New Jersey Court of Errors and Appeals.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Plaintiff-Appellee,

vs.

REGINALD H. MORGAN, Jr., Treasurer of United States Express Company,
Defendant-Appellant.

On Appeal.

BRIEF FOR THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, PLAINTIFF-APPELLEE.

This action was tried before Hon. William H. Speer, sitting without a jury at the Hudson Circuit. It was submitted on an agreed state of facts. The verdict below was in favor of the Railroad Company (herein called the plaintiff) and against the Express Company (herein called the defendant). The action was brought to recover certain amounts expended by the plaintiff in defending and in satisfying judgments obtained against it in two actions instituted in the Hudson Circuit Court.

The plaintiff is a railroad company operating a steam railroad. The defendant is an express company. On June 28, 1898, the plaintiff and defendant entered into a contract which remained in force until August 6, 1908, when it was superseded by another contract made on that day. These contracts

are printed in the record, the first at page 28, the second at page 36. They both cover the transaction of defendant's express business on the plaintiff's railroad system. By each of them the plaintiff permitted the defendant's employees to be in and upon its lands, premises, property, buildings, trains, and railroad, for the purpose of transacting the defendant's business (Rec., pp. 31, 39). By the contract of August 6, 1908, the defendant agreed as follows:

> "Sixteenth.—Except as otherwise provided by Sections Eighth and Eleventh of this agreement, the Express Company assumes all risks upon money, valuables and other property in its charge or the charge of its employees, as well as all risks of injuries to person or property or injuries resulting from the death of any employees exclusively in its service while upon the trains, ferryboats or premises of the Railroad Company, and agrees to indemnify and save harmless the Railroad Company from all claims that may be made against it, and from all loss, damage and expense that may be incurred by it by reason of loss or damage to such moneys, valuables and other property, and by reason of any injuries to person or property or death of any such employees, as well as against the expense of resisting such claims, whether they be successfully resisted or not, it being understood that the Railroad Company shall not under any circumstances be responsible or liable for any such loss, damage or injury" (Rec., p. 43).

After the execution of the first of these contracts, but before the execution of the second the plaintiff, by an agreement printed at page 45 of the record, leased to the defendant the frame express building mentioned therein (Rec., p. 24).

The terminal property of the plaintiff is located at Jersey City. It fronts upon the Hudson River and extends back from the river in a westerly direction for about a mile. Within the limits of this terminal property plaintiff constructed a passage-

way extending from the river, across its property, and connecting with Johnston Avenue, a public street. The express building, leased to the defendant, adjoins this passageway (Rec., pp. 22, 24).

In carrying on its business, defendant employed a number of wagons which distributed express packages loaded on them at the express building, or brought to the express building for loading on railroads cars packages collected throughout Jersey City. These wagons used the passageway already mentioned in going to and from the express building (Rec., p. 23) It was the practice of the men employed at the express building, after finishing their work and "checking out" or recording their time, to take charge of any team and empty wagon which had made its last trip for the day, and happened to be standing at the platform, and drive with the same to the defendant's stable for the purpose of avoiding the long walk (Rec., p. 26).

Charles Black was one of the persons employed by the defendant at the express building. It was his duty to check or make a record of the packages handled there. While working for the defendant he had no other employment, business or occupation (Rec., p. 26).

On January 4, 1912, after finishing his work at the express building for the day, Black, in accordance with the custom, took charge of one of the empty express wagons and drove it along the above mentioned passageway toward defendant's stable. While driving at a point where the passageway was crossed at grade by one of the plaintiff's railroad tracks the wagon was struck by an engine owned and operated by the plaintiff, and Black was thrown therefrom and injured (Rec., p. 26).

Thereafter the two actions already mentioned were instituted against the plaintiff. One was brought by Charles Black to recover for his personal injuries. The other was instituted by his father to recover the damages sustained by him as the result of the injuries to his son (Rec., p. 26, 27).

The action brought by Charles Black was tried twice. At the first trial a verdict was directed in favor of the Railroad Company. On appeal, this Court reversed the action of the trial court (*Black* vs. *C. R. R. Co.*, 85 N. J. L. 197). The second trial of the son's case and the trial of the father's case resulted in verdicts aggregating $6,000.00 in favor of the plaintiffs therein. The judgments entered on these verdicts were paid and satisfied by the plaintiff. In addition, plaintiff expended $250.00 in resisting these claims (Rec., pp. 27, 28).

The trial Court in deciding the present case, held that at the time he was injured, Black was exclusively in the service of the defendant, that his injuries were sustained while on the premises of the plaintiff and that, therefore, the defendant was bound to indemnify the plaintiff for the moneys it had expended, under the above quoted provision of the contract of August 6, 1908.

POINT 1.

The first, second and third grounds of appeal present, in different forms, the fundamental proposition that the decision of the trial Court conflicts with the decision of this Court in the *Black* case, *supra*. In the *Black* case, this Court held that, by giving to the passageway on which Black was traveling at the time the accident occurred, the appearance of a public street, plaintiff had estopped itself from denying that the passageway was what it appeared to be, and that plaintiff's liability to Black was the same as though the passageway was actually a public street. At page 202, this Court said:

> "* * * but upon the question whether the defendant by its conduct invited the plaintiff as one of the general public and within the mean-

> ing of the doctrine we are discussing" (*i. e.*, the doctrine of implied invitation) "to use the way in the belief that it was a street, the evidence presented a question for the jury under proper instructions.
>
> To the case thus presented the rule of *Dodd* v. *Central Railroad Co.* has no application."

The contract now sued on was not, therefore, the basis of the decision in the *Black* case. The reference to the *Dodd* case is the only one having any bearing on this contract. It is, therefore, necessary to ascertain what "the rule of *Dodd* v. *Central Railroad Co.*" (80 N. J. L. 56, aff. 82 N. J. L. 524) is.

In the *Dodd* case a porter, employed by the defendant in the present case, contracted in writing with it to assume the risk of all accidents and injuries that he might sustain in the course of his employment whether occasioned by negligence and whether resulting in his death or otherwise, to hold it harmless from claims on his part or on the part of his representatives, and to release the Railroad Company on whose line he might be injured from any claims, etc., he might have against it. In addition he expressly ratified all agreements made by his employer with any transportation line in which it agreed or might agree in substance that its employees should have no cause of action for injuries sustained in the course of their employment on such line, and agreed to be bound by each and every such agreement, so far as the provisions thereof related to injuries sustained by employees of the Express Company, as fully as if he were a party thereto. Dodd's employer had entered into a contract with the Railroad Company by which the Express Company agreed to assume all risks of injuries to person or property, and injuries resulting in the death of any employees exclusively in its service, while upon the trains, ferryboats or premises of the Railroad Company and to indemnify and save harmless the Railroad Company from all claims, loss, damage and expense that might be incurred

by reason of injuries to person or property or death of such employee.

The question presented for decision in the *Dodd* case was whether or not in view of these contracts the Railroad Company owed any duty to exercise care for Dodd's safety. The court held that no such duty existed, that the act which caused Dodd's injuries was not a tort and, therefore, not actionable.

With this explanation of the rule in the *Dodd* case, the meaning of the statement of this court in the *Black* case that that rule was inapplicable to the *Black* case is perfectly clear. In the *Black* case it was held that by creating the appearance of a public street the Railroad Company had estopped itself from denying that it owed the duty it would owe if the passageway was in fact a public street. In the *Dodd* case it was held that no duty existed.

In the present case a totally different question is presented. Here the question involved is whether, assuming there was a duty owed to Black and a breach thereof, the defendant was bound by the contract to indemnify the plaintiff against the liability resulting therefrom. That it was is clear from the contract, which provides that, as between the Railroad Company and the Express Company, "the Railroad Company shall not under any circumstances be responsible or liable for any such loss, damage or injury", and, as between these two Companies, the contract is lawful and binding (*Trenton Passenger Railway Co.* vs. *The Guarantors Liability Indemnity Company*, 60 N. J. L. 246). These grounds of appeal, therefore, present no cause for reversing the judgment below.

POINT 2.

The fourth ground of appeal presents the question of the correctness of the lower Court's decision that at the time of his injury, Black was "exclusively"

in the service of the defendant. The contract itself shows what was meant by the requirement that the defendant should indemnify the plaintiff against liability for injuries to persons "exclusively" in the defendant's service. Under the eleventh paragraph of the contract, it is contemplated that the same person may be an employee of both parties (Rec., p. 40). The indemnity provision was intended to exclude from its operation such joint employees.

Aside from this, however, the finding of fact by the trial court that Black was exclusively in the service of the defendant (Rec., p. 56), was justified by the stipulated facts, for it appears that while working for the defendant, he had no other employment, business or occupation (Rec., p. 26).

POINT 3.

The fifth and seventh grounds of appeal challenge the correctness of the lower Court's decision that Black was injured while on the premises of the plaintiff. The contention underlying these grounds of appeal is that the passageway over which Black was driving had been dedicated to public use and, therefore, was not part of the plaintiff's premises. In view of the finding of fact that the passageway was part of plaintiff's premises (Rec., p. 58), it may well be doubted whether the decision below on this point is reviewable on appeal. But assuming that it is, it is clear that the lower Court was justified in deciding that this passageway had not been dedicated.

This passageway was originally constructed by plaintiff for its own purposes. Ever since it's construction, it has been paved, sewered, lighted and cleaned by the plaintiff at its own expense. The plaintiff has torn up the pavement for the purpose of laying water pipes and conduits containing wires

and replaced the same. It has erected railroad tracks, crossing and buildings extending beyond the lines of the passageway as originally constructed, without permission from, or objection by, the authorities of Jersey City. Taxes have been assessed against the property over which this passageway runs both by Jersey City and by the State of New Jersey (Rec., pp. 22, 23).

These facts clearly negative the existence of any intention to abandon this property to public use, and justify the conclusion that there has been no dedication (*Irwin* vs. *Dixion*, 9 How. 10; *Morris & Essex Railroad* vs. *Jersey City*, 63 N. J. Eq. 45, aff. 71 N. J. Eq. 308; 13 *Cyc.* 452).

It is true that persons having no business with the plaintiff use the passageway. But this, standing alone, is insufficient to show that the public have gained the right to use it. The plaintiff was under no obligation to exclude persons having no business with it for the protection of its right, *Marino* vs. *Central Railroad Co.*, 69 N. J. L. 628, and if user alone is relied upon, it must appear that the user has continued for twenty years, *Wood* vs. *Hurd*, 34 N. J. L. 87.

POINT 4.

The decision of the court below that the lease of the express building adjacent to the passageway did not carry with it the right to use the passageway as a *way of necessity* is challenged by the sixth and eighth grounds of appeal. It is true that if a grantor sells land wholly surrounded by other land which he retains, or when the part sold is surrounded in part by the land retained and in part by that of a stranger, over which there is no right of access, the law will imply a grant of a means of access to the land conveyed over the other lands of

the grantor. But before this implication arises it must appear that such a way is necessary to the enjoyment of the land conveyed. It is insufficient that such a way may be convenient or desirable, *Stuyvesant* vs. *Woodruff*, 1 Zab. 133, 153, 155, 14 *Cyc.* 1173. Accordingly it is held that if any other means of access to the land granted exists, no grant of a way of necessity is implied, *Stuyvesant* vs. *Woodruff, supra, Kingsley* vs. *Gouldsborough Land Imp. Co.*, 29 Atl. Rep. (Me.), 1074.

At the time the lease of the express building was made, no necessity for a grant of a means of access thereto existed. Under the contract of June 28, 1898, the plaintiff agreed to afford to the defendant free and unrestricted access to the plaintiff's premises, stations and trains (Rec., p. 31). Moreover it appears from the lease itself that the parties intended that the defendant should gain no right to use the passageway through it. The map of Jersey City in common use at the time the lease was made delineated the plot on which the express building stood as adjacent to the passeway which was also delineated thereon. The lease instead of referring to this map, refers to the Assessment Map of Jersey City (Rec., p. 45), which does not show the passageway (Rec., p. 25). The decision of the lower court, therefore, was proper.

POINT 5.

By the ninth ground of appeal defendant raises the contention that at the time Black was injured he had finished his work for the day and, therefore, was not an employee of the defendant. At the time the accident occurred Black had finished his work for the day at the express building. But it was the practice of men working at that building to drive empty express wagons to the company's stable on

their way home. When the accident occurred, Black was doing this. These facts fully justify the finding of the trial court that at the time the accident occurred, he was in the employ of the defendant (*Cicalese* vs. *Lehigh Valley R. R. Co.*, 46 Vr. 897) (Rec., pp. 56, 58).

POINT 6.

The grounds of appeal disclose no error on the part of the lower Court and, therefore, its judgment should be affirmed.

Respectfully submitted,

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Of Counsel.

New Jersey Court of Errors and Appeals

CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Plaintiff-Appellee,

vs.

REGINALD H. MORGAN, JR., Treasurer of the United States Express Company,

Defendant-Appellant.

BRIEF FOR APPELLANT.

Statement of the Case.

This appeal brings up the right claimed by plaintiff Railroad Company to recover against defendant Express Company, under a contract between the two companies, the amount of two judgments recovered respectively by Charles Black, a minor, and Michael Black, his father, for personal injuries sustained by Charles Black while in the employ of the Express Company, which injuries resulted from the negligence of the Railroad Company.

Charles Black sued the Railroad Company and a verdict was directed for the defendant under authority of *Dodd vs. Central Railroad,* 80 N. J. L., p. 56; affirmed 82 N. J. L., 524.

This Court thereupon reversed upon the ground that the Dodd case was not applicable to the facts of the Black case, 85 N. J. L., 197.

Upon the new trial Black recovered a verdict,

which was set aside upon grounds not pertinent to the present appeal. (See *Black vs. Central Railroad.*)

The case was again tried resulting in a judgment for Charles Black for $2,500.00, which judgment the Railroad has paid.

Michael Black, the father of Charles Black, brought suit for loss of services due to the above injury to his son, which suit was held in abeyance pending the litigation in the Charles Black suit, and finally resulted in a judgment against the Railroad for $3,500.00, which judgment the Railroad Company has paid.

The Railroad Company further claims to have expended $250 in expenses in defending these two suits.

The present suit was brought by the Railroad Company against the Express Company to recover the aggregate of these items and was tried before Judge Speer without a jury on an agreed state of facts, resulting in a judgment for the plaintiff for $6,250, which is brought up by the present appeal.

The injury occurred at a railroad crossing of the plaintiff over what was apparently a public street or highway in Jersey City leading to the docks, wharves and ferry of the Railroad Company. This apparent street or highway is laid out over lands reclaimed by the Railroad Company under a riparian grant from the State. It is an unbroken continuation of Johnston Avenue, Jersey City, and is paved, lighted and sewered and has every physical appearance of a city street.

The Express Company enjoyed the right to transport express packages over the railroad under a contract, whereby the Railroad Company agreed to (7th paragraph) "afford the Express Company

free and unrestricted access to its premises, stations and trains for the loading, unloading and transferring by the Express Company of its business." Said contract further provides:

> 16th Paragraph: "The Express Company assumes * * * all risks of injuries to person or property or injuries resulting from death of any employes exclusively in its service while upon the trains, ferryboats or premises of the Railroad Company, and agrees to indemnify and save harmless the Railroad Company from all claims that may be made against it, and from all loss, damage and expense that may be incurred by it by reason of loss or damage to such moneys, valuables and other property, and by reason of any injuries to person or property or death of any such employees, as well as against the expense of resisting such claims, whether they be successfully resisted or not, it being understood that the Railroad Company shall not under any circumstances be responsible or liable for any such loss, damage, or injury" (Ex. B, pp. 39 and 43).

The Express Company occupied a building belonging to the Railroad situated within the area of the riparian grant, adjacent on one side the railroad tracks of the Railroad Company and on the other side adjacent to the roadway, which building and appurtenant rights were held by the Express Company under a separate lease at a separate rental (Ex. C, p. 45).

This building was especially adapted to the Express Company's business, so that express packages could readily be unloaded from express cars on one side of the building, classified, checked and records made within the building, and then re-handled by loading into wagons backed up to a long platform extending along the roadway. These wagons were then driven over the roadway into the streets of Jersey City or easterly to the ferry and thence to New York.

A large number of persons were employed by the Express Company in this building in handling and re-handling the merchandise, and also in clerical work in making records thereof.

There was no access whatever to this building for either wagons or employees except over this roadway.

Charles Black was employed by the Express Company in a clerical capacity in this building under a written contract, to which his father was likewise a party (Ex. D, p. 47), under which he agreed:

> "(4) * * * I assume the risk of all accidents and injuries which I may sustain in the course of my employment, whether occasioned by negligence, and whether resulting in my death or otherwise. I agree to hold the Company harmless from any and all claims that may be made against it arising out of any claim or recovery on the part of myself, or my representatives, for damages sustained by reason of my injury or death, whether such injury or death result from negligence or otherwise.
>
> "I agree to pay to the Company, on demand, any sum which it may be compelled to pay in consequence of any such claim. I will execute and deliver to the corporation or persons owning or operating the transportation line upon which I may be so injured, a good and sufficient release under my hand and seal of all claims, demands and causes of action arising out of any such injury, or connected with or resulting therefrom.
>
> "I ratify all agreements made by the Company with any transportation line in which the Company has agreed or may agree in substance that its employees shall have no cause of action for injuries sustained in the course of their employment upon the line of such contracting party, and I agree to be bound by each and every such agreements so far as

the provisions thereof relative to injuries sustained by employees of the Company are concerned, as fully as if I were a party thereto. The provisions of this agreement shall be held to inure to the benefit of any and every corporation and person upon whose transportation line the Company shall forward merchandise, as fully and completely as if made directly with such corporation or persons" (p. 48).

At the time of the injury Black had finished his work for the day and with other boys had taken one of the Company's teams, which had finished work for the day, and was driving it to the Company's stable in order to avoid the long walk, at the time of the accident. This was no part of his regular duties, but was for his own convenience in getting home.

While thus driving down the street or roadway he was struck by one of the Railroad Company's engines at a spur crossing over the road.

Grounds of Appeal.

There are thirteen grounds of appeal alleged, all of which are relied on, but which may be condensed as follows:

(1) The finding of the Court that the Express Company was obligated to indemnify the Railroad against the claim arising out of Black's injury, notwithstanding the previous determination in *Black vs. Central Railroad* that Black was not present upon the roadway at the time and place of injury by virtue of the license contained in the contract between the two companies, but by virtue of the implied invitation extended by the Railroad Company to Black as a member of the public, independent of any contractual relations with the Express Company or between the Express Company and the Railroad Company. (Grounds of Appeal numbered 1, 2, 3 and 7.)

(2) The refusal of the Court to find that the Express Company and its employee Black had a way of necessity over the roadway in question from the Express building to the streets of Jersey City, and that Black at the time and place of injury was present in enjoyment of this way of necessity appurtenant to the lease and not by virtue of the license created by the transportation agreement, to which latter alone the contract of indemnity relates. (Grounds of Appeal numbered 6 and 8.)

(3) The finding of the Court that there were no facts sufficient in law to show a dedication of the roadway to the public use and finding that there was no such dedication. (Ground of Appeal No. 5.)

(4) The finding by the Court that Black was in the employ of the Express Company at the time of injury, and the refusal to find that at the time of injury he had finished his work for the day and was not then in the discharge of his duties as an employee of the Express Company. (Grounds of Appeal numbered 4 and 9.)

(5) The finding for plaintiff and against defendant, whereas the finding should have been to the contrary.

ARGUMENT.

POINT I.

The alleged right of the railroad to reimbursement from the express company is limited to claims arising from injuries sustained by defendant's employes while enjoying rights upon plaintiff's premises created by the agreement exhibit "B" and not otherwise.

Exhibit "B" is the identical instrument construed in both the Dodd and Black cases supra.

By this agreement the Railroad Company expressly agreed to:

> "afford the Express Company free and unrestricted access to its premises, stations and trains for the loading, unloading and transferring by the Express Company of its business."

In the Dodd case plaintiff was injured while inside an express car standing upon the tracks of the Railroad Company and at the time was actually in the act of unloading express packages.

Justice Swayze says: (page 60):

> "In the present case the plaintiff (Dodd) was in the employ of the Express Company, which was using the premises of the Railroad Company for their mutual benefit. He was therefore entitled to all the rights which arose out of the invitation and he was entitled to no more. * * Although the plaintiff was upon the premises by invitation, his rights depended upon the extent of the invitation *and that is to be ascertained from the contract between the Railroad Company and the Express Company.* It is clear from that contract that the invitation to the Express Company was conditional upon the

exemption of the Railroad Company from liability to the employees of the Express Company. That the rights of a person invited upon premises extend no further than the invitation is shown not only by *Phillips v. Library Co., supra,* but by *Feury v. N. Y. Central,* 38 Vr. 270, and *Ryerson v. Bathgate* 38 Vr. 337. It can hardly be questioned that an occupier of land may ordinarily exclude all persons therefrom, or may admit them upon such terms as he choses. * * * Since the rights of an express company * * * are necessarily the result of private contract, the rights of the plaintiff can rise no higher, and they, too, are limited by the terms of the contract between the Express Company and the Railroad Company, to which the plaintiff expressly assented and since his right to be upon the premises depended upon his contract with the Express Company, it is limited by the terms of that contract also."

(In the present case Black derived his rights as employee under a contract *identical in form* with that considered in the Dodd case.)

In the Black case the injury did not occur upon what was obviously railroad property, as in the Dodd case, but, on the contrary, occurred upon what was, in every physical aspect, a public street, paved, lighted, cleaned and sprinkled as a public street, connected in unbroken continuity with the public ferry maintained by the Railroad Company as a common carrier, and the public streets of the City.

The fee to the land underlying this roadway was undoubtedly in the Railroad Company, but the general public was invited to and did use it freely as a public street.

The Express Company does not make any different use of said roadway than that made by other members of the public (case p. 24).

Justice Garrison, speaking for the Court of Errors in the Black case, says (p. 200):

"The plaintiff was injured while driving along a way, which if not a street, had very much the appearance of one. It was a continuation of a city street. It was paved like a street. It was lighted and sprinkled like a street. It was patrolled by the city police like other streets, and where it was crossed by railroad tracks, flagman were stationed as is customary at street crossings. All of these things, with the exception of the police patrol, were the acts of the defendant. If, therefore, the way in question presented the appearance of being a street, the defendant had created such appearance and was therefore responsible for the consequences, one of which was that persons generally might use the way in the belief that it was what it appeared to be. As to such users the liability of the defendant, arising out of the appearance so created by it, would be the same as if such street actually was what it appeared to be, under the rule that 'one who holds out a way as a public street is liable.' * * * so that the question for the jury is not whether such acts of the owner were proof of an intention to dedicate a public street, but whether they had created an appearance *calculated to induce the public to use the way* in the belief that it was what it appeared to be * * * (p. 201). Hence, in the present case, if the defendant ought to have known that by giving to its private way the appearance of a public street it might give rise to the natural belief that it intended the way to be so used *by the public,* the doctrine stated is applicable to such facts and inferences as a jury might have found from the testimony. * * * (p. 202) * * * upon the question whether the defendant by its conduct *invited the plaintiff as one of the general public* and within the meaning of the doctrine we are discussing to use the way in the belief that it was a street, the evidence presented a question for the jury under proper instructions; * * * To the case thus presented the rule of *Dodd v. Central Railroad Co.*, has

no application. Under the doctrine of *implied invitation* the negligence of the defendant, as also that of the plaintiff, were clearly for the jury."

We think the comparison of these two decisions, each dealing with the same identical contracts, makes it entirely clear:

FIRST: That in that class of cases where the employee is present upon the railroad premises by virtue of the right secured to the Express Company and its employees under the transportation agreement, he is bound by the conditions imposed by the express terms of the agreement. He is there by *express* invitation and is limited by the condition that he shall have no right of action for his injury.

SECOND: In that other class of cases where the plaintiff, although an employee of the Express Company, is present upon the railroad premises by virtue of an *implied* invitation extended to the general public, to use the same as a public street, he is not bound by the condition exempting the Railroad Company from liability.

Taking this agreement in its entirety, it will be observed that the Express Company is bargaining for additional rights to those enjoyed by the general public by invitation, viz: for free and unrestricted access to the railroad premises of every kind and wherever located not for universal purposes, but for the special purpose of loading, unloading and transferring its business, and in consideration thereof the Express Company agrees to indemnify the railroad company against claims for injuries to its employees while upon the premises of the Railroad Company, and further agrees, paragraph 18th, that the Express Company employees while on the premises of the Railroad Company, shall at all times conform to the general rules of the Railroad Company and, further to discharge any such employee who

may become objectionable to the Railroad Company.

We submit that the agreement to idemnify is co-extensive with the license and that the Railroad Company is not indemnified against claims made by any employee other than one licensed under paragraph 7th.

It is furthermore to be considered that the employee has, in turn, by his employment contract, relieved the Express Company of any obligation which it may have incurred by reason of his injury under the transportation agreement and with full notice that such invitation as he enjoyed under the contract was subject to the condition that he should have no action for his injury.

The Dodd case holds that the two agreements are to be construed together.

> (Page 57) "The defense interposed grew out of *two* contracts, one between the Express Company, the plaintiff's employer, and the Railroad Company, the defendant, and the other between the plaintiff himself and the Express Company."
>
> (Page 58) "The evident intent of these *two* contracts was to exempt the Railroad Company from responsibility to the plaintiff for all accidents and injuries which he might sustain in the course of his employment."

Paragraph 4 of the employment contract (Ex. D, p. 49) expressly provides:

> "I ratify all agreements made by the (Express) Company with any transportation line, in which the Company has agreed or may agree in substance that its employees shall have no cause of action for injuries sustained in the course of their employment upon the line of such contracting party, and I agree to be bound by each and every such agreements, so far as the provisions thereof relative to injuries sustained by employees of the company are concerned, as fully as if I were a party thereto."

The same contention as made by the plaintiff in this suit could be made with equal force if the injured employee had been driving an express wagon over any crossing of the Railroad Company over any public highway, for the Railroad Company as abutting owner owns to the middle of the highway, and literally the Express Company employee would be upon the premises of the Railroad Company at the time of impact, and it can make no difference in principle that the employee was there present in enjoyment of a public easement by an irrevocable dedication, or in the enjoyment of an implied invitation to use the crossing as though a public highway, which implied invitation has every attribute of a dedicated public use, except that it is revocable.

POINT II.

If Black was not using the roadway as a member of the general public, he was using it as a way of necessity communicating with the building held by the express company under lease.

There was no access whatever to the leased building except over the disputed roadway.

Obviously the parties intended that the Express Company should obtain additional rights under the lease to those which it had under the contract. Otherwise there would be no purpose in the separate indenture of lease and the separate rent provided for thereunder.

Under the contract the Express Company merely had the right of access to the railroad premises for the special purpose of "loading, unloading and transferring by the Express Company of its business." Even the enjoyment of this right was limited by the condition that the Express Company employees should "at all times

conform to the general rules of the Railroad Company," and that if any employee of the Express Company "should be obnoxious or objectionable to the Railroad Company, he shall be removed or discharged upon the written request of the Superintendent of the Railroad Company."

Under the lease, however, the Express Company acquired very different rights in the demised premises. It acquired the right not merely of access for the special purpose of "loading, unloading and transferring of its business," but the exclusive right to occupy and use for every purpose incidental to its business, and did in fact use the premises, in part, for its clerical force.

Furthermore, the Express Company under the lease had the right, through its employees, to use the demised premises regardless of rules and regulations of the Railroad Company, nor was it required to exclude from the demised premises any employee who might be obnoxious to the Railroad Company.

Upon familiar principles the Express Company as lessee was entitled to a way of necessity over the lands of the lessor, if there was no other access, and manifestly this way of necessity was coextensive with the use which the lessee was entitled to make of the demised premises.

The trial court dismissed this contention with a bare assertion that there was no *via necessitas,* then citing *Stuyvesant v. Woodruff,* 21 N. J. Law 133, 155; *Goerk v. Wadsworth,* 73 N. J. Eq. 454.

The latter case deals with a lease for part of a building approached through another part remaining in the lessor, and which lease contains an express provision for the construction of a new approach to the leased premises, different in location from the existing way. Upon the closing up of the old way, the lessee sought a mandatory

injunction, and the court held that his rights not being clear, he should be left to his remedy at law, without prejudice. In the course of the opinion the Court does state:

> "An easement by implication of law is raised in the absence of any express contract in reference to the easement, and the question in this case relates to the effect of the express provisions in the lease as to another means of access upon the easement which would have been raised by implication of law, had no contract for other access been made. The maxim of construction *expressum facit cessare tacitum,* controls the case on this point, and the express contract for another way of access which the lessee had the right to provide, before the commencement of the term, prevents the creation of another easement by implication."

Presumably the Court decided that there was no way of necessity because the Express Company had the general right of access to the Railroad Company premises for the purpose of "loading, unloading and transferring" under the contract Ex. A, (which contract expired before the expiration of the term granted by the lease) and the additional contract, Exhibit B, which became effective upon the termination of the old contract, Exhibit A.

As above pointed out, however, this right of access was very much more restricted than the access to which the lessee was entitled in the enjoyment of its lease.

Specifically, Black's employment does not come within the scope of the general contract at all. He was not employed in the loading, unloading or transferring of express packages, but his employment was that of a clerk or bookkeeper and he was employed in that part of the leased premises devoted to clerical purposes.

We submit that under the facts of this case,

Black was present on the roadway either as a member of the general public, by general invitation (as presumably found by the jury) or in enjoyment of a way of necessity appurtenant to the lease. If in the latter capacity, the Express Company is no more bound to indemnify the Railroad Company than as though the injury had been the result of a locomotive crashing into the leased building and injuring Black while at work at his desk.

POINT III.

At the time of the injury Black was not exclusively in the service of the express company within the intent and meaning of the indemnity clause of the contract between the two companies.

The Court below decided this point adversely to the defendant on authority of *Cicalese v. Lehigh Valley R. R.*, 75 N. J. Law 897-900.

The plaintiff there brought suit against the master for injuries sustained in working a defective hand car furnished by defendant, upon which plaintiff was returning to his home, upon concluson of the day's work. Ths Court said:

> "The relation of master and servant continues during the carriage of the servant to and from his work, when done by the master or with his consent, where from the character of the service such transportation is beneficial both to the master and servant."

In the present case there was nothing transitory about the service. There is nothing to show that Black had been accustomed to ride to his work. Conceivably the employer might have had an interest in getting the employee both to and from his work where the situation was inaccessible. It is unreasonable, however, to suppose

that the employer had any interest in returning the employee to his home after the conclusion of work where he did not offer any facilities to bring him to the commencement of his work. The wagon in which the injury took place was not suitable for the conveyance of persons, but was designed and used wholly for the conveyance of merchandise. It was merely accidental that at the conclusion of the day there was an empty wagon standing at the building. Black and his companions took charge of this as volunteers in order to avoid the long walk. They were through work for the day. Their time had been checked out or recorded upon leaving the building. They were no longer under the control of the Express Company, nor subject to its discipline. The Express Company could not impose upon them obedience to the rules and regulations of the Railroad Company.

We submit that it is not within the true intent of this indemnity agreement to cover injuries to the Express Company employees after hours whenever they happen to be on lands to which the legal title may be in the Railroad Company but which the Railroad Company has apparently thrown open to general public use.

POINT IV.

The evidence required a finding that the roadway had been dedicated to public use.

This Court, when the Black case was before it, expressly left open the question whether or not under the proven facts there was evidence of dedication.

The lands were formerly under tide-water.

Johnston Avenue an undoubted public highway, extended to the water's edge. The grant of the lands under water by the state has been held not

to require the extension of the highway to the new solid filling line, upon reclamation of the lands granted.

In this case, however, the Railroad Company saw fit to physically extend the roadway over the reclaimed lands to the new water front there terminating with its public ferry to the high ways of New York City and to build a permanent roadway at large expense, improved with Belgium blocks, lighted, drained, cleaned and sprinkled, with every aspect of a city street, and over which the public was invited to develop a heavy commerce, requiring for its regulation a regular police patrol. Absolutely no signs or structures of any sort were erected to indicate that the public license was revocable, nor was there any attempt made to regulate it in any way as by a private owner.

The only regulation was that by the public authorities. It is true that the property on either side was largely devoted to railroad uses, yet in at least one instance the Railroad Company leased property within the railroad yard and abutting on this roadway for a private business. We refer to the lease to the Burns Brothers Coal Company, which is the largest individual retail distributor of coal in the metropolitan district and conducts an enormous commerce over the roadway. There is no fact in evidence even tending to negative the evidence of the senses that this was a permanent public street open to the general public.

The facts of this case are similar in many respect to those presented by *Morris & Essex Railroad v. Jersey City,* 63 N. J. Eq., 45, affirmed on the opinion below 71 N. J. Eq. 308.

There a city street extended to high water and there was thereafter a riparian grant to a railroad company. The latter leased a parcel within the yard and fronting on a continuation of the

roadway, to a warehouse firm, and the latter built a causeway to its wharf, in many respects resembling a street. The Court held that there was no dedication resulting from these facts or uses, basing its finding apparently, however, on the fact that the causeway did not connect two public places, but simply terminated in a private wharf, intimating, however, that the result would have been different had the private roadway connected with public streets or places at both ends, or terminated with a ferry.

The eighth syllabus states:

> "Where the owners of a dock in a tide-water river, constructed a road connecting their dock with the water terminus of a public street 'but the causeway was never extended across the river so as to connect with any street in the opposite city, no ferry was ever established from the end of such causeway across the river, and it was never worked as a street by the city, and was never open to the general public,' there was no dedication."

In commenting on the facts, Vice Chancellor Pitney says, p. 63:

> " * * * it became necessary and convenient for the (Railroad) Company to have access for teams to these piers and docks; but the use of the way was confined to that sort of traffic. It never was a thoroughfare leading to any public place. There was no ferry or general public travel over the causeway and over the docks for any public conveyance."

Again, at page 66,

> "The case in question is in marked contrast with one which would result from the opening of a causeway across the cove from Jersey City to Hoboken parallel with the river, with an outlet at each end into the public streets of those cities.

"In such a case the passageway would have been from one public street to another, and the travel over it might have been by individuals as members of the general public."

At page 68, the Court, supposing the existence of a road over a private tract, says:

"but all that would not make it a public highway, unless the owner solicited the public authorities to accept it as a highway and assume the burden of its repair, and they did so; *or* unless it extended entirely across the owner's land from one public highway to another, and he permitted its use by the general public."

Summing up the evidence of dedication, the Vice Chancellor continues, page 68:

"But all that did not give it the qualities of a public street, because it did not connect two public places or thoroughfares, and was not open to the general traveling public, was never constructed or maintained by the public, and yet it was called Thirteenth Street, and many people supposed it to be a public street."

The present case apparently falls within the exception above stated. The roadway was in fact open to the general public and did connect two public places, viz: Johnston Avenue on the west and a public ferry leading to the public highways of the City of New York.

The judgment should be reversed.

McDermott & Enright,
Attorneys of United States Express Co.

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Notice of Appeal and Reasons therefor.

New Jersey Supreme Court.

HUDSON COUNTY.

CENTRAL RAILROAD COMPANY OF NEW JERSEY, *Plaintiff,* *vs.* REGINALD H. MORGAN, Jr., Treasurer of the UNITED STATES EXPRESS COMPANY, *Defendant.*	Action at Law.

To

GEORGE HOLMES, Esq.,
Attorney for Plaintiff.

TAKE NOTICE that the defendant hereby appeals from the whole and every part of the judgment entered in favor of the plaintiff in the above entitled action, on the 30th day of December, 1915, to the New Jersey Court of Errors and Appeals in the last resort in all causes, upon the following grounds:

1. Although admitted that plaintiff's action was brought to recover for moneys expended in defending a damage suit, and for moneys paid in satisfying the judgment finally given for plaintiff in the suit brought by Charles Black against Central Railroad Company of New Jersey, reported 85 N. J. Law page 197, and the judgment for Michael Black depending thereon the Court erroneously ruled that there was nothing in the decision of the Court of Errors quoted in above case which makes the contract between the

Railroad Company and the Express Company (Exhibit B) inapplicable to the facts.

2. The Court erroneously ruled that the case now being tried involves a totally different question (than that involved in the suit of *Black vs. Central Railroad*) which is whether or not the contract between the Railroad Company and the Express Company (Exhibit B) is sufficient to cover the situation.

3. The Court erroneously ruled that the contract between the Railroad Company and the Express Company, (Exhibit B) covered the situation involved in the present suit, i. e. made defendant liable to indemnify plaintiff for moneys expended in resisting the Black suit and in paying the judgment recovered therein, notwithstanding that in fact and law it was established that Black was present upon the premises of the Railroad Company not by virtue of the license contained in the contract between the two Companies, but by virtue of the implied invitation extended by the Railroad Company to Black as a member of the public, independent of any contractual relations with the Express Company or between the Express Company and the Railroad Company.

4. The Court erroneously ruled that said Black was in the employ of the Express Company at the time of his injury.

5. The Court erroneously held that there were no facts sufficient in law to show a dedication of the roadway upon which the injury occurred, and erroneously ruled that there was no dedication.

6. The Court erroneously decided that the Express Company did not have a via necessitas over the roadway upon which the injury oc-

curred, arising from a lease made by the Railroad Company to the Express Company demising the building in which Black worked, fronting upon said roadway.

7. The Court erroneously refused to find defendant's request that the roadway in question was no part of the premises of the Railroad Company which the employees of the Express Company were licensed to use under the contract Exhibit B.

8. Because the Court erroneously refused to decide and rule that said Black at the time of the injury had a right to use said roadway by virtue of the easement created by the lease from the Railroad Company to the Express Company, Exhibit C.

9. Because the Court erroneously refused to find and rule in accordance with defendant's request that said Black at the time of the injury had finished his work for the day and was not in the discharge of his duties as an employee of the Express Company.

10. Because the Court erroneously found for the plaintiff against the defendant for the sum of $2500 expended by the Railroad Company in resisting the claim of said Black, whereas the Court should have found in favor of the defendant against the plaintiff.

11. Because the Court erroneously found for the plaintiff against the defendant for the sum of $2500 being the amount of money expended by said Railroad Company in satisfying a judgment recovered against it by Charles Black on account of the aforesaid injuries, whereas the Court should have found for the defendant against the plaintiff.

12. Because the Court erroneously found for

the plaintiff against the defendant for the sum of $3500 being the amount expended by the Railroad Company in satisfying a judgment recovered against it by Michael Black (father of Charles Black) for loss of services of Charles Black on account of the aforesaid injury, whereas the Court should have found for the defendant against the plaintiff.

13. Because the Court erroneously found for the plaintiff against the defendant, for the sum of $6250, whereas it should have found for the defendant against the plaintiff.

Respectfully,

McDERMOTT & ENRIGHT,
Attorneys of Defendant.

Dated, December 30th, 1915.

Complaint.

NEW JERSEY SUPREME COURT.

CENTRAL RAILROAD COMPANY OF NEW JERSEY, a body corporate, *Plaintiff,* *vs.* REGINALD H. MORGAN, Jr., Treasurer of the UNITED STATES EXPRESS COMPANY, *Defendant.*	Action at Law.

The plaintiff, a corporation of the State of New Jersey, having its principal office for the transaction of business in the City of Jersey City, County of Hudson and State of New Jersey, says:

1. That it now is, and at the time hereinafter mentioned was, the owner of, and by its agents and servants operates and operated a railroad

with its appurtenances within the State of New Jersey.

2. That the defendant is a voluntary and unincorporated association organized under the laws of the State of New York and under the laws of said State may sue and be sued in the name of its treasurer; that Reginald H. Morgan, Jr., now is treasurer of the defendant; that it was at the time hereinafter mentioned and now is engaged in the business of carrying express matter as an express company.

3. That for the purpose of having its express business transported on the railroad of the plaintiff and for the purpose of obtaining permission for its employees to be in and upon the lands, premises, property, buildings, trains and railroad of the plaintiff for the purpose of its business, the defendant on or about the seventh day of August Nineteen hundred and eight, entered into an agreement in writing with the plaintiff wherein and whereby it was provided as follows:

> "Except as otherwise provided by Section Eighth and Eleventh of this agreement, the Express Company assumes all risks upon money, valuables and other property in its charge or in the charge of its employee as well as all risks of injuries to persons or property or injuries resulting from the death of any employees exclusively in its service while upon the trains, ferryboats or premises of the Railroad Company, and agrees to indemnify and save harmless the Railroad Company from all claims that may be made against it, and from all loss, damage and expense that may be incurred by it by reason of loss or damage to such moneys, valuables and other property, and by reason of any injuries to persons or property or death of any such employees, as well as against the expense of resisting such claims, whether they

be successfully resisted or not, it being understood that the Railroad Company shall not under any circumstances be responsible or liable for any such loss, damage or injury."

and relying upon the provisions of said agreement the plaintiff permitted the employees of the defendant, and in particular an employee of the defendant named Charles Black to be in and upon its lands, premises, railroad, buildings, trains and property.

4. That at and prior to the time hereinafter mentioned the plaintiff owned in fee simple absolute certain lands and premises in the City of Jersey City, County of Hudson and State of New Jersey whereon was located its railroad terminal known as the Communipaw Terminal; that all of the land now comprised within the limits of the said Terminal was formerly under the waters of the Hudson River and New York Bay and said land was filled in by the plaintiff and its terminal constructed thereon and said plaintiff has been in possession of the whole thereof ever since; that prior to the time hereinafter mentioned the plaintiff constructed along the northerly boundary line of its said terminal a passageway for the purpose of giving access thereto from the inhabited portions of Jersey City and for the purpose of giving access to a ferry operated by it in connection with its said terminal between its said terminal and the City of New York; that said passage was laid out by the plaintiff, constructed by it, sewered by it, lighted by it, cleaned by it and it has laid water and o her pipes therein and torn up the pavement thereof and relaid the same and otherwise treated and held said passageway as its private property ever since the same was constructed

up to and including the time hereinafter mentioned; that the City of Jersey City and the State of New Jersey have assessed taxes against the land over which said passageway runs as the private property of the said plaintiff and it has paid the taxes so assessed thereon; that the said passageway is not recognized in any way by the authorities of Jersey City or the State of New Jersey except as the private property of this plaintiff; that said passageway is now, and was at and before the time hereinafter mentioned, used exclusively by persons having business with the plaintiff, or by persons using said passageway by the license and permission of this plaintiff; that said passageway was never dedicated to the public and the public have no rights therein whatsoever.

5. That on and prior to January 4, 1912, the said Charles Black was exclusively in the service of the defendant and that on said date while on the premises of the plaintiff, to wit, on the passageway above described said Charles Black was injured and thereafter brought suit in the New Jersey Supreme Court against this plaintiff for the purpose of recovering damages against it for the said injuries; that this plaintiff spent a large sum of money, to wit, the sum of One thousand Dollars ($1,000.00) in resisting the claim of said Charles Black.

6. That it has demanded of the defendant the money so expended by it in resisting said claim but the defendant has refused to pay the same.

Plaintiff demands damages in the sum of One Thousand Dollars together with interest and costs of suit.

GEORGE HOLMES,
Attorney of Plaintiff.

Answer.

(Filed Aug. 17th, 1914).

NEW JERSEY SUPREME COURT.

CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Plaintiff,

vs.

REGINALD H. MORGAN, Jr., Treasurer of the UNITED STATES EXPRESS COMPANY,

Defendant.

Action at Law.

The defendant Reginald H. Morgan, Jr., as Treasurer of the United States Express Company, makes answer to the complaint in above entitled action as follows:

FIRST DEFENSE.

1. He admits Paragraph 1 of the Complaint.

2. He admits that United States Express Company at the time of bringing this suit was a voluntary and unincorporated association existing under the common law of the State of New York and capable of suing and being sued in the name of its Treasurer and that Reginald H. Morgan, Jr., was then treasurer of said Express Company and that said Express Company was then and for a long time prior thereto had been engaged in the business of carrying express matter as an Express Company.

3. He admits that at the time of the injury to Charles Black referred to in the complaint, there was a contract in force between the plaintiff Railroad Company and the defendant Express Company containing the provisions set forth in the complaint.

For greater certainty, however, defendant begs leave to refer to the full text of said agreement when produced.

This defendant denies, however, that the aforesaid Charles Black was on the premises of the plaintiff Railroad Company at the time of his injury by virtue of the aforesaid contract or in reliance upon the provisions thereof.

4. Defendant admits that plaintiff Railroad Company was the owner of certain lands situate in the City of Jersey City comprising its terminal yard as averred in paragraph 4 of the complaint, subject, however, to such rights as the public may have acquired in the roadway therein referred to.

Defendant admits on information and belief that plaintiff constructed said roadway across its terminal yard for the purpose of connecting a dedicated, open, improved street in said City known as Johnston Avenue, with the ferry owned and operated by the plaintiff.

Defendant admits on information and belief that said roadway was laid out by the plaintiff, constructed by it, sewered, lighted and cleaned by it and that the said plaintiff had laid water and other pipes therein and torn up the pavement thereof and relaid the same. Defendant denies, however, that said Railroad Company had treated and held said roadway as its private property, but on the contrary avers that said roadway was constructed and maintained to all intents and appearances as a public highway, to which all members of the public were invited, and that said roadway at the time of the accident referred to had been used by the public as a public highway for more than twenty years.

Defendant has no knowledge as to the assess-

ment of taxes against the land comprised within the limits of said roadway, nor as to the payment of taxes so assessed by the plaintiff.

Defendant denies that said roadway is not recognized in anyway by the authorities of Jersey City or by the State of New Jersey except as the private property of the plaintiff.

Defendant denies that said roadway was used exclusively by persons having business with the plaintiff or by persons using said roadway by license and permission of the plaintiff as averred in paragraph 4 of the complaint.

Defendant denies that said roadway was never dedicated to the public and denies that the public have no rights therein whatever.

5. This defendant admits that on and prior to January fourth, Nineteen hundred and twelve, said Charles Black was in its service, but denies that on such date he was exclusively in its service as averred in paragraph 5 of the complaint.

6. This defendant admits that on January fourth, Nineteen hundred and twelve, said Charles Black was injured while driving a team of horses and wagon along the aforesaid roadway (referred to as a passageway in the complaint) and avers that said injury was caused by a collision between said team of horses and wagon driven by Black as aforesaid and a locomotive engine belonging to the plaintiff Railroad Company and operated by its employees at a railroad crossing over said roadway constructed and maintained by the plaintiff.

This defendant admits that thereafter the said Charles Black brought suit in the New Jersey Supreme Court against the plaintiff Railroad Company for the purpose of recovering damages

against it for said injuries, alleging that said injuries were caused by the negligence of the defendant and its agents and servants in operating said locomotive engine and in failing to give warning to said Black of the approach of said locomotive to the crossing over said roadway.

This defendant is informed and believes that the plaintiff expended moneys in resisting the suit or claim of said Charles Black, but as to the amount thereof is without knowledge, information or belief, and, therefore, denies that the plaintiff expended therefor the sum of One thousand dollars as averred.

This defendant further avers that in said suit Charles Black did recover a verdict of Eighteen thousand dollars and that thereafter upon rule to show cause the Circuit Court did direct that said rule be made absolute and said verdict be set aside unless the plaintiff therein elected to remit said verdict over and above the sum of Six thousand dollars and that said Black has not as yet exercised his election.

7. This defendant avers that at the time of the aforesaid injury Charles Black was not exclusively in the service of said Express Company.

SECOND DEFENSE.

1. This defendant repeats the several averments, admissions and denials embodied in the first defense.

2. That prior to the aforesaid injury to Charles Black and subsequent to the date of the contract between the Railroad Company and Express Company set forth in paragraph 3 of the complaint, to wit, August seventh, Nineteen hundred and eight, the plaintiff Railroad Company did lease to the Express Company a certain plot of land

belonging to it and situate in its terminal yard aforesaid and adjacent to the aforesaid roadway, in order to enable the Express Company to construct thereon a building for the handling of express matter received by it and the transfer thereof to the express wagons maintained and operated by the Express Company, by indenture of lease bearing date the day of .

That under and by virtue of said indenture of lease the Express Company and its agents and servants became entitled to an easment of ingress and egress to said leased premises over the roadway or passageway constructed and maintained by the Railroad Company over its said premises, which said passageway or roadway lies adjacent to the demised premises aforesaid.

3. That the right of the Express Company to occupy the demised premises aforesaid and to enjoy the easement of ingress and egress therefrom, arose wholly under the aforesaid indenture of lease and not under or by virtue of the agreement between the two companies referred to in paragraph 3 of the complaint, and that said indenture of lease does not contain provisions similar to the provisions of the contract set forth in paragraph 3 of the complaint.

4. That said Charles Black on the date of his injury was employed by the Express Company in and about the demised premises and immediately prior to said injury did conclude his work for the Express Company for the day and did thence proceed upon the conclusion of his said labors from the demised premises over the roadway aforesaid until injured as aforesaid.

5. That said Charles Black if in the employ or service of the Express Company at all at the time of the injury was in the enjoyment of the

easement of egress from the demised premises arising under the indenture of lease aforesaid and not in the enjoyment of any license arising under the agreement between the two companies referred to in the third paragraph of the complaint as dated August seventh, Nineteen hundred and eight.

THIRD DEFENSE.

1. This defendant repeats the several averments, admissions and denials embodied in the first defense.

2. That prior to the happening of the injury to Charles Black as complained of and subsequent to the making of the agreement set forth in paragraph 3 of the complaint on August seventh, Nineteen hundred and eight, the plaintiff Railroad Company did lease to the Express Company a parcel of land included within the limits of its aforesaid terminal adjacent on the north to certain railroad tracks and adjacent on the south to the aforesaid roadway or passageway, by indenture of lease bearing date the day of

That said premises were leased by the Express Company for the purpose of enabling it to maintain thereon a platform and building for the better handling of express packages between cars standing on said railroad tracks and delivery wagons operated by the Express Company.

3. That the defendant Express Company at the time of said injury and prior thereto did maintain in the City of Jersey City, outside of the limits of the railroad yard of the plaintiff, a certain other building used for the shelter and care of its horses and delivery wagons.

4. That in order to properly enjoy the demised premises in its business, it became and was neces-

sary for the Express Company to have access to the demised premises for its horses, wagons and employees, both between the demised premises and its stable, as well as between the demised premises and the ferry maintained by the plaintiff between its terminal and the City of New York.

5. That under and by virtue of the aforesaid indenture of lease said Express Company at the time of the aforesaid injury to Charles Black was entitled to an easement of ingress and egress to the demised premises over the aforesaid roadway maintained by the plaintiff.

6. That Charles Black on the date of his injury and prior thereto was employed by the Express Company in and about the demised premises and upon the conclusion of his labors for the day in and about the demised premises did proceed to drive a team of horses hitched to a delivery wagon of the defendant, and theretofore used by the Express Company in and about said premises, toward the aforesaid stable of the Express Company and over the roadway aforesaid.

7. That the said Charles Black while driving the team and attached wagon of the Express Company at the time of his injury was in the enjoyment of the easement of egress belonging to the Express Company under its aforesaid indenture of lease and was not in the enjoyment of a license arising under the agreement between the two companies set forth in paragraph 3 of the complaint.

Defendant, therefore, demands judgment against the plaintiff with costs.

McDermott & Enright,
Attorneys of Defendant.

Reply.

(Filed Sept. 17, 1914.)

NEW JERSEY SUPREME COURT.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, *Plaintiff,* *vs.* REGINALD H. MORGAN, JR., Treasurer of the United States Express Company, *Defendant.*	Action at Law.

The plaintiff, The Central Railroad Company of New Jersey, replies to the answer of the defendant in the above entitled case as follows:

1. Plaintiff denies the averment contained in Paragraph Four of the first defense contained in the answer herein to the effect that the passageway mentioned in the complaint was constructed and maintained to all intents and appearances as a public highway to which all members of the public were invited and it denies that such passageway at the time of the accident referred to had the appearance of a public highway, and it denies that such passageway had been used by the public as a public highway for more than twenty years.

2. It denies the averment of the Seventh Paragraph of the first defense contained in the answer herein to the effect that Charles Black was not exclusively in the service of the Express Company.

3. It admits that after the making of the contract between the plaintiff and the defendant mentioned in the complaint, this plaintiff leased to the defendant a plot of land belonging to it and

situate in its terminal yard, but it denies that said piece of land was adjacent to the passageway mentioned in the complaint, and it denies that said lease was made in order to enable the defendant to construct thereon a building for the handling of express matter received by it and the transfer thereof to the express wagons maintained and operated by the defendant.

It denies that under and by virtue of said indenture of lease the defendant or its agents or servants became entitled to an easement of ingress and egress to the leased premises over the passageway mentioned in the complaint.

4. It admits that the right of the Express Company to occupy the demised premises arose wholly under the aforesaid indenture of lease, but it denies that said indenture of lease gave its agents and servants any right to enjoy any easement of ingress thereto or egress therefrom because it says that at the time the said lease was made the defendant's agents and servants had the right ingress to and egress from the demised premises as well as the right of access to all other premises of the plaintiff under and by virtue of the provisions of the agreement mentioned in the complaint, but subject to the liability therein set out.

5. It denies that on the date of the injury sustained by him, Charles Black concluded his work for the defendant for the day, alleging on the contrary that at the time said Charles Black was injured, he was in the exclusive employ of the defendant, and on the premises of the plaintiff in accordance with the license granted by the contract mentioned in the complaint and that his injuries subjected the defendant to the liability set out in the complaint.

6. It denies that Charles Black at the time of

his injury was in the enjoyment of an easement of egress from the premises mentioned in the lease mentioned in the second defense contained in the answer herein, alleging on the contrary that he was on plaintiff's premises in the enjoyment of the license arising under the agreement mentioned in the complaint dated August 7, 1908.

7. It denies that it demised by indenture of lease to the defendant a parcel of land adjacent on the north to certain railroad tracks and adjacent on the south to the passageway mentioned in the complaint. It admits, however, that it did by indenture of lease dated the first day of March nineteen hundred and six demise a certain frame building located in its terminal to the defendant. It denies that said premises were leased by the defendant for the purpose of enabling the defendant to maintain thereon a platform building for the better handling of express packages between cars standing on said railroad tracks and delivery wagons operated by the defendant.

8. It has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph Three of the third defense contained in the answer herein.

9. It denies that it became necessary for the defendant to have access to the building leased to it by the plaintiff for its horses, wagons and employees between said demised premises and the stable mentioned in the third defense contained in the answer herein in order to properly enjoy the premises demised to it.

10. It denies that under and by virtue of any indenture of lease Charles Black was at the time of his injury entitled to an easement of ingress and egress to any premises demised by the plaintiff to the defendant over the passageway main-

tained by the plaintiff mentioned in the complaint, alleging on the contrary, that Charles Black at the time of his injury was on the premises of the plaintiff solely by virtue of the license granted by the contract mentioned in the complaint under and by virtue of which the defendant agreed to indemnify the plaintiff against any liability to said Charles Black by reason of the injuries to him as set out in the complaint.

11. It has no knowledge or information sufficient to form a belief as to the matters and things contained in Paragraph Six of the third defense contained in the answer herein, but it denies that at the time of the injuries to said Charles Black he had concluded his labors for the day, alleging on the contrary that at the time of the injuries to said Charles Black he was in the exclusive employ of the defendant.

12. It denies the allegations contained in Paragraph Seven of the third defense contained in the answer herein.

GEO. HOLMES,
Attorney of Plaintiff.

Amendment to Complaint.

NEW JERSEY SUPREME COURT.

CENTRAL RAILROAD COMPANY OF NEW JERSEY, a body corporate, *Plaintiff,* *vs.* REGINALD H. MORGAN, Jr., Treasurer of the UNITED STATES EXPRESS COMPANY, *Defendant.*	Action at Law.

IT IS HEREBY STIPULATED that paragraph five of the complaint herein be, and the same hereby is, amended so as to read as follows:

"That on and prior to January 4, 1912, the said Charles Black was exclusively in the service of the defendant and that on said date while on the premises of the plaintiff, to wit, on the passageway above described said Charles Black was injured and thereafter said Charles Black through his next friend brought an action in the Hudson County Circuit Court against this plaintiff for the purpose of recovering damages against it for the aforesaid injuries, and Michael Black, father of said Charles Black, instituted a suit in the same Court for the purpose of recovering damages against this plaintiff sustained by him as the result of the injuries to his said son; that this plaintiff spent a large sum of money, to wit, the sum of One Thousand Dollars ($1,000.00) in resisting the suits so brought against it, and thereafter judgment in the sum of $2500.00 was rendered against it in the suit brought by the said Charles Black and a judgment in the sum of $3500.00 was rendered against it in the suit brought by Michael Black which said judgments this plaintiff has paid and satisfied."

It is further stipulated that Paragraph Six of said complaint shall be amended so as to read as follows:

"That it has demanded of the defendant the money so expended by it in resisting said claims and the money so expended by it in satisfying the aforesaid judgments but said defendant has refused to pay the same.

"Plaintiff demands damages in the sum of Fifteen Thousand Dollars ($15,000.00) together with interest and costs of suits."

GEORGE HOLMES,
Attorney of Plaintiff.

McDERMOTT & ENRIGHT,
Attorneys of Defendants.

Agreed State of Facts.

NEW JERSEY SUPREME COURT.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, *Plaintiff,* *vs.* REGINALD H. MORGAN, JR., Treasurer of the United States Express Company, *Defendant.*	at Law. Action

The above named parties by their respective attorneys stipulate and agree for the purposes of the determination of the above entitled action only, upon the following state of facts:

1. The plaintiff is a corporation of the State of New Jersey and owns and operates a steam railroad with its appurtenances within the State of New Jersey.

2. The defendant is a voluntary unincorporated

association existing under the common law of the State of New York, and may lawfully sue and be sued in the name of its Treasurer. At the time of the commencement of this suit Reginald H. Morgan, Jr., was Treasurer of the defendant.

At all times hereinafter stated defendant was engaged in the business of a common carrier of express matter.

3. On June 28, 1898 plaintiff and defendant entered into a written contract which continued in force until August 6, 1908, when it was superseded by another contract, bearing date August 6, 1908, true copies of which contracts are attached hereto and made part hereof, being marked respectively Exhibit "A" and Exhibit "B".

4. At all times herein stated plaintiff owned and possessed certain premises in the City of Jersey City, New Jersey, granted to it by the State of New Jersey pursuant to the statutes permitting riparian owners to acquire abutting lands under water belonging to the State.

At the time of the grant thereof to the plaintiff by the State all of this property was covered by the waters of the Hudson River and New York Bay. Plaintiff thereafter filled in this land pursuant to the privileges granted by the statute as aforesaid and located thereon its railroad terminal consisting of railroad tracks, sidings, ferry sheds, piers, freight stations, passenger stations, platforms and the various other structures incident thereto. The ferry sheds connect with a ferry for passengers and vehicles operated by the plaintiff as a common carrier between its terminal and the City of New York.

In addition to the structures directly occupied and operated by plaintiff, plaintiff leased a part of its premises on which a coal trestle was and is

erected to a tenant, Burns Brothers Coal Company.

Said terminal yard fronts upon the Hudson River and extends therefrom in a westerly direction for approximately one mile. The width of the property north and south varies from one to three or four miles.

For the purpose of affording access to its property and to the ferry sheds, piers, freight stations and passenger stations located thereon, plaintiff constructed within the limits and along the northerly portion thereof, a passageway extending from the ferry house upon the shore of the Hudson River on the east, to and connecting with a public street or highway of the City of Jersey City known as Johnston Avenue, which said public street or highway extends to the westerly boundary of plaintiff's aforesaid property. This passageway physically continues the wagonway of Johnston Avenue to the ferryhouse and river front and is about the same width as the wagonway of Johnston Avenue, and like it is paved with Beglian Block pavements. No sidewalks exist east of the westerly line of plaintiff's property. This passageway gives access to plaintiff's ferry sheds, piers, and freight and passenger stations and connects them with the public streets of Jersey City, and was constructed by plaintiff for such purpose. Ever since said passageway was constructed, it has been paved, sewered, lighted and cleaned by plaintiff at its own expense. Since its construction plaintiff has torn up the pavement in said passageway for the purpose of laying water pipes and conduits containing wires and replaced the same, and has erected railroad tracks crossing and buildings extending beyond the line of said passageway as originally constructed, without per-

mission from, or objection by, the authorities of Jersey City.

Taxes have been assessed against the property over which said passageway runs by the authorities of the State of New Jersey and the City of Jersey City. The passageway is patrolled by the police of the City of Jersey City and so are the passenger terminal and ferry sheds of plaintiff. This passageway is used by persons and vehicles going from and to plaintiff's ferry sheds, passenger depot, freight stations and piers and by persons employed at or going from and to the aforesaid coal trestle leased to Burns Brothers. It is used freely without obstruction or interference, by all members of the public who so desire. There are no signs or notices indicating private ownership or the reservation of the right to exclude the public therefrom and the passageway has the physical appearance of a public street or highway and is considerably traveled.

By far the greater part of the traveling over said passageway is by those who have occasion to deliver freight to or receive freight from plaintiff, or who have occasion to travel between Jersey City and New York over plaintiff's ferry.

After the execution of the aforesaid agreements between plaintiff and defendant, Exhibit A and B defendant's horses and wagons were driven over this passageway incident to defendant's customary business of distributing express matter received over plaintiff's railroad. Such express packages were handled from railroad cars received over plaintiff's tracks, to express wagons which were then hauled over said passageway to plaintiff's ferry for ultimate delivery in New York. Likewise packages destined for delivery in Jersey City were loaded in wagons and hauled westerly

along said passageway to the city streets. Defendant's empty wagons were also drawn along said passageway going to and returning from defendant's stable which was located on Johnston Avenue outside the limits of plaintiff's yard. Defendant was charged and paid the customary rate of fare for the use of said ferry. There is no other access to Jersey City from said ferry, or from plaintiff's passenger terminal or freight platforms, cars, docks and wharves, except over said passageway, which passageway is at all times open to the general public. Defendant does not make any different use of said passageway than that made by other members of the public having occasion to take horses and trucks from, or receiving or forwarding merchandise over plaintiff's railroad.

5. Said passageway is the same as dealt with in a certain suit brought in the Hudson County Circuit Court by Charles Black, plaintiff, vs. Central Railroad Company, defendant, and referred to in the opinion of the Court of Errors reported in Volume 85, N. J. Law, pg. 197.

The present controversy concerns the liability between the Railroad Company and the Express Company for the consequences of the same accident and injury passed upon in the above reported case.

6. Subsequent to the execution of the foregoing agreement, Exhibit A, but prior to the happening of said accident, plaintiff leased to the defendant a part of its terminal premises and the building erected thereon, lying adjacent to said passageway, and described as follows, viz:

> "All that certain frame express building situate on plot known and designated as plot 46-F, Block 2145 on the Assessment Map of the City of Jersey City, Hudson County, New Jersey."

A true copy of said lease is hereto annexed marked Exhibit C.

No street of passageway is delineated on the "Assessment Map of Jersey City, Hudson County, New Jersey" as adjoining Plot 46-F, Block 2145. Said express building does in fact adjoin, however, the passageway described in paragraph 4 thereof, and the map of Jersey City in common use at the time of said lease, known as Fowlers Map of Jersey City, which map shows the lot and block numbers as designated upon the official assessment map, does delineate the aforesaid plot as adjacent to a way designated as Johnston Avenue.

After the making of the aforesaid lease defendant went into the possession of said frame express building and used the same incident to its business of receiving and delivering express matter by means of wagons owned by the defendant and driven by its employees and was in the possession and enjoyment thereof under said lease at the time of the accident hereafter referred to.

The building covered by said lease included a long platform along the north side thereof, adjacent to plaintiff's railroad tracks and so constructed as to be continuous with the platform of railroad cars when standing on said tracks. Said building also included a platform along the southerly side thereof adjacent to the passageway so constructed as to facilitate the backing up of defendant's express wagons to said building and receiving or discharging express packages.

Defendant employed in and about said building a number of employees, whose duties consisted in loading and unloading express packages between defendant's wagons and cars and classifying and making a record of the same. The building was

especially adapted to such use and there was no way of access thereto for either teams and wagons or employees except over the passageway in question.

7. On January 4, 1912, defendant had in its employ at said frame express building an employee named Charles Black under a written contract of employment annexed hereto as Exhibit D. It was the duty of said Black to check or make a record of packages handled in said building. After finishing his work on January 4, 1912, in and about said building, he did take charge of one of defendant's teams and empty wagons and did drive the same westerly along said roadway from the express building towards defendant's stables on Johnston Avenue. This was not a part of Black's regular duties.

It was the practice of men employed at the express platform after finishing their work and "checking out" or recording their time, to take charge of any team and empty wagon which had made its last trip for the day, and happened to be standing at the platform, and drive with the same to the Company's stable for the purpose of avoiding the long walk.

While working for defendant said Black had no other employment, business or occupation.

While driving said team at a point where the passageway is crossed at grade by a railroad track constructed, owned and maintained by plaintiff, which point is east of the westerly boundary of plaintiff's terminal property, said team and wagon were struck by a locomotive owned and operated by plaintiff, and said Black thrown therefrom and injured.

8. Thereafter said Black brought the suit against plaintiff in the Hudson County Circuit

Court above referred to, which has finally resulted in a verdict against said Railroad Company (the plaintiff herein), determining that the injuries of said Black were the result of the negligence of the employees of the Railroad Company and assessing the damages at $6,000. An appeal from said judgment was taken resulting in a reversal thereof with venire de novo.

9. The plaintiff herein expended the sum of $250.00 in resisting the claim of the aforesaid Charles Black growing out of his aforesaid injuries.

McDERMOTT & ENRIGHT,
Attorneys for Defendant.

GEO. HOLMES,
Attorney for Plaintiff.

Supplemental Stipulation.

NEW JERSEY SUPREME COURT.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Plaintiff,

vs.

REGINALD H. MORGAN, JR., Treasurer of the United States Express Company,

Defendant.

IT IS HEREBY STIPULATED between the respective parties hereto that Charles Black, suing by his next friend, and Michael Black, his father, have recovered judgments against the plaintiff Central Railroad Company of New Jersey, for damages for personal injuries and loss of services respectively, resulting from the injury sustained by

Charles Black in a collision with the locomotive of the plaintiff, more particularly specified in the original stipulation herein, which judgments aggregate the sum of Six Thousand Dollars.

FURTHER STIPULATED that said judgments, amounting to Six Thousand Dollars, have been paid by the plaintiff in addition to the sums set forth in the complaint and original stipulation herein.

FURTHER STIPULATED that the complaint be amended so as to set forth the above facts.

GEO. H. HOLMES,
Attorney for Plaintiff.

McDERMOTT & ENRIGHT,
Attorneys for Defendant.

Dated, April , 1915.

Exhibit A.

AGREEMENT made this twenty-eighth day of June, 1898, between the Central Railroad Company of New Jersey, hereinafter called the "Railroad Company", party of the first part, and the United States Express Company, hereinafter called the "Express Company", party of the second part.

WHEREAS, the parties hereto have agreed that the Express business transported on the trains of the Railroad Company on and after August 8th, 1898, shall be done by the Express Company under the terms of this agreement.

NOW, THEREFORE, in consideration of their mutual covenants, the parties hereto agree as follows:

THEY MUTUALLY AGREE—

First. That this contract shall cover and apply to the entire railroad and steamboat system of The Central Railroad Company of New Jersey, its

branches and leased lines, which system is herein designated as its railroad system, and shall also include express facilities, and transportation upon the trains of the Railroad Company running on the New York and Long Branch Railroad, which railroad is used jointly with the Pennsylvania Railroad Company. The said system, including the New York and Long Branch Railroad, is indicated by red lines upon the map hereto attached, which is made part of this contract. This contract, however, shall not cover or apply to any through traffic passing over the lines of the Railroad Company between Bound Brook Junction and Jersey City, to and from points beyond Philadelphia located upon, or transported via the lines of the Baltimore and Ohio Railroad, nor shall it cover or apply to through business done by the Lehigh Valley Railroad trains on the lines of the Railroad Company or its leased lines.

Second. The express business to be carried on under this contract is understood to include only such business as is carried on by the Express Company on the said system not herein otherwise provided for, except the transportation of fruit, berries and oysters in competition with the rates made by the Railroad Company so as to divert said business from the Railroad Company to the Express Company.

Third. This contract shall take effect on August 8th, 1898, and shall be and remain in full force and effect until August 7th, 1908, and shall continue in effect thereafter until it shall be terminated by ninety days' written notice by either party to the other of its intention to terminate or modify the same. It shall be binding upon and shall inure to the benefit of the successors of the respective parties hereto, whether such succession is by operation of law or otherwise, but it shall

not be assignable by either party except upon the express consent in writing of the other.

Fourth. Any disagreement arising between the parties hereto as to the construction of this contract or as to the manner in which business may be done under it shall be referred to arbitration and shall be determined by a single arbitrator if both parties can agree upon one; failing such agreement, the Railroad Company and the Express Company shall each select an arbitrator, and these two arbitrators shall select a third arbitrator. The decision of the single arbitrator, if such be appointed, or, if not, the decision of the majority of the three arbitrators shall be final and conclusive.

THE RAILROAD COMPANY AGREES—

Fifth. To furnish sufficient room in the cars upon its regular passenger trains and to transport therein, with the necessary and customary despatch, all express matter which may be furnished to it for transportation by the Express Company together with the messengers, safes, packing trunks, stationery and other general supplies used by the Express Company in the transaction of its business under this contract. It being understood that the Express Company, as far as practicable, shall forward its business upon such trains as will not interfere with the first passenger service of the Railroad Company.

Sixth. To carry, free of charge, other than the consideration of this contract, the officers, agents and employes of the Express Company when traveling upon its trains in the discharge of their duties thereon, and to issue the necessary passes upon the requisition of the proper officer of the Express Company. The Railroad Company also agrees to carry free upon its trains the safes, packing trunks, stationery and other general supplies

used by the Express Company in the transaction of its business under this contract, such right of free transportation in freight trains only to extend to live stock, equipment and supplies necessary for the transaction of the express business provided for herein.

Seventh. To afford to the Express Company free and unrestricted access to its premises, stations and trains for the loading, unloading and transferring by the Express Company of its business, and to give reasonably sufficient time to the Express Company to perform this service. At all stations on its lines used by other express companies, the United States Express Company shall have facilities equal to those afforded to any other express companies.

Eighth. Not to hold the Express Company liable for any loss or damage to any money, valuables or other property of the Railroad Company which the Express Company is carrying for it free of charge when such loss or damage is occasioned by accident to the trains of the Railroad Company upon its own lines or the lines of other railroad companies, or from causes other than the fraud or negligence of the Express Company or its employes.

Ninth. Not to carry on any express business, or any package express business on its own account, or to permit any of its agents or employes to carry on such business, or to grant to any person or persons, corporation or association, the right to carry on any such business whatsoever upon any part of its said system, either for through or local traffic, during the continuance of this contract, except that the personal baggage of passengers shall not be construed to be express business within the term of this contract; and, ex-

cept, further, that corpses may be carried by the Railroad Company at its option; and, except, further, that this contract shall not relate to any special trains provided for the use of parties having the news privileges upon the said system, or to the transportation by such parties of articles for sale by them in the trains or stations of the Railroad Company.

THE EXPRESS COMPANY AGREES—

Tenth. To carry on an express business upon the said system with vigor, efficiency and promptness, in such manner as not to interfere with or unnecessarily delay the movements of any passenger train upon which express matter shall be transported, and to promote the interests of the Railroad Company as to express business to the extent of its power.

Eleventh. To carry, free of charge, upon the said system and upon other lines operated by it (so long as the railroads owning such lines do not object) such money, valuables and small packages belonging to the Railroad Company as it may designate, its liability therefore being limited as hereinbefore set forth.

Twelfth. To make a fair division of all business between points on the said system of the Central Railroad Company of New Jersey common to any other line or lines operated by the Express Company, so that the Railroad Company may carry its full proportion thereof.

Thirteenth. To render to the Railroad Company true and accurate accounts of all business done pursuant to this contract, in such detail as the accounting department may find necessary to enable the Railroad Company to settle with its leased lines and to determine the taxes due thereon to the State of Pennsylvania. All books, way-

bills, vouchers and other documents relating to the business done by it under this contract shall be at the disposal of the Railroad Company at all reasonable times, for inspection and examination at the office of the Express Company, by the officers of the Railroad Company or any other unobjectionable persons deputed by it.

Fourteenth. To pay to the Railroad Company for the transportation of its express business, and for the faithful performance by the Railroad Company of all the conditions and agreements of this contract for the year ending August 7th, 1899, the sum of $210,000, and the same sum for each year thereafter of the duration of this contract, the same to be made in equally monthly payments of $17,500, on or before the 10th day of each month for the business of the preceding month; and if forty-three (43) per cent. of the gross earnings of the Express Company accruing from all express business upon the said system of the Railroad Company shall in any period of one year from August 8th, 1898, exceed the sum to be paid for that year as above provided, then the Express Company shall pay the Railroad Company the said excess when the next monthly installment falls due. And in addition the Express Company agrees to pay the current established ferry rates between New York and Communipaw.

For the purpose of this agreement such gross earnings shall be ascertained thus: The gross earnings from all express business transacted wholly between points on the Railroad Company's system shall be deemed to be the whole amount received by the Express Company for such transportation, not including the charges of other express lines. The gross revenue derived from express business carried by the Express Company partly upon the Railroad Company's system, and

partly upon other lines, shall be deemed to be that proportion of the whole amount received by the Express Company which the number of miles which the business is carried over the lines of the Railroad Company bears to the whole number of miles which the express matter is carried. But before such pro-rating is done, there shall be deducted from the whole amount received all charges of other express lines, and all bridge and ferry tolls. No special rate shall be given at other than competing points that will not insure to the Railroad Company forty-three (43) per cent. of the regular published express tariff rates.

Fifteenth. Except as otherwise provided by Section Eighth of this agreement, the Express Company assumes all risks upon money, valuables and other property in its charge or in the charge of its employes as well as all risks of injuries to person or property or injuries resulting from the death of any employes exclusively in its service while upon the trains or upon the premises of the Railroad Company, and agrees to indemnify and save harmless the Railroad Company from all claims that may be made against it, and from all loss, damage and expense that may be incurred by it by reason of loss or damage to such moneys, valuables and other property, and by reason of any injuries to person or property or death of any such employes, as well as against the expense of resisting such claims, whether they be successfully resisted or not, it being understood that the Railroad Company shall not under any circumstances be responsible or liable for any such loss, damage or injury.

Sixteenth. Not to employ any agent or employe of the Railroad Company in any capacity without the consent of the Superintendent of the Railroad Company, which consent shall specify the

duties to be performed and the rate of compensation to be paid by the Express Company therefor.

Seventeenth. That its messengers and employes, while on the trains or premises of the Railroad Company, shall at all times conform to the general rules of the Railroad Company, and that in case any such messenger or employe shall from any reasonable cause be obnoxious or objectionable to the Railroad Company he shall be removed or discharged upon the written request of the Superintendent of the Railroad Company.

IN WITNESS WHEREOF, the parties hereto have duly executed this agreement the day and year aforesaid.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

By J. R. MAXWELL,

(Seal.)

President.

Attest:

SAM'L KNOX,

Secretary.

THE UNITED STATES EXPRESS COMPANY,

By T. C. PLATT,

President.

Attest:

THEO. F. WOOD.

Exhibit B.

AGREEMENT made this sixth day of August 1908, between The Central Railroad Company of New Jersey, hereinafter called the "Railroad Company", party of the first part, and the United States Express Company, hereinafter called the "Express Company", party of the second part.

WHEREAS, the parties hereto have agreed that the Express business transported on the trains of the Railroad Company on and after August 7, 1908, shall be done by the Express Company under the terms of this agreement,

NOW, THEREFORE, in consideration of their mutual covenants, the parties hereto agree as follows:

THEY MUTUALLY AGREE—

First. That this contract shall cover and apply to the entire railroad and steamboat system of The Central Railroad Company of New Jersey, its branches and leased lines, which system is herein designated as its railroad system, and shall also include express facilities and transportation upon the trains of the Railroad Company running on the New York and Long Branch Railroad, which railroad is used jointly with the Pennsylvania Railroad Company. The said system, including the New York and Long Branch Railroad, is indicated by red lines upon the map hereto attached, which is made part of this contract. This contract, however, shall not cover or apply to any through traffic passing over the lines of the Railroad Company between Bound Brook Junction and Jersey City, to and from points beyond Philadelphia located upon, or transported via the lines of the Baltimore and Ohio Railroad.

Second. The express business to be carried on under this contract is understood to include only such business as is and has been customarily car-

ried on by the Express Company on the said system in the past, and it shall not relate to any special trains provided for the use of parties having the news privileges upon the said system nor include, among other things, the transportation of baggage of passengers, newspapers, supplies of concessioners exercising concessions on the said system under the Railroad Company, such as boot-blacking privileges, weighing machine concessions and the like. The Railroad Company may, at its option, carry corpses under its present rules and regulations.

In view of the peculiar nature of the business of transporting fruit, berries and oysters, it is understood that the Railroad Company may continue to conduct such business by its regular freight trains under its freight tariffs now or hereafter from time to time established, and that the Express Company may continue to conduct such business, providing the rates charged by it and established from time to time are in advance of the freight rates to an extent commensurate with the difference in the cost and expedition of the service as generally provided in Section Fifteenth hereof.

Third.—This contract shall take effect on August 7th, 1908, and shall be and remain in full force and effect until August 6th, 1918, and shall continue in effect thereafter until it shall be terminated by ninety days' written notice by either party to the other of its intention to terminate or modify the same. It shall be binding upon and shall inure to the benefit of the successors of the respective parties hereto, whether such succession is by operation of law or otherwise, but it shall not be assignable by either party except upon the express consent in writing of the other.

Fourth. Any disagreement arising between the

parties hereto as to the construction of this contract or as to the manner in which business may be done under it shall be referred to arbitration and shall be determined by a single arbitrator if both parties can agree upon one; failing such agreement, the Railroad Company and the Express Company shall each select an arbitrator, and these two arbitrators shall select a third arbitrator. The decision of the single arbitrator, if such be appointed, or, if not, the decision of the majority of the three arbitrators shall be final and conclusive.

THE RAILROAD COMPANY AGREES—

Fifth. To furnish sufficient room in the cars upon its regular passenger trains and to transport therein with the necessary and customary despatch, all express matter which may be furnished to it for transportation by the Express Company, together with the messengers, safes, packing trunks, stationery and other general supplies used by the Express Company in the transaction of its business on the Railroad Company's system under this contract, it being understood that the Express Company, as far as practicable, shall forward its business upon such trains as will not interfere with the fast passenger service of the Railroad Company.

Sixth. To carry, free of charge, other than the consideration of this contract, the officers, agents, and employes of the Express Company when traveling upon its trains in the discharge of their duties thereon, and to issue for that purpose the necessary passes upon the requisition of the proper officer of the Express Company. The Railroad Company also agrees to carry free upon its trains the safes, packing trunks, stationery and other general supplies used by the Express Company in the transaction of its business as provided for un-

der this contract, such right of free transportation in freight trains only to extend to live stock, equipment and supplies necessary for the transaction of the express business so provided for on the Railroad Company's system.

Seventh. To afford to the Express Company free and unrestricted access to its premises, stations and trains for the loading, unloading and transferring by the Express Company of its business, and to give reasonably sufficient time to the Express Company to perform this service. At all stations on its lines used by other express companies, the United States Express Company shall have facilities equal to those afforded to any other express companies.

Eighth. Not to hold the Express Company liable for any loss of, or damage to, any money, valuables or other property of the Railroad Company which the Express Company is carrying for it free of charge when such loss or damage is occasioned by accident to the trains of the Railroad Company upon its own lines or the lines of other railroad companies, or by causes other than theft, dishonesty, carelessness or inefficiency of the employes of the Express Company.

Ninth. Not to carry on any express business, as defined in paragraph second hereof, or any package express business on its own account, or to permit any of its agents or employes to carry on such business, or to grant to any person or persons, corporation or associations, the right to carry on any such business whatsoever upon any part of its said system, either for through or local traffic, during the continuance of this contract.

THE EXPRESS COMPANY AGREES—

Tenth. To carry on an express business upon the said system with vigor, efficiency and prompt-

ness, in such manner as not to interfere with or unnecessarily delay the movements of any passenger train upon which express matter shall be transported, and to promote the interests of the Railroad Company as to express business to the extent of its power.

Eleventh. That it will carry for the Railroad Company all money and other packages of whatever nature pertaining to the business of all departments of the Railroad Company, free of charge, the Railroad Company assuming risk of loss or injury thereto of property so carried except through theft or dishonesty, carelessness or inefficiency of the employes of the Express Company, over the lines covered by this agreement and those covered by agreements with other railroad companies affiliated and connected with the Railroad Company, and will also carry upon like terms and conditions money and valuable packages free of charge over such lines, for any of said companies. Where both of the parties hereto employ the same agents the receipt of the express messenger on the train shall constitute a delivery to the Express Company, and the receipt of the part, to whom packages may be addressed shall constitute a delivery by the Express Company. The employes or representatives of the Express Company when on duty, shall accept at any hour of the day or night such money and packages as above described, as the officers, employes or representatives of the Railroad Company may offer.

Twelfth. Upon all business between points on the said system of The Central Railroad Company of New Jersey common to any other line or lines operated by the Express Company, the latter will make an equal division of such business between this Railroad Company and such other line or lines to the extent of the ability of the Express Company.

Exhibit B.

Thirteenth. To render to the Railroad Company true and accurate accounts of all business done pursuant to this contract, in such detail as the Accounting Department of the Railroad Company may find necessary to enable the Railroad Company to settle with its leased lines, and to determine the taxes due thereon to the State of Pennsylvania. All books, way-bills, vouchers and other documents relating to the business done by it under this contract shall be at the disposal of the Railroad Company at all reasonable times, for inspection and examination, at the office of the Express Company, by the officers of the Railroad Company or any other unobjectionable persons deputed by it.

Fourteenth. To pay to the Railroad Company for the transportation of its express business, and for the faithful performance by the Railroad Company of all the conditions and agreements of this contract for the year ending August 6th, 1909, the sum of $225,000, and the same sum for each year thereafter of the duration of this contract, the same to be made in equal monthly payments of $18,750, on or before the 10th day of each month for the business of the preceding month; and if forty-eight (48) per cent. of the gross earnings of the Express Company accruing from all express business upon the said system of the Railroad Company shall in any period of one year from August 7th, 1908, exceed the sum to be paid for that year as above provided, then the Express Company shall pay the Railroad Company the said excess when the next monthly installment falls due. And in addition the Express Company agrees to pay at the current established ferry rates for light carts or trucks between New York and Communipaw for each and every vehicle of the Express Company, loaded or empty, transported on the ferries of the Railroad Company.

Exhibit B.

For the purpose of this agreement such gross earnings shall be ascertained thus: The gross earnings from all express business transacted wholly between points on the Railroad Company's system shall be deemed to be the whole amount received by the Express Company for such transportation, not including the charges of other express lines. The gross revenue derived from express business carried by the Express Company partly upon the Railroad Company's system, and partly upon other lines, shall be deemed to be that proportion of the whole amount received by the Express Company which the number of miles which the business is carried over the lines of the Railroad Company bears to the whole number of miles which the express matter is carried. Before such prorating is done, there shall be deducted from the whole amount received, all charges of other express lines and all bridge and ferry tolls.

Fifteenth. In order that the legitimate freight business of the railroad shall not be diverted into express channels, and thus be given a service entailing greater expense to the railroad with a revenue return to it less than the corresponding freight tariff rate on the same commodity when handled by the less expensive freight service, the Express Company hereby further agrees that it will not, without the consent of the Railroad Company, charge rates on any matter between intermediate points exclusive to the lines covered by this agreement which when divided on the basis provided under the preceding clause shall fail to net to the Railroad Company as its share of such express rate an amount equal to the current railroad tariff rate on the same commodity between the same two points, and the Express Company hereby further agrees that it will not, without the consent of the Railroad Company, charge

rates on any matter from or to any points whatever upon said railroad system less than twice current railroad tariff freight rates, except where it may be necessary to do so to meet the competition of other express companies operating over other railroad systems.

Sixteenth.—Except as otherwise provided by Sections Eighth and Eleventh of this agreement, the Express Company assumes all risks upon money, valuables and other property in its charge or in the charge of its employees, as well as all risks of injuries to person or property or injuries resulting from the death of any employes exclusively in its service while upon the trains, ferryboats or premises of the Railroad Company, and agrees to indemnify and save harmless the Railroad Company from all claims that may be made against it, and from all loss, damage and expense that may be incurred by it by reason of loss or damage to such moneys, valuables and other property, and by reason of any injuries to person or property or death of any such employes, as well as against the expense of resisting such claims, whether they be successfully resisted or not, it being understood that the Railroad Company shall not under any circumstances be responsible or liable for any such loss, damage, or injury.

Seventeenth. Not to employ any agent or employe of the Railroad Company in any capacity without the consent of the Superintendent of the Railroad Company, which consent shall specify the duties to be performed and the rate of compensation to be paid by the Express Company therefor.

Eighteenth. That its messengers and employes, while on the trains or premises of the Railroad Company, shall at all times conform to the gen-

eral rules of the Railroad Company, and that in case any such messenger or employe shall from any reasonable cause be obnoxious or objectionable to the Railroad Company he shall be removed or discharged upon the written request of the Superintendent of the Railway Company.

Nineteenth. It is, however, distinctly understood and agreed that the free transportation of the officers, agents, employes and property of the Express Company by the Railroad Company and free carriage of the money and other packages of the Railroad Company by the Express Company as hereinabove provided shall be limited in each instance to such persons and property as may be lawfully so transported and carried by said respective parties under the provisions of any existing laws or such as may be hereafter enacted during the continuance of this agreement, and the provisions hereof relating to such free transportation and carriage shall be construed as if so limited therein.

IN WITNESS WHEREOF, the parties hereto have duly executed this agreement the day and year aforesaid.

THE CENTRAL RAILROAD COMPANY OF N. J.

Attest: by

(Seal) GEO. F. BAER,
President.

G. O. WATERMAN,
Secretary.

THE UNITED STATES EXPRESS COMPANY,

Attest: by

E. R. MERRY, Jr. T. C. PLATT,
President.

Approved as to form,

JACKSON E. REYNOLDS,
General Attorney.

Exhibit C.

THIS AGREEMENT made the first of March in the year one thousand nine hundred and six between the CENTRAL RAILROAD OF NEW JERSEY, party of the first part and THE UNITED STATES EXPRESS COMPANY, party of the second part,

WITNESSETH That the party of the first part has let and rented to the party of the second part, and the said party of the second part has hired and taken from the party of the first part, all that certain frame express building situate on plot known and designated as plot 46-F Block 2145 on the assesment map of the City of Jersey City, Hudson County, New Jersey for the term of one month from the First day of March, 1906, to the First day of April, 1906, and thereafter from month to month until termination of this contract by either party, by the giving of one month's notice in writing by one party to the other party that it desires to terminate and end the relation of landlord and tenant, and to repossess itself or surrender the possession of the above demised premises, as the case may be, at the rate of One hundred and forty-two ($142) Dollars per month, to be paid monthly in advance.

And it is mutually covenanted and agreed between the parties hereto, the party of the first part covenanting and agreeing for itself, its successors and assigns, and the party of the second part covenanting and agreeing for itself, its successors and assigns, as follows:

FIRST.—That the party of the second part will pay the rent above reserved at the times when and as it becomes due.

SECOND.—That the party of the second part will deliver up at the termination of this contract, as herein provided for, peaceable possession of the above-demised premises.

THIRD.—That the party of the second part will

Exhibit C.

not abuse, destroy or misuse the above-described premises, nor use them for any purpose, except that of express business without the consent of the party of the first part under the penalty of forfeiture and damages, and will, on surrender of possession thereof leave them in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted.

FOURTH.—That the party of the second part will not assign this lease in whole or in part, nor underlet the above-demised premises or any part thereof, without the written consent of the party of the first part.

FIFTH.—That for a default in payment of rent when and as the same becomes due and for a breach of any of the foregoing covenants the party of the first part may re-enter the above-demised premises and remove all persons therefrom, without notice.

SIXTH.—That the party of the second part, on paying the rent above reserved and keeping and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the above-demised premises for the term above provided for.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be duly executed.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

By W. G. Besler,
Vice-President.

Attest:
G. O. Waterman,
Secretary.

THE UNITED STATES EXPRESS CO.,

By T. C. Platt,
President.

Attest:
C. H. Crosby,
Secretary.

Exhibit D.

No. 15929

UNITED STATES EXPRESS COMPANY

Application for Employment

I apply for employment by the UNITED STATES EXPRESS COMPANY, and for that purpose have made and signed this application in my own handwriting.

Name in full ..... Charles Black.
Residence ..... 112 Wayne St.
Place and date of birth——Jersey City, N. J. April 21, 1894.

Parent's names and residence.
Father——Mickel Black, 112 Wayne St.
Mother, Katie Black, 122 Wayne St.
Wife's name.....
My last employers, occupations, and the reasons of their termination have been as follows:

Name.	Address.	Position.	
A. & P. Tea Co.	150 Bay St.	helper,	From June 1st to July 1st, 1911
Postal Tel Co.	99 Montgomery St.	Messgr.	From July 1 to Aug. 31, 1911
U S Ex Co	Compaw	Tab boy	From Sep. 1910 to Oct 1910,

I refer to the following persons (giving addresses):

Name	Address
James Dugan	489 Henderson St.
Joe Walton,	483 Henderson St.
John Grimes,	149 Pavonia Ave.
Nockey Fischbleim,	489 Henderson St.

I also state and agree, as terms and conditions of my employment, as follows:

(1) I will during such employment faithfully observe and obey all rules and regulations of the Company and all instructions that I may receive about the Company's business.

Exhibit D.

(2) I am not addicted to the use of intoxicating liquors or other stimulants to excess, and will not so use them during such employment.

(3) The Company having made, for the convenience and benefit of itself and such of its employes as are required by it to furnish bonds for the faithful and honest performance of their duties, a contract with a Surety Company to become surety on such bonds, under which the employes pay premiums at contract rates, I agree to apply for bond in such Surety Company as may be designated by the United States Express Company to the amount required by the Company, and agree to pay the established premiums for such bond, and to abide by the terms, conditions and regulations of such Surety Company, as they may from time to time be made.

(4) I understand that I may be required to render services for the Company on and about the railroad, stage and steamboat lines used by the Company for forwarding property, and that such employment is hazardous. I assume the risk of all accidents and injuries which I may sustain in the course of my employment, whether occasioned by negligence, and whether resulting in my death or otherwise. I agree to hold the Company harmless from any and all claims that may be made against it raising out of any claim or recovery on the part of myself, or my representatives, for damages sustained by reason of my injury or death, whether such injury or death result from negligence or otherwise. I agree to pay to the Company, on demand, any sum which it may be compelled to pay in consequence of any such claim. I will execute and deliver to the corporation or persons owning or operating the transportation line upon which I may be so injured, a good and sufficient release under my

Exhibit D.

hand and seal of all claims, demands and causes of action arising out of any such injury, or connected with or resulting therefrom. I ratify all agreements made by the Company with any transportation line in which the Company has agreed or may agree in substance, that its employees shall have no cause of action for injuries sustained in the course of their employment upon the line of such contracting party, and I agree to be bound by each and every such agreements, so far as the provisions thereof relative to injuries sustained by employees of the Company are concerned, as fully as if I were a party thereto. The provisions of this agreement shall be held to inure to the benefit of any and every corporation and person upon whose transportation line the Company shall forward merchandise, as fully and completely as if made directly with such corporation or persons.

(5) I also agree for myself, my heirs, executors and administrators, to pay to the express Company all loss, damage, costs and expenses that may be caused by any negligence, fraud or default of mine.

(6) The Company may, without notice, at any time whether at the end of the month, or not, and for any reason satisfactory to the Company, terminate my employment and discharge me; and if I should be discharged before the end of the month, I am to be paid at the rate of my salary or wages for that part of the month only during which I shall have served.

I have read and understand the foregoing terms and conditions.

C. BLACK, applicant.
MICHAEL BLACK, Father.

Witness:
Geo. E. Murtaugh,
Supt. or Agt.

Exhibit D.

DESCRIPTION OF APPLICANT.

(To be prepared and signed by Superintendent or Agent.)

Height, 5 ft. 5 in.; Weight 110; Complexion light; Color of Hair Auburn; Color of Eyes, Blue Kind of Nose....Roman. What hair worn on face. None; Color of hair on face none.

Any particular marks or deformity by which applicant can be identified and any other remarks by Superintendent or Agent as to appearance, antecedents, etc:

See former application.

Attached hereto is a good photographic likeness of applicant.

Supt. or Agt.

CONTRACT OF EMPLOYMENT.

On the statement and conditions contained in the foregoing application the UNITED STATES EXPRESS COMPANY hires the applicant above named to serve as caller and to perform such other services as may be directed from time to time; from Sept. 7th 1911 and agrees to pay him for his services at the rate of 23¢ per hour..... Dollars per month, or fractional part hereof, to the date of his resignation or discharge.

Dated at Communipaw, N. J., Sept. 7, 1911.

UNITED STATES EXPRESS COMPANY,
by John J. McCabe,
Michael Black, Father,
Charles Black, Employee.

Witness:
Geo. E. Murtaugh.

Requests for Findings of Fact.

NEW JERSEY SUPREME COURT.

CENTRAL RAILROAD COMPANY OF NEW JERSEY, *Plaintiff,* *vs.* REGINALD H. MORGAN, JR., Treasurer of the UNITED STATES EXPRESS COMPANY, *Defendant.*	Action at Law.

The defendant hereby requests the Court to make the following findings of fact:

1. That the moneys claimed by the plaintiff were expended by it in defending the suit brought by Charles Black for damages sustained in the same action involved in the suit of *Black vs. Central Railroad,* 85 N. J. Law 197.

2. That Black was injured at a railroad crossing owned and operated by the plaintiff, over a roadway located within plaintiff's terminal yard at Communipaw, Jersey City, which roadway, if not dedicated by plaintiff as a public highway, at least had the physical appearances of a public highway, which appearances were created by the acts of the plaintiff.

3. That Charles Black at the time of the injury was present on this roadway by reason of the implied invitation of the plaintiff to use the roadway as a public highway.

4. That the plaintiff by its own acts held out the roadway in question to Black as a public highway and invited him as one of the public to make use of it as such, and that said Black at the time of the injury was using said highway by

reason of such invitation in reliance upon its being a public highway.

5. That the roadway in question was no part of the "premises" of the Railroad Company which the employees of the Express Company were licensed to use under the contract Exhibit "B", but that such Express Company employees used said roadway as members of the public, by virtue of the invitation of the Railroad Company to the public to use the roadway as a public highway.

6. That Black at the time of the injury had the further right to use said roadway by virtue of the easement created by the lease Exhibit "C".

7. That Black at the time of the injury had finished his work for the day and was not in the discharge of his duties as an employee of the Express Company.

8. That such employment as Black had with the Express Company on the day of the injury was subject to the terms and conditions set forth in the employment contract Exhibit "D".

Decision.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

CENTRAL RAILROAD COMPANY OF NEW JERSEY, *Plaintiff,* *vs.* REGINALD H. MORGAN, JR., Treasurer of the UNITED STATES EXPRESS COMPANY, *Defendant.*	Action at Law.

George Holmes and Charles E. Miller, Esqs., for plaintiff.

McDermott & Enright, Esqs. for defendant.

WILLIAM H. SPEER, Circuit Judge:

This action, which is tried upon an agreed statement of facts and documents annexed hereto, is brought to recover certain amounts expended by plaintiff in defending an action brought by Charles Black in the Hudson County Circuit Court. Black was an employee of the defendant, and the facts as to that employment are set out in a stipulation which is hereto annexed. On January 4, 1912, he was injured, as set out in the stipulation.

The question involved in this suit is whether or not, under the contract between plaintiff and defendant, the defendant is bound to reimburse the plaintiff for the amount it has expended in defending this suit. This question involves the consideration of two questions: First, whether this contract is applicable to this situation; and, secondly, whether, if the contract is applicable, the facts in the Black case fall under it.

Decision.

There was nothing in the decision of the Court of Errors quoted in *Black vs. Central Railroad Company of New Jersey,* 85 N. J. L. at page 197, which makes the contract between the railroad company and the express company inapplicable to the facts in the Black case. It is true that this contract was discussed, but to understand what the conclusion of the court was it is necessary to understand just what was decided. In this opinion the Court of Errors merely decided that the railroad company had impliedly invited Black to use the passageway mentioned in the stipulation, and since the passageway, by the acts of the defendant, appeared to be a public street, its liability would be the same as if it were actually what it appeared to be. The court said: "But upon the question whether the defendant by its contract invited the plaintiff as one of the public and within the meaning of the doctrine we are discussing"—for example, the doctrine of implied invitation—"to use the way in the belief that it was a street, the evidence presented a question for the jury under proper instructions."

The court also said: "To the case thus presented the rule of *Dodd vs. Central Railroad Company* has no application." It seems perfectly clear to me that the reason why the Court of Errors and Appeals said, in the Black case, that "to the case thus presented the rule of *Dodd vs. Central Railroad Company* has no application" was that at base the doctrine of the Black case is the doctrine of "estoppel", although it is also called the doctrine of "implied invitation," and as between Black and the Railroad Company the latter will not be heard to say that the way to which it had given all the appearance of a street was not what it had led him to believe it to be. If he was justified in believing it to be a street because of the acts of the railroad company, then

the company owed to him the duty of giving the appropriate signals and of treating the crossing as being what it had caused it to appear to be, and had led him to believe it to be. The acts of the railroad company had led Black to believe that while traveling this apparent public highway he was not assuming the risks under his contract but was traveling as one of the public and entitled to be treated as such. Under such circumstances the remark of the Court of Errors that the Dodd case has no application becomes clear. In the Dodd case the question was whether there was any duty owing by the railroad company to Dodd, and consequently any tort. The court held that the duty was that owing to an invitee and growing out of the contract, and that the invitation to the express company was conditional upon the exemption of the railroad company from liability to the employees of the express company; that Dodd's rights as invitee could rise no higher than those of the express company; that there was no duty to the express company, and therefore none to Dodd, and consequently no tort. In the Black case the invitation to Black did not grow out of the contract but was implied by law from the conduct of the railroad company in giving to the way the appearance of a street, consequently there was both a duty and a tort for which the railroad company was liable.

The case now being tried involves a totally different question, which is whether or not the contract between the railroad company and the express company is sufficient to cover the situation. I think that it clearly is. The pertinent provision of this contract is as follows:

"Sixteenth:—Except as otherwise provided by Sections Eighth and Eleventh of this agreement, the Express Company assumes all risks upon money, valuables and other property in its charge

or in the charge of its employes, as well as all risks of injuries to person or property or injuries resulting from the death of any employes exclusively in its service while upon the trains, ferryboats or premises of the Railroad Company, and agrees to indemnify and save harmless the Railroad Company from all claims that may be made against it, and from all loss, damage and expense that may be incurred by it by reason of loss or damage to such moneys, valuables and other property, and by reason of any injuries to person or property or death of any such employes, as well as against the expense of resisting such claims, whether they be successfully resisted or not, it being understood that the Railroad Company shall not under any circumstances be responsible or liable for any such loss, damage, or injury."

That Black was in the exclusive employ of the express company and on the premises of the railroad company when he sustained his injuries seems perfectly clear to me, and I so find. He was, by the stipulation of facts, while working for the defendant, in the exercise of no other business, employment or occupation. Nor does the fact that his day's work was finished and he was taking a team to the stables remove him from their employ. Upon this point, in the light of the stipulation of facts, *Cicalese vs. Lehigh Valley R. R. Co.*, 46 Vr. 897, is conclusive. The premises were the premises of the railroad company. No facts sufficient to amount in law to a dedication were shown, and I find and decide that there was no dedication, and no *via necessitas* arising from the leasing by the railroad company to the express company of the express building. (See *Stuyvesant vs. Woodruff*, 25 N. J. L. 155; *Goerke Co. vs. Wadsworth*, 73 N. J. Eq. 454.)

I therefore find for the plaintiff against the

defendant for the sum of two hundred and fifty dollars ($250) expended by it in resisting the claim of Charles Black.

I append hereto my findings on defendant's requests for findings of fact.

DEFENDANT'S REQUESTS FOR FINDINGS OF FACT, and the COURT'S FINDINGS thereon.

The defendant hereby requests the Court to make the following findings of fact.

1. That the moneys claimed by the plaintiff were expended by it in defending the suit brought by Charles Black for damages sustained in the same action involved in the suit of *Black vs. Central Railroad,* 85 N. J. Law 197.

THE COURT: I find this as a fact.

2. That Black was injured at a railroad crossing owned and operated by the plaintiff, over a roadway located within plaintiff's terminal yard at Communipaw, Jersey City, which roadway, if not dedicated by plaintiff as a public highway, at least had the physical appearances of a public highway, which appearances were created by the acts of the plaintiff.

THE COURT: I find this as a fact.

3. That Charles Black at the time of the injury was present on this roadway by reason of the implied invitation of the plaintiff to use the roadway as a public highway.

THE COURT: I find this as a fact.

4. That the plaintiff by its own acts held out the roadway in question to Black as a public highway and invited him as one of the public to make use of it as such, and that said Black at the time of the injury was using said highway

by reason of such invitation in reliance upon its being a public highway.

THE COURT: I find this as a fact.

5. That the roadway in question was no part of the "premises" of the Railroad Company which the employees of the Express Company were licensed to use under the contract Exhibit "B", but that such Express Company employees used said roadway as members of the public, by virtue of the invitation of the Railroad Company to the public to use the roadway as a public highway.

THE COURT: I refuse to find this as a fact, and on the contrary find that such roadway was a part of the premises of the railroad company.

6. That Black at the time of the injury had the further right to use said roadway by virtue of the easement created by the lease Exhibit "C".

THE COURT: I refuse to find this as a fact. It is a matter of law, and I find that no easement or way of necessity to use said roadway was created by implied grant under said lease.

7. That Black at the time of the injury had finished his work for the day and was not in the discharge of his duties as an employee of the Express Company.

THE COURT: I refuse to find this as a fact and find the contrary to be the fact.

8. That such employment as Black had with the Express Company on the day of the injury was subject to the terms and conditions set forth in the employment contract Exhibit "D".

THE COURT: I find this as a fact.

Defendant's Objections.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Plaintiff,

vs.

REGINALD H. MORGAN, JR., TREASURER United States Express Company,

Defendant.

Defendant objects to the decision or finding of the Court that "there was nothing in the decision of the Court of Errors quoted in *Black vs. Central Railroad Company of N. J.*, 85 N J. L. at page 197, which makes the contract between the Railroad Company and the Express Company inapplicable to the facts in the Black case."

To the decision and finding that "the case now being tried involves a totally different question, which is whether or not the contract between the Railroad Company and the Express Company is sufficient to cover the situation. I think it clearly is."

Also to the decision or finding that the fact that Black's day's work was finished and he was taking a team to the stables, did not remove him from the employ of the Express Company.

Also to the decision or finding that no facts sufficient to amount in law to a dedication (of the premises of the plaintiff included within the roadway upon which Black was injured) were shown, and I find and declare that there was no dedication.

Also to the decision or finding that there was no

via necessitas (over said roadway) arising from the leasing by the Railroad Company to the Express Company of the express building (in which Black worked).

Also to the decision and finding for the plaintiff against the defendant for the sum of $6250.00.

Also to the decision and finding for the plaintiff against the defendant for the sum of $250., expended by it in resisting the claim of Charles Black.

Also to the decision and finding for the plaintiff against the defendant for the sum of $3500.00 expended in paying the judgment recovered by Michael Black against the plaintiff and the further sum of $2500.00 expended in paying the judgment recovered by Charles Black against the plaintiff.

Also to the refusal of the Court to find defendant's fifth request.

Also to the refusal of the Court to rule as requested in defendant's sixth request.

Also to the refusal of the Court to find in accordance with defendant's seventh request, and to the finding to the contrary thereof.

Dated, Dec. 30, 1915.

McDermott & Enright,
Attorneys of Defendant.

Order.

NEW JERSEY SUPREME COURT.

CENTRAL RAILROAD COMPANY OF NEW JERSEY, *Plaintiff,* *vs.* REGINALD H. MORGAN, JR., TREASURER of the United States Express Company, *Defendant.*	Action at law.

It is on this 30th day of December nineteen hundred and fifteen ORDERED that the decision and finding of facts heretofore filed herein be amended by substituting for that portion reading as follows; "I therefore find for the plaintiff and against the defendant for the sum of Two hundred fifty Dollars ($250.00) expended by it in resisting the claim of Charles Black" the following: I therefore, find for the plaintiff and against the defendant for the sum of Six Thousand Two Hundred Fifty Dollars ($6,250.00) of which sum three thousand Five Hundred Dollars ($3,500.00) were expended by the plaintiff in satisfying a judgment obtained against it by Michael Black, father of Charles Black, for damages sustained by him as the result of the injury to Charles Black, and Two Thousand Five Hundred Dollars ($2,500.00) were expended by the plaintiff in satisfying a judgment obtained against it by Charles Black for the injuries sustained by him and Two Hundred Fifty Dollars ($250.00) were expended in resisting the claims of said Michael Black and Charles Black;

And it is further ORDERED that the following finding of facts be added thereto; The Court finds as a fact that the plaintiff expended the sum

of Three Thousand Five Hundred Dollars in satisfying the judgment obtained against it by Michael Black, father of Charles Black, for damages sustained by him because of the injuries to Charles Black and Two Thousand Five Hundred Dollars ($2,500.00) in satisfying the judgment obtained against it by Charles Black for the injuries sustained by Charles Black and Two Hundred Fifty Dollars ($250.00) in resisting the claims of said Charles Black and Michael Black;

And it is further ORDERED that the postea heretofore filed herein be set aside and for nothing holden.

Judge.

On Postea.

NEW JERSEY SUPREME COURT.

CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Plaintiff,

vs.

REGINALD H. MORGAN, JR., TREASURER of the United States Express Company,

Defendant.

Action at Law.

It is ordered that judgment be made and hereby is entered in favor of plaintiff and against the defendant for the sum of six thousand two hundred and fifty dollars, besides costs to be taxed nisi.

Entered December 30, 1915.

On motion of

GEORGE HOLMES,
Attorney.

Costs taxed at $45.60.