

6
Clerk

November Term, 1906.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ELIJAH PIVER,

Defendant in Error.

vs.

PENNSYLVANIA RAILROAD

COMPANY,

Plaintiff in Error.

In Tort.

Error to
Camden Circuit.

PRINTED BOOK.

APPEARANCES:

For Defendant in Error,

JOHN W. WESCOTT.

For Plaintiff in Error,

GASKILL & GASKILL.

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CAMDEN COUNTY CIRCUIT COURT.

ELIJAH PIVER vs. PENNSYLVANIA RAILROAD COMPANY.	}	In Tort. Judgment on Verdict.
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As yet of the fifteenth day of September, A. D. nineteen hundred and five. 10

Witness, ALLEN B. ENDICOTT, Judge.

JOHN W. WESCOTT, Attorney,

F. F. PATTERSON, JR., Clerk.

Judgment entered on the nineteenth day of January, A. D. nineteen hundred and six.

Damages -----	\$ 2,500.00	20
Costs -----	42.74	
	\$ 2,542.74	

CAMDEN COUNTY, SS:

The Pennsylvania Railroad Company, the defendant in this suit, was summoned to answer unto Elijah Piver, the plaintiff therein, in a plea of an action in tort: and therefore the said plaintiff, by John W. Wescott, his attorney complains for that heretofore, to wit, on or about the twenty-first day of December, nineteen hundred and four, the defendant had and maintained a system of railroad tracks on Fourth Street, in the City of Camden, in 30

said County ; that it was the duty of said defendant to keep its tracks and crossing over said Fourth Street fit and safe for public travel thereon, yet the said defendant disregarding its duty in this behalf there and then carelessly and negligently allowed and permitted its crossing over said *Fourth* Street to become unfit for and unsafe and dangerous to public travel thereon ; that there and then the said plaintiff was lawfully driving his horse and wagon across said railroad track at said *crossing* at
 10 Fourth Street, in Camden City, where and when a hoof of the horse plaintiff was driving as aforesaid was caught between the rail and a plank, in said crossing whereby said horse was thrown thereby violently throwing plaintiff from his said wagon to the ground, whereby said plaintiff was seriously and permanently injured and incapacitated for pursuing his usual vocation* and caused to suffer great pain of body and mind and caused to expend large sums of money endeavoring to be relieved of his said sufferings, all to his damage ten thousand dol-
 20 lars ; wherefore he brings his suit, etc.

And the said defendant, the Pennsylvania Railroad Company, by Gaskill & Gaskill, its attorney, comes and defends the wrong and injury when, etc., and says that it is not gully of the several supposed grievances above laid to its charge, nor of any, nor of either of them, nor of any part thereof, and of this the said defendant puts itself upon the country, etc. And the said plaintiff doth the like, etc.

30 Application therefore having been made by plaintiff's counsel, during the progress of the trial of this cause, it is on this eighteenth day of January, nineteen hundred and six, ordered that, the plaintiff's declaration be amended by the addition of the words, "or between one rail and another rail" after the words "between the rail and a plank."

Therefore, the Sheriff is commanded that he cause to come before the Judge of our Circuit Court, at Camden, in the County of Camden, on the nineteenth day of January, A. D. nineteen hundred and six, twelve, etc., by whom, etc., who neither, etc., to recognize, etc., because as well, etc., the same day is given to the parties, etc. And the jurors of the jury whereof mention is made also come, who to speak the truth of the matter within contained being chosen tried and sworn, upon their oaths, say that they find for the plaintiff damages at the sum
 Twenty-five hundred dollars, and the Court doth order
 judgment final in favor of the plaintiff and against the
 defendant for the sum of Twenty-five hundred dollars,
 besides costs of suit to be taxed.

10

Therefore, it is considered that the said plaintiff do recover against the said defendant his said damages, by the jurors aforesaid, in form aforesaid assessed, and also the sum of forty-two dollars and seventy-four cents for his costs and charges, by the said Court, before the Judge thereof, now here adjudged, of increase to the said plaintiff, and with its assent which said damages, costs and charges in the whole amount to the sum of Twenty-five hundred and forty-two dollars and seventy-four cents.

20

And the said defendant, in mercy, etc.

Judgment entered and signed this nineteenth day of January, A. D. nineteen hundred and six.

ALLEN B. ENDICOTT,
 Circuit Judge.

30

CAMDEN COUNTY CIRCUIT COURT.

ELIJAH PIVER	}	
vs.		
PENNSYLVANIA RAILROAD		In Tort.
COMPANY.		

10 Application is this day made by Gaskill & Gaskill, attorneys for the defendant, in the presence of John W. Wescott, attorney for the plaintiff, for an order to strike off the records the order for amendment of declaration filed in this cause as improvidently granted.

Upon the hearing of this motion to revoke the order of amendment heretofore granted in this cause it is urged by counsel for the defendant that the record shows no application for amendment and that no such application was made within the hearing of counsel. In reply
20 counsel for plaintiff insists that the application to amend was made and that the Court declared that the amendment might be made.

The recollection of the trial judge is that when a motion for non-suit was made upon the ground that the declaration was not sufficient, it was suggested to the Court by counsel for the plaintiff that an amendment covering this objection might be made if found necessary. After the determination of the case, counsel for the plaintiff mailed to the trial judge the amendment which
30 has been made and which was signed.

The application, therefore, to revoke the order of amendmend is refused.

ALLEN B. ENDICOTT,
C. C. J.

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

ALLEN B. ENDICOTT, [SEAL.]

Circuit Court Judge.

STATE OF NEW JERSEY, }
COUNTY OF CAMDEN. }

10

I, Francis F. Patterson, Jr., Clerk of the County of Camden, do hereby certify, that the foregoing is a true copy of the judgment in the case of

ELIJAH PIVER
vs.
PENNSYLVANIA RAILROAD
COMPANY.

In Tort.
Judgment on
Verdict.

20

filed January 19, 1906, and recorded in the Clerk's Office of the County of Camden, in Book I of Circuit Court Judgments, page 658, etc.

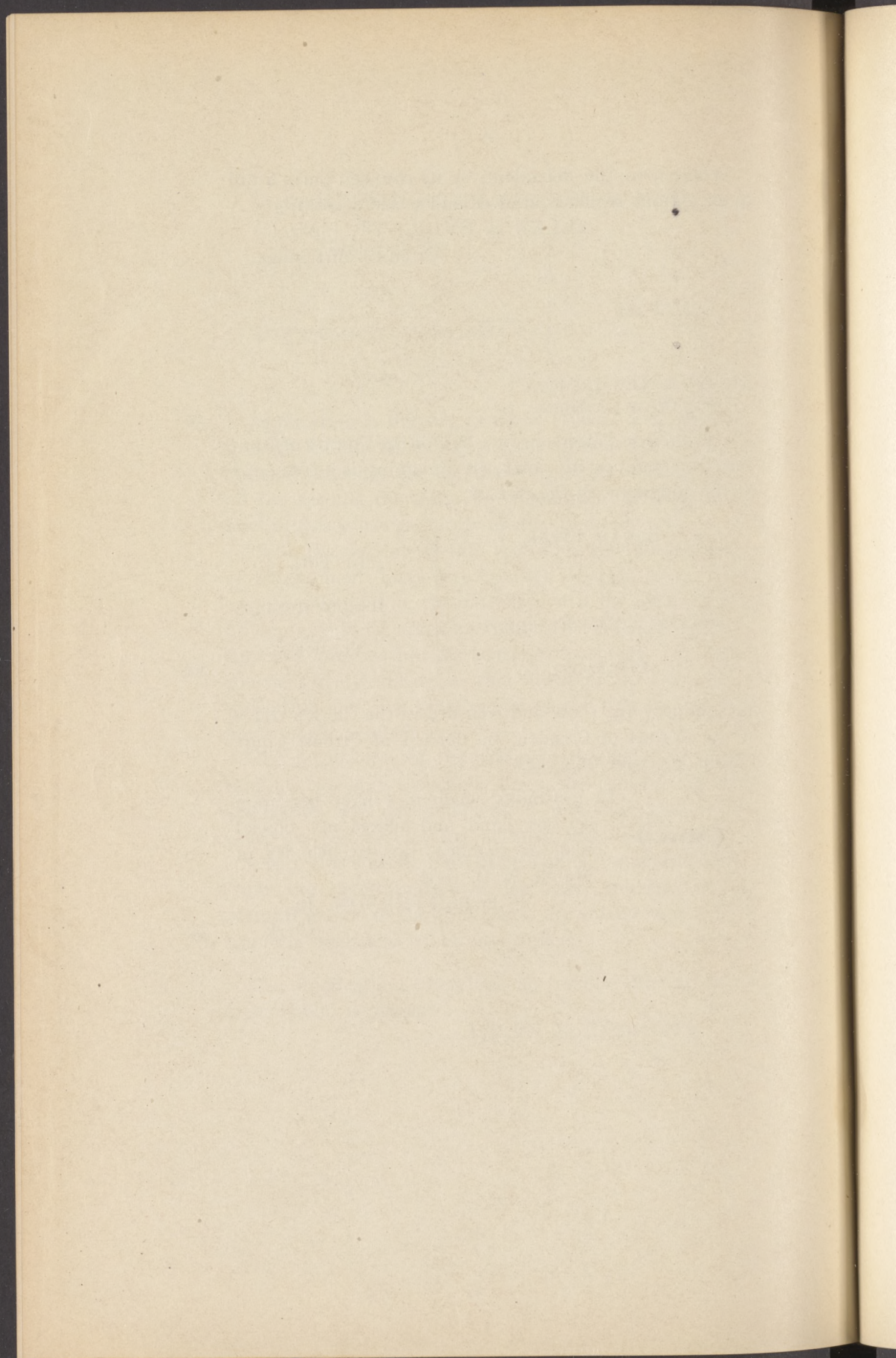
In testimony whereof, I have hereupon set my hand and affixed my official seal, at Camden, this twelfth day of March, A. D. 1906.

SEAL

F. F. PATTERSON, JR.,

Clerk.

30



CAMDEN CIRCUIT COURT

ELIJAH PIVER
 v.
 PENNSYLVANIA RAILROAD COMPANY } In Tort

WILLIAM Y. GLADNEY
 v.
 PENNSYLVANIA RAILROAD COMPANY } In Tort 10

DECEMBER TERM, 1905.

APPEARANCES :

For the plaintiff, JOHN W. WESCOTT, Esq.
 For the defendant, GASKILL & GASKILL.

20

Before ENDICOTT, J. and a Jury.

(The two cases were tried together, by consent of
 Counsel).

30

(Mr. Wescott opens the case to the jury).

ELIJAH PIVER, sworn.

By Mr. Wescott.

Q. Mr. Piver, what is your full name, please?

A. Elijah.

Q. What is your age?

A. Forty-seven last birthday.

Q. On the 21st of December, 1904, where did you live?

A. 416 Arch Street, Camden.

10 Q. What was your business?

A. Coal dealer.

Q. Coal dealer?

A. Peddling and delivering, handling coal.

Q. Handling coal?

A. Yes, sir.

Q. And how did you do that?

A. I did it by peddling basket and bucket, and also
by ton.

Q. Where did you carry it,—in your hands?

20 A. No, sir; I hauled it with a wagon, I delivered it from a wagon by hand in baskets and buckets, that is in my peddling trade I did; in my ton trade I used a chute, chute it down a cellar window.

Q. Well, you had a horse and wagon?

A. Yes, sir.

Q. Have more than one horse and wagon?

A. More than one?

Q. Yes.

A. Only one, sir, at that time.

30 Q. How long have you been in that business?

A. About seven years, I believe, then.

Q. Now, I see you have but one hand. Did you have but one arm all the time that you were engaged in this business?

A. Yes, sir.

Q. On the 21st of December, 1904, did you meet with an accident?

A. Yes, sir.

Q. About what time in the day was it?

A. Between twelve and one, on Wednesday before Christmas.

Q. Have you a family?

A. Yes, sir; at that time I had a wife and five children, haven't but a wife and three children now, I lost two since then.

10

Q. Where were you driving at the time of this accident?

A. Down Fourth, going south towards Bridge Avenue, down Fourth street, crossing Bridge Avenue, when the accident happened.

Q. Where were you going?

A. I was on my way to the coal yard for another load of coal.

Q. And what tracks did you undertake to cross over?

A. How is that?

20

Q. What tracks did you undertake to cross over?

A. I was going down the street car track to cross the track that goes across Bridge Avenue.

Q. Well, what tracks were you undertaking to cross?

A. Railroad tracks.

Q. Pennsylvania railroad tracks?

Mr. Gaskill, Jr. :

Those are our tracks.

A. Pennsylvania railroad tracks; yes, sir.

30

Q. What kind of a wagon had you?

A. One horse wagon.

Q. Well, what kind of a wagon, was it covered, open?

A. Open wagon.

Q. Open wagon?

A. Open wagon; yes, sir.

Q. Who was in the wagon with you?

A. An old man by the name of Gladney, William Y. Gladney.

Q. Where was he sitting?

A. He was sitting to the right of me, I was sitting on the left hand side driving, I always when I drive I sit to the left because it throws my lines over to the center of
 10 my wagon more, I always sit on my left because I have my right hand and I can manage my horse I think better, and I always sit on that side.

Q. Now, when you were going over the railroad crossing where was your wagon, horse and wagon—where were your horse and wagon?

A. I was about—I don't think I had passed one track.

Q. But in what part of Fourth Street were you in?

A. I was right in the center of the street, in the center of Fourth Street and Bridge Avenue when the horse
 20 caught.

Q. Can you recall whether or not your wagon was in the street car tracks, trolley tracks?

A. No, sir; I wouldn't say whether it was or no, but I think it was, the best I could say about it, but I wouldn't say positive on that.

Q. Now when you were going over there what happened?

A. My horse got his feet fast some way, I don't know, it was did so quick as that (indicating), so fast it threw
 30 me.

Q. You have stated that his feet were fast, and what happened?

A. Threw me out the length of my lines over his head, he fell and the sudden checking up of the wagon

caused the wagon to give me a toss and I went right over the horse's head.

Q. How were you driving at the time your horse was caught?

A. Just before I got down to the track the gate man waived a hand to me and hollered to me to hurry up and get across, I caught my lines that way (indicating) and hurried him up between a walk—some people call it a fox trot, dog trot, a fast walk for the horse.

Q. You were hurrying over a little? 10

A. Hurrying over, he hollered to me to hold up as I was going down.

Q. That is, the man in charge of the gates?

A. That is the man that has the gates.

Q. Were the gates at this crossing at the time?

A. Yes, sir.

Q. Were the gates up?

A. Yes, sir.

Q. Can you recall how many tracks there were, steam car tracks there at the time? 20

A. At the time I was hurt?

Q. Yes.

A. Well, no, sir, I wouldn't say positive how many there was there at that time, I never took no notice how many there was.

Q. Did you notice what track?

A. Somewheres about the center, close to the center.

Q. About the center of Bridge Avenue?

A. Close to the center of Bridge Avenue and Fourth.

Q. You were thrown out over your horse's head? 30

A. I was thrown over to the left of the horse, the horse fell to the right, his right foot was fast and I went over to the left.

Q. What happened to the horse when his foot was caught?

A. Well, he was fast so that some man there—

Q. Well, was the horse thrown or did he stand up?

A. He fell over to the right, threw him on his side over to the right.

Q. Was he held there in that position?

A. Held fast so that some man had to take an iron crowbar and pry his foot out.

10 Q. Do you know who it was that did that?

A. No, sir; I heard there afterwards that he was a railroad man, but I don't know who he was.

Q. You saw him pry his foot out, did you?

A. Yes, sir.

Q. Well, what effect did it have upon the horse?

A. Tore his hoof loose so that he bled quite a lot there, I also sent for—

Mr. Gaskill, Jr. :

20 Object to any further answer.

Q. And you also sent—

Mr. Gaskill, Jr. :

I object, if the Court pleases, to any further answer on that line, as not material; there is no suit here for injury to the horse.

Mr. Wescott :

30 Well, if there is not I move, if your honor pleases, to amend the declaration so as to include damage for the horse.

Mr. Gaskill :

We object to that for the reason that we had no notice

of it and have not prepared, we have not inquired into the value of the horse or paid any attention to it at all.

The Court :

The only question is, of course, whether the other side can meet it on such short notice. I will allow the amendment ; I suppose it is not a matter which you will have any trouble to meet, especially if the case should run into tomorrow.

Mr. Gaskill :

10

Well, I don't know about that, sometimes it take some little time to make inquiries about a horse and what it is worth, how old it is and where the man got it, and all that sort of thing.

Mr. Wescott :

Well, I don't want to stop the case,—

The Court :

I will allow the amendment if you desire it.

20

Mr. Gaskill :

If the amendment is to be allowed it seems to me that it is a matter of surprise, that we should have opportunity to prepare before going on with the case.

Mr. Wescott :

Well, I will waive it so as not to embarrass you.

Q. Do you know about how long the horse was held in this position by his foot ?

30

A. No, sir, I don't know the exact time, quite a little while.

Q. Quite a while ?

A. Yes, sir, quite a little while, I wouldn't like to say exactly how long.

Q. Were there any people gathered there?

A. Yes, sir; quite a crowd gathered there.

Q. Do you recall whether or not you were thrown beyond the extreme southern track?

A. I was threw the other side of the horse, beyond the horse's head, I had the lines in my hand and I went the length of my lines, and when the lines came up they jerked me back, then I was thrown right on the—
struck right on the crossing.

10 Q. Do you know whether or not shortly before this, this crossing was under repair?

A. Yes, sir; it had been torn up shortly before that.

Q. Now, what actually was done to you, Mr. Piver?

A. I was hurt in this right knee so that I was laid up a long time from it, and also in my side, and inwardly here (indicating).

Q. Which side were you hurt?

A. In the left hand side and right knee.

Q. How long were you laid up?

20 A. I was confined to the bed five weeks that I couldn't get up at all, and I was confined in the house about eleven weeks, I never went to my room, I never could get upstairs some over—about nearly thirteen weeks before I went up in my room in the second story, stayed right down in the front room on the couch right where the gentlemen took me at the time I was hurt.

Q. Did you have a doctor?

A. Yes, sir.

Q. Who was your doctor?

30 A. Doctor Hirst, Federal and Haddon Avenue.

Q. How long were you in his charge?

A. Well, I don't know, I might answer that, I guess, up till now, because I often stop there and ask him the conditions of my knee, sometimes he orders me to keep

off of it, and sometimes he orders me to rub it with a little liniment.

Q. This injury in your side, what became of that?

A. Well, while I was there I passed blood from the bowels for three days steady, since then I have had small stools of blood, since that time in my actions I have blood sometimes.

Q. Well, does it cause you any distress outside of that?

A. Still pain, kind of rumbling through the bowels and through the body. 10

Q. Is that what you refer to as an internal injury?

A. Yes, sir; internal that I have received to one side, that I was hurt inside.

Q. Coming down more particularly to your knee, how was your knee hurt? Can you give us any idea?

A. Well, when I got up my knee bone was driven up above, and I took my hand like that (indicating) and caught it on my knee bone and drove it back to the joint of its place, then I staggered off one side, and a man by the name of Bill Cramer—I think his name is Cramer, I think his name is William Cramer, he caught me and led me over and says to me "you come go home," and he then did take me home, and I don't know who took the couch in front through the door, I laid down there. 20

Q. Well, how has your knee got since?

A. Well, it bothers me, bothers me bed-times since it was hurt, I haven't laid a night without laying a pillow over it, I can't straighten the leg, or I can't draw it up properly. 30

Q. Can't bend it?

A. No, sir, or can't straighten it out, and in walking I have to walk my weight all on my toe, I can't use my heel but very little.

Q. Why can't you use your heel?

A. It has to be drawn in the back here (indicating), the cord has to be drawn so that the heel won't come down?

Q. Has it caused you any pain?

A. Yes, sir; it feels most of the time just like a cramp, more like a cramp through the knee, here under the bone like (indicating).

Q. How about your walking? Can you walk as well
10 as you could before?

A. No, sir; I never walk without a limp, in here (indicating) it hurts me every step I take.

Q. Have you any means of telling us what your Doctor's bills were?

A. No, sir; not positively; I don't know what my Doctor's bill has been since the first of March, though he told me my bill was \$45.00 up to that, I don't know what it has been since then, and I was still then—he was still calling on me and I was getting medicine and things,
20 along that time I asked him one day in there and he says about \$45.00.

Q. What kind of health had you before this accident?

A. Good, sir.

Q. How many hours a day did you work before you got hurt?

A. I done work from five, half-past five to sometimes half-past five and half-past six in the afternoon, all day.

Q. Have you any means of telling us what your income was a week or a month?

A. Well, sir, I would make—
30

Q. Be as accurate about it as you can, and don't exaggerate it a particle.

A. I used to put out from two to three loads of coal a day, that is peddling, and I made about all the way from three to three and a half a load, then sometimes I

would put out one, two and three loads ton trade, I made a dollar on every load of ton trade I put out; I judge I made, I estimate my clear was about \$30 a week.

Q. You had an income of \$30?

A. Yes, sir; I think it would clear that easily.

Q. Did you keep books?

A. Nothing more than memorandum or my coal book, that is all, I didn't keep a regular line of books.

Q. Have you got that?

A. Not with me, in fact I haven't any old book of it, got loose account I just kept where I let anybody have any coal by the week, I kept that up, that was all.

Q. Well now, what have you done since you got hurt?

A. Well, I have tried to peddle a little bit, we made money but I have had to give most all of my trade, all of my best trade, best work I can't do at all, the only thing I can do is anything on a level like going in a gate, or up a front steps; where I used to put out two loads of coal a day now I put out about one-half a load.

Q. About one-half a load?

A. One-half a load, six or seven hundred.

Q. What do you make now a day, Mr. Piver, about?

Q. What is that, sir?

Q. About what do you make a day now?

A. I suppose I make a dollar, or a dollar and a quarter, like that.

Q. Well now, you have given us that straight as you know, or have you exaggerated any?

A. That is as straight as I have, as I know.

Q. From a dollar to a dollar and a quarter a day?

A. Yes, sir; I don't think I go over it.

Q. When you work now what effect does it have on your leg?

A. My leg pains me awful after working of a day, well, I can't stand but very little at a time, I have to get

somewhere and sit, and bothers me getting on and off of the wagon, I can't go upstairs, when I go up steps I have to stop every bit, and of a night, as I say, when I lay down I have to have a pillow under it, it pains me, I have to.

Q. Are you able to work every day?

A. No, sir; I haven't been working every day, sometimes it pains me so I don't work, especially rainy weather, rainy weather it is worse than when it is good.

10 Q. Did you see what became of Mr. Gladney when the horse went down and you went out of the wagon?

A. When I got up I see that Mr. Gladney was under the horse, I took hold of him and some gentleman, I don't know who, went with me and we pulled him out from under the horse's feet, he was under the horse, this man I spoke about a little while ago, Mr. Cramer, he got me out, I staggered there that time and he led me off to one side.

Q. Did Mr. Gladney work for you?

20 A. At that time; yes, sir.

Q. What did he do?

A. Helped me on the coal wagon, peddle coal.

Q. Did you have a stable of your own?

A. Yes, sir, rented stables at least.

Q. You rented a stable?

A. Yes, sir.

Q. And Mr. Gladney helped you there?

A. Yes, sir; helped me tend to my horse, helped me in general, whatever was to do he helped me do.

30 Cross-examination.

By Mr. Gaskill, Jr.

Q. Mr. Piver, how long have you lived in Camden?

A. About eight years.

Q. Eight years, and did you begin coal peddling when you first came here?

A. No, sir, not at first.

Q. How long before you began your coal peddling?

A. I think I—the first summer I lived at 5th and Berkley, and then I moved up on the corner of Third and Taylor's Avenue and I kept a little shop there until I think it was in November, then I started in the coal trade there.

Q. Were you here about a year before you began the coal business? 10

A. I was here from March until about the next November, I think, sir, the best I can remember.

Q. Are your patrons in the coal business living in any particular part of the town?

A. What is that?

Q. Do the people who buy coal from you live in any particular part of the town, or are they scattered all over Camden?

A. They are all around the town, I suppose, my trade is at different people, you know, it is not one particular person. 20

Q. And they are scattered all over the town?

A. Not all over town, no, sir; my trade is mostly in north Camden.

Q. And had you been out in north Camden on Wednesday, the 21st day of December, 1904?

A. Part of it, yes.

Q. And you were driving in from north Camden to the coal yard when the accident happened? 30

A. Yes, sir; going down Fourth Street.

Q. Do you have coal yard of your own?

A. No, sir.

Q. Who did you buy your coal from?

A. I believe the yard goes by Newton's yard, I think

it goes by, down there at the Pennsylvania Railroad yard.

Q. And you were driving down Fourth Street in a southerly direction to the railroad tracks?

A. Yes, sir.

Q. When this accident happened?

A. Yes, sir.

Q. And for easy running and to save joltings you were driving down the trolley tracks, were you not?

A. In answer to that question I don't know whether
10 I did it for easy running or jolting; I was going down that way because it was a central street, we always go down it.

Q. And weren't you driving down the trolley tracks?

A. I think I was in the track, sir; yes, sir.

Q. Had you driven down Fourth Street across the railroad tracks before?

A. Before that day, you mean?

Q. Yes.

A. At that same place?

20 Q. Yes.

A. I don't think I had crossed it before that day, not at that time, that day, not that day I don't think I crossed it.

Q. But on previous days to the 21st of December you had driven down Fourth Street across these tracks?

A. Oh! yes, sir.

Q. So that you knew that there were crossings there over the railroad tracks?

A. Sure I knew there was crossing down that street
30 or I wouldn't have went down it.

Q. And how many railroad tracks cross Fourth street at that date—crossed Fourth street at that time?

A. I don't know positive whether it was three or four.

Q. Do you remember a new track had just been laid across Bridge avenue, along Bridge avenue across Fourth street?

A. I knew they had been working there.

Q. They had just laid a new track, had they not?

A. I won't say, I don't know,

Q. You are not sure about that?

A. I won't answer, can't answer.

Q. You can't say that the railroad employes had not been engaged, on or shortly before the 21st day of December, in laying a new track along Bridge Avenue across Fourth Street? 10

A. I knew they had been working there, but what they were doing I don't know, laying new tracks or repairing the old, I don't know.

Q. You can't say?

A. No, sir.

Q. Do you remember whether you had crossed two tracks before you came to the track where the accident happened? 20

A. I remember that my wagon was across one track, but whether there was another track, how many tracks there was the other side, I don't remember.

Q. When you were thrown ahead of your horse, as you say, were you thrown beyond the railroad tracks?

A. No, sir; I struck about the railroad tracks, somewhere about my horse's head, just the other side of my horse's head there was another track, might not have been a whole double track the other side, but there was a track beyond my horse's head. 30

Q. There was a track beyond your horse's head?

A. Yes, sir.

Q. You say Doctor Hirst attended you?

A. Yes sir.

Q. Is he here today ?

A. I don't know, sir, whether he is or no.

Q. Have you paid Doctor Hirst the bill of \$45.00 ?

A. No, sir, not all of it, paid him some.

Q. You haven't paid him for his attendance for your injury which occurred on the 21st of December, have you ?

A. No, sir, not all of it, I have been paying him some little as I could.

Q. For his treatment of you resulting from this injury ?

10 A. Well, I suppose, yes, sir ; I guess that was it.

Q. You have had some daughters sick who have been treated by Doctor Hirst ?

A. Yes, sir.

Q. And hasn't part of your payment to him—

Mr. Wescott :

I object to that, if your Honor please.

The Court :

20 The obligation is incurred, it don't matter whether the bill is paid or not ; what is the purpose ?

Mr. Gaskill, Jr.

The purpose is to find out whether the bill has been paid, and—

Mr. Wescott.

What I am objecting to is the question of the sickness of his daughters and their medical expense.

30 The Court.

Whether it is paid on account of services to them is proper, I will allow it.

Q. And hasn't part of your payment to him been for his services to your daughters ?

A. Well, sir, I don't know which way he credited it, I paid him some before and I paid him some since.

Q. And you don't know whether what you have paid him has been applied to your bill or to the bill for treatment of your daughters?

A. No, sir, I couldn't answer that question, paid him some before and I paid him some since.

Q. Now, you have said that you delivered two or three loads a day?

A. Sometimes two and sometimes three. 10

Q. Yes; would your load consists of filled baskets or bags?

A. Buckets and baskets.

Q. Buckets and baskets?

A. Buckets and baskets, but when I say load I mean a wagon load, don't mean bucket or basket load.

Q. And how many buckets or baskets would your wagon hold for a load?

A. I think they run about 58, something like that, 55, 56, 58, something like that, baskets. 20

Q. And you always carried—had a full load of 58 baskets, did you?

A. Sometimes might be a little short, sometimes might be a little over, sometimes I would have only as much as twenty-one, twenty-one fifty, sometimes I would have nineteen hundred and fifty, such as that.

Q. Did you drive around the streets crying coal for sale?

A. I don't use the word "for sale," I holler "coal."

Q. So that you took out full loads with you? 30

A. In the morning my first load was always full, my next load sometimes measured from nineteen hundred to twenty-one hundred and fifty.

Q. So that as an ordinary thing you did not drive out

and deliver coal to people who had ordered it in advance?

A. By the ton, yes, I did that in the afternoon.

Q. And ordinarily how many tons would you deliver in an afternoon?

A. Sometimes I would deliver one, sometimes two and sometimes three, and I have run as high as seven.

Q. And did you deliver coal by the ton every afternoon in the week except Sunday?

A. I wouldn't say every one, but most in general I
10 did, most every afternoon.

Q. So that in the morning you peddled coal and in the afternoon you delivered it by the ton?

A. In the afternoon I delivered my ton orders.

Q. Did you deliver ton loads with a one-horse wagon?

A. Yes, sir.

Q. Did you deliver a ton at a time?

A. Yes, sir.

Q. From your one-horse wagon?

A. Yes, sir.

20 Q. With the assistance of Mr. Gladney?

A. Yes, sir.

Q. Now, I understand that you made about \$35.00 a week from this work?

A. Yes, sir,

Q. Is that right?

A. Yes, sir.

Q. And you paid Gladney how much?

A. Well, sometimes I would give him different prices, I never had no regular salary with Mr. Gladney.

30 Q. Depends on the amount of work that he did?

A. Yes, sir; I give him one amount and sometimes I would give him another.

Q. Well, what you gave Gladney was deducted from what you made, your \$35.00 a week, wasn't it?

A. No, sir; I never kept books, but every Saturday

night I would count up just about what I had over and I would give it to him.

Q. You paid him Saturday night?

A. No, sir.

Q. And you counted up the money that you had on hand from your week's work and you paid him from that what you could afford?

A. No, sir; I didn't say so; I said I generally give something—sometimes some over, whatever the man wanted; I never kept accounts how much I gave him. 10

Q. Well, on Saturday—

A. On Saturday nights I have given him no particular salary, whatever I thought I had I gave it to him.

Q. On Saturday night you counted up how much money you had in your pocket and then you paid him something from that?

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

Q. Did you or did you not? I want an answer to that question. 20

(Question repeated).

A. I didn't because I never gave him nothing Saturday night.

Q. You never paid him on Saturday night?

A. No, sir; I didn't; give it to him all along through the week as he asked me for it.

Q. So that you just paid him along in dribbles through the week?

A. Yes, sir.

Q. And how much would you pay him at a time? 30

A. Well, different amounts, sometimes he would ask me for a half dollar, sometimes for a dollar, and sometimes more than that, to get him some things, something like that.

Q. And how many times a week would you pay him?

A. I couldn't tell that, sometimes it would be every day he would ask me, and sometimes it wouldn't be that often; sometimes it would be more than one time a day he would ask me for something.

Q. You only paid him then when he demanded money?

A. Whenever he asked me for anything I gave it to him.

10 Q. And what you gave him depended upon your success in selling coal?

A. Not altogether that, sir, no, sir; I just simply had him with me helping me, that was all.

Q. Did you give him three dollars a week?

A. Well, I think I gave him more than that, sir, on an average.

Q. How much more?

A. I don't know, I think—I am pretty certain I averaged over fifty cents a day for him.

20 Q. What say?

A. I am pretty certain I averaged over fifty cents a day for him.

Q. How much over fifty cents a day did you average?

A. I couldn't say.

Q. You won't say positively that you averaged—that you paid him more than fifty cents a day?

A. I won't say I gave him more than five dollars a week.

30 Q. Did you give him as much as five dollars a week regularly?

A. I wouldn't say regularly, not in money, cash, I boarded him though, I gave him his board.

Q. Now, you had a stable which you rented? Now, you rented a stable?

A. Yes, sir.

- Q. And when did you pay for that ?
 A. Paid for that in the first—first of the month.
 Q. You paid for that stable every month ?
 A. First of the month; yes, sir.
 Q. And how much did you pay for that stable ?
 A. Three dollars.
 Q. Three dollars for the month ?
 A. Yes, sir.
 Q. What did it cost you to feed your horse ?
 A. I thought I had a bill here; it cost me from, all 10
 the way from \$2.48 to \$2.77,—I think about ten dollars,
 from ten to twelve dollars.

By Mr. Wescott.

- Q. Mr. Piver, I forgot to ask you about the size of
 your horse.
 A. Do you mean the weight of him—size of him ?
 Q. Size of your horse.
 A. Well, sir, I should judge he would weigh between 20
 fourteen and sixteen hundred, he weighed fourteen hun-
 dred at the time I bought him, and he is a little fatter
 now than what he was then.
 Q. I understood you to say you boarded Mr. Gladney
 besides what money you gave him ?
 A. Yes, sir.

WILLIAM Y. GLADNEY, SWORN.

By Mr. Wescott:

- Q. Where do you live, Mr. Gladney ?
 A. 231 Taylor's Avenue.
 Q. Camden ?
 A. Yes, sir.

Q. How old are you ?

A. I will be seventy years old the 7th day of June.

Q. How long have you lived in Camden ?

A. All my life, ever since I was two years old, since I lost my mother.

Q. Do you keep house ?

A. No, sir.

Q. Do you know Mr. Piver ?

A. Sir ?

10 Q. Do you know Mr. Piver ?

A. I knew him by working for him.

Q. How long did you work for him ?

A. About four years.

Q. How much did you get a week, about ?

A. Well, I got six dollars a week by going out in the coal wagon, then I run out a furniture car after I came in with the coal wagon, then I got half what I made, if I made a dollar job or two dollar job or five dollar job I got half what I made.

20 Q. Did you get your board from Mr. Piver ?

A. No, that is, when we go around in the coal wagon he always give me my breakfast.

Q. I never had time to eat my breakfast home.

Q. When did you live at that time ?

A. I lived with my daughter.

Q. And you only got your breakfast from him ?

A. Yes, sir.

Q. Where did you get your dinner and supper ?

A. My daughter's.

30 Q. At your daughter's ?

A. Yes, sir.

Q. Do you remember an accident on the 21st of December, 1904 ?

A. Yes sir.

Q. Tell us what you recollect about it.

A. Well, we were coming down with the coal wagon after some coal, and we were walking, as we got on the track the horse threw Mr. Piver, kind of caught himself with his foot and Mr. Piver went out with the lines in his hand on his face, and he had no more—was just a raising up and the horse made a start and threw me down between the shafts and his legs and the horse fell on me, hurt my side and hurt my leg.

Q. What was the matter with the horse? 10

A. That I don't know.

Q. Do you know whether the horse got caught or not?

A. I don't know, only after I was taken out I seen a man with a crowbar prying his foot out, that's all I know.

Q. Did the horse fall down?

A. Sir?

Q. Did the horse fall?

A. He fall right on top of me, I don't know how he 20
fell or anything.

Q. Well, did he fall twice?

A. No, only fell on me the first I know of.

Q. How did you get—were you in the wagon?

A. I was taken out by some man.

Q. Where were you in the wagon? Whereabouts
where you sitting?

A. I was sitting on the right side, Mr. Piver on the left side, he, was thrown on the left and I was thrown between the shafts and the horse. 30

Q. What threw you out of the wagon?

A. The horse making a jerk, stopped so sudden, so I
fell.

Q. Well, what happened to the horse when you went out?

A. That I don't know, what happened to him at all.

Q. Well when you went out did you strike the ground?

A. Yes, sir, I went right on the ground and the horse fell on me, he fell right down on me.

Q. Then you afterwards saw them prying the horse's foot out?

10 A. After they were taking me out, as I was getting on my feet I seen a man prying the horse's foot out?

Q. Did you get hurt any?

A. Got my leg bruised, hurt, and the bones are sore yet, and my side is sore, my ribs, I can't work at no day's work, I ain't done a day's work for a year and over.

Q. Haven't you done any work at all since you were hurt?

A. No, sir.

Q. Haven't you tried to work?

20 A. No, sir, I am not able, I am sickly all the time.

Q. Why don't you try to work?

A. Well, I can't you know, when I go—sometimes my legs, sometimes it hurts me so I can hardly walk on them, pain me, and then another thing I have got a cough, and once in a while I will cough blood up.

Q. When did you get that cough?

A. Well, it was since this thing came on me.

Q. Since what?

A. Since this accident came on me.

30 Q. Since the horse fell on you, do you mean?

A. Yes, sir.

Q. Have you had a doctor?

A. No, sir.

Q. Why didn't you get a doctor?

A. Well, I wasn't able to pay no doctor.

Q. Who takes care of you now ?

A. My daughter.

No cross-examination.

DOCTOR LEVI B. HIRST, sworn.

By Mr. Wescott:

Q. Doctor, where do you live, please? 10

A. 586 Federal Street, Camden.

Q. And what is your business ?

A. Physician.

Q. Do you know Mr. Gladney, this old gentleman that went off the witness stand ?

A. I know Mr. Gladney ; yes, sir.

Q. Have you examined him ?

A. No, I never examined Mr. Gladney.

Q. Do you know Mr. Piver, this gentleman sitting here (indicating person present). 20

A. Mr. Piver, yes, sir.

Q. Were you called upon to see him about December 21st, 1904 ?

A. Yes.

Q. What did you find to be his trouble then ?

A. Why I found that he had received injuries to his knee, his side was hurt, suffering from shock.

Q. What were the symptoms that you observed—what were the effects, the conditions ?

A. Well, suffering mostly from his knee? 30

Q. How ?

A. He was suffering mostly from the hurt to the knee.

Q. What was the evidence ?

A. He had been hurt, the knee was inflamed and

bruised and swollen, and hurt him on pressure, could not move it.

Q. What did you notice about his side?

A. He complained a good deal of his side; there was some bruises there.

Q. How extensive were these bruises? How did they appear?

A. Well, the skin was reddened and tender to the touch, and so forth.

10 Q. Did you notice any discharge of blood by him?

A. He had some discharges of blood from the bowels some few days afterwards, not at that time, I think it was three or four days afterwards.

Q. How did you explain that?

A. Well, must have been some internal injury.

Q. Well, have you attended him since?

A. Yes, sir.

Q. What has been the course of his progress, in respect to the knee, for instance?

20 A. Well, it has been very slow, he has got trouble with the knee causes him to limp somewhat, stiffness, soreness.

Q. What do you call it technically?

A. It is called synovitis of the knee.

Q. Is his condition curable?

A. Well, it has been over a year since it happened, he is still suffering from it, so I don't believe he will ever get entirely over it.

Q. Is it a serious injury?

30 A. Well, it is going to lame the man, won't interfere with his living or anything like that, but he will always be hampered.

Q. Interfere with his movements?

A. Yes.

Q. His location ?

A. Yes.

Q. Does it effect his going up and down stairs ?

A. Yes; a good deal.

Q. How about his walking around the streets attending to business ?

A. Well, he will walk but he has to limp, you know, there is some soreness there, the motion is limited.

Q. How ?

A. The motion is limited. 10

Q. The motion of his knee is limited ?

A. Yes.

Q. What have you to say with respect to the evidence of internal injury ?

A. I think he has gotten over that possibly, I haven't discovered anything recently.

Q. How ?

A. I think he has gotten over that to a certain extent, I haven't discovered anything very recently, in fact I have not examined Mr. Piver for probably two or three months. 20

Q. Have you, when he has called upon you, noticed any complaint he has made about his side ?

A. Yes, he does complain about the side once in a while, the last time I seen him he complained about it somewhat.

Q. Did you know him before he received this injury ?

A. Oh, yes.

Q. What sort of a physical man was he, in respect to the general health ?

A. Always had good health, always had good health. 30

Q. Have you an idea what the amount of your bill is Doctor, up to the present time ?

A. Why, I think Mr. Piver's present bill is somewhere about \$50.00, I don't know the exact amount, somewhere about there.

Cross-examination.

By Mr. Gaskill, Jr. :

Q. Now, Doctor, explain to us so that we can get it a little more fully what synovitis of the knee is ?

A. Well, it is an inflammation of the knee joint, there is a covering of the knee joint, and this covering becomes inflamed from an injury or an accident of some sort causing thickening of the covering—thickening of the fluid
10 that is in the joint.

Q. So that synovitis is actually a thickening of the fluid which covers the knee joint ?

A. Yes, practically is.

Q. In simple words, then this man had a sprained knee ?

A. His knee was—

Q. Just answer that question, if you please, Doctor.

A. Yes, you would call it a sprain if you wish, commonly called a sprain.

20 Q. Now, Doctor, as to his passing blood from the bowels, did you see him pass blood from his bowels ?

A. No, I did not not.

Q. Or see any stools of his in which blood occurred ?

A. No, I did not see the stool.

Q. So that you only know that there was blood from the bowels by his telling you so ?

A. By his telling me; yes, sir.

Q. And any consequent internal injury indicated by blood from the bowels would only be known to you by
30 his telling you that there was blood from the bowels ?

A. Yes.

Q. Now, I understand he has not paid you as yet this bill of \$50.00 for personal injury ?

A. No; I have not been paid.

By Mr. Wescott :

Q. This condition of the knee could be caused, I understood you to say, by an injury, Doctor?

A. By an injury ; yes, sir.

DR. WILLIAM WESCOTT, sworn.

By Mr. Wescott :

10

Q. Where do you live?

A. Berlin, Camden County.

Q. New Jersey?

A. New Jersey.

Q. What is your business?

A. I practice medicine.

Q. Are you related to me by blood?

A. Yes, sir ; brother.

Q. Did you, at my request, examine these gentlemen here, Piver and the old man by the name of Gladney? 20

A. Yes, sir.

Q. How long since?

A. Yesterday.

Q. Yesterday?

A. Yes, sir.

Q. What did you find in the case of Mr. Piver?

A. The difficulty with Piver is largely with the right knee, the large tendons in the back part of the leg are somewhat shorter, gives the leg a semi-flexed position ; the knee cap is somewhat fixed ; it is not entirely movable as it is on the other side ; the girt of the leg is a little increased around the joint. 30

Q. The what?

A. The girt of the joint is a little increased, an inch perhaps, motion is curtailed and the man complained of

pain upon exercise, he has a painful spot in the left side of his body about at the lower edge of the ribs.

Q. How do you know he has a painful spot there?

A. Well, of course I got the statement from the man, there is an involuntary action of the muscles upon irritation, and some increased action of the heart when I hurt him.

Q. Could he feign that?

A. No, I think not; this man has a irritable heart,
10 goes along too fast.

Q. Could that be due to your examination of him?

A. Well, I don't think it was, we had a very easy time of it, and I don't think the man was at all bruised.

Q. What do you technically call this condition of his knee?

A. He has had a low form of the inflammation of the knee, it is called synovitis, that means literally, an inflammation of the internal structures of the knee, or joint, goes all about through the whole joint; when a
20 man has synovitis the knee has swelling in it, stiffness of the leg, it is familiarly known, the common name.

Q. Is his condition, the condition of his knee a critical one?

A. Well, the act of inflammation has subsided, and I don't believe that the structures will assume their normal again, he will probably be more or less of a cripple hereafter.

Q. Does it affect his knee?

A. Yes; he limps a little.

30 Q. How does this condition of his knee affect his putting his foot down, if you noticed?

A. It keeps the heel practically off of the ground, the contracted condition of the posterior tendons keeps the man from putting his heel down practically, so that he walks with his knee slightly bent all the time.

Q. Could that be assumed by him?

A. Oh, it could be, but it is not in this case.

Q. Did you examine the old man, Mr. Gladney?

A. Yes, the old man is very feeble, he has got a pulse of 104; his left leg from the knee to the foot is livid, and has a small ulcer, there is a small ulcer part-way betwixt the knee and foot, the knee is somewhat stiffened in its action.

Q. Which knee is that?

A. I think it is the left leg in the old man, the right leg in the young man; he has a tender flank. 10

Q. Tender what?

A. Tender flank, he has a place betwixt the edge, he is tender betwixt the edge of his ribs on the left side and his haunch bone.

Q. What say?

A. I say the old gentleman is tender betwixt—in the portion of his body betwixt his left side, his ribs, and his pelvis, his haunch bone; his left leg is congested; he has a cough, and I got the history of some spitting of blood from him, there is physical evidence of bronchitis on the left side of the lung; the old man is very feeble, and he gets his breath with difficulty. 20

Q. With difficulty?

A. With difficulty.

Q. Well, how much, if any, of this that you noticed about him could be attributed to the accident that he went through of the 21st of March, 1904, by a horse falling on him?

A. All of it is compatible with the history of his accident. 30

Q. All of it?

A. Yes.

Q. Well, of course he ought to have had a physician ?

A. Yes; the old man ought to have a good deal in life by the appearance of him.

Q. Ought to have had what ?

A. A good many things in life in the way of comfort, and so forth.

Mr. Gaskill :

I ask that that be stricken out.

10

The Court :

Yes.

Q. Well, he ought to have had a physician ?

A. Yes.

Q. Can he be relieved by a physician now for these troubles ?

A. Oh yes ; he is being treated, I think, in the dispensary, I took bandages off of him and salves when we examined him, or at least he removed them in my presence, he has got them on now.

20

Q. And he can be cured, you think ?

A. No, I don't think that this old man can be cured at all, he is a bad specimen.

Q. He is a bad specimen to cure ?

A. Yes.

Q. Well, this condition of his, Doctor, could that be brought about by a horse falling on him ?

A. Yes.

30 Cross-examination.

By Mr. Gaskill, Jr. :

Q. Doctor, I understand that you only saw Piver and Gladney on one occasion ?

A. That's all.

Q. Piver is still young enough, is he not, for time to enable the structure of his knee to assume its normal condition?

A. No.

Q. No?

A. No.

Q. Do you say you are able to tell that his apparent inability to get his heel to the ground was not assumed by simply seeing him on one occasion?

A. It is not assumed. 10

Q. Well, that is not the question. I ask that that be stricken out and the question read. Just observe the question.

(Question repeated.)

A. I can't see any other way to answer the question, it is not assumed.

Mr. Gaskill :

I ask that that be stricken out. 20

The Court :

He asks if you can tell from one observation that it is not assumed.

The Witness :

Oh, yes; I can tell that it is not assumed from what I learned of the man.

Mr. Gaskill: 30

I ask that be stricken out as not responsive. I asked him if from the one interview which he had with the man he could tell that the injury, the limp was not assumed.

The Witness :

I don't know how to answer. I understood—from my examination of the man I got my impression, I got my ability to testify this afternoon that I do not believe that the man assumed, I did not understand the question.

Mr. Gaskill :

I ask, if the Court please, that be stricken out as not responsive, I think the question can fairly be answered
 10 yes or no.

(Repeated.)

Q. Do you say that you are able to tell that his apparent inability get his heel to the ground was not assumed by simply seeing him on one occasion?

A. Well, I would say yes, if I understood the question.

The Court :

If you can tell from that one interview.

20 A. Yes ; certainly I can tell from that one interview.

Q. This accident having occurred in December, 1904, Doctor, would you say that the bronchitis which Gladney has in his left lung at the present time was caused by that injury?

A. I said "could have been," yes, sir.

Q. You say that the present bronchitis which he has could have been caused by the injury which he received in December, 1904?

A. Certainly.

30 Q. And that he would have bronchitis from December, 1904, to the present time?

A. As a result ; yes.

Q. In other words, he has habitual bronchitis, has he?

A. He has got a chronic condition, yes.

Q. And that, you say, was caused by the accident ?

A. I say it could have been, yes, sir.

Q. Could have been caused ?

A. Yes, sir.

PLAINTIFF RESTS.

Mr. Gaskill, Jr.:

10

We desire to make a motion for a nonsuit, if the Court please, we move for a nonsuit in each of these cases on the ground, first, of variance between the proof and the declaration ; the declaration states that the injury was received by the horse catching its hoof between the rail and the plank, and the declaration must be sustained by the proof. There is in this case no proof whatever as to how the horse caught its foot, simply that its foot was caught. Second, there has been no proof whatever of negligence on the part of the defendant company ; there has been no proof whatever that the crossing was improperly constructed, or that the crossing was improperly maintained, there has been no attempt whatever to prove either of these two things, the mere fact that there was an accident there does not make the company responsible in damages ; there must have been negligence on the part of the company, either in construction or maintenance and care, there has been no proof whatever of either. And in the third place, that the doctrine of *res ipsa loquitur* does not apply in a case of this sort, there must be proof that something was left undone, or that something that was done by the company caused the horse to fall ; it is not a case where the mere happening of an accident puts upon the company responsibility.

20

30

Mr. Wescott :

It depends upon how the accident happened, the nature of the accident. Sometimes the mere happening of an accident don't send a case to the jury, sometimes it does, for instance, if you keep a store and I go in your store to buy something and I go through the floor into the cellár, that is all I have to prove, I don't have to prove the thickness of the board, or which board broke, or how rotten they were, or anything about it. Now,
 10 here is a public crossing, public highway which every citizen who uses the same is entitled to have in a safe condition, that is the law. Piver, as a citizen, was using this public highway in the ordinary way driving, the hoof of his horse catches in the crossing laid down by the railroad company, the horse is thrown, his hoof is partially torn off, the horse is thrown, and the plaintiff is injured. Now then, there is more than the mere hap-
 20 pening of an accident, it is telling you how the accident happened, isn't it? It is telling you that the horse's hoof got caught in the railroad crossing; now, it is utterly immaterial whether it was caught between two planks or between a rail and a plank so it caught there; it was caught there and held and the horse was thrown. Now, then, the next fact is that the railroad employe pried the horse's hoof out of the place where it was caught. Now, it is irresistibly implied that there was some improper construction and use of that portion of the highway by this railroad company in the fact that the horse's hoof was caught and the horse thrown, isn't
 30 there? Isn't that irresistibly implied?

The Court :

I think so; I want to hear you on it.

Mr. Wescott:

Because the horse's hoof could not have gotten caught and thrown if there had not been something there to catch it and throw it; the mere fact that there was a hole there of some sort which caught the horse's hoof and threw the horse is proof that the crossing was not in a suitable condition.

Mr. Gaskill:

The only thing we would say in reply, if the Court please, is that it is to be just as much presumed that the horse's hoof was in improper condition or had been improperly shod, or that it had roughened nails upon the outside which caught it, or that it had too long a toe, or that the heel projected too far; all of that is as much to be presumed as it is that the crossing was in improper condition, and therefore the doctrine of *res ipsa loquitur* cannot apply.

The Court:

The motion will be refused.
 (Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly).

ALLEN B. ENDICOTT,
 Circuit Court Judge.



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30

THE CASE FOR THE DEFENDANT.

(Mr. Gaskill, Jr., opens the case to the jury)

FREDERICK W. BROWN, sworn.

10 By Mr. Gaskill, Jr.:

Q. Where do you live, Mr. Brown?

A. 554 Pine Street.

Q. In this city?

A. Yes, sir.

Q. And what is your business?

A. I am a horseshoer.

Q. Did you shoe the horse of Elijah Piver shortly before the 21st day of December, 1904?

20 A. Yes, sir.

Q. And did you shoe that horse for winter use or not?

A. I did.

Q. And in shoeing it for winter use, how do you designate the manner in which the horse is shod?

A. Why sometimes I call it half-shod, and sometimes sharp, and sometimes half-sharp.

Q. Was this horse shod sharp or half-sharp?

A. This horse was half-sharp.

Q. Now, is half-sharp what is also called rough shod?

30 A. Well, some people calls it that way, but I do not.

Q. You do not?

A. No.

Q. Now, describe what half-sharp is.

A. Well, half-sharp you take the heels about three-quarters of an inch high, and they are drawn by taking

off three-sixteenths on a point, about half an inch of the heel, and they come to about seven-sixteenths where it touches the ice and snow, they are about three-quarters inch high, five-eighths to three-quarters.

Q. How about the toes? Are the toes long or short?

A. Toes run from $2\frac{3}{4}$ to 3 inches; it is according to what kind of a horse you are working on.

Q. Was this horse shod with a toe running from $2\frac{3}{4}$ to 3 inches in length?

A. He was; yes, sir.

10

Cross-examination.

By Mr. Wescott:

Q. Well, two inches and three-quarters in length, the toe was?

A. Yes, sir.

Q. Where is the toe, on the front part of the shoe?

A. On the front of the foot; yes, sir.

Q. Well, does that run along with the edge of the foot widthwise, or how?

20

A. Well, it sets right on the front of the shoe, right to the point of the toe.

Q. The front of the shoe curves to the curve of the horse's foot, doesn't it?

A. Yes, sir.

Q. So does that toe?

A. The toe is straight when they are sharpened.

Q. When did you shoe this horse last?

A. About four or five weeks ago.

Q. When did you shoe this horse last before the accident?

30

A. I couldn't tell you.

Q. What?

A. I can't tell without looking at my books, I don't know the date.

Q. Well, have you got books that you can tell?

A. Yes, sir.

Q. Well I wish you would look at them so as to let us know when you shod him. How did you shoe him, sharp?

A. Half sharp.

Q. What is rough shod? Is that half sharp?

A. Well, some people calls half sharp rough shod, and some calls the regular shoe rough shod, some people calls—

10 Q. Now, these heels that you speak of, there are two of them, aren't there?

A. Yes, sir,

Q. On each shoe?

A. Yes, sir.

Q. One on each side?

A. Yes, sir.

Q. What is the shape of them?

A. Why, they are a wedge shape.

20 Q. Wedge shape?

A. Yes, from the point of the shoe where you turn it up, say.

Q. Could you indicate on a piece of paper the shape of them?

A. Yes, sir; these heels are from $\frac{5}{8}$ to $\frac{3}{4}$ of an inch high.

By Mr. Gaskill:

Q. How high is the toe?

30 A. They run about the same as the heels, you get them as near level as you possibly can.

By Mr. Wescott:

Q. Now, these heels, you say, were how big?

A. Why, they were about $\frac{5}{8}$ of an inch wide, and about $\frac{3}{4}$ of an inch high.

Q. $\frac{5}{8}$ inch wide and $\frac{3}{4}$ inch high; now what shape are they? That is what I can't get.

A. Why, the toes are about $2\frac{3}{4}$ to 3 inches long.

Q. I am not talking about the toes, we are talking about the heels. The heels are $\frac{5}{8}$ of an inch wide?

A. Yes, sir.

Q. And $\frac{3}{4}$ of an inch high? 10

A. Yes, sir; that is right.

Q. Can you show the shape of the heel on that piece of paper?

A. Not very well, no, I ain't no drawer.

Q. Is it shaped like that (indicating on piece of paper)?

A. Not near that big.

Mr. Gaskill, Jr.:

To save time, if the Court please, suppose Mr. Brown returns with a shoe tomorrow which will be the style. 20

Q. Shaped a little like that, is it (indicating)?

A. Yes, sir.

Q. The thin part where it goes on to the shoe?

A. This wide part here (indicating) where it goes on to the shoe, it is always solid, and then this goes—

Q. Then wedge shape towards the ground, it gets narrower?

A. Yes, sir.

Q. Now, as I understand, the thick part of this wedge is up against the shoe? 30

A. Next to the foot.

DR. PAUL MECRAY, sworn.

By Mr. Gaskill, Jr.:

Q. Where do you live, Doctor?

A. 405 Cooper Street, Camden.

Q. And what is your business?

A. Practice of medicine and surgery.

Mr. Gaskill, Jr. :

Are you willing that I should overlook all questions in regard to his being competent?

10 Mr. Wescott :

Oh, certainly.

Q. Have you examined Elijah Piver, one of the plaintiffs in this case?

A. I have on two occasions.

Q. When was the first occasion?

A. About eleven days after his accident, ten days I think.

Q. And when was the last examination?

A. Day before yesterday.

20 Q. On your examination day before yesterday, what did you discover, if anything, to be the matter with him?

A. I found that he chiefly complained of a disability in a knee, in one knee, he had a slight limp in walking, and he—

Mr. Wescott :

When was this?

Mr. Gaskill :

30 Day before yesterday.

A. (resuming) And he could not entirely straighten his knee, possibly about like that (indicating), and then he could not flex it more than about that way (indicating); he complained of some pain on using the knee; then he

complained of a soreness in the chest over the left side about in this region (indicating).

Q. What is the trouble with his knee at the present time?

A. The knee has been sprained.

Q. Is that the common name, or may that be called the common name for synovitis?

A. In a case of this sort they are used interchangeably, synovitis means the swelling and inflammation following a sprain ordinarily.

10

Q. Is the condition of his knee—Was the condition of his knee better or worse day before yesterday than it was on the occasion of your first examination?

A. Very much better.

Q. Was the condition of his side better or worse day before yesterday than it was on the occasion of your first examination?

A. It was better, very much better.

Q. What is your opinion as to the probability of recovery of Mr. Piver from these injuries?

20

A. I think that as far as the knee goes it will improve as times goes on; it is possible, probable, as is seen in many of these cases, that after working hard or in wet weather he may have some stiffness, that is sometimes seen in a sprain, as time goes on that usually gradually gets better.

Q. Did you find anything the matter with him internally?

A. I did not.

Q. Did you find Piver suffering from anything else than the injury to his knee?

30

A. Yesterday?

Q. Day before yesterday.

A. I did not, excepting he complained of soreness here (indicating).

Q. Now Doctor, as to Gladney, how many times have you examined Mr. Gladney?

A. Twice.

Q. And when were those two occasions?

A. The day I called to see Piver Gladney was out, but he came to my office the next day, that is eleven days after the accident, and then I examined him again day before yesterday.

10 Q. Did you examine Gladney's leg or legs day before yesterday?

A. I did.

Q. And did you find an ulcer on one of them?

A. I found a crust on one of them; he has excema very badly in both feet and in his legs, they are quite scaly, that is a skin disease, I wouldn't say an ulcer.

Q. Would it be attributable to the fall or accident which he received on the 21st of December, 1904?

A. I think not.

20 Q. Did you examine Gladney as to the excema of his leg? Did you find that on the occasion of your first examination of him?

A. I did.

Q. On your examination of him day before yesterday did you find any bruises or soreness of his side?

A. He complained of soreness in this side here (indicating); there was no bruise or other evidence except his statement that he was sore there.

Q. Did you find him suffering with bronchitis on your examination day before yesterday?

30 A. He has a cough; yes.

Q. He has a cough?

A. Yes.

Q. Would that, in your opinion, be attributable to the accident which he received on the 21st of December, 1904?

A. I think it is due to a change in his circulation known as arterial sclerosis, it is the cough of old, thin people.

Q. Is that change in his circulation due to the accident which he received on the 21st of December, 1904?

A. No; it is due to his old age, and in fact he has had a pretty hard time in life, I fancy.

Cross-examination.

By Mr. Wescott:

10

Q. You went, Doctor, to see Piver about ten days after the accident?

A. I did.

Q. At his home?

A. Yes.

Q. You went there at the instance of the railroad company, I suppose?

A. I did.

Q. And you did not find Gladney there, but the next day Gladney came to your office? 20

A. Yes.

Q. And he came there at your request, I suppose, didn't he?

A. I don't remember the exact arrangement.

Q. Well, it is undoubted that you went there to examine both of these men?

A. Yes.

Q. And one of them you did not find there, but you did examine him at your office the next day? 30

A. Yes.

Q. And didn't you ask Piver to send Gladney there?

A. Probably, I don't remember.

Q. Well, it is true, isn't it, he came there at your request in some way, directly or indirectly? It was

through you that he came to your office for the purpose of his examination?

A. Probably; yes.

Q. Oh well, can there be any doubt about it?

A. I think—I don't know, I don't remember the arrangement, I think it is probable that I talked with this man and he said that he would come up.

Q. Did you make a report, Doctor, in writing about these two cases?

10 A. I did.

Q. And sent it to the railroad company?

A. I did.

Q. Sent them to the railroad company?

A. I did.

Q. They have reports of what you found to be their respective conditions about ten or twelve days after the accident?

A. I think they have; yes sir.

20

WILLIAM B. GINNELLY, sworn.

By Mr. Gaskill, Jr.:

Q. Where do you live now, Mr. Ginnelly?

A. Bridgeton.

Q. And for whom do you work?

A. For the Pennsylvania Railroad.

30 Q. And did you work for the Pennsylvania Railroad Company in December, 1904?

A. Yes, sir.

Q. And what was your work?

A. Carpentering.

Q. And in December, 1904, were you working on the crossing or crossings at Fourth Street and Bridge Avenue, in Camden?

A. Well, I was around there, I couldn't say positively that I was working on that crossing just that day.

Q. Were you on that crossing between the hours of twelve and one on that day?

A. Yes, sir.

Q. Did you see Piver and Gladney drive down Fourth Street to the railroad tracks?

10

A. Yes, sir; seen them coming across there.

Q. And where were they driving as they came down Fourth Street?

A. Driving right in the trolley track, right in the center as near as I could tell.

Q. Were the wheels running on the rails of the trolley tracks?

A. Yes, sir.

Q. And where was the horse then, relative to these rails?

20

A. Travelling right down the center of the track across the crossing.

Q. What were you doing at the time these two men drove down and got on the railroad tracks?

A. Why I am pretty certain that I was going to my dinner.

Q. Did you have your dinner there with you?

A. No, sir; it was down in the shop, down in the carpenter shop.

Q. How many tracks were there—How many railroad tracks were there on Bridge Avenue at that time?

30

A. Why, I think there was four tracks, I think, that is, four tracks for four trains to run on.

Q. Do you remember whether any of them was a new track or not?

A. There was one of them.

Q. And do you remember which one it was?

A. Yes, sir.

Q. Which one?

A. It was one on the west side, the north side I should say.

Q. On the north side?

10 A. Yes, sir.

Q. Did Piver and Gladney drive over that track?

A. Yes, sir.

Q. And on which track was it that the horse caught its hoof and fell?

A. On the eastbound track.

Q. How many tracks then had Piver and Gladney crossed before they came to the eastbound track?

A. Crossed three.

Q. They had crossed three?

20 A. Had crossed three, that is, three single tracks, that is, three single rails.

Q. Now, I am simply asking as to how many tracks—you say there were four tracks there?

A. Two.

Q. They had crossed two tracks?

A. Yes, sir.

Q. They still had—Did they still have one track yet to cross?

A. Yes, sir.

30 Q. Beyond the track in which the horse caught its hoof?

A. Yes, sir.

Q. Now, where was it that the horse caught its hoof?

A. It was in between the frog and the main track.

Q. Please state that again.

A. It was in between the frog and main track, I call it main rail.

Q. Is it more accurate to say the "main track" or the "main rail"?

A. Well, the main rail.

Q. How did the planking in that eastbound track fit up to the rails?

A. Tight.

Q. Tight? 10

A. Yes, sir,

Q. Did it fit tight to the guard rail or to the main rails?

A. To both of them, fit up tight, perfectly tight.

Q. It fit to the main rail?

A. Yes, sir.

Q. On the outside or the in?

A. On the inside; yes sir.

Q. And fit to the guard rail on the inside?

A. On the inside; yes sir. 20

Q. There was an open space then between the main rail—

Mr. Wescott:

Just get him to describe it.

Q. Well, describe what space there was there, then, in which a horse might catch its foot?

Q. Well, I should judge there was about an inch and a half. 30

Q. And where was that space?

A. That was between the guard rail and the main rail.

Q. Now, did you see the horse catch its hoof?

A. No, sir.

Q. How soon after the horse caught its hoof did you see it ?

A. Why, the horse was down on its side.

Q. And what did you do ?

A. I went and got a bar, helped undo the harness first, then I took and went and got a bar and pried its hoof loose.

Q. Which hoof was it ?

A. It was on the right foot.

10 Q. Front or back ?

A. Front foot.

Q. Was the horse laid off of the tracks and the wagon taken off of the tracks ?

A. Yes, sir.

Q. Did anyone come up that you know while you were prying the horse's hoof out ?

A. The gateman there was there.

Q. Do you know what his name is ?

A. I can't think of it now.

20 Q. Is he here in the room ?

A. Yes, sir ; he is.

Q. Stand up, Mr. Mahoney.

A. Mahoney, that's the name.

Q. Is that the name (indicating person standing) ?

A. That's the man, he was there.

Cross-examination.

By Mr. Wescott :

30 Q. You marked with a cold-chisel on the track where the horse's hoof caught, didn't you ?

A. No, sir.

Q. Right after the accident ?

A. Didn't have no cold-chisel.

- Q. What ?
- A. Didn't have no cold-chisel ; I marked it.
- Q. You marked it with what ?
- A. With a chisel there, small chisel we had, a calking-chisel.
- Q. Now, let me understand ; it was the horse's front hoof that got caught ?
- A. Front shoe.
- Q. Front shoe that got caught ?
- A. Shoe on the right foot ; yes, sir. 10
- Q. On its right foot ?
- A. Yes, sir.
- Q. And which track was it, now, where the horse got caught ?
- A. On the eastbound track.
- Q. Eastbound track ?
- A. Eastbound track.
- Q. Which of the two southern tracks was that ?
- A. Which of the two southern tracks ?
- Q. Yes, tracks running east and west, do they ? 20
- A. Yes, sir.
- Q. There were four tracks ?
- A. There is four tracks there ; one of them didn't use yet.
- Q. Now, approaching Bridge Avenue from the north going south, which track was that—which do you call that ?
- A. That was the third.
- Q. Third track ?
- A. That would be the third track, yes. 30
- Q. Well, which was the fourth track ?
- A. Why, there was several tracks on the south side of the crossing.

Q. Now, let me see, there were four tracks there, weren't there?

A. Yes, sir.

Q. Now, which one of these tracks coming in that direction was it that this horse got caught in? (Indicating).

A. We would call it the second track from that side.

Q. The second track from this side (indicating)?

A. Yes, sir.

10 Q. And it is the third track from that side (indicating)?

A. It is the third track from that side; yes, sir.

Q. Which way was the right or left-hand rail?

A. It was on the right.

Q. On the right hand as you are going east?

A. As you are going east, yes.

Q. Are the tracks there just the same now as they were the day this accident occurred?

20 A. I couldn't answer that, I have been away from here a year.

Q. What?

A. I couldn't answer that, I have been away from here a year, might have been changed since then.

Q. You haven't seen them since?

A. I have been down there, but I couldn't say whether they have been moved.

Q. Haven't you been down there since you came back?

30 A. Yes, sir, looked at them, but I couldn't say whether they have been moved.

Q. Actual physical conditions, the corner:—

A. It is different around there.

Q. Are they the same now as they were when this accident happened?

A. I think they are just the same.

Q. What?

A. They look just the same.

Q. Well, you know, now, don't you, that it would be physically impossible for a horse to get caught crossing that track, don't you, the way the tracks are now—that it would be physically impossible, you know that, don't you?

A. Yes.

Q. Well, if that is so, now then, there must have been a difference, because, the horse did get his foot caught, didn't he? 10

Mr. Gaskill, Jr. :

Object, if the Court please, as incompetent, immaterial and irrelevant; change of conditions since the time of the accident is not material to show danger at that time, or negligence at that time.

Mr. Wescott :

You see, if your Honor please, you see this is a question of construction, now here is a man who has been brought here to tell something about the construction of that crossing. 20

Mr. Gaskill, Jr. :

I object; he is not here to tell about the construction of the crossing, has not told about it.

(After argument) (Objection sustained.)

Whereupon the plaintiffs, by their counsel, pray a bill of exceptions, which is allowed and sealed accordingly. 30

Circuit Court Judge.

Q. You worked on the crossings along this track there on Bridge Avenue, didn't you?

A. Yes, sir.

Q. About the time of this accident ?

A. I couldn't say whether I was working on that crossing in particular or not, but I was working there on Bridge Avenue.

Q. Yes, along the crossing about the time of this accident ?

A. Yes.

Q. You are willing to admit, aren't you, that you worked on this crossing ?

10 A. I worked there hundreds of times, I was going to say.

Q. Just prior to this accident ?

A. I couldn't answer, I don't know exactly the day I worked there.

Q. It may have been that you worked there just before this accident ?

A. Might have been, might have been afterwards.

20 Q. And might it be true that you did not quite complete the work at this crossing at the time of the accident, so far as you now recall ?

A. We never go away from there and leave a hole where anything can get into it.

Q. No, no, that is begging the question, of course you would say that, but something did get in a hole there, didn't it ?

A. No, sir.

Q. Didn't you pry this horse's hoof out ?

A. That was in the rail.

Q. What ?

30 A. That was in between the guard rail and the other rail.

Q. Very well, you pried his foot out of it ?

A. His shoe out.

Q. Now, might it not have been true that you hadn't quite completed the work at this crossing yet ?

Mr. Gaskill, Jr. :

I object to the question as put, making a supposititious case, "might it not have been possible."

The Court :

I think the question perhaps ought to be a little more specific so as to let the witness know what you mean.

A. I don't understand.

Q. Now, you have said that you were working some-
time before the accident along that street ? 10

A. Yes, sir.

Q. And sometime before the accident at the Fourth
Street crossing ?

A. Yes, sir ; but I couldn't tell the date.

Q. Now, because you can't tell the date, might it not
be true that you were working there at the time of this
accident ?

Mr. Gaskill, Jr. :

Same objection. 20

The Court :

I will allow this question.

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

ALLEN B. ENDICOTT,
Circuit Court Judge.



A. Couldn't say. 30

Q. You were there, weren't you ?

A. I was on the outside of the crossing altogether, I
was on the sidewalk.

Q. But you were at that crossing ?

A. I was there.

Q. And you were a carpenter ?

A. Yes, sir.

Q. And you were working for the railroad company ?

A. Yes, sir.

Q. And you would go where the railroad company sent you, wouldn't you ?

A. Yes, sir.

Adjourned until Friday, Jan. 19, 1906, 10.00 A. M.

10

Camden, N. J., January 19, 1906.

Trial of the cause resumed on the above date in the presence of counsel for the respective parties.

WILLIAM B. GINELLY, recalled.

By Mr. Gaskill, Jr. :

20

Q. You were asked on cross-examination, Mr. Ginelly, if a horse could get its foot caught in the crossing as it is constructed at present ?

A. Yes.

Q. And to that you answered no ; explain what you mean by that.

A. That was a misunderstanding then ; I meant in this way, that the planking was in good shape now as it was then ; just the same shape now as it ever was ; it is up tight against the rails.

30

Q. Is there any different distance between the main rail and the guard rail now from what there was in 1904 ?

A. No.

Cross-Examination.

By Mr. Westcott.

Q. How big was this crow-bar?

A. The crow-bar, I should judge, was about 5 feet long.

Q. And about how thick?

A. Well, it runs tapering, from an inch and half on down to about an inch.

Q. The space between the two rails, the guard rail and the main rail you stated yesterday was an inch and a half?

10

A. Yes, sir.

Q. That is correct, isn't it?

A. I say it is that.

Q. Did you measure it?

A. No, sir, I haven't measured it.

Q. Have you been at this crossing since the accident and looked at it?

A. Just one day, yes, sir.

Q. When was that?

A. Last Friday.

20

Q. Last Friday?

A. Yes, sir.

Q. Now, this space between the two tracks is how deep?

A. I don't know exactly about that.

Q. Between the two rails, the guard rail and the other?

A. I don't know exactly how deep it is.

Q. Well, what should you judge?

A. I should judge it was an inch and a half.

Q. Yes, that is right; and the sides of it are perpendicular, aren't they?

30

A. The side of it?

Q. The sides of this opening between the track—it is shaped like a U?

A. Sort of shaped like a U, yes.

Q. The sides of it are straight up and down and the bottom of it is hollowed out like a U?

A. Yes, sir.

RICHARD MAHONEY, sworn.

By Mr. Gaskill, Jr. :

Q. Where do you live?

10 A. 104 West Street.

Q. In Camden?

A. Camden, yes, sir.

Q. Are you employed by the Pennsylvania Railroad Company?

A. Yes, sir.

Q. And what do you do?

A. Gate tender.

Q. And where are you gate tender?

A. Fourth and Bridge Avenue.

20 Q. Are you gate tender there now?

A. Yes, sir.

Q. And were you gate tender there at the time of the accident, in December, 1904.

A. Yes, sir.

Q. Do you remember seeing Mr. Piver and Mr. Gladney drive down to the crossing?

A. Yes, sir, I remember seeing them drive over the crossing.

Q. And what street were they driving down?

30 A. Driving down Fourth Street.

Q. And did they get all the way over the tracks when you saw them?

A. No, sir.

Q. And where were they when you first saw them?

A. On the east bound track.

Q. And in what position or condition were they?

A. Well, when I saw them on the east bound track the horse was lying down on its side, and I seen Mr. Piver fall over on top of the horse off of the wagon, but Mr. Gladney I didn't see at all at that time; I didn't seem him until after.

Q. Did you go up to them?

A. Yes, sir, I went right to them as soon as I seen the horse down, the position they were in.

Q. Did anybody go with you up to see them?

10

A. Not at that time, because there was nobody there but these two men and myself at the time.

Q. Did you see any one around later while the horse was still down?

A. While I was holding the harness down I seen a carpenter come by and called him to come and assist.

Q. Was that the same man that was on the stand just before you.

A. Yes, sir.

Q. Mr. Ginelly?

20

A. Yes.

Q. Did he come up?

A. He came up and assisted me.

Q. How did he assist?

A. He helped undo the horse's harness off of the horse and wagon.

Q. Then what did he do?

A. Well, after he got the wagon away, then they got a bar and pried the horse's hoof out from between the guard rail and the main rail.

30

Q. When you saw these men coming, did you beckon or call to them to hurry?

A. No, sir.

Q. At what gait or speed were they going across the tracks?

A. Well, at that time I couldn't tell what gait or speed they were going across, because when I seen them the horse was lying down, but as a general thing I have seen them pass there—

Q. No, not as a general thing ; that is all.
No cross-examination.

10

FRED. W. BROWN, recalled.

By Mr. Gaskill, Jr. :

Q. Mr. Brown, have you made a shoe like the one you put on the horse of Mr. Piver just previous to the accident on the 21st of December?

A. As near as possible.

Q. And have you that with you?

A. Yes, sir.

Q. Will you undo it and show it please? When did
20 you make this shoe?

A. Yesterday afternoon.

Q. And have you shown it to either of the counsel?

A. Nobody seen it since it come out of the shop.

Mr. Gaskill, Jr. :

We offer that for the purpose of illustration and ask that it be marked for identification D. 1.

No Cross-examination.

30

ALEXANDER WHILLDEN, sworn.

By Mr. Gaskill, Jr. :

Q. Where do you live?

A. 4330 Pine Street, Philadelphia.

- Q. And by who are you employed?
- A. Pennsylvania Railroad Company.
- Q. And in what department are you employed?
- A. Chief Engineer, Maintenance of Way.
- Q. And where is the office of the Chief Engineer Maintenance of Way, located?
- A. Broad Street Station, Philadelphia.
- Q. And the Maintenance of way department covers what?
- A. The Maintenance of Way department covers— 10
- Q. Briefly.
- A. Covers the maintenance of way, after the track has been put in operation.
- Q. Does that department prepare plans for crossing of railroad and trolley tracks?
- A. Yes, sir.
- Q. And is there what is known as a standard crossing?
- A. Yes, sir.
- Q. And is that plan prepared in your office? 20
- A. Yes, sir.
- Q. In what position are you employed in that office?
- A. Draftsman.
- Q. And you are acquainted with the plans are you, of the standing crossings?
- A. Yes, sir.
- Q. How are those plans made or in what way are they originated and produced?
- A. They are originated by drawings, brown paper drawings, I should say, and then tracings prepared from those. Is that an answer to your question? 30
- Q. Well, from what data do you prepare your crossings, from any experiment or—
- A. Yes, from experimental track or whatever the subject may be that we are making plans.

Q. On which side of the rail does the flange of the wheel run ?

A. The inside.

Q. And in preparing the crossings do you estimate the width of the flange of the wheels ?

A. That has been estimated when the plan was made, yes, sir.

Q. And what is the thickness of the thickest flange ?

A. One and seven-sixteenth inch.

10 Q. And what is the width of the space between the main rail and the guard rail ?

A. One and three-quarters inch.

Q. And how much room does that leave for play or for difference in gauging ?

A. Five-sixteenths of an inch.

Q. When your plans are prepared for standard crossings to whom are they supplied or furnished ?

A. They are supplied to the mills or manufacturers of the article ; they are supplied to the assistant engineers in
20 quantity, who, in turn, distribute them.

Q. Do these crossing frogs come in one piece or in a number of separate pieces to be put together ?

A. They are put together at the mill.

Q. They are delivered then to the employees in one piece or several pieces ?

A. In one piece.

Q. I show you a blue print. Will you tell me what that is ?

A. P. R. R. standard plan of crossing frogs for street
30 railways.

Q. Is that the plan from which standard crossings were constructed in December, 1904 ?

A. Yes, sir.

Q. I show you on the left corner, "Correct, Joseph

T. Richards, Chief Engineer, December 1, 1891"—do you know that signature?

A. Yes.

Q. Is that the signature of Mr. Richards?

A. Yes, sir.

Q. And was he the assistant engineer at that time?

A. He was.

Q. And he is now the chief engineer, isn't he?

A. Now the chief engineer.

10

Mr. Gaskill, Jr.:

I offer this in evidence and ask that it be marked Exhibit 2.

Mr. Wescott:

I doubt whether it is evidence, but I do not object to it.

Mr. Gaskill, Jr.:

As an illustration.

Q. Now, Mr. Whillden, does this show a railroad track? 20

A. Yes, sir.

Q. And does it show one or more trolley tracks?

A. Shows one trolley track.

Q. How many railroad tracks?

A. Two railroad tracks.

Q. Which are the railroad tracks?

A. These two are the railroad track; this track is the trolley track. (Indicating.)

Q. Now, which are the main rails of the railroad track? 30

A. This and that, this and that, the outside rails of the railroad track. (Indicating.)

Q. Now, which are the guard rails of the railroad track?

A. This and that, this and that, the inside rails of the railroad track?

Q. Are the guard rails shown as shorter rails with a slight curve at each end?

A. Yes, sir.

(Said plan is marked Exhibit D. 2 for identification.)

No Cross-examination.

10

ROBERT P. SNOWDEN, sworn.

By Mr. Gaskill, Jr.

Q. Where do you live?

A. Camden.

Q. And by whom are you employed?

A. Pennsylvania Railroad.

Q. In what capacity?

20 A. Assistant Engineer Pennsylvania Railroad, Amboy Division.

Q. Does that have charge of any of the tracks through Camden?

A. It has charge of all the tracks on Bridge Avenue.

Q. Are you acquainted with the crossing at Fourth Street and Bridge Avenue?

A. Yes.

Q. Is there any system of inspection of trolley crossings over the railroad tracks?

30 A. Yes, one man regularly reports every week. That man is the sub-foreman. In addition the regular watchman, the track watchman, goes over it every day.

Q. Who instituted the system of inspections by sub-foremen?

A. I did.

Q. Do you know the construction of the crossing frogs of the railroad and trolley tracks?

A. Yes.

Q. And are they furnished to your department in one or more pieces?

A. They usually come in several pieces; for each track there probably would be four, maybe only two.

Q. Are the guard rails bolted fast in position when the crossing frog comes to you?

A. Yes. 10

Q. And is or is not the space between the guard rail and the main rail subject to adjustment by the employees who put the frog in position?

A. No.

Q. In the construction of the crossing at Fourth and Bridge Avenue, is any plank used?

A. Planking are used between guard rails, and in fact all over the crossing except where the rails go.

Q. What space is there between the guard rail and the main rail? 20

A. An inch and three-quarters.

Q. Why isn't that filled?

A. To allow space for the flanges of the wheels to go through.

Q. Did you see the crossing at Fourth and Bridge Avenue on or about the 21st Day of December, 1904?

A. Yes, I probably saw it the same day.

Q. And what was its condition? What was the condition of that crossing of the east bound track?

A. It was in good condition. 30

Q. Was the planking good or not?

A. The planking was good.

Q. And did it fit tightly to the guard rails on the inside, or not?

A. Yes, tight.

Q. And how about on the outside of the main rail?

A. Tight on both sides.

Cross-examination.

By Mr. Wescott :

Q. What is the depth of that opening between the two tracks?

A. The depth varies from an inch and a quarter, to the height of the rail.

10

Q. What was it at that crossing?

A. Well, I say it varies at different points. Where there is a joint we have a block in to keep the rails apart. There is an inch and a quarter, but at other points it is down to the bottom of the rail.

Q. Between the trolley tracks what is the depth of that opening between the two trolley tracks?

A. Whereabouts?

Q. Well, take this diagram here for instance. There are supposed to be a couple of trolley tracks, are there?

20

A. No, a couple of steam tracks.

Q. These are the trolley tracks?

A. These are the trolley tracks, the trolley rails.

Q. Now, take from that trolley rail to that trolley rail, and take the distance along in there,—what is the depth of it, that opening?

A. Well, the depth would be the height of the rail in some places.

The Court :

30

How high is the rail?

The Witness :

A 5 inch rail, I think it was.

Q. The height of the rail?

A. Yes.

Q. What, that depth between the two tracks is that deep?

A. Between the two rails, between the guard rail and the main rail, is at some places 5 inches.

Q. Between there it is 5 inches?

A. Not at that point, you say between the rail, all along the way between there.

Q. No, I am not talking about all the way along; I mean the distance between the two tracks. What is the depth of that opening? It must be uniform, mustn't it? 10

A. No.

Q. Have you been down there to look at that crossing?

A. Yes.

Mr. Wescott:

I suggest to counsel that the jury be allowed to go down and look at the crossing. 20

Mr. Gaskill, Jr.:

The elevation work has changed the work there very much.

Q. Has the width between the main rail and guard rail been changed any?

A. No.

Q. That is an inch and a half?

A. An inch and three-quarters?

Q. Now, has the depth of it been changed any? 30

A. No.

Mr. Wescott:

Very well then; it is just the same; I think the jury ought to see the depth there.

Mr. Wescott :

You understand that the frogs that are there now are not the ones that were there on the 21st?

Q. Oh, they are not?

A. No.

Q. Then how can you say the crossing is the same now as it was on the 21st?

A. It is a precisely similar crossing except for the angle.

10 Q. Except it is similar?

A. It is a similar crossing except for the angle.

Q. Have you been down to look at this crossing at Fourth and Bridge Avenue recently?

A. Yes.

Q. Don't you know that the depth of the opening between the guard rail and the main rail, and between the two trolley rails is uniform, exactly the same?

A. No, it is not.

Q. It is not?

20 A. No.

Q. Will you go down there and measure it?

A. No, I don't need to go down there, because I know now.

Mr. Wescott :

If counsel on the other side would agree to that, I would like to have the jury go down there at noon and look at that crossing, because we have it testified to that it was the same as it was on December 21, 1904.

30

Mr. Gaskill, Jr. :

It seems to us entirely unnecessary. That matter is very simple and very clear and it is not worth while to take the time either of the jury, the Court or counsel.

The Witness :

If you will allow me to explain, I can very readily.

Q. No. Now the depth there varies from what you say?

A. Varies from an inch and a half where the joints are, to about five inches where there are no joints.

Q. That variance of depth is between the two trolley tracks now, is it?

A. Between the two trolley rails ; not at all points.

Q. Well, I am talking about that one down there. 10

A. That is what I say, exactly.

Q. Down there that one varies from an inch and a half to about five inches.

A. Yes, it was either one or the other.

Q. Now, will you tell us whether this space between the guard and main rail is U-shaped, shape like a U. with the sides perpendicular and the bottom hollowed out a little?

A. Where the distance is an inch and a half it is U. shaped? 20

Q. It is U. shaped?

A. Yes.

Q. Don't that U. shape continue from trolley rail to trolley rail?

A. No, because where there is no joint there is no filling.

Q. Are there any joints between these two trolley rails down there at that crossing?

A. I think not.

Q. Well, then if there are no joints, the U. shape is uniform, isn't it, continues? 30

A. Yes.

Q. But you say it varies in depth from an inch and a half to five inches.

A. Where there is a joint it is U. shape ; where there is no joint it is the shape of two sides of two rails contiguous to one another ; that is not a U.

Q. But you say that the shape of things down there, the shape is not a U. shape down there at this crossing?

A. Where there is a filler.

Q. No, down there at this crossing, do you say on your oath it isn't U. shaped now?

A. I say it isn't U. shaped all the way through, no ;
10 from trolley track to trolley track.

Q. From trolley track to trolley track?

A. From trolley track to trolley rail.

By Mr. Gaskill, Jr. :

Q. Was there a joint in the east bound track between the trolley rails?

A. Yes, there was, yes.

Q. At the time of that accident?

A. At the time of that accident.

Q. I mean the joint not in the trolley rails, but the
20 joint in the rails of the steam road.

A. Yes.

Q. Between the trolley tracks?

A. Yes.

Q. Which side was that, the south or north?

A. On both sides.

By Mr. Wescott :

Q. You have said that you were probably down there
30 the day of the accident?

Mr. Gaskill, Jr. :

Just for the sake of shortening the matter, it seems to me this is not proper re-cross-examination and I don't think it is bringing out anything essential.

The Court.

If anything has been forgotten I will allow it.

Q. Your language as I took it down was,—“I probably saw it the same day, the crossing.”?

A. That is right.

Q. What enables you to say that you probably saw it the same day?

A. Because I was up and down in that vicinity for several weeks every day.

Q. Simply because you were up and down in that vicinity for several weeks every day?

10

A. We were at work at that time.

Q. It was not on account of this accident?

A. No.

FREDERICK J. POTTER, sworn.

Mr. Gaskill, Jr. :

Q. Where do you live?

20

A. Bordentown, in this state.

Q. And are you employed by the Pennsylvania Railroad Company?

A. Yes, sir.

Q. In what capacity?

A. Supervisor.

Q. And as supervisor do you have charge of any of the tracks in Camden?

A. All of the tracks on the Amboy Division in Camden?

30

Q. And do these tracks run on Bridge Avenue, crossing Fourth Street?

A. They do.

Q. And as supervisor, do the crossings at Fourth

Street and Bridge Avenue, come under your supervision?

A. They do.

Q. And is any report made to you of the condition of those crossings?

A. A weekly report is made to me by the foreman.

Q. And who is that foreman?

A. William P. Lewis.

Q. Was he the foreman in December, 1904?

A. He was.

10 Q. And did he make any report to you previous to the 21st of December, 1904?

A. He did.

Q. And what time was it, before the 21st that you received that report?

A. The 19th of December.

Q. And what condition did that report show the crossing of the east bound track at Fourth Street and Bridge avenue to be in?

20 (Objected to.)

The Court:

Is that not hear-say testimony?

Mr. Gaskill, Jr.

It does not seem to me so. He is testifying to a report which came to him in the course of a systematic examination and inspection of the crossings.

30 The Court:

Is that any different from what some person may have said to him? I don't think it is competent.

Q. Is it your duty to do anything, if a report comes in showing that a crossing is not in good condition?

A. Yes.

Q. And what is it your duty to do?

A. I would instruct the foreman to put it in good condition, make necessary repairs.

Q. Did you on or shortly after the 21st of December, 1904, instruct your foreman to put the crossing of the east bound track at Fourth Street and Bridge Avenue in good condition?

A. No, no such orders given.

Q. Was it necessary to give any such order?

A. It was not. 10

Q. Did you personally see the crossing at the east bound track of Fourth street and Bridge Avenue, shortly before the 21st of December, 1904?

A. I was there practically every day at about that time.

Q. Was your company doing any work in that neighborhood at that time?

A. They were.

Q. What were you doing?

A. We had put in a new track to the north of the then existing tracks; had put in a new crossing frog in that new track and were getting ready to make quite extensive changes through that vicinity. 20

Q. And did you in the course of that work, examine the crossing of the east bound track at Fourth Street and Bridge Avenue, on or about the 21st of December, 1904?

A. Very shortly after that date; after the accident occurred an examination was made by myself.

Q. And did that crossing show to you at that time when you made your examination that any changes had recently been made? 30

A. Not between the time of the accident and the time of the examination.

Q. What condition did you find that crossing to be in?

A. Good condition.

Q. What condition as to planking?

A. The planking were good and properly placed, no holes.

Q. How about the crossing frog,—what was its condition?

A. It was in good condition.

Q. What is the space between the main rail and the guard rail?

A. An inch and three-quarters.

10 Q. On which side of the rail does the flange of the car wheel run?

A. On the inside.

Cross-examination.

By Mr. Wescott :

Q. You say you were putting down the track and making preparations to make extensive changes there. Did you move any tracks about that time?

20 A. No tracks had been moved. An additional track had been put in, but the original tracks had not been moved.

Q. Were you preparing to move tracks?

A. The tracks were moved some months later.

Q. Well, were you preparing at that time to make these extensive changes?

A. Yes.

30 Q. You heard of this accident, as I understand it, Mr. Potter?

A. Yes, sir.

Q. And you went down there to inspect the crossing?

A. Yes, sir.

Q. After you heard of the accident?

A. Yes, sir.

- Q. To see what condition it was in?
 A. Yes, sir.
 Q. Do you know the day you went there?
 A. Know what?
 Q. Do you know what day you went there?
 A. I can't state positively, probably the following day.
 Q. You think it was the following day?
 A. Yes.
 Q. But you are not sure? 10
 A. I am not positive as to the day.
 Q. How soon did you hear of the accident?
 A. Probably heard of it the evening of the day on which it occurred.
 Q. And it was of sufficient consequence to cause you to go down there and examine the crossing, wasn't it?

(Objected to as calling for a conclusion ; objection sustained.)

- Q. Well, was it because of the accident that you went 20
 down there and examined the crossing, was it?
 A. I had business there practically every day?
 Q. I know, just leave that out. You stated that it was because of the accident being reported that you went down there to examine the crossing, wasn't it?
 A. I probably would have gone on that account if I had no other business.
 Q. Wasn't that the reason you went down there, because you heard of the accident?
 A. I can't state that ; I would have gone there in all 30
 probability if I never heard of the accident.
 Q. Well, you admit you heard of this accident?
 A. Yes, sir.
 Q. And after that you went down and examined the crossing?

A. I did come down and examine the crossing after I heard of the accident, yes.

Q. You say the space between the guard rail and the main rail is an inch and a half?

A. An inch and three-quarters.

Q. And that the flange of the wheel runs between that space between the two tracks, the guard track and the main track?

A. The guard rail and the main rail?

10 Q. Do you know the depth of the space intervening between the trolley rails down there?

A. I know the height of the rail.

Q. I am not asking you about the height of the rail; do you know the depth of the space between the main rail and the guard rail?

A. I do.

Q. Have you seen it recently?

A. The same crossing is not in there as was in at the time.

20 Q. Oh, the same crossing ain't there?

A. No.

Q. Well, Mr. Potter, the crossing that is in there now, the depth between the two tracks, the guard rail and the other rail, is about an inch and a half, isn't it?

Mr. Gaskill, Jr.

I object. This is as to a different crossing from the crossing which was in the track at the time the accident occurred; the conditions might be different; and also
30 because it is immaterial.

Mr. Wescott:

My answer to that is that the other side has positively proven by a witness,—I think the witness just ahead of

this one or the other one, that the condition there now is the same it was when this accident occurred. It is the same crossing,—the same machinery,—not the identical machinery, but the same sort.

Mr. Gaskill :

We do not say and have not said that the crossing is the same. The thing we do say and stand by, is that the distance between the guard rail and the main rail is the same, but by reason of the elevation, the construction of that additional track there, the necessity of throwing the other tracks, making a different angle which required a different frog to be put in, the situation there to-day is different from what it was then. The witness just preceding this one said the same frog was not there to-day as at the time of the accident. 10

Mr. Wescott :

But he did say, if your Honor please, that the depth between the guard rail and the main rail varied from an inch and a half to five inches and it is there now. That is just the reason I want the jury to be permitted to go down there and examine it. 20

Mr. Gaskill :

We didn't say any such thing.

(Question repeated.)

Mr. Gaskill, Jr. :

We object to that as being immaterial as to anything regarding the present frog there which may be a mere temporary frog while the elevation is going on. 30

The Court :

Yes, but I think some witnesses have said the conditions were the same there.

Mr. Gaskill :

Only in one particular, the distance between the guard rail and the stock rail ; that is the one point where they are the same.

The Court :

I will let the question stand.

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

ALLEN B. ENDICOTT,
Circuit Court Judge.

SEAL

Q. Now, the depth of the opening, the space between the main rail and the guard rail, between the two trolley tracks that are in that crossing now, is about an inch and a half, isn't it ?

20 A. An inch and a half where there is a filler. Where there is not a filler it is—

Q. Now, confine yourself to the space between the trolley tracks,—it is about an inch and a half ?

A. The depth between the guard rail and the main rail ?

Q. Yes, between the two trolley tracks is about an inch and a half, isn't it ?

A. It is an inch and a half where there is a filler, and five inches where there is no filler.

30 Q. What do you mean by a "filler?"

A. At the angles the space, there is a filler in there to secure them at a uniform distance of an inch and three-quarters; they are bolted together with a filler there holding them at the proper distance apart, and where the filler is it is an inch and a half.

Q. Now, how far does that filler stretch?

A. It extends out beyond the angle, perhaps a foot or a foot and a half.

Q. What do you mean by the angle? I don't understand you.

A. If you show me that plan there, I can explain it much better.

Q. Now, suppose this is to represent the trolley track, these two rough lines and that is the car track (indicating); now, there is a guard rail and there is a guard rail (indicating). Now, the distance between the two trolley tracks,—I mean the distance between the guard rail and the main rail, all the way along there, one trolley track to another is an inch and three-quarters, isn't it? 10

A. The distance between them is an inch and three-quarters.

Q. Now what I want to know is what is the depth of that opening from that trolley track to that trolley track, and if it is not about an inch and a half? 20

A. There is a guard rail extending here and extending there, (indicating) and this rail extends out—

Q. No, I don't want you to go beyond that.

A. Well, I am explaining what the angle is. There is a portion of that that is built up very solidly, with a filler extending out beyond the line of the trolley track, extending out to possibly out in that proportion out there. (Indicating.) Where that filler is the depth is an inch and a half; between that point and there the depth is the height of the rail, or five inches. 30

Q. Do you say that?

A. Yes.

A. Have you seen that place down there?

A. I see many crossings.

Q. Have you seen that one?

A. This present one?

Q. Yes.

A. Yes.

Q. And you say the depth there is five inches?

A. Yes, where there is no filler.

Q. When you leave the Court room, or when you go away from here, go off the witness stand, will you go down there at that crossing and take your rule and measure that distance?

10 Mr. Gaskill, Jr. :

I object; counsel has no right to give directions to a witness as to what he should do?

Mr. Wescott :

I am not directing him to do it; I ask him if he will do it.

Q. And then come back and testify again.

20 Mr. Gaskill, Jr. :

Well, I object to it.

Mr. Wescott :

I am simply asking him in the interests of truth and fairness if he will do it.

(Objected to.)

Mr. Gaskill :

30 We are testifying to nothing but what is true and we are here fairly and on our rights.

Mr. Wescott :

Will you consent to the jury going down there?

Mr. Gaskill :

We have already answered all your appeals to prejudice. We stand upon the proof here.

By Mr. Gaskill, Jr. :

Q. Mr. Potter, you said on your cross-examination that you were preparing to make changes at Fourth and Bridge Avenue. Had you actually made any change to the east bound track on the ground at Fourth and Bridge Avenue on the 21st of December, 1904? 10

A. We had not.

Q. And when you say you were preparing to make changes what do you mean by that,—that it was office work or what?

A. We had put in an additional track and we were preparing to move every track that was running through the crossing.

Q. Where were you doing that preparing, on the ground or in your office? 20

A. In the office.

Q. Had you actually done any work in the way of preparation to move the east bound track on the ground there, the day of the 21st of December, 1904?

A. We had not, had not disturbed the track in any way.

WILLIAM R. P. LEWIS, sworn.

By Mr. Gaskill, Jr. :

Q. Where do you live, Mr. Lewis? 30

A. I live in Camden, on Stevens Street.

Q. Yes, and are you employed by the Pennsylvania Railroad Company?

A. I am.

Q. And in what capacity are you employed?

A. Foreman of the road.

Q. And how long have you been foreman of the road?

A. About 41 years.

Q. And as foreman, did you have charge and supervision of any of the tracks in the City of Camden?

A. I had.

Q. And of those tracks which are on Bridge Avenue and cross Fourth Street?

10 A. Yes, sir.

Q. Do you make any examination of the crossings of trolley tracks over the railroad tracks in the City of Camden?

A. I do.

Q. And does that examination include the crossings at Fourth Street and Bridge Avenue?

A. It does.

Q. And do you make that examination personally or through a foreman, a sub-foreman?

20 A. I made it personally and I have a sub-foreman; it is his duty to do it.

Q. Yes, and you employ track walkers also?

A. Yes, sir.

Q. And is it any part of their duty to inspect crossings?

A. Yes, sir.

Q. Do the sub-foreman and track walkers report to you?

A. Yes, sir.

30 Q. And in addition to these examinations, do you make any examination yourself of crossings?

A. I do.

Q. Did you make any examination of the crossing at Fourth Street and Bridge Avenue on or shortly before the 21st of December, 1904?

- A. I did, yes, sir, just before.
- Q. Just before? How long before?
- A. I suppose about two or three days.
- Q. And in what condition did you find the crossing of the east bound track at Fourth Street and Bridge Avenue?
- A. Good condition.
- Q. What was the condition as to the planking?
- A. Good.
- Q. And how were the planking placed? 10
- A. Placed tightly up against the rails.
- Q. And what was the condition of the crossing frog?
- A. Good.
- Q. When you receive reports of your sub-foreman and your track walker, do you forward those reports to any person?
- A. I do, to my supervisor.
- Q. Who is he?
- A. Mr. Potter.
- Q. Did you forward a report to Mr. Potter on the 10th of December, 1904? 20
- A. Yes, there was a report went to him.
- Q. And did you forward that report to him?
- A. No, sir; my sub-foreman; I was sick at that time.
- Q. Now, Mr. Lewis, when these crossing frogs come to you to be placed in a track, is the guard rail bolted fast in position to the main rail or not?
- A. They are.
- Q. What is there that holds the guard rail away from the main rail and in position? 30
- A. There is what we call fillers; it is a cast-iron thing between the two.
- Q. And that filler is placed at the bottom of the rails and extends up to within an inch and a half of the top of the rail?

A. Yes, sir.

Q. But that filler does not extend—Does that filler extend clear across the whole width of the crossing frog?

A. Not quite.

No Cross-examination.

CHARLES ARCHER, sworn.

10 By Mr. Gaskill, Jr. :

Q. Where do you live, Mr. Archer?

A. 711 New Street, Camden.

Q. And are you employed by the Pennsylvania Railroad Company?

A. Yes, sir.

Q. What work do you do?

A. I am the sub-foreman of a gang.

20 Q. As sub-foreman do you make any examination of the railroad and trolley crossings in the City of Camden?

A. Yes, sir.

Q. Do you or did you on or before the 21st of December, 1904, make an examination and inspection of the crossing at Fourth Street and Bridge Avenue?

A. I did.

Q. And also make an inspection of the other crossings, did you at Fourth Street and Bridge Avenue?

A. Yes, sir.

30 Q. After you made your examination, did you make any report of the result of that examination?

A. I did, yes, sir.

Q. And to whom did you make that report?

A. To my sub-foreman.

Q. And your foreman being sick at that time, to whom?

A. Well, of course, naturally I would be the one; I was acting as foreman at that time.

Q. And to whom then would you send your report?

A. I should send it then to Mr. Potter.

Q. Did you in fact send a report to Mr. Potter on the 19th of December, 1904?

A. A report was sent to Mr. Potter.

Q. And what did that report state as to the condition of the crossing at Fourth Street and Bridge Avenue?

A. In good condition. 10

Q. And in what condition did you actually find the crossing at Fourth Street and Bridge Avenue?

A. In good condition.

Q. And what was the condition as to planking?

A. Good.

Q. And how was it placed?

A. Tightly against the rails.

Q. And what was the condition of the crossing frog?

A. Good. 20

Cross-examination.

By Mr. Wescott :

Q. When did you send in your last report before the 21st of December?

A. Before the 21st of December?

Q. Yes.

A. It was sent on the 19th.

Q. On the 19th of December you sent a report?

A. That was on Monday. 30

Q. You heard of the accident I suppose, didn't you?

A. Yes, I heard of the accident.

Q. Did you go down and look at the crossing after you heard of the accident?

A. Not at that time, no, sir.

Q. Why not?

A. Well, I sent some one else to look at it and make a report.

Q. You sent some one else to go look at it and make a report?

A. Yes.

Q. That was after you sent your report on the 19th?

A. Well, that is the report of the accident I am referring to now, when I say that.

10 Q. Yes, but you sent a report of the condition of the crossing on the 19th?

A. On the 19th, a Monday.

Q. Then you heard of the accident?

A. Yes, sir, then I heard of the accident.

Q. Then you sent some one to inspect the crossing and make a report, didn't you?

A. No, not to inspect the crossing.

Q. Well then, did you send some one to the crossing?

20 A. Yes, sir.

Q. And that some one made a report.

A. They made a report.

Q. And when did you send that some one to the crossing?

A. Just after my hearing of the accident.

Q. When was that?

A. That was on the 21st, just after it occurred.

Q. Who was the person you sent?

A. It was a clerk that we have down in the office.

30 Q. Where is he?

A. He is in the office now, I suppose.

Q. Did he make a report?

A. He made a report according to my direction.

Q. Where is that report?

A. That report I suppose Mr. Potter has.

JAMES W. WOLBERT, sworn.

Mr. Gaskill, Jr. :

Q. What is your name?

A. James W. Wolbert.

Q. And where do you live?

A. 25 North Second Street, City of Camden.

Q. Are you employed by the Pennsylvania Railroad Company?

A. Yes. 10

Q. And what work do you do?

A. I am assistant foreman.

Q. Is it your duty to make inspections of the crossings in Camden?

A. No, sir.

Q. Were you sent to make an inspection of the crossing in Camden at Fourth Street and Bridge Avenue on or before the accident of the 21st of December, 1904?

A. No, sir.

Q. Well, did you go and make an examination? 20

A. No, sir.

Q. Well, did you see the crossing at Fourth Street and Bridge Avenue?

A. I worked there about a week before on Thursday and Friday.

Q. Oh, you were working?

A. Yes, sir, with a gang of men.

Q. At the crossing of the east bound track or some other crossing?

A. The new track at Fourth Street, west bound. 30

Q. And while working on that new track did you have occasion to see the other crossings which were actually in place there at Fourth Street and Bridge Avenue?

A. Yes, sir.

Q. And did you notice in what condition they were?

A. Why, to the best of my knowledge they were all right.

Q. Particularly referring now to the crossing of the east bound track at Fourth Street and Bridge Avenue, what was its condition?

A. Good condition according to my knowledge.

Cross-Examination.

By Mr. Wescott :

10

Q. You have charge of a gang of men?

A. Yes, sir.

Q. You work at the crossings along—

A. I work in the yard most of the time.

Q. But along somewhere about that time you worked at different crossings along Bridge Avenue?

A. Yes, sir, it was all new work.

Q. What?

A. I was working on new work there.

20

Q. At different crossings along the avenue?

A. Yes.

Mr. Gaskill, Jr. :

Now, if the Court please, this is the last witness we have here, but we have sent for the clerk mentioned by Mr. Archer on the stand. We did not know that he had sent any one out to make an examination after the accident, and we have sent for him and we would like to have the privilege of calling him if he comes in time.

30

Mr. Wescott :

I will not myself voluntarily consent to that arrangement.

Mr. Gaskill, Jr. :

Then we rest without any reservation.

DEFENDANTS REST

BOTH SIDES REST

10

Mr. Gaskill:

We move, if the Court please, for binding instructions to find verdicts for the defendant in each of these two cases on the ground that there has been no negligence proven against the company. The company has shown all due care both in the construction, maintenance and inspection of the crossing in question. We have shown what is the standard crossing and we have shown that we have such a crossing in position, and that the accident could not have happened in any other manner than that of the horse catching its hoof between the main rail and the guard rail, and that such space necessarily must exist in every crossing in order that trains may safely pass over them, and no duty whatever could be imposed upon the company, which the company had not amply and fully fulfilled.

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The Court:

The motion is refused.

30

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

ALLEN B. ENDICOTT,
Circuit Court Judge.



SEAL

During the course of his argument to the jury, Mr. Wescott said, referring to a report made of the condition of the crossing in question, "Mr. Potter has that report in his pocket."

Mr. Gaskill, Jr. :

I object; there is nothing to show that. I think counsel is very seriously going outside the facts of the case.

10 The Court :

Yes, I sustain your objection in that regard; it has not appeared it was in his pocket.

Mr. Wescott :

Well, that is right, it has not; I have to beg everybody's pardon. Of course it was not testified it was in his pocket—

20 Mr. Gaskill, Jr. :

I object to any further remarks upon this line; it is not material and it is a serious waste of time and an indignity to both counsel and the Court, and I think I have a right that it should be stopped.

The Court :

The objection is sustained. Counsel has now agreed with your objection and the Court's ruling, as I understand it.

30 Mr. Wescott :

Yes, I simply correct the statement; when I used the figure of speech that it was in his pocket, I did not mean that literally, and I beg everybody's pardon. I hope you will put it down on the record, but I think I am within

the facts, when I say that that report was sent to Mr. Potter, and like the other report that was not produced here, that report is not produced.

(Mr. Wescott also said, Referring to one of the plaintiffs, "They sent their doctor down there to examine him at once, and he made a report, and it is also significant that that report was in writing, and that report had not seen the light of day, at least before this jury.")

Mr. Gaskill, Jr. :

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I object to that line of argument, because these reports could not have been offered in evidence under any rule of law whatever, and I therefore object to your Honor's permitting counsel to argue to the jury to our prejudice that we did not produce anything we hadn't any legal right to produce, and it could not be offered in evidence if we did produce it.

The Court :

20

The objection is sustained.

30

DEFFENDANT'S REQUESTS TO CHARGE.

1. The Jury cannot find verdicts for the plaintiffs merely because an accident happened at the crossing in question; the fact that an accident happened does not make the defendant liable, and verdicts cannot be rendered against it simply because of such accident and the resulting injury.

10 2. The defendant railroad company is not liable in damages unless it was guilty of some negligence; the negligence charged in this case is improper construction or maintenance of crossing; so that the Jury must find that the railroad company did not properly construct or keep in repair its crossing, otherwise the verdict must be for the defendant.

20 3. If the Jury is satisfied by the evidence that the horse's hoof caught between the main rail and the guard rail, the defendant railroad company is not liable and must not be held responsible in damages in this action.

4. The Jury must not find a verdict against the defendant unless the Jury is satisfied that there was an improper space between planking and rail in which the horse's hoof was caught.

30 5. The Jury must not find a verdict against the defendant unless it is satisfied by a preponderance of testimony that there was an improper space between planking and rail in which the horse's hoof was caught and that the horse's hoof was caught between rail and planking.

6. The Jury must not find a verdict against the defendant because the horse's hoof caught between the

main rail and the guard rail unless it is satisfied by a preponderance of testimony that there was an improper and too great a space between the main rail and the guard rail.

7. The defendant company having shown a system of inspection of crossings, and that according to this system examination was made of the crossing in question which disclosed that the crossing was in good condition, the defendant fulfilled its duty in the premises.

10

8. The defendant having shown that the crossing in question was of standard construction, that the crossing frog of the railroad and trolley track was standard and that the planking was in good condition and fit tightly to the main rails on the outside and to the guard rails on the inside of the track leaving no space open except the space between the stock and the guard rails, fulfilled its duty in the premises.

9. The Jury must not include the bill of Dr. Hirst of \$50 in the amount of damages to be awarded Elijah Piver in-as-much as the bill has not been paid at the time of trial.

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10. Binding instructions are given to find a verdict for the defendant in each of the cases.

30

CHARGE OF THE COURT.

ENDICOTT, J. :

Gentlemen of the Jury: You must not conclude that because an accident happened at this street crossing that therefore of necessity the Railroad Company is liable to respond in damages. Before you can award damages against them because of this accident, you must be convinced that the accident was the result of some negligence on the part of the Railroad Company, that it failed in some duty it owed to these plaintiffs as well as the public in general as they used this highway.

It is the duty of a railroad corporation to so construct and maintain its crossings that they may be safely used by persons travelling the highway. Every person using the street of a city has a right to assume that the railroad crossing will be kept in such repair as to be good and sufficient for the safe passage of carriages, horses and cattle, and if that duty is not performed the resultant damages are recoverable by any one lawfully and carefully using the highway.

That the horse of Piver caught its hoof or shoe at this crossing and that that caused the horse to fall and the two plaintiffs to be thrown out of the wagon receiving the injuries described to you is proved and not denied in this case. The main inquiry is, Was the accident and the resultant injury caused by the neglect of the Railroad Company—did it fail to properly construct or keep in repair the crossing at this place? You have heard the testimony of the witnesses for the defendant that the construction was standard and that the crossing was frequently inspected at this point, and you must before you find against the defendant company be convinced by the

preponderance of the testimony that the railroad neglected some duty either as to the manner of construction or keeping in proper repair of this crossing ; that is, that there was an improper space between the planking and the rail or the main rail and the guard rail in which the horse's hoof or shoe was caught.

If, in your deliberations, you come to the conclusion that the company failed in its duty in this respect and that because of its negligence this accident happened to these plaintiffs, then you must consider what damages shall be awarded them ; and if you award them damages you should give them such sum as will compensate them for the pain and suffering which they have or may endure and for the financial or money loss which they have or will hereafter sustain because of these injuries, taking into consideration their respective ages, the state of their health, how long they will probably live, during what period of their probable future lives they would be able to work and the amount of money they would earn.

The requests to charge on both sides are refused except as already charged.

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DEFENDANT'S EXCEPTIONS.

The defendant, by its counsel, prays a bill of exceptions to the charge of the Court in the following particulars, viz :

10 1. To that part of the Court's charge in which the Court charged it was the duty of the railroad corporation to so construct and maintain its crossings that they may be safely used by persons travelling the highway, and every person using the street of a city has a right to assume that the railroad crossing will be kept in such repair as to be good and sufficient for the safe passage of carriages, horses and cattle, and if that duty is not performed the resultant damages are recoverable by any one lawfully and carefully using the highway; and a bill of exceptions is allowed and sealed accordingly.

ALLEN B. ENDICOTT, [SEAL.]

20 Circuit Court Judge.

2. Also to the Court's refusal to charge the first request submitted by the defendant in the language of said request; and a bill of exceptions is allowed and sealed accordingly.

ALLEN B. ENDICOTT, [SEAL.]

Circuit Court Judge.

30 3. Also to the Court's refusal to charge the second request submitted by the defendant in the language of said request; and a bill of exceptions is allowed and sealed accordingly.

ALLEN B. ENDICOTT, [SEAL.]

Circuit Court Judge.

4. Also to the Court's refusal to charge the third re-

quest submitted by the defendant in the language of said request ; and a bill of exceptions is allowed and sealed accordingly.

ALLEN B. ENDICOTT, [SEAL.]
Circuit Court Judge.

5. Also to the Court's refusal to charge the fourth request submitted by the defendant in the language of said request ; and a bill of exceptions is allowed and sealed accordingly.

ALLEN B. ENDICOTT, [SEAL.]
Circuit Court Judge.

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6. Also to the Court's refusal to charge the fifth request submitted by the defendant in the language of said request ; and a bill of exceptions is allowed and sealed accordingly.

ALLEN B. ENDICOTT, [SEAL.]
Circuit Court Judge.

7. Also to the Court's refusal to charge the sixth request submitted by the defendant in the language of said request ; and a bill of exceptions is allowed and sealed accordingly.

ALLEN B. ENDICOTT, [SEAL.]
Circuit Court Judge.

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8. Also to the Court's refusal to charge the seventh request submitted by the defendant in the language of said request ; and a bill of exceptions is allowed and sealed accordingly.

ALLEN B. ENDICOTT, [SEAL.]
Circuit Court Judge.

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9. Also to the Court's refusal to charge the eighth request submitted by the defendant in the language of said

request ; and a bill of exceptions is allowed and sealed accordingly.

ALLEN B. ENDICOTT, [SEAL.]
Circuit Court Judge.

10. Also to the Court's refusal to charge the ninth request submitted by the defendant in the language of said request ; and a bill of exceptions is allowed and sealed accordingly.

10 ALLEN B. ENDICOTT, [SEAL.]
Circuit Court Judge.

11. Also to the Court's refusal to charge the tenth request submitted by the defendant in the language of said request ; and a bill of exceptions is allowed and sealed accordingly.

ALLEN B. ENDICOTT, [SEAL.]
Circuit Court Judge.

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NEW JERSEY COURT OF ERRORS AND
APPEALS.

NEW JERSEY, SS :



The State of New Jersey, Allen B.
Endicott, Judge of our Camden County
Circuit Court, Greeting :

Foreasmuch as in the record the proceedings and 10
also in the giving of judgment in a certain plaint which
was in our Camden County Circuit Court before you be-
tween Elijah Piver, plaintiff, and Pennsylvania Railroad
Company, defendant, in a plea of action of tort manifest
error hath intervened to the great damage of the Pennsyl-
vania Railroad Company, as is said ; and we being willing
that the error, if any there be, should in due manner be
corrected and full and speedy justice done to the parties
aforesaid in this behalf, do command you that if judg- 20
ment be thereupon given and affirmed then you distinctly
and openly send under your seal the record and pro-
ceedings aforesaid with all things touching the same to
our Judges of our Court of Errors and Appeals in the last
resort in all causes, at Trenton, on the thirteenth day of
March next together with this writ that the record and
proceedings aforesaid being inspected we may cause fur-
ther to be done thereon what of right and according to
the law and custom of this State ought to be done.

Witness our Chancellor and President Judge of our
said Court of Errors and Appeals, at Trenton aforesaid, 30
the twenty-third day of February, one thousand nine
hundred and six.

S. D. DICKINSON,
Clerk.

GASKILL & GASKILL,
• Attorneys.

RETURN.

The answer of Allen B. Endicott, Judge of the Court within named:

The record and proceedings of the plea whereof mention is within made and all things concerning the same to the Court of Errors and Appeals within specified, at the day and place within contained, I certify in a certain
10 schedule to this writ annexed as I am within commanded.

ALLEN B. ENDICOTT,

Judge of the Camden County Circuit Court.

20

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NEW JERSEY COURT OF ERRORS AND
APPEALS.

ELIJAH PIVER, Plt'f and Def't in Error. vs. PENNSYLVANIA RAILROAD COMPANY, Def't and Plt'f in Error.	}	In Tort. Assignment of Errors.	10
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And now at this day the plaintiff in error assigns the following causes of error:—

1. Because the Trial Judge erroneously, unlawfully and contrary to the objection of the plaintiff in error permitted the plaintiff below to amend his declaration out of the presence of attorneys of defendant upon suggestion to the Court that counsel for plaintiff would like permission to amend his declaration if he found that he needed so to do, and that the said Trial Judge did permit the said declaration to be amended upon a certain matter, upon application for amendment which does not appear in the transcript of testimony as taken by the official stenographer. 20

2. Because the Trial Judge erroneously and unlawfully refused to non-suit the plaintiff below being thereto moved by the defendant, the plaintiff in error. 30

3. Because the Trial Judge erroneously, unlawfully and contrary to the objection of the plaintiff in error admitted incompetent evidence as follows:—

“Q. Well, Mr. Potter, the crossing that is in there
 “now, the depth between the two tracks, the guard rail
 “and the other rail, is about an inch and a half, is it not?”

“Mr. Gaskill, Jr. I object, this is as to a different
 “crossing from the crossing which was in the track at
 “the time the accident occurred. The conditions might
 “be different, and also because it is immaterial.”

10 “After argument, the Court said, ‘I will let the ques-
 tion stand.’”

4. Because the Trial Judge erroneously and unlawfully
 refused the motion of the plaintiff below, that binding
 instructions be given to the Jury to find for the defend-
 ant, on the ground that no negligence was proven against
 the Company, and that the Company had shown all due
 care in construction, maintenance and the inspection of
 the crossing in question.

20 5. Because the Trial Judge erroneously and unlaw-
 fully charged the Jury as follows:—

“It was the duty of the railroad corporation to so con-
 “struct and maintain its crossings that they may be safely
 “used by persons travelling the highway, and every per-
 “son using the street of a city has a right to assume that
 “the railroad crossing will be kept in such repair as to be
 “good and sufficient for the safe passage of carriages,
 “horses and cattle, and if that duty is not performed the
 “resultant damages are recoverable by any one lawfully
 “and carefully using the highway.”

30 6. Because the Trial Judge erroneously and unlaw-
 fully refused to charge the first request of the defendant
 in the language of said request as follows:

“The Jury cannot find verdicts for the plaintiffs merely
 “because an accident happened at the crossing in ques.

“tion; the fact that an accident happened does not make
 “the defendant liable, and verdicts cannot be rendered
 “against it simply because of such accident and the
 “resulting injury.”

7. Because the Trial Judge erroneously and unlawfully refused to charge the second request submitted by the defendant in the language of said request, to wit:—

“The defendant railroad company is not liable in
 “damages unless it was guilty of some negligence. The
 “negligence charged in this case is improper construction
 “or maintenance of crossing, so that the Jury must find
 “that the railroad company did not properly construct or
 “keep in repair its crossings, otherwise the verdict must
 “be for the defendant.”

10

8. Because the Trial Judge erroneously and unlawfully refused to charge the third request, submitted by the defendant in the language of said request, to wit:—

“If the Jury is satisfied by the evidence that the horse’s
 “hoof caught between the main rail and the guard rail
 “the defendant railroad company is not liable and must
 “not be held responsible in damages in this action.”

20

9. Because the Trial Judge erroneously and unlawfully refused to charge the fourth request submitted by the defendant in the language of said request, to wit:—

“The Jury must not find a verdict against the defend-
 “ant unless the Jury is satisfied that there was an im-
 “proper space between planking and rail in which the
 “horse’s hoof was caught.”

30

10. Because the Trial Judge erroneously and unlawfully refused to charge the fifth request submitted by the defendant in the language of said request, to wit:—

“The Jury must not find a verdict against the defend-

“ant unless it is satisfied by a preponderance of testimony
 “that there was an improper space between planking and
 “rail in which the horse’s hoof was caught, and that the
 “horse’s hoof was caught between rail and planking.”

11 Because the Trial Judge erroneously and unlawfully refused to charge the sixth request submitted by the defendant in the language of said request, to wit:—

10 “The Jury must not find a verdict against the defendant because the horse’s hoof caught between the main rail and the gaurd rail, unless it is satisfied by a preponderance of testimony that there was an improper and too great a space between the main rail and the guard rail.”

12. Because the Trial Judge erroneously and unlawfully refused to charge the seventh request submitted by the defendant in the language of said request, to wit:—

20 “The defendant company having shown a system of inspection of crossings, and that according to this system examination was made of the crossing in question, which disclosed that the crossing was in good condition, the defendant fulfilled its duties in the premises.”

13. Because the Trial Judge erroneously and unlawfully refused to charge the eighth request submitted by said defendant in the language of said request, to wit:—

30 “The defendant having shown that the crossing in question was of standard construction, that the crossing frog of the railroad and trolley track was standard, and that the planking was in good condition and fit tight to the main rails on the outside and to the guard rails on the inside of the track, leaving no space open, except the space between the stock and the guard rails, fulfilled its duty in the premises.”

14. Because the Trial Judge erroneously and unlawfully refused to charge the ninth request submitted by the defendant in the language of said request, to wit:—

“The Jury must not include the bill of Dr. Hirst of \$50 in the amount of damages to be awarded Elijah Piver inasmuch as the bill has not been paid at the time of trial.”

15. Because the Trial Judge erroneously and unlawfully refused to charge the tenth request submitted by the defendant in the language of said request, to wit:—

“Binding instructions are given to find a verdict for the defendant in each of the cases.”

And the said Pennsylvania Railroad Company prays that the judgment aforesaid may be reversed, annulled and altogether held for nothing, and that it may be restored to all things which it has lost by occasion of the said judgment, etc.

GASKILL & GASKILL,
Attorneys for and of Counsel with Plaintiff in Error.

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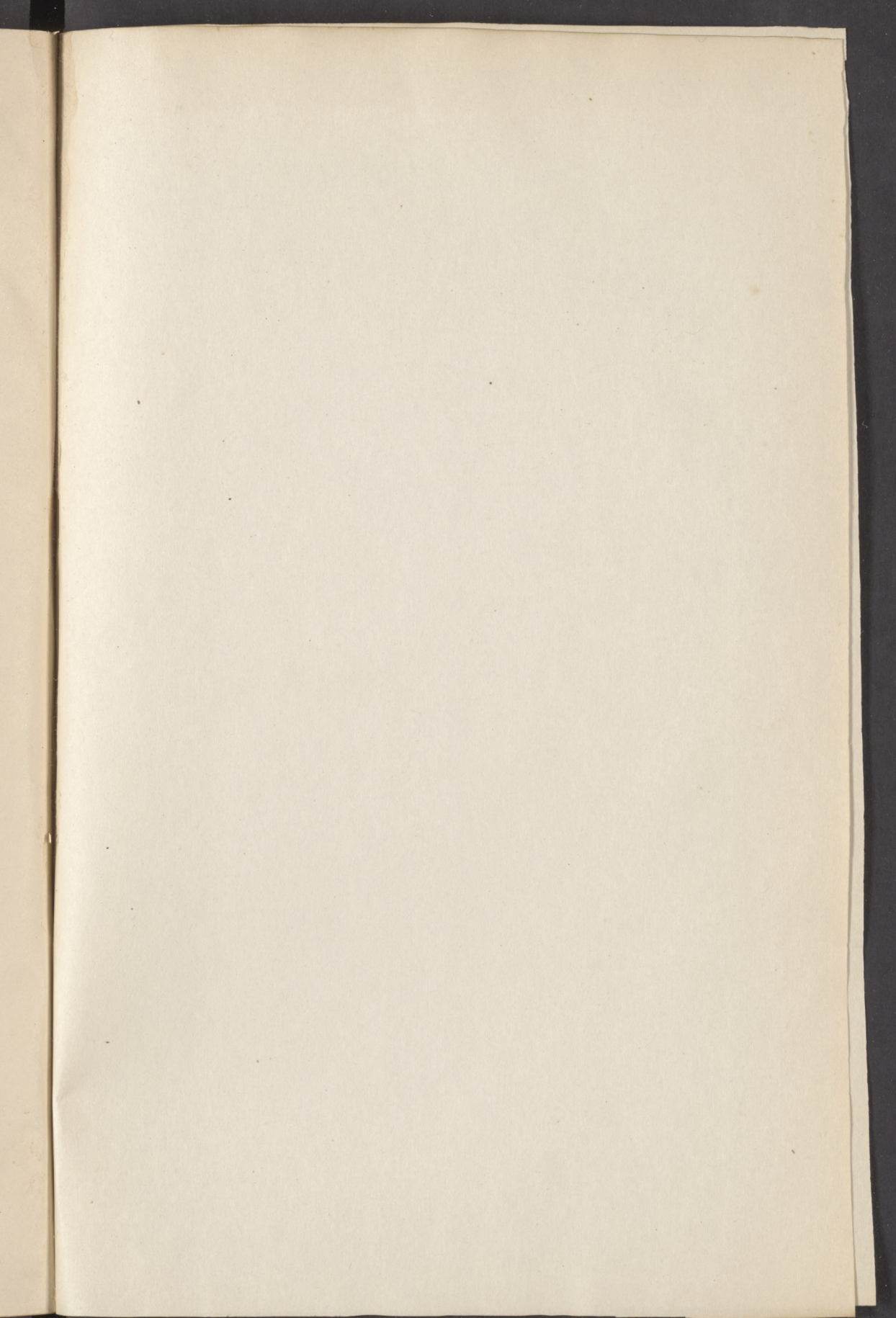
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NEW JERSEY COURT OF ERRORS AND
APPEALS.

	ELIJAH PIVER,	}	
	Defendant in Error.		In Tort.
	vs.		
	PENNSYLVANIA RAILROAD	}	Joinder
10	COMPANY,		in Error.
	Plaintiff in Error.		

And afterwards, the said Elijah Piver, by John W. Wescott, his attorney, comes into Court and says that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid, and he prays here that the Court here may proceed to examine as well the records and proceedings aforesaid, as the matters
20 aforesaid assigned for error, and that the judgment aforesaid in manner aforesaid given may in all things be affirmed, &c.

JOHN W. WESCOTT,
Attorney for Defendant in Error.



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