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The Central Railroad Company of New Jersey

CLAIM DEPARTMENT

No. B488

JERSEY CITY, N. J. September 11, 1917

Pay to the order of William A. Fagan

Eighty-five Dollars, $ 85 00/100

NOT VALID IF DRAWN TO "CASH" OR "BEARER" OR IN FAVOR OF A MEMBER OF THIS DEPARTMENT, OR FOR AN AMOUNT IN EXCESS OF FIVE HUNDRED DOLLARS ($500), OR AFTER SIXTY DAYS FROM DATE, UNLESS THE TIME LIMIT IS EXTENDED IN WRITING BY THE CLAIMS ATTORNEY.

SETTLED.

REGISTERED No. 6403 CONTROLLER

TO TREASURER OF
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY
143 Liberty Street, New York, N. Y.

COLLECT THROUGH
THE COAL AND IRON NATIONAL BANK
IN THE CITY OF NEW YORK

William W. Gidde
SPECIAL CLAIM AGENT.
~~DISTRICT CLAIM AGENT.~~

Exhibit D-5(a) Growth

Exhibit D-5 (a) (front)

B

Exhibit LO-3 (Back)

State of New Jersey
County of Hudson } s.s.

On this 11th. day of September in the year 1917
before me personally appeared William A. Fagan,
to me known and known to me to be the person described in and who executed the foregoing
instrument, and he acknowledged that he executed the same for the uses and
purposes therein set forth.

William W. Fiddes
Comm'r of Deeds For N.J.
Comm. Expires May 1, 1918

State of
County of } s.s.

being duly sworn according to law deposes
and says: I am of full age and of nationality the same as
I understand and speak both the
and English languages. I have interpreted the release on the opposite side of this paper to
the said to full understanding and
signed the same with full knowledge of its contents and effect.

Subscribed and sworn to before me
this day of 19

(Interpreter)

(Address)

COMPTROLLER'S OFFICE
SEP 14 1917
CHIEF CLERK

W-3 (Back of)

Exhibit D-4

September 19th, 19

File No.6004.

Mr. Wm. A. Fagan,
1514 Asbury Ave.,
Asbury Park, N.J.

Dear Sir:-

Enclosed herewith please find transportation from Asbury Park to New York and return for yourself. I have referred your letter of the 17th inst. to Superintendent Stein, and presume you will receive transportation for Mrs. Fagan in a short time.

Very truly yours,

Special Claim Agent.

WWG:N.

Copy to Mr. Stein:- The letter referred to above attach heretow

Ex D4
10/30/19 K.

B

Exhibit D-3 (Front)

Form 15 LAW

Ex D3 K.

10/30/19

10-16-2,000

File No. 6004

Employee.
Classification

Know all Men by these Presents, That I, William A. Fagan, 1514 Asbury Avenue

of the City of Asbury Park in the County of Monmouth and State of New Jersey for and in consideration of the sum of Eighty-five ($85 00/100) Dollars,

lawful money of the United States of America to me in hand paid by The Central Railroad Company of New Jersey, the receipt whereof is hereby acknowledged, have REMISED, RELEASED AND FOREVER DISCHARGED, and by these presents do for myself, my heirs, executors and administrators, REMISE, RELEASE AND FOREVER DISCHARGE, the said THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, ------- its successors and assigns, of and from all claims and demands whatsoever, which against the said Company I ever had, now have, or which my heirs, executors or administrators hereafter may have by reason of any matter, cause, or thing whatsoever, from the beginning of the world to the date of these presents, and particularly, but without limitation of the foregoing general terms, by reason of personal injuries received while employed as a laborer, by said Company, at Pier 11, North River, New York, New York, on or about August 6, A. D. 1917.

I, Have read the above & understand it

Dated this 11th day of September 1917.

Signed, sealed and delivered in the presence of

[signature]

William W. Giddes

William A. Fagan L. S.

L. S.

Paid by Draft No. B-488

Correct:

Claim Agent.

Approved: Lok. [signature]

Claims Attorney.

Approved: William W. Giddes

Special ~~District~~ Claim Agent.

Approved:

General Attorney.

Chg.- Transp. Fit. Ty & Per. Cert Div.

b-3 (Front)

B

Ex. D5
10/31/19 K.

I. Have read the above
& understand it.
William. A. Fagan

Exhibit D-5 (B)

Brit b-5(B)

B

Exhibit D-5 (9) (Back)

Wm. A. Fagan

THE COAL & IRON NATIONAL BANK
THE CENTRAL R. R. CO. OF N. J.

E. Dunn

Agent

Idem B
10/29/19 M

10/30/19
Dy B 6 M.

501.3

THE CENTRAL R.R. CO. OF NEW JERSEY
SEP 13 1917
SECRETARY & TREASURER

RECEIVED PAYMENT
ENDORSEMENTS GUARANTEED
THE COAL & IRON NATIONAL BANK
OF THE CITY OF NEW YORK
ADDISON H. DAY, CASHIER

Exhibit 6-5 (a) (Back of)

B

Notice of Appeal.

Filed November 18, 1919.

Monmouth County Circuit Court.

WILLIAM A. FAGAN,
Plaintiff-Respondent,

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Defendant-Appellant.

Notice of Appeal.

To

HENRY K. GOLENBOCK, Esq.,
Attorney of Plaintiff-Respondent.

TAKE NOTICE, that the defendant appeals from the whole of the judgment entered in this cause to the Court of Errors and Appeals.

GEO. HOLMES,
Attorney of Defendant-Appellant.

Dated: November 6th, 1919.

Summons.

Served April 22, 1918.

THE STATE OF NEW JERSEY TO THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, A CORPORATION:

[L. S.] You are summoned to answer the annexed complaint of William A. Fagan, in an action at law in the Monmouth County Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of the said Monmouth County Circuit Court, at Freehold, within twenty days after 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, WILLARD W. CUTLER, Judge of the said Monmouth County Circuit Court, at Freehold, this 15th day of April, nineteen hundred and eighteen.

JOSEPH MCDERMOTT,
Clerk.

WIGHT, WIGHT & GOLENBOCK,
Attorneys.

Complaint.

Served April 22, 1918.

MONMOUTH COUNTY CIRCUIT COURT.

WILLIAM A. FAGAN, Plaintiff, vs. THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation, Defendant.	Action at Law. Complaint.

Plaintiff, residing in the City of Asbury Park, in the County of Monmouth and State of New Jersey, says:

1. That defendant is a corporation organized and existing under and by virtue of the laws of the State of New Jersey.

2. That at all times hereinafter mentioned in this complaint, the said defendant was a common carrier, and engaged, as such common carrier, between the States of New York and New Jersey, and between various states and territories of the United States.

3. That, as such common carrier, it operated, managed and controlled Pier No. 10 North River, in the City, County and State of New York.

4. That on August 6, 1917, the said defendant used, managed and operated the aforementioned

New Jersey State Library

Pier at said place, for the purpose of interstate commerce in conveying freight between the State of New York and the State of New Jersey and elsewhere.

5. That on the aforementioned date, and prior thereto, the plaintiff was employed by the defendant as a freight loader.

6. That on said date, plaintiff was instructed by the defendant, its Superintendent, agents and servants to go upon a certain truck, loaded with crates of pineapples.

7. That said loaded truck was attached to a motor truck, and conveyed from the said Pier onto a barge, which was alongside of said Pier.

8. That while the said plaintiff was standing in the position as directed, and as the loaded truck, upon which he was standing, was being conveyed by the motor truck from the pier onto the barge, the said crates of pineapples fell from said truck onto the plaintiff, causing him to be thrown and seriously injured as hereinafter stated.

9. That the occurrence and injuries resulting therefrom were caused by the negligent manner in which defendant's officers, agents, servants and employes loaded the truck upon which plaintiff was placed, and also by the defects in defendant's ways, works, machinery, appliances, plant, cars or the improper use or operation of same at said place, and by the defendant's negligence in failing to formulate, promulgate and enforce proper rules and regulations for the safety of the plaintiff and his co-employes, in that the defendant conducted its

work by unsafe and dangerous methods, and did not have proper guards on said truck, upon which the freight was loaded, and in that the defendant negligently and carelessly conducted itself in and in connection with said acts, control and command, while the said defendant, as a common carrier by railroad was engaged in commerce between the States of New York and New Jersey, as defined in an Act of Congress, entitled "An Act relating to the Liability of Common Carriers by Railroad to their Employes in certain cases," Approved April 22, 1908, and the amendments and supplements thereto, all being caused without any negligence on the part of the plaintiff in anywise contributing thereto.

10. That the said plaintiff sustained injuries to his foot, leg and other parts of his body, and became sick, sore and disabled and suffered mental pain and agony, and was unable to do or perform his customary labor, and is still unable to perform such labor, and, upon information and belief, is permanently injured, and is otherwise injured.

11. That said plaintiff, as a result of said injuries, was compelled to employ medical aid and attendance and expend large sums of money for such, and, upon information and belief, will require medical aid and attendance for a long time to come.

That, by reason of the foregoing, plaintiff suffered and sustained damages in the sum of $15,000.

Plaintiff demands $15,000 damages.

WIGHT, WIGHT & GOLENBOCK,
Attorneys for Plaintiff.

Answer.

Filed May 13, 1918.

MONMOUTH COUNTY CIRCUIT COURT.

WILLIAM A. FAGAN, Plaintiff, vs. THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation, Defendant.	Action at Law. Answer.

The answer of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation of the State of New Jersey, having its principal office for the transaction of business in the City of Jersey City, in the County of Hudson and State of New Jersey, says:

I. It admits paragraphs 1, 2, 3, 4 and 5 of the complaint.

II. It admits that the plaintiff while so employed by the defendant was injured on the date mentioned in the complaint, but denies that the injuries so sustained by plaintiff were the result of any negligence on the part of the defendant, its agents, servants or employees.

III. It denies paragraphs 9 and 10 of the complaint.

IV. It has no knowledge of the matters and things alleged in paragraph 11 of the complaint.

Answer.

AS A SEPARATE DEFENCE, it alleges that after the occurrence of said accident, to wit on the 11th day of September, 1917, plaintiff by an instrument in writing under seal, for a good and valuable consideration, released this defendant of and from all claims and demands which he then had or which his heirs, executors or administrators thereafter might have by reason of the injuries occurring to him on the 6th day of August, 1917, mentioned in the complaint.

AS A SECOND SEPARATE DEFENCE, it alleges that the complaint discloses no cause of action against this defendant.

AS A THIRD SEPARATE DEFENCE, it alleges that the injuries mentioned in the complaint were the result of risks arising out of plaintiff's employment, which were assumed by him.

AS A FOURTH SEPARATE DEFENCE, it alleges that plaintiff's injuries were solely the result of contributory negligence on his part.

GEO. HOLMES,
Attorney of Defendant.

Reply.

Filed June 3, 1918.

MONMOUTH COUNTY CIRCUIT COURT

WILLIAM A. FAGAN, Plaintiff, vs. THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation, Defendant.	Action at Law. Reply.

1. Plaintiff replies that the release mentioned in the answer was procured from him by fraud and deceit, in that he was asked to sign a receipt for a certain sum of money which he received from the defendant through one of its servants agents and representatives, and was advised that the paper was merely a receipt for the money given to him; that he was not asked to read the paper, nor was he truthfully advised what the contents of the paper was. That he was then and there and by the same person informed that the sum of money paid to him was for compensation for the time that he was then out of employment, and was advised that he would receive further sums of money later on.

2. Denies the allegations in the second, third and fourth separate defences.

WIGHT, WIGHT & GOLENBOCK,
Attorneys for Plaintiff.

Answer to Reply.

Filed June 4, 1918.

MONMOUTH COUNTY CIRCUIT COURT.

WILLIAM A. FAGAN, Plaintiff, vs. THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant.	Action at Law. Answer to Reply.

Defendant denies each and every allegation contained in plaintiff's reply.

GEO. HOLMES,
Attorney for Defendant.

Judgment.

Filed October 31, 1919.

This action was tried before Judge Willard W. Cutler, with a jury in the presence of the counsel of the respective parties at the Monmouth County Circuit Court on October 29, 30 and 31 1919 the case having been heard and submitted to the jury they returned their verdict as follows: that they find in favor of the plaintiff and assessed the damages in the sum of six thousand four hundred and fifteen dollars whereupon it is adjudged that the plaintiff William A. Fagan, recover of the defendant the Central Railroad Company of New Jersey, a Corporation, the sum of six thousand four hundred and fifteen dollars and the costs which are taxed in the sum of ninety seven dollars and fifty seven cents, making in the whole the sum of six thousand five hundred twelve dollars and fifty seven cents.

Judgment entered October 31, 1919 at 2:45 P. M.

Grounds of Appeal.

Filed December 23, 1919.

NEW JERSEY COURT OF ERRORS AND APPEALS.

WILLIAM A. FAGAN, Plaintiff-Respondent, vs. THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant-Appellant.	On appeal from the Monmouth County Circuit Court.

GROUNDS OF APPEAL:

To

H. K. GOLENBOCK, Esq.,
Attorney for Plaintiff-Respondent.

SIR:

TAKE NOTICE that the following are the grounds upon which the defendant, The Central Railroad Company of New Jersey, appeals from the judgment heretofore entered in this cause against it:—

(1) The said judgment was given for the plaintiff, William A. Fagan, and against the defendant, The Central Railroad Company of New Jersey, whereas, by the law of the land, judgment ought to have been given for said The Central Railroad Company of New Jersey and against the said William A. Fagan.

(2) The Judge before whom the trial of the issues joined between the parties was had, erroneously refused to grant defendant's motion for a nonsuit at the close of plaintiff's case.

(3) The said Judge erroneously denied defendant's motion for the direction of a verdict in its favor at the close of the whole case.

(4) The said Judge erroneously charged the jury, as requested by the plaintiff, as follows:

> "If the jury finds as a matter of fact that "the trailer that the plaintiff was on had no "guards in the front where the plaintiff had "to be, and if you further find the railroad "company did not exercise reasonable care in "providing the trailer with those rails, and "thereby the accident occurred, and plaintiff "was injured, then they must find the defend-"ant was negligent."

(5) The said Judge erroneously refused to charge the jury as follows:

> "There is no evidence in this case from "which you may find negligence upon the part "of the defendant with respect to the manner "of construction of the trailer truck or with "respect to the racks used thereon."

(6) The said Judge erroneously refused to charge the jury as follows:

> "There are three questions in this case: (1) "Was the defendant guilty of negligence? (2) "Did the plaintiff assume the risk of this acci-"dent? and (3) Was plaintiff fraudulently in-

"duced to sign the release? If you resolve "any one of these three questions in favor of "the defendant then your verdict must be for "the defendant, no matter what your deter- "mination may be as to the two remaining "questions."

(7) The said Judge erroneously refused to charge the jury as follows:

"If you find that the plaintiff himself wrote "on the release the words, 'I have read the "above and understand it', and then signed "his name to the release, your verdict must "be for the defendant."

Dated, December 12th, 1919.

Yours respectfully,

GEO. HOLMES
Attorney of Defendant-Appellant.

Testimony.

MONMOUTH COUNTY CIRCUIT COURT.

WILLIAM A. FAGAN, Plaintiff, vs. THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant.	Action at Law.

FREEHOLD, N. J., October 29, 1919.

TESTIMONY.

Before HON. WILLIARD W. CUTLER, Judge, and a Jury.

APPEARANCES:

For Plaintiff, HENRY K. GOLENBOCK, Esq.
For Defendant, DEVOE TOMLINSON, Esq., and Messrs. DURAND, IVINS & CARTON.

WILLIAM A. FAGAN, Sworn for plaintiff.

DIRECT-EXAMINATION BY MR. GOLENBOCK:—

Q. Mr. Fagan, where do you live?
A. 1514 Asbury Avenue.
Q. Asbury Park?
A. Yes, sir.
Q. How old are you?
A. I will be fifty-two next December.
Q. So that you were fifty years old when the accident occurred?

A. Yes, sir.

Q. Are you married?

A. Yes, sir.

Q. And have a wife?

A. Yes, sir.

Q. And children?

A. I have six.

Mr. Tomlinson:—That is objected to. I don't think it makes any difference whether the man is married or not. This action is not brought by the next of kin.

The Court:—I do not suppose it has any bearing on the case.

Mr. Golenbock:—I think we have a right to know the plaintiff's general situation as to family and as to whether anybody is dependent on him for support and I think the jury may determine that as a factor of damages.

The Court:—For what purpose could it possibly have any bearing?

Mr. Golenbock:—It seems to me it may have some bearing as to the amount of loss he has sustained and the mental pain that he has suffered through his inability to support his family.

Mr. Tomlinson:—It has been held repeatedly that that is not a proper or competent question.

Mr. Golenbock:—Well, it is immaterial. I will withdraw the question anyway for the present.

Q. You live with your family at the house you stated, don't you?

A. Yes, sir.

Q. And you have been working for the Central Railroad of New Jersey?

A. Yes, sir.

Q. And do you recall how long a time prior to the time of the accident?

A. About nine months.

Q. Will you please speak up so that the last juror can hear you without any trouble?

A. Yes, sir.

Q. Now when you started in to do work for the railroad company what did you do?

A. Trucking, hand trucking.

Q. And what work had you been doing up to the time of the accident?

A. Hand trucking.

Q. And between the time you started and the time of the accident had you been doing hand trucking only?

Mr. Tomlinson:—That is objected to, "hand trucking only". I object to that as leading.

The Court:—Yes, the question is leading.

Mr. Tomlinson:—And I move to strike out the response.

The Court:—Yes, strike it out.

Q. What had you been doing from the time you first started up until the accident occurred, what kind of work?

A. Hand trucking.

Q. And was that the only kind of work you did during that time?

Mr. Tomlinson:—That is objected to as leading.

The Court:—He may answer that.

A. Yes, that is the only kind of trucking I did. I had other work to do, shoveling.

Q. Coming down to the accident, what time of day was it this accident occurred?

A. Between four and five o'clock.

Q. Now did anybody talk to you or direct you to do any kind of work immediately before the accident?

(Objected to.)

The Court:—Yes. You see that question is leading.

Mr. Golenbock:—Well, this is preliminary. I can go through all the formalities of asking the questions if counsel wants it.

The Court:—Counsel objects.

Q. When this accident happened what kind of a truck were you on? What kind of trucking were you doing?

A. I was hand trucking.

Q. I am talking now at the time of the accident. What kind of a truck were you on?

A. An electric truck.

Q. And who instructed you to go on this electric truck?

A. The foreman.

Q. Who?

A. Dorsey.

Q. Howard Dorsey?

A. Yes, sir.

Q. And what kind of a truck was that you were on?

A. An electric truck attached to a trailer.

Q. What kind of a truck was this trailer?

A. It was one of these Reynolds improved trucks.

Q. Is that the name of it?

A. Yes, sir.

Q. Can you tell us approximately how big or how wide that truck was?

A. I should judge it was about two and one-

half or three feet wide and about six feet long, in my judgment.

Q. Now this trailer, did that have any power of its own?

A. No, sir.

Q. And in order to move it about what would have to be done with it?

A. You would have to have an electric truck attached to it.

Q. Attached, an electric truck, to propel the trailer?

A. Yes, sir.

Q. Now when you say that Mr. Howard Dorsey directed you to go on this trailer had you ever been on a trailer before?

A. No.

Q. Was that your first time?

A. My first time.

Mr. Tomlinson:—That is objected to as leading.

The Court:—Why?

Mr. Tomlinson:—I think it is leading.

The Court:—Yes.

Mr. Golenbock:—It is an amplification of the preceding question.

Mr. Tomlinson:—I object to counsel leading the witness. They are essential parts of this testimony. It is an essential part of the plaintiff's case and I do not think it is fair.

Mr. Golenbock:—But the leading question is already answered in another way, that is all.

The Court:—Then it should not be asked again.

Mr. Golenbock:—Sometimes it is necessary to bring it out.

The Court:—There is no reason why the

rule should be violated. When it comes to a vital point it is not proper. It has been asked and answered.

(Previous testimony repeated.)

The Court:—I cannot see how that can be framed any differently. I do not see any objectionable feature. One is a consequence of the other.

Q. Now, Mr. Fagan, did you have anything to do with loading that trailer truck at that time?

Mr. Tomlinson:—That is objected to as leading.

A. No, sir.

The Court:—Find out what he had to do. That is another leading question, "Did you have anything to do?"

Q. Do you know who did the loading of the freight on the trailer truck?

A. They were loaded on the inside.

Q. You don't know who did it?

A. No, sir.

Q. Did you load it?

A. No, sir.

Q. Did you have anything to do with the loading of that trailer?

A. No, sir.

Q. So that when you were directed by Mr. Dorsey to go on this trailer it had already been loaded?

A. It had already been loaded.

Q. Now when you got on the trailer will you tell the court and jury what position you were in until the time of the accident?

A. Well, the trailer was filled up with this merchandise and pineapples and the electric truck was empty and I put one foot on the electric truck and one on the pin of the trailer to balance myself. So when it left the dock to go onto the float and struck the gangplank it shook the merchandise in the trailer and that commenced to come over on me, and I put my hand over this way (indicating) to keep them from coming down, and the weight of them came over on me, straightened me out and tore this hip (indicating) out of my body and mashed my leg and my foot was paralyzed.

Q. And how high was this pile or load on the truck that fell over on you?

A. I should judge it was about a foot over my head.

Q. At that time did you notice whether there were any sides in front of the load to protect the load from falling?

A. I didn't notice.

Q. I mean when it started to shake or fall did you notice then whether there were any sides there?

A. No, sir.

Q. Now when was the first time that you noticed there wasn't anything in front to protect you?

Mr. Tomlinson:—That is objected to. That has not been testified to.

Q. When was it if you did notice there wasn't any sides in front or anything in front of the load to protect it from falling?

(Objected to.)

Q. Did you notice whether there was anything in front of the load on the trailer to protect the load from falling?

A. No, there was nothing in front.

Q. When did you notice that?

A. I didn't take notice about it at all.

Q. Until when?

(Objected to.)

A. The merchandise commenced to come right over on me.

Mr. Golenbock:—I think that is a satisfactory answer.

Mr. Tomlinson:—I don't like to be objecting to your leading questions, Mr. Golenbock.

Mr. Golenbock:—You may deem it leading but I don't.

Q. Now, Mr. Fagan, you say that load was about two feet over your head?

A. I should judge it was about two feet.

Q. Now you saw the load shake when it struck the edge of the plank?

A. As soon as it struck the edge of the plank that led from the dock to the float, I think the tide was out, and it struck that, the trailer, or the load struck, and I put my hand up to keep the merchandise from falling overboard and that came quick on me and spread me right out.

Q. And where did it injure you?

A. Hurt my spine here (indicating), tore my hip out of the socket and all the side of my leg and turned my foot right in.

Q. What was done for you after that?

A. Four or five fellows carried me off the truck, after they took the pineapples off of me, carried me off on the dock and tried to put my hip back, but they couldn't.

Q. Who tried to do that?

A. Dorsey.

Q. And had an ambulance been called?

A. Yes, sir.

Q. And from what hospital?

A. The Hudson Street Hospital.

Q. And what was done with you after that?

A. They took me to the hospital and when they got me to the hospital they put me in bed and let me lay there half an hour.

Q. And during that time did you have any pain?

A. Pain all the time.

Q. Much pain?

A. Yes, I suffered with pain until they put me under ether.

Q. What time did they put you under ether?

A. I should judge it was about seven o'clock in the evening.

Q. And when for the first time did you become conscious?

A. I think it was one o'clock the next morning, or maybe three o'clock in the morning.

Q. And did you have pain then?

A. Yes, sir; it commenced to pain me as soon as I woke up.

Q. And when you woke up what was your condition?

A. Why, they had it bandaged, right here and down below. (Indicating.)

Q. So that you weren't able to move your legs?

A. No, sir; I couldn't move them any.

Q. Where did you have pain at that time?

A. Right in the back and all the ways down my hip, down into the foot, all the ways down, right in my back.

Q. Now these pineapples, you say they were crates of pineapples. Will you describe to the jury the size of these crates?

A. I should judge the crates would be 100 or 130 pounds each.

Q. Well, could you tell about how many pines there were in each crate?

A. No. I should judge about two or three dozen. I am not sure.

By the Court:—

Q. How big were the crates?

A. I should judge, your Honor, it will weigh 125 or 130 pounds.

Q. No, the size. How big were they?

A. They were about that long and about that high. (Indicating.)

Mr. Golenbock:—Will you concede that indication was two feet by a foot?

Mr. Tomlinson:—I will have them here, Mr. Golenbock.

Mr. Golenbock:—The crates?

Mr. Tomlinson:—Yes, sir.

By Mr. Golenbock:—

Q. Now how long did you stay in the hospital?

A. From the 6th of August until the 11th of September.

Q. Coming back to your work, Mr. Fagan, I would like to ask for a moment. You say you were a hand trucker?

A. Yes, sir.

Q. And what kind of work is that? Will you explain that to the jury, please?

A. Do you mean what kind of a truck?

Q. What kind of work?

A. One of these little two wheel trucks you push by hand or pull.

Q. What kind of work did you do? What was the actual work that you did as a hand trucker?

A. Haul the boxes and barrels from the dock to the float.

Q. Now when you get a load do you push it or pull it? How do you convey it?

A. Pull the little hand trucks back of me.

Q. And as you face in front the hand truck would be in back of you?

A. Yes, sir; in back of me.

Q. And how much money were you making when you worked for the railroad?

A. $2.62 a day.

Q. What was your average per week?

A. About $18.

Q. At the time Mr. Dorsey directed you to go on this trailer did he give you any instructions?

A. No, sir.

Q. Said nothing to you at all?

A. No, sir.

Mr. Tomlinson:—That is objected to as leading.

The Court:—Yes.

Q. Did he say anything to you at that time?

A. No, sir.

Q. Did he say anything to you as to the condition of the load?

A. No, sir.

Mr. Tomlinson:—That is objected to and I move to strike it out.

The Court:—Yes, strike it out. You may ask him if anything was said.

Q. Will you tell the court and jury, if you please, what he did say to you before you went on this trailer?

A. "Fagan, go and give them a hand on that trailer, on that truck," and then I dropped my hand truck and went. I never took notice about——

(Objected to and asked to be stricken out.)

The Court:—Yes, just what he said and stop there. If counsel wants anything further he will tell us.

Q. What did he say?

A. I dropped my other work.

Q. What did he say?

A. He said, "Fagan, get on that truck."

Q. You say that you stayed at the hospital a period of about two weeks. At the end of that time did you have a conversation with the doctor there? Did you have a talk with any doctor there?

A. Well, after I was there two or three weeks I went home. They wanted to send me to White Plains and I told them no, I would go home——

(Objected to and asked to be stricken out.)

The Court:—Strike it out and ask it over again.

Q. Did you first answer yes or no? Did you have a conversation with any doctor at the hospital before you left?

A. Yes.

Q. Now in consequence of that conversation what did you do?

A. I came home, down here to Asbury Park.

Q. Now do you remember the time you left the hospital?

A. The 11th of September, I believe.

Q. And what time in the day was it?

A. I should say half-past nine in the morning.

Q. And which direction were you going when you left the hospital? What direction had you started to go?

A. I started from the hospital to West Street to get the car.

Q. And how many blocks is it from the hospital to West Street where the car runs?

(Objected to as immaterial.)

A. In the best of my judgment it is about five.

The Court:—I am relying on counsel to not put in anything that is immaterial.

Mr. Golenbock:—I think it is material.

Q. What time of day did you reach the pier where the accident occurred that day?

A. Why, about a quarter of one.

Q. A quarter of one?

A. Yes, sir.

Q. So that it took you from half-past nine until you reached the pier at a quarter of one?

A. A quarter of one; yes, sir.

Q. Now this accident occurred on what pier?

A. Pier 10.

Q. And was that the pier you went to the day you left the hospital?

A. Yes, sir.

Q. And when you got to the pier that day who did you see?

A. I saw Howard Dorsey.

Q. Was he the same foreman that told you to get on this trailer?

A. Yes, sir.

Q. And did you have a talk with him?

A. I asked him if he wouldn't send somebody home with me.

(Objected to.)

Q. Did you have a talk with him?

A. Yes, sir.

Q. Now what was that conversation?

A. Yes, sir.

(Objected to.)

The Court:—How is that competent?

Mr. Golenbock:—How he got into touch with Mr. Giddes and Mr. Ming which resulted in his receiving money.

The Court:—I don't see how it is competent.

Mr. Golenbock:—Mr. Dorsey was the foreman in charge of the men and he was technically still in charge of them and they were under his direction at that time and he was in charge at the time of the accident.

The Court:—How does that make this conversation after the accident competent?

Mr. Golenbock:—I will withdraw the question.

Q. After this talk with Mr. Dorsey where did you go?

A. Why, I asked Mr. Dorsey if he wouldn't send a man home with me.

By the Court:

Q. No, after this conversation where did you go, not where you were.

A. After the conversation with the doctor?

Q. With Dorsey?

A. I came right over to Jersey City.

By Mr. Golenbock:

Q. With whom?

A. Mr. Reynolds and the man that was with him.

Q. And who else?

A. Mr. Conover, the foreman of the train.

Q. And when you got over to the ferry—how were you taken over the ferry in the waiting-room?

A. On a roller chair.

Q. And was the roller chair operated by you in the ferry?

A. Yes, sir.

Q. And when you were brought in the waiting-room of the ferry who came to see you?

A. Why, Mr. Conover went upstairs and told the gentlemen upstairs to come down, that I was downstairs.

(Objected to.)

The Witness:—I didn't know the gentlemen at the time.

Q. After Mr. Conover went upstairs who came down with him? Who came down?

A. Why, Mr. Giddes and another gentleman.

Mr. Golenbock:—Mr. Giddes, will you please stand?

(A gentleman in the audience stands.)

Q. Is that the gentleman that came down to see you?

A. Yes, sir.

Q. And who else?

A. That gentleman alongside of him, I think.

Mr. Golenbock:—Will you stand up, please, Mr. Ming?

(Another gentleman in the audience stands.)

Q. Is that the gentleman?
A. Yes, sir; I think so.
Q. Anybody else with them?
A. I don't recall anybody else.

Recess until 1.30 P. M.

(Trial of the cause resumed at 1.30 P. M.)

WILLIAM A. FAGAN resumed.

DIRECT-EXAMINATION CONTINUED BY MR. GOLENBOCK:—

Q. Mr. Fagan, when Mr. Ming and Mr. Giddes, the gentlemen you have before recess identified as being the two gentlemen who came to you when you were in the ferry-house, the waiting-room of the railroad, did you have a talk with them?

A. They asked me how I was.

Q. Your answer is you did have a talk with them?

A. Yes.

Q. Will you state the conversation that you had with them?

(Objected to.)

A. They asked me how I felt.

The Court:—Now whenever counsel objects you stop until after he is heard.

Mr. Tomlinson:—I object to this question, if the court please. I suppose that the purpose of it is to show the circumstances under which this release was executed and if that is so I think the proof to my mind is in the inverse order, and yet I have no desire to object. If

it does relate to the circumstances leading up to this release I must object, because there is no proof that anything Mr. Giddes or Mr. Ming said could bind the defendant.

The Court:—Why do you think that any conversation with these gentlemen is binding on the company?

Mr. Golenbock:—I think there is no dispute that these gentlemen represented the company.

The Court:—But he doesn't concur in it.

Mr. Golenbock:—If it is objected to I will withdraw it for the time being.

Q. What time on that day did you reach home at Asbury Park?

A. About half-past five or a quarter of six.

Q. And when you came home what did you do or what was done for you?

A. When I came home I went to bed. I got sick.

Q. How did you feel when you got home?

A. I felt very sick.

Q. And how did you feel when you reached the waiting-room and when you saw Mr. Giddes and Mr. Ming?

A. I felt sick.

Q. Did you have pain at that time?

A. Yes, sir; pain that day, plenty of it.

Q. When you got home and took to bed did you have a doctor?

A. Well, no, I had no doctor and I was sent back. My wife sent me back a week afterwards to the hospital.

Q. And what hospital did you go back to again?

A. The Hudson Street Hospital.

Q. The same hospital where you were before?

A. Yes, sir.

Q. And how long did you stay the second time?

A. One week.

Q. And what did they do with you there during that time?

A. In fact they couldn't do anything for me but leave me stay there for a week.

Q. After that where did you go?

A. They sent me to the Ruptured and Crippled Hospital.

Q. And where is that situated?

A. 42nd and Second Avenue.

Q. New York City?

A. New York City.

Q. And how many times did you visit that hospital?

A. Three times.

Q. And each time you went from Asbury Park to the hospital?

A. Yes, sir.

Q. And after that did you get any treatment of any kind?

A. What?

Q. Did you get any treatment of any kind?

A. Well, they prescribed for me.

Q. What treatment?

A. Massages.

Q. Massages?

A. Yes, sir.

Q. And did you have that? Did you get those massages?

A. My wife massaged me at home.

Q. Now how long in all had you been confined to bed?

A. Off and on nine months.

Q. Were you able to walk or use your legs during nine months?

A. I haven't been able to do it yet.

Q. And did you have any pain during the nine months?

(Objected to as leading.)

Q. How did you feel during the nine months?

A. I felt miserable, felt pain all the time. I couldn't sleep at night. I didn't know what it was to have a good night's sleep.

Q. After nine months how did you feel?

A. I felt I could go around on a crutch a little bit, around the house.

Q. Can you now at this time get around with the aid of crutches?

(Objected to as leading.)

The Court:—Oh, yes.

By the Court:—

Q. How do you get around now? Tell us how you get around now.

A. With crutches.

By Mr. Golenbock:—

Q. Is that the only way you are able to get around?

A. That is the only way.

Q. Now on this particular occasion when this accident occurred, you say it was low tide?

A. Yes, sir.

Q. So that the end of the plank which was on the pier was elevated above the end which was on the barge?

(Objected to as leading.)

Mr. Golenbock:—I will withdraw the question.

Q. Describe the condition of the plank between the pier and the barge over which this trailer and truck went.

A. What was the condition, did you say?

Q. Yes.

A. Why, the plank leading from the dock to the float was away down. The tide was out. It was away down.

Q. Now, then, which end of it was elevated?

A. The end next to the dock.

Mr. Tomlinson:—I object that there is no testimony that either end was elevated.

Mr. Golenbock:—He said it was inclined. The tide was low and the plank was at an incline.

The Court:—And you draw the inference from that?

Q. Was the plank in any way at an angle?

A. It was low and the end next to the dock was sticking up about an inch and a quarter or an inch and a half, so that when the trailer hit it——

Mr. Tomlinson:—I object that that is not responsive, the rest of this, and I move to strike it out.

The Court:—No, I won't strike it out. He doesn't say anything.

Mr. Tomlinson:—I thought I ought to make that objection.

The Court:—All right.

By the Court:—

Q. How wide was this plank?

A. To the best of my opinion it was about eight feet wide.

Q. You don't mean the plank?

A. The plank that leads from the dock to the float, for the float had went down.

The Court:—Well, now, proceed.

By Mr. Golenbock:—

Q. Have you been doing any work since the accident?

(Objected to as leading.)

The Court:—Yes, it is.

Q. What have you done since the accident occurred?

A. Nothing, absolutely nothing.

Q. Why not?

A. Absolutely nothing.

Q. Why not?

A. I wasn't able, couldn't use my limbs.

Cross-examination by Mr. Tomlinson:—

Q. Mr. Fagan, I think you said you made about $18 a week; is that right?

A. You will have to speak a little louder. I am kind of deaf.

Q. Mr. Fagan, I understood you to tell Mr. Golenbock that you made about $18 a week; is that correct?

A. On an average.

Q. How much did you make a day?

A. $2.62.

Q. And that makes about $15 a week, doesn't it?

A. I worked Sunday, $4.02.

Q. Is that your signature?

(Paper handed witness.)

A. It looks like it.

Q. Well, you did write that, didn't you?

A. I don't remember.

Q. Well, it looks like your signature?

A. I don't remember writing it.

Q. You don't remember writing it. Mr. Hulshart,—just get Mr. Hulshart, please, will you? How long had you been working for the railroad company?

A. Nine months.

Q. And where had you been working for them?

A. I had been working for them in the Broadway Tower, Jersey City and New York.

Q. Where in New York had you been working?

A. Pier 46 and Pier 10.

Q. And how long had you worked at Pier 46?

A. Well, off and on about three weeks.

Q. How long had you worked at Pier 10 before this accident?

A. I should judge about two months.

Q. And what were you doing there those two months?

A. Hand trucking.

Q. What were you doing this day before you got hurt?

A. Hand trucking.

Q. Whom had you been working with that day?

A. Well, when you are hand trucking you are working by yourself.

(Objected to.)

Q. Had you been working with anybody on that day?

A. Not until that evening, not until I was sent on that truck.

Q. And what time did you start to work that morning?

A. Well, it was about half-past eight.

Q. And what time was it that you went on this truck, the electric truck?

A. About four o'clock.

Q. What sort of a day was it, clear?

A. Well, yes, I think it was a nice day.

Q. Daylight all right, wasn't it?

A. The daylight was all right.

Q. You say it was low tide?

A. Yes, sir.

Q. Now you had been working around there for three months prior to that hand trucking?

A. No, I said two months.

Q. Two months you had been working around there hand trucking?

A. Yes, sir.

Q. And during that time you had been up and down this plank with hand trucks?

A. I went up and down several planks.

Mr. Tomlinson:—I move to strike that out as not responsive.

The Court:—He may answer the question as to whether he had been down this particular one he is asked about.

Q. You had gone down this same plank a number of times while you were hand trucking?

A. In that period?

Q. Any time. Do you say yes to that?

A. Yes, with the hand truck.

Q. And you had gone down that plank with the hand truck when the tide was just as low as it was this day, hadn't you?

A. I hadn't taken notice of that.

Q. You didn't notice?

A. No, sir.

Q. You had seen men working around that pier with electric and trailer trucks, hadn't you?

A. Well, I seen them working, yes.

Q. And you had seen them go down this gangplank, hadn't you?

A. I had seen them go down several gangplanks.

Q. And had seen them go down this gangplank, hadn't you?

A. Not in particular.

Q. Do you mean to say you never saw them go down this gangplank?

A. I couldn't say.

Q. You remember testifying at the last trial, don't you?

A. Yes.

Q. And now do you want to say that you had never seen these men go down this gangplank with these electric and trailer trucks?

A. Well, I disremember.

Q. You had seen them go down gangplanks just like this one?

A. Well, there are four or five gangways up there.

(Question repeated.)

A. Yes, sir.

Q. And when the tide was the same as it was this day?

A. Well, the tide varies up there at different times. Sometimes it is higher and sometimes it is lower.

Q. The angle of the gangplank varies according to the tide, doesn't it?

A. Some tides lets it lower than others. Some days it is inclined maybe four or five feet from the end of the dock to the float—four or five feet, so it doesn't stay even. Some days it is even.

Q. And the gangway raises and lowers with the rise and fall of the tide, doesn't it?

A. Exactly.

Q. And you had seen men on these electric and trailer trucks go down these gangways when the tide was just the same as it was this day, hadn't you?

A. Yes, sir; I had seen them go down.

Q. Now what were you doing when you went down that day?

A. Hand trucking.

Q. What were you doing when you went down this gangplank the day that you were injured?

A. I had one foot on the electric truck and the other on the trailer, with my hand on the trailer to balance myself, so that when it struck this gang plank the merchandise commenced to tumble over and I turned around with my other hand to save the merchandise from falling over and it was too heavy for me and it came down on top of me and it came down on top of me and tore me up.

Q. Just listen to my question, if you please. I am not asking you for a recital, I am asking you to answer my question.

Mr. Golenbock:—I submit that is a complete answer what he was doing the day he was injured.

Mr. Tomlinson:—May I ask Mr. Golenbock what his motion was? I didn't know there was any motion before the court.

Mr. Golenbock:—I object to his stating it. I object to the question being asked again, because it has already been answered.

The Court:—Anything further about this answer? Then ask another question.

Q. Now where did you have your left foot?

A. My left foot was on the electric truck.

Q. Where did you have your right foot?

A. My right foot was on the trailer, the pin that goes into the trailer.

Q. Why did you have your right foot on the pin?

A. I had no other place to put it.

Q. Is that the only reason you had it on the pin?

A. Well, that pin used to come out once in a while, used to jump out.

Q. You had your right foot on that pin to keep the pin from jumping out?

A. As you went along——

Mr. Golenbock:—I object that he has already answered.

(Previous testimony repeated.)

Q. Didn't you?

A. Yes, I did.

Q. Well, you did?

A. Yes, sir.

Q. And where did you have your left hand?

A. My left hand? I had my right hand on the trailer to balance myself.

Q. What part of the trailer?

A. On the front part.

Q. On the front part?

A. Yes, sir.

Q. What part of the front part?

A. Well, the middle.

Q. What part of the middle?

A. Well, just like the trailer—like that, on the merchandise. (Indicating.)

Q. I thought you said there wasn't any rack or anything on the front of it.

A. I didn't say about the rack. I said the merchandise.

Mr. Golenbock:—There cannot be any cross-examination on that. There is no testimony that he held his hand against any rack.

Mr. Tomlinson:—I am trying to find out where he had his hand. I understood his testimony to be that this trailer was empty and then there was the trailer truck with the pineapples loaded on it. I am trying to find out whether he had his hand on a crate of pineapples or whether, as he says, on some part of the truck.

Mr. Golenbock:—He said he had his hand against the merchandise.

Q. Now you mean to say that you had your right hand on the merchandise?

A. Sir.

Q. You say you had your right hand on the merchandise?

A. Yes, sir.

Q. And where did you have your left hand?

A. My left hand was not in use then, it was idle.

Q. And held out loose?

A. Yes, sir; and my right hand up on the merchandise like that, (indicating) on the trailer.

Q. And when was it that you first put your right hand up against this merchandise?

A. When I started off the pier.

Q. When you started off the pier?

A. Yes, sir.

Q. And how many crates of pineapples would you say there were on this truck?

A. I couldn't be positively sure of that. I didn't load the truck. I didn't have anything to do with the loading of that.

Q. Now there were twenty crates, as a matter of fact, weren't there?

Mr. Golenbock:—That is objected to. He has already said that he didnt know and Mr. Tomlinson is attempting to testify there were twenty crates.

Mr. Tomlinson:—It is cross-examination.

The Court:—He can say what he knows about it.

Mr. Golenbock:—But he has said that he can't tell that.

(Question repeated.)

A. I couldn't say.

Q. Were there less than twenty?

Mr. Golenbock:—I object that he has already exhausted him on that point.

By the Court:—

Q. Do you know?

A. No, sir.

By Mr. Tomlinson:—

Q. Were there more than twenty?

A. I couldn't tell you.

Mr. Golenbock:—I object. I think it is a waste of time to insist on an answer he can't give.

The Court:—You may proceed on cross-examination.

Q. Have you any idea how many crates there were?

A. I haven't the least idea.

Q. How large were these crates?

Mr. Golenbock:—I object to the question on the ground that when I attempted to show

the size of the crates Mr. Tomlinson voluntarily made the statement that he would have the crates here and for that reason we did not proceed with the examination.

The Court:—I think that point is well taken.

Mr. Tomlinson:—He didn't offer to show the size. He wanted to stipulate with me and I said I would prefer not to stipulate because I would produce a crate of that size. I think I am entitled to get his statement on the record as to how large these crates were.

The Court:—All right. You may ask.

A. Well, I couldn't tell you exactly the size of the crates, only just pretty nearly give you—maybe I would be wrong or I wouldn't be right.

(Crate produced.)

Q. Is that the size of one of them?

A. Yes, sir; I believe so.

Q. That is about what they look like, is it?

A. Well, I guess it is, although it don't look like a pineapple crate.

Q. How were they loaded?

A. Sir, I don't know how they were loaded. I never loaded none.

Q. Can you tell whether they were loaded on the end or loaded on the side?

A. I don't know.

Q. You don't know that?

A. No, sir; I don't know.

(Crate offered in evidence and marked A for Identification.)

Q. Now how many of these crates fell off the truck, if you know?

A. I have no idea. After they hit me I was

knocked out. I don't know whether it was twenty or thirty or ten or not. I don't know how many went over on me.

Q. And as you started down the incline were you looking towards the crates or away from them?

Q. I had my hands on the merchandise to keep them from overbalancing and they tipped over on me and caught me on the back and spread me out like that. (Indicating.)

Q. And were you looking at them or were you sideways of them?

A. I came out sideways, with my hand on the merchandise, which threw my left hand on the electric truck and when it commenced to fall I put my two hands up and tried to keep them from falling over.

Q. Well, now, perhaps you don't understand me or I don't understand you. Did you have your face turned towards the load of merchandise as you started down?

A. Yes, sir; I had to.

Q. And yet you couldn't tell whether they were piled on end or down that way (indicating) lengthwise?

A. No, sir; I don't know.

Q. Now did I understand you to say there was no rack on the front of that truck, on the front of that trailer truck?

A. There was none on the front of that truck, no.

Q. You are certain about that now?

A. Yes, pretty nearly.

Q. Well, now, are you absolutely certain about it?

A. No, sir; I am not absolutely certain about

it, but if there was any in front it wouldn't come over on me.

(Objected to and asked to be stricken out.)

The Court:—Strike it out.

Mr. Golenbock:—It ought to stand, it seems to me.

The Court:—That is a conclusion for the jury to draw.

Q. Did you ever have a conversation with that gentleman? (Indicating Mr. Hulshart.)

A. If that is the gentleman that came to see me over in the hospital, yes, I know him.

Q. And do you remember his preparing this statement and your signing your name to it?

(Paper shown witness.)

A. No, I don't remember. That is my name. That don't look like my signature.

Q. You don't think you signed it?

A. No, sir; I did not.

Q. When you were hurt? What day were you hurt, Mr. Fagan?

A. The 6th of August.

Q. And on the 11th of September you had a talk with Mr. Ming and Mr. Giddes, didn't you?

A. I had a call from them.

Q. You had a talk with them?

A. Oh, yes, when I came here to Jersey City.

Q. When you came to Jersey City?

A. Yes, sir.

Q. And during that time you signed a release, didn't you?

A. No, sir.

Q. You signed a paper, didn't you?

A. I signed a receipt for what money they gave me.

The Court:—Answer the question.

Q. You signed a paper?
A. I signed a paper; yes, sir.
Q. And wrote your name on that paper?
A. Yes, sir.
Q. And did you do anything else?
A. No, sir.
Q. You are certain about that?
A. No, sir.
Q. You are certain about that?
A. Yes, sir.
Q. And where were you when you signed that paper?
A. I was sitting in the rolling chair.
Q. And was that about the size of it? (Indicating paper.)
A. I couldn't tell you.
Q. You remember signing your name?
A. I remember endorsing a check for money.
Q. Didn't you sign a paper?
A. That was the only paper I remember signing, the check they gave me for the money.
Q. Well, what do you mean? When did you sign the receipt for the money?
A. When I signed the check. I put my name to the check.
Q. And you also signed another paper, didn't you?
A. Not to my knowledge. I don't remember.
Q. Didn't you testify at the last trial that you signed a paper and you really couldn't say whether it was a receipt or a release?

A. I gave my receipt for the money after they gave me the $85.

(Question repeated.)

The Court:—He may answer that. Counsel is entitled to an answer to that question.

Q. Only what you said at the last trial.

A. I disremember what I did say at the last trial.

(Check shown witness.)

Q. That is your signature on the back of that check, isn't it?

A. Yes.

Mr. Tomlinson:—I ask to have it marked for identification.

(Check marked B for Identification.)

Q. And when you got that check you signed another paper, didn't you?

A. I don't remember. That is the only paper I remember signing. I was that sick I was anxious to get home. I was anxious to get my fare to go home.

Q. Didn't you say at the last trial that you signed the paper and that you thought it was a receipt?

A. I disremember.

Q. You don't know what you said at the last trial, is that the idea?

A. I know I signed a check for the money, or before they gave me the money I signed a receipt for it.

Q. You mean another paper than that?

A. After I endorsed that it was taken away and then they gave me a paper, a receipt.

Q. Then you signed another paper?

A. A receipt for the money.
Q. Is that your signature?
A. That is my signature.
Q. Is that your writing?
A. No.
Q. You never wrote those words, "I have read the above and understand it"?
A. No, sir.
Q. You aren't absolutely certain, are you?
A. I don't remember signing anything that day except that check.
Q. But you do admit that is your signature there?
A. That is my signature.
Q. And you aren't absolutely certain whether or not that is your writing there?
A. No.
Q. You aren't absolutely certain, are you?
A. No, sir.
Q. Now you had never worked on an electric or a trailer truck before?
A. No, sir.
Q. And do you know Mr. Hannon, the assistant foreman of Pier 10? Stand up, Mr. Hannon.

(A gentleman in the audience stands.)

Q. But you know him, do you?
A. Yes, sir.
Q. And Tony Palmieri, do you know Tony Palmieri?
A. No.

(Mr. Palmieri was requested to stand and complied.)

Q. Who was driving the electric truck that day?
A. Why, some Italian chap.
Q. Wasn't it Tony Palmieri who was driving it?

A. It looked like him. I really don't know them up there. I never worked steady enough to know any of them.

Q. It does look like him?

A. It looks like the man who was driving it at noon.

Q. But hadn't you been working on that trailer truck or the electric truck all day with him that day?

A. No, no.

Q. I think you said, Mr. Fagan, you couldn't tell how many of these crates were on the truck?

A. No, sir.

Q. It was about a usual load, wasn't it?

Mr. Golenbock:—I object. He testified he didn't know how large it was and they asked him more or less, if he could give any idea at all, and he said no and I think it is stretching it to a point where your Honor ought not to permit it any further.

The Court:—You see this is cross-examination and plaintiff's counsel is entitled to a great deal of latitude on cross-examination.

Q. It was the usual load, wasn't it, Mr. Fagan?

(Objected to.)

A. I don't know. I don't know how they load the trucks.

Mr. Golenbock:—I object to that as calling for a conclusion and in fact indefinite, as to what he usually did.

(Previous testimony repeated.)

The Court:—I think the answer may stand.

Q. Didn't you say at the last trial, Mr. Fagan, in answer to this question of mine on page 33: "It

was about the usual load that these trailers carted, wasn't it?" and didn't you say, "Well, you know the pineapple boxes go away up over the truck"? And then the question was repeated and you said, "About the usual load". Didn't you say that at the last trial?

A. I disremember what I said at the last trial.

Q. Will you say you didn't say it at the last trial?

A. I disremember.

Q. Will you say that you didn't say it at the last trial?

A. No, sir; I wouldn't say I didn't.

Q. And during the time you have been working on the pier, Mr. Fagan, you had seen these trailer trucks with loads similar to the load you had on this day go up and down this gangplank, hadn't you?

A. No, sir. The pile that was on this load I was on was an extra big load.

Q. It was an extra big load?

A. A bigger load than ever I took notice of seeing on any of the rest of them.

Q. Do you remember testifying at the last trial in answer to my question which was worded as follows, "And during that two months had you seen other loads of pineapples or merchandise similar to the load you were on go down the gangplank?" and didn't you answer "Yes"?

A. Yes.

Q. You did answer that at the last trial, didn't you?

A. Yes, sir.

Q. Now do you want to change your testimony now?

A. No, sir.

Q. So what you said at the last trial wasn't the truth, was it?

Mr. Golenbock:—I object. There is no contradiction. The question on the last trial was whether it was a similar quantity of pineapples or merchandise. There is no dispute it was pineapples and the question here today is whether he says it was extraordinary. There is no contradiction between his testimony today and at the last trial.

The Court:—That is for the jury to say.

Q. Are you willing to say now during these two months you were down on that pier you had seen other loads on trailer trucks similar to the load you had on go down that gangplank?

A. The loads varied altogether. Sometimes there wasn't a half a load and sometimes it was over a load. Sometimes it was over the top of the truck.

Q. And you had seen trailer trucks with all those sorts of loads go down the gangplank?

A. Yes, sir.

Q. And when the gangplank was as steep as it was at that time?

A. No, sir.

Q. How steep was this gangplank on this day when you saw the other loads go down?

A. You know it varies. The tide this day was low, about seven feet incline from the—I am only saying I should judge about seven feet incline from the dock here down, and other days it may be four; other days it may be a little more and other days it may be a little less.

Q. But you had seen all sorts of loads go down that gangplank?

A. I had seen all sorts of them.

Q. And the reason you kept your foot on that pin

was because you were afraid that pin would jump out?

A. Particularly because I was afraid it would come out and particularly because I had no other place to put it.

Q. Did you ever see any other men hold their foot on the pin that way?

Mr. Golenbock:—I object to that as immaterial, whether he did or not. There is no contention that the pin had anything to do with the situation for a minute. I object to an examination as to the pin as immaterial, incompetent and irrelevant.

The Court:—He may answer that.

(Objection noted for plaintiff as ground of appeal.)

A. Well, as a rule——

Q. Just answer my question, please.

A. Eh?

Q. Had you ever seen any other——

A. No.

Q. You had never seen any other man?

A. No, sir; no other man that particular——

Q. Answer the question yes or no.

A. No.

Q. Now what work had you been doing on this day just before you went down the gangplank with this trailer truck?

A. Hand trucking.

Q. And where were you hand trucking, what part of the pier?

A. On the north side of the pier.

Q. You were handtrucking from the pier down to the floats?

A. Yes, sir.

Q. And did you handtruck down this same gangplank?

A. I don't believe I did.

Q. Do you know whether you did or not?

A. No, sir; not with the handtruck that day.

Q. But you went down the other gangplank?

A. Yes, sir.

Q. And there are two or three there similar to this one, aren't there?

A. I pulled it right down, the handtruck.

Q. There is no difference between this gangplank and the other gangplanks?

A. Well, the tide don't vary it. It is as low one place as at the other.

Q. And there is the same angle at one gangplank that there is at the others?

A. Yes, sir.

REDIRECT-EXAMINATION BY MR. GOLENBOCK:—

Q. Mr. Fagan, during the time you worked for the Central Railroad Company of New Jersey were you instructed to pay particular attention to the gangplanks or to the loading of trailers?

(Objected to as leading.)

The Court:—The objection is sustained.

Q. Did you pay any particular attention as to the gangplanks or as to the trailers as they were loaded?

(Objected to as leading.)

A. No.

Q. Now if there had been a guardrail in front of that load which you were on at the time of that accident you would have seen it, wouldn't you?

The Court:—He was asked that and he said he wouldn't know.

Mr. Golenbock:—I am asking if there had been was he in a position to see it.

The Court:—He said he didn't know.

Mr. Golenbock:—But I am following it by the question whether he was in a position to see it prior to the accident.

The Court:—You may ask him that.

Q. Immediately prior to the accident were you in a position to see whether there were any guard-rails in front of that trailer?

Mr. Tomlinson:—I object to that as leading. Let him explain where he was.

Mr. Golenbock:—He testified to that and I thought he would object to going over it again. When the case commenced I asked him whether he was in a position to see whether there were any guard rails there or not.

The Court:—No, that is for the jury to say, not for this witness to say. You may locate him and show where his position is or was at that time and after he does that, why then the jury can say whether he can see or not.

Q. Mr. Fagan, immediately prior to the falling of these pineapple crates which way were you facing?

A. Which do you mean? What do you mean?

Q. Were you facing towards the load or facing towards the electric truck in front of you?

A. I was facing towards the load.

Q. Now then, were you in a position to see any guard-rails there at that time, at that moment?

Mr. Tomlinson:—That is objected to as calling for a conclusion.

The Court:—Yes, not what he did see. You see the jury have to say whether he could. This witness may tell whether he did or whether he did not.

Q. From that moment on, Mr. Fagan, or at that time, did you see any guard-rails there in front of the load?

A. No, sir.

Q. Was there any?

A. No.

Q. Now in your work of hand trucking which way would you be facing?

A. Why, the merchandise would be right behind me.

Q. And you would be pulling?

A. Yes, sir; pulling the truck.

Q. And the hand truck and the merchandise on it would be back of you?

A. It would be back of me.

Q. So that in doing your work as a handtrucker would it make any difference whether the plank was lower or higher than the pier?

A. No.

Q. Would it make any difference in your work?

A. No.

Q. Now when was it, if you recall, the time that Mr.—— what was that name? Do you recall how long after you came to the hospital in New York that Mr. Hulshart called to see you?

A. Well, I should judge, I think it was maybe a week or two weeks.

Q. And during that time what was your state of health and state of mind?

A. Very poorly. I was in bed feeling poor.

Q. Were you suffering extreme pain and agony?

A. Pain and agony both.

Q. Now you are quite sure that this particular load upon which you were at the time of this accident was about a foot above your head?

A. Oh, yes.

Q. There is no question about that?

A. No, sir.

Mr. Golenbock:—It is conceded that he was doing interstate commerce, that the plaintiff was working for the defendant doing interstate commerce work?

Mr. Tomlinson:—Yes, I conceded that in my opening.

Mr. Golenbock:—Do I understand that proceedings as to the release have been barred out or shall I go into it now?

The Court:—Has it been offered in evidence?

Mr. Golenbock:—No, sir; it was offered for identification.

The Court:—You better keep your case in the regular order. They may ask the witness whether the paper bears his signature and offer it for identification, but if it is not offered then the jury nor nobody else knows what it may be.

RECROSS-EXAMINATION BY MR. TOMLINSON:—

Q. Mr. Fagan, you just stated to Mr. Golenbock that there were no guard-rails on this trailer truck?

Mr. Golenbock:—I object to his making a statement as to the evidence. He said he only referred to the front of the trailer and that question doesn't include his being at that particular part of the trailer.

Mr. Tomlinson:—I will withdraw the question and reframe it.

Q. You stated to Mr. Golenbock that there were no front rails on that trailer truck. What is your answer to that?

A. Yes.

Q. Why then did you tell me two or three minutes ago that you didn't know whether there were any there or not?

Mr. Golenbock:—I object to the question on the ground that the question does not include that particular part of the answer previously made by this witness that it wasn't until he turned his face towards the merchandise that he then knew there wasn't any.

Mr. Tomlinson:—On cross-examination this witness admitted that he didn't know and couldn't say whether there was any front rail on that trailer.

Mr. Golenbock:—That was when he went around and faced the load.

The Court:—He may proceed to test the credibility of the witness.

(Question repeated.)

A. I didn't until I turned around and the merchandise came on me and I could see then there was nothing there.

Q. Did you not tell me two or three minutes ago that you couldn't say now whether there was any front rail on that trailer truck or not?

A. If there had been it wouldn't have come over on me.

Q. That is your only reason for saying there wasn't one, wasn't it?

A. No, sir; it was the jolt on that gangplank that started the merchandise, going over the incline.

Q. I am talking about the front guard-rail of the trailer truck.

A. There was none on it.

Q. Why then did you tell me a few minutes ago that you didn't know whether there was any there or not?

A. I didn't until I turned around.

Mr. Golenbock:—I object that he said he didn't until he turned around and then he knew.

Mr. Tomlinson:—I ask permission to have the stenographer refer back to the notes.

The Court:—He may refer to the notes.

Mr. Tomlinson:—It was on my cross-examination.

(Previous testimony repeated.)

Q. Now why was it that a few minutes ago you said you weren't absolutely certain whether there were any guard-rails on the front of that trailer truck and now you say to Mr. Golenbock you know there was none?

A. I knew there was none when I turned around and saw the merchandise coming over on me, then I knew.

Q. Why did you say a few minutes ago that you were not absolutely certain?

A. Why, never going on the truck and not having loaded that I couldn't be certain whether it was there or not.

Q. Why did you say——

A. I don't know.

Mr. Golenbock:—He has already explained that.

The Court:—He may answer that.

Q. Why did you say when I asked you about this a few minutes ago, why did you say, "I am not absolutely certain whether there was a guard-rail in front or not"? Why did you say that?

A. Not then I wasn't.

Q. When you said it did you mean you weren't certain?

A. I wasn't absolutely certain until the truck struck this gangplank.

Q. Then why was it, Mr. Fagan—now try and understand me—that a few minutes ago you said, "I am not certain whether there was any guard-rail on the front of that truck"? Why did you say that?

A. Isn't that what I am saying now?

Q. No, sir. Can't you answer that?

A. Certainly.

Q. Can't you answer that question?

A. Why did I say it?

Q. I asked you a few minutes ago whether or not you were certain that there was a guard-rail on the front of that trailer truck and you said, "I am not absolutely certain whether there was one or not."

A. Neither I was.

Q. I don't think you understand me.

Mr. Golenbock:—I think you do. I think you are trying to make him misunderstand.

Q. I asked you a few minutes ago, I said, "Mr. Fagan, are you absolutely certain whether there was a guard-rail on the front of that trailer truck?" and you said, "No, sir; I am not absolutely certain."

A. I wasn't certain.

Q. When you told me that you weren't absolutely certain, were you?

A. No, sir.

REDIRECT-EXAMINATION BY MR. GOLENBOCK:—

Q. Do you mean that you weren't certain a minute ago or did you mean you weren't certain at the time you first got on the trailer there?

A. When I first got on the trailer.

Q. And when you say you aren't certain you mean when you first got on the trailer?

A. Yes, sir.

Q. But you are certain when you turned around and looked at this load?

A. Yes, sir.

Mr. Tomlinson:—Now I object. That may leave a prejudicial inference unless I can explain to the jury.

CROSS-EXAMINATION BY MR. TOMLINSON:—

Q. Now a few minutes ago I said to you, "Mr. Fagan, you are not absolutely certain whether or not there was a front rack on that trailer truck?" and you said, "No, sir; I am not absolutely certain." Now do you now say that you meant by that that you weren't certain at the time the accident happened? Is that what you mean now to say?

A. I am certain there was none on it.

Q. You are certain of that now?

A. Yes, sir.

(Iron rail produced.)

Q. Do you mean to say there was no rail like that on the front of that trailer truck? Are you willing to swear there was no rail like that on the front of the trailer truck?

A. I am willing to swear I don't think there was.

Q. That you know there was, or don't think there was?

A. I don't think there was.

Q. You aren't absolutely sure, are you?

A. No, sir; I am not absolutely sure whether there was or not.

(Iron rack offered in evidence and marked D for Identification.)

By Mr. Golenbock:—

Q. Mr. Fagan, was there any wooden rack in front of the trailer to hold the load from falling.

A. No.

Q. You are sure of that?

A. Sure of that.

By Mr. Tomlinson:—

Q. Now I understand you to say you are not certain whether there was an iron rack like that or not?

I think the renewal was a wooden affair and not like that one.

Q. That was not what I asked you. I ask you whether you are willing to swear there was no rack like that on the front of the trailer truck.

A. I wouldn't swear to that now, really. I can't remember.

DAVID H. REYNOLDS, Sworn for plaintiff.

DIRECT-EXAMINATION BY MR. GOLENBOCK:—

Q. Mr. Reynolds, in 1917, for whom did you work at that time?

A. The Central Railroad.

Q. For how long had you been working for the Central Railroad?

A. I think about seven months as near as I can tell.

Q. And what was your work while you were working for the Central Railroad?

A. Handtrucking.

Q. And you were what is called a trucker?

A. Yes, sir.

Q. And did your actual experience with the Central Railroad have anything to do with loading?

A. Yes, sir; I have loaded.

Q. And did you have anything to do with the loading of trailers attached to motor trucks around the piers and barges, etc.?

A. Yes, sir.

Q. You had seven months' experience. And have you had experience in the seven months you worked for the Central Railroad in loading pineapples?

A. Merchandise of all descriptions.

Q. And do you recall specifically among the merchandise loaded that there were pineapples loaded on the trailer which you were working on?

A. Yes, sir.

Q. And these trailers that you worked on and loaded, did they have protected sides or rails on? How were they constructed?

(Objected to.)

Mr. Golenbock:—I will withdraw the question.

Q. How were they constructed?

The Court:—What difference does it make, unless you show the condition of this trailer? What is the object of it?

Mr. Golenbock:—I want to show the method of loading freight, the proper method and the improper method, and to show that loading of this kind by comparison was improper.

The Court:—Proceed.

Mr. Golenbock:—I will withdraw the question altogether.

Q. Mr. Reynolds, in your experience with pineapples and pineapple crates to what height would you load a trailer with such kind of goods?

Mr. Tomlinson:—I object. If this man is going to testify as an expert I want to cross-examine him.

The Court:—You may cross-examine him.

CROSS-EXAMINATION BY MR. TOMLINSON:—

Q. How long did you say you worked for the Central?

A. About seven months as near as I can come to it.

Q. What work?

A. Hand trucking.

Q. Hand trucking?

A. Yes, sir.

Q. And that work consisted of loading hand trucks frequently, didn't it?

A. Loading hand trucks; yes, sir.

Q. And that was your sole work?

A. Well, unless the boss sent for me and put me to doing something else.

Q. Well, what other work would your boss put you at?

A. Loading these trailers and placing the stuff on the cars and like that.

Q. And what work did you do in the trailers?

A. I would load them.

Q. Your main job was what?

A. Hand trucking.

Q. And occasionally you loaded trailers?

A. Loaded and unloaded them.
Q. I beg your pardon.
A. Yes, sir.
Q. Occasionally you did that?
A. Yes, sir.
Q. But your main job was hand trucking?
A. Yes, sir.

Mr. Tomlinson:—I object to that.

DIRECT-EXAMINATION CONTINUED BY MR. GOLENBOCK:—

Q. Mr. Reynolds, do you recollect in your seven months' experience as to how many times you loaded pineapples on trailers?

A. Oh, well, I can say from fifty to two hundred.

Q. From fifty to two hundred?

A. Yes, sir; I couldn't exactly tell you the number.

Q. And you are making that number fifty to two hundred, you are allowing that difference because you are not certain as to the number of times?

A. Yes, sir.

Q. And there is no question in your mind there was at least fifty and not more than two hundred?

A. Yes, sir.

Q. And that was done at the request or direction of Mr. Dorsey?

(Objected to as leading.)

Mr. Tomlinson:—Well, it is leading, but it will save time.

The Court:—Do not ask leading questions if counsel objects to it.

Q. At whose request or under whose instructions or directions did you load these pineapples on the trailers?

A. Sometimes we got the instructions from the superintendent and sometimes from the other bosses. We have four or five bosses to give instructions.

Q. Any of the bosses may give instructions?

A. Yes, sir.

By the Court:—

Q. And what did you do if more than one boss gave you instructions at the same time?

A. Well, that was hard to tell.

Mr. Golenbock:—I submit the witness is well qualified.

CROSS-EXAMINATION BY MR. TOMLINSON:—

Q. Your job was a laborer on that pier?

A. Yes, sir.

Q. And your main work at that time was hand trucking?

A. Hand trucking.

Q. And sometimes you assisted in loading these trailers?

A. Yes, sir.

Q. Under the direction of some one else?

A. Yes, sir.

Mr. Tomlinson:—I submit he is not qualified.

FURTHER REDIRECT-EXAMINATION BY MR. GOLENBOCK:

Q. They were all laborers on the pier and no matter what a man's work was he was a laborer, except the foremen and bosses that you had?

A. Yes, sir.

Q. And outside of that everybody was a laborer?

A. Yes, sir.

Q. And when the question was asked under certain supervision, every time you loaded a trailer there wasn't a foreman watching you, was there?

(Objected to.)

The Court:—I will allow that.

Q. There wasn't a foreman watching you every time you loaded trailers, was there?

A. No, sir.

Q. And when the question was asked under whose direction, you understood then that he meant that you were to do it, didn't you?

Mr. Tomlinson:—I object to his understanding.

The Court:—It doesn't make any difference. I will allow you to do this as to this witness. Not expressing an opinion as to whether the trailer was loaded properly he may tell how this trailer was loaded, if he knows it, and you may show how it was loaded and he may show how it compares with ordinary loading.

Mr. Golenbock:—He doesn't know the condition of the trailer upon which this accident occurred, but he does know about the ordinary way of loading trailers.

The Court:—You can prove how they were ordinarily loaded.

Q. Now will you state to the court and jury, Mr. Reynolds, how the pineapple crates were loaded on these trailers?

A. Supposed to be placed crossways on the trailers.

Q. And how high?

A. Well, they shouldn't go above the racks on the truck.

Q. And how high do they go?

A. I never loaded them above that or saw them loaded above these racks.

Q. What was the ordinary way of loading pineapples on these trailers, how high?

A. Just as high as the sides of the racks.

Q. As high as the guards?

A. Four feet and one-half, whatever it was.

Q. And the size of the racks was four to four and a half feet?

A. Something like that.

Q. And did you see the particular load upon which Mr. Fagan was at the time of the accident?

A. No, sir; at that time I was working out on the float in a car.

Q. And you have seen Fagan around talking, haven't you, talking from time to time?

A. I saw him; yes, sir.

Q. His work was hand trucking?

(Objected to as leading. Objection sustained.)

Q. What was his work?

A. His work was hand trucking mostly all the time I saw him.

Q. Were you the man that took Fagan across the ferry at the time that he came from the hospital?

A. Yes, sir.

Q. And you were the man that brought him to Asbury Park that day?

A. Yes, sir.

Q. Now, Mr. Reynolds, you have noticed during your experience working for the Central Railroad on this particular pier that the tide changes from time to time?

A. Yes, sir.

Q. And that because of the condition of the tide and position of the plank changes?

(Objected to as leading. Objection sustained.)

Q. And when the tide changes what happens to the plank that connects between the pier and the barge?

A. Well, the plank sometimes varies five, six or seven feet and when it changes the other way it goes up.

Q. Do you mean the incline varies up and down?

A. Yes, sir; up and down.

Q. Now what has been the customary usage or method of work on that particular pier when the tide is low and the incline of the plank is downward, as to the connecting piece between the end of the plank that is on the pier——

Mr. Tomlinson:—I object as to what was customary.

The Court:—Why?

Mr. Tomlinson:—This man has testified he wasn't engaged in this kind of work.

The Court:—I suppose if he knows he can tell. Find out what opportunity he had to examine the dock and see it and then he may testify to what he saw there.

Mr. Golenbock:—I will withdraw the question for the time being so as to ask a preliminary question.

Q. And in your experience as a trailer freighter and hand trucker did you have occasion to pass over the planks that were connecting the barge and pier?

A. Yes, sir.

Q. Every day?

A. Yes, sir.

Q. How many times during the day?

A. Oh, many times during the day.

Q. And in your experience in passing over these planks had you had occasion to see what was done with the end of the plank that connected the pier and the barge whenever the tide was low and the plank was at a great angle?

A. Yes, sir; we often had to stop and put another piece on.

Q. Well, would this piece be on the end of the plank or the pier?

A. On the pier; yes, sir.

Q. And for what effect or for what purpose?

A. So that you could get up to the plank and get down.

Q. And not disturb the load?

A. Yes.

(Objected to and asked to be stricken out.)

The Court:—Strike it out.

Q. Tell us if you know for what purpose that piece was added to the gangplank connecting the pier whenever the tide was low.

Mr. Tomlinson:—I object to counsel asking leading questions.

The Court:—I will sustain that objection. Ask another question.

Q. You say that an additional piece would be placed at the edge of the plank on the pier?

A. Yes, sir.

Q. Now why?

A. Yes.

Q. Why?

A. So that you could get up on the gangplank with the truck without coming up like that one that went over.

Q. And what effect would that additional piece have when the gangplank was at an incline upon a load as you would pass over with it?

A. When your wheels would go over there you would go down the steep incline. It would have no effect upon the load.

Q. And what effect would it have on the load if they had that piece attached to the end of the plank?

Mr. Tomlinson:—I object unless he testifies it would have some effect.

Mr. Golenbock:—That is what we want.

The Court:—Ask him whether it would have any effect or not.

The Witness:—It would have a great effect on these trailers, when the front wheels would drop down the hind wheels would come up.

Q. And what effect would it have on the trailers if there was no piece attached to the end of the plank and if there was an incline on account of the tide?

A. It would upset the load and the end of the plank would stop at the end of the pier.

Q. And what effect would it have if it would jump over the plank, the load?

A. It would dump anybody in front of it in the river.

Q. And did you ever see any freight dumped over when passing over the gangplank?

(Objected to as incompetent.)

(Question repeated.)

Q. There being no piece attached to the end of the gangplank when there was an incline of the gangplank on account of the low tide?

Mr. Tomlinson:—I object to that as irrelevant and immaterial. This man testified it

was necessary to have a leather stringpiece and if it was not there the truck could not go over it. Mr. Golenbock asked what happened if it jumped over and he said it would go into the river. What difference does it make as to previous loads as to whether they jumped in the river or on the dock?

The Court:—It may be answered.

(Objection noted for defendant as ground of appeal.)

By the Court:

Q. Do you understand the question? What you saw yourself, not what anybody else told you.

A. Yes, sir; I saw lots of loads dumped overboard, more than one.

Cross-examination by Mr. Tomlinson:—

Q. Where do you work now, Mr. Reynolds?

A. Atlantic Coast Loading Company.

Q. You are getting paid for coming here, I presume?

A. Yes, sir.

Q. Who is paying you?

A. Mr. Golenbock.

Q. You have talked this case over with Mr. Golenbock a number of times?

A. I saw him a few days ago and he said the case was coming up again.

Q. You testified at the last trial?

A. Yes, sir.

Q. Now your main job was hand trucking, wasn't it?

A. Yes, sir.

Q. Did you ever work on a trailer truck attached to an electric truck?

A. A very few times.

Q. A very few times?

A. Yes, sir.

Q. And you told me awhile ago, Mr. Reynolds, that you assisted in the loading of these trailer trucks?

A. Yes, sir.

Q. And under whose supervision did you assist in loading them?

A. Mr. Dorsey and Mr. Paddy.

Q. And some one of the foremen or bosses would always supervise that loading?

A. Yes, sir.

Q. So that all you did was simply work under the orders of somebody, wasn't it?

A. Yes, sir; that was all.

Q. Now when you said they usually loaded the loads as high as the racks, what racks did you mean?

A. I meant these wooden racks three and a quarter and four feet high.

Q. On the sides?

A. Yes, sir; on the sides.

Q. Is this the same rack they usually use on the front?

A. Some trucks had them on to push them around by. I guess that was what it was for.

Q. Some trucks had them?

A. Yes, sir.

Q. And some had no racks?

A. I think a few didn't have any.

Q. Some had these racks?

A. Yes, sir.

Q. How high did you say these wooden side racks were?

A. Well, four feet, I think, as near as I can remember.

Q. And is that similar to the pineapple crates you saw? (Indicating crate to witness.)

A. Yes, sir; it looks like them.

Q. And you would lay them sideways, wouldn't you, like that, across the truck? (Indicating.)

A. Yes, sir.

Q. And how many high can you usually pile?

A. Why, I mostly forget now. Just as high as these wooden racks would be on the sides of the trucks. I don't know how many it would take to go up there.

Q. You piled them four or five high?

A. Yes, sir; four or five high.

Q. And you would load them sideways right back from the front, wouldn't you, on the trailer truck?

A. Yes, sir.

Q. So that there would be a tier of crates on the bottom and then there would be some more on top and so on up?

A. Yes, sir.

Q. Do you know what the degree of the angle created by the gangplank at low tide would be?

A. That is very hard to tell. Sometimes it is a great deal lower than what it is at others.

Q. You didn't see the tide on this day, did you?

A. I didn't take much notice of it.

Q. You didn't see the accident?

A. No, sir; I didn't see the accident.

Q. And you don't know whether there was any stringpiece there or not, do you?

A. No, sir.

Q. What do you say the stringpiece was constructed of?

A. That was sheet iron.

Q. And the idea of that, or the purpose of it, was to assist in the truck going up and then down, wasn't it?

A. Yes, sir.

Q. And if it weren't there the truck, either the electric or the trailer truck, could not get over unless it jumped over?

A. It would have to jump to get over.

Q. And if it jumped over there would be a violent jerk or jar?

A. Yes, sir.

Q. And do you know who would put the stringpiece along as the tide receded and went down?

A. Why, most anybody that wanted to go down that happened along and happened to be down there would stop and put it down. I have put many a one down myself.

By the Court:—

Q. What is that?

A. I have put many a one down myself.

Q. Where did you get them?

A. They were standing up against the posts inside of the ferry.

By Mr. Tomlinson:—

Q. There were quite a good many men working on this pier, weren't there?

A. I couldn't say, seventy-five or eighty.

Q. Possibly more?

A. Possibly more and maybe less, I don't know.

Mr. Golenbock:—I want to get on the record for the basis of a question, I want to get on

the record whether Mr. Tomlinson will concede that Mr. Fagan is about five feet ten, otherwise I will have to prove it. In height, about five feet ten in height.

Mr. Tomlinson:—Yes.

Mr. Golenbock:—Then it is conceded the height of Mr. Fagan is five feet ten inches.

REDIRECT-EXAMINATION BY MR. GOLENBOCK:—

Q. Now, Mr. Reynolds, I am asking this for the purpose of having it on the record, so do not answer until the Court instructs you to——

A. No, sir.

Q. Mr. Reynolds, will you say whether a load of pineapples being loaded on a trailer such as has been described, of about seven or more feet in height, would you say that was a proper or improper method of loading?

(Objected to.)

The Court:—I don't think you have shown Mr. Reynolds is an expert. I don't think he is an expert.

Mr. Golenbock:—But would your Honor say that a man that loads from 50 to 200 loads wouldn't know how to load?

The Court:—Yes, he may have loaded every one of them wrong.

Mr. Golenbock:—That is for the jury to pass on.

The Court:—Now you want me to allow him to express an opinion before the jury. Now I have allowed you to show how he loaded these. Now it is for the jury to say whether that is a proper way of loading them or not, because an

expert is one giving an opinion based on his unusual knowledge on the subject.

Mr. Golenbock:—Will you grant me an exception?

The Court:—Oh, yes.

(Objection noted for plaintiff as ground of appeal.)

Mr. Golenbock:—I want to ask one other question for the same purpose.

Q. Mr. Reynolds, would you say that a trailer such as has been described loaded with crates of pineapples to about seven and one-half feet in height, without having any guardrails in front to protect the load from falling, would you say that that was a proper or improper method of loading?

(Objected to. Objection sustained.)

(Objection noted for plaintiff as ground of appeal.)

CROSS-EXAMINATION BY MR. TOMLINSON:—

Q. Mr. Reynolds, the level of the floor of the trailer truck—the floor of the trailer truck is about level with the floor of the electric truck, isn't it?

A. No, I think it is a little higher

Q. A little higher?

A. Yes, sir.

Q. But not very much if anything?

A. I think there is a little difference between them.

Q. How much difference will you say there was?

A. Five or six inches, I don't know. It has been so long since I have seen them I don't know.

Q. Your memory is not very clear about it?

A. It was quite awhile ago.

Q. And this protecting piece you spoke about, they have a protecting piece at each end of the gang-plank, don't they?

A. No, they most generally use protecting pieces on the pier.

Q. Isn't there another one on the end down below?

A. No, sir; if the float goes up too high they slide in the end and that makes the end on the float even.

Q. Don't they have one on each end?

A. They most generally have one on each end, or they most generally pull the plank in.

Q. Sometimes they have a piece on each end?

A. Yes, sir.

Q. They are sheet iron?

A. Yes, sir; sheet iron.

Q. As a matter of fact, they put them on in the morning?

A. Yes, sir.

Q. And leave them there all day; that is so, isn't it?

A. Yes, sir.

By Mr. Golenbock:—

Q. But if there were any on in the morning there would be no need of keeping it there, would there?

A. No, sir.

By Mr. Tomlinson:—

Q. But they have them there? They put them on in the morning and keep them there all day?

A. Yes, sir.

Q. And don't they automatically lift themselves?

A. Yes, sometimes they work off the end of the plank. The tide keeps working and they may slide

back and drop off the end of the plank. The tide works them.

Q. As a rule they work automatically?

A. Yes, work up and down with the plank.

Q. And the plank works up and down with the tide?

A. Yes, sir.

By Mr. Golenbock:—

Q. And when it is not there it cannot work up and down, can it?

A. No, sir.

Mr. Golenbock:—With the exception of a doctor whom we expect here tomorrow we rest.

The Court:—You may proceed with the defense.

Mr. Tomlinson:—If the court please, I move at this time for a nonsuit, upon the grounds, first, that the plaintiff has not shown any negligence; secondly, that the evidence discloses that even if there was negligence it was absolutely a risk of the plaintiff's employment, which was assumed by him, it was an obvious risk and was therefore assumed by him.

The Court:—The court will refuse to nonsuit.

Mr. Tomlinson:—You will, of course, allow an exception.

The Court:—Yes.

(Objection noted for defendant as ground of appeal.)

DEFENDANT'S TESTIMONY.

JOHN F. TOOMEY, Sworn for defendant.

DIRECT-EXAMINATION BY MR. TOMLINSON:—

Q. Mr. Toomey, where do you live?

A. 169 Wilkinson Avenue, Jersey City.

Q. And where were you on the day of this accident?

A. With the Jersey Central Railroad, Pier 10, North River.

Q. And how long had you been working there?

A. Ten years.

Q. And what is your job?

A. General foreman.

Q. And what duties do you have as general foreman?

A. Well, I oversee the loading at the pier, the loading up of the freight.

Q. What is your method of loading onto floats, outbound freight from Pier 10?

A. I have bulkhead planks and side planks.

Q. How wide would say these planks are?

A. Well, our bulkhead plank is 7-1/2 feet by 18 feet long.

Q. How long is it?

A. 18 feet.

Q. And what if anything has it on the ends?

A. Why, a racepiece, a sheet iron racepiece.

Q. What is that?

A. That is a sheetiron racepiece about seven feet long and five feet wide.

Q. And what is the purpose of that?

A. Well, this protects it unloading freight, otherwise we could not load up or unload unless we had it there.

Q. Why couldn't you?

A. The planks would project, both ends, over our bulkhead and also over our floats.

Q. Were they on one or both ends?

A. On both ends.

Q. How do they operate, Mr. Toomey?

A. Well, it is rigged—normally the tide has a four and a half foot drop and about the same raise, about a fifteen per cent. grade either way.

Q. And what happens to this racepiece when the tide raises and when it falls?

A. Well, the racepiece goes with the tides. We adjust them according to the tides.

Q. You mean you have to adjust them as the tide commences to raise?

A. Yes, sir, or the tide otherwise commences to shove the plank in. With the raising or lowering of the tide we adjust this.

Q. And how do you get your freight from the pier onto the floats?

A. At the present time we use hand trucks and trailers.

Q. And do you remember the day Mr. Fagan was injured?

A. I do; yes, sir.

Q. And what were you using during that day?

A. We were using the hand trucks and the trailer both.

Q. What is a trailer truck?

A. A trailer truck is a four wheeled truck, a platform truck, about four feet long—no, it is six feet or six and a half feet long and three feet wide.

Q. And how was that attached to the electric truck?

A. By a coupler.

Q. What?

A. By a coupler, a hook with an attachment, attached to the trailer.

Q. On what part of the electric truck does the driver stand?

A. On the front.

Q. And what is there back of him if anything on the electric truck?

A. If he is loading or unloading trucks or trailers there is a man behind him to protect the load.

Q. Is the back part of the electric truck empty or does it have some other wood part on it?

A. There is nothing on the platform truck outside of the hauling arm to pull the trailer.

Q. Nothing on the electric truck?

A. Nothing on the electric truck; no, sir.

Q. Now when the electric truck is hooked up to the trailer truck are the floors of the two trucks level or not?

A. Well, the electric truck is about eleven or twelve inches from the ground and the trailer is about twenty.

Q. So that the trailer is a little bit higher?

A. A little higher.

Q. And what if anything did you use on those trailer trucks about the time Mr. Fagan had this accident in respect to guard-rails or rails?

A. At that time we used pipe ends and we used wooden racks. We used them on trucks at that time.

Q. What did you use on the front end?

A. The front end of the truck Mr. Fagan was hurt on?

Q. Yes, sir.

A. Pipe ends.

Q. And in what respect was the pipe end that

was on the end of the trailer truck on which Mr. Fagan was different from this which I show you?

(Pipe end shown witness.)

A. Immediately across the truck it has some pipe ends, some made pipe ends, across the truck.

Q. Was it any different from this?

A. No, sir; no different.

Q. And what was on the side?

A. Nothing on the side.

Q. Did you see the accident?

A. No, sir; I did not.

Q. Did you go there after the accident?

A. A few minutes afterwards.

Q. Do you know how many crates of pineapples there were on this trailer truck?

A. Twenty crates.

Q. How do you know that?

A. I only know on the float. I was on the float when Mr. Fagan was hurt looking at them handle the trailer truck in the car.

Q. Now I show you Exhibit A (indicating crate) and ask you in what respect if any that is different from the crates of pineapples that were on that trailer truck.

A. Same sort of crate.

Q. Do you know how they were loaded on that trailer truck?

A. They were loaded flat, across the truck.

Q. And do you know how many there were in each tier?

A. Four or five tiers.

Q. And four tiers, didn't you have?

A. Five tiers four high, that is twenty crates.

Q. I mean the tiers going up.

A. Yes, sir; four high.

Q. Four high and five back?

A. Yes, sir.

CROSS-EXAMINATION BY MR. GOLENBOCK:—

Q. Mr. Toomey, when you spoke about this piece that connects with the plank, you only had reference to their maximum work if they were attached to the plank? If they weren't there they wouldn't work that way, would they? Answer the question yes or no.

A. If the racepiece were on the plank?

Q. If the racepiece weren't there it wouldn't work?

A. You couldn't take the plank in or out.

Q. If it weren't there it wouldn't work?

A. You couldn't take it in or out.

Q. Suppose the tide was normal and the plank would be a straight line on the pier with the one on the barge, or the car on the barge, you wouldn't need this plank, would you?

A. Yes, sir; we need this racepiece.

Q. Why do you need that if there was no incline?

A. We would have four inches of plank sticking up at both ends.

Q. You don't mean to say that the ends are pointed out?

A. The ends are square across. There is about a four inch thickness of plank.

Q. Wouldn't they be leveled down to a point?

A. No, sir; they wouldn't be level.

Q. Did you ever see any of these gangplanks without any piece?

A. No, sir.

Q. Never did?

A. No, sir.

Q. How long have you been railroading?

A. Fourteen years.

Q. And during your experience you never saw them changed?

A. No, sir; they never changed them.

Q. They are not stationary? They can be moved?

A. These planking, the floats had rollers under them then.

Q. I am not talking about the planks.

A. Yes, sir; you could move them at that time if you wanted to.

Q. You have moved them many times?

A. Yes, sir; took them in and out at night and morning.

Q. Now you described the trailer and you say that you had no piece similar to Exhibit B for Identification upon it, the pipe rail. You are sure of that?

A. Yes, sir.

Q. And you say that all the trucks you had at the time of the accident had one of these ends on?

A. All of these trucks when I got them, yes.

Q. You are sure of that?

A. Yes, sir.

Q. You were called as a witness at the last trial of this case?

A. Yes, sir.

Q. And do you recall testifying, or being asked this question, and this answer given by you, on page 73, "Q. As a matter of fact your trailers are constructed so that racks can be used on all sides; isn't that right? A. Well, they are. They come here with two racks. That is the way we get them, two racks. You don't get any in the front and back at all, get two racks for the sides, side racks?" Now do you remember being asked that question and that answer being made?

A. Yes, sir.

Q. Now with that question and answer in mind do you now say that those trucks or those trailers had side and front pieces?

A. These racks or pipe ends were used in the front. They were used in the front and back of the truck.

Q. Why?

A. I had racks made to protect the sides, wooden racks with iron braces to protect the sides and rear of the truck.

Q. I call your attention to an answer made at the former trial, "They come here with two racks. That is the way we get them, two racks. You don't get any in the front and back at all, get two racks for the sides, side racks." Now you say you had side racks made; which is true?

A. These pipe racks come and can be changed so they can be used on the side, front or back of a truck.

Q. Do you mean the same side pieces could be used for the front and sides or the rear?

A. Yes, sir.

Q. And only two of them when you get the trucks?

A. Two is all we get.

Q. And on that particular day you say you had them all around?

A. Around where?

Q. All around the trailer.

Mr. Tomlinson:—That is not what he said.

A. I have them on trailers when I handle them.

Q. Now I further call your attention to another question and answer which was made at the last trial in which you were asked this question: "How

about the back and front? (Referring to the trailers.) A. There is no guard on it". Were you asked that question and did you make that answer?

A. There wasn't any guard on it.

Q. Yes, did you answer that question at the last trial?

A. I don't remember saying about the guard. I know there was a pipe there.

Q. I am asking you whether you answered that question that way.

A. I don't remember.

Q. And I further call your attention to another question and answer at the last trial, you were asked, continuing the question as to the guards——

Mr. Tomlinson:—What page?

Mr. Golenbock:—Page 75.

Q. "In the rear also? A. Not in the rear, just the two sides." Now are you correct now or were you correct at the last trial?

(Objected to.)

The Court:—But to what does the question refer, you see? Does it refer to the truck in question or other trucks. You see it is not fair to ask the witness a question without referring to the subject matter.

Mr. Golenbock:—I am referring to the physical appearance of the trucks they used at that time. I am referring to the front and side pieces that they have used and calling his attention to the difference between his testimony at this and the last trial.

The Court:—So that there will be no misunderstanding, you are referring now to the

general trucks that were used and not these trailer trucks?

Mr. Tomlinson:—May I object here?

The Court:—Yes.

Mr. Tomlinson:—He is abstracting this evidence. He is following up this question on page 74, "At the time of the accident you had trailers that had front and rear guards?" and then there are four or five questions that constitute a colloquy and I say that he can't take one of these questions and not read the rest.

Mr. Golenbock:—Why, if I ask ten or twelve questions——

The Court:—Yes, you should inform the witness on the subject matter as to which questions were asked. That is proper. But of course you cannot pick out a question here and there.

Q. I will ask this question and show that I am referring to this very same thing. I asked you at the last trial this question: "Now you have one kind of trailers or several kind of trailers?" and your answer was, "Well, we have got four wheeled trailers. They are all the same, four wheeled trucks." Now then—I am turning to another question on the same page and down further and I ask Mr. Toomey whether he was not asked this question and made this answer as I am going to read: "As a matter of fact your trailers are constructed so that racks can be used on all sides; isn't that right? A. Well, they are. They come here with two racks. That is the way we get them, two racks. You don't get any in the front and back at all, get two racks for the sides, side racks." Now then, I followed that up by another question on page 75, in which the question was referring to the same racks, "In the rear also? A. Not in the rear, just the two

sides." Now I am calling the witness' attention to the testimony I have read and asking him which is true.

Mr. Tomlinson:—I object to that question. Page 75 refers to a question on page 74 between folios 20 and 30 and does not refer to the question on page 73.

Mr. Golenbock:—Now then, I will abide by Mr. Tomlinson's objection and read the question.

Q. "Haven't you seen trailers that had guards on the back and front?" (Referring to the same truck and the same subject matter I spoke of.) Then Mr. Tomlinson objected. Do you want me to refer to that?

Mr. Tomlinson:—No sir; but I am referring to the front and rear guards.

Mr. Golenbock:—My general question related to that.

Q. Now, then, the question, "At the time of the accident you had trailers that had front and rear guards? A. Our trailers, we have got—— Q. Did you? Yes or no. A. I want to answer you right. Our trailers—we have got racks. Trailers come through with two side racks and we have had one set of trailers come through with a little pipe front, or rack, and bend this pipe in the front about two feet and a half in height, one for the front of the truck. That is the only rack I ever saw on the front truck. Q. That is on the front of the truck? That is on the front? A. Yes. Q. In the rear also? A. Not in the rear, just the two sides." Now then, I want to know whether your testimony at the former trial is true or whether your testimony today is true. Which is true?

A. Well, my testimony today. I don't know as there is any change. I said there was a pipe in the front and back.

Q. Did you say anything about a pipe in the back and front at the last trial?

A. I mentioned the pipe in front of the truck. We had the front and back like they are.

Q. Is this the pipe (pointing to Exhibit B for Identification)? Is this the pipe which comes on the sides and is sometimes used for the front?

A. Yes, sir.

Q. And those are the only guards you have on the sides?

A. We use them all around on the trucks and we have racks, new racks, made for the sides, which are higher than these.

Q. And what did you mean when you said you had front and back racks but no side racks?

Mr. Tomlinson:—He didn't say that.

A. The pipe ends I wouldn't consider——

Q. "They come here with two racks. That is the way we get them, two racks. You don't get any in the front and back at all, get two racks for the sides, side racks."

A. These two side racks can be adjusted any way you want them, put them on the front or back.

Q. That is the only explanation you can give of your testimony today?

A. Yes, sir; you can use them side or back.

Q. You say the length of the truck is how long?

A. Six feet and a half, about that.

Mr. Golenbock:—Will you concede the width between these two points here is two feet?

Mr. Tomlinson:—No, sir; I won't concede anything.

Mr. Golenbock:—Then we will have to measure it. Will your Honor have the Clerk get a ruler so we can measure it.

(The rack was measured.)

Mr. Golenbock:—Then suppose we put it on the record that the actual measurement is 28 inches?

Q. So that, Mr. Toomey, you mean to tell the court and jury that the only side pieces that you put on for a six foot truck is this twenty-eight inch pipe?

A. Yes, they are front or they are back or they are side racks either.

Q. Take the two sides. What was the rest of your answer?

A. It only applies to certain commodities, and those racks, groceries and small stuff, we have little iron racks made for that purpose and any iron rack goes in the ends or the sides or the tail of the trucks higher than this pipe. We have a higher rack used for trucking.

REDIRECT-EXAMINATION BY MR. GOLENBOCK:—

Q. And you have grooves in the front and rear of the trucks where you can put planks in or cross-pieces?

A. Pipe ends.

Q. You are still working for the railroad, aren't you?

A. Yes, sir.

Q. You were the foreman on that pier?

A. Yes, sir.

Q. And you have been since the accident?

A. I didn't see the accident.

Q. How far away from the scene of the accident were you at the time it happened?

A. Probably fifty feet.

Q. Did you know it at the time it happened?

A. Word came to me; yes, sir.

Q. How long after it happened did it come to you?

A. A couple of minutes anyway.

Q. You had nothing to do with anything in reference to the accident?

A. No, sir, no more than see him taken care of and taken away.

Q. You attended to the man and saw that he was taken away?

A. Yes, sir.

Q. And the other men attended to taking away the crates?

A. Yes, sir, I went on the float to see that the pineapples went on the car there.

Q. And did he see you go pick the pineapples up?

A. The pineapples was on the float.

Q. You say there were twenty crates on the car?

A. Yes, sir.

Q. You counted them?

A. Yes, sir.

Q. Did you say anything about that at the last trial?

A. No, sir; I did not that I remember.

Q. Why did you count the load?

A. Well, I will tell you the reason I counted it. I thought I might be short on the car or there had some fallen overboard in the shipment.

Q. Do you know how many you originally loaded?

A. Yes, sir; twenty.

Q. Did you have supervision of the loading?

A. Our receiving clerk did.

Q. Well, you didn't stand there at the time this particular trailer went by?

A. No, sir.

Q. And nobody told you at that time or any other time how many crates there were?

A. Nobody told me until I went to investigate myself and found twenty.

Q. You found twenty?

A. Yes, sir.

Q. You don't know how many there should have been?

A. No, sir.

Q. Did you inquire afterwards?

A. Yes, sir.

Q. When?

A. Shortly afterwards.

Q. Who of?

A. Our receiving clerk.

Q. What made you ask?

A. I wanted to know what the total shipment was or if they had some of them fell off.

Q. Wasn't that the last load they took in on the car?

A. It might have been. I wouldn't say it was the last load that went in the car, no.

Q. Why wouldn't you say that?

A. It was a big shipment that day.

Q. I understand it was a big load. Wasn't it the last load that went on that barge?

A. I think one followed this.

Q. And for that reason they piled up all they had at the time?

A. They had three or four different commodities of this load that went on this car.

Q. I am talking about pineapples. That was the last load of pineapples that was taken off from the pier to go on to this barge, wasn't it? It was the last load of pineapples, wasn't it?

A. Yes, sir.

Q. They didn't load pineapples all that day?

A. No, sir.

Q. How long had they been loading them?

A. That was all. That was the reason they had pineapples.

Q. You remember that very plainly?

A. Yes, sir; I remember it particularly, the train.

Q. Where did they go?

A. J. F. Crayton, Easton, Pennsylvania.

Q. And what did it have in it besides that?

A. Oranges.

Q. And what else?

A. Grapes.

Q. And how many baskets of grapes?

A. 125.

Q. You don't know the exact number?

A. No, sir.

Q. And what else, oranges?

A. Yes, sir.

Q. And what else, what commodities beyond what you have said?

A. Beans.

Q. You can't tell us the quantity?

A. Oh, packages, he had 340.

Q. You are exact about that?

A. What?

Q. And when you say it was 340 I am asking if you are making a guess of the total number.

A. Or 300.

Q. And you couldn't give us any definite number except these pineapples?

A. I remember 130 boxes of grapes and probably 40 or 50 boxes of oranges. I can't say anything else.

Q. And all this is guess work?

A. Yes, sir; as near as I can get to it.

REDIRECT-EXAMINATION BY MR. TOMLINSON:—

Q. Was that guesswork as to the pineapples?

A. Yes, sir; guesswork all around, and outside of that my bill of lading, when I looked at the pineapples I wanted twenty crates of pineapples, that is the reason I asked.

Q. I thought you said you counted them at the gangplank.

A. I counted them on the float.

Q. You did count them?

A. Yes, sir; in the car.

Q. After the accident?

A. Yes, sir.

Q. Then you did look at the waybill?

A. Yes, sir; and I found twenty crates. They had the right shipment.

Q. So there is no guesswork about that?

A. No, sir.

Q. And these pipes, were they permanent or removable?

A. Removable.

Q. Did you happen to notice the racepiece on the end of the gangplank on this day, the gangplank where Mr. Fagan went down?

A. I did; yes, sir. They were lying even, lying the regular way.

Q. And were they attached?

A. They dropped the plank in the usual way.

RECROSS-EXAMINATION BY MR. GOLENBOCK:—

Q. And what did you mean when you said it was a guess on the rest? Didn't you mean it was a guess so far as the pineapples were concerned?

A. Yes.

Q. Referring to the pineapples?

A. Referring to the pineapples, and being as the crates were dumped on the plank I went there.

Q. And did you include the pineapples in your statement that it was a guess all around?

A. I do recall that I lookel at the shipment of pineapples thinking I might have lost some overboard after the accident.

Q. Well, why did you go back to the car and count them over again when you had counted them on the float?

A. After the man was hurt I went in on the float and the truckload of pineapples was outside of the car and I counted twenty boxes and when I asked the receiving clerk where was the bill of lading, the duplicate, I saw there was twenty receipted for, knowing none of them dropped overboard.

Q. And why did you go in once again and count them?

A. I didn't go but once.

Q. Didn't you say you counted them on the barge and counted them again on the float?

A. I came and got the receipt to see I didn't lose any freight.

Q. How many did you count?

A. Twenty, only once.

Q. How many times?

A. Only once.

Q. So that you didn't go any more and count them after you counted them on the barge?

A. I went to the car there and counted the car. I couldn't go any nearer.

By the Court:—

Q. How were these gangplanks fastened?

A. We have them attached, the planks, to falls

from the roof of the building and bolted to this doorsill. They are made to take in.

By Mr. Golenbock:—

Q. You have reference to the gangplank?
A. Yes, sir.

(Adjourned till October 30, 1919, at 10.00 A. M.)

FREEHOLD, N. J., October 30, 1919.

Trial of the cause resumed at 10 A. M.

JOHN TOOMEY, resumed for plaintiff.

RECROSS-EXAMINATION BY MR. GOLENBOCK:—

Q. Mr. Toomey, you know a great deal about loading trailers, don't you?
A. Yes, sir.
Q. How long had these trailers been in use by the Central Railroad at that time?
A. You mean up to the time?
Q. Up to the time of the accident, yes, sir.
A. I couldn't exactly tell you. It may have been two months, it may have been three months. I don't know exactly.
Q. And it was practically a new thing up there, wasn't it? But during the time that they had used those trailers on that pier you had seen them loaded and had at times supervised the loading of them, hadn't you?
A. Right at the pier?
Q. Yes, while they were being used on the pier.
A. Sometimes I did and sometimes I didn't. I wasn't always around.

Q. That was part of your work, wasn't it?

A. Part of my work, yes, sir.

Q. You wouldn't say that a load seven feet high piled with pineapple crates would be a proper load, would you?

A. Seven feet high?

Q. Yes.

Mr. Tomlinson:—Seven feet high from where, from the ground or the floor of the trailer?

Mr. Golenbock:—Seven feet high, loaded so high.

Q. You wouldn't say that was a proper load?

A. No, I wouldn't say it was a high load.

Q. You wouldn't say it was a high load?

A. No, ordinary load.

Q. You would say that seven feet of pineapple crates would be an ordinary load?

A. Yes.

Q. In spite of the fact that the guards or the pipe guards or rails, as you call it, which were stationed or placed on the front and rear of the trailer, was only about two and a half feet from the ground or floor of the trailer?

A. The pipe rack?

Q. The pipe rack, yes.

A. Two and a half feet, yes, above the trailer, the body.

Q. This pipe rack would be only two and a half feet?

A. Above the trailer.

Q. Above the trailer, and yet you would say that the seven foot load of pineapple crates would not be an improper load?

A. Be an ordinary load.

Q. Ordinary load?

A. Yes, sir.

Q. The ordinary load, as you say, Mr. Toomey, would be four high and five tiers?

A. Four high and five tiers, yes.

Q. Do you know how high that would be?

A. Well, it would be probably seventy-two inches.

Q. That would be how many feet?

A. Six feet.

Q. That would be the average load?

A. Well, sometimes it would. The average load—of course you could——

Q. Could what?

A. The average load, sometimes we would have probably a crate or two on top single.

Q. And yet you would say that that would be a proper way of loading?

A. Well, proper, of course, to the loading, I say yes.

Q. But what wouldn't you say that it was proper? In what respect would it not be proper?

A. Well, I wouldn't say it was not proper. I couldn't say it was not proper.

Q. You just said that as to loading you would say it was proper. Now you must have had something in your mind, that in some respects it was not proper. Now in what respect was it not proper?

Mr. Tomlinson:—I object to that. Of course if it is not proper let him answer that, but I object to counsel assuming that it was not proper.

The Court:—This is cross-examination.

Mr. Tomlinson:—Of course it is cross-examination, but he cannot assume something which is not in the evidence. Let him ask him what, if anything, was improper.

Mr. Golenbock:—I don't want to ask him the way you want me to, Mr. Tomlinson.

Mr. Tomlinson:—I am not speaking to you, I am addressing my objection to the court.

(Question repeated.)

A. Well, I haven't in my mind to say it was not proper, no.

Q. Then you would say it was proper in every respect?

A. Proper load, yes.

Q. What did you mean when you said that in respect to loading it was proper? Why did you limit your answer to the load, as to the load that it was proper? Why didn't you say that it was proper in every respect in the first instance?

A. Well, but for every day loading I would say that it was proper loading.

Q. Did you ever in your experience ever supervise the loading of pineapple crates on a trailer on which you had wooden framework placed in front of the load and the rear to prevent it from falling?

A. Well——

Q. Yes or no.

A. I have, yes, sir.

Q. And you would do that with any loads which were about six or seven feet high, wouldn't you? Yes or no.

A. I would if we had——

Q. Just answer——

Mr. Tomlinson:—No, let him answer.

Mr. Golenbock:—No, I am going to have him answer proper.

Q. Just answer the question yes or no.

The Court:—He is entitled to an answer yes or no.

(Question repeated.)

A. Yes.

Q. You would not swear now that this load which Mr. Fagan was on had any of those wooden racks on front or rear, would you?

A. It had a pipe on.

Q. Just answer my question. I will ask Mr. Kelly to repeat it.

(Question repeated.)

A. Had no wooden racks.

REDIRECT-EXAMINATION BY MR. TOMLINSON:—

Q. What did it have?

A. Had a pipe rack.

Q. Now you say that you have used wooden racks on front and rear of the loads of crated pine-apples.

A. At the time this accident happened——

Mr. Golenbock:—I object to that as not being responsive and ask that the part of the answer which was given be stricken from the record.

The Court:—Strike it out.

Q. When have you used it?

Mr. Golenbock:—I object to that next question unless the question is withdrawn or answered.

Mr. Tomlinson:—I don't know what you mean.

The Court:—He may answer the question. He may amend his question if he so desires, add something to it. When he starts to answer before counsel is through counsel is not bound by it.

Mr. Tomlinson:—I don't so understand the rules of practice.

The Court:—I think counsel is not prevented from finishing his question.

Mr. Tomlinson:—No, I didn't mean that. If it is an amended question I have no objection to it.

The Court:—Just strike that out and let counsel ask the question as he wants to. The witness started to answer.

(Question repeated.)

Q. You say that you have used wooden racks in the front and rear of loads of crated pineapples. When did you use those, under what circumstances?

A. Well, I used them—at the time of this accident of Mr. Fagan's I had nothing but the pipe rack to use at the time. A short while afterwards we got a set of new trucks which had compartments set on the sides and front of the truck for to put wooden racks, wasn't pipe at all.

Q. What I will now ask you is, how often did you use wooden racks on the front and rear ends of trailer trucks on which were loaded crates of pineapples?

A. Oh, I couldn't tell you. I have used them quite often.

Q. You used wooden racks?

A. Wooden and pipe ends on both ends, certain trucks.

Q. What?

A. I would on certain trucks.

Q. On what trucks, what kind of trucks?

A. On trailer trucks.

Q. How high would those wooden racks be that you used on the front ends?

A. Well, the wooden rack, about three feet and a half.

Q. And when would you use wooden racks and when would you use pipe racks on the front end?

A. Well, on the conditions, what sort of work we had to use. One was set up for the square compartments on the sides and front of truck, four wooden racks.

Q. Now what was the condition of this truck on which Mr. Fagan was working at the time of his injury with regard to the possibility of putting on there the wooden—putting on the front of it the wooden rack?

(Objected to. Objection overruled. Objection noted for plaintiff as ground of appeal.)

A. There was no place to put on a wooden rack on that truck on that day in question, nothing but pipe end.

RECROSS-EXAMINATION BY MR. GOLENBOCK:—

Q. Mr. Toomey, just a moment. When you went to the scene of the accident did anybody instruct you to examine the trailer?

A. No, sir.

Q. There was nothing the matter to the trailer, was there?

A. The trailer was all right.

Q. So that no instructions were given to you by anybody to examine it and you had no occasion for the examination of the trailer?

A. No, I didn't.

Q. And all you did at the time, as I understood you yesterday, was that you counted the number of crates? Other than that you did nothing?

A. I noticed the——

Q. Other than that you did nothing?

A. What do you mean? I counted the crates of pineapples. It was not necessary for me to look at the condition of the truck.

Q. And outside of that you did nothing?

A. Looked at the truck and the pineapples, that was all.

Q. Yes or no.

Mr. Tomlinson:—Let him answer the question.

Mr. Golenbock:—He doesn't need any assistance, Mr. Tomlinson.

The Court: No remarks by counsel.

Mr. Tomlinson:—But, your Honor, if I may be heard just a second, I do think that this witness has a right to answer his question in full without being interrupted every time by Mr. Golenbock.

The Court:—He has a right to answer the question the way he pleases as long as it is his direct answer.

(Question repeated.)

Q. Do you want to answer that question?

A. Well, I had nothing, of course, to occasion to examine the condition of the truck at the time.

Q. How many trucks did you have on that day?

A. Trailer trucks?

Q. Yes.

Mr. Tomlinson:—I object to that as incompetent, irrelevant and immaterial.

Mr. Golenbock:—It is cross-examination, if your Honor please, as to what he knows about this particular truck, showing the opportunity and occasion and credibility.

The Court:—Yes, I think that is competent. I am going to allow that question.

(Objection noted for defendant as ground of appeal.)

By the Court:—

Q. If you can remember, how many trucks did you have on that pier?

A. At the time I think we had twenty-four trucks.

By Mr. Golenbock:—

Q. After you counted the pineapples you immediately went to see about Fagan, didn't you?

A. I went back to our bulkheads to see our receiving clerk.

Q. After that you paid no more attention to the incident?

A. I paid attention to Mr. Fagan. I seen that he was taken to the hospital.

Q. After that you merely paid attention to Mr. Fagan?

A. Yes, sir.

Q. Did you at the last trial state that you had only one kind of a truck?

A. I don't remember.

DR. JOHN BASSIN, sworn for plaintiff.

DIRECT-EXAMINATION BY MR. GOLENBOCK:—

Q. Doctor, you are a duly licensed physician for the state of New Jersey?

A. Yes, sir.

Q. And for how many years have you been practicing medicine and surgery?

A. Nineteen years, nineteen or twenty years.

Q. Where did you receive your medical education, doctor?

A. Cornell and Long Island College Hospital.

Q. Have you had experience in connection with hospitals and hosiptal work?

A. I believe so.

Q. Will you enumerate those that you have, Doctor?

A. I was connected with the St. Francis Hospital in the state of New York, Lincoln Hospital, Red Cross Hospital, Ruptured and Crippled Hospital, and until recently Long Branch, I had some connection there.

Q. Have you had any connection with the navy work as physician?

A. Yes, sir. I have seen service in this war.

Q. And have you any connections now in this state?

A. Yes, I am the surgeon of the State Rehabilitation Commission and medical advisor of the state Department of Labor.

Q. Of the state of New Jersey?

A. Yes.

Q. You have examined Mr. Fagan at my request, have you, Doctor?

A. Yes, I think it was about a year ago.

Q. You testified at the last trial.

A. Yes.

Q. Now Doctor, will you describe what you found at that time from your diagnosis and examination?

A. As far as I can remember he had a thrombophlebitis or diseased vessels in the leg, with a great deal of injury to the tissues surrounding, I believe the leg and foot, with loss of motion and sensation in the leg and foot to a great extent. And he also

had a luxation of the right—I believe it was the right hip, and arthritis, really an inflammation within and outside of the joint following this luxation. There was also a separation of the joint called the right sacro-iliac joint inside of the right hip joint, and immediately adjoining the lower aspect and the right surface of the spinal column, in that region. He had a great deal of distortion of the foot, leg, and structurally or functionally his motion is very much impaired. He has had to use crutches and could not step on his foot, could not balance himself any way at all. And his nerve reflexes, as compared with the left or good, healthy member, were very much impaired.

Q. Doctor, is he able to use his hip with this condition as you have described the hip?

A. I have not examined him today. I just tried to make him walk. I didn't get a chance. I don't know his actual condition today. I see he is on crutches.

Q. I mean at the time you examined him, Doctor, was he able to use his hip?

A. To a degree, yes; oh yes.

Q. But was he able to use the hip in the same manner as the other hip or left hip?

Mr. Tomlinson:—I object to that as leading. Let the doctor describe what he saw.

The Court:—The doctor may describe what his condition was at that time as to the use of the hip.

A. The use of the hip was impaired because of the inflammation that had set in secondary to whatever caused this condition, and the lining of the joint itself was impaired, evidently, undergoing a process of degeneration, impairing its motion, so

it was limited. The fluid, the so called synovial fluid, joint oil, was doubtless diminished because it was painful when I tried to forcibly—use the joint for him. And I don't recall the exact limitation of motion in degrees, but it was quite definite that it was at least half, possibly, of the natural joint motion.

Q. Would you say, Doctor, that those injuries which you have described from your diagnosis were of a permanent and lasting character?

A. I thought so then.

Q. You have superficially examined him this morning. Would you say from that that still the same condition exists?

Mr. Tomlinson:—I object, except that it does not appear that the doctor has examined him this morning.

Q. Did you see him this morning?

A. Yes, I made him walk. Without any proper examination I could readily see that his motion had not improved from the time I had seen him last year, either in the hip or in the foot or leg.

Q. Doctor, the condition of the foot as you have described, was that of a permanent and lasting character at the time you had examined him?

A. I thought so.

Q. And Doctor, could you state with reasonable certainty whether the injury which you have described today and which you have found upon this plaintiff could have been the proximate result of original injury which was sustained in August, 1917?

(Objected to as leading.)

The Court:—Oh, yes. I don't think there is enough knowledge of the doctor of what the accident was in 1917. You see you are asking him to know too much.

Q. Doctor, assuming a man standing on a trailer, which trailer is loaded with crates of pineapples, approximately twenty or more crates, each crate weighing about seventy-five or one hundred pounds, if I recollect correctly; and assuming a man was standing one foot on the trailer and one foot on an electric truck which is attached to this trailer, and that by reason of the trailer coming in contact with a certain object those pineapples fall from the trailer and fall upon him, striking him on the spine, back, hips, and spreading him out: could you say with reasonable certainty, Doctor, whether the injuries and diagnosis which you have just described that you found upon this plaintiff could with reasonable certainty have been, as far as you could see, as a result of an accident as I have described?

A. Well, I believe the physical findings would point to a direct force applied in a manner of an accident that might have happened that way. I don't know whether that was the actual accident.

Q. I don't say that you know it did happen, but can you reasonably say that such an injury could result from such an accident?

A. I believe so.

Q. Now Doctor, could you say from the examination that you made and from the results of your examination that that man will ever be able to walk without crutches?

(Objected to as leading.)

The Court:—Yes, it is leading.

Q. Could you say, Doctor, whether this plaintiff will ever be able physically to have the use of his right leg without the aid of crutches?

(Objected to as leading.)

The Court:—Yes, it is sustained.

(Objection noted for plaintiff as ground of appeal.)

Q. Doctor, for how long a time do you think this plaintiff would have to use crutches in order to get about?

A. As long as he gets along without a brace, which will supply the support that the crutches do.

Q. Do you mean then that the brace would take the place of the crutches?

A. Yes.

Q. And Doctor, could this plaintiff have the use of that leg without either crutches or brace at any time?

(Objected to as leading.)

The Court:—Put it in another form. You see you are asking leading questions. They are objectionable.

Q. Well, Doctor, can you say whether this plaintiff could have the use of his right leg without the use of a brace or crutches?

(Objected to as leading.)

The Court:—The same ruling. It is leading.

Mr. Golenbock:—I think it is only a direct way of asking the question. He has already answered that he would have to use a brace instead of crutches. Now I am asking whether he could do without either. I don't see how possibly the question could be framed any dif-

ferent way than asking a direct question, unless I leave it for the assumption of the jury that he could not. Otherwise I would have to show by question direct that he could not use the leg without either one of the two instruments.

The Court:—Find out whether there is going to be any improvement, the extent of the improvement, whether this condition is going to continue.

Mr. Golenbock:—There is already, I understand, testimony that there won't be.

The Court:—Well, then you don't want to ask it again, do you?

(Objection noted for plaintiff as ground of appeal.)

The Court:—The subject matter is proper if you get it in proper shape so that the doctor can answer it.

Q. Doctor, will you tell the court and jury what the plaintiff would have to do in order to get about at any time?

A. Well, he would either have to use crutches without bringing his foot down on the ground, so that he can sustain any part of his body weight, or else he would have to be supplied with special orthopedic braces encircling his hip and a metal extension leading from that hip-metal circle—to an artificial lock joint knee and lock joint, as we call it, ankle, with a special support for his foot—we call this a foot plate—which he could wear within the shoe. And in that way his body weight, instead of going down on his foot, would have to be supported from his hip down to his ankle, and naturally aided by the extra metal support, which would supplant

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the muscles and the structures of the foot, which are in my opinion permanently impaired.

Q. So that, Doctor, he would either have to use the crutches or this contrivance as you have described?

A. I believe so.

Q. In order to use his leg?

A. Yes, sir.

CROSS-EXAMINATION BY MR. TOMLINSON:—

Q. When was it that you examined Mr. Fagan, Doctor?

A. About a year ago, I believe.

Q. And that was for the purpose of trial?

A. Well, I was asked to examine him and come and testify on his behalf.

Q. And you made your examination primarily for the purpose of testifying at the last trial?

A. Well, primarily to make a diagnosis and only secondarily, of course, because I was requested to come to trial. I was not sure I would have to come to trial at all. I was interested in the injury.

Q. Well, Doctor, you remembered the last trial, of course?

A. I have some recollection, yes.

Q. And remember your testifying at the last trial?

A. I believe I said that I was——

Q. Now just a minute, Doctor. You remember testifying at the last trial?

A. Yes, I did testify.

Q. And don't you remember me asking you, Doctor, "But I say didn't you make your examination primarily for the purpose of testifying at this trial?" And didn't you answer, "Primarily, yes"?

A. Perhaps I have. But if I would be allowed to modify this statement——

Q. I am just asking you whether you said that.

A. I believe I said that, yes.

Q. And that was the only examination made, wasn't it, Doctor?

A. Except what I have seen today, just today—we consider that one state a very important part of the examination, making a man walk to see whether his function is all right.

Q. How long did you examine him this morning?

A. Oh, about five minutes.

Q. Where was it?

A. I walked him out of this room before and then walked him out here again and tried to make him stand on his feet if possible. I tried to flex his joints and I wanted to take the crutches away from him but he couldn't get along without them. I wanted to make sure just as to how much improvement he had made, if any, and I can't see that he has made any improvement as far as this examination went.

Q. My question was how long did this examination take place?

A. About five or ten minutes, I suppose, grossly.

Q. What hospitals did you say you were connected with, Dr. Bassin?

A. Oh, I was connected with several hospitals. I am connected with all of the hospitals of the state now.

Q. With what hospitals are you officially connected?

A. I am officially connected with all the hospitals in the state and to do compensation surge

in, which covers all the hospitals of the State of New Jersey.

Q. What hospitals?

A. All of them.

Q. Every hospital in New Jersey?

A. Every hospital in New Jersey; that is, to do compensation work.

Q. Well, what are some of those hospitals?

A. All hospitals. I operated yesterday at the hospital in Newark, Clinton Hospital.

Q. And when were you appointed for that hospital?

A. I don't have to be appointed at all. I am appointed by the state.

Q. What is your job with the state?

A. Medical physician for the commission of labor, and inspector for the rehabilitation commissioner of the state of New Jersey.

Q. When did you get that job?

A. About three months ago.

Q. You didn't have this man under your care, did you?

A. No, sir.

Q. Doctor, are you basing your testimony today upon your recollection of this examination or upon your reading of the testimony which you gave at the last trial?

A. No, sir; I believe I am recalling what my examination revealed to me about a year ago and what I saw today. I read this testimony and found some mistakes in it. Hahneman Hospital, I was never connected with any such hospital. There are some errors in there.

Q. There are some errors?

A. Some errors about the hospital connection, yes.

Q. But you did read this testimony before you went on the stand, didn't you?

A. I just glanced over it.

Q. You read it over, didn't you?

A. I didn't read it over, no.

Q. You glanced over it?

A. Glanced over it.

Q. You got the substance of it?

A. I am not sure of it.

Q. Now Doctor, when you say this man's condition is probably the result of this accident or it might be the result of this accident, what you mean is, isn't it, that the injuries which he has were the result of a trauma or a blow?

A. Trauma means more than a blow to me.

Q. Traumatic injuries, aren't they ?

A. Traumatic injuries, yes, sir.

Q. That means that the injuries resulted from physical contact with something.

A. Yes, sir; direct or indirect.

Q. Do you say that the tissues of the leg are diseased? The tissues are diseased, is that what I understand you to say?

A. They were diseased in a certain way, inflamed, undergoing inflammation.

Q. And therefore you say that there is loss of sensation in the foot?

A. There was a loss of sensation when I examined it last year. I didn't examine him for sensation today.

Q. Was there a loss of sensation in the leg?

A. Loss of sensation in the leg below the knee and the foot. I stuck a pin in it, two or three pins in it, and he didn't feel it.

Q. So therefore you would say, wouldn't you,

Doctor Bassin, that this man could not at the time that you examined him, at least, have any pain in his foot and leg below the right knee?

A. In some regions of that foot and leg. Nerve distribution follows certain regions.

Q. Now if there is a loss of sensation how could there be any such sensation?

A. Oh yes; you may have a loss of sensation on the outer aspect of the leg and not on the inner one. It depends on the nerve from which a trunk is derived and distributed to the skin.

Q. Then when you told the jury that there was a loss of sensation you did not mean a total loss of sensation, did you, except the leg below the knee and foot?

A. I meant in the sense that I examined him, wherever I tested the sense of sensation, it was gone.

Q. That is what I am getting at; wherever you tested this man's leg or foot you didn't find any sensation, did you?

A. No, not as I recall.

Q. How could you compare the sensations in the relative portions of that leg and foot unless you tested it in every portion?

A. I know in this way. I went over the two main regions, that is, the front regions, which we call the extensor region, and the back, or flexor region, and I found there was no sensation there as far as I could see. I tested the deep reflexes to make doubly sure that his deep sensations and what they call tendon reflexes are gone as well as the superficial skin sensation, and I found that his deep tendon reflexes were also gone in the foot. I don't remember exactly about his knee joint. I don't think that I tried that out. I don't believe

that I tried out any deep tendon reflexes with his foot; I took that for granted, that his sensation, both the deep and superficial, during my examination did not reveal that there was any responsive sensation. Now if he had a patch of sensation elsewhere—it may have been an inch or two which I could not go over—why, I can't account for that.

Q. But you do say, don't you, Doctor Bassin, that this man could wear a brace and that that brace would enable him to walk?

A. I don't say it would enable him to walk; it would substitute the crutches; it would enable him to walk without crutches.

Q. Well, isn't that walking?

A. I don't think it is proper walking. It is impaired walking.

Q. I didn't ask you whether it would enable him to properly walk, Dr. Bassin, I asked you whether it would enable him to walk.

A. Well, yes; I think he ought to be able to. I think he ought to be able to walk somehow.

Q. You mean that if he put on the brace he could get along and live; he could proceed, he would have locomotion without the use or aid of crutches; isn't that what you mean?

A. I mean impaired locomotion. He does not use the leg because the brace uses the leg for him. It is an artificial appliance, just the same as the man who who has no leg at all, or might just as well have an artificial limb. That is locomotion.

Q. He could control himself, he could move, couldn't he, he could walk?

A. Just the same as a man with an artificial limb.

Q. Now won't you be good enough to answer the question? I am not asking you as to how properly he could walk, I am asking you whether with the

brace he would not be able to walk without the use of crutches.

A. Yes, he would be able to walk, of course.

Q. You haven't had this man under your care at any time, have you?

A. No, sir.

Q. And you have only seen him two times; last year in court or the time that you examined him, and then in court and today in court?

A. That is all, sir.

REDIRECT-EXAMINATION BY MR. GOLENBOCK:—

Q. Dr. Bassin, in the event that Mr. Fagan would have one of these appliances, as you term it, a brace, he would not be able to get about normally, would he?

(Objected to as leading.)

Mr. Golenbock:—I know it is, but it is an explanation. There have been certain impressions left, probably, and I want to show just what the situation is, and I think the jury is entitled to know.

The Court:—That is very true, but are you entitled to ask leading questions?

Mr. Golenbock:—I think in redirect I am, what has been brought out in cross.

The Court:—In the discretion of the court I will allow you to ask the question.

(Objection noted for defendant as ground of appeal.)

A. No, sir.

Mr. Tomlinson:—If the court please, I would like to apply at this time for permission to have Dr. Bennett and Dr. Shaw ex-

amine Mr. Fagan sometime today, either now or at the noon recess.

The Court:—Well, is there any objection to that?

Mr. Golenbock:—I think a formal objection I will make.

The Court:—Why?

Mr. Golenbock:—On the ground that if they wanted a physical examination there is a proper procedure; that they have not asked for any physical examination, and also that they have had an examination. If they wanted any further examination they should have asked for it in a proper manner.

The Court:—What is more proper than to ask now?

Mr. Golenbock:—Well, I just want to have the record clear and then your Honor can rule upon that.

The Court:—Oh, I shall allow an examination. The only question is when.

Mr. Golenbock:—Also I should like to ask this: that the examination take place now in the presence of Dr. Bassin and that the medical testimony come in prior to the other witnesses, so that Dr. Bassin can be here at the examination and testimony of the other doctors.

The Court:—You may allow the examination to take place before Dr. Bassin, and they may do that now. I cannot control the time and place.

Mr. Golenbock:—I think Dr. Bassin, being connected with the state, and that his services are, I understand, imperative and important

to be about from place to place, and I have no doubt Mr. Tomlinson will agree to that.

The Court:—You may call Dr. Bassin back if you desire after the examination of the physicians as to the result of the examination. I cannot direct the other side.

Mr. Golenbock:—I realize that. My idea is to have the medical testimony now, so that in case I need Dr. Bassin I may bring him back.

The Court:—You may have the examination now in the presence of Dr. Bassin and then after the examination if you desire to recall Dr. Bassin you may do it. I will allow you to recall Dr. Bassin.

Mr. Tomlinson:—Of course I don't know now whether I will want to call Dr. Shaw and Dr. Bennett, any more than Mr. Golenbock will want to call Dr. Bassin. I do not want to keep them around here any more than Mr. Golenbock wants to keep Dr. Bassin, but I am not prepared to say at this time what I will do.

TONY PALMIERI, sworn for defendant.

DIRECT-EXAMINATION BY MR. TOMLINSON:—

Q. Tony, where do you live?

A. 167 E. 102nd St. New York City.

Q. Where do you work?

A. I am working for the government over on the ships in Hoboken.

Q. How long have you been working over there?

A. In Hoboken?

Q. Yes.

A. About two or three weeks.

Q. Did you use to work on Pier 10?

A. Yes, sir.

Q. For the Central Railroad?

A. Yes, sir.

Q. Were you working there the day that Mr. Fagan got hurt?

A. Well, I stood right by the electric truck.

Q. What were you doing if anything on that electric truck?

A. Only I was driving it is all.

Q. You were driving it?

A. Yes.

Q. And what was that electric truck attached to if it was attached to anything?

A. No.

Q. Did you see Mr. Fagan when he got hurt?

A. Well, I seen when the load fell off, he was halloeing, but I couldn't look on behind all the time. I had to look in front, you know.

Q. What was he doing?

A. He was standing on the truck, on the platform of the truck and I was driving.

Q. What fell over on him?

A. Crates of pineapples.

Q. What were those crates of pineapples loaded on?

A. They was on a trailer.

Q. Trailer truck?

A. Yes, sir; trailer truck.

Q. Was that hooked up to the electric truck you were driving?

Mr. Golenbock:—I suppose that is what Mr. Tomlinson calls leading, but I have no objection. He may proceed and lead the witness.

A. Yes, sir.

Q. How long had you seen Mr. Fagan that same day?

A. That same day?

Q. Yes?

A. He was with me from nine till about half past nine in the morning.

Q. Well, for how long after that was he with you?

A. He was from the time that he go home at night, because he used to go home about quarter past four.

Q. And what kind of work had he been doing with you that day from half past nine up until the time that he got home?

Mr. Golenbock:—I object. He didn't say until he got home. He said until he went home.

The Court:—Yes.

Q. When did he go home that day?

A. Well, he used to go home in the night about half past four or five, I think. I don't know. I am not sure.

Q. What time did he go home this day that he got hurt?

A. It was about half past three or four, something like that.

Q. Now what kind of work had he been doing with you that day?

A. Only hooked up the trailers behind the machine.

Q. And how many trips had he made with you?

A. Well, I can't tell you.

Q. Have you any idea?

A. No, I can't tell you a thing.

Q. What other work if any had he done with you since he started in at half past nine with you?

A. Sometimes he used to pull the trailer, some-

times he used to get a load on the platform for the machine, the electric machine.

Q. I mean on this same day.

A. This same day.

Q. How many times if any had he worked with you this same day before he got hurt on that trailer truck?

A. I can't tell you that.

Q. What?

A. I don't know. I couldn't tell you that.

Q. Had he worked at all with you that same day before he got hurt on the trailer truck with you?

A. Yes, sir.

Q. Now you say that he was working on the trailer truck with you. Just tell these gentlemen what he was doing and what you were doing that same day.

A. Well, I was driving the machine and he was on the platform of the electric truck. He tried to hold the pineapples, he had a load of pineapples to pull to the float, and he was standing on the sideways of the machine with his hands by the freight, but you know I couldn't turn all the while and I couldn't look behind what he used to do, you know.

Q. Now when these crates of pineapples fell over where was your electric truck?

A. It was from the plank to the float, you know, on the end of the float; on the end of the float, on the end of the plank.

Q. How high were these pineapples loaded on the trailer truck?

A. It was about four high.

Q. Now before that accident, Tony, that same day, when, as you say, Fagan was working on the trailer truck with you, what had you been doing?

A. What had I been doing?

Q. What had both of you been doing?

A. Well, we had been pulling the trailers and we had been getting a load of all kinds of stuff on the train, you know.

Q. Where had you been pulling those trailers?

A. On the float in the car. The float, and then we got a car on the float with the freight loaded in the car.

Q. On the float from where?

A. From the bulkhead, from the dock.

By the Court:—

Q. Then the cars were on a float, were they?

A. Yes, the cars were on a float; yes, sir.

Q. Then you ran the stuff that you were going to load in the cars on these trucks down on your barge and then loaded them in the cars?

A. Yes, sir.

Cross-examination by Mr. Golenbock:—

Q. Mr. Palmieri, you say that when you were driving this particular electric truck on the occasion when the accident occurred you were looking front?

A. Yes, sir; I was looking front.

Q. It was your business to see where you were going, wasn't it?

A. Yes, sir.

Q. You had no reason to turn back, did you?

A. Well, sometimes I turned back.

Q. Well, at that time—I am not talking about sometimes—on this particular truck you had no reason to turn back, did you?

A. Well, I turned back because I see that load fall off. That is the reason I turned back.

Q. You did look back when the load fell off, did you?

A. Yes.

Q. But before the load fell off you didn't look back?

A. Well, sometimes, not all the time, you know. Once in a while I would turn around.

Q. I am talking of this load, mind you. I am talking about this load. Did you look back before the pineapples fell?

A. Yes, I did look back.

Q. When?

A. Well, I can't tell you exactly when. It was once in a while.

Q. The last time you looked back was when the pineapples were falling, is that right?

A. Yes.

Q. Now your truck, then, was on the plank between the pier and the barge?

A. Yes, sir.

Q. Now where was it, where were you in reference to the pier, when you looked back once before that time?

A. Well, I looked back before that time to be sure.

Q. Where were you when you looked back once before? Where was your truck?

A. I was on the truck.

Q. I know, but were you on the pier?

A. No, between the float and the plank.

Q. Between the float and the plank?

A. Between the float and the plank.

Q. Now you have reference to the time when the pineapples fell down; is that right?

A. Yes, sir.

Q. But I am talking about the time when you

looked back once before that time, where were you?

A. I did quite a lot of times before that.

Q. What?

A. Yes, I did look back a lot of times before.

Q. Now tell us where you were with your truck when you looked back before this time when the load fell off the trailer; where were you?

A. I was on the electric truck, driving the truck on the front.

Q. Where was your electric truck, on the pier?

A. Between the plank and the platform.

Q. How many times did you look back while your electric truck was between the pier and the barge?

A. I couldn't tell you how many times.

Q. Did you look back more than once?

A. Certainly.

Q. How many times?

A. I couldn't tell you.

Q. Well, did you look back more than twice?

A. Well, looked back once in a while. I can't tell you how many times.

Q. You mean to say that when your electric truck got on the plank, between that time and the time that the merchandise fell from the trailer, you looked several times backwards?

A. Yes.

Q. Sure of that?

A. Yes.

Q. Why did you look back several times? Did you expect the load to fall?

A. No, but—well, sure; if I see the load fall I tell him to fix them different.

Q. Did you expect that load on that trip to fall from the trailer?

A. No.

Q. Did not?

A. No.

Q. With whom did Fagan work the day before the accident, with you?

A. He used to pull the handtruck. It wasn't on the dock. That is all over the pier.

Q. Did you know him when you would see him?

A. When I would see him?

Q. Yes, before the day of the accident did you know him when you saw him?

A. Yes, I seen him in the pier but didn't know him.

Q. How many men in all were working around the pier?

A. I think there was about a hundred at that time.

Q. Did you know every one of the hundred?

A. No.

Q. Did you ever talk to Fagan before the day of the accident?

A. No, I had nothing to do with him.

Q. Did you know who he was?

A. Had nothing to do with him.

Q. Had nothing to do with him and didn't know the difference between him and the other hundred men, did you?

A. He come from Jersey. I was come from New York. I didn't know him at all.

Q. You wouldn't even know him when you saw him. So that the first time you saw him was when he was working on the day of the accident on the pier with you?

A. I saw him before on the pier but didn't know him.

Q. Your business was to run an electric truck?

A. Yes.

Q. Do you know how many trailers you had on that pier?

A. Well, I don't know.

Q. Don't know?

A. No.

Q. Well, your electric truck was used to move about the trailers, any one of them, on this pier?

A. Well, we had four machines on the pier to pull the trucks.

Q. You mean four electric trucks?

A. Four electric trucks, yes.

Q. The same as you had?

A. The same as I had.

Q. But you didn't have a particular trailer every day to move up and down, did you?

A. Well, I used to pull trailers, and they would get a load on them trucks of everything.

Q. What I mean is this: you would move with your electric truck any trailer on the pier, wouldn't you?

A. Yes, whenever the truck was loaded, yes.

Q. Any truck that was loaded you would take from the pier over to the barge and into the car?

A. Yes, and sometimes the other fellow, the other machine, used to do it, used to do the same work I did.

Q. But I mean you didn't have any particular trailers you would work on or work with, did you?

A. No.

Q. You would connect any trailer that you were told to and be ready to take over to the barge?

A. Yes, I used to take them in when they was all checked. The receiving clerk would have to check it first.

Q. You had nothing to do with the trailers, did you?

A. No, sir.

Q. There were men who did nothing else but load the trailers?

A. Yes, we had about four or five men on the front to load them trailers.

Q. How many loads of pineapples did you take off that day with Fagan?

A. I can't remember.

Q. Well, give us an idea how many.

A. Well, what is the use of telling you any lie? I don't know.

Q. Well, was it more than one?

A. I used to take off all kinds of groceries.

Q. Did you take any more than one load of pineapples before the accident happened with Fagan on the trailer?

A. I had taken them but I don't remember that.

Q. Well, do you remember right immediately before the accident what kind of a load you had on the trailer?

A. The same day?

Q. The same day, right before the accident, that load; what was it on that load?

A. I can't remember.

Q. And you say that Fagan worked with you nine o'clock in the morning?

A. About nine or half past nine.

Q. What did he do?

A. What do you mean?

Q. What did he do when you say he worked with you nine or half past nine in the morning?

A. Before that time?

Q. Yes.

A. That is the time we used to work separate.

Q. I know, but he started work then, and what

did he do when he started to work with you that morning?

A. Hooked up the trailers.

Q. Behind the machine?

A. Yes.

Q. Always hooked up?

A. Yes, and he hooked up when we was on the platform in front, I should take it up, leave it on the platform.

Q. Do you mean to say that Fagan worked with you all day on that truck?

A. Yes, I think he was.

Q. You think he was?

A. Yes, he was.

Q. Now you mean do you think, or are you sure, which is it?

A. He was working with me all day.

Q. When you say you think he was were you then sure or were you not sure?

A. Yes, I am sure.

Q. How many men worked on trailers, do you know, the same kind of work as you say Fagan did for you?

A. Every machine had one man.

Q. Every machine had one man?

A. Yes, sir.

Q. And assuming Fagan would be working with you on one trailer and you would move the trailer onto the car and unload it, you would then bring the trailer back loaded, wouldn't you?

A. No, they got to be loaded first. Leave the trailers on the platform and they come back loaded.

Q. You would leave the trailer on the car?

A. Yes.

Q. In the car?

A. Yes.

Q. While Fagan or another man who was on the trailer would unload it you would go out with your electric truck and get other trailers?

A. He used to go with me too.

Q. But if you would leave the trailer truck there he would stay there and unload it at times, wouldn't he?

A. No, he got nothing to do with unloading the truck. He got a man on the float to unload.

Q. A man on the float?

A. Yes.

Q. And would the man who stands on the trailer remain sometimes and help to unload the trailer truck?

A. No, he had nothing to do with the unloading.

Q. Well, did any man who ever went with you at any time stop and stay in the car and help unload the trailer?

A. He only had to stay on the machine with me, that is all.

Q. I understand, but did it ever happen in your experience that the man who would go with you on the trailer would remain in the car and help unload the freight?

A. No, sir; never did.

Q. How is that?

A. No.

Q. Never?

A. No.

Q. So you mean to say that the man would only stand on the trailer and do nothing else?

A. Stand on the trailers and——

Q. Why would he have to stand on the trailer?

A. To hook it up.

Q. To hook it up?

A. Yes, to hook it up and watch the freight that

it don't fall off; to hook up the trailers on the front, on the dock, and watch the freight on the trailers that it don't fall off.

Q. Why was it necessary to watch the freight from falling off the trailer?

A. Well, I don't know.

Q. Well, was it because it would be improperly loaded?

A. Why, yes. I had to have a man for it to hook up the trailers and he at the same time used to do that too.

Q. After he hooked up the trailers why did you need a man to watch the load? Was it because those loads would be improperly loaded on the trailer? What is your answer?

A. He had nothing else to do.

Q. Nothing else to do except——

Mr. Tomlinson:—I object to the interruption.

Q. Is that your answer, or did you want to say more?

A. That is all.

Q. So the only reason, you say, that the man remained on the trailer was because he had nothing else to do; is that right?

A. Yes, sir.

Q. So that it was not necessary for him to stay there to watch the load.

A. That is his orders from the boss, to stay there and watch it.

Q. When you say watch it you mean watch the load?

A. Watch the load and work and do everything, hook up and do everything.

Q. But after the man hooks up the electric truck

to the trailer then it is hooked up and he is through with it, isn't he?

A. No, he ain't through till he has to go on the float and take it off.

Q. And take what off, the load?

A. No, the hook.

Q. Take the hook off?

A. Yes.

Q. Weren't the men in the car to take off the hook?

A. They ain't got nothing to do with it. They only unload the trucks.

Q. Nothing to do with unhooking the hook?

A. No, sir.

Q. And you still say that it was part of his work to watch the load from falling?

A. Yes, sir.

Q. Will you stand up and show us those by your height how high the load of pineapples was on this trailer on which the accident happened?

A. It was about four high.

Q. Stand up and show us how high according to your height.

A. Well, it is taller than I am.

Q. I understand, but how high? Was it over your head?

A. Four high can't be over my head.

Q. I am asking you to show us.

A. It would be about that high. (Indicating.)

Q. Up to your eyes?

A. Yes.

Q. How tall are you?

A. I don't know; about five feet five, I think.

Q. Five feet five?

A. Yes.

Q. And you say that five feet five and four feet would be about to your eyes?

A. You can figure it out, four crates of pineapples, how high it would be.

By Mr. Tomlinson:—

Q. When you say it was about to your eyes do you mean when you were standing on the trailer truck or the electric truck?

Mr. Golenbock:—I object, because the question was to show the height as he stood at this time.

The Court:—He can answer that question. It is quite proper.

(Question repeated.)

A. When he used to stand on the electric truck.

Q. Now was the floor of the trailer truck on the same level with the electric truck or was it higher or was it lower than the floor of the electric truck?

A. The trailer was a little higher than the electric truck.

Recross-examination by Mr. Golenbock:—

Q. The trailer was a little higher than the electric truck?

A. Yes.

Q. You said he used to stand on the electric truck; did you mean he? You are talking about Fagan, or you mean yourself was as high——

A. Well, I am talking about myself.

Q. Did you have a place to sit down on the electric truck?

A. No, sir.

Q. Had to stand?

A. Yes, sir.

Q. So that the floor of your electric truck was lower than the floor of the trailer; is that right?

A. Yes, it was a little lower.

Q. And you say that that particular load of pine-apples was up to the height of your eyes?

A. Yes.

Q. What made you say that it was four high? Is it because you heard Mr. Toomey say that yesterday?

A. No, I said it last time too.

Q. Did you?

A. I did; yes, sir.

Q. You are sure that you said in your trial that it was four high in this particular load?

A. I think I am sure; yes, sir.

Q. Can you read English?

A. Not much.

Q. Well, can you read printed English?

A. You read.

Q. No, I am going to give you the book and let you read it.

A. It will take too much time to read it.

Mr. Tomlinson:—I object to such procedure.

Mr. Golenbock:—I am going to let him show where the record appears at the last trial.

Mr. Tomlinson:—No, you may read the question.

Mr. Golenbock:—There is no such testimony and I want him to find it.

Mr. Tomlinson:—I object to such a statement of Mr. Golenbock and ask that it be stricken from the record.

The Court:—Yes, strike it from the record.

Mr. Golenbock:—Then I challenge Mr. Tomlinson to show where this witness said it was four high at the last trial.

Mr. Tomlinson:—I object to your question.

Mr. Golenbock:—All right. I will ask the question so we may get it on the record. You concede that this is a correct transcript of the minutes?

Mr. Tomlinson:—No, I won't concede it. I won't concede anything to you, Mr. Golenbock.

Mr. Golenbock:—All right. I withdraw the witness for a moment. Mr. Tomlinson, take the stand.

DE VOE TOMLINSON, sworn for plaintiff.

DIRECT-EXAMINATION BY MR. GOLENBOCK:—

Q. Mr. Tomlinson, you are the attorney for the Central Railroad and have charge of the case of Fagan *versus* Central Railroad at the last trial?

Mr. Tomlinson:—I object to that question, if the court please, upon the ground that it is irrelevant, incompetent and immaterial.

The Court:—What is the object?

Mr. Golenbock:—I want to lay a foundation for the service of copies of the state of the case, the transcript of the minutes of the last trial by Mr. Tomlinson upon me, and to show that this is a copy that I received, for the purpose of laying a foundation and having Mr. Palmieri go through his examination to find whether there is any testimony that he gave at the last trial——

The Court:—I will allow the question.

Mr. Tomlinson:—If the court please, I wish to enter a further objection for the reason that Mr. Golenbock has now assigned the purpose for this examination, which is to allow the wit-

ness to go through the testimony. Of course that is clearly objectionable, and since it is objectionable I object at this time to the preliminary question which he is propounding for the purpose of that ultimate object.

The Court:—I shall allow that question.

Q. Answer the question, please.

A. I am counsel for the Central Railroad Company.

Q. You were counsel and had actual charge of the trial of this case, didn't you, Mr. Tomlinson?

Mr. Tomlinson:—Of course I wish to enter another objection.

(Objection overruled.)

A. Yes.

Q. I show you a copy, Mr. Tomlinson, and ask you whether that is a copy of the state of the case that you have served upon me or my firm, Wight, Wight & Golenbock, state of the case on appeal?

Mr. Tomlinson:—I object to this question upon the previous grounds.

(Objection overruled.)

A. Yes.

Q. And that contains the testimony of the last trial?

A. I don't know.

Q. Will you look at it, please?

A. I have looked at it.

Q. And does it contain the testimony of the last trial?

A. I don't know, to the best of my knowledge.

Q. Will you look at it, please?

A. Do you want me to read it all the way through?

Q. You have a copy. You have an exact copy of that, haven't you, Mr. Tomlinson, of that state of the case that you have handed to me, which I have handed to you?

A. Oh yes, of course.

Q. And it was printed at your request by the same printer?

A. Yes.

Q. As the copy that you have in your possession?

A. Yes.

Q. The copy which is in your possession, which is similar to the one of mine that you have in your hand, does that contain the testimony of the last trial?

A. It purports to, Mr. Golenbock.

Q. To your best knowledge and belief it does, doesn't it?

A. To the best of my knowledge and belief it does. I don't know though. I can't swear that it does.

Mr. Golenbock:—Now I want to recall Mr. Palmieri.

TONY PALMIERI, recalled.

FURTHER CROSS-EXAMINATION BY MR. GOLENBOCK:—

Q. Mr. Palmieri, I hand you a copy of the book which is a state of the case entitled "William A. Fagan, respondent, *versus* Central Railroad Company of New Jersey," in which book is the transcript of the testimony you gave at the last trial, and I ask you to go through it and see if there is any testimony at the last trial in which you said that this particular load was four high of pineapple crates.

(Objected to.)

The Court:—Can you prove what a witness swore to by producing a record of this kind?

Mr. Golenbock:—I believe I can, if your Honor please, because supposing he had said it was five high: could I not use his testimony, the record, to show that he at the last time said four high?

The Court:—You may ask him then whether on that occasion he was not asked so and so and he did not respond so and so. Suppose you want to prove it; can you offer the printed record then to show it? You see the printer's record is only used for convenience. When you say, "You were a witness at the former trial?" "Yes." "You were asked such and such a question and you answered so and so." Suppose the witness says he didn't: you can't produce the record; you have to prove it another way.

Mr. Golenbock:—All right. I am perfectly satisfied in this situation.

Q. You are just as positive about everything that you testified today as you are that you testified at the last trial that the pineapple crates were four high?

A. I think I did say that.

Q. You think you did say that? Are you sure you said that?

A. I said four high.

Q. No, I am asking you are you sure that you said at the last trial that the case of pineapples on this trailer were four high?

A. That is what it was, four high.

Q. Are you sure that you said that at the last trial?

A. Yes, I am sure.

Q. And you are just as sure about that as you are about everything else that you testified today? What is your answer? Well, never mind.

PATRICK HANNON, sworn for defendant.

DIRECT-EXAMINATION BY MR. TOMLINSON:—

Q. Mr. Hannon, where do you work?

A. Pier 10, North River.

Q. What railroad?

A. Jersey Central, assistant foreman.

Q. Were you assistant foreman there on the day that Mr. Fagan got injured?

A. Yes, sir.

Q. That was August 6, 1917?

A. Yes, sir.

Q. Had you known Mr. Fagan at all?

A. Yes, sir.

Q. How long before this accident had you known him?

A. Well, about three or four months.

Q. And what work if any had you seen him doing on that pier before the accident?

A. Well, laboring work.

Q. Well, in the course of that laboring work what particular jobs did you see him do?

A. Well, anything that I put him at.

Q. Well, what would you put him at?

A. Hand trucking or loading freight on trailers or loading freight on the electric trucks out of the cars onto the pier.

Q. How many times had you put him at work loading freight on the trailers?

A. Well, several times previous to that.

Q. Had you seen him working on these trailers?

A. Yes.

Q. When?

A. Well, any time of the day I put him there.

Q. Can you say about how many times you had seen him working on the trailers before this accident?

A. Well, off and on maybe half a dozen times.

Q. What sort of work was he doing on those trailers? Just tell the jury what he was doing on them.

A. Well, in the morning when they started in they would start in unloading the car, then when they would be through with that he would go to the bulkheads and pull off the trailer from the bulkhead to the floats that they carted on.

Q. What had you seen Fagan doing on those trailers?

A. Why, I would put him right at unloading them and following up the trailer, when he would get out on the bulkhead, couple up the trailer to the electric truck.

Q. And then what would he do?

A. Then follow the truck up into the car door.

Q. How would he follow that truck?

A. Well, sometimes he might get on the truck and sometimes he would follow it behind, get on the electric truck.

Q. How many times did you see him on the electric truck when there was a trailer truck attached to it?

A. Well, that I couldn't tell you. Several times. They make different trips during the day.

Q. You had seen him several times?

A. Yes, sir.

Q. When the trailer had pineapples on it?

A. Well, I couldn't say pineapples, offhand; any kind of freight, pineapples or cases or any kind of merchandise.

CROSS-EXAMINATION BY MR. GOLENBOCK:—

Q. Mr. Hannon, how long have you been working for the Central Railroad Company?

A. About sixteen or seventeen years.

Q. During that time you have been assistant foreman?

A. Not all the time.

Q. You have raised up from a common laborer to assistant foreman?

A. Yes.

Q. Are you assistant foreman now?

A. Yes.

Q. And at the last trial, which took place November 6, 1918, and November 7, 1918, you were in the employ of the Central Railroad Company, weren't you?

A. Yes.

Q. You were not here at the last trial, were you?

A. No, sir.

Q. And when for the first time did you have a conversation with anybody about this case, how many months ago from this day?

A. Well, I don't think I had any conversation with anybody outside of the lawyer here yesterday morning.

Q. When was the first time that you spoke to the lawyer?

A. Yesterday morning or a couple mornings ago, the first morning we got in.

Q. So that the first time anybody knew what you knew about this case was a couple mornings ago?

A. Well, that is all outside of myself.

Q. That is what I mean.

A. I never was asked anything about it.

Q. You volunteered your information to Mr. Tomlinson?

A. What I know about it, just the same as I told you.

Q. Did you volunteer? Did you go to him or were you sent for?

A. I was sent for.

Q. And when you were sent for not a soul in the world knew what you knew about this case?

A. No, sir.

Q. Mr. Hannon, you say you knew Mr. Fagan how long?

A. Two or three months ago.

Q. Two or three months?

A. Off and on.

Q. Two or three months?

A. Maybe more than that, maybe nine months.

Q. You have had over one hundred and one hundred and fifty men on that pier?

A. Well, about one hundred and twenty-five or one hundred and thirty-five.

Q. And sometimes more?

A. Sometimes more.

Q. And there are how many assistant foremen there?

A. Two.

Q. And there is one foreman?

A. There is one foreman and two assistant foremen.

Q. How many bosses are there, so called?

A. Three.

Q. Three altogether?

A. Yes.

Q. And you didn't have any particular set of men to look after, did you?

A. No, no.

Q. All the three had the whole pier in charge?

A. In charge, yes, sir.

Q. So that at no time did you single out Mr. Fagan for any special attention or direction?

A. Well, when they would land on the dock in the morning I would meet their foreman, Dorsey, Howard Dorsey, and any man I wanted to take out I would take him out and put any place.

Q. You would tell Dorsey how many men you would want?

A. Yes.

Q. You had nothing to do with the men except through their own foreman or bosses, such as Dorsey was?

A. I wouldn't bother with them after that.

Q. But you would tell Dorsey you wanted so many men?

A. So many men.

Q. You wouldn't say, "I want Fagan and Johnson or Jackson;" you would say, "I want two or three men"?

A. Pick out two or three men, any man that I thought was——

Q. So that during the time that Mr. Fagan was working on Pier 10 there was nothing about him that directed your attention to him or gave him any special attention?

A. Not a bit.

Q. And he did his work the same as every other man on the pier?

A. The same as every other man.

Q. You are not ready to swear today that he at any time prior to that day had loaded or unloaded pineapples from that trailer?

A. I couldn't say. He has been taking all kinds of freight off.

Q. But you couldn't swear now that he prior to this particular load when the accident happened

had anything to do with a load of pineapples on a trailer, could you?

A. I couldn't swear that, no, but I know he has been taking——

Q. That is your answer. And you don't know any reason why you were not called at the last trial, do you?

A. No, I don't know any reason, no.

Q. And you never talked to anybody about this case except to Mr. Tomlinson.

A. No, sir.

Q. Now I called Mr. Toomey's attention to something which he gave at the last trial in which he said this: "Now, Mr. Toomey, how is this freight loaded on this truck? A. How is it loaded? Q. Yes, sir? A. Well, it is all according to the commodity. Now if we have groceries and bags of flour and crates of pineapples, they are all loaded in the same way on the truck and they are loaded by four men every day; they do nothing else but load them trucks every day." Now do you say that you have all the men in that place do all kinds of work?

Mr. Tomlinson:—I object. In the first place I object, if the court please, to the reading of Mr. Toomey's testimony in the last trial, which of course is grossly improper, and it certainly does not support any foundation for a question to this witness. I object to the question.

(Objection sustained.)

Mr. Golenbock:—It is cross-examination.

The Court:—Oh, yes, but you can't read somebody's testimony and then ask him what he has got to say. If it was his own testimony it might be different.

Q. Mr. Toomey is your boss, isn't he?

A. Yes, sir.

Q. He has charge of the pier?

A. Yes, sir.

Q. What would you say, Mr. Hannon, if I told you now that Mr. Toomey testified that he had four men specially to do nothing else but load these trailers?

(Objected to.)

Q. Would you say that you are mistaken in that you say you had all men do all kinds of work, especially in that you had Fagan load at any time any trailers?

(Objected to.)

The Court:—Well, I think that is objectionable too.

(Objection noted for plaintiff as ground of appeal.)

The Court:—The question is what this man said, not what somebody else says. He is testifying to his own view, not what somebody else's view may have been. The jury wants to know what he knows about it.

Mr. Golenbock:—I am calling his attention to the fact that his superior testifies or has testified to something different than what he testified.

The Court:—That may be; he is not responsible for what his superior testified.

Mr. Golenbock:— Certainly it might be proper to call his attention to see whether he wants to correct his testimony. All right. I will accept your Honor's ruling.

Q. You don't know anything about this particular load that this accident occurred, do you?

A. I saw the load, yes.

Q. You saw the load before or after?

A. After.

Q. You mean after it had already fallen apart or gone off the trailer?

A. Yes. Well, it was on the trailer when I saw it.

Q. You mean it had been reloaded?

A. Yes.

Q. Well, you mean to say that after it fell off the trailer it was put back on the trailer again?

A. Yes, sir.

Q. And wasn't it right onto the barge where the car was in which the freight was to go into?

A. Not when I saw it.

Q. Where was it when you saw it?

A. I saw the trailer just as the electric truck started from the end of the plank.

Q. I am talking about the time when it fell off the truck, fell from the trailer.

A. I saw the load when the load started from the end of the plank where it did fall.

Q. I am talking now after it fell; did you see the load?

A. After it was reloaded I did.

Q. Reloaded on the trailer?

A. Yes.

Q. Sure of it? Why would it have to be reloaded on the trailer? It was right at the door of the car?

A. How could it be the door of the car, the end of the float? The accident happened at the end of the float, and how could the car door be at the end of the float?

Q. Well, doesn't it connect——

A. It has to go six——

Q. Doesn't that pier connect with the barge?

A. It has to go six car lengths.

Q. It didn't go to the car in front of the entrance, did it?

A. No.

Q. Went further on?

A. Went further on, went six cars further on.

Q. How many loads of pineapples had been carried that day into that car?

A. I couldn't tell you how many loads of pineapples were carried that day.

Q. You don't know?

A. No.

REDIRECT-EXAMINATION BY MR. TOMLINSON:—

Q. Mr. Hannon, did I understand you correctly to say that you saw this load as it started off the bulkhead?

A. I saw the load starting from the end of the gangplank where the accident happened.

Q. And where was Fagan then?

A. He was taken to the office at Pier 11 gate.

Q. Did you see this before the accident?

A. No, I didn't see the load before the accident.

DR. REGINALD S. BENNETT, sworn for defendant.

DIRECT-EXAMINATION BY MR. TOMLINSON:—

Q. Dr. Bennett, where do you reside?

A. Asbury Park.

Q. You are a licensed practitioner of medicine?

A. Yes.

Q. How long have you been that, medical practitoner?

A. Twenty years.

Q. What institution did you graduate from?

A. Columbia University.

Q. Are you connected with any hospital?

A. Consultant of Monmouth Memorial.

Q. Where do you practice?

A. Asbury Park.

Q. Have you any official position in Monmouth County?

A. County physician of the County of Monmouth.

Q. And have you done any surgery?

A. Not major surgery in a number of years.

Q. Did you examine Mr. Fagan, the plaintiff in this case, before today, Dr. Bennett?

A. Yes.

Q. About how long ago was that?

A. About one year ago.

Q. And that was for the purpose of trial?

A. Yes.

Q. Did you examine him again today?

A. Yes.

Q. Who was present today at the time of the examination?

A. Dr. Shaw and Dr. Bassin.

Q. Won't you tell the court and the jury what you found at your first examination and what you found today?

A. You mean just the difference or to make a citation of each?

Q. I think you ought to describe his condition from the first examination and then his condition today so as to tell what if any changes there has been.

A. About a year ago when I examined Mr. Fagan I found the man at home, dressed and with crutches at his side. His hip had been injured and his leg had been injured, and there was marked disability

of the right leg and the right hip. His foot was swollen and his leg was swollen and he complained somewhat of pain in that member. I didn't test for nerve sensation as it was tested today. There has evidently been an injury at the hip joint and some injury to the blood-vessels. Today there is some motion to the hip joint; I would say there was a quarter or a third disability of that hip joint. The muscles of the right thigh have shriveled or atrophied. I would attribute it to nonusage. And the leg below the knee is swollen in different regions that we measured from a half inch to an inch. There is practically a total lack of nerve sensation or feeling in the nerves below the knee. The man is able to move the foot, move the leg, but not able to walk. There is somewhat of improvement, marked improvement from last year to this time, in the way of usage of the leg and the limb.

Q. You say there is a quarter to a third loss of motion in the hip?

A. Yes.

Q. Do you know how much loss of motion there was at the last examination you made in the right hip joint?

A. It was so painful to him at that time that I could not determine. It seemed to be functionally all gone. It was so painful that I could not make an examination of the hip joint properly.

Q. Now you say—I understood you to say there is an atrophy of the leg or the hip?

A. To the knee.

Q. Down to the knee?

A. Yes.

Q. You attribute that to lack of movement?

A. Non-usage.

Q. And exercise?

A. Yes.

Q. Now assuming, Doctor, that this leg was exercised in the future, moved, what would you say as to the probabilities of improvement?

A. I think there will be constant improvement to a certain limit.

Q. What do you say as to the practicability or impracticability of the use of a brace?

A. I cannot see the use of a pelvic brace. A brace to the leg might be a benefit to him, so that he might be able to walk without crutches.

Q. And what effect if any would walking and exercising that leg have upon him?

A. Have a marked tendency to improve it.

Q. What if any pain does it cause Mr. Fagan to move his hip and his knee?

A. It practically causes him no pain now to move it.

CROSS-EXAMINATION BY MR. GOLENBOCK:—

Q. Doctor, you say that you have not done major surgery in many years; is that right?

A. No.

Q. And that eliminates the question of minor surgery, which is cuts and bruises and that sort?

A. Yes.

Q. When you examined him last year, Doctor, you say that you found his hip and leg was injured and that you did not test him for nerve sensation?

A. I did not.

Q. But today you say that there is practically a total lack of sensation?

A. Below the knee.

Q. Now when you say practically you mean that

there is no sensation whatsoever, isn't that true, Doctor?

A. It seems to be so.

Q. So when you say practically you mean none at all?

A. Yes.

Q. Now you didn't tell us anything about his spine, Doctor. You do know, don't you, that he was injured in his spine?

A. Yes, he has been injured at the socro-iliac joint.

Q. And that is what Dr. Bassin testified to as having been injured?

A. Yes. There is a separation there.

Q. To that extent you don't at all differ from Dr. Bassin's testimony?

A. No.

Q. Doctor, as a matter of fact you don't mean to convey the impression to the court and jury that this man will ever be able to use his right leg, particularly that part from the knee to the foot, no matter how much of constant improvement he may receive or have by the use of exercising his leg?

A. You mean as good as it was before?

Q. I mean that he will not have the use of that leg.

A. I think there is a very strong possibility and probability that he will have some use of that foot and leg.

Q. And when you said that constant exercise would to a certain extent improve it, to what extent have you reference or have you in mind?

A. To the atrophied muscles. They would increase in strength and size.

Q. Doctor, doesn't that necessarily mean that he

would have to regenerate the nerves of the leg in order to have any use of it?

A. Of those nerves below the knee, yes.

Q. Yes, I am always referring to that part below the knee. And isn't it a fact, Doctor, that nerves do not regenerate in old age?

A. Not so well as in youth.

Q. As a matter of fact practically none?

A. Oh, yes.

Q. So that, Doctor, this man being fifty-two years of age you would not say that he will at any time regenerate to such an extent that he will ever be able to use that leg without crutches?

A. I wouldn't want to make that as a positive statement.

Q. You mean you would not want to deny that?

A. No.

Q. In other words, you would have to practically admit that he would have to use crutches all his lifetime?

A. No.

Q. What do you mean then?

A. I mean that there is a strong possibility of his being able to use that leg to some extent.

Q. Without the use of crutches?

A. Yes.

Q. To what extent, to stand on it?

A. Yes.

Q. Could he walk without crutches?

A. Yes.

Q. How far?

A. Well, I don't know how far.

Q. Well, you are giving us an opinion. Why not continue as to how far he would be able to walk without crutches?

A. If those nerves regenerate he will be able to walk to some limited degree.

Q. A few feet?

A. Yes.

Q. But you have a minute ago said it is an unlikelihood for a man of his age to have his nerves regenerated.

A. I never made such a statement.

Q. You didn't make such a statement?

A. No.

Q. Assuming you said that for the time being, Doctor——

Mr. Tomlinson:—I object. He says he didn't say it.

The Court:—Yes, you must reframe it.

Mr. Golenbock:—I am assuming now that he didn't say so for the time being.

Q. Can you say, Doctor, how many years it would take before these nerves can or would probably regenerate sufficiently for him to walk without crutches the number of paces that you just mentioned?

A. Well, if he makes as much improvement in the coming year as he has in the past year he will be able to use the limb to a great deal more extent than he is using it now. He is able to bear some weight upon it now.

Q. No matter how much improvement he will show, he will always have a total loss of sensation?

A. I wouldn't like to say that, Mr. Golenbock.

Q. Do you mean to say that he would regain sensation?

A. There is such a possibility.

Q. There are certain possibilities?

A. There is such a possibility.

Q. Doctor, do you know that it takes from three to six years to regenerate the nerves in a healthy young man or young person? Do you know that?

A. Well, those are—that is not a definite statement that anybody, any physician, could make. It takes a long period of time.

Q. Now my question had two points in it: one was that it was a young man, healthy body, of a young person, and also that it took from three to six years to regenerate the nerves. Isn't that true?

A. It is perfectly true.

The Court:—What do you understand the witness has said to that, that the statement is true or that your question contains two items?

Mr. Golenbock:—Well, I am assuming now that he answered——

The Court:—I personally don't know what he said.

Mr. Golenbock:—I had better have that clearly understood.

Q. Then that question as I put it to you is true in fact?

The Court:—Just repeat that question.

(Question repeated.)

Q. That is true in fact, isn't it?

A. Yes.

Q. Now Doctor, you don't mean to contend that this man will ever be able to do the work similar to the kind that he was doing before the accident?

A. I do not.

Q. You mean that he will not?

A. Yes.

DR. HARRY E. SHAW, sworn for defendant.

DIRECT-EXAMINATION BY MR. TOMLINSON:—

Q. Dr. Shaw, you are a licensed physician of New Jersey?

A. Yes, sir.

Q. How long have you been practicing?

A. Twenty-one years.

Q. Where do you reside?

A. Long Branch.

Q. Where do you maintain your office?

A. At Garfield Avenue, Long Branch.

Q. Are you connected with any hospitals?

A. Monmouth Memorial Hospital.

Q. In what capacity?

A. Acting surgeon.

Q. How long have you been connected with the Monmouth Memorial Hospital?

A. Twenty years.

Q. Dr. Shaw, did you examine this morning, for the purpose of testifying in this trial, Mr. Fagan, the plaintiff?

A. Yes.

Q. What did you find?

A. On examination of the hip or the back part of the pelvis here there is a separation of the joint between the hip and the spine where it has extended about an inch wider at the right side than on the other. Of course that at the present time is all healed up, perfectly solid. The motion in the hip by flexion and extension and rotating it this way is limited to about possibly one-third of the normal action. There is no pain elicited on doing that unless you get away out, like a person bent your elbow in a perfectly healthy joint. The muscles of the thigh have atrophied to about an inch to an inch and a half, loss greater, or the atrophy is greater in the leg than it is on the other,

atrophy is greater in the leg than it is on the other, much smaller. That is due to non-use. The motion of the knee is about one-third less than the other knee. That also can be moved and Mr. Fagan can move it himself without causing any pain. From the knee down, starting about at the lower part of the knee cap, there is a complete loss of sensation, tactile sensation, by touch or by using a pin, from that down to the lower part of the sole of the foot. Starting about three or four inches above the ankle the skin is somewhat reddened and the leg is swollen, varying from a half inch to an inch and an eighth over the other leg. The deep reflexes, as we call them, that is, by testing him, show that the reflex motions coming from the spine are all right down to the knee and from there are lost. I don't suppose I can say what he said, can I?

Q. No, I don't think you had better.

A. That is the extent of what I found.

Q. I think it is permissible but I don't care to insist upon it. Now you spoke of atrophy of the muscles of the thigh. What if any method is there in which that condition might be remedied or corrected or improved?

A. The use of massage will improve that greatly, active motion by his own activity of that leg, and passive motion and passive massage by a masseur.

Q. What would you say the atrophy results from?

A. Non-use.

Q. How much lost motion of the thigh do you say there was, Doctor?

A. About one-third loss.

Q. About one-third loss?

A. Loss, I should say.

Q. What is your judgment in regard to the pos-

sibilities or probabilities of an improvement in the future of that condition?

A. I think there is a great possibility and probability of improvement down to the knee joint and including the motion of the knee joint; because that is controlled by the muscles above. From the knee down the improvement is very problematical.

Q. In your judgment does Mr. Fagan feel any pain in the lower part of his leg below the knee?

A. No, sir.

Q. Assuming that there had been an improvement in the upper part of his leg, that is, above the knee, and in the condition of his hip during the past year, what influence, if any, would that have upon your judgment with respect to the possibility or probability of an improvement in the future?

A. If during one year's time there has been some improvement or any improvement, that shows that the improvement necessarily or naturally would continue.

Q. What, if any, pain in your judgment does it cause Mr. Fagan to move that knee?

A. None whatever.

Q. What, if any, pain in your judgment does it cause Mr. Fagan to move his hip so far as he can move it?

A. None.

CROSS-EXAMINATION BY MR. GOLENBOCK:—

Q. But what he can't move he can't; isn't that so?

A. Yes.

Q. That applies to the last question of Mr. Tomlinson, if he can't move his hip he can't, that is all there is to it?

A. If he can't he can't?

Q. Yes.

A. Yes, of course.

Q. So that question does not relate to what he can't, but there is a great part of it that he can't; is that right?

A. There is a one-third part he can't.

Q. Now Doctor, you say that ought to be some improvement in a year; you said that?

A. No, I think not. I said if there was an improvement in a year the improvement should continue.

Q. Well, has there been any improvement in sensation in a year?

A. I don't know.

Q. Did you find any sensation at all?

A. Today is the first time I have seen him.

Q. I mean today, did you find any signs of sensation there at all?

A. No, sir.

Q. So there could not have been any improvement in that respect, could there?

A. No, sir.

Q. Now you say that active motion might improve the situation?

A. Of the hip and thigh muscles.

Q. Doctor, wouldn't you say that in a condition where the muscles are already overdriven, so to speak, that passive motion would be far better for the situation than active?

A. I never said that they were over——

Q. Well, aren't they?

A. No, sir; they haven't been used, as I understand, since the accident. They are not in use now.

Q. Now you said there is an atrophy of an inch and a half in circumference?

A. In the size of the muscle, yes, the size of the leg.

Q. Doesn't that mean that it is overdriven, so to speak, as commonly used?

A. Not driven enough, so the circulation has not gone to that muscle to nourish it and make it grow.

Q. The condition, as I understand it, is because it has been overdriven in some respects.

A. Because it has not been driven enough.

Q. Did it become atrophied because it was not driven enough?

A. Yes.

Q. That is your opinion?

A. Yes.

Q. And you are certain that from the knee down the improvement is problematical?

A. Yes.

Q. But that you say that there is a great possibility of improvement in the knee joint?

A. Yes.

Q. You don't mean to say that this man will be able to be about without the use of crutches?

A. Crutches or some other appliance?

Q. Or some other appliance, yes?

A. No, I don't.

Q. As a matter of fact, Doctor, you would say, wouldn't you, that even so with a brace he would have to use crutches, after examining him and seeing him?

A. No, sir.

Q. You would not?

A. If he would use a brace from his knee down he would be just like a man with the leg off below his knee, would walk just as good as a man can with an artificial leg; possibly start with a cane but afterwards walk with a limp. He is going to move his knee; he moves it now.

Q. I understand you would compare Fagan's leg from the knee down the same as if a man had a wooden leg?

A. Yes, sir.

REDIRECT-EXAMINATION BY MR. TOMLINSON:—

Q. That is, for the purpose of walking?

A. For the purpose of walking; yes, sir.

Q. What effect, if any, would the use of a knee brace, this walking with a knee brace and using it have upon the leg above the knee?

A. It is going to benefit that by increasing the supply of blood to the muscles of the thigh and knee, make it increase and grow, and after a while it should be at least as strong as the other one.

By Mr. Golenbock:—

Q. When you said that that comparison which I asked you to make was for the purpose of walking only, now as a matter of fact the comparison is good for any purpose, isn't it?

A. Why, yes, walking and working. The leg is used for walking, I mean, particularly.

DR. REGINALD S. BENNETT, recalled.

FURTHER CROSS-EXAMINATION BY MR. GOLENBOCK:—

Q. Dr. Bennett, you were here at the last trial, weren't you?

A. Yes.

Q. You were in court?

A. Yes.

A. And you were present when Dr. Bassin testified at that trial?

A. Yes.

Q. You didn't take the stand at all at that trial, did you?

Mr. Tomlinson:—Oh, it is conceded.

Mr. Golenbock:—No, it is not conceded. There is no record that he didn't take the stand and I want to bring it on record.

Mr. Tomlinson:—I am conceding it now.

Mr. Golenbock:—I want to prove that Dr. Bennett was present at the time Dr. Bassin testified at the last trial and did not take the stand at any time during the trial.

The Court:—You may ask the question.

Q. You didn't

A. No, I didn't.

Mr. Tomlinson:—I have completed my medical testimony, if your Honor please, if the other side wishes to bring Dr. Bassin back.

Mr. Golenbock:—Nothing I want to prove any further.

CHARLES M. HUMMELBERGER, sworn for defendant.

DIRECT-EXAMINATION BY MR. TOMLINSON:

Q. Where do you live, Mr. Hummelberger?

A. Jersey City.

Q. Are you in the employ of the United States Railroad administration?

A. I am.

Q. In what capacity?

A. Assistant trainmaster.

Q. Where have you your central office?

A. Jersey City.

Q. What are your duties as assistant trainmaster? What is your general line of work?

A. My general line of work is following up operations on the New York City stations, transfers and various other duties that come with the general duties of a trainmaster.

Q. What duties if any have you which take you upon the piers in New York harbor?

A. Matter of observation as to how the work is done. That is about the answer, how the work is done. I think that would answer fully what was required.

Q. What acquaintance, if any, have you with the method of handling trailer trucks and electric trucks upon the piers in New York harbor?

A. I have observed the handling at the various piers for the different companies in addition to that of the Jersey Central.

Q. For a period of how long a time?

A. For the last three or four years.

Q. Are you acquainted with the Reynolds truck, trailer trucks?

A. Yes.

Q. What is the size of that truck, do you know Mr. Hummelberger?

A. 36 by 72, and it stands 20 inches high from the floor.

Q. How is that fastened to the electric truck?

A. It is fastened to it with a coupling. On the end of it is a pin which fits in it and in the case of what we would term our load carriers or electric trucks, fits into an appliance that was put there for the purpose.

Q. What is the coupler on, is that on the trailer truck or the electric?

A. The coupler proper is on the trailer.

Q. Now, Mr. Hummelberger, what have you observed upon the different piers with respect to the rack on the front and rear ends of the trailer trucks?

A. Some trucks are used without racks and some with racks.

Q. Of course I am referring to the racks on the front and rear ends.

A. Yes.

Q. Those that use the racks use what kind of a rack?

A. A large number of them are the pipe racks.

Q. In what respect do those racks differ from this rack which I show you, Exhibit B for Identification?

A. That was the type of rack that is used generally by the Jersey Central at this time.

Q. Have you seen that on any other piers?

A. I saw some on the other piers similar to that, yes.

Q. And on trailer trucks equipped with such a rack what commodities are carried, when the rack is hauled by an electric truck—that is, when the trailer truck is hauled by an electric truck?

A. All kinds of merchandise, the general freight handled on the pier, with a few exceptions, like long bar iron or something of that kind.

Q. Now, Mr. Hummelberger, relying upon your experience I ask you whether a trailer truck to be hauled by an electric truck, which trailer truck is loaded with twenty crates of pineapples, five tiers deep and four tiers high, is properly loaded.

A. Yes.

CROSS-EXAMINATION BY MR. GOLENBOCK:—

Q. How many of those loads have you ever seen carted or loaded on a trailer truck?

A. Several hundred.

Q. Of pineapples?

A. Not necessarily pineapples.

Q. I am asking you pineapples.

A. That would be very hard to say. I never took any particular note of them.

Q. As a matter of fact you paid no particular attention as to any kind or any particular kind of merchandise that you saw loaded on the trailers, did you?

A. I knew it was general merchandise.

Q. But you never paid any particular attention to any particular kind of merchandise loaded on any trailer?

A. Yes.

Q. What was it?

A. Paid particular attention to the loading of iron, as an illustration.

Q. Did you pay any particular attention to any other kind of commodity?

A. Yes.

Q. What?

A. Eggs as an illustration.

Q. What else?

A. Canned goods.

Q. What else?

A. Flour.

Q. What else?

A. Sugar, flour.

Q. And is that all the kind of commodities that you took particular attention to?

A. No. I said a minute ago general merchandise.

Q. Now you never stopped to count any number of cases or crates or boxes or number of pieces of iron or any number of any particular or general kind of merchandise loaded on a trailer?

A. I did.

Q. You did? And when was this for the first time?

A. Some time ago, when we were making a test, testing out tractors, as an illustration.

Q. When did you do that?

A. Some time during last January.

Q. January of 1919?

A. 1919, yes.

Q. So was that the first time in your experience that you ever took cognizance of the number——

A. Not the first time. You didn't ask me the first time.

Q. I asked you for the first time and you mentioned this day. Now if that is not the first time will you please tell us the first time that you ever took cognizance of the number of any particular commodity on any one of those trailers?

A. That would be very hard to say. Probably back as far as five or six years ago.

Q. How long have you been with the Central Railroad?

A. About four years.

Q. When you answered that you were with the United States Railroad administration that is in effect the Central Railroad, isn't it?

A. Yes.

(Objected to.)

The Court:—State the objection.

Mr. Tomlinson:—I object to that upon the grounds that that calls for a conclusion. It calls for an interpretation of the act taking over the railroad.

The Court:—I suppose he properly can find out what railroad he is connected with.

Mr. Tomlinson:—He has already said that

his principal work was on the piers of the Jersey Central. That is what he said.

Q. You confined yourself only to the work of the Central Railroad of New Jersey, didn't you?

A. I am in their employ.

Q. But you get paid by the Central Railroad of New Jersey?

A. By the administration.

Q. But you get paid through the Central Railroad company's office, don't you?

A. Not the Central Railroad Company.

Q. What company do you get paid through?

A. I am paid by the administration.

Q. But you are in the employ of the Central Railroad of New Jersey, aren't you, as a matter of fact?

A. Not the Central Railroad Company of New Jersey.

Q. It is not?

A. No.

Q. You were hired by the Central Railroad Company?

A. Yes, but there is a distinction.

Q. Isn't that so?

A. I was employed by the Central Railroad of New Jersey.

Mr. Golenbock:—Isn't that an answer?

The Court:—No, let him answer.

A. I was first employed by the Central Railroad Company of New Jersey and now I am employed by the railroad administration.

Q. But there was no change in your employment because the United States Railroad administration took over the Central Railroad and all other roads, as far as your work is concerned?

A. There was some change, yes.

Q. In what way?

A. The duties became somewhat different.

Q. Your duties now are confined solely and only as far as the Jersey Central work is concerned?

A. The Central Railroad of New Jersey, yes.

Q. And you can't say what particular occasion you ever had of counting the number of pineapple crates on any trailer?

A. There was no particular necessity at any one time of considering pineapples but there was necessity of counting different commodities on a truck at one particular time.

Q. But my question relates only that you had no occasion at any time to count the number of crates of pineapples on any particular trailer?

A. Not that I recollect at this time.

REDIRECT-EXAMINATION BY MR. TOMLINSON:—

Q. Mr. Hummelberger, who were you with before you came with the Central Railroad?

A. Raritan River Railroad.

Q. How long were you with them?

A. About three years.

Q. In what capacity?

A. As superintendent.

Recess till 1.30 P. M.

Trial of the cause resumed at 1.30 P. M.

Mr. Golenbock:—Your Honor, I think before the next witness is called I would like to have a concession on the record, that the

last witness, Mr. Hummelberger, was in the employ of the Central Railroad Company on November 7 and 8, 1918, and was available as a witness at the last trial and that he was not here in court as a witness on the last trial, or else I will recall him, if there is no such concession made.

Mr. Tomlinson:—In the first place I don't know whether that is so or not, and in the second place I don't see how it has any bearing on this case. Mr. Hummelberger was not called as a witness in this case. He was not an expert.

The Court:—What relevancy can it have?

Mr. Golenbock:—That may be a question for the jury. That is the point, what relevancy it should have, where it is shown that a witness brought at a trial was available and was not called.

Mr. Tomlinson:—That rule applies, if the court please, only, as your Honor well knows, to a case where they witnessed the actual accident. It does not apply to an expert witness.

Mr. Golenbock:—I don't think the cases go to that extent of differentiating between—I think the court should allow us to show for whatever purpose or effect it may have. It may not have any effect or it may have a great deal of effect. When that witness, whether he be an expert or as to the condition——

The Court:—I am going to allow you to call him.

Mr. Tomlinson:—Does your Honor rule that this is relevant?

The Court:—Well, I don't know what rele-

vancy it has, and yet I think perhaps they are entitled to have that go on the record.

Mr. Tomlinson:—Of course the rule is settled that counsel on cross-examination may ask a witness to the extent, "Did you testify at the previous trial?" but where a man is called merely as an expert the rule is certainly different and it does not make any difference whether he was called before or not.

The Court:—I am not sure that he is not entitled to ask this witness the question. I am going to let him ask it anyway.

Mr. Tomlinson:—If your Honor rules that I don't want take up the time of the court and jury any more than is absolutely necessary, and if that is the ruling then I concede on the record that he was in the employ of the Central Railroad Company of New Jersey on the date of this accident.

Mr. Golenbock:—Not on the date of the accident, on the date of the trial of this case, the first trial, and was available to be called as a witness. That is the concession, is it?

The Court:—Was the company in the hands of the Director General last November?

Mr. Tomlinson:—It was, your Honor.

Mr. Golenbock:—It would not make any difference.

Mr. Tomlinson:—It would make a material difference.

The Court.—I cannot let something go on the record of his own knowledge which necessarily cannot be so.

CHARLES M. HUMMELBERGER, recalled.

FURTHER CROSS-EXAMINATION BY MR. GOLENBOCK:—

Q. Mr. Hummelberger, you were in the employ of the Central Railroad on November 7, 1918?

A. Central Railroad Company or Central Railroad Company of New Jersey?

Q. Central Railroad Company of New Jersey.

A. What date?

Q. November 7 and 8, 1918.

A. No.

Q. For whom were you working?

Mr. Tomlinson:—Now, if the court please, I object to that. I object to it as irrelevant and incompetent and as not proper cross-examination.

The Court:—I will allow that. I think you can go into the antecedents of a witness. I am only allowing it on the theory that you overlooked it before. Otherwise I would not.

Mr. Golenbock:—Yes, sir; absolutely. I thought there would be no question about that.

Q. For whom were you working on November 7 and 8, 1919?

Mr. Tomlinson:—I wish to enter an objection, if the court please, upon the same ground, and get the objection on the record.

The Court:—Yes.

A. I was working for the United States Railroad administration.

Q. Weren't you working for the United States Railroad administration, the particular branch of that administration being the Central Railroad Company of New Jersey?

A. Not the Central Railroad Company of New Jersey, no.

Q. Aren't you today working for the United States Railroad administration and the particular branch of it being the Central Railroad Company of New Jersey?

A. Not the Central Railroad Company of New Jersey, no. I am not working for the Central Railroad Company of New Jersey.

Q. You are working under the same chiefs or heads as you were when you were working for the Central Railroad of New Jersey?

Mr. Tomlinson:—I object to that as immaterial.

Mr. Golenbock:—I think this is material. I want to test the credibility of this witness, to show that it is practically the same thing, except that the United State Railroad administration took over that particular business for the time of the war, but that in other respects there has been no change at all as far as the separate railroad companies being a distinct and separate business, if your Honor please. We want to show that by this witness.

The Court:—What difference does it make in this case?

Mr. Golenbock:—I want to show, in the first place, the unwillingness of this witness to testify to what is asked by counsel for the plaintiff, to the question propounded to him. I want to show further that he was available at the last trial and working for the same concern as he was at the time the accident happened, he was working for the same concern at the time of the last trial that he is

today; and because of this witness' unwillingness to answer direct questions I must get around it by the method I have undertaken.

Mr. Tomlinson:—I object to the statement, in the first place, upon the part of Mr. Golenbock in regard to this witness' unwillingness to answer him is unfounded and absolutely at fault. He has not shown any such an intent or conduct.

Mr. Golenbock:—Well, I will leave that for the jury.

Mr. Tomlinson:—In the second place I object to it as irrelevant, incompetent and immaterial. Now I think that this is all irrelevant and immaterial. But to shorten matters and to allow us to get through with this trial I am willing to admit here and now that on the date of the accident Mr. Hummelberger was employed by the Central Railroad Company of New Jersey, that on the date previous to the trial he was in the employ of the United States Railroad Administration, operating through Walker D. Hines, Director-General of Railroads, the Central Railroad of New Jersey; that on the date of the previous trial he was available.

Mr. Golenbock:—That is all I asked at all times.

Mr. Tomlinson:—Lest the jury place a misinterpretation upon what I said I want to further supplement my concession by the statement that the Central Railroad Company of New Jersey on the date of the previous trial did not have in its employ Mr. Hummelberger; that the corporation, that is, the company, the Central Railroad Company of New Jer-

sey, is separate and distinct and was on the date of the previous trial separate and distinct from the United States Railroad administration.

HENRY JOHN NELSON, sworn for defendant.

DIRECT-EXAMINATION BY MR. TOMLINSON:—

Q. Now Mr. Nelson, who are you employed by?

A. United States Railroad Administration.

Q. In what capacity?

A. Freight agent.

Q. Where?

A. Pier 39, North River, New York.

Q. What are your duties with regard to that pier?

A. General supervision over the entire pier.

Q. What other piers, if any, besides Pier 39 do you have control over?

A. Pier 46, North River.

Q. How long have you been agent for those two piers?

A. About fifteen years.

Q. What is the general nature of the work which was carried on at those two piers?

A. Transportation of freight.

Q. From what point to what point in general?

A. Interstate, New York State, the various other states throughout the union.

Q. And how is the transportation of commodities from New York State to other points, particularly referring to New Jersey and the New Jersey shore, accomplished?

A. They are handled by hand trucks and electric power on the pier to floats on which there

are cars, which are towed to Jersey City and dispatched from Jersey City.

Q. How are those commodities gotten into the cars on the floats from the piers on the New York side?

A. By hand trucks and electric trucks.

Q. What acquaintance if any have you with the conditions in this same regard prevailing on Pier 10?

Mr. Golenbock:—If he knows.

Q. If you know, of course.

A. The conditions are practically the same at Pier 39 as they are at Pier 10.

Q. Have you ever observed the methods of trucking from the piers to the floats on any other piers?

A. Various other piers.

Q. State some of them.

A. Pier 4, Pennsylvania Railroad; Pier 9, Lehigh Valley Railroad; Pier 13, D. L. & W. Railroad; Pier 29, Erie Railroad; Pier 22, B. & O. Railroad; Pier 28, Pennsylvania Railroad; and various others.

Q. Are you or are you not familiar with the various types of trailer trucks hauled by an electric truck which are in use on these different piers?

A. Yes, sir.

Q. Are you or are you not familiar with the type of trailer truck commonly known as the Reynolds truck?

A. Yes.

Q. What if any racks on the front of these Reynolds trailer trucks are commonly used in the transportation of commodities such as pineapple crates, crated pineapples, a trailer truck drawn by an electric truck to a float?

A. Pipe racks.

Q. How if at all do those pipe racks differ from Exhibit B, which I now show you?

A. That is exactly the same.

Q. I now show you Exhibit A. How if at all does Exhibit A for Identification, which I now show you, differ from the ordinary crate which is used for pineapples?

A. No different. That is a regulation pineapple crate.

Q. And on the piers which I have mentioned, when a trailer truck is loaded with those crates, what racks if any are commonly used on the front of the trailer trucks?

Mr. Golenbock:—I object to the question unless the question specifically and exclusively refers to Pier 10, where this accident occurred.

The Court:—Oh no, I am going to allow it generally. I think it is competent.

Mr. Golenbock:—I further object to the question unless the question includes the work performed on Pier 10.

The Court:—I will allow the question generally.

(Objection noted for plaintiff as ground of appeal.)

A. Pipe rack.

Q. In what respect does that pipe rack differ if at all from Exhibit B for Identification, which I now show you?

A. Not any.

Q. Now, Mr. Nelson, I ask you from the experience which you have described and your observation of trailer trucks drawn by electric truck upon the various piers, assuming that a trailer

truck drawn by an electric truck has loaded upon it twenty pineapple crates similar to Exhibit A for Identification, which I have shown you, which racks are loaded in tiers of five back and four high, in your judgment is that a proper or an improper loading of that trailer truck?

Mr. Golenbock:—I object to the question.

The Court:—Why?

Mr. Golenbock:—On the ground that this witness has not qualified as to his knowledge of the method of loading pineapple crates on those cars.

The Court:—You may cross-examine him if you desire.

CROSS-EXAMINATION BY MR. GOLENBOCK:—

Q. Mr. Nelson, you say you are a freight agent?

A. Yes.

Q. What are your particular duties?

A. I have general supervision of the pier.

Q. As a matter of fact your supervision is exclusively and particularly to the office work?

A. No, sir.

Q. Don't you spend all your time or most of all your time upstairs looking after the clerical end of it?

A. I do not.

Q. You say you do have charge of the pier?

A. Entire operation.

Q. But you don't in any way spend any time looking after the handling, shipping or loading of freight, do you?

A. A great deal of it.

Q. You say that you spend a great deal of your time on the pier?

A. Yes, sir.

Q. Well, where do you spend most of your time, on the pier or in your office?

A. General supervision requires me to go all over the pier.

Q. General supervision requires you to go all over the pier?

A. It depends upon circumstances.

Q. Mostly where do you spend most of the time?

A. Very hard to say.

Q. You don't pay any particular attention to any particular method of loading, do you?

A. That is part of my duties.

Q. But do you pay any particular attention as to the method of loading?

A. I do.

Q. Don't you have on your pier men who are particularly hired to look after that?

A. I supervise.

Q. I realize that you supervise, but I mean haven't you on your pier several men who are purposely placed there for that work, to supervise the loading of trucks?

A. I have foremen.

Q. And how many foremen have you on your pier?

A. Two.

Q. That is Pier 39?

A. Yes, sir.

Q. How many have you on Pier 46?

A. One.

Q. And you entrust those men with the charge of looking after as to the method and manner of loading freight?

A. That is part of their duties.

Q. I say you intrust those men with that duty?

A. Part of their duties.

Q. That being part of their duties, you intrust them with that part of their duties, don't you?

A. That is part of their duties.

Q. So that you have men whose business it is to look after how this material or freight is loaded on hand trucks or trailers?

A. That is part of their duty.

Q. So as a matter of fact you haven't personally anything to do with looking after the actual operation of loading either hand trucks or trailers?

A. I have.

Q. And why are these men that you say are particularly put on the pier for that purpose, if you personally look after that work?

A. I don't load them, I supervise.

Q. I don't say you load them. I say you have men to look after the loading. Now if you have men to look after the loading why does it necessitate your looking after it?

A. I still supervise, part of my duties.

Q. Do you ever stand and watch how they load freight?

A. I do, every day.

Q. And do you recall any particular occasion when you saw pineapple crates loaded?

A. Yes.

Q. Lots of times?

A. Lots of times.

Mr. Tomlinson:—Your Honor will allow the question I propounded?

The Court:—Yes.

FURTHER DIRECT-EXAMINATION BY MR. TOMLINSON:—

(Previous question repeated as follows:)

Now Mr. Nelson, I ask you from the experience which you have described and your observation

of trailer trucks drawn by electric trucks upon the various piers, assuming that a trailer truck drawn by an electric truck has loaded upon it twenty pineapple crates similar to Exhibit A for Identification, which I have shown you, which racks are loaded in tiers of five back and four high, in your judgment is that a proper or an improper loading of that trailer truck?

A. It is a proper loading.

Q. It is a proper loading?

A. It is a proper load.

FURTHER CROSS-EXAMINATION BY MR. GOLENBOCK:—

Q. Mr. Nelson, do you know how high this piping sits up after it is placed in the trailer?

A. I have never measured it.

Q. Can you make a rough estimate as to how high it is?

A. I wouldn't care to.

Q. Well, now, Mr. Nelson, this Exhibit B for Identification sets right into the trailer, does it not?

A. It does.

Q. And it sets it down to this edge of the point which I have placed my thumb on into this trailer, doesn't it?

A. Apparently that particular one does.

Q. I am talking about this one. So that the floor of the trailer is a line with the edge of this end of the piping which has been trimmed down?

A. That particular one would so indicate.

Mr. Golenbock:—Can we have the rule again, please?

(Rule produced by Mr. Tomlinson.)

Q. Will you please measure from the end of the point where it is filed down or machined down and tell us the measurement of that, please?

A. Four and three-quarters inches.

Q. In other words, this particular piping sets into the trailer four and three-fourths inches, as you have measured it?

A. That is right.

Q. Then will you please measure from the edge of where you have measured it up to the height of this piping?

(Witness measures.)

A. About eighteen inches.

Q. So that when this piping is placed into the trailer the height of it above the floor of the trailer would be eighteen inches; is that right?

A. Yes, sir.

Q. Now do you know the height of each pineapple crate?

A. I do not.

Q. Did you ever take the trouble of measuring it?

A. I did not.

Q. In loading the pineapple crates on trailers how high would you load it?

A. Four high.

Q. At all times?

A. At all times.

Q. None higher and none less?

A. That is the customary load.

Q. Well, would you ever load it any higher than that?

A. No, sir.

Q. Never would?

A. No, sir.

Q. Do you know how high it would be above the pipe rack, the top of the four tiers?

A. No, I do not.

Q. Would it be considerably higher than the height of the piping?

A. What would be considerably higher?

Q. The top of the load.

A. Four high?

Q. Yes.

A. Yes, it would be higher.

Q. I said would it be considerably higher?

A. I can say it would be higher, but how much considerably higher than that I can't say.

Q. How often did you get to Pier 10?

A. Three or four times a month.

Q. You don't know what goes on on that pier, do you?

A. Not daily.

Q. Well, I mean as to the particular kind of work or method of work; you don't know anything about that, do you?

A. The same as ours on Pier 39. The operations are the same.

Q. How do you know it is?

A. Because I have observed it.

Q. You worked for the Central Railroad for how many years?

A. Twenty-three years.

Q. And you work now for the United States Railroad administration, Central Railroad Company of New Jersey, don't you?

A. United States Railroad administration.

Q. Now finish the whole title, will you, please?

A. The United States Railroad administration.

Mr. Tomlinson:—Of course he can't finish it if it is not the truth.

Q. Now let us see whether it isn't or not. You make out way-bills, don't you, and freight receipts?

A. They are made out at the pier.

Q. Under your supervision?

A. Right.

Q. Isn't there upon every one of your way-bills, freight bills, freight receipts, not only the name of the United States Railway administration but the name of the Central Railroad Company of New Jersey?

Mr. Tomlinson:—I object to that as immaterial. I don't see how it can possibly be relevant.

Mr. Golenbock:—You just a minute ago said it was not the truth. Now we will find out whether it is the truth or not.

The Court:—I think it is immaterial.

Mr. Golenbock:—It may be immaterial as far as the case is concerned, but as far as testing the credibility of this witness I think it is very material.

The Court:—You are asking about a detail of names.

Mr. Golenbock:—Yes, I asked him for the full name of the concern for which he works and he said the United States Railroad Administration. Now I ask him whether in every one of the papers of which he has supervision that it does not say that it is the United States Railway Administration, Central Railroad Company of New Jersey, and that is the official title.

Mr. Tomlinson:—It is not the official title.

Mr. Golenbock:—Now let us see whether it isn't or not.

Mr. Tomlinson:—I object to it anyway as irrelevant.

The Court:—I will sustain that objection.

(Objection noted for plaintiff as ground of appeal.)

Q. As a matter of fact, Mr. Nelson, every railroad in this country is under the supervision of the United States Railroad Administration?

Mr. Tomlinson:—That is objected to as immaterial. That is a matter of law.

The Court:—I don't think it is a correct conclusion either. I don't think it is proper.

Mr. Golenbock:—That is the foundation for the next question and if your Honor overrules it I ask an exception.

(Objection noted for plaintiff as ground of appeal.)

Q. Isn't it a matter of fact, Mr. Nelson, that every railway is under the supervision of the United States Railroad Administration, and underneath that particular name there is the name of the particular road under which anything may go to be transacted?

Mr. Tomlinson:—I object, for the same reason. Of course it is a matter of which the court will take judicial notice that the majority of the roads in this country have been taken over by the government. The question of whether this witness knows whether or not on the letterheads of the Sante Fe there appear the words "United States Railroad Administration" is ridiculous.

The Court:—I sustain the objection. It does not appear that the witness knows.

Q. Do you know that to be a fact?

(Objected to.)

The Court:—Yes, I will allow you to ask him if he knows.

A. I don't know.

Q. Do you know then that the words "Central Railroad Company of New Jersey" appear on all your paraphernalia in your office and under the words "United States Railway Administration"?

Mr. Tomlinson:—I object and pray an exception upon the ground that it is immaterial, incompetent and irrelevant to this issue.

The Court:—I will admit it.

(Objection noted for defendant as ground of appeal.)

A. It does not.

Q. Does it appear on any of it?

A. It does not.

Q. You are very positive about that?

A. I am positive about it.

Mr. Tomlinson:—Now if the court please, I offer in evidence Exhibit A for Identification. It may be marked as an exhibit now.

(Article marked Exhibit D 1.)

I offer in evidence Exhibit B for Identification.

(Article marked Exhibit D 2.)

JAMES F. IRWIN, sworn for defendant.

DIRECT-EXAMINATION BY MR. TOMLINSON:—

Q. Mr. Irwin, where do you work?

A. West Short Railroad, Pier 23, North River.

Q. How long have you worked there?

A. About three years.

Q. And what is your job up there?

A. Assistant foreman.

Q. In your capacity as assistant foreman just what are your duties?

A. Why, supervising the loading and unloading of cars.

Q. From where and to where?

A. From the bulkhead onto the float and from the floats onto the piers.

Q. Before you went with the West Shore where were you employed?

A. For the Florida East Coast Railroad, Jacksonville.

Q. How long were you employed down on the Florida East Coast?

A. Seven years.

Q. And during your railroad experience what observations if any have you made along the piers on North River, New York, with particular reference to the use of trailer trucks?

A. Well, I have noticed the loading of trailer trucks all up and down the different piers on North River.

Q. And have noticed their loading with what sorts of different commodities?

A. All commodities of freight.

Q. And have those observations included or have they not included the loading of those trailers with pineapple crates similar to Exhibit D 1?

A. They have, yes, sir.

Q. Are you or are you not familiar with the trailer truck commonly known as the Reynolds truck?

A. Yes, sir, I am.

Q. What if any rack on the front of those trailer

trucks have you observed in use along the piers on North River?

A. Why mostly the pipe rack.

Q. And how if at all do those pipe racks differ from Exhibit D 2 which I now show you?

A. Practically the same.

Q. And what if any commodities are used or are carried on the trailer trucks which have on the front of them a pipe rack similar to Exhibit D 2?

A. Why practically all commodities of freight.

Q. Including pineapple crates?

A. Including pineapples, yes, sir.

Q. What if any experience have you had or observations have you made with regard to the loading of the Reynolds trailer truck along the New York harbor pier?

A. Why, we use the Reynolds truck; the only truck that we use is the Reynolds truck, in fact.

Q. Have you or have you not observed the method in which these trailer trucks are loaded on other piers?

A. Yes, sir; I have.

Q. For how long a period of years?

A. For the past three years now, a little over two years.

Q. And have or have not those observations included the loading of Reynolds trailer trucks with pineapple crates similar to Exhibit D-1?

A. They have, yes, sir.

Q. Now Mr. Irwin, I ask you from your experience and observation whether a trailer truck attached to an electric truck, which trailer truck is loaded with twenty pineapple crates similar to Exhibit D 1, such crates being packed or loaded five deep and four tiers high, whether that truck is properly or improperly loaded?

A. I would say it would be properly loaded.

CROSS-EXAMINATION BY MR. GOLENBOCK:—

Q. Mr. Irwin, what are the dimensions of those trailers?

A. Trailers?

Q. Yes.

A. 3 by 72 by 20 high, I believe.

Q. 3 by 72?

A. What?

Q. What do you mean by 3?

A. 3 feet by 72 inches by 20 inches high.

Q. When you say height you mean the height of the sides, don't you, this piping?

A. The height of the floor of the truck from the ground.

Q. Up to what?

A. Up to the bottom of the truck.

Q. Well, from where to where? From the bottom of the truck up to where?

A. From the floor to the bottom of the truck, the height of the truck.

Q. Well, do you measure the height as being the sides up to the height of the sides? Is that what you mean?

A. Yes.

Q. How long have these trailers been in use?

A. We have been using them ever since I have been on the pier.

Q. That is how long?

A. We don't use the trailer truck at this particular pier I am on, but the Reynolds truck we have used for three years, ever since I have been on the job.

Q. What job are you talking about, West Shore?

A. Yes, with the West Shore.

Q. And how long have you been with the West Shore?

A. About three years.

Q. Do you remember the particular time when you started to work for them?

A. The particular time? No, I don't.

Q. When? What year?

A. In 1917, I believe.

Q. What part of 1917?

A. It must have been the first part of the year of 1917.

Q. Can you recall what month?

A. No, sir.

Q. You wouldn't say it was after August, 1917, would you?

A. I wouldn't say either way.

Q. You wouldn't say either way?

A. No, sir.

Q. How did you come to be here today?

A. Why, I was sent here by my agent.

Q. Who is your agent?

A. Mr. C. L. Stevens.

Q. You mean agent of the company?

A. Agent of the West Shore, yes, sir.

Q. How were you sent here, telephoned to you that you should be here?

A. No, he called me upstairs and told me——

Mr. Tomlinson:—Just a minute.

Mr. Golenbock:—I have no objection to what he told him.

The Court:—How is that competent?

Mr. Golenbock:—I want to show under what process he is here.

The Court:—He told you he was sent by his superintendent.

Mr. Tomlinson:—I will admit, if the court please, that I requested the West Shore to have Mr. Irwin here.

Q. You were not subpœnaed to come to court at all, were you?

A. No, sir.

Q. And you were not here on the last trial?

A. No, sir.

DANIEL J. GRACEY, sworn for defendant.

DIRECT-EXAMINATION BY MR. TOMLINSON:—

Q. Where do you reside, Mr. Gracey?

A. New York City.

Q. What is your occupation?

A. General foreman.

Q. Where?

A. Pier 20 and 21, North River, New York.

Q. And what railroad are those piers connected with?

A. Erie Railroad.

Q. How long have you been connected up there with the Erie on those piers?

A. About nineteen years.

Q. Before you went with the Erie where were you?

A. I worked for the Santa Fe in Kansas.

Q. In Kansas?

A. Yes.

Q. Now Mr. Gracey, during your experience as a railroad man what observations have you made of trailer trucks, the operation and loading of trailer trucks on the piers in New York harbor?

A. Well, I can't say that I have observed very much outside of my own pier.

Q. What do you use on your pier?

A. The trailer truck, the Reynolds.

Q. And for how long a period have you used them?

A. Why, three years, as far as I know. That is as long as I have been in the present position.

Q. Now what chance did you have to observe the operation of those trucks?

A. Why, I am with them all the time and supervise the handling of them, the men that handle them and the operation.

Q. What if any racks do you use on the front of those trailer trucks?

A. I use the pipe truck, pipe rack, similar to that.

Q. Similar to Exhibit D 2?

A. Same thing.

Q. And, Mr. Gracey, what is your practice with regard to the use of those racks?

A. I use them on all classes of trade.

Q. What is your practice with reference to carrying crates of pineapples similar to Exhibit D 1?

A. The same thing. I have used it on them.

Q. Now from your experience, Mr. Gracey, I ask whether a trailer truck hauled by an electric truck, on which trailer truck are loaded twenty pineapple crates, similar to Exhibit D 1, in tiers, or loaded five tiers back and four tiers high——

Mr. Golenbock:—I object to the question.

Mr. Tomlinson:—Will you wait till I finish my question?

Q. I ask you whether or not that is loaded properly.

Mr. Golenbock:—I object to the question on the ground that it is leading and going to one of the particular issues in the question, and I think that a question of that kind ought to be asked for the witness to describe what

in his opinion a proper loading would be of this particular kind of merchandise. I have been very lenient as far as objecting to leading questions, and I think I want to object to it now on the ground that it is very much leading and germane to the issue.

Mr. Tomlinson:—If your Honor thinks it is leading I will reframe it.

The Court:—Yes, there is another objection to it because you left out the Reynolds truck.

Mr. Tomlinson:—I will reframe it.

The Court:—You had better reframe it, because you want to connect it with the Reynolds truck.

Q. Now, Mr. Gracey, I ask you whether in your opinion, based on your experience, a Reynolds trailer truck loaded with twenty crates of pineapples, which crates are similar to Exhibit D 1, and which crates are loaded five tiers deep and four tiers high, I ask you what is your judgment with regard to the propriety of that loading?

Mr. Golenbock:—I object to the question on the ground that it is leading.

The Court:—Oh, no.

(Objection noted for plaintiff as ground of appeal.)

A. I think it would be properly loaded.

CROSS-EXAMINATION BY MR. GOLENBOCK:—

Q. Would a load of crates of pineapples seven feet high be a proper loading?

A. Twenty crates would be proper loading.

Q. No, I am not asking you about twenty crates, I am asking you would a load of crates of pine-

apples seven feet or more in height be a proper loading.

A. I don't know the measurements of those crates.

Q. You say you are an experienced man in loading freight?

A. I am.

Q. I want to know whether a seven foot high load of pineapple crates would be or not a proper load.

A. I think it would.

Q. Have you got the same kind of pipe as this Exhibit D 2?

A. Same truck.

Q. And do you know that the height of the piping from the edge which goes into the trailer is only eighteen inches in height?

A. I do.

Q. And yet you say that a load of seven feet or more would be proper loading?

A. I have loaded them.

Q. You haven't been here at the last trial, have you?

A. No, sir.

Q. And have you been subpœaned today?

A. No, sir.

JOHN J. REILLY, sworn for defendant.—

DIRECT-EXAMINATION BY MR. TOMLINSON:—

Q. You haven't been subpœnaed, have you, to come here today?

A. No, sir.

Q. I asked you to come here today?

A. Well, I don't know who you asked. My agent sent me here.

Q. You were asked to come here?

A. Yes, sir.

Q. Where do you live, Mr. Reilly?

A. 19 Beacon Avenue, Jersey City.

Q. Where are you employed?

A. New England Steamship Company, Pier 14 and 15, North River.

Q. How long have you been employed there?

A. Twenty-four years.

Q. Just state to the court and jury, if you please, what your duties are.

A. General foreman, supervising the loading and unloading of steamers, general cargo.

Q. And what is the practice or the process by which you accomplish the transferring of freight from the pier to the steamers?

A. Electric truck, tractor and trailer, and hand truck.

Q. Have you any Reynolds trucks on your pier?

A. Yes, sir.

Q. What if any have been your observations with regard to the use of trailer trucks, including the Reynolds trailer truck, on piers along the North River?

Q. Well, we use them and I know of various other companies who use them along the river.

Q. And for what commodities do you use the Reynolds trailer truck?

A. All commodities.

Q. Do you or do you not use them for transferring pineapple crates similar to Exhibit D 1?

A. Yes.

Q. And what if any pipe or rack do you use on the front of those trailer trucks?

A. We use no racks.

Q. None at all?

A. None at all.

Q. What have been your observations with regard to the loading of the Reynolds trailer trucks on the piers along the North River?

A. Well, a number of them use these pipe racks, a number of them don't use any.

Q. And you don't use any?

A. We don't use any.

Q. Now what have been your observations with regard to the way in which pineapple crates are loaded on these Reynolds trucks?

A. They are loaded across the truck, as a rule.

Q. Now, Mr. Reilly, I ask you whether, basing your answer on the experience which you have had, the observations you have made, the tests you have made, a Reynolds truck, attached to an electric truck, which trailer truck has loaded on it twenty pineapple crates similar to Exhibit D-1, loaded five back and four tiers high, I ask you what is your judgment with regard to the propriety of that loading?

Mr. Golenbock:—I object to the question on the ground that it is leading.

The Court:—The question may remain. The objection is overruled.

(Objection noted for plaintiff as ground of appeal.)

A. Proper loading.

CROSS-EXAMINATION BY MR. GOLENBOCK:—

Q. Mr. Reilly, how long have these trailers been in use?

A. We have got them about five years, five years and a half.

Q. And you mean to say that during the five years, the five years and a half that you used them, you used no guard pieces in front at all?

A. No.

Q. Sure of that?

A. Yes.

Q. Would you say, Mr. Reilly, that a load of pineapples, crates of pineapples, being seven feet or more in height, would be a proper load?

A. Seven feet from the top of the truck?

Q. Seven feet from the floor of the trailer to the height of the load.

A. Well, that depends on how it is loaded and how you get it there. I don't know how you would get it up there.

Q. Assuming that it is loaded in the manner that you have indicated, laying them across, being over seven feet in height; would you say that was proper loading?

A. If you could load it up there, yes. That is a lift and it would be proper. It depends on how you stow it on that truck.

Q. Assuming now that it was loaded across in the same manner as you indicated was loaded generally, and being seven feet high from the floor of the truck, would you still say that that was proper loading?

A. No.

REDIRECT-EXAMINATION BY MR. TOMLINSON:—

Q. Mr. Reilly, would it be possible to load a trailer truck seven feet high?

A. It would not be possible without a crane or some appliance overhead to land it on top. It would be impossible for men to lift it up.

RECROSS-EXAMINATION BY MR. GOLENBOCK:—

Q. Mr. Reilly, do you know how high four tiers of four crates of pineapples would be?

A. Yes.

Q. How high?

A. I should judge on the top of a truck above five feet eight.

Q. Five feet eight?

A. Yes.

By Mr. Tomlinson:—

Q. From where?

A. From the floor.

By Mr. Golenbock:—

Q. From the trailer?

A. No, the ground.

Q. I am talking now how high it would be from the floor of the trailer if there were four of these pineapple crates as indicated by Exhibit D 1 laid in the same manner as you have indicated before?

A. About four feet from the top of the trailer.

Q. Four feet?

A. Yes.

Q. Supposing another tier was put on top of that; how high would that make it?

A. Practically about five feet high, another foot. They are about twelve inches.

Q. And you still say that seven feet height or thereabouts would not be a proper loading?

A. Not proper loading, no.

REDIRECT-EXAMINATION BY MR. TOMLINSON:—

Q. Mr. Reilly, will you take this measure and measure the height of this Exhibit D-1?

(Witness measures pineapple crate.)

A. Just about 11½ inches.

By Mr. Golenbock:—

Q. And you still insist that that would be a proper loading of four tiers high without any railing front at all?

A. Yes.

By Mr. Tomlinson:—

Q. Mr. Reilly, how were they transported? How do you transport your trailer trucks, that is, how are they driven? How many men have you on it?

A. One man with a train. We run them in trains of five and seven.

Q. Five and seven?

A. Trailers to a train.

Recross-examination by Mr. Golenbock:—

Q. Just a moment. I don't understand that at all. Does that make any difference as to the method, the method where you run five to a train?

A. No, sir.

Q. Makes no difference at all?

A. No.

Q. Did you have a man with each trailer?

A. One man with a train.

Q. One man with a train of five or seven cars?

A. Yes, sir.

Q. You mean the man who controls the electric truck?

A. One man that runs the tractor or the electric truck, the other man with the trailers, attending to the trailers.

Q. Ten trailers?

A. Attending to the trailers.

Q. And you say you haven't been subpœnaed here today?

A. No, sir.

WILLIAM W. GIDDES, sworn for defendant.

DIRECT-EXAMINATION BY MR. TOMLINSON:—

Q. Where do you live, Mr. Giddes?

A. Dunellen, New Jersey.

Q. What is your occupation?

A. Attorney at law.

Q. And are you in general practice?

A. With a corporation, yes.

Q. With what corporation?

A. The Employer's Liability Insurance Corporation, of London.

Q. I show you Exhibit C for Identification and ask you whether that is your signature in the attestation clause.

A. It is.

Q. Did you witness that?

A. Did I witness what?

Q. Did you witness the execution of that document?

A. I did.

Q. I show you the name "William A. Fagan" and ask you who wrote those words?

A. Mr. Fagan.

Q. I show you the words written in ink, "I have read the above and understand it", and ask you who wrote those words.

A. Mr. Fagan wrote those also.

Q. Did he write them before or after you signed your name?

A. Before.

Q. I show you the signature "William W. Giddes, Commissioner of Deeds for New Jersey", on the back of this document, attached to the document, and ask you whether that is your signature.

A. It is.

Q. I ask you whether or not you took Mr. Fagan's acknowledgment to this document.

A. I did.

Mr. Tomlinson:—I offer this in evidence.

The Court:—Show it to the other side.

(Paper marked Exhibit D-3.)

CROSS-EXAMINATION BY MR. GOLENBOCK:—

Q. Mr. Giddes, what is your particular business for the Employers' Liability Insurance Corporation?

A. As attorney.

Q. And how long have you been with them?

A. Been with them since May, 1918.

Q. And before that you were with the Central Railroad Company of New Jersey?

A. I was.

Q. For how long a time?

A. Since June, 1912.

Q. How long have you been admitted to practice law?

A. Since 1915.

Q. And while you were studying law you were connected with the Central Railroad Company of New Jersey?

A. Not while I was studying at law school, but during clerkship.

Q. But you were an attorney during the time that you worked for the Central Railroad Company of New Jersey?

A. Part of the time, yes.

Q. And what were your special duties when you worked for the Central Railroad Company of New Jersey?

A. The settlement of cases.

Q. It was not for the purpose of trying cases for the Central Railroad Company, was it?

A. No.

Q. You were employed to settle cases; is that right?

A. Yes.

Q. What was your official title at the time that you settled or got this paper marked Exhibit D3?

A. Special claim agent.

Q. Before you got that title of special claim agent what were you known as?

A. As claim agent.

Q. When were you raised from claim agent to special claim agent?

A. I don't recall the exact date.

Q. Was it after you had been admitted to the practice of law?

Mr. Tomlinson:—I object to that as immaterial. What difference does it make?

Mr. Golenbock:—I am trying to fix the date.

The Court:—I will allow it.

A. I can't recall that either.

Q. Can't recall that?

A. No.

Q. As special claim agent you had special cases to look after to settle, didn't you?

A. Had just the same class of cases as I had before I assumed that title.

Q. And that gave you a higher elevated position, so to speak, in that particular line of work?

A. I shouldn't say so.

Q. That carried with it more salary, didn't it?

A. No, I didn't receive——

Mr. Tomlinson:—I object to that, your Honor. What difference does it make?

The Court:—I think it is immaterial.

Q. Now you say that you took the acknowledgment; is that right?

A. Yes.

Q. Did you tell Mr. Fagan to raise his hand?

A. No.

Q. Did you ask him whether he swore to it?

A. No.

Q. Before he signed it did you read it to him or did he read it for himself?

A. He read it and then I explained it.

Q. You mean first he read it to himself and after that you explained it to him; is that right?

A. After he had seen it and before I had taken the acknowledgment.

Q. Did he read it aloud to you?

A. No.

Q. To himself?

A. Yes.

Q. How long a time did it take him to read this paper Exhibit D-3?

A. Why, I don't know the exact time.

Q. Well, about?

A. It may have been five minutes.

Q. It may have been more?

A. About five minutes, I should say.

Q. Well, then, you want to limit yourself to five mintes?

A. No, because I don't know the exact number of minutes.

Q. Well, then you say it was possibly more than five minutes?

A. It may have been four, it may have been six.

Q. Now according to that wouldn't you say that it took him a long time to read that paper, if it took him between four and six minutes to read it?

Mr. Tomlinson:—I object to that as calling for a conclusion.

(Objection sustained. Objection noted for plaintiff as ground of appeal.)

Q. He read it carefully, didn't he?

A. He read it as any one would.

Q. Well, did you notice whether he was carefully reading this paper or not?

A. I noticed that he read it apparently as carefully as any one naturally would.

Q. Well, what do you mean as any one naturally would?

A. Well, as any one would read a paper.

Q. If he read it as carefully as you say he did what made you explain it to him?

A. Because I had always made it a practice to do so before taking an acknowledgment.

Q. Explain the whole paper to him? You explained the paper to him?

A. I explained just what it meant by executing a release.

Q. When you explained it to him what did you say to him?

A. I told him that he was receiving $85 in settlement of his case, he understood that was a final settlement of his case, before taking the acknowledgment.

Q. Did you use the words "final settlement of the case"?

A. I don't recall whether I used those specific words or not.

Q. Well, did you use the substance of those words?

A. Yes.

Q. Now then, can you recall, if you can refresh your memory now, what words you did use when

you told him and explained to him the purport of this paper?

A. I can't recall the exact words that I used.

Q. You didn't warn him that that was his final claim that he would have against the company, did you?

A. Why, yes.

Q. You did warn him that?

A. I did.

Q. I presume you told him not to sign it also, didn't you?

A. Pardon me.

Q. You went so far as to tell him not to sign it, didn't you?

A. No.

Q. Who was present at the time when you say Fagan read this paper and when you explained the contents to him?

A. Mr. Ming, Mr. Hone, of the Railroad Company, and another gentleman that accompanied Mr. Fagan.

Q. Mr. Giddes, do you remember the conversation that led up to this paper that you had with Mr. Fagan?

A. Why, I remember we had a conversation before we executed the release.

Q. Do you remember the exact conversation?

A. Not the exact words.

Q. Well, do you remember being told that Fagan did not have any transportation, the money to go home with?

A. I was told that he wanted transportation.

Q. And that was the first intimation that you had of what Fagan wanted, wasn't it?

A. No.

Q. Didn't you receive a telephone message from

New York pier stating that Fagan was coming over and wanted his transportation?

A. No, not I.

Q. Well, where did you hear that he needed transportation?

A. Sometime during the discussion, either before or after the execution of the release, that fact was mentioned.

Q. You don't know whether it was before the signing of the release or after?

A. No.

Q. Don't know?

A. Don't recall now.

Q. And did he sign the release before he got the $85 or after?

A. He signed that before he got the $85.

Q. And it was after that that he talked about transportation?

A. I can't tell it definitely.

Q. Didn't you a minute ago say that it was after the signing of the release that he talked about transportation? Do you want to change it now?

A. I think my testimony was that it was either before or after, during my conversation, I didn't recall which.

Mr. Golenbock:—I am asking the stenographer to read back.

(Previous testimony repeated.)

Q. Did you give him the $85 in cash or by check?

A. I gave it to him by check.

Q. And how did he get the cash?

A. Why, I believe Mr. Hone had the check cashed for him.

Q. Well, was he asked to sign anything when you gave him the check?

A. He had to endorse the check before the cash was given to him.

Q. Now did he endorse this check before he signed the release or after?

A. After he signed the release.

Q. And after that he received the money; is that right?

A. That is right.

Q. Was there any conversation had between Mr. Fagan and yourself in reference to ten weeks' pay?

A. No.

Q. There wasn't a word said about that?

Mr. Tomlinson:—Just a minute. I object to this unless first it is shown that it was in the chain of events leading up to the execution of this paper, and in any event I will object to it as not proper cross-examination on this offer which I am now making of this document.

The Court:—I will allow the conversations, however. Perhaps they may not be exactly material.

Mr. Tomlinson:—I object to it, then, your Honor, unless it is shown that it was immediately prior to the signing of the paper. In other words, if it was after, it has no bearing at all.

The Court:—Oh, no. I will confine it to what took place prior to the period.

Mr. Golenbock:—I am confining it myself to that period of time.

The Court:—The witness has answered it and he said no.

Q. Will you tell us what you said to Mr. Fagan at the time you took this acknowledgment?

A. Why, I explained first——

Q. No, just tell us what you said. Never mind what you explained.

A. I said, "You understand you are receiving this $85 and releasing the railroad from any further claim;" and then I took the usual acknowledgment from him.

Q. Now how did you take this usual acknowledgment? What did you do? Never mind the usual acknowledgment; what did you say or do?

A. Why, I said to him, "Do you acknowledge that you sign, seal and publish this written release as your voluntary act and deed for the uses and purposes therein expressed?"

Q. You said that to him?

A. Yes.

Q. And what did he say to you?

Mr. Tomlinson:—If the court please, I think I ought to enter another objection, and that is that it seems to me that all this testimony that Mr. Golenbock is now trying to adduce is directed towards proving fraud.

The Court:—No, I think he may cross-examine on the execution of the document.

Mr. Tomlinson:—What I am doing is offering this document. If the man signed it then I think it is admissible, with the allowance to the plaintiff to prove fraud.

The Court:—Yes, but you asked him whether he didn't take the acknowledgment. Proceed.

(Objection noted for defendant as ground of appeal.)

(Question repeated.)

A. "I do."

Q. Was there any discussion as to amounts, Mr. Giddes?

A. Why, there was some little discussion, yes.

Q. Well, what was it?

A. Well, he didn't know just what he wanted to settle and I offered him $80. He refused to take that and I finally offered him $85 and he consented to accept it.

Q. You voluntarily offered a raise of $5?

A. Yes.

Q. He didn't ask for $85?

A. He didn't mention any particular sum.

Q. So he said he would not accept $80; is that how you came to raise it $5 more?

A. Yes.

Q. You said that he read it carefully; is that what I understood you to testify to?

A. As carefully as an ordinary person would, in my opinion.

Q. Well, do you mean as an ordinary person would realizing that it was a release? Do you mean it in that way?

A. Realizing that it was any paper.

Q. No, but I am asking now, realizing that it was a release of his rights against the company.

A. All I can say is that I think he read it carefully.

Q. Do you remember being asked this question at the last trial and giving this answer? This is an answer pertaining to the $85, at the end of the last answer of that page. "And when the release was brought down Mr. Hone, Mr. Ming and another gentleman and Mr. Fagan were present; and I gave the release to Mr. Fagan to read over. He apparently read it, took it and looked it over the same

as any one else would who was intending to read it. After he had read it over I explained its contents, stating that it was a release in which, for the consideration of $85, he was releasing his claim against the railroad; and he signed the release and then I took the usual acknowledgment, after which I presented him with a check for $85." Now do you mean to say now that he read it carefully or he apparently read it?

A. Well, I don't think there is anything contradictory in the two answers.

Q. Well, you know the difference in a man who apparently reads and a man who does actually read it; don't you know that?

A. I know that I or no one else is capable of saying whether another man is reading a document. All we can say is that when he takes it and scans it we can only assume that he is reading it.

Q. Well, didn't you say a moment ago that he read it in the manner that any man would read that paper?

A. Yes.

Q. And didn't you make that statement having in mind the fact that you wanted to convey the impression that you knew he read it?

A. I thought that he did read it.

Q. Didn't he as a matter of fact ask you for transportation and you said that you were paying $80 now, being ten weeks pay, at a lump? Didn't you say that to Mr. Fagan?

A. No.

Q. Didn't Mr. Fagan say to you, "Why don't you pay me the same as you paid the colored man over in the terminal, for every two weeks?" and didn't you answer to him and say that you had discontinued that since May last of that year and

that you were paying now for ten weeks in a lump sum?

A. No.

Q. Didn't Mr. Fagan say to you after that that at the end of ten weeks you would come to see him in reference to more money, or he should come to see you, and didn't you say to Mr. Fagan, "Come and see me for more money"?

A. No.

Q. Didn't you say to Mr. Fagan when you gave him the $85, "Sign this receipt"?

A. No.

Q. And didn't you when you said "Sign this receipt" hand him this paper and tell him to sign?

A. No.

Q. Mr. Giddes, you knew the man was suffering at the time, didn't you?

A. I knew——

Mr. Tomlinson:—If the court please, I object to that. The question is whether this man signed this paper.

Mr. Golenbock:—I think it is a proper question as showing what knowledge he had as to his condition. We will show that he took advantage of his condition at the time.

The Court:—That is a defense, isn't it?

Mr. Golenbock:—We have a right to bring it out by any witness, that is my contention.

The Court:—Well, then, you may call him again. You may call anybody as a witness, but you have got to confine yourself to cross-examination. If you desire to use this witness in your rebuttal I will direct that he not leave the court until after you have a chance to recall him.

Q. How long did this entire transaction take, Mr. Giddes?

A. You mean——

Q. From the time you first saw him up to the time you finally closed the matter.

A. Twenty-five minutes or a half hour.

Q. No longer than a half hour?

A. I think not.

Q. Any shorter period of time than twenty-five minutes?

A. It may have been a little shorter.

Q. How much shorter, how much less?

A. Oh, two or three minutes.

Q. Don't you remember being asked at the last trial—listen to the answer that you made as follows: "You say you discussed the thing a short time. What do you call a short time? A. Well, we were there probably fifteen or twenty minutes. Q. That is all? A. About that length of time. Q. Would you say it was longer or less time than fifteen or twenty minutes? A. No, I think it was fully fifteen or twenty minutes. Q. No longer? A. I say fully fifteen or twenty minutes. Q. I am asking you whether it was longer than fifteen or twenty minutes or not. A. I don't know. Q. Is that the maximum time that this transaction took? A. I don't know exactly the time because I didn't take it. Q. You say between fifteen and twenty minutes, so you are leaving yourself five minutes leeway as a minimum and maximum time? A. I just gave that, not as being any statement of any measurements. Q. Then I am asking you whether twenty minutes is the maximum time that the contract took. A. It may have been a little more or a little less. Q. How much more? A. Probably five or six minutes more, or five minutes less. Q. And

it may have been half an hour more? A. No, I didn't say anything of the kind. Q. What was the minimum time that the entire transaction took? A. I can't tell you."

Mr. Tomlinson:—Now of course I object to reading all this testimony. I waited patiently to try to find out what he is trying to do.

The Court:—You must proceed in the ordinary way if you want to ask him if he said so and so.

Mr. Golenbock:—I just wanted to combine all the entire questions and answers pertaining to that phase of the question.

The Court:—You see the witness couldn't answer that, because he might say, "Yes, I said part and didn't say part."

Mr. Golenbock:—I am going to ask him as a whole.

Q. Did you get those questions and make those answers on the last trial?

The Court:—I will allow that as long as it has been read.

A. I can't state positively.

Q. Why did it take you twenty-five or thirty minutes?

Mr. Tomlinson:—He has not said it took him twenty-five or thirty minutes. Now don't misstate the evidence, please.

Mr. Golenbock:—What was said? That was my understanding.

A. I said about twenty-five minutes.

Q. Did you say that it took between twenty-five and thirty minutes?

A. I said that it took about twenty-five minutes.

Q. Did you mention thirty at all in your answer?

A. I think I mentioned something about a half hour.

Q. Well, is there any difference between thirty minutes and a half hour? Now why did it take you a half hour for the transaction, Mr. Giddes? This is not a laughing matter. Do you think getting a release is a laughing matter?

Mr. Tomlinson:—I object to such a statement, and ask that that be stricken from the record as improper.

The Court:—Strike it from the record.

Q. Why did it take you all that long, Mr. Giddes?

A. For the discussion as to the amount that Mr. Fagan would settle for. He steadfastly refused at first to accept the $80 and then we had to send up and have the release drawn and brought downstairs, give him time to read it over, take the acknowledgment.

Q. And during that time you stood there with him, did you?

A. I stood there with him all the time.

Q. And the only discussion you had was the difference in the $80 and the $85; that is the only dispute between you two?

A. Well, he refused to take the $80, so I offered him the $85.

Q. And he took the $85?

A. Yes.

Q. And was it after that that he asked you for transportation?

A. He didn't speak to me about transportation.

Q. Who did?

Mr. Tomlinson:—Unless the witness knows, unless it was in his presence.

A. And I didn't give him the transportation.

Q. Who told you that he wanted transportation?

Mr. Tomlinson:—I object. What difference does it make who told Mr. Giddes?

The Court:—No, I don't think it makes any difference.

Q. Did you know at the time that he wanted the $80 or $85 that he wanted transportation?

A. I don't recall.

Q. In what condition did you find that man when you first came and saw him in the waiting room?

(Objected to.)

The Court:—It is admitted.

Mr. Tomlinson:—I wanted to state my grounds.

The Court:—Yes, you may state your grounds.

Mr. Tomlinson:—No, I will withdraw the objection.

A. I found him in a wheel chair and found him sitting in the wheel chair.

Q. Did he express pain or agony?

A. Didn't express agony; said he felt badly.

Q. Didn't he tell you he was a very sick man?

A. No, I don't recall that he said those particular words.

Q. Well, do you recall words that he did use?

A. No.

Q. Didn't you know that he had a broken leg?

A. Yes.

Q. So that his injury was a serious one?

A. I don't know that I knew the exact seriousness of the injury.

Q. Well, didn't you know that he was in the hospital for a period of two weeks and wasn't cured yet?

Mr. Tomlinson:—I object to that. It is immaterial upon the question of the execution of this document.

The Court:—Yes, that is immaterial.

Q. Did you have anything further to do with Mr. Fagan after that?

Mr. Tomlinson:—I object to that as immaterial. What happened after this paper was signed can obviously have no bearing upon this matter.

The Court:—Yes, I will sustain your objection.

(Objection noted for plaintiff as ground of appeal.)

Q. Did you have any conversation with Mr. Fagan and his wife with reference to more money?

Mr. Tomlinson:—I object to that as immaterial.

Mr. Golenbock:—I want to show that it is very material, that at that time, we contend that at that time when he signed that paper he was told it was a receipt, he could come for more money. Now I want to show by this witness that he did come for more money after that, that he had a conversation with him as to more money.

The Court:—Would that show anything?

Mr. Golenbock:—Yes, I think that it would

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be some evidence to show whether there was really a meeting of the minds and whether there was really a release given or whether it was in the form of a receipt, as it was stated to him.

Mr. Tomlinson:—If there was not a meeting of minds, your Honor, this document was signed through mistake and Mr. Fagan's remedy is in a court of equity. The only way in which this document can be set aside or could be given less than full consideration is on the ground that there was fraud in the execution of it, if there was fraud either in the execution of it or in the events immediately preceding the signing of this by Mr. Fagan. Now what happened——

The Court:—Misrepresentation of the contract?

Mr. Tomlinson:—Yes, sir. Now what happened afterwards cannot be relevant on the question of whether this was misrepresented. And anything that comes later, even if Mr. Giddes did see this man later and promise to pay him money, that has nothing to do with this release. The release cannot be disaffirmed or affirmed, cannot be avoided or affirmed at will. It is done when it is signed, and on that day it is either good or else it is bad, and everything that is done after that has no bearing at all. I submit therefore that anything happening after this thing was signed is immaterial.

Mr. Golenbock:—My contention is not the fact that he called for money afterwards, that that release is good or bad. My contention is that the evidence that I intend to bring out

that they did call for money, was that he was told at the time he signed this paper that this was only a receipt, that he could call for more, as evidence for the jury to determine whether this was a release or whether it was not.

The Court:—You may ask him anything he said at that time. I have allowed you to ask anything relative to this conversation.

Mr. Golenbock:—But I want to show that these people did call afterwards for more money.

The Court:—That cannot affect this witness.

(Objection noted for defendant as ground of appeal.)

The Court:—You might show by your party what he did himself, and why he did it.

Q. Mr. Giddes, how many cases in all have you settled for the Railroad Company?

(Objected to as immaterial.)

The Court:—I don't think that is material.

Q. That was really your special and only work at the time when you settled or attempted to settle this Fagan case?

A. Not my entire work, no.

Q. What else was your work? What else consisted of your work if not settling cases?

A. Reading over the cases after they had been investigated, to determine liability, further investigation.

Q. But you were known as a special claim agent; in other words you had charge of settling and setting down prices for the settlement of cases, didn't you?

A. I had no authority to give those prices to any one else.

Q. But you could set a price on a case that you desired to settle, couldn't you?

A. Up to a certain amount.

Q. And that was practically all that your work consisted of?

A. Part of my work.

Q. And you were at that time an attorney at law admitted to practice in this state?

A. At the time of the execution of this release, yes.

Mr. Tomlinson:—I now offer this release in evidence, and rest.

[DEFENDANT RESTS.]

PLAINTIFF'S TESTIMONY IN REBUTTAL.

WILLIAM A. FAGAN, recalled for plaintiff.

DIRECT-EXAMINATION BY MR. GOLENBOCK:—

Q. Mr. Fagan, when you were brought to the ferry house and when you left Mr. Giddes and Mr. Ming, state to the court and jury your entire conversation you had with them.

A. Why, when I came on the dock in the chair, Mr. Conover, my friend foreman, went upstairs and told Mr. Giddes that I was downstairs.

Mr. Tomlinson:—I object. That was not in this witness' presence.

The Court:—No, you can't tell what somebody else told you.

A. Mr. Giddes and Mr. Ming and the other gentleman——

Q. Let me ask this question. As a result of a telephone conversation you went over to Jersey City?

A. Yes.

Q. On the ferry?

A. On the ferry.

Q. With whom?

A. Mr. Reynolds and Mr. Conover.

Q. And when you were taken over the ferry and when you came to the Jersey City side what happened to you? What did he do for you?

A. Well, they took me in on the rolling chair and I wanted my transportation home and wanted to get home in the worst way because I was sick.

Mr. Tomlinson:—I object to what he wanted to do.

A. And I didn't know what I was doing. Mr. Giddes come downstairs himself and another gentleman, I didn't know him at the time then, and I asked them for my transportation home and he asked me how I felt first; and I told him I felt awful sick. And he asked me then how long I was in the hospital and I told him from the 6th of August to that day, which was the 11th of the next month, September. So then they studied a while and then they said, "Well, we will give you $80 for ten weeks half pay." "Well," I said, "why not give it to me every two weeks, like you did that colored fellow down in Broadway tower?" "Well," he says, "we don't do that any more." He said, "I will give it to you every ten weeks in a lump sum. We don't do that any more since last May. We give it for ten weeks," he said, "in a lump sum."

So after he gave me the money—first he gave me a check and then he asked whether I would sooner have the check or the money and I told him I would sooner have the money, naturally I endorsed the check; and then when he went to get the money for me he put a paper in front of me and told me to sign a receipt for it. So I did. In fact, I would have signed anything that day, I didn't know what it was.

Mr. Tomlinson:—I object to that last statement and move it be stricken out.

The Court:—Strike it out.

Q. When he told you to sign a receipt did you sign it?

A. I signed it, yes.

Q. Did you ask him immediately then as to more money? What did you say to him and what did he say to you?

A. What is that?

Q. What did he say to you and what did you say to him in reference to more money?

A. I asked him, I says, "Is this all?" "Well," he says, "come back," he says, "in ten weeks." He said, "Come up to my office and see me or I will come and see you." So I had to come up anyhow, I had to come up to the hospital in ten weeks after that day. My wife took me back up to the Ruptured and Crippled Hospital.

Q. Did you receive a letter from Mr. Giddes to call and see him?

Mr. Tomlinson:—I object to whatever happened subsequently to the signing of this paper, on the ground that it is not competent evidence to show what happened on the day that this paper was signed. All that is competent, I

contend, is what happened on this day, anything that is leading up to the execution of this paper, to the signing of this paper, whatever it was, and that if there was not any fraud that was practiced on that day, if there was not any fraud the paper stands. But whatever happened afterwards, your Honor, cannot make any difference to the case, whether he came up to see Mr. Giddes later or whether he didn't, can obviously have no bearing upon the fact of the legality of that release, and I therefore object to this question upon that ground.

The Court:—Well, let us see one minute. If Mr. Giddes wrote him a letter wouldn't it be contradictory of the fact that it was a release? Wouldn't it be corroborative of the fact that this man says that it was not a release, it was a receipt?

Mr. Tomlinson:—No, sir; I don't think it would be. The paper, of course, speaks for itself. This man says, "True, this paper speaks for itself, but I was advised it was something else."

The Court:—He says, "He told me it was a receipt."

Mr. Tomlinson:—"And I was advised it was a receipt, I was told it was a receipt before I signed it." That was before he signed it. Now what was told him afterwards, or what was said to him afterwards cannot relate back, cannot have any bearing on the signing of it.

The Court:—No, but at the time of the execution he said this gentleman who read the release told him to sign it as a receipt and to come back after ten weeks and see me about it. I think it is competent and I will let it come in.

Mr. Tomlinson:—I want to get an objection on the record, if your Honor will pardon me, and I want to get my grounds.

The Court:—Yes, get your grounds.

Mr. Tomlinson:—I object to this question on the ground that the sole question before this court and this jury on the question of the execution of this paper is whether or not at the time Mr. Fagan signed this paper and immediately prior thereto he had misrepresented to him the contents thereof, and that whatever happened later or was said later is irrelevant and incompetent and as having no bearing on the question; and I object furthermore on the ground that there is nothing to show that Mr. Giddes had any power or authority to promise this man additional compensation.

The Court:—Repeat the question.

(Question repeated.)

The Court:—Of course that in its form is objectionable, because if he received a letter that ought to be produced.

Mr. Golenbock:—I might state to the court now that this letter was produced in evidence on the last trial and since that time I have been unable to locate it in my papers and I don't know—I thought maybe it got mixed up with my friend Tomlinson's papers and he said he hasn't got it and it is not in the file or on record, and I will have to have the contents of it told by the recipient, because it is not available. It was put in evidence at the last trial.

The Court:—Printed in evidence?

Mr. Golenbock:—It was not printed in the case, no, sir. I don't know why, but it was not printed in the case, but it was used on the last trial.

The Court:—Well, you may prove its loss. It is incompetent as it stands now.

Mr. Golenbock:—Well, I suppose I will have to take the stand.

The Court:—You can't certainly prove the contents of a document unless you lay a foundation.

Mr. Golenbock:—I realize that, if your Honor please.

The Court:—The objection is sustained as it stands now.

Mr. Golenbock:—I will suggest that Mr. Fagan stand there while I testify at this end of the table, so that he does not have to move up and down.

The Court:—Yes.

HENRY K. GOLENBOCK; sworn.

The Witness:—I was attorney——

Mr. Tomlinson:—I object to any such procedure.

Mr. Golenbock:—Do you want me to ask questions and answers?

Mr. Tomlinson:—Yes, of course I do.

By Mr. Golenbock:—

Q. Are you the attorney in charge of the case of William A. Fagan, plaintiff, against the Central Railroad Company of New Jersey?

A. Yes.

Q. Were you in charge of the case during its trial on November 7 and November 8, 1918?

A. Yes.

Q. Did you have in your possession a letter written by Mr. Giddes on letterhead of the Central Railroad Company of New Jersey, written to Mr. William A. Fagan?

A. I had.

Q. Was that letter used in evidence at that trial?

A. It was.

Q. And was that introduced in evidence and marked as one of the exhibits during the course of the trial?

A. It was.

Q. And have you now that letter in your possession?

A. I have not.

Q. When did you last see it?

A. On the last day of the trial, when it was used in court.

Q. Have you made any efforts to ascertain where the letter is now?

A. I have.

Q. What efforts did you make?

A. I looked through my files, particularly the files relating to this case. I have also asked Mr. Tomlinson, the attorney for the defendant, if he had it and I have been unable to find it.

Mr. Tomlinson:—I object, if the court please, upon the ground that no sufficient efforts to find have been produced. The custodian of that document I presume would be the clerk of the Monmouth County Circuit Court.

Mr. Golenbock:—If you will pardon me, I

will add, I will supply that. I have also done that. I forgot to state in my answer that I have also looked through the file of the clerk of this court and that letter was not in his file.

CROSS-EXAMINATION BY MR. TOMLINSON:—

Q. Now as I started to say, Mr. Golenbock, before being so interrupted by you, when did you speak to the clerk?

A. I spoke to the clerk day before yesterday.

Q. What clerk?

A. The gentleman who sits at the table; I don't know his name.

Q. And what efforts did he make to your knowledge?

A. He said he would get the file of this case, and he brought it up here and I looked through the file with him and there was no letter.

Q. Did you make any efforts immediately after the trial of the case to locate that letter?

A. No, I did not.

Q. Did you make any effort at any time prior to a week before this trial to locate that letter?

A. No, I did not. Prior to a week prior to this trial—I was either——

(Objected to.)

REDIRECT-EXAMINATION BY MR. GOLENBOCK:—

Q. Was it your impression that this letter was in the file of this case?

Mr. Tomlinson:—I object to what his impression was or belief was.

The Court:—I will admit that.

A. It was.

Q. Upon finding that you did not have the letter in your possession did you make the efforts that you have stated previously to find this letter?

A. I have.

Mr. Tomlinson:—I have nothing to say, if your Honor feels it is sufficient.

The Court:—You may ask this witness what he knows about the letter before you ask him about the contents, when it came in his possession.

Mr. Tomlinson:—Before the witness answers this question finally, of course, I want to get my objection put into the record.

The Court:—This question is as to what he knows about it.

WILLIAM A. FAGAN, resumed.

By Mr. Golenbock:—

Q. Mr. Fagan, have you or have you had this letter that was sent to you by Mr. Giddes asking you to call in your possession since the last trial?

A. No.

Q. And is that the letter that you turned over to me?

A. That is the letter I sent to you.

Q. Did you receive such a letter?

Mr. Tomlinson:—I object to that, if the court please, upon the ground I have already assigned, that whatever correspondence he had, whatever conversation he had with Mr. Giddes about more money or anybody else after the execution of this paper could not have any bearing upon it.

The Court:—I am going to let him answer the question, subject to your objection.

Q. Did you? Just answer the question, please.

(Question repeated.)

A. From Mr. Giddes?

Q. Yes.

A. Yes.

Q. And in response to this letter did you call and see him?

The Court:—Why not find out what was in it?

Q. What were the contents of that letter?

The Court:—If he knows.

Q. If you know.

Mr. Tomlinson:—I want to object to that upon the ground that it is irrelevant and incompetent and wholly immaterial to the issue in this case.

By the Court:—

Q. Can you state what the contents of that letter were?

A. Why, told me to call up to his office the next time I came up to the city, Jersey City, and see him.

By Mr. Golenbock:—

Q. And did you call and see him?

A. My wife and I both called to see him.

Q. Did he at that time say to you that he had a release from you?

A. No, sir.

(Objected to. Objection sustained.)

Q. What conversation did you have with him on that occasion?

Mr. Tomlinson:—I object to that, if the court please.

The Court:—Now what is the purport of this conversation?

Mr. Golenbock:—The purport of this conversation, if your Honor please, is on the same line as the purport of the letter, to show that even at that time there was no claim by Mr. Giddes that that paper which he signed was a release, which is a very important fact for the jury to determine as a question of fact, whether that paper was a release at that time or not.

Mr. Tomlinson:—The question of whether this paper is a release, to my mind, is a question of law; and that question of law depends upon certain questions of fact, which are whether fraudulent representations were made to this man; in other words, whether Giddes said to this man, "This paper is a receipt," or whether he said to him, "This paper is a release." Now if that be true any conversation and talk with anybody, whether it be Giddes, Ming or anybody else, subsequent to the execution of this paper could have no bearing on the issues of this case and I certainly object to it.

The Court:—Well, supposing in that conversation Giddes said it was a receipt; suppose he said that in the conversation; wouldn't it be competent?

Mr. Tomlinson:—Afterwards?

The Court:—Yes.

Mr. Tomlinson:—No, sir.

The Court:—Wouldn't it be carrying out his view?

Mr. Tomlinson:—What happened afterwards doesn't make any difference. It is not the same as a voidable contract. The contract is either voidable or not voidable, and what happened afterwards cannot have any bearing upon that.

The Court:—May it not be contradictory of the statement of the witness as now made on the stand?

Mr. Tomlinson:—What statement is that?

The Court:—That he told him that it was a release.

Mr. Tomlinson:—Well, something that happens afterwards.

The Court:—Well, but what he says about it. Suppose he says something about it.

Mr. Tomlinson:—I don't think that can affect it at all.

The Court:—Suppose now that he can show that he had said to John Jones that "The paper that this man Fagan signed I told him was a receipt". Would it be competent to put that in?

Mr. Tomlinson:—No, sir; the question is what was said at that time and done at that time.

Mr. Golenbock:—There seems to be a dispute as to what was said at the time, and throwing any and all light upon the subject of what was said even by continuing the act.

The Court:—You may prove the conversation. Take your exception.

(Exception noted for defendant as ground of appeal.)

Q. What conversation did you have with Mr. Giddes at the time when you and your wife called to see him?

A. Why, my wife and I went over to see him, waited in the office for him. He was out when we got there and we waited until he come in. And my wife asked him if he didn't have some more money for me and he said no. He said that there was no more coming to me. He said the last payment, the $85, he says that was all the money he was going to give us. He said he had done more for me than really he would do for anybody else.

Q. Did he at that time mention the word release?

(Objected to.)

The Court:—Oh, no, no. That would not be competent.

Q. Did he say anything else other than what you have already stated?

(Objected to.)

A. That is all.

Q. Mr. Fagan, when you were in that chair at the Central Railroad waiting room, Jersey City, what time was it, do you recall?

A. Between three and four o'clock.

Q. And had you from the time that you left the hospital up to that time had anything to eat or drink?

A. Nothing.

Q. And were you under great stress and pain and suffering?

(Objected to as leading. Objection sustained.)

Q. How did you feel at the time?

A. I felt awful sick, awful weak. I felt exhausted. I wanted to get home. That is all I thought.

Mr. Tomlinson:—I move to strike the last part out.

Mr. Golenbock:—No, I think that shows state of mind, physical condition.

The Court:—I will let it stand.

Q. Now Mr. Fagan, you say you have been around the pier for about seven or eight months or nine months, you say?

A. Well, off and on, yes.

Q. And you had occasion to notice how the plank which connects from the pier to the barge is composed or made out of, haven't you? You have had occasion to notice it?

A. Oh, yes.

Q. Can you describe to the jury the ends of those planks, how they are shaped?

A. Why, they are chipped off the same as you would an adz, you know, and then an iron or steel plate laid over it, comes right down to a thin edge.

Q. And this thin plate is put on the edge for what purpose, do you know?

A. Why, for keeping the wood from wearing off, breaking off.

Q. This thin edge that you are speaking of——

A. Steel edge.

Q. That is not a part of the contrivance which is sometimes used to connect the pier with this plank?

A. Yes.

Q. That is a separate piece, isn't it?

A. A separate piece is thrown over that.

Q. So that the edge of the plank is thinned down?

A. Yes.

CROSS-EXAMINATION BY MR. TOMLINSON:—

Q. Now, Mr. Fagan, what did you say the edge of that plank was on the pier, the plank that you went down this day?

A. You have got to speak a little louder. I can't hear you, Mr. Tomlinson.

Q. What sort of an edge was on the plank of the gangway that you went down that day that you got hurt?

A. Why, just like the one that I am explaining. It was edged off with a steel—well, trimmed to the end of it; come right down to a point, the same as you would chip it right down like that.

Q. And next to that wasn't there a piece of iron?

A. What?

Q. Next to that from the pier wasn't there a piece of iron, sheet iron?

A. I didn't take particular notice.

Q. Now you say that you signed a paper that you were told was a receipt?

A. Sir?

Q. You signed a paper which Mr. Giddes told you was a receipt?

A. He gave me a paper to sign my name, to sign a receipt for the money.

Q. And you say he told you it was a receipt?

A. Yes, he said a receipt for the money.

Q. For the $85?

A. $85.

Q. And you did sign that paper, didn't you?

A. I signed a receipt for the money, yes.

Q. And that is your signature, isn't it? (Exhibit D-3 shown witness.)

A. Yes, sir.

Q. Now do you say that you didn't write those words there?

A. No, sir; I don't think I did.

Q. You are sure about that?

A. Yes, in fact, I don't remember, I don't even remember signing that or reading it. I don't remember anything at all about it. I was actually exhausted.

Q. Now I am asking you, Mr. Fagan, will you swear that you didn't write those words, "I have read the above and understand it"?

A. No, I can't swear to anything. I am not sure.

Q. You are not sure whether you wrote that or not?

A. No.

Q. I will ask you to take that pad and this pen and write these words "I have read the above and understand it".

(Witness writes.)

Q. Then under that write "William A. Fagan". Just sign your name.

(Witness writes.)

Q. Now as I understand you to now say, Mr. Fagan, you won't swear that you didn't write that, will you?

A. I won't swear, no.

Q. And you won't swear that you didn't write that before you wrote your name?

A. All I remember saying, I signed my name to that paper. I won't swear that I did it, but I know I signed my name to the paper he put in front of me.

Q. And you won't swear whether you wrote those other words or not?

A. No, I won't.

Q. You may have written them?

A. I may.

Q. Now Mr. Fagan, after you had signed this paper, sometime later you wrote to Mr. Giddes and asked for transportation from Asbury Park to Jersey City, didn't you?

A. For my wife.

Q. And for you, for yourself?

A. I had transportation to come back. I wrote for my wife, transportation for my wife.

Q. And didn't you write to him for transportation for yourself?

A. Yes.

Q. You wrote to Mr. Giddes for transportation for both of you?

A. Yes, sir.

Q. Mr. Giddes was going to get your wife a job, wasn't he?

A. She asked him for one but he didn't get it.

Q. She asked him for one and she went up to see him about it, didn't she?

A. She asked him for one, yes.

Q. How long was it after the day you signed this release that she went up to see Mr. Giddes?

A. After I signed this receipt?

Q. After the day you signed the paper, do you know how long a time after you signed the paper was it that you went up to see Mr. Giddes?

A. About ten weeks after that.

Q. You are certain about that?

A. No, let me see. I am not certain about that. I think I went back in two weeks to the hospital, stayed two weeks home and went back to the hospital for one week more after I stayed home, or one week, the first time, then I stayed home two weeks after that and my wife sent me to the hospital for one week, and then they sent me up to the Ruptured

and Crippled Hospital and I come home from there. But it was ten weeks from the time that I signed that receipt for the money he gave me before I bothered him for any more.

Q. Did you read this paper?

A. No, sir.

Q. Didn't know what was in it?

A. I didn't know a thing in it, any more than a child.

Q. Then why do you say it was a receipt?

A. I signed a receipt for the money, and naturally I would sign a receipt to you, if you handed me money; you would have to get a receipt for it, wouldn't you?

Q. If you didn't know what was in the paper?

A. I didn't know. I knew I had the money and I signed the receipt for the money for ten weeks half pay.

Q. And you endorsed the check?

A. I signed the check. They asked me if I wouldn't sooner have the money than the check and naturally I wanted the money.

Q. What I am asking you is, how is it you know it was a receipt if you didn't read it and didn't know what was in that paper?

A. I am only telling what he told me, to sign a receipt for it.

Q. You didn't know whether it was a receipt or what it was, did you?

A. I gave him a receipt and signed my name, that is all I know.

Q. You supposed it was a receipt; is that all you know?

Mr. Golenbock:—He said Mr. Giddes told him to sign this receipt. He said that ten times.

The Court:—This is cross-eamination.

Q. You supposed it was a receipt, didn't you?

A. Yes.

Q. You didn't read it, didn't know what was in it?

A. No, sir.

Q. How long after you signed that paper was it that you got this letter from Mr. Giddes?

A. I couldn't tell you.

Q. That letter, was that written in September?

A. Sir?

Q. That letter of Mr. Giddes was written on September 19, 1917, wasn't it?

A. I couldn't tell you. I disremember.

Mr. Golenbock:—If Mr. Tomlinson has a copy of it I will consent to the copy of it going in evidence.

Mr. Tomlinson:—Yes, I have it.

Mr. Golenbock:—All right. Suppose you take it out of your record.

Q. This letter was written about a week after you signed this paper, wasn't it?

A. I couldn't tell you that. I disremember.

Q. Haven't any idea?

A. No.

REDIRECT-EXAMINATION BY MR. GOLENBOCK:—

Q. And you relied all together on Mr. Giddes' statement that it was a receipt?

(Objected to as leading.)

The Court:—Oh, yes, that is leading.

Mr. Golenbock:—Well, that is an explanation of what has been brought out on cross-examination.

The Court:—Well, you can't be leading.

Q. Were you in a position that day mentally and physically to read anything, to appreciate what you read?

(Objected to as leading. Objection sustained. Objection noted for defendant as ground of appeal.)

MRS. HELEN FAGAN, sworn for plaintiff.

DIRECT-EXAMINATION BY MR. GOLENBOCK:—

Q. Mrs. Fagan, you are the wife of Mr. Fagan who was just on the stand?

A. Yes.

Q. How long have you been married?

A. Eighteen years.

Q. And you have children?

A. Five children.

(Objected to.)

The Court: It is immaterial.

Q. Do you remember the time that your husband was hurt?

A. Yes, sir.

Q. And do you remember the time that you received a letter from Mr. Giddes asking you and your husband to call?

A. Yes, I received several, not one but several. Every time——

Mr. Tomlinson:—I object to this testimony.
The Court:—Yes, the objection is sustained.

Q. Did you receive a letter?

A. Yes, sir.

Mr. Golenbock:—I think her answer "several" ought to stand.

The Court:—Oh, no. Whether she received one, I should strike that out if counsel asked to; not what this lady did.

Q. Did your husband receive a letter?

A. Yes, sir.

Q. And did you in company with your husband call to see Mr. Giddes?

A. Yes, sir.

Q. Do you recall the conversation you had with him in the presence of your husband?

Mr. Tomlinson:—I object to this, your Honor, upon the same ground I assigned in my objection to the other question. What happened after this paper was signed cannot have any bearing on the case.

The Court:—I will allow the question the same as I did before.

(Objection noted for defendant as ground of appeal.)

A. We had a conversation. I went up to Mr. Giddes' office and I told him that my husband was outside and we came out and we talked outside and I said to him, "Mr. Giddes, now the ten weeks have expired," telling him the remark of my husband the time that he got the lump sum.

The Court:—Strike that out.

Q. Never mind what your husband told him.

A. I said, stating in addition to that, "Now that the ten weeks have expired we would like to have a little more money." Mr. Giddes said, "No, we won't give you any more money. We don't do that any more. We have paid Mr. Fagan all that we are going to pay him." I said, "Mr. Giddes, isn't there a liability law that a working man receives

half pay until such time as they are able to return to work?" He said, "No, that has been done away with since last May. We represent our own insurance company." And I said, "Is that possible?" And I said, "Well then, Mr. Giddes, if you can't do anything more for my husband, can't you give me work or through your influence get me something to do that I can make about $2 a day to support my family?" explaining to him the conditions——

Mr. Tomlinson:—I object to this part of it.

The Court:—Oh, yes; that is highly incompetent. Strike that last out.

Mr. Golenbock:—What does your Honor call the last part?

The Court:—All the conversation with Mr. Giddes about getting her a position. That has nothing to do with this case.

Q. Since the accident, Mrs. Fagan, has your husband been able to do anything at all?

A. No, sir; he has not earned a dollar.

No cross-examination.

DAVID REYNOLDS, recalled for plaintiff.

DIRECT-EXAMINATION BY MR. GOLENBOCK:—

Q. Mr. Reynolds, were you present at the time Mr. Fagan got the money through Mr. Giddes?

A. Yes, sir.

Q. Tell the court and jury what you heard said when he received that money.

A. Well, he received the money and they gave him a paper to sign.

Q. What did you hear said in reference to the paper?

A. That it was a receipt for the $85; there wasn't anything read or nothing else.

Q. Who said anything about receipt at the time?

A. The man who presented it to Mr. Fagan; whoever it was I don't know.

Q. You don't know whether that was Mr. Giddes or Mr. Ming?

A. It was one or the other of them.

Q. They were both there?

A. Yes.

Q. Was anything said in reference to what the money was for?

(Objected to as leading.)

The Court:—Yes. What was said?

Q. What was said in reference to the money?

A. The way I understood, it was half pay.

(Objected to.)

The Court:—Oh, no. What was said.

Q. What did you hear said, as far as you have heard at the time?

A. I most forget now, it has been so long.

Q. Was there anything said about transportation when he first came over the ferry?

A. Yes, Mr. Fagan wanted his transportation home.

Q. Do you recall if at all any conversation in reference to him coming for more money?

Mr. Tomlinson:—At what time, at the time this was signed, the same day?

Mr. Golenbock:—Yes.

A. Well, there was something I understood about Mr. Fagan should stop——

Mr. Tomlinson:—I object to what he understood.

Q. Not what you understood.

The Court:—Just what the conversation was.

Q. You don't have to use the exact language if you don't remember it, but in substance what you heard.

A. It was to stop in when he come up and see Mr. Giddes.

Q. Did you hear Mr. Fagan say about getting pay for two weeks?

(Objected to. Objection sustained.)

Q. Do you recall if anything else was said at the time the money was given to Mr. Fagan?

A. There was something said between them about getting paid in two weeks.

Q. Do you recall exactly what was said?

A. I do not.

Q. Tell us what you do remember, what was said about that.

A. It has slipped my memory, it has been so long.

Q. Well, the best that you remember. You don't have to tell us every word of it. In substance what was said at the time the money was handed to Mr. Fagan?

A. There was something said about he should stop in when he came up again.

Q. Was any paper at that time read to him?

(Objected to.)

A. No, sir; no paper at all.

Mr. Golenbock:—That is rebuttal.

The Court:—I think that is competent.

Q. Did he read any paper before he signed it?

A. Well, I couldn't say if he read the paper or not. I didn't hear none read, no, sir.

Q. I don't mean hear read; did you see Mr. Fagan read any paper?

A. No, sir.

Q. Was any paper read to him?

A. There was no paper read to him, no, sir.

Q. Did anybody swear him or have him acknowledge any paper?

(Objected to as leading.)

Mr. Golenbock:—Well, it is rebuttal. I think that is direct rebuttal of what Mr. Giddes testified to, that he took his acknowledgment.

The Court:—You may ask him if anything was said about swearing anybody.

Q. Was anything said about swearing Fagan?

A. No, sir; I didn't hear a word about it.

Q. Would you have heard it if he had?

(Objected to.)

The Court:—No, the question is where he was.

Q. Where were you?

A. My hand was right on the chair.

Q. But you don't know whether it was Mr. Giddes or Ming that said that the paper was a receipt?

A. No, sir; I didn't know the gentleman apart at that time.

Q. Now Mr. Reynolds, did you after the accident or immediately after the accident have occasion to pass the gangplank between the pier and the barge where the accident happened?

(Objected to as improper redirect-examination.)

Mr. Golenbock:—It is rebuttal, if your Honor please. I am going to exhaust this witness now on all points that I want to rebut on.

The Court:—On what part?

Mr. Golenbock:—Rebuttal on the question that one of the witnesses, I think it was Mr. Toomey, who said that all of these planks, as I recall, were about eight inches in thickness on the end. I am ready to show that all these planks connecting between the pier and the barge are at the edge shaved down or to a point; and also want to show further that there was not what they call a racepiece at that particular point.

The Court:—Proceed.

Q Will you describe, Mr. Reynolds, the appearance of the gangplank that connected the pier and the barge, that is, at this end? Confine yourself particularly at the end.

A. At the end it was kind of shaved off, like, that the edges was something like that. (Indicating.) And there was a piece, I think, about eight or ten inches, whether steel or iron or something, all the way across at the end of the plank. It was on a slant.

Q. You mean the end was at a slant?

A. The end of the plank, yes, sir.

Q. Now on this particular occasion when you went to see about the accident did you have occasion to notice whether there was any race-piece there connecting the plank with the pier?

A. Yes, I happened to work on that same barge about two car lengths away from where the accident happened, and I was inside the car and when I came out I had to come right across that same runway, and there was five or six standing there

looking around and looking to see how things were spilled around and one of them says, "This is——"

(Objected to.)

The Court:—No, not what was said.

Q. Was there a race-piece there at that time?

(Objected to as leading.)

A. I took notice. They were looking around.

The Court:—Yes, it is leading. Tell us what was at the end of the plank, if anything.

Q. What was at the end of the plank then?
A. There was nothing there then.
Q. Did you take notice of it?
A. Yes.
Q. Was there a race-piece there?
A. No, sir; not then.
Q. And that was immediately after the occurrence of the accident?

(Objected to as leading.)

A. Yes.
Q. Was it immediately after the accident?

(Objected to as leading.)

The Court:—Strike it out.

Q. How long after the accident was it that you came to the place where the accident happened?
A. It couldn't have been over three or four minutes.
Q. Mr. Fagan was still on the pier?
A. He was on the pier.
Q. And the ambulance hadn't come yet?
A. No, sir.

CROSS-EXAMINATION BY MR. TOMLINSON:—

Q. Mr. Reynolds, they used two sorts of gang-planks on that pier, didn't they?

A. Well, connecting the barge and the pier together there was mostly the same.

Q. Didn't they use one kind of plank that had the edge shaved down and another kind of plank that was blunt at the end?

A. No, the ones what connected the barge with the ferry, that is, the pier, both ends was shaved off, I think, and this strip of steel or iron, whatever it was, was across the edge.

Q. Do you say that this plank down which Mr Fagan went had the edge shaved down?

A. The ends were slanted off. Off the end of the plank was slanted off.

Q. So as to come to a sort of point, you mean?

A. Yes.

Q. You are certain about that?

A. I am pretty positive.

Q. Are you absolutely certain about it?

A. Yes, sir.

Q. Don't you know as a matter of fact that those planks that they used from that pier down to the float have blunt ends and have over those blunt ends a sheet iron?

A. I don't know what they have now but that was all they had then.

Q. Don't you know as a matter of fact that that was what they had then?

A. No, sir.

Q. How much are you getting paid to come here and testify?

A. I am getting a day's pay, that is all.

Q. By Mr. Golenbock?

A. Yes.

Mr. Golenbock:—I will admit that he gets his day's pay for every day that he comes to court.

Q. You don't know whether or not Mr. Fagan read that paper, do you?

A. I couldn't say if he read it or not, no, sir.

Q. He may have read it and you not know it?

A. Well, he didn't read it out loud. There was nothing read out loud or I would have heard it.

Q. Just answer the question.

Mr. Golenbock:—I think that he is answering the question.

The Court:—No, he may answer the question.

(Question repeated.)

Q. That is true, isn't it?

A. Yes.

Q. And you don't know what was in that paper, do you?

A. No, sir; I don't know what was in the paper.

Q. And when you said it was a receipt you said that because you supposed it was a receipt; isn't that so?

A. That is what I thought it was.

Q. But you do know that Fagan signed that paper, don't you?

A. There was some paper handed to him, yes, sir

Q. And you supposed it was a receipt?

A. Well, I supposed it was a receipt.

Q. Now do you swear that either Mr. Giddes or Mr. Ming told him it was a receipt?

A. I didn't hear Mr. Giddes or Mr. Ming tell him anything. They handed him the paper to sign.

Q. So neither of them told him it was a receipt, so far as you heard?

A. So far as I heard, yes, sir.

Q. They handed him this paper and he signed it?

A. He signed it and I supposed it was a receipt for the money he received.

Q. They handed him this paper and he signed it; is that correct?

A. Yes, sir.

Q. And then a check was given to him for $85?

A. Well, there was a check gave to him, yes, sir.

Q. After he signed this paper?

A. Well, I couldn't say if it was after or before. I don't remember.

Q. And that is all there was to it?

A. Yes, sir.

Q. How soon on this day that Fagan was hurt did you get there after the accident?

A. How soon after he was hurt?

A. Yes.

A. About three or four minutes, couldn't have been longer than that.

Q. And how did you come to examine this plank?

A. Well, I saw three or four of them standing around there looking and I happened to look down and see there wasn't no race-piece there.

Q. And how long had you been working there?

A. I worked there altogether, on and off, about seven months.

Q. And how long had that race-piece been off?

A. That is something I couldn't say, for I was working on the cars that day, on the float.

Q. And they were going up and down that plank without that race-piece on, weren't they?

A. Well, they must have been.

Q. How close was the edge of the gangplank to the floor?

A. Well, it was slanted off like that. As near as I could come it would be about two inches or two and a half, maybe more than that. Where the float was down it was further than that.

Q. And you are willing to swear that there was not a blunt end; is that right?

Mr. Golenbock:—I object to what he is willing to swear.

The Court:—The question is what he does say.

Q. Will you swear there was no blunt end?

A. No blunt end. As I say, the ends of the plank were shaved off.

Q. I say you swear it was shaved off?

A. Yes.

Q. Of that plank where Fagan was working?

A. Yes.

Q. And you didn't see anything of the race-piece around?

A. Not when I went out at that time.

[PLAINTIFF RESTS.]

DEFENDANT'S TESTIMONY IN SURREBUTTAL.

WILLIAM W. GIDDES, recalled for defendant.

DIRECT-EXAMINATION BY MR. TOMLINSON:—

Q. Mr. Giddes, did you tell Mr. Fagan this was a receipt?

A. No.

Q. What if any connection had you had with

this case prior to the time that he signed this release?

A. Only to look it over as to liability.

Q. And why was it that you offered him $85 for a case of this kind?

Mr. Golenbock:—I object to that as calling for a conclusion, why. It is apparent to the jury why he offered $85.

The Court:—Does that make any difference in this case?

Mr. Tomlinson:—Well, my offer is this, your Honor: my offer is to show that Mr. Giddes had charge of this case, that he had investigated it and found that it was a case——

Mr. Golenbock:—I object to what he found.

The Court:—No, the question is what he said to this man. What he said to the man when he offered the $85 is competent. What he did it for I don't think is competent.

Mr. Tomlinson:—Well, if you won't allow me to state my grounds I can't say anything more.

Q. Didn't you tell Mr. Fagan that you considered there was no liability in this case upon the part of the company?

A. I did.

Q. And did you tell him the reason therefor?

A. I told him there was no liability under the Federal Employers' Liability Act, because there was no negligence on the part of the company.

Q. Did you write a letter to Mr. Fagan under date of September 19th? (Carbon copy of letter shown witness.)

A. Yes, September 19, 1917.

Mr. Tomlinson:—I ask that this be marked for identification.

Mr. Golenbock:—I have no objection for marking it in evidence.

(Letter marked Exhibit D-4.)

Q. And as a result of what communications with Mr. Fagan did you write that letter?

A. Why, it was in connection with transportation that he wanted for Mrs. Fagan.

Q. Anything else?

A. It may have been in connection with a position that Mrs. Fagan wanted me to endeavor to secure for her.

Q. What do you mean by transportation, a pass?

A. A pass for Mrs. Fagan. Our department had no authority to issue a pass to the wife of a claimant, and therefore it had to be referred to the superintendent.

Q. Who was present at the time Mr. Fagan signed this release?

A. Mr. Ming and Mr. Hone and another gentleman who came with Mr. Fagan and myself.

CROSS-EXAMINATION BY MR. GOLENBOCK:—

Q. How many times did you see Mr. and Mrs. Fagan at your office after the signing of this paper marked Exhibit D 3?

A. I don't recall the exact number.

Q. Now, Mr. Giddes, now isn't it a matter of fact that you had seen Mr. and Mrs. Fagan once prior to this letter dated September 19, 1917?

A. I can't say positively.

Q. Don't you remember, Mr. Giddes, that the

occasion when they called to see you prior thereto there was no question or no conversation had with reference to money? Isn't that so?

A. I wouldn't say so.

Q. And don't you recall that the first visit that they made to you was before the first ten weeks had expired from the time of the accident?

A. I couldn't state positively in regard to that.

Q. You wouldn't deny that, would you?

A. No.

Q. You admit that you sent this letter dated September 19 and marked Exhibit D 4 to Mr. Fagan, do you?

A. Yes.

Mr. Golenbock:—This is not the letter, Mr. Tomlinson, we were talking about. It is not the letter we referred to.

Q. Didn't you write a letter to Mr. Fagan asking him to call and see you?

A. I may have written such a letter.

Q. And wasn't this letter some time after you procured the paper signed by Mr. Fagan marked Exhibit D 3?

A. Yes, it would have to be.

Q. Has your counsel got a copy of that letter?

Mr. Tomlinson:—I object. I have already told Mr. Golenbock I have not the letter.

Mr. Golenbock:—No, a copy, I said. I didn't say the letter.

Mr. Tomlinson:—That is the only copy of any letter I had. I told you that.

Q. But you do remember having sent a letter to Mr. Fagan other than this letter which is marked in evidence Exhibit D-4?

A. No, I can't say that I sent more than one letter.

Q. Now do you remember being asked this question at the last trial: "And didn't you invite Mr. Fagan to call and see you? A. No, not to come and see me." Was that question asked and the answer made by you?

A. Yes.

Mr. Tomlinson:—I object. I don't see how that is contradictory.

Mr. Golenbock:—I am going to rebut it here where it is contradictory.

The Court:—All right. Proceed.

Q. And you were asked further: "Never did? A. Simply to go to a doctor." Do you remember that question being asked and that answer made?

A. Yes.

Q. And the question was further asked, "You never invited Mr. Fagan to come and see you? A. No. Q. Positive about that? A. Yes."

Mr. Tomlinson:—I don't see what effect this witness' testimony at the former trial in this respect could have on this case.

The Court:—I don't see as it stands now.

Mr. Golenbock:—He said he never received the letter. I want to show that such a letter was offered in evidence. The following question will show that such a letter was introduced in evidence and identified by him.

Mr. Tomlinson:—What difference does that make? That was testimony on the former trial. That goes to contradiction, if there were contradictions on the former trial.

Mr. Golenbock:—That is my object in ask-

ing this question, contradictory between testimony offered at the last trial and given on this trial.

The Court:—He dosn't say he didn't send a letter; he says he doesn't remember it.

Q. Weren't you at the last trial shown a letter which you identified you had signed and sent asking Mr. Fagan to call and see you?

(Objected to.)

The Court:—I will allow that.

Mr. Tomlinson:—I want to get an objection on the record.

The Court:—Make your objection.

(Question repeated.)

A. Yes.

Q. How did you know that Mr. Fagan was in the waiting room in the Central Railroad depot that day?

The Court:—Wait a minute. Something you have forgotten?

Mr. Golenbock:—No, he was just asked about that.

A. I was informed by some one, I don't know whom.

Q. And when you saw him you told him that under the Federal Liability Law he had no case?

A. I told him there was no liability under the Federal Employers' Liability Act.

Q. So you constituted yourself a court and jury to pass upon that question?

(Objected to.)

The Court:—Strike it out.

JAMES A. HONE, sworn for defendant.

DIRECT-EXAMINATION BY MR. TOMLINSON:—

Q. Mr. Hone, you are in the employ of the Railroad Administration?

A. Yes, sir.

Q. And how long have you been in that employ?

A. Six years.

Q. Have you been working steadily?

A. Up until February 24, 1918.

Q. Where did you go then?

Mr. Golenbock:—I object. It is immaterial where he went.

The Court:—Well, he may show his antecedents.

Mr. Golenbock:—Well, we are now concerned with the date on which this accident occurred.

The Court:—You may always show who he is and what he is.

A. I was inducted into the army, the United States Army.

Q. And when did you come out of the army?

A. February 1st.

Q. You are in Mr. Failing's office?

A. Yes.

Q. Mr. Failing is what, what is his title?

A. Assistant general claim agent.

Q. And were you employed in his office on September 11, 1917?

A. Yes, sir.

Q. In what capacity?

A. Stenographer.

Q. Were you present on that day when Mr.

Fagan signed this paper marked Exhibit D 3 which I now show you?

A. Yes, sir.

Q. What if anything did you have to do with that paper?

A. I made the release out.

Q. Were you there when Mr. Fagan signed it?

A. Yes, sir.

Q. Please tell the court and jury just what you saw and what you heard.

A. When I first went down upon notification of Mr. Giddes to come down, I might be needed, I had been there for some little time; I was told to go upstairs and——

Mr. Golenbock:—I object to what he was told.

Q. Never mind what anybody told you unless Mr. Fagan was there. Just tell us what you did.

A. I went back upstairs and made out a release for $85, brought it down again and handed it to Mr. Giddes. Mr. Giddes gave the release to Mr. Fagan and told him that this was our general form of release and for him, Mr. Fagan, to read it over carefully. And after Mr. Fagan had read it over for some I should say five minutes, it took him to read it over, he raised his head up and nodded his head; and then Mr. Giddes explained to Mr. Fagan——

Mr. Golenbock:—I object to what he explained, the use of the word "explained."

The Court:—Yes, tell what Mr. Giddes said.

A. Mr. Giddes told Mr. Fagan to write "I have read the above," and for him to sign his name.

Q. What if anything did Mr. Fagan do?

A. Mr. Fagan signed his name.

Q. Now after that what if anything did Mr. Giddes do?

A. Mr. Giddes took Mr. Fagan's acknowledgement.

Mr. Golenbock:—I object to that and ask that that be stricken from the record.

The Court:—Why?

Mr. Golenbock:—Because that is calling for a conclusion.

The Court:—What took place?

Mr. Golenbock:—But he doesn't describe what took place. State what he did.

The Court:—Yes, you may strike that out.

Q. Just tell us what Mr. Giddes said to Mr. Fagan.

A. Mr. Giddes said to Mr. Fagan that "That is your name and you know what you are signing?" Mr. Fagan said, "Yes, I do."

Q. I show you these words written in pen and ink, "I have read the above and understand it," and ask you if you know who wrote those words on that paper.

A. Mr. Fagan wrote those words.

Q. I show you the words "William A. Fagan" and ask you if you know who wrote those words.

A. Mr. Fagan wrote those.

Q. What if anything did you hear Mr. Giddes say to Mr. Fagan about this paper being a receipt?

A. Nothing.

Q. What if anything did you hear Mr. Giddes say to Mr. Fagan about coming back later for more money?

A. Nothing whatever.

CROSS-EXAMINATION BY MR. GOLENBOCK:—

Q. You are still working for the railroad?

A. Yes, I am.

Q. Central Railroad?

A. Yes.

Q. The same company that Toomey worked for?

A. The Administration, yes, sir.

Q. The same company?

A. The United States Railroad Administration.

Q. Were you subpœnaed to come to court today?

Mr. Tomlinson:—I submit——

Mr. Golenbock:—All right. I will accept his answer. I am not going to quibble about that.

Mr. Tomlinson:—I am not quibbling.

Mr. Golenbock:—I am not. I am satisfied to take your version about it.

Mr. Tomlinson:—I think I have a right to have it stricken.

The Court:—Yes, you have the right. Strike it out. What the witness said may remain. Do you want some other objection?

Mr. Tomlinson:—Yes, I do have objection to Mr. Golenbock's statement.

Mr. Golenbock:—If there is anything put in there I consent to it being stricken from the record.

Q. Mr. Hone, you are not under subpœna, are you?

A. No, sir.

Q. And you are sure that there was nothing said about it being a receipt, are you?

A. Absolutely sure.

Q. You were not there all the time, were you?

A. I was there when Mr. Fagan signed his name to the paper.

Q. But you were not there all the time during the time while Mr. Giddes and Mr. Ming were there?

A. Except a few minutes while I went upstairs and made out the release I was.

Q. Except those few minutes?

A. Except a very few minutes. It took me very few minutes to make that out.

Q. But you are sure that all Mr. Giddes said to Mr. Fagan, "This is the general form of release; read it over carefully;" sure of that?

A. When I gave the release to Mr. Giddes, Mr. Giddes personally, the release to Mr. Giddes for the first time.

Q. And at that time he said, "This is the general form of release; read it over carefully"?

A. Yes.

Q. That is what Mr. Giddes said to Mr. Fagan?

A. When Mr. Giddes presented it to Mr. Fagan the first time, yes.

By Mr. Tomlinson:—

Q. Had you finished your answer?

A. No, sir.

Q. Go ahead and finish it then.

By Mr. Golenbock:—

Q. Do you want to finish it?

A. I didn't get the answer.

Q. I will withdraw the question. When Mr. Giddes handed the paper marked Exhibit D-2 to Mr. Fagan did he say to him, "This is the general form of release; read it over carefully"?

A. He did.

Q. Sure?

A. Absolutely.

Q. And you are also sure that after he read it over Fagan nodded his head?

A. Yes, he did.

Q. Sure of that?

A. Indication of meaning yes.

Q. And you are also sure that after he had signed all that Mr. Giddes said to Mr. Fagan was, "This is your name; you know what you are signing" and Fagan said, "I do"?

A. Yes.

Q. And you are sure that that is all the conversation——

A. Not sure.

Q. You don't know what I am going to say.

A. Finish it.

Q. You are sure that is all the conversation that took place at the time in reference to that paper?

A. No, sir.

Q. Tell us what else was said.

A. Mr. Giddes took his acknowledgment.

Q. I didn't ask you that. I move that that be stricken from the record, what may be to his mind an acknowledgment.

The Court:—You may ask him to tell you.

Mr. Golenbock:—I am asking him what was said and you can tell us that. I ask that that answer be stricken as far as was said.

The Court:—Yes.

Q. What if anything else at all was said besides what I repeated you had already testified to?

A. After Mr. Fagan had wrote in above his

name and signed his name to it Mr. Giddes told Mr. Fagan that "That is your name and you have written that above your name and know what you are signing?"

Q. That is all?

A. Yes.

Q. That is all.

By Mr. Tomlinson:—

Q. That is all while you were there, is it?

A. While I was there, yes.

By Mr. Golenbock:—

Q. And from the time that you brought the release down up to the time that Mr. Giddes and Mr. Ming left, you left with them, you were there all that time?

A. Yes.

REDIRECT-EXAMINATION BY MR. TOMLINSON:—

Q. Mr. Hone, who went out and got the money on the check?

A. I did, sir.

Q. And when you went up to the office to typewrite this release who was down with Fagan?

A. Mr. Giddes and Mr. Ming.

RECROSS-EXAMINATION BY MR. GOLENBOCK:—

Q. But there is no question in your mind that you were present all the time from the time that you brought back this release or Exhibit D 3 up to the time Mr. Ming and Mr. Giddes and yourself left; you were there all the time, you are sure of that?

A. I was not there at the time I went after the check, the money.

Q. No, I am not talking about going after the check but I am talking about the time you drew the release, up to the time you left Mr. Ming and Giddes you were there?

A. I don't quite get you at all. I don't understand what you mean.

Q. Well, you were present at the time the release was handed to Mr. Fagan?

A. Yes, I was.

Q. You were present at the time you say Mr. Giddes said to him, "You have signed your name, you have signed this and you know what you are signing?"

A. Yes.

Q. And Mr. Fagan said yes?

A. Yes.

Q. And that is all the conversation that was had in reference to that paper?

A. As far as I remember it is.

WILLIAM E. MING, JR., sworn for defendant.

DIRECT-EXAMINATION BY MR. TOMLINSON:—

Q. Mr. Ming, you are employed by the Railroad Administration?

A. Yes, sir.

Q. You are in Mr. Failing's office?

A. Yes, sir.

Q. How long have you been with the railroad?

A. With the railroad since 1898.

Q. Were you present on September 11th when Mr. Fagan signed this paper marked Exhibit D 3 which I now show you?

A. Yes, sir.

Q. And who else was present?

A. Mr. Giddes, Mr. Hone and a gentleman who had accompanied Mr. Fagan to the waiting room.

Q. Mr Reynolds?

A. I have learned that it was Mr. Reynolds since.

Q. Was Mr. Reynolds there all the time, do you know?

A. I think not.

Q. Where did this occur?

A. This was in the concourse of the waiting room at Jersey City.

Q. Please tell the court and jury the circumstances leading up to the execution of this paper and the circumstances of the execution itself.

A. I learned that Mr. Giddes was going down and as this was a case that originated in my district I went down with him, and as a result of the conversation between Mr. Giddes and Mr. Fagan he agreed to pay him a certain sum of money, which was acceptable to him.

Q. To whom, Fagan?

A. To Mr. Fagan. Thereupon Mr. Hone was requested to prepare a release, which he did, and it was afterwards offered to Mr Fagan for his perusal and signature, and it was duly executed.

Q. What was said by either you or Mr. Giddes to Mr. Fagan about the contents of this paper?

A. It was explained to him that he was releasing——

Mr. Golenbock:—I object to what was explained to him. I think the conversaton should be stated.

The Court:—Tell us what was said.

A. He was told that this was a release and that for this certain sum of money he was releasing the

company from any further claim on account of this particular injury.

Q. Who told him that?

A. Mr. Giddes.

Q. Did you have any conversation with him at all in regard to the contents of the paper?

A. Not in regard to the actual settlement, no.

Q. And what if anything was said by Mr. Giddes to Mr. Fagan about this paper being a receipt?

Mr. Golenbock:—I object. That is a leading question and I think the question ought to be asked what was said, what the conversation was.

The Court:—It may be asked.

(Question withdrawn.)

A. Absolutely nothing.

Q. Did you see Fagan sign this paper?

A. I did.

Q. When was it that he signed this paper with reference to what was told him by Mr. Giddes as to the contents thereof?

A. It was after he had evidently read it.

Mr. Golenbock:—I object to the word "evidently" and move to strike that part of the answer from the record.

The Court:—Yes, you may find out what he did.

A. Mr. Giddes handed this document to Mr. Fagan and he held it for some little time and acquiesced——

Mr. Golenbock:—I object to that and ask that that be stricken from the record.

The Court:—Yes, strike out the word "acquiesced."

A. Well, as a result of his perusal he signed the paper.

Q. Now just answer this question if you please, Mr. Ming: you have already testified that Mr. Giddes explained this paper or told Mr. Fagan what was in that paper.

Mr. Golenbock:—I haven't heard him say anything about that. I might not have listened but I don't recollect him having said anything about that.

The Court:—Tell us what the conversation was. That is what we are trying to find out.

Mr. Tomlinson:—If the court please, this witness has already testified that Mr. Giddes explained to Mr. Fagan that this was a release and after that Mr. Fagan signed it.

The Court:—Well, we have got that in.

Mr. Tomlinson:—And now I am asking this witness whether this signature was written before or after that explanation by Mr. Giddes.

The Court:—He may answer that.

A. Afterward.

Q. I show you these words in pen and ink, "I have read the above and understand it," and ask you if you know who wrote those words.

A. I do.

Q. Who did?

A. Mr. Fagan.

Q. And I ask you when he wrote those words, before or after he signed his name.

A. Before.

Q. And I ask you whether or not at any time before Mr. Fagan signed this paper, this paper was handed to him.

A. It was.

Q. And I ask you what if anything Mr. Fagan did with this paper after it was handed to him and before he signed it.

A. I have got the impression that he read it.

Mr. Golenbock:—I object and ask that that word "impression" be stricken from the record, or I ask that the whole answer be stricken from the record.

The Court:—Tell us what he did.

A. Well, he held it up before his face in this manner. (Illustrating.)

Q. For how long did he hold it before his face at that time?

A. It might have been three or four minutes.

Q. And then what did he do?

A. He signed it.

Q. And before he signed it did he write those words?

A. He did.

Q. And after that what if anything did Mr. Giddes do?

A. Mr. Giddes took his acknowledgment.

Mr. Golenbock:—I object and ask that that be stricken out.

The Court:—Strike it out.

Q. What did Mr. Giddes say to him?

A. He asked him if he signed this paper with knowledge of its contents, or some such phraseology of that sort; I can't recall his exact words.

Q. And what did Fagan say?

A. He said he did.

Cross-examination by Mr. Golenbock:—

Q. Mr. Ming, who told you that Mr. Fagan was downstairs in the waiting room?

A. I don't remember.

Q. Wasn't it Mr. Conover?

A. I have no recollection of seeing Mr. Conover anywhere there.

Q. You know Mr. Conover, don't you?

A. I do.

Q. You wouldn't say it was not Mr. Conover?

A. I do say positively it was not.

Q. But whoever it was that informed you, what did they tell you Fagan was doing down stairs? What did they say he was there for?

A. Told me he wanted to settle his case.

Q. Somebody told you Fagan wanted to settle his case?

A. Yes, sir.

Q. You don't know whether it was Conover or somebody else?

A. I know positively it was not Mr. Conover.

Q. Isn't it a matter of fact, Mr. Ming, that Mr. Fagan wanted transportation across from New York to Asbury Park?

A. I have no recollection of transportation being mentioned.

Q. You haven't?

A. No.

Q. You wouldn't deny that that was asked?

A. No.

Q. Do you remember that something was said about transportation at the time?

A. I say I have no recollection of transportation being mentioned.

Q. You say that whoever told you, they said that Mr. Fagan wanted to settle his case?

A. Yes.

Q. And that is the only information you received, that he wanted to settle his case?

A. That is all.

Q. And that is the only source you received the information from?

A. You don't intimate where I received the information.

Q. Some man told you that he wanted——

A. Yes, some of our office force.

Q. And that was the only source you received that information from?

A. Yes. Pardon me. You will have to supplement it by what Mr. Fagan said afterwards, of course.

Q. Oh, all right?

A. He said he wanted his money or settled it up.

Q. Which did he say, wanted money or wanted to settle it?

A. He didn't say he wanted his money. It may have been to settle.

Q. You are not sure now whether he said he wanted his money or wanted to settle the case?

A. He wanted to settle the case.

Q. He may have said he wanted his money?

A. What would be the difference?

Q. That is for the jury to say. He may have said that he wanted his money or may have said to settle the case?

A. My recollection is that he wanted to settle his case.

Q. So you want to withdraw that he said he wanted his money?

A. I will take that back.

Q. Who was it suggested the amount?

A. As to the settlement itself Mr. Giddes took care of the entire amount.

Q. But you were present?

A. I was.

Q. And who suggested the amount?

A. Mr. Giddes.

Q. And what did Mr. Giddes originally offer?

A. $80.

Q. And was there any dispute about that amount?

A. There was no actual dispute. Mr. Fagan asked to have it increased on a certain little expense that he put in and Mr. Giddes acquiesced in it.

Q. Gave him $5?

A. Yes.

Q. What was the expense mentioned?

A. I think it was cab hire.

Q. Cab hire from where?

A. Down at this end, at Asbury Park.

Q. Cab hire for what day?

A. On his return. He was going home.

Q. You mean for that day, or the day of the settlement?

A. I do, yes, sir.

Q. You mean he wanted to get paid for——

A. He wanted to ride from the railroad station to his home when he got to Asbury Park.

Q. And Mr. Giddes increased it $5?

A. Yes.

Q. For the cab hire?

A. Yes.

Q. What made you come down with Mr. Giddes? Didn't you think that Mr. Giddes was able and capable of settling a case without you?

A. I knew that he was capable. I explained a few minutes ago it was something that happened in my district and I was interested for that reason.

Q. Wasn't it for the further fact that you wanted to be a witness to the entire transaction?

A. No, there was already a witness.

Q. Who was it?

A. Mr. Hone.

Q. And weren't you there at all times?

A. Well, I was down with Mr. Giddes and was there till he left.

Q. Was Mr. Hone taken down for the purpose of being a witness or were you there for that purpose?

A. Mr. Hone was taken down for the reason that if it became necessary to prepare any papers he might be sent back to get them.

Q. Do you say that after Mr. Fagan signed the paper Mr. Giddes said to him, asked him if he signed the paper with a knowledge of its contents?

A. Yes; that may not have been the exact phraseology.

Q. But the substance of it is correct?

A. Yes, sir.

Q. You are an adjuster yourself, aren't you?

A. Yes.

Q. In other words you settle cases?

A. Yes.

Q. And that is your business?

A. Not entirely. That is part of my business.

Q. What is the other part?

A. I have charge of the investigations and preparation of cases and various other work that accrues to my office.

Q. It is all in one department, isn't it?

A. Well, I have distinct——

Q. You are in the claim department?

A. I have a distinct office. It is subordinate to the claim attorney's office.

Q. Aren't you a subordinate to Mr. Failing?

A. Yes.

Q. Who was claim agent?

A. No.

Q. Claim attorney? What is it? Is it a new capacity?

A. Mr. Failing is claims attorney.

Mr. Tomlinson:—What difference does it make what position Mr. Failing holds?

The Court:—Proceed and find out.

Q. That is your business, to settle cases, part of your business?

A. Part of it, yes, if we so desire.

Q. Did you inform Mr. Fagan that he had no case?

A. No, sir.

Q. You didn't tell him anything about it?

A. No, sir.

Q. And of course if Mr. Fagan said he wanted to settle it there was no question about whether he had a case or not, was there? Then the only question that remained was the amount?

A. That is all. The two have to agree, that is all.

REDIRECT-EXAMINATION BY MR. TOMLINSON:—

Q. Mr. Ming, after Mr. Fagan signed this paper what if anything else was done?

Mr. Golenbock:—I object. That is not redirect. I haven't brought out anything.

Mr. Tomlinson:—I have got the right——

The Court:—Oh, yes. Proceed.

A. He was handed the consideration.

Q. What was that consideration?

A. $85; a check in this case for $85.

Q. I show you Exhibit D for Identification and ask you if that was the check?

A. Yes, sir.

Mr. Tomlinson:—I offer this in evidence.

(Check marked Exhibit D-5.)

RECROSS-EXAMINATION BY MR. GOLENBOCK:—

Q. Mr. Ming, do you mean to tell the court and jury that the appearance of this check is the same as at the time Mr. Fagan endorsed it?

A. Well, there may be a cancellation put on by some bank, I suppose, or something of that sort.

Q. Outside of the cancellation is it in the same condition as it was at the time Mr. Fagan signed and endorsed the check?

Mr. Tomlinson:—Show it to him.

Q. See it and see whether it is or not.

A. Well, there are several stamps on here that did not appear at this time. There is also a perforation in the check which was not there at the time.

Q. Name the number of stamps which are on there now which were not there at the time Mr. Fagan took the check.

A. There is one says "Settled."

Q. By whom was that put on?

A. I haven't the least idea.

Q. Was that in the claim department?

A. No.

Q. Was that the customary method of showing that a case was settled?

Mr. Tomlinson:—I object. What difference does that make?

Mr. Golenbock:—I want to have the jury know that it was not on there.

Mr. Tomlinson:—He has said so. He has admitted it.

Q. What else is there on that check that was not there at the time it was handed to Mr. Fagan?

A. There is a stamp here that says "Registered" and a number in it. It is quite indistinct, but it was not on there. And these perforations of course were not there. There is one on the back here that says "Central Railroad of New Jersey, Secretary and Treasurer," was not there. And there is a little notation of some kind that was not there. There is also the deposit stamp of the bank.

By the Court:—

Q. And that lower stamp "Settled" was not on it?

A. No, sir.

[BOTH SIDES REST.]

Motion for a Direction.

Mr. Tomlinson: If the court please, I move to direct a verdict upon three grounds: the first being that no negligence has been shown on the part of the defendant; the second being that the accident which is the basis of this suit was a risk of the plaintiff's employment which was assumed by him; and the third being that it is shown that the plaintiff has executed a full and general release.

Taking up these points in their inverse order, it is of course clear that if there were no fraud in the execution of this release it would be a complete bar. I desire to call your Honor's attention to the words "I have read the above and understand it", written in ink, under which Mr. Fagan's signature appears. Mr. Fagan upon the stand said that he would not deny that he had written those words. He said he might have put them there and he might not, but he would not deny that he did. He admitted his signature. Messrs. Ming, Hone and Giddes all state that he did put those words there before he signed this paper.

Now the cases, as I understand them, hold this: that if a man can read—even though a man can read, yet if he relies upon somebody else to disclose to him the contents of the document which he is about to sign and the contents are misrepresented to him there is fraud, and the fact that he can read is of no avail. But if a man can read and does read and relies upon the power to read, then it doesn't make any difference whether there was a misrepresentation or not; he is bound by the exercise of his own senses. And I submit that that is the case with the case at bar, because the evidence on the plaintiff's side is at a balance. Fagan said he may have put this here and he may not. Our

witnesses say that he did put those words there, that he did write and that he signed. And I submit, therefore, that the case comes within the line of authorities that hold that where a man relies upon his own senses, his own power to read, that he is bound by his action in that regard, irrespective of whether somebody else misrepresented the contents of that document to him or not.

Now my second point is that there was an assumption of risk here, because this man testified, admitted upon the stand, that although he had not —or he stated on the stand that although he had not been engaged with this particular truck before, yet he did admit that he had used a hand truck up and down those planks for a period of two months at least; that he had seen men with these trailer trucks attached to an electric truck similar to the two trucks in question going up and down these gangplanks; that when he went down—I call your Honor's attention to this part of the testimony —that when he went down that gangplank he put his hand upon the coupling pin to keep it from jumping out; and if that does not indicate that he knew at least some of the dangers I fail to see what could indicate that. He said that he had watched men going down those gangplanks and when I asked him how many crates were on this load he said he couldn't tell; and when I asked him to give some idea he said he couldn't give any idea, and he had his hand up on those crates.

Now I submit that this case comes within the proposition laid down by the United States Supreme Court in the case of Seaboard Airline Railway *vs.* Horton, 233 U. S. 492, where the Supreme Court said: (Reads.)

Now my contention is that this man had been

working on these piers, that by his own statement, which denies that he had ever been on these trucks before, on these trailer trucks, he had seen them working, he had seen lots of men working on them going down the plank and he knew or should have known of the danger of this load falling off; that that was why he was on there. I think that clearly enough appears from the evidence. And since he did know or should have known of that particular obvious risk of that load falling off, I think he should be taken to have assumed it.

My third ground is that no negligence has been shown. Apparently the plaintiff relies upon negligence in the following respects: first, the racks; second, the platform; and third, the loading.

Now upon his cross-examination first he said that there were no racks on here in front. Then later he said that there may have been. Our testimony says that there were, and that is uncontradicted except by Fagan's statement that there might not have been. Our testimony has shown that that was the usual way of protecting these trucks, or the usual rack we put on these trucks. True it is that Toomey said that on some trucks he used wooden racks, but he said that on this particular truck that was the only rack which could be used. These other witnesses on other lines all say that was the customary rack. So I submit there can be no finding of negligence in that regard.

With reference to the platform, there was testimony that if this race-piece had not been there the truck could not have gotten over unless they had jumped over; and Reynolds said that on his examination, when he was first on the stand—that is the only testimony with regard to any deficiency or any defect in that way—when Reynolds later

went on the stand and said that the plank were shaved down so as to come almost flush with the floor except for two or three inches. I submit that there could be no finding of negligence in that regard.

With reference to the loading, I interrogated Fagan at great length on that and he said that he did not know how many there were, he could not give any idea. He said that he did not know whether they were piled on the bottoms or on the end; he did not know anything about it. Now the testimony is uncontradictory that there were twenty crates of pineapples on that trailer truck and testimony has been produced to show that that is a safe load and that they were loaded in a proper and safe manner. And there has been no testimony whatsoever to contradict that.

I therefore respectfully ask for the direction of a verdict on those three grounds or any one of them.

The Court: If there is any one of them that is good I could not direct a verdict, could I?

Mr. Tomlinson: I realize that.

(Mr. Golenbock replies.)

The Court: Well, gentlemen, I think there is enough to go to the jury. If there is anything at all here I cannot take it away, and I think under that Court of Errors opinion I am bound to let it go to the jury on the question of this release. They practically said that that is a jury question.

(Objection noted for defendant as ground of appeal.)

Adjourned till October 31, 1919, at 10 A. M.

FREEHOLD, N. J., October 31, 1919.

Trial of the cause resumed at 10 A. M.

Mr. Tomlinson:—If your Honor please, I asked Mr. Fagan yesterday to write on a piece of paper, "I have read the above and understand it," and sign his name to it. At that time I overlooked offering it in evidence. I recognize that the case is closed but I do feel that I ought to make the motion now to offer that paper in evidence. I overlooked it yesterday.

Mr. Golenbock:—It seems to me that I must object to this being introduced in evidence now, for to do that would open the entire case, I would have to examine the other exhibits, etc., would have to go into the case all over again.

The Court:—Why would you?

Mr. Golenbock:—Well, for the purpose of comparison.

The Court:—They are right here.

Mr. Golenbock:—Well, I say if your Honor rules it would there may be a necessity of going into the case further.

The Court:—I will let it come in. You may put in anything you desire.

Mr. Golenbock:—If I find it is necessary.

The Court:—Yes, look at it and see. Show it to counsel.

(Paper marked Exhibit D-5.)

Charge of the Court.

On the 6th day of August, 1917, William A. Fagan was injured while in the employ of the Central Railroad Company of New Jersey on a pier in New York City moving freight from that pier to a barge. At the time the plaintiff was injured this railroad company was engaged in interstate commerce, that is, carrying passengers and freight, or one of them, from one state to another; and that being the case, this plaintiff, if he can recover at all, must do so by the provisions of the law known as the Federal Employers' Liability Act. The first section of that act reads as follows:

"That every common carrier by railroad while engaged in commence between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injuries while he is employed by such carrier in such commerce, or in case of the death of such person, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and if none then of such employee's parents, and if none then of the next of kin dependent upon such employee for such injury or death resulting in whole or in part from the negligence of any officer, agent or employee of such carrier, or by reason of a defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

Now you will see, gentlemen, in listening to that section, that the negligence must be, "that such

injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier," that is, the railroad, "or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment." The mere fact that the plaintiff was injured will not entitle him to recover. He must show by a preponderance of the testimony that his injuries were caused by the negligence of an officer, agent or employee of this company, or by reason of any defect or insufficiency due to the company's negligence in its cars, engines, appliances, machinery, track, roadbed, boats, wharves or other equipment.

It is not disputed that the plaintiff was engaged and employed by this company in interstate commerce work at the time of this accident. But the defendant does deny that the injuries of which the plaintiff now complains were caused by negligence. You have heard all the evidence and you must determine when and how this accident actually occurred and if it was the result of negligence. You are the sole judges of what the evidence has been and must determine the weight that you will give to the testimony of the various witnesses. You should not rely on the memory of counsel as to what the testimony was or on the recollection of the court, but you should determine yourselves what the witnesses have sworn to on the stand. You should decide this case not from prejudice, not from sympathy, but from the evidence, applying the rules of law I will lay down for your guidance. You are not to decide what in your opinion the law should be, but decide this case in accordance with

the law as it now exists applicable to this case, applied to the evidence you have heard on the stand.

The plaintiff says in substance that he had been working on this pier for some two months on a handtruck. That he was taken off the handtruck and told to go on this trailer; that the trailer was loaded with crates of pineapples higher than his head, and he stood with one foot on the tractor and the other on the pin in the coupling connecting the trailer with the tractor; one hand was on the trailer; that the trailer jolted when it went over the plank which went from the dock to the barge; that he tried to hold the crates in place, but they fell on him and crushed him. It is also contended by the plaintiff that the race-piece that was over the end of the plank was missing at that time. And that in substance is the plaintiff's story. You are to be the sole judges, however, of what the plaintiff has testified and what his witnesses have testified on the stand.

The defendant company denies there was any negligence; that the trailer was of a kind and character that were used by other freight handlers; that the truck was loaded with twenty crates of pineapples, five deep and four high; that a trailer loaded in that way was properly loaded and that the race-piece was not missing, but was in its proper place.

Was there negligence on the part of the company? If so it is for you to decide by the evidence of what the negligence consisted which caused the accident. For if there was no negligence there can be no recovery, even if there was an accident. Was it the negligence of the officers, agents or employees of the company? If so how were they negligent? Was it any defect or insufficiency in the appliances

or equipment of the railroad? If so what appliance or equipment was defective and caused the injury? You gentlemen are to decide the case from the evidence.

The fact that this race-piece was missing would not make the company liable on the theory that it did not provide a safe place for the plaintiff to work unless it knew of the missing race-piece and had a reasonable time to replace it before the accident or that it has been missing for such a length of time before the accident as to have afforded the railroad company a sufficient opportunity to make a proper inspection and ascertain its condition and to repair or replace this missing part.

If the plaintiff has failed to show by a preponderance of the evidence that his injury was caused by the negligence of any officer, agent or employee of this company or by reason of any defect or insufficiency due to this railroad's negligence in its cars, engines, appliances, machinery, track roadbed, boats, wharves or other equipment, then there should be no recovery by the plaintiff. If, however, you find the plaintiff's injuries were due to such negligence, still there can be no recovery if he assumed the risk of such employment and the injuries were the result of the risk so assumed. For it has been held, "Under the Federal Statute the employer is not liable for injuries received by an employee arising out of a risk assumed by the latter, a risk which is entirely obvious to the employee and is fully appreciated by him as an assumed risk under the Federal Statute."

But if the violation by the railroad company of any statute enacted for the safety of the employee contributed to the injury the plaintiff cannot be held to have assumed the risk of his employment.

But I do not recall any evidence of the violation of such a statute in this case. The rule is that the plaintiff assumed not only the ordinary risks incident to the employment but also such special features of danger as are plain and obvious and also such as he would discover by the exercise of ordinary care.

This plaintiff had worked on this pier for some two months, had taken goods from the pier to the barge over a gangplank by hand trucks and seen electric trucks with trailers take goods from the pier to the barge. He says he never worked on such a trailer until this particular trip. The operator of the electric truck testifies the plaintiff had been with him on the trailer before that day. This gangplank was one on an incline, according to the plaintiff's story. The trailer was loaded as high or higher than his head with crates of pineapples. He stood, as has been said, with one foot on the truck and the other on the pin which connected the trailer with the truck, with one hand against the boxes. Could the plaintiff have seen that in going down this gangplank there was danger of the boxes falling upon him, not that he knew they would fall but that they were liable to do so? If there was an obvious risk and the plaintiff made no protest but proceeded with his work he assumed the risk and cannot recover if he was injured while engaged in such work; unless, as I have said, the violation of some statute enacted for the safety of the railroad's employees contributed to this particular injury.

If you find the injuries of the plaintiff were the result of that risk assumed by him or if you find that his injuries were not due to the negligence of the company or its officers, agents or employees,

your verdict would be a verdict for defendant. If, however, you find the plaintiff's injuries were not the result of any risk assumed by him but were caused by the negligence of the company's officers, agents or employees, or by reason of defects or insufficiency in the company's equipment, due to the company's negligence, you still have another problem to solve before the plaintiff can recover a verdict.

It appears that some time after the accident the plaintiff left the hospital and went to the railroad company's office and there signed a paper by which he released this company from all claim he had against it for this injury. If this release was not obtained by fraud, deceit or by misrepresentation of its contents, it is an absolute defense to this action, even if the plaintiff had a valid cause of action at the time he signed the paper. If the plaintiff signed this release voluntarily, without any fraud, deceit or misrepresentation as to its contents, he cannot now repudiate his act. The plaintiff says, however, that he was told that the paper which he was asked to sign was a receipt and supposed he signed a receipt for $85, the amount which was then paid to him, and nothing was said about a release. The defendant claims that this paper was prepared after a talk with the plaintiff in which the plaintiff was told the defendant company denied liability; that $80 was first offered and finally $85 was agreed upon; that after the paper was drawn it was handed to the plaintiff to read; that after the plaintiff had examined it it was explained to the plaintiff, who then signed it and acknowledged it. You should consider all the evidence carefully and after doing so determine whether the defendant obtained the exe-

cution of this paper by fraud, deceit or by misrepresenting its contents.

Mere inadequacy of consideration will not entitle the plaintiff to have the paper set aside if he knew the amount at the time he signed and delivered it. He cannot change his mind after he executed a paper of this kind because he new considers that the amount which he received was too small.

If you find this release was obtained by fraud or deceit or by misrepresentation of the contents of the paper made by or on behalf of the railroad company, and that the plaintiff has a cause of action against the company, after applying the rules I have laid down for your guidance to the facts as you find them proved by the evidence, you will then determine the amount of the award by way of damages for the plaintiff's injuries.

He is entitled, if entitled to anything, to a sum which will compensate him for his injuries. You cannot award exemplary damages or anything to punish the railroad company. The plaintiff is entitled, if entitled to anything, to compensation. In arriving at this amount, if you decide in favor of the plaintiff, you should allow for the pain and suffering he has undergone and will probably have to undergo in the future, if you think it appears from the evidence that he will probably undergo suffering; not possibly but probably undergo suffering in the future as the result of this injury. And there, gentlemen, is a question for you to determine. The law lays down no rule by which you can say that a man may receive so much a day for pain and suffering or so much a week or so much a month. That is left to you to determine, but not for your determination arbitrarily. You should consider the matter carefully—the extent of the

man's suffering, the extent that he has suffered in the past, whether he will probably suffer in the future, and then award such sum as you as sensible business men think will be fair and right to compensate him for this pain and suffering.

He is entitled to be compensated for the time he has lost from his usual employment. He is entitled to be compensated for his present and probable future disability and diminished earning power; and in determining that question you should consider not only what the plaintiff has testified to, but the evidence of the doctors who have examined him and their opinion as to his future condition; for all moneys expended by him in endeavoring to be cured of this injury. From this amount you should deduct the $85 already received by the plaintiff. And if there has been contributory negligence on the part of the plaintiff you should also deduct from this amount the amount you find represented by the plaintiff's proportionable contributory negligence. For in cases under this federal act contributory negligence is not a defense to the action, as in our state law, but the federal act provides, "The fact that the employee may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of the negligence attributable to such employee." The amount thus ascertained will be the amount you will award the plaintiff if you render a verdict in favor of the plaintiff.

If, however, you find that the plaintiff's injury was the result of a risk assumed by him your verdict would be for the defendant. If you find plaintiff's injury was not the result of the negligence of any officer, agent or employee of the defendant and

was not caused by any defect or insufficiency of equipment of the defendant due to the defendant's negligence, your verdict will be a verdict for the defendant. Or if you find the execution of the release was not obtained by fraud, deceit or by misrepresentation of its contents, the verdict would be for the defendant.

Now, gentlemen, you can see that the case is one for you to determine from this evidence, applying the rules of law which I have laid down to you.

There was a motion made to nonsuit and another motion to direct a verdict. But the decisions of those motions has nothing whatever to do with your decision of this case. It does not indicate what you should do or what the court thinks you should do in this matter. It was simply a decision of the court that under the case as presented it was a jury case, not one that the court should take away from the jury; and it is now your duty to retire to your jury-room, consider the evidence, apply the law as I have laid down for your guidance and then render a verdict in accordance with that evidence, applying the law which I have laid down to you.

Now, gentlemen, it is needless for me to say that you must be guided by the evidence which has been presented on the stand, not from what you may know or hear outside, not from prejudice, not from sympathy, but solely from the evidence; and that verdict will be a right one.

I have some requests to charge and I will dispose of those now. These are the requests of the defendant.

1. Even if you should find that there was negligence upon the part of the defendant, yet if you

should also find that the risk of this accident was such as would have been obvious to an ordinarily prudent man while working under the same conditions as the plaintiff, then your verdict must be for the defendant.

I so charge you.

The second request I refuse to charge otherwise than I have charged.

3. In order for you to find that the plaintiff assumed the risk of this accident it is not necessary for you to first find that he had ever worked upon a trailer truck prior to this accident. And if you should find that this was his first trip upon a trailer truck, but that a man working under like conditions and exercising ordinary prudence would have realized and appreciated the dangers and possibilities of such an accident, then you must find for the defendant. I so charge.

4. In order for you to find for the plaintiff you must first find:

(1) That there was negligence upon the part of the defendant; and

(2) That the plaintiff did not assume the risk; and

(3) That the plaintiff was induced by fraud to sign the release. And if you resolve any one of these three questions in favor of the defendant then your verdict must be for the defendant, no matter what your determination may be as to the two remaining questions.

I so charge you.

5. I refuse to charge otherwise than I have charged.

6. Even if you should find that the defendant was guilty of negligence and that the plaintiff did not assume the risk, yet if you should also find that when plaintiff signed the release he understood what it was, then you must find for the defendant.

I so charge.

7. Even if you should find that the race-piece was not in the proper position at the time of the accident, yet you may not find negligence upon the part of the defendant by virtue of this fact, unless you also find either that the defendant had knowledge of its being out of position and had a reasonable opportunity to place it back in position prior to the time of this accident, or that it had been out of position for so long a period of time that the defendant in the exercise of reasonable diligence would have discovered this fact and would have had a reasonable opportunity to put it back in position before the accident.

I so charge you.

8. Even if you should find that the defendant was negligent and should find that the plaintiff did not assume the risk, yet if you should also find that plaintiff signed and understood the release, then your verdict must be for the defendant.

I so charge.

9. Even if you should find that the contents of the release were misrepresented to the plaintiff, but you also find that the plaintiff understood the contents of such release before signing it, then your verdict must be for the defendant.

I so charge.

11. If you find that there was no fraud or misrepresentation in connection with the execution by plaintiff of the release, then your verdict must be for the defendant; and in this connection the inadequacy of the sum mentioned in such release to compensate for his injuries may not be considered by you.

I so charge you.

The 12th I refuse to charge otherwise than I have charged.

Plaintiff's requests.

1. The defendant railroad company is obligated under the law to the plaintiff to the extent of its duty to him to see that ordinary care and prudence is exercised to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for him.

I so charge.

5. If the jury finds as a matter of fact that the trailer that the plaintiff was on had no guards in the front where the plaintiff had to be, and if you further find the railroad company did not exercise reasonable care in providing the trailer with those rails, and thereby the accident occurred, and plaintiff was injured, then they must find the defendant was negligent.

I so charge you.

I refuse to charge the other requests otherwise than I have charged.

(The requests on the part of the defendant which were refused by the court were as follows:)

2. There is no evidence in this case from which you may find negligence upon the part of the de-

fendant with respect to the manner of construction of the trailer truck or with respect to the racks used thereon.

5. There are three questions in this case: (1) Was the defendant guilty of negligence? (2) Did the plaintiff assume the risk of this accident? and (3) Was plaintiff fraudulently induced to sign the release? If you resolve any one of these three questions in favor of the defendant then your verdict must be for the defendant, no matter what your determination may be as to the two remaining questions.

12. If you find that the plaintiff himself wrote on the release the words, "I have read the above and understand it," and then signed his name to the release, your verdict must be for the defendant.

(The requests on the part of the plaintiff which were refused by the court were as follows):

2. If the jury finds as a matter of fact that one of the cooperating causes, if they find in the first instance that there was more than one cause of the injury complained of, and that one of the cooperating causes was a negligent act or omission for which the railroad company is responsible, then they must find in favor of the plaintiff.

3. If the jury finds as a matter of fact that the load on the trailer was unusually high and not properly loaded, then you should consider if the defendant railroad company exercised reasonable care to see that the load on the trailer upon which the plaintiff was directed to go on was properly loaded. If the jury finds as a matter of fact the

company was in that respect negligent and the accident and the injuries to the plaintiff was as the result of such negligence, then the jury must find in favor of the plaintiff.

4. If the jury finds as a matter of fact that the guards or rails on the ends of the trailer on which the plaintiff was on at the time the accident occurred was not a proper safety provision for the use of the trailer trucks in conveying a load of pineapple crates such as has been testified to, then they should consider the further question whether the railroad company exercised reasonable care in loading the trailer, so that the pineapple crates would not be over and above the guard or rails, and by reason of which the accident and injuries to the plaintiff resulted, then the jury should find in favor of plaintiff.

Defendant's Exceptions.

Mr. Tomlinson:—Your Honor charged the jury in substance that if the risk of these pineapples falling over on him was one which should have been appreciated by the plaintiff he assumed the risk of the accident unless there was a violation of some safety statute. I wish to note an objection to that part of the court's charge on the ground that no evidence has been adduced to show any violation of any safety statute.

The Court:—You may take an exception to what I said on that subject.

Mr. Tomlinson:—I also wish to take an exception to your Honor's refusal to charge my requests Nos. 2, 5 and 12 and to your Honor's charging the plaintiff's request No. 2.

Defendant's Exceptions.

(After the jury had retired they were recalled to the courtroom and further instructed by the court as follows):

Gentlemen, so there will be no misunderstanding in this case, I want to read you the section of the statute with regard to the assumption of risk:

> "That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injury to or the death of any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Now in this evidence there is no violation of any such safety statute. So that the simple question for you to determine is, did this man assume the risk of his employment without any exception?

Mr. Golenbock:—I take an exception to his Honor stating in refusing to charge at this time at the end of the quotation of the rule on assumption of risk in reference to the safety appliance act, in not stating to the jury that the sole question in this case is under Section 1 of the Employers' Liability Act.

I also take further exception to his Honor's ruling, in refusing to charge the jury according to the requests handed by plaintiff other than those charged.

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Notice of Appeal.

Filed November 30, 1918.

Monmouth County Circuit Court.

WILLIAM A. FAGAN, Plaintiff-Respondent, vs. THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant-Appellant.	Notice of Appeal.

To

HENRY K. GOLENBOCK, Esq.,
Attorney of Plaintiff-Respondent.

TAKE NOTICE, that the defendant appeals from the whole of the judgment entered in this cause to the Court of Errors and Appeals.

GEO. HOLMES,
Attorney of Defendant-Appellant.

Dated: November 16th, 1918.

Summons.

THE STATE OF NEW JERSEY TO THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, A CORPORATION:

(L. S.) You are summoned to answer the annexed complaint of William A. Fagan, in an action at law in the Monmouth County Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of the said Monmouth County Circuit Court, at Freehold, within twenty days after service upon you of this writ and annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, WILLARD W. CUTLER, Judge of the said Monmouth County Circuit Court, at Freehold, this 15th day of April, nineteen hundred and eighteen.

JOSEPH McDERMOTT
Clerk.

WIGHT, WIGHT & GOLENBOCK
Attorneys.

Complaint.

MONMOUTH COUNTY CIRCUIT COURT.

WILLIAM A. FAGAN, Plaintiff, vs. THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation, Defendant.	Action at Law. Complaint.

Plaintiff, residing in the City of Asbury Park, in the County of Monmouth and State of New Jersey, says:

1. That defendant is a corporation organized and existing under and by virtue of the laws of the State of New Jersey.

2. That at all times hereinafter mentioned in this complaint, the said defendant was a common carrier, and engaged, as such common carrier, between the States of New York and New Jersey, and between various states and territories of the United States.

3. That, as such common carrier, it operated, managed and controlled Pier No. 10 North River, in the City, County and State of New York.

4. That on August 6, 1917, the said defendant used, managed and operated the aforementioned

Pier at said place, for the purpose of interstate commerce in conveying freight between the State of New York and the State of New Jersey and elsewhere.

5. That on the aforementioned date, and prior thereto, the plaintiff was employed by the defendant as a freight loader.

6. That on said date, plaintiff was instructed by the defendant, its Superintendent, agents and servants to go upon a certain truck, loaded with crates of pineapples.

7. That said loaded truck was attached to a motor truck, and conveyed from the said Pier onto a barge, which was alongside of said Pier.

8. That while the said plaintiff was standing in the position as directed, and as the loaded truck, upon which he was standing, was being conveyed by the motor truck from the pier onto the barge, the said crates of pineapples fell from said truck onto the plaintiff, causing him to be thrown and seriously injured as hereinafter stated.

9. That the occurrence and injuries resulting therefrom were caused by the negligent manner in which defendant's officers, agents, servants and employes loaded the truck upon which plaintiff was placed, and also by the defects in defendant's ways, works, machinery, appliances, plant, cars or the improper use or operation of same at said place, and by the defendant's negligence in failing to formulate, promulgate and enforce proper rules and regulations for the safety of the plaintiff and his co-

employes, in that the defendant conducted its work by unsafe and dangerous methods, and did not have proper guards on said truck, upon which the freight was loaded, and in that the defendant negligently and carelessly conducted itself in and in connection with said acts, control and command, while the said defendant, as a common carrier by railroad was engaged in commerce between the States of New York and New Jersey, as defined in an Act of Congress, entitled "An Act relating to the Liability of Common Carriers by Railroad to their Employes in certain cases," Approved April 22, 1908, and the amendments and supplements thereto, all being caused without any negligence on the part of the plaintiff in anywise contributing thereto.

10. That the said plaintiff sustained injuries to his foot, leg and other parts of his body, and became sick, sore and disabled and suffered mental pain and agony, and was unable to do or perform his customary labor, and is still unable to perform such labor, and, upon information and belief, is permanently injured, and is otherwise injured.

11. That said plaintiff, as a result of said injuries, was compelled to employ medical aid and attendance and expend large sums of money for such, and, upon information and belief, will require medical aid and attendance for a long time to come.

That, by reason of the foregoing, plaintiff suffered and sustained damages in the sum of $15,000.

Plaintiff demands $15,000 damages.

WIGHT, WIGHT & GOLENBOCK,
Attorneys of Plaintiff.

Answer.

Filed May 13, 1918.

MONMOUTH COUNTY CIRCUIT COURT.

WILLIAM A. FAGAN, Plaintiff, vs. THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation, Defendant.	Action at Law. Answer.

The answer of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation of the State of New Jersey, having its principal office for the transaction of business in the City of Jersey City, in the County of Hudson and State of New Jersey, says:

I. It admits paragraphs 1, 2, 3, 4 and 5 of the complaint.

II. It admits that the plaintiff while so employed by the defendant was injured on the date mentioned in the complaint, but denies that the injuries so sustained by plaintiff were the result of any negligence on the part of the defendant, its agents, servants or employees.

III. It denies paragraphs 9 and 10 of the complaint.

IV. It has no knowledge of the matters and things alleged in paragraph 11 of the complaint.

Answer.

AS A SEPARATE DEFENCE, it alleges that after the occurrence of said accident, to wit on the 11th day of September, 1917, plaintiff by an instrument in writing under seal, for a good and valuable consideration, released this defendant of and from all claims and demands which he then had or which his heirs, executors or administrators thereafter might have by reason of the injuries occurring to him on the 6th day of August, 1917, mentioned in the complaint.

AS A SECOND SEPARATE DEFENCE, it alleges that the complaint discloses no cause of action against this defendant.

AS A THIRD SEPARATE DEFENCE, it alleges that the injuries mentioned in the complaint were the result of risks arising out of plaintiff's employment, which were assumed by him.

AS A FOURTH SFPARATE DEFENCE, it alleges that plaintiff's injuries were solely the result of contributory negligence on his part.

GEO. HOLMES,
Attorney of Defendant.

Reply.

Filed June 3, 1918.

MONMOUTH COUNTY CIRCUIT COURT

WILLIAM A. FAGAN, Plaintiff, vs. THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation, Defendant.	Action at Law Reply.

1. Plaintiff replies that the release mentioned in the answer was procured from him by fraud and deecit, in that he was asked to sign a receipt for a certain sum of money which he received from the defendant through one of its servants agents and representatives, and was advised that the paper was merely a receipt for the money given to him; that he was not asked to read the paper, nor was he truthfully advised what the contents of the paper was. That he was then and there and by the same person informed that the sum of money paid to him was for compensation for the time that he was then out of employment, and was advised that he would receive further sums of money later on.

2. Denies the allegations in the second, third and fourth separate defences.

WIGHT, WIGHT & GOLENBOCK
Attorneys for Plaintiff.

Answer to Reply.

Filed June 4, 1918

MONMOUTH COUNTY CIRCUIT COURT.

WILLIAM A. FAGAN, Plaintiff, vs. THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant.	Action at Law. Answer to Reply.

Defendant denies each and every allegation contained in plaintiff's reply.

GEO. HOLMES .
Attorney for Defendant.

Judgment.

Filed November 7, 1918.

This action was tried before Judge Willard W. Cutler, with a jury in the presence of the counsel of the respective parties at the Monmouth County Circuit Court on November 6th and 7th, 1918.

The case having been heard and submitted to the jury they returned their verdict as follows: That they find in favor of the plaintiff and assess the damages at the sum of four thousand nine hundred and fifteen dollars. Whereupon it is adjudged that the plaintiff, William A. Fagan, recover of the defendant, The Central Railroad Company of New Jersey a corporation the sum of four thousand nine hundred and fifteen dollars and his costs which are taxed at the sum of fifty one dollars and ninety seven cents, making in the whole the sum of four thousand nine hundred sixty six dollars and ninety seven cents.

Judgment entered November 7, 1918, 1.15 P. M.

Grounds of Appeal.

Filed December 16, 1918.

NEW JERSEY COURT OF ERRORS AND APPEALS.

WILLIAM A. FAGAN, Plaintiff-Respondent, vs. THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant-Appellant.	On Appeal from the Monmouth County Circuit Court.

GROUNDS OF APPEAL:

To

H. K. GOLENBOCK, Esq..
Attorney for Plaintiff-Respondent.

SIR:

TAKE NOTICE that the following are the grounds upon which the defendant, The Central Railroad Company of New Jersey, appeals from the judgment heretofore entered in this cause against it:—

(1) The said judgment was given for the plaintiff, William A. Fagan, and against the defendant, The Central Railroad Company of New Jersey, whereas, by the law of the land. judgment ought to have been given for said The Central Railroad Company of New Jersey and against the said William A. Fagan.

(2) The Judge before whom the trial of the issues joined between the parties was had,

erroneously refused to grant defendant's motion for a non-suit at the close of plaintiff's case.

(3) The said Judge erroneously denied defendant's motion for the direction of a verdict in its favor at the close of the whole case.

(4) The said Judge erroneously permitted one Edward Reynolds to answer, over the objection of the defendant, the following question:

> "Will you tell us whether you had seen any "trailers on that pier and describe as to its "appearance and how it was constructed."

(5) The said Judge erroneously charged the jury as follows:—

> "And so, gentlemen, it is important for you "to determine whether the plaintiff in this "case assumed the risk of his employment."

(6) The said Judge erroneously charged the jury as follows:—

> "It appears that some time after the acci- "dent the plaintiff left the hospital and went "to defendant's office, and after accepting $85 "signed a paper that was brought him. The "plaintiff testified that he thought he was sign- "ing a reecipt. Defendant's claim agents "testify that it was a release. It was a written "document and must be produced by the de- "fendant if it relies upon this document to "prevent a recovery by the plaintiff. The paper "has not been produced and its absence has not "been accounted for, and there is nothing be-

"fore the court that will warrant you in saying "that the plaintiff is prevented from recovery, "if you find that he has any claim against this "company, by reason of any paper that was "signed at that time."

(7) The said Judge erroneously charged the jury as follows:

"That it is no defense for the defendant that "because the plaintiff sustained his injuries "by the negligence of a fellow servant of the "plaintiff."

Dated, December 2nd, 1918.

Yours respectfully,

GEO. HOLMES,
Attorney of Defendant-Appellant.

MONMOUTH COUNTY CIRCUIT COURT.

WILLIAM A. FAGAN, Plaintiff, v. CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant.	Action at Law.

FREEHOLD, N. J., November 6, 1918.

Testimony.

BEFORE HON. WILLARD W. CUTLER, *Judge,* AND A JURY.

APPEARANCES:

For Plaintiff, HARRY GOLENBOCK, ESQ.
For Defendant, DE VOE TOMLINSON, ESQ., and MESSRS. DURAND, IVINS & CARTON.

WILLIAM A. FAGAN, sworn for plaintiff.

DIRECT-EXAMINATION BY MR. GOLENBOCK:

Q. Mr. Fagan, how old are you?

A. I will be fifty the eighth day of next month.

Q. You have been working for the Central Railroad Company of New Jersey?

A. Yes, sir.

Q. For how long a time have you been working for that concern?

A. About nine months.

Q. And do you recollect about when it was that you started to work for the company?

A. It was some time in November, 1916.

Q. Now what was your work throughout the period of time that you worked for the railroad company?

A. Hand trucking.

Q. Is there a distinction between hand trucking and a different kind of trucking?

A. Yes, you pull one truck by the hand and the other truck is pulled by the electric truck.

Q. Now in this hand trucking that you speak of, is this freight placed against or on a hand truck, one row of merchandise——

Objected to as leading.

Q. Will you explain fully as to the difference between hand trucking and electric trucking, as to the size of the truck, the size of the load and the shape of the trucks?

A. The electric truck is a square truck and it holds more at a time than the hand truck would.

Q. Can you tell us approximately the size of this truck which is called an electric truck?

A. The size of it?

Q. The size of it, yes. What is the length and width and what is the height of the sides?

A. Well, I should judge the width of it is about two feet and a half and the length of it about five feet.

Q. Now has it sides or protecting sides?

A. It has sides.

Q. What part of the truck is protected?

A. Two sides and the ends.

Q. You mean the rear?

A. The rear, yes.

Q. How is that protected?

A. It has two sides and the rear and one rear side.

Q. Now tell us the size of the hand truck and how much merchandise they can carry.

A. Well, a hand truck is like a small wheelbarrow, you know, with two wheels to it, that you can push whichever you are a mind to with the hands.

Q. You say that up to that date you had been hand trucking?

A. Hand trucking, yes.

Q. When for the first time on that day had you been told by some one who was over you, to go upon this electric truck?

Mr. Tomlinson: I object, because it has not been shown yet that he was told.

The Court: Yes, show the circumstances.

Q. Were you told on that day at any time by any one in charge of Pier 10 or for you to go upon the electric trucking?

A. Yes, I was told by my own foreman.

Q. Who was he?

A. Howard Dorsey.

Q. And when was that, what part of the time as pertaining to the time of the accident?

A. That was about four o'clock and the accident happened between four and five.

Q. You are quite certain now that up to that date you had been doing only hand trucking?

Objected to as leading.

A. Only hand trucking.

The Court: Yes, don't lead him.

Q. Will you describe the size of the pineapple

crates which were on this particular truck at the time that the accident happened?

A. Well, I think, to the best of my knowledge, they were big boxes, put up in boxes, you know, pineapples.

Q. Were they heavy?

A. Yes, they were pretty heavy.

Q. Did you have anything to do with the loading of that truck upon which you were told to go on?

A. No, I had nothing to do with the loading of that truck.

Q. When you were told by Dorsey to go on that truck it had already been loaded?

A. It had already been loaded, yes.

Q. Do you know anything about the electric trucking work?

Objected to. Objection sustained.

Q. At the time Dorsey instructed you to go on that truck did he give you any instructions?

A. None whatsoever.

Q. Did he warn you as to its dangerous condition?

Objected to as leading.

A. No.

The Court: That may stand.

Q. Now then when he told you to go on this truck what did you do?

A. I went on.

Q. Will you describe as to just how you stood?

A. Well, the electric truck was attached to a trailer and this trailer was loaded up with these pineapples and the trailer had a hook on it and the hook hooked into the end of the electric truck to pull it out, and going down those inclines that hook

is liable to jump out all the time, you know, and I placed my foot on it to keep the hook in when it went down the incline, and I seen it was going down the incline when the freight commenced to fall over on me and tried to save the freight. It jumped, on this foot, and held this foot on that pin and then spread me out like that (illustrating) and the freight all come on my back; and four or five or six fellows up there pulled it all off of me—I didn't know who they was at the time—and carried me out; and this hip was turned inside out, a dislocation, and that foot was turned right in that way. (Illustrating.)

Q. This trailer you spoke of—is this particular truck that you were talking about, is that what you call a trailer?

A. A trailer.

Q. And that was the first load that you ever made on a trailer?

Objected to as leading.

Mr. Golenbock: I am merely explaining the testimony.

The Court: Well, no; that should not be explained. This is your witness. You should not lead him.

Q. Was that the first load that you had made on an electric truck?

Objected to as leading.

The Court: Yes, it is leading.

Q. What was done to you after this accident happened.

Q. Why, I was taken out and carried off the truck and brought out on the pier, and the doctors were sent for to the hospital and they tried to put

my hip back in its place and they couldn't do it, they couldn't put it back there because it was so painful. I was hollering with the pain. And then they took me up in an ambulance to the Hudson Street Hospital and they etherized me and fixed the hip and when I woke up I was in bed with my legs tied down here below, and stayed that way for five weeks and never slept night or day. The pain was awful.

Q. Will you tell us what various parts of the body that you were hurt at the time of the pine-apple boxes coming in contact with you?

A. My back was hurt and this hip turned.

Q. When you say this you are indicating the right hip?

A. The right hip.

Q. Where else?

A. The right hip and my leg.

Q. You mean the right?

A. The right leg.

Q. Anywhere else?

A. My back and this hip was turned out of its socket and my leg right here was all black and blue, this foot was turned right in, turned right around.

Q. You say when you were taken to the hospital that both your feet were bandaged together?

A. After they operated on me and put my hip back.

Q. When after you were taken to the hospital was this operation performed on you?

A. About seven o'clock in the evening.

Q. The same day?

A. The same day.

Q. What hour of the day did this accident happen?

A. Between four and five.

Q. You don't know the exact time?

A. Well, no; I don't.

Q. How long were you in such position as you indicated, after both feet were strapped or bandaged together?

A. About two weeks, three weeks.

Q. Were the bandages after that taken off?

A. Yes, the doctor took them off.

Q. How long did you stay at the hospital?

A. From the 6th of August to the 11th of September.

Q. These barges, where were they to be shipped, these barges upon which the cars were, and particularly this car where the pineapples were to be conveyed to? Where were they going?

Mr. Tomlinson: I object unless he knows.

Q. If he knows.

A. Why, they was——

The Court: Find out whether he knows.

Q. Do you know where the barges upon which this freight car was were bound for?

A. To go across to the Jersey side.

Q. Had you been out of your bed while you were at the hospital?

A. Well, I was out for about two days.

Q. In what way were you out?

A. Out on crutches, on these crutches.

Q. Out on crutches?

A. Yes, sir.

Q. Did you have a conversation with some one at the hospital on the day that you left, September 11th?

Objected to.

Q. With whom, with some authority at the hospital? Or I will reframe it. Did you have a conversation with the doctor in the hospital who had charge on your admission?

Objected to.

The Court: I will allow that if he had a conversation with somebody. It may be proper or it may not, but not the conversation. You want to identify the party.

Q. Did you have a conversation?

A. Only with the doctor in the institution.

Q. And as a result of the conversation you left the hospital that morning?

A. Yes.

Q. Now what time did you leave the hospital in the morning on the 11th of September?

A. About nine or half past nine o'clock.

Q. Do you know where the hospital is situated?

A. Hudson Street. Hudson and Jay, I think it was.

Q. Do you know how far it was from the freight house or Pier 10?

A. To the best of my judgment it is about six to seven blocks.

Q. How far is the hospital from West Street? You know where West Street is, don't you?

A. About four blocks.

Q. Now from there is it quite a distance to the freight house?

Objected to as leading.

The Court: No, that question is objectionable.

Q. How far is it from West Street and Jay to the Central Railroad freight house?

A. I should think about five blocks.

Q. Do you know whether it is Jay or Jayne?

A. I disremember, but I know where the hospital is, but I don't belong to New York.

Q. When you got to West Street, what did you do, walk or take a car?

A. I had two gentlemen to help me on the car. I was so weak, my head was all gone from me. I stopped every about two or three minutes from the time I left the hospital until I go down there. I could hardly get my breath from exhaustion. My legs was paining me and my back and I couldn't stand up.

Q. How long did it take you to get from the hospital to the freight house of the Central Railroad?

A. Took me from half past nine in the morning till one o'clock, quarter of one.

Q. Why did it take you so long to get there?

A. It took me most of the time from the hospital to West Street, because when I got on to West Street two gentlemen took me on the car and I got down to the ferry quick.

Q. When you got to the freight house did you talk to Mr. Dorsey or anybody else?

A. Yes, I talked with Mr. Dorsey. I seen Mr. Dorsey there.

Q. What did you talk to him about?

Objected to.

The Court: Why do you think it is competent?

Mr. Golenbock: Well, I want to lead up as to how he came in contact with the gentleman who gave him the $85, and under what circumstances he received this money. It may be rebuttal but I am just leading up to it.

The Court: Is that part of your case?

Mr. Golenbock: It is not, sir.

The Court: Then why do you go into it?

Mr. Golenbock: All right, sir.

The Court: That is a matter of defense, as I read your pleadings.

Mr. Tomlinson: Yes, that is the way I understand it.

The Court: It is only mixing the case up. You had better let it stand. In your answer you set up certain reasons why it should not apply. Confine yourself to your original case.

Q. What time of day did you take the train for Asbury Park?

A. Well, it was about four o'clock, I should judge.

Q. When you reached home what did you do?

A. I had to go to bed.

Q. How long after that did you remain in bed?

A. Remained there two weeks, and I had to be taken back to the hospital again.

Q. What hospital did you go back again?

A. The same one, on Hudson Street.

Q. And how long did you stay at the Hudson Street Hospital the second time?

A. One week.

Q. Then did you go back home?

A. They sent me from there to the Ruptured and Crippled hospital.

Q. Where is that?

A. That is on 42nd and 2nd Avenue, I think it is.

Q. New York City?

A. New York City.

Q. How long did you stay there?

A. I didn't stay there at all, because I had no

way of getting there after I left the hospital the second time, so finally I came right down home to my wife and made arrangements so that she could take me up there to the Ruptured and Crippled Hospital to see the doctors up there.

Q. How many times did you go to that hospital?

A. Three times.

Q. And you received treatment there?

A. I received treatment there, yes.

Q. Now since that time, since the last time that you have been to the hospital, have you had treatments?

A. Why, massages.

Q. Where?

A. Home.

Q. I mean what part of the body did you receive massages?

A. Why, the hip, right down to my feet, all the ways down my back.

Q. Were you able to walk about?

A. No.

Q. Ever since the accident how have you been able to go about if at all?

A. Well, just go around with these sticks and every time I go around I imagine there is about ten pounds hanging on this leg all the time, and then my back hurts me, lose my breath, can hardly get my breath all the time.

Q. Are you able to walk much even with the crutches?

A. No.

Q. Have you been working at all since the day of the accident?

A. Couldn't do a thing. It was as much as I could do to sit up.

Q. How long have you been in bed all told?

A. About nine months.

Q. Well, you don't mean you were in bed altogether during that time, do you?

A. I think all told I was—yes, I was in bed all last winter; couldn't get out of bed at all.

Q. How much money were you making at the time you were working for the Central Railroad?

A. I was making $2.60 a day.

Q. It totaled how much a week?

A. About $17.50. If you worked on Sunday you got $4.02.

Q. Do you still feel pain at the places you indicated you were hurt?

A. It is paining me now.

CROSS-EXAMINATION BY MR. TOMLINSON:

Q. How much did you say you made?

A. $2.62 a day.

Q. How many days a week did you work?

A. Worked six days, and sometimes I worked on Sunday.

Q. Six days a week at $2.62 a day, how do you make $17.50 a week?

A. Well, it amounted—my wage amounted to about $18 a week, take on an average, working Sunday and weekdays. Of course I didn't work every Sunday, I will admit that.

Q. Six days a week at $2.62 is $15.72, isn't it?

A. Well, on an average I made about $18 a week by working on Sunday.

Q. Did you get paid by the day or by the week?

A. Got paid——

Q. I am not asking you when you got paid, I am asking whether you got paid so much per day or so much per week.

A. Got paid so much per day.

Q. How long had you been working for the company before you were injured?

A. Before which?

The Court: Before you were hurt?

A. Oh, about nine months.

Q. And where had you been working?

A. Well, I was working—I worked at Broadway Tower, worked in Jersey City and I worked over on the meadows for them—I forget the name over there—filling in a dump there for Mr. Ford. I worked over there too. In fact, I worked any place I was sent.

Q. Worked all around, didn't you?

A. All around.

Q. Did you ever work at Pier 39?

A. No, sir.

Q. How about 46?

A. I worked at 46.

Q. What did you do at Pier 46?

A. Hand trucking.

Q. What did you do over at Jersey City?

A. I worked in the sulphur boat, shoveling sulphur, and the trucking besides. Whenever there was no trucking to be done they sent me over to the boats.

Q. How many times did you work at Pier 10 before this day you were injured?

A. Well, I worked there altogether two months steady.

Q. What were you doing during those two months?

A. Hand trucking.

Q. Do you know Tony Palmieri?

(Tony Palmieri was requested to stand and complied.)

Q. Do you know him?

A. No, I can't say that I do.

Q. Never saw him before?

A. I can't say that I did.

Q. Who were you working with the day that you got hurt?

A. It was a young fellow like him driving a truck.

Q. He was driving a truck?

A. Yes.

Q. How long during that day had you been working with the same man who was driving the truck when you got hurt?

A. Why, on that load.

Q. Hadn't you worked with him before that day?

A. Not to my knowledge. I was taken from the hand truck and put on that truck at that time.

Q. I am asking you, Mr. Fagan, whether you had worked that same day before you got hurt with the man who drove the truck when you did get hurt?

A. No, sir.

Q. You are sure about that?

A. Yes.

Q. And you say that you were just operating a hand truck yourself?

A. Yes, hand truck.

Q. Hadn't ever been on a trailer truck before?

A. No, sir.

Q. You are sure about that?

A. I am, sir.

Q. And you don't know who was driving the——

A. Well, he lived over in New York and I didn't know the people that worked on that pier.

Q. Well, you had worked on Pier 10 before?

A. I worked there about two months.

Q. And you knew some of the men, didn't you?

A. It takes you a long time to work there before you know the people that work there.

Q. You knew the men with whom you worked, didn't you?

A. I only knew one man, Harry, the checker over there, and Mr. Toomey.

Q. You knew Mr. Toomey, didn't you?

A. Yes.

Q. And Mr. Toomey was there the day you got hurt, wasn't he?

A. Yes, he was.

Q. He was up here?

A. Yes, sir.

Q. Where were you standing when you got hurt?

A. I had one leg on the electric truck and one leg on the pin that goes from the trailer into the electric truck.

Q. Which way were you facing?

A. I was placed with my side this way, to the electric truck, and this foot on the pin of the trailer. (Indicating.)

Q. What were you doing with your hands?

A. My hands, I had them on the front of the trailer, because when we struck the incline to go down I tried to protect the goods from falling over, the merchandise, the merchandise from falling over; and when we struck the incline they all come so sudden on me that they caught that leg and they come right on top of me and spread me right out like that. (Illustrating.)

Q. Before you went on that trailer did you tell anybody that you didn't want to take that job?

A. No, I didn't tell nobody I didn't want that job.

Q. Just answer my question please, yes or no.

A. Did I tell anybody?

Mr. Goldenbock: He has already answered that he said he told nobody.

Question repeated.

A. I did not, because I ain't a man like that; generally try to do what I am told to do.

Mr. Tomlinson: I move to strike that last out as not responsive.

The Court: Strike it out.

Q. You went on there; how was the light? Was it light in the pier? Was the pier light?

A. Well, it was not dark.

Q. It was half past four in the afternoon?

A. About quarter past four or half past four. I won't be sure, but it was between that hour, between four and five.

Q. On a summer afternoon?

A. Yes, the 6th of August.

Q. Had you gone down that gangway before?

A. We had gone down different gangways with the hand trucks.

Q. And you had gone down that same gangway lots of times before, hadn't you?

A. Not before with a truck.

Q. You had gone down that same gangway lots of times before, hadn't you?

Mr. Goldenbock: I object unless it is shown that on previous occasions the conditions were the same.

The Court: I will allow the question.

Question repeated.

A. I had gone down that gangway several times before but with a different truck.

Q. And you had gone down that gangway when it was just as steep as it was on this day, hadn't you, Mr. Fagan?

A. With a hand truck.

Q. You said you put your foot on the pin to keep it from coming out?

A. Yes, sir.

Q. Well, if this was the first time that you had ever been on a trailer truck how did you know that was necessary?

A. Because I have seen them with other people.

Q. Oh, you had seen them?

A. Yes.

Q. And you had seen other men operating those motor trucks or trailers, haven't you?

A. No, it was very seldom that an electric truck went out empty with a trailer attached to it, that it didn't have a load on it. But this electric truck had no load on and there was no other place for me to stand only where I did to protect the merchandise from falling.

Q. Now you have gotten that out of your system, suppose you answer my question. My question was whether you had not seen other men take those trucks down on that float, on a float on one of those planks.

A. I have seen men take other merchandise down, yes.

Q. With trailer trucks and electric trucks?

A. With an electric truck.

Q. Yes, with a trailer attached?

A. No, some of them trailers goes out without any man on the trailer at all.

Q. Well, hadn't you seen these electric trucks go down with the trailers hooked on to them, with two

men, one man on the electric truck and one on the trailer truck?

A. No, no man can stand on the trailer truck going down while it is loaded.

Q. Standing as you were standing then?

A. No.

Q. You mean to say you are the only man——

A. No, I mean to say that this here electric truck was empty that I was standing on and the other electric trucks were loaded that other men went on.

Q. You mean to say that you had never seen any trucks go down the way that yours went down that day?

A. Yes, I have.

Q. You have?

A. Yes, but there would be no man on. Sometimes there would be a man on, sometimes there might not be.

Q. Sometimes there were, sometimes there were not?

A. Yes. Unfortunately I happened to be on this one.

Q. And the only way you knew that you should keep your mind on that pin was because you had seen other men working that way, wasn't it?

A. No, because simply I seen that the pin was in the habit of coming out.

Q. When other men were taking trucks?

A. When other men were taking trucks that pin would come out when it struck the incline to go down on the float.

Q. You had seen other men working these floats and had seen the pin come out, therefore you knew that it was necessary for you to keep your foot on the pin; is that right?

A. To keep it from coming out, to keep the merchandise from falling over into the river.

Q. Yes, and I say the way that you knew that was because you had seen other men do it.

A. I have seen other men do it. I have seen that pin come out. I have seen that pin come out of the trucks, but I haven't seen other men do it.

Q. Haven't seen other men keeping their foot on the pin?

A. No, I haven't.

Q. You mean to say that they simply ran those trucks down and let the pins come out?

A. That has been done; yes, sir, I have seen the pin come out several times.

Q. They didn't usually do it, did they?

A. They don't make a habit of doing it.

Q. They make a habit of devising some way of keeping that pin from coming out, don't they?

Mr. Golenbock: I object to that as calling for a conclusion. The witness' answer already covers that.

The Court: Yes, I think that is improper.

Q. You had seen other men work those trucks, hadn't you?

A. Yes, I have seen other men work them.

Q. Is that the kind of pin that you saw? (Pin shown witness.)

A. Yes, it looks like it.

Mr. Tomlinson: I ask that this be marked for identification.

The Court: Yes, you may have it marked.

(Pin marked Exhibit A for Identification.)

Q. And is this what the pin hooked into?

A. Yes.

(The article referred to was marked Exhibit B for Identification.)

Q. Mr. Fagan, the pin didn't come out of this truck on the day you were injured, did it?

A. No, because I had my foot on it.

Q. Now never mind that. I am asking you whether it did or not. Just answer my question.

A. No.

Q. Where were you when these boxes fell over on you?

A. I had one foot on the electric truck and one foot on the pin.

Q. Well, where were the trucks?

A. They were going down the incline, right down the incline going out on the float.

Q. How far down the incline were they?

A. Well, they were pretty nearly all the ways down the incline when the truck was stopped.

Q. Pretty nearly all the ways down?

A. Yes, when the truck was stopped.

Q. Where did you fall?

A. I was spread out on the electric truck by the weight of the pineapples.

Q. And where was the electric truck at that time?

A. Well, I don't know; I couldn't answer that question because I was knocked senseless with the pineapples. I couldn't tell where I was.

Q. Now as you went down the incline, which way were you looking?

A. I was looking at the truckful of freight, with my hands on it to keep it from falling.

Q. You were looking at what?

A. I was watching the freight, the trailer. I was watching the trailer and the freight coming over on me.

Q. You mean the freight on the trailer?

A. On the trailer, yes, sir.

Q. Your head was on a level with the top of the freight, wasn't it, at least as high as the top of the freight?

A. No, the freight was over my head.

Q. How much over your head?

A. I should judge about two feet.

Q. How much altogether was on that trailer?

A. It was packed up, filled up.

Q. What say?

A. It was filled up, as much as you could get on it.

Q. Well, how much was that?

A. Well, I couldn't exactly tell you how much one of those trucks holds, but I know it was full so that you couldn't get any more on it.

Q. It was about the usual load that those trailers carried, wasn't it?

A. Well, you know the pineapple boxes go away up over the truck.

Mr. Tomlinson: I move to strike that out.

The Court: Yes, strike it out.

Question repeated.

A. About the usual load.

Q. Now how long before you were injured had you been working on Pier 10?

Mr. Golenbock: I submit that has been answered three times.

The Court: I don't understand that he answered how long he had been working prior to that time. He told us how long he had been working altogether.

Mr. Golenbock: On the pier.

By the Court:

Q. Can you answer it? How long had you been working, prior, before the accident? How long had you been working continuously on this pier?

A. Before the accident on that day?

Q. No, altogether.

A. About two months.

By Mr. Tomlinson:

Q. And during that two months had you seen other loads of pineapples or merchandise similar to the load you were on go down that gangplank?

A. Yes.

Q. You had?

A. Yes, sir.

Q. How many of them, Mr. Fagan?

A. Oh, I couldn't tell you that.

Q. Quite a great number, weren't there?

A. Yes.

Q. They went down there day in and day out, didn't they?

A. Day in and day out.

Q. And the electric trucks were hauling them, weren't they?

A. Yes.

Q. Just the same as was being done on this day?

A. Yes, sir.

Q. Mr. Fagan, the company paid you $85, didn't they?

A. $85, yes, sir.

Q. Who was present from the railroad company at the time this payment was made?

A. There was two gentlemen. I didn't know none of their names at the time.

Q. Was this gentleman over here?

(Mr. Giddes was requested to stand and complied.)

Q. Was this one of them?

A. I knew one of those was Mr. Giddes; I seen him afterwards.

Q. And do you recognize Mr. Giddes?

A. I can't see him with that sun, that light.

Mr. Tomlinson: Just walk over, Mr. Giddes.

(Mr. Giddes complies.)

A. Oh, yes; I know Mr. Giddes. He had a mustache on then though.

Q. Was the other man Mr. Ming?

(Mr. Ming requested to stand and complied.)

A. Yes, I think I recognize that man too.

Q. And they paid you $85?

A. Yes.

Q. And you signed a paper, didn't you?

A. Well, they paid me $85——

Q. Now I am asking you whether or not you signed a paper.

A. I gave them a receipt.

Mr. Tomlinson: I move to strike that out. I want to get an affirmative or negative response to it.

Mr. Golenbock: I think that answer is sufficient.

The Court: No, he may answer whether he signed a paper.

Q. On that day you signed a paper, didn't you? Yes or no.

A. I signed a receipt.

Mr. Tomlinson: I move to strike that out and ask for an affirmative or negative response.

By the Court:

Q. Yes, you may say whether you signed a paper. The question of what the paper is speaks for itself. Did you sign a paper? Yes or no.

A. I did that day, yes, sign a paper. I would have signed anything.

By Mr. Tomlinson:

Q. Signed a paper?

A. Yes.

Q. Now Mr. Fagan, didn't you sign and deliver to Mr. Giddes and Mr. Ming a release?

A. No, sir; I didn't. I would be a crazy man if I did.

Mr. Tomlinson: I move to strike that latter remark out.

Mr. Golenbock: I think that ought to stand, because that answers fully whether he did or not and the reason why.

The Court: He says he didn't, and this conclusion he drew I think should be stricken out. The fact that he did not sign it may stand.

Mr. Tomlinson: But I mean his remark about being crazy.

The Court: Yes, the reason for it may be stricken out.

Q. Mr. Fagan, didn't you acknowledge before Mr. Giddes that you signed a release as your voluntary act and deed?

A. No, sir.

Q. You didn't acknowledge anything before them?

A. No, sir; I don't remember if I did.

Q. You don't remember?

A. No, sir.

Q. Now what you you mean by that? Do you mean that you didn't or that you don't remember whether you did or not?

A. I don't remember, I don't recollect.

Q. You might have done so, might you not, if you don't remember?

A. I might have done anything at all at that time.

Q. You might?

A. I was so sick and so in pain all over me I couldn't exactly tell you.

Q. So that you are not willing to swear then, are you, that you did not acknowledge before Mr. Giddes signing a release?

A. I am not willing to swear that, no.

Q. Not willing to swear that you didn't?

A. No, sir.

REDIRECT-EXAMINATION BY MR. GOLENBOCK:

Q. Do you know what acknowledging means?

A. Collision?

Q. No, acknowledging.

A. Yes.

Q. What is it?

A. To own up. To acknowledge is to own up that you have got a thing.

Q. Do you remember Mr. Giddes ever having said, "Acknowledge that you sign, seal and deliver this paper as your voluntary act and deed"? Did he ever say that to you?

A. No, sir; not to my knowledge.

Q. If he had said it to you do you think that you would have remembered it at this time?

Mr. Tomlinson: I object. In the first place it is leading and in the second place it is sup-

position, Mr. Golenbock says, "If something had happened would you have done so and so?"

The Court: Yes, I suppose it is improper in its form.

Mr. Golenbock: I submit that he said that he could not swear that he didn't acknowledge. Now it will be up to the question as to what he knows as to what acknowledgment meant, and then after explaining it I said if he had acknowledged it and if the statement had been made to him as I said in my question, whether he would have remembered it, in order to clear up his misapprehension as to whether there was any acknowledgment or not.

Question repeated.

Mr. Tomlinson: He has already said that he didn't remember one way or the other about it.

The Court: I will allow him to answer the question.

Objection noted for defendant as ground of appeal.

Q. Will you answer that?

Question repeated.

Q. If he had said anything like that.

A. He hadn't said nothing like that to me.

Q. You are quite sure that he hadn't said anything like that to you?

A. I am quite sure.

Q. And what did he say that caused you to sign that particular paper?

A. Why, he asked—in the first place when I come over there Mr. Giddes and this gentleman was down there and another gentleman and they asked me how I felt and I told them I felt very miserable

and sick and I wanted to get home; and he says, "Well, I guess you want some money." I says, "Yes." And he gave me $85 and I says to him, I says, "Can't you give me this every two weeks, the same as you gave it to the colored man that was hurt down to Broadway Pier?" He says, "No, we don't do that any more; we give it all in a lump sum for every ten weeks, a lump sum every ten weeks." And I says to Mr. Giddes then, "Well, can I come back again in ten weeks and see you or you see me for more money?" And he says, "Yes."

Q. And then what followed after that? What did he do?

A. Well, I asked him then, how is it he couldn't pay me every two weeks like this colored man that got hurt down Broadway Pier, and he told me that they didn't do that any more from May, that they paid it all in one lump sum every ten weeks.

Q. Did he produce the $85 to you and in what form?

A. He got a check and he gave me a check——

Q. How much money was the check made out for?

A. For $85. And I endorsed the check and then he asked me if I would sooner have money or the check, and I told him I would sooner have money.

Q. What did he do with the check?

A. He took the check away and gave me money.

Q. What did he say in reference to this receipt?

A. Then he put the paper right in front of me and he says, "You sign here," and I says, "All right." I signed my name, thinking I was giving him a receipt for the $85.

Q. Did he say anything to you what that paper was?

A. No, he didn't.

Q. Did he say it was a release?

A. Not to my knowledge he didn't.

Q. Was anything said either by Mr. Ming or Mr. Giddes as to releasing any of your rights in this connection?

A. No, not a thing, not to my knowledge.

Q. Now have you seen Mr. Giddes again about this same money?

A. Well, the next time I came up my wife was with me and she had a talk with them——

Mr. Tomlinson: I object to what his wife said.

Mr. Golenbock: Well, it was in his presence and I think it is competent.

Q. Were you and your wife together talking to Mr. Giddes?

A. Yes.

Q. What was said?

A. My wife asked Mr. Giddes if there wasn't something more coming to me and he said no; he said they couldn't do any more for me, and in fact they did more for me than they would for anybody else.

Q. He said he had done more for you than he would for anybody else?

A. Yes.

Q. Did he say at that time that you had given him a release?

A. No, sir.

Q. Didn't state a word about it?

A. Didn't state a word. I have got my wife for a witness he didn't say anything of the kind. There was nothing at all about a release that I know of. I would be crazy if I did it.

Q. How many men were working on this pier?

The Court: This was part of your original case, was it? Unless it is something you have forgotten.

Mr. Golenbock: It was brought out by Mr. Tomlinson and I think I want to clear that up. Of course I started on the other point first.

The Court: All right.

Q. About how many men would you say had worked on this pier?

A. I couldn't really tell you that. There was a big crowd of men there.

Q. And you received pay every two weeks, did you, in the regular course of work?

A. Yes.

Q. You didn't get paid every day?

A. Oh, no; every two weeks.

RECROSS-EXAMINATION BY MR. TOMLINSON:

Q. Now Mr. Fagan, you told Mr. Golenbock that you didn't acknowledge before Mr. Giddes signing that release. You told me that you didn't remember whether you did or not. Now which do you mean to swear to?

A. I said that—I told you that I signed a receipt on that paper that he put in front of me to sign.

Q. I ask you, Mr. Fagan, whether you didn't acknowledge before Mr. Giddes executing a release?

A. No, sir.

Mr. Golenbock: I object to the question. While it is answered and answered very favorably, I object to it on the ground that he has already explained what he meant by acknowledging, which is really not acknowledging.

The Court: The question has been asked and answered. I will let the answer stand.

Mr. Tomlinson: I hadn't finished my question, your Honor.

The Court: Well, ask the question.

Q. Now please listen to me, Mr. Fagan, and let me get through before you answer. You stated to me that you didn't remember whether or not you had acknowledged to Mr. Giddes signing a release. You told Mr. Golenbock that you did not acknowledge it. Now which do you want to swear to, what you told me or what you told Mr. Golenbock?

Mr. Golenbock: I now object to the question, that it is apparent by his definition of acknowledge that he did not know what acknowledgment was; therefore it is an improper question, because it is a comparison of testimony which is not contradictory.

The Court: Answer the question.

Question repeated.

A. What I told Mr. Golenbock, I didn't acknowledge it.

Q. So when you told me you didn't remember you didn't mean that, did you?

Mr. Golenbock: I object. That speaks for itself. The jury may take that into consideration.

The Court: I will allow that question.

A. No, I didn't mean that. I meant to say that I didn't sign any release.

Q. I was not asking you about signing a release; I asked you whether you did not acknowledge before Mr. Giddes signing a release.

A. No.

Q. You say now that you didn't?

A. I didn't acknowledge that I did.

Q. Well, why did you tell me a while ago then that you didn't remember whether you did or not?

Mr. Golenbock: I now submit——

The Court: It is admitted.

A. I misconstrued your meaning.

Q. Oh, you misconstrued my meaning?

A. Yes.

Q. And now you say that you did not acknowledge it?

A. I did not acknowledge it.

Q. You did sign a paper, didn't you?

A. I signed a release—or I signed a receipt for the money I got. There was no release mentioned to me at all.

Q. Did you read that, Mr. Fagan?

A. No, sir; I couldn't read anything that day, in fact; I was too sick.

Q. How do you know then whether it was a release or whether it was a receipt?

A. Well, I don't know, that is a fact.

Q. How big a paper was it, Mr. Fagan? Was it about that size? (Indicating.)

A. I couldn't tell you. I told you that I was so sick that I didn't really know what I was doing. I would have signed anything that day. When I got the $85 and they put this paper in front of me I signed my name to it.

Q. What color paper was it, Mr. Fagan?

A. I couldn't even remember that. I don't even remember that, because I was very sick. I was sitting in a chair at the time, one of those wheel chairs, and I don't even remember what kind of paper it was.

Q. Were there one or two pages to it?

A. I couldn't tell you that.

Q. Well, then, you really don't know what was in the paper, do you?

A. I don't really know what was in the paper.

Q. You don't really know what was in the paper?

A. No, sir.

Q. And the next time you came back Mr. Giddes told you that he couldn't do anything more for you, that he had done more for you than he could for anybody else.

A. That is what he told my wife, he was talking to.

Q. You were there, weren't you?

A. I was there, yes. I was up to see the doctor.

Q. You were there when Mr. Giddes told you that?

A. Yes.

Q. And, Mr. Fagan, you signed that paper after you had got the $85, didn't you? You got the $85 before you signed that paper?

A. No, I signed that paper before I got it.

Q. How soon before?

A. Well, I couldn't exactly tell you how soon before. All I wanted to get was my fare to get home. I was that sick that I wanted to get home. That is all I remember, and I didn't even ask for the $85. I only asked for my fare to get home. Money wasn't bothering me that day at all.

Q. You endorsed the check, didn't you?

A. I endorsed the check all right.

Q. And you endorsed the check at the same time you signed that paper, didn't you?

A. Well, I don't know. I can't tell you that. I can't swear to that. I won't swear to anything I am not sure of.

Q. Was Mr. Ming there when you signed that paper?

A. Sir?

Q. Was Mr. Ming, this gentleman here, in the office when you signed that paper?

A. I couldn't tell you that either.

Q. Where did you sign it? Where were you when you signed it?

A. I was by the ticket office, I think, by the railing here.

Q. Is that in the waiting room?

A. Yes, sir.

Q. Mr. Giddes was there, wasn't he?

A. Yes, sir.

REDIRECT-EXAMINATION BY MR. GOLENBOCK:

Q. Mr. Fagan, there had been a telephone message sent by Mr. Dorsey to Mr. Giddes that you were coming across the ferry?

Objected to as leading. Question withdrawn.

Q. Was there a telephone message from Mr. Dorsey, your foreman, to Mr. Giddes?

Objected to as leading.

The Court: Find out if he knows anything about it.

Q. Was there a telephone message sent to Mr. Giddes by any one?

A. Mr. Conover, the boss of the train, was over on the boat with me, and Mr. Reynolds; and Mr. Conover is foreman of the train, and as foreman of the train he informed Mr. Giddes of my being

downstairs when I went over. I told Mr. Conover——

Mr. Tomlinson: I object to what he told Mr. Conover.

The Court: Yes.

Q. When you reached the Jersey City side how did they bring you into the waiting room?

A. On a rolling chair off the boat.

Q. And at the time you got this money had you had anything to eat or drink from the time since you left the hospital that day?

Objected to as immaterial.

The Court: How is that competent?

Mr. Golenbock: Very competent to show his state of mind and health and condition at the time he received the $85; very competent, I submit, if your Honor please.

Mr. Tomlinson: In the first place it is leading.

Mr. Golenbock: Well, I can't ask him any other way. If you suggest it I will be glad to accept your suggestion.

The Court: Yes, he may answer that question.

Objection noted for defendant as ground of appeal.

A. No, I had nothing to eat.

Q. Or anything to drink?

A. Or anything to drink.

Q. And this was what time of day?

A. Between three and four o'clock.

Q. And you had asked for fare to go home?

A. I had asked Mr. Conover for my fare to go home.

Q. And that was the reason that Mr. Giddes came to see you?

Objected to as leading.

The Court: Yes, that question is leading. Strike it out.

Mr. Golenbock: All right. I will withdraw it.

Q. Were you at the office at the time you received the $85 or was it in the waiting room?

A. It was in the waiting room while I was on the rolling chair.

By Mr. Tomlinson:

Q. Mr. Fagan, did you ask Mr. Giddes or Mr. Ming or any Central Railroad man to get you something to eat or something to drink?

A. No, sir.

Q. Did you make any protest about signing this paper?

Mr. Golenbock: Do you understand the question?

A. That part I don't remember, I don't know anything at all about.

Q. You don't remember making any protest, do you, about it?

A. No, I don't remember making any protest at all.

By Mr. Golenbock:

Q. You were perfectly willing to sign a receipt for $85, weren't you?

Objected to.

The Court: It is too late now. You have gone into this question.

DR. JOHN BASSIN, sworn for plaintiff.

DIRECT-EXAMINATION BY MR. GOLENBOCK:

Q. Doctor, you are a duly licensed physician in the state of New Jersey?

A. Yes, sir.

Q. Where have you received your medical education, Doctor?

A. Cornell University, Long Island College Hospital, New York City.

Q. Have you had experience in connection with hospitals?

A. I think so. I was surgeon at Hahnemann Hospital, New York City, for several years, surgeon at the Red Cross Hospital, I was surgeon for St. Francis Hospital, and only very recently I was surgeon on the staff of the Ruptured and Crippled Hospital. I am an ex-Navy surgeon, seen service in this war; and I am presently consulting orthopedic surgeon at the Monmouth Memorial Hospital, Long Branch.

Q. You have examined Mr. Fagan at my request?

A. Yes, sir.

Q. When.

A. Day before yesterday.

Q. Will you describe what you found at this time from your diagnosis and examination?

A. The diagnosis is that he has a chronic dislocation of the right hip joint, by a chronic inflammation about the joints, so-called arthritis. He has a chronic sprain of the right sacro-iliac joint, which is the joint next to the spinal column and the lower arc of the right hip joint and the spinal column proper. He has a paralyzed foot, with complete destruction of the blood-vessels and coagulation of

blood. We call it a thrombophlebitis, which means destruction of the blood conveying vessels of the foot, and destruction of the end nerve of the foot, so that there is no reaction to electrical degeneration. He has also a distorted hip joint, due to muscles which have atrophied or died, partly because of the accident primarily and partly because of disuse. He has a difference in circumference between the right or alleged injured leg and thigh as compared with the left of about one inch in some places, and in some places an inch and a quarter, which is due to actual death, or as we call it, degeneration of muscular tissue because of lack of nutrition and lack of innervation. He is unable to feel pain or temperature or has no response in the foot whatever. You can cut it, burn it or do anything else with it and he would not know. It is called the natural sensation. He says it is like a great weight, which is simply a psychic imagination or psychic exaggeration, because he has no natural sense of perception for motor conduction. That is the diagnosis.

Q. Now, Doctor, you say that disuse of the hip, you mentioned partial disuse of the hip. Would you say that was because of the injury that he had sustained of the hip and for that reason it is in the present state?

A. I believe so.

Q. And would you say, Doctor, that those injuries which you have described from your diagnosis were of a permanent and lasting character?

A. I think so.

Q. And would you say, Doctor, assuming that a man who is standing upon a trailer or truck loaded with pineapple crates, and one foot on another truck that was connected with it, with a truck of pine-

apples loaded quite some distance above the height of his head, and that the pineapples fall upon this man and spread him out and strike him upon the back and dislocate his hip and injure his foot, would you say with reasonable certainty that the injuries which you find upon this man now are approximately the result of the original injury which he sustained as I have described?

Mr. Tomlinson: I object to that as leading. It is absolutely leading.

Question repeated.

The Court: That is objectionable as leading, that is all.

Mr. Golenbock: It is a hypothetical question, whether he could with reasonable certainty say——

The Court: You don't put it in that way. You ask him whether it was. You don't put it in the alternative, whether it could or could not, or anything of the kind.

Q. Can you state whether the injury which you find upon this man at the present time is proximately the result of the original injury which he sustained on August 7, 1917?

A. I believe that the injury must have taken place at that time, regardless of what the injury was. It is a question of force or violence, and the position in which the patient found himself at that time. It takes usually from four to six or eight months before an extremity of this kind will find itself so paralyzed; and since the man was injured a year ago I could reason clinically, have clinical reason to believe that the results that he suffers there are directly attributable to the cause which

is the injury alleged, I believe, to have taken place at that time.

CROSS-EXAMINATION BY MR. TOMLINSON:

Q. How many times have you examined Mr. Fagan?

A. Once.

Q. That was day before yesterday?

A. Yes.

Q. Had you ever seen Mr. Fagan before that examination?

A. No, sir.

Q. Did you prescribe for him till the other day?

A. Well, no.

Q. You made your examination, solely, didn't you, Doctor, for the purpose of testifying at this trial?

A. Not necessarily. I intended to treat this man if he wants to put himself in my charge at the Long Branch Hospital, if anything can be done for him.

Q. But I say didn't you make your examination primarily for the purpose of testifying at this trial?

A. Primarily, yes.

Q. You made this examination at the request of Mr. Golenbock, didn't you?

A. Yes, sir.

Q. You have had quite a lot of experience testifying at trials, haven't you, Doctor?

A. I don't think so. It is occasional, that is all.

Q. Doctor, as time goes on this man's condition is likely to improve to some extent, isn't it?

A. Not in my estimation.

Q. Why not?

A. Because nothing in the human body can

undergo a process of regeneration or improvement unless there is circulation. You can't reestablish in vessels where the blood is congealed, and the lining also destroyed. The linings in the vessels and the veins of that man's foot are destroyed absolutely and totally.

Q. It is better now than it was a couple months after the accident, isn't it?

A. He might be down to his foot; that I don't know. I haven't seen him in that time.

MRS. HELEN FAGAN, sworn for plaintiff.

DIRECT-EXAMINATION BY MR. GOLENBOCK:

Q. Mrs. Fagan, were you with your husband at any time to see Mr. Giddes?

A. Yes, when I took him back to the hospital.

Q. Will you tell us about when that was?

A. It was two weeks after he had come home that I saw he was in such a dreadful condition the hospitals wouldn't receive him in Asbury, and Dr. Taylor wouldn't have anything to do with it.

(Objected to as not responsive.)

The Court: No, just answer the question.

Mr. Golenbock: She is trying to fix the time from other events, and I think that is permissible to fix the date.

The Court: No, you can answer the question without going into a lot of other matters.

Q. Do you remember when he left the hospital in New York?

A. Yes, the 11th day of September.

Q. Did you have any conversation with Mr. Giddes?

A. No, not at that time. It was two weeks later

when I took him back to the hospital in his dreadful weakened condition.

Q. That was after you had taken him to the hospital?

A. Yes, after I had taken him back to the hospital again.

Q. How many weeks was that, about, after the date of the accident?

A. Oh, it was—let me see. It was about eight weeks after the date of the accident, to the best of my recollection.

Q. Did Mr. Giddes at that time, during your conversation, say anything to you about a release that your husband had signed?

A. No, sir.

Mr. Tomlinson: I object. If the court please, I object to this upon the ground that that is part of the plaintiff's direct case.

The Court: Well, he was asked that. The plaintiff was asked that question, was anything said about a release.

A. There was nothing said about a release.

Q. And what did you say to him in reference to getting money from him?

A. I asked him about the—I said how the ten weeks had expired. I spoke to Mr. Giddes about this. I says, "Now the ten weeks have expired and when shall I come? Are you going to send me money in a check or where shall I come to get the money, the compensation money?" He says, "We don't do that any more. The liability law has nothing to do with it. We are our own insurance and we pay," he said, "all in a lump sum for ten weeks'

pay. But we won't give Mr. Fagan any more money, but we will take care of him at the hospital."

Q. What hospital did he say?

A. The Hudson Street, and they wanted to send him to White Plains. I said, "Why not, as long as it is a matter of time, send him home and let me have the money that you are paying that hospital to take care of him, to help support the children?" He said, "No, we don't do business that way." We would have to go the way he done business. Then when he refused I says, "Is there anything you can give me when I take my husband home that I can earn about $2 a day?" He said, no, he was not in a position to give me anything, he hadn't anything to do with that end of it, but he could leave my address with two or three men along the line; and I tried to speak to the trainmaster and he said no.

Q. Do you recall when your husband came from the hospital the first time?

A. Yes.

Q. Do you recall in what condition he was when he reached home?

A. Yes, he was in a very weakened condition, and I thought really he would not live.

Objected to.

The Court: No, not what you thought.

Q. Will you describe his state of health and state of mind at the time, if you know?

A. Well, he was really prostrated. He couldn't even take a glass of water to take a drink. I had to feed him like a baby and wait on him just the same for those two weeks, just tend to him like a helpless child.

Q. And had you been attending to him from time to time?

A. All during that two weeks' time night and day I took care of him.

Q. Did he express pain?

A. Yes, he couldn't move himself any more than a child. He was entirely helpless.

Q. How did he express pain?

Objected to.

The Court: What did he say?

A. Pain in his back and limbs, and he would scream if I touched his limbs and upon his back to move him at all.

Q. He would what?

A. He would scream and holler with pain if I moved his back or his limb.

CROSS-EXAMINATION BY MR. TOMLINSON:

Q. The company did pay the hospital bill at the Hudson Street Hospital, didn't they?

A. I don't know that. I never knew anything about it. That is what Mr. Giddes told me, that he would pay that.

Q. You didn't pay it?

A. No, I didn't. They never sent me a bill.

Q. And so far as you know your husband didn't pay it?

A. Well, they never sent any bill to us and Mr. Giddes told me they were responsible for that.

Q. How many times did you see Mr. Giddes?

A. Twice I saw him to the best of my recollection.

Q. Were both of those times after Mr. Fagan had gotten the $85?

A. Yes, both of those times were after he had gotten that.

Q. And when you saw Mr. Giddes he said that he couldn't do any more, didn't he?

A. He said he wouldn't do any more for us.

Q. He said he couldn't, didn't he?

A. No.

Mr. Golenbock: I object. The witness said he wouldn't.

A. He wouldn't do any more than they had done for us because that is more than they usually did for any one else.

Q. Didn't he say that he couldn't do any more?

A. No, he didn't say he couldn't, because I knew he could.

Q. You are certain about that, are you?

A. I am quite certain.

Q. How do you know that he could, Mrs. Fagan?

A. Why, he could, of course. Did he expect a man that was working, when he said he would pay him half pay every ten weeks—I was looking for that half pay every ten weeks.

Q. Did he make any such promise of half pay every ten weeks?

A. With the understanding when he gave my husband that $85, that was half pay for ten weeks.

Q. You were not there, were you?

A. That is what he told me.

Q. You were not there, were you, when Mr. Giddes paid him the $85? Mr. Giddes didn't tell you that he would pay Mr. Fagan half pay for ten weeks?

A. No, he didn't; he told me the insurance company had nothing to do with it any more.

Q. He didn't tell you, did he?

A. No.

REDIRECT-EXAMINATION BY MR. GOLENBOCK:

Q. What did he say about ten weeks?

A. He said that they had taken it over into their own hands, they were their own insurance company, and they paid it in a lump sum every ten weeks, instead of giving it under the Liability Law; that had gone out of action the first of May.

Q. He would not pay it to Mr. Fagan?

A. No, but he would pay him for taking him to the hospital and everything else. And I said why not send him home and let me have the money; I could take care of him.

[PLAINTIFF RESTS.]

Motion for Nonsuit.

Mr. Tomlinson: If the Court please I wish at this time to move for a nonsuit upon two grounds: First, that the plaintiff has not shown any negligence upon the part of the defendant; and secondly, it appears that the injury which the plaintiff sustained was due to a risk which he assumed in this employment. Now I wish to call your Honor's attention to three cases on this point under the Federal Liability Law. In the first place it has been held by numerous authorities that the defense of assumption of

risk still exists to an action brought under the Federal Act.

(Argues and cites authorities.)

In this case it is true that the plaintiff says that this was his first trip on these trucks, but he also says to the court that he had seen this same thing being done time and time again; that this load which he undertook to take down on the day in question was the usual load that was taken day in and day out; that the reason he knew he should keep his foot on that pin going down the incline was because he had seen other men do it; he had observed time and time again other employees doing precisely the same thing which he was doing on the day in question; but he admits that he made no protest about taking this down. It was a risk which was entirely obvious, and I submit was assumed by him, and I think we are certainly entitled to a nonsuit.

(Mr. Golenbock replies.)

Mr. Tomlinson: To make myself entirely clear, I move for a nonsuit, first upon the ground that no negligence has been shown upon the part of the defendant; and secondly, I move for a nonsuit that even though the defendant was negligent, the plaintiff assumed the risk of such negligence, which was obvious.

The Court: What do you consider the negligence which you have shown? That is the only thing that bothers me.

Mr. Golenbock: I consider negligence in various things. I consider first the improper loading, the height of the load; second, as to

the condition of the connecting plank between the pier and the barge.

The Court: What is the difficulty with that?

Mr. Golenbock: That the tide having been lowered, the point of the plank was raised above the level of the floor boards.

The Court: Where is there any evidence of that?

Mr. Golenbock: There is some. The plaintiff testified to that, that as it struck the plank it jumped up because of the tide being low, and as it jumped up it shook the load and going down the incline the load fell.

Mr. Tomlinson: If the court please, there is not a particle of evidence that this stuff was loaded defectively and there is not a particle of evidence that there was any negligence in that platform or in the gangplank leading down to the float.

The Court: I will refuse a nonsuit and give you an exception.

Objection noted for defendant as ground of appeal.

DEFENDANT'S TESTIMONY.

TONY PALMIERI, sworn for defendant.

DIRECT-EXAMINATION BY MR. TOMLINSON:

Q. Where do you live?

A. I live 167 East 102nd St., New York.

Q. Where do you work?

A. Pier 10, New Jersey Central Railroad.

Q. Were you working there the day that Mr. Fagan was hurt?

A. Yes, I used to run the machine.

Q. You were doing what?

A. Running the machine.

Q. Running what machine, Tony?

A. The electric machine.

Q. Electric truck?

A. Electric truck, yes, whatever you call it.

Q. Were you driving the truck that was hauling the truck that Mr. Fagan was on when he got hurt?

A. Yes, he was on the machine. He come with me on the machine.

Q. Now just how did the accident happen, Tony, so far as you know? Tell us what you know and don't tell us anything more.

A. He was on the machine and there was nothing on the platform of the machine. The machine was empty.

Q. On what platform?

A. On the machine platform.

Q. On the platform of the electric truck?

A. On the platform of the electric truck, yes. And I used to pull trailers loaded with pineapples and they had a load of pineapples on and he was on the machine, standing on the machine, and when I went down the plank the tide was——

Q. Where were you going to take those pineapples?

A. Into the float from the car. You go in the car and when I went down the plank he was standing this way on the machine, with his hands by the pineapple crates. I don't know if he could hold or not, but the load fall down and they fall on top of his legs.

Q. Which way were you facing as you went down the gangplank?

A. Looking in front.

Q. You were facing front?

A. Yes. Of course I had to look what I was going over with the machine; I couldn't look behind.

Q. Do you know which way he was looking?

A. I don't know. He was standing with his hands by the pineapples. I don't know if he was looking side or front, because I can't look behind all the time.

Q. How many times did you turn around as you were going down?

Mr. Golenbock: I object to that as leading, whether he did or not. He said he couldn't look around.

The Court: Yes, it is leading.

Q. How many times, if any, did you turn around?

Mr. Golenbock: I object. That does not cure it.

The Court: Yes, that cures it.

Q. How many times, if any?

A. Well, I turned around once in a while; I couldn't say how many times. I have got to look once in a while because I have got to watch the load, if it is falling down or not, you know.

Q. Was this the first time you had worked with Mr. Fagan?

A. That was the first day.

Q. Was it the first time that day? Had you worked with him before that day?

Mr. Golenbock: I object to that as leading and improper. Of course it is an essential feature of the defense.

The Court: Yes, let him tell about what he had done.

Q. Had you worked with Mr. Fagan on the same day before the accident?

A. You mean before that day?

Objected to.

The Court: Yes, I will allow that.

A. Before that day, you mean?

Q. No, the same day, before the accident happened?

A. Oh, yes; sure. I don't know, from nine or half past nine in the morning to the time he stopped.

Q. What time did this accident happen?

A. Well, he used to come over there about nine or half past nine from Jersey, started work over there about that time.

Q. What time did he get hurt that day?

A. About four o'clock, I think.

Q. What were you doing when you were working with him that same day? What sort of work were you doing with him?

A. This same work, put any kind of freight on the trailers.

Q. Freight on trailers?

A. Any kind of freight, and we pulled them in.

Q. Well, during that same day had he or had he not worked on those trucks hauling those trailers with you?

A. Yes, that day.

Q. He had that day?

A. Yes.

By the Court:

Q. How many times had he been with you down there making these trips?

A. Well, I can't remember that.

Q. Well, how many? Can't you give us any idea?

A. Because sometimes I used to pull the trucks, sometimes I used to get a load on the machine. I can't tell you anything about that, how many times.

By Mr. Tomlinson:

Q. Have you any idea?

A. I used to pull the trailer the time they had a load on it. Sometimes it was empty, just to get a load on the machine. I don't know. I couldn't tell you about that, because we had plenty of trucks to pull them in anyway.

Q. What time that day did you start in to work with Fagan, about what time?

A. Started work in the morning, the machines.

Q. Well, whatever you started that day about what time was it?

A. About nine or half past nine.

Q. Did you work with him all day up until half past four or four o'clock?

A. All day, to the time he got hurt.

Q. Now just tell us, Tony, what you did that day while you were working with Mr. Fagan.

Objected to.

The Court: He says he had worked with him, now he asks him what he was working at.

Question repeated.

Q. What sort of work were you doing with Fagan that same day?

A. Well, I used to pull trailers in the car and only he had to hook her up, hook on the machine and hook her up when he run on the cars.

Q. What was Fagan doing?

A. On the machine?

Q. Well, the work that you were doing that day?

A. He was standing on the machine when I go on the float, but he had to hook up the trailer behind the machine, and after that he had to watch the load.

Q. Had he gone down the gangplank with you that day before the accident happened?

A. Before that day?

Q. No, that same day before the accident happened, had you made any other trips with Fagan that day?

A. Sure.

Q. And what kind of loads did you have on at those times? What kind of loads did you have on these other trips you made with Fagan that same day?

A. Well, any kind of groceries there was on, pineapples and everything.

By the Court:

Q. Was this truck loaded differently from the other trucks that you had been carrying down that day?

A. Well, there would be only one kind of freight. There is lots of different kinds of freight.

Q. I mean was it piled up the same way, was it loaded the same way as you ordinarily loaded it?

A. Well, some heavy and some light, you know, like that; all different.

Cross-examination by Mr. Golenbock:

Q. Tony, how long have you been working for the railroad?

A. Who, me?

Q. Yes.

A. Well, I have been working there about two

years now, but I have been working before in 46, and about three years before after that I quit the job and went out of New York and come back in New York and started over there again.

Q. Is that all together about two years?

A. Working now about six years with the Jersey Central.

Q. Six years with the Jersey Central?

A. Yes.

Q. And at the time or about the time of the accident or in August, 1917, you were what they call an electric freighter?

A. Electric truck.

Q. You had charge of an electric truck?

A. Yes, sir.

Q. And the men who are what they call electric freighters, they have got something to do with the loading of trucks, have they?

A. They have got to pull them in.

Q. But they have nothing to do with the loading of them? They don't load them?

A. No, they don't load them.

Q. All you have to do is just stand on the truck and take them in?

A. Yes, sir; that is all.

Q. You would go on the dock with your electric truck and hook up to any trailer, wouldn't you?

A. Yes, sir.

Q. Do you know how many men were working as electric truck freight men?

A. Men unloading, you mean?

Q. How many men were there about?

A. Well, I don't know; sometimes two or three, sometimes less, sometimes more.

Q. Two or three on the whole pier?

A. No, I mean to load them trucks. The whole pier, you mean?

Q. Yes.

A. Oh, there is a pretty big crowd of men.

Q. Well, were there as high as two or three hundred men?

A. No.

Q. Two hundred men?

A. I don't think there was a hundred men working there.

Q. Well, were there a hundred men?

A. Pulling hand truck and doing any kind of work.

Q. Wouldn't you hook up your truck to any truck and any man around go on there? You didn't have any particular man always working with you, did you? Do you understand my question? When you worked on that day you didn't have any particular man to help you, did you?

A. No.

Q. No particular man; your truck would be hooked up to another trailer and any man would be put on that trailer and go with you; is that right?

A. Any man, yes.

Q. And you never had a man all day to work with you steady on the trailers?

A. Well, I had a man pretty near steady that time, on another machine, but that day he was short, I didn't know if he was coming to work or not, and I had this man.

Q. But I am talking in general, that you never had a man steady with you all day long?

A. The other day I had a man steady.

Q. All day long?

A. The other day I had a man steady.

Q. I am not talking about the other day, I am

talking about generally. Generally did you have any steady man to work with you?

A. You mean that day?

Q. Any day.

A. Any day? Before I had a steady man to work on the machine.

Q. Did you always have a steady man to work with you?

A. That man is there yet.

Q. Does he always work with you on one truck?

A. Yes.

Q. This same man?

A. Yes.

Q. Every day?

A. Yes.

Q. You are sure of that?

A. I am sure, every day, yes.

Q. I thought you said a minute ago that you would hook up your electric truck to any trailer and any man would get on there to unload.

A. But it was the same electric truck pulled trailers in the car every day, you know.

A. I understand that, it is the same electric truck, but I am talking about the same man would go on there and unload. It is not the same man all the time?

A. Yes, I had the same man work with me all the time.

Q. What did you mean before when you said that your electric truck would be hooked up to any trailer and any man that happened to be on the trailer would go with you?

A. Any man could do that work, sure.

Q. Any man could do that work?

A. Yes.

Q. Now as you were going down this plank—there was a plank between the pier and the barge?

A. Between the pier and the float or the barge.

Q. And the tide was low that day, wasn't it?

A. Yes, it was low.

Q. So there was quite an incline between the pier and the barge, wasn't there?

A. It was about the—I don't know. The tide was low. I can't tell you.

Q. Well, didn't you feel that your truck was going down at the time when you passed this plank between the barge and the pier?

A. You don't feel it; you go down easy.

Q. When you struck this plank you could tell, couldn't you? You could tell when you struck that plank, couldn't you? Can't you tell when the tide is low?

A. Well, I can tell but I don't know if I can tell you how much it was low, how many feet it was low.

Q. Can't you tell how many feet?

A. Might be four or five feet low.

Q. Might be four or five feet?

A. Yes.

Q. You are still working for the railroad?

A. Yes, sir.

Q. Has anybody talked to you about this case?

A. No, sir.

Q. Nobody at all? Did Mr. Tomlinson talk to you about this case?

A. There was a man a long time ago, but I don't remember.

Q. Nobody talked to you since?

A. No, sir.

Q. Nobody at all?

A. No, sir.

Q. And you still work for the railroad?
A. Yes, sir.

JOHN TOOMEY, sworn for defendant.

DIRECT-EXAMINATION BY MR. TOMLINSON:

Q. Mr. Toomey, where do you live?
A. I live at Jersey City, 169 Wilkinson Avenue.
Q. What is your occupation?
A. General foreman.
Q. Where?
A. Pier 10, North River.
Q. For the Jersey Central Railroad Company?
A. For the Jersey Central Railroad Company.
Q. How long have you been employed in that capacity?
A. I am working, I am ten years general foreman.
Q. Mr. Toomey, how was freight transferred from Pier 10 onto the floats?
A. Well, it is whatever commodities we have. We transfer it from the bulkhead to the cars by hand truck, and we also transfer it on four wheeled trucks that we call trailers, pulled by our motors, electric motors. Certain commodities, and of course certain classes of freight, which there is an amount of, of course we use trailers, we call them, and straight lots. That is the mode of our doing work there, both with the hand truck and trailer.
Q. How big are those electric trucks?
A. Well, the electric motor is about seven feet long.
Q. How big are the trailers?
A. The trailers are about equal length, about seven feet.

Q. How were the trailers and the trucks hitched onto each other?

A. By a coupler.

Q. Now I show you Exhibit B for Identification and ask you where that is fastened.

A. This here is fastened to the back of the motor.

Q. That is the electric truck?

A. It sets right down on the back of the motor that way, yes, sir. (Illustrating.)

Q. And I show you Exhibit A for Identification and ask you what that is.

A. That is our hook we use for our trailer, hooks right in here. (Indicating.) These two bolts are fastened to the trailer. These are fastened to the trailer, bolted in. This is our mode of handling and that, of course, that is bolted to the motor to hold it.

Mr. Tomlinson: I offer these in evidence.

(Exhibits A and B for Identification marked Exhibits D1 and D2.)

The Court: If the plaintiff wants to cross-examine before they are offered——

Mr. Golenbock: I have no objection. I don't see the materiality, therefore I don't object.

Q. Now Mr. Toomey, how is this freight loaded onto the trucks?

A. How is it loaded?

Q. Yes, sir.

A. Well, it is all according to the commodity. Now if we have groceries and bags of flour and crates of pineapples, they are all loaded in the same way on the trucks and they are loaded by four men every day; they do nothing else but load them trucks every day.

Q. How do you actually get them off of the float?

What passageway is provided, if any, from the pier to the float?

A. Well, we have got a plank eighteen feet long reaching from the bulkhead to the float for our gangplank. That is eighteen feet.

Q. How wide is it?

A. About seven feet and a half wide.

Q. Now is that gangplank always level?

Mr. Golenbock: I object. It is leading. The proper question, it seems to me, would be to describe the condition.

The Court: Yes, describe how it was.

Q. Well, go ahead and describe the condition.

A. What, about the plank?

The Court: Yes.

A. The plank is about eighteen feet long and about seven feet and a half wide, with an uplift of about a foot and a half as a guard; that is the guard rail; set from the bulkhead to the float platform. And of course the plank elevates with the rising and lowering of the tide. If the tide comes up we have a grade; if the tide goes down we also have a grade.

Q. Do you know what angle there is to that plank at low tide?

Mr. Golenbock: I object unless it is shown that this same condition as described in the question—it is very indefinite—is the same as that condition which existed at the time of the accident.

The Court: I will allow that question as to the general thing. Of course it does not apply to this case unless you show what it is.

Mr. Tomlinson: No, sir; my thought is,

however, that the witness Palmieri testified, as I understand his testimony, that it was nearly if not quite low tide. Now I would like to see what the angle is at low tide.

The Court: Yes, I am going to allow it.

A. Our tide has a drop of about four feet and a half, and that is generally the normal drop of the tide, about four feet and a half; and it is say about fifteen per cent. grade; that is, from the bulkhead.

CROSS-EXAMINATION BY MR. GOLENBOCK:

Q. Mr. Toomey, you were not present at the time of this accident?

A. I was on the bulkhead, yes, sir.

Q. But you were not present to see the accident?

A. I was on the bulkhead about fifty feet away from this plank.

Q. You didn't see the accident, did you?

A. I saw the truck going down at the time.

Q. Did you see the accident? You didn't see the crate fall on the man, did you?

A. No, sir.

Q. You know Howard Dorsey?

A. Yes, sir.

Q. He is still in your employ?

A. Well, I don't know.

Q. And you wouldn't say he is not.

A. He is not with me on Pier 10.

Q. You would not say he is not connected with the Central Railroad of New Jersey at this time?

A. No, I wouldn't say not, for I don't know anything about it.

Q. Is he here in court?

A. Not as I know of. I don't see him.

Q. He is the man who had immediate charge of Fagan?

A. Yes, he was foreman of Mr. Fagan at the time.

Q. Now you have one kind of trailers or several kind of trailers?

A. Well, we have got four wheeled trailers. These are all the same, four wheeled trucks.

Q. Did you have protecting sides on the front and rear above them?

A. When we are on certain commodities, heavy groceries, we put a side on.

Q. In other words, some trailers are protected on the front and others are not; isn't that right?

A. It all depends upon the commodity we are loading. If it is a small commodity I use a rack. If it is groceries, something small, I have got to protect, I do so. But with bales or bags of flour that lays directly across the truck I don't use racks.

Q. If you wanted to you could use racks?

A. Well, if I wanted to I could use them.

Objected to.

The Court: I think I will allow that.

Q. As a matter of fact your trailers are constructed so that racks can be used on all sides; isn't that right?

A. Well, they are. They come here with two racks. That is the way we get them, two racks. You don't get any in the front and back at all, get two racks for the sides, side racks.

Q. Do you mean to tell this court and jury that the trailers haven't any guards in the rear?

A. It has got two side racks.

Q. How about the back and front?

A. There is no guard on it.

Q. Is there at any time on any truck?

A. Why, a little pipe or guard, that is about all, stands about that high from the truck, (indicating), just a pipe, that is about all the guard there is there.

Q. Haven't you seen trailers that had guards on the back and front?

Mr. Tomlinson: I object. I don't think it makes any difference if this witness has seen other trailers with racks. What possible difference does it make?

The Court: No, the only question is what the trailers were on this particular day.

Mr. Tomlinson: Were in use at the time of this accident.

The Court: Yes.

Mr. Golenbock: My question relates to that time.

Mr. Tomlinson: No, you said any trailer.

Mr. Golenbock: My general questions were relating to that. That is what I had in mind.

Q. At the time of the accident you had trailers that had front and rear guards?

A. Our trailers, we have got——

Q. Did you? Yes or no.

A. I want to answer you right. Our trailers—we have got racks. Trailers come through with two side racks and we have had one set of trailers come through with a little pipe front, or rack, and bend this pipe in the front about two feet and a half in height, one for the front of the truck. That is the only rack I ever saw on the front truck.

Q. That is on the front of the truck? That is on the front?

A. Yes.

Q. In the rear also?

A. Not in the rear, just the two sides.

Q. At or about the time of the accident had you seen any trailers used by other railroads which had guards all around?

Objected to. Objection sustained.

Q. You still work for the railroad?

A. Yes, sir.

Q. General foreman?

A. Yes, sir.

Q. Have been working for the railroad for how long a time?

A. Thirteen years altogether.

WILLIAM W. GIDDES, sworn for defendant.

DIRECT-EXAMINATION BY MR. TOMLINSON:

Q. You live where?

A. Dunellen, New Jersey.

Q. By whom are you employed?

A. The Employers' Liability Assurance Corporation of London.

Q. Where is your office?

A. 56 Maiden Lane, New York.

Q. What is your occupation?

A. Lawyer.

Q. Before going with that concern were you employed by the Jersey Central?

A. I was.

Q. In what capacity?

A. Special claim agent.

Q. And how long had you been so employed?

A. Since 1912, June 17th.

Q. Do you know Mr. Fagan?

A. I do.

Q. Did you have an interview with him about this accident?

A. In regard to a settlement.

Q. How many conferences did you have with him?

A. So far as the settlement was concerned I had but one conference, and then I saw him on a number of occasions after that.

Q. Did you or did you not come to any agreement with him?

A. I did.

Mr. Golenbock: I object to that as calling for a conclusion, as to an agreement.

The Court: Yes. What took place?

Mr. Golenbock: I ask that the answer be stricken from the record.

Q. What was the result of your conference?

Objected to.

The Court: What the result was, that comes to a conclusion too. Find out what the conferences were, more what you want to get at.

Q. You had several conferences with him, you testified?

A. I did.

Q. What did Mr. Fagan say at these conferences?

A. On September 11, 1917, the date of the first conference, I was informed that he was downstairs in the waiting room of the Terminal at Jersey City and that he desired to adjust his case. As I had the adjustment in charge I went down with Mr. Ming and discussed his case with him and told him that we did not consider that there was any liability in his case, as it was a Federal Employers' Liability case and not a compensation case.

Q. What do you mean by a compensation case?

Mr. Golenbock: I object. It speaks for itself.

The Court: Proceed. What did he say?

Mr. Tomlinson: Did your Honor rule upon that question?

The Court: Yes. I don't think it is important. Let's find out what he said.

A. And after discussing the case for a short time I told him that I would give him $80 to adjust his case, and finally agreed to give him $85 as a final adjustment of his case. He agreed to accept——

Mr. Golenbock: I object to what he agreed.

The Court: What he said.

A. He said he would accept the $85 as a final adjustment, and I arranged to have a release drawn, as well as a draft for the $85. This was brought down by J. A. Hone, who was a stenographer in our office at that time.

Q. Where is Mr. Hone now?

A. He is in the service, Camp Dix.

Q. Go ahead.

A. And when the release was brought down Mr. Hone, Mr. Ming and another gentleman and Mr. Fagan were present; and I gave the release to Mr. Fagan to read over. He apparently read it, took it and looked it over the same as any one else would who was intending to read it. After he had read it over I explained its contents, stating that it was a release in which, for the consideration of $85, he was releasing his claim against the railroad; and he signed the release and then I took the usual acknowledgment, after which I presented him with a check for $85. After the release had been executed

—at the time of the execution of the release Mr. Ming and Mr. Hone were present, as well as myself. They were present also at the time that I delivered the check. Mr. Fagan said he desired the cash and I sent Mr. Hone to one of the offices to procure the cash, after the draft had been endorsed by Mr. Fagan.

Q. Did you at any time tell Mr. Fagan that this was merely a receipt?

A. No, absolutely not.

Q. Did you ever at any time thereafter promise to pay Mr. Fagan any additional sums?

A. No, I refused to do that.

Q. Did you tell Mr. Fagan or Mrs. Fagan that you would pay them a lump sum for compensation for ten weeks at any time?

A. No.

Q. What did you do with the release, Mr. Giddes?

A. I took it up to the office and prepared the usual letter and sent it to the comptroller, who has charge of all——

Mr. Golenbock: I object to what this witness did with the release, not in the presence of this plaintiff.

The Court: What he did with it, I think that is competent.

A. Sent it to the comptroller, to whom we send all the releases.

CROSS-EXAMINATION BY MR. GOLENBOCK:

Q. That was nothing so wonderful or extraordinary, was it, your sending it to your comptroller?

A. No.

Q. That was part of your duty, wasn't it?

A. Yes.

Q. So there is nothing about that that enters into the case one way or the other, does it, what you did with the release?

A. I don't know whether it does or not.

Q. You are a lawyer, aren't you?

A. I am.

Q. How long have you practiced law?

A. Since 1915.

Q. Was that during the time you were settling cases for the Central Railroad?

A. Not during all the time I was settling, no.

Q. But you were a lawyer while you were getting releases for the Central Railroad?

A. For some of the time, yes.

Q. Do you call that practicing law too?

Mr. Tomlinson: I object. That is absolutely improper.

The Court: Immaterial.

Q. You say you took the usual acknowledgement. That was after you gave Mr. Fagan the money?

A. No, before I gave him the money.

Q. You took his acknowledgement before you gave him the money?

A. Yes.

Q. You made him raise his right hand?

A. No, I didn't make him raise his right hand.

Q. And you say you gave it to him to read over?

A. Yes.

Q. And he read it over?

A. Yes.

Q. How long did it take him to read it?

A. Well, it took him a little while.

Q. How long?

A. I don't know the exact time.

Q. Five minutes?

A. Probably five or six minutes.

Q. He read it carefully, didn't he?

A. Yes, he took his time.

Q. And because of the fact that it took him so long and he read it carefully you thought it best to read it to him afterwards, didn't you?

A. No, I didn't read the whole thing.

Q. Didn't you say that after he read it you read it to him?

A. No, I said I explained it to him.

Q. The fact that he read it about ten or fifteen minutes, did you think it was necessary to explain the release to him?

A. Yes, because I always do that.

A. Do you remember a gentleman by the name of Reynolds?—Stand up, Reynolds.—Do you remember that gentleman?

A. I don't know whether I have seen him before or not.

Q. Do you remember whether he was present when the $85 was given?

A. I couldn't state positively. I know another gentleman was present whose name I didn't know.

Q. What did you say to Mr. Fagan? Did he swear to it?

A. I explained to him that in consideration—for the consideration of $85 he was releasing the railroad from any further claim, and then I gave him the usual statement that I do in taking——

Q. Don't tell us what the usual is. Tell us what it was on this occasion.

A. I said, "Do you acknowledge that you sign, seal and deliver this release as a voluntary act, for the uses and purposes therein expressed?"

Q. You said all that to him?

A. Always do.

Q. I didn't ask always, but did you say that to Mr. Fagan?

A. I did.

Q. And he said yes?

A. Yes.

Q. You said you offered him $80?

A. At first.

Q. And then you finally magnanimously agreed to give him $85?

A. Yes.

Q. Wasn't there some talk about ten weeks pay?

A. No, it couldn't be ten weeks, because——

Q. Never mind why. And wasn't it the basis upon which you arrived at $85, ten weeks half pay?

A. No.

Q. It was not?

A. No.

Q. You knew that Fagan had no money to go home with, didn't you?

A. No.

Objected to as immaterial.

Q. Weren't you informed at the time that Fagan was in the waiting room that he didn't have any money to go home with?

Objected to as immaterial.

Mr. Golenbock: They brought that out, that he was informed that he was downstairs.

The Court: I think I will allow that. There was some evidence as to his having said something about it.

Objection noted for defendant as ground of appeal.

A. No, because he——

Q. Not why. You answer no; that is all. You are a lawyer; you know how to answer questions. You did give him transportation too, didn't you?

A. No, not I.

Q. Who gave him transportation?

A. I don't know. I presume Mr. Ming must have given it to him.

Q. Wasn't it in your presence?

A. No.

Q. Didn't you tell Mr. Ming to give him transportation?

A. No, Mr. Ming had charge of that himself.

Q. You say you discussed the thing a short time. What do you call a short time?

A. Well, we were there probably fifteen or twenty minutes.

Q. That is all?

A. About that length of time.

Q. Would you say it was longer or less time than fifteen or twenty minutes?

A. No, I think it was fully fifteen or twenty minutes.

Q. No longer?

A. I say fully fifteen or twenty minutes.

Q. I am asking you whether it was longer than fifteen or twenty minutes or not.

A. I don't know.

Q. Is that the maximum time that this transaction took?

Mr. Tomlinson: He said he didn't know.

Mr. Golenbock: I want to pin him down to the time.

The Court: Yes, you may find out.

A. I don't know exactly the time, because I didn't take it.

Q. You say between fifteen and twenty minutes, so you are leaving yourself five minutes leeway as a minimum and maximum time?

A. I just gave that, not as being any statement of any measurement.

Q. Then I am asking you whether twenty minutes is the maximum time that the transaction took.

A. It may have been a little more or a little less.

Q. How much more?

A. Probably five or six minutes more, or five minutes less.

Q. And may have been half an hour more?

A. No, I wouldn't say anything of the kind.

Q. What was the minimum time that the entire transaction took?

A. I can't tell you.

Q. When you first said fifteen or twenty minutes wasn't that correct in your mind as the correct time that the entire transaction took?

A. Yes, I think it took about fifteen or twenty minutes.

Q. And during that time it took Fagan ten minutes to read this over, didn't it?

A. That was during the discussion.

Q. You said the discussion took a short time and you had in mind the entire transaction?

A. I had no such thing in mind. I can't anticipate what you want me to say.

Q. Didn't I frame my question to include the entire transaction, and your answer was that to your knowledge it was fifteen or twenty minutes it lasted?

A. That was in discussion before the release was executed.

Q. Now you want to modify it, before the release was executed? Now have you told us, if that is your final answer, how long did the entire transaction take?

A. About—well, about a half hour.

Q. Now, Mr. Giddes, isn't it true that after you have answered that the entire transaction took you between fifteen and twenty minutes, and followed by my question that this man, the plaintiff, took about ten minutes to read the paper, that you saw your error as to the time and you changed your answer?

A. No, absolutely not.

Q. You are connected with what company, did you say?

A. Employers' Liability Assurance Corporation.

Q. Isn't that an insurance corporation that carries insurance for accidents and compensation for employers and employees?

A. Yes.

Q. And you are still settling cases for that company, aren't you?

A. No, I am trying for them.

Q. Don't you often settle cases as well?

A. No, I don't settle all cases.

Q. Never settle any cases?

A. No, we have other men to do that.

Q. Isn't it customary for even a trolley lawyer to settle cases?

Mr. Tomlinson: I object to what is customary.

The Court: Immaterial.

Q. Now you say that was the first time you ever met Fagan?

A. Yes.

Q. And did you notice what state of mind he was in, what condition of health he was in at the time?

A. Yes.

Q. Did you pay any attention to that?

A. He was in the usual condition of a man who had been in the hospital.

Q. How could you tell it was the usual condition when that was the first time you had ever met him?

A. Because I have seen many, many men who have been in the same condition.

Q. You judge him and his condition at that time by other men?

A. Yes.

Q. Although you didn't know--did you know the seriousness of his injury at that time?

A. I knew that he had a broken leg.

Q. Did you know the seriousness of the injury that he had at that time?

A. Well, I didn't know that he was—I don't know whether I appreciated the entire seriousness at that time or not.

Q. And yet you mean to tell the court and jury that you judged his condition at that time by other men, although you didn't know what condition this man was in?

A. Certainly.

Q. After paying the $85 there was no further need of your having any further transactions with Mr. Fagan?

A. Only with the requisite treatment; and we always allowed men to be treated at our emergency hospital.

Q. Where is your emergency hospital?

A. Jersey City.

Q. What hospital?

A. Emergency hospital conducted by the Jersey Central Railroad.

Q. And for that reason you went to see him?

A. Oh, no.

Q. Did you ever go to see him at his house?

A. No.

Q. Did you ever have a conversation with him and his wife with reference to further money?

A. Yes.

Q. Didn't they come to you and ask you after the first ten weeks were up for ten more weeks?

A. No, they just came up to——

Q. You just answer no. Didn't they mention in their conversation that $85 was for the first ten days (*sic*) pay?

A. No.

Q. They never spoke a word about it?

A. No.

Q. And you never said a word to them about the release, did you?

A. Oh, yes.

Q. Sure about it?

A. I did.

Q. In spite of the fact that you told them there was a release, they again called upon you, did they?

A. Yes.

Q. And didn't you invite Mr. Fagan to call and see you?

A. No, not to come and see me.

Q. Never did?

A. Simply to go to the doctor.

Q. You never invited Mr. Fagan to come and see you?

A. No.

Q. Positive about that?

A. Yes.

Q. You are as positive about that as anything else you have testified today, aren't you?

A. I am positive I didn't invite him to come to see me.

Q. I ask you if this letter was signed by you. Is this your signature? Just look at the signature. (Letter shown witness.)

A. Yes.

Mr. Golenbock: I offer it in evidence.

Objected to as incompetent, irrelevant and immaterial.

The Court: I don't think it is material now.

Mr. Golenbock: I will show your Honor the contents of it.

The Court: It is not your case now.

Mr. Golenbock: But I am cross-examining.

The Court: But you can't offer it on cross-examination. You may offer it for identification.

Mr. Golenbock: All right. I offer it for identification.

(Letter marked Exhibit C for identification.)

Adjourned till November 7, 1918, 9.30 A. M.

FREEHOLD, N. J., November 7, 1918.

Trial of the cause resumed at 9.30 A. M.

WILLIAM W. GIDDES, resumed.

CROSS-EXAMINATION BY MR. GOLENBOCK:

Q. Mr. Giddes, you said you had several conferences with the plaintiff. Can you give us the time when these conferences took place?

A. They were subsequent to the first conference. I can't give you the periods, however, the dates.

Q. Wasn't the second conference, that is, the one after you had given him the $85, a little after ten weeks from that time?

A. I couldn't say.

Q. You wouldn't deny that it was ten weeks or thereabouts?

A. It may have been around that period.

Q. Now you say that all the difference that there was between your figure and Fagan's figure was $5? You understand my question, don't you?

A. No, he didn't put up any figure. I offered him that amount.

Q. So that it was of your own accord and your own good nature and kind feeling towards him that you increased the amount $5?

A. Yes.

Q. What made you do that, sympathy?

A. As usual in striking an adjustment.

Q. Well, there was no discussion between you and Mr. Fagan about this; why would you then increase your offer $5?

A. He didn't want to accept the amount that I had offered originally.

Q. I understood you a few previous questions to say that there was no discussion as to price, that you increased it of your own free will. Now how do you account for your last answer then?

A. Well, when a man won't accept the amount that I offer then I increase the offer.

Q. So that there was a difference between your amount that you offered him and the amount that he would accept of $5?

A. That he finally accepted. Yes, the difference was $5.

Q. When did you graduate as an attorney, Mr. Giddes?

A. In February 1914 or 1915, I have forgotten which. It is either 1914 or 1915.

Q. You said yesterday that you became a lawyer in 1915. Is that right?

A. It is either 1914 or 1915.

Q. Where did you graduate from?

A. New York University.

Q. Did you take a night course or a day course?

Objected to.

The Court: It is immaterial.

Mr. Golenbock: I want to show by the next question as to what his occupation was at the same time. I am trying——

The Court: You may ask him directly whether he had any other occupation, if you think it makes any difference.

Q. Prior to your becoming a lawyer what was your business?

Mr. Carton: I object to that as absolutely immaterial. What relevancy can that have in this case, as to becoming a lawyer?

Objection sustained.

Q. How long had you been working for the Central Railroad?

A. Since 1912.

Q. So that you were working for the Central Railroad while you were studying for your legal profession?

A. Not in the University.

Q. What do you mean when you say not in the University?

A. I took the course in the University prior to 1912.

Q. How long had you been an adjuster altogether?

A. Since 1912.

Q. There is a difference between a special claim agent and an ordinary claim agent, is there not?

Mr. Carton: I object. I can't see that it has any relevancy.

The Court: Why do you think it has?

Mr. Golenbock: I want to show by my next question, if your Honor will permit the witness to answer this, to show what the qualifications and what his special work was, to adjust cases of this kind, and to show the efforts made by this witness to settle this man's case in the manner that he has.

The Court: Well, does that make any difference?

Mr. Golenbock: Well, it might show the intent of this witness at the time to accomplish just what he has done in the manner that he has accomplished it.

The Court: The question is whether or not there was misrepresentation at the time the release was executed such as to make it void; otherwise it will stand.

Mr. Golenbock: But we may show the special ability of this witness to do the very thing he has done in the manner he has done it.

The Court: The objection is sustained at this time.

Mr. Golenbock: I will withdraw the question.

Q. You are known as a special claim agent?

A. I was.

Q. I mean at the time you were working for the Central Railroad.

A. Yes.

Q. You were not always a special claim agent?

A. No.

Q. That is, you had graduated into this special claim agent's position after several years' work for the Central Railroad?

A. No, it was just a change of titles when the new claims attorney took office.

Q. And as special claim agent you were given special cases to adjust, weren't you?

A. No, I adjusted all cases just as before when I had the title of claim agent.

Q. Can you account for the change in title?

A. Only that the claims attorney came from the New York Central and had special claims agents on the New York Central and he appointed two on the Jersey Central.

Q. Now then, there were special claim agents as well as ordinary adjusters, weren't there?

A. Yes.

Q. And you became one of the special claim adjusters?

A. There were no adjusters; one was special claim agent and the other claim agent.

Q. You became a special claim agent?

A. Yes.

Q. That was of a higher grade than claim agent, wasn't it?

A. Yes.

Q. And you got that title or office because of your peculiarly good qualifications as an adjuster?

Objected to. Objection sustained.

Q. Mr. Giddes, as an attorney didn't you at the time think that it was unethical to get a release from this man for $85, being in the condition that he was that day?

Objected to. Objection sustained.

Q. Why didn't you wait until Mr. Fagan got home and call on him at his house and talk to him about settlement?

A. Because I was informed that he wanted to settle his case.

Q. Isn't it a fact, Mr. Giddes, that you were informed that he wanted some money to get home?

A. No.

Q. Weren't you told that at that time?

A. No.

Q. Sure of that?

A. No, because I understood he was to receive a pass to get home.

Mr. Golenbock: I move to strike out what he understood.

The Court: Yes, you may strike that out.

Q. During the conversations that you had, or conferences, as you call them, after September 11th, there was never at any of those conferences any mention of the release, was there?

A. Yes.

Q. You are sure of that, too?

A. Yes.

Q. Just as sure as you were yesterday that you hadn't written to Mr. Fagan?

A. I didn't say I hadn't written to Mr. Fagan.

Q. Do you want to deny that now?

A. I was asked——

Q. Do you want to deny now that you testified yesterday that you hadn't written to Mr. Fagan to call to see you? Yes or no.

A. I didn't deny that I had written yesterday.

Q. No, I didn't say that you had written yesterday. I say do you want to deny that you had testified yesterday that you hadn't written to Mr. Fagan to call to see you? Do you want to deny that today?

A. No, I don't want to deny it.

Q. What do you mean by your last answer then?

A. Because your question yesterday was whether I had invited the claimant to the office and I said no.

Q. Do you consider any difference between writing a man to call and see you and inviting a man to call at your office?

A. Oh, a big difference.

Q. Did you think that I asked you whether you were inviting Mr. Fagan on a social visit? Is that what you thought I was asking you yesterday?

A. There is a big difference.

Q. Did you think when I asked you whether you had invited Mr. Fagan to call to see you that it was a social visit?

A. No.

Q. You understood my question fully, didn't you?

A. I understood just what you asked me.

WILLIAM E. MING, JR., Sworn for Defendant.

DIRECT-EXAMINATION BY MR. CARTON:

Q. Mr. Ming, are you in the employ of the Central Railroad?

A. Yes.

Q. In what capacity?

A. At this time I was district claim agent.

Q. At this time, the present time?

A. No, at the time of this alleged happening.

Q. At the time of the Fagan accident?

A. Yes.

By the Court:

Q. What is your capacity now?

A. The federal title is investigator, and my corporation title is district claim agent.

By Mr. Carton:

Q. Where is your office?

A. Jersey City.

Q. Were you located there in September, 1917?

A. Yes.

Q. Did you have anything to do with the Fagan claim?

A. Prior to the adjustment one of my men made an investigation of the matter and reported to me. Then I was also present at the time the release was taken from Mr. Fagan.

Q. When was that, Mr. Ming?

A. I can't recall the exact date, Mr. Carton.

Q. It is said to have been in September, 1917.

A. I have no doubt that is correct.

Q. Is that your recollection?

A. Yes. I haven't refreshed my recollection.

Q. Do you remember the circumstances under which the release was executed, where it was executed, etc.?

A. Yes.

Q. Tell us about it.

A. As the result of a message that came to the office Mr. Giddes and I went to the waiting room—rather, the concourse there alongside the waiting room—and found this Mr. Fagan there and an adjustment was made there.

Q. Was that the first intimation you had that Mr. Fagan was there or was to be there?

A. Yes.

Q. Had you sent for him?

A. No, sir.

Q. Had Mr. Giddes, as far as you know?

Mr. Golenbock: I object to any reference to any question of what was in operation in the mind of Mr. Giddes.

Mr. Carton: I said as far as he knew.

The Court: Repeat the question.

(Question repeated.)

A. Not to my knowledge.

Q. Was this at the Jersey City Terminal?

A. Yes, sir.

Q. Who was present outside of Mr. Giddes and yourself and Mr. Fagan?

A. We had a former stenographer, J. Arthur Hone by name, was present.

Q. Is he the gentleman who is said to be in the service now?

A. Yes; there was also Mr. Fagan and some man who had brought the message up to the office, I understood.

Q. Tell us what took place when you yourself

and Mr. Giddes went down and talked to Mr. Fagan.

A. Mr. Fagan intimated that he would like to settle up his alleged claim against the railroad company, and as a result of the conversation between Mr. Fagan and Mr. Giddes that settlement was consummated.

Q. What was the amount?

A. $85.

Q. Was there some suggestion of $80 in the first instance?

Objected to.

The Court: What the conversation was as you recall it.

Q. What was the conversation? What the conversation was prior to the $85 sum being fixed.

A. Originally Mr. Giddes offered $80; and after—oh, just a few words or two, the offer was increased to $85 and that was acceptable to Mr. Fagan and he accepted it and executed the release.

Q. You were there at the time?

A. Yes.

Q. And Mr. Giddes was there?

A. Yes.

Q. Did you see Mr. Fagan after that time?

A. I have never seen him until I see him here in court. That is, I don't think I have; I have no recollection of seeing him.

CROSS-EXAMINATION BY MR. GOLENBOCK:

Q. Mr. Ming, your title as claim agent is inferior to that of special claim agent, isn't it?

A. I wouldn't say that, Mr. Golenbock. I have charge of a district and Mr. Giddes was in Mr.

Failing's office. My office was distinct from the other office.

Q. A special claim agent does special work, doesn't he? That is why he is called special claim agent; isn't that true.

A. I wouldn't say that.

Q. Would you say that it is not so?

A. Perhaps I can qualify it a little if you will allow me in my own answer.

Q. Well, now, tell us.

A. There is a distinction between a district claim agent's office and the claims attorney's office. Men who do settling in the claim attorney's office had the title of special claim agent. I had the title of district claim agent and had some subordinates who were claim agents.

Q. Now you have had subordinates who were claim agents or special claim agents; so that special claim agents have special cases which they have to settle or charge of settling; isn't that true?

A. No, they simply do similar work for the claim attorney's office.

Q. Now you have been working for the railroad how long, Mr. Ming?

A. Twenty years.

Q. Now you say that Mr. Fagan intimated that he would like to settle his case on that day?

A. No, he said he would like to settle it.

Q. When you say he intimated you mean he said that he would like to settle?

A. I do.

Q. That is what you mean by intimated?

A. Yes.

Q. Do you know the name of the man who came upstairs to tell you that Mr. Fagan was downstairs?

A. No, I don't.

Q. Do you know a man by the name of Mr. Conover?

A. I do.

Q. And don't you remember that it was Mr. Conover who came up to tell you that Mr. Fagan was downstairs?

A. I didn't see the gentleman who came up.

Q. You didn't see him?

A. No.

Q. To whom was this message delivered?

A. I don't know.

Q. Wasn't it delivered to you?

A. No.

Q. Weren't you informed by Mr. Conover that Mr. Fagan was downstairs and he would like to have transportation?

A. I have no recollection of any conversation of the kind.

Q. Don't you remember receiving a message from the New York pier that Mr. Fagan was coming across and that he would like to have his transportation home?

A. I do not.

Q. Was there any one in your office that received such a message?

A. I am not able to answer that.

Q. Who had charge of Mr. Fagan's case at the time of the settlement, you or Mr. Giddes?

A. Mr. Giddes; I believe he did.

Q. Will you tell the court and jury why it was necessary for you and Mr. Giddes and one other man to go and see Fagan, who was downstairs, for a settlement?

A. I only had an interest——

Q. Let me finish the question. Didn't you at the

time think that Mr. Giddes was able to settle it himself?

A. I knew that he was thoroughly able to settle it, but it accrued in my district and I naturally was interested in it, and for that reason I accompanied him down.

Q. Why did you need Mr. Hone then?

A. He was the stenographer and we told him what to do and he went up and did it and brought back what was necessary.

Q. You made sure that you had every preparation to get this man's release, didn't you?

A. We never do anything without taking a release.

Mr. Golenbock: I didn't ask you that question and I ask that that answer be stricken.

A. If you will ask the question again——

The Court: I don't think that answer ought to be stricken out. Proceed.

Q. Don't you remember that Mr. Fagan asked for transportation from you and Mr. Giddes?

A. I can't answer you one way or the other there. It is likely.

Q. Didn't you hear him ask?

A. It is likely that he was furnished transportation.

Q. No, I didn't ask you whether he was furnished transportation; I ask you whether he didn't ask you for transportation or ask Mr. Giddes for it.

A. I have no recollection of it.

Q. When you went downstairs where did you find Mr. Fagan?

A. He was in a wheel chair.

Q. And you could tell he was very sick, couldn't you, by looking at him?

A. No.

Q. You think he was a very well man from looking at him?

A. You asked me if I thought he was a very sick man. I said no.

Q. Now I ask you whether you thought he was a very well man by looking at him.

A. He looked like a man who had come out of the hospital.

Q. You knew that as a matter of fact, didn't you?

A. Yes.

Q. How did you know? Did Mr. Conover tell you?

A. I have no recollection of Mr. Conover.

Q. Who told you that Mr. Fagan just came out of the hospital?

A. Mr. Fagan himself said so.

Q. Sure of that?

A. Yes.

Q. And that is the only way you knew of it?

A. Yes.

Q. You say after a word or two the offer was increased from $80 to $85. Was this word or two from Mr. Giddes?

A. It was general conversation between them.

Q. Between Fagan and Giddes?

A. Yes, sir.

Q. And Mr. Fagan didn't object to $80, did he?

A. There was some little intimation of expense there and Mr. Giddes agreed to compensate him for the expense.

Q. And all the expense that he intimated was $5; was that right?

A. Yes, sir; that was perfectly acceptable to Mr. Fagan.

Q. As a matter of fact $80 was perfectly acceptable, except for this intimation that there was an expense of $5?

A. I recollect that the expense did not quite go $5, but it was made $5.

Q. Mr. Giddes increased it to $5 even though it was not $5?

A. Yes.

Q. Sure of that?

A. Yes.

Q. Do you remember Mr. Reynolds being there? —Mr. Reynolds, stand up.

A. I wouldn't recognize this man, but I know there was another man there.

Q. Well, you know Conover, don't you?

A. I know Conover, yes.

Q. It was not Conover with you and Giddes, when you said there was another man?

A. No.

Q. You were there all the time, weren't you?

A. Yes, sir.

Q. And what you have testified today is all you know about it?

A. Yes.

[DEFENDANT RESTS.]

The Court: Has the release been offered?

Mr. Carton: It has not, your Honor.

The Court: How do you rely on the document then if you don't offer it?

Mr. Carton: My recollection of the testimony yesterday is that the release had been

executed and sent to the accounting department.

The Court: The plaintiff says he executed a receipt and you say it is a release. How are the court and jury to say it is a release if it is not here?

Mr. Carton: Your Honor, I suppose we have to rely upon the weight of the evidence in that regard.

The Court: Why is not the paper here? It is in your possession.

Mr. Carton: Mr. Tomlinson has had charge of the case and the release is not here and I assume it has been sent to the accounting department and is there.

The Court: Well, that will not help us here, without you have it.

Mr. Carton: We will have to rely upon the testimony on both sides, your Honor.

PLAINTIFF'S TESTIMONY IN REBUTTAL.

WILLIAM A. FAGAN, Recalled for Plaintiff.

DIRECT-EXAMINATION BY MR. GOLENBOCK:

Q. Mr. Fagan, I show you plaintiff's Exhibit C for Identification and ask you to tell the court and jury how you got this.

A. I wrote a letter to Mr. Giddes for transportation——

Q. First answer this question: how did this paper that I showed you come to you?

A. By mail.

Mr. Golenbock: I now offer this letter.

(Letter examined by Mr. Carton.)

Mr. Carton: I have no objection to it.

The Court: It may be marked.

(Paper marked Exhibit P 1.)

Q. Mr. Fagan, you were examined by Dr. Bennett, weren't you?

A. Yes, sir.

Q. What day?

A. The 4th of this month.

Q. And Dr. Bennett came to you as representing whom?

A. The railroad company.

Q. Mr. Giddes testified that you had read a paper which he gave you to sign. Is that true? Did you read any paper?

A. No, sir.

Q. Was any paper read to you?

A. No, sir.

Q. Was there any explanation made of any paper to you?

A. No, sir.

Q. Was there at any time during this conversation any reference made to any release?

A. No, sir.

Mr. Carton: I object. That was gone into yesterday. This witness was examined directly on the matter.

The Court: Yes, I think it has been gone into.

Q. How many children have you, Mr. Fagan?

A. Five.

Q. How many go to school?

Mr. Carton: I object. That is part of the affirmative case.

The Court: Yes. It doesn't throw any light on the subject anyhow.

No cross-examination.

Mr. Golenbock: May I before proceeding to examine the next witness read this letter to the jury, if your Honor please?

The Court: Yes.

(Mr. Golenbock reads letter, Exhibit P 1.)

Mr. Golenbock: I desire to call you gentlemen's attention to the fact that the words "call at my office when you come up" are in Mr. Giddes' handwriting, as admitted.

EDWARD REYNOLDS, sworn for Plaintiff.

DIRECT-EXAMINATION BY MR. GOLENBOCK:

Q. Mr. Reynolds, you work for the government now?

A. Yes, sir.

Q. And in 1917, in May, you worked for whom?

A. The railroad company.

Q. Central Railroad of New Jersey?

A. Central Railroad of New Jersey.

Q. What was your work there?

A. I was trucker.

Q. How long did you work for the Central Railroad?

A. I worked for the Central Railroad about eight months.

Q. And you had been working on Pier 10?

A. Pier 10, yes, sir.

Q. Now had you seen the trailers that we were talking about on that pier?

A. Yes, sir.

Q. Will you tell us whether you had seen any trailers on that pier and describe as to its appearance and how it was constructed?

Mr. Carton: I object, on the ground that it is not rebuttal.

Mr. Golenbock: I think it is. I want to show—one foreman testified that the trailer had no support or guards in the front except one pipe or two pipes, I forget now which it is. I want to show in rebuttal that they had trucks there that had sides all around, covered all the space front as well as the sides. I think that we could not introduce as part of our case until it was contradicted, until it was brought out by them that they had no such trailers.

The Court: Well, suppose they did have such trailers; then what?

Mr. Golenbock: Then it becomes a question whether that load was properly piled, and whether this trailer, which is an appliance, whether that was at that time defective or one used which they should have used at the time for this particular kind of work. If they had trailers that had guards all around, they should have, according to the law of the Federal Employers' Liability Act, I construe it that they should have used it on that occasion as well.

The Court: Where do you find any such law?

Mr. Golenbock: Under the section which says that any person receiving injury by reason of a defect in ways, works, machinery, appliances or any other instrumentality used in their work. And I submit that under that——

The Court: Isn't that part of your original case?

Mr. Golenbock: We have brought that out but it has been contradicted, and I think I ought to be able to show in rebuttal that they have such trucks or trailers.

(Mr. Carton replies.)

The Court: If you say you forgot it in your original case I will allow you to put it in.

Mr. Golenbock: Yes, I did forget it in my original case, to put it in more fully than I have.

The Court: On that ground I will allow it.

Objection noted for defendant as ground of appeal.

Q. Will you answer that question, Mr. Reynolds?

A. Yes, they had them there with racks on the sides about four feet high, I should judge three and a half to four feet high, and on the ends also.

Q. When you say ends what do you mean?

A. On each end. That is all around.

Q. All around?

A. Yes, sir.

Q. What is the difference in handling freight between a hand truck and a trailer?

Mr. Carton: I object. That certainly has been gone into by Mr. Fagan.

The Court: Yes.

Q. Did it require different knowledge of handling freight of one who handled a hand truck or one who handled a trailer truck?

Objected to.

The Court: The objection is sustained. It is not rebuttal.

Q. Who directed you to take Mr. Fagan home on September 11, 1917?

A. Mr. Dorsey.

Q. And he was your foreman?

A. He was my foreman.

Q. And he was Fagan's foreman?

A. Yes, sir.

Q. Did Conover go along with you?

A. Conover went across the ferry with us.

Q. Who telephoned to Mr. Giddes that Fagan was coming across?

A. Mr. Dorsey said he would telephone over there to let them know that we were coming across the ferry.

Q. Were you present at the time that Mr. Fagan asked Mr. Dorsey for transportation across and he said that he would telephone to Mr. Giddes to arrange for it?

A. I was right there when he said he would telephone over and let them know we was coming across.

Q. When you went across the ferry to the Jersey City side how did you get Fagan into the waiting room?

A. Well, I took him by the arm and helped him off the ferry, and Mr. Conover went and got a wheel chair and brought it down and set him down in that and pushed him up in the waiting room.

Q. When he got up into the waiting room who came down?

A. There was a couple gentlemen came down; I don't believe I ever saw them before, not to my knowledge.

Q. Did you recognize any one of them when they were on the stand?

A. What is that?

Q. Did you recognize Mr. Giddes as one of them?

A. I recognize Mr. Giddes over there, yes, sir.

Q. And do you remember the conversation that took place between Mr. Giddes and Mr. Fagan?

A. No more than Mr. Fagan, he said he wanted transportation home.

Q. And what did Mr. Giddes say about that? Did Mr. Giddes consent to it?

A. Yes, he consented to giving him his transportation home, and then he said something about some more money, giving him more.

Q. What did he say about giving him more money?

A. Then he sent a fellow upstairs for a check, and he brought the check down and presented that to Mr. Fagan.

Q. Gave that to Mr. Fagan?

A. Yes, sir.

Q. Did he request him to do anything when he gave him that check?

A. Well, then Mr. Fagan told him he would sooner have the money than have the check, it would be more serviceable to him than what a check would.

Q. So what did Mr. Giddes ask Mr. Fagan to do?

A. Well, he asked Mr. Fagan to endorse the check and he would get it cashed for him, or have it cashed.

Q. Was anything else said about any other paper?

A. And then he had to sign a receipt.

Q. Told him to sign a receipt?

A. For $85.

Q. Did Mr. Giddes read any paper to Mr. Fagan at that time?

A. No, sir.

Q. Did Mr. Giddes explain to Mr. Fagan the contents of any paper?

A. No, sir.

Q. Did Mr. Fagan read any paper at that time?

A. All I saw him do is sign the receipt.

Q. And after being told that they wanted a receipt?

A. Yes, sir.

Q. What train did you take Mr. Fagan on to take him home?

A. I think it was 3.30 or something like that. I am not positive.

Q. Now when the $85 was mentioned was anything said by Mr. Giddes as to what that covered?

A. I understood that was half pay for ten weeks. That was what I understood.

CROSS-EXAMINATION BY MR. CARTON:

Q. Where are you employed now, Mr. Reynolds?

A. I am working for the government, Morgan.

Q. In what capacity and where?

A. Morgan, New Jersey.

Q. When did you cease your service with the Central Railroad?

A. The 24th of February.

Q. Of the present year?

A. Yes, sir.

Q. You had been employed at Pier 10 until that time?

A. Yes.

Q. What were you doing there?

A. I was hand trucking.

Q. Are there a number of trailers used such as

New Jersey State Library

was used by Mr. Fagan the day of the accident on that pier?

A. Well, as near as I can come to it, I guess they have got eight or ten of them there. That is what they had when I was there.

Q. How long have you been with them on the pier?

A. I was there eight months.

Q. Saw those trucks and trailers in use every day?

A. Every day they was used, yes, sir.

Q. You refer to their having guard rails around the sides and on the ends?

A. Yes, sir.

Q. Were those guard rails used for handling all manner of truck?

A. Well, they are supposed to be.

Q. Aren't those guard rails only used when they are handling small articles which might drop off?

A. Well, if you are loading iron or anything like that that is so long you couldn't get the front and the back pieces in; but in loading sugar or flour or anything like that, or groceries, such as that, they are supposed to be used.

Q. Well, are they used?

A. Well, sometimes they are neglected.

Q. Sometimes they are used, sometimes they are not?

A. Yes, sir.

Q. They are not used when large bulky stuff is packed on the truck, are they, like bags or boxes?

A. Well, bags of sugar or anything like that, I have often used them myself.

Q. You have used them?

A. Yes.

Q. What is the guard rail that is on in front of the trailer?

A. Well, it is a strip of iron along there, but there is a wooden piece fits in there too, just the same as the side.

Q. There is a regular strip, sort of an iron pipe, isn't there, that comes up in front?

A. Yes.

Q. That is there permanently?

A. Yes.

Q. That is all the rail there is on there in front of the truck, is it not?

A. Well, there is supposed to be a wooden piece goes in the same as the back. There is a couple sockets for a couple arms to go in.

Q. Are they used?

A. Well, as I said before, sometimes, and sometimes they are not.

Q. Well, they are only used when there are small articles piled on the trucks, aren't they, to keep them from slipping off?

A. Well, groceries and such things as that.

Q. When large articles or large boxes are put on the truck they are not used, are they?

A. Well, they are supposed to be.

Q. Did you use them all the time?

A. Well, I have used them.

Q. And you have gone several times without using them, haven't you?

A. Well, the only way I have used them, I would load trucks and put them in there myself, put them on myself.

Q. Did that in every instance?

A. Well, it is not necessary when you have got iron or anything like that, long strips of iron.

Q. Well, you used your own judgment when you put them on, didn't you?

A. Yes.

Q. And these trucks, after being loaded in turn, would come along and pick them up as they were and take them on the floats?

A. Yes.

Q. And that was the same during the time you were there?

A. Yes, sir.

Q. When you went across the ferry with Mr. Fagan on this day in question over in Jersey City, what did you do when you got in the ferry house with regard to notifying Mr. Giddes or any one else that you were there?

A. Mr. Conover notified them upstairs. He went right on upstairs and notified them.

Q. Then some one came down?

A. Some one came down, yes, sir.

Q. Who came down, Mr. Giddes and Mr. Ming, these gentlemen that have been on the stand?

A. Mr. Giddes, and I didn't know who the other gentleman was.

Q. What conversation took place between Mr. Fagan and the gentlemen that came down?

A. Well, they asked Mr. Fagan how he felt, and he felt very miserable. He couldn't hardly walk, to tell you the truth.

Q. Well, you helped him in?

A. Yes.

Q. And you say Mr. Fagan said he wanted transportation home?

A. Well, yes; he wanted his transportation home; he didn't have any other way of getting there. When I am working I never carry any money with me, when I am working.

Q. He didn't ask for money, did he?

A. Well, no; he wouldn't very well go home unless he had transportation.

Q. Did he state what he was going over there for, from the ferry over to the Jersey City Terminal, where you saw these men? Did Mr. Fagan tell you what he was going there for?

A. He was on his way home; that is the only thing he was going.

Q. Well, you knew he was to meet some one there, didn't you?

A. He was to meet some one over there, yes.

Q. Did he tell you what he was going to meet them for?

A. No, sir.

Q. Well, did you know?

A. I did not.

Q. You do know that when these gentlemen representing the company came down he asked them for transportation?

A. He wanted his transportation home.

Q. How did the question of the $80 come up?

Mr. Golenbock: There is no testimony as far as this witness is concerned that there was any discussion about the $80. He said they told him they would give him $85.

Q. Well, $85. How did that question come up if Mr. Fagan went there for transportation only?

A. Well, I don't really remember how it came up or how it started. The way I understood it, it was pay for ten weeks, half pay.

Q. How did you understand that? What was said that made you understand that?

A. Because I was right there present.

Q. Tell me something that was said that led you to believe that it meant ten weeks' compensation.

A. Because there was a fellow down at Broadway Tower, he got hurt and he was getting paid every two weeks; and Mr. Fagan says, "Why can't you pay me every two weeks as well as you pay him?"

Q. And is that all that was said about it?

A. Well, they went on talking something else. I don't know what they did say now.

Q. Well, you don't remember anything about that, do you? Do you arrive at your conclusion now because some one else who had been hurt had gotten pay some other way?

Mr. Golenbock: I object. That is not what he said. That is a misstatement of the evidence. He said Fagan said "Why not pay me every two weeks, like the man that got hurt on Broadway Pier?"

The Court: Proceed. It is proper cross-examination.

Q. Will you answer that question?

A. They said they had quit doing that, they would pay in bulk every ten weeks.

Q. Who said that?

A. The gentleman that was down on the floor.

Q. One of these gentlemen who has taken the stand?

A. It must have been them. I didn't see anyone else.

Q. You were there; you are testifying. Which man said that?

A. Well, the three of them was talking through one another. They was talking together.

Q. How did this question come up about ten weeks' pay or $85 or any such conversation if Mr.

Fagan only went there for transportation? Who brought it up?

A. Well, it must have been Mr. Giddes himself.

Q. Well, it must have been; don't you know?

A. Yes, Mr. Giddes.

Q. What did he say when he first broached this question?

A. That is what I understood him to say, that was half pay for ten weeks, ten weeks' half pay.

Q. How was the sum of $85 arrived at? Who suggested that?

A. Well, that is what I don't know. I don't know.

Q. You don't know much about this at all, do you?

A. No, I don't know so much about it.

Q. Were you there all the time?

A. I was right there present all the time, yes, sir.

Q. After this conversation there was some one went upstairs to get a paper?

A. There was some one went upstairs and brought a check down and handed it to Mr. Fagan and Mr. Fagan said that he would rather have the money than he would a check.

Q. What else was handed to him besides that check?

A. There was a receipt handed to him to sign.

Q. How do you know it was a receipt?

A. Well, I shouldn't think it would be anything else.

Q. And that is the reason that you are saying a receipt isn't it?

A. Well, it must be a receipt; it wouldn't be anything else. There was nothing read or anything like that.

Q. Do you mean to say Mr. Fagan signed this paper without reading it? Well, did he?

A. He signed a receipt.

Q. Without reading it? Now don't you know, Mr. Reynolds? You can't answer that question?

A. I couldn't say if he read it or not. I know he had it in his hand.

Q. You were right there with him, weren't you?

A. I was right in back of him, yes; right back of his chair.

Q. Who handed him the paper that he signed?

A. I am not positive if it was Mr. Giddes or the other gentleman.

Q. What was said to Mr. Fagan when the paper was handed to him to sign?

A. He was to sign a receipt.

Q. What was said to him?

Mr. Golenbock: I submit he has already answered it, to sign a receipt.

The Court: Proceed.

Q. What was said to Mr. Fagan when he was handed the paper to sign?

By the Court:

Q. Can you tell us any more about it than you have?

A. Now what they said I don't remember, no, sir.

By Mr. Carton:

Q. And you can't tell us anything that was said about it further than you have told us?

A. That is about all I know what they said.

REDIRECT-EXAMINATION BY MR. GOLENBOCK:

Q. Mr. Reynolds, if Mr. Fagan had read any kind of a paper that would have taken him five or ten minutes you would have noticed it, wouldn't you?

A. I certainly would have heard it, yes.

Q. You would have noticed it?

A. Yes.

Q. And you didn't see him do any such thing?

A. No, sir.

Q. And at the time they handed him this paper they asked him to sign a receipt; is that right?

A. Yes.

The Court: Don't go over it; it has been gone over.

RECROSS-EXAMINATION BY MR. CARTON:

Q. Is that so? Why is it a few minutes ago you couldn't say what was said or what was requested of Mr. Fagan?

A. I told you once or twice he signed a receipt.

Q. Well, you don't know whether he signed a receipt or not because you didn't read the paper, did you?

A. I didn't read the paper, no, sir.

Q. And you didn't hear the man who handed it to Mr. Fagan tell him what it was, did you?

A. No, sir.

Q. Now you are willing to say he signed a receipt?

A. That is what I supposed it was.

Q. That is what you supposed it was?

A. Yes.

Q. At any rate he signed a paper?

A. He signed a paper, yes, sir; and it was a receipt for the money that he received.

The Court: Now is there any use of pressing this matter? You don't produce the paper, and how can the court allow the jury to say what the effect of a paper is that is not produced?

Mr. Carton: Well, it seems to me no further than what the evidence is.

The Court: Well, the evidence does not show the contents. There is not a particle of testimony what it is. It is a conclusion of both. One says it was a receipt and one says it was a release?

Mr. Carton: Mr. Giddes says it was a release.

The Court: And this man said it was a receipt. You haven't got it here. I don't think it is a question for the jury at all. You have got a paper and the court cannot pass upon that and cannot allow the jury to pass upon it. You set up a paper which you say is a release in full. That is what your claim is?

Mr. Carton: Yes, sir.

The Court: And the paper is not produced.

Q. Were you with Mr. Fagan and the man with whom he was talking during the whole time he was there in the Terminal that day?

A. I was right in their presence.

Q. What were you doing there?

A. I was sent with Mr. Fagan to bring him home.

Q. Were you sitting there with them?

A. I was not sitting, I was standing.

[BOTH SIDES RESTS.]

Motion for Direction.

Mr. Carton: Your Honor, at this time I want to renew the application made yesterday by Mr. Tomlinson for a nonsuit, in the form of a direction of a verdict for the defendant, advancing the arguments made by Mr. Tomlinson at the end of the plaintiff's case, and the further reasons why I think we are entitled to a direction at this time because of the proof on the whole case.

It seems to me, your Honor, that there is no evidence in this case anywhere that amounts to negligence on the part of the defendant company. I cannot see in this record anywhere, of the witnesses that have gone on the stand, where there has been anything testified to that amounts to negligence on the part of the defendant company. And if there has not been negligence shown it is beyond contention that we are entitled to a verdict at the hands of the court at this time.

This man was a longshoreman, working on this pier. As he has testified to, he was working in the regular way. The suit is brought under the Federal act, and of course one of the prerequisites is that negligence must be shown in behalf of the defendant. Now I fail to see where any witness has testified to anything, any circumstance, any duty or any omission of duty or anything that points to the negligence of the defendant company, and if that is so, your Honor, I insist that we are entitled to a direction at this time.

And we are also entitled to a direction, I think, on the ground of the assumption of risk. The case being of this character, the plaintiff assumes the risk. In this case the evidence is clear that it was an obvious risk. This man was employed by the defendant

company some ten months, and he has not spoken. He had been on this pier some two months, had been on Pier 46 for some time, was wheeling there this same truck, or hand truck, up until this time, up and down this same gangplank for two months, and saw this trailer being used there every day; appreciated the danger, if there was danger in them, because he has himself testified that while not running a trailer and motor truck until this day, that he knew there was a likelihood of the coupling pin coming out, because the very first trip, he says, when he went down on that trailer he kept his foot on that thing. He knew the situation, he appreciated the danger there.

The company is not an insurer of its employees under the circumstances, could not be. These men are engaged in this work, handling freight every day up there; and there isn't anything in this case that takes it out of any other case where the defense of the assumption of risk has been established and allowed.

The case quoted yesterday by Mr. Tomlinson, the Chief Justice's case, in the Court of Errors and Appeals, the Capon case, it seems to me is on all fours with this case—the same sort of a gangway, the same sort of a declivity caused by the tide going out, the man had the same kind of an accident happen; and the court held that he had assumed the risk in that instance.

And I respectfully insist, your Honor, on both of these grounds, on the ground of the assumption of risk, and particularly on the ground that no negligence has been shown in this case, that we are entitled to a verdict. As I recall the rule of court on the question of the assumption of risk, it is not a

question of what the evidence is on the assumption of risk, but whether there is any evidence that the plaintiff did not assume the risk; and if there is no evidence the assumption is under the law, as I understand it, that he did assume the risk. And because of that situation, your Honor, I insist there isn't anything to go to the jury, and I respectfully ask for a verdict for defendant.

The Court: I will hear you on the part of the plaintiff in regard to the negligence that you claim.

(Mr. Golenbock replies.)

The Court: I think there are some questions of fact which should go to the jury. I refuse to take it away from the jury at this time, and allow you an exception, and you may note your objection so that you may have the benefit.

Objection noted for defendant as ground of appeal.

Charge of the Court.

GENTLEMEN OF THE JURY: On the 6th day of August, 1917, William A. Fagan, the plaintiff in the present suit, was injured while in the employ of the Central Railroad Company of New Jersey on Pier No. 10 in New York City, moving freight from the pier to a barge. At the time the plaintiff was injured this company was engaged in interstate commerce; that is, carrying passengers and freight, or one of them, from one state to another. And that brings the present case, if the plaintiff has cause of action, under the terms of an act known as the Federal Employers' Liability Act. Under the provisions of this act the plaintiff can

recover if he was injured while in the employ of this railroad company in interstate commerce, resulting in whole or in part from the negligence of any of the officers, agents or employees of this company, or by reason of any defect or insufficiency due to negligence in its cars, engines, appliances, machinery, tracks, roadbed, works, boats, wharves or other equipment.

The mere fact that the plaintiff was injured will not entitle him to recover. He must show by a fair preponderance of the evidence that his injuries were caused by the negligence of an officer, agent or employee of the company, or by reason of any defect or insufficiency due to the company's negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment, as well as that he was at the time he was injured engaged in interstate commerce work. You will notice that the action is based on negligence of the defendant company.

This plaintiff testifies that he was loading pineapples upon a barge to be carried by the defendant company from New York to New Jersey when he was injured; and if this was the case he was engaged in interstate commerce work, and I do not understand from the evidence that that has been disputed. But that fact standing alone, that he was engaged in interstate commerce work, will not entitle him to recover. He must go further and show that his injuries were caused by the negligence that I have just mentioned. You have heard all the evidence and you must decide when and how the accident actually took place in which this plaintiff was injured. You are the sole judges of what has been testified to and you must determine the weight you will give to the testimony of the various

witnesses. You will not rely on the memory of counsel as to what the testimony was, or on the recollection of the court, but you should determine the questions of what has been testified to by the various witnesses and what they have sworn to on the stand and the weight that you will give to this testimony. You should decide this case not from prejudice, not from sympathy, but from the evidence, applying the rules of law I lay down for your guidance. You are not to decide what in your opinion the law should be, but to decide the case in accordance with the law as it now exists applicable to this case as it appears from the evidence.

There has been a motion in this case to nonsuit and another motion to direct a verdict. Those two motions have been decided adversely to the defendant, but that does not indicate in the slightest degree the manner in which you should decide this case. That was simply the decision of the court that the question of whether there was any negligence in this case should be left to you to decide, and whether there was an assumption of risk by the plaintiff in this case should be left to you to decide. And you gentlemen must consider the whole evidence in this case, for the determination of this case depends on whether or not there was negligence on the part of the defendant company and whether or not there was an assumption of risk of the employment by the plaintiff in this case. If the plaintiff has not established to your satisfaction that there was negligence on the part of the defendant company that was proximately the cause of the plaintiff's injury, there can be no recovery. The plaintiff must establish his case by a preponderance of the testimony and show you where the negligence was that caused the injury, if you

find there was any negligence on the part of the defendant company which caused the injury of which the plaintiff now complains.

If, however, you find from the evidence that the injury of the plaintiff was caused by a defect or insufficiency in any equipment due to the negligence of the defendant company or the negligence of the officers, agents or employees of the company, there can be no recovery by this plaintiff if he assumed the risk of his employment. In the case of Capon *vs.* Delaware, Lackawanna and Western Railroad Company, which has been referred to, Chief Justice Gummere held, among other things, as follows: "Under the Federal statute"—and that is the statute under which this action is brought—"the employer is not liable for injury received by an employee arising out of a risk assumed by the latter, a risk which is entirely obvious to the employee and is fully appreciated by him is an assumed risk under the Federal statute."

And so, gentlemen, it is important for you to determine whether the plaintiff in this case assumed the risk of his employment. For if he did there can be no recovery, even if the accident was due to the negligence of the defendant company. Was there a risk in this employment which the plaintiff assumed? If so, as I have said, he cannot recover unless the plaintiff's injury was the result of a violation by the defendant of some statute enacted for the safety of the employees; and I do not recall that it is alleged that the company violated any such statute.

The rule is that the plaintiff assumes not only the ordinary risks incident to the employment, but also such special features of danger as are plain and obvious, and also such as he would discover by the

exercise of ordinary care. This plaintiff had worked on this pier for some two months. He had taken goods from this pier to barges over a gangplank by a hand truck, and had seen electric trucks with trailers take goods from this pier to barges. He says he never worked on such a trailer until this particular trip. The operator of the electric truck testifies that the plaintiff had been with him on the trailer before on that day. This gangplank was on an incline, as could be seen by any one on the pier. The trailer was loaded as high or higher than the plaintiff's head with boxes or crates of pineapples. It is claimed that the plaintiff stood with one foot on the electric trailer and the other on the hook or pin which connected the trailer with the electric motor or truck, with both hands or one hand against the boxes on the trailer. Was he doing that to keep them from falling? Would a reasonable employee see that in going down this gangplank at an incline there was danger of the boxes toppling over upon him, or that there would be a jolt when this truck went over the raised end at the pier, and that it would tend to topple over the boxes or crates on this trailer? If he saw that and knew it was it not an assumption of the risk that naturally would follow? Not that he knew they would topple over but that they were liable to. If there was such a risk that was obvious and the plaintiff made no protest but proceeded with his work he assumed the risk and cannot recover even if he was injured while engaged in such work.

If you find the injury of the plaintiff was the result of a risk assumed by him or if you find that the injury was not due to the negligence of the company or its officers, agents or employees, your duties are ended and your verdict should be a verdict for the defendant. If, however, you find that the plain-

tiff's injury was not the result of any risk assumed by him but was caused by the negligence of the defendant's officers, agents or employees or by reason of defects or insufficiencies of the company's equipment due to its negligence, you have still a further duty before you before you can render your verdict.

It appears that some time after the accident the plaintiff left the hospital and went to defendant's office and after accepting $85 signed a paper that was brought him. The plaintiff testifies that he thought he was signing a receipt. Defendant's claim agents testify that it was a release. It was a written document and must be produced by the defendant if it relies upon this document to prevent a recovery by the plaintiff. The paper has not been produced and its absence has not been accounted for, and there is nothing before the court that will warrant you in saying that the plaintiff is prevented from recovery, if you find that he has any claim against this company, by reason of any paper that was signed at that time.

Now if you find that the plaintiff is entitled to recover against this company in the way and manner which I have mentioned, then it will become your duty to determine the amount that you will award him. Because your verdict, if you find in favor of the plaintiff, must be in dollars and cents such sum as will compensate him for the injuries which he received. If, however, you find for the defendant you need not consider the question of damages.

If the plaintiff is entitled to recover he is entitled to recover such an amount as will compensate him for his injury; nothing by way of exemplary damages or by way of punishment to the defendant. In arriving at the amount of your ver-

dict, if you decide in favor of the plaintiff, you should allow him for the pain and suffering which he has undergone by reason of this accident and for pain and suffering which he may probably suffer in the future, if you are satisfied from the evidence that he will suffer such pain and suffering in the future. And in determining that, gentlemen, you are to use good ordinary common sense. There is no rule of law laid down by which the plaintiff can recover so much a day, so much an hour or week or month for the suffering, but you should take into consideration the extent of his injuries, the length of time that he was laid up, the probable pain and suffering which he has endured, and then allow him such sum, if you will allow him anything, as will compensate him for that pain and suffering. He will be entitled to any loss of wages which he is prevented from earning by reason of the accident. He is also entitled to be compensated for any permanent and possible permanent injury which he has suffered. And in considering that you should determine whether or not the permanent injury, if he has a permanent injury, will diminish his earning capacity in the future. In determining that matter you should consider not only the testimony of the plaintiff himself but the testimony of the physician who has been produced here, who told you on the stand of the extent of this plaintiff's injuries.

From the amount thus ascertained you should deduct the sum of $85 which he has already been paid; and if you find that the plaintiff in this case has been guilty of contributory negligence you should also deduct from this amount the amount you find represents the plaintiff's proportionate contributory negligence. For in cases under this Federal Employers' Liability Act contributory neg-

ligence is not a defense to the action as under our state law; but under the Federal Act the fact that an employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to the employee. The amount thus ascertained will be the amount you will award the plaintiff if your verdict is in favor of the plaintiff.

If, however, you find that the plaintiff's injury was the result of a risk assumed by him, whatever the extent of his injury may be, your verdict will be for the defendant. If you find the plaintiff's injury was not the result of the negligence of any officer, agent or employee of the defendant and was not caused by any defect or insufficiency of the equipment of the defendant company due to its negligence, your verdict should be for the defendant.

Now, gentlemen, it is a question of fact for you to determine. This case depends upon two questions: was the accident which resulted in the injury of the plaintiff caused by the negligence of the defendant company? If it was, the plaintiff is entitled to recover, unless he assumed the risk of his employment. If he did assume the risk then he cannot recover even if it was caused by the negligence of the defendant company.

I have been requested by the plaintiff to make several charges, and there is one I think I will charge you. The others I refuse to charge except as I have charged.

That it is no defense for the defendant that because the plaintiff sustained his injuries by the negligence of a fellow servant of the plaintiff.

I so charge you. The other requests to charge I refuse.

Mr. Golenbock: I call your Honor's attention that throughout the charge you said the negligence of the defendant must have contributed or must have influenced the accident. I call your Honor's attention that the act says in part or in whole, which your Honor has throughout failed to state.

Defendant's Objections.

Mr. Carton: I wish to take exception to that part of your Honor's charge in the statement immediately after you made reference to the Capon case, wherein you stated that it was for the jury to decide whether or not the plaintiff had assumed the risk; my objection being that that statement was improper because there is no evidence in this case that the plaintiff did not assume the risk.

The Court: Note your objection to what I did say.

Mr. Carton: I also wish to take exception to that part of your Honor's charge referring to the release. I don't know the statement, but the language, as I recall it, is that notwithstanding the release there was nothing to prevent the jury from finding that the plaintiff was entitled to recover, as the release is not produced. We say that it should have been left for the jury to say under the evidence whether the plaintiff had settled his case for a good consideration and signed and acknowledged a release to the company releasing it from all claims; there being in the case evidence to the effect that the plaintiff had executed such a release, so releasing the company.

The Court: You may note your objection to what I did say.

Mr. Carton: I also wish to take exception to your Honor's charge of the request by plaintiff's counsel, that is, with regard to the fellow servant law; because there is no evidence in this case of any negligence of any fellow servant.

Plaintiff's Requests to Charge.

1. That it is no defense for the defendant, that because the plaintiff sustained his injuries by the negligence of the fellow servant of the plaintiff.

2. Plaintiff must receive a verdict even if the jury finds that the injuries were caused through the plaintiff's contributory negligence; no matter whether the plaintiff's negligence is equal or greater than that of the railroad company. The relative amounts of damages caused by the negligence of the respective parties must be determined.

3. If the jury finds that there was a violation of the statute in that the truck was defective then the question of contribuory negligence cannot be entertained and need not be considered by the jury.

4. Entitled to damages for

1. Expense.

2. Loss of time.

3. Pain and suffering.

4. Permanent injuries.

5. Diminished earning power.

Less $85 received.

New Jersey Court of Errors and Appeals.

WILLIAM A. FAGAN, Plaintiff-Respondent, vs. THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant-Appellant.	On Appeal.

BRIEF FOR DEFENDANT-APPELLANT.

This action was instituted under the Federal Employers' Liability Act, in the Monmouth County Circuit Court, to recover damages for personal injuries sustained by the plaintiff on August 6th, 1917, while employed by the defendant as a freight handler at Pier 10, North River, New York City. The verdict below was for the plaintiff, and this appeal brings before this Court for review, the judgment entered thereon.

Statement of the Facts.

The accident occurred between four and five o'clock in the afternoon (p. 17) while the plaintiff was engaged in hauling or assisting in the hauling of certain crates of pineapples from Pier 10, to one of the defendant's floats or barges which was moored to the Pier (pp. 20, 21, 121, and 122).

These crates are loaded on what is known as a trailer truck (pp. 19 and 20) which is hauled by an

electric truck, upon which no freight is loaded (p. 20). The two trucks are connected by a pin or coupler on the trailer truck which hooks into the end of the electric truck (pp. 79 and 80). One man was driving the electric truck (p. 47), while the plaintiff stood with one foot on the electric truck and one foot on the coupling pin (p. 20).

In order to get from the bulkhead of the Pier to the barge or float, it is necessary for these trucks to proceed down an inclined gangway or platform (pp. 21, 33 and 78). As the trucks started down the incline, some of the crates on the trailer truck toppled over onto the electric truck and struck the plaintiff, causing the injuries complained of (pp. 20, 43 and 121). At the time the accident happened the two trucks were nearly all the way down the incline; in fact the electric truck was just going onto the barge from the gang plank (pp. 121, 145).

The plaintiff testified that he had worked for the defendant for a period of about nine months prior to the accident (pp. 15 and 16); that he had been employed for part of this time at defendant's Pier 46, North River, New York City (p. 35), and that he had been employed on Pier 10 for a period of about two months prior to the accident (p. 35). He further testified that during the time of his employment he had done hand-trucking only (p. 16), and that previous to the trip which resulted in this accident he had never worked on a trailer truck (p. 47).

As opposed to this testimony, Tony Palmieri, who was operating the electric truck at the time of the accident (p. 119) testified that the plaintiff had been working with him on the electric truck and trailer truck, on the day of the accident, from nine or half-past nine o'clock in the morning until the time of the accident (pp. 119, 120 and 121); that during such time the plaintiff and Palmieri had been engaged in pulling trailers loaded with crates

from the bulkheads to the floats where they were loaded into cars (p. 122). This of course is the precise work in which they were engaged at the time of the accident.

Patrick Hannon, Assistant Foreman of Pier 10, in corroboration of Palmieri, testified that he had seen the plaintiff working a number of times on trailer trucks when such were loaded with various kinds of freight and merchandise (pp. 138-139).

The trailer truck was what is known as a Reynolds trailer truck (p. 161), and is six feet in length by three feet in width (pp. 79 and 161). It stands twenty inches high from the floor (p. 161). As has already been stated, this truck is connected with the electric truck by a coupler or pin fastened on the trailer (p. 161). The driver of the electric truck stands on the front and back of him there is a wooden platform, which, as already stated, on this particular occasion was empty (pp. 20 and 80). The gang-plank is eighteen feet in length and about seven and one-half feet in width (p. 78). This plank elevates and lowers with the rising and lowering of the tide. At low tide the plank is about fifteen per cent. grade (p. 79). The plank is protected at both ends with a sheet-iron race piece about seven feet long and five feet wide (p. 78).

Specification of the Errors Relied on.

I.

Because the trial judge refused to direct a verdict in favor of the defendant.

II.

Because the trial judge charged the jury as follows:

> "If the jury finds as a matter of fact that "the trailer that the plaintiff was on had no

"guards in the front where the plaintiff had "to be, and if you further find that the rail- "road company did not exercise reasonable "care in providing the trailer with those rails, "and thereby the accident occurred, and plain- "tiff was injured, then they must find the de- "fendant was negligent."

III.

Because the trial judge refused to charge the jury as follows:

A. "There is no evidence in this case from "which you may find negligence upon the part "of the defendant with respect to the manner "of construction of the trailer truck or with "respect to the racks used thereon."

B. "There are three questions in this case: "(1) Was the defendant guilty of negligence? "(2) Did the plaintiff assume the risk of this "accident? and (3) Was plaintiff fraudu- "lently induced to sign the release? If you "resolve any one of these three questions in "favor of the defendant then your verdict must "be for the defendant, no matter what your de- "termination may be as to the two remaining "questions."

C. "If you find that the plaintiff himself "wrote on the release the words, 'I have read "the above and understand it', and then signed "his name to the release, your verdict must be "for the defendant."

ARGUMENT.

I.

The Court erred in refusing to direct a verdict in favor of the defendant.

At the close of the plaintiff's case the defendant moved for a non-suit, assigning as grounds therefor, *first,* that no negligence upon the part of the defendant had been shown, and, *second,* that the accident which resulted in plaintiff's injuries was a risk of plaintiff's employment which was assumed by him (p. 77). At the close of the whole case the defendant moved for a direction of a verdict in its favor, assigning the same grounds as were the basis of the motion for a non-suit, and the additional ground that the evidence showed that the plaintiff had executed a release which constituted a bar to this action (p. 271). Both of these motions were denied by the learned trial judge, and such denial we contend was clearly error.

A.

There was no evidence of negligence.

A careful reading of the pleadings and testimony will disclose, we think, that the plaintiff at the trial sought to convict the defendant of negligence in the following three respects: *first,* that the trailer truck did not have on the front of it a sufficient guard rail; *second,* that the crates were improperly loaded on the trailer, and, *third,* that the stringpiece or racepiece which normally was attached to the gangplank at the end on the bulkhead was missing at the time of the accident.

(1) *The guard rail:*

Although plaintiff on direct-examination testified that there was no front guard rail on the trailer truck at the time of the accident (20, 21, 54), yet on cross-examination he admitted that he was not absolutely certain about it (p. 43), and when shown an iron rack (marked "D" for identification, p. 60) said that he was not sure whether or not there was a rack similar to such exhibit on the front of the truck at the time of the accident (pp. 59, 60), and when asked whether he was willing to swear that there was no such rack on the front of the trailer truck, said "I wouldn't swear to that now really; *I can't remember.*" This was the sole evidence produced by the plaintiff as to the absence of the rail, and even without rebuttal by the defendant, we think would clearly be insufficient to warrant the jury in finding that there was no such rail on the truck at the time of the accident.

The defendant, however, showed by Mr. Toomey (p. 78), General Foreman of Pier 10, that on this trailer truck there was a front iron guard rail similar to the one which was shown to the plaintiff, and which measured twenty-eight inches in width and eighteen inches in height (pp. 89, 99, 179). Mr. Toomey further testified that at the time of the accident the only front guard rails used on any of the trailer trucks on the pier were iron or pipe rails similar to the one which was on the truck in question at the time of the accident. He further stated that the trailer truck in question could be fitted only with this sort of a rack or guard rail (pp. 100, 101). The defendant further showed by the testimony of Mr. Hummelberger (pp. 160, 162), Mr. Nelson (pp. 172, 173, 174), Mr. Irwin (pp. 183, 184, 185), Mr. Gracey (pp. 188, 189) and Mr. Reilly (pp. 191, 192, 193) that such an iron rack or pipe rail was that which was customarily used

on Reynolds' trailer trucks similar to the one involved in this accident on the railroad and steamship piers in and about New York Harbor; and indeed Mr. Reilly testified (pp. 192, 193) that on a number of piers, and particularly on the piers of the New England Steamship Company, of which he was General Foreman, no rack at all was used on the front of such trailer trucks.

Thus with regard to this part of the case we have the plaintiff's statement of his unwillingness to swear that no pipe rack or guard rail was on the front of the trailer truck, while on the other hand we have the positive affirmative testimony of the defendant's employee that the customary guard rail was upon the front of such truck, with the further testimony of men experienced and expert in this line of work, and not employed by the defendant, that such guard rail or pipe rack was that which was customarily used, if any were used.

It would seem that argument is unnecessary to demonstrate that there was not the slightest scintilla of evidence from which negligence might be imputed to the defendant with respect to the guard rail or manner of construction of the trailer truck, and that the plaintiff's charge of negligence in this particular must fall of its own weight.

(2) *The manner of loading:*

The plaintiff, who was about five feet ten inches in height (p. 74), first testified that the load on the trailer truck was about one foot over his head (p. 20). Later he testified that they were about two feet over his head (p. 21), and still later said that they were about one foot over his head (p. 55). This was all he was willing to swear to, however, as to the nature of the load, as he stated that he did not have the "least idea" of how many crates there were (p. 41) and could not tell the manner in which they were loaded, being unable to say whether they were

loaded on their ends or loaded on their sides (p. 42). Mr. Reynolds, a witness produced upon the part of the plaintiff, testified that it was customary to load pineapple crates on these trailer trucks crosswise and as high as the tops of the side wooden racks (pp. 65, 66, 71, 72); that these wooden racks were between four and four and one-half feet high (p. 66); that it was usual to load the crates on the trailers sidewise or crosswise in tiers, that is a tier on the bottom, a tier upon that tier, and so on; that it was usual to load these tiers four or five crates high (p. 72). A crate was shown the plaintiff and identified by him as being similar to the crates which were on the truck on the day of the accident (p. 42). Such crate was eleven and one-half inches in height (p. 195) and was identified by Mr. Nelson as being a regulation pineapple crate (p. 174). The witness Reynolds also testified that the floor of the trailer truck was about five or six inches higher than the floor of the electric truck. The defendant's evidence with respect to the loading consisted of the testimony of Mr. Toomey (p. 90); that he went on the float after the accident and found that there were twenty crates on this truck (p. 90); that he verified such fact by the billing which had been issued for the shipment (pp. 91, 93); that these crates were loaded crosswise on the trailer in five tiers from front to back and four crates high, that is five cases loaded from the front to the back of the trailer, and four cases high (p. 81); the testimony of Mr. Palmieri that the crates were loaded on the trailer about four high (p. 121); the testimony of Mr. Hummelberger (p. 162), Mr. Nelson (pp. 174, 175), Mr. Irwin (p 185), Mr. Gracey (p. 190) and Mr. Reilly (p. 193), that such method of loading would be a proper loading.

Thus on this branch of the case the plaintiff's attempts to convict the defendant of improper loading consisted solely of the testimony of the plaintiff

that the load was one or two feet over his head, with his entire lack or disclaimer of any knowledge as to the number of crates, or the method in which they were piled or loaded, and the testimony of Reynolds that the ordinary method of loading such crates was to load as high as the tops of the side racks, between four and four and one-half feet high, and to load about four crates high. On the other hand, the defendant showed, first, that there were twenty crates, and that these crates were loaded crosswise and four crates high, a method which not only the expert and experienced witnesses said was proper, but which also Mr. Reynolds, the plaintiff's witness, said was proper. And in this connection the Court's attention is called to the testimony of Mr. Reilly at page 194, where Mr. Reilly demonstrated quite conclusively the impossibility of the plaintiff's testimony that these crates were loaded two feet over his head, or practically seven feet from the platform of the trailer.

> "Q. Mr. Reilly, would it be possible to load "a trailer truck seven feet high?
> "A. It would not be possible without a crane "or some appliance overhead to land it on top. "It would be impossible for men to lift it up."

It is earnestly submitted that there was no evidence from which the jury could have legally found any negligence upon the part of the defendant in regard to the loading. The plaintiff's testimony even taken by itself fails to bear the impress of truth. The fact of his entire willingness to swear that the height of these crates was seven feet, and his entire unwillingness to testify even approximately as to the number of crates or to give any description as to the method of their loading, would certainly indicate, to our minds at least, that his story was one conjured up in a vague, mad sort of effort to secure a jury's verdict. When compared with defendant's testimony, moreover, it appears

not only improbable, but impossible, and we submit, therefore, that on this phase of the case there was no legal evidence to go to the jury on the question of the defendant's negligence.

(3) *The Racepiece or Stringpiece:*

The plaintiff testified that when the trailer truck struck the edge of the gangplank in going from the dock, it shook the load on the trailer. To use his exact language,

> "So when it left the dock to go onto the float "and struck the gangplank, it shook the mer- "chandise in the trailer" (p. 20).

At no time, however, did he testify as to the presence or absence of the racepiece or stringpiece at the time of the accident.

Mr. Reynolds, a witness for the plaintiff, testified that it was customary on Pier 10 to place at the pier end of the gangplank, a racepiece or stringpiece (pp. 68, 69); that these pieces were made of sheet-iron and were customarily put on the planks in the morning and left there all day (p. 76); that as a rule they worked automatically; that is, worked up and down with the plank, coincident with the rise and fall of the plank, which of course was in its turn dependent upon the rise and fall of the tide (pp. 76, 77); that if this racepiece or stringpiece was absent, *neither* the electric *nor* the trailer truck could get over the end of the plank on the dock unless it jumped over (p. 73); that if these trucks jumped over the effect would be to dump into the river, not only the load but also any person in front of the load (p. 69). Mr. Reynolds also testified on cross-examination that he was not present at the time of the accident and did not know whether the stringpiece was in position or not. To quote his testimony,

> "Q. You didn't see the tide on this day, did "you?

"A. I didn't take much notice of it.
"Q. You didn't see the accident?
"A. No, sir; I didn't see the accident.
"Q. And you don't know whether there was "any stringpiece there or not, do you?
"A. No, sir" (p. 72).

In an apparent realization of the damaging effect of this admission, Reynolds was again put on the stand in rebuttal, after the close of defendant's case and testified that *after* the accident he noticed that there was no stringpiece at the end of the plank (p. 242). He also testified in rebuttal that the pier end of the plank was slanted off or shaved down to a point (p. 243).

On the defendant's behalf, Foreman Toomey of Pier 10, testified that the ends of the planks were not levelled or slanted down to a point, but that they were square across, being about four inches thick (p. 82); that a racepiece constructed of sheet iron, seven feet in length and five feet in width was always used on these planks; that without such racepiece it would be impossible to load or unload freight (pp. 78, 79) for the reason that,—to quote his testimony:

"The planks would project both ends over "our bulkhead and also over our floats" (p. 79).

that these racepieces were adjusted so as to operate with the plank; that is, rise or fall with the plank, dependent upon the rise and fall of the tide (p. 79); that such racepieces were used on both ends of the gangplank; that is, on the dock end and the barge end (p. 79); that on the day of the accident he noticed the racepieces on the end of the plank upon which the accident happened and that the racepieces were lying and attached in the regular manner (p. 93).

This then was the status of the testimony with reference to the stringpiece or racepiece,—The testi-

mony of the plaintiff that as the trailer went over the end of the plank, the load shook; the testimony of Reynolds that it was customary to use a racepiece which ordinarily worked automatically with the rise and fall of the plank, but that on this day, *after* the accident he noticed that the racepiece was absent. The testimony of Toomey that the racepiece was on the day of the accident attached in the usual manner and operating in the usual manner. We believe that a careful study of Reynolds' testimony will demonstrate that it is so inconsistent as to be impossible of belief. As has already been shown, he testified upon direct-examination that he he did not know whether or not the racepiece was present at the time of the accident. If, as he testified when called to the stand the second time, he noticed that the racepiece was absent after the accident, why did he not mention this fact upon his direct-examination? And, although he testified that the racepiece was absent after the accident, and, although he testified, as has previously been shown, that in order to get over the plank without an attached racepiece, both trucks would have to jump over the end of such plank and would throw into the river anybody or anything in front of the load, there is not a scrap of evidence to show that either the plaintiff or any part of the load at the time of the accident in question was thrown into the river. In fact, to the contrary, the evidence shows conclusively that both the plaintiff and the whole load stayed upon the bulkhead.

The fluctuating nature of his testimony, moreover, is shown by his evidence (p. 76) as to the use of the racepiece on the end of the plank next to the float. When first interrogated as to the use of a racepiece at this end, he answered that the racepiece was only used on the pier end. Then, after a number of questions, he finally admitted that they were generally used on both the pier end and the end next to the barge.

We submit that since the only evidence of the absence of the racepiece was the self-contradictory testimony of Mr. Reynolds, who obviously blew hot and blew cold as the occasion required, while on the other hand, there was the positive, affirmative and virtually uncontradicted testimony of Mr. Toomey that the racepiece was placed in position, there was no legal, competent evidence from which a jury might have found that the racepiece was in fact absent.

Even assuming, for the purposes of argument, however, that there was sufficient evidence from which a jury might have found that the stringpiece or racepiece was in fact missing at the time of the accident, yet we still insist that there was no evidence of negligence upon the part of the defendant in this regard.

It is of course well settled that the Master is not the insurer of the Servant's safety but is only required to exercise ordinary care and diligence in furnishing the Servant with a reasonably safe place in which to work and with reasonably safe machinery and appliances, and also, to exercise ordinary care and diligence in making repairs and keeping such premises and appliances in a reasonably safe condition.

26 Cyc., pp. 1102, 1136.

Comben v. *Belleville Stone Company,* 36 Atl. 473; 59 N. J. L. 226.

Baldwin v. *Atlantic City Railroad Co.,* 45 Atl. 810; 64 N. J. L. 232.

Campbell v. *T. A. Gillespie Co.,* 55 Atl. 276; 69 N. J. L. 279.

Burns v. *Delaware & Atlantic Telephone & Telegraph Company,* 59 Atl. 220; 70 N. J. L. 745.

Ruane v. *Erie Railroad Company,* 85 Atl. 178; 83 N. J. L. 423; affirmed in 100 Atl. 1027.

We conceive it to be equally as well settled that where an accident happens to the Servant because of a defect in an appliance, there is no liability upon the part of the Master unless both of the following two facts are first shown,—

FIRST: Either that the Master had actual knowledge of the defect or that the defect had existed for such a length of time that the Master in the exercise of a reasonable inspection would have discovered it; and,

SECOND: That the Master had a reasonable opportunity after acquiring such actual or constructive knowledge, to remedy it.

26 Cyc. 1141.

Fenderson v. *Atlantic City Railroad Co.*, 31 Atl. 767; 56 N. J. L. 708.

Baldwin v. *Atlantic City Railroad Co., supra.*

Randolph v. *N. Y. C. & H. R. R. R. Co.*, 55 Atl. 240; 69 N. J. L. 420.

Rogers v. *Roe and Conover*, 66 Atl. 408; 74 N. J. L. 615.

Ruane v. *Erie Railroad Co., supra.*

Penna. R. R. Co. v. *Knox*, 218 Fed. 748.

Penna. R. R. Co. v. *Glas*, 239 Fed. 256.

Southern Ry. Co. v. *Derr*, 240 Fed. 73.

Patton v. *Texas & Pacific Ry. Co.*, 179 U. S. 658.

See also:

Schnatterer v. *Bamberger*, 79 Atl. 324; 81 N. J. L. 558.

Collins v. *C. R. R. Co. of N. J.*, 101 Atl. 287.

The rule appears to have been quite succintly expressed by Justice Lippincott in the case of *Fender-*

son v. *Atlantic City Railroad Company, supra,* as follows:

> "The rule is that the company is bound to "use only reasonable care to prevent accidents "to its employees, and, to this end, is bound "to exercise reasonable care in furnishing suit- "able machinery and appliances, and to use a "like reasonable care in keeping them in proper "repair, as the risks assumed by the employees "are not those which are brought about by the "negligence of the company in these respects. "A railroad company is not held to the exer- "cise of extraordinary care towards its em- "ployees, as in the case of passengers; but it "is only required to furnish such appliances as "are reasonably calculated to insure the safety "of its employees. Nor is the company re- "sponsible for an injury resulting from what is "otherwise a suitable appliance becoming sud- "denly out of repair, unless it has been guilty "of negligence is not ascertaining the defect and "remedying it. Thus, if the coupling pin of a "freight car suddenly becomes out of repair, the "company using the same will not be liable for "an injury to an employee in consequence "thereof, unless its attention had been called "to the defect, or the company, by an exercise "of a reasonable degree of care, should have "discovered the defect, and had an opportunity "to make the needed repair." 31 Atl. at 769.

In the case at bar there is not a shred of evidence showing that the racepiece was absent at any time prior to the accident. The plaintiff, as has already been shown, had no knowledge as to its presence or absence, even at the time of the accident, and based his assumption of its absence at such time solely upon the alleged jerk or jolt which was sustained by the truck. Reynolds was not present at the time of the accident and did not know whether the racepiece was present or absent, and his observations were confined to a time *after* the accident.

Since, therefore, there was no proof that this

racepiece or stringpiece was missing at any time before the accident, and no evidence from which such fact might legally be inferred, it seems clear, without the necessity of further argument, that under the doctrine of the foregoing authorities, there was no evidence from which a jury might legally have found negligence on the part of the defendant on this phase of the case.

B.

Plaintiff assumed the risk.

Irrespective of the question of negligence, we believe that the learned Trial Judge should have directed a verdict in favor of the defendant for the reason that the accident was clearly an obvious risk of plaintiff's employment which was assumed by him. It is true that the plaintiff testified that during the period of his employment at Pier 10, and prior to the date of the accident, he had done only hand trucking and that the trip which resulted in the accident was his first trip on an electric truck and trailer truck (p. 16). This is, of course, at variance with the testimony of Tony Palmieri, the driver of the electric truck, who testified that the plaintiff had been working with him all during the day of the accident, and during such time had made a number of similar trips with him (pp. 120, 121, and 122), and also with the testimony of Patrick Hannon, the Assistant Foreman on Pier 10, who swore that he had seen the plaintiff make a number of similar trips prior to the accident (pp. 138 and 139).

Assuming the situation to be true, however, the situation is not altered in the least, for the fact remains that the danger of just such an accident as actually occurred, must have been perfectly obvious to the plaintiff, and if it was obvious then he must

be considered to have assumed it, and cannot recover in this action.

The plaintiff had been working for the defendant for a period of about nine months; part of this time having been spent at Jersey City, part at Pier 46, and a space of at least two months prior to the time of the accident at Pier 10 (p. 35). During this time he was, he contends, engaged in hand trucking (p. 35), but he was entirely familiar with the gangways leading from the prier to the floats and barges, and, having admittedly on a number of occasions gone down this same gangway with hand trucks and having frequently seen other men go down these gangways on the electric and trailer trucks such as he was on when he was injured (pp. 36 and 37) when the tide was just as low as it was on the day in question (pp. 36, 37 and 38). In fact, during the two months of his employment at this Pier he had seen numbers of trucks with "all sorts of loads" go down this gangplank (p. 50). The loads, according to his testimony,—

> "The loads varied altogether. Sometimes "there wasn't a half a load and sometimes it "was over a load. Sometimes it was over the "top of the truck" (p. 50).

It was daylight (p. 36) so there was nothing to prevent him from actually perceiving the size of the load and the danger of its falling over. Although he insisted that this was his first trip on an electric truck coupled to a trailer truck, yet he confessed to sufficient familiarity with these trucks to know that in going down the incline of the gangway he should keep one foot on the coupling pin in order to keep it from coming out, for, as he said, such pin "used to come out once in a while, used to jump out" (p. 39), and in fact he admitted that he had on this trip, put his right foot on such pin for the purpose of preventing it from coming out (p. 39).

In addition, as the truck started off the pier, he admittedly had his face turned toward the merchandise on the trailer trucks (p. 43) and put his hand up against such merchandise (pp. 39, 40). This was corroborated by Tony Palmieri, the driver of the electric truck, who said that "he" (the plaintiff), "was standing on the sideways of the machine with his hands on the freight" (p. 121). Furthermore, the plaintiff stated (and we consider it a very significant if not controlling feature of the case) that when going down the incline he placed his hands upon the front of the trailer truck to prevent the load from over-balancing. Using his exact language:

> *"I had my hands on the merchandise to keep "them from overbalancing and they tipped over "on me* and caught me on the back and spread "me out like that" (p. 43).

These statements of the plaintiff lead irresistibly to one of two conclusions. Either he was not stating the truth when he testified that this was his first trip upon these trucks or else he had so constantly observed them and their manner of operation that he was perfectly familiar with them and the danger incident to their use; and, if he was not familiar with the trucks and the manner of their operation from the Pier to the floats or barges, why did he know that he must keep his foot on the coupling pin? Likewise, if he was not cognizant of the danger of the loads, and in particular of the load in question, falling over, why did he try to guard against such possibility by placing his hands on the load in going down the incline? In this latter connection, we bespeak the Court's attention to the driver of the electric truck, Tony Palmieri, to the effect that the job of the man on the trailer truck is to watch the load on the trailer

and see that it does not fall off. To quote his testimony,—

> "Q. Why would he have to stand on the "trailer?
> "A. To hook it up.
> "Q. To hook it up?
> "A. Yes, to hook it up and watch the freight "that it don't fall off; to hook up the trailers "on the front, on the dock, and watch the "freight on the trailers that it don't fall off" (pp. 129 and 130).

And again,—

> "Q. So that it was not necessary for him to "stay there and watch the load.
> "A. That is his orders from the boss, to stay "there and watch it.
> "Q. When you say watch it you mean watch "the load?
> "A. Watch the load and work and do every-"thing, hook up and do everything" (p. 130).

This testimony of Palmieri as to the duty of the attendant on the trailer truck was uncontradicted, and the coincidence of his statement as to its being part of the job of the attendant on the trailer truck to watch out for the load, and the action of the plaintiff on this, his alleged first trip, in thus watching out for the load is strikingly apparent. And, in this connection, it is also to be noted that at the time of the accident, the two trucks were practically all the way down the incline and the electric truck was just going from the gangplank or gangway onto the barge or float (pp. 121, 145).

This case would seem to be governed by that of *Capan* v. *Delaware, Lackawanna & Western Railroad Co.*, 102 Atl. 661. The plaintiff in that case was employed upon the defendant company's dock at Jersey City and at the time of the accident was engaged in transferring certain oil cakes from the company's cars standing on the dock to a

barge lying alongside of it. He was using a hand truck for this purpose. While engaged in this work the tide began to recede causing the incline from the dock to the barge to become gradually more and more steep. While doing so, he lost control of the truck, slipped and fell, and one of the oil cakes toppled over and fell upon him, fracturing his arm. The lower Court directed a verdict in favor of the defendant. The Court of Errors and Appeals sustained this action of the lower Court upon the ground that the plaintiff assumed the risk of such an accident. Chief Justice Gummere, who delivered the opinion, said:

> "If it was dangerous for a single longshore-
> "man to attempt to handle a truck so heavily
> "loaded upon so steep an incline unless he had
> "assistance, that danger was as obvious to the
> "appellant as to his employer, or any of its
> "representatives."

and further:

> "Under the federal statute the employer
> "is not liable for injuries received by the em-
> "ploye arising out of risks assumed by the
> "latter. A risk which is entirely obvious to
> "the employe, and is fully appreciated by him,
> "is an assumed risk under the federal statute,
> "and that being so, the appellant, by his con-
> "duct in attempting to handle the truck with-
> "out assistance, notwithstanding his knowl-
> "edge of the danger of such an attempt, re-
> "lieved the respondent from liability."

An attempt may be made to distinguish the Capan case from the case at bar, upon the ground that in the Capan case the plaintiff admitted upon the witness stand that he appreciated the danger under the conditions existing at the time of the accident, of attempting to handle the truck without assistance, but thought that he was strong enough

to do so. We believe, however, that this distinction is without substance for two reasons:

First, because it is clear from the testimony that the plaintiff in the instant case did appreciate the risk, and,

Second, because the true legal test is not whether the employee did actually appreciate the risk, but whether the risk was such an obvious one as would have been observed and appreciated by an ordinarily prudent person.

In support of the first reason, we deem it only necessary to again direct the Court's attention to the plaintiff's testimony that although he was entirely familiar with the gangways leading from the Pier to the floats and barges; that he had frequently seen other men go down these gangways on the electrics and trailer trucks, when the tide was just as low as on this particular day, and with all sorts of loads; that on this day in going down the inclined plank he kept one foot upon the coupling pin, because he knew that otherwise the pin might jump out, and in addition kept his hands on the front of the load on the trailer truck to protect such load and to prevent it from overbalancing. The fact that an employee appreciated a risk may of course be shown just as fully and as effectually by his conduct as by his express admission, and if such testimony does not show beyond conjecture that the plaintiff understood and appreciated the risk and danger of just such an accident as did occur and which he admitted he tried to prevent by keeping his hands on the load as the trucks started down the incline, then we are at a loss to understand what testimony would show it.

With respect to the second proposition: *i. e.,* as to what is the test of an assumed risk, the Court's attention is respectfully directed to the opinion of

the United States Supreme Court in the case of *Seaboard Air Line Railway* v. *Horton,* 233 U. S. 492, at page 504, where Mr. Justice Pitney in delivering the opinion of the Court, used the following language:

> "Some employments are necessarily fraught "with danger to the workman—danger that "must be and is confronted in the line of his "duty. Such dangers as are normally and "necessarily incident to the occupation are pre- "sumably taken into the account in fixing the "rate of wages. *And a workman of mature "years is taken to assume risks of this sort, "whether he is actually aware of them or not.* "But risks of another sort, not naturally inci- "dent to the occupation, may arise out of the "failure of the employer to exercise due care "with respect to providing a safe place of work "and suitable and safe appliances for the "work. These the employee is not treated as "assuming until he becomes aware of the de- "fect or disrepair and of the risk arising from "it, *unless defect and risk alike are so obvious "that an ordinarily prudent person under the "circumstances would have observed and appre- "ciated them.*"

(See also, *Philadelphia & Reading Railway Company* v. *Marland,* 239 Fed. 1, and *Chesapeake & Ohio Railway* v. *Proffitt,* 241 U. S. 462, in which latter case Mr. Justice Pitney said, at page 468, that:

> "The employee is not to be treated as as- "suming a risk that is attributable to the em- "ployer's negligence, until he becomes aware "of it, or it is so plainly observable that he "must be presumed to have known of it."

In our own State of New Jersey, the same principle was applied by the Supreme Court in the case of *Grover* v. *New York, Susquehanna & Western Railroad Company,* 69 Atl. 1082; 76 N. J. L. 237. In this case, plaintiff was employed

by defendant as a brakeman upon a freight train. He mounted to the top of the caboose attached to the train and took his position on the walking plank or runway to signal the engineer to move the train. In obedience to his signal, the engineer started the train. As is usual with freight trains, the starting of the engine caused a sudden jerk of the cars, making it necessary for the plaintiff to balance or set himself by arranging his body and feet on the walking plank. While so balancing himself, his feet were caused to come in contact with a lantern bracket which was placed or fastened in the walking plank or runway. The Supreme Court held that the plaintiff assumed the risk of such an accident. Chief Justice Gummere who delivered the opinion, said:

> "Knowing that it was there *he must be pre-*
> "*sumed* to have known that if he stood close
> "enough to it, when the train started, to be
> "thrown against it, he would probably lose
> "his balance, and be in danger of falling from
> "the car. Having this knowledge, he assumed
> "the risk of what followed by standing in such
> "close proximity to the lantern bracket when
> "he signaled the engineer to start his train."

Applying these rules to the case at bar, it is undisputed that the plaintiff could see what he was doing; that he had been down these gangways a number of times with hand-trucks; that he had seen these trailer trucks go down this and other gangways on previous occasions with all sorts of loads, the load extending sometimes over the top of the truck; that on a number of such occasions the tide was just as low as it was on this particular day; that he was familiar enough with the situation to know that he must keep one foot upon the coupling pin and that he must keep his hands on the load on the trailer truck in order to prevent it from falling over or overbalancing. Certainly

nothing could be plainer to a man of only ordinary intelligence than the possibility of the occurrence of just such an accident as actually did occur.

The case of *Baugham* v. *New York, Philadelphia & Norfolk Railroad Company,* 241 U. S. 239, is also very analogous in principle to the instant case. There plaintiff was employed as a brakeman in the defendant's yard at Port Norfolk, Virginia. On the second day of his employment, while mounting a freight car that was being transferred from the defendant's wharf to a barge moored at the wharf, he was killed by being crushed between that car and certain other cars which were upon the barge. The centre tracks on the barge gradually converged until the space between them so diminished that cars being moved on one centre track would almost touch those standing on the other centre track, and in fact, the roofs of the cars sometimes touched. Plaintiff while ascending a car on one of the centre tracks was caught and confined between the eaves of the roof of the car which he was ascending and the eaves of the roof of the car on the other centre track. The lower Court held that plaintiff assumed the risk of such an accident and therefore could not recover. This finding was affirmed by the United States Supreme Court.

It must be borne in mind that the plaintiff in the case at bar was essentially a longshoreman; that although according to his contention, he had performed, prior to the time of the accident, only the work of hand-trucking, yet his work for a long period of time prior to the accident was confined to work upon these piers; that in the performance of such work he must necessarily have become familiar to a very great extent at least, with the various practices and methods of work on the piers; that in hand-trucking he must necessarily have become acquainted with the sizes and weights of

crates of pineapples such as were being carried on the day of the accident.

His case is not the case of a clerk being suddenly transferred to a longshoreman's job, nor the case of a railroad brakeman being transferred to a pier. Taking his testimony as true, his assignment to the trailer truck on this particular day meant only a change from one job to another job on the same pier where both jobs were being constantly carried on together and commingled. This being so, it would certainly seem to us to follow that only the slightest conjecture and the exercise of only the slightest thought would have shown this man that these crates when tilted at an angle as they must necessarily be in going down the inclined plank, would fall, unless he supported them; that since they would so fall without any support, the purpose of his job on the trailer truck must necessarily be to prevent them from falling; that from his experience with such merchandise in hand-trucking, he must have known whether he could support them or not and there is not the slightest bit of evidence that he made any protest at any time against doing this work. We therefore most respectfully submit that the plaintiff should be held to have assumed the risk of the accident in question,—

First: because the evidence shows that he did understand and appreciate the risk, and

Second: because the risk was perfectly obvious and must have been recognized and appreciated by the plaintiff, had he been in the exercise of ordinary care and prudence.

C.
The Release barred the action.

The accident occurred on August 6th, 1917 (p. 3). By way of a separate defense the defendant duly pleaded and produced a written release, dated September 11th, 1917, purporting to have been signed by the plaintiff, releasing the defendant from all claims or demands which plaintiff might have had by reason of the injuries sustained as the result of the accident.

This document was marked Exhibit D-3 (p. 198), and photographic reproductions of the same are hereto annexed. The front of such document is reproduced on photograph marked "Exhibit D-3 (Front)", while the back thereof is reproduced on photograph marked "Exhibit D-3 (Back)".

The attention of the Court is directed, at this time, to the signature "William A. Fagan" and over such signature the words "I have read the above and understand it", and is also directed to the certificate of acknowledgment of William A. Fagan of said instrument, which certificate bears the signature of William W. Giddes, a Commissioner of Deeds for New Jersey (Exhibit D-3 Back).

Mr. Giddes, the officer who took the acknowledgment and who is one of the attesting witnesses, and who is also an attorney at law of New Jersey (p. 197), testified that on September 11th, 1917, he was employed by the defendant, although not so employed at the time of the trial (p. 198); that he was what is known as a Special Claim Agent (p. 199); that in such capacity he had a conversation with the plaintiff with reference to a possible settlement; that the sum of $85.00 was finally agreed upon (pp. 202, 203, 206, 211); that after the plaintiff's acceptance of such amount, the release was drawn upstairs and brought downstairs to where

the plaintiff was (p. 211); that the plaintiff then read such release carefully, this procedure on his part taking about five minutes (pp. 200, 206), and Mr. Giddes explained its contents in the following language:

> "You understand you are receiving this $85 "and releasing the railroad from any further "claim" (p. 205);

that the plaintiff before he signed his name, wrote the words "I have read the above and understand it", and then signed his name (p. 197); that then Mr. Giddes took the plaintiff's acknowledgment (pp. 198, 205), using the following language,—

> "Do you acknowledge that you sign, seal "and publish this written release as your vol- "untary act and deed for the uses and pur- "poses therein expressed?" (p. 205)

to which query the plaintiff made the following response,—

> "I do" (p.206);

that there were also present at such time, Mr. Ming, Mr. Hone, employees of the defendant, and a man who had accompanied the plaintiff (p. 202); that after he signed the release, a check for the amount of $85.00 was given him (Exhibit D-5-A), which he endorsed and which Mr. Hone then had cashed for him (pp. 203, 204).

The plaintiff contended that this release was obtained by fraud (p. 8), and in an attempt to support such contention produced testimony as follows:

The plaintiff at first denied that he had signed the release (p. 44), but later admitted that the signature was in fact his (p. 230). Likewise, he at first emphatically denied that he wrote the words "I have read the above and understand it" (p. 47). Likewise, later he admitted that he might have

written them (pp. 231, 232). He testified that on the day he signed this paper he had conversations with Mr. Giddes and another man; that they said:

> "Well, we will give you $80 for ten weeks "half pay" (p. 217).

and that the plaintiff said:

> "Why not give it to me every two weeks, like "you did that colored fellow down in Broad- "way tower?"

to which one of them replied:

> "We don't do that any more."

that then, to use the plaintiff's testimony:

> "He said, 'I will give it to you every ten "weeks in a lump sum. We don't do that any "more since last May. We give it for ten "weeks,' he said, 'in a lump sum.' So after "he gave me the money—first he gave me a "check and then he asked whether I would "sooner have the check or the money and I "told him I would sooner have the money, "naturally I endorsed the check; and then "when he went to get the money for me he "put a paper in front of me and told me to "sign a receipt for it. So I did. In fact, I "would have signed anything that day, I didn't "know what it was" (pp. 217 and 218).

that, continuing plaintiff's testimony:

> "I asked him, I says, 'Is this all?' 'Well', "he says, 'come back', he says, 'in ten weeks.' "He said, 'Come up to my office and see me or "I will come and see you'" (p. 218).

that in a later conversation with Mr. Giddes:

> "He said that there was no more coming "to me. He said the last payment, the $85, "he says that was all the money he was going "to give us" (p. 228).

The plaintiff testified further that he did not read the paper and did not know what was in it (p. 233); that he *supposed* it was a receipt (pp. 233, 234); that he called it a receipt because he supposed it to be a receipt and because as he stated:

> "I signed a recipt for the money, and natur-
> "ally I would sign a receipt to you, if you
> "handed me money; you would have to get a
> "receipt for it, wouldn't you?" (pp. 233, 234).

Mr. Reynolds, also on behalf of the plaintiff testified that he was present at the time the plaintiff got the money from Mr. Giddes; that his recollection about the matter was not very clear, for as he stated:

> "I most forget now, it has been so long" (pp. 237, 238).

That he could not say whether or not the plaintiff read the paper (pp. 240, 244); that he had no knowledge of the contents of the paper and merely *supposed* that it was a receipt (p. 244), and that although on direct-examination he testified that the man who presented the paper to Mr. Fagan said it was a recipt for the $85.00 (p. 238), yet later admitted that he, Reynolds, thought it was a receipt (p. 244) and that he *did not* hear either Mr. Giddes or Mr. Ming tell the plaintiff that it was a receipt (p. 244); that they handed the plaintiff the paper and he signed it (p. 245); that then a check for $85.00 was given the plaintiff.

For the defendant, Mr. Giddes, in rebuttal denied telling the plaintiff that this paper was a receipt (p. 246), and although he admitted writing a letter to the plaintiff under date of September 19th, 1917 (see Exhibit D-4) explained that this letter was in reference to a pass for the plaintiff's wife, desired in connection with a position which Mr. Giddes was endeavoring to secure for her (p. 248).

Mr. Hone testified that he was an employee of the defendant's claim department in the capacity of stenographer and made this release out (pp. 252, 253); that he took it down to Mr. Giddes who then gave it to the plaintiff, telling him, the plaintiff, that this was the defendant's general form of release and for him, the plaintiff, to read it over carefully (p. 253); that after the plaintiff had read it over for about five minutes, he raised his head up and nodded his head and then Mr. Giddes told the plaintiff, Mr. Fagan, to write "I have read the above and understand it" and sign his name (pp. 253, 257); that thereafter the plaintiff did write the words "I have read the above and understand it" and signed his name (pp. 253, 254); that thereafter Mr. Giddes took the plaintiff's acknowledgment in substantially the following form:

> "That is your name and you have written "that above your name and know what you're "signing?"

to which the plaintiff replied:

> "I do" (pp. 257, 258).

that there was nothing said about the document being a receipt (pp. 254, 255).

Mr. Ming, also produced upon the part of the defendant, testified that he was employed in the defendant's claim department and was present at the time the plaintiff signed this document (p. 259); that this transaction took place in defendant's waiting room at Jersey City (p. 260); that there were present, Mr. Giddes, Mr. Hone, Mr. Ming, the plaintiff and Mr. Reynolds; that the plaintiff said he wanted to settle his case (p. 265); that as the result of the conversation between Mr. Giddes and the plaintiff, Mr. Giddes agreed to pay the latter a certain sum of money which was acceptable to him, the plaintiff (p. 260); that thereupon Mr. Hone prepared a release which Mr.

Giddes handed to Mr. Fagan (pp. 260, 261); that at such time Mr. Giddes told Mr. Fagan that the paper was a release and that for the sum of money agreed upon between them, the plaintiff was releasing the defendant from any further claims on account of his injuries (pp. 260, 261); that Mr. Fagan then held the paper before his face for three or four minutes (pp. 261, 263); that then the plaintiff wrote the words "I have read the above and understand it" and then signed his name (p. 262); that then Mr. Giddes asked the plaintiff if he signed the paper with knowledge of its contents, to which the plaintiff replied that he did (p. 263); that absolutely nothing was said by Mr. Giddes to the plaintiff about the paper being a receipt (p. 261); that after the plaintiff signed the document, he was then handed a check for $85.00 (pp. 268, 269; see Exhibit D-5).

This then, at the close of the case, was the status of the evidence with regard to this release. Reynolds had very little recollection, and did not hear anyone tell the plaintiff that the document was a receipt, but did remember that it was handed to the plaintiff and signed by him. The plaintiff according to his story believed that he was going to get more money later and therefore supposed it was a receipt. In addition, as he testified, he thought that as a condition precedent to receiving any money he must sign a receipt for the same and therefore supposed that this document was a receipt. On the other hand, there is the clear-cut and it seems to us, believable testimony of the defendant's witnesses that the contents of the paper were thoroughly explained to the plaintiff.

There can be no question, of course, that in the absence of fraud, this document would be a complete bar to plaintiff's action and it is most earnestly submitted that there was no sufficient evi-

dence of fraud to warrant the submission of the case to the jury.

The law is well settled that where a party attaches his signature to a contract otherwise valid, a conclusive presumption is created except as against fraud that the signer read, understood and assented to its terms.

34 Cyc., pp. 1055, 1056, 1057.
Fivey vs. *Pennsylvania Railroad Company*, 52 Atl. 472; 67 N. J. L. 627.
Zdancewicz vs. *Burlington County Traction Company*, 71 Atl. 123; 77 N. J. L. 10.
Vellekoup vs. *D. Fullerton & Company*, 74 Atl. 793; 79 N. J. L., p. 16.

And it is equally well settled that the charge of fraud must be clearly and distinctly proved by the party who asserts it. The presumption is in favor of innocence and fraud is not to be assumed on doubtful evidence.

Kerr, Fraud & M., 384.
34 Cyc., p. 1100.
Fivey vs. *Pennsylvania Railroad Company*, 52 Atl. 472; 67 N. J. L. 627.
Lynch, Administrator, vs. *Newman*, 37 N. J. Law Journal, 17.

The instant case is analogous to and we think governed by that of *Fivey* vs. *Pennsylvania Railroad, supra.* That case arose out of an action instituted to recover damages for injuries alleged to have been sustained by the plaintiff as a result of the defendant's negligence. The defense was two-fold. First, a denial of the negligence and second, a release. This release was contained in the application for membership in the defendant's Relief Fund, which was signed by plaintiff sometime prior to the accident. One of the agreements contained in the application

was that if the applicant should be accepted as a member, the acceptance of benefits from the Relief Fund for injury or death should act as a release of all claims for damages against the defendant arising from such injury or death. The plaintiff admitted signing this application containing such agreement, but alleged that it was obtained by fraud and deceit, and without knowledge by him of the fact that the release was contained therein. It appeared that the plaintiff signed this application in the presence of the defendant's medical examiner, in its Relief Department at Jersey City, the plaintiff having presented himself to such examiner for the required physical examination. The plaintiff testified that the examiner simply shoved this paper in front of him, the plaintiff, and told him to sign his name, and further told him that "it was all a matter of form"; that nothing was said by the examiner with reference to the nature of this document before the plaintiff signed it, with the exception of a statement that "it was a benevolent association belonging to the employees of the Railroad, and that there was so much deducted from their wages every month to contribute toward the support of this fund"; that nothing was said about releasing the defendant in case of any accident; that the plaintiff could read a little, but not much; that when the paper was handed to him he commenced to look at it to see what it contained, but that the examiner would not give him time to read it, and that he therefore did not read any part of it; that the examiner did not read the paper or any part thereof to him, either at the time of signing or prior thereto. Upon this evidence the Trial Court directed a verdict in favor of the defendant, which action was sustained by the Court of Errors and Appeals, holding that there was not sufficient evi-

dence of fraud to go to the Jury. Justice Hendrickson, in delivering the opinion in *inter alia* said:

> "The fact that the plaintiff did not choose to "read the paper, or the material parts of it, "before signing, or did not know the contents "at the time, can not in the absence of actual "fraud, relieve him from its obligations. * * * "the allegation is that fraud was practiced "upon the plaintiff in procuring his signature, "by fraudulent representations as to the nature "of the paper signed, and as to the party with "whom plaintiff was contracting. This aver- "ment is based upon the plaintiff's version of "what the medical examiner said as to the "nature of the paper about to be signed. * * * "It is not a statement as to the contents of the "paper, but, rather, a remark as to its nature. "* * * To establish a misrepresentation that "will invalidate a contract, it must appear that "the representations were not only false but "were made with the intent to deceive, and that "the party seeking relief acted upon, and was "mislead by them. It is difficult to see wherein "the statement of a medical examiner was false "or fraudulent, within the rule here stated. * * * "The fact is pointed to that after this statement "the medical examiner 'shoved the paper' in "front of the plaintiff, and 'told him to sign' his "name; that plaintiff 'commenced to read it', "and he 'was told by the doctor it was all a mat- "ter of form', it was immaterial'. In the case "of *VanDeventer* vs. *VanDeventer, supra* (46 "New Jersey Law, Page 460), the objection was "that the party who had executed the obligation "did not know its nature, and was told by the "plaintiff that the papers were of no account, "and only a formal matter. But since it was "not shown that the obligor was defrauded by "any representation that the documents were "of a different character or import from that "plainly appearing on their face, and it appear- "ing that the obligor could read, and had lib- "erty to examine the papers, the supreme court "held the objection insufficient to avoid the "obligation. * * * There was in the present "case an entire failure to show the indicia of "actual fraud."

It would certainly seem that the plaintiff's case in the matter of alleged fraudulent statements was very much stronger in the *Fivey* case than in the case at bar. In the *Fivey* case, the plaintiff could read very little; secondly, he was told by the medical examiner that this was a benevolent organization which he was joining; third, he was told by the medical examiner that it was all a matter of form, and fourth, he was not given an opportunity by the medical examiner to read the document before he signed it. In the instant case, however, the plaintiff could read; secondly, he did admittedly have ample opportunity to read the document. Third, he wrote upon the document that he had read and understood it. Fourth, assuming to be true his testimony that Mr. Giddes told him to sign a receipt and assuming further that such request amounted to a representation that the document was a receipt this still would have been the truth, because the document was in effect a receipt as well as a release, and in the words of the *Fivey* opinion was

> "Not a statement as to the contents of the "paper, but rather a remark as to its nature."

The *Fivey* case seems to be the foremost opinion upon this subject in New Jersey, and applying its tests and principles to the case at bar, it seems clear beyond any doubt that the evidence of alleged fraud was entirely insufficient to permit its submission to the Jury.

In the case of *Vellekoup* vs. *D. Fullerton & Company, supra,* the plaintiff, who was injured while in defendant's employ, sought to avoid the effect of a release which had been executed by him upon the ground that same was procured by fraud and deceit. The testimony showed that the plaintiff was unable to read; that he had not read the paper which he signed; that it was not read to him, and

that its purport was not explained to or understood by him, and was in fact misunderstood by him. Upon this state of facts, the supreme court held, Justice Garrison delivering the opinion that:

> "The present case is barren of any testimony "that would have supported a finding, by the "Jury that the plaintiff's execution of the re-"lease had been procured by fraud or imposi-"tion."

The Court further said that:

> "Whether or not the plaintiff understood "that he was signing a release of his right of "action against the defendant" was "an irrele-"vant matter," and that ignorance of the effect "of the release signed by him "presents the "same irrelevancy".

and as was said in the case of *Zdancewicz* vs. *Burlington County Traction Company, supra:*

> "The plaintiff's belief * * * that the "paper he signed was a sick benefit receipt was "not induced by anything which was said to "him on the occasion of his signing. He said "nothing either to Mr. Budd or to Doctor "Prickett to indicate that he did not fully "understand the contents of the paper, or its "purpose."

It is contended furthermore, that even if Mr. Giddes did in fact tell the plaintiff that the document was a receipt, yet such a statement, if a misrepresentation at all, was a misrepresentation as to the *legal* effect of the document and therefore, would not avoid it.

Jackson vs. *Pennsylvania Railroad Company,* 54 Atl. 532; 69 N. J. L. 79.

It is to be noted, however, that the plaintiff's case is barren of any testimony that Mr. Giddes said the paper was a receipt. At the most plain-

tiff's contention is simply that Mr. Giddes told him to "sign a receipt".

We feel that the testimony of the plaintiff with reference to alleged statements of Mr. Giddes, requesting the plaintiff to come back at a later period are so vague and self-contradictory as not to deserve serious consideration. We think, however, that in pasing we should direct the court's attention to the fact that such statements, even though made, were not representations concerning matters *in presenti,* but were mere promises and were not therefore such fraudulent representations concerning the nature of the document, as would avoid it.

Jackson vs. *Pennsylvania Railroad Company, supra.*

An examination of the cases wherein it was held that there was sufficient evidence to submit to the Jury the question of fraud in the execution of the release or other instrument will disclose, we think, that in nearly all of these cases the releasor was illiterate, incapable of reading or a foreigner, it being the universal trend of the authorities to hold to his written act a man who can read, unless there are some extraordinary surrounding circumstances.

34 Cyc. pages 1056, 1057.

Burik vs. *Dundee,* 49 Atl. 42; 66 N. J. L. 420.

Zdancewicz vs. *Burlington County Traction Co., supra.*

Pabisz vs. *Newark Spring Mattress Company,* 36 N. J. Law Journal, 114.

The distinction was well expressed in the case of *Pabisz* vs. *Newark Spring Mattress Company, supra,* as follows:

> "The petitioner did not *understand how to* "*read,* as did the plaintiff in the case of *Fivey* "v. *Penn. R. R. Co.,* 67 Law, 627; he had *no in-* "*terpreter* to explain it, as was the case in

"*Burik* v. *Dundee Woolen Co.*, 66 Law, 420, al-
"though he was admittedly ignorant of the
"English language; nor was the instrument
"*read* and *explained* to him, as was done in the
"case of *Zdancewicz* v. *Burlington Traction*
"*Co.*, 77 Law, 10."

Further argument would seem to be unnecessary and superfluous to demonstrate that in the case at bar there was no sufficient evidence of fraud to go to a jury. It was not disputed that the plaintiff was able to read; it was not disputed that he had an ample opportunity to read the document, nor was it denied nor disputed that he wrote upon the document before signing it the words "I have read the above and understand it". Moreover, it affirmatively appears that he was relying upon his own senses in executing this paper, and was not relying upon any agent or employee of the defendant. In fact it appears that he even brought with him a friend, Mr. Reynolds, for the apparent purpose of seeing that his rights were protected. There is then entirely absent from the case that element of reliance and dependence upon the statements and conduct of the releasee, which has been held to be so vitally necessary to avoid a release or written instrument, even though fraudulent and misleading statements regarding its contents be shown. The case which is presented is therefore one in which the parties acted at arm's length, where the plaintiff signed it, after having first written in his own handwriting on the document a statement that he had read and understood it, where he was able to read and had an opportunity to read; where the witnesses swore that its contents were explained to him; where its acknowledgment by him was certified by an attorney at law of New Jersey, and where such attorney swore that he had duly explained its contents to the plaintiff before it was signed by him. In the face of this evidence, can it

be fairly suggested for a moment that there was sufficient evidence to go to the Jury that the plaintiff was induced by fraudulent statements to sign the paper? To thus hold would certainly weaken, impair and destroy to a large extent the solemn and inviolate character which has heretofore been attributed to sealed instruments. And in this connection the Court's attention is again directed to the fact that nowhere in his testimony does the plaintiff claim that any of the defendant's employees *told* him that the document was a receipt. He merely contends that Mr. Giddes told him to "*sign* a receipt".

It may be contended that the amount of the consideration mentioned in the release is disproportionate to the injuries sustained by the plaintiff, and that therefore the defense of the release should be regarded with disfavor on the ground that the contract is a hard one from the plaintiff's standpoint. And indeed we cannot refrain from suggesting that this thought may have been in the minds of the jury and that such thought, rather than any question of fraud, was responsible for their verdict. That such contention would be entirely without merit would seem to require no argument, and likewise, we think, it is clear beyond doubt, that a verdict arrived at through such a process of reasoning would be wholly contrary to law. It was decidedly not within the province of the jury to determine whether or not the consideration for the release would fully compensate the plaintiff. We think it is settled beyond question that any alleged inadequacy of consideration has absolutely no bearing upon the question of the validity of the contract of release, and may not be considered either for the purpose of deciding whether the contract was a fair one to both parties or in determining whether there was fraud in the procuring of the same. See *Fivey* vs. *Pennsylvania*

Railroad Company, supra. The release in question was a contract duly entered into by both parties and performed on its part by the defendant. And it is earnestly submitted that there is no evidence in the case which would warrant depriving the defendant of the protection thereof.

We therefore urge as a consequential proposition that the learned Trial Court should have directed a verdict in favor of the defendant on this ground.

II.

There was error in the charge of the Trial Court.

The learned Trial Judge charged the Jury as follows:

> "If the jury finds as a matter of fact that "the trailer that the plaintiff was on had no "guards in the front where the plaintiff had "to be, and if you further find the railroad "company did not exercise reasonable care in "providing the trailer with those rails, and "thereby the accident occurred, and plaintiff "was injured, then they must find the defend-"ant was negligent."

As we have endeavored to point out in a former portion of the brief, there was no evidence on the plaintiff's behalf that the trailer truck on which the plaintiff was at the time of the accident had no guard in front, while on the defendant's behalf, it was testified: first, that there was in fact a guard rail on the front of such trailer truck, and secondly, that such guard rail was that commonly used by railroad and steamship companies in and around New York Harbor. This being so, we think it clear that there was no legal evidence from which

the jury might find either that such guard rail was absent at the time of the accident or that the defendant had not used reasonable care in providing the trailer truck with such a guard rail. The action of the Court in so charging the jury, however, may very well have lead them to believe that in the Court's mind, there was such evidence, and they may well have seized upon this part of the charge as affording them a ground for their verdict. We contend, therefore, that this was error.

See

Camden & Atlantic City Railroad Company vs. *Williams,* 40 Atl. 634; 61 N. J. L. 646.

III.

There was error in refusal of the learned Trial Judge to charge as requested by the defendant.

A.

The Trial Court refused to charge the following request of the defendant.

> "There is no evidence in this case from which "you may find negligence upon the part of the "defendant with respect to the manner of con- "struction of the trailer truck or with respect "to the racks used thereon."

The refusal of this request again involves, of course, the question of whether there was any legal competent evidence to go to the Jury with the respect to the absence of a guard rail on the front of a trailer truck or in respect to the mode of construc-

tion of such trailer trucks. As we have already heretofore endeavored to show there was no such evidence produced and this refusal of the Court would therefore seem to be clear error.

B.

The Judge also refused to charge as follows:

> "There are three questions in this case: (1) "Was the defendant guilty of negligence? (2) "Did the plaintiff assume the risk of this "accident? and (3) Was plaintiff fraudulently "induced to sign the release? If you resolve "any one of these three questions in favor "of the defendant then your verdict must be "for the defendant, no matter what your de- "termination may be as to the two remaining "questions."

The action was based upon the alleged negligence of the defendant. The defense was, first, that there was no negligence; secondly, that even if there was negligence the plaintiff assumed the risk and third, that the release barred the action. If the defendant successfully asserted any one of these three defenses, it cannot be questioned but that it was entitled to a verdict. This we think, the defendant was entitled to have made clear to the Jury and explained to them in the language used in the request. We, therefore, submit that the learned Judge erred in refusing to charge as requested.

C.

The Trial Judge also refused to charge the following request of the defendant.

> "If you find that the plaintiff himself wrote "on the release the words, 'I have read the "above and understand it, and then signed "his name to the release, your verdict must "be for the defendant."

As has already been shown, the validity of the release depended upon the question not of whether the plaintiff understood the nature of the document, which he was signing, but whether his execution thereof was induced by fraud and we think, it has also been shown, that even though there was fraud, yet if before signing the document the plaintiff read it over and thereby and therefore depended upon his own senses, *i. e.,* his ability to read and understand the writing and did not rely upon the fraudulent representations, the release would not be void. If this be true, it would seem to logically follow that if the plaintiff himself wrote before signing the release a statement thereon to the effect that he had already read and understood it, it would be proof conclusive that he had done so, which in turn would be conclusive proof as aforesaid, of his reliance upon his own understanding of the nature of the document and the absence of his reliance upon the defendant. We submit, therefore, that the refusal as requested was error.

IV.

The judgment below should be reversed.

Respectfully submitted,

GEO. HOLMES,
Attorney of Defendant-Appellant.

DEVOE TOMLINSON,
Of Counsel.

New Jersey Court of Errors and Appeals.

WILLIAM A. FAGAN, Plaintiff-Respondent, vs. THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant-Appellant.	ON APPEAL.

BRIEF FOR DEFENDANT-APPELLANT.

This action was instituted under the Federal Employers' Liability Act, in the Monmouth County Circuit Court, to recover damages for personal injuries sustained by the plaintiff on August 6th, 1917, while employed by the defendant as a freight handler at Pier 10, North River, New York. The verdict below was for the plaintiff. This appeal brings before this Court for review the judgment entered thereon.

Statement of the Facts.

The accident occurred between four and five o'clock in the afternoon (pp. 15, 28) while the plaintiff was engaged in loading or assisting in the loading of certain crates of pineapples from Pier 10 to one of defendant's floats or barges which was moored to the pier (pp. 3, 4, 5, 16, 17, 18, 19, 32).

These crates of pineapples were loaded onto what is known as a trailer truck (p. 16), which was hauled by an electric truck, upon which no freight was loaded (pp. 16, 17). The two trucks were connected by a pin on the trailer truck, which hooked into the end of the electric truck (pp. 16, 17). One

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man was driving the electric truck (p. 26), while the plaintiff stood with one foot on the electric truck and one foot on the coupling pin (p. 32).

In order to get from the bulkhead of the pier to the barge or float, it was necessary to go down an inclined gangway (pp. 17, 27, 28, 29). When the two trucks were nearly all the way down the incline (p. 32), some of the crates on the trailer truck toppled over onto the electric truck and struck the plaintiff, causing the injuries complained of (p. 27). The load of pineapples was about the usual load for such a trailer (p. 33).

The plaintiff testified that he had been working for the defendant for a period of about nine months (p. 13); that he had been employed for part of this time at defendant's Pier 46, North River, New York (p. 25), and that he had been employed on Pier 10 for a period of about two months (pp. 25, 26). He further testified that during the time of his employment at Pier 46 and Pier 10 he had done hand-trucking only (pp. 14, 15, 25), and that prior to the time of the accident he had never worked on a trailer truck (p. 26). On the contrary, however, Tony Palmieri, who was operating the electric truck at the time of the accident (p. 60), testified that the plaintiff had been working with him on the electric and trailer trucks on the day of the accident from nine or half-past nine o'clock in the morning until the time the accident occurred (pp. 62, 63); that during said day the plaintiff and Palmieri had gone down this same gangplank on these trucks a number of different times, carrying various sorts of loads (p. 64).

Both the electric and the trailer trucks are about seven feet long (p. 69). The gangplank is eighteen feet long and about seven and one-half feet wide (p. 71). This plank elevates and lowers with the rising and lowering of the tide. At low tide the plank is at about fifteen per cent. grade (pp. 71, 72).

John Toomey, General Foreman at Pier 10, testified that the trailer trucks on the pier were each equipped with two side-racks but had no racks on the front or rear, except that he had seen one set of trailer trucks which had a small bent pipe or rack in front about two and one-half feet in height (p. 74) ; that these were the only racks he ever saw used on the front of any of the trucks (pp. 74, 75).

Edward Reynolds, called by the plaintiff, testified that he had worked for the defendant at Pier 10 as a trucker (p. 104), and that some of the trucks had racks three and one-half to four feet high, not only on the sides, but also on the ends (p. 106). He further testified, however, that these racks were not always used and that he used his own judgment about putting them on the trucks (pp. 111, 112).

Specification of the Errors Relied on.

(1) Because the Trial Judge refused to direct a verdict in favor of the plaintiff.

(2) Because the Trial Judge charged the jury as follows:

> "It appears that some time after the accident "the plaintiff left the hospital and went to "defendant's office, and after accepting $85 "signed a paper that was brought him. The "plaintiff testifies that he thought he was sign- "ing a receipt. Defendant's claim agents testify "that it was a release. It was a written "document and must be produced by the de- "fendant if it relies upon this document to "prevent a recovery by the plaintiff. The paper "has not been produced and its absence has not "been accounted for, and there is nothing before "the court that will warrant you in saying that "the plaintiff is prevented from recovery, if you "find that he has any claim against this com- "pany, by reason of any paper that was signed "at that time."

ARGUMENT.

I.

The Court erred in refusing to direct a verdict in favor of the defendant.

At the close of the plaintiff's case the defendant moved for a non-suit, assigning as grounds therefor, first, that no negligence upon the part of the defendant had been shown, and, secondly, that the accident which resulted in plaintiff's injuries was a risk of plaintiff's employment which was assumed by him (p. 57). At the close of the whole case the defendant moved for a direction of a verdict in its favor for the same reasons (p. 119). Both of these motions were denied by the learned Trial Judge. This, we submit, was clearly error.

(A) There was no evidence of negligence.

It is indeed difficult to determine what evidence is relied upon by the plaintiff to indicate any possible negligence upon the part of the defendant. There was absolutely no testimony that these crates of pineapples were improperly loaded or that the load was too large for the truck. In fact, the plaintiff himself testified that the load was "about the usual load" (p. 33). Likewise, there was nothing to show any defect in the condition of the bulkhead or of the gangplank. The gangplank was at the same grade as was usual at low tide (pp. 29, 68, 71, 72), and there was not even an intimation or an insinuation that there was any defect in its state of repair.

By process of elimination, therefore, it is clear that any evidence, to warrant the finding of negligence, must be found in the testimony with respect

to the condition of the trailer truck; and still further applying the process of elimination, a careful reading of the testimony discloses, we think, that any doubt that the plaintiff's sole claim of negligence in this regard is with respect to the absence of any racks on the ends of such trucks. The plaintiff himself gave no testimony with respect to this feature of the case, and the only evidence in this respect was the testimony of Mr. Toomey, who testified that racks were used on the ends of the trailer trucks only where small commodities, such as groceries, were being carried (p. 73), and that in such cases the rack consisted only of a small pipe front two and one-half feet in height (p. 74); and the testimony of Mr. Reynolds who, in substance, said that racks three and one-half to four feet in height (p. 106) were used in carrying groceries and small articles and were only occasionally used in carrying larger articles (p. 111).

Therefore, the only testimony in the whole case which could possibly afford any basis for the finding of negligence upon the part of the defendant are these few words of Mr. Reynolds to the effect that occasionally a rack was used. We think that no further argument or discussion is necessary to demonstrate beyond peradventure that there was absolutely no evidence of negligence to go to the jury and that, therefore, the Trial Court should have directed a verdict for the defendant.

(B) Plaintiff assumed the risk.

Irrespective of the question of negligence, we think that the Court should have directed a verdict in favor of the defendant, for the reason that the accident was clearly an obvious risk of plaintiff's employment which was assumed by him. It is true that plaintiff testified that during the period of his employment at Pier 10, and prior to the date of this

accident, he had done only hand-trucking and that the trip which resulted in the accident was his first trip on an electric truck and trailer truck (pp. 14, 26, 28). This is, of course, at variance with the testimony of Tony Palmieri, the driver of the electric truck, who testified that during the day of the accident, and prior to the accident, the plaintiff had made a number of similar trips with him (pp. 62, 63, 64). Assuming the plaintiff's testimony to be true, however, the situation is not altered in the least, for the fact remains that the danger of just such an accident as actually happened must have been perfectly obvious to the plaintiff, and if it was obvious, he must be considered to have assumed it and cannot recover.

The plaintiff had been working for the defendant for about nine months, part of the time at Jersey City, part of the time at Pier 46, and for a period of at least two months prior to the time of the accident, at Pier 10 (p. 25). During this time he was engaged in hand-trucking (p. 25), but he was perfectly familiar with the gangways leading from the pier to the floats and barges (pp. 28, 29), having admittedly on a number of occasions gone down this same gangway with hand trucks, and he had frequently seen other men go down these gangways on the electric and trailer trucks such as he was on when he was injured (pp. 29, 30, 31). In fact, during the two months of his employment at this pier he had seen great numbers of loads of pineapples and other merchandise similar to the load he was on at the time of the accident being hauled down this gangplank "day in and day out" by the electric trucks "just the same as was being done on this day" (p. 34). The load that toppled over and caused his injuries was the usual load used on these trucks (p. 33). It was daylight (p. 28), so there was nothing to prevent him from actually perceiving the size of the load and the

danger of its falling over. Although Mr. Fagan said that this was his first trip on an electric truck coupled to a trailer truck, yet he admitted that he was familiar enough with these trucks to know that in going down the incline of the gangway he should keep one foot on the coupling pin in order to keep it from coming out (pp. 27, 29). In addition, he admitted (and we think it a very significant, if not controlling, feature of the case) that when going down the incline he placed his hands upon the front of the trailer truck to keep the load from falling over. His exact language was as follows:

> *"My hands, I had them on the front of the "trailer, because when we struck the incline "to go down I tried to protect the goods from "falling over, the merchandise, the merchan-"dise from falling over"* (p. 27).

These statements of the plaintiff plainly indicate one of two things: either he was not stating the truth when he said that this was his first trip on these trucks, or he had so constantly observed them and their manner of operation that he was perfectly familiar with them and the dangers incident to their use; for if he was not familiar with these trucks and if he did not know the danger of this load falling over, why did he try to guard against this possibility by placing his hands upon the load in going down the incline; and in this connection it is to be noted that when the accident happened the trucks were "pretty nearly all the ways down the incline" (p. 32).

This case seems to be on all fours with the facts of *Capan* v. *Delaware, Lackawanna & Western Railroad Company,* 102 Atl. Rep. 661. In that case the plaintiff was employed upon the defendant company's dock at Jersey City, and at the time of the accident was engaged in transferring certain oil cakes from the company's cars standing on the

dock to a barge lying alongside of it. He was using a hand-truck for this purpose. While engaged in this work the tide began to recede, causing the incline from the dock to the barge to become gradually more and more steep. He undertook to go down this incline in its altered condition with a load of about seven hundred pounds of oil cakes upon his truck. While doing so he lost control of the truck, slipped and fell, and one of the oil cakes toppled over and fell upon him, fracturing his arm. The lower Court directed a verdict in favor of the defendant. The Court of Errors and Appeals sustained the action of the lower Court in this regard, upon the ground that the plaintiff assumed the risk of such an accident. Chief Justice Gummere, in writing the opinion, said:

> "If it was dangerous for a single longshore-
> "man to attempt to handle a truck so heavily
> "loaded upon so steep an incline unless he had
> "assistance, that danger was as obvious to the
> "appellant as to his employer, or any of its
> "representatives,"

and further in his opinion, the Chief Justice also said:

> "Under the federal statute the employer
> "is not liable for injuries received by the em-
> "ploye arising out of risks assumed by the lat-
> "ter. A risk which is entirely obvious to the
> "employe, and is fully appreciated by him, is
> "an assumed risk under the federal statute,
> "and that being so, the appellant, by his con-
> "duct in attempting to handle the truck with-
> "out assistance, notwithstanding his knowl-
> "edge of the danger of such an attempt, re-
> "lieved the respondent from liability."

An attempt may be made to distinguish the Capan case from the case at bar, for the reason that in the Capan case the plaintiff admitted upon the witness stand that he appreciated the danger,

under the conditions existing at the time of the accident, of attempting to handle the truck without assistance, but thought that he was strong enough to do so. We think, however, that this distinction is without substance, for two reasons: First, because it is clear from the testimony that the plaintiff in the instant case did appreciate the risk, and, secondly, because the true legal test is not whether the employe did actually appreciate the risk, but whether the risk was such an obvious one as would have been observed and appreciated by an ordinarily prudent person.

In support of the first reason we deem it only necessary to again call the Court's attention to the testimony of the plaintiff (pp. 27, 29) where he stated that in going down this incline he kept one foot upon the coupling pin because he knew that otherwise the pin might jump out, and in addition he kept his hands on the front of the load on the trailer truck to protect such load from falling over. If this testimony does not show beyond any shadow of a doubt that the plaintiff understood and appreciated the risk of just such an accident as did happen, and which he admitted he tried to prevent by keeping his hands on the load as they went down the incline, then we are at a loss to understand what testimony would show it.

With regard to the second proposition, *i. e.,* as to what is the test of an assumed risk, we wish to direct the Court's attention to the opinion of the United States Supreme Court in the case of *Seaboard Air Line Railway* v. *Horton,* 233 U. S. 492, at page 504, where Mr. Justice Pitney, in delivering the opinion of the Court, used the following language:

> "Some employments are necessarily fraught
> "with danger to the workman—danger that
> "must be and is confronted in the line of his

"duty. Such dangers as are normally and "necessarily incident to the occupation are "presumably taken into the account in fixing "the rate of wages. *And a workman of mature "years is taken to assume risks of this sort, "whether he is actually aware of them or not.* "But risks of another sort, not naturally inci- "dent to the occupation, may arise out of the "failure of the employer to exercise due care "with respect to providing a safe place of work "and suitable and safe appliances for the work. "These the employe is not treated as assuming "until he becomes aware of the defect or dis- "repair and of the risk arising from it, *unless "defect and risk alike are so obvious that an "ordinarily prudent person under the circum- "stances would have observed and appreciated "them,"*

(see also *Philadelphia & Reading Railway Company* v. *Marland,* 239 Fed. Rep. 1) and the same principle was applied by the Supreme Court of New Jersey in the case of *Grover* v. *New York, Susquehanna & Western Railroad Company,* 69 Atl. Rep. 1082. In this case the plaintiff was employed by the defendant as a brakeman upon one of its freight trains. He mounted to the top of the caboose attached to the train, and took his position on the walking plank or runway thereon to signal the engineer to move the train. In obedience to his signal the engineer started the train. As is usual with freight trains, the starting of the engine caused a sudden jerk of the cars, making it necessary for the plaintiff to balance or set himself by arranging his body and feet on the walking plank; while so balancing himself his feet were caused to come in contact with a lantern bracket which was placed and fastened in the walking plank or runway. The Supreme Court held that the plaintiff assumed the risk of such an accident.

Chief Justice Gummere, in writing the opinion, said:

> "Knowing that it was there *he must be "presumed* to have known that if he stood "close enough to it, when the train started, "to be thrown against it, he would probably "lose his balance, and be in danger of falling "from the car. Having this knowledge, he "assumed the risk of what followed by stand- "ing in such close proximity to the lantern "bracket when he signaled the engineer to "start his train."

In the instant case, it is undisputed that plaintiff could see what he was doing; that he had seen these trucks go down this gangway on previous occasions; that the load which was on his truck was the usual load that was on the other trucks; that during the two months of his employment at this pier he had seen great numbers of loads of pineapples and other merchandise similar to the load on which he was at the time of the accident being hauled down this gangplank "day in and day out" by the electric trucks "just the same as was being done on this day"; that he was familiar enough with the situation to know that he must keep one foot upon the coupling pin; that he must keep his hands upon the load on the trailer truck in order to prevent it from falling over, and that he was not strong enough to hold it (p. 17). Certainly nothing could be plainer to a man of only ordinary intelligence than the possibility of the occurrence of just such an accident as actually did occur.

The case of *Baugham* v. *New York, Philadelphia & Norfolk Railroad Company,* 241 U. S. 239, is also very analogous to the case at bar. In that case the plaintiff was employed as a brakeman in the yard of the defendant company in Port Norfolk, Virginia. On the second day of his employment,

while mounting a freight car that was being transferred from the wharf of the company to a barge moored at the wharf, he was killed by being crushed between that car and certain other cars which were upon the barge. The center tracks on the barge gradually converged until the space between them so diminished that cars being moved on one center track would almost touch those standing on the other center track, and in fact the roofs of the cars would sometimes touch. Plaintiff, while ascending a car on one of the center tracks, was caught and confined between the eaves of the roof of the car which he was ascending and the eaves of the roof of a car on the other center track. The lower Court held that plaintiff could not recover because he assumed the risk of such an accident, and such finding was affirmed by the Supreme Court of the United States.

We most respectfully submit that in the instant case plaintiff should be held to have assumed the risk of the accident in question, (1) because the evidence showed that he did understand and appreciate the risk, and (2) because the risk was perfectly obvious and must have been recognized and appreciated by the plaintiff had he been in the exercise of ordinary care and prudence.

II.

There was error in the charge of the Trial Court.

The defendant set up, by way of a separate defense, that after the accident the plaintiff executed a written instrument releasing the defendant from all claims or demands which the plaintiff might have by reason of the injuries which he sustained as a result of said accident (p. 7). The reply of

the plaintiff asserted that such release was procured by fraud, in that the plaintiff was asked to sign a receipt for a certain sum of money, and insisted that the paper in question was merely a receipt for the money given to him; that he was not asked to read the paper, nor was he truthfully advised as to the contents thereof.

At the trial, William W. Giddes, a witness produced upon the part of the defendant, testified, without any objection being interposed upon the part of the plaintiff, that he, on behalf of the defendant company, had certain conversations with the plaintiff relative to the accident; that the plaintiff finally agreed to accept the sum of $85 as a final adjustment of any claim which he might have, by reason of the accident, against the defendant; that Mr. Giddes then had a release prepared, which the plaintiff signed and acknowledged (p. 77). Mr. Giddes also testified, without any objection upon the part of the plaintiff, that this instrument which the plaintiff signed and acknowledged was a release in and by which the plaintiff, for the consideration of $85, released his claim against the defendant company (pp. 77, 78, 80). Mr. W. E. Ming, Jr., another witness produced upon the part of the defendant, testified that he was present at the time the plaintiff signed the instrument in question and that such instrument was a release (pp. 94, 95, 96).

The plaintiff admitted signing a paper (pp. 36, 43), but stated that he did not read the paper and did not know whether it was a release or whether it was a receipt (p. 43). Edward Reynolds, produced upon the part of the plaintiff, testified that he was with the plaintiff at the time he signed such paper and that he, the witness, supposed such paper to be a receipt (pp. 108, 115, 117). Reynolds admitted, however, that he did not read the paper and

that he did not hear any one tell the plaintiff what such paper was (p. 117).

With reference to this phase of the case, the Court charged the jury as follows:

> "It appears that some time after the accident "the plaintiff left the hospital and went to de- "fendant's office and after accepting $85 signed "a paper that was brought him. The plaintiff "testifies that he thought he was signing a re- "ceipt. Defendant's claim agents testify that "it was a release. It was a written document "and must be produced by the defendant if it "relies upon this document to prevent a re- "covery by the plaintiff. The paper has not "been produced and its absence has not been "accounted for, and there is nothing before the "court that will warrant you in saying that "the plaintiff is prevented from recovery, if "you find that he has any claim against this "company, by reason of any paper that was "signed at that time."

Of course, the effect of this charge was to virtually eliminate and strike out that separate defense of the defendant which pleaded as a bar to plaintiff's action, the alleged release.

Admittedly the sole reason which impelled the Trial Court to so charge the jury, and thus deprive the defendant of the benefit of this defense, was the fact that the paper itself was not produced and that secondary evidence only was given as to the contents thereof.

We think that there was error in this portion of the charge for two reasons: *First.*—The issue on this part of the case, as finally defined by the pleadings, was not whether the paper which was signed was a release or a mere receipt (as the Court apparently had in mind), but was the question of whether the plaintiff had been induced by fraud or misrepresentations to sign a release. In this

connection it is quite important to note the wording of the plaintiff's reply (p. 8). This reply does not deny that the paper which was executed was a release, but virtually admits it by asserting that

> "the release mentioned in the answer was pro-
> "cured from him by fraud and deceit, in that
> "he was asked to sign a receipt for a certain
> "sum of money which he received from the de-
> "fendant through one of its servants agents
> "and representatives, and was advised that the
> "paper was merely a receipt for the money
> "given to him; that he was not asked to read
> "the paper; nor was he *truthfully* advised what
> "the contents of the paper was."

It is quite manifest from this pleading, as it is also manifest from a careful perusal of the direct-examination of the plaintiff and of the plaintiff's witness, Reynolds, and the cross-examination of the defendant's witnesses, that at no time during the pendency of the action or the trial thereof was plaintiff's counsel proceeding upon any other theory than that the paper which was signed was actually a release which the plaintiff had been fraudulently induced to execute. We think, therefore, that the Court should have submitted to the jury the problem of deciding under all the circumstances of the case, as revealed by the testimony, just what the true agreement was which was reached between the plaintiff and the representative of the defendant and whether or not any fraud was practiced upon the plaintiff in this respect. *Second.*—Assuming that the pleadings were elastic enough to permit the plaintiff at the trial to deny that the instrument in question was a release and to assert that it was merely a receipt, yet we still think that the Court erred.

It is, of course, admitted that the paper or instrument itself would have been the best evidence, and it is, of course, likewise admitted that had the plain-

tiff introduced any objection, the parol testimony of Mr. Giddes and Mr. Ming, with reference to the contents of such paper or instrument would not have been admissible without preliminary proof showing that the instrument had been lost or destroyed. We bespeak most earnestly, however, the Court's attention to the fact that at no time during the entire trial did the plaintiff's counsel make the slightest objection to this testimony. We contend, therefore, that this testimony, having been given without any objection either at the time or subsequently, should have stood, and was perfectly competent for submission to and consideration by the jury.

It is submitted that this case clearly comes within the line of authorities which hold that where testimony has been given witihout objection and no motion to strike out has been made, acquiescence in its introduction will be presumed.

Berryman vs. *Graham,* 21 N. J. Eq. 370;
Rowland vs. *Rowland,* 40 N. J. Eq. 281;
Roll vs. *Rea,* 32 Atl. Rep. 214;
Fath vs. *Thompson,* 33 Atl. Rep. 391;
Camden & Atlantic City Railroad Co. vs. *Williams,* 61 N. J. Law 646; 40 Atl. Rep. 634.

And this rule includes secondary evidence of the contents of a written instrument. *Roll* vs. *Rea, supra; Fath* vs. *Thompson, supra.* The Court of Errors and Appeals in *Roll* vs. *Rea, supra,* said:

> "The bills of exception disclose much second-
> "ary evidence of the contents of the deed
> "brought out on the examination of witnesses
> 'by the counsel of the plaintiff as well as by
> "counsel of the defendant, and no exception
> "was taken on either side to the admission of
> "such evidence, nor was any motion made to
> "overrule it. *By this course, objections to the*
> *"mere admissibility of secondary evidence were*

"waived pending the taking of testimony and "it was too late to interpose them after counsel "had summed up before the jury."

32 Atl Rep. at page 215.

We think that the case at bar comes clearly within the scope of these decisions and that, therefore, the evidence, having gone in without objection, should stand, and it was error upon the part of the Trial Court to tell the jury to entirely disregard such testimony. That it was material error, if error at all, goes without saying, since the effect was to entirely and completely deprive the defendant of the benefit of this defense which it had raised.

III.

The judgment below should be reversed.

Respectfully submitted,

GEORGE HOLMES,
Attorney of Defendant.

DEVOE TOMLINSON,
Of Counsel.

36 MAR.T.1919

New Jersey Court of Errors and Appeals

WILLIAM A. FAGAN, Plaintiff-Respondent, vs. THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant-Appellant.	On Appeal.

BRIEF FOR PLAINTIFF-RESPONDENT.

STATEMENT.

Plaintiff was employed by the defendant as a hand trucker only (p. 14), on the pier, where the accident happened, for about two months (p. 26). On the day of the accident, he was told by his foreman, one Dorsey, to go on the loaded truck attached and propelled by an electric truck (p. 15).

Plaintiff had nothing to do with the loading of the truck (p. 16), and this was the first trip that he made on the electric truck (pp. 15-26), and his foreman did not give him any instructions or warning of the condition of the load (p. 16). He had not, previous to this occasion, gone down the gang-plank between the pier and the barge, except with a hand truck.

The difference between the hand trucking and the trailer truck, the one plaintiff was on when injured, is that in hand trucking, the truck is pulled by hand, and the trailer truck is pulled by an electric truck, to which the loaded trailer is attached (p. 14).

It was customary on that pier, in loading trailers, with merchandise, to place racks all around the trailer to keep the merchandise from falling off (p. 14, 106).

POINT I.

The Court did not err in refusing to direct a verdict in favor of the defendant.

United States Congress has undertaken, in passing the Federal Employers' Liability Act, to cover the subject of the liability of railroad companies to their employees injured, who are engaged in interstate commerce.

Section 1 of an act entitled "Federal Employers' Liability Act," Act April 22, 1908, Ch. 149, 35 Stat. L. 65, reads as follows:

> § 1. (Liability of railroads for injuries to employees.)
>
> *That every common carrier* by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between he District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, *shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce,* or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, *for such injury* or death *resulting in whole or in part from the negligence* of any of the officers, agents, or employees of such carrier, *or by reason of any defect or insufficiency,* due to its negligence, in its cars, engines, *appliances,* machinery, track, roadbed, works, *boats, wharves,* or *other equipment.*

The underlying reason for the act, as well as general object sought to be accomplished is plain upon its face.

The present act reflects and is in harmony with what may be said to be the strong trend of the public mind in nearly all the civilized countries at this time, and to quote the language of Judge Rogers in the case of Fulgham vs. Midland Valley R. Co. (C. C.) 167 Fed. 660-633:

"So it is provided in substance, where the employee is injured in the service of a railroad, while engaged in interstate commerce, he shall have a cause of action for that injury, and this action he can maintain in his own name, although he may have, by his own negligence, contributed to the injury."

Richey-Federal Employers' Liability Act, p. 34.

The evidence as has been brought forth during the trial presented many questions of negligence on the part of the defendant company, and the trial court properly left it to be decided by the jury.

It was for the jury to determine whether the accident and injuries resulting therefrom to the plaintiff was due in whole or in part to the negligence of the defendant for the following reasons:

1. Because of the improper manner of the truck being loaded, same being at the height of two feet over the plaintiff's head (p. 33), without any protection on the ends, and while the said truck struck the plank placed between the bulkhead and the float (p. 71), it shook the load and fell from the truck, while it was going down the incline.

The rule is well settled that it is a positive duty of the master to take reasonable precautions that the place in which his servant is to work shall be reasonably safe.

Baltimore and Ohio R. R. vs. Baugh, 149 U. S. 368.

Thus it remained as a question of fact for the jury to determine whether the manner of the loading of the freight on the trailer was negligent or not.

2. Because the master failed to warn the plaintiff of the dangers incident with said work.

The plaintiff did not have any previous experience with that kind of work. When the accident occurred the plaintiff made his first trip on the trailer truck. He previously worked as a hand trucker, and, therefore, was not familiar with the proper manner in which a trailer should be loaded; nor could he know that the trailer should have had protections on the ends to keep the freight from falling.

The master should have warned the plaintiff, and in the absence of such warning, it therefore became a proper question for the jury to pass upon whether the defendant company was negligent in failing to warn plaintiff of the dangers incident to the work in view of all the surrounding circumstances.

3. Whether the equipment furnished—that is the trailer upon which the freight was loaded—was defective or insufficient, was a question properly left for the jury to pass upon.

The testimony showed that the trailers usually and customarily had protectors on the sides as well as the ends (pp. 106-110-111), but on this trip there was nothing on the ends so as to prevent the freight from falling.

4. There was a further question for the jury to pass on, and that is whether the trailer was properly loaded, and that the improper loading was one of the proximate causes of the accident.

Upon well-established principles, it has been held that the fact that an employee may have assumed the risk from one of two contributing causes of injury will not defeat his right to recover where the other cause is one for which the master is liable. Thus where one of the proximate causes of injury was the negligence of a fellow servant of the deceased, it was immaterial whether the plaintiff had assumed the risk of the defendant's negligence, since the law is that it is only necessary for the plaintiff to show that one of the co-operating causes of injury was a negligent act or omission for which the master is liable.

Richey's Federal Empoyers' Liability Act, p. 41.

5. The question of assumption of risk was a jury question.

Lacombe, Circuit Judge, in the case of Lindsay vs. N. Y., N. H. & H. R. R. Co., 112 Fed. 384, said:

> "Where there is reasonable ground for difference of opinion as to whether the defect was plainly observable by him the jury should decide."

The testimony in the case at bar showed that the plaintiff had nothing to do with the loading of the freight; had no opportunity to examine it, and had no experience as to that kind of work. This trip with the trailer when the accident occurred was the first he ever made. He had no knowledge what effect it would have as to the load on the trailer when it struck the gang-plank, connecting the wharf and the barge, and, upon traveling over the plank, on the down-grade. There is no testimony in the case that at the time he made this particular trip he had knowledge of the condition of the tide or the gang-plank.

The case of Capan v. Delaware, Lackawanna & Western Railroad Company, 102 Atl. Rep. 661, so much relied upon by the defendant-appellant, should have no bearing with the case at bar, for the following reasons:

In the Capan Case.	**In the Case at Bar.**
1. Plaintiff was working with a hand truck, transferring freight from pier to barge and while so engaged, the tide began to recede, causing the incline from dock to the barge to become gradually more and more steep.	1. This was Fagan's first trip and, therefore, he could not know of the change in the tide.
2. He had a load of seven hundred pounds on his truck which he claimed was too much for one man to handle.	2. He had nothing to do with the loading of the trailer nor was he experienced in that kind of work.
3. He admitted that he appreciated the danger under the conditions existing at the time of the accident of attempting to handle the truck without assistance, but thought that he was strong enough to do so.	3. He did not know of the dangers under the conditions existing.

As it was said by Chief Justice Gummere in the Capan case:

> "A *risk* which is *entirely obvious to* the employee *and is fully appreciated by him,* is an assumed risk under the federal statute."

A great deal has been argued by the defendant-appellant about the position of the plaintiff's hands when the load fell. By reading the testimony (p. 27) it can be readily seen that when the trailer struck the gang-pank and in the incline the load commenced to fall, the plaintiff put his hands against the load to keep it from falling on top of him, which is a most natural thing to have done. It was within the natural rule of self-preservation.

In Little Rock & M. R. R. Co. v. Moseley, 56 Fed. Rep. 1009:

> A switchman in the employ of the company was injured while coupling cars because of the failure of the company to keep the spaces between the ends of the ties properly filled The plaintiff testified that he did not know of the condition of the track at the place of the accident, although he had been working five nights before the accident as a night watchman in the yard where it occurred. The court held that the trial judge had properly refused to direct a verdict for the defendant company and that it was for the jury to determine "whether, under all the circumstances, the plaintiff did have knowledge of the alleged defect in the track at the place where he was injured, and before he was injured."
> As to the inspection prior to taking service, the court said:
> "We think that no such duty of inspection prior to taking service, or during his term of service, was devolved upon the plaintiff. He was simply bound to notice those obvious defects in the tracks, or other appliances, which he had an opportunity to notice in the discharge of his duties as a switchman, and he is only affected with knowledge of such obvious defects as he is shown to have had an opportunity to notice before the injury complained of was sustained."

In Texas & Pacific R'y Co. v. Archibald, 170 U. S. 665, 4 Am. Neg. Rep. 746:

> A switchman in the employ of the railroad company had been injured while attempting to couple two cars because of getting his foot entangled in a broken brake rod with links and chain attached to it, and it was contended on the part of the railroad company that it was not its duty to inspect such cars which merely came to it from another road for the purpose of being loaded and then returned, and requested the trial judge to instruct the jury that

if the brakeman knew or by the exercise of ordinary care could have known of this custom and method of the company not to inspect such cars, that then he could not recover. The trial judge refused to charge that the brakeman could not recover if by the exercise of ordinary care he could have known the custom, and the court upon appeal held that no error had been committed and that the plaintiff was not bound to exercise ordinary care to ascertain the methods in question. The court, at page 671, 170 U. S., and page 751, 4 Am. Neg. Rep. said: "The court was clearly right in striking the words from the requests. The elementary rule is that it is the duty of the employer to furnish appliances free from defects discoverable by the exercise of ordinary care, and that the employee has a right to rely upon his duty being performed, and that whilst in entering the employment he assumes the ordinary risks incident to the business, he does not assume the risk arising from the neglect of the employer to perform the positive duty owing to the employee with respect to appliances furnished. * * * No reason can be found for and no authority exists supporting the contention that an employee, either from his knowledge of the employer's methods of business or from a failure to use ordinary care to ascertain such methods, subjects himself to the risks of appliances being furnished, which contain defects that might have been discovered by reasonable inspection. * * * The employee * * * has the right to rest on the assumption that appliances furnished are free from defects discoverable by proper inspection, and is not submitted to the danger of using appliances containing such defects because of his knowledge of the general methods adopted by the employer in carrying on his business, or because by ordinary care he might have known of the methods, and inferred therefrom that danger of unsafe appliances might arise. The employee is not compelled to pass judgment on the employer's methods of business or to conclude as to their adequacy. He has a right to assume that the employer will use reasonable care to make the appliances safe and to deal with those furnished relying on this fact, subject, of course, to the exception which we have already stated, by which where an appliance is furnished an employee, in which there exists a defect known to him or plainly observable by him, he cannot recover for an injury caused by such defective appliance, if, with the knowledge above stated, he negli-

gently continues to use it. In assuming the risks of the particular service in which he engages, the employee may legally assume that the employer, by whatever rule he elects to conduct his business, will fulfill his legal duty by making reasonable efforts to furnish appliances reasonably safe for the purposes for which they are intended; and whilst this does not justify an employee in using an appliance which he knows to be defective, or relieve him from observing patent defects therein, it obviously does not compel him to know or investigate the employer's modes of business, under the penalty, if he does not do so, of taking the risk of the employer's fault in furnishing him unsafe appliances."

In Norman v. Wabash R. R. Co., 62 Fed. Rep. 727, the plaintiff, an employee of the defendant, had been injured because of defects in the floor of the freight sheds of the defendant where the plaintiff was required to work. The court, per Taft, J., said:

"The plaintiff denied that he knew of the defects in the floor, and testified that he had been so few times in the north side of the shed as to make his ignorance of its condition possible and reasonable. The fact that the foreman swears that Norman was every day in the north side of the sheds and had been there several hundred times, merely produces a conflict between the foreman and Norman, which it was for the jury to decide. * * * Manifestly, plaintiff had the right to submit to the jury the issue whether he was negligent or not."

In Northern Pac. R. Co. v. Teeter, 63 Fed. Rep. 527, there was testimony that defendant in error had never seen the track, in which was a hole he fell in, when it was not covered with slush and snow, and had never done any work on it in the place where the accident occurred before that day. The court sent the case to the jury with the instruction that the plaintiff could not recover if he knew, or had reasonable opportunities to know, of the unsafe condition of the track.

In the case of Pierce v. Clavin, 82 Fed. Rep. 550, the question whether upon all the facts the plaintiff knew, or ought reasonably to have known the danger of the alleged defective appliance should have been submitted to the jury.

In Valley R'y Co. v. Keegan, 87 Fed. Rep. 849, the plaintiff said he had not noticed the defect, and the question was properly left for the jury.

In New Orleans Ice Co. v. O'Malley, 92 Fed. Rep. 108, the evidence as to the plaintiff's knowledge was conflicting, and the case went to the jury on that ground.

> "The elimination of the doctrine of fellow servants, and the modification of the doctrines of contributory negligence *and assumption of risk* for the betterment of human rights as approved to those of property, and in the light of modern thought and opinion, the law should be liberally construed as possible."
> Richey's Federal Employers' Liability Act, page 52. Citing Behren v. Ill., etc., R. R., 192 Fed. 581-582.

POINT II.

There was no error in the charge of the trial court.

It is a matter of sound judicial discretion whether testimony should be ruled upon before it is actually given.

Fath v. Thompson, 33 A. 391.

At the end of the case, the trial judge excluded the question of the release from the jury, on the ground that the paper, purporting to be the release, was not produced (p. 117-118).

It is a matter of sound judicial discretion, whether testimony should be struck from the record at the close of the trial.

Brown v. N. J. Short Line R. Co., 76 N. J. L. 795.

It is an elemental principle of law that the trial judge may exclude evidence on his own motion.

In the case of Bullock v. State (Court of Errors and Appeals), 65 N. J. L. 560, at pages 575 and 576, Mr. Justice Depue said:

"Where evidence, which is illegal, is received by the court in the progress of the trial, it is competent for the court subsequently to exclude such illegal testimony."

POINT III.

The judgment should be affirmed.

Respectfully submitted,

WIGHT, WIGHT & GOLENBOCK,

Attorneys and of Counsel for Plaintiff-Respondent.

3 7 MAR.T.1920

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

WILLIAM A. FAGAN, *Plaintiff-Respondent,* *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, *Defendant-Appellant.*	*On Appeal.*

BRIEF OF RESPONDENT.

Statement of the Case.

This was an action to recover damages for injuries sustained by plaintiff in the employ of the Central Railroad Company of New Jersey in interstate commerce, under the provisions of an Act of Congress entitled "An Act relating to the liability of common carriers by railroads to their employees in certain cases, approved April 22nd, 1908," 8 Fed. Statutes Annotated, 1208.

Plaintiff obtained a judgment of $6,500 and from that judgment this appeal is taken.

The errors assigned are that the Trial Court refused to direct a verdict in favor of the defendant; the Trial Court improperly charged the jury in one particular; the Trial Court refused to charge the jury as requested by defendant in its 5th and 12th requests.

ARGUMENT.

I.

The motion to direct a verdict

The motion to direct a verdict was made upon three grounds treated in the defendant's brief under the following heads: (a) There was no negligence. (b) Plaintiff assumed the risk. (c) The release barred the action.

A consideration of defendant's brief will indicate that defendant's counsel has argued the case as if upon a motion for a new trial. He has asked the Court to weight the evidence and to de-

termine upon a consideration of all the testimony that the verdict of the jury was contrary to the weight of the evidence and that, therefore, a verdict should have been directed.

The rule is almost too well settled for citation of authority that the questions of negligence and assumption of risk are generally for the jury. The burden is on plaintiff under the Employers' Liability Act of Congress to prove negligence "of any of the officers, agents or employees of such carrier." The burden is on defendant to prove that plaintiff assumed the risk.

Kanawha, etc., R. Co. v. *Kerse,* 239 U. S. 576, 60 U. S. (L. Ed.) 448.

Justice Pitney said:

> "The burden of proof of the assumption of risk was upon defendant, and unless the evidence tending to show it was clear and from unimpeached witnesses, and free from contradiction, the trial court could not be charged with error in refusing to take the question from the jury."

If there is any evidence from which negligence can be found and if the evidence is in such a state as that the jury is not obliged to find that the plaintiff assumed the risk the Court would have erred had it directed a verdict.

Armbrecht v. *Delaware, etc., R. R. Co.,* 90 N. J. L. 529;
Tonsellito v. *New York Central & Hudson River R. R.,* 87 N. J. L. 651;
Clark v. *Public Service Electric Co.,* 86 N. J. L. 145;
Dickinson v. *Erie R. R.,* 85 N. J. L. 586.

In the last case cited this Court referred to the rule as being settled that "A second concurring verdict upon the same state of facts or slightly varying evidence will cause the Court to hesitate before granting a third trial." In the case *sub judice* this is the second concurring verdict. On appeal to this Court the first verdict was set aside because the Trial Court had taken from the jury the question as to whether plaintiff was bound by the release. While, therefore, the Supreme Court has not had an opportunity to pass upon the weight of the evidence, no rule to show cause having been taken, nevertheless it appears that two juries have found that defendant was negligent and that plaintiff did not assume the risk and the remarks of the Chancellor in the Dickinson case apply.

Having in mind these rules we shall attempt to avoid discussing the weight of the evidence, although this will be extremely difficult in view of the treatment of the case by defendant.

A.

The story of the accident.

The accident occurred August 6th, 1917. Prior to the day on which it occurred plaintiff had been employed on the pier of defendant hand trucking. (P. 16.) He had used a little two-wheel truck (p. 23). Merchandise is put on these trucks and the workman pulls the truck behind him. (P. 24.) On the day in question he was taken off the work of hand trucking and directed to assist in transporting merchandise from the pier to the float by means of a trailer pulled by an electric truck (p. 17). He had never worked upon an electric truck or trailer before the trip on which the accident happened (pp. 47, 48, 18). The trailer was loaded by employees of defendant on the inside. Plaintiff had nothing to do with the loading and when directed to go to the trailer it had been already loaded (pp. 19, 42, 48). He was given no instructions with respect to the manner in which he should do his work. This is not denied. The foreman who set him to work was not called. On page 25 plaintiff testifies in response to the question "Q Will you tell the Court and jury, if you please, what he (the boss) did say to you before you went on this trailer? A 'Fagan, go and give them a hand on that trailer, on that truck,' and then I dropped my hand truck and went. I never took notice about— Q What did he say? A I dropped my other work. Q What did he say? A He said, 'Fagan, get on that truck.' This was about four o'clock in the afternoon." (P. 36.)

The method of procedure is for the electric trailer driven by an employee to couple up to the trailer and then to proceed with the trailer down the gang plank on to the float. The plaintiff's description of the accident is as follows (p. 20): "A Well, the trailer was filled up with this merchandise and pineapples and the electric truck was empty and I put one foot on the electric truck and one on the pin of the trailer to balance myself. So when it left the dock to go onto the float and struck the gang-plank it shook the merchandise in the trailer and that commenced to come over on me, and I put my hand over this way (indicating) to keep them from coming down, and the weight of them came over on me, straightened me out and tore this hip (indicating) out of my body and mashed my leg and my foot was paralyzed." He said on page 38: "A I had one foot on the electric truck and the other on the trailer, with my hand on the trailer to balance myself, so that when it struck this gang-

plank the merchandise commenced to tumble over and I turned around with my other hand to save the merchandise from falling over and it was too heavy for me and it came down on top of me and it came down on top of me and tore me up." On page 56 he says: "A No, sir; it was the jolt on that gangplank that started the merchandise; going over the incline."

It is significant that no other witness testifies as to how the accident happened save the plaintiff, although the driver of the electric truck was produced by the defendant, Tony Palmieri (p. 118). All he says with respect to how the accident happened is (p. 121) as follows: "A Well, I was driving the machine and he was on the platform of the electric truck. He tried to hold the pineapples, he had a load of pineapples to pull to the float, and he was standing on the sideways of the machine with his hands by the freight, but you know I couldn't turn all the while and I couldn't look behind what he used to do, you know."

It appears, therefore, beyond controversy that while plaintiff was engaged in the transportation of this load of pineapples on the trailer pulled by the electric truck standing in the position usually assumed by a man engaged in such work, as the trailer went over the gangplank something started the merchandise falling forward. It fell upon plaintiff and injured him severely.

The claim of plaintiff was that there was improper loading, the absence of a guard rail on front of the truck and the absence of a race piece or stringpiece on the gangplank at the time of the accident; that because of a combination of these circumstances, all due to the negligence of agents of defendant, the accident happened. It is significant that although defendant produced witnesses who were present at the time of the accident and some who were not but who had knowledge of the conditions of the pier at the time, no one testifies what, in fact, did cause or could have caused (excluding negligence) the accident.

B.

The doctrine of res ipsa loquitur or res ipsa dicit.

The electric truck and trailer were proceeding in the ordinary way and as the trailer went over the gangplank, for some reason the load commenced to fall and did fall causing the injuries to the plaintiff.

In *MacKenzie* v. *Oakley,* 108 Atl. 771, the Supreme Court held that where an automobile skidded on a wet road without proof as to what caused the skidding the question was for the jury under the doctrine of *res ipsa loquitur.* The Court said:

> "In this respect the case was properly submitted to the jury as one of fact. The situation presented is within the rule applicable to an accident, which suddenly and for no apparent cause happens, and yet from the very fact of its occurrence an abnormal situation is presented which bespeaks negligence in operation, under the rule of *res ipsa loquitur,* which calls upon the defendant for an explanation to exculpate herself from the legal inference or presumption of negligence arising therefrom.
>
> Cases of that general character in which this principle of liability was applied in this court and in the Court of Errors and Appeals are presented by Sheridan *v.* Foley, 58 N. J. L. 230, and Higgins *v.* Goerke-Krich Co., 91 N. J. L. 464."

In the Sheridan case the Supreme Court held that the falling of a brick wall injuring a laborer was *prima facie* case of negligence. In the Higgins case the dropping of a lid of a box upon the hand of a customer in a department store was held *prima facie* case of proof of negligence. And the Court used this significant language:

> "In the case at bar no attempt is made by defendant to explain the occurrence from that viewpoint, and, in the absence of an explanation comporting with the exercise of due care and foresight for harm, a case of *prima facie* negligence is established."

In *Hughes* v. *Atlantic City Railroad,* 85 N. J. L. 212, this Court considered the doctrine of *res ipsa loquitur* with great care. The plaintiff was a passenger on a railroad train and an electric bulb exploded causing injury. The Court charged the jury that unless the railroad company satisfied the jury that the accident did not occur from negligence there must be a verdict for the plaintiff. This Court reversed that judgment but solely upon the ground that the question of negligence was for the jury. It

distinctly approved the principle that from the happening of the accident negligence might be found by the jury.

In the case *sub judice* it is conceded that the accident happened. While witnesses are produced by the defendant who were present at the time no explanation is made as to how it happened. It is almost inconceivable that it should have happened were there no negligence on the part of one or more of the agents of defendant.

There is, however, evidence in this case—evidence of actual negligence on the part of defendant.

C.

The loading.

Plaintiff was five feet, ten inches in height (p. 74). The trailer was loaded about a foot above his head (p. 20). He later said (p. 21) that it was about two feet above his head but a consideration of his testimony (p. 55) indicates that he intended to say about a foot above his head. This would make the load about seven foot above the floor of the trailer. It was made up of crates of pineapples. He also said that it was an unusually large load (p. 49). It is true that Palmieri was produced by defendant (p. 121) and testified that the load was about four foot high. This is the only testimony in the case with respect to the height of the particular load. Toomey, produced by defendant, endeavors to support the testimony of Palmieri, although he had not seen the load, by testifying that, after the accident, he counted the number of cases and found that there were twenty and that a load of twenty cases on the trailer would make the load about four foot high. But the effect of the testimony of Toomey and of Palmieri is considerably weakened by the testimony of Toomey (p. 91) as follows: "Q Wasn't that the last load they took in on the car? A It might have been. I wouldn't say it was the last load that went in the car, no. Q Why wouldn't you say that? A It was a big shipment that day. Q I understand it was a big load. Wasn't it the last load that went on that barge? A I think one followed this. Q And for that reason they piled up all they had at the time? A They had three or four different commodities of this load that went on this car. Q I am talking about pineapples. That was the last load of pineapples that was taken off from the pier to go on to this barge, wasn't it? It was the last load of pine-

apples, wasn't it? A Yes, sir. Q They didn't load pineapples all that day? A No, sir. Q How long had they been loading them? A That was all. That was the reason they had pineapples." Toomey said on page 93 that his testimony with respect to the number that was on this trailer was guess work.

It is inferable from the testimony of Toomey, defendant's witness, that this being the last load of pineapples they piled all they had on the load and the testimony of Toomey is to that extent corroborative of the testimony of plaintiff, but whether the load was four foot high, as contended for by defendant, or seven foot high, as contended for by plaintiff, was a question for the jury.

The jury had before it a sample of the crate of pineapples. It had a right to consider whether if the load had been only four foot high the falling of the boxes of pineapples would have injured plaintiff to the extent that it did.

Reilly (p. 194) says that it would not be possible to load the trailer seven foot high, without the use of a crane. The jury was not obliged to believe this testimony. It had before it the boxes and it could determine whether it would be possible to load to the height of seven foot. There was no evidence as to the condition of the place in which the loading was done; there was no evidence that the loading was not done from a platform or that the boxes of pineapples were not standing on top of boxes of other commodities. There was no evidence that the men loading were standing upon the floor. Common knowledge informs us that there are innumerable ways, without the use of a crane, by which these crates could be loaded to the height of seven foot. Besides the testimony of Reilly, that it could not be done there was the testimony of plaintiff that it had been done, and there was also the testimony of Toomey that this was the last load of pineapples, and it is fair to assume from his testimony that they piled on all they could.

Whether the trailer was loaded to the height of four foot or seven foot was a question for the jury. Whether the loading to the height of seven foot was negligence was a queston for the jury.

In addition to the inference which might be drawn from the happening of the accident there was the testimony of Reilly, the witness for defendant (p. 194), as follows: "Q Assuming now that it was loaded across in the same manner as you indicated

it was loaded generally, and being seven feet high from the floor of the truck, would you still say that that was proper loading? A No."

Plaintiff's witness Reynolds testified (p. 66) that the ordinary way of loading pineapples was to load them just as high as the sides of the rack and that the sides of the rack were four and a half feet high.

It is highly significant that neither Dorsey or the receiving clerk who supervised the loading (p. 91) or any other person who actually loaded the particular load was called by the defendant (see testimony of Reynolds, p. 71).

D.

The guard rail.

It is customary on these trailers to have a guard rail in front to protect the load from falling.

Toomey, witness for defendant (pp. 80, 81, 84). On page 84 Toomey says that he has them on trailers when he handles them (pp. 88, 100), Hummelberger (p. 162), Henry John Nelson (pp. 173, 174), James F. Irwin (pp. 185, 186), Daniel J. Gracey (p. 189). Reilly, produced by defendant (pp. 192, 193), testified that he in his work did not use racks or guard rails at all, but there was no testimony that the place where he worked with trailers was at all comparable with the place at which the accident happened. Of course, whether guard rails are to be used or not depends to a great extent upon whether the trailer is to proceed over level ground or whether as in the case at bar it is to go down an incline. There was evidence from the defendant's own witnesses from which the jury might have found that the use of the guard rail was customary and taken in combination with the ground over which the trailer had to move was a necessity and its absence negligence.

There was evidence from which the jury might find that there was no guard rail on this particular truck. The plaintiff testified with respect to the guard rail (p. 20) that prior to the accident he did not notice whether there was a guard rail or not; that he did notice when the merchandise commenced to come down over him that there was no guard rail (p. 21).

On cross examination (p. 43), after again stating that there was no guard rail in front, plaintiff said that he was not absolutely certain about it. This testimony is cleared up by a con-

sideration of all his testimony (pp. 52, 53, 54, 56, 57). Plaintiff makes it quite clear that the apparent uncertainty in part of his testimony is due to the fact that he is trying to distinguish between a time prior to the accident and a time immediately after the accident. He says that prior to the accident he did not know whether there was a guard rail there or not. On page 57 he says: "A Why, never going on the truck and not having loaded that, I couldn't be certain whether it was there or not." And he says that when he saw the load falling and turned around he then realized that there was no guard rail in front. The only evidence produced by defendant as to this guard rail was that of Toomey (p. 80). We have read the testimony of Toomey in which he refers to the guard rail (pp. 80, 81, 83, 84, 85, 86, 87, 88, 89, 93, 96, 97, 98, 99, 100 and 101), and from that testimony the jury might properly infer that Toomey was testifying from general custom that this truck had a guard on it and not from personal inspection of the truck, and this, notwithstanding his positive statement on page 99 that it did have a pipe rack. His testimony, taken as a whole, leaves that impression upon the mind. It is significant that the man Palmieri, who had been working with plaintiff and was at the scene of the accident at the time of the accident, was not asked a single question with respect to the presence or absence of the guard rail and that Dorsey, the foreman, who set plaintiff at work, was not called. It is further significant that Toomey testifies (p. 93) that these guard rails were removable. If this guard rail was absent, in view of the testimony of defendant's own witnesses that it is customary to have it, the jury, from the testimony, was entitled to find that it was absent because of negligence on the part of one of the servants of defendant, and that its absence caused the happening of the accident. The jury had before it not only the testimony of the witnesses, but the pineapple crate, and it was within their province to find that the absence of the guard rail caused the accident and that its absence constituted negligence.

E.

The race piece or string piece.

Reynolds, a witness produced by the plaintiff, testified that it was customary to have over the place where the gang plank joins the pier a race piece or string piece; that the purpose of this race piece or string piece is to permit the trailer to go from

the pier on to the gang plank without upsetting the load (pp. 68, 69); that if this race piece or string piece be absent the load will be upset (p. 69). An attack is made upon Reynolds' testimony because of his statement (p. 69), that if the race piece was not present the load would be dumped in the river. It is urged that inasmuch as this load was not dumped in the river, therefore the race piece must have been present. The jury were not obliged to take this statement of Reynolds as indicating that every load which went over the gang plank if there were no race piece would actually go into the river. On page 242 Reynolds testified that immediately after the accident he examined the gang plank and found that there was no race piece there. He said on page 73: "Q And if it (the race piece) weren't there the truck, either the electric or the trailer truck, could not get over unless it jumped over? A It would have to jump to get over. Q And if it jumped over there would be a violent jerk, or jar? A Yes, sir." An attack is made upon this testimony upon the ground that the effect of it is, that if the race piece had not been present the electric truck or trailer could not have gotten over on to the gang plank; that it would have to jump. It is quite apparent what Reynolds meant. The absence of the race piece would leave a space between the gang plank and the pier over which the electric truck and trailer would have to pass to get on to the gang plank. This is what Reynolds meant by a jump. The effect of Reynolds' testimony is, taken as a whole, that it was necessary to have this race piece over the place where the gang plank and the pier met so that the electric truck and trailer might get from the pier to the gang plank without disturbing the load; that if this race piece was absent when the trailer struck the place where the gang plank joined the pier there would be a sudden jerk or jolt which would upset the load. That he saw the gang plank immediately after the accident and that the race piece was not there. The testimony of the plaintiff is to the effect that he did not know whether the race piece or string piece was there or not, but that when the trailer struck the gang plank "the jolt on that gang plank that started the merchandise going over the incline" (p. 56). The defendant contented itself with respect to the race piece by calling Toomey and again a consideration of his testimony as a whole leads to the impression that he is testifying from general custom, although he says (p. 93) that he happened to notice the race piece and the gang plank where the plaintiff went down and that they were attached in the regular way. He doesn't say, however, at

what time he made this examination. These string pieces or race pieces were not permanent. They were removed from time to time and whoever desired to use the gang plank put them down (p. 73). It is argued that because Toomey testified (p. 82) that the ends of the plank were not leveled or slanted down to a point, but were square across, that it was impossible that this string piece or race piece could be absent and the elecetric truck get over it. In contradiction of this testimony of Toomey plaintiff testified (p. 229) that the ends of the planks were shaved down, as did also Reynolds (p. 243). It is again highly significant that Palmieri, the man who was present at the time of the accident, was not asked by defendant anything with respect to the presence or absence of this race piece.

The jury were entitled to find from the evidence that the string piece was a necessity; that its omission was negligence; that there was negligence on the part of Palmieri, an employee of defendant, who drove his electric truck with the trailer on to the gang plank knowing that the race piece was not there, and that the absence of the race piece caused the accident. Defendant's counsel devotes a considerable portion of his brief under this heading to a discussion of those cases, holding that before the master can be held for a defect in an appliance the defect must have existed such a length of time as that the master in the exercise of a reasonable inspection would have discovered it, and that the master had a reasonable opportunity, after acquiring such actual or constructive knowledge, to remedy it.

The Court, in response to the request of defendant, charged the jury (p. 286):

> "Even if you should find that the race piece was not in the proper position at the time of the accident, yet you may not find negligence upon the part of the defendant by virtue of this fact, unless you also find either that the defendant had knowledge of its being out of position and had a reasonable opportunity to place it back in position prior to the time of this accident, or that it had been out of position for so long a period of time that the defendant in the exercise of reasonable diligence would have discovered this fact and would have had a reasonable opportunity to put it back in position before the accident."

The Court charged substantially the same thing on page 279 of the record. There was no request to charge the jury that they could not find negligence because of the absence of the string piece or race piece. The question as to whether the jury

might have found negligence on the part of the defendant because of the absence of the string piece was not presented to the Court below and is not presented here by any ground of appeal. If there was in the case with respect to loading and in respect to the absence of a guard rail, or one of these, evidence from which the jury might find negligence on the part of the defendant there could not have been a non-suit or a direction of a verdict, and these were the only motions under consideration here, the denial of which is assigned as ground of appeal. But it is submitted that taking the evidence with respect to this race piece as a whole the jury might have found either that the master had actual knowledge of the defect or that the defect had existed for a sufficient length of time as that the master in the exercise of a reasonable inspection would have discovered it, and that the master had a reasonable opportunity, after acquiring such knowledge, to remedy it. But under the Federal Employers' Liability Act, so-called, the jury were also entitled to find that the action of Palmieri in taking his electric truck with the trailer over this gang plank without a string piece was negligence on the part of Palmieri and therefore the negligence of a servant of defendant for the acts of whom defendant is made liable by the terms of the Employers' Liability Act.

F.

The question of the assumption of risk.

In *Gila Valley, etc., R. Co.* v. *Hall,* 232 U. S. 94, 58 L. Ed 521, the Supreme Court of the United States said:

> "The true test is not in the exercise of ordinary care to discover dangers, by the employee, but whether the defect is known or plainly observable by him. An employee is not charged by law with the assumption of a risk arising out of defective appliances provided by his employer, unless his employment was of such a nature as to bring to his attention and cause him to realize and comprehend the dangers incident to the use of such appliances."

In *Cincinnati, etc., R. Co.* v. *Thompson,* 236 Fed. 1, the Court said:

> "Knowledge of the risk is the watchword of the defense of assumption of risks."

The burden of proof on the issue of assumption of risk is on the employer. *Kanawha, etc., R. Co.* v. *Kerse,* 239 U. S. 576 (1916), 60 L. Ed. 448.

In *Kanawha Railway* v. *Kerse,* 239 U. S. 576, the accident was caused by plantiff coming in contact with a piece of timber placed in a horizontal position over a switch, about three feet six inches above the top of an ordinary box car. There was strong evidence that plaintiff had worked about the place before the accident and knew of the existence of the timber. He, however, denied it, and was supported by some corroborative proof. The Supreme Court refused to consider the question of assumption of risk as one of law.

Mr. Justice Pitney said in *Chesapeake & Ohio Railway* v. *Proffitt,* 241 U. S. 462:

> "The employee is not to be treated as assuming a risk that is attributable to the employer's negligence, until he becomes aware of it, or it is plainly observable that he must be presumed to have known of it."

The Supreme Court of the United States in *Seaboard A. L. R. Co.* v. *Horton,* 233 U. S. 492, 58 L. Ed. 1062, drew the distinction between contributory negligence and assumption of risk. The determining factor upon the question of assumption of risk is knowledge. It is not what an ordinarily prudent man would do under the circumstances. The employee must have actual knowledge. Of course, as Mr. Justice Pitney said in the Proffitt case, the risk may be so plainly observable that he must be presumed to have known of it. But after all, whether the knowledge be proven by positive evidence or by presumption the question is one of knowledge. And consider the facts in the Kanawha case, *supra.*

The case of *Grover* v. *New York, Susquehanna & Western R. R. Co.,* 76 N. J. L. 237, is clearly distinguishable. In that case by the declaration it appeared that the plaintiff was injured by coming in contact with a lantern bracket upon a walking plank caused by the movement of freight cars that started in obedience to his, plaintiff's signal. The Court held that under the rules of pleading it must be assumed that plaintiff knew the bracket was there and knew or that he must have been presumed to have known that if he stood close enough to it, when the train started, he would be thrown against it and would probably lose his balance and be in danger of falling from the car. In the case at bar there was no knowledge whatever on the part of the plaintiff of the improper loading, the absence of the guard rail or the absence of the string piece.

In *Lennon* v. *Erie R. T.*, 92 N. J. L. 209, this Court held that where it appeared that plaintiff was killed when riding on the running board of a moving train on which defendant had negligently allowed a plank to be placed and carried for the use of one of the defendant's train men and while the train was in motion a fellow servant of the deceased passed along the running board in order to dismount and negligently struck his foot against the plank, causing one end to fall to the ground and the other to strike and kill the deceased, plaintiff had not so clearly assumed the risk of injury by stepping on the running board under such circumstances as to warrant the Court in taking the case from the jury. The Court said (Mr. Justice Bergen):

> "The consequence of the negligence of the master, through a concurring cause for which he is responsible, does not charge the injured servant with the assumption of the risk, unless it be obvious, and where, as in this case, the knowledge by the servant of a dangerous condition, the risk of which it is claimed he assumed because obvious, or otherwise acquired, is to be inferred from testimony which is not conclusive, a jury question is present and its submission to the jury was not error."

Justice Pitney, while Chancellor, in *Burns* v. *Del. & Atl. Telegraph Co.*, 70 N. J. L. 746, said:

> "It is not merely the physical surroundings of the servant that must be obvious to him in order that he may be held to have assumed the risks arising therefrom, but it must be obvious to him, or at least to an ordinarily prudent servant under the circumstances, that there is danger to him in such a situation. It is his voluntary acceptance of, or persistence in, an employment that involves personal hazard to him that debars his action; the theory of the law being that his wages have been fixed in view of the hazard. But where the danger is unknown to the servant, he cannot be held to have voluntarily assumed it, although the physical surroundings that create the danger are known to him."

It has, therefore, been held that in the absence of notice or knowledge an employee does not assume those risks which are unusual or extraordinary in character. *Koepke* v. *Chicago, etc., R. Co.*, 200 Ill. App. 247; *Renn* v. *Seaboard Air Line R. Co.*, 170 N. C. 128, 86 N. E. 964.

In *Grybowski* v. *Erie Railroad Co.*, 88 N. J. L. 1, affirmed on appeal of the Supreme Court, 89 N. J. L. 361, the Supreme Court, Gummere, *C. J.*, said:

> "The third ground upon which the defendant rested its motion was that the plaintiff was barred from a recovery because her decedent had assumed the risk of the accident which produced his death. This ground, also, we think, is without substance. The doctrine of assumption of risk has no application to such risks as arose solely and directly out of the negligent acts of fellow-servants. And if it did so apply, as a general rule, it would have no pertinence in the case of accidents the right of recovery for injuries arising out of which is regulated by the Federal statute; for to so hold would be to nullify the declaration of Congress that every common carrier by railroad engaged in interstate commerce shall be liable in damages to the personal representative of any employee who shall lose his life while engaged in such commerce, when his death results 'from the negligence of any of the officers, agents or employees of such carrier.'"

If the jury believed the testimony of the plaintiff that this was his first trip, with an electric truck, there was no testimony whatever that he was familiar with their use. It is not to be presumed that a man who is hauling as a common laborer a small truck by hand no matter how long he happens to have been hauling that small truck at a place where electric trucks and trailers are in use is familiar with the operation of an electric truck and trailer. He states that one Dorsey, the foreman, assigned him to the work and that he received no instructions. And it is significant that Dorsey is not called to contradict him, nor is anyone called on the part of the defendant to prove that plaintiff had any knowledge with respect to the operation of the electric truck and trailer. He had nothing to do with the loading of the trailer. He was not present in the place where it was loaded. If this truck was negligently loaded, the negligence was that of employees of defendant. It is again significant that those who loaded the truck were not called by the defendant. Plaintiff cannot be said to have assumed the risk of the improper loading of this truck if the jury find that it was improperly loaded and that the improper loading contributed to the accident. If the truck had been properly loaded the jury might have found that there would have been no accident. It was an extraordinary circumstance due to the negligence of a fellow-servant for which the defendant is liable under the statute. There was no evidence that plaintiff knew that the method

of loading was of such a nature as to cause an accident. With respect to the absence of the guard rail in front, his testimony is that he did not know of the absence of the guard rail until the merchandise began to fall. If this guard rail was absent it was the negligence of those who had loaded the truck, employees of the defendant, for whose acts under the statute defendant is liable. Plaintiff says that by reason of the fact that when he came to the truck it was loaded he did not notice the absence of the guard rail. If the jury found that the accident occurred because of the absence of the guard rail negligently left off the truck by the servants of the defendant there was no proof of knowledge on the part of the plaintiff which would permit the Court to find, as matter of law, assumption of risk. Riding on the trailer as plaintiff was he could not see whether the race piece or string piece was in place or not. There is no evidence that he knew that this race piece or string piece was not in place. If the accident was caused by the omission of the race piece or string piece there was negligence on the part of an employee of defendant in not placing the race piece or string piece in position and there was negligence on the part of the driver of the electric truck in attempting to take the electric truck on the gang plank without the race piece being present. For this negligence the defendant is liable.

Defendant says in its brief "the plaintiff understood and appreciated the risk and danger of just such an accident as did occur and which he admitted he tried to prevent by keeping his hands on the load as the truck started down the incline." There is no proof in the case that any such accident occurred before. If there had not been negligence on the part of someone it would not have occurred. While it may be said that the plaintiff assumed the ordinary risks he did not assume a risk that was caused by negligence. While the driver of the truck, Palmieri (pp. 129, 130, 131), testified that one of the duties of the man on the trailer was to watch the load, the jury was not obliged, in view of all of the testimony, including that of the plaintiff, Reilly and Toomey to find that it was anticipated by anyone that in ordinary operation the load would fall off or that it was anticipated by anyone that any extraordinary circumstances would require the man on the trailer to prevent the load from falling off. At the most his duty was to watch the load and perhaps steady it.

If this accident had happened in the ordinary course of operation and there had been no evidence whatever from which

the jury might find that the accident was caused by extraordinary circumstances due to the negligence on the part of defendant's employees an argument might be made that the plaintiff did not assume the risk. Even, then, in view of the failure of the foreman when he put the plaintiff at work to instruct the plaintiff as to his duties, the foreman realizing the danger, if any, there being no evidence that plaintiff realized the danger, the question would still be for the jury as to whether the risk was so apparent as that the plaintiff assumed it.

This case is in nowise similar to *Capan* v. *D. L. & W. R. Co.*, 91 N. J. L. 164.

I.	I
In the Capan case plaintiff was performing his duties with a hand truck transferring certain oil cakes from cars standing on the dock to a barge lying alongside of it, and while so engaged the tide began to recede, causing the incline from the dock to the barge to become gradually more and more steep.	In the case at bar: This was plaintiff's first trip. There is no evidence that the receding of the tide had anything to do with the accident. Plaintiff had not been down this gang plank before (p. 52). When he went to work he received no instructions.
II	II
He undertook to go down the incline in its altered condition with a load of about 700 pounds of oil cakes upon his truck.	Plaintiff had nothing to do with the loading of the trailer nor had he anything to do with the operation of the electric truck. He was simply riding on the electric truck and trailer performing his duties.
III	III
He admitted that he appreciated the danger under the conditions existing at the time of the accident of attempting to handle the truck without assistance but thought that he was strong enough to do it.	Plaintiff did not know of the improper loading of the truck; he did not know of the absence of the guard rail; he did not know of the absence of the string piece or race piece. He had no knowledge of any danger.

In the Capan case the cause of action was rested solely upon the failure of the defendant to furnish assistance. In the case at bar the cause of action is rested upon the negligence on the part of defendant with respect to loading, lack of guard rails, defective gang plank and improper operation of the electric truck. Indeed, it is urged that there is no similarity between the two cases whatever, except that the accidents in each case happened to occur at a pier and that a gang plank had something to do with them.

For the Court to have granted the motion to direct a verdict upon the ground of assumed risk it must have appeared that the plaintiff assumed the risk of each one of theitems of negligence counted upon. There were no requests to charge that

plaintiff assumed the risk of the accident growing out of any certain state of circumstances. The Court properly charged the jury with respect to the assumption of risk at page 279 of the record: "If, however, you find the plaintiff's injuries were due to such negligence, still there can be no recovery if he assumed the risk of such employment and the injuries were the result of the risk so assumed." And again on page 280: "Could the plaintiff have seen that in going down this gang plank there was danger of the boxes falling upon him, not that he knew they would fall, but they were liable to do so? If there was an obvious risk and the plaintiff made no protest, but proceeded with his work, he assumed the risk and cannot recover if he was injured while engaged in such work." Upon the question of assumption of risk the Court charged the first, third, fourth and seventh requests of the defendant which were more favorable than defendant was entitled to.

G.

The release did not bar the action.

The evidence with respect to the execution of the release is as follows: Plaintiff was frightfully injured. He was immediately taken to the hospital, where he remained from August 6th until September 11th (p. 23). He left the hospital September 11th at 9:30 o'clock. It took him to get from the Hudson Street Hospital from 9.30 to 12:45 to reach the pier. He there met Dorsey and asked Dorsey to have a man sent home with him (p. 27). He was taken across the ferry in a roller chair (p. 28), and when he reached the Central Railroad offices he met Giddes, who is a special claims agent for the railroad (p. 99), and Ming, employed by the railroad. They knew that he was coming, having been communicated with from New York (p. 217). He says that he wanted his transportation home and wanted to get home in the worst way because he was sick, and then testifies as follows: "A And I didn't know what I was doing. Mr. Giddes came downstairs himself and another gentleman; I didn't know him at the time then; and I asked them for my transportation home, and he asked me how I felt first, and I told him I felt awful sick. And he asked me then how long I was in the hospital and I told him from the 6th of August to that day, which was the 11th of the next month, September. So then they studied a while and then they said, 'Well, *we will give you $80 for ten weeks' half pay.*' 'Well,' I said, 'why not give it to me every

two weeks, like you did that colored fellow down in Broadway tower?' 'Well,' he says, 'we don't do that any more.' He said, 'I will give it to you every ten weeks in a lump sum. We don't do that any more since last May. We give it for ten weeks,' he said, 'in a lump sum.' So after he gave me the money—first he gave me a check and then he asked whether I would sooner have the check or the money, and I told him I would sooner have the money; naturally I endorsed the check; and then when he went to get the money for me he put a paper in front of me and told me to sign a receipt for it. So I did. Q When he told you to sign a receipt did you sign it? A I signed it, yes. Q Did you ask him immediately then as to more money? What did you say to him and what did he say to you? A What is that? Q What did he say to you and what did you say to him in reference to more money? A I asked him, I says, 'Is this all?' 'Well,' he says, 'come back,' he says, 'in ten weeks.' He said, 'Come up to my office and see me or I will come and see you.' So I had to come up anyhow; I had to come up to the hospital in ten weeks after that day. My wife took me back to the Ruptured and Crippled Hospital." (In corroboration of the testimony of the plaintiff that there was to be more money there was the sending of a letter by Giddes to plaintiff asking him to call and see him (p. 225)). It was three o'clock in the afternoon. The plaintiff testified (p. 229): "A I was awful sick, awful weak. I felt exhausted. I wanted to get home. That is all I thought" (p. 230). Plaintiff testified on cross examination: "Q You signed a paper which Mr. Giddes told you was a receipt? A He gave me a paper to sign my name, to sign a receipt for the money. Q And you say he told you it was a receipt? A Yes; he said a receipt for the money. Q For the $85? A $85. Q And you did sign that paper, didn't you? A I signed a receipt for the money, yes."

There is on the receipt the words, "I have read the above and understand it" in handwriting. When asked about that plaintiff says that he has no recollection of writing it and that he thinks that he did not (p. 231). He says: "I don't remember anything at all about it. I was actually exhausted." Defendant's counsel had plaintiff write the words, "I have read the above and understand it," copying the words that were on the receipt, and offered the exhibit in evidence at D. 5. There was no expert testimony offered by the defendant to show that the writings were by the same hand. The question was left for the jury to determine from the actual exhibits. On page 233 plain-

tiff testified that he did not read the paper; that he didn't know what was in it, and then as follows: "Q Then why did you say it was a receipt? A I signed a receipt for the money, and naturally I would sign a receipt for you, if you handed me money; you would have to get a receipt for it, wouldn't you? Q If you didn't know what was in the paper? A I didn't know. I knew I had the money and I signed the receipt for the money for ten weeks' half pay. * * * Q What I am asking you is, how is it you know it was a receipt if you didn't read it and didn't know what was in that paper? A I am only telling what he told me, to sign a receipt for it."

Plaintiff had the Employers' Liability Act of New Jersey in mind, as indicated by his testimony and from his testimony and that testimony of Helen Fagan, the wife (p. 236), to the effect that when they came back and saw Giddes afterwards they told him the ten weeks had expired and they wanted more money and that Giddes then said for the first time: "No, we won't give you any more money. We don't do that any more," the jury were entitled to infer that the railroad representatives fraudulently represented to the plaintiff that he was signing a receipt for ten weeks' half pay and that he would be paid under the Employers' Liability Act. The plaintiff explains (p. 31) how sick he felt and how he was gotten home that night and then a week afterwards had to be taken back to the same hospital and then subsequently to that to the Ruptured and Crippled Hospital, to which place he had to return three times. He was confined to bed off and on for nine months. The plaintiff is corroborated by Reynolds. Giddes, Ming and Hone were produced for the defendant and they each of them, of course, testified that they carefully explained to plaintiff exactly what this release was, and that he read it and that he acknowledged that he signed, sealed and delivered it. In considering their testimony, however, it is significant as bearing upon the impression that the plaintiff had that plaintiff testified with respect to asking for money paid in installments every two weeks "like they did to a colored fellow down on Broadway tower" (p. 217), and there is no specific denial that this conversation took place. Ming's testimony (p. 265) indicates how little reliance can be put upon him. He first said that plaintiff stated that he wanted his money or settle it up. He then, when he realized that his statement that plaintiff wanted his money might be corroborative of plaintiff's insistence that he went there to get money for his half pay under the Employers' Liability Act, changed and insisted that plaintiff did not say he wanted his

money, but that he did say that he wanted to settle his case. From the testimony the jury were entitled to find if they so chose that this man, in a weak and physical condition, in agony, in a roller chair, just having left the hospital and on his way home, desiring to get from the railroad company transportation and some money, and believing that he was entitled to receive money under the Employers' Liability Act of this State, met three representatives of the railroad in the ferry waiting room on his way home to his wife, and was paid by them upon his request for some money the small sum of $85, which would be equivalent to about the sum he wanted as half pay for ten weeks, and then upon being paid it was given a paper and was informed by the representatives of the railroad giving it to him that it was a receipt, whereupon without reading it or having it read to him he signed it. The paper now appears to be a releasee. The jury were entitled to find that the plaintiff did not understand the nature of the instrument that he signed and that his misunderstanding was due to the false statement made by the agents of the railroad company that it was a receipt.

The case of *Fivey* v. *Penna. R. R. Co.*, 67 N. J. L. 627, is not an authority for the case at bar. In that case as a condition of employment the plaintiff was obliged to enter into a contract with the railroad company agreeing to be bound by the provisions of the relief fund. Had plaintiff not signed this contract, defendant would not have employed him. It was an express contract in writing. Plaintiff took with him a book which contained the contract and retained it for over two months. There was no express representation that the paper was other than it actually was. The circumstances indicated that a contract was being entered into. It was not like the case at bar, where money was being paid to the plaintiff and where he was then told to sign a paper as a receipt, a natural thing.

In *Kdancewicz* v. *Burlington County Trac. Co.*, 77 N. J. L. 10, the signing of the release was admitted and the case was barren of any evidence of any representation made by the agents of the defendant to the plaintiff. The Court, in disposing of the rule to show cause, said:

> "The plaintiff's belief (which, in disposing of this rule, we assume he entertained) that the paper he signed was a sick benefit receipt, was not induced by anything which was said to him on the occasion of his signing. He said nothing, either to Mr. Budd or to Dr. Prickett, to indicate that he did not fully understand the contents of the paper, or its purpose."

The inference to be drawn from the Kdancewicz case is that if the belief of the plaintiff that it was a receipt had been induced by anything said by the agents of the defendant the case would have been different. In the case at bar the belief that the paper signed was a receipt was induced by statements made by the defendant's representatives.

In *Vellekoup* v. *Fullerton Co.,* 79 N. J. L. 16, there was no evidence whatever of mirepresentation. It is true that there was evidence that the plaintiff could not read and had not read the paper that he signed and that it was not read to it, and that its import was not explained to or understood by him and was, in fact, misunderstood by him, but there was no evidence that his misunderstanding was due to any affirmative statement by the agents of the defendant.

Considerable of the brief of defendant is taken up with endeavoring to argue that because the plaintiff could read he was bound by the release which he signed, notwithstanding that the jury may have found that he did not read it and notwithstanding the false statement made with respect to its effect.

This Court in the case of *Dunston Lithographing Company* v. *Borgo,* 87 Atl. 334, 84 N. J. L. 623, in reversing the Supreme Court in an action on a contract said:

> "At the close of the case counsel for the plaintiff moved to overrule the defense upon the ground that the defendant had no right to rely upon the representation of Bryan, but was bound to inform himself of the contents of the endorsement before signing it, and that his negligence in failing to do so precluded him from making the defense set up by him. * * * We consider the instruction complained of to be erroneous. Although, as a general rule, the affixing of a signature to a written contract creates a conclusive presumption against the signer that he read, understood, and assented to its terms, this rule has one notable exception, viz: Where the signature to the contract was procured by fraud or imposition practiced upon the signer with intent to deceive him as to the *purport* of the paper which he signs. If such fraud or imposition be employed, and results in inducing the person upon whom it is practiced to put his signature to a paper which he otherwise would not have signed, he is entitled to set it up as a defense to an action brought against him by the other party to the transaction for a breach of the contract provisions contained in the instrument. Allaire *v.* Hartshorne, 21 N. J. L. 665; Duncan, Sherman & Co. *v.* Gilbert, 29 N. J. L. 521; Holcomb *v.* Wyckoff, 35 N. J. L. 35; Fivey *v.* Penn. R. R. Co., 67 N. J. L. 627. *And this is*

so notwithstanding that he might have discovered the fraud perpetrated upon him by reading the paper, and was guilty of negligence in not doing so. Alexander *v.* Brogley, 63 N. J. L. 307."

"Nor is the fact that the fraudulent representation, which induced the signing of the paper was made by an agent without authority from his principal material in an action brought by the principal upon a contract obtained by the fraud of his agent, for it is entirely settled that if a principal seeks to enforce a contract made by his agent, he is as much bound by any material misrepresentation made by the agent as if made by himself."

In the Dunston case the allegation was that the agent of the plaintiff falsely represented to the defendant that the paper which he signed was a mere order. In the case at bar the representation was that the paper which the plaintiff signed was a receipt.

In *Traugott Wirsching* v. *Grand Lodge of Free and Accepted Masons of New Jersey,* 67 N. J. E. 711, affirmed in this Court on the opinion of Vice-Chancellor Stevens, the Vice-Chancellor held that although the statements alleged to have been false were with respect to the effect of a legal instrument, nevertheless as the complainant had not read the instrument or had it read to him the statement of the effect was in reality a statement of the contents. He distinguished *Fivey* v. *Penna R. R. Co.,* 67 N. J. L. 627, stating that in that case the Court had found that there was no fraud.

The real question in this class of cases is, "Was the plaintiff deceived by a false representation of the defendant or its agents?" We think that it can hardly be contended but that the jury was justified from the evidence in finding that plaintiff was deceived by the representatives of the defendant into believing that the paper which he was signing was a receipt and that he was deceived to the knowledge of defendant's agents. The jury were entitled to take into consideration all of the circumstances, including the physical condition of the plaintiff.

Where there are special circumstances where the facts that the releasor is in great distress or pain and *inops consilii,* the release may be avoided.

34 Cyc. p. 1064.

As to circumstances of particular cases, in *International, etc., R. Co.* v. *Shaford,* 36 Texas Civ. App. 251, 260; 81 S. W. 1189, the Court says:

> "No definite rule of law can be laid down as to what condition of mind or degree of mental imbecility is sufficient to avoid a contract made with a party taking advantage of it. As in the case of fraud itself, each case will depend upon its own circumstances and the state of mind must be taken into connection with the other facts of the transaction to determine whether or not the contract may be avoided."

The question of this release has already been before this Court when the case was heard before (*Fagan* v. *C. R. R. Co. of N. J.,* 93 N. J. L. 107). The evidence with respect to the release was, as we understand it, substanitally the same except that the paper writing was not produced by the defendant. Its contents, however, were proven by secondary evidence. The Court because of the absence of the paper writing took away the question as to the effect of the release from the jury. The action of the Trial Court this Court held to be error, intimating that the matter should have been submitted to the jury. This Court said, "*The cause was tried and submitted to the jury by both parties upon the theory that the contents of the release had been proven, but its execution as a release obtained by fraud or misrepresentation.*"

In determining this question as to the effect of this release the manifest intent of Congress should be considered and as bearing upon that intent the provisions of section 5 of the act, 8 Fed. Stat. Anno. 1365, which is to the effect that "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act shall to that extent be void," is not to be overlooked.

While it has been held that this provision does not prevent a compromise of a cause of action and a release it was so held for the reason expressed by the Court in *Anderson* v. *Oregon Short Line R. Co.,* 47 Utah, 614, 155 Pac. 446: "In making such a settlement, if it is fair and free from fraud, concealment, etc., no rights of either of the parties are frittered away, but, on the contrary, are firmly maintained."

And the general rule under the act is thus expressed: "A release after injury for a good consideration, and in the absence of proof that it was not fairly entered into, is binding

upon the parties, and a bar to an action for damages.'' *Mitchell* v. *Louisville, etc., R. Co.,* 1914 Ill. App. 77; *Ballenger* v. *Southern Ry. Co.,* 106 S. C. 200, 90 S. E. 1019; *Panhandle, etc., Ry. Co.* v. *Fitts,* Texas Civ. App. 1916, 188 S. W. 528.

In *Ballenger* v. *Southern Ry.,* Sup. Ct. So. Car., 90 S. E. 1019, a release was set aside because of erroneous information given to plaintiff by doctor of defendant as to the nature of the injuries.

In this connection the testimony of Mr, Giddes is important (p. 251). He swears that he told the plaintiff at the time the release was executed that there was no liability on the part of the railroad under the Federal Employers' Liability Act. This testimony indicates that there was no intent on the part of plaintiff to release any liability under the Employers' Liability Act, nor was it a compromise or settlement of any claim of the plaintiff under that act. It is also important as indicating that the plaintiff was induced to believe that he was signing a receipt for wages paid under the provisions of the Employers' Liability Act of this State. For if the statement of Giddes were true and there was no liability under the Employers' Liability Act of Congress, then there could be no liability on the part of the railroad at all unless it were under the Employers' Liability Act of this State. To permit this release to bar a cause of action under the Employers' Liability Act obtained in the manner in which this release was obtained would be to defeat the manifest intent of Congress and in all the cases that I have had access to in which the effect of a release has been considered it has been held that it must have been fairly entered into and free from fraud or concealment of any kind.

There is no decision we have found directly in point in the Supreme Court, nevertheless that Court has indicated its idea of the intent of Congress and that nothing will be permitted to interfere with that intent.

Phil B. W. v. *Schubert,* 224 U. S. 603, 56 L. Ed. 911;
Chicago v. *Bond,* 240 U. S. 449, 60 L. Ed. 735;
Chicago v. *Wagner,* 239 U. S. 452, 60 L. Ed. 379.

H.

There was no error in the charge of the Trial Judge.

Appeal is taken upon the ground that the Trial Judge charged the jury as follows: "If the jury finds as matter of fact that the trailer that the plaintiff was on had no guards in the front where the plaintiff had to be, and if you further find that the railroad company did not exercise reasonable care in providing the trailer with those rails, and thereby the accident occurred, and plaintiff was injured, then they must find the defendant was negligent."

We have considered in some detail the evidence with respect to the presence or absence of these guards. The evidence of the plaintiff was to the effect that there were no such guards. The evidence of the plaintiff's witnesses and of defendant's witnesses was to the effect that such guards were commonly used. We have pointed out that there was no evidence on the part of the defendant of any probative value that the guard was present on this trailer. The man who would know, to wit, the driver of the electric truck, Palmieri, was not asked about it; Dorsey, the foreman, was not called.

Moreover, Toomey, the general foreman for the defendant, on the pier where the accident occurred, admitted that the iron pipe which was used during the trial as an exhibit and marked Exhibit B, was not the guard they used on the trailers when loading merchandise, such as pineapple crates, for which they had much higher racks (p. 89). He said they used wooden framework on the front and rear of the trailer truck when loading pineapple crates (p. 98).

> "Q Did you in your experience ever supervise the loading of pineapple crates on a trailer on which you had wooden framework placed in front of the load and the rear to prevent it from falling? A Well—
>
> Q Yes or no. A I have, yes, sir.
>
> Q And you would do that with any loads which were about six or seven feet high, wouldn't you? A I would if we had—
>
> Q Just answer.
>
> *M. Tomlinson.* No, let him answer.
>
> *Mr. Golenbock.* No, I am going to have him answer properly.
>
> Q Just answer the question—yes or no.
>
> *The Court.* He is entitled to an answer—yes or no. (Question repeated.) A Yes.

Q You would not swear now that this load which Mr. Fagan was on had any of those wooden racks on front and rear, would you? A It had a pipe on.
Q Just answer my question. I will ask Mr. Kelly to repeat it. (Question repeated.) A Had no wooden racks.

The jury might have found that the proper guards were not there; that they ought to have been there and that they were negligently omitted, and the Court therefore properly charged the jury that if they found such a condition of affairs they must find the defendant guilty of negligence. This charge of the Court must also be taken in connection with the remainder of the charge. The Court charged the jury at page 277 that the burden was on the plaintiff to show by a preponderance of the testimony that his injuries were caused by the negligence of an officer, agent, or employee of the company, or by reason of any defect or insufficiency due to the company's negligence in its cars, engines, appliances, machinery, track, roadbed, boats, wharves or other equipment. He had drawn to the jury's attention the respective contentions of the plaintiff and defendant (pp. 277, 278).

I.

There was no error in the refusal of the Trial Judge to charge as requested by defendant.

(a) We have already covered the request dealt with by the defendant under subdivision a. If there was evidence to go to the jury of negligence with respect to the manner of the construction of the trailer truck, as we have insisted there was, the refusal to charge as requested was properly denied.

(b) The Trial Judge had already charged the request of the defendant dealt with by it in its brief under subdivision B several times. It is similar in purport to its request No. 4 (p. 285), which was charged and which point had already been covered in the Judge's charge.

(c) The defendant requested the Court to charge that if the jury found that the plaintiff himself wrote on the release the words "I have read the above and understand it," and then signed his name to the release, the verdict must be for the defendant.

Assuming for the sake of the argument that the jury found that the plaintiff had, in fact, written the words in question upon the release that would not be conclusive. It would be of the ut-

most importance, of course. It would be a statement by the plaintiff made at the time of the signing of the release directly contrary to his testimony given upon the stand. But here again the jury were entitled to take into consideration the manner in which this release was obtained. And it was for the jury to determine whether the statement of the plaintiff on the stand or the statement made by him in writing at the time he signed the release represented the true fact. In the presence of fraud or misrepresentation the statement of the plaintiff that he "had read the above and understood it" is no more conclusive upon him than is his signature attached to the paper writing. The Court properly charged the jury that it was for them to determine from all of the evidence in the case whether the release was obtained by fraud or not. He said, page 281: "You should consider all the evidence carefully and after doing so determine whether the defendant obtained the execution of this paper by fraud, deceit or by misrepresenting its contents."

"Mere inadequacy of consideration will not entitle the plaintiff to have the paper set aside if he knew the amount at the time he signed and delivered it. He cannot change his mind after he executed a paper of this kind, because he now considers that the amount which he received was too small."

He also charged the sixth request of the defendant (p. 286), as follows: "Even if you should find that the defendant was guilty of negligence and that the plaintiff did not assume the risk, yet if you should also find that when plaintiff signed the release he understood what it was, then you must find for the defendant." And the eighth request (p. 286): "Even if you should find that the defendant was negligent and should find that the plaintiff did not assume the risk, yet if you should also find that plaintiff signed and understood the release, then your verdict must be for the defendant." And the ninth request (p. 286): "Even if you should find that the contents of the release were misrepresented to the plaintiff, but you also find that the plaintiff understood the contents of such release before signing it, then your verdict must be for the defendant." And the eleventh request: "If you find that there was no fraud or misrepresentation in connection with the execution by plaintiff of the release, then your verdict must be for the defendant; and in this connection the inadequacy of the sum mentioned in such release to compensate for his injuries may not be considered by you."

And in this connection and bearing upon the question as to whether the release was obtained by fraud or not or by a misrepresentation that it was a receipt rather than a release we draw the Court's attention to the fact that the words alleged to have been written by the plaintiff on the release are as follows: "I have read the above and understand it." If the defendant's agents intended to irrevocably bind plaintiff, as apparently they did, and if there had been no misrepresentation, why did not the agents have the plaintiff write, "I have read the above *release* and understand it."

It is respectfully insisted that there is no error and the judgment should be affirmed.

Respectfully submitted,

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