

New Jersey Court of Errors and Appeals

CALEB T. HUBBARD,
Plaintiff-Respondent,

vs.

ATLANTIC COAST ELECTRIC RAIL-
WAY COMPANY,
Defendant-Appellant.

Action at Law.

STATE OF CASE

DURAND, IVINS & CARTON,
Counsel for Appellant.

STEWART A. FARRELL,
LEON W. TAYLOR,
Counsel for Respondent.

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New Jersey Supreme Court

CALEB T. HUBBARD,

Plaintiff,

vs.

ATLANTIC COAST ELECTRIC RAIL-
WAY COMPANY, BODY CORPORATE,
Defendant.

Judgment
Record.

10

Atlantic Coast Electric Railway Company, body corporate, the defendant in this cause, was summoned to answer unto Caleb T. Hubbard, the plaintiff therein, in an action at law, upon the following complaint:

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“Plaintiff who resides at Bradley Park, Monmouth County, State of New Jersey, says that:

1. Defendant is a domestic corporation and at the time hereinafter mentioned owned and operated a trolley railroad in the Borough of Avon, Monmouth County, State of New Jersey, by running cars, propelled by electricity, over rails laid upon public streets of said Borough.

30

2. On the twenty-fifth day of March, 1916, said Caleb T. Hubbard, while crossing Main Street directly north of the Shark River bridge in the Borough of Avon, Monmouth County, New Jersey, was run down by a trolley car owned and operated by said defendant, and then and there carelessly and negligently operated by a servant of said defendant in and about its business, in that said defendant, through its servants and employees, headlessly and without signal or warning of any kind ran into and knocked down said plaintiff, at which time said defendant was recklessly operating

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Judgment Record

said car and in that said defendant failed to stop said car before the same struck plaintiff. That at the time hereinbefore mentioned, plaintiff was a pedestrian and was lawfully crossing the said street and railroad tracks.

10 3. As a result of the negligence of said defendant, said plaintiff received a fracture of one shoulder and a compound fracture of one leg together with other bodily injuries, underwent great pain and suffering, and has been permanently injured.

4. As a result of said injuries, said plaintiff has been forced to pay out large sums of money for medical attendance and other expenses incident to his injuries.

Plaintiff demands Ten Thousand Dollars (\$10,000) damages.

STEWART A. FARRELL,
Attorney for Plaintiff."

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The defendant answered as follows:

"Defendant, a corporation of the State of New Jersey, with its principal office in Allenhurst, Monmouth County, New Jersey, says that,

1. It denies paragraphs 1, 2, 3 and 4.

2. The accident set forth in the complaint was due to the negligence and want of care on the part of the plaintiff, and was not due to, or the result of any negligence or want of care on the part of the defendant.

30

DURAND, IVINS & CARTON,
Attorneys of Defendant."

The plaintiff replied as follows:

"Plaintiff denies each and every allegation in paragraph marked two of the answer herein.

40

STEWART A. FARRELL,
Attorney for Plaintiff."

Judgment Record

This action was tried before Judge Nelson Y. Dungan, with a jury, at the Monmouth County Circuit, on January 30th and 31st, 1917.

The cause having been heard and submitted to the jury, they returned their verdict as follows,

The jury rendered a general verdict against the defendant and in favor of the ^{Plaintiff} ~~defendant~~, for \$1500.

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of \$1500, and his costs, which are taxed at the sum of \$49.98, making in the whole the sum of \$1549.98.

Judgment entered March 2nd, 1917.

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Caleb T. Hubbard — Direct
NEW JERSEY SUPREME COURT
MONMOUTH CIRCUIT

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CALEB T. HUBBARD,

Plaintiff,

vs.

ATLANTIC COAST ELECTRIC RAIL-
WAY COMPANY,

Defendant.

Action at Law.

Freehold, N. J., January 29, 1917.

20

MR. FARRELL: I would like to state for the purpose of the record that it is conceded by the defendant that the Atlantic Coast Electric Railway Company is a corporation of the State of New Jersey and operates a street railway through the Borough of Avon and that the car in the alleged accident was operated by said railway company.

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THE COURT: That is admitted in the opening argument of counsel, that it was defendant's car that was in the collision.

CALEB T. HUBBARD, sworn for plaintiff.

DIRECT EXAMINATION BY MR. FARRELL:

40

Q. Mr. Hubbard, you are the plaintiff in this action?

A. Yes, sir.

Q. Do you remember the 25th of March, 1916?

A. Yes, sir.

Caleb T. Hubbard — Direct

Q. Will you state to the court and jury exactly what happened on that morning prior to the time you were hurt?

A. Well, I came down the river that morning with four bushels of clams. Mr. Megill had engaged two bushel off of me and I made up my mind I would stop there on the bridge and sell the other two bushels to people coming along. So I went down there, I landed at Kling's dock, that is just west of the railroad towards the trolley track. I landed my boat there and brought some clams up there on the east side of the trolley track and had them sitting along the bridge fender there. I wasn't there more than an hour, I suppose, before I sold out the two bushel extra. I then went across the bridge over to the Casino and telephoned for Mr. Megill to come up after his two bushel. I came back, and a very few minutes after I came back Mr. Megill was there after them. We carried them up and put them in bags and carried them across the tracks, he helped me, and we laid them on the step of the automobile, one on each side.

10

Q. One moment, Mr. Hubbard; where was the automobile with reference to the trolley tracks?

20

A. The automobile was headed south, about half way between the end of the bridge fender and the bridge.

BY THE COURT:

Q. The bridge fender?

A. Yes, of the Shark River bridge, the wagon bridge.

30

BY MR. FARRELL:

Q. You mean half way between the end —

A. As near as I can tell about half way between the end of the fender and the bridge.

Q. You mean the end of the bridge and the end of the railing?

A. Yes, the railing.

40

Caleb T. Hubbard — Direct

BY THE COURT:

Q. Was it north of the bridge or south of the bridge, the automobile?

A. North of the bridge.

BY MR. FARRELL:

10 Q. North of the bridge facing south? The automobile was facing south, wasn't it?

A. The automobile was facing south; yes, sir.

Q. After you laid the clams on the automobile what did you do?

A. Well, he paid me for them —

BY THE COURT:

20 Q. Now just one minute. How are the tracks located there in the middle of the street? Are there two tracks there or one?

A. Right there at the approach of the bridge there is one track.

Q. Is it a double track road or a single track road at that point?

30 A. Just north of where the accident happened, I should judge a hundred feet, probably one hundred and twenty-five feet, there is a switch, and from that switch on across the bridge south there is a single track. There is a single track all the way across the bridge from that switch.

Q. So that where the automobile was standing there was a single track?

A. Yes, sir.

BY MR. FARRELL:

Q. What did you do after you were paid for the clams, Mr. Hubbard?

40 A. Well, we stood there talking a few minutes, and I

Caleb T. Hubbard — Direct

asked him when he thought he would want any more and he told me. "Well, then," I says, "I will go on up the river." So I started and came around the automobile; I got within about five feet of the track, I judge, and I halted. I halted and looked for the car coming.

Q. Which way did you look?

A. I looked south first.

Q. Did you see any car?

A. I didn't see anything. And then I looked north and I saw a car approaching the switch. 10

Q. Now how far do you think was the switch from the bridge there?

A. I should judge about 100 or 125 feet.

Q. You saw the car coming from the north towards the switch?

A. Yes, sir.

Q. Had it stopped at that time at the switch?

A. I halted until it did stop. I didn't know whether it was going on over or whether it was going to stop on the switch. They usually do stop at the switch. But as soon as the car halted, as soon as the car stopped, I then proceeded across the tracks from the east to the west. 20

BY THE COURT:

Q. Where did that car stop, on the switch?

A. Stopped, yes — just so the other car could — it stopped on the switch or just a little this side of the switch. 30

BY MR. FARRELL:

Q. How many feet were you, about, from the track when you looked south?

A. I should judge about five feet.

Q. What did you do then, Mr. Hubbard?

A. I then proceeded to cross the track, and after this car had stopped on the switch I thought I was safe, didn't see another car. 40

Caleb T. Hubbard — Direct

Q. Did you hear a bell or any kind of a signal at that time?

A. No, sir; I didn't hear anything.

Q. Did you hear any bell at all until you were struck by the trolley car?

A. No, sir.

Q. How far did you get when the car struck you?

10 A. Well, I must have been very near across the track, when I happened to turn my head. I don't know what caused me to turn, but I turned my head and the car was so close to me that I made an effort to get out of the way of it but didn't succeed and was struck. I must have dodged back.

Q. When the car struck you did it knock you down?

A. Yes, sir.

Q. Tell exactly what happened to you after the car struck you.

20 A. Well, it knocked me down and it just rolled me right over and over like that (illustrating) and I was well under the car. There was about that much of me outside the running-board. (Indicating.) The rest of me was under the car. Oh, I must have been pretty well back under it.

Q. What happened then?

30 A. They stopped the car then and pulled me out of there. I don't know who it was pulled me out, whether it was the motorman or Mr. Megill or who it was. Mr. Megill was right there yet and Mr. Megill asked me where I wanted to go, whether I wanted to go home or whether I wanted to go to the hospital, and I studied it over and I says, "Well, they will take me to the hospital anyway, so I guess I might as well go right from here."

Q. Who took you to the hospital?

A. Mr. Megill.

Q. In his automobile?

A. Yes, sir.

Q. Did you suffer any pain at that time?

40 A. Yes, sir.

Caleb T. Hubbard — Direct

Q. What injuries did you have?

A. Well, I had this shoulder bone broken here. (Indicating.)

BY THE COURT:

Q. Indicating the right shoulder?

A. Yes, sir. And the left leg was broken off up there. (Indicating.) 10

THE COURT: Indicating about the lower third, the juncture of the middle and lower third of the left leg.

A. It was broken off, both bones, and also splintered. The bone was splintered above.

BY MR. FARRELL:

Q. In addition to those injuries did you have any burns or lacerations? 20

A. Yes, I had a burn here on both elbows, slightly, I suppose maybe as big around as a quarter, something like that, just slight burns; and then I had more or less scratches on my face and slight bruises on my body.

Q. When you reached the hospital who attended you there, Mr. Hubbard?

A. Dr. Garrison; that is, in the first place, as soon as they could attend to me after I arrived there, there was Dr. Garrison, Dr. Prout and Dr. Ackerman, and Dr. Wagner was present. 30

Q. You were immediately put to bed, weren't you?

A. Not immediately. They had quite a lot of patients there that day and I was taken to the dispensary first and prepared for bed. I was stripped and I was there awhile, I should judge a half an hour or so, probably longer. Then I was taken up in the ward and put to bed and my leg was set in the bed.

Q. How long did you remain at the hospital? 40

Caleb T. Hubbard — Direct

A. I was there from the 25th of March till the 8th of May.

Q. About seven weeks and a half ; and then what did you do?

A. Well, I got permission to go home. I asked Dr. Garrison if I could go home and he says, " Well, if you can walk on crutches," he says, " I guess you can go all right, if you will report here," he says, " every eight days at first." So then I went home.

Q. Did you report to Dr. Garrison at the end of eight days?

A. I reported, I think, every eight days, I think for about three weeks — well, three trips, I mean ; three trips, every eight days ; I think it was three.

Q. What happened then at the last treatment you had according to that arrangement?

A. Why, after they was ready to take the cast off — my leg in the meantime was in a plaster of Paris cast all the time — and after they got the cast off he says, " It would be better for you to come every day for awhile, so they can massage the leg and get those ligaments limbered up, so you can use it quicker." I then reported every day for probably a couple weeks at the hospital.

Q. And during this time after you left the hospital you used crutches, didn't you?

A. Yes, sir.

Q. When were you able to go around without the crutches?

A. Why, along about September, about the middle of September. I then had to walk with a cane.

Q. You used a cane after that?

A. Yes, sir.

Q. Up till when?

A. I probably used a cane a month or more, six weeks.

Q. Do you feel any pain at the present time in your leg or in your shoulder?

A. Yes, I do ; at times, not all the time ; but at times in stormy weather or anything like that I feel more or less

Caleb T. Hubbard — Direct

pain, and I am quite lame in my leg. My shoulder don't bother me much, except a little pain, but I have the use of it very good. My leg does bother me.

Q. What do you mean by bothers you, Mr. Hubbard?

A. Well, it seems to be weak. Now if I happen to step on a bunch or anything I flinch, I will have to almost fall down. There is a crookedness there. I can't handle it, it is very crooked. I can't handle it like I used to.

10

Q. Do you suffer from anything else?

A. Yes, I have a rupture that has come on since the accident.

Q. A rupture?

A. Yes.

Q. Did you ever suffer prior to the accident from a rupture of any sort?

A. No, sir.

Q. Had you ever had any trouble with your leg prior to the accident?

20

A. No, sir.

Q. How old are you, Mr. Hubbard?

A. Forty-eight.

Q. Are you married?

A. Yes.

Q. Your wife living?

A. Yes.

Q. Have you any children?

30

A. Five.

THE COURT: What difference does that make?

MR. FARRELL: Well, on the question of damages, that is all, your Honor.

THE COURT: Damages, wife and children?

MR. FARRELL: He has children dependent on him. 40

Caleb T. Hubbard — Direct

Q. I show you this bill, Mr. Hubbard, and ask you if you received that from the hospital.

A. Yes, sir.

(Bill offered in evidence and marked Exhibit P 1.)

BY THE COURT:

10

Q. What is the amount of the hospital bill?

A. \$69.50 from the hospital itself.

THE COURT: It will be received.

BY MR. FARRELL:

Q. Mr. Hubbard, how far did the trolley car push you after it struck you, if you know?

20 A. Well, I couldn't say.

Q. You were conscious after you were hit by the trolley car, weren't you?

A. Yes, sir.

Q. What is your business, Mr. Hubbard?

A. Why, I follow digging clams and selling clams.

Q. During the period in 1915 from May or June until September how much per day did you average from your business?

30 A. Well, the previous year I run from \$25 to \$30 a week during that time.

Q. That is your busy season, isn't it, Mr. Hubbard?

A. Yes, sir.

Q. How much do you average after the middle of September a day?

A. Oh, about \$15 a week.

Q. Did you expend any money for carfare and automobile hire, etc., to take you to the hospital after you left the hospital?

40 A. Yes, sir.

Caleb T. Hubbard — Cross

Q. How many times do you think you went to the hospital after you left it?

A. Well, I don't — I couldn't hardly say. As I say, I went there for about two weeks every day, and then I made I think it was three trips every eight days, the first start off, I said. So you could tell from that about how many trips I made to the hospital.

CROSS EXAMINATION

10

BY MR. CARTON:

Q. Mr. Hubbard, you say you are engaged in the clamming business?

A. Yes, sir.

Q. In Shark River?

A. Yes, sir.

Q. Do you live near by?

A. I live on Union and Hillside Avenues, Neptune City.

20

Q. And how long have you lived in that vicinity?

A. Why, about two years and a half, somewhere around there; that is, off and on. I have been around — not right there all the time, but I have been around there for the last twenty-two or twenty-three years.

Q. And have you been familiar with the location of the streets and the Shark River bridge and the line of the trolley tracks during all that time?

A. Yes, sir.

Q. And on the day in question I think you stated you had got about four bushels of clams and were selling them on the east side of the road?

A. On the east side of the track; yes, sir.

Q. Where is the track located there, on the east or the west side of the road?

A. It is on the west side of the street and the road.

Q. Your place that you had taken up was just north of the Shark River bridge on the east side of the road?

30

40

Caleb T. Hubbard — Cross

A. On the east side of the railroad but not on the east side of the wagon road.

Q. Up on the east side of the railroad?

A. That is right.

Q. The east side of the trolley track?

A. Yes, sir.

Q. On the west side of the road or street?

A. Yes, sir.

10 Q. That place where you were stationed, is that used by wagons and automobiles going over the bridge?

A. Well, it is out in the road, but there is a sidewalk there on the approach to the bridge. You know there is a sidewalk over the bridge and there is also a sidewalk there alongside the trolley track where I was standing with these clams.

Q. And that is where you had taken up your station that day? You had sold two bushels, you say, and then engaged to sell the other two to Mr. Megill?

20 A. Yes.

Q. And you had been there about an hour?

A. I was there somewhere around that.

Q. And I suppose you had observed the trolley cars going back and forth by you?

A. Yes, sir.

Q. And very close to where you were standing they were going?

30 A. Yes, sir; well, within five or six feet from where I was standing.

Q. They were going all during that hour within five or six feet within where you were standing?

A. Yes.

Q. And you knew the track was there?

A. Certainly.

Q. Just where did Mr. Megill's automobile stand?

40 A. It stood about half way from the end of the bridge railing of the bridge, headed south, hadn't turned around yet. You see he came from Asbury Park.

Caleb T. Hubbard — Cross

BY THE COURT :

Q. Were you loading the clams in the right or the left hand side of the car?

A. Why, let me see. If I am not mistaken we loaded them one on each side of the step. He didn't want to put them on the inside of the car on account of the wet, wetting the car inside, and he had them in two bags, a bushel in each bag; and I am not positive whether we loaded one on each side of the car or whether we loaded them both on the same side. But I am pretty sure that we loaded them one on one side and one on the other, the bags on the step. But when we were talking before I started across the track we were on the east side of his car.

10

Q. Which would be the left hand side of it?

A. Which would be the left hand side going south, yes.

BY MR. CARTON :

20

Q. That would be the off side from the track?

A. I don't know anything about the off side, but I know right and left.

Q. Well, the furthest away from the track. It was the side of the car furthest away from the track, wasn't it?

A. Yes, sir.

Q. And your best recollection is that you loaded a bushel on each step on the side of the car?

A. I am pretty near sure that is the way we loaded them, because as I say, when I started to go back across the track around the car I was on the east side of the car.

30

Q. Had you been standing in front of the car?

A. In front of his automobile?

Q. Yes.

A. No, we were on the side. He was in the car, sitting in the car, when I was talking to him.

Q. And did Mr. Megill then get in his automobile?

A. He was in.

Q. He was in all the time?

40

Caleb T. Hubbard — Cross

- A. Not all the time, no.
- Q. Well, I mean after you had gotten the clams in.
- A. Yes, sir.
- Q. And did he start his engine in the automobile?
- A. He had started his engine; yes, sir.
- Q. While you were there talking with him?
- A. Well, just as I left him, before I got back to the
- 10 track he had started his engine.
- Q. You heard the automobile engine going?
- A. Yes, sir.
- Q. He was standing, though, he hadn't started his car yet?
- A. Hadn't started the car yet, no.
- Q. Then you started to go around the back of the car to go north?
- A. I started north around the car.
- Q. On the east side of this automobile, and then you
- 20 approached the trolley track?
- A. Yes, sir.
- Q. And I understood you to say you were only about five feet from the track and you looked south?
- A. Yes, sir.
- Q. Did you see any car coming?
- A. No, sir.
- Q. Just describe how you looked when you were within five feet of the track.
- A. Well, I looked south, I didn't see any car. I just
- 30 turned and looked north and I saw a car approaching the switch; and I kept my eye on that car.
- Q. Until it stopped?
- A. Until it stopped, and then I proceeded across the track.
- Q. Then you went across the track?
- A. Yes, sir.
- Q. How near the end of the switch was this car north that you were looking at, how far was it from the point
- 40 where it stopped when you first saw it?

Caleb T. Hubbard — Cross

A. Well, I couldn't say. It wasn't long in motion, I know, before I seen it stop. I couldn't tell just how far it was from the switch when I saw it was coming towards the switch, and it wasn't in motion long before it stopped. As soon as it stopped I started to go across. I seen it wasn't coming on.

BY THE COURT:

10

Q. Stopped before it reached the point of the switch?

A. Yes, so the other car could pass, I suppose, far enough.

BY MR. CARTON:

Q. That is what that southbound car stopped there for, I suppose, so the northbound car could pass it?

20

A. Sure. It is a single track.

Q. Then you started across the track and how far did you say you had gotten over before you saw the northbound car that struck you?

A. Well, it was all done so quick I couldn't tell you how far I was across, but I must have been pretty well across when I turned my head for some cause or other, I don't know whether I heard something or what. But I turned my head, I know, like that, and this car was so close to me that I tried to get out of the way, I must have dodged back; I dodged back to the east side again. The fender of the running-board — the fender hit me, knocked me down, and I went underneath the running-board. I was under the car, about that much of me was out from under the car. (Indicating.)

30

Q. Do you know which side of the front of the car struck you, whether on the east side or the west side, that did it?

A. That I couldn't say.

40

Caleb T. Hubbard — Cross

Q. Is it your best judgment that you started to go across and that you heard this noise or saw something, then you stepped back again?

A. I think that must have been — that must have been the way of it; yes, sir. I dodged back, I suppose.

Q. You are just a little in doubt about it at this time?

A. In doubt about what?

10 Q. In doubt about whether you had started to go across when you heard the noise or saw the object, that you stepped back again to get out of the way of it. Aren't you a little in doubt as to whether that is what happened or not?

A. As I say, I went across and I must have been pretty well across, because it don't take long to cross a single track. And I turned my head, I saw the car, but it was so close to me that I couldn't get out of the way of it, and I jumped back. Of course I didn't have much time to decide which way to jump, whether forward or backward, and I jumped backwards.

20 Q. You were going forward on an ordinary walk, I suppose?

A. Yes, sir.

Q. And it struck you then that you could retrace your steps and get back and avoid the accident better than go ahead?

A. I didn't have time to retrace any steps or anything. It was all done as quick as that. (Illustrating.)

Q. Well, you did attempt to get back, didn't you?

30 A. I think so; because it was on the east side of the car, I think, that struck me, or else I would have went clear underneath the car.

Q. Well, that would be a conclusion. Don't you know more positively, Mr. Hubbard, just what you did do there at that time?

A. I have told all that I know about it.

Q. Well, you have told us that you think you did so and so and that you must have done so and so.

40 A. I am not positive about it; no, sir.

Caleb T. Hubbard — Cross

Q. And your best recollection is it was the east side of the car that struck you?

MR. FARRELL: I object. It has already been answered. He has gone over it.

(Objection overruled.)

(Question repeated.)

10

A. Yes, sir.

Q. Now, Mr. Hubbard, do you recall how you fell after being struck?

A. Yes, sir; I fell away from the car.

Q. Towards the east side?

A. I fell right — well, I fell away from the car. I don't know, couldn't say whether I went towards the east side or the west side or how I fell, but I fell away from the car, so that the fender passed over me.

20

BY THE COURT:

Q. You mean towards the north?

A. Yes, sir.

Q. You fell towards the north?

A. Yes, sir; the car was coming from the south and I fell away towards the north.

30

BY MR. CARTON:

Q. Towards the roadway?

A. Well, I couldn't say whether it was towards the roadway or not.

Q. With respect to the track, did you fall towards the rail or towards the roadway east of the rail?

A. Well, I must have fell —

Q. Don't you know, Mr. Hubbard?

A. Well, I fell about on the track.

40

Caleb T. Hubbard — Cross

Q. On the most easterly rail?

A. The east side of the track, yes, sir.

Q. The most easterly rail?

A. Or as I say, if the wheels had passed over me as I laid there —

10 Q. Now, Mr. Hubbard, I haven't asked you to any more than answer my question. Do you say that you fell east of the east rail or on the east rail?

A. I fell just on the inside of the east rail.

Q. What do you mean by the inside, the east or the west of the rail?

A. I mean west of the east rail.

Q. And fell towards the street?

A. What is that?

Q. Fell towards the street, towards the roadway, fell over toward the roadway?

20 A. No, I fell north. I told you before I fell north.

Q. The car was going north?

A. Well, I fell north.

Q. You fell north?

A. Yes.

Q. And when you fell you were east of the east rail?

A. No, sir; west of the east rail.

Q. Well, now, are you sure about that?

A. Yes, sir.

Q. Then you fell between the two rails of the track?

30 A. Yes, but not in the middle, not exactly in the middle.

Q. You fell just inside the east rail, just west?

A. Yes.

BY THE COURT:

Q. What do you mean, Mr. Hubbard? I understood you to say that if the wheels had come on it would have passed by over the place which you indicated about on the west line. What do you mean by that?

40 A. Well, I mean if the car had — if they hadn't got

Caleb T. Hubbard — Cross

the car stopped, if the wheels had passed over me it would have come over about here, (indicating) to indicate about how I laid; in fact, how far I was under the car.

Q. Indicating about the waist?

A. About here. (Indicating.)

A. Yes, sir; because there was about that much of me —

Q. Do you mean that that portion of your body was north of the car or east of the car, which? 10

A. Well, I don't understand you exactly. Oh, east of the car, this portion from here up was east of the car.

Q. Indicating the waist line. From the waist up would be east of the car.

A. Your Honor understands that where the wheels are there is a running-board projects over quite a ways from the wheels. Well, as I say, there was about that much of me there, now the same as the wheels would hit me here.

Q. Indicating about the height of the armpits? 20

A. Yes, sir; outside the running-board. But the wheels are inside the running-board yet, may be a foot, I don't know exactly how far.

BY MR. CARTON:

Q. So I understand from this, Mr. Hubbard, that if the car had gone on and had not stopped, that the wheels would have gone over you?

A. Most assuredly; I was right on the track. 30

Q. You were within the line where the wheels would have gone over you?

A. Yes, sir.

Q. And do you recall just where you were under the car when the car actually had stopped?

A. Just where — well, no, not exactly, but I must have been. I was pretty well back towards the wheels, but I wouldn't try to describe just exactly where I was, because I was excited and hurt pretty bad, you know; and you 40

Caleb T. Hubbard — Cross

wouldn't look much to see where you were after you got out, you would think of getting out.

Q. Well, the wheels hadn't reached you, anyhow?

A. No, the wheels hadn't reached me.

Q. Was any one there with you that day outside of Mr. Megill?

10 A. Yes, there was a man with me but he didn't come up at all, he stayed right in the boat, and he didn't know anything about the accident. He told me he never even heard a car —

Q. I haven't asked you that. I asked you if anybody was with you.

A. Yes, he was with me, but he didn't come up. He stayed in the boat.

Q. You say that in March, the spring of the year, you made from \$25 to \$30 a week in your business?

A. No, sir; I didn't say that.

20 Q. What did you say?

A. I said from the middle of June till Labor Day.

Q. That is what you said or meant when you made the statement as to \$25 or \$30 a week, to start from June?

A. I said I made that from the middle of June till Labor Day.

Q. And that is the period that you described as the busy season?

A. Yes, sir; but I would like to state —

30 Q. Well, your counsel will give you an opportunity to state whatever you want to state. Mr. Hubbard, you have referred something to a rupture having recently developed.

A. Yes, sir; I never had a rupture before.

Q. When did that happen?

A. I commenced to notice it right around after I commenced to walk around on crutches.

Q. And when was that?

A. That was after I came back from the hospital. I came away from the hospital the 8th of May.

40 Q. And did you tell your counsel when you were describing your injuries to him that you had been ruptured?

Caleb T. Hubbard — Cross

A. Yes, sir.

Q. What else do you do in addition to working in the river, Mr. Hubbard? Any other occupation?

A. Why, just laboring work. Of course, as I say, from the middle of June until Labor day, I always follow the river, always work in the river; but at times outside of that I have worked around, laboring work, everything I can get to do.

Q. And in the river, the clamming business, what do you do, rake those clams out of the river, then put them in baskets? 10

A. We dig them. The soft clams we dig with a shovel and a hoe, then I have a car, have cars in the river, and we put them in the water until we get a chance to sell them, keep them fresh.

Q. How do you take them out of these cars? What do you put them in when you deliver them?

A. I sell wholesale to dealers and they come right there to the shore and get them. We simply put them in the boat and bring them ashore to dealers and sell them wholesale. 20

Q. What do you put them in, barrels?

A. Put them in baskets, and sometimes put them right in the boat and when we get ashore put them in their baskets. I sell wholesale mostly, hardly ever sell any retail.

Q. What sort of baskets do you put them in, bushel baskets?

A. Sometimes bushel baskets, sometimes half bushel baskets. 30

Q. From the boat to the car? What do you mean?

A. Or to the party who buys them. Mr. Megill had a car. We take them from the boat to the wagon or car or whatever it is.

Q. In those baskets?

A. In the baskets, yes.

BY THE COURT:

40

Caleb T. Hubbard — Redirect

Q. Do you have anybody help you, Mr. Hubbard?

A. Nobody helped me that day.

Q. No, but usually I mean during this busy season.

A. Yes, sir; my son.

Q. How old is he?

A. Nineteen years old.

10 Q. You pay him no compensation, I suppose? Do you pay him anything?

A. Oh, yes, I give him whatever I can afford to give him. Of course there is something coming to me for board. He is a man, almost, and whatever I feel that I can afford to give him I give him.

Q. How much does that average?

A. Oh, I don't know, four or five dollars a week, probably. It is according, as I say, if I am doing pretty good I give him more.

20 BY MR. CARTON:

Q. Did your son continue the boat business during your illness last summer, the clamming business?

A. No, sir.

REDIRECT EXAMINATION

BY MR. FARRELL:

30 Q. Mr. Hubbard, in crossing from Kling's dock to the road itself is there any other place you can cross than right here?

(Objected to.)

THE COURT: What is the objection?

MR. CARTON: It seems to be an omitted question. It is not material whether there is any other place or not.

40 I don't see the materiality of it.

Edward J. Megill — Direct

THE COURT: What do you think the materiality of it is?

MR. FARRELL: On the ground, your Honor, to show that this is a regular crossing. That seems to be denied here.

THE COURT: If the track was in the right of way, if it is in the roadway, he had a right to go in any part of the road, didn't he, a right to use any part of the road? I think it is immaterial. The objection will be sustained. 10

EDWARD J. MEGILL, sworn for plaintiff.

DIRECT EXAMINATION BY MR. FARRELL:

Q. Mr. Megill, do you remember the day on which Mr. Hubbard was hurt? 20

A. Yes, sir.

Q. Will you state what you did just prior to the accident?

A. Well, he called me on the telephone and said he had a couple of bushels of clams for me, and I guess I told him I would be down there in a half hour or something like that, an hour, and so I drove down to the end of the bridge, the north end; I drove just as close up as I could drive, so I would be well on the road. That would be right in front of the — I should think that would be where you would walk across the bridge; there is path across it, and I was well to the right, and that would give anybody a chance to go by. 30

BY THE COURT:

Q. Is that in the Borough of Avon?

A. Yes, I guess so. I am not sure but I should say so. 40

Edward J. Megill — Direct

BY MR. FARRELL:

Q. You parked your automobile just north of the bridge proper, did you?

A. Yes, sir.

Q. Alongside of the railing, is that correct?

A. Yes, sir.

10 Q. How does the railing run?

A. Well, it runs — let's see; coming in this way it runs — it is a down grade there a little, you know.

Q. How does it run from the bridge?

A. From the bridge I should say around 25 feet.

Q. Runs parallel with the trolley tracks?

A. North and south.

Q. And how far east of the trolley tracks would you say the railing was?

20 A. Well, the rail is not very far east of the trolley tracks. I should say around two feet. That is as near as I can judge.

Q. Now will you state exactly what Mr. Hubbard did as far as you saw on that particular occasion?

30 A. Well, we had been around there, I guess we had been around there ten or fifteen minutes and we had loaded the clams, I think it was two bushel, and put one bag on one side of the car, on the running-board, and one on the other side of the car; and we talked a few minutes about one trade or another, he generally does ask me about when I would want some clams, and I think I started the car sometime in the mean time there, just when I don't know. I had to crank it.

BY THE COURT:

Q. On which side of the automobile was Mr. Hubbard when he was talking with you?

40 A. I think when we finished, we had been working around — I think we had been across the road, I don't remember, looking at an old boat. I don't know whether

Edward J. Megill — Direct

he had, but I know I had. But I think he was on the east side of my car, and my car was headed south.

Q. Were you in the car at that time or standing there?

A. Well, I had been talking with him outside and inside both, for I know I talked to him — after I got in I sat down, I think he started to go away, and my car was running and I was looking around for my son, who was with me.

10

BY MR. FARRELL:

Q. You got into the automobile and Mr. Hubbard left?

A. Yes.

Q. In what direction did Mr. Hubbard walk?

A. He went north.

Q. Towards the track?

A. Well, that would be towards Asbury.

20

Q. What did you do then after he left the automobile?

A. Well, I guess I was whistling and looking around for my boy to get in the car with me. He was over fooling around among those old boats across on the other side of the road.

Q. Just state what you saw after that.

A. Well, I was looking north; I looked north; finally I turned around anyway and I saw Mr. Hubbard, he walks right down this — mostly behind me then it would be. Well, I looked around and first, I guess he looked south first, and I don't know whether he saw the car or not, but I did.

30

Q. You saw the car coming across the bridge?

A. Yes, sir.

Q. And how far distant was the car from you when you first saw it?

A. Oh, let's see. I should say fifteen or twenty yards when I first saw it.

Q. It was on the bridge itself?

A. Oh, yes.

Q. And did you look to see where Mr. Hubbard was? 40

Edward J. Megill — Direct

A. Yes, and then I think he was right behind me, mostly behind me, see? And then when I would be looking around, pretty soon the car was right opposite me and still he hadn't got to the crossing yet.

Q. Then state what you saw.

A. Well, he steps on the track, that is all.

Q. And the car struck him?

10 A. Yes, sir.

Q. About how far over the track was he when the car struck him, as you remember?

A. Well, as near as I can tell you I couldn't see him when he was struck, so he must have been pretty close to the east side of the track.

Q. Now when you were sitting in the automobile and the car was coming across the bridge did you hear any bell?

A. No, sir.

Q. Or gong?

20 A. Didn't hear anything that I remember of; no, sir.

Q. Did you hear any bell at any time before the trolley car struck Mr. Hubbard?

A. No, sir.

Q. The car in coming across the bridge at one time was right alongside of you, wasn't it?

A. Yes, sir.

Q. Within —

A. Three or four feet, four feet, maybe.

30 Q. You were sitting in the automobile when you first observed the car coming?

A. Yes, sir.

Q. That was somewhat up in the air, wasn't it?

A. The car or me?

Q. No, your automobile, your seat.

A. Well, sure; it is a runabout.

Q. You could see right over the railing, couldn't you?

A. Yes, sir; I could see over the railing.

Q. At the point where Mr. Hubbard was crossing the trolley track have you ever seen any one else cross there?

40 A. Oh, yes, crossed there many a time myself.

Edward J. Megill — Direct

- Q. Many times yourself?
 A. Yes, hundreds of them.
 Q. You have seen Mr. Hubbard cross there many times?
 A. Well, I don't know that I have seen him so many times.
 Q. You have seen him?
 A. Yes, sure.
 Q. Is there any other crossing from the road itself to the west to get to the river?
 A. No, sir; you would have to cross the track. Of course you can go just as far north as you want to to get across, but just as soon as you get to the end of that rail there is a track that everybody has to cross.
 Q. There is a telegraph pole at the end of the railing, isn't there?
 A. Well, really I don't know.

10

BY THE COURT:

20

Q. How high is the railing over the bridge, Mr. Megill?

A. Well, I should — the railing, what we are speaking about on the end there?

Q. Yes.

A. I should think that would be about four or five feet, as near as I can remember. You see I don't know exactly.

Q. And the trolley there over that bridge runs between two rails, does it not?

A. Spans; yes, sir.

Q. Now how high are those handrails as it goes across the bridge?

A. I don't know, sir.

30

BY MR. FARRELL:

Q. Are those spans higher than your head?

40

Edward J. Megill — Cross

A. Oh, you mean the bridge spans?

Q. Yes.

A. Oh, yes, they would be higher than your head. But this particular railing that we are speaking about down on the end of the bridge, that is not as high as that; that is low down; about as high, I judge, up there four or five feet.

Q. Now the road that runs from the bridge itself down to the end of the railing is on a down grade, isn't it?

10

A. Yes, sir; a slant.

CROSS EXAMINATION

BY MR. CARTON:

Q. Mr. Megill, you say you were there about ten or fifteen minutes with Mr. Hubbard?

20

A. I guess about that time in all, as near as I remember.

Q. And your boy was with you?

A. Yes, sir.

Q. And you say you had been over on the east side of the road?

A. I think I had; yes, sir.

Q. What sort of car did you have?

A. I had a Cole runabout.

Q. A top on it?

30

A. Yes, sir.

Q. What sort of a top?

A. Well, just an ordinary runabout top.

Q. Glass or curtains?

A. Well, it had curtains but had glass in them.

Q. And your car was stopped just north of the bridge and was facing south?

A. Yes, sir.

Q. And you were sitting in the car at the time this accident happened?

40

A. At the time the accident happened; yes, sir.

Edward J. Megill — Cross

Q. And you say you were concerned about your boy, listening for him or calling to him?

A. Yes, that was what kept me waiting so long.

Q. And he was over on the east side of the road?

A. I guess he was. I really don't know where he was.

Q. Now you say after you had finished with Mr. Hubbard, Mr. Hubbard was then on the east side of your car and started north?

A. Yes, sir. 10

Q. Your engine was running at that time?

A. Yes. Well, I don't know whether I had started it just then; I must have. I couldn't remember just exactly. I know I was sitting in the car with the engine running when this accident happened, because I was looking around waiting for my son to get in or the chances are I would have been away.

Q. Were you looking out on the east side or the west side?

A. Both sides and back. 20

Q. Both sides and back?

A. Yes, because I have to look where I would turn around, but I remember.

Q. And when Mr. Hubbard got by your car did he continue going north far or did he immediately turn west?

A. No, he had to go north a little further to get around this railing.

Q. To get around this railing?

A. Yes. 30

BY THE COURT:

Q. Did he go around the end of the railing?

A. Yes, sir.

Q. The north end of it?

A. Yes, sir.

BY MR. CARTON:

40

Edward J. Megill — Cross

Q. And that is a fact, that you say that is four or five feet high, that railing?

A. Well, I should say about that. I wouldn't say that is just right.

Q. And after he got to the end of the railing what course did he then take?

A. He went west.

10

Q. Went west?

A. Yes.

Q. Across the track?

A. Yes.

Q. Now you say you saw him at that point?

A. Yes, sir.

Q. You say you saw him looking south?

A. Saw him looking south and looking north both.

Q. You don't know whether he saw the car or not?

A. No, sir; I don't.

20

Q. You say you did see it?

A. I saw the car coming across the bridge; yes, sir.

Q. What attracted your attention to the car?

A. Well, I don't know unless I happened to see it.

I am sitting right here; here has got to come the car right down here, close right by me. You see about four or five feet I would be from the car. (Indicating.)

Q. Did you see it before it got up opposite you?

A. Yes, sir.

Q. Did you hear it?

30

A. I don't think so. I couldn't remember. I couldn't say.

Q. Your engine in your automobile was going at that time?

A. Yes, sir; it was running.

Q. You didn't hear any bell ringing?

A. No, sir; I didn't.

Q. And did you observe the car coming from the north about that time?

A. I don't think I did.

40

Q. Didn't see that at all?

Edward J. Megill — Cross

A. I don't remember. I don't remember anything about that car.

Q. You did observe that after the accident there was a car standing there?

A. Yes, sir.

Q. There is a slight curve of the track to the east after it gets over the end of the bridge, is there not?

A. I believe there is; yes, sir.

Q. Did you call to Mr. Hubbard when you observed his danger?

A. I don't know whether — I couldn't say. I don't think I did.

Q. The fact is did you call to him yourself?

A. No, I don't think so. I don't remember of it.

Q. Why didn't you?

A. Well, I don't know why. I don't think I did. Well, I might have halloood at him; I might have halloood at him, but I couldn't say.

Q. Did you think he could get out of the way or was going to get in the way of the car?

A. Well, when I first saw him I didn't think — when he was about — I don't know, about in the same distance from the track as I would be, you see, walking down this walk, and then the car was bending this way, maybe that was the reason he couldn't see it. I was up higher than he was, I could look over, and then this track comes down turning this way. That is the only reason I could ever account he couldn't see the car, because I could see it plain as day.

Q. Do you know he couldn't see the car?

A. No, I don't know whether he could or not. But that is the only reason that I can see that he couldn't see it.

Q. Did you think at that time that he couldn't see the car?

A. No, I didn't think anything about it.

Q. You didn't call to him?

A. No, sir; not as I remember. As I say, I might have halloood. I don't know whether I halloood or made any effort. I know I was right there pretty quick, but I

Edward J. Megill — Cross

don't know what way I got there, but I know I was there and helped to pull him out from under the car.

Q. When Hubbard left, after he was talking with you and after he proceeded north, did he take a short turn west to go across the track?

A. Well, he had to go about fifteen feet, I should say.

Q. North?

10

A. North before he could get to the end of this railing.

BY THE COURT:

Q. How far?

A. I should say around fifteen feet from me.

BY MR. CARTON:

20

Q. And then he turned directly where, across the track?

A. Yes, sir.

Q. And how far is it, about, from the end of this railroad where Hubbard went across from the end of that bridge proper, the wagon and trolley bridge?

A. Well, I don't know. It may be. I couldn't tell you. I suppose 25 or 30 feet; and that may be too short. I don't know about that. I am just guessing at that distance.

80

Q. And this rail that you have referred to extends all the way from the end of the bridge north to this point where Hubbard went around?

A. I think it does; yes, sir.

BY THE COURT:

Q. What kind of a rail is that?

A. If I remember right, it is just an ordinary fence rail, like you would see anywhere along the road, to protect a car from going off.

40

Q. Just one rail on the top?

Edward J. Megill — Redirect

A. One rail on top and then I think there is another on the side, like that.

Q. Just two rails?

A. I think it is like that. That is the way it comes to me in my mind.

Q. Mr. Megill, do I understand that the rear of your automobile was about 15 feet from the north end of that fence or rail?

A. Yes, sir; from the north end. It might be just a little further than that. If I should say any I should say further, but that is as near as I can put it.

Q. And Mr. Hubbard was walking directly north?

A. Yes, sir.

Q. Now which way was he facing at the time you say the trolley car was opposite your automobile?

A. Which way was he facing at the time the trolley car was opposite my automobile?

Q. Yes; was he still facing north or did he then turn towards the west?

A. I think he had about made the turn, just about to turn.

10

20

REDIRECT EXAMINATION

BY MR. FARRELL:

Q. Mr. Megill, this railing you speak of had upright posts in it, didn't it?

A. Oh, yes.

Q. All the way up to the bridge?

A. I suppose it did; yes, sir.

Q. About how fast was the car going when it went by you?

A. It wasn't going very fast.

Q. About how fast?

A. Well, I don't know. I should say five or eight miles an hour.

Q. And when it struck Mr. Hubbard how fast was it going, had it slowed down any?

30

40

Edward J. Megill — Redirect

A. Well, really I don't know that. I couldn't say whether it went any slower — yes, I reckon it would at that time.

Q. Going about five miles an hour?

A. I should say that. I know the car was going slow.

10 Q. About how many feet was Mr. Hubbard from the track when he looked for the car from the south?

A. I should say he was about four feet, somewhere around there.

BY THE COURT:

Q. And where was he?

A. When he looked, why, he was right by the end —

Q. Not where he would be but where was he?

A. At the end of the railing.

20 Q. He had gotten to the end of the railing when you saw him look south?

A. Yes, sir.

BY MR. FARRELL:

Q. You are under subpoena, aren't you, Mr. Megill?

A. Yes, sir.

30

MR. TAYLOR: If your Honor please, it seems very important to me that it be determined whether or not where this man was hit was a public crossing in the usual place where people cross there to go down to the river; and to make the distinction, it is true it was in the public road, but the rule is somewhat different as to the degree of care, etc., which a trolley company shall use at a crossing which is recognized and has been used from what they are in the middle of a block. Therefore we would like, if your Honor

40 will permit, as an omitted question, to have your Honor re-

Edward J. Megill — Redirect

consider the ruling of a few moments ago that this could not be omitted.

(The court examines the statutes.)

THE COURT: What do you think of that, Mr. Carton?

MR. CARTON: Well, I don't know just the application, your Honor, what Mr. Taylor's application was. To produce a witness? 10

THE COURT: Of course there is no proof upon it, but as I recollect that situation, this statement would not apply, because there are no houses there, are there?

MR. TAYLOR: If your Honor please, through that district, as I interpret the statute, it does not mean that because in a congested district there may be a vacant lot at every hundred feet of space, but it determines more the character of the neighborhood, etc. As a matter of fact, we think that we can prove to your Honor that there are a number of houses and that the average is much less than one hundred feet in the neighborhood. We may not be able to, but that is the offer, if your Honor please. 20

MR. CARTON: We claim, your Honor, that there is no crossing there at all, nothing like a crossing. All along the west side of the track people may go off the road down on the river anywhere for blocks along there, the same as they may on the east side of the road. There is no fence to keep them from doing it. But there is no crossing, there is no place to go to or fro. And even though they could within the 1915 act, it would not come within it anyhow, because there are no houses from Belmar to where the Avon station is, and it is our information that there isn't any crossing there at all. I know that looks like a crossing; people do go down on both sides, but they do all along the roadway. The river is adjacent. 30 40

Dr. Charles T. Prout — Direct

THE COURT: It is not your claim that the trolley tracks are not within the lines of the public road, that is, that they run on a private right of way?

MR. CARTON: Your Honor, I am in some doubt about it. I think it is.

10 THE COURT: Well, then I think if there is a question about that then counsel ought to be held to show first, if you claim that the statute applies, that it is necessary first to show that it is a location where the statute would apply according to these terms.

MR. TAYLOR: Then we may offer that later?

THE COURT: If it is shown.

20

DR. CHARLES T. PROUT, sworn for plaintiff.

DIRECT EXAMINATION BY MR. FARRELL:

Q. Doctor, you are duly admitted to practice as a physician and surgeon in this state?

A. I am.

30 Q. On the 25th of March, 1916, did you see Mr. Hubbard?

A. Yes, sir.

Q. Did you examine him at that time?

A. I did.

Q. Will you state to the court and jury what you found?

A. He had a double fracture of the left tibia and fibula and a fracture of the right clavicle.

40 THE COURT: You see you will have to tell us that in English.

Dr. Charles T. Prout — Direct

A. Mr. Hubbard's statements were correct, a fracture of the left leg and right shoulder.

BY MR. FARRELL:

Q. A double fracture of the left leg?

A. Yes, sir.

BY THE COURT:

10

Q. Right shoulder, did you say?

A. Right shoulder.

BY MR. FARRELL:

Q. What other injuries did you find, Doctor?

A. Why, they consisted of superficial abrasions which I did not think required any special treatment.

20

Q. What treatment did you give Mr. Hubbard at that time?

A. Why, the first few days his leg was put in a fracture box. It was applied to relieve as much of his pain as possible, and I believe we set the shoulder.

BY THE COURT:

Q. Why do you say the shoulder, Doctor, when you say it was the clavicle?

30

A. You asked me to explain it.

Q. But the clavicle is the collar bone, isn't it?

A. Yes, that is what was fractured. He calls it the shoulder.

Q. But you wouldn't call it the shoulder?

A. No, sir.

BY MR. FARRELL:

Q. How long was he under your treatment, Doctor? 40

Dr. Charles T. Prout — Direct

A. He was in the hospital, I believe, from March until May. I believe his dates are correct.

Q. How long did his leg remain in the plaster cast?

A. I think about nine or ten weeks.

Q. What does the process consist of, setting a leg? Exactly what do you do, Doctor?

10 A. There was quite a little swelling there at the time and it was not considered advisable to attempt to reduce the fracture at that time. That is, we used applications of ice to reduce the swelling, used a fracture box to hold the leg in as good a position as possible, simply a box with three sides, three sides of a box padded with cotton to immobilize as best we could for the time being, and I think it was kept in a device of that kind for three to five days; I don't know absolutely how long, but it was between three and five days.

Q. And then what?

20 A. Then we attempted to reduce the fracture, that is, get the bones in apposition, and we did not get as good a result as we wanted to, so we used an anesthetic, gave Mr. Hubbard some gas and oxygen and attempted it again, and at that time I believe we applied a plaster cast.

BY THE COURT:

Q. What was the result the second time?

A. That plaster cast was kept on —

Q. No, what was the result the second time?

30 A. It was the same as the first time. It was practically all that was done for him. That was the final. He has had different casts on, but that was the setting of the leg.

Q. My question did not relate to the cast, the results to the leg.

A. Considering the character of the fracture I would say that he had a good result.

BY MR. FARRELL:

40 Q. Did you examine Mr. Hubbard on Friday of last week?

Dr. Charles T. Prout — Direct

A. Thursday.

Q. Thursday of last week?

A. I did.

Q. What did you find then with reference to his leg?

A. He has a shortening of the left leg of about one-half inch. The leg is a trifle smaller in circumference than the right leg.

Q. What do you find with reference to his shoulder?

A. He has union and I consider that he has a good functional result. 10

Q. Did you find any other conditions?

A. He had a hernia, inguinal hernia, on the left side.

BY THE COURT:

Q. By that you mean a rupture, don't you?

A. A rupture; yes, sir; excuse me. 20

BY MR. FARRELL:

Q. In your opinion, Doctor, is the hernia a proximate result of the injuries sustained by Mr. Hubbard on March 25th?

A. Mr. Hubbard was not under my care. I have not seen Mr. Hubbard since June, from June until last Thursday. There is such a thing as a hernia being the result of a fall, but in those conditions as a rule it comes on at the time of the fall with excruciating pain. That is one of the etiological causes of hernia. 30

Q. You heard Mr. Hubbard testify that he did not feel this rupture until he had taken up the use of crutches?

A. Yes.

Q. Up to that time of course he had been in bed down at the hospital?

A. He had.

Q. Would that have any effect on your answer?

A. I think if the hernia was produced by that fall that he would have pain nevertheless. 40

Dr. Charles T. Prout — Direct

Q. But is it not a fact, Doctor, that it is apt to show up after he began to use his body, as in this case?

A. He complained of no pain, no evidence of a hernia there while in the hospital.

BY THE COURT:

10 Q. Well, Doctor, what is your opinion as to whether the hernia was a result of the accident?

A. I don't want to make an expression of opinion. I am not an authority on hernia. It is a question in my mind as to whether it is or is not the result of it. I don't know. You ask me the etiology of hernia and I can tell you. You can draw your own conclusions as to whether it might be the possible result of it.

Q. You want us to give an opinion that you can't?

20 A. There are other things, if you want me to discourse on the subject, to tell you other factors that might tend to produce hernia, and I can do that.

BY MR. FARRELL:

Q. At the time you examined Mr. Hubbard Thursday last who was present?

A. Dr. James F. Ackerman, Dr. Bishop, of New York, and yourself.

Q. They examined Mr. Hubbard also, didn't they?

30 A. They did.

Q. You had a conversation about this hernia?

A. We talked things over in the office; yes, sir.

Q. What was the substance of that conversation?

(Objected to. Objection sustained.)

MR. TAYLOR: If your Honor please, I don't know if the foundation has been properly laid yet, but were we able to show to your Honor that Dr. Bishop, who is a great
40 specialist of New York on this subject, in the presence of the

Dr. Charles T. Prout — Direct

physician of the defendant company and who brought him there, and he was employed by the company, was of the opinion that the proximate cause of this injury was the accident, were we able to show that could it not be admitted? Because we learn in many ways —

THE COURT: I am inclined to think that the very statement is quite improper, Mr. Taylor. Certainly if you knew of a physician who would express such an opinion as that he was available to you and you haven't brought him here. 10

(Mr. Taylor consults with the court at side bar.)

MR. TAYLOR: There is no question that the doctor of the company examined him at our request and by our right, with his own counsel and his own physician, at his office; no question that he examined him on Friday or Thursday, whenever it was. 20

Q. What conclusion did you come to, Doctor, after you examined Mr. Hubbard on Thursday as to this hernia?

(Objected to.)

THE COURT: Well, what was your opinion, I suppose, as the result of that examination, is what it means.

MR. FARRELL: Well, I want to show that he had a conference with these other doctors, that is really what I want to show. 30

THE COURT: Well, that has appeared, that he had a conference. What his conclusion was is substantially the same as asking him his opinion as the result of his examination. Of course his opinion as the result of that conference would not be proper. His opinion as the result of the examination would be proper. 40

Dr. Charles T. Prout — Direct

Q. What is your opinion, Doctor, as to this hernia?

THE COURT: I suppose you mean to say as to whether or not it was the result of the accident?

MR. FARRELL: I do, your Honor.

10 A. I understand Mr. Hubbard denies ever having had a hernia before.

THE COURT: Now that will be stricken out.

A. I advance this as the cause of hernia. A man put in bed becomes emaciated, his abdominal muscles weak, and the results of lack of exercise or poor food might be to be susceptible to a hernia, it might develop it as a result of that, as a result of illness.

20 Q. That was Mr. Hubbard's condition, wasn't it?

A. That is a question, as to whether you would call him —

Q. I mean his condition at the time —

A. He was put in bed.

Q. He was in a weakened condition, wasn't he, as the result of the injuries?

A. Well, his vitality would not be as good, no, as it was before.

30 Q. You saw him down at the hospital, didn't you, Doctor?

A. I did.

Q. He was in a weakened condition at that time, wasn't he, after he had been there a month or so?

A. Yes, he was not as strong as he was before that.

Q. Doctor, in your opinion do you think that Mr. Hubbard will ever regain the normal condition in the left leg as to length?

A. No, I think the result at the present time is permanent.

40 Q. Absolutely permanent?

William Lokerson — Direct

A. I think so.

NO CROSS EXAMINATION

RECESS TILL 1.30 P. M.

10

(Trial of the cause resumed at 1.30 P. M.)

WILLIAM LOKERSON, sworn for plaintiff.

DIRECT EXAMINATION BY MR. TAYLOR:

- Q. Mr. Lokerson, are you a resident of Belmar? 20
 A. Yes.
 Q. And you have lived there how long?
 A. In the neighborhood of twenty years.
 Q. Are you acquainted with the neighborhood where
 this accident occurred?
 A. Living a short distance from it.
 Q. You heard the testimony this morning as to where
 the man was hit, etc.?
 A. Yes, sir.
 Q. Do you know as a matter of fact whether or not 30
 this place is used as a crossing to get down to the river, to
 the boathouse, and if so how long has it been used?

(Objected to. Objection sustained.)

THE COURT: Now, Mr. Taylor, I am not going to say that that may not become of some importance through the case. As I have before indicated, if it be shown that this is a location which is covered by the statute, then that may be material to the case.

40

William Lokerson — Direct

(Counsel consults with the court at side bar.)

(Question repeated.)

MR. CARTON: I object to the question as irrelevant, incompetent and immaterial.

10 THE COURT: The objection will be overruled. I understand that it is not admitted that the point of collision occurred in the public road. If that were an admitted fact in the case then I should think it would be quite immaterial whether this was a point of crossing, unless it should appear to be such a crossing as is contemplated in the 1915 and 1916 statutes constituting our traffic act; but with that not admitted it may be important to find if this be a private right of way, to show that at this point of crossing it was persistently used and regularly used by the public in such a way as to constitute an implied invitation to the public to use
20 the crossing at this particular point; because then the presence there of the plaintiff would have been that of a trespasser and the company would have owed no duty to him except to abstain from willful injury. With that view of it I am inclined to think it may be relevant to inquire as to the use which has been made of this particular place by the public to cross and recross; and therefor the objection will be overruled and an exception will be noted.

30 (Objection noted for defendant as ground of appeal.)

A. About eight or ten feet north of the platform that Mr. Kling has out there is a road which has been there twenty years if not longer. The bank is cut down so that a wagon can be driven down to the edge of the river.

Q. And is that on the west side of the track?

A. That is on the west side of the trolley track; yes, sir.

40 Q. And it crosses the trolley track at what point?

William Lokerson — Direct

A. About eight or ten feet north of the boathouse there, about eight or ten feet north of the platform Mr. Kling has there.

BY THE COURT:

Q. Well, this railing that has been spoken of, does that run up past Mr. Kling's boathouse?

A. A platform there to get off the trolley car, yes, railed in. 10

Q. I thought the boathouse was on the bridge.

A. Well, Kling's is right on the north end of the bridge, on the west side.

Q. You mean that there is an opening in this railing along there?

A. No, about eight feet from the end of that there is a road, a public road, or at least it is not a public road —

Q. You mean eight feet from the railing?

A. About eight feet from Mr. Kling's railing or platform; yes, sir. 20

BY MR. TAYLOR:

Q. Now, Mr. Lokerson, do you know for a great many years how the public has gotten to that boathouse which was formerly used as a saloon, etc.?

A. With a horse and wagon?

Q. No, on foot, pedestrians; right across the end of the bridge, if they had to cross the trolley track. 30

A. If they went from the south, that is, from Belmar over, they would have to cross it.

Q. No, from the Avon side.

A. From the Avon side they would have to cross the track also.

Q. And to get to this boathouse you have got to cross the track?

A. Yes, sir. 40

William Lokerson — Direct

Q. There is no obstruction there to keep one from going right down, is there? I mean it is open?

A. There is an opening on the east side. The west side is railed in, a platform.

Q. What do you mean by the west side of the platform railed in?

10 A. It used to be a hotel there and there was a platform built with a guard all the way around it, so that they would have to follow down the steps to get into the bar.

Q. To get into the bar?

A. Yes.

Q. And there is an opening there for people to go down?

A. Yes.

20 Q. I have led you off a little myself. If one is directly opposite the boathouse on the east side of the track and wants to go to the boathouse where do they have to cross or where do they cross? Where is the ordinary?

A. If they are right in front of the boathouse, or probably they would be on the bridge, they have got to step right around on the end of the bridge over the abutment on that end.

Q. Not on the bridge?

A. They have got to get off the bridge to get into the pavilion.

30 Q. May I ask this question? Did you hear the testimony this morning as to where the plaintiff was hit, where he was when he was hit?

A. I didn't pay much attention to it. I heard what he said.

THE COURT: Well, he doesn't testify himself where he was, but Mr. Megill says that it was at the end, just at the end of the railing.

40 Q. Mr. Lokerson, do you know as a matter of fact whether or not the main street commences at the end of the railing?

William Lokerson — Cross

A. The main street commences at the end of the bridge. The railing extends north beyond the end of the bridge.

CROSS EXAMINATION

BY MR. CARTON:

10

Q. Mr. Lokerson, I didn't just understand the first part of your testimony, that you refer to a distance of some eight feet. What had that reference to?

A. The wagon road is about eight feet from the end of the platform that leads down to the edge of the river.

Q. And is this platform that you are referring to the platform in connection with the boathouse that is there?

A. Connected with Kling's boathouse; yes, sir.

Q. Kling's, the north end of the bridge? That is the boathouse at the north end of the bridge? 20

A. Yes, sir.

Q. And Riggs' boathouse has been referred to. Where is that?

A. That is what they used to call the Island House, in the middle of the bridge.

Q. That is further on towards Belmar?

A. Yes.

Q. And you say the patrons approaching Kling's boathouse going from Avon or Belmar, either one, I suppose, are obliged to go over the trolley track? 30

A. Yes, sir.

Q. Up at their platform?

A. Yes, sir.

Q. Do you know whether or not it is a fact that west of the trolley track there is a railing or a fence fencing off the river or the meadow?

A. Connected with the pavilion only.

Q. Connected with the pavilion only?

A. Yes, sir. 40

William Lokerson — Cross

Q. So that a person going west from Main Street over this track is obliged to get access to the river through this pavilion?

A. Go through the pavilion. They can go around the end of the platform there; that north end of it is open, open all the way up there for a block or more.

Q. And get down to the river that way?

10 A. Yes, sir; that is where the road is, Mr. Carton.

Q. Does this railing on the west side of the track extend up to the platform, extend south to the platform?

A. Yes.

Q. And then is there a railing hooking up with it running on at right angles with the river fencing off the platform?

A. I am not sure whether the railing connects right on to the main building or not.

20 Q. When did you observe this situation there last, Mr. Lokerson?

A. I have been up there several times this past week.

Q. Went up with a view of observing just what the conditions are that existed there?

A. I am just taking it from my memory now. I haven't observed it at all. I don't know anything about the case.

Q. You live over in Belmar and ride back and forth in the trolley car?

A. Yes, sir.

30 Q. And haven't given any special observation recently?

A. No, sir.

Q. Nor do you know just exactly the conditions that existed there on March 25th, do you?

A. No, sir.

Q. There has been a guardrail or railing spoken of extending from the end of the bridge down north for some distance. Is that a continuation of the railing fencing off the foot bridge from the trolley track over the bridge?

40 A. I think there is a short piece from the bridge itself, a hand rail, extends up there some six or eight feet.

William Lokerson — Redirect

Q. Do you know whether or not that is a continuation of the rail that goes all the way across the bridge?

A. It is not the same structure, but I think it is continued on by the parties who built the bridge, or at least for the same purpose, for safety.

REDIRECT EXAMINATION

10

BY MR TAYLOR:

Q. Did I understand you then, Mr. Lokerson, that in front of the platform and the entrance to the boathouse there is no obstruction whatever?

(Objected to. Objection sustained.)

MR. TAYLOR: Would it be proper to ask first — 20

THE COURT: Well, of course the objection to your question was that it was a leading question.

Q. Is there any obstruction between the east side of the track and the platform of the boathouse?

A. Only that short continuation of the rail of the bridge.

Q. How far does that continue?

A. I don't think it is over six or eight feet at most. 30

Q. How far does the platform run by the boathouse?

A. It extends out ten feet, I would say, probably, further north.

BY THE COURT:

Q. I don't quite understand it yet, Mr. Lokerson. Do I understand now that the railing which is between the roadway and the trolley track only extends eight or ten feet north of the bridge? 40

William Lokerson — Recross

A. Yes, sir.

Q. That is it?

A. Yes, sir.

Q. Then is there any railing which extends north of the bridge on the west side of the trolley track?

A. Around this platform which was built there for the purpose of going fishing.

10 Q. Only the platform? The platform extends north of the bridge, does it?

A. Yes, sir.

Q. How far north of the bridge?

A. I would say eight or ten feet.

Q. Eight or ten feet north?

A. Yes. It was built there by Mr. Kling when he opened his boathouse, or whoever opened previously to him.

Q. And is a platform designed to permit people to alight from the trolley car?

20 A. From the trolley car, to get down to the boathouse.

REXCROSS EXAMINATION

BY MR. CARTON:

Q. Do you say there is no fence erected on the west side of the track north of this platform?

A. North of the platform?

30 Q. Yes.

A. Not to my knowledge; no, sir.

Q. Was it your observation that this railing that you refer to fencing off the bridge from the trolley track is only some eight feet long?

A. Eight to ten feet, I don't think it is over ten feet.

Q. Don't you know as a matter of fact that it is some thirty feet?

A. I don't think so.

Q. You haven't made any measurement?

40 A. No, sir; not at all.

Edward J. Megill recalled — Direct

- Q. Or any specific observation?
A. Not at all.

EDWARD MEGILL, recalled for plaintiff.

DIRECT EXAMINATION BY MR. TAYLOR:

10

Q. Mr. Megill, do you remember the location of the boathouse, the railings, etc., as of March 25th last, at the time this accident occurred?

A. Pretty good; yes, sir.

Q. Was there any obstruction, any fence or railing or anything between the east side of the railroad track and the boathouse to prevent one from passing from one to the other?

A. You have to go back of this little railing, you know, and then there is an opening, passageway. But you have got to go back to this railing. There is a railing there I guess about twenty-five feet long on the side, and half way between that, you have to go out and go back about fifteen feet, and then there is a bend to go into the boathouse.

20

BY THE COURT:

Q. You think the railing between the road and the trolley track is how long?

A. The railing between the road and the trolley track? Well, twenty-five feet; because I didn't stand all the way up close and the railing was still behind me, and I had the car, and then you get to the end of this railing and then go across.

30

Q. I understood you to say that the rail was still fifteen feet behind you?

A. Well, about fifteen feet.

Q. Now is there any railing on the west side of the track?

A. That I couldn't say. I know there is steps to go

40

Edward J. Megill recalled — Direct

down. I have been down there a hundred times myself personally. You go right straight across the end of this railing and it was about ten or fifteen feet behind my car where this opening was, and I was alongside of this railing, that is, east of the railroad track.

Q. Is there anything at the end of this railing to indicate that there is a crossing?

10 A. Well, there is steps to go down, the end, right at the end of the railing; that is just a sidewalk, I suppose. That is a continuation of the sidewalk going over the bridge along there.

Q. I mean across the track, if there is anything to indicate there. You may object to this question, because it is in the line of what you objected to.

20 MR. CARTON: I assume under our objection, that my objection goes to this line of questions on the crossing, and I did not think it necessary to take it up specifically.

THE COURT: The objection will be understood as going to this question and an exception will be noted.

Q. The question is if there is anything there to indicate that it is a crossing, like a planking or a well beaten path or anything of that kind.

A. Well, that I couldn't say, sir.

30 BY MR. TAYLOR:

Q. Have you seen people crossing back and forth there?

A. Yes, sir.

THE COURT: Oh, he said that on his examination when he was on the stand before.

Q. You know these premises for the last twenty years?

40 A. Yes, sir.

Edward J. Megill recalled — Cross

Q. Who had it prior to Mr. Kling?

A. A fellow named Brand there and Tom Kelsey had a saloon there.

Q. And the entrance to that saloon was about the place of this crossing?

A. Yes, I judge so.

Q. And to enter their saloon you had to cross the railroad track?

A. Yes, sir. 10

Q. The one which we are referring to?

A. Yes, sir.

Q. Where does Main Street commence, do you know, Main Street in Avon?

A. I suppose it commences at the bridge.

Q. Commences at the bridge?

A. Yes, sir.

CROSS EXAMINATION

20

BY MR. CARTON:

Q. Do you know the most westerly line of Main Street, where it commences at the bridge, where that is located?

A. I don't unless it be right by the bridge next to the sidewalk, that is all I know.

BY THE COURT:

30

Q. Is the sidewalk east of the track or west of the track?

A. East.

BY MR. CARTON:

Q. And the sidewalk is west of the wagon bridge and east of the trolley track?

A. I suppose between the two.

40

Edward J. Megill recalled — Cross

MR. TAYLOR: The witness is mixed up, I think, your Honor. I think he is referring to the sidewalk of the bridge.

THE WITNESS: Yes, sure. I don't know that there is any sidewalk there.

10 Q. Well, the footpath over the bridge, the path over the Shark River bridge, that is on the west side of the roadway, is it not?

A. Yes, I guess that is right.

Q. East of the trolley track?

A. East of the trolley track.

Q. And just how many feet east of the bridge do you say the trolley track is?

A. East of the bridge?

Q. East of the footbridge.

20 A. East of the footbridge?

Q. Yes.

A. Well, I don't —

Q. West of the footbridge.

A. I couldn't say. I should say five or eight feet. I am not sure about that.

Q. And parallels the footpath all the way across the bridge? Now what have you to say of this rail that you have referred to as being probably some twenty-five feet long? Is that what is a continuation of the guardrail on the west side of the footpath of the bridge?

30 A. On the west side?

Q. Yes. The guardrail that is on the west side of the footpath over Shark River Bridge, is the rail that you have been referring to a continuation of that rail?

A. Let's see. I don't know that. That rail goes right off the bridge. I think that is from the west side of the footpath.

Q. And it is a continuation of the rail on the west side of the bridge all the way across, isn't it?

40 A. I don't know about that, I suppose it must be.

Edward J. Megill recalled — Cross

Q. You don't know about that?

A. No, I know it comes from the bridge on down. I know you have to go around that to get across. That is all I know.

Q. Well, that is the same rail that continues over the bridge, or you don't know?

A. Well, it might be fast together. I couldn't say.

Q. I only want to know what you know from what you did observe. 10

A. I don't believe I did.

Q. Now in regard to just west of the track, there is a railing there, isn't there, fencing off —

A. West of the track?

Q. Yes.

A. Not where you go down those steps.

Q. No, but just north of the steps?

A. Just north of the steps? I don't know, sir. All I know is I have drove up there many a time and stopped there and got out to go down the steps. I couldn't tell you about the rails. 20

Q. When you go down to this boathouse?

A. Yes, been down there lots of times.

MR. FARRELL: If your Honor please, interrogatories were served and I desire to read them in evidence.

THE COURT: You served interrogatories? 30

MR. FARRELL: Yes, sir.

THE COURT: And they have been answered by the company?

MR. FARRELL: Yes, sir.

THE COURT: All right. 40

Interrogatories

(Mr. Farrell reads second, fourth, fifth and sixth interrogatories and answers as follows:)

INTERROGATORIES

To DURAND, IVINS & CARTON, Attorneys for Defendant.

- 10 PLEASE TAKE NOTICE that the plaintiff demands that you cause to be served on him, within the time prescribed by law, the answer under oath of the defendant, to the following interrogatories:
- FIRST INTERROGATORY: What is the name and address of the motorman who was operating the trolley car at the time of the accident?
- 20 SECOND INTERROGATORY: How many miles per hour was the car going at the time it struck the plaintiff?
- THIRD INTERROGATORY: Did the motorman ring any bell, or make other signal, before the accident? If so, how many feet distant from the plaintiff was the car at the time said bell or signal was given?
- 30 FOURTH INTERROGATORY: How far distant from the plaintiff was the motorman when he first saw the plaintiff?
- FIFTH INTERROGATORY: Immediately prior to the accident, was the trolley car under complete control of the motorman?
- SIXTH INTERROGATORY: How far did the trolley car carry the plaintiff after the latter was struck by the car?
- 40 SEVENTH INTERROGATORY: What is the name

Answers to Interrogatories

and address of the motorman who was operating the trolley car which was approaching from the North at or prior to the time of the accident?

Dated January 19, 1917.

STEWART A. FARRELL,
Attorney for Plaintiff.

10

ANSWERS TO INTERROGATORIES

TO STEWART A. FARRELL, Attorney of Plaintiff.

PLEASE TAKE NOTICE that the following are answers to the interrogatories served on us January 19th, 1917:

ANSWER TO FIRST INTERROGATORY: George Irons, Bradley Beach, New Jersey.

20

ANSWER TO SECOND INTERROGATORY: Not over 5 miles per hour.

ANSWER TO THIRD INTERROGATORY: Yes; by ringing gong, and also shouting aloud to plaintiff. The motorman rang gong coming over Shark River Bridge, about 125 feet south of accident, and also rang gong when leaving bridge, about 30 feet before place of accident, and rang gong and shouted out to plaintiff when he observed plaintiff about stepping on track in front of his car.

30

ANSWER TO FOURTH INTERROGATORY: About ninety feet.

ANSWER TO FIFTH INTERROGATORY: Absolutely.

ANSWER TO SIXTH INTERROGATORY: Eighteen feet.

40

Answers to Interrogatories

ANSWER TO SEVENTH INTERROGATORY:
M. Lavin.

DATED, January 24th, 1917.

DURAND, IVINS & CARTON,
Attorneys of Defendant.

10

ANSWER TO ADDITIONAL INTERROGATORY:

The car was a 28 foot double truck car, No. 211.

DURAND, IVINS & CARTON,
Attorneys of Defendant.

20 STATE OF NEW JERSEY }
MONMOUTH COUNTY } ss.

GEORGE B. CADE, of full age being duly sworn according to law on his oath says; that he is secretary of the defendant, in the suit in which the foregoing answers to interrogatories are made; that he is familiar with the facts in the case, that the facts set out in the said answers and the statements made therein are true to the best of his knowledge, as he verily believes.

30

GEORGE B. CADE

Sworn and subscribed to before me
this 27th day of January, 1917.

ANNA F. WHITLOCK,
Notary Public of N. J.

40 MR. FARRELL: There is an additional interrogatory which has been answered, which I wrote out, I did not put in the form of an interrogatory. I have the answer here.

William Fisher — Direct

My recollection is, subject to Mr. Carton's approval, "What number and type of car struck the plaintiff?"

MR. DURAND: Car No. 211, twenty-eight feet long, double truck.

WILLIAM FISHER, sworn for plaintiff.

10

DIRECT EXAMINATION BY MR. TAYLOR:

Q. Mr. Fisher, you were formerly a motorman for the Atlantic Coast Electric Railway Company?

A. Six years and a half.

Q. What other experience have you had as a motorman?

A. I had twenty-two years' experience as a railroad man, but four other years as a motorman.

Q. Where?

20

A. On the Schuylkill Valley Traction Company.

Q. You worked for the Atlantic Coast Company how many years?

A. Six and a half years.

Q. Do you know the type of car referred to here as the twenty-eight foot double truck car No. 211?

A. Yes, I know the car.

Q. Have you ever run that type of car?

A. Yes.

30

Q. Assuming that the car was running not over five miles an hour and was under perfect control, what is the quickest time you could stop that car?

A. In five miles?

Q. Yes.

A. Ten to fifteen feet; not with hand brakes, though.

Q. Not with hand brakes?

A. No.

Q. Supposing you used what is known as the juice or reverse?

40

William Fisher — Direct

A. Reverse?

Q. Could you stop it in ten feet running at that rate of speed?

(Objected to as leading. Objection sustained.)

- 10 Q. What methods have you of stopping a car?
 A. What methods?
 Q. Yes.
 A. On the Atlantic Coast you have only hand brakes, hand brake and reverse.
 Q. With the hand brake how quickly could you stop?
 A. Oh, a car length, running that speed.
 Q. About how far is that?
 A. How far a car length? About twenty-eight to thirty feet.
- 20 Q. Using the other method to which you have referred how long does it take to stop?
 A. You could bring a car down running at slow speed in a very short space, I should say within ten to fifteen feet.
 Q. If the car is in good working order can you bring it down in ten feet?
 A. In good working order, yes, at a slow rate of speed.
 Q. You are familiar with this location, are you, Mr. Fisher?
- 30 A. Yes, but I didn't always run on that route.
 Q. But you are familiar with this location?
 A. Yes.
 Q. You have run over that a great many times?
 A. Yes.
 Q. And you know where Kling's boathouse is?
 A. Yes.
 Q. Do you know the location of the tracks?
 A. I know the location of the tracks; yes, sir.
- 40 Q. I want to ask you, is there any obstruction between Kling's boathouse and the east side of the track, immediately in front of Kling's boat house to the east side of the track?

William Fisher — Direct

A. The only obstruction is the rail on the end of the bridge, that is, on the east side, the east side of the track.

Q. Is that north or south of the entrance to Kling's boathouse?

A. North.

Q. Have you seen people passing backward and forward across the track?

A. People do to get across the track to get on the car.

Q. But they have to go across the track to get into Kling's boathouse?

A. They have to cross the tracks to get into the boathouse.

Q. During the summer time how frequently would you see people crossing there?

A. Oh, quite often.

Q. What do you mean by quite often?

A. The cars run ten minutes apart and they let off quite a few people there.

Q. Let off people to go there, do they?

A. Yes, sir.

Q. In the winter time do you know whether it is also used?

A. Yes, was used for the men going fishing and clamming and so on.

Q. There is no sign up there that you know of, or there was not; you never saw any sign there warning people off, did you?

(Objected to. Question withdrawn.)

Q. Where does Main Street commence relative to the bridge?

A. Well, I should think that Main Street started at the end of this here guardrail.

Q. How far is the railroad track at the end of the bridge from the bridge itself, do you know?

MR. CARTON: I object to that because I do not understand the question.

William Fisher — Direct

THE COURT: Well, the question in effect is how far north of the bridge does the guardrail extend?

MR. TAYLOR: Yes, that is the better form. I will withdraw the previous question, if I may.

10 Q. How far west of the bridge is the railroad track at the north end of the bridge?

A. I don't quite understand that. It is a single track all across the bridge and it doesn't take the switch to go to the west —

THE COURT: Now you are just questioned about the north end of the bridge. At the north end of the bridge how far from the bridge is the railroad track, how far west of it?

20 MR. TAYLOR: I guess it is not material. I will withdraw the question.

Q. Now, Mr. Fisher, have you seen wagons standing in front of Kling's boathouse?

(Objected to as immaterial.)

THE COURT: You mean on the bridge?

30 MR. TAYLOR: No, the bridge commences, if your Honor please, and Main Street commences, according to our contention —

Q. Have you seen wagons standing in front of Kling's boathouse?

A. Yes, on the roadway.

MR. CARTON: That is the question objected to.

40 THE COURT: The objection is made. I do not see the point of it.

William Fisher — Cross

MR. TAYLOR: I will withdraw it then, if your Honor thinks better.

THE COURT: I do not see the reason of the question.

MR. TAYLOR: My only object was this: to show that wagons standing between the railroad track and Kling's boathouse —

10

THE COURT: West of the railroad track?

MR. TAYLOR: In front of Kling's boathouse, it would have a tendency to show that the main street commenced at the end of the bridge and there was no private right of way. That is the object of the question.

THE COURT: Well, your question was not clear to me on that point.

20

MR. CARTON: If your Honor please, it was not clear to me, and with the explanation, if that is the purpose, I withdraw my objection. There is no objection to it now.

THE COURT: Well, he says he withdraws it.

CROSS EXAMINATION

BY MR. CARTON:

30

Q. Mr. Fisher, you were employed, you say, by the Atlantic Coast people for a time?

A. Six and a half years.

Q. And are not with them now?

A. Not with them now; no, sir.

Q. Been subpoenaed here today?

A. Subpoenaed?

Q. Yes, I say were you subpoenaed here today?

40

William Fisher — Cross

A. Well, not exactly a subpoena.

Q. Well, if it was not exactly how near to it was it?

A. How near to it?

Q. Yes.

A. I was asked to come down. I was not compelled to.

10 Q. Mr. Fisher, you say that the type of car in question going along at about five miles an hour, in your best judgment, could be stopped in ten or fifteen feet?

A. Yes.

Q. There is just a little grade there, isn't there, at the point of this accident, after you go over the north end of the bridge?

A. As you approach the north end of the bridge a man —

20 Q. Now that is not the question. Will you answer my question, sir? Is there a grade, a little incline to the north, at the north end of the bridge?

A. A slight grade; yes, sir.

Q. A down grade, incline?

A. Yes.

Q. And this guardrail that you refer to as being on the east side of the trolley track, did you observe as you have gone over the bridge there whether that guardrail continues the same height all the way across the bridge?

A. No, I couldn't say that.

30 Q. What have you to say as to whether or not there is another guardrail on the west side of the track north and extending into Kling's boathouse?

A. There is no guardrail at Kling's boathouse only at the rear end of the platform, because people could not get on and off a car.

Q. I don't mean immediately in front of the entrance to Kling's boathouse, but from Kling's platform north on the west side of the track isn't there a guardrail there?

A. I am not quite sure about that.

Motion for Nonsuit

MOTION FOR NONSUIT

MR. CARTON: Now, if the court please, I make an application for nonsuit on the showing as made out by the plaintiff's case. In the first place, your Honor, I claim we are entitled to a nonsuit because of the lack of any evidence of want of care on behalf of the defendant company. The evidence, as I understand it, of Mr. Hubbard is that he heard no bell. The evidence is, it seems to me, that he was beside Mr. Megill's automobile, with its engine running, and he has testified that he has lived in that community for years, that he knew this immediate situation, had been there for an hour or more on the day in question, and saw the trolley cars going back and forth, and therefore was obliged to have some idea that there were trolley cars running up and down there. Now Mr. Hubbard's evidence is, as I recall, that after he had loaded this car, these clams in the automobile, that he started north, that he went, coupling up with Mr. Megill's testimony, probably some fifteen feet to the end of the rail before he could cross; that when he got to that point he turned immediately west across the track; Mr. Hubbard says within some five feet of the trolley track. He then says that he looked south and did not see any car coming. Now at that point, had he looked south in such a way that he could have seen, or the way he ought to have looked, he could have seen all the way across that bridge. But that is not the point. He says he first looked south, your Honor, and then he looked north, and he observed that there was a southbound car coming into the switch, had not yet stopped. He waited at this point, within a few feet of the tracks, until this car stopped, and then he proceeded across the track directly in front of this car, without taking any other observation or any other look, and was struck by the left front part of that car; showing that he immediately and without any care or any observation, any of the things that an ordinarily prudent man should do for his own protection, and especially under the cases, that he failed to do.

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Motion for Nonsuit

THE COURT: This is another point, I assume, of contributory negligence?

10 MR. CARTON: This is on the point of his contributory negligence. My first point is that there has not been shown direct evidence nor evidence from which it might be reasonably concluded that the defendant's employees were negligent nor did not do what they should have done under the circumstances. The evidence in that regard by Mr. Megill, which is all the proof we have to date on the matter outside to the answers to the interrogatories, which have been read also, is that the car was going about five miles an hour, ready to go into this switch, just about as slow as it could go. And of course there is proof that no one heard a bell ring. But it seems to me, your Honor, with the proof in that shape, that we are entitled to a nonsuit on the ground that they have not shown that the defendant lacked in any
20 duty it owed to this plaintiff.

And on the second point my insistence is that the evidence is clear from the plaintiff's own showing, what he has said. I appreciate always that on a nonsuit, if there should be any question it should go to the jury; but it seems to me on his own showing he cannot maintain his position, because he comes up to this track; he knew there was a trolley track; he knew that cars had been going up and down; he had observed them and he had imposed on him a special knowledge of the immediate or imminent danger or
30 likelihood of a car coming from the south; because from the double track each side of the bridge, a single track on the bridge, and he saw this car coming up and stopping, and he waited until he saw whether he could go across or not, and that must have meant something to him, that there was a car coming from the other side. And yet without using care and caution that any man should have done, he immediately goes across the track. Now, your Honor, I insist that that is negligence, absolute and complete.

40 It is corroborated, if there is anything to be said, by his other witness on that point. He says he started north

Motion for Nonsuit

with his back to this car, went probably some fifteen feet, and I don't know whether Mr. Megill was apprehensive for his welfare or not. He may have been looking for his boy, but evidently something must have suggested itself to Mr. Megill what he was doing. He saw the car, he heard the car, it went by him, and he was not concerned especially about it; and yet this plaintiff walked directly in front of it. Now, your Honor, I respectfully insist that this is a case where a nonsuit should be granted.

10

(Mr. Farrell replies.)

THE COURT: I have no doubt that the question of the negligence of the motorman, in view of the testimony in regard to the sounding of the signal of warning and the fact that the car failed to be stopped, presents a jury question. I would have no doubt in this case about the duty of the court to grant the nonsuit upon the contributory negligence of the plaintiff, were it not for one fact which has not been mentioned; because it is the duty of a person approaching a trolley track not only to look and listen but to look and listen in such a way as to make looking and listening effective; and there is no testimony that his view of the approaching trolley car, which, as a matter of common knowledge, rises up ten feet in the air, could have been observed over this guardrail. There is no testimony that the rails across the bridge are of such height as would obstruct the view of the plaintiff of the approaching trolley car.

20

30

But there is just one joint which makes the court doubt whether or not a nonsuit should be granted, and that is the fact of this very automobile standing where it did, right up against this guardrail, as Mr. Megill says, within four feet of the track; and it appears that there is a curve in that direction; that is, that there is a curve to the east after a northbound trolley car passes over the bridge. And it may be, or certainly it is sufficient, it seems to me, to make the question for the jury, to say whether or not that curve is sufficient — and with the trolley car standing where it was

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E. Everett Throckmorton — Direct

10 — to obscure from the plaintiff the view of that approaching trolley car, which, if it had not been for the automobile there, must have been close enough for him to have seen it if he had looked properly. There isn't any question about that, and if it were not for the presence there of that automobile, which makes a question for the jury, whether the view was obstructed, I feel that I ought to grant this nonsuit; but in a motion for nonsuit to doubt is to deny. Therefore, having just that one doubt in the case, the motion for nonsuit will be denied and an exception to that ruling will be granted.

(Objection noted for defendant as ground of appeal.)

DEFENDANT'S TESTIMONY

20

E. EVERETT THROCKMORTON, sworn for defendant.

DIRECT EXAMINATION BY MR. CARTON:

Q. Mr. Throckmorton, what is your profession and business?

A. Surveyor.

Q. In business in this county?

30

A. Long Branch; yes.

Q. How long have you been a surveyor?

A. Over twenty years.

Q. Did you make a survey of the portion of the road at the point of this accident at Belmar or Avon?

A. Yes, sir.

Q. Did you make a plan or map?

A. I did.

Q. Is this it, the paper I show you?

A. That is a blueprint of it.

40

Q. Will you put it up?

E. Everett Throckmorton — Direct

MR. TAYLOR: I object to it because it has not been sufficiently proven yet. I do not think it ought to be put up until it is proven.

MR. CARTON: I guess likely that is so.

Q. Did you make this map from actual survey and measurements, Mr. Throckmorton?

A. Yes. 10

Q. On the ground?

A. Yes.

Q. When did you make it?

A. Last Tuesday.

Q. Is the map drawn to a scale?

A. It is.

Q. And does the map or plan truly represent the situation and the measurements as you made them on the ground?

A. Yes. 20

MR. CARTON: I offer the map in evidence.

THE COURT: There is just one thing, whether or not the conditions remain unchanged since March 25, 1916.

Q. Let me ask you, Mr. Throckmorton, how long have you been familiar with the situation depicted by that map?

A. Well, I have been associated with the railroad on and off a long while, doing their work. 30

Q. In its engineering department?

A. Yes.

Q. Had you ever had occasion to examine that situation prior to where you made your map?

A. Not in particular, no.

Q. Is the situation as it exists there now, at the time you made your map, the same as it was last March, or as you know? 40

E. Everett Throckmorton — Direct

MR. TAYLOR: How does he know if he never had occasion?

THE COURT: It ought to be preceded by whether or not he knows whether or not the conditions are the same.

10 Q. Do you know whether or not the conditions shown by your map, whatever it does show, are the same that existed there last March?

A. In my opinion they are, yes.

THE COURT: No, it is not your opinion. Your opinion is not asked. The question is do you know?

A. I can't say that I do, emphatically.

Q. Did you have anything to do with the survey of the track when it was laid there?

20 A. Not north of the bridge, no.

Q. Have you had anything to do with the examination of the situation there since the track was laid?

A. I examined the bridge; yes.

Q. Is there any change now at the north end of the Shark River bridge of the location of the tracks or rail any different now from what they were last March?

30 MR. TAYLOR: I respectfully submit that that is an improper question. He cannot testify to that. He says he doesn't know what they were there.

THE COURT: I think that is so, Mr. Carton.

Q. How often have you gone by the location and situation of this as shown on your map since last March?

A. Oh, I may have been by there twelve or fifteen times.

40 Q. Do you know whether there has been any change made to the things or objects shown on your map since last March?

E. Everett Throckmorton — Direct

A. No.

Q. You don't know?

A. I don't know.

Q. Do you know whether the north approach to the bridge has been changed since last March?

A. I know that it has not.

Q. Do you know whether the trolley tracks at the north end of the bridge have been changed since last March?

A. No, they have not been changed.

10

Q. Do you know whether the switch has been changed since last March?

A. No, I don't know that.

Q. You don't know that?

A. I don't know that.

Q. Do you know whether the tracks of the bridge as far south as they are shown on your map have been changed since last March?

A. I know that they have not.

20

Q. Does your map show anything else than what I have interrogated you about now?

A. There is the location of the boathouse there that you have been speaking of.

Q. On the west side of the track?

A. On the west side.

Q. Do you know whether that location is the same as it was last March?

A. Yes, that is the same.

30

Q. Is there anything else shown on your map that I have not inquired about?

A. Not that I recall, no. May it please your Honor —

THE COURT: Of course I don't know what the map shows. You have asked him about the switch and he says that he does not know that there is any change in that, does not know whether it has been changed or not. It seems to me it might easily be shown whether there has been or not by somebody who knows.

40

E. Everett Throckmorton — Direct

MR. TAYLOR: Perhaps we can dispose of the whole business and it won't be necessary to put one on for the switch.

BY MR. TAYLOR:

- 10 Q. Were you there in March?
 A. Last March?
 Q. Yes.
 A. No.
 Q. You don't know where the guardrails were then, do you?
 A. On the bridge?

MR. TAYLOR: It necessarily follows if he was not there in March.

- 20 Q. Were you there in April?
 A. I couldn't tell when I crossed the bridge.
 Q. At that time you crossed as a passenger, didn't you, on the road?
 A. On the trolley? No.
 Q. How did you cross?
 A. Crossed in an automobile.
 Q. You didn't take any particular observation of the place at that time?
 A. Not last March, no.
 30 Q. Naturally you would not, because you didn't have any occasion to?
 A. No.
 Q. And as a matter of fact, are you an engineer for the company at the present time?
 A. I do all their outside work.
 Q. You do all their outside work?
 A. Most all their outside work.
 Q. Particularly in the Long Branch Division?
 40 A. Yes,

E. Everett Throckmorton — Direct

Q. You don't do much on the Belmar Division, do you?

A. I laid the tracks through Belmar, I built all the road through Belmar, bridges and all.

Q. Have you done any work for them in the Belmar Division in the last three or four years?

A. I built the extension of tracks through the campground, or Sea Girt, I think it was two years ago.

Q. You don't know the conditions, whether or not there were any of these guardrails there in March or not, do you?

10

A. Guardrails?

Q. Yes, in March, of your own knowledge. Now not as you recall it, but can you state positively?

A. Emphatically?

Q. Yes, last March.

A. No.

Q. Can you state emphatically that the street from the Avon side was not raised last March?

20

A. The street raised?

Q. Yes, the street from the Avon side was not raised?

A. The grade changed, you mean?

Q. Yes, the grade changed about a foot. Can you state that?

A. I had nothing to do with it, no.

Q. You can't state whether that was or not?

A. No.

Q. Do you know as a matter of fact whether or not the bridge was inclined slightly to the east when the planking was put in?

30

A. I know that the bridge had started to travel, that is, the wagon bridge.

MR. TAYLOR: I submit under those conditions the map is not proper.

THE COURT: I had already ruled that. I had already ruled that he had not yet shown sufficient knowledge.

40

E. Everett Throckmorton — Direct

MR. TAYLOR: Well, I mean as to the rest then.

BY MR. CARTON:

10 Q. Now, Mr. Throckmorton, what is the distance of the guardrail extending from the north end of the Shark River bridge to its termination northerly, that is, the guard rail immediately east of the trolley track?

(Objected to. Objection sustained.)

THE COURT: I feel that I shall have to sustain the objection, because his observation appears to have been made quite recently, and until it be shown that there have been no changes south —

20 MR. CARTON: Well, not on the point of offering the map, your Honor. It seems to me, in view of the testimony of the plaintiff, and particularly Mr. Megill, that there is a guardrail there, was a guardrail there then, that we might inquire of this witness if he has measured and what he has found the length of this guardrail to be at this time.

30 THE COURT: He has now testified that he does not remember having known about conditions there last March and he does not know whether there has been any changes; so the measurements he made quite recently would not establish the fact that that was the length of that guardrail at that time.

MR. CARTON: That is true, your Honor, but he said that he knows that the north end of the bridge has not been changed.

MR. TAYLOR: He does not say that, Mr. Carton. He says it is inclined a little.

40 MR. CARTON: And in view of the plaintiff's witnesses that there was a guardrail that extended northwardly

George B. Cade — Direct

from the north end of the bridge, it seems to me it would be evidential of this guardrail.

THE COURT: An objection will be noted to the court's ruling.

(Objection noted for defendant as ground of appeal.)

10

MR. CARTON: I withdraw the witness, your Honor.

GEORGE B. CADE, sworn for defendant.

DIRECT EXAMINATION BY MR. CARTON:

Q. Mr. Cade, are you familiar with the location of the Shark River Bridge?

A. Yes, sir.

20

Q. Were you familiar with it last March 25th?

A. Yes, sir.

Q. Is there at this time, Mr. Cade, a guardrail on the east side of the trolley track extending from the north end of the bridge a distance northerly?

(Objected to.)

THE COURT: Well, if the purpose be to ask him whether there has been any change in that following that.

30

MR. CARTON: If there is such a rail now my next question is if there has been any change since last March.

THE COURT: Assuming that will be the next question the question may be answered.

(Objection withdrawn.)

A. There is.

40

George B. Cade — Cross

Q. Is that guardrail located in the same position and does it bear the same length now as it did last March 25th?

A. It does.

Q. What is the length of it?

A. I should say from 25 to 30 feet. I never actually measured it myself.

10 Q. Mr. Cade, has there been any change in the track, location of your railroad track, over Shark River bridge since last March?

A. There has not.

Q. The switch immediately north of the Shark River bridge, has there been any change from where it is now from what it was last March?

A. No, sir.

BY THE COURT:

20 Q. Has there been any change in the location of your tracks between the point of the switch and the bridge?

A. There has not.

CROSS EXAMINATION

BY MR. TAYLOR:

30 Q. Do you know whether or not the Borough of Avon has raised the grade there just north of the Shark River bridge?

A. Not to my knowledge.

Q. Do you know whether they have or not?

A. We have never been called to raise our tracks.

Q. Do you know whether the Borough of Avon has?

A. I couldn't tell you what the Borough of Avon has done with their streets, but our tracks have never been raised.

Q. What department are you in charge of, Mr. Cade?

A. I am Secretary, Treasurer and Claim Agent.

40 Q. Who has charge of the construction department?

George B. Cade — Cross

A. The superintendent.

Q. Who is the superintendent?

A. Mr. Charles E. Hereth.

Q. Who is Mr. Hereth's superior?

A. Mr. Hazelrigg.

Q. And I understand then that you are in another branch of the service; is that so?

A. Why —

Q. Yes or no now. I don't want an explanation. You are or you are not. Are you or not? 10

THE WITNESS: Judge, can I explain the conditions in our property?

Q. Answer the question yes or no.

MR. CARTON: Answer the question, Mr. Cade. 20

A. Not altogether.

Q. Well, are you or are you not?

THE COURT: He says not altogether.

Q. Do you have charge of any of the construction?

A. No, sir.

Q. Are you familiar with the bridge as it was last January?

A. I am. 30

Q. Were you familiar with it in February, 1916?

A. I can't say that I am particularly with it in February or any other time. I remember conditions as I went down there, I think it was the same day of the accident, and I have been by there all the time. That is all I can tell you.

Q. Now on the day of the accident did you take measurements, etc.?

A. No, sir; I didn't. 40

George B. Cade — Redirect

Q. You knew nothing about the measurements until you had examined the map, did you?

A. I know of one measurement that our conductor took the day of the accident.

Q. And your information in reaching any conclusions you might reach as to distance would be from this map. wouldn't it?

10 A. I have no conclusion as to distance at all.

Q. And also measurements made by your conductor; is that so?

A. He took the measurement he did to show how far the man was carried after he was struck.

Q. And as a matter of fact you don't know of your own knowledge any of these distances, do you?

A. No.

REDIRECT EXAMINATION

20

BY MR. CARTON:

Q. Mr. Cade, did you cause Mr. Throckmorton to make a survey and plan for you?

A. I did.

Q. Have you seen the survey and plan that he has prepared?

A. I have.

30 Q. I ask you if there has been any change from March 25th last to the present time of the tracks and objects shown by Mr. Throckmorton on his map.

A. I answered that no.

MR. TAYLOR: I submit the witness has shown that he himself does not know about the distance, and the only source of knowledge —

40 THE COURT: That is not the question. It is only as to the changed condition. You see he was not asked about any distance except the length of that guardrail, and

George B. Cade — Redirect

he does not attempt to give that exact. He says 25 or 30 feet.

MR. CARTON: Now, if your Honor please, I renew my offer.

THE COURT: Is there now any objection to that map? 10

MR. TAYLOR: There is, your Honor.

THE COURT: Well, you may state the objection.

MR. TAYLOR: The objection is this: that I imagine Mr. Cade's testimony is going to be used to help prove this map; in other words, to show that the conditions are the same. Mr. Cade has testified himself that he does not know whether the distances are the same, etc., to-day as they were at that time, except as his memory has been refreshed by the map and by the measurements of the conductor. Now that being so, if he does not know the distances, etc., he naturally does not know whether the map — he says there is no change. 20

THE COURT: You see, Mr. Taylor, all he testifies to is the conditions. 30

MR. TAYLOR: But the thing which makes up conditions is measurements. It is fundamental with the conditions, and if he does not know that the measurements have been changed he does not know that they are the same and the distances are the same today that they were March 25, 1916; he naturally cannot follow up and say the conditions are the same if he does not know. He may testify generally that the conditions are the same, but when you come to particularize on it he doesn't know. 40

E. Everett Throckmorton — Direct

10 THE COURT: Mr. Taylor, let me make this suggestion. Unless the surveyor should go right to the scene of the accident, we will say, in its relation to this case, we could never get a map, could we, unless we permitted testimony on whether or not there had been any change of conditions by witnesses other than the surveyor? These witnesses do not pretend to give the measurements. They testify that the conditions were the same. Then the surveyor makes his survey, if conditions are similar, and he is the one who gives measurements. You see you cannot say that one man must testify to everything. We have to sometimes piece things together, you know.

20 MR. TAYLOR: My impression, if your Honor please, was that Mr. Cade's testimony was irrelevant; that he could say that the railings which are shown on that map, the distances and everything else, today are the same as existed there in 1916, and the witness has said that he did not know that that condition was true.

THE COURT: The map will be admitted and an exception to that ruling will be noted.

(Objection noted for plaintiff as ground of appeal)

(Map marked Exhibit D 1.)

30 E. EVERETT THROCKMORTON, resumed.

DIRECT EXAMINATION BY MR. CARTON:

Q. Mr. Throckmorton, did you say the map was drawn to a scale?

A. Yes.

Q. What is the scale?

A. Ten feet to an inch.

Q. What does the lower line on your map indicate?

40 A. This lower line?

E. Everett Throckmorton — Direct

Q. Yes.

A. The east truss of the highway bridge.

Q. And what does the space between that line and the next line represent?

A. The width of the roadway on the highway bridge.

Q. What is the width of the roadway?

A. 20.7 feet.

Q. And what is the space immediately next to this roadway? 10

A. A footpath.

Q. That is on the west side of the wagon bridge, is it not?

A. Yes.

Q. And what is its width?

A. Seven feet, from the center of the truss to the center of the guard on the footpath.

Q. And how is the westerly line of that footbridge fenced off, if it is fenced off?

A. By railing. 20

Q. What sort of railing.

A. As I recall it, an iron railing.

Q. And what is its height?

A. Approximately 3 feet 6 inches, I should say; the ordinary height of a bridge railing.

Q. How far north does that railing extend? Will you indicate on your map?

A. The railing that you are speaking of now, that is, the iron railing, goes to the north end of the bridge, opposite the north end of the bridge. 30

Q. And you have shown a white spot there. What does that indicate?

A. This one?

Q. Yes, and the one above it as well. Does that represent the north end of the wagon bridge?

A. There is a pole at each end, the end of the rail and the end of the truss.

Q. Your line continuing north flares a little to the west, does it not? 40

E. Everett Throckmorton — Direct

A. Deflects to the west.

Q. And is the railing the same right on up to its end?

A. There is a little grade to the north, lower on the north end.

Q. What is the distance from the north end of the bridge to the north end of the guardrail?

A. This rail you are speaking of here?

10

Q. Yes.

A. 41 feet.

Q. That would be from this point that you have indicated to the end of the 41 feet?

A. That is it.

Q. What is the space shown immediately west of this guardrail?

A. Opening between the highway bridge and the footpath and the trolley bridge.

Q. What is its width?

20

A. 5.5 feet.

BY THE COURT:

Q. Where is that?

A. Between the footbridge and the trolley bridge, the footpath.

BY MR. CARTON:

30

Q. Is that an open way over the river?

A. That is open.

Q. And then you next come to the trolley bridge?

A. To the trolley bridge itself.

Q. And what is its width?

A. Ten feet over all.

Q. Are there any guardrails on either side of the trolley bridge going over the river?

A. They are what we call a guardrail, that is, a guard down on the bridge itself, but no high obstructions, eight
40 inches high.

E. Everett Throckmorton — Direct

Q. Just eight inches high?

A. Just a trolley guard.

Q. No guard of any height outside of this?

A. No.

Q. At what point do the trolley tracks curve east, if they do curve east?

A. Well, they begin about fifteen feet south of the north end of the rail you have been speaking of.

Q. And is the curve marked or gradual?

10

A. Gradual.

BY THE COURT:

Q. I don't quite understand where the curve commences.

A. 15 feet south, approximately, of the north end of that railing they have been speaking of.

20

BY MR. CARTON:

Q. And is that a single track over the bridge?

A. A trolley track, yes.

Q. And what does it terminate or run into north?

A. A crossover or switch.

Q. And then there is a double track?

A. From there north.

Q. On the main street in Avon?

A. Yes.

30

Q. How far is the point of the south end of that switch from the northerly point of the guardrail, so-called?

A. This fencing here?

Q. Yes.

A. 46 feet.

Q. And how far distant from that same point is it to the end of the —

A. Of the track?

Q. Of the track.

A. 44 feet.

40

E. Everett Throckmorton — Direct

Q. Did you make any measurements or have you any knowledge of the width of Main Street in Avon at the north point of the bridge?

A. We went up above and measured between the curbs. That is 69 feet between the curbs, and that is far enough.

10 Q. I don't mean that, Mr. Throckmorton, but do you know the actual width of Main Street immediately at the north end of the bridge, or in other words, do you know how far west Main Street extends at the north end of the bridge?

A. No, I do not.

BY THE COURT:

Q. I notice a drawing marked "Platform" there. What does that indicate?

20 A. That is a platform built on the west side of the trolley. The property belongs to the boathouse, I should imagine.

Q. And what is the line going north from that?

A. There is another fence and a bulkhead, retaining bulkhead, along there; holds the fill for the railroad or roadway, whichever you might term it.

BY MR. CARTON:

Q. The blue or marking on your map running at right angles to the track, is that the boathouse, so called?

30 A. That is the boathouse.

Q. And right under that is marked "Platform"?

A. That is really the porch of the boathouse.

Q. And then you also have marked "Platform" in the space immediately north of that?

A. Yes.

Q. What is that platform used for, as observed by you?

40 A. Well, there was no use made of it when we were there. You see there were no people going to or fro or any one around there.

E. Everett Throckmorton — Direct

Q. As you observed, is it an approach to this boat-house?

A. Yes.

BY THE COURT:

Q. There seem to be some steps indicated on the south end of the platform. What are they?

10

A. This building is on the same elevation of the top rail or guard, and you go down four steps that go into the boathouse and then you go down six more, that is, on this platform that runs around the south side of the boathouse, where all the boat landings are.

BY MR. CARTON:

Q. The level of the boat house is some feet lower than the level of the street?

20

A. You go down four steps to get down to that platform.

Q. Can you tell us, by rule or otherwise, the distance from the northerly end of the platform as shown at the top of your map north to the end of your line which you have marked "Fence"?

A. I have got that note right here. It is 70 feet.

Q. And that you say is a fence?

A. Fence and bulkhead. There is a fence on top of the bulkhead.

30

Q. Is the river or the surface some distance below that?

A. I should say yes, about four feet, the surface of the adjoining property.

BY THE COURT:

Q. That is marsh there? That is not the river there?

A. No, it is a marsh; some filling been put in there.

40

E. Everett Throckmorton — Cross

BY MR. CARTON:

Q. And what is the character of the fence there?

A. Well, they are just rough posts and two ordinary rails, timber rails.

BY THE COURT:

10 Q. How high is the fence above the bulkhead?

A. Oh, I should say it was three feet, or three feet six inches.

BY MR. CARTON:

Q. Mr. Throckmorton, the wagon bridge over Shark River, is that an iron bridge?

A. Yes, Pratt truss.

Q. Do the sides of the bridge, as I style them as a layman, extend up over the roadway some distance?

20 A. Yes.

Q. And what is the type of these protections on there on either side of the bridge, or the style of them?

A. Well, it is a genuine Pratt truss, regular Pratt truss, about seven feet in height.

Q. Iron?

A. Iron.

Q. Not solid construction?

A. No.

Q. An ordinary ——

30 A. Open truss.

Q. The jury may know what a Pratt truss is, I don't. And that is the same on both sides of the bridge?

A. On each side of the highway bridge, yes.

CROSS EXAMINATION

BY MR. TAYLOR:

40 Q. There is no obstruction here, is there, going off this platform?

E. Everett Throckmorton — Cross

A. No.

Q. People can go right on there?

A. Yes.

Q. In fact, they do do so?

A. I imagine so.

Q. You didn't measure the height of the trusses, did you?

A. No, it is merely by walking along by them, with reference to the height of the body. 10

Q. And between the trusses there is certain ironwork holding the trusses, etc., isn't there?

A. Yes, sir.

Q. You didn't measure the height of the fence, did you?

A. The height of the railing along the footpath?

Q. Yes.

A. No.

Q. And do you know how many boards there are running horizontally from the top or parallel to the top of the fence until it reaches the bottom? 20

A. For the foot walk?

Q. Yes.

A. This is an iron railing with a balustrade rail on top.

Q. And it is filled in between, isn't it?

A. Network.

Q. Do you know what the condition was — is this a telegraph pole here? 30

A. Telegraph pole.

Q. How large around was that telegraph pole?

A. About fourteen inches in diameter.

Q. On the 25th of March do you know what the grade was at the end of this street, the 25th of last March?

A. No, I don't know anything about it.

Q. You don't know whether it has been filled in since that time, do you?

A. I don't think it has.

Q. But you don't know, do you? 40

E. Everett Throckmorton — Redirect

A. No. The platform would show that if it had been.

Q. But you don't know?

A. No.

Q. You don't know whether there were any fills there at that time or not?

A. No.

10 Q. Isn't it true, Mr. Throckmorton, that in many cases, while in a fence of this kind where you can look directly through it, if you are facing it, if you get it at an angle that the whole vision is obstructed?

MR. CARTON: I object to that as calling for a conclusion.

MR. TAYLOR: Well, he is an expert on these matters.

20 THE COURT: The question may be answered.

A. In my opinion any one standing there —

Q. I didn't ask you that.

A. You can see right over this railing.

Q. Now, Mr. Throckmorton, you have been very honest in your answers. Won't you answer that question?

A. No, you couldn't see through this railing, according to the way you put it.

30

REDIRECT EXAMINATION

BY MR. CARTON:

Q. The railing that you have just now referred to, through which you could not see, is the railing east of the footpath over the bridge?

A. East of the railing or west?

Q. East.

40

A. West of the footpath.

E. Everett Throckmorton — Redirect

Q. West of the footpath?

A. West of the footpath.

Q. Just indicate on your map the two railings that cover the bridge, guard the bridge on both sides.

A. This is a Pratt truss that this is the railing of the footpath, which in my estimation is not over three feet six inches high.

10

BY THE COURT:

Q. Now just look again. I think you are mistaken about that.

A. This is the Pratt truss. This is the two lines showing the Pratt truss over the highway bridge.

Q. I thought that was the bottom of the next one.

A. This is the Pratt truss and this is the highway railing. This is the edge of the trolley, the outside edge of the trolley. (Indicating on map.)

20

BY MR. CARTON:

Q. Mr. Throckmorton, have you your field notes with you?

A. Yes, sir.

Q. Will you be good enough to look at that first and then let me ask you again to indicate on the map the most westerly rail shown on the Pratt truss?

30

A. This one shown right here, the westerly truss, that is.

Q. Well, now, I so understood you first and then I understood you to say —

THE COURT: You indicated awhile ago the line above that.

A. Well, then I was in error if I did.

40

E. Everett Throckmorton — Recross
 RE-CROSS EXAMINATION

BY MR. TAYLOR :

Q. When I refer to the railing, where if you stood alongside of it and facing it and you answered that you couldn't see through, what railing did you mean?

10

A. This one. (Indicating.)

Q. Oh, you meant that one?

A. Yes.

Q. You didn't mean the fence?

A. No, not along the footpath.

Q. I understood that that was the one. That was the one I was referring to.

A. If I did I was in error.

Q. Then you admit that you can't see through where the trusses are?

20

A. No, if you stand in the right position.

Q. Now we will suppose a child, to use an illustration which will conform to your definition, suppose a child three feet in size should be along the fence, the outer fence, the one west of the footpath, and would look along there; are not the same kind of obstructions such that the same conditions might exist?

(Objected to. Objection sustained.)

30

THE COURT: That is not based on any proven facts in the case.

Q. Mr. Throckmorton, wouldn't it be possible to gain the same position from the westerly side of the footpath as far as the view is concerned as at the trusses on the road?

(Objected to. Question withdrawn.)

BY THE COURT :

40

Q. Mr. Throckmorton, how far is it from the truss

E. Everett Throckmorton — Recross

you mentioned through which a person could not see, to the most easterly rail of the trolley track?

A. About 15 feet.

BY MR. TAYLOR:

Q. Then it would be at least 12 feet 5 inches, wouldn't it?

A. That is to the guard, about 15 feet. 10

BY THE COURT:

Q. To the rail?

A. Yes, sir; to the rail.

BY MR. TAYLOR:

Q. That doesn't show it, I think, Mr. Throckmorton. 20

A. Come here and I will be glad to explain it.

(Witness indicates on map.)

A. 7 feet there and 5 feet 5 inches there; that is 12 feet 5 inches.

Q. Where does it show on the map?

A. It is right there, the scale.

Q. It is not shown, is it? 30

A. It is not necessary to have them in figures, if you know the conditions existing there.

MR. TAYLOR: I submit he has not scaled it and I submit he cannot testify to it.

BY THE COURT:

Q. Is that matter of your own personal knowledge?

A. Yes, sir; without the least particle of doubt. 40

George W. Irons — Direct

BY MR. TAYLOR:

Q. You are testifying from the map now, aren't you?

THE COURT: Well, it is not entirely necessary. If he had any knowledge aside from the map of course it is all right.

10

Q. Mr. Throckmorton, there are perpendicular posts both on the truss and the rail or guard at the west of the footpath, are there not?

A. Perpendicular posts in the rail on the west of the footpath but not of the truss.

Q. Do you know how many parallel bars there are from the footpath from the top?

A. No, I do not.

Q. You don't know whether one or four?

20

A. No. In my judgment there are two, one at the bottom and one at the top.

Q. But you don't know?

A. Not to a certainty.

GEORGE W. IRONS, sworn for defendant.

DIRECT EXAMINATION BY MR. CARTON:

30

Q. Mr. Irons, are you in the employ of the defendant company?

A. Yes, sir.

Q. As a motorman?

A. Yes, sir.

Q. How long have you been in their employ?

A. Fourteen years this month.

Q. Been running a car all that time?

40 A. Yes, sir; never did anything else but that for this last fourteen years.

George W. Irons — Direct

Q. Over the Belmar Division, the route from Asbury Park to Belmar?

A. Yes, sir; I have run that ever since they run the road from Sixteenth Avenue to Sea Girt, to Belmar; from Sixteenth Avenue, Belmar, to Sea Girt.

Q. That is a continuation to the south of the road?

A. Yes. That is, I ran there before they extended it down.

Q. You were the motorman running the car that caused this accident? 10

A. I was; yes, sir.

Q. And it happened on March 25th, as you recall?

A. Yes, sir; seven minutes past one.

Q. In the afternoon?

A. Yes, sir.

Q. And do you remember the fact that you were proceeding from south to north with your car?

A. Yes, sir. 20

Q. It has been said that there is but a single track over the bridge.

A. Yes, sir.

Q. You were going over that track?

A. Yes, sir.

Q. And will you explain to us how you managed or handled your car in coming over that track in regard to speed and what you did?

A. Yes, sir. I come across Shark River bridge, I suppose running about ten miles an hour, until I got within maybe 150 feet of the end, where I always shut off my power and brake down for the switch. 30

Q. What did you do that day?

A. Just the same as I have always done, just as I am telling you.

Q. Shut off your power?

A. Shut off my power perhaps 150 feet from the other end of the bridge.

Q. 150 feet south? 40

George W. Irons — Direct

- A. Yes. The car didn't have no power on when she come to the end of the bridge, just drifting along maybe five miles an hour, not over that. And I got about 100 feet, probably 90 feet, from the end of the bridge, and I saw this automobile standing there and these two gentlemen or three gentlemen stood there alongside of it. As I approached the end of the bridge this one elderly gentleman started down towards the end of the rail.
- 10 Q. Is that Mr. Hubbard?
 A. Yes, sir.
 Q. Prior to that time, Mr. Irons, what had you done if anything by way of giving notice of your approach?
 A. Rang the bell, foot gong.
 Q. Where was that?
 A. About 125 feet south of the end of the bridge.
 Q. Now you came on up as you have indicated?
 A. Yes, sir; when I saw them I rang the bell again,
- 20 as it is my custom to do when I see people along the track that way or standing along the track.
 Q. And you did that on this occasion?
 A. Yes, sir. And within about 30 feet I rang the bell again; and when I come up to the pole where he stepped out, as he was walking down, I supposed he was going to stop there to get on the car. I still slacked up the speed of the car, and when I saw him step out about five feet ahead of the car I threw my heel on the gong that way two or three times (illustrating) and yelled as hard as I could. I
- 30 don't know why he couldn't hear me, because I halloosed loud enough to hear me half a mile.
 Q. Did you do anything with your brake at that time?
 A. Yes, braked the car, and besides braking reversed the car to stop.
 Q. You say you saw Mr. Hubbard approach that track all that time as you were going along?
 A. Yes, sir.
 Q. Going north?
 A. Yes, sir.
- 40

George W. Irons — Direct

Q. Where did you say your car struck Mr. Hubbard or where on the track was he when he was struck?

A. He had just stepped on the rail, just stepped over that way from the post. I suppose the pole stands within three feet, probably, of the track. He just stepped off on the track that way when the fender hit him.

Q. Just before, as he stepped around this post, before he stepped on the track, did he look towards you?

A. No, sir; never looked at all, or never stopped. 10

Q. You knocked him down, I suppose?

A. Yes, sir.

Q. Within what distance did you stop your car?

A. Eighteen feet.

Q. Is there a downgrade there?

A. There is slightly.

Q. And how far distant is that to the switch, about?

A. I should judge from the pole to the switch is maybe twenty-five feet; that is, from the end of the guard-rail. 20

Q. Was there anything about Hubbard's conduct or motion forward that indicated to you that he was going across your path?

A. No, sir.

Q. Until he turned west to go on the track?

A. No, sir; I never dreamed that the man was going on the track. I supposed he was going to stop there to get on the car, the same as lots of other people done. When he walked down to this pole I slacked the speed of the car more to come to a stop, and just as I did that he stepped in front of the car. 30

Q. Did you observe Mr. Megill's automobile standing there?

A. Yes, sir.

Q. And did you tell us about how far north that rail extends from where Mr. Megill's car was standing?

A. I should think about 30 feet. Oh, north from where Mr. Megill's car was?

Q. Yes. 40

George W. Irons — Direct

A. About 30 feet, I should judge. I think he stood about half way up the railing.

Q. You saw Mr. Megill when you were going by?

A. Yes, sir; saw him sitting in the automobile.

Q. Will you look at the plan of the wall, Mr. Irons? This is pointing to the place west of the platform that has been indicated as the boathouse.

10 A. Yes, sir.

Q. Will you tell us about where you were on the track when you first clanged your bell?

A. I was away back here when I first clanged the bell, north of Riggs' boathouse. This is Kling's here?

Q. This is Kling's, I think.

A. The other one don't show here.

Q. Is the map familiar to you at all? Do you recognize it?

A. Yes, sir.

20 Q. Do you recognize what this space is through here?

A. This is a footpath from here. That is to go on the bridge, isn't it?

MR. TAYLOR: It says so.

Q. Your track is west of this footpath, is it not?

A. Yes, sir.

Q. And do you know what protection there is on the west side of the footpath for pedestrians?

30 A. The west side of the footpath?

Q. Yes.

A. Yes, there is an iron railing all the way across the bridge.

Q. How high do you say this fence is where it is indicated here as fence?

A. I should judge about four feet, maybe five. That is where it extends from the pole on out to the end of the bridge, from the end of the bridge on to the pole.

40 Q. Is there any guard or protection or rail on the west side of the railroad track north of Kling's platform?

George W. Irons — Direct

A. Yes, sir.

Q. What is that fence?

A. It is a fence runs out right up along the platform and then shoots out towards the trolley track along the embankment, where the bulkhead is put up to hold the embankment.

Q. Mr. Irons, have you been running that route this past year? 10

A. Yes, sir.

Q. And been running it ever since March?

A. No, not ever since March. I was over at Long Branch about two months this last summer, all except that, and I went back there this fall again.

Q. Is there any difference or any change in the conditions surrounding the footpath, I mean the bridge, the guardrails and Kling's dock there now and the guardings around it from what there was last March? 20

A. No, sir; I don't think there is any change. I don't think there is a change made there.

Q. I show you a photograph.

MR. TAYLOR: I object. He has not offered it. If it is to refresh his memory —

MR. CARTON: That is what it is.

THE COURT: I cannot rule until the question is asked. 30

Q. I ask you to examine the photograph, Mr. Irons, and I ask you if there is any change, has been any change since last March, from that shown on the photograph and say if the situation was last March exactly as it is shown in that photograph.

A. Just as good as I can describe it. I don't think there is a change made into it nowhere. 40

George W. Irons — Cross
CROSS EXAMINATION

BY MR. TAYLOR:

- Q. Mr. Irons, you say that about 90 feet away you first saw Mr. Hubbard, didn't you?
- 10 A. Yes, sir.
- Q. And you rang the bell at that time?
- A. Yes, sir.
- Q. What did you ring the bell for?
- A. The same as I always do.
- Q. You anticipated danger?
- A. No, sir.
- Q. Just for the fun of it?
- A. I always ring the bell when I see people walking on the track, just as it is customary, that is all.
- Q. Just as a custom?
- 20 A. Yes.
- Q. It was not rung with any intent to warn any one, was it?
- A. No, not particularly. I just saw these people standing there and rang the bell as I approached them.
- Q. It may be that you forgot this custom at this time?
- A. No, sir; never forget.
- Q. You didn't have any particular one to warn?
- A. Well, I saw them standing there and I rang as I would for you.
- 30 Q. You saw them standing there and anticipated some danger, that they might get on the track?
- A. No, not necessarily that.
- Q. Did you or didn't you?
- A. No, not necessarily that.
- Q. You rang it for amusement or to hear the music?
- A. No, it is the custom. That is what the bell is there for and that is what we use it for.
- Q. If there is no danger what do you use it for?
- 40 A. There are lots of times when I ring it when there

George W. Irons — Cross

is no danger. If a wagon is on the opposite side of the street I ring it so they wouldn't go over.

Q. In other words, you ring it lest he should come over?

A. Yes.

Q. In other words, to warn people away, is it?

A. Yes, sir.

Q. And avert any danger?

A. Certainly, that is what it was for. 10

Q. You saw Mr. Megill and Mr. Hubbard when you were 90 feet away, didn't you?

A. About that, I should judge.

Q. And you saw Mr. Megill in his car when you were passing his car?

A. Yes, sir.

Q. And you looked at him and recognized him as Mr. Megill?

A. No, I didn't. 20

Q. But you saw him?

A. I saw him there in the machine but I didn't know who the man was.

Q. You had never known Mr. Megill, had you?

A. Not personally, no.

Q. But you looked while you were passing the machine to see if there was a man there?

A. Yes, I saw the machine.

Q. When did you next ring your bell?

A. I judge about 50 feet away. 30

Q. And what was that for?

A. The same thing as before.

Q. Well, what was it for before?

A. Well, just as I told you.

Q. Well, tell me again, please.

A. Because people stood on the opposite side of the track there.

Q. And because there might be danger?

A. Yes.

Q. Now the next time you rang it was when? 40

George W. Irons — Cross

A. I should judge, I don't know, 25 or 30 feet maybe.

Q. 25 or 30 feet?

A. When I saw him walking down towards the end of the railing.

Q. You saw him running down towards the end of the railing?

A. Not running, walking.

10 Q. Now at that time you anticipated that there was really danger that he might get on the track, didn't you, when you saw him going in that direction?

A. Yes, sir; you would think so too.

Q. And you saw Mr. Hubbard passing down toward the site of where he was finally hit, didn't you?

A. Yes, sir.

Q. And you didn't know whether he was going to stop or not, did you?

A. No, sir.

20 Q. And you began to ring your bell very hard then, didn't you?

A. Yes, sir.

Q. Because you did anticipate that he would come on the track, that he would go on the track?

A. When I saw him step out across the rail then I knew he was going to.

Q. I didn't ask you that; but you say about 30 feet away you began to anticipate he might go on the track?

A. Sure.

30 Q. And you began to ring your bell very hard?

A. Yes, sir.

Q. And began to shout at him?

A. No, I didn't say that.

Q. How close did you get before you began to shout at him?

A. About five feet. He stepped over on the rail and I halloed.

Q. You had a car that was closed?

40 A. No, not very much closed, but the side door was

George W. Irons — Cross

open; one side door was open and the door closed behind me.

Q. You opened it before you halloooed at him?

A. No, sir; the door was open.

Q. Was open?

A. Yes.

Q. Were the doors open all the way through your car?

A. Yes, sir.

Q. Hubbard continued to walk towards the track? 10

A. He wasn't walking towards the track, he walked north, the same as the car was going.

Q. He continued to walk parallel to the track, didn't he?

A. Yes, sir.

Q. And if he continued to walk far enough parallel to the track he would have to cross the track, wouldn't he, or if he continued in the same course he was then traveling? He would have to cross the track because the track goes over to the center? 20

A. Yes, or else turn further to the northward.

Q. That was about 30 feet away when you became very much alarmed, was it?

A. No, I wasn't alarmed 30 feet away; I was more alarmed when I saw him step off on the track. That was the only time I was alarmed.

Q. But when the car was 30 feet from him how far was he from the track?

A. Well, I suppose may be four or five feet. I have got to guess at those things. I don't know. 30

Q. And he continued to draw closer to the track right along?

A. Yes, sir; he walked right down along the rail.

Q. Now that telegraph pole is there, isn't it?

A. Yes, sir.

Q. And one there? (Indicating on map.)

A. Yes, sir.

Q. Did that obstruct your view?

A. No, there isn't one there. That is a post. 40

George W. Irons — Cross

- Q. But that didn't obstruct your vision at that time?
 A. No, sir; not at all.
- Q. And you continued to see him until the very moment he was hit?
 A. Yes, sir.
- Q. Where did he get on this map before he went directly on the track, right by that pole?
 A. Right by that pole; yes, sir; and then he turned right there around to the westward.
- 10 Q. He turned short around there?
 A. Yes, sir.
- Q. You knew that was a crossing at that place, didn't you, to go to the boathouse?
 A. Yes, sir.
- Q. People have been crossing there for years?
 A. Yes, ever since I have been running up and down there.
- 20 Q. And long before?
 A. I suppose so.
- Q. And in the summer time it is used by probably four or five hundred people a day that cross there?
 A. Generally.
- Q. Maybe a thousand?
 A. Maybe ten thousand.
- Q. And it is also used in the wintertime?
 A. Sure.
- Q. Now as a matter of fact you were looking at that other car coming from the north, weren't you?
 30 A. No, sir; I didn't look at the other car; I was watching him from the time I put my eyes on him till I hit him.
- Q. Point to where Mr. Megill's machine was, if you please.
 A. About right up in here, at the end of the footbridge there. (Indicating on map.)
- Q. Then Mr. Hubbard was where?
 A. Right here, about at the end of the automobile.
- 40 Q. And you were where?

George W. Irons — Cross

A. About here, about 90 feet back from the pole here when I first saw him. By the automobile he stood.

Q. When you were opposite Mr. Megill's car where was Mr. Hubbard?

A. Well, right close to this pole here, I don't know how far down.

Q. You mean he was about at the end of the railing?

A. No, not at the end of the railing.

Q. Nearly there?

10

A. Yes, nearly there.

Q. Nearly at the end of the railing?

A. Yes, sir.

Q. And you took your mind off of the road long enough to look at this car and see that there was a man in it?

A. In the automobile. Anybody could see that. You could see that looking right up the road; didn't have to turn your head.

Q. Nevertheless you did it?

20

A. I saw there was an automobile standing there, sure.

Q. Where was the man in the automobile?

A. Sitting up on the seat. I don't know which side he was on.

Q. On the front seat?

A. Yes.

Q. And was the car right hand drive or left hand drive? Could you tell that?

A. No, sir.

Q. Do you remember the type of the car?

30

A. No, sir; I couldn't tell you what kind of a car it was or anything about it.

Q. You say you were five or six feet away from Mr. Hubbard when he finally stepped on the rail?

A. About five feet, I judge.

Q. When he stepped on the rail?

A. About five feet; yes, sir.

Q. And you saw him during all this time, didn't you?

A. Sure, I saw him from the time he left the machine until he stepped on the rail.

40

George W. Irons — Cross

Q. And you were about five or six feet away from him when he actually stepped on the rail?

A. Yes, sir.

Q. You may have been seven or eight, mayn't you?

A. I don't think so.

Q. You may have been?

A. No, I don't think it is over five feet, probably less than that.

10 Q. It probably may have been more than that too?

A. No.

Q. You don't know how far away from him you were as a matter of fact?

A. I couldn't tell you that, but I should say not over five feet at the outside.

Q. Then when you saw him step on the track how fast were you going, 30 feet from the place you hit him?

A. Five miles an hour.

20 Q. And when you saw him step on the track then you put the brakes on, didn't you?

A. Sure. I had the brakes on before that.

Q. How long before that did you have the brakes on?

A. I suppose 50 or 60 feet away. I was slacking up all the time, because I expected he was going to stop there to get on the car.

Q. Was the car in working order?

A. Yes, fine.

30 Q. Do you mean to say that you had those brakes on 50 or 60 feet and it didn't stop it?

A. Of course I had the brakes on, but I didn't have them on to stop it.

Q. How far was he away from you when you first put on the brakes to stop it?

A. I don't know, I suppose 50 or 60 feet. When I put on the brakes to stop it?

Q. To stop the car.

A. About five feet.

Q. About five feet?

40 A. When he stepped on the rail.

George W. Irons — Cross

- Q. And the brake continued on all the time, did it?
 A. Yes, sir.
- Q. And you carried him at least 18 feet after you hit him?
 A. Yes, sir. 10
- Q. When did you first put on the reverse?
 A. Just the time I hit him.
- Q. Just the time you hit him?
 A. Yes, sir.
- Q. You didn't put it on before?
 A. No, sir; didn't have time to put it on before; didn't have no call to put it on before.
- Q. Why do you say there was no call for it?
 A. Wasn't anything in the way to stop the car.
- Q. The man was in the way?
 A. No, not till he stepped on the track.
- Q. You said five feet away.
 A. Then I said it when I put on the reverse. 20
- Q. You said awhile ago you didn't put on the reverse until you hit him.
 A. No, I didn't say that, I said when he stepped on the rail.
- Q. How was the rail that day?
 A. Fine.
- Q. Do you mean to say that with the type of car you were using that day or with the car that you were using that you couldn't stop that with the aid of the brakes and the reverse within twenty-three feet? 30
- A. Within twenty-three feet?
- Q. Yes.
- A. She stopped, not within twenty-three feet; she stopped in eighteen feet.
- Q. With the car how long would it take you to make a stop with the aid of the reverse?
 A. I suppose about fifteen feet.
- Q. About fifteen feet?
 A. Maybe twenty, according to the speed she was running. 40

George W. Irons — Cross

- Q. Well, with that rail, the rail you had that day.
 A. About fifteen or eighteen feet, as I did stop.
- Q. Do you mean to say it would take fifteen or
 eighteen feet, with a good rail, as you had, if it ran five or
 six miles an hour, as you were running, to stop the car with
 the use of the reverse?
 A. Yes.
- 10 Q. As a matter of fact you went twenty-three feet?
 A. No, sir.
- Q. You figured that, that you carried him eighteen
 feet and you saw him five feet away.
 A. Yes, but don't you suppose it takes you time to
 reverse the car and put the brakes on? Can you do that in
 the twinkling of an eye, reverse your brakes and put your
 brakes on and stop a car? I have been a motorman too long.
- Q. When you saw this man going in a direction where
 he would have to cross the track why didn't you stop the car
 before?
 20 A. Because I didn't think there was any use.
- Q. You thought he was probably going to stop and
 get on the car?
 A. Sure, that is exactly what I did think.
- Q. That is what you guessed at?
 A. No, I didn't have to guess.
- Q. That is what you thought?
 A. That is what I thought, just the same as I see you
 walking along the track.
- 30 Q. Wouldn't you think a man walking alongside a
 track in a place where there was a crossing was going to
 cross the track?
 A. Yes.
- Q. You thought he was going to get on the car?
 A. Sure.
- Q. You used your own judgment?
 A. That was the only thing I could use.
- Q. And if you had gone to work and put on your
 brake and your reverse ten feet further back you wouldn't
 40 have hit him, would you?

III

George W. Irons — Redirect James H. Stillaway — Direct

A. I suppose I would. I didn't suppose he was going to step on the track.

Q. Did this man give you a signal that he was going to stop?

A. No, sir.

Q. You saw him running in that direction and guessed he was going to stop?

A. Yes.

Q. You guessed wrong, didn't you?

10

A. Yes.

Q. And it resulted in the crippling of this man, didn't it?

A. Yes, sir.

REDIRECT EXAMINATION

BY MR. CARTON:

Q. I omitted to ask you the length of your car.

20

A. Twenty-eight feet. I never measured it, but that is what they say it was, twenty-eight feet long; double truck, hand brake.

BY THE COURT:

Q. What is the height of it?

A. I couldn't say about that, I suppose maybe ten or twelve feet. I don't know what the height of those cars are.

30

JAMES STILLAWAY, sworn for defendant.

DIRECT EXAMINATION BY MR. CARTON:

Q. Mr. Stillaway, you were the conductor on this car in question, were you not?

A. Yes, sir.

Q. On March 25th last, the car that met with an accident, you were the conductor?

40

James H. Stillaway — Direct

- A. Yes, sir.
- Q. Where were you on your car that day?
- A. The back end platform.
- Q. Do you remember the progress of the car over the bridge before you met with the accident?
- A. Do I remember what?
- Q. The progress of the car as it went over the bridge.
- 10 A. Yes, it was not very fast.
- Q. About how fast was it going over the bridge, would you say?
- A. Well, I judge after we passed Riggs' there it wasn't going over five miles an hour, not a bit.
- Q. Did you hear the gong sounded as you went over the bridge?
- A. Oh, yes, sir.
- Q. Where was the car on the bridge at that time when the gong sounded?
- 20 A. About when he left Riggs' he started to ring his bell, as he always does when he goes off the bridge, to warn anything that may approach coming on the track, like a wagon or anything.
- Q. How far south of Kling's pavilion is Riggs' place?
- A. How far south is it?
- Q. Yes.
- A. Why I judge about 50 feet. I couldn't tell, I never measured it, but I am only just using my own idea.
- Q. Did you observe the car after you first heard this bell clang as it went over towards the end of the bridge?
- 30 A. The autocar, you mean?
- Q. No, the trolley car, the speed it kept up as it went over towards the end of the bridge, your trolley car.
- A. Our trolley car?
- Q. Yes; did you observe after you heard the bell ring whether its speed slackened?
- A. Oh, yes, he was reducing his speed down all the time, sure.
- Q. Did you hear the bell clang after that before the
- 40 accident?

James H. Stillaway — Cross

A. Yes, a very sharp bell too. That is what made me think something was kind of getting excited.

Q. What did you observe after this sharp bell?

A. The car fetched up with a very swift jerk and I jumped out and ran alongside the car and ran forward.

Q. How fast do you say the car was going just at the time you heard this last bell, when it fetched up?

A. Well, very, very slow.

Q. Had it then gotten off the bridge over on the road-way? 10

A. Well, just the front truck of the fender like was on to the road about.

Q. Did you observe within what distance the car stopped after the brakes went on?

A. I jumped out to see right away, and I observed the man laying right in under the front end of the car.

Q. Where was the man lying on the ground when you got out?

A. He was laying with his body on his side, like, with his legs under the car and his head right in under the front steps. 20

Q. On the east or west side of the car?

A. On the east side of the trolley.

Q. Did you help to get him up?

A. Yes, I was the one that helped lift him to his feet, yes.

Q. You didn't see Mr. Hubbard, of course, before he was struck?

A. No. 30

CROSS EXAMINATION

BY MR. TAYLOR:

Q. You didn't know there was any one in the way, did you?

A. No.

Q. And the first your attention was attracted to any- 40

James H. Stillaway — Cross

thing extraordinary was when you heard these sharp clangs, wasn't it?

A. Yes, that is right.

Q. Now how many times do you say the bell did ring between Murphy's pavilion and Riggs'?

A. I wouldn't give you the exact count of time, but the bell when he rang it quite fast, you couldn't count them.

10 Q. You mean he generally does?

A. Yes, I didn't count them. I couldn't tell you that, I am sure.

Q. There is nothing between Murphy's and Riggs' is there. to look out for?

A. Nothing between Murphy's and Riggs'?

Q. Yes.

A. No, you are on the railroad bridge, private way.

Q. What was he ringing so on a private way for?

A. He wasn't ringing. He started ringing after he
20 left Riggs'.

Q. Oh, he started ringing after he left Riggs'?

A. Yes, sir.

Q. How far can you hear one of those bells, an ordinary ring?

A. Well, I wouldn't give you that answer.

Q. Wouldn't give me that answer?

A. No. It is quite a ways, quite a loud bell, but you can hear them many times yourself and you have heard them many times. You can find that out yourself.

80 Q. Why? This was a particularly loud bell, you thought, for this occasion, wasn't it?

A. Well, sure; you give a sharp bell, it is a loud one.

Q. Now you have testified you didn't know that there was anything extraordinary until you heard those sharp bells.

A. Yes.

Q. And how far were they given away from where the accident happened?

A. The sharp bell was given right close to it.

40 Q. Well, how far away?

James H. Stillaway — Cross

A. Well, how can I tell where the man was standing? Where I stood I couldn't see anything.

Q. You know how fast the car was running?

A. Yes, about five miles an hour.

Q. You testified to that. How far was it away? You are accustomed to judging distances. You have worked on it a good while.

A. How far from the man when these bells were given? 10

Q. Ten feet?

A. How could I tell when I didn't see the man?

(Objected to.)

THE COURT: He said he didn't see the man.

MR. TAYLOR: There was an impact when the man was struck. He could judge from that, perhaps. 20

Q. How far after this sharp bell was given did the car go before the brakes were put on?

A. I judge it was a very short distance, because it fetched up with a jerk.

Q. How far did it go?

A. Well, not over 18 feet, sure.

Q. No? I guess you misunderstand me. How far did the car go from the time these sharp bells were sounded until the brakes were put on? 30

A. How far did it go?

Q. Yes.

A. He was putting the brakes on when he was ringing the bell at the same time. He was doing all he could to stop the car, and that was the sharp notice he gave.

Q. Is there any other reason why you should observe the times he was ringing the bell from Riggs' until you heard the sharp bell?

A. Well, I wouldn't observe an ordinary bell but when he gave a sharp bell I imagine — 40

James H. Stillaway — Cross

Q. You did observe that?

A. Yes, I imagined something.

Q. And you also testified that you have heard bells before that?

A. I have worked on a car for eleven years for this company and I have heard many a bell, no doubt, and we will get a little more proof, as long as you want it that way.

10 Q. You have testified that on this day just previous to this accident that you heard him ring a bell and remembered his having rang the bell prior to the time the sharp bells began to ring.

A. You mean on this day or some other day?

THE COURT: We are talking about this day, no other day. Just remember that in all the rest of your testimony, we are talking about this day and no other day.

20 Q. How do you happen to remember that Mr. Irons, the motorman, on this day just prior to the time the accident happened and while he was on the bridge, rang his bell a number of times prior to the time that the sharp bell came?

A. Because I remember it. That is about all I can say. I have got it in my mind.

Q. Can you tell us about how many times he rang his bell between Ninth Avenue and Eighth Avenue, Belmar?

A. No, I couldn't.

30 Q. Do you know that he rang it between Ninth Avenue and Eighth Avenue?

A. Yes.

Q. You remember that distinctly, don't you?

A. Yes.

Q. You remember that he rang his bell between Fifteenth Avenue and Sixteenth Avenue in Belmar that day, don't you?

A. I can't go so far back. You are going quite a ways away from the place where it happened.

40 Q. And you don't want to get very far from there on your testimony, do you? But you remember distinctly that

James H. Stillaway — Cross

between Ninth Avenue and Eighth Avenue he rang his bell?

A. I remember he did, yes.

Q. That is 700 or 800 yards away, isn't it?

A. Oh, no. I imagine it would be a little further than that, wouldn't it?

Q. Well, we will say it is a thousand; but you can't go as far as Sixteenth Avenue, which is a mile?

A. I can't remember distances that far away. I never took any measurements. 10

Q. As a matter of fact, you don't remember whether he rang that bell after he left Riggs' at all until he rang the sharp bell, do you?

A. Oh, yes.

Q. But you don't remember between Fifteenth and Sixteenth Avenues?

A. No.

Q. That was ten minutes before. I suppose that is out of your memory. 20

A. Oh, he might have done it, but there was no extraordinary ringing or I would notice it.

Q. Who have you talked this case over with?

A. Mr. Cade.

Q. When?

A. Not so long ago.

Q. Well, when? That is not the question.

A. Well, I didn't look at the exact time?

Q. Well, was it at New Year's or since then?

A. Oh, a little recenter than that. 30

Q. But you don't want to answer the question now; you are trying to avoid it, aren't you?

A. Well, I told you I had talked it over with him and that is sufficient, isn't it?

Q. Well, it seems to be in your mind.

A. Well, is it in yours?

THE COURT: You are asked to answer questions. You will not comment upon them. 40

Hugh Finnegan — Direct

Q. Will you tell me when you last talked with Mr. Cade?

A. I was talking with him today.

Q. What time today, after lunch, after court adjourned?

A. A little before lunch.

10 Q. And were you talking to him after court adjourned this noon?

A. I ain't seen him close enough to speak to him since dinner.

Q. Since dinner?

A. No.

Q. But you know when the court adjourned at 12.30, don't you?

A. Yes.

Q. Have you talked with him since 12.30?

A. No.

20 Q. That is what I am trying to find out.

BY MR. CARTON:

Q. You have also talked with me about it, haven't you, talked with me about the case too, haven't you?

A. Yes.

30 HUGH FINNEGAN, sworn for defendant.

DIRECT EXAMINATION BY MR. CARTON:

Q. Where do you reside?

A. Long Branch.

Q. Were you on the car that caused this accident last March?

A. Yes, sir.

Q. Were you in the employ of the trolley company?

40 A. Not now, no.

Hugh Finnegan — Direct

- Q. Were you at that time?
 A. Working for the Atlantic Coast, yes.
 Q. The Atlantic Coast Electric Railway Company?
 A. Yes, sir.
 Q. In what capacity?
 A. Line department, electric department.
 Q. On the poles?
 A. Yes, sir.
 Q. And where did you take the car that day? 10
 A. At Sea Girt.
 Q. And were proceeding northward towards Asbury
 Park?
 A. Yes, sir.
 Q. Do you remember the happening of this accident?
 A. Yes, sir.
 Q. Do you remember the car crossing over the bridge
 just prior to the accident?
 A. I do. 20
 Q. Where were you sitting in the car?
 A. About seven feet back on the right hand side.
 Q. That would be the east side, I suppose, wouldn't
 it?
 A. Yes, sir.
 Q. Next to the wagon bridge?
 A. Yes, sir.
 Q. And what is the type of that car? Are there
 benches running along the side, are they those short benches
 with the aisle in the center? 30
 A. The aisle in the center and seats on each side.

BY THE COURT:

- Q. Cross seats?
 A. Yes, sir; aisle in the middle and seats on each side.

BY MR. CARTON:

- Q. Two passengers to a seat? 40

Hugh Finnegan — Direct

- A. Two to a seat.
- Q. Did you observe whether any gong was sounded as you were crossing over the bridge that day?
- A. Yes, before we got off the bridge.
- Q. And about how far south of the pavilion was it there when you first noticed this gong?
- A. Just about leaving the bridge, about the length of the car leaving the bridge.
- 10 Q. About the length of the car leaving the bridge?
- A. Yes, sir.
- Q. And what do you say was the speed of the car, about, at that time?
- A. It was rolling along slow.
- Q. Then how far was that from the point of accident, do you say?

THE COURT: Did he see the accident?

- 20 Q. From the time where the car stopped.
- A. From the time he was ringing the bell till the car stopped?
- Q. Yes.
- A. I haven't any idea how many feet it is.
- Q. Do you remember when the car did stop?
- A. Yes, sir.
- Q. And how fast do you say the car was proceeding just before it stopped?
- 30 A. When the car stopped the car was reversed and it had to stop.
- Q. Just before it was reversed, before it did stop, how fast do you say it was going?
- A. Just going slow.
- Q. Would you care to give us an estimate in miles per hour?
- A. I haven't any idea how fast it was going in miles.
- Q. You don't run a car yourself?
- A. No, sir.
- 40 Q. Did you see Mr. Hubbard before he was struck?

Hugh Finnegan — Direct

A. Yes, sir.

Q. When did you first notice him as you were coming over?

A. When I first noticed him was when the car made the turn.

Q. Where was he then?

A. Right by the pole.

Q. Right by the pole?

A. Yes, sir.

10

Q. What was he doing when you first saw him?

A. When I seen him he was walking right into the car.

Q. And did you observe where he came from?

A. No, I didn't.

Q. Did you notice whether he looked towards you to see the car?

A. No.

Q. Did he look?

A. I don't know.

Q. Didn't observe him?

20

A. No.

Q. What was his course when you first observed him?

A. When I first seen him he was walking right in front of it.

Q. Walking right in front of the car?

A. Yes.

Q. Going a westerly direction, was that?

A. Going across in front of the car when I first seen him.

30

Q. Did you notice him any distance east of the track before he stepped on the track?

A. No, sir.

Q. And you say the car was going slowly then, that you would not give us an estimate of the rate per hour?

A. Yes, sir.

40

Hugh Finnegan — Cross
CROSS EXAMINATION

BY MR. TAYLOR:

- Q. Mr. Finnegan, how far was the car away from Mr. Hubbard when you first saw him?
- A. The length of a car across the bridge.
- 10 Q. How far?
- A. Just the length of a car going off the bridge.
- Q. That was the length of a car away?
- A. Yes, sir; the length of a car leaving the bridge.
- Q. When you first saw him?
- A. On the north side of the bridge.
- Q. And at that time he was stepping on the track?
- A. I don't know if he was stepping on the track then or not.
- Q. But the car had to go further before he was struck?
- 20 A. Yes, the car had to go further before he was struck.
- Q. And you testified, did you not, that the first time you saw him he was directly in front of the car?
- A. Yes, sir.
- Q. And there was at least 28 feet then?
- A. I don't know how long a car is.
- Q. Well, the length of the car? We already have that.
- A. The length of a car. The car went over the bridge. It was the length of a car when he went off the bridge, when
- 30 we first heard the bell, and he had quite a space to go before he struck this man.
- Q. And your judgment is that it was about the length of a car?
- A. No.
- Q. Didn't you tell us that a moment ago?
- A. You didn't get me.
- Q. Try to explain.
- A. You don't understand what I mean by this car on the edge of the bridge?
- 40 Q. No, I don't.

Alexander Brewer — Direct

A. The car was off the end of the bridge the length of a car when I first heard the sound of the bell. Well, he had to go twice the length of this car before he would get into this man.

Q. Then as a matter of fact if the car was 28 feet long he would have to go at least 50 feet before he hit the man?

A. Yes, sir.

Q. And the man then was on the track? 10

A. No, he was not on the track. I couldn't see from where I stood that the man was on the track.

Q. You couldn't see the man?

A. I seen the man when he stepped away from the pole and went into the track.

Q. How far away was that?

A. From the pole to the side of the car?

Q. No, how far was the car away from the man when he stepped out? 20

A. He was right in front.

Q. The car was in front of him?

A. Yes.

Q. Then you mean to say that he ran into the side of this car?

A. Yes, sir.

Q. In other words, Mr. Hubbard ran into the side of the car?

A. Yes, sir.

Q. That is quite enough. Are you working for the company now? 30

A. No, sir.

ALEXANDER BREWER, sworn for defendant.

DIRECT EXAMINATION BY MR. CARTON:

Q. Mr. Brewer, where do you live?

A. Avon.

Q. And have you lived there for some time? 40

Alexander Brewer — Direct

- A. About eighteen months in Avon.
 Q. And what is your business?
 A. I just work for the Standard Oil in the summer time and clam some in the winter time.
 Q. Clam in Shark River?
 A. Yes, sir.
 Q. Were you at the scene of this accident on the 25th of March last?
 10 A. Well, I was near it.
 Q. Tell us where you were, Mr. Brewer.
 A. I was at the north end of Shark River bridge.
 Q. Where were you there in relation to the roadway or the trolley track?
 A. I was just at the end of the footbridge, I suppose about ten feet from the end of the drive, wagon bridge.
 Q. Did you see Mr. Megill's car there that day?
 A. I did. I suppose it was his.
 20 Q. The car that was standing there?
 A. Yes, sir.

BY THE COURT:

- Q. Were you ten feet south of the end of the bridge or ten feet north of the end of the bridge?
 A. North of the end of the bridge.

BY MR. CARTON:

- 30 Q. Were you north or south of the automobile that was there?
 A. Well, I was a little north of the automobile.
 Q. Did you see Mr. Hubbard when he was there with Mr. Megill?
 A. Yes, sir.
 Q. And did you observe the car coming from the south over the bridge?
 A. Yes, sir.
 40 Q. When was your attention first directed to it?

Alexander Brewer — Direct

- A. About the time it was leaving Riggs' boathouse.
 Q. That is south of the Kling boathouse, isn't it?
 A. South of the Kling.
 Q. About how far south is that of the Kling boathouse?
 A. I am not certain, but I should imagine 180 to 200 feet.
 Q. And what attracted your attention to the car at that point? 10
 A. The bell.
 Q. Did you hear a bell clang?
 A. I did.
 Q. Now did you then observe what Mr. Hubbard did?
 A. Observe what he did?
 Q. Yes.
 A. No, I didn't, really, not so soon as that.
 Q. What did you observe that he did just after that?
 A. After that? Passed me on the east side. 20
 Q. Passed you on the east side?
 A. Yes, sir.
 Q. And you were some distance in front of the car?
 A. In back of the car.
 Q. In back of the car then?
 A. A short distance.

BY THE COURT:

- Q. When you say back of the car you mean the trolley car or automobile? 30
 A. The automobile.

BY MR. CARTON:

- Q. That is, on the north side of the automobile?
 A. Yes, sir.
 Q. And what course did Mr. Hubbard pursue then?
 A. About north.
 Q. About north? 40

Alexander Brewer — Direct

- A. Yes.
- Q. And proceeding on a walk, was he?
- A. Yes, sir.
- Q. Did you observe the car coming up nearer to you then?
- A. The trolley?
- Q. Yes, the trolley car.
- 10 A. Yes, sir.
- Q. How was it going, fast or slow?
- A. Well, it was just going along as if it might be going to stop at the end of the bridge.
- Q. As though it might be going to stop?
- A. Yes, sir.
- Q. Did you hear any further bell then or thereafter?
- A. Not at that time, but after.
- Q. Did you observe Mr. Hubbard as he proceeded on?
- A. I did not.
- 20 Q. You didn't observe him after that point?
- A. No, sir; because my back was to him.
- Q. Your back was to him?
- A. Yes, sir.
- Q. And the last you saw of Mr. Hubbard before he was struck was when he was proceeding north?
- A. Yes, sir.

BY THE COURT:

- 30 Q. You were going south, were you?
- A. Standing still.
- Q. Oh, standing still?
- A. Yes.

BY MR. CARTON:

- Q. And the car came up and came by you, did it?
- A. Yes, sir.
- Q. The trolley car?
- 40 A. Yes, sir.

Alexander Brewer — Direct

Q. What did you next see or hear after that?

A. A sharp bell.

Q. A sharp bell?

A. Yes, sir.

Q. Did you turn around then to see the cause of it?

A. Yes, sir.

Q. What did you observe?

A. I observed the trolley had stopped.

10

Q. Did you see Mr. Hubbard?

A. Yes, sir.

Q. Where was Mr. Hubbard?

A. Well, I suppose about a foot in front of the front trucks of the trolley, underneath the running-board on the east side.

Q. The east side?

A. The east side; yes, sir.

Q. Lying on the ground, I suppose?

A. Yes, sir.

20

Q. Could you tell us about how fast the car was going after it passed you at the last time you saw it as it was going by you?

A. I can give you an idea, that is the best I can do. You will have to — not more than five, four or five miles an hour, the last time I saw it before the bell came.

Q. Did you observe the motorman do anything?

A. Of course I saw him tighten up on his brake after he rang down the bridge.

Q. You mean before he reached this point?

30

A. Yes, slow up; of course as I looked around of course he threw on his brake as tight as he could.

Q. So that at just the point of the happening of the accident you didn't observe it?

A. I did not; no, sir.

Q. You were back to him?

A. Yes, sir.

(Adjourned till January 30, 1917, at 10.00 A. M.)

40

Alexander Brewer — Direct
Freehold, N. J., January 30, 1917.

(Trial of the cause resumed at 10.00 A. M.)

ALEXANDER BREWER, resumed.

10 FURTHER DIRECT EXAMINATION BY MR. CAR-
TON:

Q. Mr. Brewer, I think you said you were familiar with the location there. I don't know whether I asked you whether you knew where the end of the railing, so called, is, that is, the railing that is just on the east side of the trolley track at the north end of the bridge.

A. On the west side of the footpath.

Q. On the west side of the footpath, a continuation
20 out of that?

A. Yes.

Q. You stood between the north end of that and Mr. Megill's car, did you not, when Mr. Hubbard met with the accident?

A. Yes, sir.

Q. And did you take occasion then or have you since, Mr. Brewer, to make any observations at a point at the end of that railing where the pole is southward to see how far you could see an approaching car?

30 A. Not since; no, sir.

Q. Did you at that time?

A. Well, I can give you an idea about how far I saw the car at that time.

Q. How far did you see it at that time?

A. Well, it was at the north end of Riggs' boat landing, or boathouse, rather, and I suppose that might be maybe two hundred feet.

40 MR. TAYLOR: Is this competent? He doesn't say that he was in the same position that the plaintiff was.

Alexander Brewer — Direct

THE COURT: No, he stood where he said he was, ten feet north of the north end of the bridge.

MR. TAYLOR: I respectfully make an objection.

THE COURT: The objection will be overruled.

Q. And the same rail or guarding over which you saw the car that distance is the same rail that continued on down to where Mr. Hubbard was, is it not? 10

A. To a certain point, and then there is an addition to that railing which runs on an incline.

Q. Runs on an incline?

A. Yes, sir.

Q. So as the railing goes north it inclines?

A. I am pretty sure it does; yes, sir.

Q. And from that point where you were you say you could see the car about at Riggs' boathouse? 20

A. I saw that.

Q. And how far do you say it was, approximately, from where you stood?

A. I am not positive, but it is 150 to 200 feet.

Q. Now at the end of that railing, north of the end of that railing, how far south could you see down the track from that point?

MR. TAYLOR: I object. He has not laid any foundation for the question. 30

A. I don't quite understand you.

MR. TAYLOR: I object to the question because he has not shown that he ever was there or when he was there.

THE COURT: Yes, I think unless it appears that he made an observation there.

Q. Have you taken occasion to make an observation 40

Alexander Brewer — Cross

from that point of the track south, Mr. Brewer?

A. I don't quite understand you.

Q. You were standing some feet south from the end of the railing and you have told us how far you saw the car; then I have asked you if you have taken occasion to observe from the end of the railing the view south to see how far you could see down the track.

10 A. Why, I haven't.

Q. You haven't done that?

A. Not since that time.

Q. Did you at that time?

A. No, I didn't.

Q. How near do you say Mr. Megill's car stood to this rail?

A. To the railing along the footpath?

Q. Yes, along the footpath.

20 A. Well, that probably was four or five feet from that.

BY MR. TAYLOR:

Q. What is that, four or five feet from the railing?

A. Four or five feet from the railing. That would be on the west side of the footpath.

BY MR. CARTON:

30 Q. Do you know from your own experience, Mr. Brewer, whether passengers take the car at this point, passengers going north, at the north end of the bridge?

A. Occasionally, yes.

CROSS EXAMINATION

BY MR. TAYLOR:

40 Q. Mr. Brewer, you stood between what is known as the truss of the bridge, in other words, the guard of the

Alexander Brewer — Cross

wagon bridge, or the west guard of the wagon bridge and the west guard of the footbridge, did you not?

A. I did, at the end of the guardrail of the wagon-bridge.

Q. And you don't know what one could see in leaving the wagon bridge proper, do you?

A. What you could see?

Q. What one could see.

A. Yes.

Q. You haven't looked for that?

A. Not since that time. I know what I saw then.

Q. Did you walk on the wagon bridge that day at this point, opposite where the accident happened or nearly so?

A. Not up on the wagon bridge.

Q. How do you fix the distance which you said the automobile was from the railing or trusses? How do you know it is four or five feet? May it not have been two or three feet? It may have been that, mayn't it?

A. Well, it may have been. I didn't measure the distance.

Q. In other words, your view was very hazy as to how far it was? There was excitement and everything?

A. Well, there was no excitement on my part.

Q. It doesn't interest you when you see a man struck?

A. I didn't see him struck.

Q. You saw him after he was struck, didn't you?

A. I did.

Q. When did you take your observation as to where the car was, before he was struck or after he was struck?

A. I saw the car before he was struck and after.

Q. And you then can't testify positively whether the car was two feet or six or seven feet from the trusses or guards, can you, really?

A. Of course not.

Q. Of course you can only tell what you know. Now after the accident occurred did you run up to the scene of it?

A. Run?

Q. Well, did you go up to the scene of it?

10

20

30

40

Alexander Brewer — Cross

A. I did.

Q. Did you assist in getting Mr. Hubbard out from under the car?

A. I don't think I touched him.

Q. You don't think you touched him?

A. I don't think I did.

Q. You were a mere onlooker at that time?

10

A. At that time.

BY THE COURT:

Q. Mr. Brewer, do you understand that map?

A. Do I understand the map?

Q. Do you understand the map?

A. Well, I have never looked this over but I understand the situation a little bit down around the place.

20

Q. You were going from north to south?

A. I was standing at that time.

Q. Were you going from north to south or had you come over the bridge?

A. I had come from north to south and hadn't yet reached the bridge. I had stopped.

Q. What?

A. I had stopped there; yes, sir.

Q. I thought you said the place where you stopped was ten feet north of the bridge.

30

A. Well, that is where I did stop, about ten feet north of the bridge.

Q. So at the time this accident happened you hadn't yet reached the bridge?

A. Not exactly; no, sir.

Q. Now where were you with reference to that railing? Will you point out the railing which is north of the bridge there?

40

MR. TAYLOR: This is the railing, isn't it? (Indicating on map.)

Alexander Brewer — Cross

MR. CARTON: Yes.

Q. Where were you in reference to this railing?

THE COURT: Show him where the end of the bridge is and where the end of the railing is.

MR. TAYLOR: I think the end of the bridge is there and the end of the railing is here. (Indicating.) 10

MR. CARTON: That is right.

Q. Which side of that railing were you?

BY MR. TAYLOR:

Q. Which side of the railing were you, west or east?

A. Which is the railing? 20

Q. Here. This is the railing on the east side of the footpath. This is the railing. This is the trusses west of the bridge and this is the footpath.

A. This is the protecting railing of the footpath from the trolley track; is that the idea?

Q. Yes.

A. I was on the east side of that, if this is on the east side of the trolley track.

MR. CARTON: It is. 30

BY THE COURT:

Q. And how near to the automobile were you?

A. I didn't measure that distance, but probably eight or nine feet, ten feet.

Q. Were you in front of the automobile?

A. No, sir.

Q. Alongside of it or back of it?

A. In back, rather. 40

Alexander Brewer — Redirect — Recross

Q. In back of the automobile?

A. Yes.

Q. And how close to that railing were you?

A. Probably ten feet from that railing at that point.

Q. And how close to the north end of that railing were you, where the telegraph pole is?

A. Probably 30 to 35 feet, it might be possibly 40 feet.

10 Q. Well, that railing, if it refreshes your recollection, is shown to be 41 feet long from the bridge to the northerly end of it.

A. 41 feet long?

Q. And you say you were in the rear of the automobile?

A. In the rear of the automobile.

REDIRECT EXAMINATION

20

BY MR. CARTON:

Q. Mr. Brewer, a word. Could you give us an estimate of about where the automobile stood with reference to the end of the bridge and the end of the rail?

A. The automobile stood up probably close at the end of the railing there. This is a pole here.

Q. The railing you are referring to now, is that the guardrail?

30 A. The protecting of the drive bridge on the west side.

Q. That is where you place the automobile as having stood?

A. Yes, sir.

RECCROSS EXAMINATION

BY MR. TAYLOR:

40 Q. Now where were you standing, may I ask you to show where you were standing when you saw the car about

Alexander Brewer — Recross

150 feet away? Where on this map, please? You see here is the fence. Here is the beginning of the footbridge in here. Now this is the footpath. Where were you standing there?

A. The car stood in front of this post, facing this pole.

THE COURT: Indicating the north end of the main girder of the bridge on the west side of the bridge.

10

A. And the car stood facing this pole. I stood kind of in the rear of the car, a little bit on the east side, in the rear of the car.

Q. Then it appears, Mr. Brewer, that the car was between you and the track facing it?

A. The automobile, you mean?

Q. The automobile, yes.

A. Well, it naturally was between me and the track at a certain place.

20

Q. Well, it was also to the south of the track, wasn't it?

A. Southwest, rather.

Q. Do you know how large the car was?

A. No, I don't.

Q. Ordinary sized car, you think?

A. I imagine, touring.

Q. Won't you explain to the court and jury how it is that your view was not shut off from the bridge yet if you were in that position? You couldn't see through the car, could you?

30

MR. CARTON: I object. He is asked to explain to the court and jury how it was he couldn't see the car.

THE COURT: Well, the last part of the question is proper, whether or not he could see through the car. He may answer that.

A. At certain places I could see through it.

40

Alexander Brewer — Recross

- Q. Were the curtains on or off?
- A. The back curtains might have been on. The front curtains were not.
- Q. You don't remember about that?
- A. I don't remember about the back curtains.
- Q. Then, in other words, Mr. Brewer, at some places you could see it and some places you couldn't?
- 10 A. I could see it at certain points and certain points I couldn't see it.
- Q. And you say you were walking towards Belmar, weren't you?
- A. No, I was standing still.
- Q. But you had started towards Belmar? You were headed in that direction?
- A. Headed in that direction.
- Q. What caused you to stop there?
- A. I was interested in the clams that they had loaded
- 20 on the automobile.
- Q. And you were looking at the clams?
- A. I was.
- Q. And you were not expecting any accident or anything of the kind?
- A. No, sir; I didn't.
- Q. And you didn't see anything of the accident?
- A. I didn't see the accident.
- Q. Did you see Mr. Hubbard there?
- A. I saw him before.
- 30 Q. How long before, a quarter of a minute, a half a minute?
- A. It might have been a minute, it might have been a half a minute. I am not positive about it.
- Q. Did you see Mr. Megill there?
- A. Yes.
- Q. Talking to him?
- A. I don't know as I spoke to Mr. Megill.
- Q. But you were examining the clams on the side of Mr. Megill's automobile, weren't you?
- 40 A. Yes, sir.

Michael Lavin — Direct

MICHAEL LAVIN, sworn for defendant.

DIRECT EXAMINATION BY MR. CARTON:

Q. Mr. Lavin, are you employed by the Atlantic Coast Electric Railway?

A. Yes, sir.

Q. As a motorman?

A. Yes, sir. 10

Q. Were you the motorman on the southbound trolley car the day of this accident?

A. Yes, sir.

Q. You were proceeding with your car from Asbury Park towards Belmar?

A. Yes, sir.

Q. Was it your car that came up and waited in the switch for the car coming from the south that caused the accident?

A. Yes, sir. 20

Q. Do you remember stopping there that day?

A. Yes, sir.

Q. Did you see the car coming north as it approached near the bridge?

A. Yes, sir.

Q. Were you in a position where you could see it, plain view?

A. Yes, sir.

Q. Did you observe it as to speed, whether it was going fast or slowly? 30

A. Coming very slow.

Q. Did you hear any gong sounded?

A. Yes, sir.

Q. Where?

A. At Riggs' boathouse.

Q. And did you hear any other gong sounded after that?

A. Well, I heard one sharp bell ring. I was talking to the conductor at the time and didn't take very much notice 40

Michael Lavin — Cross

to it, but when I turned around they were picking this man up.

Q. You didn't actually see the accident?

A. No, sir.

Q. You were talking with your conductor, you say?

A. Yes, I was talking about clams.

Q. That is near the river there, is it?

10 A. About 75 feet from the river.

CROSS EXAMINATION

BY MR. TAYLOR:

Q. Let us get this right now. Here is the switch, is it? (Referring to map.) Point out where you were standing waiting for the other car.

20 A. You explain it and then I will tell you. I think this is the railroad track running down here. The south bound track is this? And the northbound track is here. I think this is the point of the switch, right there. (Indicating on map.)

Q. Now where was your car standing?

A. Well, I was standing further back.

Q. Back in here? (Indicating.)

A. No, no. I was standing about 75 feet from the point of this switch, the other way.

30 Q. 75 feet from the point of the switch?

A. Towards Asbury Park.

Q. You know where Riggs' boathouse is, don't you?

A. Yes, I do know where it is.

Q. Mr. Lavin, what is the distance from the end of this switch, the point of the switch, to the platform of Kling's boathouse, about?

A. I couldn't tell you. I never measured it.

40 MR. TAYLOR: Is there a scale on this map, Mr. Carton?

Michael Lavin — Cross

MR. CARTON: Yes. One inch represents ten feet, I think.

Q. Well, if one inch represents ten feet on this map does it refresh your memory any looking at the map as to the distance to Kling's boathouse? It is 100 to 150 feet, isn't it, from there?

A. From where?

Q. From the point of the switch to Kling's boathouse.

A. I couldn't tell you how far it is. I never measured it.

Q. How can you tell me you were seventy-five feet back?

A. Well, I figure about seventy-five feet back from the switch.

Q. Won't you figure as near as you can how far it is from Kling's boathouse to the point of the switch?

A. I don't want to give you any exact figures.

Q. I don't expect you to give me exact figures, but using the same methods that you figured the other part, about 125 feet, isn't it?

A. I couldn't say. I won't say. I tell you I took notice where I was standing from the point of the switch, that is all I know.

MR. TAYLOR: If your Honor please, after measuring this, if I am right on it, it is about 110 feet from the point of the switch to this platform.

THE COURT: It measures in inches, does it?

MR. TAYLOR: Yes, your Honor.

Q. That is 185 feet, then, across the platform to the south side of the boathouse is 40 feet more, roughly, a little bit more than that, it really is. Now can you give us a rough estimate of the distance between the south side of Kling's boathouse, which is a point about here, and a place

Michael Lavin — Cross

at Riggs' where you heard the bell ring? In other words, is it 150 feet or 200 feet?

A. I couldn't say.

Q. We don't ask you to say exactly what it is. It is about 200 feet, isn't it?

A. From Riggs' boathouse?

10 Q. From Riggs' boathouse to the south side of Kling's boathouse; probably about 200 feet, isn't it?

A. How many feet is it across that bridge?

Q. I really don't know.

A. I will tell you, I never measured distances and that is why I don't —

BY MR. CARTON :

Q. Give us your best estimate.

20 BY MR. TAYLOR :

Q. Give your best judgment, that is all we want. We don't expect you to be absolutely accurate.

A. Well, may be 125 feet.

Q. 125 feet?

BY THE COURT :

30 Q. That is from Kling's to Riggs' boathouse?

A. It might not be that.

Q. That is your judgment?

A. That is my judgment.

BY MR. TAYLOR :

Q. You were talking to the conductor during that time, were you?

A. During the time he rang the bell?

40 Q. Yes.

Michael Lavin — Cross

A. No, I was looking out front watching the car coming northbound.

Q. And did you have the door of your car open?

A. Had the east side door facing the ocean open.

Q. And you were, as you have described it, at least 350 feet from this other car when you heard it ring its bell; that is so, isn't it?

A. What, from the —

Q. Yes, figuring this to be this distance we have just obtained. 10

A. From where I was standing?

Q. Yes, from where your car was standing you were at least 350 feet, weren't you?

A. I couldn't say positive what it was. It might be 150, it might be 200.

Q. Nevertheless the distances have been figured up at least 350 feet, haven't they?

A. I don't know. 20

Q. Was there anything particular to attract your attention about the ringing of the bell at Riggs' boathouse?

A. Why, naturally when a man comes at the foot of the switch he generally looks for the Sea Girt car coming over that bend.

Q. And they announce it by ringing the bell that they are coming, do they?

A. Not always. You have got to look up and see the man.

Q. By looking is the way you observe? 30

A. So you don't both run in and both cars into the switch together.

Q. And you do that by looking, don't you?

A. You have got to look to see whether he is coming or not.

Q. They do not signal you by bell that they are coming, do they?

A. Once in a while. I always ring the bell coming across that bridge; they all do. 40

Michael Lavin — Cross

Q. And because you do and they all do it is very natural for you to think that he did that day, isn't it?

A. I don't know what he rang it for. He might have rang it for this passenger.

Q. You think he did ring it?

A. He rang his bell, because you could hear that bell ring pretty nearly a quarter of a mile. If a man was deaf he would hear that bell ring.

10

Q. It was an ordinary trolley bell, was it?

A. It was an iron bell, with an iron bottom to it; and when you touched that bell any man that has got any hearing could hear it.

Q. Hear it a quarter of a mile?

A. I don't say a quarter of a mile, but you could hear it. It is not a wooden bell, it is an iron bell.

Q. You did say a quarter of a mile?

A. That is all right.

20

Q. You didn't hear it?

A. You could hear that a long distance.

Q. Answer the question. Don't volunteer so much information. You did say you could hear it a quarter of a mile?

A. I only just said I imagined you could hear it. I didn't say —

Q. And you imagined you heard it ring too, didn't you?

30

A. I didn't imagine, because I tell you a man that was deaf could hear it ring.

Q. They didn't have a church bell on the car, did they?

A. Well, it is an iron bell.

Q. Now isn't it a fact that you ring the bell when crossing that bridge?

A. Always do, yes.

Q. And the other men as far as you know do also?

40

A. Every man that I ever know rings that bell going across the bridge, yes, as far as I know. I never stood there and watched them, but I know I do it.

Michael Lavin — Cross

Q. And don't you think you are justified in saying that he rang it because you always do, that is the custom?

A. No, I heard it.

Q. You heard him ring the bell although you were 350 feet away?

A. Yes, I heard him ring the bell.

Q. You have testified that you heard it ring once, haven't you?

A. I told you I heard it ring at Riggs' boathouse, and also ring again, and when I turned around they were picking this man up. That is all I know about the accident.

Q. If you could hear the bell ring at Riggs' boathouse you could hear it ringing at any other place between Riggs' boathouse and the place you were, couldn't you? If it was again rung after he left Riggs' boathouse you could hear it, couldn't you?

A. Why, naturally you could hear it.

Q. And did you hear it ringing except as you have testified, at Riggs' boathouse and about the time when the accident occurred?

A. I heard it ring yes, a sharp bell.

Q. That is all you did hear, at Riggs' boathouse and then the sharp bell; that was all, wasn't it?

A. That is all I paid attention to.

Q. You did pay attention to those two?

A. Well, naturally when you come to the bridge you see the man coming over the bridge, I heard the bell ring.

Q. You can answer yes or no, can't you? Now answer yes or no. You did pay attention to those two?

A. I paid attention to the one, yes, but not the other one.

Q. Which one didn't you pay attention to?

A. The last ring.

Q. You didn't pay attention to the last ring?

A. When I turned around they were picking this man up.

Q. You didn't pay any attention to the loud, sharp ring, but you did to the ordinary ring?

Michael Lavin — Cross

A. Yes.

Q. In spite of the fact that one was at least two hundred feet closer to you than the other?

A. The reason I paid attention to it, because any man that comes up to the switch always watches the car coming, the northbound, going to Asbury Park.

10 THE COURT: Well, you see, Mr. Lavin, the witness should answer the questions. Just pay attention to the questions and answer them. If there is anything that needs to be said the counsel who called you as a witness will ask it.

Q. Now Mr. Irons, when he testified that when he rang the bell at Riggs' boathouse and rang it at least once or twice between Riggs' boathouse and the time that he rang the sharp bell, didn't tell the truth then, did he?

20 (Objected to.)

THE COURT: You cannot require one witness to characterize the testimony of another witness.

Q. Then do you say that Mr. Irons is mistaken when he testifies?

A. I never paid attention.

Q. But you didn't hear any, did you, except those two you have testified too?

30 A. I heard them two that I testified to.

Q. Now if the bell had been rung at any other time you would have heard it, wouldn't you?

A. I was too busy talking to somebody else.

Q. But you were not too busy talking to some one else to hear it at Riggs' boathouse, were you?

A. I always do that, naturally, when a man comes to the switch and he watches.

40

George L. Hampton — Direct
 GEORGE L. HAMPTON, sworn for defendant.

DIRECT EXAMINATION BY MR. CARTON:

- Q. Mr. Hampton, what is your business?
 A. Photographer.
 Q. And where do you live?
 A. Asbury Park.
 Q. Have you lived at Avon? 10
 A. I used to; yes, sir.
 Q. Are you familiar with the situation with the bridge,
 the Shark River bridge, at the south boundary of Avon?
 A. I have been past there several times; yes, sir.
 Q. And how long have you been acquainted with that
 location?
 A. Well, around there all my life.
 Q. Did you recently make a photograph of that situ-
 ation for this suit? 20
 A. Yes, sir.
 Q. When was that?
 A. Last Thursday in the afternoon.
 Q. At the time the surveyor was there?
 A. No, sir.
 Q. Does the situation shown in your photograph repre-
 sent the situation substantially as it existed last March?

(Objected to.)

MR. TAYLOR: I object. He has not shown that he 30
 knew anything about it last March. He may have lived
 there off and on all his life, but that does not —

THE COURT: I suppose the first question should be
 whether he knows whether it does or not.

Q. You say you have lived, and outside of living in
 Avon have had occasion to go back and forth by this place
 frequently? 40

George L. Hampton — Direct

A. Well, on an average pass there about two or three times a month, sometimes in the trolley and sometimes in an automobile.

Q. And did that take place last March, these trips by there?

A. Yes, sir.

10 Q. And have you known of the general situation as it existed around there for some years past?

A. Why, about, yes.

Q. And you know how it existed last March?

A. Well, to the best of my knowledge it is the same as it was the other day.

Q. And you gained that knowledge from your observation or trips by there?

A. Well, I never took no particular notice of it. It is simply a matter of fact. I have been past there several times, and as a fact I have stopped off there.

20 Q. Where did you stop off there prior to this?

A. Well, I stopped off there about four years ago and took a picture there of some part of the bridge, I don't know whether that same part, but I got off at that end and took a picture near the end of the bridge.

Q. Will you tell us your best judgment now whether the situation as it existed today and shown on your photograph is the same as it existed last March?

30 MR. TAYLOR: I object to that question. I think he has not shown a foundation. He says he knows nothing about it.

THE COURT: He does not appear to have made any observation last March; he made an observation four years ago.

(Question withdrawn.)

40 Q. Let me ask you this question. Does the situation differ substantially now from what it did four years ago

George L. Hampton — Direct

when you examined it before and made a photograph of it?

A. Not to my knowledge.

Q. Is it your best knowledge that the situation is the same now as it was then?

A. Yes, sir.

MR. TAYLOR: I still object to the offer for this reason —

10

MR. CARTON: I haven't made an offer.

THE COURT: He has not made it yet.

Q. Did you make this photograph?

A. Yes, sir.

Q. And does the picture represent what it portrays there?

A. Yes, sir.

20

BY THE COURT:

Q. Developed and printed by you?

A. Yes, sir.

MR. CARTON: Now I offer it.

MR. TAYLOR: I object to the offer, because it is not shown that four years ago he made any observation of this particular spot. He says he took a photograph of part of the bridge.

30

THE COURT: I think, perhaps, if there had been no testimony by him as to the conditions, the same situation arises as when the map was proved, and it having been shown by another witness that the conditions were the same when the survey for the map was made as when the accident occurred, and it appears that this photograph was taken on the same day, I think that accounts for the situation on the

40

George L. Hampton — Direct

two dates. The objection will be overruled and an exception will be noted.

(Objection noted for plaintiff as ground of appeal.)

(Photograph marked Exhibit D 2.)

10 BY MR. CARTON:

Q. Mr. Hampton, where did you have your instrument placed when you took this picture?

A. Is that the one you just showed me?

Q. Yes.

A. I had it north of the bridge.

BY THE COURT:

20 Q. How far?

A. Well, about 150 feet, I should judge, from the bridge proper. I made no measurements.

Q. That is looking towards the bridge, is it?

A. Looking towards the bridge; yes, sir; looking towards the south.

30 MR. TAYLOR: Your Honor, it doesn't seem to me that a photograph taken 150 feet away should be received. Any one who knows photography knows how it can be used from different angles to accentuate or distort or enlarge.

THE COURT: Well, upon examination of the photograph you now move to strike it out?

MR. TAYLOR: I do, sir.

THE COURT: The motion will be denied and an exception will be allowed.

40 (Objection noted for plaintiff as ground of appeal.)

George L. Hampton — Cross
CROSS EXAMINATION

BY MR. TAYLOR:

Q. Mr. Hampton, to the best of your knowledge you were not around the vicinity of this accident in March, 1916, were you?

A. Well, I was not right up there the day of the accident, but I go through there on an average of about three times a month and I don't know — 10

Q. You don't know whether you went there that month or not?

A. Yes, I generally go past there every month, because we have orders all the way up the line.

Q. But you didn't make any particular observations on those trips just how everything is, did you?

A. No, no more than I would if I was sitting in the trolley and got used to the place.

Q. Have you got a brother working for the trolley company? 20

A. Yes, sir.

Q. You have worked for the trolley company too, haven't you?

A. No, sir.

Q. Expect to get a job from them this summer?

A. No, sir.

Q. Now is it true that in photography you can take pictures from different angles, different distances, etc., that accentuate or diminish or give a false view? 30

A. You can give no false views; no, sir; not with the ordinary outfit that we use.

Q. This photograph was taken 150 feet away from the bridge?

A. I said approximately, that I made no measurements. It may be a little more. I don't think it is any less.

Q. Why didn't you take it right at the side of the bridge where you would be within eight or ten feet of where this accident happened? 40

George L. Hampton — Cross

A. Well, I couldn't get the switch in and all that foreground. You want some foreground in it.

Q. Had it been taken within ten feet of where the accident happened the photograph would have shown the details much more intelligently, wouldn't it?

10 A. Well, not the details, no; it would have showed it larger and cut out the foreground, would have showed it larger in proportion, of course, nearer to it.

Q. And the way this photograph is taken the details at the actual place of happening are not as large and distinct as they are at the point of the switch, are they?

A. Well, the details of what do you mean,

Q. Well, first as —

A. On the bridge itself —

Q. The details of the bridge and of the platform and the immediate vicinity of the accident itself are not as large as they are at the switch, are they?

20 A. Not as large. If you were very close to it it would be larger.

Q. If you were close to it it would be larger?

A. The same detail is there, only it is not so large, that is the only difference. You are back over there.

BY THE COURT:

30 Q. The photograph as taken, does it give a view which would meet the eye of an observer at that point or is the view just given there a distorted view?

A. No, sir; it is an absolutely correct view, taken with an ordinary camera and good ordinary lens.

BY MR. CARTON:

Q. You are employed by Cole and Company, the photographers of Asbury Park?

A. Yes, Cole and Company. They do no work like that.

Richard Brace — Direct

RICHARD BRACE, sworn for defendant.

DIRECT EXAMINATION BY MR. CARTON:

Q. Mr. Brace, did you recently at my request make some observations on the ground at the north end of the Shark River bridge?

A. Yes, sir.

Q. Any one with you at the time?

10

A. Yes, sir.

Q. Mr. Bowles with you?

A. Yes, sir.

Q. When did you make these observations?

A. Last Saturday.

Q. Where did you take your views from, from what point?

A. 6 feet from the north end of the railing on the bridge, east of the north end, to the west railing of the footbridge.

20

Q. And will you look at that map and see if it means anything to you.

A. I stood right out here. (Indicating on map.)

Q. Is that what you call — that line marked "Fence," is that what you call the railing?

A. Yes, sir.

THE COURT: Now just mark your own initial "B" on there, where you stood.

30

(Witness marks on map.)

Q. And you say that point indicated on the map by you now is 6 feet east from the north end of the rail there?

A. Approximately.

Q. Did you take a view southward from that point?

A. Yes, sir.

Q. And how far could you observe a car coming up the track?

40

Richard Brace — Cross

- A. To Riggs' boathouse.
- Q. How far do you say Riggs' boathouse is located south from that point?
- A. I should say about 200 feet.
- Q. What is the character of the rail marked "Fence" there to which you have referred?
- A. It is a wooden rail.
- 10 Q. And as to height?
- A. About three feet, three feet six inches.
- Q. And does it continue the same height, the same character of fence, all the way over the bridge?
- A. Yes, sir; except it is lower on account of the incline.
- Q. The fence is the same distance from the ground all along?
- A. Yes.
- 20 Q. But it drops down because of the incline to the ground?
- A. Yes.

CROSS EXAMINATION

BY MR. TAYLOR:

- Q. Mr. Brace, you may have stood eight feet from the rail, mayn't you?
- 30 A. No, I don't think so.
- Q. Your mark there shows it eight feet. Did you measure the distance you were from the rail?
- A. No.
- Q. Guesswork, was it?
- A. Yes, sir. I am a pretty good guesser.
- Q. Your observation is totally confined to that which you made last Saturday, isn't it?
- A. Last Saturday.
- 40 Q. Now if I am not mistaken you were directly east of this pole, weren't you?

Edwin W. Bowles — Direct

A. Not directly east of the pole, no.

Q. You have marked it directly east.

A. A foot or so it is away.

Q. Well, you were east of the pole and about one foot north of the pole?

A. No, I was about one foot south of the pole.

Q. One foot south of the pole?

A. Yes.

Q. In other words, from where you were standing the pole would not be between you and anything at all?

A. That is the idea.

10

EDWIN W. BOWLES, sworn for defendant.

DIRECT EXAMINATION BY MR. CARTON:

Q. Mr. Bowles, did you make the observation with Mr. Brace last week?

A. Yes, sir.

Q. And from what point did you make an observation of the bridge of a trolley on the northbound track?

A. From the end of the railing and also from the end of the bridge.

Q. Just look at the map, Mr. Bowles. Are you familiar with it? Are you familiar with the points shown on the map?

A. I am not familiar with this map. I am familiar with the ground.

Q. Probably your familiarity with the ground and looking at the map will work out all right.

MR. TAYLOR: This is the fence which goes from the end of the footpath to this end.

A. Well, I took the observations from here, from this point here.

20

30

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Edwin W. Bowles — Direct

MR. TAYLOR: That is the end of the footpath.

A. Just at the end of the footpath. I also took one from here at the end of this, an observation here at the end of the footbridge.

Q. You first made an observation directly at the end of the bridge?

10 A. The footbridge.

Q. And did you make an observation south?

A. Yes, at this point here. (Indicating.)

Q. Well, I understood you first to say that you made an observation at two points.

A. I did.

Q. First from this point, the end of the bridge, and then this point, the end of the rail.

A. Yes.

20 Q. Now first take a point at the end of the bridge. Where did you stand with reference to that line or the pole that is marked on there, the dot?

A. Here. (Indicating.)

Q. Immediately east of it, from that distance?

A. East of it.

Q. How many feet?

A. Probably about two or three feet.

Q. And did you then observe an ordinary trolley car coming from the south to north?

30 A. Yes, from this point you could see one across the bridge, the entire length of the bridge.

Q. Over to the Belmar side?

A. Yes, sir.

MR. TAYLOR: How is that relevant? We do not claim that we were at any time at that point he is testifying about now.

THE COURT: Well, I will admit it.

40 Q. Then did you make an observation from the point at the end of the rail?

Edwin W. Bowles — Direct

A. Yes, sir.

Q. Where did you stand there?

A. Well, I stood at the east side of the pole there and I also stood to the south side of it.

Q. Do you mean the south side of it?

BY MR. TAYLOR :

Q. Of the telegraph pole? 10

A. Of the telegraph pole, the dot there, the end of the railing; that is the idea.

BY MR. CARTON :

Q. First you stood on the east side and how many feet east of the pole did you say it was from where you stood?

A. Oh, probably two or three feet. 20

Q. And make an observation there from that point?

A. Yes, sir.

Q. How far down the track could you see?

A. See clearly to Riggs' boathouse.

Q. And how many feet do you say that is in your judgment?

A. Well, I should judge it is 150 feet at least.

Q. Then you say you made another observation from that point. Where did you stand then?

A. Here, nearer the track. (Indicating.) 30

Q. And west of the fence?

A. Oh, west of the fence.

Q. And within how many feet of the track?

A. Well, I should judge about three feet, about a pace, I should say.

Q. Between the fence and the track, at any rate?

A. Yes, sir.

Q. And from that point south how far could you see the track, get a clear view of the track?

A. A clear view of the track the length of the bridge. 40

Edwin W. Bowles — Cross

Q. Over to the Belmar side?

A. Yes, sir.

CROSS EXAMINATION

BY MR. TAYLOR:

10 Q. In this last observation you stood between this line here and the fence, the telegraph pole and the track; is that so?

A. Between the track on the west side and the fence.

Q. And probably about three feet from the railroad track; is that so?

A. About three feet from the track, between the track and the fence.

Q. You were not standing on top of the fence, were you?

20 A. No, I did not.

Q. Or on top of the telegraph pole?

A. I didn't climb either one.

Q. You know as a matter of fact that that map shows that there is only 2 feet 6 inches in the place where you stood, that you were standing between the telegraph pole and the end of the fence and the track?

A. Well, that is a very good guess.

Q. Is your other testimony a guess?

A. You can get it without measuring.

30 Q. Is your other testimony a guess?

A. No, sir.

Q. You would have to displace the fence to stand where you said you were standing, wouldn't you?

A. No, sir.

Q. Oh, yes, you would.

A. I could lean against it.

Q. How tall are you?

A. I think I am 5 feet 10.

Q. What is your occupation, Mr. Bowles?

40 A. Real estate.

Caleb T. Hubbard recalled — Direct

Q. Have you sold any houses within the last year?

A. Yes, sir.

MR. CARTON: I object to that as immaterial. What has that got to do with it?

MR. TAYLOR: If your Honor please, I want to show that Mr. Bowles is a man about town, with no occupation, ready and willing to do any kind of a job of this kind he can, and in that way show interest.

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THE COURT: That will be rejected.

MR. CARTON: I object to the statement.

MR. TAYLOR: I apologize if I have gone too far in making my statement.

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DEFENDENT RESTS

PLAINTIFF'S TESTIMONY IN REBUTTAL

CALEB T. HUBBARD, recalled for plaintiff.

DIRECT EXAMINATION BY MR. FARRELL:

Q. Mr. Hubbard, on this occasion did you see the witness Brewer who testified here?

30

A. I did not; no, sir.

Q. You heard him testify that he was standing right back of the automobile?

A. Yes.

Q. You walked back of the automobile, didn't you?

A. Yes, sir.

Q. And you didn't see him?

A. No, sir; I saw nobody.

40

Caleb T. Hubbard recalled — Direct

Q. At the place where you were crossing the track at the time you looked southward was there anything which obstructed your view?

(Objected to as not rebuttal. Objection sustained.)

10 Q. Have you been on the place or the premises where you crossed since this accident?

A. Yes, sir.

Q. Did you stand in a position as indicated on the map, a few feet west of the telegraph pole and a few feet north, a position indicated there?

THE COURT: By the B.

A. No, two feet north of the B. I stood in west of the pole.

20 Q. East of the pole?

A. East of the pole, north.

Q. Did you look southward on that occasion?

A. Yes, sir.

Q. Did you have a clear view south?

A. No, sir.

Q. How high is the railing there, according to the measurement on your body?

A. Well, I stood alongside of it and it came up about to there. (Indicating.)

30

THE COURT: Indicating below the armpit.

Q. When you stood alongside of it it was right up to there?

A. Yes.

Q. Have you observed the roadbed in that particular vicinity since the accident?

A. I have; yes, sir.

Q. When was that?

40

A. That was last Thursday.

Caleb T. Hubbard recalled — Cross

Q. Last Thursday?

A. Yes, sir.

Q. And you have also seen it on other occasions, have you?

A. Yes.

Q. Was there any change in the roadbed itself in regard to whether it was higher or lower?

A. I noticed that the roadbed had been raised.

Q. It was higher when you observed it?

10

A. Yes, sir.

BY THE COURT:

Q. When you speak of the roadbed you mean the bed of the street?

A. Yes, sir; I mean the — of course there is no sidewalk there at that point. It is all roadway.

Q. When you speak of the roadbed you don't mean the bed of the trolley road but you mean the street?

20

A. No, I mean the wagon road.

BY MR. FARRELL:

Q. When you speak of that particular place you mean where you crossed?

A. Where I crossed, a few feet north of the pole.

Q. No, east of the pole?

A. East of the pole; yes, sir.

Q. You are quite sure, Mr. Hubbard, that you didn't hear any bell?

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(Objected to. Objection sustained.)

CROSS EXAMINATION

BY MR. CARTON:

Q. You say the roadbed has been raised since the time of the accident there, Mr. Hubbard?

40

Caleb T. Hubbard recalled — Cross

- A. Yes, sir.
- Q. Tell us where you have noticed the raise.
- A. I noticed the raise as it was where I went to cross the track, from where I stood at the time of the accident.
- Q. Just at that point?
- A. I noticed the last time I was down there I could see down the track better; the railing didn't obstruct my view like it did at the time of the accident.
- 10 Q. I thought you couldn't get a view the last time you looked at it?
- A. Well, I couldn't get an unobstructed view.
- Q. You couldn't see the top of the car when you looked at it here recently, could you?
- A. Yes, I could see the —
- Q. I understood you to say you couldn't get a view from there.
- A. As I say, I couldn't get an unobstructed view.
- 20 Q. How much space was occupied by this fill or this raise that you observed there the other day?
- A. I don't understand your question.
- Q. Well, was it just filled in and raised at the point where you go across the track there?
- A. Oh, no, it was filled in with a gradual fill.
- Q. There hasn't been a new street made there or anything, has there?
- A. I don't know anything about that.
- 30 Q. You know the same old stone road is there that has been there for twenty years, don't you, just as it was last year?
- A. Oh, there has been alterations made in it lots of times, different places.
- Q. Repairs?
- A. Yes.
- Q. You mean to say the roadbed has been changed in any way since last spring?
- A. Yes.
- Q. By raising it up higher?
- 40 A. Yes, sir.

Caleb T. Hubbard recalled — Cross

Q. With what, clay, gravel?

A. I don't know what material. I know it is higher than it was.

Q. Then the whole roadbed, as well as the point where you crossed the track, has been raised since last spring?

A. I don't know how far.

Q. But right around where you were it has been raised?

A. Yes.

10

Q. Do you say that because you can see a car coming now and you didn't see it last spring?

A. No.

Q. Is that what makes you think so?

A. I noticed that there had been a change, there had been a raise, there had been a fill there, that is all.

Q. Did you see anybody making the fill?

A. No, sir.

 20

MR. TAYLOR: If your Honor please, I don't know whether this evidence will be admissible or not at this time. We have another expert who could not be with us yesterday as to the extent of the injuries. I don't know whether it is discretionary with your Honor or not, but we would like to offer him if it is admissible.

THE COURT: Well, you see there is absolutely no question about the testimony offered. Is there any objection to that?

30

MR. CARTON: I didn't get the point.

THE COURT: They have here another physician as to the injury. The question is whether there is any objection.

MR. CARTON: It seems to me, your Honor, we have not offered any proof, it could not be in rebuttal, and this witness certainly could have been here yesterday.

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Motion for Direction

THE COURT: The court cannot admit it if you object to it. I can simply let it in if there is no objection.

 BOTH SIDES REST

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 MOTION FOR DIRECTION

MR. CARTON: I now wish to renew my application for a nonsuit in the form of a motion for the direction of a verdict for the defendant: first, on the proposition that negligence has not been proven against the defendant company; and secondary, on the ground that the negligence of the plaintiff has been clearly shown. If there were any question about it, your Honor, it seems to me at the end of the plaintiff's case it has been cleared up now, and particularly the point which seemed to raise some question in the court's mind as to whether or not this automobile of Mr. Megill's formed an obstruction.

20

Now it seems to me, your Honor, that that has been eradicated. Some of us had some doubt in our minds at the time. This automobile stood up here at the end of the footbridge. Mr. Megill swore it was back here some ten or fifteen or twenty feet, and Mr. Brewer says likewise. Now it is clear that in any aspect of the matter it could not have been an obstruction to Mr. Hubbard's view southward. Mr. Brewer, who was standing back of the automobile and some ten or fifteen feet further south, says he could see the car and did see the car, as did Mr. Megill himself. Mr. Hubbard, when he went within a few feet of going by that rail, his vision south was clear and unobstructed. Nothing under heaven ever interfered with his view. There was nothing there to interfere with it except this rail three or four feet high, which of course would not be an obstruction. And

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Mr. Brace and Mr. Bowles have said at this point some five

Charge of the Court

or six feet of here, they have a clear view of Riggs' boat-house and at the range of their vision they could not possibly hit Mr. Megill's automobile, nor did it intercept it in any way.

And further than that, Mr. Bowles told you that within two or three feet of that pole on the west side, and at the space within two or three feet east of the track, there you could see all the way across the river. It seems to me, your Honor, that this man cannot be excused from negligence. Certainly if any man ever was negligent in attempting to go across a track it was this man. And it seems to me the evidence on that point now is clinched, and any doubt that we had in mind at the end of the plaintiff's case has been taken away; and I respectfully insist that we are entitled to the direction of a verdict. 10

THE COURT: The motion will be denied and an exception noted. 20

(Objection noted for defendant as ground of appeal.)

RECESS TILL 1.20 P. M.

CHARGE OF THE COURT: 30

Gentlemen, at the outset I desire to say that you are not to be influenced in the slightest degree by the refusal of the court to grant the motions made on behalf of the defendant to nonsuit the plaintiff and to direct a verdict against the plaintiff. That is no indication of the views of the court upon the merits of this case at all. The effect of the denial of those motions is simply to decide that the court cannot nonsuit or direct a verdict in favor of the defendant as 40

Charge of the Court

10 matter of law, but that the case involves questions of fact which the jury shall decide. It does not indicate the views of the court as to whether or not the plaintiff has made out his case or whether he has not made it out; it is simply a decision that he has presented sufficient facts in the case to make it a question for you jurors to decide whether or not he has made a case. Nor should you be influenced in the slightest degree by the appeals made to sympathy or prejudice. I have found Monmouth County jurors much too intelligent to be swayed by prejudice or by sympathy. Your oath obliges you to find a verdict according to the evidence in the case. If you listened attentively to it you did not hear one word about sympathy or prejudice in your oath. It was that you would find a verdict according to the evidence in the particular case, implying, of course, according to the rules of law applicable to the case as they should be defined to you by the court.

20 Now there is no question in this case but that the plaintiff was injured, that he was run into by a trolley car. That is an admitted fact. And if that alone would entitle him to recover the defendant would not be in court defending this suit. But more than that is necessary before a person injured by a trolley car can recover. It must appear that the collision and his consequent injuries were occasioned through some negligence on the part of the person in charge of the car. And the charge in the plaintiff's complaint is that this negligence consisted in "that the defendant's car, through its servants and employees, heedlessly and without signal or warning of any kind ran into and knocked down said plaintiff, at which time said defendant was recklessly operating said car, and in that said defendant failed to stop said car before the same struck plaintiff." Then the damages which are claimed appear in the next clause, which says, "as a result of the negligence (note the word "negligence") of said defendant, said plaintiff received a fracture of one shoulder and a compound fracture of one leg, together with other bodily injuries, to the end that he had great pain and suffering and has been permanently injured."

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Charge of the Court

Now while a hernia or a rupture is not mentioned in the complaint, it does say that he suffered other injuries as a result of this collision, and it appears from his testimony and that of his physician that he now has a hernia and that he had no hernia before this accident. But his own doctor, you will remember, expresses grave doubt about the rupture being the result of the collision. He says that hernia as the result of injury usually occurs at once and is accompanied with great pain. And it appears by the testimony of the plaintiff that he suffered no great pain in the region of the hernia. 10

Now since plaintiff must prove by the greater weight of the evidence that his injuries for which he seeks to recover have occurred through the fault of the defendant, can you say, in that posture of the testimony, that there is sufficient evidence to entitle the plaintiff to recover damages for the rupture?

But there are certain injuries about which there is no question. While he speaks in the complaint about a broken shoulder, it appears that it is not a broken shoulder at all, it is a broken collar bone; and the plaintiff's complaint, if he desires, may be amended in that particular. 20

MR. FARRELL: I would like to amend, your Honor, in that particular.

THE COURT: Yes. Now it also appears by the complaint that he had a compound fracture of the left leg. There is no evidence in the case that he had a compound fracture. There is evidence that both bones of the left leg were broken. That is not a compound fracture. A compound fracture is one where the bones protrude through the flesh so as to permit infection of the bone itself. There is no evidence of that, but the evidence is that both bones in the left leg were broken. 30

Now admittedly the plaintiff had those injuries, a broken collar bone and both bones of the left leg were broken; and you may assume for the purpose of assessing 40

Charge of the Court

the plaintiff's damage in the case, that those injuries were painful. It appears that he was in the hospital from March 25th to May 8th, 1916; that he reported there three times, that is, eight days apart, and then every day for two weeks, and that he used crutches until the middle of September; and he says that he is yet quite lame and that he feels pain in stormy weather. Any other injuries you may recall if the court has failed to mention them. The court does not pretend in the limits of a charge to recite all the testimony to the jury, only, as was suggested in the argument, touching just the high spots. That is all the court can do. And so the plaintiff in this case, if he is entitled to recover, is entitled to be compensated for his injury, that is, the broken collar bone, the broken leg, the abrasions and contusions about his body, which the doctor says were superficial, and for the pain and suffering which he has undergone as the result of those injuries, and if he is not yet cured, for such pain and suffering as you believe he will, from the evidence in this case, undergo in the future as the result of his injuries; and also for such deformity as you find, the shortening of his leg. The doctor says his leg is about half an inch short. He would also be entitled to be compensated for that deformity.

Now this word compensation presents some difficulty, because you cannot just figure up, as you would figure up an account, how much that amounts to. But it is intended to exclude any damages by way of punishment for the negligent act on the part of the persons in charge of the trolley car, and to give to the plaintiff what will be a return to him in dollars and cents, what you believe as reasonable men will return to him in dollars and cents compensation for this injury and for the pain and suffering.

Now if he is entitled to recover he would also be entitled to be repaid the amount of his hospital bill, which is \$69.50. Then it appears that he had some loss of income. This accident occurred on the 25th of March. He said he was a clamdigger and that from the time of his injury, during the month of March and up until the middle of

Charge of the Court

June, he said that he made about \$15 a week from digging clams, and then from the middle of June until Labor Day he said he made \$25 or \$30 a week. But it appears from this he paid his son, he says, on an average of \$4 or \$5 a week, which of course should be deducted, what he paid out. If he did not conduct the business then he would pay nothing from it during that period. Now those, gentlemen, are the elements of the plaintiff's damage.

But of course, while the court has mentioned first the question of damage, this question will not be considered at all unless you find in the first place the person in charge of this trolley car operated it negligently to the extent of injuring the plaintiff in this case. Now the negligence alleged, as I said, is the failure to ring the gong and failure to observe the plaintiff and stop the car before reaching him. That, stripped of its legal verbiage, is the negligence of which the plaintiff complains, failure to ring the gong and failure to stop the car before reaching the plaintiff and to observe him.

Now the failure of the motorman to sound a gong or bell when approaching a public crossing where he has reason to anticipate persons will be liable to cross the track, would be negligence on his part; and for any negligence on the part of the motorman the defendant company, the Atlantic Coast Electric Railway Company, is responsible and must answer in damages, for any negligence on the part of the motorman.

Now let us consider first whether the bell was rung. The plaintiff says he did not hear the bell. Mr. Megill says he did not hear the bell. You will notice that neither one of them swears positively that no bell was rung. They both of them say that they did not hear the bell. Negative testimony of that character is entitled to very little weight as compared to positive testimony, if you believe the positive testimony; unless it should appear that the persons who say they did not hear were attentive and in a position where they would have been likely to hear if the gong had been sounded. Opposed to that you have the testimony of Mr.

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Charge of the Court

Irons, who says that he commenced ringing this bell, that he rang it the first time when he was down by Riggs' boat-house, which he thinks is about one hundred and twenty-five feet away. He says then he saw this automobile along this railing and those people standing there and talking, and that then he was about ninety feet away, he thinks, and that he again rang his gong. Then he saw the plaintiff start and walk down along the east side of this railing and that he rang his gong again when he passed along the railing, and then again sharply when he saw him get on the track. The conductor also testifies to the ringing of the gong, but not with the same particularity as the motorman. Mr. Finnegan, who was on the car at that time, — I think he was an employee of the company, — says that the gong was rung. Mr. Brewer, who appears to have been in no way connected with the company, but who says he was standing ten feet north of the bridge, and he said to the east and north of the automobile, says that he heard the gong sounded; and the motorman on the other car, that is, the car that was going southerly, says that the gong was sounded. Now here are five witnesses who testify positively that the gong was sounded. But, as suggested in one of the requests to charge, you are not necessarily controlled by the greater number of witnesses if you find those witnesses are not creditable witnesses. Of course if you find their testimony to be equally creditable with the witnesses for the plaintiff, then the question of numbers is to be considered by you for whatever you think it is worth. Now so much for the ringing of the bell.

As I have said, if you find, the burden of proof being upon the plaintiff to establish negligence by the greater weight of the evidence, if you find that the testimony of those two witnesses who say that they did not hear the bell ring outweighs the testimony of those five witnesses who say positively that the bell did ring, then you would be justified in finding that the motorman of this trolley car was negligent.

We will leave that point now. There seems to be some

Charge of the Court

question whether the place where Mr. Hubbard was struck was in a public street or on a private right of way. But it does appear beyond dispute that it was a place where people were accustomed to cross the defendant's tracks, so there is no substantial difference in the duty of the motorman in charge of this trolley car, whether it was on a public street or on a private right of way. If it appear that it was a place where people for a long time had been accustomed to cross without objection on the part of the defendant company — one witness says that he has known this to be a crossing place for people for twenty years, that he himself has crossed over there hundreds of times, and a witness who was formerly a motorman says that people crossed there, and one of the motormen present, of the defendant company, says that people crossed there frequently — such use would constitute an implied invitation to the public to use it and impose on the company the duty to exercise reasonable care to avoid colliding with persons crossing the tracks. So, as I have already indicated upon the question of the care to be taken by the motorman, it makes little or no difference in this case whether or not it was in a public street or whether it was a private right of way.

I have used the words "reasonable care," you observe. One test of negligence is whether or not a person in a given situation acts as a reasonably careful and prudent person. And on the question of whether or not the motorman was negligent, this is the first question to ask yourselves: did the motorman act as a reasonably careful and prudent person should have acted under the same or similar conditions and circumstances? Now it was the duty of this motorman to look ahead, to observe his track and to have his car, in approaching a place where people crossed and where he should have expected people to cross, under such control as to reduce its speed and to stop it if necessary in order to avoid a collision. But it is admitted in this case on the part of the plaintiff that this car was going at a slow rate of speed. No one fixes it over five miles an hour except Mr. Megill, who says that it was going five to eight miles an

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Charge of the Court

hour; and most of the witnesses agree that this car was going about five to eight miles an hour. Therefore the speed was certainly not excessive under ordinary conditions.

10 Now as I have said, it was the duty of the motorman not only to have his car under control but to make observation of the persons upon the track or likely to come upon the track. And the motorman says that he did observe and he says that he saw Mr. Hubbard about the time he first sounded his gong, or rather, when he was at a point about ninety feet away, he saw Mr. Hubbard and Mr. Megill talking at the automobile. Then he says that he saw Mr. Hubbard go down the railing to a point by the track. Mr. Hubbard himself says, you remember, that he was talking with Mr. Megill on the east side of the automobile; that was the side away from the track; that he came around the automobile and at a point five feet from the track he halted. That is this point, being at the end of this railing
20 which is shown there, five feet, and I have marked a little dot, a little line on there, which is five feet; the scale of this map being ten feet to the inch, and that is just half an inch from that track there, the little mark in lead pencil that has been made there. And then he says he halted. Now while the motorman denies the halting, he admits, as I have already stated, that he saw the plaintiff going north outside of the railing, and supposed he was going to get on the car; that then he started to slow down still more; he was going less than five miles an hour; and that when the plaintiff got to
30 the end of the railing, which it appears is only three feet—that is, appears by the testimony of the surveyor, is only three feet from the track—that the plaintiff stepped directly in front of the car when it was too close to be stopped before striking him. He says that he put on all brakes and stopped the car, and it appears that it was stopped before the front wheels passed over Mr. Hubbard, who was thrown down under the car by the impact.

40 Now, gentlemen, were these things which the motorman says he thought and did what a reasonably careful and prudent man would have thought and done under the circum-

Charge of the Court

stances and conditions which then and there presented themselves to him? If they were what an ordinarily reasonable and careful man would have thought and done under those circumstances, then he was not negligent. Was he justified, when he saw the plaintiff walking down outside of that railing and halting, if he did halt at that point, was he justified in assuming that the plaintiff expected to be a passenger upon that trolley car, and in failing to halt the trolley car before coming to that point? If he was not justified in that, if that was not a reasonable belief, not a reasonable assumption on his part, and if he ought to have anticipated that the plaintiff would have continued on over the track and failed to stop his car — because he had it under control — then it was negligence; but it was not negligence, as I have said, if as a reasonable man he had a right to anticipate from the movement of the plaintiff that he was about to take that trolley car.

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Now, gentlemen, if, as I have already indicated, the motorman was not justified in what he thought and did, in other words, if he did not act as a reasonably careful and prudent man, then he was negligent; and unless there was some negligence on the part of the plaintiff himself which contributed to the collision and to his consequent injuries then he is entitled to your verdict. But even though you find that the motorman was negligent, yet if there was any negligence, however slight, on the part of the plaintiff, which contributed to the accident and his injuries he cannot recover.

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Now there was a duty which devolved upon the plaintiff as well as upon the motorman. It was his duty to make reasonable observations for his own safety and to look and to listen for the approach of trolley cars. As was stated in a case in our highest court of this state, "Where a foot passenger attempts to cross a street railroad it is his duty before crossing to use his powers of observation to observe approaching cars which are within a distance, if run at lawful speed, to put him in danger." That is, he has a right to assume they will be run at lawful speed; and there is

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Charge of the Court

nothing in this case to show that this car was not being run at lawful speed. "And if he fails to perform this duty and is injured he will usually be held guilty of contributory negligence."

10 Now it was the duty of Mr. Hubbard not only to look and to listen but to look and to listen at such point or points as to make looking and listening effective. If he looked when he was directly behind that automobile or directly
20 behind a fourteen-inch telegraph pole, which made his observations from those points where he knew he could not see south upon the track, he did not make such observation as the law requires of him. A mere glance is not sufficient; it must be an attentive observation. Now a great deal has been said about these bridge trusses, which it appears are seven feet high. As I have stated, I have drawn that line there where the plaintiff says he was, five feet from that track. And it would appear if he was at that point that these bridge
30 trusses here, if this map is drawn correctly — and it is not attacked by any testimony that it is not correct — if he was at the point where he says he was you can readily see that these trusses, which are seven feet high, would present no obstacle to his observation. It appears that this fence along which he was walking is about three to three and a half feet high, according to the defendant's witnesses, and the plaintiff fixes it to be about the height of his arm-pits. So that his observation was above that, and it appears, as the photograph also shows here, that this railing along here is very
30 little if any higher. Would that railing have presented any obstacle to his observation? And it appears that on the railroad bridge itself there is no high structure except it is suggested that there were trolley poles there. They may show in the picture.

40 Then a suggestion has been made, and I think perhaps the suggestion came from the court himself, that this automobile may have obstructed his observation; and that arose from the fact that Mr. Megill testified that his automobile was within three or four feet of the track. But he says, you will recollect, that his automobile was about fifteen feet from

Charge of the Court

the end of that railing; and there is a cross mark, pencil mark, there at fifteen feet scaled on that map; and it will be for you to say whether placing his automobile in about the location which I am indicating with the pointer, whether or not that would have formed any obstruction to the view of the plaintiff if he had looked attentively at a point five feet from the tracks. You are assisted by this map; you may be assisted by the photographs to the extent that conditions are not changed there, and it is stated that they are not changed. 10

Now, on the other hand, there is another circumstance which you may consider. Manifestly a person who is making an observation and is obliged to make an observation both ways cannot look both ways at once; and he says that when he arrived at this point he looked to the south and then looked to the north, saw a trolley car approaching from that direction and waited for that to stop before proceeding upon the track, and then, without looking again to the south, he proceeded to cross the track. Now, then, was that the act of a reasonably careful and prudent man, careful for his own safety? If he looked there for any considerable length of time to the north, was it the act of a prudent man to step upon that track without again making an observation to the south? Or if his observation was made quickly, if he did not stand there for any considerable time, then the question is if he had looked attentively to the south was the trolley car which was approaching from that direction near enough for him to have seen it? 20

Now, gentlemen, in view of the admitted slow speed of the car and the fact testified to by Mr. Megill, if you find it to be a fact, that when the trolley car was opposite his automobile, Mr. Hubbard had not yet reached the track, and considering all the other conditions, including the car on the switch there, can you say that if Mr. Hubbard had looked attentively to the south he would not have seen the approaching car in time to avoid it? If he would and if he failed to take such reasonable care for his own safety as a reasonably careful and prudent man would ordinarily take, then he was negligent, and as I have already indicated, if he was negli- 30 40

Charge of the Court

gent, even though the motorman was negligent, he cannot recover.

10 To sum up what I have said upon the question of negligence, sometimes accidents occur notwithstanding the exercise of due care on the part of the persons involved in the accident. Now if this were a mere accident, that is, if nobody was at fault, then of course the plaintiff cannot recover; because the only theory upon which he can recover against the railroad company is upon the theory that this motorman was negligent. Again, if both the motorman was negligent and Mr. Hubbard was negligent, that is, if they were both negligent, then Mr. Hubbard cannot recover; that is, if his negligence contributed in any way to this collision. He can recover if you find it to be established by the greater weight of the evidence that the motorman was negligent and if it does not appear in the case that there was any negligence on the part of Mr. Hubbard which contributed to the collision and to his consequent injuries.

20 I am requested by the plaintiff to charge several requests, the first of which I decline to charge except as I have charged.

The second is withdrawn.

3. That the jury shall take into consideration that the trolley tracks at this crossing were single tracks and it is a question for the jury to consider whether or not the plaintiff acted as a prudent man would act in observing the car which was approaching from the north.

30 I charge you that.

4. That the proximity of the railing to the tracks and the trolley poles on the bridge are to be taken into consideration as to whether or not the plaintiff acted as a reasonable man should act.

I have already told you that.

5. That it was the duty of the motorman to ring his bell before reaching the crossing in time to put the plaintiff on notice of the approach of the car.

40 I have charged fully on that.

Charge of the Court

6. That it was the duty of the plaintiff to look and listen, but that the plaintiff was under no duty to stop.

Now I cannot say that. That is, he was under no duty to stop in order to make his observation; but of course it was his duty to stop if the trolley car was so close to him that he could not go upon the track in safety in front of it, if the trolley car was being operated at reasonable speed. Otherwise that is a correct proposition, he was not obliged to stop in order to make his observation. 10

7. That the jury has a right to assume that the brakes, appliances, etc., of the car were in working order.

You do not have to assume that, because the testimony of the motorman is distinctly that they were, everything was in good order, the brake as well.

8. That the weight of testimony does not mean the greatest number of witnesses, but a preponderance of evidence of the witnesses who actually saw the accident.

I charge you that. 20

The ninth I decline to charge except as I have charged.

My attention has been called by Mr. Taylor to the fact that I said to you that the conditions had not changed there from the time the accident happened until the survey for the map was made and the photograph taken. By that I mean it appears that the conditions relating to the location of the track, the trusses and guardrails and things like that have not changed. Of course you remember the testimony of the plaintiff himself, who said that the roadway was raised at the point where he made his observation. If that be true of course you have a right to take that into consideration. 30

(The plaintiff's requests which were refused by the court were as follows:)

1. That if the jury believe that the motorman could have stopped the car before the same struck the plaintiff then the negligence of the motorman in not doing so was the proximate cause of the accident and the jury shall find for the plaintiff. 40

Charge of the Court

9. That if the jury believe the motorman saw the plaintiff 25 or 30 feet distant, walking towards the track, and that the plaintiff did not signal the car to stop and the motorman observed the plaintiff until he stepped on the track, and that the motorman could have stopped the car before it struck plaintiff, then they shall find for plaintiff.

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Notice of Appeal

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NOTICE OF APPEAL

TO STEWART A. FARRELL, Attorney of Plaintiff.

Dear Sir:

TAKE NOTICE that the Atlantic Coast Electric Railway Company, body corporate, defendant, appeals to the Court of Errors and Appeals in the last resort in all causes, from the whole of the judgment entered in this cause. 20

DURAND, IVINS & CARTON,
Attorneys of Atlantic Coast Electric Railway Company,
Defendant-Appellant.

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Grounds of Appeal

GROUNDS OF APPEAL

The following are the grounds of defendant's appeal in the above stated cause.

1. The following question was admitted over defendant's objection:

10 Q. Do you know as a matter of fact whether or not this place is used as a crossing to get down to the river to the boathouse, and if so how long has it been used?

2. The following question was overruled over defendant's objection:

Q. Now, Mr. Throckmorton, what is the distance of the guard rail extending from the north end of the Shark River bridge to its termination northerly, that is, the guard rail immediately east of the trolley track?

20 3. Plaintiff's evidence showed that the accident complained of was due to the negligence and want of care of plaintiff, that he was negligent, and his own negligence contributed to the injury, and defendant's motion for nonsuit should have been granted.

4. Plaintiff's evidence failed to show that the accident was the result of negligence or want of care on the part of the defendant, or defendant's agents or employees, and defendant's motion for nonsuit should have been granted.

30 5. The evidence in the cause shows that the accident complained of was due to the negligence and want of care of the plaintiff, to the contributory negligence of plaintiff and defendant's motion for direction of verdict for the defendant should have been granted.

6. The evidence in the case shows that the accident complained of was not due to or the result of any negligence or want of care on the part of the defendant or any of its agents or employees, and defendant's motion for direction of verdict for the defendant should have been granted.

Dated April 3rd, 1917.

DURAND, IVINS & CARTON,
Attorneys of Defendant-Appellant.

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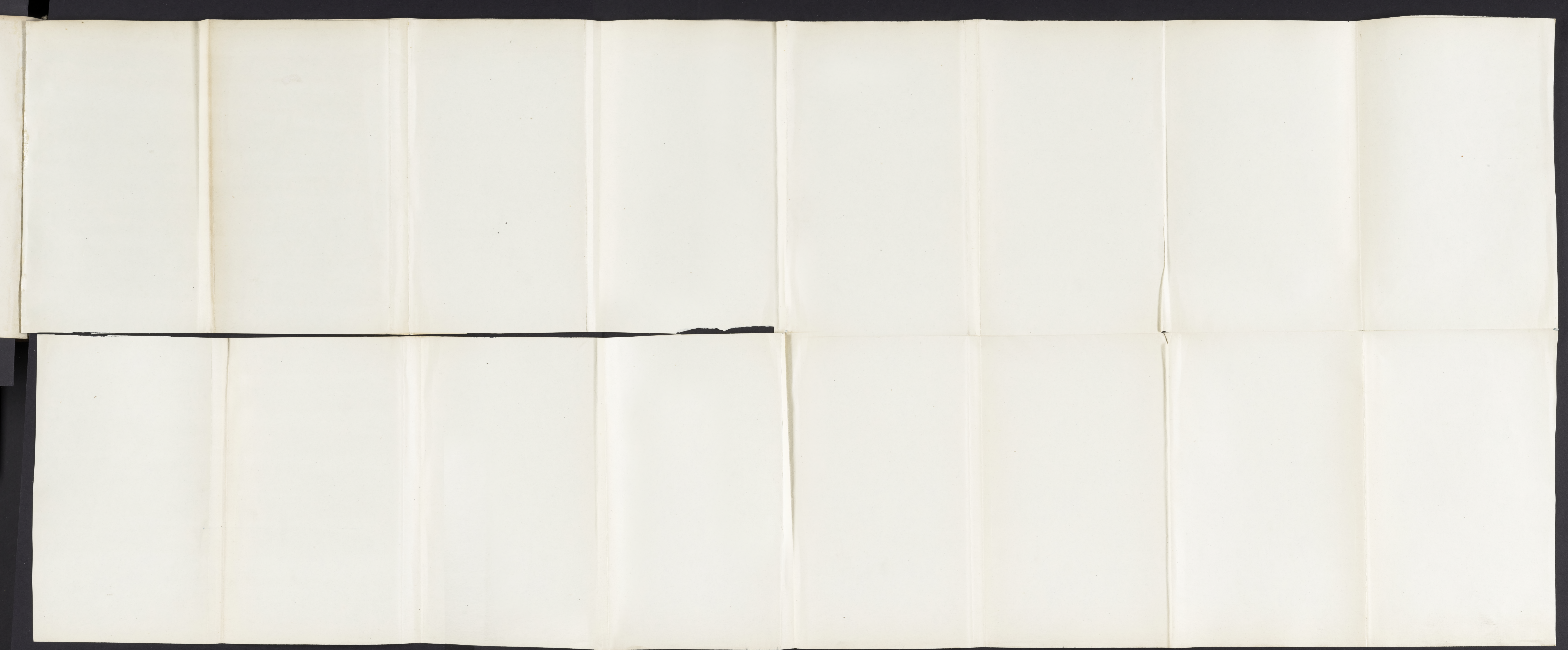
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SHARK RIVER.

← 98' To platform

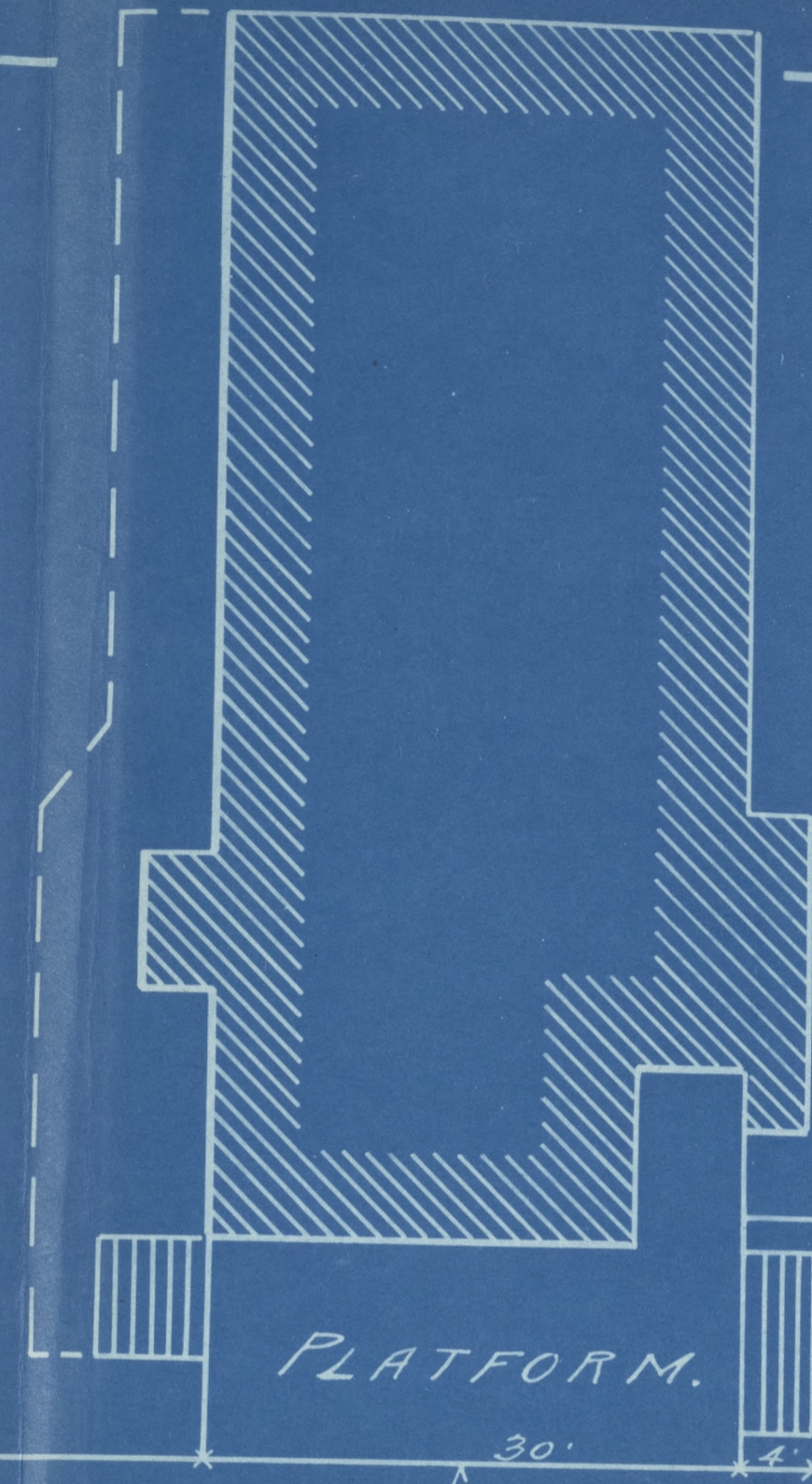
67'

71'

A. C. E. R. R.

FOOT PATH.

HIGHWAY BRIDGE.



PLATFORM.

30'

10'

5.5'

7'

20.7'

Flag pole

PLATFORM

72'

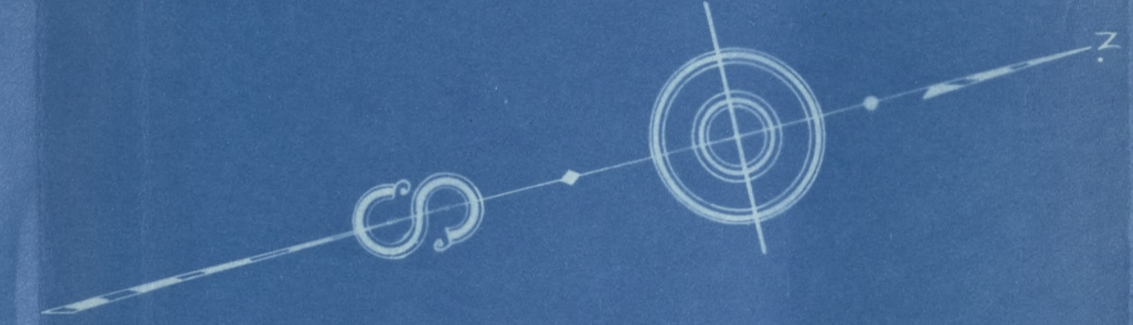
FENCE.

FENCE.
41'

F STREET.

FENCE

CURB.



SCALE 10 FEET TO AN INCH

62

1000

New Jersey Court of Errors and Appeals

CALEB T. HUBBARD,
Plaintiff-Respondent,

vs.

ATLANTIC COAST ELECTRIC RAIL-
WAY COMPANY,
Defendant-Appellant.

Action at Law.

BRIEF for APPELLANT

DURAND, IVINS & CARTON,
Counsel for Appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS

CALEB T. HUBBARD, Plaintiff-Respondent, vs. ATLANTIC COAST ELECTRIC RAIL- WAY COMPANY, Defendant-Appellant.	}	Action at Law.	10
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BRIEF FOR APPELLANT

This appeal brings up for review, a judgment of the Supreme Court, entered March 2, 1917, for \$1549.98, on a verdict recovered in a Supreme Court issue, tried at the Monmouth Circuit. 20

Plaintiff's action was brought to recover for personal injuries sustained in an accident, in which he was struck by a trolley car operated by defendant company.

The statement of the accident in the complaint is, that on March 25, 1916, while plaintiff was crossing Main Street, directly north of the Shark River bridge, in Avon, he was run down by a trolley car of defendant. 30

The principal grounds for reversal are, that at the close of plaintiff's case, the evidence presented by plaintiff showed,

(1) That the accident complained of was due to the negligence and want of care of plaintiff, and

(2) It failed to show that the accident was the result of defendant's negligence or want of care, and defendant's motion for non-suit then made should have been granted, and also

At the close of the entire case plaintiff's motion, based on the same grounds, for a direction for the defendant, should have been allowed. 40

Plaintiff's evidence of how the accident happened may be briefly summarized, as follows:

10 He was a clammer, clamming in Shark River, and had engaged to sell some clams to a Mr. Megill, who came for them in his automobile, and stopped his car, facing south, north of the north end of the bridge, and at the end of the foot-walk of the bridge, next the trolley bridge, about half way between the end of the fender or railing, and the north
 10 north of where the accident happened, one hundred feet, probably one hundred and twenty-five feet, there is a switch, and from that south, on across the bridge, there is a single track, and all the way across the bridge, and where the automobile was standing there was a single track. He says, speaking to Mr. Megill: (printed case, page 9).

20 "Well, then I will go on up the river, so I started and came around the automobile. I got within five feet, I judge, and halted. I halted and looked for the car coming. I looked south first. I didn't see anything, and then I looked north, and I saw a car approaching the switch. I should judge the switch was about 100 or 125 feet from the bridge. I saw the car coming from the north toward the switch."

Q. Had it stopped at that time at the switch?

30 A. I didn't know whether it was going on over or whether it was going to stop on the switch. They usually do stop at the switch, but as soon as the car stopped I then proceeded across the tracks, from the east to the west.

Q. Where did that car stop, on the switch?

A. Stopped, yes, just so the other car could pass. I then proceeded to cross the tracks, and after this car had stopped on the switch I knew I was safe; didn't see another car."

40 On cross examination he testified, that he was very familiar with the location; had been around there for the last 22 or 23 years, and had been familiar with the location

of the streets and the Shark River bridge, and the line of the trolley tracks, during all that time.

As part of this cross examination is important, we quote: printed case, pages 18 and 19,

“ Q. Then you started to go around the back of the car to go north?

A. I started north around the car.

Q. On the east side of this automobile, and then you approached the trolley track? 10

A. Yes, sir.

Q. And I understood you to say you were only about five feet from the track and you looked south?

A. Yes, sir.

Q. Did you see any car coming?

A. No, sir.

Q. Just describe how you looked when you were within five feet of the track.

A. Well, I looked south, I didn't see any car. I just turned and looked north and I saw a car approaching the switch, and I kept my eye on that car. 20

Q. Until it stopped?

A. Until it stopped, and then I proceeded across the track.

Q. Then you went across the track?

A. Yes, sir.

Q. How near the end of the switch was this car north that you were looking at, how far was it from the point where it stopped when you first saw it? 30

A. Well, I couldn't say. It wasn't long in motion, I know, before I seen it stop. I couldn't tell just how far it was from the switch when I saw it coming towards the switch, and it wasn't in motion long before it stopped. As soon as it stopped I started to go across. I seen it wasn't coming on. 40

Q. Stopped before it reached the point of the switch?

A. Yes, so the other car could pass, I suppose, far enough.

Q. That is what that southbound car stopped there for, I suppose, so the northbound car could pass it?

A. Sure, it is a single track."

10 This testimony shows that plaintiff was in a situation with which he was very familiar. He knew that the cars passed at the switch, just north of the bridge; that when the car he saw coming south stopped, it did so to allow the car then due from the south to pass, and yet with this knowledge he walked northward from the automobile, along the inside of the railing, took a casual glance south, the opposite direction to which he was going, it does not appear he turned around or changed his northward course to do so, saw as he says, no car coming, then looked north, the
20 direction in which he was moving, saw a car coming south toward the switch, he had then reached the end of the railing, halted and stood watching the car coming from the north, until it stopped, then without looking south for the car he knew was due to pass at the switch, proceeded to cross the track, and was struck.

It is clear that the plaintiff did not at the time use such precaution and care for his safety as a reasonably prudent man would use, under the circumstances. There was no crowd; he appears to have been alone at the point of
30 accident; he was upon familiar ground, was well acquainted with all the surrounding conditions. His observation of the approach of the south bound car and its stopping at the switch, gave notice and warning to him of the near approach of the north bound car, and if the automobile of Megill obstructed his view, as suggested by the court in refusing defendant's motion for non-suit, of which, however, there was no evidence whatsoever, it was his duty, in making his observations for his safety, to exercise additional caution because of such obstruction.

40 It was his duty, in making his observation, to make it

effective. He could not run recklessly or carelessly into danger. His failure to see the approaching car, because of a temporary obstruction, would not excuse his lack of proper observation. His duty required him to wait or put himself in a position where the required observation could be made.

This lack of care and caution of the plaintiff is also proven by the testimony of his witness Megill. He says, printed case, page 28:

A. Well, I was looking north, I looked north; finally I turned around anyway and I saw Mr. Hubbard, he walks right down this, mostly behind me then it would be. Well, I looked around and first, I guess he looked south first, and I don't know whether he saw the car or not, but I did.

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Q. You saw the car coming across the bridge?

A. Yes, sir.

Q. And how far distant was the car from you when you first saw it?

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A. Oh, let's see. I should say fifteen or twenty yards when I first saw it.

Q. It was on the bridge itself?

A. Oh, yes.

Q. And did you look to see where Mr. Hubbard was?

A. Yes, and then I think he was right behind me, mostly behind me, see? And then when I would be looking around, pretty soon the car was right opposite me and still he hadn't got to the crossing yet.

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Q. Then state what you saw.

A. Well, he steps on the track, that is all.

Q. And the car struck him?

A. Yes, sir.

Q. About how far over the track was he when the car struck him, as you remember?

A. Well, as near as I can tell you, I couldn't see him when he was struck, so he must have been pretty close to the east side of the track."

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From the evidence of this witness it appears that his automobile was about fifteen feet from the end of the railing; that the plaintiff walked northward along this railing; he saw him look south, then north, and continue along the railing; that witness saw the car coming over the bridge, at first fifteen or twenty yards from him, then pretty soon the car was right opposite him, and still plaintiff had not got to the crossing yet, and, as he says, "Well, he steps on the track, that is all, and the car struck him." He also says,

10 "I was up higher than he was, I could look over, and then this track comes down, turning this way. That is the only reason I could ever account he couldn't see the car, because I could see it plain as day." (Printed case, page 35.)

Megill's evidence shows his automobile did not obstruct plaintiff's view. The bridge railing between the road and trolley right of way was an open railing, four or five feet high, and the end of the railing around which plaintiff was required to pass in order to reach or cross defendant's track, was at least fifteen feet north of Megill's automobile and defendant's trolley car, with a height of ten to twelve feet showing about this railing for at least that distance, and if the plaintiff had taken a look south before attempting to cross, he could not have helped seeing the approaching car from the south which struck him. In reply to questions by the court, he said that the rear of his automobile was about

20 fifteen feet from the north end of the rail, that it might be just a little further than that, and Hubbard was walking directly north, — Printed case, page 37.

30 "Q. And Mr. Hubbard was walking directly north?

A. Yes, sir.

Q. Now which way was he facing at the time you say the trolley car was opposite your automobile?

A. Which way he was facing at the time the trolley car was opposite my automobile?

Q. Yes, was he still facing north or did he then turn towards the west?

40 A. I think he had about made the turn, just

about to turn." Printed case, page 37.

But whether the automobile might have obstructed plaintiff's view or not, is not material, in view of the evidence of plaintiff and the witness Megill. Plaintiff says, he looked south, then he looked north, saw the south bound car approaching the switch, halted, watched it until it came to a stop, kept his eye on it until it stopped, then proceeded to cross the track. Megill says he saw him look south first, then north, then he continued along the railing, he was walking directly north, then he made the turn toward the west, across the track. How long he continued to look north, after looking south, before he proceeded to cross the track, does not appear, but it must have been some little time. It was long enough for him, watching the approaching car from the north, and unable to decide from its speed whether it would stop or not, to see it reduce its speed and come to a stop at the switch, and long enough for a car approaching from the south to have come within his range of observation, if he had looked in that direction, and certainly a sufficient period to have required another observation to the south before attempting to cross the track. This duty he failed to perform; his conduct was not that of a prudent man, concerned for his personal safety. Without a proper observation to the south, he proceeded to cross the track, and the accident and his injuries were the result of his own want of care.

The question is, could he by looking south, just before proceeding to cross the track, have seen or observed the car approaching from the south, and avoided danger. It is clear from the evidence that he could, and this is the test. If by the exercise of care and caution he could have avoided the danger, which, because of his failure to exercise, he ran into, he cannot recover.

The rules governing the duty of the plaintiff in the situation presented in this case, are well defined and settled by the courts of this state.

In *Newark Passenger Railway Company vs. Block*, 26 Vr. 605, the Court of Errors and Appeals held:

The rule requiring one exercising his lawful right in a

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place where the exercise of lawful rights by others may put him in peril, to use such precaution and care for his safety as a reasonably prudent man would use under the circumstances, is the measure of duty for one who crosses a public highway on foot. He must use his powers of observation to discover approaching vehicles, and his judgment how and when to cross without collision. If obstacles temporarily intervene to prevent observation, he should wait until observation can be made.

- 10 See also remarks of Justice Garrison in *Connelly v. Trenton Passenger Ry. Co.*, 27 Vr. at page 703.

A nonsuit should be ordered when it appears, from the plaintiff's own showing, that he contributed by his own carelessness to the happening of the accident by which he was injured, or when it appears that the accident was not the result of any wrongful or negligent act on the part of the defendant or of its employees. *North Hudson Co. Ry. Co. v. Flanagan*, 57 N. J. L., 696.

- 20 In *Jewett v. Paterson Railway Co.*, 33 Vr., page 430, Judge Adams speaking for the Court of Errors and Appeals said:

There is nothing about the act of pedestrianism on a public highway to take the case of a traveler on foot, who is injured by collision with any vehicle, out of the usual rule that a plaintiff's contributory negligence is ground for nonsuit. This is true whether the vehicle does or does not move on rails.

- 30 The following quotation is an extract from the opinion in the *McClain* case (at pp. 464, 465): "The circumstances, as represented by the evidence on the part of the plaintiff, warranted the conclusion that by the exercise of the reasonable care which it was the duty of the defendant's driver to observe, the injury would have been avoided. But this fault, on the part of the defendant, did not charge it with liability, unless the plaintiff was free from negligence contributing to the calamity. * * * As a street car must continue on the rails of its track, persons otherwise travelling on the street are required to use care to keep out
40 of its way. If by the exercise of reasonable care the plaintiff-

iff could have seen the approaching car, and ought to have apprehended the danger of the situation, he was chargeable with negligence for he was not at liberty to take even doubtful chances of the consequence of crossing the track in the face of danger, or in reliance upon the successful attempt of the driver to slack the speed of his horses."

See also *Brady v. Consolidated Traction Co.*, 63 N. J. L. 25, same case 64 N. J. L. 373.

Mr. Justice Fort in *Schwanewede v. North Hudson Ry. Co.*, 38 Vr. 449, said: A person cannot take chances and hold himself free from contributory negligence. There is a difference between an unforeseen peril and being overtaken by one recklessly incurred.

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A person who, while attempting to cross over the tracks of a trolley road, in front of a car which is only one and a half times its own length away, falls and is run over by it, contributes, by his own negligence and recklessness, to the injury which he received, and must bear the consequence of his temerity. *Gilliland v. Mid. & Somerset Trac. Co.*, 38 Vr., 542.

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"When a person drives upon a trolley track, and comes in collision with a car, in order to charge the trolley company with negligence, he must show that the motorman, by the exercise of due care, could have avoided the injury to him.

If a person drives upon a trolley track without exercising reasonable observation to ascertain whether there is danger from an approaching car, he is guilty of contributory negligence." *Solatinow v. Jersey City, &c., Ry. Co.*, 41 Vr., 154.

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In *Harbison v. Camden & S. Ry. Co.*, 45 Vr., 254, Chief Justice Gummere said: "The failure of the plaintiff to look behind him before attempting to cross over, and so ascertain whether or not he would be in jeopardy by doing so from the approach of the car, was itself an act of negligence which was largely, if not wholly, responsible for the accident. That such failure on the part of the plaintiff will bar a recovery for injuries received by him has been frequently declared by our courts."

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In *Hageman v. North Jersey St. Ry. Co.*, 45 Vr., 281, Mr. Justice Garretson said: "In crossing the roadway a foot passenger must use his power of observation to discover approaching vehicles and a reasonable judgment when and how to cross without collision. In such case the degree of care required exceeds that required to avoid collision with other foot passengers on the sidewalk, not because the right of a foot passenger and the right of a driver of a vehicle differ, but because of the circumstances. The vehicle usually travels at a greater speed which cannot be so quickly stopped or deviated from its course; the street car cannot be deviated from its track, while the passer on foot may quickly stop, turn aside or even retrace his steps.

So it may be generally said that if obstacles temporarily intervene to prevent observation, reasonable prudence would dictate delay until such observation as is requisite has been made.

In *Winter v. N. Y. & L. B. R. R. Co.*, 66 N. J. L., page 677, the plaintiff was nonsuited. It appeared that he was driving toward the track. He looked first north, and he concluded that it was past train time, that there was no train approaching from that direction, and then devoted his attention to looking south. He was struck by a south bound train, which came along about three quarters of an hour late. A nonsuit was ordered because he neglected to take any further observation to the north, when he had sufficient time to do so before attempting to cross the track.

In *Cantrell v. Erie Railroad Company*, 35 Vr., 277, plaintiff approached the track, and reaching a point thirty-five or forty feet from it, he stopped and looked along the track toward the north, where his view was unobstructed for sixteen hundred feet, and seeing no train, he proceeded to cross the track diagonally, looking only toward the south, where his view of the track was unobstructed for nine hundred feet. As he reached the further rail he was struck by a train coming from the north. He was nonsuited, because before attempting to cross the track he had had ample opportunity for looking again toward the north, as well as toward the south, and an attempted glance would

have given him timely warning. (See also *P. R. R. Co. v. Leary*, 27 Vr., 705.)

The accident resulted from the plaintiff's negligence to make proper observation before proceeding to cross the track, and he is not entitled to recover, and the defendant's motion for nonsuit should have been granted.

The court based its refusal to nonsuit on the ground, that the automobile of Megill might have obstructed plaintiff's view of the car approaching from the south. The court, in refusing the motion, ignored the well established rule, that if obstacles temporarily intervene to prevent observation, the person should wait until the required observation can be made.

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This doubt of the court was entirely removed by the evidence produced by defendant, and as it was the only question which influenced the court in refusing the motion for nonsuit, there should, at the close of the case, have been a direction for defendant.

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The witness Brewer testified, that he stood in the rear of the automobile and saw the car coming at a distance of about two hundred feet (*P. C.*, p. 125), and observed the car coming up nearer to him. It was coming along as if it might be going to stop at the end of the bridge (*P. C.*, p. 126).

The witnesses Brace and Bolles also testified, that at a point at the end of the railing, looking south, they could see to Riggs' Boat-house, about two hundred feet, and that at a point two or three feet east of the pole at the end of the railing, they could see a car clear across the trolley bridge, over the Belmar side. These locations were where the plaintiff stood.

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The motorman Irons testified, that the plaintiff walked north along the rail, stepped around the post and stepped on the track, and never looked toward him; never looked at all. (*P. C.*, p. 99.)

Plaintiff's evidence also failed to prove any negligence of defendant causing the accident.

The place of the accident was at the north end of the Shark River Bridge, a place where people stood to take cars of defendant company, an established point to take on and let off passengers.

The motorman Irons testified, printed case, page 99:

“ Q. Was there anything about Hubbard’s conduct or motion forward that indicated to you that he was going across your path?

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A. No, sir.

Q. Until he turned west to go on the track?

A. No, sir, I never dreamed that the man was going on the track. I supposed he was going to stop there to get on the car, the same as lots of other people done. When he walked down to this pole I slacked the speed of the car more to come to a stop, and just as I did that he stepped in front of the car.”

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The witness Brewer also testified that the car when passing him was going along as if it might be going to stop at the end of the bridge.

The remarks of Chief Justice Gummere, in *Harbison v. Camden and Suburban Railway Company*, 74 N. J. L., 253, apply to this case. “ The plaintiff did nothing before making an attempt, to suggest to the motorman his desire to cross; did not even look around in the direction of the car. The failure of the motorman to anticipate the plaintiff’s action was therefore not negligence, and as he had no reason to anticipate such action, there was no cause for the ringing of his gong. Nor can the failure of the motorman to stop the car, after the plaintiff started to cross the track, in time to prevent the collision, be deemed negligence on his part. The fact that the plaintiff was not more than a foot or two from the track when he turned to cross it, coupled with the further fact that he was struck just as he got upon the track, demonstrates that the car was so close upon the plaintiff when his intention to cross over was first made manifest to the motorman, that the bringing it to a standstill before colliding with him, was an impossibility.

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In the second place, the failure of the plaintiff to look behind him before attempting to cross over was in itself an act of negligence, which was largely, if not wholly responsible for the accident."

All the witnesses who saw the car, testify it was running very slowly, under full control, not going five miles an hour. This appears from the testimony of Megill, Brewer, the motorman Irons, the conductor Stillaway, and the motorman Lavin on the south bound car.

That the accident could have been avoided by the exercise of proper care by the plaintiff, was apparent at the close of plaintiff's evidence, and he should have been non-suited, and if the doubt expressed by the court in refusing the motion was sufficient to put defendant upon proof, then that doubt having been cleared at the close of the entire case, the court should have directed a verdict for the defendant.

We submit the court erred in refusing defendant's motions for non-suit and for a direction, and the judgment should be reversed.

DURAND, IVINS & CARTON,
Counsel for Appellant.

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New Jersey Court of Errors and Appeals

CALEB T. HUBBARD,
Plaintiff-Respondent,

vs.


ATLANTIC COAST ELECTRIC RAIL-
WAY COMPANY,
Defendant-Appellant.

Action at Law.

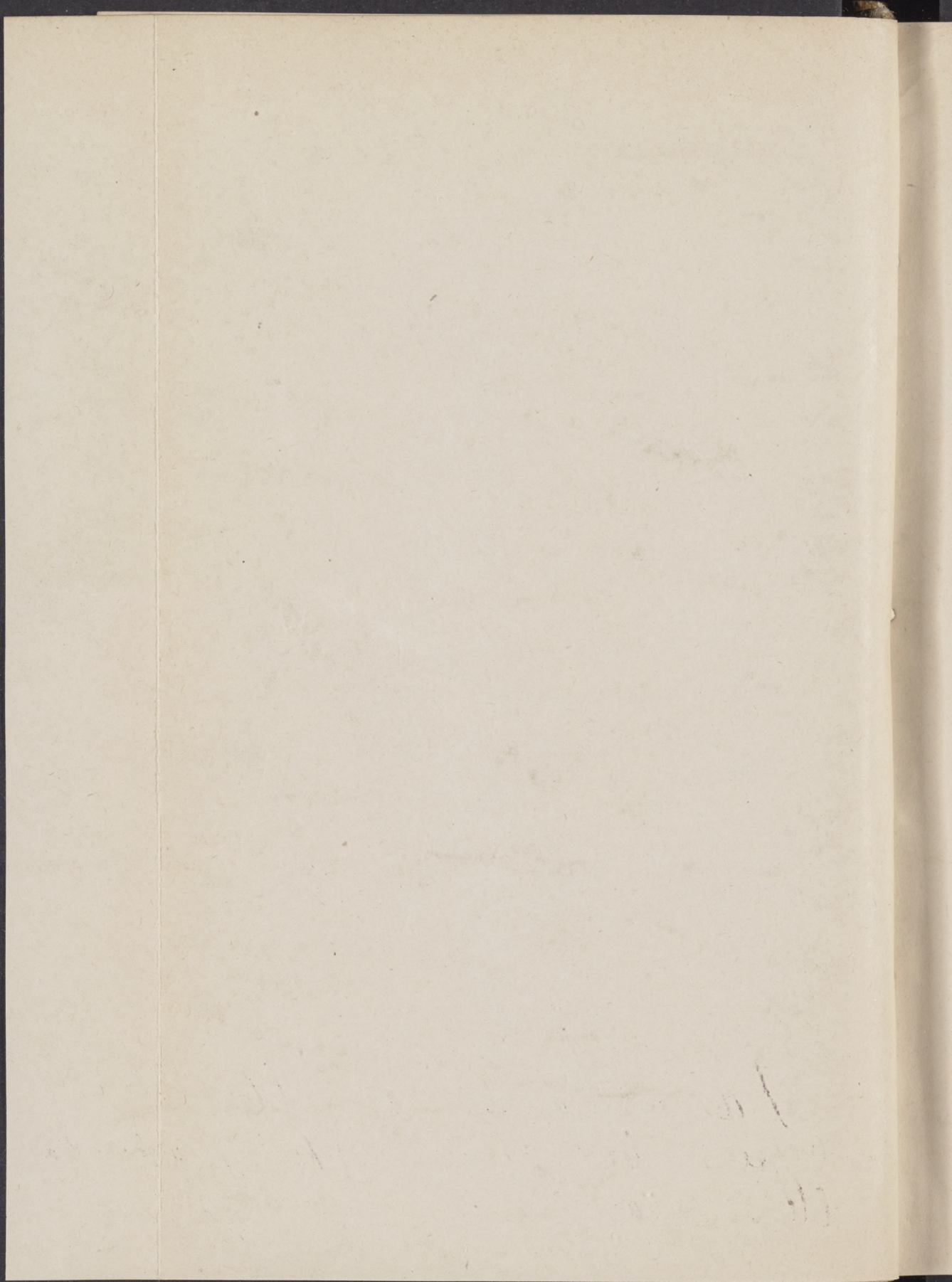
Brief for Respondent

LEON R. TAYLOR,
Counsel for Respondent.

STEWART A. FARRELL,
On the Brief.

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N. D. [Signature]



NEW JERSEY COURT OF ERRORS AND APPEALS

CALEB T. HUBBARD,
Plaintiff-Respondent,

vs.

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Defendant-Appellant.

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BRIEF FOR RESPONDENT

Point I

The Motion For a Non-Suit at the Close of the Plaintiff's Case Was Properly Denied.

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At the close of the plaintiff's case the evidence showed certain facts from which the jury could reasonably infer that the plaintiff acted as a reasonably prudent man would have done under the circumstances and this case clearly comes under the long established rule that where the facts have been established by evidence from which negligence may be reasonably inferred, the case must be submitted to the jury.

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This well founded doctrine is ably set forth by the Court of Errors and Appeals in the case of Newark Passenger Ry. Co. vs. Block, 55 N. J. L. 605, 27 Atl. 1067, cited by the appellant. The testimony showed that an east bound car running on the south street car track had stopped upon the crossing and plaintiff had waited until it passed, when she went on, looking to both sides; that not seeing any west bound car she stepped on that track and was immediately struck and run over. These facts are very similar to those in the present case and the court upon

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affirming judgment for the plaintiff laid down the general rule as follows:

10 "The power to direct a verdict is identical with, and rests upon the same foundation as the power to non-suit. When in such case the trial judge is requested to non-suit, or to direct a verdict, his duty is, as was well expressed by Lord Chancellor Cairns in Metropolitan Ry. Co. vs. Jackson 3 App. Cas. 193, to show whether any facts have been established by evidence from which negligence may be reasonably inferred. If none, there is no case to go to a jury, but if from the facts established, negligence may be reasonably and legitimately inferred it is for the jury to say whether from those facts negligence ought to be inferred. In performing this function, the trial judge must take care not to trench on the peculiar province of the jury to determine questions of fact and must bear in mind that the question is not whether he would infer negligence from the established facts, but whether negligence can be reasonably and legitimately inferred therefrom by the jury. It follows that, if the real facts have not been established by the evidence but remain in substantial dispute, the trial judge must submit them and the inferences to be drawn from those which the jury find established, to the determination of the jury."

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30 Upon the trial it was established by the evidence of the plaintiff that on the day in question, he was crossing the tracks owned by the defendant company from east to west at a crossing where people for many years had been accustomed to cross; that when about five feet from the track he looked south first (P. C. page 9, line 9) and did not see any car and then looked north and saw a car coming from the north toward the switch (P. C. page 9, line 16); that he halted until the car coming from the north stopped at the switch and then proceeded across the track. As to the plaintiff's looking north and south, he is corroborated

40 by the testimony of the witness Megill. Plaintiff further

testified, that he did not hear any bell or any signal of any sort (P. C. page 10, line 5); that from the point where he looked there was an elevation or upward grade running toward the bridge over which the car, which struck the plaintiff, came, and also a curve in the track eastward from the bridge to this point; and on the bridge there were spans which were much higher than his head, as testified by Megill (P. C. page 31, line 40). In addition to this the automobile in which the witness Megill was seated was located close to the rail within three or four feet (P. C. page 30, line 28) and between the plaintiff and the car approaching from the south across the bridge (P. C. page 28, line 8). At the point where the plaintiff crossed, the tracks of the trolley company were single tracks. It must be borne in mind that it was impossible for the plaintiff to look in both directions at the same time and that the time between his observations to the south and north was but a little while according to his own testimony; how long is not shown, perhaps one second or twenty seconds. With these conditions existing and the physical location of the place of accident, there were presented facts from which the jury could believe that the plaintiff acted as a reasonably prudent man would have acted under the circumstances. Such a presentation of evidence at the close of the plaintiff's case warranted the trial judge in denying the motion for nonsuit and placing the case in the hands of the jury at this particular stage of the trial. Such evidence did not justify the trial judge in adjudicating that the plaintiff was guilty of contributory negligence as a matter of law.

Under the evidence as produced it was reasonable to infer that the question of the plaintiff's contributory negligence was in doubt. This doctrine is laid down in the case of *Napodensky vs. West Jersey and S. R. Co.* (*Shapiro vs. same*) 88 Atl. 1033, where the facts are almost identical with the case now at bar and briefly stated were as follows:

"Where driving a horse that he hired from the plaintiff, Jacob Shapiro, which was hitched to an open wagon, crossing the tracks of defendant's railroad, Napodensky, a man about seventy years

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of age, was struck by a train. The track was a single one and there was an electric alarm bell at the crossing. Eight or ten feet from the track on the left hand side as plaintiff crossed were coal sheds on the railroad siding extending in the direction of the station, upon which side some of the defendant's cars stood. The testimony of the plaintiff was that as he approached it, he stopped his horse and listened for the approach of a train; 10 heard no alarm from the crossing bell and no sound to indicate the approach of a train. Plaintiff urged on his horse and met with the accident. The Court of Errors and Appeals said that if this situation presented the true state of facts, the plaintiff was entitled to recover, since nothing in this concatenation of facts speaks of contributory negligence or reflects the exercise of due care on the part of the defendant. The defendant met the situation by tes- 20 timony in direct contradiction thereof, and contended that from the facts going to make up the plaintiff's case, his negligence was a contributing factor in the case and barred recover. It also urged that he must have seen the train, had he looked, since he had an unobstructed view of one thousand feet along the track in the direction in which the train was coming. It is probable that such would have been the case if *there had been no obstruction on the siding*, which the plaintiff testified was a fact. This being the situation, the question for the jury to settle was whether in the environment thus created which presented a cross- 30 ing with the view obstructed, a signal bell not ringing, the absence of any signal to indicate an approaching train, the absence of any gates and a flagman at the crossing, and a horse upon which the plaintiff was required to devote some attention, the plaintiff was guilty of contributory negligence." Citing *Goodenough vs. Penn. R. R. Co.* 27 Atl. 40 93¹.

The court says: "A true and practical solution of such a situation and the legal characterization of the acts of a man so jeopardized necessarily presents a jury question, under proper instructions from the court, defining the legal responsibility of the parties concerned. This rule of substantive law has been the subject of frequent reiterations by this court to the effect that *where the plaintiff has rested his case and the evidence leaves a question of his contributory negligence in doubt, the determination of the question of the negligence of the defendant, presents an issue of fact which must be submitted to the jury.*" Citing *Brewster vs. N. Y. Central R. R. Co.* 78 Atl. 160 and other cases. "The second contention of the appellant is that the testimony of the plaintiff and his witnesses was of a negative character as to the ringing of the bell and the blowing of the whistle, while that of the defendant is of an affirmative character, and the defendant's testimony, therefore, should be accepted as positive proof of the facts. While under our decisions, testimony of an affirmative character is clearly entitled to more weight than that of a negative character, it is not for the court to characterize the defendant's version as infallible and thus eliminate from the case whatever weight the testimony of the plaintiff might have had upon this subject."

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In the case of *Buttelli vs. Jersey City H. & R. Electric Ry. Co.* 59 N. J. L. 302, 36 Atl. 700, the facts are again similar and the court held as follows:

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"When one who was passing on foot along the public highway which had no sidewalk or path but a side ditch, and the rails of the street railway company, whereon its cars running the same direction in which he was going, were laid down within two feet of the ditch, it was a question for the jury whether in walking along the track or the narrow strip between it and the ditch, he failed to do what

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a prudent man would have done under the circumstances. If a motorman running a trolley car on a highway in the day time perceives a person passing along on foot upon or closely opposite the track and apparently heedless of signal and the motorman could arrest the movement of the car before striking the man, the failure to do so is evidence of negligence and must be submitted to the jury."

10 It was established in the plaintiff's case by the defendant's answer to the fourth interrogatory (P. C. page 61, line 33) that the motorman saw the plaintiff about ninety feet away. With this evidence produced it was within the realm of the jury and for the jury to determine whether or not the plaintiff acted as a prudent man; also whether or not the defendant could have stopped the car in time to have avoided the accident. The similarity of facts brought it under the rule laid down in the Buttelli case above cited.

20 The case of Conrad vs. Elizabeth P. N. C. Ry. Co. 58 Atl. 376 is at point, in which the syllabus of the decision reads in part as follows:

30 "If from the testimony of the case the jury could legitimately find that when the plaintiff started to cross the trolley tracks laid in the public highway it was apparently safe for him to do so under the conditions within his observation, one of which was a trolley car sufficiently distant to be checked or, if need be, stopped before it should reach him, the question of the plaintiff's contributory negligence is for the jury."

In Bauer vs. North Jersey R. R. Co. 74 N. J. L. 624, 65 Atl. 1037 (Court of Errors and Appeals), the facts briefly stated were:

40 Plaintiff started to cross the track at which time a west bound car was approaching in full view at a point, which from the evidence was shown to be a distance of the width of Schark Street and two houses beyond, probably from 15 to 100 feet, where she undoubtedly saw the car or could have seen it had she looked, and the motorman did see or

could have seen her at the same distance. She was hit by the car just as she was about to leave the track she was crossing. The proof was that the car was going fast. There was also evidence that the motorman did not ring any bell. The court held as follows: "On the evidence a motion to non-suit on the ground that the motorman was without negligence was denied and rightly as we think." The court in reversing a direction to non-suit on the ground that the girl's negligence contributed to the injury, laid down:

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"The child was upon the cross-walk where she had right to be and where she had the right to rely upon the fact that the motorman of the car as well as the drivers of all motor vehicles or other vehicles would respect her priority or right to cross the street if she was in position to justify her proceeding to cross under a reasonable belief that she could do so with reasonable safety if both she and the motorman were in the exercise of reasonable care." Citing Consolidated Traction Co. vs. Glenn 37 Atl. 66. "Whether a person proceeding to cross at a cross-walk, who may see a car approaching is in the exercise of reasonable care is for the jury. *Where reasonable minds may differ* as to whether a person on foot should cross a street, when upon the sidewalk, in front of an approaching trolley car was under the given circumstances guilty of an act of negligence which contributed to the injury is always for the jury. The trolley car has no special right in the streets, at the cross-walk, over the rights of a pedestrian. Our decisions all hold that it is not under all circumstances negligence per se to go upon a trolley track at a cross walk either on foot or when driving a vehicle for the purpose of crossing without first looking for an approaching car." Citing Consolidated Traction C. vs. Scott 34 Atl. 1094 and numerous other cases.

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Point 2

The Case Was Properly Submitted to the Jury as There Were Disputed Questions of Fact and the Negligence of the Defendant Was Clearly Established.

As to the negligence of the defendant, the court's attention is respectfully referred to the testimony of the motorman Irons under cross examination (P. C. page 111, line 5):

10 Q. "Did this man (meaning plaintiff) give you a signal that he was going to stop?"

A. "No, sir."

Q. "You saw him running in that direction and guessed he was going to stop?"

A. "Yes."

Q. "You guessed wrong, didn't you?"

A. "Yes."

20 Q. "And it resulted in the crippling of this man, didn't it?"

A. "Yes."

By such testimony of the defendant it was clearly shown that the motorman took a chance and as a result of it the accident occurred. In addition to this the motorman Irons testified (P. C. page 102, line 5) that he first saw the plaintiff when he was ninety feet away and (P. C. page 106, line 5) that he continued to see him until the very moment that he was hit.

30 Under these circumstances the negligence of the defendant is clear and unequivocal and questions were presented which justified the jury in bringing in a verdict for the plaintiff on the ground that the motorman, observing the plaintiff when ninety feet away and keeping him under his observation until the very time he was hit and running his car at a moderate rate of speed should have stopped his car before it struck the plaintiff, who according to the motorman's own testimony, did not make any signal to stop nor show any intention of getting on the car. It was, therefore, or should have been apparent, to the motorman that

40 the plaintiff did not hear any bell and was ignorant of the

presence of the moving car. Moreover, the facts as presented would have justified the jury in believing that the motorman did not ring any bell, and that he saw the plaintiff when he said he did. Furthermore, it was established that this was a regular crossing and by the testimony of the motorman Irons it was shown that he knew that people were in the habit of crossing at this particular place and that people had been crossing there for years in great numbers (P. C. page 106, line 15-30). Yet in spite of this knowledge, the motorman testified that he thought that the plaintiff was going to get on the car. Such testimony appears incredible under the circumstances and the jury in bringing in the verdict, which they did, repudiated such testimony and were justified in doing so. Moreover, the question of the ringing of the bell presented another disputed fact upon which the jury was the sole judge. On this point, the court's attention is called to the testimony of the witness Megill who was seated in the automobile directly alongside of the track and was in a position to see and hear on account of the height of the automobile and his proximity to the trolley car. His testimony was clear and concise to the effect that he did not hear any bell and it is reasonable to believe that if any bell had been rung, he would have heard it.

In the case of *Kraut vs. Public Service R. R. Co.* 81 Atl. 751, plaintiff, who was the only witness for himself, testified that he was crossing a certain street and that when he was five or six feet distant from the north bound track, he looked and saw a car forty-five or fifty feet away coming at a pretty fair rate of speed toward him on that track; that he proceeded to cross and as he was stepping over the last rail, his foot was struck by the car and he was injured. The Court of Errors and Appeals held that the Supreme Court erred in ruling that a verdict should have been directed for the defendant on the ground of contributory negligence on the part of the plaintiff, and ruled that the case was properly submitted to the jury. The Court held in part as follows:

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10 “From the testimony of the plaintiff, the jury was justified in concluding that the motorman when fifty feet away ought to have seen the plaintiff within five feet of the track crossing upon the crosswalk. It was undisputed that the motorman was then driving the car at a pretty fair rate of speed. It traveled fifty feet where plaintiff traveled about ten feet. It was, therefore, up to the jury to find either *that the motorman did not make proper efforts to prevent the collision* or that the inability to stop the car was due to its excessive and unlawful rate of speed.

20 “The plaintiff was upon the cross walk where he might reasonably expect that the motorman would expect pedestrians to cross and would have the car under proper control accordingly and the plaintiff had a right to expect that the motorman would respect his right to cross the street if he was in position to justify such crossing under reasonable belief that he could safely do so if both he and the motorman exercised reasonable care.” Citing *Bauer vs. North Jersey R. R. Co.* 65 Atl. 1037. The Opinion of the court further reads:

30 “From the testimony, the jury could legitimately find that when the plaintiff, after looking when five feet from the track, started to cross, it was apparently safe for him to do so under the conditions within his observation, one of which was a trolley car running at a pretty fair rate of speed and sufficiently distant to be checked or, *if need be, stopped before it could reach him.* The question of the plaintiff’s contributory negligence was, therefore, properly submitted to the jury in the District Court.”

40 The same principle is laid down in the recent case of *Heckman vs. Cohen* 100 Atl. 695, decided by the Court of Errors and Appeals on March 5, 1917, in which the testimony was that the plaintiff stepped from his wagon on the right side of the road and proceeded to cross the street with

fifteen pies piled on his left arm and was struck by an automobile; that the automobile that struck the plaintiff was on the trolley tracks and directly behind a trolley car. Plaintiff testified that when he saw the automobile it was about one hundred feet away and that he had walked from the rear of his wagon to a distance, estimated variously, from nine to fifteen feet and had passed over one track and was just on the inside of the track when he was struck by the automobile. The court held in affirming the judgment for the plaintiff:

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“ We think that there was a question of fact for the trial judge to determine whether the defendant, under the surrounding circumstances, by the exercise of reasonable care could have avoided running into the aged plaintiff. The trial judge found that the defendant could have avoided the accident by the use of reasonable care. The speed at which the car was driven in the surrounding circumstances and the failure of the driver of the automobile to sound a warning to the aged plaintiff were the basis of the court’s finding that the defendant was negligent.”

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In *Divine vs. Public Service R. R. Co.* 88 Atl. 1080, the Court of Errors and Appeals held as follows:

“ Where the plaintiff, who had walked upon the cross walk of a public highway, was struck by a street railway car as he was clearing the far rail of the far track and the evidence justified the inference that the car was running twenty miles an hour and also tended to say that the motorman, when one hundred feet away, ought to have seen the plaintiff in the act of crossing, it was up to the jury to find either that the motorman did not look or that he did not make proper effort to stop or that his inability to stop was due to the excessive speed of the car and therefore the question of the negligence of the defendant company was for the jury.”

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See also *Migans vs. Jersey City H. & P. Ry. Co.* 70 Atl. 168 (Court of Errors and Appeals).

10 Little, if any, weight can be attached to the testimony of the witnesses Brace and Bowles on the part of the defendant as to the physical situation of the place where the accident occurred. Their observations were made nine months after the accident occurred under conditions different than those existing at the time of the accident. There was no automobile located at the place as shown by the evidence of the plaintiff's witnesses and furthermore the road bed had been raised at that particular point as testified by the plaintiff (P. C. page 158, line 35).

Most of the cases cited by the appellant differ materially as to facts, and hence the rule applicable in those cases does not apply to the case at bar.

20 In the case of *Schwanemede vs. North Hudson Ry. Co.* 38 Vr. 449, the non-suit is based primarily on the plaintiff's own testimony under cross-examination. "You thought you could get over and you took a chance?" Answer, "Yes." By such testimony, of course, it was evident that the plaintiff in that case was guilty of contributory negligence.

In the case of *Gilliland vs. Mid. Somerset Trac Co.* 38 Vr. 542, cited by the appellant, the evidence showed that the plaintiff attempted to cross ahead of the car on a dark night although warned of its presence, tripped over the first rail and fell. These facts of course are in no way analogous to the case in question before this court.

30 In *Solatinow vs. Jersey City H. & P. Ry. Co.* 41 Vr. 154, the facts were that the plaintiff did not look for an approaching car nor made any effort to do so, which situation is entirely different from that presented on this appeal.

40 In *Harbison vs. Camden & Suburban Ry. Co.* 45 Vr. 254, cited by the appellant, an entirely different situation is presented. Plaintiff in that case was riding a bicycle within a foot or two of defendant's street car tracks and suddenly turned to cross the track without looking to the rear. Plaintiff in that case was certainly guilty of contributory negli-

gence, but the facts are entirely different from the facts in the case at bar.

In *Hageman vs. North Jersey St. Ry. Co.* 45 Vr. 281, cited by the appellant, the testimony showed that the trolley car which struck the plaintiff was proceeding in back of a wagon and the plaintiff did not see the car for that reason; that in this case the plaintiff was in a hurry to get across in front of the car going West so as to catch it; that his mind was intent on getting that car and that was the reason that he did not look to see whether there was anything in back of the wagon. Moreover he testified that he was conversing with his friend as he crossed. Plaintiff further testified that when he got within a foot or two of the next rail he did not remember whether he looked to see if any car was coming or not. These facts, of course, are entirely different and remove these cases from a rule applicable to the case on appeal now before the court.

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In *Winter vs. N. Y. & L. B. Ry. Co.* 66 N. J. L. 677, cited by the appellant, the testimony showed that the plaintiff in crossing the railroad track made his observation toward the south at a distance of 368 feet from the crossing where the accident occurred, and also looked to the north at about the same distance. He did not look again toward the north and the court held that his view being unobstructed he was negligent. This case differs materially from the case on appeal for the reason that the observation made at such a great distance certainly could not be effective. The Court stated its opinion as follows:

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“If those acts and attentions of observation are performed when the observer is so far from the crossing that before he will reach it the train, coming from that quarter open to his further attention and observation, has time to advance so as to endanger him, then the plaintiff is negligent.”

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Practically the same situation exists in the case of *Cantrell vs. Erie R. Co.* 34 Vr. 277, cited by the appellant, in which the plaintiff testified that when about 35 or 40 feet from the track he looked north where his view was unobstructed for 1600 feet and then crossed the track diagonally,

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looking only toward the south where his view of the track was unobstructed for 900 feet. The plaintiff further testified that his hearing was good, but he was not listening or paying any particular attention to it. It will be noticed, in the last two cases cited by the appellant, that there was no obstruction of any sort and that furthermore the observations made by the plaintiffs were made at a great distance from the crossing itself.

10 The charge of the trial judge to the jury, which occupies pages 163-176 of the printed case, sets forth the facts and law in a most able and fair manner. The court charged (P. C. page 171, line 26) :

“ But even if you find the motorman was negligent, yet if there was negligence, however slight, on the part of the plaintiff which contributed to the accident and his injuries, he cannot recover.”

20 Practically the same language is used by the court on page 174, line 12, printed case, and the jury was repeatedly directed by the court as to this well founded proposition of law. The jury, however, found by its verdict in favor of the plaintiff that the plaintiff was free from contributory negligence and the accident was due solely to the negligence of the defendant company.

The case now before the court falls clearly under the authority, both as to facts and law, of the leading case of *Napodensky vs. West Jersey & S. R. Co.* 88 Atl. 1033 above cited in full and the judgment should be affirmed.

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Respectfully submitted,

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On the Brief.

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