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Notice of Appeal.

Filed Oct. 16, 1928.

New Jersey Supreme Court

EDWARD ALLEN,  
Plaintiff,

vs.

ARMOUR & COMPANY,  
Defendant.

Action at Law

10

To: EDWARD L. KATZENBACH, ESQ., Attorney of  
Defendant:

*Sir:*

YOU WILL PLEASE TO TAKE NOTICE that the above  
plaintiff herewith appeals to the New Jersey Court  
of Errors and Appeals from the judgment entered  
in the above case in the Warren Circuit of the Su-  
preme Court, and that within the time prescribed  
by the rules in such cases made and provided,  
there will be filed and served upon you by the  
above plaintiff, his reasons and grounds of appeal.

20

Dated, October 13, 1928.

Yours truly,

30

FREDERIC B. SCOTT,  
Attorney for Plaintiff.

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**Grounds of Appeal.**

Filed Nov. 3, 1928.

NEW JERSEY COURT OF ERRORS  
AND APPEALS.

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<p style="text-align: center;">EDWARD ALLEN, Plaintiff-Appellant.</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">ARMOUR &amp; COMPANY, a Cor- poration, Defendant-Respondent.</p>	}	Action at Law
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The above plaintiff-appellant, according to the practice in such cases made and provided, herewith sets out his reasons or grounds of appeal, to wit:

1. The Trial Court erred in directing the jury to return a verdict against plaintiff and in favor of the defendant of no cause of action.

FREDERIC B. SCOTT,  
Attorney of Plaintiff-Appellant.

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40

**Summons and Complaint.**

Filed Jan. 20, 1928.

STATE OF NEW JERSEY

TO

ARMOUR &amp; COMPANY, a corporation.

YOU ARE SUMMONED to answer the annexed Complaint of Edward Allen, in an action at law in the New Jersey Supreme Court. And take notice, that unless you file your answer to said Complaint with the Clerk of the said New Jersey Supreme Court, at Trenton, within twenty days after the service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit, and judgment may be entered against you.

10

Witness, WILLIAM S. GUMMERE, Chief Justice of the said New Jersey Supreme Court, at Trenton, this 3rd day of January, Nineteen Hundred and Twenty-eight.

20

FRED L. BLOODGOOD,  
Clerk.

FREDERIC B. SCOTT,  
Attorney.

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40

*Summons and Complaint.*

NEW JERSEY SUPREME COURT,  
WARREN COUNTY.

10

EDWARD ALLEN,  
Plaintiff,

*vs.*

ARMOUR & COMPANY, a Cor-  
poration,  
Defendant.

Action at Law

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The plaintiff, residing at Phillipsburg, Warren  
County, New Jersey, says:

30

1. That at all the times hereinafter mentioned,  
he was employed as a brakeman by The Delaware,  
Lackawanna and Western Railroad Company.

2. That during the course of plaintiff's employ-  
ment, he was directed by The Delaware, Lacka-  
wanna and Western Railroad Company, and in-  
vited by the Lehigh Valley Railroad Company, to  
ride and travel upon the top of a freight car, in  
the course of his employment, over the tracks of  
the Lehigh Valley Railroad Company.

3. That over the tracks of the Lehigh Valley  
Railroad Company and in the vicinity of the Han-  
over Street crossing of said railroad company,  
there had been suspended and was maintained a  
telephone wire serving the defendant, Armour &  
Company, and used by it in its business.

40

4. That said telephone wire as so suspended and  
maintained cleared and was free from interfering

*Summons and Complaint.*

or coming in contact with persons riding on top of freight cars using the tracks of the Lehigh Valley Railroad Company.

5. That on July 13th, 1926, the defendant, through its servants and agents, so carelessly and negligently interfered or tampered with said telephone wire as to cause it to sag and hang down over the tracks of the said Lehigh Valley Railroad Company, so much so that the plaintiff, while lawfully engaged in riding a freight car over and upon said tracks, in the night time, came into contact with said telephone wire and was thrown from the top of said freight car to the ground, grievously injuring him about the head, face, body and limbs. 10

6. That as a result of said negligent acts of the defendant, the plaintiff was permanently injured. 20

WHEREFORE, he brings this his suit and demands Two thousand nine hundred and ninety-nine dollars (\$2,999) as his damages.

FREDERIC B. SCOTT,  
Attorney of Plaintiff.

30

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**Answer.**

Filed Jan. 30, 1928.

NEW JERSEY SUPREME COURT,  
WARREN COUNTY.

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EDWARD ALLEN,  
Plaintiff,

*vs.*

ARMOUR & COMPANY, a Cor-  
poration,  
Defendant.

Action at Law

20

The defendant, an Illinois corporation, says:

1. It denies all of the allegations of the complaint.

FIRST SEPARATE DEFENSE.

The defendant was not guilty of any negligence and the injuries sustained by the plaintiff were due solely to his own negligence.

SECOND SEPARATE DEFENSE.

30

The plaintiff was guilty of negligence contributing to the accident and injuries received, if any.

EDWARD L. KATZENBACH,  
Attorney for Defendant.

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**Reply.**

Filed Feb. 7, 1928.

NEW JERSEY SUPREME COURT,  
WARREN COUNTY.

<p style="text-align: center;">EDWARD ALLEN, Plaintiff,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">ARMOUR &amp; COMPANY, a Cor- poration, Defendant.</p>	}	<p>10</p> <p>Action at Law</p>
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Edward Allen, the above plaintiff, answering the allegations of the first and second separate defense set forth in the defendant's answer filed in the above cause, says that he denies the allegations contained in the first and second separate defenses. 20

WHEREFORE he prays that judgment may be rendered in his favor.

FREDERIC B. SCOTT,  
Attorney of Plaintiff. 30

**Postea and Judgment.**

Entered June 5, 1928.

NEW JERSEY SUPREME COURT  
WARREN COUNTY.

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EDWARD ALLEN,  
Plaintiff,

*vs.*

ARMOUR & COMPANY, a  
corporation,  
Defendant.

Action at Law

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This case was tried before Circuit Judge Rulif V. Lawrence with a jury at the Warren Circuit on May 21st, 1928.

The said judge directed the jury to return a verdict against the plaintiff and in favor of the defendant of no cause of action and the jury returned a verdict accordingly.

30

WHEREFORE it is adjudged that the complaint of the plaintiff be dismissed, and that the defendant, Armour & Company, a corporation, do recover of the plaintiff, Edward Allen, its costs which have been taxed at the sum of..... costs \$

40

**Transcript of Proceedings.**

NEW JERSEY SUPREME COURT

WARREN COUNTY.

<p style="text-align: center;">EDWARD ALLEN, Plaintiff, <i>vs.</i> ARMOUR &amp; COMPANY, Defendant.</p>	}	<p style="text-align: right;">10</p> <p style="text-align: center;">Action at Law</p>
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The above cause was moved before Rulif V. Lawrence, Circuit Court Judge and a jury on May 21, 1928.

Mr. Scott opened the case for the plaintiff to the jury. 20

Mr. Gildea opened the case for the defendant to the jury.

THE CASE OF THE PLAINTIFF.

ERNEST SWISHER, SWORN.

By Mr. Scott:

Q. Where do you live? A. Easton.

Q. In July, 1926, what was your business? A. Foreman, night drill. 30

Q. Of what railroad? A. Delaware, Lackawanna and Western.

Q. How long had you been foreman? A. For quite some time. I don't know the exact dates.

Q. Six months or a year? A. About a year and a half.

Q. In July, 1926, you were that? A. Yes.

Q. In July, 1926, your job was where? A. In 40

*Ernest Swisher, for Plaintiff, Direct.*

Phillipsburg yard delivering cars from the D. L. and W. to the Pennsylvania Railroad.

10 Q. How did you get from the D. L. and W. to the Pennsylvania Railroad? A. We pulled out from the D. L. and W. on the Central tracks and shunted on the Central tracks, and into the Pennsylvania.

Q. A member of your crew was Mr. Edward Allen? A. Yes.

Q. How long about had he worked as a member of your crew? A. He must have worked six to eight months, if I recall.

Q. What kind of train did you take over to the Pennsylvania Railroad? A. A mixed train.

Q. Freight or passenger? A. Freight.

20 Q. By a mixed train you mean freight cars? A. Freight cars, tank cars, box cars.

Q. What was Allen's job in your crew? A. Allen's job was head man, to ride at the head end of the train, coming in next to the engine.

Q. On July 12, 1926, do you remember an accident happening to Allen? A. Yes, sir, I remember an accident happening to him.

Q. What time did that accident happen? About when was it? A. About 10.32, 10.35, round there.

30 The Court: Evening?

Witness: Yes, sir.

Q. What kind of day was it, warm, or fair? A. I don't just recall what kind of a day it was.

Q. About 10.32 at night? A. Yes, sir.

Q. Where had your train been? Where did it start from just before the accident happened?

40 A. Just before the accident happened it started from the Central tracks.

*Ernest Swisher, for Plaintiff, Direct.*

Q. Where did you come from? A. Come from the D. L. and W.

Q. Was your car being pulled or pushed? A. The car was being pushed.

Q. Over what tracks, west? A. South.

Q. Pushed from Lackawanna tracks over Central tracks and you were headed for the Lehigh Valley tracks? A. We pulled from the D. L. and W. and shunted over on the Pennsylvania Railroad. 10

Q. Did you get on the Lehigh Valley tracks at any time? A. Yes, sir, we got on the Lehigh Valley tracks.

Q. Will you tell the Court and jury on which tracks you were when you learned of this accident to Edward Allen? A. I was on the Lehigh Valley tracks when we learned of the accident. 20

Q. You are familiar with that location where are the Lehigh Valley tracks that you have just been describing? A. Yes.

Q. I call your attention and show you a certain photograph, and ask you if you recognize this first photograph as in the vicinity of the Lehigh Valley tracks? A. Yes, sir, right here was the Lehigh Valley track, right behind this signal here. 30

Mr. Scott: Just mark that. (He does.)

Mr. Scott: I ask that be marked for identification.

The Court: Show them to your adversary, and see whether he objects or not.

Mr. Gildea: We have no objection.

(Received and marked.)

*Ernest Swisher, for Plaintiff, Direct.*

Q. On this photograph, D-1, you have indicated by an ink mark, the Lehigh Valley track? A. Yes, sir.

10 Q. Is that part of the interchange system of tracks you were speaking about? A. That is part of the tracks, yes, sir.

Q. On the night that the accident happened to Allen, will you tell the Court and jury whether you were traveling on this particular track? A. We was traveling on that particular track.

Q. Is the track shown in this picture? A. Yes, the track shown in the picture.

Q. In what direction were you going? A. Going south.

20 Q. You were going, as you look at the picture, where? A. Going towards it.

The Court: Going into the picture?

Witness: Yes.

Q. Going into the picture? A. Yes.

Q. Prior to this night in question, you had traveled over that place many times? A. Many times, yes, sir.

30 Q. Can you tell us whether you had ever observed a certain car—

Mr. Gildea: Unless you have some special use for the photograph, I am afraid it is going to confuse the jury. It is the opposite side of the car.

—shown in this photograph, D-1? A. Yes, I seen that car many a night.

40 Q. Will you tell the Court and jury, this car you are speaking about, is not on wheels is it? A. I would say about that, I don't think it was.

*Ernest Swisher, for Plaintiff, Direct.*

Q. During the numbers of times you had traveled over prior to the night of the Allen accident will you tell the Court and jury whether you had ever observed any wire suspended or connected from said car? A. Yes, I had seen a wire from that car to a pole across the tracks.

10

Q. Look at this other photograph. Can you tell us to what pole they were connected? A. This pole on this corner here.

The Court: Let him mark it.  
(He does.)

Q. Did this wire extend from the car to where?

A. To the pole. From the pole to the car.

Q. Over the track? A. Over the tracks.

Q. Over the Lehigh Valley tracks? A. Yes.

20

Q. With respect to the top of box cars that you had had in your trains, will you tell the Court and jury how high that wire was? A. That wire would not clear a man standing on the car this particular night.

By the Court:

Q. He is speaking about prior to this accident. How long has that wire been there to your knowledge? A. I don't know just exactly how long.

30

Q. A month, or two months, how long had you seen it? A. I seen it ever since I seen the car there.

Q. How long had the car been there to your knowledge? A. To my knowledge it had been there a couple of months.

Q. At what height was that wire above the box car, to your knowledge? A. I don't exactly know the height, but—

40

*Ernest Swisher, for Plaintiff, Direct.*

Q. Above a man's head? A. Yes, it would clear a tall man.

Q. What do you mean by a tall man? A. Six-foot man, six foot five, it would clear him.

Q. You have seen that frequently? A. Yes, sir.

10 Mr. Gildea: Why not just draw a wire on there. Have the witness run a wire over from the pole to the box car.

Mr. Scott: I don't know whether he could.

By Mr. Scott:

Q. You say this wire was attached to this box car? A. Yes, it was attached to a scantling or something.

20 By the Court:

Q. At the top of the car? A. Yes.

Q. Sticking up, I suppose? A. Yes, up in the air.

By Mr. Scott:

Q. On the night in question you say you left the Lehigh Valley? A. Yes.

30 Q. Allen was a member of the crew. As you went over towards the Lehigh Valley tracks do you recall where Allen was? A. I do not recall exactly what car he was on, but he was on a high box car.

Q. What was he to do there? A. Pass signals.

By the Court:

Q. You know he was next to the engine, do you? A. I don't know for sure.

By Mr. Scott:

40 Q. Do you know whether he was on top of a box car? A. He was on top of a box car, yes.

*Ernest Swisher, for Plaintiff, Cross.*

Q. Passing signals by lantern? A. By lantern.

By the Court:

Q. Was that his duty to be there? A. That was his duty.

By Mr. Scott:

10

Q. As you went over the Lehigh Valley tracks and came in the neighborhood of this wire, did you learn of anything happening? A. No, not until the engine stopped.

Q. When the engine stopped, what did you do? A. I got off, and ran back to see what was the matter.

By the Court:

Q. What did you find? A. I found Edward Allen lying on the ground, and the wire wrapped around him.

20

By Mr. Scott:

Q. What wire do you mean? A. This wire reaching from the pole over to this car.

Q. How did you know it was that wire? A. Because it was broken, and that was the only wire that was lying across the tracks.

Q. There had been no other wire in that neighborhood? A. No, sir.

30

*Cross examination by Mr. Gildea.*

Q. You said that on the night of this accident the wire was not high enough to clear a man on a box car, didn't you? A. I didn't say it was not high enough.

Q. I think you said on direct examination that on that night it was not high enough to clear a

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*S. L. Harrison, for Plaintiff, Direct.*

man on a box car? A. I didn't say it was not high enough to clear a man that night. Previous nights it was.

Q. You didn't see it the night before the accident? A. I did not see it.

10 Q. Mr. Allen's place as head brakeman would be up near the locomotive whether you were being pushed or pulled, was it? A. Yes, sir.

Q. He would be the brakeman who would immediately pass signals to the engineer whether the engine was at the rear of the train or the head? A. At all times.

---

S. L. HARRISON, sworn.

20 By Mr. Scott:

Q. You were a member of Mr. Swisher's drill crew on the night of July 12, 1926? A. I was, sir.

Q. And Allen was also a member of your crew? A. Yes, sir.

Q. How long had you been working on that job? A. Since 1924, April, 1924.

30 Q. You traveled frequently over the site of the interchange tracks? A. Almost every night.

Q. Your position was—— A. A brakeman on the job.

Q. On the night in question what was the first knowledge you had that anything happened to Allen? A. When we stopped, threw the train into emergency.

40 Q. Then what did you do? A. I was riding on the first car going south into the Pennsylvania Railroad. I got off and went back to see what happened.

*S. L. Harrison, for Plaintiff, Cross.*

Q. What did you find? A. I found Allen lying on the ground with this wire round him. Apparently, it pulled him off, this wire that was there.

Q. Had you ever seen the wire before? A. Yes, I had seen it before, from the time they put it up. We watched it each day to see what it was doing there. We knew it was there. 10

Q. Where did it extend from? A. From Hanover and Market across the Valley tracks to this refrigerator car.

Q. How was it attached to the car? A. Attached to a post, timber about 2x4.

Q. From your knowledge and observation, how high was that wire prior to the night in question, with respect to the top of a box car? A. About seven feet, or eight feet. It would clear me and I am six feet. 20

By the Court:

Q. You had gone under it? A. Yes, sir.

Q. How many times? A. Lots of nights before that I had gone under it. I can't say the number of nights.

By Mr. Scott: 30

Q. At the time of the Allen accident, will you tell the Court and jury whether it was light or dark? A. Dark, about 10.30 or 10.32 at night time.

*Cross examination by Mr. Gildea.*

Q. You could see the wire at night? A. You could not see it at night time. 40

*Arthur J. Parke, for Plaintiff, Direct.*

Q. You had seen it before the accident? A. I had seen it before, yes.

Q. In the day time? A. Yes, because at the time when our shift went to work it was daylight, and we had seen it when we come off the first  
10 job.

By Mr. Scott:

Q. Did you trace this wire across? A. Yes, we did trace the wire.

Q. Where did it run to? A. The piece that was left was on this pole across on the corner of Hanover and Market Streets, and the remainder was around Allen. It was the only wire in that  
20 vicinity that ran across the track. That was the only wire that could have pulled him off this car.

By Mr. Gildea:

Q. Where were you riding? A. On the head car going in, which was a hopper, a coal car.

---

ARTHUR J. PARKE, SWORN.

30 By Mr. Scott:

Q. Where do you live? A. Phillipsburg.

Q. In July, 1926, what was your business? A. Locomotive engineer on the night drill, Phillipsburg Yard.

Q. Of the D. L. and W.? A. Yes.

Q. You knew Edward Allen? A. Yes.

Q. Was he a member of the crew, of the drill  
40 crew? A. He was a member of our crew.

*Arthur J. Parke, for Plaintiff, Direct.*

Q. Do you remember on July 12th, 1926, an accident happening to Allen? A. I do.

Q. Prior to the accident, prior to your learning of the accident, where had you started from?

A. From the Lackawanna yards.

Q. You were going where? A. Pennsylvania yards. 10

Q. Over to where, to what point? A. From the Lackawanna yard to the Pennsylvania yard, out on the Central tracks, over the Valley to Pennsylvania.

Q. Did you on that trip pass the vicinity shown in these two photographs, D-1 and D-2? A. Yes, sir, right here is where the accident happened.

Q. That is on D-1? A. No, D-2. Here is D-1.

Q. On D-2, and the track shown on D-1 and D-2 is the Lehigh Valley track? A. That is the tracks we were going over, yes, sir. 20

Q. Before this accident happened to Allen, had you seen Allen any place? A. I saw him back on the first or second car, his proper place, giving signals.

Q. What kind of car was that? A. Box car.

Q. He was giving signals to whom? A. To me, from the head end of the train.

Q. What was the first knowledge that you knew that anything was wrong? A. He was giving the signal to come ahead right along. All at once I seen the lamp go high in the air, which was out of the ordinary, and at that time was not necessary. So I said to the fireman "Where did Ed. go?", and I come up to the cab window to see if I could see him on top of the car. I could not, so I put the brake into emergency, and stopped. 30

*Harold Farcha, for Plaintiff, Direct.*

Q. In making that trip from the Lackawanna tracks over the Pennsylvania Railroad tracks by way of the Lehigh Valley tracks, do you recall a car, an Armour car, shown in these photographs D-1 and D-2? A. Yes.

10 Q. Did you ever observe any wire strung from that car? A. I had never taken any particular notice of that at all.

Q. You had never taken any particular notice? A. No.

Q. When you say you missed Allen you say you stopped your car? A. Yes, sir.

20 Q. What did you do? A. Went back to where I could see him lying behind the track, alongside the track. The fireman I believe was back before I got there.

Q. When you got there, was Allen on the ground? A. He was lying on the ground, yes, sir.

Q. Did you see any wire around? A. I did right afterwards, yes. I didn't look right away. I didn't know what had happened to him. I only saw the wires afterwards.

Q. At the time you saw this lantern go up in the air, was it light or dark? A. Dark.

30 *Cross examination by Mr. Gildea.*

No questions.

---

HAROLD FARCHA, SWORN.

By Mr. Scott:

40 Q. You were a member of Mr. Swisher's crew that was operating on the Lackawanna Railroad on July 12, 1926? A. Yes, sir.

*Harold Farcha, for Plaintiff, Cross.*

Q. You know Edward Allen? A. Yes, sir.

Q. He was a member of your crew? A. Yes, sir.

Q. On the night of July 12, 1926, do you recollect leaving the D. L. and W. yards and going over to the Pennsylvania Railroad? A. Yes, sir.

Q. At that time you were a fireman? A. Yes, sir.

10

Q. Are you familiar with the vicinity shown in the photographs on the Court's desk there, known as D-1 and D-2? A. Yes, sir.

Q. You recognize that Armour car there? A. Yes, sir.

Q. Do you know whether prior to that night, July 12, 1926, there were any wires attached to, or connected with that car? A. I never noticed any wires at all up there any time.

20

Q. What was the first knowledge you had that anything unusual had happened? A. The moment the engineer stopped and wanted to know what become of Ed. I jumped off, and I saw he was lying in back of us, and I went back and found him bleeding very hard, and saw some wire there.

Q. Where was he bleeding from? A. From the nose and head.

30

*Cross examination by Mr. Gildea.*

Q. What kind of train did you have that night?

A. We had a mixed train, low cars and high cars.

Q. Open cars and closed cars? A. Yes, sir.

Q. Do you recall whether or not there was any car in that train so loaded that any of the load was higher than a box car? A. No, I don't know

40

*Ambrose E. West, for Plaintiff, Direct.*

anything about the train, what the loads were on it, or what was in the load.

Q. They do sometimes, railroad cars, have loads that extend in the air higher than the top of box cars? A. Not that I know of.

10 Q. Haven't you ever seen one? A. No.

By the Court:

Q. What is the average height of a box car from the ground? A. From the ground, I don't know. I could not say, to be honest with you.

Q. You never found out in all of your experience? A. I have nothing to do with box cars.

Q. The next time you come in Court you had better find that out. Somebody will ask you, surely.

20

---

AMBROSE E. WEST, SWORN:

By Mr. Scott:

Q. You live where? A. Easton.

Q. You work for the Lehigh Valley Railroad?

A. Yes, sir.

Q. You are an engineer? A. Engineer, yes, sir.

30 Q. How long have you worked for the Lehigh Valley? A. How long have I been doing that?

Q. How long have you worked for the Lehigh Valley? A. About 45 years, altogether.

Q. In July, 1926, you worked for the Lehigh Valley? A. Yes, sir.

Q. I have got a couple of pictures up here I would like you to look at, and see if you can recognize the vicinity of those pictures? A. Yes, sir. I can recognize that.

40 Q. That is D-1? A. In fact, I can recognize this one.

*Ambrose E. West, for Plaintiff, Direct.*

Q. The other one, D-2. The track in this picture, Mr. West, is that the Lehigh Valley track?

A. That is not exactly the Lehigh Valley track. It is an interchange track between the Central Railroad and the Lehigh Valley and Belvidere or Pennsylvania Railroad.

10

Q. Prior to July 12, 1926, had you ever seen that, what we call the Armour car, shown in this picture there? A. Yes, sir.

Q. How long had it been there to your knowledge? A. I could not state exactly, but it probably was there in the neighborhood of two or three months.

Q. While it was there, do you recollect any wire being attached to it, or wires? A. Yes, there was a wire ran across from a pole located on the west side of Hanover Street.

20

Q. I show you a picture known as D-4, and ask you if that is the pole shown in the picture? A. Yes, I think this is the pole.

Q. This pole you mean you think is the pole that is marked with a cross up at the top? A. That was the pole where one end of the wire was attached, and it run over the Lehigh Valley tracks diagonally across Hanover Street.

Q. To where? A. To the Armour beef car here, or temporary beef station.

30

Q. This pole you spoke about, I am going to mark with your initials at the top, just "W." That is right, isn't it, that is the pole? A. Yes.

Q. You have heard about an accident to a Lackawanna employee on July 14th, 1926, didn't you? A. I didn't see the accident.

Q. You heard about it? A. Yes.

Q. On July 13th, 1926, did you see anything unusual with respect to this wire running from the

40

*Ambrose E. West, for Plaintiff, Direct.*

Armour beef car to this pole? A. I had delivered cars to the Central Railroad of New Jersey, and I was on my return trip around this interchange on that track there.

The Court: Referring now to D-1.

10 The signal is located right at Hanover Street crossing. It was in a stop position and I come to a stop. I laid there probably 10 or 15 minutes, I could not say exactly, and then I proceeded, and at the same time I lit my headlight. When I did that, I saw this wire lying low across the track, and I hollered to a man there with a truck. He was loading lumber on a truck.

20 Q. What kind of truck was it? A. I could not say what kind of truck it was. It was an open truck, with low sides.

The Court: Any lettering on it?

The Witness: That I could not say. I didn't notice, but I think the truck was painted yellow. I am pretty sure the truck was painted yellow, but I didn't take notice of any lettering.

30 Q. When you did notice it, if you will just go on and tell us? A. When I noticed this wire, I hollered to the man that had this truck loading this lumber, and I said "What are you going to do about that wire?" I had stopped the engine again, and he ran over, and he climbed up the ladder on this car and got this wire, and held it up as high as he could hold it, and then I passed under it with the engine, and I thought probably the man would fasten this wire up again, as there was a 2 by 4  
40 scantling erected somewhere on that car. I

*Ambrose E. West, for Plaintiff, Cross.*

thought he would fasten it up again. I went around in the yard, and I was working at the upper end of track 3 and 5 in the Lehigh Valley yard. This was in the neighborhood of about ten o'clock, or somewhere round there. It might have been later and it might have been a little earlier, and I seen a train go over the crossing to go into the Pell Dell Yard or the Pennsylvania Railroad, and it come to a stop, and stopped rather quick, and this train stopped so quick it attracted my attention more than anything else, and then I seen two lights, I could not see the men, it was too dark to see that, but I could see two lanterns pass down along just there, and I thought probably a car had left the track, or something. I thought something had happened. 10

Q. About what time was it? A. Then we was still working in the yard up there, and one of my own train men, or brakemen, came up and told me that a D. L. and W. train man had got caught with the wire and throwed off the car, so he must have left this wire hang low again and caught the man on top of the car. 20

Mr. Gildea: I move that be stricken out.

The Court: Strike it out, hearsay testimony. 30

*Cross examination by Mr. Gildea.*

Q. What time was it when you——

The Court: Of course, the corpus delicti is not really here in dispute at all.

Q. What time was it when you saw this wire sagging over this track? A. About eight o'clock.

Q. About eight o'clock? A. In the evening. 40

*Andrew Robert Stamm, for Plaintiff, Direct.*

Q. On the 13th July? A. Yes, sir, on the 13th July.

Q. When you say eight o'clock you mean eight o'clock Standard time or Daylight time? A. Eight o'clock standard time.

10 Q. It was dark enough then to turn your head light on? A. It was not real dark, but turning the head light on gave me a better view.

---

ANDREW ROBERT STAMM, SWORN.

By Mr. Scott:

Q. You are connected with Armour and Company? A. Yes.

20 Q. In what capacity? A. Manager.

Q. Their plant is located where? A. Market and Hanover Streets, Phillipsburg.

Q. How many men in July did you employ? A. At that time about eleven.

Q. Eleven? A. At that time, yes.

Q. Your deliveries were made in what manner? Your meat deliveries were made in what manner? A. Truck delivery

30 Q. How were they designated or painted? A. Yellow.

Q. One of these photographs here I have, all of them show a car. If you will kindly look at these photographs here, there is apparently a refrigerator car shown in these photographs, D-1, 2 and 4? A. They are right, all of them.

Q. Will you tell us in what way that car was used in connection with your business, with the business of the Armour Company?

40 The Court: On July 13th, 1926?

*Andrew Robert Stamm, for Plaintiff, Direct.*

A. No, that was not used with our business.

Q. You say that was an Armour car? A. Yes.

Q. Belonging to your company? A. Yes.

Q. Did you have anything to do with the location of that car there, the place that that car was in on July 13th, 1926?

10

The Court: Any time, when originally placed.

A. Yes, I did.

Q. When was it put there? A. About three months, three to three and a half months before the accident occurred.

Q. What was the purpose for putting it there?

A. We were using it as a store house then.

Q. Store house? A. Store house and office combined. We had a telephone hooked up there, a sort of shipping clerk's office, that is what it was.

20

Q. Being an office, was there any telephone connection with that office? While it was being used as an office, was there any telephone connection? A. Yes.

Q. How was that telephone connection made?

A. From this pole here marked.

Q. On D-4 at the top with a cross at the side?

30

A. Yes, those markings are right.

Q. There was a telephone wire running over to the car? A. Yes.

Q. How was that wire put there? A. That wire was put there immediately upon the car being placed there, that same day, I think. We had to have our telephone there.

Q. You continued that office as a receiving office for your receiving clerk up until what time?

40

*Andrew Robert Stamm, for Plaintiff, Cross.*

A. June, we opened the new house June 14th, which was Flag Day, Monday. That Saturday we made preparations to clean everything out of that house and put it in the new house, which was about June 12th we abandoned that box car.

10 Q. You abandoned it on June 12th? A. Yes.

Q. That is, you took everything out of it and put it in the new house? A. Yes, that is right.

Mr. Scott: That is all at this time. I ask leave to recall this witness.

*Cross examination by Mr. Gildea.*

Q. Who put the telephone up there? A. The Telephone and Telegraph Company.

20 Q. Do you know whose car it was? Was it Armour and Company's car? Did they own the car? A. Yes, we owned the box car.

Q. Who owned the ground, do you know? A. I don't know, quite a few people at that particular point, I think. It seems to be two or three railroads there that own that particular ground.

Mr. Scott: I am willing to agree, Mr. Gildea, that that ground was leased to Armour and Company by the Lehigh Valley Railroad Company.

30

Mr. Gildea: For how long?

Mr. Scott: An indefinite period.

Mr. Gildea: A monthly tenancy?

Mr. Scott: That I don't know. I know that monthly payments were made.

Mr. Gildea: I don't think it is material.

Mr. Scott: I don't think it is material.

Mr. Gildea: That is all, Mr. Stamm, now

40

*Fred S. Heit, for Plaintiff, Direct.*

FRED S. HEIT, sworn:

By Mr. Scott:

Q. In July, 1926, you worked for whom? A. Armour Company.

Q. And for whom do you work at the present time? A. For the Armour Company. 10

Q. How long have you worked for Armour and Company? A. I would judge about five and a half years now.

Q. In July, 1926, who was what you call your boss? A. Mr. Stamm.

Q. That was the gentleman just on the stand? A. Yes, just on the stand.

Q. I show you several photographs, Mr. Heit, and ask you if you recognize that car in these photographs, D-1, D-2 and D-4, that has been designated by the different witnesses as the Armour car? A. Yes, I recognize the car, but there is some things that is not on here. 20

Q. You recognize the car? A. Yes, but there is some things that is not on here.

Q. You mean there is something that should be on there that is not there? A. Wood.

Q. But as far as the car is concerned, you recognize that as the Armour car? A. Yes, sir.

Q. Did you see that car on July 12, 1926? A. I seen the car every day I was working pretty near while it was there. 30

Q. What kind of a truck did you drive, Mr. Heit? A. I could not really recall back what truck I was driving.

Q. What truck did you drive? A. What kind?

Q. The Armour truck? A. Yes.

The Court: Ordinarily, he means.

*Fred S. Heit, for Plaintiff, Direct.*

Q. Are all the Armour trucks painted alike? A. Every one I seen has been painted yellow, yes.

Q. Did you get down to this car at any time on July 12th, 1926? A. As far as recollecting back the date, I could not say the date, but I have been  
10 lots of times to the car, yes.

Q. For purposes connected with your employment? A. I have been in the employment, and after my time was up.

Q. Do you recollect an occurrence in July, 1926, when an engineer of the Lehigh Valley Railroad called your attention to anything? A. Yes, sir.

Q. What was the date of that occurrence? A. I could not tell you the date.

Q. Prior to this Lehigh Valley engineer calling  
20 your attention, or attracting your attention, had you done anything to the Armour car that was shown in these photographs? A. I was taking the wood away from that car.

Q. Had you done anything to the car? A. I had taken the wood away from the car.

Mr. Scott: I ask that be stricken out as not responsive.

The Court: What had you done to the car itself?

30 Witness: I didn't do anything to the car.

The Court: You had not done anything?

Witness: No.

Mr. Scott: I am surprised by what this witness says. I would like to have the privilege of a more and broader scope of examination. When I say I am surprised, there are only two ways of satisfying the Court—

The Court: What do you want to do? You want to examine him as a hostile witness?

40

*Fred S. Heit, for Plaintiff, Direct.*

Mr. Scott: Yes, sir.

The Court: That is your privilege.

By Mr. Scott:

Q. Had you not ripped off about ten boards off this particular car? A. I don't know if that is what you would call them. I called it firewood. 10

The Court: Had you ripped them off the car?

Witness: Yes, sir, I had taken something, ripped them off.

Q. How had you been ripping them off? A. I don't just remember how I did take them off any more.

Q. Were you taking them off by—— A. I pulled it down the side. If you will give me that, I will show you. 20

Q. Were you pulling them off with your hands, or did you have some tools with you, or what? A. I had an old hammer.

Q. When you got down to the car, at the time do you recollect whether there was a wire running from a pole on Hanover Street over to the car? A. Yes, sir, there was. 30

Q. How was that wire fastened to the car? A. It was put across the tracks and down on to the car on to a scantling.

Q. Scantling? A. That is what I judge it was.

Q. And these boards that you ripped off the car, can you show us where they were on any of these photographs? A. Here is the car here. I don't just remember the back end of that car, to tell you the truth.

Q. I have another photograph here that may 40

*Fred S. Heit, for Plaintiff, Cross.*

help you. Will that be of any assistance? A. No, this is the back end, I think. It is like this here—

10 Q. Pick out the best one? A. As much as I can explain to you, like if there was boards up here, you know (indicating).

Q. Scantling at the side? A. Yes, one up here, and one up here, like a frame put up there, and I took this down, and in taking this down I didn't take notice of this wire being any way connected there, and it come down.

Q. You were getting those boards off with an old hammer? A. An old hammer I got there, yes, sir.

20 Q. After you got through taking off those boards, or was it after you got through taking off those boards, the Lehigh Valley engineer called your attention to the wire being down? A. I don't just remember whether I was loading them up or not when he called my attention he could not get through, there was a wire down there, yes, sir.

*Cross examination by Mr. Gildea.*

30 Q. What time of day were you taking this firewood? A. After I had my lunch in the evening it was, after quitting time.

Q. What time did you quit that day, do you remember? A. About half-past five, if I can just remember back.

Q. How long did it take you to collect the firewood? A. I really could not say how long it did take me. I went home and got my lunch, and come back with my car, and took this down, and

*Fred S. Heit, for Plaintiff, Cross.*

then put it on my truck and took it home. When I got finished it was dark, that is certain.

Q. Were you being paid by Armour and Company for the time you spent collecting this firewood? A. No, sir, I was not working for Armour and Company at that time. I was working for myself, trying to get kindling wood for myself. 10

Q. Where were you going to burn it? A. Home in my stove.

Q. Did you ask anybody's permission to collect this firewood? A. Yes, I did.

Q. Whose? A. I asked my manager, the boss, Mr. Stamm.

Q. What did you ask him? A. I asked him whether I could have this firewood around there to use and cut up for firewood. He said "Yes." I asked him for the loan of the company's truck, and he said "As long as you take care of it, it's all right." I often do that. 20

Q. Did anyone connected with the Armour Company tell you to take that telephone down? A. No, I didn't know it was down.

Q. Anybody tell you to take down the scantling supporting the wire? A. No, I asked for that. 30

Q. Did you ask anybody to give you permission to take that scantling down? A. No, I didn't want the scantling down, that has anything that was connected with the wire I didn't want.

Q. What did you ask Mr. Stamm if you could have? A. The wood around there for firewood.

Q. Did you say any particular wood? A. No.

Q. You just asked for permission to collect some firewood? A. That is all. 40

*Fred S. Heit, for Plaintiff, Cross.*

Q. Was he there at the time you were collecting it? A. No, sir, Mr. Stamm had gone home. There was nobody there.

10 Q. You heard about this accident that happened there to Mr. Allen, didn't you? A. I didn't know it until the next morning.

Q. You heard about it the next morning? A. Yes.

Q. And the day you heard about it was the day after the day you collected the firewood? A. Yes.

20 Q. What did you do after this engineer called your attention to the fact that the wire was too low? What did you do then? A. I got it, held it up over his train to go through. After his train got through, I took this scantling, and put this up again, and I thought I had it high enough for everything to clear.

Q. You put it back on the scantling? A. Back on the scantling again, yes, sir.

Q. Did you have the scantling up and the wire on the scantling? A. I stuck it up there on the car there and put a couple of nails in it the same as it was before.

Q. How long a piece of wood was this scantling? A. I really could not say.

30 Q. Can you give us some idea? A. I could not really tell you. I didn't measure it.

Q. Was it as long when you put it up as it was when it came down? A. I never broke it.

Q. You didn't break it? A. No, I didn't break it at all.

By the Court:

40 Q. How did it come down? A. I really could not tell you.

*Fred S. Heit, for Plaintiff, Cross.*

Q. Did you know it was down? A. No, positively no. I would not harm a dog, let alone harm a person.

By Mr. Gildea:

Q. You didn't know it was down until the engineer called it to your attention, you say? A. Positively not. 10

Q. When you put it up again, did you have any idea how high the wire was above the track? A. No, I did not.

By the Court:

Q. How did it get down? A. It must have come down when I pulled these other boards down. It must have been fastened to one of these boards I pulled down. 20

Q. You had no intention of pulling that down? A. Positively not, no, sir.

By Mr. Scott:

Q. What did you mean when you said a few minutes ago you asked for that scantling? A. I asked for the wood. There was scantling on there and boards, different things for firewood, that was all there.

Q. Who did you ask? A. I asked my boss, Mr. Stamm. 30

Q. When you got there the wire was all right, wasn't it? A. Yes.

Q. What did he tell you when you went about taking down this wire? When you asked him for this wood, what did he tell you about being careful about the wire? A. He said "You should be careful so that the wire don't get down and nobody don't get hurt." 40

*Edward Allen, for Plaintiff, Direct.*

By Mr. Gildea:

Q. You didn't ask Mr. Stamm for this particular scantling? A. I didn't want that scantling when it was connected with that wire. I didn't want it.

10 Q. You didn't want it? A. No.

Q. You didn't ask for it and didn't intend to take it? A. No, I didn't want that. All I wanted was firewood.

(At this point a luncheon recess was taken until 1:15 P. M., after which the trial of cause was resumed in the presence of counsel for the respective parties.)

20

EDWARD ALLEN, SWORN:

Q. Where do you live? A. Phillipsburg, New Jersey.

Q. How old are you? A. 27.

Q. In July, 1926, for whom did you work? A. D. L. and W. Railroad.

Q. How long before that time had you worked for them? A. About a year and six or eight months.

30 Q. In what service were you, passenger or freight? A. Freight yard service.

Q. Your duties took you from what point to what point? A. In Phillipsburg yard to deliver cars in other yards.

Q. Did that take you over what they call Pell Dell? A. Pennsylvania and the Valley.

Q. Was that day work or night work? A. (No response.)

40 Q. Your job was that of train man? A. Train man, yes.

*Edward Allen, for Plaintiff, Direct.*

Q. Your duties as train man were what? What did you have to do with your train? A. On top of cars, mostly.

Q. When you were on top of cars, what did you do there? A. Relay signals from other members back to the engineer.

Q. Look at these two photographs, D-1 and D-2. I would just like to ask you whether you are familiar with that location? A. Yes, sir.

Q. In both these photographs there is shown a railroad track? A. Yes, sir.

Q. How often before July 12, 1926, had you traveled over that? A. It was our job most every night.

Q. In these pictures you notice a car which we call the Armour car? A. Yes.

Q. Had that been there for some time prior to July 12th, 1926? A. Yes, quite some time.

Q. How long would you say? A. Quite a bit over two months.

Q. Did you notice anything attached to that car? A. Yes, there was a platform built along one side and a piece of timber running up on one end.

Q. How high was that piece of timber would you say? A. I should judge ten to twelve feet.

Q. On that piece of timber was there anything attached? A. Yes, there was an insulator with a wire on.

Q. That wire ran from where to where? A. From this pole on the corner of Market Street across to this timber on this car.

Q. In one of these photographs there is a pole marked "W" and in D-4 there is a pole marked "X" and "W". Is that the pole you have reference to? A. Yes, sir.

*Edward Allen, for Plaintiff, Direct.*

Q. That pole ran from that pole down to where? A. Across the Lehigh Valley tracks to this car.

10 Q. How long had that wire been there before July 12, 1926, to your knowledge? A. I had noticed it several times. It had been there quite some time.

Q. With respect to you, you were standing on a car, a box car. Will you tell the jury whether it was higher than you, or not? A. Previous to this accident it was far higher than my height.

The Court: How tall are you?

Witness: Five feet eleven inches.

20 Q. You say you had seen it there a number of times before? A. Yes.

Q. On the day of this accident, this accident happened to you about what time at night? A. Very shortly after 10.30.

Q. Will you tell the jury was it dark or light at the time? A. Real dark. It had been raining previous to the accident.

Q. You say it was real dark? A. It was real dark.

30 Q. You started that night from what yard? A. D. L. and W.

Q. You were going over to where? A. Out on the Central and across on the interchange track, through the Valley into the Pennsylvania yard.

Q. Your job was to get on top of a box car, you say? A. Yes, sir.

Q. Do you recollect getting on a box car? A. Yes, sir.

40 Q. Where did you get on that car? A. On the bridge.

*Edward Allen, for Plaintiff, Direct.*

Q. Where is that with respect to the Lehigh yard? A. On the Central tracks over the Delaware River.

Q. You got on the box car at that point? A. Yes, sir.

Q. How far was that from the Lehigh Valley tracks? A. Probably 200 yards. 10

Q. Why did you get on the car? A. That was my position to relay signals as we went through in this interchange track into the Pennsylvania yards.

Q. You relayed the signals by what method? A. Lantern.

Q. Having gotten up on top of this box car, will you tell the jury whether you had the lantern with you? A. Yes, sir. 20

Q. You were going over towards the Pennsylvania at the time this accident happened? A. Yes, sir.

Q. Will you tell the jury whether at the time this accident happened to you it was light enough to see any wires? A. It was not.

Q. Will you describe just how this accident came about, as far as you know? A. As we got the signal, I returned it back to the engineer, and we started off. I was standing there, with no knowledge of anything or any danger of any description, until suddenly my feet were thrown out under me, and I was spilled off the end of the car, on the front of the engine, and so on the ground. 30

Q. Something caught you where? A. Just about the knees.

Q. Do you know whether that something was a stick of wood, or a club, or what it was? A. At 40

*Edward Allen, for Plaintiff, Direct.*

that time I didn't exactly know just what it was, whether it was a wire, or rope had been dropped, lowered, or what it as.

Q. Did you find out subsequently? A. No. That night I was semi-unconscious, and didn't  
10 know, or have any idea what caused the——

Q. When you fell, you say, first on the engine?  
A. Yes.

Q. Then from the engine to the ground? A.  
Yes.

Q. Do you recall how you landed? A. Not exactly, I went down sideways, if I remember.

Q. About how high would you say the box car was you were traveling on? A. I should judge not less than twelve feet from the ground.

20 Q. When you landed on the ground, will you tell the Court and jury what part of yourself you hit? A. That I don't just remember. I was stunned, dazed, so I didn't just recollect how I struck.

Q. When you came to yourself, did you have any marks or bruises on you? A. Yes, sir.

Q. Where were they? A. My left hip and side was bruised and marked and my face was cut.

30 Q. How about your head? A. My nose was all loose on one side, and the side of my face and ear was badly torn.

Q. Will you step down and show the jury where your nose was injured? A. It came right down through here. You probably see the scar right there.

Q. Was that a permanent mark? A. Yes.

Q. That has been there for how long? A. Ever since the accident.

*Edward Allen, for Plaintiff, Direct.*

The Court: Which ear was torn?

Witness: The left one.

Q. What was done with you after the accident?

A. We called in the doctor, and the doctor advised to go to the hospital. I was taken to the Easton Hospital. 10

Q. Where did they take you? A. Easton Hospital.

Q. How long were you there? A. A little bit over two weeks.

Q. Who doctored you at that place? A. I was cared for in the hospital, by the hospital doctor.

Q. In Easton? A. Yes.

The Court: Any bones broken, Mr. Allen? 20

Witness: Not to my knowledge.

Q. When you were in the hospital, where did you suffer most, or what part of your body suffered most? A. My nose and head was plugged up. It was hardly possible to breathe, and like that.

Q. How long did that continue? A. That was several weeks before my nose was straightened out.

Q. Prior to this accident how steadily did you work? A. Every night. 30

Q. For how long a time? I don't mean how many hours, but how many months? A. Ever since I was with the railroad company. Every time I was called for duty I was there.

Q. What doctors did you have in Easton? A. Two doctors.

Q. In Easton? A. In Easton, no.

*Edward Allen, for Plaintiff, Direct.*

Q. Did you have any doctors in Phillipsburg?

A. Yes.

Q. Who were they? A. Dr. Bloom and Dr. Wolff.

10 Q. At the time you were injured, how much were you making a week? If you can't give me the week, give me the day or month? A. That was pretty hard to answer.

By the Court:

Q. Were you paid every two weeks? A. Yes.

Q. What was your average pay check, or average earnings? A. They run right around \$75 to \$80.

20 Q. How continuously were you employed? You say you were always ready when called out. What did that mean? A. After I had taken the Phillipsburg job I was called every night. I was supposed to work every night.

Q. Six nights a week? A. Seven nights a week.

Q. How long had you been doing that, going back six to eight months? A. From eight to ten months.

30 Q. Eight to ten months? A. Yes, between that.

By Mr. Scott:

Q. After the accident, how soon were you able to get back to work? A. I was not able to get back to work for between four and five months.

Q. When you went back to work, have you worked steadily ever since? A. No, I haven't.

Q. Is your job the same kind of a job? A. Yes, sir.

*Edward Allen, for Plaintiff, Direct.*

Q. What is the reason that you haven't been working steadily ever since, if you know? A. I haven't been able at times. I am too unwell to work.

Q. In what way, Mr. Allen? A. In dizziness and headaches and on one occasion back trouble. 10

Q. How does the headache affect your work? A. I have dizzy spells, that I am unable to move around.

Q. Is your work still on top of a car, on the top of freight cars? A. No, it isn't.

Q. With respect to your nose, will you tell the jury whether you had any trouble with it since you went back to work? A. I have.

Q. In what way? A. It is very tender, and on various occasions it is very easy to start bleeding. 20

Q. Prior to this accident, will you tell the jury first whether you ever had these headaches or dizzy spells you speak about? A. I did not.

Q. What was the condition of your health before the accident? A. I never had headache, and I felt good all the while. I was able to work every night.

Q. About these nose bleeds, did you ever have these before? A. No, I never had a nose bleed. 30

Q. How many times since you went back to work have you been obliged to stop railroading?

Mr. Scott: I will withdraw the question.

Q. After you got well enough to go around, did you go back to railroad work? A. I worked out of Port Norris yards. I moved in Phillipsburg. Mr. Johnson was formerly foreman of the drill. He had been hurt, and was off, and I took 40

*Edward Allen, for Plaintiff, Cross.*

10 the place of him until I was hurt, and while I was in the hospital I was replaced. They put him back, and put me back in Port Norris, and on that occasion I had to move back to Port Norris, and my expense was more than I could pay, and I had to move back to Port Norris, and in that way I did not return to railroading.

Q. What business are you doing now? A. I am working in a dairy.

Q. Is that work steady? A. Yes, sir.

Q. How steadily do you work at that new work? A. Not very steadily. On the average I am off four or five days a month.

Q. Why is that? A. Not feeling well enough to hold my position.

20 Q. You went both to Dr. Wolff and Dr. Bloom for treatment? A. Yes, sir.

Q. While you were with the railroad company, did they allow you something for your lost time? A. Part of it.

Q. How much? A. I don't just remember the exact figures.

Q. More than \$150? A. No, it was not more than that.

30 *Cross examination by Mr. Gildea.*

Q. How soon after the accident was it you were told if you were going to work for the railroad any more you would have to work back to Port Norris? A. Between four and five months I reported able to work.

Q. What were you doing in the four or five months? A. Just round home.

Q. Not doing any work? A. No.

40 Q. You had lived at Port Norris before you

*Edward Allen, for Plaintiff, Cross.*

moved to Phillipsburg? A. Yes, I had worked out of Port Norris for several months.

Q. You lived there for several months? A. Yes.

Q. Where did you come from originally, Phillipsburg? A. Easton.

Q. You lived at Phillipsburg before you went to live at Port Norris? A. No. 10

Q. Where? A. Port Norris when first I worked for the railroad.

Q. How long did you live at Port Norris? A. Probably seven or eight months.

Q. You went to work for the railroad there? A. Yes.

Q. Then you moved from there to Phillipsburg? A. Yes, sir.

Q. Then when they told you you would have to go back to Port Norris to work for the railroad you didn't want to do that? A. I could not afford to move back. 20

Q. How long after that did you go back? A. It was a little over four months.

Q. After the railroad told you you would have to move back to Port Norris? A. No, after the accident.

Q. I want to know how long it was after the railroad told you you would have to move back to Port Norris, how long after that you went to work? A. Not quite a month. 30

Q. You went to work for this dairy company? A. Yes.

Q. Which company is that? A. Easton Sanitary.

Q. Where is their place of business? A. Easton.

Q. You work in Easton now? A. Yes.

Q. At the time of this accident did you have a regular job with the railroad, a regular run, or 40

*Andrew Robert Stamm, Recalled for Plaintiff,  
Direct.*

regular duties, or were you an extra man, went when you were called? A. Steady man every night.

10 Q. I thought you said you were taking the place of some member of the crew when he was in the hospital? A. After he had been hurt, I was placed there as a steady job. When I was hurt myself, he was recalled as no men were available in that branch of the service.

Q. How long did you say you had worked for the railroad company up to the time of this accident? A. Quite some over two years.

20 (At this point came the testimony of Dr. G. Homer Bloom and Dr. Frank Wolff, both of which are omitted from this transcript at request of Mr. Scott.)

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ANDREW ROBERT STAMM, recalled.

By Mr. Scott:

Q. This morning I think you told us you were manager of the Armour and Company plant? A. That is right.

30 Q. I think you told us about arranging to have that car put there, what we call the Armour car in the picture? A. Yes.

Q. You had put there two or three months before this occurrence? A. Yes.

Q. And the purpose of it was, I recall, you used it as a receiving office and storage? A. That is right.

Q. A place for you while you were building a—  
A. A new house.

40

*Andrew Robert Stamm, Recalled for Plaintiff,  
Direct.*

Q. The new house was completed and you closed up the car? A. Yes.

Q. Then what did you do with the car? A. The car stayed there just about a month.

Q. Then what did you do with it? A. We put it back on its trucks and sent it back to Chicago. 10

Q. As manager of the plant there, you were sole manager of the Easton plant? A. Phillipsburg plant.

Q. You heard of this occurrence the next day? A. The following morning about seven o'clock, yes.

Q. And proceeded to make an investigation of it? A. I made no investigation whatsoever. I reported to my attorneys. 20

Q. You made no investigation whatsoever? A. No, the news was all told to me. I had none to make.

Q. You mean by that that you were saved the trouble of investigation, the news was brought to you? A. The news was all brought to me.

Q. You immediately relayed it to your attorneys? A. Yes, that is right.

Q. By immediately, you mean the same day? A. I believe it was. 30

Q. Will you tell the Court and jury whether you know whether there was an investigation conducted with respect to this accident? A. By our company?

Q. Not by your company. If you know of any investigation?

Mr. Gildea: Objected to as immaterial.

Mr. Scott: I am going to lay the foundation for an admission. 40

*Andrew Robert Stamm, Recalled for Plaintiff,  
Direct.*

The Court: For an admission of liability?

Mr. Scott: An admission on behalf of the defendant by this representative.

10 The Court: He may answer. If it is not properly connected up, I will strike it out.

A. Yes, there was several investigations.

Q. By whom were these several investigations made? A. Telephone and Telegraph people for one. Lehigh Valley Railroad another.

Q. And in any of these investigations did you participate? A. Yes.

Q. In both of them? A. Just the one.

20 Q. Which one was that? A. Lehigh Valley Railroad.

Q. Don't answer this question, because it is a question Mr. Gildea may want to object to. As a result of your participating in the investigation, which you say the Lehigh Valley Railroad conducted, do you recollect making any statement whatsoever—when I say whatsoever, so it would be a fair question, I will say I don't want to say what it was—did you make any statement whatsoever with respect to this accident?

30

Mr. Gildea: I object to that, if the Court please, and perhaps I ought to ask leave now to cross-examine the witness as to his relation with the defendant, so that there may be no doubt that if any attempt is made—

40 The Court: I think I will let you do it, Mr. Gildea, in the regular way. I will overrule the objection and let you have an exception. He may answer; and then, should it appear that the question you are anticipating has

*Andrew Robert Stamm, Recalled for Plaintiff,  
Direct.*

not yet been asked, I will rule on that when——

Mr. Gildea: I object to this on the ground that it is irrelevant, and upon the ground that this witness is not an officer of the defendant company, of the character who could bind the defendant company by any admission made. I understand the objection is overruled?

10

The Court: The objection is overruled, with qualification that the Court reserves the right to strike the testimony, if it appear that any statement was made without authority. I can't yet tell what that was. I don't know.

20

Mr. Scott: I want to try the case fairly. I didn't want to bring anything before the Court and jury until the Court said I had a right to.

The Court: Did you make any statement at the investigation?

A. Yes, there were several questions asked. I answered them to the best of my ability.

Q. Don't answer this question until Mr. Gildea says whether he wants to object to it. Do you recollect, or did you at the time we have just been discussing and you have been interrogated upon, admit to the Lehigh Valley Railroad Company the responsibility of the defendant, Armour and Company, for this accident?

30

Mr. Gildea: Objected to. In the first place, it is very leading, and this witness is Mr. Scott's witness, and in the second place, it—

40

*Andrew Robert Stamm, Recalled for Plaintiff,  
Direct.*

The Court: I think you are wasting time. I am going to let him answer it.

A. Not Armour and Company at all, the driver.

10

Mr. Scott: In view of the fact I am not given to ask foolish questions, I would like to state to the Court that I am surprised at this answer. I am surprised, and ask leave to have a proper examination of this representative of the defendant company.

20

The Court: You will understand that you are impinging a well recognized rule that the mere admission of an employee, or manager, as this gentleman appears to have been, would not necessarily, as a matter of law, bind Armour and Company. You are attempting to get into the record an inference, instead of what this gentleman actually did, or what he said, or something of that sort. I will let you pursue the examination. Go ahead.

Q. When was this Lehigh investigation? A. When was it?

Q. Yes, the next day after the accident? A. No, I should judge about three, four or five days, possibly a week.

30

Q. Possibly a week? A. To the best of my knowledge, understand.

Q. Not the next morning? A. I don't think so.

Q. What is the fact? Was it a week, or ten days, or possibly the next morning? A. I don't think it was the next morning, no.

Q. What is your actual knowledge, or haven't you any? A. Two years have elapsed. I have gone through a whole lot in two years. It is hard to answer the question. I would, if I could.

40

*Andrew Robert Stamm, Recalled for Plaintiff,  
Direct.*

Q. You have no recollection now whether it was the next morning, or a week or ten days afterwards? A. No, I am pretty sure it was not the following morning.

Q. At that time the matter was up to you with respect to your company causing the accident? 10

Mr. Gildea: Objected to, on the ground that it is leading and irrelevant.

The Court: It does have a tendency to be leading.

Mr. Gildea: On the further ground that I don't think it makes any difference what somebody may have said as to his company.

The Court: The question is withdrawn. 20

Q. At the time, whenever it was, whether the next morning, or ten days afterwards, just what happened? A. In what respect?

By the Court:

Q. With regard to the investigation, trying to find out— A. The Lehigh Valley sent a representative round. He wanted to get a little information. I gave them some information. 30

Q. What did you give them? A. Just about what I knew of the case at that time.

Q. Do you recall more definitely? A. I don't recall what the questions were, no, your Honor.

Q. Did you at any time say you had sent Heit to the car to dismantle it? A. No, sir, I did not.

Q. Did you ever say that Heit, at the moment of the accident, or at any time the wire came down, was dismantling the plant for your company? A. Yes, he was. He was taking away some of the 40

*Andrew Robert Stamm, Recalled for Plaintiff,  
Direct.*

wood. In taking away some of the wood, I mean we——

Q. Was he dismantling the plant for you, for your company? A. No.

10 Q. Did the company have anything to do with what he was doing at the time? A. No.

Q. What did you say to Heit as to the wire, anything? A. As to the wire, I said nothing, no, sir.

By Mr. Scott:

Q. Just a moment ago you told the Court in respect to a question whether he was doing it for the company, you said "Yes." Which answer to the  
20 question that the Court put to you, which answer is true, the one that——

Mr. Gildea: I——

The Court: He is his own witness. The effect would be to neutralize.

A. He was not doing it for the company. He was doing it for himself.

By the Court:

30 Q. That is a fact, is it? A. Yes, sir. The thing come around as we were going. We close about five or five-thirty and I was going out. He asked me if he could have the wood. There was quite a lot of wood around the box car. I said "Yes, go ahead and take it."

Q. Is that all that was said? A. Yes. "Yes," I said, "go ahead and take it." There was nothing else said.

*Motion for Direction of Verdict for Defendant.*

By Mr. Scott:

Q. What else did you tell Heit? A. I don't remember telling him anything else at the time.

Q. You are sure you didn't tell him anything else? A. Positive.

Q. Positive? A. I am almost positive. 10

Q. Are you positive, or almost positive? A. Almost positive I didn't say anything else that time.

Mr. Scott: I rest, sir.

Mr. Gildea: We rest.

Mr. Gildea: I move for direction of a verdict in favor of the defendant upon the ground that there is no evidence in the case which shows, or tends to show, that the act complained of was done by an employee of the defendant company, acting within the scope of his employment. 20

Mr. Scott replied.

LAWRENCE (J): Counsel for the defendant company has moved for the direction of a verdict in this case, on the ground that the plaintiff has failed to show the relation of master and servant between Mr. Heit, who, admittedly, was responsible for the falling of the wire which caused the accident, and forms the basis of this suit. It appears that Heit was not made a party defendant, but that the Armour Company was, and obviously, in the circumstances, as a matter of law, the evidence must indicate that at the moment the accident happened the relation of master and servant existed between Heit and the defendant company. It does appear that he had been in their employ, but that that employment had ceased for the day, and that he had for a purpose of his own requested permission of the manager 30 40

*Direction of Verdict for Defendant.*

of the defendant company to remove from the car to which reference is made, certain lumber which he desired to use in his own household as firewood. It appears that that permission was given by the manager, and with it went instructions to Heit that he must not disturb the telephone wire in question. He admits that he did. In other words, the effect of his testimony is that while removing certain lumber, in some way the upright or stanchion, whatever may have been supporting this telephone wire, was removed with the result that the wire fell. His attention was called to it by an engineer of a railroad company, who happened to be operating in the yard at the time. It seems to me clearly that as a matter of law, there is no proof here that at the time the relation of master and servant existed between the defendant company and Mr. Heit, and while I, very reluctantly, am obliged to reach this conclusion, because the plaintiff was injured, nevertheless law is law and right is right, and if the defendant company has not been shown to be liable in the case, necessarily it cannot be held, and in all the circumstances while there has been testimony here which might be misinterpreted, it seems perfectly clear to me there is no testimony that Heit was doing anything for the company. What he was doing was for his own benefit. There is no evidence here the company had directed Heit to dismantle this car, and in the circumstances I am strongly inclined, even though reluctantly, to grant this motion.

The motion is granted. The jury will be directed to return a verdict in favor of the defendant, and you may have an exception.

(Exception noted for plaintiff).

10 OCT. 1. 1929 0

**New Jersey Court of Errors and Appeals.**

EDWARD ALLEN,  
Plaintiff-Appellant,

VS.

ARMOUR & COMPANY,  
Defendant-Respondent.

Action at Law.

**BRIEF OF APPELLANT.**

**Statement.**

This is an appeal from a judgment entered June 5, 1928, in the above case after a direction of a verdict in favor of defendant-respondent on the trial of the cause of the Warren Circuit of the Supreme Court. This appeal though perfected and noticed for argument at a prior term of this Court went off by consent for sufficient reasons then appearing.

The appellant's suit was brought against the respondent for damages for personal injuries to the appellant occurring under the following circumstances:

About three months before the accident happened, the respondent Armour & Company, after taking the wheels and trucks from under it had placed one of their box-refrigerator cars on a piece of property leased to it by the Lehigh Valley Railroad Company in the town of Phillipsburg, New

Jersey, in the vicinity of the Hanover Street crossing of the Lehigh Valley Railroad tracks. This car was used by the respondent as a temporary combined office and warehouse, to which office, a sort of shipping clerk's office, there ran a telephone, the telephone wire being put there immediately upon the car being placed for storage and office uses, and continued until the happening of the accident involved in this case.

The telephone wire was attached to the refrigerator car at the top by a scantling or 2 x 4 piece of board and ran from the refrigerator car over the Lehigh Valley Railroad Company's tracks to a pole on Hanover Street. Prior to the day of the accident, which occurred in the dark at about 10:30 on the night of July 13, 1926, the telephone wire in question stretched across the Lehigh Valley's railway tracks so it would clear a man six feet five inches high.

On the evening of July 13, 1926, the appellant Allen worked as a trainman in the freight service for the Delaware, Lackawanna & Western Railroad Company, his duties being to assist in delivering freight cars from his employer's Phillipsburg yard to other railroad yards, riding on the top of the box cars, relaying signals from the other members of his crew back to his engineer.

On the night in question, Allen started from the Delaware, Lackawanna & Western yards on the top of a box car, out over the Central Railroad tracks, across an interchange track, through the Lehigh Valley yards, and into the Pennsylvania

Railroad yards proceeding to relay signals, as was his duty. As the train on which he was riding got to the vicinity of the wire in question, without any knowledge of anything being wrong or of any danger, his feet were suddenly thrown out under him and he was spilled off the end of the car onto the front of the engine, and so onto the ground, something having caught him "just about the knees". Being rendered semi-unconscious, he personally did not learn what caused him to fall off the car, although when his lantern disappeared the train was stopped and Allen was found lying on the ground with the wire in question wrapped around him. It apparently having pulled him off the car.

Some time in the evening, in the neighborhood of ten o'clock, one West, an engineer of the Lehigh Valley Railroad Company, noticed the wire in question lying low across the Lehigh Valley's tracks, and he hollered to a man loading a yellow painted truck near the refrigerator car (subsequently identified as a truck of the respondent), "What are you going to do about the wire?" He then stopped his engine again, and the man, loading the yellow truck, ran over, climbed up the ladder on the Armour storage car, got the wire and held it up as high as he could, so that West's engine could pass under it.

The man, loading the truck and who held the wire up while West's engine passed under it, was subsequently identified as one Heit, who at the time and for some time previously had been in the

employ of the respondent Armour & Company. He had a recollection of the occurrence when West, the engineer of the Lehigh Valley Railroad Company, called his attention to the low telephone wire. Prior to West's calling his attention to said wire, he had been taking wood away from the Armour car and loading it onto an Armour truck, having ripped off a number of boards off said car with the aid of an old hammer. When he got down to the car initially, the wire in question, running from a pole on Hanover Street over to the car, was there, crossing the tracks and down to the Armour car, on a scantling. After West called his attention to the wire, Heit got it, held it up over West's train, and after West's train had gone through Heit took the scantling and put it up again, thinking that he had it high enough for everything to clear—he fastened the scantling with the telephone wire up on the car, and put a couple of nails in the scantling. The wire, he explained, "must have come down when I pulled these other boards down—it must have been fastened to one of these boards that I pulled down".

This witness testified that he had received permission from manager Stamm of the Armour & Company to get some kindling wood from the Armour box car, asking particularly for the scantling supporting the wire. (See the following question and answer: "Q. Anybody tell you to take down the scantling supporting the wire? A. No. I asked for that." Although in the next answer he testified that he did not want the par-

ticular scantling that had anything that was connected with the wire. P. 33, ll. 29-30.)

When Heit requested Stamm, the manager of the respondent, to get fire wood at the car, Stamm advised him that he "should be careful so that the wire didn't come down and nobody don't get hurt" (p. 35, l. 38 *et seq.*). Heit's contention, as well as the respondent's Armour & Company, was that at the time of the occurrences with which he was concerned, hereinbefore set forth, he was not working for Armour & Company but for himself, trying to get kindling wood to burn in his home stove.

It appears from the evidence that on the completion of its new store house, the respondent closed up the refrigerator car, letting it stay in its position on the leased property for about a month, when it was put on its trucks and then sent back to Chicago. The witness Stamm (p. 26) was the General Manager of the respondent company, employing eleven men at their place of business. It was he that had placed the storage-office car at its location at the time of the accident, having the telephone hooked up, as hereinbefore described.

This witness Stamm, the appellant was obliged to call to endeavor to show that the truckman Heit was actually acting as a servant of the respondent and about its business at the time he placed the telephone wire in the position which the jury had a right to find was negligently done, irrespective as to whether this wire was initially negligently knocked down by said truckman; and although he

refused to admit, in the examination by appellant's attorney, that the work being done by the truckman Heit was being done on behalf of or in the course of Heit's employment, in response to the following question by the Court he did make this admission:

"Q. Did you ever say that Heit at the moment of the accident or at any time the wire came down was dismantling the plant for your company?"

"A. Yes. He was. He was taking away some of the wood. In taking some of the wood, I mean" (p. 51, l. 36, *et seq.*; p. 52, line 1, *et seq.*).

Although in the next breath, apparently realizing the gravity of said admission, when asked by the Court "Q. Was he dismantling the plant for you, your company?" he answered, "No," (p. 52, l. 3 *et seq.*) denying also almost simultaneously Heit's statement that he had instructed Heit to "Be careful, so that the wire didn't get down and nobody don't get hurt."

At the conclusion of plaintiff's case, the learned trial Court adjourned with counsel to his chambers, where discussion of the respondent's motion for a direction of a verdict was had, and at that time the contradictory statements of Stamm being called to his attention, especially that statement that Heit was dismantling the plant for the respondent Armour & Company (p. 51, l. 36 *et seq.*, also quoted *supra*), the learned trial Court advised counsel that in his opinion such contra-

dictory testimony was but "*A slip of the tongue*" of the witness.

This expression was perhaps more artistically stated when the learned trial Court, in his direction of a verdict for the defendant-respondent, when he said:

"\* \* \* if the defendant company has not been shown to be liable in this case, necessarily it cannot be held, and in all the circumstances, *while there has been testimony here which might be mis-interpreted, it seems perfectly clear to me there was no testimony that Heit was doing anything for the company*" (p. 54, ll. 25-29).

### ARGUMENT.

**The Trial Court erred in directing a verdict for the Respondent.**

It appears hardly necessary more than to say that the trial Court's direction of a verdict for the respondent involved a finding by it that the evidence was uncontradictorily in favor of the respondent on the two following questions:

- (a) Was the truckman Heit in the employ of the respondent at the time he put the telephone wire up over the Lehigh Valley tracks? And,
- (b) Whether such acts were within the scope of his authority?

It being conceded that the yellow truck being used by the truckman Heit was the truck of the

respondent, a presumption was raised that it was in the possession of the owner, if not personally then through its servant; and such proof likewise raised a like presumption that the driver Heit was acting within the scope of his employment. But, as said by this Court in *Mahan v. Walker* (97 N. J. L. 304):

“Either of these presumptions may be entirely wiped out by uncontradicted proof to the satisfaction of the Court to the contrary, in which case the matter is a Court and not a jury question.”

But if, as this Court also said, the proof is contradictory or subject to contradictory interpretations the question becomes one for the jury.

This Court has said, with respect to the same subject,

“If, however, the evidence is contradictory or reasonably subject to contradictory interpretations, the question of liability is for the jury.”

(*Tischler v. Steinholtz*, 99 N. J. L. 149 at 152.)

“Conflicting testimony, it is recognized, is always for the jury, and the trial Judge is only justified in directing a verdict upon a court question arising from the admitted or uncontraverted facts of the case, and the weight of conflicting testimony must always be submitted to the jury for their consideration and determination.”

(*Burrichter v. Wischnefsky*, 103 N. J. L. 340, at 342.)

Whether such conflicting testimony comes from the mouth of a single witness or a number of witnesses is beside the case, and it is for the jury to determine whether a witness's "tongue slipped" or whether it "might be misinterpreted."

The situation is somewhat analgous to that in *DeMott v. Knowlton* (100 N. J. L. 296) where the driver of an automobile, which went up on a sidewalk injuring a pedestrian, gave testimony to an occurrence which would have exonerated her from negligent driving, and where this Court said:

"But that testimony did not justify the withdrawal of the question of the driver's negligence from the jury, for whether or not that testimony was credited in its entirety it was open to the jury to find, as they evidently did, that if the driver had used reasonable care in the circumstances she could have avoided going on the sidewalk, and that her failure so to do was the proximate cause of the accident" (p. 298).

Or in the case of *Thomas v. Devine* (104 N. J. L. 361) where there were contradictions between the driver of the car Barclay (in this case Heit) and Devine, his master (in this case Stamm, representative of the respondent), and wherein this Court said in discussing the grounds of appeal that a verdict should have been directed in favor of the master Devine:

"The contradictions in the testimony were for the jury to deal with and to reconcile,

if that could be done, and the only question for us to determine is whether the evidence lends any support to the finding of the jury that Barclay was engaged on his master's business" (p. 363).

This Court there finding that the trial Court properly submitted the question for the jury, and that its finding was supported by the evidence.

It may be that the witness Stamm's reticence, to disclose to appellant's attorney that its truckman Heit was dismantling the plant or office-storage car for the respondent, was due to the appreciation of the seriousness such an admission would have, and that the inquiry by the learned trial Judge himself *threw the witness off his guard*, penetrated his reserve or reluctance, and elicited the truth, or that the witness had some other unexplicable reason for answering theretofore in a manner contradictory.

But whatever the witness's reason was, we take it this Court is not concerned about, as it has repeatedly said that on an appeal the weight of the evidence or the credibility of witnesses, is not passed upon by it; and for the further reason that the trial Court, on a motion for a direction of a verdict, is obliged to pass upon that question, having in mind the testimony most favorable to the party against whom the direction is sought to be made.

Whether Stamm's testimony was a *slip of the tongue* or "the truth coming out," it was not

within the province of the learned trial Judge to "interpret it" favorably to the respondent. The trial Court should have at least presented it with all the evidence in the cause to the jury, leaving the rectification of any error of that body's finding to the Supreme Court on a Rule to Show Cause.

It is respectfully submitted that the judgment in question should be set aside and a *venire de novo* issue in this cause.

Respectfully,

FREDERIC B. SCOTT,  
Attorney for Appellant.

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## New Jersey Court of Errors and Appeals

<hr style="width: 10%; margin: 0 auto;"/> <p style="text-align: center;">EDWARD ALLEN, <i>Plaintiff-Appellant,</i></p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">ARMOUR &amp; COMPANY, <i>Defendant-Respondent.</i></p> <hr style="width: 10%; margin: 0 auto;"/>	}	ACTION AT LAW.
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### BRIEF OF RESPONDENT

From the evidence offered by the appellant at the trial of this case (the defendant rested at the close of the plaintiff's case), it appeared that one of the truck drivers of the respondent, Fred S. Heit by name, asked the Phillipsburg manager of Armour & Company if he could have some wood which was about a box car which Armour & Company had temporarily used as a place of business and had then abandoned (p. 33). Heit came back after working hours and removed some boards from the box car. He wanted the wood for kindling to use in his home (p. 33). In taking the boards from the car he disturbed an upright support of a telephone wire which ran from the box car to a pole, passing over a railroad track of the Lehigh Valley Railroad, upon which the plaintiff was working at the time of his injury. His (Heit's) attention was called to the fact that he had disturbed the wire and he replaced it. Either the wire was not put in a proper position or something made it sag, causing the plaintiff's injury after dark on the day in question. Heit had permission

of his superior to use one of the trucks of Armour & Company to carry the firewood home.

The facts as to what Heit was doing on the evening of the accident and prior to the accident, and why he was doing it, were not in any manner disputed. He was simply collecting firewood for his own use, having obtained permission to do so, and was doing it after working hours. He had not been instructed to do anything in connection with the telephone wire. The wire was owned by the Delaware & Atlantic Telephone & Telegraph Company. The trial Court directed a verdict for the defendant upon the ground that Heit at the time he is alleged to have been negligent in connection with the telephone wire was not working as a servant of the defendant.

The appellant contends that the testimony of Andrew R. Stamm, who was the local manager of Armour & Company, raised a question for the jury as to Heit's status at the time he was collecting firewood. The pertinent part of this testimony is as follows (pp. 51, 52):

"By the Court:

\* \* \* \* \*

Q. Did you at any time say you had sent Heit to the car to dismantle it? A. No, sir; I did not.

Q. Did you ever say that Heit, at the moment of the accident, or at any time the wire came down, was dismantling the plant for your company? A. Yes, he was. He was taking away some of the wood. In taking away some of the wood, I mean we—

Q. Was he dismantling the plant for you, for your company? A. No.

Q. Did the company have anything to do with what he was doing at the time? A. No.

Q. What did you say to Heit as to the wire, anything? A. As to the wire, I said nothing, no, sir.

By Mr. Scott:

Q. Just a moment ago you told the Court in respect to a question whether he was doing it for the company, you said 'Yes.' Which answer to the question that the Court put to you, which answer is true, the one that——

Mr. Gildea: I——

The Court: He is his own witness. The effect would be to neutralize.

A. He was not doing it for the company. He was doing it for himself.

By the Court:

Q. That is a fact, is it? A. Yes, sir. The thing come around as we were going. We close about five or five-thirty and I was going out. He asked me if he could have the wood. There was quite a lot of wood around the box car. I said 'Yes, go ahead and take it.'

Q. Is that all that was said? A. Yes. 'Yes,' I said, 'go ahead and take it.' There was nothing else said."

The testimony of Stamm and Heit showed beyond any doubt that Heit was acting for himself in collecting the firewood, and was not at that time a servant of the defendant. There was no evidence upon which an inference to the contrary could be based.

There having been no evidence of any negligence upon the part of the defendant or anyone to whom it, at the time, bore the relation of master, the trial Court properly directed a verdict for the defendant.

EDWARD L. KATZENBACH,  
*Attorney for and of Counsel  
with Defendant-Respondent.*



