New Jersey Court of Errors and Appeals

HENRY SCHNACKENBERG, *Respondent,* *vs.* THE DELAWARE, LACKAWANNA and WESTERN R. R. Co., *Appellant.*	Action at Law. On Appeal.

APPELLANT'S BRIEF.

Statement.

This is an appeal from a judgment of $2,000 entered in the Essex County Circuit Court on the verdict of a jury on the second trial of a personal injury case happening at a railroad crossing in the City of East Orange, New Jersey on January 25, 1913, the case having been previously reversed on an appeal to the Supreme Court, on account of the contributory negligence of the respondent and a *venire de nova* ordered (See 86 N. J. L. 517).

At Harrison Street, where the accident happened and throughout East Orange the appellant's two tracks run in a general easterly and westerly direction and cross Harrison Street at right angles.

For nearly a half a mile west of Harrison Street the tracks run practically straight (p. 84 ll. 15-18); parallel with the tracks on their southerly side and abutting the eastbound track is McKinley Avenue which runs west from Harrison Street to Kennilworth Place (p. 22, ll. 1-9).

Kennilworth Place runs north and south, but does not cross the tracks, it ending at the property line of the appellant, nearest its east-bound track.

On the west side of Kennilworth Place and south of the tracks is a fence surrounding an ice-plant.

On the south-west corner of Harrison Street and running along McKinley Avenue a garage had been erected, the nearest point of which on Harrison Street was 47 feet from the nearest rail of the eastbound track (p. 84, ll. 1-2).

From the edge of the garage on Harrison Street to the fence on Kennilworth Place, *which limits one's view of the eastbound track, is* 520 *feet* (p. 82, ll. 20, 31), the fence being 24 feet from the nearest rail of the eastbound track (p. 99, ll. 36, 40).

The appellant's tracks and McKinley Avenue were practically of the same grade (Exhibits D-2, 4, 5, 6, and 7) and the railroad both at the crossing in question and to the west and east of the crossing for a considerable distance, did not run through any cut or embankment.

Aside from a small fence about 20 feet in length (p. 40 l. 67) and shown in the above mentioned photographic exhibits, the appellant had not barred or enclosed its right of way.

To the west of the crossing and both along and on McKinley Avenue and the appellant's property as shown in the photographic exhibits referred to there were trees and telegraph poles which, it is claimed, obstructed the respondent's view.

But the following table relative to the alleged obstructions running from the crossing to a point beyond the line of vision i. e., from the edge of the garage up to where the fence obstructed the view on Kennilworth Place, 520 feet (p. 82, ll. 27-30) shows that the distances between each and every one of these obstructions were sufficient, if the respondent was looking, not only to have seen the flicker of the headlight but to have seen an

almost continuous glare thereof for at least 520 feet.

Crossing.	Obstruction.	Distance from crossing.	Opening.
1—0	Pole	56 ft.	56 ft.
2—0	Pole	184 "	128 "
3—0	Tree	275 "	147 "
4—0	Pole	323 "	48 "
5—0	Tree	344 "	21 "
6—0	Tree	398 "	54 "
7—0	Pole	456 "	58 "
8—0	Tree	463 "	7 "
9—0	Tree	513 "	50 "
10—0	Tree	515 "	2 "
11—0	Trees	542 "	37 "

(Page 103, l. 20, et seq.; p. 104, l. 1, et seq.)

From a measured observation on a level with the edge of the garage taken in the center of Harrison Street one had a view west to where it intersected the east-bound track of 1122 feet west from the crossing (p. 83, ll. 10-13), each tree or pole naturally, cutting out a small sector of one's vision as one approached the tracks but one's vision extended further west as one approached the track (p. 93, ll. 24-28).

By actual observation at night time near the edge of the garage (p. 140, ll. 31-4), one could first see the flicker of the headlight of an engine about even with the fence on Kennilworth Place (p. 139, ll. 3-7) the east side walk of Kennilworth Place (p. 139, ll. 20-1), a distance from the crossing of edge of the garage (p. 140, ll. 31-4), one could first see the flicker of the headlight of an engine about even with the fence on Kennilworth Place (p. 139, ll. 3-7) the east side walk of Kennilworth Place (p. 139, ll. 20-1), a distance from the crossing of about 510 feet (p. 82, ll. 27-30), also measurement taken from map exhibit D-8.

The appellant had erected gates at the crossing

in question (Answer, ¶2, p. 13) but did not maintain or post any sign as to the hours between which said gates would be operated (p. 55, l. 22 et. seq), and at the time of the accident it had not posted any notice that said gates were out of order (p. 55, l. 22 et seq).

In its answer it admitted that it had "permitted said gates to remain open while" an engine "then being operated by the defendant's servants, was passing along said railroad over said crossing" (Answer, ¶3, p. 13), but denied that said gates were negligently operated and that it failed to give sufficient warning of the approach of its engine.

The Accident.

On the morning of January 25, 1913 at about 4:45 o'clock the respondent who was familiar with the crossing in question (p. 42, l. 18 et seq.), driving a bakery wagon with one horse, drove north down Harrison Street toward McKinley Avenue and the crossing in question (p. 22, ll. 34-5).

When the respondent got right opposite the garage (p. 23, ll. 5-12), that is, the front of the wagon even with the edge of the garage (p. 45, l. 15), as shown by the marking on exhibit D-2 (p. 45, ll. 25-27), he brought his horse to a complete stop (p. 23, l. 7; p. 45, l. 13). He then saw the gates were up (p. 23, l. 8; p. 46, ll. 17-18).

At this point he made a "thorough point of observation" (p. 23, l. 27), stopping for a minute or a half a minute (p. 46, ll. 1-3), looking both to the right and left (p. 46, ll. 12-13) from one side to the other (p. 46, ll. 16-17), and then he started his horse toward the crossing on "a slow walk, medium" (p. 47, ll. 13, 14).

As the horse started on his walk to the crossing the respondent claims he continued to make

observations, by keeping his head moving first in one direction and then in the other, towards Orange and East Orange and continued these observations until he got up to the track and got hit by an engine traveling east, running at the rate of not more than 30 miles an hour (p. 118, l. 37 et seq.).

His last observation in the direction from which the engine which hit him was coming was when he was right up to the track, when he then saw the engine on top of him (p. 47, l. 15 et seq.), the engine cutting the horse out of the shafts and knocking the respondent out of the wagon (p. 24, l. 1 et seq.), causing the injuries for which suit was brought.

The respondent says the headlight of the engine was lit, (p. 55, ll. 10-11) and that from a point 40 feet east of the crossing (p. 66, l. 28, et seq.) he "could fairly see the red light like on the back part of the engine through the darkness", (p. 60, l. 38, et seq.).

What he saw was a red lantern about 7 inches high and about 10 inches in circumference (p. 126, l. 10, et seq.).

One of appellant's witnesses said he thought he could see the tail light about 400 feet from the crossing after he left the engine and had gone back to the crossing (p. 131, l. 1 et seq.), but the fact was that the engine stopped at Halsted Street (p. 122, l. 20 et seq.) which really was about 900 feet east (p. 84, l. 24, et seq.) from the crossing in question.

The respondent's reason why he did not see the head-light of the approaching engine was two-fold first, because it was still very dark at the time the accident happened and secondly it was a foggy morning.

On the previous trial of this case the respond-

ent had contented himself with the darkness of the morning, but the fog or mist was a new element introduced on the second trial, the present appeal.

Under the evidence the appellant contended that, in view of the fact that the respondent was placing no reliance whatever upon the gates as a protection but was exercising and making an independent observation for the engine which hit him, respondent must have seen the engine which struck him and that, irrespective of the darkness of the morning and the *alleged foggy weather,* he was guilty of contributory negligence.

Argument.

It is conceeded that under the law this Court may well find that as to the giving of the statutory crossing signals the evidence both pro and con presented a question for the jury and that one reason or ground of appeal is not now here urged.

However, under the adjudications of both this and our Supreme Court it is insisted that, on his own showing, the respondent was guilty of contributory negligence in view of the fact that, having placed no reliance for his safety on the crossing gates, knowing them to be up, at the time he approached the crossing and seeing no one in attendance upon them, the observations he claims to have made and relied upon were of so perfunctory a character as to be negligent, and the requested direction of a verdict should have been granted. Otherwise if said observations were not made at all, as he says they were, this is a case where a verdict was founded on demonstrated false testimony and should be allowed to stand.

In the disposition of the case, the Trial Court

governed itself as if the case at bar arose both under Chapters 35 and 96, P. L., 1909.

This appellant contended on the trial and here contends that Chapter 35, P. L., 1909 had no application whatever to this accident and further no application to an accident happening at the crossing in question, and that both statutes were unconstitutional.

Appellant further contends that even though Chapter 96 P. L., 1909 was applicable to an accident happening at the crossing where the instant accident happened, it nevertheless is but procedural and where the uncontradicted evidence shows contributory negligence in no way related to the alleged breach of duty under either of the statutes, this Court can, and under its adjudications should, set the verdict aside.

During the progress of the trial the appellant claims error was committed both in the reception and rejection of evidence and in the refusal of the Court to charge and instruct the jury specially as requested.

These three errors may be succinctly classed as follows:

1. On the allowance by the Court of the introduction of evidence, the refusal to charge as requested and the action of the Trial Court, allowing liability to be predicated upon acts or omissions of the defendant's servants after the accident had occurred.

2. On the refusal of the Trial Court to charge, and certain errors in his charge relative to the contributory negligence of the respondent.

3. On the refusal of the Trial Court to permit inquiry relative to and charge the jury about the evident change in the respondent's testimony on the instant from the former trial.

POINT I.

A verdict should have been directed on account of respondent's contributory negligence.

Being mindful of the fact that the crossing where the accident happened was one which the appellant had assumed to protect by crossing gates, the pertinency and applicability of the Crossing Acts, Chapters, 35 and 96, P. L., 1909, or one of them, aside from the constitutionality of said acts, or the one if applicable to the situation of the crossing in question, undoubtedly would be germane to the discussion under this point, *unless it appears that the respondent, knowing the danger arising from the omission to operate the gates, voluntarily exposed himself to it, hence being precluded from maintaining an action for the injury which resulted from such exposure.*

This we contend was shown by the respondent and forms a bar to his action, whether we express its application in the terms of the maxim, *"Volenti non fit injuria"* or "contributory negligence."

We concede that, so far as the giving of the statutory signals was concerned, this court may well find that that fairly presented a question for the jury, but an examination of the respondent's evidence shows that he was fully cognizant and appreciative of the danger and risk to which the appellant's conduct may have exposed him, for he distinctly, three times, relates that he was placing absolutely no reliance upon the gates and their operation for his protection.

> "I got opposite that garage. I stopped my horse there; I looked and listened. The gates were up. I didn't see any gateman or anything (page 23, l. 6 et seq.).
>
> * * * * * * *

"Why, I made a thorough point of observation either way, because there were some mornings I had to stop there, that the gates were down or just being put down, a train coming along, either a freight or something and I was used some mornings that I had to stop about there, for a train would come on, and that is why I stopped" (p. 23, l. 26, et seq.).

* * * * * * *

"I looked from one side to the other for a train. Of course, I seen the gates were up, no gateman or anything around, and as I didn't hear no train or anything, the gates were up, and I said 'get up' and I drove on" (p. 46, l. 16 et seq.).

Under the Crossing Acts in question, assuming them here applicable solely for the sake of argument, before investigating whether the respondent was careless or not, there is a larger question to be considered and that is whether the respondent consented to run the chances of a fully appreciated danger voluntarily; because his freedom to act where he had placed a reliance on a due and proper operation of the gates being absolute, created by the statute, any of his actions not predicated upon such neglect, a prior consideration of the question of his negligence.

For, as said by Lord Bramwell in *Lax v. Darlington,* L. R. 5 Exch. 33 (1879), he

"had very grave misgivings as to whether the plaintiffs were entitled to recover, because if they knew the amount of danger, and chose to risk it, it is their own fault. * * * If a person chooses to go out with an obvious danger before him he must take the consequences."

If these facts are undisputed, it then becomes a question of law which the court may decide was held in *Thomas v. Quartermaine,* 17 Q. B. D. 414, and 18 Q. B. D. 645, and cited with approval in *Dowd v. Erie,* 70 J. L., at 457.

That it was dark at the time of the accident served but to intensify the light of the engine's headlight which was concededly lit (p. 55, l. 10). This is manifest.

As said by Gummere C. J. in *Hoopes v. W. J. & S. R. R. Co.,* 65 N. J. L. 91, "that this headlight was not stationary, but moving toward the crossing, is demonstrated by the accident" and continuing he says:

> "No other danger appears to have been present to distract his attention. * * * Due care on his part, in the language of the Court of Errors and Appeals in the case of *Central Railroad Co. v. Smalley,* 32 Vr. 277, required him to use his eyes 'as to make looking reasonably effective' under the existing circumstances.
>
> "If he had done this, he would readily have observed what was a fact, namely that a light 'was in reality moving towards the crossing.' If he had observed this, ordinary prudence required that he should have waited before attempting to drive over the track, until either the moving light had passed beyond the crossing, or until 'he was satisfied that it was not the headlight of an oncoming train'" (pages 91-2).

The above case was cited with approval and a Rule to Show Cause made absolute in *Brennan v. Penn. R. R. Co.,* 73 N. J. L. 147, where the plaintiff testified similarly to the respondent that when he first saw the train coming "all I seen was the light and the light was on me then," (p. 150—See respondent's testimony page 47, l. 31, et seq.).

By repeated adjudications persons injured at railroad crossings during the night time, when their only view of an approaching train was its headlight and their unobstructed view was less than 47 feet, (pp. 84, ll. 1-2) have been held guilty of contributory negligence as a matter of law.

In *Cantrell v. Erie R. R. Co.*, 64 N. J. L. 277, the accident happened between 9 and 10 P. M., and from a point from 35 to 40 feet from the crossing the plaintiff had an unobstructed view. This court upheld the judgment of non-suit.

In *Brennan v. Penn. R. Co.*, 73 N. J. L. 147, the accident happened at 5:30 P. M. when it "was dark or twilight." Thirty to thirty-five feet from the crossing the plaintiff had a continuing unobstructed view.

The Supreme Court made the defendant's Rule to Show Cause absolute.

In *Van Riper v. N. Y. S. & W. R. R. Co.*, 71 N. J. L. 345, the accident happened at night, the headlight of the engine was lit and from a point 32 feet from the nearest rail of the tracks the plaintiff had a continuous uninterrupted view. In this case the Supreme Court made the defendant's Rule to Show Cause absolute, because the accident was due to the plaintiff's negligence in not observing the nearness of the defendant's train.

In *Graves v. B. & O. Ry. Co.*, 76 N. J. L. 362, the question of contributory negligence was submitted to the jury, for the reason that it appeared there was no headlight on the engine.

In this instant case on its appeal to the Supreme Court, 86 N. J. L. 517, this court held that a verdict should have been directed where the plaintiff's unobstructed view 30 feet from the crossing was for a distance of 400 feet in the direction from which the train was coming.

Under the foregoing cases which are particularly applicable to accidents happening in the night time, (although there are innumerable cases holding the same view collated in *Brennan v. Penn.* 73 N. J. L. at 150-1), the opinion of this court in *Joyce v. W. J. & S. R. R. Co.*, 83 N. J. L. 609, is applicable.

> "The line of judicial precedents, of which the cases cited are illustrations, compel us to the conclusion that the plaintiff * * * was guilty of negligence which contributed to his injury."

For, as said by Gummere C. J. in *Lynch v. Penn. R. R. Co.* (Supreme Court—opinion filed Jan. 13, 1916):

> "It follows, therefore, either that he was mistaken in his statement that he looked or else that he looked in such a perfunctory manner that he was not conscious of what was before his eyes."

Assuming that both Chapters 35 and 96 P. L. 1909, are applicable to the crossing in question and that the construction of this court of Chapter 35 in *Fernetti v. W. J. & S. R. R. Co.*, 87 N. J. L. 268, would also be the construction given to Chapter 96 and that they both applied to an accident happening at the crossing in question, if the operation or non-operation of the gates proximately contributed to the accident, the respondent, as hereinbefore shown, was not placing any reliance on the operation or non-operation of the gates and the rule as laid down in *Duryea & Price v. D. L. & W. R.R. Co.*, 221 Fed. Rep., 848, 854-5, is applicable.

> "If the plaintiff had looked though not required so to do, and by looking, saw the train in time to avoid it, and then walked into the danger which she saw, the question would be entirely different and doubtless she would have been guilty of contributory negligence notwithstanding the negligence of the railroad company * * *."

One therefore cannot be heard to say that, having looked, he failed to see what was before his eyes.

The requested verdict should have been directed.

B.

Neither Crossing Act was applicable to the case at bar.

Neither Chapter 35 nor 96, P. L., 1909 was applicable to the case at bar, because each statute contemplates that in any action against a railroad company, the proximate cause of the accident must have been the injured party's assumption that the gates would be duly and properly maintained and operated.

The respondent's testimony set out in sub-division A. clearly shows that he was proceeding to go over the crossing on no such an assumption, and therefore the Court's refusal to take the case from the jury (Ground of Appeal No. 9), and his reference to the Crossing Acts in question (p. 150, l. 10, et seq.), (Ground of Appeal No. 10), was error.

In *Field v. C. B. & Q. Ry. Co.,* 14 Fed., 332, it appears that a statute of Iowa required the railroad to erect a warning sign-board. The plaintiff claimed that the defendant neglected to set it up and that thereby its liability was absolute, but the Court said:

> "Suppose for example, that the defendant could show that the plaintiff saw the train nearing the crossing, and, nevertheless, rashly attempted to cross in face of impending danger, what good reason can there be why he should not be permitted to do so?
>
> "What reason would there be in saying that if the sign had been up he might have been warned by it of the coming of the train and avoided the danger, seeing that he had before him a more impressive warning of the impending danger than any sign-board could have given."

C.

The Crossing Acts in question are Procedural.

Assuming that both the Crossing Acts in question were applicable to the accident in the present case and that they modified the prior existing rule of legal caution, it is contended that a verdict should still have been directed because both acts are at best procedural.

In all acts procedural, there is in each judicial act an element of discretion, executive power and also the influence of some rule of substantive law.

Even in the case of an act of procedure most strictly regulated by positive law, the Trial Court is bound to exercise an administrative or executive function in applying the rules of substantive law applicable in the case before him.

In the instant case the trial judge in directing a verdict should have directed a verdict because the evidence was uncontradictedly against the fact that the matter of the operation or non operation of the crossing gate was the proximate cause of the accident while the testimony regarding the acts of the respondent shown under subdivision A, as to his contributory negligence, was uncontradicted.

We find nothing in the opinion of this Court in the cases of *Brown v. Erie,* 87 N. J. L., 487; *Fernetti v. W. J. & S. R. Co.,* 268, that militates against the construction of the statutes here contended for and we do find countenance for our construction, in *Waibel v. W. J. S. R. Co.,* 87 N. J. L., 573, and the unreported case of *Lynch v. Penn. R. R. Co.,* supra.

The statutes not being so binding upon the Trial Court as to oblige him to send the case to the jury, there was error in his refusal to direct a verdict.

POINT II.

The crossing acts in question are unconstitutional.

A study of the two Crossing Acts in question shows that Chapter 35, P. L. 1909, p. 54, deals with a particular kind or character of crossing.

Obliged as we are to take the construction this court has given this statute in *Brown vs. Erie,* 87 N. J. L., 487, we need but refer to the Chancellor's construction thereof in relation to Section 22 of the Railroad Act, at p. 493 to show that the crossing intended to be covered by the statute had certain surrounding physical characteristics, to wit, a fence or an embankment or the laying of the track in a cut, at least four feet deep.

The evidence in the case at bar both from the plaintiff, p. 41, l. 21, et seq., and as shown by the photograph exhibits D-2, D-4, D-5, D-6, D-7, shows conclusively that such physical characteristics were not present or surrounding the crossing in question.

The other statute, Chap 96, P. L. 1909, p. 137, an examination shows, *covers all other railroad crossings not possessing the physical characteristics and surroundings contemplated by Chapter 35, P. L. 1909, where a railroad has or shall install safety gates,* etc.

If either statute is applicable to the case at bar, Chapter 96, P. L. 1909, and not Chapter 35, P. L. 1909, is the one.

At first blush it may not be apparent why concern has been expressed as to which statute

is applicable, but when one reads the concluding clauses of each statute, we take it, our concern is made apparent.

Chapter 35, P. L. 1909, provided that in all cases covered by that act the fact whether the person injured

> "was or was not guilty of contributory negligence shall be a question to be determined by the jury, in all actions brought to recover damages for such loss of life or personal property."

Chapter 96, P. L. 1909, however is much more drastic, for it reads:

> "And in every action brought for injuries to person or property, or for death caused at any crossing protected as aforesaid, no plaintiff shall be barred of the action because of the failure of the person injured or killed to stop, look and listen before passing over said crossing."

Thus, under the first statute the defendant is always entitled to have the jury pass upon the matter of the injured party's contributory negligence, while under the other statute with *the same kind of negligence of the railroad as under the first statute,* the acts of the plaintiff before passing over the crossing are no longer the subject of a jury's determination but, by legislative fiat, a party's contributory negligence in failing to stop, look and listen, does not bar his action at all, and the jury is precluded from so finding because *no plaintiff shall be barred of his action, because of such failure.*

> "Barred is a word common as well to the English as to the French of which cometh the nowne, a Bar, barra. It signifieth legally a destruction for ever, or taking away for a time of the action of his that a right hath" (Stroud's Judicial Dictionary, 165).

We have thus shown how a statutory benefit

may be given or conferred upon one railroad over another; or even a statutory benefit or exemption given to parties litigant against the same railroad on account of accidents merely because they may happen at different crossings.

And for what reason?

Perhaps fortuitously one railroad is built through a place where its construction must of necessity cause it to be so built as to bring it under Chapter 35, P. L. 1909. Maybe, economically, the layout situation of one crossing over another, perhaps, on the same road, but at a different place, is better had under Chapter 96, 1909. But why speculate? An examination of both statutes furnishes us with no rationale whatever for determination.

Surely both statutes in question,—but we are mainly concerned with Chapter 96, P. L. 1909, as we concede that is the only one having a semblance of applicability to the crossing here involved are unconstitutional as violating Article IV Sec. 7, p. 11 of the Constitution of the State of New Jersey.

Burlington vs. Penn. R.R. Co., 58 N. J. E. 547;
State vs. Price, 71 N. J. L. 249.

In charging the jury relative to said statutes, in allowing the case to go to the jury under said statutes and in holding that said statutes were applicable, the appellant, as alleged in in Grounds of Appeal, was prejudiced and harmed.

Ground of Appeal No. 9, p. 4 and p. 147-148;
Ground of Appeal No. 10, p. 4 and 150, l. 10, et seq.; p. 161, l. 29, et seq.

POINT III.

What happened after the accident was immaterial to the issue.

The testimony of the respondent (Infra Point I) having been to the effect that he was placing no reliance upon a due and proper operation of the crossing gates, at the time of the accident, and the appellant having admitted in its answer that they were open (Answer, ¶2, p. 13), the court nevertheless, over the objection of the appellant, permitted the respondent to propound questions, both to the plaintiff and the defendant's engineer and flagman relative to the actions of the gateman *after the accident had taken place.*

To the plaintiff was propounded the following questions and the following answers were elicited:

> "Q. Who was this Italian that came out of the shanty? A. He was the gateman; the fellow that operates the gates.
>
> "Q. Had you seen him before the morning at any time? A. Yes, sir; I had.
>
> "Q. During what period before that time had you seen him at the gates—at the shanty?
>
> "Q. Had you seen this man before that day at all? A. Yes, sir, I had; I had seen him before that day of the accident" (p. 25, l. 20, et seq.).
>
> Grounds of Appeal No. 2, p. 2.

To the engineer the following question was propounded:

> "Q. Did you see any one else in the vicinity of the crossing immediately after the accident? A. Why, yes, I saw the gateman after I went back on the crossing" (p. 120, l. 23 et seq.).
>
> Ground of Appeal No. 7, p. 4.

And of the flagman of the engine the following question was asked:

> "Q. Did you see anything else about the

crossing when you came back, in addition to the plaintiff? A. Why, the flagman was on the crossing, that was all" (p. 128, l. 15, et seq.).

Subsequently in his charge to the jury the trial court instructed the jury at length relative to the testimony thus elicited and charged the jury as a fact that the gateman was clearly negligent (p. 151, p. 27, et seq.).

Ground of Appeal No. 8, p. 4.

All of this objectionable testimony and the Court's charge to the jury relative thereto, was harmful in that, being immaterial to the issues raised by the pleadings and the respondent's proof as offered in support of the triable issues, it diverted the jury's attention from the real issues and had a natural and logical tendency to inject into the case a most harmful influence of negligence when in fact that was not an issuable matter.

How prejudicial this was the appellant does not know, but that it was prejudicial must be manifest.

Germane to the foregoing subject and in an endeavor to show that the appellant was not operating its gates under Chapter 96, P. L. 1909, inquiry was directed to whether the appellant *after the accident* had posted any sign on the gates relative to "during what hours its gates would be operated", to which the plaintiff answered

"A. No; there was not."

The trial court struck this answer out until he had "time to consider it," and the appellant requested of the trial court at that time that the court instruct the jury.

"that what we may have done after the acci-

dent has no bearing on the case now being tried."

The question and discussion being found at length on p. 63, ll. 40-1 and p. 64, l. 1 et seq.

This refusal of the trial court, either considered alone or as part of the general objection covered by the Grounds of Appeal noted under this point, permitted the jury to base their verdict on merely the happening of the accident and immaterial matters and things *which happened after the accident* and therefore was error.

POINT IV.

The appellant's requests Nos. 2-3 and 8 should have been charged.

Grounds of Appeal No. 13-14-18.

The second request to charge embodied the proposition that if the respondent was not placing a reliance upon the open gates as an assurance of his safety but was making an independent observation for the approach of the train, irrespective of the fact, that the gates were open, then the open gates were not the proximate cause of the accident.

This request was not covered by what the Trial Court charged the jury at p. 151, l. 19, et. seq., although it embodied the law as we conceive it to be.

The appellant's third request which the Court denied "except as charged" embodied the proposition that if the jury believed the respondent's own testimony that he looked as attentively as he claims he did, he is charged in law with seeing what is to be seen.

Lynch v. Penn. R. R. Co., supra.

This request, though denied "except as charg-

ed" is not found in thought, idea, substance or expression in the Trial Court's charge.

The eighth request dealt with the constant use by the respondent of this crossing lulling his appreciation of danger and making him careless in exercising prudence and was drawn up under the case of *Berry v. Penn. R. R. Co.*, 48 N. J. L., 141.

But the Trial Court refused to charge only that:

> "For even the failure of the defendant to give the statutory warning, or lower the crossing gates, did not absolve the plaintiff in attempting to cross the tracks of exercising both care and prudence" (p. 169, l. 34, et seq.).

This ignored a vital feature that really may, under the evidence, have been the real cause of the accident.

POINT V.

Appellant should have been allowed to test the respondent's motives and credibility.

Grounds of Appeal No. 3, 15-16.

This appeal is from the second trial of this case, the former judgment having been set aside by the Supreme Court on appeal, its opinion being reported in 86 N. J. L., 517.

The first trial took place on March 5, 1914; the Supreme Court handed down its opinion November 30, 1914; the present trial started on October 26, 1915.

On the present trial the respondent, besides testifying to its being very dark, stated:

> "I believe it was raining that night and it was sort of misty," (p. 23, ll. 1-2).

On cross-examination it appeared that the respondent had given no testimony at all on the former trial about it "being sort of misty" (p. 52, l. 27, et. seq.,), and consequently the appellant proceeded to endeavor to make inquiries which would develop a motive for the injection of this new testimony and sought to impeach the respondent's credibility by the following questions which the Trial Court refused to allow:

> "Q. And have you a recollection as to the reason why the case was to be re-tried?
> "Q. Did you learn, Mr. Schnackenberg from any source whatever as to the reason that this case was to be re-tried" (p. 54, l. 3, et. seq.).

Ground of Appeal No. 3, p. 3.

Subsequently the appellant sought by its 4th and 5th requests to charge (Grounds of Appeal 15 and 16) to have the jury's attention directed to the fact that if this new and additional testimony as to the misty weather condition was untrue and injected into the case solely for the purpose of circumventing justice, that the use and injection of such testimony, if false, could be considered as affecting all of the respondent's evidence.

The Trial Court denied in toto to charge the appellant's fourth request and charged only the respecting its fifth request, and that not in the specific language requested:

> "that the jury have a right to consider that there was not any testimony at the prior trial with respect to a foggy condition of the atmosphere" (p. 160, l. 27-31).

While it is conceded that the *limits* of cross-examination lie, to a certain extent, within the discretion of the Trial Court, it is also elemental that a denial of the right to cross-examine at

times works a substantial prejudice; a pursuit of our rejected inquiries we believe would have shown the reason for this newly injected testimony and its untruth, *notwithstanding the by-play of the respondent's counsel, evidenced by the record at page 146, l. 30, et seq. and page 147, l. 1* et seq., a matter sufficient to have been the ground for a mis-trial—A tactical manouvre of the most unfair character.

The refusal of the Trial Court to cover in his charge or charge the appellant's requests 4 and 5, in line with the evidence refused to be allowed to be brought before the jury, worked a substantial harm to the appellant.

VI.

This Court is requested that the Trial Court be directed to direct a verdict as requested or that this court set the judgment aside on account of the errors committed by the Trial Court.

Respectfully submitted,

FREDERIC B. SCOTT,
Attorney and of Counsel for Appellent.

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New Jersey Court of Errors and Appeals

HENRY SCHNAKENBERG, *Plaintiff-Respondent,*	*Action at Law.*
vs.	
THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, *Defendant-Appellant.*	*On Appeal from Essex County Circuit Court.*

Brief of Plaintiff-Respondent.

This action was instituted in the Essex County Circuit Court to recover damages for the personal injuries sustained by the plaintiff, which were occasioned by a collision with a locomotive engine operated by the defendant company at a highway crossing in the City of East Orange. The negligence charged in the complaint was the omission of the statutory signals and the failure to lower the gates, although at the time of the accident the defendant had a gateman stationed at the crossing to discharge this duty.

The proofs disclosed that on January twenty-fifth, nineteen hundred and thirteen, the plaintiff, a young man of about nineteen years of age, was driving a bakery wagon north on Harrison street; the time was four forty-five A. M., it was very dark and misty. The double tracks of the defendant company cross Harrison street at about right angles, the crossing is guarded by safety gates, and a gateman is stationed there to operate them. South of the tracks and running parallel with them for about a block is a narrow street known as McKinley avenue. On the southwest

corner of McKinley avenue and Harrison street is a garage. The plaintiff was sitting in the front of his wagon and had checked his horse to a walk about seventy feet south of the garage. Just as he passed this latter building he stopped the horse and looked and listened for approaching trains; hearing none, and no bell or whistle being sounded to warn him of the approach of any, and the safety gates being up, he proceeded toward the crossing, continuing his observation for approaching trains. When his horse was upon the eastbound track, he, for the first time, heard the noise of an engine, and, turning, saw its headlight whereupon he reined in the horse, but not in time to save it from the oncoming engine. The force of the collision killed the animal and threw the plaintiff from his seat to the ground, rendering him unconscious. He sustained rather serious injuries, from the effects of which he was still suffering at the time of the trial, which was had on October 26th, 27th and 28th, 1915. No motion was made for a non-suit and the defendant rested its case after adducing testimony regarding the ringing of the engine bell as it approached the crossing, introducing in evidence a map and some photographs taken more than two years after the accident on a bright sunshiny day and under conditions radically different from those present at the time of the accident, together with testimony regarding the distances along the tracks which a person could see in day time when stationed at various distances from them.

A motion for the direction of a verdict for the defendant was then made upon the grounds that the so-called Crossings Act applicable to the *locus in quo* (Chaps. 35 and 96, P. L., 1909) were unconstitutional and that irrespective of their provisions there should be a verdict directed for the

defendant because the plaintiff had been guilty of contributory negligence and there had been no negligence on the part of the defendant. The application was denied and the issue submitted to the jury. There was a verdict of two thousand dollars ($2,000) in favor of the plaintiff and to review the judgment consequent thereon, this appeal is prosecuted.

No complaint was made of the *quantum* of the damages and of the numerous exceptions noted at the trial and stated as grounds of appeal (Case, pp. 2-7), those relied upon in the appellant's brief for reversal are the failure to direct a verdict, the refusal to charge as requested and the admission of alleged immaterial testimony.

On behalf of the respondent, I submit that the judgment should be affirmed for these reasons:

I.

THE ALLEGED CONTRIBUTORY NEGLIGENCE OF THE PLAINTIFF WAS FOR THE JURY.

As above stated, the accident happened at four forty-five o'clock in the morning, while it was still very dark and misty (p. 21, l. 21; p. 22, l. 37; p. 23, l. 1). Schnakenberg had been making deliveries in the neighborhood, his last stop having been on Kenilworth place, which street is about half a block from Harrison street and runs parallel with it (p. 22; l. 18); after making this delivery, he drove south on Kenilworth place to Webster place, on which street he proceeded east to Harrison street (p. 22, l. 20); he then turned north on Harrison street toward the crossing (p. 22, l. 33); about one hundred feet south of the crossing he checked his horse to a walk and so proceeded until he stopped, looked and listened (p. 23, l. 17; p. 45,

l. 9); he observed that the safety gates were up, he heard no whistle or bell and although he looked in both directions for approaching trains, saw none (p. 23, ll. 7-16, 22-24; p. 46, ll. 4-21; p. 59, l. 4); he then walked his horse to the crossing continuing his observations (p. 23, ll. 33-40; p. 46, l. 37; p. 47, l. 15); when his horse was fairly upon the eastbound rails he heard the noise of an engine approaching him from the west and through the darkness and fog saw its headlight (p. 24, l. 1 *et seq.*); he immediately reined in the horse, but in an instant the engine was upon it; the force of the collision killed the horse and dragged Schnakenberg out of the wagon to the ground, rendering him unconscious (p. 24, l. 38; p. 25, l. 8). The engine passed on for two blocks before it was brought to a stop (p. 117, ll. 10-14); the engineer coming back, met the plaintiff and asked him what his engine had struck; he also told Schnakenberg that the bell had not been sounded (p. 26, l. 35; p. 46, ll. 7-20). It will be remembered that Kenilworth place is the first street to the west of Harrison street, running parallel with it (p. 21, l. 31); this street runs up to the defendant's right of way, but does not cross it. At Kenilworth place there is a fence near the right of way which obstructs a view of the tracks further west to one about to cross the tracks at Harrison street (p. 82, l. 20; p. 92, ll. 1-8); in addition to this obstruction there are several groups of trees and telegraph poles extending in a line parallel with the eastbound track from Kenilworth place toward Harrison street (p. 86, l. 30; p. 92, l. 10). The plaintiff testified that on the morning of the accident it was so dark and foggy that from the point where he made his observations in Harrison street; he could see a distance of but thirty feet along the track (p. 63, ll. 8-36).

On page 11 of its brief, the appellant states that upon the former appeal of this case the Supreme Court held that a verdict should have been directed where the plaintiff had an unobstructive view thirty feet from the crossing for a distance of four hundred feet in the direction from which the train was coming, but it does not state that on the present trial the plaintiff's credibility was sought to be impeached by the testimony given at the former trial. This colloquy ensued:

> "Q When you were about even with the garage you could see about four hundred feet up the track, could you not?
>
> A No, not in the morning, I couldn't. It was very dark. I could not.
>
> Q Do you recall testifying at the other trial that you could see four hundred feet up the track?
>
> A. I did in reference to daytime; not in reference to night." (P. 47, ll. 34-40; p. 48, l. 1).

It further appeared that upon the former trial the plaintiff had been asked whether in driving along Harrison street he could very readily see the sign, "Look out for the Locomotive," and that he then answered, "Not that morning; it was very dark," whereupon the defendant's attorney said to the witness, "I mean in the daytime," and that the witness then answered "Yes"—meaning that in the daytime he could see the sign (p. 61, ll. 37-41; p. 62, ll. 1-5). It further appeared that upon the former trial he testified that as he approached the tracks he could see about up to the gateman's shanty, which was a distance of about thirty feet (p. 62, ll. 18-23); and he so testified upon the present trial (p. 63, ll. 20-36). The inference sought to be drawn, apparently, is that the plaintiff changed his testimony. A reading of this portion of the evidence lends us support to such inference, but shows that the witness' attention was directed to observations possible in the daytime

and not on the morning of the accident when it was very dark and misty.

The appellant concedes on page 8 of its brief that whether a statutory signal was given, was, under the testimony, for the jury. It is argued that notwithstanding this, the plaintiff was guilty of such contributory negligence as to bar a recovery.

Under all of the cases, it is manifest that the submission of this question to the jury was proper. In the first place, the open gates were an invitation to cross. It was so held in *Shafer* vs. *Lehigh Valley R. R. Co.*, 75 N. J. L., 75; Fort, *J.*, speaking for the court there said:

> "Open gates are an invitation to cross.
>
> "Although they do not excuse a failure on the part of the traveler either to look or listen, yet open gates, under such circumstances, are clearly evidence of the negligence of the agents of the defendant company, and whether the plaintiff exercised reasonable care and prudence, or that care and prudence which was required of him under the circumstances surrounding him, was a question for the jury."

In the second place, crossing the tracks at four forty-five in the morning, while it was still very dark and foggy, was attended with much more peril than during the daylight, and the duty to give audible warning of the engine's approach was absolutely imperative. The jury was justified in concluding that no audible signal was given. The uncontradicted proof was that the plaintiff stopped his horse, looked and listened and then proceeded on a walk towards the tracks; the engine was running light or without any cars attached to it, and it can be readily appreciated that it did not make very much noise as it approached the crossing; so the plaintiff was limited practically to his sense of sight to ascertain the presence of a locomotive upon the tracks and because of the darkness and the

mist, the trees and telegraph poles along the tracks his dependence upon this sense was considerably restricted. Nor must it be forgotten that there was a westbound, as well as an eastbound, track at the crossing in question and that the plaintiff had to make observations for trains coming in both directions. It should also be borne in mind that there were other lights along the right of way than the headlight of the engine, and it can be readily conceived that on the morning in question the surrounding fog made it less discernible than would have been the case had the weather been clear. Again, the only evidence in the case with reference to the distance the headlight of an engine approaching from the west is visible to one *stationed* at the crossing, is that of Dr. Arthur W. Smith. All of the defendant's observations and photographs were made on bright sunshiny days. Dr. Smith testified that on a clear night he stationed himself opposite the garage near the crossing and waited for an eastbound train and although he knew the train was approaching he could not see the headlight until after it had passed a tree which he calls the "big tree," a distance of but two hundred and seventy feet from the crossing (p. 134, l. 41; p. 135, l. 1 *et seq.*) This being the situation, it was a question for the jury to determine whether in the environment thus created, which was a crossing with the view obstructed, the safety gates up although the gateman was in his shanty immediately adjoining them, the absence of any warning to indicate an approaching train, the surrounding mist and darkness and a horse upon which the plaintiff was required to devote some attention, the plaintiff was guilty of contributory negligence. The facts are almost identical with those in the recent case of *Napodensky* vs. *West Jersey & S. R. R. Co.*, 88 Atl.,

103, and the following language there used by this court is particularly apposite:

> "Negligence is not an *ex cathedra pronouncement* with which an act may be arbitrarily branded in the abstract as the judicial eye may conceive it. It presents a concrete proposition for a jury to solve, where the facts vary, as narrated by opposing witnesses, and from which different minds may conjecture differently, as they may view the conduct of a man in a difficult or trying situation, harassed and confused in the compass of seconds, with conflicting and contending views for self-preservation and deliverance, from a zone of danger, in which he is charged by law with the natural duty, presumably uppermost in his mind, of observing due care for himself and his property. Negligence in such circumstances becomes a relative term, incapable of exact determination, except upon consideration not only of the facts, but of all the circumstances, and in view of the entire environment in which the actor is placed. Kingsley *vs.* D., L. & W. R. R., 81 N. J. Law, 536, 80 Atl., 327, 35 L. R. A. (N. S.), 338. The true and practical solution of such a situation, and the legal characterization of the acts of a man so jeopardized, must necessarily present a jury question, under proper instructions from the court defining the legal responsibility of the parties concerned. McCool *vs.* West Jersey & S. R. R. Co., 81 N. J. Law, 479, 81 Atl., 111. This rule of substantive law has been the subject of frequent reiteration by this court to the effect that where the plaintiff has rested his case, and the evidence leaves the question of his contributory negligence in doubt, the determination of the question of the negligence of the defendant presents an issue of fact which must be submitted to the jury."

II.

THE ALLEGED FAILURE OF THE PLAINTIFF TO LOOK AND LISTEN EFFECTIVELY, DID NOT BAR HIS ACTION.

As stated above, the defendant had installed safety gates at the crossing and had employed a gateman to operate them. Therefore the Act of 1909 (P. L. 1909, p. 137) is applicable. This act is entitled, "An Act with reference to the degree of care necessary to be used by travellers over railroad crossings protected by flagmen or safety appliances or both," and it provides that:

> 1. "Wherever any railroad whose right of way crosses any public street or highway, has or shall install any safety gates, bell or other device designed to protect the traveling public at any crossing or has placed at such crossing a flagman, any person or persons approaching any such crossing so protected as aforesaid, shall, during such hours as posted notice at such crossing shall specify, be entitled to assume that such safety gate or other warning appliances are in good and proper order, and will be duly and properly operated unless a written notice bearing the inscription 'out of order' be posted in a conspicuous place at such crossing, or that the said flagman will guard said crossing with sufficient care whereby such traveler or travelers will be warned of any danger in passing over said crossing, and in any action, brought for injuries to person or property, or for death caused at any crossing protected as aforesaid, no plaintiff shall be barred of the action because of his (the) failure of the person injured or killed to stop, look and listen before passing over said crossing."

At the time of the accident the defendant had not posted any notice indicating the hours between which the gates would be operated, nor had it posted any notice that the gates were out of order.

Consequently the plaintiff was entitled to assume that the gates were in good and proper order and would be duly and properly operated. *Brown* vs. *Erie Railroad Company,* 87 N. J. L. (pp. 487-495). The situation here presented is not distinguishable from that dealt with by this court in *Fernetti* vs. *W. J. & S. R. R. Co.,* 87 N. J. L., 268, where it was argued that the plaintiff's decedent was guilty of contributory negligence because she did not look and listen effectively before crossing the defendant's tracks. Mr. Justice Kalisch, speaking for this court said:

> "It is argued by counsel of appellant that the plaintiff's decedent was guilty of negligence contributing to her injury and death, in attempting to cross the tracks immediately behind the electric train, as a matter of law, because she did not look or listen effectively, as it was her duty to do, and that if she had waited until the electric train had passed far enough away from the crossing for her to make looking effective, she would have had an unobstructed view of one thousand feet in the direction that the engine came that struck her.
>
> "It is conceded by counsel of appellant that the act of 1909 (Pamph. L. 1909, p. 137) was applicable to the crossing where the plaintiff's decedent was killed. This being so the provision of that act which declares, 'no plaintiff shall be barred of the action because of his failure of the person injured or killed to stop, look and listen before passing over said crossing,' is a complete refutation of the appellant's contention." *

The respondent admits that even under the statute he could not be guilty of rashness and still claim the benefit of its provisions; but it is nowhere asserted that Schnakenberg was rash. The insistment is simply that he did not look and listen effectively; under the decisions above re-

*See also Hatch vs Erie R.R.Co. decided by the Supreme Court since the writing of this brief and not yet officially reported

ferred to, he was absolved from this duty under the circumstances presented.

The appellant states on page 13 of its brief that the plaintiff below placed no reliance upon the fact that the gates were up; such a statement is puerile in view of the excerpts from Schnakenberg's testimony printed at the bottom of page 8 and at the top of page 9 of its own brief. Hence it follows that the argument contained on page 13 and based upon such fallacious premises is not pertinent.

The question argued on page 14 of the appellant's brief, insofar as it deals with Chapter 96 of the laws of 1909, is fully answered by *Fernetti* vs. *W. J. & S. R. R. Co. supra.* On pages 15, 16 and 17 of its brief, the appellant urges that Chapters 35 and 96 of the laws of 1909 are unconstitutional. The case was tried and submitted to the jury upon Chapter 96 (Charge p. 150, l. 10 *et seq.*) and Chapter 35 was not referred to or even mentioned. The constitutionality of Chapter 96 is sufficiently vindicated by

Brown vs. *Erie R. R. Co. (supra).*
Fernetti vs. *W. J. & S. R. R. Co. (supra).*
Waible vs. *W. J. & S. R. R. Co.,* 94 Atl. 951.
Lynch vs. *P. R. R. Co.,* 96 Atl. 395.

The appellant, on pages 18 and 19 of its brief, complains that the trial judge erred in permitting the plaintiff to show that at the time of the accident there was a gateman stationed at the crossing. The testimony objected to was that immediately after the accident this gateman emerged from his shanty; and that he was the same gateman who had been employed at the crossing for some time prior to the accident (p. 25, ll. 12-40; p. 26, l. 31; p. 68, l. 19). Surely such testimony was material; how, otherwise, could the plaintiff show that the defendant maintained a crossing contemplated by the statute? Criticism is also levelled at the trial court because, after striking out testimony regard-

ing the absence of any sign on the gates after the accident, to the effect that they would be operated during certain hours, he refused to instruct the jury in the language requested by counsel. It was abundantly proved and uncontroverted that before the accident there was but one sign at the crossing, the "Stop, Look and Listen" sign (p. 42, ll. 10-30; p. 55, ll. 23-40; p. 56, ll. 8-17; p. 64, l. 38) and the plaintiff endeavored to show that during the daylight of the same day upon which the accident occurred, he passed over the crossing and again observed only the usual crossing sign (p. 63, l. 37; p. 64, l. 2). This offer was refused and the testimony struck out. The court's instruction to the jury (p. 64, l. 31 *et seq.*) embodied the substance of the request and sufficiently protected the defendant.

The remaining grounds of appeal are entirely without merit. Under Point IV it is claimed that the trial judge erred in refusing to charge the second, third and eighth requests. An examination of the second request (Ground of Appeal, No. 13, p. 5) demonstrates that it was grounded upon an erroneous assumption of fact, viz.: that the plaintiff placed no reliance upon the open gates before crossing; the testimony bears no such construction. The third and the eighth request did not include all of the circumstances which should influence the conclusion of the jury and could have been refused *in toto*. *Cons. Traction Co.* vs. *Chenowith,* 61 N. J. L. 554; *Fernetti* vs. *N. J. & S. R. R. Co., supra.* The trial judge, however, four times during his charge, instructed the jury that a traveler must use care and prudence in attempting to pass over a railroad crossing and that if he fails so to do he is guilty of such contributory negligence as would defeat a recovery even though the railroad failed to give the statutory warning or lower the crossing gates (p. 151, l. 19; p. 152, l. 19; p. 154, l. 29; p. 157,

l. 27, *et seq.*). Under Point V it is asserted that the trial court should have permitted counsel to ask the plaintiff below the questions set forth on page 22 of its brief. A reading of these questions will demonstrate their immateriality. Nor was the defendant prejudiced by the refusal of the trial court to change the fourth and fifth request except as charged.

IT IS RESPECTFULLY SUBMITTED THAT THE JUDGMENT UNDER REVIEW SHOULD BE AFFIRMED WITH COSTS.

March Term, 1916.

WILLIAM K. FLANAGAN,
Attorney for and of Counsel with Plaintiff-Respondent.

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Filed Feb. 2, 1916.

NEW JERSEY COURT OF ERRORS AND APPEALS.

HENRY SCHNACKENBERG,
Plaintiff-Respondent,
against
THE DELAWARE, LACKAWANNA, & WESTERN RAILROAD COMPANY,
Defendant-Appellant.

Action at Law.

The Delaware, Lackawanna and Western Railroad Company, the above appellant, within the time required by law, herewith sets forth and writes down its reasons and grounds of appeal in the above case:

1. Because the trial court refused to declare a mis-trial of said cause on account of the opening statement of the plaintiff's attorney to the jury, that there were certain Acts of the Legislature relative to the particular crossing where the accident happened, and referred to in the plaintiff's complaint, which Crossing Acts were not matters for presentation to the jury, but were procedural and purely for the administrative guidance of the Court.

2. The Court erred in allowing the following questions to be put by the plaintiff's attorney to the said plaintiff:

> "Q. Who was this Italian that came out of the shanty? A. He was the gateman; the fellow that operates the gates.
>
> "Q. Had you seen him before that morning at any time? A. Yes, sir; I had.
>
> "Q. During what period of time before that had you seen him at the gates—at the shanty?

"THE COURT: You mean that morning?
MR. FLANAGAN: No, I do not mean that morning; I mean before that.
MR. FLANAGAN: I meant before the day of the accident."

3. Because the Court refused to allow the defendant to propound the following questions to the plaintiff:

"Q. Will you tell me when it was that you first learned that there would be a re-trial of this case.
"Q. And have you a recollection as to the reason why the case was to be re-tried? A. No, I have not.

"THE COURT: You need not answer that. It is immaterial.

"Q. Did you learn, Mr. Schnackenberg, from any source whatever as to the reason that this case was to be re-tried?"

4. The trial court erred in that it allowed the plaintiff's attorney to propound the following question to said plaintiff on re-direct examination.

"Q. On the morning of this accident, Mr. Schnackenberg, how far could you see along the tracks?"

5. Because the trial court refused to instruct the jury that what may have been done after the accident had no bearing on the case now being tried, said situation being created by the following questions and answers:

"Q. Mr. Schnackenberg, you passed that crossing later in the day, the same day of this accident, did you not? A. Yes, sir.
"Q. And it was daylight when you crossed it? A. After the accident.
"Q. Yes. A. Yes, sir.
"Q. And was there any sign there indicating that the gates would be operated during certain hours?

"Objected to.
"A. No, there was not."

6. Because the trial court refused to allow the defendant to propound the following question to Howard M. Bird, one of its witnesses:

"Q. Prior to the accident in question had you ever had any other accident?"

7. Because the Court allowed the plaintiff's attorney to propound the following questions to the witness, Howard M. Bird, on cross-examination:

"Q. Did you see anyone else in the vicinity of the crossing after the accident?"

8. Because the Court erred in allowing the plaintiff's attorney to propound the following question on cross-examination to the defendant's witness, George G. Weber:

"Q. Did you see anyone else about the crossing when you came back in addition to the plaintiff?"

9. Because the Court refused to direct a verdict at the end of the entire case for the reasons set forth at length to the Court.

10. Because the Court erred in its charge to the jury relative to what is known as the Crossing Acts, P. L., 1909, Chapters 35 and 96 of said year, and in its reference to the case of *Brown against Erie Railroad Company,* as construing Chapter 96 of the Laws of 1909.

11. Because the Court in its charge to the jury charged the jury that he, the gateman, was negligent. He was an employe of the defendant and for his negligence in the line of his duty the defendant company is legally accountable.

12. Because the Court refused to charge the following request of the defendant handed up to

the Court before the conclusion of said case and before the Court's charge to the jury:

> "I charge you that there is not imposed upon the railroad company any additional or varying duties relative to the approach of the trains to a railroad crossing on account of weather conditions."

13. Because the Court refused to charge the following request of the defendant handed up to the court before the conclusion of said case and before the Court's charge to the jury:

> "If you believe that the plaintiff was not placing a reliance on the open gates at the crossing as a means of assuring his safety, but was making an independent observation for the approach of trains irrespective of the fact that the gates were open, then I charge you that the open gates were not the proximate cause of the accident."

14. Because the Court refused to charge the following request of the defendant handed up to the court before the conclusion of said case and before the Court's charge to the jury:

> "If you believe that the plaintiff could have seen the train during the time he has testified he looked for the same, then I charge you that in law he is not excused because he says he did not see it, because the law says that when one looks he must look effectively and that he is presumed to see that which is to be seen."

15. Because the Court refused to charge the following request of the defendant handed up to the court before the conclusion of said case and before the Court's charge to the jury:

> "If you believe that the plaintiff's version of the accident has been changed to meet the situation of this trial and to overcome the law as it was decided should have been ap-

plied to this case on the first trial thereof, you have a right to discredit the plaintiff's entire story as to how this accident occurred, because the law says that one who testifies falsely to one particular and material fact is apt to testify falsely in other particulars."

16. Because the Court refused to charge the following request of the defendant handed up to the court before the conclusion of said case and before the Court's charge to the jury:

"You are not obliged to accept the plaintiff's version as to the foggy condition of the weather at the time of the accident, if you believe it has been given to specially meet the exigencies of this case. And in considering if it has been so given, you have a right to take into consideration that not one word relative to a foggy condition was testified to on the other trial of this case."

17. Because the Court refused to charge the following request of the defendant handed up to the court before the conclusion of said case and before the Court's charge to the jury:

"I charge you there is no competent or legal proof as to any loss the plaintiff suffered on account of the two cents on each dollar of sales he claims he got in addition to his salary from his uncle."

18. Because the Court refused to charge the following request of the defendant handed up to the court before the conclusion of said case and before the Court's charge to the jury:

"In determining whether the plaintiff failed in his duties to exercise the care demanded of him at the crossing in question, you will take into consideration whether the constant use of the crossing by the plaintiff, and his familiarity with the situation, did not lull his appreciation of the danger, and make

him careless about exercising the prudence required of him in this case. For even the failure of the defendant to give the statutory warning, or to lower the crossing gates, did not absolve the plaintiff in attempting to cross the tracks of exercising both care and prudence."

19. Because the Court erred in refusing to allow the defendant to send to the jury, after the conclusion of said cause, defendant's Exhibits D-1 and D-1A, which, during the progress of the trial had been offered, received and marked in evidence.

FREDERIC B. SCOTT,
Attorney of Defendant-Appellant.

Petition.

ESSEX COUNTY CIRCUIT COURT.

HENRY SCHNACKENBERG, *Plaintiff,* *vs.* THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, *Defendant.*	Action at Law.

To the HONORABLE FREDERIC ADAMS, a Judge of the Essex County Circuit Court:

The humble petition of Henry Schnackenberg showeth that he has, as he is advised, good cause of action against the Delaware, Lackawanna & Western Railroad Co. for damages to his person by the wrongful act of the said defendant and that he is desirous of commencing an action in this Honorable Court against the said Delaware, Lackawanna & Western Railroad Co. for the same; but in regard that your petitioner is an infant

under the age of twenty-one years, to wit, of the age of nineteen years.

Your petitioner therefore humbly prays your Honor to admit him to prosecute the said action by Richard Schnackenberg, his uncle, as your petitioner's next friend.

And your petitioner shall ever pray, &c.

Dated, February 4th, 1913.

HENRY SCHNACKENBERG.

I do hereby consent and agree that the above named Henry Schnackenberg shall be at liberty to prosecute this action by me as his next friend, according to the prayer of the above petition.

WITNESS my hand and seal this 4th day of February, A. D. 1913.

RICHARD SCHNACKENBERG.

Witness:
D. A. WARREN.

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

DANIEL A. WARREN, being duly sworn according to law, on his oath says that he was present and did see the said Henry Schnackenberg, the petitioner in the above petition, duly sign the said petition, and that he was also present and did see the said Richard Schnackenberg duly sign the consent *pro chein ame.*

DANIEL A. WARREN.

Subscribed and sworn to before me }
this 4th day of February, 1913. }
Ernest F. Keer,
M. C. C. of N. J.

Order Appointing Next Friend.

ESSEX COUNTY CIRCUIT COURT.

HENRY SCHNACKENBERG, *Plaintiff,* *vs.* THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, *Defendant.*	Action at Law.

It appearing from the reading of the petition of Henry Schnackenberg, that he is of the age of about nineteen years, and alleges himself to have a cause of action against the Delaware, Lackawanna & Western Railroad Co.,

It is ORDERED that Richard Schnackenberg be admitted to prosecute said cause of action for the said Henry Schnackenberg in the above said Court against the Delaware, Lackawanna & Western Railroad Co. as the next friend of the said Henry Schnackenberg.

Dated, February 5th, 1913.

Let the foregoing rule be entered.

FREDERIC ADAMS,
Circuit Court Judge.

February 6, 1913.

Summons.

(Seal.) THE STATE OF NEW JERSEY, to DELAWARE, LACKAWANNA & WESTERN RAILROAD CO.

You are summoned to answer the annexed complaint of Henry Schnackenberg, in an action at law in the Circuit Court in and for the County of Esser, and Take Notice that unless you file your answer to said complaint with the Clerk of the said Essex County Circuit Court at Newark, within twenty days after the service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, FREDERIC ADAMS, a Judge of the said Circuit Court at Newark, this 7th day of February, 1913.

LOUIS HOOD,
Attorney

JOSEPH MCDONOUGH,
Clerk.

Complaint.

Filed Feb. 14, 1913.

ESSEX COUNTY CIRCUIT COURT.

HENRY SCHNACKENBERG, by RICHARD SCHNACKENBERG, his next friend, *Plaintiff,* *vs.* THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, *Defendant.*	Action at Law.

Plaintiff, Henry Schnackenberg, by Richard Schnackenberg, his next friend, of the City of East Orange, Essex County, New Jersey, says that,

1. Defendant is a corporation. At the time within stated defendant operated a steam railroad upon tracks laid through the City of East Orange.

2. The said railroad within said City crosses public street known as Harrison Street, and at that crossing defendant had erected on both sides of the railroad tracks gates which were operated and guarded by servants of the said defendant.

It was the duty of said defendant, by its servants, for the protection of persons crossing said railroad, to close said gates at the approach of trains and to keep them closed while trains were passing on said railroad.

3. On January 25th, 1913, defendant, by its servants, negligently permitted said gates to remain open while a train of cars, then being operated by defendant's servants, was passing along said railroad over said crossing; and negligently failed to give signal of the approach of said train by ringing a bell or blowing a whistle or by giv-

ing sufficient warning of said approach in any other manner.

4. Because of said negligent omissions said train collided with a horse and wagon then being lawfully driven by plaintiff over said crossing and across said railroad. Whereby the plaintiff, who was riding therein, was thrown out and seriously injured as to his head, body and limbs, having, among other things, a finger dislocated and general contusions and suffering from great shock.

5. Plaintiff has been and in the future will be prevented from transacting and attending to his necessary affairs and business, and was and in the future will be deprived of divers great gains, profits and advantages which he might and otherwise would have derived from the same; plaintiff also was obliged to pay and expend a considerable sum of money in and about attempting to be cured of the said injuries and in the future will be obliged and forced to pay out large sums of money in being so cured.

Plaintiff demands $5000.00 damages.

LOUIS HOOD,
Attorney for Plaintiff.

Answer.

Filed March 3, 1913.

ESSEX COUNTY CIRCUIT COURT.

HENRY SCHNACKENBERG, etc., *Plaintiff,* *vs.* THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, *Defendant.*	Action at Law.

The above defendant, answering the complaint of the plaintiff, says:

1. It admits the allegations in paragraph 1 of the complaint.

2. It admits the allegations of fact in paragraph 2 of the complaint that "the said railroad within said City crosses public street known as Harrison Street, and that at that crossing defendant had erected upon both sides of the railroad tracks gates which were operated and guarded by the servants of the defendant"; but it denies the allegation of the duty of the defendant stated in said paragraph 2 of the complaint.

3. It admits the allegation in paragraph 3 of the complaint that "on January 25, 1913, defendant by its servants" * * * "permitted said gates to remain open while" an engine "then being operated by the defendant's servants, was passing along said railroad over said crossing"; but it denies that said gates were negligently operated and that the defendant negligently failed to give a signal and sufficient warning of the approach of said engine.

4. It denies the allegations contained in the 4th paragraph of the complaint.

5. As to allegations in paragraph 5 of the complaint, it has no knowledge or information sufficient to form a belief.

6. And for a further and separate defense the defendant says that said injury of the plaintiff as alleged in his complaint was due to the plaintiff's contributory negligence at the time of said injury.

FREDERIC B. SCOTT,
Attorney of Defendant.

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Reply.

Filed March 5, 1913.

ESSEX COUNTY CIRCUIT COURT.

HENRY SCHNACKENBERG, etc., *Plaintiff,* *vs.* THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, *Defendant.*	Action at Law.

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The plaintiff denies the sixth paragraph of the answer.

LOUIS HOOD,
Attorney of Plaintiff.

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Order for Substitution.

Filed Oct. 15, 1915.

ESSEX COUNTY CIRCUIT COURT.

HENRY SCHNACKENBERG,
Plaintiff,

vs.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Defendant.

Action at Law.

It is on this day of October, Nineteen Hundred and Fifteen, ORDERED that William F. Flanagan, be and he is hereby substituted as attorney of the plaintiff in the above entitled action in the place and stead of Louis Hood, Esquire.

I hereby consent to the entry of the above order.

LOUIS HOOD.

Dated, October 8, 1915.

Judgment.

ESSEX COUNTY CIRCUIT COURT.

24757

HENRY SCHNACKENBERG, by RICHARD SCHNACKENBERG, his next friend, *Plaintiff,* *vs.* THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, *Defendant.*	Action at Law. On Verdict by a Jury. Judgment for Plaintiff. Amount $2000.00. Costs Total

LOUIS HOOD, Atty. of Plaintiff:

This action was tried before Judge Frederic Adams with a jury at the Essex County Circuit Court on October 28th, 1915.

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

They find in favor of the Plaintiff, Henry Schnackenberg, by next friend, Richard Schnackenberg, and assess the damages against the said Defendant, Delaware, Lackawanna and Western Railroad Co., at the sum of Two Thousand Dollars.

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of Two thousand dollars and costs, which are taxed at the sum of dollars and cents, making in the whole the sum of dollars and

Judgment entered, and signed October 28th, A. D. 1915.

WM. S. GUMMERE,
Judge.

92-223.

Rule for Judgment.

Fled Oct. 29, 1915.

ESSEX COUNTY CIRCUIT COURT.

HENRY SCHNACKENBERG, by next friend, etc.,
Plaintiff,
vs.
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Defendant.

Action at Law

This cause was tried before the Honorable Frederic Adams, with a jury, in the presence of counsel for the respective parties at the Essex County Circuit Court on October 26, 27, 28, 1915.

The cause having been heard and submitted to the jury, they returned their verdict as follows: That the defendant is guilty of the wrongs and injuries within laid to its charge in manner and form as the plaintiff has above thereof complained against it, and they assess the damages of the said plaintiff on occasion thereof over and above his costs and charges by him about his suit in this behalf expended, at the sum of Two Thousand Dollars ($2,000).

Whereupon it is adjudged that the said plaintiff, Henry Schnackenberg, by next friend, etc., recover of the defendant, The Delaware, Lackawanna & Western Railroad Company, the sum of Two Thousand Dollars ($2,000) besides his costs of suit to be taxed.

Rule actually entered October 29, 1915.

On motion of

WILLIAM K. FLANAGAN,
Attorney of Plaintiff.

Let the foregoing rule be entered.

FREDERIC B. ADAMS,
Circuit Court Judge.

October 29, 1915

Transcript of Testimony and Proceedings.

ESSEX CIRCUIT COURT.

Tuesday, October 26, 1915.

HENRY SCHNACKENBERG

vs.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY.

Action at Law.

Before HON. FREDERIC ADAMS, J., and a Jury.

For Plaintiff appears WILLIAM K. FLANAGAN, ESQ.

For Defendant appears FREDERIC B. SCOTT, ESQ.

A jury is called and sworn.

Mr. Flanagan opens for plaintiff.

During the course of Mr. Flanagan's opening:

MR. SCOTT: I do not want to interrupt Mr. Flanagan, may it please the Court, but I feel that I must interrupt him at this point. We have always claimed and do now claim that any acts of the legislature to which Mr. Flanagan has referred are purely procedural, and not a part of the right of action of the plaintiff, and therefore, in the administration of justice, those acts are purely for the guidance of the Court in the administration of the case, and that the reference to the acts of the legislature before the jury, I think, are so serious that I ask the Court to declare a mistrial, because I feel that the stating of such facts to the jury in the opening of

the case is so prejudicial to the defendant that, no matter what action is subsequently taken, the fact that there are acts of the legislature on the books, we have always contended and do now contend, and will contend here, are not for the plaintiff, but for the guidance of the Court. I desire to raise that question preliminarily, because my opponent is conversant with the attitude that this defendant company has taken in matters of that character. The situation, I take it, is the same as if a case were once tried and goes up on appeal, and the appellant court says something, and then it comes back for a retrial, and the Court should read to the jury what the appellate court said about the particular case. While we concede that what the appellate court said is for the guidance of the trial court, I take it that it would be manifest error for the trial court to read that opinion and its analogy to the—

THE COURT: That question has not arisen, Mr. Scott.

MR. SCOTT: But I was just using that as an illustration.

THE COURT: Let me understand what your motion is.

MR. SCOTT: My motion is, in view of Mr. Flanagan's opening that there were certain acts of the legislature relative to this particular crossing accident, which acts we contend are procedural and purely for the administrative guidance of the Court—

THE COURT: You have not yet told me what your motion is.

MR. SCOTT: My motion is for a mistrial on account of such statement before the jury.

THE COURT: I shall deny that motion. It is quite true, I agree with you, that if there is any statute which applies to this case, it is a matter to be presented to the Court and not to the jury, and it is to be construed by the Court and not by the jury; but I think Mr. Flanagan's remark, that he relied on some statute, without saying what it was, is quite innocent.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Scott opens for defendant.

Adjourned until to-morrow, Wednesday, October 27, 1915, at ten o'clock A. M.

SECOND DAY.

Wednesday, October 27, 1915.

Met pursuant to adjournment.

Present: Counsel as before stated.

HENRY SCHNACKENBERG, plaintiff, sworn in his own behalf.

DIRECT EXAMINATION BY MR. FLANAGAN:

Q. Mr. Schnackenberg, you are the plaintiff in this suit? A. I am.

Q. And on January 25, 1913, how old were you? A. Nineteen years.

Q. Where did you live at that time? A. I lived at 149 Day street, Orange.

Q. Was that your own home? A. No, sir; I boarded there.

Q. With whom? A. With Harry Rawnsley.

Q. Mr. Rawnsley is the man who is employed in the court house here, is he not? A. Yes.

Q. What was your occupation at that time? A. A driver.

Q. Employed by whom? A. Richard Schnackenberg, my uncle.

Q. And in what business was he engaged? A. He was in the baker business.

Q. What were your duties as such driver? A. Deliver orders.

Q. At what time did you start in the morning? A. Around three o'clock.

Q. Did you drive a one-horse or a two-horse wagon? A. I drove a one-horse wagon at that time.

Q. Where was the horse and wagon stabled at the time— A. Stabled at the Orange depot.

Q. Now, you met with an accident, did you not, on the 25th of January, 1913? A. Yes; I did.

Q. At what time of the day? A. About quarter to five in the morning.

Q. Where? A. At Harrison street, East Orange.

Q. What were you doing that day? A. I had been delivering my orders, the same as any other morning, up to that point.

Q. Will you tell us in what general direction Harrison street, East Orange, runs? A. Harrison street runs north and south.

Q. What is the next street to the west of Harrison street which runs north and south? A. West?

Q. Yes. A. Kenilworth place.

Q. Do the tracks of the defendant company cross Harrison street? A. Yes; they do.

Q. Which direction do they run? A. East and west.

Q. How many tracks are there? A. Double track.

Q. That is— A. Two tracks.

Q. Is there any street to the south of the tracks? A. Yes, sir; McKinley avenue runs parallel with the tracks.

Q. Where does McKinley avenue start? A. It starts at Kenilworth place and runs up to Harrison street.

Q. It did not cross Harrison street, did it? A. It crossed Harrison street, but on the other side it has another name; it ain't called McKinley avenue.

Q. Then it runs as far as Harrison street? A. It runs as far as Harrison street.

Q. Now, tell us what is the street one block to the south of McKinley avenue and parallel with it. A. It is Webster place.

Q. Tell us where you had been on the morning of the accident just before the accident? A. I had delivered my last order on Kenilworth place; I drove east on Webster place into Harrison street.

Q. To get from Kenilworth place to Webster place how did you drive, which way? A. East.

Q. East? A. Yes, sir.

Q. Or south? A. Kenilworth place, I drove east into Harrison street. Kenilworth place runs east and west.

Q. (By the Court.) Through what street, through Webster place? A. I drove through Webster place into Harrison street.

Q. (By Mr. Flanagan.) And then what direction were you driving on Harrison street? A. I was driving north on Harrison street, toward the track.

Q. And you say this was about quarter to five in the morning? A. Yes, sir; about, I should think.

Q. Was it dark? A. Yes, sir; it was very dark,

in January, quarter to five in the morning. I believe it was raining that night and it was sort of misty.

Q. Tell us what you did as you approached the track. A. Why, there is a garage right up to the corner of McKinley avenue and Harrison street. I got opposite that garage. I stopped my horse there; I looked and listened. The gates were up. I didn't see any gateman or anything. I made a complete stop of the horse, and didn't hear anything of an oncoming train, or anything, and I drove on.

Q. Now, was there any bell sounded or whistle blown? A. No, sir; there was no bell rang or no whistle blown.

Q. At what speed had you been driving the horse before you stopped him? A. Why, I checked my horse down to a walk about a hundred feet before I brought him to a stop; I checked him down to a walk.

Q. Now, you looked and listened? A. Yes, sir.

Q. And you say there was no bell or no whistle? A. No, sir; there was not.

Q. And what did you do after that? A. Why, I made a thorough point of observation either way, because there were some mornings I had to stop there, that the gates were down or just being put down, a train coming along, either a freight or something, and I was used some mornings that I had to stop about there, for a train would come on, and that is why I stopped. I made sure either way that nothing was coming, and I didn't see nothing coming either way, and I drove on and said, "Getap." After I had stopped. I kept on looking east and west for either ways, and didn't see no train or nothing, till I got up to the track. I had my horse up to the track and the wheels of the front part of the wagon almost up

to the track, when all at once I seen the headlight and the noise of an engine almost on top of me, and I just said, "Whoa," like that, and I held the horse in, and with that the engine came along and just cut the horse out of the shaft and dragged him down the track, cut him all up, and it knocked me out of the wagon on the ground.

Q. What happened to you? A. I dislocated the right finger, the little finger, on my right hand, and I injured my spine, and very nervous ever since. I was knocked out on my head and shoulder.

THE COURT: You have not told us which way the train was coming.

WITNESS: This train was going east, toward New York, coming from the west.

Q. Immediately after the accident, Mr. Schnackenberg, were you conscious? A. Yes, sir; I was.

Q. When you struck the ground, you say, you hit your head and shoulders? A. Yes, sir.

Q. Now, did you know what had happened to you at that moment?

MR. SCOTT: May it please the Court, I do not desire to object, but I do now object to the plaintiff's attorney leading his witness.

THE COURT: I do not think the question is objectionable. You may answer the question.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Question read.

A. Well, I know that I was knocked out, knocked on the ground, but I didn't know anything for a few minutes then.

Q. Why did you not know anything for a few minutes?

THE COURT: The question is what you knew then, not what you know now.

A. I was unconscious.

Q. (By the Court.) What did you know then? A. Nothing.

Q. (By Mr. Flanagan.) For how long were you unconscious? A. For a few minutes.

Q. Then what did you do? A. Why, the first thing I know after I had picked myself up was the Italian coming out of his shanty.

Q. Coming out of what? A. Coming out of the gate shanty that is right alongside of the track, and he says to me—

THE COURT: Never mind.

Q. Who was this Italian that came out of the shanty? A. He was the gateman, the fellow that operates the gates.

MR. SCOTT: I object as immaterial under the issues. We admit that the gates were up at the time, and what the Italian did after the accident is immaterial to the accident itself. Our pleadings expressly admit that the gates were up.

THE COURT: I do not think it is immaterial.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Had you seen him before that morning at any time? A. Yes, sir; I had.

Q. During what period of time before that had you seen him at the gates—at the shanty?

THE COURT: You mean that morning?

MR. FLANAGAN: No, I do not mean that morning; I mean before that.

The stenographer reads from the record as follows: "Q. Had you seen him before that morning at any time? A. Yes, sir; I had."

MR. FLANAGAN: I meant before the day of the accident.

10 MR. SCOTT: May it please the Court, I object, because it is immaterial under their pleadings. They claim that the gates were up, and in our answer we admit that the gates were up.

THE COURT: I do not think it is immaterial. Answer the question.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

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Q. (By the Court.) Had you seen this man before that day at all? A. Yes, sir; I had; I had seen him before that day of the accident.

Q. (By Mr. Flanagan.) When had you seen him before the day of the accident? A. There was some mornings when I approached the track I seen him come out of the shanty to lower the gates, or other mornings the gates were down, and after the train had went through the gates

30 I seen him put them up.

Q. You are sure that it was the same man that you saw the morning of the accident? A. Yes, sir; the same man.

Q. Now, after you picked yourself up what did you do? A. Well, I walked down the track for about 30 or 40 feet, I should think, and I believe the engineer and fireman, or the flagman, came back from the engine.

Q. And then what happened? A. Why, the

40 first thing—I spoke first; I said—

THE COURT: No, no; not what they said to you.

Q. What did you do after that?

THE COURT: We cannot have any conversation.

Q. No, do not tell us what the engineer told you. What did you do after that, after seeing the gateman and the flagman? A. Why, after that I went back to my uncle's store.

Q. Now, will you describe the injuries that you sustained? A. I dislocated the little finger on my right hand.

Q. Will you show that to the jury? A. (Exhibiting finger to the jury.) Yes, sir; I have that finger there still stiff; you can see it was put out of place.

Q. And what other injuries did you sustain? A. Why, I injured my spine.

Q. How about your head? A. Why, I was knocked on the head. Of course, I was bruised and pretty well shaken up.

Q. Now, did you consult a physician? A. Yes, sir; I did.

Q. When? A. The night of the accident.

Q. Who is he? A. Dr. Sheehan.

Q. And did he prescribe treatment for you? A. Yes, sir; he did.

Q. How often did you visit him after that or did he prescribe for you? A. Why, I believe I went to see him every day for two weeks, and within that two weeks he came to the house to see me several times.

Q. And after that? A. Why, after that I have been to different physicians.

Q. Did you consult Dr. Sheehan after the first two weeks? A. No, I don't believe I have.

Q. Now, were you able to work immediately after this accident? A. No, sir; I was not.

Q. What did you do? A. After the accident?

Q. Yes. A. Why, I hired a man to run the route for me.

Q. And did you assist him in any way? A. No, sir; I did not; that is, in work. I told him where to go to deliver the orders.

Q. Well, were you with him? A. I was on the wagon with him for two weeks and showed him where to go; I did no work. Of course, there was no one that knew the route—I was in no fit condition to work or be on the wagon, but there was nobody that knowed the route; I had picked up the route myself, for I had come from New York five months previous to the accident and started with my uncle, as we started the business there in Orange, and nobody knowed the route; I had picked up the route myself; nobody knew it; that was why I was forced to be on the wagon. I set on the wagon, but I did no work; I had the man on the wagon with me; I just showed him where to deliver the stuff.

Q. How long did that continue? A. That continued two weeks.

Q. Did you pay him any money for those services? A. Yes, sir; I did.

Q. How much? A. $24.

Q. That is, for the two weeks? A. Yes, sir; for the two weeks.

Q. What wages were you earning at the time of the accident? A. I was earning $15 a week, and two cents on all sales, which brought my salary up to $20 a week.

Q. After what time did you get back at your usual work? A. Why, about a month. I found out I couldn't drive the wagon no more; I was so nervous I couldn't be on the wagon no more; it was impossible for me to drive the wagon.

Q. Just tell the Court and jury how that nerv-

ousness affected you at that time? A. Why, after the accident I got on the wagon, after this man went off, and I tried to drive the wagon myself again, and I found that I was so nervous in getting near the railroad, or so, that I couldn't be on the wagon. I had this scare in me, and my nerves were so shaken up that it was impossible for me to drive the horse any more.

Q. Then did you leave your uncle's employ? A. Yes, sir; I did.

Q. Did you secure employment immediately after that? A. No, not immediately.

Q. How soon after did you secure employment? A. Why, about two months.

Q. And with whom did you secure this employment? A. Roll Brothers, butchers, in Orange.

Q. And what work did you do for them? A. Butcher.

Q. What did that consist of? A. Cut meat and wait on trade.

Q. (By the Court.) I understand that they are butchers? A. Yes, sir.

Q. (By Mr. Flanagan.) And what salary did they pay you? A. $15 a week.

Q. Now, please tell us whether you suffered any pain by reason of these injuries immediately after the accident? A. Yes, sir; I did; I had this finger in splints——

BY THE COURT:

Q. Can you tell us when you secured this employment? A. About two months after the accident.

Q. Yes, I believe you did tell us that. A. I had my finger in splints, and Dr. Sheehan gave me electric treatments for my back, for my spine, and I was very nervous, of course; I couldn't sleep nights. I used to come down—sometimes I used to come downstairs; I couldn't lay in bed,

and I would stay downstairs to try to pass the night away; I was so nervous, having this thing in front of me; my nerves were all unstrung.

By Mr. Flanagan:

Q. How about your ability to eat? A. Sometimes I wouldn't eat for two or three days, and before the accident I never knew what it was to let a meal go by.

Q. Did you suffer any pain in any part of your body except your finger? A. Why, I did; yes, sir.

Q. Where? A. My back.

Q. What part of your back? A. My spine, the lower part of my back.

Q. Did that pain affect you in your ability to lift weights? A. Yes, sir; it certainly did.

Q. Now, since the accident and within the past year, say, has your nervous condition improved? A. No, sir; it has not.

Q. How about the pains in your back, do you suffer still from them? A. I still suffer to this day.

Q. And how about your ability to sleep? A. Why, there is sometimes now that I can't sleep from nervousness; there are days that I can't eat; I have to go home from work sometimes, knock off a day or two.

Q. Have you consulted other doctors since you consulted Dr. Sheehan? A. Yes, sir; I have.

Q. And they have prescribed for you? A. Yes, sir.

Q. What have they prescribed? A. Why, liniments and alcohol to rub my back with and medicines for my stomach.

Q. Have you been able to work every day since you secured the job with Roll's? A. No, sir; I have not.

Q. Why? A. Because of this here pain in my

back, or this nervousness, I wasn't able to work.

Q. Well, how many times have you not been able to work? A. Well, quite often, sometimes for two or three days, maybe, then again half a day or so, right along.

Q. And how frequently do those periods occur when you cannot work? A. Well, it was last summer—that is, this here July and August—it was very bad; I was home from work some time, and it has up to lately, too, but those were the worst two months.

Q. Did you incur doctors' bills and bills for medicines? A. Yes, sir; I have.

Q. And how much were they? A. Why, Dr. Sheehan's bill was $50, and $5 for medicine, and I don't know just what the other doctors' were. I had three since, three different doctors since I had Dr. Sheehan. I didn't just keep track of them, what it was, but it was quite a little.

Q. Now, at the time of this accident, Henry, what did you do with your wages and any moneys that you earned? A. Why, sometimes——my parents are on the other side, in Germany, and sometimes, Christmas or New Year's or my father's or mother's birthday, I will send them a present, and the rest I spent for my own living.

Q. You kept all your wages outside of that? A. Yes, sir.

Q. Outside of these expenditures for presents, and so forth? A. Yes, sir.

Q. Spent it for yourself? A. Yes, sir; spent it for my own living.

Q. And you did that all the time before this accident since you left Germany? A. Yes, sir; I did.

Q. And how long was that? A. That time of the accident, that was about six years.

THE COURT: How long was it before the

accident that you did this? Was that the question?

MR. FLANAGAN: Yes, sir.

Q. (By the Court.) You had been in the habit of doing this for six years before the accident? A. Yes, sir.

Q. (By Mr. Flanagan.) Were you confined to your bed by reason of these injuries immediately after the accident? A. Yes, sir; I was.

Q. Tell us about that, please. A. Why, after I had been on the wagon with this man and showed him where to go, and like that, I went back home and went to bed.

Q. What time was it when you got through with the route? A. Why, around ten or eleven o'clock in the morning.

Q. And then you went home and went to bed? A. Yes, sir; I did.

Q. And how long did that continue? A. About two or three weeks.

Q. (By the Court.) You mean that you remained in bed two or three weeks? A. After the accident, off and on.

Q. (By Mr. Flanagan.) As I understand it, after the day's work was done— A. Yes, sir.

Q. —you would go home and go to bed? A. Yes, sir.

Q. And remain in bed? A. Yes, sir.

Q. During the rest of the day? A. Yes, sir; that is it.

Q. And you say that continued for two or three weeks? A. Yes, sir.

BY THE COURT:

Q. You say you did that every day? A. Yes, sir; every day.

Q. And you say you did that for two weeks? A. Yes, sir; two or three, maybe.

By Mr. Flanagan:

Q. What is the condition of your injured finger now, Mr. Schnackenberg? A. Why, it is still stiff, and there is some days—it all depends on the weather—it pains more than others.

Q. What kind of weather does it pain? A. Damp and cold; that is when I have the most pain now in it.

By the Court:

Q. Let me see your finger? A. (Witness exhibits his finger to the Court.)

Q. This one (indicating)? A. No, sir; this one (indicating).

Q. Oh, the little finger? A. Yes, sir; the little finger on the right hand.

Q. I thought you said the middle finger. A. The little finger.

By Mr. Flanagan:

Q. And how about your nervous condition? A. Why, I am still very nervous at times.

Q. And how does that affect you? A. Why, I can't eat sometimes for two or three days, or I can't sleep right, like I used to.

Q. How about your back? A. My back still pains at times. I am still keeping on with the doctor's liniments and alcohol, whatever he prescribed.

Q. And your head? A. Why, at times I get a very bad headache. I never had a headache before the accident.

Q. And how about your ability to lift heavy weights? A. Why, I can't lift the weight like I used to before the accident. I was able to lift almost anything; I wasn't afraid to tackle anything, but I can't now.

Q. Why? A. On account of the pain in my back. If I go to lift up anything it catches me through the back and I have to simply let go of it; I can't lift it.

CROSS EXAMINATION BY MR. SCOTT:

Q. Are you still suffering from an ankylosis of the finger, Mr. Schnackenberg? A. Yes, sir; I am.

Q. What is ankylosis? A. Well, it is kind of stiff.

Q. Do you know what ankylosis is? A. Why, stiffness of the finger, isn't it?

Q. Is that your definition of it? A. Yes, sir.

Q. When did you first have a knowledge of that expression, the medical description of your finger? A. Why, that it was dislocated?

Q. No, that you had ankylosis of your finger? A. Why, ankylosis—I mean it is stiff.

Q. Well, what I wanted to know is where you first learned that you had ankylosis of the finger. A. I thought that is what you meant just now when you said "ankylosis"; I thought you meant stiffness of the finger.

Q. And where did you first become acquainted with that medical term? A. Why, ankylosis?

Q. Yes. A. Just now, when you said it.

Q. Is that the first time you ever heard it? A. I believe so.

Q. I call your attention, Mr. Schnackenberg, to a paper, and ask you if this is your signature (paper shown to witness)? A. Yes, sir; it is.

Q. And do you remember making a statement in answer to a question, "What has been the extent and what is now the probable duration of the injuries complained of?"—in answer to that question do you remember stating that "The injuries sustained were very painful for two months; that the injury to the finger resulted in ankylosis thereof, which will be permanent, and I will still suffer from nervousness"? Do you remember making that answer to that statement or question? A. Why, I am still nervous.

THE COURT: No, that is not the question. Do you remember making that answer? Yes or no.

WITNESS: Say it again, please.

Q. Do you remember making this answer: "The injuries sustained were very painful for two months"? A. Yes, I remember that.

Q. "The injury to the finger resulted in ankylosis thereof, which will be permanent"? Do you remember making that statement? A. Well, I don't just understand what you mean by that, Mr. Scott.

Q. I ask you whether in response to the question, "What has been the extent and what is now the probable duration of the injuries that you complain of"? you answered, "The injuries sustained were very painful for two months. The injury to the finger resulted in ankylosis thereof, which will be permanent"? A. Yes, sir.

Q. You remember making that answer? A. Yes, sir.

Q. You have just told us that the first time you ever heard the word "ankylosis" was when I mentioned it just now? A. Yes, sir.

Q. You were mistaken in that? A. Yes, sir.

Q. Will you tell us, then, how it was that you came to describe the injury to your finger as ankylosis at a prior time? A. Well, because I don't understand those words.

Q. Somebody told you those words? A. No, sir; they have not.

Q. How did you use that word, that expression, if you did not understand it? A. Why, I thought that is what you meant, the stiffness of the finger.

Q. What I wanted to know, how you came to make an answer to a question propounded to you and use the word "ankylosis" if you had never heard of it before? A. Probably you asked me.

MR. FLANAGAN: Show him the paper. Perhaps that will refresh his recollection.

Defendant's counsel hands paper to witness.

WITNESS: Why, I believe that you asked me if it was ankylosis, and I said yes, and that is how they came to put it down.

Q. When was it that I asked you those questions? A. At the last trial.

Q. When was it? A. I don't just remember when it was.

Q. And at that time when you made those answers did you know what ankylosis was? A. I don't believe I did.

Q. Well, how did you come to use the expression "ankylosis" in that answer? A. I believe that that is what you had reference to; you asked me if I had ankylosis of the finger, and I thought that you meant stiffness.

Q. My question was, "What was the nature of your injuries?" and your answer is that you had ankylosis. Now, what I want to know is how you came to use the expression "ankylosis"? A. I don't know, Mr. Scott.

The interrogatories propounded to plaintiff and the answers thereto are marked respectively D-1 for identification and D-1A for identification.

THE COURT: Let the witness look at the question and the answer.

WITNESS: It does not say anything about it here, does it?

Q. Not in the question. The question reads, "What has been the extent and what is now the probable duration of the injuries you complain of?" A. Yes.

Q. You remember being asked under interrogatories that question? A. Yes.

Q. And you remember answering that question as set forth in this answer? A. Why, I believe that I said that my finger was stiff, and somebody, I don't know just who, said that word—

Q. Somebody told you— A. No, right there in court somebody used that word, that that is what it would be. I don't believe I used that word. Somebody said that is what it would be and I said yes.

Q. If it appears in an answer under interrogatories made by you that you said that the injury to the finger resulted in ankylosis, then it was what somebody told you, you say? A. Right there somebody—because the man was to put it down on paper, and he didn't want to put down "stiffness of the finger," I believe, and somebody said that word, I believe. I don't think that I mentioned that word.

Q. And that is how the word "ankylosis" gets in this answer? A. I believe so.

Q. Somebody told you? A. Yes, sir; somebody saying it there.

Q. When did the other trial take place, Mr. Schnackenberg? A. I don't just remember the date.

Q. Was it in March, 1914, after the snowstorm? A. I say I don't remember the date.

Q. Do you remember the month? A. No, I don't; I remember it was 1914.

Q. Have you no knowledge as to when that trial took place, as to the date? A. No, I haven't looked it up.

Q. The answers to which I have called your attention were sworn to on the 9th day of February, 1914. Would you say that the other trial took place before or after that time? A. Well, it must have taken place before, didn't it? I can't just say it, because I don't know the date; I don't remember.

Q. Do you remember where those papers were prepared? A. No, sir.

Q. These answers? A. No, sir.

MR. FLANAGAN: Well, just look at it there, Mr. Schnackenberg. Just hand it to the witness and let him look them all over.

Q. Do you remember where those answers were prepared (shown to witness)?

THE COURT: You are referring to D-1 for identification and D-1A for identification?

MR. SCOTT: D-1 and D-1A.

A. I believe by Mr. Hood.

Q. In Mr. Hood's office? A. Yes, sir; I am sure it was.

Q. And you swore to them down in Mr. Hood's office? A. Yes, sir.

Q. So those answers, or this special answer, was prepared down in Mr. Hood's office? A. I believe they were.

Q. Now, at the time the answers were drawn up were you present? A. I don't just remember.

Q. You read the answers over? A. I believe I have.

Q. And when you came to the answer relative to the injuries, describing the ankylosis of this finger, did you understand what that meant? A. Why, I don't think I placed it in my mind; I just thought it meant the stiffness of my finger. I didn't give it any other thought; that is what I thought it meant.

Q. So that when you swore positively that you had ankylosis of this finger you were swearing to something—you were not positive that you knew what it was?

MR. FLANAGAN: That is not fair to the

witness, if your Honor please. He said he thought it meant stiffness of the finger.

THE COURT: He says nothing about being positive; he said he thought it meant stiffness.

Q. At the time you made this answer, was that the first time you ever heard of ankylosis? A. I believe it was.

Q. And who told you you had ankylosis of the finger? A. Why, I never gave it a thought. When I looked over it I thought it meant stiffness of the finger.

THE COURT: You get off the question. If you can, tell us who told you.

WITNESS: I don't know.

Q. Who was present when you made the answers, then?

MR. FLANAGAN: That is shown by the affidavit.

THE COURT: No, not necessarily. It shows who took the affidavit, not necessarily who was present.

A. I don't know; I don't just remember.

Q. That is the best of your recollection as to the occurrence in February, 1914? A. Yes, sir.

Q. This place up at Harrison street, the railroad crossing in question, there is no cut or embankment there, is there, either side of the crossing? A. There is a little bit of a cut on the south side of the rail, and there is a lot of poles and trees there.

MR. SCOTT: I ask that so much of the answer be struck out as is irresponsive.

THE COURT: Strike out everything that does not relate to the cut.

Q. Is there a fence along the track on either side running from Harrison avenue up to Kenilworth place? A. Yes, sir; there is for a short time; there is a fence right from the arm of the gate to the first telegraph pole.

Q. And how long is that fence? A. Well, it is about 20 feet, I should think.

Q. And where is this cut that you have reference to? A. Why, it is a little bit of a gutter, like, from the track to the road.

Q. Now, is there any high embankment? A. No, not just a high embankment.

MR. FLANAGAN: Just a minute. I think counsel ought to limit that to some height. What he apparently has reference to is the bearing of the statute on this situation, and the statute very specifically says four feet.

THE COURT: I do not understand you.

MR. FLANAGAN: I object to the question because it is too general and asks the witness, Is there any high embankment? I do not think that is susceptible of an intelligent answer, and I do not see how it could be evidential in this case unless it is limited to four feet, as the statute prescribes.

THE COURT: I see no objection to the question. Let us, in the first place, get the name of the street right. It is not Harrison avenue; it is Harrison street.

MR. SCOTT: Harrison street.

THE COURT: Answer the question.

Question and answer read.

Q. I show you a photograph, Mr. Schnackenberg, and ask you whether you can point out—whether you recognize that as being the junction of McKinley avenue and Harrison street (photograph shown to witness)? A. Yes, sir; I do. This is the corner, right there (indicating).

Q. And I ask you if that correctly represents the situation as it appeared on the day of the accident?

MR. FLANAGAN: In daylight or darkness, do you mean?

MR. SCOTT: The physical objects.

A. This was in the morning; it was very dark when the accident occurred; it was about five o'clock in the morning, and these pictures were taken in broad daylight, I believe. There is snow on the ground in some of them.

THE COURT: With that exception, is it a correct representation of the locality?

MR. SCOTT: Of the locality, the buildings and—

WITNESS: Yes.

Photograph marked D-2 for identification.

Q. Can you point out to the jury where there is any embankment from Harrison street westward along the railroad track? A. There is no embankment; there is just a little gutter, I stated.

Q. Can you point out where any embankment is? A. No, sir.

Q. Your answer is that there is no embankment? A. There is no embankment; I don't see any.

MR. FLANAGAN: Well, in that picture, you mean?

WITNESS: In that picture, I don't, no. Those pictures were taken in broad daylight, and this happened at quarter of five in January, when it was pitch dark.

MR. SCOTT: I ask that that be stricken out.

THE COURT: You may discuss the photo-

graph without that reference. The question is whether it correctly represents the locality.

Q. The fence that you have reference to in your testimony is the fence that is shown in this photograph? A. Shown right there; yes, sir (indicating).

Q. You had travelled the crossing for a number of months prior to the accident, had you not, Mr. Schnackenberg? A. Yes, sir; I had for five months every morning except Sunday.

Q. And both day and night-time? A. Both day and night.

Q. And in the morning at the same time? A. In the morning at the same time.

Q. And for how many mornings consecutively before the accident happened had you crossed the crossing at the same time in the morning? A. For five months, every morning, at the same time, except Sunday, always around quarter to five.

Q. And did you notice at that crossing a crossing sign, "Look out for the locomotive"? A. I did in the daytime; I couldn't see it in the morning.

Q. It was there, was it not? A. It was there; yes, sir.

Q. (By the Court.) A crossing sign? A. Yes, sir.

Q. (By Mr. Scott.) That sign was located where, on which corner? A. On the northerly side of the track, where the shanty is.

BY THE COURT:

Q. Which side of Harrison street—the street that you were on? A. I was on Harrison street.

Q. And which side was this railroad sign, the east or the west? A. The east side.

Q. The north side of the track and on the west side? A. Yes, sir.

Henry Schnackenberg—Cross.

By Mr. Scott:

Q. Your work at that time required you to make morning deliveries, as I understand you? A. Yes, sir; it did.

Q. And you started to work at what time? A. Around three o'clock in the morning.

Q. And you got your horse—you went down to the livery stable and got your horse? A. Yes, sir.

Q. And then where did you go to? A. Went down to the store.

Q. And loaded your wagon? A. Yes, sir; I did.

Q. And started to make deliveries? A. Yes, sir.

By the Court:

Q. You went to the Orange station, where your horse was kept? A. Yes, sir; he was right at the Orange depot.

Q. And then where was the store? A. The store was on Main street.

Q. In Orange? A. In Orange.

Q. And the accident occurred in East Orange? A. The accident occurred in East Orange.

By Mr. Scott:

Q. And from the store you started, as you have said, to make deliveries? A. Yes, sir.

Q. And the night before, do you remember where you had been? A. Yes, I do.

Q. Where? A. In bed.

Q. What time did you retire? A. I don't know just what time I went to bed. I was through work at three o'clock in the morning.

Q. Did you go home immediately and go to bed? A. Why, I don't know whether I just went home immediately; I don't remember, but I know I went to bed early, for I had to get up at three o'clock in the afternoon.

Q. And that was your practice always, to retire early in the afternoon? A. Yes, sir; it was.

Q. When you were working for your uncle? A. Yes, sir.

Q. You have no recollection as to what you did the night before? A. Yes, sir; I went to bed and slept.

Q. What time did you get up? A. Why, I got up about half-past two or quarter to three.

Q. And after you got your rig and went down to the store and loaded your wagon, you started driving around. About what time did you get in the neighborhood of Harrison street? A. Where the accident occurred?

THE COURT: You mean on the day of the accident?

MR. SCOTT: I mean on the day of the accident.

WITNESS: You mean what time the accident occurred, around there?

Q. No, what time did you get in the neighborhood?

THE COURT: What time did you get on Harrison street?

A. I had some stops on Harrison street—drove over to Kenilworth place around half-past four.

Q. Did you cross the tracks going south before the accident happened? A. In the morning?

Q. Yes. A. No, I did not; that is, not at Harrison street; I crossed them at Orange.

Q. At Orange? A. Yes, sir.

Q. And you got down in the neighborhood of Kenilworth place about what time? A. Around twenty minutes to five.

Q. And you made a delivery at that time, did you, on Kenilworth place? A. I made my last delivery.

Q. From there you turned around and went back to Webster place? A. Yes, sir.

Q. Webster place runs parallel with McKinley avenue? A. It does, one block south.

Q. And McKinley avenue runs parallel with the railroad track? A. Right on the track.

Q. After you came into Harrison street and started to go north toward the crossing, did you bring your horse down to a trot? A. I brought him down to a walk about a hundred feet before I stopped him.

Q. And when you got right opposite the garage you brought your horse to an absolute stop? A. I did; yes, sir.

Q. And at that time you were about on the edge—about even with the edge of the garage? A. That is, the front of the wagon was even with the edge of the garage, where I was sitting.

Q. The head of the horse was about 10 or 12 feet ahead of you? A. About 10 feet, I should say.

Q. On this photograph, D-2 for identification, I would like to know if the place I point to shows the edge of the garage (indicating on photograph)? A. Yes, I believe it does.

Q. I will mark that with a cross (marking on photograph). That is correct? A. Yes, sir; I believe it is.

Q. And when you stopped you were about even with the edge of the garage? A. Yes, sir.

Q. Now, how long did you stop there, a minute or half a minute? A. I stopped long enough to make a complete stop of the horse.

Q. Do you remember whether you stopped there a minute or half a minute? A. I couldn't say just how long it was; I didn't look at the watch, but I stopped long enough to make a complete stop of the horse and wagon.

Q. Do you remember testifying on the other trial that you stopped there a minute or half a minute? A. I don't. It may have been that time.

Q. It might have been a minute or half a minute? A. Yes, sir; because I made a complete stop of the horse and wagon.

Q. And when you made this complete stop of your horse and wagon what did you see? A. I stopped, looked and listened for a train.

Q. After you made your stop? A. After I made my stop.

Q. And you looked and listened? A. Yes, sir.

Q. Which way did you look? A. I looked east and west, both ways.

Q. For how long a time did you look east? A. Well, I don't know just how long. I brought my horse to a complete stop. I looked from one side to the other for a train. Of course, I seen the gates were up, no gateman or anything around, and I didn't hear no train or anything, and as I didn't hear no train or anything, the gates were up, and I said, "Get ap," and I drove on.

Q. How long did it take you to make your observation toward the east? A. Now, I brought my horse to a stop and I looked—

THE COURT: Do not tell us that again. We have heard that several times.

WITNESS: I looked from one side to the other; I looked from one side to the other; I kept on looking.

Q. And while you were stopping and while you were sitting there and while the wagon was motionless, you were looking back and forth, each way? A. From one side to the other.

Q. To the right and to the left? A. To the right and to the left.

Q. And then you started your horse? A. Started my horse, yes.

Q. Now, about how far is it from the edge of the garage to the nearest rail of the railroad track? A. I should say about 30 feet.

Q. And when you started your horse did you whip him up? A. No, sir; I didn't whip him. I didn't have no whip on the wagon.

Q. Did you call to him to speed him up at all? A. I didn't speed him; I just said, "Get ap." I just started up just the same as I did any other time.

Q. And did the horse start on a run? A. No, sir; he didn't start on a run; he started on a walk.

Q. A slow walk or fast walk? A. A slow walk, medium.

Q. And as he started on this walk did you continue to make your observations? A. Yes, sir; I did.

Q. And you looked both to the east and to the west? A. Yes, sir; I kept on looking.

Q. And you kept moving your head first in one direction and then in the other direction? A. That is what I did.

Q. And looked up toward Orange and toward East Orange? A. Yes, sir.

Q. And you continued that method of observation how long? A. Till I got up to the track and got hit.

Q. Where were you when you last glanced up toward Orange, or toward the west? A. How far was I?

Q. Yes. A. Why, I was right up to the track. I seen the engine on top of me; that is the last I seen.

Q. When you were about even with the garage you could see about 400 feet up the track, could you not? A. No, not in the morning, I couldn't. It was very dark. I could not.

Q. Do you recall testifying at the other trial that you could see 400 feet up the track? A. I

did in reference to daytime; not in reference to night.

Q. It is a fact that in the daytime from the edge of the garage you could see 400 feet up the track? A. Well, in daytime I don't know if you can see 400 feet; I don't believe you can see that far.

Q. Do you remember testifying that you could see 400 feet? A. In reference to the daytime, not in reference to the accident.

BY THE COURT:

Q. The question that you are now asked is as to daytime? A. As to daytime.

Q. What do you say? A. Probably that far, but you couldn't see that far right out, because there is poles and trees along the track. Mr. Flanagan, if you will let me just have the book I can show how the poles and trees are.

MR. FLANAGAN: Do you want something to illustrate with?

WITNESS: Yes, sir; the poles and trees. (Illustrating with books.) Now the fact is that when you are 30 or 40 feet from the track you can see through those poles.

Q. (By the Court.) What do you mean by "poles"? A. Telegraph poles. Now, when you approach the track, when you are about 5 feet away from the track, you can't see anything for these poles and trees; they form a solid wall. Now, when you are 5 feet away from the track in daytime you can't see no further up the track than about 30 feet, I should say, in daytime.

Q. (By Mr. Scott.) In other words, if you are standing right up against a pole you can't look through it? A. Not up against the pole, Mr. Scott. If you are 5 feet away from the track,

you can be 20 feet on the side of the poles or the arm of the gate, it is impossible for you to see up the track any more than about 30 or 40 feet in the daytime.

Q. Do you remember testifying at the other trial, Mr. Schnackenberg, in response to a question, that you could see 400 feet up the track?

MR. FLANAGAN: Now, if your Honor please, I object to that question put in that way. I think the counsel should read the question as presented and the answer as given on the former trial. He has predicated his question upon the theory that upon the former trial the witness made a certain statement, and I do not think it is fair for him to generalize his answer.

MR. SCOTT: I will ask the specific question, to save time.

THE COURT: I think the correct way in such a case is to refer specifically to the testimony and ask the witness whether he said that in answer to such and such a question.

Q. Do you remember at the other trial of this case, on page 38, Mr. Schnackenberg, in response to a question, saying that you could see 400 feet—

Objected to.

THE COURT: What was the question?

Q. "Question: Regarding this point at the garage you speak of, you can see, I understand, 400 feet up the track? Answer: What is that? Question: At Harrison street, the garage, can you see about 400 feet up the track at that point? Answer: Up McKinley avenue? Question: Yes, up the track. Answer: About I should think. Question: I understand you to say that you could see 400 feet

up the track at that point. Could you see 400 feet up the track at this point at the garage, or when you got on the track? Answer: At the end of the garage." Do you remember testifying to that? Just yes or no. A. In one question you asked me—

THE COURT: No, do you remember testifying to that?

WITNESSS: Why, I believe I did in an answer to Mr. Scott, the question that he asked me.

THE COURT: It does not make any difference whose question it was, do you remember testifying to that?

WITNESS: Yes, sir; in the daytime.

Q. And it is a fact that you could from the end of the garage see up McKinley avenue 400 feet? A. I don't believe you can see 400 feet up there in the daytime.

Q. Did you ever make any observations to see how far you could see up the track? A. Yes, sir.

Q. Did you go there for that purpose? A. Yes, sir.

Q. With whom? A. Myself, and I went there with others.

Q. When did you go there? A. I went there very often since the accident.

Q. I say specially for this purpose? A. Yes, sir; specially.

Q. With whom did you go? A. I don't just remember with whom I went, but I went there for my own good.

Q. And what method of making observations did you make at the time? A. Why, I went there day and night-time both, and I just judged about the distance.

Q. You just judged? A. Yes, sir.

Q. Did you make any measurements? A. No, sir.

Q. Did you stand at the edge of the garage and see how far you could see up the track? A. Yes, sir; I did.

Q. And did you make any measurements? A. No, sir.

Q. Did you have anybody assist you to make measurements? A. No, sir.

Q. Did you stand 40 feet from the track and look up west? A. About 30 or 35 feet; that is about as far back as you can stand.

Q. And did you make any other measurements except at the garage? A. Why, right up to the track, about 5 feet from the track, yes, sir.

Q. And who was with you when you made those measurements? A. I don't know just who was with me. I just made the measurements myself, for my own good.

THE COURT: You do not mean measurements; you said you made no measurements. You made observations?

WITNESS: Observations; yes, sir.

Q. And you did not make any measurement? A. No, sir; I did not make any measurements.

Q. At the time of the accident you did not know what train struck you, did you? A. No, sir; I did not.

Q. You did not know whether it was a light engine or an express train? A. No, I couldn't tell you, only I know the engineer told me that it was engine 916.

THE COURT: Never mind what the engineer told you.

Q. And did you not tell Dr. Adams that the

train that hit you was the Buffalo Express? A. I might have; it might have been the Buffalo.

Q. Did you tell Dr. Adams that? A. I don't just recollect that; I might have told Dr. Adams; I don't say I didn't.

Q. And you do not know what train struck you? A. No.

Q. You do not know whether the train that struck you was hauling any cars or not? A. Why, I was told it was a wildcat afterwards.

THE COURT: Never mind what you were told. Strike that out.

Q. You did not know at the time of the accident whether the engine had any cars attached to it or not? A. No, sir; I did not.

Q. Now, is your recollection clear as to your testimony on the former trial? A. Is my recollection what?

Q. Is your recollection clear as to your testimony on the former trial? A. Excuse me! Just let me understand what you mean by that, Mr. Scott. Do you mean that I know that testimony?

Q. Do you remember what you testified to on the other trial? A. Yes, sir; I do.

Q. Do you recollect that on the former trial you gave no testimony at all as to the fact that it was sort of misty on the morning in question? Just yes or no. A. No, I believe I didn't.

Q. And it is a fact that you gave no testimony on the former trial that it was sort of misty? A. That is the fact.

Q. Who were those doctors that examined you, Mr. Schnackenberg? A. Since Dr. Sheehan examined me?

Q. Yes. A. There is Dr. Gerbert—I mentioned him in the last trial—and since that I have been

to Dr. O'Brien, on Center street, in Orange, and Dr. Brien corner of Ridge and Main streets.

Q. Are those gentlemen in court? A. No, sir; they are not.

Q. You are still working for Roll Brothers? A. No, sir; I am not.

Q. Where are you working? A. G. R. Lange, 30 McChesney street, Orange.

Q. What is your business there? A. Butcher.

Q. (By the Court.) What do you do? A. Cut meat and wait on trade, the same as I did at Roll's.

Q. (By Mr. Scott.) And what are you getting there? A. $16 a week.

Q. Do you drive around? A. No, sir.

Q. Will you tell me when it was that you first learned that there would be a retrial of this case? A. When I first learned that there should be a retrial of this case?

Objected to as irrelevant.

THE COURT: How is this material?

MR. SCOTT: The witness has testified that in the first trial the element of mist and rain was not testified to by him. Now, I think I have a right to go into the motives and reasons why this new element is injected in the case.

THE COURT: You may ask the question, if you desire to.

Q. (By the Court.) When did you first know that there was going to be another trial? A. I don't just remember.

Q. (By Mr. Scott.) Well, what is your best recollection? A. I couldn't say, Mr. Scott.

Q. And you have a recollection that you were told that the case was going to be retried? A. I have a recollection that I told what?

Q. That you were told that the case was to be retried. A. Yes, sir.

Q. And have you a recollection as to the reason why the case was to be retried? A. No, I have not.

THE COURT: You need not answer that. It is immaterial.

Q. Did you learn, Mr. Schnackenberg, from any source whatever as to the reason that this case was to be retried?

Objected to.

THE COURT: Do not answer this question.

MR. SCOTT: I just desire to have it noted on the record. Do not answer it.

THE COURT: It could not possibly be a legal question, if it began in that way, without reference to what the rest of it was going to be.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Now, Mr. Schnackenberg, will you tell us how far the first telegraph pole west of the crossing in question is from the crossing? A. The first telegraph pole?

Q. Yes. A. Why, there is one, I believe, right at the corner where the gate is.

THE COURT: I suppose you mean on the south side of the track?

MR. SCOTT: On the side that he was on, the south side.

THE COURT: On the south side.

Q. (By the Court.) Can you tell us how far the first telegraph pole is away from the line of Harrison street? A. I believe it is only about 5

or 6 feet, the first one; it is right behind the arm of the gate, if I ain't mistaken, and there is another one right at the end of the fence, about 20 feet away from there.

Q. (By Mr. Scott.) You saw the headlight of this engine that struck you? A. Yes, I did when it was right on top of me.

Q. The headlight was lit? A. The headlight was lit.

Q. And after the accident do you recollect running down towards the Brick Church station? A. No, sir; I didn't run down towards the Brick Church station.

Q. And you say it is a fact that you did not run down toward the Brick Church station? A. Yes, sir; I do state. I walked down about 40 feet from where I was knocked to the ground.

Q. (By the Court.) In the direction of the Brick Church station? A. In the direction of the Brick Church station; yes, sir.

Q. (By Mr. Scott.) On this shanty did you notice whether at the time of the accident or prior thereto there were any signs relative to the operation of gates? A. No, sir; I didn't see any.

Q. What have you to say as to whether there were any notices on any of the gate posts at that crossing? A. I didn't see any.

Q. Did you look for them? A. Why, if they had been there I ought to have seen them. I didn't see any.

Q. And did you on the morning that you approached the crossing in question—

THE COURT: You are not referring, of course, to the railroad signal sign. You saw that?

WITNESS: Not in the morning, I couldn't

see the sign. In the daytime you could see the sign, "Look out for the locomotive."

By The Court:

Q. You know the sign was there? A. Yes, sir; I know.

Q. You are not speaking of that. You are speaking of the sign as to—. A. Yes, sir; what time the gates would be operated.

Q. You did not see anything like that? A. No, sir; I didn't see.

Q. (By Mr. Scott.) Did you look for that on the morning in question? A. I didn't see any more signs.

Q. Did you look for them? (No response.)

Q. (By the Court.) Did you look for that that morning? A. Yes.

By Mr. Scott:

Q. Where did you look for them? A. On the gates.

Q. Had you ever seen them there before? A. No, sir; I had never seen any signs there before.

Q. Why did you look for a sign on the gates that particular morning? A. Well, it might be put there, that the gates wouldn't be operated at any time.

Q. Why did you look for them on this particular morning? A. I don't know why I looked; I did; but I didn't see them there.

Q. Is it a fact that you looked on any morning for the sign on the gates—on the morning of the accident? A. Well, it was there in front of me; I would see it. I can't say that I looked for them exactly.

Q. Well, you did not look for any sign on the gates that morning? A. Yes, I did; I looked out in front of me.

Q. And what part of the gates did you look for such a sign? A. I can't say what part. The gates were up.

Q. Can you show us on this photograph? I show you a photograph, and ask you if that correctly represents the fixed objects at the crossing in question on the day of the accident? (Photograph shown to witness.) A. No, it don't, indeed not.

Q. Fixed objects, buildings? (Former question read.) A. Why, the buildings are the same, but not the ground.

Q. There is snow on the ground? A. There is snow on the ground and the houses and everything, and the roofs.

Q. The snow is on the ground and on the roofs? A. It makes a different appearance altogether.

Q. Now, will you tell us where you looked for that sign before you came over? A. That sign was bound to be there any time; the gate may be out of operation any time.

Q. (By the Court.) No, you are getting off the question. You have said that you looked for a notice. All you are now asked is to show where you looked. A. Why, I looked in front of me. I thought it may be on the arm of the gate or either on the pole there.

Q. (By Mr. Scott.) And you looked at what gate? A. Why, I looked—I couldn't see the gates very good—I looked in front of me; I looked at the whole gate. It was pitch dark.

Q. And you looked for a sign? A. Yes, sir.

Q. And what kind of an observation did you make for that sign? A. Well, I looked for that sign at the same time and stopped and listened for the train.

Q. And had you ever seen anything there be-

fore? A. No, sir; I had not, not them kind of signs.

Q. And by "them kind of signs" what do you mean? A. Why, I have seen signs on the Erie, like you asked me in the last trial if I had seen any signs that these gates wouldn't be operated only at such and such hours.

Q. On the last trial you were asked relative to the "Look out for the locomotive" sign on the Erie Railroad? A. Yes, sir; on the Erie.

Q. On the Erie? A. No, you asked me if I had seen any similar signs on the Erie, that these gates wouldn't be operated only such and such hours.

The photograph last shown to witness is marked D-3 for identification.

Q. You had never seen such signs with regard to the operation of the gates? A. On the Lackawanna?

Q. On the Lackawanna. A. I don't believe I have.

Q. And you had never seen any such sign at the Harrison street crossing? A. No, sir.

Q. And you had travelled back and forth there for five or six months? A. Yes, sir; all through the Oranges.

Q. Now, will you tell us why you looked for such a sign, if you had never seen such a sign? A. I did see such a sign on the Erie.

Q. And that is the reason you looked this morning for this sign? A. Why, it may have been put there, certainly.

Q. And that was your only reason? A. Why, my reason is that it may be put there any minute.

Q. I say that was your only reason? A. My reason was that the gates may be put out of commission any minute. In the wintertime you often find, when it is cold—

THE COURT: No, you are asked about your reason. Have you given it?

WITNESS: Yes, sir; I have.

Q. And as you approached the crossing and had your team to a stop at the edge of the garage you saw the gates were up? A. Yes, sir.

Q. You saw nobody putting a sign on the gates? A. No, sir; I did not.

Q. Now, since the time that Dr. Adams and Dr. Washington have examined you has there been any apparent condition on account of this accident, something that you can see?

THE COURT: There seem to be two questions there.

Q. Do you remember being examined by Dr. Adams? A. Right after the acident.

Q. I say you remember being examined by Dr. Adams? A. Right after the accident.

Q. And since that time has anything appeared on your body in any way that you did not have at the time Dr. Adams examined you? A. Why, I don't know as there has anything appeared on the outside of my body, but my back is very bad and my finger is there.

Q. And you remember being examined by Dr. Washington? A. Dr. Washington?

Q. Yes. A. Excuse me! Was that down in the court house? Yes. I don't know the gentleman's name; I know I was examined down in the court house here.

Q. And since Dr. Washington examined you has anything on account of the acident appeared on your body that you could see that was not present at the time when Dr. Washington examined you? A. Why, not on the outside of my body.

Q. About how long did it take you to go from

the edge of the garage, where you stopped your wagon, until you got to the track where you were hit? A. Why, I cannot just say how long. The horse was about 20 feet away from the track. Now, how long would that take just to drive a horse up to the track, 20 feet? A. I should think it is less than a minute.

Q. The day of the accident, that morning was very cold, was it not? A. Why, it had been raining the night—

Q. I say it was very cold?

THE COURT: It was very cold?

A. Yes, it was in January; I think it was cold.

Q. Is there any doubt in your mind on that question? A. No, there is not.

Q. And how far were you from the track when you first saw the headlight of the locomotive? A. Why, I had my horse up to the first track and the wheels almost up to the track; that is, I had the front part of the wagon, where I was sitting, almost up to the track when I seen this headlight and the noise that an engine makes coming along, you know, and it went right through me like that, cut the horse out of the shaft—

THE COURT: No, you have answered the question.

Q. And the train was making the usual noise of an engine? A. Just like a "Biz," that you could hear right there at the spot. I didn't hear it before.

RE-DIRECT EXAMINATION BY MR. FLANAGAN:

Q. When you walked down the track after the accident could you see the engine? A. Why, I just could fairly see the red light like on the

back part of the engine just through the darkness.

Q. Could you see whether there were any cars attached to it? A. Not at the time, I didn't, no.

Q. On the last trial, Mr. Schnackenberg, which was held on the 4th and 5th of March, 1915, were you asked any question regarding the mist— A. Regarding what?

Q. Regarding the mist. A. No, I was not.

Q. Just wait until I finish my question. Were you asked any question as to whether the morning was a misty one? A. No, I was not.

Q. Now, Mr. Schnackenberg, do you remember on the trial of this case—I am reading from page 27—having been asked this question: "In going over that crossing you said you observed the sign post which said 'Look out for the locomotive'"? Do you remember being asked that question? A. Yes, sir.

Q. And do you remember answering it, "Yes, sir"? A. I do.

Q. And the further question, "Was it there during the five months you were travelling over that crossing"? A. Yes, sir.

Q. And you answered, "What there"? and the further question, "Was that sign post there during all the time you were travelling over that crossing"? and you answered, "Yes"? A. Yes, sir.

Q. And the further question, "On what side of the street was it"?

THE COURT: You remember that, do you?
WITNESS: Yes, sir; I do.

Q. And you answered, "It was on the side where the shanty is"? A. Yes, sir.

Q. And this question: "In driving along Harrison street you could very readily see the sign, couldn't you"? A. Yes, sir.

Q. And you answered that, "Not that morning;

it was very dark"? A. Yes, sir; I did; that is just what I said.

Q. And the further question, "I mean in the daytime"? A. I remember that.

Q. And you answered, "Yes"? A. Yes.

MR. FLANAGAN: I am reading from page 31, Mr. Scott.

Q. Do you remember being asked this question: "You could see, looking down in the direction you were going, you could see the other side of the track"? A. I remember that.

Q. And you remember answering, "Yes, sir"? A. Yes, sir; I do.

Q. And the further question, "You could see beyond the shanty"? A. Yes, sir.

Q. "You could see beyond the gate shanty on the other side"? A. I remember being asked that.

Q. And you answered, "Just about up to the shanty"? A. I remember that.

Q. On the morning of this accident, Mr. Schnackenberg, how far could you see along the track?

MR. SCOTT: I object. I do not think that is a matter of redirect examination. I think that has all been brought out on his direct examination.

THE COURT: The witness stated on direct examination when it was that he first saw the train, and on the cross examination he was asked as to his observations along the track. I do not remember that he was asked on the direct examination how far he could see along the track.

MR. FLANAGAN: No, sir.

THE COURT: Acting on that impression,

which I think is probably a correct one, this question is legitimate on redirect examination. You may answer the question.

Question read.

A. Why, about 30 feet.

Q. And how do you arrive at that conclusion, Mr. Schnackenberg? A. What is that?

Q. How do you fix that distance? A. Why, that is about as far as I could see. It couldn't have been no further than 30 feet, about 30 feet.

By The Court:

Q. Can you now tell us how you fix that? A. Why, the darkness of the night just probably let me see that far; I couldn't see no further.

Q. That is the best answer you can give? A. Yes, sir.

By Mr. Flanagan:

Q. Mr. Schnackenberg, you have already testified that on that morning you could see from a position south of the track just about up as far as the shanty? A. Yes, sir.

Q. What was that distance from where you were up to the shanty? A. About 30 feet, I should say, Mr. Flanagan.

Q. And you saw the shanty from that position? A. I just about could make out that it was the shanty; I thought it was the shanty that was there; I couldn't see it very clearly.

Q. Is that the reason you say that you could see about 30 feet? A. Yes, sir; that is what I say.

Q. Mr. Schnackenberg, you passed that crossing later in the day the same day of this accident, did you not? A. Yes, sir.

Q. And it was daylight when you crossed it? A. After the accident?

Q. Yes. A. Yes, sir.

Q. And was there any sign there indicating that the gates would be operated during certain hours?

Objected to.

A. No; there was not.

MR. SCOTT: I ask that that answer be stricken out.

THE COURT: Strike out the answer until I have time to consider it. Do not answer when a question is objected to.

MR. SCOTT: I ask the Court to instruct the jury, on account of that question, that what we may have done after the accident has no bearing on the case now being tried.

THE COURT: (After argument.) It seems to me it is a very doubtful question.

MR. FLANAGAN: Well, I will not press it.

THE COURT: I will sustain the objection.

MR. SCOTT: May I ask the Court to instruct the jury, as I have requested, that what the railroad company would do after the accident, if they did anything, has no bearing on the question now before them? In other words, the jury from the questions propounded might have an erroneous impression.

THE COURT: I shall tell the jury merely this: that they will determine this case by answers and not by questions, by the testimony, and by nothing else. There is nothing before the Court on this subject except a question which was overruled.

Q. Did you ever at any time before this accident see any sign about that crossing other than the "Stop, Look and Listen" sign? A. No ,sir; I did not.

Q. Mr. Schnackenberg, you recollect signing these interrogatories before me, do you not (paper shown to witness)? A. Yes, sir; I think I do.

Q. I am referring now to D-1 A for identification. Do you remember signing that before me? A. Yes, I do.

Q. Before William K. Flanagan? A. Yes, sir.

Q. And swearing to it? A. Yes, sir.

Q. On the 9th day of February? A. Yes, sir.

Q. 1914? A. Yes, sir.

MR. FLANAGAN: I omitted to ask the witness about Dr. Sheehan. May I do so now?

THE COURT: You may ask it as an omitted question.

Q. Have you tried to secure the attendance of Dr. Sheehan here to-day? A. I have.

Q. With what result? A. Why, I went to him a couple of weeks ago, when I heard about the case coming up; so Mr. Sheehan told me that is now in New York, connected with a hospital, and sometimes has to undergo with very serious operations, but at any time this trial would come up and he should be in Orange, he would be too glad to come down and testify. I went over to the house last night, but the lady that was there, she told me that he was—

MR. FLANAGAN: Do not tell us what the lady said.

Q. (By the Court.) Well, you did not get him? A. I did not get him; no, sir.

Q. (By Mr. Flanagan.) And I understood that Dr. Sheehan told you that if he were in Orange he would be glad to come? A. Yes, sir; that is what he told me.

Q. And did you ascertain whether he was in Orange yesterday or not? A. Yes, I did.

Q. And did you find that he was out of Orange? A. I found out that he was out of Orange.

Q. Where? A. In New York.

RE-CROSS EXAMINATION BY MR. SCOTT:

Q. You do not know where he is to-day? A. I don't Mr. Scott.

Q. You were talking about that train, or engine, after the accident. Where was that train when it stopped? A. Why, the engineer told me it was at Halsted street—

THE COURT: No, what did you see?

Q. Was it a couple of blocks down from Harrison street? A. Why, it must have been about a couple of blocks; I couldn't just say exactly. I seen the red light that an engine has in the back of it.

Q. It was about two blocks from Harrison street? A. That is where it stopped, I should think; that is where I was told. I couldn't just say, for it was dark; I couldn't just very well say if it was two blocks; it must have been about two blocks, I should think.

Q. And how far down toward the Brick Church station did you go after the accident? A. Why, about 40 feet.

Q. (By the Court.) Beyond the station? A. No, beyond Harrison street, where the accident happened.

Q. (By Mr. Scott.) And where was it that you first saw the red lights? A. It was there, where I stopped, where I met the engineer and fireman.

Q. And from that point you could see the red lights on the rear of the train? A. Just could see the red light; I couldn't make out anything else.

Q. Were there one or two? A. I believe there was one.

By The Court:

Q. You saw that from the 40 foot point that you reached in walking toward the Brick Church station? A. Yes, sir; I did.

Q. That is, from that point you saw the red light? A. Yes, sir.

Q. Mr. Schnackenberg, what was your last birthday? A. Now?

Q. The last one. A. Why, the 4th of July.

Q. Are you twenty-one now? A. Twenty-two.

Q. You were twenty-two on the last 4th of July? A. On the last 4h; yes, sir.

Q. How long did you stay with Mr. Roll? A. Up to Roll's?

Q. How long were you there? A. I was there about a year and two months.

Q. At $15 all the time? A. Yes, sir.

Q. Were there any deductions from you wages on account of your absence? A. No, I don't believe there was; he always paid me the $15 a week.

Q. And when was it that you went to the place that you are now employed? A. Why, I guess it is about a year ago last May.

Q. And did you start in at $16? A. Yes, sir, I did.

Q. And you are still getting that? A. Yes, sir.

Q. Have you been able to work steadily? A. No, I have not.

Q. Have you had any deductions from your wages? A. No, sir; I haven't had no deductions; he has always paid me full wages, too.

Q. Do you remember where you left your order on Kenilworth Place? A. I believe it was right on the corner, No. 1.

Q. How far is that from the railroad? A. One block, right on the corner of Webster Place.

Q. Did you go any further north on Kenilworth Place than the corner of Webster Place? A. No, sir; I did not.

Q. You just turned around and went back and went out Webster Place? A. Yes, sir.

Q. Was the gateman who was then engaged at that crossing the same man who is there now? A. No, sir; there is a different man there now.

Q. Just when was it that you saw the gateman that morning? A. After I had picked myself up from the ground.

Q. And what did you see? A. What did I see?

Q. Yes. A. I see him coming from the station in the direction towards me.

Q. You mean that he was coming from the direction of the shanty, or that he was coming out of the shanty? A. Out of the shanty.

Q. You mean that you saw him come out of the door of the shanty? A. Yes, sir; I did, for I walked towards the shanty first.

Q. Do you know his name? A. No, sir; I don't.

Q. Did you know him? A. Why, I just know him to see him, that he was stationed there, not personally.

Q. Not personally acquainted with him? A. No, sir.

HARRY RAWNSLEY, sworn in behalf of plaintiff.

DIRECT EXAMINATION BY MR. FLANAGAN:

Q. Mr. Rawnsley, you are employed in the court house here, are you not? A. Yes, sir.

Q. And where do you reside? A. 149 Day street, Orange.

Q. And on January 25, 1913, did Henry Schnackenberg, the plaintiff in this case, board with you? A. Yes, sir.

Q. And for how long before that had he boarded with you? A. Well, he boarded about five months before this accident.

Q. Did you see him frequently during the five months? A. Every day.

Q. Will you tell us what his general appearance with reference to his health was? A. Oh, he was a good, strong, red-faced German boy. This is when he came over here.

Q. And you know when he met with this accident, do you not? A. Yes, sir.

Q. On the 25th of January, 1913? A. Yes, sir.

Q. Did he continue to live with you after that? A. Lived with me for about nine months after that.

Q. Did you notice any difference in his physical condition after this accident? A. Oh, his nerves seemed to be all gone; I noticed that all the time.

Q. How did that manifest itself? A. Well, he was nervous. He would go up and go to bed, and I would be sitting there reading some nights, and he would come back downstairs, and he would say that every time when he started to go to sleep something would come black before his eyes, and he couldn't sleep.

Q. Did he complain of pain? A. No, he didn't

complain much of pain; he wasn't feeling good.

Q. Did he take his meals at your house, too? A. Yes, sir.

Q. Did you notice any difference in his appetite before and after this accident? A. Oh, yes, he never ate while he was in my house the same again.

Q. How long did that continue? A. About the whole nine months. He would just nibble things. He used to be a good eater.

Cross examination waived.

DELLA SCHNACKENBERG, sworn in behalf of plaintiff.

DIRECT EXAMINATION BY MR. FLANAGAN:

Q. Mrs. Schnackenberg, you are the wife of Henry Schnackenberg, the plaintiff? A. I am.

Q. When were you married? A. We were married September 16, 1914.

Q. And for how long before that time had you known Mr. Schnackenberg? A. I knew him from three months before the accident.

Q. Some time in the latter part of 1912? A. Yes, sir.

Q. Did you see him frequently before you were married? A. Yes, I did.

Q. What was his general condition of health before that time? A. Well, before the accident he was very healthy, very robost, and he was very lively before, more so than after.

Q. Now, you saw him after the accident, did you? A. I saw him after the accident very frequently.

Q. And what change, if any, did you notice in his physical appearance? A. Well, he did not

seem to care as much about going out as he did before and he wasn't very lively any more, and when he came to my house he was always nervous, very nervous, and he always complained of backache, and has yet.

Q. (By the Court.) You are now speaking of the time before you were married, when he came to your house? A. Yes, sir.

Q. (By Mr. Flanagan.) Now, since your marriage? A. Since my marriage he still complains of backache. I have to rub him. He has been to the doctor several times. Of course, eating, I didn't know much about him before we were married, but he doesn't eat very much.

Q. Do you know any occasions when he has come home from work in the middle of the day? A. Oh, yes, sir; very often.

Q. And what does he do when he comes home? A. He always goes to bed.

Q. And you say that you have rubbed his back? A. I have; yes, sir.

Q. What sort of applications have you rubbed his back with? A. Well, I have rubbed it with alcohol and then with a prescription by the doctor.

Q. How often do you attend to him? A. Well, when he comes home from work I always do it and nearly every other night at other times.

Cross examination waived.

RICHARD SCHNACKENBERG, sworn in behalf of plaintiff.

DIRECT EXAMINATION BY MR. FLANAGAN:

Q. Mr. Schnackenberg, you are the uncle of Henry Schnackenberg, the plaintiff in this case, are you not? A. Yes, sir.

Q. On January 25, 1913, he was in your employ as a driver, was he not? A. Yes, sir.

Q. Do you know how long he continued in your employ after that? A. After the accident?

Q. Yes. A. Well, I think it was about a week; I am not sure, but I think it was about a week.

Q. Do you remember his hiring a boy to help him on the wagon for two weeks after the accident? A. Yes, he had a man on the wagon with him.

Q. For how long? A. Why, for the length of time—I don't remember exactly if it was a week; it might have been over a week, but I know he had a man with him for a whole time.

Q. And then he left your employ, did he? A. Yes.

Q. Now, for how long before this accident had he worked for you? A. Why, I think it was about six months.

Q. And you saw him very frequently during that time, did you? A. Yes, I saw him every day.

Q. And what was his condition of health during that time? A. Well, he was always in the best of health.

Q. Did he ever lose any time because of illness before that? A. No.

Q. During that time, rather? A. No.

Q. How about after the accident, did you notice any change in his physical appearance or condi-

tion? A. Yes, there was. He wasn't able to do his work; I had to let him go.

Q. What were his wages at that time? A. Why, I was paying him $15 a week and a commission.

Q. And that commission amounted to about $5 a week? A. Yes, two per cent.; he would make about $5 a week.

Q. Have you seen him since he left your employ? A. Have I seen him?

Q. Yes. A. Off and on, yes.

Q. And what have you to say with regard to his physical appearance during the last year, say? Compare that with what it was before the accident. A. Well, I believe he isn't near as healthy as he was before the accident; that is, in appearance and other things, such as not being able to sleep; he has complained of that.

MR. SCOTT: I ask that that be stricken out.

THE COURT: Yes. Never mind what he said to you, but describe what you yourself have observed.

WITNESS: Well, I have observed that he did not look as healthy as what he did before the accident.

Q. You owned this horse and wagon that Henry was driving that day? A. Yes, sir.

Cross examination waived.

PLAINTIFF RESTS.

JOHN KING ADAMS, sworn in behalf of defendant.

DIRECT EXAMINATION BY MR. SCOTT:

Q. Dr. Adams, you are a graduate of what hospital, or what college?

MR. FLANAGAN: I will admit the Doctor's qualification.

MR. SCOTT: All right.

Q. Do you remember examining for the railroad company young Mr. Schnackenberg? A. Yes.

Q. Do you recollect when that was? A. In no way except from the record.

Q. Was it after an accident to him or not? A. Yes, it was.

Q. And do you remember about how long it ago it was? A. I should say it was in the neighborhood of two years.

Q. Where was that examination made? A. At the house where he lived, on Day street.

Q. And will you tell the Court and jury what you found at the time—what you found his condition to be? A. When I saw him the only visible injury which was apparent to me was a slight swelling and stiffness of the little finger on the right hand.

Q. What was the character, or nature, of your examination? A. The character of the examination was asking the history of the accident and then examining the patient. He said, when I asked him to remove his clothes, that it was unnecessary, as he had no marks of injury.

Q. Did he make any complaint to you at that time of any injury to his body? A. To what?

Q. To his body—his spine or his body. A. Yes, he said he had a pain in the back.

Q. You have told us that he said he had no marks? A. He had no marks, yes.

Q. At that time did Mr. Schnackenberg tell you that he was struck by the Buffalo Express? A. The Buffalo Express, going east, as he expressed it, as I recall.

CROSS EXAMINATION BY MR. FLANAGAN:

Q. And did he further say in that connection, Doctor, that he thought it was the Buffalo Express because that, to his mind, was the fastest train on earth, or words to that effect? A. He may have done so, but if he did, I don't recall it now.

Q. And did he not further say that it must have been the Buffalo Express, or something as fast as that, because it went through like a whirlwind? A. It is possible that he did, but I don't recall it.

Q. Did you examine his spine, Doctor? A. Simply to the extent of having him bend and manipulate his body.

Q. You did not remove his clothing? A. No.

Q. And manipulate the— A. No.

Q. The vertebrae or— A. No, I palpated them through his shirt.

Q. Did you examine his head or neck? A. In a general way; yes, sir.

Q. He told you that he had been dragged out of the wagon and struck the ground upon his head and shoulders, did he not? A. No, sir; I don't recall that he did now. He told me that he was thrown out of the wagon as a result of this collision between the horse and the locomotive, and that he was unconscious for a few moments, and then picked himself up; but whether he said that he was dragged out, I don't recall.

Q. And you are sure that the only reference that he made to his back at the time of your ex-

amination, shortly after the accident, was that he was suffering pain in his back? A. As I recall it.

Q. He may have made further disclosures along that line, but you do not recall it? A. I hardly think so.

WALTER S. WASHINGTON, sworn in behalf of defendant.

DIRECT EXAMINATION BY MR. SCOTT:

Q. Dr. Washington, you are a graduate of what hospital?

MR. FLANAGAN: I will admit Dr. Washington's qualification.

MR. SCOTT: I will qualify the doctor.

Q. Of what college are you a graduate? A. I am a graduate of Trinity, Toronto.

Q. And you have practiced medicine for how long, sir? A. Thirty-nine and a half years.

Q. And where has that practice been? A. About twenty-eight and a half of it has been in Newark and the balance was in the West.

Q. And have you been connected in a medical capacity in any way with the County of Essex? A. Yes, I was the county physician of Essex county for eight years.

Q. Did you have occasion, at the request of the defendant company, to examine Mr. Schnackenberg? A. I did, yes, sir.

Q. And can you recall when that was? A. Yes, sir; it was on March 3rd of last year.

Q. Will you tell the Court and jury what you found at that time? A. I examined Mr. Schnackenberg's eyes and his heart and his lungs and his

back, and I examined his knee jerks, examined him for tremor and examined him for static ataxia. So far as all of these things are concerned, his condition was normal. He complained of two tender points at the lower part of his back. Of course, those are subjective symptoms, and I knew nothing but what he told me, but I examined him for that. The next day I examined his finger. It was overlooked, or I did not remember it, the first day. I examined the little finger of his right hand, and found that it was ankylosed, stiff, partially closed. He could close it on his hand, but he could not completely open it. So that as far as my examinations are concerned, the only abnormal thing was the ankylosis of this joint of this little finger.

Q. Could you find anything the matter with his back from your examination? A. There was no way I could determine.

Q. What? A. There was no possible way for me to determine anything abnormal about his back.

Q. And there was nothing at that time that you could have pointed out to a jury showing the result of any injury aside from the finger? A. Nothing whatever.

Q. Have you observed Mr. Schnackenberg in court to-day? A. Yes, I heard him testify to-day.

Q. And from your observation of him what would you say as to whether there was any change in his condition since your prior examination. A. Nothing that I could—

MR. FLANAGAN: I do not think the observation that the doctor has made of this young man qualifies him to answer that question intelligently, or to be of any evidential value. It has been testified to by

the doctor that this young man had what he called subjective symptoms, something that he could not see, and that he had an ankylosed finger, that he could see. Now he is asked whether having sat around the court room and having heard this young man testify on the stand, he could notice any change in his condition.

THE COURT: He can testify as to general appearance, and so on. Let the doctor tell what he knows.

WITNESS: I heard part of his testimony the last time he was on the stand; I did not hear all of it; I heard practically all of his testimony this morning—

MR. FLANAGAN: That is not an answer to the question.

THE COURT: Go on, Doctor.

WITNESS: From my observations of those times, I can see no difference between his appearance to-day and what I saw of him a year ago last March.

CROSS EXAMINATION BY MR. FLANAGAN:

Q. How long did you observe him a year ago last March, Doctor? A. When do you mean?

Q. I am using your own expression. You have just said, in answer to a question, "when I saw him a year ago last March." I now ask you how long you had him under observation a year ago last March? A. Well, I do not remember how much of his testimony I heard; I did not hear all of it, I know, but I heard part of it. At least, I am quite sure that I did not hear all of it, but I heard part of it. Then I saw him when I examined him, and then I saw him the next morning, particularly when I examined his finger. So

that I am just speaking of my general examination and not my particular examination—

Q. You are wandering off and you are not answering my question.

Question read.

A. I answered that.

MR. FLANAGAN: I think I am entitled to an estimate from the doctor as to the length of time that he had him under observation, not what the witness was doing during the time that he had him under observation.

BY THE COURT:

Q. Can you give us a closer estimate as to the time? A. I think I gave a fairly close one in the answer. The answer can be read.

Q. You mean you heard a part of his examination in court, I suppose, on the former trial? A. I heard part of it.

Q. In court? A. In court. But I did not hear all of it; at least, I do not think I heard all of it, but I heard part of it. The rest of the observation was during my examination of him.

Q. And the next day you looked at his finger? A. The next day I looked at his finger.

Q. Now, Mr. Flanagan would like to know about how much time all this occupied, if you can tell us. A. The examination took probably ten or fifteen minutes on the first day. Of course, the examination the second day was only a matter of a few seconds, examining his finger. It took no time to determine what that condition was. The length of time that I heard him on the stand I do not remember.

By Mr. Flanagan:

Q. Your examination, Doctor, was made during the course of the trial in one of the ante-rooms of the Supreme Court room, was it not? A. Yes, sir.

Q. Anid it was only such examination as you could make without apparatus, or anything of that sort? A. I didn't need any apparatus.

Q. It was only such examination as you could make without the aid of apparatus; is not that the fact? A. I do not know what you mean by such a question.

Q. Well, did you use any apparatus in your first examination? A. Do you mean instruments? Is that what you mean by "apparatus"?

Q. Yes. A. I used a stethoscope; that is an apparatus.

Q. That is simply to test his heart? A. Well, that is the apparatus you speak of, I suppose.

Q. And there are other— A. I used my fingers —that is apparatus—and my eyes.

Q. And there are other instruments by which you can detect nervous symptoms, are there not? A. None that I ever heard of.

Q. In nerve trouble you never knew or heard of any? A. What do you mean by "nerve trouble"?

Q. The patient complains of feeling nervous. I assume that he must be suffering from some form of nervous disorder. Is there any apparatus by which you can detect nervous disorders of the body? A. Not of that kind.

Q. Is there any apparatus by which you can determine nervous disorders of any kind to which the human body is subject? A. No, none whatever.

Q. Your examination in the ante-room lasted about ten minutes, did it not, Doctor? A. Yes, sir.

Q. I was present at that examination, was I not? A. Yes, sir.

Q. Now, when you speak of a subjective symptom, you mean something that is not visible to the eye? A. Yes.

Q. But you do not mean to intimate that because you cannot see it it is not present? A. No.

Q. So that he may be suffering as he testifies that he is without there being any objective signs of it? A. Yes.

Q. That would be visible to the eye? A. Yes.

Q. You have not examined him since the last trial, have you, Doctor? A. No.

Q. And, of course, you do not want the Court and jury to understand you as saying that he may not now be suffering from the pains that he testifies he is suffering from? A. Oh, no.

JOHN T. DRAKE, sworn in behalf of defendant.

DIRECT EXAMINATION BY MR. SCOTT:

Q. Mr. Drake, you are a civil engineer? A. Yes, sir.

Q. And you are connected with the Lackawanna Railroad Company? A. Yes, sir.

Q. Do you know where Harrison street is, in East Orange? A. Yes, sir.

Q. How long have you been a civil engineer? A. For about sixteen years.

Q. Were you familiar with the Harrison street crossing in 1913? A. Yes, sir.

Q. And what have you to say as to whether the fixed objects at the crossing and in the neighborhood of the crossing west, towards Kenilworth Place and beyond, are the same at the present time as they were in January, 1913? A. They are the same.

Q. Do you kow where the garage is at the corner of Harrison street and McKinley avenue? A. Yes, sir.

Q. On what corner of Harrison street is that? A. That is the southwest corner.

Q. Did you make any observations from Harrisson street looking west toward the tracks of the D. L. & W. Railroad? A. Yes, sir.

Q. And when did you make those observations? A. I think it was at the same time, in March or April last, of this year.

Q. And how did you make those observations? A. With a surveying instrument.

Q. And with or without the assistance of any other person? A. With the assistance of others,

Q. Were these made in the daytime? A. In the daytime.

Q. Will you just tell the Court and jury how the observations were made. A. A surveying instrument, a transit, when put in line with the corner of this garage, and a fence to the west, which limited the view, and the line fixed by those two points intersected with the center of the eastbound track.

Q. (By the Court). What were the two points? A. The corner of the garage and a fence about 520 feet to the west of the garage—a fence running toward the garage.

Q. (By Mr. Scott.) Where did you make your first observation from, Mr. Drake? A. That was the only observation, was this observation determining where the line fixed as I have described would interset the center of the eastbound track

BY THE COURT:

Q. Let me see if I understand you. You ran from the corner of the garage to the northerly corner of the fence? A. Yes.

Q. To the corner of the fence nearest the track? A. Nearest the track.

By Mr. Scott:

Q. Where were you when you made that observation as regards Harrison street? A. I was at the instrument in Harrison street first.

Q. In the road? A. In the road.

Q. And will you state just what the result of that observation was? A. The line fixed as I have described intersected the track at a point 1122 feet from the center of Harrison street.

Q. And on a level or even with the edge of the garage? A. Yes, sir; even with the edge of the garage.

By the Court:

Q. That is, from the center of Harrison street, I suppose? A. Yes, sir.

Q. Where your instrument was? A. Yes, sir.

By Mr. Scott:

Q. You say that is 1120 feet? A. 1122 feet; yes, sir.

By the Court:

Q Is your terminal point the center of the track? A. The center of the track; yes, sir.

Q. The center of the eastbound track? A. The center of the eastbound track.

By Mr. Scott:

Q. What have you to say as to whether that observation that you made was an unobstructed observation? A. Well, it was necessarily an unobstructed observation.

Q. It was necessarily an unobstructed observation? A. Yes, sir.

Q. What was the distance, if you know, from

the edge of the garage, to the nearest rail of the eastbound track? A. About 47 feet.

Q. 47 feet? A. 47 feet.

Q. Did you make any other or further observations with reference to what view you would have between the edge of the garage and the first rail of the track? A. No, sir.

Q. What have you to say as to whether there were free places of observation? A. There are free places of observation. When I say I made no other observation, I mean that I made no other exact observation.

Q. The eastbound track, running from Harrison street up toward Orange, do you know whether that is curved or straight? A. It is straight for nearly a half a mile.

Q. For half a mile? A. For nearly a half a mile.

Q. And can you tell us how far Halstead street is east of the Harrison street station? A. How is that?

Q. How far Halstead street is east of the Harrison street station? A. Why, it is nine or ten hundred feet, about nine hundred or ten hundred feet.

Q. You prepared a map of this situation, Mr. Drake? A. Yes, sir.

Q. And you have that with you? A. Yes, sir.

Q. And what does that map represent? A. It represents the surroundings of this crossing and the tracks of the railroad and other objects

[Map produced by witness placed upon the wall.]

THE COURT: Indicate in a general way what it is that the map shows.

MR. SCOTT: I will make an offer of the map at this time.

THE COURT: Mr. Flanagan wants an opportunity to examine on it. You may cross-examine now, if you like.

BY MR. FLANAGAN:

Q. Mr. Drake, you say that this map represents truly the situation as it existed at the Harrison street crossing, in East Orange, on January 25, 1913? A. Yes, sir.

Q. How do you know that? A. I have had a general acquaintance with that region for the last sixteen years.

Q. You have been employed by whom during the sixteen years? A. By the Lackawanna Railroad.

Q. In what capacity? A. In the engineering department.

Q. On how many occasions have you examined the premises in question? A. Well, that is difficuilt to say. I have been there a good many times in the past fifteen or sixteen years; I have ridden across it hundreds of times, I suppose.

Q. When you say "ridden across it," you were just like any other pedestrian on the highway, or traveller? A. You simply used it as a highway, to cross the tracks? A. Yes.

Q. You did not make any particular observations at that time as to the surroundings? A. I noticed the surroundings in a general way; yes, sir.

Q. In a general way? A. Yes, sir.

Q. Now, these other times that you have been there what was your object in going there? A. I am unable to say at the present time. I have been on that crossing a good many times during the period of my employment by the Lackawanna Railroad.

Q. Well, what was your purpose in going there

at any of these times? A. Well, I have been engaged in surveys, a survey of this region, running levels, and so forth; I have been in this region at one time for the purpose of determining how a certain side track might be laid. I couldn't say exactly as to how many times I have been there or what called forth each particular occasion.

Q. But you have never made any particular observation to determine the fixed objects, have you? A. Yes, sir.

Q. When? A. When the survey was made.

Q. And when was that? A. Last spring.

Q. That was the spring of 1915, but previous to that time did you ever make any observation of the surroundings and fixed objects? A. Well, I have told you as well as I am able; I don't know how I could tell you any more or less.

Q. Before you went there for the purpose of making observations for the purpose of making this map have you ever examined the premises with a view to ascertaining what the fixed objects were surrounding that crossing? A. Well, I don't know that I can say any more than I have.

Q. Do you not understand the question? A. I am unable to say any more than I have.

Q. Your map does not show the surrounding trees or telegraph poles, does it? A. Yes, it does.

Q. What? A. It does.

Q. Where do you indicate those? A. [Indicatin on map.] There is a pole, there is a pole, there is a tree, there is another pole and another tree, switch stand, telegraph pole, tree, one tree there, two there and two there.

Q. Do you know whether that switch stand was there on January 25, 1913? A. Yes, sir.

Q. You do? A. I do.

Q. What do you say as to that? A. I do know it was there.

Q. You say it was there? A. It was there.

Q. On which side of the track? A. On the southerly side.

Q. Can you indicate the switch stand in what purports to be a picture of this situation [photograph shown to witness]? A. I can't see it; no, sir.

THE COURT: I think there is no evidence as to when these photographs were taken.

MR. FLANAGAN: No, sir; there is not. They were used on the other trial.

THE COURT: It does not afford any proof as to the particular date.

MR. FLANAGAN: No, sir; that is true.

Q. Can you see the switch stand in that picture [shown to witness]?

THE COURT: What picture is that?

MR. FLANAGAN: I am showing him these photographs.

THE COURT: Well, I want to know how to put them down. If they are marked, I can put them down. If they are not marked, let us have them marked.

MR. FLANAGAN: Well, I cannot vouch for their accuracy.

Q. Why are you so sure that the switch stand was there at the time of the accident? A. On account of having made a detailed survey for a side track there at that point.

Q. Some years ago? A. Yes, sir.

Q. What has that to do with the erection of the switch stand? A. Because that was a portion of the survey made at that time.

Q. Did you ever see the switch stand there? A. Most assuredly; yes, sir.

Q. When was it put there? A. I don't know.

Q. Well, why do you say it was put up before January 25, 1913? A. Because I made a survey of it before then.

Q. Who made a survey? A. I did.

Q. Is this the survey that you made? A. No, sir.

Q. Well, what was the date of your survey? A. I don't know; it was several years ago.

Q. Well, so is January 25, 1913, several years ago, is it not? A. Well, it is two years ago, Yes.

Q. Well, if you do not know what day you made your survey, how can you say it was before January 25, 1913? A. Well, it was three or four years ago; it must have been before that time.

Q. Now, I do not ask you to conclude from this experience what it must have been; I ask you if you know? A. It was three or four years ago—

Q. No, you said it was some time ago; that is what you said. A. I said three or four years ago.

Q. But, as I understand you, you never made any detailed examination of the surroundings of the Harrison street crossing before you made this map, with a view to placing or fixing the fixed objects about that crossing? A. Yes.

Q. What? A. Yes.

Q. When did you do that? A. I said yes in agreement with your question.

Q. Well, then, you mean no. A. You asked me if—you said you understood certain things, and I said yes.

Q. Then, as I understand you, you have not made any detailed examination of that for that purpose, except when you made this map? A. Not a detailed, no.

MR. FLANAGAN: Now, if your Honor

please, I think the witness has exhibited that his knowledge of the surroundings does not measure up to the standard required to make this map evidential.

THE COURT: Let us see what the witness does know.

BY THE COURT:

Q. Do you know how long the garage has been there on that corner? A. Well, it has been there for six or eight years at least.

Q. Do you know how long those trees have been there? A. They have been there as long as I have been acquainted with the road, over fifteen years.

Q. Do you know how long those telegraph poles have been there? A. Those telegraph poles have been there—I can't give definite evidence on the telegraph poles; no, sir.

Q. Do you know how long that line has been there? A. The railroad has been there for over sixty years.

Q. I meant the telegraph line. A. The telegraph line has been there while I have been connected with the road.

Q. Do you know whether any bushes or trees have been cut down on the south side of the track on the west side of the Harrison street crossing in the last three or four years? A. There have been none.

THE COURT: I do not think there can be any difficulty about using this map.

MR. SCOTT: I will renew my offer.

THE COURT: I will receive it, subject to cross examination. Some inaccuracy may be developed by cross examination. You may examine the witness to show what it shows.

BY MR. SCOTT:

Q. Have you indicated on that map the observation that you have made and testified about? A. Yes, sir; by a red line [indicating on map]. This red line is drawn through the corner of the garage and through the corner of the fence down here at Kenilworth place and extending on until it intersects the track a long distance off the map.

BY THE COURT:

Q. What is your scale? A. The scale is 10 feet to the inch.

Q. This is north (indicating)? A. That is north.

Q. Where are the gates? A. Here are the gates on the southerly side, and these are the gates on the northerly side [indicating].

Q. Brick Church station is down here [indicating]? A. Yes, sir.

Q. This is Harrison street [indicating]? A. Harrison street.

Q. This is the eastbound track? A. Yes, sir; eastbound track.

Q. And this is the westbound track [indicating]? A. The westbound track.

Q. And this is McKinley avenue? A. That is McKinley avenue [indicating].

CROSS EXAMINATION BY MR. FLANAGAN:

Q. When you say that you could see the distance indicated by that red line, just tell us how you fixed that distance? A. I set up the transit, as I have already described, on the center of Harrison street in line with this corner of the garage (indicating)—

Q. In line with the corner of the garage? A.

Yes, sir—and this corner of the fence, and got the sight pole held by an assistant on each rail of the track.

Q. How long was the sight pole that the assistant held? A. 7 or 8 feet long.

Q. Painted how? A. Red and white.

Q. And you made this observation at what time during the day? A. Some time in the morning, if I remember correctly.

Q. A bright, sunshiny day? A. An ordinarily clear day.

Q. It was what day? A. What date did you make this observation? A. Somewheres around the 1st of April; it might have been March or April, last year.

Q. Did you follow him up the track as he walked up? A. Yes, sir.

Q. And let him walk past the poles and the trees of Kenilworth place? A. Yes, sir.

Q. And on up? A. Yes, sir.

Q. And then told him to stop, or indicated him to stop, when he got beyond the limit of your vision? A. Yes, sir.

Q. And that is what you mean when you say that, standing on the corner, or setting your instrument up in the center of Harrison street opposite the garage, you can see that distance up the track? A. Yes, sir.

Q. Did you watch approaching engines on that day coming from the west to the east? A. I don't think any came along at that time.

Q. And you made no other observations at that crossing except on that day? A. Not for this special purpose; No, sir.

Q. You made none at night? A. No, sir.

Q. Or any other time except when the sun was out and the day was clear and it was bright? A. Yes, sir.

Q. Now, Mr. Drake, you have already stated that as you stand in Harrison street and look west, the fence to the left of Kenilworth place, as shown on the map, limits your vision? A. Yes, sir.

Q. You mean that you cannot see any further along the track than that? A. No, sir.

Q. And directly in front of this fence there begins a line of trees along the track, does there not, as you move east from Kenilworth place? A. There are several trees; Yes, sir.

Q. Now, will you tell me how many there are as indicated on your map? A. They are all indicated there. [Indicating on map.] Here are three trees together, here are two, here is another one, here is another, and another—one, two, three, four, six, nine.

Q. And how many poles are there? A. Four.

Q. Nine trees and four poles? A. Yes, sir.

Q. Did you make any other observation toward the west than the observation at the corner of the garage? A. No, sir.

Q. How many feet from the track was that observation? A. Approximately 50 feet.

Q. And you made no observation other than that at any other distance from the track? A. No, sir.

Q. Did you walk toward the track from this position opposite the garage? A. Yes, sir.

Q. And look down the track, west? A. Yes, sir.

Q. Did you notice that as you approached those poles and trees seem to get closer and closer together until when you get in a certain position that they formed almost a solid wall? A. When standing in line with the trees, of course, there is.

Q. And as you approach the crossing they get closer and closer together, as you look west, than when you stood opposite the garage, practically 50 feet away? A. You mean that they occupy a smaller space in your vision?

Q. Yes. A. A smaller angle in your vision?

Q. Yes. A. Yes.

Q. That is true. And, of course, your vision down the track is necessarily limited to that extent, is it not? A. The vision down the track really extends further the nearer you approach the track. These individual trees cut out small portions of the vision, of course.

Q. Do you not get to a point, as these trees and obstructions get closer together in your vision, where your vision down the track is restricted and limited? A. Yes, sir; as you approach the track you can see further and further down toward Orange. At all times each pole and each tree does cut out a small sector of the vision.

Q. Then how do you say that you can see further down toward Orange? A. It is the fact. Each tree at any point within this range of 50 feet does cut out a certain portion of the vision, but it does not reduce the total length of vision down the track.

Q. I do not believe you understand what I mean, Mr. Drake. Perhaps I can illustrate it by using these books. (Illustrating with books.) Do you say, assuming that you are approaching me and these are poles along the track, that you can see further down the track as you approach the track, assuming that the track is here, although you are willing to say that there comes a point when that line of trees forms a solid wall? A. I have not said that.

Q. Well, do you say it? A. No, I do not.

Q. Well, do you say there is not a point where those trees and poles form so effective a wall that you cannot see beyond the first one? A. Which do you call the first one.

Q. The first one to your left from the crossing. A. Well, it might be the first to the left or to the right; I don't know.

Q. We are talking about—A. Do you call this the first one or that the first one [indicating]?

Q. No, that would be the first that you would see looking from Harrison street [indicating]. A. Yes. That is a tree there—

Q. Poles and trees; I am grouping them together. What do you say about that? A. What is the question, again please?

Q. [Question read as follows: "Well, do you say there is not a point where those trees and poles form so effective a wall that you cannot see beyond the first one?"] A. I say that they do not form so effective a wall that one cannot see beyond the first one.

Q. I mean before you get upon the track? A. Yes, before you get upon the track.

Q. And the safety gate—I suppose you call that the westerly safety gate on the southerly side (indicating)? A. Yes, sir.

Q. When that is up that also tends to obstruct one's vision as he approaches the track? A. When he gets in line with it, yes.

Q. And as he gets in line with all the other objects? A. Each individual object does form a certain obstruction to the track—to the view.

Q. You have already said that the fence at Kenilworth place limits the vision? A. Yes, sir.

Q. Do you mean that one cannot see beyond that, looking up to the west from Harrison street? A. You cannot see an object—

THE COURT: From what point in Harrison street?

MR. FLANAGAN: The crossing.

THE COURT: You mean in line with the corner of the garage?

MR. FLANAGAN: At the corner of the garage, yes.

THE WITNESS: It limits the view of all objects not any taller than the fence.

Q. And the trees are matted pretty closely around that fence, are they not? A. I don't think so.

Q. Well, does not your map show three together there? A. Three together; they are standing in line parallel with the track.

Q. Close together? A. Yes, sir. They are really all growing from one root; it is a triple tree.

Q. Now, Mr. Drake, do they not effectively block your vision of that fence? A. What do you mean by "effectively"?

Q. What do you think I mean? A. I think you mean that it so blocks it that you cannot see anything.

Q. I mean, to all intents and purposes, do not those trees and fence block your vision to the west of it? A. No, sir.

Q. This pole that your assistant carried was how many feet higher than the fence? A. It probably was not any higher than the fence.

Q. I am not dealing in probabilities. Do you not know how high it was? A. No, I do not.

Q. And you are an engineer? A. Yes, sir.

Q. And use the same sort of a pole all the time? A. Yes, sir. This pole was either a seven foot pole or an eight foot pole.

Q. Or a nine foot pole? A. No.

Q. Or a six foot pole? A. No.

Q. Or a six and a half foot pole? A. No, seven and eight.

Q. Well, you do not know which? A. No. We have some seven and some eight. Which this was I do not know.

Q. And by looking very minutely to the west and fixing your attention on the fact that you wanted to stretch this out as far as possible, you could see the red mark, or you could see this gentleman when he got beyond the west of the fence? A. I had no desire to stretch the distance as far as possible. As to the rest of the question, I say yes.

Q. Your object in going there was to make a survey of the situation so as to unable you to testify? A. Yes.

Q. And you did not try to minimize the distance that you could see, did you? A. No, sir.

THE COURT: Before we take our recess, I will say that, if counsel on either side desire to make the application, and if the jury think it would be useful, I will send the jury up to see this crossing.

MR. FLANAGAN: I intended to make such an application at the close of the case. I think it would be very useful, particularly in view of the testimony of this last witness, so that the jury can see exactly what is there.

THE COURT: I think it is desirable, in view of the testimony of any witness that has been called or may be called.

After discussion, counsel agree that the jury be sent to view the crossing in question.

At one o'clock, P. M. the court takes a recess of one hour.

AFTER RECESS.

John T. Drake—Cross.

JOHN T. DRAKE, resumes the stand in behalf of defendant.

CROSS EXAMINATION (continued) BY MR. FLANAGAN:

Q. Mr. Drake, is the westbound track west from Harrison street perfectly level for a distance of half a mile, say? A. Yes, sir.

Q. Up to what point is it perfectly level? A. I think the grade begins to dip down when you get pretty near up to Orange station.

Q. But in the vicinity, say, 1000 feet west of Kenilworth place, it is practically level? A. Practically level; yes, sir.

Q. And continues practically level until it gets to Harrison street? A. Yes, sir.

Q. Did you make any measurements of the trees around Kenilworth place? A. That is, the trees along McKinley avenue?

Q. Yes. A. Yes, sir.

Q. How high are those trees? A. Oh, I made no measurements as to their height. They are 25 or 30 feet high or more.

Q. And what is the circumference of the limbs, or a line drawn around the edge? A. Well, some of these trees are quite large; they may be 20 feet across; others are small; they may be 5 or 6 feet across. That is not a measurement.

BY THE COURT:

Q. Do you mean inches or feet? A. No, the spread of the limbs.

Q. Oh, I thought you meant the trunk. A. No, the limbs. That is not a measurement.

BY MR. FLANAGAN:

Q. No, your best judgment. A. Yes, sir.

Q. How high would you say they were? A. Oh, they are at least 30—25 feet, the larger trees.

Q. Are they not as much as 50 feet high? A. I hardly think so. That is a pretty high tree.

Q. Well, are they 40 feet? A. They might be 40 feet.

RE-DIRECT EXAMINATION BY MR. SCOTT:

Q. Mr. Drake, what have you to say—from the point where you made this observation, and going toward the track, what have you to say as to whether the view west is obstructed to any extent by these trees that Mr. Flanagan has spoken about?

MR. FLANAGAN: I understood the witness this morning to say several times that he made but one observation, and that was at the edge of the garage, some 47 feet from the track, and I think I asked him several times whether he made any other observations near the track, and his answer to all those questions was that he had not.

THE COURT: I understood the witness to say, after describing the line that he ran, 1120 feet, as to which he said there was an unobstructed vision, and that from the edge of the garage to the near rail was 47 feet, that he made no further observation.

WITNESS: Might I explain that?

THE COURT: I am not asking questions. Is there anything that you wish to explain?

WITNESS: By that I meant not precise, no instrumental observations were made, no observations with a transit.

Q. Did you make any observations without this transit, or instrument? A. Yes.

Q. What have you to say as to where those observations were made? A. Well, there was no precise point, Mr. Scott. I observed the views, to what extent these various trees and poles would cut off, in a general way, until I was between this garage and the crossing, but at no particular, precise point.

Q. Where were these observations made, aside from the one you have spoken of? A. From the center of Harrison street.

Q. And between what points? A. Between this point, about 50 feet from the track, up to the track.

Q. And as result of said observations, what have you to say as to whether these telegraph poles and trees obscured the view to the west? A. Each telegraph pole cuts off, of course, a small segment of the view; each tree cuts off a small segment of the view. The limbs are trimmed to a height—on most of the trees are trimmed to the height of about nearly the height of a locomotive. With regard to the trees and telegraph poles alike, each cuts off a small segment of the view.

Q. Can you tell us how far you could see up the track west at any distance between the edge of the garage and the south rail of the eastbound track as compared with the view that you specially took and made measurements of? A. At every point closer than at the point which this precise observation was made one can see further down the track. In all cases the fence corner is what limits the view; that is what limits a clear—the whole view.

Q. Will you point out on the map the fence that you refer to? A. The fence is at this point (indicating.)

Q. And how far is that from the nearest rail of the nearest track? A. [Measuring on map.] That is 24 feet.

By The Court:

Q. What is this, the most westerly tree? A. No, the fence corner.

Q. That fence, you say, is an obstacle? A. That is an obstacle to the view; yes, sir.

Q. I meant to ask you, can you tell us how long that fence has been there? A. That fence has been there for six or eight years, anyhow.

By Mr. Flanagan:

Q. Mr. Drake, will you go to the map there and give me these distances? How many trees are there along the eastbound track in the vicinity of the fence that you have been speaking of, that you have shown on the map there? A. Five down to that clump of trees; that is eight, and two are ten.

Q. And how many feet from the fence is the tree that I indicate [indicating on map]? A. [Measuring on map.] 90 feet, about.

Q. Now, will you tell us the distance from the southerly rail of the eastbound track of these twelve trees, the respective distances? A. [Measuring on map.] Thirteen feet, the next is twelve, and thirteen; then there are three trees together, each of which is about twelve and a half feet; the next tree is sixteen and a half, the next is thirteen and the next is nineteen and a half and the next is sixteen.

Q. And what is the distance between the tree furthest to the west and the one furthest east of the group? A. [Measuring on map.] About 140 feet.

By The Court:

Q. Let me see if I understand that. Were is this group of trees at Kenilworth place? A. [Witness indicates on map.]

Q. And where is the 140 foot measurement,

where does that take you to? A. [Indicating on map.] From here to here. I didn't mean that; you didn't include that tree in the group.

MR. FLANAGAN: Where?

THE COURT: The question was in the vicinity of Kenilworth place.

MR. FLANAGAN: No, I was speaking of the group of ten trees.

WITNESS: [Indicating on map.] One, two, three, four, five, six, seven eight, nine, ten.

MR. FLANAGAN: I meant these trees, the nine trees.

BY MR. FLANAGAN:

Q. What is the dot on the map just above the most westerly tree? A. That is a telegraph pole.

Q. Now, how close is the most westerly telegraph pole shown on the map to the nearest rail? A. 9 feet.

Q. And of the group of nine trees shown on the map in the immediate vicinity of Kenilworth place, what is the distance from the most westerly of that group to the most easterly of it? A. (Measuring on map.) 88 feet.

Q. What is the building indicated on the map to the west of the fence at Kenilworth place? A. That is an artificial ice plant.

Q. And the most northerly corner of that is how far from the nearest track? A. Which track do you mean, the same one that we have been measuring to?

Q. Yes. [Measuring on map.] 24 feet.

Q. Does that also obstruct the vision to the west as does the fence at Kenilworth place? A. It does; the fence obstructs it before—

Q. That also obstructs the vision to the west?

A. It doesn't obstruct it more than the fence, except the high points.

Q. Does it not extend closer to the track than the fence? A. No, sir.

Q. Does not your map indicate that it does? A. No, sir; that is a low platform, about 4 feet above the ground.

Q. You understood my question this morning, when I asked you whether you had made any other observations, other than the one from the corner of the garage, did you not? A. I understood it to mean any observations of that character; that is, precise observations.

Q. Although you understood me to say "any observations," did you not? A. Well, we had under consideration observations of the character that we were talking about at the time; at least, I understood it that way.

Q. You understood me to mean any observations, did you not? A. I understood you to mean observations of that character.

Q. Since you have been at lunch have you been talking with your counsel? A. Not as to observations.

Q. But you have been speaking with him as to the testimony you gave this morning? A. No, sir.

Q. All of these observations, I understand, were made on a sunshiny day in April? A. I am not precisely clear as to what sort of weather it was. It was an ordinary day, not remarkably bright and not dull; it was an ordinary, clear day.

Q. Do you know whether the sun was shining? A. Yes, the sun was shining.

Q. Then, I say, the observations were made on a sunshiny day? A. A clear day.

Q. Well, the sun was shining, was it not? A. Yes, the sun was shining.

MR. SCOTT: I omitted one or two questions. I would like the permission of the Court to ask Mr. Drake one or two questions that I omitted.

THE COURT: You may ask them.

FURTHER DIRECT EXAMINATION by Mr. Scott.

Q. I would like you to state the distance from the crossing of the first tree, Mr. Drake. A. [Measuring on map.] 275 feet.

Q. And the next tree west from that tree? A. (Measuring on map.) 69 feet.

Q. And the distance to the third tree west from the second tree west? A. [Measuring on map.] 54 feet.

FURTHER CROSS EXAMINATION by Mr. Flanagan:

Q. Now, suppose you give us the distances of the poles from Harrison street going west. A. [Measuring on map.] The first pole is 56 feet.

Q. 56 feet? A. Yes, sir.

Q. Now, the next obstacle, whether it be a tree or a pole? A. [Measuring on map.] 128 feet.

Q. What is it, a tree or a pole? A. A pole.

Q. [By the Court.] 128 feet additional to the 56? A. Additional to the 56; yes, sir.

Q. [By Mr. Flanagan.] And the next? A. The next is a tree. [Measuring on map.] 91 feet.

Q. [By the Court.] Does that make up your 275 feet? A. That should make up the 275 feet.

Q. [By Mr. Flanagan.] And the next obstacle is what? A. The next obstacle is a telegraph pole, and that distance is 48 feet.

Q. And the next? A. The next is a tree, at a distance of 21 feet, and the next is a tree, at a distance of 54 feet.

Q. Yes. A. And the next is a telegraph pole, at a distance of 57 feet, and the next is a tree, at a distance of 7 feet.

Q. 7 feet? A. 7 feet. 50 feet beyond that is another tree, and that brings us up to the group.

Q. Of three trees? A. No, not three; it was nine trees.

By The Court:

Q. You say 6 feet? A. This last distance was 50 feet.

Q. 57 and then 7? A. Then 7.

Q. And then what? A. Then 50.

Q. 50? A. Yes, sir.

Q. (By Mr. Flanagan.) Continue. A. There are two trees together there; they are about 2 feet apart.

Q. (By the Court.) How far beyond the 50 feet? A. The next tree beyond the 50 is 2 feet.

Q. 2 feet? A. 2 feet.

Q. And two trees? A. No, the distance of 50 feet took us to a tree and the distance of 2 feet to another tree; they are growing right close together. Then 27 feet takes us to a group of three trees, 20 feet more to another tree, 14 feet to another tree, 1 foot to another, 20 feet to a telegraph pole, and beyond that about 6 feet to the last tree.

By Mr. Flanagan:

Q. That brings you up to the vicinity of the fence at Kenilworth place? A. That takes us beyond the fence; that takes us about 51 feet beyond the fence.

Q. These distances you measured from the center line of Harrison Street? A. The center of Harrison Street.

Q. As you stand near the track, the southerly

rail of the eastbound track, facing north. if the safety gate on that side were up that would be the first obstruction that would meet your vision, would it not? A. Yes.

Q. How far from the safety gate is the first pole? A. (Measuring on map). About 25 feet.

Q. 25 feet from the first pole to the safety gate? A. To the gate post.

Q. To the gate post? A. Yes, sir.

Q. Mr. Drake, were any photographs made at the time you made this survey? A. Not at the time we made the survey.

Q. Not at that time? A. Not on that day, no, sir.

Q. Were they made, to your knowledge, any other time? A. There were photographs made some time previous to that.

Q. Do you know how shortly previous? A No, I don't know.

Q. Well, within a month? A. Oh, it was several months before that.

Q. Were you present when they were made? A. Yes, sir.

FURTHER DIRECT EXAMINATION BY MR. SCOTT:

Q. Mr. Drake, do you know whether these were the photographs taken at that time (photographs shown to witness)?

MR. FLANAGAN: One moment.

THE COURT: This is merely for the purpose of identification, I suppose?

MR. SCOTT: For the purpose of identification.

THE COURT: Just show them all to him. How many are there?

MR. SCOTT: Five.

THE COURT: Witness being shown five photographs.

Question read.

A. Yes, sir.

MR. SCOTT: I ask that they be marked for identification.

Photographs identified by witness marked respectively D-4, D-5, D-6 and D-7 for identification.

Q. Who took those photographs? By whom were these photographs taken? A. Mr. Bunnell.

FURTHER CROSS EXAMINATION BY MR. FLANAGAN:

Q. How many photographs were taken, do you know? A. Five.

Q. No more? A. No more.

OTTO KRAFT, sworn in behalf of defendant.

DIRECT EXAMINATION BY MR. SCOTT:

Q. Mr. Kraft, what is your business? A. I am a locomotive air brake man.

Q. Did you for the purpose of this trial weigh the bell of engine 916? A. I did.

Q. And will you tell the Court and jury what that bell weighed? A. The bell weighs 107 1-2 pounds.

Q. And what did the tongue of the bell weigh? A. Eight and a half pounds.

CROSS EXAMINATION BY MR. FLANAGAN:

Q. When did you weigh this bell and tongue? A. Why, I believe about eighteen months ago.

Q. Sir? A. I weighed them about seventeen or eighteen months ago, I believe.

Q. How long was that after the accident? A. Well, I don't know anything about the accident.

Q. Well, the accident occurred on January 25, 1913. Now, do you know the date on which you weighed these things? A. When did the accident happen?

Q. January 25, 1913. A. Why, I weighed the bell—well, that might have been about a year after the accident.

Q. Do you know anything about the bell or the tongue before that? A. No, sir.

MR. FLANAGAN: Unless this is connected up, sir, I think that testimony should be stricken out.

THE COURT: I will take the evidence.

WATSON B. BUNNELL, sworn in behalf of defendant.

DIRECT EXAMINATION BY MR. SCOTT:

Q. Mr. Bunnell, what is your business? A. Photographer.

Q. For the Lackawanna Railroad? A. Yes, sir.

Q. And how long have you been photographer? A. Ten years or more.

Q. Do you know where Harrison Street, East Orange is? A. Yes, sir.

Q. Did you ever take any photographs of Harrison Street, East Orange, when Mr. Drake was present? A. I have.

Q. How many times have you taken photographs of Harrison Street, in East Orange, when Mr. Drake was present? A. One, to my knowledge. I don't keep a record of all that were present.

Q. I show you five photographs, one marked D-2 for identification, one marked D-7 for identification, one marked D-6 for identification, one marked D-5 for identification and one marked D-4 for identification, and ask you whether those are the photographs that you took at the time Mr. Drake was present (photographs shown to witness)? A. They are.

Q. Taking, first, the photograph furthest away from the nearest rail of the eastbound track on the southerly side, will you tell the Court and jury where your camera was when you took that photograph?

THE COURT: Can you tell us also how that is marked?

WITNESS: That is marked C 2411.

THE COURT: No, I mean the stenographer's mark?

WITNESS: D-2.

Q. I show you D-2 for identification and ask you where your camera was when you took that photograph? A. The camera was in the center of Harrison Street at a point 50 feet south of the south rail of the eastbound track, looking in a westerly direction.

Q. I show you a photograph marked D-7 for identification, and ask you where your camera was when that photograph was taken (shown to witness)? A. My number is C 2412. It was taken at a point 40 feet south of the south rail of the eastbound track, looking west.

Q. (BY THE COURT.) 10 feet nearer the track than the other? A. Yes, sir.

Q. (BY MR. SCOTT.) I show you another photograph, marked D-6 for identification, and ask you where your camera was when you took that (photograph shown to witness). A. Photograph

No. C 2413. It was taken at a point 30 feet south of the south rail of the eastbound track, looking west.

Q. I show you another photograph, marked D-5 for identification (photograph shown to witness)—

THE COURT: These were all taken in the center of Harrison Street?

WITNESS: Yes, sir.

THE COURT: On the center line?

WITNESS: The center line of Harrison Street.

Q. I show you D-5 for identification, and ask you where your camera was when you took that (photograph shown to witness)? A. This is photograph C 2414. It was taken 20 feet south of the south rail of the eastbound track, in the center of Harrison Street, looking west.

Q. I show you photograph D-4 for identification, and ask you where your camera was when you took that (photograph shown to witness)? A. This view was taken on the center line of Harrison Street at a point 5 feet south of the south rail of the eastbound track.

Q. What have you to say as to whether those photographs correctly represent the conditions at the time you took them? A. They do.

Q. And in what direction was your camera pointed? A. Westward.

MR. SCOTT: I offer these photographs in evidence.

MR. FLANAGAN: There has been no effort to establish that these conditions were the conditions that were present at the time of this accident. For that reason I do not think they are evidential, sir.

THE COURT: There is evidence to show

that the structures, including the trees and poles—there is not very much about poles, but the trees and bushes—there is evidence tending to show, I think, that they are the same. The witness said the buildings were the same; that is, the corner building, the garage, and the Kenilworth place fence. It is true that they do not show the atmospheric conditions that existed at quarter before five in the morning, and they could not be used for that purpose, but I think they may be used for the purpose of showing the situation and character of the fixed features of the scene. For that purpose, I think they are available. Do you offer them in evidence?

MR. SCOTT: Yes, sir.

THE COURT: I will receive them.

Photographs marked respectively Ex. D-2, Ex. D-4, Ex. D-5, Ex. D-6 and Ex. D-7.

CROSS EXAMINATION BY MR. FLANAGAN:

Q. These photographs were taken when, Mr. Bunnell? A. December 23, 1914.

Q. What sort of a day was it? A. It was fairly clear; I think it was a very—a day very much the same as today, I think.

Q. Was the sun shining? A. I don't think the sun was shining. I can probably tell by the looks of the pictures. I don't make a note of those things (photographs handed to witness). Yes, sir; a sunshiny day.

Q. These photographs indicate that the sun was shining quite brightly, do they not? A. Yes, sir.

Q. In other words, it was a clear, cold—was it a cold day? A. I think it was cold, yes, freezing, I should judge.

Q. And you made no observations to see how far one might see down the track to the west at these various distances from the track, did you? A. No more than comes incidental with the photographs; I made no tests or anything to see how far I could see.

Q. How high was your camera from the ground when you took this five foot view? A. 5 feet 2, the height of an ordinary person's eyes, standing on the ground.

Q. How many times did you make photographs? A. In connection with this place?

Q. Yes. A. Once.

Q. Had you been to the Harrison Street crossing on more than one occasion for the purpose of making photographs? A. Yes, sir.

Q. On how many occasions? A. I think only once before. I took photographs for the engineering department in regard to future things before I knew anything about this case; it was about a year before these were taken, maybe more than a year. Those were general views up and down the track, north and south, only three views.

Q. Did you take these views at the time Mr. Drake made his observations for the purpose of making this map? A. Mr. Drake made no survey at the time he was with me; he only helped me measure the distances; we measured the distances.

Q. Who measured the distances, you or Mr. Drake? A. Both together.

Q. He held the tape? A. He held one end of the tape and I held the other.

Q. You made no photograph 10 feet from the track, did you? A. I did.

Q. You did? A. Yes, sir.

THE COURT: You did not mention it; you went from 20 feet to 5 feet.

Q. Just look at your notes again on these photographs and tell me whether you made any photograph 10 feet from the track. A. (Referring to photograph). I did. It isn't with this bunch of photographs.

Q. Oh, it is not with the bunch of photographs? A. No.

Q. Did you make a view? A. Yes, sir.

Q. Do you know where that photograph is? A. I do not.

Q. Where was it when you last saw it? A. The last I saw it it was sent from my office.

Q. You sent it from your office to the legal department? A. Yes, sir—the claim department.

Q. And you have not seen it since? A. No, sir.

RE-DIRECT EXAMINATION BY MR. SCOTT:

Q. Mr. Bunnell, on the back of these photographs there is indicated in typewriting the position of your camera, the distance it was from the crossing? A. Yes, sir.

Q. (BY MR. FLANAGAN.) That is, from the southerly rail of the eastbound track? A. Yes, sir.

Q. (BY THE COURT.) Measured on the center line of Harrison Street? A. Yes, sir.

The map produced by defendant and heretofore referred to is offered in evidence and marked Exhibit D-8.

HOWARD M. BIRD, sworn in behalf of defendant.

DIRECT EXAMINATION BY MR. SCOTT:

Q. Mr. Bird, you were an engine man of the Lackawanna Railroad Company on January 25, 1913? A. Yes, sir.

Q. And on January 25, 1913, do you remember having an accident in East Orange? A. Yes, sir.

Q. Where did you take charge of your train, or engine, on that day? A. I took charge at Hoboken.

Q. And at what time? A. About 8:30, I should judge.

Q. 8:30 when? A. In the evening. I am not positive about the beginning of it, about the starting point.

Q. And where did you go to? A. I went to Gladstone.

Q. And was it after you went from Hoboken to Gladstone that the accident occurred? A. Yes, on my way back.

Q. When you left Gladstone did you have any train attached to your engine? A. No, sir.

Q. Your engine was running what they call light? A. That is right.

Q. And who was on that engine with you? A. The fireman and the flagman.

Q. And who was the flagman? A. George Weber.

Q. About what time did you leave Gladstone on the day of the accident? A. About 3:10.

Q. Will you tell the jury the number of your engine? A. 916.

Q. Did you have a bell on that engine? A. Yes, sir.

Q. I would like you to explain to the jury how

that bell is rung? A. It is rung by air, automatically.

Q. Explain a little more in detail what you mean when you say "automatically." A. There is a bell-ringing valve right underneath the bell, and it works on a plunger, and this here valve is worked by air, and the plunger is connected to the crank on the bell, and that rings the bell.

Q. Have you any recollection whether your bell was ringing about the time of the accident? A. Have I any recollection?

Q. Have you any recollection? A. Yes, sir.

Q. What have you to say as to whether it was ringing at the time of the accident or not? A. Well, the accident made me take more notice to the bell ringing, and I also got up back on the engine and shut the bell off; I didn't get entirely off the engine, but I got part way out, and I went back and shut the bell off.

Q. Can you tell us where you started this bell ringing? A. Millburn.

Q. And where is Millburn, east or west of Harrison Street? A. West.

Q. About how far west of Harrison Street crossing? A. About nine miles, I should judge, eight or nine.

Q. What have you to say as to whether the bell continued ringing after you started the air on the bell at Millburn and until after the accident happened?

Objected to as leading.

THE COURT: It is objectionable in form I sustain the objection.

Question withdrawn.

Q. After you started the bell ringing, when did you stop it ringing? A. After I stopped the engine.

Q. From the time you started the bell ringing at Millburn until you stopped it ringing, what have you to say as to whether it was ringing?

Objected to as leading.
Objection overruled.

A. What have I to say in regard to its ringing?

THE COURT: Yes.
WITNESS: It was ringing.

Q. And will you tell the jury for what distance your bell rang after you left Millburn? A. Why, about eight or nine miles.

Q. You have told us that you turned off the air, or stopped the bell. Where did that occur? A. Where did I stop the bell?

Q. Yes. A. After I stopped the engine there at Brick Church, there on that crossing. I don't know the name of the street.

Q. Was that before or after the accident? A. After the accident.

Q. And about how far from Brick Church station was it that you stopped the bell? A. Well, the lower end of the platform there. The platform there runs between both crossings, practically all the way up from one crossing to the other. We were down to the lower end of the platform. I don't know just how far it is, how many feet.

Q. Will you describe more in detail just how you came to stop the bell ringing? A. By turning off the air.

Q. Well, how did you come to stop it? A. Well, on account of stopping the engine. Stopping the engine, standing there while I went back to see what I had struck, it wasn't necessary for me to have the bell ringing, and I stopped the bell.

Q. Did you see the plaintiff after the accident? A. Yes, sir.

Q. Where was he? A. He was about half-way down the platform, the Brick Church platform, as near I could judge, about half-way down.

Q. What was he doing? A. He was coming after me, or someone in charge of the engine.

Q. Prior to the accident in question had you ever had any other accident?

MR. FLANAGAN: I object to that. I cannot see the materiality or relevancy of it.

THE COURT: I sustain the objection.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

CROSS EXAMINATION BY MR. FLANAGAN:

Q. You say you met the plaintiff immediately after the accident half-way down the platform? A. Yes, sir.

Q. How far was that from the Harrison Street crossing? A. Well, I don't know just the distance. It would probably be just a short block, the distance of a short block.

Q. Well, 250 or 300 feet? A. Probably, yes. 200.

Q. What? A. Probably 200 feet.

Q. Well, was it as much as 300 feet? A. No, I shouldn't say so.

Q. Well, would you say 250? A. About 200 feet.

Q. About 200 feet easterly from the Harrison Street crossing? A. Yes, sir.

BY THE COURT:

Q. To the point where your engine stopped? A. No.

Q. Is that it? A. No, I was going back, and I met him coming down towards where my engine stopped.

Q. You are speaking of the place where you met him? A. Met him, yes.

BY MR. FLANAGAN:

Q. Where did you stop your engine? A. Well, the front end of the engine was right on the next crossing. I don't know the name of the streets.

Q. How far is that from the Harrison Street crossing? A. Well, I should judge about two short blocks.

Q. That is, 400 feet? A. 400 or 500 feet.

Q. And you talked to the plaintiff, did you not, when you met him? A. Yes, sir.

Q. And you said to him, did you not, "What did I hit"? A. No, sir; I don't remember saying that to him.

Q. You may have said it to him? A. I don't think so.

Q. Did you tell him that you did not know what you hit? A. I don't remember that; no, sir.

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

THE COURT: That question is not objected to, but in what point of view would it be competent?

MR. FLANAGAN: I am just testing his recollection, with a view to—

WITNESS: I knew what I hit.

MR. FLANAGAN: With a view to his previous testimony, in this trial.

THE COURT: What is that?

MR. FLANAGAN: I am directing these questions to the witness with a view of testing his credibility, in view of his prev-

ious testimony in the trial of this case.

THE COURT: Credibility is to be tested, as a general rule, as to matters that are relevant and competent. I do not know how this is affected by the question of previous testimony. The general rule is that agents who are employed to do things are not agents whose statements bind their employers. Mr. Scott could not use statements made by an engineer or a fireman. In the case of an accident on a trolley car, or where there is a suit brought for personal injury, the plaintiff cannot inquire what the conductor or motorman said about the accident, because they are not employed for that purpose; they are employed to run cars, not to talk about things. Now, here is a man who is employed to run an engine. If the question is not objected to, and, as you say, you already have some testimony on the subject in this case, probably I ought not to object myself, but I do not think it is competent.

Q. Did you see the plaintiff driving his wagon across the track before you stopped him? A. No, sir.

Q. You did not? A. No, sir; I didn't see him, no. Before I struck him?

Q. Yes. A. No, sir; I saw the horse and wagon, but I didn't see him.

Q. How far away were the horse and wagon when you saw them? A. I should judge about 50 feet.

Q. How fast was your engine going? A. About thirty miles per hour, not over thirty miles per hour.

Q. Not over thirty miles? A. Not over thirty miles per hour, to the best of my judgment.

Q. How long had you been a locomotive engineer before this accident, Mr. Bird? A. About thirteen months.

Q. You are still in the employ of the Delaware, Lackawanna & Western Railroad Company? A. Yes, sir.

Q. At the time this accident happened it was very dark, was it not? A. Yes, sir; five o'clock in the morning, or 5:03, it was dark.

Q. And the condition of the atmosphere? A. Clear.

Q. Clear? A. Clear.

Q. You say that it was not misty? A. It was not misty.

Q. What time did you leave, or did you pass, Millburn crossing? A. Probably about 4:46 or 4:47, about that time.

Q. 4:47? A. Yes, sir.

Q. And what time did this accident occur? A. 5:03.

Q. 5:03? A. Yes, sir.

Q. So that it took you sixteen minutes to make the run from the Millburn crossing to Harrison Street? A. Yes, sir.

Q. Mr. Bird, were you asked this question upon your direct examination by Mr. Scott upon the previous trial of this case? I am reading from page 57. "Question: What is the first knowledge you had"?—referring to the fact that the plaintiff was about to cross the track. Answer: The first knowledge I had I saw him dodge right up in front of me about 50 feet, and, of course, I made the emergency application of the brake, and done my best to stop, but failed to do so, hitting the horse." A. When I said, "him" I meant—

Q. No, answer my question. Did you so answer? A. Yes, sir; I did.

Q. And were you asked this question: "Ques-

tion: Yes, when you saw him first. Answer: Oh, when I saw him first; probably 50 feet, to the best of my ability"? A. Yes, sir.

Q. Were you asked and did you answer that way? A. Yes, sir.

Q. Now, when you met the plaintiff immediately after the accident did you not tell him that the bell had not been rung as you approached the crossing? A. No, sir.

Q. What was the fireman's name who was with you that morning? A. I can't remember. He quit soon afterwards and went away. It was the first time I had ever had him in my life.

Q. Is he in the courtroom? A. No, he quit the road and went off some place shortly afterwards. He had only been here probably three or four months all told.

Q. Did you see the plaintiff hurled out of the wagon? A. No, sir.

Q. Did you see anyone else in the vicinity of the crossing immediately after the accident?

Objected to as immaterial.

Objection overruled.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. Why, yes, I saw the gateman after I went back on the crossing.

Q. And where was he? A. Walking around on the crossing.

Q. He was an Italian, was he not? A. Well, I don't know; I couldn't tell you; I didn't ask him.

Q. At the time your engine crossed the Harbor Street crossing that morning were the gates up or down? A. Up.

Q. When did you see that they were up? A.

I saw they were up when I went by there; they were up still when I went back.

Q. You did not observe that they were up until just about the time you were to cross? A. About the time I got across there, yes.

Q. Why? A. Well, in the first place, looking parallel with the track, you can't always see those gates until you get very near onto them.

Q. And, of course, it was dark that morning? A. Yes. There are electric lights along there.

Q. Where do you say there are electric lights? A. All along that street there; that is, especially on the crossing. I am not positive whether they are all up the street or not, but there are electric lights on that crossing.

Q. Mr. Bird, are you sure whether they are electric lights or gas lights? A. Well, I am not sure whether they are electric lights or gas lights; there are lights, anyhow.

Q. Is it not a fact that there is but one gas light at that crossing, and that is on the southerly side of the crossing? A. I wouldn't say positive on that.

Q. Is it not a fact also that there are no electric lights after that until you get up to the next crossing—going west? A. I don't know; I wouldn't say anything about that, because I am not familiar with the streets. All I am familiar with is the tracks.

MR. SCOTT: I desire to offer in evidence photograph marked D-3 for identification, which has been testified to and identified by the plaintiff as representing the conditions, outside of the snow, at the time at the crossing in question.

Photograph marked Exhibit D-3

BY THE COURT:

Q. Mr. Bird, did you have a red light on your engine? A. Yes, sir.

Q. Where was it? A. On the rear end of the tank.

Q. What kind of a light was it? A. A lantern.

Q. An ordinary oil light? A. Yes, sir, an ordinary oil light.

Q. With red glass? A. Yes, sir.

Q. You say when your engine came to a stop that it was about on the line of the next street east of the Brick Church station, if I remember right? A. Yes, sir.

Q. You do not recall the name of that street? A. No, I do not. I am not familiar with the streets.

Q. The name of it is Halsted Street. That can be proved, if it is important. What was the length of your engine and tank, about? A. Probably 35 feet.

Q. Then your red light was about 35 feet west of the westerly line of Halsted Street? A. Yes, sir.

Q. Assuming that to be Halsted Street? A Yes, sir.

Q. I do not know that I quite understood when you stopped this bell ringing. When you got off the engine, you said, you shut it off? A. Yes, sir.

Q. What did you shut it off for? A. Because I didn't want to annoy the people around there any more than I could help. There are bulletins posted up about blowing the whistle and ringing the bell in Orange.

Q. How long before you started again? A. I went back and got the plaintiff's name and address, and walked the full length of the platform; I don't know just how long it was; probably twelve or fifteen minutes.

Q. Then you did start up again? A. Yes, sir; we started up again.

Q. And how about the bell? A. The bell also.

Q. Did the bell ring all right? A. Yes, sir.

Q. There was nothing worng with the mechanism? A. No, sir.

Q. How long did it ring? A. All the way down to Roseville Avenue. It is customary to ring a bell all that distance.

By Mr. Flanagan:

Q. Is not that the reason you say you rung it, because it was customary to ring it? A. No, sir.

Q. How many times did you make this trip at that time in the morning before the accident? A. Probably never at that time in the morning.

Q. But at other times during the day? A. Yes, at most any time in the day or night.

Q. How many times did you make this trip from Gladstone to Hoboken? A. We didn't have any regular trip up there; we were just sent up there off and on, probably once a week or once a month; it is hard to tell.

Q. How many times do you suppose you had made that trip before the accident? A. That same kind of trip?

Q. Any time of day. A. Oh, I don't know; probably hundreds of times.

Q. How many times have you ever made it at that time in the morning? A. Well, I couldn't say that I ever made it at that time in the morning.

Q. To the best of your recollection, you had never made it at that hour in the morning? A. No, I don't know; I couldn't say. To the best of my recollection, I couldn't swear that I made it at that time in the morning. I have been through there at all hours, but probably not just that time.

Mr. Scott: I offer in evidence the interrogatories and the answers. They are marked D-1 and D-1A for identification.

Marked respectively Exhibit D-1 and Exhibit D-1A.

The Court asks the jury whether they want to view the crossing in question, and they respond that they do.

GEORGE G. WEBER, sworn in behalf of defendant.

DIRECT EXAMINATION BY MR. SCOTT:

Q. Mr. Weber, your business? A. Flagman on the Lackawanna Railroad.

Q. And you have been for how long? A. Going on eight years now not over.

Q. Do you know Mr. Bird? A. Yes, sir.

Q. Were you on an engine with him in January, 1913? A. Yes, sir.

Q. Do you recall an accident happening in the Oranges? A. Yes, sir.

Q. Did you see this young man there on that day (indicating)? A. Did I see him that day?

Q. The plaintiff—did you see Mr. Schnackenberg? A. Yes, sir.

Q. Where did you go on the engine with Mr. Bird? A. Hoboken.

Q. And did you go out to Gladstone with him? A. Yes, sir.

Q. And come back with him? A. Yes, sir.

Q. Have you any recollection relative to the bell ringing on the morning of the accident? A Yes, sir.

Q. Will you tell the jury what your recollection is as to when the bell started ringing prior to the accident? A. Why, I can, on account of the accident made my attention to the bell ringing.

Q. About when did it start? A. Oh, at Millburn.

Q. Can you tell the jury when it stopped ringing? A. Yes, sir.

Q. When? A. It stopped after the engine had stopped.

Q. And where did the engine stop? A. Well, just east of Brick Church station; that is, near the other crossing. I don't know what the name of it is.

Q. Do you know what the name of that crossing is? A. No, sir; I do not.

BY THE COURT:

Q. Do you mean east? A. East of Brick Church station.

Q. Are you sure that you mean east? A. Yes, sir.

Q. The engine ran down by the station? A. Yes, sir.

Q. And stopped? A. Yes, sir.

THE COURT: Yes, you are right.

BY MR. SCOTT:

Q. Will you tell the jury what happened to the bell from the time it started ringing at Millburn until it was stopped after the engine stopped, east of Brick Church station? A. How is that, Mr. Scott?

Q. (Question read.) What happened to the bell?

Q. Yes. A. I don't understand what you mean in that question, Mr. Scott.

Q. (BY THE COURT.) What did the bell do? A. Why, the bell was ringing, if that is what you mean.

Q. (BY MR. SCOTT.) Will you tell the jury how you recall the fact that the bell was stopped ringing? A. Why, the engineer climbed up on the engine and closed it off, shut it off.

Q. Did you see the accident to Mr. Schnackenberg? A. Well, no, I haven't seen it; I only seen some subject approach to the crossing, and he put the air brake on, and I said to the engineer, "What did you do, get him"? That is all that was said.

Q. What kind of weather was it? A. Why, it was a dark night, clear.

Q. On the rear of the tender of your engine did you have any lights? A. Yes, sir.

Q. What color of lights did you have? A. Red light.

Q. And where were they placed on the engine? A. Back of the engine.

Q. What part of the engine? A. Why, in the tender.

Q. And do you know whether they were on the right or left hand side of the tender? A. Why, they were in the back, where the step is on, where you climb up on the back; they are in the center of the back.

Q. How large were those lights? A. Oh, I don't know exactly; ordinary lights.

Q. Can you indicate to the jury about how large they were? A. About that size, I should judge (indicating).

Q. That is, you mean—A. Round.

Q. About ten inches or more in circumference? A. I guess about that.

Q. And about how tall, or how high? A. You mean the frame and all?

Q. Yes, the frame and all. A. Oh, about seven inches.

Q. Do you know anything about whether the headlight was lit on the engine or not? A. Yes, sir; it was lit.

Q. You say it was lit? A. Yes, sir.

CROSS EXAMINATION BY MR. FLANAGAN:

Q. Your engine stopped in front of the Brick Church station? A. No, little east.

Q. And how many lights are there around the station there? A. How many lights are there there?

Q. Yes. Quite a number there, are there not? A. Oh, yes.

Q. And it was pretty brightly lighted around the station there? A. I don't remember; that I couldn't say.

Q. Well, what is your recollection as to how many lights there were around the station? A. I couldn't remember that.

Q. Well, would you say as many as fifteen or twenty? A. I wouldn't say neither one, because I don't remember.

Q. Well, would you say there were as many as ten? A. I couldn't say that.

Q. But you know there were enough to make it fairly bright around the station? A. There were some lights; I don't know how many.

Q. You had no difficulty in seeing in the vicinity of the station? A. Oh, no.

Q. Do you now say that you knew that you had hit an object approaching the track before the collision—at the time of the collision? A. I didn't know it until after the collision; no, sir.

Q. You did not know until after? A. No, sir.

Q. Where was it you had this conversation you speak of with the engineer before the collision, how many feet from the crossing? A. Before the collision? Not until after he hit it.

Q. What? A. Not till after he hit the subject.

Q. You told us a moment ago on direct examination that you saw something, and then you said to the engineer, "Well, did you get him"? A. Well, in that way, yes, I did say that.

Q. And was that before the collision? A. Just a second, just enough to say the words, that is all.

Q. And how far away was this object when you saw it? A. Oh, I don't know. I couldn't see very good, you know. I was on the left hand side of the engine. Probably 20 feet before I seen it.

Q. You mean this object was crossing the track 20 feet ahead of your engine? A. Just loomed up to me, and at that moment he put the brake on, and I said, "Did you get him"? I made the remark.

Q. Did you see anything else about the crossing when you came back, in addition to the plaintiff?

Objected to as immaterial.

Objection overruled.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. Why, the flagman was on the crossing; that was all.

Q. The flagman or the gateman? A. Or the gateman, as you would call it.

Q. You call him the flagman? A. We call him the flagman, yes, sir—the protection of the crossing.

Q. He was an Italian? A. I could not say.

Q. He is not there now, is he? A. That I couldn't say.

Q. He is not flagman there now, is he?

Objected to as immaterial.

Q. Well, have you seen him since the accident? A. No, sir.

BY THE COURT:

Q. Mr. Weber, did you go back with the engineer? A. Yes, sir.

George G. Weber—Cross.

Q. Toward the place of the accident? A. Yes, sir.

Q. You stopped, you say, east of the Brick Church station—the engine stopped—A. Yes, sir.

Q. —east of the Brick Church station? A. Yes sir.

Q. Do you remember a street, the next street east to the station? A. Do I know the name?

Q. No, do you know that there is a street there? A. Yes, sir.

Q. How near did your engine stoj to that street? A. I think it was partly on the street, if I am not mistaken.

Q. When you walked back did you or did you not pass the Brick Church station building? A. When I walked back? Yes.

Q. When you walked back? A. Yes, sir.

Q. The platform or the sidewalk, does it run all the way from one street to the other? A. Yes, sir.

Q. And do you remember how much you had got beyond the Brick Church building before you met Mr. Schnackenberg? A. Not exactly; I think we met him right near the Brick Church station, where we met him running down towards us.

Q. Where was it that you saw the gateman? A. At the crossing.

Q. At the crossing where the accident took place? A. Yes, sir.

Q. And at that time was Mr. Schnackenberg with you? A. Yes, sir.

Q. Is it your recollection that he walked back with you or that you met him? A. Why, he met us, and then we walked back to the crossing to see how much damage there was.

Q. You walked back together? A. Yes, sir.

Q. Can you give us any idea of the distance that you walked back together? A. Oh, about 200 feet.

Q. After you met him you walked back about 200 feet? A. Yes, about 200 feet.

By Mr. Flanagan:

Q. How far were you east of the Brick Church station when the engine stopped? A. How far east?

Q. Yes. A. You mean with the engine?

Q. Yes. A. Why, about that crossing there; I think the head end of the engine was on the crossing.

Q. And how many feet is that east of the Brick Church station? A. Oh, I don't know; I suppose a short block, about 200 feet, maybe, or 175 feet, something like that.

Q. And about how many feet would you say from the Harrison Street crossing? A. Did the engine stop?

Q. Yes. A. About 400 feet, or two short blocks.

Q. Would you say that your engine was no more than 10 or 15 feet east of the Brick Church station when it stopped? Did you say that? A. 10 or 15 feet east?

Q. Yes. A. No, sir; I did not; I said she was east of Brick Church station.

Q. Well, how many feet—that is, towards New York? A. Well, a small block probably.

Q. A small block? A. Yes, sir.

By the Court:

Q. Do you remember noticing your red light after you got off the engine? A. Yes, sir.

Q. What did you notice? A. I noticed the red light on the engine.

Q. Where were you when you noticed it? A. Why, I noticed it all the way walking back. It was my protection, to protect that engine.

Q. What was the furthest point from the en-

gine where you saw that red light? A. The furthest point was about 400 feet from the engine; that is the furthest we were; that would be Harrison Street crossing.

Q. Was there any difficulty about seeing the red light? A. Yes, sir.

Q. What? A. No, sir; I had no difficulty at all.

Q. Was there any fog? A. No, sir.

By Mr. Flanagan:

Q. Do you know whether it had been raining during the night? A. Whether it had been raining?

Q. Yes. A. I don't remember that; no, sir.

Defendant Rests.

Arthur W. Smith, sworn in behalf of plaintiff in rebuttal.

Direct Examination by Mr. Flanagan:

Q. Dr. Smith, you are a veterinary surgeon, are you not? A. Yes, sir.

Q. And your office is where? A. 15 Railroad Place, East Orange.

Q. And how long have you maintained your office there? A. Ten years or a little over.

Q. Where is 15 Railroad Place with reference to the Harrison Street crossing in East Orange? A. Well, Railroad Place runs from Harrison Street east on the north side of the track to Prospect Place.

Q. How many blocks away? A. Two blocks to Prospect Place. My office is the first door, facing the railroad, west of the depot.

Q. Have you had occasion to cross the Harrison Street crossing? A. Oh, yes.

Q. During the time that your office has been maintained there? A. Yes.

Q. And have you crossed it during the night and in the day time? A. Yes.

Q. Doctor, what have you to say with regard to the view of the track to the west that one may have on approaching the crossing going in a northerly direction from a point, say, 45 feet south of the crossing and walking toward the crossing until you get upon the track?

Objected to.

A. In the center of the street or on the side of it?

MR. SCOTT: One moment. I object as not being proper rebuttal.

THE COURT: I think you may examine the witness on that subject.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. What do you say to that, Doctor? (Question read).

THE COURT: You mean the crossing on Harrison Street?

MR. FLANAGAN: Yes.

THE COURT: Put that in your question.

MR. FLANAGAN: Yes, the Harrison Street crossing.

A. From a point 45 feet away from the track you would only get a view of the track not more than 100 feet. When you get up to about 40 feet you would increase to perhaps 150 feet, and when you get up to about 30 feet you can see up the track not more than 250 feet, a clear view, on a fair day. From that on until you get to the gate

line your view beyond 200 feet becomes more obstructed, due to the line of trees and poles. When you get on the gate line your view, of course, is entirely obstructed, except what you may see around the edge of the gate. Between the gate and the rail, of course, it is unobstructed.

BY THE COURT:

Q. You are speaking of a view which a man has standing or in a carriage? A. Moving, I mean, driving across the tracks from a point 45 feet from the rail.

Q. In a carriage, or a wagon? A. Yes, sir.

BY MR. FLANAGAN:

Q. Now, these distances that you have given us are based upon observations made during the daytime, are they not? A. Yes.

Q. And will you explain to the jury how it is that from a point, say, 15 to 20 feet from the track your view is limited until you get beyond the gatepost? A. Going towards the rails?

Q. Yes. A. Well, about 200 feet from the crossing, perhaps 225 or 250 feet, there is a very large tree which is right on the curbline, and west of that there are several trees and telegraph poles, and that tree, of course, forms the largest obstruction, and you cannot see clearly beyond that tree, and the nearer you get to the rail, of course, your view you can see in between the trees and poles beyond that, but it is not a very good view and the nearer you get to the track the more it becomes obstructed, due to those poles and trees being so close together.

Q. Now, have you made any observations at night? A. Yes, sir; I have crossed there at all hours during the day and night.

Q. Now, what have you to say with reference to observations made at night from the center

of Harrison Street as you approach the crossing? A. Well, the observation would be almost the same. You could not distinguish clearly a headlight until you got past the one big tree; that is, the nearest tree to the crossing.

BY THE COURT:

Q. Can you point out that one big tree on the map? A. There it is, right there, this tree here (indicating on map), the first tree from the crossing.

THE COURT: The witness indicates a tree near the end of the garage.

Q. What is it you say about that? A. You can't distingush an engine headlight.

Q. Until it gets there? A. Until it gets to about that tree.

Q. To about that point? A. Yes, sir.

BY MR. FLANAGAN:

Q. And have you approached the crossing from the south while a train was coming from the west? A. Oh, yes, several times.

Q. What have you to say with reference to the approaching in such a way that the headlight is effectually obstructed from the view of one approaching the track by these various obstructions?

Objected to as too indefinite.

THE COURT: I will allow the question. It seems to me that the particular objection to the question is that it is leading, but if you do not object on that ground, I will allow it.

MR. SCOTT: I do not object on that ground.

THE COURT: Answer the question.

A. The headlight is not clearly in view until

it gets to or almost to that first tree west of the crossing, which, in my opinion, is about 200 feet or a little over 200 feet.

THE COURT: Let us measure it (measuring on map). It is about 27 inches. That would be 270 feet or a little more—275 feet. We have exact figures on that.

Q. Now, Doctor, as the train proceeds at nighttime—I am speaking of nighttime—as it proceeds in a westerly direction towards the crossing from Kenilworth place do these various poles and trees offer any obstruction to seeing it by one approaching the track—that is, the poles and trees further up than the crossing? A. Why, they do. You can hardly see it. You do not get a good view of it until it has come almost to the first tree.

Q. No, I mean after that. A. After it has passed that first tree?

Q. Yes. A. Well, you can see it. Then there are two telegraph poles there, and, of course, if you are right up to the gate line, the gate would be in the way.

CROSS EXAMINATION BY MR. SCOTT:

Q. The nearer you got to the track the worse the view was? A. Between here and the crossing?

Q. I say the nearer you got to the track as you came from the south—the eastbound track—the worse your view was? A. The nearer you get to the track, yes.

Q. 5 feet away how far could you see up the track—5 feet away from the nearest rail? A. On a clear day?

Q. On the best possible day. A. 5 feet from

the track, I should say you could see about 100 feet beyond the first tree; that would make you a little over 300 feet; but 10 feet away you couldn't see as far.

Q. I show you a photograph, Exhibit D-4, taken 5 feet away from the rail, the south rail of the eastbound track, and ask you if you cannot see in that photograph almost up to the Orange station? A. At what point are we going to stand, right here at the corner?

Q. That is 5 feet away from the south rail of the eastbound track, looking west. I want you to tell us whether, in that photograph there you cannot see almost up to the Orange station? A. In that photograph you can—well, you can see almost up to Oakwood Avenue. I am asking you where you stand here?

Q. I am asking you in that photograph whether you can see almost up to the Orange station? A. Yes, sir; up to Oakwood Avenue.

Q. And how far beyond Oakwood Avenue is the Orange station? A. Oh, about half a mile.

Q. Did you make these observations purposely for the purpose of testifying in this trial? A. Well—

Q. Just yes or no. A. Yes.

Q. When? A. Last night I just looked the ground over to be a little more familiar with the number of trees and poles.

Q. And what time did you make this observation? A. Last night, about eight o'clock.

Q. And how long were you there while you were making this observation? A. Oh, not more than five or ten minutes.

Q. Can you be more particular about the time that you were there, instead of saying about eight o'clock? A. No, it was eight o'clock—it wasn't half an hour before nor half an hour after.

Q. Was it between five minutes of eight and five minutes past eight? A. I couldn't say that positively.

Q. Was it before eight o'clock when you got there? A. I think it was before.

Q. And how long did you stay there? A. Not more than ten minutes.

Q. And how many trains did you see going east? A. One.

Q. And what time did that train approach the crossing? A. Well, I didn't take the time with my watch, to say, but it was about eight o'clock in that neighborhood.

Q. What was that train, a passenger or a freight train? A. I think it was a passenger train.

Q. Are you sure that it was a passenger train? A. I am not so sure, no.

Q. And where did that train stop? A. I think it stopped at Brick Church station; I am not positive.

Q. You are positive that it did not stop at Brick Church? A. I am not positive; I think it stopped at Brick Church. I think it was a passenger train.

Q. And where were you standing when you made your observation for that train? A. I didn't stand; I walked from the corner of the garage to the gates.

Q. And where did you start to make your observations, at the edge of the garage? A. At the corner of the garage.

Q. And you walked over to the track? A. Almost—walked slowly to the track.

Q. And after you walked to the track what did you do? A. Why, I stopped until the train went by, and then I walked up McKinley avenue—well, half-way through the block.

Q. And how long was it before you arrived at the crossing, near the track, that this train came along? A. I was at the garage when the train came along.

Q. You were standing at the garage? A. I was down at the garage when the train came; I walked down towards the track; when the train—

Q. Were you out in the middle of the road or— A. No, on the sidewalk.

Q. And with reference to the edge of the garage where were you standing? A. About in the center of the sidewalk.

Q. On the level, or even with the edge of the garage? A. About even with the edge of the garage.

Q. And did you look up west at that time? A. Yes, sir.

Q. And from that point did you see the engine? A. You could just see the flicker of the light come between the trees.

Q. And that first flicker of the light you saw up as far as Oakwood avenue? A. Oh, no, you can't see that. Not more than Kenilworth place.

Q. Was it up as far as Kenilworth place when you first saw the flicker of the light? A. I think it was.

Q. Was it between Oakwood avenue and Kenilworth place when you first saw it? A. No, it was at Kenilworth place.

Q. But you could see the flicker of the light up at Kenilworth place? A. Knowing that a train was coming, you could see the light between the trees.

Q. The fact that you knew that the train was coming did not help you to see the light, did it? A. Well, no.

Q. You first saw this train when it was at Kenilworth place? A. Yes, sir.

Q. And Kenilworth place is beyond this first tree that you say obstructed your view? A. Yes, sir.

Q. About where on Kenilworth place was it that you first saw this light, about even with the fence? A. About even with the fence somewhere. I don't just know where I was at Harrison street.

Q. This point I point out on the map—here is Kenilworth place, and here is a fence around the ice plant (indicating on map). There is the fence, right there? A. Yes, sir.

Q. And this is Kenilworth place? A. Yes, sir.

Q. Now, was it about here that you saw the flicker of the light (indicating)? A. Not quite as far west as that.

Q. Well, about— A. Well, about in here (indicating).

Q. About even with the— A. Even with the east sidewalk.

Q. Even with the west sidewalk of Kenilworth place? A. That is right.

By The Court:

Q. That is where you saw the light shining through the trees? A. That is where you can just catch it through the trees.

Q. That is, you mean in between the trunks of the trees? A. Yes, sir.

By Mr. Scott:

Q. And that is even with the east sidewalk of Kenilworth place? A. Yes, sir.

Q. Were you paid for your services relative to making these observations for the plaintiff? A. No, sir.

Q. Have you any arrangements of any character whatsoever as regards any compensation on account of your services in this case? A. No, sir.

Q. Do you know the plaintiff? A. No.

Q. Were you engaged by his attorney? A. Not directly, no.

Q. You were engaged indirectly by whom?

Objected to.

THE COURT: I do not think we need take any time on that. He comes here as a witness to testify to facts that he has investigated.

MR. SCOTT: I think I have a right to show his interest in the matter.

THE COURT: I think you have spent enough time on that.

MR. SCOTT: I will ask the question, and then the Court can rule.

(Question read).

THE COURT: You may answer that question.

A. By Mr. Warren.

Q. And who is Mr. Warren? A. Well, he is a friend of mine.

Q. And is he in the courtroom? A. Yes.

(A man in the audience arises).

Q. The gentleman standing up? A. That is the Mr. Warren that I had reference to.

Q. When were you engaged by Mr. Warren? A. Only just recently, a week or two weeks ago.

Q. Now, this observation that you made, Doctor, when you first saw a flicker of the light, was when you were standing near the edge of the garage? A. Yes.

Q. Did you make any other or further observations on the night that you made them? A. On that night?

Q. Yes. A. Well, as soon as I heard that train coming, just saw it, I walked towards the track to observe—

Q. And as you walked toward the track you could see the engine better and better, could you not? A. No, not until it got to the line of the first tree, or shortly back of it.

Q. I show you another photograph, taken 40 feet from the crossing, and call your attention to what has been designated as the first tree, or what is shown to be the first tree, west of the crossing (photograph shown to witness). What was to hinder you from seeing the engine in question from the time it was between the tree further west and the tree in question? A. Well, this one tree in question and also the next tree west.

Q. Point it out on the map. This is the first tree (indicating)? A. This is the next tree; here is a telegraph pole.

Q. And here is the next tree? A. Yes, sir.

Q. And there is a telegraph pole? A. Yes, sir.

Q. What was there to hinder you from seeing that train, or the headlight of that train, from the time it was between the telegraph pole and the second tree? A. Here is the second tree (indicating). Do you mean here?

Q. No. A. This is the first tree and that is the pole.

By The Court:

Q. Answer the question. What was there to hinder you from seeing the headlight? A. Between here and here (indicating)?

By Mr. Scott:

Q. What was there to hinder you from seeing the headlight of the engine between the first tree and the telegraph pole just west of it? A. Why, the tree itself was almost on a line with it; the first tree obstructed the view.

Q. The tree itself? A. That is the only thing I have in mind there. That is a pretty large tree.

Q. And what was there outside of the telegraph pole and the tree, the second tree, to hinder you from seeing the train from the time it was between the third tree west of the crossing and the first tree—outside of those two objects? A. Nothing there.

Q. Nothing? A. No.

Q. And was that all the observations you made? A. That I made last night?

Q. Yes. A. All the special observations, yes. Of course, every time we cross there we have to look up to see whether a train is coming.

Q. Now, when you got nearer the crossing, Doctor, did you see any other trains—nearer the eastbound track—did you see any other trains coming east on the eastbound track? A. I only saw one last night.

Q. Only one last night? A. That is, when I was there to look for it.

Q. And you are sure that that train arrived at that crossing between five minutes of eight and what time after eight? A. Well, I am not sure. I will say between half-past seven and quarter past eight.

Q. Now, you want to put it a little earlier than five minutes of eight?

MR. FLANAGAN: I object to that. The witness has never said five minutes of eight.

Q. You made this observation last night? A. I made this observation last night. I saw one train coming east about eight o'clock.

Q. For the special purpose of testifying here? A. Yes, for the purpose of refreshing my recollection of the thing.

Q. And the nearest recollection you can give

us of the time you were up there and saw this train is that it was between half-past seven and quarter past eight? A. Yes.

Q. And do you know whether the train that you saw arrived at Harrison street nearer half-past seven, nearer quarter of eight, nearer eight o'clock or nearer quarter past eight? A. Nearer eight o'clock.

Q. Nearer eight o'clock? A. Yes.

Q. And during the time that you were at the crossing last night did you notice any trains going west? A. I won't be sure; I think there was one went west.

Q. And what was that? A. I believe a passenger; I don't remember.

Q. You had no assistance in making your observations last night? A. No assistance?

Q. Yes. A. No.

Q. As to the measurements? A. No.

Q. You did not have anybody fix the places where you first saw the flicker of the light? A. No.

Q. The train at the time you made the observation was moving? A. Yes, sir.

Q. And what have you to say as to whether it was moving fast or slowly? A. Well, not fast nor slow. I think it stopped at Brick Church station and it was slowing down to make a stop.

Q. The next street that crosses the railroad west of Harrison street is Oakland avenue? A. Oakwood avenue, I think; I am not sure.

Q. And what have you to say as to whether you can see any part of Oakwood avenue 50 feet from the south rail of the eastbound track? A. No.

Q. No part? A. No, sir.

Q. Can you see any part of Oakwood avenue 40 feet from the south rail of the eastbound track? A. No.

Q. Or 30 feet? A. No.

Q. Or 20 feet? A. I wouldn't be sure about 20 feet. If you stood there and looked in between the trees you might see it.

Q. Or 5 feet? A. 5 feet, I don't think you can, unless you get to the side of the gate, you can. I don't know just how many feet the gates are from the track. If you get inside, between the rail and the gate, you can see it.

Q. When you get 5 feet from the track how far up towards Orange can you see? A. Well, I don't know just how far that gate is. If you are behind that gate, you can't see, of course. Now, if that gate is more than 5 feet from the rail you can see up to four or five blocks beyond Oakwood avenue.

RE-DIRECT EXAMINATION BY MR. FLANAGAN:

Q. When Mr. Warren asked you to come here and testify did he also tell you that he had been sent to secure the services of someone by the attorney of Mr. Schnackenberg? A. That he had intended to secure the services?

Q. Yes. A. No.

Q. I mean when he asked you to come here and testify regarding this matter did he say to you that the attorney of Mr. Schnackenberg had asked him to procure someone? A. Oh, yes.

Q. And did he tell you that I was the attorney of Mr. Schnackenberg? A. Yes.

BY THE COURT:

Q. Doctor, I will ask you a question. I do not know whether you will be able to answer it. One of the things that you saw from Harrison street was the headlight between the trunks of these trees? A. Opposite Kenilworth avenue (indicating on map).

Q. Along here (indicating)? A. Along here, yes.

Q. A little to the east of Kenilworth avenue? A. Yes, sir.

Q. So that you knew the train was coming? A. Yes, sir; I knew the train was coming.

Q. Now, are you able to say whether a man remaining at Harrison street and having first seen the light of the headlight shining between the trunks of those trees would ever lose sight of the train from that point on to the crossing, if he remained there? A. Well, yes.

Q. Why would he lose sight of it? A. He would lose sight of the headlight.

Q. Would he lose sight of the train? A. At night, you mean?

Q. The train would be lit up at night, you remember. A. He would lose sight of the train because at that distance you can't see the cars plainly. He would lose sight of the train in the line of this first tree and this second tree and back here, when he was on the line with the third tree (indicating). These trees, of course, are all more or less obstructed by the—

Q. He would not know there was a train coming? A. He wouldn't know there was a train coming unless he saw the headlight there.

Q. But when the headlight got to the big tree, he would then have a pretty clear view of that? A. After passing here, with the exception of these two poles, which don't amount to much (indicating).

Q. From that point on he would have a pretty clear view for that 275 feet? A. Yes, sir. This corner is 30 feet from the rail. When he gets at 45 feet—

Q. I mean a man in the center of the road there. A. Yes, sir; that is right.

HENRY SCHNACKENBERG, plaintiff, recalled in in his own behalf in rebuttal.

DIRECT EXAMINATION BY MR. FLANAGAN:

Q. Mr. Schnackenberg, when you met the engineer, Bird, immediately after this accident did he tell you that the bell had not been ringing?

THE COURT: Do not answer this question. Let us consider it. I think the foundation was laid for this question.

MR. FLANAGAN: Yes, sir.

THE COURT: You may ask the question.

Q. Will you answer that question? A. Why, yes, sir; the engineer told me that the bell was not ringing nor a whistle blown.

Q. And did he say to you that he did not know what he had struck? A. Yes, sir; he did.

PLAINTIFF RESTS.

ADJOURNED until tomorrow, Thursday, October 28, 1915, at ten o'clock a. m.

THIRD DAY.

Thursday, October 28, 1915.

Met pursuant to adjournment.

Present, counsel as before stated.

MR. FLANAGAN: If your Honor please, there seems to have been in the testimony as adduced yesterday some discrepancy as to the condition of the weather on the morning of the accident, and now I want to ask the Court if it will allow me to produce the testimony of the government observer in this section, Professor Wiener? He is in court this morning with his records, and I thought perhaps it might be

more dependable as to the situation that morning than the testimony already adduced.

THE COURT: I will do almost anything as to which counsel on both sides agree.

MR. SCOTT: I am surprised, and the case is closed, and I am without proper facilities to rebut such testimony.

THE COURT: I will not do it without consent.

MR. FLANAGAN: These are public records. I should suppose that was a matter within the discretion of the Court.

THE COURT: Not without consent.

(By direction of the Court, and with the consent of counsel, the jury is sent to view the premises in question).

The Court takes a recess until one o'clock, p. m.

AFTER RECESS.

MR. SCOTT: May it please the Court, I would like to ask for the direction of a verdict. The first reason which I desire to have appear on the record is that, if the Court refuses to direct a verdict on the ground that it feels bound to let the case go to the jury on account of what are known as the Railroad Crossing acts of 1909, chapter 35, I think it is, and chapter 96—

(By direction of the Court, the jury retires).

MR. SCOTT: As I have just stated, if the Court feels bound to send the case to the jury and refuses to direct a verdict on account of the two Crossing Acts mentioned, the defendant company feels obliged to

state to the Court that, under the evidence, Chapter 35, or the first act of 1909, does not apply to the evidence in the case. Going from that chapter to a consideration of the two chapters, the same chapter, 35 and chapter 96, as I understand, the proper practice is where a statute is claimed to be unconstitutional in a trial court, the only method or necessity, is to have the same entered on the record, and the Court does not pass upon the constitutionality of the question. We claim that both of the statutes themselves are unconstitutional. As regards chapter 96, Pamphlet Laws of 1909 the latter act of 1909, we claim that that act is not a part of the substantive right of the plaintiff's action, but is in itself procedural, and that under those circumstances the Court is not bound in all cases to send the case to the jury, and neither is the plaintiff in all cases given the benefit of not being debarred, as the statute uses the expression, to stop, look and listen.

That brings us to the reasons why we ask for the direction of a verdict, and the reasons upon which we ask for the direction of a verdict are, first that there has been contributory negligence shown on the part of the plaintiff, and, second, no negligence on the part of the defendant company.

THE COURT: I deny your motion.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(The jury returns into court).

Mr. Scott sums up for defendant.

Mr. Flanagan sums up for plaintiff.

The Court charges the jury as follows:

Charge.

ADAMS, J.

Gentlemen of the Jury. On the 25th day of January, 1913, the plaintiff was injured by a collision with an engine running without train eastbound at the Harrison street crossing, in the City of East Orange. This suit is only for personal injuries and losses. The horse, which was killed, was not his, nor the wagon. It is for his own personal injuries that the suit is brought.

The case that involves the right of a citizen and the right of a railroad company at the crossing of a public highway raises, I need not say to you, very important questions—important both to the citizens of the State and to the transportation companies of the state—and you will readily understand that it must be true, and it is true, that the courts have given very much attention to this class of questions, which involve enormous interests both of personal security and of property. It is, therefore, to be carefully considered.

There are two distinct subjects in this case: the question as to gates, and the question whether the engineer failed to ring the bell, as required by statute. The plaintiff's complaint asserts that the defendant company was negligent in both of these particulars. This is the allegation: "On January 25, 1913, the defendant, by its servants, negligently permitted said gates to remain open while a train of cars, then being operated by defendant's servants, was passing along said railroad over said crossing, and negligently failed to give signal of the approach of said train by ringing a bell or blowing a whistle." There is an allegation of double negligence, negligence in having the gates up and negligence in not giving a

statutory signal. The answer, which is the paper which the defendant files, admits that the gates were up, but denies negligence, and denies that the defendant negligently failed to give a signal of the approach of the engine. So that, you see, having ascertained what the legal rights and obligations of the parties were, the great question in the case is the question of negligence.

I will refer first to the question of the gates. In the year 1909 the legislature of this state passed a statute entitled "An Act with reference to the degree of care necessary to be used by travellers over railroad crossings protected by flagmen or safety appliances or both." This statute has been construed by our courts, especially by our Court of Errors and Appeals, in two cases, *Brown v. Erie Railroad Company,* 2 Gummere 487, decided in 1914, and *Fernetti v. West Jersey & Seashore Railroad Company,* decided on March 1st, 1915, reported in 2 Gummere 268. The gist of this statute as construed by our highest court, in its application to this case, is this; that a railroad company which has installed gates like these at a crossing may post at such crossing a notice stating the hours during which those gates will be operated, and during those hours a traveller shall be entitled to assume that the gates are in good and proper order and will be duly and properly operated, unless notice is posted that they are out of order, or that the flagman will guard the crossing. In the Brown case the Court of Errors has held that, if the railroad has posted no notice, the statute is still applicable, and that in such case a traveller passing at any hour of the twenty-four over the crossing might assume that the gates are in good order and would be properly operated.

In the case now on trial no notice of any

kind was posted. Consequently, the plaintiff when he approached the crossing on the early morning of January 25, 1913, was, in the words of the statute, "entitled to assume that the safety gates were in good and proper order and would be duly and properly operated." What does that mean? Why, of course, it means this: that the gates would be lowered on the approach of a train or engine, and that the fact that they were not lowered was an assurance to the traveller that no train or engine was closely approaching, or, to put it another way, that the traveller might cross without danger from a coming train or engine. To use the language of Mr. Justice Kalisch in the Fernetti case, "such a condition of things, under the statute, absolved the plaintiff from stopping, looking and listening." While this is true, it is also true that a traveller, if he became aware that a train or engine was closely approaching, would be bound to act with prudence, although he would not be bound to look for it. If he became aware that it was closely approaching, he would be bound to act with prudence, not to go into visible danger, if he had not entered it, and to withdraw if he could from the zone of danger, if he had already entered it. In this case the gateman was clearly negligent in not lowering the gates on the approach of this engine.

Mr. Schnackenberg testified that as soon as he picked himself up he saw the gateman coming out of his shanty. He knew the man, he said. He said that he had habitually crossed, every morning early, about this time, and this is his language: "There were some mornings when I approached the track I saw him come out of the shanty to lower the gates; on other mornings the gates were down, and after the train had went through the gates I seen him put them up

It was the same man that I saw the morning of the accident." And not only the plaintiff saw the gateman emerging from the shanty after the accident, but Mr. Bird, the engineer, testified that he saw the gateman after the accident in that vicinity, and nobody saw him before the accident. It seems that the gateman was in his shanty, but that, for some reason, he did not hear the engine coming. It probably did not make as much noise as a train would have made. The gateman probably was not expecting it, for it apparently was not running on any schedule. Nevertheless, the gateman was negligent. He was an employee of the defendant, and for his negligence in the line of his duty the defendant company is legally accountable.

But while the gateman was negligent and the company was his employer, it does not necessarily follow that your conclusion on this branch of the case should be in favor of the plaintiff. It is necessary to go one step further, and ask whether the plaintiff himself by some imprudence of his own contributed to his own injury. According to his own account, which no one contradicts, he undertook to make observations of his own for his own safety. He says that he saw that the gates were up and that there was no gateman, or anything, as he expresses it, and so he stopped, looked and listened. He brought his horse, he says, to a standstill in the center line of Harrison street, so that as he sat in his wagon he was about on a line with the northerly wall of the garage, which stands on the southwest corner of McKinley avenue and Harrison street, at the Harrison street crossing. His horse's head was, he says, about 10 feet in front of him, which would be about 30 feet distant from the most southerly rail of the eastbound track. While in

that position he looked, he says, east and west, and saw nothing and heard nothing, and spoke to his horse, which walked forward and was struck and killed by the engine on the eastbound track, which threw the plaintiff to the ground and injured him.

It is admitted that the headlight of the engine was burning. The plaintiff says that he saw it the instant before the collision, and there is other evidence that it was burning. Only one witness has been sworn on either side has made a test at night to see how far the headlight of an engine approaching from the west can be seen from the point where the plaintiff says that he was. This witness is Dr. Arthur W. Smith, a veterinary surgeon, of East Orange, I think. He testified that from that point he saw a headlight shining between the trunks of the trees. I think his testimony as originally given was somewhat modified. At first, according to my notes, he says about even with the fence at Kenilworth place, and that is 520 feet away. Afterwards he says that it was somewhat east of that that he saw a light shining through the bunch of trees, and I think finally he said that it was about at the end of the fence, which I take to be about 300 feet distant from the corner of the garage. He said also that from a tree which he calls the big tree, and which is about 235 feet distant from the corner of the garage, the view of the engine would be practically clear to a man who stood at that point. Both Mr. John T. Drake and Mr. Smith have testified as to the view toward the west afforded at different points to a person who goes northerly along the center line of Harrison street from a point in range with the corner of the garage to the eastbound track—in other words, who goes over the ground that the

horse and wagon traversed. You have also before you numerous photographs taken towards the west from different points in the center line of Harrison street. I have not examined any of these photographs. I should think that they would be instructive. The engine, according to the estimate of the engineer, was moving at the rate of thirty miles an hour, or forty-four feet in a second. Thirty miles an hour means forty-four feet in a second. Now, if you are inclined to do puzzles, make a little calculation. If the horse were thirty feet from the southerly rail and went on a walk, how long did it take him to reach the place where he was struck? On a walk at the rate of three miles an hour he would go about four and a half feet in a second—4.40 feet exactly, or a little less than four and a half feet. If the engine were moving forty-four feet in a second where was the engine when the plaintiff started his horse? Was it in view or not in view? What opportunity, if any, did the plaintiff have of seeing the engine before he started to see his horse? What opportunity, if any, did he have of seeing the engine after he started his horse? In short, were the circumstances such that he had notice of the approach of the train in time to keep out of danger? If he did have such notice, and still went on into danger, he was guilty of contributory negligence, and cannot recover.

In this connection, you have to consider the state of the atmosphere. It was dark; but lights are meant to shine in the dark. The time when a headlight is least visible is in the sunlight. The darker it is, the brighter a light or a lamp shows. The plaintiff said it was a little misty. I think he said a little; at least he said it was misty.

It is admitted that he did not say so before, at the former examination. Mr. Bird, the engineer, says it was a clear day. The plaintiff says that after the accident he walked about 40 feet east on the track. I do not suppose that his measurement is very accurate; it is only an estimate; but he says it was about 40 feet, showing how it lies in his mind. He said, "I could see the red light on the back part of the engine as I walked down the track." How far away was that red light? It was on the back of the tank, and the engine stood on the line, or perhaps a little below the line, of Halsted street, below the Brick Church station. If the plaintiff saw the red light as he walked down from the point of the accident at the distance of 37 feet, which, I think, was what the witness gave us as the length of the engine and the tank west of Halsted street, do you think that he could have had any difficulty in seeing a headlight at that distance or even a greater distance? Which is the brighter of the two, or which is the more conspicuous of the two, at night, a headlight or an oil lantern, or lamp—a lantern with red glass, to produce a red effect. The plaintiff says he could see to the shanty and could see about 30 feet along the track. The question is whether the state of the atmosphere was such as to make it impossible for him to see something bright, conspicuous, at a considerably greater distance.

The other distinct question in the case is the question of the statutory signal. Did the engineer ring the bell? The burden of proof is on the plaintiff, and it is for the plaintiff to satisfy you, by what shall seem to you to be the weight of the evidence on this branch of the case, that the bell was not rung. The plaintiff says that the bell was not rung. That means, of course, that

he did not hear it. You will readily understand that the value of a statement that a witness did not hear a sound of some kind depends upon the question whether he probably would have heard it if the sound had been given. The plaintiff says that he did not hear the sound of the engine itself until it was right upon him. Yet, of course, it made some sound. On the other hand, you have the testimony of the engineer and the flagman, which is that the bell was rung automatically by air; that the engineer made the connection at Milburn, and that it rang continuously all the way from Millburn to Orange, or to Brick Church, where the engine stopped, and where he turned it off after the accident to prevent the noise from ringing the bell, and that he turned it on again when the engine started, and it worked well.

The statutory requirement is contained in our Railroad Act: "A bell of a weight not less than thirty pounds shall be placed on each engine and rund continuously in approaching a grade crossing of a highway, beginning at a distance of at least three hundred yards from the crossing and continuing until the engine has crossed such highway, or a steam whistle shall be attached to each engine and be sounded," and so forth. It is not necessary that both signal shall be given; it is in the alternative; either a bell or a whistle. One is sufficient, and it is the law that an engineer who complies with the statutory requirements as to signals, the purpose of which, of course, is to notify persons that the train is coming, may drive on, with a right of way over everything at high speed, in order to make the schedule time that is required by the travelling public. The condition on which the engine secures its right of way is the giving of one or the

other of those signals. If it does that, all other persons must step out of the way. It is entirely different from the case of a wagon or carriage in a public highway.

So that you have, on one side, the plaintiff's statement that the bell was not rung, and, on the other side, the testimony of the two men on the engine that it was rung in the way which they have mentioned. The plaintiff says that the engineer told him after the accident that he did not ring the bell. This the engineer denies; he says he did not say so. It is admitted that he did not blow the whistle, and if he rang the bell, it is not necessary that he should; and, as you are the judges of all questions as to the weight of evidence, you may judge as to the probability of the engineer stating to a person injured that he did not give a legal signal. A question for the jury is thus presented on the subject of this signal, and the precise question is this: Does the greater weight of the evidence support the plaintiff's claim that the bell was not rung? If you say yes—that is, if you conclude that the bell was not run—you convict the defendant of a failure to do its duty. But, while this would be so, it does not necessarily follow that your conclusion on this branch of the case should lead to a verdict in favor of the plaintiff. It is necessary to go a step further, and to inquire whether the plaintiff, by some imprudence of his own, contributed to his own injury. It is not necessary to repeat what I have already said on that subject. The same considerations apply. It is, of course, obvious that, however much an engineer might fail to give a signal a person on the road who, seeing the train, knowing that it was a dangerous vehicle, should place himself in its path, with his eyes open,

could not recover, because his own carelessness would disentitle him to a verdict. In short, the defendant company, if it is at fault under the statute in the matter of the gates, can acquit itself only by showing the contributory negligence of the plaintiff. If the defendant company is at fault in the matter of the signal, it can acquit itself only by showing contributory negligence.

If the result of the whole case is to show to your satisfaction that the plaintiff has been injured by any fault of the company, to which injury his own imprudence has not contributed, you will find a verdict for the plaintiff. Otherwise, for the defendant.

In case you should determine that the plaintiff is entitled to your verdict, you will give him compensation. He became of age on July 4, 1914, up to which time, really, his earnings belonged to his parents who, I believe, were on the other side of the water. But he seems to have had no guardian. He had an uncle, who was kin to him. But, I suppose, the plaintiff may be regarded fairly as an emancipated person even before he became of age, and the question of minority need not concern you. That which he would be entitled to, if he is entitled to anything, would be compensation for his physical pain, for his disability, for his loss of income, past and probable in the future, and for his disbursements.

We, naturally, in a question of this kind turn to the physicians who have testified, of whom there are two, Dr. Adams and Dr. Washington. They both examined him. Dr. Adams examined him, he said, about two years ago. The only visible injury was a slight swelling and stiffness of the little finger of the right hand. He said

it was unnecessary to remove his clothes, as he had no marks, and I do not understand that it is claimed that there was any visible physical injury except the finger. Dr. Washington described his examination on the 3rd of March, 1914, and he said he found the general action of his system, the heart, lungs, and so forth, normal, all right. He says that the plaintiff complained of two tender spots in the lower part of the back, and that he found that the little finger of one of his hands was stiff; that he saw him today, and that he seemed to be in the same physical condition that he was in when he examined him in March of last year.

It needs no physician to tell us that the plaintiff had a severe shock. He had a narrow escape. His nervous system was, no doubt, upset. He says that Dr. Sheehan came to see him every day for two weeks, and then he came to see him several times after that. The physician evidently tried to quiet him. The plaintiff says that he was working for his uncle; that he hired a man, and rode on the wagon for a fortnight in order to show him the route, and paid him $24. He was then getting $15 a week from his uncle and two per cent. on his sales, amounting, he said, to $18 in all. His uncle said it amounted to $20. About two months after the accident he secured employment at Roll Brothers and got $15 per week. He is there yet, and gets $16. I do not know that it appears when it was raised from $15 to $16. The loss of wages, if there was any loss of wages, due to the accident is recoverable, if he can recover anything, as one of the items of his claim. He said that he had electrical treatment from Dr. Sheehan, and that he has pain in the back still; that he lost some time when working for his uncle and for Roll, and that there

was no reduction in wages; he lost no earnings. Dr. Sheehan's bill was $50 and the medicine was $5. His uncle said that he had to let him go because he could not do the work; that he was not as well and healthy a man after the accident as he was before. The plaintiff himself says that he cannot do the lifting that he used to do.

Of course, the fact of the accident proves nothing. You go back to questions of legal liability first, and then, if liability is established in favor of the plaintiff and against the defendant, the question of damages will be dealt with, with these items in mind.

I have been requested by counsel for the defendant to charge certain propositions, which I will dispose of.

The first one, as I understand it, asks the Court to say that the duties which are incumbent on the railroad company as to the approach of trains do not vary with the weather. I charge that. Their duties are meant for all weathers, hot or cold, wet or dry.

I deny the second proposition, and also the third, except as charged. I deny the fourth also.

I deny the fifth, except the last sentence: that the jury have a right to consider that there was not any testimony at the prior trial with respect to a foggy condition of the atmosphere.

The sixth request I deny, and also the seventh, as questions for the jury.

The eighth request I charge in part. I deny the first sentence, and charge the last sentence: "Even the failure of the defendant to give the statutory warning or to lower the crossing gates did not absolve the plaintiff in attempting to cross the tracks of exercising both care and pru-

dence." I charge that in the sense that I have already stated: that if he noticed, if he observed, if it was brought to his attention while crossing the railroad track that a train was coming, he was bound to be prudent.

I deny the ninth request except as I have charged.

(The jury retires).

MR. SCOTT: May it please the Court, I desire first to except to the Court's refusal to allow Exhibits D-1 and D-1A, which have been offered and received in evidence, to go to the jury. Those are the interrogatories and answers.

Exception noted as ground of appeal.

MR. SCOTT: I desire to except to that portion of your Honor's charge in which your Honor explained to the jury the crossing acts in question, and referred to the case of *Brown v. Erie Railroad Company,* in view of the fact that the Brown case dealt with Chapter 35 of the Laws of 1909, and what was said with reference to Chapter 96 of the Laws of 1909 is purely dictum—

THE COURT: It dealt with both.

MR. SCOTT: —and the further fact that the only statute applicable, if at all, to the case at bar was Chapter 96 of the Laws of 1909.

Exception noted as ground of appeal.

MR. SCOTT: I desire to except to that portion of your Honor's charge in which the Court stated as a fact, not leaving it to the jury to determine as a fact, that the gateman was negligent.

Exception noted as ground of appeal.

MR. SCOTT: I desire to specifically except to each request handed to the Court, which the Court refused to charge, except as the Court did charge, because the Court did not charge said request in the specific language of each request as requested.

Exception noted as ground of appeal.

The Court takes a recess until tomorrow, Friday, October 29, 1915, at ten o'clock, a. m.

DEFENDANT'S REQUESTS AND EXCEPTIONS.

Defendant's counsel requests the Court to charge the jury as follows:

(1) I charge you that there is not imposed upon the railroad company any additional or varying duties relative to the approach of the trains to a railroad crossing on account of weather conditions.

(Charged).

(2) If you believe that the plaintiff was not placing a reliance on the open gates at the crossing as a means of assuring his safety, but was making an independent observation for the approach of trains irrespective of the fact that the gates were open, then I charge you that the open gates were not the proximate cause of the accident.

(Denied except as charged).

Defendant's counsel prays an exception to the refusal of the Court to charge specifically as requested.

Exception noted as ground of appeal.

(3) If you believe that the plaintiff could have seen the train during the time he has testified he looked for the same, then I charge you that

in law he is not excused because he says he did not see it, because the law says that when one looks he must look effectively and that he is presumed to see that which is to be seen.

(Denied except as charged).

Defendant's counsel prays an exception to the refusal of the Court to charge specifically as requested.

Exception noted as ground of appeal.

(4) If you believe that the plaintiff's version of the accident has been changed to meet the situation of this trial and to overcome the law as it was decided should have been applied to this case on the first trial thereof, you have a right to discredit the plaintiff's entire story as to how this accident occurred, because the law says that one who testifies falsely to one particular and material fact is apt to testify falsely in other particulars.

(Denied).

Defendant's counsel prays an exception to the refusal of the Court to charge as requested.

Exception noted as ground of appeal.

(5) You are not obliged to accept the plaintiff's version as to the foggy condition of the weather at the time of the accident if you believe it has been given to specially meet the exigencies of this case. And in considering if it has been so given, you have a right to take into consideration that not one word relative to a foggy condition was testified to on the other trial of this case.

(Denied except as charged).

Defendant's counsel prays an exception

to the refusal of the Court to charge specifically as requested.

Exception noted as ground of appeal.

(6) I charge you there is no competent or legal proof as to any loss the plaintiff suffered on account of the two cents on each dollar of sales he claims he got in addition to his salary from his uncle.

(Denied).

Defendant's counsel prays an exception to the refusal of the Court to charge as requested.

Exception noted as ground of appeal.

(7) I charge you that there is no competent or legal proof as to any permanent injuries of the plaintiff.

(Denied).

Defendant's counsel prays an exception to the refusal of the Court to charge as requested.

Exception noted as ground of appeal.

(8) In determining whether the plaintiff failed in his duties to exercise the care demanded of him at the crossing in question, you will take into consideration whether the constant use of the crossing by the plaintiff, and his familiarity with the situation, did not lull his appreciation of the danger, and make him careless about exercising the prudence required of him in this case. For even the failure of the defendant to give the statutory warning, or to lower the crossing gates, did not absolve the plaintiff in attempting to cross the tracks of exercising both care and prudence.

Charge.

(Denied except as charged).

Defendant's counsel prays an exception to the refusal of the Court to charge specifically as requested.

Exception noted as ground of appeal.

(9) A person about to cross a railroad track is charged with the duty of looking and listening for the approach of trains. Where he knows that a gateman is habitually stationed at a crossing he is charged with the added and further duty of looking for him. And I therefore charge you that while open crossing gates give the plaintiff a right to assume that a train is not about to pass, if you find that the plaintiff failed to look for the gateman, or failed to look both ways or listen for any approaching train, your verdict must be for the defendant company.

(Denied except as charged).

Defendant's counsel prays an exception to the refusal of the Court to charge specifically as requested.

Exception noted as ground of appeal.