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Notice and Grounds of Appeal.

(Filed Jan. 20, 1917).

New Jersey Supreme Court.

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HUDSON COUNTY.

FRANCESCO CAPAN, *Plaintiff-Appellant,* *vs.* THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, *Defendant-Appellee.*	Action at Law. Notice and Grounds of Appeal.

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To W. J. LARRABEE, ESQ.,

Attorney of Defendant-Appellee:

Take notice that the plaintiff-appellant appeals from the whole of the judgment entered in this cause to the Court of Errors and Appeals, and the said plaintiff-appellant states and assigns the following grounds of appeal from the judgment of the New Jersey Supreme Court, Hudson County, in the above cause:

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Because the Court granted the defendant's motion for a direction of a verdict in favor of the defendant upon the evidence given at the trial, whereas said trial judge should have submitted the case to the jury for its verdict.

Dated, Jan. 11, 1917.

HORACE L. ALLEN,
Attorney for Plaintiff-Appellant.

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Complaint.

(Filed October 19, 1915.)

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

FRANCESCO CAPAN, *Plaintiff.* *vs.* THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, *Defendant.*	Action at Law.

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The plaintiff, residing at 235 Fourteenth Street, Jersey City, New Jersey, says:

FIRST: That before and at the time of the committing of the grievances hereinafter mentioned, at Jersey City, Hudson County, New Jersey, the said defendant was and still is a corporation engaged in the business of common carrier of passengers and freight by railroad, and was and still is engaged in commerce and carrying freight by railroad between the States of New York, New Jersey and Pennsylvania and other States of the United States of America.

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SECOND: Said defendant then and there owned and possessed and had the management and control of a certain railroad with its appurtenances, which was operated and used by it in such business of common carrier and in commerce as aforesaid, and as part of said railroad defendant maintained a certain pier known as Pier 3 of The Delaware, Lackawanna and Western Railroad Company, in Jersey City, from which pier the defendant unloaded kegs from freight cars received from out of the State of New Jersey to a barge adjoining said pier to be shipped to points out-

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side the State of New Jersey in such commerce between the States of New Jersey, Pennsylvania and New York and other States of the United States of America.

THIRD: That on January 6th, 1915, the plaintiff was engaged in such commerce by the defendant in the capacity of a laborer in and about the work of pulling a hand truck loaded on each trip with two kegs which were being taken from a certain freight car by the plaintiff on said pier to a barge or boat of the defendant, in the doing of which plaintiff was ordered and directed to pull and draw said hand truck from said pier to said barge over a plank resting on said pier and barge. All of which work was done under the orders and directions of the said defendant, and as the kegs which was thus being unloaded was brought into the State of New Jersey to said pier at Jersey City, to be shipped to points outside of the State of New Jersey, the injuries hereinafter mentioned were received and suffered by the plaintiff and inflicted by the said defendant while the plaintiff was so employed in such commerce as aforesaid, at the place aforesaid, and while the said defendant was such common carrier and engaged in commerce between the aforesaid States..

FOURTH: That in the process of unloading said freight car and carrying said kegs therefrom over said pier to a barge, the plaintiff was not warned by the defendant of the transitory and sporadic dangers then and there connected with said work, and as to the perils and dangers connected with said work, and the defendant failed to provide a sufficient number of servants in and about such work, and did not station any servant or servants on said barge near said plant to retard the descent of the truck loaded with kegs which the plaintiff was drawing down to the said barge when the

grade became so steep as to make said work extra hazardous and perilous, and to subject the plaintiff to extreme and unnecessary danger.

FIFTH: That the plaintiff complied with all of the directions of the defendant, and owing to the fact that the defendant did not give him any warning of the transitory and sporadic dangers then and there existing, and did not employ and supply a sufficient number of servants to render safe the aforesaid work, and did not supply and station a man or men on said barge at said plank to retard the loaded truck which the plaintiff was drawing from the dock to the barge, the plaintiff was pushed forward by said loaded truck and fell, and the kegs which had been on said truck rolled upon him, breaking his right arm, and bruising and otherwise injuring him.

SIXTH: That said defendant disregarded its duty in that it did not move said kegs by a proper system and in a reasonably safe manner, and did not furnish the plaintiff with proper and safe appliances to perform his work, and failed to provide the plaintiff with reasonably safe instrumentalities in order to perform the aforesaid work with reasonable safety.

SEVENTH: That said injuries were received by the plaintiff while the defendant was such common carrier and engaged in commerce between the aforesaid States and while the plaintiff was employed in such commerce.

EIGHTH: By reason of said injury plaintiff was and has ever since been and will hereafter be unable to perform his duties and work, and during that time has lost his salary and wages, to wit: $500. He was obliged to pay $25.00 for medical attendance and medicines.

NINTH: That this action was commenced with-

in two years from the time of said cause of action; wherefore and by virtue of an Act of Congress of the United States of America, entitled, "An Act relating to the Liability of Common Carriers by railroads to their employees in certain cases", being a public Act and approved April 22nd, 1908, and the supplements thereto, and amendments thereof, an action accrued to the said plaintiff to demand and have of and from the said defendant the sum of money herein demanded in manner and form as is demanded. 10

TENTH: The plaintiff demands as damages $1,999.

HORACE L. ALLEN,
Attorney of Plaintiff.

Answer.

(Filed November 5, 1915.)

NEW JERSEY SUPREME COURT. 20
HUDSON COUNTY.

FRANCESCO CAPAN, *Plaintiff,* *vs.* THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, *Defendant.*	Action at Law.

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Answering the complaint of the plaintiff herein, the defendant says:

1. It admits the allegations contained in the first paragraph of said complaint.

2. It admits so much of the second paragraph of said complaint as alleges that "said defendant then and there owned and possessed and had

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the management and control of a certain railroad with its appurtenances, which was operated and used by it in such business of common carrier and in commerce as aforesaid, and as part of said railroad defendant maintained a certain pier known as Pier 3 of The Delaware, Lackawanna and Western Railroad Company, in Jersey City." It denies all other allegations in said paragraph contained.

3. It denies the allegations contained in the third, fourth, fifth, sixth and seven paragraphs of said complaint.

4. It has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in the eighth paragraph of said complaint and demands that the plaintiff duly prove the same.

5. It admits so much of paragraph "ninth" as alleges "that this action was commenced within two years from the time of said cause of action." It denies all other allegations in said paragraph contained.

SECOND DEFENSE.

Defendant says that the plaintiff assumed the risk of the accident and injury complained of in his complaint.

THIRD DEFENSE.

Defendant says that the plaintiff was guilty of contributory negligence.

Defendant demands that the complaint be dismissed, with its costs.

W. J. LARRABEE,
Attorney of Defendant.

Reply.

(Filed November 11, 1915.)

NEW JERSEY SUPREME COURT.
HUDSON COUNTY.

FRANCESCO CAPAN, *Plaintiff,* *vs.* THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, *Defendant.*	Action at Law.

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The above named plaintiff for a reply to the defendant's answer herein, denies that the grievances set forth in the complaint resulted from a risk assumed by plaintiff, and denies that plaintiff was guilty of contributory negligence.

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HORACE L. ALLEN,
Attorney of Plaintiff.

Postea.

(Filed Oct. 21, 1916.)

NEW JERSEY SUPREME COURT.
HUDSON COUNTY.

FRANCESCO CAPAN, *Plaintiff,* *vs.* THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, *Defendant.*	Action at Law. Postea.

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The respective parties appearing in Court on October 20th, 1916, and stipulating that the testimony taken before Judge Speer and a jury, at the

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Hudson Circuit on December 29th, 1915, in said cause, shall constitute and be the testimony at this retrial; and counsel for the defendant having moved to direct a verdict in favor of the defendant on the ground that the plaintiff had assumed the risk of the accident resulting in his injury.

The Court conceiving himself to be bound by the opinion of the Supreme Court rendered at the February Term, 1916, in the above cause, in conformity thereto, directed the jury to find a verdict for the defendant and against the plaintiff, on the ground that under the proofs submitted, said plaintiff had assumed the risk of the said accident.

Thereupon the jury rendered a verdict in favor of the defendant and against the plaintiff.

WM. H. SPEER,
Judge.

Order to Enter Judgment.

(Entered Oct. 21, 1916.)

NEW JERSEY SUPREME COURT.
HUDSON COUNTY.

FRANCESCO CAPAN, *Plaintiff,* *vs.* THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, *Defendant.*	Action at Law. On Postea.

It is ordered that judgment be and hereby is entered in favor of the defendant and against the plaintiff with costs.

Entered Oct. 21, 1916.

On motion of

W. J. LARRABEE,
Attorney.

Testimony.

NEW JERSEY SUPREME COURT.
HUDSON COUNTY.

FRANCESCO CAPAN,
Plaintiff,
vs.
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Defendant.

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Oct. 20th, 1916. By agreement, the testimony taken before Judge Speer and a jury, at the Hudson Circuit on Dec. 29th, 1915, in said cause, shall constitute and be the testimony at this retrial. (See Postea.)

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HORACE L. ALLEN, for the Plaintiff.
W. J. LARRABEE, for the Defendant.

FRANCESCO CAPAN, sworn, testified through an interpreter as follows:

DIRECT EXAMINATION BY MR. ALLEN:

Q. On January 6, where did you work? A. For the Delaware, Lackawanna.

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Q. On that afternoon whereabouts were you working for the Lackawanna? A. Pier 4.

Q. Who was your foreman? A. John Barry.

Q. Is he here in court now? A. Yes, sir.

Q. Where is he? (Witness indicates.)

Q. This man sitting here alongside of Mr. Larrabee? A. Yes.

Q. He was the foreman? A. The second foreman.

Q. What were you doing on pier 4? A. We unloaded copper and placed it on the docks.

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Q. Who took you from pier 4, did you say A. The foreman.

Q. What did he put you to work at? A. Pier 3.

Q. What were you to do, and what did you do at pier 3? A. We unloaded oil cakes and then from there we placed on the barge.

Q. How did you take these oil cakes from the dock down onto the barge? A. Two at a time.

10 Q. On a truck? A. Yes.

Q. And what did you pull the truck over in order to get it onto the barge? A. We would drive this truck like a horse.

Q. Pull the truck behind you? A. Yes, sir.

Q. Was there any plank between the barge and the dock? A. Yes; a plank.

Q. What did John Barrett tell you to do, what orders did he give you? A. He told us to load the stuff, to place it on the barge and hurry up.

20 Q. He told you to hurry up? A. Yes, sir.

Q. Did he tell you that more than once? A. Yes, he did.

Q. How many times did you hear Barrett give you that order to hurry up? A. I did not count it, but he said that many times.

Q. While you were doing this work of pulling the truck to take the cakes down onto the barge, what if anything happened to you? A. As this truck was heavy it pushed against me and I fell

30 down, and then one of these oil cakes fell on my arm (indicating the right arm).

Q. Which arm did it fall on? A. The right forearm.

Q. And what happened to your arm? A. My bones, one or two, I don't know, broke out.

Q. Were you conscious or unconscious after the cakes fell on your arm? A. I was half dead. They took me from there and carted me away.

Q. Where did they take you; where did you

40 go? A. They took me up there and then they

placed me on the engine and from there they sent for an ambulance and brought me to the hospital.

Q. What hospital? A. St. Mary's, Hoboken.

Q. And did you stay at St. Mary's? A. About a half hour.

Q. Then where did you go? A. I had another man with me who took me home to my house.

Q. Where is that? A. 235 14th Street, Jersey City. 10

Q. And did you stay home then? A. Yes, sir.

Q. For how long were you kept in the house? A. Two months and ten days or two months and fifteen days, I do not remember for sure.

Q. During that time what was the trouble with you? A. I had always this arm of mine on the side here; I could not move it.

Q. And what doctor treated you? A. Doctor Sturchio and Balino. 20

Q. How long did Dr. Sturchio treat you? A. A little over two months.

Q. Did the doctor for the railroad company, Dr. Arlitz, see your arm? A. One time the company sent for me and sent their own doctor.

Q. After the two months and ten days in the house was your arm all right? A. No, sir; not even now it is well.

Q. What is the matter with your arm now? A. When I try to do a little work now to chop a little stick or try to raise up a chair, I feel pains in my arm. 30

Q. Do the muscles of your right arm feel as good as the muscles of your left arm? A. No, sir.

Q. Can you do the work to-day that you did on January 6? A. No, sir.

Q. When do you feel pain in this right arm? A. Whenever I try to do a little work.

Q. And from January 6 up to the present time you have not been able to do any work; is that it? A. No, sir. 40

Q. Now at the time that this truck pushed against you and caused you to slip were there any men or was there a man alongside of the plank to retard the truck as you pulled it down? A. No, sir.

Q. About what time in the afternoon did you fall? A. Half past six.

10 Q. How long had you been working there before you fell? A. I worked one hour in that place.

Q. Now before this day did you ever move freight by the truck down onto boats for the railroad company when they had men there to retard the truck and hold it back as you pulled it down onto the boat? A. Yes; when the water was low they had always men there to retard the progress of the truck.

20 Q. How many men? A. Two—it all depends on the weight. Sometimes they use one man; sometimes they use two men.

Q. Were there any men there to retard the truck on this afternoon, January 6, when you were hurt? A. No, sir.

Q. Did you get a bill from Dr. Sturchio, the doctor? A. Yes, sir.

Q. What was the amount of that bill? A. Forty-five dollars, he said.

30 Q. Forty-five dollars? A. Forty-five.

CROSS EXAMINATION BY MR. LARRABEE:

Q. How long had you been employed by the railroad company at the time you were hurt? A. Five years.

Q. How long had you been employed in the work of trucking freight from the piers to barges? A. Two years in this line of work.

40 Q. Two years in this kind of work? A. In that line of work.

Q. How many trips did you make up and down

this gang plank when you were unloading this oil cake before you fell and were hurt? A. About thirty.

Q. At the time you fell, when you were making the trip when you fell, when you were going down this gang plank, did you look to see where you were going? A. I was looking going toward this barge boat; I did not know whether the water was low or high. 10

MR. LARRABEE: I move that the last part be stricken out.

THE COURT: It will be stricken out.

Q. How steep was this gang plank which you were going down at the time you fell? Show us with your hand. A. I could not do that because I do not remember exactly what happened.

Q. You passed up and down this gang plank thirty times? A. Yes, sir. 20

Q. But you did not notice how steep it was? A. No, sir.

Q. Isn't it a fact that at one side of this gangway there was a skid which was used and intended to be used for the purpose of preventing or retarding the progress of your truck as you went down this gangway? A. The thing that you mention is there all the time, but when the water is low you cannot control the truck. In order to do so you must have men to hold it back. 30

Q. Did you have your truck up against this skid? The wheel of your truck up against this skid, or this brake, in order to hold back the truck as you were going down it on this particular occasion when you were hurt? A. I done all I could to hold back this truck, but my strength was not enough for it.

MR. LARRABEE: I submit that is not an answer to the question. 40

THE COURT: I will strike that answer out and he may answer the question.

A. That is the only way to get down there. We always go through on this skid that you mention.

MR. ALLEN: I think he is confused with the gangway.

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MR. LARRABEE: I said the skid.

Q. What was this skid or this brake put there for? A. This thing, it is placed there in order to hold this truck back, but not when the water is low. When the water is low you must have men to control the truck.

Q. Did you make any complaint to your foreman that you did not have enough men to pull your truck or to hold it back? A. No; I didn't; we were there to work and obey orders.

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Q. Did you have any assistance the trip you made just before you were hurt? A. No, sir.

Q. No man held your truck back just before? A. There was nobody there to do it.

Q. How long was it between the trip on which you fell and the trip that you made just before it—how much time? A. I do not remember, but may be two or three or five minutes.

Q. Two or three or five minutes between the trip just before the one on which you were hurt, is that right?

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THE INTERPRETER: That is what he said.

Q. Was that his answer?

THE INTERPRETER: I will put the question over again.

A. Yes; that is what I said, only I cannot tell you the exact time. I had no time with me.

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Q. But it was not over five minutes? A. More or less about five minutes.

Q. And on that previous trip did you have any trouble with your truck? A. No, sir.

Q. You passed down the gang plank—across this gang plank safely with two oil cakes on your truck? A. Yes; two at a time.

Q. They weighed about 650 pounds, did they? A. I don't know.

Q. Do you know how much each single oil cake weighed? A. No, I do not. The boss knows that. I don't know. I was there to work. 10

Q. And was your truck too heavy to pull at any time during the afternoon up to the time that you were hurt? A. It did not seem to me at the time that it was too heavy. I felt at the time that I could go on and work with it.

Q. Did you feel that way at the time that—

MR. ALLEN: That is what he says. 20

Q. Was the boat, the deck of the boat, the deck of the barge, lower than the pier, the gang plank on the pier, what I call the bridge on the pier? A. I did not pay any attention to that.

Q. But you were on the barge and off the barge thirty times? A. Yes, about thirty times.

Q. Working there for about an hour before you were hurt? A. Yes, sir.

Q. Doing the same thing all the time, that is trucking up and down? A. Yes; always in a hurry, too. 30

Q. And were you careful in looking to see what you were doing? A. I know that I was carrying these oil cakes from the pier to the barge, that is all I know.

Q. Were you looking to see where you were going all this time? A. Certainly, I was watching what I was doing.

Q. If you were watching what you were doing and looking where you were going, how do you account for the fact that you did not notice whether this boat was lower or higher than the dock 40

or the pier? A. As we were working in a hurry like horses, as the place was dark, I didn't pay any attention if the water was lower or the barge was lower or if the other end was lower or high.

Q. Wasn't there an electric light right up overhead over the top of the gang plank? A. There was a small lamp.

10 Q. How big? A. About this way (illustrating); a smaller than one like that (indicating)—smaller.

Q. Bigger than that (indicating)—the big one or the smaller one? A. Smaller than the smallest one here.

Q. When the company gave you another man to help you out, to hold your truck back, when did they do that? A. You mean on this occasion or some other time?

20 Q. Other times that you have testified to; they did not give you any this time? A. When the water was low the company always furnished us with one man or two in order to hold the truck back.

Q. How much weight did you have on the truck at that time when they furnished you an extra man?

MR. ALLEN: He has answered that question and said he did not know.

30 MR. LARRABEE: When they furnished him with an extra man?

MR. ALLEN: No; on this occasion.

MR. LARRABEE: We are talking about the other times.

A. With this same weight—two sacks.

Q. How low was the water at the time? A. I could not tell you how low, but when the water was low the company would furnish us with one

40 man or two.

Q. Then you cannot say how low the water had to be before the company furnished you with

another man? A. No, sir; I can't say that; I don't know that.

Q. Why did they furnish you with another man when the water was low?

MR. ALLEN: I object to that. How can he give his conclusion as to why the company did it?

THE COURT: I think that is what he is called upon to give, his own conclusion as to why he thought they did furnish it. I will permit it.

MR. ALLEN: All right.

A. To help us.

Q. Was it because it was dangerous to go down that plank without the assistance of another man? A. Yes; unless there was someone else there to help, a person might go over board and get killed.

BY THE COURT:

Q. Had you ever worked on this gang plank carting material like this on any other day before the day in question? A. Yes; I worked two years in that line and did that kind of work.

BY MR. LARRABEE:

Q. Did you ever truck two of these oil cakes at any other time down one of these gang planks? A. Yes, I did, and when the water was low I would have also a man to help.

Q. How many men were there in your gang at this time? A. There were twelve that day.

Q. How many? A. Twelve.

Q. How many of them were pulling trucks and carting freight? A. Six.

Q. Was any assistance furnished any of the other men up to the time that you were hurt? A. No, sir.

Q. Did any of the other men get pushed over

by their trucks? A. After I was hurt then two men were placed there to help.

MR. LARRABEE: I ask that the question be answered.

A. That I do not know.

Q. You did not see anyone hurt then? A. No, sir.

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Q. How much can you put on one of those trucks—how much weight can you carry on one of those trucks? A. I do not know how much I can carry, but I know that we always place two sacks, but if it was something else, heavy, then we have some help. Sometimes they use two men, three men.

Q. What do you mean by something else heavy? A. A machine may be.

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Q. How much? How heavy? A. I don't know.

Q. Well, a thousand pounds or two thousand pounds? A. I don't know that; the bosses take care of that.

Q. Why didn't you ask the foreman to give you another man to help you? A. I was not there to give orders, it was up to the boss and I could not ask him that.

MR. LARRABEE: I submit that that is not an answer to the question.

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THE COURT: That seems to be directly an answer.

MR. LARRABEE: A request for another man is not an order, is it?

THE COURT: That is only his method of dealing with your question. I think it is a responsive answer.

Q. Did you ever ask him at any other time to give you an extra man? A. No, sir.

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LOUIS SEBIO, sworn, testified through an interpreter.

DIRECT EXAMINATION BY MR. ALLEN:

Q. On January 6, 1915, did you work for the Delaware, Lackawanna & Western Railroad Company? A. Yes, sir.

Q. Did you work with Francesco Capan? A. We were working on the same boat, but he belonged to one gang and I belonged to another gang.

Q. Who was the foreman there? A. Mr. John Barry.

Q. Can you point him out? A. Right here (indicating)—the foreman.

Q. Before Capan worked on pier 3 where had he been working, if you know? A. I don't know where he worked.

Q. When did you commence to work on pier 3? A. I worked there for seven years.

Q. At what hour on January 6? A. About 4 o'clock I think.

Q. You commenced to work at about 4 o'clock on the afternoon of January 6. Now was there a gang plank on the end of pier 3? A. Yes, sir.

Q. Was that fast to the end of pier 3, one end of the gang plank? A. Yes, sir.

Q. And how far out from the pier did the gangway extend—stick out over the water? A. The bridge did not extend over the water, but we used to place the gang plank on the bridge and then on the boat.

Q. Did the gangway stick out from the dock about three or four paces? A. No, sir.

Q. Well, what was it that was fastened to the dock and was lowered, if anything? A. Chain. There was a chain to lower or raise this bridge.

Q. A bridge. Now did the bridge stick out from the dock? A. Not outside the dock.

Q. Was one end of the bridge lowered? A. No; it was always the same level.

Q. How would the trucks roll from the dock down onto the barge? A. The bridge was lowered and then from there there was a plank.

10 Q. Show us the slant of the bridge, or the angle.

(Witness illustrated with a slanting blotter.)

MR. ALLEN: Indicating an angle of 18 degrees, is that satisfactory?

MR. LARRABEE: Yes.

Q. And then from the lower end of that bridge show us the angle or slant of the plank down onto

20 the boat.

(Witness illustrates by placing another blotter at the end of the first, extending it, on the same slant).

MR. ALLEN: Indicating an angle of 18 degrees; is that satisfactory?

(No response.)

Q. Do you know how heavy these oil cakes were? A. The exact weight I do not know, but

30 I think it was about 350 pounds, each.

Q. Did you handle these cakes? A. Yes

Q. What did you do with them? A. Pulled the truck.

Q. How many cakes were placed on a truck? A. Two.

Q. Had you done this kind of work before? A. Yes, sir.

Q. Now before January the 6th, when the water was so low that the plank and the bridge had the

40 slant at an angle that you have shown us and

you were pulling freight of weights as much as 700 pounds on a truck, did the company furnish any man or men alongside of the plank to retard the truck? A. Yes, sir.

Q. At the time on this afternoon when Capan and you were at work was there any man or were there any men alongside of the plank to retard the truck? A. No, sir; nobody. 10

Q. Did you see anything happen to Capan? A. As he reached the plank—as he was walking on this plank he slipped and then one of his oil cakes fell on his arm.

Q. Now after he fell were there any men placed alongside of the plank to retard the trucks as they were being taken down onto the boat? A. Yes, sir.

Q. How soon after that, after the accident to Capan? A. As soon as he fell. 20

Q. Right away? A. Yes, sir.

Q. And who ordered them there? A. This gentleman here, the foreman.

Q. And on the days before this accident when you have said that men were placed alongside of the plank to retard the truck, who placed the men there? A. Any man that had a right to do it; the checker or himself or the boss.

Q. When you say the boss, who do you mean? A. He is a foreman; a boss is not a man. 30

Cross Examination by Mr. Larrabee:

Q. How many trips did you make up and down this gang plank before Mr. Capan was hurt? A. I don't know; we loaded and unloaded about four or five cars.

Q. About how long were you passing up and down there before the accident? A. So many times I could not state.

Q. How long? Not how many times. 40

THE INTERPRETER: I asked about the time. Now he says "How many times—about twenty or one hundred times."

Q. Twenty or one hundred times over this gang plank until Mr. Capan was hurt? A. Yes, sir.

Q. How many of these oil cakes did you have on your truck? A. Two.

Q. Every trip that you made you had two cakes on it? A. Yes, sir.

Q. What was the slope of the gang plank when you first commenced to unload this shipment of oil cakes; or to load it up? A. This way (illustrating).

Q. That is, was it just about the same when you started to work as it was when Mr. Capan was hurt? A. No, not when I started, because when I started the water was not so low, but gradually it lowered down.

Q. When did you first notice that the gang plank had been lowered after you started to work? A. A little at a time as we were working this water went down a little bit.

Q. You were very careful then to notice that this gang plank was being lowered every little while, while you were working? A. Yes.

Q. Did you see Capan fall? A. Yes, sir.

Q. What caused him to fall? A. He slipped on this plank as he was pulling this truck.

Q. He slipped. Then you would not say that the truck pushed him over? A. Certainly, because it was sloping down and then the truck pushed from the back.

Q. Well, if Mr. Capan slipped how can you say the truck pushed him over? If he fell by reason of slipping how can you say that the truck pushed him over? A. As the water was low the truck would go down itself.

Q. Well, did he slip first and then the truck ran over him; was that it? A. As he fell down and he slipped, then he put his hands on the plank and then he was hurt.

Q. What I would like to know is, did Mr. Capan slip and then the truck run over him—slip and fall and the truck run over him, or did the truck push him over? A. No, sir; the truck did not go over him, but this oil cake fell on his arm. 10

Q. Was it the truck which pushed him over and caused him to fall or did he fall because he slipped on the gang plank? A. He slipped, and then as he did that then the truck, then this cake fell on his arm.

Q. Then it was not the truck that pushed him over; is that right? A. Yes, but the strength was there—the strength of the truck caused him to fall down—to slip. 20

By the Court:

Q. Did the truck make him fall down or didn't it? That is what Mr. Larrabee wants to know. A. I do not know if it was the truck made him fall or not.

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JAMES ROSSI, sworn.

DIRECT EXAMINATION BY MR. ALLEN:

Q. Do you know Capan? A. I know him.

Q. Did you work with him January 6th? A. Yes, sir.

Q. Where were you? A. I was on the boat and
10 he was pulling the truck.

Q. What were you doing on the boat? A. Piling up the stuff, piling up the cake.

Q. Did you see Mr. Capan fall? A. Yes; I seen.

Q. Where was he when he fell? A. He fell on the plank.

BY THE COURT:

Q. Did you see what made him fall? A. Sure, I seen.

20 Q. Well, tell us.

BY MR. ALLEN:

Q. What was it? A. He came out, he pull the truck, he slipping on plank, and he fall and one cake came onto him.

Q. How much did these cakes weigh? A. Well, 315, something like that.

Q. 350? A. 315.

Q. Pounds? A. Yes, sir.

30 Q. Did you handle them on the dock—on the boat? A. Yes, on the boat, yes.

Q. Did you see the plank before Capan slipped? A. Sure, I see the plank, because the plank was—

Q. Show us the slant of the plank as you saw it. A. The plank was like that (illustrating) from the bridge; see?

Q. The plank slanted from the dock down onto the boat about like that? A. Yes, sir.

Q. How many of these cakes did Capan have
40 on his truck? A. Two on the truck.

Q. Did you ever see this work done before on the dock? A. Sure, I seen it.

Q. Was the water low there that afternoon? A. It was low water, sure.

Q. Low tide? A. Low tide.

Q. Was the boat lower than the dock? A. Well, of course it was the water low, it was more low to the tide. 10

Q. Before January 6th did you ever see the work of taking oil cakes weighing 315 pounds each from the dock down onto the boat when the water was just as low as it was this afternoon- A. Sure, I see other cake weighing like that, 315 pound—

Q. Did you see that kind of work before— A. Sure, I see it.

Q. When the water was as low as it was this afternoon? A. Yes. 20

Q. Now on those times before January 6th, were there any men stationed alongside of the plank by the company to retard the truck as it came down? A. No; nobody stand by the plank.

Q. What? A. Nobody stand by the plank.

Q. Not on January 6th? A. No.

Q. But before January 6th— A. Before. yes.

Q. —did you ever see men stationed alongside of the plank? A. Before, sure.

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By the Court:

Q. How often had you seen that; how many times? A. How many times? Why, I see it before that, the other man he give it a hand.

Q. How many days before the 6th of January when you were there when they were carting down oil cake on an incline the same as this had you seen them have men to help them? A. Sure, when they tie it on they put the men in the boat, the hold. 40

Q. Always? A. Sure.

By Mr. Allen:

Q. Now as soon as Capan slipped and fell were there any men placed alongside of the plank to hold back the trucks as they were brought down onto the boat? A. When the other fellow pull the truck nobody holding it, you know.

Q. Now right after the accident to Capan— A. Then two men.

Q. —what happened then? A. They hold on the plank—two men.

Q. Who put the men there? A. Well, anybody do that; anybody, you see; there were two men to hold it.

Q. What did the men do there? A. Holding the truck to keep hold of it.

Q. They did hold the truck? Cross examine.

By the Court:

Q. Did you see Capan fall? A. Yes, sir.

Q. Did you see what made him fall? A. He fall on the plank and the cake go on top of the hand.

Q. Did you see what made him fall, did you see what pushed him down if anything? A. You could see where he fell on the hand.

Q. I don't think he fell up in the moon. Did you see what made him fall, what was it that made him go down? A. How he go down?

Q. Yes; what made him go down when he went down? A. Half past six.

The Interpreter: (After interpreting the question) He was pulling this truck and then he fell down; He slipped, that is all.

By Mr. Allen:

Q. What made him do it? A. (Interpreted) I do not know.

CROSS EXAMINATION BY MR. LARRABEE:

Q. Where were you working at the time that Capan fell? A. I worked on the boat.

Q. You were on the boat? A. Yes, sir.

Q. What kind of a boat was it, was it covered? A. No; no covered; it had like a lid; no cover on the boat.

Q. Open? A. Open, yes. 10

Q. How far away were you from where Capan fell? A. It was a big boat, you know; it took—

(Question repeated).

A. From here to that door, indicating the main door. We work in any place, and a man go in on a plank, we can't watch that. I see the man fall, you know; it catch his hand. I see.

Q. I can't understand that. 20

(Answer repeated).

Q. How long have you been working for the company? A. Going on four years.

Q. How long had you been working on the loading of these oil cakes on the day Mr. Capan was hurt? A. From four o'clock or half past four; I don't know the exact time.

Q. And you were particular to notice that this gang plank was sloping about like that (illustrating), or as you have indicated? A. Yes, sir. 30

Q. Did you truck any freight that day yourself? A. (Interpreted) He did it, but not on this day. He did that other times, but not on this day.

Q. Did you see what caused Mr. Capan to slip?

MR. ALLEN: He answered that; he said he did not.

THE COURT: I will permit that. I think it is a very proper question. 40

A. As the water was low, and the plank was wet, this man had to go down.

By the Court:

Q. Why? A. Because he could not hold back his truck.

The Court: That is what you wanted to find out.

10

Mr. Allen: I will read to the Court and jury the interrogatories served upon the defendant company and answered by them under oath.

1. State the kind and character of work in which the plaintiff, Francesco Capan was engaged at the time of receiving the injuries described in the complaint. A. Trucking freight.

20

2. State the amount of wages which he was being paid by the defendant immediately prior to that time. A. Average daily wage $1.86; average weekly wage $11.16.

The Court: Now the rest of these are only to prove that the company was engaged in interstate commerce, and that is admitted?

Mr. Allen: Yes.

30

The Court: What is the use of reading them?

Mr. Allen: Plaintiff rests.

The Court: What about the doctor's testimony?

Mr. Allen: I am willing to read Dr. Arlitz' testimony.

Mr. Larrabee: I will stipulate that it would not be any different from what it was. I haven't any object in putting him

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on, only I have sent for him in case he is wanted.

MR. ALLEN: I will read his testimony. I will offer it as my evidence.

(Testimony of Dr. Arlitz, given in a former trial of the case earlier in the day, which resulted in a mistrial, read to the jury by the reporter, as follows: 10

WILLIAM J. ARLITZ, sworn on behalf of the defendant testified as follows:

DIRECT EXAMINATION BY MR. LARRABEE:

Q. Doctor, you are a physician—

(Qualifications admitted by Mr. Allen.)

Q. Doctor, did you, at the request of the defendant, make an examination of the plaintiff Francesco Capan to ascertain the extent of the injuries sustained by him while in the defendant's employ January the 6th, 1915? A. I made two examinations. I made one on the 10th day of March, and I made one on the 18th day of May. 20

Q. Will yo state briefly what you found as a result of your examination? A. I found at the time of my first examination that he had a thickening of the bone across the middle third of the right forearm, and that this thickening was the result of an injury. I saw him again on the 18th of May and I found that the condition was very much improved, and that the bone was firm, union was good, and I thought at that time he was able to resume work. 30

Q. In your judgment then on the 18th of May, the plaintiff had sufficiently recovered the use of his arm to warrant him in resuming his work? A. Yes, sir. 40

Q. From your observation, your examination of the plaintiff, would you say that he was unable to use his arm in doing manual labor such as the trucking of freight, after the 18th day of May, the date of your last examination? A. My opinion was that he was able to resume his work on the 18th day of May. I had in mind that he was
10 a man who worked on the freight docks at the Lackawanna yard.

Q. Then by the expression that he was able to resume work you had in mind the work in which he was engaged at the time he was injured? A. Lifting boxes, lifting all sorts of freight, pushing a truck, pulling a truck, working in a gang.

Q. That is manual labor? A. Yes.

Q. I think that is all. Cross examine.

20 Cross Examination by Mr. Allen:

Q. Doctor, did you know what Capan worked at at the time you thought he was able to go back to work? A. Yes; he was a laborer in the freight docks in Hoboken.

Q. Well, doing what kind of work? A. Such work as all those laborers do; pulling a truck, pushing a truck lifting boxes, lifting metals, lifting wire, working in gangs.

30 Q. What made you come to that conclusion that he was capable of lifting boxes and doing the usual work of a laborer in the yard? A. My physical examination of the injury.

Q. Examining the arm; what did you mean by that? A. Examining the arm and the surrounding tissues and the muscles and the structures.

Q. How did you examine the arm, look at it? A. Yes; fuctionated it, felt it, moved the joints.

Q. And is that all that you did? A. Yes; that
40 is the only way I could examine it.

Q. Did you test him out to see what he could lift? A. Oh, no.

Q. You did not get him to grab any machine or appliance? A. Grip my hand; that is the usual test.

Q. Only to shake hands with you? A. Yes, sir.

Q. You had nothing in your office to test his—did you have in your office any appliance such as they use in gymnasiums? A. Yes; I have such an instrument; that is called a dynometer. It is for the purpose of testing the grip of an individual—the strength of the forearm.

Q. Did you do that with this man? A. I did not do it for an obvious reason. That is absolutely within the control of the will; that is mental matter.

Q. In other words, he could have simulated and he could have pretended, and you would have to rely upon that? A. Yes, sir.

Q. And then your conclusions as to his being able to go back to work was just founded upon the examination that you have testified to, and that only? A. That examination and my experience in such matters.

Q. Of course you did not test his strength to see whether he could pull a truck— A. How many pounds he could lift? No; I did not do that.

Q. Whether he could pull a truck loaded with 700 pounds down an incline of 18 degrees, did you? A. He could roll it down an incline with one hand. He would not need the other one; he could roll it down.

Q. He could just take that weight and roll it down. A baby could do that? A. Yes.

Q. But you did not test to see if he could with safety pull a truck of 700 pounds behind him down a gang plank of eighteen degrees? A. I did not have an opportunity of testing that.

Q. You know that was the work he had been doing? A. I know men do that sort of thing.

Q. You did not have that in mind at that time? A. I did not have that in mind at that time, but I know men do that sort of thing.

Q. If you did not have that in mind at that time, that he was called upon to do that kind
10 of work, your conclusion formed from grasping his hand and making the examination that you did would not justify you in saying that he was able to do that kind of work? A. Yes, it would, because I did not have in mind that particular thing. I had in mind all of the things that such a man must do. He is compelled to exercise a considerable amount of strength and muscular skill in the performance of such work.

Q. Now, Doctor, did this condition of the bone
20 —what did you call that, a hardening of the bone? A. No; he had had a bony injury which was probably a fracture.

Q. Now there was a good healing there you say? A. I thought so.

Q. And what, if any, was the percentage of depreciation in that arm at that time from a normal arm? A. Well, there was no apparent depreciation at that time. What depreciation had existed prior to that time I cannot say. Now
30 there is a different side to that question. I will answer what you are trying to ask. When a bone is broken there is always more or less laceration of the soft structures surrounding those bones and they are more or less torn.

Q. May I ask you this, do they render the arm more tender and less able than a normal arm? A. They do for the time being.

Q. Now, Doctor, I have a great respect for your fairness; will you look at Mr. Capan's arm
40 to-day and just tell us in all fairness what is the

condition of that right arm? A. (After functionating, articulating and measuring the arm;) The after-union is good in the arm. He has some attenuation of the muscles.

Q. What do you mean by attenuation of the muscles? A. He has some shrinking of the muscles of his forearm.

Q. How long will that in your opinion continue? A. That will entirely depend upon the amount of physical exercise he takes. It is a condition that is brought about by the injury plus disuse. Now you know I do not know much about this history. I do not even know whether this man is working at the present time.

Q. Doctor, you find then a difference in the condition of his right arm, his right forearm, from a normal arm? A. Yes, sir.

Q. And what percentage is it a depreciation by reason of this condition of the muscles? A. It is a shrinking of the muscles. It is a depreciation at the present time.

Q. Now at this time he cannot work as well as he could with a normal arm, or he cannot play golf as well, can he? A. I do not know that he can play golf.

Q. Well, if he wants to he has got the right to, hasn't he? A. Yes. I do not know that that would interfere with his playing golf, the forearm, because his wrist is not involved; neither is his shoulder or his elbow. I do not know that that would hurt his swing any.

Q. There is some depreciation there? A. Yes.

Q. What percentage would you call it? A. That I cannot say. It might not be any for his particular line of work, and it might be.

Q. Well, for the work of trucking—of pulling a hand-truck along a dock, that is loaded sometimes with very heavy articles weighing as much

as six or seven or eight hundred pounds, and pulling the truck, pulling the truck down an incline onto barges—an incline of 18 degrees—would you say that there has been a depreciation? A. Yes; there has been depreciation.

Q. And what percentage? A. I cannot say that. It might be five per cent. at a point com-
10 mencing from the elbow to the ends of the fingers.

Q. Now, Doctor, generally how long does it take for a fracture of that kind to heal? A. Six weeks; we expect that a man with a fracture of both bones of the arm will be back to work in from six to eight weeks unless there is some unusual complication. That is my experience in 25 years of surgery. Sometimes three months. It all depends on the nature of the injury. If it is a simple fracture without any unusual dis-
20 placement, without any unusual laceration, we expect a man to get back in from six to eight weeks. The thing that bothers him mostly at that time is the stiffness in his joint from holding the arm in splints.

Q. Now this condition of the muscles that you speak of to-day, is that the stiffness? A. Oh, no.

Q. What condition is that? A. That shrinking of those muscles is because the muscles in that part have not been functionated in the way that
30 they were functionated prior to the time of that accident.

PLAINTIFF RESTS.

FOR DEFENDANT.

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JOHN BARRETT, sworn.

DIRECT EXAMINATION BY MR. LARRABEE:

Q. Mr. Barrett, you are foreman, employed on the pier number 3 of the Delaware, Lackawanna & Western Railroad Company? A. Yes, sir.

Q. Were you so employed on January 6, 1915? A. Yes, sir. 10

Q. Was the plaintiff in this case, Mr. Capan, employed under you on that day? A. Yes, sir; under my supervision.

Q. How long had Mr. Capan been employed on Pier 3? A. Oh, he has been employed off and on for four or five years, I guess. Off and on, at intervals; he has been in the employ at intervals for four or five years; but to the best of my belief he was about 228 days in the employ in the last time he came back 'till the day of the accident. 20

Q. How many men did you have under you unloading this oil cake from the cars on to the barge on January 6th, of this year? A. On that particular boat?

Q. How many men did you have engaged in unloading from the car on to the barge? A. At that particular period?

Q. That particular period. A. About thirty-six men. 30

Q. How many, thirty-six? A. Thirty-six.

Q. How long were you working up to the time that Mr. Capan was hurt? A. Not quite an hour.

Q. How many of these oil cakes did each man pull on his truck? A. Two-two bags, or bales, as you would call them.

Q. Were they all passed up and down this same gang plank? A. Yes; passing into the other; two gang planks were used. 40

Q. Two gang planks were used? A. Yes, sir.

Q. Why were the two used? A. One was an in-

coming plank for the loaded trucks; and the other was an outgoing plank for the light trucks to come out, so that the men that had charge of that load wouldn't come in contact with the men who were taking in the loaded trucks.

Q. And they all went in on the barge on one side and came out on the other? A. Yes, sir.

10 Q. What time did they start to work unloading this oil cake? A. Started around five o'clock on Pier 3.

Q. Can you say what the slope of the gang plank was—the bridge, which was a part of the pier; what was the slope of that bridge? A. About two and a half foot.

Q. What? A. About two and a half foot from the level of the dock.

20 Q. You mean one end of it was two and a half feet lower than the level of the dock? A. Yes, sir.

Q. About how long was it? A. That bridge you mean?

Q. Yes. A. That bridge is from fifteen to eighteen feet.

Q. Fifteen to eighteen feet long? A. Yes; from the point of the dock to the extremity.

Q. Would you mind illustrating to the jury 30 just about what this slope was? Illustrate it. Show just about what the slope was? A. (Witness indicated by holding a desk blotter in a slanting position.)

Q. It was about eighteen feet long and about two and a half feet lower at one end that at the other? A. Yes, at the end of the slope.

Q. And then from this bridge, stretched across the water space to the barge, were these two gang planks, one to go in on and one to come out 40 on? A. Yes, sir.

Q. Did you see Mr. Capan at the time that he fell? A. No; I didn't see him at the time he fell; I seen him immediately before and immediately after.

Q. What do you mean by "immediately before"? A. As I was coming off the lighter Capan—he passed me in with his loaded truck with two bags of oil cakes; and just as he passed me, a couple of moments, he fell, as he was coming off the dock to the barge. 10

Q. You were coming out of the barge and going up the gang plank? A. I was going up the bridge; I was on the bridge at the time.

Q. And he was coming down the bridge? A. Yes, sir.

Q. Did you notice whether his truck was up—the wheel of his truck was up against the skid which was put there for the purpose of breaking the descent of the truck? A. Yes, sir; at the time I passed him. 20

Q. Did you notice whether his truck was up against this skid at that time? A. At the time I passed him; yes, sir.

Q. It was? A. Yes, sir.

Q. When did you next notice him? A. After he fell, with the two bags of oil cake on the top of him; a few seconds after that, passing out; before I got to the top of the bridge. 30

Q. Was the truck which he was pulling still up against this skid which was there in order to break the descent of it? A. No; not when he was picked up.

Q. Was the truck standing right side up? A. No; the truck was flat.

Q. What do you mean by "flat?" A. Laying down; laying down.

Q. On end? A. Laying down; it was not upended, not standing up; lying flat. 40

Q. Was it resting on the wheels or turned upside down? A. Resting on the wheels, of course.

Q. The natural position of the truck? A. Yes, sir; resting on the wheels.

Q. It was not up against this skid at that time? A. No; the wheel was not against the brake. The truck was right then, with the two bags of oil cake having toppled off it.

Q. It was empty? A. Yes; the two bags top-
10 pled off.

Q. Did you take notice of the position of the bridge at the time this work was commenced—A. Yes, sir.

Q. —of unloading this oil cake? A. Yes, sir.

Q. How much lower at that time was the end of the bridge nearest the barge, the one nearest the barge—how much lower was one end than the other at the time they commenced to work? A.
20 The time of the accident, you mean? A. I don't hear you.

Q. How much lower was one end of the bridge at the time they commenced to work than it was at the time of the accident? A. The bridge was not touched from the time the boat started to the time of the accident; the bridge was not lower.

Q. The bridge was not lower? A. Was not lower.

30 Q. The position of it was not changed at any time? A. No.

Q. After you commenced to unload this oil cake until after the accident to Mr. Capan? A. No, sir.

Q. It was not changed? A. Not to my knowledge.

Q. Well, are you positive? Were you present all of this time? A. No; I wasn't there all the time. I seen the boat started; but I was there
40 for the greater part of half an hour and the bridge had not been lowered at that time, previous to the accident.

Q. It was not lowered for half an hour? A. For half an hour before.

Q. Before the accident it was not lowered? A. Half an hour before the accident the bridge had not been touched.

Q. Then you are positive that for at least a half hour before the accident up to the time of the accident the position of this bridge was not lowered? A. No, sir. 10

Q. Was not changed? A. No, sir for half an hour.

Q. So that the freight handlers passing up and down this bridge were at least for a half hour before Mr. Capan was hurt passing over it in the identical position it was in when he was hurt? A. Yes, sir; for half an hour previous to the accident. 20

Q. Do you recall how long after the accident it was when this bridge was lowered? A. No, sir; I do not.

Q. Have you any idea at all? A. I have not. When Mr. Capan got hurt I accompanied him to the foot of the dock; at least helped him up there; and I didn't return for quite some time.

Q. You assisted in taking Mr. Capan away at the time? A. Yes, sir; it was in the checker's charge then; in the charge of the checker of the gang. 30

Q. Did you put these extra men on there? A. No, sir; I did not.

THE COURT: Who did?

A. Probably the checker.

Q. That was part of your work, was it? A. Which?

Q. To determine whether additional men were necessary. A. No; it was the checkers part just as well as mine. 40

THE COURT: How did you determine that, Mister? How did you make up your mind they were needed?

A. Beg pardon?

THE COURT: How did you make up your mind that these extra men were needed on those days? How did you know when to put them on?

A. Because I did it all the time.

THE COURT: How would you tell that? Go out and look at the boat and see how it looked at the pier?

A. You could tell by the bridge.

THE COURT: You determine it by the bridge? When you made up your mind to put extra men on you made up your mind the tide was low by the water on the bridge side?

A. A light boat is not as low at the dock as a loaded boat or boat partly loaded.

THE COURT: And you were loading this all the time with these heavy things, weren't you?

A. No, sir; not all the time.

THE COURT: Well, pretty much all the time?

A. Well, there was four cars on it, putting on the sixth car; that would be nine ton to a car, each car. Of course the more weight goes on the boat the deeper the boat goes.

THE COURT: And the more the gang plank sags?

A. Yes, sir.

THE COURT: And the more necessity there is for extra men?

A. Yes, sir.

THE COURT: I see.

A. And it depends on how the boat is loaded. If the boat is loaded deeper one end than the other, of course, naturally enough the other end comes up. 10

THE COURT: It depends where the end of the bridge is that you had your men on.

A. That end of the bridge is higher.

THE COURT: What time did you put the men on this day?

A. I didn't put them on. 20

THE COURT: What time did they go on?

A. That I couldn't tell you.

THE COURT: Well, you saw them on?

A. Afterwards, when he was hurt; I came around about seven o'clock; the men were on the bridge then, because the dock there is about a quarter of a mile long, and eight or nine gangs—

THE COURT: Nobody is blaming you for not knowing. I only want to know what you know about it. What time of day was low tide there that day? 30

A. It was low tide around five o'clock, if I remember rightly.

THE COURT: And this accident happened about what time?

A. Around six. 40

THE COURT: The tide stays low half an hour, doesn't it.

A. Yes, sir.

THE COURT: Well, then, it was dead low tide at the time the accident happened, wasn't it?

10 A. Yes, sir.

THE COURT: All right.

Q. Was there any other accident on the day in question? A. No, sir.

Q. In unloading this oil cake? A. No, sir; no other accident.

Q. Did any of the men in your gang ask you for any assistance? A. No, sir.

20 Q. Did any of them make any complaint that they were having difficulty in going down the gang plank? A. No, sir.

Q. Holding their trucks back? A. No, sir.

Q. Did Capan say anything to you whatever about needing somebody to help him? A. No, sir; he did not.

THE COURT: What time did you put the men on the day before that?

30 A. Beg pardon?

THE COURT: What time did you put the extra men on, the day before the day of the accident?

A. Well, the day before, I don't remember, because we do not handle that kind of stuff every day; lighter stuff, of course.

THE COURT: Lighter stuff, you don't have

40 to put men on at all.

A. No.

THE COURT: With this kind of stuff you do put men on, because it is heavy.

A. Yes, it is heavy stuff. The way the tide was, and the way the boat was when I left her there was no occasion for the men to be on the boat for to hold back the truck.

THE COURT: What time was that? 10

A. Just at the time of the accident; because I see one end of the boat was high and the other end of the boat was low.

THE COURT: Which end was high?

A. The forward end.

THE COURT: Which end were they loading?

A. They were loading the aft end. 20

THE COURT: They were loading the aft end?

A. Yes, sir.

THE COURT: That is where the gangplank was, on the aft end?

A. It was an open scow; no gangways under the boat.

30

THE COURT: The plank was on the aft end, wasn't it?

A. No; the planks are on the forward end, the high end of the boat.

THE COURT: I see.

Q. Mr. Barrett, did you ever on any previous occasion furnish assistance—provide two men, or provide a man to retard the progress of one of

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those trucks which was loaded with two oil cakes weighing approximately the same as this that you were handling at this time, when the tide, or the slope of this gangplank was the same as it was on the day and at the time that Mr. Capan was hurt? A. No; not just as it was at that day.

Q. What? A. Not such as it was at that time on that day.

10

Q. Under similar circumstances did you ever furnish an additional man? A. Under similar circumstances?

Q. Under similar circumstances; that is to say, when he had a load of 650 pounds, which I think was testified as the weight of these—

THE COURT: 660.

20

Q. About 660 pounds— A. 331 they weigh.

THE COURT: Well, 662.

Q. —passing down the gangplank—passing down the bridge, down to the gangplank, when the tide was just about as high as it was at this time, and the slope of the gangplank and the bridge was the same or precisely similar? A. Did I put any men there?

THE COURT: Did you ever do it on such occasions?

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Q. Did you ever on such occasions furnish extra help, have a man to retard the progress of the truck? A. No, sir; with the same weight on the truck, no, sir; unless it was heavier weight, such as machinery that would weigh a thousand pounds, or something like that.

THE COURT: Let me ask you this question: You said when the accident happened

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there were no extra men on that plank, didn't you?

A. Yes, sir.

THE COURT: And you said it was dead low tide when the accident happened; didn't you?

A. Yes, sir; I said low tide—well, it may be— 10

THE COURT: Well, you said it was?

A. Yes; it might not be dead low.

THE COURT: Yet you said when you got back at seven o'clock the men were there. Now, what were they there for—the extra men?

A. Yes; they were there at seven o'clock. 20

THE COURT: Well, what were they there for if they were not necessary?

A. Well, twenty-nine tons—three cars of oil cake at 29 tons, that would lower the boat considerably in the meantime.

THE COURT: They were loading the back of the boat?

A. Yes, sir. 30

THE COURT: The front was high?

A. Yes, sir.

THE COURT: And that is where the plank was?

A. That is where the plank was.

THE COURT: Why did they have these extra men there if the tide was low and they were not necessary? Can you explain that to us? 40

A. No; I can not. The men were put there by the checker, not by me.

THE COURT: Well, when you came back and saw that boat with the plank on it and the men there, did you see any necessity to have men there that time.

10 A. Well, I didn't give it a thought at the time. I didn't—we were just finishing up the work when I got there, and the last trucks; so, of course, I didn't take the men from there.

THE COURT: So you didn't give it any thought then, did you?

A. Sir?

THE COURT: You didn't give it any thought then, as to whether these extra men were

20 necessary?

A. Well, they probably were necessary at that time.

THE COURT: Well, why? Just explain why they were necessary. Can you do that?

A. The tide—the boat was lower then; that is the only explanation I can give.

THE COURT: Was the boat lower then?

30

A. Yes; the boat was lower then than she was

THE COURT: How much?

A. Well, I would say a couple of feet.

THE COURT: A couple of feet lower?

A. Yes, sir.

THE COURT: You told us the tide was dead low at the time of the accident.

40

A. Yes, sir; but the boat then was lower.

THE COURT: What made it lower?

A. With the weight of the oil cake going on it.

THE COURT: How much had gone on from the time you went home and came back?

A. Three carloads.

THE COURT: You know that, do you, as a fact? 10

A. Yes, sir.

THE COURT: All right.

A. Fifty-seven ton.

Q. You testified that the bridge was lowered after this accident? A. Was lowered? I don't know; I couldn't say.

Q. It was after the accident when the bridge was lowered? A. Yes; it was after the accident; but what time I couldn't say. 20

Q. How long after you could not say? A. No; I couldn't say how long afterwards.

Q. Wouldn't the lowering of the bridge explain the putting on of extra men? A. Yes, sir; it would.

THE COURT: What effect does the lowering of the bridge have? 30

A. Sir?

THE COURT: What effect does the lowering of the bridge have on the inclination of the plank?

A. The plank rests on the bridge.

THE COURT: Exactly. And if you lower the bridge you make the slant less; you make the slant of the plank less, don't you? 40

A. Yes; you make the slant less.

THE COURT: Well, then, if you lower—

A. It makes the plank more on a level keel.

THE COURT: Well, then, if you lower the bridge and you make the plank more level, what do you need extra men for? Will you explain that to us?

10 A. Well, you got them on the bridge then; not on the plank.

THE COURT: Where were the men, on the bridge or the plank, when you got back?

A. On the bridge.

THE COURT: On the bridge?

A. Yes, sir.

THE COURT: All right.

20

Q. When Mr. Capan fell and you saw him after the fall, where was his body? Was it on this plank or on the bridge? A. On the plank.

Q. Where was the truck? A. On the bridge.

Q. The truck was on the bridge. And these men—these extra men which you were speaking about, their duty was to retard the truck, to retard the progress of this truck as it was carried down the bridge to the plank, before it reached

30 the plank? A. Yes; at the time.

Q. Was there any occasion to have any man, and did you ever have a man assist in carrying the truck over the gang plank; that is, from the bridge over the gang plank on to the barge? Did he continue to assist? A. On that particular occasion?

Q. On any occasion? Was it the business of this extra man to accompany the truckman in going over the gangplank? A. Oh, yes; I would

40 say when there is remarkably low tide or in case

handling heavy freights, such as copper or heavy machinery, as I said before.

Q. The bridge then, was lowered after the accident? A. Yes, sir.

Q. It was not changed— A. For a half hour previous to the accident.

Q. —for a half hour before the accident? A. Yes; for a half hour before the accident it was not lowered. 10

CROSS EXAMINATION BY MR. ALLEN:

Q. How long have you been working around the dock there at Pier 3? A. Six years.

Q. How much does the tide rise and fall? A. Well, I could not answer you that question.

Q. You never noticed how much the tide has dropped from dead high water to dead low water? 20 A. It rises considerably and drops considerably.

Q. What do you mean by "considerably?" Now, during the six years that you have been there what has been the average drop in the tide? A. Well, I never studied the tide, so I couldn't tell you that.

Q. Well, have you seen the tide drop five feet? A. Yes; I have seen it; I have seen it drop six feet also.

THE COURT: It drops about a foot and a half an hour, doesn't it? 30

A. It depends on the wind. If there is an easterly wind the low water—the tide stays in longer. If there is a westerly wind, of course, it takes the water out. I have seen the tide come up as high as the dock, and I have seen it at high tide two feet, I would say, lower.

Q. Well, have you ever seen the tide drop five feet or more? Can you tell us whether it will 40

drop as much as a foot an hour? A. Sometimes I should say it would drop.

THE COURT: Well, he has already testified it would, because he has said he has seen it drop six feet.

Q. This boat that was being loaded was how
10 long? A. In length? Well, I couldn't give an estimated length; I couldn't tell you.

Q. About how long? About how long? A. About how long?

Q. 100 feet? A. No; not 100 feet; say 60 feet.

Q. Now, the bags were placed on what part of the boat? A. The bags were placed aft.

Q. Well, from aft all the way 'midship? A. Well, not quite to 'midships.

Q. Not quite to 'midship? A. Not quite 'mid-
20 ship; no.

Q. Were you in a hurry to load up that boat? A. No; no particular hurry.

Q. You didn't start till five o'clock? A. Around five o'clock.

Q. And didn't you want to get through? A. No; she didn't finish that night; the boat didn't finish until next day.

Q. Why didn't the men put more than two
30 cakes on a truck? A. That is the ordinary load.

Q. That is the ordinary load? A. Yes, sir.

Q. That is heavy enough, isn't it? A. That is the ordinary load.

Q. And each cake weighed 330 pounds? A. 330 or 331.

Q. And the gangplank that Capan and his fellow-workmen took the cakes on from the dock down on to the barge was resting on what part of the barge? A. Was resting on the deck of the
40 barge.

Q. On what part of the deck? How near 'midship? A. Oh, how near 'midship?

Q. Yes. A. It was resting on the forward part of the deck.

Q. Well, how far from 'midship? A. Three-quarter, a quarter—more than three-quarter.

Q. Did you see this gangplank and notice the slope before this accident? A. Yes, sir; I was on the boat half an hour, on the boat, and with the gang a half hour previous to this accident. 10

Q. At the time of the accident? A. At the time of the accident.

Q. Then you were there from half-past five to six o'clock. A. Yes; about that; from half-past five to six o'clock.

Q. Will you point out the slant again? A. (Witness indicates by holding a desk blotter in an inclined position.) 20

Q. Oh, that is the slant now, eh? A. Yes; that is about it.

Q. That was the slant of the plank? A. Yes; from the point of the dock to the boat.

Q. Well, did the plank go from the dock to the boat? A. From the bridge, yes; the bridge is part of the dock.

Q. The bridge is part of the dock? A. Yes, sir.

Q. This bridge stuck out over the water from the dock? A. No, sir. 30

Q. The bridge doesn't extend out over the water at all? A. No, sir.

Q. Comes flush with the side of the dock? A. With the side of the dock.

Q. But that can be raised up or down, can it? A. Yes, sir.

Q. And you and the checker took care of raising that up and down, did you? A. Yes; or order a man to do so when necessary. 40

Q. You observe the condition of the boat and the water? A. Yes, sir.

Q. And you observe the weight of the freight that they are carrying? A. Yes, sir.

Q. And you determine when the bridge should be lowered in order to make it safe for the men? A. Yes, sir.

10 Q. And you have placed men on the bridge and on the plank to retard the trucks when they were being brought down? A. At certain times.

Q. At certain times. That was your system and custom before this accident? A. Yes, sir; and afterwards; has been all the time.

Q. And you would station two men there for that purpose, holding the truck back so that it would not by its weight press down on the man that was pulling? A. If the load required two

20 we would put two; if the load required one there would be one put; if the load required six there would be six put there.

Q. You and the checker would take care of that? A. If I wasn't there the checker would. I would not be there all the time; the checker is responsible for it.

THE COURT: Your company would do that?

30 A. Yes; my foreman.

THE COURT: Your foreman?

A. Orders from the company.

THE COURT: From the company?

A. Yes, sir.

Q. Now, what would you call this work, light work or heavy work, that they were doing? A. Well, it was not light; it was not the heaviest.

40 Q. Oh, you have had heavier work? A. Yes.

Q. You mean you have taken on to boats heavier

things than two cakes that weigh 660 pounds? A. Yes.

Q. But when you have done that you have stationed as many as six men to retard it if necessary? A. If necessary, if it weighed a ton, a couple of ton; according to the weight that would be on the truck.

Q. Well, you have put men there when they weighed six or seven ton and it was dead low water, haven't you? A. Yes, if the boat was low with the water; if the boat was lowered down to the final point of her finishing. 10

Q. You commenced to load this boat at five o'clock? A. Around five; yes.

Q. At five o'clock it was on a level keel? A. No, not level; not level keel.

Q. Was there anything on it? A. Oh, the boat?

Q. Yes. A. Yes; there was. There was about three cars on it; two cars aft. 20

Q. Two carloads aft? A. Yes, sir; two cars there were on it; two cars.

Q. Was it tilted much then? A. Yes; it was tilted quite some.

Q. Then the stern was lower in the water than the bow? A. Yes, sir.

Q. How much lower was it? A. Oh, it was considerably lower; probably four feet; because there is a cabin on the aft end which lowers the boat also; it goes all the time higher. 30

Q. When you lower the boat, fifty feet long, put your cargo aft to almost 'midship, that does not raise the bow? It just causes the entire boat to settle, settle more aft; isn't that the way it works out? A. The bow comes up; it raises the bow up.

Q. Does it raise the bow up? A. Yes, sir.

Q. The sinking of the stern raises the bow up; 40

the sinking of the stern, of the aft part of the boat raises the bow up? A. Yes, sir; yes, sir.

Q. That would be so if you put the weight on the very stern, wouldn't it? A. If you put it on the very stern—

Q. But if the weight of the cargo is from the stern all the way to 'midship that would sink the entire boat, would it not? A. Well, it would sink the entire boat?

Q. Yes; into the water. A. No, sir.

Q. Well, the more cargo you put on, from 'midship aft, the more it would lower the boat; it would also lower the bow, would it not? A. We put the cargo on from aft to 'midship—from aft to the bow.

Q. Yes, sir. A. That raises the boat; if you put it on from bow to stern it raises the stern up just the same way.

THE COURT: And the nearer you go from stern to 'midship the more you sink the bow, then—if you start to load in the stern?

A. Yes; if we had started to load; and the nearer you go to 'midship the more you—

THE COURT: The more you sink the bow.

A. The more you sink the bow?

THE COURT: Yes; the more you sink the bow.

A. Oh, yes; the more you sink out from the starting point.

Q. And you started at five o'clock to load this cargo on to the very stern? A. Yes, sir.

Q. And you worked up toward 'midship? A. Yes, sir.

Q. You had men piling these cakes up? A. Yes, sir.

Q. And they piled them how high? A. Five—six high.

Q. And after they got them up six high they worked forward to 'midship, did they not? A. Sir?

Q. (Repeated by the stenographer.) And after they got them up six high they worked forward to 'midship, did they not? A. Yes, sir. 10

Q. Now, about the time of the accident on the gangway, had the cargo been loaded on to this boat up to 'midship? A. No, sir; not to 'midship.

Q. You didn't see Capan fall? A. No; I didn't see him fall.

Q. He was behind you? A. I just passed him, he going in and I coming out.

Q. You kept on walking as you passed him? A. Yes, sir.

Q. And he kept coming down with the truck? 20 A. Yes, sir.

Q. And when you heard the commotion whereabouts were you, when you turned to look around? A. Just about the top of the bridge; within a pace of the top of the bridge.

Q. How far was Capan from you as you turned around? A. I should say about twelve or thirteen feet to the point of the plank.

Q. And he was lower than you by about three 30 feet? A. Yes, sir; two and a half or three feet; two and a half or three feet; around that.

Q. And the cakes were on top of him? A. Yes, sir.

Q. And then you took him and brought him up on the dock? A. Yes, brought him on the dock and took him to the head of the pier.

Q. Now, as you came up the bridge you saw Capan? A. Yes, sir; I passed him.

Q. At that time what was he doing? A. Pull- 40

ing the truck with two bags of oil cake on it.

Q. He had that behind him and he was pulling it along? A. Yes; behind him.

Q. And going right down the gangway? A. Yes, sir.

Q. And he was hurrying along? A. Well, not exactly hurrying.

10 Q. Well, what was he on, a fast run? A. Just a walk; a steady walk.

Q. Steady walk? A. Yes, sir.

Q. Was that the way all the men were working? A. That was the way all the men were working; nobody running.

Q. They couldn't stop; they were going right ahead with this work? A. They were going right ahead.

Q. Under your orders? A. Yes, sir.

20 Q. You told them to hurry up? A. No; I didn't tell them, not particularly; no; they were not forced.

Q. What do you mean? A. The men were not forced.

Q. If you didn't tell them particularly, did you tell them to hurry up? A. They were not forced.

Q. Did you tell them to hurry up? A. That is my business; not forced them; spoke to them, that is all.

30 Q. Did you tell them to hurry up? A. That is my business. I told them to "shake it up."

Q. That is your business; and that is what you did that afternoon? A. But not forced them; not forced them; spoke to them; that is all.

Q. Spoke to them. A. Spoke to them, but not forced them.

Q. And told them to "shake it up?" A. Not forced them; not forced them by any means.

40 Q. I know you didn't take a club or whip or

anything of that kind and force them; but you did speak to them? A. Spoke to them.

Q. So they knew what you were talking about, and you told them to "shake it up?" A. Probably did.

Q. And you told them that more than once? A. Well, that is my habitual way of telling them all the time. 10

Q. And you told them that on that afternoon? A. I had been telling them that all the time; even I told it to them to-day before I came up here.

THE COURT: You want to get as much work out of them as you can properly.

A. That is what I am there for. If I don't do it somebody else will.

Q. Capan obeyed your orders to "shake it up;" 20 didn't he? A. Well, he didn't go any extra fast when I said, "Shake it up," than he had been going.

Q. Now, what was there about this wedge? I didn't understand your testimony about that. Which was it, a wedge or a brake? A. Skid.

Q. Is there any brake on this bridge? A. No; there is a skid on the bridge.

Q. A skid? What do you mean by that? A. 30 It is two pieces of oak 5 by 3 with five stays across the center, from one to the other, five stays, and it is supported flush against the dock. When the bridge is lowered it is supported against the side of the dock, one side of it; and the other side acts as a brake for to pull the truck down on to the boat.

Q. That is on the bridge? A. That is on the bridge, laid on the bridge.

Q. And that is fastened there? A. No; not 40 fastened.

Q. Well, they don't take it off the bridge? A. It is sometimes taken off.

Q. It is not on this plank that extends from the bridge on to the boat, is it? A. No.

Q. There is nothing on the plank— A. (Interrupting) Nothing on the plank.

Q. —to act as a brake for the truck? A. No.

10 Q. The only thing when the men get on the plank that they can rely on, if the tide is low and the weight is heavy enough, are the men you place there to retard the movement of the truck as it goes down? A. If it is necessary to put a man there.

Q. Well, that is the only thing the men have got to depend on when they are on the plank? A. Yes; they only got the plank.

20 MR. ALLEN: That is all.

MR. LARRABEE: That is our case.

The defendant moved to direct a verdict on the ground that no negligence had been proven by the plaintiff and that the plaintiff assumed the risk of the accident, and the Court conceiving himself to be bound by the opinion of the Supreme Court rendered at the February Term, 1916, in the case of Francesco Capan -vs- The D. L. & W. R. R. Co.,in conformity thereto, directed the jury to find a verdict for the defendant and against the plaintiff, on the ground that under the proofs submitted, said plaintiff had assumed the risk of said accident, to which direction the plaintiff objected and excepted.

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New Jersey Court of Errors and Appeals.

FRANCESCO CAPAN, *Plaintiff-Appellant,* *vs.* THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, *Defendant-Appellee.*	Action at Law.

10

BRIEF FOR PLAINTIFF-APPELLANT.

20

Statement of Facts.

This action was brought to recover damages for an injury sustained by the plaintiff because of the negligence of the defendant railroad company in failing to give the plaintiff warning of the transitory and sporadic dangers connected with his work, in failing to supply a sufficient number of servants to render the work safe, in not moving the oil cakes in a safe manner and by a proper system, in not furnishing the plaintiff with proper and safe appliances and reasonably safe instrumentalities in order to perform his work with reasonable safety; and was based upon the act of Congress known as the Federal Employers' Liability Act, approved April 22nd, 1908.

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The case was first tried at the Hudson Circuit, on December 28th, 1915, before Judge William H. Speer and a jury. The defendant moved for a

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non-suit on the ground that the negligence of the defendant, if any, in failing to furnish a sufficient number of servants was a patent risk and one assumed by the plaintiff. The trial court denied the motion for non-suit, leaving to the jury the question as to whether or not in this case the plaintiff assumed the risk.

The jury found for the plaintiff and a rule to show cause was taken and argued at the February Term, 1916, of the Supreme Court before Chief Justice Gummere and Justices Swayze and Bergen.

The rule to show cause was made absolute. The per curian opinion was filed July 29, 1916.

On October 20th, 1916, by stipulation of counsel, the testimony taken before Judge Speer and a jury at the Hudson Circuit on December 29th, 1915, in said cause, was agreed to constitute and be the testimony at the retrial, and counsel for defendant having moved to direct a verdict for the defendant upon the ground that the plaintiff had assumed the risk of the accident resulting in his injury, the Court, conceiving itself bound by the opinion of the Supreme Court, in conformity thereto, directed a verdict for the defendant and against the plaintiff on the ground that under the proofs submitted, the plaintiff had assumed the risk of said accident. To the direction of a verdict objection and exception was taken. From the judgment entered in favor of the defendant the plaintiff takes this appeal.

In support of this appeal it is now urged that there was error in the direction of a verdict and that the case should have been permitted to go to the jury.

Evidence was presented to the jury which would justify the finding of the following facts in the case: The plaintiff, late in the afternoon of Janu-

ary 6th, 1915, was taken from Pier 4, Jersey City, where he had been engaged at work, and put to work at unloading oil cakes from cars on Pier 3, Jersey City, to a barge lying alongside of the pier (pp. 9, 10). The oil cakes weighed about 350 pounds each (l. 30, p. 20). Two oil cakes were placed on a hand truck and the plaintiff pulled the hand truck thus loaded behind him to the end of the pier and down a plank on to the barge, where the oil cakes were unloaded and piled up on the deck aft of midship (l. 18, p. 50). The plaintiff by means of another plank or gangway returned to the dock with his empty truck and proceeded to load up again with two oil cakes and return to the barge (l. 40, p. 35). He made about thirty trips to the barge with his loaded truck and had been at this work for about an hour when the accident occurred (l. 2, p. 13). The dock was equipped with a bridge at the end of it (l. 26, p. 51), which was lowered by the defendant company through its foreman or checker (l. 37, p. 51). The lowering of the bridge lessened the slant of the plank (l. 41, p. 47), as the plank rested with one end on the bridge and the other on the barge.

By the orders of the railroad company either the foreman or checker stationed men alongside of the plank whenever the tide was low and the crew were trucking heavy freight down the plank to the boat (ll. 17-34, p. 52). If the load required it the company placed as many as six men alongside the plank to retard the truck and render the work safe. The company's system was to have the foreman or checker determine whether one man or as many as six men should be placed at the plank to retard the trucks (ll. 4-15, p. 40). The company also delegated to the foreman or the checker the duty of raising or lowering the bridge, and it was the duty of the foreman or the checker to observe the weight of the freight the men were drawing, to determine when the bridge should be raised or

lowered to make it safe for the men, and to place men on the bridge and plank to retard the trucks when they were being brought down to the boat (l. 38, p. 51, ll. 1-15, p. 52).

The bow of the barge, on which the plank rested, raised or lowered with the tide and with the loading of the barge. The change in the position of the barge with the attendant change in the slant or incline of the plank was to be observed and determined by the foreman or checker, and protection against danger ensuing to the men at work was furnished by the company through its foreman or checker, by supplying and stationing a sufficient number of men to retard the trucks and prevent their descent from injuring the crew (ll. 16-41, p. 40, ll. 1-13, p. 41).

The foreman was hurrying the men along, getting as much work as possible out of them (l. 31, p. 56). The place where the men were descending was dark (l. 2, p. 16) and the plank was wet (l. 1, p. 28). The plaintiff had neither time nor opportunity to observe the environment, the changing positions of the boat and the plank, or to calculate when the combination of circumstances, such as the load on the barge, with the weight of the freight and its position on the barge, causing the bow to raise or to settle; the changing tide, influenced by conditions of the wind (l. 34, p. 49); the angle of the bridge on which one end of the plank rested, and the weight of the freight, and then determine when the danger point was reached. The foreman or the checker was there for the purpose of making the necessary observations, and determining when the bridge should be lowered and when men should be placed there to retard the trucks.

The plaintiff knew of this system and assumed that the company would exercise and perform its duties to assign sufficient men to retard the truck when the work became dangerous.

The plaintiff, intent with his work, ordered many times to hurry up, did not appreciate the existing conditions, much less did he appreciate the existing dangers. They were working (as he testified) in a hurry, like horses; the place was dark and he didn't pay any attention to whether the water was lower or the barge lower (l. 1, p. 16). He did not know the weight of the oil cakes (l. 7, p. 15, l. 11, p. 15), but knew that the bosses took care to see when he was carrying freight heavy enough to require the assistance of men to retard the truck (l. 37, p. 16, l. 22, p. 18).

For an half hour before the accident the foreman had not changed the position of the bridge. The company's foreman thought it was low tide at five o'clock in the afternoon of January 6th, 1915 (l. 34, p. 41), and that the tide remained low for an half hour and was dead low at the time the accident happened (l. 1, p. 42), while a witness for plaintiff testified that the water gradually lowered after they started to work (ll. 17-26, p. 22). Before that time neither the foreman nor the checker had placed any man or men to assist the plaintiff at his work and to retard the truck on the plank (ll. 18-40, p. 51). After the accident the checker placed men by the plank to retard the trucks drawn by the other members of the crew, down said plank, and upon the foreman's return to the work at seven o'clock, he continued the men at the plank until the work was completed, thereby evidencing the fact that he considered it necessary to have the men there even after the tide had commenced to raise (l. 22, p. 46).

The plaintiff testified that the truck, being heavy, pushed against him and he fell and one of the oil cakes fell on his right forearm and broke it (l. 11, p. 10— l. 34, p. 22). He was taken to St. Mary's Hospital and thence to his home

and confined to his home for two months and ten days. From January 6th, 1915 to the date of the trial, December 28th, 1915, he was unable to work. Whenever he attempted to do a little work about the house he felt pains. His average wages were $11.86 per week (l. 23, p. 28), so that his pecuniary loss in wages was $604.00. His doctor's bill was $45.00 (l. 30, p. 12).

10 The physician for the defendant company examined the plaintiff in court before the jury and found and testified to the muscles of the plaintiff's right arm being attenuated or shrunken, which made the plaintiff's right arm different from a normal arm. That it was a depreciation at that time by reason of the shrinking of the muscles and that for the work, such as the plaintiff had been accustomed to do, there had been a depreciation in his right arm which might be 20 five per centum (p. 34).

POINT I.

Assumption of Risk.

From an examination of the evidence here, there would appear to be sufficient for debate as to conclusions in relation to the question of not only whether the combined physical situation of the weight of the cargo being placed on the barge, 30 loading from the stern to mid-ship, with its changing effect on the slant or incline of the gang-plank, the lowering of the tide with its change in the position of the gang plank, the lowering of the bridge on which the gang-plank rested, and the weight of the oil cakes carried on the hand truck must have been known to the plaintiff, but whether the danger therefrom was known and obvious to him.

40 The plaintiff testified that he "was working

in a hurry like horses; the place was dark and he did not pay any attention if the water was lower or barge was lower" (l. 1, p. 16). He knew that on previous occasions when the water was low the company had furnished him with a man or two to hold back the truck, but he did not know how low the water had to be before the company furnished him with such help (l. 37, p. 40 to l. 2, p. 41). Referring to these previous occasions, when questioned why the company furnished him with another man when the water was low, he knew that the company had furnished another man to help him for unless there was some one else there to help, a person might go over-board and get killed (l. 3 to 20, p. 17). This knowledge of a previous condition of danger was when the water was low, but how low it had been or had to be before the company furnished such man *he did not know.*

This accident was not incident to the continuous operation of a dangerous mechanism. The gang plank was harmless unless the tide lowered sufficiently to make it dangerous to draw a hand truck down it with a heavy load of certain weight. When the tide lowered the bridge at the end of the dock on which the shore end of the gang plank rested should have been lowered by the company so as to lessen the incline of the plank (l. 40, p. 47). The incline of the gang plank also depended upon the part of the barge on which the load was placed in reference to the end of the barge on which the plank rested. The company's foreman testified they were loading the aft end, and the plank was on the forward end.

Even if it could have been assumed that a careful man could not have failed to notice how low the tide was getting and just how heavy were the oil cakes and appreciated the danger of the loaded hand truck pushing him and causing him

to slip on going down the gang plank to the barge, still it was not a necessary inference that from such low tide the gang plank was unsafe. The gang plank was safe when he commenced to work and as he progressed with his work. In fact if the load was light it did not matter how steep the incline was. He might well have reasoned that in the loading of the barge and in the adjustment of the bridge the gang plank
10 would be kept at a safe incline and position for him to work on.

Cole vs. Warren Mfg. Co., 63 N. J. L., 626.

It cannot be said beyond all question of debate that if he had used his eyes with any degree of care he could have appreciated the dangers. It was not his duty to approach the gang plank with caution. The adjustment of the gang plank was one controlled by the master and its
20 foreman. The place was dark. There was but one small electric light (ll. 2 & 6, p. 16) and the gang plank was wet (l. 1, p. 28).

The observations as to the incline of the gang plank, influenced by different changing causes, was to be made, in the master's behalf, by the foreman or the checker, to determine when the danger point was reached and when it would be necessary to lower the bridge or to provide and station along side the gang plank enough men to
30 retard the trucks, or to do both, and maintain the work of loading the barge in safety.

This case was one about which opinions might reasonably differ and hence it was a proper one to go to the jury.

Upon this subject it is only necessary to state that, by all the authorities in this State, it is held that when the evidence on any given subject in this *class of cases* is open to fair debate, and leaves the mind in a state of *some* doubt
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upon the question, the trial judge is *not justified* in taking the question from the jury. Wherever two inferences can be drawn from the evidence upon questions of negligence, a case is presented which calls for the opinion of a jury.

Bahr v. Lombard, 24 Vr. 233.
D. L. & W. Rd. v. Shelton, 26 Vr., 342.

It is also settled that if the case presents a fairly debatable question whether the plaintiff's negligent conduct so contributed, the solution of that question is for the jury. 10

Moore v. Central R. R. Co., 4 Zab., 824;
Runyon v. Central R. R. Co., 1 Dutch., 556;
Aycrigg v. N. Y. & Erie R. R. Co., 1 Vr., 460;
Harper v. Erie R. R. Co., 3 Vr. 88;
Matthews v. Penna., Central R. R. Co., 7 Vr. 531; 20
Toffey v. D. L. & W. R. R. Co., 9 Vr. 525;
Bonnell v. D. L. & W. R. R. Co., 10 Vr. 300.

The degree of care required by law of the defendant as applied to the facts of the case, in this respect leaves the plaintiff only responsible for the risks obvious to him, or which he could have discovered by the exercise of ordinary care. 30 In view of the principle that the plaintiff had the right to assume that his employer had exercised reasonable care in furnishing proper appliances and in keeping them safe, the facts are such that whether the dangers were obvious to him or whether he could have perceived the dangers by ordinary observation, became questions for the jury and not for the court to solve. The facts as presented in the evidence were the subjects of two 40

or more classes of conclusions or inferences, both perhaps to an extent reasonable and it was within the province of the jury to determine which to adopt.

Comben v. Belleville Stone Co., 59 N. J. L., 232.

The plaintiff could not be considered as having an entire acquaintance with the effect of loading the boat, the tide and weight of the loaded hand truck. He had no time to stop and observe. The things concealed from him were the ever changing slant or incline of the gang plank, due to changing causes which could only be observed by the foreman or checker stationed there to observe and regulate the slant of the plank by lowering the bridge on which the plank rested. There was the latent danger of the shifting changing position of the gang plank as the load increased on the barge and as it approached mid-ship. While the plaintiff admitted that he knew that there was danger "in going down the plank without assistance when the water was low" on some previous occasion, yet he did not know how low the tide was on this occasion and the risk, due to the changing conditions, was not then obvious to him. He could not stop to consider the gradations in the heighth of the tide and the effect the increasing load had on the barge to sink the bow on which the plank rested. It cannot be said that obviously there existed danger at this gang plank. It was not a danger entirely obvious in its character.

The obvious dangers are those which are apparent. They are the apparent risks of the work. They are the risks which are apparent in the exercise of ordinary observations and which are disclosed by the use of the eyes and other senses.

Dillenberger v. Weingartner, 64 N. J. L., 292, 299.

The danger from the special work of that hour was not obvious in the sense mentioned but of latent character.

The danger had not been present in the ordinary and normal use of the gang plank.

It does not appear that the plaintiff fully knew long before the accident of the slant and the peril. 10

This accident was not incident to the continuous operation of a dangerous mechanism. The gang plank was harmless unless the slant was too great for the weight of the loaded trucks.

Addicks v. Christoph, 33 Vr., 786.

The question therefore is presented whether the case upon the whole of the evidence should have been withdrawn from the jury and a verdict directed for the defendant. 20

This is only done when the facts are undisputed, or from the whole of the evidence the *only* reasonably legitimate inference which can be drawn is that no liability has been established. The question must not be open to a fair debate.

Johnson v. Devoe Snuff Co., 33 Vr., 417.

The rule is well settled that "a jury should be controlled in its verdict by a peremptory instruction only where the testimony is of such a conclusive character as would compel the court, in the exercise of a sound legal discretion, to set aside a verdict if one were returned in opposition to such testimony." 30

Baldwin v. Shannon, 14 Vr., 596;
Crue v. Caldwell, 23 Vr., 215;
D. L. & W. Rd. R. Co. v. Shelton, 26 Vr., 342; 40
Haines v. Merril Trust Co., 27 Vr., 312.

If the question thus raised under the evidence, is a fairly debatable one, then it should go to the jury, otherwise not.

Pen. Rd. v. Righter, 13 Vr., 180;
Comben v. Belleville Stone Co., 30 Vr., 226.

In a multitude of other cases in our courts the principle is impliedly recognized, if not distinctly
10 declared, that it is the danger that must be known or obvous and not merely the physical situation in order to charge the injured servant with assumption of an obvious risk. The doctrine of latent dangers is largely grounded upon this distinction.

Paulmier v. Erie Rd. Co., 5 Vr., 151;
Smith v. Erwin, 22 Vr., 507;
Foley v. J. City Electric Light Co., 25
20 Vr., 411;
N. Y. Sus. & West. Rd. Co. v. Marion, 28 Vr., 94;
Electric Co. v. Kelly, 28 Vr., 100;
Western Union Tel. Co. v. McMullen, 29 Vr., 155;
Chandler v. Coast Electric Ry. Co., 32 Vr., 380;
Johnson v. Defoe Snuff Co., 33 Vr., 417;
Dillenberger v. Weingartner, 35 Vr., 292;
30 *Christenson v. Lambert,* 38 Vr., 341.

In the case of *Burns v. Del. & Atl. Tel. Co.,* 41 Vr., 745, 752, Mr. Justice Pitney, in delivering the opinion of this Court, said:

"It is not merely the physical surroundings of the servant that must be obvious to him in order that he may be held to have assumed the risks arising therefrom, but it must be obvious to him, or at least, to an ordinary prudent servant, under the circum-
40

stances, that there is danger in such a situation. * * * *And so the known absence of safeguards or precautions cannot prevent a recovery where the danger that renders them necessary is unknown to the injured servant.*"

Again in *Rogers v. Roe & Conover,* 45 Vr., 615, 617, Chief Justice Gummere, in his opinion, delivered for this court, said,

"It is not the obviousness of the physical condition or situation which charges the servant with the assumption of the risks that arise from it, but the obviousness of the danger which the physical condition or situation produces." 10

It is not merely the physical surroundings of the servant that must be obvious to him in order that he may be held to have assumed the risks arising therefrom, but it must be obvious to him, or at least to an ordinarily prudent servant, under the circumstances, that there is danger in such a situation. * * * But where the danger is unknown to the servant, he cannot be held to have voluntarily assumed it, although the physical surroundings that create the danger are known to him. And so the known absence of safeguards or precautions cannot prevent a recovery where the danger that renders them necessary is unknown to the injured servant. 20

Burns v. Del. & Atl. Telegraph Co., 41 Vr., 746, 751. 30

The peculiar circumstances of this case presented a question of fact which must enter for the consideration of the jury, all the details and minutiae of the environment, which throw light upon the situation and the conduct of the plaintiff.

Cullen v. N. J. & S. R. R. Co., 85 N. J. L., 708. 40

A servant has the right to take it for granted that his master has performed his duty by the exercise of that reasonable care for the servants safety which the law required, and that, having a foreman present superintending the work of loading the barge who would when the tide lowered sufficient, or the barge sunk sufficiently on account of the increasing load of the oil cakes, cause the bridge to be lowered so as to lessen the incline of the gang plank or station sufficient men at the gang plank to retard the truck and render the work safe.

Smith v. Erie Rd. Co., 38 Vr., 636.

POINT II.

Negligence of Defendant.

The rule of law which enjoins upon the master the duty to provide his servants with reasonably safe instrumentalities embraces the duty of providing proper and sufficient help and assistance so that they may perform the work with reasonable safety.

Petersen v. American Grass Twine Co., 90 Minn., 343, 96 N. W., 913;
Flike v. Boston & A. R. Co., 53 N. Y., 549, 13 Am. Rep., 545;
Booth v. Boston & A. R. Co., 73 N. Y., 38, 29 Am. Rep., 97;
Wright v. Southern P. Co., 14 Utah, 383, 46 Pac., 374;
Johnson v. Ashland Water Co.. 71 Wis., 555, 5 Am. St. Rep., 243, 37 N. W., 823.

The duty is an absolute and non-delegatable duty.

Alabama G. S. R. Co. v. Vail, 142 Ala., 134, 110 Am. St. Rep., 23, 38 So., 124.

Whether or not the master in the particular case performed his duty of employing a sufficient number of men to do the particular work with reasonable safety to the employees *is a question of fact to be determined by the jury.*

Southern P. Co., v. Lafferty, 6 C. C. A., 474, 15 U. S. App. 193, 57 Fed., 537;
Denver, S. P. & P. R. Co. v. Wilson, 12 Colo., 20, 20 Pac. 340; 10
Supple v. Agnew, 191 Ill., 439, 61 N. E. 392;
Harvey v. New York C. & H. R. R. Co., 19 Hun, 556;
Wright v. Southern P. Co., 14 Utah, 383, 46 Pac., 374.

A master is liable for injury to his employee, due to his negligence in failing to furnish a suitable number of servants to do the work required 20 of them.

Di Bari v. J. W. Bishop Co., 199 Mass., 254, 85 N. E., 89, 17 L. R. A. (N. S.) 773 and foot notes.

It is respectfully submitted that there was error in taking this case from the jury and that the judgment should be reversed and that there be a venire de novo. 30

Respectfully submitted,

HORACE L. ALLEN,
Of Counsel for Plaintiff-Appellant.

Telephone 1697 Worth THE WEIBEZAHL PRINT 25 Elm St., N. Y. 40
—1917—

New Jersey Court of Errors and Appeals.

FRANCESCO CAPAN, *Plaintiff-Appellant,* *vs.* THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, *Defendant-Appellee.*	Action at Law. On Appeal from Supreme Court, Hudson Circuit.

10

BRIEF OF DEFENDANT-APPELLEE.

20

Facts.

This action was brought in the Supreme Court of Hudson County under the Federal Employers' Liability Act, approved April 22nd, 1908 (U. S. Comp. Stat. 1913, p. 3912), to recover damages for personal injuries sustained by the plaintiff while in the defendant's employ, loss of wages and medical attendance.

On January 6th, 1915, at the time of the happening of the accident complained of, the plaintiff was engaged in trucking freight from one of the defendant's Hudson River piers in Jersey City, to a barge moored alongside it.

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In doing his work it was necessary for him to pull his loaded truck down a bridge or passageway (which was a part of the pier) and thence across a gang plank onto the barge, where the truck was unloaded. In returning to the pier with his empty truck, plaintiff would cross from the

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barge to the bridge over another gang plank, so as to avoid interfering with loaded trucks going onto the barge (Case, p. 35, line 43; p. 36, lines 1-5).

The bridge in question was so constructed that it could be raised or lowered as occasion required (Case, p. 19, lines 38-40). At the time of the accident both the bridge and the plank were sloping toward the water at an angle of about eighteen degrees (Case, p. 20, lines 10-26).

The load on the plaintiff's truck consisted of two bags or bales of oil cake (Case, p. 10, lines 3-10), each weighing about 330 pounds (Case, p. 44, line 20).

On one of the plaintiff's trips from the pier to the barge, in passing down the bridge and onto the gangplank, just as he reached the gangplank he fell (Case, p. 21, lines 11-14; p. 48, lines 21-24) and one of the bags of oil cake toppled from the truck onto his right arm, fracturing it between the wrist and the elbow (Case, p. 10, lines 26-35).

The specific act of negligence which plaintiff sought to establish at the trial was the failure of the defendant to provide a sufficient number of servants to handle the truck as it was passing down the incline, it being contended that on prior occasions, when the slant of the bridge and the gangplank was the same as on the one in question, truckmen wheeling trucks similarly loaded were furnished with assistance to retard the progress of their trucks as they passed down. No proof of any other negligent act on the part of the defendant was offered.

The case was first tried on December 29th, 1915, and was permitted to go to the jury on the questions of defendant's negligence and plaintiff's assumption of risk. A verdict in favor of the plaintiff resulting, defendant obtained a rule to show cause why it should not be set aside because

(a) No negligence on the part of the defendant had been shown.

(b) That plaintiff had assumed the risk.

(c) That the verdict was excessive.

The rule thus obtained was argued before the Supreme Court *en banc* at the February Term, 1916, the Chief Justice and Justices Swayze and Bergen sitting.

An opinion was filed June 29th, 1916 making the rule absolute, as the Supreme Court, passing the question of the obligation of the defendant to furnish the plaintiff with assistance in handling the truck, *held* that the plaintiff had assumed the risk. For convenient reference the opinion referred to is here quoted in its entirety: 10

Per Curiam:

"This action was brought to recover compensation under the Federal Employers' Liability Act. Capan was a laborer upon the railroad company's docks at Jersey City, and was engaged in unloading oil cakes from its cars on the dock, and wheeling them on a hand truck to a barge lying alongside. He had loaded about seven hundred pounds of these cakes upon his truck, and while drawing it down the gang plank from the dock to the boat he slipped and fell, and one of the oil cakes toppled off the truck and struck him, fracturing his arm between the wrist and elbow. 20

"The plaintiff claims that the defendant company is liable under the Federal statute by reason of its failure to furnish him assistance in handling his truck; the descent from the dock to the barge being so steep, on account of the receding tide, as to make it unsafe for him to handle the truck unaided. The trial court left two questions to the jury; first, whether the company was not negligent in failing to furnish the plaintiff assistance; second, whether the risk of handling the truck, under the existing conditions, without 30 40

assistance, was one which the plaintiff had assumed. The jury resolved both of these questions against the defendant, and rendered a verdict in favor of the plaintiff.

"Passing the question of the obligation of the railroad company to furnish the plaintiff assistance in handling the truck, we think it clear that the danger of handling it without such assistance was as obvious to the employee as to the employer. In fact, the plaintiff admits that he knew that it was dangerout for a man to undertake to handle the truck under the existing conditions without help, but thought that he was strong enough to do so.

"Under the Federal statute the employer is not liable for injuries received by the employee arising out of risks assumed by the latter, and as the finding of the jury on the question of the assumption of risk is without legal justification under the proofs submitted, the rule to show cause must be made absolute."

The case was again tried at the September Term, 1916, upon the same testimony as was presented at the first trial. Upon motion of defendant the trial court then directed a verdict in favor of the defendant, on the ground that the plaintiff had assumed the risk of the accident. Plaintiff now appeals.

ARGUMENT.

I.

Plaintiff assumed the risk.

It is the settled law of this State that an employee assumes all the risks usually incident to the employment, included in which risks are those arising in consequence of special features of danger known to him, or, which he could have discovered by the exercise of reasonable care, or, which should have been observed by one ordinarily skilled in the employment in which he engages.

Weatherby v. Newfield Rug Co., 80 N. J. L. 364.

The alleged negligence of the defendant below which it was sought to establish at the trial, was, as heretofore stated, that defendant failed to delegate another man to assist the plaintiff in holding back his loaded truck while passing down the incline, as had been done on other occasions.

On behalf of the defendant, it is now respectfully urged that even conceding negligence on its part in the respect indicated, the risk of handling the loaded truck without assistance was one which was known or obvious to the plaintiff and assumed by him. 10

As germane to defendant's contention that the risk was assumed by the plaintiff, the court's attention is respectfully directed to the following pertinent features of the evidence, viz:

Plaintiff was engaged in doing work of the most simple character—work not calling for the exercise of skill. 20

He was thoroughly experienced, having been working for the defendant for five years and employed at trucking freight from piers to barges for two years (case, p. 12, ll. 36-40).

Familiarity with his environments must be presumed, as he had trucked freight at the same spot for two years or so before (case, p. 17, ll. 22-30) and on the day of the accident he had been so engaged there for about an hour before he was injured (case, p. 12, ll. 10-12). 30

He knew that when the water was low and the weight on the truck the same as on the occasion in question, assistance was necessary to control the truck (case, p. 13, ll. 29-31; p. 14, ll. 15-17; p. 16, ll. 21-36). At the point in the testimony last cited, when asked how much weight he had on his truck on prior occasions when assistance had been furnished, he answered: 40

"With this same weight—two sacks."

The following excerpts show that he also knew the danger of attempting to work without assistance under the conditions which it is contended existed, but thought his strength equal to the occasion:

> "Q. Why did they furnish you with another man when the water was low? * * * A. To help us.
>
> "Q. Was it because it was dangerous to go down that plank without the assistance of another man? A. Yes; unless there was someone else there to help, a person might go overboard and get killed." (Case, p. 17, ll. 3-20.)
>
> * * * * * * *
>
> "Q. And was your truck too heavy to pull at any time during the afternoon up to the time that you were hurt? A. It did not seem to me at the time that it was too heavy. I felt that I could go on and work with it." (Case, p. 15, ll. 13-17.)

The effect of all these damaging admissions the plaintiff sought to avoid by the bald assertion that he had no knowledge of the physical situation, that is, the inclination of the passageway (Case, p. 13, ll. 16-23, p. 16, ll. 1-4). Certainly such a startling statement is entitled to no weight whatever, for the following reasons:

Plaintiff had been passing back and forth over the locus in quo for an hour before he was hurt (Case, p. 12, ll. 10-13) and had made about thirty trips between the pier and the barge (Case, p. 12, l. 41, p. 13, ll. 1-3), during all of which time he was observant of his surroundings (Case, p. 13, ll. 4-10, p. 15, ll. 36-38). The whole physical layout was in plain view all the while and, in fact, was rather minutely observed by plaintiff's fellow workmen Sebio (Case, p. 20, ll. 10-27), who was laboring at the same task and under the same

conditions as the plaintiff. Under such circumstances the plaintiff cannot be heard to say that he failed to see it (*Penna. R. R. Co. v. Righter*, 42 N. J. L., 177, 187).

Furthermore, there was a contrivance referred to as a "skid" lying on the floor of the bridge, which had been placed there for use as a brake, the practice being to jam the wheel of the truck against it in descending the incline. The plaintiff noted the presence of this skid (Case, p. 13, ll. 24-38) and, in fact, had his truck up against it just before he fell (Case, p. 37, ll. 18-26). How he could have seen the skid lying on the floor of the bridge without seeing the inclined position of the latter is beyond comprehension.

The evidence discloses that aside from the weight on the truck the plaintiff's inability to hold it back was due to the inclination of the *bridge*. The slant of the plank was not a factor, as at the time the plaintiff fell he had just reached the plank (Case, p. 21, ll. 11-14), his truck being behind him and still on the bridge (Case, p. 48, ll. 20-24).

According to the undisputed evidence the position of this bridge had not been changed for at least half an hour before the accident (Case, p. 39, ll. 1-20), during all of which time the plaintiff was trucking the same load down it that he was handling when his truck pushed him over (Case, p. 10, ll. 8-10, p. 35, ll. 35-37). The pressure of the loaded truck from behind and the muscular effort exerted by the plaintiff in holding it back as he descended the incline must, therefore, have forcibly brought the physical situation to his attention, as must also the effort required to pull the empty truck back from the barge.

In view of the foregoing facts it is respectfully submitted that the physical situation was known to the plaintiff or should have been observed by

him as one ordinarily skilled in his employment.

Supplementing his knowledge of the physical situation, the plaintiff had knowledge of the circumstances under which extra help was necessary and of the danger of continuing at work without assistance. If, therefore, the occasion was such as to require the assistance of another man, the plaintiff was aware of it, or should have been, as he had the same opportunities for observation as the defendant and was even better qualified to determine whether or not he possessed sufficient strength to handle his truck with safety. Yet, notwithstanding all this, he continued to work without any complaint and without any request for assistance (Case, p. 14, ll. 18-21, p. 42, ll. 24-26).

Under the circumstances he must be deemed to have assumed the risk.

Foley v. Electric Light Co., 25 Vr., 411;
Regan v. Palo, 33 Vr., 30;
Coyle v. Griffing Iron Co., 34 Vr., 609;
Durand v. Railroad Co., 36 Vr., 656;
Rogers v. Roe & Conover, 45 Vr., 615;
Sabere v. Atha Co., 46 Vr., 306;
Weatherby v. Newfield Rug Co., 51 Vr., 364;
Texas etc. Ry. Co. v. Rogers, 57 Fed., 378;
Cartwright v. Ry. Co., 228 Fed., 872;
Nephew v. Whitehead, 81 N. W. (Mich.) 1083;
Mayott v. Norcross, 52 Atl. (R. I.) 894;
White v. Owosso Sugar Co., 112 N. W. (Mich.) 1125;
Manore v. Kilgore, 120 N. W. (Minn.) 340;
York v. Ry. Co., 117 Mo., 405; 22 S. W., 1081;
Clinchfield Coal Co. v. Wheeler, 108 Va., 448; 62 S. E., 269.

II.

The verdict was properly directed in favor of the defendant.

In view of the situation disclosed by the evidence, the only conclusion that could be drawn was that the plaintiff had assumed the risk. There was therefore, no error in the direction of the verdict on that ground. 10

Baldwin v. Sherman, 14 Vr., 596;
Weatherby v. Newfield Rug Co., supra.

III.

The judgment of the Supreme Court should be affirmed.

Respectfully submitted,

WALTER J. LARRABEE, 20
Of Counsel for Defendant-Appellee.

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Telephone 1697 Worth THE WEIBEZAHL PRINT 25 Elm St., N. Y
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