

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 367

ERIE RAILROAD COMPANY, PETITIONER,

*vs.*

HARRY J. TOMPKINS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

**IN UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

HARRY J. TOMPKINS, Plaintiff-Appellee,

against

ERIE RAILROAD Co. (a New York Corporation),  
Defendant-Appellant

**STATEMENT UNDER RULE XIII**

The above entitled action was commenced by the service of a summons and complaint on the defendant-appellant on or about August 29, 1934. Notice of appearance for defendant was served on September 18, 1934. Issue was joined by the service of the defendant's answer on the 28th day of September, 1934. Complaint was filed on the 7th day of September, 1934, and answer was filed on the 28th day of September, 1934. The original parties were those above mentioned. The defendant was not at any time arrested, and no bail has been taken and no property attached.

This action was tried by Honorable Samuel Mandelbaum and jury on the 5th, 6th, 7th and 13th days of October, 1936. The case was submitted to the jury and on the 13th day of October, 1936, the jury rendered a verdict in favor of the plaintiff and against the defendant in the sum of \$30,000 and at the close of the said trial and the rendition of the said verdict by the jury, counsel for the defendant made a [fol. 2] motion to set aside the said verdict and for a new trial on the grounds that the verdict was against the weight of evidence and the law, etc., and after due deliberation, Honorable Samuel Mandelbaum denied the said motion without opinion on or about November 9, 1936.

A judgment in the sum of \$30,000 together with costs in the sum of \$95.00 and interest in the sum of \$165.00, herein appealed from, was entered on the 16th day of November, 1936. This appeal was taken on the 16th day of November, 1936.

There has been no change of attorneys for the respective parties.

[fol. 3] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

L 58, Page 389

HARRY J. TOMPKINS

against

ERIE RAILROAD CO. (a New York Corporation),

SUMMONS

To the above-named Defendant :

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable John C. Knox, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 29th day of August A. D. 1934.

Charles Weiser, Clerk.

Bernard G. Nemeroff, Plaintiff's Attorney, Office and Post Office Address, 11 Broadway, Borough of Manhattan, City of New York.

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[fol. 4] IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT

Plaintiff, by his attorney Bernard G. Nemeroff, complains of the defendant and alleges as follows :

First. That this plaintiff is a citizen of the State of Pennsylvania and resides at 1125 Wyoming Avenue, Exeter, Pa.

Second. That at the times hereinafter mentioned, the defendant was and still is a domestic corporation, duly organized and existing under the laws of the State of New York and operating a steam railroad both in the State of New York and in the State of Pennsylvania, and that said corporation has its principal place of business in the Borough of Manhattan, City, County and State of New York.

Third. That on or about the 24th day of July, 1934, plaintiff was lawfully on a foot path near the intersection formed by Rock Street and a railroad track exclusively maintained by the defendant corporation in the Borough of Hughes-[fol. 5] town, City of Pittston, Luzerne County, Pennsylvania, and which said foot path runs parallel with and adjacent to said railroad track and said foot path furthermore has been for a long time prior to the said date herein used by the public as a means of egress and ingress to and from the streets abutting to and intersecting the said railroad track maintained by the said defendant, and that said use was with the full knowledge, consent and acquiescence of said defendant, and the proximity of said foot path to the said railroad tracks was fully known to the said defendant, its servants, agents, employees and others.

Fourth. That as plaintiff was on said foot path, the defendant, negligently, carelessly and recklessly and without heed to the safety of the public, ran one of its trains on said railroad track at a high and dangerous rate of speed and negligently, carelessly and recklessly omitted, while so operating said railroad train, and although approaching a crossing, to give any signal by ringing of the bell or blowing of the whistle of the locomotive of said railroad train, or otherwise, although defendant had no gates or any flag-men at said crossing, by reason whereof plaintiff was unaware of the approach of the said locomotive, and that said defendant carelessly, recklessly and negligently permitted an object to project from the said train, which was operated by said defendant.

Fifth. That by reason of the defendant's said negligence and without any fault or negligence on the part of the plaintiff, said plaintiff was struck with great force, hurled to the ground and underneath the wheels of said railroad train and thereby inflicting upon him serious injuries.

[fol. 6] Sixth. That by reason of the defendant's negligence, carelessness and recklessness as aforesaid, plaintiff was seriously wounded, bruised and injured and suffered severe wounds and cuts in his head and face, resulting in his having severe scars thereon and permanently disfiguring his face and head; and also suffered severe wounds and cuts on his thigh, hip, legs and feet; he also suffered the amputation of his right arm at its junction with the shoulder and was severely injured and bruised in and about his body, with the result that he has ever since been incapacitated and caused to suffer great pain of body and mind and suffer severe mental and nervous shock and, as plaintiff is informed and verily believes, his injuries as aforesaid will be permanent and he will be permanently disabled and caused to suffer continuous pain, humiliation and inconvenience, and ever since said injuries, the plaintiff has been and will be permanently prevented from attending to his usual vocation and plaintiff's earning capacity has been permanently impaired; and the plaintiff has necessarily paid and has become liable to pay expenses for medical and surgical attendance and for nursing and for medicines and will hereafter necessarily incur further expenses of a similar character, all to the plaintiff's damage in the sum of \$100,000.

Wherefore plaintiff demands judgment in the sum of \$100,000 with the costs and disbursements of this action.

Bernard G. Nemeroff, Attorney for Plaintiff, Office  
& P. O. Address, 11 Broadway, Borough of Man-  
hattan, City of New York.

[fol. 7] *Duly sworn to by Bernard G. Nemeroff. Jurat omitted in printing.*

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[fol. 8] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AMENDING COMPLAINT

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto as follows:

1. That paragraph "Third" of the complaint herein, the first line thereof, be amended to read as follows: "That on or about the 27th day of July, 1934."

2. That the defendant owned, operated and controlled the tracks and trains referred to in the complaint at the time of the accident set forth therein.

Dated, New York, October 4th, 1934.

Bernard G. Nemeroff, Attorney for Plaintiff. Davis,  
Polk, Wardwell, Gardiner & Reed, Attorneys for  
Defendant.

[fol. 9] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEARANCE

Please take notice that we are retained by and appear in this action as Attorneys for the defendant above named and demand that a copy of all papers in this action be served on us at our office number 15 Broad Street, Borough of Manhattan, City of New York, New York.

Dated, New York, September 18, 1934.

Davis, Polk, Wardwell, Gardiner & Reed, Attorneys  
for said Defendant, Office and Post Office Address,  
No. 15 Broad Street, Borough of Manhattan, City  
of New York, N. Y.

To Clerk of the United States District Court, Southern  
District of New York. Bernard G. Nemeroff, Esq., Attorney  
for Plaintiff, 11 Broadway, Manhattan, N. Y. C.

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[fol. 10] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER

The above named defendant, by Davis, Polk, Wardwell, Gardiner & Reed, its attorneys, for its answer to the complaint herein:

1. Denies that it has any knowledge or information sufficient to form a belief as to the allegations or any of them, contained in paragraph "First" of the complaint.
2. Upon information and belief, denies the allegations, and each of them, contained in paragraphs "Third",



“Fourth”, “Fifth” and “Sixth” of the complaint, and especially denies that the plaintiff has been damaged in the sum of One Hundred Thousand (\$100,000) Dollars, or in any other sum for which this defendant is responsible, and except that it denies that it has any knowledge or information sufficient to form a belief as to the exact nature, extent and consequences of the alleged injuries to the plaintiff.

3. Further answering the complaint, and as a defense thereto, defendant alleges upon information and belief [fol. 11] that the accident and the injuries to the plaintiff were caused or contributed to by his own negligence or want of care.

Wherefore, defendant demands judgment dismissing the complaint, together with the costs and disbursements of this action.

Davis, Polk, Wardwell, Gardiner & Reed, Attorneys  
for Defendant, Office & P. O. Address, 15 Broad  
Street, Borough of Manhattan, City of New York.

*Duly sworn to by G. C. Manning. Jurat omitted in printing.*

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[fol. 12] SUBPENA ANNEXED TO BILL OF DISCOVERY

The President of the United States of America to Erie  
Railroad Co. (a New York Corporation), Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by Harry J. Tompkins and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you of Two Hundred and Fifty Dollars (\$250).

Witness, Honorable John C. Knox, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 10th day of November in the year One Thousand Nine Hundred and

Thirty-four and of the Independence of the United States  
the One Hundred and fifty-ninth.

Charles Weiser, Clerk.

Bernard G. Nemeroff, 11 Broadway, Solicitor.

The Defendant is required to file its answer or other  
defense in the above cause in the Clerk's Office on or before  
the twentieth day after service hereof excluding the day  
of said service; otherwise the bill aforesaid may be taken  
Pro Confesso.

Charles Weiser, Clerk. (Seal.)

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[fol. 13] IN UNITED STATES DISTRICT COURT

[Title omitted]

BILL OF DISCOVERY

To the Honorable, the Judges of the United States District  
Court for the Southern District of New York:

Harry J. Tompkins, a citizen and resident of the Borough  
of Exeter, Commonwealth of Pennsylvania, brings his bill  
against the Erie Railroad Co., a corporation duly organized  
and existing under and by virtue of the laws of the State of  
New York, with its principal place of business in the South-  
ern District of New York, and there operating a steam rail-  
way as a public carrier of passengers and freight for hire.

And thereupon your orator complains and respectfully  
shows:

1. That your orator is twenty-eight years of age, Amer-  
ican born, has been married for four years, has a child three  
years of age and up to the time of the accident hereinafter  
mentioned, in which your orator lost his right arm, was a  
[fol. 14] skilled iron moulder and, as such, a member of the  
International Iron Workers Union.

2. That on the 27th day of July, 1934, your orator re-  
sided at 7 Hughes Street, Hughestown Borough, City of  
Pittston, Commonwealth of Pennsylvania, and when on his  
way to his said home, at 2:30 A. M. of that day, less than  
a block and a half therefrom, walking on a beaten foot path  
towards said home, used for many years past as a public

highway with the knowledge, acquiescence, consent and approval of the defendant, a train owned and operated by the defendant suddenly appeared in the opposite direction and came tearing down toward your orator at a terrific rate of speed on a track running parallel with said highway, and that after the engine of said cars of said train had passed your orator some projection from one of the cars, either the third or the fourth car of said train, projecting way out into the highway, struck your orator and swept your orator backward off his feet under the wheels of a car of said train which ran over your orator and severed his right arm at the point of its junction with the shoulder. That your orator also suffered a laceration of the right supraorbital region, a laceration of the scalp and the right parietal region and numerous other contusions, abrasions, cuts and bruises, and necessarily submitted to a disarticulation of the right shoulder joint at the hospital where he was for some time necessarily confined; that your orator suffered all said injuries through no fault on his part and solely through the negligence of the defendant in permitting said projection to extend out into the said highway at 2:30 in the morning when it was dark and when, in the absence of light, pedestrians could not see such projection.

[fol. 15] 3. That on the 29th day of August, 1934, your orator commenced an action at law in the United States District Court for the Southern District of New York, against the above-named defendant, the Erie Railroad Co., to recover \$100,000 damages for said injuries by filing in the office of the Clerk of said Court the summons and complaint in said action and by causing the said defendant, on said date, to be served with a copy of said summons and complaint within said Southern District of New York; that the said action entitled "Harry J. Tompkins, plaintiff, against Erie Railroad Co., (a New York corporation) defendant" was duly docketed in said Court as docket #L58-389; that the said defendant thereafter on or about the 18th day of September, 1934, duly entered its notice of appearance in said action by counsel and on the 28th day of September, 1934, filed in the office of the Clerk of said Court and served on your orator's attorney in said action its answer to said complaint, a copy of which summons marked Exhibit "I", of which complaint marked Exhibit

“II” and of which answer marked Exhibit “III” are hereto annexed and made part hereof; that the said action at law has been at issue since September 28th, 1934 and is still pending and undetermined on the law side of this Court and is now #1535 on the Civil Jury Calendar awaiting trial.

4. That except as to the allegation that the defendant is a New York corporation operating a steam railroad both in the State of New York and in the Commonwealth of Pennsylvania, with its principal place of business in the Borough of Manhattan, City, County and State of New York, which the defendant admits, the answer of the defendant in said action in effect denies each and every allegation of your orator’s said complaint in said action at law and thus raises issues therein making it incumbent upon your orator, in order to establish a prima facie case, to prove the allegations of your orator’s said complaint with respect to the defendant’s negligence and the other elements of your orator’s cause of action; that the said defendant moreover on the 28th day of September, 1934, through its counsel in said action, caused to be served upon your orator’s attorney in said action at law a demand for a bill of particulars, a copy of which marked Exhibit “IV” is hereto annexed and made part hereof, requiring your orator to “describe in detail” the aforesaid accident, to “specify the exact manner in which it is alleged the accident occurred”, to “describe in detail the manner it is alleged that the defendant was negligent”, to “indicate, by name, occupation or otherwise, the agents, servants or employees of the defendant who are alleged to have been negligent”, to “describe in detail the object which it is alleged the defendant negligently permitted to project from the said train, including its dimensions, its nature and its location on the train.”

5. That because the said accident happened in the dark at 2:30 in the morning and because of the manner in which the said accident happened, after a number of the cars of the train had passed your orator and was flying past your orator at a terrific speed and because your orator was struck suddenly with violent force and thrown under the wheels of the car, your orator is unable to state and your orator does not know what object the defendant permitted to project from the said train, much less the dimensions, [fol. 17] its nature and its location on the train, and your

orator is unable to indicate and does not know either by name, occupation or otherwise the agents, servants or employees of the defendant who caused said object to project from said train or permitted it to project; in truth your orator is unable to state and does not know precisely in what particulars the defendant, its agents and servants was negligent except that in causing and in allowing any object to project from the train into the highway where it might injure unsuspecting pedestrians; that there were no other pedestrians or persons at the scene of the accident at the time of its occurrence and that your orator therefore has no witnesses nor witness who saw the accident. That all the information in the premises is peculiarly within the knowledge of the defendant and its own agents and servants; that the said train was at the time of the accident carrying freight and that the car of the train from which the object projected, as your orator believes, was bulging with freight; that the blood of your orator bespattered a number of cars of the train which ran over your orator but that your orator was unable to inspect and did not inspect the cars whereas the defendant and its agents and servants did, as your orator verily believes, inspect the cars and from the blood on the said cars and from other evidences was able to ascertain just which cars ran over your orator and from which car the object projected; that the defendant, and its servants and agents, also know where said car was loaded and know the contents thereof and from their inspection of the car, after the accident, know also what the object was that was projecting and how it projected and who caused the same to project, [fol 18] as well as why it was projecting, and as to all of these facts your orator is wholly ignorant and helpless to prove because the witnesses are all in the employ of the defendant and the information is within its own peculiar knowledge and control.

6. That it will be a great hardship on your orator if he were compelled to proceed to the trial of said action at law with all the evidence of the negligence of the defendant within the defendant's exclusive control; that your orator has fully and fairly stated all the facts in the case to his counsel herein and to his attorney in said action at law and has been advised by them after said statement and your orator verily believes that your orator has a meri-

torious cause of action against the defendant in said action at law but that your orator cannot safely proceed to trial and will hardly be able to establish a prima facie case on the trial of said action in law without a discovery and without the aid of this court of equity before trial to afford your orator a discovery of the facts, information and the names of the witnesses in the control of the defendant and that upon such discovery your orator will moreover be able to comply with the defendant's said demand for a bill of particulars.

7. To the end, therefore, that the defendant may, if it can, show why your orator should not have the discovery of all and singular the matters and things herein prayed for, your orator submits herewith the following interrogatories to which the said defendant shall true, direct and perfect answer make :

Interrogatory 1. On July 27th, 1934, at or about 2:30 or 2:45 in the morning, in the Borough of Hughestown, City [fol. 19] of Pittston, Commonwealth of Pennsylvania, was the defendant operating a train through the Borough of Hughestown, City of Pittston, past the crossing at Rock Street?

Interrogatory 2. If so, of how many cars did the train consist?

Interrogatory 3. If so, which of the cars, if any, carried freight?

Interrogatory 4. If any of the first four cars carried freight, i. e., the four cars nearest the engine of said train, (a) what was the number of each of said four cars? (b) what was the particular type and construction of each of said cars? (c) what was the particular type and construction of the doors of each of said cars? (d) at what point were these cars respectively loaded? (e) what were the names and addresses of the persons who did the loading? (f) what was loaded into each car, giving the weight and quantity of the materials loaded into each car? (g) and what was the destination of each of said cars?

Interrogatory 5. What is the name of the station where the said train stopped before reaching Hughestown, Pennsylvania?

Interrogatory 6. At what time did the said train actually leave said station?

Interrogatory 7. At what time was said train scheduled to leave said station?

Interrogatory 8. After the train passed Rock Street crossing in Hughestown, Pennsylvania, on July 27th, 1934, [fol. 20] did the defendant or any of its agents or servants discover any marks or stains of blood or what appeared to be blood on any of said cars?

Interrogatory 9. If so, (a) give the date and the time of the discovery, (b) the names and addresses of the persons who made the discovery, (c) the particular cars of said train so marked or stained with blood or what appeared to be blood.

Interrogatory 10. Give the names and addresses of the servants and agents of the defendant who unloaded the first four cars of the said train, stating the position they at the time occupied with the company, and the time and place of the unloading.

Interrogatory 11. At or before the time of the unloading of the respective first four cars of said train, did the defendant, its agents or servants observe that the rolling doors or other doors or appurtenances of any of said four cars of said train were out of repair? If so describe what was observed in detail.

Interrogatory 12. At the time or before the unloading of any of the said first four cars of said train, did the defendant or any of its agents or servants observe with respect to any of said cars that the door had been forced out or had fallen out of its sliding grooves and/or bulged out? If so describe what was observed in detail.

Interrogatory 13. At the time or before the unloading of any of the said first four cars of said train, did the defendant or any of its agents or servants observe with respect to any of said cars that one or more objects had been projecting through the door or other aperture of the car or projecting from any part of any of said four cars? If so, describe what was observed in detail.

Wherefore, your orator asks for the aid of the equity side of this Honorable Court in the premises and prays

that its writ of subpœna may issue directly to the defendant, the Erie Railroad Co. and H. R. Cole, Assistant to its Vice-President, and other officials of said defendant, commanding it and them at a certain time therein to be named to appear before this Honorable Court and then and there full, true, direct and perfect answer make to each of the various interrogatories hereinabove set forth.

And your orator will ever pray, etc.

Bernard G. Nemeroff, Solicitor for Complainant,  
Office & P. O. Address, 11 Broadway, Borough of  
Manhattan, City of New York.

[fol. 22] *Duly sworn to by Harry Tompkins. Jurat omitted in printing.*

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[fol. 23] Exhibit I, Annexed to Bill of Discovery

This exhibit consists of the summons printed herein at p. 3.

Exhibit II, Annexed to Bill of Discovery

This exhibit consists of the Bill of Complaint printed herein at pp. 4 to 7, inclusive.

Exhibit III, Annexed to Bill of Discovery

This exhibit consists of the Answer printed herein at pp. 10 to 11.

Exhibit IV, Annexed to Bill of Discovery

This exhibit consists of the defendant's demand for a verified Bill of Particulars printed herein at pp. 24 to 26.

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[fol. 24] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEMAND FOR BILL OF PARTICULARS

SIR:

Please take notice that the defendant herein demands that you serve upon its attorneys, within ten days from the date of service of this notice, a verified bill of particulars as to the following matters, to wit:

First: Describe in detail the accident out of which this alleged cause of action arises, and in particular,



(a) Specify the exact date, time and place of the alleged accident.

(b) Indicate the exact place on the defendant's property where the accident is alleged to have occurred.

[fol. 25] (c) Specify the exact manner in which it is alleged the accident occurred.

Second. Describe in detail the exact manner in which it is alleged that the defendant was negligent, and in particular,

(a) Specify in detail the manner in which it is alleged that the defendant was negligent.

(b) Indicate, by name, occupation or otherwise, the agents, servants or employees of the defendant who are alleged to have been negligent.

(c) Describe in detail the object which it is alleged the defendant negligently permitted to project from the said train, including its dimensions, its nature, and its location on the train.

Third. Specify in detail the exact nature, extent and consequences of the alleged injuries to the plaintiff, and in particular,

(a) Indicate each and every injury alleged to have been sustained by the plaintiff, and which, if any, of the same are alleged to be permanent.

(b) Specify the exact period plaintiff is alleged to have been prevented from performing his regular duties and the loss of salary, if any, therefrom.

(c) Specify the exact period which the plaintiff has been prevented from performing duties of any character and the loss of salary, if any, therefrom.

[fol. 26] (d) Itemize in detail the amounts alleged to have been expended by the plaintiff as the result of this accident for medical expenses, hospital bills, etc.

Dated, New York, September 25, 1934.

Yours, etc., Davis, Polk, Wardwell, Gardiner & Reed,  
Attorneys for Defendant, Office and Post Office  
Address, 15 Broad Street, Borough of Manhattan,  
City of New York.

To Bernard G. Nemeroff, Esq., Attorney for Plaintiff, 11  
Broadway, Borough of Manhattan, City of New York.

[fol. 27] IN UNITED STATES DISTRICT COURT

[Title omitted]

PLAINTIFF'S BILL OF PARTICULARS

SIR:

Please take notice that the following is a bill of particulars of the plaintiff's cause of action, as demanded by the defendant herein:

1. (a), (b) The accident occurred on July 27th, 1934, at about 2:30 A. M. on a foot path located between the Rock Street Crossing and Hughes Street, on the north side of the tracks and about 60 feet easterly of the Rock Street crossing.

(c) That as the plaintiff was lawfully on a foot path, adjacent to the defendant's railroad tracks, the defendant was negligent and careless in permitting one of the doors of its cars or some other similar object to project from the side of the train, striking the plaintiff without warning, as a result of which he was thrown to the ground and under the wheels of the train.

[fol. 28] 2. (a) Defendant was further negligent and careless in permitting, maintaining, and acquiescing, for a long period of years, a foot path and highway to be located so close to its tracks as to be dangerous to life and limb, and without protecting the same in any way, and in further failing to make proper inspection of its trains, so that no object would extend over the pathway as the trains passed the aforesaid public path and highway.

(b) Plaintiff at this time is without knowledge or information as to the names or occupations of the agents, servants or employees of the defendant who were negligent.

(c) Plaintiff is without accurate knowledge as to the exact dimensions of the object which projected from the train operated by the defendant, as described in the complaint, except that the said object projected at least a sufficient distance from the side of one of the cars of the said train to strike the plaintiff while he was a safe distance from the said train. The projection extended from one of the cars immediately following the engine. Plaintiff does

not know the exact location of the car with its relation to the engine.

3. (a) The plaintiff suffered the following injuries as the result of the accident complained of herein: Traumatic amputation of the right arm, about 1½ inches below the shoulder joint; laceration of the right supra-orbital region with resultant scars of permanent nature; laceration of the scalp in the right parietal region resulting in scars of a permanent nature; and was severely injured and bruised in and about his body and caused to suffer great pain of body and suffered severe mental and nervous shock and [fol. 29] is informed that said nervous shock will be of a permanent nature.

(b) Plaintiff has been unable to perform his regular duties from July 27th, 1934, the date of the accident complained of, until the present time, and believes he is permanently incapacitated from resuming his former occupation. Plaintiff's salary prior to the accident complained of was the sum of approximately eight dollars a day.

(c) Plaintiff has been prevented from performing duties of any character until the present time and his said total incapacity will be permanent.

(d) Plaintiff has incurred to date in an effort to cure himself of the injuries complained of the following expenses: For physicians and surgeons \$350.00; for hospital \$89.00.

Dated, New York, N. Y., April 29, 1936.

Bernard G. Nemeroff, Attorney for Plaintiff, Office  
and P. O. Address, 32 Broadway, Borough of Man-  
hattan, City of New York.

To Davis, Polk, Wardwell, Gardiner & Reed, Esqs., At-  
torneys for Defendant, 15 Broad Street, New York City.

[fol. 30] *Duly sworn to by Bernard G. Nemeroff. Jurat  
omitted in printing.*

[fol. 31] IN UNITED STATES DISTRICT COURT, SOUTHERN  
DISTRICT OF NEW YORK

L 58—389

HARRY J. TOMPKINS, Plaintiff

against

ERIE RAILROAD Co. (a New York Corporation), Defendant

**Statement of Evidence**

Before Hon. Samuel Mandelbaum, D. J., and a Jury

New York, October 5th, 1936,  
10:30 o'clock a. m.

Appearances:

Bernard C. Nemeroff, Esq., Attorney for Plaintiff;  
Everett G. Hunt, Esq., of Counsel.

Davis, Polk, Wardwell, Gardiner & Reed, Esqs., Attor-  
neys for Defendant; Theodore Kiendl, Esq., of Counsel.

(A jury was duly empaneled, examined and sworn.)  
[fol. 32] (Mr. Hunt opened to the jury on behalf of the  
plaintiff.)

(Mr. Kiendl opened to the jury on behalf of the defend-  
ant.)

HARRY JAMES TOMPKINS, the plaintiff, called in his own be-  
half, being duly sworn, testified as follows:

(Informal recess.)

Direct examination.

By Mr. Hunt:

Mr. Hunt: May it please the Court, I will offer in evi-  
dence a blueprint, the one I used in opening to the jury,  
showing the general locality of the accident.

Mr. Kiendl: Defendant has no objection.

(Marked Plaintiff's Exhibit No. 1.)

Q. Mr. Tompkins let me ask you to keep your voice up, take a comfortable position and keep your voice up so that the last gentleman can hear down here (indicating). This is your first experience in court, is it?

A. Yes, sir.

Q. How old a man are you?

A. 29.

Q. And you were born where?

A. Hughestown Borough.

Q. That is the place we have been talking about?

A. Yes, sir.

Q. You stayed in school until you were how old?

A. 15.

Q. You were one of a number of children, were you not?

A. Yes, sir.

[fol. 33] Q. You went to work as soon as you could?

A. Yes, sir.

Q. And your first work you did was what?

A. In a knitting mill.

Q. And after a short time there did you take up some other work?

A. Yes, sir. I worked in a coal breaker.

Q. And then?

A. I worked in a foundry, a stove foundry.

Q. That is the one I wanted to ask you about. What is the name of the foundry company?

A. Pittston Stove Works.

Q. And in that place you learned a trade, did you not?

A. Yes, sir.

Q. And that trade is known as what in the business?

A. Moulding trade.

Q. That is a trade where the work amounts to what?

A. You mean the wages?

Q. No, the work; what is the nature of the work?

A. Why, it is making the parts for stoves out of sand moulds.

Q. And that trade has a union and you were one of the union men, were you?

A. Yes, sir.

Q. You worked for that concern how many years altogether?

A. 14 years.

Q. Now, going right to the time of the accident, immediately before had you actually been working, or what was the condition?

A. The foundry was shut down.

Q. And had been for how long before?

A. I believe about two months.

Q. So that you had been out of work during that time?

A. Yes, sir.

Q. Did you occasionally during that time find some little odd jobs to do?

A. Well, I would go out and repair stoves, if I could get jobs, at private homes.

[fol. 34] Q. You have seen this blueprint before, have you not, Mr. Tompkins?

A. Yes, sir.

Q. And I will first ask you to look at it and place the letter T, indicating your name, on the house where you resided with your family at the time of this occurrence.

A. (Witness complies.)

Mr. Hunt: May I go over that, with the Court's permission.

The Court: Surely.

(Mr. Hunt retraces the letter placed by witness.)

Q. That house you have indicated is the second house from the corner of Hughes Street and the railroad tracks?

A. Yes, sir.

Q. Now——

The Court: Is that house on Hughes Street?

Mr. Hunt: That house is on Hughes Street.

The Witness: Yes, Sir.

Mr. Hunt: And, Mr. Kiendl, I assume that we agree for the purposes of the trial that the railroad track runs generally in a northerly and southerly direction?

Mr. Kiendl: It has been so stipulated already.

Mr. Hunt: Yes.

Q. Now, how long did you live at that particular place prior to the accident.

A. Three years.

Q. How long, Mr. Tompkins—you said you were born right there in this village, were you?

A. Right in the borough, yes, sir.

[fol. 35] Q. And you were familiar with that section, I assume, from the time you were a child?

A. Yes, sir.

Q. When you come down in an easterly direction on Hughes Street does Hughes Street cross the railroad tracks or does it end at the railroad tracks?

A. It ends at the railroad tracks.

Q. After you cross—assuming you had crossed over the railroad tracks from the end of Hughes Street, what is in this vacant plot over here that is shown on the blueprint to the east of the tracks?

A. A baseball ground.

Q. And then farther down are there any buildings?

A. Yes, sir.

Q. What buildings are farther down?

A. Houses on the other street.

Q. Where is the schoolhouse?

A. It is—

Q. Is it east of west of the railroad tracks? Have you got your directions clear? Do you know which is east and which is west there?

A. East, it is.

Q. The schoolhouse would be east of the railroad tracks?

A. Yes, sir.

Q. Now, your main highway or the only road that crosses the railroad tracks in this section is known as what street?

A. Rock Street.

Q. That is a grade crossing, is it?

A. Yes, sir.

Q. I mean does it have gates or anything of that kind?

A. No, sir.

Q. Now I want to direct your attention and see if you can describe to these gentlemen in your own way the condition that exists on that land between the northerly side of Rock Street and Hughes Street. That is it has been agreed here that there is a space between the picket fence along in front of the houses on the railroad track, a space [fol. 36] of 35 feet, and it runs from Rock Street over to Hughes Street.

A. Yes, sir.

Q. Now that is what I want to direct your attention to, and will you try in the first instance mentally to describe just what that condition was day in and day out for years,

between Rock Street and Hughes Street. Could you do that, do you think?

A. Well, it has been used for all kinds of automobiles, trucks, and it is honest land, and there is ruts from the cars and things that was in it, and the best place to walk was along that track, there was a well-beaten path there.

Q. Well, let's see if we can separate it. You say along the track was a well-beaten path?

A. Yes, sir.

Q. That had, to your knowledge, been there and had been in use over a period of years. How many years?

A. 12 years.

Q. That is as far as you remember back?

A. That is as far as I remember.

Q. Now could you tell us a little more about—in the first place, can you indicate with your left arm or hand in some way approximately the width of the path?

A. It would be about the width of that desk there (indicating).

Q. You mean that desk—is that the same width as the one alongside of it?

A. Yes.

Mr. Hunt: Well, that is about, may we agree, Mr. Kiendl, approximately two feet?

Mr. Kiendl: Fine.

Q. And that started where?

A. Well, at Rock Street.

Q. And ran how close to the railroad track? You said along the railroad track. That is why I use that expression.

A. Yes, sir.

[fol. 37] Q. How close to the railroad track did that run as it went toward Hughes Street?

A. About two feet from the end of the ties.

Q. Then let me ask you—up where the path was, was that particular part of this 35 feet stretch, was that level ground or not?

A. That was level.

Q. It was level?

A. Yes, sir.

Q. Now, beginning at the edge of the path and running down towards the picket fence, was that level ground or was it not?



A. It started to slant there.

Q. And after you started on the down slope you said something about there were ruts, and what else did you say about that?

A. There would be ruts and it would be slanted.

Q. Let me ask you, were there any paths down in there after you got off the slope?

A. No, sir.

Q. As a matter of fact, something was said about that by Mr. Kiendl. Did you ever see anybody walking down in the low part of this land?

A. No, sir.

Q. As a matter of fact, in rainy weather was it in a passable condition or was it not, so far as a pedestrian was concerned?

A. It was not.

Q. And let me ask you, the houses themselves, the house level of these adjoining houses, was that the same as the main track of the railroad or was the track higher than the level of the houses?

A. The track was higher.

Q. So that this low land that we have been referring to was down near the houses and approximately on the same level as the houses?

A. Yes, sir.

Q. The path was up on the high ground adjoining the track?

A. Yes, sir.

Q. And that path you told us started at Rock Street and [fol. 38] ran alongside the track until you got over to Hughes Street, Mr. Tompkins. Now——

Mr. Kiendl: I don't think he did tell us that.

Mr. Hunt: I am sorry.

Q. Where did it go to, Mr. Tompkins?

A. The only place I ever walked it was from Hughes to Rock.

Q. Yes. Well, it started, you told us, at Rock Street?

A. Yes, sir.

Q. And ran along the tracks how far?

A. To Hughes.

Q. To Hughes. Now, when you arrive near Hughes, will you try to tell his Honor and these gentlemen what other

condition existed there at that time and had existed, if you know what I refer to.

A. Well, there had been a path that comes out, out of Hughes Street and crosses the track there diagonally and goes up over the hill and joins on to Center Street in Hughestown Borough, leading to the Butler Colliery.

Q. Now you see, Mr. Tompkins, we have never been there, and I know it is very familiar to you. That path that you have just——

Mr. Hunt: Your Honor, I will offer in evidence two photographs taken by the defendant company which were produced upon the taking of a deposition.

Mr. Kiendl: To which there is no objection.

(Marked Plaintiff's Exhibits Nos. 2 and 3 respectively.)

[fol. 39] Mr. Kiendl: It is stipulated, Mr. Hunt, that these photographs show with reasonable certainty the conditions that existed at the time of the accident?

Mr. Hunt: I am going to ask the witness right now.

The Court: Are these photographs supposed to be taken by the defendant?

Mr. Hunt: They were taken by the defendant company.

Q. I will show you an exhibit which I have offered in evidence, and ask you to look at it closely, Mr. Tompkins, and can you see from where you are sitting—being Plaintiff's Exhibit 3—can you see?

A. Yes, sir.

Q. And along there can you see the path as it was, that you have described, as it was at the time this photograph was taken?

A. Yes, sir.

Q. Can you see the path?

A. Yes, sir.

Q. Now Mr. Kiendl wanted me to ask—will you look at it closely, and in regard to the balance of the 35 feet between the track and the fence——

A. Yes, sir.

Q. Is that the same as it was at the time this accident happened?

A. Yes, sir.

Q. So far—do you recall what the weather had been shortly before this accident, as to whether you had had any rainy season or not, or don't you remember?

A. I don't remember.

Q. Now, during the rainy season what condition did the lower part of this land get into?

A. Why, it was all muddy and soggy.

Q. It was like any other dirt road?

A. Yes, sir.

Mr. Hunt: Does your Honor care to see this?

[fol. 40] The Court: I have a copy.

Mr. Hunt: Now I will ask permission to show this to the jury, may it please the Court.

(Exhibit 3 handed to the jury.)

Mr. Kiendl: Do you stipulate as to the other one, Mr. Hunt, that that shows with reasonable accuracy the conditions that existed at the time of the accident?

Mr. Hunt: Yes, I will stipulate that. I don't know what the condition of the road should be here. I don't know that I ought to stipulate. I don't think the young man himself does.

Mr. Kiendl: Well, he identified one. I would like them to be identified,—you have put it in evidence—either as an accurate picture or an inaccurate picture. I don't care which.

Mr. Hunt: This picture was taken, Mr. Kiendl—now, don't—this picture was taken so far back, your camera is so far away, you have brought up a close-up picture.

Q. Will you look at that and can you say from the angle at which that picture is taken, can you see the path which you have told us about? Can you see the beginning of it?

A. No, sir.

Q. You mean from that particular angle it does not show up as it does in the close-up picture?

A. No, sir.

The Court: Are you reading from No. 2?

Mr. Hunt: This is from Plaintiff's Exhibit 2.

[fol. 41] Q. Now, Mr. Tompkins, you were telling us about another path that approached Hughes Street, and I will ask you if you will look at the diagram and indicate first with your left hand the general direction that that path took and where did it lead to, if you know?

Mr. Kiendl: Is this the second path, Mr. Hunt?

Mr. Hunt: This is the second one.

A. It came up through Hughes, came over this way, over the tracks, right up to Rock Street and right up over the hill.

Q. Of course, was that a perfectly straight path or was it like all paths; did it wind or was it perfectly straight?

A. Well, it would wind.

Q. Well, could you take a ruler——

Mr. Kiendl: I object to the form of the question, if your Honor please, and move to strike out the answer on the ground that counsel assumes that all paths wind. I understood the testimony in this case is that the path in question between Rock and Hughes Street did not wind.

Mr. Hunt: That is true, sir.

The Court: Suppose you reframe the question.

Q. What kind of a path was this after it crossed the railroad track, where did it lead to and what kind of a path was it?

Mr. Kiendl: I object to that as wholly immaterial. The path across the railroad track has nothing to do with the issues in this case.

[fol. 42] The Court: Overruled.

Mr. Kiendl: May I have an exception?

Q. What kind of a path was it? I mean just describe it generally.

A. Well, where it came off Hughes Street it was wide, a wide path, it came over the track and then when it came over the track it was not so wide and went right up over the hill to Rock Street and up over the hill.

Q. And led to where?

A. Up to Center Street in Hughestown and to the Butler Colliery; from Center Street, it led to Center Street and then it followed Center Street to Butler Colliery.

Q. And the only street that that path crossed on the way was this so-called Rock Street?

A. Yes, sir.

Q. Now will you take a ruler and lay it there at an angle that you have indicated so that you can give us the general direction that that path took? Can you do that for us, please?

A. (Witness complies.)

Mr. Hunt: Now, with the Court's permission I would like to be permitted to draw a line where the ruler lays.

The Court: Yes.

(Counsel draws a line.)

Q. You have already told us that until it reached the tracks it was wider at that point than it was after it crossed over the tracks.

A. Yes, sir.

Q. It continued across, you have told us, across Rock Street, have you not, Mr. Tompkins?

A. Yes, sir.

[fol. 43] Q. And after crossing over Rock Street it went on down to what street was that?

A. It went up over the hill.

Q. Over the hill?

A. And down to Center.

Q. And down to Center, and that is the way—now, what was that path used for, if you know?

A. Well, by people going to church, going to any of the homes up in Hughestown from below the railroad and going to the Butler Colliery to work, men going there to work.

Q. The workmen who lived in that part of Hughestown along Hughes Street, to your knowledge, used that path regularly in going to their work?

A. Yes, sir.

Q. So that you will have to describe it, and I don't wish to lead you. Can you describe it somewhat more as to whether it was a well worn path that was or was not—

A. It was a well worn path.

Q. It had been used, to your knowledge, by these different people over a period of approximately how long?

A. 12 years.

Q. Now, did that path and the one alongside the railroad track, did they meet anywhere?

A. Yes, sir.

Q. Now will you tell us where?

A. Right as the path came up out of Hughes it met the one coming up from Rock to Hughes.

Q. And the two paths met about what distance from the end of the railroad ties?

A. About two and one-half or two feet.

The Court: Where did they meet, did you say, these two paths?

The Witness: The one came up out of Hughes Street and it met the other one coming from Rock Street over to Hughes.

[fol. 44] Q. And they met at a point, you stated, about two to two and one-half feet away from the end of the ties?

A. Yes, sir.

Q. That path that runs from Rock Street over to Hughes, during the years that you have lived there, was used by whom?

A. From Hughes to Rock?

Q. From Rock to Hughes or from Hughes to Rock, yes.

A. Why, by teamsters driving coal wagons, coal trucks.

Q. The path itself was used by them?

A. Yes; by men going to work, working at No. 9.

Q. Was there any way to get into Hughes Street from the main street except to walk along this path that existed?

A. Yes, sir.

Q. And if you wanted to get into Hughes Street from the main street you would have to go up to what is called—what is the name of that street?

A. Searle Street.

Q. Searle Street. You would have to go all the way up to Searle Street and then you would walk along Searle Street until you got to Hughes Street?

A. Yes, sir.

Q. That was the only other way to get to these homes on Hughes Street?

A. Yes, sir.

Q. Now, Mr. Tompkins, coming down to the day of your accident, you had I believe you call it supper up there, your last meal, do you not?

A. Yes, sir.

Q. You had your supper that evening about what time?

A. About five o'clock.

Q. Was that your usual time?

A. Yes, sir.

Q. And the little girl at that time was how old?

A. Three years.

Q. Where did Mrs. Tompkins' mother live?

A. In Exeter Borough.

[fol. 45] Q. Exeter Borough. In mileage, from your home to Mrs. Tompkins' mother's home, was approximately how far?

A. Five or six miles.

Q. And had there been any illness at the home of Mrs. Tompkins' mother?

A. Yes, sir.

Q. And did you have a telephone?

A. No, sir.

Q. Did you have an automobile?

A. No, sir.

Q. Did you have some—you can't tell us what, but did you have some talk with Mrs. Tompkins that evening at supper time?

A. Yes, sir.

Q. After that conversation and after you had finished your supper, did you start for the home of Mrs. Tompkins' mother?

A. About an hour after I had my supper I did.

Q. And you proceeded to her home how?

A. I walked.

Q. And you arrived there all right, did you, in due course?

A. Yes, sir.

Q. And you stayed there that evening, did you, Mr. Tompkins?

A. Yes, sir.

Q. Were you there all the time or did you have—or did you go out for a period of time?

A. In the evening I took a walk down about eight o'clock, down to the river.

Q. The Susquehanna River is right near Mrs. Tompkins' mother's home?

A. It is right behind it.

Q. And it is a common practice and custom up there to fish at night, is it not?

A. Yes, sir.

Q. Along the banks of the river?

A. Yes, sir.

Q. You were down there for a while?

A. Yes, sir.

Q. Then did you return to your mother-in-law's home?

A. Yes, sir.

Q. And eventually left her home at about what time?

A. About half-past twelve or one o'clock.

[fol. 46] Q. And then you proceeded towards your own home, you say, and what highway, what is the name of it, what road did you use?

A. Well, I followed the main road from Exeter Borough, I don't know what highway they call it.

Q. On your way home did anything occur? Did you see anybody?

A. Yes, sir.

Q. And try to—you met those people where?

A. On the Fort Jenkins Bridge crossing the Susquehanna River.

Q. I want to get at this. You had proceeded from your mother-in-law's home towards your own home about how far before you reached this bridge?

A. About four miles.

Q. And so you had to go only about another mile to reach your own home?

A. Yes, sir.

Q. What happened there when you got to the bridge?

A. I was walking across the bridge and there was a car pulled up ahead of me and it stopped and one of the men got out, opened the door and called to me and said, "Come on, Harry, we will give you a ride up."

Q. And when you got there you knew those two men, did you not?

A. Yes, sir. I worked with one of them.

Q. One of the young men worked with you?

A. In the foundry with me.

Q. And the other gentleman was who, the man driving the car?

A. Was Mr. Harrington.

Q. Was he chief of police at that time or before that?

A. Before that.

Q. And so you got in the car and went where?

A. Right up Rock Street and across the crossing.

Q. And they stopped and let you out on which side of the crossing, the side towards your home or just beyond the crossing?

A. Right up over the crossing.

[fol. 47] Q. And you got out, did you?

A. Yes, sir.

Q. And, I assume, said goodnight to the gentlemen?



A. Yes, sir.

Q. Now then, from that point where you got out, in order to reach your home from the point where you got out, you would walk where?

A. I would cross the track and walk over Hughes Street over to Hughes Street along the track.

Q. You were on Rock Street when you got out, of course?

A. Yes, sir.

Q. And then you stepped back across the tracks toward what place, where the path began?

A. Yes, sir.

Q. And then to reach your home you would simply walk along the path until it ended and you went diagonally into Hughes Street?

A. Yes, sir.

Q. Now I want you to speak slowly and take your time and in your own words try to describe to us everything that you can remember, everything that happened from the time you took the path at Rock Street and started toward Hughes Street. Do you think that you can do that?

A. Yes, sir.

Q. Well, go ahead and do this, then, if you will, please.

A. I was about half ways over the block when I heard the whistle and I seen the headlight of a train, so I kept right on walking and I had walked it plenty of times and I wasn't a bit afraid, and when I got to almost where the paths joined, all but a few steps, the engine passed me.

Q. Passed you without any trouble?

A. Yes, sir; and when I got right on the path there was something came up in front of me, a black object that looked like a door to me, and I went to put my hands up and I guess before I got them up I was hit.

[fol. 48] Q. And you were stuck where, first?

A. Right here (indicating side of face).

Q. On your righthand side, and is there any—are there any scars still there?

A. Yes, sir, right through the eyebrows (indicating).

Mr. Hunt: Mr. Kiendl, can we agree, to save time here, that on the right side—just hold your face around where the jury can see you—there is a scar running from within the eyebrow down through the eye-lid for a distance of what is that distance, three-quarters of an inch?

Mr. Kiendl: Well, whatever it is we will agree on to save time.

Mr. Hunt: Rather a big scar. I think that is a fair description, isn't it?

Mr. Kiendl: I think that is perfectly fair, Mr. Hunt.

Q. That is where you were struck first by whatever it was?

A. Yes, sir.

Q. Have you any conscious recollection of how you were thrown under the train or anything of that kind?

A. No, sir.

Q. You were where the next time that you were either conscious or semi-conscious?

A. In the receiving room of the hospital.

Q. And can you tell us what your condition was at that time, so far as you were able to understand?

A. Well, my arm was off, I knew that when I came to.

Q. You knew that when you came to?

A. Yes, sir.

Q. And were you then put under the doctor's care?

A. Yes, sir.

[fol. 49] Q. And was there an operation performed to the end of the stump?

A. Yes, sir.

Q. Go ahead, if you will, Harry, and tell us what your condition was while you were there in the hospital. If you had any pain, you should tell us about it.

A. Well, when I came to they had a blanket or something wrapped around my arm. I had a little stump. And I told the doctor not to take it off until I went to sleep, so he gave me a shot in the arm, and I asked him if it would put me to sleep, and he said yes. So when I came to again they had me all fixed up. I did not feel much pain then, but the next morning I was delirious and they let me lay until one o'clock and then they took me up and operated me.

Q. Do you know what that operation was, what the purpose was?

A. Yes, sir.

Q. What was it?

A. They took my arm right out of the socket.

Q. You have no stub or anything?

A. Or no socket; they took the socket too.

Q. And after that, tell us briefly, without going too much into detail, how did you progress while you were there in the hospital?

A. Well, I was there 21 days and they discharged me but my shoulder was still draining from the infection from the rusty rails, and I went to the dispensary for about two months and they cut it open again for an abscess.

Q. Drained it out again?

A. Put a drain in it, yes, sir.

Q. And then what happened after that?

A. Well, they had the drain in for a few weeks and it cleared up.

Q. And since then you have had no recurrence of that?

A. No, sir, but the "fingers" always hurt me.

[fol. 50] Q. You have that—that is the sensation, is it not?

A. No, sir, I feel them, they hurt.

Q. And that has been so from the time of the accident down to the present time?

A. Yes, sir.

Q. Harry, you didn't have enough education so that you are able to do any office work or anything of that kind?

A. No, sir.

Q. Something was suggested here by Mr. Kiendl in his opening that you slipped or something of that kind. Did any such thing happen?

A. No, sir.

Q. The path itself was a perfectly solid clean path, was it not?

A. Yes, sir.

Mr. Hunt: Your witness.

Cross-examination.

By Mr. Kiendl:

Q. Mr. Tompkins, as I understood it, you went to school and continued in school until you were fifteen years old?

A. I believe about that.

Q. And you learned how to read?

A. Yes, sir.

Q. You learned how to write?

A. Yes, sir.

Q. And you can read the English language?

A. Yes, sir.

Q. And you can write the English language?

A. Yes, sir.

Q. Do you know a man by the name of Bernard C. Nemeroff?

A. Yes, sir.

Q. And does he sit at counsel table with Mr. Hunt?

A. No, sir.

Q. Well, he is the lawyer that you retained in this case, is he not?

A. Yes, sir.

Q. And you retained him in the month of August, 1934?

A. Yes, sir.

Q. Less than a month after your accident happened?

A. Yes, sir.

[fol. 51] Q. Right?

A. Yes, sir.

Q. And told him how the accident happened?

A. Yes, sir.

Q. And he agreed to take your case?

A. Yes, sir.

Q. Now, you have been shown two pictures?

A. Yes, sir.

Q. Plaintiff's Exhibits 2 and 3. Did they show the conditions of that piece of land between Rock Street and Hughes Street as they existed on the day when your accident happened?

A. The one does, the other one I could not see the path in.

Q. Now, the one you said does is this one (exhibiting)?

A. Yes, sir.

Q. Plaintiff's exhibit 3, isn't it?

A. Yes, sir.

Q. And the one that does not is Plaintiff's Exhibit 2 (handing)?

A. Yes, sir.

Q. Now, looking at Plaintiff's Exhibit 2, I am going to ask you, Mr. Tompkins, whether that picture shows the track and the land between the track and the picket fence from Rock Street on up north? It does, doesn't it?

A. Yes, sir.

Q. Does it show it the way it looks or the way it looked on the day of the accident, or doesn't it?

A. Yes, but the path—

Q. But you can't see the well defined path in that picture?  
Can you?

A. No, sir.

Q. Now, aside from what the pictures show, Mr. Tompkins, I would like to examine you about what you know about that territory between Rock Street and Hughes Street between the railroad track and the fence. There is a fence that runs right along?

A. Yes, sir.

Q. And substantially a straight fence, isn't it?

A. Yes, sir.

Q. And it goes from one block to the other?

A. Yes, sir.

[fol. 52] Q. Now, that territory from the railroad track to the fence is about 35 feet wide?

A. Yes, sir.

Q. You know that to be the fact, don't you?

A. Yes, sir.

Q. And 150 or 200 feet long, something like that?

A. Yes, sir.

Q. And you told Mr. Hunt on your direct examination that there was a well defined, solid, hard path on a level running right along the railroad track that whole distance.

A. Yes, sir.

Q. Down to Hughes Street?

A. Yes, sir.

Q. And that there was another path that crossed it at Hughes Street?

A. Yes, sir.

Q. Now, the path in Hughes Street you said was a wide path up to the railroad track?

A. Yes, sir.

Q. And Hughes Street runs right down to the railroad track, doesn't it?

A. Yes, sir.

Q. And this path, when you are walking along Hughes Street up to the railroad track, runs right straight out to the track, doesn't it?

A. No sir, it goes a little diagonally.

Q. Goes a little diagonally to the right as you are approaching the track.

A. Yes, sir.

Q. And then crosses over the track?

A. Yes, sir.

Q. And then goes in the direction that you show on this map, Plaintiff's Exhibit 1?

A. Yes, sir.

Q. Now, that is one path that you know about?

A. Yes, sir.

Q. That you have walked over to work time and again and seen people walk over it going to church and going to work?

A. I have not seen people walking over it going to work. I never worked up at that colliery.

Q. You never did, but you have seen other people using that path?

A. Yes, sir.

Q. Now, this other path that ran alongside the railroad [fol. 53] track, you have used that yourself, have you?

A. Yes, sir.

Q. And you have seen others use it?

A. Yes, sir.

Q. Now, outside of those two paths that you have described—

A. Yes, sir.

Q. (Continuing)—is there any other footpath any other place in that 35 feet between Rock and Hughes Street?

A. No, sir.

Q. No place?

A. No, sir.

Q. You are positive of that?

A. Yes, sir.

Q. You have never seen any?

A. No, sir.

Q. And you told Mr. Hunt, and if I am wrong you will correct me, that you never saw anybody walk any place in that territory.

A. No, sir.

Q. Except along these paths?

A. Yes, sir.

Q. Now, you don't really mean that, do you, Mr. Tompkins?

A. Yes, sir.

Q. Well then, are we to understand that you lived in that neighborhood about 12 years?

A. Yes, sir, I lived there all my life in the borough.

Q. Yes, but you lived in that very neighborhood about 12 years?

A. About.

Mr. Hunt: No, he didn't say that.

Mr. Kiendl: Well, I am asking him.

The Witness: About 12 or 14 years in that neighborhood.

Q. 12 or 14 years you lived in that neighborhood?

A. Yes, sir.

Q. And during all that time you were within two blocks of the Rock Street crossing of the railroad company, weren't you?

A. Yes, sir.

Q. And during those 12 or 14 years you tell this Court and jury that you never saw anybody walk in that piece of land that we are talking about between the railroad [fol. 54] track and the fence?

A. No, sir.

Q. And between Rock and Hughes Streets?

A. No, sir.

Q. Every time in those 12 or 14 years that you have seen anybody walking in that territory they were walking on the path that goes up to Hughes Street or they were walking on the Hughes Street path that came up to the track, is that right?

A. Yes, sir.

Q. Now I will ask you again, Mr. Tompkins, do you mean that seriously?

A. Yes, sir.

Q. Did you know that there was a gate in the fence between Rock and Hughes Streets? Did you know that?

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. And was that a gate leading to a house?

A. Yes, sir.

Q. Did you ever see anybody walk through that gate?

A. No, sir.

Q. Did anybody ever live in that house during the 12 or 14 years you were there?

A. Yes, sir.

Q. And you never saw anybody use that gate?

A. No, sir.

Q. Is that the gate that is shown in this picture (handing Exhibit 3)?

A. Yes, sir.

Q. You see the gate?

A. Yes, sir.

Q. And that is the gate leading to the house that is shown on the righthand side of that picture?

A. Yes, sir.

Q. You never saw anybody walk through that gate?

A. No, sir.

Q. You never saw anybody walking from the gate up to the railroad track?

A. No, sir.

Q. And you never saw anybody at any time in your 12 or 14 years walking any other place in that territory than [fol. 55] where you have told us, on the two paths?

A. No, sir.

Q. Do you know how people got into the house shown on that picture?

A. No, sir, I do not.

Q. Well, do you tell this jury, Mr. Tompkins, that you lived there some 12 or 14 years, within a block of that house, with your wife and your child, and you can't tell this jury how people got into that house that is right alongside the railroad tracks there?

A. I did not live around—only three years right around there, but I lived on the other block.

Q. Well, let's see if we get this straight. You lived for three years in the house that you have marked on this map?

A. Yes, sir.

Q. And that is within a block of the house that is shown in this picture?

A. Yes, sir.

Q. Now, for 12 or 14 years you lived in that neighborhood?

A. Yes, sir.

Q. And where did you live before you moved into the house that you have marked with a T?

A. On Searle Street.

Q. On Searle Street?

A. Yes, sir.

Q. That is a street that is shown on this map too, isn't it?

A. Yes, sir.



Q. And that is within a block or two?

A. Yes, sir.

Q. Of this very place?

A. Yes, sir.

Q. And you lived there for ten years?

A. Yes, sir.

Q. 10 or 12 years I think you said.

A. Yes, sir.

Q. So altogether this is the fact, isn't it, Mr. Tompkins, that you lived within two blocks of the site of the place where you were hurt for some 12 or 14 years, right?

A. Yes, sir.

[fol. 56] Q. And you can't tell us now how people get into that house?

Mr. Hunt: He has already answered that.

Mr. Kiendl: I ask that it be answered again, your Honor.

The Court: Proper cross-examination. Objection overruled.

Q. You can't tell us yet how people get into that house that has the gate that you see in this particular Plaintiff's Exhibit 3?

A. Well, I presume they get in the front gate. There is a front gate too.

Q. Is there a front gate?

A. Yes, sir.

Q. But you have never seen anybody walk through this particular gate?

A. No, sir.

The Court: Did you ever see how they got out?

The Witness: Well, no, I never was around when they were coming out and going in.

Q. Did you ever see any people delivering milk?

A. No, sir.

Q. Or groceries or anything of that kind?

A. No, sir.

Q. Or going through that gate to this house?

A. No, sir.

Q. Never?

A. No, sir.

Q. Now, Mr. Tompkins, did it rain on the 27th of July, 1934?

A. I don't know.

Q. Well, you haven't any recollection of it raining while you were walking?

A. No, sir.

Q. Along the track that night?

A. No, sir.

[fol. 57] Q. You know it wasn't raining, don't you?

A. No, sir, not that night.

Q. And you can't tell us when, if ever, it rained before that night?

A. No, I don't recall.

Q. You haven't any recollection on that at all?

A. No, sir.

Q. Have you any recollection as to the surface of the ground between Rock Street and Hughes Street on the night in question?

A. Well, it was never good, the ground was always bad except on the one spot where that path was.

Q. Yes. Well, you are judging or telling us what you observed with your eyes?

A. Yes, sir.

Q. You never walked on it?

A. No, sir.

Q. The only place you ever walked was the path?

A. Yes, sir.

Q. Now, the path that night, was there any indication of it being wet or not?

A. No, sir.

Q. Slippery?

A. No, sir.

Q. Good hard path?

A. Yes, sir.

Q. No indication of any rain on it that you remember at all?

A. No, sir.

Q. Now, was there anything in that territory, Mr. Tompkins, as you were walking alongside the railroad track, was there any reason that you know of why you could not have stepped aside two or three feet if you wanted to?

Mr. Hunt: I object to that as purely argumentative, it is not a question.

The Court: Objection overruled.

Mr. Hunt: Exception.

Q. (Read.)

A. Well, if I had stepped aside I would have been on the slant and I might have fell there if I stepped aside.

[fol. 58] Q. You don't mean the slant that is shown on this picture, Plaintiff's Exhibit 3. Is that what you mean?

A. Slant or rut; there was ruts there where cars drive there.

Q. Yes, but you are talking about the slant and the ruts shown on this picture, Plaintiff's Exhibit 3, is that right?

A. Yes.

Q. Well, when this train came along, Mr. Tompkins, you did not attempt to step to your left at all, did you?

A. No, sir.

Q. And the reason you did not, you were a little afraid about stepping into a rut or stepping on the slant and slipping, is that the reason?

A. Well, I had no fear of walking on the path. I had walked there before when trains went past.

Q. So it never occurred to you to step to the left at any time, did it?

A. No, sir.

Q. But there was no reason why you, a comparatively young man, in good health——

A. Yes, sir.

Q. (Continuing.) —could not have stepped out there five, ten or fifteen feet if you had wanted to, was there?

A. Well, if I had I would be in the ruts and things, if I did.

Q. You would have been in the ruts and things?

A. On the slant.

Q. You would have been in the ruts and on the slant?

A. Yes, sir.

Q. That is what you mean?

A. Yes, sir.

Q. Will you show us on the picture that you say is a fair picture, the ruts that you are talking about, will you show us in Plaintiff's Exhibit 2 the ruts that you are talking about, if you can find them there?

A. That is the roughness right there (indicating).

Q. Ruts?

A. The roughness and ruts where the cars come up right here (indicating).

[fol. 59] Q. Where the automobile tracks are?

A. Yes, sir.

Q. Now I want to inquire into that situation again. When you knew this train was coming——

A. Yes, sir.

Q. (Continuing.) —did it occur to you to get out of the way of that train at all?

A. Well, it occurred to me to be careful. I knew the train was coming.

Q. You knew the railroad track was a place of danger, didn't you?

A. Yes, sir.

Q. And you knew if you got too close to the train you might get hit by something?

A. Positively.

Q. And you had that in mind when you were walking along there, did you not?

A. Yes, sir.

Q. And having that in mind, didn't it occur to you to walk down that little slope there and get out of the way?

A. No, sir. I have walked there so often when trains came by that I did not fear any danger.

Q. I see. So that you were not afraid of getting hit by anything?

A. Oh, yes.

Q. Well now, in your own mind at that time what were you thinking about, what did you think might hit you?

A. I wasn't thinking of anything hitting me.

Q. Well, I thought you said you were afraid you might get hit by something.

Mr. Hunt: No, if it please the Court——

The Witness: No, sir.

Mr. Kiendl: If I am wrong I will withdraw it.

Q. You did not say that?

A. No, sir.

Q. You were walking along there without being afraid [fol. 60] of being struck by anything, were you?

A. I did not think there was any danger; I had walked there plenty of times.

Q. You didn't quite answer my question.

A. Well, no, I did not fear it because I knew the path was wide enough that I could get by without being hit.

Q. You could get by a moving train without being hit?

A. Yes, sir, on that path.

Q. In the middle of the night?

A. Yes, sir.

Q. And that was about 2.30 when this accident happened, wasn't it?

A. Somewhere about that; I don't remember the exact time.

Q. But that is as near as you can fix it, about 2.30 in the morning?

A. Yes, sir.

Q. And it was pretty dark to see where you were heading, wasn't it?

A. Pretty dark, yes.

Q. There weren't any lights around there at all, were there, except the locomotive's headlight?

A. That is all.

Q. And after the engine passed you there weren't any lights there at all?

A. No, sir.

Q. It was just as dark as it can be at that time of night in that place, wasn't it?

A. Yes, sir.

Q. And could you see the side of the engine?

A. Yes, sir.

Q. As it passed you?

A. Yes, sir.

Q. Were you facing it?

A. No, sir, but I could see it.

Q. As it came along you were walking straight ahead?

A. Walking on the path, yes, sir.

Q. Now, this particular path was two feet wide?

A. About two feet from the end of the ties.

Q. I did not ask you that; the path was about two feet wide?

A. Yes, sir.

Q. And then it was about two feet off the end of the ties?

A. Yes, sir.

[fol. 61] Q. Now, had you ever seen any trains on that track before in your life?

A. Yes, sir.

Q. And did you know that the ends of the cars came out over the rails of the track, projected?

A. Yes, sir.

Q. Did you know whether they came out over the ends of the ties, some of the larger cars?

A. Yes, sir.

Q. And about how far would you say you had noticed the side of a train coming over the edge of the ties that you are talking about, a foot or so?

A. No, I cannot say, because I am not sure.

Q. Would you say half a foot or two feet?

Mr. Hunt: From the rail or the ties?

Mr. Kiendl: From the ties.

Q. Well, you can't give us any idea?

A. No, sir.

Q. Well, you had walked along that path frequently?

A. Yes, sir.

Q. Daytime and nighttimes when trains came past?

A. Yes, sir.

Q. And you can't tell the jury how far the farthest point of the train extended over the ties that you see in these pictures?

A. No, sir.

Q. But you know it extended over some, don't you?

A. Yes, sir.

Q. And it extended over in that space of two feet between the end of the ties and the beginning of that so-called path, is that right?

A. Yes, sir.

Q. So that when you were walking on that path, if you were walking in the middle of it, and I assume you were—right?

A. Well, I might have been a little over, I am not saying I walked right in the middle.

Q. Well, so far as you can recall, you were walking right down the path, weren't you?

A. Yes, sir.

[fol. 62] Q. And your right side was within two feet of the ties, the railroad ties?

A. Yes, sir.

Q. Now, are you sure of that?

A. Yes, sir.

Q. And the railroad trains that came along there you knew projected over the ties?

A. Yes, sir.

Q. But you did not know how far?

A. No, sir.

Q. So if I have you correct, Mr. Tompkins, and please correct me if I am wrong, when you were walking along

this path, the moving side of the train was within two feet of the right side of your body, wasn't it?

A. Yes, sir.

Q. And it probably was about a foot from the right side of your body, wasn't it?

A. It was about two feet.

Q. Well, you say it was two feet to the railroad ties.

A. Yes, sir.

Q. And you say the cars extended sidewise beyond the ties?

A. Yes, sir.

Q. You don't know how far?

A. No, I do not.

Q. So the greatest distance that the right side of your body had from this moving train was two feet, and it might have been only one foot, isn't that true?

A. It might have been one.

Q. It might have been one or two feet, and is that about your best recollection?

A. Yes, sir.

Q. That you were within one or two feet?

A. Yes, sir.

Q. Of the sides of these moving cars?

A. Yes, sir.

Q. Now, was that train going fast?

A. Yes, sir.

Q. You have seen railroad trains going through time and time again?

A. Yes, sir.

Q. And I suppose like most young men, they attracted your attention?

A. No, sir, they never attracted my attention. I have seen too many of them.

[fol. 63] Q. Well, it had been a common occurrence for you to see railroad trains?

A. Yes, sir.

Q. You have seen them all your young life?

A. Yes, sir.

Q. You had seen so many of them that you got kind of sick and tired with them, is that right?

A. Well, no, sir. If they came by if I am out, I will see them there.

Q. What I am trying to get at, Mr. Tompkins, have you some conception of the speed of a train?

A. About 30 or 35 miles an hour.

Q. I am not talking about this particular train.

A. Oh.

Q. I am talking about trains generally. You have looked at them often enough so that you have some idea of the rate of speed at which they are traveling?

A. Yes, sir.

Q. And as you were walking along within two feet of the sides of this train, how fast do you estimate the train was going?

A. About 30 or 35 miles an hour.

Q. And would you from your observation of railroad trains describe that as being a terrific speed?

A. No, not terrific.

Q. You did claim that this train moved at a terrific rate of speed, didn't you?

A. No, sir.

Q. Never?

A. No, sir.

Q. Perfectly sure of that?

A. Yes, sir.

Q. You never made the claim that it came tearing down at you at a terrific rate of speed?

A. No, sir.

Q. You never made a claim that it went flying past you at a terrific rate of speed?

A. No, sir.

Q. And if any such claim were made in this case, it would not be true, would it?

A. No, sir.

Q. Because, according to your estimate, the train was going about 30 miles an hour?

A. Yes, sir.

[fol. 64] Q. As a matter of fact, the train was going about 10 miles an hour, wasn't it?

A. No, sir.

Q. Well then, if I get your testimony correctly, Mr. Tompkins, you were walking along within two feet of the side of this moving train that was going past you at the rate of 30 miles an hour, and you kept right on walking alongside of it?

A. Yes, sir.

Q. Without any fear that anything was going to hit you?

A. Yes, sir.



Q. Without any fear that any coal or something else might have fallen from that train and hit you; that is right?

A. I do not think there was any coal on that train.

Q. Well, you did not know when you saw the train coming what it had on, did you?

A. No, sir.

Q. And did it occur to you that there might have been coal on that train?

A. No, sir.

Q. That might fall off and hit you?

A. No, sir.

Q. Did it occur to you that there might be anything else on the train that might fall off and hit you?

A. No, sir.

Q. You felt perfectly safe in your own mind as you walked along there within a foot or two of a 30 mile moving train, to continue along, and it never occurred to you at any time to get farther away to a place of safety?

A. No, sir.

Q. Now, Mr. Tompkins, do you know a man by the name of Thomas P. Mackin?

A. Yes, sir.

Q. And is he a Justice of the Peace in the section?

A. Not now he is not.

Q. Was he at one time?

A. Yes, sir.

Q. Down in the Borough of Exeter, in the County of Luzerne?

A. Yes, sir.

Q. And were you righthanded?

A. Yes, sir.

Q. Before the accident?

A. Yes, sir.

Q. Had you learned to write lefthanded?

A. A little.

[fol. 65] Q. I show you a signature "Harry Tompkins," and ask you if you can identify that as your original signature made with your left hand?

A. Yes, sir.

Q. Now, that signature, that original signature, I ask you if you remember in November, 1934, swearing to some paper before the Justice of the Peace, Mr. Mackin, whom I have asked you about.

A. I took one to him, but I don't recall it.

- Q. You took a paper to him?  
 A. Yes, but I don't recall just when it was.  
 Q. We are not interested yet in what it was. You took a paper to him?  
 A. Yes, sir.  
 Q. That Mr. Nemeroff had sent to you?  
 A. Yes, sir.  
 Q. And you signed the paper?  
 A. Yes, sir.  
 Q. Before this Justice of the Peace?  
 A. Yes, sir.  
 Q. And you swore to it?  
 A. Yes, sir.  
 Q. Now, is this the paper that you signed and swore to—and I show the witness, if your Honor please, the original of a bill of complaint in the discovery proceeding in this action taken from the official files of this court (handing to witness). Can you tell us if that is the paper you signed and swore to?  
 A. Do you wish me to read it all or just tell you from what I have here?  
 Q. Well, if you can without reading it, and I will give you an opportunity to read it later on. You can tell now whether that is the paper?  
 A. Yes, sir.  
 Q. You know it is, don't you?  
 A. Yes, sir.  
 Q. Now that paper came to you, I suppose, in the mail, did it?  
 A. I don't recall.

The Court: Well, how did you get this paper?

The Witness: I don't remember if it was sent through the mail or brought in to me.

- [fol. 66] Q. Well, in any event you know you got it?  
 A. Yes, sir.  
 Q. And signed it and swore to it?  
 A. Yes, sir.  
 Q. Now, Mr. Tompkins, as you were walking along the track, this path here from Rock Street to Hughes Street, you did hear the whistle of the locomotive, didn't you?  
 A. Yes, sir.  
 Q. And was that the usual crossing whistle?  
 A. Yes, sir.

Q. That engineers blow in that territory?

A. Yes, sir.

Q. You knew it to be?

A. Yes, sir.

Q. And you could hear it distinctly and clearly, couldn't you?

A. Yes, sir.

Q. Before the train came around the curve you heard that whistle?

A. Yes, sir.

Q. Before you could see the headlight of the train you heard that whistle?

A. Well, I heard the whistle and then right after the headlight.

Q. You heard the whistle right after the headlight?

A. Yes, sir.

(The stenographer read the previous answer of the witness as follows: "Well, I heard the whistle and then right after the headlight.")

Q. You heard the whistle?

A. Yes, sir.

Q. Before you saw the headlight?

A. Yes, sir.

Q. And at the time you heard the whistle the train was around the curve, right?

A. Well, it was just coming around.

Q. Just coming around the curve?

A. Yes, sir.

Q. And right after hearing the crossing whistle you saw the headlight?

A. Yes, sir.

Q. And at that time how far would you say the train [fol. 67] was from you—500 feet, 300 feet, 1000 feet, or don't you know?

A. I don't know.

Q. Well, it was a good distance down the track, wasn't it?

A. Not a very far distance, no.

Q. Well, about how far?

A. Well, maybe about a hundred or a hundred and fifty feet.

Q. Well, first you told us you don't know and then you say a hundred or a hundred and fifty feet.

A. That is just about what I would figure there.

Q. Just what you think?

A. Yes, sir.

Q. Somewhere between 100 and 150 feet away?

A. Yes, sir.

The Court: Away from you?

The Witness: Yes, sir.

Q. When you heard the whistle?

A. Yes, sir.

Q. And the crossing whistles are two long and two short blasts of the whistle, aren't they?

A. I don't know.

Q. What did you mean by a crossing whistle? You said this was a crossing whistle. What was it?

A. I figured it was a crossing whistle, when the crossing was there.

Q. Did you figure by any chance it was a warning whistle for you to get away from the railroad tracks? Did you?

A. No, sir.

Q. Well, after you heard the whistle you saw the headlight?

A. Yes, sir.

Q. Did you hear the locomotive bell ringing as this engine went right on by within two feet of you?

A. I don't recall the bell.

Q. You don't know whether it was ringing or not?

A. I don't recall it.

Q. Did you hear the noise of this train as it came around the curve?

A. Yes, sir.

[fol. 68] Q. Did you hear the exhaust of steam on the locomotive as it was going through?

A. I don't remember that.

Q. Well, do you know, Mr. Tompkins, whether the character of the railroad track around that curve, the direction from which the train came, was upgrade or downgrade or on the level?

A. It is level.

Q. It is level?

A. Yes, sir.

Q. Are you sure of that?

The Court: Is that a curve or curb?

Mr. Kiendl: Curve. The curve that I am referring to, if your Honor please, is the slight curve shown in the map. You will see the train came from this direction toward Rock Street, and here is the curve down here (indicating), and it is about, according to this scale, I should say, roughly, 400 feet from the Rock Street crossing and some 250 feet, roughly, from Hughes Street.

Q. Now, did you say that the track was on a level grade coming around that curve?

A. Yes, sir.

Q. Don't you know it is upgrade?

A. No, sir.

The Court: Do you mind illustrating it to the jury so that they can understand it?

Mr. Kiendl: Not at all, your Honor (exhibiting map and describing curve to jury).

Q. The curve is shown plainly in Plaintiff's Exhibit 2, isn't it?

A. Yes, sir.

Q. And that is the curve we are talking about?

A. Yes, sir.

[fol. 69] Q. Now I ask you, Mr. Tompkins, if it is not the fact, to your knowledge, that this railroad track from Avoca up to Rock Street is all upgrade?

A. No, sir.

Q. You say it is all on the level?

A. Yes, sir.

Q. As this engine went by did any steam come out from the side to frighten you at all?

A. I don't recall.

Q. About how many cars passed you before you were struck?

A. Well, the engine had passed me and I don't know how many cars had passed me.

Q. Well——

A. I did not count them.

Q. I thought, and it has been suggested here that three or four cars passed before you were struck. Don't you know?

A. No, I did not count them.

Q. Can you give us some idea?

A. Well, there was a few cars passed me.

- Q. How many? Your best recollection.  
A. I don't know how many.  
Q. Do you know what kind of cars they were?  
A. No, sir.  
Q. You don't know whether they were coal cars or straight cars, box cars or tank cars?  
A. No, sir.  
Q. No recollection?  
A. No, sir.  
Q. Or what kind or type of cars they were?  
A. No, sir.  
Q. Well, after a few cars passed you——  
A. Yes, sir.  
Q. (Continuing)—a black object came along, I think you told us?  
A. Yes, sir.  
Q. It looked like a door to you?  
A. Yes, sir.  
Q. That was swinging from the side of one of these cars?  
A. I could not say that.  
Q. Well, when you saw this black object, where was it?  
A. It was on the car.  
[fol. 70] Q. And was it fast to the side of the car or was it projecting out from the car?  
A. Well, I could not see very good. It was coming out from the car. That I know.  
Q. Well, you got the definite impression from that black object coming at you and this train moving 30 miles an hour, that it was a door, didn't you?  
A. Yes, sir.  
Q. And you had that impression on the night of the accident?  
A. Yes, sir.  
Q. And you have had it from that day to this?  
A. Yes, sir.  
Q. And has it always been your claim, Mr. Tompkins, that the object that looked like a door to you is the thing that hit you on the night of the accident?  
A. Yes, sir.  
Q. And did you tell your lawyer, Mr. Nemeroff, that?  
A. Yes, sir.  
Q. And his assistants and Mr. Hunt?  
A. Yes, sir.  
Q. And you have told them all that?

A. Yes, sir.

Q. From the very beginning?

A. Yes, sir.

Mr. Kiendl: I would like to have—I assume it is unnecessary to mark these original filed papers in evidence.

The Court: It is a matter of record.

Mr. Kiendl: Yes.

Q. I show to Mr. Tompkins the original bill of discovery which he received, signed and swore to, and ask him to look at the second page of that and tell me whether it is there stated, "That a train owned and operated by the defendant suddenly appeared in the opposite direction and [fol. 71] came tearing down toward your orator at a terrific rate of speed." That is there, isn't it?

A. Yes, sir.

Q. Was that a true statement?

A. No, sir.

Q. Did you sign and swear to that statement?

A. Yes, sir.

Q. Did you read it?

A. Yes, sir.

Q. And you now know it is not true?

A. Yes, sir.

Mr. Hunt: Your Honor, Mr. Kiendl refers to that as a statement. That, I submit, is nothing but a conclusion anyway, as to what is a terrific rate of speed. One man may think one thing and someone else another.

Mr. Kiendl: Yes, but I am taking what this witness testified, your Honor, in cross examination.

Mr. Hunt: Well, he says he does not think so.

Mr. Kiendl: No. He doesn't know.

Q. Now, in that bill of discovery did you read the part of it on page 2, that there was a projection extending into the highway at 2.30 in the morning where it was dark and when in the absence of light pedestrians could not see such projections?

A. Yes, sir.

Q. Was that true?

A. No, sir.

Q. But you read, signed and swore to that statement, didn't you?

A. Yes, sir.

Q. Now I call your attention, Mr. Tompkins, to another statement in that bill of discovery, "That because the said accident happened in the dark at 2.30 in the morning and because of the manner in which said accident happened, after a number of cars of the train had passed your orator [fol. 72] and it was flying past your orator at a terrific speed"—did you read that?

A. Yes, sir.

Q. Was that true?

A. No, sir.

Q. Did you read in that statement, Mr. Tompkins, something to the effect that you did not know what kind of an object projected from the side of the car?

Mr. Hunt: I object to the form of the question, if the Court please. I have no objection if he will read the wording in the affidavit.

The Court: Read the wording, counsellor.

Mr. Kiendl: I will be glad to.

Q. Did you read in that bill of discovery that I now show you, the original of the signed paper sworn to by you——

Mr. Hunt: What page, Mr. Kiendl?

Mr. Kiendl: At page 4.

Q. (Continuing.) "Your orator is unable to state and your orator does not know what object the defendant permitted to project from the said train." Did you read that?

A. Yes, sir.

Q. Was that true?

A. No, sir.

Q. And it goes on to say: "Much less the dimensions, its nature and its location on the train." Did you read that?

A. Yes sir.

Q. Was that true?

A. No, sir.

Q. You got this statement in November, didn't you, of 1934?

A. I don't remember just when it was.

Q. About that time, wasn't it Mr. Tompkins?

A. Well, I don't remember, truthfully.

[fol. 73] Q. Well, just look at it and see. It is verified on November 6, 1934.

A. Well, that must be when I got it, then.



Q. Well, I assume so (handing).

A. Yes, sir.

Q. Did you notice as any of these cars went by you, Mr. Tompkins, that they were bulging with freight?

A. No, sir.

Q. You didn't notice any condition of that kind, did you?

A. No, sir.

Q. Did you notice in this bill of discovery that I now show you that there is a statement——

Mr. Hunt: What page?

Mr. Kiendl: On page 5.

Q. (Continuing.) "That the car of the train from which the object projected, as your orator believes, was bulging with freight." Did you read that?

A. Yes, sir.

Q. Was that true?

A. No, sir.

Q. Why did you swear to all these statements, Mr. Tompkins, if they were not true?

Mr. Hunt: I object to the form.

Q. Tell us in your own words.

Mr. Hunt: I object to the form of that question, if your Honor please.

The Court: I think that is a proper question.

Q. Now tell us in your own words, if you will, why you swore to these various statements in this bill of discovery that I have pointed out to you that you admit were not true?

[fol. 74] Mr. Hunt: I object to that as incompetent, irrelevant and immaterial as to why he signed a paper that was sent to him by his lawyer to sign.

The Court: Overruled.

Mr. Hunt: Exception.

A. Well, they were sent to me by my lawyer, so I signed them.

Q. You heard Mr. Hunt just say that, didn't you?

A. No, sir.

Q. They were sent to you by your lawyer to be signed. Is that the only reason that you can avow in this court?

A. Yes, sir.

Q. For signing a lot of false statements that I have pointed out to you—that your lawyer asked you to do it.

Mr. Hunt: Objected to.

The Court: Objection overruled and exception.

Q. Is that the only reason you can give us?

A. Yes, sir.

Q. Isn't it the fact, Mr. Tompkins, that you never saw any object on the side of that train and you don't know what it was?

A. No, sir.

Q. And that is the reason you made the statement so you might try to find out if there were any objects protruding, isn't that true?

A. No, sir.

Q. Now, when you got this paper from your lawyer containing admittedly false statements did you get in touch with him by letter or by telephone?

A. No, sir.

Q. Or by coming to New York?

A. No, sir.

Q. And saying "this is not so"?

A. No, sir.

[fol. 75] Q. Did you ever talk to him about it from the time you signed and swore to this paper until the present day?

A. Not about that particular thing, no.

Q. Never did?

A. No, sir.

Q. You have never had any chat with Mr. Nemeroff, who is not here, your lawyer that you retained originally, or with any other lawyer or with any assistant or any other lawyer in this case about those statements?

A. No, sir.

Q. Did you ever claim, Mr. Tompkins, that this train came down on you without any signal or warning of any kind?

A. No, sir.

Q. Never made that claim?

A. No, sir.

Q. You are sure of that?

A. Yes, sir.

Q. Never told that to Mr. Nemeroff, your lawyer?

A. No, sir.

Mr. Kiendl: Have we the original of the complaint?

Mr. Hunt: It is on file. Go ahead and use the copy, Mr. Kiendl. I won't raise any question about it.

Q. Did you ever read the complaint in this action?

A. I don't remember.

Q. Did your lawyer, Mr. Nemeroff, ever tell you he was bringing suit against the railroad company?

A. Yes, sir.

Q. And did he ever send you or give you a copy of the complaint?

A. Yes, I believe he did.

The Court: Gentlemen, don't discuss this case among yourselves or with anyone else. We will take a recess until two o'clock.

(Recess until 2.00 p. m.)

[fol. 76]

Afternoon Session

Juror No. 6: Your Honor, about four o'clock I would like to be excused. I am on a registration board.

Mr. Kiendl: That is entirely agreeable.

The Court: The Court will have no objection to that if you gentlemen have not.

Mr. Kiendl: I have not.

Mr. Hunt: I think Mr. Kiendl and I would like to quit then too.

The Court: Well, it is a matter of public duty. This man is a member of a registration board and would like to be excused at four o'clock, so that at four o'clock we will call it a day.

HARRY JAMES TOMPKINS, resumed the stand:

Cross-examination.

By Mr. Kiendl (continued):

Q. Mr. Tompkins, have you discussed during the luncheon period with anybody this bill of discovery that I asked you about before lunch?

A. Yes, sir.

Q. During the lunch hour?

A. Yes, sir.

Q. With whom did you discuss it?

A. Mr. Walsh and Mr. Kaufman.

Q. That is one of the attorneys at counsel table?

A. Yes, sir.

Q. And Mr. Wallace?

A. Mr. Walsh.

Q. And who else?

A. Mr. Kaufman.

Q. Who is he, is he one of your attorneys?

A. Yes, sir.

Mr. Hunt: He is the young man that was here this morning.

[fol. 77] Q. Anybody else?

A. No, sir.

Q. And you discussed your testimony?

A. Yes, sir.

Q. And did you discuss it with Mr. Nemeroff, your lawyer?

A. No, sir.

Q. You have not seen or talked to him about it?

A. No, sir.

Q. Are there any other reasons that you have thought of during the lunch hour why you signed and swore to these statements?

A. No, sir.

Q. And Mr. Walsh and Mr. Kaufman both asked you about it, did they?

A. Yes, sir.

Q. And you have nothing more to add to what you told us about it this morning before the luncheon recess?

A. No, sir.

Q. As I understand it, Mr. Tompkins, you went to visit a sick mother-in-law on the night of July 26th?

A. Yes, sir.

Q. And she lived at a place five or six miles away from your home on Hughes Street?

A. Yes, sir.

Q. Near where you were injured?

A. Yes, sir.

Q. You walked that distance, about five or six o'clock in the afternoon?

A. Yes, sir.

Q. And you got there around eight o'clock?

A. A little before that.

Q. And you paid a visit?

A. Yes, sir.

Q. And did I understand you went fishing?

A. No, I just took a walk down to the river where they were fishing, for a few minutes, that is all.

Q. Watching them fish for a few minutes and walked back to the house and stayed there until about half-past twelve?

A. About that.

Q. Did you have anything to eat after you had your supper that evening?

A. We had a little lunch, cup of coffee.

[fol. 78] Q. Nothing to drink?

A. No, sir.

Q. Did you play cards or anything of that kind?

A. No, sir.

Q. And you left there about half-past twelve and started walking back?

A. Yes, sir.

Q. And you got to a bridge about four miles away from your mother-in-law's place?

A. Yes, sir.

Q. A car came along and stopped and picked you up?

A. Yes, sir.

Q. In the car there were two men that you named?

A. Yes, sir.

Q. One was Mr. Harrington?

A. Yes, sir.

Q. The chief of police of Hughestown?

A. Yes, sir.

Q. He is the only policeman in town, isn't he?

A. He is not chief now, Mr. Kiendl.

Q. But he was at that time?

A. No, not at that time he wasn't.

Q. He wasn't?

A. No, not at that time.

Q. He was some time before that?

A. Yes, sir.

Q. And then there was somebody else in the car that you had worked with in the Pittston Stove Company?

A. Yes, sir.

Q. A man named Schultz?

A. Yes, sir.

Q. Who is in court now?

A. Yes, sir.

Q. And you got in the car?

A. Yes, sir.

Q. And the car continued down towards the Rock Street crossing?

A. Yes, sir.

Q. Now, as the car came towards the crossing did it at any time go on the place called Searle Street?

A. Yes, sir.

Q. And it went along Searle Street to Rock Street, did it?

A. Yes, sir.

Q. Then it turned to the right?

A. Yes, sir.

Q. And went up Rock Street one block to the railroad crossing?

A. Yes, sir.

[fol. 79] Q. Showing you Plaintiff's Exhibit 1, the map, I will ask you if you can look at it with me so that the jury can see it. This automobile that you had the ride in on the night of the accident came along Searle Street as it is indicated here at the top of this map and came to the corner of Searle and Rock Street and turned to the right?

A. Yes, sir.

Q. And went down Rock Street over the railroad track?

A. Yes, sir.

Q. And stopped on the far side of Rock Street?

A. Yes, sir.

Q. Where you got out?

A. Yes, sir.

Q. Did you ask him to get out on the corner?

Mr. Hunt: You do not mean on the far side of Rock Street, do you?

Mr. Kiendl: On the far side of the railroad crossing.

A. Yes.

Q. Did you ask to get out at the corner of Searle and Rock Street so you could walk one block down Searle Street to your home?

A. No, sir.

Q. Did you ask to get out before the car stopped at the Rock Street railroad crossing?

A. No, sir.

Q. You got out at the far side?

A. Yes.

Q. Why didn't you get off at the corner of Rock and Searle Street?

A. Well, it was closer to my home the other way.

Q. Just a few feet?

A. Oh, more than that.

Q. Well, one way was about a block and a half and the other way was about a block and a quarter?

Mr. Hunt: Your Honor, I think the diagram speaks for itself. He is speaking of blocks up there. I guess they [fol. 80] do not have blocks up there.

The Court: It is argumentative, but at the same time, I don't know, it is cross-examination.

Q. Well, the Hughes Street block from Searle Street to the railroad crossing is a long block, isn't it?

A. From Rock to the railroad was that, Mr. Kiendl?

Q. No; Hughes Street from Searle Street up to the railroad crossing is a long block?

A. Yes, sir.

Q. And the block between Rock Street and Hughes Street along Searle Street is a short block?

A. Yes, sir.

Q. One way you would have to walk a little farther than the other way?

A. There is a half block between Rock Street and where you turn off Searle to Hughes.

Q. A half block where you turn off Searle to Hughes?

A. Yes, sir.

Q. I call that a block. You say that is a short block?

A. Yes.

Q. You had one short block?

A. Yes.

Q. And a good way along the long block on Hughes Street?

A. Yes.

Q. The other way you would have just a short block and then a short block on Hughes Street to your house?

A. The other way would be only a half a block, Mr. Kiendl.

Q. It is what is shown on the map here (indicating)?

A. Yes, sir.

Q. You would have to go this way (indicating) to get to this house on Searle and Rock Street?

A. Yes.

[fol. 81] Q. The other way you would have to go that long block to the railroad track and then up Hughes Street to your house?

A. Yes, sir.

Q. Was Hughes Street from Searle Street to Rock Street in good condition so you could walk along it?

A. Yes, for walking it was.

Q. And Searle Street from Rock Street to Hughes Street, was that in good condition so you could walk along there?

A. Yes, sir.

Q. No slopes, no ruts?

A. No, sir.

Q. And no railroad tracks?

A. No, sir.

Q. Had you often walked around that other way?

A. Well, if I was at my mother's—my mother lived there,—then I would go up that way.

Q. During the luncheon recess did you read the complaint in your action?

A. No, sir.

Q. Did you discuss that with either Mr. Walsh or Mr. Kaufman?

A. Yes, sir.

Q. The complaint?

A. Well, it was——

Q. I do not mean the paper that we have identified with your signature on, the bill of discovery; I am talking about the complaint in this action.

A. No, we just talked about the paper you was asking me about.

Q. You told us before lunch that you had seen the complaint in this action. Do you remember that?

A. Yes, sir.

Q. I show you the original of the complaint in this action produced from the court files and ask you to look at that and see if you can tell us whether or not you had ever seen that or a copy of it at any time.

A. Yes, sir.

Q. Have you read it?

A. Yes, sir.

Q. Did you discuss it with your lawyer, Mr. Nemeroff?

A. No, sir.

[fol. 82] Q. When you read it did you find it was true?



A. Yes, sir.

Q. It says in this complaint, if I may read from the original from the court record: "That as plaintiff was on said footpath, the defendant negligently, carelessly and recklessly and without heed to the safety of the public, ran one of its trains on said railroad track at a high and dangerous rate of speed." Did you read that?

A. Yes, sir.

Q. Was that true?

A. Well, it was going——

Q. Was that true?

A. Yes, sir.

Q. The train was running at a high and dangerous rate of speed, was it?

A. Yes, sir.

Q. 30 miles an hour at half-past two in the morning?

A. Yes, sir.

Q. Through a small country village?

A. Yes, sir.

Q. You considered that a high and dangerous rate of speed, did you?

A. Yes, sir.

Q. Did you ever see trains go through there at 30 miles an hour at other times?

A. Mostly the Ashley freight.

Q. Did you know this train was the Ashley freight?

A. I heard after. I seen it go down different times.

Q. Before and after?

A. Yes.

Q. You knew that the train that was involved in this accident was the Ashley freight?

A. I have heard it, yes, since I have started the case.

Q. Did you hear it before?

A. No.

Q. Had you ever seen this train go through there before the accident?

A. No, I don't think I did.

Q. Had you ever heard it go through there before?

A. Yes, sir.

Q. You heard the whistle night after night a half a block from the railroad track, hadn't you?

A. Yes, sir.

[fol. 83] Q. And you say that you had not seen any trains go over that track at 30 miles an hour at any time except

what you have learned since the accident about the Ashley freight?

A. Yes, sir.

Q. Had you ever seen trains on other railroad tracks go as fast as 30 miles an hour?

A. Yes, sir.

Q. You have seen that thousands of times, haven't you?

A. Yes, sir.

Q. I want you to tell the Court and jury in your own words, Mr. Tompkins, if you can, what you considered to be a high and dangerous rate of speed about this particular train on this particular night when you were hurt.

A. Well, I just thought that that 30 or 35 miles an hour was fast, that is all.

Q. You thought it was too fast to run a railroad train?

A. Yes, sir.

Q. At half-past two in the morning? Did you mean that?

A. Yes, sir.

Q. I will read on from this complaint, Mr. Tompkins. I will repeat part of it: " \* \* \* ran one of its trains on said railroad track at a high and dangerous rate of speed and negligently, carelessly and recklessly omitted, while so operating said railroad train, and although approaching a crossing, to give any signal by ringing of the bell or blowing of the whistle of the locomotive of said railroad train, or otherwise." Did you read that when you read the complaint?

A. Yes, sir.

Q. You did?

A. Yes, sir.

Q. Was that true?

A. About the blowing of the whistle, no. The whistle did blow.

Q. And the headlight on the locomotive was lit and you saw it?

A. Yes, sir.

Q. As the train approached you?

A. Yes, sir.

Q. You never discussed that statement in your complaint in this action with any of your lawyers here, with any of [fol. 84] their assistants, or with anybody else?

A. No, sir.

Q. Why didn't you, Mr. Tompkins? Why didn't you tell them that that was not true?

A. Well, I signed what they sent to me.

Q. You gave us that reason for signing the other paper that I showed you with your signature on, this morning?

A. Yes, sir.

Q. Did you ever sign this paper?

A. I don't recall. If my signature is on it I will know it.

Q. Your signature is not on it. I show it to you. Do you agree with me that your signature is not anywhere on this paper?

A. Yes.

Mr. Kiendl: I think it is conceded that that complaint has not been signed by the plaintiff. That is so, Mr. Hunt?

Mr. Hunt: That is true.

Q. That complaint not having been signed by you, Mr. Tompkins, I ask you again to explain to this Court and jury why it was that when you read in the complaint that no signal was given of this approaching train by bell or by whistle or otherwise you didn't tell your lawyers about it, so that the complaint would have been true?

A. Well, I just signed what they sent to me, that is all. I wanted to do what my lawyers wanted me to.

Q. This you did not sign?

A. No, sir.

Q. Do you want this Court and jury to understand that your lawyers wanted you to do something that was false at any time?

A. No.

Q. They never told you to say that the whistle did not blow on this train, did they?

A. No, sir.

Q. They never told you to say that you did not see the headlight of the locomotive, did they?

A. No, sir.

[fol. 85] Q. When you saw that in the complaint why didn't you call it to their attention?

A. Well, I didn't know what to do about it. I just went along with my lawyers, that is all. What they sent me in I signed.

Q. Mr. Tompkins, what you really mean is that you hoped that you might be able to get away with a charge that you know was not so?

Mr. Hunt: Objected to as incompetent and irrelevant—

The Court: Objection sustained.

Mr. Hunt: (Continuing)—and a pure statement by the railroad lawyer, absolutely unjustified. He knows very well he has not a particle of evidence to justify that statement.

The Court: Mr. Hunt, you must not do that. I said "Objection sustained." There is no necessity for making any speech after it.

Q. Mr. Tompkins, I want to come back to the black object that seemed like a door, that you say hit you.

A. Yes, sir.

Q. I want you to tell the Court and jury in your own words and taking your own time just what you saw, how it appeared to you, and why you got the impression that it was a door.

A. Well, all I seen, Mr. Kiendl, was just a black object in front of me.

Q. A black object?

A. Yes; it was like a shadow, and it seemed to be wide.

Q. As a matter of fact, you hardly saw it at all?

A. And it seemed to be wide. I don't know if it was a door or what it was. I am not saying that it was a door.

[fol. 86] Q. You don't know what it was? You haven't any idea what it was?

A. No, sir.

Q. Why did you say that it seemed like a door?

A. Well, it was wide like those doors on a refrigerator car.

Q. You mean that you saw a black object that was wide?

A. Yes.

Q. How wide?

A. About two and a half, two feet.

Q. Two feet wide?

A. Yes, sir.

Q. Projecting from the side of the car?

A. Yes, sir.

Q. You have a recollection of having seen such an object?

A. Yes, sir.

Q. Coming out from the side of the moving car about two feet?

A. Yes, sir.

Q. It looked black to you?

A. Yes, sir.

Q. It was coming right at you?

A. Yes, sir.

Q. Why didn't you jump off to the side?

A. It was too close to me. I didn't have a chance to do anything.

Q. It was right on top of you?

A. When I took notice of it it was right on top of me.

Q. It was right on top of you?

A. It was right on top of me.

Q. By that you mean that you didn't have a chance to do anything?

A. Yes, sir.

Q. When you saw this object that was about two feet wide, how high was it?

A. It was right in front of me.

Q. I know that. How high was it?

A. You know how tall I am; five feet or something, something like that.

Q. How high was the object? It was two feet out from the car. Was it the size of a freight door, five or six feet high?

A. Something around that, about the height of that.

[fol. 87] Q. That is your best recollection?

A. Yes, sir.

Q. Let us see if we get that straight, Mr. Tompkins. The object was about two feet wide and it was about five or six feet high; right?

A. Yes, sir.

Q. You knew that that was about the width and the height of a freight car door?

A. Yes, sir.

Q. And it hit you just in the right eye?

A. Yes, sir.

Q. That is the only place?

A. Right through (indicating).

Q. It didn't hit you any other place in the body?

A. My head was all swollen. I wasn't cut in my eye.

Q. It hit you in the side of the face?

A. Yes, sir.

Q. It didn't hit your body at all?

A. My leg was cut up here and here (indicating).

Q. You don't know whether it was from that dark object?

A. No.

Q. Or whether it was from the fact that you fell down and were dragged along?

A. No, sir.

Q. You don't know whether the swelling on the side of your eye was from this object hitting your face, do you?

A. No, sir.

Mr. Kiendl: I think that is all.

Redirect examination.

By Mr. Hunt:

Q. Mr. Tompkins, I want to direct your attention to each one of the matters that Mr. Kiendl asked you about. Do you know the gentleman with whom I just spoke?

A. Yes, sir.

Q. His name is Colwell, is it?

A. Yes, sir.

Q. In regard to Plaintiff's Exhibit 3, Mr. Kiendl first on his cross examination directed your attention to what apparently is an opening in that picket fence that runs [fol. 88] from Hughes Street over to Rock Street. Do you know whether that is the entrance—you know that Mr. Colwell lives in that house, don't you?

A. Yes, sir.

Q. Do you know whether he uses what apparently is an entrance there?

A. No, sir.

Q. You don't know anything about that?

A. No, sir.

Q. You don't know, as a matter of fact, that the real entrance to his house is on Hughes Street?

A. No, sir.

Q. You don't know that?

A. No, sir.

Q. This last paper, the paper which concededly you never signed, is a legal paper. You understand that, don't you?

A. Yes, sir.

Q. Drawn by someone, either by Mr. Nemeroff or someone in his office, is that correct?

A. Yes, sir.

Q. In other words, this language in here is legal language. You don't know anything about that?

A. No, sir.

Q. Did you ever read this complaint, this paper that you did not sign? Have you any recollection one way or another?

A. No, I haven't.

Q. Mr. Kiendl asked you if you read that, and at the time he showed you this paper did you assume that you had signed it?

A. Well, I had quite a few and I don't recall just which ones I signed and which I didn't.

Q. Look at that paper and see, if you will, whether you have any recollection of ever having read it, and if you have tell us, and if not tell us so.

A. I am not sure.

Q. Have you any recollection one way or the other on whether you ever saw it or read it before, Mr. Tompkins?

A. No, sir, I don't remember.

[fol. 89] Q. I mean, can you think of any occasion why you should be reading a complaint?

A. No, sir.

Q. Does anything like that come back to you?

A. No, sir.

Q. So to get at the truth of this matter, you don't know of any occasion why you should ever be reading the complaint and you have no recollection of it?

Mr. Kiendl: I object to the form of that question, if your Honor please—"so as to get to the truth of this matter."

The Court: Overruled.

Mr. Kiendl: Exception.

Q. You may answer. Is that a fact?

A. Yes, sir.

Q. Nevertheless, let us read a paragraph or two; "That at the times hereinafter mentioned, the defendant was and still is a domestic corporation, duly organized and existing under the laws of the State of New York and operating a steam railroad both in the State of New York and in the State of Pennsylvania, and that said corporation has its principal place of business in the Borough of Manhattan, City, County and State of New York." Do you know anything about that, as a layman? As a layman, as a moulder, do you know anything about a thing like that?

A. No, sir.

Q. You had talked to Mr. Nemeroff, of course, before the action was started and had told him that the accident happened, had you not?

A. Yes, sir.

Q. By the way, before you ever knew Mr. Nemeroff had you told the doctors there in the hospital, later on, how your accident happened?

A. Yes, sir.

Q. Had you told them the same as you told his Honor and these gentlemen?

[fol. 90] Mr. Kiendl: I object to that, to what he told the doctors in the hospital being the same as he has testified to here.

The Court: Overruled.

Mr. Kiendl: Exception.

Q. Had you, Mr. Tompkins?

A. Yes, sir.

Q. As a matter of fact, if anyone asked you about your accident you told them substantially the same as you have told us here?

A. Yes, sir.

Mr. Kiendl: I object to that as improper redirect, as calling for a conclusion, and as irrelevant, incompetent and immaterial.

The Court: Overruled.

Mr. Kiendl: Exception.

Q. You had advised Mr. Nemeroff that you were on the footpath, had you not?

A. Yes, sir.

Q. In regard to the footpath, when it came to the complaint, I will read you this: "That on or about the 24th day of July, 1934, plaintiff was lawfully on a footpath near the intersection formed by Rock Street and a railroad track exclusively maintained by the defendant corporation in the Borough of Hughestown, City of Pittston, Luzerne County, Pennsylvania, and which said footpath runs parallel with and adjacent to said railroad track and said footpath furthermore has been for a long time prior to the said date herein used by the public as a means of egress and ingress to and from the streets abutting to and intersecting the said railroad track maintained by the said defendant, and that said use was with the full knowledge, consent and acqui-



escence of said defendant, and the proximity of said foot-path to the said railroad tracks was fully known to the said [fol. 91] defendant, its servants, agents, employees and others." Was that your language or the lawyer's language?

A. It was the lawyer's.

Q. Do you know what it means now that I have read it?

A. (No answer.)

Q. Do you understand it now that I have read it to you?

A. No, sir.

Q. Do you know what the word "proximity" means?

A. No, I don't.

Q. Do you know what the word "acquiescence" means?

A. No, sir.

Q. Coming down to this other paper, did you advise Mr. Nemeroff, as you have here, that in your judgment, in the short time you had to see it the train was going about 30 or 35 miles an hour?

A. Yes, sir.

Q. And, sir, it did come to your attention in February that Mr. Nemeroff was going to try to examine the employees of the defendant in an effort to find which car it was and what was projecting from that car? He so advised you, didn't he?

A. Yes, sir.

Q. That was the purpose of these papers. You received in regular course some papers from his office?

A. Yes, sir.

Q. You do not know who drew them?

A. No, sir.

Q. You did not take it upon yourself to tell him how to draw them or anything of that kind?

A. No, sir.

Q. You had told him, you told me, that this train in your estimation was going 30 or 35 miles an hour?

A. Yes, sir.

Q. Did you ever claim whether that was fast or whether it was slow or whether it was medium or whether it was [fol. 92] terrific or anything of that kind?

A. No, sir.

Q. Was the choice of those words, describing that as terrific, yours? Did you have anything to do with that?

A. No, sir.

Q. Let me ask you, Mr. Tompkins : At the time the engine passed you how many more steps, or how far, any way you can describe it—how much further did you have to go as the engine was passing you before you reached the point where the two paths converged?

A. About four or five steps.

Q. So the only time that you were walking parallel to the train was this matter of four or five steps?

A. Yes, sir.

Q. So that we may get it, can you point out from where you are sitting some distance that about represents that distance we are talking about, that is, the one from the point where you were when the engine passed you until the point where you were when you were struck.

A. About from the rail to you.

Q. From the beginning of that rail to me?

A. Yes, sir.

Mr. Hunt: Could I ask one of your gentlemen or someone to estimate that distance for the record?

Mr. Kiendl: You estimate it, Mr. Hunt, and I will take it.

Mr. Hunt: Seven or eight feet.

Mr. Kiendl: All right.

Q. So far as that distance is concerned, you did walk parallel to the train?

A. Yes, sir.

Q. You had reached what point at the moment that something appeared in front of you?

A. Right where the two paths meet.

[fol. 93] Q. Did you ever swear to anybody that it was a door that hit you?

A. No, sir.

Q. As a matter of fact, Mr. Tompkins, you don't know yet just what it was?

A. No, sir.

Q. I mean you have your own idea from what you did see?

A. Yes, sir.

Q. You have your own idea what it was?

A. Yes, sir.

Q. Did you so advise Mr. Nemeroff, that you were unwilling to swear that it was a door?

A. Yes, sir.

Q. But that that was your impression, that it must have been?

A. Yes, sir.

Q. As that came on you, I think you told us this morning before luncheon, you remembered trying to get your hands up but you didn't believe you got them up. Those were your own words, weren't they?

A. Yes, sir.

Q. Now sir, can you in addition to that give us some accurate estimate of when this object got near enough to you so that you realized it was an object, so that you could realize it was an object as distinguished from the darkness? How close upon you do you think it was, in your best estimate?

A. From here right to that rail there, the end of it.

Q. You mean from where you are sitting to this end of the rail?

A. Yes, sir.

Q. A matter of three or four feet?

A. Yes, sir.

Q. That train was moving?

A. Yes, sir.

Q. As a matter of fact, your next step was to be in what direction?

A. Down in Hughes Street.

Q. You were just on the verge of making your turn in to Hughes Street?

A. Yes, sir.

Q. In the opportunity that you had to see what it was that struck you were you able to make out any dimensions?

A. No, sir.

[fol. 94] Q. You only give the estimate such as you have been able to give us here?

A. Yes, sir.

Q. As a matter of fact, there is page after page of this. Did you read all this, do you remember?

A. No, sir.

Q. It was sent to you by your attorney and you were requested to sign it?

A. Yes, sir.

Q. Let us assume that you did read it.

Mr. Kiendl: I object to any assumption. The witness says he did not.

Mr. Hunt: He says he didn't read all of it, Mr. Kiendl.

Q. I will read to you this part: “\* \* \* and that after the engine and said cars of the said train had passed your orator”—by the way, do you know what an orator is?

A. No.

Q. (Continuing:)—“\* \* \* had passed your orator, some projection from one of the cars, either the third or fourth car of said train, projecting way out into the highway struck your orator and swept your orator backward off his feet under the wheels of the train.” Now, later on, in regard to this projection—do you know what the word “projection” means?

A. Yes, sir.

Q. Here is the part that was read by Mr. Kiendl in regard to that projection: “Your orator is unable to state and your orator does not know what object the defendant permitted to project from the side of the train.”

Mr. Kiendl: Not from the side.

Q. “From the said train, much less the dimension, its nature and location on the train.” Then you go on to say [fol. 95] that you don’t know the names of the people. Now, you have already told me that you know the purpose, that what Mr. Nemeroff was trying to do was to examine the employees of the defendant to find out what car this was and what it was projecting from the side of the train. Were you then or are you now able to give the dimensions of whatever it was that struck you first?

A. No, sir.

Q. Did you then or have you ever been or are you willing now to swear positively that it was a door?

A. No, sir.

Q. You don’t feel that you can do that?

A. No, sir.

Q. Although you have an idea of what you believe it to be?

A. Yes, sir.

Mr. Hunt: I think that is all.

Recross-examination:

By Mr. Kiendl:

Q. If I am correct, you have told Mr. Hunt that you have no recollection of having read the complaint in this action.

A. No, sir.

Q. Is that right?

A. Yes, sir.

Q. Why did you tell me before lunch, when I showed it to you, that you recalled having received it and having read it?

Mr. Hunt: I have no objection at all, but may we have it appear on the record that when he showed a paper to Mr. Tompkins that Mr. Tompkins did not examine it and did not read it?

Mr. Kiendl: He looked at it and said he had received it and read it.

[fol. 96] Mr. Hunt: He looked at what? Let us be fair about it.

Mr. Kiendl: I am trying to be fair about it. I claim he looked at it and told me he had received that paper and had read it.

Q. I show you that original complaint again and ask you, Mr. Tompkins, isn't that so—before lunch?

A. Well, Mr. Kiendl, they——

Q. Isn't that so—before lunch, Mr. Tompkins?

A. Yes, sir.

Q. You saw that paper and I asked you if you read it, and you said you had.

A. Yes, sir.

Q. After lunch you told Mr. Hunt that you didn't read it at all?

A. I said I didn't recollect.

Mr. Hunt: He didn't say that; he said he didn't know, as a matter of fact, whether he had or not.

Q. You said you didn't know whether you had read it at all. Why was it that before lunch you knew that you had read it and after lunch you didn't know whether you had read it or not?

A. I had so many, they all seemed alike.

Q. How many did you have?

A. Five or six.

Q. You had three. You had your bill of complaint, you had your bill of discovery, and you had your bill of particulars. That is all you had.

A. I don't remember what I had.

Q. What made you guess you have five or six?

A. Well, I didn't know.

Q. You are just guessing about five or six?

A. Yes, sir.

Q. But you did have legal papers in this lawsuit?

A. Yes, sir.

[fol. 97] Q. In which you are trying to recover money from this railroad company?

Mr. Hunt: Objected to. Of course he is.

Q. And you did read those papers, didn't you?

A. Well, I might have read a little. I didn't read them all.

Q. You didn't read them all?

A. No, sir. I would read some of it.

Q. This paper that you signed and swore to before a Justice of the Peace, did you read that before you swore to it?

A. I don't recall, Mr. Kiendl. I might have.

Q. This is the bill of discovery (indicating)?

A. Yes, sir.

Q. This has this in it: "Borough of Exeter, County of Luzerne, Commonwealth of Pennsylvania. Harry J. Tompkins, being duly sworn, deposes and says that he is the complainant herein, that he has read the foregoing bill and knows the contents thereof, that the same is true to his own knowledge except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true." Then there is your signature and then it says, "Sworn to before me this 6th day of November, 1934," and there is the signature of the Justice of the Peace.

A. Yes, sir.

Q. Before you signed and swore to that paper did you read it?

A. Probably I did.

Q. You know you did, don't you?

A. No, sir, I am not sure.

Q. You aren't sure?

A. No, sir.

Q. Did you know that that paper that you signed and swore to before a Justice of the Peace had the complaint in [fol. 98] your action attached to it right after your signature, the second page? Did you know that?

A. Yes, sir.

Q. In the paper which you have signed, which you don't remember whether you read or not, I call your attention to this language: "That on the 29th of August your orator commenced an action at law in the United States District Court for the Southern District of New York against the Railroad Company to recover damages by filing in the office of the clerk a summons and complaint in said action and by causing it to be served, that the action is entitled 'Harry Tompkins vs. The Erie,' was duly docketed," and so forth, notice of appearance put in, served on your attorneys in said action as answer to said complaint, "a copy of which summons attached, Exhibit 1, and of which complaint, marked Exhibit 2, are annexed and made part hereof." Did you read that part of it?

A. Yes, sir.

Q. That the complaint was actually attached to the paper which you swore to before this Justice of the Peace?

A. Yes, sir.

Q. Was there anything about that part that I just read to you that you did not understand, that you read the bill and knew the contents of? Every word of that page you understand perfectly, don't you?

A. This page here (indicating)?

Q. Yes.

A. Yes, sir.

Mr. Hunt: What page is that, Mr. Kiendl?

Mr. Kiendl: That is the verification page.

Q. I think you told Mr. Hunt that you knew what the word "projection" meant.

A. Yes, sir.

Q. But that you didn't know what the word "proximity" meant.

A. No, sir.

[fol. 99] Q. You didn't know what the word "acquiescence" meant?

A. No, sir.

Q. You know what "knowledge" means?

A. Yes, sir.

Q. You know what "consent" means?

A. Yes, sir.

Q. But you don't know what "acquiescence" means?

A. No, sir.

Q. As to the proximity of the footpath to the railroad tracks, do you want this jury to understand that you don't know what that means? Look at it here—"and the proximity of said footpath to the said railroad tracks." Do you tell this jury you do not know what that means?

A. No, sir.

The Court: What do you think it means?

The Witness: Well, I have no idea.

Q. You have no idea?

A. No, sir.

Q. Who were the doctors in the hospital?

A. There was Dr. Murphy, Dr. Fleming, and the internes.

Q. Who were the internes?

A. There was an Evans, there was Bernaci.

Mr. Kiendl: Are the hospital records in court?

Mr. Hunt: We have a copy of the admissions, but the original records are not here.

Q. What doctors did you tell?

A. I told Dr. Fleming.

Q. Is he in court?

A. No, sir.

Q. You told Dr. Fleming?

A. Yes, sir.

Q. What other doctor?

A. Dr. Murphy.

Q. Is Dr. Murphy in court?

A. No, sir.

[fol. 100] Q. Those are the only two doctors you told?

A. Yes, sir.

Q. About how this accident happened?

A. Yes, sir. They were my doctors.

Q. Did you tell them you were hit by a car door?

A. No, sir.

Q. Did you tell them that you didn't know what hit you?

A. I told them there was something sticking out of the car, but I didn't know what it was.

Q. You didn't say or suggest to them that you were hit by any car door, did you?

A. No, sir.

Q. Or that you thought or assumed that you had any idea it was a car door?



A. I told them what I thought, yes, but I said I wasn't sure of it.

Q. That was true when you told it to the doctors and it is true today?

A. Yes, sir.

Q. You said you had no idea, when Mr. Hunt examined you about the dimensions of that object. You were sure it was two feet wide when I asked you.

Mr. Hunt: He did not say he was sure.

Mr. Kiendl: I will withdraw that.

Q. You said it was about two feet wide when I examined you?

A. That is what I said.

Q. Did you say that because if you were in the footpath it would have to reach out two feet to hit you, or did you say it because you looked at it and saw it was two feet wide?

A. That is what it was. I saw it.

Q. You told me it was about two feet wide and about the height of a car door?

A. Yes, sir.

Q. You told me that?

A. Yes.

Q. Did you tell that to the doctors?

A. No, sir.

Q. Did you tell it to anybody else at any time?

A. No, sir.

[fol. 101] Q. So there won't be any mistake about it, Mr. Tompkins, on this map (Plaintiff's Exhibit 1) let me draw a line where you say this footpath from Hughes Street to Rock Street ran along the railroad tracks. You say about two feet from the tracks and parallel to it?

A. Where the path goes along the track, do you mean?

Q. No; the path from Rock Street to Hughes Street was two feet from the track?

A. Yes.

Q. It ran straight along?

A. Yes.

Q. Would that be about where it is, where the ruler is now (indicating), assuming that is two feet?

A. Yes, sir.

Q. It is at the point where the two paths meet—the one Mr. Hunt drew in pencil and the one I just put on here in pencil—where you were, is that right?

A. Yes, sir.

Q. Almost opposite Hughes Street, if it were extended right up to the track?

A. Yes, sir.

Q. If I put an X here that will indicate the exact spot of the accident, will it not?

A. Yes, sir.

Q. I will put a circle around it. That is right, isn't it?

A. That is right.

Q. You had not started turning into the other path when you were hit? You were just at that point?

A. Just at the point.

By Mr. Hunt:

Q. Just one question: These gentlemen you spoke of, the surgeons who took care of you, you had told them about your accident before you ever had a lawyer or ever started any case at all, hadn't you?

A. Yes, sir.

Mr. Kiendl: I make the same objection to protect the situation that I did before.

[fol. 102] The Court: Both of you gentlemen opened the door pretty wide and I think it is pertinent. It is all right.

Q. Did you tell them before or after you ever had a lawyer?

Mr. Kiendl: May I have the same objection and an exception to this line, without constantly objecting?

The Court: The same ruling.

A. I told them right after it happened, as soon as I was—I didn't have no lawyers or anything then.

Q. Did you tell those gentlemen substantially as you have told us today under oath?

A. Yes, sir.

Q. Those men are living right out there, are they not?

A. Yes, sir.

Q. They are active practicing surgeons and in that hospital?

A. Yes, sir.

Mr. Hunt: That is all.

Mr. Kiendl: That is all.

WILLIAM COLWELL, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows :

Direct examination.

By Mr. Hunt :

Q. Mr. Colwell, try to keep your voice up so we can hear back here, please.

A. Yes, sir.

Q. You are a resident of Hughestown, are you not?

A. Yes, sir.

[fol. 103] Q. You have been a resident there how long?

A. Well, I am living in the house I live in now a little over two years.

Q. How long have you been a resident of Hughestown altogether?

A. About fourteen years.

Q. You are familiar with that section where the railroad track crosses Rock Street, are you not?

A. Yes, sir.

Q. As a matter of fact, for the last two years you have lived right there at the railroad?

A. Yes, sir.

Q. Your name is Colwell. Let me ask you, are you a close friend of this young man or do you know him just from living in the same village?

A. Well, I know him from being—from living around there so long.

Q. Have you ever worked in the same place or anything of that kind?

A. No, sir.

Q. I neglected to ask your business. What is it?

A. I work in the mines.

Q. That has been your life's work?

A. Yes, sir.

Q. Now, sir, I will first call your attention to the railroad track. First we have Rock Street (indicating) (Plaintiff's Exhibit 1). Do you see that?

A. Yes, sir.

Q. And the railroad track? (Indicating.)

A. Yes, sir.

Q. Between Rock Street and Hughes Street there are two houses. One, you could say, is on the corner of Rock and the

railroad track and the other is on the corner of Hughes and the railroad track?

A. Yes, sir.

Q. One seems to be about twice as large as the other?

A. Yes, sir.

Q. Do you live in either one of those houses?

A. Yes, sir.

[fol. 104] Q. Which one? The large or the small?

A. The large one right here (indicating) (Plaintiff's Exhibit 1).

Q. Take my pencil and make a "C" there indicating your initial.

A. (Witness indicated.)

Q. That is your home, is it not?

A. Yes, sir.

Q. A question arose this morning that I want you to straighten out, while I think of it. I show you a photograph that has been put in evidence, Plaintiff's Exhibit 3, and ask you if the house shown in the photograph is your home.

A. Yes, sir.

Mr. Hunt: I will show that to the jury, your Honor. (To the jury) Gentlemen, this picture that is shown here (indicating) is Mr. Colwell's home.

The Court: Is that Exhibit 3?

Mr. Hunt: That is Exhibit 3.

Q. The first thing I want to ask you about is this: there is a picket fence runs all the way from Rock Street to Hughes Street, is there not?

A. Yes, sir.

Q. About half way down that picket fence there is apparently an opening?

A. Yes, sir.

Q. Do you see it there in the picture?

A. Yes.

Q. What is that opening?

A. That is a gate.

Q. What is that a gate to?

A. Well, whenever we go up to Hughestown we always go out that gate to go up that way.

Q. When you go to Hughestown you go out that gate?

A. Yes, sir.

Q. When you speak of going up to Hughestown what do you mean by that?

A. Well, we always say "Up to Hughestown." That is more up in the upper end of Hughestown.

[fol. 105] Q. What I am getting at is this: when you say "Go up to Hughestown" do you mean in some direction which would require you to cross the railroad tracks?

A. Yes, sir.

Q. "Up to Hughestown," then, is over by the baseball field?

A. Yes, sir.

Q. And the school and those things?

A. Yes, sir.

Q. That is what you mean by "Up to Hughestown"?

A. Yes, sir.

Q. When you would be going up to Hughestown—in other words, to cross the tracks—you would use that gate that appears there in the picture?

A. Yes, sir.

Q. Now, in going into your home is that the only gate into your home?

A. No, sir; there is two other gates.

Q. The front of your house is on what street?

A. Hughes Street.

Q. Your house fronts on Hughes Street?

A. Yes, sir.

Q. I assume that naturally there is a gate in front of the house.

A. There is a gate right in front of the house.

Q. That gate is to the rear of your house?

A. It is on the side.

Q. You said there were two other gates. Where is the other gate?

A. Well, there is a gate out in front coming out on Rock Street.

Q. Do you have to go by that little house in some way?

A. Yes, sir, on the lower side of that little house.

Q. You go by the little house and then when you get to Rock Street there is no gate?

A. Yes, sir.

The Court: How far is your house from where Tompkins lived?

[fol. 106] The Witness: I lived cater-corner from where Tompkins lived at the time of the accident.

Q. Diagonally across the street?

A. Yes.

Q. Now, Mr. Colwell, I want to direct your attention first to the physical condition that exists there on that land that is between the railroad track and that picket fence that runs along the side of your house. It is agreed here, I might tell you, that there is a space in there of 35 feet between the picket fence and the railroad track. Is your mind on that now?

A. Yes, sir.

Q. Will you tell these gentlemen, first, in your own way, is there any path from Rock Street to Hughes Street? If so tell us all about it, how long it has been there to your knowledge, whom you have seen use it, and where it is located. Just tell us the whole story about it without any questions from me, please.

A. Well, from Rock Street over to Hughes Street there is a road between that railroad sign, and that is the only place you can go in there, is right between that sign and the railroad.

Q. When you say "the sign"—I will have to interrupt once in a while—you refer to what sign?

A. The railroad sign.

Q. That "Stop, Look and Listen" or something?

A. Yes, sir.

Q. When you say you go in between that sign and what—

A. The railroad tracks.

Q. (Continuing) What is it that goes in between the railroad sign and the railroad tracks?

A. There is a road goes in there?

Q. That road is used by whom?

A. Well, practically everybody that goes down in there.

[fol. 107] Q. Is Hughes Street a wide street or a narrow street?

A. Hughes Street is a narrow street. If you come up that way you can't turn around.

Q. Coming up Hughes Street is it absolutely impossible or would it be with the greatest of difficulty?

A. I don't know. I never tried it out.

Q. Did you ever see anybody try?

A. No, I didn't.

Q. The truth of the matter is that some people come out of Hughes Street and go down here (indicating) and turn around and back up?

A. Yes.

Q. Other people, if they want to go right over, just go simply through the low land to Rock Street, is that correct?

A. Yes, sir.

Q. I was directing your attention particularly to a path. If there is any path there I want you to tell us where it is located, how long it has been there, and what it is for.

A. The only path that is there is right up against the ties.

Q. Is that path shown there in the picture? Can you see a part of it?

A. Well, you can see an impression of it right along here (indicating), very faint.

Mr. Kiendl: That is Plaintiff's Exhibit 3?

Mr. Hunt: That is Plaintiff's Exhibit 3.

Q. That path, will you show us with your hands approximately how wide it is, so that we can have it on the record.

A. Well, the foot path is only that wide (indicating).

Q. A matter of 18 inches or two feet?

A. Yes.

Q. How long has that path been there, to your knowledge?

A. As long as I can remember.

Q. Tell us who uses it.

A. Well, people going to No. 9. Mostly everybody that goes out through Rock Street that way.

[fol. 108] Q. Is that the regular way of getting out to Rock Street?

A. Yes, it is.

Q. That path adjoins the railroad ties, does it not?

A. Yes, it does.

Q. That path is up on the high ground, so to speak?

A. Yes.

Q. It is up on a level with the road bed of the railroad. What about this other ground down there? What condition is that in for walking? I mean generally speaking?

A. Well, it is in a bad shape to walk in.

Q. As a matter of fact, does anybody use the lower part for walking purposes?

A. Nobody uses it.

Q. Mr. Colwell, when you get over near your street is there any other path that you can tell us about that adjoins on to the one that you have just described, and if so where does it go?

A. There is a path comes up and goes up over the railroad and goes up to—up over Rock Street and out to Butler Breaker.

Q. That path has been there, to your knowledge, how many years?

A. As long as I can remember.

Q. And used by whom?

A. By people working at Butler's, children going to school, people going to church.

The Court: You say "as long as I can remember." How long can you remember?

The Witness: Well, as long as I can remember living there.

The Court: How long is that?

The Witness: Well, at least 14 years.

Q. Do those two paths that we have been talking about at some point adjoin? Do they become one path at some point?

A. Yes, they do.

[fol. 109] Q. Where is that point with respect to Hughes Street?

A. Well, I don't quite get your point.

Q. Is it right at Hughes Street or is it just before you get to Hughes Street where the two paths come together?

A. It is right at the railroad.

Q. How close to Hughes Street?

A. Well, I couldn't exactly tell you, but it is parallel—it is on a parallel slant from Hughes Street. It isn't straight.

Q. I know what your word means. It is not straight out from Hughes Street; it is on a slant towards what?

A. Towards Rock Street.

Q. Now, coming down to the night when this accident happened, were you in your home?

A. Yes, sir.

Q. With your family?

A. Yes, sir.



Q. In bed?

A. Yes, sir.

Q. What was the first thing that called to your attention the fact that Mr. Tompkins had been injured?

A. Well, two boys started rapping on the door.

Q. After they rapped on the door did you come down to see what it was about?

A. I went downstairs to see what was the matter.

Q. After some talk, after something was said, did you put on your trousers and go outside?

A. My wife told me not to go out.

Q. You can't tell us about it. She didn't want you to go out? She thought it was something else?

A. Yes, and she told me not to go out, that them fellows was crazy; so there was knocking on the front door and one fellow ran out the gate and was running up and down the street.

Q. Then what did you do?

A. So the other fellow was hollering that there was a fellow [fol. 110] low run over, and I looked out the side window and I could see him.

Q. You could see whom?

A. Mr. Tompkins.

Q. Could you see who it was from where you were?

A. No.

Q. You mean you saw him afterwards?

A. No; I didn't know until afterwards.

Q. What did you do?

A. Well, I said there was an accident and I slipped my trousers on and went out.

Q. When you got there just tell these gentlemen what happened. Go right ahead and use your own words. Tell us exactly what you saw.

A. When I went out there Mr. Tompkins was laying up against the rail and his arm was off.

Q. Where was the arm?

A. The arm was lying in the middle of the road.

Q. By "the middle of the road" you mean what?

A. In the middle of the railroad.

Q. Between the two rails?

A. Yes.

Q. And his body was lying where?

A. Outside the rails.

Q. These two young men who awakened you, did they assist you in any way or did they leave?

A. No, sir; I told them to go down to Mrs. Rentford's—she lives the second house below here (indicating)—and have her call an ambulance.

Q. Is that because Mrs. Rentford is the person there that has a telephone?

A. Yes, sir.

Q. You don't have one in your home?

A. No, sir.

Q. Then they left?

A. They left there and I didn't see them after.

Q. Then what did you do?

A. I went out there and I stayed there, and people came around. Until the ambulance came I stayed there.

[fol. 111] Q. You were right there and you know where Mr. Tompkins was lying?

A. Yes, sir.

Q. You know where the arm was lying also?

A. Yes, sir.

Q. You have told us where the body was and the arm. Now I want to know where that was with respect to the place where the two paths meet.

A. Well, it was approximately—well, I couldn't say exactly, but it was between six and ten feet from where the paths meet.

Q. When you say "six and ten feet from where the paths meet" do you mean nearer to Hughes Street or nearer to Rock Street?

A. Oh, it was right—almost at the intersection of Hughes Street.

Q. Yes, but I mean when you say it was nearer—you said how many feet, about?

A. Between six and ten feet.

Q. Do you mean toward Rock Street or further beyond where the paths meet?

A. No; towards Rock Street.

Q. In other words, he was six to ten feet, lying there on the ground six to ten feet——

A. Yes.

Q. (Continuing.) —from the place where the two paths meet——

A. Yes, sir.

Q. (Continuing.) —on the side towards Rock Street?

A. Yes, sir.

Q. Of course you don't know how far he was knocked?

A. On the side towards our house.

Q. You don't know how far he was knocked back when he was struck, or anything of that kind?

A. No, sir.

Mr. Hunt: That is all, sir.

Cross-examination.

By Mr. Kiendl:

Q. Mr. Colwell, this path that you have told us about runs along the railroad track——

A. Yes, sir.

[fol. 112] Q. (Continuing.) —from Rock Street up towards Hughes Street——

A. Yes, sir.

Q. (Continuing.) You said it was a path that was right up against the ties, didn't you?

A. Yes, sir.

Q. Is that true?

A. Yes, sir, it is.

Q. That path is right up against the ties?

A. That path edges right against the ties.

Q. It isn't any two or three feet away from the ties; it is right alongside the ties?

A. Right alongside the ties.

Q. Just, you say, what you describe as a path in those pictures?

A. Yes, sir.

Q. So if you walk along that path in any direction at any time you are walking right at the edge of the ties on which the railroad rails, the steel tracks, are laid, isn't that so?

A. Well, now, you could walk in the center of that path —of course——

Q. Let us see if we understand each other.

Mr. Hunt: Let him finish, please.

A. You see, the end of the path——

Q. I did not ask for an explanation; I asked for the facts.

A. The end of that path runs up against the ties.

Q. By that you mean——

Mr. Hunt: I submit that the witness has not finished his answer.

Mr. Kiendl: You are quite correct. I am out of order, Mr. Hunt. I am sorry.

A. (Continuing.) And the path, I should judge anybody could walk on that—no, you wouldn't be up against the rails.

Q. Now you are finished, are you, sir?

A. Yes, sir. You wouldn't be up against the rails.

[fol. 113] Q. When you say the far side of the path goes up to the ties you mean that, don't you?

A. Yes, sir.

Q. When you speak of the ties you mean these things that are shown in the two exhibits you have looked at?

A. Yes, sir.

Q. Plaintiff's Exhibits 2 and 3. You mean these long bars of wood underneath the rails of the track?

A. Yes, sir.

Q. When you say the path comes up to the end of those ties you mean just that?

A. Yes, sir.

Q. There is an end of a wooden tie, and right alongside of it is this path?

A. Yes, sir.

Q. That path runs from Rock Street up to the intersecting path at Hughes Street?

A. Yes, sir.

Q. Right along the edge of those ties all the way? Right?

A. Well, now—yes, it does.

Q. Of course it does. It shows here in the picture, doesn't it?

A. Yes.

Q. The path is about two feet wide, you told us?

A. Yes, sir.

Q. And a man is about two feet wide, isn't he?

A. Yes, sir.

Q. So anybody walking up and down that path at any time, his body is right in line with the ends of those ties on one side?

Mr. Hunt: That I object to.

Mr. Kiendl: I withdraw it.

Q. Have you walked along that path?

A. Yes, I have.

Q. If you walked along the middle of that path that is two feet wide is it or is it not a fact that your side of the body nearest to the railroad rails is about in line with the end of the ties?

A. Well, now, I don't know. I never took that much notice.

[fol. 114] Q. What?

A. I never took that much notice.

Q. Think about it now, Mr. Colwell. You have a path two feet wide coming up to the very ends of these ties and you walk along them. Don't you know that a man's body must be in line with the end of those ties in order to walk along that path?

A. Well, it certainly would be.

Q. You lived there for how many years?

A. Two years.

Q. And you saw people walking along that path, didn't you?

A. Yes, sir.

Q. You saw trains go up and down that railroad track?

A. Yes, sir.

Q. When you saw trains going up and down the railroad track did you observe that the wheels ran on the rails, the steel rails?

A. Yes, sir.

Q. Did you observe that the sides of the car and the sides of the locomotive projected over the rails? Did you ever notice that?

A. Yes, sir.

Q. Did you notice that the overhang of those cars and trains came out beyond the ends of the ties?

A. No, I didn't.

Q. You didn't notice?

A. No, sir.

Q. Did you notice how far they did come out?

A. Well, now, I never——

Q. You never measured it?

A. No.

Q. But it is the fact, Mr. Colwell, that you know right well that these railroad trains have some overhang?

A. Certainly.

Q. They overhang at least the length of the ties, don't they, down at that point and every other point?

A. No, I don't believe so.

Q. You don't believe so?

A. No, I don't.

Q. But you don't know one way or the other?

A. Not to be positive.

[fol. 115] Q. Mr. Colwell, walking along the path that you say was there, coming right up to those ties, and a train coming up, you know that your body would be awfully close to the side of that train, don't you?

A. Yes, it would.

Q. A matter of inches it would be, wouldn't it?

A. Well, I don't know, now. It would—it would be close.

Q. It would be awfully close, wouldn't it?

A. Yes, it would.

Q. And it would be awfully dangerous to walk on that path?

Mr. Hunt: That I object to, what would be awfully dangerous.

The Court: Overruled.

Mr. Hunt: Exception.

Q. It would be awfully dangerous, wouldn't it, Mr. Colwell, to walk along that path with a moving train so awfully close to you?

A. Well, it would, yes.

Q. You are testifying from what you observed as the result of living there a couple of years?

A. Yes, sir.

Q. This is not the first time that you have testified in this case, is it, Mr. Colwell?

A. No, sir.

Q. You were called as a witness by the plaintiff down in Pottstown, Pennsylvania, and testified, is that right?

A. Yes, I did.

Q. You say there are two paths—one where you have placed it right up against the ties——

A. Yes, sir.

Q. (Continuing.) —the other coming up from Hughes Street?

A. Yes, sir.

[fol. 116] Q. Do you see the Hughes Street path in the picture which I now show you, Plaintiff's Exhibit 3? Do you see it?

A. Yes.

Q. Will you point out with the end of my pencil that path.

A. Right here (indicating), right along there.

Q. Can I mark with my pencil the place that you have indicated? See that I get it accurately.

A. Yes, sir. (Indicating.)

Q. Is that it (indicating)?

A. On this side of that line it is (indicating). Here you can see for yourself (indicating).

Q. What I am trying to do is this: Have I indicated a line where you say a path from Hughes Street up to the railroad track runs or haven't I?

A. Yes, you have, but it is on this side of that line (indicating). It is on the inside of that line.

Q. Just about where that line is? It may be an eighth of an inch out or something like that? That is the path you are talking about, isn't it?

A. Yes, yes.

Q. Now, were there any other paths any place between Hughes Street and Rock Street other than the path that I have marked with a pencil and the path you say is two feet wide running along the edge of these ties?

A. Between Rock Street and Hughes Street?

Q. Yes.

A. No, sir.

Q. How far would you say it is from Rock Street to Hughes Street? A matter of 150 feet or so?

A. About 100 feet.

Mr. Kiendl: We agree it is about 115 feet.

Mr. Hunt: Yes, from the——

Mr. Kiendl: Nearest point of Rock Street to the nearest [fol. 117] point of Hughes Street, is about 115 feet.

Mr. Hunt: Yes, about.

Q. Now, take that piece of land, Mr. Colwell, it is about 115 feet long and about 35 feet wide between Hughes Street, Rock Street, the railroad ties and the fence. In the two years that you have lived at the house that you have indicated on the map had you ever seen anybody at any time walk in any part of that territory except on the two paths that you have told us about?

A. No, sir.

Q. Never once?

A. No, sir. That is too rough walking.

Q. Let us see, Mr. Colwell; see that I get this straight. You have never seen a soul——

A. No, sir.

Q. (Continuing.) —walking over any other part of that whole territory?

A. No, sir.

Q. Except the path along the ties and the path to Hughes Street?

A. Yes, sir.

Q. Do you mean that?

A. I sure do.

Q. You understand that you have told Mr. Hunt here—I thought you did—that you walked out of your gate across part of that territory?

A. Well, that path I do.

Mr. Hunt: May it please the court, Mr. Kiendl has framed his question wrong. He is talking about walking along. He says “walking along from Hughes Street to Rock Street.”

Mr. Kiendl: No, I didn't, but I will get it straight. I do not want to take any unfair advantage. I will repeat the question.

[fol. 118] Q. Mr. Colwell, from Hughes Street to Rock Street, about 115 feet running along the railroad track and about 35 feet wide from the edge of the ties to the fence in front of your place, did you ever see anybody walking in any part of that territory except on the two paths?

A. And the path coming out of our house.

Q. Oh, there is another path there, is there?

A. There is a path coming out of the side gate.

Q. Is that a path that you can see and walk along?

A. Yes.

Q. And know that it is a path?

A. Yes, sir.

Q. A well defined path?

The Court: Pardon me. You testified to two paths so far—one path along the ties and the other path along Hughes Street; is that right?

The Witness: Yes, sir.

The Court: Is there a third path besides those two?

The Witness: Yes, there is. It is marked on that picture.



Q. You haven't told us anything about the path until I directed your attention to it.

A. Well, I——

Q. You forgot that?

A. I did. I understand that it was there.

Q. That path was shown on Plaintiff's Exhibit 3 by the broken ink line from your gate up toward the path that runs along the edge of the ties?

A. That is it.

(Mr. Kiendl indicated to the jury on the picture.)

Q. Now we have three paths, Mr. Colwell. Were there any others in there?

A. Yes, sir.

[fol. 119] Q. Where were they?

A. Right here, going up from——

Q. No; I am asking you about a certain restricted piece of territory. Are there any other paths in there?

A. No, there is no more in there.

Q. Then, I ask you, Mr. Colwell, if you ever saw anybody take a step, walk a step, any place in that territory except on the three paths that you have now told us about.

A. No, sir, I haven't.

Q. Did you ever see anybody walk alongside of your fence?

A. No, sir.

Q. Is there any reason why you could not walk alongside of your fence if you wanted to?

A. Well, you could walk alongside of it, but you would roll down and under.

Q. You would roll in under the fence?

A. Exactly.

Q. You don't mean that, do you?

A. I sure do. Here is the ditch right here (indicating), see, and down here there is a bank goes right under the fence.

Q. Now, you asked me if I saw the ditch?

A. Yes.

Q. There are some rocks right up against the fence, aren't there?

A. Yes.

Q. And a drain that runs in there?

A. Yes, sir.

Q. But come out two feet from the fence. There is no reason why you couldn't walk in there, is there?

A. It is pretty rough there.

Q. It is like it is shown in this picture?

A. No, sir; it is rougher than that.

Q. Do you mean that the territory we are talking about is not correctly shown in this picture, Mr. Colwell?

A. It is not, no, sir.

Q. You have been a good neighbor of the plaintiff for some years?

A. I have been a neighbor of the plaintiff for a long time.

[fol. 120] Q. Did you hear him testify?

A. No, sir. Only right here, yes.

Q. You say that this picture does not show the condition of that 35 feet between Rock and Hughes Street——

A. No, sir.

Q. (Continuing.) —as it was at the time of the accident?

A. No, sir, it doesn't show it very plain there.

Mr. Hunt: At this time could we have the date when these pictures were taken?

The Court: The picture that you have shown, Mr. Kiendl, is Plaintiff's Exhibit 3?

Mr. Kiendl: Yes, your Honor.

Q. How about this picture, Plaintiff's Exhibit 2? Does that show the condition of that territory we have been talking about as it was at the time of the accident?

A. No, sir.

Q. Look at these two which I now show you.

Mr. Kiendl: I ask to have them marked Defendant's Exhibits A and B for identification.

(Marked Defendant's Exhibits A and B for identification.)

Q. (Continuing.) Those are pictures looking up toward the curve in the railroad track. Do they show the conditions as they were at the time of the accident?

A. No, sir.

Q. They do not either?

A. They don't. That ground down in there is awfully rough all along in through there.

Q. There isn't any path that you can see in any pictures——

A. No, sir.

[fol. 121] Q. (Continuing.) —or actually there that runs along that fence?

A. No, sir, there isn't.

Q. None of any kind?

A. No, sir.

Q. You do not see the path which I show you in that picture, Plaintiff's Exhibit 2, running along your fence?

A. That isn't a path.

Q. What is it?

A. I put that there so the water would not be running in the yard.

Q. It is a level piece of ground?

A. It is dirt up to that fence, a level piece there.

Q. You can walk up on that to get to Rock Street?

A. Sure, if you have somebody help you over the ditch there.

Q. Will you show us on any of these pictures, if you can, where the ditch is that you have to have somebody help you over to get to your gate?

A. No, sir, they don't show on these pictures.

Q. Here is a great collection of pictures, Mr. Colwell. Look at them all and see if you can find the ditch that you are talking about that you have to be helped to get over.

Mr. Hunt: Mr. Kiendl, here is one you might show him.

A. Here is the closest I can show you. Do you see there (indicating)? There is a 30-inch pipe goes under the railroad. There is a deep ditch.

Q. That is this picture, isn't it, Plaintiff's Exhibit 2? That is the one that you said did not accurately show the condition?

A. Well, it doesn't. It doesn't. This is what I am trying to tell you. There is a 30-inch pipe goes under the road and you can't see it there. It comes right out right there (indicating).

[fol. 122] Q. You are indicating the place where the crossing sign is?

A. Exactly, and then there is a deep ditch runs from there right down.

Q. From there down you can't cross over without being helped?

A. No, sir.

Q. How wide is the ditch? A foot or two?

A. A foot or two I guess it is.

Q. You could step right over it without any trouble if you wanted to?

A. If you wanted to, but it is handier to go over here and get in the front gate.

Q. After you have passed over the place where this drain is underground, pass the crossing sign post, you are up near the tracks?

A. Yes, sir.

Q. I asked you if there is any reason why a man who is able to walk can't walk any place in there that he wants to.

A. Sure he can, but——

Q. You have never seen anybody do that?

A. No, sir.

Q. Not in all your life?

A. Not, not while I have been living there.

Q. Have you ever seen any railroad men working in there around the tracks?

A. Yes, I have seen men working in there around the tracks.

Q. They do a lot of switching of coal cars?

A. Yes, sir; not right—on the other side of the crossing.

Q. On the other side of the crossing there is a switch track?

A. Yes, sir.

Q. They switch cars in and out of there a great deal?

A. Yes.

Q. Railroad men are around there all the time up near the track, walking back and forth?

A. Yes, sir.

Q. It has always been so, hasn't it?

A. Yes, as long as I know of it.

Mr. Kiendl: I think that is all.

[fol. 123] Redirect examination.

By Mr. Hunt:

Q. You were asked what might not be done. You have told us what actually has been done there during the years you have been around there?

A. Yes, sir.

Q. I suppose if a person was sufficiently agile he could walk the picket fence over if he wanted to try it, couldn't he?