

to get the particulars and make a report of the same to the Superintendent. I went there and in the course of my investigation I saw this young girl, Rosa Bushey. I saw her on Hastings street.

Q. Did you have any conversation with her at that time?

A. Yes, sir.

Q. Did she say to you at that time that at the time of the accident she was on Hastings street, and did not see it, and that no one saw it?

A. Yes, sir, that is what she said.

Q. Did she say at that same time that Pete Teagan or Tean was with her at the time?

A. Yes, sir.

CROSS-EXAMINATION.

I am still in the employ of the Detroit, Grand Haven & Milwaukee, in the same position, and have been ever since; was employed there five or six months previous to that. I saw this girl, Rosa Bushey, on Hastings street, just opposite that brick building where the boy lived who got injured. She was on the sidewalk. As nearly as I can remember, I think it was about nine o'clock; I could not exactly say to a half hour; it was somewhere around that time. She was standing on the sidewalk with several other parties. The mother of the boy was there, and several others whom I don't remember. The mother is the only other one I could name. I think they are all I conversed with, as far as I can remember—Rosa Bushey and the mother. I think the mother came up afterward, after I had been talking some little time to Rosa Bushey. She was there while I was talking with Rosa. I suppose she heard my conversation with her. I asked her whether there was anyone around there that saw the accident, and she told me no, there was not; that she herself was standing on Hastings street at the time, and did not see the boy until afterward. She said that Pete Teeny or Tean, or whatever his name is, was on Hastings street. I asked her whether there was anyone else there, and she told me that this Pete Tean was not there, that

he saw it afterward, that like herself he was on Hastings street. I can't remember her exact words, no further than that. The mother came up at the time. I could not exactly say whether she heard what I asked her or not. I could not say whether she came up at that exact time. I remember the mother being there. I could not say whether she was there in the first place or not.

Q. What did you say to Rosa, or she to you, after the mother came up?

A. I don't know.

Q. You regarded this as an important matter, did you not?

A. Yes, sir.

Q. You intended to charge your memory with what you learned?

A. I generally do.

Q. What other conversation did you have with Rosa?

A. Nothing further. I asked her name, age and address, and turned round and went away.

Q. Where did you go?

A. I think down through the yard down to the office.

Q. And that was the extent of your investigation?

A. Yes, sir.

Q. You did not go to see the mother at all?

A. It was not my intention to see anyone in particular. I wanted to get any particulars I could from anyone I came across.

Q. And you talked with Rosa, and although the mother was there, you did not talk with her, you went right back to the office?

A. I do not remember talking with the mother.

Q. And that was your investigation of this important matter?

A. Yes, sir. I could not say whether the mother heard all the conversation or not; she might have heard all.

John Landon, produced and sworn on behalf of the defendant, testified:

I am an engine-man in the employ of the Detroit, Grand Haven & Milwaukee Railway Company; have been in the employ of that company as an engine-man since the year 1863. I was in charge of this engine that ran over this boy, James Hughes.

Q. State to the jury in as few words as possible what occurred as you saw it.

A. We ran down to the freight-shed used by the Grand Trunk Company with the engine coupled onto some cars, came up, and passed over the crossing and cut the cars; cut a portion of them off, six for instance, and threw one into the stock-yard; came back and coupled on again, and the switchman gave me the signal to slack back and place the cars so we could cut the crossing and leave it clear. We cut the crossing, moved ahead with five cars, four box-cars and one flat-car next to the engine. We moved ahead, perhaps a car-length or two, and my attention was attracted by seeing a small colored boy just in front of the driving-wheel, on the point of being run over by the engine. I reversed the engine, used as good judgment as I could, tried to stop her as soon as I could. The engine and the front truck of the flat next to the engine passed over the boy, according to the best of my belief and knowledge. He lay beside the truck, near the last truck of the flat and was being cared for by switchman Macomb when I stepped off the engine and went to his assistance. I called to the fireman, Patrick Flanigan, who was still on the engine, to bring me my handkerchief from my coat-pocket hanging in the cab. I noticed at the time that the boy was bleeding, that the blood was spurting up. Then I saw the bleeding stop, and I told him to remain there, that he need not bring the handkerchief, and I said to Mr. Macomb that we would take the boy home. I asked of some one of the children where the boy lived. Some one went back and showed us where he lived. Mr. Macomb took the boy in his arms, and I gave him what assistance I could. He took the boy in the house. I

asked for some place to lay the boy, and there was nobody there to respond to it except quite an elderly colored lady. I asked if there was any young person that could tell me where the mother was, or who would care for the child, and nobody responded. I requested Mr. Macomb to lay the child on a table that was standing in the room, and just about at this point a lady came in the room claiming to be the mother of the child. At the time the accident occurred the engine stopped short of the frog, perhaps the length of the engine or the length of a car or two. There were five cars attached to the engine. We went ahead with five cars when we cut the crossing. The remainder of the cars were left the other side of Hastings street. I was going east. The engine was headed east. The cars were behind me. The first position in which I saw the boy it looked to me like a pair of large eyes and a dark face, as though a head and a pair of eyes with a dark face were on one side of the rail and the remainder of the body on the other side of the rail.

Q. State whether you had seen the boy before that day.

A. I had not. I never had seen him before to my knowledge. When we are on duty engines pass down there every 15 or 20 minutes, or half an hour sometimes, in the day. In the evening it would be less—at that hour. That is a part of this company's yard.

On cross-examination the witness said:

This engine has four wheels, two on each side, driving wheels, ahead, and the truck behind those. The driving wheels are ahead. They are the first wheels that would run over any person that was in front of the engine.

John Macomb, produced and sworn on behalf of the defendant, testified:

Examined by Mr. RUSSELL:

I am employed as a freight conductor by the Detroit, Grand Haven & Milwaukee Ry. Co. I commenced in the employ of this company in 1869, and have been continuously in their employ since that time. At the time of this accident I was work-

ing as switchman in the Detroit yard; in the part of the yard that is called the "lip." I was with this train in question. Where the accident occurred was, I think, two or three car-lengths east of Hastings street. We stopped and cut the crossing, and this little boy was on the front of the engine. I did not see him get on.

Q. State what you saw. Don't state where the boy was when you did not see him.

A. I pulled him out from under the car.

Q. How did you know he was under the car?

A. I saw him and pulled him out from under it. I did not know that he was on the engine. I heard the boy holler, and I was standing pretty near the front end of the flat-car. I jumped from that when I heard him holler, and I saw the boy. He was kind of doubled up, trying to push himself out. The cars would have gone right across his body, but I caught him. I had to wait until the front wheels of the hind trucks of the flat-car went over his thumb, before I could get him out. I picked him up in my arms, and the boy hollered, "Carry me home." At that time Mr. Landon, the engineer, called to me, called me Jack, and said, "Wait, and tie a string around his limb," and he hollered to the fireman to get his handkerchief. I said, "It is too short," and he came to me and we carried the boy home and laid him on the table. I did not see anybody there when I picked the boy up; did not recognize anybody only Mr. Kenney and the engineer, Mr. Landon. We took the boy up, took him home, laid him on the table, and I think his mother sent some lady up stairs for a pillow. I asked the boy where he lived, and he told me at Hastings street, and I took him right into that brick building that corners on Hastings and the track. I think I met Mr. Keith, as I was coming out. That is the only one I remember meeting. I saw a lady that acted very much like his mother to me. I think she was there when I went in, and she asked a lady to go up stairs for a pillow.

Q. Had you seen this boy before the accident?

A. I am pretty positive I had.

Q. Where and when?

A. That night, after we came down to back into the western house, I think not to exceed 20 minutes before the accident occurred. I think he was accompanied by a couple of little lads, running after the engine.

Q. What did you do or say?

A. I hollered to the boys, and said, "I will chastise you;" warned them to keep away.

THE COURT—That wasn't what you said, was it? Use your own language.

A. I said, "I will spank you." I would like to say, if that boy could catch the foot-board, he could not catch the hand-rail. He is not big enough. He probably caught the foot-board and dragged along with it. He is not big enough to get onto it.

Q. At what point were you when you gave this warning to this boy and the others?

A. I was on the front of the foot-board. The engine was backing west, going into the western freight house. I don't think he was then 20 feet from where I picked him up afterward, that is, at the time when he was running after the engine, not to exceed that. I would not be positive, but it was between the cattle-yard switch and Hastings street.

CROSS-EXAMINATION.

The flat car was next to the engine, and I think there were two box cars behind the flat. There are different lengths of cars. The lengths are marked on some of them. I could not give any estimate in regard to the length. From the east line of Hastings street up to the first frog, it will hold four cars clear of Hastings street, and you might get five. There are cars that run thirty-six feet long, and there are cars that run twenty-six. I said it was about three car lengths east of Hastings street where the boy was picked up. I think his leg lay a little up west of that, where he first got run over. I had to wait in picking him up till the front wheel of the back truck passed over his thumb. He threw his hand up against the rail

trying to get out. I am the man who picked him up off the track. I first caught him by his right leg. What I mean by the distinction I make between the place I picked him up and the place where the accident occurred, is, a man may fall under the wheel and be dragged ten or fifteen feet. He may have been a little farther back. I have seen men dragged twenty feet. I did not see the limb at all. It was west of the frog where he was hurt, where I picked him up. When the engine was backing down, after we left the coal dock, going into the Great Western freight house, going west, he started to run after the engine, as the engine was backing. He was running in the same way the engine was going. I was standing on the front plank. He only followed a few feet. He was then just east of Hastings street, I think. I could not say whether he crossed Hastings street or not. I did not pay any attention. I was riding on that front step, keeping a lookout; that is a part of my business. The majority of us get on there to avoid getting on the back end. It is the safest place to get on.

Q. Didn't you pay any attention or keep any lookout?

A. We certainly did. Any boy that comes around, all of us warn him to keep away. The plank is there for the switchman to ride on, and to keep a lookout if it is necessary.

RE-DIRECT EXAMINATION.

This was between half-past six and seven o'clock. The night crew had begun work. I think we had three cars attached to the engine. The accident was on the 16th or 17th of July.

Pervis Kenney, produced and sworn on behalf of the defendant, testified:

I am employed as a switchman on the Detroit, Grand Haven & Milwaukee Railway. Have been in employ of that company two years and a half or three years. At the time of this accident I was employed as a switchman with this train. At the time the accident occurred, I was just east of Hastings

street, I suppose probably a car length. The first thing that called my attention to it was Mr. Macomb pulling the boy out from underneath the car. That is the first I saw. When we cut the crossing, Mr. Curran gave the signal to go ahead from the crossing. Of course I gave Mr. Macomb the signal to go on, he being the forward switchman, and my attention was drawn that way. I ran right up to where Mr. Macomb was, and by this time Mr. Landon was off the engine there. I saw they were doing all they could, so I turned around and went over and told the yardman, Mr. Keith, as I thought they would have to telephone for an ambulance or something of that kind, and Mr. Keith and I came right back over, and they took him in the house. I did not see anybody around there at that time. I did not wait until they got to the house with the boy. In my judgment, I think the boy was picked up about ten or fifteen feet west of the frog.

Q. How far had the engine to run before it got to the stop which you intended to make in case no accident occurred?

A. About two car-lengths or a little over. The engine stopped very near where we intended to stop it.

Q. Why did you intend to stop there?

A. To cut the crossing.

No cross-examination.

M. J. Curran, produced and sworn in behalf of the defendant, testified:

I am employed as yardman of the Detroit, Grand Haven & Milwaukee railway; have been employed nearly four years; for three years as yardman and previous to that as a switchman. At the time of this accident, on the 16th of July, 1884, I was employed as a yardman. Mr. Macomb and Mr. Kenney were employed with me. I did not see this accident by which Jimmy Hughes was hurt. I was standing on the south side of the train; was not doing anything at that moment. After I had cut the crossing, I gave the engineer a signal to go ahead. I also called to the switchman, Mr. Macomb, to come down on

the other side, on the south tracks. There were two tracks and we were on the north track. The train started very slowly at first, as they usually do. It had not gone only about two car-lengths, probably a little more, when the engineer reversed the engine very suddenly, which called my attention in that direction. I saw Macomb then picking the boy up from under the wheel. When I reached the place Macomb and the engineer, Mr. Landon, were there. Macomb had the boy in his arms. He asked him where he lived, and immediately started to carry him to his home. I saw the place where the boy was run over. There were three cars attached to the engine at the time. I went to his house with the men when they carried the boy away—a brick house at the corner of the track and Hastings street. I stayed there probably two or three minutes, and went for a doctor. Previous to the time when the boy was carried away by Mr. Macomb, I did not see any of the witnesses who have testified to being there. Did not see anybody there except our own men.

Alexander Forbes, produced and sworn on behalf of the defendant, testified:

I am employed as night watchman at the D. & M. yards. On the 16th of July, 1884, and about that time I was employed at night in what is called the "lip." On the night of this accident, I was at the Hastings street crossing. On night duty. I did not know of the accident till they spoke of it ten or fifteen minutes after. Mr. Ross had come over from the other yard, which he frequently does. We chatted a little bit, and then I went to look over the cars that were on the other side of the crossing. I knew this little colored boy before that. I never saw him on the track. Never did. Have seen him about the crossing there. He lived close by.

Q. Have you ever seen him in company with other children about there?

A. He was not very much taken up with the other children except his own sister. I have never seen him over on the

other side of the crossing south of the railway that I am aware of, and never saw him about the open space between the tracks. He kept at home very good. Was a very quiet boy.

William Ross, produced and sworn in behalf of the defendant, testified:

I am employed as night watchman for the D. & M. Railway company. Have been in the employ of the company nearly twelve years. I was working for the same company on or about the 16th of July, 1884, on night duty. My duty principally is inside the yard, but frequently, in the evening, I go over to the "lip" to assist Mr. Forbes, because there are so many roughs around there, and he can scarcely take care of the cars that are left there in his charge. At the time of the accident I was standing about the centre of Hastings street, on the south side of the railroad track. A few minutes previous to that time I was over on the north side, close by that brick building that stands by the track. The engine was pulling up so many cars from the Western House, and to prevent their cutting me off from crossing to my own side, I re-crossed the track to the south side. My attention was taken first by seeing the engine come to a stop or stand-still. That was the first that my attention was attracted to it. Somebody said there was some child run over, and I ran to see what had happened, and there I found Mr. Landon and one of the switchmen carrying the boy around the front end of the engine. I don't remember that there were any more except Landon and the switchmen there. I don't know how many there might have been. I took no particular notice of the number that possibly might have been there at the time of the accident.

Q. Do you know just the point where the boy was run over, with reference to the frog or the switch?

A. Yes, sir, I should judge possibly 10 or 12 feet, or it might be more, west of the switch.

Q. Do you mean the switch or the frog?

A. I mean both. I do not know as there is much difference.

Q. How far apart are the switch and the frog?

A. I don't exactly know. I never paid much attention to the distance. I know it is no very great distance. I knew this little colored boy before he got hurt. Had seen him about the premises before the accident. The first I saw of him was standing by the corner of his own house, right by the door-way. It might have been ten or fifteen minutes before the accident. The next I saw of him he was running up from the cattle-yard, as it were, alongside of the team-track there, where they unload coal and such like. There were three boys together, and he was ahead of the other two. He was running, as I thought, to cross the track ahead of the engine. The engine was moving at that time. I did not further keep watch of the boy than that I kept sight of him until I thought he reached the track, and when he went in front of the engine I saw no more of him. Next thing I saw of him, I met John Landon carrying him in his arms, or helping to carry him to his house. It may not have been over three minutes between the time I saw him running there and my knowledge of the accident. I don't think it could have been over three minutes or thereabouts after I saw the boy running, before I heard the engine stop suddenly. It may not have been that. I was paying very little attention to the thing at all, only that I saw the boy reach the track, and he disappeared in front of the engine, and I saw nothing more of him. I have seen him back and forward at the crossing very often. I have seen him going up and down, crossing and re-crossing the track, many times.

CROSS-EXAMINATION.

My ordinary duty is inside the yard, on the south side of Atwater street, perhaps 200 yards from this crossing; the main yard, south of Atwater street. I go off duty at seven in the morning. I live right near the corner of Hastings street—on the southwest corner. The little boy lived diagonally across on the northeast corner, and I saw him often in front of his house. The other children that I saw with him at the time I

speak of, were boys, about his own size, or they might have been a little larger. They were white. I did not pay much attention to them.

RE-DIRECT EXAMINATION.

By the yard I mean the main-yard from Atwater street to the river. In one sense this place where the accident occurred is a part of the yard; it is simply another part of it. I never saw the boy on any engine; but the same night, a train was pulling up on the north track and I saw him go forward and reach his hand to lay hold of the car as it passed by, and I then ordered him back, and called the attention of his mother to him at the same time. It may have been about ten or fifteen minutes before the accident. The boy at this time was close by their door. At the corner of the building there. The cars pass within five or six feet of their door.

Q. When you see children playing about the premises around there, what do you do?

A. The best we can to keep them off. The boy was frequently on the street. In fact, I never was aware that they had any back-yard for him to play in. However, I don't know positively whether they had or not; but the boy was frequently around the tracks and about the doors of the house in front. I can't tell of course how frequently he was there in the day time. It was only a portion of the time that I could say anything about, previous to my going to rest. I have seen the boy crossing and re-crossing the tracks and the street. It was a daily occurrence.

RE-CROSS EXAMINATION.

During the day generally when I was at home, I was sleeping the principal part of the day. I went to bed from nine to ten o'clock in the morning, and arose at five in the afternoon. Then I would have my meal and get down to work at six o'clock. The yard where my duties are is the yard of which this one where the accident occurred is a part. The main yard is south of Atwater street. There is no fence around that

main yard. There is a fence around the cattle-yards on the north side of Atwater street. My duties are all over the premises, from the station to Rivard street. The principal portion of my beat is between Atwater and the river.

Patrick Flanigan, produced and sworn on behalf of the defendant, testified:

I am a locomotive fireman. I have been in the employ of the defendant company about nine years continuously. I worked in the shop a part of the time; have worked as a fireman about four years. At the time of this accident I was firing on the engine that ran over this boy. It was No. 9 then. The present number of the engine is 218. I saw the boy after he was picked up, not before. I saw the engineer reverse the engine, and I saw the switchman, Mr. Macomb, give the signal at the second car, a signal to stop. I asked the engineer what was the matter, and he said he had run over a boy. I remained on the engine. When we started, immediately after the crossing was cut, we ran sixty feet, I guess, before the accident occurred. I had never seen the boy before the accident occurred, to my knowledge. Have seen him several times since. I did not see any children there that night until after the accident.

CROSS-EXAMINATION.

When the engine stopped the front of it was about fifty feet east of Hastings street. The train was cut. It started up again and ran about sixty feet; then the accident occurred.

Alexander Forbes, recalled on behalf of defendant, testified:

Q. The mother of this little boy has testified that she required him to play in the back yard, and coal-shed always: State what you know if anything of his playing elsewhere.

A. I have seen him on the street often between her own door and Franklin street. I have seen him there pretty often on summer evenings. It would be curious if he would not

have some playing that way. He was right there in my sight where I could see him. He was a very quiet, nice little fellow. I never had to quarrel with him. I never saw him about the track to bother.

Mrs. Katie Woodlyn, being recalled on behalf of the plaintiff, denied that the witness Ross, about twenty minutes before the accident happened, called her attention to the fact that the boy had been reaching out toward the car, etc., as he testified.

MR. RUSSELL.—I admit that Ross did not testify he saw the boy on the track at that time when he reached out.

The Witness.—I did not see Mr. Ross anywhere around there. He never spoke a word to me—not a word.

Benjamin Wolhaupter, produced on behalf of the defendant, testified:

I am a civil engineer and draughtsman by profession, and am employed as draughtsman and engineer's assistant, for the Detroit, Grand Haven & Milwaukee Ry. I have been in the employ of that company something over four years. I have taken certain measurements of engine No. 218, formerly engine No. 9. The length of the foot-board of that engine is seven feet and ten inches. The hand-rail is a piece of inch and a quarter or inch and a half round iron, bent up on both sides and across the forward part of the engine. Its height from the foot-board is three feet. It is about a foot shorter than the foot-board, or six feet and ten inches. The forward part of the cab is 19 feet four inches from the rear part of the foot-board, that is to say, the part of the foot-board next to the engine. The end of the hand-rail is at an equal distance on both sides from the end of the bottom of the foot-board, within possibly a fraction of an inch. The centre of the hand-rail is about at the centre of the foot-board. The width of the outer portion of the tank is six feet four inches as nearly as may be, from outside to outside, and that comes down a little

below the center of the boiler on each side. The centre of the boiler is about five feet nine inches from the track rail. The tank is constructed over the top of the boiler, similar to a saddle. It covers the most of the length of the boiler within about a foot or eighteen inches, something like that, all the way from the forward part of the cab up to within that distance of the smoke-stack. The total height as nearly as may be of the tank above the track is about eight feet eleven inches, nearly nine feet. The height of the top of the boiler from the foot-board is about six feet nine inches. The tank is about fourteen inches above that. It is twelve inches to the top of the foot-board from the top of the rail. The height of the bottom of the saddle, each side of the boiler, above the foot-board, is somewhere about four feet; I did not take any dimensions of that.

Q. Suppose a person four feet high were standing on the foot-board of the engine, how much space could he occupy and be entirely out of sight?

Mr. GRIFFIN—Is this from actual test?

Mr. RUSSELL—Yes, sir.

THE COURT—The boy said he stood on the end of the foot-board.

Mr. RUSSELL—We will not raise the question but that if the boy stood on the end of the foot-board, he could be seen; but the testimony of the plaintiff does not carry out that idea.

A. A boy four feet high could occupy about six feet space on the foot-board, and be entirely out of the sight of the engineer, looking through either front cab window.

THE COURT—You mean that in a space six feet in length, on that foot-board, he could not be seen?

A. He could not be seen in the central portion for six feet.

Q. You mean three feet from the centre each way?

A. Three feet from the centre each way. If the engineer should lean out of the side window with his arm resting on the window-sill, and make a special effort to see to a point four feet above the foot-board, about two feet nine inches each side

from the centre would be out of sight. The hand-rail is about twelve inches, six inches on each end, shorter than the foot-board. That six inches refers to where the rail passes into the foot-board, the perpendicular ends of the rail. I made no measurement of the height of the steam-chest above the foot-board, or with reference to the hand-rail; but I should judge it was about twelve inches higher than the hand-rail.

CROSS-EXAMINATION.

I made my observations day before yesterday on engine 218; I think it was that engine, I would not swear to the number of it. The yard foreman, Mr. Thomas Daniels, the yard master, the engineer and fireman, were present. Never had my attention called to that particular engine that I remember of. I measured but the one engine there in the yard. I did not after I got the measurements taken take my post in the cab. The engineer was there. He did not start up. The engine was stationary. The engineer is generally on the right hand side. That is his position when he is running the engine.

Q. When they are running in the country, where they want to see straight ahead, don't you know that they generally look out of the window immediately in front?

A. They do, yes, sir.

Q. When they are running in cities, where they want to see as far as they can around on the track, and as nearly as they can in front of the engine, they look out of the side window, do they not?

A. That is merely a matter of the judgment of the engineer.

Q. If I understand you right, when the engineer was looking out of the side window, you gave the estimate that you did a few minutes ago, as to his position when his elbow was upon the window?

A. I could not see his elbow on the window. When he was in that position, I was in front of the engine moving a straight edge which I had, and found out how near the centre I could go before it passed out of the line of the engineer's vision as he was leaning out of the cab window.

Q. How could you tell when you reached that point?

A. By the signal the engineer gave me.

Q. What signal did he give you?

A. Perhaps I had better describe just how I took the measurement: I was standing in front of the engine. I held the straight edge up plumb, the base of it resting on the foot board, held it where the engineer could see. He was then looking out of the window. I was holding one of my hands on the straight edge four feet from the foot board. I moved it in until he said he lost sight of my hand, and when he lost sight of my hand I stopped and measured it. I was not in the cab at that time at all.

Q. Suppose the engineer did not lose sight of your hand when he said he did, then your measurement would not be right?

A. No, sir, my testimony is based on that.

RE-DIRECT EXAMINATION.

Q. State how you made the measurement, getting the point four feet high, or getting the point to which you could see the cab window?

A. I stood on the foot-board, with this straight-edge perpendicularly raised in front of me, looking past the side of the straight-edge, and gradually moving it in toward the centre of the foot-board, until I lost sight of the window. When I lost sight of the window, I measured the distance from there to the same spot on the other side of the foot-board.

THE COURT—Then you, from the outside, determined where you would lose sight of the window, for yourself?

A. Yes, sir.

Q. And when the engineer determined it, he determined it by saying when he lost sight of your hand?

A. Yes, sir.

Q. At the time you took this measurement, when the engineer was looking out of the window, were you looking over your hand to the engineer?

A. Yes, sir.

Q. Did you not then lose sight of him at the same time he said he lost sight of your hand?

A. No, I could see the upper portion of his head.

Q. But could you see his eyes any farther than he said he could see your hand?

A. I think not.

Q. You looked in a straight line, of course, from your hand to the cab window, and toward the engineer, in each case?

A. I was watching for the signal, for him to tell me when to stop moving the straight-edge?

Q. When you were holding your hand on the straight-edge, you looked in a direct line also from your hand to the front cab window?

A. When I was standing on the foot-board, and found out the distance with my own eyes, I was looking for the corner of the window; but when I was holding the rod four feet from the foot-board, I was looking on the outside of it, to get the signal from the engineer when to stop moving the straight-edge.

Intermission until 2 P. M.

Thursday, Dec. 10, 1885, 2 P. M.

Patrick Nash, produced and sworn on behalf of the defendant, testified:

I am employed as a locomotive engineer on the Detroit, Grand Haven & Milwaukee Ry. I am working on engine No. 218 now, which used to be No. 9. I am working day-times this week. I have been employed by this company about 12 years. I assisted Mr. Wolhaupter day before yesterday in making certain measurements of that engine. I assisted in measuring the width and height of the front window on my side. That is all I assisted him in doing, but I saw him taking other measurements. When he was holding a straight-edge on the foot-board and getting the view from the foot-board of the cab, he put it in my sight, so that I could see it, and kept moving it until it disappeared. He told me to sing out when

it disappeared from my view, and I did so. The water-tank which is on the boiler obscures the view from the foot-board to the cab window.

CROSS-EXAMINATION.

I have been running that engine about eight months. I run in the yard. The yard extends from Brush street to Orleans street. We run between those points. We run three pony-engines in the daytime and three at night. Sometimes one of them works up on the transit road after they get through down there. I saw a number of gentlemen examining that engine yesterday when I was there. I do not remember seeing you there. I remember there was one man trying to see how far he could see me when I was inside of the cab, when he was bending down in front. I don't know whether he got out of my sight or not. I was not watching him. I had something else to watch.

Mr. Russell offers to introduce testimony to show the engine in question has not been changed since the accident.

THE COURT—There is no testimony to show any changes in the engine except in the number of it. The rule is that the engine being made in a certain way it will be presumed to remain in that same condition until some changes are shown.

MR. RUSSELL—If counsel will concede that the city map shows with approximate correctness the crossing of the yard by these various streets that is all we desire.

MR. ENGLE—We have no objection.

MR. RUSSELL—We introduce it to show the position of the streets crossing the yard.

THE COURT—It must be used for any and every purpose for which it is legitimate.

Rosa Bushey, recalled on behalf of the plaintiff, testified:

Q. It has been testified to by Mr. Martin that on the next morning after the accident he came down Hastings street in front of Mr. Woodlyn's house, met you and had a conversation with you there, and asked if you saw the accident, and that

you said No, that you were not there, that you did not see it, that you were not there but were on Hastings street, and that Mr. Tean was on Hastings street with you. Will you state whether that is true or not?

A. No, sir; that is not true. I never saw the gentleman at all on Hastings street.

Q. Were you there the next morning after the accident?

A. Yes, sir; I was there, and the next morning I went to work in the forenoon, about half-past eleven. I was working at Mrs. Kelly's. The night of the accident I stayed at home at my mother's. The next forenoon about eleven o'clock I went away to work. From the time I got up in the morning I was in the house.

Q. Were you on Hastings street at all?

A. No, sir; I was not. I was right at home.

No cross-examination.

Moses Woodlyn, recalled on behalf of the plaintiff, testified:

I heard Mr. Martin's testimony. I know him by sight. I saw him the next morning after the accident. The night after the accident I stayed with the little boy up at the hospital. I came down to the yard about half-past five. I went in, fed my horse, cleaned him off, and got my breakfast. After breakfast I was sitting at the front door. About nine o'clock that morning I was sitting at my door. I saw Mr. Martin. I first saw him coming from the freight-shed down; he came right up where I was. He asked me if I was the father of the boy, and I told him I was.

Q. What else?

Objected to as irrelevant and immaterial. "Mr. Martin has not testified to seeing this witness on that morning, and it is not proper rebutting testimony."

Objection overruled, exception for defendant.

A. He asked me if I was there when the accident occurred. I told him I was not. He asked me if I knew anybody that was there at the time. I said I did not know anybody, but I

knew who said they were there. I gave him Miss Bushey's name, and he wrote it down. I gave him Peter Tean's name, and he wrote it down. He asked me if I knew of anyone else, and I said I did not.

Mr. RUSSELL—I desire to have my exception cover all this testimony.

A. He was there just long enough to get the information from me; about five minutes, I suppose.

Q. Which way did he go then?

A. He went up the track east.

Q. During the time he was there was Miss Bushey there at all?

A. No, sir.

Peter Tean, recalled on behalf of the plaintiff, testified:

I know this engine which is now known as No. 218. Have been on the step in front of the engine. I have stood on the front step of the engine and looked to see whether I could see the engineer in his cab, through the front window, and found I could see the engineer in his cab, when standing on the front step. I could see him through the front window.

Mr. RUSSELL—It is not disputed that he could see the engineer from certain portions of the front step.

CROSS-EXAMINATION.

By Mr. RUSSELL:

Tean is the name I go by. I was once arrested on suspicion. That was about two months ago. Was never arrested at any other time. Am not aware of a complaint lying against me at this time for larceny.

RE-DIRECT EXAMINATION.

Q. What became of you when you were arrested?

A. They let me go again.

William Richardson, recalled on behalf of the plaintiff, testified:

I am familiar with this engine which is now known as No. 218. I saw her yesterday, and have been on her front step; was there yesterday. Standing on the south side of that step, you can stand two feet from the end, and see the engineer through the front window. I bent down to see how far a boy four feet high could stand from the end of the board and see the engineer through the front window of the cab; and I should judge he could stand two feet toward the north end of the plank and see the engineer.

John Berry, sworn on behalf of the plaintiff, testified:

I know this engine No. 218, formerly No. 9. I was once in the employ of the Detroit, Grand Haven & Milwaukee Railway Company as switchman in the yard. I worked in connection with this engine, am familiar with it, and have been on it; have been on the front step and in the cab. A boy four feet tall, standing at the end of the plank in front of the engine—at the right-hand end of it—could be seen from the front cab window. He could stand in toward the centre of the plank about two feet from the end, and be seen from the front cab-window on the engineer's side. If the engineer looked out of the side window and tried to look around in front, he could see farther. He could then see a boy four feet high about three feet from the end.

CROSS-EXAMINATION.

I last examined this engine yesterday. I see it every day. I know the boy could be seen two or three feet from the end of the board by sitting there. The foot-board must be nearly eight feet long. I think there would be only about two feet in the centre where a boy four feet high would be out of sight. I have put my head down within four feet of the foot-board in order to find out. I did it yesterday. My head was below the iron hand-rail.

Q. You put your head below that?

A. Yes, sir.

Q. How high is that rail from the foot-board?

A. I should say about eighteen inches.

The foregoing is the substance of all the testimony of both parties on the trial of said cause.

Thereupon the Court instructed the jury as follows:

GENTLEMEN OF THE JURY:—In this case the plaintiff Hughes, by his next friend, seeks to recover from the defendant, the Detroit, Grand Haven & Milwaukee Railway Company, damages, that is compensation, for injuries inflicted upon him by cutting off his leg and his thumb.

The declaration contains several averments of negligence, several grounds upon which the plaintiff seeks to recover, most of which I shall withdraw entirely from you, and will narrow the case to such limits that I think you will find very little difficulty in determining it. I admonish you that you are not to consider anything that I do not lay before you. It is a vice on the part of jurymen to do this; it is wrong on their part, and they have no right to discuss anything except what the Court gives them to discuss.

For the purposes of this case, the question as to whether there was a fence there or not will not be discussed. In other words, no man must talk about the fence at all in the jury-room. I withdraw it from you. You have nothing to do with it. You are not to talk about it, and if any juror attempts to talk about it, you must simply refuse to listen, and refuse to discuss it. On that ground there can be no recovery. Whether there was a fence there or was not a fence there, for the purposes of this case makes no difference whatever. You are also to refrain from discussing the conduct of the watchman, whether he gave warning, whether he looked out, what he did or what he did not do—all that is withdrawn from you, and you have no right, under my instruction, to talk about that either. Every moment you talk about it, or think about it when you retire to the jury-room is a waste of time. And not only that, but it is a willful disobedience of the direction of the

Judge, which you are bound to follow. Those grounds will be eliminated entirely from the case.

The question as to whether the defendants have been in the habit of allowing children to go on the track or not, will be eliminated also. You are not to talk about that, to discuss it, or to give it any weight. During the progress of the case, not knowing exactly what aspect it might assume, some testimony of that kind was admitted. But in the view which I now take of it, all that will be stricken from your deliberations. You will have nothing to do with it. I also, under the circumstances of the case, deem it proper to withdraw from you the consideration of the question as to whether the parents of the child exercised or did not exercise due care in regard to the child. That also will be taken from your deliberations.

There is then but one question left, and that is as to the circumstances of the accident itself; the circumstances under which the boy got upon the foot-board, and under which he fell from it and was injured, if he did fall from the foot-board and was injured. I believe it is practically conceded that he was on the foot-board. Now, he had no right to be there. He was a trespasser in being upon the grounds at all. He had no right to be upon that foot-board. Nor was there any duty upon the part of the company, through its engineer, to look out for any one being upon that foot-board, who had no right to be there. In other words, the mere omission to see that anybody was on the foot-board would not of itself be sufficient ground for a recovery in this case. Because, as I said before, there is no duty upon the part of the company to look out for men on the foot-boards of their locomotives, or for children either. So that this is not one of those cases where, if something is not seen or noticed, the omission to see or notice would carry a liability with it, it not being the duty of the company, through its engineers, or officers, to see whether the boy was or was not on the foot-board. The question then will resolve itself entirely into this: Did the engineer see that boy upon the foot-board? The testimony in regard to that is in a very small compass. The boy says that the engineer looked at

him when he got on the foot-board. The engineer says that he did not see the boy until he observed him along side of the track after the accident. To fortify the engineer, testimony has been introduced that he could not have seen the boy if he was upon the foot-board, that it was a physical impossibility; that the relation of the foot-board to the cab was such, and the shape and form of the engine in front of the cab was such, that he could not have seen the boy; that it was impossible for him to have seen the boy if he was there, that is, a boy of that height. On the other hand, testimony has been introduced tending to show that he could see the boy; that he would be perfectly plain there. On the one hand you have the boy saying that the engineer looked at him, and the testimony tending to show that the engineer could have seen him where he says that he stood. On the other hand, you have the testimony of the engineer that he never saw the boy until he was alongside of the track, and the testimony on the part of the gentleman from the railroad office that it was impossible for the engineer to have seen the boy if he had been there. There is the true state of the case. You are to determine whether the engineer did see him or did not see him. If you find that he did not see him, that ends the case, and your verdict will be for the defendant. But if you find that he did see him, your next question will be, what was the engineer's conduct under the circumstances? Was he guilty of gross negligence under the circumstances? Because, in order to render the company liable, the negligence of the engineer must have been gross. He must have done that which patently was imprudent, which patently was dangerous to the boy under the circumstances. The engineer, if he did see the boy when he got upon the board, knew that the boy was there, was it, under the circumstances, dangerous to start the engine with the boy in that position? Was it patently, clearly, plainly dangerous? That is a circumstance into the determination of which various elements will enter. Of course the age of the boy must be taken into consideration; the capacity of the boy to take care of himself; whether he was of that size, that age, that apparent degree of intelligence, that

the engineer might suppose he could hop off, or could hold on; or that he would have the strength to hold on, that he would have the presence of mind, in case anything happened, to remain there without injury to him; whether, in a word, he was a boy of that intelligence, that strength, that age, which would render it safe for him to be in that position with the engine in motion. Because, if it patently and openly was evident that the lad was of so tender years that he had not the discretion, the strength, the experience, which would enable him to take care of himself, in that position, and if the engineer saw it and knew it, it would be wrong for him to start the engine with the boy upon that foot-board. You are to determine the truth about that. Then, after the engine was started the accident is said to have been occasioned by its sudden stoppage. You are to determine whether that stoppage, under all the circumstances, created the accident. If the engineer saw the boy there, and if it was a place of danger, under any and all circumstances, for a lad of those years, the engineer, before starting, should have told him to get off. Of course it follows from that that if the stopping of the engine threw the boy down, if it brought about the very danger to which the boy would be subjected by being in that place, the engineer knowing of his being there, it follows as a matter of course that the engineer would have been guilty of gross negligence, and that the boy would be entitled to recover. That is all there is in this case. You are to determine that one point.

If you find, under the instructions I have given you, that the company is liable, then you will come to the subject of damages. The rule of damages is very simple, in one sense; but as I have told you before, it has this difficulty, that it is left entirely to the good sense and discretion of the jury, which must be exercised reasonably. It is left entirely to their good sense and discretion. As I have had occasion to say before, you cannot weigh it, you cannot measure the damage, you cannot add it up in figures, you cannot feel of it, you cannot see it; but you must form your estimate of it in your own minds. The elements of damage are these: What pain and suffering

the boy endured; he is entitled to compensation for that. All that has been proved to you, all that he endured from the beginning to the end; what he endured at the time, what he endured in the hospital, what he endured afterwards, when his leg broke out; what he naturally has endured since. All that he is to be compensated for, if he is to be entitled to any compensation whatever. He is also entitled to compensation for the loss of his leg and the loss of his thumb. You should estimate what disadvantage such a deprivation would amount to, as nearly as you can, and in dollars and cents allow him compensation for that. You are to take into consideration how far it will deprive him of the natural use of his body; how far it incapacitates him from the ordinary pursuits of life; how far it deprives him, in a word, of the vigor and capacity which naturally belongs to a man. You may also take into consideration the mortification and humiliation, if you find that that would exist, which would attend the mutilation of his body. All these—the pain, the deprivation of the use of his members, and the mortification and humiliation of being disfigured—all these naturally flow from the injury, and all these the law says you may give compensation for. Take the case, consider it very carefully, exclude from your deliberations all those things which I have told you to exclude, and arrive at a result as soon as you can.

Mr. RUSSELL—Earlier in the case we spoke of requesting the Court to order the jury to view the premises.

THE COURT—I will not do it now; it is too late.

Mr. RUSSELL—We think under your Honor's charge, the jury should see the locomotive.

THE COURT—Take an exception. This is very unusual. I will not allow it, even if both counsel consent to it. There was a time when counsel on both sides talked of doing it. It was not done then, and I shall not give my instructions first and let them look afterwards. That would not be just to the Court. You may take an exception to the refusal of your request.

Thereupon defendant, by its counsel, then and there accepted:

First. To that portion of the charge of the Court in relation to the manner in which the engine was stopped.

Second. To the refusal of the Court to instruct the jury to find a verdict for the defendant, as requested.

Third. To the language of the Court in saying to the jury that it is practically conceded that the boy was on the foot-board of the engine.

Fourth. To the language of the Court's instruction to the jury that the mortification and humiliation of the plaintiff is a basis for compensation.

Inasmuch as none of the aforesaid matters appear of record, the said Judge of the Superior Court of Detroit, has this 5th day of May, A. D. 1886, at the request of counsel for defendant, settled and signed this bill of exceptions.

J. LOGAN CHIPMAN,
Judge of the Superior Court of Detroit.

BILL OF EXCEPTIONS.

STATE OF MICHIGAN—SUPREME COURT.

JAMES HUGHES, <i>by his next friend, &c.</i>	}	<i>Appellee,</i>
THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY,		<i>Appellant.</i>
<i>vs.</i>		

ASSIGNMENTS OF ERROR.

And now comes the said Detroit, Grand Haven & Milwaukee Railway Company, Appellant, by George Jerome, its attorney, and says that in the record and proceedings in said cause in the court below there is manifest error, as follows, to wit:

The court below erred—

First. In refusing to instruct the jury as requested by defendant and appellant, to find a verdict for defendant.

Second. In saying to the jury, in the final charge, "I believe it is practically conceded that he (the plaintiff) was on the foot-board."

Third. In instructing the jury in respect to the measure and rule of damages as follows:

"You may also take into consideration the mortification and humiliation, if you find that that would exist, which would attend the mutilation of his body, all this, the pain, the deprivation of the use of his members, and the mortification and humiliation of being disfigured, all these naturally flow from the injury, and all these the law says you may give compensation for."

Fourth. In permitting the following question to be put to the witness Rosa Bushey, and her answer thereto, against the objection of defendant's counsel, namely:

"Q. Will you state whether you have seen children around upon those grounds?"

"A. Yes, sir, I have often seen them on the track."

Fifth. In permitting the following question to be put to the witness Rosa Bushey, and her answer thereto, against the objection of defendant's counsel, namely:

"Q. What were they (the children) doing there?"

"A. I used to see them playing around the track."

Sixth. In permitting the following question to be put to the witness Rosa Bushey, and her answer thereto, against the objection of defendant's counsel, to wit:

"Q. State whether you have seen them (other children than the plaintiff) riding on the front step of the engine?"

"A. Yes, sir, I have seen some girls on the engine."

Seventh. In permitting the following question to be put to the witness Hattie Woodlyn, and her answer thereto, against the objection of defendant's counsel, to-wit:

Q. What, if anything, did you say before you went in?

A. I said, "Children, sit still; I will go in and draw your papa's tea."

Eighth. In permitting the following question to be put to the witness Hattie Woodlyn, and her answer thereto, against the objection of defendant's counsel, to wit:

Q. Do you of your own knowledge know about children frequenting these grounds, and riding on the cars and engines?

A. Other children have been on the railroad premises and on the cars and engines, riding in the banana cars, hanging on.

Ninth. In permitting the plaintiff to prove, against the objection of defendant's counsel, by a number of witnesses, that they had seen other children than the plaintiff playing upon the ground or premises upon or in the vicinity of which plaintiff was injured.

Tenth. In permitting the plaintiff to testify against the objection of defendant's counsel that he was not of sufficient understanding.

Eleventh. In permitting the following question to be put to the witness Moses Woodlyn, and his answer thereto (the wit-

ness having testified that he saw defendant's witness Martin on the morning after the accident, and that Martin asked him if he was the father of the boy), against the objection of defendant's counsel, to wit:

Q. What else?

A. He asked me if I was there when the accident occurred. I told him I was not. He asked me if I knew anybody that was there at the time. I said I did not know anybody, but I knew who said they were there. I gave him Miss Bushey's name, and he wrote it down. I gave him Peter Tean's name, and he wrote it down.

And because of the errors aforesaid in the rulings and decisions and in the charge of the court below, said defendant prays that the verdict rendered and judgment entered in said cause may be reversed and set aside, and a new trial granted.

GEORGE JEROME,

Attorney for Defendant and Appellant.

E. W. MEDDAUGH,

Of Counsel for Defendant.