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NEW JERSEY COURT OF ERRORS AND APPEALS.

PHILIP D. HEINZ,  
*Plaintiff-Appellee,*

*vs.*

DELAWARE, LACKAWANNA & WEST-  
ERN RAILROAD COMPANY,  
*Defendant-Appellant.*

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**BRIEF OF DEFENDANT-APPELLANT.**

**Statement.**

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This is an appeal from a final order of the Supreme Court reducing a verdict in a personal injury case from \$11,300 to \$9,945, the circumstances giving rise to the action of the Supreme Court being as follows: The appellee was injured in an accident at a railroad crossing on the 13th day of April, 1912. He thereafter began suit against the appellant and on a trial at the Sussex Circuit recovered a verdict of \$9,945. A rule to show cause was obtained on this verdict in the Supreme Court, at the February Term, 1914, finding that they could not say how much of the \$9,000 of said verdict was for loss of profits and how much was for pain and suffering, set the verdict aside. Thereafter the appellee took a trial de novo at the Sussex Circuit and recovered a second judgment against the appellant for \$11,300, a rule to show cause in which matter was again allowed by the Court and on June 12, 1916, the Supreme Court filed its opinion

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(pp. 318-319), stating that "the plaintiff's estimate and calculation of his business losses in many instances is too highly nebulous for use as a basis upon to which to find a verdict," and it thereupon ordered that said verdict "must be reduced to accord with that rendered on the former trial." On July 3, 1916, the plaintiff-appellee filed a remittitur, consenting that the verdict in his favor rendered at the September, 1915, term of the Sussex Circuit Court for the sum of \$11,300 damages, be reduced to the sum of \$9,945, the said plaintiff remitting from the said verdict the sum of \$1,805, and consenting that the judgment in his favor be entered for the sum of \$9,945 (p. 320). Upon the filing of this remittitur the plaintiff-appellee on the same day entered an order discharging the rule to show cause obtained by the defendant-appellant and ordering that judgment final be entered in this cause in favor of the plaintiff-appellee against the defendant-appellant for the sum of \$9,945, judgment on which order was subsequently entered in the Supreme Court.

### **Argument.**

The verdict of the jury being in a case for unliquidated damages, and not susceptible of admeasurement or calculation as to any part thereof being particularly erroneous, the Supreme Court on the rule to show cause obtained, was without authority to reduce said verdict to accord with the verdict in the former trial and in doing so usurped the powers and function of the jury and deprived the appellant of its right to have the matter of damages again passed upon by a jury.

### POINT I.

An examination of the entire record will show that the action of the plaintiff-appellee was for unliquidated damages, to wit, for pain and suffering, personal injuries and for loss of profits in his business as a baker. The objection that the appellant makes to the scaling down of the verdict in this case so that it must accord with the verdict of the jury on a former trial of this case which the Supreme Court had already set aside, we urge, was not within the province or authority of the Supreme Court. In *Dunning vs. Reed*, 76 New Jersey Law, 384, Justice Parker speaking for the Supreme Court, relative to the powers of the judges of the District Court to order a new trial to be had on such terms as he shall think reasonable, said:

“We understand this as conferring on judges of District Courts as full and ample power in ordering new trials in their courts as obtained in courts of common law jurisdiction; and such courts constantly exercise the power of giving the plaintiff the option of accepting a reduced verdict, or being put to a new trial, in cases where the right of recovery is established but the verdict appears excessive. It is sufficient, without going outside of our own State, to cite the cases of \* \* \* all of which were based on contracts and scaling down of verdicts in tort cases for personal injuries is too common a practice to require citation” (pp. 385 and 386).

The appellant admits that in so far as the authorities go with respect to the scaling down of verdicts in contract cases the courts have always recognized the fact that the erroneous part of the verdicts were matters of calculation. An examination of the authorities in New Jersey with respect to this practice shows a well defined and recognized limitation of the authority of the courts in such matters.

In *Truax v. Truax*, 2 N. J. L., 153, it appears that the jury found a verdict for more than the plaintiff demanded in her state of demand filed with the justice and thereafter released and remitted the surplus and took judgment for the amount of the demand filed. The court in examination of the case determined that the calculable surplus was properly remitted.

10 In *Young v. McPherson*, which was an action of dower, the jury evidently included certain annual value in their verdict for damages. Pennington, Justice, in reviewing the matter at that time stated that

“It is evident that the jury have included the annual value in the damages but cannot this be corrected by a remission of the damages to the amount of the annual value *which is a subject of calculation?*”

20 In *Thompson v. The Morris Canal & Banking Company*, 17 N. J. L., 480 which was an action of trespass against the Canal and Banking Company, the company was found guilty at the Circuit and damages assessed against them for \$11,291. On a motion to set the verdict aside for excessive damages the Court said that with respect to trespass to land not being of

30 “an ideal but a visible tangible nature, admits of measurement and appraisal, so nearly certain, that honest minds seldom differ much about the amount; and if, in such case, the verdict be for a sum very disproportionate to the visible injury, without any circumstances of ill will or malice, it will commonly be set aside for excessiveness.” (p. 483.)

The limit to which the Court in that case allowed itself to go was purely a reduction of the verdict to the calculable amount of the plaintiff's injuries.

40 In *Obert v. Hammel*, 18 N. J. L. 73, an action

of ejectment, the verdict was for the whole of a farm but the proof in the case was that the plaintiff was entitled to but 1/20th part thereof. In view of the fact that the excess of the verdict was calculable Ford, Justice, stated that the Court had no difficulty in reducing the verdict to accord with the proof.

In *Berry v. Vreeland*, 21 N. J. L., 183, the Supreme Court recognizes its inability to interfere with verdicts in the following language:

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“The court in actions of trespass, especially for personal torts, when damages can be gauged by no fixed standard, but necessarily rest in the sound discretion of the jury, interferes with a verdict on the mere ground of excessive damages with reluctance, and never, except in a clear case. \* \* \* Where there is a clear standard for the *measure of damages* no difficulty in applying it. The measure of damages is a question of law, and is necessarily under the control of the court.”

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(p. 187.)

In the case above cited it appeared that the damages were susceptible of calculation and were greatly in excess of the verdict. A new trial rather than a reduction by way of calculation was nevertheless the method adopted by the court.

In the case of *New Jersey Flax Company v. Mills*, 26 N. J. L., which was an action by Mills against the Flax Company for services performed, the verdict of the jury showed itself to be clearly contrary to the evidence because the mode in which it could have arrived at its result and finding was such that although it entitled the plaintiff to a verdict, it entitled him to a verdict for a less amount than found by the jury. The evidence in the case, it appeared, was so plain and undisputed that the court was able to calculate the amount of the verdict's excessiveness and having made such a calculation, it ordered that the plain-

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tiff enter a remittitur for the excess of the verdict over the sum which it had determined should have been the verdict.

In *Jackson v. Traction Company* (59 N. J. L., 26) which was a death action, the earning capacity of the decedent plainly appeared. The court, on an examination of the verdict said:

10           “While, as has been well said, a jury in these cases must to a large extent form their estimate of damages on conjectures and uncertainties, yet where the evidence furnishes some standard for valuation of damages, a verdict wholly disregarding such standard ought not to stand.” (p. 28.)

and thereupon the court on calculation, reduced the verdict if the plaintiff would abate from the verdict rendered a fixed and determined sum.

20           In *Vanderbeck v. Mayor and Aldermen of the City of Paterson*, 68 N. J. L., 584, the Supreme Court again recognized its limitation of authority in reducing a verdict on a rule to show cause to those kinds of action wherein the separation of the damages recovered, the good from the bad, was susceptible of admeasurement and ascertainment and stated that the plaintiff may be given his election to hold a verdict for a sum of money which he has sustained by his proof on the remission of the excess which was calculable by the Court.

30           In *Johnson v. Bowers*, 69 N. J. L., which was an action for work done and materials furnished by the plaintiff to the defendant, through inadvertence at the trial the plaintiffs claim only was litigated by the parties and established by the verdict, but the defendant's claim still stood admitted, and he received no benefit by the verdict. The Supreme Court on rule to show cause dealing with this question said that

40           “The right of the court to amend the ver-

dict without the consent of the plaintiff may be doubtful, but there is no doubt of our right and duty to stay entry and execution of the judgment until the plaintiff does equity to the defendant by remitting the amount of the credit stated in the bill of particulars (pp. 547-548)."

An examination of this case shows that the action of the trial court was based solely upon the fact of a matter which was undisputed and hence necessarily calculable. 10

From an examination of the authorities heretofore referred to, it is apparent that the court in each and every instance has acted only upon a verdict and scaled or reduced the same down to a different or lower figure, where the amount of the verdict under the proof was susceptible of ascertainment by a calculation, a base for which calculation was either afforded by the evidence or had been established by some rule of law. In the present case it must be conceded that the record discloses that there is no fixed criterion for assessing the damages. It is the contention of the appellant that to say in such cases that the verdict of the jury should not have exceeded a certain sum is to invade the peculiar province and to assume the functions of the jury. To the suggestion that the course pursued by the trial judge would be desirable as to often relieve the parties of the expense and delay of a new trial, Lumken Justice, in *Lang vs. Hopkins*, 10 Ga., 45 makes what appears to us to be a proper answer to the query, when he says: 20

"The answer to such a suggestion is that neither the venerable sages of the common law, nor the wisdom of the legislature deemed it prudent or safe to confide this power to the judge. Without such authority he has no jurisdiction or power to pass upon or determine questions which the law refers to the enlightened conscience of impartial jurors 30

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and with which he is forbidden to interfere except where the finding leads him to suspect or authorized him to infer that the verdict is the result of undue bias or prejudice. We are not to consider what would be more convenient or economical than the course marked out by the express provisions of the law in determining such questions nor do we design to suggest that the course of the court below was influenced by such considerations however laudable they may be."

10 In the case of *Brunswick Light & Water Company vs. Gale*, 91 Ga., 813, which was an action for personal injuries, it was held;

20 "The court having determined that the ground in the motion for a new trial complaining that the damages found by the jury were excessive, was well taken. It was error not to grant a new trial unconditional, there being in the evidence no guide or criterion by which the court could determine the amount which should be written off."

The situation with which the appellant is confronted is that it feels that the Supreme Court, while it has the power to control the verdicts of juries has not had the power to find what those verdicts should have been. For if the amount of the reduction of the verdict as ordered by the Supreme Court and as remitted by the plaintiff appellee was not susceptible of calculation, then there can be no doubt that the selection and finding by the Supreme Court that the verdict in the instant case for \$11,300 was \$1,355 in excess of what it ought to have been, such a determination was a personal determination by the Supreme Court and a substitution of its judgment for the judgment of the jury.

30 It is our contention that the Supreme Court in reducing the verdict in this case necessarily found that the jury which sat in the case had  
40 been either passionate or prejudiced, and both

practically mean one thing, and yet the Supreme Court permitted the verdict to stand in part. By so finding the Court also by necessary implication found that the issues in the case had not been tried by such a jury as the law contemplates and yet denied the appellant the right to have these issues passed upon by a fair and lawful jury. In other words, the situation presented is that the case at bar being a case in which damages for a tort have been assessed by a jury at an entire sum, the Court, upon a motion for a new trial for excessive damages and for insufficiency of evidence to support the verdict, according to its own estimate of the amount of damages which the plaintiff ought to have recovered, has substituted its opinion with respect to an amount which only could be properly assessed by another jury. If, as said in the case of *Murry vs. Leonard*, 75 N. W., Reporter, 272;

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“the jury were influenced by passion and prejudice in rendering the verdict which the Court found to be excessive to so great an extent, there were sufficient grounds for holding that the entire verdict and all the questions in the case were likewise influenced.

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\* \* \* Cases will arise in which the rule for the measure of damages is fixed and definite and where the verdict upon a special finding will disclose some particular fact or some element of damages which would authorize the Trial Court to reduce the amount thereof in such manner as to bring the verdict or findings within the proper amount. In such cases the Trial Court may very properly make a conditional order that a new trial be granted unless the excessive amount be remitted. The rule here laid down only applies to cases where the amount of damages is to be determined by the judgment of the jury.”

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Mr. Southerland in his work on “Damages” says:

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10 "There is an apparent departure from the sound principle in this practice. The Court concludes that the jury was influenced by passion or prejudice or both because they found such excessive damages and yet allows their findings covering the major propositions of the case upon which damages are consequent to stand. Why should a verdict be in part retained if the jury were really influenced by passion or prejudice? Where their estimate is rejected and another substituted is the latter a verdict?" (I Southland's "Damages," p. 108-114.)

20 That the rule with respect to calculable damages is the proper course to be followed is apparent from a reading of the case of *Bank of the Commonwealth of Kentucky vs. Ashley* (2 Peter's U. S., 327). In that case, which was a suit on a number of notes, the verdict was in excess of the amount of the notes sued upon to the extent of the amount of one of the notes and the United States Supreme Court preceded to make a precedent "in furtherance of justice" by allowing the party who recovered the verdict to enter his remittitur for the calculable excess of the verdict.

This practice with respect to calculable reductions in verdicts has had the early sanction of the Court of Appeals in the State of New York, where Strong, J., in the case of *Moffet vs. Sackett*, 18 N. Y., 528, said:

30 "It is undoubtedly competent for a Court sitting at General Term on appeal from the Special Term to allow or reject a claim of either party where its extent has been definitely fixed, *or can be clearly determined*, but where the amount is indefinite or uncertain it cannot be determined by the Court without assuming the province of a jury."

Again in the case of *Cassin vs. Delaney*, 38 N. Y., page 181, the Court of Appeals said:

40 "In cases where specific items are presented upon contract and can be passed upon reject-

ing or sustaining the specific charge this Court and the courts below are in the habit of directing the reversal or affirmance, subject to the condition that the parties shall take their direction upon the questionable items. This, I have no doubt, is sound practice. It has never, however, been applied to cases where discretion on the part of the jury was allowed or where the damages were for a tortious act of the party or its consequences."

### POINT II.

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If the Supreme Court was without authority in reducing the verdict in the instant case in manner and form as it was ordered by it, instead of granting to this appellant a new trial, it is manifest that such action was a deprivation by it of the appellant's right to have the question of damages again passed upon by a jury, or in other words, the action of the Supreme Court deprived this appellant of its constitutional rights, both under the State and Federal Constitutions, of a trial by jury. 20

### POINT III.

The order and judgment of the Supreme Court should be set aside and the Supreme Court directed to order a new trial because in its opinion it has determined that the verdict of the jury was excessive at least to the extent of \$1,355.00—an excessiveness apparent to the Court, but not in law legally ascertainable by the Supreme Court. 30

Respectfully submitted,

FREDERIC B. SCOTT, 40  
Attorney of Appellant.

CHAPTER II

The first part of the book is devoted to a general survey of the history of the world from the beginning of time to the present day. The author discusses the various stages of human development, from the earliest forms of life to the modern era. He also touches upon the different civilizations and cultures that have shaped the world as we know it today.

CHAPTER III

The second part of the book focuses on the political and social changes that have taken place in the world during the last few centuries. The author examines the rise of the nation-state, the development of democracy, and the impact of the industrial revolution. He also discusses the various wars and conflicts that have shaped the modern world.

CHAPTER IV

The final part of the book deals with the future of the world. The author discusses the various challenges that the world is facing today, such as climate change, nuclear war, and global inequality. He also offers some thoughts on how we might overcome these challenges and build a better world for the future.

**New Jersey**  
**Court of Errors and Appeals**

PHILIP HEINZ,  
Respondent and Plaintiff,

vs.

THE DEL. LACK. AND  
WESTERN RAILROAD  
COMPANY,  
Defendants and Appellants,

On Appeal from  
Judgment of  
the Supreme  
Court.

**Brief of Wm. H. Morrow, of Counsel with  
Plaintiff-Respondent.**

The precise question involved in this appeal has not, so far as I know, been before this court for consideration.

But the practice complained of, of asking the plaintiff to remit from the amount of damages which the Supreme Court and the Circuit courts of this State have, upon consideration, thought to be in excess of the amount fairly within the discretion of a jury, has prevailed for a long time.

Jackson, Admr., v. Traction Co., 30 Vroom, 25, 28, is an early case, tried in 1896, and the Supreme Court, on a rule, determined that the damages awarded were excessive and directed that unless the plaintiff would abate from the verdict of \$5,000.00 the sum of \$3,000.00, the verdict might stand; otherwise, for the excessive verdict, the rule should be made absolute.

In Miller v. Railroad Company, 20 N. J. L. J., 19, the court directed that a verdict for \$2,500 was excessive and reduced the verdict to \$1,000.

Struckbine v. The Oxford Iron Co., was tried by me before Chief Justice Beasley, many years ago, and a verdict for \$2,500.00 was rendered. The Supreme Court deemed the damages awarded to be excessive, and reduced the verdict to \$1,000.00, and if the plaintiff refused to accept that amount a new trial should be ordered.

Verdicts, two of them, successively, in the Graham v. Consolidated Traction Co., were severally reduced to \$1,000.00. See N. J. L. J., Vol. 20, page 281.

In Rafferty's Admr. v. Erie R. R. Co., 37 Vr., 450, the verdict was for \$5,000, but the Supreme Court deemed that \$2,500 was a proper sum for compensation to plaintiff and reduced the verdict to that amount; but said that unless she would accept such reduction the rule would be made absolute. This was in 1901.

In Baldwin v. Thompson, 41 Vr, 447-8, the verdict was for \$1,500. The Supreme Court, in an opinion by Mr. Justice Swayze, said the testimony did not warrant a verdict for that amount, and the sum of \$500 was proper compensation, and unless plaintiff would accept that amount the verdict should be set aside. 1904.

In *Werpupp v. N. J. Street Railway Co.*, 27 N. J. L. J., 172, the verdict was for \$5,000, and the court said the amount was excessive, but that if plaintiff consented a judgment might be entered for \$3,000.

I presume that in the past twenty years a hundred verdicts in tort cases have been, with consent of plaintiff, reduced in amount.

This practice has prevailed in almost every State in the Union. And its propriety has been challenged and sustained in the appellate court of almost every one.

The industry of counsel for the appellant has discovered but one State, Georgia, where it is not permitted.

I have read the following cases, all of them actions for personal injuries sustained, and all upholding the practice followed in this State :

In *Kolb v. Flages*, 27 Ill., Appeals, 531, it was said : "it is now the well settled practice in cases sounding in damages, to permit the plaintiff to remit from the verdict found by the jury instead of making a rule to show cause absolute."

In *C. C. & C. & St. Louis R. R. Co. v. Bickett*, 11 Ind. Appeals, 39, the Indiana Court said : "The right of the trial court to permit a remission of a part of a verdict or submit to a new trial in cases where there is no definite standard by which to measure damages, is supported by the great preponderance of the decisions."

The same practice is sustained in *Detzar v. R. Stroh Brewing Co.*, 119 Mich., 282. The Michigan court said : "This has always been a matter of discretion, and, where it is not clearly erroneous, the action of the trial court should not be disturbed."

Young v. Cowden, 98 Tenn., 577, holds: "The rule as laid down and followed in almost every State in the Union of suggesting a remittitur as a condition of not granting a new trial, and while it cannot be made peremptory upon the plaintiff, but must remain optional, still, when it is accepted by the plaintiff, and there is no attempt to prevent an appeal on the part of the defendant and thus to coerce him to submit to the judgment, he has no right to complain, inasmuch as the court fixes the damages at an amount lower than that fixed by the jury."

In Wisconsin, Corcoran v. Harron, 55 Wis., 120, the court said: "The practice adopted by the trial judge is clearly sanctioned by the great weight of authority. We must therefore hold that, in actions of tort as well as on contract, where the damages are clearly excessive, the trial judge may either grant a new trial absolutely, or give the plaintiff the option to remit the excess, and in case he does so order the verdict to stand for the residue."

The same rule is followed in Pa., the earliest case being McBride v. Daniels, 92 Pa. St. Rep., 332, and from that case to the present time, the practice has been universal and sustained by the Supreme Court.

In Clifton v. R. C. & S. R. Co., 135 S. W. Rep., 40, 42, the Supreme Court of Appeals of Missouri said: "The rule announced is as follows—The Rationale of these late cases is that, the fact that a verdict is too large does not in itself indicate that the jury was actuated by passion or prejudice where there was no error in the admission or rejection of evidence, &c. &c., and no misconduct on the part of the jury was shown, and the evidence established that the plaintiff was entitled to substantial damages, and that in such a case if the plaintiff would consent to a remittitur

of a part of his verdict, the defendant cannot complain."

In *Cook v. The Globe Printing Co.*, (a slander case), 227 Mo., 471, the same court said: "The rule is, that when the case has been well tried, the only meritorious objection which can be used against the judgment is the excessiveness of the verdict, to reduce the verdict to a sum which to the judgment of the court would be reasonable and just."

See, also, *Wiring v. Smith*, 222 Pa. St., 8; S. C. 70 A., 906. In this case the court said: "Nor are we convinced that the conditional order of the court below, after trial and verdict, complained of, would justify a reversal of the judgment entered in the present case. The learned judge evidently followed the rule of our own cases in this respect in a well-meaning effort to have the matters in dispute between the parties finally determined." Citing *Fleming v. Brown*, 194 Pa., 67; 44 Atl., 1064, in which Brown, J., in passing upon a conditional order made by the court below and not accepted by the defendant, said: "The relief tendered was refused. The order of the court providing for it was made for the benefit of the defendant now complaining of it, and we overrule his second assignment of error."

In *Stauffer v. Reading*, 206 Pa., 473, 55 Atl. 1072, the present Chief Justice, in reviewing the discretionary power of courts in granting or refusing new trials, among other things, said: "Hence it is well settled that the court may impose terms upon either or both parties as conditions of the grant or refusal, and the latitude allowed to the discretion of the court to this end is very great. It is clear, therefore, that the learned court below was well within the rule of our own cases in this respect, and certainly should not be convicted of

error for doing what this court has said he had the right to do in the proper exercise of his discretion."

In the principal case, the action was by a son-in-law, who had eloped with and married defendant's daughter, and on the return home, the father had followed the young man with a rifle gun, shooting him several times and inflicting some injuries. The measure of damages in such cases is not, so far as I know, fixed by any rule, but must be left very largely to the discretion of a jury. In the particular case the jury awarded \$45,000.00, which the court reduced to \$35,000.00.

In *Noxon v. Remington*, 61 Atl 953, the Supreme Court of Errors of Conn., held that a trial court had jurisdiction on a motion for a new trial on the ground that the damages awarded were excessive, to order that a new trial on that ground should be granted, unless the party in whose favor the verdict had been rendered would file a remittitur of so much of the verdict as the trial court deemed excessive.

The action was by a wife, 74 years old, whose husband was 75 years old, against a woman who was 64 years old, and who had by her blandishments and seductions alienated the affections of her husband and had committed adultery with him.

There has never, to my knowledge, been established any standard by which damages in that class of cases may be estimated or fixed. The Conn. court, quoting from the case in 116 U. S. Supreme Court, said: "To indicate before passing upon the motion for a new trial its opinion that the damages are excessive and to require the plaintiff to submit to a new trial, unless by remitting a part of the verdict he removes the objection, certainly does not deprive the defendant of any

right or give him any cause for complaint.”

Then the Conn. court said: “We are clearly of the opinion that the practice of thus granting a new trial, nisi, in certain cases where the damages awarded by the verdict are clearly excessive, is a beneficial one to the parties, and is in no sense a usurpation of the functions of the jury. Such an order frequently saves the parties the expense of a second trial. The plaintiff is not compelled to remit the sum suggested by the court, but may elect either to remit the sum suggested by the trial court, or to submit to a new trial, &c. Since the reduced sum required to be paid by the judgment after the remittitur has been filed is a part of the damages assessed by the jury, the defendant can not be heard to say that such reduced damages were not assessed by the jury.”

In *Osborn v. Quincy C. & R. R. Co.*, 144 Mo. Appeals, 124, it is said: “It is now the more general rule that the court may make an order denying the motion for a new trial upon condition that the successful party will remit a certain sum from the verdict, although the amount remaining is not capable of definite computation from the evidence.”

The courts of the following named States have adopted the same rule, the opinion in each given case using language similar to that in the opinions quoted: Colorado, Arizona, California, Alabama, Illinois, Iowa, 17 N. W. Rep., 94; 90 N. W., 815; Kansas, 42 Pac., 244; 80 Pac., 935; Louisiana; Mich. 157 Mich., 541; Minn. 99 Minn., 97; 108 N. W., 891; Nebraska, Montana, N. C., Ohio, Oregon, Tennessee, Texas. See, also, *Smith v. Times Publishing Co.*, (a libel case), 178 Pa., 481.

This question has been passed upon by the U. S. Supreme Court in *North P. R. R. Co.*, 116 U. S., 642. The action was for personal injury and a

verdict for \$25,000 was rendered. The court ordered a new trial unless the plaintiff would remit \$13,000 of the \$25,000, which he did. The Supreme Court said: "The exaction, as a condition of refusing a new trial, that the plaintiff should remit a portion of the amount awarded by the verdict of the jury was a matter within the discretion of the court."

It held that the amount found was excessive, but that no error had been committed on the trial. In requiring the remission of what was deemed excessive, it did nothing more than require the relinquishment of so much of the damages as, in the opinion of the court, the jury had improperly awarded. The corrected verdict could therefore be properly allowed to stand.

This case was followed by the same court in *Kennon v. Cooper*, 131 U. S., 22; and the latter in *Tevis v. Ryan*, 233 U. S., 283, and approved in 158 U. S., 52.

And there are at least 50 cases reported in the Fed. Rep. following, as they must, the decisions of the highest court in the land.

From this review of the cases in courts of last resort in so many of the States, and the cases decided in the U. S. Supreme Court, I think there is little ground for the fear entertained by the *Lackawanna R. R. Co.*, that its constitutional rights, under either the State or the Federal Constitutions, are about to be infringed.

This particular case illustrates the wholesomeness of the rule established by the cases cited and so largely quoted from.

The cause has been tried twice—by able and experienced trial judges, one of whom occupies a place on the bench of this honorable court—and there were two carefully tried cases, with no

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errors, save in the first, when the court thought there was not enough evidence to justify damages for loss in business, and the other without any question whatever in the rulings of the court; on the first trial the jury gave a verdict for \$9,945.00; and the second jury increased this amount to \$11,300.00; this amount the Supreme Court, after careful examination, and considering the arguments of counsel, thought to be a trifle too large and reduced the amount to the original \$9,945.00.

And I submit that the judgment of the Supreme Court, so entirely in line with the practice sanctioned, I presume, by every justice of that court in reducing the amounts of verdicts deemed to be excessive, ought to be affirmed.



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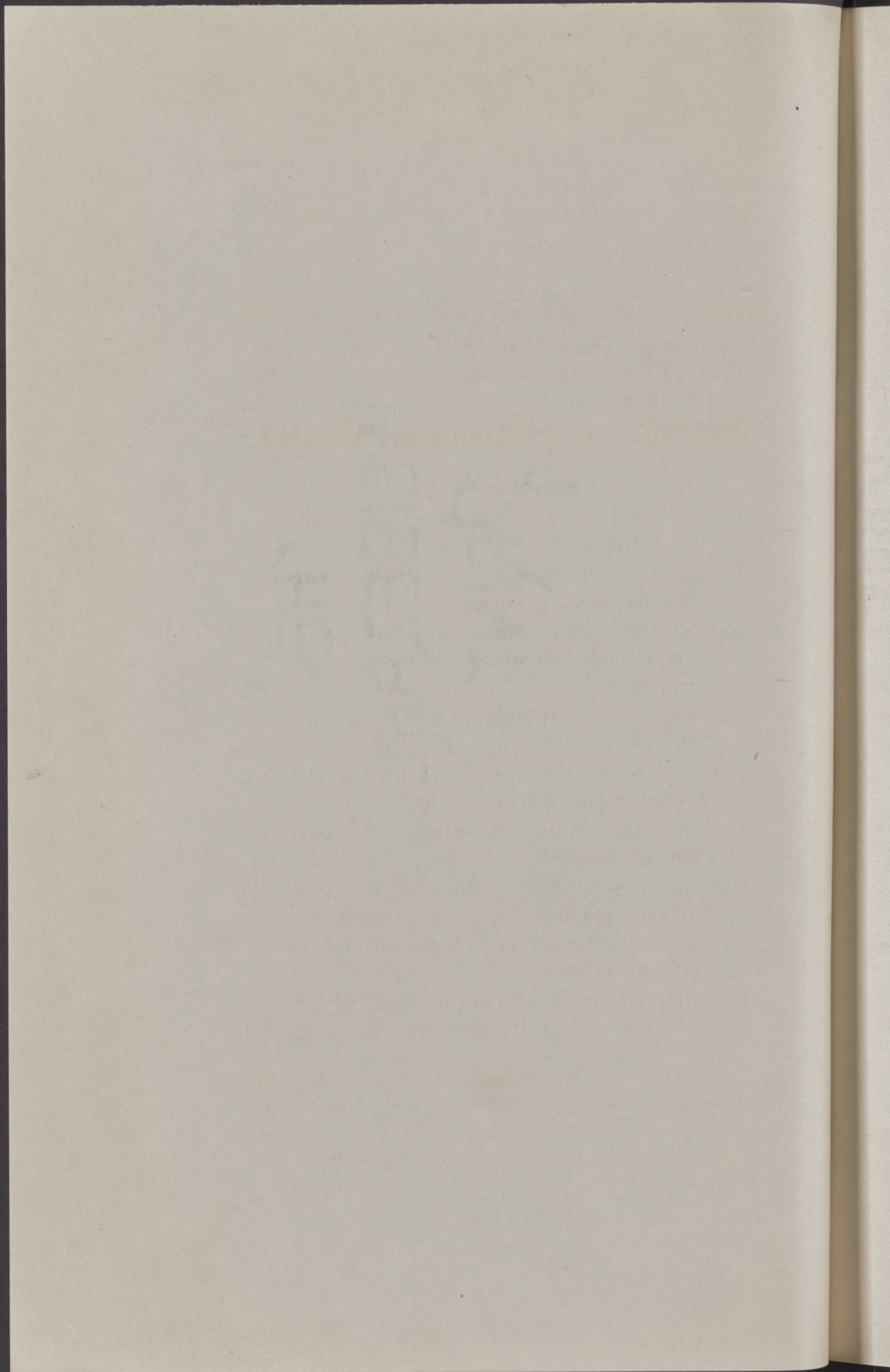
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**Notice of Appeal to Court of Errors and Appeals.**

(Filed July 14, 1916.)

**New Jersey Supreme Court.**

10

SUSSEX CIRCUIT.

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PHILLIP HEINZ,  
*Plaintiff-Respondent,*

*against*

THE DELAWARE, LACKAWANNA &  
WESTERN RAILROAD COMPANY,

*Defendant-Appellant.*

---

20

To WILLIAM H. MORROW, Esq.,  
Attorney of Plaintiff-Respondent.

SIR:

YOU WILL PLEASE TO TAKE NOTICE that the above defendant hereby appeals from the final order of the New Jersey Supreme Court in the above matter made and entered in the said matter on the 3d day of July, 1916, to the New Jersey Court of Errors and Appeals. 30

AND YOU WILL FURTHER TAKE NOTICE that the above defendant-appellant will serve upon you within the time required by law and the practice in such cases made and provided, its reasons and grounds for said appeal.

40

AND YOU WILL FURTHER TAKE NOTICE that on July 5, 1916, this defendant-appellant filed with the Clerk of the Supreme Court, within fifteen days after final judgment rendered in said matter, a bond or recognizance pursuant to the statute in such cases made and provided, duly approved as to form and sufficiency by one of the Commissioners appointed by the New Jersey Supreme Court to take recognizance of bail, etc.

10

Yours truly,

FREDERIC B. SCOTT,  
Attorney of Defendant-Appellant.

Dated, July 6, 1916.

---

**Grounds of Appeal.**

(Filed Aug. 9, 1916.)

**20 NEW JERSEY COURT OF ERRORS AND APPEALS.**


---

PHILLIP HEINZ,

*Plaintiff-Respondent,*

vs.

THE DELAWARE, LACKAWANNA &  
WESTERN RAILROAD COMPANY,

*Defendant-Appellant.*

---

} Action at  
Law.

30

The above appellant, within the time prescribed by law, now comes and writes down its grounds and reasons of appeal:

1. Because the Supreme Court of the State of New Jersey was without authority in law to direct

*Grounds of Appeal.*

the entry and making of the order made and entered in this cause on June 3, 1916.

2. Because the Supreme Court of the State of New Jersey in ordering and directing the making and entry of the order made and entered on June 3, 1916, in this cause deprived this appellant of its constitutional right of trial by jury, violating Section VII., Article I. of the Constitution of the State of New Jersey. **10**

3. Because the Supreme Court of the State of New Jersey in ordering and directing the entry and making of the order made and entered in this cause on June 3, 1916, deprived this appellant of its constitutional right to due process of the law of the land, especially Article V. of the Amendments to the Constitution of the United States.

4. Because the Supreme Court of the State of New Jersey in ordering and directing the making and entry of the order made and entered in this cause on June 3, 1916, deprived this appellant of its constitutional right to trial by jury, violating the VII. Amendment of and to the Constitution of the United States. **20**

5. Because the order of the New Jersey Supreme Court made and entered in this cause on June 3, 1916, was contrary to law.

6. Because the order of the New Jersey Supreme Court made and entered in this cause on June 3, 1916, deprived this appellant of its right to trial by jury, violating Section VII. of Article I. of the Constitution of the State of New Jersey. **30**

7. Because the order of the Supreme Court of the State of New Jersey made and entered in this cause on June 3, 1916, violated this appellant's right to due process of law guaranteed to it by the Fifth Amendment to the Constitution of the United States. **40**

8. Because the order of the Supreme Court of the State of New Jersey made and entered on June 3, 1916, violated the Constitution of the United States in that it deprived this appellant of its right of trial by jury guaranteed to it by the Seventh Amendment of and to the said Constitution.

10 9. Because the direction of the Supreme Court of the State of New Jersey of and to the making of the order of June 3, 1916, in substance and effect is the reducing of the verdict of a jury in a case of unliquidated damages by the New Jersey Supreme Court and the substitution of its opinion and judgment on a matter that was and is solely the matter of consideration by and the province of a jury.

FREDERIC B. SCOTT,  
Attorney of Appellant.

20

30

40

**Summons.**

(Filed July 30, 1912.)

The State of New Jersey, to Delaware, Lackawanna and Western Railroad Company:

You are summoned to answer the annexed complaint of Philip Heinz in an action at law in the Supreme Court.

(L S.)

10

And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, WILLIAM S. GUMMERE, Chief Justice of the Supreme Court, at Trenton, this Thirtieth day of July, Nineteen hundred and twelve.

20

WM. RIKER, JR.,  
Clerk.

Henry Huston,  
Attorney.

30

40

**Complaint.****NEW JERSEY SUPREME COURT.**

SUSSEX COUNTY.

10	<p style="text-align: center;">PHILIP HEINZ, <i>Plaintiff,</i>  <i>against</i>  DELAWARE, LACKAWANNA &amp; WEST- ERN RAILROAD COMPANY,  <i>Defendant.</i></p>
----	---

PHILIP HEINZ, plaintiff, of the Town of Newton, in the County of Sussex, and State of New Jersey, says:

1. That on or about the first day of April, Nineteen hundred and Twelve, the defendant was a corporation, and owned and operated and managed a certain steam railroad, running through the Borough of Andover, in said County of Sussex, and State of New Jersey;
2. That said railroad in said borough aforesaid at the time aforesaid, intersected and crossed at grade a certain public street and highway used by pedestrians and wagons and vehicles of all kinds, called High Street;
3. That said defendant on the Thirteenth day of April, Nineteen hundred and Twelve, ran and operated cars over said railroad, drawn and propelled by steam locomotives;
4. That on or about the thirteenth day of April, Nineteen hundred and Twelve, the said plaintiff was lawfully on said railroad riding in a wagon, drawn by two mules hitched thereto, toward and across said railroad where it intersects and crosses said public street and crossing aforesaid;
5. That at said time and approaching said place the said defendant, by its servants, was run-

*Complaint.*

ning, operating and managing a certain train of cars on and over said railroad, drawn by a steam locomotive, with the intention of crossing said public street at the place and crossing aforesaid;

6. That it thereupon became and was the duty of said defendant to reasonably guard and protect said crossing, or to give a signal of the approach of said train of cars by ringing a bell, or blowing a whistle, or by some other sufficient method to warn the said plaintiff or other persons lawfully crossing said railroad at said time and place of the approach of said train of cars; 10

7. That said defendant wholly neglected said duty aforesaid and negligently failed to reasonably guard and protect said crossing aforesaid when said train of cars was approaching thereto, and neglected to blow a whistle, or ring a bell, or to use any other method to warn the said plaintiff or any other persons lawfully crossing said railroad at said time and place of the approach of said train of cars; 20

8. That without any negligence on the part of the said plaintiff, and wholly by reason of the negligence of the said defendant, the said train of cars, operated and managed as aforesaid, then and there violently collided with the said wagon in which the said plaintiff was riding, and with the two mules thereto attached, and violently collided with the said plaintiff so riding in said wagon, and threw said plaintiff to the ground; 30

9. That thereby the said plaintiff was severely cut, bruised, wounded and injured, so that his life was dispaired of;

10. That thereby the said wagon in which the said plaintiff was riding was broken up, demolished and completely destroyed, and the said two mules thereto attached were killed, and the harness on said mules was broken and destroyed; 40

11. That at said time and place said wagon aforesaid was loaded with bread, cake, pies and

*Complaint.*

other bakery products, and that the same were thereby wholly destroyed;

12. That by means and as a result of said collision aforesaid the said plaintiff became sick, sore, lame and disabled, and continued sick, sore lame and disabled from the time aforesaid until the present time;

10 13. That during all said time the said plaintiff underwent and suffered great pain, and still undergoes and suffers great pain, and in the future will undergo and suffer great pain by reason of said collision aforesaid;

14. That by reason of said collision said plaintiff will be permanently injured and disabled, and was hindered and prevented, and in the future will be hindered and prevented from transacting and attending to his necessary and lawful affairs by him during all that time to be performed and transacted, and lost and was deprived of, and in the future will lose and be deprived of divers great gains, profits and advantages which he might and otherwise would have derived and acquired;

20

15. That by reason of said collision aforesaid said plaintiff was forced and obliged to and did pay, lay out and expend large sums of money, to wit, five hundred dollars, in and about endeavoring to be cured of said injuries so received as aforesaid;

30

16. That by reason of said collision aforesaid said plaintiff did suffer great loss by the killing of said two mules as aforesaid, and the destruction of said wagon and harness of said plaintiff, and the destruction of said bread, cakes, pies and other bakery products of said plaintiff, to wit, the sum of eight hundred dollars;

Plaintiff demands as damages, twenty-five thousand dollars.

40

HENRY HUSTON,  
Attorney of Plaintiff.

**Answer.**

(Filed August 18, 1912.)

**NEW JERSEY SUPREME COURT.**

<p style="text-align: center;">PHILIP HEINZ, <i>Plaintiff,</i>  <i>against</i>  DELAWARE, LACKAWANNA &amp; WEST- ERN RAILROAD COMPANY,  <i>Defendant.</i></p>	}	<p>Action      <b>10</b> At Law.</p>
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For answer to the plaintiff's complaint filed in this action and served upon the defendant, The Delaware, Lackawanna and Western Railroad Company, the defendant says:

1. That as to the statements contained in the first, second and third paragraphs of said complaint it admits the same to be true. **20**

2. That as to the statements contained in the fourth paragraph of said complaint, it denies the same to be true.

3. The defendant denies that said plaintiff was lawfully on said crossing as alleged by the fifth paragraph of said complaint, but admits the statements in said paragraph as to the running and operation of said train of cars to be true. **30**

4. The defendant denies that the plaintiff was lawfully on said crossing but admits its general duty is as set forth by the statements in the sixth paragraph of said complaint are true.

5. That as to the statements contained in the seventh and eighth paragraphs of said complaint, the defendant denies the same to be true.

6. That as to the statements contained in the ninth paragraph of said complaint the defendant **40**

*Answer.*

says that by reason of a collision between an engine of the defendant and the plaintiff, the plaintiff was severely cut, but as to the nature, extent and duration of said injuries, the defendant has not sufficient knowledge or information to form a belief.

7. That as to the statements contained in the  
 10 tenth paragraph of the complaint, the defendant says that by reason of a collision between an engine of the defendant and the plaintiff, it admits that the said plaintiff's mules were killed, but as to whether the harness of said mules was broken or destroyed as alleged in said tenth paragraph, the defendant has not sufficient knowledge or information to form a belief.

8. That as to the statements contained in the  
 20 eleventh, twelfth, thirteenth, fourteenth, fifteenth and sixteenth paragraphs of said complaint, this defendant has not sufficient knowledge or information to form a belief.

And this defendant by way of defense says:

1. That said plaintiff was not lawfully on said crossing as alleged in his complaint.

2. That it was not guilty of any carelessness, negligence or improper conduct in the premises and that the injuries and damages described by  
 30 the plaintiff in his complaint were caused by the fault and negligence of the plaintiff.

FREDERIC B. SCOTT,  
 Attorney of Defendant.

**Postea.**

(Filed .)

**NEW JERSEY SUPREME COURT.**

PHILIP HEINZ, <i>Plaintiff,</i> <i>against</i> DELAWARE, LACKAWANNA & WEST- ERN RAILROAD COMPANY, <i>Defendant.</i>	}	Action At Law.	10
--	---	-------------------	----

Afterwards, that is to say, on the 21st, 22nd, and 23rd days of September, in the year 1915, at a Circuit Court, held at Newton, in the County Sussex, before his Honor George S. Silzer, a Judge of the Circuit Court, to whom the issues joined as aforesaid, were referred to by his Honor James F. Min- 20  
 turn, the Justice of the Supreme Court holding the Sussex County Circuit Court, according to the form of the statute in such case made and provided, come as well the within named Philip Heinz, plaintiff, as the within named The Delaware, Lackawanna & Western Railroad Company by their respective attorneys within named, and the jurors of the jury being summoned to try the said issue, also come, who, to try the truth of the matters within contained, being chosen, tried and 30  
 sworn on their oath say: That the said The Delaware, Lackawanna & Western Railroad Company is guilty of the trespasses and grievances above laid to its charge, in manner and form as the said Philip Heinz hath complained against it, and assess the damages of the said Philip Heinz over and above his costs and charges, to the sum of \$11,300, and for those costs and charges to the sum of

GEORGE S. SILZER,  
 Circuit Court Judge. 40



*Harvey Snook—Direct.*

HARVEY SNOOK, sworn as a witness on behalf of the plaintiff, testifies as follows:

DIRECT EXAMINATION BY MR. MORROW:

Q. What is your calling? A. Civil Engineer.

Q. How long have you been engaged in that calling? A. Seven years.

10

THE COURT: Have you submitted your map to the other side?

MR. MORROW: It is the same map we used before.

THE COURT: If there is no objection to it we can put it in without further qualification.

MR. MORROW: All right; I want to prove some distances.

Q. Have you the map here? Is that the map you have made? A. (The witness produces map.)

20

MR. SCOTT: I think we can waive the formal proof of making of the map if you want to get some distances.

MR. MORROW: Then I think the map may be put up, so that we can see it.

THE COURT: Is this map drawn to scale?

THE WITNESS: Yes, sir.

30

THE COURT: And is it made from a survey made on the ground?

THE WITNESS: Yes, sir.

Q. When was the survey made? A. December 14th, 1912.

Q. By yourself? A. Yes, sir.

Q. What is the scale of the map? A. One inch equals fifty feet.

40

*Harvey Snook—Direct.*

MR. SCOTT: Is that the map which was used on the former trial?

THE WITNESS: It is the same map that was used on the former trial except that it has a little profile on and these buildings located.

10 MR. SCOTT: I thought the original map was on yellow paper?

THE WITNESS: This is the same map, and has this little profile added to it and these buildings located; otherwise it is the same map.

MR. SCOTT: Are the stenographer's identification marks on it?

THE WITNESS: I don't see them, but it is the same map.

20 BY MR. MORROW:

Q. You have that map, to my mind, upside down, and the wrong way. Can't you put that map up so that it will show the directions? A. If you can place it over there it will be arranged the other way.

Q. Is the north indicated on that map? A. It is.

Q. Up at the upper left hand corner? A. Yes, sir.

30 Q. It is north at the upper part of the map? A. Yes, sir; north to the upper and left hand corner.

Q. Which way is east? A. East would be here (indicating).

Q. To the right hand? A. Yes, sir.

Q. And west to the left? A. Yes, sir.

Q. Is the public road shown there? A. It is.

Q. Indicated between the double lines? A. Yes, sir; the double lines.

40 Q. That is a road extending from where to where? A. From Newton to Stanhope.

*Harvey Snook—Direct.*

Q. Newton would be to the left and Stanhope to the right? A. Yes, sir.

Q. The Village of Andover is to the left, is it not? A. Yes, sir.

Q. Will you state, now, whether the public road, and the tracks of the railroad are on the same level? A. They are not.

Q. Which is the higher? A. The railroad. **10**

Q. How much higher? A. I took an elevation in 1912 and I show a difference of 2.4 feet, and I took an elevation yesterday, and I show an elevation of 2.2 feet.

Q. Has the road been filled up some? A. No. I don't think the road has been changed.

Q. What is it, then, that causes the difference? A. I don't know, unless the tracks have been raised slightly.

Q. Is the High street crossing in the Village of Andover shown there? A. It is. **20**

Q. Where is that? A. It is marked High street.

Q. How wide is the public road at that point where you leave the public road to go over the High street crossing? That is, the travelled track, I mean? A. There is a sort of—there are really two roads leading over the track, with a small green spot in between, one road coming from Andover and one coming from Newton.

**30**  
THE COURT: Is the High street crossing the place where the accident happened?

MR. MORROW: Yes, sir.

Q. Now, I want to know the width of the public road, as it runs parallel with the railroad track? A. It is improved twenty-four feet wide.

Q. And was improved at the time of this accident, wasn't it? A. Yes, sir.

Q. Can you tell from your map how wide the railroad tracks are there, one track to the other **40**

*Harvey Snook—Direct.*

on the crossing? A. Well, it is four feet seven and a half inches.

Q. How far is it from the track on the east side to the center of that public road? A. Thirty-four feet.

Q. Is there a whistling post along the railroad track? A. There is.

10 Q. What is the distance to the one nearest to the crossing? A. 297 feet.

THE COURT: In what direction is that?

THE WITNESS: That is towards Stanhope.

THE COURT: That is north from High street?

A. No. That would be nearly south from High street.

20 Q. What is the distance to another whistling post? A. It is 797 feet to another whistling post.

Q. Is there any whistling post along the line of the road on that side before you get into Andover? A. There is not, except the two.

THE COURT: In which direction is it claimed the train came? Going from Stanhope to Newton or the other way?

30 MR. MORROW: Going from Stanhope toward Newton; going from the right of the map, toward the left, is it not?

THE WITNESS: It is, yes, sir.

MR. MORROW: As that map shows?

THE WITNESS: Yes, sir.

Q. Does that map show correctly the curve in the railroad tracks? A. It does.

Q. Is there a switch station below the first whistling post there (indicating)? A. There is.

40 Q. How far is that switch station from the crossing? A. It is 478 feet.

*Harvey Snook—Direct.*

Q. Have you observed how far one standing on the edge of the crossing can see down the track?

MR. SCOTT: Objected to. I would like to examine him preliminarily as regards the nature of his observation.

MR. MORROW: Yes, I suppose that is right.

10

MR. SCOTT:

Q. When did you make these observations? A. December 14th, 1912.

Q. And did you make them alone? A. No, sir.

Q. Whose assistance did you have? A. One of my helpers.

Q. Who was it? A. I have no record of who was with me.

Q. When were the observations made, in the day time, in the morning or when? A. They were made in the afternoon.

20

Q. About what time were they made? A. I don't know that.

Q. What kind of a day was it? A. I don't know.

Q. Do you know whether it was a clear day, or cloudy or rainy? A. It was not rainy.

Q. As regards whether was it clear or cloudy; you have no recollection? A. No, sir; I have no recollection.

30

Q. How did you make that observation? A. With rod, levelling rod.

Q. Where were you standing when you made it? A. I was stationed at the centre of the crossing.

Q. Between the tracks? A. Between the tracks.

Q. Where was your helper? A. My helper was—

Q. Without the distance at the present time, where was he? A. He was in the centre of the track.

40

*Harvey Snook—Direct.*

Q. In the centre of the railroad track? A. Yes, sir.

Q. Down toward Stanhope? A. Yes, sir.

Q. What was the method of your making your observation? A. By placing a target on the rod eleven feet high.

10 Q. What was the nature of the target? A. An ordinary levelling target on a levelling rod.

Q. What color? A. Red and white.

Q. Which was eleven feet from the ground, the bottom of the track, between rails? A. Yes, sir.

Q. About how large was that target? A. Well, an ordinary target is perhaps eight inches in diameter, somewhere near that.

Q. Will you illustrate to the jury with your hands approximately about the size of that? A. Well, it is about that size (illustrating).

20 Q. And this target was stationed down the track? A. Yes, sir.

Q. And you looked down the track from the centre of High street? A. Yes, sir; and from other points.

30 MR. SCOTT: We desire to object to the testimony on the ground that the testimony does not appear to have been made under the same or similar circumstances as existed at the time of the accident.

THE COURT: Of course, it will have to be shown that the circumstances were similar.

MR. MORROW: We will show that by our witnesses. He was not at the accident.

MR. SCOTT: An observation made with a surveyor's target is not similar at all to an observation made of an engine which is a large piece of machinery.

40 THE COURT: I will permit the testimony provided it is connected up later.

*Harvey Snook—Direct.*

BY MR. MORROW:

Q. Proceed. A. A target eleven feet high could be seen 736 feet toward the culvert while standing on the crossing.

THE COURT: Where is the culvert?

THE WITNESS: Towards Stanhope.

Q. Go on? A. A target eleven feet high could be seen 797 feet while standing about the centre of the public road, thirty-four feet from the centre of the railroad track. 10

THE COURT: In which direction was the target.

THE WITNESS: The target was still south from the crossing there.

Q. Do you know Mr. Totten's barn there? A. I do. 20

Q. Where is that barn? A. It is approximately one hundred and twenty feet south of the crossing and fifty feet west of the railroad.

THE COURT: Is it indicated on the map?

THE WITNESS: It is

THE COURT: How?

THE WITNESS: By small squares. 30

THE COURT: Where is the culvert, is that indicated on the map.

THE WITNESS: The culvert is just below the end of the map.

THE COURT: How far is the culvert, by rail, from the High street crossing?

THE WITNESS: It is 1106 feet.

Q. Is there any other point on that map to which you wish to call attention? A. Well, we 40

*Harvey Snook—Direct.*

have a profile from the centre of the public road up over the track and a short way up High street:

Q. What is the course of the road from the centre of the public road to the crossing? What is the grade, if there is a grade? A. Well, the grade varies somewhat. I have elevations here showing every five feet from the centre of the public road to a point about thirty feet beyond the tracks.

Q. How much of a grade, five feet? A. No. I say, I have a profile showing the elevations every five feet from the centre of the road to a point about thirty feet west of the railroad.

Q. What is the difference in the grade? A. The difference between the centre of the public road and the railroad track is 2.1 feet, the difference between the gutter and the centre of the railroad track is 2.2 feet.

Q. Beyond the track what is it? A. At five feet beyond the track, assuming that the elevation at the centre of the road is one hundred, the elevation at five feet beyond the track is 102.1; at ten feet beyond the track it is 102.3; at fifteen feet beyond the track it is 102.6; at twenty feet beyond the track it is 102.9; and twenty-five feet beyond the track it is 103.3; at thirty feet beyond the track it is 103.7.

Q. That all appears on the map? A. Yes, sir; that all appears on the map.

Q. What is the number of feet from the switch to the crossing? A. It is 478 feet.

Q. What is the grade of the track at the crossing? A. Approximately one and a half per cent.

Q. Which way is the grade? Toward Andover or toward Stanhope? A. It is down toward Andover.

*Harvey Snook—Cross.*

## CROSS EXAMINATION BY MR. SCOTT:

Q. How far does the road from Stanhope, the public road, follow the railroad? A. It leaves the railroad at a point approximately five hundred feet south of the crossing and extends all the way to Andover Junction.

Q. It runs parallel with the railroad? A. Yes, sir. 10

Q. What is the difference, or the average difference, between the public road and the nearest rail or the centre of the tracks of the railroad where it runs parallel? A. You mean the outside—

Q. Between the public road and the railroad tracks? A. Oh, it would vary from thirty-four feet to about two to three hundred feet.

Q. Going down towards Stanhope, will you indicate how far the Public Road runs parallel with the railroad before it commences to diverge off? 20  
A. About five hundred feet.

Q. Will you indicate that on the map? A. About at this point (indicating).

Q. Have you indicated on your map the next crossing nearest Andover from High street? A. I have.

Q. About how far is that crossing from the centre of High street crossing? A. 351 feet.

THE COURT: In which direction? 30

THE WITNESS: That is north.

Q. Does the grade of the road continue to run down toward Andover? A. I think it does.

Q. And is it still a one and a half per cent. grade? A. I don't think I took any levels, no, I did not take any levels in that direction from the crossing.

Q. Was there a sign-post, railroad warning sign-post by the High street crossing, at the time you made your survey? A. I have no record of any, but I think there was one there. 40

*Harvey Snook—Cross.*

Q. You were familiar with this crossing before you made this survey? A. Yes, sir.

Q. I show you a photograph and ask you if that photograph represents the crossing which you have indicated on your map? A. I have no doubt that it does.

10 MR. SCOTT: I will have this photograph marked for identification.

The said photograph is marked "Defendant's D-1" for identification of this date.

Q. And at about the time of the accident to Mr. Heinz, would you say that that photograph represented the conditions there? A. I don't remember when the accident was. Whether the leaves were out at that time or not.

20 Q. The fixed objects, the trees and Totten's barn and the railroad track? A. Totten's barn is not shown here.

Q. And the railroad track and the public road? A. It looks the same.

Q. Will you look on your map and indicate on there where that railroad crossing sign was located? A. (Indicating on the map.) At this point.

Q. Will you mark it with your pencil? A. (The witness marks it with a cross.)

30 Q. As the public road goes down toward Netcong and Stanhope, does it gradually raise? A. It gradually lowers.

Q. And at the point where the public road turns off into High street you say that the public road is lower than the railroad track crossing? A. It is.

Q. And how many feet? A. As I show on my profile it is 2.2 feet. That was made yesterday. I have a level taken in 1912, which shows 2.4 feet.

40 Q. When you made these observations with this

*Harvey Snook—Cross.*

surveyor's target you could see the target very plainly? A. I could see the target.

Q. Plainly? A. Yes, plainly.

Q. And at the crossing you could see this target 736 feet? A. I could.

Q. And at thirty-four feet from the crossing you could see this target 797 feet? A. I could.

Q. Will you indicate on that map where you were standing when you took the view or took the sight which gave you a view of 797 feet? A. I was standing at this point (indicating). **10**

Q. Will you mark that "A"? A. (The witness marks on the map "A.")

Q. Can you also mark on that photograph where you were standing when you took that second view? A. (The witness marks on D-1 for identification a cross and "A.")

Q. And at that time you had no difficulty at all in distinguishing the target? A. I could see the target. **20**

Q. I say you had no trouble? A. No, sir.

Q. Did you ever make any observation as to how far you could see an engine from that crossing from the centre of the tracks? A. I watched the trains, but I could make no measurement of it.

Q. You could make no measurements of it? A. No, sir. **30**

Q. Will you give us the distance again to Tot-ten's barn from the crossing? A. Approximately a hundred and twenty feet south of the crossing.

Q. Do you know what the nature of the grade of the railroad tracks is, coming up to the culvert, up to the switch? A. Well, it is down grade from the culvert toward Andover.

Q. Down grade from the switch toward Andover? A. Yes, sir.

Q. And, up grade, from the culvert up to the **40**

*Harvey Snook—Re-Direct.*

*Dana Applebaum—Direct.*

switch? A. I could not say that, I think it is down grade from the culvert all the way up to Andover.

Q. Where is the highest point of the grade of the railroad track between the Culvert and the High street crossing? A. I cannot say that.

10 Q. Did you make any measurements? A. I took level for four hundred feet from the crossing, toward the culvert.

Q. And after that you took no measurements? A. No, simply what I observed.

Q. The mouth of the culvert you stated is 1106 feet from the centre of the High street crossing? A. Yes, sir.

RE-DIRECT EXAMINATION BY MR. MORROW:

20 Q. It was not raining on the day that you took those observations? A. It was not.

MR. MORROW: I offer the map in evidence.

Admitted and marked "Plaintiff's Exhibit P-1" of this date.

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DANA APPLEBAUM, sworn as a witness on behalf of the Plaintiff, testifies as follows:

30 DIRECT EXAMINATION BY MR. MORROW:

Q. Where do you live? A. At Tranquility.

Q. Where were you on the thirteenth of April, 1912? A. I was at Andover.

Q. Is that the day that Mr. Heinz was injured at the crossing? A. Yes, sir.

Q. Where were you at Andover? A. I was about twenty feet, I should judge, from the station going south, that is, south of the station.

40 Q. South of the Andover station? A. Yes, sir.

Q. Did you observe the semaphore of the railroad along the line of the railroad track there?

*Dana Applebaum—Direct.*

MR. SCOTT: Objected to as leading.

Objection overruled; Defendant excepts.

A. Yes, sir.

Q. What were you doing there? A. I was waiting for that train; the 10:10, I think it was.

Q. That came from what direction? A. It came from Netcong.

Q. What did you notice about the semaphore, what did it indicate? A. As I stood there, it raised up, that indicated that a train was coming. 10

MR. KING: Just wait. I object.

Q. Were you familiar with the movement of the semaphore there? A. Yes, sir.

Q. Had you observed it? A. Yes, sir.

Q. When the semaphore was raised, what did you observe after that? A. Well, the coming of the train. 20

Q. Do you know where the communication or connection is made to raise the semaphores? A. Well, it is right this side of Whitehall, I could not tell just where.

Q. State whether Whitehall is beyond the culvert of the Lackawanna road and toward Netcong?

A. Yes, sir; it is on the other side of the culvert.

Q. Did you remain standing there after you saw this semaphore put up? A. I did. 30

Q. What, if anything, did you hear, respecting the approach of the train? A. I heard one sharp blast.

Q. And in what direction was that? A. That, was up towards the culvert.

Q. What accompanied the blowing of the sharp blast? A. Well, a sort of a crash.

Q. Had you before hearing this sharp blast, heard any other whistle or sound of the approaching train? A. I did not. 40

*Dana Applebaum—Cross.*

Q. What did you do, immediately after you heard the crash? A. Well, I went down to where the wreck was.

Q. Down to the High street crossing? Down to this railroad crossing? A. Yes, sir.

Q. Did you know what street that was? A. It was at High street.

10 Q. You were familiar with the place, were you? A. Yes, sir.

Q. What did you see there? A. Well, the first thing I saw was the mules, that is the first thing I came to. One was under the locomotive, and the other one laid on the right hand side as you were going down. The wagon, that lay on the right hand side as you would be going up High street. Then I saw Mr. Heinz, he was stopped right there, and he got on the train and it was  
20 not a very few minutes till we moved on.

Q. Where was Mr. Heinz, where was his body? A. Mr. Heinz, when I first saw him, they were helping him on the train.

Q. That is the first you saw of him? A. Yes, sir.

Q. Will you state what interval of time there was between this single sharp blast you heard and the sound of the crash? A. Well, it was not very long. I don't know as I can tell just how long,  
30 but it was not just only that between.

## CROSS EXAMINATION BY MR. SCOTT:

Q. Where do you live now? A. At 'Tranquility.

Q. Exactly where were you at the time you saw the semaphore move, on the station platform? A. No. I was not on the station platform. I was about oh, twenty, may be ten or fifteen feet from the semaphore, standing right between the switch  
40 and the main line.

*Dana Applebaum—Cross.*

Q. You were down nearer High street? A. No, I was about ten or fifteen feet from the freight house; the semaphore stands there by the freight house, and I was about ten or fifteen feet below the freight house.

Q. Were you on the station platform? A. No, sir; I was not on the platform. I stood between the switch and the main line.

10

Q. You stated that you heard this loud blast. As regards any other blasts of the whistle or blows of the whistle, you were not paying any particular attention, were you? A. I was not paying any particular attention, no; I was only waiting for the approach of the train.

Q. And you did not hear the bell ring? A. I heard no bell, nor no whistle.

Q. You were not paying any particular attention to any whistle? A. Well, not necessarily, no, sir; but—

20

Q. When you got down to the crossing, you say you saw Mr. Heinz? A. Yes, sir.

Q. At that time where was Mr. Heinz? A. He was right alongside of the coach.

Q. The coach of the train? A. Yes, sir.

Q. Did Mr. Heinz at that time say anything to you about the blowing of the whistle? A. No, sir.

Q. Did he say anything at all about blowing a whistle? A. No, sir.

30

Q. I show you a paper and ask you if that is your signature which is attached to it? A. Yes, sir; it is.

Q. You made a statement to Mr. Kyle relative to what you knew about this accident? A. Yes, sir; in New Milford, Pennsylvania.

Q. And, do you remember stating to Mr. Kyle, as follows: "The wagon lay on the north side of the track, west of the crossing. One of the mules

40

*Dana Applebaum—Cross.*

lay west of the crossing, on the south side of the track, and the other one was in under the engine. I am well acquainted with Mr. Heinz?" Do you remember making the statement? A. Yes, sir.

Q. And do you remember making this statement: "And when we got off the train at Newton, Heinz asked me if the engineer blew for the crossing?"

10 A. No, I never made any such assertion.

Q. Will you state you never made such an assertion or statement? A. I will.

Q. I ask you further, if you did not state to Mr. Kyle "When we got off the train at Newton I saw Heinz at his house and it was there he asked me if the engineer blew for the crossing." A. It was not that day. It was about four weeks after that I saw Mr. Heinz. I did not see Mr. Heinz that day to have any conversation with him at  
20 all. I saw him on the train, I saw him at Newton and I went up to his residence, but there was so many in there I did not go in to see him.

Q. Did Mr. Heinz ask you whether the engineer blew for the crossing? A. He did, about five weeks, four weeks, four or five weeks after that.

Q. And did you also make this statement to Mr. Kyle: "I don't know whether the engineer blew for the crossing before he blew the long blast of the whistle or not. He might have blown the crossing whistle, but I was not paying any attention until I heard the long blast of the whistle."  
30 A. Well, I told Mr.—

Q. Just state yes or no. Did you make that statement? A. How was that.

Q. I will read it over to you: "I don't know whether the engineer blew for the crossing before he blew the long blast of the whistle or not. He might have blown the crossing whistle, but I was not paying any attention until I heard the long  
40 blast of the whistle." Did you make that state-

*Dana Applebaum—Cross.*

ment? A. I don't remember whether I did or not.

Q. Will you say you did not? A. Oh, yes, I will say that I did not make that assertion.

MR. SCOTT: I will have this statement marked for identification which the witness identifies.

The said statement is marked "Defendant's D-2" for identification of this date. 10

Q. You say, from the position that you stood in down or near the Andover station that you could see the engine? A. I could see the engine after she came down to the second crossing. I could just see the smokestack. There is quite a curve there. You can just see the top of the smokestack and very little of the engine.

Q. What part of the engine did you first see? A. The smokestack. 20

Q. How far had you moved from the platform of the station before you could see the smokestack?

A. Oh, I don't remember as I moved at all.

Q. From the station platform you could see the smokestack of the engine? A. Yes, down by the second crossing.

Q. Did you have any trouble in seeing that smokestack? A. No, sir.

Q. And do you know, how far that was? A. Well, really, I don't know, but I think perhaps 30 three hundred and fifty yards.

Q. From here to the Cochran House? A. Well, perhaps that distance.

Q. Will you give us your best judgment? A. Well, I thought about three hundred or three hundred and fifty yards, perhaps.

Q. Do you remember testifying at the last trial of this case? A. Yes, sir.

Q. And, do you remember testifying in answer to the following question as follows: "Q. I paid 40

*Dana Applebaum—Re-Direct.*

no attention to the whistle blowing until I heard the long blast of the whistle?" To which you made answer: "A. No, I did not take. Q. You paid no attention? A. I paid no attention." Do you remember so testifying on the former trial? A. No. I don't remember. I might have, but I don't remember it.

10 Q. Do you remember testifying at the former trial in answer to the following question, as follows: "Q. I was too far away to hear the bell ring?" To which you answered: "Yes, sir." And that was the fact that you were too far away to hear the bell ring? A. Well, I don't remember. I don't know whether you can hear a bell from the depot up to that High street crossing or not. I never took any particular notice of it.

20 Q. You don't know anything about the bell ringing or not, do you? A. No. I don't know whether the bell rung or not.

## RE-DIRECT EXAMINATION BY MR. MORROW:

Q. Did you get on the train? A. I got on the train right there.

Q. And, where was the last car of the train with reference to the High street crossing? A. That was about four feet from the crossing.

30 Q. And where was the front of the train with respect to where you stood, or the next crossing above the High street crossing? A. I could not just answer that question. I forget just how many coaches were on that train. I think there were two coaches and a baggage car; perhaps it might have been ninety feet down there from the crossing, the head end.

40 Q. Was it a straight line from where you stood to the point where you saw the smokestack of the engine? A. It is around the curve.

*Dana Applebaum—Re-Direct.*

Q. There was nothing in the way of your seeing it? A. No, sir.

Q. As I understand it, you were there waiting to take this train to Newton? A. Yes, sir.

Q. Were you looking down that way? A. I was looking down that way, yes, sir.

Q. What for? A. I was waiting for the train.

Q. Why did you look down that way? A. Well, 10  
I saw that semaphore rise and I just knew it was coming.

Q. Who was Mr. Kyle who interviewed you? A. I believe he was a claim agent.

Q. Where were you? A. I was at New Milford, Pennsylvania.

Q. Where is that? A. That is about twenty-two miles this side of Binghamton, New York.

Q. You were working there? A. I was working there. 20

Q. Was this statement written down? Was the statement written down while you were there? A. Yes, sir.

Q. By whom? A. By Mr. Kyle.

Q. Was it read to you? A. Well, I read it, as he wrote it.

Q. I don't know what you mean by that? A. Well, I sat there in the station and he took my testimony and I sketched it as he was writing.

Q. And then, after he had finished the writing, did he read it to you as a whole? A. I think he did. 30

Q. And did it read what was stated here by counsel? That you had been asked if you heard the whistle blow twice before the train came, whatever that question was; was that read to you? You said you made no such statement? Was any such statement read to you? A. I don't remember that. 40

*Dana Applebaum—Re-Cross.*

## RE-CROSS EXAMINATION BY MR. SCOTT:

Q. You do recollect that the statement was sworn to by you, don't you? A. I do.

Q. And before whom, do you remember? A. Before whom was it sworn to?

Q. Yes. A. A Justice of the Peace there, Mr. Sharp.

10

BY MR. MORROW:

Q. Was it stated to you that that was to be used in any judicial proceeding, when you were sworn?

MR. SCOTT: Objected to.

Objection overruled; defendant excepts.

A. No, there was nothing said in regard to whether the paper would ever be used or not.

20

Q. Why did you go before the Justice of the Peace, do you remember? A. Well, that I don't remember.

Q. Who suggested your going before a Justice of the Peace? A. Mr. Kyle.

BY MR. SCOTT:

Q. The affidavit you made before the Justice of the Peace was correct, was it not? A. It was, as far as I knew.

30

Q. You swore to it? A. Yes, sir.

BY MR. MORROW:

Q. Were you working for the Railroad Company at that time? A. I was working for a contractor, Walter H. Milligan.

Q. Up along the line of the road? A. Yes, sir.

*Marcus S. Willis—Direct.*

MARCUS S. WILLIS, sworn as a witness on behalf of the plaintiff, testifies as follows:

## DIRECT EXAMINATION BY MR. MORROW:

Q. Where do you live? A. At Stewartsville, New Jersey.

Q. What are you employed at? A. As a clerk in the drill store room of the Ingersoll Rand Company. 10

Q. Where were you living in April 1912? A. I don't remember any dates, but I have lived at Stewartsville four years.

Q. And have you been all that time in the employ of this company? A. Yes, sir.

Q. Were you at Andover, or near there, at the time Mr. Heinz was injured? A. Why, I was on the Delaware train. 20

Q. Is that the train that struck him? A. I believe so, yes, sir.

Q. Where did you get on the train? A. At Stewartsville, New Jersey.

Q. Then, did you change anywhere? A. I changed at Stanhope.

Q. At Netcong? A. Yes, sir.

Q. What train did you take there? A. I don't know. We always, when I lived here in Newton, called it the 10:23 at Newton. It leaves there at 9:55, something like that. 30

Q. Do you remember the culvert on the line of the railroad, going under the cutoff, a few hundred feet south of the Andover station? A. I remember the cutoff, yes, sir. I worked on the cutoff.

Q. The culvert? A. Yes, sir.

Q. State whether or not you heard any whistle blow from the train on which you were riding after your train passed the cutoff culvert? A. I never remember of any blowing until somewhere 40

*Marcus S. Willis—Cross.*

when somebody said Phil Heinz is hurt, and I suppose the brakes was put on and that was the crash I heard.

Q. Did you hear the whistle blown just before that? A. I did.

Q. What did you hear? A. An ordinary locomotive whistle.

**10** Q. What did you do then? A. Why, I sat still in the car. All the while. I sat with my wife.

Q. Did you hear anything after you heard this whistle? A. Well, as I said, there was a crash.

Q. How soon after the sounding of the whistle, did you hear the crash? A. I could not just say a very few seconds.

Q. What kind of a day was this? A. It was very stormy. Something like this morning.

**20**

## CROSS EXAMINATION BY MR. SCOTT:

Q. You testified at the last trial, did you not? A. Not very much, no, sir.

Q. I say, you testified at the last trial? A. Yes, I did. Very little.

**30** Q. Do you remember Judge Black, the Court, asking you this question about the last whistle: "The Court: When was the last whistle you heard prior to that?" "The Witness: I could not tell you. I was not listening to whistles. Not particularly. When I was coming to Newton I did not listen to the train blowing, only I heard a sharp whistle and then there came the crash and somebody said there was an accident and I sat in the train a while with my wife, sat opposite her talking there." Do you remember testifying to that? A. I don't just remember; but I said just as I said here, I was sitting in the seat with my wife, yes, sir.

**40**

Q. And, it is the fact that you were not par-

*Marcus S. Willis—Cross.*

particularly listening to whistles or for whistles?

A. Oh, no. But I noticed that one.

Q. You noticed that one particularly, the loud one? A. Yes. Because it was right there and the crash was soon after.

Q. And the other whistles you did not pay any particular attention to? A. No, sir.

Q. You stated just now that the day was a stormy day, like this morning? A. Yes, sir. 10

Q. Do you remember on the former trial of this case stating that the day was stormy, misty? A. Yes, sir.

Q. And was it a fact that it was merely misty and overcast, rather than stormy like this morning? A. Well, there was a fog, yes, somewhat.

Q. It was not raining hard? A. No. Well, it was when we got to the Newton station, quite a little. 20

Q. Have you talked over this case with anybody since the last trial? A. No, sir. I did not want to talk about it to anybody. There is not much money in it.

Q. You say you have not talked it over with anybody? A. No, sir.

Q. About how long was it after you heard this loud whistle that you heard the crash? A. That I could not say. A very few seconds.

Q. Five or six seconds? A. I did not have any watch. I did not watch it, so I could not tell you. 30

Q. Give us your best judgment? A. I said, a very short time; I could not remember just how long it was.

Q. Was it within a half a minute? A. Oh, yes.

Q. Or a quarter of a minute? A. Yes, sir.

Q. About a half a minute? A. Yes, sir. 40

*Philip Heinz—Direct.*

PHILIP HEINZ, the plaintiff, sworn as a witness on his own behalf, testifies as follows:

## DIRECT EXAMINATION BY MR. MORROW:

Q. Where do you live? A. At Newton.

Q. How long have you lived here? A. About seventeen years.

10 Q. What had been your business prior to the thirteenth of April, 1912? A. Baking; baker.

Q. Where? A. On Spring Street, opposite the Court house.

Q. Are you a baker by trade? A. Yes, sir.

Q. How long have you worked at that trade? A. Ever since I have been old enough to work.

Q. How old are you now? A. I was born in 1870, July twenty-fourth.

20 Q. Did you have wagons in your business to take out bread and cake? A. Yes, sir.

Q. Did you go out with them at any time? A. Yes, sir.

Q. State where you had been on the morning of the thirteenth of April, 1912? A. I had been around the town early in the morning, and went to Andover.

Q. And where, from Andover, did you go? A. That is where I got hit.

30 Q. You passed on through the Village of Andover, didn't you? A. Yes, sir.

Q. Where did you go? A. I got down to the Culvert and waited on three customers, the crossing culvert towards Stanhope.

Q. From the crossing culvert towards Stanhope? A. Yes, sir, the street culvert.

Q. You went through the street culvert? A. I did, yes, sir.

Q. Did you go to the other side of that? A. Yes, sir.

40 Q. What did you do after you had finished on

*Philip Heinz—Direct.*

the other side of the culvert? A. I turned around and came back.

Q. How did you come back? A. I got out at the culvert and stopped this side of the culvert to a customer I had. She had ordered some rolls.

Q. What did you do? A. I walked from the culvert up to the crossing.

Q. Where did you walk? A. On the road. On **10**  
the side of the road.

Q. Which side of the road did you walk on? A. On the left hand side.

Q. As you came up? A. As I came up, yes, sir.

Q. How far did you walk? A. I walked up to the railroad again.

THE COURT: Is that on High Street?

THE WITNESS: Yes, sir.

Q. Where was your wagon then? A. That **20**  
was behind me.

Q. What did your team consist of? A. A team of mules.

Q. What kind of a wagon did you have? A. A top wagon.

Q. How long were the mules and the wagon, from the mules' heads to the rear of your wagon?  
A. The mules?

Q. Yes. The distance from the heads of your mules to the rear of your wagon? A. That I **30**  
could not tell.

Q. Give us your estimate, can't you? A. Well, they were the length of the mules and the length of the wagon.

Q. When you were walking along the track, before you reached the crossing, what did you do?  
A. I was looking for the train.

Q. What train? A. The train that hit me.

Q. Did you know about that train? A. Yes, **40**  
sir.

Q. When you got to the crossing what did you

*Philip Heinz—Direct.*

do with respect to looking for a train? A. I looked down to see whether the train was coming.

Q. What did you see? A. I did not see anything.

Q. Did you hear anything? A. No, sir.

THE COURT: Did you board your wagon or were you still walking?

10

THE WITNESS: I was walking.

THE COURT: How near the track were you?

THE WITNESS: Up to the track.

Q. Then what did you do, after you got up to the track and looked down the track? A. I stepped back a few steps and looked down and walked down to the wagon and got on, sitting on the front of the wagon, on the dashboard.

20

Q. Did the top project over that dashboard? A. No, sir.

Q. How far did it come from the dashboard? A. From the dashboard?

Q. Yes. The top. A. The top did not go over the dashboard at all.

Q. How much did it lack of going to the dashboard? A. On the edge of the body, I was on, and the dashboard.

30

Q. What was the distance between the top cover and the dashboard where you sat? Was it one foot, two feet or any distance at all? A. It did not come up there at all.

Q. When you got onto the wagon and sat down, what did you do then? A. I looked for the train.

Q. Did you also listen? A. Yes, sir.

Q. State what, if anything, you saw or heard? A. I saw the train.

40

Q. At first, when you looked, what did you see? A. I did not see anything.

*Philip Heinz—Direct.*

Q. Then what? A. Then I saw the train coming out a little below where Mr. Totten's barn is, or even with the barn, and I said to the driver, "We are gone," and grabbed the lines from the driver's hands and jerked the mules, and there was a crash.

Q. You were struck? A. Yes, there was a blow and a smash, they were blowing when they hit me. **10**

Q. Where was the locomotive when you first heard the blow of the whistle? A. By Ben Totten's barn.

Q. What kind of a blow was it? A. It was one blow.

Q. What was its character? A. Just one toot, one loud toot.

Q. Was it loud? A. Yes, sir, one toot.

Q. What kind of a morning was it? A. Cloudy, **20**  
misty, misty, fine, foggy rain when I got there at that time. It had rained earlier in the day.

Q. What became of you after that? A. After I got hit, I was thrown out on the ground.

Q. After your mules turned the corner to go up on the track, did they stop on the track? A. No. I jerked them and they had not time to stop.

Q. Before you saw the train, had the mules stopped? A. No, sir.

THE COURT: Did you get on the left hand **30**  
side of the wagon or on the right hand side?

THE WITNESS: On the left hand.

THE COURT: On the side of the train?

THE WITNESS: On the side of the train. I had the driver driving.

Q. Which way did you jerk them when you jerked? A. I gave them a jerk with both lines, **40**  
as hard as I could.

*Philip Heinz—Direct.*

Q. To pull them which way? A. In the back

Q. Off the track, do you mean? A. Yes, sir.

Q. You were brought to Newton, were you? A. Yes, sir, they put me on the train.

Q. Where were you taken from the coach? A. Mr. Rude had a livery coach and they put me in the livery coach and brought me home and took me  
10 to bed.

Q. Where was your home then? A. At the bakery.

Q. Near to here? Across the street? A. Yes, sir, across the street.

Q. Had you any physician? A. Doctor Hood.

Q. When did he come? A. He helped undress me.

Q. How soon after you reached your home did he come? A. In a very few minutes.

20 Q. How long did Dr. Hood continue to attend you? A. He is attending me yet.

Q. Do you mean to say he has attended you continuously from that time to this, from the time of this accident? A. Yes, sir.

Q. How long were you in bed? A. About three months I was helpless.

Q. What did you do then? A. I got up.

Q. What did you undertake, if anything, to do with respect to your business? A. I did not do  
30 anything. I had to lie on a couch most of the time. All the while I was in the bakery. After I got hit I lay on a couch or in bed, most of the time, after I got hit, until I sold out.

Q. State whether you were endeavoring to do any work? A. I was not able to.

Q. Did you try to? A. Yes, sir.

Q. What was the result? A. I could not stand up. I tried to wait on customers in the store, in the bakery, I had not been in the bakery, that  
40 time, after I got hurt, about a year.

*Philip Heinz—Direct.*

Q. You tried to wait on customers in the store?

A. Yes, sir.

Q. You had a store in connection with your bakery? A. Yes, sir.

Q. What did you sell? A. All the bakery stuff, and candies.

Q. During this time you were in bed, up to the first of July, what was your physical condition? **10**

A. I was perfectly helpless most of the time.

Q. Who cared for you? A. My wife and the girl that helped us cook.

Q. How long did you continue to carry on the business or have business carried on there? A. Till next April.

Q. Then what did you do? A. Then I sold out.

Q. During that year's time, did you try to do any work about your business? A. I was not able to. I tried to. I laid down most of the time. **20**

Q. What happened to you when you tried it and were not able to? A. I was not able to stand up.

Q. You could not stand up? A. No, sir.

Q. Will you state to the jury if you suffered, and tell what your sufferings were from the time of this accident until now? A. Well, I was hurt all over.

Q. How? A. My back, my shoulder. At the time of the injury, do you mean?

Q. Yes. A. My left leg, from the hip all the way down to my toes, and right side from the knee down. **30**

THE COURT: Were there any bones broken?

THE WITNESS: No, sir. And my face and shoulder were all skinned, and my back hurt me, it hurts me yet, my shoulder and legs.

Q. Where have you been living since the first of April, 1913? A. On Sussex street.

Q. In Newton? A. Yes, sir. **40**

*Philip Heinz—Direct.*

Q. State what the condition of your health has been during that time? A. I have been in bed most of the time, or on a couch.

Q. State whether or not, you have suffered? A. I have.

Q. State how you have suffered? A. I have been on a couch most of the time.

10 Q. How have you suffered? A. My back, my shoulders and my legs.

Q. What about your nervous condition? A. That is what hurts me.

Q. State if you are affected in your nerves? A. Through my shoulder and spine and my back, that is what hurts me.

Q. Do you notice anything peculiar in the passages from your bowels? A. Yes, sir.

Q. What? A. At times it was bloody.

20 Q. How soon after this accident did you observe the passage of blood from your bowels? A. At different times.

Q. How soon after, first? A. Three or four weeks, I should say; it might not have been that long.

Q. How long has that continued? A. It does at times yet.

Q. How much blood did you notice at any time? A. Quite a little blood and matter.

30 Q. Did you expel any bloody compound from your stomach? A. I did, yes, sir.

Q. How shortly after the accident? A. That was shortly after the accident.

Q. In what quantities? A. I vomited it.

Q. How long did that continue? A. At different times.

Q. State whether that still continues? A. Not as much, no, sir.

40 Q. Have you been able to do any work since you moved to Essex street? A. No, sir.

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Q. How is your sleep? A. Not very good.

Q. How much do you sleep? At night when you go to bed? A. That I cannot say. I lay there a good deal of the time, most of the time, in pain.

Q. How much do you sleep in the night time? A. That I could not tell you.

Q. How much are you awake, then? A. A good deal of the time; the night seems awfully long. **10**

Q. Every night? A. Yes, sir.

Q. State whether you feel as strong or stronger than you did after you left your bed? A. No, sir.

Q. Well, what are you, as strong or stronger? Or weaker than you were when you left your bed in July? A. About the same.

Q. Do you know anything about your water? The urine that passes from you? A. The doctors have at different times. **20**

Q. Have you given them samples of the urine that you passed? A. Yes, sir, right along. A number of them.

Q. What doctors have you seen? A. Dr. Hood, Dr. Ayres and Dr. Hicks. And then I had an ex-ray taken by the doctor in Newark, Dr. Baker, I think his name was.

Q. On what part of your body? A. He took four or five ex-rays of my shoulder, my back, through my shoulders and my back. **30**

Q. When was that done? A. Just before the trial, the first trial.

Q. Before the last trial? A. Yes, sir.

Q. Have your legs and hands retained their normal condition since then? A. No, sir, they have not.

Q. In what particular have they not? A. My left leg has no feeling, my left side had no feeling. **40**

*Philip Heinz—Direct.*

Q. What about swelling? A. It is the right one swells, and this hand is white at times, it turns white.

Q. Does your right leg swell? A. At times it swells quite a lot.

Q. Much larger than the normal size? A. Yes, sir.

10 Q. What is the condition as regards pain and suffering when the leg is swollen? A. The right leg hurts me like everything.

Q. What about your hand? A. That is swollen too parts of the way.

Q. Which one? A. The right one.

Q. How frequently do those muscles swell? A. I cannot say that. Quite often.

Q. Do you know whether you have any sensation in your left leg? A. Sir?

20 Q. Have you sensation in your left leg? A. Yes, sir.

Q. I guess you don't know what I mean by that, do you? A. Yes, sir.

Q. What? A. Well, I have stuck pins in and tried it that way.

Q. Would you feel any sensation, any pain, when a pin was put into you? A. No, sir, not unless it was stuck in real deep; when I hold it that way (indicating) I cannot feel anything.

30 Q. Who did that to you? A. Dr. Hood and Dr. Hicks, there was three doctors did it.

Q. How shortly after the accident was it that they tried it? That they tried those experiments? A. Well, after I was out of bed.

Q. And does that still continue, that lack of sensation? A. Yes, sir.

Q. What became of your mules? A. They got killed. At least they told me they did. I did not see them after they got hit.

40 Q. What were they worth? A. They cost me five hundred dollars.

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Q. Were they worth that this day? A. At the time I got hit?

Q. Yes. A. They ought to have been worth that or more. They got killed in the Spring and when I bought them it was in the middle of the Summer, about eight months before.

Q. How old were they? A. They were supposed to be six or seven years old. **10**

Q. What happened to your wagon? A. That was all broke up.

Q. What was the wagon worth? A. That I could not tell.

Q. As nearly as you can tell? A. Second hand, as it was?

Q. Yes. A. Seventy-five or eighty dollars.

Q. And your harness? A. Seventy dollars. That is a new set.

Q. Was that double harness? A. Yes, sir. **20**

Q. And the contents of your bake wagon? A. That got spilled.

Q. What was it worth? A. Thirty-five or forty dollars.

Q. What you had left? A. I had only sold a few loaves, I had practically the full load.

Q. Was anything else lost to you that day? A. No, sir.

Q. Or destroyed? A. No, sir.

Q. Are you familiar with the baking business? **30**  
A. I am, yes, sir.

Q. Have you hired bakers? A. Yes, sir.

Q. For how long have you done that, before this accident? A. Ever since I have been in business.

Q. And you said you had worked at it yourself, I believe? A. Yes, sir, all my life.

Q. And you had paid wages? A. Yes, sir.

Q. Were you able to do any more work after this accident? A. No, sir. **40**

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Q. What work had you done before that in the way of baking? A. I worked in the bake shop when I was not on the wagon.

Q. In the bake shop? A. Yes, sir.

Q. Constantly? A. Quite constantly, yes, sir.

Q. You had charge of your business? A. Yes, sir.

10 Q. How many teams did you have? A. Three.

Q. And three drivers? A. Yes, sir.

Q. How many days in the week did they go out on their routes? A. Every day. I had two country wagons and a town wagon that I ran myself.

Q. How many barrels of flour did you make a week? A. Before I got hurt?

Q. Yes. At the time of the accident? A. Twenty-five barrels.

20 Q. A week? A. It averaged that.

Q. Did it average that continuously? A. Yes, sir. It would be more, when the heighth of the cut off was on, I used much more than that.

Q. The cut off was about completed at this time? A. Yes, they were about through.

Q. I want to know what your ordinary trade was? A. Twenty-five barrels a week.

30 Q. How many loaves of bread did you bake from a barrel of flour? A. Four hundred and twenty-five on the average.

Q. What did you get for it? A. It averaged four cents a loaf wholesale.

Q. Is that the way you sold it? A. I sold most of it, all the drivers took out was sold wholesale to the drivers.

Q. That is what you got for it? A. Yes, sir.

Q. How many loaves did the men take out on their trips? A. It averaged four hundred and twenty-five loaves.

40 Q. Is that all that a barrel of flour would

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make? A. Loaves of bread?

Q. Yes. A. Yes, sir.

Q. What places did you run to? A. I had twelve different trips. That is, each wagon went out every day and they had each three separate trips each week and they went over the trips twice a week.

Q. How many out of town trips were there? **10**

A. There were twelve out of town trips.

Q. I don't mean twelve different places, but the teams actually made twelve out of town trips?

A. Yes, sir.

Q. Each day they took out four hundred and twenty-five loaves of bread? A. Yes, sir, not counting the cake and pie and rolls.

Q. What else did they take besides bread? A. Bread, cake, pie, rolls, all bake stuff.

Q. How many loaves of bread did you sell in the town of Newton per day? A. About two hundred loaves from the wagon, from my town wagon; then the store would average about two hundred loaves a week and around the different stores in Newton about a hundred and fifty loaves a day. **20**

Q. Each day of the week? A. Each day, yes, sir.

Q. For six days? A. Yes, sir.

Q. Did you say how many you sold per day from the town wagon? A. Two hundred, it would average that, some days more, some days not as much. **30**

Q. Did you ship bread by stages or by railroad? A. I did, yes, sir.

Q. How many per week? A. That would go eight hundred loaves, I should say, per week.

Q. Do you know how many loaves of bread you sold per week in the whole? A. About fifteen hundred. **40**

Q. That is, a day? A. A day, yes, sir.

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Q. A week would be more than that? A. Six times that. It would be a little more than that. We had the store open most of the day on Sunday, and people would come in and get stuff if they wanted anything Sundays.

Q. How many barrels of flour would it require to make the nine thousand loaves of bread which  
10 you sold every week? A. Twenty-two barrels.

Q. How much did that cost a barrel? A. It averaged five dollars and twenty-five cents a barrel.

Q. How much yeast did you use? A. To one barrel?

Q. Yes. A. A pound and a half to one barrel it would average.

Q. How much sugar? A. Three pounds to a  
20 barrel.

Q. How much lard? A. Four pounds.

Q. How much salt? A. Three pounds.

Q. How many quarts of milk? A. About ten quarts.

Q. Do you know what the cost of baking one barrel of flour into bread, exclusive of labor, was? A. Six dollars and seventy-five cents, somewhere about that.

Q. What other expenses were connected with the making of the bread? A. The bakers.

Q. How much did you pay the bakers per  
30 week? A. I paid one of them fifteen, fourteen and twelve dollars a week, and their board.

Q. What was the board worth? A. About four dollars a week, and then I had one, I had four bakers about six months, seven months in the year, an extra helper during the summer months.

Q. What other expenses were connected with the making of the bread? A. Fuel.

Q. How much would that cost you per week?  
40 A. About two dollars.

Q. How much rent did you pay? A. I paid

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four hundred and fifty dollars or five hundred and fifty dollars a year, forty-seven dollars and something a month.

Q. What did you pay your drivers? A. That varied; one got ten dollars, the other nine and another six, and their board.

Q. And their board would be worth four dollars a week? A. Yes, sir. 10

Q. What was the average wages paid those men?

THE COURT: He has told what each one was.

Q. What was it worth per day for the use of the team and wagon?

MR. KING: Objected to.

Q. Did you hire teams and wagons? A. I had 20 my own teams.

Q. Your team cost you five hundred dollars, you said? A. Yes, sir.

Q. What, per day, would it cost to feed them? A. About two dollars and a half a week, I estimate.

Q. For each horse? A. For each horse, and counting the stable, repairing and stable.

Q. How long would a team last you in service? A. It would vary, some last longer than 30 others.

Q. This five hundred dollar team of mules? A. Well, I have had another team about their same age and I drove them six years and sold them for three hundred dollars when I got out of the bakery.

Q. Is that a fair illustration of what you did? A. Yes, sir.

Q. Was there a blacksmith bill? A. Yes, sir.

Q. How much would that cost you? A. That 40

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was quite a bill, the blacksmith would be ten or twelve dollars a week, I should say.

Q. That blacksmith bill covered work for the wagons as well as shoeing the horses? A. Yes, sir.

Q. How about the harness? A. That included all.

**10** Q. That would include the harness? A. Yes, sir.

Q. Was there any other expense connected with carrying on the business? A. What do you mean?

Q. With your making bread and selling it? A. I had a girl.

Q. What did you give her? A. She would average four dollars a week.

**20** Q. And you gave your constant attention to the business, did you? A. Yes, sir.

Q. What about your wife? A. She did, too.

Q. Did you pay her wages? A. No, sir.

Q. Besides bread, you made cakes and pies, did you? A. Yes, sir.

Q. How much flour would you consume a week in baking cakes and pies? A. About three barrels.

Q. How much sugar? A. To a barrel of flour?

**30** Q. Yes. A. About ninety-eight pounds. Half as much sugar as flour.

Q. How much was the sugar a pound? A. About five cents.

Q. How much milk did you use? A. A pint to the pound of sugar, on the average.

Q. What did that cost you? A. Three cents.

Q. Did you use butter and lard in making those things? A. Yes, sir.

**40** Q. How many pounds? A. Just about half the amount of butter and lard that you would use sugar.

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Q. How much was butter worth per pound?

A. The butter and the lard about twelve cents, I should say, the two together.

Q. Did you use any other ingredients? A. Yes, sir.

Q. What else? A. Into the cake?

Q. Yes. A. Cream of tartar.

Q. How much of that did you use? A. Every 10  
two pounds an ounce, that would be ninety-eight  
ounces to the barrel.

Q. What did that cost you? A. Thirty-five  
cents a pound.

Q. Anything else? A. Soda.

Q. How much of that? A. Half the amount  
of soda that you would use cream of tartar.

Q. Forty-nine ounces? A. Yes, sir.

Q. What did that cost you? A. About one and  
three-quarters cents a pound. 20

Q. Was there anything else? A. Flavors, ex-  
tracts.

Q. How much extract did you use? A. About  
two quarts to the barrel.

Q. What did that cost you? A. A dollar a  
quart.

Q. Did you use any eggs? A. Yes, sir, four  
eggs to the pound of sugar.

Q. How much did they cost you? A. They  
averaged two cents apiece the year around. 30

Q. Do you know how much would be the total  
expense of making a barrel of flour into cakes  
and pies? A. Around thirty dollars.

Q. What would those pies and cakes sell for  
that you made from that barrel of flour? A.  
Sixty-five dollars.

Q. How many barrels did you make a week and  
sell? A. Three barrels.

Q. State whether or not the same men who  
helped bake the bread and who helped sell the 40

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bread and the same clerk in your store, also made and sold the cakes and pies? A. They did. The drivers would help make the cakes and pies and they helped sell.

Q. Did the drivers sell it? A. Yes, sir.

Q. State whether this business with you kept up constantly or not? A. It did.

**10** Q. Have you stated now all the expenses connected with the carrying on of this business? A. About, yes, sir.

Q. Let me call your attention to some items—  
A. Paper bags and things like that.

Q. Did they cost you anything? A. Yes, sir.

Q. How much? A. They cost me about two dollars a week.

Q. And the fuel? A. The fuel cost two dollars a week.

**20** Q. What about your taxes, insurance and repairs? A. I might say six dollars a week, five or six dollars a week.

Q. And your paper, twine, etc., you say how much? A. I should say it would average about four dollars, something like that.

Q. Were there some other incidentals? A. There was two or three dollars a week for others.

Q. Does that comprise all the expenses you were subject to in carrying on this business? A.

**30** About, yes, sir.

Q. Do you know how much the profits per week were from this business? A. Yes, sir, they were about a hundred and fifty dollars a week.

Q. A week? A. Yes, sir.

Q. How long had you been doing as well as that? A. Until I got hurt.

Q. How long before that time? A. About ten or twelve years.

Q. Prior to this time had you ever been sick?

**40** A. I had been operated on once for appendicitis.

Q. How long before? A. About six years before.

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Q. How had you been, physically, and as regards your health, from the time of that operation up to the time of this accident? A. I was not sick at all. I got burned once.

Q. Where? A. On my face, my hands.

Q. How did that affect your health? A. It did not affect me at all.

Q. Had you any disease of any kind at all? A. **10**  
No, sir.

Q. Had you any heart trouble? A. No, sir.

Q. Why do you quite frequently place your hands upon your breast? A. Because it pains me there.

Q. And twitch your face, the twitching in your face? A. It hurts me.

Q. What hurts you? A. Pain, shooting pain in there.

Q. When you put your hand to your face and draw your face, what occasions that? A. **20**  
The pain, shooting pain.

Q. Is that constant, or not? A. Yes, it is always with me.

Q. When you sit still, as you are now? A. When I am lying still it does not hurt me as much.

Q. How far can you walk at a time? A. This is about as far as I have walked.

Q. That does not tell me anything? How many **30**  
feet can you walk at a time? A. That I don't know.

Q. Tell me as nearly as you can judge? A. About all the walking I do is around the house from my bedroom.

MR. KING: I object.

Q. How many feet can you walk, or what distance can you walk now? A. Not over two or three hundred feet, I would not think. **40**

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Q. What happens to you then? A. I fall down.

Q. You fall down on the way? A. Yes, sir.

Q. Where did you go to from Newton, on which route? A. One route would be—

THE COURT: How is that important?

MR. MORROW: Well, I don't know; he tells what he sold. I suppose that is sufficient.

10

Q. Did you go to Newark to see a specialist?

A. I did, yes, sir.

Q. Who did you see? A. Dr. Hicks.

Q. When was that? A. I could not tell. It was before my trial some time.

Q. Before the former trial? A. No, sir, after the former trial.

Q. How much have you paid Dr. Hood for his services? A. Two hundred and fifty dollars.

20

Q. When did you pay that? A. About a year and a half ago.

Q. Have you paid him anything since? A. I have not, no, sir.

Q. How constantly has he come to see you since that time? A. Once a week or oftener, perhaps he would be there once a week and if I got a bad spell he would come oftener.

Q. How much did you pay Dr. Hicks? A. Twenty-five dollars.

30

Q. How much did you pay Dr. Ayres? I have not got a bill from Dr. Ayres yet.

Q. Do you know how much Dr. Hood's unpaid bill amounts to? A. I have not asked him; I don't know, no, sir.

Q. Or Dr. Ayres? A. I have not asked him. I have paid Dr. Baker twenty-five dollars for the ex-ray.

Q. When did you sell the business? A. In April of the following year.

40

*Philip Heinz—Cross.*

Q. Why did you sell it? A. Because I had to, it all went to nothing, I was not able to attend to it, and there was no business left.

Q. There was no business left? A. No, not to speak of.

Q. Did you get anything for it? A. Four hundred and fifty dollars.

Q. What did you give for that four hundred and fifty dollars? A. The fixtures and what I had, show cases, I must have had fifty show cases in different stores and places that I had out. 10

Q. You had them around the country in different places, did you? A. Yes, sir.

Q. Did you furnish show cases for customers who sold your bread? A. I did, yes, sir.

Q. Was there anything in that money which you received, was that or any of it for the good will of the business or only for the material things? A. No, sir. There was no business there to give the good will for. 20

## CROSS EXAMINATION BY MR. SCOTT:

Q. You kept no books of account? A. No, sir.

Q. You have no books showing the various items that you have testified about? A. No, sir.

Q. You have no method of substantiating these items except from your recollection and your memory? A. Sir? 30

Q. You have no method of substantiating the items? A. I know what sales and what the men did every day, the drivers, yes, sir.

Q. I say, you have no record? A. I have no record, no, sir.

Q. You have no record to substantiate these things? A. No, sir.

Q. And they are entirely drawn out from your recollection? A. From my knowledge. 40

Q. From your knowledge and recollection? A. Yes, sir.

*Philip Heinz—Cross.*

Q. You have no books of any kind, nature or description, have you? A. I have some, yes, sir.

Q. And you have those books here? A. No, sir; just the odd store books that I would sell to different stores around town.

Q. What do those books show? A. They just show what I would sell to the different stores.

10 Q. What period of time do they cover? A. Well, for a number of years.

Q. But they only show matters of sales? A. What the different stores would buy weekly, the accounts against all the different stores and what they would buy.

Q. How many books are there? A. Oh, I could not tell you that.

Q. I notice your counsel occasionally read from a list as regards the various items which you  
20 have been testifying to; did you have occasion to assist in the preparation of that list? A. Did I have occasion?

Q. Yes. A. I made the list up.

Q. You made the list up? A. Yes, sir.

Q. When did you get together or start to make that list out? A. I had that at the last trial, Judge Huston had that.

Q. At the time that you were in charge, what was the gross sales of your business per day? A.  
30 About a hundred dollars, somewhere about a hundred dollars a day.

Q. When you talk about the gross sales in your business a day, you mean the average sales? A. Average, yes, sir.

Q. And you are sure that it was a hundred dollars? A. Somewhere about a hundred dollars.

Q. It might have been less than a hundred dollars? A. It would average a hundred dollars; some days it would be more, some days it would  
40 be less.

*Philip Heinz—Cross.*

Q. And as a general thing it was less, wasn't it? A. No, sir.

Q. And didn't it amount to about seventy-five dollars a day at that time? A. No, sir, it would average a hundred dollars.

Q. Are you positive of that? A. Yes, sir.

Q. I ask you if you recall answering an interrogatory in this case relative to the gross sales in your business in which you stated that your gross sales at that time, at the time of the accident, averaged seventy-five dollars a day? A. When I got hit, right at that time, was the dull-est time of the year. 10

Q. And I ask you if you remember making another affidavit to a second set of interrogatories, in which you stated that, at exactly the same time, at the time of the injury, your sales were a hundred dollars a day? A. I make that now. 20

Q. And I now ask you to kindly tell the Court and jury which one of those statements that you made is true? A. I said, at the time I got hurt, was the dullest time of the year. That is what I mean to say.

MR. SCOTT: I ask that the answer be stricken out and that the witness be directed to make a responsive answer.

THE COURT: Yes, it may be stricken out. The counsel wants to know which is true. 30

THE WITNESS: March and April were the dull-est months of the year. My sales for March and April were smaller than at any time of the year.

THE COURT: Counsel wants to know which of those statements is true?

THE WITNESS: A hundred dollars. It would average that all the year around.

Q. And the seventy-five dollar statement is not true? 40

*Philip Heinz—Cross.*

THE COURT: He does not say that, he says that was true at the time of the accident.

Q. Then I ask you whether the answer to the interrogatory that the gross sales at the time of the accident were seventy-five dollars a day—

10 THE COURT: He says that was true also. He says they are both true, as I understand the witness; he says that at the time of the accident the sales were seventy-five dollars a day, but that they averaged a hundred dollars a day, but that that was the dullest time of the year, as I understand the witness.

Q. When was it that you visited Dr. Hicks?

A. That I could not tell you.

20 Q. Can't you give me about the date? A. I could not tell. It was right previous to the time, I think one of my trials here.

Q. Wasn't it shortly after the first trial? A. It was after the first trial, yes, sir.

Q. About how long after? A. Some time after.

Q. And with reference to that time, when you first saw Dr. Hicks, when was it that you first had your urine examined? A. Right along.

30 Q. When was the first time? A. It had been examined ever since I have been hurt.

Q. When was the first sample that you furnished to your physician? A. Oh, that I could not tell you. It was shortly after I got out of bed. He has examined it all the time.

Q. And that had been constant, continuous, ever since? A. At different times, yes, sir.

Q. Didn't you furnish Dr. Hicks with a sample of your urine, also? A. I did.

40 Q. How many examinations has Dr. Hicks made of you? A. Two.

*Philip Heinz—Cross.*

Q. When was the first? A. I could not tell you. It was after the trial.

Q. A year after the trial? A. How long ago was the first trial?

Q. December of 1913. A. When was the appeal taken to Trenton? Then I can tell you nearer. It was after that.

Q. How long after the first trial was it, about? **10**  
A. I could not tell you, I have not got the date.

Q. Was it six months after? A. I have not got any date, but I should say it was.

Q. When was the second examination made by Dr. Hicks? A. To-day.

Q. Whereabouts? A. Here in Newton.

Q. In the court room? A. Here in Newton.

Q. At what place? A. At the Court House.

Q. How long did the examination of to-day take?  
A. I could not tell you. I did not have my watch **20**  
out.

Q. About how long? A. A half an hour, possibly.

Q. Who was present when Dr. Hicks made the examination? A. Dr. Hood.

Q. You have spoken about some ex-rays being taken of your body; are those ex-rays in your possession? A. They are not.

Q. In whose possession are they? A. I don't know. **30**

Q. Did you ever see them after they were taken?  
A. I did. Judge Huston had them the last I saw of them.

Q. And you have not seen them since? A. No, sir.

Q. Since the last trial, who, besides Dr. Hicks, has examined you? A. Dr. Baker. Since the last trial?

Q. Since the last trial? A. Dr. Hood and Dr. Hicks. **40**

*Philip Heinz—Cross.*

Q. Not Dr. Ayres? A. Dr. Ayres examined me a little, yes.

Q. When did Dr. Ayres make his examination?

A. To-day.

Q. That was a short examination? A. Yes, sir, he just felt of my shoulder here.

10 Q. In what manner? A. Right here, he felt through my shirt of my shoulder.

Q. That was all the examination Dr. Ayres made? A. Yes, sir.

Q. That is the only examination Dr. Ayres has made of you since the last trial? A. I think it is.

Q. Prior to coming to Newton where did you live? A. At Montclair.

20 Q. What business were you in there? A. I worked for my brother at Nutley, baking; my parents lived in Montclair. I don't understand the question.

Q. What was your business in Montclair, or your brother's business in Montclair? A. Bakery.

Q. For how long have you been in the bakery business altogether? A. Here in Newton?

Q. In the bakery business? A. For myself, or—

Q. Either for yourself or as a baker? A. Ever since I was a little boy twelve or thirteen years old.

30 Q. Have you had any other occupation since that time? A. For a year I ran a store in Savannah.

Q. Did you ever engage in any athletics? A. I did not.

Q. Did you ever do any boxing? A. What do you mean?

Q. Or prize fighting? A. Professionally?

Q. Professionally? A. No, sir.

40 Q. Is it not the fact that you did box professionally in Nutley? A. I did not. I worked for my brother at Nutley, in the baking business.

*Philip Heinz—Cross.*

Q. At your brother's place or around your brother's place? A. No, sir.

Q. Is it not the fact that you boxed under the name of Smith, while at Nutley? A. No, sir.

Q. What name did you box under? A. I did not box under any name.

Q. Did you ever box at all at any place, under your own or an assumed name? A. Do you mean professionally? **10**

Q. Professionally? A. No, sir.

Q. Or for money? A. No, sir.

Q. When was the first time that you noticed this whitened condition of your hand? A. Ever since I have been hurt.

Q. And who first remarked that condition, you or your physician? A. I did. He said he had noticed it.

Q. And who was the first one who noticed it? **20**  
A. Dr. Ayres and Dr. Hood, both.

Q. When Dr. Hicks examined you the first time, will you tell us what he did in making his examination? A. He did a lot at that time.

Q. Just tell us what he did? A. I could not tell you what he did, he put instruments all over me, different instruments and he had me blind-folded, and I could not see what he did do a good deal of it.

Q. About how long did it take him to make the examination? A. I don't know. It seemed an awful time. **30**

Q. Was it an awful while or was it a short while? A. Well, I should say an hour or an hour and a half at least.

Q. On this morning of the accident you started from your store at Newton? A. I did, yes, sir.

Q. And you and George Randall were together? A. He did the driving, yes, sir. **40**

*Philip Heinz—Cross.*

Q. Did you go right down to the culvert before delivering any goods? A. Yes, sir.

Q. And you delivered some bread there? A. Yes, sir.

Q. To a woman whose name you don't know? A. Yes. To one I do know the name of, the other side of the culvert. Mrs. Stiff.

10 Q. Who was the last person to whom you delivered bread before you came back to the culvert? A. Before I came back to the culvert, I don't know; the only lady I know in there was Mrs. Stiff. There was three customers that usually bought from me.

Q. Then you started back to High Street? A. I turned around.

Q. You turned around and started back to High Street? A. Yes, sir.

20 Q. You had been over that crossing a number of times before? A. I had, yes, sir.

Q. And you were familiar with it for the last ten or fifteen years or twelve years? A. Twelve years, I should say, yes, sir.

Q. And you crossed it at least four or five times a week at least? A. I would not say that many, no, sir.

Q. Three or four times? A. Two or three times, yes.

30 Q. Did you go the same time, in the morning? A. It would vary.

Q. Would it be in the morning? A. Not always.

Q. About how far was the last place where you delivered bread from that crossing, before you started to come back? About how far was the place where you last delivered bread, before you turned around? A. I turned around when I got in front of Mrs. Stiff's house.

40 Q. She was the other side of the culvert,

*Philip Heinz—Cross.*

through the culvert? A. She was the other side towards Stanhope.

Q. And you turned around there? A. I turned around there, coming back.

Q. And you started to walk back? A. No, I rode back till I got to the culvert and I got out at the culvert.

Q. And when you got out at the culvert you delivered some more bread? A. No. There was nobody home. The lady asked me, or she ordered some stuff there, some weeks before and was not home. Three coffee cakes. **10**

Q. From that place you started to walk up to High Street, did you? A. Yes, sir.

Q. And Randall was driving the wagon? A. Yes, sir.

Q. Did he always do the driving? A. He did when he was with me. He or some other driver. **20**

Q. Did you ever do any driving? A. No, sir.

Q. At no time? A. In the country, out in the country I always had a man with me to drive.

Q. Did you ever do any driving over the High Street crossing? A. No, sir.

Q. Or in the neighborhood of the High Street crossing? A. No, sir.

Q. Are you sure of that? A. Yes, sir.

Q. At the High Street crossing there was a crossing sign, was there not? A. There was. **30**

Q. And it was there on the day of the accident? A. It was, yes, sir.

Q. Did you see it on the day of the accident? A. I could not say that I did. It was there though.

Q. The crossing sign was similar to other railroad crossings? A. It is, yes, sir.

Q. The same as the signs that we see at other railroad crossings? A. It is; yes, sir.

Q. Of other railroad companies? A. Yes, sir. **40**

Q. Randall, as you stated, drove down to the

*Philip Heinz—Cross.*

Stanhope Turnpike and down the Turnpike? A. He did.

Q. Did you walk alongside of him? A. I walked ahead of him.

Q. About how much ahead of him were you? About how much ahead of the team were you? A. I could not say.

10 Q. Were you ahead of the team or not? A. I was.

Q. And the team followed you down High Street? A. No, he drove the team.

Q. He drove the team after you down High Street? A. Yes, sir.

Q. Before you turned into High Street did you get in the wagon? A. Sir?

Q. Before you turned into High Street did you get into the wagon? A. I did not.

20 Q. Did you look to see where the wagon was there? A. I don't remember that.

Q. Where was it you first got into the wagon? A. Where I got in the wagon?

Q. When did you get in the wagon? A. It was after he made the turn off the main road, to the crossing.

Q. About how far from the main road was it that you got in the wagon? A. It was not very far.

30 Q. Was it more than five or ten feet from the main road that you got on the wagon? A. I should say somewhere about that, a little more than that from the main road.

Q. It was further than that? A. It was more than that from the main road, nearer the track, it was nearer the track than that.

THE COURT: How near the track?

THE WITNESS: The track was only thirty-four  
40 feet.

*Philip Heinz—Cross.*

THE COURT: How near the track were you when you got in the wagon?

THE WITNESS: Ten feet, I should say, I stepped back a little ways and got in the wagon, or got on the dashboard of the wagon.

Q. You knew this train was due? A. Yes, sir.

Q. It was about train time when you approached the crossing? A. It was after the train time. **10**

Q. How did you know it was? A. At least, I thought it was.

Q. How did you know it was after train time? A. I did not know it. Only I thought it was. I knew the train had not come yet, because I would have seen the train if it had come.

Q. Up to the time you went up to the crossing you had not either heard or seen the train? A. No, sir.

Q. Then you went up to the crossing, and how near to the nearest rail of the track toward Stanhope Turnpike did you go? A. I walked right up to the track and looked down the track. **20**

Q. Right onto the track? A. Yes, sir.

Q. Did you stand on the track? A. I looked down the track, yes, sir.

Q. Did you stand on the track? A. On the track? Yes. I looked down the track.

Q. And you looked down? A. I did.

Q. At the time you looked down, you say you could not see any further than Totten's barn? A. I did not say that I could see only that far; I could see below Totten's barn. **30**

Q. How far below Totten's barn could you see? A. I don't know. I never measured it.

Q. Do you think you could see as far as Mr. Snook has told us about? A. Sir?

Q. Do you think you could see as far as Mr. Snook has told us about? A. Why, yes, I should think so. **40**

*Philip Heinz—Cross.*

Q. About how long did you remain at the track looking down the track? A. Not long.

Q. About how long? A. A few seconds.

Q. And then you turned completely around? A. Yes, sir.

Q. And at the time you turned completely around, how far were the mules' heads from the tracks? A. A few feet from the tracks, a few steps.

Q. Two or three feet? A. I could not say. Four or five. I stepped back a few steps and got in the wagon.

Q. And the team was moving on? A. They were, yes, sir.

Q. You walked back two or three steps, and jumped up on the wagon? A. I stepped up on the wagon.

Q. Were the curtains of that wagon down? A. Yes, sir.

Q. Where was Randall, inside or outside of the curtains? A. He was inside of the curtains, but you could not get inside of the wagon. You want me to tell how the wagon was?

Q. I want to know where Randall was with respect to the curtains? A. He was sitting on the wagon and there was about ten inches here and it is about sixteen inches back to the top from the seat, it was ten inches back of that that he sat on his seat.

Q. Where was the curtain, in the back of Randall or in front of him? A. About the side of him, about even with his face.

Q. How did the curtain run? Across the wagon? A. It ran up and down the sides of the wagon.

Q. Did you have a curtain in front of the wagon to keep the rain out? A. No, sir.

Q. When you approached the crossing did you see anybody there? A. At the crossing there was a little girl that had a baby carriage, that I passed.

*Philip Heinz—Cross.*

Q. Did you see any grown people? A. No, sir.

Q. Did you see any wagon? A. No, sir.

Q. Any woman? A. No, sir.

Q. Or any man? A. I saw there was a group at the door of the house across from where I got hit, across the way there, and there was no man or no wagon or no woman at the crossing there that I saw, outside of that.

10

Q. You say you did not see anybody? A. No, sir, there was not anybody there, only that little girl, I should say ten or twelve years old, who had a baby carriage.

THE COURT: Did you get all the way into the wagon?

THE WITNESS: I was sitting on the edge of the wagon, I had my feet on the dashboard, on the front board of the wagon.

20

Q. This team you had driven around before?

A. I had driven them around daily, yes, sir.

Q. At that time, did you have another team of mules? A. I did, yes, sir.

Q. Who drove that team? A. Various ones.

Q. Where did you drive this team besides going down to Andover? A. What team is that you refer to?

Q. The team that was killed at the time of the accident? A. Around the town, they would go to different places and around the town.

30

Q. Around to other parts of the country? A. Well, not so much around to other parts of the country; only to the cutoff.

Q. About how long did it take you to get up to the wagon, after you had looked down the track, about how long did it take you to get into your wagon? A. From the time that I stood there until I got into the wagon?

Q. Yes. A. Not over four or five seconds, at the most.

40

*Philip Heinz—Cross.*

Q. About how long after you got in the wagon was it that you were struck? A. It was only three or four seconds, four or five. I could not say positively, five or six seconds, that I got hit.

Q. When you looked down the track was there anything to obstruct your view? A. There was some railroad ties there. I don't know as they would obstruct your view.

10 Q. When you looked down the railroad track those ties did not obstruct your view down the track, did they? A. No, sir.

Q. Was there anything else to obstruct your view? A. No, sir.

THE COURT: Did you look all the way down to the cutoff?

THE WITNESS: You cannot see the cutoff from there.

20 THE COURT: You cannot see there?

THE WITNESS: No, sir, there is a sharp curve by Totten's barn.

Q. I show you a photograph and ask you if that accurately represents the crossing in question as it appeared at the time of the accident? A. Yes; I should say it did.

MR. SCOTT: I will have this photograph marked for identification.

30 The said photograph is marked "Defendant's D-3 for identification" of this date.

Q. Will you indicate on that just where you stood when you looked down the track? A. Where is the crossing? Is this the crossing?

Q. This is the crossing? A. This is the road coming up?

Q. Yes, this the road coming up? A. I will let you mark it if you will do so. It would be right to the side somewhere, about there (indicat-

40

*Philip Heinz—Cross.*

ing). This is the road that turns up to High Street and somewhere about there I should say, the edge of the road, the edge of the High Street road.

Q. And you were right by the track? A. Yes, sir, and I stepped back, somewhere back to here.

MR. MOROW: You stepped back to get in the wagon? 10

THE WITNESS: To get in the wagon, yes.

Q. You have made a mark at the place where you stood when you looked for the train? A. I looked for it all along, coming up to the railroad. I listened all the way along for the train.

Q. I mean, the place that you looked for the train by the track? A. By the track, yes, sir.

Q. How many teams did you run on the cutoff? A. One. That one. 20

Q. That one team? A. That is all.

Q. How many times, altogether, did they go up there? A. Every time they went up, I went up.

Q. How many times a week was that? A. It would vary. When I got hit it was not much doing there then; twice a week, I should say.

Q. That was the only route that you took charge of? A. That was all, and the town route.

Q. All the other routes, they were conducted and the sales made by your men? A. Yes, sir. 30

Q. What proportion did you other routes bear to this route and the town route, what proportion in volume of business, did your town route and this route to the cutoff, the cutoff route, bear to your other routes? A. At the time I got hurt?

Q. Yes. A. The town route was the best.

Q. Was it better than all the other routes put together? A. No, sir.

Q. Was it more than half of the other routes put together? A. No, sir, it was not. 40

Q. What proportion then? Can you state? Did

*Philip Heinz—Cross.*

it bear to your entire business? A. What do you mean?

Q. The volume of business down in the town route and in this cutoff route? A. At that time? At the time I got hurt?

Q. At that time, what share of your business? A. It was scarcely half at the time I got hurt.

10 THE COURT: What share was it, a quarter or a half?

THE WITNESS: Oh, a tenth part of it, a tenth part.

MR. MORROW: The cutoff business was a tenth part of your whole business?

THE WITNESS: No. It was not that. A fifteenth of that, I should say.

20 Q. And the town business was what part? A. Do you mean with the stores in town and my wagon with the stores, or just what I sold on the wagon?

Q. With the stores? A. About a quarter.

Q. And the balance was handled by your drivers? A. And the store in town, the bake shop, you did not say that did you.

30 Q. I included the bake shop? A. I thought you meant the stores I delivered stuff to, or that we delivered to by the basket in town.

Q. To put the question another way, what proportion of your business was done on these various routes, exclusive of this cutoff route or town shop and your town business? A. Not quite half.

Q. And you never handled those outside routes? A. Once in a while I would go over them with the drivers.

40 Q. But it was not necessary? A. No; It was not necessary. I would go over them to see what—

*Philip Heinz—Cross.*

Q. To see what? A. To see whether they were going on delivering right or not, I went over them with the drivers to see whether they went over the routes.

Q. Will you explain to the Jury why it was necessary for you to give up your business, on account of the alleged loss of business on those routes? A. Because I was not able to attend to them. When I got hit with the train I was not able to attend to the business at all. **10**

Q. But you never had been obliged to go on those routes except occasionally? A. I did. I had to see that the stuff was baked, and counted the stuff when it came in and went out.

Q. You counted it? A. Yes, sir, everything that was taken out was an account made of and what was brought back.

Q. Couldn't that be done by another person? A. I don't know whether it could or not. **20**

Q. Wasn't it done by another person? A. No. It was not. It was done by me.

Q. While you were out, who did the counting? A. Nights when I came in I did it.

Q. On April twenty seventh 1912, after this accident, Mr. Kyle of the Railroad Company called on you, did he not? A. I could not say.

Q. He called on you after the accident? A. He came in different times, yes I could not tell you what dates. **30**

Q. And it was shortly after the accident? A. He said that he had been in different times.

Q. Never mind what he said, but he came in after the accident? A. He came after the accident, yes.

Q. And at that time did you have a conversation with him? A. No, sir.

Q. Did you talk to him at all? A. Just a few words, yes, sir. **40**

*Philip Heinz—Cross.*

Q. And did you tell him how the accident happened? A. I did not.

Q. Did you tell him that you were riding in a covered baker wagon, with your driver, George Randall? A. I did not.

Q. But that was true, was it not? A. I was riding with him, yes.

10 Q. That was true? A. Yes, sir. No, sir, that was not true.

Q. You were not driving in your wagon? A. Not when I got hit.

Q. I did not say when you got hit. Did you tell Mr. Kyle, "I was driving in a covered baker wagon with my driver George Randall"? A. I did not.

Q. That was not true? A. No, sir.

20 Q. The wagon was loaded with bread, cake and pie? A. No, sir, I did not say it.

Q. That was true, was it not, that the wagon was loaded with bread, cake and pie? A. It was, yes, sir.

Q. Did you say, "We were driving along the macadam road which was parallel with the Delaware, Lackawanna and Western tracks and on the north side of the tracks." A. I did not.

30 Q. But that was true, was it not, that you were riding on the macadam road which runs parallel with the Delaware, Lackawanna & Western Railroad tracks? A. Yes, but opposite, the other side of the culvert.

Q. Did you say to Mr. Kyle, "It was my intention to cross to the south side of the tracks to serve some customers there." A. May I ask you one question, and I think you won't ask me these questions.

Q. I ask you whether you said that to Mr. Kyle? A. I did not.

40 Q. Or did you tell that to Mr. Kyle? A. I did not.

*Philip Heinz—Cross.*

Q. But it was true that it was your intention to cross from the north side of the tracks to the other side to serve some customers, was it not? A. Over High street, yes, sir, over the High street crossing, it was.

Q. Past the culvert? A. Yes, sir.

Q. Did you tell Mr. Kyle that, "As I approached the crossing I looked to see but could see no train"? A. I did not. 10

Q. Did you tell Mr. Kyle, "When I stood up to look around the curtain toward the east at the time the mules reached the crossing I heard the engineer toot his whistle." A. I did not.

Q. Was it a fact that you had to stand up and look around the curtain? A. I did not. It was not the fact.

Q. And did you tell Mr. Kyle that, "And I said to Randall, 'We are gone.'" Or words to that effect? A. I did not. 20

Q. But you did say to Randall words to that effect, did you not? A. "We are gone." Or something to that effect, but I did not say it to Mr. Kyle.

Q. And did you say "I pulled the mules to the right to get the mules off the crossing"? A. I did not.

Q. But you did pull to the right to get the mules off the crossing? A. I pulled them behind, yes, sir, both lines. 30

Q. "And almost at the same instant I pulled the lines the engine struck the mules, busted the wagon and I was thrown out." Did you tell Mr. Kyle that? A. I did not.

Q. But that was true, was it not? A. That was true, yes, sir, I testified to that.

Q. Did you tell Mr. Kyle, "I could not see the train coming west until I was almost on the crossing." A. I did not. 40

*Philip Heinz—Cross.*

Q. Did you make the following statement to Mr. Kyle: "On account of the rain the curtains were down and I had to stand up and look around the curtains"? A. I did not.

Q. After the accident did you see the engineer of the train? A. I did not.

10 A gentlemen named Mr. Thorpe is asked to stand up.

Q. Did you see that gentlemen after the accident? A. Where? Down on the crossing?

Q. Yes? A. I did not. The first time I recollect seeing him is in Court.

Q. And do you recollect that that gentleman there said to you, "What did you stop for"? A. No, sir. He did not say it either.

20 Q. And do you recollect saying to that gentleman, Mr. Thorpe, the engineer, "I was going to turn around"? A. I never saw Thorpe until he was in Court at the time of the trial.

Q. Did you make that statement to Mr. Thorpe? A. Why, no. I never seen the man.

Q. Did you make that statement to anybody else there at the time? A. No, sir, I did not. I did not feel like talking when I lay there.

30 Q. Did anybody ask you what you were doing on the crossing at that time? A. No, sir, they did not.

Q. Have you a brother-in-law? A. I have.

Q. What is his name? A. I have two.

Q. What are their names? A. One is Gorman and the other is Sparling.

Q. What is the full name? A. William Gorman and William Sparling.

Q. Where do they live? A. One lives down on Main street, the other on Bond street right near where I live.

40 Q. Where does Mr. Gorman live? A. They both work in the shoe factory.

*Philip Heinz—Cross.*

Q. Where is that shoe factory? A. Here in Newton.

Q. This profit that you made in your business, did you bank that money? A. I did not. I paid out most of it for cash.

Q. For what? A. For materials and different things that I bought.

Q. I mean the profits? A. The profits. I 10  
banked some of them yes, sir, and I bought property with some of the profits.

Q. Where did you bank that money? A. In the Sussex Bank.

Q. For how long a time prior to the accident had you banked it in the Sussex Bank? A. At different times as long as I was in business.

Q. And did you bank it in any other bank? A. No, sir.

Q. What properties did you buy? A. I bought 20  
the barn back of the jail building and built onto it.

Q. How much did that cost you? A. Somewhere about forty-five hundred dollars, that is, the building and the property.

Q. And did you buy any other property? A. Yes, sir, I bought property in the South that I sent up to look at twice.

Q. Where is that? In Georgia? A. In Georgia. 30  
In Milangeans County.

Q. Did you buy any other property? A. No, sir.

Q. What is the nature of that property? A. It was a store. It has been torn down.

Q. When was that purchased? A. I had that when I came to Newton, but I sent Mr. Johnson down twice for me and that cost me quite some money. I was at the hospital and operated on for appendicitis, and while I was hurt I spent some money; that went for some of the profits. 40

*Philip Heinz—Cross.*

Q. What did you do with the hundred and fifty dollars a week that you made? A. I used it in different ways. I have been living on it ever since I got hurt, what I did not spend.

Q. And your family consists of your wife and yourself and your little girl? A. One girl alive and one dead.

10 Q. Do you rent that house down there, or do you own it? A. I rent it.

Q. Do you own any other property? A. No, I do not.

Q. Or any other property outside of the Georgia property and the barn you have already described? A. Only what my father left me. I have some property of my father's up in Montclair.

Q. Is there a mortgage on your barn? A. There is, of six hundred dollars.

20 Q. And is the only thing you have to show for this profit that you have spoken about of a hundred and fifty to a hundred and seventy-five dollars a week for the last ten years, the barn with this mortgage, this living for your family and this piece of property which is mortgaged, and the Georgia property? A. Yes, sir, and the receipts that I have paid Judge Huston for quite a sum of money.

30 Q. That is since the litigation? A. Since and before.

Q. When did you get out of bed after the accident? A. The middle of July, about the twenty-fifth of July.

Q. That was 1912? A. The same year that I got hurt.

Q. You started this suit against the Railroad Company on the thirtieth day of July 1913? A. I don't know the dates, I cannot tell.

40 Q. Very shortly after you got out of bed, you started this suit? A. I think so, yes, sir.

*Philip Heinz—Re-Direct.*

Q. Within a week? A. Yes, sir.

Q. And prior to that time you had been in consultation with Judge Huston as regards this accident? A. Prior to that time?

Q. Prior to the time the suit was started and while you were in bed? A. He was in to see me a few times, yes, sir.

Q. And you had talked over this prospective litigation had you? A. I had, yes, sir. 10

Q. Have you all the checks—? A. I have not.

Q. Have you all the checks that you have paid out money on since the inception of this suit? A. I have not. I paid a good deal of it out in cash.

Q. Have you a record of all the cash that you have paid out? A. I have not, no sir.

Q. Is there any method or way that you can ascertain the various amounts of money that you have paid out since the inception of this suit? A. That would be hard to tell. There has been a lot paid out, or spent, it has been over three years and a half. 20

Q. After you went out of business the moneys that you have been disbursing have been drawn from the bank? A. No, sir. I had it home, a good deal of it, I drew some of it from the bank and others I had home in the house. 30

## RE-DIRECT EXAMINATION BY MR. MORROW:

Q. Have you had any income from any source since the accident happened? A. No, sir, only a little rent from the barn.

Q. How much? A. About a year's rent.

Q. How much is that? A. Fifteen dollars a month.

Q. That is all the money you have had? A. That is it, yes, sir. 40

*Philip Heinz—Re-Cross.*

Q. Have you had anything from the property in Georgia? A. No, sir, and it has been a detriment to me.

Q. Have you paid money out on account of that? A. Yes, sir, I have.

Q. Have you had any money from this property in Montclair? A. I have not. No, sir. That is  
10 my father's estate and is not settled.

Q. Is that productive property? A. It is a farm.

Q. Does it produce anything to you? A. No, sir; a man has it for the taxes.

Q. How much money have you paid out since this accident happened? A. That I could not tell you. A lot of it.

Q. That does not give me any information. About how much? A. Nine or ten thousand dol-  
20 lars.

## RE-CROSS EXAMINATION BY MR. SCOTT:

Q. What have you paid this nine or ten thousand dollars out for?

MR. MORROW: I object.

A. I paid Judge Huston some money, quite a lot of it.

Q. How much? A. I cannot tell. I lived three  
30 years and eight months, and have not done any work. I sent Mr. Johnson south for me.

BY MR. MORROW:

Q. How many times? A. Once since I got hurt

BY MR. SCOTT:

Q. Can you tell anything else? A. Insurance that I am carrying, doctor's bills, and different things. I could not begin to tell them.

Q. Where did you get that ten thousand dollars  
40

*Philip Heinz—Re-Cross.*

that you say you spent since this accident? A. I had it.

Q. Where did you have that? In the bank?

A. No, sir. I had a good deal of it home. Most of it home.

Q. Most of it home? A. A good deal of it.

Q. How much was that and where did you get it? A. Some of it I had had out, that I had loaned and I got it back. 10

Q. How much of it did you have home? A. I had six thousand dollars out.

Q. And home? A. I could not tell what I had home. I had some in the bank.

Q. How much did you have in the bank? A. I could not tell that. I had some home and some in the bank.

Q. Where did you have that six thousand dollars out? A. At Nutley. 20

Q. To your brothers'? A. No, sir.

Q. Was that on a loan, a mortgage loan? A. It was on a loan, yes, sir.

Q. On a mortgage? A. No, sir.

Q. On a note? A. No, sir, it was a loan, on no note.

Q. Who was the party in Nutley that you loaned this six thousand dollars to? A. My sister.

Q. What was her name? A. Katie.

Q. Is she married? A. No, sir; an old maid. 30

Q. Does she live there in Nutley now? A. She does not. She lives in Brookdale.

Q. When was it she paid this money to you? A. She paid it to me at different times since, as I asked her for it.

Q. Since the accident? A. Yes, sir.

Q. This Brookdale is outside of Montclair? A. Yes, sir. It is in Bloomfield Township.

Q. When did you receive the first payment on 40

*Philip Heinz—Re-Cross.*

this six thousand dollars? A. I could not tell. Shortly after I was hurt.

Q. How much was that? A. She paid me at different times.

Q. How much was the first payment? A. A thousand dollars.

10 Q. How many payments has she made since that time? A. Different ones.

Q. In what amount was the second payment? A. The next one was five hundred dollars.

Q. Do you keep any record of those payments? A. No, sir.

Q. Or give her any records or receipts? A. No, sir.

Q. What did you do with that money after it was paid over to you? A. I paid Judge Huston considerable of it.

20 Q. Did you keep it in the house, or bank it? A. When I got it I gave it to Judge Huston, a good deal of it.

Q. What did you do with the balance? A. I lived onto it and paid them bills.

Q. When was the last time that your sister made a payment to you on this loan? A. About six months ago.

Q. How much was that? A. Three thousand dollars.

30 Q. And none of this money you banked? A. No, sir, I paid it out as fast as I got it.

Q. How was it paid to you, in cash or by check? A. In cash.

Q. Did you go down to Bloomfield or Nutley to get this money? A. No, sir, it was sent to me.

Q. By whom? A. By a relative. A brother-in-law, came in an automobile.

Q. How old a woman is your sister? A. Sixty-five or sixty, she is an old maid.

40 Q. She lives at Brookdale? A. Yes, sir.

*Philip Heinz—ReCross.*

Q. Do you know where? A. Yes, sir; right next to the Dutch Reformed Church at Brookdale.

Q. Do you know what street? A. Bellevue avenue.

Q. Your brother-in-law, what is his name? A. I don't know where he is now, he is out west.

Q. What is his name? A. Day.

Q. That is the one who brought this money? A. **10**  
Yes, sir.

Q. Day, you say the name is? A. Yes, sir.

Q. Was he the man who ran the business in Nutley? A. No, sir; that is my brother who ran the bakery in Nutley.

Q. What was Day's full name? A. Nelson.

Q. Where did he live in Nutley? A. I don't know whether it is Chestnut, the head of Chestnut street. I don't know what it is. It is a little cross street by the head of Chestnut street. **20**

Q. What business was he in there at Nutley? A. He is a carpenter.

BY MR. MORROW:

Q. What have you paid Judge Huston this money on account of? A. For fees.

Q. Was there a claim against you also of a few hundred dollars? A. In the Morris case, yes, sir.

Q. And you paid that? A. Yes, sir. **30**

Q. And the expenses of this litigation that has been going on? A. Yes, sir.

MR. SCOTT: I object. I don't think that can be recovered in this suit.

MR. MORROW: I want to show what he has done with the money. Why he made these payments. I won't pursue it any further.

*Dr. Bruno Hood—Direct.*

DR. BRUNO HOOD, sworn as a witness on behalf of the plaintiff, testifies as follows:

## DIRECT EXAMINATION BY MR. MORROW:

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

Q. What is your profession? A. Physician.

10 Q. How long have you been a physician? A. For thirty years.

Q. Where have you practiced during that time? A. In Newark, New Jersey, Kansas City, Missouri, and I have been in Newton for twenty-six years.

Q. What has been your practice, a general practice? A. General medicine and surgery.

Q. Of what College did you graduate? A. The College of Physicians and Surgeons, New York City.

20 Q. Do you know Mr. Heinz, the plaintiff in this case? A. I do.

Q. How long have you known him? A. Since he has resided here, sixteen or seventeen years, something like that.

Q. Were you his physician prior to the time of the receipt of the injuries complained of in this suit? A. Yes, sir.

30 Q. State what the condition of his health had been prior to that time, prior to 1912? A. With the exception of an attack of appendicitis, which was cured by an operation, and a burn that he had from an explosion of a gas engine, he was a very healthy man and an unusually strong man.

Q. Did he suffer any after effects, affecting his physical condition, either from the gasoline explosion or from the appendicitis? A. Oh, no, no, he got perfectly well from each of them.

40 Q. Where did you see him after the thirteenth of April after the accident? A. The first glimpse

*Dr. Bruno Hood—Direct.*

I got of him was as he was being taken from the coach. I was in a room in the County Clerk's office, the Freeholders' room, and I saw them take him from the coach. He was being supported by two men and they helped him to the house, and about that time I received a summons there to go and attend to him and I ran across the street.

Q. State what you found his condition to be? 10

A. At that time he was very much bruised. He was suffering pain. He had a cut in his scalp on the right side of his head about an inch and a half long, the right side of his face was bruised and scratched and bleeding; his right arm and hand was abraded and bruised. So was his left hand, and I helped undress him and put him to bed. Then we found that his right leg from the knee down was bruised, and his left leg was bruised the entire length of the leg, from the hip right down to his toes. And he had bruised conditions, contusions about the upper part of his chest and side, the right side and chest. 20

Q. Do you notice any vomitting by him? A. Yes, he vomitted on that occasion.

Q. Did you notice what the vomit contained?

A. I think there was some blood in that first vomit, if I recall it rightly.

Q. Did he suffer any pain? A. Yes, sir, a great deal of pain. 30

Q. Where? A. In his chest. He was pretty well used up at that time. He suffered a lot of pain; squirming and writhing and groaning, pain; like anybody who was severely hurt.

Q. How often did you see him that day? A. I don't know. I don't remember how often I saw him that day, but I saw him several times that day.

Q. What was his condition all day? A. He was suffering a great deal of pain. 40

*Dr. Bruno Hood—Direct.*

Q. How long after that did you continue to visit him? A. Well, I have never ceased, absolutely.

Q. What was the condition of his wounds and bruises from that time forward? A. Why, his wound on the head, in due course of time—the scalp wound did not seem to be very severe or a very serious affair, and none of his wounds were  
10 deep or seemed to be serious. His legs appeared to be very deeply bruised, because they remained discolored for a very long time. They were black and discolored a long time and that finally faded away and they turned green and yellow, like bruises do when they get old, evaporate and get away, or absorb rather, not evaporated, until finally they approximated the normal condition again, the normal appearance.

Q. Did you notice any change in his legs, any  
20 swelling, or anything of that kind? A. Not at that time, only that swelling of the bruises. That passed away. He did not have swelling again until we got him up out of bed. He was in bed a long time, over three months, I think, approximately seventy-five days.

Q. When he got out of bed, will you describe what the condition was then? A. When he got out of bed, he was about dragged out of bed, he was bent up in a chair and bolstered up; he  
30 could not get up out of it without assistance; he was propped up in bed like you would an invalid, and then his legs began to swell and they swelled terrifically too.

Q. What did you do with them? A. I bandaged them, bandaged them with elastic bandages, and cotton bandages, and rubbed them and worked them.

Q. From the time he got up what was his ability to walk and go about and attend to affairs? A.  
40 From the time he got up?

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Q. Yes? A. Well, he sat around there for a time upstairs; he was helped out of bed, and finally, he got a little more strength and a day came when we helped him downstairs; with the aid of a cane he could hobble about a little and then he sat by the window there. I tried to get him interested in his business, and then I tried to get him to wait on customers, he could not do it. He was in a collapse. He simply could not do it. 10

Q. He was physically unable you mean? A. He was physically unable to do it.

Q. And do you remember any special treatment you extended to him? A. Yes. I gave him a little electrical treatment, I gave him vibratory treatment and gave him medicinal treatment too, and did about everything I could think of.

Q. What effect did the treatment have? A. Oh, it was not beneficial, except in this, he gained strength. And he has not near the swelling he had in his limbs. 20

Q. You say you have visited him since that time? A. Yes, sir.

Q. How much? How frequently? A. Well, I generally go to see him about once a week, and I go to see him in addition to that when he sends me word he wants to see me or he wants me to see him.

Q. What condition do you find him in as compared with what it is after he left his bed and tried to walk about? A. Well, in one respect he is much better in condition, that is, as regards muscular strength. He can get about a great deal better than he could when he first got out of bed. But he has since developed a fixed disease. 30

Q. What is that? A. He has developed diabetes.

Q. How serious is that? A. How serious is diabetes? 40

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Q. No. His condition of diabetes? A. Well, under restrictions, he is doing pretty good, but that is no cure.

THE COURT: Is there such a thing as traumatic diabetes?

10 THE WITNESS: I understand there is, yes. Not of my personal experience, but out of my own reading. I can give you references to it.

Q. What are the restrictions? You say when you get him under restrictions? A. Diabetic restrictions, cutting out to a certain extent certain kinds of food that are productive of forming sugar in the system, or an excess of sugar.

20 Q. What is the trouble with Mr. Heinz now? What is the present condition of him in addition to the diabetes of his? A. Well, his general nervous debility; his lack of physical vigor; his inability to apply himself, to do anything. He is unable to get about well enough for a man to do anything.

Q. In what respect is he unable to get about? A. Well, he hobbles a little in a miserable sort of a way, with the use of a cane, as you have seen him here, squirming and writhing and holding himself; that is the usual demeanor. That is what he does.

30 Q. How much of the time is he in this condition of writhing and turning? A. I have never seen him out of it since he was injured.

Q. State whether or not this condition is accompanied by pain? A. Well, I don't know. He tells me he has pain, he acts like a man who has pain. I cannot see him have pain.

40 Q. Have you any general term in your profession by which you characterize his condition? What is the state that he is in? A. Well, it is a traumatic neurosis. I would say an injury, the result of an injury on his nervous system.

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Q. How, in your judgment, might such a condition be produced, by what? A. A neurosis of that sort?

Q. Yes? And the condition that this man is in?

A. It could be produced, and was produced in his case, by an injury.

Q. When you saw him state whether or not the injury appeared to be a recent one? A. When I first saw him? **10**

Q. Yes, sir, A. Oh, yes, sir, it was fresh blood.

Q. State whether the conditions which you found him in and have found him in from that time, could have been from any other cause than the injury? A. Well, whether his present condition could have developed from any other cause?

Q. Yes? The condition you have seen from the thirteenth of April, 1912, till now? A. Oh, I presume a man might get that condition from illness following an injury. **20**

Q. I want to know whether his condition is now from injury? A. I say, I suppose a man might get that condition from illness following an injury.

Q. Yes, and now I want to know whether his condition at present is from illness? A. I don't think it is, because his condition developed right from the injury. He was a sound man before this. **30**

Q. State now, in your judgment, what will be the progress of his condition, the future of it? A. In my judgment?

Q. Yes, sir. A. I don't think he will recover. I don't think he will get any better. I think he will get worse. Diabetes gets worse in the course of time.

Q. As a physician, will you state whether or not his injury and the condition he is in, including the diabetes, is likely to lead to other com- **40**

*Dr. Bruno Hood—Direct.*

plications or diseases? A. It predisposes him to it, yes; diabetes of itself does.

THE COURT: I don't think I understand you. Do I understand that the nervous condition that he is in now might come from the injury?

10 THE WITNESS: Yes, sir.

THE COURT: What do you say about the condition of diabetes?

THE WITNESS: I think in his case it came from the injury, from the effect of his nerve injury. And his diabetes predisposes him to other illness.

Q. Have you noticed any difficulty of his breathing? A. Yes, sir.

20 Q. What have you noticed about that? A. He has rapid and labored breathing, on every slight exertion.

THE COURT: That is incident to the diabetic condition?

THE WITNESS: No. I think not always so. It has been found that some diabetics are thin and slender and breathe well at times. It depends upon the physique of the man.

30 Q. You have said that you have observed him suffering; are his symptoms such as you would ordinarily expect from the injury which it is said he received? A. Would you please state that again?

Q. Are his symptoms of his physical defects and his nervous condition such as you ordinarily would expect from the injuries which he had received? A. Well, I don't know as I quite grasp it. I think there are plenty of people who might receive such an injury as he did and get well.

40 Q. I want to know if those symptoms would

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follow the injuries which he received? A. I think his present condition is the result of his injury, yes, sir.

Q. Have you noticed anything of its effect upon his mental condition, his condition of comprehending, of thinking? A. Yes. He is dull and apathetic ordinarily. To-day here in Court he was a little excited. But ordinarily he is not in that condition. 10

Q. You have seen him here on the witness stand? A. I did.

Q. And this constant writhing? A. Yes, sir.

Q. When you see him at his house, will you state as to what you observe with respect to those conditions? A. Just exactly the same behaviour. Just exactly the same as he behaved here on the witness stand. He always does that now.

Q. Is he able to go out of his house and go any distance? A. No. I don't think he could walk any distance. 20

Q. Have you, as a physician, resorted to any experiments to see what his sensitiveness is, what sensitiveness he has in his limbs? A. Yes, sir, I have.

Q. What have you done in that regard? A. A number of times I have tested the sensation in his legs.

Q. In what way did you test it? A. I blindfolded him and by going over his legs with pins, a compass with sharp points, to determine his sensation, and at what distance he recognizes two points as two distinct points. I have tested his blood pressure a number of times. I have examined his urine a great many times. I have examined his heart, his lungs, physically, I made a physical examination a number of times; I do it quite frequently. 30

Q. Now, I want to ask you, if, when you made 40

*Dr. Bruno Hood—Direct.*

those tests with pins and points of a compass, what was his condition as to being able to see what you were doing? A. He could not see at all.

Q. How? Why not? A. Because I blindfolded him.

10 Q. Will you state whether or not he responded in any way to the pricking with the pins and the points of the compass? A. If he responded in any way? Yes, he responded in some way. A very indifferent way. Very far below the normal. It varies a little at different times when you test him. I have seen him so you could stick a pin into him half its length and he would not know it was there.

THE COURT: Is that all over his body?

20 THE WITNESS: No, not all over his body. Mostly in the left leg. More so than the right leg. To a very much lesser extent in the right leg. I have taken the points of a compass five and a half or six inches apart, sharp points, and he could not distinguish it from one point.

Q. Would he flinch any? A. Sometimes not at all, sometimes you could not tell, he could not tell you were touching him; that is, according to his expressions. I cannot feel for him.

30 Q. Have you made any tests with reference to pains in his body? A. Well, I cannot tell whether he had pain.

Q. Has he any tender spots anywhere? A. Yes, he jerks and squirms on pressure at certain points.

Q. What points? A. He has a point on his back that will always make him squirm, he will flinch very sharply there.

40 Q. I would like to know how close your observation of him has been since he got up from his bed in July, 1912? A. As nearly as I can

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remember, I think I have seen him at least once a week since that time, and frequently oftener. Very lately, I think, I have seen him, say within the last two or three months, once a week.

Q. Do you know anything about his appetite?

A. Only from what he tells me and what his wife tells me, as I acquire about it.

Q. Do you prescribe for him any? A. I tell him 10  
some, yes, some restrictions mostly, yes, sir.

Q. Have you discovered, or do you discover, in him, before this accident or even after the accident, any condition of his heart that is abnormal?

A. No. I think he has a good heart.

Q. He has a good heart there? A. Yes, for a big man. He has a good heart for a big man.

Q. I mean the physical heart? A. Yes, he has a little rapid pulse, generally, but he has a pretty good heart for a large man, no valvular trouble 20  
that I can hear.

Q. Did you take him to Newark, or go with him to Newark? A. Yes; I took him to Newark once. I took him to Newark to Dr. Charles F. Baker.

Q. What was Dr. Baker? A. I think Dr. Baker is partly a general practitioner, and quite a good surgeon, bone surgeon I think largely, and a very good ex-ray operator.

Q. Was there an ex-ray taken of him on this occasion? A. Yes; ex-ray pictures were taken of him in my presence. 30

Q. What did you discover from the ex-rays?

A. Nothing. Normal structure.

Q. Has there been any change indicated in the body of this man, as to his chest, with regard to his drooping or falling forward? A. Yes, he kind of droops down on his right side, he always complains of pain in the upper part of his chest and I think he assumes that attitude to ease 40

*Dr. Bruno Hood.—Cross.*

himself, that is my inference. He unconsciously does that. He hangs down on his right side.

Q. Do you notice anything in his conduct that indicates a feigned set of symptoms? A. No. I have tried to guard against that as much as I possibly could, but I think he is honestly broken up.

10 Q. Did you take him to see Dr. Hicks? A. No. I did not. I sent him there. I did not take him there. Young Mr. Huston took him there in his car. Henry W. Huston took him there in his car and brought him back.

Q. What is his appetite and his ability to eat and nourish himself? A. Well, I have never seen him eat. I have no personal knowlege of that I only know from inquiry that he is an indifferent eater.

20

## CROSS EXAMINATION BY MR. KING:

Q. As this man sat on the witness stand did you observe him before he went on the witness stand? A. Yes, I have observed him a lot.

Q. I mean in Court to-day? A. Yes, sir.

Q. Since this case started, and before he went on the witness stand, did you see him sitting here? A. Yes, sir, I did.

30 Q. Did you notice any facial contortions while he sat here? A. Yes, sir.

Q. That was before he went on the witness stand? A. Yes, if you will watch him long enough you can see it.

Q. I am asking, did you see any this morning before he went on the witness stand? A. Yes, I did.

Q. Did you see any? A. Yes, I have.

Q. How many? A. Well, I kept no record of it.

40 Q. About how many, did you notice? A. I could not say.

*Dr. Bruno Hood—Cross.*

Q. How frequently did he have this manifestation of pain that you saw when he was not on the witness stand? A. A part of the time I was not even in the room and I don't know.

Q. When you were here how many did you take notice of in him? A. I saw him move and twist as he usually does.

Q. Have you noticed him have this twitching and symptoms he had on the witness stand? A. Not as markedly, but I think he had them. 10

Q. Did you notice them? A. I certainly did.

Q. Did you notice when the Court asked him a question he did not have the grimace on his face while talking? A. No, I did not.

Q. Isn't that true? A. I did not see it.

Q. Did you notice when Mr. Scott was asking him questions or Judge Morrow was asking him questions, as long as he was answering the questions he did not manifest that for a few minutes? A. No, I did not. 20

Q. Is not that true? A. I don't think it is.

Q. Did you see in him at any time, except while waiting for a question, any manifestation of pain? A. Yes, sir.

Q. When he was on the witness stand? A. Yes; I think he twitched and jerked regardless of what was going on.

Q. While he was answering questions? A. Yes, while he was answering questions. 30

Q. Did you see a single time when he was answering questions or had his mind fixed on the question that he had any manifestation of pain? A. Yes, I think he did.

Q. These facial contortions that he had while on the witness stand, would express extreme pain, would they not? A. I don't know that they would, they might be habit, vicarious habit. 40

Q. Do you think he has the vicarious habit of

*Dr. Bruno Hood—Cross.*

manifesting to this jury an indication of pain when he does not have it? A. He might do a lot of contorting without having pain, yes.

Q. And it might possibly be this manifestation that he made on the witness stand may not have indicated any pain at all? A. It originated with pain. He might have pain at times and  
10 some of them might be unaccompanied by pain.

Q. So that there is not any indication by what he did on the witness stand as to whether he was suffering pain or not? A. I don't think every contortion he had of necessity was the result of pain.

Q. How can you separate a contortion in your opinion that manifested pain from one that did not? A. I could not tell. I cannot tell when a man has pain.

20 Q. Everything he did then on the witness stand might have been made out of whole cloth? A. It might have been.

Q. It could have been, that is the word I will use? A. It could have been, yes.

Q. He could have done that very thing, couldn't he? A. If he knew enough about it, yes.

Q. Is he an unusual man? A. He would to be more than an unusual man to do that.

30 Q. Did you notice anything in his answers that indicated he was not a man of keen intelligence? A. He is not a man of keen intelligence, no.

Q. Where did he fall at the wayside that you should say that? A. He answered in a line of matters in which he was thoroughly versed, his daily occupation.

Q. Is it his daily occupation to think about his trouble and think about this case? A. It has gotten to be his daily occupation in late years.

40 Q. As the number of feet he was from the crossing? A. I don't know about that. He perhaps

*Dr. Bruno Hood—Cross.*

was more or less in error about that, I think. I very much doubt if he knows just how far he was from the crossing or the railroad or anything of that sort.

Q. If his pain was as severe as his actions indicated, wouldn't it take a man of tremendous intellect to give answers properly to the questions propounded to him and still be suffering from that pain? A. I don't think so, a man of his business. 10

Q. Neurasthenia does not produce pain, does it? A. Not of necessity.

Q. So that if he had this traumatic neurasthenia which we have spoken about, it would not be manifested by an exhibition of pain? A. Not of necessity.

Q. You say, not of necessity? A. No, sir.

Q. In its ordinary application, would you say that it would be manifested by pain by an exhibition of pain? A. Well, how is that again, please? 20

Q. I say, if he had traumatic neurasthenia would it ordinarily be manifested by an exhibition of pain? A. Well, I think this man has just a little bit more than the ordinary case of neurasthenia.

Q. No. Please just answer the question. Can't you answer whether it would ordinarily be manifested by an exhibition of pain? A. Oh, I think he would have some pain, yes. 30

Q. Would it be manifested by pain which would produce the contortions, I think the word is that you used, that he exhibited on the stand? A. I think people who suffer pain undergo contortions, yes, he would have contortions.

Q. Do you believe that if he now has neurasthenia that the exhibition on the stand was a fair exhibition of the pain produced by that condition? A. Oh, I think while he was on the stand it was exaggerated because he was under excitement. 40

*Dr. Bruno Hood—Cross.*

Q. You said that you did not think the man was feigning? A. No, I don't think he is.

Q. Whatever got into your head, that he might be feigning? A. Well, in an examination of a patient and testing him, I generally keep in mind to find out some of the things that a patient has not got as well as what he has got. There are  
 10 some negative investigations as well as positive investigations, and it is a very common thing. We all use our senses. If you see a sharp point coming at you or a hot iron coming at you, you involuntarily shrink, because you know it is going to hurt you, and if a man saw you with a pin, or if you were to thrust a pin at his arm or leg he would expect to be pricked as a consequence and would manifest pain; therefore we have to guard against that effect of the sense of the sight,  
 20 and he if you blindfold him he cannot be brought into deceiving himself and it would be a more true test, you can tell more nearly, you can guard against his deceiving himself.

Q. So you believed it was worthy of consideration that you should direct your attention not only to the things you could see, but you wanted to exclude those things which you believed were not true, which possibly the patient might voluntarily or involuntarily profess to be true or to  
 30 produce to your eye? A. He might involuntarily supply them, yes, any patient could do that.

Q. For consideration? A. For no consideration.

Q. For your consideration? A. Oh, yes, for my taking into consideration the judgment of his condition.

Q. How much has this man lost in weight since you began to attend him? A. I don't know, sir, at present.

40 Q. Can you tell approximately? A. No, sir. I never saw him weighed.

*Dr. Bruno Hood—Cross.*

Q. Since you began attending him you can surely tell the jury whether he has lost weight or not?

A. I don't know whether he has. I never saw him weighed.

Q. Tell the jury your best thought about whether he has lost weight or not? A. I could not say. He always was a large man. He told me at one time, if you want that, he told me at one time that he has lost seventy-five pounds in weight. **10**

THE COURT: You could tell by looking at your patient whether he had lost seventy-five pounds during the time you attended him or not?

THE WITNESS: Well, the kind of man he is, it is pretty hard to tell what he would weigh.

THE COURT: But you could tell whether he had lost seventy-five pounds or not during that time? **20**

THE WITNESS: A large man like him?

THE COURT: Yes.

THE WITNESS: To all outward appearance he looks about as heavy as he did.

Q. Did you notice his face while on the witness stand? Doesn't it bear the imprint to you of being sensible? A. Yes, he is sensible. **30**

Q. You mentioned something about his mental condition, what have you to say to this jury that you can point out to them that you saw while he was on the witness stand that did not represent fair mental ability? What particular thing can you point out? What did he do? What did he lapse in? What did he say? What didn't he say? A. Well, on the witness stand?

Q. Yes? A. I have no criticism to make of that at all. **40**

*Dr. Bruno Hood—Cross.*

Q. Then you will say to the jury from what they saw, they would be correct in drawing the conclusion that there was nothing the matter with him mentally? A. They saw him under particularly stimulated conditions.

10 Q. I say, from what they saw while he was on the witness stand, would they be justified in saying that there is nothing wrong with his mental condition? A. Well, while he was on the witness stand?

Q. Yes? A. Yes, I think so.

Q. I have noticed the plaintiff lean his head down on his arm, can you tell me what physical condition that you have observed about him would warrant a man in doing that thing? A. I don't know why he did it.

20 Q. You have noticed this continual grimace on his face indicating pain, will you say that was justified? I want to treat you fairly. A. Yes, I think the man has a certain amount of bodily irritation and it manifests itself in that way.

Q. Is there anything physical about this man that you can point to the attention of this jury which you say is objective and which justifies his present condition as manifested on the witness stand. A. There is no objective symptom that I can point to just now, but there is that about 30 this man that would show that he is far from being a well man.

Q. I did not ask you that, I asked you for the symptoms which would justify his actions on the witness stand; what is there that you can point this jury to that they can see about this man which justifies his action on the witness stand? A. No. His symptoms are largely subjective.

Q. So that you can say to this jury sitting here that there is not a single thing about this man 40 that you can point them to and say "Gentlemen,

*Dr. Bruno Hood—Cross.*

there is the cause of this condition, or there is a condition"? "There is the condition which I show you on his body which is productive of what he claims." A. You cannot do that with anything short of a broken leg.

Q. If I had an arm off you could show that couldn't you? A. Yes, you could show that, but you cannot show it with a disease. **10**

Q. Do you know what habitic is? A. No, I do not.

Q. Is it true that nervous motions persisted in for a long time, that those motions would continue involuntarily without a producing cause? A. To a certain extent I think that is true of anyone producing a certain motion, after a while it will continue to a certain extent.

Q. Being unable to point to the jury a single objective symptom which they can see are you entirely dependent upon what he says for the truth of his condition? A. No, sir. **20**

Q. What do your eyes as a physician see? What did your eyes see or your hands feel that warranted you in saying that this condition is what he tells you? A. Well, the examination of the urine, for instance.

Q. When did you examine the urine? A. When did I examine the urine?

Q. Yes? A. Do you want definite dates. **30**

Q. Yes. A. Well, I don't remember definite dates as to that. I have examined it a great many times. If you would like me to go to my records. I can produce them. On one occasion, if Dr. Arlitz can fix the dates when he was shown to my office, I remember very distinctly I examined his urine that very day and it reacted very unabundantly, very freely to sugar then.

Q. Is it not true that most of heavy men have a reaction of sugar? A. No, I think not. **40**

*Dr. Bruno Hood—Cross.*

years.

Q. Why? Is there any doubt about it in your mind? A. Why is there any doubt about it? Because I think it is not so.

Q. The Court asked you whether diabetes could be produced by traumatism. Traumatism is a blow? A. Yes, sir.

Q. You told the Court you thought it could?

10 A. I have read so. I have read it.

Q. Have you had any experience from which you can say that diabetes is produced by a traumatism? A. No, sir. I am a country doctor. I do not see many cases. I see a few.

MR. KING: I am a country lawyer, too, but I think we know something once in a while.

MR. MORROW: We do, I think; but we do not know it all.

20

THE WITNESS: I am dependent to a large extent on what I read.

Q. And as matters progress the reading changes, don't it? A. Yes, sir.

Q. Don't you remember that in olden times they used to use leeches on men and take blood out of him for most everything? Well, if you do remember it, at that time, if you had been testifying before a jury would you tell them that leeches were the proper thing to do if you had read it in a standard medical book? A. I suppose so.

30

Q. And if you had been back in the witchcraft days of Massachusetts you would advise burning one to the stake? A. Very likely.

Q. Is it not a fact that those things you are talking about, that are subjective, that is, those that you cannot see, but those things that the subject tells you, that those things lead to a wrong conclusion, is not that frequently so? A. Well, the examination of a specimen of urine is not subjective, is it?

40

*Dr. Bruno Hood—Cross.*

Q. I am speaking of the subjective symptoms. Is it not true that what this man tells you and the things he apparently manifests, may be entirely untrue? A. It is possible, yes, surely; but a man generally tells the truth more or less, more or less of the truth. He cannot fib to me all the time. He may a good part of the time, but I don't think he can.

10

Q. Is it your testimony that in cases of this character, you must draw your conclusions from what the patient tells you and what you see? A. Yes, sir.

Q. That is right, is it not? A. Yes, sir.

Q. Can you tell me? I have asked you, but I will ask it again, can you tell me of any physical disability about this man which would warrant you fairly in putting that construction on it as you have; for instance, can you tell me one single physical disability about this man which would fairly warrant him in putting his head down on the witness stand as he did? What condition is there that you can point out that warrants that? A. I know of nothing that would compel him to perform that one act, no, sir.

20

Q. You have mentioned the pain in the chest. That is just from what he has told you when he spoke to you; he showed no physical deformity as a result of his injuries that would lead you to believe there was pain there? A. He complained of the pain every time that I met him.

30

Q. Do you think that fairly exhibited the condition at that time? A. No, not necessarily, no man would or could show all there is to his condition.

Q. If there are any bones broken or shoulder blade out of place, that would show? A. Yes, he would show that.

Q. Or if the arm were dislocated? A. Yes, he would show that.

40

*Dr. Bruno Hood—Cross.*

Q. Or if there was abnormality in the heart action he would show that, wouldn't he? A. Yes. But he might have a change in his nerves.

Q. So far, therefore, as the case shows and so far as the ex-rays shows and so far as you can see, there is not anything the matter with that man's shoulder or chest, is there? A. As far as  
 10 I know, there is nothing wrong with his bony structure, there is nothing wrong with his lungs, you can see no growth or nothing abnormal in his muscular structure on these pictures which I have. But, on the other hand, I am not an expert at reading ex-ray photographs.

Q. Where are those photographs? A. In my possession.

Q. Have you any objection to bringing them to Court? A. None whatever. I have had them here  
 20 before, on previous occasions, and had the pleasure of carting them back, and nobody looked at them. and I did not bring them along this time.

Q. On the exterior of the man, on his flesh, is there anything there that you can see that indicates physical disability or injury? A. No, sir.

Q. In other words, if you stripped this man before this jury now, there is not a single thing over his whole body that you could point out to them that exhibited a physical disability, is there?  
 30 A. No, sir.

Q. And the ex-ray which went through him, that did not show anything either, did it? A. No, sir.

Q. This nerve business that we are talking about, is it your idea that the mind controls the body, or that the body, the physical functions of the body, in part control the mind? A. Well, I think it would be, in a way with different individuals.

40 Q. Haven't you known of a mother who would

*Dr. Bruno Hood—Cross.*

sit looking down at her baby and imagine the baby were dead, and have tears streaming down her cheeks and the tears flow just as heavy as could be, what is that? A. I don't think I have seen just that state of things, no, sir.

Q. Haven't you seen it almost as bad? A. Similar.

Q. What is that, isn't that nerves? A. Yes, 10  
sir.

Q. I am trying to get these things so the jury can understand them, if I cannot. A sudden fright goes to your heart and to your spine and the cold chills go up and down your back, what is that? A. That is nerves.

Q. If that were to keep up what would you call it, what would that be? A. Oh, it does not keep up.

Q. If it kept up what would it ultimately pro- 20  
duce? A. I don't know.

Q. It could not produce anything, could it? A. I don't know what that would produce.

Q. Where is the nerve center, so-called? A. Where are they?

Q. It is in the brain, is it not? A. In the brain, largely.

Q. What injury to this man's head did you find that would indicate any physical disability which would be productive of that nerve injury? 30  
A. I found no injury that would of necessity cause those symptoms.

Q. I think you said that the injury to his head healed up? A. Yes, sir, it healed up kindly, that was a scalp wound.

Q. Was there anything but a scalp wound? A. That is all. As far as I could see. Now, mind, he could be hit by a heavy object like a locomotive, and he might outwardly have no particular or apparent injury but he might internally be very 40

*Dr. Bruno Hood—Cross.*

severely injured. I have seen a man who had fallen from a building who had outwardly no injury but his internal organs were very much disorganized.

Q. Where was the scalp wound on this man?

A. On the right side of his head.

Q. Can the scar be seen? A. I think so, yes,  
10 sir.

Q. (Examining the plaintiff's head.) Is that it?

A. Yes, sir, right there.

Q. You can move that? A. Yes, sir.

Q. Showing that it does not adhere to the scalp any more than any other part of the skin? A. It did not when I had hold of it last, no, sir.

Q. To the best of your recollection it does not now, does it? A. I believe not.

Q. So far as the physical appearances show  
20 that is thoroughly healed up? A. I think so.

Q. You don't believe the nervous condition comes from that, do you? A. No, not from that cut in the scalp.

Q. Now, the next thing is the leg, is your testimony that the leg had these contusions and abrasions and that they healed up? Did they heal up in such length of time as would ordinarily heal them in an ordinarily healthy man, such as he?  
A. Yes; they healed up promptly enough.

Q. And are any of the scars of those wounds  
30 or contusions or abrasions left? A. No, nothing of any consequence. He has a little enlargement in his right leg, but I don't think that is anything of great consequence.

Q. The seat of the nerves not being there it is not probable that that causes his nervous condition, is it? A. No, sir.

Q. You don't think they cause it? A. I don't think so, no, sir.

Q. He says that one hand is, I think he said,  
40 whiter, or lighter than the other? A. Yes, it is.

Q. Did you notice that? A. Yes; at times.

*Dr. Bruno Hood—Cross.*

Q. What causes that? A. Oh, I think that is a nerve influence on his small blood vessels, the vasor motor track.

Q. I am poor enough to be a lawyer, so I cannot be a physician, but the doctor here suggests that it is leucoderma, is that right? A. I don't think it is.

Q. What do you think it is? A. I think it is merely a flushing at times; he has no skin disorder. **10**

Q. Getting down to his leg, you say you are able to blindfold him, and then when you stick a pin in him sometimes he don't know whether you put one in and sometimes he does? A. Yes, sir.

Q. And also he could not tell about the two points of the compass whether it was wide open or nearly closed, is that true? A. How? **20**

Q. That is true, is it not? A. That he could not distinguish?

Q. That he could not distinguish the prick points of a compass sometimes? A. He cannot sometimes, as far as I know, he cannot.

Q. Have you been in a country circus where you can in the side show see persons that you can stick a knife right in their leg or arm at will and they will not notice it, haven't you seen that? A. I have never been near enough to those fellows to see how they did it. **30**

Q. Didn't you go in the ten-cent side? A. No. I never saw that thing done, no, sir.

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The Court thereupon adjourned to to-morrow, Tuesday, September 22, 1915, at 9:30 o'clock A. M.

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*Dr. Bruno Hood—Cross.*

SECOND DAY.

Newton, N. J., September 22nd, 1915.

The trial was resumed pursuant to adjournment.

DR. BRUNO HOOD, resumes the stand.

10 CROSS EXAMINATION BY MR. KING (Continued) :

Q. Did you find these ex-ray plates? A. Yes, sir.

Q. Have you them here? A. They are right in the seat there by Dr. Ayres. (The plates are produced.)

Q. I show you this and ask you if that is one? A. Yes, sir.

Q. And that is the other? A. That is the other.  
20 There are some other views that I did not have developed but were simply thrown on the screen that we could inspect them at the time.

MR. KING: I don't know. I have no authority to offer these in evidence unless the plaintiff consents.

MR. MORROW: What is that you desire to offer in evidence?

MR. KING: The ex-rays.

MR. MORROW: I don't think they need to  
30 be offered just at this time.

MR. KING: Then I will have them marked for identification.

MR. MORROW: As I understand it, you say they show nothing?

MR. KING: They show nothing. Will you consent that they go in at this time?

MR. MORROW: I suppose they might just as well go in. I cannot be captious on the order of proof.

40 Admitted and marked "Defendant's Exhibits D-4 and D-5" of this date.

*Dr. Bruno Hood—Re-Direct.*

## RE-DIRECT EXAMINATION BY MR. MORROW :

Q. Are there any lesions attendant upon nervous disorders? A. Why, no, not in some nervous disorders, in some nervous disorders there are some.

Q. May not there be nervous disorders without lesions? A. There are nervous disorders without known lesions.

Q. What do you mean by "lesions"? Please explain that more to the jury? A. Why, lesions are changes in the normal structure of the organs. Changes that are brought about by disease processes. 10

Q. What are the causes of nervous disorders? A. Why, they are sometimes the result of infections of the body, like, very likely, locomotor ataxia, that is the result of the particular poison operating in the body. They are, on the other hand, sometimes the outcome, the sequence of an acute disease, which is also a poison of the body, like an attack of paralysis following diphtheria. They are sometimes the result of exposure, cold, wet, and often times the result of injury; and there are other diseases, nervous diseases, very marked nervous diseases, without known cause, positively known cause. Various causes are assigned but none of them are absolutely a matter of fact. 20

Q. What is the seat of a nervous disorder? A. Well, that depends on which nervous disorder. 30

Q. A nervous disorder such as Mr. Heinz suffers from? A. I think his trouble is in his central nervous system.

Q. Where does that come from? A. I think from the shock that he has. I don't mean the cut in his head.

Q. What do you mean by the shock? A. The violent contact at the time of the accident of a large heavy man like him, struck by a locomotive train, or by a locomotive and thrown on the 40

*Dr. Bruno Hood—Re-Direct.*

ground. That is the thing that made him sick. Thrown violently on the ground by a locomotive.

Q. What is the source of the life of the nervous system? Where does it come from? The source of the nervous system? Is it connected with the brain? A. Oh, yes. It is in continuity with the brain. The brain is part of it, the central part of  
 10 it, the brain, the spinal cord, and the accessory ganglia, etc.

Q. A sudden blow, with force, might the brain be affected thereby? A. Oh, yes.

Q. And if the brain was affected by the sudden blow, or fall of the kind Mr. Heinz received, what effect would that probably have on his nervous system?

MR. KING: Objected to. That does not state the evidence.  
 20

THE COURT: I don't think it does quite accurately.

MR. KING: I submit further it is not re-direct examination.

MR. MORROW: He was examined at great length about that matter, I thought.

THE COURT: I think it is re-direct.

MR. MORROW: He said, in answer to the last question, that such a blow or fall as Mr. Heinz received would be likely to affect the brain and I want to know what the effect of that would be on the nervous system.  
 30

MR. KING: It does not appear that there was a fall. I call attention to that.

THE COURT: He was found alongside of the track, wasn't he?

MR. MORROW: He was thrown violently to the ground.

THE COURT: Yes, I will admit the question.  
 40

*Dr. Bruno Hood—Re-Direct.*

Q. Go ahead. You understand the question? If the brain was affected by the sudden blow or fall of the kind that Mr. Heinz has received, what effect could that probably have on his nervous system, or what effect would it probably have on his nervous system? A. Why, it has been shown experimentally that irritation of a certain part of the brain will produce diabetes, and to me it seems highly probable that Mr. Heinz's condition ensues from such an irritation, in addition to his general nervous breakdown. 10

Q. That is what I want to get at, the nervous breakdown, from what would that ensue, probably? A. The nervous breakdown comes from the jar to his nervous system.

Q. I did not know yesterday that you had taken Heinz to Newark. In your cross examination it was stated how frequently he was taken, how often was it? A. Henry Huston took him once, and I took him once, he has been to Newark twice. 20

Q. You took him first? A. Yes, sir.

Q. How did you take him? A. I took him in a train.

Q. From his house until you got to the specialist's office, how did you take him?

MR. KING: I object to that. That may be entirely misleading. 30

THE COURT: No. I don't think so. I understand this is directed to his ability to walk in the first place. The inference may be drawn that if he had gone to Newark he was able to walk very well. The jury might draw that inference. I understand this is to show the fact and to show that such an inference cannot be drawn.

MR. KING: The question was not what 40

*Dr. Bruno Hood—Re-Direct.*

the plaintiff did, but what the doctor did.

MR. MORROW: I want to know how they did get together to Newark, from the time they left Newton, from the time the plaintiff left his house.

10 THE COURT: I understand the purpose of this is to show in what manner they went there.

MR. MORROW: That is what I want to get at, yes, sir.

THE WITNESS: I sent a wagon to his house and had him brought to the station in Newton.

MR. MORROW: And there you met him?

THE WITNESS: Yes, sir.

Q. Then what did you do? A. I took him on the train to Newark.

20 Q. Then what? A. The car I wanted comes right directly in front of the station. I took him in that street car to the corner of Walnut and Broad Streets and we slowly shuffled down Walnut Street about a block and a half, a city block, to Dr. Baker's house.

Q. And coming back? A. Coming back we repeated that. We stopped on the way down Broad Street to get something to eat.

30 Q. Tell what he did? A. He shuffled along, as you have seen him here in the Court room to-day, with the aid of a cane. He could not get shoes on his feet at that time. He had to wear slippers. He had no shoes to get on, he had bought a large pair of slippers, his feet were swollen, and he slowly travelled along. He had not far to walk. Only one block from Broad to Mulberry Street, it is just one block through there.

40 Q. Will you tell us about his getting on and off the trolley car? A. With difficulty and with

*Dr. Bruno Hood—Re-Cross.*

helping him along, we had to assist him along getting hold of his arms and the conductor and also brakeman on the trains helped him.

Q. Can you tell me when that was? A. I cannot tell that from memory. It seems to me that it was in the Summer of 1914, somewhere along there.

Q. Was it after the other trial? A. I can probably find that date in my record. 10

Q. Can't you find it here? A. It is a matter of over three years ago, I cannot place that from memory.

Q. Can't you tell whether it was before you were sworn in this case in December, 1913, at the December, 1913, Term of Court? A. My impression is, I am not positive about that, but my impression is that that was done some time in 1914, I may be wrong about that, but that is my impression. 20

## RE-CROSS EXAMINATION BY MR. KING:

Q. You have been telling the jury about the nervous system; as a matter of fact, what is a nerve? A. What are nerves?

Q. I don't mean the physical thing you can see; there is something beyond the physical thing you can see, in a nerve, isn't there, that is, the sensation that comes from the nerve, to the brain and the answer from the brain back to the nerve, what is that? A. That impulse? 30

Q. Yes. A. I don't know how to describe that action.

Q. You never saw it, did you? A. Why, no; you cannot see a thing of that sort.

Q. When this nerve theory that you have in mind is clouded in and shrouded in mystery, is it not, just the same as the operation of the brain? A. It is known by its manifestations. 40

*Dr. Bruno Hood—Re-Cross.*

Q. You can find, of course, the nerve running down the body, but the manner of operation is nothing but a deduction? A. You see the result of the operation.

Q. I say, the manner of operation is a matter of deduction? A. Well, I presume that is right.

10 Q. You don't think for a moment, do you, that this man Heinz is mentally incapable, do you, to-day? A. Oh, you mean, in the sense of being a rational being?

Q. Yes? A. Yes, certainly he is a rational being.

Q. Would you be surprised if you should hear he was an expert in this Court on the value of horses, would you be surprised about that? A. An expert on the value of horses?

20 Q. Yes. Was examined as an expert in this particular Court, in this very Court room, after the time of his injury, on the value of horses? A. Oh, he is mentally efficient, yes.

Q. Then you think he was mentally efficient sufficient to be an expert? A. I don't know what he knows about horses.

Q. Now, you have fairly given us your opinion about this, haven't you? A. Why, I tried to answer all the questions put to me as I saw them, and as I knew them.

30 Q. And the final result of all this is and you are willing to say to the jury that it is nothing more than your opinion? A. Surely that is my opinion.

BY MR. MORROW:

Q. What is that opinion based upon?

MR. KING: Objected to. We have been over this three times.

40 THE COURT: I think it already appears that it is based upon his experience and reading, he said.

*John Lanterman—Direct.*

MR. MORROW: I will state that.

It is admitted by counsel for the plaintiff and for the defendant, that John Lanterman, who was sworn on the previous trial, is dead. And I offer to read his testimony from the printed book, which is the same as the stenographer's notes.

MR. SCOTT: We agree to that. 10

The following testimony is thereupon read by consent.

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JOHN LANTERMAN, sworn as a witness on behalf of the plaintiff, testifies as follows:

DIRECT EXAMINATION (Read by Mr. Morrow):

Q. Where do you live? A. At Dover.

Q. How long have you lived there? A. A year and eight months. 20

Q. Where did you live prior to going to Dover?  
A. Before I moved to Dover?

Q. Yes. A. At Newton.

Q. You know the railroad from Newton to Stanhope? A. Yes, sir.

Q. You may state whether or not you came from Dover to Newton on the thirteenth day of April, 1912? A. I did.

Q. And whether it was on the train that usually arrived here about half past ten? A. I did. 30

Q. What car of that train were you sitting in?  
A. In the second car from the engine.

Q. On which side of the car? A. On the right hand side.

Q. When you came up from Stanhope, arriving near Andover, were you in a position where you could see out of the window? A. I was, yes, sir.

Q. In what way? A. Towards the crossing. 40

*John Lanterman—Cross.*

Q. How could you see out of the window? A. I had my head out of the window.

Q. Do you know where the new cutoff crosses the Sussex Road? A. Yes, sir.

Q. Just below Andover? A. Yes, sir.

Q. After the train came to the cutoff you may state when you first heard any whistle or bell? A. By Mr. Totten's barn.

Q. Where is Mr. Totten's barn? A. Down this side of the cutoff.

Q. And you may state whether or not that is near High street? A. It is near High street.

Q. Following that whistle what did you hear? A. I heard a crash.

Q. You still had your head out of the window? A. Yes, sir.

Q. How long a time elapsed between that blowing of the whistle there and the crash that you heard? A. How long?

Q. Was there any length of time between? A. Not more than two seconds.

## CROSS EXAMINATION (Read by Mr. Scott):

Q. With whom have you talked this case over before you came to Court? A. I did not talk it over with anyone.

Q. You never talked the matter over with anybody at all? A. Only Mr. Huston.

Q. How many times have you talked it over with Judge Huston? A. He just wanted to know if I knowed anything about it and I told him I did, and that is all I know.

Q. On the day in question you say you were sitting in the second car from the engine? A. Yes, sir.

Q. How many cars did this train have? A. I think there were five cars on.

Q. What was the car ahead of your car? A. A smoking car and baggage.

*John Lanterman—Cross.*

Q. Do you know that as a fact or because there is usually a smoking car ahead? A. No, there was a baggage car ahead of the one that I was in.

Q. Where did you start to put your head out of the car window? A. When I got on at Netcong, when I changed there, I did.

Q. And did you continue to have your head 10  
out of the window all the way up? A. Yes, sir.

Q. How far did you have your head extended out of the window? A. Just far enough so I could see out.

Q. Did you have your whole head out of the window? A. To get some fresh air.

Q. Was that the only purpose you had it out of the window, to get some fresh air? A. I was sick.

Q. You were sick? A. I had a headache. 20

Q. What kind of weather was it outside? A. Rather misty.

Q. When you got to the cutoff, what did you do? A. I did not do nothing.

Q. Did you keep your head out going through the culvert there? A. Yes, sir.

Q. You kept your head out of the window until what time? A. Until the crash took place, when I went out of the car.

Q. When you heard the whistle blow, where 30  
were you? A. Right by Totten's barn.

Q. And at the time that the whistle blew you were on the opposite side of the track from Totten's barn, were you not? A. Yes, sir.

Q. And how did you place that whistle blow at Totten's barn? A. By the telephone poles.

Q. And what special indication is there on the telephone poles to show just opposite Totten's barn? A. I took notice of the poles and I looked right across and saw the barn after the train 40  
stopped.

*John Lanterman—Cross.*

Q. You went back? A. No, I just looked from the telephone pole.

Q. And you fixed the place where the whistle blew at that time? A. Yes, sir.

Q. Prior to that time you had not been paying any attention to the whistles? A. I had.

Q. How many times did the train whistle for  
10 crossings from the time it left Netcong up to High street? A. I did not stop to count them.

Q. More than once? A. Sure, more than once; certainly.

Q. Where is that telephone pole that you picked out? A. I think it is the second pole from the crossing.

Q. The second pole from the crossing on the right hand side of the train? A. Yes, sir.

Q. That is where the whistle blew? A. Yes,  
20 sir; straight across from Totten's barn.

MR. MORROW: If Your Honor please, I do not feel quite sure that yesterday I asked Mr. Heinz a question about how far he could see down this track from the crossing, or when he was approaching the crossing. I would like to ask him that.

MR. KING: That was asked and he said he could see down the same length as the engi-  
30 neer who had his target to make observations.

THE COURT: He was asked if he could see as far as the surveyor who had his target, as I recall it.

MR. MORROW: I did not ask him, I notice, further, if he listened for the approach of the train.

THE COURT: I don't think we ought to go over the case again.

MR. MORROW: I think those are matters I  
40 overlooked.

THE COURT: I think he testified to going

*Benjamin Totten—Direct.*

to the track and looking for this train that had not come and he described just what he did and then how he got back into the wagon. You may this noon-time direct the stenographer's attention to the particular part you wish and if it has not been covered you may let me know and I will reconsider.

MR. MORROW: My colleague suggested to me that Mr. Heinz was not asked how far he could see down the track that morning, but how far he could see down the track at that crossing generally and not on that morning. 10

THE COURT: You had better have the stenographer's notes examined and let me know.

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BENJAMIN TOTTEN, sworn as a witness on behalf of the Plaintiff, testifies as follows: 20

DIRECT EXAMINATION BY MR. MORROW:

Q. Where do you live? A. At Andover.

Q. Do you know the crossing at High street in Andover. The crossing of the Lackawanna Railroad? A. I live right by it.

Q. You live by it? A. Yes, sir.

Q. On which side of the street, going up High street from the railroad crossing? A. On the left hand side. 30

Q. Is your house the first house? A. The first house, yes, sir.

Q. How far is your barn from the street, from High street, as nearly as you can tell? A. The barn?

Q. Yes? A. About a hundred and twenty feet.

Q. What is the distance from your house to the crossing? A. I never measured it, but I should think it was about thirty-five or forty feet. 40

*Benjamin Totten—Direct.*

Q. Where were you on the morning of the thirteenth of April, 1912? When the train came up from Netcong about a quarter after ten? A. I was sitting in the sitting room right by a window looking right out, that is the window does, I was not, I was looking at the desk sitting there. That is, the house is thirty-two feet long, I think, the  
 10 rooms, thirty-two feet with the length from the street to the house.

THE COURT: Is Mr. Totten's house shown on this map? Is it one of the blue buildings shown on the map?

THE WITNESS: I could not tell you anything about that particular grouping. I never seen it before.

20 THE COURT: Is it in this group of buildings or is it on the other side? Or is it separate from the barn?

THE WITNESS: Yes, the house is separate from the barn. North from that.

THE COURT: Nearer to High street?

THE WITNESS: Yes, sir.

MR. MORROW: Practically on the same line but nearer to High street?  
 30

THE WITNESS: Yes, sir.

Q. Were you expecting Mr. Heinz that morning? A. I was looking—

Q. Expecting him to come? A. Well, I was expecting him, yes. It was his time to come and I think my wife was in an upper room and says, "There's Mr. Heinz"—

MR. SCOTT: I object to the conversation and move to strike it out.  
 40

Motion granted.

*Benjamin Totten—Cross.*

Q. Did you buy bread of him generally? A. We bought our bread of him and I bought potatoes of him.

Q. Did you hear the train come up to the crossing that morning? A. I cannot say I heard the train at all till it blowed the whistle at the barn, that is the train.

Q. What kind of a whistle was that? A. Well, 10  
it was a very sharp, shrill whistle, enough to raise you clear off the chair if you were not more than a hundred and sixty feet away.

Q. Which way did you look then when you heard the whistle? A. I looked up, I looked out of the window to the corner of the barn and I just seen the end of the train coming past. I turned my head to look and Mr. Heinz's team was about coming onto the track. And that was the last I seen till I seen the relicts of the team. 20

Q. Did you see Mr. Heinz do anything when you looked up? A. When I saw Mr. Heinz, when I looked up I saw Mr. Heinz sitting in the front of the wagon and he grabbed the lines from the other man's hands and jerked his whole weight back, and strong enough I though for to throw the team if they were settled pretty heavy on their pins.

## CROSS EXAMINATION BY MR. SCOTT:

30

Q. Is your recollection as good today as it was two days after the accident? A. What are you saying? You will have to talk a little louder. My ears are a little bit obstructed.

Q. Is your recollection as good today as it was two days after the accident? A. Why, if there is anything happens today, I think it is, but if it happens five or six years ago, I cannot say it was. 40

*Benjamin Totten—Cross.*

Q. Do you recollect when the accident happened?

A. I recollect seeing it and hearing the whistle blow.

Q. Do you recollect the date when the accident happened? A. The date?

Q. Yes, the date? A. I don't know anything about the date. I cannot tell you about the date.

10 I never put it down on any date.

Q. Do you recollect a short while after the accident happened, two days after the accident happened, Mr. Kyle, from the Railroad Company came up to your house? A. Do I recollect it? Yes, sir.

Q. What is your recollection as to how many days after the accident happened it was that he called? A. I could not tell whether it was three or five or fifteen days now.

20 Q. Do you recollect making a statement to Mr. Kyle at that time when he called? A. Of what?

Q. About the accident? A. Why, I recollect telling him just that much that I saw the engine—

MR. SCOTT: I object.

Q. Just tell us whether you recollect making a statement to him? A. I recollect he was there and I made a statement, yes, but what I said—

30 Q. Did you sign that statement? A. I did, after refusing to.

Q. And did you read that statement over? A. No, sir.

Q. Was it read over to you? A. My eyesight was not sufficient to read it.

Q. Was it read over to you? A. I suppose he read the statement that he had there.

Q. Over to you? A. Well, there was nobody else there to read it to.

40 Q. And, after he read it over to you did you

*Benjamin Totten—Cross.*

sign it? A. Well, I did, after refusing to. I told him I had no business to and did not want to sign it. I did not know what he put down anyway, I could not read it.

Q. I show you a paper and ask you whether or not that is your signature attached to it? A. I cannot tell you whether it is or not. I cannot see it. There is a name there. It looks like it. I must have signed it. I cannot tell you. It looks like my handwriting. **10**

Q. Is there any doubt in your mind that you did sign it? A. I signed a paper, I cannot tell you whether it was this paper or another sheet of paper.

Q. What would enable you to find out whether that was your signature? A. What would enable me?

Q. Yes? A. Well, if there is anybody here you can call who knows my signature— **20**

THE COURT: If you are able to sign a paper you can tell whether it is your signature? Look at it?

THE WITNESS: I cannot tell whether it is my signature or not.

THE COURT: You can say whether that is your signature or not? **30**

THE WITNESS: It looks like my signature.

THE COURT: Do you think it is your signature?

THE WITNESS: I think it may be, yes, sir.

THE COURT: Look at it and say whether it is your signature or not?

THE WITNESS: I see the big "B" and the "T" and it looks like I make it, and the rest I cannot tell what sort of letters they are. **40**

*Benjamin Totten—Cross.*

THE COURT: Is that your signature or is it not?

THE WITNESS: I suppose it is, yes, sir. I don't suppose a man would sit down and write what was not his signature.

Q. Do you recollect at the time Mr. Kyle called making this statement to Mr. Kyle:

10 Q. "Q. I heard the engineer of this train blow four blasts of the whistle where he passed in under the culvert of the cutoff?" A. I don't think I ever made any such statement to Mr. Kyle.

Q. Do you remember making such a statement? A. I made a statement that I heard a small whistle from the train, but whether it was four blasts or more I cannot say.

20 Q. Will you deny that you made such a statement to Mr. Kyle? A. I will deny I said it, yes, sir, that I said I heard four blasts.

Q. You did not see Mr. Heinz until after you heard the whistle? A. I did not see him until after I heard the whistle.

30 Q. You did not see Mr. Heinz until after you heard the alarm, the loud whistle? A. I did not see Mr. Heinz until after he was pulled out from the wreck. There was two or three men, when I got out there, I did not run to get out, because I could not be of any use, but the first thing I seen was them trying to pull Mr. Heinz out from under the wreck.

Q. So that when you have testified on your direct examination that you saw Mr. Heinz pull on the lines that was an incorrect statement? A. That was before the engine struck the team.

Q. And you did not see anything before you saw Mr. Heinz being pulled out from the wreck? A. No, sir.

40 MR. MORROW: He did not say that.

*Benjamin Totten—Cross.*

THE WITNESS: That is, after I seen the team I did not see anything, not even the engine strike the team, because the engine was between me and the team.

Q. And you did not see Mr. Heinz before he was struck at all? A. Before what?

Q. Before he was struck? A. I saw him grab the lines and jerk the lines on the team back. 10

Q. And where were the mules at the time you saw Mr. Heinz? A. They were hitched to the wagon, right in front of that, between that and the railroad.

Q. About how far from the railroad track were the mules? A. I should think from where I looked at them, where I was, they were about ready to step, the next step I should say would be on the track, but I cannot say for sure on that that is the way it looked to me at that distance. 20

Q. It was near the track, so near that it would be hard for you to tell whether they were just by the track or on the track? A. No, I cannot tell which it was, but they were ready to put their foot down on the track, they were still moving ahead, you would expect they were going to get on the track if they put their feet down. I don't know. He gave them a pretty good pull back, I thought, from the way he meant, the way I saw— 30

MR. SCOTT: I object to all that and move to strike it out.

THE COURT: I think it is proper so far.

Q. Do you know Mr. Thorpe, the engineer of the train? A. No, sir, I don't know the engineer on the train.

(A man called Mr. Thorpe is asked to stand up in the court room.) 40

*Benjamin Totten—Cross*

Q. Have you ever seen that gentleman, did you ever have a conversation with that gentleman?

A. Well, I can see a man standing there, but who it is, I cannot tell.

Q. Did you ever have a conversation with him?

A. That I don't know. I may have met him a dozen times, but his name or the man I don't  
 10 know. Anyways I would not know him so far as to meet him, but if he stands there I cannot tell, my eyesight is such I don't know a person if I meet them unless I know them very well or I hear them speak.

THE COURT: Is that the man?

THE WITNESS: I don't know him, from anything I have ever seen of him. I don't know where I have ever met him without I met him here this  
 20 morning before coming in.

Q. Do you remember having a conversation with that gentleman, Mr. Thorpe? A. That man?

Q. Yes? A. No, sir, I don't know that I ever have met him anywheres. I cannot name any place.

Q. Do you remember in a conversation with that gentleman saying to him "you did not blow the whistle"? A. Oh, I don't know, but I might have met him and said that too.

30 THE COURT: Did you say that to Mr. Thorpe, the gentleman who was just up here? What Mr. Scott has asked you?

THE WITNESS: I cannot say that I ever met the gentleman or spoke to him anywhere.

THE COURT: Did you say that to him?

THE WITNESS: I cannot tell you that. I could not tell you who I spoke to. I might have spoke  
 40 to him and said—

*Benjamin Totten—Cross.*

THE COURT: Not what you might have done, just answer to the question. Listen to the question.

MR. MORROW: The trouble is he does not hear the question and he answers something else every time.

THE COURT: That is the reason I am telling him to listen to the question, so that we can get responsive answers. 10

MR. MORROW: He don't get the question before he answers and I think we should make sure that he gets it.

Q. Did you say to Mr. Thorpe, the gentleman who was just up to the witness stand, "You did not blow the whistle"? A. I don't know why I should have said—

THE COURT: No. Did you say that to Mr. Thorpe or didn't you say it? 20

THE WITNESS: I cannot say. I cannot say that I ever met the man before in my life.

Q. And did he say to you, "Yes, I did"? A. I have no recollection of any conversation of that kind.

Q. Will you deny that he said, "Yes, I did"? A. I might just as well deny it, because I don't know that he ever did. I don't want to deny the truth for the sake of lying here. 30

Q. Did you then state to Mr. Thorpe, after he said "Yes, I did." Did you say to him, "Yes, you did blow it, way up there"? A. No, sir. I don't recollect any such conversation anywhere.

MR. SCOTT: I would like to have this signed statement which is identified by the witness, marked for identification.

(The said statement is marked "Defend- 40

*Benjamin Totten—Re-Direct—Re-Cross.*

ant's D-6" for identification of this date.)

MR. MORROW: Is it customary to show papers to a witness and then not exhibit it until he had gone from the stand. I think when a paper is shown to a witness we have a right to see it.

10 THE COURT: I don't think that is your right here. Counsel is simply asking the stenographer to identify it and he may offer it later. You cannot anticipate his case.

## RE-DIRECT EXAMINATION BY MR. MORROW:

Q. Is your eyesight now as good as it was three years or six months ago? A. No, sir.

Q. What has been the trouble with you since then? A. There is a cataract growing on the lense since that time.

20 Q. How is your hearing? A. Very poor.

Q. How was it three years ago or six months ago? A. It was a little better than it is now. I have been losing my hearing for years.

## RE-CROSS EXAMINATION BY MR. SCOTT:

Q. Do you remember testifying on the other trial of this case? A. Yes, sir, I remember being here and being called onto the stand here before.

30 But when it was or what for I don't know now.

Q. Do you remember a paper being shown to you at the last trial with your signature on? A. I have had a paper showed to me once before. I think it was the same one I had now.

Q. And do you remember at that time saying that you could not tell whether it was your signature or not? A. I cannot tell as I said that at all.

40 Q. I say; do you remember on that trial saying

*Dr. Edward Ayres—Direct.*

that you could not tell whether it was your signature or not? A. I cannot tell what I said, whether it was so or was not.

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DR. EDWARD AYRES, sworn as a witness on behalf of the Plaintiff, testifies as follows:

DIRECT EXAMINATION BY MR. MORROW:

10

Q. Where do you live? A. Branchville.

Q. What is your profession? A. Practicing medicine.

Q. How long have you practiced your profession? A. Since 1881.

Q. Where during that time? A. In New York City until eight years ago, now, here, since.

Q. What college are you a graduate of? A. The University of New York, the City of New York. 20

Q. Where were you on the thirteenth of April, 1912? A. I was on the train that collided with Mr. Heinz.

Q. Where did you come from? A. I came from New York.

Q. Did you see Mr. Heinz after the accident? A. Yes, sir. I got out of the train as soon as it stopped and walked forward and saw him lying on the ground, partly sitting up. I asked him if he was much hurt and he did not respond particularly, he was not unconscious. I made no examination except to notice that he had a cut on his scalp, and I withdrew, I had no further relations with him at that time. 30

Q. How soon after that did you see him? A. I examined him formally in September, 1912, over here in Newton.

Q. Where was he then? A. At his home.

Q. In what part of the house was he? A. He was on the main floor, I think. 40

*Dr. Edward Ayres—Direct.*

Q. Please describe, without my further asking you, what occurred at this examination, what you observed? A. Dr. Hood and I saw him together at that time, and we asked him a number of questions as to his condition and made an examination to test whether what he was stating was true or not. So far as we could ascertain that.

10 The general picture of the man's condition was that of lowered tone in the nervous system. Not so much mentally as physically, and his actions were below par. His heart's action was, the pulse was somewhat more rapid than normal and somewhat lacking in vigor or force. He complained of—

MR. KING: I object.

20 THE WITNESS: I beg your pardon, I am going to just express my own observation.

MR. KING: Pardon me, I am making an objection to the Court.

THE COURT: I don't understand that this is admissible. This is not the family physician.

Q. Tell what you saw that he did?

30 MR. KING: I might go a step further. I am not so sure that it is sound in law. I think following the case which we have in mind, I think it is well known law if a man makes an examination of the plaintiff for the purpose of testifying, not the family physician, that his evidence would, following that rule, be excluded if it was preceded by a talk with the patient, because I submit to the Court as a matter of law, that the physician would be unable to receive the

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information which the law precludes and yet testify as to conditions which was the result of both examination and declarations made by the patient.

THE COURT: I don't think it goes quite that far.

MR. KING: I know it does not, but I prefaced what I said by saying that I am not sure that it goes that far. But it does seem to me that that was the meaning of the Court and so far as I know it has not been brought up to the Court for adjudication. 10

THE COURT: I will permit the Doctor to say what he found there on his own examination.

Defendant excepts.

THE WITNESS: I observed in Mr. Heinz that he was unable to walk, that his gait was sort of irregular, he walked with a limp and a tendency to drag his limbs somewhat. He had a peculiar motion with his hands, closing them and opening them, a constant tendency to swing to slide sideways. I examined him as to his sensibilities in the skin, using a compass with two sharp points, and blindfolded him, testing him as to ability to recognize the distance of the two points apart when he felt them touch the skin, in order to determine the accuracy with which he could sense those points touching him— 20 30

MR. KING: I move to strike that out and that the witness be precluded from further testifying in that connection because he is about to state something which is based on the verbal statement of the patient.

THE COURT: I do not understand it so.

MR. KING: It must of necessity be so, 40

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because the information given to him as to what this witness knew was a statement made by the plaintiff. He had the plaintiff blindfolded and he could not see, and it is but proper that I should make the objection.

THE COURT: Do you recall the name of the case?

10 MR. KING: I have it on my memorandum.

MR. MORROW: I am not asking the witness to say one word about what the patient said.

THE COURT: He is going to tell us that the patient told him how far those points were apart.

MR. MORROW: I am going to ask him something else about that. What the patient did when he pricked him with these points of the compass. Not what he said.

20 THE COURT: Mr. King objects to the information given by the patient as to the distance of the two points. You don't press that.

MR. MORROW: I do press the witness to tell what the distance was between the two points, then I propose to have him tell what the patient did, not what he said, as this witness applied these tests to the different parts of the body.

30 THE COURT: That will be admitted.

THE WITNESS: My effort was aimed at finding out—

MR. KING: Objected to.

Q. Tell what you did and what you found? A. I found that by testing this man with a compass in every possible way, so as to fool him if possible, he had, in my opinion, a loss of sensibility to a very considerable degree in the left leg.

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MR. KING: I ask permission to examine this witness as to how that information was conveyed to him, to ascertain whether it comes within the prohibition of the rules as stated by the Court.

THE COURT: Yes; I think that is proper.

THE WITNESS: I will be glad to answer that question. 10

BY MR. KING:

Q. Did you have this plaintiff blindfolded? A. Yes, sir; part of the time, not altogether.

Q. I am speaking now of the tests regarding which Judge Morrow has asked you? A. Yes. While I was making that test he was blindfolded.

Q. Did you receive communication from him as to what he could distinguish? And, if so, how did he communicate that to you? A. Partly by responding to the question: "Do you feel more than one point?" Partly by an exhibition of pain. 20

MR. KING: I submit therefore, the answer ought to be excluded.

MR. MORROW: You can exclude what the patient said to you about not feeling the point, but the manifestation, that the witness has a right to state, how the patient manifested it. 30

THE COURT: Yes.

THE WITNESS: Well, aside from the technicalities of the law—

THE COURT: Just give the results and give your opinion from the results that were obtained, irrespective of anything the patient told you. 40

*Dr. Edward Ayres—Direct.*

MR. KING: I do think where the doctor has received information coming both verbally and observation, that his evidence ought to be excluded.

THE COURT: I will admit his evidence so far as it was gained by observation, and without the statements the patient made.

10 MR. KING: I beg an exception to that.

THE COURT: I thought that was what you objected to.

MR. KING: I think the whole evidence ought to be excluded. A man cannot be put on the witness stand and say this information, part of it came to my knowledge from what was told me and a part from what I saw, or my observation. He cannot give the part that comes one from another. The result must be based upon what he observed.

20

THE COURT: I will limit him to basing his opinion upon what he observed and without the verbal assistance of the patient.

MR. KING: That is not the question asked.

THE COURT: That is what I am directing the witness to do. To give the result of his examination limited in the way that has just been indicated.

30 THE WITNESS: The formation of my opinion was not based solely on other things than statements of the patient. I had to take everything into consideration to form my opinion.

THE COURT: It is impossible to separate it then?

THE WITNESS: Certainly. I had to take the concensus of the two together.

40 THE COURT: Then it cannot be admitted.

*Dr. Edward Ayres—Direct.*

I did not understand you to say that. I understood you to say that there were certain things which you observed irrespective of what the patient told you that indicated something to your mind and brought a conclusion to it.

THE WITNESS: No, sir. Will you permit me to explain myself a moment. 10

MR. MORROW: No, let me ask you the questions.

Q. When you applied these compass points to the patient, what if any, physical response was made? I don't mean by words? A. He would shrink from them or wince.

THE COURT: You drew some conclusion from that didn't you? 20

THE WITNESS: I did, but my conclusion included other matters.

THE COURT: What was that conclusion?

THE WITNESS: That he felt those points closer on some parts of his body than he did on others.

THE COURT: That is something irrespective of what the patient told you, is it not?

THE WITNESS: Yes, sir. 30

Q. Did you try the compass points on other points of his body and note the different results?

A. Yes, sir.

Q. Where did you try it where you got a different result? A. On the right leg, the abdomen, the chest, the arms.

Q. What did you find when you applied it to his right leg as to his wincing? A. Well, if I put the two points of the compass very close together, —I might explain it this way, he could not feel but one— 40

*Dr. Edward Ayres—Direct.*

Q. I wish you would just answer the question.

THE COURT: Yes; simply answer the question.

Q. What did you find when you applied it to his right leg, as to his wincing? A. There was more sensation.

10 Q. Where did you apply it where it was not so sensitive? A. To the left leg.

Q. How did the lack of sensation manifest itself? Not what he said, but by any act? A. It would take greater pressure.

Q. What else did you discover about him? A. In the examination of his right shoulder I found a very much increased sensibility, a greater sensation, evidence of pain, from the shoulder down along the right part of the chest.

20 Q. Have you stated now all you observed about this man in that first examination in September? A. His muscular power was decreased. His grip was not as strong as I would have considered normal, natural, to a man of his build. His ability to handle himself in walking in getting up or lying down, was slow and lacking in vigor, lacking in power. I cannot testify at all to anything further that I can add under the restrictions.

30 Q. Did you make a subsequent examination of him? A. In September. That was in September. The next examination was in April next year.

Q. What did you find his condition to be then? A. There was no change, practically speaking.

THE COURT: That was one year after the accident?

THE WITNESS: Yes, sir. The conditions were the same as I found them in the September examination.

40 Q. The first was in September 1912, and the

*Dr. Edward Ayres—Direct.*

next was in December 1912? A. The first was in September 1912, and the next was in April 1913.

Q. Have you seen him since to make any examination of him? A. No, sir. He mentioned in the chair yesterday my examining him yesterday, but I would not count that as an examination at all.

10

Q. You saw him? A. That is all. I did not make an examination.

Q. Did you talk with him? A. Only "How do you do"? And how he was feeling.

Q. What, in your judgment will be the future progress of his difficulty? A. In answering that am I permitted to indicate the existence of diabetes which had come out since I saw him?

Q. Yes, sir.

20

MR. KING: I object to that.

THE COURT: Why?

MR. KING: Because he is basing his answer upon what some other physician says.

THE COURT: That may be, but they could put that in a hypothetical question.

MR. KING: Do they offer him now as an expert for that purpose?

THE COURT: Yes. I understand so.

THE WITNESS: In the condition in which I found Mr. Heinz, the outlook as to his recovery or continuance in the same condition or growing worse, was poor. It was possible that he might recover. It was possible that he might make no improvement and he might get worse, and as I think I stated here in the previous trial, being in this condition he was more subject to degeneration of some of his organs than a normal man would be. It is not possible to form a sharply defined opinion as to his future up to the time

30

40

*Dr. Edward Ayres—Direct.*

of my last examination, including his condition found since by others, I would make the prognosis distinctly bad, the outlook would be distinctly bad.

Q. From what might the diabetes condition arise? A. I cannot testify as to any experience on that.

10 Q. No. But from your knowledge as a physician? A. Our highest authorities affirm that it may arise from an injury. The origin of diabetes is somewhat of a fog in medicine in any case, but it is claimed by very high authorities that it may originate from an injury.

Q. From your examination of this man's condition at the times you have mentioned, will you state what might have been the cause of his condition, one of the causes? A. In my opinion  
20 a severe blow, a jar, a shock.

Q. Will you state how, in your opinion, such a result could have followed a heavy blow, a sharp blow, a hard blow? A. We know that a severe jar blow upon the body will disturb the capacity of the nervous system for doing its work. We cannot describe that by conditions that can be seen under the microscope or by  
30 direct examination. The nerve may lose its capacity to do its work, and still look just like a nerve that can do it. Very much, we might say, like a set of battery cells in an automobile. We cannot see the difference between one that won't give current and spark and one that will. But we have to be guided in those cases by the result. Shock is a condition of the nervous system in which its capacity to carry on its work is more or less temporarily lost. And also may be permanently lost. I think I have covered the question.  
40

*Dr. Edward Ayres—Cross.*

## CROSS EXAMINATION BY MR. KING:

Q. Did you find on this examination that the muscular vigor of his hand had decreased? A. That was my opinion.

Q. Did you find that both in September and in April? A. Yes, sir.

Q. I ask you whether you said at the previous trial of this case, "The strength of his hands in squeezing mine, was fairly normal for a man of his muscle." Did you say that? A. If it is in the record, I assume that I did, yes, sir. 10

Q. Will you look at the record? Would you like to see the record, sir? A. No, sir; I will take your word for it.

Q. You will take my word for it that I am reading correctly? A. Yes, sir.

Q. Supposing you shook hands with one of the jurymen, would not his will determine the extent of the squeeze which he gave your hand? A. To a very large extent, yes, sir. 20

Q. Wouldn't it entirely so? A. I don't think so. If I happen to prick him with a pin when I take his hands.

Q. I am not asking you about pricking with a pin. I say to you, does not the will determine the amount of pressure a person can give to his hand? A. You asked me if it did not wholly do so and I gave you the answer. 30

Q. Your explanation is if you stuck him with a pin? A. Certainly.

Q. Did you stick this man with a pin when you shook hands with him? A. No, I did not.

Q. What relationship has the sticking of a pin to do with your examination of this man? A. It only has relationship to make your question more intelligible.

Q. Has it anything to do with this man? A. I did not stick him with a pin. 40

*Dr. Edward Ayres—Cross.*

Q. You did not stick him with a pin? A. No, sir.

Q. So that at the time he shook hands with you could give you a light pressure or a heavy pressure? A. Yes, sir.

10 Q. Was your evidence before "The strength of his hands in squeezing mine was fairly normal for a man of his muscle." Was that true? A. Fairly normal. I wish to make the statement here to-day that he had lost no particular amount of power. That is not of any great importance either.

Q. So that you think that his muscular development, the manner in which he shook hands with you, in that arm, is fairly normal, and you lay no stress on that? A. General loss of tone.

20 Q. This motion with his hands, can be simulate that motion without there being any physical justification for that condition? A. Yes, he could simulate that. He could simulate almost any one symptom.

Q. Then to tell the jury, is there any symptom that he has now, any manifested symptom that he has now, which could not be simulated? A. He could not simulate the combination and continue to do it under all conditions and circumstances of observation.

30 Q. What is the combination that you can point out to this jury that this man has exhibited in Court since you have been here, what is the combination? I am using the word combination as you use it. What is the combination? A. The word "combination" as I use it, includes all important symptoms on all my examinations, on my questions to him, on my observations, on his bearing. That is the way I use the word.

40 Q. What combination did you observe in this man since he has been in Court, that you can

*Dr. Edward Ayres—Cross.*

point this jury to and say that combination cannot be simulated? A. I do not feel prepared to answer that because it was not in my mind.

Q. Will you put it in your mind now and answer it? A. Will I put what?

Q. The question I have asked you? A. The combination he presents here now? That is only a part of the picture of his condition. 10

THE COURT: That is what you are asked. The Counsel wants you to tell the jury what combination of symptoms have appeared here in Court that could not be simulated?

THE WITNESS: Oh, I do not know of any particularly.

Q. Is there any combination of symptoms which you observed in this man yesterday or to-day, I mean since he had been in Court before the Jury, what is that combination if there is any? 20

A. Well, of course, to answer that directly would simply describe Mr. Heinz since he has been in Court here, it simply includes all his actions and motions his writhing, twisting, flushing, flushed face and drawing his mouth, and so on.

Q. Can he draw his mouth at will, as I do to you? A. He can do any one of those things at any one time. 30

Q. What combination of things have you observed since the man has been in Court which he could not do. Just give us the combination?

A. I think he could do that through this length of time here in Court if he was an accomplished actor.

Q. Then you are willing to say to this jury that everything that Heinz has done in Court to-day can be simulated if he wanted to do that, and also that which he did yesterday? A. If he was a smart actor. 40

*Dr. Edward Ayres—Cross.*

Q. What thing has he done which you can point to this jury that any ordinary man would not be able to do? What thing is that? A. Well, of course, I see him now with the knowledge how he has been before.

10 Q. Now. You say it needs an actor. What things has he done in Court which you can point to this Jury that any man could not do, whether he was an actor or not? A man of ordinary intelligence? What is that thing? A. Oh, I would not undertake to make it that way. I could not do it. My judgment on which he is acting or not is not on what he does here in Court at all. I am perfectly willing to let you have that question.

THE COURT: There is no use arguing back and forth. Just answer the questions.

20 Q. Is the future progress of his case, of this man, so far as your ideas go, shrouded in mystery? A. Future what?

Q. The future probability of this man as to recovery, shrouded in mystery? A. Well, a physician has to form an opinion as to the future of a patient largely by—

30 MR. KING: I submit that question can be answered by Yes or No. What is the use of these arguments?

THE WITNESS: I think that the man's future is bad, distinctly bad.

Q. I ask you whether in your opinion that man's future is shrouded in mystery, as to his recovery? A. It is not.

Q. You are absolutely sure? A. No, sir. That is a different proposition. It is not shrouded in mystery though.

40 Q. Is it shrouded in doubt? A. It has got a percentage of doubt, but the percentage is less than the other.

*Dr. Edward Ayres—Cross.*

THE COURT: The doctor is simply giving his opinion, as I understand it?

THE WITNESS: Yes, sir.

Q. It is true then that it is not possible for you to form any sharp decision about this man? The line of demarcation is not your mind sharp and clear, is it? A. No, not for me or any other man.

10

Q. Is not that partially produced by the fact that there are no physical or objective symptoms which you can discover? A. Well, your question, as of course, you know, is a bigger one than you think? It is a difficult one for a doctor to answer, because he has to form his opinion as to the extent of those things.

MR. KING: I submit this question ought to be answered. It is perfectly fair.

20

Q. Is not that partially produced by the fact that there are no physical or objective symptoms which you can discover? A. In one sense there are no symptoms that we can point out to, but in combination it is stronger than a number of different highly wrought symptoms.

Q. What combination of physical disabilities can you point out to this Jury which warrants you in your last statement? A. Which what?

30

Q. What physical disabilities in this man can you point out to the jury which warrants you in your last statement? I mean, something the jurymen can see? A. You would not let me answer that question before.

MR. MORROW: Answer the question, it is a fair question.

THE WITNESS: In forming my opinion—

Q. That is not what I ask you at all. I ask you what you can point out to this Jury, whether

40

*Dr. Edward Ayres—Cross.*

it is a scalp wound, or a leg off or arm off or any such thing, I am asking you what you can show to the jury which justifies your opinion?

A. I cannot show anything to the Jury but my opinion—

Q. There is not anything then about this man that the jury can see for themselves? I mean  
 10 objective symptoms? A. No, we have nervous diseases that have no visible symptoms, like hysteria.

Q. His bones, so far as you can discover are intact, are they not? A. Certainly. It is a nervous disease.

Q. His flesh, so far as you can discover, except that scar on his head, is intact? A. Yes, sir. This is a functional nervous disease.

Q. Then you come down in your opinion to  
 20 saying it is composed of a nervous condition? A. Yes, sir.

Q. Then will you finally say that the symptoms which this man has exhibited in Court may be simulated by him? A. Well, that is a restrictive question, because it does not include the man's whole conduct for the past two years.

Q. I am asking about the things which he exhibited in Court and which you saw? A. He might, if he was a good actor, I don't know.

30 Q. Do you believe this man has traumatic neurasthenia? A. Yes, sir.

Q. Did you at the last trial testify as follows?  
 "Q. Can you recall in your experience any case of traumatic neurasthenia that did not finally recover sufficiently to resume their ordinary normal occupations and functions? A. Yes, I had just such a case as this in a trial in Mineola."  
 Was that question asked of you and did you answer that way? A. Yes, sir.

40 Q. "Q. What was the name of the party? A.

*Dr. Edward Ayres—Cross.*

Barnes." Is that true? A. Yes, sir.

Q. "Q. What is the first name? A. I don't remember the rest of his name." Was that true?

A. Yes, sir.

Q. "Q. Where was the action brought? A. Where was that? "Q. Was it in action? A. Oh, yes, against the Union Railway. "Q. And when was that? A. Oh, that is six, seven or eight years ago. I don't remember. Before I

came out here from New York." "Q. Where does the patient live at the present time? A. I don't know. All I mean to say, sir, is that the last I know of him, he was no better and that was about two years after the injury." "Q. That was two years after the accident? A. Yes, sir."

"Q. And you base your experience in testifying on this one case that you had? A. I did not say so, no, sir. You asked me for any citation and I cited that case." Do you now, in this case, answer the same way as you answered in the Court before in reference to that case? A. Yes, sir.

Q. Did you have, did you testify, or did you examine a man by the name of Barnes in a trial in Mineola? A. Yes, sir.

Q. Mineola, in the County of Nassau? A. Yes, sir. Long Island.

Q. When was that trial held? A. I don't remember now.

Q. Is your evidence before, about eight years ago, correct? Six, seven or eight years ago? A. That dates from the time that was given. You would have to add the time since that.

Q. And the man's name was Barnes? A. I think so.

Q. And the suit was against the Union Railway? A. I think that was the name of the Railroad.

*Dr. Edward Ayres—Re-Direct.*

Q. No. Now think. Before you said it was the Union Railway. Is that true? A. Well, that is my opinion. I think it is the Union Railway. I never looked at the name on the map or anything.

Q. But you are sure that the name was Barnes? That you are sure about? A. Yes, sir.

10 RE-DIRECT EXAMINATION BY MR. MORROW:

Q. What is traumatic neurasthenia? A. It is the name for a nervous shock condition, more or less persistent, due to a blow or an injury. Traumatic meaning injury.

Q. By force? A. Force, yes, sir.

Q. You saw this man on the ground after the accident? A. Yes, sir.

20 Q. Will you state whether or not traumatic neurasthenia would be one of the probable results of that accident to him? A. I don't think I would care to say "Yes" to that, because no one can tell from the injuries what results may happen in that respect. One might be thrown a hundred feet and not cause much trouble and another man might be thrown very much lesser distance and suffer that trouble.

30 Q. I mean, are the conditions under which he suffers now the result of that accident? A. Yes, I would say so.

Q. You said a few moments ago that referring to the man's appearance here in Court, any person might have simulated all that he did, but I understood you to undertake to proceed further and to say that taking the whole history of the case—let me ask you, taking the whole history of this case, from the beginning until now, until you saw him on the witness stand, will you state whether or not such condition could have been simulated?

40 MR. KING: I object to that; that is within the prohibition of the Lamberston case.

*Dr. Edward Ayres—Re-Direct.*

MR. MORROW: I do not ask what other people have told him at all. I mean now what he himself saw, what he has seen, based upon his own knowledge. I don't want what other people told him.

MR. KING: That is objected to because the knowledge may have been received by sight or hearing. 10

THE COURT: He may answer that if he will exclude what anybody told him or what Mr. Heinz told him.

Defendant excepts.

A. I don't quite know how to answer that question, because I don't know what was the phrasology. I consider that he was not acting. Is that an answer?

Q. Taking the whole history of this case, from the beginning until now, until you saw him on the witness stand, from your knowledge, will you state whether or not such condition could have been simulated? 20

MR. KING: Objected to.

MR. MORROW: I ask from your personal knowledge, based, upon what you yourself have seen of this man?

THE COURT: And excluding what Mr. Heinz has told you or what was said in your presence. 30

MR. KING: Objected to.

Objection overruled. Defendant excepts.

A. I don't consider he was acting.

Q. Assuming that Mr. Heinz was thrown from his wagon on the occasion of the thirteenth of April 1912, and that thereafter he was in bed three months, unable to get up, and that he suffered pain from this injury, and had the other symptoms which you have detailed from your own 40

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knowledge. Assuming that all to be true, would you say that any person might simulate the condition which he has presented?

MR. KING: Objected to, the question asking if any person might simulate it.

THE COURT: Whether he could simulate it?

10

MR. MORROW: Yes, whether Mr. Heinz could simulate it.

A. No, sir, he could not.

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DR. WILLIAM H. HICKS, sworn as a witness on behalf of the Plaintiff, testifies as follows:

DIRECT EXAMINATION BY MR. MORROW:

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

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

Q. What is your profession? A. Physician.

Q. How long have you practiced that profession? A. Twenty-three years.

Q. Of what medical school are you graduated?

A. The University of New York.

Q. Have you given special attention to any particular branch of your profession? A. I have.

30 Q. To what branch? A. Nervous and mental diseases.

Q. How general has been your practice in that connection? A. I have devoted my entire medical career to the study and practice of those specialties.

Q. How many patients do you see and treat in the course of a year afflicted with nervous trouble? A. That is very hard to say. I was connected with the Essex County Hospital where  
40 from a thousand to fifteen hundred are treated.

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I was there fifteen years and received in the institution from two or three hundred a year; and I was connected with the Department of Nervous and Mental Diseases of the New York Post Graduate School for some years, and I have seen there from thirty to fifty a day three times a week. I have been Consultant at Beth Israel Hospital for about fifteen years, and have seen quite a number there. My private practice has brought to my attention a great many hundreds of cases. **10**

Q. What are the causes of nervous disorders?

A. Why, the causes may be many. There are what is called predisposing or inherited causes, where there is a defect of organization of the nervous system. Then the afflicted nervous conditions may be due to poisons taken into the system, or to disease or to accidents, to injuries.

Q. Have you any specific name for nervous diseases that are superinduced by accidents, like traumatism? A. Well, usually they are at present termed traumatic hysteria and traumatic neurasthenia, but it is found in most of those injured cases they are sometimes rather complex; that is, there are sometimes symptoms of neurasthenia and symptoms of hysteria mixed together, so that it is the tendency now to refer to the nervous conditions which arise as the result of injury or traumatism as traumatic neurosis. **20**

Q. Is there anything which you can see in the patient, in his organism which shows the presence of this disease? A. Well, there are many patients that suffer from severe nervous diseases and mental disturbances, who look like athletes when you look at them, so far as seeing anything is concerned. Very often you cannot see it, but you observe it in the actions and conversation and conduct; sometimes the symptoms are hidden from mere observation, and it requires an **30**

**40**

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examination to bring out the symptoms, a careful examination.

Q. Does the condition necessarily imply an organic change, a change in the body or any part of it? A. There are many sufferers from nervous diseases where it is impossible to demonstrate any organic lesion.

10 Q. What are the attendant symptoms of the nervous diseases which you have mentioned? How does it manifest itself? A. You mean traumatic neurosis?

Q. Yes? A. Well, a traumatic neurosis is characterized by irritability, weakened responsiveness and irritated condition of the nervous system. That is, an individual develops a tendency to be emotional and he gets angry easily, and he is inclined to be weak, and then his powers of

20 sustained effort becomes affected, so that he cannot think very long at a time without breaking down, being unable to think consecutively in many cases. In other cases the weakness is more pronounced into the bodily action, so that they cannot exercise themselves physically for any length of time without becoming exhausted. An exhausted condition or irritable condition. In the traumatic condition, or traumatic states as

30 it is not seen, that condition is more of a responsive irritable state than a real weakened state. There is a loss of control present. That is some times manifested under excitement. The heart beats rapidly and the patient either turns pale or flushes, and upon effort he is likely to develop more or less tremor and shaking, as it were. They have some palpitation at times, and if it is sufficiently severe, they become prostrated and unable to get about. Sometimes they have to lie in bed. Sometimes they develop a great many pains, and

40 neuralgias, as it were, jumping about from one

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part of the body to the other, or are confined in certain localities. This weakened condition of the nervous system renders one more susceptible to true diseases, such as pneumonia and things like that, when they are less resisting.

Q. Is there any tendency to cause diabetic conditions? A. Yes. In a certain percentage of cases of diabetes the cause is frequently that of traumatism or injury, particularly injuries to the head, that is likely to cause a diabetic condition. I think somewhere around six per cent. of the case of diabetes are due to traumatism. Then in cases of traumatic neurosis the disturbance of the nervous system which results in that disturbance of what we call metapolism, or the finer nutritions of the body, gives rise to, in the cause of traumatic neurosis, sometimes to diabetic conditions, when sugar appears in the urine, and sometimes there is no sugar, and sometimes that is most likely to set up a neuritis. 10  
20

Q. What is that? A. That is an inflammation of the nerve, so that the patient has a good deal of pain, or, if the inflammation affects the sensory nerve, he has a condition of numbness and anaesthesia, so that they do not sense things, you can prick them with a pin and they cannot feel it.

Q. That condition sometimes occurs? A. Yes. 30  
sir. That condition also occurs in traumatic neurosis, in the mixed condition, where you have some symptoms of hysteria and some symptoms of neurasthenia.

Q. Have you made an examination of Phillip Heinz the plaintiff in this case? A. I have.

Q. When did you first see him? A. I saw him, I think, it was the twelfth of last April.

Q. At what place? A. At my office in Newark.

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Q. How long was he there? A. I suppose about an hour.

Q. What did you do with him? A. I examined him thoroughly.

Q. How thoroughly did you examine him? A. As thoroughly as I knew how.

10 Q. What did you do? A. I first took his history, asked him questions about the subjective symptoms which he detailed to me—

Q. You need not tell what he said to you about his symptoms? A. And after I had taken that, then I proceeded to make a physical examination. I first had him walk across the house, observed that he had a waddling gait, and rather dragged the left foot. And, because of one of the statements he made, I had him lie down on the floor on his back, and asked him to get up. He turned  
20 on his side, then over upon his stomach, and pushed himself up on his hands, then his feet, then pushed himself up on his knees. Then I asked him to lie down again on his back which he did. I asked him to get up without turning over, and he tried to but was unable to do so. That characteristic method of getting up when lying on the back shows a weakness of the back. Shows that there is something wrong with the strength in the back, either there is pain upon  
30 the effort to arise themselves while in that position, or there is weakness which prevents them from doing so. Then I had him stand up, close his eyes, put his feet together, and when he did that he would sway and would fall over unless he would catch to something. You would have to catch him to keep him from falling. There were times during the examination when he would be trembling and shaking, like this, (illustrating) then that would steady down and he would not

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be so shaky. I tested his patella reflexes; his right reflex was diminished and I was unable to obtain the left reflex at all. I tested the superficial reflexes and found that his abdomen and cremastic reflexes were present and planta present but diminished. Then I put him on the electric chair and by means of the peculiar form of an electric current called the d'Orsival spark, 10 which produces very painful penetrating, boring, burning sensation that no one could stand without flinching if their sensation is normal, when that spark is turned on an individual I don't believe there is anyone that could prevent themselves from flinching or showing symptoms of a terrific pain that it produces. I tried that spark, beginning on his legs, and I found that on his left foot and leg up to above the knee, I could apply a severe d'Ordival spark that would make 20 most anyone scream out, and yet he would not flinch or show any sense of pain. When I got higher than that he would flinch and almost jump out of the chair, and when I would try it on any other part of the body except the foot and below the knee on the right limb, he would show the same symptoms of excruciating pain that any normal individual would show. That indicated to my mind that there was an anaesthetic or sensitive condition of the portions of his 30 body which I tested in that way. I then took his blood pressure and found that to be 140, and his pulse; his pulse was 130, and when I was through with the examination his pulse rate had increased to 135.

Q. What is the normal blood pressure and pulse? A. The normal blood pressure?

Q. Yes? A. Well, for his age, for a man of

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his age and weight, around 135 to 145 would be normal.

Q. Proceed. A. Then I took a sample of his water and examined that. I had a specific gravity of 1020 and was acid and contained sugar.

Q. What did that indicate? A. It indicated that he had a glycosuria or diabetic condition.

10 Q. Proceed. A. I also found that his grasp in the right hand was less than that in his left hand.

Q. Is there, normally speaking, any difference in the grasp of the two hands? A. Very little. If a person is right handed, the grasp in the right hand is greater than in the left hand. May I consult my notes?

20 Q. Yes. (Consulting notes). A. I believe that is all that I can remember now of that first examination.

Q. Did you examine him afterwards? A. I examined him yesterday.

Q. Where? A. In the adjoining room.

30 Q. What did you find his condition to be yesterday, as compared with what it was at the time of your first examination? A. I found yesterday that his pulse rate was not as rapid as it was, it was 124 yesterday, and his blood pressure was about the same, it was 145, which is a little above what it was before. And the patella reflexes on the right side was a little exaggerated if anything, and on the left side I could obtain it but it was diminished. The wabbling gait remains the same, and the sensation, the prick of the pin, seemed to be about the same, except that it seemed that he could feel a little lower down than he could in the first instance, showing that that neurotic condition is a little better than it was at the first examination.

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*Dr. William H. Hicks—Direct.*

Q. What would be one of the probable causes of this man's condition, as you found him at the first examination and at the last one? A. What might be the cause?

Q. Yes? What is the probable cause of it?

A. Well, there are a number of things that cause a mixed neurosis or mixed nervous condition. That condition sometimes follows acute diseases, like grippe, and it sometimes follows extreme exposure, such as getting an acute chill; it sometimes accompanies the condition of rheumatism, and it accompanies a condition of diabetes, and it is caused by injuries, falls, blows, particularly injuries to the head. **10**

Q. Assuming that on the thirteenth of April 1912, Mr. Heinz met with a railroad collision with a locomotive, by which he was thrown from his wagon upon the ground, some little distance, and sustained injuries to his head, his back and other parts of his body, and, that, thereafter, he was confined in his bed for nearly three months, and was without other disease preceding this occurrence and had been a well man excepting that he had had an attack of appendicitis, upon which a successful operation had been performed, and that he had also had a burn from an explosion of a lamp; what would you say was the probable cause of the injuries or the condition in which you found him? A. Under the hypothetical question the only observable cause is that of the injury. **20**

Q. From your examination of the man what would you say will be the probable future of his condition? A. Why, it is very difficult to state what the future holds for this man. His future is serious. A traumatic neurosis which has existed as long as his has existed, with the pronounced symptoms that he manifests, is likely to **30**

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persist much longer, and he is likely to be rather rendered so susceptible to influences of any kind that even should he get very much better he is likely to have a relapse from time to time which will disable him more or less. The appearance of sugar in his water is very serious symptom. That presence of sugar indicates a serious disturbance in the processes of nutrition or metabolism, as we call it. And when once it persists for some time it is pretty apt to remain and he has to be kept on a pretty strict diet in order to keep the amount of sugar down or to keep the poison from the urine, and, in time, the disease is far more likely to get worse than it is to get better. Bringing on all of the attendant symptoms that belong to that grave and incurable disease diabetes.

- 10
- 20 Q. Did you observe in this man at the time you made that examination, say yesterday, anything like simulation on his part? A. Why, it did not appear to me that he was simulating. Of course, all nervous causes all cases that have neurasthenia or hysteria, or any of the functional neuroses, from the very nature of the disease, tend more or less to exaggerate symptoms. A neurasthenic patient or nervous individual will often tell you that they do not sleep at all, when,
- 30 may be, if you put a nurse by them, you will find they do sleep quite a little; but they are perfectly honest in there seeming exaggerations, as it were, and oftentimes, those individuals are very miserable and feel a pain what we call paralgesis, but if you will attract their attention away from those painful symptoms they will begin to smile and have no pain apparently. But that is characteristic of the disease, and you can go in the large sanitariums and you will find hundreds of
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*Dr. William H. Hicks—Cross.*

people who look like athletes apparently and they will sit down and talk with you, and talk upon any subject, and the moment their attention is not held they become miserable and helpless individuals. That is characteristic of certain functional disturbances.

Q. Looking at this man as you saw him at your office in Newark and again yesterday here, is he capable of doing any work? A. Looking at him? **10**

Q. Yes. And taking into consideration the examination you made of him? A. Well, if you will allow me to base my opinion upon the symptoms I found I will say that he is not able to work. Looking at him, I could not say so.

Q. I mean from the whole examination? A. Yes, sir. **20**

## CROSS EXAMINATION BY MR. KING:

Q. You were engaged to make a physical examination of this man and to draw your deductions as to his condition were you not? A. I was.

Q. Did you know at the time you were engaged, that would be required to appear in Court or did you so understand, that you would be required to appear in Court? A. Why, I examined him as I examine all cases of a like nature. **30**

Q. Can't you answer that question? A. I will answer it if you will just wait—

THE COURT: Did you know that you would have to appear in Court?

THE WITNESS: No. I did not. Now, will you let me explain. I have a right to explain.

THE COURT: No. It is better to just answer the questions. **40**

*Dr. William H. Hicks—Cross.*

Q. When did you first learn that you were to appear in Court? A. When?

Q. Yes? A. After I had sent in my report of the case.

Q. So that you had examined him, then sent in a report, and then you were engaged to appear in Court? A. After I had sent my report,  
10 yes, sir.

Q. To whom did you send that report? A. To Dr. Hood.

Q. And you were not engaged prior to sending the report, to appear in Court? A. No, sir.

Q. There is not any doubt in your mind, is there, that this man has a condition which will grow worse? A. No, sir.

Q. There is no possibility of doubt about it? A. There is no doubt in my mind.

20 Q. You will say from your examination that that is a reasonable certainty? A. Yes, sir.

Q. Will you go further and say that you are sure that that condition will result? A. Oh, well, you cannot be absolutely sure of anything.

Q. Just as sure as you can possibly be, you are sure of that aren't you? A. No, sir.

Q. How far will you go in stating to the jury on that matter? A. As I stated in my direct  
30 examination, the future for him is difficult to describe. It may get better for a while and if it does he is likely to get worse again, and the appearance of the sugar and the persistence of the sugar, unless he is on a diet, would indicate a grave turn in the disease, and if he develops a real diabetes, we know that that disease is not curable, but we know that people live for a great many years with it sometimes.

Q. I want to go back to this neurasthenia and ask you whether that is such, in your opinion,  
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*Dr. William H. Hicks—Cross.*

whether that is such an ascertainable disease that you can fairly prognosticate this man's injury? You are willing to say that it is, are you not?

A. I think I can fairly well.

Q. You are willing to have your evidence rest or fall in your prognostication, are you not? A. Why, I can say that the overwhelming probabilities are that this man will not get well. He may get better, but he will get worse again. 10

Q. And you really think and really believe and tell this jury and Court that in your fair opinion the large probabilities are that he will get much worse? A. Yes, sir.

Q. You believe there will be no temporary cessation from the difficulty under which he now labors? A. I do not say that. I believe there may be.

Q. If so, it will only be temporary? A. It will only be temporary. 20

Q. In other words, the character of this man's disease is fixed as you believe and you can see? A. I believe so.

Q. There is not any doubt about that? A. There is doubt about everything that cannot be demonstrated in a mathematical way.

Q. There is not any inferrable doubt is there? A. Well, the overwhelming probabilities are I think his future is such that he will never be a well man again. 30

Q. How long have you been practicing in Newark? A. For twenty-three years, twenty-two years.

Q. Did you appear in the Essex Circuit Court in the December Term 1911 on February 19th, 1912, in a suit the trial of which was started February 19th, 1912, in a case between Antonio

*Dr. William H. Hicks—Cross.*

Minichino by his next friend against the Public Service Railway Company? A. I did.

Q. Did you give evidence in that case? A. I did.

Q. Did you appear for the plaintiff in that case? A. I did.

Q. That is, you appeared for the boy? A. Yes, 10 sir.

Q. I want to ask you whether in that case these questions and answers were asked you, and I am reading from a transcript, may I read from the transcript? If you find reason to deny the accuracy of this record, halt me, otherwise I will assume it to be true and that will save time? Will that be agreed upon between us?

Q. Dr. William H. Hicks, that is your name? A. Yes, sir.

20 Q. Sworn for the plaintiff? A. Yes, sir.

Q. Direct examination by Mr. Beecher. You know Mr. Beecher, don't you? A. Yes, sir.

Q. (Reading.) "Q. Have you pursued any special line of practice? A. I have." "Q. What? A. Nervous and mental disease." "Q. And for what part of your entire practice have you made that a specialty? A. Why, ever since May 22, 1893." "Q. Have you held any public positions in institutions that gave you experience in the 30 line of practice that you have spoken of? A. I have." "Q. You may state them, please? A. I was for fifteen years assistant physical and pathologist at the Essex County Hospital for the Insane at Newark, and I think about twelve years, a consultant in nervous and mental diseases at the Newark Beth Israel Hospital; clinical assistant, department of nervous and mental diseases of the New York Post Graduate Medical School and Hospital—"

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*Dr. William H. Hicks—Cross.*

THE COURT: Is it necessary to recite all these qualifications? Can't you get to the point?

MR. KING: I want to bring it back to him. I will cut it short.

THE COURT: That part cannot be so important, and we might get right down to the point you are aiming at. 10

MR. MORROW: He has said all that on this witness stand already.

Q. You did examine this boy, didn't you? A. Yes, sir.

Q. How old was he at that time? A. I don't remember.

Q. About eight years old, was he? An Italian boy? A. I could not say. He was under ten. Between five and ten something, I think. 20

Q. Was he an Italian boy? A. I don't remember.

Q. (Reading). "Q. Well, now, doctor, will you tell us what you found to be the condition of this plaintiff on your first examination? A. So far as I was able to ascertain I could see no physical defect; no evidence of physical disease, so far as I was able to determine; but he exhibited some mental deficiencies. He was deficient in attention, and in control; and he was deficient in interest and curiosity, at the first examination. 30  
Next to the last examination he manifested, besides the things I have already mentioned, a condition of partial convulsion, with maniacal frenzy. That was next to the last examination he exhibited that condition." "Q. Now as to the condition, you have described in the first examination, comparing that with the next one, the following day, was there any difference? A. In the first four 40

*Dr. William H. Hicks—Cross.*

examinations there were slight differences in the mental attitude of the child. That is, at one or two of the examinations the child was not so dull and listless as he was in the other two examinations. In the first examination the child seemed to attract the attention of a normal child of that age. He was not fighting, or going into a

**10** condition of destructiveness at that time, but I was unable to attract its attention as one is able to attract the attention of a normal child of that age. My methods for attracting the child's attention are these: Take a child of that age it is easily attracted by bright things, such as bright colors, brilliant colors, and such as a brilliant flash of light, things of that kind; a child of four years or three and a half years of age becomes

**20** very much interested in bright things, bright colors, bright flashes. So I produced a card that had upon it a good many brilliant colors, and tried to interest the child in this card. He did not pay any attention to it. And then by turning on the electricity I could produce a spark which would jump from one pole to another, produce a brilliant light, by drawing the pole out it produces a bluish violet flame which is very interesting to little children. I can entertain them

**30** by the hour by that electrical display in the office. But this child, while it at first attracted his attention, he looked at it, he went right back into his apathetic state; I could not get him to take any further interest in that display. Then I produced some grapes and bananas and tried to get him interested in fruit. He would have nothing to do with it, paid no attention to it. Then I went out the room and got a little bell and came in and began to ring this bell right behind the child's back, and he paid no attention—"Q.

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*Dr. William H. Hicks—Cross.*

What did you do with the fruit? A. I left the fruit in front of the child. The child was sitting on its mother's lap right in front of my desk, had a board pulled out and put the fruit right in front of the child, after having offered it to him, and he paid no attention to it. I left it within his reach, thought his curiosity would be aroused, and he would play with it. He paid no attention to it at all. Then the ringing of the bell, I slipped in the back way and began to ring the bell. He paid no attention to it." "Q. How would that have been with a normal child, ringing the bell? A. With a normal child he would have jumped, turned around, looked at it, turned his head to see what this noise was about, the tinkering of the little bell. Then I proceeded to arouse his attention by pictures, pictures of animals. I have a large book there with colored pictures of horses and dogs and chickens, and things of that kind. He would take no interest whatever. Then I got a piece of cake, tried to get him to take the cake in his hand, he refused to do that. Then I procured a little kitten that we have there that has been trained by my little girl to do a number of tricks, and I set that little kitten up on the board right in front of the child on my desk; I would hold a little brass ball in front of it, a colored ball strung to a string, and this little kitten would sit up on its haunches and bat this ball with its feet. A normal child would be tickled to death to see that; would laugh over it; talk about it, and be very much interested. When I set the cat up there, and the cat began to play with this ball the little boy looked at it in a sullen way, and saw it, and then laid right back in his mother's lap; paid no more attention to it whatever."

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*Dr. William H. Hicks—Cross.*

THE COURT: It does not seem necessary to read all this testimony in this record. Can't we get at the point you are after?

MR. KING: I am now going to show that this witness gave testimony and read what he said about this boy.

10 THE COURT: Suppose you get at the important part.

MR. KING: This is what he did from which he reached the conclusion. I have got the boy downstairs in Court now, I have got him here.

THE COURT: Let us get to the point of this.

MR. KING: Does the Court exclude me from reading to him what he said his testimony was then.

20 THE COURT: I don't think you ought to go into the minute details of the testimony. Let us get to the relevant matters.

MR. KING: If I can show to the jury that he made a mistake, the jury may say that he may make another mistake. And if I simply say he made a mistake the jury have nothing to go by, but if I read the record here of what he did in this other case then I can fairly say that he made a mistake and he  
30 might make the same mistake here. The jury are fairly entitled to have this. How can I argue before the jury that the man is wrong unless I can show them the details wherein he is wrong?

THE COURT: You are familiar with what ought to be done and I wish you would eliminate as much of it as you can.

MR. KING: I do not wish to put in anything that is not necessary. I think the jury are  
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*Dr. William H. Hicks—Cross.*

fairly entitled to know what was in this suit and I can show what the result of it was. I will cut out as much as I can, but I will give him an opportunity to answer about all the testimony, anything he wants to and straighten it out when we get through.

Q. (Reading.) "Q. Did he attempt to do anything with the kitten when you put it down or at any other time? A. When I got through with it the cat jumped down on the floor right by the little fellow's foot, and the moment the cat struck the floor he gave it a vicious kick and sent it across the floor." "Q. Did you observe any manifestations at the time of the kitten incident—? A. That kick, however, was not at that examination, that was an examination before the last one that was manifested. Then I put some money—" 10  
 "Q. That was in November 1911, you have just referred to as another? A. Yes." "Q. That was examination Number four? A. The kick at the cat occurred at the examination that I held in November, 1911, Number four." "Q. We will pass that, and confine ourselves to the others? 20  
 A. In these first four examinations the tests indicated that the child was backward in its mental development in that the function of attention was diminished, or almost absent, and unless you can get the attention of a child, arouse its attention so it becomes interested in an object, it is impossible to get that child to learn anything. 30  
 All of us know that unless you put your attention on a thing, focus your mind upon it, it is impossible for you to grasp the subject under consideration; if you allow your mind to wander from one thing to another while it is being presented to you it is impossible to understand what is being presented to you. So in the development, 40

*Dr. William H. Hicks—Cross.*

the education of a child, the first essential principle of the mind is that the child's attention can be arrested and held for a few moments anyway, and the degree of—"Q. Were there any other peculiar manifestations of an abnormal character in any of those four examinations that you made in the early part of your treatment? A. The

**10** child exhibited a lack of affection for its mother, and a lack of judgment and control, for a child of that age, in that it would pay no attention to its mother." "Q. Now in regard to any manifestation of want of affection for its mother or anybody else? Did you observe? A. At the first four examinations that was not as pronounced, and was not exhibited in as pronounced a way as the next one to the last examination." "Q. When

**20** you first saw this boy, and during those four examinations, did you form any opinion as to whether or not he could be cured, so as to become reasonably normal in his condition? A. After the first examination?" "Q. After those four early examinations? A. Yes." "Q. What were they? A. My opinion was that the child was mentally defective, and that the defective condition was not a curable one. On the fourth of November, 1911, the child was brought to my office and I proceeded to go through the tests which I have already

**30** described. I first made the usual effort to get the child's confidence, and get rid of its fear and embarrassment, and using methods which any of us use in trying to get the confidence of a little child; but the child would not have anything to do with me; he seemed to be—he was very active; he could not hold his limbs still; he could not sit still; he was in constant motion, and it was impossible to attract his attention. I went through the various tests again. Tested his hear-

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*Dr. William H. Hicks—Cross.*

ing by coming in from an outer door, in back, and ringing a bell. The same methods as on previous occasions with the lack of results; but in this particular examination the child showed a tendency to destructiveness, and to uncontrollable excitement, and meaningless actions of destructiveness. For example, it had a little badge that belonged to some order, which is quite an ornamental badge; it tore this badge off and pulled it to pieces, picked it to pieces, crammed it in its mouth and chewed it, and it had on a little white necktie; it pulled this necktie off and twisted that, and tore it, threw it away. He also tore his jacket off of him and started to undress right in the office. This examination covered a period of something over two hours, and a good deal of that time I simply sat silently watching the child. Every effort that his mother made to assist him, and prevent him from tearing things up as he was doing, why, he would fight back at her, and at times spat at her, came near spitting in her face once; and tried to tear at her bosom; tore at her clothing in a meaningless sort of way, like he was in a confused state of mind. And then I brought in a music box that plays a dozen tunes that are quite attractive to children; they are simple melodies, airs, children two or three years old are very much interested in it, and it will hold their attention quite some time. I brought that in and started it up, played several tunes right there in the room. The child paid no attention to it whatever, just kept on with those meaningless motions the child had, hanging to its mother, throwing itself on the floor, rolling about sliding down, climbing up on his mother, and tearing his clothing. Then I tried the kitten test again. When the kitten jumped off the table

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*Dr. William H. Hicks—Cross.*

he paid no attention to it until the kitten jumped off the table down at his feet; then he gave it a vicious kick. Then he became very much excited, and grew very red, almost dusky, in the face; threw himself on the floor; fell on the floor, and there he had twitchings, and tossings, and draw up the limbs and he pounded his head on the floor until he had to be restrained; his nose was mashed, he bled profusely, he smeared the blood all over his face, and he was a frightful sight to look at. And for some minutes the child went on in this frenzy, not only knocking his head and throwing himself about in a convulsive way, but screaming with a peculiar cry that is characteristic of a mental disturbance. It was not the cry of a normal child, because no tears were shed at any time. And during that period the child was confused, and did not know what he was doing. That was the first attack of the kind that I had seen. The next examination covered the same tests, with some little variations, but the next day the child did not show those vicious tendencies, and did not have this attack, but showed his restlessness, increased motor activity, and the lack of power to concentrate attention, absolutely unable to control itself, and showed no affection for its mother, kicking and fighting. That is all I can recall at present." "Q. Doctor, how would you determine, in a child two and a half or three years old, whether it was in a normal condition mentally or whether it was defective? A. Well, a normal child from two and a half to three years old, reacts to its elementary environments in this fashion; a child of that age will feed itself, use a spoon, or use a fork and it will make its wishes known. It can use sentences with as many as ten words; it attends to the calls of nature, so that it will not soil itself; and its sleep is quiet and

*Dr. William H. Hicks—Cross.*

undisturbed; and it has an interest in environments such as attract the attention of a child, bright objects and peculiar noises and music; and it responds to commands, and is rather diffident and backward in the presence of dangers, and acts with some degree of understanding of the propriety of conduct in the presence of strangers; that is, it treats strangers differently to that of its immediate family." "Q. You are now talking of the normal average child two and a half years of age? A. Yes, sir; two and a half to three years." A. As a result of such an injury an individual might develop any of the forms of insanity, with the exception of senile dementia; and it might develop epilepsy; and it might develop any degree of feeble-mindedness, idiocy imbecility or feeble-mindedness. I think it is a case of feeble-mindedness, plus epileptic attacks, psychic in form psychic epilepsy. There is no improvement. At the first examination I was unable to detect from my own personal investigation the presence of anything except defective mentality on the part of the child; in my last examination I was able to, on account of this psychic attack that it had, to determine that the child was suffering from some form of epilepsy, probably of a psychic form. From the history I had attributed it to traumatism, injury to the head. "My opinion is that the child was mentally defective and the defective condition was not a curable one."

THE COURT: Is it your point that in some other case the doctor expressed an opinion which turned out to be wrong?

MR. KING: Absolutely.

THE COURT: And that, therefore, you have a right to show that, in this case, and to say that he is wrong here?

*Dr. William H. Hicks—Cross.*

MR. KING: No, I do not say that he is wrong. I cannot say that. That is for the jury to say. But I say this attacks his credibility as an expert.

10 MR. MORROW: How can that be without having all the facts and circumstances in the case. If the child is brought into Court we would have to have all the facts and circumstances in that case and the jury would have to determine that he was wrong in that case and then determine how that would affect his credibility in this case.

THE COURT: How can that affect this case.

MR. KING: I have offered to read the whole record and I will read it if you want it.

20 MR. MORROW: Then, if this jury have that record submitted to them they would go into an examination of that case and that would be absurd in this case. They would wander far afield from the real issues that we are trying, and they would try another case before trying this case.

30 THE COURT: You may be permitted to cross examine the witness as to his knowledge and experience and as to any facts in any certain case and whether from the outcome of that case his experience and testimony was not wrong, and then you can argue from that that he may be wrong here; but I am not going to permit the trial of another case on the cross examination of this witness and the introduction of the testimony in another case. You may ask him if he was in error in that case and follow that up by pointing out the outcome.

MR. KING: I don't know as he knows it yet.

40 MR. MORROW: There is just the trouble.

*Dr. William H. Hicks—Cross.*

It is proposed not by the doctor to show that he has made a mistake, but to show by somebody else that he has made a mistake.

THE COURT: I will permit Counsel to cross examine doctor and show the mistake if it can be shown, but I will not permit the reading into this record the testimony in another case. That it seems to me is not proper. 10

Q. Did you on that trial, after having examined this boy, say this, or, was this question asked of you and did you answer it as follows: "Q. Might a blow on the head of the plaintiff, from the runboard of a trolley car going pretty fast produce in this child the condition in which you found him on your first examination? A. Yes."

MR. MORROW: I suppose it will confine it if I interpose an objection. 20

THE COURT: That is right to the point and I will admit it.

Q. Did you answer so? A. Why, yes.

Q. And was this question asked of you on that trial, and did you answer, as follows: "Q. Taking the condition in which you found this child on your examination, might it result from traumatic injury? A. Yes, injury to the head." A. Yes, sir. Go on now, see what else it might result from. 30

Q. You can have it, Doctor. "Q. What mental abnormalities might follow injuries to the head by force." And there was some objection which I won't read. And that was followed by this question. "Q. Take a blow at the base of the skull caused by a child three years old being struck by a trolley car running fast, what injuries, or what manifestations, might result from such a blow causing serious injury? A. As a result of 40

*Dr. William H. Hicks—Cross.*

such a blow. You mean what mental results?"

"Q. Yes, mental? A. As a result of such an injury an individual might develop any of the forms of insanity, with the exception of senile dementia, and it might develop epilepsy; and it might develop any degree of feeble-mindedness, idiocy, imbecility, or feeble-mindedness." "O.

- 10 What would you define the mental condition of this child as being at the present time? A. I think it is a case of feeble-mindedness, plus epileptic attacks, psychic in form, psychic epilepsy." Did you say that? A. I did.

Q. And did you testify as follows: "Q. And to what, from the history which you had, did you attribute that? A. From the history I had I attributed it to traumatism, injury of the head." Did you answer that way? A. I did.

- 20 Q. Did you testify as follows: "Q. Do you think this plaintiff will be able to obtain such an education as a boy may get in the public schools up to the age—going to school, say up to the age of sixteen? A. I think it is impossible in his case." Did you answer so? A. I did. "Q. What do you say as to whether or not he is likely to be a dependent all his life as the result of these injuries to his head? A. Not the slightest doubt in my mind that he will be dependent all his life." Did you so answer? A. I did. "Q. Dependent in such a way as to require what? A. Require constant care, looking after. As he grows older he is likely to become more or less dangerous, so that he will either have to be kept in a home or have some attendant with him all the time." Did you answer that way? A. I did.

Q. (A little boy is exhibited before the witness.) Is that the boy? A. I think it is. It looks like the boy.

- 40 Q. It looks like him? A. It looks like him, yes, sir.

*Dr. William H. Hicks—Re-Direct.*  
*George N. Randall—Direct.*

RE-DIRECT EXAMINATION BY MR. MORROW :

Q. What do you know further about this case after your testimony? A. Nothing at all. I never heard anything more about the child.

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GEORGE N. RANDALL, sworn as a witness on behalf of the plaintiff, testifies as follows: **10**

DIRECT EXAMINATION BY MR. MORROW :

Q. Where do you live now? A. At Huntsberg.

Q. Where were you living on the thirteenth of April, 1912? A. On Spring street, with Philip Heinz.

Q. What did you do for him? A. I drove a baker wagon. **20**

Q. Were you with him on the thirteenth of April, 1912? A. Yes, sir.

Q. At the time he was injured? A. Yes, sir.

Q. Who drove the wagon from the culvert over the public road down to the High street crossing that day? A. I did.

Q. Where was Mr. Heinz while you were driving the wagon? A. He walked from the foot of the hill up—I could not say how far he walked how far up, from the cutoff in, but he got in the wagon just as we swung to go up High street. **30**

Q. Where did you go then? A. To the Railroad track.

Q. Did your team stop on the track and stand still? A. Not till Mr. Heinz jerked them.

Q. What happened to them then when he jerked them? What did they do, the team? A. They were walking along up a kind of little grade, and the whistle blowed and he reached over and grabbed the lines that way (illustrating) and jerked them. **40**

Q. What is that? A. The whistle blew and he

*George N. Randall—Direct.*

grabbed the lines and jerked them back and the engine hit us.

Q. Did you hear that whistle blow? A. Well, I would not say it was five seconds I heard the whistle and he grabbed the lines and just as he grabbed the lines the engine hit us.

10 Q. What kind of a whistle was it? A. A sharp, shrill whistle.

Q. Had you heard any whistle before that? A. No, sir.

Q. Were you watching Mr. Heinz all the while as you came up to the crossing? A. No, sir.

Q. What were you doing? A. I was driving the mules along.

Q. Looking in what direction? A. I was looking right straight ahead.

20 Q. Were you observing Mr. Heinz at all until he got in the wagon? A. No, sir. He was around the corner. We had the side curtains up and you could not see only right over the road in front.

Q. You could not? A. All I could see was ahead, straight ahead.

Q. You could not see him until he got into the wagon? A. No, sir; not till after we made the turn.

30 Q. Where did he sit when he got onto the wagon? A. Right on the edge of the seat, at the edge with his feet on the dashboard.

Q. Could he see out of the wagon to his left? A. Not that I know of, unless he looked around that way (indicating). I was further back than he was.

Q. He was in front of you? A. Yes, sir; he was on the left side, I was on the right side.

Q. Mr. Heinz then sat on the side next to the train, did he? A. Yes, sir.

40 THE COURT: How far was the wagon from the first rail when he boarded it? How far

*George N. Randall—Cross.*

away were the heads of the mules from the first rail when he got aboard the wagon?

A. When I made the turn to come up High street he got aboard the wagon.

THE COURT: How far were the heads of the mules from the first rail that you were coming to when he got aboard? **10**

THE WITNESS: I should say as far as from here to one of those windows over here, when he got onto the wagon.

Counsel agree that the distance indicated by the witness is a distance of fifty feet.

Q. Had the wagon turned into the High street crossing or towards the High street crossing? A. Yes, sir. **20**

Q. And the mules, of course, were ahead of the wagon? A. Yes, sir.

Q. Had you seen Mr. Heinz walking along by your side? A. I saw him walk up to the wagon and get in.

Q. That is the first you saw of him, is it? A. Yes, sir.

Q. How near he had been to the track before that you don't know, do you? A. No, sir.

CROSS EXAMINATION BY MR. SCOTT: **30**

Q. Did you keep your eyes on Mr. Heinz while you were driving up to the High street crossing?

A. I could not see him until I turned to the High street crossing.

Q. As you came up the Stanhope Road toward the crossing, Mr. Heinz was walking ahead of you?

A. Yes, sir.

Q. And you could see him from there? A. Yes, sir. **40**

*George N. Randall—Cross.*

Q. And, as you turned in to the crossing, the High street crossing, toward the track, when the wagon was about fifty feet from the first rail Mr. Heinz got in? A. Yes, sir.

Q. And Mr. Heinz did not go up to the track to look down the track? A. I could not say. I could not see how far he went up that way.

10 Q. From the time Mr. Heinz got into the wagon until he was struck, did he get out? A. No, sir.

Q. Just before you turned in to the High street crossing, will you describe how Mr. Heinz got on the wagon? A. He stepped right up on the step on the shaft, then on the shaft and from the shaft right on the dashboard.

Q. Did you bring your wagon up to him and he jump on? A. He was walking right along and stepped right on the wagon while I was going.

20 Q. He was walking along, and, as the wagon came along he jumped up on the wagon? A. Yes, sir.

Q. You did not see him go up to the crossing? A. I could not say. I could not see how far he went up that way, I could not see him.

Q. From the time you turned in to the crossing until the time the accident happened, Mr. Heinz did not go up to the track? A. Not that I seen.

30 Q. It was possible for you to have seen him was it not? A. Oh, yes, after I turned the corner.

Q. After you had turned the corner if Mr. Heinz went up to the track you could see him? A. Yes, sir; but he might have been up there before I turned the corner.

40 Q. How far had Mr. Heinz preceded you and the wagon going down to Stanhope turnpike toward High street, how much ahead of you was he, or was he even with you? A. Oh, no. He was away ahead of me. I stopped at the house right under the hill there, I don't remember the name and he walked on ahead.

*George N. Randall—Cross.*

Q. Where did you catch up to him? A. Just as I turned into High street.

Q. As you came up toward High street did you see Mr. Heinz walking ahead of you? A. No, sir; I could not see him.

Q. Then Mr. Heinz got in the wagon fifty feet from the crossing of the first rail? A. Yes, sir.

Q. Where was Mr. Heinz with relation to where you were sitting? A. Right on the edge of the seat. **10**

Q. Can you show the jury, assuming your seat there to be the seat you were in, where Mr. Heinz would be? A. (Illustrating.) I sat in this seat this way and there is the edge of the seat and Mr. Heinz was sitting this way.

THE COURT: He was on your left?

THE WITNESS: Yes, sir. **20**

THE COURT: But you are showing the right now?

THE WITNESS: There was the seat and I was sitting on this side and Mr. Heinz on the edge over here.

Q. How much further front was he than you? A. I should judge about a foot.

Q. How far back in the wagon were you? A. I was clear back, as far as I could get. **30**

Q. How far back was that? A. I should judge about eighteen inches.

Q. These curtains came down on both sides of the wagon didn't they? A. Yes, sir.

Q. With reference to the seat of the wagon on which you were sitting how far did they extend on the side beyond the seat? A. About that much (indicating).

Q. About a foot or a foot and a half? A. About half of the curtain, yes, sir. **40**

*George N. Randall—Cross.*

Q. About how far would you say that was? A. I should think about eighteen inches.

Q. Was Mr. Heinz inside of the curtain too with you? A. Yes, sir.

Q. You were doing the driving at the time? A. Yes, sir.

10 Q. And you did not pay any attention to looking out either to the right or to the left? A. I was not looking for a train.

Q. From the time you went to the crossing on High street until you were struck you just paid attention by looking right straight ahead? A. Yes, sir.

Q. You never made any observation for a train either way, did you? A. No, sir.

20 Q. Did Mr. Heinz talk to you from the time you turned into High street before the whistle blew? A. I could not say; we were always talking and joking, on joking terms, I don't know whether we were talking that minute or not.

Q. You have no recollection of what happened in that regard? A. No, sir.

Q. How was he sitting at the time? A. He was on the edge of the seat that way (indicating) right up on the edge of it.

30 Q. Where was the head of the mules or the feet of the mules, say, when you first heard the whistle? A. I should say it was, their nose was about with the rail, of the railroad track.

Q. Were they going? How were they going? A. Walking.

Q. About how fast? Would you say? A. Oh, I should say about four miles an hour at that time.

Q. At the time you heard the whistle they had their noses about on the track? A. Yes, sir.

40 Q. After you heard the whistle blow, you say Mr. Heinz looked up or out behind the curtain? A. No, sir; I did not.

*George N. Randall—Re-Direct.*

Q. When did Mr. Heinz look out behind the curtain? A. I did not notice him looking.

Q. You did not see him looking? A. No, sir.

Q. You don't know whether Mr. Heinz looked at all? A. No, sir; I do not.

Q. You have no knowledge or recollection as to whether Mr. Heinz looked at all from the time he turned into High street up to the crossing? A. **10**  
I have not.

Q. What you did, as you testified on the former trial, was to drive the wagon, and drive them, as you said "to the finish?" A. Yes, sir.

Q. The engine did not hit Mr. Heinz? A. Sir?

Q. Did the engine hit the mules? It did not hit Mr. Heinz? It hit the mules, did it not? A. It hit somewheres. I could not say where it did hit.

Q. It did not hit the body of the wagon? A. **20**  
I could not say about that.

THE COURT: Did the wagon go over?

THE WITNESS: It did, yes, sir.

## RE-DIRECT EXAMINATION BY MR. MORROW:

Q. Was the wagon destroyed? A. Yes, sir; there was nothing left but the top.

Q. As Mr. Heinz sat there on the footboard in front of you could he have seen out of the wagon by looking down the track? A. Yes; by turning his head that way (indicating) he could, yes, sir. **30**

Q. You don't know whether he turned his head that way or not, do you? A. No, sir; I do not.

Q. You don't know whether he was looking down the track or not, do you? A. No, sir.

Q. You could not say before Mr. Heinz got into that wagon that he had not been up to the crossing? A. No, sir; I could not say.

Q. Because you had not watched him? A. The **40**  
road runs parallel this way (indicating) and the other goes straight.

*George N. Randall—Re-Cross.*

Q. You did not see but what he had been up to the crossing? A. Yes, sir.

## RE-CROSS EXAMINATION BY MR. SCOTT:

Q. You were familiar with that crossing? A. Yes, sir.

10 Q. And had ridden over it from time to time, many times? A. Yes, sir.

Q. And you knew on that morning that that train was due through there about 10.20.

Q. And it had not gone up yet? A. No, sir. It was due at Newton at 10:20.

Q. Do you remember making a statement in this case to Mr. Kyle on April fifteenth, after the accident, in which you said, "If we did not have the curtains down we could have looked to the east and seen the train before it reached the crossing?"

20 A. Yes, sir.

Q. That was the fact, was it? A. Yes, sir.

## BY MR. MORROW:

Q. What kind of a morning was it? A. It was damp and misty, kind of a misty rain.

Q. Was there any fog? A. Yes, sir.

Q. How far could you see ahead of you? A. Well, I should say, as far as from here to those windows (indicating).

30 Q. Not further? A. Not much further than that.

The Court then took a recess until one o'clock this day.

—•—  
AFTER RECESS.  
—•—

*Colloquy.*

MR. MORROW: I have talked to my colleague and Mr. Heinz about Mr. Heinz's testimony and he said he could see down that track, Mr. Heinz says he meant to say on ordinary occasions he could see down as far as the engineer said, but he did not understand the question related to the weather on that day. I think the inference being there that he ought to be allowed to correct that. **10**

THE COURT: How does it appear on the record.

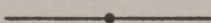
MR. MORROW: I think that is what appears, that he could see as far as the engineer stated. I don't know whether the man could see as far as the engineer saw a railroad train.

The testimony was then read. **20**

THE COURT: That is as I recall it. I was thinking of that when he was on the stand yesterday. I thought at first he had not mentioned it. Then I found afterwards he stated he had looked to see whether a train was coming and he says he heard nothing and went back to the wagon and jumped in.

MR. MORROW: He used the expression as the stenographer read it to me, that he listened. **30**

THE COURT: Well, I suppose in looking for a train his ears were working too.



*Samuel Wilson—Direct.*

SAMUEL WILSON, sworn as a witness on behalf of the plaintiff, testifies as follows:

## DIRECT EXAMINATION BY MR. MORROW:

Q. Where do you live? A. At Andover.

Q. Where were you on the thirteenth of April, 1912, the day Mr. Heinz was injured? A. I was  
10 working on a porch for Albert L. Davidson, on High street.

Q. How far from the track of Lackawanna Railroad was that? A. From eighty to eighty-five paces.

Q. Did you hear the crash of the accident, the collision? A. No, sir; I did not.

Q. What did you hear? A. I heard the alarm whistle of the train near Mr. Tottens, I heard  
20 a train coming, either over the cutoff or over the Sussex Road, which attracted my attention, but I heard no whistle and I looked up to see whether it was on the cutoff, I could see them from there, but I could not see the Sussex Road, and I says to myself, "Is it possible—"

MR. KING: I object.

Q. Did you hear any bell rung? A. No, sir.

Q. Did you hear the bell rung at the time you heard the sharp whistle? A. No, sir.

30 Q. Or afterwards? A. No, sir.

Q. And that whistle was near Mr. Totten's barn? A. Yes, sir; I should say, well, as the engineer said, about a hundred and twenty feet, it might have been before the barn or it might have been just after it passed the barn.

Q. Did you go down there afterwards? A. Well, probably five or ten minutes afterwards. I saw there was some excitement going on and  
40 walked down to see what it was.

*Samuel Wilson—Cross.*

## CROSS EXAMINATION BY MR. SCOTT:

Q. Where were you at the time or just prior to the accident? Can you point out to us the place where you were, on that map? A. (Indicating.) Somewheres about here I should say.

Q. And you see on that map what is known as the public road? A. I can.

Q. That is the Netcong Stanhope Road? A. **10**  
That is it. That is the culvert, coming in this way here.

Q. You can see where it is marked "High street?" A. Yes, sir.

Q. With relation to the public road and the track, which side of the track was you, on the public road side or on the other side? A. No, sir; I was up in the Village, somewheres about here, (indicating) I should say.

Q. Were you on High street? A. Yes, sir. **20**

Q. About how far from the crossing were you? A. Well, as near as I can tell, I don't know just what part of the building I was at, but, from the centre of the building to the crossing is about eighty-five feet, as I would pass there, as I would pace it.

Q. What were you doing at the time? A. I was working at carpenter work. My records says I was building piers for porches. **30**

Q. Who were you working for at that time? A. For Robert L. Davidson.

Q. Why were you working with anybody? A. No, sir.

Q. Nobody but yourself? A. I was working alone.

Q. What were you doing just prior to the time when you heard the whistle? A. Well, I could not say just what I was doing, I was working at the porch, my record says, building piers, I was making piers for the porch the afternoon and the **40**

*Samuel Wilson—Cross.*

morning of that day. It had been cloudy part of the forenoon and had rained a little and I had marked my records one sixteenth of an inch of rainfall during the day, but it did not stop me from my work and my records shows that it was cloudy the rest of the day.

10 Q. You were not particularly interested in the rain itself that morning? A. No, sir.

Q. And you were not paying any particular attention to it? A. No, sir; I was not.

Q. And the first thing you heard was one blast of the whistle? A. Yes, sir; that is more than this rumbling of the train and I looked up to see, wondering what train it was coming.

Q. You heard the rumbling of the train? A. I don't remember whether it was a train on the cut-off or not.

20 Q. You heard the rumbling of a train? A. Yes, sir; but I heard no whistle, that I remember.

Q. Did you hear the rumbling of that train before you heard the whistle? A. Oh, yes; a little bit, probably two or three seconds, probably more or less, I was not paying any particular notice to it.

Q. You heard the rumbling of the train two or three seconds before you heard the whistle? A. Yes, sir; I should say so.

30 Q. Prior to that time you were not paying any attention to the train? A. No, sir.

Q. And you were not paying any particular attention as to whether any whistles were blown or any bell was rung or not? A. No, sir.

Q. Well you describe to the jury, if you can, just how this rumbling of the train sounded to you? A. Just like any other train was coming down the grade. Anybody knows what that is. I cannot give a description of those things.

40 Q. One train might sound different to-day from

*John W. Thorpe—Direct.*

what it did yesterday, altogether might it not? A. Yes. It depends altogether on the direction of the wind.

Q. From where you were, there is no doubt in your mind that the thing you heard was the rumbling of the train, it could not have been anything else, but the rumbling of a train coming down the grade? A. Well, I was so well satisfied that I looked up to see which road it was on. I thought to myself, "It is that milk train" and was wondering how fast the time had passed. It seemed that the work had not gone as fast as I thought it would have went for the time I had been busy. 10

Q. This was about ten o'clock in the morning, was it? A. Yes, sir.

BY MR. MORROW:

Q. How soon after you heard the rumbling did you hear this sharp blast near Totten's barn? A. Oh, probably two or three seconds; I could not tell about those times, sometimes the time goes very rapidly, other times it goes slow. 20

BY MR. SCOTT:

Q. It might have been more than two or three seconds? A. It might have been five seconds or it might have been less. The train was running pretty fast. 30

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JOHN W. THORPE, sworn as a witness on behalf of the plaintiff, testifies as follows:

DIRECT EXAMINATION BY MR. MORROW:

Q. You were the engineer in charge of the train concerned in this accident on the thirteenth of April, coming from Netcong to Newton, were you not, about ten o'clock? A. Yes, sir. 40

Q. How fast was your train going when you

*John W. Thorpe—Direct.*

came through the culvert under the cutoff? A. About thirty miles an hour.

Q. Can you tell me how long the train was? A. Six cars and the engine.

Q. How long was the engine? A. About forty feet, I should think, forty-five.

10 Q. And each car, how long was it? A. How long were the cars?

Q. Yes. A. Well, I never measured them, I don't know; I should judge something like thirty five feet, I should judge some of them were thirty feet and some of them was forty feet.

Q. How many of them were there in all? A. Six cars.

Q. And the length of the train was about two hundred and eighty feet, is that right? A. Yes, sir.

20 Q. Do you know the width of the culvert under the cutoff there? A. No, sir; I never measured it.

THE COURT: Are there two tracks under it or one?

THE WITNESS: One, on the Sussex Branch.

Q. Do you know the length of it either? A. No, sir; I never measured it.

Q. There is a high embankment there, isn't there? A. Hay—

30 MR. MORROW: Never mind.

—●—  
No Cross Examination.  
—●—

*Gilbert W. Lunger—Direct.*

GILBERT W. LUNGER, sworn as a witness on behalf of the plaintiff, testifies as follows:

## DIRECT EXAMINATION BY MR. MORROW:

Q. Where do you live? A. Netcong, New Jersey.

Q. What do you do? A. I am engaged in the flour, feed and grain business. 10

Q. Were you in that business in 1911 and 1912? A. Yes, sir.

Q. Did you sell flour to Philip Heinz? A. I did.

Q. How many barrels did you sell him the year ending December thirty-first, 1911? A. 492½ barrels.

Q. That was up to what day? A. From January sixth, 1911, to December fifth, 1911. 20

Q. Do you know how many barrels you sold him after the fifth of December, 1911? A. I sold him probably—or, during the year of 1912, I sold him 130 barrels.

Q. How many did you sell him up until the first of April of that year? A. I sold him from January, 1912, to April twelfth, 1912, two hundred and fifty barrels.

Q. Do you know of his buying flour from other flour dealers? 30

MR. KING: Objected to.

A. I only know what he told me.

Q. Did you see it? A. Yes, sir, I have seen other flour in his store than what I have sold him.

Q. Do you know what dealers? A. Washburn, Crosby & Co. Gold Medal Flour.

Q. Any others? A. I am not sure of any other brand. 40

*Gilbert W. Lunger—Cross.*

*Emma Heinz—Direct.*

CROSS EXAMINATION BY MR. SCOTT:

Q. What brand did you sell? A. We have sold brands—

THE COURT: What brand did you sell?

10 THE WITNESS: I sold him all Spring wheat flour, but I cannot tell you just exactly the brand. Of course, we have several brands of flour that we are handling.

Q. Not one special brand? A. No special brand, no, sir.

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EMMA HEINZ, sworn as a witness on behalf of the plaintiff, testifies as follows:

20 DIRECT EXAMINATION BY MR. MORROW:

Q. You are the wife of Philip Heinz, the plaintiff? A. Yes, sir.

Q. Where did you live in April, 1912, when he was injured? A. Right opposite the Court House.

Q. On Spring Street? A. Yes, sir.

Q. Were you there when he was brought home? A. Yes, sir.

30 Q. Will you tell this jury how long he remained in bed after the accident? A. About three months.

Q. Did you take care of him? A. I did.

Q. What was his condition during that time, as to his ability to help himself? A. He could not help himself for a long time.

Q. During that period, that three months? A. He could not move his arms.

Q. Could he turn over in bed? A. No, sir.

Q. Who turned him over and attended to him? A. Coney Drake used to help me, he was there.

40 Q. Do you remember when he first got out of bed? A. I do not remember the date, no, sir.

*Emma Heinz—Direct.*

Q. Do you remember the fact of his getting out of bed? A. Yes, sir.

Q. Who helped him out? A. I don't remember.

Q. State whether you did? A. I don't remember.

Q. Could he get out of bed himself? A. No, sir.

Q. How long did that continue that he was not able to get out of bed himself? A. I don't know exactly how long it was. **10**

Q. As near as you can tell? A. I should think a week or so.

Q. During that summer, and the fall, what was his ability to walk? A. Oh, he could manage to walk a little with a cane, he could not walk without a cane.

Q. How did he walk when he undertook to walk even with a cane? A. He dragged his limb and his shoulders. **20**

Q. How has it been ever since that time? A. It has been about the same ever since.

Q. State whether or not there has been any improvement in him? A. I don't think so.

Q. What trouble does he appear to have in his head? Have you noticed anything peculiar about that? A. Yes, he holds his head to one side.

Q. Did you see him here on the witness stand? Yesterday? A. Yes, sir. **30**

Q. Did you see the contortions of his face? A. Yes, sir.

Q. And the movements of his hands? A. Yes, sir.

Q. State whether you have ever seen that before? A. Yes, sir.

Q. How much of the time does he do that? A. Well, when he sets up any length of time.

Q. Then he does it? A. Yes, sir.

Q. How much of his time does he spend on his **40**

*Ainslee R. Berry—Direct.*

back? A. Most of the time on the couch or in bed.

Q. So far as you have observed, has he since the thirteenth of April, 1912, been able to do any work? A. No, sir.

Q. Before this accident, what did he do? A. Well, he always helped in the shop and on the  
10 wagon.

Q. Was he busy? A. Yes, sir, all the time.

Q. Do you know anything about the baking business yourself? A. No, sir.

Q. Or what he did? A. No, sir.

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No Cross Examination.

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AINSLEE R. BERRY, sworn as a witness on behalf  
20 of the plaintiff, testifies as follows:

DIRECT EXAMINATION BY MR. MORROW:

Q. Did you work for Mr. Heinz at the time of his accident? A. I did.

Q. How long had you been working for him? A. I think it was nearly eleven years all together.

Q. Prior to the accident had you been working any considerable time? How long before the accident had you worked for him? A. I don't know,  
30 between eight or nine years, something like that.

Q. What did you do? A. I ran a baker wagon out in the country.

Q. What did you take in your wagon? A. Bread, cake, pies, rolls.

Q. How many days a week did you go out? A. I went out six days a week.

Q. Who else went out there? A. We had another driver, Mr. Stackhouse, and there had been two or three other different men while I was  
40 there.

*Ainslee R. Berry—Cross.*

Q. You were there continuously during this time? A. Yes, sir.

Q. Were you familiar with the value of the load when it was taken out? A. Yes, sir.

Q. And were you charged with the value of that load when you took it out? A. Yes, sir.

Q. And were you credited with what was brought back? A. Yes, sir. 10

Q. How much was the average value of the load you took out?

MR. SCOTT: Objected to. I don't think witness has shown any qualification which would entitle him to state that.

MR. MORROW: I will qualify him.

THE COURT: What was the amount you were charged with when you went out?

THE WITNESS: Why, I was charged with the 20  
wholesale price of the things.

Q. How much did that amount to in each load?

A. Well, I should say that would average—why, it averaged from twenty-seven up to thirty dollars. Mr. Heinz speaks of twenty-five dollars, but he is certainly putting it too low there.

Q. Did you sell out generally? A. Most generally I sold out and most times I had stuff shipped to me.

Q. How about the loads the other men took 30  
out, did you sell them, too? A. They took out about the same as I did.

## CROSS EXAMINATION BY MR. SCOTT:

Q. Did you make any records of these things?

A. No, sir, I never kept any book particularly, nothing like that, only what I credited out.

Q. Have you any records, do you know where any records are of the loads that were taken and who took them? A. I had the stuff and I sold 40  
it and the money I brought in.

*Ainslee R. Berry—Cross.*

Q. When did you quit working for Mr. Heinz, what date? A. The fourth of April, I think.

THE COURT: What year? The year he was hurt?

THE WITNESS: The year when he sold out, the last year he was in business.

10 Q. The testimony you have given as regards the load, the value of the load at wholesale prices, etc., that is all from your recollection? A. Yes, sir.

Q. What route did you have? A. I would take different routes; I went to Blairstown, to Branchville, Allamuchy; I went over each trip twice a week.

Q. You made those trips alone? A. Yes, sir.

20 Q. You worked there for Mr. Heinz from the time of the accident up to the April when he sold out? A. Yes, sir.

Q. And you also at that time went over those routes alone? A. I did.

Q. And you handled the business? A. I did, towards the last, till after Mr. Heinz got hurt, then I done the whole of it.

Q. You attended to the furnishing of the customers and the collecting of the money and securing other customers? A. Yes, sir.

30 Q. Now, will you state to the jury why any of those routes fell off? If you know? A. Yes, sir. They certainly did after Mr. Heinz got hurt, they did not before.

Q. Will you explain why? A. That I could not tell, only that Mr. Heinz could not get around to look out for them and the business was not conducted as it ought to have been, as near as I can tell.

40 Q. Is that the only reason? A. That is the only reason I can give you.

*Ainslee R. Berry—Cross.*

Q. Can you give me the name of any person who made any complaint to you? A. Well, there were a couple of stores. That is all I can recollect. Of course, there was some customers along the route.

Q. What stores were they? A. One at Stillwater and one at Branchville.

Q. Who owned the Stillwater one? A. Col. **10**  
Warner.

Q. Is he still there? A. No, sir.

Q. Who owned the Branchville one? A. Taral Shay.

Q. Is he still there? A. Yes, sir.

Q. What were the names of the couple of customers? A. That I don't remember, there was a number of customers on the road, private customers, I could not recollect them.

Q. One or more of them? A. Two of them that **20**  
dropped me.

Q. That was all? A. That was all that dropped me entirely. Of course there was lots of them that did not buy steady off of me.

Q. Did you ever have any of them drop you the year before Mr. Heinz was hurt? A. Not that I can recollect.

Q. You might have had might you not? A. I don't think so.

Q. After he was hurt these two dropped you? **30**  
A. There was quite a few of them after Mr. Heinz got hurt that dropped me.

Q. You only mentioned before two, were there more? A. Well, there was more of them, but they would not buy steady off of me, they had been buying steady and they did not buy steady off of me after he got hurt, any more.

Q. Can you mention the name of anyone of them? A. I could not; not particularly now. For I dealt with everybody, you might say. **40**

*Ainslee R. Berry—Cross.*  
*Motion for Non-suit.*

MR. MORROW: I have a witness under subpoena who has not appeared in Court; his name is Wolf Stackhouse, and if I may reserve the right to call him should he appear before the conclusion of the testimony, I will rest now.

10 MR. KING: We have no objection to that.

THE COURT: Very well, that reservation may be noted.

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PLAINTIFF RESTS.

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MR. SCOTT: I ask for a non-suit on the grounds:

20 First: That there was no evidence of negligence upon the part of the defendant Company.

30 Second: The plaintiff was guilty of contributory negligence, and in urging this reason I desire to inquire of the Court whether the Court feels bound under the law, as it apparently exists on the statute books, to refuse my application. My reason of contributory negligence is that, taking the testimony of Heinz and admitting, for the sake of argument, that it is all true and most favorable to him, we have the position of a man going up to a crossing, with no obstruction to the view, with the view seven hundred and thirty-six feet, with a train running at thirty miles an hour, and then going back from the crossing, fifty feet from the crossing, as Randall testified, and getting into a wagon and driving over the crossing, without looking, listening or stopping.

40 And taking Mr. Heinz's testimony alone, that he was right near the crossing, he was right by the first rail

*Catharine Sullivan—Direct.*

when he looked and the wagon was nearer than Randall says it was, then I say when Mr. Heinz says he looked for that train, in the eyes of the law, Mr. Heinz saw that train, because the law recognizes the physical laws of the rumbling of the train the view that the man would have if he looked as he said he did and all those facts and circumstances. So I say, taking Mr. Heinz's testimony that he looked and he was only two or three feet from the crossing, then I contend that Mr. Heinz saw that train and if he did not see that train then his testimony is false that he looked; and, on the ground that Mr. Heinz saw that train, or, in the eyes of the law saw the train, I ask for a non-suit. And I urge this irrespective of the Crossing Act of 1910.

THE COURT: I think there is a jury question here; I will deny the motion.

Motion denied; defendant excepts.

---

CATHARINE SULLIVAN, sworn as a witness on behalf of the defendant, testifies as follows:

DIRECT EXAMINATION BY MR. KING:

Q. Where do you live? A. No. 62 Ward Street, Orange.

Q. You are a teacher? A. Yes, sir.

Q. How long have you been a teacher? A. I started the first of October of last year.

Q. Where did you teach from October, 1914, to March, 1915? A. In St. Lucy's Parochial School, in Newark.

Q. Did you have there among your pupils a boy by the name of Antonio Minnichio? A. I did.

*Catharine Sullivan—Direct.*

Q. Is this the boy in Court? A. I saw him this morning, yes, sir.

Q. Did you see him in Court this morning? A. No, I saw him Tuesday.

Q. (A boy is exhibited to the witness.) Is that the boy? A. Yes, sir.

Q. Were you his teacher? A. Yes, sir.

10 Q. From what time to what time? A. From the first of October to the fourth of March.

Q. The first of October, 1914? A. The first of October, 1913.

Q. Is it 1913? A. No, 1914, to the fourth of March, 1915.

Q. Have you a record of the number of days that he attended school? A. Yes, sir.

Q. Can you tell me?

20 MR. MORROW: Objected to.  
Objection sustained; defendant excepts.

Q. Have you a record before you of the number of days that he attended school, the record kept by yourself?

MR. MORROW: Objected to.  
Objection sustained; defendant excepts.

Q. Does your record show the number of days that this boy attended the school?

30 MR. MORROW: Objected to.  
Objection sustained; defendant excepts.

MR. KING: To save time I make the offer now to prove by this teacher that this boy has been attending her school from October, 1914, to March, 1915. I offer to prove the number of days he attended, by the record which she kept.

40 MR. MORROW: Objected to.  
Objection sustained; defendant excepts.

Q. When this boy was in your school, did you

*Catharine Sullivan—Direct.*

notice as to whether he was an ordinarily bright boy?

MR. MORROW: Objected to.

Objection sustained; defendant excepts.

Q. He was of Italian parentage? A. Yes, sir.

Q. Were there other Italian pupils there in your school room? A. Yes, sir, it is mostly an Italian school. 10

Q. How did this boy compare with the other pupils in the school room mentally?

MR. MORROW: Objected to as immaterial.

Objection sustained; defendant excepts.

MR. KING: In view of the objections that is as far as I can examine this witness, and I have another witness as to the same matters Mrs. Myrick, whom I should like to call. 20

THE COURT: If you are right in your contention that it is the defendant's right to introduce this evidence the Court will protect you and reverse my ruling if I am in error; but there is no reason why the same ground should be gone over again on the trial.

MR. KING: All I can say now is I offer now to show that this boy collected a judgment of seventy-five hundred dollars from the defendant company in that suit on November sixth, 1913, and that notwithstanding that he was in school within three months thereafter as the information is handed to me. Now, I think that is material, that is, the time, the fact that he was in school at that time is material to show how far a man may be off in his surmises. 30

MR. MORROW: We object to the evidence. 40

Objection sustained; defendant excepts.

*Sadie Cooper—Direct.*

MR. KING: I wish to withdraw the statement that I made that the judgment was paid November sixth. I see by the memorandum that the judgment was satisfied October thirteenth, although the money was paid November sixth, unless it was done in anticipation of that payment. I want to be accurate about it.

10

MR. KING: I offer to prove those matters by competent evidence.

MR. MORROW: Objected to.

Objection sustained; defendant excepts.

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SADIE COOPER, sworn as a witness on behalf of the defendant, testifies as follows:

DIRECT EXAMINATION BY MR. SCOTT:

20

Q. Where do you live? A. At Andover.

Q. Did you live there in April, 1912? A. Yes, sir.

Q. Did you live near High Street? A. Yes, sir.

30

Q. Will you turn around and look at that map on the board, Plaintiff's Exhibit P-1, call your attention to that black mark there where it is marked High Street and also a place marked Public Road, did you live on the side nearest the Public Road or on the other side of the railroad track? A. On the other side.

THE COURT: Did you live on the same side as Totten lived?

THE WITNESS: No, sir. On the other side.

Q. On the other side of the railroad track from Mr. Totten? A. Yes, sir.

Q. The other side of High Street? A. Yes, sir.

40

Q. But on the same side of the railroad track? A. No, on the same side as the barn.

*Sadie Cooper—Direct.*

Q. On the same side of the railroad track? A. Yes, sir.

Q. How far was your house from the High Street crossing there? A. About a hundred and thirty-five feet.

Q. Do you know Mr. Heinz? A. No, sir.

Q. Do you know him by sight? A. Yes, sir.

Q. Do you remember an accident happening there in April, 1912? A. Yes, sir. 10

Q. Before that accident happened had you been out and around that morning, or not? A. Yes, sir.

Q. How long before the accident had you been around outside of your house? A. Just a few minutes.

Q. What were you doing? A. I was looking for the children.

Q. In looking for the children did you have occasion to look down toward High Street crossing of the railroad? A. Yes, sir. 20

Q. Will you tell us whether, when you first looked down toward the railroad crossing you saw Mr. Heinz or not? A. I did not.

Q. What have you to say as to the first time you saw Mr. Heinz? A. I did not see him till after the train struck.

Q. What have you to say as to when you first saw the wagon? A. Why, I saw it coming down the road just after the train whistled. 30

Q. Which way was it coming? A. From toward Netcong, toward that way.

Q. You say you saw the wagon coming from Netcong? A. From that way, yes, sir.

THE COURT: Before it got to the turn into High Street?

THE WITNESS: Yes, sir.

Q. When it got down on the Turnpike near 40

*Sadie Cooper—Cross.*

High Street what have you to say as to whether you saw it or not? A. I saw it, yes, sir.

Q. What have you to say as to whether Mr. Heinz walked up to the railroad track and looked down the railroad track from the time you saw the wagon below the junction of the Netcong and Stanhope Road and High Street? A. He did not.

10 Q. What have you to say as to whether you were in a position to have seen him? A. Yes, sir.

THE COURT: Did you see him on the ground at all from the time the wagon reached the junction of the Turnpike and High Street until he was struck?

THE WITNESS: No, sir.

20 CROSS EXAMINATION BY MR. MORROW:

Q. He might have come up the Turnpike then without seeing him, might he not? A. I don't see how he could.

Q. You did not see him at all that day until after he was struck? A. No, sir.

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

Q. From anything you saw? A. No, sir.

Q. Did you see the other man in the wagon?

30 A. I saw one man, but I could not tell which one it was.

Q. You saw one man in the wagon? A. Yes, sir.

Q. And only one man? A. Yes, sir, only one.

Q. Where did you see him first? A. Sitting on the seat.

Q. Where was the wagon when you first saw him? A. Near Mr. Totten's barn, right across from Mr. Totten's barn.

40 THE COURT: Do you mean on the Turnpike or on High Street?

*Sadie Cooper—Re-Direct.*

THE WITNESS: No, on the Turnpike.

Q. Coming up toward High Street? A. Yes, sir.

Q. One man? A. Yes, sir.

Q. How long did you see that one man? A. Not very long.

Q. Until the wagon turned up into High Street? A. Yes, sir. 10

Q. How far up into High Street did you continue to see that man in the wagon? A. Well, I saw him until the train struck.

Q. And all that time that you saw the wagon come up the Turnpike and up High Street until the train struck the wagon, you saw only one man in the wagon, is that it? A. Yes, sir.

Q. And that was not Mr. Heinz? A. Well, I could not say who it was; I only saw one man.

Q. And you did not see two men there at all? A. No, sir. 20

Q. Where was the wagon when the train struck it? A. The mules were in the middle of the track.

Q. How much of the mules were on the track? The mules were entirely on the track? A. Yes, sir.

Q. Was any part of the wagon on the track? A. I don't think so, no, sir.

Q. Did you see Mr. Heinz after the accident? A. Yes, sir. 30

Q. Where was he? A. When they were putting him on the train.

Q. Did you see them pick him up off the ground? A. I did not see them pick him up, but I saw him when they were putting him on the train.

Q. Did you know where he came from? A. No, sir.

RE-DIRECT EXAMINATION BY MR. SCOTT: 40

Q. When was it you saw two men on the wagon? A. When they picked him up and put him

*John Drake—Direct.*

on the train, that is the first I knew there was two men.

Q. What have you to say as to whether you saw any other person aside from the person you saw in the wagon looking out from any part of the wagon? A. No, sir, I did not see anybody.

10 Q. You saw the wagon struck? A. Yes, sir.

Q. And as it went over did you see Mr. Heinz? A. I did not see him till they put him on the train.

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JOHN DRAKE, sworn as a witness on behalf of the defendant, testifies as follows:

DIRECT EXAMINATION BY MR. SCOTT:

20 MR. SCOTT: While the officers are putting that map up, I would like to read Mr. Clarke's testimony. I am ready to prove that Mr. Clarke has died since the accident.

MR. MORROW: If you say so, that is enough. You may use the map.

MR. SCOTT: Judge Morrow agrees that is the map made by Mr. Clarke and used upon the other trial and testified about in the previous trial. Mr. Clarke is dead. I offer  
30 the map in evidence.

Admitted and marked "Defendant's Exhibit D-7" of this date.

BY MR. SCOTT:

Q. You are familiar with the map on the wall? A. Yes, sir.

Q. Will you give me the measurements from the mouth of the cutoff to the centre of High Street? A. 1097 feet.

40 Q. From the centre of High Street to the next street toward Andover station, what is the distance? A. 347 feet.

*John Drake—Direct.*

Q. From the mouth of the culvert down to the street north of High Street, will you give me the grade of the track? A. It is only just about one per cent.

THE COURT: Going down toward the crossing?

THE WITNESS: Going down toward Andover, 10  
toward the crossing.

Q. And, it begins where, with reference to the culvert? A. I should say about a mile from the culvert, a mile south of the culvert.

Q. Toward Netcong? A. Toward Netcong, yes, sir.

Q. Do you know the width of the culvert? A. About forty feet.

Q. That is north to south? A. No. That is what we call the length of it. 20

Q. What is the opening part of the culvert?

THE COURT: He says forty feet.

THE WITNESS: Forty feet from side to side, measured across the tracks.

Q. What is the distance between the south side of the culvert and the north side of it? A. About eighty seven feet.

Q. Will you state what the degree of curve of the track is from the mouth of the culvert down to the High Street crossing? A. It is a two degree curve. 30

Q. And from High street crossing down to the crossing next north? A. That is practically all straight.

MR. MORROW: Point that on the map where it is a two degree curve.

THE WITNESS: The two degree curve is from here to the culvert (indicating) and from this crossing down to the other is practically straight. 40

*John Drake—Direct.*

MR. MORROW: It is a two degree curve from the culvert to High street?

THE WITNESS: Yes, sir.

Q. Have you with you a profile drawn by Mr. Clarke? A. Yes, sir.

10 MR. SCOTT: If the Court please, that profile was also used on the former trial in Mr. Clarke's testimony.

MR. MORROW: Yes, that is right; we have it.

THE COURT: That will be admitted then.

Admitted and Marked "Defendant's Exhibit D-8" of this date.

Q. You are familiar with that profile? A. Yes, sir.

20 Q. What does that represent? A. The darker line represents the top of the cut on which the track runs for the greater part of the distance, and this blue line represents the top of the rail.

Q. Is there anything shown on there relative to the public road? A. And here is a brown line which represents the centre of the public road, the grade of it.

Q. From High street toward the culvert is that public road represented on that profile? A. Yes, sir.

30 Q. And will you run your finger along the centre of the public road from High street? A. Here is High street, and this line to which the pencil points, the brown line, is the grade of the public road, it follows, as the pencil is now running, to there, then it is gone farther than that.

MR. MORROW: Where does it get to toward the culvert, the public road?

40 THE COURT: How far does the line extend, to what point does it extend?

*John Drake—Cross.*

THE WITNESS: That would be about seven hundred feet from High street.

Q. Above on that profile there are blue marks showing what? A. About there are three green lines, the lowest of which represents the height of the bottom of the engine cab window above the earth, the line above that, the green line above that represents the top of the cab window, and the highest line, the highest green line, is the highest point on the locomotive. 10

Q. And that is continued down to High street?

A. That is continued down to High street.

MR. SCOTT: In Mr. Clarke's testimony it appeared that in fixing those lines the engine used was engine No. 515, the engine here in question.

MR. MORROW: We will admit whatever Mr. Clarke's testimony says on that, that his testimony as taken shall be taken as true, just as though he was here to prove it. 20

MR. SCOTT: Then it will be agreed that the engine markings shown on that profile represent the grade of the engine here in question.

MR. MORROW: Yes.

30

## CROSS EXAMINATION BY MR. MORROW:

Q. What does the dip at the right hand end of your diagram Exhibit D-8 indicate. A. That represents the brown line at the side of the track just as the track comes out of the culvert, it runs across quite a high spot there. The culvert is right here.

Q. That is the culvert under the cutoff? A. Yes, sir.

Q. Now, mark the line of the track as it comes from the culvert? A. That is this blue line. 40

*John Drake—Cross.*

Q. And that runs to where? Up to High street crossing, a little beyond? A. Yes, sir.

Q. And the public road? A. That is the brown line.

Q. And the public road drops away from the—  
A. Beyond this point, yes, it drops down to approximately this part here.

10 Q. Where is High street on the lower map Exhibit D-17? A. This is High street (indicating).

Q. Marked High street? A. It is marked High street.

Q. Is the curve a uniform one from High street to the culvert? A. Yes, sir, the curve is uniform from about this point to High street, from a point about three hundred feet north from the culvert to High street it is a uniform curve of two degrees.

20 Q. Is the line here marked 50 on the brown line, the brown line coming down which intersects the curve, is that about half way between High street and the mouth of the tunnel? A. It appears to be a little closer to the mouth of the tunnel than High street.

Q. Where is the greater curve? From that point toward the tunnel or from that part toward the crossing? A. From that part toward the tunnel.

30 Q. That is the greater curve? A. Yes, sir.

Q. From the point fifty toward High street it is much straighter line if you take the whole distance along, is it not? A. That is a two degree curve from here to here.

Q. What is the other one? A. The other is about three degrees.

40 Q. So that a train approaching High street crossing from the mouth of the culvert, until it gets to Number fifty goes around a fifty per cent. more curve, does it not? A. That is right.

*Watson B. Bunnell—Direct.*

WATSON B. BUNNELL, sworn as a witness on behalf of the Defendant, testifies as follows:

DIRECT EXAMINATION BY MR. KING:

Q. You are employed by the Railroad Company?

A. Yes, sir.

Q. As photographer? A. Yes, sir.

Q. Did you make a photograph of the scene of High street down to Andover? A. I did. 10

Q. I show you a photograph which has been marked D-3 for identification and ask you if you made that photograph? A. I did, yes, sir.

Q. Does that correctly represent the situation as it exists to your memory at the time you took it? A. It does.

Q. When was it taken? A. April nineteenth 1912. 20

MR. SCOTT: I offer this photograph in evidence.

Admitted and Marked "Defendant's Exhibit D-3" of this date.

Q. I show you another photograph and ask you if you made that, and if it fairly represents the condition on the crossing as shown there through the camera in the direction in which it was placed?

A. Yes, sir, I took that and it is a correct representation of the crossing. 30

MR. SCOTT: I offer this photograph in evidence.

Admitted and Marked "Defendant's Exhibit D-9" of this date.

Q. I show you another photograph which has been marked for identification "Defendant's D-2" and ask you if you also took that? A. I did.

Q. And does it correctly represent the situation shown on the photograph? A. It does. 40

*Watson B. Bunnell—Cross.*

MR. SCOTT: I offer this photograph in evidence.

Admitted and Marked "Defendant's Exhibit D-1" of this date.

CROSS EXAMINATION BY MR. MORROW:

10 Q. Won't you please look at the photograph Exhibit D-3, what is this triangular looking space here? A. That is the forks of the two roads as they approach, that is, out of the main Netcong Road into the High street approach to the crossing.

Q. There is a fence shown there, is there not? A. Yes, sir.

Q. There are four or five bars which look like a fence there? A. Yes, sir.

20 Q. Did the road from Netcong come right along the line above that three cornered piece? A. Yes, sir.

Q. And then it went over the track? A. Yes, sir.

Q. The road on the upper side of that three cornered piece came down from Andover, did it not? A. Yes, sir.

Q. And went up over the track at the same place? A. Yes, sir.

30 Q. That photograph does not show much of the actual crossing, does it? A. It shows the roadway up to the crossing; it was intended to show the crossing also.

Q. What is the building above that telegraph pole there? A. That is a barn.

Q. That is Totten's barn? A. I suppose so, from the testimony.

40 Q. Looking at that barn in this picture it would seem to be very close to the road coming up from Netcong, would it not? A. Rather, yes.

*Watson B. Bunnell—Cross.*

Q. That is owing to the way you put your camera, is it not? A. The ground is a little higher and you are looking level with the road, it don't show all the land practically.

Q. That barn, as a fact is a hundred and sixty feet down from the crossing, is it not? A. That is what I understand to be the testimony.

Q. Now, look at Exhibit D-9, that shows you in front of the telegraph pole that actual crossing doesn't it? A. Yes, sir. 10

Q. That shows it very clearly? A. Yes, sir.

Q. There is a road leading up to the crossing right by the telegraph pole? A. Yes, sir.

Q. To the left of that road going down is that the Netcong road? A. Yes, sir.

Q. And the other road comes down from Andover? A. Yes, sir.

Q. And there is a little three cornered piece in there? A. Yes, sir. 20

Q. That is not there now, is it? The whole road is covered over as a road way? Or don't you know? A. I don't know.

Q. Was that green grass there in that corner? A. I think so, yes.

Q. At that time? A. It was at the time this picture was taken.

Q. There is no green grass there now? A. I could not tell you that. 30

Q. Has not that centre of the road been changed since this accident? A. I could not tell you.

Q. Did you observe that the rail of the railroad has a joint? A. Just about the middle do you mean?

Q. Yes, just about the middle of the wagon track over it? Or don't you know that? A. How is that again?

Q. Isn't there a joint in the rail of the track nearest to High street on the lower side, about 40

*Watson B. Bunnell—Cross.*

midway between the crossing? Or, don't you know anything about that? A. Well, judging by the joint above, I should think there would be a joint about the middle of the road.

Q. The middle of the road as it was then? A. Yes, sir, at the time that picture was taken.

Q. You don't know anything about it now, do you? A. No, sir.

Q. In coming up from Netcong with a wagon one would come up around here at the bottom of this picture, below that three cornered piece there?

A. Not from Andover? Did you say?

Q. I mean from Netcong? A. Yes, sir.

Q. Right up around this way? A. Yes, sir.

Q. And then turn and go at right angles to that road, wouldn't he, or practically so? A. Yes, sir.

Q. But that picture does not show that, does it? That picture makes that a very acute angle, doesn't it? A. Looking across the angle it is a kind of a natural curve as anyone would drive a corner of that kind.

Q. And is the road in a straight line from its junction with the Turnpike road until it gets over the crossing? A. No, I would not think so, it is a kind of a big curve.

Q. The roadway of High street passed up along there doesn't it? A. It goes right straight up the hill from there.

Q. That house which stands at the left hand side of your picture, is that on the right hand side of High street as you go over the track from the Netcong road? A. Yes, sir.

Q. And the next house is also so? A. Well, that is quite a ways back there, it is, I should judge the next street above.

Q. This picture does not show Totten's house does it? A. I don't know where Totten lives.

*Watson B. Bunnell—Re-Direct.*

Q. Totten lives in the first house on the left hand side as you go over the crossing? A. No, it does not show that.

Q. You have not got any diagram that shows his house at all, have you? A. I could not say as to that.

Q. Look and see if there is any there that shows this whole situation? A. (The witness examines the photographs.) **10**

Q. There is not is there? A. There appears to be a house, I don't know if it is a wagon shed in the rear of this barn here. I don't know whose house it is. The Totten house I should judge was just off the picture, off the edge of the picture there.

Q. But it does not show? A. No, sir.

RE-DIRECT EXAMINATION BY MR. SCOTT: **20**

Q. Totten's barn, you have stated you don't know whether it is or not? A. I don't know whether it is or not.

Q. You are just stating from what you have heard in the testimony in this case? A. That is all.

MR. SCOTT: We now offer in evidence the certificate of the Clerk of Nassau County, certified to by the Judge of the Court, as to the clerk's signature, that he has searched the records of the Courts in the County of Nassau from the inception of Nassau County to date, which was March 25, 1915, for any action or suit brought against the Union Railroad Company by any plaintiff whose name was Barnes, from January 1st, 1899 the inception of the County of Nassau to date and that he fails to find any such record where any suit was brought. **30**  
**40**

*William E. Wilson—Direct.*

10 MR. MORROW: I shall object to that. That is not a copy of any record. It is only a conclusion which someone comes to on what he does not find, and I think our Supreme Court decided a number of years ago that an officer cannot certify to what his record does not show. He must give copies of the records. It is not for him to say what the records do not show. All he can certify to is a copy of the record and nothing else.

THE COURT: I will overrule the offer. I think there are objections to it besides the one given. I do not think it is admissible. Defendant excepts.

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20 WILLIAM E. WILSON, sworn as a witness on behalf of the Defendant, testifies as follows:

## DIRECT EXAMINATION BY MR. SCOTT:

Q. Do you know Mr. Heinz? A. I do.

Q. And you have known him for how long? A. For a number of years.

Q. What is your business? A. Painter and paper hanger.

30 Q. On April 13, 1912, what was your business? A. I was a painter at that time.

Q. Do you know where High street in Andover is? A. I do.

Q. Were you working down in that neighborhood at that time? A. Yes, sir.

Q. With whom were you working? A. I was working alone.

Q. For whom were you working? A. For Mrs. Decker.

40 Q. Will you turn around and look at the Defendant's Map Exhibit D-7 on the wall and see if

*William E. Wilson—Direct.*

you can locate High Street? A. Yes, sir. Here (indicating).

Q. With reference to the High Street crossing of the railroad can you indicate by a "W" where you were on the morning of April 13, 1912? A. Well, I should judge about where I show here. Do you want me to make a "W" here?

Q. Yes. A. (The witness marks the map). 10

Q. You were working on High Street? A. Yes, sir.

Q. About how far would you say that was from the crossing? A. About a hundred and forty to a hundred and fifty yards.

Q. Were you at that time familiar with the running of trains on the Sussex Branch toward Andover? A. Yes, sir.

Q. Were you familiar with the morning train? A. Yes, sir. 20

Q. About ten o'clock or a little thereafter on that morning, do you recollect what you were doing? A. I do.

Q. Will you tell the jury? A. I was painting in the second story, in the front room of Mrs. Decker's dwelling.

Q. At that time, what have you to say as to whether you heard the approach of any train? A. The first I heard of the approach of a train was a whistle, the crossing whistle, the four blasts. 30

Q. And after you heard the four blasts, or at the time you heard the four blasts, did you do anything? A. I did.

Q. Will you tell the jury what you did? A. May I go into just a little detail?

Q. Just tell the jury what you did? A. It was a Saturday morning, and I was very anxious to finish painting a room and the hall that I might go— 40

*William E. Wilson—Direct.*

THE COURT: You are asked what you did not what you were thinking about.

THE WITNESS: All right.

THE COURT: What did you do?

THE WITNESS: I was painting a room; painting a door at the time the whistle blew.

10 Q. At the time the whistle blew, what did you do? A. I was a little surprised at its being so late and pulled out my watch to see if it was Mr. Zeek's train coming.

Q. What time was it? A. I think it was about sixteen or eighteen minutes after ten o'clock.

Q. After you heard the four blasts of the whistle what have you to say as to whether you heard any other blasts of the whistle? A. I heard another whistle, yes, sir.

20 Q. And do you know whether it was a whistle of a similar character? A. It was a whistle of the same character.

Q. Will you describe to the jury the nature of the second whistle you heard? A. Well, I would take it as a warning whistle.

Q. By that you mean what?

THE COURT: You thought it was the same locomotive, did you?

30 A. Yes, sir.

Q. By warning whistle you mean what? A. I would take it that it was a note of danger.

Q. What was the character of it? What was there to indicate that? A. It was a shrill, sharp whistle.

Q. About how long after you heard the crossing whistle was it that you heard this shrill whistle? A. Well, I should think about five seconds, I mean about five or six seconds. I don't know just the  
40 length of time it was.

*William E. Wilson—Cross.*

Q. Could you tell from the four whistles where the train was at the time? A. It was between the culvert and the crossing, but where I don't know. I would suppose it was just out of the culvert.

MR. MORROW: Never mind about supposing.

## CROSS EXAMINATION BY MR. MORROW:

10

Q. You have been examined somewhat about this matter before, haven't you? A. I have.

Q. You were cross examined by Judge Huston weren't you? A. I was.

Q. And didn't you say to him in answer to a question put by him: "I had my watch out and found it was somewhere near 10:14 and that is the way I knew it was George Zeek's train blowing four blasts for the crossing, and immediately I won't say immediately, just shortly after, I heard the distress signal or warning signal, whichever you may call it." Did you say that? A. That is principally the same thing. 20

Q. I ask you if you said that? A. I presume I did.

Q. What do you recall about it? A. It will take that space I suppose.

Q. You say then that you heard four blasts for the crossing? A. Yes, sir.

Q. What crossing do you mean? A. The High street crossing, I presume. 30

Q. Why did you say "immediately or just shortly after I heard the distress signal." A. Well, why did I say it?

Q. Yes. A. Well, I presume it was because it happened.

Q. When you were testifying before you thought first you heard the distress signal immediately after you heard the four blasts didn't you? A. I don't think I testified to that. 40

*William E. Wilson—Cross.*

Q. When you first said immediately after didn't you then think it was immediately after the four blasts that you heard the warning signal? A. Did I say in that testimony immediately, or shortly thereafter?

10 Q. That is what you said first? "I knew it was George Zeek's train blowing four blasts for the crossing and immediately—" now, when you said that "and immediately" what was in your mind then, that the warning blast occurred like that (indicating) after the four first whistles?

MR. KING: May we not have the whole answer read? We object because he has not read the whole answer.

THE COURT: I will admit the question. Defendant excepts.

20 Q. I am reading the answer to you?

THE COURT: Let him answer it if you want an answer.

Q. When you said first I heard Zeek's train blowing four blasts for the crossing, and immediately, when you used that word immediately, didn't you think the warning blasts came right after the four blasts? A. Very quickly after, yes, sir. I still say that, very quickly.

30 Q. Further on in your cross examination you were asked: "Q. How long was it after that that you heard the long blast." That is the warning whistle? "A. Well, I have no way of knowing that, I think it was a very short space of time."

Q. And did not Judge Huston then ask you: "Q. Well, within two or three seconds?" And your answer: "A. Well, I should say between somewhere around five seconds, four or five seconds," Is that what you say now? A. That is what I say  
40 now, yes, sir.

*William E. Wilson—Cross.*

Q. How long had you worked at that house?

A. Well, if I recollect I began that morning.

Q. What time? A. Seven o'clock.

Q. Did you hear any other whistles blowing for that crossing that morning? A. I have no recollection of them.

Q. Had you at any time recollection of them? If you have not any recollection now, had you at any time any recollection of hearing any other whistles blow that morning? A. I don't know, sir. **10**

Q. You have no recollection of hearing any whistles blow that morning, until you heard these four blasts, is that right? A. I don't know that I did.

Q. Were you hurrying up with your work? A. I was.

Q. And intent on getting it done? A. I was. **20**

Q. And you were not giving attention to whistles at all? A. Not particularly, no, sir.

Q. Are you accustomed to hearing whistles on the Sussex Road? A. Yes, sir.

Q. And on the cutoff of the Lackawanna Railroad? A. Not very often on the cutoff, no, sir.

Q. They had finished its construction in the Spring of 1912 and you had heard whistles up there before? A. Very seldom.

Q. Sometimes? A. I don't know that I did. **30**

Q. Don't you know whether you ever heard one at all? A. I don't know that I have.

Q. You did hear whistles on the Sussex Road? A. Yes, sir.

Q. Was there anything about any whistle you ever heard on the Sussex Road that attracted your attention? A. Why, yes.

Q. What was that? A. The peculiar whistles of the different trains.

Q. You noticed that did you? A. Yes, sir. **40**

*John W. Thorpe—Direct.*

Q. Do you know Coley Drake? A. Do I know who?

Q. Coley Drake (A man called Drake is asked to stand up in the Court room). Do you know that man? A. Yes, sir.

Q. Did you have a talk with him about these whistles at the house of Charley Meyers in Andover last Fall? A. I don't know that I did.

Q. At any time? A. I don't know that I did.

Q. Didn't you have a conversation with him or someone in his hearing and presence about this? A. I don't know that I did.

Q. And didn't you say there in his hearing that you had not heard any whistles but they made you hear the warning signal and they kept at you and kept at you and at last you told them yes, you had heard the signals? A. I did not.

20

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JOHN W. THORPE, recalled as a witness on behalf of the Defendant, testifies as follows:

## DIRECT EXAMINATION BY MR. SCOTT:

Q. What is your business? A. At present I am water superintendent of Netcong.

Q. And you have been such for how long? A. About three years.

30 Q. Were you at one time in the employ of the Lackawanna Railroad? A. Yes, sir.

Q. How did you come to leave the service? A. Because I did not wish to work any longer.

Q. You retired from the service? A. I retired, yes, sir.

Q. Up to the time you left the employ of the Railroad Company how long had you been employed by the Railroad Company in all? A. Since March 5th, 1886.

40

*John W. Thorpe—Direct.*

Q. You had served in what capacities? A. As fireman and engineer.

Q. How long had you been an engineer prior to leaving the service? A. About eighteen years.

Q. In 1912 did your run take you on the Sussex Branch? A. Yes, sir.

Q. From what point did your run start on the morning of April thirteenth? A. At Port Morris. **10**

Q. And you ran from Port Morris to where? A. From Port Morris to Branchville the first trip, and Port Morris to Franklin the second trip and Port Morris to Newton the third trip.

Q. Did you see Mr. Heinz the plaintiff in this action, in April, 1912? A. I did, yes, sir.

Q. In the neighborhood of High street, Andover? A. Yes, sir.

Q. On that morning that you saw Mr. Heinz, can you tell us what engine you were running? **20**  
A. Number 515.

Q. You had started from Port Morris that morning? A. Yes, sir.

Q. About what time did you see Mr. Heinz? A. Well, I saw him—we struck the rig Mr. Heinz was in at 10:13 about 10:13, it was 10:13 when the engine stopped.

Q. In approaching the High street crossing on the morning that you saw Mr. Heinz in April, can you tell the Court what was the condition of the rails, the track? A. It was raining slightly. **30**

Q. What would be the condition, or what was the condition of the rail? A. The rail was all right, only wet, that is all.

Q. Have you any recollection of what steam pressure you were carrying? A. Well, I could not say positively, but I think 165 pounds.

Q. Do you know what is known as pipe line pressure? A. You said steam pressure.

Q. I said steam pressure? A. You mean the air. **40**

*John W. Thorpe—Direct.*

Q. Yes, what was the pressure on the air? A. Ninety pounds train line, and 110 pounds main reservoir.

Q. When you left Netcong on the morning in question were you on time? A. I was four minutes late.

10 Q. What have you to say, as you approached the High street crossing on the morning in question, where you started your bell ringing? A. Just as I was leaving the tunnel, was leaving the cutoff culvert.

Q. Will you tell the jury how you started that bell ringing? A. By a little valve that is in the air line that runs to the bell, the bell ringer.

Q. How did you turn the air on the bell? A. There is a little valve and you can turn it very easily with your two fingers.

20 Q. After you started the bell ringing, will you tell the jury how it operates? A. Well, if I understand it right; I don't know as I can give the mechanical explanation of it, but what I have seen of it works one way, the same as the automobile engines.

Q. I have in mind whether the bell ringing is continuous or not? A. It is continuous, yes, sir; certainly, till the air is turned off.

30 Q. How do you stop the bell ringing? A. You shut it off.

Q. Will you tell the jury, where, after you turned the air on the bell, on the morning in question near the cutoff, where you turned it off, if at all? A. I did not turn it off till after I got stopped and got down on the ground, and I forgot to shut it off and got back on the engine and shut it off.

Q. Will you turn around to the map Exhibit D-7, and see if you can find the High street crossing on there? A. Yes, this is High street.

40 Q. With reference to the High street crossing,

*John W. Thorpe—Direct.*

where was it that you stopped your train the morning that you saw Mr. Heinz? A. It was here (indicating).

Q. Where was your engine when you pulled to a stop with reference to the High street crossing or the crossing next north? A. This is the next crossing north or west.

Q. And when your engine or train was stopped, what have you to say as to whether the engine was on the next crossing north or not? A. It was not very much of it on the crossing, I don't think. **10**

Q. It was not very much of it on the crossing? A. No, sir. I don't think there was scarcely any of it on the crossing.

Q. About how far, in your recollection, was it from the crossing next north of High street? A. Oh, it was only a few feet. I did not measure it, but it was very close to the crossing. **20**

Q. As you approached the High street crossing, will you tell the jury what you have to say as to whether you blew any whistles at all on the day of the accident? A. As soon as I cleared the culvert of the cutoff, I blew the regular crossing whistle, two long and two short.

Q. And, in using the expression "as soon as I cleared the culvert" will you give me some more detail, will you express that in feet measurement if you can? A. Oh, well fifty or seventy-five feet probably. **30**

Q. Fifty or seventy-five feet from the mouth of the culvert? A. Yes, sir; probably a little more.

Q. And after you blew the crossing whistle, will you state whether you had occasion to whistle again? A. Yes, sir. I had not much more than let loose of the lever before the fireman hollered, he says, "There is a team, blow your whistle." And I pulled the whistle, the whole length of it. **40**

THE COURT: Where were you then?

*John W. Thorpe—Direct.*

THE WITNESS: Well, I was this side, a little north of the ringing post.

THE COURT: How far is that about from the crossing?

THE WITNESS: I could not tell you.

Q. Can you indicate on this Exhibit D-1, about  
10 where you were when you blew the second whistle?  
A. Well, there is a switch here, about five hundred feet, and I think I was about half way to that switch to this ringing post.

MR. MORROW: Which ringing post?

THE WITNESS: The first ringing post.

Q. This ringing post? A. No, not that one; that is the one next to the crossing; I don't think you can see the other one on that picture.

Q. Here is the switch, is it not? A. I think I  
20 was about half way between that and the first ringing post, below the culvert.

Q. You were further down than the switch post? The switch post which I have pointed out to you?

A. Further up, not down.

Q. Further down toward the culvert? A. Yes, sir; that is up, pretty steep too.

Q. I will mark that with a "T" right here? A. Yes, sir.

MR. MORROW: Don't the map show where  
30 that switch stand is there?

THE WITNESS: I don't see it. Yes, there it is. That signal post. That is the two of them together there.

MR. MORROW: At the same place?

THE WITNESS: That there is a semaphore, they are both right close together.

THE COURT: It is marked on the map Ex-  
40

*John W. Thorpe—Direct.*

hibit D-7, by the word "Whistling post" is it not?

THE WITNESS: Yes, sir; that is the whistling post.

Q. Can you indicate on the map where you were when you blew the alarm whistle? A. I was in here (indicating).

Q. I am talking about the alarm blast? A. I was somewhere in here (indicating). 10

Q. With reference to the whistling post on the map, were you nearer the culvert or nearer High street? A. Nearer to High street, that is when the warning blast was let off.

THE COURT: About how far from the whistling post toward High street?

THE WITNESS: About a hundred feet. 20

THE COURT: And your crossing whistle was blown at that point?

THE WITNESS: As I came out of the culvert.

THE COURT: Between the culvert and the place marked whistling post?

THE WITNESS: Yes, sir.

Q. About how long after you came out of the culvert was it before you blew the crossing whistle? A. Not over five seconds, hardly that; four seconds, not over four seconds, I don't believe. 30

Q. You have already said you were forty or fifty feet out of the tunnel when you blew the crossing whistle? A. Fifty or seventy-five feet I said, didn't I?

Q. Now, will you continue and tell the jury just what you knew and what you saw relative to the team which you subsequently struck? A. After the fireman hollered to me to blow the whistle, when I rounded the curve, so I could see the 40

*John W. Thorpe—Direct.*

wagon, the mules was close to the track, they were not on the track yet. Then I was beyond that switch which is almost five hundred feet away, and they went up the track and stopped dead, right square on the track and stood there till I struck them.

10 Q. And did you see the plaintiff, Mr. Heinz before the engine struck him? A. No, sir; I saw nobody.

Q. How long after the foreman told you there was a team did you start to blow the alarm whistle? A. As soon as I could get hold of the whistle; not over two seconds.

20 Q. And with reference to the time that you start that alarm blast, will you tell us when you started to apply the brakes on your train? A. Why, I used ten pounds of air as soon as the fireman told me about the team; that was a service application.

Q. Then, after you made this service application, did you subsequently make an emergency application? A. As soon as I saw the team I put in the emergency.

Q. After you brought your train to a stop did you get off your engine? A. Yes, sir.

30 Q. What have you to say as to whether the bell was ringing when you got off your engine, or not? A. It was; till I got back and shut the air off of it.

Q. When you got on the ground, did you see Mr. Heinz? A. I saw him before I got off the engine on the ground.

Q. Did you have any conversation with Mr. Heinz? A. I went back there and asked him what he stopped for, he said "I was going to turn around."

40 Q. He said he wanted to turn around? A. He said he was going to turn around.

*John W. Thorpe—Cross.*

Q. Can you tell us about how far you were from the crossing when you made the emergency application? A. Well, was a little west of that switch, or a little south of it, I mean, the Sussex Track—we are governed by east and west, but the Sussex Tracks runs nearer north and south than they do east and west, and this was south of this switch where I applied the emergency. 10

Q. You said you were south, by south you mean towards the cutoff? A. Towards Netcong, yes, sir.

Q. About how far south of this switch were you? A. I should judge I was seventy-five feet.

## CROSS EXAMINATION BY MR. MORROW :

Q. Was there anyone on the locomotive with you at that time. Anyone besides the fireman? A. No one that I know of. 20

Q. Was not a man by the name of Auble on the locomotive with you? A. No, sir.

Q. John Auble? A. He was not on the train that I know of.

Q. I want to have you show me a little bit about where you were, on this map Exhibit D-7. Your train was coming from the culvert in the direction of the left wasn't it? A. Yes, sir.

Q. And the wagon road was at your right, wasn't it? A. It was on the side of the main road, yes, sir. 30

Q. The wagon road was on your right, wasn't it? A. Yes, sir; here.

Q. Not a very great distance from the railroad track? A. Yes, sir.

Q. You were on the right hand side of your locomotive weren't you? A. Yes, sir.

Q. Was there anything that prevented your seeing the wagon along this highway, and still look out for the crossing? A. Well, the curve, only the curve. 40

*John W. Thorpe—Cross.*

Q. When you got out of the curve? A. No, sir.

Q. When you got out of the curve nothing prevented your seeing that at all? A. No, sir.

Q. You were on the outside of the curve? A. Yes, sir.

Q. And you had as good a view of the team on the track as your fireman could have had who was  
 10 on your left side, didn't you? A. No, sir.

Q. Why not? A. I could not see it, the wagon was around that curve.

Q. I am not talking about around the curve, I am talking from the switch on? A. Yes, sure.

Q. You could see better than your fireman couldn't you, there? A. Yes, sir.

Q. Could the fireman at any point back here see a man along that road better than you could? A. He certainly could, from here.

20 Q. How? A. Because he could see across here.

Q. Yes? Could he see a man up here any better than you could? I point right up here opposite station 26.95, could your fireman see a man better than you from up there, better than you could? A. Not at that point, no.

Q. Could he opposite 79 see a man better than you could? A. No, sir; not there.

Q. Could he see a man there, at that station 72 any better than you could? A. No, sir.

30 Q. At what place along there could he see a team along the road better than you could? A. Here (indicating). Here is where he told me.

Q. How could he see the team from that point? A. Because he could.

Q. Why couldn't you see it if you were on the right hand side of the engine next to the public road; why couldn't you see it as quickly as he could who was on the left hand side of the engine? A. Do you think I could see through iron and

40 steel?

*John W. Thorpe—Cross.*

Q. Could he see it better than you could? A. He did not have to look through the iron and steel and the stack.

Q. Did he look back of you? A. No; he could see on the left side of the cab.

Q. Could he see on the left side of the cab? What could he see on the left side of the cab? A. The public road. **10**

Q. How could he see that? What could he see of the public road on the left hand side? A. I guess you never railroaded.

THE COURT: The witness says in coming here that the fireman could see up here better than he could. He does not speak of the public road up here. He speaks of it nearer the crossing.

Q. Then you mean to say when you got here at this point, your fireman saw this man on the public road? A. Yes, sir. **20**

Q. And you did not see him until after he did? A. I could not see him.

Q. How far were you from the crossing when you saw him? A. I told you I was seventy-five feet south of that switch.

Q. How many feet was that? A. That is almost five hundred feet.

Q. When you were sworn before in this case weren't you asked this question by the Court: "The Court: How far from the crossing were you when you saw him?" "The Witness: About four hundred and fifty feet or fifteen rail lengths." Did you answer in that way? A. No, not in that way. **30**

Q. Well, that is just what it reads here. What is a rail length? A. Thirty feet.

Q. When you said four hundred and fifty feet or fifteen rail lengths, which is the same thing as four hundred and fifty feet, did you know what you **40**

*John W. Thorpe—Cross.*

were saying? A. I said four hundred and fifty feet or fifteen rail lengths to that switch.

Q. The question was: "How far were you away from the crossing when you saw him?" And your answer was: "About four hundred and fifty feet or fifteen rail lengths?" And then Judge Huston asked you: "Q. Where was the first time you saw  
10 Mr. Heinz? A. Not till we got to that switch, between the whistling post and the High Street crossing, which is just fifteen rail lengths from the crossing." Isn't that what you said? A. That was not my testimony.

Q. That is not your testimony? A. I don't think I ever testified it was fifteen rail lengths that I saw him.

Q. You think the stenographer got your testimony down wrong? A. I could see him beyond  
20 that switch. When he came around on a straight line he would be right straight ahead of me.

Q. On your direct examination before you said that you were two minutes late at Cranbury Lake, is that right? A. Yes, sir.

Q. And did you say that after you got through the culvert for the cutoff or before you got through the cutoff, you turned on your bell, you turned the air on the bell? Which one was it, before you  
30 got through the cutoff or after you got through the cutoff? A. After I got through the cutoff.

Q. Why do you say it was after, when you were sworn here a few years ago you said it was before you got through the culvert that you turned it on. Now, which is right, was it before or after? A. It was after I got through, just as I went out of the culvert.

Q. Why did you say then it was before you got through? A. I don't know as I did say so.

40 MR. KING: I submit to your Honor it is exactly what he said. Now he said it was

*John W. Thorpe—Cross.*

either before or after and he is asking him to say it was before. I submit that is unfair.

Q. Then, didn't you say in answer to counsel for the railroad company, "And immediately after" that is, immediately after blowing the regular crossing whistles, only three or four seconds, the fireman on the other side says, "Blow your whistle there is a team." Did he say that to you? A. Yes, sir. 10

Q. And that was three or four seconds after you blew the crossing whistle? A. I did not time myself. It was only my judgment.

Q. I am asking what you said? A. I said it, certainly I said it.

Q. And you blew your crossing whistle immediately upon your emerging from the culvert? A. Yes, sir. 20

Q. And then in three or four seconds from that time the fireman told you there was a team on the track? A. Yes, sir.

Q. Now, you were going at the rate of thirty miles an hour, weren't you? A. Yes, sir.

Q. That is forty four feet a second is it not? A. I never figured it out.

Q. And you say in three or four seconds after you blew that whistle, as you emerged from the tunnel, then this man called your attention to the team on the track? A. Yes, sir. 30

Q. And then you had gone, at the farthest, one hundred and seventy-six feet, had you not, from the mouth of the tunnel? A. I have not figured it out.

Q. And how soon after the fireman told you there was a team on the track did you blow the warning whistle? A. I did not time it, I did not look at my watch.

Q. Just as quickly as you could? A. Just as soon as I could get hold of the whistle, yes, sir. 40

*John W. Thorpe—Cross.*

Q. That simply involved your reaching your hand up and taking hold of the rod to pull that whistle? A. Yes, sir.

Q. And that was the first and only startling whistle you blew, wasn't it? A. No, sir.

Q. When did you blow another? A. The last whistle I blew, yes.

10 Q. Immediately after you blew the two long and two short whistles and this man spoke to you, you reached up and gave the signal by a long whistle? A. Yes, sir.

Q. And that was one hundred and seventy-six feet outside of the culvert? A. Yes, sir.

Q. Do you know how many feet that was from the crossing? A. No, sir.

Q. Were you not at Totten's barn when you blew that whistle? A. No, sir.

20 Q. How soon after you blew the warning whistle did you see Mr. Heinz's team? A. Well, right away.

Q. How far were you from the crossing then? A. Why, I was south of that switch.

Q. How many seconds was it after you blew the warning whistle before you saw Mr. Heinz's team? A. I could not tell you.

Q. It was within two seconds, wasn't it? A. I don't know.

30 Q. Don't you know anything about it at all? A. I did not time myself.

Q. It was almost immediately, wasn't it? A. It was shortly, it was not a great while.

Q. It was very short, wasn't it, a very short time wasn't it? A. I don't know how long it was, I tell you.

Q. Wasn't it so short that you had no time to give any further warning or signal until you struck Heinz? A. Why, yes.

40 Q. Did you give any other? A. That switch was five hundred feet away.

*John W. Thorpe—Cross.*

Q. Did you give any other warning? A. No, sir, not after I blowed the long whistle.

Q. Not after the first one?

MR. KING: The witness says not after he blew the long whistle.

THE COURT: If Counsel says something else, that does not bind the witness.

10

Q. When you saw Heinz's team when you were at the switch station, wherever that was, the team was progressing towards the crossing, was it? A. It was almost on the crossing.

Q. How many seconds was it from the time you saw it almost on the crossing until you hit him?

A. Not very long.

Q. How many seconds? A. Oh, while I run pretty near five hundred feet.

Q. I don't care for that? How many seconds was it? A. I ain't a figurer.

20

Q. You don't pretend to tell that? A. No, sir.

Q. All that time did the team keep on going on the crossing? A. They went on till they got on the crossing, then they stopped.

Q. What stopped them? A. I could not tell you. I was not there.

Q. How many seconds before you reached them was it that they stopped and stood still? A. Well, I ran that distance from the switch in that time.

30

Q. Four hundred and fifty or five hundred feet? A. No, not quite all of that.

Q. Well, at this switch you were making thirty miles an hour? A. And they were almost on the crossing, right by the crossing and stopped on the crossing.

Q. And stood still there for you to hit them? A. Yes, sir. They did. They never moved. I never seen anyone try to move them either.

40

*John W. Thorpe—Cross.*

Q. You did not see the least movement of Mr. Heinz to get the team off the track? He stopped them and did nothing further? He just let his team stand there? A. Yes, sir. They stood there anyway till I hit them.

Q. Do you remember putting the air on that bell on any other day than that before this accident? A. On the thirteenth?

Q. Yes? A. No, sir.

Q. Can't you remember any other day? A. No, sir.

Q. Can you remember any other day of your blowing the two long and the two short whistles, before that day? A. No, sir.

Q. How long after that did you run the train? A. About a year.

Q. You remember that you blew it every time after that didn't you? A. No, sir.

Q. Didn't you? A. No, sir.

Q. Don't you remember that from that time, the very next time you passed over that track you blew those two long and two short whistles? A. Do you know that I did?

Q. Do you know that you did? Yes? A. I don't know.

Q. You don't remember about that at all? A. No, sir.

30 Q. When you blew the two long and two short whistles, had anything then occurred to fix it in your mind, when you blew them? A. Why, it ought to fix it, didn't it.

Q. I mean when you got through blowing that signal until you blew the sharp blast, was there anything there to fix in your mind that you had blown this regulation whistle? A. I don't understand what you are just getting at.

40 Q. I want to know, if, at the time you blew those regulation whistles, there was anything

*John W. Thorpe—Cross.*

which fixed it in your mind that you had blown it, until after this accident? A. Well if a man called my attention to them, certainly I would remember them.

Q. I want to know what you remember yourself about hearing whistles? Tell us anything calling your attention and fixing it in your mind the fact that you had blown those whistles? A. On that occasion? 10

Q. Yes, sir. Until you blew the long blast? A. No, sir.

Q. Then if you had not blown the sharp blast you might not be able the next day to remember that you blew those two long and two short whistles, would you? A. I don't know about that, I don't know as I would.

Q. When you were sworn before, didn't you say in answer to this question: "Q. On the day you say that after you got through the culvert and a hundred feet from the whistling post you blew the whistle? A. That is only from my judgment." "Q. Which whistle was that? A. A hundred feet from which, which way do you mean?" "Q. On this day, after you got through the culvert, a hundred feet from the whistling post, you blew the whistle, what whistle was that? A. That was the regular crossing whistle." "Q. That was a hundred feet after you got through the tunnel, wasn't it? A. Well, it was this side of the tunnel, yes, sir." And didn't you say in answer to that: "A. Somewheres thereabouts, I did not get out and measure it, nor I never measured it, between that whistling post, there is a distance signal, right by the whistling post, and between that and the culvert is where I blew the whistle." Isn't that what you said? A. That is what I was saying today too. 20 30 40

Q. You don't know whether it was nearer the

*John W. Thorpe—Re-Direct.*

station or nearer the culvert? A. It was nearest the culvert.

Q. You say somewhere between the two? A. Well, that would not be nearest the station, would it?

Q. Well, I don't know? A. Well, I do.

10 Q. I ask you, which was it nearer, nearer the signal post or near the culvert? A. It was between the two. I did not measure the distance.

Q. Do you know what the distance is between that post and the tunnel? Do you know what that distance is? A. Not exactly, no, sir.

Q. About six hundred feet, is it not? A. From the signal post to the tunnel?

Q. Yes? A. No, sir, not as much as that.

Q. How many? A. Not over three hundred feet I don't think.

20 Q. What kind of a day was it? A. It was raining a little, cloudy.

Q. How far did this train run from the time the fireman called your attention to the team until the train stopped? A. I never measured it.

Q. As near as you can tell? You are a railroad engineer?

30 THE COURT: He has described the point; said it ran almost to the next street, the front of the train and it is a mere matter of measurement.

Q. When did you put the emergency brakes on? A. When I saw the team going up on the track.

Q. Didn't you put them on when the fireman called out to you? A. No, sir, I did not expect I was going to find a team anchored on the track.

## RE-DIRECT EXAMINATION BY MR. SCOTT:

40 Q. Counsel has asked you about your recollection of blowing the whistles at these other

*Louis H. Kuhmichael—Direct.*

times; will you state to the jury what caused you to recollect the blowing of the whistle and the ringing of the bell on the present occasion from the other times? A. Well, the event of the occurrence brought my attention to the blowing of the whistle, made me remember it.

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LOUIS H. KUHMICHAEL, sworn as a witness on behalf of the defendant, testifies as follows: 10

## DIRECT EXAMINATION BY MR. SCOTT:

Q. What is your business? A. Engineer.

Q. For the Lackawanna Railroad Company?

A. Yes, sir.

Q. In April, 1912, what was your business? A. Fireman.

Q. For whom were you fireman? A. For Thorpe. 20

Q. Do you remember seeing Mr. Heinz in April 1913? A. Well, I saw the man on the ground, I could not say who it was not.

Q. In the neighborhood of High Street near Andover? A. Oh, yes, I saw him there.

Q. About what time of the day was it? A. Well, it was after ten o'clock. I did not look at my watch.

Q. Was there anybody on that engine aside from Mr. Thorpe and yourself? A. No, sir. 30

Q. Have you any recollection whether the bell on the engine was ringing on the morning in question? A. Yes, sir, it was.

Q. Will you tell the Court and Jury when the bell was started to ring? A. Well, it was in the vicinity of the cutoff. My recollection was on the other side of the cutoff, the upper side, towards Netcong.

Q. Do you know whether the bell continued to ring for any length of time or distance? A. 40

*Louis H. Kuhmichael—Direct.*

Yes, sir, it rang until after Mr. Thorpe got back and shut it off.

Q. How far was it after it was started to ring that Mr. Thorpe got off the engine? A. How far it was?

Q. Yes, from the place where it started? A. That I don't know; it was from the cutoff to  
10 where we stopped, six cars below the road crossing.

Q. Did you stop south of High Street or north of High Street? A. Well, north and south, you get me mixed up.

Q. Did you stop nearer to Andover than the culvert side? A. We use east and west on the train cards.

Q. When you brought your engine to a stop, were you nearer the Andover station side of the High Street crossing or nearer the Culvert side?  
20 A. Well, I don't know. We were about six cars below the crossing.

Q. Looking at that map Defendant's Exhibit D-7, can you indicate about where you were when you stopped? A. This is High Street here?

Q. Towards your right is the Andover station, towards your left is the cutoff? A. Well, the rear car stood right about on that crossing, the three coaches and the milk car and freight car were over.

30 Q. Will you tell the jury what you saw Mr. Thorpe do with regard to the bell after the train was brought to a stop? A. I saw him get down the step, and on the ground, where I stood, and he got right up and shut it off, and then came down again and told me to get up in the cab and stay there till he came back.

Q. Did you see Mr. Heinz's wagon or team before the accident, on the morning in question? A. I saw the team, yes, sir.

40 Q. Will you tell the jury just what you saw? A. Well, I saw it—can I show on this map?

*Louis H. Kuhmichael—Direct.*

Q. Yes? A. This, I should judge is the main road; I was up in the vicinity of here, and of course, I was looking there and I did not holler until I saw the mule heads getting to turn going up this hill and I should judge about half way in the road, and I hollered.

Q. They turned in to High Street? A. Yes, sir, that is a short little space in there, and it is on the map here, and right in here is about where I told Mr. Thorpe to blow his whistle and he did right away, because I could see him; I could see the wagon back here but I did not know the man was going to turn until I see the mules turning. 10

Q. How soon after you told Mr. Thorpe to blow his whistle did he blow his whistle? A. Very quick. I should not think it was any part of a second. Just as quick as a man could raise his arm and get hold of the whistle. 20

Q. Where did you first see the wagon? Where were you? A. I was on the left side of the cab.

Q. Where were you on the track? Can you show about where you were when you first saw the wagon? A. Well, in anything like that you don't never look around to see where you are on the railroad. You say where I first saw the team?

Q. Yes? Where was the train when you first saw the wagon? Where was the engine and where was the wagon? A. My idea was we saw it way up in here (indicating near the signal station). 30

Q. Where was the wagon? A. I just thought I saw the wagon about in here somewheres. (The witness indicates the main road near the crossing.)

Q. When did you first see the team was going on High Street? When you first saw the team it was on the highway the Stanhope Highway was it not, not on High Street? A. It was on the Turnpike road.

Q. When you first saw the team had it turned 40

*Louis H. Kuhmichael—Direct.*

in? A. No, not when I first saw it, no, sir. It was right in here somewhere (indicating) where I hollered to Mr. Thorpe.

Q. How soon after you first saw the team on the highway was it, before you saw it turn into High Street to the crossing? A. I just could not say that. A very few seconds, because it was not  
10 far.

Q. How soon after you saw it turn into the Highway or into High Street to the crossing, was it, before you notified Mr. Thorpe? A. Well, just as soon as it turned in, I should judge about the length of the mules.

Q. How many seconds after you saw the wagon turn into High Street was it before you told Mr. Thorpe? A. Oh, there is something no one could answer. I should judge four or five seconds on  
20 that.

Q. Can you tell us, by looking at the map, where you were, where the engine was, when you first saw the team turn into High Street to the crossing? A. No, I could not say exact about that here. I should think it was about here.

THE COURT: Indicating around the signal post?

THE WITNESS: Yes, the other side of the whistle  
30 post. The whistle post is back here. It was after he blowed the whistle.

Q. How soon was it after you told Mr. Thorpe that the team was coming up the High Street crossing, that he blew his whistle? A. I did not get that.

Q. When you told Mr. Thorpe that there was a team there, what did he do? A. He blowed a long blast.

Q. From the time he blew the long blast were  
40 you able to observe the team? A. Yes, sir. I could see it right to the time it got struck.

*Louis H. Kuhmichael—Cross.*

Q. And before the team was struck did you see Mr. Heinz or anybody in sight? A. I could see someone looking around the curtain, a man's head looked out, with a black hat or a derby, I don't know which it was, a black hat, and I could see him looking around the curtain.

Q. When you saw the person peering around the curtain where was the team? A. The team was on the crossing, and stood there. **10**

## CROSS EXAMINATION BY MR. MORROW:

Q. You say that while this team stood on the crossing a man peeped out from the curtain and looked down the track toward where you were? A. He looked up the track. That is uphill where we were, the way the engine was coming was down hill. **20**

Q. He looked up the track in the direction that your train was coming? A. Yes, sir.

Q. You could see him plainly do that could you? A. I could see the man's head and the hat I could not see whether the man was a man or a lady, I saw something black looked out there and it looked like a hat and a head.

Q. It was evidently someone looking down the track, or up the track, south on the track, from where you were coming? A. Yes, sir. **30**

Q. He was in plain sight of you, was he? A. He was, but I could not see every particular and say whether it was a man or a lady.

Q. Whatever it was? A. Sure. He was in plain sight.

Q. You saw him plainly and he must have seen you plainly if he was looking. There was nothing to hinder his seeing you, was there? A. No, sir.

Q. After your seeing him peep out and his peeping out and seeing you he stood still did he until **40**

*Louis H. Kuhmichael—Cross.*

you struck him? A. Yes, sir, he did.

Q. He made no effort to get over the track at all, out of your way? A. No, sir.

Q. He just stood there? A. He stood right still.

Q. What was the distance from him that you were on the train when you saw him peeping out?

10 A. What was the distance?

Q. Yes? How many feet? A. I did not measure it.

Q. As nearly as you can tell? A. When I first saw him on the track?

Q. When you saw him peeping? A. I don't know how many feet it was.

Q. As near as you can tell? A. Well, between three and four hundred feet.

20 Q. How long had he been standing still on the track when you saw him peeping out? A. I did not time myself at the time.

Q. A second or two or two or three seconds? A. I don't know.

Q. Was it some little time, any appreciable time after he stopped? A. It was not long, because we were going pretty fast.

Q. I want to know about how long he stood still on the track before he peeped out and saw you? A. How long he stood on the track?

30 Q. Yes? Before he peeped out? A. Just as he stopped he peeped out.

Q. And then he stood still? A. Yes, sir. I could see the legs of the mules and everything about them.

Q. Did you see him coming up from the public road to the crossing? A. Yes, sir.

Q. Where were you then? About how far from the crossing? A. Well, I don't know that. You mean how far I said we were back?

40 Q. Was it just before Thorpe blowed the long whistle? At that time? A. Just before?

*Louis H. Kuhmichael—Cross.*

Q. Yes? That you first saw him? A. Well, no, he pulled the whistle down, he blowed and I looked up, and he looked out around the curtain.

Q. No, I mean before he got up to the track. Where was he when you first saw him? A. Before he got to the track?

Q. Yes? A. Oh, I did not see him.

Q. Didn't you say a little while ago you saw him on the road first before he turned around? **10**

A. I saw the wagon and mules.

Q. I mean the wagon and mules? A. You were saying about peeping out.

Q. You saw the wagon and the mules going along the public road toward the crossing? A. Yes, sir.

Q. Were they in plain sight of you until they were struck? A. Yes, sir.

Q. And were you in plain sight of each other if you chose to look weren't you? A. Yes, sir. **20**

Q. And so, if there was a man in the wagon he could see that train coming toward that crossing before he went up into High Street, is that right?

A. How is that?

Q. As you were in plain sight of the wagon, if there was a man in the wagon he could see you before he turned up from the public road to go into High Street? A. Yes, if he looked.

Q. And he could see you all that way from where you first saw him until he was struck, if he chose to look at you? A. Yes, sir. **30**

Q. And all that time the bell was ringing, was it? A. Yes, sir.

Q. Within how many feet of where this wagon was was the bell started? A. I said in the vicinity of the cutoff.

Q. About how many feet were you at any time, feet you said? A. Where the bell was started?

Q. Yes? Where you first saw the wagon? Not **40**

*Louis H. Kuhmichael—Cross.*

the man, the wagon? A. Why, the bell was ringing from the cutoff all the way.

Q. When you first saw the wagon the bell was ringing? A. Yes, sir.

Q. How far off was the wagon from the bell when you first saw the man, how many feet about?

A. That is just about how far I was.

10 Q. About four hundred feet? A. I don't know the exact distance.

Q. Had that whistle blown, that sharp whistle, before you saw the wagon? A. No, sir.

Q. Right after you saw the wagon? A. Right after I saw the wagon. But I did not tell him to blow until he turned. I did not know the man was going to turn up the high.

Q. This man, if there was a man in the wagon, could have seen you all that way until he was struck? A. I could see the rig not the man, I said.

Q. If there was a man there he could have seen you? A. If he looked, yes, sir.

Q. And yet, with the bell ringing and the rumbling of the train he still came along to the crossing and stood on the track and you were approaching all the while, did he? A. Yes, sir.

Q. When you blew that alarm whistle, had you not passed both the whistling posts? A. I don't know if we had or not. I might have said so that we did there.

Q. I am going to get at that in a moment, what you said, you need not anticipate what you said; I want to know if you had not passed both whistling posts, the one nearest the culvert and the one 795 feet from the crossing when he blew the warning whistle? A. No, it was farther than the first whistling post where he blew the warning whistle, where he started it and he blowed it till he struck him.

40

*Louis H. Kuhmichael—Cross.*

Q. You were asked on cross examination by Judge Huston: "Q. And you have got no way by which you can tell where you were? That is, when he blew this warning whistle"? And your answer was: "A. Yes, sir, by this whistling post and one thing or another there." Did you say that? A. I don't know if I did say it.

Q. That is right, is it not, you said it? A. I don't know if I said that in just those words. I was on the left side, I could not just say where the whistling post was. **10**

Q. Then did you not answer the next question: "Q. You had got past the whistling post?" And was not your answer: "A. Yes, sir." A. The warning whistle, sure.

Q. When you blew the warning whistle? A. Yes, he blew it all the way down, that is what he did, when he started till he struck the team. **20**

Q. We will go back a little bit, did you tell them when you were on the witness stand before that he blew that whistle all the way down from the time he first sounded it till he got struck, till you struck the team, did you tell them that.

MR. KING: Objected to as immaterial.  
(Question withdrawn.)

Q. Did you testify to that on the former trial? A. I don't know just what I testified to on the last trial. What he is getting at, if he blowed the whistle? **30**

THE COURT: You don't remember what you said?

THE WITNESS: I don't just remember what I did say, no, sir.

Q. Let me go back a little: "Q. But, as a matter of fact, when you called his attention to the team, as you say, and he blew this whistle, **40**

*Louis H. Kuhmichael—Cross.*

this long whistle, that is what you call an alarm whistle, I suppose," and your answer was "Yes, sir." Is that right, the alarm whistle was the long whistle? A. Yes, sir.

Q. Weren't you right there by Ben Totten's barn? A. We were above the barn.

Q. How near the barn were you? A. We were  
10 two hundred feet above the barn, that is towards Netcong.

Q. Did you say that? A. I could not say whether I said that, no, sir.

Q. "Q. Did you look at the barn and see where you were? A. No, sir." "Q. How do you know that you were a hundred to two hundred and fifty feet above the barn? A. I judge we were up that distance up the track." Did you answer that? A. I may have.

20 Q. "Q. You are guessing at that, aren't you? A. Well, it is all guess work on the distance. I did not measure anything." Did you make that answer? A. Yes, sir.

Q. "Q. Did you see that barn that day? A. Not particularly." Is that correct? A. Yes, sir.

Q. "Q. You don't remember whether you saw the barn or not, do you? A. No, sir, not particularly." Is that right? A. Yes, sir.

30 Q. "Q. You don't remember any particular thing by which you can fix the place where you were? A. Just about with the tracks. That is all." Did you answer that? A. Yes, sir.

Q. "Q. You don't know where you were? A. I certainly know where I was." Did you say that? A. I might have said that.

Q. "Q. And you have got no way by which you can tell where you were? A. Yes, sir, by the whistling post and one thing and another there." Did you answer that? A. I might have.

40 Q. "Q. You had got past the whistling posts? A. Yes, sir." Did you say that? A. Got by them?

*Louis H. Kuhmichael—Cross.*

Q. I ask you if you said in answer to that question: "Q. You had got past the whistling posts? A. Yes, sir." A. Well, when we blowed the whistle—

Q. I ask you what you said, whether you said yes, when you blew the alarm whistle you had got past the whistling post, when you blew the alarm whistle? A. I told you a while ago, he blowed the whistle until he struck the team. **10**

Q. And then, didn't you say he asked you if you had got past the next whistling post, that is the post for the next crossing, and your answer was "Yes, sir."

MR. KING: I object to that unless it appears in the record in that way.

Q. "Q. And you had got past the next whistling post, had you not? A. (No answer read.)" Isn't that what you said? A. (No answer.) **20**

Q. "Q. You were between the first whistling post from High street and High street somewhere? A. Yes, sir." Isn't that right, didn't you say that? A. I don't know if I did say that or not. I don't really know what you are trying to get at there, where we started to blow the alarm whistle, is that what you want to know?

Q. I am asking you what you testified to before this Court on the trial before? A. I could not say whether that is it or not, or what it was. **30**

Q. Your memory was as good then as it is now, wasn't it? A. Yes, sir, it was.

Q. Weren't you asked: "Q. You were between the first whistling post from High street and High street somewhere. A. Yes, sir, when this whistle was blown." Is that right? A. It was blowed all the way down.

Q. Were you asked that question? A. Where we started to blow? **40**

*Louis H. Kuhmichael—Cross.*

Q. The question as I read it; I will put it again:

“Q. You were somewhere between the first whistling post from High street and High street?”

And your answer was: “A. We were between the whistling post and High street, that is where we were.” Did you answer that way? A. I don’t

10 know if I did or not. I believe we were farther back than that where we started to blow and then he blowed all the way down.

Q. I am asking you if you did not give the answers to these questions in this language?

THE COURT: He says he don’t deny it.

THE WITNESS: No, I don’t deny it.

Q. The next question: “Q. There are two whistling posts there?” And your answer: “A. I mean the nearest one to High street.” What did

20 you mean by that, “The nearest one to High street”? A. I don’t know if I said that or not.

Q. What did you mean? Did you mean by that that you blew this whistle when you were between the first whistling post nearest to High street and High street? That is what you meant, didn’t you? A. I did not blow the whistle.

Q. When you heard the whistle blow? A. The whistle was blown all the way down.

30 Q. Did you tell them on the trial of this case two years and a half ago, this same thing? A. I would if it was asked me.

Q. You were asked when the whistle was blown, and did you volunteer to say then as you say now that it was blown all the way down? A. Well, if they would have asked me I would; the warning whistle was.

Q. You were asked by the Court this question: “The Court: The question is where was the team when you first saw it?” And your answer was:

40 “A. They had turned the corner of the curve.” Do you remember answering that to the Court’s

*Louis H. Kuhmichael—Cross.*

question at that time? A. I saw the team on the Turnpike road.

Q. I ask you if you answered that to the Court when it asked you, "Where was the team when you first saw it," and your answer was, "They had turned the corner of the curve." A. Just about to turn the corner.

Q. Did you answer this question by saying, "They had turned the corner of the curve?" A. I don't know whether I did or not. 10

Q. Then did not the Court ask you, "How far?" and your answer was, "They were half way between."

Q. Then didn't the Court ask you: "Q. Between the road and the track?" And your answer was, "A. Yes, sir." A. They were right between the road and the track when I told Mr. Thorpe to blow his whistle. 20

Q. The question is where the team was when you first saw it, and I ask you if in answer to a question put to you by the Court, you did not tell him first, the team had turned around the corner of the curve, and the next answer was, half way between the two streets? A. I don't understand it that way.

THE COURT: Did you say that at the last that or not.

THE WITNESS: I don't know whether I said that or not. 30

Q. Then did not the Court say to you: "The Court: Well, the testimony is that the distance from the center of the coad to the center of the track is thirty-four feet, so that would make it, according to your estimate, about fifteen feet from the track? Where the team was when you first saw it. And was not your answer: "The witness: I should judge not, they were a little bit closer than that to the main road." 40

*Louis H. Kuhmichael—Cross.*

MR. SCOTT: I don't find in the record any such question by the Court as repeated to the witness by Judge Morrow. I find a question that is quite similar, but not exactly the same.

10 Mr. Morrow (Reading): "The Court. Well, the testimony is that the distance from the center of the road to the center of the track is thirty-four feet; so that would make it, according to your estimate, about fifteen feet from the track?" Didn't you answer that: "The Witness: I should judge not, they were a little bit closer than that to the main road." Didn't you answer that to the Court? A. I may have, yes, sir.

20 Q. Then, did not Judge Black or Counsel ask you: "Q. They were a little closer to the main road?" And your answer was again: "A. Yes, sir." Then were you not asked: "Q. Had the team and the wagon gotten away from the main road when you first saw it?" And was your answer: "A. It was leaving the main road." Didn't you answer that? A. The mules' heads was not turned yet, they was about to turn.

Q. Didn't you answer that question that way: "It was just leaving the main road"? A. I don't know if I said that or not.

30 Q. Then was not this further question asked you: "Q. What was leaving the main road?" And was not your answer: "A. The wagon." Did you answer that in that way? A. I may have.

Q. Well, it was true, was it? Was that true if you did? A. I showed you on the map where I—

40 Q. Then did not counsel repeat to you: "Q. Just leaving the main road?" And your answer was: "A. Yes, sir." Is that right? A. Yes, sir, they just was leaving the main road.

Q. And did not Judge Huston then ask you

*Louis H. Kuhmichael—Cross.*

this question: "Q. You just stated to me that when you saw the team and hollered at the engineer that you were between the first whistling post south of High street and High street, is that so?" And was not your answer: "A. Yes, sir." Didn't you say that on your previous examination? A. I don't know if I did.

Q. Do you say you did not? A. Just the distance I don't know. 10

Q. I do not ask you what happened at all. I am asking you if on that occasion you did not say they were between the first whistling post south of High street and High street when you first saw the team and hollered to the engineer? A. I don't know if I said it or not.

Q. "Q. And when you saw them they just turned out of the road so that the wagon was leaving the road, is that right?" And your answer was: "A. When I first saw them." A. That is the head of the mules. 20

Q. "Q. And you called to the engineer and he blew the alarm whistle?" And your answer was: "A. Yes, sir." Isn't that what you testified to? A. Yes, sir, that is it.

Q. Your memory when you gave this testimony in December, 1913, was as good as it is to-day, wasn't it? A. Yes, sir.

Q. And, if you said then that when you first saw this team the wagon was just leaving the main road and was midway of this main road, and you hollered to the engineer and when they were there he then blew the alarm whistle it was between the first whistling post and the High street crossing, that was so, wasn't it, then? A. Between the first whistling post? 30

Q. If you said that on the former trial— A. It was back farther than that.

Q. I did not ask you that. I am asking you, 40

*Robert Leake—Direct.*

if you said then, a year and six months after this accident happened if you said then that you hollered to the engineer and he blew the sharp whistle when the wagon was leaving the public road and you were between the High street crossing and that first whistling post, did you believe that to be true when you said it? A. They were  
 10 back farther than that.

Q. I did not ask you that. At that time what did you believe? A. I just don't know what I said then.

It is admitted that the bell on the engine in question weighed one hundred and sixteen pounds.

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ROBERT H. LEAKE, sworn as a witness on behalf  
 20 of the defendant, testifies as follows:

## DIRECT EXAMINATION BY MR. SCOTT:

Q. You are a passenger train dispatcher? A. Yes, sir.

Q. Connected with the Lackawanna Railroad? A. Yes, sir.

Q. Your business is of what character? Will you explain to the jury? A. The issuance of telegraphic or telephonic train orders regarding  
 30 the movement of trains.

Q. And did your business at the time of this accident cover what is known as the Cutoff Division? A. It did, yes, sir.

Q. How did you make the records? A. From the reports, from the towerman and the operators at the reporting stations.

Q. Does anybody else at the same time have charge of the dispatching and movement of trains over the same division as you do? A. Only my-  
 40 self.

*Robert Leake—Direct.*

THE COURT: Do you want to introduce a record?

MR. SCOTT: I am going to.

THE COURT: Perhaps Judge Morrow has no objection.

MR. MORROW: What is it you want to ask?

MR. SCOTT: I want to prove that there were no trains running over the Cutoff at the time of the accident. **10**

MR. MORROW: You don't mean to include the trains that might have been extras, I suppose, something of that kind, working trains, will he know about that?

MR. SCOTT: Yes, he will know about that.

MR. MORROW: Well, I don't know. I want to ask him about that.

Q. Have you that record with you? A. I have. **20**

Q. How soon after those trains are reported to you do you make those records? A. At the time of reporting.

Q. And that record is in your handwriting? A. Yes, sir.

Q. Do you know where the Sussex Road goes under the Cutoff? A. I do.

Q. What is the station west, the first station west of the place where the Essex Road crosses the Cutoff? A. In the direction of Slateville Junction, do you mean? **30**

Q. Yes. A. Greenville is our reporting station.

Q. What is the reporting station the other side?

THE COURT: This witness undoubtedly has knowledge of the records. Why don't you ask him just what you want to ask?

Q. Will you look at your records and state whether there are any trains moving over the Cutoff Railroad, in the neighborhood of where **40**

*Robert Leake—Cross.*

*John Sexton—Direct.*

the Cutoff is crossed or by where the Sussex Road crosses the Cutoff between 10:00 and 10:16 on April thirteenth, 1912? A. There was one east-bound about 10:19 or 10:20.

Q. Is that the only train? A. That is the only train that was in that neighborhood at that time;  
10 number twenty-six.

CROSS EXAMINATION BY MR. MORROW:

Q. What is that? You say there was a train passed there at 10:00 what? A. 10:19 or 10:20 about.

Q. Going east? A. Going east, yes, sir.

Q. Where did you get that report from? A. Leaving Greenville at 10:12, it was on time and due at 10:24.

20 Q. There is no station on this Cutoff? A. No, sir.

Q. Have you a report of the exact time of leaving Greenville? A. Yes, sir.

Q. How far was this crossing from Greenville? A. Five miles from Greenville.

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JOHN SEXTON, sworn as a witness on behalf of the defendant, testifies as follows:

30

DIRECT EXAMINATION BY MR. SCOTT:

Q. What is your business? A. Road master.

Q. Are you familiar with the Cutoff, what is known as the Cutoff? A. Yes, sir.

Q. Where does it begin? A. It begins at Slateville Junction and ends at Port Morris.

Q. Are you familiar with its entire length? A. Yes, sir.

40 Q. Do you know where it crosses, or where the Sussex Road goes under the Cutoff? A. Yes, sir.

*John Sexton—Direct.*

Q. What have you to say as to whether there are any grade crossings on it? A. There are no grade crossings.

Q. Are you familiar with the High street crossing in Andover? A. Yes, sir.

Q. Were you familiar with it in April, 1912? A. Yes, sir.

Q. Will you look at Exhibit D-9 and state whether there was a crossing sign of that character at that crossing at that time? A. Yes, sir, that crossing sign was there. **10**

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No Cross Examination.

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BY MR. MORROW :

Q. There was no bell there at that time, was there? A. No, sir. **20**

MR. SCOTT: I object to that and ask that it be stricken out.

Motion granted.

MR. SCOTT: I ask the Court to instruct the jury that the remarks of Judge Morrow, coming from learned counsel, are entirely improper.

MR. MORROW: I don't know about that. I asked that question. I have not asked whether there is one there now. **30**

THE COURT: It will be stricken out.

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*George Herrman—Direct.*

GEORGE HERRMAN, sworn as a witness on behalf of the defendant, testifies as follows:

## DIRECT EXAMINATION BY MR. SCOTT:

Q. What is your business? A. Shoemaker.

Q. Where do you live? A. In Newton.

10 Q. Do you know Mr. Heinz? A. Well, I know him when I see him.

Q. On April thirteenth, 1912, were you a passenger on the Lackawanna train? A. Yes, sir.

Q. Do you remember the accident happening in Andover? A. Yes, sir.

Q. Where did you get on that train? A. At Cranbury Lake.

Q. Do you recollect on which side of the train you were sitting? A. On the left coming towards Newton.

20 Q. What have you to say as to whether any whistle was blown at the time, or from the time you left Cranbury Lake up until the time of the accident? A. As he was leaving the culvert I heard the crossing signal and that was followed by an alarm whistle.

Q. You talk about a crossing whistle; what do you mean by that? A. Two long and two short whistles.

30 Q. Will you tell the jury what drew your attention to the fact of the blowing of the crossing whistle? A. Yes. The long whistle.

Q. The long whistle? A. Yes, sir.

Q. Will you explain how the long whistle drew your attention to the crossing whistle? A. Well, I have heard a good many of them blown, that is the reason it called my attention. That is why I remember the whistles blown at the culvert end.

40 Q. Did you prior to that time have any familiarity with railroad whistles? A. Did I? I should

*George Herrman—Cross.*

think I ought to have. About nine years in the service of a railroad company, the Erie.

Q. What railroad company were you in the service of? A. The Erie Railroad.

## CROSS EXAMINATION BY MR. MORROW:

Q. Do you know what crossings there are between Cranbury Lake and this High street crossing? A. Well, not exactly, no. 10

Q. Do you know that there are any? A. Well, not exactly, only an overhead crossing, where the crossing goes under a bridge.

Q. Isn't there a crossing near to Cranbury Lake, this side of Cranbury Lake? A. I don't know of any.

Q. Did you hear that whistle blown after you left Cranbury Lake until you got to the culvert? A. I did not notice any. 20

Q. You did not pay any attention to that at all? A. No, sir.

Q. Don't you know that there are two or three crossings in there? A. No, not that I know of.

Q. Do you know Whitehall? A. I know where the road goes down the other side of the track there.

Q. The road goes down the other side of the track, don't it? A. Yes.

Q. Did you hear any blown for Cranbury Lake that day? A. They blow there every day when they are going to stop. 30

Q. Did you hear it blown that day? Do you remember that? A. Not exactly, no, sir.

Q. Where were you when you first heard this regulation whistle? A. Coming from the culvert.

Q. Were you through the culvert? A. Just about, yes, sir.

Q. How soon after that did you hear the alarm whistle blown? A. It was not only a couple of seconds. 40

*George Zeek—Direct.*

Q. Then within two seconds after that you heard it? Within two seconds after you heard the four whistles you heard the alarm whistle?

A. In a couple of seconds.

Q. How long did it blow? A. Well, I could not say exactly how long it blew. Quite a while.

Q. Two seconds? A. A couple of seconds, yes,  
 10 over a couple of seconds, a couple of seconds, anyway.

Q. You don't think it blew much longer? Did it blow any longer than two seconds? A. I could not say because I did not take any time on it.

Q. As near as you can remember? A. Do I remember?

Q. Yes. A. As near as you can remember, did it blow more than two seconds? A. Well, not much longer than that.

20

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GEORGE ZEEK, sworn as a witness on behalf of the defendant, testifies as follows:

## DIRECT EXAMINATION BY MR. SCOTT:

Q. Were you a conductor on the Lackawanna Railroad in April, 1912? A. Yes, sir.

Q. Your run was from Netcong up to Andover? A. Yes, sir.

30 Q. Do you remember the accident to Mr. Heinz? A. I do.

Q. Have you your train book with you? A. Yes, sir.

Q. When did you make the entries in that train book? A. April thirteenth, 1912.

Q. What train did you have on April thirteenth, 1912, on the morning of that day? A. Train Number 609.

40 Q. Do you know what engine you had? A. Engine Number 515.

*George Zeek—Direct.*

Q. Will you tell the jury just what that train was made up of? A. There was two coaches and a combination, two box and a milk car.

Q. With reference to the engine, will you tell the jury just how the cars were arranged? A. I could not say exactly how they were arranged; but the two coaches and the combination car was on the rear, the coaches was on the rear and the combination car was ahead of the coaches. 10

Q. In front of the two coaches and the combination there were three other cars? A. There were three other cars. Two box cars and a milk car.

Q. So that you had six cars on that train? A. There were six cars on the train.

Q. Have you a record of the weight of these cars? A. There was three 62 M's., there was four 62 M. 20

Q. Will you explain to the jury what that means? A. That is thousand pounds.

Q. Will you give the numbers of the cars? A. There is two others here, one was 35 and one was 31 thousand pounds.

Q. The cars that you had in your train were six cars, weren't they? A. Yes, sir.

Q. Give the number of the cars and the weight of each car?

THE COURT: Why are the numbers important? What light will they throw on this matter? 30

MR. SCOTT: The numbers are not so important, perhaps.

THE COURT: Then don't let us go off into unimportant matters.

THE WITNESS: The freight cars were 10 M's. There were four cars weighed 62,000 pounds each. One car weighed 35,000 pounds, and the merchandise 10,000 pounds, 45,000 with the load. One car 40

*George Zeek—Cross.*  
*James Doherty—Direct.*

weighed 31,000 pounds, and the merchandise 10,000 pounds, 41,000 pounds with the load.

Q. Is that the weight of all the cars in your train? A. I guess there was 10 M's. in the milk car; yes, 10 M's. more.

Q. How much would the milk car weigh? A. That is 62 M's. That is one of the four that I gave you.

Q. Did you see Mr. Heinz and Mr. Thorpe after the accident? A. I did.

Q. What have you to say as to whether they were talking or conversing? A. I heard Mr. Thorpe say to Mr. Heinz: "Why did you stop on the crossing?" I did not hear the answer that Mr. Heinz gave to Mr. Thorpe. That is all I heard of that.

20

CROSS EXAMINATION BY MR. MORROW:

Q. How long was this train? A. The train was about three hundred feet, I should judge.

Q. Where were you riding at the time of the accident? A. At the time of the accident I was on the head end of the rear car, that is, on the west end, as we call it, or the north end, of the rear car.

30

JAMES DOHERTY, sworn as a witness on behalf of the defendant, testifies as follows:

DIRECT EXAMINATION BY MR. SCOTT:

Q. What is your business? A. I work for Horn & Stones at the saw mill.

Q. Do you know Mr. Heinz by sight? A. Yes, sir, when I see him.

Q. On April thirteenth, 1912, do you remember an accident at High street near Andover? A. Yes, sir.

Q. Where were you at the time of the acci-

*James Doherty—Cross.*

dent? A. I was at the depot, on the platform, waiting for the train.

Q. How long had you been there before the accident happened? A. About a half an hour.

Q. Were you there for any particular purpose? A. No, sir; I was coming to Newton on the train.

Q. You were waiting for the train? A. I was waiting for the train, yes, sir. 10

Q. Do you remember hearing any whistles? A. Yes, sir.

Q. Will you tell the jury what you know about any whistles? A. I heard it blow two longs and two shorts; and about a second or two seconds after it, she kind of blew on, continued on blowing.

Q. What train was this? A. It was due there 10:14.

Q. Where were you waiting for this train? A. On the platform of the station. 20

Q. At the time of the accident could you see the engine? A. No, sir, not from where I stood. I crossed over on the other side and I seen it.

Q. Where did you cross over? A. By the depot right across from the depot.

Q. And from the depot, from there, across the depot, you could see down towards High street? A. Yes, sir, I seen the engine.

CROSS EXAMINATION BY MR. MORROW: 30

Q. Was the engine blowing off steam then? A. I could not say.

Q. Did you hear any other noise? Any noise at all while the engine stood there? A. No, sir.

Q. And about how far were you from the engine? A. Well, I should judge about a hundred feet.

Q. When you saw it? A. Yes, sir.

Q. Was it rainy then? A. It was misty, yes, sir. 40

*Frank Johnson—Direct—Cross.*

FRANK JOHNSON, sworn as a witness on behalf of the Defendant, testifies as follows:

## DIRECT EXAMINATION BY MR. SCOTT:

Q. On April thirteenth 1912, you were a trainman on the Lackawanna Railroad? A. Yes, sir.

10 Q. Do you remember being on the train with which Mr. Heinz had a collision? A. Yes, sir.

Q. Have you any recollection as to the giving of any signals by that train on the day of the accident, just prior to the accident? A. What signals do you mean, the same signals or what?

Q. Any signals at all? A. Prior to the accident?

Q. Before the accident? A. The whistle, the crossing whistle, and the alarm whistle.

20 Q. In what car were you when you heard the crossing whistle? A. The third car, the fourth car, the baggage car.

Q. Do you know where you were with reference to the culvert when you heard the crossing whistle? A. The car I was in was in the culvert. You said the crossing whistle.

Q. The crossing whistle? A. The car I was in was in the culvert when that crossing whistle was blown.

30 Q. And with reference to the alarm whistle, was that blown before or after the crossing whistle? A. After it.

Q. Where was the train when the alarm whistle was blown, if you know? A. It was out of the culvert. That is the car I was in. I should imagine the last car was just leaving the culvert.

## CROSS EXAMINATION BY MR. MORROW:

40 Q. You were in the middle car, were you, when you heard the crossing whistles blown? A. The fourth car from the engine.

*George Van Auken—Direct.*

Q. How long did the blowing continue of that signal? A. The crossing whistle?

Q. Yes? A. I should judge about three seconds it would take to blow it.

Q. Three seconds? A. I should judge that.

Q. How soon after the crossing whistle ceased to blow did you hear the alarm whistle? A. Almost immediately. 10

Q. Did you feel the brakes go on at the same time? A. Yes, sir.

Q. How far were you out of the tunnel then? A. Well, about all the cars, I should think, that is the car I was in.

Q. And that is about what distance from the tunnel? That is, when you heard the alarm whistle I mean? A. Yes, sir.

Q. Two car's length out of the tunnel? A. About that. 20

Q. How far was the locomotive out of the cut of the tunnel then? A. The locomotive from the tunnel?

Q. Yes? A. Well, I don't know. I could not say positively.

Q. How far about? A. I should judge about—

THE COURT: We have more or less accurate measurements, haven't we? There were four or five cars. 30

THE WITNESS: I could not tell exactly.

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GEORGE VAN AUKEN, sworn as a witness on behalf of the Defendant, testified as follows:

DIRECT EXAMINATION BY MR. SCOTT:

Q. What is your business? A. I work in the shoe factory. 40

Q. Do you know Mr. Heinz? A. I do.

Q. Do you remember when he was injured in 1912? A. Yes, sir, I do.

*George Van Auken—Cross.*

Q. Where were you at that time? A. I was on the train that injured him.

Q. Where were you sitting? In what car? A. I was in the fourth car from the engine.

Q. What kind of a car was that? A. It was a combination baggage and smoker.

10 Q. Do you know anything about the bell being rung and the whistles being blown on that train before the accident happened? A. I could not say about any bells being rung. I know the whistle was blowing. The whistle was blowing when I came out of the culvert. It stopped, and started, right up afterwards. As the car I was in came out of the culvert it stopped and it started right up, almost immediately after that.

## CROSS EXAMINATION BY MR. MORROW:

20 Q. You were in the tunnel or were you out of the tunnel when you heard the first whistle? A. Just after coming out of the tunnel.

Q. Did it blow more than once, first? A. I could not say as to that. It stopped and then it started right over again.

Q. Then right away over again? A. Yes, sir, almost immediately.

30 Q. What was the character of that second blast? A. It was a long shrill whistle.

Q. An alarm whistle? A. Yes, sir.

Q. And it followed one other whistle just before? A. That followed, well, one or two others, I could not say.

Q. You don't remember hearing more than one? A. That is all.

Q. And the long blast was right after the one you do remember hearing? A. Yes, sir.

40 Q. How far were you out of the tunnel when that long shrill blast blew? A. I could not say as to that; not very far.

*Charles T. Kyle—Direct.*

Q. Do you know how long it continued to blow?

A. I think almost until the train stopped.

Q. That is all you heard? A. Yes, sir.

Q. Did you feel the brakes go on? A. I could feel the jar of the cars as the brakes went on.

Q. When was that done? When that second whistle began to blow? A. I don't remember about that, just when it started. 10

Q. That was about it, wasn't it? A. About that or shortly afterwards.

Q. As soon as he blew the alarm whistle, he also put on the steam brakes, didn't he? A. I could not say as to that exactly.

Q. To the best of your recollection isn't that so? A. Yes, sir.

Q. That is pretty decisive, is it not, the two things, the alarm and the putting on of the brakes shook you up then? A. Yes, sir. 20

Q. And that was a very short distance after you got out of the tunnel? A. It was not very far.

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CHARLES T. KYLE, sworn as a witness on behalf of the Defendant, testifies as follows:

## DIRECT EXAMINATION BY MR. SCOTT:

Q. Do you live at Dover? A. Yes, sir. 30

Q. You are a claim agent for the Lackawanna Railroad? A. I am.

Q. Did you investigate the Heinz case? A. I did.

Q. Do you recollect, shortly after the accident seeing Mr. Totten? A. I did.

Q. And did Mr. Totten make a statement to you at that time? He did.

Q. Did Mr. Totten say to you "I heard the engineer of this train blow four blasts of the 40

*Charles T. Kyle—Direct.*

whistle when he passed in under the culvert of the cutoff"? A. I did.

Q. I show you a paper and ask you if Mr. Totten signed that paper? (Showing witness paper marked Defendant's D-6 for identification.) A. He did.

10 MR. SCOTT: I offer this paper in evidence. (Admitted and marked "Defendant's Exhibit D-6 in evidence" of this date.)

Q. Did you see Mr. Heinz after the accident? A. I did.

Q. Where did you see him? A. At his home.

Q. How many times? A. Oh, probably two or three times.

Q. Did you ever have a conversation with him relative to the accident? A. I did.

20 Q. Do you remember having a conversation with Mr. Heinz on April twenty-fifth 1912? A. I do.

Q. Do you remember Mr. Heinz saying to you, "I could not see the train coming west until I was almost on the crossing"? A. I do.

Q. You also interviewed Mr. Randal, his driver? A. Yes, sir.

30 Q. And do you remember Mr. Randall saying to you, or making this statement to you, "If we did not have the curtains down we could have looked out and seen the train before we reached the crossing"? A. I do remember it.

Q. You interviewed Mr. Dana Applebaum? A. I did.

Q. And, at that time, did Mr. Applebaum give you a statement as to what he knew about this accident? A. He did.

Q. And where was that statement taken? A. At New Milford, Pennsylvania.

40 Q. I show you a paper and ask you if that is Mr. Applebaum's statement? A. It is.

*Charles T. Kyle—Cross.*

Q. And, after the statement was taken, what have you to say as to whether or not it was sworn to? A. It was.

MR. SCOTT: I offer this paper in evidence, it being the paper which was formerly marked Defendant's D-2 for identification.

(Admitted and marked "Defendant's Exhibit D-2 in evidence" of this date.) 10

CROSS EXAMINATION BY MR. MORROW:

Q. What do you mean by your being claim agent, that you go around and hunt up the evidence in behalf of the Company? A. No, sir.

Q. What then? A. I investigate claims and ascertain the facts.

Q. You went to see these people to get what you call the facts, did you? A. Yes, sir. 20

Q. That is the line of your business, then, to adjust the claim after you find the facts out?

A. If the facts warrant the settlement of the claim, why, we settle it.

Q. Your primary object is to get the facts, is it not? A. Yes, sir.

Q. Don't you want to tie persons up to the statement which you have them to make? A. Yes, sir.

Q. You write those statements down, don't you? 30  
A. I do.

Q. And when you can you get the parties to sign them? A. I do.

Q. And, if you can, you also get them to swear to them? A. Sometimes.

Q. How does that enable you to make a settlement to get them to sign and swear to a statement? A. It don't enable me to make a settlement.

Q. What is the purpose then of getting them 40

*Charles T. Kyle—Cross.*

to sign their names? A. The statements are submitted to our law department.

Q. After you submit them to your law department and your law department is informed by you that you have written down just what the parties said, they believe you don't they? A. Yes, sir.

10 Q. Why is it necessary to have signatures and oaths of witnesses to it? A. If I take a statement from the witness, if it is true I ask them to sign it.

Q. Why do you have to ask them to sign it? A. That is one of the customs of the company to have signed statements.

Q. Do you mean that the Company instructs you to get them to sign the statement? A. Whenever we can.

20 Q. Do you know why you get them to sign the statements? A. If a man makes a statement, if it is true, I ask him to sign it. If it is not, we do not.

Q. You know what he says and you write it down? A. Yes, sir.

Q. And you take that to the law department, you mean the lawyers of the company? A. We submit it to our legal department.

30 Q. You submit it to the department having charge of the defence of the case or having charge of the settlement of the case don't you. I want to know now how the signature of the witness or the affidavit of the witness adds to the truth of what you tell the law department? A. I don't tell the law department, I report what the man tells me.

40 Q. If you have written the statement just as the party tells it to you how much does it add to the value of it by your having the man sign his name and swear to it, if the department be-

*Charles T. Kyle—Cross.*

believes what you say they told you? A. It is our instructions to get signed statements.

Q. That is the only reason you have for doing it? A. No. If a man gives a statement, if it is true, I ask him to sign it.

Q. I can't understand the purpose of his signing it. That does not make it any more true, if you write down what he says, does it? A. I **10** think so.

Q. How so? A. He reads it over, and if it is a correct statement he signs it.

Q. But old man Totten didn't read that paper over? Did old man Totten read that paper over? A. I read it to him.

Q. Did he read it over? A. He claims his eyes are poor.

Q. He did not read it over? A. He did not.

Q. You get these papers signed after you fix **20** them so that you may use them in Court, isn't that the purpose? A. Sir.

MR. SCOTT: I object to that.

Question withdrawn.

Q. After you have these papers prepared, you have the parties to sign them in order that you may use them in Court don't you? A. I don't know that they will be used in Court when I take **30** them.

Q. Have not all the statements you procured in this case been brought here? A. As far as I know.

*Samuel Wills—Direct.*

SAMUEL WILLS, sworn as a witness on behalf of the defendant, testifies as follows:

## DIRECT EXAMINATION BY MR. SCOTT:

Q. What is your business? A. Electrician and miller.

10 Q. You live at Andover? A. Yes, sir, I do.

Q. Do you know Mr. Heinz? A. Yes, sir.

Q. Do you remember in April, 1912, when he was hurt, the time he had an accident on High Street? A. Yes, sir.

Q. Where were you at the time? A. Up to Mr. Odgen Ayres' house on High street.

Q. Look at that map, Exhibit D-7, can you tell us where that was? A. Located about there, somewhere (indicating).

20 Q. About how far from the crossing? A. I never measured it.

Q. About how far? A. Perhaps three hundred feet.

Q. Do you know of the train that runs up to Newton around ten o'clock in the morning? A. Yes, sir.

30 Q. Will you state to the jury whether you have any knowledge or recollection of the whistle of that ten o'clock train on the morning that Mr. Heinz was hurt? A. What is that?

Q. State whether you have any recollection or knowledge of the blowing of a whistle at about ten o'clock on the morning that Mr. Heinz was hurt? A. I have.

40 Q. Will you tell the jury what you heard? A. I heard the whistle. I was up at Mr. Ayres' putting electric wires in the house and was out at that time on the tin roof, it was the roof over the bay window, when the train came, and I heard two long and two shorts.

*Samuel Wills—Cross.*

Q. And after that what happened? A. In a short time the long drill whistle came.

Q. The first whistle you heard, do you know what train that was the whistle of? A. It was the mail train, as we term it, in Andover.

Q. And that was run by what conductor? A. Mr. Zeek.

10

## CROSS EXAMINATION BY MR. MORROW:

Q. You were sworn in this case on the former trial, were you not? A. Yes, sir.

Q. Do you remember saying this: "The train was coming and at the crossing warning or signal I attempted to make the report, I attempted to say to Mr. Ayres, 'There comes the train' I was going to say 'There comes' and I was going to say 'the mail' I was going to say that, and at that time the danger blast occurred the long one." Did you say that? A. I don't think I said it as many times as it is there. I made this remark, that I was going to say to Mr. Ayres, "There comes the mail train" after the warning signal was given.

20

Q. But you did not get that all out, did you? A. I did not.

Q. You got as far as "There comes" then the warning signal came? A. Yes, the warning signal came.

30

Q. Just as quick as that, did it? A. Well, it was very quick.

Q. When you heard the first whistle blow, you started to speak right away, didn't you? A. Yes, sir.

Q. And before you could say, "There comes the mail train" you heard the warning whistle? A. Yes, sir.

Q. And you speak pretty quickly, don't you? A. No, not so awful quick, no.

40

*Charles S. Steele—Direct.*

Q. You are not slow in your speech, are you?  
A. Medium.

Q. It did not take you very long to speak this when you heard the two whistles blow, the first ones? A. Well in that time it might have consumed several seconds.

10 Q. If you started to say "there comes" and before you could say "the mail train" which would indicate to us that you heard something else, that did not take you many seconds between "there comes" and "the mail train" did it? A. I don't think it was a great many either.

Q. If you looked at your watch it would not be a quarter of a second, would it, if you said "There comes" and before you said "the mail train" the warning blast came, that would be very quick? A. It just came in short.

20

RE-DIRECT EXAMINATION BY MR. SCOTT:

Q. You say you heard four blasts first? A. Yes, sir.

Q. Then the warning blast after? A. Yes, sir.

Q. Will you tell the jury how long after that warning blast started it continued? A. I don't know. I did not time it. It blew several seconds. I did not have any record of it at all.

30

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CHARLES S. STEELE, sworn as a witness on behalf of the defendant, testifies as follows:

DIRECT EXAMINATION BY MR. SCOTT:

Q. What connection have you with the local bank? A. The Sussex National Bank, I am the Assistant Cashier at the present time.

40 Q. How long have you been such? A. I cannot say just how long I have been Assistant Cashier. I have been connected with the bank for forty-nine years.

*Charles S. Steele—Direct.*

Q. You have been subpoenaed to produce the record of the account of Philip Heinz? A. Yes, sir.

Q. Have you it with you? A. Yes, sir.

Q. Are those the original sheets? A. Yes, sir.

Q. Let me see them? A. (Producing sheets.)  
It begins October 11th.

MR. KING: We offer them in evidence. 10

Q. This is an account with the bank, so that the debit would represent what? A. Those are the checks.

Q. When a man makes a deposit where do you put it? A. Right there, sir (indicating).

Q. Under the debit? A. Under the credit.

Q. When he draws checks where do they go?  
A. They go on the opposite side and the balance is carried out. There is a deposit made of \$1158.20 20  
and he paid out \$236.62 that was taken out and left that balance on the right hand and it runs right down that way.

Admitted and marked "Defendant's Exhibit D-10" of this date.

THE WITNESS: You ask me what the debits are, I am telling you checks, but here there are some notes. That is the daily balance on each side, this under the debits. I think I mentioned 30  
those were balances but you call them deposits.

MR. MORROW: Where are the deposits?

THE WITNESS: The deposits are under the line where there is printed on the top credit, except where it says "D". That is discount for a note or renewal or something like that.

MR. KING: We have a subpoena out for the administrator of Henry Huston. I want 40  
to state what the evidence will be. We are going to prove it if we can, in refuta-

*Charles S. Steele—Direct.*

10 tion of the allegation made by Mr. Heinz that he paid large sums of money to Henry Huston in his lifetime. The administrator is out in an automobile and he will probably not be in before six o'clock and we do want to have the man here. The subpoena is out now, but if he does not appear I shall have to make an application such as may be proper. The subpoena is out and he will probably be here.

THE COURT: Could not that be obviated by asking Mr. Heinz to state what he can state on the matter?

MR. KING: I suppose it might. I will ask him that. Mr. Heinz, what specific sums did you pay to Henry Huston?

20 MR. HEINZ: I cannot tell you. It was at different times.

MR. KING: That is not what I am asking you. How much money have you paid him altogether? Five hundred dollars? Two thousand dollars? Ten thousand dollars? And during what period?

MR. HEINZ: I could not tell.

MR. KING: You do say you paid him large sums of money?

30 MR. HEINZ: I paid him considerable money, yes, sir.

MR. KING: Large sums of money?

MR. HEINZ: I don't know what you call large.

MR. KING: During what time have you paid him these large sums of money?

MR. HEINZ: While these suits were going on.

MR. KING: This suit.

40 MR. HEINZ: This suit and the Morris suit. The Morris suit was previous to this.

*Charles S. Steele—Direct.*

MR. KING: Do you call this now the Morris suit?

MR. HEINZ: No, another suit, the Morris suit.

MR. KING: What was the Morris suit?

MR. MORROW: I don't know as that makes any difference.

THE COURT: It was a previous suit of 10  
a different nature I suppose.

MR. KING: It had nothing to do with this suit?

MR. MORROW: Not at all.

MR. KING: Can you tell how much money you paid out to Henry Huston since your injury?

MR. HEINZ: No, sir, I cannot.

MR. KING: Was the Morris suit of which you speak after or before your injury? 20

MR. HEINZ: That was before.

MR. KING: Did you continue paying him money on the Morris suit before the time of the injury?

MR. HEINZ: That I could not tell you.

MR. KING: What is your best recollection?

MR. HEINZ: That I cannot say.

MR. KING: I am asking your best recollection? 30

MR. HEINZ: I don't think I did, before the suit was started.

MR. KING: How much money did you pay him on the Morris suit after you were injured?

MR. HEINZ: That I cannot tell you.

MR. KING: How much did you pay him on this suit?

MR. HEINZ: I cannot tell you.

MR. KING: Well, I have done my best but I don't get anything. 40

*Dr. Albert N. Jacob—Direct.*

DR. ALBERT N. JACOB, sworn as a witness on behalf of the defendant, testifies as follows:

## DIRECT EXAMINATION BY MR. KING:

Q. Where do you live? A. In Sparta.

Q. You are a practicing physician? A. Yes, sir.

10 Q. Graduated from where? A. From the Jefferson Medical College, Philadelphia.

Q. Where have you been practicing since you graduated? A. Partly in Philadelphia and partly at Sparta.

Q. How long have you been practicing in Sparta? A. For ten years.

Q. Have you examined Mr. Heinz? A. Yes, sir.

Q. When did you examine him? A. At the last December Term of Court, last year.

20 Q. At whose solicitation did you examine him? Who requested you to examine him? The Railroad Company? A. The Company, yes, sir.

Q. So you examined him for the Railroad Company? A. Yes, sir.

Q. Who else was present when you examined him? A. Dr. Arlitz and Dr. Hood.

Q. Dr. Hood, Dr. Arlitz and you? A. Yes, sir.

30 Q. In your own way I want you to tell the jury how you examined him and what you discovered? A. Well, we, first, of course, questioned him, to find out what he was complaining of, mostly, and after we had our answers we examined him physically and applied the various tests to satisfy ourselves as to his physical condition.

Q. What tests did you apply? A. Why, the first test we applied was to examine his heart and lungs. The heart we found to be in a chronic state of inflammation. Most likely due to an overlaying of fat, quite a heavy amount of fat.

*Dr. Albert N. Jacob—Direct.*

Next we examined his lungs and found at the base of both lungs, most marked on the left side, an edematous condition.

Q. What condition is that? A. Blood in it, or mucus.

Q. Talk to the jury. They want to know what it means. I don't know myself. Talk it so that we will all understand it. Can you do that? A. **10**  
I will try to. It is a condition similar, as though a man had a clot or collecting of this mucus or spittal in the base or the lower portion of both lungs. That, of course, is quite general, where a man is suffering from a heart condition, as this man is, although he has never complained of it, or apparently has never complained of it; yet that man is suffering from this heart lesion and has suffered from it for several years, and it took this accident to bring out the condition as I **20**  
found it. He was then suffering from a shortness of breath, which you find in all cases of that kind. There was no valvular lesions or leakage as we commonly call it, because the heart has not as yet reached the stage of stretch which it will if he lives long enough, it will over stretch itself, and then we will have these valvular lesions which will show themselves. Of course, he carried on in the office about in the same manner as he did on the stand, probably not nearly so **30**  
markedly, but seemingly as though he wanted to impress us—

MR. MORROW: I object to that. The doctor may tell just what he did without commenting on it.

THE COURT: Just tell what he did, doctor.

MR. KING: That he seemingly wanted to do that may be stricken out.

Q. You may give your impression; not what **40**

*Dr. Albert N. Jacob—Direct.*

he seemed to want to do to you. A. My impression was that those contortions or movements were to draw my attention to the fact that he was suffering. More so than he actually was suffering. Because I did not find anything in his condition which would lead me to believe that he was suffering. On palpation or feeling I could not  
 10 elicit any squirming. We had the man talking, we had his attention engaged, and, while in that condition I squeezed him pretty hardly on the points he complained of mostly, and there was no flinching at that time. I applied other tests to the nervous condition there. I found his reflexes to be absolutely normal. His grasp or grip was about as much as I cared to have him squeeze my hand. I did not determine it with the little instrument we have for that purpose to find out  
 20 the exact number of pounds he could squeeze, but to my hands it was decidedly more than I cared to have him repeat often. His knee jerk, the knee jerk was about normal.

Q. The knee jerk is the reflex? A. The patella reflex, as we call it. We had a little trouble to get it on account of his excessive avoirdupois there, we could not get him to cross his knees, and had to hold the leg up the best we could to get it, but in that way we got it and I judge  
 30 it was about normal. He had no marked ankleklonis.

Q. What is that? A. Well, reflex action, when you grasp the foot and the leg and press with a quick motion, there was not the quivering which we would get if there was any lesion of the spine.

Q. What is a lesion of the spine? A. A disease, or obstruction which would prevent the flow or reflex action flow of the force through the column. The urine I did not examine. Dr. Arlitz  
 40 took the sample home and was to communicate

*Dr. Albert N. Jacob—Direct.*

with me what he found and I relied on him for the analysis of that sample and he tells me—

MR. MORROW: I object.

THE WITNESS: That is all I can tell you, as far as the examination went.

Q. Did you find anything objective about this man that indicated,—I mean by objective something, of course, you can see and the jury can see, which indicated that he was sick? A. Nothing but these contortions that he went through. 10

Q. When you get to these contortions, did you find any physical disability which in your opinion warranted those contortions? A. No, sir.

Q. If there was, I want to know it? A. No, sir.

Q. There were none? A. There was none that I could detect. 20

Q. How did those contortions compare with what you have seen here in Court? A. They were a good deal milder.

Q. Have you noticed him sitting down here as he has been sitting here this afternoon? A. Yes, sir.

Q. How do his contortions when he was on the witness stand compare with what he had down here? A. They seem to be very much subdued while he was sitting there. 30

Q. It is said that he has traumatic neurasthenia, which is, as I interpret it in a simple way, nothing more than an injury to the nervous system, brought on by shock, do you know anything about nerves and shocks? A. Why, some, yes.

Q. Did you see any indication in this examination that warranted you in saying that he had any shock to the nerve? A. No, sir, I would not call it so.

Q. Looking at his face, isn't it full and round- 40

*Dr. Albert N. Jacob—Direct.*

ed and complete? A. Yes, sir. He seems to be a well nourished man. Well, developed.

Q. Do you find any lesions on his face which indicate nervous conditions? A. No, sir.

Q. Would not that be the probable fact if he had a case of traumatic neurasthenia? A. To a greater or less extent, yes, sir. He would be more or less drawing his features.

10 Q. Would this be intermittent or constant? A. I think it would be more constant.

Q. Did you examine him more than this once? A. No, sir, that is the only chance I had.

Q. What have you to say as to his physical condition and weight, comparing this time with the time you examined him? A. Why, I think he has lost a little weight, I think he has lost a little in weight.

20 Q. A person of his weight and build, who remained inactive, would he be inclined to lose weight? A. To a certain extent. If his nourishment was not kept up.

Q. I noticed when he went on the witness stand that he appeared to have some difficulty in using one of his legs, I think the left one? A. I believe so, yes, sir.

Q. In your examination of him did you find anything that warranted that condition which he exhibited? A. No, sir, nothing at all.

30 Q. Nothing at all? A. Nothing at all.

Q. What, in your opinion, is the matter with him? A. Why, I would call him a malingerer.

Q. What is a malingerer? A. A man who puts on or pretends, or feigning.

Q. Is that your candid opinion under oath? A. Yes, sir, he is feigning most of these conditions.

*Dr. Albert N. Jacob—Cross.*

CROSS EXAMINATION BY MR. MORROW:

Q. May not a man be suffering from a nervous condition and not show any lesion or structural injury of his system? A. Where, in the brain?

Q. Yes? His nervous system? A. Nothing but a functional condition.

Q. Well, I say, you do not find any organic change at all, do you, in cases of persons who are suffering from nervous distress? A. No, sir. 10

Q. So that a person may suffer from a nervous condition, without betraying it in his person to your eye? A. Well, yes, he may, sure.

Q. And can you see the operation of a nerve, even if you should take a microscope? A. No, sir.

Q. You cannot tell a nervous condition, that is, by any examination of the nerves at all, can you? A. No, sir. 20

Q. Not in the least? A. No, sir.

Q. So that a person may suffer very much from the nervous condition of neurasthenia, or whatever else you chose to call it, as that he could not walk easily, he could not lift up his leg, he could not lift his hand? A. Oh, yes, he could.

Q. Without your seeing any reason for it? A. He could lift his hand. Neurasthenia would not cause a man to be absolutely impotent lifting his arm or leg. 30

Q. I don't mean to say they would be absolutely impotent? A. Well, to any extent, or any degree. Why, a neurasthenic can always lift his arm or leg.

Q. Just as much as others? A. Yes, sir.

Q. He has absolute control? A. Yes, sir.

Q. Can this man walk naturally, do you think? A. Certainly he can.

Q. Without using any of these expedients he has shown here? A. Certainly he can. 40

*Dr. Albert N. Jacob—Cross.*

Q. Have you ever seen him do it? A. I have never seen him do it, no, sir. He drags his leg, but I think he drags it for effect only.

Q. What do you see him do, what do you see in him that makes you say that? A. Simply my trained eye.

10 Q. Did you hear Dr. Hicks' testimony this morning? A. I did.

Q. You do not agree with Dr. Hicks, do you? A. No, sir.

Q. Have you given study and attention to nervous conditions of this character? A. No more than a general practitioner would, and the general practitioner now-a-days is supposed to know quite as much as a specialist if he wants to be successful.

20 Q. How many cases of traumatic neurasthenia have you had since you have been in Sparta? A. That would be a little difficult to count just now.

Q. How many traumatic neurasthenia have you had? A. In Sparta?

Q. Yes? A. Oh, I suppose, probably, three or four, probably more.

Q. Did they have some of the same symptoms this man has? A. One man had, yes, sir.

Q. Is he still suffering from it? A. To a slight extent, yes, sir.

30 Q. Who is he? A. Mr. Washer.

Q. You gave it as your opinion on the trial of his case that he would not get well, didn't you? A. Not in reference to his neurasthenia, I did not.

Q. You did not? A. No, sir. I said he would get well. He has practically gotten well of the neurasthenia, but he has not gotten well of his other conditions and never will of those.

40 Q. Would a blow such as resulted from Mr. Heinz being thrown from his wagon down on the railroad track in a railroad collision, probably produce neurasthenia? A. I hardly think so.

*Dr. Albert N. Jacob—Cross.*

Q. Does it ever? A. No, not to any degree.

Q. Isn't that so said by the writers on this subject? A. It will in some cases, yes, sir.

Q. They say so in some cases, don't they? A. Yes, sir.

Q. And this whole subject has been revised a good deal in the last forty years hasn't it? A. I presume so, that was before my time. 10

Q. Within the last twenty-five years? A. That is just barely within my time. It is being revised all the time, and the further we go the greater the tendency is to strike out the word traumatic neurasthenia. That is the tendency of the present day.

Q. Do you know Dr. Bailey who has written a work on Nervous Diseases? A. I am not acquainted with the Doctor.

Q. Is he an authority? A. I don't know him, I am not acquainted with him at all. 20

Q. Dr. Austin Flint, he is an authority on the subject? A. He may be. I am not acquainted with him.

Q. Don't you know his books? A. No, sir. I cannot afford to have every book ever written.

Q. Do you know Dr. Osler's work on this subject? A. I know of it, yes, sir.

Q. Have you read it? A. No, sir.

Q. Would you consider him an authority? A. Well, he might be considered so. 30

Q. He is considered so the world over isn't he? A. Well, he might be.

Q. He is one of the most eminent physicians and surgeons in the world isn't he? A. He is not a surgeon, no, sir.

Q. A specialist, a physician? A. He is a physician, yes, sir.

Q. He has been called to London hasn't he? A. He is occupying a Chair in London, yes, sir. 40

*Dr. Blaes Cole—Direct.*

Q. If he says neurasthenia may be superinduced by a blow or force or violence, would you agree with him?

MR. KING: Objected to on the ground that it is only where a physician quotes authorities that other medical authorities can be read in contradiction.

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THE COURT: I think that is the rule.

MR. MORROW: I think it makes no difference what authorities he quotes, you may quote to him other authorities and ask him whether he agrees with them.

THE COURT: I think it is only where the Doctor uses authorities that you can use authorities as I understand the rule.

Q. Have you any authorities to cite in support  
20 of your proposition? A. No, sir.

Q. You have not any at all? A. No, sir.

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DR. BLAES COLE, sworn as a witness on behalf of the defendant, testifies as follows:

DIRECT EXAMINATION BY MR. KING:

Q. You live in Newton? A. Yes, sir.

Q. And you practice medicine here? A. Yes,  
30 sir.

Q. You are a graduate of what college? A. Of the University of Pennsylvania.

Q. And you are subpoenaed here by the Delaware, Lackawanna Railroad Company? A. Yes, sir.

Q. As a witness for them in this suit? A. I suppose so.

Q. Did you see Mr. Heinz when he was giving his evidence on the witness stand? A. Part of  
40 the time.

*Dr. Blaes Cole—Cross.*

Q. Did you make any observation of him when he was on the witness stand? A. Just a casual observation, yes, sir.

Q. Well, how long did you observe him? A. Well, not for any definite length of time.

Q. Did you observe him long enough so that you made up your mind as to whether in your opinion he was simulating or had actual physical defects which warranted his contortions? A. In my opinion I thought he was simulating. 10

Q. I say did you make such observation of him so that your mind was made up? A. Yes, sir.

Q. What was the result of your observation? A. The result of my observation was that I thought he was simulating.

Q. You mean by that feigning? A. Yes, sir.

Q. And malingering? A. Yes, sir. 20

## CROSS EXAMINATION BY MR. MORROW :

Q. What did he do that made you think he was simulating and malingering? A. Nothing that anybody else could not do.

Q. That is the only reason? A. Yes, sir.

Q. Might a person be ill and do the things he did? A. Not from any physical cause, I should not think.

Q. From a nervous cause, might he? A. I don't think so. 30

Q. In other words, may not a man's nervous condition be such as that all the actions of Mr. Heinz would be natural and not feigned or simulated? A. I would answer no to that question.

Q. Why do you think that? Do you know anything about nervous diseases? A. Yes, a little.

Q. Have you had any cases? A. Well, I have had cases that I would come in contact with in my practice. 40

*Dr. Blaes Cole—Cross.*

Q. Have you had any of them manifest such symptoms as Mr. Heinz has? A. No, sir.

Q. Have you had any of them that were thrown in a railroad collision from a wagon upon the ground, upon the railroad track? A. No, sir.

Q. Have you had any of them that had such violence as that or been subject to such violence?

10 A. No, sir, I really don't know what violence he has been subjected to.

Q. He was thrown from a wagon, down on the railroad track, in a railroad collision, or a collision with a locomotive going thirty miles an hour? A. It was not a very high wagon, was it?

Q. I don't know that that makes much difference.

20 MR. KING: It is not what the Judge thinks about it.

Q. Do you know what traumatic neurasthenia is? A. I know what the books say it is.

Q. Is there such a thing? A. They describe it, yes.

Q. Do you believe it? A. We have to.

Q. You have to believe it? A. Yes, sir.

Q. But you know there is such a thing? A. We have got to take their word for it.

30 Q. You don't doubt it, do you? A. I will not doubt it, no, sir.

Q. What is it? A. It is a nervous state that is supposed to follow an injury.

Q. And the patient has not control of himself at all times, has he? A. Not at all times. However, that is not hard and fixed as a rule.

Q. Tell me; when a patient is subject to a stress upon him and is under excitement, are the symptoms liable to manifest themselves more than when he is calm? A. Yes, sir.

40 Q. So that when Mr. Heinz was upon the wit-

*Dr. William J. Arlitz—Direct.*

ness stand subject to a long examination, you might expect him to show more of these symptoms than when he is sitting quietly at his home, isn't that true? A. That is very true, sir, yes, sir.

BY MR. KING:

Q. Were you connected with the Insane Asylum? A. Yes, sir. 10

Q. Where? A. At Morris Plains.

Q. For how long? A. For about eight months.

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DR. WILLIAM J. ARLITZ, sworn as a witness on behalf of the defendant, testifies as follows:

DIRECT EXAMINATION BY MR. KING:

Q. Where do you reside? A. At Hoboken, New Jersey. 20

Q. Are you employed by the Lackawanna Railroad? A. I do work for them.

Q. They pay you for that don't they? A. They do, yes, sir.

Q. How long have you been working for the Lackawanna Railroad Company? A. About eight or nine years I should say.

Q. You act as physician in the examination of claims presented against the company? A. I do. Yes, sir. 30

Q. You also apply bandages to those persons who are injured? A. I do. I apply about four thousand surgical dressings a year for the Lackawanna Company. I take care of all their injured at the lower end of the line.

Q. The Lackawanna Company sent you to examine Mr. Heinz, did it not? A. It did, sir.

Q. What special line have you in medicine? A. My special line is neurology and accidental surgery. 40

*Dr. William J. Arlitz—Direct.*

Q. What is neurology? A. By neurology is meant the study of the diseases of the nervous system.

Q. Then there is such a thing as disease of the nervous system, isn't there? A. Yes, sir.

Q. What have you to say as to whether there is such a thing as traumatic neurasthenia? A.

10 Such a thing is described in the text books.

Q. What have you to say as to whether such a thing exists? A. I believe that, following a trauma, a person may suffer with an exhaustion, provided that they have primarily a nervous organization that is below the average or below the standard; the tendency of all people who are injured is to get well, to a certain extent; but a few, a certain few people have not the average type of resistance, and those people suffer with a form of exhaustion which has been called neurasthenia.

20

Q. Does Mr. Heinz have the ordinary powers of resistance, or did he have when you saw him? A. He did not.

Q. Did you know him before the injury? A. I did not.

Q. From his physique, did he lose any flesh, or couldn't you tell that? A. I don't know.

Q. When did you examine Mr. Heinz? A. If I recall rightly, it was on the thirteenth day of September, 1912, in the office of Dr. Morrison at Newton.

30

Q. Who else was there? A. Dr. Barhaven, an assistant of mine, Dr. Morrison and Dr. Hood.

Q. In your own way, tell the jury how you examined him and what you found? A. At that time I made what I would call a complete physical examination of Mr. Heinz. I examined his heart, I examined his lungs, I made a general observation of his entire physical make up. I took

40

*Dr. William J. Arlitz—Direct.*

his blood pressure, I took a specimen of his urine, which I examined; I examined his superficial and his deep reflexes. I examined his ocular reflexes, and I noted the status of his equilibrium. At that time I found that Mr. Heinz was suffering with a hypertrophy or an enlargement of the heart. That he suffered from an embarrassed respiration, that he had numerous rales on both sides of his chest. This was determined by oscillation or listening to the chest. I found a marked rapidity of the heart's action. I found that the blood pressure was in excess of the normal blood pressure, it being 160. I found that he had quite a marked swelling or edema of his lower extremities, which was due to his heart's condition, which I found at that time. An examination of the reflexes failed to disclose any evidences of neurasthenia, traumatic or otherwise, and I found no evidences of any functional or organic disease of the spinal cord or of the brain. At that time Mr. Heinz did not present any of the paroxysms or contortions, as they have been called here. He presented none of those which he presented here in Court. I made an analysis of the urine when I arrived home. I found an absence of albumen and an absence of sugar. These specific gravity of the urine was 1020. I should not say the urine was a normal urine. I examined him again at the office of Dr. Hood, early this year, and the symptoms were about the same as they were on my prior examination. Except that his general resistance was perhaps a little better than it was at the time of my first examination.

Q. What is the matter with him now, in your opinion? A. I think Mr. Heinz is suffering with a heart condition, which I have described. It is characteristic of such heart conditions that a

*Dr. William J. Arlitz—Direct.*

person may go along with a condition of that kind for a great many years. It may not be recognized by the individual, and, unless a very careful examination is made of him by a medical examiner the condition may not be recognized. Should an individual of that kind receive a trauma, it would be prone to bring all of those latent  
 10 symptoms to the surface. That is characteristic of such heart conditions.

Q. A trauma did you say? A. A trauma. It was my opinion and it is my opinion at this time, that prior to this accident Mr. Heinz was suffering with that heart condition. Heart conditions of that nature are always progressive in character. Treatment will arrest them for a time, will ameliorate them for a time, but the tendency is to grow progressively worse.

20 Q. Has he such a thing now as traumatic neurasthenia? A. No, sir, not in my opinion.

Q. I think the doctor on the other side said he would not say his diabetes came from traumatism. I ask you, if it is diabetes that he has, whether that probably came from this blow or a blow in a railroad accident? A. He has not a diabetes at this time, not according to the examination of the two specimens of urine which he furnished me. Still, it is possible that the man  
 30 suffers with a glycosuria. Because, you might examine a man on three, four or five occasions and find it negative, you may find the sugar negative, and then you may find evidences of sugar in the next four or five specimens you examined. That to a very large extent is dependent upon the diabetic life of the patient or of the individual. It is a recognized fact that diabetes is a disease of the pancreas, what is generally called the sweetbread of the individual; it is due to  
 40 a disease of the pancreas. It is also characteristic of diabetics that they present many neurotic

*Dr. William J. Arlitz—Direct.*

manifestations. They complain of being unusually tired. They complain of pain here and there, and sometimes diabetics develop what is called neuritis that is, pain in this extremity or pain in some other extremity; it is also true that by an irritation in the floor of the Fourth Ventricular a glycosuria or sugar can be produced in the urine That was an experiment that was tried by a celebrated French physician about fifty or more years ago, and it is always quoted now-a-days as one of the factors which will produce sugar in the urine. But that is not a diabetes. That is an irritation glycosuria. True diabetes is essentially due to a disease of the pancreas. **10**

Q. Then you believe that this man had a diseased heart prior to this accident? A. That is my opinion.

Q. And you believe that this accident has accentuated the condition of the heart? A. That is my opinion. I so stated at the last trial. I believe that now. I believe that he had a latent condition which was not recognized, which had not been treated, and in the trauma which has been described, I believe that accentuated those underlying symptoms and brought them to the surface. **20**

Q. What would be the ordinary physical symptoms from his condition of the heart or from the condition of his heart? A. What would they be? **30**

Q. Would they be manifestations? A. You mean these paroxysms which he presents?

Q. Yes? A. No. Those paroxysms are not characteristic of anything. There is not a disease known, except a so-called habetic, or habit tic; and by habetic we mean a falsified movement of some part of the body which is induced by repeated repetition. In other words, if I do that (indicating) to my face for an indefinite number of times, after a while it becomes a habit with me. **40**

*Dr. William J. Arlitz—Direct.*

THE COURT: Have you seen that as evidence of pain also?

THE WITNESS: Oh, yes, I have seen, for instance, a man contort his face with pain. The characteristic thing about him is this, if a man distorts his face from an intense pain, immediately there is an interruption in his train of thought and for some time after that, it takes him some moments or minutes to recover the trend of his thought, or his thought waves. Yes, I have seen people look as if they were suffering terribly.

Q. Is it your frank belief that this man is putting that on? A. I don't believe that is characteristic of anything. It is my honest opinion that he is simulating that facial paroxysms. I don't think he is simulating the edema of the lower extremities. I think that is a bona fide symptom. I think his embarrassed respiration is a bona fide symptom.

Q. You think that is bona fide? A. Yes, I do.

Q. And you think the state of the lower limb is bona fide? A. Surely, yes, sir.

Q. What about the dragging of the lower limb? A. I don't think that has any connection with this accident nor with his heart condition.

Q. Is there anything that you know about this man, physically, that is against the Railroad Company? Tell it if you know of anything of that sort?

MR. MORROW: Objected to.

Objection sustained; defendant excepts.

Q. Tell me anything in addition to what you have already testified, that you know about this case, that is the result of your examination?

MR. MORROW: I object and ask that questions be propounded to the Doctor.

*Dr. William J. Arlitz—Cross.*

THE COURT: As a result of his examination. I will admit that. Is there anything else?

A. There is nothing else.

CROSS EXAMINATION BY MR. MORROW:

Q. If it had not been for the trauma this condition of the lungs and the heart might have remained dormant until now, might they not? A. Quite true. No, I won't say that until now, I would like to modify that. The man might have had an extravasation or these symptoms might have been brought to the surface in many ways at any time, and they might have run along for a year, two years or three years in the form they were or been brought out right away at that time. 10

Q. He might have gone along for some time without knowing that he had any heart or lung trouble? A. He might, yes, sir. 20

Q. Without having his personal physician discover it? A. He might discover it.

Q. And might not? A. And he might not. That would all depend upon the doctor's ability to diagnose heart conditions and whether the man went there often enough to be examined. 30

Q. If he had no sensation of suffering from his heart or his lungs he would have no occasion to go there at all? A. Yes. Many people seriously ill, know nothing about it. The first evidence they have of it is when they try to take out an insurance policy and find—

Q. I did not ask you that? A. I am trying to answer your question.

MR. KING: Hasn't he a right to answer?

MR. MORROW: Not to tell us what other people do when they go for an insurance policy? 40

*Dr. William J. Arlitz—Cross.*

THE WITNESS: I was citing my experience.

MR. MORROW: I am not asking for that experience.

Q. Did you discover no nervous trouble in this man's condition at all? A. He has no nervous trouble.

10 Q. He has none at all? A. That is my opinion.

Q. Has he heart murmur? A. He did not have.

Q. Why do you say that his heart is diseased? Because it is rapid in its movement? A. Well, I say that because it is my opinion that his heart is enlarged. It is my opinion that he has had, does have and has now, some difficulty with his return circulation; and because of that defect with his return circulation, he has an edema of the lower extremities.

20 Q. What evidence have you that he has trouble with the heart as you have just detailed? A. I have described, that he has embarrassed respiration. He has edema of the lower extremities and he has numerous rales in his chest.

Q. And they all come from his heart action? A. That is my opinion.

Q. Did they come from any other causes? A. I don't think so. I was not able to discover any in this case.

30 Q. Has he a dilated heart? A. I think he has. I think at this time. I think originally he had a hypertrophy and he has now a commencing dilatation with a commencing loss of compensation.

Q. Is it not true that nervous diseases produce the same kind of action of the heart? A. Diseases of the nervous system do produce a disturbance in the circulation, but not a disturbance of this character. They produce an erratic circulation. They produce an intermittant  
40 heart or intermittant pulse. They produce some-

*Dr. William J. Arlitz—Cross.*

times symptoms of so called heart rashes in the lower extremities, but they do not produce embarrassed respiration with rales in the chest and edema in the lower extremities.

Q. Was there albumen in this man's urine?

A. No, sir; none whatever.

Q. And at that time had he edema in the legs?

A. He did. 10

Q. And he had an enlargement there in the legs? A. An enlargement of the legs?

Q. Yes. A. Both legs exhibited quite a noticeable pitting on pressure.

Q. Doesn't he have those symptoms only when there is albumen in the urine? A. Not at all. A person might have an enlargement of the heart with the subsequent dilation and a previous loss of compensation and it would go to such an extent that the heart's action might be practically nil without any albumen in the urine. 20

Q. When it goes to that extent, is not a man so far gone that he is scarcely able to get about or do anything at all? A. Not at all. A man with a heart disease might follow his daily occupation. No one would know anything about it. And the man might die suddenly.

Q. Doesn't he, with that condition, have to sit up in his bed to sleep? A. Some cases do. Some cases, that is when cardiac dilatation takes place, after the hypertrophy and compensation is less they get edema in the lower extremities and get myscitis or dropsy of the abdomen, as the respiration becomes very much embarrassed, and they become air hungry, and they must sit up in bed. That is very true. 30

Q. And is not the condition so striking that anybody will observe them? A. A person might have pronounced cardiac hypertrophy and embarrassed respiration and it be not at all evident, 40

*Dr. William J. Arlitz—Cross.*

unless the man was to attempt some unusual exercises like walking up a hill or walking up a flight of stairs.

Q. Does not sugar in the urine produce these same conditions in the heart and in the legs?

A. It does not. Sugar in the urine or true diabetes, will do this, it lessens the general resistance, and a characteristic feature in diabetes, where the general resistance is less, is that the patient commences to lose a lot of weight, that their sleep is disturbed because they must get up during the night to urinate. They are leg weary. They are tired. They have not the ambition to perform their usual duties in their former manner. That is the characteristic history of the diabetic.

Q. Is not that a presentation of the characteristics of Mr. Heinz? A. No, sir; he is not anything like it.

Q. You think he is not? A. That is my opinion.

Q. You seem to throw doubt upon the fact of traumatic neurasthenia, don't you? A. To throw doubt upon it?

Q. You seem to express a doubt about that? A. You mean about the trauma?

Q. About the condition? A. In this case?

Q. In any case? A. Well, I explained that statement. While it is true that people who have a resistance below the average, if they are shocked by trauma, why there is no doubt about it, that those people do suffer with the effects of the shocking, as it has been called, and for an indefinite period they are not able to pull themselves together. Now, that is what is generally meant by a traumatic neurasthenia. But a true traumatic neurasthenia is just this; it means that individuals are born with protoplasmic cells that are perhaps a little less in strength and size than the average individual, and that because of some shocking,

*Dr. William J. Arlitz—Cross.*

whether it be traumatic, emotional or otherwise, those cells fail to undergo the biochemic changes which occur in normal individuals. In other words, they have not got the resistance. They tire out. That is all there is to it.

Q. Where are those cells that you mention?

A. The protoplasmic cells. The entire organism is made up of protoplasmic cells. **10**

Q. How many cells are there in the brain? A. I could not tell you.

Q. Don't they say there is six hundred thousand of them? A. I could not tell you. There might be six hundred million. I don't know anything about that.

Q. When they are diseased the whole system feels the effect of it, doesn't it? A. They may be for the time being. If you had a fright, your mental status would be upset for the time being. **20**  
If you had a shocking or shaking, your mental status would be upset for the time being. If you had considerable worry for a very long period of time it would disturb your nervous equilibrium. Those things are true.

Q. Sometimes it lasts a long time doesn't it?

A. Surely, yes, sir.

Q. That is what is meant by professional men who work very hard and break down with nervous exhaustion, isn't that the condition? A. That has **30**  
sometimes been erroneously called neurasthenia. that is the exhaustion from hard work.

Q. Now, won't a shock produce the same or similar effects? That is, a shock that comes from a strong blow? A. Yes, provided they are below the normal, as I said. There is an inherent tendency in the human being to get well after a trauma. If the resistance is below the average one will find a prolongation of that period. But **40**  
we will have to recognize the tendency of human

*Dr. William J. Arlitz—Cross.*

beings to get well after a trauma and if they have not that average resistance there may be a prolongation of the period of recovery a prolongation of certain symptoms. Surely, I admit that.

Q. There is the cause and there are the attendant symptoms, aren't there? A. Surely.

Q. That is very true of a great many diseases;  
 10 for instance, you take smallpox, a dozen might be exposed to it and yet not all contract it, isn't that true? A. I don't explain that at all. That is immunity. But that has not anything to do with the resistance. That is very true of the sexual life too. I don't understand that. That is good luck, I guess.

Q. Is there any authority that sustains your position in the medical world, in the medical literature of the day? A. I would like to say this,  
 20 that all textbooks, in describing neurasthenia, traumatic, idiopathic, or otherwise, they built up a complex picture which fits the subject in general, but does not fit any particular case. Now, the last word, absolutely the last word on the subject of neurasthenia is a book published in 1915, by Prof. Burr, of the University of Pennsylvania, and I think, while I do not like to recognize any man's authority in the description of a case, because they are composed of elements  
 30 which make composite pictures, I will depend upon my own judgment and my own skill, if I have any, but I think that Prof. Burr's description of neurasthenia is very much in record with my own.

Q. Do you recognize Prof. Osler's system of medicine, as one of the standard authorities on the subject? A. I do not recognize Prof. Osler as an authority neurasthenia, because, as I said before, Prof. Osler gives a complex description of  
 40 neurasthenia and I do not recognize it. If Prof.

*Dr. William J. Arlitz—Cross.*

Osler was here and examined Mr. Heinz I would respect his opinion.

Q. You do not respect what he writes generally?

A. I say, it is a good complex picture of things that Prof. Osler saw or Prof. Brown or Prof. Smith. But they could not write anything about Mr. Heinz unless they had examined him.

Q. Then you cannot tell anything about a disease or its symptoms except as it is applied to a particular individual? A. Exactly. Textbooks give you a fundamental knowledge of the subject, and that is all. **10**

Q. And you take that knowledge and apply that in your examination to a particular subject don't you? A. And you add to and withdraw and then finally your own knowledge brings you a conclusion.

Q. Better than what the authority says? A. I thinks so. **20**

Q. Don't you have to respect what the authority says? A. About the complex picture, surely. I think Prof. Osler is a wonderful man.

Q. Isn't he an authority on diabetes? A. Why, I don't know that he is. He is an authority on the general practice of medicine. He is not an authority in any particular line. He is a man who has varied talents.

Q. Do you know of any other man in the world, in the medical world, that is recognized as an authority superior to Dr. Osler? A. Well, that is the view point. I being an American, of course, I think Prof. Osler. Foreigners though think the Germans are greater authorities, and the Austrians think the Austrians are greater authorities. **30**

Q. Do you say the diabetes may not be produced by a trauma? A. It is my opinion that it cannot be, unless the injury is directly applied to the pancreas. **40**

*Motion for Direction of Verdict.*

Q. And you therefore do not agree with Dr. Osler on that subject? A. I do not agree with him.

MR. KING: That is all we have, unless we may call Mr. Huston's administrator when he arrives.

10

THE COURT: You may preserve that.

MR. KING: Then we rest.

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DEFENDANT RESTS.

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TESTIMONY CLOSED.

20

MR. MORROW: I did want to introduce the official record of the testimony of the fireman, such as I read in during his examination. I have the stenographer's notes here, the transcript showing what he testified to on the former trial and I suppose that ought to be offered in evidence.

MR. SCOTT: Whatever Judge Morrow read in the record from the testimony on the former trial will be accepted as he read it. Whatever Judge Morrow read from the book we will agree was from the book.

30

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TESTIMONY CLOSED.

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MR. SCOTT: I now move for the direction of a verdict on behalf of the Defendant, on the ground:

FIRST: That there has been no negligence shown on the part of the Defendant Company.

40

SECOND: That the acts of the driver directly contributed to the accident, and that

he, being the agent of the Plaintiff, his were attributable to the Plaintiff and there can be no recovery.

THIRD: On the ground that the plaintiff himself personally was guilty of contributory negligence.

Motion denied; defendant excepts.

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The Court then took a recess until seven o'clock this day. 10

Night Session:

The trial was resumed pursuant to adjournment.

Mr. King sums up for the Defendant.

Mr. Morow sums up for the Plaintiff.

The Court thereupon adjourned until tomorrow, Thursday, September 23, 1914, at 9:30 o'clock A. M.

Third Day, Newton, N. J., September 23, 1915. 20

The trial of the case was resumed pursuant to adjournment.

### Charge.

The Court then charged the jury as follows:

THE COURT: Gentlemen of the Jury, on the Thirteenth of April, 1912, Mr. Philip Heinz came in contact with an engine of the Delaware, Lackawanna & Western Railroad Company the defendant in this case, at the High street crossing, in Andover, and this suit is brought to recover compensation for the loss and injuries which he claims he sustained. 30

The mere happening of the accident or collision does not give a right to recover. There must be more than that. The right to recover is based upon the theory of negligence, carelessness; and

*Charge.*

the plaintiff in this case alleges that the negligence was the failure of the Railroad Company to perform its duty in the matter of the statutory signal. You see, gentlemen, the legislature has given the right to the railroads to run their engines over our highways, and an engine is not obliged to stop at every crossing, as the other

10 traveller, to see whether anybody is approaching, in order that they may stop in time. The railroads may run as rapidly as they please over those crossings. In connection with that, however, the State imposes a duty upon the railroads, and that is, to give certain signals. And, if they have performed their statutory duty, then they have no further liability. Now, that statutory duty, Gentlemen is set out in our Railroad act as follows:

20 "A bell of weight not less than thirty pounds shall be placed on each engine and rung continuously in approaching a grade crossing of a highway, beginning at a distance of at least three hundred yards from the crossing and continuing until the engine is across the said highway; or a steam whistle shall be attached to each engine and be sounded, except in cities, at least three hundred yards from the crossing and at intervals until the engine shall have crossed the highway."

30 So you see, the duty is upon the Railroad Company to do either one or the other. It is not obliged to do both. If the Company has complied with either one of these requirements, then the Company has performed its full duty under the statute and both you and I are bound by the statute.

40 You will see, therefore, that the first question to be decided by you is whether the Company was negligent? Did the Company fail in the performance of its duty? Did the Company fail to

*Charge.*

give either one of these signals that the law requires it to give?

If you find that the Company did give either one of these signals, then that is the end of the case, because, if the defendant company performed the duty that the law puts upon it, then there is no negligence on its part, and we have to measure the negligence by the rule that the law puts upon it. 10

I might say in passing, that this is not what is termed and is not claimed by the plaintiff, to be an extra-hazardous crossing and one which required additional safeguards. No such claim is made, and the proof does not show anything of that kind. So you need not consider that feature

Your first problem therefore will be to ascertain whether the statutory signal was given, either one of these signals which I have mentioned. If you determine that the signal was given, either the bell rung as the statute requires or the whistle blown as the statute requires, then your verdict, of course, will be no cause of action. That will be the end of the case. Because, then, there would be no negligence. 20

If, on the other hand, you find that either one of these signals was not given, then you come to the next step of the case, and, that is, to consider the duty of the Plaintiff. 30

You see, gentlemen, Mr. Heinz, in approaching this crossing, also had a duty to perform. No person can carelessly and recklessly approach a railroad crossing and then if he is injured complain about it. A person in approaching a railroad crossing has a duty to perform, and that duty is to use that care which a reasonably prudent man would exercise under the circumstances.

Now, in this case, Mr. Heinz says that he went to the track, looked down and listened and could 40

*Charge.*

not hear anything. There was no train there at that time. If you believe that, gentlemen, why, of course, you may readily find that he exercised the care which a reasonably prudent man would in going there and listening in that way. But it is for you to say whether he did that. You must take all the circumstances surrounding it

**10** whether, if he did look down, could he see the train? Where was the train? If the train was there, why didn't he see it? So you see, all of the elements that have been brought out by both sides, must be considered by you in determining whether he exercised the care which a reasonably prudent man would under the circumstances.

If Mr. Heinz himself was careless, if he was negligent, if he did not exercise the care that he should exercise, or, if his driver in the wagon did

**20** not exercise the care that he should have exercised, then, of course, if the accident was caused by that negligence or contributed to by that negligence then Mr. Heinz cannot recover, and that is the end of the case.

If the railroad company did not ring the bell or did not blow the whistle, and so was negligent, and if either Mr. Heinz or his driver was negligent in contributing to the accident—if the negligence of both combined, then there would be no

**30** cause of action and there cannot be any recovery.

So, to put it a little more concretely;

If you find that the Railroad Company was not negligent, that is the end of the case, and you need not go a step further.

If you find that the Railroad Company was negligent, then you take up the plaintiff's conduct. If you find that Mr. Heinz was himself negligent, then that also ends the case. It does not make

**40** any difference how negligent the Railroad Company was, he cannot in that event recover.

*Charge.*

If you find that the Railroad Company was negligent and Mr. Heinz was not, then, of course, you take up the question of damages.

Now, the rule for damages has been set out by our Courts in this way:

“The elements of the damages are,

“First, the actual injuries sustained; 10

“Second, the pain undergone;

“Third: The effect on the health of the sufferer, according to his degree and its probable duration, as likely to be temporary or permanent;

“Fourth: The expenses incidental to attempts to cure or to lessen the amount of injury; and,

“Fifth: The pecuniary loss sustained through inability to attend to a business or occupation, which again, may be of a temporary character or may be of such as to incapacitate the party for the remainder of his life.” 20

Those are the elements that you are to consider; and, in considering those, gentlemen, if you come to the question of damages in the case, give them your careful consideration. There has been a great deal of testimony here of a most surprising nature. It is really a said commentary upon the medical profession to think that reputable Doctors will come upon the stand and differ so materially upon things that seem to be possible of more or less demonstration. How one doctor can say that this man's leg was so paralyzed that it is hardly susceptible if touched, and another doctor says there is no such condition existing. That creates a difficult problem for you, gentlemen, to determine where the truth lies, because if you come to the question of damages then the condition of this man is a matter of great importance. If he is simply simulating, why you certainly would not give him any such damages as you would if he 30  
40

*Charge.*

was actually several injured; and you must, as sensible men, take this testimony, and determine where the truth is, and what the probability is, and which doctors tell the truth and whether their testimony can be reconciled or not.

- I think I ought also speak to you, gentlemen, on the question of the profits of the business.
- 10 You have all the evidence before you and you ought to consider that carefully, weighing the probabilities, and determine whether you are satisfied that Mr. Heinz made a profit of seventy-five hundred dollars a year or a hundred and fifty dollars a week. You have a right to consider his testimony, whether it convinces you, as sensible men. You have a right to take up this bank account and see how much money was put in the bank. As I recall from just casually looking at the sheets—
- 20 you will have to take them yourselves and find the facts—I think there was deposited during six months a sum of fourteen hundred dollars. Now, is it probable, gentlemen, that a man who is making seventy-five hundred dollars a year, should only deposit fourteen hundred dollars in the bank in six months, and have payments against that deposit? And you must consider his own testimony, on the other hand, give it the weight that you think is honest and proper. Take all of the
- 30 circumstances into consideration. I only speak of it, gentlemen, so that you may carefully consider all of the facts in this matter.

Now, take the case, gentlemen, and apply your good common sense to it, and return a verdict accordingly.

Are there any of the requests Mr. Scott that I have not covered?

MR. SCOTT: May I just look at them?

- 40 THE COURT: Yes. I think all of them have been covered.

*Charge.*

Counsel examines the requests.

MR. MORROW: Your Honor did not say anything about the value of the mules and the wagon or harness or contents of the wagon.

THE COURT: Yes gentlemen, of course, if the plaintiff is entitled to recover, he is entitled to recover, as Judge Morrow has said, whatever loss he has had, and that loss, of course, would include the loss of the mules whatever their value was, and the wagon and the harness and the contents of the wagon; together with the other elements which I have already detailed to you. 10

MR. SCOTT: I only find the seventh and the ninth that I wish to call attention to.

THE COURT: I refuse to charge the Request number nine, and the others Mr. Scott concedes have been charged with the exception of number seven which I charge as follows: 20

7. The Court charges the Jury that there is no evidence in this case to show negligence on the part of the defendant in not stopping its train within a shorter distance than it appears in the evidence in this case it did.

I so charge you. I understand, Judge Morrow, you make no claim that there is any negligence in not stopping the train?

MR. MORROW: No, not at all. 30

THE COURT: Your claim is, as I have already outlined it to the jury, the failure to give the statutory signals?

MR. MORROW: Yes, sir.

The jury then retire.

MR. KING: I would like to call attention to the fact that the Court in charging the Jury said that where the plaintiff went there, speaking of the crossing, and listened, and did not see or hear any train coming, then in substance, that he had 40

*Charge.*

performed his duty in that behalf. My criticism is and my suggestion is that the Court change the charge to show that he must continue his looking until he has gotten over the crossing.

THE COURT: I think you are right.

By instruction of the Court the Jury are returned to the Court room.

10 THE COURT: Gentlemen of the Jury, my attention has been called to one statement that I made which does not perhaps completely express the rule; it is with reference to Mr. Heinz coming up to the track and looking and listening. I think I ought to add to that statement something else, in view of the fact, of Mr. Heinz's testimony, as I recall it, he says he then walked back from the track to the wagon and jumped on the wagon and came back in the wagon to the track. Of  
20 course, it was his duty at all times in approaching that crossing, both at the time when he stood at the track and as he approached it afterwards in the wagon to exercise his faculties, to look and to listen and to exercise the care which a prudent man would under those conditions. In other words, gentlemen, he would not walk up to the track and look for the train and then go back to the wagon and shut his eyes. He should at all  
30 times, until he was over the track, exercise the care which a reasonably prudent man would under the circumstances, to look and to listen and to make that looking and listening effective if it is possible to do so.

MR. MORROW: I thought the young man said that after he got on the wagon he looked down the track also.

THE COURT: That is for the Jury.

MR. MORROW: Yes, but I don't want that part  
40 of it left out.

The jury then retire.

**Defendant's Request to Charge.**

9. The Court charges you that if the plaintiff stopped and listened before he attempted to cross, the noise incident to the moving train must have been sufficiently audible to have enabled him to conclude that the train was approaching.

Declined.

Defendant excepts.

10

**Rule to Show Cause.**

(Filed, Sept. 28, 1915.)

**NEW JERSEY SUPREME COURT.**

SUSSEX CIRCUIT.

PHILIP D. HEINZ,

*Plaintiff,*

*against*

THE DELAWARE, LACKAWANNA AND  
WESTERN RAILROAD COMPANY,

*Defendant.*

Action.  
at Law.

20

Application having been made to me within six (6) days after the verdict in the above cause, it is hereupon on this 25th day of September, 1915,

ORDERED, that the plaintiff do show cause before this Court at the November Term thereof, why the verdict rendered in his favor on the 23rd day of September, 1915, should not be set aside and a new trial ordered. 30

GEORGE S. SILZER,  
Judge.

Entered, Sept. 28, 1915,

On motion of

FREDERIC B. SCOTT,  
Attorney of Defendant.

40

**Reasons.**

(Filed, Sept. 30, 1915.)

**NEW JERSEY SUPREME COURT.**

<p style="text-align: center;">PHILIP HEINZ, <i>Plaintiff,</i> <i>against</i> 10 THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, <i>Defendant.</i></p>	}	Action. at Law.
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The following are the reasons upon which the defendant rests the motion for a new trial in the above stated cause:

1. The Court refused to non-suit the plaintiff, although a non-suit should have been granted.
- 20 2. The Court refused to direct a verdict against the plaintiff and in favor of the defendant, although such a direction of the verdict should have been granted.
3. The verdict of the jury was contrary to the evidence.
4. The verdict of the jury was contrary to the weight of the evidence.
- 30 5. The jury found for the plaintiff, whereas, in fact it should have found a verdict for the defendant, since it appeared from the evidence that the plaintiff was guilty of contributory negligence and that the defendant was not guilty of negligence.
6. The verdict of the jury was contrary to the charge of the Court.
7. The damages awarded by the verdict were and are excessive.

Dated September 29th, 1915.

**Exhibit D-2.**

STATEMENT IN THE MATTER OF PHILIP HEINZ at Andover, N. J., taken at New Milford, Pa., on Jan. 23, 1913, by C. T. Kyle; Dana W. Appleman, Summerville, Pa., Brakeman, W. H. Gahagan, Hallstead, Pa.

On the 13th day of April, 1912, I was at Andover, N. J. station. It was about 10:10 A. M., and I was waiting for a train for Newton, N. J. I was standing on the south side of the tracks about half way between the station building and Young's feed house. I was looking east and I saw the arm of the semaphore which is just east of the station set at danger indicating that the train I was waiting for had entered its block. A very short time after I saw that the train had entered the block. I heard a long blast of the whistle and in a few seconds I saw the top of a covered wagon flop over at the High Street crossing, which is about 600 or 700 feet east of the station. I could see nothing but the top of the wagon as it turned over. I could not see the engine strike the wagon or mules. I was waiting for the train but cannot say whether the engineer blew for the crossing before he blew the long blast of the whistle or not so I paid no attention to the whistle blowing until I heard the long blast of the whistle. I was too far away to hear the bell ringing. When I saw the wagon upset I started to the High Street crossing and when I reached the crossing I saw Philip Heinz and his driver getting on the train. The wagon lay on the north side of the track west of the crossing, one of the mules lay west of the crossing on the south side of the track, and the other one was in under the engine. I am well acquainted with Phillip Heinz and when he got off the train at Newton, Heinz asked me if the engineer blew for the crossing,

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30

40

*Exhibit D-2.*

and I told him I did not know. I only heard the long blast of the whistle. I saw Heinz once after the accident. I asked him how he was getting along and he said to me I am going to remember you in this case. I have not been interviewed by any attorney or any one representing Philip Heinz in regard to his ac-

10 cident. I cannot be of any use either to Philip Heinz or The D. L. & W. R. R. Co. in this case as I did not see the accident. I do not know whether the engineer blew for the crossing before he blew the long blast of the whistle or not. He may have blown the crossing whistle but I was not paying any attention until I heard the long blast of the whistle. On account of the curve I could not see the High St. crossing and I just caught a glimpse of the top of the wagon

20 as it was upsetting. As I recall the weather it was not foggy but was raining just a trifle. When we got off the train at Newton I saw Heinz at his house and it was then he asked me if the engineer blew for the crossing and I told him that I did not know.

C. T. Kyle, Asst. Claim Agent of the D. L. & W. R. R. is the first person who has interviewed me regarding this accident and this statement is made to him of my own free will without any promise

30 of being paid for same or any pressure being brought to bear on me by my employer or anyone else.

DANA W. APPELMAN.

Sworn and subscribed before me }  
this 23rd day of January, 1913. }

Chas. M. Shelp,  
Notary Public,

Com. expires Feb. 21, 1915.

40 (Seal)

**Exhibit D-6.**

STATEMENT IN THE MATTER OF Philip Heinz and Geo. Ranchill at Andover, N. J., taken at Andover on April 15th, 1912, by C. T. Kyle. Benjamin D. Totten, Andover, N. J., Farmer, Self.

On the 13th day of April 1912, I was in my home on the south side of the D. L. & W. tracks at High St. crossing. I was watching for Mr. Heinz the baker as I owed him some money and wanted to pay him. I sat in the bay window facing the tracks and had a view of the crossing and the street which runs parallel with the tracks. The train which comes from Netcong and which is due at Andover about 10:10 A. M. was coming west. I heard the engineer of the train blow four blasts of the whistle when he passed in under the culvert of the cutoff. I looked toward the crossing and saw a covered baker wagon drawn by a team of mules just on the crossing. At the time I saw the team on the crossing I heard the engineer of the train blowing an alarm whistle and looked and saw the engine about 150 feet east of the crossing. It looked to me though the driver tried to pull his team around to his right off the crossing but before he could do so the engine struck the team and wagon and by this time the engine cut off my view and I saw no more of the accident. I heard the train coming before I saw the team on the crossing but do not know whether the engine bell was ringing or not. The team was going toward the south side of the tracks and was on the crossing the first I saw it. When I saw the team on the crossing I also heard the engineer blowing his whistle and looked and saw the engine about 150 feet east of the crossing. There were two men in the wagon but I had no conversation with them regarding the accident. I do not know any one who saw the accident. I knew it was train time and was listening for the train and this is why I knew the engineer blew for the crossing before I heard him blow the alarm whistle.

B. D. TOTTEN.

## Defendant's Exhibit 10.

Sheet No. 8.

NAME		Philip Heinz.	
Date.		Debit.	Credit. Balance.
1911			
Oct.	27	Bal. for'd	313.20
	28	11.50	301.70
10	Nov.	4	16.80 284.90
		6	32.48 252.42
		13	16.00 236.42
		14	158.20 78.22
		15	88.20 166.42
		15	7.50 158.92
		16	14.00 144.92
		17	7.00 137.92
		18	2.40 135.52
		20	26.75 162.27
		21	120.00 42.27
20		27	70.00 112.27
	Dec.	5	12.52 99.75
		8	8.00 91.75
		15	74.26 166.01
		26	95.55 261.56
		27	5.00 256.56
1912.			
		30	17.00 239.56
	Jan'y	2	7.50 232.06
30		4-D	4.79 445.50 672.77
		5	657.50 15.27
		16	68.47 83.74
		18	4.05 79.69
		22	82.97 162.66
		24	48.12 210.78
		27	97.80 112.98
		29	42.17 155.15
	Feb.	1	66.39 88.76
		3	32.00 56.76
40		7	43.00 99.76

*Defendant's Exhibit 10.*

	10	49.00		50.76	
	13	4.75		46.01	
	15	33.00		13.01	
	17		5.00	18.01	
	23		54.50	72.51	
	Balance	72.51			
		<hr/>	<hr/>	<hr/>	
	30	1457.69	1457.69		<b>10</b>
		<hr/>	<hr/>	<hr/>	
	24	Balance	72.51		
	Date.	Debit.	Credit.	Balance.	
	26		75.00	147.51	
	28	20.00		127.51	
Mch.	2	4.00		123.51	
	4		103.62		
	4-D	550.00	346.38	23.51	
	5	7.50		16.01	
	6		66.96	82.97	<b>20</b>
	11	40.50		42.47	
	14	2.00		40.47	
	22		81.52	121.99	
	25	28.00		93.99	
	27	50.09		43.90	
	28		65.10	109.00	
Apl.	1	4.66		104.34	
	8		114.90	219.24	
	8	20.00		199.24	
		726.75	925.99		<b>30</b>
	Date.	Debit.	Credit.	Balance.	
	1912.				
Apl.	11	36.84		162.40	
	13	54.90		107.50	
	15	47.00		60.50	
	19		70.50	131.00	
May	2		102.50	233.50	
	4		62.49	295.99	
	6-D	350.00	247.50	193.49	
	9		112.00	305.49	<b>40</b>

*Defendant's Exhibit 10.*

		15	8.75		296.74
		17	87.00		209.74
		18	126.28		83.46
		20	24.35		59.11
		21	4.00		55.11
		31		131.23	186.34
	June	4	25.00		161.34
10		6		55.19	216.53
		7	6.00		210.53
		11	2.00		208.53
		13	133.00		75.53
		14		75.00	150.53
		15	15.00		135.53
		24	100.00		35.53
		26	5.00	60.60	91.13
		27	13.00	100.00	178.13
	July	1	16.00		162.13
20		2	75.00		87.13
	Date.		Debit.	Credit.	Balance.
		3	19.00		68.13
		5		102.25	170.38
		8-D	257.50	147.75	60.63
		12	91.32		30.69
		15		106.31	75.62
		Balance	75.62		
		41	2299.31	2299.31	
30		15	Balance	75.62	
		16	30.00		45.62
		22		68.53	114.15
		23		74.50	188.65
		25	28.50		160.15
		26	54.00		106.15
		27	26.85		79.30
	Aug.	3	5.00		74.30
		5		67.76	142.06
40		8		52.00	194.06

*Defendant's Exhibit 10.*

	9	2.50		191.56	
	12	53.75		137.81	
	13		51.60	189.41	
	14		56.00	245.41	
	15	37.75		207.66	
	16	117.00	65.00	155.66	
	23	92.00		63.66	
	27		49.25	112.91	<b>10</b>
Sept.	3	64.00		48.91	
	6	7.50		41.41	
	7		103.56	144.97	
	Balance	144.97			
		<hr/>	<hr/>	<hr/>	
	13	663.82	663.82		
		<hr/>	<hr/>	<hr/>	
Date.		Debit.	Credit.	Balance.	
1912.					
Sept.	7	Balance for'd	144.97		<b>20</b>
	10		67.15	212.12	
	19	116.75		95.37	
	23	29.00		66.37	
	30	54.60		11.77	
Oct.	3		139.27	151.04	
	8		27.88		
	" D	150.00	123.12	152.04	
	9	1.00		151.04	
	11		105.00	256.04	
	17	105.00		151.04	<b>30</b>
	18	55.75		95.29	
	19	3.00		92.29	
	21	8.00		84.29	
	23	7.50		76.79	
	31		61.12	137.91	
Nov.	6		58.20	196.11	
	12		68.00	264.11	
	16	5.93		258.18	
	18	200.00		58.18	
Dec.	6	7.50	78.04	128.72	<b>40</b>

*Defendant's Exhibit 10.*

	10	64.00		64.72
	14	14.64		50.08
	1913.			
	Jan'y 2	50.00		.08
	6		1.88	
	" D	125.00	123.12	
	9		61.63	61.71
10	13		50.00	111.71
	14	54.00		57.71
	15	3.75		53.96
	22	8.00		45.96
	24	9.00		36.96
	28		23.00	59.96
	Feb'y. 1	52.50		7.46
	15	3.75		3.71
	27		97.08	100.79
	Mch. 3	85.00		15.79
20	6		30.60	46.39
	8	18.74		27.65
	10	3.75		23.90
	13		33.00	56.90
	17	40.00		16.90
	18		66.21	83.11
	20	23.00		60.11
	29	25.00		35.11
	Apl. 7		80.00	
	" D	125.00	124.20	
30	12	3.50		31.61
	16	25.00		6.61
	18		38.93	45.54
	30		61.60	107.14
	May 7		49.54	156.68
	10	45.50		111.18
	12	12.00		99.18
	15		26.00	
	" D	184.53	99.00	39.65
40		<hr/>	<hr/>	<hr/>
		1719.69	1759.34	

*Defendant's Exhibit 10.*

1913.			Debit.	Credit.	Balance.
Date.		For'd			
			1719.69	1759.34	39.65
May.	27			35.50	75.15
	28		20.00		55.15
June	4			31.00	86.15
"			1.30		84.85
	7		17.10		67.75
	9		7.34		60.41
	13		3.00		57.41
	17			275.00	332.41
		Balance	332.41		
		49	2100.84	2100.84	
		" Balance		332.41	
	19		73.72		258.69
	21		91.00		167.69
	25		14.08		153.61
	27		22.50		176.11
	28		40.00		136.11
July	2		50.00		86.11
	3		18.75		67.36
	5		28.00		39.36
	14			5.00	
	" D		112.00	99.00	31.36
	23		20.00		11.36
	24			37.50	48.86
	29		15.00		33.86
Aug.	5		2.80		31.06
	13		12.00		19.06
	14		3.00		16.06
	19		2.00		14.06
	21		3.25		10.81
	26		1.00		9.81
Sept.	2		1.50		8.31
	3			10.00	18.31
	15		12.00		6.31

*Defendant's Exhibit 10.*

		16		2.50	
		" D	100.00	98.97	7.78
		20	.45		7.33
		25		17.75	25.08
		29		20.25	45.33
	Oct.	2	3.25		42.08
		6	1.00		41.08
<b>10</b>		8	15.00		26.08
		9	4.48		21.60
		16	12.00		9.60
		23		40.00	49.60
		25	20.00		29.60
	Nov.	1	8.00		21.60
		17		1.50	
		" D	100.00	98.50	
	1914.				
		24	12.00		9.60
<b>20</b>	Jany.	27	3.00		6.60
	Feby.	2		20.00	26.60
		9	2.00		24.60
		11	3.00		21.60
		13	12.00		9.60
		17		3.00	12.60
			<hr/>	<hr/>	<hr/>
			796.28	808.88	
	Sheet No. 8.				
	1914.				
<b>30</b>		For'd	796.28	808.88	12.60
	Feby.	17-D	103.00	98.50	8.10
	Apl.	1		48.48	56.58
		7	4.10		52.48
		9	1.75		50.73
		13	24.00		26.73
		16	4.75		21.98
		30	2.00		19.98
	May	13	12.00		7.98
		18		1.50	
<b>40</b>		" D	100.00	98.50	

*Defendant's Exhibit 10.*

July	20		7.50	
"	D	500.00	492.50	
Aug.	18		11.35	
"	D	100.00	88.65	7.98
Oct.	20		7.50	
"	D	500.00	492.50	
Nov.	18		1.35	
"	D	90.00	88.65	10
Jany.	20		7.50	
"	D	500.00	492.50	
Feby.	18		1.35	
"	D	90.00	88.65	7.98
Apl.	20		7.50	
"	D	500.00	492.50	
May	18		1.35	
"	D	90.00	88.65	
July	20		7.50	
"	D	500.00	492.50	20
Aug.	18		1.35	
"	D	90.00	88.65	

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**Opinion of Supreme Court.**

(Filed June 12, 1916.)

**NEW JERSEY SUPREME COURT.**

February Term, 1916.

PHILIP HEINZ,

v.

10 DELAWARE, LACKAWANNA & WEST-  
ERN RAILROAD Co.

On Rule to  
Show Cause  
from Sus-  
sex Circuit.

Argued February Term, 1916. Decided June  
Term, 1916.

WILLIAM H. MORROW, for Plaintiff.

FREDERIC B. SCOTT, for Defendant.

Argued before Justices PARKER, MINTURN and  
KALISCH.

20 PER CURIAM.

Upon a former rule in this case, granted upon  
a former judgment obtained for \$9,945.00, this  
court set aside the verdict, upon the ground that  
there appeared in the case no testimony of the  
plaintiff's claim of loss of profits in his bakery  
business, and that in this respect the verdict  
was excessive.

30 The legal effect of that rendition was to order  
a new trial of the case upon the question of  
damages only, the judgment standing good in  
order respects.

Prac. Act. Sec. 73 par. 9.

The plaintiff, however, saw fit to try the entire  
case de novo, with the result that the verdict  
for \$11,300.00 rendered upon the second trial is  
before us for review, upon a second rule to show  
cause.

*Opinion of Supreme Court.*

The retrial of the case may have the effect, notwithstanding the provision of the Practice act referred to, of presenting the entire case de novo to us upon this rule.

Upon that subject we express no opinion further than to state that we have examined the entire case in the light of the briefs submitted, and the extent of the oral argument, and are satisfied that the testimony in the case presented a fair question of fact for the jury, and we therefore are not inclined to disturb their solution of it. **10**

Manifestly such was the determination of this court upon the previous rule in view of the result announced.

We think the plaintiff's case was fortified in some respects upon the last trial, which renders it still less vulnerable to legal criticism. **20**

Our examination however, of the testimony relative to the damages suffered by the plaintiff, in his person and property, leads us to conclude, that as to the latter, the plaintiff's estimate and calculation of his business losses, in many instances is too highly nebulous for use as a basis upon which to found a verdict, and that it must be reduced to accord with that rendered upon the former trial. **30**

Such will be the rule. **40**

**Consent of Plaintiff to Reduction of  
Verdict.**

(Filed July 3, 1916.)

**NEW JERSEY SUPREME COURT.**

10	PHILLIP HEINZ,  <i>vs.</i>  THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY.	In an Action at Law, Etc.
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20 The plaintiff in this cause hereby consents that the verdict in his favor recovered at the September, 1915 Term of the Sussex Circuit Court for the sum of \$11,300.00, damages, be reduced to the sum of \$9,945.00, the said plaintiff hereby remitting from the said verdict the sum of \$1,805.00, and consenting that judgment in favor of the plaintiff be entered for the sum of \$9,945.00 damages, with costs of suit.

Dated, July 3, 1916.

WM. MORROW,  
Attorney of Plaintiff.

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**Order Discharging Rule.**

(Filed July 3, 1916.)

**NEW JERSEY SUPREME COURT.**

<p style="text-align: center;">PHILLIP HEINZ,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">THE DELAWARE, LACKAWANNA &amp; WESTERN RAILROAD COMPANY.</p>	}	<p>In an Action at Law, and Rule to Show Cause, etc.</p>	10
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This cause having been tried at the September, 1915 Term of the Sussex Circuit Court, and a verdict having been rendered for the plaintiff for the sum of \$11,300 damages, and the postea having been duly filed and judgment nisi entered thereon, and the defendant having procured a Rule to Show Cause why the verdict should not be set aside, and the rule having been argued before the Court at the February, 1916 Term, and the Court having considered the same and the reasons assigned for setting aside the verdict as being of the opinion that the said reasons, excepting that in which it is claimed that the damages awarded are excessive in amount, are not sufficient to set aside the said verdict, but that the damages are excessive in amount, and that such excess amounts to the sum of \$1805, and that the said verdict, ought, accordingly, to be reduced to the sum of \$9,945.00, it is thereupon ordered that said Rule be discharged on condition that the plaintiff elects to accept the reduction of the said damages to the said sum of \$9,945.00 in lieu of the said damages awarded by the jury in its verdict; and that upon the plaintiff filing consent by himself or his attorney to such remittitur, the said Rule to Show Cause be discharged, with costs of the plaintiff on the Rule, and that judgment final

be entered in this cause in favor of the plaintiff, and against the defendant for the sum of \$9,945.00 damages, with cost of suit; and that otherwise the said Rule be made absolute and *a venire de novo* do issue.

Dated, July 3, 1916.

Entered, July 3, 1916.

On motion of

WM. H. MORROW,  
Attorney of Plaintiff.

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### Judgment.

This action was tried before George S. Silzer, Judge with a jury on September 21, 1915, at the Sussex County Circuit Court.

The cause having been heard and submitted to the jury, they returned a general verdict against the defendant and in favor of the plaintiff for the sum of \$11,300.

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Subsequently to the rendition of said verdict a rule to show cause why the verdict should not be set aside and a new trial granted, was allowed defendant, which said rule was argued at the February term 1916, and the Court filed its opinion at the June term 1916, holding that the aforesaid verdict is excessive and that said verdict should be set aside and a new trial be had unless the plaintiff remit the sum of \$1,355 from said verdict and the plaintiff having remitted the said sum of \$1,355 and accepted the sum of \$9,945 in lieu of said verdict,

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WHEREUPON, it is adjudged that the plaintiff recover of the defendant the sum of nine thousand nine hundred and forty-five dollars and his costs, which are taxed at the sum of \_\_\_\_\_, making in the whole the sum of \_\_\_\_\_.

Judgment entered November 8, 1915.

WM. S. GUMMERE,  
C. J.

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