NEW JERSEY COURT OF ERRORS AND APPEALS.

ANDREW J. DEFGUARD,
Plaintiff,
Defendant in Error,

vs.

NEW YORK AND LONG BRANCH RAILROAD COMPANY,
Defendant,
Plaintiff in Error.

STATEMENT OF FACTS.

On the morning of the twenty-first day of July, nineteen hundred and four, the plaintiff, a boy about twelve years of age, was riding in a wagon drawn by two horses and being driven by a man named Sanderson. The plaintiff was sitting on the seat to the left of the driver, having been requested by Sanderson to go with him for the purpose of holding his horses while he was unloading his wagon. The wagon was on open wagon, and, on the day in question, was being used for carting ice.

The place of the accident was the intersection of a street called Broadway and the right-of-way of the defendant in Long Branch, New Jersey.

Broadway is a thoroughfare running about east and west and crossing at right angles the railroad tracks at grade. The wagon, at the time of the accident, was passing over the tracks in a westerly direction. The right-of-way was protected by arm gates, two on the east and two on the west side of the tracks. At this crossing the defendant operates four tracks, the most easterly and the most westerly being used as freight tracks, and the two centre tracks being used for their regular trains.

On the day in question, the most easterly track to the south of Broadway was occupied by five to seven freight cars, which were standing with the most northerly end of the train close up to the southerly side of Broadway, at about five feet from the side walk, (Page 30, l. 10, &c.; page 38, l. 20, &c.) and these cars had been standing there for a day or two before the accident. (Page 44, l. 1, &c.)

On the south side of Broadway, and obstructing the view of the traveler going west, there were buildings, trees and shanties placed along the right-of-way by the defendant Company, the nearest being a few feet from the track.

The gates are operated by a gate tender, by means of a handle located on the east side of the track, and on the south side of the highway. (Page 25, l. 10, &c.)

As the location was, at the time of the accident, it was impossible for the gateman standing at his gate post to have a view to the south so as to see whether a train was approaching from that direction, but to obtain such view he would have to go towards the west and clear the standing freight cars. (Page 28, l. 1, &c.; page 39, l. 5,

&c.; page 55, l. 32, &c.; page 56, l. 35, &c.; page 61, l. 12, &c.; page 126, l. 20, &c.)

These obstructions would also prevent a wagon traveller from seeing a train approaching from the south until he was also beyond the obstruction of the standing cars.

(See testimony of David, Miller, Van Schoick and Brown, page 55, line 32, &c.)

The driver of the wagon had driven up to the railroad crossing, and had brought his horses to a stop at the usual place to permit a south bound train to pass. The gates were lowered for this train and after the train passed, the gateman raised the gates and stood leaning on the post and the wagon started up and crossed the track. (Page 46, l. 30, &c.; page 47, l. 1, &c.; page 49, l. 30, &c.; page 54, l. 30, &c.) As the wagon got upon the track, an engine running north struck the wagon, threw out and killed the man, and very seriously injured the plaintiff. (Page 55, l. 1, &c.)

Apparently no bell was rung, nor whistle blown, as none of the witnesses for the plaintiff testify that they heard any bell or whistle, but all testify that the first thing they heard was the crash of the collision.

The defendant did not produce, as witnesses, any of the operators of the train or the operator of the gates, and confined its testimony to evidence concerning the boy's condition, and the proof of a map made for the purpose of suit, and the taking of observations at certain selected spots, by a person who made the map.

The defendant has assigned twenty-eight assignments of error.

The fifteenth assignment of error alleges that the Judge erred in refusing to direct a verdict for the defendant. (Pag 17, l. 20).

POINT ONE.

The Court Properly Refused to Direct a Verdict in Favor of the Defendant.

The motion for direction was placed upon two grounds, namely:

FIRST. That the driver of the wagon was negligent and that his negligence, contributing to the accident, should be imputed to the plaintiff.

SECOND. That the boy himself was negligent, contributing to the injurr. (Page 180).

No claim was made that the defendant was not negligent.

The doctrine of imputable negligence, as between husband (driver) and wife, has been accepted in this State.

> Pennsylvania R. R. Co. vs. Goodenough, 55 N. J. L., 577.

But as between a driver and his passenger, it is denied.

> Bennett vs. N. J. R. R. & T. Co., 7 Vr., 225.

If the question of whether the contributory negligence of the servant (driver) could be imputed to the passenger (mas-

ter) is open to discussion, yet that question cannot be raised in this case as it is obvious that if there were any relation of master and servant in the cast at bar, the driver was the master and the plaintiff (passenger) the servant.

While it is a familiar rule sustained by abundant authority, that a master may be liable for the acts of his servants, I think it would be difficult to find authority for the proposition that a servant is responsible for the negligent acts of his master.

In discussing the cast of Thorogood vs. Bryan, 8 Man., Gr. & Scott, 116, Chief Justice Beasley, repudiating the doctrine of that case, and discussing the reason of the doctrine of imputable negligence, laid down therein, says: "But I have failed to perceive how it is that the passenger in a public conveyance becomes identified, in any legal sense, with the driver of such conveyance. Such identification could result only in one way, that is, by considering SUCH DRIVER THE SERVANT OF THE PASSENGER. * * * In a practical point of view it certainly does not exist. The passenger has no control over the driver, or agent in charge of the vehicle. **And it is this right to control the conduct of the agent, which is the foundation of the doctrine that the master is to be affected by the acts of his servant.**"

Bennett vs. N. J. R. R. & T. Co., 7 Vr., 227.

Applying this reasoning and principle to the case at bar, it is apparent that this boy was not the master of the driver, and had no control over his conduct, and the logical conclusion is that the conduct or negligence, if any existed, upon the

part of the driver, could not be imputed to the plaintiff.

Nor was the plaintiff himself guilty of any negligence contributing to his injury.

Contributory negligence is a defense which must be proved by the defendant unless from the plaintiff's evidence it appears to exist.

No facts proved by the plaintiff, or by the defendant, showed any contributory negligence upon his part.

His testimony is to the effect that he heard no train approaching (and it is proved he could not see any), and that he had no control over the driver, is quite apparent from the testimony. He did not urge him to go forward into any petril, nor did he advise or assist him, or in any way participate in the control of the vehicle in which he was riding.

The contention of counsel for the defendant was that he should have heard the engine approaching. The defendant, however, did not produce any evidence to show that the approaching engine made any noise, and it did not produce any witnesses to testify that either the bell was rung or the whistle blown, nor did it produce any evidence to show that audible signals of its approach were given; in fact, it did not produce the operators of the engine, nor the man in charge of the gates who lifted them and invited the driver to cross.

It did admit that it was its duty to maintain and guard the tracks. (Case, page 24, l. 1, &c.)

Under such circumstances the Court could not rightfully decide that the plaintiff was guilty of negligence, contributing to his injury.

Goldsboro vs. Cen. R. R. Co., 31 Vr., 49.
Tubello vs. D. L. & W. R. R. Co., 38 Vr., 581.

POINT TWO.

Assignments of Error, Numbers 2, 3, 4 and 5, Do Not Show the Commission of Any Error by Submitting to the Jury Any Illegal Evidence Harmful to the Defendant.

Assignment of Error, No. 2, presents an Exception found on page 27.

The objecting counsel stated no reason for his objection, but asked a question of the Court.

The question, however, was competent.

Assignment No. 3 presents an Exception on page 47, Assignment No. 4 presents Exception found on page 48, and Assignment No. 5 presents Exception found on page 55, and these are all subject to the same criticism.

However, if these Exceptions were properly taken, and presented under Assignments, the evidence was competent and could do the defendant no harm, even, if the questions were not strictly proper, because this same testimony was given by other witnesses without objection by the defendant, and the truth of it was not seriously controverted and its materiality must be admitted.

The sixth Assignment presents an Exception found on page 65. If the reason for the objection of the learned counsel was that the question was leading, which is the only objection that can be spelled out from his remarks, that is not subject to a charge of error.

The seventh Assignment presents Exception on page 90, and Assignment No. 8 presents Exception found on page 93.

These two last Exceptions present the question as to whether the doctor, who attended the boy, could testify as to the probable duration of his injuries.

The questions and answers were legal and competent.

POINT THREE.

The 10th, 11th, 12th and 13th Assignments of Error Concern Questions Directed to an Expert Witness, Calling for Expert Opinion.

The questions to which these Assignments refer are found upon pages 133, 135, 136 and 138 respectively.

It is submitted that the questions objected to were all competent and proper, and that the grounds of objection were not proper and not properly stated.

POINT FOUR.

The Remaining Assignments of Error from No. 16 to 27 Inclusive, Deal with the Requests to Charge Submitted to the Court and to the Charge of the Court.

It is submitted that the charge of the Court, upon the propositions of law applicable, was correct, and that if any of the requests submitted were not charged by the Court, they were such as the Court was not legally bound to charge.

Parties are entitled to have proper legal requests charges, but the Court may comment upon or explain them so as to aid the comprehension of the jury, and parties are not entitled to have culled from the case a partial set of facts and request deduction therefrom.

Durand vs. N. Y. & L. B. R. R. Co., 36 Vr., 667.
Consol. Traction Co. vs. Chenowith, 29 Vr., 416.
Consol. Traction Co. vs. Haight, 30 Vr., 577.

It is respectfully submitted that there was no error, prejudicial to the defendant, committed in the Court below, and that the judgment should be affirmed.

WARREN DIXON,
Attorney and of Counsel with Defendant in Error.

EDMUND WILSON,
Of Counsel.

New Jersey Court of Errors and Appeals.

ANDREW J. DEFGUARD,
Defendant in Error,

v.

THE NEW YORK & LONG BRANCH RAILROAD COMPANY,
Plaintiff in Error.

On Error to Supreme Court.

BRIEF FOR PLAINTIFF IN ERROR.

This writ of error is prosecuted to review a judgment for $4,500 and costs, the result of a trial at Monmouth Circuit before Judge Vail. The action is for personal injuries sustained by the plaintiff July 21, 1904, at the crossing of Broadway over the tracks of the defendant company in Long Branch.

Plaintiff was then about eleven years and eight months old (p. 62, l. 10), and was riding in an open farm wagon, with one Sanderson who was driving. Both were sitting on the same seat, Sanderson on the right side (p. 51). They were going in a westerly direction on Broadway, the tracks running northerly and southerly. Sanderson was carting ice from an ice house at Mapes Pond to the Long Branch plant of the Monmouth Ice Company (p. 35), and had paid the plaintiff ten cents to go with him to hold the horse (pp. 67-68). They had delivered one load and was going back with an empty wagon for the second load when the wagon was struck (p. 69) by an engine going north at about 8.20 a. m. (p. 54). Sanderson was instantly killed, and plaintiff sustained injuries about the head and in one knee.

I.

THERE WAS ERROR IN THE REFUSAL TO STRIKE OUT TESTIMONY OF DR. BEACH THAT HE HAD KNOWN EPILEPSY TO OCCUR SEVEN YEARS AFTER SUCH AN INJURY.

The case was tried on the part of the plaintiff upon the theory that epilepsy would result from the injury, and it is evident from the size of the verdict that the jury accepted that theory.

The accident had occurred about two years before the trial, and admittedly the plaintiff up to the time of the trial had not had epilepsy, or any symptom of it (pp. 97-98), except a certain amount of irritability which Dr. Beach said indicates in such cases a predisposition to epilepsy (p. 98, l. 19). He had previously said (p. 91, l. 9) that he "should think that the probable result would be epilepsy." Dr. Beach was the only physician who testified on the part of the plaintiff, and the only witness who testified that epilepsy was at all within the probabilities of the case.

Of the three physicians who testified on the part of the defense (all of whom were of unusually wide experience), Dr. Field (p. 162, l. 10) said that a head injury was never a cause of epilepsy; Dr. Forman said it was only a very remote possibility, that it occurs in a very small percentage of cases of head injury, and there was nothing to indicate it in the present case (p. 164, l. 11); and Dr. Taylor said there were no conditions which would have a tendency to make him believe that plaintiff would have epilepsy (p. 173, l. 12).

Dr. Beach upon his original examination was permitted against objection to testify that the conditions resulting from the injury would impair the earning capacity of plaintiff to the extent of "perhaps one-half, perhaps one-third" (p. 94, l. 33).

The latter testimony was afterward struck out (p. 132), and thereupon the witness was again put on the stand (although the plaintiff's case had been rested and the case on the part of defense had been gone into),

and was again allowed to go over the ground of his original examination.

In the course of such re-examination Dr. Beach was asked (p. 135, l. 32):

"*Q. How remotely from the time of the accident may epilepsy appear as a result of the accident?*

"(Objection made on the ground that the witness had not shown any expert knowledge that qualified him to speak upon that subject. Objection overruled and exception taken.)

"*A.* I never saw any, never had any in my practice.

"*Q. Have you known cases?*

"*A. Yes, sir; seen them.*

"*Q. How remotely have you known epilepsy to follow cases of this kind?* (Objected to.)

"*Q. How long?*

"*A. Seven years.*"

On cross examination he testified as follows:

"*Q.* This case that you have been led to mention where epilepsy occurred seven years after the injury, what was the injury?

"*A.* Well, it was a hit on the head from a sharp object, a bolt.

"*Q.* How was the injury inflicted?

"*A.* Inflicted by machinery.

"*Q.* What do you know about the case?

"*A.* Well, I seen the man. I know from the history of it.

"*Q. You didn't treat the man at any stage?*

"*A. No, I didn't treat it at all.*

"*Q. You didn't see the injury when it was new?*

"*A.* No, I saw the place where it was struck. You could see the place.

"*Q. How many years after the injury did you see it?*

"*A. Well, it must have been about fourteen years.*

"*Q.* About what?

"*A.* Fourteen years.

"*Q.* Fourteen years afterward?

"*A.* Yes, sir.

"*Q.* And what was there to indicate the injury at the time you saw it?

"*A.* Just a small mark on the summit of the head.

"*Q.* Did you learn whether there had been a fracture of the skull?

"*A.* There wasn't any such history given.

"*Q.* What?

"*A.* The man didn't know.

"*Q.* The man didn't know?

"*A.* Didn't know about it.

"*Q. Who gave you the history?*

"*A. Well, the gentleman who had the trouble was one of them.*

"*Q. The man who had the epilepsy?*

"*A. Yes, sir.*

"*Q. Told you about it, did he?*

"*A. Yes, sir; and then others too.*

"*Q. What is that?*

"*A.* Then I made inquiries about it, and others told me, too.

"*Q.* Who told you outside of the epileptic himself?

"*A.* Well, I can't—I know several did, but I can't recall just who they were.

"*Q. You didn't get the history from any physician who had attended him, did you?*

"*A. No, sir.*

"*Q.* And it is upon that case, upon what you learned concerning that case, that you base your opinion in this case that epilepsy will intervene?

"*A.* Oh, no.

"*Q.* Not upon that?

"*A.* No, sir.

"*Q.* It is not upon anything that you have ever had in your practice either, is it?

"*A.* No, sir; I never had a case of epilepsy by a head injury.

"*Q. And you never saw a case of head injury followed by epilepsy except this one that you have told us about?*

"*A. Not that I now remember of.*

"Q. And whether the epilepsy in that case occurred seven years after the injury or not, you took on the statement of the epileptic, did you?

"A. Yes, sir."

Motion was then made on the part of the defendant to strike out the testimony (p. 140, bottom), which the Court apparently was at first inclined to grant, but after hearing Mr. Wilson, decided to allow the testimony to stand (p. 141, l. 13).

"Mr. Strong: Certainly that part of the testimony which says that epilepsy intervened after seven years, that part cannot stand.

"The Court: I will allow the whole answer to stand. The doctor says—and I overlooked that part—that he does not base his opinion upon that case. I did not recollect that he said that. You move to strike it out and I overrule that motion.

"Mr. Strong: I wish in my motion to state the portion of the testimony that I now move to strike out. I desire to except to your Honor's overruling my former motion, which was perhaps more extensive than the one I now make. May I have that exception?

"The Court: I do not think you ought to experiment on it.

"Mr. Strong: No, I have not experimented. I have made a motion and your Honor has now denied it, and it is not an experiment for your Honor to allow it.

"The Court: What is your motion now, Mr. Strong?

"Mr. Strong: I wish to make my motion now in a more definite form.

"The Court: Then you want to withdraw the other?

"Mr. Strong: I do not withdraw anything. I have an exception to your Honor's ruling upon that point?

"The Court: No; you made a motion and I overruled it and give you an exception. Why isn't that all of it? You cannot pile one motion on top of another without asking a question.

"Mr. Strong: If your Honor will allow me to state, I think in dealing with that question it was understood to relate to the general testimony that the witness had

given on the subject of epilepsy. That was the way Mr. Wilson regarded it in his argument, and that is the light I think, in which your Honor overruled it. Now I wish to make a more limited objection and move to strike out that portion of the testimony wherein the witness says that epilepsy within his knowledge has occurred as late as seven years after the injury. Now that part of the testimony is based entirely on this one case, and in that case based upon the statement of the epileptic, and I think that I am entitled to have that stricken out.

"The Court: You brought that testimony out on cross examination.

"Mr. Strong: No, your Honor will allow me—

"The Court: Yes, you did bring it out, because it was in the cross examination of the doctor, where you asked him about the length of time after the accident, where you came in contact with it.

"Mr. Strong: Mr. Wilson brought that out before.

"The Court: Not this morning, he didn't.

"Mr. Strong: Your Honor is under a misconception. I do not wish to interrupt you, but you surely are.

"The Court: As I understand now, you are moving to strike out testimony which was brought out on your cross examination, and I do not think you have any right to cross examine and see whether you want the testimony or not and then move to strike it out, and I refuse to allow the motion.

"Mr. Strong: Since your Honor has put your ruling upon that ground, I wish to call your Honor's attention to the fact that Mr. Wilson asked this witness, 'How long have you known of epilepsy occurring after the injury?' and he said 'Seven years.' That was in his direct testimony this morning, and by Mr. Wilson.

"The Court: You did not make any objection to it at the time; you waited till you got to your cross examination, and then, circumstances having developed which seemed to me to change the situation, I made the inquiry of Mr. Wilson. Now, you move to strike out the testimony, after the cross examination.

"Mr. Strong: No, sir; my motion is to strike out the testimony taken on direct examination, that he has known epilepsy to occur seven years after the injury. I could not object to that on direct examination, because it was apparently based on his own knowledge. On cross examination it appeared that it was based on the statement of the epileptic. Now I move to strike out not only the cross examination but also the direct examination on that point.

"The Court: I refuse, on the ground that your objection to the direct examination comes too late, and you cannot strike out your own cross examination."

Whereupon the defendant by its counsel, excepted.

Of course the evidence of Dr. Beach to the effect that epilepsy might result as long as seven years after the injury, being based wholly upon the statement of the person affected, whom the witness saw for the first time fourteen years after the injury, was incompetent. It was hearsay of the plainest description.

If the basis of this testimony had appeared at the time it was originally offered, undoubtedly the Court, upon objection, would have excluded it. No objection, however, was possible upon the ground that it was hearsay, because the question (p. 136, l. 24) was, "How remotely *have you known* epilepsy to follow cases of this kind?" The question called for *knowledge* on the part of the witness, and his answer was an assertion of knowledge. It was only after cross examination, in which it appeared that the witness had no knowledge, but only information of the character above mentioned, that the inadmissibility of the testimony appeared, and the only remedy was to strike it out. The motion was properly made and the refusal of it was error, which was undoubtedly prejudicial. The testimony was of vital importance in respect to the principal item of damages.

II.

THE COURT ERRED IN REFUSING TO CHARGE THE DEFENDANT'S NINTH REQUEST.

Said request was: "9. The jury will not be justified in basing their verdict upon the theory that epilepsy may result from this accident." (P. 195.)

The Court in compliance with the sixth request of the defendant correctly charged that the plaintiff "cannot recover present damages for apprehended future consequences unless there is such a degree of probability of their occurrence as amounts to a reasonable certainty that they will result from the original injury." (P. 192, l. 18.) The Court, however, should have entirely withdrawn from the jury the theory of epilepsy as an element of damage. The proof did not justify within the rule above quoted, a finding of the requisite degree of certainty that epilepsy would result.

The only evidence tending in the least degree to support such a finding is that of Dr. Beach. In answer to the question (p. 90, l. 17) "What in your opinion will be the probable history of this case?" he said, *"Well, judging from the time I have observed him since he has had the accident, I should think the probable result would be epilepsy"* (p. 91, l. 10).

He was cross examined as follows (pp. 97-99):

"*Q.* Well now, Doctor, you don't mean to say that this boy has epilepsy now, do you?

"*A.* Oh, no; no, sir.

"*Q.* You don't mean to say that he ever has had an epileptic seizure, do you?

"*A.* No, sir.

"*Q.* You don't mean to say that he has at present any symptom of epilepsy, do you?

"*A.* Well, he—

"*Q.* No, just answer that question.

"Mr. Wilson: He is going to answer it. What do you want to interrupt him for?

"*Q.* What do you say about that, whether he has at the present time any symptom of epilepsy?

"*A.* Well, after wounds of this kind, irritability—

"*Q.* I object. I want an answer to that question, please.

"*A.* I will have to just tell you what I am judging on.

"*Q.* I don't want to know what you are judging on; I want to know whether he has any symptoms of epilepsy.

"*A.* Yes, he has irritability.

"*Q.* Well, irritability isn't any very sure sign of epilepsy, is it?

"*A.* After head injury it is.

"*Q.* You mean that wherever after head injury there is irritability, that that indicates approaching epilepsy?

"*A.* Predisposition to it; yes, sir.

"*Q.* That is not my question. May there not be that irritability and yet epilepsy not result?

"*A.* Oh, that might be possible.

"*Q.* Might be possible?

"*A.* Yes, sir.

"*Q. You cannot say with certainty now that he will ever have epilepsy, can you? Do you mean to be understood as saying that?*

"*A. No, I cannot say positively that he would have it.*

"*Q.* He may never have it; that is true, isn't it?

"*A.* He may not.

"*Q.* Did you ever see a case of head injury resulting in epilepsy?

"*A.* Yes, sir.

"*Q.* How many of them?

"*A.* One.

"*Q.* Within your practice?

"*A.* Well, this was not in my practice, but I saw it.

"*Q.* You have seen one person?

"*A.* I have seen one, yes.

"*Q.* You knew of one, not in your practice?

"*A.* No, not in my practice.

"*Q.* Who afterwards became an epileptic?

"*A.* Yes, sir.

"*Q.* How many head injuries similar to this one have you had in your practice?

"*A.* I don't think I could say.

"*Q.* What?

"*A.* I couldn't say positive.

"*Q.* Well, make a guess at it, or tell us as near as you can. An estimate, then, not a guess. How many do you think you have seen?

"*A.* Five or seven.

"*Q.* Did any of them develop epilepsy?

"*A.* Well, a good many of them I didn't follow up.

"*Q.* Do you know of any one of them having developed epilepsy?

"*A.* I knew a great many of them and didn't know the history of them at all, at the hospital.

"*Q.* I ask you the question, *Do you know of any one of them having developed epilepsy?*

"*A. No, sir; I don't. I never had a chance to observe them.*

"*Q. Have you ever heard since that they had epilepsy?*

"*A. No, sir; I didn't hear anything about them afterward. . . . .*"

And again (bottom of page 101):

"*Q.* Within what time would you expect epilepsy to develop, if it ever is going to develop from such an injury?

"*A.* Well, time varies.

"The Court: In your best judgment, Doctor, in this case.

"*Q. Just let me ask you. Have you any definite idea about that at all?*

"*A. Definite idea how long before it will develop?*

"*Q. Yes.*

"*A. No, sir.*

"*Q. What?*

"*A. I haven't any definite idea how long before it will develop.*

"*Q. As a matter of fact, you never have had any experience in such a matter?*

"*A. No, sir.*

"*Q.* In your fixing the extent of impairment of earning capacity from one-third to one-half, did you fix that upon the hypothesis that epilepsy was going to result in this case?

"*A.* No, sir.

"*Q.* That was not on the hypothesis of epilepsy?

"*A.* No, sir.

"*Q. Then you did not really expect epilepsy would result, did you?*

"*A. Well, the chances are more in favor of it than not.*

"*Q.* Well, why didn't you figure your impairment of his earning power then on the basis of epilepsy?

"*A.* Well, I took what he really had now.

"*Q.* Yes, what he really had now. Well, now, he may entirely outgrow these symptoms, may he not?

"Possibly." . . .

Being recalled, Dr. Beach testified (p. 136) that he had known epilepsy to follow as remotely as seven years after the injury, and on cross examination testified that he had seen but one such case, and that one he saw fourteen years after the injury, and his information that epilepsy had supervened seven years after the injury was derived solely from the statement of the epileptic (pp. 139-140).

(This testimony on re-examination is fully set forth under Point I. in this brief.)

Dr. Field testified that a head injury was never a cause of epilepsy, and that it is not so given by Osler; and Dr. Forman testified that epilepsy is only a very remote possibility, that it occurs only in a very small percentage of cases of head injury. Both of these physicians as well as Dr. Taylor said there was nothing to indicate that it would occur in the present case.

The rarity of epilepsy, if it ever occurs, as a result of head injury is undisputed, and is confirmed by Dr. Beach's own experience.

If Dr. Beach's opinion was admissible at all it was barely within the boundary line, and taken as a whole

and in connection with the other medical testimony, it did not amount to more than a scintilla.

The thing that the jury must find in order to allow damages for epilepsy is not that it may possibly or even probably result, but that it will result.

Probability rising to the height of a reasonable certainty will justify a finding that a certain thing will happen, but the finding is not that the happening is probable, but that it will take place.

Strohm v. N. Y. Cent. &c. R. R. Co. 96 *N. Y.* 306.

Watson Damages for Personal Injuries, Sec. 302.

Dr. Beach did not give a positive opinion that epilepsy would follow. He would not say that he expected it to follow. The utmost he would say was that "the chances are more in favor of it than not" (p. 102, l. 26); that is to say, in a hundred chances perhaps there would be 51 in favor of it and 49 against it, or in a thousand perhaps 501 in favor and 499 against.

But this is not the degree of probability which is required. Not a bare preponderance of probability but a reasonable certainty is necessary.

III.

THE COURT ERRED IN REFUSING TO CHARGE THE SEVENTH REQUEST OF THE DEFENDANT.

The following is the request: "7. There is no evidence which will justify the jury in finding that any of the injuries to the plaintiff will be permanent" (p. 195).

Outside of the alleged possibility of epilepsy (already discussed) the only signs of injury remaining at the time of the trial were pains in the head which Dr. Beach said would last "a year or more" (p. 135, l. 26; p. 133, bottom), and a slight deformity of the knee which he said might disappear in five or seven years" (p. 134, top), and again, "in ten years" (pp. 138, 139).

After repeated efforts he was finally coaxed into say-

ing that in his best judgment the leg would never be as strong as a normal leg (p. 138, l. 35).

The witness, however, admitted that the boy showed no lameness at the time of the trial (p. 103, l. 37), and that he could run as well as walk (p. 104, l. 12).

Doctors Field (p. 146, bottom), Forman (p. 164, bottom), and Taylor (p. 172, l. 20), each testified that the injury to the knee existing at the time of the trial was of a trifling nature and would entirely disappear.

IV.

THE COURT ERRED IN REFUSING TO CHARGE DEFENDANT'S EIGHTH REQUEST.

The Court was requested on the part of the defendant to charge: "8. There is no evidence which will justify the jury in finding that the earning capacity of the plaintiff will be impaired after he has reached the age of twenty-one years" (p. 195).

From what has already been said it follows that the charge so requested should have been given.

The boy at the time of the trial was less than fourteen years old, so that he would have over seven years in which to recover before reaching his majority.

In a year or more from the time of trial his headaches will have disappeared,—so Dr. Beach says.

In from five to seven years, according to Dr. Beach, his knee deformity may have wholly disappeared, though he gives ten years as the time in which this *will* have happened.

Even if there should be any deformity or weakness of the knee remaining when the plaintiff arrives at his majority, there is nothing from which the jury could say that it would be sufficient to affect his earning capacity.

The impairment of earning capacity after reaching twenty-one years of age is altogether too speculative to serve as a basis of recovery.

V.

THE COURT ERRED IN REFUSING TO CHARGE THAT DAMAGES COULD NOT BE RECOVERED ON THE THEORY THAT PLAINTIFF'S EDUCATION WOULD BE INTERFERED WITH.

This is the substance of the 10th and 11th requests (p. 195).

Dr. Beach testified that in consequence of the injury it had not been proper or safe to the time of the trial for the plaintiff to attend school (p. 91, l. 12), and that he would be incapable of studying for three or five years from the time of the trial (p. 101, l. 25-32), during the time when he should be acquiring an education (pp. 100-101).

That the schooling of the boy had been and perhaps would be more or less interfered with as a result of the injury remained a feature of the case and was insisted upon as an element of damage, although the ridiculous estimate of Dr. Beach that plaintiff's earning capacity would be impaired "perhaps one-half, perhaps one-third" (p. 94, l. 34) in consequence of his inability to study at the time when he should be acquiring an education (pp. 100-101) was struck out (p. 132, l. 10).

The allowance of damages upon this ground was improper for two reasons: 1st, it is too remote, speculative and uncertain, and 2d, if such damages are recoverable in any case they must be specially alleged in the declaration. The declaration in this case contains no such allegation (p. 4).

VI.

THE COURT ERRED IN REFUSING TO CHARGE THAT THE PLAINTIFF WAS BOUND TO JUST THE SAME DEGREE OF CARE AS IF HE HIMSELF WERE DRIVING.

This was the defendant's third request to charge (p. 194).

There is no distinction between the driver and a person sitting beside him as to the care required in looking and listening for a railroad train.

The defendant was entitled upon request, to have the law so stated to the jury. Instead of doing so, however, the Court, as if to draw a distinction, said in charging on the subject of contributory negligence, "You will bear in mind of course that he was not driving the wagon" (p. 188, l. 18).

VII.

THE COURT ALSO ERRED IN REFUSING TO CHARGE THE PRESUMPTION THAT THE BELL WAS RUNG OR WHISTLE BLOWN AS REQUIRED BY THE STATUTE.

The twelfth request of the defendant was as follows:

"12. The law requires that upon every engine approaching a highway crossing a bell shall be rung continuously, or a steam whistle shall be blown at intervals, during a distance of three hundred yards, and until the engine has crossed the highway; and there being no evidence in this case to the contrary, the presumption is that the company complied with the law, and that either the bell was rung or the whistle was blown, as above stated."

It is true the Court charged that no recovery could be had upon the ground that there was a failure to give the statutory signal (p. 186, l. 10). But the point of the request was in its bearing upon the question of contributory negligence.

The defendant was entitled to have the jury instructed that there was a presumption that the bell was ringing or whistle blown as the engine approached the crossing, as a basis for the inference that if the plaintiff had been listening he would have heard the signal.

VIII.

THE COURT ERRED IN REFUSING TO CHARGE THE DEFENDANT'S FIFTH REQUEST.

The request was as follows:

"5. If the accident occurred on the west siding track and the plaintiff had a clear view of that track in the direction from which the engine came, at a point twenty-eight feet before reaching the nearest rail of that track, but did not see the engine until it struck the wagon, he was guilty of negligence which contributed to the accident, and cannot recover in this action." (Pp. 194-195.)

There were four tracks crossing Broadway. Going from east to west as the wagon was moving, the first track was a siding upon which at the time of the accident some coal cars were standing just south of Broadway; next was the north bound running track; next to that was the south bound running track, and last was another siding (p. 58; p. 119, bottom).

There was a conflict in the testimony as to the track upon which the collision occurred.

Davis (p. 25, top) testified that the engine was on the south bound track, that is to say, the third track.

Brown, the uncle of the plaintiff, who witnessed the accident, testified positively, both on direct and on cross examination, that it was on the fourth or furthest track,—the last one to be crossed going in the direction that the wagon was going (pp. 57-58).

The coal cars on the east siding constituted some obstruction to the view to the south, but the testimony was undisputed that at a point sixteen feet east of the east rail of the south bound track the cars on the east siding ceased to obstruct the view, and from that point there was a clear view for 1,900 feet in the direction from which the engine came (p. 122, l. 25).

The nearest rail of the west siding, upon which Brown says the accident occurred, was twelve feet further in the direction the wagon was going than the east

rail of the third or south bound track (p. 124, top). So that, if the accident happened on the track that Brown says it did, the occupants of the wagon had a clear view of 1,900 feet down that track in the direction from which the engine came, while they were still twenty-eight feet from the track.

As the wagon was moving west and the engine was moving north, it must have struck the left side of the wagon, which was the side where plaintiff was sitting (p. 51, l. 18; p. 54, l. 28).

It was an ordinary farm wagon (p. 50, l. 23). It had stopped forty or fifty feet east of the crossing to allow a train to pass going north on the north bound track, after which, the gates having been raised by the gateman, it started forward and went right on until it was struck by the engine.

Plaintiff says he did not see the engine at all and does not know what struck him (p. 72, top). He was at that time eleven years and eight months old (p. 62, l. 11), unusually bright and mature, "more like a man than he was like a boy" (p. 78, l. 13; p. 79, l. 10). The situation was not at all complicated or confusing. The danger of a railroad crossing was fully within his apprehension. He was chargeable with the same degree of care under such circumstances that would be required of an adult. In *Barlow v. Jersey City, &c. Ry. Co.* 38 *Vroom*, 364, a boy less than twelve years of age was held subject to the general rules applicable to adults in respect to boarding a street car.

Sheets v. Connolly St. Ry. Co. 25 *Vroom*, 578.
North Hudson Ry. Co. v. Flanagan, 28 *Vr.* 696.
Brady v. Consol. Trac. Co. 35 *Vroom*, 375.
Fitzhenry v. Consol. Trac. Co. 35 *Vroom*, 674.
Vorrath v. Burke, 34 *Vroom*, 188.

The action of the flagman in raising the gates did not relieve the persons in the wagon from the duty of using their senses of sight and hearing.

Berry v. Penna. R. R. Co. 19 *Vroom,* 141.
Swanson v. Central R. R. Co. 34 *Vr.* 605.
Van Riper v. N. Y. Sus. & W. R. R. 42 *Vr.* 345.

There was no claim that the bell was not rung, and upon the hypothesis of the request in question, namely, that the accident occurred on the fourth track, there was a clear view covering a distance of more than a third of a mile, for twenty-eight feet before reaching the nearest rail. Yet the plaintiff admits that he remained unaware of the approach of the engine until he was hurled into the air by it, and of his own knowledge actually cannot say what caused his injuries. If any care whatever was demanded of him it is obvious that he did not exercise it. He does not say that he either looked or listened, and the fact that he did not see the engine is conclusive proof that he did not look.

Pfuelb v. Penna R. R. Co. 31 *Vr.* 278, 281.
Conkling v. Erie R. R. Co. 34 *Vr.* 338.
Diele v. Erie R. R. Co. 41 *Vr.* 138.

In *Brady v. Consolidated Traction Company,* 35 *Vroom,* 373, 375, where the plaintiff was a boy about nine and a half years old, struck by a trolley car while crossing a street railroad track, the present Chancellor, then Chief Justice, in delivering the opinion of the Supreme Court, said:

"The duty of observation required from children may differ in extent and degree from that required from an adult. Judgment which a jury might find lacking in prudence if formed by a person of mature years might perhaps be found not to be lacking in prudence if formed by a child, but the child is not excused from some duty of observation."

"Had plaintiff performed this duty in the very slightest degree he would have perceived the approaching car in time to avoid it, for there was admittedly no obstacle in the way to obstruct his view. That he did not see the car establishes the fact that he did not look, as re-

quired even of a child. Righter v. Pennsylvania Railroad Co. 13 *Vroom,* 180."

Regardless of the question whether Sanderson's negligence is imputable to the plaintiff, he is at least responsible for his own want of care, and he was under the same obligation to look and listen that Sanderson was.

It has been held repeatedly in this Court and in the Supreme Court, that if a person driving a wagon, while at a distance of thirty feet from the nearest rail has a view which will enable him to see an approaching engine, but still goes forward not seeing or not regarding it, he cannot recover if he is injured thereby.

Dotty v. Atlantic City R. R. 35 *Vroom,* 710.
Van Riper v. N. Y. Sus. & W. R. R. Co. 42 *Vr.* 345.
Diele v. Erie R. R. Co. 41 *Vroom,* 138.
Conkling v. Erie R. R. Co. 34 *Vroom,* 338.
Penna. R. R. Co. v. Righter, 13 *Vroom,* 180.
Goodenough v. Penna. R. R. Co. 26 *Vroom,* 596.

Thirty feet has thus been settled in this State as the distance from a railroad track at which a person *in charge of a horse and wagon* having knowledge of an approaching train, may avoid injury.

But much less than thirty feet would have been sufficient for one situated as was this plaintiff. *He had no responsibility for the horse and wagon,* but only for his own safety.

With nothing to do but to alight from this farm wagon, if he had seen the engine, as he should have seen it when he was still twenty-eight feet from the track, his position was practically one of security,—almost as much so as if he were on foot,—for it was but the work of an instant to get out either at the side where he was sitting, or by going to the rear and dropping from the end of the wagon.

It was not a closed carriage from which there might be difficulty in extricating one's self in an emergency,

but a simple, open, empty farm wagon, which any boy of eleven or twelve years is familiar with, and can climb in and out of with perfect ease and freedom.

Upon all the grounds above stated the judgment should be reversed.

JOHN S. APPLEGATE,
ALAN H. STRONG,
Of Counsel with Plaintiff in Error.

INDEX.

TESTIMONY.

For Plaintiff:

MONMOUTH COUNTY, SS:

The State of New Jersey, to the Sheriff of the County of Monmouth aforesaid,

[SEAL.]

GREETING:

You are hereby commanded to Summon New York and Long Branch Railroad Company (a corporation) if in your County it may be found, so that it be and appear before our Circuit Court to be holden at Freehold in and for the said County of Monmouth on the Twelfth day of August next to answer unto Andrew J. Defguard an infant who sues by Annie Defguard his guardian *ad litem* in an action of tort to his damage of Twenty Thousand Dollars as is said:

And have you then and there this writ.

WITNESS Charles E. Hendrickson, Esquire, a Judge of our said Circuit Court of Freehold aforesaid, the thirtieth day of July in the year One Thousand Nine hundred and four.

JOSEPH MCDERMOTT,
Clerk.

WARREN DIXON,
Attorney.

I hereby depute and appoint Clay Woolley my Special Deputy, to serve and execute the within writ.

Witness may hand this 1st day of August A. D. 1904.

O. C. BOGARDUS,
Sheriff.

RETURN.

Duly served on New York and Long Branch Railroad Company by Rufus Blodgett, Superintendent, August 2, 1904.

OBADIAH C. BOGARDUS,
Sheriff,
Per CLAY WOOLLEY,
Special Deputy.

Monmouth County Circuit Court, of the twelfth day of August, nineteen hundred and four.

MONMOUTH COUNTY, SS.:

New York & Long Branch Railroad Company, the defendant in this suit was summoned to answer unto Andrew J. Defguard, an infant who sues by Annie Defguard his guardian *ad litem*, in an action of tort, and thereupon the said plaintiff, by Annie Defguard, his guardian *ad litem*, complains:

For that whereas the said defendant, at all times hereinafter mentioned was and still is a corporation doing business in the County of Monmouth aforesaid, and was the possessor, manager, operator and controller of a certain steam railroad, railroad tracks, right of way, steam locomotives and cars, running in and through Long Branch in the County of Monmouth aforesaid, and which said right of way, railroad tracks, locomotives and cars the said defendant at said times operated and ran across a certain public street or avenue known as Broadway in said City of Long Branch, in the County aforesaid, at grade, and which said crossing of said public road or avenue by said right of way and tracks and appliances and constructions of the said defendant, was made dangerous and in order to prevent accidents and injuries to pedestrians and vehicles crossing or about to cross said right of way on said public road, the said defendant during said times, maintained safety gates and gatemen over and at said crossing to be used by said defendant to warn and notify pedestrians and vehicles about to cross said right of way, of the approach of said locomotives and cars to said highway, by lowering said gates over said highway at said crossing when a locomotive or cars was approaching said highway and about to cross the same.

And whereas the said defendant at the time of the committing of the grievances hereinafter mentioned, was operating, propelling and running a certain steam locomotive along said tracks approaching to and across said highway.

And whereas the said plaintiff Andrew J. Defguard, heretofore to wit, on the twenty first day of July, nineteen hundred and four, he then and still being an infant under the age of twenty-one years, was lawfully in and upon said public street or avenue, and was riding in a certain vehicle drawn by a horse along the same and was about to cross and was crossing the said right of way, and tracks of the said defendant at the place where the said right of way and tracks cross said highway, and where said locomotive was approaching and about to cross the same; and by reason of the said obstructions and the dangerous crossing the said plaintiff, in the exercise of due care upon his part, did not ascertain the approach of said locomotive.

Whereby it became and was the duty of the said defendant toward the said plaintiff to use due and reasonable care in the operation and management of its said railway, railroad tracks, locomotive and safety gates and to use due and reasonable care to warn and guard persons approaching said railway crossing in vehicles of the approach of said locomotive to said public street by means of its gates or gatemen or by other reasonable means and warning so as to notify persons about to cross and crossing said right of way and tracks upon said public street of the approach of said locomotive, and to use due and reasonable care to run said locomotive at a reasonably safe rate of speed while approaching and crossing said highway where the same is intersected by said right of way at grade, and to use due and reasonable care in the operation in said railroad locomotive by ringing a bell on said locomotive at a distance of at least three hundred yards from the place where

the said railroad tracks cross said public road or avenue, and to keep said bell ringing until the said locomotive had crossed said highway or avenue, or to sound a steam whistle attached to said locomotive for at least three hundred yards from the highway where the said railroad tracks cross the aforesaid road, or avenue, and to keep said whistle sounding until the said locomotive engine had crossed said highway or avenue or had come to a stop according to the statute in such case made and provided, but on the contrary thereof the said defendant so negligently and carelessly operated, maintained and ran its said locomotive engine and safety gates and said railway appliances so that the said locomotive through the negligence of the said defendant as aforesaid, was propelled and ran with great force and violence upon and against the said wagon in which the said plaintiff was then and there being carried and ran with great force and violence into and against the said plaintiff while he was crossing said tracks in said wagon on said highway and while he was in the exercise of due care upon his part.

By means of which wrongs and injuries said plaintiff then and there became and was greatly injured, and fractured in his head, limbs, body and mind, internally and externally. and then and there suffered and underwent great pain and anguish of body and mind, to wit, from thence hitherto and evermore during his natural life will be greatly injured in his head, limbs, body and mind, internally and externally, and will undergo great pain and anguish and in the future will be prevented from pursuing his lawful avocation and business and from earning large ——— of money which but for said injuries he would otherwise be able to earn and receive in the future.

And the plaintiff avers that he is an infant of the age of about ten years, and that he was incap-

able of guarding and protecting himself against the dangers and injuries aforesaid.

Wherefore said plaintiff says that he has been injured and suffered damage in the sum of twenty thousand dollars, and therefore he brings suit, etc.

WARREN DIXON,
Plff's Atty.

To the Honorable the Monmouth County Circuit Court:

The petition of Andrew J. Defguard, respectfully shows that he is an infant of the age of about ten years, and resides with his mother, Annie Defguard, in West Long Branch, New Jersey, that he was injured on the twenty-first day of July, Nineteen hundred and four, by being run into by a locomotive of the New York & Long Branch Railroad Co., and that he has a good cause of action to recover compensation from said company for said injuries and that he is about to bring a suit against said company to recover compensation therefor.

Whereby he prays that his said mother, Annie Defguard, may be appointed his guardian *ad litem*, to prosecute a suit in this court for him in his behalf.

WARREN DIXON,
Atty of Pltf.

STATE OF NEW JERSEY.}
County of Hudson. } ss.:

Annie Defguard, being duly sworn on her oath says that she is the mother of Andrew J. Defguard the petitioner above mentioned, and that the said petition has been read to her and the

matter and things therein stated are true to the best of her knowledge, information and belief, and that she is desirous of being appointed guardian *ad litem* to prosecute said suit for her said son.

her
ANNIE X DEFGUARD.
mark.

Subscribed and sworn to this 25th day of July, 1904, before me at

RICHARD P. BENTLEY,
Master in Chancery of
New Jersey.

I, ANNIE DEFGUARD, the mother of the above named petitioner, a resident of Monmouth County, do hereby signify my desire to be appointed guardian *ad litem* to prosecute the said suit in behalf of my said son Andrew J. Defguard.

her
ANNIE X DEFGUARD.
mark.

MONMOUTH COUNTY CIRCUIT COURT.

ANDREW J. DEFGUARD,
Petitioner,

vs.

NEW YORK AND LONG BRANCH RAILROAD COMPANY.

} Rule.

Upon reading and filing the verified petition of Andrew J. Defguard, and the consent of Annie Defguard, thereto annexed it is,

Ordered that the said Annie Defguard, *be,* and she hereby is appointed guardian *ad litem* to bring said suit in behalf of said Andrew J. Defguard.

WILBUR A. HEISLEY.
J.

Rule granted this
26th day of July, 1904.

On motion of
WARREN DIXON,
Pl'ff's Atty.

[Endorsed:]—Filed Aug. 1, 1904, Joseph Mc Dermott, Clerk.

Monmouth County Circuit Court, of the twelfth day of August in the year of our Lord 1904.

ANDREW J. DEFGUARD, &c.
Plaintiff,

vs.

NEW YORK & LONG BRANCH RAILROAD COMPANY,
Defendant.

In Tort. Plea.

And the said defendant, New York and Long Branch Railroad Company, body corporate, by John S. Applegate & Son, its attorneys, comes and defends the wrong and injury when &c. and says it is not guilty of the said supposed greivances above laid to its charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff has above thereof complained against it, and of this the said defendant the New York and Long Branch Railroad Company puts itself upon the country, &c.

JOHN S. APPLEGATE & SON,
Attys of Defendant.

STATE OF NEW JERSEY. } ss:
County of Monmouth. }

RUFUS BLODGETT, of said county and state of full age being duly sworn according to law on his oath says that he is the Superintendent of the New York and Long Branch Railroad Company, the defendant in the above plea mentioned, and as such is acquainted with the matters and affairs of said Company appertaining to this suit; and deponent further says that the said plea is not intended for the purpose of delay and that he,

this deponent, verily believes that the said defendant has a just and legal defence to the said action on the merits of the case.

RUFUS BLODGETT.

Sworn and subscribed before me this nineteenth day of August, A. D. 1904.

J. H. DAVIS, JR.,
[L. S] Notary Public,
N. J.

[Endorsed]—Filed Aug. 20, 1904, Joseph McDermott, Clerk.

Therefore it is commanded the Sheriff that he cause to come before the Judge aforesaid, at Freehold, aforesaid, on the first Tuesday of May in the year of our Lord one thousand nine hundred and six, twelve &c.; by whom &c.; to neither &c.; to recognize &c.; because &c.; the same day is given to the parties aforesaid and now on this day to wit:—the eleventh day of June, in the year of our Lord One Thousand nine hundred and six to which day this cause was continued comes the parties aforesaid, by their said Attorneys before the said Judge at the place aforesaid.

The Sheriff of the County of Monmouth return into this Court with the writ of the State of New Jersey to him directed and delivered with all things duly executed with a panel of the jurors hereunto annexed. The jurors of the said jury being to wit:

1. Jacob O. Lambertson,
2. J. Schanck Herbert,
3 Stephen A. Johnson,
4. Walter Sherwood,
5. Robert F. Kohler,
6. Patrick McCue, Sr.,
7. Reuben H. Wagner,
8. William Reid,
9. Jacob E. Applegate,
10. Ambrose Hyres,
11. George M. Polhemus,
12. Alfred E. Reid.

also come who do say the truth of the matter within contained being duly impaneled and sworn on their oath say that they find, in favor of the plaintiff and against the defendant and assess the damage at Four thousand, five hundred dollars.

Therefore it is considered that the plaintiff do recover against the said defendant his said damages to the sum of Four thousand five hundred dollars, and also the sum of for his costs and charges in his said suit in this behalf expended which said damages, costs and charges in the whole amount to

Judgment entered and signed July thirteenth, 1906.

B. A. VAIL,
Judge.

STATE OF NEW JERSEY,
County of Manmouth. } ss.:

I, Joseph McDermott, Clerk of the County of Monmouth and also Clerk of the Circuit Court for said County do hereby certify that the foregoing "TRANSCRIPT" in the case of Andrew J. Defguard by next friend against the New York and Long Branch Railroad Company is a true and correct copy thereof as the same remains of record in my office.

IN WITNESS WHEREOF, I have hereunto
[SEAL.] set my hand and seal this First
day of August, A. D., Nineteen
hundred and six.

JOSEPH MCDERMOTT,
Clerk.

[Endorsed:]—Filed Sep. 14, 1906. S. D. Dickinson, Clerk.

New Jersey, ss.:

The State of New Jersey, to Ben-
[seal.] jamin A. Vail, Esq., Judge of our Circuit Court in and for the County of Monmouth,

Greeting:

Because, in the record and proceedings and also in the giving of judgment in a plaint, which was in our Circuit Court, holden at Freehold in and for the said County of Monmouth, before you, between Andrew J. Defguard, an infant, who sues by Annie Defguard, his guardian *ad litem,* plaintiff, and the New York and Long Branch Railroad Company, a corporation, defendant, in an action of tort, manifest error hath intervened to the great damage of said New York and Long Branch Railroad Company, as it is said; we being willing that the error, if any there be, should, in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given, then you distinctly and openly send under your seal the record and proceedings aforesaid with all things touching the same, to our Judges of our Court of Errors and Appeals in the last resort in all causes, at Trenton on the sixth day of August next, together with this writ, that the record and proceedings aforesaid being inspected we may cause to be further done thereupon for correcting that error, what of right and according to the law and custom of the State of New Jersey, ought to be done.

Witness our Chancellor and President Judge of our said Court of Errors and Appeals at Trenton aforesaid the 17th day of July, in the

year of our Lord one thousand nine hundred and six.

S. D. Dickinson,
Clerk.

[Endorsed:]—Filed Sep. 14, 1906. S. D. Dickinson, Clerk.

The answer of Benjamin A. Vail, Judge of the Monmouth County Circuit Court, the records and proceeding whereof is within made with all things touching and concerning the same, I do hereby certify and send to the Court of Errors and Appeals as within I am commanded in a certain schedule hereunto annexed.

B. A. Vail,
Judge.

COURT OF ERRORS AND APPEALS.

Andrew J. Defguard.
Defendant in Error,

vs.

New York and Long Branch Railroad Company,
Plaintiff in Error.

Assignment of Errors.

Afterwards, that is to say, on the sixth day of August in the year of our Lord one thousand nine hundred and six, in the Court of Errors and Appeals of the State of New Jersey, comes the said The New York and Long Branch Railroad Company by John S. Applegate & Son, its Attorneys and says that in the record and proceed-

ings aforesaid and also in the matters recited and contained in the said Bill of Exceptions, and also in giving the verdict upon the said issue between the parties aforesaid joined, and also in giving the judgment aforesaid there is manifest error in this, to wit,

1. That the said judge before whom the said issue was tried, at and upon the trial of said issue ruled out legal evidence offered by the Defendant. (*Pro ut* the said Bill of Exceptions.)

2. There is also manifest error in this, to wit, that the said judge who tried said issue at the trial thereof permitted the following question to be asked, and answered contrary to the objection of the said defendant and exception duly taken on direct examination of witness James Davis, sworn for plaintiff:

"Q. Standing in the position where you observed the flagman, was it possible for him to see a train approaching from the south under the conditions presented there and at the place where you saw him standing?" To which last question defendant's counsel objected on the ground it had not been shown that the witness had ever made an observation. But the court overruled the said objection and allowed the witness to answer the question. (*Pro ut* the said Bill of Exceptions.)

3. There is also manifest error in this, to wit, that the said Judge who tried said issue at the trial thereof permitted plaintiff's witness Lafayette Van Schoick on direct examination to be asked, and to answer against the objection of said defendant and exception duly taken, the following question:

"Q. You may state whether or not those cars would cut off the view of the flagman at the place

where you saw him standing." (*Pro ut* the said Bill of Excepions.)

4. There is also manifest error in this, to wit, that the said judge who tried said issue at the trial thereof permitted the following question to be asked, and answered (against the objection of said defendant and exceptions duly taken) by the same witness on direct examination:

"Q. Where was he obliged to go before he could see, Mr. Van Schoick?" (*Pro ut* the said Bill of Exceptions.)

5. There is also manifest error in this, to wit, that the said judge who tried said issue at the trial thereof permitted on direct examination the following question to be asked, and answered (against the objection of said defendant and exception duly taken) by plaintiff's witness William T. Brown:

"Q. Would that have any effect on the view of a man standing at the crank where the gates were worked?" (*Pro ut* the said Bill of Exceptions.)

6. There is also manifest error in this, to wit, that the said judge who tried said issue at the trial thereof permitted the following question to be asked, and answered (against the objection of said defendant and exception duly taken) on direct examination of Andrew J. Defguard, the witness of the plaintiff,

"Q. Where do you have your pain now?

A. Have pain all through my head, all around my head. (Indicating on left side of head.)

Q. You were pointing to left side of your head. Do you mean that you only have it on the left side of your head?" (*Pro ut* the said Bill of Exceptions).

7. There is also manifest error in this, to wit,

that the said judge who tried said issue at the trial thereof permitted the following question to be asked, and answered (against the objection of said defendant and exception duly taken) on direct examination by Dr. Edmund Beech, a witness for the plaintiff, to wit:

"Q. I will strike out the question I have already asked, and ask you this general question, doctor: What in your opinion will be the probable history of this case?" (*Pro ut* the said Bill of Exceptions).

8. There is also manifest error in this, to wit, that the said Judge who tried said issue at the trial thereof permitted the following question to be asked, and answered (against the objection of said defendant and exception duly taken) on direct examination of said Dr. Edmund Beech:

"Q. Doctor, assuming these conditions which you have described are permanent,I ask you how much, if at all, that would impair the earning capacity of this boy during youth and after maturity, assuming that he would seek his livelihood either in a manual occupation or in some occupation which involved the use of his mind rather than the use of his hands?" (*Pro ut* the said Bill of Exceptions).

9. There is also manifest error in this, to wit, that the said Judge who tried said issue at the trial thereof permitted the following question to be asked, and answered (against the objection of said defendant and exception duly taken) on cross examination of Horace B. Bannard, witness for the defendant:

"Q. Can you conceive of any way in which a traveller eighty-six feet away could have seen a train one hundred and fifty feet away from the crossing and then have collided on the crossing?" (*Pro ut* the said Bill of Exceptions.)

10. There is also manifest error in this, to wit, that the said Judge who tried said issue at the trial thereof permitted the following question to be asked, and answered (against the objection of said defendant and exception duly taken) on direct examination of Dr. Edmund Beech, a witness for the plaintiff:

"Q. Doctor, directing your attention to the injuries which you have described and which this boy suffered and first to the pain which he has in his head and the incidental discomfort which results, I ask you whether or not in your opinion that condition is permanent?" (*Pro ut* the said Bill of Exceptions.)

11. There is also manifest error in this, to wit, that the said Judge who tried said issue at the trial thereof permitted the following question to be asked, and answered (against the objection of said defendant and exception duly taken) on direct examination of Dr. Edmund Beech, a witness for the plaintiff:

"Q. How remotely from the time of the accident may epilepsy appear as a result of the accident?" (*Pro ut* the said bill of Exceptions.)

12. There is also manifest error in this, to wit, that the said Judge who tried said issue at the trial thereof permitted the following question to be asked, and answered (against the objection of said defendant and exception duly taken) on direct examination of Dr. Edmund Beech, a witness for the plaintiff:

"Q. How remotely have you known epilepsy to follow cases of this kind?" (*Pro ut* the said Bill of Exceptions.)

13. There is also manifest error in this, to wit, that the said Judge who tried said issue at the

trial thereof permitted the following question to be asked, and answered (against the objection of said defendant and exception duly taken) on direct examination of Dr. Edmund Beech, a witness for the plaintiff:

"Q. In your opinion will that leg ever be as strong as a normal leg?" (*Pro ut* the said Bill of Exceptions.)

14. There is also manifest error in this, to wit, that the court refused the motion on behalf of said defendant to strike out the testimony taken on direct examination of Dr. Edmund Beech that he had known epilepsy to occur seven years after the injury, it having appeared on cross examination that said testimony was based on the statement of the epileptic himself and not upon the knowledge of the witness. (*Pro ut* the said Bill of Exceptions.)

15. There is also manifest error in this, to wit, that at the trial of said issue when the parties had rested, the said Judge before whom the said issue was tried, refused the request of the said defendant to give direction to the jury to render a verdict for the said defendant. (*Pro ut* the said Bill of Exceptions.)

16. There is also manifest error in this, to wit, that at the trial of said issue the defendant requested the Judge to charge the jury:

"THIRD.—The plaintiff was bound to just the same degree of care as if he were himself driving;" to comply with which request the said Judge refused; whereas, by the law of the land the said Judge should have charged as requested. (*Pro ut* the said Bill of Exceptions.)

17. There is also error in this, to wit, that at

the trial of the said issue the defendant requested the Judge to charge the jury—

"FIFTH—If the accident occurred on the west siding track and the plaintiff had a clear view of that track in the direction from which the engine came at a point 28 feet before reaching the nearest rail of that track, but did not see the engine until it struck the wagon, he was guilty of negligence which contributed to the accident and cannot recover in this action;" to comply with which request the said Judge refused; whereas, by the law of the land the said Judge should have charged as requested. (*Pro ut* the said Bill of Exceptions.)

18. There is also error in this, to wit, that at the trial of said issue the defendant requested the judge to charge the jury—

"SEVENTH.—There is no evidence which will justify the jury in finding that any of the injuries to the plaintiff will be permanent;" to comply with which request the said Judge refused; whereas, by the law of the land, the said Judge should have charged as requested. (*Pro ut* the said Bill of Exceptions.)

19. There is also error in this, to wit, that at the trial of said issue the defendant requested the judge to charge the jury—

"EIGHTH.—There is no evidence which will justify the jury in finding that the earning capacity of the plaintiff will be impaired after he has reached the age of twenty-one years;" to comply with which request the said Judge refused; whereas, by the law of the land the said Judge should have charged as requested. (*Pro ut* the said Bill of Exceptions.)

20. There is also error in this, to wit, that at the trial of said issue the defendant requested the Judge to charge the Jury—

"NINTH.—The jury will not be justified in basing their verdict upon a theory that epilepsy may result from this accident;" to comply with which request the said Judge refused; whereas, by the law of the land the said Judge should have charged as requested. (*Pro ut* the said Bill of Exceptions.)

21. There is also error in this, to wit, that at the trial of the said issue the defendant requested the Judge to charge the jury—

"TENTH.—Any damages based on the theory that plaintiff will not be able to attend school and therefore his education will be interfered with, are not within the declaration and cannot be included in the verdict;" to comply with which request the said Judge refused; whereas, by the law of the land the said Judge should have charged as requested. (*Pro ut* the said Bill of Exceptions.)

22. There is also error in this, to wit, that at the trial of said issue the defendant requested the Judge to charge the jury—

"ELEVENTH.—Such damages, moreover, would be too remote and for that reason cannot be recovered in this action;" to comply with which request the said Judge refused; whereas, by the law of the land said Judge should have charged as requested. (*Pro ut* the said Bill of Exceptions.)

23. There is also error in this, to wit, that at the trial of said issue the defendant requested the Judge to charge the jury—

"TWELFTH.—The law requires that upon every engine approaching a highway crossing the bell shall be rung continuously or a steam whistle shall be blown at intervals during the distance of three hundred yards and until the engine has crossed the highway; and there being no evidence in this case to the contrary the presumption is that the company complied with the law and that either the bell was rung or the whistle was blown as above stated;" to comply with which request the said Judge refused; whereas, by the law of the land the said Judge should have charged as requested. (*Pro ut* the said Bill of Exceptions.)

24. There is also error in this, to wit, that the said Judge at and upon the trial of the said issue did declare and deliver his opinion to the jury that it was for them to decide whether the injuries to the plaintiff would be permanent; whereas, there was no evidence in the case which would justify a recovery upon the basis of a permanent injury. (*Pro ut* the said Bill of Exceptions.)

25. There is also error in this, to wit, that the said Judge at and upon the trial of the said issue did declare in his charge as a matter of fact that the injuries of the plaintiff will be permanent. (*Pro ut* the said Bill of Exceptions.)

26. There is also error in this, to wit, that the said Judge in his charge permitted the jury to find that the injuries sustained by the plaintiff may last after he attains the age of twenty-one years and to give damages for loss of ability to work in case there shall be such loss of ability after he attains the age of twenty-one years, whereas the evidence would not warrant such finding. (*Pro ut* the said Bill of Exceptions.)

27. There is also error in this, to wit, that the said Judge at and upon the trial of the said issue did refuse to charge the Third, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh and Twelfth requests to charge; whereas, the said Judge should have charged as requested.

28.—There is also error in this, to wit, that by the record aforesaid it appears that the verdict aforesaid was given upon the said issue joined between the said parties for the said Andrew J. Defguard, as aforesaid; whereas, by the law of the land the verdict on said issue ought to have been for the said New York and Long Branch Railroad Company, Defendant as aforesaid.

And the said New York and Long Branch Railroad Company, Defendant as aforesaid, prays that the judgment aforesaid for the errors aforesaid and others in the record and proceedings aforesaid may be reversed, and annulled and for nothing held, and that the said New York and Long Branch Railroad Company, Defendant as aforesaid, may be restored in all things which it has lost by the occasion of the judgment aforesaid &c.

JOHN S. APPLEGATE & SON,
Attorneys for Defendant.

ALLAN H. STRONG,
of Counsel.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE NEW YORK AND LONG BRANCH RAILROAD COMPANY,

vs.

ANDREW J. DEFGUARD.

In Error. Joinder in Error.

And hereupon, afterwards, to wit, on the first Tuesday of October, A. D., Nineteen Hundred and Six, the said Andrew J. Defguard, by Warren Dixon, his attorney, comes into Court and says that there is no error either in the record and proceeding aforesaid, or in giving judgment aforesaid, and he prays here that the Court here may proceed to examine as well the record and proceeding aforesaid, as the matter aforesaid assigned for error and that the judgment aforesaid, in manner aforesaid given, may in all things be affirmed &c.

WARREN DIXON,
Attorney.
EDMUND WILSON,
of Counsel with Defendant.

[Endorsed]—Filed Sep. 18, 1906. S. D. Dickinson, Clerk.

MONMOUTH COUNTY CIRCUIT COURT.

ANDREW J. DEFGUARD, Defendant in error, vs. NEW YORK AND LONG BRANCH RAILROAD COMPANY, Plaintiff, in error.	In Tort. Before Hon. Benjamin A. Vail and a jury.

BILLS OF EXCEPTIONS.

APPEARANCES.

For plaintiff, EDMUND WILSON and E. W ARROWSMITH, Esquires.
For defendant, JOHN S. APPLEGATE and ALAN H. STRONG, Esquires.

Be it remembered that on the eleventh day of June, in the year nineteen hundred and six, at a Circuit Court held at Freehold in and for the County of Monmouth before the Honorable Benjamin A. Vail, a Judge of the Circuit Court, the issue joined in said cause between the parties thereto (*pro ut* the pleadings) came on to be tried by a jury for that purpose duly impanelled and sworn, and thereupon the attorneys of the parties respectively to maintain the issue on their part respectively offered and gave in evidence as follows, to wit:

MR. WILSON: Counsel have agreed that we may enter this stipulation upon the record, permitting it to stand in lieu of formal proof of the fact recited in the stipulation. Shall I dictate it, Senator, subject to your approval?

MR. APPLEGATE: Yes.

MR. WILSON: The stipulation agreed upon, as I understand it, is that it is agreed that the New York & Long Branch Railroad Company, the defendant corporation, was in fact the owner of the tracks at the place of the accident and that the defendant corporation had devolved upon it the legal duty of maintaining and guarding the tracks at that point. Is that a fair statement, Senator?

MR. APPLEGATE: That is right.

JAMES DAVIS, sworn for plaintiff.

DIRECT EXAMINATION by Mr. Wilson:

Q. Mr. Davis, where do you live?

A. Long Branch.

Q. What is your business?

A. Wood turner in Edwards' mill.

Q. Did you see this accident on the 21st of July, 1904?

A. I heard the crash, and my attention was called to that. I work so that I can see right out the window right at the crossing.

Q. Did you see the boy after the accident?

A. I saw the engineer with him in his arms, the engineer of the train; that is, the one that hurt him.

Q. Was it a train or an engine?

A. Just an engine.

Q. In what direction had the engine been moving?

MR. STRONG: I object. It does not appear that he saw anything until the crash came.

Q. I ask you if you know what direction the engine was moving in.

A. The engine was moving towards Branchport. That is north.

Q. Do you know what track the engine was on?

A. The engine was on the southbound track, going north.

Q. Were there gates at this crossing?

A. Yes, there was gates there.

Q. And was there a man in attendance?

A. Yes, sir.

Q. Do you know where he was at the time of the collision?

A. There at his post.

Q. Whereabouts at his post?

A. Right at the handles there where he turns.

Q. Were the handles on the east or west side of the track?

A. On the east side of the track.

Q. And were they on the south side of the highway or the north side of the highway?

A. On the south side.

Q. On the south side of the highway?

A. Yes, sir.

Q. And was that the side and the point of the crossing nearest to the Edwards buildings?

A. Yes, sir; nearest the office.

Q. Are the Edwards buildings on both sides of the highway at that point?

A. Yes, sir.

Q. Do you know whether the gates were up or not at the moment of the collision?

MR. STRONG: One moment. This witness has not said so far that he saw anything until he heard the crash.

THE COURT: He said he heard the crash and looked out the window, and I suppose it is competent for him to say in what condition he saw the gates at that time.

MR. WILSON: That is all the question implies.

Q. What do you say to that? Were the gates up or down, Mr. Davis?

A. The gates were up.

Q. Did you notice whether a train had passed just previous to the accident?

A. Yes, sir; a passenger train.

Q. How long before the accident?

A. About a minute.

Q. Did you notice whether the gates had been lowered for the passage of that train?

A. Yes, sir; they were all right for that train.

Q. And had been raised again?

A. Yes, sir; that train had passed all the way across Broadway before he raised his gates.

Q. Did you know the man who was in the ice wagon?

A. No, sir.

Q. Did you see this Defguard boy? You told me you did, you saw the engineer pick him up?

A. Yes, sir; I saw the engineer pick him up.

Q. One other question I will ask you. When your attention was first directed to this occurrence you have told where the flagman was standing. Now what was he doing when you first saw him after the accident?

A. He was standing right at his post, about as near as he could be.

Q. Standing there at the time when you first saw him?

A. Yes, sir.

Q. In which direction was his face turned, if you noticed?

A. I couldn't say that. I was looking at the accident then. I seen he was around the handles there.

Q. Mr. Davis, did you notice whether there was a siding on the east side of the main track or near this crossing?

A. Yes, there is a siding there.

Q. Did you notice whether there were any cars upon it that day?

A. Yes, sir.

Q. What kind of cars were they?

A. Big iron coal cars, high ones about nine or ten feet high.

Q. How near did these cars come to the post where the handles were and where you say the flagman was that day?

A. Well, they was almost opposite where he comes out of his flag-house, just so he could get out all right and look up Broadway out the door.

Q. From the place where you saw him standing and the place where he operated the handles, was that east of where these tracks were?

A. Yes, sir; that is on the east side, right next to Edwards' office.

Q. Standing in the position where you observed the flagman, was it possible for him to see a train apporaching from the south under the conditions presented there and at the place where you saw him standing?

MR STRONG: I object. Has the witness ever made an observation? I don't think he could answer otherwise.

THE COURT: Well, I think the question is competent. Of course you can test his knowledge if you choose. I will allow the question.

MR. STRONG: I pray an exception, on the ground that he cannot testify to that unless it appears that he has made an observation.

THE COURT: Well, you can test that on his cross-examination. Of course if it appears that he is testifying to something that he does not know about I will strike it out.

(Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

B. A. VAIL,
[L. S.] Judge.

Q. Do you understand the question Mr. Davis?

A. No, sir; I wish you would put it again, please?
(Question repeated.)
Q. Could he look to the south and see?
A. No, sir; he could not.
Q. What prevented him from seeing?
A. The train of coal cars. That is, if he stood at the handles.
Q. Well, did he stand at the handles?
A. Yes, sir.

CROSS-EXAMINATION by Mr. Strong:

Q. The building where you were was on the east side of Broadway, was it?
A. No, sir; the north side of Broadway.
Q. The north side of Broadway; that is the other side from where the flagman stood?
A. Yes, sir.
Q. And how near was that building to the tracks of the New York & Long Branch Railroad?
A. Where I was?
Q. Yes.
A. It is about one hundred feet, straight view.
Q. One hundred feet at right angles from the track?
A. Yes, sir; right straight up. Where I was right on the line of the railroad.
Q. What?
A. Right on the line of the railroad, my building is, where I was standing.
Q. One hundred feet away from it?
A. One hundred feet away from the flag house, looking towards him.
Q. You mean one hundred feet from the flag house. How far was it from the railroad track right across directly from your building to the track; how far was it?
A. About thirty feet, out to where the accident happened; that is, straight out.
Q. You mean measuring the distance at right

angles with the track at which the accident happened, you were about thirty feet from it?

A. Not from the accident, no, sir.

Q. What then?

A. Well, the accident happened right on Broadway crossing.

Q. I mean from the track on which the accident happened.

A. Well, if I look right straight out it is about thirty feet to the track on which the accident happened.

Q. To where you were?

A. Yes, sir.

Q. What was the first thing that attracted your attention?

A. This crash, hitting the wagon and upsetting it.

Q. You hadn't been noticing it before that?

A. Oh, I look out every once in a while and see a train coming, was used to them.

Q. What had you noticed up to that time, anything in relation to the ice wagon?

A. No, sir.

Q. Hadn't seen the ice wagon at all?

A. No, sir.

Q. And had you seen this engine?

A. No, sir; never seen anything.

Q. You hadn't seen the engine until you heard the crash?

A. No, sir.

Q. Well, when you looked out where was the engine?

A. The engine was right in the middle of Broadway where it hit the wagon.

Q. In the middle of Broadway?

A. Yes, sir.

Q. Standing or moving?

A. Moving. It came up pretty near opposite me before it fetched up.

Q. It stopped pretty nearly opposite you?

A. Yes, sir; running slow.

Q. Did you go out or did you remain where you were?

A. I remained where I was.

Q. When you saw the engine it was moving slowly, you said?

A. Yes, sir.

Q. And stopped——

A. The engine didn't go but seventy-five feet after the accident.

Q. How many of these coal cars were there on the siding?

A. I couldn't say for sure, but there must have been four or five.

Q. Standing together, were they, or were they spaced apart?

A. Right coupled together.

Q. And the nearest one was how far from the easterly line of Broadway?

A. The easterly line?

Q. I mean—they were on the east side of Broadway, were they, or would you call it south?

A. I would call it south.

Q. You would call it the south side?

A. I would, yes.

Q. How near was the nearest end—

A. To the sidewalk?

Q. To the sidewalk, yes.

A. Well, I should judge about five feet. It was about five feet back from the sidewalk. They was just far enough back so a man could look out the door and look out Broadway, give him room for that.

Q. Look out the door of what?

A. The flag house.

Q. So that the flagman coming out of his house—

A. Could look up Broadway.

Q. Looking westerly along Broadway he could

see along Broadway without his view being obstructed by the cars?

A. Yes, sir.

Q. You noticed this flagman that day, you say; after the accident you saw him standing there?

A. He stood right at his post, just the same as if nothing had happened.

Q. You mean he was standing by the place where he stands to turn the gates?

A. Yes, sir.

Q. That is what you call his post?

A. Yes, sir.

Q. And did you notice him when the other train went by?

A. No, I don't notice them very often, I am so used to seeing them go by, I don't often notice them.

Q. But you did notice when the other train went by the gates were down?

A. Yes, sir; I did. The bell rang and I am sure the gates were down, passed thirty feet across Broadway before he put them up. He didn't put them up right away, like some of them.

Q. Did you stand there watching him when the other train went by, the passenger train went by?

A. I seen that go through, yes, sir.

Q. That is, you saw him put the gates up after the other went through?

A. They went up and they hadn't any more than got them up when the crash came.

Q. They hadn't any more than got them up when the crash came?

A. Yes, sir.

Q. He put them up immediately after the train passed Broadway?

A. After it passed the right distance, yes, sir.

Q. What do you call the right distance?

A. As soon as the last car gets over.

Q. Was the passenger train going northerly from Long Branch?

A. No, sir; going towards Long Branch.

Q. Was it moving rapidly, or about to stop?

A. No, it was going along rapidly.

Q. The passenger train was?

A. Yes, sir.

Q. What were your duties in Edwards' place there?

A. Wood turner.

Q. Wood turner?

A. Yes, sir.

Q. Were you engaged in turning wood at that time, or what were you doing?

A. Yes, I was right in the place I have to work.

Q. What else? What business is carried on in that place where you were?

A. That is all.

Q. Wood turning?

A. Oh, it is a regular building material place—anything in the building line.

Q. A sawmill, is it, or what?

A. Sawmill, yes, sir; everything.

Q. Sash and blind factory?

A. Yes, sir.

Q. Working in wood generally?

A. Yes, sir.

Q. And there is machinery operated there, is there?

A. Yes, sir.

Q. Operated by steam?

A. Yes, sir; but I am in a separate room where I don't hear much noise.

Q. I didn't ask you about that. Just tell us, how is the machinery operated?

A. By steam.

Q. There are buildings on the other side of Broadway belonging to the same establishment, are there, the Edwards?

A. Yes, sir; the office.

Q. The machinery buildings are on which side?

A. I would call it the north side.

Q. That is the side where you were?

A. Yes, sir.

Q. And what is the first on the south side?

A. The office.

Q. Nothing but the office?

A. Then away back they have got the lumber yard; then this on the west side of the railroad on the south side of Broadway.

Q. Then the lumber yard is on the other side of the tracks, is it?

A. Yes, sir.

Q. I suppose there is quite a good deal of noise from the machinery in your mill, isn't there?

A. Yes, sir; but we don't hear it outside.

Q. I didn't ask you that. There is considerable noise in the operation of this woodworking machinery?

A. Yes, sir.

Q. Well, you say it is all confined to the building?

A. The machinery?

Q. The noise.

A. Surt it is.

Q. You don't hear the noise outside at all?

A. I have been outside on Broadway and wouldn't know it was running.

Q. That depends on whether the windows are open or not, doesn't it, a good deal?

A. Yes, sir; I should think it would.

Q. And in the summer time the windows were open? I suppose on this day the windows were open, weren't they?

A. Yes, sir.

Q. And you naturally would hear more noise from the machinery outside when the windows are open than you would when they are shut, of course?

A. Yes, sir.

THOMAS HERBERT, Sworn:

DIRECT EXAMINATION by Mr. Wilson:

Q. Mr. Herbert, you live in Long Branch?

A. No, sir; I live in Oakhurst.

Q. Do you own the team of horses and ice wagon that is made the subject of this accident?

A. Yes, sir, I do.

Q. And in whose charge was the ice wagon that morning?

A. James Sanderson's.

Q. Where is he?

A. Where is he now?

Q. Yes.

A. It is hard to say.

Q. Well, was he killed?

A. He was killed, yes, sir.

Q. Killed at that crossing?

A. Killed at that crossing.

Q. This Defguard boy, was he in your employ at that time?

A. No, sir; he was not.

Q. He was not in your employ?

A. No, sir; he was not in my employ. Sanderson was in my employ. If the boy was employed, he was employed by Sanderson to go with him.

Q. To go with him?

A. Yes, sir.

CROSS EXAMINATION by Mr. Strong:

Q. Had the boy ever been employed by you?

A. No, sir; he had not.

Q. Do you know whether he was employed by Sanderson or not?

A. I couldn't say. I don't know that.

Q. You know as a fact that he was accustomed to go with Sanderson on your ice wagon?

A. I don't know anything about that, no, sir.

Q. You don't know that?

A. No, sir.
Q. What kind of a wagon was that?
A. It was a farm wagon for to haul ice.
Q. An open farm wagon without a top?
A. Yes, sir; without a top.
Q. And two horses?
A. Two horses.
Q. What was it used for?
A. Carting ice.
Q. For delivering ice to consumers?
A. For delivering ice from one icehouse to the Long Branch plant.
Q. To what?
A. To the Long Branch ice plant.
Q. It was not used for peddling ice or delivering to consumers?
A. No, sir; it was just for delivering ice from Mapes' Pond to the Long Branch plant and to the Monmouth Ice Company.
Q. That was what it was doing when Sanderson was killed?
A. That is what he was doing on the 21st of July. He had been down with one load.
Q. He had been down with one load?
A. He had been down with one load, yes, sir.
Q. And was this his second load?
A. He was going for the second load.
Q. He was going for the second load?
A. Yes, sir.
Q. He was going where?
A. He was going from Long Branch to Mapes' pond.
Q. Whose pond?
A. Mapes' pond. That is where they were gathering ice.
Q. The ice was stored there, was it?
A. Yes, sir.
Q. In the icehouse?
A. Yes, sir.
Q. And he had delivered one load?

A. Yes, sir.

Q. And was going back to the icehouse for another?

A. Yes, sir.

Q. Had he been doing that previous days?

A. That was the third day he was carting.

GEORGE MILLER, Sworn for Plaintiff:

DIRECT EXAMINATION By Mr. Wilson:

Q. Mr. Miller, where do you live?

A. Long Branch.

Q. And did you see this accident?

A. I seen it after it happened.

Q. After it happened?

A. Yes, sir.

Q. How soon after it happened?

A. Well, just about a second or so after it happened.

Q. Where were you when it happened?

A. Right in Mr. Edwards'.

Q. Working there?

A. Yes, sir.

Q. Inside or outside?

A. Inside, yes, sir.

Q. Did you notice whether the gates were up or down?

A. No, sir; I couldn't say anything about that.

Q. Didn't notice that?

A. As soon as the crash came I came down stairs and went across to the track, and when I got over to the track the engineer had just taken the boy up in his arms. I took the boy from the engineer and put him in the stage and took him to the hospital.

Q. The Long Branch Hospital?

A. Yes, sir.

Cross Examination By Mr. Strong:

Q. Whereabouts did you say you were working?

A. Mr. Edwards'.

Q. Which side of Broadway?

A. It is on the east side, they call it. We worked on the other side, the other side from the office.

Q. Is that the side where the machinery was?

A. Yes, sir.

Q. And the side where Davis was?

A. Yes, sir.

Q. In the same building?

A. The same building.

Q. You were not noticing anything until you heard the crash?

A. No, sir. I worked right alongside the window. I didn't notice. I worked right alongside the window and never noticed anything until I heard the crash, and somebody said the train had struck, and that is what drawed my attention.

Q. The window where you were, was it facing towards Broadway or facing towards the track?

A. Facing towards the track.

Q. And from there you could not see the crossing, could you, from where you were working?

A. Oh, yes, sir; I could see the crossing.

Q. Could you see the flagman's shanty?

A. No, sir.

Q. Couldn't see that?

A. No, sir.

Q. Couldn't see the gates, could you?

A. Only the gates on the opposite side.

Q. That is the opposite side of the tracks?

A. On the opposite side of the tracks.

By Mr. Wilson:

Q. On the west side?

A. Yes, sir; on the west side. I can see two gates out of my window.

By Mr. Strong:

Q. You went out immediately, I suppose?

A. Yes, sir.

Redirect Examination By Mr. Wilson:

Q. You say when you looked you did see two gates up on the west side of the crossing.

A. I said I can see two gates out of four. I wouldn't like to say anything——

Q. Were they up or down when you first looked?

A. I didn't notice. I wouldn't like to say.

Q. Did you notice whether there were any cars upon the siding there?

A. Yes, sir.

Q. That day?

A. Yes, sir.

Q. How many were there?

A. Oh, it looked to me to be seven or eight, but whether they were in a line there——

Q. How near up to the highway, to the south side of the highway, were those cars on that side?

A. Very near up to the flag station; because naturally I investigated. The reason I investigated——

Mr. Strong: I object. You can't tell us why you investigated. You can tell us what your investigation developed.

Q. What did you find out in respect to that matter?

Objected to.

The Court: I think what he saw, not what he investigated.

A. I took the boy to the hospital, and when I came back I spoke to the flagman——

Objected to.

Q. You can't tell us what he told you, but after you came back did you look to see whether those cars were there?

A. Yes, sir.

Q. Did you look to see whether a man standing at the gate where the crank is, whether those cars would cut his view off towards the Long Branch depot.

A. No, sir; he couldn't see.

By Mr. Strong:

Q. Couldn't see what?

A. Couldn't see down to the south, I know, without he walked out to the center of the track, and then he could look down and see it. And that is the way that man had to do to see anything coming south.

By Mr. Wilson:

Q. You mean the traveler——

Objected to.

Q. When you said that man——

A. I meant the flagman.

Q. And when you said the middle of the track did you mean the middle of the siding track or the main track?

Objected to as leading. Which track; that is the inquiry.

The Court: Mr Strong objects to the question as leading.

Mr. Wilson: I withdraw the question and ask him which he refers to.

A. I refer to the track on the opposite side of where these cars stood. He would have to step to the outside of that track. They have an inlaying track and two center tracks.

Q. Are there two center tracks?

A. Yes, sir.

Q. One going north?

A. Yes, sir.

Q. And one going south?

A. Yes, sir.

Q. And then there is a siding to the east of both tracks?

A. Yes, sir.

Q. And those cars were upon that siding?

A. Yes, sir.

Q. You say the flagman would have to step where before he could see a train coming from the south?

A. He would have to step outside of this coal car to see to the south.

Q. Well, I don't know that I am cleaer as to what you mean by outside. You mean beyond? Would he have to go close to the coal cars?

A. He would have to go to the track, to the center of the center track.

Q. To the center of the center track?

MR. STRONG: He didn't say that.

A. I say that is what he would have to do if he wanted to see clear to the south at the time.

By Mr. Strong:

Q. You didn't say center, did you?

A. Yes, sir.

By Mr. Wilson:

Q. Do you know whether the one you have referred to as the center track, whether that was the north or the south bound?

Q. The north bound track?

A. That is the north bound track.

Q. The north bond track?

A. Yes, sir.

Q. Did you notice whether the engine that did

this injury was upon the south bound or the north bound track?

A. On the south bound.

Q. It was on the south bound track?

A. Yes, sir.

Q. Which way was it going, north or south?

A. It was going north.

Q. Were there any cars attached to it?

A. No, sir.

RE-CROSS-EXAMINATION by Mr. Strong:

Q. As you go from the east side or the north side of the tracks across to the south side or the west side, the first track you come to is a siding, is it?

A. A siding track, yes, sir.

Q. And that is the track where you say those coal cars stood?

A. Yes, sir.

Q. Now then, after you pass on the siding track, what is the next track you come to?

A. The next track is the north bound track.

Q. The north bound track?

A. Yes, sir.

Q. Then you pass the north bound track and then you come to another track, do you?

A. Yes, sir; the south bound.

Q. That is the south bound track?

A. Yes, sir.

Q. How many tracks are there altogether crossing Broadway there?

A. Two side tracks and two center tracks.

Q. Then there is a fourth track, is there, after you cross the south bound track?

A. Yes, sir; there is a fourth track.

Q. And that is a siding, is it?

A. That is a siding for laying in cars.

Q. Now then, you say a man going in that direction would have to get to the middle of the

north bound track before he could look to the south?

A. Well, if he was coming from the east, which we call the ocean, if he was coming up that way he would have to look, but if he was going towards the ocean of course naturally he could see.

Q. Which way was this wagon going?

A. I don't know anything about which way the wagon was going.

Q. You don't know which way it was going?

A. No, sir.

Q. Suppose it was coming from the east, where your place of business was.

A. Yes, sir.

Q. Is that the east or west side, as you call it? Is that the shore side or the off side?

A. That is the shore side.

Q. Take it that he was coming from the shore side, towards the ocean——

A. No, sir.

Q. I mean away from the ocean. Then the first thing he would come to would be this siding track with the cars on it, the coal cars; that is reached first?

A. Yes, sir.

Q. Now when he had walked so that he could clear the side of those coal cars, he would have a clear view to the south, wouldn't he?

A. He would, yes, sir.

Q. Well, he would not have to be in the middle of the track before he could clear the coal cars would he?

A. Of course you have got to step off one track into the other.

Q. Well, there is some space between the tracks, isn't there?

A. Sir?

Q. Isn't there space between the tracks enough to allow the trains to pass?

A. Yes, sir; there is a space.

Q. You don't mean that he would have to be in the middle of the next track before he could see?

A. Of course there is a space like, you know, between both tracks, of course.

Q. He would have to be midway between the two tracks; that is what you mean?

A. Yes, sir; he would have to step nearly there to see.

Q. You don't mean to say he would have to be in the middle of the south bound?

A. I wouldn't want to say he would have to be in the middle. I meant the middle of the passage-way.

Q. The middle of the space between the tracks?

A. Yes, sir.

Q. Well, did you notice the engine at all when you first came out after the accident?

A. Notice the engine?

Q. Yes.

A. I noticed the engine standing there, yes, sir.

Q. It was standing?

A. Yes, sir.

Q. Where?

A. It was standing—well, pretty near opposite Mr. Davis' place, where he works underneath there, pretty near opposite.

Q. Then it was standing still?

A. Yes, sir.

Q. That was the first you saw of it?

A. Yes, sir.

Q. And at that time it was on the northwest side of Broadway, wasn't it?

A. On the northwest, yes; that is what we call it.

Q. You took the boy to the hospital, did you?

A. Yes, sir.

Q. And left him there?

A. Yes, sir.

Q. And it was not until you came back from the hospital that you noticed these cars, was it?

A. Yes, sir; I had noticed the cars long before that. Them cars was there a day or so before that. (Remainder of answer ordered striken out.)

Q. The cars were all linked up together, were they?

A. Looked to me so, yes, sir.

Q. No passage between them at all?

A. No, sir.

Q. Not separated?

A. No, sir.

Q. You don't really know then which way this engine had been going at the time of the accident, do you?

A. Couldn't go any other way but the south way on the south track. She was coming from the south.

Q. How do you know?

A. How do I know?

Q. You didn't see the engine moving, did you?

A. No, but I seen the passenger train come through, and I know that there was no other train coming any other way. Naturally where the engineer handed me the boy I knew the car must have been going, was going north on the south bound track, sure.

Q. You inferred that from the position where the boy was?

Q. Certainly I did.

Q. All right. I want to know if that is so.

LAFAYETTE VAN SCHOICK, sworn for plaintiff.

DIRECT EXAMINATION by Mr. Wilson:

Mr. Van Schoick, you live at Long Branch?

A. Yes, sir.

Q. What is your business?

A. Blacksmithing.

Q. Did you see this accident on the 21st of July, 1904?

A. I saw a portion of it, yes, sir.
Q. Where were you when you saw it?
A. Stood in the shop door.
Q. In your shop door?
A. Yes, sir.
Q. How near was that shop door to this crossing?
A. I should think about one hundred and ten feet, somewhere along there.
Q. One hundred and fifty feet?
A. No, it is not as far as that.
Q. One hundred and ten feet?
A. Yes, sir; somewheres about that.
Q. Was your shop to the east of the crossing or west of it?
A. East.
Q. That is towards the ocean?
A. Yes, sir.
Q. And on which side of Broadway was it?
A. On the east side.
Q. Which side of Broadway was it?
A. On the east side.
Q. Well, Broadway runs, as I understand it, east and west? Were you on the north side of Broadway or the south side?
A. On the north side, on this side. (Indicating.)
Q. On the north side?
A. Yes, sir.
Q. And one hundred and ten feet, about, away from the crossing?
A. Yes, sir.
Q. Did you see the ice wagon go by?
A. Yes, sir; see it standing there.

By Mr. Strong:
Q. Saw it standing
A. Yes, sir.

By Mr. Wilson:
Q. Standing at the crossing?
A. Yes, sir.

Q. What was the condition of the crossing when you saw it standing there?

A. Well, I saw the first train go through, he raised the gates——

Q. Pardon me one moment. Did you see whether the gates were down on the first train?

A. Yes, sir.

Q. What direction was that train moving?

A. Going towards Branchport station.

Q. You saw the wagon stand there during the passage of that train, did you?

A. Yes, sir.

Q. Then what did you see after that?

A. When he hoisted the gates this wagon started and I turned and went the other way. I didn't see it hit it.

Q. But you saw that the gates were up when he started to go across?

A. Yes, sir; he turned around. After he hoisted the gates he turned around.

Q. And that is all you saw until after the accident?

A. Yes, sir.

Q. You say you turned around; you mean you turned your face away——

A. No, I started to walk in the shop.

Q. You started to walk in the shop?

A. Didn't see any more of it.

Q. Did you see where the flagman was standing?

A. Right at the handle bars.

Q. Right at the handle bars?

A. Yes, sir.

Q. Now pardon me. Where are the handle bars?

A. On which side?

Q. First, on which side of Broadway are they?

A. On the south side.

Q. Now on which side of the railroad tracks are they?

A. On the other side, the ocean side.
Q. On the ocean side?
A. Yes, sir.
Q. And you saw the flagman put the gates up; did you see what he did after that?
A. He turned around, looked right towards the wagon and started ahead.
Q. Started ahead.
A. Yes, sir.
Q. When he went in that position was his back toward the tracks?
A. Yes, sir; towards the handle bars.
Q. Sir?
A. Right towards the handle bars. He stood right by the handle bars.
Q. That put his back to the track?
A. Yes, sir.
Q. Did you notice whether there were any freight cars on the siding that day?
A. There was four or five stood there, box cars, yes, sir.
Q. You may state whether or not those cars would cut off the view of the flagman at the place where you saw him standing.

MR. STRONG: I object, unless he has made an observation.

THE COURT: He can say if he knows.

A. How is that?
Question repeated.

THE COURT: I will admit it.

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

B. A. VAIL.
[L. S.] Judge.

A. Yes, it would.
Q. I mean the view of the flagman, had he en-

deavored to look toward the south, to the Long Branch depot.

A. Yes, sir.

MR. STRONG: I pray an exception unless it appears there was an observation.

A. He couldn't see up there unless——

Objected to.

Q. Where was he obliged to go before he could see, Mr. Van Schoick?

Objected to unless the witness has made the observation. Objection overruled.

Whereupon the defendant, by its counsel prays a bill of exceptions, which is hereby allowed and sealed accordingly.

B. A. VAIL.
[L. S.] Judge.

Q. Where would he be obliged to go before he could see, Mr. Van Schoick?

A. He would have to step out over one track and on to the other one, or so he could look around the car.

CROSS EXAMINATION by Mr. Strong:

Q. I want to get the location of your blacksmith shop. Was it on the east or the west side of the tracks?

A. On the east side.

Q. On the side nearest the shore?

A. Yes, sir.

Q. And on which side of the tracks was the wagon standing when the north bound train went by?

A. On the ocean side.

Q. On your side, was it?

A. Yes, sir. The wagon didn't stand over seventy-five feet from where I stood.

Q. About seventy-five feet from where you stood?

A. Yes, sir.

Q. On which side of Broadway is your shop?

A. On the east side.

Q. That would be the south side, would it?

A. My shop was on the east side.

THE COURT: Doesn't Broadway run east and west?

Q. Would it be south or north?

A. Well, south is on this side (indicating). Well, it is west, you take it, then; or north, I mean.

Q. Well, is your shop on the same side as Edwards' mill?

A. Yes, on the same side the mill is.

Q. But Edwards' office is on the opposite side?

A. The office, yes, sir.

Q. And is your shop the next building to Edwards' mill?

A. Yes, sir.

Q. When the gateman put the gates up after the north bound train had passed did you see the wagon start up?

A. I seen him start and I started and went in the shop, turned around and went in the shop.

Q. And it had been standing——

A. Probably a minute.

Q. How near to the track had the ice wagon been standing?

A. I should suppose forty or fifty feet, somewheres along there.

Q. About fifty feet from the track? That is fifty feet from which track?

A. From the railroad track.

Q. You mean from the siding track, where the cars were?

A. That is, fifty feet from the first track. Well, no, it wasn't as far as fifty feet from the first one, I don't think. Forty or fifty, somewhere along there; because I could just see the horses' heads from my shop. They generally stop about that place.

Mr. Strong: I move to strike that out.

Q. From where you were in your shop could you see the flagman by looking in front of the horses or behind them?

A. In front of them.

Q. You saw the wagon start up?

A. Yes, sir.

Q. Who was in the wagon?

A. A man and a boy.

Q. Who was driving.

A. I couldn't see.

Q. Was the wagon full or empty?

A. Empty.

Q. And what sort of a wagon was it?

A. Ordinary farm wagon, ice wagon, regular farm wagon.

Q. With a two-horse team?

A. Yes, sir.

Q. Did you stop to look at the wagon at all after it started to go on?

A. No, sir.

Q. Did you notice the driver at all as he drove on?

A. I didn't notice him after the wagon started. There was lots of teams, and they hoisted the gates, and then just as soon as they raised the gates up I turned around and I didn't see it hit the wagon at all.

Q. Did you see the wagon start?

A. Yes, sir.

Q. Sure about that?

A. Yes, sir.

Q. Then just as soon as it started you turned away?

A. Yes, sir.

Q. You don't know who was driving?

A. I don't know certain, no, sir.

Q. Well, how were the man and boy sitting? Which was on which side of the seat?

A. The man was on the right hand side.

Q. That would be the driver's side, would it?

A. Then he was on the side nearest to you, was he?

A. Yes, sir; back to me.

Q. Back to you?

A. Yes, sir.

Q. But the man was nearest to you?

A. Yes, sir.

Q. And the boy was on the man's left?

A. Yes, sir.

Q. Both sitting together on the front seat?

A. Yes, sir; only one seat.

Q. Had you noticed that wagon going back and forth there before?

A. Yes, sir.

Q. You knew whose wagon it was?

A. No, sir; I didn't.

Q. Did you know the man?

A. No, sir.

Q. When had you noticed it before that?

MR. WILSON: If your Honor please, I don't see how that is relevant.

THE COURT: How is it Mr. Strong?

MR. STRONG: Well, he has spoken of it as an ice wagon.

THE COURT: Well, they say it was a farm wagon. The owner of it said it was a farm wagon, merely used for carrying ice from the icehouse to Long Branch.

MR. STRONG: I want to know how this witness knows.

THE COURT: I don't see how that is material, anyhow. What is your object in showing it?

MR. STRONG: Well, I think it is part of the surroundings.

THE COURT: Well, but what difference would it make as to who was the owner of the wagon?

MR. STRONG: I don't care about the ownership.

THE COURT: Or what kind of wagon it was?

MR. STRONG: I think I ought to know what kind of a wagon it was.

THE COURT: You can ask that. I will allow you to ask that, but I think he has already said.

Q. You called this an ice wagon in part of your testimony?

A. Yes, sir. It was not a regular wagon, but they was using it for ice.

Q. How do you know they were using it for ice?

A. I seen them cart it.

Q. You had seen them cart it?

A. Yes, sir.

Q. When?

A. The day before.

Q. The wagon going back and forth over the crossing?

A. Yes, sir.

Q. The same man?

A. Yes, sir.

Q. And the same boy?

A. No, sir; the boy wasn't with him the day before.

Q. The boy was not with him the day before?

A. No, sir.

Q. Sure about that?

A. Yes, sir.

Q. Had you seen it before the day before?

MR. WILSON: I submit he is bound by this testimony, in any aspect of it. This is not cross-examination.

MR. STRONG: You don't object to my being bound by it?

THE COURT: I don't think it is material to the issue at all, that the team went over there before, or who was in it. If you want to identify it you can ask questions to bring it out; but I don't think it is material who was driving the wagon or who was in it the day before.

WILLIAM T. BROWN, Sworn for Plaintiff.

DIRECT EXAMINATION by Mr. Wilson:

Q. Mr. Brown, are you related to this boy?
A. My sister's child, yes, sir.
Q. What is your business?
A. Well, I am in the teaming business now.
Q. Where do you live?
A. Long Branch.
Q. How long have you lived there?
A. I have lived there fifteen years.
Q. Did you see this accident on the 21st of July, 1904?
A. Yes, sir.
Q. And where were you when you witnessed it?
A. Right about one hundred and fifty feet from it.
Q. And in which direction? Where were you?
A. I was going up Broadway.
Q. Pardon me one moment. You mean going up Broadway——
A. Going from the ocean up to what we call the upper village.
Q. Going from the ocean?
A. Yes, sir; I was going west.

Q. And you were about one hundred and fifty feet away when this happened?

A. Yes, sir; right down Broadway.

Q. What were you doing?

A. I was waiting for a man, to take a man down the street. He went in his store and he gave me a little child and told me to drive up and down till he came out.

Q. Was his store near that crossing?

A. Yes, sir; about a block and a half. I was walking the horse around, and this man that was driving this wagon had this little boy Jack, I always called him, passed me right opposite Seventh Avenue. My horse was walking and his horses was shacking along, and the 8.15 Central train——

Q. You say he passed you opposite Seventh Avenue?

A. Yes, sir.

Q. Passed you on Broadway?

A. Yes, sir.

Q. Which way was he going?

A. Going west.

Q. In a farm wagon?

A. Yes, sir.

Q. And who was driving?

A. The man was driving himself

Q. Where was the boy?

A. Siting alongside of him, to the left of him.

Q. Now then, go on and tell us what you observed from that point on.

A. I got very near up to him, and when he saw the 8.15 train coming he stopped very near opposite Van Schoick's blacksmith shop.

Q. This 8.15 train that you refer to, what direction did that come from?

A. Long Branch to Branchport. I think it is 8.15—I ain't positive—or 8.20, whatever time it leaves there. The flagman raised the gates up, and my horse was right opposite Slocum's coal yard, and as he raised the gates he turned his back to the handles and crank and leaned up

against it; and I saw this engine approaching up the track over Slocum's coal yard and over the mill, and I didn't know that man didn't see it; and when the team struck the track the man was run over, and rolled the team right over and over, killed the man on the tracks and threw the boy right up. That is the last I saw of him.

Q. How high in the air did you see the boy?

A. I saw him above the engine.

Q. Did you notice whether there were any cars on that siding?

A. Yes, sir.

Q. That day?

A. Yes, sir.

Q. How many were there there?

A. I couldn't say; five or six or seven, something like that; high cars.

Q. Would that have any effect on the view of a man standing at the crank where the gates were worked?

MR. STRONG: I object. It doesn't appear that this witness knows any more than anybody else.

THE COURT: Answer the question.

A. Yes, sir.

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

B. A. VAIL,
[L. S.] Judge.

Q. What effect, if you observed?

A. Well, the man couldn't see, the flagman nor any one coming up Broadway with a horse and wagon couldn't see, because there was Edwards' office, and there just opposite, between the track and Edwards' office, the cars stood here in a block, yes, five or six of them, and the flagman, it was impossible for him to see where he was; and I

know he didn't see it, because he was so excited when he struck the horses——

Objected to.

THE COURT: Strike that part out.

Q. What did the flagman do after the collision?

A. He didn't know what to do. He went right around and around—kind of appeared to be awful nervous. He didn't know what to do.

Q. A man going west on Broadway—and say this is Broadway right here, and I am pointing west, as he approached that crossing—we will say this is the crossing here, and this is south—(Indicating on map).

A. Yes, sir.

Q. And that is north?

A. Yes, sir.

Q. And I am going west on Broadway. Now when I get opposite Edwards' buildings, that row on the south of Broadway, is it possible for a traveler to see down the track to the south?

A. Yes, sir.

Q. Well, how?

A. Well, the office objects you from seeing south until you get very near on the track, and then the cars stood there and that was a good deal worse, because a man can hardly see when he comes up to the office anyhow, till he gets very near to the track. His horse has to be very near on the track to see down. After he leaves Slocum's coal office, in front of Edwards' office, his horse has got to be on the track.

Q. Supposing this to be the Edwards' building, when the driver got west he could have seen except for the freight house? (Indicating on map.)

A. Yes, sir.

Q. When the driver is off here to the east end of the Edwards building, from that point would his vision be cut off by the Edwards building or by the cars?

A. Be cut off by the cars after he passed the Edwards building.

Q. But while he passed the Edwards building his view would be cut off by the building?

A. Yes, sir; his view would be cut off by the building. But a man couldn't see until he got very near the middle of the track with a team of horses, because the cars were in the way down there bad enough any time.

Q. Did you see the boy after he was hurt?

A. No, sir; not that day, I didn't see him. They took him to the hospital. I turned around to tie my horse and take the little child out that I had in the wagon, and the man still laid between the tracks, the dead man.

Q. Did you notice which way the engine was going that hit him?

Q. Going towards Branchport.

Q. Did you notice whether it was on the south bound track?

A. The last track, the track they use for switching off.

Q. Is that the track furthest west?

A. Furthest west, yes, sir.

Q. Did the engine have any cars attached to it?

A. No, sir; nothing but the tender.

CROSS-EXAMINATION by Mr. Strong:

Q. This was a single engine, without cars attached, was it?

A. I don't thtink there was any cars attached to it, nothing but the tender.

Q. And it was on the last track?

A. On the track they were switching off on, yes, sir.

Q. Will you please tell me if that is the fourth track as you go the direction the wagon was going?

A. I think it is the sixth track.

Q. Are there six tracks there?

A. Well, yes, sir, on the fourth track.

Q. Let me see if you and I understand each other. As you go the way the wagon was going the first thing you come to is a siding track where these cars stood?

A. It wasn't any last track, because the last track——

THE COURT: Just answer the question.

Q. The first track you come to is the track where these cars stood?

A. Yes, sir.

Q. Then the next track you come to, as I understand, is the north bound running track.

A. Yes, sir.

Q. And the next one you come to is the south bound running track?

A. Yes, sir.

Q. Then the fourth track is another siding track?

A. Yes, sir.

Q. Now do you mean that this engine was running on the fourth siding track?

A. Yes, sir.

Q. That was the fourth track?

A. Yes, sir; running that way.

Q. Running that way?

A. Yes, sir.

Q. Where was the engine when you saw it first?

A. Coming right up toward Branchport. I saw the engine over Slocum's coal yard.

Q. It was going toward Branchport?

A. Yes, sir; I saw the engine coming up——

Q. Wait a minute. Don't speak too rapidly. We only get confused, you know, if we talk out-

side the questions. Tell us where you were when you saw it.

A. I was right opposite Van Schoick's blacksmith shop, very near opposite, walking the horse up, and I saw this engine coming up and I saw the man turn around.

Q. Wait a minute, please. You were just about opposite Slocum's blacksmith shop

A. Slocum's coal office, coal yard.

Q. You mean his coal office?

A. Yes, sir.

Q. Well, you couldn't have been exactly opposite the coal office, or that would have cut off your view?

A. I wasn't exactly opposite. I could just see this locomotive coming up.

Q. Which way were you, nearest to the track or further away?

A. I was to the east side of it, very near opposite.

Q. Then you mean the east side, that is the furthest side from the tracks?

A. Yes, sir; that is the furthest side from the tracks.

Q. And from there you saw the engine approaching?

A. Yes, sir.

Q. And at the same time when you saw it approaching. where was the ice wagon?

A. The ice wagon was just started across the track, just started from the front of the blacksmith shop. The ice wagon stood very near in front of the blacksmith shop.

Q. At the time the ice wagon started across, after the north bound train had gone by, you were the other side back of Slocum's coal office?

A. Yes, sir.

Q. You say that you didn't know but what the man in the wagon saw the engine?

A. No, sir; I didn't say so. I said I didn't

know but what the flagman knew whether the locomotive was coming on up or not, but he made no attempt to put the gate down.

Q. That is what you meant?

A. Yes, sir.

Q. What you said was, "I didn't know the man didn't see it." You meant the flagman?

A. I meant the flagman. I knew the man in the wagon didn't see it.

Q. You knew the man in the wagon didn't see it?

A. Yes, sir.

Q. Did neither of you make any sign to him?

A. No, sir; because I had a horse that was afraid of the cars and I had a child in the wagon with me.

Q. Then when you saw this wagon start up you must have supposed it would be struck?

A. I didn't know it was going to cross the crossing, because sometimes them locies come up there and run back and go down. After it got to Edwards' lumber yard we couldn't see it any more until it shot out there in front of the lumber office.

Q. How far was the farm wagon from the nearest track, that is, from the east siding track, at the time that it stopped there?

A. Oh, I couldn't tell exactly how far it was; fifty or sixty or seventy-five feet probably. It was out of dangr, out of reach of the track.

Q. Do you think it was as much as fifty feet, sixty feet?

A. Yes, as much as that.

Q. Then did you see this wagon start up?

A. Yes, sir.

Q. Who was driving?

A. The man that got killed was driving.

Q. Did you know him?

A. Didn't know him personally, no, sir; I had seen him.

Q. The boy was your nephew, was it?

A. Yes, sir. The boy had been speaking to me about two minutes before that.

Q. He spoke to you as he passed?

A. Well, when he came up, both stopped for the train, yes, sir. He come up Broadway and I come up Broadway when he was speaking to me.

Q. Was he in the wagon then?

A. Yes, sir.

Q. The wagon hadn't stopped to speak to you, had it?

A. No, sir.

Q. Just as it passed you?

A. Just passed me on by.

Q. As you go on toward the crossing in the direction that the wagon was going, after you get by Edwards' place there you can see to the south, can't you?

A. No, sir; you couldn't that morning till you got on the track.

Q. I mean the cars were there; but if there had been no cars there you could see to the south, couldn't you?

A. Not till you got very near on the track.

Q. Why not?

A. Because Edwards' office cuts the view off. I have traveled over that road thousands of times a day.

Q. What is that?

A. I have traveled over that road a thousand times.

Q. A thousand times a day?

A. No, not a day.

Q. How many times a day?

A. Oh, I have traveled over the road fifteen or twenty times a day. I run a five cent stage up there when I haven't anything else to do.

Q. After you get by Edwards' office then you can see to the south except for these cars?

A. You can when you get very near on the track.

Q. After you pass the coal office is there anything else to cut off your view except those cars?

A. Nothing to cut it off except the cars, no, sir.

ANDREW J. DEFGUARD, Sworn for Plaintiff.

DIRECT EXAMINATION By Mr. Wilson:

Q. Now, Andrew, how old are you?

A. I will be fourteen the 20th of November.

Q. Do you remember the day you were hurt down at Long Branch?

A. Yes, sir.

Q. Where were you when you were hurt?

A. On Broadway.

Q. At the Edwards crossing there?

A. Yes, sir.

Q. Had you been riding in the wagon?

A. Before?

Q. Yes.

A. No, sir; that was the first morning.

Q. But you were riding in the wagon that morning?

A. Yes, sir.

Q. Whose wagon was it, do you know?

A. Mr. Herbert's

Q. And why were you riding in the wagon?

A. I went with the man to hold his horses.

Q. And what man did you go with?

A. James Sanderson.

Q. And how did you come to go with him that morning?

A. I went with him to hold his horses while he unloaded the ice.

Q. Did he ask you to go with him?

A. Yes, sir.

Q. And where did you get in the wagon that morning?

A. Got in with him up at the icehouse.

Q. Up at the icehouse?

A. Yes, sir.
Q. And where was he going to?
A. He was going to the ice plant.
Q. And which direction were you going on Broadway? Which direction were you going, were you going away from the ocean?
A. Away from the ocean, yes, sir.
Q. And who was driving?
A. The man, Mr. Sanderson.
Q. Had you been driving at all?
A. No, sir.
Q. Do you remember what happened to you?
A. No, sir.
Q. What is the last thing you do remember?
A. I remember going towards the crossing.
Q. Is that the last thing you remember?
A. Yes, sir.
Q. When you came to your senses where were you?
A. Home.
Q. What was the matter with you if anything when you came to your senses?
A. I ached all over.
Q. Did you have any cuts or bruises on you?
A. Yes, sir.
Q. Do you know where they were?
A. Yes, sir.
Q. Where were they?
A. The cut was in my head, and I had my back cut and bruised my knee.
Q. Did you have any pain in that?
A. Yes, sir.
Q. Where did you have pain?
A. In my head.
Q. Where else?
A. My leg and back. I had pains all over.
Q. Did you have much pain?
A. Yes, sir.
Q. How long did your pain last?
A. Lasted all day.
Q. All day?

A. Yes, sir.
Q You mean all the next day?

Objected to.

Q. I want to know what day this was. Did you have any pain after the first day?
A. Yes, sir.
Q. How long did you have pains? Do you have pains yet?
A. Yes, sir; sometimes.

MR. STRONG: I move to strike that out.

Q. How long did you have pains?

MR. STRONG: It is manifest the boy cannot give any idea of that.

By The Court:
Can you recollect, can you give any idea how long you had pains?
A. No, sir.

By Mr. Wilson:
Q. Do you have any pain now?
A. Yes, sir.
Q. Whereabouts do you have pains?
A. In my head.
Q. Whereabouts in your head?
A. Right here. (Indicating left side of forehead.)
Q. Did you have a cut on your forehead anywhere?
A. Yes, sir; over this eye. (Indicating.)
Q. Over your right eye?
A. Yes, sir.
Q. Where do you have your pain now?
A. Have pain all through my head, all around my head. (Indicating on left side of head.)
Q. You were pointing to the left side of your

head. Do you mean that you only have it in the left side of your head?

MR. STRONG: I don't think the witness ought to be led this way.

THE COURT: I don't think it is objectionable, Mr. Strong, a boy of this age.

MR. STRONG: It seems to me the younger the boy the greater the care should be not to suggest ideas to him.

THE COURT: I don't think the suggestion can harm you because if they localize it it is to your advantage. I will allow the question.

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

B. A. VAIL,
[L. S.] Judge.

A. I have it all through my head.

Q. How often do you have those pains in a week?

A. Sometimes once a week, sometimes once in two weeks.

Q. And has that been so ever since you were hurt?

A. Yes, sir.

Q. What does that pain do to you if anything?

A. Makes me have a sick headache.

Q. What does the sick headache do to you?

A. Makes me throw up.

Q. Do you have pain anywhere else in your body except in your head?

A. Yes, sir.

Q. Whereabouts?

A. Have pain in my back if I work any.

Q. Do you have pain anywhere else?

A. Yes, sir.

Q. Where?

A. In my leg.
Q. Well, what makes the pain in your leg?

Objected to.

A. If I lift anything.

MR. STRONG: He can't tell what makes pain in his leg.

MR. WILSON: Well, it is very obvious what the witness meant and very obvious what I meant.

THE COURT: I will admit it.

MR. STRONG: I ask an exception.

MR. WILSON: I will withdraw the question.

Q. You say you have pain in your leg?
A. Yes.
Q. Which leg is it?
A. This one (Indicating left.)
Q. Does that leg hurt you all the time?

(Objected to as leading. Question withdrawn.)

Q. How often does the leg hurt you?
A. Sometimes once a week and sometimes twice a week.
Q. What makes it hurt you, if you know?
A. If I lift anything heavy or walk very far. If I walk about a mile it makes my leg stiff.
Q. Does your leg get stiff from any other cause?
A. Yes, sir.
Q. What?
A. If I sit very long.
Q. Where was the leg hurt?
A. Right through the knee.
Q. Did you go to school before you got hurt?
A. Yes, sir.
Q. You have been to school since?

A. Not very much.
Q. Why haven't you gone to school?
A. It hurts my head to study.
Q. Can you read?
A. Not very much.
Q. Do you try to read?
A. Yes, sir.
Q. What does that do to you?
A. Hurts my eyes and makes my head ache.

CROSS-EXAMINATION by Mr. Strong:

Q. Was that the first day that you had been riding with Sanderson?
A. Yes, sir.
Q. And where did you meet Sanderson that day?
A. Up at the ice house.
Q. At the ice house?
A. Yes, sir.
Q. How did you happen to be there?
A. I went over there to see him get out ice.
Q. And what did Sanderson say to you?
A. Sanderson asked me if I would go with him to hold his horses while he unloaded ice.
Q. Did you know where he was going?
A. He was going to the sea, down to the ice plant.
Q. Did he tell you so?
A. Yes, sir.
Q. And asked you to go along and hold his horses?
A. Yes, sir.
Q. And you agreed to do it, eh?
A. Yes, sir.
Q. Did he give you any money for it?
A. Yes, sir.
Q. How much did he give you?
A. Oh, sometimes ten cents, fifteen, something like that.

Q. Don't you know whether it was ten or fifteen?

A. Yes, sir.

Q. How much was it?

A. Ten.

Q. He gave you ten that day, did he?

A. Yes, sir.

Q. Did he ever give you any money before for that?

A. No, sir.

Q. What makes you say sometimes ten and sometimes fifteen?

A. I meant sometimes when I would go with him some other times he would give me fifteen.

Q. Had you ridden with him before?

A. Not carting ice.

Q. Had you before at other times ridden with him?

A. Yes, sir.

Q. And he had paid you fifteen cents?

A. Yes, sir.

Q. For what?

A. I dropped corn for him.

Q. For what?

A. To go out in the field with him.

Q. How long before had that been?

Objected to.

THE COURT: I don't see how that is material at all.

Q. You knew Sanderson then, did you?

A. Yes, sir.

Q. Had known him a good while?

A. Yes, sir.

Q. Whereabouts did you live?

A. Lived at Poplar.

Q. Where is that?

A. It is over there near the man what owns the horses.

Q. Over near Mr. Herbert's place?
A. Yes, sir.
Q. And is that anywhere near the ice-house?
A. Yes, sir.
Q. It is?
A. Yes, sir.
Q. When Sanderson gave you the ten cents this morning?
A. Going down with the load.
Q. Going down with the load?
A. Yes, sir.
Q. Had you gone down with the load?
A. No, sir; we was going down.
Q. Had you made any trip at all that morning?
A. No, sir.
Q. Then when the accident occurred was the first time you had been down, was it?
A. Yes, sir.
Q. And your wagon was empty at that time, was it?
A. Yes, sir.
Q. You hadn't got your load yet?
A. We took down a load and unloaded it.
Q. Oh, you had taken one load down?
A. Yes, sir.
Q. And then when the wagon was struck you were going down again for another load?
A. Yes, sir.
Q. That is right, is it?
A. Yes, sir.
Q. Well, now, as you went down that day toward the crossing, I mean the time when the accident happened, Sanderson was driving?
A. Yes, sir.
Q. And yon were sitting beside him on the same seat?
A. Yes, sir.
Q. Do you remember the wagon stopping?
A. No, sir.
Q. Didn't your wagon stop?

A. Yes, sir.
Q. What?
A. It stopped, but I don't remember it.
Q. You remember seeing the train go by?
A. Yes, sir.
Q. I mean the north-bound train?
A. Yes, sir.
Q. Do you remember seeing that the gates were down when the train went by?
A. Yes, sir.
Q. You remember noticing that?
A. Yes, sir.
Q. And at the time that the train went by and the gates were down was your wagon standing still?
A. Yes, sir.
Q. On Broadway?
A. Yes, sir.
Q. Whereabouts in Broadway was your wagon standing then; I mean about how near to the track was it?
A. I couldn't say.
Q. Was it as far back as Edwards' coal office?
A. Yes, sir.
Q. It was as far back as that?
A. Yes, sir.
Q. Was it any further than that?
A. No, sir.
Q. Do you mean then that it was opposite Edwards' coal office where it stood?
A. Yes, sir.
Q. That is what you mean?
A. Yes, sir.
Q. Then when the train went by what did you do?
A. We drove on and he hoisted the gates.
Q. The flagman hoisted the gates, did he?
A. Yes, sir.
Q. Where was the flagman?
A. He was by the flagpost.

Q. Where the gates were hoisted, was it?
A. Yes, sir.
Q. He hoisted the gates?
A. Yes, sir.
Q. After he hoisted the gates where did he go?
A. The man?
Q. Yes, the flagman.
A. He was leaning up against the post, the same post where the gates were.
Q. Where he turned the cranks?
A. Yes, sir.
Q. And then you drove on, did you?
A. Yes, sir.
Q. Or Sanderson did?
A. Sanderson did.
Q. Did you notice the cars, the box cars or coal cars, standing on the siding?
A. Yes, sir.
Q. You noticed them, did you?
A. Yes, sir.
Q. And how near did those cars come to where the flagman was?
A. I couldn't say.
Q. Well, did they come close up to him, or some distance off?
A. Close up to him.
Q. And then as you went on toward him he remained standing there, did he, the flagman?
A. Yes, sir.
Q. What did you do yourself?
A. I don't remember.
Q. Do you remember what you were doing after the wagon started up?
A. I was sitting on the seat.
Q. Were you talking with Sanderson or what were you doing?
A. No, sir.
Q. Then your drove right on, and what was the first you knew of what struck you?
A. I didn't know.

Q. Didn't know?
A. No, sir.
Q. Did you see the engine at all?
A. No, sir.
Q. Not even when you got struck?
A. No, sir.
Q. And you don't know what struck you?
A. No, sir.

By Mr. Wilson:
Q. Where was this place where you had your head hurt? Where did you have your head hurt?
A. Right there (indicating).
Q. Put your finger on it.

(Witness indicates a place in the back part of his head on the left side.)

By Mr. Strong:
Q. Let me see where that is. Is that it? (Indicating.)
A. Yes, sir.

Mr. Strong: I would like all the jury to notice this. (Jury examines.)

Q. Was there more than one place on your head where you were hurt?
A. Yes, sir.
Q. Where?
A. Right here somewhere. (Indicating back part of head on left side.)

By Mr. Wilson:
Q. Is that the place? (Indicating on head.)
A. Yes, sir.

By Mr. Strong:
Q. Then you had another place right near there, did you?
A. No, sir.

Q. Where is the other place?
A. No, sir.
Q. Was there any other place but that one on your head?
A. Only them two.
Q. The two right near together?
A. Yes, sir.
Q. On the back part of your head?
A. Yes, sir.
Q. On the left side?
A. Yes, sir.
Q. There wasn't any hurt over your right eye at all, was there?
A. One there. (Indicating.)
Q. Was there one there?
A. A cut.
Q. Then you had another place beside that on the back, did you?
A. Yes, sir.
Q. When you were telling us about your injuries at first, and when Mr. Wilson was examining you, you told us of a cut over your right eye, but didn't tell us anything about this place on the back of your head, did you?
A. No, sir.

Mrs. Annie Defguard, Sworn for plaintiff:

Direct Examination by Mr. Wilson:

Q. Mrs. Defguard, you are the mother of this boy?
A. Yes, sir.
Q. How soon after the accident did you see him?
A. Well, I heard it about ten o'clock, and I went after him I suppose about two.
Q. Where did you find him?
A. At the hospital.
Q. Where did you take him to?
A. Took him to my father's house.

Q. Was he conscious or unconscious at that time?

Q. He didn't appear to know anything.

Q. Who was your physician?

A. Dr. Beach.

Q. Dr. Beach continued in attendance upon him?

A. Yes, sir.

Q. What was the character of his wounds as you observed them?

A. He had a cut over the eye.

Q. The right eye?

A. The right eye; and he had a cut in the top of his head, up there in the top of his head; and his knee was drawn right around.

Q. Did he have one on his back?

A. Yes, he was cut in the back. His shirt shows where it was cut.

Q. I show you this. Is that the shirt the boy wore that day?

A. Yes, sir; that is just as it was taken off of him, cut off of him.

Q. Just in that condition?

A. Just in that condition. There is a hole in it. The lady told me to save it to show.

Q. Was there a wound in the back at that point?

A. Yes, sir; just exactly as that is. He has a scar on his back now to show for it.

Q. How long was he sick, Mrs. Defguard?

A. The doctor attended him for four weeks.

Q. Well, how frequently did he attend him during that time?

A. Twice a day, sometimes

Q. Well, at the end of the four weeks was he well?

A. No, sir; he is not well yet.

Q. Not well yet?

A. No, sir.

Q. During that first four weeks did he suffer any?

A. Yes, sir; night and day.

Q. You say he is not well yet. What is the matter with him now?

A. Why, he has sick spells.

Q. How frequently does he have them?

A. Well, sometimes he has them every two weeks and sometimes every week.

Q. How do they affect him?

A. Make him sick to his stomach. He has sick headaches.

Q. Since the happening of this affair has he attended school?

A. No, sir; not of any account.

Q. Why not?

A. Well, it hurt his head to study, and the doctor told me not to urge him to go.

Q. Did you notice any change in his mental or physical condition—

A. Yes, sir; a good deal.

Q. One moment. As between the time before the accident and since the accident?

A. Yes, sir.

Q. What change did you notice?

A. Well, he is contrary. You have to humor him in everything; and before he was a nice child.

Q. Well, what else do you notice?

A. Well, he has those sick headaches and sick spells—something he never had before. He never seen a sick day.

Q. Is he able to do physical work now?

A. No, sir.

Q. Why not?

A. Well, because he complains of his back hurting him and his leg hurting him and his head hurting him.

RECESS TO 2 P. M.

Trial of the cause resumed at 2 P. M.

MRS. ANNIE DEFGUARD, Resumed.

CROSS-EXAMINATION by Mr. Strong:

Q. You were living in Long Branch at the time of this accident to your boy?

A. West Long Branch.

Q. West Long Branch?

A. About a mile from West Long Branch.

Q. Out in the country?

A. Yes, sir.

Q. On a farm?

A. About a mile.

Q. Your son Andrew Jackson, was he living with you?

A. Yes, sir.

Q. At that time of the year he was not attending school, I suppose?

A. No, sir; there was none.

Q. It was in July?

A. Yes, sir.

Q. Was he doing anything at all?

A. Well, he was staying with his aunt.

Q. Who was his aunt?

A. Part of the time he was with me and part of the time with his aunt.

Q. Who was his aunt?

A. Mrs. John Herbert.

Q. Where does she live?

A. She lived at Poplar.

Q. At what?

A. Poplar.

Q. Where is that?

A. Well, that is close by where the man lived that drove the team.

Q. Well, at the time that he was hurt was he living with you or was he living with his aunt?

A. Well, part of the time he was with me and

part of the time with her, backwards and forwards.

Q. And that particular day had he spent the night before with you?

A. No, sir; he came from her house that morning.

Q. Came from her house?

A. Yes, sir.

Q. You hadn't seen him that morning then?

A. Yes, sir; I saw him go by when I was going to my work.

Q. Saw him go by?

A. Yes, sir; I was walking and I saw the wagon pass by my house.

Q. What time of day was that?

A. Well, I suppose that was about half past six.

Q. Whereabouts was this place where the ice was taken from?

A. Mapes' pond.

MR. WILSON: If your Honor please, I object to this examination, because it is not cross-examination.

THE COURT: No, it is not cross-examination, Mr. Strong, neither does it seem to me to be relevant.

MR. STRONG: All right. If that is your Honor's view I will stop at once.

Q. You say before the accident the boy had attended school?

A. Yes, sir; he went to school before the accident.

Q. Whereabouts?

A. He went to Poplar.

Q. Regularly?

A. Well, he went not so very regular, no, but he could go to school.

Q. How regularly did he go?

A. Well, my sister can tell you better about that.

Q. Then you don't know?

A. Well, I couldn't say. I wasn't with him all the time at that time.

Q. You mean that he was making his home with your sister, so that she would know about it for that reason?

A. Yes, sir.

Q. A bright boy, was he?

A. Yes, sir.

Q. Unusually bright?

A. Yes, sir; bright. He was more like a man than he was like a boy. You could trust him to anything.

Q. You say he has these sick spells once in a while?

A. Yes, sir.

Q. How long do they last?

A. Well, they last sometimes two or three days.

Q. That is, he is sick at his stomach?

A. Sick at his stomach and headache and his eyes hurts him.

By Mr. Wilson:

Q. What did you say your sister's name was?

A. Mrs. John Herbert.

Mrs. Lydia Herbert, sworn for plaintiff:

Direct Examination by Mr. Wilson:

Q. Mrs. Herbert, you are the aunt of this boy?

A. Yes, sir.

Q. Did he spend any part of his time with you before he was hurt?

A. Yes, sir.

Q. And has he spent some part of his time with you since he was hurt?

A. Yes, sir.

Q. Where do you live?

A. I live at Eatontown now.

Q. Where did you live then?

A. Poplar.

Q. What was his physical and mental condition before this accident?

A. Well, he was a well, hearty child, he was trusty and quick to most anything, and he was not a bit peevish. He was more like a man than he was like a boy. You could trust him to do anything, most, that you wanted him to do.

Q. Did you notice any change since the accident?

A. Yes, sir.

Q. What change have you noticed?

A. Well, he isn't like the same child at all.

Q. Tell us how he is different.

A. Well, he is kind of peevish and don't seem to have very good memory. He don't act like the same child at all whatever.

Q. Does he have any pain now?

A. Yes, sir; he has pain in his back, pain in his knee, and a good deal of the time headache.

Q. What brings on pain in his knee and back?

A. Well, when he walks anywheres of any account he complains of his leg, or if he sits steady; and at nights, when he goes to bed at night, when he is with me, I always rub it with witch hazel and bathe it. He complains of his back; if he undertakes to do anything he complains of his back a good deal. And I notice different things that I know isn't right about him.

Q. What different things have you noticed that are not right?

A. Well, he seems to wake up nights—has spells of crying in the night—seems kind of delirious and don't know where he is half the time. If you go to him and talk to him in the night, if you ask him what is the matter he can't seem to explain. That is something new he never did before.

Q. How do these pains in his head affect him?

A. Well, make him sick at his stomach, don't want anything to eat, and seems to be all unstrung.

Q. How often do they come on?

A. Well, maybe have them once a week, and maybe in two weeks after that, and maybe a little longer. He has them all the time more or less.

Q. Did he have any of this trouble before he was hurt?

A. No, sir; never had a sick day.

Q. Has he gone to school any since?

A. No, sir.

Q. Why.

A. Why, he would come home with a headache and cry in the night and I would have to be up part of the night with him, and I didn't urge him to go to school. I didn't think it would do him any good.

Q. Did the doctor make any recommendation about it?

Objected to. Question withdrawn.

Q. How many days has he stayed with you since he was hurt?

A. Well, sometimes come with me a week and stay, and then stay a week with his mother.

Q. Where does his mother live?

A. With her father.

Q. She has no home of her own?

A. No, sir.

Q. And the boy goes back and forth?

A. Yes, sir.

Q. That is, approximately with you half the time?

A. Yes, sir.

Q. Was it so before he was hurt?

A. Yes, sir; just the same.

CROSS-EXAMINATION by Mr. Strong:

Q. Where do you live? Where did you live then, Poplar, did you say?

A. Yes, sir.

Q. Which side of the railroad track is that?

A. The railroad track? It is on the west side of the railroad track.

A. The west side of the railroad track?

A. Yes, sir.

Q. How far is that from where your sister lives?

A. Poplar?

Q. Yes.

A. About a mile and a half, perhaps two miles.

Q. You think the boy spends about half of his time with you?

A. I judge so, yes, sir. I didn't keep any particular account of it at all whatever.

Q. At the time of the injury he was living at your house, wasn't he?

A. Yes, sir; left my house that morning.

Q. Did you know where he was going?

A. I knew he was going to his grandfather's house.

Q. I mean did you know he was going to ride on this ice wagon?

A. No, sir; I didn't; because Sanderson was at the icehouse and asked him to go with him to drive the team, or hold the team.

Q. You didn't hear that?

A. No, sir.

Q. What was the first you knew that he was going with Sanderson?

A. I got word that he was killed.

Q. Did the boy attend school regularly before he was hurt?

A. Quite regularly, yes, sir.

Q. Whereabouts did he go to school?

A. Poplar.

Q. Who was his teacher?

A. I don't know positive, but I think Miss Bender.

Q. When you say quite regularly, do you mean he went every day?

A. Oh, no, not every day. There is very few boys that does that.

Q. Did he go once a week?

A. Oh, yes; more than that. He did do a little better than that.

Q. What?

A. He done a little better than that, yes, sir.

Q. Was he particular about his schooling?

A. Yes, sir.

Q. And you say he seemed more like a man than a boy? You mean he was mature in his ways?

A. Yes, sir.

Q. And a boy that was steady and could be trusted, eh?

A. Yes, sir.

Dr. Edmund Beach, Sworn for Plaintiff:

Direct Examination by Mr. Wilson:

Q. Doctor, where do you live?

A. West Long Branch.

Q. Are you a practicing physician and surgeon?

A. Yes, sir.

Q. How long have you been living at West Long Branch practicing your profession?

A. Twenty-one years.

Q. What preparation had you for your profession?

A. Well, I graduated from the Maryland University in 1885, had a hospital course there. At the time I was an interne.

Q. In what hospital?

A. Maryland University, the hospital connected with it.

Q. You have been practicing medicine how many years at West Long Branch?

A. Twenty-one years.

Q. Were you called upon to treat this boy when he was hurt on the 21st of July, 1904?

A. Yes, sir; called on to treat him.

Q. When did you see him?

A. I saw him about five o'clock in the afternoon.

Q. Of the day he was hurt?

A. That day he was hurt, yes, sir.

Q. Where did you find him?

A. Found him at his grandfather's, Jackson Brown's.

Q. What condition did you find him in? Now go on, Doctor, and in your own way tell what you found.

A. Well, when I got in the house I found him in bed, and he had the history of having been in a railroad accident. His head was bandaged, and they stated that that was done at the hospital.

MR. STRONG: I object to what was said.

Q. Never mind; you found his head bandaged?

MR. STRONG: I move to strike that out.

A. He was in a cold perspiration and shallow respiration.

Q. Shallow breathing?

A. Yes, sir; shallow breathing; extremities cold and his pulse very fine, rapid; which I diagnosed as shock, suffering from shock. And I administered proper remedies and then I left, and was called again about nine o'clock, they called me again. This time I found the boy unconscious; didn't seem to know where he was; and his pulse was slightly better than it was before, but he still seemed to be in this perspiration, and he had convulsive twitching of his extremities, hands and feet—convulsive twitching at intervals,—he had

vomited some,—and very pale. Then I administered the proper remedies that I thought was best, and I didn't call again till the next morning about half past eight, I was called in to see him. (Remainder of answer ordered stricken out.)

Q. State what you found, Doctor; not what they said to you, but what you found.

A. Well, I found that his pulse was weak; the pupils of his eyes were contracted, both of them, but responded to light. He had vomited, and vomited while I was there. I removed all the bandages, dressings. The night before I had not removed them because they had just been put on in the hospital a few hours before and I didn't think it was necessary. So I removed the bandages and then I noticed the injuries.

Q. Now describe what you saw about his injuries.

A. Well, his right eye was cut, a cut about an inch long over his right eye; and in the head, the summit of the head, was a punctured wound.

Q. A punctured wound?

A. A punctured wound; seemed to be made by a bolt, as if it had been made by a bolt, and that I should judge—it was swollen around it very much, but by pressing your finger down and feeling it with a pressure you could push it down a quarter of an inch easily.

Q. Into the bony part of the skull?

A. No, it didn't seem to go into the bone; went down to the bone. I examined it thoroughly to see if the skull had been penetrated. I couldn't detect that it had. I couldn't detect that it had been penetrated. Then back of that, on the occipital part of the head there was another cut, in the rear part, the occipital part of his head; and all around his ears and his neck was dark, very dark, from bruises. As you went down his back over the spinal process—I think eight of them—the dorsal

process—around that was a bruised place two inches across.

Q. Two inches in diameter?

A. Two inches in diameter. Then there was a cut in his back, on the left hand side of his back, near the median line. His knee was very much blackened and swollen. It was an inch and a half larger around than the other knee; seemed to have been crushed and twisted. The femur had been caught in some object and the other part twisted. The cartilage of the knee was damaged.

Q. Well, now, is that a complete description of his physical condition as you found him, as you now recall it?

A. Well, the external injuries, but the head injuries still continued. You had to speak to him loud to make him hear; and when he did rouse up he was irritable, very irritable.

MR. STRONG: I don't understand that this is responsive to your question.

MR. WILSON: Well, I am the one to object if it is not.

MR. STRONG: I think the witness ought to have some guide.

MR. WILSON: I think that what he says is relevant, and therefore I submit it should be taken.

THE COURT: All right.

Q. Well, proceed, Doctor.

MR. STRONG: I ask to have the question repeated or a new question put.

Q. Outside of these external conditions which you have described, what did you discover as to the condition of the boy?

A. The second day I discovered that he had a contusion of the brain, my diagnosis at that time.

Q. What do you mean by a contusion of the brain?

A. That the membranes covering the brain or a part of the brain had been bruised.

Q. Had been bruised?

A. Had been bruised.

Q. How long was this boy under your treatment?

A. Well, I have had him more or less ever since the accident.

Q. How frequently did you see him during the first four or five weeks?

A. Twice a day.

Q. During the first six months how frequently did you see him, would you average?

A. I suppose I saw him twice a week; twice a week.

Q. Did the boy suffer pain?

A. Yes, sir; he suffered pain. The second day he had a temperature of 102.

Q. How long did that temperature keep up?

A. About nine days. The highest temperature he had was on the third day, 103. In this kind of wounds that is a very important fact, the temperature.

Q. What does the temperature tend to indicate?

A. Well. tend to indicate that the brain is injured—brain fever.

Q. What other symptoms did he have of brain injury, if any?

A. Twitching of the extremities, rigidity of the extremities.

Q. What else?

A. An involuntary passage of water.

Q. Was there a brain injury, in your opinion?

A. Brain injury, yes sir.

Q. Was his skull fractured, in your opinion?

A. I couldn't make that out. It was a punctured wound, but I hesitated quite a while on it. The

symptoms were such as you might have in a small fracture, a puncture.

Q. After the first nine days, then what was his condition?

A. Well, the fever began to lessen, seemed to be better. His vomiting lasted about five days, then he gradually grew better, a little better; but his mind was heavy and draggy and he didn't pay attention to things—didn't seem to notice anybody that would come in the room.

Q. Did his condition improve, continue to improve, and if so for how long?

A. Well, I think about six months he seemed to get better, grow better.

Q. After the expiration of this first six months has his condition improved since then?

A. No, sir; it just stands about the same thing.

Q. What is the present condition of his leg, Doctor?

A. Well, the joint is not right.

Q. What has happened to it?

A. Well, the cartilage was injured, and he had inflammation of the joint of his knee, inflammation of the joint of the knee.

By the Court:

Q. Do you mean the kneecap?

A. No, in the knee.

By Mr. Wilson:

Q. Is the kneecap relatively in the same position as the kneecap of the other leg?

A. No, sir.

Q. What about the length of the leg, Doctor?

A. Slightly shorter.

Q. Is he lame in that leg?

A. Yes, if he over-exerts himself.

Q. He complains that if he uses the leg, I think he said, if by walking a mile he used it to that extent, the leg pained him. I ask you if in your

opinion that would be a natural consequence of the injury which you observed when you first saw him after the accident.

A. Yes, sir.

Q. He says that upon physical exertion and upon walking, that his back hurts him to this day. I ask you whether in your opinion that is a natural consequence of the physical condition which you saw when you first examined him.

A. Yes, sir.

Q. He says that he has sick headaches, pains in his head, sometimes once a week, sometimes once in two weeks, sometimes a little longer, accompanied by nausea. I ask you whether or not in your opinion that is a natural consequence of his physical injuries as you observed them upon the occasion when you first saw him?

A. Yes, sir; it is a natural consequence.

Q. He says that if he uses his head in trying to study, it makes his head hurt. I ask you if that would be a natural consequence of the injury which you observed?

A. Yes, sir.

Q. In your opinion, Doctor, what is the cause of the pain which he has in his head at this late time?

A. Well, it may be due to the circulation being changed in his head.

Q. Well, may it be due to anything else?

A. Well, that would be due to the result of the injury.

Q. What would change the circulation?

A. Well, pressure from effusion.

Q. In your opinion, is there pressure still, an abnormal pressure, on the brain, on the boy's head?

A. I don't believe so now. I couldn't say positive about that.

Q. What is your prognosis, Doctor, your pre-

diction for the future of this boy, as to his mental and physical condition?

A. Well, I have observed him now eighteen months, I think, pretty near—well, say fifteen months—and he has not made any change. He seems to stand right one thing.

Q. You mean to say he has not made any progress since the first six months?

A. I mean to say he has not made any progress since the first six months.

Q. And it will be two years in July since he was hurt?

A. Two years in July.

Q. Well, now, from that circumstance what do you infer? What conclusion do you predicate upon that?

Answer ordered stricken out.

Q. I ask you, Doctor, what would be in your opinion the probable result of his condition, physical and mental—or his mental condition.

MR. APPLEGATE: I think that is objectionable, may it please your Honor. As to probable results or anything else, that is a matter of uncertainty as a basis of damages.

THE COURT: Well, isn't that a proper question for the jury? Now the doctor has described the conditions as resulting from this accident. Now isn't it competent for him to give his medical opinion as to whether those injuries are permanent or not. It seems to me that is what the question means. Isn't that competent?

MR. APPLEGATE: If the question was put in that form, whether or not it was permanent; but as to the probable results of the injury, that involves uncertainty.

THE COURT: The doctor has described his condition up to this time. Now it seems to

be competent for him to testify whether or not he thinks this condition will continue.

MR. WILSON: My inquiry is perhaps quite apart from that suggestion. According to our notion, it is entirely proper to ask an expert who has qualified what in his opinion will be the probable history of this case.

THE COURT: Well, that means whether the injuries are permanent.

MR. WILSON: Whether they are permanent or not permanent.

Q. I will strike out the question I have already asked and ask you this general question, Doctor: what in your opinion will be the probable history of this case?

MR. STRONG: Let's see what has been struck out.

MR. WILSON: I have stricken out the previous question.

(Previous question repeated.)

MR. WILSON: This present question that is asked I think would be competent.

MR. STRONG: Allow me to suggest that that word "probable" ought not to be in the question. The witness can be asked, "What in your judgment will be his future condition?" without qualifying it. That I think may be asked. But "What will be the probable condition?" I think that is different.

THE COURT: Isn't it the same thing? The doctor cannot say it may be demonstrated, because it cannot.

MR. STRONG: He can say his opinion, without saying it is probable. I submit it is objectionable in its present form, as I have stated.

Objection overruled.

Whereby the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

B. A. VAIL,
[L. S.] Judge.

A. Well, judging from the time I have observed him since he has had the accident, I should think the probable result would be epilepsy.

Q. In your opinion, Doctor, has this boy been in a condition, physical and mental, where it was proper or safe for him to attend school?

A. Has not been.

By the Court:

Q. You mean since the accident?

A. Exactly.

By Mr. Wilson:

Q. Did you give any advise or direction in respect to his attendance at school?

Objected to. Question withdrawn.

Q. Directing your attention to his knee, Doctor, the condition of his knee, will it get better or worse or continue in its present condition?

A. Well, if he over-exerts it, it will get worse.

Q. Well, suppose he doesn't over exert it.

A. Well, it has improved very little in the last fifteen months.

Q. Is he fit now or has he been since the accident for any sort of physical work, in your opinion?

A. No, sir.

Q. (To the plaintiff:) Have you got your knees bare, son?

A. Yes, sir.

Q. Come up here.

(Plaintiff stands before jury.)

Q. (To the witness:) Show us the difference in these knees?

A. This knee that is hurt, you see this bone is much more prominent here. (To the plaintiff) If you will stand sideways. (Plaintiff complies.) Now can you see the difference, gentlemen? This knee is more prominent and his weight is thrown too far forward. The shaft of the bone rests too far forward, and thus pains. If you will stand first on one leg and then on the other you will see the difference. Now throw your weight on this leg and now on the other. (Plaintiff complies.) You see that don't straighten down. (To the plaintiff:) Now try the other one. Now stand on the other one. (Plaintiff complies.) You see this always hoists up. It is a half inch larger in circumference now than the other one.

Q. Would that condition result in permanent weakness in that knee at that point, in your opinion.

A. Yes, it would. He always stands just like he is standing now, resting his weight on his other leg. Just as soon as he stops and stands he rests his weight on the other leg.

Q. Doctor, is not this knee bone, this patella, lower than the other one?

A. Slightly.

A. Is epilepsy fatal?

A. Not necessarily.

Q. A man may have it and live out his expectancy of life?

A. Yes, sir.

Q. Does it incapacitate a man for physical and mental work?

A. It does.

Q. Assuming that these conditions which you have described continue permanent, as you have said in your opinion they will be——

MR. STRONG: I object and move to strike that out.

THE COURT: The question was not completed, as I understand it.

MR. STRONG: Well, but his statement that the witness has said they will be permanent I think is not competent as part of the question.

THE COURT: Finish the question and I will rule upon it.

MR. WILSON: The objection seems to be premature. I have not asked it yet.

MR. STRONG: But you have already introduced into it that which makes it incompetent. My objection is not to the question, but to your interjecting that into the question.

MR. WILSON: We will save time by withdrawing it.

Q. Doctor, assuming these conditions which you have described are permanent, I ask you how much, if at all, they would impair the earning capacity of this boy during youth and after maturity assuming that he would seek his livelihood either in a manual occupation or in some occupation which involved the use of his mind rather than the use of his hands.

Objected to.

THE COURT: What is the objection, Mr. Strong?

MR. STRONG: The objection is that the witness cannot possibly speak upon that subject. It may impair his earning capacity in some occupations and not in others. But to put it broadly in that way, without reference to any particular occupation and to ask how much his earning capacity would be impaired by these indefinite conditions, it seems to me is altogether too remote. That may be a question left to the jury,

perhaps, but it is not a question upon which this gentleman as an expert can testify, nor are the conditions sufficiently definite to admit of an expert opinion by anybody.

THE COURT: I do not understand that that question calls for an answer from the doctor saying how much pecuniarily his capacity would be weakened by it, but what proportion. Now this is a medical expert, and it seems to me it is perfectly competent for him to say, where a person is injured, whether his brain is injured so he cannot do any mental labor or whether his physical condition is such that he cannot do manual labor. Of course the jury has got to pass upon it, but it seems to me the question is competent. I think he is a medical expert and I think he can testify. Of course the jury are not bound by his answer. They have got to pass upon the question.

Q. Doctor, the Court has instructed you to answer that question. Do you understand the question, or do you desire to have it repeated again?
A. Repeat it again.

Question repeated.

Whereupon the defendant, but its counsel prays a bill of exceptions, which is hereby allowed and sealed accordingly.

B. A. VAIL,
[L. S.] Judge.

A. Well perhaps, one-half, perhaps one-third.
Q. Did you know this boy before he was hurt?
A. Yes, sir.
Q. How long had you known him before he was hurt?

A. Oh, I have known him from a very small boy.

Q. How frequently had you seen him?

A. I used to see him riding through town a good deal, going to the store.

Q. Did he live near where you lived?

A. About a mile.

Q. Do you notice any difference in his mental capacity or his temperament now as compared with his condition before the accident?

A. Yes, he is crosser and don't have so much to say—irritable.

Q. In your opinion is that a natural result of the injuries which he has sustained?

A. It is.

Cross-Examination by Mr. Strong:

Q. Doctor, you have taken quite an interest in this case, haven't you.

A. Yes, sir.

Q. Even to the extent of assisting in procuring witnesses?

A. I haven't procured any.

Q. Talking to witnesses?

A. No, sir.

Q. Sure about that?

A. No, I talked to some coming up on the train to-day.

Q. Not before that?

A. Yes, I might. I did see a lady that taught school.

Q. Talked to her, eh?

A. Talked to her a little about him, yes.

Q. Any others that you remember now?

A. None, sir.

Q. Perhaps you have talked to others that you don't remember?

A. I don't remember talking to them.

Q. Are you on social terms with the family of this boy?

A. Have attended them, yes, off and on.

Q. I say on terms of social intimacy.

A. Oh, no.

Q. What?

A. I attend them, that is all.

Q. An occasional visitor of the family outside of your attendance?

A. No, sir.

Q. You say you knew the boy quite well before he was hurt?

A. Yes, sir.

Q. And what knowledge had you of him?

A. Well, I would meet him on the street.

Q. What?

A. Met him at the store a good deal up in town.

Q. What store?

A. There at West Long Branch.

Q. And in town? Where in town?

A. In West Long Branch.

Q. See him riding, you say?

A. Yes, see him riding a pony. He used to come quite frequently to the house for me to go up to his home.

Q. You mean riding on horseback?

A. Yes, sir; riding a pony.

Q. What?

A. Yes, sir; riding horseback.

Q. Had you ever attended him before the accident?

A. Oh, I think I had.

Q. For what?

A. I think I attended him one time for malaria and chills.

Q. When was that?

A. I don't remember just when it was. A year or two before he was hurt.

Q. A year or two?

A. Yes, sir.

Q. How long were you attending him then?

A. Oh, I made three or four calls on him.

Q. Covering what time?

A. A week, perhaps.

Q. And after that did you see anything more of him until he was hurt?

A. Oh, I would see him down town, met him at the store and with the boys around there; used to come down and ride his pony around town and have the boys up behind him.

Q You never had any occasion to talk to him, did you?

A. Oh, yes; I used to talk to him.

Q. What about?

A. Oh, different things; ask him what he was doing, whether he was going to school,—quite a number of things.

Q. Did you take any more interest in him than you did in any other small boy around town, or were you in the habit of talking that way to all small boys?

A. Well, I have to that boy—all boys.

Q. Are you pretty much occupied by your medical practice?

A. Yes, sir.

Q. You don't have time to talk very much to boys, do you?

A. Oh, meet them along the street.

Q. Well, now, Doctor, you don't mean to say that this boy has epilepsy now, do you?

A. Oh, no; no, sir.

Q. You don't mean to say that he ever has had an epileptic seizure, do you?

A. No, sir.

Q. You don't mean to say that he has at present any symptom of epilepsy, do you?

A. Well, he—

Q. No, just answer that question.

Mr. Wilson: He is going to answer it. What do you want to interrupt him for?

Q. What do you say about that, whether he has at the present time any symptom of epilepsy?

A. Well, after wounds of this kind irritability—

Q. I object. I want an answer to that question, please.

A. I will have to just tell you what I am judging on.

Q. I don't want to know what you are judging on; I want to know whether he has any symptoms of epilepsy.

A. Yes, he has irritability.

Q. Well, irritability isn't any very sure sign of epilepsy, is it?

A. After head injury it is.

Q. You mean that wherever after head injury there is irritability, that that indicates approaching epilepsy?

A. Predisposition to it, yes, sir.

Q. That is not my question. May there not be that irritability and yet epilepsy not result?

A. Oh, that might be possible.

Q. Might be possible?

A. Yes, sir.

Q. You cannot say with certainty now that he will ever have epilepsy, can you? Do you mean to be understood as saying that?

A. No, I cannot say positively that he would have it.

Q. He may never have it; that is true, isn't it?

A. He may not.

Q. Did you ever see a case of head injury resulting in epilepsy?

A. Yes, sir.

Q. How many of them?

A. One.

Q. Within your practice?

A. Well, this was not in my practice, but I saw it.

Q. You have seen one person?

A. I have seen one, yes.

Q. You knew of one, not in your practice?
A. No, not in my practice.
Q. Who afterwards became an epileptic?
A. Yes, sir.
Q. How many head injuries similar to this one have you had in your practice?
A. I don't think I could say.
Q. What?
A. I couldn't say positive.
Q. Well, make a guess at it or tell us as near as you can. An estimate, then, not a guess. How many do you think you have seen?
A. Five or seven.
Q. Did any one of them develop epilepsy?
A. Well, a good many of them I didn't follow up.
Q. Do you know of any one of them having developed epilepsy?
A. I knew a great many of them and didn't know the history of them at all, at the hospital.
Q. I ask you the question, do you know of any one of them having developed epilepsy?
A. No, sir; I don't. I never had a chance to observe them.
Q. Have you ever heard since that they had epilepsy?
A. No, sir; I didn't hear anything about them afterward.
Q. Now you say that you think that this young man's earning capacity may be impaired to the extent of a third and perhaps to the extent of a half; by what?
A. Well, the boy is——
Q. No, no; just say by what.

MR. WILSON: I submit he ought not to be interrupted.

MR. STRONG: I have a right to have a definite answer.

A. Mentality.

Q. What?

A. Deficient mentality.

Q. By deficient mentality; is that your full answer?

A. I mean he is not competent to study. It would not be advisable for that boy to study. If he can't study he can't get an education.

Q. Then you think the impairment of his mentality by rendering him incapable of study?

A. Yes, sir.

Q. That you think?

A. Yes, sir.

Q. That is, you are assuming in that that he will never be able to study, are you?

A. I can't go so far ahead as that. I say now it would not be advisable for that boy to study.

Q. But in saying that his capacity to the extent of one-third or perhaps one-half capacity of earning is impaired, does that proceed upon the idea that he never will be able to study?

A. Well, he has made very little advance in fifteen months.

Q. Just answer that question.

MR. STRONG: I move to strike out what he started to say. That is not an answer to the question.

(Question repeated.)

A. Well, I say at the time that he should acquire an education.

Q. During what time do you claim that he will be incapable of studying?

A. Well, time to load the gun.

By The Court:

Q. What do you mean by that?

A. I mean in time to acquire his education.

By Mr. Strong:

Q. Who spoke of loading any gun?

A. Well, I mean in saying that, acquiring knowledge.

Q. Is that your way of expressing the idea of acquiring knowledge, that it is loading the gun?

A. Yes, sir.

Q. Well, then, during what time, to come back to the question, do you assume that he will be incapable of studying? Can't you tell?

A. Well, that depends altogether on how the boy becomes.

Q. You can't tell definitely now whether he will be incapacitated from study during the time that he ought to be loading his gun or not, can you?

A. No, sir; I couldn't be positive.

Q. What?

A. I can't be positive of that.

Q. No, you can't be positive. Well, in saying that his earning capacity is perhaps impaired to the extent of one-third or more, upon what basis of time during which he will be incapable of studying do you render that opinion?

A. You will have to make that a little plainer. I don't understand it.

A. Well, I should say three or five years.

Q. Then you think—you mean to say that then, that for three or five years from now he will not be able to study?

(Answer ordered stricken out and question repeated.)

A. Yes.

Q. But you do say that depends altogether on things that you cannot be sure of, doesn't it?

A. Future developments, yes, sir.

Q. Within what time would you expect epilepsy to develop, if it ever is going to develop from such an injury?

A. Well, time varies.

THE COURT: In your best judgment, Doctor, in this case.

Q. Just let me ask you; have you any definite idea about that at all?

A. Definite idea how long before it will develop?

Q. Yes.

A. No, sir.

Q. What?

A. I haven't any definite idea how long before it will develop.

Q. As a matter of fact, you never have had any experience in such a matter?

A. No, sir.

Q. In your fixing the extent of impairment of earning capacity from one-third to one-half, did you fix that upon the hypothesis that epilepsy was going to result in this case?

A. No, sir.

Q. That was not on the hypothesis of epilepsy?

A. No, sir.

Q. Then you did not really expect epilepsy would result, did you?

A. Well, the chances are more in favor of it than not.

Q. Well, why didn't you figure your impairment of his earning power then on the basis of epilepsy?

A. Well, I took what he really had now.

Q. Yes, what he really had now. Well, now, he may entirely outgrow these symptons, may he not?

A. Possibly.

Q. These cases of head injury that you have had in your practice, five or seven, didn't they recover entirely?

A. They had when they left the hospital, that is all?

Q. Then you never have had a case of head injury that did not entirely recover, have you?

A. Yes, sir.

Q. You have? I mean outside of this one.

A. Well, not a contusion; without a fracture.

Q. I mean head injury by a blow on the head.

A. Yes, where the skull was fractured.

Q. Where the skull was fractured?

A. Yes.

Q. Oh, well, the skull was not fractured in this case, you said?

A. Well, I said I couldn't make out positively that it was.

Q. Well, you have led us to understand that you could not find any fracture of the skull; isn't that right?

Q. Yes, but he had pretty near the same symptoms that he would have had if he had a fracture.

Q. Haven't you expressed the opinion that the skull was not fractured?

A. Yes, sir.

Q. Do you mean that or don't you?

A. I mean it.

Q. Then his skull was not fractured, in your judgment?

A. That is right?

Q. Now have you known any head injuries in which the skull was fractured which did not recover entirely?

A. No, none that I can now remember.

Q. None that you can now remember?

A. No, sir.

Q. Doctor, in the ordinary walk of this boy you don't notice any lameness, do you?

A. At times.

Q. Have you noticed it today, as he walked in and out of this room before this jury?

A. No, sir.

Q. Have not noticed it?

A. No, sir.

Q. How lately have you noticed it?
A. Noticed it Sunday.
Q. What was he doing then?
A. Looking at him.
Q. I say what was he doing?
A. Walking.
Q. Walking lame for your observation, was he?
A. I don't know whether he thought I was looking at him or not. He was going out to get in the wagon.
Q. He can run, can't he, as well as walk?
A. Yes, sir.
Q. Your knowledge of his getting tired and the effect of exertion on him and the effect of study, from whom did you get that?
A. Got it from him.
Q. From the boy?
A. From the boy, and his parents too.
Q. That is what they told you?
A. Yes, sir.
Q. You haven't observed anything of that kind yourself, have you?
A. No, I can't say I have.

PLAINTIFF RESTS.

DEFENDANT'S TESTIMONY.

Miss MARION STEINER, sworn for defendant:

DIRECT EXAMINATION by Mr. Applegate:

Q. What is your occupation, Miss Steiner?
A. I have been a public school teacher.
Q. Where?
A. In the townships of Ocean and Neptune.
Q. The Ocean Township school is known as what school? Sometimes called the Poplar school?
A. One of them is the Poplar School.
Q. Which one?

Q. There are two; one at Oakhurst.

Q. You taught at what is known as the Poplar school did you not?

A. I have taught at both of them.

Q. And the Poplar school is situated where, in the township of Ocean?

A. In the township of Ocean, so called, the town of Poplar, probably three miles from Elberon, west.

Q. What years did you teach in the Poplar School?

A. One year in 1904 and 1905.

Q. Commencing when and ending when?

A. Commencing in September of 1904, and ending in June of 1905.

Q. Do you know Andrew Jackson Defguard?

A. He came to school at the Poplar School.

Q. You know him?

A. Yes.

Q. And was he a pupil of yours during that time?

A. Yes.

Q. How much of the time was he a pupil of yours?

A. During the year he came twenty-eight days.

Q. What?

A. Twenty-eight days during the year he came.

Q. Twenty-eight days?

A. Yes, sir.

Q. Did you notice while he was there a pupil any lameness about the young man?

A. No, sir.

Q. Never did?

A. But I didn't notice him particularly.

Q. What say?

A. I didn't notice the child particularly in that respect.

Q. Did you know at that time that he had been injured?

A. I live in the neighborhood and at the time

of the accident I heard about it, but didn't know the child when he came to school; or rather, when I took the school, I was introduced to him as the boy who had been injured in a railroad accident.

Q. Did you receive any communications during that time from the boy's people?

Objected to.

Q. In regard to your attention to the young man?

Objected to.

THE COURT: Is that competent, do you think, Senator, what communications she received from other people? Isn't it confined to her own observation of the boy?

MR. APPLEGATE: I don't insist on the question.

Q. Was there any complaint made during the attendance of the young man to you as teacher in regard to his regular attendance?

Objected to.

THE COURT: The question is overruled. I don't think is is competent, Senator. It seems to me that her testimony must be confined to her own observation of the boy.

Q. You say that his attendance during that time was twenty-eight days in the course of the year?

A. Yes.

Q. Do you know any reason why he did not attend more regularly?

A. When the child came to me he was accompanied by one of his relatives, who told me about the accident, and said that he suffered from headache, that the doctor had said not to force him to study.

Q. How did you find the boy? Did you find him apt as a pupil?

A. I did not realize that I would ever be on the stand as to whether he was bright or not, or I would have noticed him more carefully.

Q. Are you not able to state now as to whether he had any particular aptitude for study or not? You can't answer that question?

A. Well, I cannot answer it. I don't know in just what way to answer it. I could not truthfully say that I thought the boy was not bright; he was not a dumb boy by any means.

Q. In respect to his conduct did you find him a good or a bad boy?

A. Well, pretty much like other boys.

Q. Did you as his teacher notice any defect in his mental faculties at that time or during that time?

A. Well, the child found it hard to get his lessons. He did not complain to me that his head hurt him. He did not say that he could not study because his head was bothering him.

Q. But it was hard for him to acquire his lessons?

A. Yes, it was hard.

Q. Did you attribute it to any particular cause?

Objected to.

THE COURT: Do you think that is competent?

MR. APPLEGATE: I don't insist upon it if it is contrary to the Court's view.

Q. When you received the information that the boy should not be made to study too hard, did the boy have knowledge of it?

Q. Yes, the boy stood alongside of his aunt.

Q. He stood alongside and heard it?

A. Yes, sir.

Q. Did you notice whether that had any effect on the boy or not?

A. The boy came so seldom that I didn't have a

chance to prove whether he wanted to study or not.

Q. Well, did you or did you not attribute any failure on his part to study to that information?

MR. WILSON: I submit, if the Court please, that cannot be competent.

THE COURT: No, it seems to me that would be the natural conclusion, if the boy heard somebody say he should not be compelled to study, he very naturally would not. I think we would all do that.

Q. Has Dr. Beach seen you particularly in reference to the boy's conduct as a pupil?

A. How is that?

Q. Has Dr. Beach called upon you and talked with you in reference to the boy?

A. Dr. Beach has been our family physician, and of course naturally, being friendly in our relations between the two families, he has talked to me, yes, but not particularly, and only at one time. He drove in my place at one time and said there was going to be a trial of the Defguard boy, and did I think that he had been hurt by the accident.

Q. When was that?

A. This was some time ago; four weeks, I should think.

No Cross Examination.

MISS ANNA BENDER, Sworn for Defendant.

DIRECT EXAMINATION by Mr. Applegate:

Q. Miss Bender, I believe your occupation is that of teacher?

A. Yes.

Q. And you taught the Poplar school in the years 1901 to 1904?

A. Yes.

Q. During that time was Andrew Defguard a pupil of yours?

A. Yes.

Q. Did you notice his condition of health during that time?

A. He was well as far as I know. I didn't notice anything different.

Q. Was he a studious boy?

A. The first year that I had him he did quite well. He attended regularly and was good in his lessons. After that he appeared to me to lose interest to some extent. He always did the work that I gave him to do, but he was not as eager for it as the first year.

Q. Was he regular or irregular in his attendance?

A. He was irregular the first year, more so than others.

Q. To what extent was he irregular the second and third year?

A. I can't tell you exactly, because I don't remember. I know that he left the school perhaps two months—I can't say positively—before the school was out, and he was out at different times through the year.

Q. Do you know how much he was out of school altogether?

A. No, sir; I couldn't say.

Q. In any one year?

A. No, I couldn't state.

Q. In any one year can you state how much he was out of school altogether?

A. No, I couldn't tell you.

Q. Take the year 1904, the year before he was hurt.

A. I can't remember. It has been several years

ago. Of course I don't keep any particular account of any child that I have.

Q. Well, was he in attendance half the time?

A. I should think so, perhaps more.

Q. How much more?

A. I don't know; I can't say.

Q. How was it the second year?

THE COURT: Well, the year you asked about, Senator, was the last year.

MR. APPLEGATE: That is the last year before he was injured, 1904. Now I ask about 1903.

A. Well, I don't really believe there was much difference in the attendance of those two years; I wouldn't be positive.

Q. Would you call his attendance regular or irregular?

A. No, I should call it irregular.

Q. Was it very irregular?

MR. WILSON: I think the adjective ought to be eliminated, and she ought not to be encouraged to characterize it so, Senator; therefore I object to it for that reason.

THE COURT: I think it is competent, Mr. Wilson. Evidence has been offered to show —evidently intended to show that the boy's mental condition was not as good after the accident as before. Now I think it is proper to show what his school attendance was before the accident, and from that draw a comparison with what it was afterwards.

MR. WILSON: That is not the question. The witness has been asked how frequently he was in attendance. That was not objected to. Then counsel, leading the witness, put in her mouth this question: "Was his attendance irregular?" She says, "Yes, it was irregular." Then he goes further and says, "Was it very irregular?"

and that was the question that ought not to have been asked, to which my objection was entered.

THE COURT: I will allow the question. The door was opened and I think it is proper.

A. I don't remember. As I said before, he was out, I think, the last two months. I mean that I can't tell how much he was out.

Q. That was the last year?

A. Well, that was the last two years; both years the same, as far as I can tell.

Q. You say he was out the last two months in both years?

A. I think so; I will not be positive.

Q. You haven't seen him at all since the injury?

A. I saw him once.

Q. But that was not at school?

A. No, sir.

CROSS-EXAMINATION by Mr. Arrowsmith:

Q. Do you keep a record of the attendance of your pupils?

A. Yes.

Q. And there is such a record now?

A. Yes.

Q. And that would tell accurately?

A. Yes.

Q. How many days of all the three past years?

A. Yes.

Q. Do you know where that is now?

A. It is here in the room.

Q. And that would tell accurately?

A. Yes.

REDIRECT EXAMINATION by Mr. Applegate:

Q. Could you tell if you had that record?

A. Yes.

Q. Who has it?

A. Mr. Strahan, as far as I know.

Q. (To Mr. Strahan:) Mr. Strahan, you are the supervising principal?

MR. STRAHAN: Yes, sir.

Q. Have you he record of the Poplar school for 1903 and 1904?

MR. STRAHAN: Yes, sir.

MR. WILSON: The gentlemen tells me that he has reckoned it up. Why not let him testify?

THE COURT: Yes; why not call him as a witness? You are satisfied with that?

MR. APPLEGATE: Yes sir.

By Mr. Wilson:

Q. Wasn't it quite the custom of the boys in that neighborhood, farmers' boys, to leave early in the spring?

A. Well, not boys as small as that child was; older boys.

By Mr. Strong:

Q. He was about ten years old at that time, wasn't he?

A. I presume so; I don't remember. The roll book will tell his exact age.

SARAH EVERETT, sworn for defendant.

DIRECT EXAMINATION by Mr. Applegate:

Q. You reside in Eatontown, I believe, Miss Everett?

A. Yes, sir.

Q. And you are a teacher by occupation?

A. Yes, sir.

Q. And you know Andrew Defguard?

A. Yes, sir.

Q. The plaintiff in this case?

A. Yes, sir.

Q. Did he ever attend school?

A. Yes, sir.
Q. What years?
A. He came seven days in October of 1905 and three days in November, making ten days.
Q. In 1905?
A. Yes, sir.
Q. How about 1906?
A. He left my school then to go to Poplar, in November of 1905.

MR. WILSON: If the Court please, I don't see how this evidence contradicts or how it is competent, in view of the admission and statement of the plaintiff. Our proof is that the boy has not attended school since the injury.

THE COURT: No, but supposing they wanted to prove that he has.

MR. WILSON: Well, I don't see how this is proof of his attendance.

THE COURT: Why not?

MR. WILSON: The boy says and his mother says and his aunt says that he was simply there occasionally. Now this lady swears to ten days attendance.

THE COURT: Now if they can supplement that with teachers from other schools, of more than you say it is, why is not that competent?

MR. WILSON: Well, if that is it.

THE COURT: Well, I wouldn't say it is; but I think it is perfectly competent so far.

Q. Did he attend your school after he was injured in 1904?
A. I think he came three or four days in that year.
Q. Three or four days in that year?
A. Yes, sir.
Q. Did you ever notice any lameness in the young man?

A. I am not very observant, so I didn't notice it at all.

Q. Did you ever notice any physical injury from which he was suffering?

A. Well, I thought he tired out rather quickly. He didn't study very long at a time, but I didn't know why.

Q. He didn't study very long at a time?

A. No, sir.

Q. And with reference to the hours of recess, when would this fatigue that you noticed occur?

A. Well, he played just like other boys.

Q. He played like other boys?

A. Yes, sir.

Q. Played just as hard as the other boys?

A. So far as I noticed.

Q. And would he come in very tired or otherwise?

A. Just the same. I never noticed any difference.

No Cross Examination.

Charles J. Strahan, sworn for defendant.

Direct Examination by Mr. Applegate:

Q. What position do you occupy with reference to the public schools?

A. Supervising principal.

Q. Have you the register of the schools within your district?

A. I have all but the present year.

Q. Prior to July, 1904?

A. I have the four years, 1901 to 1904, inclusive.

Q. You heard the testimony of Miss Steiner, I believe it was?

A. Yes, sir.

Q. Or was it Miss Bender?

A. I heard both, yes, sir.

Q. Can you turn to your register and give us a statement of the number of days the boy attended school in that year and the number he was absent?

A. Miss Steiner said he attended twenty-eight. That is correct. He left that school November 14th.

By the Court:

Q. What year?

A. 1904.

By Mr. Applegate:

Q. Left in 1904?

A. He left November 14th. There had been forty school days up to that time and he attended twenty-eight.

MR. WILSON: That was after the accident.

Q. What year was it?

A. 1904, up to November, 1904.

By the Court:

Forty school days after the school opened in the fall?

A. Yes, sir. At the time he left there had been forty school days and he attended twenty-eight.

By Mr. Applegate:

Q. That year began when?

A. The day following Labor Day, I think.

Q. What year?

A. 1904.

Q. Have you the record there of 1903?

A. There are 176 school days and he attended 116½.

Q. 116 out of 176?

A. Yes, sir.

By the Court:

Q Was that the year ending July, 1904?

A. Yes, sir; ending June 30th.

By Mr. Applegate:

Q. The school year of 1903 began and ended about the same time, I presume?

A. Yes, sir.

Q. And have you the records there of Miss Steiner's teaching?

A. I gave you Miss Steiner's first. That was twenty-eight days. That was 1904.

By Mr. Strong:

Q. That is down to November 14th?

A. Yes, sir; that was the one I gave first.

Q. Now after that.

A. He left the school on November 14th and did not return again to that school.

By Mr. Applegate:

Q. And the days of attendance, did you give them?

A. For the year now, do you want?

Q. For Miss Steiner's year.

A. Twenty-eight days out of forty; yes, sir; I gave that.

Q. Have you any record of 1905.

A. No; he attended very little in 1905. I looked over the register but didn't take it down. It was sent in to the state superintendent.

By Mr. Strong:

Q. You have the registers here, have you?

A. Yes, sir.

Q. You have been testifying from a memorandum taken from the registers?

A. Yes, sir.

Mr. Strong: We will offer the registers. if it is desired on the other side.

MR. ARROWSMITH: No, we are willing to accept his statement.

CROSS EXAMINATION by Mr. Wilson:

Q. Mr. Strahan, how many days was he in attendance in 1903 and 1904—the year 1903-1904.

A. 116½ days.

Q. Out of—

A. Out of 176.

Q. Now the year previous, have you got a record of that?

A. Yes, sir; he was present 57½ days out of 177.

Q. He was about five years old at that time?

A. The register will show.

THE COURT: He must have been more than that.

A. The dates of that are different. Our teachers have it recorded different from what was given in this morning.

Q. Do you know as a matter of fact?

A. The ages as given to the register, that is all we have to go by. You will find it recorded on the first page. There is a list of the scholars and their ages given.

Adjourned till June 12, 1906, 10 A. M.

Freehold, N. J., June 12, 1906.

Trial of the cause resumed at 10 A. M.

HORACE B. BANNARD, Sworn for defendant.

DIRECT EXAMINATION by Mr. Strong:

Q. Where do you live, Mr. Bannard?

A. Asbury Park.

Q. And are you employed by the New York and Long Branch Railroad Company?

A. Yes, sir.

Q. In what capacity?

A. Engineer of maintenance of way.

Q. How long have you held that position?

A. Twenty years.

Q. Continuously?

A. Continuously, yes, sir.

Q. Are you familiar with the locality of the Broadway crossing at Long Branch?

A. I am.

Q. And have you made a survey and map of that locality?

A. I have.

Q. Personally made the survey, did you?

A. Personally, yes, sir.

Q. And the map also?

A. And the map also.

Q. Is this the map? (Indicating map on easel.)

A. That is the map, yes, sir.

Q. Now referring to this map, what is the scale of it?

A. Thirty feet to the inch.

And is that scale applicable throughout the entire map?

A. It is, yes, sir.

Q. And is the map correctly drawn to that scale?

A. It is.

Q. Does it correctly show all the surroundings of that crossing?

A. It does.

Q. Now what are the compass points? They are shown on the map, are they?

A. North is in that direction, east, west and south. (Indicating.)

Q. North points to the lower right hand corner?

A. Yes, sir.

Q. Broadway is shown there, is it, crossing the railroad?

A. Broadway is shown here, yes, sir; crossing the railroad. This is west, this is east.

Q. Then the direction in which this wagon is said to have gone on that day is from the bottom to the top?

A. From the bottom to the top, yes, sir; in that way. (Indicating.)

Q. And the direction in which the train is said to have run is from the left to the right?

A. Left to right.

Q. Have you shown the Edwards' building here?

A. Edwards' office and store is situated here. (Indicating.)

Q. Shown in—

A. Shown in black lines. It is an irregular shaped building.

Q. Now the mill building?

A. The mill building is on this corner.

Q. On the opposite side of the street from his store?

A. Yes, sir.

Q. That is not shown on the map, is it?

A. No, sir.

Q. Have you shown the location of Slocum's coal office?

A. Slocum's coal office is here. Slocum's coal trestle is there, connected with the track, with our east bound track.

Q. The map shows four tracks crossing Broadway?

A. Yes, sir.

Q. The first of them is—

A. The first is called the east siding, the second is called the northbound main, the third is the southbound main and the fourth is the west siding.

Q. So that there are two running tracks and a siding track on each side of the running track?

A. Yes, sir.

Q. Have you shown the location of the watchman's box?

A. The flagman's house is situated at that point, yes, sir. (Indicating.)

Q. And designated how?

A. "Flag house." Directly back of it is a small coal box.

By Mr. Wilson:

Q. On the railroad's right of way, is it?

A. Yes, sir.

By Mr. Strong:

Q. How high is this coal box?

A. The coal box is about three feet high.

Q. And the flagman's house?

A. The flagman's house, to the peak of the roof, I should judge was about nine feet high.

Q. And what diameter?

A. Seven feet two inches in diameter. It is octagonal shaped, however.

Q. And how far from the nearest track, nearest rail?

A. About seven feet.

Q. Have you shown the right of way line?

A. Yes, the right of way lines are shown in dotted lines, the full line and three little dots on each side. The right of way is one hundred feet wide, fifty feet each side of the center line between the two main tracks.

Q. Then the right of way line is just southwesterly from Edwards' store a few feet?

A. Yes; the nearest point there is about three feet.

Q. Have you made observations to determine what view may be had by a person traveling along Broadway in the direction pursued by this wagon, looking to the south, or in the direction from which this engine is said to have come?

A. I have.

Q. Just state those observations.

MR. WILSON: If your Honor please, that inquiry is objected to, unless the same conditions are imposed as under the proofs were found to have existed that day. The permanent physical surroundings are the same always: namely, the Edwards structure and the structures east of it. There is proof in the case uncontradicted that on the day in question there were upon the siding west of the Edwards building and on the railroad's right of way, and pushed up nearly on a line with the flag house, four or five iron coal cars, sufficiently high to obscure the vision of one looking towards the south. Now I most respectfully insist that if this testimony has any probative force whatever, the inquiry must involve the same conditions with which the traveler was presented on the day in question.

THE COURT: Why isn't that so, Mr. Strong?

MR. STRONG: I don't think it is so. I think we have a right to show the permanent physical conditions, and then that may be taken in connection with the fact that there were these coal cars. We certainly have a right to prove how it was.

THE COURT: I will allow the inquiry.

Exception noted for plaintiff.

Q. Answer the question, please.

A. I would state that I made observations on Broadway, starting at the points which are enumerated on this map with red circles; measured from the east rail of the south bound track along the center of Broadway. The first point—the furthest point upon this, the furthest point east

of the crossing at which a view could be obtained of a north bound train approaching the crossing of Broadway, is located 360 feet from the east rail of the south bound track, measured along the center of Broadway. At that point a view of a north bound train could be had at a distance from the center of Broadway crossing, measured along the east rail of the south bound track, of 770 feet.

Q. Let me ask you, as you look south from this crossing, are the tracks straight?

A. The tracks are straight for a distance of 1,776 feet from the crossing, yes, sir, before they strike a curve. The next point at which a view can be obtained is located 189 feet from the center of Broadway crossing, measured also along the center line of Broadway, and the distance at which a train could be seen approaching from the south is a distance of 646 feet. The next point of observation is situated 137 feet from the center of the crossing, at which point a train could be seen for 521 feet from the crossing. The next point is 55 feet from the east rail, at which point a view can be obtained of 1,900 feet of an approaching train. The last observation was made at a point sixteen feet from the east rail of the south bound track, where there was no obstruction at that point, because on the east siding would be entirely clear, so that the view is unobstructed for 1,900 feet. That last point is after you get clear from any cars standing on the east siding, any cars or any other obstruction that could be there to obstruct the view.

Q. That is 16 feet from the nearest rail of the north bound track?

A. The last rail of the south bound track, yes, sir.

Q. The east rail is the nearest rail, is it?

A. The nearest rail to the east side of Broadway.

Q. The nearest rail in the direction as you approch, as this vehicle was going?

A. Going west, yes, sir.

Q. Now you have given a point of observation here 55 feet, I think, where you said there was a view of 1,900 feet?

A. Yes, sir.

Q. Does that view of 1,900 feet exist only at that 55 foot point, or on what space as you travel along the highway?

A. That view is obtained for a space of about seven feet, or between an obstruction which exists here in the shape of a willow tree, also the fire house, and also the flag box of the company.

Q. Did you say 17 or 7 feet?

A. I will measure it to make sure. (Measures on map.) 7 feet.

Q. Then after that the view is obstructed by what, the flag house?

A. The view is obstructed by the flag house and by cars, should they be on the siding at that point.

Q. The flag house you said was about seven feet in diameter?

A. Seven feet, two inches, in diameter, yes, sir.

Q. Now it has been said that there were five or six or seven cars, large coal cars, standing a few feet south of the crossing. Are you familiar with that style of cars?

A. I am, yes, sir.

Q. What is the average or the usual length of such cars?

A. The average length is about thirty-five feet.

Q. Thirty-five?

A. Yes, sir.

Q. That includes bumpers and all—everything?

A. Bumpers and all, yes, sir.

Q. How far is the west siding which you have indicated on your map from the south bound track?

A. The east rail of the west siding is 12 feet from the east rail of the south bound track.

Q. Twelve feet?

A. Yes, sir.

Q. When was your map made?

A. Made last Wednesday, I think, or Thursday of last week.

Q. And were the conditions existing at that time the same that existed at the time that this accident occurred?

A. I have seen no change in the surroundings whatever.

Q. You have been familiar with them?

A. I have, yes, sir.

Q. Throughout the whole time?

A. Yes, sir.

Cross-Examination by Mr. Wilson:

Q. Mr. Bannard, is this map drawn to a scale?

A. It is, yes, sir.

Q. Are you in the employ of the New York & Long Branch Railroad?

A. I am.

Q. What is your official capacity?

A. Engineer of maintenance of way.

Q. And you made this map—

A. I did.

Q. —In preparation of this case?

A. Yes, sir.

Q. Now your representation assumes that the traveler is going in a westerly direction?

A. Yes, sir.

Q. And when he is back about 360 feet he can see 770 feet?

A. Measured from the center of the crossing down the south bound track, yes sir.

Q. And when he is 189 feet he can see 646 feet?

A. Yes, sir.

Q. And when he is 147 feet he can see 521 feet?

A. No, that is not—

Q. Wait. And when he is 88 feet away from that crossing I ask you how far he can see to the south.

A. As far as the front of the Edwards building.

Q. And how far is that?

A. From the center of Broadway?

Q. Yes?

A. About 94 feet.

Q. About 94 feet; when he is 88 feet away from the crossing he can see about 94 feet in the direction from which the engine came if it came from the south, and then his vision is obscured by the Edwards building; isn't that true?

A. Yes, sir.

Q. How far can he see when he is 100 feet away from the track?

A. About the same distance.

Q. So that, Mr. Bannard, in arranging your map and in indicating views upon the map, in order to get the results which you have shown, you have been obliged to make your view at a point always where the Edwards structure did not obscure the vision of the traveler; isn't that true?

A. That is true, yes.

Q. So that these long distances to the east were before you got to the Edwards structure, and your single measurement of 55 feet away from the tracks was after you got beyond the western boundary of the Edwards building, wasn't it?

A. Yes, sir.

Q. And when you got to that point, if you had gone seven feet further your vision would have been entirely obscured by this structure on the railroad's right of way, wouldn't it?

A. Those structures are a fire house and a willow tree.

Q. Haven't you already said that after the

traveler had made the journey of seven feet from this point which you have marked 55, that if he had gone seven feet his vision would be obscured by those two objects?

A. Yes, sir.

Q. One other inquiry. You never made any actual view to see how much the vision of the traveler would be obscured by the presence of coal cars on that siding?

A. No, sir; there were no coal cars there when I made the observations.

Q. And you haven't located, I think, the gates that protected the crossing?

A. Yes, sir; the gate posts are represented by these little marks there, four gate posts. (Indicating.)

Q. Where is one? Here on this corner, is this it? (Indicating.)

A. No, sir; right there, rectangular, (indicating.)

Q. It is not marked in any way but by that rectangular mark. Now I ask you this: assuming that this east siding which you have shown here was occupied on the morning in question by four or five coal cars such as have been described, assuming that these coal cars were run down on the track until the north end of them was almost opposite the flag house; assuming that the flagman stood here at this pole or post, being the one from which it is said he operated the mechanism: I ask you whether standing in that position the flagman could have seen a train approaching from Long Branch.

A. I don't think he could have seen the train; he could have seen the smoke from the smokestack.

Q. Suppose the engine at that very moment did not have any smoke coming out?

A. Well, he wouldn't have seen it if there was no smoke coming out.

REDIRECT EXAMINATION by Mr. Strong:

Q. You were asked as to the measurement from a point 88 feet from the crossing, and you said the distance you could see down the track was how much?

A. Ninety feet.

Q. Can't you take a line of some sort and clear the Edwards store?

A. Yes, you could by looking down a diagonal line.

Q. When you said 90 feet.

A. I meant at right angles to the right of way.

Q. But looking diagonally down the track it would be quite a considerable distance, wouldn't it, clearing the Edwards' store?

A. Well, 300 or 400 feet, I should judge.

Q. 300 or 400 feet measured along that south bound track?

A. About 150 feet.

Q. And you would have all of that view as you go easterly along Broadway until you get beyond the point marked 55 feet, wouldn't you?

A. Yes, sir.

Q. Seven feet beyond it?

A. Yes, sir.

Q. The view would get better as you went nearer to the tracks throughout that distance, wouldn't it?

A. Yes, sir.

RECROSS-EXAMINATION by Mr. Wilson:

Q. Mr. Bannard, assuming the traveler to have been at this point, 88 feet, just directed to your attention by Mr. Strong, you say that he could have gotten a view through here?

MR. STRONG: Not through there, no.

Q. Where?

(Witness indicates.)

A. Just clear the corner of that house.

Q. Well, he could see how far down the track?

A. About 150 feet.

MR. STRONG: Just get that as accurately as you can.

Q. I don't want you to have it any more accurately than you did before. You saw 150 feet, didn't you?

A. Yes, sir.

Q. He could get a glimpse of a train 150 feet away?

A. Yes, sir.

Q. Could he follow with his eye the journey of that train from the place he first saw it, 150 feet away, till it got to that crossing, if there were coal cars on the crossing, this fire box and the tree still standing, and the flag house?

A. No, sir.

Q. It would have been out of view in an instant?

A. Yes, sir.

Q. And as a matter of computation, if a traveler was 86 feet away from the crossing and traveling at an ordinary rate of speed with a horse and wagon, and could have got a glimpse of a train 150 feet away from the crossing, who would have got to the crossing first, the train or the traveler, the traveler 86 feet away and the train 150 feet away?

MR. STRONG: I object. It depends on the rate of speed.

MR. WILSON: I am asking him to take that into consideration.

MR. STRONG: He doesn't know anything about that.

Q. Can you conceive of any way in which a traveler 86 feet away could have seen a train 150

feet away from the crossing and then have collided on the crossing?

MR. STRONG: I think I ought to object to that. I don't understand the purport of it.

A. I don't understand that question.

THE COURT: Well, the witness says he doesn't understand the question.

Q. Don't you understand the question. Mr. Bannard?

A. No, sir; I don't think I do.

Q. What is there about it that is obscure?

A. Well, if you will read it again I will tell you.

Q. You are so confused about it you don't know the question?

MR. STRONG: I submit that is improper.

(Question repeated.)

MR. STRONG: I object to the question as obviously irrelevent.

THE COURT: No, I don't think it is. This man is under cross-examination.

MR. STRONG: What is there in those facts to suggest that he could not be injured?

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

B. A. VAIL,
[L. S.] Judge.

A. I will answer it by saying I don't know.

By Mr. Strong:

Q. Can you see anything in the facts suggested in the last question which would prevent a man being injured at the crossing?

MR. WILSON: Pardon me. He says he

doesn't know. I submit that he is concluded by that answer.

THE COURT: He says he doesn't know. It seems to me if he answers your question he might discredit his testimony.

MR. STRONG: If I discredit it I don't see any reason why I should not.

THE COURT: He has answered that he could not conceive of any circumstances by which they could collide.

MR. STRONG: No, he hasn't said that; he said he didn't know.

(Question repeated.)

THE COURT: He is your witness, and I will overrule the question.

Whereupon the defendant, by its counsel prays a bill of exceptions, which is hereby allowed and sealed accordingly.

B. A. VAIL,
[L. S.] Judge.

MR. STRONG: We offer the map.

Map marked Exhibit P. 1

MR. STRONG: If the Court please, I think I ought at this time to move to strike out a portion of the testimony of Dr. Beach given yesterday, to which I had an exception at the time it was given. But it has occurred to me that in the light of the cross-examination of Dr. Beach I may properly now move to strike out a portion of the testimony; namely his statement that in his judgment the earning capacity of the boy would be impaired to the extent of one-third or possibly one-half, assuming that he should earn his living by mental as distinguished from physical labor. I think that was the substance of it.

MR. WILSON: No, he put it both ways, whichever way he was to earn it; and assuming that

the condition of his back and leg would impair his physical activities, and the pain in his head would impair his mental activities in the way of preparation by education. That is the way he put it.

MR. STRONG: Well, he justified that opinion by the conclusion that his condition would interfere with his fitting himself, and that by reason of interference with his education there would be this impairment. Now that being the basis of his opinion as brought out by cross examination, it seems to me that the testimony is manifestly incompetent. It is not a subject upon which the witness could have any expert opinion at all; and it seems to me that the testimony, that part of it, is entirely incompetent and may be prejudicial and should be struck out.

THE COURT: I want to ask, would not the proper inquiry be from a physician whether in his judgment the injury was permanent or not; and then isn't it a question for the jury to say upon that testimony how much if anything they would give? Of course if the evidence satisfies the jury that the injuries are permanent, and the liability is established of the defendant company, they would give a greater verdict than they would if the injuries were merely temporary and would be relieved. Now isn't that the proper inquiry? I think I allowed you to go a little too far with the doctor.

MR. WILSON: I was about to make this response to the Court's inquiry and in reply to counsel's motion. It is very astonishing how my distinguished friend, Mr. Strong, gets his second wind, and he seems to have done it, and he has made his motion, and I am prepared to say that it ought not to prevail. I do say this, however: that if your Honor grants the motion, as I presume your Honor will, we ought to have an opportunity of putting Dr. Beach back upon the stand.

THE COURT: Yes, I will allow you that; but it seems to me that in looking the matter over otherwise, I have allowed you to go a little too far; and I think the proper inquiry would be whether the injuries are permanent. And as long as I have allowed your motion to strike out, I think the doctor ought to be recalled to the stand to be further examined. I will strike out that part of Dr. Beach's testimony where he gave an opinion as to the boy's probable mental or physical capacity for work in the future, and as to how much it would be impaired. The proper inquiry of the doctor should be whether or not in his opinion the injuries were permanent.

MR. STRONG: He has testified upon that point.

THE COURT: Well, if they want to put him back upon the stand after this testimony is stricken out, they may do so.

MR. STRONG: I pray an exception.

MR. WILSON: I insist he is not entitled to an exception.

THE COURT: No, I think if I strike out that testimony upon your motion, they have a right to put him on the stand and I do not think you are entitled to an exception on that point.

MR. STRONG: Well, I desire to have my request noted.

THE COURT: Well, you may have that.

MR. WILSON: We may deem it entirely unnecessary to put the doctor back, but I desire to reserve that right.

MR. STRONG: I insist upon your doing it now.

THE COURT: Well, I think if you are going to put him back, Mr. Wilson, you ought to do it now, before they go on with their case.

Dr. EDMUND BEACH, recalled for plaintiff:

DIRECT EXAMINATION by Mr. Wilson:

Q. Doctor, directing your attention to the injuries which you have described and which this boy suffered, and first to the pain which he has in his head and the incidental discomfort which results, I ask you whether or not in your opinion that condition is permanent.

MR. STRONG: I object, on the ground that it is repetition.

THE COURT: No, I don't think so. I will allow the question.

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

B. A. VAIL,
[L. S.] Judge.

A. What is the question, Mr. Wilson?

Q. I ask you whether that condition of the head which I have just described in your opinion is permanent.

A. Well, I should think the condition of his head was liable to last two or three years anyway.

Q. Is it liable to last more than that?

Objected to.

THE COURT: I suppose you object to that as being a leading question?

Q. What I want, doctor, is your opinion about the matter. You are entitled to give your opinion as to the duration of this condition in his head, the pains in the head.

MR. STRONG: I object, on the ground that he has given his opinion already.

A. It may continue a year or more.

Q. What about the condition of his leg, doctor?

A. The deformity of his leg may in the course of five or seven years disappear.

Q. And may not?

A. And may not.

Q. And is the same true of the pain in his head?

Objected to.

Q. As to the duration of that?

A. I can't tell. It is impossible. That is a probable matter.

MR. STRONG: We have had the witness' opinion. This is a suggestive question.

THE COURT: No, Mr. Strong, after I granted your motion to strike out that testimony, they have a perfect right to put the doctor back on the stand and interrogate him as to the permanency, in his judgment, of the injuries which this boy has received. You may cross-examine upon it as much as you like.

MR. STRONG: I want the objection to appear on the record that it is repetition, and upon the other ground that it is leading. He has said here that the trouble in his head may continue a year or more, and that the deformity would disappear in the course of five or seven years, and it may not. Now the question is asked him, is that true of the head. Now he has already given his opinion as to the duration of the trouble in his head, and to ask him whether it may disappear or not in five years, after he has already given his opinion that it may continue a year or more, it seems to me is suggestive and incompetent, and moreover is irrelevant, because it is not a question of what may happen, but only a question of what probably will happen. I submit this

question ought not to stand in that form.

THE COURT: If you object to it upon the ground that the word "may" is used instead of "probable," that is probably a good suggestion. Substitute "probable" for the word "may."

MR. WILSON: We will start over again.

THE COURT: Strike that question out.

Q. Doctor, this boy now is suffering, under the proofs, from pains in his head.

Objected to.

THE COURT: Just let him ask the question, Mr. Strong.

MR. STRONG: I have a right to object to counsel incorporating in his question a statement of fact.

THE COURT: I don't think you have any right to interrupt counsel until the question is asked. Do not answer the question until the Court has an opportunity to rule upon it. That will give you an opportunity. Now proceed. Mr. Wilson.

Q. Now, Doctor, how long, in your opinion, will those pains in his head last?

Objected to as repetition.

THE COURT: Answer the question.

A. A year or more.

Q. How remotely from the time of the accident may epilepsy appear as a result of the accident?

MR. STRONG: I object. The witness has not shown any expert knowledge that qualifies him to speak upon that subject.

MR. WILSON: If your Honor please, I don't know that you wish any reply, but it seems to me that that objection is hardly

worthy of my distinguished friend. Here is a man who is a physician, and if there is any substance at all in the objection it is that he has not qualified himself to speak about epilepsy.

THE COURT: I think he has qualified himself. It is for the jury to say how much weight they will give to the testimony, but I think he has certainly qualified himself to answer the question.

MR. STRONG: I pray an exception. Your Honor will recall that he never saw such a case resulting in epilepsy.

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

B. A. VAIL,
[L. S.] Judge.

A. I never saw any, never had any in my practice.

Q. Have you known cases?

A. Yes, sir; seen them.

Q. How remotely have you known epilepsy to follow cases of this kind?

Objected to.

Q. How long?

A. Seven years.

MR. STRONG: The objection is that the witness stated yesterday that he never in his practice had a case resulting in epilepsy, and the testimony now that he has known some cases or has known of some cases which did not come under his professional treatment, where the epilepsy occurred seven years afterward, is not pertinent to this case.

THE COURT: I will allow the question.

Whereupon the defendant, by its counsel. prays a bill of exceptions, which is hereby allowed and sealed accordingly.

B. A. VAIL,
[L. S.] Judge.

Q. I think you have already said that in your opinion epilepsy was what would probably attack this boy sometime?

MR. STRONG: I object and move to strike that out.

THE COURT: He did say that yesterday.

MR. STRONG: I don't think he said it just in that way. But I don't think he ought to repeat it if he did say it and I don't think counsel ought to suggest it if he did not.

THE COURT: Possibly he did not use exactly the same words in the same relation to each other, but he said that, in my recollection, in substance.

MR. WILSON: You did go over just what he did say.

Q. Doctor, directing your attention to the knee, the condition usually is structural there, isn't it?

A. Yes, sir.

Q. And the mere duration of time cannot change that condition can it?

Objected to as leading.

A. It shows that by the deformity. There is a deformity there.

MR. STRONG: He said the deformity might disappear in a certain number of years. Now for counsel to argue with the witness is not proper.

THE COURT: Well, it is leading.

Q. Does the duration of time, Doctor, have any relation in changing this structural condition that is present there?

A. I said it might disappear in seven or ten years.

MR. STRONG: You said five or seven years, to correct you.

By the Court:

Q. What is your best judgment about it, Doctor?

A. Ten years.

Q. In your opinion will that leg ever be as strong as a normal leg?

MR. STRONG: I object. He has answered that question.

THE COURT: Answer the question. I will admit it.

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

B. A. VAIL,
[L. S.] Judge.

A. Will it ever be as strong?

Q. Yes.

A. That is problematic.

Q. Well, it is all problematical; but you are one of the few people in the world permitted to give an opinion in a lawsuit as an expert, and I ask you what your opinion is.

MR. STRONG: He said it was problematic.

THE COURT: Well, he can give his best judgment.

A. In my best judgment it would not.

CROSS EXAMINATION by Mr. Strong:

Q. Is your best judgment today better than it was yesterday?

A. That is for you to judge.

Q. You said in answer to the direct examination that the deformity of the knee may disappear in from five to seven years, or it may not. Is that what you say?

A. Yes, that is what I said.

Q. And in answer to a further question you said that your best judgment was that it would disappear in ten years; is that right?

A. That is right.

Q. This case that you have been led to mention where epilepsy occurred seven years after the injury, what was the injury?

A. Well, it was a hit on the head from a sharp object, a bolt.

Q. How was the injury inflicted?

A. Inflicted by machinery.

Q. What do you know about the case?

A. Well, I seen the man. I know from the history of it.

Q. You didn't treat the man at any stage?

A. No, I didn't treat it at all.

Q. You didn't see the injury when it was new?

A. No; I saw the place where it was struck. You could see the place.

Q. How many years after the injury did you see it?

A. Well, it must have been about fourteen years.

Q. About what?

A. Fourteen years.

Q. Fourteen years afterward?

A. Yes, sir.

Q. And what was there to indicate the injury at the time you saw it?

A. Just a small mark on the summit of the head.

Q. Did you learn whether there had been a fracture of the skull?

A. There wasn't any such history given.

Q. What?

A. The man didn't know.

Q. The man didn't know?

A. Didn't know about it.

Q. Who gave you the history?

A. Well, the gentleman who had the trouble was one of them.

Q. The man who had the epilepsy?

A. Yes, sir.

Q. Told you about it, did he?

A. Yes, sir; and then others too.

Q. What is that?

A. Then I made inquiries about it and others told me too.

Q. Who told you outside of the epileptic himself?

A. Well, I can't—I know several did, but I can't recall just who they were.

Q. You didn't get the history from any physician who had attended him, did you?

A. No, sir.

Q. And is it upon that case, upon what you learned concerning that case, that you base your opinion in this case that epilepsy will intervene?

A. Oh, no.

Q. Not upon that?

A. No, sir.

Q. It is not upon anything that you have ever had in your practice either, is it?

A. No, sir; I never had a case of epilepsy by a head injury.

Q. And you never saw a case of head injury followed by epilepsy except this one that you have told us about?

A. Not that I now remember of.

Q. And whether the epilepsy in that case occurred seven years after the injury or not, you took on the statement of the epileptic, did you?

A. Yes, sir.

Mr. Strong: Now if the Court please, I move to strike out the testimony.

THE COURT: Mr. Wilson, it appears now that the doctor bases his testimony in relation to this epileptic case entirely upon a case that it seems to me to be so remote that it can have no bearing on this case. How is it competent? Now the doctor says he takes this statement from the man who is supposed to have had the epilepsy himself, but did not come under his treatment. How can it be competent? I assumed yesterday when he was testifying that these cases were within his own knowledge.

(Mr. Wilson replies).

THE COURT: I will allow the testimony to stand.

MR. STRONG: Certainly that part of the testimony which says that epilepsy intervened after seven years, that part cannot stand.

THE COURT: I will allow the whole answer to stand. The doctor says—and I overlooked that part—that he does not base his opinion upon that case. I did not recollect that he said that. You move to strike it out and I overrule that motion.

MR. STRONG: I wish in my motion to state the portion of the testimony that I now move to strike out. I desire to except to your Honor's overruling my former motion, which was perhaps more extensive than the one I now make. May I have that exception?

THE COURT: I do not think you ought to experiment on it.

MR. STRONG: No, I have not experimented. I have made a motion and your Honor has now denied it, and it is not an experiment for your Honor to allow it.

THE COURT: What is your motion now, Mr. Strong?

MR. STRONG: I wish to make my motion now in a more definite form.

THE COURT: Then you want to withdraw the other?

MR. STRONG: I do not withdraw anything. I

have an exception to your Honor's ruling upon that point?

THE COURT: No you made a motion and I overruled it and give you an exception. Why isn't that all of it? You cannot pile one motion on top of another without asking a question.

MR. STRONG: If your Honor will allow me to state, I think in dealing with that question it was understood to relate to the general testimony that the witness had given on the subject of epilepsy. That was the way Mr. Wilson regarded it in his argument, and that is the light, I think, in which your Honor overruled it. Now I wish to make a more limited objection and move to strike out that portion of the testimony wherein the witness says that epilepsy within his knowledge has occurred as late as seven years after the injury. Now that part of the testimony is based entirely on this one case, and in that case based upon the statement of the epileptic, and I think that I am entitled to have that stricken out.

THE COURT: You brought that testimony out on cross-examination.

MR. STRONG: No, your Honor will allow me—

THE COURT: Yes, you did bring it out, because it was in the cross-examination of the doctor, where you asked him about the length of time after the accident, where you came in contact with it.

MR. STRONG: Mr. Wilson brought that out before.

THE COURT: Not this morning he didn't.

MR. STRONG: Your Honor is under a misconception. I do not wish to interrupt you, but you surely are.

THE COURT: As I understand now, you are moving to strike out testimony which was brought out on your cross-examination, and I do not think you have any right to cross-examine and see whether you want the testimony or not and then move to strike it out, and I refuse to allow the motion.

MR. STRONG: Since your Honor has put your ruling upon that ground, I wish to call your Honor's attention to the fact that Mr. Wilson asked this witness, "How long have you known of epilepsy occurring after the injury?" and he said "Seven years." That was in his direct testimony this morning, and by Mr. Wilson.

THE COURT: You did not make any objection to it at the time; you waited till you got to your cross-examination, and, then, circumstances having developed which seemed to me to change the situation, I made the inquiry of Mr. Wilson. Now you move to strike out the testimony, after the cross-examination.

MR. STRONG: No, sir; my motion is to strike out the testimony taken on direct examination, that he has known epilepsy to occur seven years after the injury. I could not object to that on the direct examination, because it was apparently based on his own knowledge. On cross-examination it appeared that it was based on the statement of the epileptic. Now I move to strike out not only the cross-examination but also the direct examination on that point.

THE COURT: I refuse, on the ground that your objection to the direct examination comes too late, and you cannot strike out your own cross-examination.

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

B. A. VAIL,
[L. S.] Judge.

DR. EDWIN FIELD, sworn for defendant:

DIRECT EXAMINATION by Mr. Strong:

Q. Doctor, you are a practicing physician and surgeon?

A. Yes, sir.

Q. Whereabouts?

A. Red Bank, New Jersey.

Q. And have practiced your profession there how long?

A. Since 1876.

Q. And are you a graduate of some medical institution?

A. Yes.

Q. State what?

A. College of Physicians and Surgeons, New York City.

Q. Are you connected with the Long Branch Hospital?

A. Yes, sir.

Q. In what way, please?

A. Surgeon.

Q. And have been how long?

A. Since it was organized.

Q. That is several years?

A. Yes, sir.

Q. Do you know this plaintiff, Andrew J. Defguard?

A. Yes, I have seen him.

Q. Did you examine him?

A. Yes, I examined him on December 8, 1905.

Q. And with reference to what?

A. Injury.

Q. Injuries where? What injuries?

A. He had a scar on his head about in that position, (indicating) back of head.

Q. Describe it please.

A. And a scar on his back up there, (indicating) just to the left of the spine; and a slight scar on his eyelid—very slight; (indicating left eye) and a scar on his knee, just below the knee.

Q. How did the boy appear mentally or physically?

A. Why, I didn't see anything wrong with him mentally.

Q. Describe the injury to his head as you found it. How extensive was it?

A. There was just a slight scar.

Q. Was there a depression at all?

A. There was a slight depression, that I could not tell whether it was in the scalp or in the bone.

Q. The location of that injury was in the back part of the head on the left side?

A. About that position. (Indicating.)

Q. Won't you describe it?

A. Well, it is in the back part of the head, on the left side.

Q. And near the top of the head, was it?

A. Yes.

Q. Did you perceive anything to indicate that that injury had affected his mental capacity or development in any way?

A. No, sir.

Q. Assuming that he has now attacks of vomiting or sick headache, occurring as often as once in two weeks, or even once a week, would you attribute that to the injury which you saw on his head?

A. No, sir.

Q. To what might such attacks be attributable in a boy of that age?

A. Oh, slight indigestion or overloaded stomach or something of that kind.

Q. Might it be connected with his eyes in any way?

MR. WILSON: I object to your suggesting. The question is leading. This is an expert witness.

THE COURT: The question is overruled.

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

Q. Can you suggest any other cause that might produce such attacks?

A. Yes, eye strain.

Q. What else did you find to be the matter with him, or what else did you find in your examination of him?

A. I found where there had been an injury to the knee.

Q. Describe that, please.

A. Why, the knee was very slightly enlarged, about a quarter of an inch at that time, larger than the other in circumference, and he could not extend the leg perfectly straight. Otherwise he had all the motion of the knee, but not perfectly straight.

Q. There was some deformity then?

A. Slight.

Q. You made a further examination today, did you not?

A. Yes.

Q. In connection with some other physicians?

A. Yes.

Q. Who were they?

A. Dr. Forman, Dr. Taylor and Dr. Beach.

Q. All three of them were present with you?

A. All three.

Q. What did you discover this morning in any way different from what you saw last December?

A. The circumference of the knee; it was very little enlarged this morning, only about an eighth of an inch larger than the other.

Q. And what do you say as to the permanency or otherwise of that condition of the knee?

A. Why, the remaining in the condition it is?

Q. Whether it will or not.

A. I should think it would improve.

Q. And to what extent does that affect the usefulness of the limb at present?

A. I do not think it affects it at all.

Q. Does it have any tendency to weaken the limb?

A. I don't think so.

Q. In your opinion does he suffer any consequences from the injury to his head at this time?

A. Suffer any what?

Q. Any consequences from the injury which you saw on his head at this time.

A. In my opinion, no.

Q. Are there any other consequences of injury apparent in him now?

A. No.

Q. Except this deformity of the knee?

A. That is all.

Q. Can that deformity of the knee be cured by treatment?

A. I think it can be improved.

Q. And could it have been still more improved if there had been earlier treatment?

MR. WILSON: I object. It has been held in this state that if one be injured by the tortious act of another, and he employ reputable physicians, his responsibility as between himself and the tort feasor has ceased. It would not be competent for this gentleman to prove that this boy's condition might have been a great deal better if they had employed Dr. Field or Dr. Forman or some of these other distinguished experts who appear here for the defence. I think that is the law of this state.

THE COURT: Isn't that so?

MR. STRONG: I think it is competent to show in every case that proper treatment at the time of the injury could have produced a better result than has occurred.

MR. WILSON: The Court of Errors and Appeals in the case of Bennett *v.* The New York & Long Branch Telephone Company met and decided that very question.

THE COURT: That was my recollection of

it. I have not that case before me, but that is my recollection of what the court has decided. Now if counsel can point me to any decisions showing that I am wrong about that, they may do so.

MR. STRONG: I have no decision at hand.

THE COURT: My recollection is the other way.

MR. STRONG: Does your Honor overrule it?

THE COURT: I overrule it. If counsel has any case to cite to the Court I would be very glad to hear it.

MR. STRONG: I have no case at hand at present to present to your Honor. I cannot always anticipate these questions as they arise in the evidence.

Q. Doctor, in your judgment is there any reason to apprehend that epilepsy may result from the injury to the head of this boy?

A. In my opinion?

Q. Yes.

A. No, sir.

CROSS-EXAMINATION by Mr. Wilson:

Q. Doctor, this is not your first experience as an expert in accident cases?

A. No, sir.

Q. And you are speaking now out of abundant experience, not only as an expert surgeon, but as an expert witness?

Objected to.

MR. WILSON: Well, I won't press it then, if you object. I only want to qualify him, that is all.

Q. Well, Doctor, you saw this boy twice? In your whole life you have seen him twice?

A. Yes, sir.

Q. The first time was on the 8th of December, 1905, and the second time was this morning?

A. Yes, sir.

Q. Did you spend about as much time with him on the 8th of December as you spent this morning?

A. I don't remember the exact time.

Q. Well, about the same time?

A. I examined him on the 8th of December, but I didn't take how much time I occupied.

Q. At any rate, your information as to his condition is predicated entirely upon what you learned on those two occasions, on the 8th of December, and this morning?

A. Yes, sir.

Q. I ask you whether or not you don't think that a physician, a competent physician, who saw the boy immediately after he received the injuries, and who saw him twice daily for four weeks, and daily for a period of six months afterward, and at brief intervals during a period of twelve or fifteen months after that, would not have a better basis for his judgment than a surgeon like yourself, no matter how distinguished, who had only seen the victim of this accident twice.

A. I don't see how I can answer that question.

Q. You don't want to answer it?

Objected to.

Q. I ask you what is the trouble with the question. Don't you understand it?

A. Yes, I understand it.

Q. Well, are you too modest to answer it? Is that the trouble with it?

A. No.

Q. Then why don't you answer it?

A. Well, I will answer it; I don't think so.

Q. In other words, you are willing to put your judgment up against the man who had these op-

portunities of observation, and in your opinion your judgment is better than his?

Objected to. Question withdrawn.

MR. STRONG: I will present to the Court this objection: that counsel ought not to put to the witness questions which he knows are incompetent and which upon objection he immediately withdraws, merely for the purpose of suggesting to the jury something which he knows is incompetent in the case.

THE COURT: I don't think it is open to that objection at all. You yourself have asked questions which when objection was made were withdrawn.

MR. STRONG: I think I have stood by my guns in every case.

THE COURT: Nobody has questioned your motives, and I don't think you ought to question the motives of counsel on the other side. The question is withdrawn.

Q. Doctor, when you examined this boy you found a depresion in his skull?

MR. STRONG: He didn't say so.

Q. Well, you found a depression on the top of his head, didn't you?

A. Yes, sir.

Q. And that is quite perceptible to the finger, when you put your finger in it?

A. Very slight.

Q. Well, it was perceptible, wasn't it?

A. Yes, it was perceptible.

Q. And you are in doubt whether it was a mere depression of the scalp or whether it was a depression of the skull?

A. Yes, sir.

Q. You are honestly in doubt about that, aren't you?

A. Yes.

Q. Now assuming that it was a depression in the skull—that is one of the possibilities, isn't it?

A. Possibilities.

Q. You are in doubt about it yourself?

A. Yes, sir.

Q. Assuming now then that that is a depression of the skull, would such a depression of the skull be apt to give this boy a pain in his head?

A. I think not.

Q. Don't you think it would ever have given him a pain in the head?

A. I think not.

Q. Why do you think not?

A. Well, that is merely my opinion.

Q. You must have reasons for it, Doctor?

A. I don't think it is extensive enough to give him a pain.

Q. Is that your only reason?

A. That is my reason.

Q. Then some punctures of the skull would bring pains in the head?

A. Severe punctures.

Q. And how big a puncture would bring a pain in the head?

A. I couldn't tell.

Q. How small a puncture would not?

A. I can't state that.

Q. Then how are you able to state that this puncture is not big enough to give this boy a pain in the head, assuming that the skull is affected?

A. I don't think a puncture existed in this case.

Q. But you have already said—we set out with the premise that you yourself are in doubt as to whether that depression is in the skull or scalp. Now I say assuming that it is in the skull, do you want us to understand that the depression is not sufficient to produce pain in this boy's head?

A. That is my opinion.

Q. Can you tell us how a big a depression in the skull would make a pain in the head?

A. No.

Q. Why can't you?

A. Because I don't know.

Q. Then how do you answer the first inquiry?

A. I merely give my opinion.

Q. How do you know that this depression of the skull would not produce pain?

A. In my opinion, I said, it would not.

Q. How do you know that it would not?

A. I don't know.

Q. What is the basis of your opinion?

A. Simply because I think so. It is a mental——

Q. Well, now, Doctor, do you believe that this boy has had pains in his head since this accident?

A. But I think——

MR. STRONG: I object.

THE COURT: I think it is proper cross-examination.

MR. STRONG: It is not based upon what the doctor has seen there. The question might call for his opinion of the evidence.

MR. WILSON: I wish to found my question, if your Honor please, upon what he saw and the history of the case as the doctor knows it.

MR. STRONG: I withdraw my objection. I think that is a proper question. The other was not.

A. What is the question?

(Question repeated.)

Q. I mean as a result of the accident.

A. I think not.

Q. You don't think he ever had? Do you wish to be understood as saying that, doctor?

A. If you will explain to me what you mean by pain.

Q. I mean the same kind of pain that Mr. Strong was talking about. You know the kind that he

was talking about. You said he didn't have any of that kind of pain in his head. That is the kind I am talking about.

A. I don't think so.

Q. You don't think so?

A. No, sir.

Q. You don't think that a boy struck by a steam engine with such vehemence as to throw him up over the top of the engine and throw him upon the ground, cut his head as you see still traces of that cut, would have pains in his head?

A. Not in this case.

Q. What was there in this case, Doctor, that immunized this boy from pains in the head?

A. I don't know.

Q. You have said, Doctor, that you didn't believe that this boy had headaches accompanied by nausea as a result of this injury?

A. Yes, sir.

Q. You have said that, haven't you?

A. I think so. I think I said so. He can repeat the testimony.

Q. Well, that is your recollection of it and it is mine.

A. That is my recollection.

Q. And you have suggested that probably this sick headache and nausea came from an overloaded stomach. Does that seem to you to be a reasonable explanation?

A. Very often the cause.

Q. And assuming now that this boy had been perfectly well prior to the 21st day of July, 1904, and that immediately afterward he began to have pain in his head, and after the duration of about six months, when he was immediately recovering from the shock and injury, during the period of fifteen months that has followed since that time, if he were having these recurring sick headaches accompanied by nausea as frequently as once a

week and once in two weeks, you say in your opinion that came from overeating, do you?

A. Overeating or indigestion.

Q. Or indigestion?

A. Yes.

Q. And the fact that this sickness followed an injury of that character and came on at recurring periods of a week and two weeks during a period of fifteen months would not make any difference in your opinion, would it?

A. No, sir.

Q. Not the least? You have suggested another cause that would make this boy have pains in his head and make him sick at his stomach—eye strain?

A. Yes.

Q. Did you examine his eyes?

A. No, sir.

Q. They could be examined and that matter definitely determined, couldn't it?

A. Yes.

Q. And you haven't seen fit to do it?

A. No, sir.

Q. And you have examined him twice?

A. No, sir; I never had an opportunity.

Q. Pardon me. You have examined him twice, haven't you?

MR. STRONG: He said he hadn't an opportunity.

Q. Has any opportunity been denied you to examine this boy whenever and wherever you wanted to examine him?

A. No, sir.

Q. Doctor, might not his eyes have been injured by this very accident—shock?

A. I dont think so.

Q. You don't think so?

A. No, sir.

Q. What nerve of the brain supplies the eye?

A. The optic.

Q. Is the optic any portion of the fifth nerve?

A. Well, Mr. Wilson, if you take me into anatomy, there is a good deal of it I have forgotten.

Q. Well, I am not. I ask you, doctor—that is a fair question—as I understand it, the fifth nerve distributes itself all over the side of the head here, doesn't it, branches of it?

A. I don't remember.

Q. You don't remember?

A. No.

Q. Well, let's put it this way: Assuming that the optic nerve was some part of the fifth nerve, and that the fifth nerve did distribute itself across the side of the head, over the side of the head, assuming now that the head had been bruised and injured on that spot——

MR. STRONG: What spot?

Q. The side of the head. Would that be apt, in your opinion, to result in pain and possible injury to the eye?

A. I don't know.

Q. You don't know? Suppose that his eyes had been perfectly good before the shock of such an injury, and immediately thereafter this condition supervened; what would you attribute the cause to, if you knew of no other intervening circumstance?

A. Well, I don't know.

Q. Well, you would attribute it to the injury, wouldn't you, now, if you knew of no other intervening circumstance?

A. If every other thing was thrown out and his eyes were examined?

Q. Certainly, if every other thing was thrown out, you would attribute it to the injury, wouldn't you?

A. And found no other cause.

Q. Well, you know of no other cause, do you, doctor?

A. I have not examined his eyes.

Q. Pardon me. You ought to answer that question. You don't know of any other cause, do you?

A. No.

Q. And from the history of this case as you now understand, it, it is more reasonable to believe that that thing came from the blow of this injury than that it came from some condition of the eyes such as you refer to, isn't it?

A. I don't think so.

Q. Now, doctor, let me ask you this: You say that you don't think the boy has had any pain in his head?

MR. STRONG: As a result of this injury.

Q. As a result of this injury, during the last fifteen months. You have said that, haven't you? Do you think he has had any pains in his head at all?

Objected to.

THE COURT: It is proper cross-examination.

MR. STRONG: The objection is that the doctor's belief whether the boy has had pain in his head is not competent. It must depend on what the doctor may have heard from somebody.

THE COURT: Well, you called this doctor as an expert, and he says he has had two opportunities to examine the plaintiff. Now I think it is fair and proper to cross-examine to test his competency.

MR. STRONG: My objection is that it calls for the doctor's belief of statements made to him by other persons.

THE COURT: Well, if you are going to object on that ground, it strikes out every bit of his testimony from the time that he gave his name up to now. Proceed with the examination.

MR. STRONG: I pray an exception.

THE COURT: Well, I will consider. I don't know whether I will, Mr. Strong, to that or not. I don't think it is a fair objection, but I will consider it.

MR. STRONG: Well, I pray an excepton, and wish my prayer for an exception to be entered.

THE COURT: Yes, that will appear on the record.

Q. My inquiry is, do you think the boy has had any pain in his head during the last fifteen months.

A. I don't know.

Q. You don't think anything about that?

A. I don't know. I have no evidence of it.

Q. Certainly, if he would come into your office for treatment and tell you his story you would have no evidence of it except his story, would you?

A. No.

Q. What?

A. I would have none but his story.

Q. You have examined this boy thoroughly, haven't you?

A. Yes.

Q. Gone over him from top to toe?

A. Yes.

Q. If he has pains in his head and has had pains in his head, and you don't attribute the cause of those pains to this injury, what do you attribute them to?

A. I cannot answer that.

Q. It doesn't occur to you that the injury and

the history of the injury presented the most reasonable explanation for the pains in the head?

A. No, not to me.

Q. That doesn't seem so to you?

A. No, sir.

Q. Now doctor, directing your attention a moment to his knee, there is a deformity there, isn't there?

A. Slight.

Q. The kneecap is not relatively in the same position as the kneecap of the right leg, is it?

A. Yes, I think it is.

Q. Don't you think that the left kneecap is lower than the right?

A. No, it don't strike me so.

Q. You don't observe that?

A. No.

Q. Did you discover that his left leg was shorter than his right?

A. No.

Q. Did you measure to find out?

A. No.

Q. Don't you think that was a very proper thing for you to do?

A. I didn't see any reason why I should.

Q. At any rate you didn't?

A. No.

Q. You think a man who has got a leg that is a half inch shorter than the other leg, that his short leg is just as good as the other leg?

MR. STRONG: I object. There is no testimony that his leg is a half inch shorter than the other.

MR. WILSON: What is the testimony, an inch or a quarter?

THE COURT: The question is proper. Proceed.

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed accordingly.

Q. What do you say about that, Doctor, a man with one leg a little shorter than the other; is the short leg just as good as the long leg?

A. If it is perfectly well.

Q. Well, suppose it is not perfectly well; suppose it is so that when he walks on it a mile it begins to hurt him; is that just as good as the other leg?

A. No, if it begins to hurt him it isn't.

Q. Is there anything in the condition of that leg as you found it that would make it impossible for that boy's leg to ache and hurt him after walking a mile.

A. I found no reason why it should.

Q. Do you wish to be understood as saying that that boy, upon walking a mile would not have pain in that leg, or by using it in any other physical exertion?

A. In my opinion I don't see why it should.

Q. Well, upon what do you base that opinion?

A. By the appearance of the leg.

Q. Did it bear any appearance of having been injured?

A. There is a scar there.

Q. What?

A. A scar.

Q. Is that all the appearance?

A. And the extension is not quite complete.

Q. Is that all you observed?

A. That is all.

Q. Whether he would have pain or not in the use of that leg, in your opinion, would depend entirely upon his truthfulness, wouldn't it?

Objected to.

THE COURT: I don't see what objection there is to that question of this witness on cross-examination. He has a right to test him in every possible way.

MR. STRONG: The doctor said he was

judging from the appearance of the limb, not the boy's truthfulness.

THE COURT: The question is perfectly proper.

Whereupon the defendant, by its counsel prays a bill of exceptions, which is hereby allowed and sealed accordingly.

A. I think it would.

Q. It would depend entirely upon his truthfulness?

A. Yes, sir.

Q. You think that the left leg is just as good as the right leg?

A. I think so.

Q. And having assumed that, and having assumed that you said that, what did you mean when you said you thought the left leg would improve?

A. The extension is better now than when I saw it in December.

Q. No, but pardon me. That is not responsive. You have just said—

MR. STRONG: Let him finish.

Q. All right; go on and finish, Doctor.

A. Well, that is all.

Q. Have you finished?

A. Yes, sir.

Q. You have just said that you thought the left leg was just as good as the right leg?

A. Yes, sir.

Q. In your direct testimony you went on at some length to say that you thought it would improve. What room for improvement was there?

A. The extension was better.

Q. Is there some impairment of extension now?

A. A slight.

Q. Does that impair the usefulness of the leg?

A. No.

Q. Then how would there be improvement? What in the mischief is the use of extending the leg if it don't make the leg any better?

A. The extension now is so near perfect that it does not affect the usefulness, is the only way that I can explain it?

Q. Then the improvement is a mere tribute to the ethics of the thing rather than the usefulness, I suppose; is that it?

A. No, I don't understand it that way.

Q. Have you known of cases of epilepsy following head injuries?

A. Have I known personally?

Q. Yes.

A. No.

Q. You have had a very extensive experience, Doctor, as a surgeon, haven't you?

A. Quite.

Q. Seen hundreds of cases of head injuries, haven't you?

A. Yes, I think so.

Q. Are you able to say, Doctor, that epilepsy will not follow and overtake this boy?

Objected to. Objection overruled.

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

A. From my experience I think not.

Q. You predicate your answer purely upon your experience?

A. Yes, sir.

Q. Have you read upon the topic?

A. Yes, sir.

Q. What authorities have you read?

A. I have read Osler.

Q. At how remote a time does Osler say epilepsy may follow an injury of this character?

A. He does not give injury as one of the causes.

Q. Does not suggest it as one of the possibilities?

A. No, sir.

Q. Well, is it one of the possibilities?

Mr. Strong: I object. It is not a question of possibilities, but probabilities.

Q. Well, is it one of the probabilities? That is the first inquiry?

A. In my opinion I think not.

Q. Do you mean to say that, Doctor, in your opinion now, that a blow upon the head can never be one of the superinducing causes of epilepsy?

A. In my opinion, no.

Q. Never?

A. In my opinion, no.

Dr. D. McLean Forman, sworn for defendant.

Direct Examination by Mr. Strong:

Q. Doctor, you are a practicing physician and surgeon?

A. Yes.

Q. Here in Freehold, I believe?

A. Yes, sir.

Q. How many years have you pursued your profession?

A. Forty.

Q. A graduate of what medical institution?

A. College of Physicians and Surgeons of New York.

Q. Have you seen this boy Andrew Defguard?

A. Yes, sir.

Q. Saw him on the stand yesterday?

A. Yes, sir.

Q. And did you also examine him?

A. This morning.

Q. In connection with Dr. Field and Dr. Taylor?

A. Yes, sir.

Q. State what if anything you found in your examination.

A. The boy has a scar on the top of the head, a little to the left of the median line, with a slight depression of the scalp and possibly a slight depression of the parietal bone. He has a scar over the right eye, over the right eyebrow, a slight scar; and his left knee shows some indication of previous inflammation that he has had there.

Q. Is that all you found?

A. Substantially.

Q. In your opinion does the boy at this time suffer any consequences from the injury which you spoke of to his head, the back part of his head?

A. I think there is doubt about that. By that I mean to say that it is uncertain whether the headaches and the sick stomach that the boy has are due to the injury to the head. It may be due to other causes.

Q. What other causes?

A. It may be due to defective vision, what we call due to eye strain, what we call astigmatism; or it may be due to his digestive organs.

Q. Did you examine his eyes?

A. Not technically, no, sir.

Q. To make a proper examination in order to determine whether the headaches and vomiting were due to eye strain, what would you have to do?

A. I am not competent to make any examination. That belongs to the specialty of the eye surgeon.

Q. A specialist in that branch?

A. In that branch.

Q. Is it or not a common thing with boys of that age to develop trouble with their eyes. astigmatism?

A Yes, it is quite a common affection, and it will produce just such headaches and attacks of vomiting as this boy has. I should not be willing to say that the symptoms that he has are due to

the injury of the head until the eyes had been examined and the condition of the kidneys had been examined, and all the other causes of such symptoms had been eliminated by positive examination.

Q. It might come then from a condition of the kidneys?

A. Yes.

Q. Did you see anything to indicate the probability of epilepsy occurring in this case?

A. Epilepsy is a very remote possibility. It does occur after injuries of the head in a very small percentage of cases—very small. There is nothing that indicates it here.

Q. Would the irritability spoken of by some of the witnesses indicate epilepsy in this case?

A. I think not, sir.

Q. The injury over the eye, was that entirely healed?

A. Oh, yes; that is a trivial injury; just a little flesh wound; had nothing to do with the boy's condition.

Q. Then the only other thing that you found was his knee?

A. Yes, the knee.

Q. What did you say as to the condition of the knee?

A. The knee is slightly enlarged, only an eighth of an inch larger than the knee on the other side; and that might occur without there being any injury there at all. People's knees differ in size to that degree. There is a slight contraction of the tendons that gives an apparent shortening of the limb, that makes the boy limp a little bit; but at present there is no indication of any serious trouble in the joint, and I should think that he would ultimately recover the perfect use of his limb.

Q. There is at this time some impairment of the power to extend the limb, is there?

A. Yes, just a slight impairment.
Q. That you think will disappear in time?
A. I think so, sir.

Cross Examination by Mr. Wilson:

Q. Doctor, then it is true, is it not, that epilepsy is one of the things that may follow a head injury?
A. Yes, sir.
Q. Were you and Dr. Field educated in the same medical university?
A. Yes, sir.
Q. Studied the same books, I suppose?
A. I don't know about that, sir.
Q. At any rate, you are doing service as surgeons in the same hospital at Long Branch?
A. Yes, sir.
Q. Wise men don't always agree?
A. I believe not.
Q. And, Doctor, your opinion, after all, you are modest enough to say, is a mere human judgment that may be entirely erroneous?
A. Certainly.
Q. You have had the experience of having said of people that they were out of danger and were going to get well and they have died on your hands in a few hours, haven't you?

Objected to.

The Court: I don't think it is an improper question.

A. Yes, I have had people die when I didn't think they were going to die.
Q. And you did your best for them notwithstanding?
A. Yes, sir.
Q. Now, Doctor, to ask you about this knee a minute: there is every trace of an injury there, isn't there?

A. I think there has been an injury of the knee.

Q. And there is some diminution of power there in your opinion?

A. Yes, slight.

Q. And there is loss of extension, as you have already said? Did you observe that one leg was shorter than the other?

A. It is an apparent shortening from contraction of the tendons, I think.

Q. Would you say it was at all impossible, that that boy, having had such a history of injury, might experience pain now from the constant use of his knee? Would you say that was an impossibility?

A. No, I think he might have pain.

Q. Would you say that it was impossible that he might have pain in his head at this late day, having received the injury that he did receive?

A. I think he might have pain.

Q. Now, Doctor, as I understand it, while you do not say this pain in his head could not come from that source, you have very ingeniously suggested other possible causes of pain?

MR. STRONG: I object to your characterization.

Question withdrawn.

Q. You have suggested, Doctor, that the headache might come from indigestion?

A. Yes.

Q. That is so, isn't it?

A. Yes.

Q. Now when you made this examination of the boy did you endeavor to find out whether he had indigestion or not?

A. No, sir; I—

Q. Pardon me. You made no such effort, did you?

A. No, sir; my opinion was based upon what I

had heard of the boy's history as he gave it himself and by Dr. Beach.

Q. But if he had come to your office, Doctor, for treatment as a private patient, and he said, "Here Doctor, I have got a pain in my head, and I have had it once a week and once in two weeks for the last fifteen months," and you had endeavored to treat it, you would have first sought to find the cause of that pain, wouldn't you? Your mind would have at first reverted to the stomach as the cause of it?

A. Yes, I would have thought of that first.

Q. If you had thought of it you would have at once asked him about his digestive apparatus, wouldn't you?

A. Yes, sir.

Q. Did you ask this boy anything about it?

A. No, sir. I did ask his mother.

Q. Another thing you would have done if you had wanted to determine the cause of this boy's pains in his head, for the purpose of eliminating all other causes except the true cause, you would have determined the condition of his kidneys, wouldn't you?

A. Yes, sir.

Q. You would have examined his urine, wouldn't you?

A. Yes, sir.

Q. With a view of determining whether he had albumen in his urine?

A. Yes, sir.

Q. Did you examine the boy's urine?

A. No, sir.

Q. How long would it have taken you to apply the test for albumen in this boy's urine?

A. If I had had a sample—

Q. Five minutes, wouldn't it?

A. Yes, whenever I had a sample.

Q. And you don't know yet whether this boy's pains in his head came from his kidneys?

A. No, sir.

Q. Another thing that you would have endeavored to eliminate if he had come to your office for treatment would have been astigmatism?

A. Yes, sir.

Q. You are not an eye surgeon?

A. No, sir.

Q. Astigmatism is nothing more or less than the fact that one eye has a focus here and the other has a focus at another place?

A. That is one of the results of it.

Q. And in his efforts to change the focus he causes the eye strain and pain?

A. Yes, sir.

Q. Notwithstanding the fact that you are not an eye surgeon, you could have determined whether or not the boy had astigmatism very easily, couldn't you?

A. No, that requires an analysis that I am not prepared to make.

Q. Couldn't you have determined it by the use of glasses?

A. Well, I am not equipped to do that.

Q. You are not competent?

A. No, I am not competent.

Q. Aren't you competent to make a test whether there is astigmatism present, without determining the degree of it?

A. No.

Q. At any rate, you are a railroad surgeon, aren't you?

Objected to.

Q. One of them?

Objected to. Question withdrawn.

Q. At any rate, you have been retained for the purpose of giving testimony to this case, Doctor?

Objected to.

A. What do you mean by being retained? Define it in your question.

Q. I think that required no response?

THE COURT: I think so. I think the Doctor understands it. If the doctor says he doesn't understand it—you understand it, don't you, Doctor?

A. Yes, sir.

Q. I don't mean that in any offensive way, That is a part of your business as much as it is a part of mine?

A. I have been retained, sir.

Q. I don't mean that in any offensive way, but you have been asked by the railroad to make this examination?

A. Yes.

Q. And you have gone about it, and sat here all day yesterday and had the boy under observation, didn't you?

A. Yes, sir.

Q. And you asked for an examination this morning?

A. Yes, sir.

Q. Didn't ask for it yesterday?

A. I didn't ask for it this morning, sir. I made the examination at the suggestion of counsel.

Q. Of counsel?

A. Yes, sir. I have not asked for an examination.

Q. At any rate, as soon as the suggestion was made the boy was offered up for examination—not sacrifice—wasn't he—for examination, I mean?

A. He was offered for examination, yes.

MR. STRONG: What did you say about sacrifice?

MR. WILSON: I withdraw that.

Q. Before you examined this boy and when you

were first retained as an expert by the railroad, your mind was alert to the fact that the pain in his eye might have come from eye strain and astigmatism? Your mind was alert to that, wasn't it?

A. Yes, sir.

Q. Did you suggest to those who were guiding the destinies of the defendant here that a test should be made for astigmatism?

A. I did not.

Q. Doctor, don't you think if you had done these things that we speak about, endeavored to eliminate the possibility of indigestion, endeavored to eliminate the possibilties of albumen in the urine, the condition of the kidneys, and endeavored to eliminate the possibility of astigmatism, that your opinion as to the cause of this pain would be very much more satisfactory?

A. Certainly.

Dr. Edward E. Taylor, sworn for defendant.

Direct-Examination by Mr. Strong:

Q. You are a physician and surgeon, Doctor?

A. Yes, sir.

Q. Practicing where?

A. In Middletown, New Jersey.

Q. How long an experience have you had in your practice?

A. About fifty years, a little more.

Q. Were you a surgeon during the war?

A. Yes, sir; went through it all.

Q. And have been practicing ever since, eh?

A. Yes, sir.

Q. Have you examined this boy Andrew Defguard?

A. I beg pardon.

Q. Have you examined the plaintiff in this case, the boy?

A. Examined him this morning, yes, sir.

Q. With reference to what?

A. With reference to injuries to the head and to the knee.

Q. And what did you find?

A. Well, I didn't find much wrong anyway. I found a very slight trouble with the head, and it was very slight indeed—almost amounts to nothing, in my opinion, at any rate.

Q. Where was that?

A. That was in the top of the head near one side of the parietal bone.

Q. Just describe what you found there as well as you can?

A. I saw plenty of hair on top of his head, but a very slight cicatrix, and the depression was almost nothing. In fact, I would not know it was there at all if it had not been suggested to me that it possibly was there.

Q. In your judgment, Doctor, does that boy suffer anything in consequence of that inquiry which you saw to the back part of the head?

A. Has he suffered?

Q. Yes; are there any consequences to the boy at this time from that?

A. I cannnot conceive of any, no, sir.

Q. Suppose that he has sick headaches and vomiting spells as often as once in two weeks, or even as often as once a week; would you attribute it to the injury to his head?

A. I wouldn't think of such a thing, no, sir. I would not attribute it to that if he had been a patient coming to my office, without any history of his injuries or anything of the kind, even if I had examined his head; because a headache can occur from many different causes.

Q. Give us an idea of some of the causes that might produce these headaches?

A. Why, indigestion, overloading the stomach, racing, tearing, playing—all such things, would have a tendency to.

Q. Might it be due to the condition of the kidneys?

A. It might have been due to the condition of the kidneys, yes. I don't know that I ever had a case where the kidneys were affected and produced headache.

Q. What would you say as to the condition of the eyes having something to do with it?

A. That is a very common thing, sir, to produce headache from the condition of the eyes. We frequently hear of that. You see a great many children at this day wearing glasses, and other people too, because their eyes pain them.

Q. And do troubles with the eyes or not frequently develop at that age, twelve or fourteen?

A. Yes, it is a common thing. You see a great many children wearing glasses from the affection of the eyes, troubles with the head.

Q. Now tell me as to the condition of the knee that you spoke of.

A. Well, at the present time I would not consider it anything at all serious, not at all.

Q. Just describe what it is.

A. There was a very slight contraction, very slight indeed; and the limb, one was the very least, very little larger than the opposite side, the other limb, at the knee or below the knee, just at the head of the bone.

Q. Is there some impairment of the extension of the knee now?

A. Very little. We had him stand on a table He could stand up very straight, and both feet together nicely. I don't think if a person had not been told that there was a contraction there that they would have noticed it.

Q. Is there anything there that will be permanent at all?

MR. WILSON: He says there is nothing there.

MR. STRONG: No, he says there is a slight impairment there at this time.

Objection withdrawn.

Q. I ask you whether that condition, whatever there is there now, is likely to be a permanent deformity?

A. I don't think so. That is my opinion of it. I don't know what may happen to it.

Q. Did you see anything to indicate that the boy will have epilepsy as a result of the injury to his head?

A. No, sir; I haven't seen anything of the kind. I saw no conditions that would have a tendency to make me believe that he would have epilepsy.

CROSS EXAMINATION by Mr. Wilson:

Q. If this boy had been cheerful and sprightly before an accident of this character and had immediately afterwards shown a marked change in disposition, becoming peevish and fretful and perverse, would that indicate anything to your mind?

A. Well, if I had known the child——

Q. Pardon me. My question precludes any other conditions except the conditions imposed by the question.

A. Please repeat it again.

(Question repeated.)

MR. STRONG: I object to the question; those conditions not being present in this case or testified to.

THE COURT: Oh, they have been testified to.

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

A. Really I couldn't answer that intelligently. Of course I don't know.

Q. Pardon me. The question is whether that would have any significance in your mind. You can answer that.

A. Please repeat it again.

(Question repeated.)

A. I don't know that it would; no, sir; I don't think it would.

Q. You would not attribute that change in the disposition to the injury?

A. I would not, no, sir; not at the present appearance of that wound, my present knowledge of it.

Q. Pardon me, Doctor; my question did not imply the present appearance of the wound.

A. Well, I never saw it any other time.

Q. I am not asking you when if ever you saw it; I am asking you whether those two facts put side by side would not indicate to your mind something about this; suppose you never saw anything of it. Suppose a boy that had a cheerful, sprightly disposition met with an accident such as this one, and received a cut in the back of his head, and immediately after that his disposition changed and he became peevish and fretful and cross: would that indicate anything to your mind?

A. I don't know that it would.

Q. Isn't it true that dispositions are changed by occurrences of that sort, Doctor?

A. Yes, I suppose it is.

Q. Then if it is true that dispositions are thus changed, and that was the only cause you knew of, you would attribute it to that cause?

A. I never saw—

Q. Pardon me; if you didn't know of any other cause.

A. Not entirely to that cause.

Q. If you didn't know any other cause what would you attribute it to?

A. His education.

Q. You think his education can all change in twenty-four hours?

A. No, sir.

Q. The boy was cheerful one week and immediately afterwards his disposition was changed.

A. If he had a bolt over the head I might consider it of course.

Q. And you would consider it, wouldn't you?

A. Yes, sir; I might.

Q. Now this hole in his head, you felt it, Doctor, didn't you?

A. No, I didn't feel any hole at all.

Q. Did you put your finger on his head?

A. Yes, I tried to find it, tried my best to find it.

Q. You put your finger on and couldn't find anything?

A. Yes, sir.

Q. You don't mean that, Doctor, do you?

A. Yes, sir; I do.

Q. You couldn't find anything on his head?

A. I tell you I felt the hair there, and next came the scalp, but if there had been a hole there it had grown up, filled out.

Q. (To the plaintiff.) Come up here, son.

Plaintiff complies.

Q. This is the same boy, and he has got the same head and the same hair and you have got the same fingers. Now let me take your finger, Doctor. Do you feel any hole there?

A. I do not.

Q. You don't feel any hole there?

A. No, sir.

A. Does that feel smooth here?

A. Yes, that feels smooth.

Q. I am going to let the foreman of the jury—

Mr. Strong: This jury felt all they wanted to yesterday.

MR. WILSON: Then you don't want the foreman of the jury to feel?

MR. STRONG: Yes, go on. You had better let the foreman of the jury find it for himself. See if he can find it without your assistance.

MR. WILSON: All right. (To the juror:) Do you feel anything?

Objected to.

MR. WILSON: I submit the boy ought to show the jury. (To the plaintiff:) Tell the jury where your scar was.

Plaintiff indicates.

Q. Doctor, you couldn't find anything there now, eh?

A. No, sir; not enought to make me believe that there was an injury.

Q. Oh, are you qualifying it now? The query is whether you say now there is any evidence of a depression in that boy's skull.

A. I wouldn't have found it if some one hadn't told me before.

Q. Then you do find it, do you?

A. No, sir.

Q. Then what do you mean by saying that you wouldn't have found it if somebody hadn't told you?

A. Because you have to look for those things.

Q. Then did you find it?

A. No, sir; I didn't find any depression there.

Q. You don't feel any even now, do you?

A. No, sir.

Q. Doctor, the boy complains of pain in his leg when he uses it a good deal. Would that be a natural consequence of such an injury as he received?

A. It might be a natural consequence from an

injury of that kind, or from violent play, racing and running, football and baseball.

Q. But we know in this case that it did not come from football and baseball; it came from something else.

Objected to.

Q. The question is whether the condition in which you found that leg in your opinion would be such as that the boy might experience pain if he used it a good deal.

A. He might tire a little, yes; racing, playing; he would feel it, probably.

Q. Would the tiredness of it bring pain too, in your opinion?

A. Yes, after playing he would have an aching sensation in the limb.

Q. And if he chose to work instead of play he would have the same effect, make it hurt as bad?

A. Might possibly, yes.

Q. Wouldn't it probably?

A. If he didn't favor the leg at all.

Q. In your opinion would an injury such as this boy suffered result in giving him pain in the head?

A. I don't think so, no, sir.

Q. You don't think so?

A. That is my opinion; no, sir.

Q. How much of an injury would give a man or a boy pain in the head, do you think, an injury on the head?

A. How much of an injury?

Q. Yes, on the head.

A. That is a question that I cannot answer either. I can make your head perhaps hurt you, if I had the proper means to do it with.

Q. You can make a man's head hurt him?

A. I think I could, yes, if I hit it hard enough.

Q. What is concussion of the brain?

A. Concussion of the brain?

Q. Yes.

A. It is a blow upon the head that will perhaps produce a rupture of a small bloodvessel.

Q. May concussion of the brain be produced by a blow on the head?

A. Concussion of the brain, yes, sir; very easily.

Q. And that is the ordinary way in which it is produced, isn't it?

A. Very apt to be, yes, sir.

Q. Let me ask you this: whether or not high fever is an incident, is a symptom, is one of the things that accompanies concussion of the brain.

A. Well, yes, oftentimes.

Q. Let me ask you whether or not the involuntary discharge of urine is one of the things that comes with concussion of the brain.

A. Of urine or the bowels, either one.

Q. Would the fact that a person was delirious be one of the things that might follow concussion of the brain? Is that one of the things—out of their head, irrational?

A. Yes, they would be unconscious, perhaps.

Q. And coma is another indication of it, isn't it?

A. Yes.

Q. Now let me ask you this question: Assuming a person to have been perfectly well, and on the 21st day of July, 1904, to have been struck by a railroad engine while riding in a wagon, thrown up in the air to the height of the tender and fallen upon the ground; picked up with a contused wound on the top of the head here, two of them; a wound over the eye, a cut; assuming that this person for nine days had a fever ranging from 102 to 103 degrees, was delirious, had incontinence of urine, and continued in that condition for a period of nine days; would that indicate to your mind that the patient was suffering from concussion of the brain?

A. Not necessarily so.

Q. Well, would it suggest concussion to you?

A. Oh, if I had known that he had had an injury on the head.

Q. Well, my dear sir, my question presupposes that. You have got to know that if you answer the question. I am assuming now that the person had this history that I have told you. It is not for you to say whether it is true or false. I ask you wth that history behind it, and you saw a patient lying there nine days with a fever from 102 to 103, incontinence of urine, and coma and delirium, would you regard that as coming from concussion of the brain?

A. It would indicate that it came from the injury to the head some way or other, yes, sir.

Q. Would those symptoms be inconsistent with concussion of the brain?

A. They are sometimes, yes, sir.

Q. Would they be?

A. They might be.

Q. And if you didn't make your diagnosis of concussion of the brain, what would your diagnosis be with those facts before you?

A. If I didn't make my diagnosis from concussion of the brain?

Q. You don't understand the question, Doctor. You had better have it repeated again.

Question repeated.

A. Might have been some other acute attack, with the grip.

Q. With grip?

A. Yes.

Q. And indigestion?

A. Yes, sir.

Q. And astigmatism?

A. No, I haven't said anything about astigmatism. You haven't asked me any questions about it.

Q. You think if you were called in to see a boy

on the 21st of July, 1904, known to be healthy and vigorous the day before, or the morning of that day, who had had an accident, a collision with a railroad engine, thrown in the air as high as the tender of the engine, picked up wounded in the head at this point which you have referred to and I have referred to in this examination, picked up unconscious, for nine days continued in a condition of coma or showing delirium, and had a temperature of 102 to 103 for nine days, and had involuntary passage of the urine, you think that person might have the grip?

A. No, I didn't say so. He might have rising temperature without—

By Mr. Strong:

Q. Well, suppose the boy had concussion of the brain at that time; would that necessarily have any permanent effects?

A. At the present time?

Q. Yes.

A. No, sir; I don't think so.

Both Sides Rest.

Motion for Directions.

Mr. Strong: I desire to move for the direction of a verdict in favor of the defendant upon the ground, first, that under the circumstances in this case the negligence of the driver is a bar to the recovery by the plaintiff in this action; that the negligence under the circumstances proved would be imputable to the boy and would be a bar. The negligence of the driver I think is very clear.

Upon the second ground, that even if the negligence of the driver is not to be imputed to the boy, a recovery in this action cannot be had, because the boy himself was negligent. They were proceeding in this empty farm wagon toward this

crossing, and stopped at a distance of some sixty feet from the crossing.

Mr. Wilson: Forty or fifty, the proof is.

Mr. Strong: Well, the boy said they stopped opposite Edwards' storehouse there, which is shown to be in the neighborhood of between fifty and sixty feet by the map. At any rate they stopped there, and as the gates were raised they went forward. Now there was an opportunity to have looked in the direction from which this engine came and to have seen a distance of 1900 feet down the track while traversing a considerable portion of the distance from the stop until they came to the place where they were injured. The boy does not claim that he made any effort at all to look or that he listened at all for any sounds. In fact, he does not claim that he made any effort whatever, either by looking or by listening, to ascertain whether or not an engine might be approaching as this engine was approaching. Now it is true there were either three or four or five of these coal cars standing near the crossing which prevented an observation for some 200 feet; a distance of 200 feet down, was cut off, we will say, by these coal cars. But certainly there was the more reason on that account that any one approaching the track should exercise vigilantly his sense of hearing. There have been quite a number of cases in this state in the Court of Errors and Appeals that the principle has been laid down that a person approaching a track whose sense of sight is obscured, must all the more exercise his sense of hearing. Now this boy does not claim that he was paying any attention whatever to his surroundings. He was not using his eyes, not using his ears, as far as we know. We have no testimony in the case, and he actually tells us that he never saw this engine, even to the time he was struck. He doesn't know what struck him. He was thrown into the air without actually knowing

what hit him. Now it cannot be said that a person who confesses to that state of facts has exercised his eyes.

Now the testimony is clear in the case that at a point 16 feet from the nearest rail of the south bound track there was a clear view. At that point the persons in the wagon had gotten entirely beyond the obstruction of these coal cars. There was absolutely nothing during the last sixteen feet before they reached the nearest rail of this track that would prevent a view of 1,900 feet in the direction from which this train came. Beyond that, it is testified by one witness in the case who speaks perhaps most positively of all, and who had the best opportunity of all of seeing,—I mean the uncle of the boy, that man Brown,—he says that the accident occurred upon the fourth track, which was the siding track, not the north bound running track. And if that is so, if the accident occurred upon that track, then there was twelve feet more besides the sixteen feet, making twenty-eight feet, during which the occupants of that vehicle had unobstructed view for 1,900 feet down the track. During that twenty-eight feet everything that has been testified to here in the nature of obstruction, everything that there could have been to obstruct the view in that direction, had ceased to have any effect. Now why did not this boy see? It may possibly be that if he had seen this engine approaching, there might have been some uncertainty in his mind as to what would have been the proper course to pursue if that situation were presented, if it had been seen, if it had developed here in the case that they saw this engine approaching, after it had got outside of these coal cars, he nevertheless thought it safer to proceed, exercised that judgment, that might be a different case. But here they do not prove that. The proof to the contrary is that they did not see this engine approaching. It was not a

case where they were placed between conflicting dangers, and might hesitate whether to go forward or back, but it is a case where they ran right into danger, without ever perceiving that it was there, without knowing that it was there, without giving themselves the benefit of such knowledge as they might have had and as the law required that they should have by the exercise of their faculties.

Now whether you say that the negligence of the driver was imputable to the boy or whether you say that the boy's own negligence bars this action, perhaps is not very material. I think the motion should prevail upon either ground, but surely upon the ground that the boy was bound to use his eyes and ears, even though the sight was limited by the presence of these coal cars, even though there was this flagman there who had raised the gates within their view, he still is bound, by all the decisions in this state and everywhere else, to make an independent observation so far as he was able to by the exercise of his senses.

It is said, and they took pains to prove upon the other side, that in the position where the gateman was he could not see down the track. It must have been obvious to the occupants of this wagon that the gateman was in a position where he could not see. They were therefore notified that they could not rely upon the vigilance of the gateman and rely upon the gateman to give them warning, because the gateman could no more see than they could that an engine was coming out behind these coal cars. So it seems to me very clear that the plaintiff in this case was guilty of negligence himself, even though the negligence of the driver is not imputable to him. I submit there should be a direction of a verdict in favor of the defendant.

THE COURT: I do not think that under the circumstances of this case the negligence of the

driver—assuming that there was contributory negligence—could be imputed to the plaintiff, the boy. The boy had no control over this team whatever. He was not driving it, and he was nothing more than a passenger, so far as the evidence in the case shows, excepting that there was some evidence that he was to attend for the purpose of holding the horses while loading or unloading ice. So far as the negligence of the driver is concerned, it cannot be imputed to this plaintiff. And so far as the contributory negligence of the plaintiff himself is concerned, we all know that the courts have held that the same degree of care is not asked and charged upon a boy nine years old, which was the age of this boy—

MR. STRONG: Eleven.

THE COURT: No, he says he will be fourteen next November and this was four years.

MR. STRONG: No, I beg pardon; two years.

THE COURT: Eleven years of age?

MR. STRONG: He was a few months short of twelve.

THE COURT: Now you cannot expect the same degree of care to be given by a boy eleven or twelve years old, and the courts do not require it, as you would of an adult; and it is a question whether it would not have been a case of imprudence upon the part of the boy to have jumped out of the moving wagon, because the evidence shows that this wagon was moving upon the track when it was struck. I do not think upon either ground that I can direct a verdict in favor of the defendant. There is evidence upon which the jury must pass. Now what the weight of that evidence is it is for them to say. I refuse the motion.

Whereupon the defendant, by its counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.

B. A. VAIL,
[L. S.] Judge.

Adjourned till June 13, 1906, 10 A. M.

Gentlemen of the jury:

The plaintiff in this case was injured by being struck by a locomotive upon the road of the defendant company in July, 1904. He claims that the defendant company is responsible for his injuries which he then received; and in order to entitle him to a verdict at your hands he must satisfy you by a preponderance of proof, first, that the defendant company was guilty of negligence; that is, that it failed to perform some of the duties which the law imposed upon it. The plaintiff cannot merely come into court and say, "Gentlemen, I was struck last night by a locomotive; here are my injuries," and stop there. It might have been no fault of the defendant company that he was hurt, and he must go further, and not only show his injuries to you, but show that the defendant was responsible for those injuries. The law, of course, presumes that everybody discharges the duties which are imposed upon him; and this rule applies not only to individuals, but to corporations as well; it is the same rule which applies to both. All are supposed to use the public highways and to use the streets, and to exercise in every respect the right which the law gives them, so as not to injure their neighbors; and if they do injure their neighbors, then it becomes a question as to whether they are guilty of negligence. That, gentlemen, is the first question you must decide before you go any further in this case, and say whether or not, from the evidence in the case (and of course you will not go outside the evidence) the plaintiff has shown to your satisfaction, by a preponderance of proof, that the defendant has failed to perform some of the duties which the law imposed upon it.

Now the law prescribes certain things which a railroad company must do, such as blowing

whistles under some circumstances, and ringing bells. The law does not say that a railroad company is bound to put up gates at all the crossings, but the law does say this: that where gates have been erected before the accident, the duty rests upon the company to operate them with due and reasonable care, and for failure in that respect the company would be liable to the charge of negligence. That has been decided by our Supreme Court. There is no proof in this case that the bell was not rung or the whistle was not blown. The plaintiff must recover in this case, if he recovers at all, by satisfying you that the gates, on the morning when this accident occurred, were not being operated with such due and reasonable care as the law charges upon the defendant company.

Now, gentlemen, I do not not propose to rehearse the evidence in your hearing. You have heard it all, and it is just as fresh in your minds as it is in mine. It appears that a passenger train crossed at this place and the gates were down, as they should have been. Then the gates were raised, and the undisputed evidence in the case is that after they were raised the gateman turned his back to them and stood there, and evidently did not see the approaching locomotive. Now it is for you to say from that evidence whether the defendant company was exercising all the care, all the due and reasonable care which the law charges upon it in the management of those gates, having erected them. If the gates had not been erected, then it would be a question whether it was such a dangerous crossing that the railroad company would be charged with the duty of erecting gates; but that is not the question in this case. They erected the gates, and the law says they must manage them with all due and reasonable care in order to protect the people who might cross at that point. If you decide, upon considering that evidence and giv-

ing it all the weight you think it is entitled to, that the defendant company was not guilty of negligence,—of course the negligence of the gateman is the negligence of the company,—that the gateman exercised all the care and prudence which any man could reasonably be expected to do under the circumstances, that of course ends the case. No matter how serious the injuries of this boy may be, the defendant company is not liable for them unless the plaintiff satisfies you, as I have said, by a preponderance of proof, that it was guilty of negligence.

Now, if you should decide, after considering the evidence, that the company was guilty of negligence, then you come to the next question: was the plaintiff guilty of contributory negligence? That means, gentlemen, just this: that no matter how negligent the defendant company may have been, if the plaintiff himself failed to exercise the care and prudence which the law says he should do, in crossing the railroad crossing, or using the streets in any way, no matter how slight the negligence may have been, if there was any negligence at all on his part he cannot recover; because the law cannot apportion the negligence between the two parties. If the defendant was negligent and the plaintiff was not, then the plaintiff can recover but if both are negligent, then again that is the end of the case, and your verdict must necessarily be for the defendant.

You will bear in mind, of course that the plaintiff in this case was a lad of tender years at that time, not exceeding twelve years of age. Of course that does not relieve him under the law from the duty of looking out for himself, so far as a child of that age and of his mental capacity could do; and that is something that you may consider in arriving at your verdict in this case. Now the same duty of observation is not charged upon a child, that is upon an adult; and you must,

as reasonable men, say from the evidence in the case how much of that duty is charged upon the plaintiff in this case. The law has said this, gentlemen: "The duty of observation required from children, may differ in extent and degree from that required from an adult. Judgment which a jury might find lacking in prudence if formed by a person of mature years might perhaps be found not to be lacking in prudence if formed by a child; but the child is not excused from some duty of observation." That is the established law in this state. Now you must say, having got over the question of negligence, whether this boy, approaching the crossing as he did that morning in that wagon, exercised the due prudence and care for his own safety which the law says he would be obliged to exercise. You will bear in mind, of course, that he was not driving the wagon; and no matter how negligent the driver of the wagon may have been, you cannot impute the driver's negligence to this boy, who was not driving the wagon, had no control over it. and was merely, so far as this case is concerned, a passenger in that wagon. That does not relieve him from the duty of looking out for himself. But do not confuse your minds with the idea that because the driver of that wagon may have been negligent, that therefore this boy cannot recover. This boy can recover if the driver was guilty of negligence, if he himself was not guilty of contributory negligence.

In approaching the railroad crossing the plaintiff was bound to exercise the care reasonable in one of his age and intelligence to ascertain whether an engine was approaching; and if he was injured in consequence of his having failed to use such care, of course he cannot recover in this action. That is a question that you must determine from the evidence in the case. The plaintiff was not relieved from the obligation to use

reasonable care by the fact that he was not the driver of the wagon. He must look out for himself; and if he had an opportunity to see that engine before it reached the crossing at the time the wagon reached it, and he had an opportunity to get out of that wagon, and it was safer for him to get out than it was for him to stay in, of course it was his duty to do so; it was his duty to protect himself so far as it was possibie for him to do. Notwithstanding the flagman's act in not lowering the gates, or any other act or omission to act upon the part of the flagman, the plaintiff could not lawfully neglect to look and listen for the approaching train, and if he did not look and listen, and in consequence he was injured, he cannot recover for that injury. You will recollect the testimony upon that point—I think I state it correctly—was this: that the wagon stopped to allow the passenger train to pass at something between forty and fifty feet from the crossing, and that after the passenger train passed the gates were raised and the driver started his horse to go across. The boy says that is the last thing he knew until he wakened up the next day at his own home, or some time after the accident. There is some evidence to show, I think, upon the part of the boy's uncle, that the engine which caused the accident was not upon one of the regular tracks, but upon the further west bound track, which I think one of the witnesses called a freight track, which of course would carry it further away, and further away from the side of the track upon which this wagon just entered. You may take that into consideration, gentlemen, and say whether you think from that evidence this boy had an opportunity to look and listen and save himself; and if he did, of course he cannot recover in this case; because although he is a boy of tender years, the law says he must look out for himself so far as it is possible to do, and if he did

not, of course he cannot recover.

Now, gentlemen, I think that is all that I need say to you upon these two questions: first, upon the question of negligence, and then upon the question of contributory negligence. If you find that the defendant company was negligent and the boy, the plaintiff, was not guilty of contributory negligence, then of course you come to the question of damages. But if you decide either of the other questions in favor of the defendant company, of course your verdict will be for the defendant, and that will end the case.

Now if you come to the question of damages,—there is no question but that the boy was injured; nobody disputes that,—you will give him a verdict, first, for the sum which will pay him fairly for the pain and suffering which he endured at that time as the immediate result of this accident. Now you heard the testimony; you heard his own testimony and you heard the testimony of his attending physician as to how the boy suffered. Leaving out of your mind for the moment the question of whether his injuries were permanent or not, if you give him a verdict at all you will first say how much he ought to have for the pain and suffering which he endured at that time. Then you must decide, from the evidence in the case, whether these injuries were permanent or not. Of course if the boy is just as good physically to-day as he was before the accident, there are no permanent injuries and you can only give him a verdict for such injuries as he suffered at that time or followed within a reasonable time afterwards as the result of the accident. Now whether these injuries are permanent or not you must decide from the evidence of the physicians. One of the physicians, the boy's physician, says that the injuries in his judgment are permanent. Of course, it is a matter of judgment. These gentlemen appear here as experts; any or all of them may be mistaken; and you must take their

evidence and say, after giving it due weight, what in your judgment it is fairly entitled to, and say whether you think this boy's injuries are permanent or not. If you think they are permanent, then you will add to the other sum such sum as you think will fairly compensate him for the pain and suffering which you think he will endure in the future. Recollect, gentlemen, that your verdict settles this case once for all. This boy cannot come back here five or ten years hence and say, "I got a verdict for what I had suffered up to that time, and I have been suffering ever since. The jury did not consider this and I want to try this case over again." The law says he cannot do that. Your verdict now settles it so far as this boy's injuries are concerned, and you will consider that matter as fair and reasonable men. Then if you think his injuries are permanent, give him such further sum as you think will compensate him for his pain and suffering in the future.

Then you will have to come to this other question, if you think his injuries are permanent; how much has his earning capacity been reduced by this accident? You cannot take into consideration anything which he might earn up to the time he is twenty-one years of age, because his earnings before that time belong to his parents. If anybody could sue, they could sue. If they were deprived of his earnings and deprived of some money, to whatever extent that might be, they would have their cause of action, if the railroad company is responsible for this accident. So you must say whether you think these injuries are going to last beyond the time when this boy arrives at the age of twenty-one years. If you do, then you must say what compensation you think you ought to give him for his future, after the time he is twenty-one years; bearing in mind that you must merely give him compensation. You must not give anything in this case to punish the railroad company; you must not give anything

for sympathy for the boy, but what will fairly compensate him for his permanent injuries, for his lack of ability to work, whether his disability results from either mental or physical defects as the result of this accident, which might occur after the boy is twenty-one years of age.

I have some requests to charge upon that point. As I have said, gentlemen, you must say from the physicians' testimony whether these injuries are permanent or not; and I do not think I need say anything more upon that point than what I have said. I think it covers the request to charge upon that point.

You will also consider whether from the evidence in the case you can fairly say there is a reasonable probability that these injuries are permanent. And the plaintiff in this case cannot recover present damages for apprehended future consequences unless there is such a degree of probability of their occurrence as amounts to a reasonable certainty that they will result from the original injury; that is, the collision that occurred on this morning in July, 1904.

Now, gentlemen, I will repeat: First consider the question of negligence. If you find there was no negligence upon the part of the railroad company or its servant, that ends the case. If you do, then take the next step and say whether there was contributory negligence or not upon the part of this boy; that is, by his failure to use the ordinary reasonable care and prudence which the law charges upon him. If you find that he did not, notwithstanding the fact that he had no control of the wagon and no control of the driver, if you find that he did not take the care and prudence which the law says he must do, that ends the case, and your verdict will still be for the defendant. If you resolve those two questions in favor of the plaintiff, then you know about the

question of damages, and I do not think I need say any thing more to you upon that point.

Of course I know that you will not be controlled in this case either by sympathy or by prejudice. It does not make any difference that this plaintiff is a young boy and the defendant is a railroad corporation. You will decide this case, as I know you will, just as though it was a controversy between two of your neighbors and you were called upon merely to arbitrate it, not having any feeling of prejudice for one side or the other, and say from the evidence in the case which one of them was right and which one of them was wrong.

I refuse to charge other than as I have.

DEFENDANT'S EXCEPTIONS.

1. The defendant excepts to the refusal of the Court to charge as to each one of the requests which was not charged.

Which exception is hereby allowed and sealed accordingly.

B. A. VAIL,
[L. S.] Judge.

2. The defendant also excepts to so much of the charge as leaves to the jury the question whether the injuries will be permanent; as there is no evidence which will justify a recovery upon the basis of a permanent injury.

Which exception is hereby allowed and sealed accordingly.

B. A. VAIL,
[L. S.] Judge.

3. The defendant also excepts to the statement in the charge as a matter of fact that the injuries will be permanent.

Which exception is hereby allowed and sealed accordingly.

4. The defendant also excepts to so much of the charge as permits the jury to find that the injuries may last after the plaintiff attains the age of twenty-one years, and permits them to give damages for loss of ability to work in case there shall be such loss of ability after he attains twenty-one years.

Which exception is hereby allowed and sealed accordingly.

B. A. Vail,
[L. S.] Judge.

Defendant's Requests to Charge.

1. In approaching the railroad crossing the plaintiff was bound to exercise the care reasonable in one of his age and intelligence to ascertain whether an engine was approaching; and if he was injured in consequence of his having failed to use such care he cannot recover in this action.

2. The plaintiff was not relieved from the obligation to use reasonable care by the fact that he was not the driver of the wagon.

3. The plaintiff was bound to just the same degree of care as if he were himself driving.

4. Notwithstanding the flagman's act in raising the gates, or any other act or omission to act on the part of the flagman, the plaintiff could not lawfully omit to look and listen for an approaching train, and if he did not look and listen, and in consequence he was injured, he cannot recover for that injury.

5. If the accident occurred on the west siding track and the plaintiff had a clear view of that track in the direction from which the engine came at a point twenty-eight feet before reaching the

nearest rail of that track, but did not see the engine until it struck the wagon, he was guilty of negligence which contributed to the accident and cannot recover in this action.

6. The Court is requested to charge the jury as a matter of law, that to entitle the plaintiff in this case to recover present damages for apprehended future consequences there must be such a degree of their probable occurrence as amounts to a reasonable certainty that they will result from the original injury.

7. There is no evidence which will justify the jury in finding that any of the injuries to the plaintiff will be permanent.

8. There is no evidence which will justify the jury in finding that the earning capacity of the plaintiff will be impaired after he has reached the age of twenty-one years.

9. The jury will not be justified in basing their verdict upon the theory that epilepsy may result from this accident.

10. Any damages based on the theory that plaintiff will not be able to attend school and therefore his education will be interfered with, are not within the declaration and cannot be included in the verdict.

11. Such damages, moreover, would be too remote, and for that reason cannot be recovered in this action.

12. The law requires that upon every engine approaching a highway crossing a bell shall be rung continuously, or a steam whistle shall be blown at intervals, during a distance of three hun-

dred yards, and until the engine has crossed the highway; and there being no evidence in this case to the contrary, the presumption is that the company complied with the law and that either the bell was rung or the whistle was blown as above stated.

I hereby certify that the above bills of exception include all the evidence produced by either party upon the said trial, and also the charge to the jury in full.

B. A. VAIL,
Judge.