an examination of his head after he was— A. I did, yes, sir.

Q. —brought in there? A. Yes, sir.

Q. And where was he when you made the examination? A. Sitting on a chair in the office.

Mr. Carey: I presume this might be regarded as going beyond the proper cross examination, to say what examination he made of his head. I am willing to pursue it.

Mr. Simpson: I will object to it unless he is considered as your witness, so that I can cross examine him on it.

Mr. Carey: Then I will wait until my turn comes.

The Court: Is that all?

Q. You don't know what was done with that grip? A. No, sir.

Q. Did you see it after that night? A. No, sir.

Mr. Carey: That is all.

Mr. Simpson: That is all.

GEORGE W. KING, a witness sworn on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Simpson:

Q. Dr. King, you are a practising physician? A. I am.

Q. And how long have you been such? A. Thirty-eight years.

Q. And what is your position now? A. I am medical superintendent of the Hudson County Hospital for the Insane.

Q. How long have you been such medical superintendent? A. I have held that position for more than thirty-one years. For four years, eight months and some days I was the County Physician.

Q. And during that period have you had lunatics come under your observation? A. A great many.

Q. Thousands of them? A. Many thousands.

Q. And have you had syphilitics come under your investigation, who were affected mentally, and who were not affected mentally? A. I have.

Q. Thousands of those also? (No answer.)

Q. And you have read considerable upon mental diseases, haven't you? A. I have.

Q. Is there such a thing, Doctor, as insanity produced by a blow on the head? A. Very common occurrence.

Q. Did Charles Price ever come under your observation, the plaintiff in this case? A. He did.

Q. About when? A. I had first examined Charles Price at the request of Dr. Bissing, of the North Hudson Hospital, on March 22nd, 1915.

Q. And did you have a conversation with Dr. Bissing before you examined Price? A. I did, and I obtained the history of the case from Dr. Bissing.

Q. What did Dr. Bissing say to you? A. Dr. Bissing requested me to see this patient, if necessary, to treat him, or dispose of him in some way. He didn't want him in the hospital because he was a source of annoyance to the other patients. He gave me a history that the man received an injury to the head while in his cab on the West Shore Railroad—New York Central Railroad. I examined the patient in the presence of Dr. Bissing. I found that the patient was dazed, bewildered, dull, apathetic, disoriented; that is, he did not know his bearings, and did not know where he was, and did not know the day of the week, or the month of the year. Dr. Bissing told me—

Mr. Carey: If the court please, I object to any further testimony as to what Dr. Bissing told him as hearsay.

Mr. Simpson: I directed Dr. Bissing's attention to this, and he denied having said it. This is for the purpose of contradiction.

The Court: If it is for the purpose of contradiction, and is a matter which you have already directly interrogated Dr. Bissing on, then it is perfectly proper, although, you see, it is a dangerous way of going at it, because

the present witness may speak of some conversation with Dr. Bissing that was not gone into on direct examination.

Mr. Simpson: I will consent to have that stricken out, then.

The Court: The proper way is to question him on some matters you have already interrogated Dr. Bissing on.

Q. Did Dr. Bissing tell you that this man had a blow, and in his opinion had received a fractured skull?

Mr. Carey: I object to that. That is not what Dr. Bissing testified.

The Court: The question is, is it a question that was put by Mr. Simpson to Dr. Bissing and which he denied; that is the real question.

Mr. Carey: That is not the question which was put to Dr. Bissing and denied by him.

"Q. And you told Dr. King that this man was suffering from concussion of the brain from a fractured skull, didn't you? A. I did not; most absolutely not.

"Q. Did you have a talk with Dr. King about the condition of this man? A. After he had been removed from the institution.

"Q. Well, did you have a talk with him? A. I say after he had been removed from the institution.

"Q. You need not shout about it. A. Well, don't repeat your question.

"Q. Now let us see, Doctor. You say that you had no talk with Dr. King while the man was in your hospital? A. I did not.

"Q. Isn't it a fact that you sent for Dr. King while the man was in your hospital, had the Doctor examine him, told the Doctor

you thought he was an insane patient, and you didn't want him there, and you wanted him removed—all while the man was in your presence and in Dr. King's presence and before he left the hospital? Isn't that a fact? A. I had him committed through Dr. King.

"Q. (Repeated by the stenographer.) And you told Dr. King that this man was suffering from concussion of the brain from a fractured skull, didn't you? A. I did not; most absolutely did not.

"Q. Did you have a talk with Dr. King about the condition of this man? A. After he had been removed from the institution.

"Q. (Repeated by the stenographer.) Well, did you have a talk with him? A. (Repeated by the stenographer.) I say after he had been removed from the institution.

"Q. (Repeated by the stenographer.) Now, let us see, Doctor. You say that you had no talk with Dr. King while the man was in your hospital? A. I did not.

"Q. (Repeated by the stenographer.) Isn't it a fact that you sent for Dr. King while the man was in your hospital, had the Doctor examine him, told the Doctor you thought he was an insane patient and you didn't want him there, and you wanted him removed—all while the man was in your presence and in Dr. King's presence, and before he left your hospital; isn't that a fact? A. That is true.

"Q. What did you mean by saying a moment ago that you had no conversation with Dr. King until after the man was taken out of your hospital? A. I will be glad to explain it. You asked me whether I told Dr. King that the man had suffered a blow on

the head, and I said I had no conversation to that effect.

"Q. I don't think I did ask you whether he had a blow on the head. I asked you whether you had told Dr. King this man was suffering from concussion of the brain from a fractured skull; nothing about a blow on the head. Did you have any conversation—

"Mr. Simpson: I will withdraw that.

"Q. What do you say now as to whether or not you had a conversation with Dr. King while the patient was still in your hospital and before he was removed? A. I had to have him committed and I did speak to Dr. King in regard to the case in that way, in that connection.

"Q. Did Dr. King examine him in your presence at the hospital? A. I don't know whether I was present or not at the time.

"Q. Did you have a conversation with Dr. King at this time while he was in the hospital? A. I must have done so, yes.

"Q. Now, did you tell him then that the man was suffering from concussion of the brain due to a fractured skull? A. I did not.

"Q. Anything like that? A. No, nothing of the sort."

Q. Did you or did you not have such a conversation as the stenographer has read, with Dr. Bissing? A. I had a conversation with Dr. Bissing a good deal as stated in his direct testimony.

Q. Did Dr. Bissing tell you that the man had concussion of the brain? A. He did.

Q. And did he tell you whether it was due to a fractured skull? A. He said he had made the diagnosis of traumatic insanity.

The Court: Did he tell you it was due to a fractured skull?

Mr. Simpson: Well, I withdraw that.

Q. Did Dr. Bissing tell you that this injury was due to traumatic insanity? A. He did.

Q. And did you examine the patient with Dr. Bissing, put your hand on his skull with Dr. Bissing? A. I did.

Q. And what was done at that examination? What was found? A. I examined the patient in the presence of Dr. Bissing, went over his head, which was shaved on the left side. The head was very tender, and upon deep pressure he would cry out in pain.

Q. And was Dr. Bissing present at that examination? A. Dr. Bissing was present, and when I had completed my examination I said to Dr. Bissing that I concurred in his diagnosis; that I thought he was right when he stated that it was a case of traumatic insanity.

Q. What is traumatic insanity? A. Traumatic insanity is that form of insanity produced by an injury, violence of some kind, head injury.

Q. Did Dr. Bissing tell you that he wanted the man taken out of the hospital; that the hospital was no place for him? A. He did.

Q. And was he taken out of the hospital? A. He was.

Q. And brought to the County Jail? A. He was sent to the County Jail as a dangerous lunatic. He was there three days, examined by me again. I recommended the patient to be sent home and agreed to treat him at his home. I had done that at the request of Mrs. Alexander—

Mr. Carey: Now, I ask to have that stricken out. It is utterly immaterial who requested it.

The Court: It is. The question is, did you treat him at his home?

The Witness: I did.

The Court: Tell us what you did in that connection.

The Witness: I treated him at his home for this reason; I wanted to—

Mr. Carey: I object to that. Don't say that—

Mr. Simpson: I object to his going at this witness in that way. Object to it. This man is a gentleman.

The Court: Well, Mr. Simpson, this court will certainly treat him as a gentleman, as it does all witnesses who come here, and I will see that counsel does the same thing.

Mr. Simpson: There is a legal way of doing it.

Mr. Carey: I object to the question.

Q. (Repeated by the stenographer.) And brought to the County Jail? A. (Repeated by the stenographer.) He was sent to the County Jail as a dangerous lunatic. He was there three days, examined by me again. I recommended the patient to be sent home and agreed to treat him at his home—

Q. And brought to his home? A. Yes.

Q. And you had him under observation there? A. About three weeks.

Q. What was the purpose of having him brought or treated at his own home?

Mr. Carey: I object. He was transferred there and treated there.

Mr. Simpson: It is a medical purpose of having it done.

The Court: I will give you the benefit of it, Mr. Simpson.

Q. What was the purpose of having him re-

moved from the jail, as a medical proposition, to his house?

Mr. Carey: Objected to, and objection noted.

The Court: You objection is noted.

A. I considered the sudden onset of his mental trouble, and I didn't like to send a man like that to an insane asylum unless it was absolutely. I tried to try all means of curing him, if it was possible, and for that reason he was sent home. I treated him home for three weeks.

Q. Then what was done? A. He didn't improve, and I had him committed to the State Hospital at Morris Plains.

Q. And what is he suffering with, in your opinion? A. Traumatic insanity.

Q. Is the man suffering from paresis due to syphilis? A. He has not syphilis; he has never had it, and he has never had paresis.

Q. And is there any explanation of his condition, in your mind, except that one—insanity caused by violence? A. I cannot see how it could come from any other cause.

Q. Now, assume that this man was a railroad fireman on the 16th of February, 1915, had sufficient intelligence as a fireman to call out a block signal as he entered the tunnel; that he went through this tunnel to the terminal, which is not more than a mile away, and did not light the light which it was his duty to light; that the engineer found him leaning up against the cab; that he made some statement as to how he had received an injury; that he was then taken into the station master's office and from there taken into the hospital, and was unconscious and gradually grew worse until the time you saw him—taking those things into consideration, and also

his present condition, and that he manifested evidences on the side of his head of having been struck or come in contact with something, what would you say these evidences, as having been seen on the Thursday morning following the condition which I have described (which occurred on Tuesday night)—what in your opinion would be the producing cause of the condition in which this man is?

Mr. Carey: I object to that question, if the court please, because it involves suppositions which are not in evidence. There is no evidence in the case that he was unconscious when he was taken into the station; there is no evidence that he gradually grew worse from that time until the time when the Doctor saw him; and there is no evidence in the case that Dr. King has as yet seen his present condition.

The Court: No, there is none as to the latter; that is true.

Q. Well, in the time you saw him, leaving out the present condition, at the time you diagnosed his case as that of traumatic insanity, and eliminating from your mind the fact that he was unconscious when he was taken out of the cab—I said he was weakened—

The Court: You did say he was unconscious.

Q. Well, taken out by two men, and from there taken to the hospital, and found, I think, that he was unconscious the next day—Dr. Bissing said—taking those things into consideration and eliminating his present condition, what would you say was the producing cause of the condition that you have diagnosed him as being in?

Mr. Carey: Same objection to the question.

The Court: Well, what is the objection now? He has eliminated some of those things which you complained of before, if not all of them. Now, what is there still remaining that is not based upon a fact shown by the testimony?

Mr. Carey: I do not understand that he has eliminated from the question the statement of his gradually growing worse from that time on.

Mr. Simpson: I will eliminate that also.

The Court: That will also be eliminated. Is that all the objection?

(No answer.)

Q. (Repeated by the stenographer as amended.) Now, assume that this man was a railroad fireman on the 16th of February, 1915, had sufficient intelligence as a fireman to call out a block signal as he entered the tunnel; that he went through this tunnel to the terminal, which is not more than a mile away, and did not light the light which it was his duty to light; that the engineer found him leaning up against the cab; that he made some statement as to how he had received an injury; that he was then taken into the station master's office and from there taken to the hospital—taking those things into consideration, and also that he manifested evidences on the side of his head of having been struck or come in contact with something, what would you say these evidences, as having been seen on the Thursday morning following the condition which I have described (which occurred on Tuesday night)—what in your opinion would be the producing cause of the condition that you have diagnosed him as being in?

Mr. Carey: Up to Thursday—there is no testimony that there was any evidence of his having been struck by anything, no superficial or external evidence.

Mr. Simpson: Your objection goes to this: That the court may say there is no possible evidence. Here is a man in a railroad cab in perfect health, passes a train, of course, on which there is no projection except an iron hook—

The Court: I understand that. There is no use going into that. I understand Mr. Carey's objection is as to whether or not there was any evidence of violence upon the person of Mr. Price—that there is no testimony—

Mr. Simpson: Blood found from his head immediately that night.

The Court: All right. Is there any further objection you have to the question, Mr. Carey?

Mr. Carey: Nothing, except that there was no evidence of a mark on the head or any external evidence of a blow on the head up till Thursday.

Mr. Simpson: Well, admitting that there is no external evidence except the blood found at a place where the man's head laid, and within an hour after he is taken off the cab of his train—putting that as the only evidence of violence.

The Court: Is there any further objection?

Mr. Carey: No.

The Witness: Pardon me one moment. Did you not say also, Mr. Simpson, that there was some evidence of some unconsciousness?

Q. Assuming that that is true, can you say

what was the cause of his condition at the time you saw him and diagnosed it as traumatic insanity? What would you say was the cause? A. I would say that his condition was due to an injury of some kind which he received after the time he called that signal out, a few moments, a few minutes; it could not be very long.

Q. Now, take the case of syphilis. Would a syphilitic patient be so suddenly seized with paresis, that, although he was intelligent enough to call a signal as his train entered the tunnel, yet when it arrived a mile or mile and a half away he would be incapable of lighting lights, he would be incapable of walking unassisted, he would seem to be dazed and bewildered—would there be any such sudden seizure of paresis? A. They never have them in paresis.

Q. What? A. They never happen in paresis.

Q. What is the common cause of paresis? A. Paresis is due to one cause only, and that is syphilis.

Q. And that ever come on in this manner I have described, like a sudden seizure, a man be absolutely normal, as I am attempting to be, notwithstanding Mr. Carey, in the trial of this case, and then suddenly develop symptoms of abnormal mentality? A. The onset of paresis is never sudden; it is always slow. Peculiarities of conduct and behavior of the man is noticed for months by people who have known him for any length of time.

Q. And what would you say, Doctor, from what you saw of this man, as to whether his condition is temporary, or is it a permanent condition? A. Those cases of mental disease that recover, recover in a few months, six months, three months, nine months, or a year. After a year prognosis is bad; they don't get well, as a rule.

In a year or two they rarely get well. A few isolated cases do occur where they get well after a year or two, but they happen very seldom.

Q. In your opinion will this man get well or not? A. He has all of the—I have every reason to believe that the man will not get well; that my opinion is he will not get well.

Q. Now, going back to your examination in the jail—did you examine his head physically in the county jail? A. I did.

Q. Was there any tenderness there? A. There was an excessive tenderness—deep pressure, showing that the brain itself was injured.

Q. Did you make up your mind as to whether there was a brain lesion of some kind? A. I did.

Q. What was your opinion as to whether there was a brain lesion? A. My opinion at the time was that he suffered an injury to the head; the brain was injured; there was probably concussion of the brain took place after that injury; and I had my doubts whether there was a fracture or not. There was some evidence, mental signs, of a fracture, but I had seen no external signs to convince me there was a fracture.

Q. Going to that subject, what has been your experience in fractures of the skull and concussion of the brain? Does it happen that the head meets with violence to produce concussion of the brain without leaving any external symptoms? A. It happens very often.

Q. In the case of sandbagging for instance, could a man be sandbagged and get concussion of the brain and yet there be no external symptoms? A. Rarely have a mark after sandbagging.

Q. Although there be concussion of the brain? A. Although there be concussion of the brain; might have a fracture of the plate, and might have a laceration of the brain tissue.

Q. And there would be no external signs? A. No external sign of violence.

Q. You have performed a number of post mortems in your lifetime, haven't you? A. Yes, over twenty-five hundred.

Q. Over twenty-five hundred. Have you ever found after cutting into a man's body, when you cut into his head, that he had a fractured skull which was not discernible by any outward symptom, until you had cut into him? A. Very often.

Q. Just explain to the jury how, in your opinion, a concussion of the brain in this case would produce insanity? A. Well, concussion of the brain is—the brain is a soft mass, of putty-like consistency, filling up almost the entire cavity of the skull, and a blow on the head produces that mix-up, so to speak, of the brain substance, interfering with its nervous function and producing that condition of mentality—of erratic behavior and mental unsoundness.

Q. That violence is what produces the— A. It is like a person in a prize-fight will get a punch in the jaw. His brain gets mixed up and he takes the count, he is knocked out, so to speak; he is suffering from concussion of the brain. It is temporary sometimes; sometimes it is prolonged.

Q. Usually in the prize-fight under the New York law, it is temporary, isn't it? A. It is temporary.

Q. Now, Doctor, assume that this man was a fireman in a railroad cab and passing that cab—his own train going at the rate of twenty-five miles an hour, and a train passing, going at fifteen miles an hour; that the left side of his head came in contact with an iron bar about ten feet long and an inch in diameter, even if it were a glancing blow would that be sufficient to produce, in your

opinion, concussion of the brain such as you have described? A. It would.

Q. And yet it might not fracture the skull or leave any external evidence? A. Yes.

Mr. Carey: I object to the question. It is leading.

Q. Well, would it? Could that blow not be inflicted? Could it be inflicted without leaving any external manifestations at the time? A. There must be some intervening substance, like the peak of the cap; there must be some intervening substance to take away the force of that blow that there should be no wound. If that would strike some substance in between the thing that it struck, then you could have that without a mark of external violence.

Q. But take it only as a glancing blow. Suppose this train was going twenty-five miles an hour, and his head struck this hook a glancing blow, would there or would there not be enough violence in that blow, if it did not leave a mark, to produce concussion of the brain? A. It would; oh, yes; I see your question now. Yes, it would.

Mr. Simpson: Cross examine.

Cross Examination by Mr. Carey:

Q. Doctor, does the medical profession recognize traumatic insanity arising from shock other than from a blow? A. Read that again.

Q. (Repeated by the stenographer.) Doctor, does the medical profession recognize traumatic insanity arising from shock other than from a blow? A. It would not be traumatic insanity unless it came from a blow or an injury. You cannot have traumatic insanity unless you have an injury. You can have a form of insanity but it cannot be traumatic insanity. To have trau-

matic insanity you necessarily must have an injury.

Q. And by an injury you mean that there must be a blow? A. Violence of some kind.

Q. Do you mean there must be a blow? A. Violence of some kind, whether it be a blow, or—

Q. Well, what other violence would you name would constitute an injury? A. A man could fall and he would not have a blow.

Q. Well, something would hit him or he would hit it? A. That is the idea. If you agree on that I will say it is a blow. But a person could be sitting at his desk and faint away, and his head strike the desk, and could suffer from concussion of the brain and might have a—

Q. Now, is it recognized by the medical profession that there is a type of insanity which arises from fright, where no blow has actually struck the person? A. A fright which might amount to an overwhelming calamity would produce mental derangement, but they are always temporary; they are not lasting.

Q. Never lasting? A. Never.

Q. What kind of insanity is produced by such condition as that? A. Well, you get a mixed form of insanity; you would get—there are three or four different varieties you might have: You might have the depressed form; you might have in older people what is called arterior-sclerotic form; that means hardening of the arteries. There is always some predominating cause, some hereditary taint in a persons history who will become insane from a fright, and this fright is just the spark which ignites the flame. A fright to an ordinary person who has sound mind will not produce mental disease.

Q. But there are physical conditions under which a sudden fright will produce insanity? A.

Not to a normal person, not to a person who has an absence of any hereditary—to a person who has no hereditary taint in his family history. If a person has that taint in his family history then a cause of that kind would produce nsanity, but it would not to a normal person, or a normal individual. There is some predisposition. That person is predisposed to insanity who would get an attack of insanity from that.

Q. Well, I say under certain physical conditions insanity will result from a very severe shock in which no physical injury attends it? A. That is true.

Q. Yes. Now, as an extreme case, take the matter of shell shocks. Does insanity arise from that? A. It has been so reported, shell shock, but—

Q. Men who are subjected to that are supposed to be in the best of condition, aren't they? A. Oh, no; there are a good many people drafted who have hereditary taints in their family history, who ought not be drafted; that is being—that is receiving a good deal of consideration lately, and they are trying to stop that, and they are trying to exclude all persons who are predisposed to insanity, because it is just such persons who suffer from shell shock, persons predisposed to insanity suffering from shell shock would probably go insane.

Q. Now, you say that you were told that Mr. Price had concussion of the brain? A. I was.

Q. Did you take that into account in making your diagnosis of his condition? A. I did.

Q. And if you had been told, on the other hand, that there was no concussion of the brain, would that have had any influence on your diagnosis? A. I do not believe everything that I am told. If I were told that—

The Court: Listen to the question.

Q. (Repeated by the stenographer.) And if you had been told, on the other hand, that there was no concussion of the brain, would that have had any influence on your diagnosis? A. It would.

Q. And what influence would it have had? A. I would be all at sea. I would not know what to make of the case, because he showed every evidence of injury to the head, and if I were told that I think I would have thought there was something wrong with the person who told it to me.

Q. Well, now, Doctor, I didn't ask you anything about the person who told you? A. That is exactly what you did ask me.

Q. It is quite a different thing from calling for an opinion of the person who told it.

The Court: It was the second question that brought the explanation from the Doctor.

Mr. Carey: The explanation went to a designation of his opinion of the man who had said that thing.

The Court: Well, naturally, it seems to me to have some bearing on what regard he gave to it, whether he believed it to be true or not.

Q. You say if you had not been told there was any concussion of the brain you would have been all at sea? A. Yes.

Q. At the time you made the examination of Mr. Price did you discover any external evidences of injury to the head? A. I did not.

Q. And no scar? A. None.

Q. No wound? A. None.

Q. And you made a careful examination by palpation as well as inspection? A. Manipulation, manipulation.

Q. And you said that you found tenderness? A. Excessive tenderness on deep pressure.

Q. And by deep pressure you mean what? A. Pressing hard.

Q. Yes. Now, what part of the head did you find that tenderness? A. All the top of the head was very tender. One part was shaved and the other side where the hair wasn't clipped so close if you pressed deep there the man would wince, but it was more particularly marked on the left side.

Q. How about the right side? A. There was a tenderness there also.

Q. So that you found the tenderness all over the head, did you not? A. Exactly.

Q. Now, if this man had been hit by the hook of—I will say the handle of the firehook—by the way, did you hear the description of the handle of the firehook, Doctor? A. I don't think I did.

Q. It is shown in these photographs, and it was described in the evidence as being perhaps made of iron a little more than a half inch in diameter, and there is a picture of the handle of the firehook, which is a loop of the rod of which the stem of the firehook is made? A. That is hidden from view; that goes on the inside? (indicating).

Q. That crosses the front of the tender of the engine, this being the side of the tender? A. But the other, you can only just see the handle.

Q. You can just see the handle. I will show you another in which there is a little more of the hook seen. Here we have the side of the engine and there we have the handle—(indicating)? A. Yes.

Q.—of the hook, and you see the stem of the hook? A. Yes.

Q. Now, that extends clear across the front of the engine, front of the tank? A. Longitudinally?

Q. No, transversely. We are looking at the side

of the engine, now, Doctor. And we are looking in this space right through the opening between the tender and the cab, and this firehook, according to the testimony, was laid across the front of the tender, extending from one side to the other, and this handle which you see here being on the left hand side. That is of iron? A. Yes.

Q. Now, Doctor, assuming this man't head came in contact with an iron handle of a firehook of that description, his train going at the rate of fifteen to twenty miles an hour——

The Court: I think the testimony was twenty to twenty-five miles as to his train, and fifteen miles as to the other.

Mr. Carey: Yes.

Q. Twenty to twenty-five for his train, and the other train on which the firehook was located, going in the opposite direction at the rate of approximately fifteen miles per hour. Assume that that iron handle came in contact with his head, at a point above the left ear and within an inch and a half or two inches of the median line of the head, a line being drawn from the forehead over back to the neck, would a blow of that kind inflicted by an instrument of that kind be likely to leave external physical evidences? A. Well, that depends on how that blow was received. If that blow would come with full force you probably would have an evidence of a wound. But if that blow would be slanting and just grazed, and if he had a cap with a peak on, something like that, and it just grazed it, he need not necessarily have a wound.

Q. Would you think it possible that such a blow might be received and leave no external evidences? A. I do; that is, the way I described it. It depends on the force of that blow. That could

be a heavy blow, or the distance from that point to the man's skull might vary—in that distance. Now, if it came with full force that way (indicating by clapping his hands) then you would probably have a wound, but if you just touched it like that—

Q. Suppose you didn't hit the skull at all; suppose you— A. Glanced it.

Q. —scraped the skin there? A. If you scrape the skin you have a wound.

Q. And if it glanced against the skin, with a thin cap, thin cloth cap— A. That makes a difference.

Q. —a little thicker than a sheet of this paper? A. Was there a peak on the cap? A. There was in the front.

Mr. Simpson: I object to that. You don't know whether the man wore it front or rear.

The Court: No; it is not in the testimony. The engineer testified he didn't know whether this peak was being worn by this fireman in front or to the rear.

Q. Just assume that it strikes, not on the peak, but on his cloth of the cap, the cloth being thin, a little thicker than a sheet of paper. Could the blow be heavy enough to produce concussion of the brain under such circumstances and not leave any external evidences? A. It could. I believe it could.

Q. Now, it takes quite a heavy blow to produce concussion of the brain? A. Well, it depends on the thickness of the man's skull. You take a negro who has a thick skull. You can hit him all over the head and you can't hurt him. You take a person with a thin skull and a slight blow will hurt him. It depends on the thickness of the skull.

Q. So slight it would not leave any mark on the head? A. Yes.

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Q. Twenty to twenty-five for his train, and the other train on which the firehook was located, going in the opposite direction at the rate of approximately fifteen miles per hour. Assume that that iron handle came in contact with his head, at a point above the left ear and within an inch and a half or two inches of the median line of the head, a line being drawn from the forehead over back to the neck, would a blow of that kind inflicted by an instrument of that kind be likely to leave external physical evidences? A. Well, that depends on how that blow was received. If that blow would come with full force you probably would have an evidence of a wound. But if that blow would be slanting and just grazed, and if he had a cap with a peak on, something like that, and it just grazed it, he need not necessarily have a wound.

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Q. So slight it would not leave any mark on the head? A. Yes.

Q. Although inflicted by a hard surface, and there being nothing intervening between the scalp and the hard substance which inflicted the blow except a thin cap? A. Exactly; that is sufficient to present the evidences of an external wound.

Q. And you would not expect to find any evidences of any kind of an external wound? A. Well, I have seen it so often in sudden deaths from violence, where a person had a fracture of the skull, and you could find no wound on him whatsoever, that I can come to no other conclusion. I know that to be a fact from my experience.

Q. You are wandering from my question, Doctor. This was not a case of death at all.

Mr. Simpson: I object to that statement.

The Court: What is the question.

Q. (Repeated by the stenographer.) And you would not expect to find any evidences of any kind of an external wound?

The Court: I think you can answer that yes or no.

The Witness: I will answer it.

A. No evidence of external wound.

Q. Does it make any difference with respect to evidences of external wound whether the wound causes death immediately or whether it does not? A. It does not.

Q. That is— A. Of course, that has got to be demonstrated. You don't know how bad an injury is unless you open it up and look at it.

Q. Now, when a person is killed by a blow the circulation stops immediately, doesn't it? A. If they are killed instantly, of course, it stops; but a man can receive a blow on the head—

Q. Wait a minute—

Mr. Simpson: I object to his cutting off the witness.

Q. Circulation stops when death is instant, doesn't it? A. Yes.

The Court: He apparently was not answering the question, Mr. Simpson.

Q. (Repeated by the stenographer.) Now, when a person is killed by a blow circulation stops him immediately, doesn't it? A. (Repeated by the stenographer.) If they are killed instantly, of course, it stops; but a man can receive a blow on the head—

The Court: Let me hear the rest of your answer.

A. (Continuing) A man can receive a blow on the head. He can walk home and remain home for twenty-four to forty-eight hours and be found dead from twenty-four to forty-eight hours after the blow was received. That is a very frequent occurrence with injuries to the head. Injuries to the head are so different to injuries to other parts of the body.

The Court: Do not let us go extravagantly into this thing. I wanted to give you a fair opportunity to give a fair answer.

Mr. Carey: I ask to have the answer stricken out.

The Court: No; I will not strike out the answer as so far given.

Mr. Carey: Objection noted.

The Court: You may have your objection.

Q. Now, Doctor, let me say to you—listen to the questions and just answer the questions; because, you see, if you go beyond that you get us all—

The Witness: I ought to know better.
The Court: I know you know better.
The Witness: I will do it.

Q. In the case of instant death the circulation stops immediately, doesn't it? A. Yes.

Q. And is the blow a good deal less likely to manifest external evidences of where it struck? A. Oh, yes.

Q. Than it is in a case where death does not follow? A. Yes; most certainly it is.

Q. Now, is there swelling from a blow which causes instant death? A. There might, or there might not be.

Q. Might be swelling? A. There may or there may not be.

Q. Now, you spoke of a man who had received a blow on the head and twenty-four hours afterwards was found dead, with no external evidences of the blow manifesting themselves? A. Yes.

Q. How was it known that he had received a blow on the head? Now, tell us a personal experience of yours in that particular? A. I opened him up and found that he had a fracture of the skull, and he had a large hemorrhage, an oozing. A slight hemorrhage kept on oozing and filled up the cavity of the skull, and he died. I opened up this man's skull myself and found it.

Q. How do you know he had a blow on the head? A. Well, he could not receive a fracture of the skull from anything else but a blow, violence of some kind. He had a fracture of the skull.

Q. But necessarily a blow on the head to produce a fracture of the skull? A. Necessarily a blow—the blow need not necessarily hit the head. A man could fall from a building and land on his feet and get a fractured skull.

Q. Exactly. So in this case did you know

whether or not he had received a blow on his head? A. Oh, yes. I will tell you why. In opening the brain you scalp a man, so to speak, and when you cut the inside of the skull you see the hemorrhage underneath the tissue, under the bone. When you cut in there you find that condition. You find the extravasation of blood. You find that down deep on the scalp. But it won't make an external appearance—not appear externally.

Q. That is a case of instant death, isn't it? A. All injuries to the scalp.

Q. Now, might not that situation with respect to the blood arise from a blow to some other part of the body instead of the head? A. Oh, yes.

Q. Yes. So that if a man were to fall off a building and strike on his shoulders and his back you might find that condition? A. On his feet.

Q. Strike on his feet, and get a fracture of the skull? Strike on his buttocks and get a fracture of the skull? A. Yes.

Q. Those same features which you found would be existing there, wouldn't they? A. Exactly.

Q. So you would be unable to say that that was a result of a blow on the head? A. Not unless I found the hemorrhage and extravasation of blood external to the skull. That would be the differentiating point.

Q. In your examination of Mr. Price's head you did not discover anything which you could identify as a fracture of the skull? A. No, you cannot make a diagnosis of fracture of the skull unless you see it or feel it, if the wound is opened, and you bring your finger right into the crack; otherwise you cannot tell unless you see it; not unless it is what you call an egg-shell fracture, like a hard boiled egg, and you hit it in; that is manifest; you can see that. But an ordinary fracture of the skull nobody can make a diagnosis of a

fracture of the skull unless they open it up and see it. An X-ray might do it.

Q. How long since you have seen Mr. Price? A. I committed him in April, and I was out of the institution about a year ago, I believe it was. I thing I saw him out there about a year ago.

Q. Did you make an examination of him then? A. Yes.

Q. What did your examination consist of? A. I found that he was mentally dull, that he had tenderness on the skull; that the tenderness on the skull was still there. I didn't see much of an improvement in his mental condition.

Q. How about his complexion? A. Well, he looked fairly well nourished to me.

Q. In good physical condition? A. Fairly well; I thought so, yes, I thought he looked very good.

Q. And did he have a confused appearance? A. He did, he seemed to be dull.

Q. Bewildered? A. Not so much as he was when I had first seen him, but he—

Q. Dazed— A. —his mental operations were dull, sluggish, slow. His replies were unreliable.

Q. You never saw him before you were called to treat him, did you? A. Never.

Q. So you don't know what his mental operations were when he was in his normal condition? A. No, I do not.

Q. Did you examine as to whether he was oriented or not? A. I did.

Q. How did you find that? A. He was disoriented.

Q. To the same extent that he was when you first saw him? A. Oh, you mean at Morris Plains?

Q. Yes. A. Well, he was slightly disoriented. He said he was in an institution—

Q. Never mind what he said.

Mr. Simpson: I object to that. I am entitled to an answer there.

The Witness: I said there was a slight condition of disorientation there.

Q. A slight condition; now, at the time you treated him before he was committed to Morris Plains the disorientation was extreme, was it not? A. It was.

Q. So there was a large measure of improvement in connection with that condition? A. With that condition.

Q. Now, perhaps you would better explain what is meant by orientation to the jury? A. Orientation is a man—I am here testifying on the witness stand, and if I tell you I am in a hospital in New York, I am disoriented. You cross the tunnel sometimes and you get twisted; you think you are going uptown and you are going downtown. You are disoriented. When you lose your bearings you are disoriented. You cannot tell the distances; you cannot tell where you are.

Q. Does that also apply to time? A. Time and place. A man can be disoriented as to time and place.

Q. That means that he is confused? A. He might say it is the year 1900; he might say it is the year 1950; he might say it is Tuesday when it is Sunday; he is disoriented, and that is in regard to time. And if he tells you he is in a hospital when he is in a theater he is disoriented then in regard to place.

Q. Are those the two elements as to which orientation applies? A. Yes.

Q. Time and place? A. Yes.

Q. And when a person is confused, and continually so as to those, you say he is disoriented? A. I do.

Q. The tenderness on the head, Doctor, when you last saw Mr. Price—was that as much as ex-

isted when you saw him at the time you had him under treatment? A. No, it was not as marked as it was when I had—

Q. Will you state to what extent it was improved? A. Well, I detected—I didn't detect tenderness on the right side of his head when I had examined him. I noticed it more on the left side, and it was not so severe. I could press pretty hard and he would not wince, but he would tell me it hurt him.

Q. Now, is it possible, Doctor, to get tenderness to the head without external violence to the head? A. Oh, I would expect external violence. I cannot see how it could be.

Q. Nothing else that you know of that would produce tenderness to the head except external violence to the head? A. Well, you say, "tenderness."

Q. I am speaking from what you say? A. Of course, there could be a disease; there could be a nervous condition, a neuritis, and there would be tenderness there without an injury to the head. Yes, I can answer your question; possibly there could be.

Q. There are a great many things which produce tenderness to the head besides external injury to the head? A. Yes; there are others; yes.

Q. Was Mr. Price nervouse when you saw him? A. He was depressed.

Q. Was he nervous? A. Well, if you call that nervous—I presume you would call that nervous. He was nervous, yes.

Q. Wasn't he excessively nervous? A. Very much so.

Mr. Carey: That is all.

By Mr. Simpson:

Q. Would this excessive nervousness be a nat-

ural accompaniment of traumatic insanity? A. Oh, yes.

Q. About that tenderness—when you examined him with Dr. Bissing was there any difference in the tenderness between the left and the right hand side? A. It was all over the head when I examined him.

Q. Was it more on one side than the other? A. More on the left.

Q. One other question and I am through with you: What would an egg-shaped swelling, the shape of a half peach, purplish or red color, on the left hand side, show with respect to violence, if anything? Would it indicate that violence had been applied to that side of the skull? A. That is the sure evidence that violence was applied to the skull.

Mr. Simpson: That is all.

Mr. Carey: That is all.

BRITTON D. EVANS, sworn.

Direct Examination by Mr. Simpson:

Q. Doctor, you are a practising physician and surgeon? A. I am.

Q. And have you a specialty to which you have devoted study? A. I have.

Q. What is that? A. Particularly diseases of the mind, or mental diseases.

Q. And have you an official position in the State of New Jersey? A. I am medical director of the New Jersey State Hospital at Morris Plains, and have been for more than twenty-five years continuously.

Q. And how long have you devoted yourself to a study of mental diseases and mental disorders?

A. About thirty-one years. I have been continuously associated officially with that order of work and with institutional work, or institutions which were maintained for the purpose of caring for and treating persons of unsound mind.

Q. Can you tell approximately how many insane persons have passed under observation both in your hospital and otherwise during the time that you have been connected with the hospital? A. Well, since I have been at Morris Plains, more than twenty-five years, I think the average has been in the neighborhood of two thousand a year that have passed under my observation and care. Previous to that it was less than a thousand.

Q. Well, at the present time how many patients are there in the hospital? A. About twenty-seven hundred. The number in the institution, of course, does not represent the number that passes under my attention, because some get well, some are sufficiently improved to go away, and some die; but that represents what is about the—what has been the population, the patient population, for a number of years.

Q. Doctor, you have under your observation in your hospital a man named Charles Price, who lately lived in North Bergen, a fireman on the New York Central Railroad? A. I have.

Q. And has he been under your observation? Have you looked at him? A. Oh, yes; personally, and a number of times.

Q. How long has he been in the institution? A. Since April 15, 1915, 6:15 in the evening.

Q. What is he suffering with, in your opinion? A. In my opinion he is suffering from what is known as traumatic insanity.

Q. Has he syphilis? A. Absolutely not; no, sir: the patient never had.

Q. Never had syphilis. Did he ever have

paresis, in your opinion? A. He never had paresis or anything like paresis.

Q. Now, Doctor, what in your opinion is the possibility of a cure? In your opinion will he be cured or will he not be cured? That is, simply your opinion. A. My opinion is that he will not be restored to mental soundness.

Q. And to what degree is he unsound mentally now? Is he sufficiently unsound to require his being kept in the hospital and sufficiently unsound in mind to prevent him from following the normal occupation to make his livelihood? A. He is sufficiently unsound mentally to be under care and treatment in some institution where his safety will be guarded and where the safety of the public will be properly considered and protected, and—well, you did not ask me for what reason.

Q. Well, for what reason do you say that? A. He has no control over himself emotionally. Much of the time he is very much depressed; at other times he is excited to the point that he would do bodily injury, and even to his own family; that is, in my judgment he would, based upon what I have seen of others suffering from a similar form of insanity, and from my personal observation of him. He is at times very much confused, and emotionally—the emotional aspect of the man—and I do not mean simply the ordinary emotions, but I mean the emotions as they are allied with mental disorder, and the intensity of emotionality are such that he is confused, at one time crying, and the other time he is worried about the noises he hears, and the noise of a locomotive upsets him. For instance, there is a switch that comes in to the back of the institution. Whenever a locomotive or branch engine comes up there, or engine bringing freight, he becomes greatly agitated, and it takes some time before you can get him over this period

of agitation. At other times he becomes agitated without that, and says that he can feel part of his head go up and down. I have asked him—I don't want to get beyond——

The Court: As I understand, Doctor, you are describing the symptoms.

The Witness: Yes.

A. (Continuing) At other times I would go through and see him, and he would speak fairly calmly, but as soon as I get into conversation with him, even while he appears calm, he will not be oriented, will not seem to uderstand where he is, the time of the day, or his environment; and after he has been told emphatically certain propositions and facts, even recently, he does not have an appreciation of their bearing. For instance, last night I asked for an interview with him about nine o'clock, and had him brought to the reception room so that he would be free from the surroundings of other patients, and be free from any excitement; and he was terribly agitated, and he didn't know what was the trouble. "Well," I said, "there is no trouble, my dear man. I just wanted to talk with you." "Well," he said, "one of the doctors had told him he might have to come to court. I had not directed any of the doctors to tell him so, but somebody, knowing of it, had told him so; and he said, "I only want to do good. I am a good man," and without anything like the inquiry that anybody approaching such a subject,—saying, "Well, if I have to go to court why do I have to go to court. What is the issue?" It was not that; he was terribly agitated, and he didn't seem to appreciate the fact, and I told him if I came to court I wanted to know "Whether you want to go along with me?" He said, "I want to keep as far away from the courts as I can. I

have troubles enough." At some periods he sleeps fairly well; at others he has his sleepless nights and agitation. At no time has he seemed in the last year and a half to be anything like normal.

Q. Have you when you talked to him—has he any hallucinations or impressions about being hit on the head with a sledgehammer or anything of that kind?

Mr. Carey: If the court please, I object to what the patient may have said to the Doctor.

Mr. Simpson: This is treatment.

The Court: It is only for the purpose of describing the condition of the patient. It has no other bearing in the case.

Mr. Simpson: Lambert against the Consolidated Traction Company settles that; that the attending physician may describe what the patient said to him for the purpose of founding his diagnosis on it.

The Court: Only for the further purpose of diagnosing his condition and treating him.

Mr. Simpson: That is all this is offered for.

The Court: It has no bearing on the main issue and facts in the case. Let me hear the question.

Q. (Repeated by the stenographer.) Have you when you talked to him—has he any hallucinations or impressions about being hit on the head with a sledgehammer or anything of that kind?

Mr. Carey: Objection.

The Court: Enter your objection, then. It is only for the purpose I have indicated; it has no other purpose in the case.

Mr. Carey: Objection noted.

A. I do not remember his using the term

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"sledgehammer." He has on numerous occasions, not once, by any means, but on numerous occasions, when I led up to it—I used to ask him why he is there, which is a very frequent question to ask almost all the patients. He would say, "Well, when I was on that engine something happened, and Doctor, I don't remember anything since; I cannot remember anything right since then." He says that repeatedly, but he has said nothing about any particular sort of instrument being used or coming in contact with a particular instrument.

Q. What does that statement indicate to you medically as to his condition? I don't mean whether it is true or untrue. What does it indicate to you as to his condition, his being unable to remember anything since? A. Well, it is simply a loss of memory dating from a particular occasion. He cannot readjust himself and when he tries to he becomes depressed or agitated, and is emotionally out of adjustment, more out of adjustment than he is in a general way. It is not uncommon in traumatic insanity. A case of traumatic insanity—two or three, or four or five may not be brought up—if you could draw a picture or photograph them they would not be identical any more than two or three or four or five cases of lumbar pneumonia or of any other disease that has quite characteristic symptoms in general. They are not absolutely identical, but the indications in this case, they indicate to me—his symptoms as I have narrated them—that he is suffering from disorder of the mind of a very pronounced, positive character, as the result of injury, and commonly known as traumatic insanity or traumatic phschosis.

Q. Suppose this man was in normal mental health, to ordinary observation, on the 16th of February; that is, sufficiently clear to give a rail-

road signal, but after that he was struck on the head by an iron substance, either a glancing or another blow, would that in your opinion be sufficient cause to produce his traumatic insanity? A. It would.

Q. And, Doctor— A. I would like to modify that answer if it is the pleasure of the court: I do not mean that any man hit on the head will become insane, but I do mean to say that a very forceful contact would produce—is capable of and usually produces traumatic insanity.

Q. In the case of a fracture of the skull, does that ever produce a hemorrhage through the ear? A. That is one of the very frequent symptoms of a fracture at the base of the skull, fracture of the membrane of the ear, and blood flows from the ear.

Q. And could the fracture of the skull be produced without any external sign except the hemorrhage in the ear? A. I have seen several cases, and I think the authorities so state. I am sure it could be.

Q. And you, Doctor, made a scientific examination to determine the man's condition as to whether he had syphilis or paresis? A. Yes.

Q. And determined he had not. I think that is all? A. I might have said in reference to one—since the court has suggested I should give the symptoms bearing upon the psychosis—that he has this soreness over the left side of his head, and except there be a history that he had some neuritis, pronounced neuritis, before this damage, before this attack, or before this disability,—abnormal condition of the mind presented itself—it would indicate that there was a damage, traumatic damage to the peripheral nerves as well as damage to the brain proper, and if this traumatism would have been relieved even there——

Q. Well, will this traumatism frequently produce swelling half the size of an egg, or half the size of a peach on the skull? Would traumatism produce that swelling? A. Traumatism would produce any size swelling. The size of the swelling or the absence of the swelling would not—would be no standard as to the amount of damage done to the brain substance, and the brain is frequently damaged or lacerated by contracoup. A blow comes here and the brain lacerates down here (indicating.) That is, as a watermelon drops on the ground; where it comes in contact you see no harm done, but it cracks up on the top, and that is the French term "contracoup" used in injury to the brain particularly.

Mr. Simpson: Cross examine.

Recess to two o'clock P. M.

AFTER RECESS:

Mr. Simpson: I will read some testimony while we are waiting, that Mr. Carey agreed I might read:

(Testimony of Mr. Mabie read by Mr. Simpson.)

Whitfield Mabie, a witness produced on behalf of the defendant, being sworn, testified as follows:

Direct Examination by Mr. Carey:

Q. You are the conductor on W. D. 3 train of this defendant? A. Yes.

Q. Do you remember the train being stopped at Dumont? A. Yes.

Q. What orders did you receive there? A. To inspect the train.

Q. Did you inspect the train? A. Yes.

Q. What inspection did you make? A. I went up and down the side of the train the full length of it.

Q. Which side? A. Left side.

Q. What were you looking for? A. To see if anything projected that could hit a man on the other track.

Q. Did you find any such thing? A. No, sir.

Q. Did you find anything loose? A. No, sir.

Q. Anything whatever out of place? A. No, sir.

Q. Did you go over the top of the cars? A. No, sir.

Q. Did you know Fireman Price? A. Yes.

Q. Did you see him after the 16th of February? A. No, sir, never saw him again.

Cross Examination by Mr. Simpson:

Q. You examined the cars, you examined the locomotive? A. I went the full length of the train.

Q. Did you see the fire hook? A. Why, no, I didnt see it.

Q. Didnt see it at all? A. Did not.

Q. Although you examined the locomotive? A. I went past the engine.

Q. Both sides of the engine? A. No, sir.

Q. Which side? A. Left side.

Q. Only the left side. You didnt see the fire hook at all, did you? A. No, sir.

Margaret Price, (Recalled) for Plaintiff—Direct

MARGARET PRICE, recalled, testified as follows:

Direct Examination by Mr. Simpson:

Q. Prior to the 16th of February, 1915, how long had you been married? A. Why, about ten years.

Q. And you had seen your husband practically all the time, hadn't you, in the house? A. Yes, sir.

Q. Now, what was his conduct as to making replies? Was he slow or bewildered in making replies before that day? A. No, sir.

Q. Well, what kind of mind did he have? How did he talk? A. Very accurate; very bright.

Q. Was he active? A. Yes, sir; very.

Q. Was he ever very nervous before this accident? A. Never nervous; always was a hard worker; worked always on freight, and seven days every week. Held down the hardest jobs on the New York Central.

Q. How long had he worked? A. For ten years.

Mr. Simpson: That is all. Cross examine.

Cross Examination by Mr. Carey:

Q. You hardly feel qualified, do you, Mrs. Price, to say he held down the hardest jobs on the New York Central? A. I do. He held down always freight.

Q. Do you know about the jobs on the New York Central? A. Yes, I do.

Q. How did you become acquainted with them? A. I know that 79 is one of the hard freight jobs, and Mr. Price was on that for years.

Q. You do not know that of your own personal knowledge, do you? A. Well, I know what the men say. I know what he said.

Q. That is what I mean. You have given what

somebody told you, but not from your own knowledge? A. Well, everybody says 79 is a hard job.

Q. Not everybody? A. Oh, yes.

Q. Some people.

Mr. Carey: Now I would like to ask Mrs. Price one or two questions not bearing on this particular subject.

Mr. Simpson: Well, I would prefer that you do that afterwards, because Dr. Evans is here, and he wants to get away. I will recall her for it if it is not connected with my redirect. You can recall her any time you want.

BRITTON D. EVANS, recalled.

Cross Examination by Mr. Carey:

Q. Doctor, you stated that you saw on the average perhaps two thousand patients a year in the institution where you are now located? A. Yes.

Q. Does that mean two thousand new, separate patients on the average, a year? A. No, I tried to make that clear that I see that many on the average in the institution. I see more outside, and it does not mean a permanent population; it means partially permanent, they come and go, and new ones come——

Q. A good many of the two thousand would have been changed the preceding year, perhaps? A. Yes.

Q. And removed during the coming year? A. Yes, that is perfectly correct.

Q. You say that Mr. Price is on some occasions active and quick, and in other cases he is depressed? A. Well, I do not remember expressing myself that way. If I did I did not intend to. I

said at one time he is excited, excitable and excited, and another time he is depressed.

Q. Yes. And at some periods he is more or less calm, as a good many insane persons are.

Q. Now, in the excited condition—it is the opposite of depresed, is it not? A. Yes.

Q. And do you sometimes apply the term "exalted" to that excited condition? A. Yes; I use the term exalted sometimes when there is a certain order of excitability, or where they are above normal, but I do not mean to apply it here by any means. Exaltation means as a rule a feeling of self-importance and well-being, and he does not exhibit that. This is the order of excitement that I particularly tried to make plain in my testimony —agitation, agitated, in an excited manner, not this exaltation that is generally spoken of which carries with it a feeling of well-being and satisfaction with one's self. That is characteristic with a very different form of psychosis.

Q. And the excited, active stage, is frequently followed by a depressed stage, is it not? A. Yes; it is followed by——

Q. And is that the condition of Mr. Price? A. I tried to say, and I think I did say, clearly, that his periods were irregular. At one time he was under the slightest irritation very much agitated and upset; for instance, as by the sound of the locomotive and by somebody saying something in his presence. At another time—other times—he would not get agitated; he would have nothing apparent or that we could analyze except that he has a mentality deranged by some force applied to his brain substance—a condition such as is characteristic of a concussion, not of an ordinary psychosis with exaltation; and he has these depressions, but, like in a good many other psychoses, he does have other periods where he is apparently calm.

Q. Does traumatic insanity ever occur without concussion of the brain? A. Such a thing in—some people classify sunstroke as traumatic insanity, and they are fanciful classifications; but traumatic insanity means an injury to the brain and usually a mechanical injury.

Q. What do you mean by concussion of the brain, Doctor? A. Concussion of the brain means any force applied particularly to the skull that creates a shaking up, sometimes a point of laceration of the brain substance, so that there is no mental coordination for the time being, the periods varying according to the intensity of the shock. It is an exaggerated shock and usually as the result of force applied to the skull in some part. There are cases in which probably the brain substance is shaken up without the force being applied there, but that is what it means.

Q. Now, I do not think you have quite answered my question yet, Doctor. The question is, can traumatic insanity be caused when there is no concussion of the brain? A. I do not know of substantial traumatic insanity caused otherwise. I say there are fanciful classifications, such as sunstroke, and so on, but I personally do not call that traumatic insanity, and I am not discussing, or have not presented traumatic insanity of any sort other than force applied to the body which shakes up the brain. (Indicating by shaking his hands.) So that there cannot be mental coordination, proper iveation, and there is a mal-adjustment of one power to understand relation to their environment and numerous other derangements, an emotionally upset, irritability, a lack of coherency, and numerous other symptoms that go along with this order of psychosis; and I said further—you might take a picture of five or six cases of traumatic insanity, such traumatic insanity as I have spoken

of, and there might be deviations as there would be in cases of pneumonia; that they would not be strictly identical, but there would be substantial features which would establish the diagnosis satisfactorily.

Q. In other words, there would be some symptoms which you call characteristic, symptoms which you would expect to find, and as to the other symptoms there might be no difference, but there is a wide variation? A. Well, I did not say—well, a variation; I didn't use the term wide, but there would be a variation.

Q. Well, would the variations in themselves be very considerable? A. Yes, in non-essential phases; yes, I think it might be.

Q. Now, is there a type of insanity which is sometimes called traumatic insanity, occasioned by an emotional shock, or a shock of fear? A. I said that that is what I called a fanciful order of traumatic insanity; that is among the group—the classification depends upon the writer, or the authority when you get away from the substantial bearings. Trauma means a wound.

Q. Yes. A. (Continuing.) Traumatism means the substance of a wound having been inflicted by some body. Traumatic insanity means that a wound or damage by force, as I understand traumatic insanity, has been inflicted substantially, disturbing the brain substance, the organ of the mind, to the extent that the mind can no longer exhibit its own normal lines, and that the subject cannot adjust itself to the situations in life as he did formerly, and as he would be expected to by the general rules governing society and social conduct.

Q. Now, this shaking up of the brain which results in traumatic insanity may be caused by a blow which is applied to some other part of the

body than the head, may it not? A. Such a thing is possible, yes, but it is——

Q. For example, if a man were to fall and strike on his feet he might get concussion of the brain as the result of that? A. That is within the range of possibilities; it is not at all frequent in traumatic insanity. He might get great shock in that way, and if he struck squarely on his feet a shock or force transmitted up the spinal column—he might sustain an injury to the base of the brain; yes.

Q. Now, what authorities recognize this fanciful classification which you suggested a few minutes ago? A. What is that?

Q. What authorities recognize this fanciful classification of traumatic insanity which you have mentioned and of which sunstroke is an example, and an emotional shock is an example?

Mr. Simpson: I object to that question on the ground that the Doctor has not referred to the book. In the case of the New Jersey Zinc Company, I think it is, it is specifically held that you cannot refer to books in an examination of this kind unless the witness has appealed to them on his direct examination. He may then be directed or intrrogated as to their contents, and as to what there is there. You cannot bring in books without some warrant. I object that it is not proper cross examination.

Mr. Carey: I think the rule is——

The Court: Let me see 85 Law. He cannot be confronted with it unless he has himself cited authority.

Mr. Carey: I think the rule is a man is not permited to fortify his own opinion on direct examination, but that he may on cross examination be confronted by the citation of

authorities which are in opposition to his view.

The Court: I am satisfied the Zinc case goes this far: The Doctor not having cited any authorities at all on his direct examination you could not bring forward this, that and the other authority and confront him with them, and ask him if they did not conflict with his opinion.

(The Court refers himself to the case.) The exact rule as stated here is that books of science are inadmissible in evidence to prove the things contained in them, but if a witness refers to them as an authority, they may be received for the purpose of contradicting. The situation here is that the Doctor has not so far cited any works as authorities.

Mr. Carey: I am not asking for authorities to contradict him, but to extend his classification.

The Court: What is the question?

Q. (Repeated by the stenographer.) What authorities recognize this fanciful classification of fanciful insanity which you have mentioned, and of which sunstroke is an example, and an emotional shock is an example?

Mr. Simpson: I make the further objection that the authorities themselves are the best evidence. The books themselves, if they were admissible, would be the best evidence, and not the Doctor's statement.

The Court: I take it, Mr. Carey, that you are trying to draw from this witness now a designation of authorities in support of what he has said, so that you may by them contradict him, possibly. Would that be the situation?

Mr. Carey: Well——

The Court: I will sustain the objection. You may have your objection.

Mr. Carey: Exception noted.

Q. You spoke of the locomotive sometimes agitating him, passing of the locomotive sometimes agitating Mr. Price. I understand you to say sometimes the locomotive would not excite him. Is that correct, Doctor? A. I am not continuously with him. I can only tell you of my having seen the agitating, and the official reports made of it in addition to that; but——

Q. Well, what is your personal observation, Doctor? A. I do not remember having seen a locomotive pass and he not become agitated, if it made any noise; but there being numerous times when the locomotives go by there and no record made or report to me, it is possible that at times it does not.

Q. And how frequently do the locomotives pass? A. Well, there is no tabulation of it at all; there is no tabulation made of it at all.

Q. Well, just in a rough way, Doctor? A. Well, I don't know. When there is freight to come up there it comes right up near to the hospital; sometimes there would be a locomotive come up there four or five times a day, and maybe if they are not hauling coal or merchandise there won't be any for two or three days.

Q. But there would be several every week, would there? A. I would think so; it would average one or two a week, anyhow.

Q. Is there a report made on each occasion when he becomes excited by a locomotive or any other disturbing noise? A. The ward records made—I don't think that they are made every time, every occasion; I am inclined to the opinion that they

are not, but there are sufficient records both by the physicians and nurses to that effect, and my own personal observation, to establish the fact, that for some reason, since I knew nothing about his peculiarities before, or what susceptibilities he has, but since he worked upon a locomotive I assumed he was not excited because of a locomotive previous to this mental breakdown, and that he is now showing that he has some abhorrence or fear of the locomotive because of some incident that probably lingers in his mind now—some particular incident that was harmful to him.

Q. And is it not also your opinion that on some occasions this effect is not manifested when the locomotive passes? A. I am not sure about that. I have said—I attempted to answer that, because you know a positive proposition when you overlook a negative one.

Q. Sure, but from the occasions when reports are made of this excitability would you not say it is quite probable that the locomotive does not at all times excite him? A. Well, that is asking me a question that seems hardly—I don't want to criticise the question, but the question asked me, inasmuch as I don't know a thing if I am quite sure that I don't know it.

Q. That is hardly a fair criticism.

The Court: What is the question?

Q. (Repeated by the stenographer.) But from the occasions when reports are made of this excitability would you not say it is quite probable that the locomotive does not at all times excite him?

The Court: I do not think I understand the question, Mr. Carey.

Q. In other words, isn't it true that the locomotive comes there a good deal more frequently

than reports are made to you of Mr. Price's becoming excited on account of the locomotive? A. Yes, but if you will allow me to testify as to the reports: the reports are that it practically always excites him, and he is in a state of maladjustment all the time, either agitated or depressed.

Q. Doctor, have you frequently come in contact with Mr. Price since he has been in your institution. A. Quite frequently indeed.

Q. And I assume that you probably met him very soon after he came there? A. Yes; I met him on the day he came there.

Q. And made an examination of them? A. I didn't make his examination that day, no; I saw him——

Q. How soon did you make an examination? A. Well, about a week after that. I don't know—I didn't have a staff examination made of him, for the reason that I wanted—I mean to say immediately after his coming. We usually make a staff examination in the course of a week or two, but I wanted a Wasserman examination made. We make Wasserman examinations of pretty near all our patients now, and we postponed the staff examination. It was made later; just the date I cannot tell you.

Q. Were you present at the staff examination? A. No, I was not present at the staff examination because I had made my examination before that; made two examinations of him before that.

Q. And how frequently have you examined him since that time, Doctor? A. That I could not tell you.

Q. A number of times? A. A number of times, yes.

Q. When did you make the last examination? A. Last evening; last night about nine o'clock.

Q. How does his condition compare now with

his condition at the time you first made an examination of him. A. He is more enfeebled mentally. His general trend is toward a greater mental deterioration.

Q. What about his physical condition? A. His physical condition—general physical condition seems to be better, if anything; at least, he is carrying his flesh and his general color is good, and his heart is beating regularly, and his lungs are expanding and contracting; in other words, his inspiration and respiration are good; his appetite is good; and still he is irregular in his sleeping, gets as if scared and horrified in his sleeping, makes a noise, and the reports come in, "sleepless night", "disturbed night," other nights "slept well"; but that has been the way ever since he has been in there. But you asked me about his mental condition; he seems to have less mental grasp than he had.

Q. You say he has increased in weight? A. His general appearance would indicate it. I have not the records of his weight, although we weigh everybody who comes in, and where there is any indication of breaking or running down we weigh them to see the decrease; but where the general health—general response to food is good, and no evidence—no reason to do so, why, we do not do so; otherwise they are not directed to do so, and, consequently, do not do it.

Q. Did you examine his reflexes when he came in? A. I did.

Q. And last night also; is that right? A. How is that?

Q. And last night also? A. No; I did not last night. I observed his general muscular coordination, which seemed to be good. His mental condition I did examine carefully.

Q. Would you say that his reflexes were better

or worse than when he came in? A. I should say that they were about the same.

Q. You would not notice very much difference? A. I did not see any indication. Reflexes are of minor importance in cases of this sort, where there has been some very—especially if you don't suspect some specific form of insanity.

Q. How about the orientation of the man? A. His orientation is bad all the time.

Q. How does it compare now with the time he came there? A. It is worse, I would say, at times; it varies from time to time. His agitation and the fact of his environment and impressions made, and conditions presented to him, seem to affect his orientation. But there is always that abnormality, that more or less irritability, that believing that part of his head lifts up and down, and these attacks of depression and these attacks of agitation where he says he is fraid he will do himself harm—does not always say so, but in some of the periods—afraid he will hurt himself and do himself harm, and when asked how he did when he was out he says, "I always got along all right, the best I know." When I asked him if he wanted to come here last night he said, "If it is good and righteously—" I didn't think of the word "righteously" on my direct examination—"but I don't want to have anything to do with courts."

Q. Does he know where he is now. A. At times he seems to know where he is, yes; but he doesn't know the time of the day or the time of the year or the date, as a rule.

Q. He does not? A. As a rule he does not.

Q. You have testified in a great many cases of insanity, I assume, Doctor. A. Yes, I have; I am quite sure I am right on that.

Q. You are quite sure you are correct on that?

And in a great many cases that have attracted a great deal of attention through the country? A. Some of them have.

Q. And did you ever testify in a contested case but what eminent scientists testified also in disagreement with you?

Mr. Simpson: I object to that as not proper cross examination.

The Court: What is the purpose of it, Mr. Carey?

Mr. Carey: To show the extent in which the opinions of experts might be relied upon.

The Court: Oh, well, how is it going to be valuable if he says yes, there were persons who disagreed with him, as I suppose he must. How will that establish anything unless you go further and show that those who disagreed with him were right? It could not be possible to show that?

Mr. Carey: I think it is not necessary to go so far as that, but show that there is almost always a disagreement among eminent specialists.

The Court: I think that is a matter of common knowledge.

Mr. Carey: What is it?

The Court: I think that is also a matter of common knowledge. I will sustain the objection.

Mr. Carey: Objection noted.

The Court: You may have your objection noted.

Mr. Carey: I think that is all, Doctor.

By Mr. Simpson:

Q. Mr. Carey asked you about the Wasserman test, what was the purpose——

Mr. Carey: I didn't ask him. He spoke about it.

Q. Well, what is that Wasserman test? A. The Wasserman test is a test to determine whether or not—it is a scientific test, a reaction test of the blood, and of the spinal fluid, for the purpose of determining whether the person being examined has ever had syphilis.

Q. And what did the Wasserman tests show in his case? A. They were all negative. We made three, and sent one to the State Board of Health in New York, to have it made there. They were all positively negative, showing that he had not had syphilis, and not having had syphilis he has no form of paretic disease, or what is known as general paresis.

Q. And was not a Wasserman test made by the doctors of the railroad company by your permission and my permission up there in the hospital? A. That I am not sure about. I know that one of the physicians came up there and said that it had been contended that he had general paresis, and he was not quite convinced——

Mr. Carey: I object.

The Court: What is the objection?

Mr. Carey: Well, the Doctor says he is not sure.

The Witness: I don't think that a request was made, but I know that a doctor came up and made some inquiries about it, and I was told——

Mr. Carey: One moment.

Q. If he had syphilis the Wasserman would show positively that he had? A. Yes; there is no question about it; it is left absolutely without doubt; frequent examinations—one Wasserman examination might possibly have not been so positive as to make you want to base everything or stake everything of a scientific character on it, but

when Wassermans are made of the spinal cord, and then are made of the blood, and are made time after time, and they are negative, it leaves no speculative chance as to syphilis or any disease that results from syphilis being in existence in that particular case.

Mr. Simpson: That is all.

By Mr. Carey:

Q. How many Wasserman tests were made in Mr. Price's case? A. There were four, I believe. I have a record of them over——

Q. How long ago? A. Well, one was made only a few weeks ago.

Q. And how far apart were the tests made? A. Well, one was made about two months ago.

Mr. Simpson: Do you want to refer to your notes?

The Witness: I do not believe I care to refer to them. I believe I have the exact dates—I have the exact dates and records at the hospital. Three of them ware made at our laboratory, and one was made by the State Board of Health of the State of New York, so that while the technic is practically the same, we would be sure that somebody else would say so, because it was a matter in question, it seemed.

Q. Why is it necessary to make more than one test of that kind? A. Because it is contended by some people—just what people I don't know; I am not prepared to state—that it is always best for scientific purposes to confirm your examinations, to confirm your findings; that where as if any little faulty technic might have existed that modified it, even though it is positive as to the degree, that you could go over it; it is your oppor-

tunity in behalf of science, for your own consolation to go over it and confirm it. It is a rule. And in this particular case I had a recent one made for that purpose. There was never any doubt, I may state to you, as to the matter, because there wasn't a symptom, characteristic symptom, presented of syphilis or of syphilitic disease.

Q. Isn't it true that one examination showing negative has been known to be followed by another examination showing positive? A. Yes; that is a fact.

Q. And isn't it a fact that one, two, and sometimes three examinations showing negative have been followed by a positive result? A. I don't know of any such cases—not when the spinal cord fluid is examined, and by a competent examiner. I have no one in mind as being incompetent or particularly competent; but I can understand that there might be. But after it is found to be positive, the positive is positive. Somebody finding it negative afterwards wouldn't prove that it was not positive.

Q. And were the examinations which you made of Mr. Price of both blood and spinal fluid? A. They were.

Q. On each occasion? A. I think on each occasion. That I won't be certain about.

Q. Haven't you known as many as two negative tests to be followed—in the same person—to be followed by a positive result? A. I don't remember; I think that is possible, but I have never known it.

Q. Isn't it a well recognized proposition in your branch of the medical profession that the Wasserman test negative is not conclusive, but that the positive is conclusive? A. Negative properly done—or positive properly done, which in his case was done, by the colloidal gold test, by the Noguchi

method, and by the ordinary Wasserman method—it was done by three capable men, and it was watched by others, and every control held over it, and there wasn't a symptom to indicate syphilis besides that. It is a matter of routine, and since it seemed to be there would be likely to be some controversy, more than ordinary care was observed and scientific efforts given in the matter.

Q. Doctor, do you not recall that a request was made on behalf of the defendant company to have a Wasserman test made under their supervision, and that that request was declined by you after submitting the matter to the board of directors of the hospital? A. I don't remember it very well, but I know that is just what I would do, and do it now. I would not have any people coming from the outside to do that without an order of the court to do so.

Q. And, as a matter of fact, did you not receive from Mr. Simpson within three or four weeks past a letter in which he declined to give consent to a Wasserman test?

Mr. Simpson: I object to that on the ground that the letter is the best evidence.

Mr. Carey: You have asked the question on your direct examination, if a request was made.

Mr. Simpson: I think that was ruled out.

Mr. Carey: No, it was not ruled out.

The Court: No; it was answered.

Mr. Simpson: I think the Doctor said he had no recollection. I know there is no positive evidence of it.

The Court: I will overrule the objection, however.

Mr. Simpson: My objection goes to the fact that the letter ought to be produced, not to the witness answering it.

Q. (Repeated by the stenographer.) And, as a matter of fact, did you not receive from Mr. Simpson within three or four weeks past a letter in which he declined to give consent to a Wasserman test? A. I am not sure about that; I won't say that I did not.

Q. You have no recollection on it? A. Well, I don't know. Since you have mentioned it it seems to me that I had some information relative to it. If I have it is on record in his case, and I can produce it in court; but two hundred and eighty thousand letters——

The Court: If there is one have you seen it, Doctor.

The Witness: I don't think I have; but it must be in my office. I will look over what records I have if you want me.

The Court: We will see.

(Mr. Carey produces a paper.)

Mr. Simpson: That is a copy of the letter I gave to you?

Mr. Carey: Yes.

Mr. Simpson: I gave this letter to Mr. Carey.

All right, you can put that in.

(Paper marked as D-8 in evidence.)

Mr. Simpson: I admit that is a true copy of a letter I gave to Mr. Carey to have the Doctor go up to Morris Plains.

(Exhibit D-8 read to the jury by Mr. Carey.)

Q. Do you remember now receiving that letter, Doctor? A. I think that letter or something like that, something of that sort, came to me; but it would have made no earthly difference, because these things are done without the consent of counsel. It is done as a scientific process; that is, so

far as our prosecution of scientific investigations is concerned. But for ordering somebody else to do it, or having somebody else do it, I am not permitted by the ruling authorities to have that sort of thing done.

Mr. Simpson: That is the board of directors of your institution?

The Witness: Yes; they have decided that counsel in matters of that sort have no control except there is a court order to that effect.

Q. And do you recollect now, Doctor, of having refused to permit the Wasserman test to be made by a doctor of the railroad company? A. I don't remember it, but I know it is perfectly natural, and I would have done it if I didn't do it. If it had come directly before me, and whoever represented me no doubt did so. If we could have our patients all punctured up there upon the request of anybody that was interested, why——

Q. Never mind that.

Mr. Simpson: I object to his cutting him off. They could have the patients punctured every day if they would let doctors in there to do it.

The Court: Any more evidence?

Mr. Carey: I am looking for the letter Dr. Evans wrote refusing a request two years ago, or so; that was at the time the compensation case was under consideration, about the time it was coming on for trial. I would not take the time of the court in this instance were it not implied by Mr. Simpson that consent was given.

Mr. Simpson: I will let you put in the letter. Do not keep the Doctor on the stand. I will let you put in the letter.

The Court: He says that he does not recall that he did decline to do so, but if the application had been made he would have declined it.

The Witness: I am rather of the impression that this matter came before me, and since my memory is refreshed; but if it were to come before me to-morrow, the same sort of a request, I would decline both as a matter of principle, and by the directions given me by the governing board of the institution.

Q. And consequently you are able to state that no permission has ever been given to the railroad company to make this test through their own physicians? A. No, not in this case; nor any other case, and not likely to be except by an order of the court.

By Mr. Simpson:

Q. Now, your institution is governed by a board of directors recognized by the State, isn't it? It is a State institution? A. Appointed by the Governor and confirmed by the Senate.

Q. Senate of New Jersey. And whatever they say in cases like this you do? I mean they make rules— the board of directors make rules? A. They make rules and regulations which have the force of law when approved by the Governor of the State.

Q. And those regulations do not permit you except under a court order—do not permit you, even if you were willing, to have these incompetent people who are committed to your charge, incised, punctured and dissected alive by outside physicians, do they? A. Surely not.

Mr. Carey: I object to the form of the question.

The Court: The characterization may not be proper, Mr. Simpson.

Mr. Simpson: Why, not, your Honor?

The Court: I do not think that that is the situation, or would occur.

Mr. Simpson: Well, the jury will say.

The Court: Let them say it, then.

Q. Whether or not this institution is so run that any gentleman who has a medical certificate can prance in there and take out a man's spinal fluid if he likes—that is what I want to know? A. Such operations as that—if that is in the form of a question, Mr. Simpson—

Q. Yes. A. —are more or less serious unless you have full control of the patient and can put him in the proper position and have somebody take care of him. It is not like examining his eyes, or his tongue. Sometimes they are ill for a half a day, or sometimes more, and have to be looked after carefully, and the man who would come in from the outside—it is perfectly clear we would not be responsible for that after I had given my permission to do it; and I do not think the relatives and friends would endorse it, or the people of the State, and I know my board does not permit it, and I have not done it, and I do not intend to do it except under a very competent order.

Mr. Carey: He has gone plenty far enough in this. I only brought it up because of the implication that we have had permission.

Q. Now, Doctor, one other question I want to ask you: There never was at any time on your part an attitude that you would refuse to allow any reputable physician to be present at your own tests, if they made such application, was there, for the railroad company?

Mr. Carey: I object to that as immaterial.
Mr. Simpson: I will withdraw that.

Q. Did any physicians for the New York Central Railroad, to your recollection, ever ask to be present at any of these tests conducted by you? A. Not to my best recollection. I feel quite sure of that.

By Mr. Carey:

Q. Were they ever notified that the test was about to be made? A. Never; I never thought it necessary.

Q. So the tests were made entirely without their knowledge? A. Their knowledge or consent.

Q. Yes; didn't even ask their consent, did you? A. What is that?

Q. You didn't even ask the railroad's consent, did you? A. No; I recognize the importance of the railroad, but not in that capacity.

By Mr. Simpson:

Q. It has been said here that two years ago they requested a test. Now, at any time in that interval of two years has any one requested you for the railroad to allow a physician to be present at any test made at all, or to have a test made by you for them in their presence—anything of that kind? A. According to my best recollection nothing of the kind—no such requests have ever been made.

JOHN V. DUNNET, sworn.

Direct Examination by Mr. Simpson:

Q. Doctor, you were a physician at Morris Plains, and are under Doctor Evans? A. Yes, sir.

Q. And have you made a specialty of pathology? A. Yes.

Q. And did you make a pathological examination known as the Wasserman test of a patient named Charles Price now in that institution? A. Yes, I did.

Q. How many did you make? A. Why, several of them.

Q. Can you tell from your notes; just look at your notes. A. (After referring to papers.) Eight.

Q. And what do those tests show as to the presence or absence of syphilis? A. All negative.

Q. Negative? A. All, yes.

Q. That would indicate what, that he had no syphilis? A. If they are negative, probably.

Cross Examination by Mr. Carey:

Q. What was that answer? A. (Repeated by the stenographer.) If they are negative, probably.

Q. Then the negative result is a probability, shows a probability that the syphilis is absent? A. Is absent, yes.

Q. The positive result, however, is conclusive; is it not? A. Yes.

Q. And the negative result only a probability; is that right? A. Yes, it is right, but if you have some other tests, different tests, and all are negative, you can have ninety-eight or ninety-nine chances out of a hundred that syphilis is absent.

Q. In other words, a large number of tests increases the probability that syphilis is absent? A. Yes.

Q. And you make in some cases a large number of tests so as to confirm, as far as you are able to, the absence of syphilis? A. Yes.

Q. And it is because the result—a negative result—produces only a probability that you make tests from time to time? A. Yes.

Q. And has it been your experience that negative tests were sometimes followed by positive results? A. Not in my experience, when all of these tests we are doing—when all are negative we are not allowed to say that syphilis is present.

Q. When did you make these different tests? A. On October 17th, was the last one; I have not the record for another—another one I made I think four or five weeks before.

Q. Four or five weeks before? A. Yes.

Q. And when was the earliest one made? A. The earliest made was made by Dr. Thorne, the pathologist who was in charge of Morris Plains about one or two years ago; I cannot say exactly because I have not the record of that.

Q. You didn't make that test? A. No, but it was made by Dr. Thorne, who was pathologist before me.

Q. Were you present at the time? A. No, I was not at Morris Plains at that time.

Q. And did you make all of the others of these tests? A. I did.

Q. And when was the earliest one that you made? A. I cannot tell exactly when the first one was made; I cannot give the date exactly. I have only the records from the last one.

Q. The only record of date you have is October 17th of this year? A. Yes, of this year, October 17th, 1917.

Q. Were all of the others made during this year? A. Yes.

Q. What part of the year, September, or October? A. Probably September or October. No, not October; September, probably.

Q. September? A. Yes.

Q. And you made altogether seven, you say? A. Well, I have right here, seven, and one was made before, would be altogether eight.

Mr. Carey: That is all.

By Mr. Simpson:

Mr. Carey: Just a moment, please.

By Mr. Carey:

Q. What thing would be likely to prevent the positive result if syphilis was actually present? I mean what things would be likely to produce a negative result if syphilis were in fact present? A. Well, I don't understand your question exactly.

Q. Well, there is such a thing as a negative result when syphilis is present? A. That happens, yes.

Q. Now, what would be likely to produce that negative result even though the disease were present? A. Nobody knows.

Q. They simply know the facts? A. The facts, yes, but yet nobody knows why.

Q. They don't know the reason? A. No.

By Mr. Simpson:

Q. Considering the above facts, that is, the tests you made, from the laboratory standpoint, what would you say as to all idea of paresis being eliminated or not in the case of this patient? A. Well, when you have a patient whose blood gives a negative once in a test, when you have this spinal fluid whose pressure is normal, when you have a globulin test—

Mr. Carey: Just a moment, are you reading your answer from the paper?

The Witness: This is exactly the test I have made.

Mr. Carey: Are you reading your answers?

The Witness: No, I am not reading them, but I am taking them in the same order I have made them.

Mr. Carey: You are not reading now what you are stating to the stenographer, but are

simply conferring with your notes to see the basis upon which you have your statements, is that it?

The Witness: Yes.

Mr. Carey: All right.

A. (Continuing.) And when you have globulin tests negative made of this spinal fluid, lymphatic cycosis, meaning the count of the number of cells which are contained in the spinal fluid, the Wasserman reaction from the spinal fluid, and the colloidal action—when you have all these tests negatived you are allowed to say that paresis is absent.

Q. And in your opinion does that test make it positive that paresis is absent in this case, in the case of Price? In your opinion is paresis absent in the case of Price by reason of these tests? A. Yes, surely.

Mr. Simpson: That is all.

Mr. Carey: That is all.

MARGARET PRICE, recalled.

Direct Examination by Mr. Carey:

Q. Mrs. Price, I think you testified yesterday that some clothing belonging to Mr. Price was returned to you by the railroad company? A. Yes.

Q. And who returned it, do you know? A. Why, I don't know who returned that grip, Mr. Carey.

Q. Was it in a handbag—it was in a handbag, was it? A. Yes, sir.

Q. You cannot recall who returned it? A. No, sir; I don't remember the man's name.

Q. About when was it returned? A. It was about a week after the injury.

Q. Do you know the man? A. Why, I would know him if he was in the court room, but I don't know his name.

Q. You didn't know his name? A. No, I don't know his name.

Q. You would know his face if you saw him? A. Yes, I would know him if he were here.

Mr. Carey: That is all.

By Mr. Simpson:

Q. When were these clothes returned to you? A. About a week after Mr. Price was injured.

Q. At that time where was he? A. He was in the North Hudson Hospital.

Q. Was there or was there not his cap returned to you that he wore at work? A. No, sir; his cap was missing.

Q. What was returned to you? A. His jumper and a blue handkerchief he wore about his neck, and his dinner pail.

Q. And do you know who sent it to you? Whether it was Mr. Seaman, or— A. No, it was not Mr. Seaman.

Q. Do you know whether it was a fireman that sent it? A. It was a fireman that brought it, but I don't know his name.

Q. Do you know whether it was your husband's engineer? A. No, sir.

Q. It was a fireman? A. It was a fireman who brought it to me.

Q. Was there any explanation given to you by the man who brought it about the absence of this cap?

Mr. Carey: Objected to.

A. No; I was on my way to the hospital, Mr. Simpson—

Q. Well, when was the last time you saw his

cap? Was that when he went out that day? A. No; he wore that cap on the engine.

Q. He never brought it home? A. No, sir.

Mr. Simpson: I think that is all.

Mr. Carey: That is all.

GEORGE B. MCMURRAY, sworn.

Direct Examination by Mr. Simpson:

Q. You are a practising physician and surgeon, Doctor? A. Yes, sir.

Q. And have been such how long? A. 1908.

Q. And were you one of the staff of the New Jersey State Hospital for the Insane at Morris Plains? A. Yes, sir.

Q. And how long have you been there as a member of the staff? A. Since 1911.

Q. Do you know a patient there named Charles Price? A. Yes, sir.

Q. Is he under your personal observation? A. Yes, sir.

Q. How often have you seen him since he has been confined there? A. That would be impossible to say; about twice a day.

Q. And in your opinion, has he ever since he has been admitted to the hospital, been suffering from paresis? A. No, sir.

Q. Has he ever, in your opinion been suffering from syphilis since he has been an inmate of the hospital? A. No, sir.

Q. What in your opinion is his condition? A. He is suffering from a psychosis brought on by traumatism.

Q. And in your opinion is that permanent or will it disappear? A. I should say it was a permanent condition.

Mr. Simpson: Cross examine.

Cross Examination by Mr. Carey:

Q. Can you say more than this, Doctor; that the condition in which Mr. Price is may have been caused by traumatism? A. I do not quite get your question.

Q. (Repeated by the stenographer.) Can you say more than this, Doctor: that the condition in which Mr. Price is may have been caused by traumatism? A. No, sir.

Q. Now, Doctor, you have seen Mr. Price since he came in there originally? A. Yes, sir.

Q. You had personal care of him to a considerable extent? A. Yes, sir.

Q. How about his physical condition as compared with what it was when he came there? A. Why, he has put on considerable flesh; I should say he was somewhat better physically except for the pain in his head, which is just as bad, and perhaps a little worse.

Q. How about his orientation now compared with what it was when he first came there? A. It is not as good.

Q. Not as good as it was, at the present time. Did you talk with Dr. Fendrich on a recent occasion when he was up there to see another patient? A. Doctor who?

Q. Fendrich? A. This Doctor here beside you?

Q. Yes. A. Yes; I talked to him.

Q. And on that occasion did you say to Dr. Fendrich that he was improved in every way, physically and mentally? A. I certainly did not.

Q. You did not? A. I did not.

Q. What did you say to him about the patient's improvement? A. I said he—

Mr. Simpson: I object to that.

He can lay a foundation to contradict him, but how can his conversation about the condition of the patient be competent unless he

specifically directs his attention to certain things?

The Court: Well, I suppose, Mr. Simpson, it would go to the question of the truth of his present testimony, if it were shown that it did not match up with his present testimony upon that score, and I presume it grew—let me hear the testimony.

Q. What did you say to him about the patient's improvement?

The Court: I will overrule the objection.

A. I think perhaps I said he had improved somewhat physically in respect to taking on weight; that his appetite was better. That was the limit of his remarks.

Q. Is that all you said to him about the improvement of the patient? A. That is all to my recollection.

Mr. Carey: That is all.

Mr. Simpson: That is all.

Mr. Simpson: Now, when you put in those photographs did you put in anything about the measurements on the back, distances between the cabs and the track, and so on?

Mr. Carey: I have not put them in yet; I have not had an opportunity.

Mr. Simpson: Who is the man knows about them?

Mr. Carey: Mr. Chase and Mr. Johnson.

GEORGE E. CHASE, sworn.

Direct Examination by Mr. Simpson:

Q. What is your name? A. Charles E. Chase.

Q. Mr. Chase, what is your occupation? A. Assistant Division engineer of the West Shore.

Q. Can you tell me the distance between the tracks entering the tunnel on the west side, and the distance between the adjacent rails and inside rails on the tracks entering the tunnel from the point at the signal just west of the tunnel to the mouth of the tunnel? A. I didn't measure in that location, but I have measured at various points within a quarter of a mile, half mile.

Q. From the mouth of the tunnel? A. In the tunnel.

Q. Oh, I didn't mean in the tunnel; outside of the tunnel is what I wanted to get, as you enter the tunnel, you know, on the west side? A. I can say within two or three inches.

Q. That is all right. What do you say is the distance? A. The distance between the inside rails is eight feet six.

Q. And that is within three or four inches either way, is it? A. Possible.

Q. And what is the distance—do you know the distance that the engine cab overhangs the rails? Have you measured that? A. I did measure that.

Q. How much is that? A. It is given on a print which I have here, shown best. Mr. Carey, I think, has a copy. (Refers himself to papers.)

Mr. Carey: You will excuse me, Mr. Simpson: This witness measured the distance between cabs of that class of engines, and will be able to tell you what the distance is when they are on tracks, side by side, that are thirteen feet center. That is what he is testifying to now.

The Court: That is, from the inner rails of both tracks, they are eight feet six inches apart?

Mr. Carey: Eight feet six inches apart; yes.

Q. What do you say is the distance between the cabs of the types of engines here, 907 and 3189, when the engines are adjacent, that is parallel on opposite tracks, the tracks being about this distance apart? A. This is on the assumption that the tracks are on the—of the assumption of being thirteen feet apart; and I quoted thirteen feet three.

Q. Then we can take three inches off.

The Court: Thirteen feet three is from center to center.

The Witness: Thirteen feet three is from center to center of the track.

The Court: What is the distance between the inner rails of such two tracks?

The Witness: Eight foot six.

The Court: Your question assumes the tracks are thirteen feet center, and the fact is that they are thirteen feet three inches from center to center in order to make the distance between the inside rails of the two tracks eight feet six inches apart, which he says is the distance.

Q. What is the distance between the cabs in such condition as you have described?

Mr. Carey: That is, when the inner rails are eight feet six inches.

The Court: Eight feet six inches apart, or the tracks are thirteen feet three inches from center to center.

A. Each cab overhangs a distance of two feet eleven inches at the outside.

Q. That would be four feet twenty-two inches, wouldn't it? A. Yes, five feet ten inches.

Q. That they would overlap? A. Subtracting from eight feet six gives the answer to the question you have asked.

Q. How much would that be? A. That is two feet and eight inches.

Q. Clearance? A. Clearance.

Mr. Simpson: That is all.

Cross Examination by Mr. Carey:

Q. Where two engines stand on adjacent tracks, that distance apart, the distance will be two feet eight inches. A. Two feet eight inches, within an inch or two.

The Court: Anything further?

Mr. Simpson: No; that is my case.

Mr. Carey: Mr. Simpson yesterday you called for Mr. Nearpass, and to-day you called for the name of another man who was in the superintendent's office at the time Mr. Price was in there.

Mr. Nearpass was not here yesterday, but I have him here to-day.

Mr. Simpson: I will put him on.

JAMES P. NEARPASS, sworn.

Direct Examination by Mr. Simpson:

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

Q. Were you on the 16th of February, 1916? A. I was on the rear train of 72—train 72.

Q. Were you employed on the New York Central the night Price was brought in the station master's office? A. West Shore Railroad.

Q. Were you employed by the New York Central at the West Shore station? A. Yes.

Q. Were you in the station master's office when Price was brought in? A. No, sir.

Q. Did you go in with him? A. No, sir.

Q. You didn't see him at all that night? A. Yes, about ten minutes after he was taken in the office.

Q. You went in? A. About ten minutes after.

Q. Did you stay there until he was taken out? A. No, I did not.

Q. How long did you stay there? A. Oh, probably two or three minutes.

Q. Who was in there when you were in there? A. Why, quite a number were in there. I seen Mr. Seaman, and Foster—I guess that is all.

Q. That is all you know. What became of his cap, do you know? A. I didn't see any cap.

Q. Do you know what became of his cap? A. No, sir.

Mr. Simpson: That is all.

Mr. Carey: That is all.

THOMAS W. HICKS, sworn.

Dorect Examination by Mr. Simpson:

Q. Are you employed by the New York Central, Mr. Hicks? A. Yes, sir.

Q. Were you on the 16th of February, 1915? A. Yes, sir.

Q. Did you see Mr. Price on that night? A. I did.

Q. Where did you see him? A. I saw him at

Weehawken station—you mean the last I saw him?

Q. Yes. Did you help to take him in the station? A. I did not.

Q. Well, how did you see him in the station? Did you go in the station after he was there? A. I met—the engineer and the brakeman; they were bringing him to the station master's office,.

Q. Who was the trainman, do you know? A. Mr. Riker.

Q. Mr. Riker. And did you go in after them or before them? A. I went with them.

Q. And did you stay in there all the time they were in there? A. No, sir.

Q. You came out before they left, did you? A. Well, I don't know whether I came out ahead of them, or I went in and came out and went back again.

Q. Do you know what became of his cap, Mr. Price's cap? A. I do not.

Q. Do you remember seeing his cap? A. I did.

Q. You did? A. Yes.

Q. Where did you see it? A. I saw it put in his hand bag.

Q. Who put it in? A. Well, I am not positive; but I think Mr. Foster put it in.

Q. You thought Foster put it in? A. But I am not sure.

Q. Did it have a tear in it? A. It did.

Q. Where was the tear? A. On the left side of the cap, about. (Witness indicates.)

Q. Right about there, where you point on your head? A. Yes.

Q. That is right above your ear? A. Pretty high up.

Q. Pretty high up, on top; and you have never seen it since that time? A. Never did.

Cross Examination by Mr. Carey:

Q. You saw it put in the bag? A. Yes, sir.

Q. Anything else put in the bag at the same time? A. Well, there was his jumper, and I am not sure as to the overalls or not; I don't know if he wore them, but there was a jumper and the cap.

Q. Of what material was the cap? A. I think it cost about twenty-five cents; thin cloth with a peak such as firemen use; pretty good cap.

Q. Was this tear near the peak of the cap? A. Well, it started right about here (indicating). A little above the front piece.

Q. You never saw the cap afterwards? A. No; I never did.

Q. Do you know what was done with the bag? A. The last I saw of it it sat in the station master's office.

Q. You were conductor of that train, weren't you? A. Yes, sir.

Q. And the last you saw of that was in the station master's office? A. Yes, sir.

Q. Did you see it after that night at all? A. No, sir.

Q. You don't know what became of the cap? A. I do not.

Q. Other than what you have said. That is all.

Mr. Simpson: That is all.

RICHARD RIKER, sworn.

Direct Examination by Mr. Simpson:

Q. Mr. Riker, you were employed on the train on which Mr. Price was the fireman this night? A. Yes, sir.

Q. Did you assist the locomotive engineer, Mr. Foster, to take him in the station master's office? A. Yes, sir.

Q. Did he have a cap on when you helped take him in the office? A. No, sir.

Q. He didn't have any cap on? A. No, sir.

Q. Did you see the cap? A. Yes, sir.

Q. Where was it? A. In Mr. Foster's hands.

Q. And did Mr. Foster have it from the time you took hold of this man to help him in until you got him in? A. Yes, sir.

Q. Did you see whether there was any tear in the cap? A. There was a slight tear over the left temple, as near as I could judge.

Q. What did Mr. Foster do with the cap? A. I don't know.

Q. What was the last you saw of the cap? A. In Mr. Foster's hands.

Q. In the station master's office? A. Going in the door.

Q. Did you go out before Mr. Foster? A. Yes, sir.

Mr. Simpson: That is all.

The Court: Cross examine?

Mr. Carey: That is all.

JACOB FOSTER, recalled.

Direct Examination by Mr. Simpson:

Q. Yesterday, as I remember it, you said that your recollection was that Price took his cap off in the station master's office. Is that correct, or is it a fact that you took his cap off in the cab and carried it to the station master's office? A. Well, I really don't remember whether I took it off or whether I had it in my hand.

Q. You don't remember that. What do you say now about it? A. But I remember the cap went to the station master's office.

Q. What do you say now about it? Did you take the cap off his head in the cab? A. No; not that I know of.

Q. Did you have in in your hand when Riker came to you? A. I don't know whether I took it from him or whether I picked it up, or took it out of his hand, or whether I picked it up from the cab floor.

Q. You don't remember very clearly about it? A. No, I don't remember about that.

Q. Let us go in the station master's office: Did you put it in his bag in the station master's office? A. That I don't remember whether I—I don't remember whether I put it in his bag in the station master's office, or whether I left it outside; it was left in the station master's office.

Q. You don't remember what happened to it? A. No.

Q. You didn't take it off his head in the cab to see what was the matter with his head, did you? A. No.

Q. And you won't say whether you had it in your hand when Riker met you or not? A. Well, I am not positive about it; I may have had it.

Q. You don't know where it is now, do you? A. No, I do not.

Cross Examination by Mr. Carey:

Q. You saw it after that night? A. I did not.

Q. Ever see it after that night? A. I did not.

Q. Ever know anything about what became of it? A. I do not.

Mr. Carey: That is all.

Mr. Simpson: That is the case, your Honor.

Mr. Carey: If your Honor please, I desire to make some motions now.

The Court: All right, sir.

MOTION FOR NONSUIT ON BEHALF OF DEFENDANT.

Mr. Carey: I desire to move for a nonsuit on the ground that no negligence has been proved against the defendant company; that no injury is proved to have been inflicted upon Mr. Price's head in the way that the complaint charges, and there is no evidence sufficient to go to the jury upon the question of whether or not Mr. Price's head was in fact injured on the occasion of February 16, 1915; that if any injury arose to Mr. Price in connection with his service for the railroad company such injury was an injury arising from risks known to Mr. Price and assumed by him; that if injury came to Mr. Price on that occasion the injury was the result solely of his contributory negligence.

The Court: I am willing to hear you in regard to it.

(After hearing argument by Counsel for the respective parties.)

The Court: I will decline to nonsuit.

Mr. Carey: I note an objection.

The Court: You may have it entered.

ADAM F. FENDRICH, sworn.

Direct Examination by Mr. Carey:

Q. Dr. Fendrich, you are a practising physician in Jersey City? A. In Weehawken.

Q. And have been for how many years? A. Seventeen.

Q. Located in Weehawken during that time? A. During the entire time.

Q. You are employed by the New York Central Railroad Company to look after cases of injury

which occur on the River Division of the New York Central? A. Yes, sir.

Q. And have been so employed how long? A. In the neighborhood of about ten years.

Q. And have you had any hospital experience, Doctor? A. Yes, sir.

Q. State it? A. At the present time I am the attending surgeon in the North Hudson Hospital, and have been for the past seven years, approximately.

Q. Speak a little louder, Doctor? A. I have been the attending surgeon for the North Hudson Hospital approximately seven or ten years—between that time.

Q. Any other hospital experience? A. I have had internship in New York hospitals, clinical work, and dispensary work.

Q. What hospitals? A. Both in Roosevelt and Bellevue hospitals, New York.

Q. Did you see Mr. Price on the night of February 16th, 1915? A. Yes, sir.

Q. You were called to the Weehawken station of the railroad to see Mr. Price? A. Yes, sir.

Q. Who called you? A. Why the call came over the phone and I haven't any idea as to who called.

Q. Where did you see Mr. Price that evening? A. I saw him in the station master's office at the West Shore Railroad.

Q. Do you remember what time it was when you got there? A. Some time in the early evening; I should judge around eight o'clock.

Q. Around eight o'clock? A. Around that time; I am not sure.

Q. Now, Doctor, will you state what you found and what examination you made of Mr. Price at that time? A. Why, I went down to the station and found Mr. Price lying in the station master's office. So I walked over to him and spoke to him—asked him—

Q. Just tell what examination you made and what you found? A. In examining I looked over his head and the rest of his body to see whether he was injured anywhere, and could find nothing at the time of my examination to lead me to make a diagnosis as to what sort of an injury the man had received.

Q. And did you at that time note his pulse? A. I noticed his pulse, his eye reflection and general appearance, and they were to my mind absolutely normal.

Q. And did you see anything in his condition at that time that indicated a shock from a blow on the head or any other part of the body? A. He manifested no condition of symptoms of shock.

Q. What did you do then, Doctor? A. I had him removed; ordered his removal to the North Hudson Hospital.

Q. Speak a little louder, Doctor? A. I say I ordered his removal to the North Hudson Hospital.

Q. And was he removed? A. He was.

Q. And did you go with him to the hospital? A. I don't think I went with him; I believe I was up at the hospital waiting for him when he came in.

Q. When you saw him at the station did you find any blood on any part of his face or head? A. There wasn't the sign of an injury anywhere upon him; nor was there blood anywhere about his body.

Q. Were you at the hospital when he arrived? A. I was.

Q. Where was he taken? A. When he came in, do you mean?

Q. Yes. A. Why, I don't know. The cases come in the side entrance to the hospital. I wasn't

down there at the time of his entrance; I was waiting upstairs in the ward for him.

Q. You were upstairs? A. Yes, sir.

Q. On which floor? A. The ward floor; that is the first floor.

Q. And is it there where you first saw him after he reached the hospital? A. That is where I first saw him after he came to the hospital.

Q. How did he come into the hospital, do you recall? A. I wasn't there when they brought him into the hospital, so I cannot tell you.

Q. Where was he when you first saw him? A. He was lying in bed. They brought him upstairs and immediately put him to bed.

Q. Now, will you go on and state what you did that night after he reached the hospital? A. Not being able to discover anything on account of the hair on his head, that was taken off entirely.

Q. By the way, who was there at that time? A. The nurse in attendance, the interne, and Dr. Bissing, superintendent.

Q. Who was the interne? A. Dr. Kooperman was the interne at the time.

Q. You were all present at the time— A. We were all present.

Q. —when the hair was taken from his head? A. Why, I was not there when they took it off, when they took the hair off; because I had something else to do for a minute, and while they were taking the hair off I went to the rest of the ward to attend to another case.

Q. And you came back after the hair had been taken off, did you? A. They notified me when the hair was removed.

Q. Now what did they do in the way of removing the hair? A. The hair was clipped very close to the head, and half of the head shaved, very, very close.

Q. Which half of the head was shaved? A. The left half of his head was shaved very closely to the scalp, the right half was clipped.

Q. Now, go on and state what examination you made and what result you found? A. Why, then, after the hair was removed I made an examination by looking over his head first to see whether there was a mark or an abrasion or bruise of any kind on his head, and not discovering any I palpated the head for any signs of swelling or depression about the man's head, and could discover none. I further examined him as to the eye reflexes and his general appearance, and the symptoms that he would complain of. I arrived at no conclusion at all after that examination; there were no evidences,—external evidences that could be determined by my examination that the man had been injured. I had taken it for granted that the man was injured or had some head condition; ordered an ice cap for his head, and left instructions to the nurse for the care of him during the evening, or during that night.

Q. Now, at that time did you take his pulse and respiration and temperature? A. His pulse, respiration and temperature were taken by the nurse in the hospital.

Q. In your presence? A. No, sir.

Q. Not in your presence? A. I took it myself, but for record the nurses take it.

Q. What is it? A. I say I took the pulse and respiration myself, but for record the nurses take it, and then chart it on their charts.

Q. Did you take those that night at the hospital yourself? A. The pulse and respiration I took myself.

Q. And what did you find that was? A. The pulse and respiration were perfectly normal.

Q. Was there any indication at that time of

concussion of the brain? A. There were no indications of concussion of the brain.

The Court: Do the jurors hear all this testimony? If you do not, gentlemen, let it be known at once. You see, there is a difficulty in this room, gentlemen—counsel speak in that position—especially you, Mr. Carey, anybody who sits at that desk—that you are directing the attention of the witness to you and when he answers his voice is naturally directed to that direction.

Mr. Carey: Keep your voice up, Doctor.

Q. Any indication of fracture of the skull? A. There were no indications of fracture of his skull.

Q. At that time will you state about what condition you found, if any, with respect to tenderness? A. Mr. Price complained of tenderness over the entire head.

Q. The entire head? A. Yes, sir.

Q. How long was Mr. Price under your observation at the North Hudson Hospital? A. North Hudson Hospital—he was under my observation from the time he came in until he was discharged.

Q. And how frequently did you see him? A. I saw him every day.

Q. Examined him every day? A. Yes, sir.

Q. And about how long a time was he in the hospital? A. Well, my recollections are that he was there four or five weeks; I am not sure about that.

Q. And during that time did you discover any evidences of external violence to his head at all? A. I did not.

Q. Were there any such evidences? A. There were none.

Q. And during that time did he give—during any of the times when you examined him did he

give any evidences of having suffered from shock arising from a blow? A. He did not.

Q. Any evidences of fracture of the skull? A. No, sir.

Q. Did you at any time tell Mrs. Price that he was suffering from fracture of the skull? A. No, sir.

Q. Or that he was suffering from concussion of the brain? A. No, sir.

Q. Did you reach any conclusion with respect to what was the cause of his condition? A. I did not.

Q. Are you a specialist in mental diseases? A. No, sir.

Q. Brain diseases? A. No, sir.

Q. You make no pretense to it? A. I do not.

Q. Were you able to diagnose his case? A. I was not.

Q. And you have, I presume, Doctor, had some experience in connection with injuries to the head? A. Quite a large experience with injuries to the head.

Q. And in your judgment would a blow upon the head caused by the head coming in contact with the end of a fire hook, such as has been described in this case, the fire hook being on an engine going at the rate of fifteen miles an hour or so, and Mr. Price going on his engine at the rate of twenty to twenty-five miles an hour,—could a blow from a fire hook under such circumstances be likely to cause external evidences of the impact? A. It would.

Q. Do you conceive that it would be possible for such a blow to be administered and not show external evidences. A. I do not.

Q. And did you at any time see any evidences of bleeding from any part of Mr. Price's head or face? A. No, sir.

Q. Did you at any time see any swelling on his head? A. No, sir.

Q. Was there swelling on his head of any kind? A. There was none of any kind.

Q. Were his features swollen at any time? A. Not at any time.

Q. Was his neck swollen at any time? A. No, sir.

Q. Have you ever known of a case of concussion of the brain caused by a blow upon the head, administered by a hard object like an iron, without leaving external evidence of the blow? A. I have not.

Q. Do you think that it is possible that a blow sufficiently heavy to cause concussion of the brain could be administered to the head by an iron object and not leave external evidences of it?

Mr. Simpson: I object, because that question has been asked four times.

The Court: What is the question?

Q. (Repeated by the stenographer.) Do you think that it is possible that a blow sufficiently heavy to cause concussion of the brain could be administered to the head by an iron object and not leave external evidences of it?

Mr. Simpson: It is the fourth time.

Mr. Carey: It is not.

Mr. Simpson: I withdraw the objection.

Q. (Last question again repeated by the stenographer.) A. I do not think it is possible.

Q. During any of the time which you saw Mr. Price from the first to the last, did he exhibit to you evidences of suffering from shock? A. No, sir.

Mr. Carey: Cross examine.

Cross Examination by Mr. Simpson:

Q. You do a great deal of work for the New York Central as a physician? A. Yes, sir.

Q. And testify for them frequently? A. Yes, sir.

Q. And testified in the compensation case? A. Yes, sir.

Q. Do you claim to be a specialist in mental diseases? A. No, sir.

Q. You are a man of general practice, aren't you? A. Yes, sir.

Q. Do you say that you rank in the medical profession as high, in the knowledge of mental diseases and injuries to the head, as Dr. Evans and Dr. King? A. There is a difference.

Mr. Carey: I object to the question.

The Court: He has distinctly, in his direct examination, Mr. Simpson, declared—disclaimed any special knowledge or expertness or any knowledge at all of matters of the class of which you are speaking, as I remember his testimony.

Q. You are a general practitioner, aren't you? Where is your office? A. Beg pardon?

Q. Where is your office? A. My office is in the First National Bank of Union Hill.

Q. Well, you are in general practice, aren't you? A. Yes.

Q. Now, you could not diagnose this man's condition, you say? A. No, sir.

Q. Did you ask him questions? Did he make statements to you? Yes, sir.

Q. In your endeavor to get a diagnosis? A. Yes, sir.

Q. —of his condition? A. Yes, sir.

Q. What did he say to you upon which you were unable to found a diagnosis?

Mr. Carey: I object to the question as to what he said to him.

Mr. Simpson: He says he could not diagnose his condition. I want to find out what he did to diagnose it, and to do that I have the right to find out what were the circumstances of his inability to diagnose the condition.

The Court: Upon that point the question is perfectly proper, but that is not the question you asked, Mr. Simpson.

Mr. Simpson: I asked him what he said to him.

The Court: Yes.

Mr. Simpson: He is the treating physician —I will withdraw that.

Q. Did you get any information from him upon which you were unable to found a diagnosis?

Mr. Carey: If the Court please, if he was unable to found a diagnosis, then what he got from him is immaterial. He has disclaimed—

The Court: Upon the idea that he is to be treated as an attending or prescribing physician, that he has the right to have and make use of statements and history for the purpose of aiding him in his diagnosis of the trouble.

Mr. Carey: But he testifies that he was unable to make a diagnosis. That is a negative proposition. If he had testified he did make the diagnosis I would think that these questions were perfectly properly; but he has said he has not made a diagnosis.

Mr. Simpson: Well, he has made a diagnosis, because he diagnosed him as not being struck on the head. To that extent he has made a diagnosis.

Mr. Carey: He didn't say that.

Q. As I understand you, do you say that this man was not struck on the head? A. I didn't say that, Mr. Simpson. I said in my examination of him I could discover nothing that would indicate an injury to his head.

Q. So your diagnosis didn't exclude that, did it? A. Exclude that injury?

Q. Yes, exclude that he had been struck on the head? A. No; I must keep that in mind, naturally.

Q. Now, you said that he had no symptoms of shock? A. Yes, sir.

Q. Is unconsciousness a symptom of shock? A. Yes, sir.

Q. Is unconsciousness a symptom of the man having been struck? A. Yes, sir.

Q. Didn't you testify before Judge Tennant in answer to the question: "What was his condition when you saw him lying in the office, if he was not unconscious?" (A) "When he was lying in the office he was lying there apparently unconscious?" A. "Apparently unconscious."

Q. Didn't you so testify? A. I say lying apparently unconscious.

Mr. Simpson: I ask to have that stricken out.

Q. Didn't you so testify? A. I did.

Q. And did you also testify: (Q)"What did you find the condition of the head to be?" (A) "At the time of the examination I did not examine his head thoroughly at the Weehawken station." Did you so testify? A. I did.

Q. You did not examine him thoroughly at the Weehawken station. Now, did you order him taken to the hospital? A. I did.

Q. Did you order the left side of his head shaved? A. I ordered the entire hair upon his head cut off.

Q. It was not done, though, was it? Wasn't the right side clipped and the left side shaved? A. Well, yes, it was shaved, but it looked as though the entire head was entirely shaved.

Q. What do you say? Dr. Bissing says the right side was clipped and the left side shaved. What do you say? A. Well, they may have just clipped on the right side, and used a razor on the left side.

Q. That is your opinion? A. Yes.

Q. Now, why did you examine this head, shaved close on the left side, if you didn't think he had an injury to the left side of the head? A. I don't think that they told us—at the station told us that he was injured on the head.

Q. On the left side? A. Yes, sir.

Q. The left side was shaved then? A. The left side was shaved.

Q. And you say he complained of tenderness all over the head? A. Yes, sir.

Q. Did he complain of more tenderness on the left side than on the right side? A. I do not recollect such a condition.

Q. You won't say that that is not the fact, will you? A. I cannot say it.

Q. Isn't tenderness an indication of a blow on the head? If a man complains of tenderness when you press his scalp isn't that one of the things you take into mind in determining whether he has been struck on the head? A. I do.

Q. Now, do you remember seeing Mrs. Price at the hospital with Mrs. Masterson, and Engineer Foster, on the morning after the accident? A. Well, I don't recall who I saw on the morning after the accident.

Q. Do you remember whether you said to Mrs. Price and Mrs. Masterson and Mr. Foster that Price had a fracture of the skull, and that you

would not permit anybody to see him except Mrs. Price, not even his father? Do you remember making that statement? A. I do not remember making a statement that Mr. Price was suffering with a fractured skull.

Q. Will you say that you didn't say that to Mrs. Masterson, Mrs. Price and the engineer, Mr. Foster? A. I will say that I did not say he was suffering with a fracture of the skull.

Q. Did you tell them he was suffering from any head injury? A. Well, that I do not recollect.

Q. You don't remember that? Now, how long was he under your observation? A. His entire stay at the hospital.

Q. Assume that he had been in good mental health on the afternoon of the day you fire saw him, sufficient to follow his occupation, and that within ten minutes afterwards he was found in a weak condition, and assisted into the room, practically in the condition in which you first saw him, and that subsequently he developed traumatic insanity; would you say it was probable that between the time he was attending to his duties and the time you saw him, taking in mind the subsequent development of traumatc insanity, that he had received a blow on the head?

Mr. Carey: I object to the inclusion in that question that he developed traumatic insanity.

Mr. Simpson: I said, "suppose he had."

Mr. Carey: That is the question in dispute.

Mr. Simpson: Sure. There is evidence of that. I didn't say he had. "Suppose he had."

The Witness: Well, if a man had traumatic insanity it must necessarily follow an injury.

Q. Yes, but I am asking you as a physician, who

says you could not diagnose his case. Assuming what I told you is true, would you say that he had received an injury to the head? A. I would.

Q. There were ice bags put on his head, weren't there? A. Yes, sir.

Q. Are ice bags the common treatment for injuries to the head? A. They are very common treatment.

Q. What is the purpose of them? A. Well, there are two purposes. In the first place they are used for the alleviation of pain; and in the second place, as a preventive to any inflammatory condition to the coverings of the brain, preventing meningitis.

Q. Now, you did diagnose the man's case as not—

Mr. Simpson: I will withdraw that; you have already answered that.

Q. Now, when you took him into the hospital, before you saw him, his hair was fixed up in this way, wasn't it, by somebody? A. When he first came to the hospital?

Q. Yes. I mean it was clipped and shaved? A. When he first came in it was not clipped and shaved.

Q. How long afterwards? A. After I had seen him and ordered the hair removed.

Q. And was it after the hair was removed you gave him the thorough examination? A. Yes, sir.

Q. Now, at that time the hair was removed was his face washed, too? A. No; his face wasn't washed. They didn't give him a bath.

Q. They didn't give him a bath? A. No.

Q. Where did you examine him for blood stains? A. In the bed.

Q. No, I mean where on the body? A. On his head?

Q. Yes. A. All over his head, back, front, sides, all over.

Q. All over? A. All over.

Q. And you say there was no blood? A. Absolutely none.

Q. Did you know that the pillow on which he had come to the hospital—there was blood on that? A. I did not.

Redirect Examination by Mr. Carey:

Q. Did you see the pillow on which he was brought to the hospital? A. Yes, sir.

Q. This tenderness you have testified would be evident of a blow to the head—there are other things that cause tenderness besides a blow, are there not? A. Oh, yes.

Q. State some of them. A. You may have tenderness to the head from neuralgic conditions; you may have tenderness over the entire head from diseases of the brain, of the bone; you may have tenderness over the head from tumors of the brain, tumors of the bone; you may have tenderness on the head from meningitis.

Q. Now, is a weakened condition—may that be caused also by something other than a blow? A. Yes, sir, surely.

Q. What, for example? A. A man may have been sick at one time and through over exertion bring on an attack of weakness; he may have had kidney disease and bring on an attack of sickness, weakness.

Q. Was he unconscious at the time you saw him at the station? A. No, sir.

Q. What is that? A. No, sir; he was not.

Q. What did you mean when you testified "apparently unconscious?" A. Upon coming into the room and seeing a man lying perfectly still on the floor, I assumed that he was unconscious until I examined him.

Q. And that was what you had in mind when you testified to "apparent unconsciousness?" A. That is the——

(Answer unfinished by the witness).

Mr. Carey: That is all.

Recross Examination by Mr. Simpson:

Q. Now, didn't you testify in the other case: "Taking into consideration the man's apparent semi-conscious condition, I ordered his removal immediately to the hospital"? A. Yes, sir.

Q. Then you had no reason to think he was not semi-conscious if you ordered his removal to the hospital, did you, on that ground? A. I had no reason to think he was not semi-conscious; no, sir.

Q. What I want to find out is this: Mr. Carey makes much of the word "apparently," but I find you testified in the other case that on his apparently semi-conscious condition, which you evidently believed to be true, you ordered his removal to the hospital. Is that a fact? A. Surely. I take whatever is told me in an emergency as being the truth.

Q. But what I want to know is not what you were told, but whether at the time you ordered his removal to the hospital you believed him to be semi-conscious? A. I believed him to be semi-conscious; yes, sir.

Q. Now, one other thing: aren't you wrong when you say his face wasn't washed? Don't you remember that the man had been working all day, and when you saw him in the station master's office his face was covered with soft coal dust, and when you examined him at the hospital his face was not covered with soft coal? A. I don't remember any such thing.

Q. Do you remember that his face was covered with coal dust? A. I do not.

Q. Was his face covered with coal dust when you examined him for blood? A. I don't remember.

Q. But you do remember there wasn't any blood? A. I know there was no blood.

Q. But you don't remember whether there was any coal dust? A. If you mean it was black, Mr. Simpson, it was not black. A man may have coal dust; from a little distance it would show, but not even give one the idea that his face was dirty from coal dust.

Q. Well, if this man had come in from Haverstraw behind a soft coal train, you being familiar with railroad work would be apt to tell it, wouldn't you? A. Oh, yes, surely.

Q. Well, now, did the man that you examined in the hospital look as if he had come in from Haverstraw behind a soft coal train? A. Yes; he looked as if he had come in behind a soft coal train.

Q. Without having his face washed? A. Yes, without having his face washed.

Mr. Simpson: That is all.

Mr. Carey: That is all.

(Witness excused.)

Jacob Foster, recalled, testified as follows:

Direct Examination by Mr. Carey:

Q. Mr. Foster, you were the engineer with Mr. Price on the 16th of February, 1915? A. Yes, sir.

Q. And between the New Durham station and the easterly end of the tunnel did you at any time notice anything indicating that the side of the engine cab had been struck in any way? A. I did not.

Q. By anything on the passing train? A. I did not.

Q. Did you notice anything out of the ordinary at all in connection with anything possibly striking the side of the engine on the opposite side? A. No, I did not; it was dark; I could not see.

Q. Now, from the time you left your block signal to the west of the tunnel you were pretty busily occupied with guiding your train and watching for signals through the tunnel? A. Through the tunnel.

Q. And as you come out of the tunnel on the easterly end what is the condition of the track? Is it straight or curved? A. There is a number of tracks leading into the yards.

Q. That is, is the track on which you came in straight or curved as you leave the tunnel? A. Curved.

Q. Curved in what direction. A. Curved to the right.

Q. And as you came down from the easterly end of the station into the tunnel on the tracks that you took that night, state whether or not you crossed a number of switches?

The Court: You mean from the easterly end of the tunnel to the station?

Mr. Carey: From the easterly end of the tunnel to the station.

The Court: You just reversed it.

Q. State whether or not you crossed a number of switches. A. Yes, crossed a number of switches.

Q. And in going over the switches will you state whether or not the engine swayed from side to side. A. Well, I don't recollect that; it may sway to a certain extent.

Q. Well, does or doesn't it? A. It may sway to a certain extent.

Jacob Foster, (recalled) for Defendant—Cross

Q. In rounding this curve on the easterly end of the tunnel will you state whether or not the engine ordinarily sways somewhat? A. Well, it swayed just a little, but we usually slow her right down in approaching the yard.

Q. About how far is it from the easterly end of the tunnel to the station? A. Well, about a quarter of a mile; not quite a quarter of a mile.

Q. Now, at the time that you saw Mr. Price after you reached the station, and from that time until he went away in the ambulance, did you at any time see any blood on his face? A. I didn't see any blood.

Q. Did you see any mark on his face or head anywhere? A. I did not.

Q. Did you see him after that night? A. I saw him at the hospital the following day.

Q. The following day? A. Yes, sir.

Q. At that time was there any evidence of a blow on his head by way of a bruise or anything of that kind which you saw? A. I couldn't notice anything myself.

Q. Was that the last time you saw him? A. No; I saw him three or four successive days, each day I went up there to see how his condition was.

Q. Did you see him at any time that his face was swollen? A. I don't recollect of seeing anything wrong about his face.

Q. Or forehead? A. No.

Mr. Carey: Cross examine.

Cross Examination by Mr. Simpson:

Q. He had an ice cap on when you saw him at the hospital? A. Yes.

Q. Well, you couldn't see under the ice cap whether he had a bruise on his head or not, could you? A. No.

Q. And the ice cap covered the same portion of

his head where his cap would cover, in place, if the cap was torn, didn't it? A. Just about.

Q. So that you couldn't tell what was under there. Now, when you got to the station you didn't examine his head, did you, in the cab? A. No, I did not.

Q. And he had a heavy mop of hair on, didn't he? A. Yes.

Q. You didn't look in his ear to see whether he was having a hemorrhage of the ear, did you? A. No, sir.

Q. You simply made a casual examination of his head. Why did you look at his head? A. He complained of his head.

Q. What did he say?

Mr. Carey: I object to what he said.

Mr. Simpson: I think I have a right to show why this man examined his head.

Mr. Carey: Well, he said he complained of his head, and that is sufficient.

Q. What part of his head did he complain of? A. The left side of his head.

Q. And was his cap on then? A. That I don't recollect.

Q. Did he have his hand up against his head when he complained of it? A. Well, that I couldn't tell very positively.

Q. You are not very clear about this, are you? A. Not—

Q. Your memory doesn't seem to be good about it. Now, you say it swayed but it didn't sway enough to throw you off your feet, did it? A. Oh, no.

Q. Just a gentle rocking, wasn't it, of the engine, as she would go over the switches? I mean it was not an unusual force that would throw a man against the cab, throw him on the ground or throw him against the boiler, was it? A. No.

Q. And when your engine oscillates going at twenty-five miles an hour, as it did there, it doesn't throw you against any part of it going through the tunnel, and approaching the tunnel, or emerging from the tunnel—did it? A. No.

Q. And does it? A. No.

Q. There wasn't rock enough to throw you about the cab, was there? A. No.

Q. Or injure your head. That is all.

Redirect Examination by Mr. Carey:

Q. Did you examine the left side of your engine after Mr. Price was taken away? A. I did.

Q. Did you find any marks on it at all? A. That is the first thing I did when I returned to the engine after taking Mr. Price down to the station master's office—to look for marks on to the side of the cab.

Q. And did you find any? A. I did not.

Q. Any indication whatever that anything had struck the side of the cab? A. I didn't see no mark, saw no mark.

Recross Examination by Mr. Simpson:

Q. You had no reason to believe that anything had struck the side of the cab, had you? There was no condition. It was said that the man's head had been struck in the cab, wasn't it? Isn't that the fact? A. On account of this complaint I looked to see whether—that would be natural, to look to see whether anything—whether any mark was on the cab.

Q. Well, here, if he had been leaning out of the cab the way this man in this picture is shown,—if he had been leaning out of the cab and had been struck on the left side of the head what would you expect to find on the left side of your cab? A. Well, looked to see if there was a mark from any—

Jacob Foster, (recalled) for Defendant—Recross

Q. Why would you expect to find a mark if a man was leaning clean out of the cab and was struck on the left side of his head—he being outside of the cab—how would you expect to find a mark on the cab, the substance of the cab?

Mr. Carey: I object to that. There is no evidence that the man was leaning out of his cab.

Mr. Simpson: That is for the jury to say. Nobody knows where he was. He was struck on the left side of his head. He might have been out of his cab.

The Court: Isn't it a matter of argument entirely?

Mr. Simpson: No; I want to show why this man examined his cab.

The Court: I see no objection to asking him why he examined his cab.

The Witness: We do that so that we could make a report.

Q. Did anybody instruct you to do that? A. No, sir; that is our—that is natural for us to do anything like that.

Q. Did you see this engine as it passed you—the other engine? A. I saw it approaching.

Q. You didn't see it as it passed? A. No; my attention was drawn direct ahead.

Q. Did you see your own fireman, whether he was leaning out of the cab? A. That I don't remember, because, my attention was drawn ahead. He may have leaned out. He might lean out frequently and I wouldn't notice him, because my attention is ahead.

Q. Well, it is customary, isn't it, for firemen to lean out of the cab and look ahead? A. Undoubtedly, most—(Answer unfinished by the witness.)

Mr. Simpson: That is all.

By Mr. Carey:

Q. At this point after you passed your signal was there any occasion for the fireman to lean out of the window to look ahead? A. No.

By Mr. Simpson:

Q. What do you mean by saying there was no occasion? Didn't you testify something about that at the last hearing? What do you mean by saying there was no occasion to look out of the cab—to lean out of the cab? A. (No answer.)

By Mr. Carey:

Q. Well, were there any signals for him to see on that side? A. No; there is no more signals for the fireman to take after we pass the New Durham station.

By Mr. Simpson:

Q. Yes, but has he nothing to do after he passes that last signal? Hasn't he anything to do by looking ahead? Are you the only man that looks ahead? A. Why, he undoubtedly looks ahead.

Q. It is his business to look ahead, isn't it? A. It is part of his business to look ahead.

Q. Well, suppose he chose to look out of the cab, and looked; that is entirely up to him, isn't it? A. That is up to his occupation.

By Mr. Carey:

Q. But it is not necessary for him to do it? A. It is not necessary for him to do it.

By Mr. Simpson:

Q. Suppose there was a train approaching on the other side, isn't it customary for him to look out? A. It is not.

Q. Well, why isn't it necessary? A. There are

no more signals for him to look for; nothing for him to look for.

Q. I am not talking about signals. I am talking about lookout. Suppose there was something derailed on his side of the engine, suppose there was a freight engine derailed which would sideswipe his car, isn't he under a duty to look out and see? A. Yes; he would certainly be under duty.

Q. Then he is under duty to look out, and it is necessary for him to look out?

By Mr. Carey:

Q. Is it necessary for him to stick his head out and look out? A. No.

By Mr. Simpson:

Q. Why not, if his windows are dirty? A. He has a front cab door.

Q. Suppose the window is dirty? You are using soft coal. Suppose his cab window glass is dirty?

Mr. Carey: I object to that. There is no evidence that it was dirty.

Mr. Simpson: Well, he is saying it is not necessary under any circumstances to put his head out. I have a right to call his attention to the circumstances.

The Court: Well, suppose it was dirty, Mr. Foster; then what would he do? The front cab window being dirty, what would he do?

Mr. Carey: Objected to.

The Witness: He might—

The Court: Well, wait a minute, do not answer the question.

Mr. Simpson: I withdraw that.

Q. Isn't it a general custom? Haven't you seen lots of firemen leaning out of the cab and

looking ahead? Isn't that the general custom? A. Firemen and engineers both do it.

Q. Leaning out, and it is the general custom? A. They don't lean out; they simply look out.

Q. Haven't you seen them with the elbow on the thing, and the head outside, looking ahead? A. Well, not very far; it is not necessary to put the head out very far.

Q. Isn't it a general custom for the man to lean on his cab, a fireman, and put his head—extend his head out beyond the side of the cab? You say that is never done in the West Shore Railroad Yards?

The Court: No, he has not said any such thing as that.

Mr. Simpson: Well, I ask him that.

A. I usually keep my front cab door window clean so that I can look out.

Q. I didn't ask you what you do. I ask you what you observed as to the action among firemen. You say they never lean out in the West Shore yard? A. Oh, no.

Q. Don't they do it as a general custom? A. They lean out, certainly.

By Mr. Carey:

Q. When they lean out how far do they lean out? A. Well, that I couldn't really tell you. I suppose just far enough to see.

Mr. Carey: That is all.

(Witness excused.)

L. A. Seaman, (recalled) for Defendant—Direct

Louis A. Seaman, recalled on behalf of the defendant, testified as follows:

Direct Examination by Mr. Carey:

Q. Mr. Seaman, you were in the station master's office at the time Mr. Price was brought in there, were you not? A. Yes, sir.

Q. Did you make any examination of him. A. I did.

Q. State the examination you made and what you found. A. Why, the two men brought him in the office and when they did I had him sat in a chair. I parted his hair and looked for a scalp wound, and I found nothing at all, not even a red spot. I went all over his head. I done it for to use the first aid injury—took it up in case he was hurt. After that I took him in and had him lying down on to a cushion, propped his head up, and I looked again and I couldn't find anything; and when Dr. Fendrich came there I held the light for him while he looked, and I saw no mark of any kind at all.

Q. What kind of a light was it that you had? A. Electric light.

Q. Was there any blood on his face? A. No, sir; his face was clean.

Q. Any blood anywheres around it? A. No, sir; not at all. I applied cold water towel to his head.

Q. Was he there when you went out? A. Yes, sir.

Mr. Carey: Cross examine.

Cross Examination by Mr. Simpson:

Q. What was his condition when he was brought into your office? A. He was brought in by two men; sort of dazed.

Q. Dazed? A. Well, I don't know.

Q. Don't you know whether he was dazed or not? A. Well, I am not a physician.

Q. You testified about March. You are first aid man, aren't you? Don't you know enough about first aid to know whether a man is dazed or not? A. No, I do not.

Q. You don't know whether this man was dazed? A. No.

Q. But you had him lay down? A. Yes, I did.

Q. Although you didn't know he was dazed. Why did you have him lay down? A. To make it more comfortable for him.

Q. Was he comfortable standing up? A. He was not standing up; he was sitting down.

Q. Was he comfortable sitting down? A. I don't know whether he was; I wouldn't be.

Q. Why did you— A. I sat him up in a chair.

Q. What was the matter with him? A. Two men brought him in. There was two men brought him in the office.

Q. Well, did he seem to be hurt or injured in some way? A. Well, he was stooped over.

Q. And was he dazed? A. Well, that I don't know.

Q. You don't know that. Did you hold any conversation with him? A. No.

Q. You put a cold towel on his head. Why did you do that? A. Why, for to kind of cool his brain off a little.

Q. Why? Why cool his brain? A. There was no object in it; I just simply do that to a good many of them.

Q. Wasn't it because you had been told he had been hit on the left side of his head A. Yes.

Q. Well, why didn't you say so?

Mr. Carey: I object. What difference does it make what he was told? That is not competent in the case; that is not evidence in the case.

Mr. Simpson: I want to find out why he put the towel on his head.

Q. You say to cool off his brain you put it on? A. Yes, sir.

Q. Did you take off his cap before you put it on? A. No, sir; I didn't touch his cap.

Q. Did he have a cap on? A. No.

Q. Did you see his cap? A. No, sir; I did not.

Q. Did you see anybody put it in his bag? A. No, sir.

Q. Were you there all the time he was there? A. Yes, I was.

Q. Are you still station master? A. No, sir.

Mr. Simpson: That is all.

Mr. Carey: That is all.

(Witness excused.)

JAMES H. LEE, recalled on behalf of the defendant, testified as follows:

Direct Examination by Mr. Carey:

Q. Mr. Lee, you have already been sworn in this case on behalf of the plaintiff? A. Yes, sir.

Q. You were the engineer on the train that passed the engine on which Price was? A. Yes.

Q. And you have testified, I think, that the two engines passed outside of the tunnel to the west? A. I have.

Q. You got your engine to the Granton Round House that night? A. I did.

Q. Took it down in the Weehawken yard through the tunnel? A. Yes.

Q. And it was there hooked on to the train? A. Yes, sir.

Q. And do you remember the number of the engine? A. 3109—3189.

Q. 3189. And you are familiar with that style of engine? A. Yes, sir.

Q. Before you went through the tunnel—about how far was your engine from the tunnel when you started out with your train? A. Why, about a thousand feet, approximately, I should say; a thousand feet.

Q. Before you started out with your train did you notice the condition of your engine in general, and did you notice the position of the fire hook on the engine? A. I did.

Q. Is it part of your duty to look over the engine before starting out on every trip? A. It is.

Q. And you did on this occasion? A. Yes, sir.

Q. Did you notice the position of the fire hook on the engine? A. I did.

Q. State where it was. A. It was across the front part of the tender, extending from the right side to the left.

Q. And on which side—well, you say the right side to the left. The right side is the engineer's side and the left side is the fireman's side, is it? A. Yes.

Q. And on which side of the tender was the hook end? A. On the right side.

Q. And that hook consists of what? A. It consists of an iron rod with a handle, and two hooks on one end.

Q. Two prongs? A. Two prongs.

Q. On the hook end. Now, what was the position of the handle that night when you looked at your engine? A. The handle rested on the wing of the tender on the left side.

Q. And by the wing of the tender you mean— A. The outer edge of the tank.

Q. —the outer edge of the tank, the iron plate which constitutes the— A. Side of the tank.

Q. —side of the tank. And about how far did that handle extend over the side of the tank? A. Not over four inches; between maybe three or four inches.

Q. Were you present when these photographs which are D-4, D-6, and D-7, were taken? A. I was.

Q. And will you state whether or not the hook is located at the time those pictures were taken in substantially the same position that the handle was located at the time you left the Weehawken yards? A. Just about the same as it was on the night in question.

Q. Now, what is there—I have shown you D-7 now. Will you also look at D-6 and see if that represents practically the position of the handle. A. (After examining photographs.) Practically is the same.

Q. And D-4? A. (After examining photographs.) They are all about the same.

Q. Was the engine upon which this was located at the time of the same class as 3189? A. Exactly the same type.

Q. And the structure of the engine upon which this was located, which is engine number 3195, is the same as the structure of engine number 3189? A. They are the same.

Q. Will you look at D-5, and I call your attention to those iron tubes which are shown there, and marked P. A. Right.

Q. Were those tubes on the engine 3189? A. They were.

Q. Same as these? A. Same.

Q. Now, when the fire hook is in the position which you have testified to, does it or does it not bear against those tubes? A. It does; it drops down in behind those little tubes, pipes, iron pipes.

Q. What does the hook end of the fire hook rest on? A. On the back of the tank.

Q. And does the plate of the tank—or does that plate of the tank extend up above the deck of the tank? A. It does.

Q. And do you know whether or not the hook on that night—the hook end was up against the outside plate of the tank? A. It was.

Q. Which is higher, the hook end or the handle end of the hook when it is in position such as is shown on these exhibits and these photographs? A. The handle end.

Q. Do you know about how much? A. I have never measured. I think about twelve or thirteen inches.

Q. Now, when the hook is in that position will you state whether or not it requires some force to lift it up and get it out? A. It does require force.

Q. And by reason of what? Anything more than the heft of the hook? A. By the reason of the—by reason of the closed space between those water pipes, and the coal doors. The hook gets fastened in there and it requires some exertion to remove the fire hook.

Q. Some exertion beyond what would be required by the mere weight of the hook? A. Yes.

Q. Now, when the hook is in the position that you saw it before you left the yard that night does the motion of the engine chuck the hook so that the handle extends further out? A. I have never noticed it in my experience.

Q. You have never known of that? A. I have not.

Q. And you have had experience of how long as an engineer? A. Twenty-two years.

Q. Did you serve as a fireman prior to that time? A. I did.

Q. And in all your experience have you ever known of the motion of the engine chucking the fire hook in that way so that it would extend further out over the tank? A. I have not.

Q. Now, will you state whether or not it was customary before and after the time when Mr. Price was taken off of his engine, February 16, 1915, that the handle of the fire hook should be placed so that it would extend three or four inches or so outside of the outside plate of the tank? A. Not a general custom, but I have seen hooks numbers of times extended same as that.

Q. Now, when you reached Dumont did you examine your train—your engine? A. I did.

Q. And when you arrived there did you notice in particular the position of the fire hook?

Mr. Simpson: I object to this on the ground that it has already been gone over. He testified to this thing in the beginning. He went and found it resting against the pipes and the end extending; went into detail about it at the beginning of his examination.

The Court: I do not remember that. Of course, if it is so there is no purpose in going into it again.

Mr. Carey: It was not. There was one witness who did, and it was Mr. Hinckley, and I think the deposition or testimony of the conductor is in, but I don't think the engineer did testify to that.

The Witness: I did not.

Q. (Repeated by the stenographer) And when you arrived there did you notice in particular the position of the fire hook. A. I examined that portion of the train known as the locomotive and the fire hook.

Q. What position did you find the fire hook in when you reached Dumont? A. The same position it was at Weehawken.

Q. Was it extended any further out on the fireman's side? A. It did not.

James H. Lee, (recalled) for Defendant—Cross

Q. Do you know whether or not the fireman had made any use of the hook from the time you pulled out of the Weehawken yard with your train up to the time when you reached Dumont? A. Not to my knowledge.

Q. And you were right where you could see him during the whole of the journey? A. I was.

Q. There was nothing between the fireman and the engineer on the engines of this class—is there? A. No, sir.

Q. They sit directly opposite each other? A. Can see every move.

Q. Do you recall whether you passed other trains after leaving New Durham on your way to Dumont that night? A. I cannot recall.

Q. You don't recall? A. No.

Q. When you examined the end of the fire hook at Dumont were there any evidences of it having struck anything at all—any hair, or blood or anything of that kind? A. I saw no evidences of that character.

Q. In going through the Weehawken tunnel after passing beyond the signal which is the last one to the west of the tunnel, are there any other signals on the fireman's side until you get through the tunnel? A. Not governing the movement on that track.

The Court: Going east, you mean?

Mr. Carey: Yes.

The Witness: Not governing the movement on that eastward track.

Mr. Carey: Cross examine.

Cross Examination by Mr. Simpson:

Q. You are now employed by the New York Central as an engineer, aren't you? A. I am.

Q. And you were an engineer on this date, the 16th of February, 1915? A. Yes, sir.

Q. You had nothing to do with this fire hook, did you? You didn't use it and had nothing to do with it, did you? A. No; that is out of my line.

Q. Did you have anything to do with it? A. No.

Q. It was none of your business to watch this fire hook to see that it was in good condition? A. Oh, yes.

Q. Why? A. It is my business to see that everything on the locomotive is in its proper place.

Q. But you didn't use this at all? A. I don't use it.

Q. Was it lying on the coal when you saw it in Weehawken? A. No.

Q. Where was it lying? A. On the—deck above the tank.

Q. The tank behind the engine? A. Yes.

Q. Part of the engine? A. The tank is part of the locomotive.

Q. And is it near the fire box? A. No.

Q. And when you took your train from Weehawken you had to run that train, didn't you, and watch for signals and see what was ahead of you? A. Yes.

Q. That was your necessary business, wasn't it? A. That is my business.

Q. Were you doing that on this occasion, or were you watching your fireman? A. Well, I could do both.

Q. Well, were you doing that or watching your fireman? Were you watching the signals and running your train or were you watching your fireman? Or do you say under oath that you were doing both? A. Well, when you sit on the locomotive you just sit as here. Your eyes are not glued constantly ahead. You can glance sideways.

Q. But you are attending to your business, watching the signals, if you have people behind you whose lives depend on you? A. Yes. But

my business requires me to look across the locomotive on the water glass, also.

Q. Well, did you keep your eyes fixed on the water glass from the time you left Weehawken? A. Well, that and looking ahead.

Q. You don't know what the fireman is doing all the time, do you? A. I don't say I do.

Q. How far is Dumont from Weehawken? A. 13 miles.

Q. How long did it take you to make it? A. That I can't tell; around about thirty-five minutes, perhaps.

Q. And you are the man who asked the fireman to look at his hook, before you started, aren't you, when you got to Dumont? A. Well, I think I did ask him how his hook was.

Q. Didn't you say to him: "How is your hook?" And didn't he go over with you then and look at the hook? A. Well, you don't have to walk very far, only a step either side to see the hook.

Q. Well, the hook was behind you? A. I think I did ask him how his hook was.

Q. Why did you ask him how his hook was? A. Well, on account of getting a message to inspect the train, and that is the only thing on a locomotive that the fireman uses, his hook.

Q. That is the only thing that could project from the locomotive, isn't it? A. Well, that is about the only movable thing.

Q. That is what I mean, the only movable thing that could project is that hook; isn't that a fact? A. That is about the only thing I know of.

Q. That is the reason when you got this message the first thing you said was: "How is your hook?" A. I did say that.

Q. Had you seen the hook at all, or had your attention been called to it from the time you left Weehawken until the time you got to Dumont? A. Hadn't my attention been called to it?

James H. Lee, (recalled) for Defendant—Cross

Q. From the time you left Weehawken till the time you got to Dumont was your attention called your back to it looking ahead of you? A. Well, the general line of my business, my eyes glance around the inside of my cab; I would notice it if it was out of place.

Mr. Simpson: I didn't ask that. I ask that that be stricken out as not responsive.

Q. From the time you left Weehawken to the time you got to Dumont was your attention caleld to this hook? A. No.

Q. What is this hook used for? A. To rake over the fire.

Q. How long is this hook? A. I don't know.

Q. Wasn't it longer than the usual hook? A. Well, it is no longer than other hooks I have had on the engine.

Q. Isn't it a fact that it was ten feet long and that caused it to project three or four inches, and if it had been of the usual length it would not have projected at all?

Mr. Carey: I object to that.

The Court: We are not concerned with that under the pleadings.

Mr. Simpson: We are concerned with this man's credibility. He has testified about this hook. I want to know what he knows about it. I am not attempting to try any issues about this size. I am trying to find if he knows what he is talking about. He has been allowed to testify for Mr. Carey that there was no blood, no hair on the hook; that he examined the hook; that he saw the hook in Weehawken. I want to find out what he knows about it.

The Court: Let me hear the question.

Q. (Repeated by the stenographer) Isn't it a

fact that it was ten feet long and that caused it to project three or four inches, and if it had been of the usual length it would not have projected at all?

Mr. Simpson: I withdraw that question.

Q. Wasn't this hook longer than the ordinary hook?

Mr. Carey: I object to that question. It is immaterial what its length was. We have the measurement of it and we are not charged with using an improper hook.

The Court: I agree with you, but I cannot agree with you that there is no materiality about the length of the hook, but, I think, on the contrary, I think it is material. Let me hear the question.

Q. (Repeated by the stenographer) Wasn't this hook longer than the ordinary hook?

The Court: If you are insisting upon it you may have the benefit of it. Take your exception.

Mr. Carey: I note an objection.

Q. Wasn't this longer than the ordinary hook, the one you are talking about? A. Longer than some; shorter than others?

Q. What? A. Others used shorter than that; and then it was longer than some we have had.

Q. It is the longest you have had? A. I have seen longer.

Q. Now, you say that there was no hair on this handle, or any blood on the handle. Did you look for blood and hair on the handle? A. I inspected. It looked at the proper place. I say I saw nothing of foreign substances.

Q. Did you examine the hook, either end of it, for the purpose of determining whether there was any blood or hair on it? A. Well, I would not look at either end; I would only look at the one end.

Q. Which end did you look at? A. At the handle end.

Q. Did you look at it to determine whether there was blood or hair on it? A. I didn't scrutinize it as closely as that; I just looked at the hook to see if it was in its place, and I would see anything on the hook.

Q. That was the only reason you looked at it, to see if it was in its place? A. To see it was properly placed.

Q. And you didn't examine it to see if it struck a man's head or not? A. No.

Mr. Carey: That is all.

Mr. Simpson: That is all.

(Witness excused.)

HARRY VAUGHN, a witness sworn on behalf of the defendant, testified as follows:

Direct Examination by Mr. Carey:

Mr. Vaughn, you are in the employ of the New York Central Railroad Company? A. Yes, sir.

Q. And have been for how many years? A. About fifteen years.

Q. You were in the employ of the company on the 16th of February, 1915? A. Yes, sir.

Q. In what capacity are you employed now? A. Conductor—

Mr. Simpson: I object to that as unimportant, what he is doing now.

Q. In what capacity were you employed at that time? A. Brakeman.

Q. Were you on this train upon which Mr. Lee was the engineer? A. Yes, sir.

Q. Brakeman on that train? A. Yes, sir.

Q. And what position on the train? A. Head brakeman.

New Jersey State Library

Q. And where did you ride that night? Where on the train did you ride that night from Weehawken to Dumont? A. On the engine; on the left side of the engine.

Q. The fireman's side; in front or behind the fireman? A. In front of the fireman.

Q. Is that the position where the head brakeman rides on freight trains? A. Yes, sir.

Q. This was a freight train, was it? A. Yes, sir.

Q. And do you remember the number of the engine? A. 3189.

Q. You are familiar with that class of engines, aren't you? A. Yes, sir.

Q. And on that night before you left Weehawken and before you left the Weehawken yards, did you notice the position of the fire hook? A. Yes, sir.

Q. And will you describe the position of it—first, when was it that you noticed it? How long before you started out? A. Just as we were pulling out of the yard.

Q. Just as you were pulling out of the yard? A. Yes, sir.

Q. Where did you come from? A. On top of the train.

Q. From the top of the train? A. Yes, sir.

Q. And going over to what position? A. Over inside of the cab.

Q. You had been outside on the train, had you? A. Yes, sir.

Q. And you went over to the inside of the cab? A. Yes, sir.

Q. In passing over to the inside of the cab where did you go with respect to the tender? A. Over the top of the tender; over the top of the coal.

Q. So you stepped right over the fire hook, did you? A. Yes, sir.

Q. Did you notice its position? A. It was in position where they always carry hooks.

Q. What? A. The normal position, where they always carry the hooks; on the front of the tank.

Q. On the front of the tank? A. Yes, sir.

Q. Now, on which side was the hook end of the—A. Right.

Q. That is the engineer's side? A. Yes, sir.

Q. And the handle was on the left side, was it? A. Yes, sir.

Q. About how much did the handle project over the side of the tender, if at all? A. Oh, three or four inches.

Q. Were you present when these photographs D-4, 5,—D-7, D-6 and D-4 were taken; those three photographs? Just look at them. A. (After examining photographs) Yes, sir.

Q. Look at each one. Turn over. A. (Doing so) Yes, sir.

Q. Do you notice the end of the fire hook on each one of those? A. Yes, sir.

Q. Which end is that? A. That is the handle end.

Q. Now, will you state whether or not these photographs represent substantially the position of the handle and the extent of projection over the side of the tender to the engine? A. They do to the best of my knowledge.

Q. Do you know whether or not that is the proper place to carry the fire hook when it is not in use? A. Yes, sir; that is where they all carry them.

Q. And I call your attention to those pipes indicated by the letter P on Exhibit D-5? A. Yes, sir.

Q. Were you present when that picture was taken? A. Yes, sir.

Q. And do you know whether or not the engine 3195 is of the same class as 3189? A. Yes, sir; I know that much.

Q. Did 3189 have the same pipes as you see in this photograph? A. Yes, sir; they all have.

Q. And will you state whether or not the rod of the fire hook bears against those pipes as it is in that position? A. Yes, sir.

Q. Did it bear against the pipes that night as you passed over it? A. Yes, sir.

Q. And you say you are now a conductor? A. Yes, sir.

Q. Freight conductor? A. Yes, sir.

Q. Have you noticed whether or not fire hooks are frequently carried in that position with a projection of three or four inches to the handle? A. Well, no—

Q. You have not noticed that? A. I haven't noticed that.

Mr. Carey: Cross examine.

Cross Examination by Mr. Simpson:

Q. They are not frequently carried with any projection, are they? A. Why, different lengths of the hook, maybe they are.

Q. You say you have not noticed that, and if you haven't noticed it what do you say is a fact,—that they are carried that way or not? A. They are carried across the end of the tank.

Q. But not projecting? A. Some of them projecting.

Q. But very rarely you see them project, don't you? A. Yes, rarely now.

Q. Now, you were sworn in this other action, weren't you? A. Yes, sir.

Q. And didn't you testify as follows: (Q.) "Do you recall the train being stopped at Dumont?" (A.) "Yes." (Q.) "And for what purpose was it stopped?" (A.) "Got a message fireman on 72 had been hurt." (Q.) "Did you make an inspection of the train?" (A.) "No, sir." (Q.) "What

is your answer?'' (A.) ''No, sir.'' (Q.) ''You didn't make any inspection at all?'' (A.) ''No, sir; we had to back up in the yard, close up the switches, and the conductor and the other man made the inspection of the train.'' Did you so testify at the last hearing?

Mr. Carey: I object to that question because he has not on this examination testified to anything that occurred at Dumont. The reason I didn't ask him about it is that on the other hearing it was shown that he didn't make any inspection at that point. His knowledge was confined to the Weehaken yard.

Q. You are testifying entirely to what happened at Weehaken?

The Court: Yes; that has been the whole examination.

Q. And you testified to nothing that happened except at Weehawken?

Mr. Carey: That is what he testified.

Mr. Simpson: Let him testify whether he did.

Q. Do you say that you don't know anything about the condition after you left Weehawken—not what the condition was, but do you say you don't know anything about it after you left Weehawken? A. No, sir; made no inspection after leaving Weehawken.

Q. And you were in the cab all the way to Dumont? A. Yes, sir.

Q. Rode in the cab behind the fireman all the way to Dumont?

The Court: Ahead of the fireman.

Q. Ahead of the fireman? A. Yes, sir.

Q. Did 3189 have the same pipes as you see in this photograph? A. Yes, sir; they all have.

Q. And will you state whether or not the rod of the fire hook bears against those pipes as it is in that position? A. Yes, sir.

Q. Did it bear against the pipes that night as you passed over it? A. Yes, sir.

Q. And you say you are now a conductor? A. Yes, sir.

Q. Freight conductor? A. Yes, sir.

Q. Have you noticed whether or not fire hooks are frequently carried in that position with a projection of three or four inches to the handle? A. Well, no—

Q. You have not noticed that? A. I haven't noticed that.

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Q. But not projecting? A. Some of them projecting.

Q. But very rarely you see them project, don't you? A. Yes, rarely now.

Q. Now, you were sworn in this other action, weren't you? A. Yes, sir.

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is your answer?'' (A.) ''No, sir.'' (Q.) ''You didn't make any inspection at all?'' (A.) ''No, sir; we had to back up in the yard, close up the switches, and the conductor and the other man made the inspection of the train.'' Did you so testify at the last hearing?

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The Court: Yes; that has been the whole examination.

Q. And you testified to nothing that happened except at Weehawken?

Mr. Carey: That is what he testified.

Mr. Simpson: Let him testify whether he did.

Q. Do you say that you don't know anything about the condition after you left Weehawken—not what the condition was, but do you say you don't know anything about it after you left Weehawken? A. No, sir; made no inspection after leaving Weehawken.

Q. And you were in the cab all the way to Dumont? A. Yes, sir.

Q. Rode in the cab behind the fireman all the way to Dumont?

The Court: Ahead of the fireman.

Q. Ahead of the fireman? A. Yes, sir.

Q. He was in the cab. Where were you? A. In the cab.

Q. Sitting in front of him? A. Yes, sir.

Q. Well, how could he look through you and see the signals? A. He looked through the front window, over my shoulder.

Q. Over your shoulder, you being in front of him made no difference? A. No, sir.

Q. Didn't lean out at all to look for signals? A. He might lean out an inch or two to look out.

Q. Why did you ride there in front of the fireman? A. It was the only place to ride on the engine.

Q. Why were you riding on the engine at all? You were a brakeman. A. It is the place to ride.

Q. What does he do there? Does he do anything there, or just ride? A. He looks out, watches the train.

Q. He has to watch the train, too? A. Yes.

Q. Watch ahead of him? A. Watch ahead for signals, and look back and look at the train.

Q. Why doesn't the fireman watch for the signals instead of the head brakeman? A. Sometimes he is busy; he looks out for signals, too.

Q. What would he be busy with between Weehawken and Dumont if you had to watch for signals that night. What would he be doing on that night? A. I wasn't doing anything that night.

Q. You just sat and watched for signals because the fireman was busy? Now, if the fireman was busy what was he doing? Was he hooking up his fire? A. No, sir.

Q. What was he doing while you were watching for signals that he ought to be watching for? A. He was sitting on the seat box behind me.

Q. Smoking a cigarette? A. I don't know whether he was or not.

Q. Isn't it a fact that you were watching for

signals because he was doing something else? A. No, sir.

Q. Well, why were you watching for signals? A. It is for both of us to watch for signals.

Q. You mean two men on one side and only one on the other watching for signals? A. That is the engineer, running the train alone, and you help him.

Q. Fireman, is that what you mean—both of you watch for signals? Now, if both of you see the signal at the same time what do you do? Do you touch him on the shoulder and say: "There is a signal?" Or does he tap you and say "There is a signal?" A. He communicated the signal to the engineer.

Q. If you are both watching and you both see a green light on the track, or a Ford automobile, what do you say? Do you both talk to each other, or do you both say to the engineer: "There is a Ford on the track"?

Mr. Carey: I think that is impertinent.

The Court: I will take it, subject to your objection.

Mr. Carey: Exception.

Q. If you both see the signal at the same time, you and fireman, what do you both do? A. We both speak at once sometimes, or one ahead of the other.

Q. Both speak at once to the engineer? A. We might.

Mr. Simpson: I guess that is all.

Redirect Examination by Mr. Carey:

Q. You say you watch for signals. There are times when the fireman is busy tending to his fires, are there not? A. Yes, sir.

Q. And on those occasions you watch for signals? A. Yes, sir.

Harry Vaughn, for Defendant—Recross
Brant Hinckley, (Recalled) for Defendant—Direct

Q. Now, on the night in question do you know whether or not the fireman had done anything to his fires from the time he left the Weehawken yards until you reached Dumont? A. He had not.

Mr. Carey: That is all.

Recross Examination by Mr. Simpson:

Q. Did you watch for signals from the Weehawken yards to Dumont? Did you? A. Watch them all the time.

Q. Did you watch for signals in front of the fireman—sitting in front of the fireman? Did you watch for signals from Weehawken to Dumont on this night? A. Yes, sir.

Mr. Simpson: That is all.

Mr. Carey: That is all.

(Witness excused)

Brant Hinckley, recalled on behalf of the defendant, testified as follows:

Direct Examination by Mr. Carey:

Q. Mr. Hinckley, I show you Exhibit D-6. Is that your picture, the man looking out of the cab—the window of the cab? A. Yes, sir.

Q. Cab window. When a fireman has occasion to put his head out of the window to look for signals will you state whether or not that is about the extent of his extending his head? A. Approximately, yes.

Q. On this occasion you were sitting in the cab of an engine of the same class as engine 907 on which Mr. Price was? A. Yes, sir.

Q. You knew Mr. Price, didn't you? A. Yes, sir.

Q. Will you state how his height compared with

yours? A. Well, as near as I can remember, him and I was practically the same build. He might have been a little heavier that I am.

Q. Now, when you examined the fire hook at Dumont did you see any indication of the handle end having struck anything? A. I did not.

Q. Did you observe any hair or blood or anything of that kind on the handle? A. No, sir.

Mr. Carey: Cross examine.

Cross Examiation by Mr. Simpson:

Q. Did you examine it for hair and blood? A. I did not.

Mr. Simpson: That is all.

Mr. Carey: That is all.

(Witness excused.)

Clark H. Humpleby, a witness sworn on behalf of the defendant, testified as follows:

Direct Examination by Mr. Carey:

Q. You are in the employ of the New York Central? A. I am.

Q. In what capacity? A. Road foreman of engines, at present.

Q. How long have you been employed in that capacity? A. Five years.

Q. And you were employed in that capacity in February, 1916? A. Yes, sir.

Q. 1915 I should say? A. Yes, sir.

Q. Are you familiar with the different classes of engines used on the road? A. I am, sir.

Q. Will you state whether or not engine 907 and engine 992 belong to the same class? A. They do, sir.

Q. Will you state whether or not engine 907 and engine 904 belong to the same class? A. Yes, sir.

Q. And these engines that belong to the same class, will you state whether or not they are of the same dimensions? A. They are.

Q. And standardized construction, are they? A. Standardized, yes, sir.

Q. And with reference to the overhang and width of the engines and tenders, they are the same? A. Yes; so far as the width of the tenders and cabs are concerned; yes, sir.

Q. And the height of the seat box? A. Height of the seat box, yes, sir.

Q. I notice on some of these photographs there are projections outside of the cab window on the fireman's side. For example, I call your attention to Exhibit D-2. You notice a projection outside of the rear window on the fireman's side. A. Yes, sir.

Q. What is that? A. An arm rest.

Q. Will you state whether or not those arm rests are put on by the manufacturer, or after they come from the manufacturer? A. At the time the arm rests were put on by the men. The company got the arm rests out and gave them to the men and they were nailed on. But at the present time they are put on with hinges and lap in.

Q. So, in those Exhibits, D-7, D-6, D-4 and D-5, where no arm rest is shown on the photographs, what would you say as to the position of the arm rests—in this D-7? A. I assume there was none on when those photographs were taken.

Q. Well, are they put on on hinges sometimes? A. They are; but, of course, if the arm rest is turned in the inside of the cab it would not show on that photograph.

Q. In this case the arm rest may have been on the inside of the cab? A. Yes; I assume it was.

Mr. Carey: Cross examine.

Cross Examination by Mr. Simpson:

Q. What is the arm rest? Something outside of the cab for a man to put his hands on? A. Yes, sir.

Q. What is that for, so that he can lean out? A. Sir?

Q. So that he can lean out? A. Yes, sir.

Mr. Simpson: That is all.

(Witness excused.)

James P. Nearpass, recalled on behalf of the defendant, testified as follows:

Direct Examination by Mr. Carey:

Q. Mr. Nearpass, you have already been sworn, and you are a trainman on the train that Mr. Price was on February 16th? A. Yes, sir.

Q. What were you on the train? A. I was the rear trainman, or the flagman.

Q. Speak a little louder, please. You saw Mr. Price in the stationmaster's office— A. Yes, sir.

Q. —that night? Were you present when Mr. Seaman was examining Mr. Price's head? A. I was—well, I came in there about five minutes after it happened.

Q. Did you see Mr. Seaman examining Mr. Price's head? A. I did.

Q. And what did you do, if anything, at that time, when Mr. Seaman was examining his head? A. Why, we looked at him. We didn't find any scar.

Q. Speak out louder.

Mr. Simpson: I object.

A. We didn't find any wound or anything. Everything seemed to be normal.

Q. Any blood on his head? A. No blood.

Q. Or face, or anywhere that you saw? A. No, sir.

Q. Did you see any marks on his head anywhere? A. I did not.

Q. How closely did you examine him? A. Why, we parted his hair, you know, and went all over his head.

Q. What kind of light did you have there? A. Electric Light.

Q. How near was the electric light to Mr. Price's head? A. Oh, we had it right down near his head.

Q. On the train coming in that night did you notice anything indicating that anything struck the outside of the train anywhere? A. I did not.

Mr. Carey: Cross examine.

Cross Examination by Mr. Simpson:

Q. Didn't you simply look at his head to see if you could find a bruise, and didn't find any? Isn't that all you did? A. Well, we looked—

Q. Isn't that all you did? Yes or no. Did you do any more than that? A. Why, no.

Q. Didn't you testify on the last trial: (Q.) "What kind of an examination did you make of his head?" (A.) "I simply looked over his head to see if he had any bruise." Didn't you so testify on the last trial?

Mr. Carey: That is what he testifies now.

Mr. Simpson: No; he denies having done that.

The Court: I don't think he has denied it.

Q. Didn't you say now that you did not simply look over his head to find bruises? A. No, sir.

Q. Well, what did you say now? A. We looked over his head.

Q. Do you say now, as a fact, that all you did

was simply to look at his head to see if you could find bruises? Do you say that? A. Yes.

Q. Is that all you did? A. We went—

Q. Is that all you did? A. I don't remember; I don't know.

Q. How was he when you first saw him? Did he have his hand up to his head like that? (Indicating.) A. He had his hand on his head; yes, sir.

Q. Show the jury how he had his hands. A. Well, up over his head like this. (Indicating.)

Q. Where was he when you saw him with his hands over his head? A. Lying on the cushion.

Q. In the stationmaster's office? A. Yes.

Q. You didn't see him until he got in there? A. No, sir.

Q. Did you say anything to him? A. I don't remember I said anything to him.

Q. Didn't you say—testify at the last trial: "Two or three times I says: 'Charlie, do you know me?' and he didn't make any answer." A. I might have said so.

Q. Well, is that a fact? Did you say to him: "Charlie, do you know me?" and he failed to make any answer? A. I don't remember.

Q. You don't remember. Your memory is pretty bad about it. Did you see his cap—oh, I asked you about that yesterday. That is all.

(Witness excused.)

THOMAS W. HICKS, recalled on behalf of the defendant, testified as follows:

Direct Examination by Mr. Carey:

Q. Mr. Hicks, you saw Mr. Price in the stationmaster's office? A. Yes, sir, I did.

Q. Did you look at his head at all? A. I did.

Q. Won't you describe what you did, and tell us what you found? A. Why, I parted his hair on the left side of the head, as he complained.

The Court: Talk louder, Mr. Hicks.

Q. Just what did you find not what he said. A. I found nothing.

Q. Well, what did you do? A. I looked at his head.

Q. Did you do anything in the way of parting his hair?

The Court: He said he parted his hair on the left side of his head, as I remember it. Is that right?

The witness: That is right.

Q. Did you feel any swelling at all? A. I did not.

Q. Did you see any marks at all? A. None.

Q. Any blood anywhere? A. No, sir.

Q. Where was he at the time you made the examination with respect to the light? A. Laying on a cushion in the stationmaster's office. The light was—oh, a few feet from him, on the left side.

Q. What kind of a light was it? A. Electric.

Q. Will you state whether or not there was good light there? A. Good light.

Q. Did you see him afterward? A. I did not.

Mr. Carey: Cross examine.

Cross Examination by Mr. Simpson:

Q. He had a pretty thick mop of hair on, didn't he? A. Yes, sir.

Q. And you don't claim to have any special art in finding bruises, do you? A. No, sir.

Q. You simply made an ordinary observation? A. Yes, sir.

Q. And saw nothing. Where was he when you first saw him? A. Why, the engine man and trainman were bringing him down from the train, leading him.

Q. How was he, weak? A. Why, he was groggy.

Q. He looked to you as if he would fall if they didn't assist him? A. I think he would need assistance.

Q. And when you got in the station did he seem to be himself or did he seem to be dazed and half conscious? A. He was dazed.

Q. Did he seem to know what was going on around there? A. Didn't appear to.

Mr. Simpson: That is all.

Mr. Carey: What was that last answer.

(Answer repeated by the stenographer.) Didn't appear to.

Mr. Carey: That is all.

(Witness excused.)

CHARLES E. CHASE, recalled on behalf of the defendant, testified as follows:

Direct Examination by Mr. Carey:

Q. ——

Mr. Simpson: Perhaps we can stipulate these measurements and save time. If you will say what Mr. Chase is going to say I will stipulate it.

Mr. Carey: I think he would better testify.

Q. Mr. Chase, you made some measurements in connection with engine located adjacent to each other on tracks of the New York Central? A. I did.

Q. When did you make those measurements? A. On October 6th of this year.

Q. And will you state what engines you had? A. 3189 and 904.

Q. 3189 is the engine which it has been testified drew the freight train out that night. What was the track centers at the point where you made the measurements? A. Thirteen feet four inches.

Q. And your testimony yesterday as to the track centers just east of the tunnel was thirteen feet three inches, as I recall it. A. Just west.

The Court: West.

Q. Just west of the tunnel? A. Yes; thirteen feet three.

Q. So there was a difference of one inch, was there? A. One inch.

Q. What with respect to the elevation of the tracks where you made these measurements—the two adjacent tracks? A. About the same elevation, as I recall it.

Q. If there was any difference to what extent would there be a difference? A. I don't know of any difference.

Q. Don't know of any difference at all. Did you take the elevation of the handle of the fire hook on engine 3189 when it was resting across the tender? A. I took its elevation relative to other objects.

Q. And relative to what objects? A. The hook four inches higher than the arm rest of the window.

Q. Four inches higher than the arm rest of the window?

The Court: Which window?

Q. Window on which end? A. That is apparently the engine upon which—no, that was—the hook was on engine 3189.

Q. Yes, and the arm rest was on what engine? A. The arm rest was on engine 904, from memory; that is not recorded here. I am quite certain it must have been 904.

Q. Haven't you a record of that number there? A. I have a note here, the hook is four inches higher than arm rest of window. Which window is not noted. But I am very certain from memory that it is the window of the cab of the engine upon which the hook was not; that is, the hook was on the other tank.

Q. You had two engines there, did you not? A. I did.

Q. Do your notes show what those engine numbers were? A. The numbers I have given: 3189 and 904.

Q. Those were the only two engines you had there? A. The only two that day.

Q. Now, on that occasion did Mr. Hinckley, the witness who has testified here, sit in the engine cab of 904? A. He did.

Q. And with his head out of the window about as shown in this photograph here, in D-6? A. He sat like that, as I recall.

Q. Now, did you take the difference in elevation between Mr. Hinckley's forehead, as he sat there, and the end of the iron hook—the handle of the iron hook? A. I did; I took that difference in elevation.

Q. And what was that difference of elevation? A. Mr. Hinckley's forehead was fifteen inches above the hook.

Q. That is, when Mr. Hinckley was sitting in the engine cab of 904? A. He sat in the engine cab of 904; in the cab window.

Q. Between the outside of the arm rest of 904 and the hook on 3189 what was the clearance? A. Two feet nine inches.

Q. And the track centers as you have said before— A. Thirteen feet four inches.

Q. Thirteen feet four inches. On the track center of thirteen feet three inches the clearance would have been how much? A. Two feet eight inches.

Q. What is the difference between the plates on the side of the engine tank? A. Ten feet exactly.

Q. Is there an arm rest, or was there an arm rest on the day that you had engine 3189? Was there an arm rest on that engine? A. I noted it.

Q. And where was the arm rest? A. Cab window.

Q. On which side? A. On the side toward engine 904.

Q. Yes. And do you know whether that was the fireman's side or not? A. I do not.

Q. Was it on the side of the engine on which the handle of the fire hook was extended over? A. It was; it was the same side.

Q. Now, did you take the projection of the fire hook as it was on engine 3189 on that occasion, and the projection of the arm rest on the engine? A. I took the relative projection.

Q. And what did you find that to be? A. The arm rest extended a half an inch further from the center of that track than the handle of the accident hook.

Q. Who placed the fire hook in position, if you know, on the occasion when these measurements were taken.

Mr. Simpson: I object to that as unimportant.

A. I don't recall.

Q. You don't recall anything about it.

Mr. Carey: Cross examine.

Chas. E. Chase, (Recalled) for Defendant—Cross

Cross Examination by Mr. Simpson:

Q. When the iron hook was fifteen inches below the man's, Hinckley's, forehead, how far did it project over the side of the other engine? A. It projected four inches over the plate of the tank.

Q. Did you take its distance above or below the forehead of Hinckley when it projected two feet over the tank? A. I did not.

Q. And the more it projected the higher it would go, if it were on a slant up, wouldn't it? A. It would.

Q. One question more: is this engine the arm rest is on supposed to be the same type of engine that Price was on this night? A. I think not; I believe Mr. Price was on 907. This arm rest is 3189. I don't know—

The Court: The same type of engine as the freight engine—

Q. Well, these arm rests—are they on all engines? A. I believe so; I am not very familiar—

Q. What is the purpose of them, do you know? A. The purpose of the arm rests?

Q. Yes. To allow a man to lean out of the cab, is it, to put his arm on it? A. I should imagine so. I am not very familiar with the engines.

By Mr. Carey:

Q. You don't know anything about them, do you? A. I do not.

Q. That is not in your department? A. No.

(Witness excused.)

BRANT HINCKLEY, recalled on behalf of the defendant, testified as follows:

Direct Examination by Mr. Carey:

Q. Mr. Hinckley, you were present at the time these measurements were taken by Mr. Chase? A. Yes, sir.

Q. And on that occasion did you place the fire hook in position on engine 3189? A. I did.

Q. And you sat also in the engine cab of 904? A. Yes, sir.

Q. Will you state whether or not on that occasion you placed the fire hook so that it projected as nearly as you could tell the same as it did on the night that Mr. Price was taken off 907? A. I did.

Q. These measurements of which we are now speaking, when Mr. Chase was present and took them, was not the same occasion as the taking of these photographs? A. I understand that.

Q. They were on different occasions, were they? A. Yes, sir.

Q. On the occasion when those measurements were taken by Mr. Chase we had no camera there? A. That was on the 6th day of October.

Q. Yes. And do you remember the date when the photographs were taken? A. Those?

Q. Those, yes. You were present when they were taken? A. I believe that was on the—let's see—17th, I think—well, I wouldn't say.

Q. Well, you were present on both occasions? A. Yes, sir.

Q. And you placed the fire hook on both occasions? A. I did.

Q. On the different engines.

Mr. Carey: Cross examine.

Cross Examination by Mr. Simpson:

Q. When did you place the fire hooks for the photographs? A. Why, immediately before they were taken.

Q. When were they taken? A. About two o'clock, I believe, or later, possibly.

Q. What day? A. I haven't got my time book here so I could not state.

Q. Well, how many months ago? A. Within the last month.

Q. When were the measurements taken with the other gentleman? A. The measurements were taken on the 6th day of October in the afternoon, on Saturday.

Q. That was over two years after the accident? A. Yes, sir.

Q. Did you measure the fire hook at Dumont on the 16th of February, 1915? A. I did not.

Q. Well, how do you know you put it in the same position? Did you carry it in your head for over two years? A. Yes, sir.

Q. You could tell, could you? A. Yes, sir.

Q. Without any measurement? A. Yes, sir.

Q. You remembered it for over two years so that you could go with that fire hook and put it in exactly the same position it was at Dumont? A. No; I told you approximately; that was as near as I could possibly place that. (Shaking his finger.)

Q. Why the finger? A. Well, just to draw your attention, like you do to me.

Q. You can do that with your pleasing countenance; you don't have to point your finger. A. Well, I am not aiming a gun at you.

Q. Would you like to? A. What is that?

Q. Would you like to? A. Oh, no, no.

Q. What I want to find out is, do you say seriously that you could carry it in your mind's eye,

during the time this suit was running, for two years, and place it in the same position? A. For one reason; the loop of that handle, as Mr. Lee called my attention the night of February 16th, just laid about the edge of the tender; that is, when the unusual happened, anything would impress it on your mind.

Q. Was that an unusual thing? A. Why, we got a message to back in there and inspect our train. That is something unusual.

Q. Why? A. Because it is not an every day occurrence.

Q. You don't mean the position of the hook was unusual; you mean the stopping of the train was unusual? A. Yes, sir; and when they called my attention to the position of the hook, that was unusual; that is what impressed it on my mind.

Q. Do you have any foot rule with you? Is that one of the things you carry? A. You are not supposed to carry it, unless you feel inclined to do so.

Q. Is there any printed rule of the company about the position of the head brakeman in the cab of the engine? A. No, sir; it is his proper position on the engine. His proper position is in a place where he can watch. The rule says that all employees on the train shall observe and communicate as to position and color and indication of all signals.

Q. I say is there any printed rule? A. That is a printed rule.

Q. You haven't got it with you, have you? A. I have not; but you couldn't communicate the signal to one another if he wasn't there where he could talk to you.

Q. Did you ever ride in the cab without a head brakeman? A. On passenger trains.

Q. No, on freight trains; did you ride without him? A. Not unless they are doing work switching and things like that.

Q. Does he ever relieve you when you are making up your fire? A. No, sir.

Q. Watch for signals while you are making up your fire? A. A fireman has to see all signals at all times.

Q. You cannot see a signal if you are hooking your fire. A. Well, those signals are some distance apart.

Q. Could you see the signal if you were hooking your fire? A. It is a sure thing you can't if you are hooking your fire.

Q. Suppose you were hooking your fire and you pass a signal on your side, who would report it? A. On my side?

Q. Yes. A. There is no signals on my side.

Q. Well, what do you watch for if there are no signals? You are supposed to watch the signals— A. Your signals are all located on the right hand side of the track.

Q. Well, suppose you passed such a signal and you are hooking your fire, and you don't see it; would the head brakeman report it? A. The brakeman would call out, and the engineer would call out—"Danger signal" or "Caution Signal" and you would answer it.

Q. You both see it, and call out—both engineer and the fireman? A. Yes, sir.

By Mr. Carey:

Q. The one who sees it first is the one who calls it out? A. Yes, and the other repeats.

Q. The other repeats if he sees it? A. Whether he sees it or not, and then that lets the other party know that you understand the position of the signal.

By Mr. Simpson:

Q. On coming out of the tunnel are the signals

on your side or the engineer's side? A. Engineer's side.

Q. So you call the signals out as you go through the tunnel? A. Which way?

Q. Coming from Weehawken. A. That is, as you emerge from the westerly portal?

Q. No, as you emerge from the tunnel. A. There is no signals on the west bound track inside of the tunnel.

Q. How do you know you are all right, then? A. You get your indication before you enter the tunnel; there are two signals outside.

Q. How near are they outside? A. One of them is possibly one hundred feet from the tunnel, and as you go around and enter the tunnel there is a tunnel block.

Q. No, I mean as you come out on the west side. A. There is no more signals from the east portal of the tunnel all the way through until you get possibly—well, approximately one hundred and fifty feet; then there is a distance signal.

Q. Well, would you call that out? A. Yes.

Q. Well, then, when is the next one? A. Then the next one is just about, I should say, two hundred feet west—or east of the station.

Q. Now, do you remember who called those out this day? Was it you or the head brakeman who called them out? A. Well, we repeated them; always repeat them.

Q. Both called out. Did you see Price as you passed him that day? A. I did not.

Mr. Simpson: That is all.

By Mr. Carey:

Q. As I understand, the head brakeman sits there and notices signals and calls them, except when he is on duty outside on the train? A. Stays there and calls signals, and looks back over

the tracks, or trains, to see if there is any fire flying, or anything like that to indicate brake sticking, or brake beam dropping, and similar occurrences.

Q. But his proper position except when he is out working on the train is in the cab with the fireman? A. Yes, sir.

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

(Witness excused.)

Clark H. Humpleby, recalled on behalf of the defendant, testified as follows:

Direct Examination by Mr. Carey:

Q. Mr. Humpleby, on one occasion when measurements were taken by Mr. Chase on engine 3189 the engine taken out by Mr. Lee was used. Do you know why that engine was not used when the photographs were taken? A. I couldn't tell you; I have no knowledge of that. I have no knowledge of any lending the engine for any photographic purposes.

Q. Do you know where engine 3189 was at the time these photographs were taken, a few days previous— A. I couldn't answer that; I don't know.

Q. Do you know where the engine is now? A. Yes; she is on the division; but what location I am unable to state at present.

Q. Do you know anything about her being placed in the shop at Albany for repairs; or isn't that within your— A. Off handed I couldn't answer that question. I can tell you by looking up our records.

Q. All right. Do you know where engine 907 is, whether it is on this division or not? A. 907

was transferred to the Syracuse division, December 16th, 1916.

Q. And has not been on this division since? A. Not since that date.

Mr. Carey: That is all.

Mr. Simpson: No question.

(Witness excused.)

THOMAS J. QUEST, a witness sworn on behalf of the defendant, testified as follows:

Direct Examination by Mr. Carey:

Q. You are in the employ of the New York Central? A. Yes, sir.

Q. In what capacity? A. Locomotive engineer.

Q. Were you in the employ of the company on February 16, 1915? A. I was.

Q. How long have you been employed by the company? A. The New York Central?

Q. Yes. A. About twenty two years.

Q. And in what capacity have you served?

Mr. Simpson: I will admit his qualifications.

if you want to prove him an expert.

Q. Well, have you served as fireman and engineer?

Mr. Simpson: I will admit it.

A. Messenger boy, fireman and engineer.

Q. When did you become an engineer? A. In the spring of 1907.

Q. Did you see Mr. Price the night he was taken off the train? A. I did.

Q. Where did you see him? A. Stationmaster's office.

Q. Did you look at his head? A. Not that I remember.

Q. You don't remember that. Did you do anything in connection with examining him at all? A. No, sir.

Q. Did you do anything in connection with his bag? A. Once more that question.

Q. Did you do anything in connection with his bag or grip? A. Yes, I did.

Q. What did you do? A. Brought it from the engine to the stationmaster's office.

Q. And did you put anything in it? A. On the engine; yes sir.

Q. What did you put into it from the engine? A. Cap.

Q. Anything else? A. No, sir, not that I remember.

Q. After it was brought into the stationmaster's office was anything else put into it while you were there? A. Not that I remember.

Q. Do you recall anything about overalls or jumper or anything of that kind? A. I do not.

Q. Did you get his dinner pail also? A. I did, sir.

Q. Anything else that you got from the engine in connection— A. A coat.

Q. Coat. And where did you leave that bag? A. Stationmaster's office.

Q. And do you know anything about what became of it after that? A. No, sir.

Q. That is the last you saw of it? A. Yes, sir.

Q. What is the proper position for a fireman's hook when it is not in use, Mr. Quest? A. Placed crosswise on the front end of the tank.

Q. The handle on which side? A. Fireman's side.

Q. And on what does the hook end of the hook rest? A. Top of the tank; resting against the flange.

Q. And will you state whether or not the side plate of the tender comes above that plate where the hook end rests? A. It does.

Q. Do you know about how much? A. Ten inches.

Q. And I show you this photograph Exhibit D-7; that shows handle of fireman's hook extending about three or four inches beyond the side plate of the tank. Will you state whether or not you frequently see fire hooks in that position? A. I do, sir.

Q. Carried when not in use? A. Yes, sir.

Q. Is that proper position for them? A. Proper and normal position.

Q. Are you familiar with the engines of the 3189 class? A. I am, sir.

Q. And engine 3195 is of the same class, is it? A. Same class.

Q. And I draw your attention to the pipes shown and marked P on that photograph, Exhibit D-5. Will you state whether or not the rod of those fire hooks pressed against those pipes when located there in that position? A. It does, sir.

Q. And will you state whether or not when in that position as shown by this photograph any force is required to lift the hook from its position, in addition to lifting the mere weight of the hook? A. Force is required.

Q. And what is the cause of that? A. The weight of the hook.

Q. When the fire hook is in that position which is higher, the hook end or the handle end? A. The handle end.

Q. And on an engine of that class will you state whether or not it is possible for the motion of the engine to shuck the fire hook in such a way as to cause a greater projection than when it is ori-

ginally placed in that position? A. I feel it is not possible.

Q. Have you ever known of an accident of that kind where the motion of the engine moved the fire hook? A. Never knew of an accident of that kind.

Mr. Carey: Cross examine.

Cross Examination by Mr. Simpson:

Q. Was there a tear in the cap you found? A. Once more.

Q. (Repeated by the stenographer.) Was there a tear in the cap you found? A. Not that I know.

Q. Did you examine it? A. Not that I remember.

Q. You just picked up the cap and put it in the bag and put it in the stationmaster's office; is that it? A. That is all, sir.

Q. You don't know whose cap it was, do you? A. I could not say exactly whose cap it was.

Q. And you left it in the stationmaster's office with the bag, did you? Did you lock the bag before you left it there? A. Oh, no.

Q. How far could a hook extend over the side of a tank and still be in its normal and proper position? A. I don't understand that question.

Q. (Repeated by the stenographer.) How far could a hook extend over the side of a tank and still be in its normal and proper position? A. About the width of the handle.

Q. If it was any more than that it would not be in its normal and proper position, would it? A. Oh, no.

Q. What is the width of the handle? A. 2½ to 3½ inches approximately.

Mr. Simpson: That is all.

(Witness excused.)

(Recess to two o'clock P. M.)

(After recess.)

JOHN JOHNSON, a witness sworn on behalf of the defendant, testified as follows:

Direct Examination by Mr. Carey:

Q. Mr. Johnson, you are employed by the New York Central Railroad Company? A. Yes, sir.

Q. In what capacity? A. Supervisor of tracks.

Q. And what does that territory cover? A. From Jersey City to Cedar Cliff, almost.

Q. And how far is that? A. Sixty three miles.

Q. How long have you been supervisor of tracks? A. Since 1899.

Q. And you were in that position and active in that position, in the month of February, 1915? A. Yes, sir.

Q. I show you some photographs marked Exhibit D-7, D-6, D-5 and D-4, and ask you if you were present when those photographs were taken? A. Yes, sir.

Q. What was the distance between track centers at the place where those engines were stationed? A. Thirteen feet.

Q. There are two engines shown on the photographs? A. Yes, sir.

Q. Did you measure the track centers? A. Yes, sir.

Q. And as to the elevation of the tracks— A. About level.

Q. Could you see any difference between the elevation of the two tracks? A. No.

Q. What are your duties in connection with track supervision? What are your duties in connection with track supervision? A. Looking after the repairs.

Q. And in connection with the supervision of the tracks do you go over the territory frequently? A. Yes, sir.

Q. Will you state whether or not in connection with your duties you find from time to time boards from freight trains along the track? A. Yes, sir.

Q. Coming from what? A. From freight cars.

Q. Freight cars passing along the track? A. Yes, sir.

Q. And what part of the freight cars? A. Well, sometimes they come from the roof and the sides and doors.

Q. You are familiar with the Weehawken tunnel? A. Yes, sir.

Q. Is that part of your district? A. Yes, sir.

Q. Can you state whether or not there are stones sometimes falling from the roof of the tunnel? A. Yes, sir.

Q. Of what size? A. They are of various sizes; from a pound on up.

Q. And in the winter time will you state whether or not icicles form in the tunnel? A. Yes, sir.

Q. Where? A. Through the center of the roof. Along on the side.

Q. And do you know of those icicles falling? A. Yes, sir.

Q. And striking trains? A. Well, I have heard of their striking trains.

Mr. Simpson: I ask to have that stricken out.

The Court: Yes. Just your own knowledge you are asked for, not what anyone else told you, but your own knowledge.

Q. Do you know that of your own knowledge? A. Yes, sir.

Q. And have you known of your own knowledge of men being struck by icicles in the tunnel? A. I—it seems to me I have.

Mr. Carey: Cross examine.

Cross Examination by Mr. Simpson:

Q. When did you see a man struck by the icicle in the tunnel? A. I didn't say I seen anyone struck.

Q. Well, you never saw anyone struck by stone or icicle? A. No.

Q. What you are telling is what you heard somebody else say? A. Well—

Q. Is it or is it not? A. It is what I heard; I haven't seen it.

Mr. Simpson: I ask to have that stricken out.

The Court: I am in doubt that it may be stricken out. I do not understand he says it is only hearsay as to stones falling in the tunnel, but as to anyone being struck by them, or icicles.

Q. You have said that you know of men being struck with stones and icicles in the tunnel. Did you ever see anybody struck by a stone or an icicle in the tunnel? A. No.

Q. And when you say you have known of it you mean somebody has told you of it? A. I have had reports of it.

Q. Somebody has reported it to you? A. Yes, sir.

Mr. Simpson: I ask to have that portion stricken out.

The Court: That portion, if any, which does refer in any part of his testimony to a person being struck by an icicle or stone may be stricken out.

Q. Now, then, did you ever see a stone fall from the top of the tunnel? A. No, I did not.

Q. Did you ever see an icicle fall from the top of the tunnel? A. No, I did not.

Q. And when you say you know of them falling is that some reports that somebody made to you? A. Yes, sir.

Mr. Simpson: I ask to have that stricken out as hearsay.

By Mr. Carey:

Q. Have you ever seen icicles lying along the tracks in the tunnel? A. Yes, sir.

Q. And from where did they come? A. From the roof.

Q. Did you ever see stone, except ballast stones of the railroad, lying in the tunnel? A. Yes, sir.

Q. And where would those stones come from? A. From the roof.

By Mr. Simpson:

Q. Did you ever examine the roof of the tunnel? A. Yes, sir.

Q. What kind of stones has it in? A. Trap rock.

Q. What precautions are taken to prevent them falling on passenger trains and other trains? A. We have three rock gangs examine the tunnel every week.

Q. Once a week only? A. Yes, sir.

Q. And that is the only precaution taken to prevent them falling, is it? A. Yes.

Q. And what precaution is taken to prevent icicles falling? A. The same way, and also men at night knocks them down.

Q. Well, how often in the week? A. About whenever it is required.

Q. Well, how often is it required? A. Well, when the icicles form.

Q. And these icicles you see lying on the tracks, how do you know they don't come from the side of freight trains? A. They don't have any icicles on freight trains.

Q. Didn't you ever see icicles falling alongside of a freight train in the winter, underneath? A. I have seen cars standing in the yard where they form icicles, from under coal cars.

Q. If they went in the tunnel wouldn't they fall in the tunnel? A. Well, they would be discolored from coal.

Q. When did you see an icicle in the tunnel or a stone? What is the nearest date you saw one with reference to the 16th day of February, 1915? A. Well, I have not taken any date, but at several times I have seen them.

Q. But you cannot tell when was the date nearest to the 16th of February, 1915, that you saw an icicle or stone lying on the ground, can you? A. Well, within six months.

Q. Within six months of that date? A. Yes.

Q. That is the nearest you can give us? A. Well, at different times—

Q. Is that the nearest date you can give us? A. Well, I haven't given you any dates; I didn't keep any record.

Q. You don't know the dates? A. No.

Q. And you are familiar with the condition of the tracks, are you? A. Yes, sir.

Q. These boards are boards that are lying on the ground, are they? A. No, between the tracks.

Q. Do they fall off freight trains sometimes? A. Yes, sir.

Q. When did you find any boards in the year 1915? A. I didn't keep any—I didn't keep any record.

Q. Did you find any in January? A. I could not say what month. I did not keep any record.

Q. And you don't know whether you found any in February lying on the track? A. I couldn't tell you.

Q. Don't know that? A. I didn't keep any record of those things.

Q. Now, you know the signal west of the tunnel, don't you, the first signal? A. Yes, sir.

Q. For the trains coming in from the West. There is nothing between that signal and the station in the way of a permanent structure that would strike a man going along on the left side of the cab, is there? A. Not anything.

Q. Not anything. That is all.

Mr. Carey: That is all.

JOHN K. BOSTWICK, sworn.

Direct Examination by Mr. Carey:

Q. Mr. Bostwick, you are employed by the New York Central Railroad Company? A. Yes, sir.

Q. And in what capacity? A. Timekeeper.

Q. Have you the records of payrolls showing payments of wages made to Mr. Charles Price? A. Yes, sir.

Q. Covering what years? A. 1913 and 1914, and January and February, 1915.

Q. How were the wages paid? At what intervals? A. Every—twice a month—semi-monthly.

Q. Now, will you read the payments made in the year 1913? A. In January, first period $56.74; second, $33.80. February, first period, $33.85; second period, $52.56. March, $58.24; second period $44.35. April, $44.35; second period $60.19. May, $56.62; second period $57.28. June, $65.47; second period $57.28. July, $65.47; second period, $61.38. August, $53.25, second period $65.47. September, $61.53; second period $53.38. October, $45.01; second period $67.58. November, $63.36; second period $59.13. December, $59.34; second period $59.55.

Q. Have you the footings for that year? A. Yes, sir.

Q. How much? A. $1,335.28.

Q. Now, give us the payments for 1914. A. January, first period, $63.61; second period $67.84. February, $50.68; second period $55.10. March, first period $54.91; second period $63.36. April, first period $54.91; second period $55.26. May, first period $54.91; second period $43.76. June, first period, $50.68; second period $50.68. July, first period $44.44; second period $59.13. August, first period $48.90; second period $55.47. September, first period, $46.18; second period $51.00. October, $60.22; second period, $52.09. November, first period, $61.45; second period, $70.95. December, first period $68.54; second period, $68.84.

Q. And your footing for that is? A. $1,352.91.

Q. And have you the wages paid in January, 1915? A. $65.79, and $72.59.

Q. Making a total of how much for that month? A. $138.38.

Q. What was that?

The Court: $138.38.

Q. And have you the payments for February? A. Yes, sir; first period is $57.43, and $7.57.

Q. And that ended his receipt of wages? A. Yes, sir.

Mr. Carey: Cross examine.

Cross Examination by Mr. Simpson:

Q. It ended his receipt of any money from the West Shore, didn't it? He didn't get any money after that $7, did he, in February? A. No, sir.

Q. You never paid him anything after that? A. I mean on the pay roll; I don't know—

Q. What was the $7 for? A. The time he made from the 15th of February.

Q. Until he was injured? A. Yes, sir.

Q. Now, would that indicate that he was a pretty steady worker? A. Yes, sir.

Q. And do you take your locomotive engineers from the fireman in the New York Central? A. Yes, sir.

Q. What would an engineer earn?

Mr. Carey: If the Court please, I object to that. There is no evidence—

A. I have no record; I could not tell you that.

Q. Haven't any record? A. No.

Q. Well, an engineer earns more than a fireman? A. Yes, sir.

Mr. Carey: I object to that. There is no evidence in this case that Mr. Price was an engineer.

Mr. Simpson: No, but he would have been. Still, I do not press it.

Q. And you say he earned about thirteen hundred and what a year?

The Court: One year was $1335, another $1352.

Q. And was that all money as a fireman? A. Yes, sir.

Q. He received it as a fireman. Do you know how long he was employed as a fireman? A. No, sir, I do not.

Mr. Simpson: That is all.

Mr. Carey: That is all.

(Witness excused.)

Mr. Carey: If the Court please, Mr. Chase was asked on his direct examination if the fire hook had been extended whether the elevation would have also been increased. He had not figured it out at that time,—he had not figured it out at that time what the difference in elevation would be in case it were ex-

tended two feet and eight inches. He has done that now and I would like to put him on the stand.

The Court: Put him on.

MR CHASE, recalled.

By Mr. Carey:

Q. Mr. Chase, you have testified that the forehead of Mr. Hinckley was fifteen inches, I think, above the level of the fire hook when the fire hook extended four inches over the side of the engine cab. A. That is true.

Q. Now, have you made a computation to see what would be the difference between Mr. Hinckley's forehead and the fire hook if the fire hook was extended two feet eight inches? A. I have made that computation.

Q. And what do you find it to be? A. The difference in elevation would then be nine and a half inches. The fire hook would be nine and a half inches below Mr. Hinckley's forehead.

Mr. Carey: That is all.

Cross Examination by Mr. Simpson:

Q. That is if Mr. Hinckley sat upright in the cab window? A. If he sat upright.

Q. Suppose he leaned out this way over the cab window and brought his head half way down, how much below his forehead would the fire hook have been if it were two feet eight inches out?

Mr. Carey: That is a matter that the jury can tell just as well as the engineer.

Mr. Simpson: It may be, but you put this man on as an expert.

The Court: Read the question.

Q. (Repeated by the stenographer.) Suppose he leaned out this way, over the cab window, and brought his head half way down, how much below his forehead would the hook have been if it were two feet eight inches out?

The Court: That, Mr. Simpson, it seems does not give a basis for a mathematical calculation, because of the uncertainty of the distance he may have lowered his forehead.

Mr. Simpson: I said half way down.

The Court: It would simply mean this, as I take it, mathematically speaking now: if it extended two feet eight inches it would bring the handle end of the fire hook—how low do you say, or how high—

The Witness: Nine and a half inches.

The Court: Then I take it for each inch he brought his head down it would reduce that one inch?

The Witness: Yes.

The Court: If each fraction of an inch he brought his head down would reduce the space just that distance, so that if his forehead would also be nine and a half inches, why, then, his head would be on a line with the elevation of the hook when it was two feet eight inches over the tender.

The Witness: That is true; nine and a half inches.

The Court: For mathematical computation you must have something as to the elevation of the forehead of Mr. Price.

Mr. Simpson: I thought if I said he brought it half way down, instead of it being—for argument sake, instead of it being directed up into the air, it were one foot down—instead of one half—he would make something different. I said half the distance.

The Court: Well, he has answered in answer to my question if he brought his forehead down one foot, why, then, of course, the elevation would be immediately changed to correspond with that distance. It would have brought it on a line if he brought it down nine inches.

The Witness: Yes, it would.

Q. How many feet was it from the arm rest of the engine on which Mr. Hinckley was to the top of his head as you saw him sitting? A. Well, now, that can be answered indirectly from the other measurements shown. The hook is four inches higher than the arm rest of the window. Mr. Hinckley said it was fifteen inches above the hook—

The Court: Nineteen inches would be the answer.

The Witness: Nineteen would be the answer.

Q. And how high do you say the hook was over the arm rest when it was projected two and a half feet out? A. The height over the arm rest—

The Court: Two feet eight inches.

Q. Two feet eight inches; that is the clearance, isn't it?

The Court: No; that was the basis used for his computation.

The Witness: It is over the arm rest a distance of fifteen plus four minus nine and a half, which is nine and a half inches.

Q. Nine and a half inches above the arm rest when it protrudes out two feet eight inches? A. Yes, sir.

Q. All right, sir.

(Witness excused.)

Mr. Carey: Dr. Cooperman has been here every day since the trial. He wanted to get off this morning, and said we could telephone for him. I told him we would do that; that we wanted him at two o'clock.

I would like to read the testimony of Charles W. Folk, who was examined as a witness in this case, to show the discrepancy between his testimony as given now and the testimony which he gave on the former occasion.

Mr. Simpson: I object to it unless it is such portion as was called to his attention.

The Court: I presume that is the offer, because any other would not be proper. That is the ambulance driver?

Mr. Carey: Yes. On page 106 and the top of 107, beginning with the question: (Q.) "What was the condition of the pillow?" (A.) "The condition of the pillow—there was blood on it." (Q.) "After you took him out?" (A.) "After I took him out." (Q.) "Was there any blood on it when you brought him in?" (A.) "No, it was a clean pillow case." "Cross examination by Mr. Carey: (Q.) When did you first notice that?" (A.) "As soon as I got over to the house." (Q.) "When you—" (A.) "Over to the store." (Q.) "The place where you started out from?" (A.) "Yes." (Q.)"You didn't notice it at the hospital?" (A.) "No." Also as to the quantity of blood: (Q.) "How much blood was there on it?" (A.) "Quite a little." (Q.)

"How large a spot?" (A.) "Ten or twelve inches; not exactly covering the pillow, but all around, maybe about ten inches square."

I think that is all.

The Court: Have you any other witness that you wish to call?

Mr. Carey: Dr. Kooperman is the last witness.

The Court: Have you any witnesses in rebuttal?

Mr. Simpson: Yes.

The Court: Have you any objection to going on with your rebuttal until the doctor is put on?

Mr. Carey: No.

Mr. VAUGHN, recalled in rebuttal, on behalf of the plaintiff.

Direct Examination by Mr. Simpson:

Q. On this night whose business was it to look at the top of the train to see there were no boards on it? A. I went over the top of the train at Weehawken.

Q. You did. Were there any boards on it at all, loose boards? A. No, sir; none that I noticed.

Mr. Simpson: That is all.

Cross Examination by Mr. Carey:

Q. You went over it just before the train pulled out? A. Yes, sir.

Q. Walked on the top of the cars? A. Yes, sir.

Q. Now, when you were sitting in the engine cab you stopped to look back over the train; is that right? A. Yes, sir.

Q. That is one of the things which you do there? A. Yes, sir.

Q. And in connection with watching the boxes on the wheels, is that one of the things which you look after? A. Yes, sir.

Q. Now, in order to do that you—how do you look back?

Mr. Simpson: I object to that. I haven't asked him anything about that. I simply asked him one question, whether he inspected the top of the train before it left Weehawken.

The Court: That is all his direct examination went to, Mr. Carey.

Mr. Carey: I understand that.

Mr. Simpson: This is no cross examination.

Mr. Carey: With the indulgence of the court I would like to ask him about this.

The Court: On your own side of the case, a part of your own case.

Mr. Carey: Yes.

The Court: All right; he is your witness then.

Direct Examination by Mr. Carey:

Q. Now, how did you look? What is your position as you are looking back? A. Why, I turn part way around, and look back over the train, going around curves, to see if there is anything wrong with the train any place, anything dragging.

Q. And when you are looking back for that purpose you were on the fireman's side? A. Yes, sir.

Q. And if the fire hook should be extended out beyond the usual distance would your attention be called to it? A. Yes, sir.

Mr. Simpson: I object to that on the ground that that is for the jury to say, not for this witness. He can't say whether it was or not, I take it.

Q. Could you see it when you were looking back? A. Yes, sir.

Q. And if it had been extended out would you have seen it— A. Yes, sir.

Q. —in looking back? That is all.

Redirect Examination by Mr. Simpson:

Q. When you are looking back you are looking at the boxes on the wheels, aren't you? What do you look back for? A. Look the whole train over.

Q. What do you look back for? What is your purpose? A. That is my duty to look back.

Q. Well, look at what? A. Look at the cars, look at the train.

Q. The freight cars? A. Yes, sir.

Q. To see that they don't throw fire; is that what you are looking for? A. Yes, sir, any cause.

Q. What? A. For any cause; any trouble, anything with the cars.

Q. In other words, you are looking to see if your freight cars are moving all right; is that what you are looking for? A. Yes, sir; to see if they are all right.

Mr. Simpson: That is all.

Mr. Carey: That is all.

(Witness Excused.)

MARGARET PRICE, recalled on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Simpson:

Q. On the morning that your husband was taken to the North Hudson Hospital did you have a conversation with Dr. Fendrich? A. Yes, sir.

Q. Did he tell you that your husband's skull

was fractured and that he would not allow Mrs. Masterson in the room or your husband's father, or anybody but you? A. Yes. The first morning he told me his skull was fractured, and three days after Mrs. Masterson was there and Mr. Foster, and he came out—I came out of the room with him, and they met me outside and he told the three of us that he did not want anyone in that room only me. "Why," I said, "I have telephoned for Mr. Price's father to come on on account of your saying he was not going to live." He said: "Mrs. Price, you have got my orders. I want no one in there but you and the nurse."

Q. Did he say why? A. He said he was in a critical condition.

Q. Well, did he say in the presence of Mrs. Masterson anything about his having a fractured skull? A. Yes, sir.

Q. Well, then, what did he say? A. He said he had a fractured skull and he didn't want—

Q. Was that the morning after he was taken, or three days afterwards? A. That was three days afterwards.

Q. You say he told you he was not going to live? A. Yes, sir, the first morning.

Q. When did he tell you that? A. The 17th.

Mr. Simpson: That is all.

The Court: Cross examine.

Mr. Carey: Nothing.

(Witness Excused.)

Mrs. Masterson, recalled in rebuttal on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Simpson:

Q. Mrs. Masterson, were you at the North Hud-

son Hospital three days after the injury or four days after when Dr. Fendrich was there, and Mrs. Price and Mr. Foster, the engineer on the train? A. Yes, sir.

Q. And when was that? Was it three days after the man was hurt or was it three days after the day following he was hurt? A. I think it was Saturday morning.

Q. You don't know what day of the week he was taken there? A. Tuesday; the accident was on a Tuesday.

Q. And where did you see Dr. Fendrick? A. Met him at Mr. Price's door, the door of the room that he was in.

Q. Were you going out of the room or going in? A. No, I was in there. I had been in the room when Dr. Fendrich entered, and left. Mr. Foster and I walked out, and we remained outside while Dr. Fendrich and Mrs. Price were in the room.

Q. Well, what did he say in your presence? You didn't hear what he said in the room if you were on the outside? A. No.

Q. What did he say outside of the room? A. He said there was no one allowed to enter the room because Mr. Price was in a serious condition, and Mrs. Price said: "Well, what is it?" He said, "A fractured skull." Mr. Foster was there also.

Q. Well, did he say you could not go in? A. No, I could not enter; no one could enter that room except Mrs. Price and the nurse. So Mrs. Price said: "Well, I have telephoned for his father." He said: "He cannot enter, because he is in a critical condition."

Mr. Simpson: That is all.

Cross Examination by Mr. Carey:

Q. Whom do you say was present at the time this conversation took place? A. Mr. Foster, Mrs. Price and Dr. Fendrich—there were four.

Q. Was Dr. Kooperman present at that time? A. No, sir.

Q. Any of the nurses? A. No, sir; they were standing outside of the door.

(Witness Excused.)

JACOB FOSTER, recalled in rebuttal, in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Simpson:

Q. Do you remember at the North Hudson Hospital when Mrs. Price, Mrs. Masterson and Dr. Fendrich were there? A. No; I remember being at the hospital.

Q. Do you remember being in the presence of Dr. Fendrich, Mrs. Price and Mrs. Masterson, on Saturday following the accident? A. I don't actually remember it.

Q. Do you remember ever being at the hospital? A. Oh, yes.

Q. When? A. I went there on two or three different occasions.

Q. Did you see Mrs. Price there on any of the occasions? A. Yes; yes, I saw her there.

Q. Did you see Mrs. Masterson there on any of the occasions? A. I don't remember her because she was a stranger to me at that time.

Q. Do you remember seeing any other woman there besides Mrs. Price? A. I don't remember about that part.

Q. Don't remember about that at all. Do you remember any conversation in your presence between Dr. Fendrich and Mrs. Price? A. Well, that I could not say; there may have been, but I have no remembrance of it.

Mr. Simpson: All right, sir; that is all.
Mr. Carey: That is all.
(Witness Excused.)

BARNETT KOOPERMAN, a witness sworn in rebuttal on behalf of the defendant, testified as follows:

Direct Examination by Mr. Carey:

Q. You are a practising physician in Hudson County? A. Yes, sir.

Q. Located where? A. West New York.

Q. How long have you been practising medicine? A. Four years.

Q. And were you at the North Hudson Hospital at the time Mr. Price was brought there? A. I was.

Q. Do you remember the case? A. I do.

Q. What were you doing at the hospital at that time? A. I was the house surgeon at that time.

Q. About what time of the day was it that Mr. Price was brought in? A. He was brought in the evening.

Q. And where did you first see him? A. I saw him in the emergency room.

Q. And where is that? A. Downstairs.

Q. In the basement? A. Yes, sir.

Q. And were you there when he was brought in? A. I got there when he was in the room already.

Q. He was in the room already? A. Yes.

Q. Who was with him? A. I met Dr. Fendrich and a couple of nurses.

Q. Was there anybody there from the ambulance when you saw him? A. I really could not say that; I don't remember.

Q. Where was he taken? A. From there?

Q. Yes. A. He was taken up into a private

room after he had the emergency—that is, I shaved his head first—

Q. Wait a moment. Where did you shave his head first? A. Down in the emergency room.

Q. Down in the emergency room? A. Yes.

Q. And then after that had been done where was he taken? A. He was taken upstairs.

Q. And how was he taken upstairs, do you recall? A. No.

Q. Anybody from the ambulance there when he was taken upstairs? A. I don't think so.

Q. And that was some little time after he was brought in? A. Yes.

Q. Now, in regard to the taking off of his hair, what do you say was done? A. Why, the superintendent called me up and told me that there was an emergency case coming in, and people told him that it was most likely a head injury, and in all cases of head injuries we are instructed to have the hair either shaved or cut closely, and I did the same thing in that case.

Q. Was the head shaved all over. A. Why, no. You see, I began to shave—his head was so that the left side of the head was towards me. I shaved that part first.

Q. You clipped the hair first? A. Clipped the hair first.

Q. With what? A. The scissors.

Q. Yes. A. And shaved part of it; and when I found I could not—but I didn't find any necessity for shaving the whole head because I didn't find anything on there.

Q. How long was the hair after you had clipped it with the scissors? A. Oh, about a quarter of an inch or so.

Q. Yes. Now, what was done in your presence after the hair had been removed, as you have testified? A. What I did?

Q. Yes, what was done in your presence—what you did and what the others did? A. Dr. Fendrich was there, and Dr. Fendrich examined the man carefully and gave instructions to have him taken upstairs.

Q. Now, you say he examined the head carefully? A. Yes, sir.

Q. How did he do it? A. Why, first he inspected the head, palpatated it.

Q. Yes. A. Percussion.

Q. And did you make any inspection? A. I did.

Q. Did you make any palpation of the head? A. I did.

Q. Where was that done, downstairs or upstairs? A. Both downstairs and upstairs.

Q. After this examination downstairs was he taken upstairs? A. Yes, sir.

Q. And what examination was made of him after he was gotten upstairs that night? A. That night? Why, we—I have examined him again, and—

Q. And how did you examine him the second time? A. The same as the first, the general routine of examination.

Q. Did you make pressure also? A. Yes.

Q. Go on. A. And, of course, we—first I palpated—inspected the head by looking at it; secondly I palpated it and felt all over it to see if I could find anything the matter with it.

Q. And did Dr. Fendrich do the same thing? A. He did.

Q. In your presence? A. Yes, sir.

Q. And did Dr. Bissing do the same thing in your presence? A. He did.

Q. Did you make any further examination after that night? A. Yes.

Q. How frequently? A. Why, we—twice a day.

Q. For how long a period? A. Well, the first—I should judge the first week.

Q. During the first week? A. Yes.

Q. Now, your subsequent examination, after the first day, did those consist of the same thing you had done before? A. Why, no, when he began to speak I spoke to him, asked him certain questions.

Q. Yes. And did you after the first day inspect his head and palpate his head? A. Yes.

Q. And press his head? A. Yes.

Q. And how long did that continue? A. Why, I should judge for the first week or so we did that; and then when Dr. Fendrich called in Dr. Hunt to see the man, why, I was there, too, to hear his opinion on the case.

Q. Now, did you continue to attend him during all of the time he was in the hospital? A. Why, the only thing—the only way I attended him was by the instructions of Dr. Fendrich.

Q. Did you see him every day during the time he was in the hospital? A. Yes; I saw him more than once a day.

Q. Now, at any time when you saw him from the beginning to the end did you ever see any indication of the effect of a blow upon his head anywhere? A. No.

Q. Did you ever see any swellings on his head? A. No.

Q. Was your examination such that if there had been a swelling on his head you would have found it? A. Yes, sir.

Q. And did you ever see any blood around his head or face, or ears or nose or mouth? A. No, sir.

Q. Did you ever see any blood on the pillow of the ambulance? A. No; we never go into the ambulance to look.

Q. What is it? A. I say we never go out of the emergency room.

Q. Did you at any time while he was at the

hospital see any blood coming from him anywhere? A. No.

Q. Did you take his pulse and his respiration during examinations? A. I did.

Q. Will you state how you found them? A. I really don't remember.

Q. You don't remember? A. I found 'em almost normal; I can remember that; but I could not give you the exact figures.

Q. What is that? A. I say I found 'em almost normal.

Q. Was that true at every time that you examined him? A. Yes.

Q. Did you ever see any indication of shock in Mr. Price? A. No.

Q. If there had been indication of shock would your examination have disclosed it? A. Yes, sir.

Q. Did you ever see any indication of concussion of the brain in Mr. Price? A. Why, I—(pausing) he might have had it.

Q. Well, I am asking you if you saw indications of it from which you would diagnose concussion of the brain? A. The first night, yes.

Q. What were those indications? A. Why, the fact that the man was unconscious.

Q. What? A. The fact that the man was in a semi-conscious condition.

Q. Did you ever see any indication after that of concussion of the brain? A. No, after he regained his consciousness I did not.

Q. Were you there when Mr. Price was taken away from the hospital? A. Yes, sir.

Mr. Carey: Cross examine.

Cross Examination by Mr. Simpson:

Q. When he was brought into the emergency hospital you simply clipped half of his head, didn't you? A. Yes, sir.

Q. And you were going to clip the other half? A. No; I clipped the whole head, but shaved part of it.

Q. Isn't it a fact that you clipped part of his head and you were going to clip the other half, but Dr. Fendrich said it was not necessary to clip the right side because you could not see any marks there? A. No.

Q. Did you testify as follows before Judge Tennant: (Q.) "Tell us what you did in connection with the petitioner." That was Price. A. I—

Q. Wait a minute. (A) "He was brought in, taken into the emergency room and clipped, his hair shaved off, half of it. I was going to have shaved the rest. Dr. Fendrich said it was not necessary because he could not see any marks there." Did Dr. Fendrich say that? A. Yes.

Q. And you only shaved the left side? A. I only shaved the left side, yes; that is what I say.

Q. And you only shaved it for that reason—because Dr. Fendrich said you could not find any marks on the right side; is that right? A. His hair was cut, yes.

Q. Do you understand the question? A. You asked me why I only shaved the left side of the head.

Q. I ask you if you only shaved the left side because Dr. Fendrich told you you could not find any marks on the right side. A. No; I could not see any marks on the right side.

Q. Didn't you testify at the last hearing that Dr. Fendrich said it was not necessary because we could not see any marks there, referring to the right side? Did you so testify? A. I might have.

Q. Was it a fact, did you testify so? A. Yes.

Q. Now, you say when he was brought in there was evidence of a concussion of the brain from semi-consciousness? A. Yes.

Q. Well, what is concussion of the brain? A condition of the brain produced by violence? A. Yes.

Q. And in your diagnosis, then, his condition indicated that there had been some kind of an injury to the head? A. No, it might have been, I said.

Q. Oh, no. You testified to Mr. Carey "Yes." There was no "Might have been." You said, "Yes, I thought he had concussion of the brain because he was semi-conscious." Did you mean that when you said it to Mr. Carey? A. Yes.

Q. All right. When you said he was unconscious, that it indicated a concussion of the brain, did the concussion of the brain indicate that he received a blow on the head? A. I don't understand that question.

Q. Did concussion of the brain, if it existed, indicate that he had a blow on the head? A. Not necessarily.

Q. How else could concussion be produced except by violence? A. Jumps on a fence.

Q. Well, that is violence, isn't it? A. Yes, but you asked me about a blow on the head.

Q. Well, violence of some kind. Can concussion be produced from anything except violence produced by a blow on the skull? A. Yes.

Q. Leave the blow on the skull out, and I will put the question simply to you. Can concussion of the brain be produced by anything except violence? A. No, sir.

Q. You had not had much, if any, experience on the 16th of February, 1915, as a physician practising for yourself, had you? A. No.

Q. You were still in the hospital as an interne, weren't you? A. Yes, sir.

Q. Getting your experience to enable you to relieve the ills of mankind afterwards? A. Yes.

Mr. Simpson: That is all.

B. Kooperman, (Rebuttal) for Deft.—Redirect

Redirect Examination by Mr. Carey:

Q. Is it necessary in order to produce concussion of the brain that the violence should be applied to the head? A. No.

Q. It may be applied to other parts of the body and produce the same results? A. Yes.

By Mr. Simpson:

Q. You said you didn't see any blood on the pillow. Why, you didn't even see the pillow, did you, in the ambulance? A. That is what I said; I didn't see it.

Q. Well, how did you expect to see blood on a thing that you didn't see?

Mr. Carey: He didn't expect to see it.

Mr. Simpson: You asked him if he saw blood on the pillow and he said no.

The Witness: I told Mr. Carey I didn't go out to see.

Q. You didn't see the pillow at all? A. No.

Q. You don't want to say to the jury that you saw the pillow and that there was no blood on it? A. No; I told Mr. Carey that I did not go out to see the pillow.

By Mr. Carey:

Q. Did you see the pillow at any time in the hospital? A. You mean from the bed?

Q. I mean the ambulance pillow, at any time in the hospital? A. No.

By Mr. Simpson:

Q. There is a record up in the North Hudson Hospital of this case, isn't there? A. Yes.

Mr. Simpson: That is all.

(Witness Excused.)

Defendant rests.

Mr. Simpson: No more rebuttal.
(Both sides rest.)

DEFENDANT'S MOTION FOR A DIRECTION OF VERDICT.

Mr. Carey: Now, if the Court please, I move for a direction of verdict on the ground that no negligence has been shown against the defendant; that the negligence set out in the complaint has not been proved against the defendant by the plaintiff, and that if any injury were received by Mr. Price it was wholly due to his own negligence; that if any injury were received by Mr. Price on the testimony in this case the injury arose out of the risk assumed by him in connection with his employment. Also that the other possible or probable causes of an injury which might have been occasioned to Mr. Price at this time other than being struck by the fire hook have not been excluded so as to make it a proper question for the jury to determine whether or not the fire hook struck it. On the evidence in this case it is affirmatively shown that the injury was not caused by the striking of the fire hook, and unless so caused the defendant is not responsible for it.

The Court: I do not think there can be any doubt in anybody's mind, and there is not in the court's mind, that the plaintiff must recover, if he recovers at all, on the allegation of negligence set forth in the complaint, which is that the injury was sustained by and through coming in contact with this fire hook which in turn is alleged was negligently so placed that it overhung the tender tank, as to permit that to be done. I do not think there is any question about that. There is one thing I do want to call your attention to, however,

and that is you are raising the question of assumption of risk. Having in mind just what I have said, and wherein I agree with you perfectly as to the right of recovery, I am wondering whether the question of assumption of risk can have any bearing upon this case at all. I have in mind and I am now reading to you from the case of Grybowski v. Erie Railroad Company. It is a Supreme Court opinion, but it has been affirmed by the Court of Errors in toto:

> "The third ground upon which the defendant rested its motion was that the plaintiff was barred from recovery because her decedent had assumed the risk of the accident which produced his death. This ground, also, we think, is without substance. The doctrine of assumption of risk has no application to such risks as arise solely and directly out of the negligent acts of fellow servants. And if it did so apply, as a general rule, it would have no pertinance in the case of accident the right of recovery for injuries arising out of which is regulated by the Federal Statute; for to so hold would be to nullify the declaration of Congress that every common carrier by railroad engaged in interstate commerce shall be liable in damages to the personal representative of any employee who shall lose his life while employed in such commerce, when his death results 'form the negligence of any of the officers, agents, or employees of such carrier.' "

What I wish to bring to your mind is this: that if the plaintiff recovers at all the plaintiff must recover for and through, and because and by reason of having established the allegations set forth in his complaint, which is not an allegation of

negligence chargeable to the company itself directly, but an allegation of negligence upon the part of a fellow or co-employee; and, therefore, under the Grybowski rule the question of assumption of risks as applicable to a matter of that sort has no bearing whatever. Do I make myself plain on that?

Mr. Carey: I understand it exactly.

The Court: Now, if that has happened for any other cause, of course, it might be that that cause was one which Mr. Price had assumed the risk of of; but I am wondering—I am inclined to think that the rule in the assumption of risk in this case as it is before us can have no applicability. It certainly cannot have under this rule which I have read to you, which is the law of this State, and I do not think it has been changed by federal findings.

Mr. Carey: I conceded that under both federal and state law if the negligence causing the injury is the negligence of the defendant or of its employees then there is liability; but for injuries arising out of the natural and proper operations carried on by the defendant there can be no recovery, because the assumption of risk has not eliminated by the federal statute.

The Court: We travel in circles; not only can there be a recovery because there is no assumption of risk, but because there is no negligence. As I say, in arguing that question, you are always arguing in a circle, and you get back to the same point.

Well, is there anything, Mr. Carey, that you wish to say in relation to this motion that was not argued in the other motion?

Mr. Carey: I think I have covered the ground on my argument on the motion for a non suit.

The Court: The reason that I say that is I

think your reasons are practically identical with the reasons urged on the motion to non suit.

Mr. Carey: I do not think I shall take up the time of the Court to go over the argument again, because it is largely that which I have already stated; although there is in the case now evidence showing other possible and probable causes of injury to a person situated as Mr. Price was situated. We have evidence in regard to the icicles formed and falling, and stone falling, and things falling from freight cars, which was not in the case before. That, of course, is additional evidence in the case and has a bearing on that particular subject. The other subjects I think I covered as fully as I could cover them, and I won't go over the ground again.

The Court: I will decline to direct a verdict for the reason that I think it is a case which presents a question for the jury to pass upon. I feel it is not for me now to pass upon the matter.

Mr. Carey: I want to have my objection noted on the record.

The Court: You may have it. That is to my declination to direct a verdict.

Court's Charge to the Jury.

Gentlemen of the Jury:

This is an action brought and being maintained by Charles Price through his next friend against the New York Central Railroad Company. The action is brought under what we know as the Federal Employers' Liability Act. It is brought for the purpose of recovering damages which it is alleged Price sustained growing out of some negligence chargeable to the defendant company, the occurrence taking place on February 16, 1915.

The act upon which the suit is based provides that where one is engaged (where the Railroad Company, for instance,) in interstate traffic (that is, traffic between two states, at least: for instance, as shown in this case, between the State of New Jersey and the State of New York) and at the time of the happening complained of was so engaged, and likewise where the employee of that company is engaged in service which was interstate, such company shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions (that is, between one state and another, or between one state and a territory, or such like) resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, tracks, roadbed, wharves, works, boats or other equipment.

You will see, gentlemen, that it is necessary first that there should be an allegation of the negligence which it is contended was the cause of the happening, and with which the plaintiff intends to charge, and for which he intends to hold the defendant company for the injury. Therefore, it is necessary that we should go back at this time to what that allegation of negligence is upon the part of the plaintiff. It is necessary, gentlemen, because upon that allegation of negligence and the establishment or lack of establishment thereof will depend for solution the question as to whether or not the plaintiff in law is entitled to have a recovery at all or not. I hope you understand me perfectly, gentlemen.

The duly rests first upon the plaintiff by his complaint, which is his first pleading in the case, to set up and specify what the act of negligence

is that he says another employee of the company was guilty of, or that the company itself was guilty of, by and through which the injury happened to him; and when he does specify that, and he goes to trial upon that, then, as I will tell you later, the burden rests upon him to establish that negligence by a fair preponderance of the evidence.

So again I say to you you can see how important it is that you should have before you and know just what the plaintiff's allegation of negligence is, and it is not only important that you should know it now, but that you should keep it in your mind during the entire consideration of this case.

Now, what is the negligence? The negligence of the defendant consisted in this: that the employees of said defendant upon another locomotive in passing the locomotive upon which the plaintiff was had a certain iron bar of the length of about twelve feet, which said iron bar was left by the employees of the company on the locomotive upon which they were, projecting out beyond the said locomotive in such a manner that a locomotive passing such a locomotive would strike the said iron bar, or the said iron bar would strike the said locomotive or a person thereon, and while the plaintiff's locomotive (that is, Price's locomotive) was passing the said locomotive upon which the said iron bar was so carelessly exposed the said iron bar without fault on the part of the plaintiff came in contact with the head of the plaintiff and severely and permanently injured the plaintiff in and about his head.

That is the allegation of negligence with which the plaintiff charges the defendant with responsibility. In that respect, gentlemen, the issue before you is simple, because the allegation is a

single one. It is not a case where you have several allegations of negligence and where the proof may go to all of them or some of them, so that the plaintiff is in a position where at the end of the case, and when it comes to you, it may be said to you rightly that the burden is upon the plaintiff to satisfy you by a fair preponderance of the evidence that the defendant was guilty of some one or more of such allegations of negligence; so that if in relation to some he has not met the burden, but in relation to some one or more he has, there may then be a recovery—that is not the situation in this case. That is the reason that I say it is simplified. There is only one allegation of negligence; that is a direct and simple one to understand, and the burden is upon the plaintiff to satisfy you of it and to establish it by a fair preponderance of the evidence.

Now, the difficulty, as I foresee it, lies in this, gentlemen: that much of the evidence in this case is not direct evidence. I mean that evidence which would go, if it goes at all, toward establishing the allegation of the plaintiff. It is what we call circumstantial evidence, and therein you may have your greatest difficulty; and then it becomes necessary that you should know what the rule is which has been laid down by our courts to guide you—men in just such positions as you are in—to guide you in determining whether or not the plaintiff has made out his case. Now, listen; listen attentively and, if possible, understandingly to this rule. I do not think you can misunderstand it:

The well established rule is that it is not enough for the plaintiff to prove the possible responsibility of the defendant, but he must show the existence of such circumstances as justify the inference of fault on the part of the defendant, and exclude—exclude the inference that the damage

was due to a cause for which the defendant was not responsible.

In applying that rule keep in mind always, gentlemen, as you must, the allegation—the single allegation of negligence made in this case.

And then the court goes on and says that the plaintiff must prove circumstances which render it probable, and not merely possible—not merely possible that the defendant is at fault. But when it is said that the circumstances must exclude an inference that the damage was due to a cause for which the defendant is not responsible, it is not meant to change the rule that ordinarily governs in civil cases and to force the plaintiff to exclude such inference beyond doubt. All that is required is that the circumstances should be so strong that a jury might properly, on grounds of probability rather than of certainty, exclude the inference favorable to the defendant.

Now, what you must find, gentlemen, before you need to go any further is this: take the charge of negligence which I have just read to you and weigh up all of the testimony, all of the facts, all of the circumstances, all of the conditions as they have been portrayed to you in this case, and as you believe them or find them entitled to belief, and then say to yourselves under this rule, Has the plaintiff made out such a case that we as twelve jurors can say that by a fair preponderance the defendant or its servant upon this passing train was negligent in the matter of which the plaintiff has charged it. If your answer to that is no, that ends the case so far as you are concerned; because then in law and in fact the plaintiff is not entitled to a verdict. If your answer to that query is yes, then the plaintiff is entitled to a verdict, subject only to those things which I shall immediately bring to your attention.

Of course, one acting in the position Mr. Price was acting in is required by law to exercise care for his own safety, and the law places upon him the burden of exercising in that direction that care which a reasonably prudent person would exercise, considering the time, place, circumstances and conditions, the nature of his business, and all that goes with it. If he did not do that, and that contributed to what happened to him, then we say, commonly speaking, that he was guilty of contributory negligence, Such negligence is a thing which the law requires the defendant to establish, and to establish by a fair preponderance of all the evidence. If that has been established, and in that manner, then the way in which you will treat it will be this: under the act under which this action is brought it is provided that in all actions hereafter brought against any such common carrier by railroad under and by virtue of the provisions of this act, to recover damages for personal injury to an employee, or where such injury has resulted in death, the fact that the employee (that is, such a man as Price) may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to amount of negligence attributable to such employee.

You will see, therefore, gentlemen, that if it has been established in the manner that I have indicated it must in order to be established at all, that Price himself was guilty of negligence which contributed to the happening, and to his injury, that does not bar him and preclude him from having a verdict, if he has satisfied you of the other things, and in the manner which I have indicated; but you are to treat it as that section which I have just read to you provides, and the court has said as to the meaning of that section this—and it will

have special reference, gentlemen, when you get to the question, if you do get to it, of what damages shall be—the court has said as to that section "It means, and can only mean, as this court has held, that where the causal negligence (that is, the negligence that proximately caused the happening) is attributable partly to the carrier (that is, the Railroad Company) and partly to the injured employee (in this case Price) he (that is Price) shall not recover full damages, but only a diminished sum, a lessened sum bearing the same relation to the full damages that the negligence attributable to the carrier (that is, the railroad) bears to the negligence attributable or chargeable to both," (the railroad company and Price.)

So that if you get to that point, gentlemen, where you are called to assess the damages in this case you will apply that portion of the statute which I have just read to you, and also what the court has said upon that section.

Now, if you get to the question of damages, gentlemen, then what may a recovery be had for in a case of this character?

Plaintiff is entitled to be compensated for pain and suffering, mental and physical, which he has endured and suffered, which he may be presently enduring and suffering, and which he will in reasonable probability suffer in the future; likewise as to any disability proximately growing out of the injury received by and through the occurrence complained of. The burden of satisfying you as to all of those things—as to the questions of pain and suffering and disability, their degree and extent, as well as the time over which they have existed, or will exist in reasonable probability—is upon the plaintiff. He must satisfy you of those things by a fair preponderance of the evidence. If he has satisfied you in that direction then the

plaintiff is entitled to be compensated for the pain and suffering and disability which he has so established.

He is also entitled to recover for loss of earnings which may be shown to have been, or will in reasonable probability be, the proximate result of the happening in question and the injury and disability resulting therefrom. The burden there, likewise, gentlemen, still is upon the plaintiff. The plaintiff must satisfy you first that he has lost, that he is losing, and that he will within reasonable probability lose in the future, and what that loss was and will be—all depends of course, and always going back to this: that that loss is the proximate result of injury which in turn was the proximate result of negligence shown as against the defendant. As he may have shown you in that direction, if he has, the plaintiff is entitled to have compensation therefor as a part of his verdict.

In that direction, gentlemen, there is another important thing in this case which will require your serious attention, and that is that there is a conflict, there is a contest as to whether or not the infirmities, the injuries and the disability of which the plaintiff is now complaining are the proximate result of this alleged happening to him on the date in question. Plaintiff says they are. Defendant says they are not. As I have said to you, gentlemen, the burden is upon the plaintiff to satisfy you of that by a fair preponderance of the evidence, and it is not sufficient that the plaintiff shall have made out that it is possible that this present condition of Mr. Price is the result of the injury received upon the date in question, but he must go further and show you by a fair preponderance of the evidence that, looking at all of the facts and all of the circumstances, it is reasonably

probable that the condition of which he is complaining is the proximate and natural result of the happening as charged against the defendant company. I say, gentlemen, that is a matter of contest in this case which ought to have your most serious consideration, and no doubt will.

And then finally, and in conclusion, gentlemen, after you have resolved all of those questions and you have determined what the loss is—and I am now speaking particularly to the question of loss of earnings—you will understand this: that that loss of earnings may go to the future, as you may find the evidence on that point under the rules which I have given you; and if that loss does go to the future you will keep in mind that if Price were earning, and able to earn, instead of now being under the alleged disability which it is claimed prevents him from earning, he would not have that sum which would come from future earnings in his hands at this time, but he would earn them from month to month, or from week to week, as he worked and labored and received them. So, therefore, the law says that if you put or add to a verdict, or make a part of your verdict loss of earnings for the future, that sum that you shall so add shall not be the gross, total sum that you will find that he will lose, but it shall be that sum reduced to its present worth—capitalized, the law says; brought down to that sum which represents the present day value of the whole sum. And do not be unmindful of this gentlemen: that in calculating the loss, if any, which the plaintiff has shown himself to be entitled to, if he has, you are to keep in mind the question of contributory negligence which I have already brought to your attention, and how, if you find that has been established—how the verdict shall be diminished under the rule which I have given you.

Now, gentlemen, in arriving at a solution of those findings, particularly relevant to the verdict and what it should be, if you get to that point, of course there are many things which you are to take into consideration. Sometimes they are said to be possibilities, sometimes probabilities. Ordinarily we dealt with probabilities. You are to take into consideration, and have a right to, the age of Mr. Price, the probability of the length of time that he would live but for the condition that he is in today. What would be probable? Would he have continued to earn? Would he have continued to work and labor continuously, or would he have done so intermittingly? Is it probable that his wages would have continued from that time increasing, or would they have diminished? Would other infirmities have come upon him in the course of nature? And might any other number of things have happened to just such a man, in just such a business as Mr. Price was in, which would naturally, and aside from the charge now made, have prevented him from earning or increasing his earnings? All those things, gentlemen, which I have mentioned to you you are to take into consideration and apply. There may be others which you in your good judgment and good common sense will see should be applied, and, seeing them, of course, you should apply them.

Aside from that, gentlemen, I have nothing further to say to you, except to charge certain requests which I am asked to charge, and they are: In this action but one ground of negligence is charged by plaintiff against defendant, and that is that the employees on one of the defendant's locomotives carelessly left an iron bar about twelve feet in length projecting out from that locomotive so that when the locomotive on which plaintiff was employed passed the locomotive upon

which the iron bar was projecting, plaintiff's head came in contact with the iron bar, causing the injury complained of. Unless plaintiff has established by a fair preponderance of the evidence that he was injured in the manner alleged, and by reason of the negligence alleged, the verdict should be for the defendant.

Unless the fire hook struck Price and caused the injury complained of there can be no recovery.

If the fire hook was placed in proper position by Hinckley—that is, the fireman of the freight train—and the motion of the engine caused it to move so as to project over the side of the engine far enough to strike Price, there can be no recovery in this action.

There is no claim in the complaint that the fire hook was improper, hence there can be no recovery in this case because the fire hook in question may have been longer than some used by the defendant.

With that, you make take the case.

The Jury retired.

Mr. Simpson: I take an exception to what his Honor said about there being difficulty about circumstantial evidence. I understand the true rule to be that circumstantial evidence presents no greater difficulty than direct evidence.

The Court: Of the requests I have charged 1, 5, 6 and 7. Numbers 2, 3 and 4 I have not charged.

Mr. Carey: I desire an objection to the refusal of the Court to charge the requests which the Court failed to charge.

The Court: As to the requests on the assumption of risk, as I have previously stated,—and it appears on the record,—I do not conceive that the question of assumption of risk could enter into the case under the pleading.

PRICE vs. NEW YORK CENTRAL.

DEFENDANT'S REQUESTS TO CHARGE.

1. In this action but one ground of negligence is charged by plaintiff against defendant and that is that the employees on one of defendant's locomotives carelessly left an iron bar about 12 feet in length projecting out from that locomotive so far that when the locomotive on which plaintiff was employed passed the locomotive upon which the iron bar was projecting, plaintiff's head came in contact with the iron bar, causing the injury complained of. Unless plaintiff has established by a fair preponderance of the evidence that he was injured in the manner alleged, and by reason of the negligence alleged, the verdict must be for defendant.

2. If the fire hook on engine 3189 was in the usual position in which the hook was carried when not in use when that engine passed the engine on which Price was employed, the verdict must be for defendant.

3. Price assumed the risk of injury from a fire hook carried in the usual position on a passing engine, and if injured by a hook carried in the usual position he cannot recover in this action.

4. If the fire hook was in the position testified to by Hinckley, Lee and Vaughn, when engine 3189 left the Weehawken Yards and was not moved by any employee of the company until after the engine passed Mr. Price's engine, there can be no recovery in this case.

5. Unless the fire hook struck Price and caused the injury complained of, there can be no recovery.

6. If the fire hook was placed in proper position by Hinckley and the motion of the engine caused it to move so as to project over the side of the en-

gine far enough to strike Price, there can be no recovery in this case.

7. There is no claim in the complaint that the fire hook was improper, hence there can be no recovery in this case because the fire hook in question may have been longer than some used by defendant.

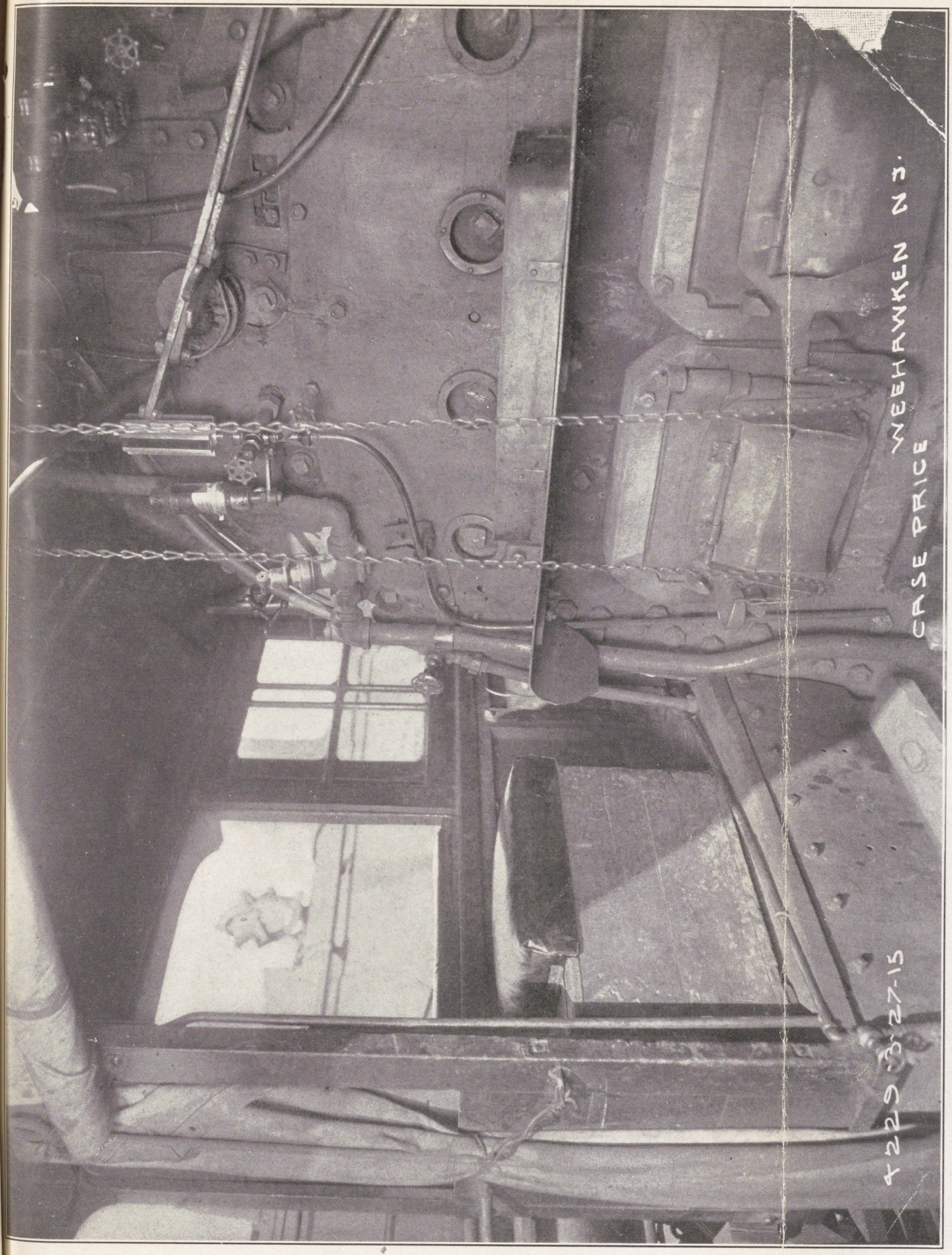
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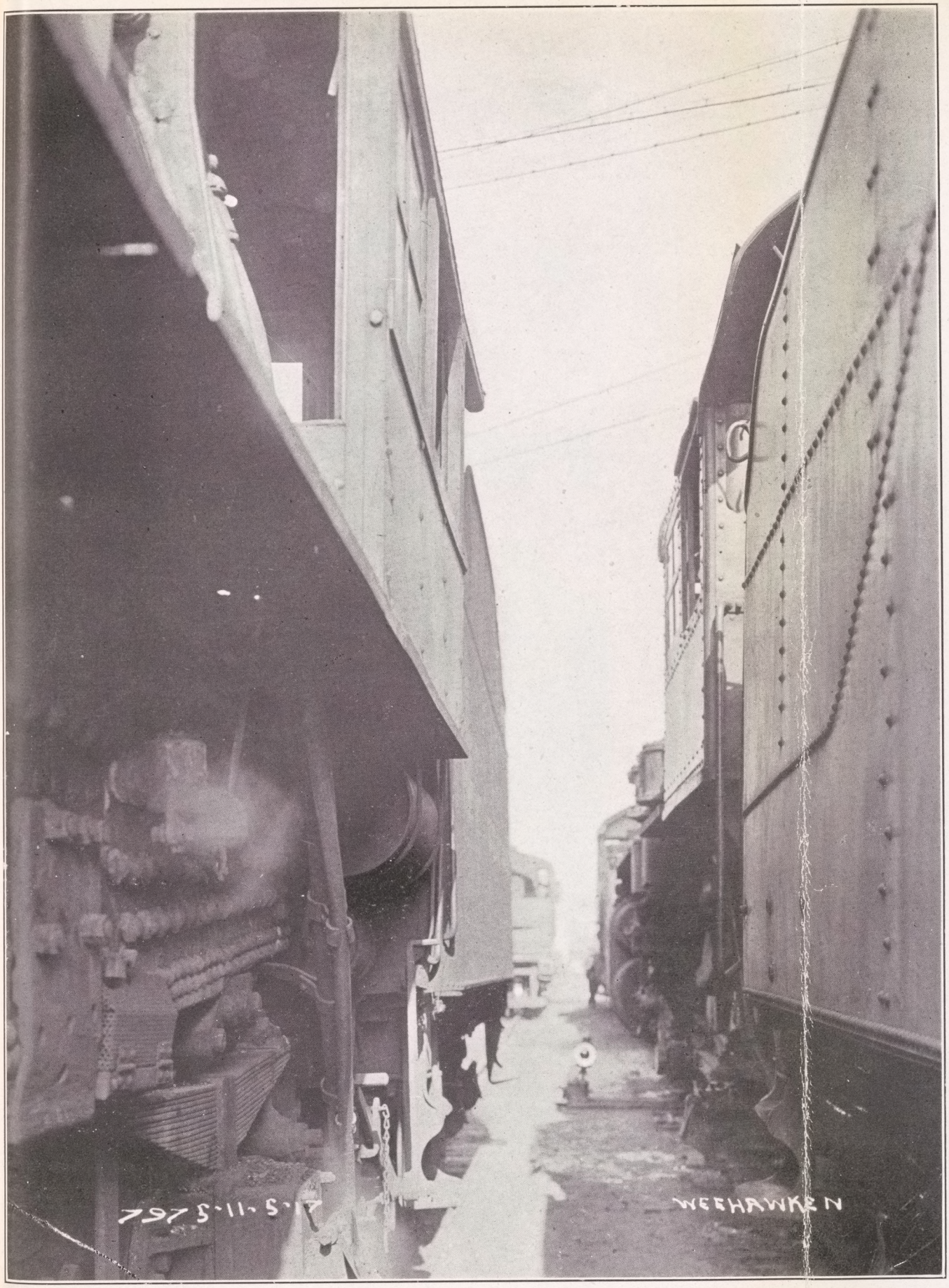
Exhibit D-3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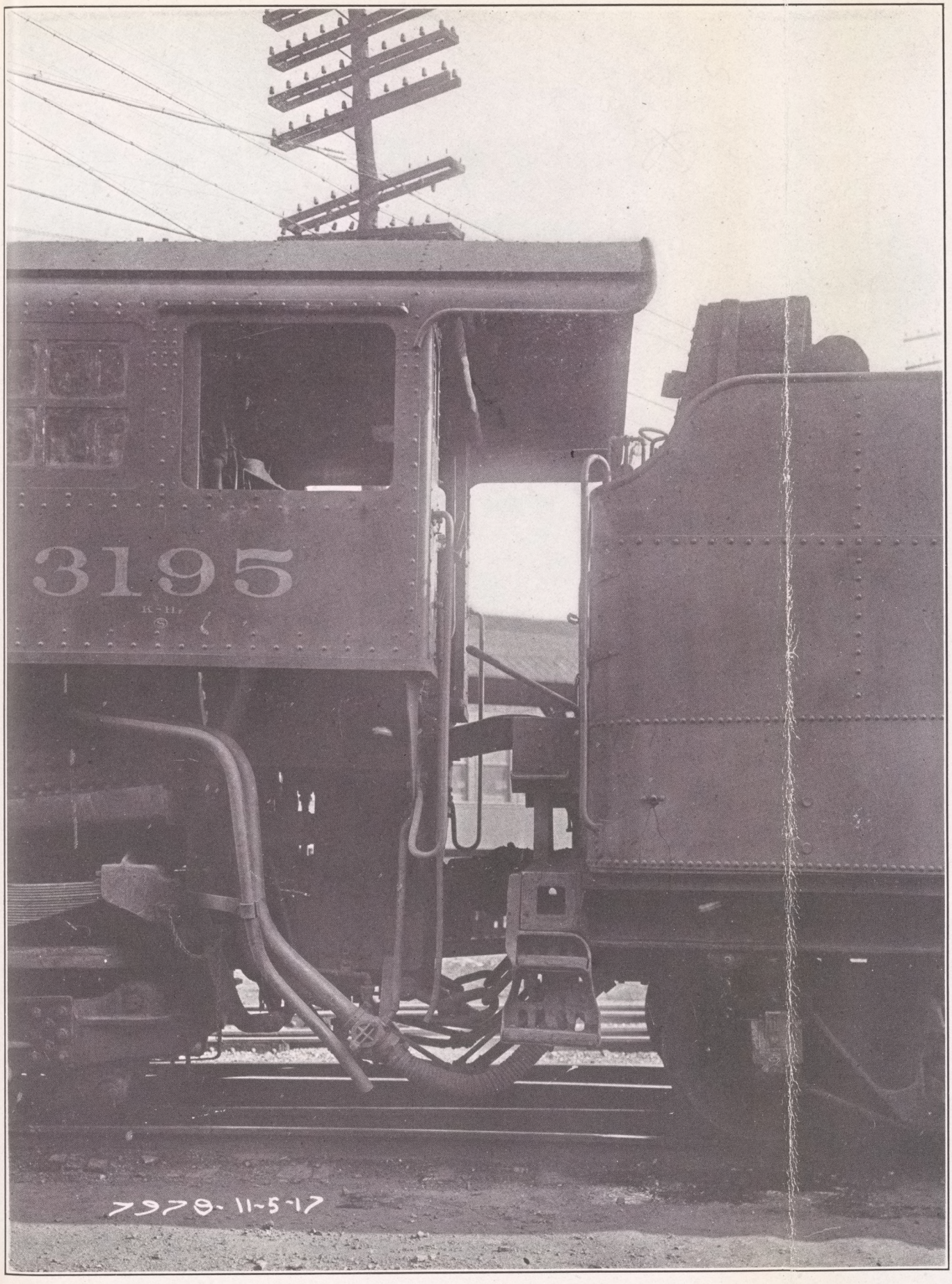
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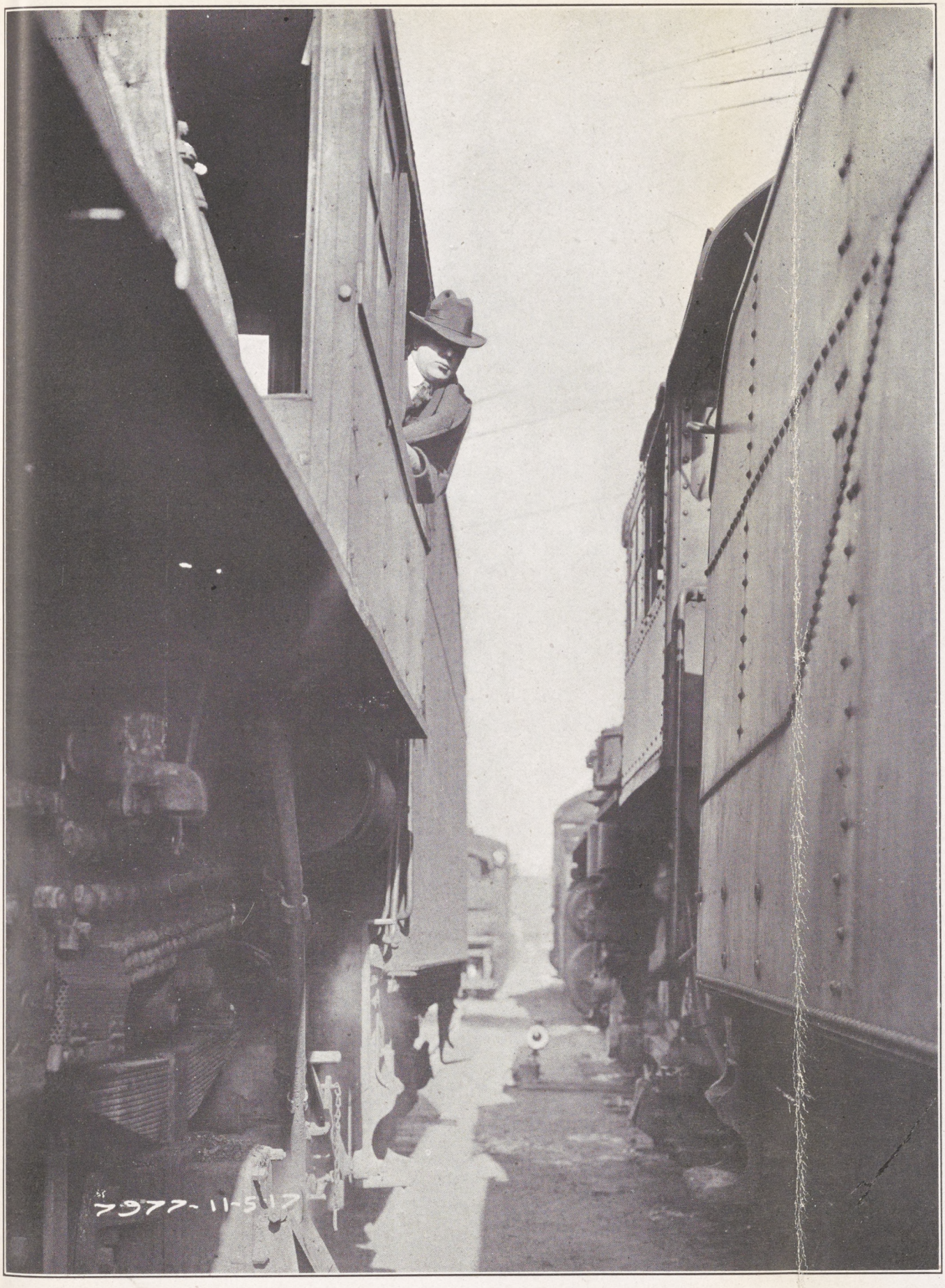
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