INDEX.

Notice and Grounds of Appeal on Appeal to Court of Errors and Appeals.

New Jersey Supreme Court.

BRIDGET ROHAN, Admr'x,
Plaintiff-Appellee,
vs.
AMERICAN SUGAR REFINING CO.,
Defendant-Appellant.

On Appeal.

(Filed June 19, 1919.)

To Alexander Simpson, Esq., Attorney of Plaintiff-Appellee.

Take notice that the appellant, the American Sugar Refining Co., a corporation appeals to the Court of Errors and Appeals in the last resort in all cases in New Jersey, from the whole of the judgment entered in this cause, on the following grounds:

(1) That the Supreme Court affirmed the judgment of the Hudson County Circuit Court, although there was error in so doing.

(2) Because the Supreme Court affirmed the refusal of the Hudson County Circuit Court to grant a non-suit at the close of the plaintiff's case, although it was error so to do.

(3) Because the Supreme Court affirmed the refusal of the Hudson County Circuit Court to direct a verdict for the defendant on the close of the whole case, although it was error so to do.

EDWARDS & SMITH,
Attorneys of Defendant-Appellant.

Opinion of Supreme Court.

(Filed June 5, 1919.)

NEW JERSEY SUPREME COURT.

FEBRUARY TERM, 1919.

BRIDGET ROHAN, Amr'x, *vs.* AMERICAN SUGAR REFINING CO.,		Appeal from Hudson Circuit.

Argued before Gummere, Chief Justice, and Justices Swayze and Trenchard.

For the appellant, Edwin F. Smith and Walter L. Glenny;

For the respondent, Alexander Simpson.

PER CURIAM:

This is an action under the Death Act. The plaintiff's decedent, Alexander Rohan was engaged in hauling ashes from the defendant company's plant on Washington Street in Jersey City. This plant is adjacent to a body of water known as the Gap, and Washington Street runs down to the water's edge. At the time of the accident the defendant was engaged in unloading drums of sugar from a freight car standing on a track which ran through the street at this point. It had been engaged in this work for two days prior to the accident. The unloading was done by means of a heavy rope which was fastened to the car, then twisted around the drum and carried to another drum on the far side of the street. When this was done the drum was rolled out of the car on the skids, and then down the skids to the street. The plaintiff's decedent while driving along Washington Street ran into this rope, and was so injured that he died.

The only questions argued before us are wheth-

er the court should have ordered a non-suit; and whether there should have been a verdict directed.

The contention is that the court erred in refusing to non-suit or direct a verdict, first, because there was no evidence of negligence on the part of the defendant company; and, second, because of the contributory negligence of the decedent.

We think both of these questions were for the jury. *Prima facia* the defendant had no legal right to occupy the whole of the roadway of the street for something like three days, and thus interfere with the public user thereof. But, assuming that such right existed, so far as the decedent was concerned, the company was bound to exercise it in such a way as not to jeopardize people travelling on the street; and this duty they owed to the decedent. It is at least doubtful under the evidence whether they gave him warning, or took any other steps for his protection. Clearly, therefore, we think the question of the negligence of the defendant was one to be determined by the jury.

Whether the decedent was negligent, or not, depended upon whether he used reasonable care for his own safety. He had been at work at this place for some time, hauling ashes, and there was evidence to show that whenever he came to the place where the rope was stretched across the street the employees of the defendant company lowered it in order to enable him to pass by in safety. This being so it was for the jury to say whether he had a right to assume that when his truck drew near to the obstacle the same course of conduct would be followed; and whether, in so assuming, he acted as a reasonably prudent man would have done under the same conditions.

We conclude, therefore, that both the motion to non-suit and the motion to direct a verdict were properly refused, and that the judgment under review should be affirmed.

Notice of Appeal to Supreme Court.

(Filed Oct. 29, 1918.)

HUDSON COUNTY CIRCUIT COURT.

BRIDGET ROHAN, Administratrix *ad prosequendum* of the Estate of ALEXANDER ROHAN, deceased, *Plaintiff-Respondent,* *vs.* THE AMERICAN SUGAR REFINING COMPANY, a corporation, *Defendant-Appellant.*	Action at Law.

To Alexander Simpson, Esq., attorney of Plaintiff-Respondent:

Take notice that the defendant appeals to the New Jersey Supreme Court from the whole of the judgment entered in this cause.

Yours respectfully,

EDWARDS & SMITH,

Attorneys of Defendant-Appellant.

Dated October 26, 1918.

Grounds of Appeal.

(Filed Nov. 13, 1918.)

NEW JERSEY SUPREME COURT.

BRIDGET ROHAN, Adm'r., *Plaintiff,* *vs.* AMERICAN SUGAR REFINING COMPANY, *Defendant.*	On Appeal &c.

The following is a specification of the grounds upon whcih the defendant relies for a reversal of the judgment entered in the above entitled cause:

1. The trial court refused upon request to nonsuit plaintiff on the following grounds:

(a) That there is no negligence shown on the part of the defendant.

(b) That plaintiff's decedent was guilty of contributory negligence.

2. The trial court refused upon request to direct a verdict in favor of the defendant upon the following grounds:

(a) That there is no negligence shown on the part of defendant.

(b) That plaintiff's decedent was guilty of contributory negligence.

3. The following questions were admitted in the testimony of John F. McCormack against defendant's objection:

"In your opinion, how fast could that truck go over the pavement?"

"Could it go over ten miles an hour on such pavement?"

EDWARDS & SMITH,
Attorneys of Defendant.

Summons.

The State of New Jersey to American Sugar Refining Company, a corporation:
(Seal)

You are summoned to answer the annexed complaint of Bridget Rohan, administratrix *ad prosequendum* of the estate of Alexander Rohan, deceased, in an action at law in the Circuit Court of the County of Hudson. And take notice, that unless you file your answer to said complaint with the Clerk of the said Court within twenty days after the service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, Luther A. Campbell, Judge of the Circuit Court of the County of Hudson, at Jersey City, this twenty-fourth day of April, nineteen hundred and eighteen.

JOHN J. MCGOVERN,
Clerk.

ALEX. SIMPSON,
Attorney.

Amended Complaint.

(Filed July 26, 1918.)

HUDSON COUNTY CIRCUIT COURT.

BRIDGET ROHAN, Administratrix *ad prosequendum* of the Estate of ALEXANDER ROHAN, deceased, *Plaintiff,* *vs.* THE AMERICAN SUGAR REFINING COMPANY, a corporation, *Defendant.*	Action at Law.

The plaintiff, who resides at No. 100 Bright Street, Jersey City, in the County of Hudson for an amended complaint, says that:

1. She is the administratrix of the estate of Alexander Rohan, deceased, and brings into Court letters of administration *ad prosequendum* granted to her upon said estate by the Surrogate of the County of Hudson, on the 23rd day of April, 1918.

2. The defendant is a corporation of the State of New Jersey.

3. The intestate of the plaintiff, Alexander Rohan, was injured on the 11th day of April, 1918, by reason of the negligence of the defendant, as result of which injuries he died.

4. The negligence of the defendant consisted in this:

That while the plaintiff's intestate was driving a truck along a street or highway in Jersey City, known as Washington Street, the said truck came in contact with an obstruction in the nature of a rope or cable which was stretched across

said street by said American Sugar Refining Company, without light or other warning or without a person in charge thereof to give warning of the presence of said rope or cable, which was stretched across said street illegally, and by reason thereof the intestate of the plaintiff received such injuries that he died.

5. The intestate of the plaintiff was at all times in the exercise of due care for his safety.

6. The intestate of the plaintiff left him surviving a widow and next of kin who have suffered pecuniary injury by reason of his death.

7. The within action is commenced within twenty-four calendar months after the date of the death of said intestate.

Plaintiff demands $25,000.00.

ALEX. SIMPSON,
Attorney for Plaintiff.

Answer to Amended Complaint.

(Filed Aug. 2, 1918.)

HUDSON COUNTY CIRCUIT COURT.

BRIDGET ROHAN, Administratrix *ad prosequendum* of the Estate of ALEXANDER ROHAN, deceased,
Plaintiff,

v.

THE AMERICAN SUGAR REFINING COMPANY, a corporation,
Defendant.

Action at Law.

Defendant, a domestic corporation, answering the amended complaint herein, says:

1. It has no knowledge as to the matters set forth in paragraph one (1) and therefore denies the same and leaves plaintiff to make proof thereof.

2. It admits paragraph two (2).

3. It denies paragraphs three (3), four (4), and five (5).

4. It has no knowledge of the matters set forth in paragraph six (6).

5. It admits paragraph seven (7).

By way of defense to said action, defendant says:

1. That neither decedent, his next of kin, or plaintiff suffered any injury or sustained any loss by reason of any negligence on the part of defendant or any of its servants.

2. That said plaintiff and the widow and next of kin of decedent did not suffer the loss or sustain the injury alleged.

3. That decedent was guilty of contributory negligence.

EDWARDS & SMITH,
Attorneys of Defendant.

Testimony.

HUDSON COUNTY CIRCUIT COURT.

BRIDGET ROHAN, Administratrix *ad prosequendum* of the Estate of ALEXANDER ROHAN, deceased,

Plaintiff,

v.

THE AMERICAN SUGAR REFINING COMPANY, a corporation,

Defendant.

APPEARANCES:

ALEXANDER SIMPSON, Attorney for Plaintiff.
EDWIN F. SMITH, Attorney for Defendant.

Be it remembered, that on this tenth day of October, Nineteen hundred and eighteen, at a Circuit Court holden at Jersey City in and for the County of Hudson, before his Honor, Luther A. Campbell, Judge of the Circuit Court, to whom the issue above joined had been referred for trial the said issue between the parties (pro ut the proceedings), came on to be tried by a jury for that purpose, duly empanelled, and thereupon the plaintiff and defendant offered evidence as hereinafter set out to maintain the issue on their respective parts as follows:

William Dowd—Direct.

WILLIAM DOWD, sworn.

DIRECT EXAMINATION BY MR. SIMPSON:

Q. Where do you live, Mr. Dowd? A. 603 Ferry Street, Newark.

Q. And you are employed by the American Sugar Refining Company? A. Yes.

Q. And you were employed by the American Sugar Refining Company in Jersey City on the 11th of April, 1918? A. Yes, sir.

Q. And where were you employed? What part of the city, I mean? Where was your place of employment? A. Why, on Washington Street, Jersey City.

Q. At what part of Washington? Is it near Dudley? A. Washington, Essex and Dudley.

Q. And Washington Street, on each side of it it is occupied by the sugar house building, isn't it? A. Yes, sir.

Q. And is there anything in the street in the way of car tracks there, or was there on the 11th of April? A. Yes, sir.

Q. What was in the street? A. One single track.

Q. Freight track? A. Yes, sir.

Q. And what part of the street is that in? A. It runs on the west side for—oh, pretty close along with the street; then it turns over towards the east.

Q. Against the curb? A. Yes, sir.

Q. And what is that track used for, or what was it used for on this day and for sometimes before, for freight cars? A. Yes, sir; there was a freight car there on that day.

Q. But I mean usually it was used for freight cars, wasn't it? A. Yes, sir.

Q. Now, was there anything in the street in the way of metal drums on this 11th day of April? A. Yes, sir.

Q. How much of the street about was blocked with the metal drums? A. Well, pretty near one-third.

Q. And what else was in the street beside the metal drums, the freight car? A. The freight car.

MR. SMITH: Now, do not lead him, Mr. Simpson.

MR. SIMPSON: Well, you do not dispute that.

MR. SMITH: I do not want you to lead him whether I dispute it or not.

Q. Well, was there anything in the street besides the freight car and the metal drums? A. No, sir.

Q. Now, what was your duty on that day? What were you doing? A. I was removing drums that was formerly taken from the freight car, to bring them in on the boilers, or along the boilers.

Q. And how large were these drums? A. How long that I have been with these drums?

Q. (Repeated by the stenographer) How large were these drums? (Mr. Simpson) How big were the drums? A. Oh, they were four feet in diameter, I guess; I don't know just exactly.

Q. How high were they? A. About four foot in diameter.

Q. That is four feet across. Then what was the length of them? A. Twenty foot.

Q. Twenty foot? A. About twenty foot.

Q. About twenty feet long and four feet wide? A. Yes.

Q. And how many of them were in the street, do you know? A. Eleven or twelve.

Q. And how did they get in the street? Were they taken out of the freight car? A. Yes, sir.

Q. Now, what was the method of taking them out of the freight car? A. Well, they were removed from the freight car by a line.

Q. What kind of a line? A. About three and a half inch line.

Q. Metal, was it? A. No, it was a rope line.

Q. Rope? A. Yes.

Q. And where was it fastened? A. It was fastened on one of the drums in the back of these—I suppose, in the back of the end drum that was—let me see, there were about five drums deep there, and, as I suppose, it was fastened to one of those drums in the back.

Q. Back where? A. Back from the street.

Q. Well, on the street? Was the drum on the street? A. Yes, sir; the drum was on the sidewalk that was fastened to it.

Q. One end of the rope was fastened to this drum on the side where you were; the other end of the rope fastened to the drum on the freight car? A. Fastened to the drum on the freight car.

Q. And how was it taken out? How was the drum in the freight car taken off? A. It was pulled with the tackle.

Q. Pulled by tackle along this rope? A. Yes.

Q. And this rope remained there permanently and the tackle ran along it; is that the situation?

MR. SMITH: I object to it. It is directly leading.

Q. Well, describe it.

MR. SIMPSON: The witness seems to be a little bit laborious in his testimony. He is

employed by you, and I want to make it as quick as I can.

THE COURT: Let it be stricken out.

Q. Just describe the situation. How was this drum moved? Do not look at Mr. Smith. Look at me. Just describe this tackle. Describe this operation. A. There were two or three turns around the drum.

Q. Of what? A. Of this line, around the drum.

Q. What line? A. Of the line that was pulled from the tackle. There was a single line out from the drum to the pole—

Q. To what? A. Or from the drum—the drum in the freight car to the drum in the back.

Q. Was that or was that not a stationary line there? A. No.

Q. What moved it then? A. Well, when you would pull this tackle then the line would come with the drum.

Q. That line that was stretched across the street would come, would it? A. Yes, sir; it was stretched from the top of the car.

Q. And was it that line that pulled the drum out? A. Yes, sir.

Q. Now, on the 11th of April what were you doing? Were you actually moving these drums yourself? A. Yes, sir.

Q. And what part of it did you do? A. Well, there were two of them on the end, west side of the car, that I was taking into the boiler room at that time.

Q. And while you were there doing this work about 1 o'clock did you hear any noise of any kind, any unusual noise? A. Yes, sir; I heard—I heard somebody holler "whoa, stop," and then in an instant I heard a crash of glass.

Q. An instant after that? A. Yes, sir.

Q. Now then, when you went out having heard

this cry of "whoa" and instantly after the crash of glass, what did you find? A. I found a man fetched up against the rope with the automobile.

Q. I show you a picture. Is that the condition of the hood of the automobile? Does that picture correctly represent the condition of the hood of the automobile—A. Yes, sir.

Q. When you saw the rope? A. Yes, sir.

MR. SIMPSON: I offer that in evidence.

MR. SMITH: Let me see it. (After examining it) No objection.

(Photograph marked P-1 in evidence.)

Q. Does this also correctly represent the hood of the automobile when you went out to see it? A. Yes, sir.

MR. SIMPSON: I offer this in evidence.

MR. SMITH: No objection.

(Paper marked P-2 in evidence.)

Q. And what was the condition of the man with reference to the motor truck and the rope when you went out? What did you see? A. Well the man— the automobile was fetched up against the line—

Q. Yes. A. —and the man was fastened under the hood by this line.

Q. And what part of his body was the line on? A. The line was right across in here, and his head was just in this way; the hood stretched down on his head.

Q. Was there anybody else there when you got out besides the man on the line and the truck? A. Yes, sir.

Q. Who was there? A. There was a fellow by the name of Garvey.

Q. Garvey. Anybody else there? A. A fellow by the name of Steve Sarbowsky.

Q. Steve Sarbowsky. Anybody else there? A. And there was a man by the name of—oh, a Polish fellow. He is here now.

Q. What is his name? A. Willousky, or some name like that.

Q. How with reference to the truck? Did you see what condition the truck was in? A. Yes, sir.

Q. What was the condition of the brake? A. Good condition.

Q. No, but did the man have his foot on it or not? A. Yes, sir.

MR. SMITH: Now, if your Honor please, that is directly leading.

Q. Well, will you describe, when I ask you what the condition of the man was in reference to the brake—will you describe what you saw? A. I saw the man's foot on the brake, the engine stalled. We tried to push—push the automobile back and the brake wouldn't allow us to do it.

Q. Why not? A. Why the brake held too tight.

Q. And how far was the rope advanced, if any? Was the rope in exactly a straight position or had it been pushed out or pushed back? A. The automobile moved the rope at least six inches ahead when it hit the rope.

Q. When it hit the rope, the rope had been moved six inches when the car stopped. And what did you do after that? A. I helped to take the man off the automobile.

Q. What was his condition? A. Well, every place you touched him he was sore.

Q. What do you mean by that? A. Well, we got him by the arms and he said he was sore; his body was all sore, and he said his head hurt him.

Q. Was he conscious? A. Yes, sir.

Q. Was there anything said there by Sarbowsky in your presence to the man? A. Yes, sir. He asked the man what the hell was the matter with him was he blind?

Q. And what did you say?

MR. SMITH: I object.

A. I didn't say nothing.

THE COURT: He did not say anything; all right.

Q. Now, what position was his automobile in when you saw it with reference to these drums? A. Well, it was between the drum and the freight car.

Q. How much open space was there for the automobile there between the drum and the freight car? A. There was at least three foot.

Q. Three feet for the automobile to move in, do you mean, or more? A. I didn't just exactly measure that.

Q. Don't be so shy about it. Give us your estimate? A. Well, say three or four foot.

Q. Four feet clear space. And what occupied the rest of the street? A. Well, the freight car and the drums.

Q. Now, what did you do with the man after you jumped up in the car? A. I helped to release the rope from him, raised the hood up and helped to take him down from the automobile.

Q. And what was his condition? A. Well just as I said. He said he was sore all over.

Q. Well, was he conscious or unconscious? A. Yes, sir; he was conscious.

Q. Did you take him to the hospital? A. I

helped lower him down and they brought him to the hospital.

Q. In what way did he get to the hospital? A. Well, they carried him to the hospital; that is the American Sugar Refining Company's hospital.

Q. American Sugar Refining Company's hospital. Where were you when you heard this "whoa" and immediately afterwards the crash of glass? A. On the west side of the freight car.

Q. How far from the point where the automobile had been struck by the rope? A. About two-thirds from the point.

Q. Well, how far in feet? A. Well, thirty feet, forty foot to a freight car.

Q. Well, I am not familiar with the measurements of freight cars. You were practically thirty feet away from the point, were you? Did you see anything before you heard the crash of glass? A. No, sir.

Q. You didn't see the man coming? A. No, sir.

Q. You simply heard the cry "whoa", "stop", and then the crash. And what did you, look? A. I went around. I heard the crash of glass and I went around and the automobile was stretched up against the line.

MR. SIMPSON: Cross examine.

CROSS-EXAMINATION BY MR. SMITH:

Q. Washington Street, that place where this happened, is below the canal, south of the canal? A. Yes.

Q. On both sides of the street is the sugar property? A. Yes.

Q. And along the west side of the street coming down Washington Street runs the same north and south, doesn't it—? A. Yes, sir.

Q. On the west side of the street the railroad track comes down until it gets quite some distance below the canal? A. Yes.

Q. And turns off a little towards the center of the street; is that right? A. Yes.

Q. And below the sugar property is the gap, isn't it? A. Yes, sir.

Q. And the gap is one hundred feet of water, isn't it? A. Yes, sir.

Q. The gap is two hundred feet water, isn't it—where the water is? A. Yes.

Q. And there is no bridge over it? A. No bridge.

Q. And there is no place for wagons or automobiles to get across the gap, is there? A. No, sir.

Q. On this day you say they had been unloading these drums? A. Yes, sir.

Q. Now, the way they unload the drums, as I understand you, is to put a rope around the drum? A. Yes, sir.

Q. And then they carry over here and fasten it somewhere? A. Yes.

Q. And put a tackle on the rope? A. Yes.

Q. And they pull on the tackle? A. Yes.

Q. And the drum comes over the side of the car, down the skids into the street? A. Yes.

Q. Now, of course, every time a drum comes out the rope comes? A. Yes.

Q. And the rope is down? A. Yes.

Q. And when they want to pull out another one they do the same thing; is that right? A. Yes.

Q. Now, on this day you were over on the west side of the street, weren't you? A. Yes, sir.

Q. Beside some drums that were standing up? A. Behind the freight car.

Q. Behind the freight car? A. Yes.

Q. That had the drums on? A. Right on the east end of the freight car.

Q. East end? A. Yes.

Q. North end? A. I mean the north end.

Q. That is the end towards Jersey City, we will say; and you were on the west side of that? A. Yes.

Q. And the first thing that attracted your attention was somebody hollering "whoa! stop!" is that right? A. Yes.

Q. Now, after you heard that was after you heard the crash? A. Just an instant.

Q. Well, an instant. It was a space of time, wasn't it? A. Yes.

Q. Then when you heard the crash you ran around to see what was the matter? A. Yes.

Q. Is that right? A. Yes.

Q. Now, when you got to this automobile, this automobile you say was facing the gap, wasn't it? A. Facing the gap.

Q. And you say it was up against the rope? A. Yes.

Q. Now, the rope ran from the top of the freight car, or drum on the car—they roll the drums out, don't they? A. Roll the drums out.

Q. How high was the freight car? A. Nine foot, I guess.

Q. Abut nine feet? A. Eight or nine feet.

Q. It was a freight car with sides on it? A. No, it was a coal car.

Q. A coal car; it was not any box car? A. No, it was not any box car.

Q. And the rope would come over the drum, over the side of the car, and then down, wouldn't it? A. Yes.

Q. And this automobile you say was crushed up against the rope? A. Crushed up against the rope.

Q. Is that right? A. Yes.

Q. Now, when you said there was a space of three feet between the drums and the car you didn't mean that, did you? You didn't mean—the automobile couldn't get in any three feet, could it? A. No; I mean when the automobile and the freight car and the drums were all side by side.

Q. Then there was a clear space of three feet on each side of the automobile? A. Yes.

Q. In order to pass through. That is what you mean; isn't it? A. Yes.

Q. Now, that rope that was there was in plain sight, wasn't it?

MR. SIMPSON: I object to that on the grounds that it is for the jury to say whether it was in plain sight or not. He can describe the condition, where the rope was and how high it was, and all that; but he cannot tell of this man's conclusion whether it was in plain sight.

THE COURT: What is the question?

Q. (Repeated by the stenographer) Now, that rope that was there was in plain sight, wasn't it?

MR. SIMPSON: Plain sight of whom, of what, when? It is for the jury to say.

MR. SMITH: It is not for the jury to say. It is a plain question.

THE COURT: In plain sight of whom?

Q. It was in plain sight of anybody on the street there that was not hidden from it, wasn't it? A. Yes, sir.

Q. And a person coming down the street, south in the middle of the street, that rope was right in front of them, wasn't it?

MR. SIMPSON: I object to that on the grounds that it is for the jury to say.

THE COURT: Why, aren't you asking from this witness a conclusion as to something based upon his being in a position different entirely from what the witness was in this case?

MR. SMITH: No, sir; I am asking him from his own observation there. The jury cannot tell at this time. The jury is not there. I am asking this man if, standing in the centre of the street—.

THE COURT: Well, there is no evidence that he ever stood in the centre of the street to look at it. The evidence is he was on the other side of the car.

MR. SMITH: I will withdraw the question.

Q. It was daylight? A. Yes, sir.

Q. Clear day? A. Yes sir.

Q. And the rope was how wide in diameter? A. How wide in diameter?

Q. Yes. A. Three and a half inch.

Q. All right. Now, that rope was stretched right across the street, wasn't it? A. Yes.

Q. From the tackle there to the other tackle? A. Yes.

Q. —on the side; is that right? A. Yes, sir.

Q. Now, had you been that day or that morning, while they were doing this thing, around in the street? A. Yes, sir; we had moved a car before that.

Q. Could you see from the position in the centre of the street the rope as it stretched across? A. Yes, but I didn't pay any attention to that.

Q. I am not asking you that. Could you see it? A. I did not see it.

Q. You did not pay any attention to that? A. No, sir.

THE COURT: How high was this three-inch rope above the street?

The Witness: It was right on the top of the car, which is between eight and nine foot.

THE COURT: That was one end of it?

The Witness: Yes, sir.

THE COURT: Now, was the other end the same height or higher.

The Witness: No, sir; it ran down towards the drum which is—

THE COURT: On the sidewalk?

The Witness: Yes, sir.

THE COURT: How high was it at that point where it was attached to the drum on the sidewalk?

The Witness: At least four foot.

THE COURT: About four feet.

The Witness: Yes.

THE COURT: And the car was how high?

The Witness: Between eight and nine feet.

THE COURT: So that it ran from eight or nine feet in height down to about four feet in height?

The Witness: Yes, sir.

THE COURT: That is the three-inch rope?

The Witness: Yes, sir.

Q. Now, you say that Steve said to the man when you were coming around there—Steve said to the man: "What the hell is the matter with you? Couldn't you see that?"

MR. SIMPSON: I object to that. He said: "Are you blind?"

Q. Is that what he said: "What the hell is the matter with you? Are you blind?" A. Yes.

Q. That is what he said? A. Yes.

MR. SMITH: I think that is all.

MR. SIMPSON: That is all.

(Witness excused.)

BRIDGET ROHAN, sworn.

DIRECT EXAMINATION BY MR. SIMPSON:

Q. Where do you live, Mrs. Rohan? A. 174 Ashburn Avenue, Yonkers.

Q. And on the 11th of April did you have a husband? A. Yes, sir.

Q. What was his name? A. Alexander Rohan.

Q. And how old was Alexander Rohan on the 11th of April? A. Forty-seven.

Q. And how old are you? A. Forty-one last May.

Q. And did you have any children with Alexander Rohan? A. Seven children.

Q. Name them and give their ages? A. Anna, going on eighteen—

Q. Where is she? Is she employed now? A. Yes, sir.

Q. Was she employed at the time her father was killed? A. She was not.

Q. What was she doing at the time? A. She was going to High School.

Q. Preparing to be a teacher? A. No, sir; she was prepar—

MR. SMITH: I object.

Q. What was she preparing for?

THE COURT: Why?

MR. SMITH: To what she was preparing for. I do not see that it makes any difference in this case.

MR. SIMPSON: Withdraw the question.

Q. How much does she earn now? A. Ten dollars a week.

Q. What is the next child? A. Mary.

Q. How old is she? A. Going on sixteen.

Q. Is she working? A. No, sir.

Q. She is living at home? A. Yes, sir.

Q. Go on, give the rest of the names. A. Jessie, twelve; Monica, nine; Alexander, seven; Robert, three.

Q. And were they all supported by Mr. Rohan in his lifetime? A. Yes, sir.

Q. How much money did he give you a week? A. He gave me forty dollars a week and paid twenty-five dollars rent.

Q. Twenty-five dollars a month? A. A month.

Q. That would be roughly hundred eighty-five dollars a month? A. Yes, sir.

Q. Now, did he get anything back out of that except his food at the table? A. No, sir.

Q. And about what do you estimate his food to cost a week at the table, what he ate? A. About seven dollars a week.

Q. And you had him and yourself and the seven children to feed? A. Yes, sir.

Q. And what did the children's clothes come out of, that forty dollars? A. Yes, sir.

Q. And did your clothes come out of the forty dollars? A. Well, my son allowed me fifteen dollars. That clothed me.

Q. You had a stepson? A. No, he was my son.

Q. Your son, but Mr. Rohan's stepson. A. Yes, sir.

Q. And did you get your clothes out of the forty dollars a week? A. No, sir.

Q. What business was your husband in at the time he was killed? A. He owned and ran an automobile truck.

Q. Do you know what his earnings were with that truck a day? A. He made an average of twenty-seven dollars a day.

Q. Do you know how much of that was his expenses? A. Well, about seven dollars a day, I should judge.

Q. So he had clear earnings of about twenty dollars a day? A. Yes, sir.

Q. Did you see him at the hospital the day he was injured? A. Yes, sir.

Q. And what was his condition? A. He was paralyzed from the neck down.

Q. And how long did he live before he died? A. He lived four days.

Q. And he died in the hospital? A. Yes, sir.

Q. Where did you live at the time he was injured? A. 100 Bright Street, Jersey City.

MR. SIMPSON: Cross examine.

CROSS EXAMINATION BY MR. SMITH:

Q. Did you have anything to do with keeping his books? A. No, sir.

Q. Well, what you know is that he gave you forty dollars a week, you say? A. Yes, sir.

Q. And out of that, of course, you took care of the house? A. Yes, sir.

Q. And supported the children? A. Yes, sir.

Q. And clothed the children? A. Sir?

Q. Clothed the children? A. Yes, sir.

Q. Now, your son was working, wasn't he? A. Yes, sir.

Q. He supported himself, didn't he? A. Yes, sir.

MR. SIMPSON: That is a step-son.

MR. SMITH: Is that Mr. Rohan's son?

MR. SIMPSON: No.

MR. SMITH: I did not hear that.

Q. How many of these children were Rohan's children? A. Seven.

Q. How many did you have altogether? A. Eight.

Q. And the oldest of Mr. Rohan's children was Annie? A. Yes, sir.

Q. And you say she is now working somewhere. Where? A. In the Western Union.

Q. Western Union. She gets ten dollars a week? A. Yes, sir.

Q. And how old did you say the next one was, May? You said her age was sixteen? A. Yes.

Q. And what was the next girl's name? A. Evelyn.

Q. Evelyn? A. Yes, sir.

Q. And how old is she? A. Fourteen.

Q. And they are all home with you, are they? A. Yes, sir.

MR. SMITH: I think that is all.

MR. SIMPSON: That is all.

(Witness excused.)

JOHN F. MCCORMICK, sworn.

DIRECT EXAMINATION BY MR. SIMPSON:

Q. What is your business—present occupation? A. Instruction in the Ordnance, Motor Instruction School, at Camp Merritt.

Q. United States Army? A. United States Army.

Q. Are you Mrs. Rohan's son? A. Yes, sir.

Q. And did you know your step-father in his life-time? A. Yes, sir.

Q. Did you instruct him how to run this motor truck? A. Yes, sir.

Q. And what do you know as to whether he was capable of running that? A. I know he was capable of running it.

Q. And did you ever work with him before you went into the Army? A. Yes, sir. I ran the truck for him.

Q. And do you know how much he earned a day with the truck when you ran it? A. Yes, sir; I do.

Q. How much? A. About twenty-seven dollars a day on an average.

Q. How much of that was his expenses? A. About between six and seven—about seven dollars a day.

MR. SIMPSON: Cross examine.

CROSS EXAMINATION BY MR. SMITH:

Q. Does that include the wear and tear on the truck? A. What would include?

Q. That six or seven dollars a day? A. That was operating expenses daily.

Q. Operating expenses? A. Operating expenses and gasoline and all.

Q. That did not include any repairs or deterioration of the truck? A. Just gasoline and oil.

Q. Just gas and oil? A. Yes, sir.

Q. You don't know what it costs for deterioration on the truck, do you? A. Why, it cost him—I drove it for about a year. It cost him about one hundred and fifty dollars for repair for that whole first year.

Q. One hundred and fifty for repair for the first year? A. Yes, sir.

Q. How long did he have the truck, do you know? A. He had the truck since the summer of 1914.

MR. SMITH: I think that is all.

MR. SIMPSON: That is all. That is the case.

(Witness excused.)

DEFENDANT'S MOTION FOR NONSUIT.

MR. SMITH: Now, if your Honor please, I ask for a nonsuit on the grounds that there is no evidence of negligence on the part of the defendant company, and that there is evidence of contributory negligence on the part of decedent.

On the first ground I respectfully submit that there has been no evidence yet of any negligent act on the part of the defendant company. The proof is that they were unloading cars. The proof is that they did have a rope stretched across the street; that is while it's daylight; that this was a three and a half inch rope; that they were unloading in the ordinary course of business something intended for the Sugar Company. I, therefore, respectfully submit that there is no evidence

in this case which requires it to be submitted to the jury.

THE COURT: Is there any contention but what it was a public street?

MR. SMITH: No, no, no; there is no contention that it was not a public street.

THE COURT: There is no evidence of any of the means taken to guard the public against this other than the means which the public itself would exercise; that is, the direct using of his eyesight to determine the fact of the existence of the rope across the street.

MR. SMITH: No, but your Honor does not go far enough. There is evidence that somebody called to him to stop; there is evidence that there was a time after that before the auto ran into the rope. Now, there is not any question. I suppose your Honor is thinking of the Brady case, or the Moreharck case.

THE COURT: Yes, the Moreharck case.

MR. SMITH: There is not any question of the right of an abutting owner to use the street.

THE COURT: A reasonable portion of the street.

MR. SMITH: Yes, the street.

THE COURT: Well, use the street in a reasonable way.

MR. SMITH: In a reasonable manner.

THE COURT: Considering the rights of the public in the street, which are predominent rights.

MR. SMITH: And your Honor will find that set forth in case after case in this state. Now, the only proof in this case that I see is the fact that this rope was stretched across

the street. There is not any proof of unreasonable use. There is not any proof that they were doing anything they did not have a perfect right to do.

THE COURT: No, but when they had the perfect right to do a thing they were under obligations to use at least reasonable care in the manner in which they did it—

MR. SMITH: Of course.

THE COURT: —which included, as the Moreharck case suggests, reasonable precaution of informing the public, or keeping the public from the danger.

MR. SMITH: Of course.

THE COURT: Yes.

MR. SMITH: There is not any proof yet that there was not any; that they did not use reasonable care. You have got nothing yet in this case except the fact that the man ran into the rope.

THE COURT: Well, I will not non-suit. you may take your exception.

MR. SMITH: I take the exception.

THE COURT: Of course, I have in mind the class of case this is, too.

MR. SIMPSON: I want to let the jury see these. I have forgotten them.

(Mr. Simpson shows photographs he wanted to the jury.)

Defendant's Case.

STEVE SARBOWSKY, sworn.

DIRECT EXAMINATION BY MR. SMITH:

Q. Mr. Sarbowsky, you worked for the American Sugar Refining Company, did you? A. Not now.

Q. Not now. Did you work for them in— A. Yes, I did work before.

Q. —the date of this accident—in April; you worked for them in April, didn't you? A. Yes, I did.

Q. And what were you doing? A. Loaded drums.

Q. Loading drums? A. Yes, do everything; do all the repairs, or regulate the work.

Q. How did you load and unload those drums? A. How?

Q. How did you unload them? A. The time that accident happened?

Q. Yes. How were you doing it? A. We got the drums on the car. When we raise the drums out from the car we had nothing on the street, but when we raise them out of the car we have the skids underneath the drum, and we have a rope fixed on the end of the car and one end on the drum, and we have the skids from the car to the ground for to roll them off.

Q. Where is the rope fastened, to the drum? A. Not on the drum; in the car.

Q. In the car? A. If there is any drum we can take and roll them over; they are just on a drum to pull them out.

Q. And where does the rope run, from the car to where? A. To the other side of the street.

Q. To the other side of the street? A. Yes, sir.

Q. And you pull on the rope, do you? A. Yes, sir; pull on the rope.

Q. And does that pull the drum out? A. Yes, sir.

Q. You remember the time of this accident, do you? A. Yes, sir.

Q. When did you start to work in the afternoon? A. Around 1 o'clock.

Q. Had you been working before that? A. Yes, sir; worked all morning. We worked by two weeks before that, every day.

Q. Had you seen Mr. Rohan, the fellow who was hurt, before that? A. Yes; I seen the automobile. I didn't know the name of the fellow in the automobile, but I seen the automobile coming.

Q. Had he been there while you were unloading the drums?

MR. SIMPSON: I object to this as leading.

THE COURT: What is the question?

Q. (Repeated by the stenographer) Had he been there while you were unloading the drums?

MR. SIMPSON: I object on the grounds that it is perfectly leading, unless the man will say yes.

THE COURT: I will overrule the objection.

A. I didn't know the fellow's name, but I seen the automobile coming many times.

Q. Now, do you remember the time of this accident? A. Yes, sir.

Q. And where were you? A. On the end of the rope, by the tackle.

Q. At the end of the tackle? A. Yes, sir.

Q. And where was the tackle? A. The tackle is the other side of the street, from the car to the street.

Q. That is the east side of the street? A. Yes, sir.

Q. And what were you doing there? A. Why, pulling, pulling off the car.

Q. While you were pulling did you see this automobile come? A. Yes, sir.

Q. What did you do? A. I get out and holler to him.

Q. Get out where? A. Yes, sir.

Q. Where did you get? A. Eh?

Q. You say you got out. Where did you get? A. From the drums. We stood on that side of the car, and the drums load there; and I come out from the tackle to the street and I holler and raise my hand up.

Q. What did you holler? A. I hollered "stop." I hollered "whoa."

Q. How far away was he from where the rope was when you hollered to him? A. About seventy-five to a hundred feet.

Q. When you hollered how many times did you holler? A. I don't know exactly, but I hollered more than once.

Q. And you say you went out into the street? A. Yes, sir; right in the middle of the street.

Q. How near to the path of the automobile did you go? A. Well, I go on the street, but I seen him coming; I moved out to the side.

Q. Now when you hollered to him and stood out there and held up your hand, did he stop? A. He did not stop until he hit the rope.

Q. And did you see him do anything towards stopping? A. No.

Q. Now, after he hit the rope— A. Yes, sir.

Q. —did you say anything? A. Yes, sir; I say: "What is the matter with you? Are you blind running into the rope." (I holler to him: "What is the matter with you?")

Q. Then what did you do? A. I ran out and telephoned for the ambulance.

Q. And then did Mr. Dowd come, do you know? A. Well, Dowd ran out the other side. I hollered to him and he come right in with his men.

Q. Then when you went away was the automobile up against the rope? A. Yes, sir.

Q. And did you talk to the man at all? A. No, sir.

Q. Now, you say you ran off to talk to who? A. To Mr. Ducomo.

Q. Mr. Ducomo? A. Yes, sir.

Q. He is in the sugar house? A. Yes, sir.

Q. The sugar house property is on both sides of the street? A. I don't know whether it is a sugar house, but they use both sides.

Q. I mean there is nothing there but the sugar house, is there? A. Nothing but the sugar house; yes, sir.

Q. Now, how was that automobile coming at the speed when you hollered to him? A. Well, the regular speed.

Q. His regular speed, you say? A. Yes, sir.

Q. Did you see him stop at all? A. I don't know. I didn't pay any attention to his stopping or not. I know he stopped when he hit the rope.

Q. Where did the rope catch on the automobile? Did it catch the upright on the side? A. Yes, the front of the cab that they have over the head.

CROSS-EXAMINATION BY MR. SIMPSON:

Q. You were working on the tackle, were you? A. Yes, sir.

Q. And where were you standing working on the tackle? A. On the end of the rope.

Q. On the end of the rope? A. On the end of the rope.

Q. Which side of Washington Street? A. On the east side.

Q. And which side of Washington Street was the automobile? A. On the middle of the street.

Q. And you were on the east side? A. Yes.

Q. And you were on the sidewalk? A. No, in the street.

Q. In the middle of the street? A. Yes, sir—not in the middle, but where he come—around the side of the street.

Q. Oh, there is no sidewalk there? A. On the side of the street there, not the sidewalk, on the side of the street.

Q. Is there any sidewalk there? A. Yes.

Q. All right. Mr. Smith said there was not. You were on the sidewalk—you were not on the sidewalk? A. Around the street.

Q. You were in the street? A. Yes.

Q. In the gutter? A. Yes, sir.

Q. In the gutter, who was with you? A. The whole bunch.

Q. Who is the whole bunch? A. Oh, I don't know how many was there. I have four or five.

Q. And what were you doing? A. Pulling that drum off the car.

Q. How did you pull it? A. On a rope.

Q. Pulley? A. Yes, sir.

Q. When you pulled on the pulley would that pull the drum right off the car? A. Yes, sir.

Q. And would this big rope come with it? A. No, sir; the rope stayed on the car, one end.

Q. The rope stayed on the car, but the drum came along the rope, did it? A. Along the skids; yes sir.

Q. And the rope still stayed on the car? A. Yes, sir.

Q. Now, this rope was fastened one end to the

car; the other end came down, didn't it? A. No, no.

Q. How? A. One end is fast to the car and the other end we have the tackle there.

Q. Well, the other end—how high was the other end above the street? A. The drum is about four or five foot.

Q. Four or five foot? A. Yes.

Q. The other end was higher? A. Yes, sir; was higher.

Q. How much? A. As high as the car.

Q. So he came diagonally down this way? A. Yes, sir. He come this way. He have it that way.

Q. And you had the street full of drums? A. Not in the street—yes, on the side of the street.

Q. Side of the street full of drums? A. Yes.

Q. And on the other side was the freight car? A. On the other side was the freight car.

Q. So that this man came in he had to come in this space between the drums and the freight car, didn't he? A. Yes.

Q. And had to look out he didn't run into these drums? A. There was plenty of room there.

Q. How much room was there? A. Well, between the car was about two foot; but the other side we have by four feet.

Q. Four feet to go in? A. On his side.

Q. On his side? A. Yes, sir.

Q. His side was four feet clear space? A. No; between the car and the automobile is about two feet.

Q. But this side— A. Four feet.

Q. That makes six feet clear he had? A. Yes.

Q. Though he had to look to go in this space that gave him six feet clear, did he? A. Yes.

Q. As he came down? A. Yes.

Q. Otherwise he would run into the drums. Now, you saw him coming down the street, too? A. Yes sir.

Q. When you saw him coming down you went out and hollered "whoa! stop!"? A. Yes.

Q. And you told Mr. Smith you only hollered once; is that right? A. I did not say I hollered once. I say I hollered a couple of times, but how many times I don't know.

Q. Well, how many times did you holler? A. Well, I hollered three times at least.

Q. What did you mean by telling Mr. Smith you only hollered once? How many times did you holler? A. I say I hollered about three times.

Q. Where did you stand when you hollered? A. In the street, in the middle of the street.

Q. In the middle of the street? A. Yes.

Q. Did you always stand in front of the automobile? A. What?

Q. Did you always stand in front of the automobile? A. For to hit me? No, I moved further.

Q. Did you always stand in front of it? A. No; I stand on the end of the rope.

Q. Which end of the rope did you stand? A. Where I had the tackle on.

Q. Where the tackle was? A. Yes.

Q. That is where you stood when you hollered? A. No, when I hollered I stood in the street.

Q. How far out in the street did you holler?

MR. SMITH: Well, I object.

Q. How far out were you when you hollered? A. Well, I working.

Q. Well, is it one foot or two feet or how far? What do you mean two feet? A. I mean two feet.

Q. How far out in the street did you stand from the tackle? A. I stand in the middle of the street.

Q. Did you walk away from the other men? A. Yes, sir.

Q. You walked away from the other men? A. Yes, and I ran out in the middle of the street.

Q. Now, this other man who was standing thirty feet away, immediately after he heard the whoa he heard the crash of glass, is that so? A. I don't know.

Q. You don't know that? A. No.

Q. You were the foreman there, weren't you? A. Yes, sir.

Q. It was your business to take care of that job was it? A. Yes, sir.

Q. And when you hollered, "Whoa, stop!" what were they doing with the drum that you were pulling on? A. They do nothing.

Q. Where the men working on it? A. No, they stop it.

Q. Well did they come out with you? A. Yes, sir.

Q. How far out was the drum in the street? A. On the car; it was on the car yet.

Q. Still in the car? A. Yes.

Q. Did you make any noise when you pulled with the tackle? A. What do you mean, noise?

Q. (Repeated by the stenographer) Did you make any noise when you pulled with the tackle? A. No.

Q. No noise? It was a silent tackle, was it? A. Yes.

Q. Now, you say this automobile came fast; is that right? How fast did he come? A. The regular speed.

Q. About forty miles an hour? A. I don't know about that.

Q. How fast did he come? A. I don't believe he come forty miles an hour.

Q. How fast? You saw him. I do not care what you believe. A. I don't know how fast.

Q. Ten miles an hour? A. Maybe ten.

Q. Was it more than ten? A. I don't know.

Q. Was it less than ten? A. Maybe less; I don't know exactly how fast he was going.

Q. Well, how is it you don't know? You saw the automobile? A. I saw the automobile, but I don't know how fast he can go that time.

Q. You saw how fast he was going? A. Yes, I saw him coming.

Q. Well, how long did it take him from the time you first saw him until he hit the rope? A. It don't take him long, because—it didn't take long to come into it.

Q. Didn't take a minute? A. I don't say a minute; maybe more; I don't know exactly.

Q. You don't know how long it took? A. No, sir.

Q. But it was a very short space of time? A. Yes.

Q. From the time you first hollered until the time he hit the rope. Now, why didn't you tell us how fast the automobile was going?

MR. SMITH: I object.

A. How I can tell? If I can tell, I tell.

Q. Well, you won't tell, will you?

THE COURT: I think he has indicated by his testimony that he does not know how fast. He cannot express how fast.

Q. Do you know how fast the automobile was coming? Did it make any noise at all? A. No.

Q. It was a silent automobile, was it? A. Yes.

Q. Didn't make any noise at all. When this automobile came along was it just noiseless? Absolutely noiseless, was it? A. Made no noise at all.

Q. You believe that yourself, do you? A. (No answer.)

Q. Now, how near was he to the freight car when he hit this rope? A. How far what?

Q. (Repeated by the stenographer.) Now, how near was he to the freight car when he hit this rope? A. To the freight car? Right to the car.

Q. You said there were two seats on the other side? A. Yes, but two seats on one side and four seats on the other side.

Q. Well, was the rope coming down from the car over his automobile? A. Yes.

Q. So the rope was lower at his automobile than it was at the end of the freight car, wasn't it? A. Yes, sir.

Q. How high was it from the ground at the place where it hit his hood? A. About eight feet.

Q. Eight feet? A. Yes.

Q. How high was it near the car where it struck? A. Near the car, about nine feet.

Q. Now, when the car stopped you said to him, "What the hell is the matter with you, are you blind"? A. Yes, sir.

Q. That is all you said to him, isn't it? A. Yes, sir.

Q. And what did you do after you said to him "What the hell is the matter with you, are you blind"? A. We went over to Mr. Ducomo's and was telephone for ambulance.

Q. What was his condition? A. I don't know.

Q. Was he talking? Was he conscious? A. I don't know. I don't talk nothing.

Q. Didn't he say to you that no warning had been given of the rope? A. What?

Q. Didn't he say to you no warning had been given of the rope? A. Didn't say anything.

Q. Didn't say anything? A. No.

Q. Well, was he in condition to talk? A. I have not the time to look on the man, because I ran out for Mr. Ducomo for the ambulance.

MR. SIMPSON: That is all.

RE-DIRECT EXAMINATION BY MR. SMITH:

Q. Mr. Witness, when you say that there were so many feet on each side there between the automobile and the car, what do you mean? When his machine was in there? A. Yes, sir.

Q. In other words he had two feet clear space on one side and four feet clear space on the other side? A. Yes, sir.

Q. Of the machine? A. Yes, sir; of the machine.

MR. SMITH: That is all.

RE-CROSS EXAMINATION BY MR SIMPSON:

Q. Can you tell me how many drums were in the street there at that point? A. I don't know exactly. About twelve on the east side and two on the west side, I believe, on the sidewalk—on the west side.

(Witness excused.)

JOHN F. MURPHY, sworn on behalf of the defendant.

DIRECT EXAMINATION BY MR. SMITH:

Q. You are in the employ of the Sugar Company, are you? A. Yes, sir.

Q. I show you a deed made by F. O. Mathiesen Sugar Refining Company—

MR. SIMPSON: I make no contest that they did not own the real estate.

MR. SMITH: Then it is admitted that the Sugar Company owned the property on each side of the street?

MR. SIMPSON: Yes, if you state that as a fact.

MR. SMITH: That is the fact here.

MR. SIMPSON: All right.

MR. SMITH: That is all with Mr. Murphy.

CROSS EXAMINATION BY MR. SIMPSON:

Q. Do you know who was in charge of these men who were moving these drums; who was the superior? A. No sir; I was not there that day.

Q. No, but I mean general custom. Would you know wno was their boss, superior? A. Well, the chief engineer.

Q. Who was that? A. Mr. Ducomo.

(Witness excused.)

J. W. WHITE, sworn on behalf of the defendant.

DIRECT EXAMINATION BY MR. SMITH:

Q. Mr. White, you are employed by the Sugar Company, are you? A. Yes, sir.

Q. How long have you been employed there? A. Beg pardon.

Q. How long have you been employed there? A. Ten years.

Q. What was your position? A. I was assistant chief engineer, our plant engineer.

Q. Did you know Mr. Rohan, the deceased? A. Oh, yes.

Q. And he was engaged in carting away ashes from the factory, wasn't he? A. He was.

Q. And how did he get into the property of the factory, from what street? A. Well, along Washington Street.

Q. Along Washington Street. And you know the place about where they were unloading the drums, do you? A. About where?

Q. Do you know the place where they were unloading the drums on Washington Street? A. Yes.

Q. And had you ever seen Mr. Rohan coming along Washington Street at any time while they were unloading drums there? A. I had.

Q. Within two or three days? And do you know how long he had been coming while you were unloading drums? A. At least two days before.

Q. And how many times a day did you know him to come there to take these ashes? A. Between four and six trips.

Q. Between four and six trips? A. Yes, sir.

Q. Had you ever seen them unloading drums? A. I had.

J. W. White—Cross.

Q. Had you ever been into the street while the rope was stretched across? A. I had.

Q. Can you tell me whether or not that rope was easily observable to anybody in the street? A. It was.

Q. The rope, as each drum was lowered—what became of the rope? Did the rope still stay up or was it lowered? A. It slacked off.

MR. SMITH: You may cross-examine.

CROSS EXAMINATION BY MR. SIMPSON:

Q. Did you see him go under the rope when it was tight? You saw his machine go under the rope when it was tight? A. It could go under the rope when it was tight.

THE COURT: It could or could not?

THE WITNESS: It could not.

Q. How do you mean it slacked off, the rope was put down on the ground? A. Taken completely off the street.

Q. Well, how taken off the street? A. The end that was loose was simply pulled over to the other side and left in the car.

Q. That is, it was carried away? A. Yes, sir.

Q. And when it was cleared away there was no rope at all across the street? A. There was not.

Q. Well, how would he get by if the machine would not go under the rope? A. He waited until the street was cleared by my orders.

Q. Then he would go through? A. Then he would go through.

Q. When the rope was all taken off and put in the car he would go through? A. He would go through.

Q. That is the time you saw him going through

that you describe? A. The rope was not in position when he went through.

Q. That is what I want to know. When he went through—you said he could not go under the rope. Well, how did he get through then? A. Because I slacked the rope off so that he could get through.

Q. It was clear? A. It was clear.

Q. And how many times did you do that? A. At least once.

Q. When was that? A. That was in the morning.

Q. Well, when did you see him go through the other time besides the once? You said you saw him there for two days? A. The previous day.

Q. Well, how did he get through then? A. Because there was no rope there.

Q. No rope there. Then you never saw him pass the freight car when the rope was across the street? A. It would be impossible for him.

Q. You never saw him do that? A. I did not.

MR. SIMPSON: That is all.

RE-DIRECT EXAMINATION BY MR. SMITH:

Q. He could not do it? A. No.

Q. Now, had you given him orders not to attempt to go through there while they were unloading—

MR. SIMPSON: I object to that.

Q. Well, what did you mean a little while ago, Mr. White, when you said by your instructions he did not attempt to go through there when the rope was there? A. Because I was in charge of the gang. I was in charge of Steve and it was my orders—

MR. SIMPSON: I object to what his orders were.

Q. I only want to know whether or not you spoke to Mr. Rohan about it? A. I had in the morning, because he hunted for me to have the rope slacked.

Q. And what did you say to him then? A. I told him that I would go out and see if I could do it.

Q. Did you say anything to him about waiting until that slacked off the rope? A. I simply told him—he could not get through until I did slack the rope; so it was totally unnecessary to say that.

Q. And was that the day before that you spoke to him or the same morning? A. That was that morning.

Q. The morning he was hurt? A. Yes, sir.

Q. On a previous trip? A. That was on a previous trip.

Q. And do you know about how long it would take to unload a drum? A. About how long.

Q. Yes. A. Why, it would take about half an hour to pull it out.

Q. To unload a drum. And these drums were for use in your factory, weren't they? A. Yes.

Q. Had come in on the freight trains? A. They were unloaded in coal cars.

MR. SMITH: I think that is all.

RE-CROSS EXAMINATION BY MR. SIMPSON:

Q. You were in charge of this job, were you? A. I was.

Q. Were you there when the man was hurt? A. I was not.

Q. Where were you? A. I was out to lunch.

Q. Did you have anybody there with a red flag

to warn any of the traffic going up and down Washington Street? A. I did not.

Q. You did not have anybody whose particular and sole business it was to warn pedestrians and traffic? A. The foreman was in charge of that.

Q. Did you have anybody else there who had nothing else to do but warn anybody? A. No.

Q. Now, what was this conversation you had with this dead man in the morning? A. He came looking for me—

Q. What time? A. I could not say what time; it was in the morning; it was before dinner.

Q. Where did he find you? A. Somewhere in the refinery.

Q. And what did he ask you? A. He asked me to have the rope slacked.

Q. What do you mean? How do you slack the rope? A. Let go one end of it.

Q. Did you do it? A. I did just as soon as the drum was in position where I could do it safely.

Q. What time was that? A. Before noon.

Q. Shortly before noon, wasn't it? A. I don't remember.

Q. Oh, you remember. You mean to tell this jury you do not remember when it was that this man asked you to have the rope taken down? A. It was before noon.

Q. How long before noon? Was it a half hour or was it two days?

MR. SMITH: I object if your Honor please, because the question is absurd.

MR. SIMPSON: Well, this man knows how long it was.

Q. Was it ten minutes before noon? A. It was about the middle of the morning.

Q. And you had it taken down? A. I had it

slacked down when the drum was in position where it could be done safely.

Q. You had it done? A. I had it done.

Q. How long after he asked you? A. About fifteen or twenty minutes.

Q. And you did not see the scene—the place again until he was hurt, did you? A. I did, yes.

Q. When? A. About twelve o'clock.

Q. Did you see him after you had the rope slackened up to the time he was hurt? A. No, I did not.

Q. You didn't tell him the rope was put back, did you? A. No, I did not.

Q. You didn't have any of your men—you did not tell any of your men: "Look out, I have had this rope taken down for this man. He may be back again. See that he is told I had the rope put up again," did you? A. No, I did not.

MR. SIMPSON: That is all.

BY MR. SMITH:

Q. As I understand, you cannot tell the exact time that Mr. Rohan came to you that morning can you? A. No.

Q. How many trips did he usually make in the morning?

MR. SIMPSON: I object to that as irrelevant and incompetent—how many he usually made. It is not proper redirect.

Q. How many did he make the day before?

MR. SIMPSON: I object to that unless this man has personal knowledge of it and saw it.

THE COURT: Of course, that presumption always goes with it, Mr. White. You are only to tell of that which you know yourself, that you have personal knowledge of. I think

then the question by adding "to your personal knowledge," may be answered.

THE WITNESS: I could not give the exact number of trips because I am not familiar, I am not in charge, and there is no record kept of the number of trips that those men make; but they always average over four and up to six trips.

Q. I see, and that is a day? A. That is per day.

Q. Four to six per day. Now, let me ask you about Washington Street there. From the canal, as you call it, which is north of the place where these drums were being unloaded, to the gap is there any other property there except that of the sugar house? A. There is not.

Q. Is there any traffic on that street south of the canal by anybody except people coming to and from the sugar house? A. There is not.

Q. Can wagons get over the gap? A. They cannot.

Q. This man Rohan, as I understand it, was coming to the sugar house to take ashes away? A. He was.

Q. And he had been doing that for how long, can you tell? A. Off and on for about six months previous to that.

MR. SMITH: I think that is all, Mr. White.

BY MR. SIMPSON:

Q. You say there is no traffic; there is a ferry there at the end of Washington Street, isn't there? People go to the Central Railroad, don't they? A. There is a row boat ferry.

Q. There is a ferry, I do not care whether it is an airship? A. There is a ferry.

Q. That people go to, and your people have

been trying for a long time to put a bridge over there and never succeeded, haven't you?

MR. SMITH: I object.

MR. SIMPSON: Trying to close up the ferry.

MR. SMITH: I object.

THE COURT: I will sustain the objection.

Q. Well, there are pedestrians that go on this street to the ferry, aren't there? A. Yes, sir.

Q. What do you mean by saying there is no traffic on the street; the street is a public highway; wagons go there, don't they? A. No wagons go there.

Q. Well, they can go there; you don't own Washington Street, do you? It is a public highway, isn't it? A. Certainly.

Q. What did you mean when you said that there was no traffic there? Are you there all the time in Washington Street? A. Part of the time.

Q. Well, how much were you there yesterday? A. My office fronts Washington Street. I was at least four hours.

Q. Well, do you watch to see if there is traffic there? A. No.

MR. SIMPSON: That is all.

BY MR. SMITH:

Q. Well, is there any place for them to go to? A. There is none.

BY MR. SIMPSON:

Q. They can go to the gap if they want to, can't they, and get the sea view over the Central Railroad? A. (No answer.)

MR. SMITH: And jump overboard; is that it?

BY MR. SMITH:

Q. There are no manufactories there or other places there that require the traffic? A. No.

Q. And there is property on both sides for some distance in Washington Street in possession of the sugar company? A. Yes.

MR. SMITH: That is all.

(Witness excused.)

MR. SMITH: I rest.

JOHN F. MCCORMACK, recalled in rebuttal.

DIRECT EXAMINATION BY MR. ~~SMITH~~ Simpson

Q. You are familiar with the truck this man was operating when he died? A. Yes.

Q. How fast could it go? A. The truck was governed at ten miles an hour.

Q. That is the fastest it could go? A. Yes.

Q. Are you familiar with that pavement down that street? A. Yes, sir; all those streets down there.

Q. In your opinion, how fast could that truck go on that pavement?

MR. SMITH: I object.

THE COURT: Why?

MR. SMITH: How in the world is this man's opinion competent on that? It could go ten miles an hour.

MR. SIMPSON: On such pavement as this.

MR. SMITH: It could go ten miles an hour on such pavement as that.

Q. Could it go ten miles an hour on such pavement as that?

MR. SMITH: I object. He is not qualified.

MR. SIMPSON: You mean he is not qualified.

MR. SMITH: He is not qualified to testify on that. It would only be a conclusion on his part.

THE COURT: Have you ever driven that truck over that pavement?

THE WITNESS: Yes, sir; I have driven into the sugar house.

Q. How fast would it be possible to drive that truck in the condition in which it was that day on that pavement? A. Not over five or six miles an hour at the most.

MR. SMITH: I object and take an exception.

THE COURT: You may have an exception.

Q. What kind of a truck was it? A. Garford; six ton.

Q. And was it a noisy truck or what? A. Yes; it was fairly noisy.

Q. As it moved? A. Yes, sir; on that pavement it would be pretty noisy.

Q. What kind of pavement was it? A. A block pavement.

Q. What?

THE COURT: Block.

A. Cobblestones, commonly known as.

MR. SMITH: That is all.

Smith

CROSS EXAMINATION BY MR. ~~SIMPSON~~:

Q. You could drive that truck ten miles an hour? A. It was possible to operate it at ten miles an hour.

MR. SMITH: That is all.

MR. SIMPSON: That is all, sir.

(Witness excused.)

MR. SIMPSON: That is the case. I would like to put in the life expectancy tables, if I may. Have you any objection?

MR. SMITH: No.

MR. SIMPSON: Can I put it in afterwards so the Judge will have the benefit of them?

MR. SMITH: Yes.

MR. SIMPSON: I will get it down stairs while you are summing up. That is my case.

DEFENDANT'S MOTION FOR A DIRECTION OF VERDICT.

MR. SMITH: Now, if your Honor please, I move for a direction of verdict on the ground that there is no evidence of negligence on the part of the defendant company, and that there is evidence of contributory negligence on the part of decedent.

THE COURT: I will deny your motion.

MR. SMITH: Exception.

THE COURT: You may have it.

(Mr. Smith sums up to the jury on behalf of the defendant.)

(Mr. Simpson sums up to the jury on behalf of the plaintiff.)

(The stenographer was not present during the summing up of counsel, but a stenographer having been called in thereafter, the following took place):

THE COURT: Mr. Stenographer, objection has been raised to the remarks of plaintiff's counsel as made with reference to the financial standing, and so forth, of the defendant company, to which remarks Mr. Smith, defendant's counsel, desires to object on the

record. Mr. Smith do you still ask to have the objection on the record?

MR. SMITH: I do. I wanted the objection to appear on the record at the time I made it.

THE COURT: Now, do you still desire to have that objection on the record?

MR. SMITH: I do. But the remarks are gone. I can't repeat them now.

THE COURT: Gentlemen of the Jury, whatever those remarks were that were objected to you will disregard, because it is a matter of no consequence to you or to the Court who the parties are (or who or what either of the parties is) appearing before you; and it is no concern of yours or mine what their respective financial or social or other conditions may be. All that you and I are concerned with here is what the facts are in this case and rules of law applicable thereto. ~~you must disregard them entirely.~~ There is nothing else should control either one of us. If in the summings up arguments were used or statements made which were not borne out by the evidence and are not based on facts in the evidence in the case, they have no value to you in deciding the case. That is all I can say upon the subject. You will have to remember yourself what those remarks were which counsel objects to; the Court cannot help you on that. If they are not borne out by the evidence in this case you must diregard them entirely. Mr. Smith, is there anything else you wish me to say?

MR. SMITH: I think not.

THE COURT: Mr. Stenographer, are you prepared to take my charge?

STENOGRAPHER: Yes.

The Court then charged the Jury as follows:

(The defendant's counsel had heretofore submitted to the Court the following written Requests to Charge, namely):

DEFENDANT'S REQUESTS.

1. If the defendant gave warning to the decedent of the presence of the rope in time for him to stop his auto before striking it, and decedent did not stop, there can be no recovery against defendant.

2. If plaintiff could have seen the rope by the exercise of ordinary care and prudence, and his failure to exercise ordinary care was the cause of his running into the rope, he cannot recover.

3. Defendant being the owner of the land on the west side of Washington Street, and lessee of the land on the easterly side thereof, had a right to temporarily obstruct the street for the purpose of loading and unloading merchandise, including the drums it was unloading, and from the mere fact that the defendant had obstructed the street with this rope in unloading the drums, no inference of negligence on the part of defendant can be drawn.

Charge of the Court.

This is an action on the part of the Administratrix of Alexander Rohan, deceased, against the American Sugar Refining Company, in which the plaintiff is seeking to recover damages which it is alleged she and the children—the next of kin of the deceased party—have suffered because of the death of the husband and fatner, Mr. Rohan. They are seeking to recover the pecuniary loss or damage which it is alleged here they have suffered. I have used the word "pecuniary" and have done so intentionally and advisedly, as you will see later on when I get to that part of my charge where I shall instruct you what the verdict is to be if there is a verdict found for the plaintiff. You must determine for whom the verdict shall be.

In all cases of this character the right of the plaintiff to succeed rests upon the idea of the negligence of the defendant; that is, that the party against whom the action is brought, that is the defendant whether the same be an individual or be a corporation, is liable to the plaintiff on the ground of having transgressed some legal duty which was owing to the plaintiff's decedent, and has transgressed that duty either affirmatively and openly, or passively; that is to say has done something which the defendant ought not to have done and which caused the death. I mean by that, that the defendant has done something actively which defendant should not have done, or has neglected the performance of something which in law it was called upon to do, with respect to the party who seeks recovery in the case.

The rule of law is that the plaintiff must prove

his case. So in this case the burden is on the plaintiff to satisfy you by the fair preponderance of the evidence that the defendant was negligent in the manner charged by the complaint and that that negligence was the proximate cause of this happening to the deceased Mr. Rohan. It is not necessary, considering the short space of time this case has consumed, that I should repeat the evidence or describe the circumstances and conditions out of which this accident is alleged to have taken place.

The law seems to be this with respect to such parties as are doing such a thing as seems to have been done by the agents and servants of this defendant company: "Every person"—I am quoting now from an opinion of the Court of Errors in this State in which the language of the court in a case decided in a sister State has been adopted, namely: "Every person occupying lands along the line of a public street has a right to obstruct the sidewalk in front thereof for a reasonable time in order to move heavy merchandise to or from his premises, provided he does so in such a way as not to interfere with the public use to a greater extent than is necessary for the purpose and does not prevent passengers having a safe passageway around the obstruction."

That is undoubtedly the law. Persons occupying premises adjoining and bounding on a public street where merchandise must be handled, placed upon and moved, must have the right to use and obstruct the street for that purpose. Their mere use of the street for such purpose does not make them liable to other persons. Of course, the public has a right legally to use the public street; but the mere fact that in this case the defendant was making the use of the street it was making,

the mere fact that it was so using it, does not charge it with negligence. But a person in using a public street must use some care, and the Court applies it to any one using a public street; the rule is that the use of the street must be in a reasonable manner, so that other persons having a right to also use the street and using reasonably care upon their part may have a reasonably safe use of that public street. That is the rule and the law as I understand that applies to cases of this character, and applies to the case before us.

So here the first question is has the plaintiff satisfied you by the fair preponderance of evidence that the manner and means by which this defendant company was using the street, the proper use of the street by it not being unlawful, was being exercised in an unreasonable way, under such circumstances and conditions as existed in this particular horizon.

It may be said that reasonable care in the manner of using a street may go to the extent of requiring some warning. It may appear that is so. If so, was there proper warning? All those things go into the question of what reasonable care was taken under the circumstances; and you must take into consideration all those things, and the time, and place, and manner and means of using the street for the purpose; and that would include a warning if it were necessary. There is evidence in this case that there was warning given. So it is for your consideration to say whether such warning, given under such conditions as existed with regard to the time and place and the object of the work and the manner of doing it in this case, that a person driving a vehicle and exercising his right of passage on

the street, was duly notified, was reasonably notified in time so that he could have brought his vehicle to a timely stop. The question is, was the time and manner and method of giving that warning within the line of reasonable use and care of the street by the defendant, having in mind the fact that the plaintiff must also exercise reasonable care so that he might not come to harm by his own act, and if he has not exercised that reasonable care, and the accident happened, there could not be any recovery in this case.

As I have said before, the law says that the burden is upon the plaintiff by the fair preponderance of evidence to prove that the defendant company was negligent under the rule I have given you and under the facts and circumstances in this case; and if you conclude on the evidence that the plaintiff has not so done, then your inquiry ceases right there, because then the plaintiff has not made out a case entitling to a recovery. If you find the plaintiff has done that, however, then you must consider whether the negligence of the defendant was the proximate moving cause of what happened to her deceased husband. Was defendant's negligence the thing that directly produced and caused the accident which happened to him? If she has not satisfied you as to that by the fair preponderance of evidence, then she cannot recover. If upon both those points she has satisfied you in the manner indicated then you must consider another point, and that is what was the conduct of the deceased himself, Mr. Rohan? Did any act on his part contribute to or cause the accident in question? If it did, that was contributory negligence, and plaintiff cannot recover.

I have already intimated to you that a person

using a public street or highway, while he or she will have a right to assume that that street or highway will be free of obstruction and pitfalls so that it will be reasonably safe, yet the law is that such person using the public street or highway must also use reasonable care on his part against probable harm; in other words, must not go blindly ahead, but must use the care which a reasonable prudent person would use so that he will not come to harm. Under the circumstances and facts in this case as we find them (and that is what you must consider), the query is whether Mr. Rohan so conducted himself under such rule as he should not? Or, putting it in another way, if you are satisfied that Mr. Rohan did not observe that rule but was himself negligent, and if that negligence of his, whatever it was if there were any, contributed to cause what happened to him—the burden of satisfying you as to that and as to his conduct, is upon the defendants, and they must satisfy you upon that by the fair preponderance of evidence, and if it has been shown to you in that manner, then, even if the defendant company was negligent, yet the plaintiff cannot recover unless she has satisfied you that the deceased was not guilty of contributory negligence and you have determined that the plaintiff was not negligent and that the defendant company was guilty of negligence which caused the accident.

This action is brought under what is known as the Death Act, which gives a certain right of action in case of death to the wife and children or next of kin of the deceased.

Under the statute, in case you find that the plaintiff is entitled to recover, you are limited

to a verdict of compensation only for the pecuniary loss to the plaintiff and next of kin. The statute says that in every such action the jury shall give such pecuniary damages as resulted from the death to the wife and next of kin of the deceased person.

What the plaintiff is entitled to recover if she gets your verdict is a capital fund—that is money—which shall represent the present day value of all the pecuniary loss which will fall upon the widow and the next of kin by the premature taking off of the deceased. That fund is to be ascertained by taking into account all the possibilities. The intestate might have died by the course of nature shortly after the time of this accident; he might, had he lived on, have suffered financial reverses; the wife, had she lived, might have died long before he died; so might his next of kin. Nothing is to be added for loss of society or wounded feelings or anything else which cannot be measured by money and satisfied by a pecuniary recompense. I have said that the deceased might have met financial reverses. In that event he might not have been able to contribute to his wife and family as he formerly did. Again; the wife, had the husband lived longer might have died before, and so might some or all of the next of kin. That is, if this accident had not happened, if he had continued to live beyond that time, his wife might have died prior to his decease and his contributions to her then would have ended at her death; so, likewise, had Mr. Rohan continued in life, some or all of his children might have died before he would have died; in that event his contributions for them would have ceased for each at the time of their respective deaths. The thing I am endeavoring to bring to your mind is that in determining

what your verdict should be for, if you conclude that the plaintiff is entitled to recover by your verdict, you are to take into consideration all these things that are usually common events. You are not to give anything in your verdict for anything that is not comprised in the words "pecuniary loss"—your verdict must always be a pecuniary one. As I have said, nothing can be allowed in a case of this character for loss of society or for wounded feelings or anguish or sorrow. Those matters should not have any place in your verdict. The law does not permit them to enter into a case of this character. The damages are to be determined exclusively by reference to the pecuniary injuries resulting to the widow and next of kin of the deceased by his death. The injury to be thus recovered for has been defined by our courts to be the deprivation of a reasonable expectation of a pecuniary advantage which would have resulted by the continuance of the life of the deceased. Compensation for such deprivation is the sole measure of damages in such case.

Now what has been shown to you to have been the reasonable expectation of this widow and these children as to what the husband and father, had he lived his natural period of life, would have contributed to them in money? That is the thing upon which your verdict primarily is to be based as to the amount of damages if your verdict is for plaintiff. I repeat, if you find for plaintiff, compensation for such deprivation of pecuniary advantage is the sole measure of damages by which you are to be guided.

The burden of proving the amount of damages, —that is the pecuniary loss to the plaintiff,— is upon the plaintiff, and she must satisfy you by

the fair preponderance of evidence what that loss reasonably will be.

It is your right and duty to take into consideration the ages of these persons as disclosed in the evidence. It appears that the deceased was about forty-seven years of age, and that according to what are known as the Carlyle Tables of the Expectancy of Life, he had an expectancy of the continuance of his life of twenty-three years more. Those tables however do not control. They are referred to as some guide, but you must yourself determine the question of the probable duration of his life if he had not met with this accident. Although a person,—a man,—according to those tables may have an expectation of twenty-three years of additional life it is not to be considered that he will surely die at the end of the twenty-three years; nor is it to be considered that he will live surely that number of years beyond his present age,—forty-seven in this case. But the tables are useful as showing a reasonable average, and as a matter that might be taken into a reasonable consideration as to the duration of the life in question. The children are fifteen, fourteen, nine, seven, and three years of age respectively, as I remember the evidence.

If you find for the plaintiff you must first find the gross sum of money which you can say from the evidence is the pecuniary fund which the plaintiff has satisfied you by a preponderance of the evidence she had a reasonable expectation of receiving as a pecuniary adventage during the natural life of the father and husband. That however is not to be the gross sum of all his earnings during his natural life, but is to be a capital sum or fund which at its present day worth will represent the amount of the probable contribu-

tions of the deceased to his family within the natural limit of his life if this accident had not occurred. It is not what would have been realized by the wife and children during that period in a lump sum now at this time: but what would that have come to if contributed month by month or week by week, or day by day, in smaller sums.

Bear in mind they would not have the whole sum of such contributions from him at one time.

By your verdict, if you find for the plaintiff, you must fix the sum of the contributions that she had a reasonable expectation of receiving from the deceased up to some time in the future when those contributions would cease; and that expectation,—that sum,—must be reduced to its present day value, if the plaintiff is entitled to have a verdict.

If you find that the deceased's own act contributed to the accident your verdict must be for the defendant. And your verdict must also be for the defendant if you find that the defendant was not guilty of negligence which was the proximate, direct cause of the accident, as I have already stated.

There is nothing further that occurs to me that I can say to you. You will keep in mind of course that this case is not to be disposed of upon pity, or favor, or prejudice, or because you feel that sympathy should go to one side or to the other side,—to the one party or to the other party,—or because of the character or standing of the one or the other: but you must consider what are the facts in the case according to the evidence that has been given,—as the facts have been established by the evidence and by nothing else, and according to the rules of law applicable to the case as I have explained them to you. If you fol-

low those principles as I have indicated them then your verdict will be a legal one; but if you step aside from that course your verdict will not be a legal and proper one.

With regard to the requests to charge which have been handed to me I charge you that if the plaintiff's husband could have seen the rope by the exercise of reasonable care and prudence and his failure to exercise reasonable care was the cause of his running into the rope, she cannot recover. That is, the plaintiff cannot recover if that was so. I also charge you as requested that the defendant company being the owner of the land on the west side of Washington Street and lessee of the lands on the easterly side thereof, had a right to temporarily obstruct the street for the purpose of loading and unloading merchandise, including the drums it was unloading; and from the mere fact that the defendant had obstructed the street with this rope in unloading the drums no inference of negligence on the part of the defendant can be drawn.

You may take the case, gentlemen.

(The jury retired to consider of their verdict.)

MR. SIMPSON: I want to take some exceptions.

(1) I except to that part of the charge of the Court that instructs the jury that the use of the street and its obstruction in this case by the defendant was lawful.

(2) I except to the Court charging the first of the defendant's requests in the manner the Court amended and charged the same.

(3) I except to the Court charging the second request of the defendant and in respect to which the Court substituted reasonable care for ordinary care.

(4) As to the charge of the Court that no inference of negligence can be drawn from the mere fact of the defendant obstructing the street with this rope in its operations, I except on the ground that that is for the jury to pass upon.

MR. SMITH: I have no exception to the charge.

Verdict.

The jury returned a verdict in favor of the plaintiff for $15,000.00.

Judgment.

This action having been tried before Judge Luther A. Campbell, with a jury in the presence of counsel on October 10th, 1918 and a jury having rendered a verdict in favor of the plaintiff for $15,000.00 damages.

It is ordered that judgment final be entered and is hereby entered in favor of the plaintiff and against said defendant for the sum of $15,000. and the plaintiff's costs to be taxed on motion of Alex. Simpson, attorney for plaintiff.

Rule on Affirmance of Judgment.

NEW JERSEY SUPREME COURT.

(June 7, 1919.)

BRIDGET ROHAN, ADMINISTRATRIX OF ALEXANDER ROHAN, DECEASED, *Plaintiff-Appellee,* *against* AMERICAN SUGAR REFINING COMPANY, *Defendant-Appellant.*	Action at Law. Appeal.

The above cause having been regularly argued at the February Term, 1919 of the New Jersey Supreme Court, by Edwards & Smith, Esqrs., for the defendant-appellant, and Alex. Simpson, Esq., for the plaintiff-appellee, and the Court being of the opinion that there was no error in the proceedings.

It is on this seventh day of June, 1919, ordered, that the judgment below be in all things affirmed, with costs, and the record be remitted to the Hudson County Circuit Court to be proceeded with in accordance with the practice of said Court.

Entered June 7, 1919.

On motion of

Alex. Simpson

Of Counsel with Plaintiff-Appellee.

New Jersey Court of Errors and Appeals

BRIDGET ROHAN, Administratrix *ad prosequendum* of the Estate of Alexander Rohan, deceased, Plaintiff-Respondent, v. AMERICAN SUGAR REFINING COMPANY, a corporation, Defendant-Appellant.	Action at Law. On Appeal.

BRIEF FOR RESPONDENT

This case was tried before the Honorable Luther A. Campbell, Judge, of the Hudson County Circuit Court, and a jury. It resulted in a verdict for the plaintiff in the sum of $15,000. The defendant appeals from the judgment upon this verdict on two grounds:

I. That error was committed by the Trial Court in refusing to grant non-suit at the close of the plaintiff's case.

II. That error was committed by the Trial Court in refusing to direct a verdict for the defendant at the close of the whole case.

Facts

Washington Street in Jersey City, at the place where the accident to Alexander Rohan happened, was a public highway running north and south. The street ends and abuts on a place known as the Gap, a waterway leading to the Hudson River. Washington Street is used by a great number of people at this point for the purpose of communicating with the manufacturing industries that are located on the southerly side of the Gap and it is the only means of communication for the persons in the locality on that side and is also used by numerous commuters and other persons employed by the Central Railroad Company and other railroads desiring to get to the business and manufacturing locality in lower Jersey City. By crossing the Gap considerable time is saved by these various persons in lieu of their going to New York or going over a circuitous route to lower Jersey City by way of the Lafayette section. On page 2 of the brief of the appellant, it is said, "That there is no traffic south of the canal except to the plant of the defendant save a few instances where pedestrians might decide to cross the Gap in a rowboat." From this statement it would appear that the crossing in these boats are mere transitory happenings, but as a matter of fact, for the purposes above set forth, there is considerable uninterrupted use made of Washington Street and the Gap ferry, in the immediate vicinity where this accident happened. There is no denying the fact that the decedent was engaged in carting ashes from the defendant's factory and

had made trips prior to the time he was injured, so that the situation is not similar to the one where the defendant was merely a casual pedestrian in the vicinity. The defendant was rightfully entitled to be in the place where he was at the time he was injured and he was also one of the traveling public clothed with the corresponding legal rights and privileges.

POINT I

The Court properly denied the motion for non-suit.

Under Point One in the argument made in the brief of the appellant, the predominating notion of the appellant seems to be that since the defendant owned all the lands on each side of Washington Street, from a point a short distance north of the accident, by reason of that ownership it had the right to exercise a quasi exclusive ownership over the street or public highway which separated the property which it owned on the east and west side of Washington Street. In other words, the claim seems to be that while the defendant was the abutting owner possessing the title to the fee of the street, its possession of and right to utilize that fee was paramount to the easement of the general public. On page 9 of the brief of the appellant the rule regarding the appellant's rights is but partially set forth, because while the appellant had the right temporarily to use the street for the purpose of loading and unloading merchandise, which presupposes a temporary obstruction of the sidewalk, still,

however, all its activites in this particular regard are subject to the general rule that the right must be exercised in a reasonable manner, as stated in *Welsh v. Wilson*, 101 N. Y., 254, so as not to unnecessarily encumber and obstruct the sidewalk. It will hardly be contended by the appellant that there is any justification in law for the proposition that an abutting owner can take exclusive possession of a street, even though it owns the property on both sides of the street. The true test seems to be and the theory upon which the case was submitted to the jury was whether the defendant had exercised its right to use the street in a reasonable manner and temporarily obstruct the same, or whether it unnecessarily or unreasonably interfered with the decedent's right to use Washington Street as a public highway with the use which the traveling public had the paramount right to enjoy without illegal interruption.

An inspection of the case of *Welsh v. Wilson*, 101 New York, 254, as cited in the brief of the appellant, will show the following facts: "That the defendant Welsh, desiring to remove two large cases of merchandise from a store in the City of New York, placed a pair of skids across *the sidewalk* to the steps of the store and would not have taken more than five minutes to remove the cases from the store to the truck. After the skids had been there two minutes, the plaintiff came along the sidewalk and seeing the skids in her pathway turned toward the store and attempted to pass around the skids, and in doing so she slipped upon the skids and was injured."

Judge Earl in that case spoke as follows:

> "The defendant had the right to place the skids across the *sidewalk* temporarily for the purpose of removing the cases of merchandise. Everyone doing business along a street in a populous city must have such a right, to exercise in a reasonable manner, *so that he must not unnecessarily encumber and obstruct the sidewalk. When the plaintiff found this obstruction in her pathway she had the option to either wait a couple of minutes or to cross the street and pass around the sidewalk or to pass around the truck in the street or to take the way she selected.* The plaintiff was under no obligation to provide her a safe way around the obstruction. It is, therefore, evident that the temporary obstruction of five minutes in the *Welsh* case can have no bearing on the exclusive possession attempted to be exercised in the case at bar."

The sole question decided in the case of *Welsh v. Wilson* was whether it was a reasonable and not unnecessary interference with the public passage for Wilson to utilize the sidewalk in front of his place for a period of five minutes, and no Court could decide otherwise than Judge Earl did in that particular instance.

The case of *Weller v. McCormick*, 52 N. J. L., 470, is cited in the brief of the appellant, and for the purpose of understanding the citation in the *Weller* case it may be well to state the circumstances under which the decision in that case was arrived at in the Supreme Court: Mary Weller was injured by the falling of a branch of a shade

tree which stood near the curb in one of the streets in New Brunswick in front of property of McCormick. Upon the first trial of the case the Supreme Court, upon a rule, had decided that the testimony in the first trial would justify no greater inference that the tree belonged to the defendant than that it belonged to the city. And on the ground that the plaintiff had adduced no preponderance of evidence to establish the liability of the defendant, the verdict in the first trial was set aside. At the second trial certain proof was supplied and the plaintiff was nonsuited and the case was taken to the Supreme Court on a Writ of Error.

Justice Dixon, writing the opinion for the Supreme Court, page 471, said:

> "From the ownership and unlimited right of control thus possessed by the defendant, it must be concluded that he maintained the tree in the street, for his private purpose, and hence, as stated in our former opinion in this case, he was bound to exercise due care to prevent its becoming dangerous. This obligation is plainly deducible from the relative rights of the public and the abutting owner in the highway. *The public right is paramount, and includes the right to have the street safe for travel. That of the abutting owner is subordinate to this public right.* He may use the highway in front of his premises, when not restricted by positive enactment, for loading and unloading goods, for vaults and chutes, for awnings, for shade trees, etc., *but only on condition*

that he does not unreasonably interfere with the safety of the highway for public travel. Any such interference, arising from a want of due care on his part, is unreasonable, and, therefore, to occasion such interference by negligence in the exercise of his subordinate private rights, is a breach of public duty. This public duty, to exercise reasonable care, imposed on every person using the highway, if negligence take place, exists for the benefit of individual travelers, and hence, when an individual sustains peculiar personal injury as the result of such negligence, a private action accrues to him against the person in default."

It will be seen that instead of sustaining the claim of the appellant the case of *Weller v. McCormick* not only justified the instruction of the Trial Court and its action in refusing to non-suit but is plenary authority for the submission of this case to the jury upon the showing made by the plaintiff and his witnesses.

In the case of *Tompkins v. North Hudson R. Co.*, 63 N. J. L., 322, the facts were that Tompkins, while passing along one of the streets in Hoboken in front of the stable of the North Hudson Railway Company, was struck by a bale of hay which was being unloaded from a wagon belonging to the defendant, Never. Never was a feedman, and his wagon, loaded with hay, was standing across the sidewalk backed up to within four or five feet of the stable of the North Hudson Railway Company, and bales of hay were being unloaded therefrom. The plaintiff, Tomp-

kins, assumed that the process of unloading would stop while he went by. He attempted to pass between the four or five feet from the stable to the wagon and while doing so was struck by one of the bales which had just then been thrown from the wagon by one of Never's drivers, who was engaged in unloading.

Judge Gummere, at page 323 of the *Tompkins* case, in writing the opinion, spoke as follows:

> "It seems to us that, whether the act of the plaintiff, in passing through this narrow way, knowing that the hay was being then unloaded upon the sidewalk from the wagon, was or was not one which a reasonably prudent man would have attempted, was, under the circumstances mentioned, a question of fact to be determined by the jury, rather than one of law to be determined by the Court; and that, therefore, the judgment of non-suit cannot be rested upon the ground upon which it was placed by the Trial Court."

In the case of *Tompkins* the question whether Never was negligent, was left to the jury, but in regard to the case against the railway company the Court said:

> "That there was a failure to show any neglect of duty owing by the abutting of the property owner, that is, the railway company, or any careless conduct by its contributing to his injury. It took no part in the unloading of the bale from the wagon and the carelessness of Never's employee cannot be attributed to the com-

pany, for, although it instructed him where to discharge the hay, it did not by so doing create the relationship of master and servant between them, nor make itself responsible for his acts in carrying out those instructions."

"Nor was there anything wrongful in the instructions themselves. The company had a right to have the wagon backed on the sidewalk temporarily for the purpose of discharging the hay. Every person occupying lands along the line of a public street has a right to obstruct the sidewalk in front thereof for a reasonable time in order to move heavy merchandise to or from his premises, provided he does so in such a way as not to interfere with its use by the public to a greater extent than is necessary for the purpose, and does not thereby become bound to furnish to the passerby a safe passage around the obstruction."

Welsh v. Wilson, 101 N. Y., 254.

It must be learned in this connection in the cases of *Welsh v. Wilson*, *Weller v. McCormick* and *Tompkins v. North Hudson Railway Company*, that these were all sidewalk cases, and the Courts have been very careful in restricting their decisions to the facts and circumstances of the particular instances of injuries arising from obstructions to the sidewalk. Upon the question of the contributory negligence of the decedent in attempting to pass through the space at which he was killed, we think the *Tompkins* case is ex-

tremely pertinent. We think that the same rule that was applied in the *Tompkins* case on the question of Tompkins' negligence in passing through the four or five feet of space from the stable to the hay truck was a question of fact for the jury rather than one of law to be determined by the Court, is decisive of the Trial Court's action in the present case, 62 N. J. L., page 324.

In the case of *Freedman v. Snare & Triest Co.*, 71 N. J. L., 610, the Court says, as stated in the appellant's brief, page 10:

> "That it is the undoubted right of landowners to deposit in the street building materials required in the improvement of their abutting property, although the public lawfully using the street may be, as in many cases they necessarily are, to some extent, incommoded thereby. Of course, the right is to be reasonably exercised, in view of the rights of the public, and is subject to regulation in the public interest."

Further on down the page, it adds:

> "That it is manifest that every deposit of building materials of the character now in question necessarily amounts to a temporary exclusion of the public from the space thus occupied. A reasonable interference with the public easement is rightful. If the public be unreasonably hindered or endangered, the party at fault may be required to remove the obstruction. And further, an individual member of the

public, if specially damnified by the nuisance while in the exercise of his rights in the street, may maintain a private action. But this refers only to parties injured while using the street as a street, and not to those whose injuries arise from their attempted use of the obstructing materials for their own purposes whether of pleasure, convenience, or profit."

POINT II

There was no error committed by the Trial Court in failing to direct a verdict since there was no doubt of the legal right of the Court to deny the motion at the close of the whole case.

The introduction of testimony by the defendant and the injection into the case of various issues of fact necessarily fortified the Court in refusing at the close of the case to direct a verdict on behalf of the defendant. From the testimony given on behalf of the defendant, the jury certainly could have found or inferred certain circumstances to be established which where necessarily involved in the solution of the question of defendant's liability. The jury might have found under the evidence: That on the morning of the day of the accident the intestate had given notice to an official of the defendant that he desired for the benefit of the defendant to get his auto past the rope which was being used to unload a drum. It was also permissible for the jury to draw the inference that the intestate, having called to the attention of defendant the

fact of his inability to perform the work which he was engaged to do for the defendant, by reason of the rope strung across the street, and his complaint whether remedial action taken by the defendant, was or was not of such a character as to justify him in relying upon the defendant for a continued safe passageway. The jury would also be justified in finding that decedent, at the time when he did drive through and was injured, properly assumed that the rope had not been restored, contrary to the complaint registered by him. It was also permissible to find that if a restoration of the rope had been made after the complaint by the plaintiff and an element of danger thereby added, it was reasonable and necessary that the defendant should give the testate warning of the dangerous new situation existing at the time the testate attempted to drive through. If the intestate was warned while he was 75 to 100 feet away from the rope by a signal by hand from the foreman standing in the street, or rather, as Dowd says, the warning and the crash were simultaneous, this warning certainly could not have been decided as a matter of law, but necessarily demanded submission to the jury. In the brief of the appellant, it is said in regard to Dowd's statement on line 23, page 15, "Dowd's statement that the crash came, an instant after he heard the shout of 'whoa! stop!' is his manner of explaining the space of time, and it could not be held that because of such testimony a jury could find that the shout and the crash were simultaneous." The jury had the opportunity of hearing Dowd testify and observing his demeanor on the stand, and the possibility he had of observing the facts

to which he testified, and it cannot be said as a matter of dogma, that because the astuteness of counsel conceives that a witness's testimony is inexact, thereby a jury question is eliminated.

In regard to the question as to whether the testate was clearly guilty of contributory negligence, (Appellant's Brief, page 16, line 20), it is evident that from a reading of the state of the case that the question of the defendant's guilt of contributory negligence is one to be decided by the jury. Reasonably prudent men might justifiably differ upon the facts as testified to by the plaintiff, and the defendant's witnesses, and different inferences could be drawn from these facts, and it is hard for any one to conceive a case which with more reason could be denominated a fact case than the situation presented by this appeal. The attention of this Court has been directed by the appellant to the case of *Matheke v. United States Express Company*, 92 Atlantic Reporter, 399. The pertinent portions of that opinion, as expressed by Judge Garrison, are as follows:

> "There is, however, a more fundamental error that runs through the case and is presented by the refusal of the District Court to charge the defendant's second request, *viz.*, that the driver of the wagon had the right to presume that the street was free from a scaffold suspended from the elevated structure. This request embodied a proper statement of the law, and ought to have been charged as correctly presenting the legal aspect of the case if the driver of the wagon did not see the

scaffold or know of its existence, which the jury must have found to be the fact if they accepted the statement of the driver, who testified that he did not see the scaffold, because he was looking at his horses, and that he did not look up because he was looking where he was going. *If, notwithstanding the driver's denial that he saw the scaffold, the jury had found that he did see it, a logical and perhaps a legal basis of negligence would have been laid*: but that question was not submitted to the jury; what was left to the jury was the failure of the driver to look for the scaffold, which admitted fact was treated both in the Trial Court and in the Supreme Court, as being a negligent act. *This assumes that it was the duty of the driver to look out, or rather to look up, for such an obstruction to travel as this suspended scaffold proved to be. The law, however, imposed no such duty upon the driver, who, as correctly stated in the request, had the right to presume that the street was free from a temporary obstruction in so unusual a place.* Of course, if the driver saw the obstruction or had knowledge of its existence, it was his duty to use reasonable care to avoid it, but if he did not see it or know of it, he was under no duty to look for something that he had the right to presume did not exist."

The correct rule is that stated by this Court in *Durant v. Palmer*, 29 N. J. L., 544, where, speaking of the public highway, it was said:

> "The traveling public have a right to suppose that there is no dangerous impediment or pitfall in any part of it without a light placed to give warning of it or a suitable railing to protect from it."

This was said of an open area in the surface of the highway, but the rule thus laid down applies to all interferences with the safety of travel on a highway arising from those temporary uses of it that are unusual in the sense that they are not the normal and permanent incidents of a highway. Permanent encroachments upon the highway, such as front door steps, hitching posts awning poles, and this elevated railroad structure itself, are incidents of the highway of which the traveling public must take notice; *but merely temporary obstructions to travel, such as an open area or coal chute, the piling up of building materials, a lowered arc light or a sign or an awning suspended so low as to impede travel, are matters as to which, in the absence of knowledge or of actual warning, the presumption is that no such obstruction to travel will be encountered.* Such a presumption is essential to the protection of the public, especially in congested centres of traffic and travel where rapidly moving cars and motors are to be encountered and, if possible, avoided to say nothing of the safeguarding of slower moving vehicles and pedestrians. These normal incidents of surface travel suffice to tax the skill of a driver, whose whole attention can be given to what is within his field of vision without adding to his duties that of making continuous investigations as to what is taking place over his head or what is taking place above the ordinary parallel of vision, since to a mathematical certainty his ability to give attention to what is before him, will

be diminished in exact ratio to the attention he gives to the making of such aerial observations. The basis of this salutary rule is the presumption that obtains in the cases to which it applies which was correctly stated in the defendant's request and ought to have been charged.

In the case of *Brady v. Erie Railroad Company,* 80 N. J. L., p. 473, Judge Gummere said (what we consider to be the true rule in regard to the traveling public), as follows:

> "Every person having occasion to use the public highway of the street is entitled to feel that he is absolutely safe while using ordinary care. In case an accident arises from obstructions, and no one has a right without special authority to obstruct a public highway or render its ordinary use dangerous, if he does so he would be a public nuisance, and for injuries directly resulting therefrom to travelers upon the highway he is legally accountable."

In the case of *Opdyke v. Public Service Railway Company,* 78 N. J. L., p. 576, this rule is emphasized by former Chancellor Pittney. In his opinion in the *Opdyke* case, on p. 583 of that opinion, he speaks as follows:

> "It is well settled that one who places an unauthorized obstruction within the limits of the highway is liable to an action at the suit of any person who is thereby specially damnified. Also if the obstruction or other nuisance may be without the limits of the travel of the highway."

Citing *Durand v. Palmer,* 5 Dutcher, 544, and approving it, the Court said:

"The street and every part of it by force of the common law is so far dedicated to the public that any obstruction that unnecessarily incommodes or impedes its lawful use by the public is a nuisance."

Temple Hall Association v. Giles, 4 Vroom., 460;
Meyers v. Birch, 4 Vroom., 238.

See also the case of *Harrison v. New York Bay Cemetary,* 77 N. J. L., 514 which states the pertinent rule as follows:

"Where an abutting owner places a hitching post in the highway his failure to use reasonable care that the highway thereby be not rendered unsafe makes himself liable for resulting injuries to the user of the highway."

In the case of *Sonn v. Erie Railroad Company,* 66 N. J. L., p. 428, the facts were as follows:

Emma Sonn was riding a bicycle along the Pompton Turnpike and while crossing the railroad of the New York and Greenwood Lake Branch of the Erie Railroad Company she was thrown from the bicycle and sustained personal injuries. Justice Collins, at page 430 of the Sonn opinion, says in the following language:

"That every person using the turnpike has the right to assume that the railroad bridge will be constructed and kept in such repair as to be good and safe for the safe passage of carriages, horses and cattle, and if that duty is not performed resultant damages are recoverable by anyone lawfully and carefully using the highway."

Gillespie v. Cummin, 33 Vroom., 370;
Morhart v. New Jersey Street Railway Company, 35 Vroom., 236.

In dealing with the question of Miss Sonn's contributory negligence it was claimed that as Miss Sonn sat on the front seat of the bicycle, if either she or her companion had looked carefully the defect in the bridge would have been seen as it was daylight, about half-past four o'clock, and the bicycle could have been stopped or so deflected as to go clear. The Supreme Court said in the *Sonn* case that a careful reading of the testimony of that case satisfied the Court that the question of contributory negligence in regard to what might have been seen had either Miss Sonn or her companion looked with care was rightfully left to the jury. Comparing the decision of the *Sonn* case with what Justice Gummere said as to the contributory negligence of Tompkins in the case of *Tompkins v. North Hudson Railway Co.*, 63 N. J. L., p. 322, it was the right of the jury to say whether the act of the decedent Rohan, in passing as he did at the time he was injured along Washington Street, was or was not the act which a reasonably prudent man would have attempted. Under all the circumstances, particularly in view of the dispute as to warning received by the decedent, there was presented a question of fact to be determined by the jury rather than one of law to be determined by the Court.

See also

Morhart v. New Jersey Street Railway Company, 35 Vroom, 236.

From these decisions of our Courts we think it unquestionably appears that the law in this state while expressly settled as to the right of abutting owners to temporarily use the sidewalk for the purpose of business, has not been extended so as to justify the propositions claimed by the appellant.

We respectfully insist that the contention of the appellant, as set forth in its brief, which attempts to read into our decisions a new doctrine concerning the right of abutting owners, is not supported by either the public policy or the spirit of our decisions relative to the use of public highways. The mere statement of the proposition that abutting owners who own property on both sides of a city street can by the mere fact of their ownership acquire a prospective and exclusive right to monopolize the street for their private use in violation of the paramount rights of the traveling public, emphasizes the untenable content of the appellant's position. It is respectfully insisted, first, that a careful inspection of the decisions of our Courts will indicate a substantial justification for the submission of the facts of the case at bar to the jury and manifest the propriety of the Trial Court's action in refusing to non-suit or direct a verdict. When the facts in any case are in substantial dispute and different inferences might fairly and justly be drawn from the established facts, the settlement of these facts is purely within the province of the jury, and no citation is necessary to substantiate the jury's exclusive prerogative. Since the law of the case was fairly and clearly stated by the Trial Court and the jury were justified, under the evidence, in finding a verdict for the plaintiff, we respectfully insist that no legal reason has been advanced by the appellant, nor do we believe that any matters suggested or argued by the appellant in its brief ought to actuate this Court in disturbing a verdict which was rendered by a jury in accordance with proper instructions from the Court.

ALEXANDER SIMPSON.
Attorney of and Counsel with
Appellant-Respondent.

ADDENDA

ROHAN,
vs.
AMERICAN SUGAR REFINING CO.

By reference to the brief of the appellant, the testimony cited by the Appellant, page 25, of its brief, it will be apparent that the decedent had asked the defendant's employees to slacken the rope and that this had been done and that the rope had been put back without notice to the decedent and as he came along he had a right to assume that his request had been complied with and this condition had not been altered, whereas, as a matter of fact during his absence the rope had been put back without his knowledge. Under these circumstances, his conduct, as far as contributory negligence is concerned was surely for the jury.

New Jersey Court of Errors and Appeals.

BRIDGET ROHAN, Administratrix, *ad prosequendum* of the Estate of Alexander Rohan, dec'd, *Plaintiff-Respondent,* *vs.* AMERICAN SUGAR REFINING COMPANY, a corporation, *Defendant-Appellant.*	At Law. On Appeal from Judgment of Supreme Court.

BRIEF FOR APPELLANT.

Statement.

This appeal brings before this Court a judgment of the New Jersey Supreme Court affirming a judgment of the Hudson County Circuit Court in the above entitled matter entered upon the verdict of a jury wherein the jury found for the plaintiff in the sum of $15,000. Defendant appealed to the New Jersey Supreme Court and that Court affirmed the judgment.

Physical Facts.

Washington Street in Jersey City runs approximately north and south—crossing various streets; the southerly end thereof abuts on the waterway leading from the Hudson River into what was intended to be the South Cove Grant to Jersey City made by the Legislature of the State of New Jersey. The Gap as it now exists is about two hundred (200) feet wide (p. 19). There is no bridge

over the gap and no vehicles can cross the same (p. 19) and the only way anyone can get from one side to the other is by rowboat (p. 50). The defendant owns or leases all the property on both sides of Washington Street from the Canal south to the Gap (p. 50) and there are no manufacturies or other places that require traffic except that of the defendant (p. 52) and no traffic south of the canal except to the plant of the defendant (p. 51), save in a few instances where pedestrians might desire to cross the Gap in the rowboat (p. 50). A railroad track is laid in Washington Street from the southerly side of the Canal, runs southerly on the west side of the street until about 200 feet north of the Gap where it comes to the east and runs approximately in the center of the street (p. 19).

Facts Relative to Accident.

On April 11th, 1918, defendant was removing some drums from a freight car which stood on the railroad track at a point where the track runs in the center of the street (p. 11); said drums were about 4 feet in diameter and about 20 feet in length (p. 12); about eleven or twelve had been already unloaded (p. 12). The unloading was done with a 3½″ rope (p. 21). This rope was fastened to the car, a turn taken around the drum and the rope then run from the car to an object (in this instance a drum) on the east side of the street. A tackle is then fastened to the rope, the rope pulled and the drum raised to the side of the car and on skids placed from the car to the street and then rolled down the skids to the street and then removed to the side of the street (pp. 12-32). At the car end the rope is about 8 or 9 feet high (p. 23); on the drum end (or end pulled on) the rope is about 4 feet high (p. 23). The rope when stretched from the car

to the drum on the easterly side of the street was plainly observable to anybody on the street (pp. 21-45). Each time a drum is unloaded the rope comes down (p. 19) or is slacked off (pp. 45-46), although the end fastened to the car remains there until the drums are all unloaded (p. 36). It would take about half an hour to unload a drum (p. 47).

Defendant had been unloading drums in this manner for at least two days before the day of the accident hereafter mentioned (p. 44).

Decedent was engaged in carting ashes from defendant's factory (p. 44) and had made from four to six trips a day (p. 44), while the drums were being unloaded, for at least two days prior to the day of the accident hereinafter mentioned (p. 44). He knew the method of unloading, having on the morning of the day of the accident, on a previous trip, hunted up Mr. White, plant engineer, and requested him to have the rope slackened (p. 48) so that he could get through. He could not get through if the rope was up (pp. 45-46) and would wait until the street was cleared, viz., the rope slacked off—and then go through (p. 45).

On the day in question, decedent early in the afternoon, came south on Washington Street, with his auto-cart, going at usual speed, and ran into the rope which was in position to unload a drum and was in use for that purpose. He was injured so that he died.

Plaintiff's Claim.

Plaintiff's allegation of negligence was that

> "the truck came in contact with an obstruction in the nature of a rope or cable which was stretched across the said street by said American Sugar Refining Company, without light or other warning or without a person in charge thereof to give warning of the pres-

ence of said rope or cable, which was stretched across said street illegally, and by reason thereof the intestate of the plaintiff received such injuries that he died."

DEFENDANT

denies the allegations of negligence alleged.

Evidence.

Plaintiff's evidence consisted of William Dowd who stated (p. 11) that he was employed by the defendant; that he was on Washington Street where they were unloading drums; about one third of the street was blocked with drums; he was taking some drums which had been unloaded to the boilers (p. 12); the drums were about four feet in diameter and twenty feet long and there were 11 or 12 in the street (p. 12); (he then describes the method of unloading the drums as above mentioned); he describes the happening of the accident thus:

While working west of the car removing some drums (p. 18) he heard somebody holler "Whoa, stop" and then in an instant heard a crash of glass (p. 14); ran out and found "a man fetched up against the rope with the automobile" (p. 15); the man was fastened under the hood with the rope (p. 15); the hood stretched down on his head—when he got to the truck a man named Garvey and Steve Sardowsky were there (p. 15); the brake was in good condition, the man had his foot on it; the men tried to push the auto but the brake was too tight (p. 16); the automobile had moved the rope at least six inches ahead when it hit it (p. 16); the man was taken out; Sardowsky asked the injured "what the hell was the matter with him, was he blind" (p. 17); when he heard the shout "whoa" he was about 30 or 40 feet away; he heard nothing before the shout, nor had he seen the auto.

On cross-examination he states that he was on the west side of the street behind the freight car (p. 19); the first thing that attracted his attention was somebody hollering "whoa, stop" and an instant later heard a crash of glass (p. 20); and then he ran out and saw the auto facing the gap up against the rope, crushed up against it (p. 20); that the space between the car and the drums was sufficient to permit the passage of the auto and leave three feet on each side (p. 21); that the rope was in plain sight of anybody on the street (p. 21); it was daylight, the rope was 3½" in diameter; the rope at the top of the car was between 8 and 9 feet high (p. 23) and ran down towards the drum where it was four feet (p. 23).

Bridget Rohan, widow, states (p. 24) that she is 41 years of age, has seven children—18, 16, 12, 9, 7, 3, supported by decedent (p. 25); decedent gave her $40.00 per week and paid $25.00 per month rent (p. 25).

John F. McCormick, step-son of decedent states that he taught decedent to run the auto and he was capable of running it (p. 28); that it was governed at 10 miles an hour and could go no faster; knows all the pavement on Washington Street; the truck could not go over 5 or 6 miles an hour on such pavement; it was fairly noisy; pretty noisy on that pavement (p. 53).

Defendant produced several witnesses.

Steve Sardowsky states that he worked for defendant and was unloading the drums (p. 32) and describes the method of unloading; he had seen the decedent running the auto around the scene of the accident many times while they were unloading drums (p. 33); witness was on the east side of the street, pulling on the tackle, saw the auto coming, ran out and raised up his hand and hollered "Whoa, stop," the auto then

being from 75 to 100 feet from the rope; hollered more than once (p. 34); he ran right out to the middle of the street and then when the auto came on he moved out of its path (p. 34); the man did nothing, nor apparently did anything toward stopping but came on and hit the rope (p. 34); witness hollered to the man, "What is the matter with you? Are you blind running into the rope?" (p. 34); he called witness Dowd, and he came right in with his men (p. 35); when he hollered the auto came on at regular speed.

On cross-examination he said: The space between the car and the drums was sufficient for the auto to pass and leave six feet clear (pp. 37-42); that when he saw the auto coming he went out and hollered, "Whoa, stop" at least three times and stood right in the middle of the street (pp. 38-39), only moved when the auto was about to hit him (p. 38); the auto came at regular speed, maybe ten miles an hour, but he can't say just how fast; the auto made no noise as it came along (p. 41); the rope was about 8 feet from the ground where it hit the hood (p. 41).

J. W. White states (p. 44) he is assistant chief engineer of defendant; decedent was engaged in carting ashes from the factory; he had been coming there for at least two days before the day of the accident while they were unloading drums (p. 44); he made from four to six trips a day (p. 44); the rope used in unloading was plainly observable to anyone in the street; as each drum was lowered the rope was slacked off (p. 45).

On cross-examination he states (p. 45) that the auto could not go under the rope when it was tight (p. 45); when the rope was slacked it was taken completely off the street; if the rope was up and decedent wanted to get by he waited

until the street was cleared and then he would go through (p. 45).

On re-direct examination he said that on the morning of the accident, decedent waited until the rope was slacked off (p. 47) having hunted up witness and asked him to have the rope slacked so he could get through (p. 47); this was on a previous trip; it would take about half an hour to unload a drum (p. 47).

On re-cross examination, he stated that there was no red flag out; that the foreman was in charge of the work and would see to warning people if any came along (p. 48); no one was there whose sole duty it was to warn people (p. 48); that the morning of the accident when decedent came to him to have the rope slacked it was before noon, about the middle of the morning; that decedent waited about 15 or 20 minutes until the rope could be slacked off (p. 49); that there is no traffic on Washington Street south of the canal, except by people coming to and from defendant's property; wagons could not get over the Gap (p. 50).

On re-cross he states there is a rowboat ferry across the Gap which pedestrians take (p. 51).

ARGUMENT.

POINT I.

A nonsuit should have been granted by the Trial Court upon the ground that no negligence upon the part of defendant appeared and the Supreme Court erred in affirming the refusal of the Hudson County Circuit Court so to do.

At the close of the plaintiff's case the evidence showed clearly that defendant owned all the lands on each side of Washington Street from a point

some distance north of the scene of the accident to the Gap, a considerable distance to the south thereof (pp. 11-18); that it was, on the day of the accident, unloading merchandise (drums for its engines or boilers) from a freight car standing on railroads tracks on the westerly side of the street near the curb, the drums being unloaded from the easterly side of the car by being raised to the top of the car by means of a rope and then lowered down skids from the car to the street (p. 19); the rope being fastened to the car, then passed around the drum and fastened to an object (in this instance a drum) standing on the easterly side of the street (p. 19); a tackle is then fastened to the rope and the rope, by means thereof, pulled until the drum is raised to the top of the car and the drum lowered down the skids to the street (p. 19); after a drum was thus lowered the rope comes down with it (p. 19); it was not stationary (p. 14), and when they want to lower another drum the rope is placed in position again (p. 19); that at the time of the accident the men were unloading a drum (pp. 19-20); that at the car end the rope was 8 or 9 feet high (p. 23) and at the other end about 4 feet high (p. 23); that the rope was 3½" in diameter (pp. 13-22); it was daylight and clear (p. 23) and the rope was in plain sight of anyone on the street not hidden from it (p. 22); that decedent ran his auto into the rope at a speed which caused the uprights holding up the hood over the driver's seat to bend inward and injure him.

We insist that under the evidence at the close of plaintiff's case there should have been a nonsuit.

Subdividing plaintiff's allegations of negligence we find that his first subdivision is

(a) that the rope was illegally stretched across the street.

Defendant had a legal right to temporarily use a portion of the street for the purpose of unloading merchandise.

Defendant as abutting owner possessed the title to the fee of Washington Street, subject only to the easement of the public, and while it may be true that the easement of the public is paramount, yet for all purposes not inconsistent with the right of the public defendant is entitled to use the street.

> **"It had the right as abutting owner to temporarily use the street for the purpose of loading and unloading merchandise, although in so doing it may (likewise temporarily) obstruct the passage of vehicles and pedestrians along the street or sidewalk."**
>
> Elliott on Roads and Streets, Sec. 880, Note 39; Sec. 831, Note 31, and cases cited.
>
> Joyce on Nuisances, Sec. 223, etc.

In *Welsh v. Wilson,* 101 N. Y., 254, the Court said:

> "The defendant had the right to place the skids across the sidewalk temporarily, for the purpose of removing the cases of merchandise. Every one doing business along a street in a populous city must have such a right to be exercised in a reasonable manner, so as not to unnecessarily incumber and obstruct the sidewalk."

In *John A. Tolman & Co. v. City of Chicago,* 240 Ill., 268, the Supreme Court of Illinois said:

> "The delivery of merchandise, fuel or other supplies at business and other houses on a street is a necessary incident to the use of a pulic highway. The streets of a city would be of a comparatively little use if merchants could not deposit their goods in them temporarily in their transit to the storehouse. A merchant may use and temporarily ob-

struct the street and sidewalk in front of his premises for loading and unloading goods when not restrained by ordinance, if he does not unnecessarily or unreasonably interfere with their use by the traveling public."

In *Weller v. McCormick,* 52 N. J. L., 470, at page 471, the Court said:

"He (abutting owner) may use the highway in front of his premises, when not restricted by positive enactment, for loading and unloading goods, etc., etc."

In *Halsey v. Rapid Transit Railway Co.,* 47 N. J. Eq., 380, the Court cites the above excerpt from the Weller case with approval.

In *Tompkins v. North Hudson R. Co.,* 63 N. J. L., 322, the Court held:

"Every person occupying lands abutting upon a public street has a right to obstruct the sidewalk in front thereof for a reasonable time in order to move heavy merchandise to or from his premises, provided he does so in such a way as not to interfere with its use by the public to a greater extent than is necessary for the purpose, and does not thereby become bound to furnish to the passerby a safe passage around the obstruction."

In *Friedman v. Snare & Triest Co.,* 71 N. J. L., 605, the Court said:

"It is the undoubted right of land owners to deposit in the street building materials required in the improvement of their abutting properties, although the public lawfully using the street may be, as in many cases they necessarily are, to some extent, inconvenienced thereby."

Of course, the right must be reasonably exercised in view of the rights of the public (*Friedman v. Snare & Triest Co.,* supra).

The only facts proved were that defendant had *temporarily* stretched the rope across a

portion of the street from the railroad car to the drums; that as each drum was unloaded the rope was slacked *and the street cleared,* the unloading of a drum consuming from twenty minutes to half an hour; that such rope was used in unloading merchandise for defendant *and was being used for such purpose at the time of the accident.*

Error of Supreme Court.

The New Jersey Supreme Court in its opinion (~~copy of which is annexed hereto~~ SEE PRINTED CASE) was in error in assuming that the defendant occupied "the whole of the roadway of the street for something like three days." Defendant did not do so. It is true that defendant had been unloading drums for three days, but the testimony shows that as each drum was unloaded, the rope was taken down and the street left clear so that any vehicles which might be there desiring to pass could do so. No vehicles save those doing business with defendant passed that way. It took twenty minutes to a half hour to unload a drum. Defendant occupied a portion of the street for a portion of the time each day while unloading drums. It did not occupy the whole of the roadway for three days.

But however this may be there was no question raised as to the reasonableness of the exercise of such right *relative to the time* consumed in unloading nor as *to the time of day* the unloading was performed, nor was there any allegation that defendant permitted the rope to remain in position *too long.* The *allegation* was that it *was stretched across the street illegally.*

We insist defendant had a legal right to temporarily use the street for the purpose of unloading these drums.

The next subdivisions of plaintiff's claim of the negligence of defendant really constitute one allegation of negligence:

(b) that there was no *light* on the rope;

(c) that there was no *other warning* on the rope;

(d) that there was no person in charge thereof to give warning of the presence of the rope.

In other words he charges negligence in *the failure to give warning of the presence of the rope.*

A sufficient answer to the charge of negligence in failing to have a *light* on the rope is found in the fact that *it was broad daylight* at the time of the accident.

As to the charges that there was no other warning on the rope, nor any person in charge thereof to give warning of the presence of the rope, it appears from the testimony that the rope was 3½ inches in diameter and was so placed that at the car end it was 8 or 9 feet above the street, and at the end in the street was about 4 feet above the street. It was in plain sight. It was in such a position that a man in an automobile in any manner observant, *could not fail to see it.* Defendant had a right to rely upon decedent using his powers of observation which would disclose to him the presence of the rope. The men were working there in plain sight pulling on the tackle which in turn pulled the rope; the freight or coal car was there; some drums were on the street; all of which tended to put decedent on his guard that work was being done at this point; it was daylight; the rope was in plain sight. The obstruction was plainly visible. No warning was necessary. Further,

Defendant was under no obligation to furnish decedent a safe passageway around the obstruction.

In *Welsh v. Wilson,* supra, the Court said:

"The defendant was under no obligation

to furnish her a safe passageway around the obstruction—"

and cites

People v. Cunningham, 1 Denio, 530;
Conn. v. Passmore, 1 Serg. & R., 219;
People v. Horton, 64 N. Y., 610.

In *Tompkins v. North Hudson Ry. Co.,* supra, the Court of Errors and Appeals said:

"Every person occupying lands along the line of a public street has a right to obstruct the sidewalk in front thereof for a reasonable time in order to move heavy merchandise to or from his premises, provided he does so in such a way as not to interfere with its use by the public to a greater extent than is necessary for the purpose, *and does not thereby become bound to furnish to the passer-by a safe passage around the obstruction,*"

citing

Welsh v. Wilson, supra. (Skids placed across the sidewalk.)

The unloading of the goods was necessary to the business of defendant; the method of unloading was usual; no warning to decedent of the presence of the rope was necessary; the rope was in plain sight; it was only temporarily used. Defendant had a right thus to obstruct the street. The only negligence was that of the decedent.

POINT II.

The trial court should have directed a verdict for the defendant, and the supreme court erred in affirming the refusal of the trial court so to do.

(a) There was no negligence on the part of defendant.

Upon the refusal of the Court to non-suit defendant offered evidence establishing that decedent

had been carting ashes from the plant of defendant in an auto for some days previous to the accident, and for at least two days prior thereto had been to the plant from four to six times a day while they were unloading drums (p. 44) having passed there many times (p. 41), and had, on the morning of the day of the accident hunted up Mr. White, assistant chief engineer of defendant, and requested him to have the rope slacked off (while it was being used to unload a drum) so that he could get his auto-truck through (p. 46) as he could not pass while the rope was being used to unload a drum (p. 46); that when decedent wanted to pass, if the rope was being used, he waited until the rope was taken down or slacked off (p. 46); that no wagons or vehicles go there (p. 51) except such as go to or from the defendant's plant (p. 50); that it takes about half an hour to unload a drum (p. 49); that the foreman in charge of unloading saw decedent approaching at regular speed while they were unloading a drum, and ran out into the street *in front of his auto-truck,* raised up his hand and hollered, "Whoa, stop" to him at least *three times* while he was still from 75 to 100 feet away, but decedent came right on until he hit the rope (p. 40); it further appeared that decedent's truck could not go faster than five or six miles per hour over such a pavement as was laid at this point; that the brakes were good; only vehicles having business at defendant's plant used this portion of the street.

It thus appears, undisputed, that the street at the point of the accident was used by vehicles which came to and from the plant of defendant, *and by no others.* That defendant had been unloading drums for use in its plant for some days; that decedent, to defendant's knowledge, knew this and also the manner of unloading; that decedent knew he could not get through with his auto-truck

while a drum was being unloaded, and on the day of the accident knew unloading was going on, as he had *on the previous trip* asked that the rope be slacked for him to get through; that the rope was plainly visible to anyone on the street, being a 3½ inch rope.

No warning to decedent, under such circumstances, was necessary, but if warning was needed, we find that in addition to the above facts of which decedent had knowledge, decedent was given warning while still from 75 to 100 feet away from the rope by signal by hand from the foreman standing in the street, and by loud yells and calls to "stop".

Plaintiff may argue that, because the witness Dowd states that he heard a cry of "Whoa, stop" and then an instant later, a crash, the warning and the crash were simultaneous, but such an argument is fallacious. Dowd did not see the auto-truck *at any time before the accident;* he was at work behind the freight car removing some drums and his attention was on his work; he heard a shout of "whoa, stop" but inasmuch as the foreman says he called at least *three times* it undoubtedly was the *last shout* that Dowd heard, and his statement that the crash came *an instant* later does not in any way detract from the testimony of the foreman that the auto truck was from 75 to 100 feet from the rope when he ran out in front of the auto truck and shouted to the driver to stop. Dowd's statement that the crash came *an instant* after he heard the shout of "whoa, stop" is *his manner of expressing a space of time* and it cannot be held that, because of such testimony, a jury could find that the shout and the crash were simultaneous.

Nor could negligence be predicated upon the failure to warn sooner. It further appeared that the foreman of the men unloading had charge of

warning traffic if any was needed; that no vehicles ever came there except such as had business with defendant; that the foreman had seen the auto-truck coming there many times while he was unloading drums (p. 33); that decedent made from four to six trips a day; that on the morning of the accident, and on the trip previous to the one on which decedent was injured, decedent had asked that the rope be slackened so he could get through with his truck. Defendant had a right to rely upon decedent's knowledge of the facts and conditions existing and the foreman had a right under the circumstances to presume that decedent would bring his auto-truck to a stop before striking the rope, and no inference of negligence can be made from the fact that the foreman waited until the auto-truck was 75 or 100 feet away from the rope before he signalled and called to decedent to stop.

There was no dispute of these facts above set forth, and we submit no inference of negligence therefrom could be drawn and the Court should have directed a verdict for defendant for want of evidence from which negligence could be inferred.

(b) Decedent was clearly guilty of contributory negligence.

We have shown that decedent had been engaged in carting ashes from defendant's plant for some time prior to the day of the accident, making from four to six trips a day; that he had done this for at least two days previous to the accident while defendant was unloading drums by means of the rope with which he came into contact and in the same manner as was in use at the time of the accident; that he knew his auto-truck could not pass through while the rope was in use; and generally waited until the street was cleared (p. 45); that the very trip previous to the

accident he had hunted up the assistant engineer and requested that the rope, which was being used to unload a drum, be slacked for him to pass through; that the car with drums on it was on the track at the time of the accident; that the rope was 3½ inches in diameter, and at the end fastened to the car was 8 or 9 feet from the ground and at the end fastened to the drum was four feet from the ground; that it was plainly visible to anyone on the street as it was daylight and clear, and the rope must have been almost on a level with his eyes, for one seated on the driver's seat of the ordinary auto-truck would have his eyes about 8 or 9 feet from the ground; that the men were working on the street in plain sight; that his truck could not go over 5 to 6 miles an hour over the pavement on Washington Street; that the brakes were in good condition; that in addition to the above facts he was warned by the foreman who called, "Whoa, stop" to him, while standing in front of his auto-truck while it was from 75 to 100 feet from the rope; that he struck the rope with sufficient force to push it out at least 6 inches from the straight line.

With his knowledge of the unloading of the drums by means of the rope, and the method of stretching the rope from the car to the easterly side of the street as each drum is unloaded; that he could not get through if the rope was being used in unloading drums, and having on that very morning observed them unloading drums, it was his duty to approach the place of unloading with care and to have his auto-truck under such control as to be able to stop the same before coming into contact with a rope which he had reason to believe might be stretched across his path, which was plainly visible to him, and which by the exercise of ordinary care he could have easily observed. The presence of the car with

drums on it, the men working in the street hauling on the rope, were also calculated to apprise him of the fact that drums were being unloaded. With his knowledge of the situation it was his duty to use reasonable care to avoid hitting the rope (*Mathieke v. U. S. Express Co.*, 92 At. Rep., 399) and the fact that he was familiar with the operation of his auto-truck, that his brakes were good, that his car could not go, on this pavement, over 5 or 6 miles per hour and that he, therefore, could have stopped it in a few feet, that he was warned while still 75 to 100 feet distant from the rope, and yet ran into the plainly visible rope at such speed as to push it out of line at least six inches, establishes, beyond dispute, his negligence and leaves no question upon which the minds of reasonable men could differ, and the Court, therefore, should have directed a verdict for defendant.

The cases setting up the doctrine that a traveler may assume the street to be unobstructed and reasonably safe for travel, have no bearing on this case and we do not dispute the doctrine. *In this case decedent knew of the obstruction and that his auto-truck would not pass it.*

So the cases of *Durant v. Palmer,* 29 N. J. L., 544; *Houston v. Traphagen,* 47 N. J. L., 24, and subsequent cases are not applicable.

The case of *Morhart v. North Jersey Street Railway Company,* 64 N. J. L., 236, is easily distinguishable. Defendant therein was not an abutting owner, nor a merchant with a place of business on the street, loading and unloading merchandise necessary to his business nor possessed of the rights of such a person. In that case the railway company had laid a hose from a water hydrant on the curb along the street to its car in order to fill the same with water; there

was evidence that the hose became covered with the dust of the road so as not to be readily distinguishable from the road and might not be perceived by a rider on a bicycle until too late to avoid it even though using due care to observe—and the only evidence of warning was evidence that the motorman, when plaintiff was *near* the car, called to him, "Hey, look out for this hose here." But in the case *sub judice* decedent *knew that drums were being unloaded by means of the rope, which, when in use, was stretched across his path about 8 or 9 feet high at the car end and about 4 feet high at the other; and he knew he could not pass with his truck when the rope was in use; the men were working in plain sight; the rope was plainly visible; he was going only 5 or 6 miles per hour; his brakes were good; he was warned when from 75 to 100 feet away from the rope.*

The case of *Matheke v. U. S. Express Co.*, 92 At. Rep., 399, is also distinguishable upon the same grounds. In that case plaintiffs were standing on a scaffold attached to an elevated railroad over a street; defendant drove a wagon under the scaffold raising some of the boards of the scaffold and injuring plaintiff. The Court of Errors and Appeals said:

> "Of course, if the driver saw the obstruction (the scaffold) or had knowledge of its existence, it was his duty to use reasonable care to avoid it, but if he did not see it or know of it, he was under no duty to look for something that he had the right to presume did not exist."

The Court, therefore, plainly states that if (as appears in the case *sub judice*) the driver had knowledge of the existence of the scaffold, it was his duty to use reasonable care to avoid it, and the fact that in this case decedent (who had such

knowledge) hit the rope with such force as to bend the iron uprights supporting the hood of the auto-truck, causing the hood to bend downward and inward, establishes his failure to perform this duty.

The argument that the rope having been slacked to permit decedent to pass through on the trip in the morning (as testified to by Mr. White, p. 47) he had a right to assume that *the rope would remain down,* we submit is specious and entitled to no consideration. Decedent knew that drums were being unloaded; he knew all of them had not been unloaded; he knew the method employed, to wit, the stretching of the rope from the car to the drum on the easterly side of the street; he knew he could not get through if the rope was in use, and it was his duty, therefore, to assume the rope might be in use and his progress barred and he was bound to approach the place with due care and caution and with his auto-truck under such control as to be able to stop the same almost instantly.

Error of Supreme Court.

In this regard we call attention to that part of the opinion of the Supreme Court relative to the contributory negligence of decedent, where it says:

> "Whether the decedent was negligent, or not, depended upon whether he used reasonable care for his own safety. He had been at work at this place for some time hauling ashes and there was evidence to show that whenever he came to the place where the rope was stretched across the street the employes of the defendant company lowered it in order to enable him to pass by in safety. This being so it was for the jury to say whether he had a right to assume that when his truck drew near to the obstacle the same course

of conduct would be followed; and whether, in so assuming he acted as a reasonably prudent man would have done under the same conditions."

Had the testimony justified the statement in the opinion of the Supreme Court that "there was evidence to show that whenever he (deceased) came to the place where the rope was stretched across the street the employes of the defendant company lowered it in order to enable him to pass in safety," we would find no fault with the conclusion of the Court that "This being so it was for the jury to say whether he had a right to assume that when his truck drew near to the obstacle the same course of conduct would be followed," but the Supreme Court was in error in assuming the testimony justified such a statement. The testimony referred to was that of Mr. White whose testimony was the only testimony on the subject and is so short that we set out all of it on this point (p. 44):

"Q. Do you know the place where they were unloading the drums on Washington Street? A. Yes.

"Q. And had you ever seen Mr. Rohan coming along Washington Street at any time while they were unloading there? A. I had.

"Q. Within two or three days? And do you know how long he had been coming while you were unloading drums? A. At least two days before.

"Q. And how many times a day did you know him to come there to take these ashes? A. Between four and six trips.

"Q. Between four and six trips? A. Yes, sir * * * (p. 44).

"Q. Did you see him go under the rope when it was tight? You saw his machine go under the rope when it was tight? A. It could go under the rope when it was tight.

"THE COURT: It could or could not?

"THE WITNESS: It could not.

"Q. How do you mean it slacked off, the rope was put down on the ground? A. Taken completely off the street.

"Q. Well, how taken off the street? A. The end that was loose was simply pulled over to the other side and left in the car.

"Q. That is, it was carried away? A. Yes, sir.

"Q. And when it was cleared away there was no rope at all across the street? A. There was not.

"Q. Well, how could he get by if the machine would not go under the rope? A. He waited until the street was cleared by my orders.

"Q. Then he would go through? A. Then he would go through.

"Q. When the rope was all taken off and put in the car he would go through? A. He would go through.

"Q. That is the time you saw him going through that you describe? A. The rope was not in position when he went through.

"Q. That is what I want to know. When he went through—you said he could not go under the rope. Well, how did he get through then? A. Because I slacked the rope off so that he could get through.

"Q. It was clear? A. It was clear.

"Q. And how many times did you do that? A. At least once.

"Q. When was that? A. That was in the morning.

"Q. Well, when did you see him go through the other time besides the once? You said you saw him there for two days? A. The previous day.

"Q. Well, how did he get through then? A. Because there was no rope there.

"Q. No rope there. Then you never saw him pass the freight car when the rope was across the street? A. It would be impossible for him.

"Q. You never saw him do that? A. I did not.

"MR. SIMPSON: That is all.

"RE-DIRECT EXAMINATION BY MR. SMITH:

"Q. He could not do it? A. No.

"Q. Now, had you given him orders not to attempt to go through there while they were unloading—

"MR. SIMPSON: I object to that.

"Q. Well, what did you mean a little while ago, Mr. White, when you said by your instructions he did not attempt to go through there when the rope was there? A. Because I was in charge of the gang. I was in charge of Steve and it was my orders—

"MR. SIMPSON: I object to what his orders were.

"Q. I only want to know whether or not you spoke to Mr. Rohan about it? A. I had in the morning, because he hunted for me to have the rope slacked.

"Q. And what did you say to him then? A. I told him that I would go out and see if I could do it.

"Q. Did you say anything to him about waiting until they slacked off the rope? A. I simply told him—he could not get through until I did slack the rope; so it was totally unnecessary to say that.

"Q. And was that the day before you spoke to him or the same morning? A. That was that morning.

"Q. The morning he was hurt? A. Yes, sir.

"Q. On a previous trip? A. That was on a previous trip.

"Q. And do you know about how long it would take to unload a drum? A. About how long?

"Q. Yes. A. Why, it would take about half an hour to pull it out.

"Q. To unload a drum. And these drums were for use in the factory, weren't they? A. Yes.

"Q. Had come in on the freight trains? A. They were unloaded in coal cars.

"MR. SMITH: I think that is all.

"RE-CROSS EXAMINATION BY MR. SIMPSON:

"Q. You were in charge of this job, were you? A. I was.

"Q. Were you there when the man was hurt? A. I was not.

"Q. Where were you? A. I was out to lunch.

"Q. Did you have anybody there with a red flag to warn any of the traffic going up and down Washington Street? A. I did not.

"Q. You did not have anybody whose particular and sole business it was to warn pedestrians and traffic? A. The foreman was in charge of that.

"Q. Did you have anybody else there who had nothing else to do but warn anybody? A. No.

"Q. Now, what was this conversation you had with this dead man in the morning? A. He came looking for me—

"Q. What time? A. I could not say what time; it was in the morning; it was before dinner.

"Q. Where did he find you? A. Somewhere in the refinery.

"Q. And what did he ask you? A. He asked me to have the rope slacked.

"Q. What do you mean? How do you slack the rope? A. Let go one end of it.

"Q. Did you do it? A. I did just as soon as the drum was in position where I could do it safely.

"Q. What time was that? A. Before noon.

"Q. Shortly before noon, wasn't it? A. I don't remember.

"Q. Oh, you remember. You mean to tell this jury you do not remember when it was that this man asked you to have the rope taken down? A. It was before noon.

"Q. How long before noon? Was it a half hour or was it two days?

"MR. SMITH: I object if your Honor please, because the question is absurd.

"MR. SIMPSON: Well, this man knows how long it was.

"Q. Was it ten minutes before noon? A. It was about the middle of the morning.

"Q. And you had it taken down? A. I had it slacked down when the drum was in position where it could be done safely.

"Q. You had it done? A. I had it done.

"Q. How long after he asked you? A. About fifteen or twenty minutes.

"Q. And you did not see the scene—the place again until he was hurt, did you? A. I did, yes.

"Q. When? A. About twelve o'clock.

"Q. Did you see him after you had the rope slackened up to the time he was hurt? A. No, I did not.

"Q. You didn't tell him the rope was put back, did you? A. No, I did not.

"Q You didn't have any of your men—you did not tell any of your men: "Look out, I have had this rope taken down for this man. He may be back again. See that he is told I had the rope put up again," did you? A. No, I did not.

"MR. SIMPSON: That is all.

"By Mr. Smith:

"Q. As I understand, you cannot tell the exact time that Mr. Rohan came to you that morning, can you? A. No.

"Q. How many trips did he usually make in the morning?

"MR. SIMPSON: I object to that as irrelevant and incompetent—how many he usually made. It is not proper redirect.

"Q. How many did he make the day before?

"MR. SIMPSON: I object to that unless this man has personal knowledge of it and saw it.

"THE COURT: Of course, that presumption always goes with it, Mr. White. You are only to tell of that which you know yourself, that you have personal knowledge of. I think then the question by adding 'to your personal knowledge,' may be answered.

"THE WITNESS: I could not give the exact number of trips because I am not familiar, I am not in charge, and there is no record kept of the number of trips that those men make but they always average over four and up to six trips.

"Q. I see, and that is a day? A. That is per day.

"Q. Four to six per day."

It will thus be seen that the testimony of Mr. White shows that during the two or three days previous to the accident, witness had seen decedent coming along Washington Street while they were unloading drums (p. 44) and that his machine could not get through while the rope was up (p. 46), and that when deceased came there and the rope was up *he waited until the street was cleared and the rope taken off and then he would go through* (p. 45); that on the morning of the accident deceased (evidently having to wait and being in a hurry) hunted up Mr. White and *asked him to have the rope slacked off so he could get through* (p. 47); that it took about half an hour to unload a drum (p. 47).

There was *no testimony* in the case to effect that whenever he came to the place where the rope was stretched it was lowered to permit him to pass in safety, nor testimony to justify such an inference and the very fact that deceased on the trip previous to the one on which he was injured *hunted up Mr. White and asked him to have the rope slacked shows beyond question that it was not customarily lowered whenever deceased approached with his automobile.*

The argument that decedent's attention might have been concentrated upon the driving of his truck between the railroad car and the drums on the side of the street, and, therefore, distracted

from the rope is ineffective, for by the testimony, it appears that there was at least six feet of clear space (three feet on each side of his auto-truck) in addition to the space occupied by his auto-truck. Not only is this so but the rope was so large in diameter and at just the height above the ground as to be almost in front of his eyes as he sat on the driver's seat of his auto-truck, that, with his duty to expect the presence thereof, he could not have avoided seeeing it had he looked.

Again, argument may be made that the only warning decedent received was the single shout, "Whoa, stop" heard by the witness Dowd, and that inasmuch as the witness testifies that he heard the crash an instant later, that the warning was given him too late for him to stop his car before striking the rope. This argument assumes that decedent was entitled to a warning which we insist he was not because of his knowledge of the unloading of the drums and the method employed. But even if entitled to a warning, we submit the evidence plainly shows he was warned in time to stop. If his truck could only go five or six miles per hour and he was given warning by a man standing in the street in front of him and holding up his hand (which is the signal to stop as applied to automobiles) and who shouted to him "Whoa, stop" when he was from 75 to 100 feet away (repeating the same at least three times), and his brakes were in good condition, there can be no reason in the world why he should not have stopped hs auto-truck before coming into contact with the rope. Argument that he might not have understood the *words* cannot avail, for surely no one can misunderstand the meaning of a *stop signal* given to an automobile driver by a man standing in the street in front of his automobile.

Under the circumstances of this case we can account for the accident only by assuming the deced-

ent to have been an extremely careless and reckless driver, or that he was either asleep or in such condition as to be incapable of carefully driving his auto-truck in the public streets.

We respectfully submit therefore that the Supreme Court erred in affirming the judgment of the Hudson Circuit Court, and that the judgment of the Supreme Court should be reversed, the verdict of the jury set aside and a new trial granted.

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