

9,1964

In the Privy Council

ON APPEAL from the Supreme Court of New South Wales in Action No. 5958 of 1956

BETWEEN

THE COMMISSIONER FOR RAILWAYS (Defendant) Appellant

AND

FRANCIS JOHN QUINLAN (Plaintiff) Respondent

TRANSCRIPT RECORD OF PROCEEDINGS

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No. 1

ISSUES FOR TRIAL

Writ issued 20th June, 1956.

Appearance entered 26th June, 1956.

Declaration dated 3rd August, 1956.

SYDNEY
TO WIT

10

20

30

FRANCIS JOHN QUINLAN by Aidan John Devereux his Attorney sues THE COMMISSIONER FOR RAILWAYS a body corporate and as such liable to be sued in and by its said corporate name and style for that before and at the time of the committing of the grievances hereinafter alleged and at all material times the defendant its servants and agents had the care control and management of a certain railway level crossing and of a certain railway train then travelling upon the permanent way at and near the said crossing And thereupon the defendant its servants and agents was so negligent in and about the care control and management of the said train and in and about the care control and management of the said level crossing and in and about failing to take reasonable and proper steps to secure the safety of the persons using the said crossing that whilst the plaintiff was passing across the said crossing in a motor vehicle the same was struck by the said train Whereby the plaintiff was seriously wounded and permanently injured and the plaintiff suffered and will continue to suffer great pain of body and mind and the plaintiff was for a long time and still is unable to follow his usual occupation and has thereby lost and will continue to lose the moneys he otherwise could and would have earned and the plaintiff has incurred and will continue to incur expense for medical and surgical attendances and for hospital x-rays ambulance nursing chemists and other charges and was otherwise greatly damnified.

*In the
Supreme
Court of
New South
Wales.*
No. 1.
Issues for
Trial.

Particulars Under Order 10

*In the
Supreme
Court of
New South
Wales.*

No. 1.
Issues for
Trial.

Dr. Sturrock (to date) £2 2s. 0d.

Pleas dated 21st November, 1956.

THE COMMISSIONER
FOR RAILWAYS
ats
QUINLAN

} The Defendant by its Attorney says that
it is not guilty.

By Statute:

Government Railways Act, 1912, as amended: the whole Act
and particularly Sections 143 and 144. 10

Ministry of Transport Act, 1932, as amended: Public Act:
the whole Act.

Transport (Division of Functions) Act, 1932, as amended:
Public Act: the whole Act.

Government Railways and Transport (Amendment) Act,
1936: Public Act: the whole Act.

Transport (Administration) Act, 1943: Public Act: the whole
Act.

Transport and Highways Act, 1950: Public Act: the whole
Act. 20

2. And for a second plea the Defendant as to so much of the Plaintiff's cause of action as depends upon the allegations that before and at the time of the committing of the grievances thereafter alleged and at all material times the Defendant its servants and agents had the care control and management of a certain railway level crossing and of a certain railway train then travelling upon the permanent way at and near the said crossing and says that it denies the said allegations and each and all of them.

Replication dated 26th March, 1956.

FRANCIS JOHN QUINLAN
v
COMMISSIONER FOR
RAILWAYS

} The plaintiff joins issue with the 30
Defendant on the Defendant's
Pleas filed herein.

Dated this 29th day of February, 1957.

No. 2

PROCEEDINGS BEFORE HIS HONOUR MR. JUSTICE
RICHARDSON AND A JURY OF FOUR:
TRANSCRIPT OF EVIDENCE OF WITNESSES

Plaintiff's Evidence

Evidence of Francis John Quinlan

TO Mr. PILE: My full name is Francis John Quinlan. When the accident happened I was twenty-six. I am now living at 11 William Street, Concord.

*In the
Supreme
Court of
New South
Wales.*

10 Q. In your adult life had you been earning your living as a truck driver up to that time? A. Yes.

Plaintiff's
evidence.

Q. Apart from that, had you had any training to fit you for any other type of job? A. No.

F. J.
Quinlan.

Q. At what age did you leave school? A. Fifteen.

Q. The accident happened on 5th January, 1956? A. Yes.

Examina-
tion.

Q. I think then you were working for your brother who was a master carrier? A. That is right.

Q. When this accident happened were you in fact driving one of his lorries, as an employee of your brother? A. Yes.

Q. What sort of vehicle was it? A. A 1955 International.

20 Q. Was it petrol or diesel? A. Petrol.

Q. A full load? A. Yes, it would be a full load.

Q. The combined weight of your load and vehicle would have been then, how much? A. Approximately five tons.

Q. Is that for both? A. It would be for the both, I think. It would be between five and six tons.

Q. Until this accident happened, did you have any disability, anything wrong with your body? A. No.

30 Q. Were you following any active sport at the time the accident occurred? A. I used to play quite a lot of tennis, and I used to do quite a bit of swimming not competition, but like pleasure.

Q. Were you any good at either of them? A. Quite good at swimming.

Q. When this accident on the 5th January occurred, you were delivering a load somewhere? A. That is right.

Q. Where were you supposed to deliver it? A. To the Housing Commission project at Dundas Valley.

*In the
Supreme
Court of
New South
Wales.*

Plaintiff's
evidence.

F. J.
Quinlan.

Examina-
tion.

Q. Before the accident occurred had you ever had occasion to make a delivery there before? A. Yes, once approximately a week before.

Q. Tiles also? A. Yes.

Q. To whose job did you make each of those deliveries? A. Well, there were two contractors.

HIS HONOR: Q. Who did you make the first delivery to? A. The same place I went to the second time.

Mr. PILE: Q. Which contractor was that? A. Not Stewart's. It was—I forget the name now; it was some decorators. It was next door to Stewart's job.

10

Q. Some contractors who had decorators in their style of name? A. That is right.

Q. On the previous occasion when you went there, what route did you take to get there? A. The same one as I—— (Objected to.)

Q. Which one did you take on the day of the accident? A. Along Adderton Road. Actually we came from Merrylands, came along Victoria Road, and came into Adderton Road.

Q. From Adderton Road how did you get to your point of destination? A. Across the Telopea railway crossing.

Q. Where is Telopea? A. It is in between Clyde and Carlingford, 20 the next station.

Q. Carlingford is the last station on the line? A. Yes, and Telopea is the next back.

Q. What is the next one after that? A. I would not rightly know.

Q. Where does it join up with the main line? A. At Clyde.

Q. On the first occasion you delivered something to the Housing project, to the decorators, what ever their name might be, had you taken the same or a different route? A. The same route.

Q. At that time did you yourself know of any other way of getting there? A. No. (Objected to; question allowed.)

30

Q. On this occasion, on the day of the accident you came along Adderton Road, about what time? A. The day of the accident, it was about 5.20.

Q. In the morning? A. Yes.

Q. And the weather? A. A very fine morning.

Q. Were you accompanied by anybody? A. By myself.

Q. That job, had you to load as well as drive? A. Yes.

Q. In a job like tiles, how do you get them on, about five or six at a time, do you? A. Yes.

Q. You came along Adderton Road, and tell us in a little bit of detail 40 how you proceeded from that point of the accident? A. When I neared

the turn into the level crossing, I put my mechanical hand out to indicate I was turning to the right, and as I approached the crossing I had to stop to make sure there was no oncoming traffic coming up around the bend. Seeing that was clear——

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Court of
New South
Wales.*

Q. Are you speaking of traffic on the road? A. Traffic on the road.

Plaintiff's
evidence.

Q. You made your crossing of the road? A. I proceeded to the level crossing and when the bonnet of my truck was level with the gates, I put the truck in low-low and I hesitated and I looked to the left and looked to the right.

F. J.
Quinlan.

Examina-
tion.

10 Q. I want to deal with what you can see there. You have it with your bonnet where? A. Level with the posts where the railway gates are.

Q. Is this a picture (handed to witness) which shows the posts about which you are speaking? A. Yes, that is the picture.

Q. That photograph was not taken at that time, but you see, although it was subsequent, it shows a notice there? A. Yes.

Q. What was the condition in that regard at the time of the accident? A. The condition of the sign? Well, I would say it was the same as it was here, just "Beware of Trains".

20 Q. While looking at the photographs, can you tell us whether these other photographs also indicate views of the crossing that would be more or less within your range of vision as you turned to your right to go over the level crossing (photographs handed to witness)? A. Yes.

Q. Although these photographs are taken some time after, how do they compare with the situation as it was on the day of the accident? A. The day of the accident, when I approached them, the gates were open.

Q. Leaving that matter aside, what about the nature of the roadway, the surface and other notices you could see? A. The surfaces are very rough and there was a—— (Objected to; argument ensued.)

30 Mr. PILE: I will not suggest that the Commissioner had it placed there, nor that they necessarily knew it was there. All I want to prove is the objective fact.

(At 3.20 p.m. the jury retired from Court; further argument ensued.)

Mr. PILE: What I seek to prove is not knowledge by the Commissioner but of user which is a relevant fact to show that it was being used. Whether that user was or should have been known to the Commissioner I do not say arises from the existence of the notice, but it does arise from user. That is the way I put it.

40 HIS HONOR: I think I should uphold the objection. Apparently there was a notice placed on a telegraph pole in Adderton Road, which no doubt, was erected for the purpose of directing carters taking material to Housing jobs, but this action having been brought against the Commissioner it could not be suggested by any stretch of the imagination, that the defendant's servants

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—the driver and the fireman—could have had notice of that fact because it would not be observed by them when using the railway line.

(At 3.30 p.m. the jury returned to Court.)

Plaintiff's
evidence.

HIS HONOR: A certain question was asked, and I have rejected it.

F. J.
Quinlan.

Mr. PILE: Q. I think you told us that your vehicle paused with the bonnet being at the gate? A. Yes.

Examina-
tion.

Q. Make no further reference to the matter which has been debated. What did you do while your vehicle was stopped there? A. I looked to the left and I looked to my right, and I paused and listened, as you have a very dim view on the left hand side. 10

Q. I want you to deal with that aspect. When you look up to the left, I think it is common ground, the line curves back on you, so to speak, on your left? A. Yes.

Q. Likewise, it curves back in the form of a small circular curve on the right?

Mr. MILLER: It is not common ground, on the right. On the left you are right.

Mr. PILE: Q. So far as the left is concerned, it is common ground there is a curve which runs to the left. When you look up there—that is the way towards Carlingford Station? A. Yes. 20

Q. How far up the line can you see from that position where you stopped your vehicle, to the left? A. I would say approximately fifty yards.

Q. Did you hear any whistle blown? A. No.

Q. Did you hear any noise associated with the running of a train? A. No.

Q. Was there any train in sight? A. No.

Q. What did you then do? A. Seeing the track was clear, and I could not hear anything, I proceeded over the crossing.

Q. What gear have you got to use to get that vehicle in those circum- 30 stances, moving? A. What they call low-low, extra low gear.

Q. What would your maximum speed in low-low be? A. Only a couple of miles an hour.

Q. You then got the vehicle over the crossing, did you? A. Yes.

Q. What was the next thing that happened? A. The next thing, I just heard the crash and I was flying through the air.

Q. At the moment you heard the crash, where did you place your vehicle, as far as you can tell us? A. I could say that my front wheels were just over the lines.

Q. Over the first line or the second line? A. Over the second line, 40 because the train hit me at the cabin.

- Q. What were your exact words then? A. The train hit at the cabin.
- Q. Do you mean you or the vehicle? A. The vehicle.
- Q. Where was the brunt of the violence done to the vehicle initially?
(Objected to). If you do not know, you would not be able to tell us.
- Q. You might look at that photograph, and would you tell me, is that
the wreckage of your vehicle following— (Objected to; question
rejected.)
- Q. What is that a photograph of? (Objected to; question rejected.)
- Q. You tell us what happened to your truck? A. I could not—
10 (Objected to.)
- Q. Do you know of your own knowledge what happened to the truck?
A. No.
- Q. You were unconscious? A. No, I was thrown clear of the truck,
but I was facing away from it.
- Q. Where were you thrown to? Can you tell us that? A. I was
thrown through the fence, right through the fence away from the train.
- Q. I suppose your movements were too fast for accurate observation?
A. That is right.
- Q. Are you speaking of the fence on the right side, or left hand side
20 line? A. The right hand side of the line.
- Q. Which way are you describing, looking towards or away from
Carlingford? A. Looking away from Carlingford.
- Q. Your back to Carlingford, you were thrown against the railway
fence? A. I am looking away from Carlingford. I was thrown on the
right side.
- Q. Tell us what happened to you then? A. There was not much
after that. A chap ran down and picked me up, and I asked him what hit
me, and he said "a train".
- Q. You had better not tell us any conversations? A. The ambulance
30 came and they took me to hospital.

*In the
Supreme
Court of
New South
Wales.*

Plaintiff's
evidence.

F. J.
Quinlan.

Examina-
tion.

Cross-
examination.

CROSS-EXAMINED

- Mr. MILLER: Q. You were bringing this load of tiles? A. Yes.
- Q. In your brother's truck from Merrylands? A. Merrylands, yes.
- Q. On a previous occasion you have spoken of, was that identical
except in the sense that it was a different time of day? A. Yes.
- Q. But you were taking a load of tiles on the previous occasion? A.
Yes.
- Q. You brought them from Merrylands? A. Merrylands, yes.
- Q. You were taking them from Merrylands to some building job in
40 Dundas Valley? A. In the Dundas Valley.

Cross-
examination.

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Court of
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Wales.*

Plaintiff's
evidence.

F. J.
Quinlan.

Cross-
examination.

Q. I want to ask you a few questions about that. You told us that you were about twenty-six at the time this happened? A. About twenty-six.

Q. You had been working all your life since you were about fifteen driving trucks? A. Since I was seventeen.

Q. Were you all the time driving for your brother? A. No, I spent about three and a half years at the gas works at Mortlake driving for a chap by the name of Lopes. That was confined to the gas works.

Q. You mean driving inside the premises? A. Yes.

Q. Was that when you were about seventeen? A. That was my first driving job. 10

Q. When you were about twenty you began working for your brother? A. Yes, that is correct.

Q. Did you then work all the time as a driver for your brother? A. Yes.

Q. Up to, and for some period after you had recovered to a point, this accident? A. Yes.

Q. I am not inquisitive, but your brother's business—was he a carrier with a number of vehicles? A. Yes.

Q. Was he mainly delivering building materials? A. Yes. Actually he was a contractor, anything that would come along he carried. 20

Q. How many vehicles did he have? A. At the time of the accident he had three.

Q. That means he had three drivers? A. That is right.

Q. Including yourself? A. That is right.

Q. Did he have a depot somewhere? A. Yes, 27 Turner Avenue, Concord.

Q. When you say he was a contractor, you mean a contract carrier? A. Yes.

Q. He was not contracting for building work himself? A. No.

Q. Is this the position, that you had been driving a vehicle for your 30 brother—I am not tying you down to a month or two—but about six years before the accident? A. Yes, roughly that.

Q. I suppose you got to know the city and metropolitan area pretty well? A. I only had—

Q. You can answer yes or no? A. I only had the one set run.

Q. Where was that? A. That was from Riverstone to St. Peters. I used to cart clay for the tileworks.

Q. You would pick up the clay in the Riverstone district? A. Yes.

Q. And you would cart it down to St. Peters to the brickworks there? A. Yes. Prior to the accident, I was only helping my brother out while the 40 other permanent tile carter was on holidays.

- Q. Apart from driving a truck, you had a car? A. Not at the time.
- Q. Didn't you drive around for Sunday drives? A. Only in the truck. We used to take picnics to Narrabeen Lakes.
- Q. You mean at the week-end or during holidays? A. Yes.
- Q. Your brother used to let you do that? A. Yes.
- Q. What I am putting to you is this, that this area out there, what I call the Dundas Valley, you knew that reasonably well, did you not, before the accident? A. No.
- Q. But you do not suggest you had never been out in that area before this accident? A. Well, I have been along the main road, but actually that was the first time I had ever been in Adderton Road.
- Q. You had been on Adderton Road on that previous occasion just before Christmas? A. Yes, a week before I think it was.
- Q. This was the 5th January I think you said? A. Yes.
- Q. Do you remember what day of the week it was? A. I could not—
- Q. It was immediately after the Christmas-New Year break? A. Yes.
- Q. I suppose you had your festive season break at that time? A. I had a few days.
- 20 Q. As far as you can recall, there was no carrying work being done from some date prior to Christmas until after the New Year. Would that be right? A. The public holidays.
- Q. And the days in between Boxing Day and New Year's Day? A. I do not think—
- Q. Can you remember whether you worked or not? A. No, I could not be.
- Q. I want you to think about this. You told His Honour and the jury that you came along with this load of tiles that morning very early; I think you say it happened somewhere before half past five in the morning? A.
- 30 Yes.
- Q. So I suppose you must have left with the lorry about half an hour before the accident? A. Roughly, yes.
- Q. You had come from Concord? A. No, Merrylands. I was living at Merrylands at the time.
- Q. How long had you been living at Merrylands before the accident? A. Offhand I would say between eighteen months and two years.
- Q. Had you picked up your load the night before? A. That is right.
- Q. You had then driven the truck to your home? A. Yes.
- Q. You left the truck at home that night? A. Yes.
- 40 Q. And you would set off from your home the next morning? A. That is right.

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Wales.*

Plaintiff's
evidence.

F. J.
Quinlan.

Cross-
examination.

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Plaintiff's
evidence.

F. J.
Quinlan.

Cross-
examination.

Q. I do not know to what extent the gentlemen of the jury know the area, but let us see if we can trace it in our minds. Do not worry until you come to Parramatta. You go along Victoria Road? A. Yes.

Q. Victoria Road is that road which runs from Parramatta Park right across to Ryde. A. That is right.

Q. The gentlemen of the jury might know the road. Do you remember where you joined Victoria Road? A. You come from Merrylands, come along Victoria Road—

Q. You had come from Merrylands? A. That is correct.

Q. Along what road to where you joined Victoria Road? A. Wood-10 ville Road into Church Street, Parramatta. It is a straight run through.

Q. Then you ran along, and you got on to Victoria Road, and you ran along Victoria Road, would this be about right—until just before you would come to the Rydalmere Mental Hospital? A. Yes, that would be right.

Q. Then you would go off to the left? A. Off to the left, yes.

Q. In other words, you would not have crossed over the Clyde-Carlingford railway line at all at that point? A. No.

Q. You had turned to your left, no tying you down to a yard or two 20—but about a quarter of a mile before Victoria Road crosses over the railway line at Rydalmere? A. No, I would not cut across that.

Q. Before? A. I am sorry. That is right.

Q. You are quite clear we are talking of the same thing. You would leave Victoria Road about a quarter of a mile short of the railway crossing in Victoria Road? A. That is right.

Q. Then you would go up a street called Pennet. Do you know that? A. I would not actually—

Q. You would go up to the left and then you would come along and the road then goes under the railway line? A. That is right.

Q. That would be two or three miles from when you left Victoria Road? 30
A. Approximately.

Q. I am not tying you down to a furlong or two. Do you follow?
A. Yes.

Q. Then you go under the very railway line we are going to talk about? A. Yes.

Q. That brings you to what I call the eastern side of it; in other words, the Dundas Valley side? A. That would be right.

Q. You follow that road along, and that road is named Kissing Point Road? A. Yes, I think that is right.

Q. You would agree with me now that in driving your lorry, after 40 being on the Kissing Point Road for some few miles—I won't tie you down—you then left Kissing Point Road and went off to your left along Adderton

Road and this time again crossed the railway line, but this time going over an overhead bridge? A. That is correct.

Q. That brought you to the western side of this railway line? A. That is right.

Q. Pausing there, do you not agree with me that that overhead bridge where you so crossed over the line was only about half a mile from where you had this accident? A. That would be right.

Q. About half a mile? A. That is right.

Q. Having crossed over that overhead bridge, that put you on what I might say was the wrong side of the line for you to deliver your tiles? A. That would be right.

Q. I suggest to you that driving along Adderton Road you first came to a level crossing on the Sydney side of Telopea Railway Station? A. That would be right.

Q. That was a level crossing right at the railway station, but on the Sydney side of it, crossing over the lines, going from east to west. You say that would be right? A. That would be——

Q. Just near Telopea Railway Station? A. Yes, past——

Q. Just to the Sydney side of it at that time. It has been changed since, but at the time of the accident? A. I cannot say that I can——

Q. You think about it overnight. I will ask you a question about it in the morning. Would you think about that tonight? A. Yes.

Q. This place where you were injured was within about a quarter of a mile beyond Telopea Railway Station towards Carlingford? A. Yes.

Q. Is that about right? A. That would be right.

Q. Four or five furlongs? A. Yes.

Q. Or two furlongs or thereabouts. One other matter, you would agree with me, would you, that if you continued along Adderton Road for another short distance you would come into Pennant Hills Road? A. That would be right.

Q. Pennant Hills Road again goes over the railway line? A. Yes.

Q. An overhead bridge around the Dundas Valley side of the line. Is that right? A. That would be right.

Mr. PILE: A subpoena has been served on the defendant Commissioner to produce certain material. I wonder if I could have access to that before Your Honor leaves the bench.

Mr. MILLER: I produce that to the Court. I also show this copy I have, but Your Honor will see the copy is long after the accident. I would suggest the subpoena really does not cover that in a relevant sense, but I do answer the subpoena.

Mr. PILE: Would Your Honor allow us to have access to those and we will cope with the debates about it tomorrow morning?

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HIS HONOR: I think they should be made available to Mr. Pile.

Mr. MILLER: Do you take that as a sufficient answer to the subpoena?

Mr. PILE: Might I have the opportunity of looking at it?

SECOND DAY: TUESDAY, 21ST NOVEMBER, 1961

Francis John Quinlan

FURTHER CROSS-EXAMINED

Mr. MILLER: Q. (approaching witness) Yesterday you remember your counsel referred the jury to this plan. So that you can get your whereabouts, this is the place, where I put my finger, where you were injured. Do you follow? A. That is right. 10

Q. So that you can follow, also you see you were going along Adderton Road and you turned to your right? A. That is quite correct.

Q. What I was asking you about yesterday was, I was suggesting that up here where Telopea Station was, there was another crossing? A. That is right.

Q. On the Sydney side of the station? A. I remember you asking me the question but I just cannot place the crossing.

Q. Have you thought about it since? A. I thought about it last night but I just cannot place the crossing at all.

Q. What I wanted to put to you was this, you agreed with me yesterday that, in coming from Victoria Road, you had come by means of a subway; the road goes by means of a subway near Dundas Station? A. That is right. 20

Q. That is a main road with a centre line, do you recall—a main road obviously? A. Yes.

Q. You continued along on the eastern side of the line, the Dundas Valley side of the line? A. That would be right.

Q. I won't tie you down, but for a couple of miles. Is that right? A. That is right.

Q. Then you left that road and went along Adderton Road and you followed that and went across by overhead bridge this line about a quarter of a mile on the Sydney side of Telopea Station? A. That would be right. 30

Q. You continued along on the western side, running parallel to the railway line? A. That is right.

- Q. You then got to this crossing where you were injured? A. That is right.
- Q. I won't tie you down to precise distances but about another quarter to half a mile further along, Adderton Road joins up with Pennant Hills Road? A. Yes.
- Q. Pennant Hills Road then goes over the overhead bridge across the railway line on the Sydney side of Carlingford Station? A. That would be right.
- Q. What I want to put to you is this, you would agree, would you not, 10 that up until shortly before this accident—when I say shortly before, I mean up until the latter part of the year 1955—all that land in the Dundas Valley through which Kissing Point Road runs was, what we might call, farming land, land on which there was no housing development up till that time. Would not that be right? A. That would be right, because the housing project, they are the only houses.
- Q. You say the housing project were the only houses ever built there really? A. In the Dundas Valley.
- Q. That project began—and I won't tie you down to a month or two—towards the end of 1955? A. I could not tell you when it began.
- 20 Q. Let us take it another way. You say you had been there just before Christmas 1955; you actually delivered a load of tiles? A. That is right.
- Q. You delivered that to a job done by this company, the Decorators' Company? A. Yes.
- Q. Which was in fact building a number of houses in that valley? A. That is right.
- Q. You could see that wherever houses were they were under construction? A. That is right.
- Q. It was obvious there were no people yet living in them? A. No.
- 30 Q. You agree with that? A. Yes.
- Q. None yet completed to permit of people living in them? A. That is right.
- Q. You could see that there were a large number of houses under construction? A. Quite a lot.
- Q. In various stages? A. That is right.
- Q. You are not suggesting the Decorators' Co. was the only company actually building there? A. No, there were Decorators and Stewarts next door to each other.
- Q. Stewarts were building a number, were they? A. Yes.
- 40 Q. Before ever these houses commenced construction, you know that the place had been subdivided and laid out in streets, did you not? A. They were not completed at that time. All the streets and subdivisions were not completed at that time.

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Q. Anyhow, the whole area had been surveyed for streets? A. Yes, that is right.

Q. And allotments and construction of houses, and that occupied a great area of this Dundas Valley? A. Quite a lot.

Q. Before the accident and at the time; and that Dundas Valley is much lower, from the point of view of geography, than the railway line itself? A. Yes.

Q. The railway line really runs along the crest of the high land there? A. That is right.

Q. What I am putting to you is this, you do not dispute that there was 10 in fact plenty of access to these places where the contractors were building houses from the roads lying down on the eastern side of the railway line? A. Well, I could not say to that, because that was my first time I had ever been to the job.

Q. You could not say one way or the other? A. Yes, and I had to get directions to go there in the first instance.

Q. But, of course, you do know now? A. I know now.

Q. That at all times there were very well built, indeed, main roads or important roads, bitumen construction running through the Dundas Valley on the eastern side virtually parallel to the railway lines. Would you not 20 agree? A. Well, at the time, as I said, when I went over there—

Q. You do know now? A. I know now, yes.

Q. Of course, you know too that there was access in fact to these building projects from those roads on the eastern side? A. Well, not at that time I did not.

Q. You say you did not know at the time? A. At the time—
(Objected to.)

Q. You did not know at the time? A. No.

Q. You do know now that is the fact, don't you? A. Well, I know you can get in there now from different roads but at that time I did not 30 know because, as I said, I had to get instructions to go to the job in the first place.

Q. Of course, all these houses have been completed since? A. Yes.

Q. They are now occupied by people? A. Yes.

Q. That is since your accident? A. That is correct.

Q. Would you agree with me at the time of the accident there were no people living on that side of the line, except possibly for the old house where Walters was? A. The old houses all around, there would be people living there but in on the Dundas Valley at the time when we were there there were no people living there at all.

40

Q. The old houses, there were only one or two scattered at long distances between each other? A. That would be right.

Q. And which appeared to be the old farm houses of people living there? A. They would be, I suppose, if they were on a farm.

Q. You said you did not even know how to get there with your load? A. No.

Q. But you are not suggesting that you asked the Railway Department for permission to use this crossing? A. No, I never asked the Railways. All the instructions I got was from the manager of the tile works, where to take my tiles and how to get there.

Q. He told you to take them to a particular job? A. That is quite
10 right.

Q. Namely? A. Direct Decorators.

Q. At the Dundas Valley housing project. Is that right? A. That is right.

Q. The actual road you took was a matter for yourself? A. No, he instructed me which way to go. As I say, I did not know how to get there. I did not have the faintest idea.

Q. Putting him aside, because he would have no connection with the Railway Department? A. No.

Q. You are not suggesting that you ever asked any railway man how
20 to get across this railway line? A. No.

Q. Of course there was no made road, was there, from this crossing leading to any building job, was there? A. No, no made road.

Q. No made road? A. No.

Q. So, wherever you went to unload these tiles you had to get there over surfaces which were not made surfaces to take lorries? A. No, they were not constructed surfaces.

Q. I want to correct something that was said by your counsel in opening. The suggestion was made that you really had no view either way at this crossing, to the right? A. I had a view at the right.

30 Q. You agree you had a complete view to the right? A. I had a view to the right.

Q. You could see away down for at least a quarter of a mile, could you not, to your right? A. Well, roughly you would be able to.

Q. Is it not clear that this had a single line, not a double line? A. A single line.

Q. Whatever train came from either direction would have to run on that one line? A. One line, that is correct.

Q. In coming to that crossing, you could see sufficiently to your right? A. Sufficiently to my right.

40 Q. To be aware of the fact that no train was coming from the right? A. That is right?

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Q. So far as any train coming from the right is concerned you could get across before any train could at all affect you. That was clear, was it not? A. That is right.

Q. You told us you went across there previously just before Christmas? A. That is right.

Q. On the previous occasion it was, I gather, in the late afternoon? A. Approximately 4.30, roughly.

Q. You said something to the effect that you had seen trains running along the line? A. I had seen one train.

Q. Was that on the previous occasion, you mean? A. Yes. 10

Q. Do you remember whether that was running to Carlingford or back from Carlingford? A. I think it was running back from Carlingford.

Q. Where had you seen it—anywhere near this crossing? A. It was past the crossing.

Q. Further towards Telopea? A. Further towards Telopea.

Q. I mean Telopea Station? A. Telopea Station.

Q. You mean between this crossing and Telopea Station, somewhere along there? A. Somewhere along there.

Q. And proceeding? A. Yes.

Q. It was a steam train, of course? A. Yes. 20

Q. This was before the line was electrified? A. Long before.

Q. The train that ran into you was, of course, a steam train? A. A steam train.

Q. What I want to put to you is this; you were aware when you came towards that crossing that there was a very restricted view of the crossing from the Carlingford side? A. That would be right.

Q. You were aware of the fact that you could not see more than about 50 yards up the line? A. That would be right.

Q. You were aware of the fact that any engine crew would have no view of this crossing for a distance back further than about 50 yards. Would it not be fair to say that? (Objected to.) 30

Q. I will put it to you again. This view you had was restricted to 50 yards because of two factors; one, the curve in the line? A. That is right.

Q. And secondly the fact that that curve led out of timbered country? A. That is right.

Q. There were well known eucalyptus growing on both sides of the line? A. I would not say what they were.

Q. Australian trees. What I am putting is that you knew not merely did you have a restricted view of that nature from the crossing but any train crew would have a restricted view coming from Carlingford of a like type, restricted by similar factors, the curve and the trees? A. That is right. 40

Q. You will agree with that. Now you see there is no doubt the train that ran you down emerged from that curve. Is that right? A. Yes, that would be right.

Q. Do you tell His Honor and the jury that you were not aware of it at all? A. No.

Q. Until? A. Until I was lying on the ground and a chap came and picked me up and I asked him what hit me.

Q. You tell us that you pulled up your lorry with the bonnet—I take it you mean the front of the bonnet? A. The front of the bonnet.

10 Q. About level with the gateposts? A. That is quite right.

Q. You were actually stopped? A. Yes.

Q. And you looked and listened? A. That is right.

Q. Is that what you say? A. Looked and listened.

Q. I suppose at that point, was your view even less than 50 yards of any approaching train, the view up that line? A. Offhand I would say yes, it would be.

Q. You are sitting in the cabin. Is that right? A. That is right.

Q. Your view to the left restricted by the construction of the cabin? A. That is right.

20 Q. I suppose you were really looking through the near side or left side window of your cabin? A. I would be.

Q. Which would be about how big—15 inches? A. Somewhere round about there. I would not know.

Q. Somewhere about that? A. That would be about right.

Q. The rest of the view to the left obscured by the door which was opaque; you could not see through it? A. No.

Q. In that situation, you are intending to go across this line. That was your intention? A. That is right.

Q. It was a very rough kind of track? A. Very rough.

30 Q. It was not a made bitumen track across? A. No.

Q. Nor was it built up with stones and material; it had a few sleepers? A. Sleepers across it, that is right.

Q. The width of it, would you agree, not more than about seven feet or eight feet? A. No, it would be no more than that.

Q. It would not be any wider than that. You then start up your lorry? A. That is quite right.

Q. Your engine had been idling? A. Just idling.

Q. But you let your clutch in and your vehicle began moving? A. Quite right.

40 Q. Had you yourself made any enquiry before this as to the times trains ran along there? A. No, no enquiry whatsoever.

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Q. You did not ascertain anything about the time-tables? A. No.

Q. Of course you realise that the line was there for the purpose of transporting passengers and goods? A. Yes.

Q. You realised also that any train emerging out of that cutting, if you were on the crossing, had no way whatever of stopping short of your vehicle?

A. Well, actually I did not know that. It all depends how fast he would be travelling and I could not tell you how far a train can stop in.

Q. It was a downgrade? A. Yes, it would be a downgrade.

Q. Downgrade from Carlingford onto this crossing? A. Yes.

Q. Shortly, would you agree that a train could not possibly pull up in 10 50 yards travelling, say, at 25 miles an hour? A. I would not know. I do not know the braking ability of a train or anything like that.

Q. But the point is you do not know one way or the other? A. That is right.

Q. You had not enquired at all? A. No.

Q. As you say, you knew nothing about the timetable? A. Knew nothing at all about the timetable.

Q. And here you are about to go across what virtually was a blind crossing? A. That would be it.

Q. So far as you were concerned and the train crew was concerned. 20 Is not that so? A. That is right.

Q. You never looked after you started to cross? A. No, I had a last look just as I was moving across.

Q. You mean you looked to your left? A. That is right.

Q. No train in view then? A. No, no train.

Q. So that that was when the bonnet was level with the gate? A. It was just—the bonnet would be just after the gate, just after the take-off.

Q. What a foot or two past the gate? A. That is right.

Q. Of course if you had looked to the left after the point of time when your bonnet was level with the gate you must have seen this train coming, 30 would you not agree? A. I did not see no train.

Q. If you had looked again to your left you must have seen the train? A. After I started off, which would be in low low gear, I looked once more to my left and there was definitely nothing coming.

Q. Still at that stage your lorry was not on the line? A. My bumper bar would be on the line.

Q. Your wheels had not mounted the rail? A. No, that is right.

Q. You were going virtually at snail's pace? A. That is right.

Q. Perhaps a mile and a half an hour? A. That would be right.

Q. You say the impact occurred onto the near side of your cabin?
 A. That is what I believe. I do not know where he hit me because I did not even see it.

Q. That is your belief? A. Yes.

Q. In point of fact your lorry was thrown to the western side of the line? A. That would be right.

Q. That is the Adderton Road side from which you had come?
 A. Yes.

Q. You also were thrown on that side? A. That is right.

10 Q. It is pretty fair to say, is it not, that the substantial part of your lorry including the load had not yet reached the railway line at the time you were struck? A. That would be true.

Q. What I am putting to you is this, that you must have been aware, had you looked again, of this train emerging, and having emerged out of the curve to your left. Would not that be fair to say? A. Well, if I had looked when I was—I would say my front wheels were onto the line, I would most probably have seen the train coming.

Q. You mean you would have seen it this 50 yards or so away? A. I would not know about where he would have been.

20 Q. What I am putting to you, if you had looked again, you are going at much slower than a walking pace really? A. Yes.

Q. I do not suppose your vehicle could go slower? A. No, that would be right.

Q. If you had looked again you must have seen this train bearing down on the crossing? A. Well, yes, if I had looked again after my truck—after I had taken off and——

Q. Of course, you had been coming uphill to this crossing? A. That is right, uphill.

Q. Even the crossing itself was slightly uphill? A. Yes.

30 Q. Towards the eastern side? A. Yes.

Q. Will you not agree that if you had looked to your left you would still have had time to slip your lorry into reverse and back back? A. No, I do not think so.

Q. Even if you had taken your foot off your accelerator, your lorry would have stopped, would it not? A. It would have been right on the line.

Q. You mean just the front bumper bar part of it? A. Well, the front bumper and just a part of the grille would have been on the line but I still would not have been able to——

Q. But the wheels not yet on to the rail, the front wheels?
 40 I would say no. A. Well,

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Q. Would not that have been, putting it fairly—had you looked you would have seen the train between the crossing and the Sydney end of that curve and you would have been able to back your lorry, reverse it? A. If I had seen the train in time enough I would have.

Q. If you had seen it at any time you would have been able to do that and it would have rolled back because you would have had the grade to help you? A. Yes, it would have rolled back.

Q. Even without putting it in another gear it would have rolled back? A. Yes, that is right.

Q. You had a fair load on, five or six tons? A. That would be quite 10 right.

Q. It would have rolled down this grade? A. That is right.

Q. You really were taking a very great chance in crossing that way that morning, weren't you? A. Well, no, not as any chance—you take a chance at any crossing you cut across.

Q. You had made no enquiries about the timetable? A. No.

Q. No enquiries from anyone in the Railway Department? A. That is right.

Q. You had only been there once before? A. Once before.

Q. There were other crossings along the line, overhead bridges. You 20 told me that? A. That is right.

Q. I suppose this crossing was a short cut for you? A. I would not know. As far as I was concerned that was the only way in.

Q. How far beyond the crossing in the easterly direction going down Dundas Valley, how far down was the house to which the tiles were being taken? A. 100 yards, 150.

Q. Beyond that, I suggest—the best part of a quarter of a mile? A. Where the tiles were going to, no.

Q. How far do you say? A. I would say 150 yards.

Q. Down a rather steep slope on the eastern side of the line? A. Yes, 30 I would not say very steep but it was a slope.

Q. How far down on the eastern side had you delivered the previous load? A. The same place.

Q. At that time there was no building going on between there and the line? A. No.

Q. They were all going on east of that? A. Yes.

Q. East of where this job was going to which you were delivering tiles? A. That is right.

Q. There was nothing to stop you getting out and walking along a bit and having a look? A. Nothing to stop me at all. 40

Q. You say this was a very unusual time you were delivering, 5.20 in the morning? A. 5.20.

- Q. Most of us are snug in our cots at that time? A. That is right.
- Q. Even in your previous experience of this crossing you have told us of having seen a train coming along? A. That is right.
- Q. It really comes to this, on this particular morning you went across without knowing whether a train was coming or not? A. That is right.
- Q. And without really caring whether a train was coming or not? A. I would not say that.
- Q. But you took no steps to find out about it? A. I value my life too much.
- 10 Q. You are not even prepared to deny that a whistle was sounded, are you? A. I did not hear none.
- Q. All you say is you did not hear one? A. No.
- Q. It could have been sounded? A. It could have been, yes.
- Q. I am not criticising your brother's lorry but it was a pretty noisy—? A. With the tiles and everything on, it would be.
- Q. You are driving along there and coming up from Adderton Road on to this place, you had travelled a distance of 30 yards or so from the edge of the bitumen to this railway line? A. That would be right.
- Q. That was an unmade kind of road? A. Unmade.
- 20 Q. An unmade kind of surface? A. That is right.
- Q. You were carrying these tiles on an open tray? A. Yes.
- Q. They necessarily made some noise, contact of tile with tile, rattling? A. That is right.
- Q. In addition to that you have the noise of your engine? A. That is right.
- Q. And the noise of your wheels on the road. So it could very well be that the engine did sound a whistle and you did not hear it, could it not? A. Quite right.
- 30 Q. At that time of the morning, would you agree that the builders and the workmen down on the job would not start work until round about eight o'clock or 7.30? A. 7.30, somewhere around then.
- Q. Here you are coming along more than two hours before anyone would be starting work? A. That is right.
- Q. Would you not agree that an engine driver driving a train along there might very well not expect anyone to be coming along there with loaded tiles at that time of the morning? (Objected to; question rejected.)
- Q. At that time of the morning, while you were there, before you started to cross did it not cross your mind that an engine driver probably would not expect a lorry to be there at that time of the morning? A. It did not cross
- 40 my mind because I did not expect the train to be there.
- Q. You did not think about it at all? A. No.

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Q. I want to come to some other matters. You personally had the responsibility of delivering these tiles? A. That is right.

Q. What was the practice? Did you get a docket from the man to whom you delivered them with an acknowledgment that he received the tiles? A. No.

Q. There would be no one there at that time to receive them? A. No.

Q. You would just take them off and leave them? A. That is right.

Q. On the previous occasion did you get a docket signed? A. No.

Q. It was the same loose arrangement? A. That is usually the arrangement they come to. 10

Q. You could drop the tiles off and someone half an hour later could pick them up and take them away before the builder arrives? A. It quite often happens too.

Q. And no record of delivery? A. That is right.

RE-EXAMINED

Re-exam-
ination.

Mr. PILE: Q. You were asked something about the state of this valley and the crossings since the accident occurred. Have you ever been back there? A. I have been past there.

Q. You mean on the road or did you get off the road? A. No, on the road. 20

Q. Are you speaking of Adderton Road or another one? A. Adderton Road.

Q. Apart from passing the place where the crossing is on Adderton Road, have you made any visit to the present situation of the valley? A. I have delivered stoves around to different parts of the valley.

Q. You were asked some questions about whether, if you had looked on your left at some point of time, you might have been able to throw the vehicle into reverse or, at all events, take your foot off the accelerator to allow it to roll or it would roll backwards. In the course of driving your vehicle, can you tell us what time lag there is between the time of your appreciating the fact of the necessity to stop or reverse and the actual point of time where your foot and eye co-operate until the gear is operated to produce the change and you have your vehicle actually moving backwards, say going from first into reverse, what time lag is there between seeing the danger and having the vehicle reversed from moving forward? (Objected to; question allowed.) A. I would say it would be quite a few seconds by the time you could see the train and move your feet and hands to change gear. 30

Q. You spoke of having that vehicle in double low? A. Yes.

Q. Does that mean you have two levers? A. No, in the extra low gear that works in any gear. 40

Q. I do not know what you are talking about. Does it mean you have to do one thrust of the clutch and alter one gear, assuming your engine is revving at the requisite speed? A. You would only have to do the normal change. You would not have to worry about your extra low gear because that works in every gear.

Q. We can forget about it having a double action, in this discussion? A. Yes.

Q. Just like a change of a normal gearbox which has a single low gear? A. That is right.

10 Q. Do you have to double declutch? A. Double shuffle, yes.

Q. For the purpose of going forward and trying to reverse backwards, do the revolutions of your engine—are they a factor in the speed with which you can change your gears? A. Yes, you would have to let your motor die right down before you could put it into reverse gear.

Q. Would your motor, in those circumstances where you have a slight incline upwards and on what you have described as rough ground, be revving at a speed that would slow the process down or not? A. No.

20 Q. The circumstances in which you were crossing over this crossing where it is slightly on an incline and the road was a little rough, and bearing in mind your load, would the speed of your engine contribute to the slowing process of getting it back into reverse? A. Yes, it would be revving pretty high.

(Witness retired)

Evidence of Frank Holden

EXAMINED

TO Mr. PILE: My full name is Frank Holden. I live in Kissing Point Road, Dundas. My occupation is works supervisor for the Housing Commission.

30 Q. As works supervisor for the Housing Commission, have you some personal knowledge of the situation in the Housing Commission's project at Dundas at a time in 1956? A. Yes.

Q. As works supervisor, would it have been part of your function or duty to make personal inspections of the site? A. Yes.

Q. And of the buildings that were under construction for the Housing Commission? A. That is correct.

Q. You have been informed of an accident which occurred to this gentleman, Mr. Quinlan, in January, 1956? A. I do not remember anything about the date. I remember an accident on a crossing there.

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Q. Happening to Mr. Quinlan? A. I would not know if it was Mr. Quinlan actually. It was a tile truck. That is all I know.

Q. As accurately as you can tell us, when did any actual work begin on any structures of the Housing Commission around that Valley? (Objected to; question rejected.)

Q. I think you have said it was your business to make inspections and to inspect the cottages themselves as they went into construction? A. That is correct.

Q. Did you do that in this case for the buildings at the Housing Commission site at Dundas in the Valley? A. Yes. 10

Q. Would that be or not from their inception of the building work? A. Yes, from the inception.

Q. Can you tell us approximately when any project started? (Objected to; question rejected.)

Q. I am not asking you to give us the day or week or month. You have actually got——? A. I made a few notes. I thought I might be asked that question.

Q. You can tell us from your own records when any building actually began? A. Yes, Earl Brothers——

Mr. MILLER: If this is something extracted from some record, I object 20 to it because I would want to see the documents.

Mr. PILE: Q. From your recollection can you tell us when the first building was commenced? A. Somewhere in the latter part of 1955.

Q. Can you do any better than that? A. Not without referring to the paper I have in my pocket.

Q. As far as your memory goes, for the purpose of being more accurate, have you consulted records relating to the construction of these cottages? A. Well, yes.

Q. Were they records which were your own records made contemporaneously? A. No, no records of mine would exist now. 30

Q. If you are asked and allowed to answer, you can give evidence of some dates which you have refreshed yourself on from official records? A. Am I allowed to refer to the piece of paper.

Q. If allowed you can answer the question? (Objected to; question rejected.)

Mr. PILE: I press that evidence.

Q. You told us at all events it was in the latter part of 1955 the work began? A. In the valley, yes.

Q. You know now the date of this accident, being 5th January? A. I do not know the actual date. 40

Q. But taking the accident as happening on 5th January, 1956, at that point of time can you tell us now, as well as you can, the number of contractors who were under way in the vicinity of Walters Crossing? (Objected to; question allowed.)

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Q. First of all, I would like to ask you how many structures were up and then I will follow with where they were in relation to the crossing.

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evidence.

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HIS HONOR: In view of the objection you had better put it the other way.

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tion.

Mr. PILE: Q. Where were the houses we are going to speak of in relation to the crossing? You know Walters Crossing? A. Is that Walters Crossing, the one where the accident happened?

Q. Yes. A. Yes, I know that one.

Q. In relation to that crossing the houses we are speaking of were where? A. Just through the crossing from Adderton Road.

HIS HONOR: Q. What do you mean by "just through"? A. There was a nature strip left on the other side of the crossing which would be, I suppose, somewhere in the vicinity of 30 ft. wide from the railway line to the back of the fences of the cottages.

Mr. PILE: Q. How far would the back fences be from the crossing itself? A. I said about 30 feet.

HIS HONOR: Q. How far from the fences to the cottages? A. Probably another 75 feet.

Mr. PILE: Q. What was that meant to convey by way of description, the nature strip? A. I do not know. You asked me where the cottages were.

Q. What do you mean by nature strip? A. Where it was intended at some future date to grow trees and shrubs, I presume.

Q. Roughly how many structures were there under construction? A. Adjacent to the crossing? (Objected to.)

Q. The cottages you have been talking about some 30 feet from the crossing, how many were there in number?

HIS HONOR: These cottages were not 30 feet from the crossing. The cottages were another 75 feet further up.

Mr. PILE: Q. These cottages you have mentioned, how many of them were there then under construction? A. Looking from the crossing down the hill there were six under construction by L. A. Stewart.

HIS HONOR: Q. You have this date in mind, the 5th January, 1956? A. Yes.

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tion.

Mr. PILE: Q. Six cottages under construction by a contractor called Stewart? A. L. A. Stewart & Co., and on the right hand side looking down the hill from the crossing, there were eleven, I think, under construction by Superior Decorating Co.

Q. It was your function, from what you have said, to make periodical inspections of these places on behalf of the Commission? A. Myself and the clerk of works. The clerk of works was there permanently in an office at that point.

Q. At the time we are speaking of, the date of the accident, 5th January 1956, what access was there to these cottages from the main highways? 10
(Objected to: argued.)

HIS HONOR: I will reserve my decision on this question. I have not yet been able to obtain the necessary reports. There is one other I must look at.

Mr. PILE: Has Your Honor had an opportunity of looking at Richardson's case?

HIS HONOR: Yes, I have had a look at that. I want to have a look at the other one.

You are still bound by your oath which you took this morning, do you understand? 20

WITNESS: Yes.

Mr. PILE: I had a number of other questions connected with this question of access. I had better ask leave to refer the witness to that later, shall I?

HIS HONOR: Yes, certainly.

Mr. PILE: Q. To go as far as we can, you know, of course, as work supervisor the quantities of materials that would go into structures of that kind that you have told us existed near the crossing. I do not mean to a brick or to the ton, but take an average cottage of the type that was going up there, what would it call for in the way of truck loads of goods? Can you tell us that? (Objected to; pressed; allowed.) 30

Q. Taking one of those cottages in the way of bricks it would call for how many loads, truck loads of bricks? A. The cottages that you referred to as being adjacent to that?

Q. Yes, those? A. Probably three loads of bricks.

Q. What about timber? A. It varies a little. Two to three loads of timber, in timbers. Depending on whether it comes from a pre-cut yard or from the builder's own yards where he cuts his own frames.

Q. What about truck loads of tiles? A. One truck load of tiles.

Q. That is for each cottage, you mean? A. Yes. One truck load of fibrous plaster, the truck delivering fixings and flooring would be separate 40 trucks—two separate trucks there—and one truck with the frames and sashes and all that sort of thing.

Q. Perhaps you can tell us this also: at the time we are speaking of was there any road laid and finished and sealed in the Valley? A. Oh yes.

Q. Was it possible at this time—— A. When you say “sealed”, no, not sealed. Made roads but not tar sealed.

Q. Did the whole valley ultimately become commission houses? A. Yes, with the exception of a few isolated parts which were set aside for——

Q. We are speaking of an acreage. Roughly how many acres? A. I 10 know the acres, but something in the vicinity of 3,000 cottages there.

Q. Ultimately 3,000 cottages were there and roads to serve them?

Mr. MILLER: I take it this is all covered by Your Honor’s ruling?

HIS HONOR: Yes.

Mr. PILE: Q. But at the time of the accident is it the position that roads were in the course of being constructed, had been, or were later? A. Had been constructed to the stage of consolidated and usable but not tar sealed. To a large degree, some under construction and some not commenced.

Q. But so far as these particular cottages that you referred to were 20 concerned was their situation such as access could be got to them any other way but over the crossing, by the lorries? (Objected to.)

Q. I am speaking of these trucks that you mentioned that would have to deliver truck loads of bricks, timber, tiles and so on. Was the terrain such that access to those cottages could be had for delivery of those goods except by way of the crossing? (Objected to; question allowed in substance but form of question rejected.)

Q. Was there any way for a truck delivering, say, a load of bricks to come and deliver it on the site where these cottages were being built to which you referred? (Rejected.)

Q. Do you know from your own personal knowledge whether trucks 30 so laden came over the crossing or not? (Objected to.)

HIS HONOR: Q. Can you speak of this from your own knowledge? A. Yes.

Q. And from your own observations? A. Yes. (Question objected to above allowed.)

Mr. PILE: Q. What was the position about lorries bringing materials of that kind to those sites? (Objected to; allowed.)

Q. What was the position about these trucks, the route they took to bring these trucks with the tiles, fibrous plaster, timber and so on to the site where the houses were going up? A. I would say they invariably 40 came across that crossing.

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tion.

Q. Apart from that route could they, bearing in mind the nature of the sites where these houses were going on, could those materials have been brought by any other route? (Objected to; pressed; rejected.)

Q. Tell us what the situation was about the rest of the valley, not immediately at this place but between that point and the point where we have been told there is a crossing which gave access to the valley on the side of the line on which these houses were? A. You mean the general picture of what the activities were?

Q. Yes, as at the date of the accident? A. Approximately, I would say, about 150 cottages under construction in the area running from Kissing Point Road up through towards Telopea Station.

Q. You might be able to indicate this on the plan, because I am personally at a loss to place Kissing Point Road? A. Not from that plan. It would be very vague.

Q. Assuming that Adderton Road and the railway line run more or less north and south, that is more or less accurate, is it? A. To a degree it is.

Q. Is Kissing Point Road running more or less parallel with the railway and Adderton Road? A. No. Adderton Road runs off Kissing Point Road at right angles more or less.

20

Q. There is a crossing, is there not, some half a mile or so further away from Carlingford than this crossing? A. A crossing towards Carlingford?

Q. No—the other way? A. The other one?

Q. Yes. Is there? A. There is another one at Telopea Station, similar to this one you mean? (Objected to; struck out.) It was identical. (Objected to; struck out.)

HIS HONOR: Witness, you must be very careful not to advance information to the Court. You must only answer questions that were put to you. I direct that those two references to “similar” and “identical” be struck out.

Mr. PILE: Q. What I am trying to get a picture of is this: you have described the crossing, you have described the houses close to them? A. Yes.

Q. Could you just give us a rough description of what existed further away from the line than that? A. What—in regard to crossings there?

Q. No. What was the general nature of the ground from there on to further away? A. I do not know just what you want there.

Q. We have been told that it was in a valley. Do you want us to have a picture of something which is a gradual slope away or which is level or which is precipitous, or how was it? A. You mean the site on which the cottages were built?

40

Q. Yes, and just beyond it?

HIS HONOR: In which direction?

Mr. PILE: Q. Away from the line? A. Away from the line?

Q. Yes. First of all the cottages themselves? A. Well, at the rear of the cottages, and I would say 30 feet from the rear, fences occur, then the rear of the cottages was down the hill again about another 75 feet and then there was the cottages and then there was a fairly steep drop off to the road in front of the cottages and from there on there was the road and again there was another fairly steep drop the other way further on, on the other side of the road.

10 Q. Was it possible to get a truck from that road you just mentioned up to the sites where the cottages were? (Objected to; pressed; rejected.)

Q. Had you, at the time we are speaking of, prior to the accident passed over the crossing yourself? (Objected to; question withdrawn.)

Q. Did you ever make use of the crossing yourself? (Objected to; allowed.) A. No, never.

Q. Did you see it, ever from being close to it while you were carrying on your duties there as supervisor? A. Did I see the crossing?

Q. Yes. A. Oh yes.

Q. When you saw it on the occasions you did were the gates open or closed? (Objected to: allowed: objection renewed: allowed.)

20 Q. If you have still got the question in your mind, what is the answer?
A. Yes, I know it. I have seen the gates both closed and open.

CROSS-EXAMINED

Mr. MILLER: Q. You are dependent on your recollection about these things as to the position on and prior to 5th January, 1956? Would that be a fair matter to put to you? A. I should think so.

Q. I mean you have got no written note to refresh your recollection, sir, of your own? A. I do not need them. I do not think I need them.

Q. Whether you need them or not just answer my question firstly. You have not got it? A. No. No notes at all.

30 Q. Let us deal with these gates first of all. You know, don't you, that immediately after this happening there was a lock and chain put on these gates and they were kept locked, didn't you? A. I know that, yes.

Q. So that on 6th January, 1956, 7th January and every other working day in January, February, March, April etc. right through, if anyone wanted to get materials on to these sites they could not go through this crossing, could they? A. No, I should not think so.

Q. They did get their materials on to the site, didn't they? A. Yes.

Q. They did get them on, didn't they? A. Yes.

40 Q. And that included these loads of bricks and loads of timber and tiles and fibrous plaster and flooring and frames and sashes that you referred to in your evidence? A. Partly.

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examination.

Q. For the construction job that was being done by these people Superior Decorating Company and L. A. Stewart & Company, isn't that the fact? They got their materials on to their sites from 6th January onwards by lorries bringing them and bringing them from roads in Dundas Valley and not coming across this crossing? A. Yes, that is true.

Q. Isn't that so? A. That is so, yes.

Q. Now let us go back to 5th January. In view of that do you seriously tell His Honor and the gentlemen of the jury that on 5th January and days prior to that materials to go on these sites for Stewart and Superior Decorating Company jobs could not have gone in the way in which they went on 10 6th January and days after the 6th January? A. I do not recollect saying that materials could not be got on to the job.

Q. What is your recollection of what you said?

HIS HONOR : The question was rejected. He was not allowed to answer it.

Mr. MILLER : He did answer it.

HIS HONOR : No, that question was not allowed. I ruled that if this witness had knowledge, that if the form of the question was based upon his knowledge as to what he observed, that was admissible. Not the question you put to him.

Mr. MILLER : I am sorry, Your Honor, I have a note. 20

HIS HONOR : I do not care what your note is.

Mr. MILLER : "Goods could only be brought"—

HIS HONOR : You should not read your notes Mr. Miller.

Mr. MILLER : Could the record be turned up?

HIS HONOR : I will put the record in order, too.

Mr. MILLER : Q. Let me take it step by step. You know this document I have got in my hand, do you (showing map)? A. Yes, I know that document very well, yes.

Q. And do you recognise that as the Housing Commission plan of this project about which you have been giving evidence? A. Yes.

Q. Called the "Dundas Valley Planning"? A. Yes. 30

Q. That is the one, is it? A. That is it.

Q. So that we can all get our bearings, here is the railway line. Do you see Carlingford up this way (indicating)? A. Yes.

Q. And Sydney down this way, do you see? A. Yes.

Q. And this was the plan prepared by the Housing Commission? A. Yes.

Q. For the particular buildings with which you were concerned, subdivision buildings; isn't that right? A. That is right.

Q. And this land had all been resumed by the Housing Commission from the owners; isn't that right? A. That is right.

Q. And, I think, two large resumptions? A. I do not know how many resumptions.

Q. There were not many? A. Probably three or four.

Q. Probably three or four owners with some considerable numbers of acres each? A. Yes.

Q. There is Telopea Station there; is that right? A. Yes.

Q. So the jury can follow it, there is Walters Crossing there; isn't that the position? A. No, that is not the crossing you have been referring to.

Q. I beg your pardon. Walter Crossing there. It is not shown as such? A. That is on—

HIS HONOR : For the purpose of the records.

Mr. MILLER : It is 241.

Q. Adjacent to Lot No. 241; is that right? A. Yes.

Q. At the time of this accident I suggest to you that all the streets shaded blue had actually been constructed by the Housing Commission and had good traffickable surfaces? Would you not agree with that? A. Yes, generally speaking that would be so, yes.

20 Q. So the jury can follow it, here is Kissing Point Road here; is that right? A. Yes, that is it.

Q. And the road you say that came up— A. Adderton Road.

Q. Left Kissing Point Road somewhere just off the plan? A. Witness indicates.) About there.

Q. And then Adderton Road came up and across over the railway line some distance from Sydney towards Telopea Station about a quarter of a mile? A. Actually that is Adderton Road there (indicating).

HIS HONOR: Witness referred to the bottom left hand end of the plan.

30 Mr. MILLER: Q. Adderton Road runs along roughly parallel to Bourke Street; is that right? A. Roughly parallel, yes.

Q. And Bourke Street goes over the railway line, over the overhead bridge and continues on on the western side of the line? A. That is correct.

Q. And ultimately goes on and joins Pennant Hills Road? A. That is correct.

Q. There was at the time of this accident or prior thereto a level crossing at the Telopea Station, just on the Sydney side, was there not? A. Yes. That is what you referred to previously.

40 Q. That is the one? A. Yes.

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Q. And that one, of course, gave access to these housing sites along the streets shaded blue, didn't it, at the time? A. No.

Q. At the time of the accident? I want you to think about this. You say at the time of the accident there was not a crossing? A. There was a crossing there but it was never used.

Q. A vehicular and pedestrian crossing both on the Sydney side of Telopea Station at the time of this accident and prior thereto? I want you to think about that? A. I did not have to. My office was just there.

Q. You are pointing to just about the word Towns? A. Yes. I used to go through across there, climb through the fence, walk across and through 10 the fence there to get out and go to the shop.

Q. But from your own description you went up along where the platform was? A. Alongside the crossing. I climbed through the fence alongside the crossing that you referred to and went over the other side through the fence again and over to the shop.

Q. Do not misunderstand me. I am asking you at the time of this accident. It has been closed up since? A. I do not know about that.

Q. How long were you on the project? A. Up to two years ago.

Q. Up to two years ago? A. Yes.

Q. I suggest to you that at some time after this accident the crossing 20 which up till then had existed at Telopea Station on the Sydney side was closed up? A. That could be so. I would not know.

Q. I am suggesting to you that before the accident there was a crossing there? A. Yes, there was, but it all depends what you call a crossing. What do you refer to as a crossing?

Q. A place where there was an opening in the railway fence on both sides, with gaps, and where vehicles could go across and people from one side of the line to the other?

HIS HONOR: Q. Was there such a crossing at 5th January, 1956? A. Yes, there was a crossing there. 30

Mr. MILLER: Q. You understand or agree that it is closed up since? It is not there now? A. Yes.

Q. And you would agree with me, too, wouldn't you, that at all times the platform on Telopea Station is a single platform, was at the time of the accident and still is, on the western side of the line? A. Yes, that is correct.

Q. So that if anyone wanted to get to that platform before this accident they would have to cross across the railway line in the vicinity of the railway crossing? A. When you say people, who?

Q. Imagine some person who was out on some expedition and wanting 40 to go across? A. Yes, a person could usually go across there, a few people.

HIS HONOR: Q. What about vehicles? A. I never saw a vehicle go through that crossing. Never.

Mr. MILLER: Q. You mean never at any time? A. Not at any time.

Q. Perhaps you were not there? A. I was there. I was permanently in that office.

Q. Your office would be how far from the crossing? A. 50 yards.

Q. And I gather from the appearance of the plan the lands then fronting Towns Street were not being built on, were they? A. To there (indicating).

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examination.

Q. You referred to Kissing Point Road and it is shown on the plan, and when we speak of this as the Valley I suppose it would be more accurate to describe it as a basin, really? It is not precipitate in the sense that Middle Harbour is precipitate? A. More or less a valley.

Q. A flat bottom basin, I think it is? A. Well, yes. There is a hill up that way. It is hilly up in this direction and flattening out down through there (indicating).

Q. Marshall Road, of course, was the road to which these cottages fronted? A. That is correct.

Q. That you are speaking of in these two jobs; is that right? A. Yes.

Q. The part edged in red, what was that? Superior Decorators.

Q. Where was Stewart's job? A. Those cottages on this side of that vacant allotment.

HIS HONOR: For the purpose of the records, what were the lot numbers?

WITNESS: They would be 230 to 240 inclusive.

Mr. MILLER: That was Superior Decorators, and 242 to 247 were Stewarts.

Q. Later on, of course, and if we go out there now we see a lot of buildings there including a big shopping centre? A. Yes.

Q. I think it is called Telopea Shopping Centre? A. It is Dundas Valley but I think they do refer to it as Telopea Shopping Centre.

(Plan shown to witness m.f.i. "1".)

HIS HONOR: Q. You are still bound by the oath that you took this morning; do you understand that? A. Yes.

Mr. MILLER: Q. Mr. Holden, I think it follows from your evidence, and in any case would you agree, that out there now in the year 1961 of course it is vastly different to what it was in the beginning of 1956? You have got hundreds of houses now? A. Yes.

Q. Finished and occupied? A. Yes.

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tion.

Q. A big shopping centre, an entirely new settlement; is not that so?
A. That is right.

Q. And you were in your position in the nature of an outdoor man
were you with the Housing Commission? A. Yes.

Q. In the sense that you were on the site? A. On the site, yes.

Q. You were not like an office man at Head Office down here? A.
Normally I am in the office half the time and in the field half the time, but
for the purposes of that project I was on the site all the time excepting one
day a fortnight, when I attended the Head Office.

Q. You describe yourself as a Works Supervisor. Was your background 10
or training in the building industry? A. Yes, that is correct.

Q. You will agree with me that the Housing Commission never got
permission from the Railway Department for the use of this crossing for this
project by any of these lorries? (Objected to; rejected.)

Q. So far as you are concerned, Mr. Holden, you did not get permission
on behalf of the Housing Commission from the Railway Commissioner to
have this crossing used for this purpose, did you? (Objected to; allowed.)

HIS HONOR: Q. What is the answer to that question now? Do you
remember the question? A. Well, I think so.

HIS HONOR: Let the question be read. (Question read to witness.) 20

WITNESS: No.

Mr. PILE: There was a matter Your Honor reserved judgment on but
I think it has been now covered.

HIS HONOR: You covered that with subsequent questions of the same
category and at that time I had made up my mind and allowed the question.

Mr. PILE: I regard the matter as having been covered by Mr. Miller's cross-
examination as well, so I do not intend to go back on it.

(Witness retired.)

Evidence of Reginald Thomas Brown

EXAMINED

30

TO Mr. PILE: My name is Reginald Thomas Brown. I live at 33 Bourke
Street, Parramatta North. My present occupation is that of contract brick
carter with Clyde Brick Company at Auburn.

Q. In the course of your occupation have you ever, some years ago,
carried loads of bricks, a quantity of bricks to a job of L. A. Stewart's?
A. Yes.

- Q. At Dundas or Telopea? A. That is right, yes. Various parts of Telopea and Dundas, yes. Dundas Valley, actually.
- Q. First of all did you do this on many occasions? A. What is that—loads of bricks?
- Q. Yes. A. Well, at least four loads a day from Clyde, yes.
- Q. How long was that going on? A. Where to in particular?
- Q. Take the Dundas Valley as a whole? A. As a whole?
- Q. Yes. A. Well, different sections of the valley, yes, at different times.
- 10 Q. You carted bricks, did you, from Clyde Brick Works to different sections of the job, did you? A. Yes, that is right.
- Q. I want to deal in particular with those loads you carried to L. A. Stewart's job. Do you remember that one? A. Yes.
- Q. Where were those cottages? A. That would be on the northern side of Telopea Station, this one you speak of.
- Q. Do you know a crossing known as Walters Crossing? A. I did not know it, not as Walters Crossing, no.
- Q. Do you know a crossing which you subsequently got to know or call Walters Crossing? A. That is right, yes.
- 20 Q. Where in relation to that were these cottages to which you were delivering your bricks? A. Well, we used to go up Adderton Road and just north of Telopea Station and over the crossing and the cottages I would say were 300 yards down straight through the crossing.
- Q. Were they, as you went over that crossing, on your left or on your right? A. I think we used to bear around to our left, if I remember right.
- Q. You bore to your left? A. Yes.
- Q. How many were they, on that particular job? A. In that particular project I think there were 6 cottages, I think.
- 30 Q. How many altogether—how many loads of bricks did you deliver to that site? A. There were two waggons on the face carting at that particular time and I just would not have it—
- Q. I meant on your own waggon? A. That would be hard. I tried to check that up with myself but I would not have a clue how many times I have been through.
- Q. But at all events it was for this particular half dozen cottages that were Stewarts? A. That is right, yes.
- Q. And you say the road you took was over what we now call Walters Crossing? A. That is right—(Objected to.)
- 40 Q. What route did you use to get over there? (Objected to; allowed.)

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tion.

HIS HONOR: Q. What route did you take? A. Up Adderton Road, across the crossing which is known as Walters Road (sic) and through, as we took it, Commission ground to cross to the Commission homes the Stewarts were building.

(3 photographs tendered, admitted and marked Exhibits "A1," "A2" and "A3".)

Mr. PILE: Q. Would you mind having a look at these photographs, the one that is on the top there, No. 1. What does that represent to you? A. Well, that to me looks very much like the crossing that we took in entering Stewarts jobs. 10

Q. On the occasions that you entered, did you ever strike the situation when the gate was closed? (Objected to; pressed; allowed.) Did you find the gates closed when you went there? A. I would say——

HIS HONOR: Not what you would say. Did you or did you not? A. Not locked but closed.

Mr. PILE: Q. On the occasions when you visited there, what was the position over all? Always closed, sometimes open? A. Sometimes open. Mainly I would say the gate on the Adderton Road side was closed, not locked, but the gate on the job side you would find that was nearly always open, amongst long grass there. 20

Q. The gate on the Adderton Road side, what is your evidence—that it was more often open than shut or more often shut than open? A. The two. There is—on those gates there is a little bit of an arm that more or less clips in like that (indicating). Sometimes you could just push it and there was no resistance at all and other times you would go there and the clip was in.

Q. Were you at some stage or other delivering brick to this project when something happened to some portion of your load? A. I think it was one afternoon I went through the crossing——

Q. Can you associate this occurrence that I am asking you about with 30 a particular event which occurs every year? A. At the time we were delivering bricks there I do recall this, that it was round about Melbourne Cup time because late one afternoon when I went back there with an empty truck with the wireless in for the bricklayers to hear the 3 o'clock or half past 3 Cup.

Q. And this incident you are going to tell us about was round about the Melbourne Cup time? A. Yes, round about that time.

Q. And that is on November what of each year? A. I am not a racing man but it is the second Tuesday in November, or something, the Melbourne Cup. 40

Q. The first Tuesday in November, isn't it? A. Yes.

Q. What happened around about that time to some portion of your load when you were crossing that crossing? A. Well, one afternoon particularly I do recall this, that the crossing there was mainly sleepers and a little bit on the rough side and I got to the cottage side of the track and I lost about 250 bricks off the back of my waggon.

Q. Where did they fall? A. On to the railway line. My offsider and myself got out and picked quite a few up and I pulled the truck off the line and then we endeavoured to do our best to clean the rest of the bricks away.

10 Q. While you were doing that with your offsider, what was the situation about trains? A. Well, I do recall this, there was a train came from Carlingford and I suppose it was only a matter of seconds that we had more or less to clean up the track and get our broken bricks and the whole ones that were there. The train that came down, it momentarily stopped and rolled on into the station.

Q. It was coming from? A. It was coming from Carlingford.

Q. From Carlingford? A. Yes.

Q. And it stopped for a short time? A. Yes, very momentarily.

20 Q. While you cleaned the lines? A. We were only a matter of seconds, I suppose, by the time we had thrown our bricks off. The train went through and I put the rest of the bricks on the waggon and I proceeded over to Stewarts' jobs.

Q. (Showing Exhibit "A1"). You can see some roofs of houses there, can't you? A. On the left, yes.

Q. Can you tell us whether they were in part of the project of Stewarts or not? (Objected to; struck out.)

Q. I am not asking you to guess——(Objected to.)

Q. I will just ask you to have a look at photograph "A3" and ask you if you are able to identify or not any houses that were Stewarts' project?

30 HIS HONOR: Q. I do not want you to guess at this, you understand. If you can say or cannot say, the Court should be informed first. Can you or can you not say? A. Your Honor, when——

Q. I do not want an explanation. I want to know can you say or is it the opposite, you cannot say? A. Well, when I first carted bricks there there was——

Q. Will you please answer my question. Can you say? A. What was the question again?

Q. "Can you identify it", I think it commenced? A. I would say no, Your Honor.

40 Mr. PILE: Q. At all events, was it this crossing that is shown in the photograph that you were on when your bricks fell off? A. That is right.

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Q. And you were on your way to Stewarts' job? A. On my way to Stewarts' job.

Q. So far as your deliveries were concerned did they take place at any given hour or were they spread throughout any time of the day?

A. Various times throughout the day.

Q. Various times? A. Yes.

Q. So far as you were concerned did you while these deliveries were being made to L. A. Stewarts—was there any practicable access for your delivery available—(Objected to; rejected.)

Q. I think you took some photographs, didn't you, shortly afterwards? 10

A. Not me sir. They were on behalf of the—

HIS HONOR: The only question is "Did you?" and you have answered "No".

Mr. PILE: Q. You did not take any yourself? A. No.

Q. But you have some photographs that were taken of the scene?

A. On that day, yes.

Q. On the same day? A. The same day, yes.

Q. After the collision? A. Yes.

Mr. MILLER: Do you mean the brick itself?

Mr. PILE: No. The collision in which Mr. Quinlan was injured. A. Yes. 20

Q. May we see them? A. I have not got them with me. I got wet yesterday afternoon here and that is in another coat. If I can explain that—

HIS HONOR: I do not want you to explain.

Mr. PILE: Q. Can you tell us now what the situation was about the site where you had to deliver them, the nature of the slopes and one thing and another there? (Objected to; allowed.) A. The ground in front of the cottages had been graded away to about nearly a 45 degree batter, more or less a grade instead of going straight down like that they grade it back on a 45 degrees angle.

Q. Could you make a delivery up that from the opposite side? 30
(Rejected.)

CROSS-EXAMINED

Mr. MILLER: Q. Mr. Brown, this occasion you spoke of round about Melbourne Cup time, what you said was that the train momentarily stopped—and I wrote your words down—is this right—"And rolled into the station"? A. Yes, just momentarily. It came around, say, from north of Telopea Station, just around the bend, and more or less I do not know

whether the driver even knew we were picking up bricks. He may have thought we were walking across here, momentarily pulled up and rolled through.

Q. Rolled into the station or rolled through? A. Not through the station, into the station.

Q. This crossing you are speaking of was right alongside the station?
A. I would say it is a couple of hundred yards from the station.

Q. Couple of hundred yards? A. Yes.

Q. But you are somewhat confused about this, aren't you, as to where
10 it was? A. What was that?

Q. I am suggesting to you there was a crossing in 1955, Melbourne Cup Time, there was a crossing at Telopea Station? A. The northern end of Telopea Station, yes.

Q. The northern end, the end nearest to Sydney? A. No, no.

Q. You just think about it. The end nearest to Parramatta River, nearest Clyde, nearest Sydney, whichever way you like to define it? Was not there a crossing right adjacent to the Telopea Station? A. I still say on the northern end of it.

Q. I do not know what you mean by the north?

20 HIS HONOR: Q. What do you mean by "northern end"? A. Well, nearest to Carlingford Station end.

Mr. MILLER: Q. You mean the Carlingford end? A. The Carlingford end of Telopea Station, yes.

Q. Are you sure of that? A. I would say yes.

Q. You give a picture of the train momentarily stopping? A. Well, I would say braked, yes.

Q. Did it stop? A. Well, I say we were picking up the balance of our load we had lost there and I said to my offsider——

30 Q. Never mind what you said to your offsider. I am asking about the train. The train momentarily stopped. They are the words you used. I only want to know what you mean by it? It came to a stop? A. It slowed down to that degree that you would say it had stopped, yes.

Q. Do you mean it slowed down but kept going? A. Slowed down, but eased its way again.

Q. Did it come to a stop? A. That I would say I was not sure of. It is five years ago.

Q. You are driving a lorry and you know when a lorry is stopped and when it is moving? A. Yes.

Q. Did the train come to a stop? A. I would say yes.

40 Q. And came to a stop on the Carlingford side of the crossing?
A. On the Carlingford side of the crossing.

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Q. What sort of a train was it? A. That I cannot recall.

Q. It was a steam train? A steam train or electric? A. Not electric.
They did not run at that time.

Q. A steam train was it? A. They have rail motors running up
there, too.

Q. Do you remember what it was? A. I would say to the best of
my knowledge it was a rail motor.

Q. Did it have other cars with it or just the one car? A. That I
could not say.

Q. At that place where you were with your bricks how far up towards 10
Carlingford could you see along the line? A. That all depends. From
entering from Adderton Road your visibility would not be a lot but after
you got across the line you could more or less see up.

Q. You did hear my question, didn't you? A. Yes.

Q. I asked you where you had the bricks problem, wherever that was?
A. Well, I was on the second gate, entry gate.

Q. You were over on the eastern side? A. On the eastern side of
the gate, yes.

Q. The eastern side of the crossing? A. The eastern side of the
crossing, yes. 20

Q. From there how far up towards Carlingford could you see? A.
I would say in the vicinity of 200 yards.

Q. And you saw this train coming? A. Yes.

Q. And you got out of the road? A. We did. The truck was already
off the line.

Q. The truck was already off the line? A. The truck was off the
road and I would say there might have been a dozen bricks we had left there
to throw off the side of the track.

Q. You personally got off the track? A. Yes.

Q. You were keeping your eye out for a train coming along? A. I 30
would say so, yes.

Q. Was your attention directed to the train by the whistle blowing, or
the hooter? A. No. I more or less saw it coming around.

Q. You mean it could have been that or you might have seen it
yourself? A. Yes.

Q. When were you first asked about giving evidence in this case? How
long back from now? A. I would say four to five months ago.

Q. Four to five months? A. Yes.

Q. That is more than six years after the occurrence? A. That is
right. 40

Q. More than five years after the occurrence? A. I take it is about
six years since the accident. That is right, yes.

Q. You did not yourself have any document from which to refresh your recollection about this Melbourne Cup Day incident, did you? A. Well, the Melbourne Cup more or less just stuck in my neck because I went back late in the afternoon. I had some friends, bricklayers, there.

Q. But you had no document or note which would enable you to refresh your recollection as to when that occurred and where it occurred?

A. Only the fact that it was Melbourne Cup Day.

Q. It was Melbourne Cup Day? A. Yes.

Q. And the Melbourne Cup immediately before this accident? A. I
10 beg yours.

Q. The Melbourne Cup before the accident, the one last before the accident? A. That would be right. That would be November.

Q. You, I gather, yourself drive lorries? A. Yes.

Q. Carting bricks? A. Yes.

Q. To various building jobs in the Dundas Valley? A. That is right.

Q. And you continued to do it, did you, up till when? When did you last do it roughly? A. My last project in the Valley was over in Evans Road, I would think.

Q. But how long ago? I do not want to tie you down; a year or two
20 back? A. Oh, yes, yes.

Q. A year or two back from now; is that right? A. Easy.

Q. Have you got any record of when you first carted any bricks into Dundas Valley? A. To answer that, sir, I have been in Clyde Brick Company's office and that one——

Q. Have you got any record, first of all, yourself? A. No.

Q. You have got no record. Did you always have an offsider with you when you went across? A. That is right, ever since I have been on it.

Q. After this accident to Quinlan did you continue to use this crossing to take bricks across? A. No. There were only six jobs in that particular
30 valley and they more or less moved around the valley from then on.

Q. Just answer my question, you understand? A. No.

Q. Did you, after the day of this accident, ever use that crossing to take bricks across? A. No.

Q. Did you use it for any purpose? A. No.

Q. The fact is that you know, don't you, there was a lock and chain put on it and it was kept locked and ultimately taken away altogether? A. That I would not say.

Q. You would not know? A. No.

Q. By the way, did you ever seek or obtain permission from the Railway
40 Commissioner to use this crossing? A. No, sir. Our instructions came——

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Q. Never mind your instructions. You were carting bricks? A. Yes.

Q. Carting for the Clyde Brick Company? A. Yes.

Q. Which was supplying bricks for the various buildings in the Dundas Valley? A. To L. A. Stewart in that particular area.

Q. I suppose Stewarts had more than one job in this housing project, didn't they? A. At that particular time I would not know.

Q. During the time you were carting bricks did you cart them to more than one Stewart job? A. Since then, do you mean?

Q. Yes? A. Oh, yes.

Q. You did? A. Yes. 10

Q. And I suggest to places through the whole area of this Dundas Valley Housing Settlement? A. That is right, sir. I carried to most of them.

Q. Is that right? A. Yes.

Q. And you got access to wherever you wanted to go with your lorry from the roads on the eastern side of the railway line, didn't you? A. Well, the routes used to vary. Sometimes we would come in from Kissing Point Road, other times we would come in from the top end around Carlingford Station, but that was only as the roads progressed and the Valley progressed in itself.

Q. Sometimes you came in from Kissing Point Road, which is on the 20 eastern side of the line? A. Yes, off Pennant Hills Road.

Q. Sometimes off Pennant Hills road, which crosses over the line near Carlingford Station? A. Yes. We used to go north of Carlingford Station up around what they call the "Bowling Club" and in around from there.

Q. Carting from Clyde I presume you came, did you—would this be the course you would take, you came over the Parramatta River there? A. The gas works, yes.

Q. Near the girls' high school? A. McArthur Street Girls' High School.

Q. On the Parramatta side of Rosehill Racecourse? A. That is right. 30

Q. And then you would come into Victoria Road, Ryde? Victoria Road runs from Parramatta Road across to Ryde? A. Victoria Road, yes.

Q. Then you go up a little towards your right as if you were going to Ryde and then you would go on your left to Pennant Street and follow that along up past Dundas and along? A. Underneath Dundas railway line.

Q. You would go underneath the subway at Dundas railway? A. Yes.

Q. And that brings you on the eastern side of the line? A. Yes. 40

Q. That is the right hand side looking towards Carlingford; isn't that right? A. Yes.

Q. And then you would deliver your bricks to wherever you wanted to go? A. Yes.

Q. What you might tell us is when, if ever, you were on the west side of the line? The west side is where Adderton Road runs alongside the railway line? Do you know it? A. Yes, it crosses over.

Q. And you know that Adderton Road looking back from, shall I say, the south when going north, Adderton Road leaves Kissing Point Road, doesn't it? A. Yes.

Q. And then goes across after half a mile or so, it goes across the
10 railway line on an overhead bridge? A. Yes.

Q. And then it continues alongside the railway line? A. On the western side?

Q. On the west side? A. That is right.

Q. Up until it then veers slightly away and joins Pennant Hills Road; is that right? A. That is right.

Q. Do you tell us that for some reason, some time when you were delivering bricks—and you mentioned this occasion in November, Melbourne Cup time, that you had somehow come on to the western side of the line? A. Yes.

20 Q. On that occasion you brought the bricks from Clyde? A. Clyde, yes.

Q. And you could have got access with your bricks without going across the line at all, couldn't you?

Mr. PILE: Access to what?

Mr. MILLER: Q. Access to the Dundas Valley Housing project? (Objected to; rejected.)

Mr. MILLER: Q. Are you accustomed to looking at maps? A. Yes.

Q. What I want to suggest to you, at the time this accident happened to Mr. Quinlan, which we know was in January, 1956, the roads you see
30 edged in blue, shaded blue, had actually been constructed and fit for use by traffic at that time. You might just look at them. Do you know some of them by name? A. I know every street in the valley. I have carted bricks to every street in the valley.

Q. Would you agree with that? A. Yes, they were constructed at that particular time? I would not agree with that because I would not know the fact.

Q. You cannot say one way or the other? A. I would not know if they were all sealed roads at that particular time.

Q. Of course they are all sealed roads now? A. Yes.

40 Q. You cannot say when it was——? A. When they were sealed.

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Q. They got to a stage where they were, without being sealed necessarily, made roads fit to take——? A. Some roads in Yates Avenue at the present time——

Q. The ones in blue. You are not able to say? A. No, I would not.

Q. I want you to assume that that is Telopea Station shown there where that little oblong is? A. Yes.

Q. Do you know Shortland Street? A. Yes.

Q. You see Stewart Street? A. Yes.

Q. You know those are two streets near Telopea Station? A. Yes.

Q. At Melbourne Cup time 1955 and in January 1956, was there not 10 a crossing there just on the Sydney side of Telopea Station? A. That I would not know.

Q. Going across into Adderton Road? A. Not at that time, I would not know.

Q. Had you even taken bricks across there? A. Nothing before that, more or less I came up Bourke Street and into——

Q. You more or less came up Bourke Street? A. And worked our way through here.

Q. From Hanson Street and along other streets? A. Yes.

Q. This place here, where you see the word "Clyde" on the map, you 20 cannot say whether or not at that time there was a vehicular crossing across at the position about where the word "Clyde" is now? A. An overhead bridge.

Q. No, a crossing? A. I would not know.

Q. You would agree with me that there was an overhead bridge across running from, it was Adderton Road going over the railway line? A. Yes.

Q. And that was a couple of hundred yards to a quarter of a mile on the Sydney side of Telopea Station. Is that right? A. Yes.

Q. Would you also agree—I think it follows from what you have said previously—that up on this other end where Pennant Hills Road is, that 30 runs over the line on an overhead bridge? A. That is right.

Q. I wanted to show you another crossing or a point anyhow. You see this point here near a lot marked 783. Did you ever use any such crossing in any such place as that? A. No.

Q. What I want to put to you is this, if there were a crossing at Telopea on the Sydney side in 1955 and in at least the early part of 1956, if there were a crossing there it might be, do you agree with me, that it was on that crossing that you had the trouble with your bricks? (Objected to; question allowed.) Would you not agree to that? A. No.

Q. See, what I am putting to you is that it is five or six years ago? 40 A. That is right.

Q. And time dulls our recollection? A. Time marches on.

Q. May it not be that the place where you had the trouble with the bricks, if there were a crossing there you do not remember near Telopea Station? A. I would say definitely not on the southern side of Telopea Station.

Q. You are not interested in north and south. You were only interested in delivering bricks? A. Our directions are to proceed to a certain point and that is it. (Balance of answer struck out by direction.)

Q. You were first asked about four or five months back? A. Yes.

10 Q. I suppose you have carted hundred of thousands of bricks since this happened? A. That is right.

Q. I suppose a number of times you have been to the Dundas Valley with bricks many many times? A. Yes, five times a day at times.

Q. I suppose most of the bricks for the whole project came from Clyde works? A. No.

Q. You were only carting for Clyde? A. Only for Clyde.

Q. You told me that you never asked permission to use any particular crossing? A. No.

20 Q. But you did say that, so far as the crossing you used was concerned on the occasion you have mentioned of the Melbourne Cup incident and other occasions round about then, the gate on the Adderton Road side was closed and you opened it. Is not that right? A. Yes.

Q. Either you or your offsider? A. Yes.

Q. Then you proceeded to go across? A. Yes.

Q. You closed the gate after you? A. That is right.

Q. That was your procedure? A. That is right.

Q. Of course, so far as the other side or the eastern side, at that time there was virtually no settlement within a mile or so of the eastern side of the crossing? A. I do recall one old homestead there.

30 Q. One old home. Apart from that, no people living there at all. Is that right? A. That is right.

Q. Of course on the western side, the open road side, there were cottages and people living in houses fronting Adderton Road? A. Yes, that is right.

Q. It was quite well settled at that time? A. Correct.

Q. Between Adderton Road and away back to Pennant Hills Road? A. Yes, all around here.

40 Q. So that you say apparently no one bothered much about the gate on the eastern side but your experience of the gate on the western side was that it was closed when you went there? (Objected to; question rejected.)

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Q. Your experience was that the gate on the western side, the Adderton Road side, was closed and either you or your offsider got out and opened it, held it open while you drove through and then closed it after you. Would not that be the picture? A. That is right. As I explained it before sometimes you would go there and the little clip that was on, that was not even clipped at all. It had to be pushed to.

Q. The gate was closed but it may be that the actual little clip on the post was not home. Is that right? A. That is correct.

Q. First of all, it is only a gate wide enough to allow one lorry to go through? A. One wagon, that is correct. 10

Q. About eight feet or ten feet? A. Yes.

Q. There was no post—you know this—or attachment against which you could close and hold the gate back open in the open position? A. That I would not know.

Q. I will show you the photograph "A.2." (Handed to witness). Would you look there? Having looked at it would you not agree that there was no such catching device to hold the gate in an open position? A. I do not see it there unless that little spot there could have been. There is a little white thing behind the post.

Q. I think that is a long way from the gate. That is several panels 20 down the fence. It would have to be a very wide gate to reach to that? A. No, actually behind your left hand post there.

Q. You point to this spot? A. The one the gate is swinging on.

Q. I suggest you have a look. You are pointing to the side of the post nearest to Carlingford? A. That is right.

Q. But the gate swings on the post nearest——? A. I did not notice which way the gates swing.

Q. Nearest to Telopea, does it not. I will show you. See if I cannot help you on this. Would you look at "A.3.?" You will see at the time the photograph was taken the chain is around the post of the gate nearest 30 to Carlingford? A. That is right, and that is the one with the sign on it.

Q. It must have been the gate swung on the other post, the one nearest Telopea? A. That is right.

Q. Now I point it out to you, looking again at "A.1." or "A.2.", there was no stopping post. You know the sort of thing I mean? A. The little hook thing.

Q. That the gates swings and catches on to? A. Yes.

Q. There was no such post there? A. That I would not know. I was the driver of the truck at that particular time.

Q. You do not remember seeing one. Your recollection is that your 40 offsider got out, opened the gate, held it open, you drove through and then he shut the gate after him? A. Yes, but when were these photos taken.

Q. We do not know really. I see they were taken by Mr. J. A. Taylor but there is no date on them. It must have been some time after the accident.

A. Some time after.

Mr. PILE: I suggest they were taken in March 1959.

Mr. MILLER: Q. Mr. Pile says they were taken about three years after the accident. A. Well, actually the set-up, I would say, when we went there at Melbourne Cup time is a different set-up to what is there now in these photographs.

Q. In what respect? A. It shows an entrance in those, more or less 10 shows an entrance, more or less a little bay into it now.

Q. What was it like? A. If I can recall, when we first went there it more or less went straight off the road.

Q. That is what I suggest was the state of the crossing down near Telopea Station. What you are pointing to on these photographs is a bay. By that you mean the railway fence comes to the Adderton Road entrance and then it goes into the gate in a bay with the gate being close to the line? A. Yes.

Q. Close to the rail? A. Yes.

Q. But your recollection is that at the time of your using the crossing 20 it was a crossing where you did not come out of a bay but you went straight through? A. You more or less——

Q. Straight through a gate in the fence? A. Straight off the road on to the railway line.

Q. Is not that rightly so? A. That is to the best of my——

Q. That is your recollection of the crossing? A. That is my recollection. At that particular time we more or less came straight off Adderton Road on to the track.

Q. Without going up a bay? A. Yes.

Q. I want you to assume that as far as the part outside the gate in 30 the photograph, there has been no alteration to the fence. Do you follow? A. That I would not know. That looks like railway lines at the present time. I think there was only wire there. It looks like a set of rails at the fence.

Q. I think you are right. That does not seem to matter. What I am asking about, the incident that you speak of when you had trouble with the crossing with some bricks, your recollection is it was a crossing where you went on to the line, not going through a gate after going up a bay such as in the photograph? A. That is right, more or less straight off Adderton Road, straight onto the railway line and across, I would say about fifteen 40 or twenty feet.

Q. That is your recollection? A. Yes, something like that.

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Q. Then your recollection is that you swung to your left? A. You would go through for a little bit and a wire fence which was pulled down later——

Q. On the eastern side of the line, and went along some distance, some yards and delivered your load? A. I would say about a couple of hundred yards in there.

Q. It might have been four hundred? A. It could have been four hundred.

Q. You delivered your load to the job? A. Yes.

Q. I suppose whenever you did deliver, you delivered what I might 10 call in ordinary business hours, somewhere between seven o'clock in the morning and five o'clock in the afternoon? A. We were not allowed to leave the yard before seven. We did not start loading before seven.

Q. You did not deliver after about what? A. Half past two to three.

Q. You did not go around there at twenty past five in the morning delivering bricks? A. No, that is past my bed hour.

Q. I think you have indicated by previous answers but I wanted to be sure of it, you have no records at all which would enable you to say when it was and where it was that the bricks fell off your truck, have you? 20
A. The day in particular?

Q. The day or the place? A. No, the place, yes, but not the day.

Q. You mean Dundas Valley? A. Yes.

Q. But I mean the particular part of the railway line. You have no note that helps you on that? A. No, no note. It was just another day of brick-carting.

Q. You lost a few bricks and went and picked them up? A. Yes.

Q. I want to show you another photograph. (Approaching witness.) If this were the crossing—let us assume it was; you mentioned that from one side of the road, the eastern side, you could see up the line for a couple 30 of hundred yards? A. Yes.

Q. It could be even further than that? A. Yes, on the job side.

Q. Would this be correct, there was a less view from the western side? A. Yes.

Q. But anyone who looked, got out and looked and at the same time walked towards the east from the crossing——? A. Got out of your truck and walked?

Q. Yes, his vision up to the left of the accident, the further he went inside the Adderton Road gate, would it not? A. If he walked up.

Q. If he went over and had a look? A. If he got out of his truck 40 and walked.

Q. You see the photograph I am showing you. (Objected to; question allowed.)

Q. Do you recognise that at all as any crossing? A. It could be one of a number. I would not have a clue.

Q. You point to——? A. I do not know whether it is a home.

Q. To a white building on the left as we look at it? A. That is right.

Q. You do not recognise the fence? A. No.

Q. You do not recognise the gate? A. The gate and the sign is the same on most of your railway level crossings.

Q. Anyhow, is this right, you do not recognise it as a photograph of any crossing that you used? A. No, definitely not.

Q. You say it is not a photograph of any crossing you used? A. Well, I say it is five years since I went there. The homes at that particular time were more or less one home delivery. When we carted bricks it was more or less plain ground and things change over the years, so this here I would not have a clue of what that is.

Q. This building on the left? A. It looks like a railway building.

Q. You do not recognise it? A. No, I do not.

Q. Do you recognise the house in the distance across the line there? A. No.

Q. As far as you are aware you have never seen that place before. As far as you can recall, the one shown in that photograph? A. In answer to that it could be and it is a railway line and crossing.

Q. As far as you are aware, you do not remember ever seeing that place before which I show to you now. Would that be a fair statement? A. Not with the background as it is now. I do not recognise that. I do not recognise that.

Q. You do not recognise the house on the right? A. No.

Q. You point to the building on the left? A. Yes.

Q. You say you do not recognise anything in that photograph? A. No.

(Above photograph m.f.i. "2".)

Q. I want to be perfectly fair. You said something about a 45 degree angle? A. The batter.

Q. 45 degrees is a pretty steep slope. You do not mean that, do you? A. I think you will find a lot of these batters on nearly 45 degrees.

Q. But whatever the slope was——? A. Whatever the slope was it was impossible to get a brick wagon over it, impossible.

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ination.

Q. What do you mean, from the point of view of driving up the allotment you could not get—? A. I would say the footpath was battered down or the ground adjacent to the footpath had a batter on it to 45 degrees on it.

Q. I am talking about before this accident to Mr. Quinlan. Do you understand that? A. Yes.

Q. At the time you were delivering bricks to Stewart's job there were no fences? A. No fences.

Q. Fences are the last thing a builder puts up? A. Yes.

Q. So that you had plenty of country in which to drive along to deliver 10 your load? A. No fences but no drive-ins either.

Q. You would not have drive-ins until the houses were built. Is that right? A. Yes.

Q. Looking at it now, one would see hundreds of houses and hundreds of dividing fences? A. That is right.

Q. Side fences and back fences and front fences? A. Yes.

Q. At the time you are speaking of what was there was open paddocks. A. More or less virgin ground.

Q. Subdivided with streets marked out and constructed and some buildings in the course of erection? A. That is right, not even kerbing and 20 guttering that early.

Q. I suppose at some stage there was no kerbing and guttering, but it was not necessary to deliver bricks to any particular allotment, to as it were go around the front of the allotment and then drive up where a drive might go for the owner or tenant for his own car to drive into his garage? A. They were never made.

RE-EXAMINED

Mr. PILE: Q. I think you were asked something about a crossing and this plan was shown to you. You were shown by Mr. Miller on this plan a crossing which he suggested was close to Telopea Station? A. Yes. 30

Q. Is that right? A. Yes.

Q. You were shown some other crossing which you said was not the Walters crossing and you were not shown by him any other crossing on the plan. Now look at the plan and allow me to point out to this one near Telopea you had pointed out? A. Yes.

Q. Another crossing and marks which suggested might be one which could be there. I point out one to you opposite 241 where you see "Marshall Street" and you see the block edged in red. What do you say about that crossing? A. The crossing that we went through was on the Carlingford side of Telopea Station. 40

Q. I point out——? A. One here, one on the southern side, and that is marked there but I do not know if that is a crossing there. It is called Walters.

Q. This one here?

Mr. MILLER: He pointed to one nearest the word “reserve”. This will have to be got down on the notes.

Mr. PILE: Q. You have had pointed out to you by Mr. Miller the crossing at Telopea Station? A. Yes.

Q. You have had pointed out to you by Mr. Miller what was suggested 10 to be a crossing near to the word “783”? A. That is right.

Q. Until now you have never had pointed out to you a crossing which is marked opposite the word “241”? A. Yes.

Q. The Carlingford side of Telopea? A. That is right.

Q. Would you be so good as to have a look at the space which exists between the word “240”—and they appear to be marked as lots and tell me whether you can recognise that? (Objected to; question allowed.) A. Could you put it again?

Q. I point out this one to you. I refer you to some sort of crossing which is marked on this plan as being opposite No. 241? A. I take it 20 that is lot 241.

Q. Having a look at the plan there, bearing in mind the other crossings to which you have been referred, are you able now to identify this crossing at 241, approximately? A. I would take that there with the crossing that I used to get into Stewart’s job.

(Plan shown to jury.)

Q. At all events you take that to be the crossing that you used? A. Yes.

Q. On the day the bricks fell off? A. Yes.

Q. Was there, on the day the bricks fell off, some sign which would 30 identify the crossing you in fact used? A. A sheet of fibro with L. A. Stewart’s name plate on it. (Objected to; evidence allowed.)

Q. You were telling us that what identified this crossing on that occasion was a sign which you said had a piece of fibro with—— A. “L. A. Stewart’s job”.

Q. How far was L. A. Stewart’s job from this piece of fibro with “L. A. Stewart” written on it? A. I would say the L. A. Stewart sign was on the roadway and you went through the gates and I suppose about 200 yards in from the other side of the gate.

Q. There is one other matter. You were asked if you had not some 40 record to refresh your recollection about the occasion of your spilling the

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bricks and some other details about the occurrence. You said you had not any record of your own. A. No.

Q. But for the purpose of refreshing your memory did you have access to somebody else's records? A. Nobody else's records.

Q. I thought you referred earlier——(Question rejected.)

Mr. MILLER: May I have Your Honor's leave to ask questions about the sign which is now mentioned? It was not given by this witness in his evidence in chief.

HIS HONOR: I will grant leave.

Mr. MILLER: Q. You mentioned a sign. You say it had "L. A. Stewart's 10 job"? A. Yes.

Q. Where was that sign? A. I would say on an electric light pole wooden pole which was nailed up with two fibro nails on the Adderton Road.

Q. On what? A. I do not recall what it was on, but it was on a piece of fibro, more or less written with a bit of timber chalk and nailed to the fence or a fence with "L. A. Stewart" on it.

Q. Reading "L. A. Stewart's job"? A. Yes.

Q. Just nailed to a post? A. Yes.

Q. Not done by any signwriter? A. No, just freehand chalk. 20

Q. Pretty roughly done? A. Yes.

Q. What you remember about it was it was nailed to a post and it could have been an electric light post or a telegraph post? A. That is right.

Q. It was on the Adderton Road side. Is that right? A. Yes, right more or less on the entrance to the railway crossing.

Q. Wherever it was is this clear it was near gates? A. Near gates.

Q. Which were in the straight line of the fence, the railway fence, where there was no bay leading into the gate over the railway line? A. That is right.

Q. I suppose in the last five years you must have seen hundreds of 30 signs put up by builders? A. Yes.

Q. Indicating where their job was? A. That is right.

Q. When were you first asked about any sign up in this road, Adderton Road? A. That was the first time today.

Q. Do you remember where any other signs were? A. Pertaining to what?

Q. Pertaining to this Ryde job any of them? A. No.

(Witness retired.)

Evidence of John Farlow

EXAMINED

TO Mr. PILE: My full name is John Farlow. I live at 9 Etonfield Parade, Croydon. By occupation I am a carpenter.

Q. Were you employed by Stewarts Building Contractors on some of the jobs which were going up in the Dundas Valley in late 1955 or early 1956? A. Yes, about six years ago.

Q. On the job that you were engaged in in the Dundas Valley initially, round about that time, how many cottages were you working on in a group
10 there? A. Six.

Q. Where were they? Can you tell us that roughly? A. Well, I can only tell you from the position that when they came in off the road——

Q. Which road are you speaking of? A. Adderton Road, I think it is.

Q. You came in to Stewarts' cottages off Adderton Road? A. Yes.

Q. Tell us about the rest of the route you took to get there? (Objected to: question allowed.) A. You would go straight along Adderton Road and turn to the right over a railway crossing and then turn to the left into the job.

20 Q. How far from Adderton Road would you say these six cottages of Stewarts were, approximately? A. The furthest about 100 yards or 120 yards.

Q. As carpenter you were on those jobs for some time while the carpentry work lasted, I presume? A. That is right.

Q. How did you go to work? A. In my own vehicle.

Q. What was that? A. A Ford truck.

Q. Did you bring any other persons with you in the truck? A. Yes, I brought all the carpenters with me each day.

Q. Did you take them home? A. Yes.

30 Q. What time did you arrive? A. It would be from various times.

Q. Roughly? A. Ten past seven, twenty past seven. We had to start work at half past seven.

Q. You arrived there usually before 7.30? A. Yes.

Q. In your Ford truck? A. Yes.

Q. You would depart then after your day's work? A. Yes.

Q. Which would be? A. About four.

Q. Carrying some men or the same crowd? A. Yes.

Q. By the same or by a different route? A. By the same route.

Q. That is over the crossing——(Objected to.)

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Q. Did you have to make any crossing to get from Adderton Road to get to the land, a railway crossing? A. I beg your pardon.

Q. Did you make use of any railway crossing to get to Stewart's job from Adderton Road? A. Yes, I had to cut across the railway crossing. (Objected to: question allowed.)

Q. I think you are aware of an accident happening to Mr. Quinlan? A. There was an accident there.

Q. The time you are speaking of as having used this crossing to get to work in your Ford truck and to get back again, was that before or after Mr. Quinlan's accident? A. Before the accident. 10

Q. I want to ask you this also. On some of those occasions when you went to cross over or you went to go back, made use of the crossing either to or from work, did you ever see a train come through while using the crossing or about to use it? A. Yes, we would see the train there.

Q. When you used that particular route to Stewart's job, can you tell us if you noticed whether there was any sign up on the road or near to the road which gave you a clue—(Objected to; question allowed.) A. Yes, there was a sign. I think it was on a telegraph pole. I am not sure—"L. A. Stewart's job".

Q. What was this sign written on? What sort of material was the 20 notice on or the "L. A. Stewart" written on? A. Just a bit of whitewash lime I suppose it would be.

Q. Written on what? A. I think it would be tin because it sort of went around the post.

CROSS-EXAMINED

Mr. MILLER: Q. This crossing you went across, was it a gate in the railway fence on the line like I have shown you there? (Sketch shown to witness.) A. Gate? There were two gates there.

Q. One on each side of the line? A. Yes.

Q. Were the gates in line with the fence? A. This gate was never 30 closed or opened. All the foliage was grown over it. That is the inside one.

Q. That is on the eastern side of the line, you mean, the side you were working on? A. Yes, the eastern side.

Q. What do you say about it? A. I would say it was never closed.

Q. What about the one on the other side? A. That was always accessible.

Q. What do you mean, it was closed? A. Sometimes closed. Sometimes you drove straight through.

Q. What did you do? A. Well, opened it and went through.

Q. And after you got through what did you do? A. Closed it. 40

Q. Why did you do that? A. Well, for safety's sake.

Q. What I want to ask you about is the gate in the fence, the line of fence like I have shown you there through which you went, assuming these are the railway fences? A. I could not remember.

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Q. I want you to think about this. You turn off Adderton Road to go across the railway line? A. Yes.

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Q. Did you go through a gate which was in the direct line of the fence?
A. The first gate.

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Q. Yes? A. I think so.

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examination.

10 Q. It was not that you drove up a kind of a bay to the gate like that (sketching)? A. Yes.

Q. Was it that or not? A. Yes, you went up a steep bit of a rise.

Q. I am not asking you about the rise but I am asking about a break in the fence like that, a gate there and the fence like that and the fence continuing along? A. I could not remember.

Q. As best as you can remember was it a gate in a straight line of the fence? A. Of the railway fence? No, I would not be sure.

(Two sketches m.f.i. "3" and "4".)

Q. You still work as a carpenter, do you? A. Yes.

Q. For Stewarts? A. No.

20 Q. How long since you worked for Stewarts? A. About three or four months on that job.

Q. Did you work on any of those jobs at Dundas Valley after Stewarts?
A. I think there were a few that were not done. They were pushed for time.

Q. You gave a hand? A. Yes.

Q. You always worked as an employee, not as a contractor? A. No, I have been a contractor the last two years.

Q. You do building work yourself? A. Yes.

30 Q. As far as you recall, except for helping out in some other job to give a hand if they were pushed for time, the only contractor you worked for on the Dundas Valley job was Stewart? A. That is correct.

Q. Do you remember how long it was before the accident to Mr. Quinlan that you began working there? A. Before the accident?

Q. Yes. You do not remember? A. It would be about—it was after Christmas.

Q. You mean you started work after Christmas? A. No, we started a week after the foundations went down.

Q. How long was that before Christmas? A. I think it would be about six weeks.

40 Q. Have you got anything that will fix this at all? Have you any record or note? A. No.

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Q. You have no particulars of your income, for instance? A. No, I have not.

Q. But recalling it, speaking from recollection, your belief is you started before Christmas, a few weeks before Christmas? A. Yes.

Q. You know Telopea Station a little bit further towards Clyde? A. Yes.

Q. Did you ever go by train? A. Never.

Q. You know the Telopea Railway Station? A. Yes, I do not know it particularly well.

Q. You know driving along Adderton Road—where had you come 10 from, where were you living then? A. Croydon.

Q. I suppose you came along Adderton Road from Victoria Road, Ryde, did you? A. I came along Kissing Point Road.

Q. To get to Kissing Point Road you had come from Victoria Road which runs from Parramatta to Ryde? A. Yes, along there.

Q. Coming up Parramatta Road to Parramatta? A. Along Parramatta Road, up Concord Road, across the bridge and turn to the left.

Q. You go across the railway bridge near the Soldiers' Hospital at Concord? A. Yes.

Q. Then you go up to where the lights are, up near St. Anne's Church, 20 Ryde? A. And turn to the left at the top of the hill.

Q. Then you would turn off just beyond Ryde golf links? A. Kissing Point Road.

Q. That is the way you went. That way would take you on to the eastern side of the railway line, the Carlingford-Clyde railway line, did it not? A. I am not very—

Q. You can take it from me the railway line is from Clyde to Carlingford? A. I only went the way that we were showed to go the first time. I never diverted from that.

Q. Kissing Point road takes off, does it not, from Victoria Road, Ryde, 30 just beyond—that is to say, on the Parramatta side—just beyond the Ryde golf links? You know the Ryde golf links? A. Yes.

Q. It turns off and goes off to the right, does it not? A. Yes.

Q. There is a sign at Kissing Point Road? A. Yes.

Q. That is the way you went along? A. Yes.

Q. Do you know where Sir Frederick Stewart's home used to be? A. We had to turn off just this side of the area, turn to the left.

Q. You say that took you to Dundas Valley, did it? A. Yes.

Q. From the Ryde side, didn't it? A. Yes.

Q. Or the eastern side? A. Yes.

Q. I am curious to know how did you get on to the Adderton Road side of the railway line? A. You turn to the right off Kissing Point Road again, don't you?

Q. Did you? A. I think so.

Q. Do you really think that? A. I am sure.

Q. Did you go over an overhead bridge? A. Not to my knowledge.

Q. Not to your knowledge? Did you go across over an overhead bridge across the Carlingford line anywhere? A. I cannot remember that.

Q. Did you go under any subway under the line anywhere? A. No.
10 I do not think so.

Q. But you do remember getting to the job from the Kissing Point Road side? A. Yes, I could take you that way now.

Q. That is your recollection, is it? A. Yes.

Q. When were you first asked to throw your mind back to the events of 1955? A. You just asked me now.

Q. Before I asked you, Mr. Pile asked you some questions? A. When I was subpoenaed.

Q. When was that? How long ago? A. Last Thursday.

Q. Till then you had not been asked at all by anyone? A. That is
20 correct.

Q. Here you are, you have no note and you are asked to throw your mind back to the year 1955 as to what you did then? A. Yes, I know particular things that I did.

Q. You were working for Stewarts as a carpenter and you used to take the men with you in your vehicle? A. That is right.

Q. Along Kissing Point Road to the job and back again along Kissing Point Road. Would that be the picture? A. Yes, came home the same way.

Q. Of course, whatever crossing you went across on this line you knew
30 that trains used to run along there? A. The railway line was there.

Q. I suppose you took care in crossing over? A. Yes, I would take care on any crossing.

Q. You would take care. You looked and made sure there was no train coming along as you went to go across. Would that be so? A. Yes.

RE-EXAMINED

Mr. PILE: Q. Just look at that photograph (handed to witness). Did you come on the scene of this accident at all the day Mr. Quinlan had the accident? A. Yes, I passed by the accident that morning.

Q. After the accident were you there at all? A. I was on the job.

40 Q. Did you see the scene following the accident that day? A. Yes, I saw the wreckage there.

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HIS HONOR: This does not arise out of cross-examination.

Mr. PILE: It goes to the identification.

HIS HONOR: I will not allow that.

Mr. PILE: Then I will have to ask Your Honor's leave.

HIS HONOR: I shall not grant any further leave.

Mr. PILE: I press for it, Your Honor.

THIRD DAY: WEDNESDAY, 22ND NOVEMBER, 1961

Mr. PILE: Would Your Honor note, I asked for leave to reopen the evidence of the last witness. I do not know whether my application included the fact that I had overlooked proving the matter. 10

HIS HONOR: If that were so I would readily grant you leave.

Evidence of Gordon Thomas Fulton

EXAMINED

TO Mr. PILE: My full name is Gordon Thomas Fulton. I live at 23 Beamish Street, Northmead.

Q. In 1955 or 1956 you were a carter employed by L. A. Stewart?

A. Yes.

Q. A building contractor? A. Yes.

Q. As a carter for them, were you engaged in bringing materials required by them at their projects from places where you picked them up? A. Yes. 20

Q. Any carting that was done was of materials to their site? A. That is right.

Q. Did you play any part in bringing materials out to L. A. Stewart's project at Dundas Valley? A. I did.

Q. Where were the houses to which you brought your materials in that manner? A. To the left of the railway crossing.

Q. Which railway crossing are you speaking of? A. Telopea Station railway crossing on the north side.

Q. I think you heard about an accident which occurred to Mr. Quinlan?

A. I heard of an accident. 30

Q. You did not see it? A. No.

Q. You knew an accident took place in which he was involved? A. Yes.

Q. You did not see it? A. No.

- Q. You knew an accident took place in which he was involved? A. Yes.
- Q. Were you on a certain railway crossing shortly after that occurrence? A. Either that afternoon or the next morning.
- Q. Where in relation to that crossing that you are now speaking of were these houses? A. After you went through the gates, they were on the left.
- Q. (Approaching witness.) Would you be good enough to look at these snapshots. You see that one? A. Yes.
- 10 Q. It is not the first time you have seen them. You saw this just before you came into Court? A. Yes.
- Q. What is that a photograph of? (Objected to: question allowed.)
- Q. What is that a photograph of? A. A railway crossing.
- Q. Which railway crossing are you speaking of? A. It is like the one at Telopea Station.
- Q. Looking at it more closely, and bearing in mind the notice you see on the posts there—— A. Yes, on the left hand side is “Beware——
- Q. Looking at those notices, you are able to tell us what that is a photograph of? (Objected to: question allowed.) A. This is a photograph of the railway crossing.
- 20 Q. You brought your materials, you have told us, to Stewart’s job? A. That is right.
- Q. What road did you approach that project from? A. Adderton Road? (Objected to: question allowed.)
- Q. How did you make your way from Adderton Road to Stewart’s project? A. From Kissing Point Road.
- Q. Having got on to Adderton Road, to get from Adderton Road to the job, where did you way-layer? A. We had to cross——
- Q. What did you do? A. We crossed the railway crossing.
- 30 Q. What do you say about that railway crossing? (Photograph shown to witness.) Is that it? (Objected to: question withdrawn.)
- Q. What do you say about the crossing shown here and the one you crossed? A. It definitely looks like it.
- Q. On the one you crossed to bring your materials over, was there anything which identified as a crossing rather than any other type of crossing at the time. Forget the photograph for a minute. On that crossing you cross was there anything there to distinguish it from other crossings? A. Yes, there was a sign (Objected to : evidence allowed) with “L. A. Stewart’s jobs” and an arrow pointing to it.
- 40 Q. Can you see that sign in that picture? A. I can see a part of it.
(Above photograph m.f.i. “5”.)

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Q. What is that a picture of? (Shown to witness.) A. That is a picture of the sign "L. A. Stewart's jobs". (Objected to: question allowed.)

Q. That is a picture of the sign "L. A. Stewart's job" to which you just referred? A. Yes.

Q. What do you say about that? (Shown to witness.) A. That is the sign.

Q. That is the sign again? A. Yes.

(Above two photographs m.f.i. "6" and "7".)

Q. What can you tell us about that? (Further photograph shown to witness.) (Answer struck out by direction.) 10

Q. Leave out any reference to the accident, but what is that a photograph of? (Objected to.)

Q. Looking at that photograph can you tell us what that is a photograph of? (Objected to.)

(At 10.12 a.m. the jury retired from Court)

Mr. PILE: I am inviting the witness to say that this is a photograph of part of the same crossing to which he has been referring. I propose to show that this is a photograph of the crossing after the accident.

HIS HONOR: I could not say by looking at that photograph that that is debris after the accident. 20

Mr. PILE: I do not propose to rely on it to establish it being debris at all. The purpose of the photograph is only to establish identity of the place and, secondly, its appearance.

(Objection was taken to the tender of the photograph: argument ensued.)

Mr. MILLER: We do not dispute it occurred at Walters Crossing but what we do say is that there was another crossing being used by the lorries near Telopea Station.

HIS HONOR: If Mr. Miller has said that, is this now necessary?

Mr. PILE: It is necessary to show the jury the nature of the crossing. 30
(Further argument ensued.)

HIS HONOR: I think I should uphold the objection.

Mr. PILE: I press the evidence.

(Above photograph m.f.i. "8".)

Mr. MILLER: Could we elucidate the matter of the other three photographs.

Mr. PILE: I tender them. (Objection taken to tender.)

HIS HONOR: The photographs now tendered by Mr. Pile, I think, are important to the issue in the case because a good deal of distinction has been drawn in cross-examination between the crossing south of Telopea Station and the subject crossing, and it is now sought by the plaintiff to identify this particular crossing by reference to the notice which was affixed to a telegraph post pointing in the direction of "Stewart's job." I will admit them but I will note Mr. Miller's objections.

(Photographs m.f.i. "5", "6" and "7" tendered and marked Exhibits "B1", "2" and "3".)

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tion.

10 (At 10.22 a.m. the jury returned to Court.)

HIS HONOR: I rejected the last photograph but I have admitted the photographs which were marked for identification "5", "6" and "7" and at some time they will be shown to you.

Mr. PILE: Q. When you were doing your carrying to these jobs, how many cottages approximately were there, as far as you can remember?

A. Six.

Q. In the performance of your deliveries, how frequently were you across that line from Adderton Road? A. May be once a day, may be twice a day.

20 Q. For how long? A. Up until the jobs were finished.

Q. Were you there at the commencement of the job or not. Over what period were you engaged on this? A. About three months.

HIS HONOR: Q. When did you commence? A. I think it was sometime in November.

Mr. PILE: Q. Until this accident happened, as far as you are concerned in your deliveries to that place, did you make use of any other access to Stewart's cottages apart from the crossing which we call Walters Crossing?

A. After the gates were locked——

30 Q. Until the gates were closed, may I take it you came along Adderton Road and went over Walters Crossing? (Objected to: question rejected.)

Q. What was your route until the gates were closed, in bringing your materials to and in leaving Stewart's job? A. Through the railway crossing from Adderton Road.

Q. Are you referring to Adderton Road? A. Adderton Road.

Q. Did you select any particular time of day? A. No.

Q. You might come or go at any point of time? A. Any time.

Q. You did not see this accident happen? A. No.

Q. But you heard about it? A. I heard about it.

40 Q. Having heard about it were you over there again on the particular crossing? A. Over that afternoon or the next morning. I went across and after that the gates were locked and I could not get across.

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Q. When you say "locked" what was the method of locking? A. Chain and padlock.

Q. From then on you had to find other access into Stewart's? (Objected to: question rejected.)

Q. That crossing was no longer available? A. Yes.

Q. How did you get your materials on to Stewart's jobs after that?

A. Well, there was an old lane way alongside an overhead on Adderton Road and we came through the trees, down over the gutter on to Marsden Road and up behind Walters old place and in the back of our jobs that way.

Q. That crossing you are talking about was where in relation to Telopea Station? A. To the south, on the Sydney side. 10

Q. On the Sydney side of Telopea was where you got off Adderton Road? A. Yes.

Q. You had to cross a gutter? A. Yes.

Q. Do you mean a made crossing? A. No, it was down over the kerb and guttering.

Q. Down over the kerb, and then pursued your way up to Walters? A. Yes.

Q. This old home of Walters? A. Yes.

Q. To get access for your deliveries to Stewart's job, was it an open way or was something demolished? A. There was a fence pulled down, a hedge and then we came into the back of our jobs. 20

Q. In your comings and goings, what was the general situation with regard to gates? A. Well, sometimes they were closed and sometimes they were left open.

Q. In your use of the crossing, as you have told us, did you ever see any other vehicles making use of it? (Objected to: question allowed.)

HIS HONOR: You must testify from your own observation. If you did not see any others, you must say so.

Mr. PILE: Q. I am only asking what you saw? A. Yes. 30

Q. You saw others using it? A. Yes.

Q. I do not suppose you would be able to tell us the number of occasions, with any sort of accuracy? A. No, I could not.

CROSS-EXAMINED

Mr. MILLER: Q. Did you ever obtain permission from the Railway Department to go across there? A. No.

Q. You never sought permission? A. No.

Q. Did you open and shut the gates? A. If they were shut when I got there, I would get out, open them and then go through and shut them. If they were not, I would leave them open. 40

Q. You would? A. Yes.

Q. How often did you go through this procedure of stopping, getting out, opening the gate, going back, going through and then shutting the gate?

A. Four times.

Q. Between the time you started in November and the time of this accident? A. No, four times on—

Q. On the occasion you did it. How many times did you find the gate shut? A. I could not say.

Q. You are rather confused about what particular crossing you went across, aren't you? A. No.

10 Q. What you told us is that after the gate was locked, which you agreed was within a day or so of this happening to Quinlan, you deviated from the road which came up towards the overhead bridge from Kissing Point Road?
A. Yes.

Q. And you did not actually go over the bridge? A. No.

Q. Is that right? A. No.

Q. But you went along what you call Marsden Street? A. No, there was a laneway before Marsden Street.

Q. You are sure about this? A. Yes.

Q. You are not confused about the name? A. No, I could not tell
20 you the name.

Q. The name Marsden Street? A. Yes, Marsden Street runs along in front of where our jobs were.

Q. There is no doubt you are speaking of the street, whatever is its correct name, to which the Stewart job you are talking about the cottages fronted, which they fronted? A. Yes, Marsden Street.

Q. You call it Marsden Street? A. Yes.

Q. Down Kissing Point Road there is a Marsden Road. You know it, do you not—called after the former Reverend Samuel Marsden historically. You do not know that? A. No.

30 Q. What I suggest to you is that the street you are speaking of is Marshall Street, not Marsden Street. When you say you went along near the railway line after the accident, is it not Marshall Street? A. I could not tell you.

Q. Do you concede you may be mistaken? A. Yes.

Q. I am suggesting there is no Marsden Street in the whole of this Dundas Valley project at all but there is a Marshall Street? A. That must be the one.

Q. I want to show you m.f.i. "1" (approaching witness). So we will know what we are talking about, I will show you. You can take it that
40 the Stewart job was being done somewhere along here where I put my finger from Lot 242 to 247? A. Yes, those six there.

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Q. Those six which you point to, 242 to 247? A. Yes, there was a laneway there.

Q. You see Marshall Street? A. Yes.

Q. There is no doubt whatever street you intended to refer to it is that street? A. That is the street.

Q. Which the plan marks as Marshall Street? A. Yes.

Q. What you said was that you went across—prior to the accident—a crossing near Telopea Station? A. South of Telopea Station.

Q. There was a crossing south of Telopea Station? A. An overhead bridge. 10

Q. Leave aside the overhead bridge for a moment. A crossing I am talking about? A. Well, I mean to cross the railway line, not a level crossing.

Q. You were talking about an overhead bridge previously? A. Yes.

Q. The overhead bridge you refer to is an overhead bridge, I suggest, where Adderton Road goes over the railway line at a point about a quarter of a mile south of Telopea Station? A. That is correct.

Q. What I am putting to you is that at Telopea Station, right on the Sydney side of it, there was a vehicular crossing there at the time Stewart's job was being built that you have referred to, right there? A. Well, I 20 never saw it.

Q. And that it led straight across into where now is Shortland Street and which was then Shortland Street and into Marshall Street? A. No.

Q. Do you tell His Honor and the gentlemen of the jury that you drove along there—how many times a day? A. Once or twice.

Q. Over a period of three months? A. Yes.

Q. That was the only occasion you were along there? A. I have been along there since.

Q. But prior to the accident? A. Yes, that is the only time.

Q. Did you never know, until I suggested to you now, that there was 30 ever at that time a vehicular crossing at Telopea Station? A. No.

Q. Immediately on the Sydney end of it? A. No.

Q. Never? A. No.

Q. You never noticed it? A. No.

Q. Even when you took this deviation which you say took you along near to Marshall Street, you did not notice it then? A. No.

Q. Let us go back a little. It is obvious, if the plan is correct, that Marshall Street does not come further towards Sydney than turn its junction with Shortland Street. That is so, isn't it? A. That is right.

Q. There is no Marshall Street or Marsden Street further towards this 40 overhead bridge, is there? A. There is where we used to go up.

Q. Used to go up where? A. There, Polding Place.

Q. You point to Polding Place there. You used to go out there. Is that what you say? A. Yes.

Q. To get to there, instead of going over the overhead bridge you drove up to near the overhead bridge? A. Near the overhead bridge and went off to the right.

Q. Went into Polding Place. Is that right? A. Yes.

Q. Where did you go then? A. Down there and across there.

Q. Then crossed over Shortland Street and along parallel with Marshall 10 Street? A. Well, these streets were never named while we were doing jobs up here.

Q. But there is no doubt the street which you are referring to as Marsden street is meant to be Marshall Street? A. Marshall Street.

Q. Of course, you did not know any street at that time as Polding Street, did you? A. No.

Q. There are a number of these little blind streets? A. Not in that area, not where we used to go out.

Q. I show you here, for instance, Field Place. That is another one of this sort of— A. Yes, but that is a long way from there.

20 Q. There is Polding Place and there is Field Place? A. Yes, they are all over Dundas Valley.

Q. But up here near Telopea Station there is one such blind place leading off Marshall Street and leading on to Marshall Street called Field Place? A. Yes.

Q. Did you notice, at the time you were delivering there, that there was another job going on, on other lots fronting Marshall Street? A. That is right.

Q. You were not delivering to that at all? A. No.

30 Q. When were you first asked to give evidence in this case? A. About six months ago.

Q. Until then you had not been asked about it at all? A. No.

Q. Are you still working for L. A. Stewarts? A. That is correct.

Q. You told us that in delivering to their building work in the Dundas Valley you came along always from the Kissing Point Road side of the Carlingford-Clyde railway line? A. That is right.

Q. You mean by that on the east side all the time, the Ryde side? A. Yes, coming through West Ryde.

Q. Where was L. A. Stewart's building headquarters? A. Croydon Park.

40 Q. You then would come, I presume, across there at Parramatta River at Concord? A. That is right.

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Q. And then go up into Ryde and go along Victoria Street? A. Victoria Road into Kissing Point Road.

Q. After the gates were closed, you discovered any way and you did in fact deliver without going across this railway line at all? A. That is right.

Q. Did Mr. Stewart have other building projects in the Dundas Valley? A. He did afterwards.

Q. You delivered to those, did you? A. Yes.

Q. Would you not agree that right from the time you started to deliver there, the place where these cottages were under construction was in areas where subdivision had been made by the Housing Commission and roads 10 had been put down? (Objected to.)

Q. I think I did say Stewart's buildings. You do not suggest that at the time of the Stewart's buildings in Marshall Street that that was the only building job going on on this project, because you have already told me that the Decorators were building along other allotments fronting Marshall Street? A. These six cottages of Stewarts were the first six to be built in Dundas Valley.

Q. None further down the basin.? A. There were some down off Kissing Point Road.

Q. What you mean by that is, on what you observed during that time, 20 that was the extent of building that you had observed? A. It depends where you mean Dundas Valley is.

Q. It was a vast building project, was it not, involving hundreds of homes and a big shopping centre and schools and recreation areas and churches and all sorts of buildings? A. Yes, they came after.

Q. But the whole thing was a big project? A. Yes.

Q. You tell us you can say, on your own observation, what was the extent of any building work commenced at the time you were delivering to the Stewart's first job? A. Yes.

Q. In the whole valley? A. They were the first six. 30

Q. They were your first six? A. Yes, they started before Superior Decorators.

Q. A week or so? A. Yes, maybe a week, maybe a fortnight.

Q. Near enough to about the same time? A. That is right.

Q. What I am asking you, other buildings had been commenced also in other parts of this valley project at that time, round about that time, or can't you say? A. Not where we were building.

Q. I do not mean up Marshall Street but on these other streets, some of these other streets? A. They would be close to Kissing Point Road if they were. 40

Q. You mean you do not remember one way or the other because you had nothing to do with them. Is that right? A. I carted up to five hundred or six hundred houses in there.

Q. That was afterwards? A. After.

Q. During the first three months when you were carting to the first Stewart job, are you able to say on your own observation that there were or were not other houses apart from Superior Decorators being built in other streets in this housing project? Are you able to say of your own observation?
A. Yes.

Q. What do you say? A. I say no.

Q. Is it that you could be mistaken about that? A. No, because the earth moving equipment was making the roads and they do not start the project until the roads have—
10

Q. Would you look at that map? I am going to suggest to you—you see all these roads shaded blue? A. Yes.

Q. I am going to suggest to you that all these roads shaded blue were actually constructed and fit for traffic, including lorry traffic, at the time you were delivering to the Stewart's first building job. What do you say as to that? Look at these shades of blue. Do you want to deny that? A. No, I would not.

Q. I want to put to you, it was obvious to you that this crossing you were speaking of in your evidence in your answer to Mr. Pile was one which,
20 if you were going to take a lorry across it, you had to exercise the greatest care? A. That is correct.

Q. In order to get across safely? A. That is right.

Q. First of all, it was a very narrow gateway? A. Yes.

Q. Barely wide enough to admit a lorry. Would not that be so? A. One way traffic.

Q. Single gateway? A. Yes.

Q. Secondly, it was a railway line on which rail trains ran? A. That is right.

Q. You knew that? A. Yes.

Q. I suppose you had seen them running there? A. On an odd
30 occasion while I was unloading.

Q. Thirdly, I suggest that approaching it at this crossing where Mr. Quinlan was injured there was a very restricted view up to the left towards Carlingford? A. Yes, you could see about 50 yards or 60 yards.

Q. That means that a train emerging from round that curve first came into view from 60 yards away? A. Yes that is right.

Q. That may be a very dangerous place to cross? A. That is right.

Q. In the case where you say the gate was closed, you got out and opened it? A. Yes.

Q. I suppose you had a jolly good look when you were doing that?
40 A. Yes.

Q. And listened? A. Yes.

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Q. To satisfy yourself there was no train coming? A. That is right.

Q. Of course, to the right you could see down a quarter of a mile or so towards Telopea? A. Yes, a good quarter of a mile.

Q. You would have plenty of warning of any train coming from the right, would you not? A. Yes.

Q. By reason of being able to see it clearly? A. Yes.

Q. Of course, the track itself was no nicely made strong surface, smooth and regular; it was pretty rough across there, was it not? A. Yes, you had to take it easy.

Q. There were just a few sleepers down? A. That is right. 10

Q. I suppose your lorry would bump going across? A. Yes, pretty rough.

Q. In addition to that, you had a solid grade up to get on to? A. Yes, from Adderton Road.

Q. Even coming back the other way you had a grade up to it, from the eastern side? A. I think it was flat.

Q. I suppose you were particularly careful right until the moment you did get safely across? A. Yes.

Q. You kept looking and listening? A. You would not hear with the motor going. You would look. 20

Q. You would certainly keep looking to the left? A. That is right.

Q. Are you a photographer? A. No.

Q. I want you to look at Exhibit "B1". You see that post on the right of the photograph that appears to be a telegraph post or an electric light post? A. That big one here.

Q. Is that right? A. Yes.

Q. I have shown you "B1". Now I show you "B2". Is the post with the piece of notice on it in "B2" the tall post in "B1"? It is the same post? A. Well, it has a notice here.

Q. It is the same one? A. It looks like it. 30

Q. That applies to the post in "B3". Is that right? A. Yes.

Q. So that all three photographers are looking from different positions, of course, but it is the same telegraph post with the notice? A. Yes.

Q. Is this the notice you refer to? A. "L. A. Stewart's job", yes.

Q. Do you know when these photos were taken? A. No.

Q. The only notice you saw was this sort of notice? A. No, there was "Beware of Trains".

Q. You refer to this little one here on the gate post. Leave that aside. The notice referring to Stewart's job, that was the only one? A. That is the only one. 40

- Q. That was just a piece of what? A. Fibro.
- Q. With this writing on it? A. Yes.
- Q. Did you put that there? A. The foreman of the job did that.
- Q. When did he do that? A. When the job first started.
- Q. Did you see him do it? A. No.
- Q. What was the foremans' name? A. Bill Sterman.
- Q. Is he still with the company? A. No, he died.
- Q. Did you know that Stewarts had actually applied to the Commis-
sioner for leave to use this crossing and it had not been granted? (Ob-
10 jected to; question rejected.)
- Q. You say a man named Sterman? A. Yes.
- Q. You mean you saw him put it up there? A. No.
- Q. Was there such a notice at other places? A. Yes, they put them
on various jobs of ours.
- Q. I mean in the Dundas Valley project, this particular notice
"Stewart's job"? A. No.
- Q. And an arrow pointing to Stewart's job? A. No.
- Q. On your own visits there, you were not the only person, to your
knowledge delivering to buildings there? A. That is right.
- 20 Q. There were no house numbers to guide men delivering? A. No.
- Q. Were there not any other places in the valley which had signs up
"Stewart's job"? A. No, the only signs they have are on the sheds.
- Q. That is the carpenter's shop or the tool shed? A. Yes.
- Q. That would be a properly painted notice? A. That is right.
- Q. Like "This building is being erected by L. A. Stewart" giving his
name and address and phone number and so on? A. Yes.
- Q. You told me you do not know of any crossing down at Telopea
Station? A. That is correct.
- Q. You are not able to say whether there is anything else down there
30 on Stewart's job? A. I would not know.
- Q. You are not able to tell whether there was any notice down on the
Kissing Point Road part of the housing project? A. No.
- Q. Pointing out any of these streets? A. No.
- Q. Saying "Towards Stewarts' job"? A. No.
- Q. You said that you went over there at all times? A. Once or
twice a day.
- Q. You do not mean out of ordinary working times; it would have
been between—— A. Half past 7 to 4 o'clock.
- Q. You had never gone across there at 20 or half past 5 in the
40 morning? A. Oh, No. I am still in bed then.

(Witness retired.)

Evidence of Gwendoline Rose Carroll

EXAMINED

*In the
Supreme
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Plaintiff's
evidence.

G. R.
Carroll.

Examina-
tion.

TO Mr. PILE: My full name is Gwendoline Rose Carroll. I am a married woman living near this crossing which is called Walters Crossing.

Q. In the old home originally occupied by the gentleman who had to have access across the railway? A. Yes.

Q. Your house would be about how far from this crossing? A. I should say about 400 yards or so.

Q. Until this building project got under way, was your home, the house on what you were using as farming purposes? A. A farm, yes. 10

Q. Did your husband have a vehicle? A. Yes.

Q. What sort of vehicle? A. A motor car, and he drove a truck.

Q. Before any other access became available through the progress of this project, where was your access? A. Through that railway crossing.

Mr. MILLER: My friend should know that there were certain statutory rights in Mr. Walters and his assigns and persons taking from him, and whatever the position may be with respect of this lady and her husband qua this crossing, it was guaranteed by Statute. I submit it is a different situation to that of a man in Mr. Quinlan's position.

HIS HONOR: That is the first time in this case that has been mentioned. 20 I had better grant you leave to ask questions on the voir dire.

Mr. PILE: I would like to be noted as objecting to that.

HIS HONOR: Mr. Miller now having drawn my attention to a private Act of Parliament, it may be of course that I should not allow this evidence. I have not decided it yet. If Mr. Miller contends that this witness comes within the definition of "assigns", if that word is used in the Act, as I have no doubt it is, then I must grant Mr. Miller leave to ask the questions on the voir dire to ascertain whether this lady comes within the definition.

Mr. PILE: All I would like to say is, whether she does come within the description or not, it would be my submission it makes no difference to the 30 admissibility of the evidence that the crossing was being used. She was one other person who might have been known to use the crossing and it stands on exactly the same footing as use of the crossing by other persons, who have already given evidence which was admissible. There will be no dispute about this Act as far as we are concerned. We have never seen it but I have no doubt what my friend says is correct.

HIS HONOR: I will allow Mr. Miller to ask the questions.

(On the voir dire.)

Mr. MILLER: Q. Would you mind telling me how long before January, 1956, you were living in what I might call Walters' cottage? A. We have lived there 17 years this month.

Q. That would be about 12 years? A. Yes.

Q. You say you were living there with your husband? A. Yes.

Q. Is your husband still alive? A. Yes.

Q. Had he purchased the property? A. No, we were renting it. It was through the Perpetual Trustee, Walters' Deceased Estate.

Q. You are renting it from the Trustee of the Walter's Estate? A. 10 Yes.

Q. That is the Perpetual Trustee Company? A. Yes.

Q. You have always occupied it as a tenant from the Trustee Company? A. Yes, the Housing Commission has resumed the property.

Q. Of course, it has since been resumed, the whole area, by the Housing Commission. Is that right? A. Yes.

Q. Is the picture, prior to the resumption by the Housing Commission and prior to the construction of cottages and so on, it was a large farming area? A. Yes, we farmed our portion.

Mr. PILE: This could not be related to the witness's competency to speak 20 about these matters at all. I object to it.

HIS HONOR: I will allow it.

Mr. MILLER: Q. That is the picture, that you and your husband were carrying on a farm, over how many acres? A. Eight acres.

Q. Did the acres include the land lying immediately adjacent to this crossing? A. There was a lane and it sort of ran into a bit of a V but ran to nothing, but there was a house just inside the gates when we first went there that people lived in. It has since been demolished. That was a few years after we lived there.

Q. You say there was a house just inside the gates to your property? 30 A. Yes.

Q. Where was that house? (Objected to: question allowed.) A. Just about 50 yards inside.

Q. 50 yards inside your gate? A. Yes.

Q. Where is the gate you are referring to? A. This gate where the accident happened, that was the only gate, the only access.

Q. At the time you were living there before this resumption, this gate crossed this place and was the way you got into and out of your property? A. Yes.

Q. You say there was no other access? A. No.

40 Q. You used it for that purpose, your husband and yourself? (Objected to: question allowed.)

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tion.

Mr. MILLER: I now have the Act and I hand it to Your Honor. It is called the Simpson's Railway Act, 1893. The financial crisis occurred round about that time. I refer to section 7.

(Further argument ensued.)

(At 11.11 a.m. the jury retired from Court.)

(Further argument ensued.)

HIS HONOR: The plaintiff in this action will rely upon the general duty of care which fell upon the Commissioner by his servants in the user of the subject land which was a railway line over which a train travelled at particular times from Carlingford to Clyde. Mr. Pile seeks to lead evidence 10 from the witness now in the witness box that she had used this crossing, but it is clear from the evidence which has been given on the voir dire that this witness with her husband had lived there at least twelve years before the accident and, on her own evidence, for a period when this land was used for farming purposes. When the plaintiff used the crossing the adjoining land had been vested in the Housing Commission, and it had commenced, through its contractors, to erect certain houses, and we are told in this case already that six houses were being erected by a man called Stewart and eleven by a company called the Superior Decorating Company. So the position is that the degree of danger would be quite different in the 20 earlier years that in the years with which we are concerned and if it had been the unfortunate experience of this witness to be injured by a servant of the Railway Commissioner, no doubt her action would have been based upon licence. As I understand Mr. Pile's presentation of the case, he does not depend upon licence or trespass but upon this general duty of care. A good deal of evidence has been led with regard to the question as to whether the Commissioner's servants ought to have become aware of the danger to persons who might come into proximity therewith, and of course that would be a totally different matter in the year 1956 to what the position was twelve years before. 30

In all those circumstances, I uphold the objection and reject this witness.

Mr. PILE: In order that I may have the necessary protection, I wish to ask her other questions than the one Your Honor has rejected.

HIS HONOR: Yes, and I will rule on those if objection be taken. Let it be understood that I reject this witness on these matters.

Mr. PILE: The next questions would be slightly different, and they would be to ask her whether the iceman did not deliver regularly, whether her husband used the crossing regularly in 1955.

Mr. MILLER: I would submit that they are in the same category. 40

HIS HONOR: I think you would have to limit it to the period from the commencement of the building project.

(Further argument ensued.)

HIS HONOR: If some of these houses in the new project had then been occupied, I think you could have led that evidence but if it is only to lead evidence as to persons going to or from this particular farmhouse, then I think it comes within the ruling that I have given.

I think I should make this observation that the duty to this witness and the duty to those persons who were going to or from her house would be altogether different to the duty which the Commissioner owed to the plaintiff. In those circumstances, apart from the ruling which I have just given, the jury might become confused.

10 (At 11.24 a.m. the jury returned to Court.)

Mr. PILE: Q: Please do not answer this question until His Honor rules on it. Did your husband drive his truck and motor car at all across this crossing? (Objected to: question rejected.)

Q. Did the tradesmen who came to your house use that crossing with their vehicles? (Objected to: question rejected.)

Q. Did the sanitary man bring his vehicle across that crossing? (Question rejected.)

Mr. PILE: The next one I will write down and hand to Your Honor. I wish to use this to show knowledge in the Commissioner of certain factors.

20 Mr. MILLER: I object to the question.

(The question sought to be asked was "Did you see the remnants of a truck delivering ice to your home on the line after collision between it and a train, before the accident?")

HIS HONOR: I uphold the objection.

Mr. PILE: Q. After the accident that occurred to Mr. Quinlan, did you see how the truck got in to Stewart's job? (Objected to: question rejected.)

Q. Was there electric power supplied to your home at the time? (Objected to: question rejected.)

30 (Witness retired.)

Evidence of John Lawrence Blench

EXAMINED

Mr. PILE: Q. What is your full name? A. My full name is John Lawrence Blench.

Q. You were formerly a Sergeant of Police, until your retirement, I think? A. Yes.

Q. You are now in retirement. Where are you living now? A. I am living at 15 Linsley Street, Gladesville.

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Carroll.

Examina-
tion.

J. L. Blench.

Examina-
tion.

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tion.

Q. Before your retirement I think you were alerted about an accident which had occurred on a railway crossing and you made a visit to it as soon as you were able? A. Yes.

Q. Arriving about what time at the scene of the accident? A. Oh, somewhere about—just after about 6.30 in the morning.

Q. And at that time Mr. Blench, did you—was the train—a train stationary close—fairly close to the crossing? A. There was a train stationary about 190 yards from the crossing.

Q. Did you observe some damage to that train? A. The train?

Q. Yes; the engine. A. Yes, I made a note of the damage. 10

Q. And what damage did you see? A. Pardon?

Q. What damage was there to the train? A. I am just trying to memorise it. I would have to use my records. I recorded that.

Q. Can you remember, first of all, without looking at your records whether it was still on the lines or not? A. No. The two front wheels were off the line. It was derailed.

Q. Did you also see some wreckage of a motor vehicle? A. Yes.

Q. Did you, while you were there, observe some photographer taking pictures? A. Yes. Just before I left the scene there were photographers there. 20

Q. Would you be good enough to look at these two pictures, first of all? (Photographs handed to witness.) Are they a fair representation of the picture following the accident when you arrived? A. Yes. This photograph in my right hand would show a scene going from Adderton Road, and that would be the train where it was derailed and stopped.

Q. If I might put "1" on that, so we will know the one you are talking about—

HIS HONOR: Very well.

Mr. PILE: Q. And the other, No. 2? A. Yes. No. 2, that is—yes, that is Addington Road again. 30

Q. Well, there is no train in this one. Does that indicate anything about the vantage point from which it was taken? A. Yes. They are both taken from the same—practically the same vantage point.

Q. So far as what is shown in this photograph which we have numbered "1"—as far as that is concerned, does that show a picture of the after effects of the accident, before anything was touched?

Mr. MILLER: How can he say that?

Mr. PILE: He said he was present.

Q. Does that represent truly or not the situation after the accident and before it was interfered with? (Objected to.) 40

Q. Do they fairly represent the scene as you saw it? A. Yes, at that particular time, yes.

(Two photographs tendered; objected to; admitted and marked Exhibits "C-1" and "C-2".)

Q. The next matter is, in the conditions in which that crossing was on the day of the accident, but a moment prior to it, will you just tell us the setup of the crossing, dealing with it from the Adderton side—— (Objected to.)

10 Q. In any case, were you familiar with it apart from the day you went there? A. No, not that particular suburb.

Q. Would you just describe it for the gentlemen of the jury as you were coming from Adderton Road up onto the crossing?

Mr. MILLER: Insofar as it purports to be a question dealing with what the position was before the accident——

HIS HONOR: No, at the date of the accident.

Q. Witness, you understand you are asked this question concerning the crossing on the morning of 5th January, 1956, when you went there at 6.30 a.m.? A. Yes, Your Honor. Driving along Adderton Road, which is parallel—— (Interrupted.)

20 Mr. PILE: I will withdraw that, Your Honor.

Q. Tell us what do you see if you stop your vehicle in Adderton Road and you look into the crossing gates. Just tell us what you would see. Can you do that? A. Yes. There is a wire gate. The line—it is on a grade; the line is on a raised grade inside——

Q. Coming back from the gate towards Adderton Road would you tell us the nature of the access to those gates? Appearance, I mean. Tell us about the fences; what sort of fences? A. A wire fence and wire gate.

30 Q. And as you come back from that wire gate towards Adderton Road, was there a parallel side entrance or was it splayed out? Can you remember that for us? A. All I remember was the old wire gate and the line was raised up above the height of the roadway. It is on a grade to go over the line.

CROSS-EXAMINED

Mr. MILLER: Q. Mr. Blench, you, I assume, have spent your life virtually in the Police Force? A. Yes.

Q. You are not a railway man? A. No.

Q. You have had no experience—— A. None whatever.

Q. You have had no experience of the driving of trains? A. None whatever.

40 Q. Or the distance within which a train can pull up and that sort of thing? A. None.

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Q. And do you remember when you were there that morning, when you got there, the injured man had already been removed, had he, by ambulance?

A. Yes, by ambulance to Parramatta Hospital.

Q. He wasn't there. I don't know whether you noticed that the fence had been cut to enable the ambulance to get into the line—the wire fence further from the crossing, down the line? Do you remember that? It doesn't matter. A. No.

Q. I want to ask you about the train itself. When you said the train was pulled up, do you recall whether it was a train with a number of passenger cars? A. Yes, I think it had three passenger cars. 10

Q. I want to show you a photograph of an engine, and you might tell me was that the sort of engine that was attached to the train? A. Yes, that engine was similar.

Q. In other words it was an engine with a bunker but not a tender? A. Yes. A train similar to that; an engine similar to that.

(Photograph of locomotive m.f.i. "9".)

Q. And did you notice that the direction in which the engine was attached to the train was that the funnel end was—— A. Connected to the train.

Q. Nearest the train? A. Yes. 20

Q. So it was running—it had apparently been running bunker first? A. Yes.

Q. Bunker leading. Mr. Blench, I assume that you did not yourself accurately measure the distances, did you? A. Not accurately.

Q. That is your estimate of what the distance was? A. Estimate.

Q. That is the estimate from the engine back to the crossing, I assume? A. Back to the crossing, yes.

Q. Had any of the department rescue crew arrived at the time you were there, actually to get the line clear and moving again? Did you notice that? A. No. 30

Q. You couldn't say one way or the other? A. No.

Q. I want to ask you about—you mentioned two front wheels of the engine were off the line? A. Yes. What I mean by that, Mr. Miller, is that would be the bunker. Those two wheels, that would be the bunker.

Q. The two wheels shown in m.f.i. "9" which are the leading wheels of the bunker end? A. Yes.

Q. Located directly under the bunker? A. Yes.

Q. And when you say "off", of course, all the other wheels of the locomotive and carriages were on the line: all the other wheels were still on the line? A. Yes. 40

Q. And those two were off, but just in the sense that the flange of the one wheel had gone over the rail and you had those two wheels on the sleepers? A. Yes.

Q. But quite close to the rail itself? A. Yes.

Q. About an inch or so, would that be correct? A. I am not too sure of that.

Q. Couldn't have been far away, anyhow? A. No.

Q. Because the other wheels were still on the rails? A. Yes.

Q. And I take it you couldn't yourself express any opinion as to when those wheels had left the rail, could you? A. Not definitely.

Q. And you yourself couldn't express any opinion as to what factors would cause a wheel such as that to move so that the flange may mount over the rail and the two move off it? A. Not mechanically, no.

Q. Did you notice whether or not these two wheels were—they were both attached to the one axle? They weren't independently moving loose: They moved on the one—did you notice that or not? A. I am not too sure of that, either.

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Re-exam-
ination.

RE-EXAMINED

Mr. PILE: Q. You gave a distance of 190 yards. I am not quite sure exactly where you started and finished your measurements from.

Mr. MILLER: From the engine back to the crossing.

WITNESS: From the crossing to where the engine was stationary.

Mr. PILE: Q. From the engine? You mean the front of the engine do you? The front of the train altogether? A. Yes; the front of the train, which was the bunker in this case.

(Witness retired)

Mr. PILE: I call for notice of action dated 16th May, 1956, unless there is no dispute about the time—

Mr. MILLER: There is no dispute about that.

30 (Noted that there was no dispute that this action was brought within the statutory period.)

Mr. PILE: I would like to have access to the documents on subpoena from the Railway Commissioner and the Housing Commissioner. (Access granted.)

Will Your Honour note by consent that there is no dispute that £108 6s. is the sum of medical and hospital expenses?

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HIS HONOR (To jury): Gentlemen, you have heard that it is not disputed that the amount spent by the plaintiff for medical and hospital expenses came to £108 6s. It is conceded to by Mr. Miller only on this basis, that he will contend that the verdict here should be for the defendant, but if you find for the plaintiff you can include the sum in your verdict as representing those out-of-pocket expenses.

(Mr. Pile tendered a letter, produced on subpoena, dated 1st December, 1955, from Housing Commission to Secretary, Department of Railways; objected to; pressed.

The jury retired whilst counsel addressed arguments to His 10 Honor.

His Honor indicated that he would reject the passage in the letter relating to the fact that this crossing was likely to be used by Housing Commission tenants and their children.

Mr. Pile submitted that the letter was not one which could have excisions made from it.

Letter rejected.)

(Subpoena and relevant file m.f.i. "10".)

(Mr. Pile sought to tender paragraphs 1, 2, 3, and 5, with the exclusion of the words to which His Honor referred, namely, 20 "and the fact that they are likely to be used by Housing Commission tenants and their children", and paragraph 6. Objected to. Paragraphs 1 and 2 admitted; remainder of tender rejected.)

(Paragraphs 1 and 2 of letter dated 1st December, 1955, from Secretary of the Housing Commission of New South Wales, to Secretary, Department of Railways read onto the transcript as follows:

"The Commission has let contracts for the erection of 212 cottages on the eastern side of the railway between Telopea 30 and Carlingford Stations as part of the general development of this Project. These cottages will be completed progressively between February and June next.

There are two level crossings in the vicinity of Telopea station and these are at present being used by building contractors and suppliers.")

(Mr. Pile tendered Regulation 75 of the Defendant Commissioner's general regulations. Mr. Pile also tendered the regulation appearing on p. 76 of the appendix commencing "Private crossings are under the control of the ganger". 40

Both tenders objected to and rejected. For His Honor's ruling, see separate transcript (p. 133).)

HIS HONOR: The only thing I have to tell the jury, I think, Mr. Pile, is that we have put onto the transcript this extract, paragraph 1 and 2 of the letter?

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Mr. PILE: That is all Your Honor has allowed in ; yes.

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(The jury returned)

F. J.
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HIS HONOR (To jury): Gentlemen, during your absence I have directed that there be entered on the transcript of evidence part of a letter dated 1st December, 1955, addressed by the Secretary of the Housing Commission of New South Wales to the Secretary of the Department of Railways, which
10 is headed, "Dundas Valley housing project, City of Parramatta". I have admitted the first two paragraphs of that letter and I have directed, as I have said, that the wording contained in those two paragraphs be placed on the transcript so I will ask my Associate to read to you those two paragraphs. (Read.)

Further
cross-ex-
amination.

Mr. PILE: That is the plaintiff's case, Your Honour.

Mr. MILLER: Before my friend closes his case, there was a matter I asked Your Honor's leave to ask the plaintiff——

HIS HONOR: Yes, the plaintiff may be recalled.

Further evidence of Francis John Quinlan

20

CROSS-EXAMINED

Mr. MILLER: Q. Mr. Quinlan, you remember, I was asking you a question about the crossing which, I suggested to you, is near Telopea station? A. Yes, I remember that question.

Q. And I was directing your recollection about it—I asked you to think about it overnight? A. Yes.

Q. And I asked you some further questions yesterday morning? A. That is right.

30 Q. What I want to direct your attention to is this: is it not a fact that during the previous trial when you were giving evidence I asked you these questions. (P. 38). I said to you, "In the course of doing that", that is to say, delivering to this job, Stewart's job, "you had passed, had you not, another crossing near Telopea station?", and you said, "Yes". I said, "And the crossing near Telopea station was a public crossing, was it not, where there was a very good view for at least 22 chains in both directions?", and you said, "Yes". I said, "Was it a public crossing?", and you said, "Yes". I said, "It was a crossing where there was a very good view along the line for at least, I suggest, 22 chains, would that be right?" You said, "Yes". Q. Of course, you could have gone across that crossing, too, that public crossing? A. Oh yes, I could have gone across there."

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*Examina-
tion.*

Now, you see, now that I have reminded you of your previous evidence—— A. Yes. This is six years ago, but I do recollect that cross-examination now.

Q. Now that I have reminded you there was a crossing there? A. Yes.

Q. And you adhere to the same questions as I put to you now I have reminded you, and give the same answers as I have just read? A. That is right.

Mr. PILE: No questions, Your Honor.

(Witness retired)

(Case for the plaintiff closed.)

10

DEFENDANT'S EVIDENCE

Evidence of Benjamin Gardiner

EXAMINED

Mr. MILLER: Q. Mr. Gardiner, is your name Benjamin Gardiner? A. Yes.

Q. Where do you live? A. No. 4 Grafton Street, Blacktown.

Q. You are a driver in the employ of the Commissioner for Railways? A. Yes.

Q. And I think at present you are electric car driver? A. Yes.

Q. Attached to Blacktown depot? A. Blacktown. 20

Q. But in 1956, January, were you a driver attached to Clyde depot? A. I was.

Q. And you were the person who drove the train which was concerned in the collision with Mr. Quinlan's vehicle at Walters' private crossing? A. Yes.

Q. Now, prior to that time had you been a driver over some period of years? A. Three years as an acting driver, which is the same thing.

Q. Three years a full driver, were you? A. No, an acting driver.

Q. And before that had you been—what? A. A fireman.

Q. That is, fireman and driver of steam locomotives, is it? A. Yes. 30

Q. And had you had experience of this line from Clyde to Carlingford prior to this accident? A. Yes.

Q. Over a period of how long? A. Seven years.

Q. Now, I want to go to this matter. During that period did you go on various lines on various duties as a driver? A. Yes.

Q. And so far as the Clyde-Carlingford line is concerned, would that depend upon you being rostered for duty which would include that line, is that right? A. Yes.

Q. So during that period, I suppose you would be sometimes on that line, sometimes on other lines, is that right? A. Yes.

Q. Now, I want to come to the particular occasion. Had you commenced duty at Clyde some time before this happened? A. Yes.

10 Q. About what time was that you started? A. 12.17 a.m.

Q. 12.17 a.m. on that same morning? A. Yes.

Q. And did your crew, that is to say, your fireman—Chopstow was his name? A. Chowstow.

Q. And your guard, Marshall, also came on at the same time? A. I am not sure about the guard, but the fireman signs on with me.

Q. Tell us, please, what did you do in the way of driving? Did you take a certain train somewhere? A. Yes, from Clyde station to Carlingford.

Q. Was that the last service? A. Last passenger service, yes.

Q. On that day, at that particular time of the night, is that right?
20 A. Yes.

Q. Then arrived at Carlingford station—is the picture that you had with you the fireman and a guard, I suppose? A. Yes.

Q. Do you remember who the guard was? A. Marshall.

Q. Now, after that, did you leave the passenger cars at Carlingford?
A. Yes, stabled the train at Carlingford.

Q. “Stabled” is the word you use. That means you stabled or put into a place the passenger cars? A. Yes.

Q. And then was the locomotive disengaged and did you take it somewhere? What did you do with it? A. On to a siding and attached trucks
30 that were at Carlingford, trucks and a brake van.

Q. What did you do then? A. Proceeded down towards Clyde, picking up on the way.

Q. That means picking up trucks on the way? A. Yes.

Q. At various sidings along the line, is that right? A. Yes.

Q. And having arrived at Clyde, what did you do? A. Stabled that train and then went into Loco, took coal on and came out and worked the goods up.

Q. That means you took a loaded goods train up along the same line, dropping off trucks at various sidings on the line between Clyde and Carling-
40 ford, is that right? A. That is right.

Q. And that brought you back to Carlingford? A. Yes.

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tion.

Q. And I am allowing for breaks—I suppose you had meal breaks and that sort of thing, did you? A. Yes, we have a meal break.

Q. At some time during those hours, is that so? A. Yes.

Q. Well, there came a time when you were to take the first train from Carlingford that morning to Clyde; that is, the first passenger train? A. That is right.

Q. Would you tell us, did you join up—

Mr. PILE: Would you mind not leading?

Mr. MILLER: No, I won't lead.

Q. You joined up the engine with the passenger cars, I take it, is that 10 right? A. That is right.

Q. And how many cars? A. Three cars.

Q. And you have got the picture now—assume that that you are in Carlingford Station, stopped there, and your engine, I think, is on the Sydney end of the train? A. That is right.

Q. And you are running—how? A. Bunker first.

Q. Bunker leading? A. Bunker leading.

Q. And this is a photograph, is it, of the type of locomotive that you were driving? (Photograph shown to witness.) A. Yes.

(Photograph of locomotive tendered; admitted and marked 20 Exhibit "1".)

Q. Now I want to ask you a few more questions. Would you come down to the jury box, and I want you to look at this photograph.

(Witness stepped down from witness box and approached jury box with counsel.)

I want you to point out to the jury—that is a photograph of the interior of the cabin of a locomotive. It is a different locomotive? A. It is a 22 class: the other one is a 20 class.

Q. The one tendered is a 20 class and this is 22 class? A. Yes.

Q. This one has a tender? A. Yes.

Q. And that has been taken off? A. Yes.

Q. But is the arrangement of the various controls, equipment, the same as in the 20 class? A. Same equipment. There is just one gauge which is called a drifting gauge which is in the photograph. We haven't got that sort of gauge on a 20 class.

Q. Would you tell us, please, so the jury can follow it, how is the driver—as the train is going towards Carlingford—towards Clyde, I beg your pardon—you are on the righthand side of the train, are you? A. That is right, riding on the righthand side, but if you were facing the locomotive you would be on the lefthand side. But the way you are going you are on the 40 righthand side.

Q. So you are always in that position near this large wheel? A. Yes.

Q. And the fireman is on the opposite side? A. Yes.

Q. That large wheel, what is it? A. A reversing screw. That controls your forward or backward movement.

Q. So it is really the wheel, the turning of which alters the gear, the direction—— A. There is actually no gears, but in placing that into a certain position, that alters your valve pressure and it gives you the same effect as the gear of a car, placing it in reverse as distinct from a forward gear.

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tion.

10 Q. Pausing there for a moment, to reverse from whatever position the screw may be in, in order to cause the locomotive to go in the opposite direction.

Mr. PILE: We are not concerned with that, are we?

Mr. MILLER: I will come to that later.

Q. How often would you have to turn the screw A. A 16 wheel— a 16 turn wheel; 16 times. Sixteen like screws, threads.

Q. You mentioned these gauges. The gauges indicate what? A. One is your steam pressure and the other is the duplex air gauge giving your train line pressure and the main reservoir pressure.

20 Q. You mean the pressure in the line in the train, from engine to car and car—— A. Right through the train. That controls the brakes.

Q. That is the Westinghouse brake system . You have the brake tube running right through? A. Yes.

Q. That is the rubber sort of joint we see between carriages? A. They connect right through.

Q. Now, the lever here is what? A. That is your regulator handle which regulates the steam. You can shut it off or close it.

Q. That is steam to the cylinder? A. The throttle it is sometimes called.

30 Q. You see this other handle down here? A. That is the Westinghouse air brake.

Q. And to bring that Westinghouse brake into action, what do you do? A. Just turn it right round.

Q. Catch hold of the handle and move it right round? A. You can make a service application halfway round, or push it right round like that (demonstrates) for emergency: just throw it round as far as it will go. It gives you as quick an action as you can get.

Q. These gauges we see here, what are they? A. They are the water gauges.

40 Q. They indicate the level of water in the boiler? A. Yes.

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Q. On the fireman's side you have these two wheels. What are they? A. One is the blower to give you a forced draught on the fire, to stop it coming out into the cab when you have got your throttle valve closed. Otherwise, with this closed and no force, the flame would come out and burn you.

Q. What is the other one? A. A steam valve injector.

Q. To give you steam? A. To force water into the boiler.

Q. So in normal running you are standing on the—as this locomotive was going, on the righthand side going towards Telopea, is that right? A. Yes.

Q. And the fireman is on the opposite side? A. Yes.

10

(Photograph of controls in locomotive cabin, together with legend, tendered. Legend objected to and rejected. Photograph admitted and marked Exhibit "2".)

JUROR: How quickly can the throttle be turned off? This is a 16 turn wheel.

Mr. MILLER: I will ask him that,—(To juror): Would you ask the question?

JUROR: Q. How quickly can the throttle or the steam control be cut off? The reversing wheel, we know, takes 16 turns, but how quickly can this be operated to shut the steam off? A. Straight away. Just one action, like that (demonstrates). (Witness returns to witness box.)

Mr. MILLER: Q. Would you tell us in your own words now—come to departure point from Carlingford. The train is standing in the station—

HIS HONOR: (To jury): Gentlemen, I don't know whether you think that that legend might be of any value to you. I have ruled against the admission of it, but if you want any part of those controls explained to you, even after you have retired to the jury room, all you have to do is make a simple request and I will have that part of the transcript read to you. Do you understand?

30

JUROR: Yes, Your Honor.

Mr. MILLER: Q. Would you tell us in your own words—begin from Carlingford—what you did, what time you did it, and so on? A. Well, when receiving the right of way from the guard at 5.7, departure time, I blew the engine whistle, opened the regulator to move the engine forward—or that is back, as the position of the engine was—to proceed to Clyde.

After getting the engine under way, I wound the screw back as usual to reduce the travel. After it was going—

Q. Mr. Gardiner, you must appreciate that this is all familiar to you, but to us and the jury it is our first experience of what you do, you follow? What a driver does in driving a train. So, would you explain it a little more slowly and a little fuller, if you would? First of all, about the time you left, what time was it? A. 5.7.

40

Q. It was 5.7? A. 5.7 a.m. I think it was 5.7 a.m.

Q. At any rate, you left according to a time table, whatever that was? A. Yes, left according to the time table.

Mr. PILE: I have asked you not to lead.

Mr. MILLER: No, I won't lead.

Q. You say you got the right of way from the guard. What does that mean? Just explain? A. The guard holds up a green flag. That is an indication to the driver that he may start. You must not start a train until you do receive the right of way from the guard.

10 Q. You received that signal from the guard? A. Yes.

Q. And then you did what? A. Blew the engine whistle.

Q. What sort of whistle was that? A. Clear, loud whistle.

Q. What sort of morning was it? A. Clear and fine.

Q. And how far, over what distance, could that whistle be heard? (Objected to; argument ensued.)

Q. Tell us, Mr. Gardiner, have you heard the whistle of this type of locomotive yourself previously, on other occasions? A. Yes. You would hear the whistle—(Interrupted.)

Q. But, you, yourself, have heard it at different times?

20 HIS HONOR: Q. Have you heard this kind of whistle blown by another driver? A. Yes, Your Honor.

Mr. MILLER: Q. In your experience, over what distance can it be heard? (Objected to; allowed.)

Q. What is your answer? A. I would say a mile or even more.

Q. Now, you tell us then, after you blew your whistle, what did you do? A. Open the regulator, to give the engine steam to proceed on its way. Then after you move the train—

30 Q. Don't say "after you do it". I wasn't there. After you did it. A. After I got the engine under way I wound the screw back, as is the normal procedure. That saves—that is like, for an economy. It saves steam. You only require a full amount steam to lift your train and then you practically immediately bring your screw back.

Q. When you say lift the train, you mean— A. Lift it; start it off the station; start it away; move it.

Q. To get the train going, you say? All right. Tell us then what did you do. A. After moving the train from the platform, the grade—it is a very steep grade, and then I shut off and allowed the train to coast down the grade.

Q. What speed did you coast along at? (Objected to.)

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tion.

Q. What speed were you doing? (Objected to on the ground that the witness was unqualified; allowed.)

Q. Were you also a car driver? A. Yes.

Q. How long had you been a car driver? A. Oh, I have had a licence now for about 30 years.

Q. Are you experienced in looking at the speedometers of cars and gauging speed?

HIS HONOR: I don't think a car helps us.

Mr. MILLER: No, but judging speed.

HIS HONOR: I should imagine I would find myself in a different position in the driver's cabin of a train than if I were seated in my motor car. 10

I think an engine driver with seven years experience can speak about speed, irrespective of whether he is a car driver.

Mr. MILLER: Q. What speed were you travelling at? A. About 25 miles an hour.

Q. Was that normal speed for that part of the journey? A. Yes.

Q. I want you to tell us then in your own words: take it along. What was done, what occurred and so on? A. Before going too far I made an application of the brakes just to see how they was holding, more or less, to test before you have gone too far. 20

Q. Is that normal practice? A. That is normal practice going down a steep grade.

Q. How far from Carlingford did you do that, about? A. Oh, about 400 yards.

HIS HONOR: Q. What did you find? A. Oh, they was acting quite normal.

Mr. MILLER: Q. Well, take it along and tell us, would you? A. Then I released the brakes and allowed the train to coast down the grade.

Q. What is the next thing? A. I got to about half a mile from Telopea station and I then sounded the whistle. 30

Q. What sort of a blast was that? A. Clear. Clear, loud blasts.

Q. Over what distance could it be heard? A. Mile or more.

Q. Tell us then? A. Then, after coming round a bend, I seen an object, a big truck, directly on the line. I immediately turned and threw the handle into the emergency position.

Q. What is the handle? A. The brake valve handle, into the emergency position.

Q. That is the Westinghouse? A. Yes, the Westinghouse air brake handle.

Q. What do you mean by the emergency position? A. Well, there is two positions. There is the service or emergency; you throw it right round to get your maximum amount of air into your brake cylinder as quick as you can. That is the emergency application.

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Q. Is that the fullest application? A. That is as far as you can get, as much air as you can get.

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Q. Does that mean the fullest application of the brake? A. That is right; and then I wound the screw, the reversing screw; to the full forward position to make every endeavour to stop the train.

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10 Q. And what happened? A. Then I felt an impact.

Q. What occurred? A. There was a smash.

Q. Well, then, at some stage did the train come to a stop? A. About 400 feet after the impact.

Q. Now, about how far were you from the truck when you saw it? A. About 50 yards.

Q. Prior to that what had you been doing? Prior to seeing the truck what were you doing? A. Just coasting downhill.

Q. What were you personally doing? A. Watching the track ahead.

20 Q. Was there anything further you could have done to bring that train to a stop before the impact? A. No, nothing possible.

Q. In doing the things you mentioned you did, did you do those as quickly as you could? A. As quickly as I could, yes.

Q. What was the next thing, would you tell us please? You have got the train; it has come to a stop. Did you yourself get off the locomotive? A. No.

Q. Did you at some stage later get off it, though? A. When the brake van crew arrived—the break-down gang.

30 Q. Now, at some stage you were aware—you became aware, did you. that the two wheels of the engine beneath the coal bunker had become derailed, is that right? A. That is right.

Q. And I understand the rest of the wheels of the train, including the locomotive, remained on the rails, is that so? A. Yes.

Q. And are you able to tell us at what point of time those front wheels became derailed? A. No, I couldn't tell you that.

Q. And in the position in which they were when derailed, in the derailed position, where was that in relation to the rail itself? Where were those two front wheels? A. Just alongside the rails.

Q. And apart from the impact with the truck, did you notice any other impact at all? A. No.

40 Q. Later on, Mr. Gardiner, the locomotive wheels were got back on the lines, is that right? A. Yes.

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Q. And the train was taken away, is that correct? A. I took the train away.

Q. You remember at what time that day the locomotive wheels were got back on the track? Do you remember how long after the accident? It doesn't matter if you don't? A. No, I don't remember the exact time. I can only say around about—round about 9 o'clock, something like that.

Q. Now, I want you to tell us, please, of your experience of that locomotive that morning, what can you tell us as to its mechanical order, its running and that sort of thing? A. It was in good mechanical order. Not long out of the workshops, in fact. 10

Q. Had you had any trouble with at all? A. No trouble whatever.

Q. Working it that night? A. No.

Q. You had worked the same locomotive since you came on duty that night, had you? A. That is right.

Q. Now, I want you to tell us, before that occasion when the tile truck was involved in this collision, had you driven over that same crossing on a number of times? A. Yes.

Q. And during a period of how long? A. Three years.

Q. And had you on any previous occasion seen any vehicle on the line there? A. Never. 20

Q. Or approaching? A. Never.

Q. Or going away from it? A. Never.

Q. Had you ever previously seen any person on the line there at that crossing? A. Never.

Q. Had you ever previously—tell us, had you noticed as you went over there on previous occasions, the gates at that crossing? Had you ever seen them open? A. Never.

Q. Were you aware of any notice on a telegraph post and referring to Stewart's job or any such thing on any telegraph post? A. No.

Q. Did you know of any vehicles that might be going across that crossing? A. No. 30

Q. Now, you were due to stop at Telopea, is that right? A. Yes.

Q. And for the purpose of setting down and/or picking up passengers? A. Yes.

Q. And from your previous experience driving along there had you ever seen any persons at or near Telopea station? A. Yes.

Mr. PILE: My friend opened this, Your Honor, and I refrained from interrupting; but it is my contention that we are not concerned in any way with this. I do not follow how my friend regards this or could contend that it becomes relevant to any issue before this jury. It is only on the ground of relevance. 40

HIS HONOR: I think it might be relevant. I will allow the question.

Mr. MILLER: Q. Would you please tell us about Teloepa station? Had you had any experience of persons there? A. Yes.

Q. Tell us about it? A. They would be on the line there. There is a public crossing just right near the station. People cross it; they would have to cross there to get to the platform.

Q. And had you previous experience of such persons crossing? A. Yes.

Q. In the place where you sounded your whistle prior to coming to Walters' private crossing, would that whistle—

Mr. PILE: Don't lead, please.

Mr. MILLER: Q. At that distance where Teloepa station was, was the sound of that whistle such as could have been heard at that station? A. In my opinion, yes.

Q. You see, at the time, the approximate time of running between Carlingford and Teloepa was what? A. Three minutes. That is for picking up and setting down and starting and stopping and going again.

Q. That is from stop to stop? A. Stop to stop and go again.

HIS HONOR: Q. Stop to stop and going again? A. Yes, Your Honor.

20 Mr. MILLER: Q. The time you sounded the whistle, the time you told us about before this impact, how far back from the crossing was that?

HIS HONOR: We have had that. I think it was back from the station.

Mr. PILE: He said half a mile from Teloepa.

CROSS-EXAMINED

Mr. PILE: Q. The first whistle you sounded you described as being loud and clear, did you? A. Yes.

Q. You can't, of course, alter the sound of a whistle by the way you blow it? A. No.

Q. So, whatever it is, it has always got to be the same? A. Yes.

30 Q. You can't do anything to sound a loud and clear one—you can sound a whistle? A. That is right.

Q. And it sounds at its own loudness and its own clarity? A. Yes.

Q. How long did you keep it going? You can have it long or short; that is all you can do? A. Yes.

Q. What was your first sounding, long or short? A. A short whistle.

Q. How was your second one? A. A short whistle.

Q. Well, now, you give us to understand, do you, that you and the guard and the driver were the people on this train—(Withdrawn.)

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Q. Did you have a passenger on? A. Oh, I wouldn't know that.

Q. You got your signal and you set the train on its way? A. Yes.

Q. You tell us that in your three years' experience on this line you had never seen the crossing used on any single occasion? A. Never.

Q. By any persons or vehicle, is that right? A. That is right.

Q. Couldn't possibly be mistaken about that? A. Couldn't possibly.

Q. Couldn't possibly. And you tell us, do you, that you had noticed that people could sometimes be at the crossing which was at Telopea station? A. Yes. They would have to cross there to get across the line to enter the train. 10

Q. You say you had seen them doing that? A. Yes.

Q. And that would be how far from the crossing of which we are speaking, when the accident occurred? A. That crossing is right near this station. That would be about a quarter of a mile from Telopea—from the first crossing.

HIS HONOR: Q. From Walters' crossing A. From Walters' crossing.

Mr. PILE: Q. A quarter of a mile between Walters' crossing and the Telopea station, is that what you say? A. Walters' crossing would be a quarter of a mile to the station.

Q. To Telopea station? A. Yes. 20

Q. Well, I understood you to say to Mr. Miller that you sounded this whistle on two occasions, once on leaving Carlingford, is that right? A. That is right.

Q. And once when half a mile from Telopea, is that right? A. Right.

Q. We have got this definite: you don't want to change this in any way? A. No.

Q. Was your second whistle blown because of the hazard of persons, as you believed it to exist, who might cross at Telopea? A. Yes.

Q. It was not a whistle intended to give warning to anyone else but 30 the people who might have been using the Telopea station? A. Or on the line in the proximity of Telopea station.

Q. By "the vicinity of Telopea" you mean maybe 50 or 100 yards from Telopea? A. Yes.

Q. Now, Mr. Gardiner, were you aware of this crossing, Walters' crossing—aware of its existence? A. I was aware of the crossing being there, yes.

Q. When you say you had been running on the line for three years, you mean as driver? A. Yes.

Q. And for several years before that as fireman? A. Yes, as fireman. 40

Q. But I suppose you will agree that in the last period of those three years as driver you had observed great changes coming over the locality there? A. No, there wasn't so many great changes there.

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Q. Well, you see, it was a rural area when you were fireman on the job, wasn't it? Up this valley, Dundas Valley on the right—on the east side of the line? A. No, it was just a field, but no rural business going on.

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Q. Grazing? A. Might have been a couple of cows, like.

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Q. Anyway, it was a grassy sort of field? A. There were open paddocks on one side.

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10 Q. Didn't you become aware round about the turn of the year 1955, the end of that year, that the Housing Commission had started a project there? A. There was a few houses starting to be put up there.

Q. And, in point of fact, you couldn't avoid it from your vantage point on the engine as a driver: couldn't avoid seeing some houses in course of construction, on your left side. A. No, you couldn't avoid seeing that.

Q. I suppose, as an engine driver, you have about as much curiosity as anybody else. When you passed them didn't you wonder what they were doing and what was going on? A. I didn't wonder. I could see what was going on.

20 Q. You could see, would I be right in putting to you, something like 18 to 20 houses were in course of construction? A. I didn't know how many. I just seen there were some.

Q. But, I mean more than two or three: maybe 15 or more than two or three: maybe 15 or more, is that right? A. I know there were some. I couldn't tell you how many.

Q. And you knew that line pretty well, I suppose: You were looking out the side of the train all the time? A. Yes.

30 Q. Would you agree that you knew those cottages were up on a sort of escarpment where it was impossible to drive a lorry along except on the same level as they were? A. No, I didn't take any notice of what the ground was.

Mr. PILE: Q. Did you ever see any lorries discharging their loads on these sites? A. No, I cannot recall ever seeing any waggons there. It is quite possible that they were there without me noticing them, and I am only just going straight through. There may not have been any there when I was passing.

Q. Would you agree that the work on these cottages began some time in November of the year before the January of the accident? A. I could not tell you any dates when they started, that did not concern me.

40 Q. Did you never see any vehicle going over—you knew that there was a crossing there which served the house before any Housing Commission work was done, serving the old house? A. I knew there was a crossing

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- there that was never ever used. That was by my observation and based on what was passed on to me by other drivers.
- Q. Are you putting that to us seriously that you thought that crossing was never in use for any purpose whatever? A. Yes.
- Q. Is that right? A. That is right.
- Q. From your point of view there was no reason why it should not have been closed up completely? A. Well, it was my idea it was closed. There was no purpose of it being there, as far as I could see.
- Q. Did you never see the sanitary man go over the intersection early in the morning? A. No. 10
- Q. Ever see an ice truck deliver over there? A. No.
- Q. Would you have had a shift on this line or would you have done the whole of the time table each day? A. I worked like to a roster all over the metropolitan area. You are not on that line all the time. Is that what you mean?
- Q. Yes. On this particular line you would have spent roughly how many hours a day? A. For some shifts, eight hours. Other days you might spend 2 hours.
- Q. It would be correct to say, over your last 3 years you would have been at some stage of each day on the line at all points of time, either morning, midday or evening? A. Not every day. I might not do it for a fortnight and then might be on it two or three days. 20
- Q. Is this fair to put to you, that over the whole of the time of the 3 years there must have been some time on various days when you would be on the line in the morning, others at midday, others at evening, others night and so on? A. That is right.
- Q. Never on any one of those different occasions did you ever see any person or vehicle on that crossing? A. No.
- Q. Approaching the crossing? A. No.
- Q. Or leaving it? A. No. 30
- Q. Do you know of an accident which occurred on it? A. No.
- Q. To an ice waggon? A. No.
- Mr. MILLER: I submit that is an improper question. There is no evidence of any such happening.
- HIS HONOR: I will allow the question.
- Mr. PILE: Q. Did it occur to you to wonder how these materials were getting to the houses you saw built? A. No.
- Q. Never crossed your mind? A. No.
- Q. May I put this to you, you never saw these materials being brought by any route? A. No. 40

Q. On to that line. You never saw them coming up a valley road, if there was one there? A. No.

Q. Do I understand you to say that you did not know yourself that the crossing existed for the convenience of the house that was on the other side of the line from Adderton Road? A. I have heard that it was a private crossing put in for a farm there. That was passed on by other drivers.

Q. You knew the farm was there; you saw the farm house? A. A farm house.

Q. There is no question about that being there? A. There is no
10 question about that.

Q. To your knowledge? A. Yes.

Q. You knew it was there. Would you agree that the view of this crossing from your train was limited to something like 50 yards approximately? A. Yes, 50 yards.

Q. Meaning, until you got to 50 yards from it you would not see if anybody was making use of it? A. That is right.

Q. Would you agree that that result occurred because of the trees on the right side of the line obscured your view of the vehicle approaching the crossing until in fact it got straddling the lines almost? A. Yes. It was
20 like an avenue of trees.

Q. You are not on the same run? A. No.

Q. Would you agree that if you could not stop your train after you got your first view of the crossing, it would be the prudent thing to do to sound a timely whistle? A. Approaching that crossing, no, because—

Q. What I put to you is this, for you have agreed with me you have only a 50 yards view of anything? A. Yes.

Q. When you are 50 yards from the crossing, would you agree that in the light of that it would be prudent to sound a whistle at a point of time which would allow anyone approaching that crossing who would not, of
30 course, be able to see you, just as you could not see him, to warn him not to start the crossing? A. No, I would not—that is a private crossing and we are understood to say that the people who use that are responsible for it and must know the running of the train. Therefore, as far as the crossing is concerned—

Q. I am not talking about those people.

Mr. MILLER: I submit the witness should finish the answer.

HIS HONOR: Q. You had not quite finished your answer. A. The people must look after that gate and keep it closed on arrival—I think it is a quarter of an hour before the train arrives, so as far as a driver is concerned over
40 that crossing there is no need to worry about it at all. It may as well not be in existence, and being over a number of years I never ever seen anybody use it, I never considered it necessary to do anything about it. And the controlling—

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Mr. PILE: Q. I have not stopped you answering that question fully, have I?
Would you agree that that was not an answer to the question I put to you?
A. I understood it was. I do not know whether that is what you wanted.

Q. You have told us that you were unaware that the crossing was ever
being used by anybody, haven't you? That is what you said before. You
did not know it was ever being used by anybody? A. Yes, I knew it was
never ever used, as far as my knowledge is concerned.

Q. Are we to understand from that that you never took any precautions
related to that crossing? A. No, that is right.

Q. Never? A. Never.

Q. Either before the Housing Commission started or after? A. That
is right.

Q. You sounded your whistle, you said, some half a mile short of
Telopea, not because of the crossing but because of the people whom you
thought might be around at Telopea? A. That is right.

Q. If this crossing had been one which was being used from time to
time, would you agree that that whistle would not have helped to avert a
collision? A. Yes, I will agree to that. You would be too close to it.

Q. The only whistle which would help to avert any collision in the
case of a vehicle using that crossing would be one sounded at a point of
time which could prevent a lorry making a start over the crossing at all.
(Objected to; question withdrawn.)

Q. You gave us your estimate of 25 miles an hour? A. Yes.

Q. Do you want us to understand that a train of three carriages and
an engine at that relatively low speed cannot be stopped for 400 feet?
A. Yes, that is a very steep grade.

Q. Three carriages and a light 20-class engine. Is that right? A.
That is right. The heavier train has better braking power, I might add.
The more carriages you have on it the better braking power you have. A
light engine and a light train, they have a limited amount of braking power
on them.

Q. First of all, I suggest to you it is not correct to say that you stopped
the train 400 feet past the crossing? I suggest to you it was not stopped until
you were 190 yards past the crossing. Would you disagree? A. I could
not disagree because I never measured it. It was only an estimate.

Q. It might be right because you never measured it? A. I never
measured it.

Q. If that was correct, and if you saw the vehicle on the crossing
at 50 yards short of the crossing, as I think you have sworn, it took 240
yards to bring your train to a halt. That is inescapable. A. 400 feet?

Q. I am suggesting you would not disagree with the estimate of 190
yards past the crossing and you had actually seen the vehicle on the crossing

50 yards on the other side of the crossing? A. I could not argue the point, but I never mentioned it.

Q. Whether you agree or disagree, assuming that the train had been stopped only in 240 yards, you would not suggest that you were only going at 25 miles an hour, would you? It would not take you 240 yards to stop the train at 25 miles an hour? A. It could take you 400 yards to stop that train.

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Q. 400 yards? A. Yes, on that grade. It is a very steep grade.

Q. What sort of situation are you dealing with? You said a moment
10 ago you in fact stopped it in 240 yards? A. I said it is possible.

Q. Give us the other end of the possibility. What is the very shortest distance you could stop it in? A. About 600 feet, 200 yards.

Q. I suppose you realise that you said a moment ago that you in fact stopped it yourself in 400 feet. Now you tell us the minimum stopping distance is 600. You are quite sure that you saw this vehicle and took care to stop a collision before the impact? A. Yes.

Q. Quite positive about that? A. Yes.

Q. Have you ever said anything different? A. No.

Q. You have not got anything to do when you get this train in motion
20 on the grade. Once you have it going and tested your braking power, you then have nothing to worry about then until you get away down near Telopea and prepare to stop? A. Yes, you have to control your train down the grade.

Q. What do you mean by controlling it? A. If you let it go, it would finish up going 100 miles an hour by the time it left Telopea on that grade.

Q. But I think you turned a wheel back a few turns and you were coasting it down? A. Coasting with the reversing screw right out.

Q. That means you were just allowing the train to coast down nicely
30 with the only thought in your mind that it would be necessary, perhaps, to get to the brake if occasion arose. That is all you have to do, is it not? A. No, watching the speed of your train. As soon as it starts to go too fast you make an application of the brakes.

Q. That is all you had to worry about at that stage of the business? A. That is right.

Q. Would not you and the fireman have a bit of a chat at that time in the morning? A. Not necessarily.

Q. At that point, having got your train under way, having satisfied
40 yourself the brakes were working and you have got the train coasting, you could then have a bit of a look around until the next situation arose where you would have to take active control of the train again to stop it? A. You would not have much time to do anything. It is only a 3 minute section between stopping and going and starting again.

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Q. I am not suggesting it would take a long while but there would be nothing calling for your immediate attention and you would have had leisure to look around at the surrounding countryside, if you felt that way inclined, would you not? A. I would have? I would have, yes.

Q. And you used to do it? A. Just a couple of seconds or two. You would not have much time to do anything. You have tested your brakes and you are going along.

Q. Would you not agree with me that coming along there as you did repeatedly over this journey, you got to know that railway track and the things at the side of it like the back of your hand. Would you agree or 10 disagree with that? A. How do you mean?

Q. Coming down there as frequently as you did, as a driver over the three years, you would have got to know the track and what existed at the side of the track; it was as familiar as the back of your hand? A. No, not necessarily. As far as the road was concerned you would.

Q. You would get to know pretty well the locality you were running through every day? A. Yes.

Q. Would you agree that the line ran very close on the right side of this crossing to a telegraph pole? A. There are telegraph poles all the way along. I would not actually— 20

Q. That is why I thought I would show you a photograph. You see this photograph taken from Adderton Road and there are the gates and there is a pole beside them? A. Yes.

Q. The pole is quite close to your track, is it not? A. I could not swear to that. I would not know about that.

Q. Do the best for me? A. It is a long time since I have been there.

Q. You can see by the picture it is pretty close to the track? A. Yes, by the way the picture shows, it looks right alongside the track.

Q. Would that be right? A. By the way the picture shows to me, it is right on the track. 30

Q. Didn't you get to know the track yard by yard, when you go over it day after day or year in and year out? A. In a sense I suppose you would say you would do that. I cannot understand what you really mean by that.

Q. You do not see what I am driving at? A. No, not really.

Q. What I am putting to you, you would get so familiar with it that if something new, some little thing happened beside your track, you would be the first to know that it had appeared for the first time? A. No, I do not say that I would. I may not have noticed it.

Q. Going up it not once a day like an odd passenger does but driving 40 your train up there, and you have to keep a lookout, haven't you? A. Yes.

Q. Part of your job in running the train, you would get to know where the posts were, where the electric light poles were, the telegraph poles and all that sort of thing? A. No, you would not. I would say you would not. Some people might. You would see them there but actually they would not register on your mind, if you understand what I mean.

Q. Something new would register on your mind? A. I should not say that. I do not know.

Q. I will tell you what I am driving at. If you put up on one of those telegraph poles a bit of fibro with "L. A. Stewarts' job" written on it right
10 on the side of your track, you would notice that, would you not? A. I do not know. I do not know whether I would or not. I could not tell you.

Q. Did you notice that it was put up there, a bit of fibro with those words written on it? A. I would not know whether it was there or not.

Q. You never heard at all of that until I just put it to you? A. I might have heard it in the last Court case but I could not tell you that either, that I remember that.

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HIS HONOR: Q. You are still bound by the oath which you took yesterday? A. Yes.

20 Mr. PILE: Q. When you actually hit the vehicle did you hit it amidships, if I can use that phrase? A. My back was turned when the impact occurred.

Q. The lorry was fairly straddling the line when the impact occurred or rather well over the line than to the other side? A. I could not tell you that because my back was turned to it on the impact.

Q. I thought you said more or less this on another occasion. Did you say this, "I turned the bend. I got the first glimpse of the crossing and I saw the motor waggon immediately in front of me." Did you say this? A. Yes.

30 Q. "Q. Where was it then? A. I would say it was about half way or three quarters way past the track that is across the railway line, actually right on the line"? A. That is right.

Q. That would be correct? A. That is correct.

Q. That is when you first saw it, so I suppose by the time of the impact it had gone a little further across the line? A. I turned around to make the application and reverse the screw.

Q. You were coming down around the line with your steam off, shut off? A. Yes.

Q. Without, at that stage, the brakes on. Would that be right? A.
40 No, the brakes would not be on just at that time.

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Q. Would you agree with me that an engine coasting down a grade like that without steam sneaks down very silently? (Objected to.)

Q. You know what I am putting to you. You make no noise? A. No, there would not be any blast coming from the locomotive. When you are steaming you can hear "choot choot choot".

Q. It is surprising how silent a big thing like a loco and three carriages can be in those circumstances with the steam shut off? (Objected to.)

Q. It sneaks down very silently? (Objected to: question allowed.)

A. I think it would come down silently. That is all I can say about that.

Q. You told us before that you had never seen the gate open at this 10 crossing? A. Never.

Q. Did you see it open this very day of the accident? A. No.

Q. Not even on that day? A. Not on that day.

Q. After this accident, you noticed yourself that the trees were all lopped, cut down around about this crossing? (Objected to: question allowed.)

Q. You noticed that, did you? A. As far as my memory is concerned, they were not lopped.

Q. Did you notice that the gate was closed and locked with a padlock and chain? A. No, I did not notice whether they were locked or open or 20 what it was. I say I had never seen it open.

Q. I am speaking of after the accident. Did you notice after this accident they closed and locked the gates with a chain and padlock? A. I never went on that line after, since—

Q. It was your last run? A. It would be just about the last run on that trip. I was a flexibility driver at that time, working both steam and electrics.

Q. Without worrying about the details, you never went up the line again as an engine driver or fireman? A. Not that I can remember.

RE-EXAMINED

30

Mr. MILLER: Q. You were asked questions about what you did after you saw this vehicle at the crossing and you mentioned something about your back, you turned towards your controls? A. That is right.

Q. That means your back would be towards the window? A. That is right.

Q. You then attended to the application of your brakes and reversing screw and so on? A. That is right.

Q. From your experience, from the time when you saw something and then reacted to it and did something, did some period of time elapse before the brakes began to take up a grip on the shoes? (Objected to.) 40

Mr. MILLER: I ask Your Honor's leave to ask this.

HIS HONOR: Yes.

Mr. MILLER: Q. What was your experience about that? A. It would not be possible for the brakes—

Q. Tell us about your experience. You see something on the line ahead and then you apply your brake. Did some time elapse between you seeing it and you doing something and then between that and the brake shoe taking up on the wheel of the car? A. A very hard thing to say. You would see something, you would get a shock and you would be doing what you could. I do not say that I could notice anything take place, only see what would occur.

Q. What period of time would elapse from the time you see something and do something on the brakes—does some period elapse? A. It must be a few seconds. It would have to be.

Q. From the time you applied your Westinghouse handle until the brake shoes began to work on the wheels—? A. Before the brake took effect, it would be a couple of seconds elapse there.

Q. You get a lapse? A. You must do.

Q. Then it would take some time to go through the motions of turning this reversing screw the number of times you mentioned? A. Yes, a good way to put it would be that with a car brake you put it on immediately but with the other one you have to empty your train pipe out and it empties air from the auxiliary reservoir into your brake cylinder, so all that must take time. I have not studied it to see how long.

Q. You did mention yesterday about the time you left Carlingford. Have you thought about that since, as to what time this train left Carlingford that morning? A. It could have been later.

Q. What was the actual time of departure? A. I think I said 5.7 yesterday morning. I think it might have been 5.17. It is a long time ago.

Q. It was according to the timetable? A. Yes.

Q. You were asked about trees in this area. Were there trees at that place growing outside the line of the Commissioner's fence? A. Yes, there is a big avenue, like going down an avenue of trees.

Q. Were the trees both inside the fence and outside the fence? Where were they? A. Alongside the line, inside or out I have just forgotten—right along the line.

Mr. PILE: Q. When you put your Westinghouse brake on you have maximum braking power exerted, a flick of the wrist? A. As much as you can get.

Q. A flick of the wrist? A. Straight round like that.

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tion.

Q. What does the wheel do to that? A. You put it in reverse gear and you can make an effort to drive your engine the opposite direction. It is not a usual practice. It is only an emergency practice, something you would do in case of urgency.

Q. The Westinghouse brake by one turn of the wrist is capable of exerting maximum braking power and stopping the engine? A. Maximum power.

(Witness retired.)

Evidence of Alan James Woolner

EXAMINED

10

To Mr. MILLER: My full name is Alan James Woolner. I live at Lane Cove.

Q. Are you the Senior Estates Officer and Valuer for the Commissioner for Railways? A. Yes.

Q. I think you have been in the Railway Department for some 33 years? A. Yes.

Q. You qualified through the Engineering Survey Draughtsmen Office? A. That is right.

Q. Is it part of your duty and has it been for some years to investigate the status of level crossings? A. That is correct. 20

Q. And examining original plans and proclaimed plans for railways? A. That is so.

Q. Examining Parish maps of lands? A. That is so.

Q. That includes examination of such maps of various places wherever it may be seen, such as the Lands Department, Registrar-General's Department, deposited plans and so on? A. That is correct.

Q. Wherever the relevant documents might be. Is that so? A. That is correct.

Q. As part of your official duties you have the control of the records of the Commissioner relating to all the real estate owned and occupied by the Railway Department? A. That is so. 30

Q. And the records relating to classification of land for the Commissioner? A. Yes.

Q. You have also control of the records relating to the status of level crossings? A. Yes.

Q. You have yourself made surveys and investigations in the various departments and with your own documents with respect to the status of this particular level crossing, Walters Crossing? A. That is correct.

Q. You have been able to trace the position with respect to it? A. That is so.

Q. Have you also under your control the gazettals and records relating to the gazettals of public level crossings? A. I would not say we have a complete record in that regard but we have access elsewhere.

Mr. PILE: I do not raise any dispute about the nature of this crossing. My friend says the Act provided originally for a private crossing and it was taken over by the Commissioner. There is no dispute about that. I understood from what my friend has said that it was initially placed there to afford
10 access, for the private accommodation of Walters initially. We do not take issue with regard to this.

HIS HONOR: A private accommodation crossing for Walters and his assigns—would you agree with that description—in 1893?

Mr. PILE: Yes.

Mr. MILLER: The relevant crossing was an accommodation works; that is the way it is used, within the meaning of s. 7 of Simpson's Railway Act of 1893.

Mr. PILE: I feel I can make this admission but I would like to look at s. 7 to see what I am admitting.

20 Mr. MILLER: Q. Since the construction of Simpson's railway line is the fact that right up to the present time this crossing was never gazetted as a public crossing? A. That is so.

Mr. MILLER: I tender the document which was referred to in the evidence of Mr. Holden which is m.f.i. "1", the plan.

(Above document marked Exhibit "3".)

(Witness taken to demonstrate to jury.)

Q. Just refreshing your recollection, this is the particular place. (Exhibit "3" shown to witness.) And there is Walters' here on this strip sketch. This particular plan of this section, do these serrated lines running
30 along parallel—what do they represent? A. They represent the boundaries of a piece of land defined as an access road prior to the time of construction of the railway.

Q. There was what is called a Crown subdivision? A. A Crown subdivision road.

Q. That is shown on the older documents? A. Yes.

HIS HONOR: That is the land shaded grey.

Mr. MILLER: Q. At this particular place the railway line is only shown by the one line. It means the two tracks down there? A. That is right.

Q. The boundaries of the Commission's land are the lines running on
40 either side? A. The green edging from there.

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tion.*

Q. Of course, it includes the land beyond both ends of the green edging?

HIS HONOR: That is plain enough.

Mr. MILLER: Q. You see this little triangle here and it is the same triangle as shown on the larger Housing Commission plan. Tell us about that triangle? A. That was a piece of that original area of undedicated land that was left after the railway was constructed over the original road and some of the adjoining land. For the purpose of constructing the railway, it was necessary to re-establish a road in another position and it was re-established in the position shown coloured brown there.

Q. Now known and for many years known as Adderton Road? A. 10
Yes.

Q. You say this was known as Walters' and was always a private accommodation crossing, and the area of land shown by the triangle with two shades, pink and the bottom side which appears to be green at the base, that was an area of land which was part of the old subdivisional road and just left like that after the construction of the line? A. That is so.

Q. Did that triangle ever become a public road or a road of any kind?
A. No.

Q. The plan then shows its position relative to this place called Walters' Crossing? A. That is correct. 20

Q. On the bottom side of the plan is shown the various areas which were resumed at some time by the Housing Commission and on which the work shown in this large plan Exhibit "3"—? A. That is correct.

HIS HONOR: It should be noted that the base of the triangle is towards the top of the plan.

(Sketch of line tendered and marked Exhibit "4".)

Mr. MILLER: Q. Of course, the Crown subdivision road becomes a public road when it is declared on gazettal and notification under the Public Roads Act 1902? A. That is the general way.

Q. This has never been declared a public road? A. That is so. 30

Mr. PILE: Which road is this?

Mr. MILLER: Q. Where the old Crown subdivision road was? A. That is correct.

Q. That includes, of course, the triangle you referred to in Exhibit "3"?
A. That is so.

Q. You are able to tell us, with respect to the railways, as at round about the time of this injury to Mr. Quinlan there were a large number of what are called private accommodation crossings in the New South Wales Railways? A. That is correct. (Objected to: question allowed.)

Q. Were there about 3,479 private level crossings round about that 40
time? A. That is correct.

Q. I think in all there were some 6,321 crossings? (Objected to.)

Mr. PILE: I submit it is immaterial but Your Honor is against me on that, but it may not be within this witness' personal knowledge.

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Mr. MILLER: Q. These matters, have you done something for the purpose of ascertaining the details? A. There have been numerous occasions in which I have been required to deal with the general desire of the Commissioner to eliminate level crossings wherever possible. In 1937 I was dealing specifically with the problem of eliminating private level crossings. Practically at periodical times ever since then the question of elimination of
10 crossings and trying to reduce the number of crossings has been with me for attention.

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tion.

Q. What about the time of this accident? What was the total number of crossings? A. I have notes in that regard if I may refer to them.

HIS HONOR: You may refer to them.

WITNESS: There were 6,321 in the State.

Mr. MILLER: Q. In an area of how many miles of road? A. 6,108.

Q. In some of those level crossings were there a certain number where the Commissioner had gatekeepers in charge? (Objected to.)

Mr. PILE: The second objection I would raise to this, if this were a case
20 which did not affect what is virtually a monopoly, my friend would be clearly entitled to say, "Well, the whole of industry takes these sorts of precautions in relation to this type of situation" and the common practice in the trade would afford some evidence, but of course that is not the system at all. All the defendant is going to do is to say what they do about it.

Mr. MILLER: I gather from what my friend just said that he does not claim that we should have any such arrangement as flashing lights and so on at this crossing. Is that so?

Mr. PILE: I am not bound to answer your question.

Mr. MILLER: Q. Would you tell us a little more about level crossings? You have a certain number where the Commissioner keeps gatekeepers in
30 charge? A. That is so.

Q. They are public crossings? A. Yes.

Q. Are they at busy places? A. Well, frequently—— (Question rejected.)

HIS HONOR: Surely these are the limits that I mentioned, that you can distinguish between an A. kind of crossing and a B. kind of crossing.

Mr. MILLER: Q. Did you tell us how many private crossings there were? I think you did say the total number? A. There are 3,479.

Q. The precautions with respect to private level crossings as compared with public crossings—— (Objected to; question allowed.) A. With
40 private level crossings, in the first place it depends on whether the railway

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has a fenced line or not. We are dealing with a fenced railway in this particular case, and in that case the precaution would be the provision of gates which were under the control of the Department and the adjoining owner.

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evidence.

Q. Gates of the same type as provided at Walters' private crossing?

A. That is so. I have never actually seen the gates at Walters' crossing.

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Mr. PILE: Would Your Honor ask my friend not to lead?

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tion.

HIS HONOR: You must not lead, Mr. Miller.

Mr. MILLER: Q. Was there ever anywhere near these private crossings flashing lights provided or swinging arms or automatically closing gates? 10

A. No.

Q. Any of those things? A. None, not at any private level crossing.

Q. I presume that the provision of such things does involve a good deal of expenditure of money. (Question rejected.)

Q. You have there with you the Department plan of survey made on this line in connection with its electrification? A. That is so.

Q. I think the plan you have was made in what year? A. 1958. (Objected to; question rejected.)

Q. Has the level, that is to say, the grade and the curve been altered at all since what it was in the steam days? A. The grade has been changed 20 a little.

Q. To what extent? A. We have no exact record of what was there prior to 1958, but the intention was for the grade to be one in 37. (Objected to.)

Q. What was the grade?

HIS HONOR: The witness says he does not know.

Q. Do you know what the grade was in January, 1956? A. I know what the Departmental records were to that effect.

Mr. MILLER: Q. What was it approximately? A. One in 37.

Q. What was the radius of this curve? A. Twelve chains. 30

Q. So that we may follow it, that means if one takes the centre point and a radius of twelve chains that then describes the line of the curve?

A. The centre line between the tracks.

Q. What was the length of the curve? A. The length of the curve was approximately eighteen chains. In that regard I might mention that there is transition curve at either end of it which comes from a railway running straight. It does not immediately commence into a twelve chain curve. It is eased into a twelve chain curve.

Q. That is on both ends? A. That is on both ends.

CROSS-EXAMINED

Mr. PILE: Q. Would I be right if I suggested to you that your historic conspectus of what has happened in the past, looking at the plans and the time, that what does stagger you is the degree of change that has come over the railways in the metropolitan area? A. That is so.

Q. You had a look at this particular section, I suppose, in fact or have you just looked at plans? A. Just looked at plans.

Q. Overall the distance from Carlingford to Telopea is 76 chains? A. I have not checked that but I should think that was pretty well correct.

10 Q. Pretty well the mark?

Mr. MILLER: I will agree to that.

Mr. PILE: Q. Walters' private crossing was at 16.48. I do not understand what this means. Would you tell me what that means? A. Sixteen miles 48 chains is the approximate distance from Central Station to that crossing.

Q. The next crossing towards Clyde would be the Mobbs' private crossing at 16.27? A. I think that is the record. I have not it in front of it.

Q. You gave evidence before? A. Yes, I have copies of that.

20 Q. You have copies of the transcript you gave.

Mr. MILLER: I will admit that. It is 16.27,40 links.

Mr. PILE: Q. I will show you the evidence. Walters' private crossing 16 miles 48 chains, Mobbs' private crossing 16.27? A. That is so.

Q. A difference of 21 chains? A. Yes.

Q. Mobbs' private crossing is the one therefore which is just at Telopea station? A. I have not investigated that crossing.

Q. Can you identify that as being that crossing which is virtually at Telopea?

Mr. MILLER: He says he has not investigated that one.

30 WITNESS: I have not checked any crossing other than the crossing under reference.

Mr. PILE: Q. You had given that evidence. You do not dispute it is true? A. No.

Q. Does not that indicate to you as a man of your familiarity, that indicates a private crossing at Telopea Station? (Answer struck out by direction.)

Mr. PILE: He said this on a previous occasion. I would say the latter part is implicit in it.

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HIS HONOR: Mr. Miller has taken the objection that this witness had not investigated this matter and, if so, I would have to uphold the objection unless you can refer to what he said on a previous occasion. It does not appear in a transcript of evidence.

Mr. PILE: Q. At all events, with your knowledge of the line, both on the site and from plans, can you tell us whether it is the fact that at Telopea there was a crossing in 1956, Mobbs'? A. No, I have not checked anything. I believe there is a crossing there.

HIS HONOR: Q. Do you know? A. No.

Mr. PILE: Q. Would you have any records that relate to that here with you, 10 in Court that could eliminate——? A. I have in Court a copy of the Exhibit that was tendered on the previous case.

Q. Having referred you to that, are you prepared to agree with me that there was at the time a private crossing at Telopea Station? (Objected to: question rejected.)

Q. From the information which you got together from any source you like can you deny that there is a private crossing at Telopea? (Question objected to: question rejected.)

Q. Is this a matter referred to in the local appendix? A. I have the local appendix. 20

HIS HONOR: Q. Is it a matter referred to in that? A. The existence of level crossings, yes.

Mr. PILE: Q. Have you got it there? A. I have it in Court.

Q. Would you verify it for me? Looking at p. 77 you would be able to answer that question for me? A. It records there is a level crossing at——

Mr. MILLER: My friend can tender the page.

Mr. PILE: I do not mind tendering it but I am not asking for the record. I am asking whether it is a fact.

HIS HONOR: If there is a record it ought to be tendered.

Mr. PILE: I tender so much of the record that relates to the crossing at 30 Telopea. I would like to have it read onto the notes.

Mr. MILLER: That is the part from line 40 down on page 88 in the old transcript.

Mr. PILE: I do not seek to tender all that. All I seek to tender is the fact, Mobbs' private crossing, 16.27; Walters' private crossing 16.48. That is what the record says.

Q. That is what my friend wants you to concede.

HIS HONOR: He produced the record.

Mr. MILLER: Q. I was going to ask for the witness to be allowed to go away. I want him to get the records dealing with the crossing at 16.27.

(Witness retired.)

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Woolner.

Cross-
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G.
Chowstow.

Examina-
tion.

Evidence of Gregory Chowstow

EXAMINED

TO Mr. MILLER: My full name is Gregory Chowstow. I live at 385 Wentworth Avenue, Toongabbie.

Q. You are employed by the Commissioner for Railways now as an engine driver. Is that right? A. That is correct.

10 Q. You are attached to which depot? A. Enfield depot.

Q. But in January, 1956, were you a fireman in the employ of the Commissioner and then attached to the Clyde depot? A. That is correct.

Q. Were you the fireman on the engine which was in charge of Mr. Gardiner, engine driver, and which was involved in this impact with a truck on the Carlingford-Clyde line in January, 1956? A. That is correct.

Q. What time had you come on duty—about midnight? A. Yes, 12.07 a.m. we signed on.

Q. On the 5th January? A. Yes.

Q. Were you working on a 20-class locomotive? A. That is correct.

20 Q. When that locomotive—as fireman did you go with the engine driver taking the last train from Clyde to Carlingford in the early morning? A. That is right.

Q. Then at Carlingford did you disengage and leave the carriages and then, with the locomotive, come back along the line, pick up empty trucks. (Objected to: question allowed.) And take them down to Clyde? A. That is correct.

Q. You picked up some other freight cars, brought them back along the line, deposited them at various sidings and ultimately came to Carlingford again? A. That is correct.

30 Q. In the morning, later on, did you join up the three passenger cars? A. Yes.

Q. And prepare for the first passenger journey from Carlingford to Clyde that morning of the 5th January? A. That is correct.

Q. I want you to come to the position where the train was in the station at Carlingford? A. Yes.

Q. You were all ready to go. Just tell us then what happened? What was done? A. I received the right of way from the guard. He was on my side platform. I blew the whistle.

Q. Who blew the whistle? A. I blew the whistle for right of way.

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tion.

Q. Because you say the guard was on your side? A. On the platform, on the firemans' side.

Q. Is that the normal practice when the fireman is on the side where the guard is? A. Yes, that is the fireman's duty, yes.

Q. If I might picture you going along, you were on the left side of the line going towards Telopea? A. That is correct.

Q. The fireman on the right side? A. The driver on the right side.

Q. Did the train then get under way? A. The train got under way. About a quarter of a mile away from Carlingford the driver blew the whistle again and then I saw him applying the Westinghouse brakes and reversing the screw. I went for my handbrake. I thought there must be something on the line. 10

Q. It does not matter what you thought. At the time just before he did that, what pace was the train travelling at approximately? A. What speed do you mean? About 25 miles an hour.

Q. Had you been along that line previously to that morning on other occasions? A. Yes.

Q. That morning was it running any different to what it had on other occasions? A. No, the same speed, more or less drifting down the hill.

Q. Did you feel something yourself or hear something? A. I felt a sort of bump. Then we drifted further and we stopped. 20

Q. At the time when you mentioned about the driver doing something with the lever of the Westinghouse, which way were you facing at that time? A. Facing towards Clyde.

Q. You yourself personally, what were you doing? A. I was observing gauges, the steam gauges.

Q. Which way were you facing yourself? A. More or less sitting on the seat of the engine facing to Clyde and observing the gauges. I had to turn to my right and I see the driver.

Q. What were you actually yourself doing at the time when the driver applied the Westinghouse brake? A. I applied my handbrakes. 30

Q. What were you doing when he did that? Which way were you looking?

HIS HONOR: Has not the witness said that he was looking towards Clyde and then demonstrated his head was on one side looking at the gauges?

Mr. MILLER: Q. You say the train came to a stop? A. That is correct.

Q. Had you yourself seen the truck before impact? A. No. I did not. It is not possible on my side to see it.

Q. Did you yourself measure the distance in which the train came to a stop beyond this crossing? A. I did not measure. 40

Q. In the functioning of the engine that morning during the time it was being worked, how was it working? A. It was in a good working order. As far as the fireman, it was easy to fire this engine, brand new out of the workshops.

Q. It had recently been maintained? A. Reconditioned.

Q. You say it was in good working order? A. Yes.

Q. Nothing unusual about it in any way? A. No, nothing was unusual.

Q. Over what period approximately had you been, at different times, working as a fireman along that line before this accident—over what period? A. Approximately about six years.

Q. You know the place known as Walters' private crossing where this impact occurred, do you? A. I do not know Walters, but I know it is a private crossing.

Q. You knew the place? A. A private crossing, yes.

Q. We know that it had gates. Can you tell us with respect to those gates, when you went along there at other times prior to the accident, had you ever seen anyone using the crossing? A. Never ever saw anyone using the crossing.

Q. Had you ever seen any vehicle either approaching the crossing or leaving it? A. Never seen any vehicle.

Q. Had you ever seen the gates open? A. I never saw the gates open.

20 Q. Did you know of any notice on a post, a piece of fibro pointing to or mentioning the name "Stewart's job" at all? A. I do not know.

Q. You did not? A. I did not.

Q. You have had experience, have you, not merely as a fireman but since you have been a driver, of driving this sort of locomotive, this class 20? A. I have, yes.

Q. Of applying the Westinghouse brake and reversing the screw. Have you had experience of that? A. I had experience, yes.

Q. From your observation of what occurred that morning, was there anything further that the driver could have done to bring this train to a stop? A. He could not possibly do anything further.

30 Q. As far as you could see did he act as quickly as he could? A. As quickly as he could.

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Mr. PILE: Q. What were your duties on the train as it was coming down that slope? A. As a fireman.

Q. What did that mean you had to do? A. I have to put a fire when required.

Q. When was that being done? A. Down at Carlingford.

Q. That was not being done as you drifted down? A. No, did not want to fire.

40 Q. What were you doing? A. Observing gauges.

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Q. You do not suggest that you have just to sit there and glare at these three gauges in the engine all the time, do you? A. The water gauge, very important to the boiler, the steam gauge.

Q. The steam gauge, and what is the other one? A. The water gauge.

Q. What is the engine driver there for? A. Driving the engine.

Q. Is he not to watch the gauges? A. A fireman has to watch at the same time.

Q. You told us you got the train moving out at Carlingford and it was then fired. That is right? A. I did not fire it.

Q. It then was fired. You did not have to do anything else? A. I 10 put the fire on before we left, yes.

Q. The train got under way and then, what I am putting to you is there was nothing for you to do so far as the management of the engine was concerned? A. Not as far as the engine itself.

Q. Your duty was to keep a lookout? A. A lookout, yes.

Q. There is no doubt about that? A. At the same time you are observing the gauge and you look out.

Q. But the gauge does not call for constant watching all the time? A. Yes, but even though you still have to watch them, how they perform.

Q. These gauges normally remain constant for miles and miles and 20 you have a glance every few minutes; that is quite sufficient? (Objected to.)

Q. I am suggesting to you that for a long time the gauge remains constant unless something goes wrong and all that is necessary is that you have an occasional glance at it. Is that right? A. Yes.

Q. But you know that you have to keep a vigilant lookout on the track? A. That is correct.

Q. You were not doing it this day? A. I was looking at the line.

Q. There was nothing wrong with the gauge? A. Nothing wrong.

Q. It was perfectly normal? A. It was good.

Q. The same all the way along until the impact as it had been at Car- 30 lingford, was it not? A. The gauge was good, yes.

Q. You have told us that as you came down you got under way and then the train was drifting downhill. That was the phrase you used? A. That is correct.

Q. What does that mean? A. You are not steaming.

Q. That means that no steam was being used to drive the train? A. That is correct.

Q. It means there were no brakes on and it was simply rolling because there was an incline? A. A down hill.

Q. Just rolling downhill? A. That is correct. 40

Q. It does that without making hardly a noise? A. Yes, that is correct.

Q. Then you suggest, do you, that you saw—what happened next?
 A. I see the driver applying his Westinghouse brake and reversing his screw and I put my handbrakes on.

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Q. After that you say there was a bump? A. A bump, yes.

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Q. Would it be wrong if I suggested to you that the first thing that happened was the bump? A. No, it was not like this, no.

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Q. Do you remember giving evidence a little while ago, and you said then "I felt the bump and the train drifted further and then stopped"?

Cross-
 examination.

A. That is correct.

10 Q. You have told us what drifting meant? A. Yes.

Q. Is not that a description of the train bumping something when it was drifting, drifting on and then the brakes being applied? A. When the brakes are applied it is still going some distance.

Q. With the emergency brake hard on and the screw exerted and your handbrake still going on? A. It still goes a certain distance.

Q. It goes, but it does not drift? A. It does not drift, but moving.

Q. "Drift" is the word you used after "bump"? A. It is moving a certain distance.

20 Q. It is your duty always to keep a proper lookout when you are not doing something else? A. That is correct.

Q. The same duty on the driver? A. That is correct.

Q. You act as the driver's eyes on the other side of the train? A. That is correct.

Q. He uses his own eyes on his side of the train. Is that right? A. Yes.

Q. Are you quite certain that the first you knew of this collision was when it happened? A. After I knew any collision—

30 Q. What I am putting to you is that the first thing that struck you was not noticing the brakes going on but having a bump? A. No, not as the brake was going on.

Q. You say you saw the brake being applied? A. Yes.

Q. You say you began to put your emergency brake on? A. Handbrakes.

Q. Some distance elapsed then before the bump. Is that right? A. That is correct.

Q. You never looked out the front to see what it was? A. I looked out the front but I could not see it.

Q. You looked out the front but saw nothing? A. I could not see anything on that side, could not see on my side.

40 Q. You were on the left side? A. On the left hand side.

Q. The train was travelling backwards? A. Bunker first.

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Q. What was there to prevent you having a good view? A. I only saw on the left hand side. I cannot see it on the right hand side.

Q. You say that quite seriously, that you could not see something right on the line? A. I could not see it on my side, and I was hanging onto the handbrakes.

Q. I thought you were watching the gauge? A. Watching the gauges and putting the handbrakes on and I was hanging onto the handbrakes.

Q. You remember you gave evidence before? A. That is correct.

Q. Would you agree that this is what you said on this matter before, "Just tell us in your own words what occurred" and did you say this, "After we had started from Carlingford, we went down about one quarter of a mile and the driver blew the whistle for the—before the Telopea private crossing and next thing I heard a bump and I could hear the driver apply the brake and I applied my brake". Did you swear that before when you were asked to say what happened? Would you like me to read it again? A. When I see the brake applied before we hit—

Q. Would you agree that this is what you said? Would you like to look at it? A. No, I believe you.

Q. You agree that that is what you swore last time? A. Yes.

Q. I think the first question asked of you in cross-examination, "You put yours on after the bump", meaning your brake and you said, "Yes, that is right"? A. I put my handbrake—

Q. This is what you said. Was this question asked of you, "You put yours on after the bump", meaning the handbrake and your answer was "Yes". Would you like to read it? If you do not remember you can tell us. A. I can remember but I put my handbrake on at the same time as the driver.

Q. (Transcript shown to witness.) I suggest there were two things you said about this subject. The first one was what I read before, "After we started from Carlingford we went one quarter of a mile and the driver blew the whistle for Telopea crossing and next thing I heard a bump and I can hear the driver applying the brake and I applied my brake"? A. I heard him apply the brake before.

Q. That is what you said? A. I must have.

Q. You do not dispute that. You also said you put your brake on after the bump? A. That must be right.

Q. Was it not correct, was it not true? (Objected to.)

Q. The question is whether what you swore then was true or not? (Objected to; question allowed.)

HIS HONOR: Q. You were asked what you said on a previous occasion. Do you appreciate that? A. Yes.

Q. Mr. Pile, cross-examining counsel, has read to you and pointed out to you on the transcript what you said? A. Yes.

Q. Do you appreciate that? A. Yes.

Q. Now Mr. Pile has asked this question, is what you said on the previous occasion true or not? A. Well, what I am saying now is true.

Mr. PILE: Q. What you said on the previous occasion was false? (Objected to.)

Mr. MILLER: If Your Honour looks at the transcript, he is not necessarily purporting to state them in the order in which they occurred.

HIS HONOR: I must look at the form of the question. What he did say was, "The next thing I heard" not "the next thing I did". He might have
10 done something between those two periods of time. I think in those circumstances I should uphold the objection.

Mr. PILE: That is not really the point. He told us here that what he did see first was the man putting the brake on and what I have read to him as his previous evidence is that he first heard something and then he saw the man apply the brake. I will not make any further reference to it.

Q. When this whistle went, what kind of a whistle was it? A. Do you mean for the right of way?

Q. This one you said was a quarter of a mile out of Carlingford?
A. A long blast.

20 Q. How long? A. I did not count how long, just ordinary, three or four seconds.

Q. From what you say, you have had in all, your experience on that line, some several years. How many years in all? A. About ten years now.

Q. Up to the time of the accident, five years? A. Yes.

Q. Five years going up and down at different times at any old time of the day or any old time when the service operated and you never saw a single person or vehicle use the crossing? A. Never ever saw it.

Q. Never saw a car approaching or a truck approaching or leaving it?
30 A. No.

Q. Never saw the gate open? A. Never saw it open.

Q. Did you ever see buildings going up on the left side of the line?
A. I did, yes.

Q. Never seen any trucks at them? A. Never seen them going past the crossing.

Q. You saw trucks at the buildings themselves? A. At buildings down the bottom, the gully. I saw them round the houses.

Q. I am talking about the houses right beside the Walters' crossing, adjacent to the left side? A. No, I did not see them.

40 Q. Never saw any trucks there? A. No.

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Q. Did you notice that on these gates there was a square plate or oblong plate about fifteen inches by twelve inches, "Beware of Trains" at this crossing? A. I do not know.

Q. You did not notice that? A. No.

Q. Did not notice there was even a notice there? A. No, I did not.

Q. Are you not supposed to keep a vigilant lookout throughout the whole course of the length you are using on the railway line except when you are occupied with something else? A. Yes, but I could not notice it. It is not written for us to read.

Q. You said you did not even notice there was a notice? A. No, I 10 cannot remember seeing any notice.

Q. You knew there was a crossing there? A. I knew there was a crossing there.

Q. Did you see a plate that might have been a notice plate? A. No, I did not.

Q. There is one on either side of the line there at this crossing? A. There might have been.

Q. You do not know? A. I do not know.

Q. Have you been waiting around this Court to give evidence since the case began? A. That is correct. 20

Q. You did that for five days before when the case was heard on the previous occasion? A. That is correct.

Q. During that time you have been in company with other railway employees? A. Yes.

Q. Men who have already given evidence? A. No. (Objected to.)

Q. They were there and you were in their company. Is that right? A. I was in the company outside.

Q. I am not suggesting this was wrong, but I suppose on the last occasion when the case was heard and this occasion when the case is coming on for hearing, there has been inevitably some conversation between you 30 about the accident? A. With them there was never any compensation.

Q. Conversation? A. Compensations but——

Q. You have not talked about the case at all? A. We talked before how lucky we all were. That is all about it.

Q. There has been no conversation, you say, about whether you ever saw anybody use this crossing before? A. No, I did not have any compensation with anybody.

Q. Thinking back on it, you are certain you never saw anybody then come onto the crossing? A. I saw a person going on the line near Telopea station. 40

Q. I am not talking about that. A. But near the crossing I never saw anybody go across the crossing.

Q. Never saw anything of a previous occurrence there, an accident on the line? A. I cannot understand the occurrence.

Q. You never saw anything of an accident to an ice truck? A. No, I did not.

Q. That is the first time you have ever heard that suggestion made, is it, when I just made it to you? A. That is correct.

Q. Since this accident have you not been employed in that line or have you been off it? A. Very little at the present time. It is all electrics.

Q. Immediately after the accident back in 1956, after this accident?
10 A. Yes, I have been over the line.

Q. As a fireman? A. Yes, as a fireman still.

Q. Did you notice the gates had been closed off with a padlock and chain? A. They were locked. I do not know how they were locked.

Q. How do you know they were locked at all? A. Closed for the traffic.

Q. But you said they were always closed before? A. Always closed, yes.

Q. There was no difference before and after? A. Yes.

Q. Closed before and after? A. Yes.

20 Q. But you told me a moment ago that you knew they were locked after. (Objected to.) A. Closed I mean.

Q. You told me that after the accident you knew that these gates were locked with a chain? A. Yes.

Q. You did say "locked" did you? A. I might have used that word.

Q. How do you know they were locked? A. They were closed for the traffic like. That is how I saw them all the time.

Q. Were they locked after the accident? A. I do not know either locked or not, but they were closed.

30 Q. You were going up and down there for about three years, weren't you? A. Yes.

Q. The gate you are speaking about, of course, would always be the gate on your side? A. It is the gate on both sides.

Q. You have to watch both gates? A. No, one side.

Q. You would be on different sides according to which way your engine was pointing on various occasions? A. No, not on this line. The fireman on this line was always on the same side.

Q. You would be on the left? A. On the right going up, on the left going back from Carlingford.

40 Q. I suggest to you that gate was almost invariably open on your side at the crossing? A. No, I never ever seen them open.

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tion.

Mr. MILLER: Q. There is no turntable at Carlingford? A. No.

Q. The engine went up to Carlingford— A. Engine first.

Q. And had to come back—? A. Bunker first.

Q. This particular curve you were asked about, of course, prior to this crossing was a curve going to the right? A. Going to the right looking from Carlingford.

Q. That is what you call a right hand curve? A. That is correct.

Q. That means a curve going to the right? A. Going away to the right. 10

Q. In your position you would be really on the outside of the curve?
A. Yes, outside the curve.

Q. One of your duties was to keep a proper level of the boilers? A.
That is correct.

Q. You see what the water level is by looking at the gauges? A. That
is correct.

(Witness retired)

Evidence of Frederick William Arthur Tunks

EXAMINED

TO Mr. MILLER: My full name is Frederick William Arthur Tunks. I 20
reside at 1 Wollongong Road, Arncliffe.

Q. Are you an officer in the employ of the Commissioner for Railways?
A. I am.

Q. Have you been so employed for many years? A. 39.

Q. As such officer did you receive a letter from L. A. Stewart Co. Ltd.
addressed to the Secretary for Railways, the letter being dated 1st December,
1955, of which that is a copy? (Shown to witness.) A. Yes.

Mr. MILLER: The original has been lost in the office. It has been agreed
that we can use a copy.

Q. Was it your duty to deal with the matter contained in that applica- 30
tion? A. It was.

Q. We know that an accident occurred at the crossing on 5th January,
1956. Was permission asked for in the letter ever granted? A. No.

(Above copy letter tendered and marked Exhibit "5".)

CROSS-EXAMINED

Mr. PILE: Q. You also received a letter of the same day from the Housing Commission? A. I have recollections of receiving a letter from the Housing Commission.

Q. I am showing you the letter m.f.i. "10". Is that the letter you received on the 1st December, 1955? A. Yes, it looks like it. It is the letter.

Q. Your answer was made to that on some date in 1959? A. That is correct. (Objected to; evidence rejected.)

10 Mr. PILE: I tender the letters m.f.i. "10".

HIS HONOR: For the same reasons, I must reject it.

Mr. PILE: Q. At all events, there was no reply made to that letter by the 5th January, 1956? (Objected to.)

HIS HONOR: Taking into account that only part of that letter has been admitted, I must uphold the objection.

Mr. PILE: My submission is that that letter was written for some purpose. The Housing Commission would not have written a letter unless it desired to have the Commissioner know something and it was a letter which required reply. I submit it is material whether they ever thought it worth while
20 of reply at the same time or for years.

Mr. MILLER: I tender this copy letter relative to the triangle of land. (Objection to tender; admissibility argued.)

HIS HONOR: I uphold the objection, not on the ground that it is irrelevant—I think it is relevant—but you will have to prove the letter now.

Mr. MILLER: I will mention it again to my friend, Your Honor. It takes a bit of time to get people here and I want to avoid that if I can. (Counsel conferred.)

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Cross-
examina-
tion.

R. L.
Marshall.

Examina-
tion.

Evidence of Richard Lennox Marshall

EXAMINED

30 Mr. MILLER: Q. What is your full name please? A. Richard Lennox Marshall.

Q. And where do you live? A. I reside at 17 Willoughby Street, East Guildford.

Q. And you are in the employ of the Commissioner for Railways, are you? A. Yes.

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Marshall.

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tion.

Q. And you were employed in January, 1956, is that right? A. Yes.

Q. And had been employed for some years prior to that? A. Yes.

Q. And in that month were you employed as a guard? A. Yes.

Q. And were you the guard on the train which left Carlingford at 5.17 on the morning of 5th January, 1956? A. I was.

Q. And which was involved in this impact with the truck driven by Mr. Quinlan? A. Yes.

Q. I don't want to go through all the earlier details except to get this from you briefly. Had you come on with the engine crew at the same time earlier that morning? A. Yes.

10

Q. At Clyde? A. Yes.

Q. And you had been with the crew taking the last train up to Carlingford on the previous midnight or thereabouts? A. Yes.

Q. And had you participated in the various movements of vehicles of a freight nature between Carlingford and Clyde during the early hours of that morning? A. Yes.

Q. And had you then been the guard on the train for passengers made up and ready to leave Carlingford at 5.17 that morning? A. Yes.

Q. And your particular position in the train was where? A. At the rear of the train.

20

Q. Did you have a separate guard's van or was it part of the passengers' car? A. It is a part of the passenger car.

Q. A little compartment at the end of the car? A. Yes.

Q. Would you tell us, please, that morning what time did the train leave Carlingford? A. We left at 5.17 a.m.

Q. And it was your duty, was it not, to give the train crew the right-of-way? Yes.

Q. And did you do so at that time, 5.17? A. At 5.17, yes.

Q. And having given the train crew the right-of-way what then happened, would you tell us please? A. I gave the right-of-way to the driver and he blew the whistle and we departed on our way to Telopea.

30

Q. Now, that whistle, was that blown as a normal thing in your experience? A. Yes, as a normal thing.

Q. And what sort of whistle was it? A. Oh, it was what you would call loud; a loud whistle on that engine.

Q. What sort of morning was it? A. Very fine. Very fine morning.

Q. Would you tell us then after that what happened to the train? What was done? A. Well, the train proceeded in a normal manner to Telopea.

Q. In running along would you tell us approximately what speed it travelled at? A. Oh, it would be approximately, I should say, something like 25 miles an hour.

40

Q. Did you notice anything unusual about the speed of the train or the movement of it? A. No, nothing unusual.

Q. Came a time, we know, when an impact occurred at Walters' Private Crossing? A. Yes.

Q. What was the first that came to your attention? A. Well, the first indication I received of the accident was just prior to it, the driver sounded the whistle and a short time afterwards he made an application of the air brakes and—

Q. Pausing there, how did an application of the air brakes come to your
10 notice? What happened so far as the train and you were concerned?
A. Well, I heard the brakes applied and then a short time after that the noise of the impact.

Q. Did you yourself see anything of the impact? A. No, I didn't see anything.

Q. Do you recall on which side of the train you were in, travelling down there towards Teloepa? A. Yes. I would be on the right-hand side of the train.

Q. As the train was proceeding? A. Yes.

Q. And you remember what actually you were doing during the course
20 of the journey from Carlingford to Walters' Crossing? A. Well I just more or less sat down in my seat.

Q. Sat down in the guard's seat in the compartment? A. In the compartment, yes.

Q. I take it you were not leaning out of the window during that journey?
A. No.

Q. We know the train came to a halt at a point on the Teloepa side of the crossing; we know that. Is that right? A. Yes.

Q. Did you yourself make any measurements of what the distance was?
A. No, I didn't make any measurements.

30 Q. You mentioned about the whistle blown after the train had left Carlingford and before the impact. What sort of whistle was that, from your observation? A. Just an ordinary whistle blast.

Q. And you were able to hear it, were you, in the guard's van? A. Yes, I was able to hear it.

Q. Had you been guard on trains travelling over that Clyde-Carlingford line on occasions before this accident? A. Well, I was a permanent guard there for about four or five years.

Q. How long? A. About four or five years.

Q. Four or five years before the accident? A. Yes, before the
40 accident.

Q. I suppose you were on different shifts, were you? A. Yes.

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Q. Now, on your experience in running there—we know the distance from Carlingford was 76 chains to Telopea, and what was the time the train usually took, in your experience, leaving at 5.17, until it pulled up in Telopea?
A. Well, it would be the table time, 2½ minutes.

Q. And from the progress of the train that morning, as far as you observed it before the accident, would you be expecting the train to be on its scheduled time at Telopea?
A. On its scheduled time at Telopea, yes.

Q. Which, I gather, was something about 5.20 or thereabouts?
A. Yes.

Q. At Telopea?
A. Yes. 10

Q. Would you tell us, please, this particular place which we know as Walters' Crossing, had you ever seen that used by anyone before the impact?
A. No, I had never seen anyone actually using it, no.

Q. Had you ever seen any vehicle approaching it or leaving it?
A. No.

Q. Had you ever seen the gates open there?
A. I had never noticed them open, no.

CROSS-EXAMINED

Mr. PILE: Q. Does that apply to the gate on both sides of the line?
A. On both sides of the line, yes. 20

Q. Never known them to be open?
A. I have never noticed them open, no.

Q. I suppose you must have wondered from time to time what on earth the gates were there for? Never saw anybody use them on one single occasion in four years?
A. That is right.

Q. You told us that when the train left Carlingford it sounded a whistle?
A. Yes.

Q. What was the point of that?
A. Just normal working.

Q. There was nobody on the platform that you wanted to hurry up or anything? In fact, I don't think you had a passenger, did you?
A. I 30 didn't notice any passengers at Carlingford.

Q. May we take it from that, being guard, that there weren't any passengers?
A. Oh, there could have been. I don't recall any passengers being at Carlingford.

Q. Anyway, there was a blast of the whistle and it went off?
A. The train moved off, yes.

Q. And you next remember, do you, a blast of the whistle which you called an ordinary blast?
A. Yes; similar more or less to the one I have already mentioned, the one leaving the platform.

Q. Whichever that was, that was the same thing; a toot, was it?
A. One 40 toot and we are off; that type of thing?
A. It would be about two seconds, I suppose.

Q. At no time in the course of that journey did you hear a blast which kept up while the train travelled something like 50 or 100 yards?
A. No, I wouldn't say that.

Q. Then you say, do you, that the first indication you had of the impact at the crossing was an application of the air brakes which you heard; is that right? A. Or felt.

Q. Well, you did say, I think—did you say “felt”? I thought you said you heard the brakes applied. You want to say “felt”, do you? A. Yes, I think you would say “felt”.

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examination.

10 Q. Would you agree with this, that down an incline at 25 miles an hour an application of the emergency Westinghouse full-on would throw you off your feet? A. Well, no, I don't think it would do that.

Q. You don't think it would? A. I don't think so, no.

Q. From just running, a sudden application of the air brake as hard as they will go, wouldn't that jerk you off your feet? A. I think they can only get a certain amount of pressure into the brake cylinder.

Q. Don't worry about the theory. I am wondering about your experience. Have you never been thrown off your feet when the emergency brake went on? A. No.

20 Q. You are quite certain it wasn't the collision first and then the brakes after? A. No, no, it wasn't that.

Q. Did you know that there had been a collision before the train was brought to a halt? A. No, I did not.

Q. So you didn't know the collision was occurring at all? What you felt you thought at the time was due to the air brake? A. That is right, Yes.

Q. Therefore you don't really know whether it went on before the impact or after. It follows, doesn't it? A. The feeling of the brakes being on is not like—the impact I heard. I felt no—I didn't feel it.

30 Q. Mr. Marshall, you live at what street in Guildford? A. Willoughby Street.

Q. Where does Mr. Chowstow live? A. I don't know for sure.

Q. Willoughby Street? A. No.

Q. I thought he lived in your street then. He doesn't live in your street? A. No.

Q. Your suburb, is it? A. No. Not as far as I know.

Q. Well, so far as this crossing is concerned, you knew of its existence, did you? A. I knew it was there, yes.

Q. You knew it had gates on either side? A. Yes.

40 Q. You knew it had “Beware of Trains” on a notice on either side?
A. Yes, I had seen those.

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tion.

Q. And you knew it had sleepers over it to raise the bed of the track up to the height of the sleepers? A. The sleepers——

Q. Loose sleepers placed between the lines, and across them, in between the spaces, side by side so as to raise the level of the bed up to the height of the sleepers? A. Yes.

Q. And you never saw even on the left side as you go down towards Clyde the gate open on any single occasion? A. No.

Q. Nor the other? A. No.

Q. Ever seen houses going up for the Housing Commission on the left side of the line? A. On the left-hand side, yes; I have seen those 10 under construction.

Q. Ever see any lorries there? A. No.

Q. Ever see any being driven towards it from Adderton Road? A. No.

Q. Or going away? A. No.

(Witness retired.)

Evidence of Sydney Foster

EXAMINED

- Mr. MILLER: Q. Your full name is Sydney Foster? A. Yes. 20
- Q. You live at 54 Cecily Street, Leichhardt? A. Yes.
- Q. And you are now a retired railway officer? A. That is right.
- Q. I think you will be 65 next February? A. Correct.
- Q. But you had been, had you not, prior to retirement, senior sub-inspector in the Department of Railways? A. That is right.
- Q. And prior to that you had been a sub-inspector for a number of years, and prior to that what is called an extra ganger, and then originally, earlier, you had been a ganger? A. That is right.
- Q. You were first appointed a ganger in 1925? A. That is right.
- Q. And you had been either sub-inspector or senior sub-inspector from 1945 up to the time of your retirement? A. Yes. 30
- Q. When did you retire? A. 1st March, 1957.
- Q. As part of your duties prior to your retirement, was the area from Clyde to Carlingford under your control? A. It was.
- Q. Did your duties involve the supervision of the gang responsible for the maintenance of that line? A. That is right.
- Q. Was there a gang so kept by the Commissioner? A. There was.
- Q. How many men were in it? A. A ganger and four to five men.

Q. Where was the gang stationed? A. At the Clyde end of the length.

Q. In your experience was it the practice for the gang to work daily along that line from Clyde to Carlingford? A. It was. They also had that line branching at Camellia down to Sandown. Some days they would be in there.

Q. That is near the Rosehill Racecourse? A. Yes.

Q. Was the ganger of the gang directly responsible to you? A. He was.

10 Q. What was the ganger's duty with respect to the length of line from Clyde to Carlingford? A. His duty was to do the maintenance, examine the length daily, by him or one of his men, and to report any irregularities that he found during that inspection.

Q. Would you repeat that? You dropped your voice? A. His duties was to examine the length and report any irregularities to me that he could not rectify himself, and the days he didn't do it himself he instructed one of the fettleers to examine the line.

Q. When you say examine the length, that means—— A. To walk it and inspect it from end to end.

20 Q. The length of line being approximately what? A. Approximately 5 miles. That is from Clyde to Carlingford.

Q. Apart from him inspecting that way, by examining the length, did you also do certain things yourself, personally? A. I did.

Q. What were those? A. I used to examine the length, some days by train; other days I would walk it.

Q. How frequently did you go over the length? A. Well, I always liked to get over the district once a week, or no less than once a fortnight.

Q. Of course, you had other duties? A. I had other tracks to look after at the time, besides that piece.

30 Q. So tell us now with respect to the crossing which we know as Walters' Private Crossing—you know the one? A. I know the one.

Q. Did you at any time ever see any indication of any use of that crossing by any vehicle or person? A. No.

Mr. PILE: Don't lead, please.

Mr. MILLER: Q. Did you see the gates open? A. No.

Q. Did you ever see any vehicle either coming or going to those gates? A. No, never noticed any.

Q. Or going away from it? A. No.

40 Q. You were aware that some building had begun down in the Dundas Valley building area, were you? A. Yes, I had heard of it.

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tion.

Q. You became aware of that towards the end of 1955? A. At the end of 1955 was when they commenced down there.

Q. Did any activity in connection with that building, such as the movement of trucks or men across this crossing, ever come to your notice?

A. No.

Q. You, of course, heard of the accident to Mr. Quinlan on 5th January, 1956? A. I heard of the accident, yes.

Q. And you did then, after that, take certain steps, is that right? We know that the gates were either that day or the next day then blocked by a chain and padlock? A. The only recollection I have of that, our 10 engineer told the ganger——

Q. You remember the engineer giving certain instructions? A. Yes.

Q. You didn't do it yourself? A. No.

Q. But after that did you see the gates then locked by chain and padlocks?

HIS HONOR: Q. Did you see it? A. No I didn't.

Mr. MILLER: Q. After that? A. No I didn't.

Q. Well, you can take it there is no dispute that they were so padlocked. Now, at that time in the end of 1955, December, and January, 1956, was there a crossing at Telopea station? A. There was, on the Clyde end 20 of the platform.

Q. And was that——

Mr. PILE: Don't lead.

Mr. MILLER: Q. What sort of crossing was that? A. That was a public crossing. (Objected to.)

Q. Just describe it, please? A. There was——

Mr. PILE: Could that be struck out Your Honor?

HIS HONOR: Yes.

Mr. MILLER: I press it, Your Honor.

Mr. PILE: There is no way of telling my friend not to lead: the words are 30 out.

(The following passage of evidence was read from the shorthand notes:

“Now, at that time in the end of 1955, December, and January, 1956, was there a crossing at Telopea station? A. There was, on the Clyde end of the platform.

Q. And was that——

Mr. PILE: Don't lead——

Mr. MILLER: Q. What sort of crossing was that?

HIS HONOR: I will direct that nothing is to be struck out.

Mr. MILLER: Q. And the crossing at Telopea station, would you tell us please, at that crossing what was the extent of view that any person had towards Carlingford and also towards Clyde, approximately? (Objected to: rejected.)

Q. Apart from the crossing at Telopea station there was at that time—I think this is conceded by Mr. Quinlan; there was an overhead bridge at a little further along, and also one at Carlingford.

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10 Mr. PILE: Q. Mr. Foster, you say that as far as you are concerned—I suppose your trips over that line would have been pretty rare, as you had a staff under you; would that be right? A. I had a staff only working in the district.

Q. You had a head ganger and four men or five men? A. Yes.

Q. Who would be doing that length? A. They would be doing the actual maintenance.

Q. They would have to do that length, and as long as they did it there would be no need for you to do it? A. Well, it was my duty to see that they did it.

20 Q. But if they did their duty, then you didn't have to do it yourself because they were doing it for you? A. I would have to make frequent visits along the district to see that they were doing their duty.

Q. Well, I take it you would do that by just making a periodic visitation and seeing whether somebody was, in fact, engaged out on the length, would you? A. That would be correct.

Q. Do you say that you never happened to be there on any occasion when you saw anybody using the crossing? A. No.

Q. But were you never there when you saw the gates left open by somebody? A. Not to my knowledge.

30 Q. Of course, it was your experience as an employee of the Railway Commissioner not only on this length but on many lengths that crossings of this kind were frequently in use? A. There are places where private level crossings are in frequent use.

Q. And that was one of them? A. No.

Q. Well, the regulations required you, and your duty was, not only to peruse the length but to see that your ganger took responsibility for seeing that the gates were kept properly secured except when required to be used? A. That is right. It was his duty.

Q. That is correct, isn't it? A. That is correct.

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Q. And that was one of those places fitted with gates, right? A. Yes.

Q. So that the duty evolved upon the ganger to see that they were kept closed except—and secured properly, except when required to be used?

A. That is right.

Q. You say that it never came to your notice that the crossing was being used at all? A. No.

Q. May I take it from that that you mean that nobody, even in the Department, notified you that that crossing was being used by strangers?

A. It wasn't. I got no notification.

Q. Who is the man immediately superior to you? Is that the engineer? 10
A. The maintenance engineer, Peterson.

Q. It was from him you got instructions to close the gate with a padlock? A. No, he didn't give it to me. He said he would send that out to the ganger.

Q. Well, it was he who told you that measures had been set in foot to close the gates with a padlock and chain, is that right? A. That is right.

Q. But neither he nor any other officer superior to you told you that the crossing had begun to be used by the public at large? A. Never had instructions to that effect.

Q. But if the gates were open, of course, that is something that the 20
ganger would attend to and rectify himself? A. If the gates were left open the ganger would close them when he was examining his length, but he wouldn't see that crossing again very likely until the next day.

Q. I am not suggesting he would close them if he wasn't there—
A. He would close them if they were open when he examined them.

Q. You said you left it to your ganger to tell you about things which he could not personally rectify? A. That is correct.

Q. But if he found a gate open, that would be one of the things he could personally rectify? A. That is right.

Q. Have you been over the line since the accident at all? A. No. 30

Q. You retired—

HIS HONOR: He retired very shortly afterwards.

Mr. PILE: Q. You didn't do that length after the accident? A. I misunderstood you. Did you say that I have been over the line since I retired?

Q. No, since the accident. You perhaps don't know when the accident occurred? A. I know when the accident occurred. Well, I mean I know it occurred. Yes, I was over the line after it occurred, yes. I thought you said was I over the line after I retired.

Q. And were not the trees all cut back and the undergrowth cleared?
A. The which?

Q. The trees cleared, lopped and the undergrowth cleared at the crossing? A. The trees were lopped periodically but I couldn't state when, whether it was before or after.

Q. But after this accident the trees were all lopped back, the undergrowth cut away and the gates locked? A. We were not responsible—

Q. I don't want to stop you— A. I am not responsible for the lopping of the trees.

Q. I realise that. I am not talking about you personally: what you saw? A. And I cannot say whether the trees were lopped after the accident and
10 before I retired, or not.

Q. You can't remember— A. They were lopped when they got up too high for the telephone wires. Could be one year or two years in between.

Q. And you can't remember now what the situation was after the accident? A. Not at the moment.

(Witness retired.)

(Plan and several copy letters tendered. Letters objected to. Objection upheld.)

Mr. PILE: Might I refer to the evidence about which there was some argument before lunch? The witness referred to another crossing. The other
20 crossing is Telopea. Your Honor remembers I made some objection and asked that something be struck out.

I find on consulting the transcript of the evidence, per favour of the shorthand writer, that there was a sentence before the point which was read out in which the last witness said that that crossing was a public crossing. That was the part I asked to have struck out, and I would renew that application. If anything more needs to be said, could we have the witness recalled?

HIS HONOR: Was not the objection taken on the basis that it was a leading question?

30 Mr. PILE: I objected to it on the basis that it would be beyond that witness' competence to express a view about public or private.

HIS HONOR: The ganger?

Mr. PILE: Yes.

HIS HONOR: I do not think I could order that to be struck out.

Mr. PILE: Well, I would like to have the opportunity to ask him a couple of questions on something.

(The witness Foster having been excused from further attendance upon the completion of his evidence, Mr. Miller indicated that an attempt was being made to locate him and have him return
40 to the court.)

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Mr. MILLER: May I respectfully mention again the other matter?

HIS HONOR: Yes.

Mr. MILLER: We looked at it in the adjournment and it is covered by authority.

HIS HONOR: Mr. Miller, I have not rejected it. I have suggested you will have to prove it strictly because your friend has objected to the copy going in.

(Further argument ensued. Decision on admissibility reserved.)

Mr. MILLER: I tender the timetable relevant at the time showing the movements of trains on the Clyde-Carlingford line on the relevant date. I have had extracted an extract showing the times between Carlingford and Telopea. 10 Perhaps my friend might look at it and take the extract rather than the large book.

Mr. PILE: My friend says these are an extract from the book which I have not looked at, and they represent the up timetable but not the down timetable. On his assurance that they conform with the timetable, I do not object.

(Extract from timetable admitted and marked Exhibit 6.)

HIS HONOR: Are you calling any other evidence?

Mr. MILLER: No. I have sent out people to try and get Mr. Foster, but he left the court and has not arrived home yet, as far as we know. That will be my last witness, subject to this other matter. 20

HIS HONOR: I do not propose to hold up the trial, but if Mr. Foster could be brought back tomorrow I would grant you leave then to ask him any necessary questions.

Subject to Mr. Foster being called, and subject to my decision in the other matter, that would be your case?

Mr. MILLER: That is so.

(Further argument ensued on the matter on which His Honor had reserved his decision.)

Evidence of Alan Grant Crawford

EXAMINATION

30

Mr. MILLER: Q. Mr. Crawford, what is your full name? A. Alan Grant Crawford.

Q. And what are you? A. Solicitor.

Q. And in what— A. In the office of the Solicitor for Railways.

Q. And you have been a solicitor there for some years, have you?
A. Yes. I have the conduct of this matter.

Q. You have had the conduct of this matter on behalf of the Commissioner? A. Yes.

Q. Prior to the commencement of this second trial did you have a conversation with someone representing the plaintiff? A. Yes, I had a conversation with Mr. Richard in the office of A. J. Devereux and Co., Solicitor for the plaintiff in this matter.

Q. Was Mr. Richard the person——

HIS HONOR: Q. He is a member of the firm, is he? A. I am unaware whether he is a member of the firm, but I know him to have the conduct of
10 this matter in the office.

Mr. MILLER: Q. Would you tell His Honor what the conversation was with respect to the matter which is at present before the Court? A. I said to Mr. Richard “I don’t know whether you are aware that the original exhibits in this case have been mislaid and cannot be found at the present stage?” He said, “No”.

I said, “Well, I have had inquiries made at the Court on a number of occasions and up to the present time they cannot be located. This raises the question as to what we are to do when this case comes on in respect of those exhibits.” He said that it was the first time he had
20 heard that the original exhibits had been lost.

I said, “Are you prepared to admit copies of the original exhibits?” He said, “Subject to talking to my counsel about it, I am”.

I said, “Now, certain admissions were made in the earlier trial in respect of those exhibits. There were agreements made between counsel and there were a number of witnesses whose attendance became unnecessary because of the agreements between counsel. Do we have to get these witnesses or do we proceed on the same basis as the last trial?” He said “Subject to consulting my counsel in the matter, so far as I am concerned, we proceed on exactly the same basis as in the last trial.”

30 I said, “Therefore I do not have to call those witnesses?” He said “Subject to my counsel, and so far as I am concerned, that is so.”

Q. When did that conversation take place? A. Approximately a fortnight ago. I would have to consult my notes to see when.

Q. And did he ever subsequently tell you that he was not prepared to? A. No. On the morning that this case started, I think the first time I saw Mr. Richard immediately before the commencement of this case, I asked him whether everything was arranged between counsel and he said so far as he was concerned it had.

40 Q. Were you ever informed to the contrary, that it was necessary for you to arrange for the attendance of any witnesses to prove these matters agreed upon at the previous trial? A. No.

Q. Did you proceed on the basis that that agreement still held? (Objected to; pressed; objection upheld.)

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Mr. PILE: Q. The long and the short of it was that on the first interview he said, "I don't mind, but all subject to what my counsel advises"? A. That is so.

Defendant's evidence. Q. The day before the trial started, or the day of the trial, I think you said, you were not informed by him that his counsel had been consulted and agreed one way or the other? A. He said to me, "So far as I am aware it is all right".

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S. Foster. Q. He only told you what his awareness was but he did not give you to understand that the matter would be admitted or not? A. I said to 10 him, "Do I have to call these witnesses?". He said "No".
Cross-
examination.

(Witness retired.)

HIS HONOR: On that evidence I will admit the document.

(His Honor ordered that the document which was Exhibit 1 in the previous proceedings be added to and form part of Exhibit 4 in this action.)

HIS HONOR: That is your case, Mr. Miller?

Mr. MILLER: If Your Honor pleases: of course, subject to Mr. Foster. He is not here yet.

HIS HONOR: Any case in reply? 20

Mr. PILE: No, Your Honor.

Mr. MILLER: I am not certain what is going to be done about Foster.

HIS HONOR: I said I would not delay the hearing but I will give leave for him to be put into the witness box on his arrival.

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Further Evidence of Sydney Foster

CROSS-EXAMINED

HIS HONOR: Q. You are still bound by the oath which you took in this matter? A. Yes.

Mr. PILE: Q. I just want to challenge one thing you said. You know 30 that crossing at Telopea? A. Yes.

Q. Do you remember at the time of the accident—I do not want to know anything about it since—but at the time of the accident—do you remember that? A. I remember it being there.

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Q. Which one were you talking about? A. There was one on the south end of the platform.

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evidence.

Q. The south end of the platform? A. That is on the Clyde end of the platform.

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Q. Right at the station? A. Yes.

Cross-
examination.

Q. Was this for pedestrians? A. Well, it was actually a public level
10 crossing.

Q. You used the word “public”. You are not speaking as of legal status. You are speaking of where people appear to be able to walk across it? A. The point is there are public and private level crossings. The public level crossing is open to all.

Q. I do not want to ask you about its official status because I do not think you would be really competent to tell us that.

HIS HONOR: I think he would. This man has been up and down the line and he can draw a distinction between what is in fact known in the Department as a public crossing and what is a private crossing, known in
20 the Department.

Mr. PILE: Q. People used to walk across the line there? A. Yes, they could walk through there.

Vehicles never did? A. They did, yes. They used that level crossing.

Q. Where did it lead to? A. I just could not say. The only thing I can say is that it led to a property on the eastern side of the railway.

Q. It was not a public road over the railway?

HIS HONOR: Now you used the word “public”.

30 Mr. PILE: Your Honor has said——

HIS HONOR: What I am saying is that this man was a ganger and he was directed to some position in the Railway Department and in the Railway property he would know what is a public crossing and what is a private crossing. Now you are going on to the question of a public road and I would not think that a ganger would know exactly what is meant by a public road.

Mr. PILE: That was not what I asked him. It would be my submission that anybody would know what a road is, that it is open to the public. That is what I was asking him.

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Q. Was it used by the public for vehicles or not? A. It could be, yes. I never saw it being used.

Q. You never saw any vehicles on it? A. I never saw any vehicles on it.

Q. Did it have gates or none? A. It had gates.

Q. They were open or shut? A. They used to close against the traffic crossing the line. They had it opened and shut. They were not permanently open gates. They were gates that had to be shut after use.

Q. I suppose usually they would be shut and people who wanted to use it opened and shut them? A. Yes. 10

Q. Sometimes they shut it if they remembered and sometimes they did not, perhaps? A. Yes.

Mr. MILLER: Q. What was the nature of the surface of the crossing itself? What did it consist of? A. Just built up with ashes on the levels.

Q. And between the lines? A. They had timber along on the inside and outside of the rails to prevent ashes banking up on the rail.

Q. There was no overhead bridge for pedestrians to get to or from Telopea Station? A. No.

Q. There is just the one platform on the western side of the road? 20
A. One platform on the western side.

Q. Was that used by members of the public to go across from that side to the platform and come from the platform to the other side, if they wanted to? A. It could have been used for that purpose but the point is when I was there there was only the one house in that vicinity and I have never seen anybody going across the line.

Q. That is what you were referring to as "that crossing". A. That is correct. Very seldom I was there—

Q. Was that there during all the years you were on that line? A. It was.

(Witness retired.)

30

Mr. MILLER: We have had typed out that by-law for convenience.

Mr. PILE: I would submit it is strictly not admissible and I refer Your Honor to a passage in Richards' case.

Mr. MILLER: I will not worry about it.

(Mr. Miller continued to address the jury.)

(Mr. Pile addressed the jury.)

No. 3**RULING OF HIS HONOR MR. JUSTICE RICHARDSON****On admissibility of documents: p. 78 of transcript record**

HIS HONOR: Mr. Pile seeks to tender Regulation 75 of the General Regulations. That regulation provided with regard to private level crossings that—

10 “they are under the control of the Way and Works Staff, who must make such arrangements as will ensure that any failure on the part of the holders of the Private Crossings to properly secure gates in the closed position after use is detected as promptly as possible . . .”

It seems to me that if there were some evidence in this case that the occupiers of Walters’ cottage had failed to properly secure gates in the closed position after use, then the regulation might be applicable, but in view of the absence of evidence relating to that matter, I feel that the regulation does not apply and I should reject it.

20 Then I am asked to admit an instruction under the heading “Level Crossings” appearing on p. 76 of a book entitled “Department of Railways, New South Wales. Instructions to Station Masters and All Others Concerned”. It is made clear in the paragraph setting forth definitions that this is an appendix to the General Regulations and in my view, this, also, should be rejected.

No. 4**SUMMING-UP OF HIS HONOR MR. JUSTICE RICHARDSON**

30 HIS HONOR: Gentlemen, the facts in this case must be judged by you. The difference between your function and mine is this: I direct you upon the law, and you will please take all directions of law from me as I give them to you, but you are the judges of the facts and you alone. So the verdict in this case, whether for the plaintiff or for the defendant, will depend upon your view of the facts.

The plaintiff is Francis John Quinlan, and he has brought this action against the defendant, the Commissioner for Railways, based in negligence. It does not follow that a plaintiff must receive an award of damages merely because he was involved in an accident on Railway property. In any action which he brings, he must prove negligence in the defendant or his servants. If the servants of the Commissioner were negligent then the Commissioner

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is liable in damages for that negligence. Shortly expressed, negligence means the doing of something which a reasonable and prudent man would not do, or omitting to do something which a reasonable and prudent man would do in like circumstances.

According to the plaintiff he sustained bodily injury when he was involved in a level crossing accident on the 5th January, 1956, when a truck laden with roofing tiles and driven by him was run down by a train hauled by a steam locomotive about 5.20 a.m. The plaintiff had approached the level crossing from the south travelling along a public road known as Adderton Road which, for some distance, ran alongside the railway line on the western side, and, it was his desire and intention to cross the line from west to east so that he might deliver his load of roofing tiles to a building which was then in course of erection. As appears from the photographs which will be with you in the jury room, the approach to the crossing from Adderton Road was over a track which consisted of metal and grass and which led up a slope to the crossing itself. There were gates on either side of the railway line at the crossing, and the plaintiff swore that when he arrived at the scene both these gates were open. He told you that, as he approached the crossing, he gave a signal with the mechanical hand on his vehicle to indicate that he proposed to turn to the right and then stopped and put his truck in low gear. Having seen that the road was clear of oncoming traffic, he said that he then turned the truck to the right and made his approach very slowly up the slope to the crossing and that when the bonnet of the vehicle was about level with the opening of the gate he again stopped the truck, looked both to his left and right and listened but, without seeing or hearing anything of approaching trains, he proceeded to cross the railway line when suddenly a train coming from the direction of Carlingford and travelling in a southerly direction towards Telopea struck his vehicle and caused him to be thrown some distance and to sustain the injuries of which he complained.

The plaintiff it is who brings the action and, therefore, the plaintiff it is who must satisfy you that he is entitled to a verdict. That means that he must, by a balance of testimony—no more but no less—bring satisfaction to your minds that the bodily harm which he suffered was caused by the negligence of the defendant or the defendant's servants. The plaintiff is not bound to satisfy you beyond all reasonable doubt. That is a standard of proof which is required in a criminal trial, but this is a civil action and the standard of proof is different. In a criminal trial, as you may well know, the Crown must prove the case substantially against the accused and the term usually employed in that jurisdiction is that the case must be proved beyond all reasonable doubt. But I direct you that in a civil case as this is it is sufficient if the plaintiff can incline the scales in his favour even slightly. If you cannot make up your minds one way or the other, that is to say, as you hold the scales in front of you they weigh at balance, not tipping either way, your verdict would go to the defendant because in those circumstances it must be said that the plaintiff has not been able to satisfy you even

slightly. However, if there is proof of facts sufficient to enable you to have some foothold for weighing and comparing the balance of probabilities at their respective value one against the other, you would be entitled to find on the balance of probabilities the plaintiff should succeed. You should be very careful to distinguish between inference and conjecture. A jury has no right to make a conjecture. You must not indulge in any guesswork, but you may draw proper inferences from proved facts, so if there are proved facts from which a reasonable person could draw an inference in favour of the plaintiff, facts which show on balance that the plaintiff's version is 10 more likely than the defendant's version, then there is sufficient evidence to support a finding for the plaintiff. It is not necessary for the plaintiff to remove every doubt from your minds, but he must at least satisfy you to the extent that you are able to reach the conclusion that the version he puts forward is the more probable of the two versions, but if you are left in a state of indecision or if you think the defendant's version is the one that commends itself to you, then the plaintiff must fail.

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I shall now direct you as to the principles of law which you will apply to the facts as you find them to be. First with regard to the crossing, an Act of Parliament authorised one Simpson to build this railway extension 20 from Clyde to Carlingford. This line of railway, including the fences on either side, was on the date in question vested in the Commissioner for Railways. By an Act of Parliament Simpson and his assigns were required to make and maintain for the accommodation of the owners and occupiers of adjoining lands such and so many gates and passages over the railway line leading to and from the same. It is important to point out to you that Simpson's Railway Act provides that persons using this accommodation crossing were required to shut and fasten the gates on either side of the crossing as soon as he or his carriages or his cattle had passed through, under pain of penalty. You may be aware, through your association with 30 the affairs of this world, that certain legal obligations fall to persons occupying premises and who fall within the categories of invitees and licensees, and therefore I deem it proper to direct you that, on the evidence in this case, the plaintiff is neither an invitee or licensee. But that does not dispose of the matter. In this case the plaintiff alleges bodily injury caused not by any defect or danger in the premises but by the manner in which a train was operated on this line of railway by the defendant and by his servants which amounted to negligence.

Liability in the defendant will depend solely upon the question whether the defendant and/or his servants were negligent, and so you will be asking 40 this question, was there conduct, on the part of the defendant in managing this crossing and on the part of the defendant's servants in operating this railway, on the day in question, such that a reasonable operator of a railway service would avoid on the ground that it involved undue risk of harm to another, because a duty of care rests upon a Railway Department to safeguard others from the grave danger of serious harm if knowingly the defendant created a danger or is responsible for its continued existence and

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is aware of the likelihood of others coming into proximity of that danger and has the means of preventing or averting it or of bringing it to the knowledge of others. With regard to that duty of care, the law does not exact a standard of perfection, and so it is the Commissioner, the defendant, cannot be made liable on the ground that he and/or his servants failed to take extraordinary care. The law does not expect that the crew of a train employed by the Commissioner will be perfect; neither does it expect them to act with extraordinary care. The law sets up this standard—and this was all that was required of this train crew in operating the train—that they should act as a reasonable man would act in like circumstances, and all 10 that was required of the Commissioner in managing the crossing was that he should act as a reasonable man would act in like circumstances. The like circumstances are, first, the operation of driving the train; second, the management of an accommodation crossing, and third, a train approaching such crossing. It is trite to point out that you will not have regard to the conduct of a reasonable man driving a motor car along the highway who is able to move from side to side, but you will have regard to the conduct of a reasonable man driving a steam train running on fixed lines, not capable of evasive action as a motor car is.

I shall now treat of the persons to whom that duty is owed. It was 20 said many times by Mr. Miller, leading counsel for the defendant, during his address, that the plaintiff took “French leave” which might lead you to think that the plaintiff was a trespasser. Assume that he was a trespasser: that does not dispose of the matter for it does not follow in no case is any duty of care owed by an occupier to a trespasser because, as I have pointed out, there are circumstances which could place upon the Commissioner as the occupier of this land a general duty to exercise reasonable care for the safety of persons using the crossing. Whether there be a duty in a particular case will depend upon the circumstances including the likelihood of people coming 30 there, but if they are likely to come the duty does not disappear because in coming they would be trespassing. Let me say straight away that it is no answer to such a case to say merely that an Act of Parliament exists which imposes a penalty of £10 on a person who, using this crossing, fails to shut and fasten the gates on either side of the crossing so soon as he and his motor truck have passed through. It is not to be supposed that the Commissioner, relying on a penal statute, can rid himself or discharge his general duty of care if that duty is owed to a person using the crossing. In this case the plaintiff was not liable to penalty under the statute. As I see the facts the accident cut off any opportunity he may have had of shutting and fastening 40 the gates. Probably, finding the gates open if he had had the opportunity he would not have shut and fastened them; indeed, according to the evidence it was not his intention, but whether or not in such circumstances he would have been liable to penalty does not affect this matter in the least. As a jury in a civil case, you have nothing to do with penalty.

It is the duty of the plaintiff to specify the negligence of which he complains. These are the plaintiff’s heads of negligence: first, negligence in

driving a train and, second, negligence in managing the crossing. I direct you that the plaintiff must have a verdict if he succeeds on only one of these heads of negligence. It is not necessary for him to prove both but he must at least prove one of them.

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I shall now direct you with respect to the law to be applied under each of these headings. First, it is the duty of the driver of a train to give reasonable warning of the approach of the train as the circumstances of the particular crossing may require. As to the circumstances of the crossing it may be taken into account that it is one where the Commissioner has provided
10 gates which are to be kept closed excepting only when persons are crossing with or without a vehicle. If the circumstances of the crossing are such that the driver of a train should give reasonable warning of the approach of a train, such warning may be given by the whistle of the train as it approaches the crossing if in the circumstances the noise of its approach is not likely to be sufficient. I think I might mention here that it was suggested by one question in cross-examination that the train "sneaked down", but whether that is a proper term or not is a matter for you and whether the train itself made any noise is also a matter for you.

With regard to the second head of negligence there is no universal stan-
20 dard of care applicable to all level crossings. What precautions will be taken depends upon the circumstances of the particular crossing and the conditions prevailing at the time when the train was driven across it. Speaking generally, it is the duty of a Railway Department to give reasonable warning of the existence of the crossing or of the approach of a train or of both as the circumstances of the particular crossing may require. Such reasonable warn-
30 ing may be given at the crossing by the provision of notices or blinking lights or gates with a gatekeeper or automatic gates, all of which things at least have been referred to during the hearing of this case. In the absence of special circumstances there is no general duty to provide a gatekeeper or, alterna-
tively, to provide automatic gates or again to provide blinking lights. Precautions which would be reasonable at the crossing of a heavy thoroughfare would not necessarily be reasonable at an unfrequented country road in the western part of the State across which trains pass three times a week. In this illustration of course I have taken the two extremes. It is conceded by Mr. Pile, leading counsel for the plaintiff, that in 1893 when Simpson's Railway was built and the Act authorising it was passed by Parliament and Walters' accommodation crossing was provided no precautions were necessary, but what you have to do is to look at the situation as it was on 5th January, 1956.

So far I have been dealing with matters of law. I turn now to sum
40 up the facts. There were a number of witnesses called in the plaintiff's case and in the defendant's case. What you are required to do is to weigh the evidence of all the witnesses and determine where the truth of the matter really lies. If it appears to you as I sum up the facts that I have expressed a view about them which is contrary to your view, then you must set on one side what I say because you are the judges of the facts

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and you alone. If I say something about them which assists you, so much the better. You are the sole judges of the credibility of a witness and the weight which should be given to his testimony. I have nothing to do with that. You ought to be able to say whether a witness is telling the truth or not because you have had the opportunity of observing the intelligence, demeanour, inclination, bias, prejudices and interest shown by the various witnesses while they were in the witness box. You have a right to believe all the testimony of a witness or to reject it all, and you have the right to believe part of the testimony of a witness and to reject the other part according as to where you think the truth is. But you should be careful not to arbitrarily reject the whole of the evidence of a witness simply and solely because you believe that a part of that witness' testimony is untrue. You must scrutinise the evidence with care and, as I say, you may then accept or reject such parts as you think to be necessary according as to whether you believe the same to be true or untrue. It would only be in case you thought that a witness wilfully and deliberately deceived the Court that you really should reject all his evidence, but it is not suggested in this case anyone set out deliberately to deceive the Court. 10

The witnesses as to the facts of the accident were the plaintiff and a police officer named Blench called in the plaintiff's case, and the train crew, driver Gardiner, fireman Chowstow and guard Marshall called in the defendant's case. 20

The plaintiff told you that he had crossed the railway crossing once before, about a week before this accident happened, and on that occasion also he was driving a motor truck and carrying roofing tiles to be delivered to a cottage in course of erection. He told you that he was carrying that load of roofing tiles, as well as this load of roofing tiles, to the Superior Decorating Company. There was another contractor named L. A. Stewart, but this plaintiff was not concerned with Stewart. His duty on both occasions was to carry roofing tiles to the Superior Decorating Company. He told you that at that time he did not know of any other way of getting there and that he had received his directions as to how to reach the cottage in accordance with a direction from the supplier of the tiles. He told you that, on the day in question, he was by himself, having no assistant, and that he saw the sign "Beware of Trains". He was asked about the curve in the railway line, but you will remember that it is common ground that there is a curve which runs to the left. I have taken into consideration that I summed up the facts of his approach to the crossing at the outset and I shall not reiterate these. Then he told you that when his front wheels were just over the second line the train hit the cabin of the vehicle and he went flying through the air and suffered the injury of which he complained. In cross-examination he admitted that he had not asked the Railway Department for permission to go over the crossing and that he had never asked any railwayman how to get across the railway line. You will remember that he described the view that he had towards Telopea 30 40

and he said that previously he had seen one train running on this particular line, and that was on the previous occasion when he was delivering tiles to the cottage in course of erection, and when he saw it it was further towards Telopea station. He was cross-examined with regard to the view on the right towards Carlingford, but I have already referred to that and I shall not repeat that part of his evidence. In cross-examination he admitted of course that the train crew would have the same restricted view of the crossing as he had of the curve. He said in cross-examination that he was not aware of the approach of the train; indeed, he said “until

10 I was lying on the ground and a chap came up and picked me up and I asked him what hit me.” He admitted in cross-examination that his view to the left was restricted by the construction of the cabin, and you will remember also that he said he had taken no steps to inquire about timetables either for the transportation of goods or passengers, and asked whether he was about to go across what would virtually be a blind crossing he said “That would be it”. Although he said that, after he started off, which would be in low-low gear, he looked closely to his left and there was definitely nothing coming and that he commenced to go across virtually at snail’s pace, he admitted that if he had seen the train he could have

20 rolled back the lorry because he had the grade to help him. With regard to the sounding of the whistle, he was asked the question, “You are not even prepared to deny that a whistle was sounded?” and his answer was, “I did not hear one”. Asked the question “It could have been sounded” he answered “It could have been, yes.” He admitted that there was some noise coming from his engine as well as from the moving tiles on the truck. In re-examination he was asked questions with regard to the reaction time between seeing an object and then applying the brakes, and he said “I would say it would be quite a few seconds, by the time you could see the train, move your foot and hands to change gear”.

30 Mr. Blench was called. He was an officer of police at the time, and in pursuance of his duties, he attended the scene of the accident later in the morning and he swore that when he arrived there just after 6.30 there was a train stationary about 190 yards from the crossing, the two front wheels were off the line and you will remember, of course, that the train was travelling bunker first, and he agreed that the photographs which will be with you in the jury room present a fair representation of the picture following the accident as he saw it when he arrived. He said that the steam locomotive had attached to it three passenger cars and that the wheels which were off the line were very close to the flange. In re-examination he said that in calculating

40 the distance of 190 yards, he commenced from the engine back to the crossing.

Now the driver of the train was Gardiner and he told you that he had had experience on this line for a period of seven years, although not continually because there were occasions when he was required to work on other lines, but on this particular occasion he signed on at 12.17 a.m. and with the fireman and the guard he was responsible for the last passenger service in the early hours of the morning of the accident, and, having delivered the train to

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Carlingford, the train was then converted into a goods train and the train crew were concerned with goods to be delivered back as far as Clyde and returning again to Carlingford and then the train was again converted to a passenger train and was ready to leave early in the morning. The photographs which you will have in the jury room, of course, show the set-up of the engine and the controls which were to be operated by the driver and the fireman. He told you first that this train left at 5.7 a.m. but corrected that later and said it left at 5.17 a.m. and he told you that when the guard holds up the green flag that is an indication to the driver that he may start. He received that signal from the guard and he then blew the engine whistle. It was a clear loud whistle and the morning was clear and fine and, in his opinion, it could be heard, say, a mile or even more. He said that after he got the engine under way he wound the screw back, which is the normal procedure; that is for economy purposes; it saves steam. He said "You only require a full amount of steam to lift your train and then you practically immediately bring your screw back". He told you it was a very steep grade, and so he shut off the steam and allowed the train to coast down the grade, and he was travelling about 25 miles per hour which was a normal speed for that part of the journey. He said also that before going too far he made an application of the brakes just to see how they were holding more or less. Again he said this is normal practice, and on this morning he did this when he was about 400 yards out of Carlingford. He found they were acting quite normally. He said that he got to about half a mile from Telopea station and he then sounded the whistle. This was the second whistle. He said "This was a clear loud blast and it could be heard over a distance of a mile or more". After coming around the bend he saw this object, a big truck, directly on the line. He immediately turned and threw the handle of the Westinghouse brake into the emergency position and he wound the reversing screw to the full forward position to make every endeavour to stop the train. Then his evidence is he felt an impact, there was a smash and the train pulled up 400 feet after the impact. He said that he was 50 yards from the truck when he first saw it and that immediately prior to seeing the truck he was coasting downhill and watching the track ahead. He told you there was nothing further he could have done; nothing further was possible, and these things that he did, that is to say applying the emergency brake and reversing the screw were done as quickly as he could. He told you that the locomotive was in good mechanical order; it gave no trouble the night before or on this morning up to the time of the crash. In cross-examination he admitted that the whistle sounds as to its own loudness and its own clarity and you could have it long or short, but on this occasion it was a short whistle. The second one, he told you, was also a short whistle. He was asked the question, "Was your second whistle blown because of the hazard of persons, as you believed it to exist, who might cross at Telopea?" and he agreed with that. He was asked the question "It was not a whistle intended to give warning to anyone else but people who might have been using the Telopea station" and he replied "or on the line in the proximity of Telopea station", and by that he said he meant 50 or 100 yards from Telopea. Then he was asked this question, "When you were

fifty yards from the crossing would you agree that in the light of that it would be prudent to sound a whistle at a point of time which would allow anyone approaching who would not, of course, be able to see you, just as you could not see him, to warn him not to start the crossing?" and he answered "No, I would not—that is a private crossing and we are understood to say that the people who use that are responsible for it and must know the running of the trains. Therefore, as far as the crossing is concerned, the people must look after that gate and keep it closed on arrival, I think it is a quarter of an hour before the train arrives, so as far as a driver is concerned over that
 10 crossing there is no need to worry about it at all. It may as well not be in existence, and being over a number of years I have never ever seen anybody use it, I never considered it necessary to do anything about it". Then he was asked these questions and gave these answers:

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Q. You sounded your whistle, you said, some half a mile short of Telopea—

that has reference to the second whistle—

Half a mile short of Telopea not because of the crossing but because of the people whom you thought might be around at Telopea?
 A. That is right.

20 Q. If this crossing had been one which was being used from time to time, would you agree that that whistle would not have helped to avert a collision? A. Yes, I will agree to that. You would be too close to it.

Q. You are quite sure that you saw this vehicle and took care to stop a collision before the impact? A. Yes.

Q. Quite positive about that? A. Yes.

Q. Have you ever said anything different? A. No.

He told you that he had not seen the notice which had been put up on the piece of fibro referring to L. A. Stewart's job.

30 Now Mr. Chowstow was the fireman. As I have reminded you, he was a witness called in the defendant's case and he swore that he had had some years of experience on this line and that on this particular morning when the train was ready to leave Carlingford he received the right-of-way from the guard and he said "I blew the whistle". Mr. Pile pointed out that the driver and the fireman are at variance here. The driver said he blew the whistle, but when Chowstow came into the box he said he blew the whistle at the station. He then said that the train got under way and about quarter of a mile from Carlingford the driver blew the whistle again. Then
 40 he said "Then I saw him apply the Westinghouse brakes and reversing the screw. I went for my hand brake", and at another stage he said "I applied my hand brakes." Then he was asked whether he had felt anything and he said he felt a sort of bump and that the train then drifted further and

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it stopped. He told you there was nothing unusual about the manner of operating the train that morning, and he confirms the driver with regard to speed. In cross-examination it was suggested to him that the first thing that happened was the bump and he said "No, it was not like this, No". Then he was asked whether on a previous occasion he had said this in reply to a request that he should tell what had happened in his own words, "After we had started from Carlingford we went down about one quarter of a mile and the driver blew the whistle for the—before the Telopea private crossing and next thing I heard a bump and I could hear the driver apply the brake and I applied my brake." Of course, that is a statement made 10 by a servant of the Commissioner which does not bind the Commissioner, but that is put to you as showing that this witness has made a different statement on a previous occasion, and the question then for you is, how does that affect his evidence? Should you give any less weight to it because of the conflicting statements that he made on two different occasions? I think I should say here that the driver was very explicit in his evidence in saying that the train was running down the line and he was keeping a lookout. He went to within 50 yards of the crossing, he saw the truck, he then applied the Westinghouse brake and reversed the screw and then the bump occurred.

The guard Marshall gave evidence in the defendant's case and he 20 told you that he had had some years' experience on this line and that the train departed at 5.17 a.m., and after the right-of-way had been given the whistle was blown, it was a very fine morning and that he noticed nothing unusual about the speed and that the first thing which came to his attention concerning the accident was after the driver sounded the whistle he made an application of the air brakes. He heard the brakes being applied and then a short time after that there was the noise of the impact.

I have summed up the facts of the accident but I must refer also to other facts in the case related to the accommodation crossing and the approaches thereto on either side. Evidence was led in the defendant's 30 case related to a small triangular shaped piece of land lying between the crossing and Walters' farm. It is very easy to see what occurred. The witness Woolner made this clear. The railway line was built partly over a piece of land originally reserved by the Crown for a road and the road was made elsewhere, in fact alongside the railway line but the boundaries of the railway land at this point did not coincide with the boundaries of the reserved road, and so it was the title to this small triangular piece of land remained in the Crown, and it is situated between the Railway Commissioner's land and Walters' farm so that, in using the accommodation crossing Walters and his family and his invitees and later, of course, his 40 assigns and their invitees—and I mean by "invitees" to include the iceman and the sanitary man, for these have been mentioned in the case; but this term of course includes all others whom Walters invited to his home, and all would go over the crossing then this triangular block and finally Walters'

land until they reached the farmhouse. It is clear that over the years Walters and his assigns, including Mrs. Carroll who came into the witness-box, have obtained a prescriptive right to the triangular piece of land. A great deal of time was spent on this matter, and I made no complaint about that, but I must be careful to explain to you, do not give this aspect of the case more importance than it deserves. Its only purpose was to show that the Commissioner was entitled to take this fact into consideration in not having a gatekeeper or blinking lights or automatic gates at this crossing contiguous to an unmade road. You will remember that Mr. Pile took
 10 objection to certain documents relating to this matter and he expressed the hope that I would instruct you that his objections were properly taken. I am sure you would not condemn Mr. Pile because he raised some objection to a document. All I need say is that counsel acted within their rights in taking that course and they abide by the court's decision as to the admissibility of the document.

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I need only refer to one or two other matters at the crossing. There is no evidence that there was in that vicinity any notice to show that this was an accommodation crossing or a private crossing or to indicate there was any restriction as to its use by the general public, and you may think
 20 the plaintiff would be unaware that it was in fact an accommodation crossing. The evidence is that the plaintiff was there only on one occasion before the date of the accident engaged in the same employment, driving a motor truck, carrying roofing tiles and delivering them to the same contractor to whom he intended to deliver this load on the day of the accident. The plaintiff told you that on this day the gates were open and there is evidence that there was a notice "Beware of Trains" and there is his evidence also that he saw the notice and you might think that such a notice was an invitation to use the crossing but in careful manner, use the crossing, but as to this notice "Beware of Trains", situated as it is, you
 30 may think it is quite possible that the train driver had not seen it, for that was his evidence. Its very situation, you may think, shows it was intended that users of the crossing should see it, and with regard to the notice on the piece of fibro attached to a telegraph post, you may think it was quite possible that the train crew would not see it. Its situation shows it was intended that contractors carrying building materials to Stewart's job should see it. Let me say here that if you think I have expressed an opinion about any of these matters which is contrary to yours, then of course you must set aside what I have said. You must evaluate the testimony of the witnesses, Holden, Brown and Fulton called in the plaintiff's
 40 case, as to the use made of this crossing by each of them taking building materials to the Housing Commission jobs, and having delivered the materials, returning again over the crossing. I find no fault with Mr. Pile's arithmetic, based on seventeen houses, each house requiring eleven loads of building materials to be brought on to the site, and if Holden is to be believed when he said "I would say they"—referring to the trucks—"invariably came across that crossing", that would mean 187 trucks going

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across this accommodation crossing to the site of the homes and 187 trucks returning. Whether you believe Holden is a matter for you, but I am bound to say to you that there is no evidence from which you might infer that 187 trucks passed over that accommodation crossing. You were told that the contractors, Stewart and the Superior Decorating Company, were building cottages, the first six and the latter eleven, but you have not been told that all those cottages had been commenced, neither were you told that all the materials required for building of all the cottages had been delivered on to the sites, nor were you told that the plaintiff's load of roofing tiles being carted on the 6th January, 1956, was the last load of building material to be brought on to the sites. Nevertheless, it is open to you to infer that a number of loads of building materials had come across Walters' crossing. As to how many will be a matter for you, and remember you are not to guess at the number but you may draw a reasonable inference supported by the facts related to the Housing Commission projects as at 5th January, 1956. You should then consider the evidence of Farlow. He told you that he was a carpenter on these jobs which were being undertaken by Stewart and that he went to work in his own vehicle, a Ford truck, and that he brought all the carpenters with him each day and he took them home again, arriving at the job usually before 7.30 and departing about 4 in the afternoon, and that he used this crossing to go to the jobs day by day and that he returned by the same route. He put it in this way, "I had to cut across the railway crossing from Adderton Road". Then you must evaluate the evidence of the driver Gardiner, the fireman Chowstow and the guard Marshall, and senior sub-inspector Foster for each of them said that he had not seen a vehicle passing over the subject crossing. Each was employed by the Commissioner for Railways in their respective duties from day to day. Mr. Pile stoutly asks you to disbelieve them. That is a matter for you. You may think that at this time, remembering that on the day in question not a single tenant of the Housing Commission was in occupation of a dwelling, there were few trains but certainly some motor vehicles, that it was possible that motor vehicles crossing over Walter's crossing could have been taken across without the drivers seeing a train and that trains might have run on this line without any member of the train crew seeing a motor vehicle at or near Walters' crossing. Senior Sub-Inspector Foster said he went along the Clyde-Carlingford route once a week and then qualified it by adding, "No less than once a fortnight, some days by train and on other days he would walk. When he went by train he was in no different position to the train crew, but when he walked you might think he would have had a better opportunity of observing motor vehicles going across Walters' crossing, but you will remember of course the length of the track which you were told was nearly five miles. If you think my observations should be cast aside, please do so.

Although the Commissioner's employees swore that they did not see Walters' crossing used, there is evidence that in 1955 the area commenced

to change from rural to suburban and that the Housing Commission began the erection of the first 17 homes in the Dundas Valley, six on lots 242 to 247 on the plan—and that plan will be with you in the jury room, and eleven on lots 230 to 240. The witness Holden said these were situated 105 feet from the crossing, 30 feet to the edge of a nature strip and a further 75 feet to the buildings in course of erection. Each member of the train crew swore that they had observed at least some of the homes in course of erection. There is perhaps more eloquent testimony in this sense that it is in writing. Mr. Tunks was called in the defendant's case and he produced

10 some correspondence and here you will have a copy of a letter which you will treat as though it was the original because the original has been lost. This is a letter from L. A. Stewart & Co. Ltd. to the Secretary for Railways dated 1st December 1955. The date is important. You will calculate that it was about 36 days before this accident. The letter said, "We hereby request permission to use the railway gate on the Carlingford side of Telopea station for access to building sites from Adderton Road. We undertake to close the gates after each time of using same. It is estimated that we should require such permission for a period of three months". The evidence is clear that permission was not granted.

20 My first observation is that the plaintiff, on the 5th January 1956, knew nothing of that application nor was he aware that permission had not been granted. Furthermore, he had no dealings with Stewart. He was operating a motor truck for his brother carrying roofing tiles from the tile company to the Superior Decorating Company.

There is another letter in evidence dated also 1st December 1955, about 36 days before this accident happened, addressed by the Secretary of the Housing Commission to the Secretary of the Department of Railways. This letter is noted in the transcript and so you will not have this before you in the jury room but I ask you please to note it as I now read it to you. It was

30 read to you by my Associate but it is proper that I should remind you again of its contents: "The Commissioner has let contracts for the erection of 212 cottages on the eastern side of the railway between Telopea and Carlingford stations. As part of the general development of this project, these cottages will be completed progressively between February and June next. There are two level crossings in the vicinity of Telopea station and these are at present being used by building contractors and suppliers". Even if the defendant's servants, the fireman, the guard and the sub-inspector did not see the motor trucks carrying building materials using Walters' crossing, this much is certain, that on the 1st December or a day or two afterwards, allow-

40 ing for the time occupied in transmission of the letter, the Commissioner had notice that this crossing was at that date, 1st December, being used by building contractors and suppliers. I should add it has not been contested that the two level crossings referred to in the letter which I have just read included Walters' crossing.

You may think on that evidence that the Commissioner, after receiving that information, took no real objection to the presence of building con-

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tractors and suppliers going across Walters' crossing, at least until the day after the accident when he caused a chain and padlock to be placed on the gates. Of course, that is a matter for you. If that observation is contrary to your view, cast it aside, but if it helps you then you might consider whether this plaintiff took "French leave" in the sense which Mr. Miller put it to you again and again in his address.

A great deal of time was spent on the question as to whether there were other crossings and whether there were other routes which might have been employed to deliver these roofing tiles to the Housing Commission homes then in course of erection, and to deliver other building materials to these Housing Commission sites. That is a circumstance, indeed, to be taken into consideration but you will not decide the matter as if that was the issue. You would not go into the jury room and say "The plaintiff could have taken that route" as you point to the plan and then decide the case against him. That is not the issue to be determined. His evidence is that he knew of no other way to reach the Housing Commission job to which he was to deliver the roofing tiles. Mr. Miller said to you at one stage that he denied knowledge of another route but being reminded of what he had said on another occasion, he admitted it. Whether his evidence amounted to such a denial is a matter for you. It is important, therefore, that I refer you to his evidence, even at the expense of reiteration: 10

Q. At that time did you yourself know of any other way of getting there? A. No.

Q. I suggest to you that driving along Adderton Road you first came to the level crossing on the Sydney side of Telopea railway station? A. That would be right.

Q. That was a level crossing right at the railway station but on the Sydney side of it, crossing over the lines, going from east to west. A. That would be——

And then he was interrupted——

30

Q. Just near Telopea railway station? A. Yes, past——
Again he was interrupted by another question in this form:

Q. Just to the Sydney side of it at that time. It has been changed since but at the time of the accident. A. I cannot say that I can——

Again he was interrupted by this question,

Q. You think about it overnight. I will ask you a question about it in the morning. Would you think about that tonight? A. Yes.

I think these questions and answers are referable to this matter. The next day when he was in the witness box under cross-examination, the question was, 40

Q. But you are not suggesting that you asked the Railway Department for permission to use this crossing? A. No, I never asked the Railways. All the instructions I got were off the manager of the tile works where to take my tiles and how to get there.

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Q. The actual route you took was a matter for yourself? A. No, he instructed me which way to go. As I say, I did not know how to get there. I did not have the faintest idea.

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10 Q. Is it not a fact that during the previous trial when you were giving evidence I asked you these questions? I said to you "In the course of doing that", that is to say delivery to this job, Stewart's job, "you had passed, had you not, another crossing near Telopea station?" and you said "Yes." I said "And the crossing near Telopea station was a public crossing, was it not, where there was a very good view for at least 22 chains in both directions" and you said "Yes". I said "Was it a public crossing?" And you said "Yes". I said "It was a crossing where there was a very good view along the line for, at least, I suggest 22 chains, would that be right"? You said "Yes". Q. Of course, you could have gone across that crossing, too, that public crossing? A. Oh, 20 yes, I could have gone across there. Now that I have reminded you of your previous evidence—— A. Yes, this is six years ago, but I do recollect that cross-examination now.

Q. Now that I have reminded you there was a crossing there?
A. Yes.

You see, this witness had said that he could not place the crossing. I do not think that a witness, when answering a question concerning the crossing replies "I cannot place it" is denying the existence of a crossing but, as I say, that is a matter related to the facts of the case and it is for you, but I thought that as such a lot of emphasis was laid upon this matter by both 30 learned counsel in their addresses I should refer to it in the way I have.

I emphasise that the issues are whether there was negligence in the driving of the train and/or negligence in the management of the crossing. If you find either or both those heads of negligence proved, the Commissioner cannot be excused because there were other routes available to the plaintiff. To give you an example, a negligent motorist who runs down a pedestrian cannot be heard to say in his evidence, "I am sorry I ran you down but if you had used the next street running parallel to this one this accident would not have happened", but you are entitled to consider the fact of other routes as a circumstance coming into the consideration of the 40 Commissioner in the management of this crossing.

The fact that another accident happened at this crossing—you will remember that Brown said in his evidence that some bricks fell from the truck on to the railway line—does not, in my view, assist in this matter since the circumstances were different. We are here dealing with a train

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comprising three carriages hauled by a steam locomotive which, of course, is a heavy thing and which takes a long time to pull up, especially on a downgrade, but according to the witness Brown it appears that the train involved in the prior accident was not a steam train. This is what he said in cross-examination, "I would say to the best of my knowledge it was a rail motor", I do not suggest that you will not take this into your consideration, but you must have regard to the evidence which throws up a clear distinction between the two types of train, and you should not make any finding of negligence against the Commissioner because there was a previous accident in different circumstances. A question was raised as to whether this prior 10 accident had happened at the same crossing, as far as Brown referred to a crossing near to which was exhibited a sign "To Stewart's job". All I say is, you will not use that to draw a conclusion against the Commissioner. It seems to me now to be quite unimportant.

On that evidence Mr. Pile asks you for a verdict in favour of the plaintiff. With regard to the first head of negligence in driving a train, Mr. Pile says that the train driver failed to give any or any sufficient warning of the approach of the train. He submits the first whistle being given was a warning that the train was about to leave Carlingford station, and the second whistle, if given, was a warning to people using the train track at 20 Telopea, but there was no warning whistle given at all to warn people using Walters' crossing, and he relies on the evidence of the plaintiff that he did not hear a train whistle, and the evidence of driver Gardiner that the second whistle was given to warn people on the line within 50 or 100 yards of Telopea station, and that if Walters' crossing was being used, the second whistle would not have helped to avert a collision because the driver was, at that stage when he sounded the second whistle, too close to Walters' crossing. The plaintiff said he listened for a whistle but never heard one. Mr. Pile submitted to you that when the whistle blew at Carlingford station, the plaintiff was some distance back from Walters' crossing, and in his 30 address he suggested a certain distance which I will not repeat because it is a question for you as to what inferences you can reasonably draw from the proved facts, as to how far back he was from the crossing when the first whistle blew. You will have to consider whether he heard it or not. He said he did not hear a whistle. Of course, Gentlemen, it must be remembered that in modern conditions there are many conditions in which it may be said either that motor vehicles make so much noise themselves, or there is so much noise surrounding them, although perhaps not in this setting, that it is not by any means certain that a person in such a motor truck will be able to hear the whistle of an engine. Mr. Pile asks you to 40 conclude that the plaintiff, as he swore, did not hear the first whistle; similarly says Mr. Pile you should conclude that the plaintiff, as he swore, did not hear the second whistle. But, said Mr. Pile, assume you find that the second whistle was sounded, you should conclude that it would not have availed anything, even if the driver had heard it. Driver Gardiner admitted in cross-examination that the second engine whistle was not sounded

at such time and in such a way as to give people using Walters' crossing a reasonable warning of the approach of the train, and he relies on the evidence that all sorts of people were using Walters' crossing at this time and that the Commissioner had notice in writing that the crossing was in fact being used and that as the train driver had a view of Walters' crossing for only 50 yards, he should have been instructed by the Commissioner to sound a whistle further back to warn people using Walters' crossing in the same way as the second whistle was given to warn people using the track at Telopea.

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Now, on this head of negligence, Mr. Miller's defence is a denial of
10 negligence, and Mr. Miller for the defendant asks you to find for the defend-
dant for a number of reasons which he advanced. First he submits that no
member of the train crew or even Foster had seen the Walters' crossing used
by any vehicle, that although the Commissioner had the letters to which
I have referred it would be unreasonable to expect that the Commissioner
could issue any instructions within such short period between 1st December
and 5th January, taking into account that the Christmas holidays intervened;
but in any event no new instruction was necessary because this was an
accommodation crossing and, as the Commissioner considered the problem
after receiving the letters, he was entitled to take into his consideration the
20 fact that adjoining the gate on one side was an unmade road, that there were
other routes and also gates were provided and a notice was exhibited which
was a sufficient warning and that a reasonable railway operator would not in
like circumstances have taken any further precautions. Gentlemen, the duty
of the Commissioner is to do everything which in the circumstances is reason-
ably necessary to secure the safety of persons using a crossing, and this
would include the duty to give reasonable warning of the approach of a
train where the Commissioner does not provide gates which are closed when
a train is approaching. Here, of course, gates were provided and it was not
the fault of the Commissioner that the gates were opened when the plaintiff
30 arrived at this crossing. If they had been closed, the circumstances, no doubt,
would have been different, for the plaintiff would have been required to leave
his lorry and open and close them as soon as his motor truck had passed
through. I only put this to you on the basis that the Commissioner was
entitled to expect that the gates would have been closed on the plaintiff's
arrival there. The fact is that somebody, whom we know not, left them
open but this cannot be charged against the Commissioner, but the Com-
missioner knew at this time that all sorts and conditions of people were
using this crossing, and when I say "all sorts and conditions of people" I refer
to the exact terms of the notice which he had in the letter from the Housing
40 Commission dated 1st December 1955 for he was told that this crossing
and the one at Telopea station was at present being used by builders, con-
tractors and suppliers. Whilst he is not required to protect against their own
carelessness people who proceed without any regard to their own safety, it is
his duty to take every reasonable precaution to ensure that the crossing will
be safe for members of the public generally who act with due care while
passing over it, subject nevertheless to it being an accommodation crossing

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and to the problem associated with an accommodation crossing as he saw it. I leave until later the question whether the plaintiff exercised care for his own safety, but the point for you to consider here is whether this duty of care fell to the Commissioner towards this member of the public; I mean, the plaintiff, in using this crossing, not in the circumstances existing when it was built as an accommodation crossing for Walters and his invitees in the 1893, but on this day in 1956 when other people besides Walters and his assigns and their invitees were using it as well with motor vehicles, and at least since 1st December, that is to say 36 days before the accident, the Commissioner having notice in writing that the crossing was being so used.

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Mr. Miller submitted that the driver kept a proper lookout, drove the train at a normal speed, which was a reasonable speed in the circumstances, and moreover it was a speed which conformed to the timetable and that the warnings given by the whistle at two points were reasonable and proper in all the circumstances existing at that time. Let me repeat what I said in order that there shall be a proper consideration. Mr. Miller submitted that the driver kept a proper lookout, drove the train at a normal speed which was a reasonable speed in the circumstances and, moreover, was a speed which conformed to the timetable, and that the warnings given by the whistle at two points were reasonable and proper in all the circumstances existing at that time, and upon seeing the vehicle on the line the driver—and the fireman supports him—did everything that could be done by applying the Westinghouse brake and turning the screw to avoid hitting the plaintiff's motor truck. Here he asked you to consider that a train travelling at 25 miles an hour would occupy a little less than four seconds of travel out of the curve and to the crossing and, further, Mr. Miller puts it to you, would a train driver have expected a load of roofing materials for a Housing Commission cottage to be delivered via this route at 5.20 in the morning? As I understand the way in which the plaintiff's case has been presented, that there was a failure to keep a proper lookout and that the speed was excessive in the circumstances are not alleged. As I have said, the allegation is that the train driver failed to give any sufficient warning of the approach of the train into Walters' crossing. I do not think I can help you further on this question, was there negligence in the running of the train? It is a matter for you to give your verdict to the plaintiff or to the defendant on this issue, according to the facts as you find them to be.

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The plaintiff's next allegation is negligence in the management of the crossing. Whether any particular form of warning is called for depends upon the circumstances. I have summed up the evidence relating to the conditions as they existed on this day. Whether a gatekeeper, flashing lights, automatic gates or some other device should be provided depends on the circumstances of this particular crossing. What precautions are to be taken depends upon the circumstances of this particular crossing and the conditions prevailing at the time. I put it to you earlier, precautions which would be reasonable at the crossing of a busy thoroughfare would not necessarily

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be reasonable at an unfrequented country road out in the west across which a train passes three times a week, and I reiterate, I have used that illustration to show the two extremes. The question of reasonableness must depend on the evidence. Until 1955 little activity opposite the crossing, a few cows, an accommodation crossing for use of Walters and his assigns and their invitees, near this crossing up to seventeen homes in course of erection; this was the first sign of a new suburb but no home then occupied, crossing now used by vehicles carrying building materials to the site of up to seventeen homes—would you think that alone would place on the Commissioner
10 a duty to provide a gatekeeper or a duty to provide flashing lights or a duty to provide automatic gates or some similar device? I am not expressing an opinion, because in any event you would not be bound by my opinion, but I should say this to you, it will help you to arrive at a correct determination of this question by a consideration of the conditions then existing at Telopea railway station. There was a crossing there. People came over the railway track. There is no evidence of a gatekeeper there: there is no evidence of flashing lights being installed there; there is no evidence of automatic gates being installed there and there is no evidence of any other similar device being installed there, but you were told by driver Gardiner that a
20 second whistle was blown by the train about half a mile back from Telopea to warn the people who were then on the railway track, within 50 or 100 yards of Telopea railway station. Mr. Pile submitted if the Commissioner, after notice on the 1st December, wished this crossing to continue as a private crossing he should have exhibited notices that it is a private crossing and that trespassers would be prosecuted, but one notice was there only on the day in question which read “Beware of Trains”. He submitted to you that that was not sufficient in the new conditions attaching to this area, but remember, as I said earlier, no Housing Commission home was occupied, and remember too it is a matter for you to say how a member of the public
30 anticipating crossing there would react to the sign “Beware of Trains”. There is no evidence that a special notice was exhibited at Telopea station, but seeing, as sub-inspector Foster in his evidence given on Friday morning said, that in 1956 the crossing at Telopea was a public crossing but the subject crossing is a private crossing, so it is in the consideration of notices that you will differentiate between the two kinds of crossing as they existed at the beginning of the year 1956. It seems to me that the conditions at Telopea with regard to notices would not help you with regard to the position at Walters’ crossing.

Gentlemen, Mr. Pile has submitted that there was another minor matter
40 that might be taken into consideration, and I think I should place emphasis on the word which he used; it is minor, but nevertheless it should be considered by you, for Mr. Pile suggested that the trees might have been lopped. The evidence is, according to Foster, that these trees were lopped about every two years, but, of course, you would only be concerned with the lopping of the trees which were growing in the Railway property and the photographs will demonstrate that position to you. Mr. Miller asks you to

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disregard this altogether because he submitted to you that it is unnecessary for the Commissioner to do something special and he submitted to you that the lopping of trees would be something special, and you will remember, as I said to you and I say to you again as a direction, that the Commissioner is only required to act as a reasonable operator of a train. If you think it was unreasonable to expect lopping of trees or if you came to the conclusion that the lopping of trees every two years was sufficient well you could discard that consideration, but as I say, even if it is minor, it should be taken into your consideration.

Now, Mr. Miller asks you with regard to this question of negligence, 10 whether there was negligence on the part of the Commissioner in governing the crossing, that you will find for the defendant, because the defence is a denial of negligence, and Mr. Miller put it to you that, apart from the question of lopping of trees, he relies on the fact that no member of the train crew even had seen Walters' crossing being used by any vehicle, and neither had Foster, that although the Commissioner had received the letters to which I have referred, it would be unreasonable to expect the Commissioner to arrange any device or any notice within this short period between 1st December, 1955, and 5th January, 1956, taking into account that the Christmas holidays intervened, but in any event the suggestion about a gate- 20 keeper, flashing lights, automatic gates or other device would be ludicrous in this sylvan setting even as at 5th January, 1956. He reminded you, as I have, that no Commission home had been occupied, and he submitted to you, furthermore, that it was reasonable on the Commissioner's part in all the circumstances to continue to consider this crossing as an accommodation crossing and, as the Commissioner considered the problem after receiving the letter, he was entitled to take into consideration that adjoining the gate on one side was an unmade road, that there were other routes and also that gates were provided and that a notice was exhibited which was a sufficient warning and that a reasonable railway operator would not in like circum- 30 stances have taken any further precaution. Gentlemen, it is a matter for you. On that question you may find for the plaintiff or for the defendant, according to the facts as you find them to be.

I come to a very important matter. The evidence is that on 6th January, 1956, the day after the accident, the day after the accident the Commissioner caused a chain and padlock to be attached to the gates of this crossing and it was suggested by Mr. Pile that this might have been done just as easily on the 5th January as on the 6th January, but, gentlemen, I am bound to give you this warning, that the Commissioner, in the light of his new experience and taking into account that an accident had 40 happened, was entitled then as a precaution against further accidents at this crossing to provide a chain and padlock on these gates but, Gentlemen, you will not take that piece of evidence as evidence of negligence on the part of the Commissioner on the 5th January, 1956, and for this reason—and I think you will see the commonsense of it and the law

provides against it—for it would be altogether unreasonable if the Commissioner could not do that on the 6th January without having that action regarded as negligence on the 5th January. You see the law is always sensible about these matters and you would think in the circumstances that it was a very wise precaution after this accident happened, fortunately not a fatal one, and fortunately too an accident which did not result in multiple injuries; nevertheless, serious injuries, and the law says that the Commissioner can do that without having the fact that this was not done at the time of the accident regarded as an omission amounting to negligence.

- 10 You see, as to whether it could have been done—and that was the only basis on which Mr. Pile led the evidence or, as a matter of fact, I think I am right in saying that the evidence was also led by Mr. Miller in the defendant's case, but Mr. Pile uses it on this basis, "Well, that could have been done on the 5th January", but Mr. Miller said "Oh, no, it could not have been done because this was an accommodation crossing and there were a number of people who were concerned, the assigns of Walters". We know now that they are a family called Carroll. "They were living at the farmhouse and so it would have been necessary still for them to have used this crossing and so we could not have altered it". There
- 20 is no evidence to show what arrangement was made with the Carrolls on the 6th January, and as there is no evidence about it, you cannot inquire. All that I need say is this, you must be very careful not to regard the Commissioner as guilty of some negligent omission because the chain and the padlock were not applied to the gates on the 5th January.

- As I have said, the defendant's defences are denial of negligence, but then there is another defence as well and that is contributory negligence. I have already put to you the defendant's case based on a denial of negligence. Summing it up, Mr. Miller submitted that there is no evidence of negligence in the train crew as to the way in which the train was operated,
- 30 and there is no evidence of negligence in the Commissioner related to the management of the crossing. But the defendant goes further than that and says that even assume that you do think that a reasonable standard of care in operating the railway required the driver of the train to anticipate the possible presence of others on Walters' crossing and to give some warning and requiring the Commissioner to anticipate the use of Walters' crossing by others besides Walters' assigns and invitees, the plaintiff was equally negligent in failing to take reasonable care for his own safety. You only come to the question of contributory negligence if the plaintiff has satisfied you, first of all, that the driver of the train and/or the Commissioner were at fault. If you come to the conclusion that neither the
- 40 Commissioner nor the driver were at fault you need go no further; your verdict would be for the defendant, but if you think that the driver and/or the Commissioner failed in some respect, then you have to come to the next question as to whether that failure caused the accident or whether that failure combined with the plaintiff's failure to take reasonable care for his own safety materially contributed to the accident.

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A defendant who relies on a defence of contributory negligence, carries the same burden as I told you the plaintiff carried originally in respect of establishing the original negligence. It is not a heavy onus; nevertheless it is a weighing-down onus. Now, the defendant, in his defence of contributory negligence alleges a number of things. The defendant says that the plaintiff did not seek the permission of the Railway Department to cross. You must look at the crossing as it was on 5th January, 1956. What notices were there? The evidence points to one only "Beware of Trains". When the plaintiff saw that notice, do you think it would be reasonable that before crossing he should have obtained that permission? 10 The defendant says the plaintiff should have considered the timetable. Do you think this is reasonable? You might think that it would have been unreasonable to expect the Commissioner to exhibit a timetable at the crossing, and that might help you to consider whether you thought that a driver of a motor lorry or a motor truck who was delivering roofing tiles to a cottage in course of erection on the other side of the railway line should have at first armed himself with a timetable. Do you think it would be reasonable that a man employed in that work would apply himself particularly to the instruction he received as to where the job was and as to how he was to get there and to deliver his load, but as to whether he 20 should have had a timetable as a reasonable precaution is a matter for you. The defendant says that the plaintiff had no right to go through there at all. True it is he did not have a right as Walters and his assigns and invitees had, but you must take into account the fact that the Commissioner had notice in writing that building materials were being taken on the 1st December, 1956, thirty-six days before this accident over this crossing and that when the plaintiff reached there on this day he would be guided by the notice exhibited "Beware of Trains". The defendant says that the plaintiff knew that he only had a view for fifty yards towards Carlingford, and, putting the motor truck into low-low gear he could not 30 escape the consequences if a train came around that curve, which it might do at any time, and in fact it did, and that the plaintiff in going across the railway line blindfolded materially contributed to his own misfortune.

Mr. Pile for the plaintiff asks you to dismiss this claim that the plaintiff failed to take reasonable care for his own safety, and on this issue of contributory negligence he asks you to find in favour of the plaintiff. He put it to you that the plaintiff cannot be said to be guilty of any contributory negligence because he was invited by the Commissioner's own notice to go across the line. He admits of course that the notice said "Beware of Trains", but through this notice he got into this situation across the railway line and he could not retreat from it. So Mr. Pile put it to you on this basis, that there is no negligence in getting into the crossing and he could not get out, and he asks you to consider the evidence as to whether the truck could have rolled back, but taking into account the reaction time which would be necessary in taking a truck out of here and taking into account that the train only occupied less than four seconds to come out of the curve and to the 40

crossing, that you will come to the conclusion in those circumstances and within that time it was impossible for the truck to roll back from the position in which it was when the train came around the curve. So Mr. Pile puts it to you that the plaintiff got into this situation not because of any failure to take care for his own safety but because of the defendant's own negligence, or the negligence of the defendant's servants, and Mr. Pile submitted to you that it was that negligence, the negligence of the Commissioner or the negligence of his servants or both, which caused the accident and it was not due in any way to the plaintiff failing to take reasonable care for his own safety. Mr.

- 10 Pile was quite right in asking you, when you consider this matter of contributory negligence, not to take into your consideration that there were other routes. That has no relation to contributory negligence, and I direct you accordingly.

Gentlemen, I do not think I can give you any further assistance, and I shall ask you therefore to retire and consider your verdict. After you retire I shall ask counsel whether they seek any further direction, and if it is necessary to give you any further direction, then I will call you back from the jury room for that purpose.

(At 12.55 p.m. the jury retired from Court.)

- 20 Mr. MILLER: If I might come now to the matters of liability. I want first of all to deal with this Housing Commission letter or that part of the letter which was admitted into evidence to which objection was taken, and the particulars which are set out at page 111 of the transcript. I would submit that this situation so relied upon by Mr. Pile in his address to the jury and on Your Honor's charge to the jury is in error for these reasons, that when the document is looked at, it was a document seeking from the Commissioner clarification and advice as to a number of matters relevant to rights pertaining to these crossings. It was not in any sense a letter giving us notice of any existing facts except in the sense in which the Housing Commission sought
- 30 elucidation of the questions which he asked, namely, what rights existed in the user of the crossings and what the future intentions of the Department were with regard to the crossings and whether if rights existed over the crossings the Railway Department requires any safety precautions at the crossing, etc. The problem we submit which stems out of Your Honor's charge to the jury, based upon the part of the letter which was admitted at page 111, is that the jury would understand that the mere mention in that letter that at present two level crossings were being used by building contractors and suppliers, the jury would understand from that statement about it that that was evidence of the fact. That is what the Housing Commission said to us. There is
- 40 no evidence that that was in fact the situation, and it is quite consistent that, arising out of the letter, the Commissioner had available to him the fact as shown by the evidence of, for instance, Mr. Foster, namely that while the Housing Commission was correct in its statements that at Telopea station the crossing that was being used by persons and lorries, that there was no use in fact being made of Walters' private crossing. In other words, it is a very

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onerous matter in the way the charge is put to the jury, for the defendant here to overcome any inference or conclusion or finding the jury might make arising out of the use of those two paragraphs. We would submit that looking at the whole letter, namely the letter from the Housing Commission it was primarily and mainly concerned with clarification of legal rights and existing local legal rights, if any, and future intentions by the Commissioner. We submit that what was said by the Housing Commission in these two paragraphs admitted at page 111 was no evidence of the fact of such alleged use, that it is quite consistent that the Commissioner, from his information, ascertained or knew that the Telopea station crossing was within the Housing Commission's description but that the Walters' private crossing was not within it, and it was quite consistent that the Commissioner defendant was dealing with the matter not by way of notification of an existing danger, but rather on inquiry from him and determination by him of the appropriate attitude of the Department in defining its legal rights qua the matter and those of any other person and taking action properly. We do submit that it is not intended by us, but in the way the jury would hear it, it is unduly onerous and strong against the defendant's case, not merely in the way Your Honor left the charge based on what was said by the Housing Commission but also by what was said by my learned friend in his speech to the jury. In this regard Your Honor may recall my friend did use to the jury illustrations referable to what a child or children might do at this place and he used the phrase "There was a conspiracy of silence so far as the Commissioner was concerned", that we did not answer the Housing Commission's letter and we kept quiet and we moved the train silently and this idea of silence, in the sense of movement of the train, was part of the same silence in that we did not answer it, done nothing arising from the Housing Commission's letter. We would ask with respect that Your Honor would recharge the jury with respect to that matter and we would submit that the latter matter, depending on those two paragraphs in the letter, ought to be withdrawn entirely and the jury told to take no notice whatever of it and that, on consideration, the matter is not one upon which consideration adverse to the defendant is called for.

I hand back to Your Honor m.f.i. "10". What I have said about the document is shown by reference to it.

The next matter is the question of the plaintiff's case here and the way it has been left, and Your Honor did tell the jury that the plaintiff's case was an allegation of negligence in the management of the train, and secondly in the management of the crossing. Now we submit that as to the management of the train there is no evidence of negligence of the defendant's servants with respect either to excessive speed or failure to keep a proper lookout, or failure to whistle. It is not a correct way, we submit, of putting it to the jury as to what the purpose of a particular whistling may have been at a particular stage of the journey when the purpose is not relevant. It is the fact of whistling which is the important thing, and although the driver said the purpose of the whistle was to warn people at Telopea station, that is not

to be restricted as an indication of the approach of the train to those people only. That is a whistling which is not exclusive to them and is heard and available to be heard by all persons who may be affected by the running of that train from that point onwards, and that certainly would include the plaintiff. We would submit that on the question of whistling there is no evidence that the appropriate whistling was not done. There was firstly no duty to whistle qua this particular crossing at all. There was no evidence of any departmental requirement with respect to it or practice with respect to such whistling approaching this place, and in addition to that the whole of

10 the evidence was that at a time when the plaintiff was within earshot of the whistle, two whistles were in fact given, and it is not relevant, we submit, for consideration of the Commissioner's duty to allow the matter to be determined upon what was the purpose of such whistling qua the question as to whether or not the plaintiff heard the whistling.

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This to some extent is tied up with Your Honor's charge to the jury with respect to the alleged open gate. The duty was put to the jury that the Commissioner was obliged, as a matter of duty, to use reasonable care to secure the safety of persons using the crossing. We submit that is too wide,

20 that on the case as presented the limit of the duty was to give some warning by whistle, not a whistle necessarily restricted to this particular case but whistling generally while in that area; that is to say running from Carlingford to Telopea. In connection with this, we submit that one must not assume that the Commissioner was aware, or his servants were aware, that the gates were open. One must assume that the gates were closed and if one assumes this plaintiff approaching to the threshold of the Commissioner's premises with the gate then closed, and the necessity of the plaintiff being on the track by himself but stopping and getting out of the truck and opening the gate, then you get an entirely different situation. Clearly this accident would not have happened at all if the plaintiff had come to this place and found

30 the gate closed. Quite obviously by the time he got out and opened the gate he could never have got his truck on to the line in time to be involved in this accident. So we submit that the matter does come down basically to the question as to whether or not there was any evidence going to the management of the train at the relevant time, a train being driven on the line between Carlingford and this particular place, and we therefore ask that the question of liability be put to the jury in the more restricted, narrower manner for which we are contending. So far as the movement of the train is concerned we would ask for the further charge to the jury by way of amendment and qualification along the lines which I have put.

40 So far as the alleged breach of duty qua the management of the crossing is concerned, we submit that there was no case made here on the static physical condition of the premises. There was no case made on any circumstances of the physical condition of those premises which showed or permitted it to be held that the Commissioner had failed in some duty qua the premises towards any person who might be on the premises. We submit it is a case in which there would need to be specific evidence going to the

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premises before any matter relevant to the alleged failure to exercise care in the management of the crossing being allowed to go to the jury, it being remembered that the plaintiff was not a licensee or invitee.

Mention was made of these matters which are provided at other places such as blinking lights and gatekeepers and automatic gates and so on, but there is no evidence here of such circumstances to the knowledge of the Commissioner or of such circumstances which ought to have been known to the Commissioner as to impose upon him the duty to do more with respect to the movement of the train between Carlingford and Telopea approaching this crossing, and the care of the crossing itself than was in 10 fact done by him on the occasion when Mr. Quinlan was injured. There is no evidence that any lopping of trees would have improved the view so as to enable the crew to see the truck coming, being on the crossing before it was in fact seen, and we submit that the plaintiff must take the premises as he finds them and that we were under no duty to lock the gate and prevent him coming on to the premises or lopping the trees.

We do get the case, so far as the management of the crossing is concerned, coming down to a case where no evidence was given by or on behalf of the plaintiff of any facts or circumstances which required or which, in the opinion of the jury, could require that steps be taken qua that crossing 20 other than or additional to those which were in fact taken and this matter of such other steps is one which cannot be determined by the jury without evidence as to facts and circumstances and what can be done, as a matter of railway practice to overcome or minimise danger arising from such facts and circumstances. It is not the sort of case which can be put by the plaintiff, and it being left to the jury to spell out or try to find some facts and/or circumstances which made it desirable or necessary to have the provision of some further precautions of the nature which has been mentioned. We do submit the case does come down to that, that the plaintiff who, at a very unusual time, namely 5.20 a.m. came upon our premises and that 30 those premises must have been and were known to him to be in a certain condition and that there is no evidence fit to be considered by the jury to show that they ought to have been at that time in some other condition, nor is there any evidence to show that such other condition would have avoided the injury to the plaintiff.

A further matter we submit is that there was no evidence of negligence of the defendant consisting of alleged failure to close the gate or have the gate closed at the relevant time. That would necessarily depend upon some knowledge of us that the gate was in fact open, and therefore no inference can be drawn against the defendant arising out of the fact that, as claimed 40 by the plaintiff when he went there the gate was open, and that there was no negligence in the plaintiff in going on to the premises. Your Honor will remember Mr. Pile said "Well, the gate was open; therefore there was no negligence in the plaintiff in going on to the premises". But we do submit that it is entirely wrong and misleading submission. That assumes

an open gate in a sense inviting the plaintiff or leading him to believe it was safe to go on and it involves the assumed knowledge in the defendant that the gate was so open, and that a person such as the plaintiff was interpreting or likely to interpret the fact that the gate was open as meaning that it was safe for him or that it was permissible for him to go on to our premises. I do submit that is not the correct charge. That is misleading and that would involve a measure of duty upon the defendant which is much higher than is warranted by the facts proved here.

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A further matter, we submit, is that when one comes to the question
10 of contributory negligence by the plaintiff, it is a proper matter to be
considered that there were in fact routes available to the plaintiff which
did not involve any such risk to him as was involved in the use by him of
this Walters' crossing. He did admit to me that he knew of other routes
to get across this line and that he had of course come from the side on
which the building work was being done, by an overhead bridge and got
on to the site through Walters' crossing. It is a relevant matter, we submit,
on the question of the duty of the plaintiff to take reasonable care for his
own safety that he chose to do these things, either ignoring other means
of access or not taking reasonable steps to ascertain such other means of
20 access and that he cannot be put in the position that he says to the jury
in effect "I did not know. I was told certain things. I did not know anything
else. It was in that state of mind that I approached and sought to go
across Walters' crossing." We submit that it is the whole situation that, if
the Commissioner is entitled to assume that people will make proper inquiry
and will take proper care for their own safety, it is then in the light of that
one must measure the duty of the plaintiff and right of the plaintiff to the
necessity of him taking care for his own safety, and one of the relevant
matters is the availability in close proximity of other routes and one
where he admitted he would have had a very good view extending over a
30 considerable distance both ways and a choice by him of a route where
the view was so restricted as to permit of him only seeing up to about 50
yards on the track to his left as he came to the crossing.

In that regard a further relevant matter would be his failure to get
out of the truck and look about him and listen, for instance, or to look
and that it was an important matter going to failure to take proper care
for his own safety that he chose to warn himself only to the extent of sitting
in a noisy truck with a limited view through a small window to the left
of the cabin, and this emphasises the importance of considering the plaintiff's
conduct and the defendant's conduct stemming out of the fact, if it be the
40 fact, that the gate was open. In other words, on the question of contributory
negligence, as also on the question of negligence itself, the plaintiff must
be put in the position of coming to that crossing as if the gate were shut;
in other words, he cannot be put in any more dangerous position as against
the defendant by reason of the fact that when he came there that morning

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he says the gate was open. On his own account he chose to seek to negotiate the crossing while at all relevant times remaining in the cabin of his truck and not making any further investigations.

We submit that these matters are important matters to the defendant in its duty as a railway operator, and it is necessary that we make these submissions. Your Honor will appreciate that previously what had happened was, that the Full Court of the Supreme Court took the view that the Commissioner's appeal should succeed on the ground that matters were left to the jury erroneously and the Court ordered this new trial. I should inform Your Honor that the Commissioner was granted a new trial but 10 claimed further and sought to get as his first submission a verdict by direction for the defendant, and in that regard application was made to the High Court for leave to appeal against the order of the Full Court directing a new trial. It was sought to get leave from the High Court to appeal with a view to arguing that the matter called for the entry of a verdict for the Commissioner on the ground that there was no evidence of breach of duty, or any duty by the Commissioner causing injury to the plaintiff. The High Court refused to grant leave and expressed the view that, as the Commissioner had a new trial these matters could be raised and dealt with in that new trial, and I mention that so that Your 20 Honor may be aware of that. The decision of the Full Court is reported but I do not think the matter in the High Court has been. It is an unusual case, it being a crossing of this nature of this particular type of railway and we do submit that the case as finally presented by the evidence, when analysed, is limited to a case of alleged negligence in the driving of a train, such negligence consisting only of alleged failure to give adequate warning by whistling the approach of the train. There is really nothing else left in the evidence as presented.

We would ask that these matters ought to be dealt with by way of Your Honor's charge to the jury. 30

HIS HONOR: I think I should re-direct the jury with regard to the present value of a sum of money which might be required in the future for hospital expenses and loss of wages in respect of the operation and that I ought to make clear what the evidence is at page 50 of the transcript. I think I should also withdraw from the jury that part of my direction which refers to the lopping of trees.

Mr. NICHOLL: As far as the lopping of the trees is concerned, we are in the position that Rich's case and Cardy's case have created a new approach to this kind of matter. If you look at what they say it seems to me, although a person may come to a piece of property in the character 40 of a trespasser, nevertheless the occupier of that property, by way of user, that he has permitted or suffered to go on, may be in a position where he has to take or regard that person as neighbour and take some reasonable steps to protect that person, and coming to the particular crossing

Your Honor said the appropriate duty to a crossing, the test is what is reasonable. It would be my submission on Rich's and Cardy's case, it is open that, having regard to the evidence, the jury might think that it was a reasonable step to take to lop the trees on railway property. This could be a matter which the jury would be entitled to take into consideration. I appreciate this case is not being presented to Your Honor that the plaintiff is a trespasser, and there was something in regard to the property simpliciter without any of these other matters which brought it within the old idea of what the approach to a trespasser was. Looking
 10 at it in the light of these recent cases, I would submit that it is a matter the jury may consider.

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Your Honor did say to the jury that you directed them as a matter of law that the plaintiff was neither an invitee nor a licensee. I would ask Your Honor to withdraw that remark in relation to the licensee. Your Honor is probably familiar with the decision of the Full Court in this very case and there the case had to go on the basis that there was an implied leave and licence. The way the case was put in the other court was that the "Beware of Trains" notice plus a previous visit and some meagre evidence of user was the way that the plaintiff sought to base leave and
 20 licence, and the Full Court there thought that we fell a bit short of the mark. There is different evidence in this case. Your Honor remembers the last part of the Full Court's decision and here we have called very considerable evidence of the actual user of the crossing. We have also given evidence of a letter that was written by the Housing Commission. That was not in evidence in the previous trial which gave notice of this, if nothing more, that the Housing Commission said that the two crossings were being used. That fact, coupled with no action by the Railway Commissioner to preclude people from coming on to the crossing, plus the inferences and the evidence that the jury has before it here of the actual
 30 user, if it accepts some of the plaintiff's witnesses, this question whether the plaintiff was a licensee may be left. It has not been opened in what character the plaintiff did go on this land. Your Honor did get around to this question in dealing with the "Beware of Trains" sign. All I ask Your Honor to do is to withdraw that direction of law that the plaintiff was not a licensee.

(At 1.42 p.m., the jury returned into Court.)

HIS HONOR: Gentlemen, learned counsel have asked me to give you several additional directions.

It was submitted to me that there is no evidence that if the trees had
 40 been lopped on the Commissioner's land the driver would have had a better view, and I think it is better that I withdraw that part of my direction which refers to the lopping of trees. Please cast that from your consideration. Otherwise, I ask you to please consider your verdict.

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The other matters which Mr. Miller and Mr. Nicholl mentioned will be noted so that the rights of the parties will be protected.

(At 1.48 the jury retired from Court and returned at 2.22 p.m. with a verdict for the plaintiff in the sum of £3,250.)

HIS HONOR: Judgment accordingly; stay of proceedings 21 days; by consent without security. Certify for view for senior counsel.

No. 5

NOTICE OF APPEAL TO FULL COURT BY DEFENDANT

TAKE NOTICE THAT in this action which was tried before His Honor 10
Mr. Justice Richardson and a jury of four on the twentieth twenty-first
twenty-second twenty-third twenty-fourth and twenty-seventh days of Novem-
ber One thousand nine hundred and sixty-one on which lastmentioned day
the said jury returned a verdict for the Plaintiff in the sum of Three thousand
two hundred and fifty pounds (£3,250 0s. 0d.) and judgment was entered
accordingly it is the intention of the Appellant to move this Honourable
Court on the first day on which the said Court sits in Banco after the expira-
tion of sixteen days from the filing of this Notice or so soon thereafter as
Counsel can be heard in that behalf FOR AN ORDER setting aside the
jury's verdict and entering a verdict for the Defendant or in the alternative 20
granting a new trial in the action upon the following grounds:—

1. That there was no evidence of negligence.
2. That there was no evidence of any breach by the Defendant of any duty of care owed to the plaintiff.
3. That His Honor was in error in admitting into evidence paragraphs 1 and 2 of the letter dated 1st December, 1955, from the Secretary of the Housing Commission of New South Wales to the Secretary, Department of Railways.
4. That His Honor was in error in his directions to the Jury in respect of the letter mentioned in the preceding paragraph. 30
5. That His Honor was in error in admitting evidence as to a notice board referring to and/or giving a direction to Stewart's Job.
6. That His Honor was in error in his directions to the Jury in respect of the said notice board.
7. That His Honor was in error in admitting evidence as to the number of houses or structures that were under construction adjacent to or near to Walters' crossing and what such houses called for in the way of truckloads or goods.

8. That His Honor was in error in admitting evidence of use made by such trucks of the said crossing.
9. That His Honor was in error in admitting evidence of persons that they had seen the gates of such crossing open.
10. That His Honor was in error in admitting evidence of a 45 degree batter or angle of the ground in front of the cottages under erection at "Stewart's Job".
11. That His Honor was in error in admitting evidence that other persons had used the said crossing.
- 10 12. That His Honor was in error in leaving to the Jury the question whether there was negligence in managing the crossing.
13. That His Honor was in error in leaving to the Jury the question whether there was negligence in the driving of the train.
14. That His Honor was in error in directing the Jury as to the duty of the train driver to give warning of the approach of the train to the particular crossing.
15. That His Honor should have directed the Jury that the train driver approaching the crossing was under no obligation to give warning of the approach of the train.
- 20 16. That His Honor should have directed the Jury that the Defendant was under no obligation to provide blinking lights gates with gatekeeper or automatic gates at the particular crossing.
17. That His Honor was in error in his directions to the Jury in respect of alternative routes by which the railway line could be crossed.
18. That His Honor should have directed the Jury that there was no evidence of excessive speed on the part of the train.
- 30 19. That His Honor should have directed the Jury that the train driver was under no obligation to decrease the speed of the train as it approached the crossing.
20. That His Honor should have directed the Jury that there was no evidence of a failure to whistle.
21. That His Honor should have directed the Jury that there was no evidence of failure on the part of the train crew to keep a lookout.
22. That His Honor was in error in respect of his directions to the Jury as to whistling of the train.
- 40 23. That His Honor should have directed the Jury that the train driver was entitled to assume that the gates were closed.
24. That His Honor should have directed the Jury that it was not a matter of negligence against the defendant to fail to have the gates closed at the crossing.

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25. That His Honor should have left to the Jury on contributory negligence the failure of the plaintiff to take an alternative route for the purpose of crossing the line.
26. That His Honor was in error in his directions to the Jury as to the plaintiff's knowledge of alternative routes.
27. That His Honor should have directed the Jury that the failure of the plaintiff to leave his truck and ensure by listening and other means that a train was not approaching was relevant in considering whether there was contributory negligence on the plaintiff's part. 10
28. That His Honor should have directed the Jury that the failure of the plaintiff to make inquiries as to the times when trains might go over the crossing was a matter to be considered on contributory negligence.
29. That His Honor should have directed the Jury that there was no evidence that the defendant knew of use being made of the crossing other than its use as an accommodation work.

DATED this Eighteenth day of December, 1961.

HERMANN JENKINS, Counsel for the Appellant.

No. 6

20

RULE OF THE SUPREME COURT DISMISSING APPEAL

Friday the Twenty-third day of
November One thousand nine hun-
dred and sixty-two.

Upon motion made herein the Sixteenth and Seventeenth days of October One thousand nine hundred and sixty-two WHEREUPON AND UPON READING the Notice of Motion herein dated the Eighteenth day of December One thousand nine hundred and sixty-one and the Appeal Book filed herein AND UPON HEARING what was alleged by Mr. E. S. Miller of Queen's Counsel with whom was Mr. H. Jenkins of Queen's Counsel and 30 Mr. N. C. Campbell of Counsel on behalf of the abovenamed Appellant Defendant and by Mr. M. E. Pile of Queen's Counsel with whom was Mr. W. K. Nicholl of Counsel on behalf of the abovenamed Respondent Plaintiff IT WAS ORDERED that the matter stand over for Judgment AND the matter standing in the list this day for Judgment accordingly IT IS ORDERED that the Appeal herein be and the same is hereby dismissed AND IT IS FURTHER ORDERED that the Appellant Defendant pay the costs of and incidental to this Appeal to the Respondent or his Solicitor Aidan John Devereux.

By the Court . 40
for the Prothonotary,
E. F. LENNON, Chief Clerk.

No. 7

**REASONS FOR JUDGMENT OF THE FULL COURT OF
THE SUPREME COURT OF NEW SOUTH WALES**

HERRON C.J. } Motion to set aside a verdict of a jury and to enter
McCLEMENS J. } judgment for the defendant or, alternatively, to order
WALLACE J. } a new trial.

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This case is before us by way of appeal from the result of a second trial. In the first action the jury returned a verdict for the plaintiff, but that verdict was set aside (*Quinlan v. Commissioner for Railways*, 60 S.R., p. 629) and a new trial was ordered on the ground that the basis upon which the learned trial Judge left the case to the jury was erroneous.

We propose later to analyse the facts in greater detail because of the appellant's submissions that there was no evidence of negligence and also because we are of the opinion that this is a matter in which the decision very much turns upon its own facts and the elucidation of these requires some analysis.

But shortly stated, the facts are that very early on the morning of 5th January, 1956, a truck driven by the plaintiff came into collision with a railway engine at a level crossing near Carlingford known as Walters' Crossing, an accommodation crossing originally provided for by s. 7 of Simpson's Railway Act of 1883. Simpson's Railway was, of course, later acquired by the New South Wales Railways.

Mr. Quinlan's case was that he was approaching the crossing from Adderton Road, which is a public highway, which ran for some distance alongside the railway on the western side. From Adderton Road a track, consisting of metal and grass led about thirty yards up a slope to the crossing itself. At the time of the accident to him Mr. Quinlan claims that the gates of the level crossing were open and that there was a notice BEWARE OF TRAINS. On the opposite side of the crossing was a new housing estate in early course of construction on what was formerly a rural area. The plaintiff had a load of tiles to be delivered to this estate.

The plaintiff gave evidence that he approached the crossing very slowly and that when the bonnet of his truck was level with the gates he put the truck in low and he hesitated and he looked to the left and looked to the right. There is some evidence that he actually stopped. He said: "I looked to the left and looked to my right and I paused and listened, as you have a very dim view on the left-hand side." He swears he did not hear any whistle blown or any noise associated with the running of the train and that there was no train in sight. In cross-examination he said that all he could say was that he did not hear a whistle, but it could have been sounded, and he was not prepared to deny that one was sounded. He then says that as he was going on to cross the railway track, a train

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suddenly appeared, proceeding south from Carlingford to Clyde, and that train struck his vehicle. His claim is that the train crew failed, in the circumstances, to give warning of approach by whistling or by any other method of protecting the crossing from the movement of trains.

It was conceded by the plaintiff that at the time when the accident happened he was a trespasser. Whether on the facts this concession was necessary may be doubtful. However it was made and the case was argued on its basis and it is accordingly unnecessary for us to examine the character in which the plaintiff was on the crossing.

Much of the difficulty presented from time to time during the some-10
what lengthy proceedings in this case has arisen from the fact that it was
not always clearly defined that it was not a dangerous premises case of
the *Indemaur v. Dames* (1866 L.R., 1 Common Pleas, p. 274), *Lippman*
v. Glendenning (46 C.L.R., p. 550) and *Vale v. Whidden* (50 S.R., p. 90)
variety, but was a case of a casual act of negligence causing injury to a
trespasser, in which the premises were a most material part of the circum-
stances and in which the true answer to the problem lay in the formulation
of the duty owed by the Commissioner for Railways to a person in the
situation of the plaintiff using this crossing, and whether, in all the circum-
stances there had been a breach of that duty. 20

For the purposes of this appeal we prescind from all considerations
as to whether the only three categories of persons found on land are
invitees, licensees and trespassers, or whether there is a wider categorisation
than these three (cf. *Vale v. Whidden*, supra), or whether the attempt to
categorise for the purpose, not of the action in respect of static negligence
but in relation to the casual act of negligence, poses a problem in which
categorisation does not exist.

It is not always easy to extract the principles affecting the duty owed
by the occupier of premises to a trespasser from the decided cases, and it
might even seem on a first examination that some even of the decisions 30
of the House of Lords are irreconcilable, particularly *Addie v. Dumbreck*
(1929 A.C., p. 358) and *Callen v. The Excelsior Wire Co.* (1930 A.C.,
p. 404). *Scrutton L.J.* in *Mourton v. Poulter* ((1930) 2 K.B., p. 183 at
p. 189) sought to explain the distinction between those two cases in a
judgment in which he differentiated between a trespasser in a case where the
land and those things on it remain in the same state, in which event a
trespasser must take it as he finds it and the owner is not bound to warn
him (*ibid.* p. 191), and the case in which "a man does something which
makes a change in the condition of the land, as where he starts a wheel, fells
a tree or sets off a blast, when he knows that people are standing near. In 40
each of these cases he owes a duty to those people, even though they are
trespassers, to take care to give them warning."

The latter leg of the principle as stated by the learned Lord Justice, in
our opinion is applicable here, because of the evidence from which it could

be inferred that it was very probable that the Commissioner knew of the use of this crossing by members of the public.

The Transport Commissioners of New South Wales v. Barton (49 C.L.R. at p. 114) was a case in which a horse strayed on to an unfenced railway line and was injured by a train. It was there held that the Commissioners' only duty was not to recklessly disregard the presence of the horse or intentionally to inflict injury on it. That case contains a discussion of the then recent decisions of the House of Lords in *Donoghue v. Stevenson* (1932 A.C. p. 580) and *Addie v. Dumbreck* (supra). Though the judgment

10 proceeds on the basis that the case was within and was covered by the category of cases in which the duty of owners and occupiers in relation to dangers upon their property was settled, Dixon J., as he then was, was at pains to point out that "insofar, therefore, as the loss of the plaintiff's mare is attributable only to the character of the undertaking established upon the premises where the mare ought not to have been, the plaintiff is not entitled to complain." p. 127. Later, His Honor, in dealing with *Addie v. Dumbreck* (supra) and with the case of *Haughton v. The North British Railway* (1892 20 R, p. 113), says, at p. 130, that Viscount Dunedin "appears to treat malicious or reckless injury as the limit of the occupier's liability to a trespasser even in respect of positive acts done with knowledge of the trespasser's proximity. But this passage does not necessarily involve a considered opinion that no difference exists between the measurement of duty in respect of such acts and that relating to the state of the occupier's premises."

The duty owed by the Commissioner to users of public level crossings has been discussed in a great number of cases, of which examples are: *Leahy v. The Commissioner for Railways* (2 C.L.R. p. 54); *Fraser v. The Commissioner for Railways* (8 C.L.R. p. 61); *Boylson v. The Commissioner for Railways* (19 C.L.R. p. 305); *Alchin v. The Commissioner for Railways* (1935 S.R., p. 498); *The South Australian Railway Commissioners v. Thomas* (84 C.L.R., p. 84); *Hale v. The Victorian Railway Commissioners* (87 C.L.R., p. 529); *The Commissioner for Railways v. Dowle* (99 C.L.R., p. 353); *Caledonian Collieries Ltd. v. Speirs* (97 C.L.R., p. 202).

The duty in relation to the lawful users of private crossings is discussed in a number of English cases.

Knight v. The Great Western Railway Co. (1943 K.B. at p. 105) is a case in which Tucker J., as he then was, sitting without a jury, held that there was a duty on a railway company to take reasonable precautions with regard to the approach of their trains to a private level accommodation

40 crossing over a branch-line, but the nature of the precautions and the degree of care required are not the same as where a line is crossed by a public way. That case contains some observations from an unreported judgment of Scrutton L.J. in *Burrows v. The Southern Railway Company*, the gist of which is summed up in this passage: "In my opinion, there is a duty cast on a railway company to take reasonable precautions in regard to the approach

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of their trains to such a crossing as that with which we are concerned in the present case. I am satisfied, however, that the nature of the precautions and the degree of care which is required may vary very considerably according to whether the crossing which is being approached is one over which the public have a right to go or whether it is merely a private accommodation crossing for the use of the adjoining occupier. The difference is merely in the degree of care which is required in the circumstances.”

Lloyds Bank Limited v. British Transport Commission ((1956) 1 W.L.R. at p. 1279) was a case involving a private accommodation crossing. In that case there was a finding of fact of contributory negligence against the deceased and this finding was upheld by the Court of Appeal, though it was not asserted that in respect of a private crossing there was no duty, because Denning L.J., at p. 1282 said: “In all these cases the precautions which should be taken depend on the degree of danger, and that depends on the particular circumstances of the case.” Morris L.J., at p. 1285, and Parker L.J., at p. 1289, expressed the same opinion. 10

But those were not cases where there was any question of trespass. The instant case, we emphasise, was a case in which counsel for Mr. Quinlan conceded that we ought to assume it.

In our opinion, the High Court has in three cases formulated the nature and extent of the duty quite clearly, and we propose to examine these and other cases to enable us to state what that duty was. The formulation of the duty depends not on the creation of any special branch of the law of negligence relating to level crossings but on the application of the general principles of the law of negligence to the facts here. 20

Thompson v. The Bankstown Municipal Council (69 W.N. p. 164) was a case in which a boy was injured attempting to remove a bird’s nest from an electric light pole, hence bringing himself into contact with a live wire, out of his reach except by doing what he did—standing on his bicycle and reaching up for it. The Full Court of this State unanimously held that he was a trespasser at the moment when and in the place where he received his injury, and in applying the principles laid down in such cases as *The Grand Trunk Railway of Canada v. Barnett* (1911 A.C. p. 361), *Addie v. Dumbreck* (supra), *Liddle v. Yorkshire North Riding County Council* ((1934) 2 K.B., p. 101), *Hillen and Pettigrew v. I.C.I. (Alkali) Ltd.* (1936 A.C., p. 65) came to the conclusion that there was no evidence disclosed in the circumstances that the appellant owed the respondent a legal duty and caused him injuries by breach of that duty. 30

The plaintiff then appealed to the High Court where he succeeded. As we read the judgment of the High Court (87 C.L.R., p. 619) Their Honors were of the opinion that the true question to be decided was whether the boy who was injured fell within the scope of the Electricity Authority’s duty of care. 40

The distinction between the principles for which Mr. Miller on behalf of the Commissioner for Railways is contending here and those for which Mr. Pile on behalf of Mr. Quinlan is contending is referred to by Dixon C.J., with whom Williams J. agreed, at p. 623: "The difficulty in deciding this appeal arises from the possibility and perhaps the necessity of choosing between two competing categories of the law of torts and applying one of them to the facts to the exclusion of the other. One category concerns the duties of an occupier of a structure with respect to the safety of those who come upon it or within the area of control exercised or exercisable by the occupier. The other category forms part of the general law of negligence and relates to the duty of exercising a high standard of care falling upon those controlling an extremely dangerous agency." At p. 642 Kitto J. said: "The law demands, as Lord Uthwatt said in *Read v. J. Lyons & Co. Ltd.* (1947 A.C., p. 156), a standard of conduct which a reasonably-minded occupier with due regard to his own interests might well agree to be fair and a trespasser might in a civilised community reasonably expect. It would be a misconception of the rule to regard it as precluding the application of the general principle of *Donoghue v. Stevenson* (supra) to a case where an occupier, in addition to being an occupier, stands in some other relation to a trespasser so that the latter is not only a trespasser but is also the occupier's neighbour, in Lord Atkin's sense of the word . . . The facts of the case must therefore be further examined for the purpose of considering whether there was another relation between the parties giving rise to such a duty of care that the jury could properly find a breach of it to have been the cause of the appellant's injuries."

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Thompson v. The Bankstown Municipal Council (supra) was decided later than *Edwards v. The Railway Executive* (1952 A.C., p. 737). Mr. Miller has pressed Edwards' case very strongly on us as an authority we should follow and as laying down principles of law which bind us; but Edwards' case was a very different type of case from this and from *Thompson v. The Bankstown Municipal Council*. In Edwards' case, children used to break through a fence and get on a railway line, though the fence was repaired from time to time to prevent the children trespassing. A child, having climbed through the fence, became entangled with a rail, was unable to move and shortly afterwards was run over before anyone could reach him. The House of Lords treated it as a premises case, because he was a trespasser, and held that because the plaintiff was a trespasser he could not recover as his injury was caused by the condition of the premises. Though the House also considered active negligence, it, in the particular facts, held that there was no evidence against the driver of the train because there was nothing to draw his attention to the presence of the boy on the line, and even if he had seen him there was no evidence that he could have pulled up.

In *Rich v. The Commissioner for Railways of New South Wales* (101 C.L.R., p. 135) a woman, in breach of a Government Railways By-law,

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crossed the railway line at a spot where she had no right to cross, there also being a notice, of which she was unaware, forbidding her. While crossing she was struck by a locomotive. Fullagar J. thought that the case was not one to be treated as turning on the character in which the plaintiff entered on the Commissioner's premises and was prepared to regard the plaintiff as a trespasser, stating that so to classify her did not dispose of the case because, while it was "hopeless for the plaintiff to succeed on the basis of any special duty resting on the Commissioner as an 'occupier', I am of the opinion that a case fit to go to the jury might have been made on the basis of a general duty to exercise reasonable care for the safety of persons 10 using the crossing."

Windeyer J., at p. 158, enunciated the proposition that, where a person is a trespasser, that determines the nature and extent of the duty that the occupier owes him, but it does not mean that no duty is owing to him. At p. 159 His Honor said, "Where a plaintiff complains of negligence in the conduct of an enterprise, especially one involving active operations like a railway, the question whether there was a breach of duty by those responsible is obscured if the classification of the plaintiff as trespasser, invitee or licensee be made in the abstract and unmindful of all the circumstances which give a particular content to abstract concepts of duty."

In the first appeal in this action this Court was of opinion (60 S.R. 629) 20 that on the assumption that the respondent was a trespasser on the crossing, a verdict in his favour could have been supported had the jury been directed in accordance with what Lord Atkin said when he laid down the neighbour principle in *Donoghue v. Stevenson* (supra at p. 580).

The latest decision requiring consideration is *Cardy v. The Commissioner for Railways* (104 C.L.R., p. 274). That was a case where a boy, roaming barefoot over the Commissioner's land, wandered on to a pit of hot ashes. At one side of the land beside the tip a pathway, which was open to pedestrians, led to certain streets and dwellings. The path was freely used 30 by pedestrians. There was evidence of frequent visits by children to the pit, together with some casual and intermittent warnings by servants of the Commissioner for Railways to keep off the pit. The importance of that case was that it recognised that in those circumstances, though the boy was a trespasser there was some duty, proportionate to the circumstances, owed to him by the occupier of the land, the Commissioner for Railways (see per Dixon C.J. at p. 206; per Fullagar J. at pp. 290 and 296, where His Honor quotes with approval the law as correctly stated in the 12th Edition of *Salmond*, at p. 516, that "The general principle (that an occupier owes no duty of care to a trespasser) is concerned only with the incidents which the 40 law attaches to the specific relation of occupier and trespasser and covers only cases in which the breach of duty of which the plaintiff complains out of the defendant's occupation or control of property, of 'premises' or a 'structure'. There are, however, cases in which the occupier, in addition to being an occupier, stands in some other relation to a trespasser so that the latter

is not only a trespasser but is also the occupier's neighbour within the familiar principle expounded by Lord Atkin." Fullagar J. then goes on to say: "The view expressed in the passage which I have quoted from the latest edition of Salmond is, in my opinion, the only view which is capable of putting all the decisions on a satisfactory basis, and which is consonant with the general doctrine of the law of negligence as laid down in *Donoghue v. Stevenson*. It has really, I think, been accepted in this court.")

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The principle, in our opinion, to be extracted from the decided cases is that, in the case of a level crossing adjacent to a public highway which is
10 not secured by a locked gate, there is a duty owed by the Railway authorities to take reasonable care towards persons to whom injury may reasonably and probably be anticipated if the duty is not observed (cf. *Bourhill v. Young*, 1943 A.C., p. 92, per Lord McMillan at p. 104).

Chapman v. Hearse (1962 A.L.R., p. 382) is authority for the proposition that it was not necessary for the plaintiff to show that this particular accident and this particular damage were probable; it would be sufficient in the instant case if the accident was of a class that might well be anticipated as one of the reasonable and probable results of the failure to whistle or give
20 any other satisfactory warning in all the circumstances here, if such failure amounted to a breach of the defendant's duty to the plaintiff in the circumstances.

Mr. Miller, for the Commissioner, has claimed that as there are 6,108 miles of railway track in New South Wales with 6,321 level crossings, of which 3,479 are private crossings, we should in this case lay down some principle of general application for all crossings. That we refuse to do, for a number of reasons. This case depends on its own special facts. Furthermore, it is not our function to "go further than (is) necessary for the determination of the particular issues" (*Donoghue v. Stevenson*, supra, at p. 583, per Lord Atkin). But, in any event, it is not our function but that of the
30 Commissioner's technical and legal advisers to decide, in the light of the particular circumstances of each crossing, whether no, or any, and if any what, precautions are appropriate, because, though there may be some general over-all policy applicable, the factual need for precautions would vary from crossing to crossing. It is the function of Courts to decide disputes as and when they arise.

Mr. Miller has claimed not only that the Judge misdirected the jury but that there was no evidence of negligence to go to the jury, and we think it proper, having regard to this claim but without rehearsing the whole of the facts, to point out that there was evidence in the case of the following
40 particular matters:

- (1) Though this crossing had never been gazetted as a public crossing, it had direct access to a public road by a gate that was not kept locked; nor was there any clear statement of a prohibition limiting use to authorised persons.

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- (2) Though it was a crossing that led from a public highway to private land, the inference was open that the defendant by his servants ought reasonably to have anticipated that vehicles would be going to and from the new development taking place on the eastern side of the line.
- (3) No padlock was provided or other steps taken to see that the gates were kept closed.
- (4) The notice BEWARE OF TRAINS, containing no statement of any prohibition against any persons coming off the highway through this gate, might well be found by a jury to amount to some form of permission to persons to use the crossing but to beware of trains when doing so. 10
- (5) It was an area close to a new residential area being built near a great metropolitan city.
- (6) It was an area of poor visibility, with a curve, a cutting and a further limitation of visibility by the presence of trees.
- (7) At the time of the accident, the obvious first signs of great residential development were clear to be seen.
- (8) These signs were of such a nature and of such an extent that it would have been within the reasonable anticipation of persons 20 aware of those developments that a great amount of material would have to be delivered by road by some means of access to service that development and that the means of access provided by this level crossing would be means likely to be used with others.

Another aspect of the case was a feature that the jury may well have considered would have put a reasonable person in the situation of the defendant on notice to inquire and take some steps. On 1st December, 1955, the Secretary of the Housing Commission of New South Wales, wrote to the Secretary of the Department of Railways, when he specifically told the latter 30 that "The Commission has let contracts for the erection of 212 cottages on the eastern side of the railway between Telopea and Carlingford stations as part of the general development of this project. These cottages will be completed progressively between February and June next. There are two level crossings in the vicinity of Telopea station and these are at present being used by building contractors and suppliers." Of the two level crossings mentioned, one is the crossing involved in this litigation, and the attention of the Department of Railways was, hence, pointedly drawn by another Government Department to the position in relation to this crossing. After this notice was given by a responsible Government Department to the Depart- 40 ment of Railways, a level crossing in the metropolitan area, with a misleading

notice, was allowed to remain unprotected for five weeks (which, it is true, included the Christmas and New Year holidays) but that was a crossing where there was evidence that there was an element of danger because of the curve and the trees.

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The following evidentiary considerations are also relevant, because the plaintiff based his claim on the lack of a whistle or other warning: On the question of sounding the whistle, it may well be that had the plaintiff's evidence stood alone it might not have been sufficient to prove a failure to whistle; but, taken with the evidence of the train driver that he recognised no duty to whistle for the crossing; the disagreement between the driver and the fireman as to who sounded the whistle and as to the manner of sounding it, the jury, weighing up the whole of this evidence, may well have come to the conclusion that the driver did not whistle at all. In any event, the jury might have concluded that, even if the whistle was sounded, it was sounded shortly after leaving Carlingford, when it might have been of no avail to users of the crossing or, alternatively, the jury might have found that it was sounded too late, if they accepted the evidence of the train driver, to be a warning to the plaintiff by then moving forward in his vehicle.

20 There was also the evidence of the Works Supervisor for the Housing Commission that a number of trucks invariably came across the crossing and that he had seen the gates both closed and open; from Brown, the brick carter, that he had used the crossing to cart bricks to Stewart's job, though the gate on the Adderton Road side was usually closed; Farlow, the carpenter, who swore that he used the crossing for ingress and egress each day and that the gate on the Adderton Road side was sometimes open and sometimes closed; Fulton, the carpenter, who used the crossing once or twice a day.

30 Though it is true that Mr. Stewart's letter of 1st December, 1955, met with a refusal, that was a letter which, taken with the letter of the Housing Commission of 1st December, 1955, should have further served to warn the Commissioner for Railways that some attention to the state of affairs at this crossing was necessary if danger was to be avoided.

A jury might have inferred in this case that members of the public might reasonably treat this crossing as a public crossing, in the absence of some clear and unequivocal method of indicating that it was a private crossing, because of the terms of the notice, the unlocked gate and its situation in relation to the public road.

40 We are not the tribunal of fact and we have no right to arrogate to ourselves the functions of a jury. It is not for us to say whether or not we believe the evidence of the driver, the fireman, the guard or Sub-Inspector Foster. The jury had ample evidence which they might have accepted of not infrequent user of this crossing under circumstances of which the Commissioner, through his servants and agents, was aware.

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Because of this evidentiary situation, we emphasise that this is a case which stands on its own facts and lays down no general principle of law. Had the circumstances of the geographic position or the form of the notice or the locking of the gate or many other things or a combination of them been different, it may well have been that there would have been no evidence to go to a jury. That is a matter on which we refuse to conjecture; suffice to say that it is our function to deal with this case and no other, and that there is evidence of negligence here. It may also well be that, had one element in the factual situation been different (for instance the form of the notice or a direction to lock the gate or a flatter approach or a different 10 locality), the jury may have taken a different view on the facts.

This case lasted for seven hearing days and no mind, no matter how well trained or skilled in the evaluation of evidence, let alone the minds of four completely inexperienced persons, could comprehend all the details of all the evidence given and all the submissions made and all the statements in the addresses and the summing-up over that period. Hence it is necessary for us to look at it on a broad basis and to ask ourselves what was really left to the jury in the summing-up in the light of the way the matter was placed before them.

His Honor, in a very painstaking summing-up, dealt in great detail with 20 the submissions of both counsel. Mr. Miller has criticised the summing-up as leaving to the jury this matter to some extent as a premises case instead of a case of an act of casual negligence, and it may very well be that there are passages in the summing-up which, taken out of their context, are capable of bearing that construction. But words taken out of their context can be made to bear any meaning. It is necessary that every summing-up be read as a whole, and if one so reads His Honor's summing-up it would appear that he left to the jury the precise questions, and those only, which arose for their determination. At one stage His Honor did say to the jury: "I 30 emphase that the issue is whether there was negligence in the driving of the train and/or negligence in the management of the crossing." However, if one analyses His Honor's summing-up further, it appears quite clearly that he is really putting these two matters as one heading under the view that "the duty of the Commissioner is to do everything which, in the circumstances, is reasonably necessary to secure the safety of persons using the crossing, and this would include the duty to give reasonable warning of the approach of a train where the Commissioner does not provide gates which are closed when a train is approaching." Later His Honor says: "It is his 40 duty to take every reasonable precaution to ensure that the crossing will be safe for members of the public generally who act with due care while passing over it." But even the way that matter is put by His Honor in its context throws it back to the matter that was really complained of, namely, the lack of an adequate whistle at the appropriate time. His Honor, in our view, quite clearly differentiated in his charge between active negligence in relation

to the circumstances that existed on the premises and negligent management of the premises themselves.

Some criticism was made of His Honor's ruling on the admission of evidence. On all the material matters set out in grounds 3, 5, 7, 8, 9, 10 and 11, we are of opinion that the evidence dealt with in those grounds of appeal was properly admitted as going to the circumstances.

On an examination of the Appeal Book, we are unable to discover, following upon Mr. Miller's minute examination of the summing-up and of His Honor's rulings as to admissibility, any material error in relation to the 10 conduct of the trial.

It therefore follows that this appeal must be dismissed, and with costs.

In conclusion, we desire to point out that this is another of those cases which have been, over the past years, causing the Judges of this Court serious concern. It is nearly six and a half years since the writ was issued on 20th June 1956. After the issue of the writ six weeks elapsed until the declaration on 3rd August. Another five and a half months elapsed before the pleas, and it was not until 29th March 1957, that the issues were filed. Two 20 years then elapsed until the five-day hearing of the action which concluded on 24th March 1959, with a verdict for £6,000 which, though criticised as excessive in the 26th ground of the notice of appeal dated 14th April, 1959, was not argued to be excessive before the Full Court. The appeal was not determined until June 1960, and it was on 27th November 1961, that the seven-day second hearing concluded before Mr. Justice Richardson, with a verdict for £3,250. The notice of appeal from His Honor was filed on 18th December 1961, and it is now, in November 1962, that the plaintiff succeeds in this Court in a case laying down no general questions of principle and which is dependent on its own facts, with a verdict which is £2,750 less than the verdict that the Commissioner did not argue was excessive over two 30 years ago.

This is a state of affairs of very great seriousness and injustice to litigants, and obviously requires some remedy.

I certify that this and the 20 preceding pages are a true copy of the reasons for judgment herein of His Honor the Chief Justice of New South Wales, Mr. Justice McClemens and Mr. Justice Wallace.

E. McDowell, Associate.

No. 8**Rule granting final leave to appeal to Her Majesty in Council**

TUESDAY the twenty-third day of July One thousand nine hundred and sixty-three

UPON MOTION made this day pursuant to the Notice of Motion filed herein on the Third day of June 1963 WHEREUPON AND UPON READING the said Notice of Motion the Affidavit of Alan Grant Crawford sworn on the Thirty-first day of May 1963 and the Prothonotary's Certificate of Compliance AND UPON HEARING what is alleged by Mr. Eric Miller of Queen's Counsel with whom was Mr. A. H. Conlon of Counsel for the Appellant and Mr. M. E. Pile of Queen's Counsel with whom was Mr. W. K. Nicholl of Counsel for the Respondent IT IS ORDERED that final leave to appeal to Her Majesty in Council from the Judgment of this Court given and made herein on the Twenty-third day of November 1962 be and the same is hereby granted to the Appellant AND IT IS FURTHER ORDERED that upon payment by the Appellant of the costs of preparation of the transcript record and despatch thereof to England the sum of Twenty-five pounds (£25 0s. 0d.) deposited in Court by the Appellant as security for and towards the costs thereof be paid out of Court to the Appellant.

BY THE COURT,

For the Prothonotary,

E. F. LENNON (L.S.)

Chief Clerk.

No. 9**Certificate of Prothonotary verifying the Transcript Record**

I RONALD EARLE WALKER of the City of Sydney in the State of New South Wales Commonwealth of Australia Prothonotary of the Supreme Court of the said State DO HEREBY CERTIFY that the sheets numbered one to one hundred and eighty inclusive contain a true copy of all the documents relevant to the appeal by the Appellant The Commissioner for Railways to Her Majesty in Her Majesty's Privy Council from the Rule of the Full Court of the said Supreme Court made in Action No. 5958 of 1956 on the Twenty-third day of November One thousand nine hundred and sixty-two so far as the same have relation to the matters of the said appeal together with the reasons for the said Rule given by the said Full Court of the said Supreme Court and that the sheets hereunto annexed and contained in pages numbered i to iv contain an index of all the papers documents and exhibits in the said action included in the annexed transcript record and of all the papers documents and exhibits in the said action not reproduced in the annexed transcript record which true copy and index are remitted to the Privy Council pursuant to the Order of his late Majesty King Edward The Seventh in his late Majesty's Privy Council of the Second day of April in the year of Our Lord One thousand nine hundred and nine.

IN FAITH AND TESTIMONY whereof I have hereunto set my hand and caused the seal of the said Supreme Court to be affixed this Twenty-fifth day of September in the year of Our Lord one thousand nine hundred and sixty-three.

R. E. WALKER (L.S.)
Prothonotary of the Supreme
Court of New South Wales.

No. 10

Certificate of Chief Justice

I the HONOURABLE LESLIE JAMES HERRON Chief Justice of the Supreme Court of New South Wales DO HEREBY CERTIFY that Ronald Earle Walker who has signed the Certificate above written is the Prothonotary of the said Supreme Court and that he has the custody of the records of the said Supreme Court.

IN FAITH AND TESTIMONY whereof I have hereunto set my hand and caused the seal of the said Supreme Court to be affixed this day of in the year of Our Lord One thousand nine hundred and sixty-three.

L. J. HERRON (L.S.)
Chief Justice of the Supreme
Court of New South Wales.

**Letter from Housing Commission of New South Wales to Secretary
for Railways dated 1st December, 1955**

Exhibit.

Letter
from
Housing
Commis-
sion of
New South
Wales to
Secretary
for
Railways.

The Commission has let contracts for the erection of 212 cottages on the eastern side of the railway between Telopea and Carlingford Stations as part of the general development of this Project. These cottages will be completed progressively between February and June next.

There are two level crossings in the vicinity of Telopea Station and these are at present being used by building contractors and suppliers.

After such time as the cottages are occupied it is probable that the
10 Commission tenants will also use these crossings.

Whereas it is appreciated that when the new station is constructed at Telopea, the one level crossing will be eliminated, it would appear that the danger of accident will continue to exist at the other crossing.

In order that the position regarding the level crossing may be clarified could you please advise on the following: —

1. What rights exist to the use of the crossings by
 - (a) Commission servants or licensees in connection with the development of the Commission's project
 - (b) Housing Commission tenants.
- 20 2. Future intentions of your Department regarding the crossings, and
3. Whether if rights exist over the crossings in favour of the Commission's land, the Railway Department requires any safety precautions at the crossing in view of the fact that they are used by building workmen, trucks, etc., and the fact that they are likely to be used by Housing Commission tenants and their children.

This matter has been discussed verbally with officers of your Department but the matter is now submitted officially in order that it may be investigated. In view of the use which is being made of these crossings, early advice
30 on the points raised will be appreciated.

**Letter from L. A. Stewart & Co. Ltd. to Secretary for Railways
dated 1st December, 1955**

Exhibit 5.

Letter
from
L. A.
Stewart
& Co. Ltd.,
to
Secretary
for
Railways,
dated 1st
December,
1955.

We hereby request permission to use the railway gate on the Carlingford side of Telopea Station for access to building sites on Addington Road.

We undertake to close the gate each time after using same.

It is estimated that we shall require such permission for a period of three months.

Exhibit 6.

Extract
from
Timetable.

Exhibit 6

Extract from Timetable for Clyde-Carlingford-Sandown Branch

Mondays to Fridays (inclusive)

CARLINGFORD Dep. 5.17 a.m.

TELOPEA Dep. 5.20 a.m.