

INDEX

	Page.
Summons	1
Complaint	2
Answer	9
Rule for Judgment	10
Notice of Appeal	11
Stipulation	12
Motion for Non-Suit	79
Charge of the Court	118
Grounds of Appeal	131

TESTIMONY.

Kelsen, Henry—

Direct	33
Cross	44
Re-Direct	61
Recalled-Direct	111

Winkowski, Mary—

Direct	62
Cross	65

Winkowski, Anna—

Direct	67
Cross	70

Kelsen, Emma—

Direct	74
Cross	76

Fitzpatrick, Richard J.—

Direct	87
Cross	89
Re-Direct	95

Daly, John M.—

Direct	96
Cross	100
Recalled-Direct	115
Recalled-Cross	116

Koralik, Leo—

Direct	102
Cross	104

Hlavaz, Joseph—

Direct	106
Cross	108

Preston, William E.—

Direct	112
Cross	113

Summons.

THE STATE OF NEW JERSEY

To

PUBLIC SERVICE RAILWAY COMPANY

10

A Corporation of the State of New Jersey

(SEAL) You are summoned to answer
the annexed complaint of Henry
Kelsen in an action at law in the
Union County Circuit Court.

20

And take notice that unless
you file your answer to said complaint with the
Clerk of said Union County Circuit Court at Eliza-
beth, New Jersey, within twenty days after the ser-
vice upon you of this writ and the annexed com-
plaint, the plaintiff may proceed in the suit and
judgment may be entered against you. (And see
notice endorsed hereon.)

30

Witness, JAMES J. BERGEN, Justice of our
said Court, at Elizabeth, aforesaid, this third day
of April, nineteen hundred and nineteen.

WILLIAM B. MARTIN,
Clerk.

SAMUEL KOESTLER,
Attorney.

40

Complaint.

UNION COUNTY CIRCUIT COURT

10	<p style="text-align: center;">HENRY KELSEN, <i>Plaintiff,</i></p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">PUBLIC SERVICE RAILWAY COM- PANY, a corporation, <i>Defendant.</i></p>	<p style="font-size: 4em; line-height: 1;">}</p> <p>Action at Law. Complaint.</p>
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20 Henry Kelsen, residing at Rahway, Union County, New Jersey, complains:

(1) That at all the times hereinafter mentioned, the Public Service Railway Company was a corporation of the State of New Jersey, engaged in business as a common carrier of passengers for reward and hire to and from certain places, cities and towns within the State of New Jersey.

30 (2) That among the places, cities and towns in which the said defendant was the common carrier of passengers for hire and reward were Carteret, Chrome Junction, Woodbridge Junction and Poor Farms Road, Metuchen, and that said Public Service Railway Company did also operate a certain railway for the carriage of passengers known as the "Fast Line" running from Elizabeth to Trenton, which said line had stations for the receipt and discharge of passengers at Chrome

40

Complaint.

Junction, Woodbridge Junction and Poor Farms Road and divers other stations.

(3) That on the 19th day of November, 1918, the plaintiff boarded one of the trolley cars of the defendant and was accepted and received by the defendant as a passenger to be, for reward by the plaintiff then and there paid to the conductor of defendant, safely carried and conveyed from Chrome by way of Chrome Junction to Woodbridge Junction. 10

(4) That plaintiff paid to the conductor of defendant then in charge of the said trolley car of said defendant ten cents (\$.10) carfare which was the hire and reward charged by defendant to safely carry and convey a passenger from Chrome by way of Chrome Junction to Woodbridge Junction; that the plaintiff received from the defendant's conductor a transfer entitling him, upon the fare so paid by him, to ride from Chrome to Chrome Junction and there transfer to another car on the Fast Line of said defendant and ride and be safely carried and conveyed by defendant to said Woodbridge Junction. 20 30

(5) That at Chrome Junction plaintiff boarded and entered one of the trolley cars of the Fast Line of defendant and was accepted and received by said defendant as a passenger for reward and hire to be carried by said defendant to Woodbridge Junction, which was a regular stop and station upon said Fast Line for the receipt and discharge of passengers of the defendant; that as payment for plaintiff's fare to be safely carried and con- 40

Complaint.

veyed to said Woodbridge Junction, defendant's conductor in charge of said Fast Line trolley car did accept and receive the transfer given to plaintiff as mentioned in paragraph 4 hereof.

10 (6) That when plaintiff boarded the said several cars as aforesaid of the defendant and was then and there riding upon said cars, it was in the night season of the 19th day of November, 1918, and was then and there dark and stormy so that plaintiff and other passengers of said Fast Line car upon which plaintiff was then and there riding could not see or discern the location or whereabouts of said car with regard to the said station at Woodbridge Junction and the approach
20 thereto.

(7) That plaintiff informed defendant's conductor of his desire to alight at Woodbridge Junction in order that he might continue his journey to his final place of destination, to wit: Rahway, but, notwithstanding such instruction and information, the car upon said Fast Line of the said defendant as aforesaid did not stop at Woodbridge
30 Junction for the purpose of permitting plaintiff and other passengers to there alight but that said defendant's servants did then and there, without the consent and against the express wish and instruction of said plaintiff, carry and convey plaintiff and other passengers for a great distance beyond said station at Woodbridge Junction, to wit: two stations to a place and point known as Poor Farms Road and there and at said place did
40 compel plaintiff to get off and alight from and did discharge plaintiff from said car and in-

Complaint.

structed him, said plaintiff, to take the next car and ride back to Woodbridge Junction and furnished to plaintiff a receipt and ticket which said defendant's conductor then informed plaintiff would be received by the car going to Woodbridge Junction as the fare of plaintiff.

(8) That plaintiff waited at said station known as Poor Farms Road and signalled to several cars of defendant which were then and there proceeding to and toward Woodbridge Junction, but said cars refused to stop and carry and convey plaintiff to said Woodbridge Junction. 10

(9) That it was a dark stormy night, raining very severely, and plaintiff and other passengers with him who had been put off said Fast Line car at Poor Farms Road as aforesaid could not see or find any road or pathway by which to make the journey toward Woodbridge Junction and Rahway and were forced, obliged and compelled to walk toward Woodbridge Junction upon, along and over tracks, rails and roadway of defendant; that said defendant negligently failed to furnish and supply plaintiff with any means by which the said plaintiff could be safely carried and conveyed to the said destination at Woodbridge Junction aforesaid. 20 30

(10) That by reason of the neglect and failure of defendant, its officers, agents and servants to stop said trolley car, upon which the plaintiff was then and there riding, at the station known as Woodbridge Junction and to give plaintiff an opportunity to alight from said car at said station and by reason of the failure of the defendant to 40

Complaint.

furnish plaintiff with safe and proper means of carrying and conveying him, the said plaintiff, back to said Woodbridge Junction, and the said plaintiff being compelled to walk back to said Woodbridge Junction in a heavy rain storm as aforesaid, the said plaintiff caught his leg in the
10 cross irons between the tracks and rails of defendant and then and there fell down to and upon the tracks, rails and ground and was severely hurt, bruised, wounded and injured in and about his limbs, chest, body, head and internally and received a rupture, by means whereof plaintiff was permanently injured, and caught a severe cold, from all of which said wounds, injuries and
20 bruises said plaintiff was confined to his bed for a long time, to wit: four to six weeks and has suffered great pain and anguish and will in future suffer great pain and anguish and by reason thereof plaintiff has been forced and obliged to spend large sums of money for medicine and doctor bills and in an endeavor to heal himself of the said wounds, injuries and bruises as aforesaid, the plaintiff has lost and was deprived of
30 great gains, earnings and profits which he otherwise would have made from his business.

(11) To the damage of the plaintiff in the sum of Five thousand dollars (\$5,000).

SECOND COUNT

40 (12) The plaintiff repeats the allegations of paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 hereof.

Complaint.

(13) That after plaintiff had been discharged at said station known as Poor Farms Road by defendant as aforesaid, it was the duty of the defendant by its officers, agents and servants to have the next returning car of said defendant travelling and running to and toward Woodbridge Junction stop at said station known as Poor Farms Road and take on the said plaintiff as a passenger to be by said defendant safely carried, conveyed and returned to defendant's station at Woodbridge Junction; that said next returning car negligently failed and refused to stop for the purpose of returning plaintiff to the station at Woodbridge Junction and defendant did not reconvey and recarry plaintiff to said station at Woodbridge Junction.

10

20

(14) That it was also the duty of cars of the defendant going to and toward Woodbridge Junction from Poor Farms Road, after plaintiff had been discharged at said Poor Farms Road as aforesaid to take on and receive plaintiff as a passenger upon the transfer or ticket given to plaintiff as aforesaid by the conductor of the defendant and to be by said returning car safely recarried and reconveyed to the station of defendant at Woodbridge Junction aforesaid; that all of said cars negligently failed and refused to stop and take on as a passenger to be reconveyed and recarried to defendant's station at Woodbridge Junction aforesaid.

30

(15) To the damage of the plaintiff in the sum of Five thousand dollars (\$5,000).

40

Complaint.

THIRD COUNT

(16) The plaintiff repeats the allegations of paragraphs 13 and 14 hereof.

10 (17) That it was the duty of the defendant to furnish plaintiff with reasonably safe means for his recarriage, reconveyance and return from the station at Poor Farms Road, where plaintiff had been improperly discharged by defendant as aforesaid, to the place of his destination at the station at Woodbridge Junction but that defendant carelessly and negligently failed to perform said duty and did not furnish to plaintiff any means whatsoever for the purpose of recarrying, reconveying
20 or returning plaintiff from its said station at Poor Farms Road to its said destination at Woodbridge Junction.

(18) To the damage of the plaintiff in the sum of Five thousand dollars (\$5,000).

SAMUEL KOESTLER,
Attorney of Plaintiff.

30

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Answer.

UNION COUNTY CIRCUIT COURT

HENRY KELSEN, <i>Plaintiff,</i> vs. PUBLIC SERVICE RAILWAY COM- PANY, a corporation, <i>Defendant.</i>	}	Action at Law Answer.	10
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The defendant, a corporation of New Jersey, having its principal office at the City of Newark, in the said State of New Jersey, says that: 20

1. It denies the truth of the matters contained in the complaint.

LEFFERTS S. HOFFMAN,
Attorney of Defendant.

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Rule for Judgment.

UNION COUNTY CIRCUIT COURT

10	<p style="text-align: center;">HENRY KELSEN, <i>Plaintiff,</i></p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">PUBLIC SERVICE RAILROAD COM- PANY, <i>Defendant.</i></p>	<p style="font-size: 3em; line-height: 1;">}</p> <p>Action at Law</p> <p style="font-size: 3em; line-height: 1;">}</p> <p>Rule for Judgment.</p>
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20 The above entitled action was tried before Judge George S. Silzer and a jury at the Union County Circuit on December 3rd and 4th, 1918. Said cause having been heard and submitted to the jury, they returned their verdict in favor of the plaintiff and against the defendant, and assessed the plaintiff's damages at the sum of \$1,000.

30 WHEREUPON it is adjudged that the plaintiff recover from the defendant the sum of \$1,000, and his costs, which costs are taxed in the sum of \$

Judgment entered December 5th, 1919. On motion of

SAMUEL KOESTLER,
Attorney of Plaintiff.

Notice of Appeal.

UNION COUNTY CIRCUIT COURT

<p style="text-align: center;">HENRY KELSEN, <i>Plaintiff,</i></p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">PUBLIC SERVICE RAILROAD COM- PANY, a corporation, <i>Defendant.</i></p>	}	<p style="text-align: center;">Action at Law</p> <p style="text-align: center;">Notice of Appeal.</p>	10
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To SAMUEL KOESTLER,
Attorney of Plaintiff. 20

Sir:

Take notice that the defendant appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause. Dated December 16, 1919.

Yours truly,

LEFFERTS S. HOFFMAN,
Attorney of Defendant. 30

Original endorsed "Service acknowledged December 18, 1919. Samuel Koestler, Attorney of Plaintiff."

Stipulation.

UNION COUNTY CIRCUIT COURT

10	<p style="text-align: center;">HENRY KELSEN, <i>Plaintiff,</i></p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">PUBLIC SERVICE RAILWAY COM- PANY, <i>Defendant.</i></p>	<p style="font-size: 3em; line-height: 1;">}</p> <p>Action at Law</p> <p style="font-size: 3em; line-height: 1;">}</p> <p>Stipulation.</p>
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20 It appearing at the trial of the above entitled cause that Public Service Railway Company was not the proper corporation to have been made defendant in the said cause, and that Public Service Railroad Company should have been such defendant, and both of the said corporations having appeared in this court at the said trial by their attorney,

30 It is hereby stipulated and agreed that Public Service Railway Company be stricken out as a defendant and that the cause be discontinued as to such defendant; that Public Service Railroad Company be substituted as the defendant in the said cause as fully and completely as if it had originally been made the party defendant therein, and that the pleadings be considered amended to the extent that the said Public Service Railroad Company will be presumed to have set up

40 tory negligence. The plaintiff shall be presumed to have filed a reply denying the allegation of

Stipulation.

contributory negligence. In other respects the pleadings shall be as originally filed except that throughout the case Public Service Railway Company shall be eliminated as the defendant and Public Service Railroad Company shall be substituted as a defendant.

IN WITNESS WHEREOF the attorneys of 10
the respective parties have hereunto placed their hands this third day of December, nineteen hundred and nineteen.

SAMUEL KOESTLER,
Attorney of Plaintiff.

LEFFERTS S. HOFFMAN,
*Attorney of Defendant, Public Service
Railway Company.*

20

LEFFERTS S. HOFFMAN,
*Attorney of Public Service Railroad
Company.*

Clerk's Certificate.

I, WILLIAM B. MARTIN, Clerk of the Circuit Court of the County of Union, and State of New Jersey, do hereby certify that the foregoing 30
is a true transcript of the pleadings in the above stated case as the same remains on file in my office.

(L. S.)

In Testimony Whereof, I
have set my hand and the
seal of said Court at Elizabeth this 26th day of December, A. D. 1919.

W. B. MARTIN, 40
Clerk.

Testimony.

UNION COUNTY CIRCUIT COURT

October Term 1919

10

KENRY KELSEN

VS.

PUBLIC SERVICE RAILWAY COM-
PANY, a corporation.

20

Transcript of stenographer's notes of evidence in the above entitled cause, taken before HON. GEORGE S. SILZER, Circuit Court Judge, and a Jury, at the Union County Court House in the City of Elizabeth, New Jersey, on the third day of December, A. D. 1919, at 4:10 p. m.

APPEARANCES:

30

SAMUEL KOESTLER, Esq., Representing the Plaintiff.

LEFFERTS S. HOFFMAN, Esq.

EDWIN C. CAFFREY, Esq., Representing the Defendant.

A jury being empanel and found satisfactory, they were sworn.

40

MR. KOESTLER: I desire to move to amend the summons and complaint in this

case by changing the name of the defendant, from Public Service Railway Company to Public Service Railroad Company.

MR. CAFFREY: The answer will be a general denial, and contributory negligence. There is now a general denial as to the tracks, and everything else. We admit the ownership of the roadbed and the operation of the car.

10

MR. KOESTLER: I admit that the tracks were operated upon a private right of way owned by the defendant.

MR. CAFFREY: Yes.

Mr. Koestler opens the case for the Plaintiff.
Mr. Caffrey opens the case for the Defendant.

20

THE COURT: Was this a railroad, under the Railroad Act?

MR. CAFFREY: Yes, sir.

THE COURT: Any dispute about that, Mr. Koestler?

MR. KOESTLER: No, sir. They have a railroad franchise and they operate over their own right-of-way.

THE COURT: At this particular place. 30

MR. KOESTLER: I desire to offer in evidence stipulation for the taking of the testimony of Dr. William Narins, and his testimony.

(Stipulation entered in evidence and marked Exhibit P 1.)

(Testimony read to the jury by Mr. Koestler.)

40

(This was medical testimony, and is omitted as not pertinent to this appeal.)

THE COURT: I would like to hear you in the morning on the question of the legal status on both sides.

ADJOURNED UNTIL TOMORROW, THURSDAY, DECEMBER 4th, 1919, At 9:30 a. m.

10

UNION COUNTY CIRCUIT COURT

October Term 1919

HENRY KELSEN

vs.

20

PUBLIC SERVICE RAILWAY COMPANY, a corporation.

30

Transcript of stenographer's notes of evidence in the above entitled cause, taken before HON. GEORGE S. SILZER, Circuit Court Judge, and a Jury, at the Union County Court house, in the City of Elizabeth, New Jersey, on the fourth day of December, A. D. 1919, at 9.30 a. m.

APPEARANCES:

SAMUEL KOESTLER, Esq., Representing the Plaintiff.

LEFFERTS S. HOFFMAN, Esq.,

40

EDWIN C. CAFFREY, Esq., Representing the Defendant. z

MR. KOESTLER: Your Honor stated yesterday that you desired to hear an argument on some question of law.

THE COURT: Yes. Perhaps you had better put your plaintiff on first so we can get the facts.

MR. KOESTLER: He comes from New York and I do not see him here yet. I told him positively to be here at 9:30. He got here yesterday at 10 o'clock and I told him to get an earlier train, that we would need him at 9:30 sharp. So I have just telephoned up to my office thinking he might have gone there but he has not come in there yet. I have two other witnesses here I could use in the meantime. 10

THE COURT: I understand you practically agree on your facts. This man as I understood the opening of both counsel yesterday, boarded the car at Chrome with the idea of going to Rahway. That he went to Chrome Junction and was there given a transfer to Woodbridge Junction. That he boarded the train and the train went past Woodbridge Junction, did not stop there at all, did it? 20

MR. CAFFREY: It stopped. 30

THE COURT: It stopped, but he didn't get off?

MR. KOESTLER: No, we claim it did not stop.

THE COURT: And you claim it did not stop?

MR. CAFFREY: Yes. We say we gave him a return ticket and he got off at—

THE COURT: Then you say he con- 40

tinued his journey and got off at a place called Poor Farm Road, at a station?

MR. CAFFREY: Yes. The next station after he learned that he had passed Woodbridge. And then he walked.

THE COURT: That is about two miles and three-quarters beyond Woodbridge Junction.

10

MR. KOESTLER: It is some distance. I don't know the distance.

THE COURT: That this is a railroad company with a private right of way at this particular place.

MR. KOESTLER: Yes, sir.

20

THE COURT: In that situation the conductor told him to take the next car back. The man tried to do it, but the cars went by, one or more.

MR. KOESTLER: Several cars. Probably three.

THE COURT: So that he could not get anything back to Woodbridge Junction, and then he was confronted with the problem of what to do, and in that situation he started to walk back on the track to Woodbridge Junction.

30

MR. KOESTLER: There being, as far as ne could see, no other means of getting back, no road, or anything which was visible. The only means open to him was this railroad track.

THE COURT: There was no road there?

40

MR. KOESTLER: None that could be seen. That would go back to Woodbridge Junction.

THE COURT: There was a highway there?

MR. KOESTLER: I don't know. They could not see. It was dark. They were let off at a place and there was nothing there. It is called a station but there are no buildings there. It is a designated stopping place. No station. No buildings.

MR. CAFFREY: It is the only stopping place on the fast line after the point where he learned he had passed Woodbridge. 10

THE COURT: Isn't there a shed of some kind?

MR. CAFFREY: No. Simply a stopping place.

THE COURT: Is there a road, a highway? 20

MR. CAFFREY: Yes. Poor Farm Road.

MR. KOESTLER: There may be a cross-road, which leads somewhere, and we didn't see it and didn't know where it led to. Maybe a country road leading, God knows where, but not back to Woodbridge Junction.

MR. CAFFREY: One road leads to Rahway and the other to Metuchen. Rahway Line. 30

THE COURT: In that situation, Mr. Koestler, what right do you think he had upon the private right of way, under the fifty-fifth section of the Railroad Act?

MR. KOESTLER: He was put there by them and he remained a passenger until they carried him back to the place to which he was entitled to go, and the relation of 40

passenger and carrier continued and he was, therefore, connected with the railroad company by reason of his relation of passenger and carrier; and I first——

THE COURT: That is, he remained a passenger so long as he stayed at the station ready to take a car out. But was he a passenger when he started to walk along the railroad track?

10

MR. KOESTLER: Decisions which I cited to your honor from other States so hold.

THE COURT: Yes, but have they this provision we have in our statute?

MR. KOESTLER: That statute would not make any difference. It does not define the relation of passenger and carrier.

20

THE COURT: Oh, no.

MR. KOESTLER: If the relation of passenger and carrier existed under the law then he was connected with the railroad company by reason of that relationship.

THE COURT: Oh, yes, he was connected with them to the extent of being at the station and waiting until another car comes along.

30

MR. KOESTLER: The other decisions which I cited to your honor do not make it incumbent upon him to wait there for an hour, two hours, or a night or a day. He did wait a reasonable time, and that is a question of fact for the jury, not a question of law, whether he waited a reasonable time to be taken back. They had two duties to perform: first, the duty of carry-

40

ing him and discharging him at the place to which his ticket read.

THE COURT: Assuming that they did not do that, and they were negligent about it, then, of course, they are responsible.

MR. KOESTLER: Then they are responsible under the statute for any damages that ensue. That is the language of the statute in the thirty-seventh section. Now, then, they did something further than that. They gave him a ticket and said this will let you take the next car back. They did not make the proper arrangements to have the next car stop to take him back. He not only waited for the next car but for several cars, and they all went by and did not take him. They were standing there in the rain. Now, you have got this point established there, he was taken past his station, that itself is a breach of the obligatoin. He was compelled to stand in the rain, that is also an aggravation of that injury. For those two things he is entitled to damages. Then you have got a separate question. He was also injured walking back on the track. If he had no right to walk back on the track then another question would arise.

THE COURT: That is the question that I am discussing. The first part does not bother me at all, Mr. Koestler. The question is what responsibility there is for his walking back on the track.

MR. KOESTLER: Then the argument merely related to the question of damages.

THE COURT: That may be, of course.

MR. KOESTLER: I contend that under the statute——

THE COURT: I am assuming for the purpose of argument, that which Mr. Caffrey does not assume, namely, they are responsible. But the question I would like to hear you on, since the plaintiff is not here, is what right he had to go back on this right of way.

10

MR. KOESTLER: My contention is two-fold: first, that the relation of passenger and carrier was in existence during all of his walk back.

THE COURT: Do you mean because you are a passenger on a car that you have a right to walk upon the tracks, when there is a statute says you must keep off?

20

MR. KOESTLER: Your relationship exists and continues until they safely deliver you or until you exercise the means of getting back, and unless you voluntarily surrender that right by doing something inconsistent with it, that relationship continues until you reach there.

30

THE COURT: Do you think, Mr. Koestler, if somebody was put off at Poughkeepsie, or Harriman, or one of the stations where the New York Central is electrified, and wrongfully put off there, carried past his destination, as the plaintiff in this case, where there are a great many electric rails, and other dangerous appliances, switches, and so forth, that the relationship of passenger would continue, so that the man might wander through this maze of electrical danger back to——

40

MR. KOESTLER: If they put him into danger he has to get out as best he can.

THE COURT: Exactly, but suppose they put him out at a station?

MR. KOESTLER: If they put him off at a safe place where he can get back—

THE COURT: This man undoubtedly was off at a safe place.

MR. KOESTLER: And they carried him back, they have absolved themselves to a certain degree. But they are yet liable. But in this case an admission shows they had not carried him back, left him there with no means of getting back except the street line of the trolley, or the railroad track running back. 10

THE COURT: Suppose you were going to Newark on the so-called owl train, the late train, and instead of going to Newark you were carried through to Elizabeth, or we may say to Linden, and you wanted to go to Newark, that is probably six or seven miles, and you were there at one o'clock in the morning, very uncomfortable situation, for which the company is responsible. Are you entitled, then, in view of our statute, to walk back on the railroad track for five miles instead of taking some other course? 20 30

MR. KOESTLER: That is an aggravated illustration and does not take into consideration the circumstances of this case, that there was no place visible there to which he could go for safety, and the only thing open to him, instead of wandering— 40

THE COURT: What investigation did he make before wandering on the track?

MR. KOESTLER: He looked and could not see anything.

THE COURT: Where do you suppose people who were getting out at the station would go to?

MR. KOESTLER: He does not know.

10 THE COURT: Was'nt it his duty to know before he took himself upon a railroad track?

MR. KOESTLER: He might have had to wander in the wilderness for more miles than to walk back a short distance to the station they had just passed.

THE COURT: Is not that his duty to do it?

20 MR. KOESTLER: No sir; it is not his duty to wander around the country at large and to go to places with which he is not acquainted. This was strange territory to him, country with which he was not acquainted, and under the decision which I first cited to Your Honor he is not obliged to do that. The decisions even go so far as where he would hire a carriage, if there was such a thing there to take him home, and that carriage broke down on the way
30 home and he was injured, the company is responsible.

THE COURT: That is a different thing. I do not know whether our statute goes so far as that. It never has.

MR. KOESTLER: This state has never had the opportunity to pass upon the question.

40 THE COURT: Not directly.

MR. KOESTLER: This is *res nova* in this state. I contend that he is not within the statute; and I contend further that the statute does not make him guilty of contributory negligence. The statute merely says if he is hit by a locomotive or car—

THE COURT: I did not understand that. That may be so.

MR. KOESTLER: That is what the statute says. Section fifty-five. 10

THE COURT: This seems to be divided into two sections: "It shall not be lawful for any person other than those connected with or employed upon a railroad to walk along the tracks of the railroad except when the same shall be laid upon a public highway."

MR. KOESTLER: Yes sir. 20

THE COURT: That is the first proposition, that it is unlawful. "Second: If any person shall be injured by any engine or car while walking, standing or playing on any railroad, or by jumping on or off a car while in motion, such person shall be deemed to have contributed to the injuries sustained and shall not recover thereafter any damages from the company owning or operating the railroad." So that if he is injured he is guilty of contributory negligence; but if he is on there he is on there unlawfully; so that the proposition is that a man who is put down at a station where he is perfectly safe, has several things he can do; assuming that he has been placed there unlawfully, then the company is responsible; he could go to a nearby livery stable, or a garage, if there happened to be any, 30 40

and hire a car and be taken home and they would have to pay for it. He could go to a nearby hotel or private house and put himself up for the night and they would have to pay the reasonable charges. He could get other means of locomotion, either by walking, or some other method, and take himself home, and whatever injuries he received as the result of that, they would be responsible for. But can he take an unlawful course? He could undoubtedly go along the highway, and if it was five miles further, it would be his duty to do that rather than to go upon a dangerous place, and they would be responsible for anything that was a direct result. Or, if the man in the exercise of prudence decided it was dangerous to do that, and stayed at the station all night, and the Jury found that he did the right thing, and for instance, if his foot happened to be frost bitten and his leg had to be amputated, the company would be responsible. But can he, in that situation, go upon a place which the statute says is unlawful? Must he not take a lawful course?

30 MR. KOESTLER: Your Honor used the word "station."

THE COURT: It was a station.

MR. KOESTLER: I know it was a station, but it was no protection.

THE COURT: But he was put upon a place, Mr. Koestler—

40 MR. KOESTLER: If this man, on the other hand, would stay there all night, and contracted pneumonia and died, the company would claim there was a track, it was

only two miles, and he should have walked back.

THE COURT: Then the answer would have been he has no right on the track.

MR. KOESTLER: That is not so, because he was connected with the railroad, and the statute makes an exception of a man who is connected with the railroad.

THE COURT: That means somebody— 10

MR. KOESTLER: No. This statute is in the disjunctive, and it says specifically connected with or employed by, in the disjunctive; and it says there are two classes of people who have a right, under certain circumstances, upon that track and it is for this jury to say whether they, or he, or any other reasonable man, under the circumstances, would do what he did. That 20 is a question of fact for the jury, and it is so decided by the Supreme Court in the Hammill case, that under circumstances it becomes a question of fact for the jury.

Now, I want to go farther than that, and if Your Honor is right in saying this man was not connected with the railroad,—but I contend he was connected with the railroad,—even if he were not connected with 30 the railroad, he was in the right, for the reason that this whole affair occurred through the negligence of the Defendant company.

THE COURT: Take the case I cited to you, Mr. Koestler, of a man who went through to Linden, he is connected in the same way as that, but would you say that he had a right to walk back from Linden on 40 the track to Newark?

MR. KOESTLER: Your Honor will pardon me, I will not assume that, because they are not the circumstances in this case.

THE COURT: It is pertinent in this way: in the first place, you say he is connected with the railroad. If he was connected with the railroad in this case he would have been in that situation, wouldn't he?

10

MR. KOESTLER: Yes. But there are certain circumstances.

THE COURT: What right did he have in that case to walk back on the railroad, any more than he would in this?

20

MR. KOESTLER: There are certain circumstances which will terminate the relation of passenger and carrier. And there is no circumstance in this case which is evident to your Honor now, which terminated that relationship. But I want to go farther than that. Your honor says the statute says it shall be unlawful. We also have another statute in this state which says it shall be unlawful to travel on Sunday. Now, your honor would not dare to hold that because a man has travelled in violation of that statute on Sunday, and was injured, that he could not recover; because our Court of Errors and Appeals has held that he can recover. That is in the Troutwine case. There a man was travelling on a railroad on Sunday, and the statute says it shall be unlawful, just as this statute, and the Court said that it was not the fact that he was travelling on Sunday—

30

40

THE COURT: Does the statute say it is unlawful to run a railroad train on Sunday?

MR. KOESTLER: Yes, sir. More than one at that time. It is the Troutwine case, Court of Errors and Appeals decision. I will read from it; they cite a case in which they say this "(reading)."

THE COURT: Certainly that is what they say. The statute says you have no right to travel on Sunday, but if they assume to take him on the train, and they were the ones who were violating the law— 10

MR. KOESTLER: He was, too.

THE COURT: He was, too. But once they took him into their possession, although unlawful, perhaps, their duty attached to them at once.

MR. KOESTLER: That is not the theory of the decision. 20

THE COURT: That undoubtedly is so.

MR. KOESTLER: But that is not the theory of the Court of Errors' decision.

THE COURT: Perhaps it is a better theory. It certainly is common sense.

MR. KOESTLER: It says: "Nor was the plaintiff's violation of the Sunday law, in a legal sense, the cause of her injury. It was only the occasion for an injury by the defendant's wrongful act." 30

THE COURT: You see there is the distinction right away, Mr. Koestler. The fact that a man was riding on a train, the fact that he was travelling on Sunday did not have anything to do with the injury that happened on the train. But the fact a man unlawfully walks upon a track and is hurt, 40

because he falls on the track, has very much to do with it, doesn't it?

MR. KOESTLER: Yes, but it is for the jury to say how long he was to stay there, or whether he could have done anything else.

THE COURT: Yes, but you are begging the question now.

10 MR. KOESTLER: No I am not. That is the question of fact to be decided, and the question of fact which must be submitted to this jury. In Atlantic City Railway Company, the Supreme Court said: "The rule is that the—"

THE COURT: Against whom?

20 MR. KOESTLER: Against Kiefer, 75 New Jersey Law. "The rule is that the relation of passenger and carrier, when established, does not terminate until the passenger has reached his destination, alighted from the train, and had a reasonable time in which to leave the place where passengers are discharged."

30 THE COURT: Undoubtedly that is so, he had to have a reasonable time to leave the place. But, does that give him a right to go upon a place which the law says is unlawful?

40 MR. KOESTLER: Yes sir; if there is no other place. Assume a case more nearly applicable to this case; assume there was a wreck on the embankment of the Pennsylvania Railroad Company here between two streets, would your honor hold that a man did not have a right to walk along that track to the next street?

THE COURT: That would be absurd to hold anything of that kind. Any more than it would if a train was carried past the station, and they called out the station, and the man presumed he was at the station and got out and was injured; or if the train was carried by and he walked back to the station. They are obliged to give him a safe egress. That is undoubtedly so. But where you are put at the Linden station at midnight, I still ask you, do you think they would have a right to walk back to Newark on the right of way of the Pennsylvania Railroad Company? 10

MR. KOESTLER: I say if there were no other visible means of getting out of the predicament in which the defendant placed him, he had the right to walk along the track, notwithstanding the statute. The sense of the statute is not to keep people off the track when it is the only means of getting to a place where they were supposed to be taken by the railroad company, but it is to prevent trespassers; and if your honor will look at the statute you will see it says "trespassing"; and that is what it is intended to prevent. It is intended to prevent the use of those tracks, where railroad supplies other means. The railroad in this case supplied no means. They not only first violated their duty— 20 30

THE COURT: Unless this was a station from which a man could get to the public highway, and if by the exercise of reasonable care he could have gotten to the public highway, then it was his duty to do it, wasn't it? 40

MR. KOESTLER: Yes, if he could see where he was going and knew where he was.

THE COURT: Or if, by the exercise of care, he could have seen where other people getting off at this station went. They certainly could not have been landed in the middle of the field somewhere, with no way of getting out.

10

MR. KOESTLER: The situation as outlined to Your Honor is that this was late at night, dark, rainy night, no lights, nothing. The only thing they could see was the rail. They could not see anything else. Where were they to go, wander in the wilderness and get in the swamp? No jury would ask a man to wander around the rain soaked fields, where he could not see his hand in front of his face, when he has got a railroad track running back a short distance to an established station where he can get a means of conveyance to take him to his home. That would not be law.

20

THE COURT: Your client has come in now, Mr. Koestler. It is entirely a new question in New Jersey, undoubtedly. And maybe other states. I do not know of any case that deals exactly with it, do you?

30

MR. KOESTLER: No sir; I do not.

THE COURT: Your client is here. We had better get the facts straightened out first.

40

Henry Kelsen—for Plaintiff—Direct.

HENRY KELSEN, the Plaintiff, being duly sworn according to law, on his oath saith:

Direct Examination by Mr. Koestler:

Q. Mr. Kelsen you are the Plaintiff in this case?

A. Yes sir.

Q. Are you a citizen ? 10

A. Sure. Since '92.

Q. Do you remember last November 19 of last year?

A. Yes sir.

Q. Were you in Chrome that day?

A. Yes, I was in Chrome and I—

Q. Just answer the question. You were in Chrome? 20

A. Sure.

Q. Where did you live at that time?

A. In that time in Rahway.

Q. And you wanted to go from Chrome to Rahway?

A. From Chrome to Rahway, sure.

Q. Did you get on a trolley car at Chrome?

A. Yes sir.

Q. About what time was it? 30

A. About half past ten at night.

Q. Did you pay your fare?

A. Sure, I paid ten cents. He give me transfer.

Q. Did he give you a transfer like this (handing paper to witness)?

A. Yes sir.

Q. When the car got to Chrome Junction did you get off? 40

Henry Kelsen—for Plaintiff—Direct.

A. Chrome Junction we got to wait, there was no—

Q. Did you get off the car at Chrome Junction?

A. Yes.

Q. And then did you wait for another car?

A. Wait for another car.

10 Q. Did you get on the other car?

A. Yes, sure.

Q. Where did that car go to?

A. Bring me up to Woodbridge Junction, to Poor Farms.

Q. When you got onto the second car did you give the conductor this transfer?

A. Yes, I give him the transfer. The conductor—
20 I give him transfer, sure, to bring me up to Woodbridge—

Q. When you gave the conductor a transfer what, if anything, did you tell him where you wanted to go?

A. Sure, I told him I wanted to go to Woodbridge Junction.

MR. KOESTLER: I offer the transfer in evidence.

30 (Transfer entered in evidence and marked Exhibit P-2.)

Q. What was the next you knew as to whether you got to Woodbridge Junction or not? Did you get off at Woodbridge Junction? A. He don't stop there.

Q. How do you know he didn't stop there?

A. Because he called every time the station. This
40 time don't call the station.

Q. He didn't call the station? A. No.

Henry Kelsen—for Plaintiff—Direct.

Q. Did they stop at Woodbridge Junction?

A. No. Would not stop. He come right to Poor Farms.

Q. How do you know he didn't stop at Woodbridge Junction? A. Because I was standing on the car. I was off seat. I wait for him stop, and he don't stop. I called him and he was talking with girls in the front, with womans, you know, and he don't come. I called him to come up and stop the car. 10

Q. Who went up to the conductor to ask him to stop? A. Lady, that lady what going with me, with her daughter, was in the same place with me.

Q. That lady sitting back there? A. Yes. She was in the same car with me, and he would not stop it. She told him. 20

Q. What did the conductor tell you, or the lady, that you heard, when they asked about Woodbridge Junction? A. He give that transfer and say next Poor Farm, come back with another car. But we call the car and no car won't stop there.

THE COURT: Just answer the question. 30

Q. Just answer a little bit at a time. Then the car finally stopped at Poor Farms. A. Yes.

Q. What kind of a place is Poor Farms? A. I don't know. I never was there. First time I was there.

Q. Did you see a lot of houses around? A. No houses. Was raining, and dark night. You can't see nothing. 40

Henry Kelsen—for Plaintiff—Direct.

Q. What time was it? A. Oh, was about quarter to twelve. I guess, at night time.

Q. You say you left Chrome Junction about half past ten,—or Chrome about half past ten?

A. Half past ten.

10 Q. And it was after that, was it? A. Yes. Had no power, and we had to wait, you know, on the Junction, we had no power, we got to wait for the car.

Q. Was it a nice night? A. Oh, yes.

Q. Was it a nice night. A. Night, sure.

Q. What do you mean? A. We had to wait for the car.

20 Q. What kind of weather was it? A. Oh, raining, and dark, and you can't see nothing.

THE COURT: Listen to what your lawyer asks you. First you said it was a nice night and then you said it was raining. Listen to his questions.

Q. When you got to Poor Farms was there a station there, a building? A. A little building.

Q. A what? A. A very small building.

30 Q. There was a building? A. A little building, just station for the waiting room, that is all.

Q. Was it closed in, was it a room, or a shed, what was it? A. Small shanty, you know, a little shanty.

Q. Would it protect you from the rain? A. No. We can't go in. We don't go in because we told to wait along side and get car take you along the other way.

40 Q. Did you see any road there? A. No.

Q. Were there any lights there? Did you see

Henry Kelsen—for Plaintiff—Direct.

any lights? A. Yes. From the car. Electric light was there, sure.

Q. What kind of electric light? A. Regular lamp, you know.

Q. Where was that? A. That was middle where the car goes, you know.

Q. Do you mean on a pole in the middle? A. 10
Yes.

Q. Did you see any other lights around there?
A. No.

Q. Did you look around to see how you could get away? A. Oh, was dark. We can't see nothing at all.

Q. Did you see any road? A. No road. We got—no road, that is all.

Q. Did you see any houses around? A. No. 20
Was so dark we can't see nothing.

Q. You say the conductor gave you a ticket and told you to wait for the next car? A. Yes sir.

Q. Did you wait for the next car? A. Sure.

Q. Did you get on the next car? A. Won't stopping.

Q. What did you do to try to make him stop?
A. We were standing, you know, right on the 30
corner, and put my hand up. All three, you know, the lady and her daughter and me, and calling, but they don't stop.

Q. There were three of you there, you and a woman and her daughter? A. Yes. We was three.

Q. Now, you say the first car going back didn't stop. How many cars passed you going back towards Woodbridge Junction. A. One, I don't 40
know, I guess three. About three. About three

Henry Kelsen—for Plaintiff—Direct.

cars. One don't stop, and then the next one don't stop. After twenty minutes was another one, about twenty or thirty minutes was three cars and nobody won't stop.

10 Q. How long do you think you waited there all together? A. Oh, waited about, I guess, about twenty-five minutes or a half an hour.

Q. Twenty-five minutes or a half an hour and three cars passed you? A. Yes. Night time, to go home.

Q. And they didn't stop? A. Nobody stopped.

Q. Did you try to do anything to make them stop? A. Certainly. We were standing right on the—right by the track.

20 Q. After those cars would not stop what did you do? A. We got to walk.

Q. What do you mean you got to walk? A. We got to walk to the station.

Q. Why didn't you go to a hotel and stay over night Mr. Kelsen? A. We don't see no street, nothing where we can go.

30 Q. Why didn't you go to a farm house around there and stay there over night? A. Can't see. Was raining and dark, we don't see no houses, nothing.

Q. Why didn't you walk on a regular street, or a road, or sidewalk? A. Was looking around for a street. Was no street. Only just railroad track.

Q. That is the only thing you could see? A. That is all what was. Railroad track.

40 Q. And you walked back toward Woodbridge Junction? A. Yes sir.

Henry Kelsen—for Plaintiff—Direct.

Q. Did you know your way around Poor Farm?

A. I never was there.

Q. You never was there before? A. No.

Q. While you were waiting and these three cars passed you did you get wet? A. Sure.

Q. Was it raining hard? A. Was raining, you know, not hard rain. Is worse like hard rain. 10
You know, was so dark.

Q. On your way walking back did any cars pass you? A. Yes. Go straight, you know, the car don't—we was afraid, we got to walk—

Q. I don't care whether you were afraid or not. I ask you whether any car passed you while you were walking back to Woodbridge? A. Yes, sure.

Q. Did it stop to take you on? A. No. No cars won't stop. 20

Q. Now, while you were walking back from Poor Farm Road, to Woodbridge Junction did anything happen to you. Did you hear the question? A. Ticket, do you mean?

Q. Did anything happen to you? A. Oh, sure. Sure.

Q. What? A. Well, you know, I was fall down, you know, on the track. 30

Q. I don't know. These men don't know unless you tell us. A. I was fallen down, you know, and hurt mine leg in, you know, I can't get up, and that lady was busy with her daughter, you know.

Q. I don't care about the lady. I only want to know what happened to you? A. Yes, I was fallen down, you know, and I can't get—was too bad to get up you know, because I thought I am dead. And that lady couldn't see. It was dark. That 40
lady can't see me.

Henry Kelsen—for Plaintiff—Direct.

Q. Now, where did you fall? A. Right on the railroad track.

Q. Why did you fall? A. Because was dark. I can't see where I going. You know every car got such, you know, light on the middle, is wood where the track is, is first iron, the other one, and
10 I never used to go on that track, because I never go on such a track, you see. I am an old man—

Q. Wait. Where were you hurt when you fell?
A. Where I hurt?

Q. Whereabouts on your body? A. Here, right here, you know, I have all around here.

Q. On the chest, you mean? A. On the chest.

Q. And in the groin? A. Yes. You know, that
20 is—

Q. Well, did you finally get back to Woodbridge Junction? A. Very easy. I got to walk there.

Q. Did you get back to Woodbridge Junction that night? A. Yes.

Q. And from Woodbridge Junction did you get to Rahway? A. To Rahway. Yes, we catch the last car. Just the last car we catch.

Q. How old are you? A. Sixty-eight years.

30 Q. What is your business? A. Photographer and artist. Travelling, you know. I travel around.

Q. How do you get your orders? A. By travelling around.

Q. You travel around from place to place? A. Sure. I make mine living.

Q. People don't come to your place, do they, to get things, as a rule? A. Not many.

40 Q. You have to go out to get your business?
A. Sure. That is mine business.

Henry Kelsen—for Plaintiff—Direct.

Q. Before this accident did you have any trouble going around getting—doing your work? A. No. I was every time I walk, walk sit or eight miles. And this time I can't walk a half mile.

Q. Why can't you work now? A. Because I got a rupture, you know. 10

Q. Did you have that rupture before you fell on the track that night. A. Never in my life. Never in my life I never had any.

Q. What were the injuries you got on your chest when you fell? Were they on your chest?? A. Sure.

Q. What was the matter there? A. I fell down on the wood. I can't see, and in the night time. 20

Q. I can't hear you? A. Whether it is stone or wood, I fall down, I can't see what it was, because it was dark. All around here I was swollen. I am just sick now. I am just sick all the time.

Q. When you got to Rahway where did you go? A. I waiting for the train and take the car to New York. I got doctor in New York. I ain't got nobody in Rahway. So I go to New York.

Q. You are married, are you? A. Yes. 30

Q. Got a wife living? A. My wife at that time—

Q. Where was your wife at that time? A. With my daughter.

Q. And that is the reason you went there? A. And that is the reason I went there, sure.

Q. When you got there did you go to bed or walk around? A. Oh, yes, sure, to bed. Right away to bed.

Q. How long did you stay in bed? A. I was 40 four weeks I can't go, you know. Four weeks.

Henry Kelsen—for Plaintiff—Direct.

Q. And then did you go to see Dr. Narins?

A. Then I want to have in couple of weeks—

MR. CAFFREY: I suggest the witness not be led.

MR. KESSLER: That is in the case already.

10

Q. Did you have any doctor at your daughter's house before you went to Dr. Narins? A. We call one doctor, but he want operation and I don't want to go to operation, you see, so I tell—I lay down couple of weeks, might I feel better. Until couple of weeks I feel no better so I was going to Dr. Narins.

20

Q. How long after the accident was it that you went to Dr. Narins? A. About three weeks. Three weeks from that time, you know. About eight or ten or December.

Q. How many times altogether did you see Dr. Narins? A. Oh, about eight or ten times.

Q. Did you pay Dr. Narins any money? A. Sure. Twenty-five dollars.

30

Q. Do you wear a truss now? A. Sure I wear a truss.

Q. Do you feel a little better since you wear a truss? A. Well, same thing. If I work I feel bad. I can't work hard.

Q. If you don't work you don't feel bad? A. If I don't work, sure, if I don't work I sit home.

Q. How much did you pay for the truss? A. Eight dollars.

40

Q. Did you have any electrical treatments? A. Yes. From a Doctor Gomez, you know, I pay him

Henry Kelsen—for Plaintiff—Direct.

thirty-two dollars. He treat me here on my chest.

Q. You paid Doctor Gomez how much? A. Thirty-two dollars.

Q. Do you know where Doctor Gomez is now? A. I don't know. People say he is dead. I ask for him. 10

Q. You tried to find him, did you? A. Yes, I can't find him. I tried.

Q. Are you able to do as much work now as you did before you had this accident? A. Not half. I can't do work, that is all.

Q. About how much money did you make a week before this accident? A. Oh, make fifty dollars, sixty dollars. 20

MR. CAFFREY: I object to this.

THE COURT: Why?

MR. CAFFREY: Because it is a conclusion. We ought to know how he made that and on what figures he bases it.

THE COURT: That is a matter of cross examination.

Q. How do you know that you sometimes made as much as fifty and sixty dollars a week? A. I know I had the money. 30

Q. You had the money, that is the way you know it? A. Sure.

Q. Can you make as much now? A. No. I am not satisfied I make fifteen. I can't work, you know. My work is artist, I got to stand and work, you see, and if I sit down I can't work. 40

MR. KOESTLER: Cross examine.

*Henry Kelsen—for Plaintiff—Cross.**Cross-Examination by Mr. Caffrey:*

Q. Doctor Gomez, when did you see him? A. Couple of weeks ago I seen in hospital, he was in hospital in Newark.

10 Q. You don't mean a couple of weeks ago, do you?

MR. KOESTLER: Yes, he said he saw him in a hospital a couple of weeks ago.

Q. When did you first see Doctor Gomez? A. First was about seven months ago.

Q. When? A. The last time, do you mean?

20 Q. The first time? A. Oh, the first time I see him about, I guess, in April, or May, he begin to treat me, you know.

Q. Is that the first time you saw Gomez? A. Yes.

Q. What year was that? A. I called him there, you know. This year.

Q. Was Doctor Gomez the man who treated you after you were injured on the railroad tracks? A. He treat me, you know, after when I call him that month, I tell you, in April.

30 Q. Was he the first doctor you saw after you were injured on the railroad track? A. No. He is the second one.

Q. Who was the first one? A. First one was Doctor—the right man what treat me was Doctor Narins.

40 Q. Well, you saw Doctor Narins in December, didn't you, 1918? A. Yes. Eighth of December, or tenth, you know.

Q. You went to his office in New York? A. Yes. Sure.

Henry Kelsen—for Plaintiff—Cross.

Q. Did you have any doctor to call at your home after the accident? A. There was one doctor he called to make me operation. I don't call him no more.

Q. What was his name? A. I don't know. Somebody sent me there, you know, my doctor sent him there, but that— 10

Q. How many times did he see you? A. Only one time. I don't call him because he—

Q. How soon after the accident? A. After the accident.

Q. How soon after? A. Right next day.

Q. When next did you see him? When did you see him again? A. No more, because he want me operation. I don't want to go to operation. 20

Q. Didn't he treat you for the injury to your chest? A. Yes.

Q. What did he do for that? A. Well he put me such, I don't know, such medicine.

Q. Didn't you testify on direct examination that he only treated you for the rupture? A. He treat me—

Q. And recommended an operation? A. He want operation. I don't want operation. He was mad. He was going away. He want right away an operation and I say no I don't want no operations. 30

Q. You had an accident the winter before this November, did you not? A. No.

Q. Didn't you fall downstairs at the house where you were living? A. No. That was my hand.

Q. Didn't you fall downstairs at the store? 40
A. Yes.

Henry Kelsen—for Plaintiff—Cross.

Q. Where you were living? A. Yes sir.

Q. And didn't you have a rupture at that time?
A. No sir. That was my hand, with the bottles.
I had bottles, you know, my hand, you know.

Q. How far did you fall? What was the distance
that you fell that time? A. A couple steps there,
10 you know.

Q. How did you fall? A. I was going for
water. Water is in cellar, you know. I got to go
for water with the bottles and I fall with the bot-
tle and scratch my hand. That is all.

Q. Didn't you talk to Mr. Lawrence and tell
him that you were injured and you were going to
sue him for damages? A. I told him my hand.

20 THE COURT: Who is Mr. Lawrence?
MR. CAFFREY: The landlord.

A. My hand, that is all.

By the Court:

Q. Did you tell Mr. Lawrence, the landlord, that
you were going to sue him for damages? A. Yes,
30 I tell him by hand, you know, that hand was spoil-
ed, you see, yes, I told him. But nothing for rup-
ture. I don't tell him about rupture.

By Mr. Caffrey:

Q. Mr. Keslen do you remember a man calling
at your store on March 11th, 1919 and had a talk
with you about your accident at Mr. Lawrence's?

40 MR. KOESTLER: I object unless the
name of the person is stated.

Henry Kelsen—for Plaintiff—Cross.

MR. CAFFREY: I will produce him.

Q. Mr. Kovac, this man here (indicating), do you remember talking to that man? A. That man here? No, I don't remember.

Q. Would you say that you didn't talk to him?
A. I never see that man.

10

Q. Never saw him? A. No sir. I don't remember.

Q. Didn't you talk to him and tell him that you fell down stairs and you had a rupture and you hurt your hand? A. I never see that man. Never talk with that Kovac.

By the Court:

Q. Did you tell him that you had a rupture?
A. No, I never see that man. I tell you truth.

20

By Mr. Caffrey:

Q. Didn't you talk to him on the 12th of March?
A. I never see that man. I don't remember. I never that man.

Q. And didn't he go to your store and have a picture framed?

MR. KOESTLER: What year was this?

30

MR. CAFFREY: 1919.

A. He bought from me a picture frame?

Q. Had a picture framed at your store? A. No. I don't remember.

Q. Do you remember on April 1st, talking to a man named Lavez?

MR. CAFFREY: Mr. Lavez stand up.

MR. KOESTLER: April 1st, 1919?

40

MR. CAFFREY: Yes.

Henry Kelsen—for Plaintiff—Cross.

By the Court:

Q. Did you talk to this man? A. I don't remember. Was lots of people come in the store. I don't remember. No, I never see that man. I don't know.

10

By Mr. Caffrey:

Q. Do you remember talking to this man later in April, around the seventeenth? A. I never see that man.

20

Q. And he had an enlargement of a picture in his watch made by you? Do you remember that man coming to your place and giving you an order and you making an enlargement of this picture? A. No. That is not my work.

Q. No, I am not saying it is. A. No, I don't make it.

Q. And didn't you tell him that you fell down stairs? A. No such a man like this was there and asked me I pay him money he call witness go for me that I fall down.

30

Q. What is this? A. Was a man like this, you know, in my store, and tell me if I got a witness I fall down cellar, my hand, so he wants to be a witness. I know that. He wants money from me to give him that he want a witness that he fall down cellar. Man like his. I don't know for sure. I don't remember for sure. Man like this. I give him couple of pictures and give him money for witness for me. That is what I remember, you know.

40

Q. Didn't you tell him that you had a rupture and you didn't know how long ago it was when

Henry Kelsen—for Plaintiff—Cross.

you fell downstairs? A. I never talk much with people.

Q. Listen to me. When you fell down stairs it made it worse? A. No, never.

Q. You didn't say that? A. No, I never talk with people what come business. I don't never talk with people what come business. No, sir. 10
Never. I never say this.

Q. Mr. Kelsen how long have you lived in Rahway? A. Four years.

Q. And during that time you travelled around Middlesex County soliciting orders, did you not? A. What was it?

Q. You went around the different parts of the county seeking orders, did you not? A. In the 20
country, sure, I go around the country.

Q. You went around New Brunswick and Metuchen and Poor Farm Road and all through that section? A. No, over there I would not go so far.

Q. How many years did you travel around Middlesex County? A. About thirty-five years.

Q. Do you understand what I said? A. Yes. How many years I have travelled around in business? 30

Q. How many years is it that you have been travelling around Middlesex County and Union County seeking orders for enlargements and so forth? A. Thirty-five years.

Q. You have been doing that for thirty-five years? A. Thirty-five years.

Q. Aren't you familiar with the road from Rahway to Metuchen and New Brunswick? A. 40
No. Mostly my place was New York State.

Henry Kelsen—for Plaintiff—Cross.

Q. Where did you travel when you were in New Jersey? A. Carteret, and Elizabeth, Newark.

Q. This car that you were on, what line was it? A. Public Service.

Q. What line, Trenton Line? A. What?

10 Q. The car that you boarded at Chrome? A. Oh, that was the fast line; yes.

Q. Trenton Fast Line? A. Trenton Fast Line, yes.

Q. Aren't there push buttons on the side of the car that you push when you want the motor-man to stop the car? A. Sure. Oh, yes.

Q. There are? A. Yes.

Q. And you knew that? A. Oh, yes.

20 Q. How many times had you travelled over that road before? A. Not many times.

Q. How many times? A. Oh, might two or three times.

Q. Haven't you ever travelled over the fast line before? A. No.

Q. How many times have you gone to Woodbridge Junction? A. Woodbridge Junction? Oh well most time I was passing to Sewaren.

30 Q. How many times did you change at Chrome to go to Woodbridge Junction? A. Oh, yes couple of times.

Q. Not more than a couple of times? A. Sure.

40 Q. Speak up so this last man may hear you. A. Yes, that is what I say. But never Woodbridge, only Sewaren, I change at Sewaren every time, and this time we catch that car and took that car.

Henry Kelsen—for Plaintiff—Cross.

Q. When you got off the car at Poor Farm Road you said there was a light at the railroad track, is that right? A. The light was from the car, from the fast line.

Q. Didn't you say there was a light near the railroad track? A. Yes. Over the track where the fast line goes, sure. 10

Q. How long did you stand there before you began to walk on the tracks? A. A. We was waiting there over twenty minutes, you know.

Q. Over twenty minutes? A. Sure.

Q. How many cars passed you? A. Not right there. We was pass the other way, part way we was going and there we tried to stop the cars.

Q. You didn't stand still at the Poor Farm Road's station, did you? A. Sure, we stand, and cars pass and won't stop there. 20

Q. Didn't you walk up and down? A. No, no. We was waiting by the car, you know.

Q. Did you stand perfectly still? A. Yes, sure, waiting.

Q. For what time? How many minutes? A. I don't remember. We was waiting one car, the other car do not stop. 30

Q. How many minutes were you waiting there? A. I don't remember. Ten or fifteen minutes, I don't know. Because he passed, the car, and they won't stop. What is the use to wait there?

Q. Answer the question, Mr. Kelsen. A. Yes, sir.

Q. How long were you waiting there before you began to walk away from Poor Farm Road? 40

Henry Kelsen—for Plaintiff—Cross.

A. I don't remember. Ten or fifteen minutes. We can't say. Or twenty minutes. I don't remember how long, because I know we waiting and cars passed and they won't stop there.

Q. And during the time that you stopped there you say three cars passed you? A. I don't re-
10 member one or two or three was passing cars and they won't stop. Couple of cars was passing. I know was passing couple of cars. Two or three.

Q. How many cars passed you while you were standing at Poor Farm Station? A. Oh, about three cars, sure. Three cars, sure.

Q. Sure of that? A. Three cars was passing, sure.

Q. Don't you know, Mr. Kelsen, that those
20 cars only run every hour? A. Well, I don't know, in the night time so late they go. I don't know. That is what I was wonder the cars passing and they don't stop there.

Q. What time was it that you reached Poor Farm Road Station? A. Oh, it was about—do you mean Poor Farm?

Q. Yes? A. Oh, was about twelve o'clock,
30 quarter to twelve.

Q. Didn't you say you got the last car from Rahway about twelve o'clock? A. No. Was about half past twelve when we was coming to the Junction, you know, back, when we was walking.

Q. And you were let off at Poor Farm Road at twelve o'clock and you walked to Woodbridge and then got the half past twelve car? A. I don't remember. It was late, you know. I don't
40 remember what time it was, only I know that was about take me to walk—I don't know the time

Henry Kelsen—for Plaintiff—Cross.

from Poor Farm to Woodbridge we walking. I know that. I don't remember what time.

Q. After you started to walk how many cars passed you? A. I don't remember. We seen couple cars. I don't know.

Q. Which way were they going? A. One was going there, one was going to Trenton track, and one was going there, you see. Passing couple cars. 10

Q. How many tracks were there at this place that you were walking? A. One track, that is all.

Q. Single track? A. Single track, that is all.

Q. And on each side of the track there was a fence, was there not? A. No, no. No fence.

Q. Do you say that there wasn't a fence on either side of the railroad tracks on which you were walking? A. No. Was no fence there; no sir. 20

Q. Are you sure of that? A. I am sure, because when I fell down was no fence. I know that. No sir. No fence. There was no fence.

Q. Didn't you have to climb over the cattle guards as you were walking along the railroad track? When you started to walk from Poor Farm Road along the railroad track didn't you have to climb over the cattle guards? A. Was a little path by the track, and when we see a car we wait on that— 30

Q. No. Answer the question. A. That is all.

Q. While you were walking along the railroad tracks did you not climb over cattle guards? A. What do you mean? 40

Q. You know what a fence is? A. Yes.

Henry Kelsen—for Plaintiff—Cross.

Q. Didn't you have to climb over something that was on the track? A. No. No. We can't see nothing. We got to go there, right track. We can't see no nothing.

Q. How far away from Poor Farm Road was it that you fell down? A. Was only about, I
10 guess, about fifteen minutes walk over there.

Q. Fifteen minutes walk? A. Was over there, yes.

Q. When you got off the car at Poor Farm Road did you walk on either side of the track looking for the road or did you stand at the railroad station? A. We was standing and waiting and after we began to walk and every car was—

Q. No. Just answer my question. After you
20 got off at Poor Farm Road Station—

THE COURT: He said first they stood, and then they began to walk.

MR. CAFFREY: I am asking him now did he look for a road on either side of the railroad track.

A. We can't go, you know, looking, because—

Q. Did you look? A. We look but we can't
30 see nothing.

Q. How far did you look? Did you walk or did you stand there and look from the place where you were standing? A. We was try to go and we can't go, I tell you why; here is the railroad track, and here is a thing, you know, you know what I mean, just no track, only just like, I can't tell you so good because I can't—you can't walk
40 here over, you can't cross over. As river, you know, first, and we can't go.

*Henry Kelsen—for Plaintiff—Cross.**By the Court:*

Q. Do you mean a ditch? A. A river, yes. You can't pass there. Sure.

By Mr. Caffrey:

Q. How many people got off the car at Poor Farm Road when you did? A. That lady with her daughter was walking with me. 10

Q. Anybody else besides that lady? A. No more. Lady and daughter.

Q. Where did they walk? A. The same with me. They want to go to Rahway.

Q. Did they fall down? A. That lady and that girl was cry.

Q. No. Did she fall down? A. No, she don't fall down, but she was crying. 20

Q. Did she fall down? A. No, she don't fall down.

Q. Was she walking ahead of you or behind you? A. She was walking with her daughter and I was on the back.

Q. You were behind her? A. Behind, sure.

Q. And she passed the place where you fell down? A. In that time she was trouble with her daughter. She was crying. She was afraid she might get killed. You know, don't see, and it is dark. You got trouble with your daughter— 30

MR. CAFFREY: I ask that be stricken out as not responsive.

By the Court:

Q. At the time you fell down were they in front of you, both of them? At the time you fell down, were both of these ladies in front of you? A. Yes. Yes. Front of me. Sure. 40

Henry Kelsen—for Plaintiff—Cross.

By Mr. Caffrey:

Q. How many people were in this car, the car that you boarded at Chrome? A. How many people was in the car do you mean?

10 Q. Yes. When you got on at Chrome? A. Oh, was lots of people there. Was full car.

Q. And you said the conductor called out every station along the road except Woodbridge Junction?

MR. KOESTLER: No, he didn't say that.

20 A. He called every time when I got, and this time he don't call station. That is reason.

Q. How many times after you got there that he called the stations? A. Couple times I was going thtre. Because every time I go to—stop in, what they call that station, not in Woodbridge Junction, I mean Sewaren. But this time I look—

Q. Just a minute. When you boarded the car at Chrome Junction did the conductor call any stations after Chrome? A. No.

30 Q. None at all? A. Nothing at all.

Q. What did you mean on direct examination when you said he called out the other stations?

MR. KOESTLER: I object. He didn't say that.

MR. CAFFREY: I think he did.

MR. KOESTLER: He did not. He said at other times he called the stations.

40

*Henry Kelsen—for Plaintiff—Cross.**By the Court:*

Q. On other times that same night did they call out the other stations? A. Same night, I mean before this night.

Q. No. When you left Chrome and before you got to Poor Farms did he call any stations at all?

A. No, he don't call. He pass. He don't call. 10

By Mr. Caffrey:

Q. You know where Woodbridge Junction station was, didn't you? A. Sure I know.

Q. You know how many stations it was from Chrome, didn't you? A. Sure I know.

Q. When you were approaching Woodbridge Station you didn't give any signal, you didn't push the button, did you? A. Sure we push the button and I told him and I give him transfer. 20

Q. Did you push the button, too? A. Sure. I told him please stop, because any time I can't—it is a hard job for me to go. Walk hard. I told him to stop and he say all right, he stop.

Q. I am asking you did you push the button before you reached Woodbridge? A. Yes, sure.

Q. You didn't say anything about that on direct examination? A. You know, I don't— 30

Q. Did you or did you not push the button when you reached a point near Woodbridge Junction? A. I told him, and that young lady told him, sure.

Q. Answer the question, Mr. Kelsen. A. Yes.

Q. Did you or did you not push the button when you were approaching Woodbridge Junction?

A. Sure, I push the button. I push the button and tell him too. 40

Q. Where was he when you told him?

Henry Kelsen—for Plaintiff—Cross.

A. When I get up and give him the transfer I tell him, please let me off in Woodbridge Junction.

Q. Where was the car when you gave the conductor your ticket? A. Right when I get up on the car I give him the ticket.

Q. When you got on? A. Got on sure.

10 Q. When you got up? A. Sure.

Q. Where were you when you got up? A. He was talking with girls on the front.

Q. Where was the car with reference to Woodbridge Junction? Was it near Woodbridge Junction? A. No. No. Right near we get up he take the transfer.

Q. What was that? A. When we got on the car he took the transfer. When I got on the car
20 he took the transfer from me.

Q. When you got in the car? A. Sure.

Q. Did he walk in the car after you and take it that way? A. He is going around and take all the tickets, you know.

Q. He went around the car and was collecting tickets? A. Tickets, sure.

Q. How far away from Woodbridge Junction was it at that time? A. I don't understand.

30 Q. When he took your ticket? A. Yes.

Q. How far away from Woodbridge Junction were you at that time? A. Right when I get up in the car, get in the car, he took the ticket.

Q. Where were you when you got up in the car? A. Well, I give him the ticket, you know. He was going around collecting tickets.

Q. Do you know where you were? A. I was
40 standing around. I don't want sit down. I give him the ticket and I stand down and wait for that,

Henry Kelsen—for Plaintiff—Cross.

because I know it don't take long time to go to Woodbridge Junction.

Q. When you reached Woodbridge Junction did you know that you had reached it, or when the car reached it, rather, did you know that the car had reached Woodbridge Junction? A. Sure, I know, because, begin to go. 10

Q. Was it at that time that you told the conductor to let you off? A. When I give him the ticket, at that time I told him, when I give him the ticket, when I was in the car I told him, please stop at Woodbridge Junction.

Q. When you told the conductor to let you off at Woodbridge Junction had you passed that point? A. When I told him to let me off at Woodbridge Junction I give him the ticket and I told him, please stop Woodbridge Junction. That is all. 20

By the Court:

Q. Where were you then? A. Was by the station at Chrome Junction when I give the ticket.

By Mr. Caffrey:

Q. When you were getting on the car you didn't hand the conductor the ticket, did you? When you were getting on the car at Chrome Junction? 30

THE COURT: Mr. Caffrey, is there any dispute of the fact that he was a passenger? Hardly worth while taking time on those things you do not dispute. I presume there is dispute on the question 40

Henry Kelsen—for Plaintiff—Cross.

whether the car was stopped at Woodbridge Junction. You claim it was stopped, and that the station was called?

MR. CAFFREY: Yes.

By the Court:

10 Q. Did you hear him call out the station Woodbridge Junction? A. He didn't stop there.

Q. And didn't call it out? A. He don't call, he don't stop there.

By Mr. Caffrey:

Q. He might have called and you not hear it, is that so? A. What?

20 Q. He might have called that station but you didn't hear him? A. No, he don't stop. When I go in the night time, you know, on the car, I would not sleep. I watch my station.

Q. Night time you would not sleep? A. No, I never sleep on car nights, I know I got to get up in the station, and I told him, and give him the ticket. That is all.

30 Q. You didn't tell him and then go to sleep, did you? A. What do you mean?

Q. You didn't tell him to put you off at Woodbridge Junction, and then fall asleep? A. Sure, I told him. I give him ticket and told him. He was talking, you know. Ticket is marked on to Woodbridge Junction.

Q. Do you keep any records of your earnings? A. What?

40 Q. Do you keep a record of what you earn? (No answer.)

*Henry Kelsen—for Plaintiff—Cross-Re-Direct.**By the Court:*

Q. Do you put in a book how much money you make? A. No, no, never.

By Mr. Caffrey:

Q. How do you know you make fifty dollars a week? A. I know. You know I count the money, I know my work what I doing I got money. 10

Q. Don't you figure your carfare and the cost of your material? Don't you keep any record of that? A. I don't have, you know, bookkeeper.

Q. Don't you keep a record of what it costs you for carfare? A. No.

Q. Don't you keep a record of what your materials cost? A. No. 20

Q. You don't keep a record? A. No sir. I buy one time I have for six months material.

Q. You don't deduct any cost of material in arriving at your profits, do you? A. No. Because I ain't got nobody practically but myself. What I buy. I got nobody.

MR. CAFFREY: That is all.

Re-Direct Examination by Mr. Koestler: 30

Q. Mr. Kelsen you testified that this accident on the track took place on November 19, 1918. You also testified that upon one occasion you fell down a few steps. Which happened first, the falling down steps, or the falling on the track? A. Sure, on the track.

Q. Which happened first, did you fall down the steps first, or on the track? A. First on the steps, sure. 40

Mary Winkowski—for Plaintiff—Direct.

Q. And how long before the time you fell on the track was it that you fell on the steps? A. Oh, about a year.

Q. A year? A. Sure.

(Karl Schaeffer sworn as Interpreter.)

10

MARY WINKOWSKI, a witness produced on behalf of the plaintiff being duly sworn according to law, on her oath, saith:

Direct Examination by Mr. Koestler:

(Through Interpreter Karl Schaeffer.)

Q. Where do you live now? A. I live in Chrome now.

20 Q. Where did you live last November? A. After Rahway.

Q. Bloodgood? A. Yes.

Q. That is right outside of Rahway? A. Yes.

Q. Were you on a trolley car with this man Kelsen one night about a year ago? A. Yes.

30 Q. Were you on the same car with him that was going from Chrome Junction to Woodbridge Junction? A. We were on the Chrome Junction and at that time the electric cars didn't go. For two hours they didn't go. We were there at ten o'clock but we didn't move until about twelve.

40 Q. Go ahead and tell your story. A. And after we had a talk maybe we wouldn't get a car at all. We had to take Amboy car and change for Sewaren. The conductor said maybe to Chrome Junction there would not be any car and we have to took a Trenton car. After we got on the car it was awful dark and it was raining.

Mary Winkowski—for Plaintiff—Direct.

There were too many people, soldiers. And the old man came in and he sat near the door. And I and my girl were sitting about the middle. After when the car had to stop Woodbridge Junction he didn't holler. When we had to get off at that place he didn't call out the station. And then after my little girl pushed the button, but we passed the station already. And I went over to the conductor and I was awful mad. 10

By the Court:

Q. Did the car stop at Woodbridge Junction?

A. No. Nobody got off. When I started to holler at the conductor and told him that it is dark and raining and it is twelve o'clock. When I was angry at him he said you have got tickets, get off, and there will be another car come and you can take it. And while we were standing there another car came. It was dark and water. And we put up our hands and hollered. 20

Q. Where did you get off? You haven't told us that yet. A. We went off I don't know where. My little girl knows. There was no station there. It was dark and wet. When we hollered when the car passed, when the first car passed we hollered and the car passed and didn't stop. When the car didn't stop we walked. We came on the bridge and the bridge was all spoiled. Then another car came and we were on the bridge. My little girl got hold of me and she cried. We got off the bridge and there was a hole. I was holding myself by the pole that was there and she was holding me. And when we got off the 30 40

Mary Winkowski—for Plaintiff—Direct.

car passed. Then he came after us and he said that he fell.

By Mr. Koestler:

10 Q. Did the car stop at Woodbridge Junction at all? A. When we were going on the other side?

Q. No. When you were going toward Woodbridge Junction from Chrome Junction did the car stop at Woodbridge Junction or did it go past it? A. No. Because it was late.

MR. CAFFREY: I ask that be stricken out.

20 THE COURT: Strike the last part out. "No" will stand.

Q. Where the conductor put you three off, what kind of a place was it? A. There were only holes and tracks.

Q. Did you see any roads there? A. Didn't see anything but two tracks.

Q. Were there any buildings there? A. Nothing.

30 Q. Had you ever been there before? A. No.

Q. How long did you wait at the place where the conductor put you off? A. He told us to get off right away.

Q. After you got off the car how long did you wait before you started to walk back? A. Fifteen minutes.

40 Q. How many cars passed you while you were standing still? A. One car. And the other car while we were on the bridge.

Mary Winkowski—for Plaintiff—Direct-Cross.

Q. Were there any lights where the conductor put you off? A. It was dark and raining. No light.

Q. There was a light in the car, wasn't there?
A. Yes.

Q. Was that the only light?

THE COURT: She says there was none at this place. 10

MR. KOESTLER: Cross-examine.

Cross-Examination by Mr. Caffrey:

Q. When you were on the car you wanted to get off at Woodbridge Junction? A. Yes.

Q. After you had found out that you had passed Woodbridge Junction you wanted to get off the car, didn't you? A. Yes. 20

Q. Did the conductor give you a ticket? A. Yes.

Q. And he told you that he would put you off at Poor Farm Road? A. No. He didn't say what place it was.

Q. Where were you in the car when you saw this man, the plaintiff? A. We got acquainted at the Chrome Junction Station. 30

Q. Did you sit near him? A. No.

Q. After you boarded the car at Chrome Junction where was the next place that the car stopped? A. We took the Rahway car and we went to Rahway.

Q. Did the car make any stop from the time you boarded it at Chrome Junction until it reached Poor Farm Road the place where you got off? A. No, it didn't stop. It went right along. 40

Mary Winkowski—for Plaintiff—Cross.

Q. Did you see Mr. Kelsen standing up in the car? A. Yes.

Q. Was he sitting in front of you or behind you? A. He was sitting near the door and I was sitting in the middle.

10 Q. You didn't see him having any conversation with the conductor, did you? A. No.

Q. Did you have a conversation with the conductor? A. I was hollering at him because he told me to get out, and I said, where am I going to get out with a child in the rain?

Q. Before that did you have any conversation with him? A. Yes. I spoke to him at the station.

20 Q. Did you talk English to the conductor? A. English?

Q. You spoke English? A. Yes.

Q. Can you speak English now? A. I can a little. Not very well.

Q. When you got off the car at Poor Farm Road did you or Mr. Kelsen walk on either side of the track looking for a road? A. There wasn't anything but woods and hills.

30 Q. Did you stand at the tracks or did you walk away from the tracks? A. You couldn't get away anywhere from the track. There was only the track.

Q. Wasn't there a cross road at the point where you were let off? A. There wasn't anything but two tracks.

Q. What was on either side of the two tracks? A. They were hills and ditches.

40 Q. How long were you walking on the tracks

Anna Winkowski—for Plaintiff—Direct.

before you learned that Mr. Kelsen had fallen?

A. I didn't see when he fell.

By the Court:

Q. How long had you been walking when you heard he fell? A. I only saw him holding himself by— 10

Q. How long had he been walking when he told you he fell? A. About five minutes.

By Mr. Caffrey:

Q. And did he fall near a bridge? A. After the bridge there was some iron there.

Q. Did he cross the bridge before he fell? A. He crossed the bridge. 20

Q. How long have you known Mr. Kelsen? A. I didn't know him at all.

MR. CAFFREY: That is all.

MR. KOESTLER: That is all.

ANNA WINKOWSKI, a witness produced on behalf of the Plaintiff being duly sworn according to law, on her oath, saith: 30

Direct Examination by Mr. Koestler:

Q. Anna how old are you? A. Past fourteen. I will be fifteen June tenth.

Q. You are a daughter of the lady who was just up here? A. Yes sir.

Q. Do you remember this man Mr. Kelsen? A. Yes sir. 40

Q. Do you remember the night when you

Anna Winkowski—for Plaintiff—Direct.

walked back along the railroad tracks with him?

A. Yes sir.

Q. Did you know him before that night? A. No sir.

Q. At that time you lived at Bloodgood's, did you? A. Yes.

10 Q. That is right near Rahway? A. Yes sir.

Q. You came from Chrome? A. Yes sir.

Q. Where did the first car take you to? A. First car we got from Chrome we got off at Chrome Junction.

Q. At Chrome Junction did you get another car? A. Yes sir.

Q. Did you have tickets when you got on the second car? A. Yes sir.

20 Q. Did you tell the conductor anything when he took your ticket? A. Yes sir; I told him that he should let us off at Woodbridge Junction.

Q. Was it a dark night? A. Yes sir.

Q. And as the car was going along could you see where you were? A. No sir; it was pouring rain.

Q. Did the car stop at Woodbridge Junction?

A. No.

30 Q. When did you find out that you had passed Woodbridge Junction? A. Why, we knew that it does not take long from Chrome Junction to Woodbridge Junction, so my mother got up and she asked him did we pass Woodbridge Junction, and he said yes. So it was at Poor Farm and he said we should get off and another car will pass and we can get on the other car.

40 Q. Did you get off at Poor Farm? A. Yes sir.

Anna Winkowski—for Plaintiff—Direct.

Q. Did the conductor give you anything?

A. He gave us transfer, we gave him the tickets.

Q. What kind of a place is Poor Farm?

A. Well, I didn't see any. Because I couldn't see. There was only two tracks and there was big high hills and we were down between the hills. We didn't see no lights or anything. 10

Q. Did you see any houses around? A. No sir.

Q. Did you see any road? A. No sir.

Q. How long did you wait at Poor Farm Road?

A. Why, the conductor told us to wait for a car.

Q. How long did you wait? A. And we were waiting around twenty-five minutes. We couldn't get any car. 20

Q. Did any car pass you while you were waiting at Poor Farm Road? A. There was one car passed us.

Q. Going towards Woodbridge Junction?

A. Going towards Woodbridge Junction.

Q. Did you try to have it stop? A. Yes. I was crying and we were waving handkerchiefs and hollering the best we could and it would not stop. 30

Q. Did the car stop? A. No sir.

Q. Was it raining? A. Yes sir.

Q. What did you do after the car didn't stop to take you on? A. We didn't want to wait any longer, it was raining and it was foggy, so we was crossing the bridge and I didn't see that man because he was going ahead of us and I was taking care of my mother. We pretty near fell down. There was trains going beneath the bridge. 40

Anna Winkowski—for Plaintiff—Direct-Cross.

Q. Did you walk? A. Yes, we was walking towards Woodbridge Junction.

Q. Do you know whether anything happened to Mr. Kelsen when he was walking back? A. No sir.

10 Q. You only know what he told you? A. He told us that he fell.

Q. How soon after you had started to walk from Poor Farm Road back towards Woodbridge Junction was it that Kelsen told you that he fell? A. Yes sir.

Q. How soon? How many minutes? A. I didn't know. Well, we saw him a few times, he was tripping over the irons across the car tracks, so we saw him a few times tripping over.

20 Q. You didn't see him fall down? A. No sir.

Q. You just saw him trip? A. Yes sir.

MR. KOESTLER: Cross-examine.

Cross-Examination by Mr. Caffrey:

Q. When the conductor let you and your mother and Mr. Kelsen off at Poor Farm Road what did Mr. Kelsen do? Did he walk around?

30 A. No sir. We was on one side of the car track and he was on the other side.

Q. Which side was he on? A. On the right. Me and my mother we were holding to a pole. Because the car was coming, when you cross the bridge.

Q. No I mean when you were at Poor Farm Road where was Mr. Kelsen? A. Why, he was on the other side of the tracks.

40 Q. What side, right or left side of the track? A. The right.

Anna Winkowski—for Plaintiff—Cross.

Q. That is the right side of the track? A. Yes sir.

Q. Going towards Woodbridge or the other way? A. Woodbridge.

Q. And what side were you and your mother on? A. The left. We were holding to a pole. Because we just crossed the bridge and the car was coming. 10

Q. Is there a bridge? A. We were crossing the high bridge.

Q. Was that at Poor Farms Road where you held on to the pole? A. Yes sir.

Q. And is that where the bridge is? A. Yes sir.

Q. So you think the bridge was at Poor Farm Road, do you? A. Yes sir. 20

Q. Well, how far had you walked before you noticed the first car? A. Why, we was walking on the bridge and the car was just coming, and the man Mr. Kelsen, was going ahead of us, and I was holding onto my mother because I was scared.

Q. So you were on the bridge, were you, before the first car came along? Yes sir.

Q. And you had walked from the place where the conductor had let you and your mother and Mr. Kelsen off, is that right? A. Yes sir. 30

Q. How long were you walking? A. I don't know. We got home to Bloodgood it was half past one.

Q. How long were you walking before you held onto the pole? A. We just got off the bridge, you know, and there was a car coming.

Q. From what station, I mean? A. Wood-bridge Junction? 40

Anna Winkowski—for Plaintiff—Cross.

Q. No. From Poor Farm Road? A. There was no station.

Q. Well, there is a road there, isn't there? A. No. There was only the car tracks.

Q. You didn't have to stand on the car tracks, did you? A. No, there was a little pile of sand there and we were standing on that. We couldn't stand there. We had to walk kind of—

Q. Wasn't there a road that crossed the track? A. No.

Q. What was there? Was there a fence at the place you were let off? A. No sir.

Q. After you walked down the track you saw a fence, didn't you? A. No sir. There was no fence.

20 Q. Did you walk on the tracks all the way or did you walk on the side of the track? A. We walked on the tracks.

Q. What is that? A. We walked on the tracks.

Q. Who walked first you and your mother or Mr. Kelsen? A. Why, Mr. Kelsen was going ahead of us and then after we were scared and we thought somebody might get caught by someone so after we were going a little quicker and he was in back of us.

Q. Then he walked behind you? A. Yes sir.

Q. How far away from him were you—how far away from Mr. Kelsen were you if you know when he fell. A. We didn't know he fell.

Q. Didn't know he fell? A. No.

Q. Did he hurry up and catch up with you? A. Yes sir. And then after he got ahead of us because my mother was tired and she couldn't

40

Anna Winkowski—for Plaintiff—Cross.

see. Her glasses were all wet and we were all soaking wet.

Q. From the time that you got on the car at Chrome how many times did the car stop before you got off the place where Mr. Kelsen did? Once or twice? A. It didn't stop at all.

Q. Have you gone over that road very much with your mother? A. No sir. 10

Q. Have you ever gone over that road? A. Which road? Poor Farm?

Q. Yes? A. No sir.

Q. Have you ever got on the car at Chrome Junction? A. Yes sir.

Q. And ride to Woodbridge? A. Yes sir.

Q. How many times have you done that. A. It was around twice, I was there. 20

Q. After Mr. Kelsen had fallen, after you learned that he had fallen, how many cars passed you then? A. Two.

Q. After that? A. Yes sir.

Q. After the two had passed—where were you when the two had passed? A. Why, me and my mother we were walking. When the first one was going we were holding onto the pole, and he was on the other side and I was holding there and my mother was slipping down the hill because there was trains going underneath the bridge. 30

Q. Trains going beneath the bridge? A. Yes sir.

Q. And that is the place where you were holding onto the pole? A. Onto the pole.

Q. Do you know what kind of trains were going underneath? A. No. 40

Q. Were they railroad trains? A. They were

Emma Kelsen—for Plaintiff—Direct.

railroad trains but I don't know what kind they were.

Q. They were not trolley cars? A. No sir.

Q. That is where Mr. Kelsen was when the first car passed? A. Yes sir.

10 Q. After you got off the car at Poor Farm Road, is that right? A. Yes sir.

MR. CAFFREY: That is all.

MR. KOESTLER: That is all.

THE COURT: Mr. Koestler, have you any doctors here?

MR. KOESTLER: No. I have the doctor's testimony in deposition, in evidence.

20 EMMA KELSEN, a witness produced on behalf of the plaintiff, being duly sworn according to law, on her oath, saith:

Direct Examination by Mr. Koestler:

Q. Mrs. Kelsen you are the wife of Henry Kelsen? A. Yes sir.

30 Q. In November 1918 at the time your husband had this accident you were staying with your daughter in New York? A. Yes. Sometimes.

Q. Sometime you stay there and sometimes you stop in Rahway? A. Yes sir; to Rahway; yes sir.

40 Q. Do you recall one occasion your husband coming home and complaining that he had been hurt? A. Yes. Was the 19th of November he came home about four o'clock in the morning. Run down and sick.

Emma Kelsen—for Plaintiff—Direct.

Q. What was the matter with him when he got home? A. He complained about accident he had. So my daughter called the doctor in the morning and doctor said he need an operation in New York.

Q. How many times did that doctor come? A. That doctor only one time. 10

Q. Do you know the name of that doctor? A. No. My daughter called him up.

Q. After that how long did your husband stay in bed? A. He stayed in bed nearly four weeks.

Q. And then where did he go? A. And then he go to Doctor Narin, and he said the same thing.

Q. Did your husband complain of pains? A. Certainly. 20

Q. What part of his body? A. About down in the chest, and he had rupture, and Doctor Narin said the same thing that he needs an operation.

Q. Do you know whether he had that rupture before he came home that night? A. I never knowed. He always was strong man and work. He always was a strong man. Never was sick before. 30

Q. He was not sick before? A. No.

Q. Since that time has he been strong? A. Since that time; yes sir. Since that time he went bent down and he can't do any more heavy work, hard work.

MR. KOESTLER: Cross-examine.

Emma Kelsen—for Plaintiff—Cross.

Cross-Examination by Mr. Caffrey:

Q. Mrs. Kelsen the night that he came home were you at your daughter's? You say he came in about four o'clock in the morning? A. Yes sir.

10 Q. Where did he go? A. He come home to my daughter. I was there too. We were there together.

Q. And then did you go back to New York? A. He was in New York. He came to New York to my daughter's.

Q. Where was your home? A. I am the most in New York. I been in Rahway and sometimes in New York.

20 Q. Where was your home at that time? A. That time I was in New York, so he came there, because he was sick and he couldn't stay here all alone.

Q. Did he go to your home in New York and stay four weeks in bed there? A. Yes.

Q. At the New York home? A. In my daughter's house; yes sir.

30 Q. Where did he stay four weeks in bed in New York? A. In New York.

Q. In New York? A. Yes sir.

Q. So the morning of the accident he went to your daughter's at Rahway? A. Yes sir. He came to New York right in the morning, in the nineteenth of November he came to New York about four o'clock in the morning after that accident he had.

40 Q. Where were you when you saw him at four o'clock in the morning? A. I was in New York.

Q. You were in New York? A. Yes sir. In

Emma Kelsen—for Plaintiff—Cross.

the same place where my husband came to my daughter.

Q. Whereabouts in New York? A. In the Bronx.

Q. What number, what street? A. 1302 Hoe Avenue.

Q. Then did your husband go to Rahway the next day? A. No sir. He was there for four weeks in succession. 10

Q. What doctor did he have first? A. He only had one doctor what my daughter called in, he said an operation, so we left him because—

Q. Just a minute. What was his name? A. I don't know his name. My daughter called him in.

Q. Where was he from? A. From the neighborhood there. 20

Q. Are you sure it wasn't a doctor from Rahway? A. No sir. New York.

Q. Wasn't it Doctor Gomez? A. After that he had Doctor Gomez. The first doctor he had in New York.

Q. How soon after the first doctor came did Doctor Gomez come? A. After a couple of months I guess he started. He had Doctor Arison after that. I don't know exactly. 30

Q. Doctor Allison? A. Arison, I guess.

Q. Do you know or are you just telling what somebody told you? Answer the question. A. Excuse me, I don't understand.

Q. Do you know of your own knowledge or what somebody told you? A. What?

Q. Who the doctor was? A. The first doctor my daughter called in, he was only once—

Q. I mean the second doctor? A. My husband called him after he was in bed for four weeks to get better. 40

Emma Kelsen—for Plaintiff—Cross.

Q. How many times did the doctor call while your husband was in bed four weeks? A. Only one time we had him. Because he said—

Q. Just a minute. You didn't have any other doctor during that four weeks? A. No sir; until the four weeks. No.

10 Q. Then did your husband go to see a doctor?
A. Yes.

Q. Did you go with him? A. No.

Q. And you don't know whether he went to see a doctor or not do you? A. Sure I know. He came home telling me what the doctor said.

Q. Only what he told you? A. Yes, he needs an operation, or he must have a truss, you know, so he wears a truss now. Since that time he
20 walks bent down and he can't do any work.

Q. How many doctors did he have of your own knowledge? A. He had only Doctor Gomez and Doctor Arison.

Q. When did he have Doctor Gomez? A. Doctor Gomez he had about a couple of months after. I can't say exactly.

Q. When did he have Doctor Gomez, before he had Doctor Allison? A. No. Right away he had
30 doctor a couple of weeks after he got—

Q. Where does Doctor Allison live? A. He lives in New York.

Q. Whereabouts? A. Downtown.

Q. Whereabouts downtown? A. My husband so I told you before, he was there. I wasn't with him.

40 MR. CAFFREY: That is all.

MR. KOESTLER: That is all. I rest.

Motion for Non-Suit.

(The plaintiff also introduced medical testimony to prove damage. It has been omitted as not pertinent on this appeal.)
Plaintiff rests.

Motion for Non-Suit.

10

MR. CAFFREY: I move for a non-suit on the ground that taking the testimony as it stands there is no liability on the part of the defendant.

The allegations in the complaint—the action is predicated upon paragraph one that he was carried past his destination.

Two: That he was walking along this highway because there was no other avenue that he saw. 20

Three: That he fell over some irons or some part of the railroad tracks.

Now, there is no contention, either in the evidence, or in the pleadings, that this was not as safe place to put this man off the car. It is not an expulsion. It is getting off the car by agreement. For the sake of argument, admitting all that, yet how can any liability be spelled out on the part of this defendant? He was not put off at an unsafe place, and it is admitted in the case that it was a private right of way. It was railroad property. So therefore, if there were any negligence in the case at all, it is on this man's part. In other words, there is no relation between the putting off 30 40

Motion for Non-Suit.

of the plaintiff at this Poor Farm Road Station, and the injury.

THE COURT: Why do you say that? Assuming simply for the purpose of argument that the man was wrongfully carried past his station?

10

MR. CAFFREY: Yes.

20

THE COURT: He is then put off at a station where the testimony now is that there was nothing but railroad tracks and a ditch on either side. Dark night, nearly midnight, and raining. A man sixty-eight years of age and unfamiliar with the situation. Now, what was he to do in that situation? In other words, what is the direct result of his being put off there and left at this place? What was he to do? Isn't it for the Jury to say what a reasonably prudent man would do in that situation? Was he to stay there and stand in the rain, sixty-eight years of age, and freeze to death, or contract cold from which he might die, or was he to take the only means that was available apparently to him to get out of that situation? Do you think he was obliged to stand there and freeze to death?

30

MR. CAFFREY: No, I don't think so.

THE COURT: Then if that was not so might not this Jury find that he was justified in taking the only means that was apparent to him of getting away from there?

40

MR. CAFFREY: Yes, but—

Motion for Non-Suit.

THE COURT: And if that was so, and he took that method and was injured, without any fault of his own, isn't that the direct consequence of the putting him off at that place?

MR. CAFFREY: I can't see that. The proximate cause of his injury was not any defect in that track. 10

THE COURT: Oh no. You did not owe him any duty to keep your tracks in repair. He was practically a trespasser on that track. But you go back further. For instance, suppose you had put him off this car at this station, and instead of walking on your track, suppose he had walked from your station from the Poor Farm Station to a public road? 20

MR. CAFFREY: Yes.

THE COURT: In order to go to Rahway, and in that path in going from your station to the public road he had been injured, would that not have been the direct result of this?

MR. CAFFREY: It might be an element. 30

THE COURT: If that might be, this is simply a different way of getting home.

MR. CAFFREY: Oh no. You admit, you say we owed him no duty.

THE COURT: Oh no. I do not say that.

MR. CAFFREY: We owed him no duty to have our tracks in repair. 40

THE COURT: You owed him no duty

Motion for Non-Suit.

10 to keep your tracks in repair. But the question is whether having left him at a certain spot he was justified in going home in some direction. Let us assume some other direction. And if in doing that which he was justified in doing he is injured, without any fault of his own, is not that the direct result of your having put him off at a place where he—

MR. CAFFREY: No, because it does not follow as cause and effect. This injury does not follow as an effect of that.

THE COURT: It is the result of putting him at a place where he had to extract himself, isn't it?

20 MR. CAFFREY: In other words, you are excluding all possible causes to this man's injury other than the condition of the tracks. I contend that the proximate cause of the injury was not—

30 THE COURT: Suppose, Mr. Caffrey, there was a highway there and he had chosen the highway, a place where he had a right to be, a place that people do walk on, but which is not kept in proper, smooth condition for people to walk, and suppose on his way home walking that night he had fallen into a hole, without any fault of his own, would not that have been the direct consequence of your negligence?

40 MR. CAFFREY: No, I cannot see that. We are dealing now with a special relation. We did not put him off the car, we

Motion for Non-Suit.

did not expel him. We are not being sued for his being put off. We are sued—

THE COURT: For not taking him to the destination, and as the result of leaving him high and dry at some other spot.

MR. CAFFREY: Yes, but the injury is not the—the putting off at this station is not the proximate cause of this injury on the track. 10

THE COURT: Why not? Unless he had to stay there, then it must be. If he had to stay there, if it was his duty to stay there and perhaps freeze to death, of course it was not. But, if he had the privilege, in view of the Jury, of leaving there in order that he might not have more severe injuries, if he took one course or another, whether on a railroad track or off it, and he was injured, is not that the thing which flows directly from the fact? 20

MR. CAFFREY: I cannot see it.

THE COURT: If he had not been left there he certainly would not have been hurt.

MR. CAFFREY: If he had stayed there he would not have been injured. 30

THE COURT: Undoubtedly. That brings it right to the point. Is not it for the Jury to say then, does not it become a question of fact, and not a question for me to decide, whether it was the reasonable thing for this man to do, considering all the circumstances, to leave there, rather than to stand in the rain all night and suffer the consequences of that? 40

Motion for Non-Suit.

MR. CAFFREY. That is assuming.

THE COURT: Assuming what?

MR. CAFFREY: Assuming that he would suffer, or would have become frozen, or something.

10 THE COURT: That is a question for the Jury to say whether it was the more prudent thing to do that or to do this. The only question that bothers me in this case is the question of trespassing on the railroad, which the statute makes unlawful. But I think that situation develops this way: that if a man is situated in a place like that, and he is confronted with the
20 necessity of either staying there all night or going home, then he must determine what to do. If he decides to walk on the railroad track, he walks on that subject to the laws of New Jersey, and if he was hit by a car then the statute says he could not recover. But it does not say that he cannot recover—or, it rather says he is guilty of contributory negligence. But it does not
30 say anything about his falling on the track. It simply says that that is unlawful. So that the result of that situation would be, when he finds the only means of egress one which the law says is unlawful, then he goes upon this unlawful place, a place he has no right to go on, an unlawful place, but the Jury may infer that he was justified in doing that. But if he had gone on this
40 same unlawful place and been hit by a train he could not recover.

Motion for Non-Suit.

MR. CAFFREY: Yes, but where is there any evidence that there was any negligence on the part of the company, assuming that he did walk? Suppose he had walked along and did not fall?

THE COURT: The company was not obliged to keep that a safe place for him to walk. 10

MR. CAFFREY: It cannot follow that is negligence on the part of the company because he fell down.

THE COURT: The negligence does not consist of the failure of the company to make the track a safe place to walk. The failure of the company consists in leaving him at a place where he has to get away, and doing that, if he falls, or hurts himself without any fault of his own, then it is a natural result of the negligence of the company in leaving him there. 20

MR. CAFFREY: I contend that there is no relation of cause and effect between his being left at the station and his falling down. There is no negligence. 30

THE COURT: Certainly is cause and effect, if the Jury finds that he was justified in leaving there.

MR. CAFFREY: It cannot be said it is the proximate cause. It cannot be the exclusive cause, and under the laws of this State it must be the exclusive cause, under the case of Houston vs. Traphagen, and somebody vs. the D. L. & W. It must not only be the cause, but the exclusive cause. 40

Motion for Non-Suit.

And I contend that it is not the exclusive cause, taking it from the first inception, when he was put off that car, it is not the exclusive cause of his injury.

10 THE COURT: I will deny the motion and allow an exception. I think it is a question for the Jury.

Exception Allowed—Sealed Accordingly.
JUDGE.

20

Defendant's Case.

JOHN S. YOUNG, (medical testimony omitted as not pertinent to this appeal).

30

JOHN BORGMEYER, (medical testimony omitted as not pertinent to this appeal).

RICHARD J. FITZPATRICK, a witness produced on behalf of the defendant being duly sworn according to law on his oath, saith:

40

Richard J. Fitzpatrick—for Defendant—Direct.

Direct Examination by Mr. Caffrey:

Q. Mr. Fitzpatrick on the date of November 19th, 1918 you were conductor employed by the Public Service? A. Yes, sir.

Q. Were you conductor in charge of the car that Mr. Kelsen was riding on? A. Yes, sir.

Q. And he boarded your car at Chrome Junction? A. Yes, sir. 10

Q. As you were proceeding along the direction towards Woodbridge Junction did you or did you not call out the station and make a stop there? A. Yes sir. Made a stop at Woodbridge.

By the Court:

Q. Woodbridge Junction? A. Woodbridge Junction; yes sir. 20

By Mr. Caffrey:

Q. Before you make the stop did you make an announcement of the station? A. Yes, sir.

Q. Did anybody get on or off the car then? A. One young fellow about eighteen years old got off and two civilians and a soldier got on. 30

Q. Two civilians? A. And one soldier got on and one civilian got off.

Q. Do you remember Mr. Kelsen speaking to you after that? A. Yes, sir.

Q. Where was that? A. Right after we passed George's Road Station.

Q. Had your car stopped at George's Road Station? A. No, sir.

Q. These stations, are they dead stops or do they stop on notice only? A. Got to give a notice and signal. 40

Richard J. Fitzpatrick—for Defendant—Direct.

Q. That is, stop on notice to take passengers on, or stop on notice to permit passengers to get off? A. To get off; yes sir.

Q. After you had passed George's Road you say Mr. Kelsen spoke to you? A. Yes, sir.

10 Q. What did he say to you? A. He wanted to get off at Woodbridge, he asked me if we were up to Woodbridge yet. He didn't tell me to leave him off at Woodbridge Junction, but his ticket called for Woodbridge, from the Carteret car and I was collecting fares and I could not look, but when I got to Woodbridge I called Woodbridge Junction out. And this young fellow got off and two civilians and one soldier got on. And then after we got past George's Road this old gentleman here asked me if we come to Woodbridge then. I said yes sir we called that out. He said, well, he said, I wanted to get off at Woodbridge. Well, I said, the best thing you can do is to go to Amboy Station at Metuchen and take a Middlesex car back. Well, he says, that is too far. Then, I said, you had better get off at Poor Farm Road; and I give him his ticket back, which I registered on the clock, and that left me three fares short.

20
30 Q. There were two other people besides Mr. Kelsen? A. Yes sir.

By the Court:

Q. How far is Poor Farm road, Mr. Fitzpatrick, from Woodbridge Junction, about? A. Well, I should judge about two miles.

*Richard J. Fitzpatrick—for Defendant—
Direct-Cross.*

By Mr. Caffrey:

Q. And Poor Farm Road is that a regular trolley station? A. Yes, sir.

Q. And you gave him his ticket back you say?
A. Yes, sir; I gave the three tickets back.

Q. And he and two other people got off? A. 10
Yes, sir.

Q. Then you proceeded on? A. Yes, sir.

Q. Do you know whether or not there is a road leading from either side of the track at Poor Farm Road? A. Yes sir. Poor Farm Road there.

Q. Where does that lead to? A. I could not tell you where it leads to. On one side I believe 20
it goes into Woodbridge.

Q. You don't know the location well enough to tell us about it? A. No, sir.

MR. CAFFREY: Take the witness.

Cross-Examination by Mr. Koestler:

Q. At the time of this incident how long had you been conductor on this trolley line? A. 30
Well, about nine months.

Q. Nine months. And in those nine months how many times a day do you pass Poor Farm Road? A. Pass three times.

Q. And you don't know where the roads lead to yet, do you? A. No, sir; I never inquired where the road lead to.

Q. How late were you that night pulling into Chrome Junction? A. We were right on time. 40

Richard J. Fitzpatrick—for Defendant—Cross.

Q. Did you have any trouble that night with the power? A. No sir.

Q. You are sure? A. Yes, sir.

Q. Do you remember talking to any girls that night in the car? A. No, sir.

10 Q. Never did that? A. Yes, if I want to get a fare off them.

Q. Weren't there any girls in that car that you wanted to get fares from? A. Yes, these two young ladies that was up here a few minutes ago.

Q. They were not the kind that you talk to about fares? A. Well, I got their tickets and then I give them back to them again.

20 Q. As soon as you left Chrome Junction you collected the tickets, didn't you? A. Yes, sir.

Q. And you collected four tickets which called for Woodbridge Junction, didn't you? A. Yes, sir.

30 Q. When you got to Woodbridge Junction you say you stopped, you knew four people ought to get off there, didn't you? A. I could not read the tickets because we haven't any time to read the tickets. When we come to the station we call the stations out. There were three passengers getting on at the time and one getting off.

Q. You are a railroad there, and you are the conductor aren't you? A. Yes, sir.

Q. And you are in charge of the people in your car? A. Yes, sir.

Q. You are supposed to know where they want to go?

40

MR. CAFFREY: I object to this.

Richard J. Fitzpatrick—for Defendant—Cross.

A. We call out the stations.

MR. CAFFREY: This is an argument.

MR. KOESTLER: I am asking him the questions. I am not arguing with him.

THE COURT: I will allow it.

Q. Isn't that so? A. Yes sir; we call out all stations. 10

Q. Aren't you supposed to know as conductor in charge of that train, where the people want to get off? A. Yes, sir.

Q. Isn't it your duty to see that they do get off? A. Well, we do leave them off, but I could not tell everyone that was getting off. When I got to Woodbridge I left the passenger off—

Q. Where were you standing when your car came to a stop at Woodbridge Junction? A. I went to the back to open the door. 20

Q. You noticed only one person got off? A. Yes, sir.

Q. You knew four ought to get off? A. I couldn't tell whether four was getting off. I didn't have time to read the tickets before I got to Woodbridge. It was only about seven minutes ride. 30

Q. How many people got on your car at Chrome Junction? A. I could not say. About four or five.

Q. Four or five? A. Yes, sir.

Q. And you mean to say that in seven minutes you could not read four or five tickets? A. I had other fares from Elizabeth.

Q. Well, how much ride is it from Elizabeth 40

Richard J. Fitzpatrick—for Defendant—Cross.

to Chrome Junction? A. I could not tell you that.

Q. How long does it take?

10 THE COURT: Mr. Koestler, you do not contend with a car full of people that a conductor has to remember where everybody gets off?

MR. KOESTLER: This was a railroad train.

THE COURT: Even a railroad train does a conductor have to remember every passenger?

MR. KOESTLER: That is a question for the Jury to decide.

20 THE COURT: You do not contend that he does, do you?

MR. KOESTLER: Yes, sir; absolutely.

THE COURT: He would have to have a better mind than most of us have.

MR. KOESTLER: I have been in trains and seen where the conductor, with seven or eight cars, and go through and say you want to get off at such and such a station.

30 THE COURT: That is where they have been especially instructed.

MR. KOESTLER: No.

THE COURT: You do not mean to say that a conductor on a trolley car must remember where everybody gets off?

MR. KOESTLER: He ought to.

40 MR. CAFFREY: Remember this was running on a railroad franchise, but there are no definite stations except upon notice.

Richard J. Fitzpatrick—for Defendant—Cross.

THE COURT: Our Supreme Court has held otherwise, Mr. Koestler.

MR. KOESTLER: I do not think so.

Q. Now, you said something about an Amboy Station. Where is that? A. That is the next station to Poor Farm Road. 10

Q. How far is that? A. About a mile and three-quarters.

Q. You are sure you stopped at Woodbridge Junction? A. Positively; yes, sir.

THE COURT: Here is what Justice Garrison says in the case of *Camden vs. Young*. (Reading case).

MR. KOESTLER: I agree with what the learned Justice says there, but the cases are differentiated. Here was a ticket. There was a street car going through a city, where there is street after street. There is a vast distinction. Here is the ticket in evidence and it shows about twelve or fifteen stations. 20

THE COURT: A conductor on a railroad train has one hundred people in one car. Can he remember where everybody gets off? 30

MR. KOESTLER: They generally do. I have seen them do it.

THE COURT: Lots of times when children, or old people, or people who are strangers, ask the conductor to see that they get off. In that case the conductor assumes a certain additional responsibility, of course. 40

Richard J. Fitzpatrick—for Defendant—Cross.

MR. KOESTLER: Yes, sir; I understand that.

Q. How long ago did this incident happen? A. Nineteenth of November.

Q. Who told you that it was that day? A. I know it was that date.

10

Q. What? A. I know it was that date.

Q. Did you make a note of it at the time? A. No, but Mr. Caffrey and a couple of more men from the Public Service come around and asked me did I remember an accident at that time. And it was a rainy night and I remember this here lady asking me that she wanted to get off at Woodbridge, after we had already passed the station, and I wanted to take them up to Amboy Avenue, Metuchen, and take a Middlesex Car, which was more convenient, but they insisted on getting off at Poor Farm Road.

20

Q. Did you report the incident that night? A. It wasn't necessary to do it.

Q. Did you report it? A. No, sir.

Q. You never thought about it again until how long after it happened? A. Until I was notified.

30

Q. When were you notified? A. Well, I could not just say.

By the Court:

Q. How soon after the thing happened? A. Well, about six or seven months, I should judge.

By Mr. Koestler:

Q. You were only notified a couple of months ago, weren't you? A. No, sir. I have been off the road now for over a year.

40

Richard J. Fitzpatrick—for Defendant—Cross.

Q. Isn't it a fact that you were only notified of this a considerable time after suit was started?

A. No, sir. I don't know when the suit was started. I could not tell you that.

Q. You were only notified, you say, about six or seven months ago? A. About that; yes, sir.

Q. So that about six or seven months after this accident happened you remembered that that particular car stopped at Woodbridge Junction and you let one man off and three got on? A. Yes, sir; I remember it very well. I remember the passengers very well. 10

MR. KOESTLER: That is all.

20

Re-Direct Examination by Mr. Caffrey:

Q. Mr. Fitzpatrick during the nine months that you were on the cars passing Poor Farm Road about three times a day, did you pass that road in a trolley car? A. Yes, sir.

Q. You did not get off the car and walk around there? A. No, sir.

MR. CAFFREY: That is all.

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John M. Daly—for Defendant—Direct.

JOHN M. DALY, a witness produced on behalf of the Defendant, being duly sworn according to law, on his oath, saith:—

Direct Examination by Mr. Caffrey:

10 Q. Mr. Daly where do you live? A. 521 Grier Avenue, Elizabeth.

Q. Are you connected with the Public Service? A. I am.

Q. What is your business? A. Foreman maintenance of way in charge of the Fast Line.

Q. Are you familiar with the railroad that runs from Chrome to Poor Farm Road? A. I am.

20 Q. Will you describe to the Judge and Jury the construction from Poor Farm Roads to Woodbridge Junction generally? A. The construction of the track?

30 Q. Yes, and the surrounding parts of the track? A. Well, Woodbridge Junction the Rahway Line crosses the Fast Line. There is a station there and there is a double track up within seven hundred feet of George's Road. George's Road to us is Saint George Avenue on the public maps, which leads to Perth Amboy. There is a station there. What we call a station, or shelter. There is also a shelter at Woodbridge Junction. Then the next road you come across is Iselin Road, leads from Woodbridge to Iselin, New Jersey.

By the Court:

Q. I think what Mr. Caffrey means is the nature of the road. It is a private right of way, isn't it? A. Private right of way.

40 Q. And how many tracks are there? A. One track.

John M. Daly—for Defendant—Direct.

Q. Is it a ballasted track? A. It is a cinder track. Ballasted with cinders.

By Mr. Caffrey:

Q. From George's Road to Poor Farm Road I understand is a single track? A. Single track.

Q. Is there a fence on either side of the track? A. Fence on the right of way. 10

Q. Are there any cattle guards? A. At every road we have what we call a cattle guard. That is, in the center of the track there is three inch angle irons between the rails, and eighteen inches outside. Then outside of that we have what we call an apron; it is a triangular piece of board placed at an angle of forty-five degrees. These are four foot high. From that we have a fence four foot high running over to our private right of way fence. They are on both sides of all roads, all farm crossings and public roads. 20

Q. Mr. Daly there is testimony in the case that this man fell at a trestle and underneath this trestle some railroad trains ran. What trestle is that? A. That is the trestle crossing over the Port Reading Railroad. It is a coal road that goes from Bound Brook to Port Reading, New Jersey. That trestle is nineteen hundred feet from Poor Farm Road, and it is two hundred feet long. 30

Q. From Poor Farm Road, walking in the direction of the trestle, in order to reach the trestle from Poor Farm Road is it necessary to get over these cattle guards? A. Absolutely, and you can't walk across our cattle guards straightway, nobody, not even a child. You have to turn sideways. 40

John M. Daly—for Defendant—Direct.

Q. Go in sideways? A. Yes.

Q. Poor Farm Road, in which direction does that run generally? A. Poor Farm Road runs east to west.

Q. From Poor Farm Road running off from Poor Farm Road are there any public highways?

10 A. Yes. Poor Farm Road leads from the old Metuchen-Woodbridge Post road. The Metuchen-Woodbridge Post Road to the westerly is three hundred feet away from our station. Fifty foot away from our station to the west is another township road that parallels our track to Saint George's Avenue. It is fifty feet. It runs right along our railroad, parallels it.

20 *By the Court:*

Q. How do you get from this place that you call Poor Farm stop to these two highways? A. Just walk down here fifty feet, the same as if you went to the corner of our lot, and then that road comes right on down to Iselin Road, and then she detours about one hundred foot and comes on down here about St. George's Avenue
30 above Kelley, the Roup-Kelley Estate. Practically parallels our track.

Q. What is there around this stop? What is there from there to the road, the nature of the country or land? A. A regular township road.

Q. I mean between this township road, Poor Farm stop, and the highway, what is there? A. Nothing at all only the roadway. At our stop we have a ten foot station, or ten foot platform,
40 parallel with the track for people to get off and

John M. Daly—for Defendant—Direct.

on. Then if you walk up here from the railroad fifty foot you come across this township road.

Q. What is there in that fifty feet? A. Just a regular dirt road.

By Mr. Caffrey:

Q. Straight road? A. Straight road. 10

Q. No excavation or depressions? A. Ditches on the outside only.

Q. Only on the outside? A. Only on the outside. A regular country road.

By the Court:

Q. Runs from this station to the highway? A. Yes.

Q. Is there a building there, a shelter building of any kind? A. At that station, no. 20

By Mr. Caffrey:

Q. Is that a regular stopping place for trolley cars at Poor Farm Road? A. Oh yes. On notice.

Q. After you pass St. George's road is it the next stop? A. Next regular stop.

Q. Are you familiar with the running of these cars? A. I am. 30

Q. Do these cars stop only at certain points, or any place where they are signalled? A. At certain points on notification to the conductor.

MR. CAFFREY: That is all.

SIXTH JUROR: May I ask what that answer was when he said that was a regu- 40

John M. Daly—for Defendant—Cross.

lar stop or a signal stop. I think he said it was a regular stop, if I am not mistaken.

(Testimony read by stenographer.)

10 *Cross-Examination by Mr. Koestler:*

Q. Then you only stop at Poor Farm Road if you are notified to do so? A. Every one is the same way.

Q. All stops? A. All stops you have to notify the conductor.

Q. You have, as a matter of fact, along that road several designated stopping places where your car will stop if requested to, is that it? A.
20 Published.

Q. Published as stopping places? A. Yes.

Q. And they are listed on the ticket? A. Yes.

Q. These fences you speak about, Mr. Daly, they run at right angles to the rails, do they not?
A. That is the road fences.

Q. Yes, sir. A. Separating the road. We have a fence paralleling our track the whole thirteen
30 miles.

Q. You have a fence on both sides? A. Yes, sir. What we call our private right of way fence.

Q. When was that erected? A. 1912 and 1913.

Q. Are you sure along the whole line you have a fence? A. Positive.

Q. You have seen it with your own eyes? A. I was there during the building of it.

40 Q. So that if anybody was on your tracks they could not get out of your right of way without

John M. Daly—for Defendant—Cross.

jumping over the fence, unless small enough to crawl? A. You can't spread that wire apart.

Q. You say at Poor Farm there is no shelter?

A. No.

Q. Do you know whether at night time there are any lights there? A. I don't think there is. I am positive there is not.

10

Q. Right at the neighborhood of the station there are no houses are there? A. Well you would not call it the neighborhood. Up on the hill, Lieutenant Cullnan, and on the right hand side—

Q. And unless those houses were lighted at night a stranger would not know there was a house there, would he? A. If it was dark.

Q. Well, assume it is a dark night? A. He would not know.

20

Q. And if it was a dark night you could not even see the road? A. Oh, positively.

Q. You know because you know it is there? A. I have been in other locations and found the road.

Q. Did you have a light with you? A. No. Rarely carry it.

Q. You can go in the dark and find the roads? A. Yes.

30

MR. KOESTLER: That is all, Mr. Daly.

40

Leo Kovalik—for Defendant—Direct.

LEO KOVALIK, a witness produced on behalf of the Defendant, being duly sworn according to Law, on his oath, saith:—

Direct Examination by Mr. Caffrey:

10 Q. Mr. Kovalik you are employed by the Public Service? A. I am.

Q. What department? A. Claim department.

Q. You are an investigator? A. Yes, sir.

Q. And you were assigned to this case of Kelsen against the Public Service? A. I was, sir.

Q. Did you call at Mr. Kelsen's any time in March? A. I did.

20 Q. What date, do you remember? A. Well, the first time I called on him was on March tenth but he wasn't home.

Q. Then when next did you call? A. On the next day, March the eleventh.

Q. On March eleventh did you have any conversation with him? A. I did. I had.

Q. Did you talk about this accident or some other accident? A. Well, if I am allowed to explain how I come there.

30 Q. No. Just answer the question. A. If I spoke to him about an accident?

Q. Yes. Did you talk to him about this accident? A. No, sir.

Q. But you entered into a conversation with him? A. I did.

Q. And at that conversation did he tell you that he had an accident by falling downstairs? A. He did.

40 Q. Did he tell you how long he was laid up? A. He did.

Leo Kovalik—for Defendant—Direct.

Q. Did he tell you about what time he had the accident? A. Yes, sir; he did.

Q. How long did he say? A. About eight months ago.

Q. About eight months ago from the time that you saw him in March he had had the accident?

A. Yes, sir. 10

Q. How long did he say he was laid up as the result of that accident? A. Four months.

Q. Four months? A. Yes, sir.

Q. Did you again see him? A. I did.

Q. When was that? A. The following day.

Q. On that day did he tell you he was suffering from a hernia? A. He did.

Q. Did he tell you how long he had had the hernia? A. He said he can't recollect how long he had the hernia. 20

Q. Did he say anything about the hernia with reference to the accident that he had when he fell down stairs? A. Yes, he said it aggravated his hernia a little bit on account of falling to the cellar.

Q. Did he do any work for you? A. He did.

Q. What did he do? A. Well he framed first two pictures, and then one picture. 30

Q. Did you see him again? A. I did.

Q. Did you have anybody when you saw him again? A. I had.

Q. Whom did you have with you? A. That gentleman sitting over there, that blonde man.

Q. Did you see him after that? A. Yes, it was on April seventeenth I brought that gentleman along with me.

Q. That was the next time? A. Yes. That was the third time I saw him. 40

Leo Kovalik—for Defendant—Direct-Cross.

Q. Did you have any conversation with him regarding the trolley accident? A. I had.

Q. Did he tell you that he had received a hernia as the result of the trolley accident? A. No, he did not.

10 *Cross-Examination by Mr. Koestler:*

Q. He told you he was suing the company and was going to put it over on the company, did he?
A. He did tell me he had a suit. He practically showed me a letter of his attorney, I suppose it was.

20 Q. And he told you he had a hernia that he got before and that he was going to put it over on the company and claim he got the hernia in this accident? A. He didn't say any such a thing. He only told me that he has a suit against the Public Service Railway Company for falling down—for being carried beyond his destination and falling down coming back.

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

30 Q. You went out here especially employed by the company to get an admission from him didn't you? A. No, sir.

Q. In reference to his hernia. A. No, sir.

Q. What did you go out for? A. I am a special investigator working for the claim department in the whole state.

Q. You are a sort of a detective or spy, aren't you? A. No, sir; I am no spy and no detective, I am an investigator.

40 Q. You went out there, you tried to get his confidence and you bought something? A. I

Leo Kovalik—for Defendant—Cross.

didn't buy something. I just needed a couple of pictures to frame and I took them down.

Q. How did you happen to know where Mr. Kelsen was? A. I was assigned to the case.

Q. And therefore you got up the need to get some pictures framed? A. I had those pictures about two years in my house and it just came in good to take them over. 10

Q. When you want to investigate somebody you have something to do in their place, haven't you? A. Well, if they have a business, most likely.

Q. Sure. Just because you gave him this order he started to talk about all his troubles, didn't he? A. Well, he didn't start the first day to tell me his troubles. The second day. 20

Q. When you came back the second day he told you about falling down the stairs? A. Yes.

Q. And when you came back the next time he told you about falling on the trolley track? A. No, sir.

Q. When did he tell you about the trolley track? A. About the trolley car he told me when this gentleman—I was there on October first and a gentleman came in there, I presume from the Public Service Corporation, and talked to him about the accident, and that was the first time I asked him, he tried to deny to me everything. I didn't know about his accident then at all. I said what does that man want. He said he is from the Public Service. And then he got over the happenings, and about an accident. Then he told he how that happened. I seen him March eleventh. 30

Q. Who was the man that came in from the 40

L *Joseph Hlavaz—for Defendant—Direct.* L

Public Service on April the first? A. A man works in the Claim Department in Newark.

Q. Who is he? A. Mr. Wood.

Q. Is he here? A. No.

Q. And you were in there with Wood? A. No. I was in there alone.

10 Q. You were in there when Wood was there?

A. He came in.

Q. Well you and Wood were in the place at the same time, weren't you? A. Well he just came in for about ten minutes and left.

MR. KOESTLER: That is all

20 JOSEPH HLAVAZ, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath, saith:—

Direct Examination by Mr. Caffrey:

Q. Mr. Hlavaz what is your business? A. I am a private detective.

Q. For the Pinkerton Association? A. Yes, sir.

30 Q. Were you hired by the Public Service to work in conjunction with the investigating department to investigate this case? A. I was.

Q. Did you see Mr. Kelsen? A. I did.

Q. Where did you see him? A. At his place of business.

Q. Where was that? A. Over in Rahway.

40 Q. When did you see him, what day, do you remember? A. I think it was April seventeenth, this year.

Q. The man who just testified? A. Same man;

Joseph Hlavaz—for Defendant—Direct.

Q. Who brought you there? A. Mr. Kovalik. yes, sir.

Q. And did you have any conversation with him? A. With whom?

Q. With Mr. Kelsen at that time? A. I did.

Q. What was that conversation? A. Well just unimportant matters. Matters of his business and so on. 10

Q. Did you give him some work? A. I did.

Q. What was the work? A. I left a picture there to be enlarged. The same picture you saw a little while ago.

Q. The same picture you gave me and I showed to Mr. Kelsen? A. Yes, sir.

Q. Did he enlarge the picture? A. He did.

Q. When next did you see him? A. He told me to come again two or three days afterward. He said I have to wait for the picture until he gets through with it. So I called again in two or three days. 20

Q. Did you call again? A. I did.

Q. At that time did you talk to him about a hernia? A. I did not.

Q. Did you have any conversation with him about a hernia at any time after that? A. I did the following day. 30

Q. The following day? A. Yes, sir.

Q. What did Mr. Kelsen say to you? A. He told me—I advised him in the first place to undergo operation. He said what is the use, I have had this for so long that I don't even know how or when I contracted it. It would not do me any good to go to operation now. 40

Q. Did he have any conversation with you con-

Joseph Hlavaz—for Defendant—Direct-Cross.

cerning an accident that he had before that? A. He did.

Q. Did he tell you that he had fallen downstairs? A. Yes, he told me that he wanted to go downstairs to his cellar to get some water to fill up his four milk bottles, see. And he fell down, 10 all the way down the stairway into the cellar. He told me that he hurt his left side of the body and the left hand. This developed into blood poisoning later on, and that he was laid up as a result of this for nearly four months.

Q. Did you have any talk with him concerning this trolley accident at all? A. I did not.

Q. Not at all? A. Not at all.

20

MR. CAFFREY: Take the witness.

Cross-Examination by Mr. Koestler:

Q. How long have you been in the employ of the Public Service? A. I am not employed by the Public Service at all.

Q. How often have you been employed by the Public Service? A. Never before.

Q. This is your first occasion? A. First case; 30 yes, sir.

Q. Who recommended you to the Public Service? A. I was sent down by my chief—by my superior officer.

Q. Then you work through your agency? A. Through my agency; yes, sir.

Q. And you were instructed to get an admission from Mr. Kelsen in reference to his hernia? 40 A. I was instructed to go to report to the Chief of the Claim Department of the Public Service.

Joseph Hlavaz—for Defendant—Cross.

Q. You were instructed by the Claim Department of the Public Service to get an admission from Mr. Kelsen about his hernia, weren't you?

A. No, I was not. I received my instruction at my office first, by my superior officer, he told me there is a case in Newark for the Public Service—

10

Q. I don't want to know what he told you. You were instructed to get information about this man's injuries, weren't you? A. Yes.

Q. And you were instructed to get him to make a statement to you? A. I was instructed to find out whether he had his hernia before this railroad accident.

Q. And therefore you went to him and had a couple of talks with him? A. Yes, I went over. Of course, I could not tell him who I was. What would be the use?

20

Q. No, of course you could not tell him that. After you made one order he immediately started to tell you about his hernia? A. No, sir. I called three times before I was able to talk to him about—before I could mention his basement accident.

Q. You didn't mention it the first two times, did you? A. No, I did not. The third time.

30

Q. The third time did you mention it? A. I did.

Q. What did you say to him? A. I noticed his hand was hanging down in some funny way. I told him what happened to you. He said I fell, and he said he would tell me the whole story then. He said he hurt his left side, and this fall also made his hernia so much worse.

40

Joseph Hlavaz—for Defendant—Cross.

Q. And he told you that made his hernia worse? A. So much worse, yes.

Q. Didn't he tell you that he had a fall on the trolley track? A. Well he hasn't said a word about this trolley accident.

10 Q. You knew at the time that you went there that he was suing the Public Service Railway Company? A. I did not. I wasn't told a word to that effect.

Q. You were just told to get an admission from him that he had the hernia before this accident? A. I was so to find it out. That is all.

Re-Direct Examination by Mr. Caffrey:

20 Q. Were you told to get an admission or told to find out whether he had a hernia before the accident or not? A. Beg pardon?

Q. Were you told simply to get an admission or were you told to investigate the case to ascertain whether or not he had the hernia before this? A. I was told to investigate his case.

MR. CAFFREY: That is all.

30

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Plaintiff's Rebuttal Testimony.

HENRY KELSEN—(recalled.)

Direct Examination by Mr. Koestler:

Q. Mr. Kelsen these two men who were just on the witness stand have sworn that they came to your place and that you told them that you had the hernia before you fell down on the trolley track. Did you tell them that? A. No, sir. 10

Q. As a matter of fact did you ever have the hernia before you fell on the trolley tracks? A. No, never.

MR. KOESTLER: That is all. 20

MR. CAFFREY: No questions.

MR. KOESTLER: Mr. Caffrey desires to offer the map. I am sorry I have not seen it before.

THE COURT: You both rest with the exception of this map?

MR. CAFFREY: I can prove the map, as the survey.

MR. KOESTLER: You say it is a correct representation? 30

MR. CAFFREY: Yes.

MR. KOESTLER: I don't know how you arrive at the lines.

MR. CAFFREY: I can prove that and put Mr. Preston on.

William E. Preston—for Defendant—Direct.

Defendant's Case (Continued).

WILLIAM E. PRESTON, a witness produced on behalf of the Defendant being duly sworn according to law, on his oath, saith:—

10 *By the Court:*

Q. You are a surveyor? A. I am.

Q. Did you make this map? A. I did.

Q. Does it truly represent the situation? A. It does.

Q. Was it made from a survey? A. Actual survey.

20 *By Mr. Caffrey:*

Q. I call your attention to certain markings on either side here of Poor Farm Road; what are those? A. They represent the cattle guards.

Q. And this represents the—— A. The two rails.

Q. This "PRW" that represents—— A. Private right of way.

30 Q. And this line here is a road? A. This is a road.

Q. Will you tell us the kind of a road Poor Farm Road is? A. That is an ordinary dirt road about fifteen feet wide.

Q. Fifteen feet wide? A. Very positive road there.

By the Court:

40 Q. Have you marked the so called platform?
A. Well, this is only a filling of ashes, leveled off like a platform.

*William E. Preston—for Defendant—
Direct-Cross.*

By Mr. Caffrey:

Q. This marking here called private road? A. That is a private road.

Q. Do you know what this road leads to? A. Not myself. I didn't follow it.

10

MR CAFFREY: It is admitted this is the road Mr. Daly referred to?

MR KOESTLER: I don't know that.

MR. CAFFREY: I can prove it otherwise.

Q. The scale is marked on the map? A. One inch equals ten feet.

Cross-Examination by Mr. Kennedy:

20

Q. These cattle guards, they are so arranged that a trolley car can go right through? A. Certainly.

Q. What are these two marks here? A. That is the planking at the crossing.

Q. Planking in between the two rails you have designated? A. One plank each side of each rail twelve and one-half feet long.

30

Q. So that the space in between the planks— A. Is leveled with ashes.

Q. And there is no wooden platform at this so called station at all, is there? A. No wooden platform.

Q. Just a level surface of earth with ashes on it? A. Earth with fine ashes on the top; yes sir.

Q. And that is an irregular road? A. Yes. It is not paved.

40

Q. And designated by its name it is a poor

William E. Preston—for Defendant—Cross.

road? A. It is an ordinary country road. It is not strictly poor.

Q. You didn't work out there at night, when it was dark, did you? A. No, sir.

Q. You can't tell us what it looks like out there when it is dark, can you? A. I don't know.

10 *By the Court:*

Q. How wide are the lines of the road as you have marked there at the crossing? A. The planks are twelve and one-half feet long.

Q. That is the width of the road? A. The road is a little bit wider than that. The sides slope off. It is about fifteen feet. This would be an embankment here, and this part is leveled off with ashes and smoothed off on the top. From
20 the side of each track over to the road.

Q. If you came by here which side of the cattle guards would you get off, this side or this? A. You would have to get off this side and you would have to cross the cattle guards.

By Mr. Koestler:

Q. These two black lines indicate the rails, do they not? A. The two rails.

Q. And on each side of the rail there is a
30 gutter or ditch? A. At the east side of the ballast, yes, sir. Not each side of the rail.

By the Court:

Q. As I understand after the car passed this cattle guard it stops at this crossing? A. Yes, sir.

Q. At the crossing on each side of the track for a distance of how many feet back is there a sand filling? A. About ten feet.

40 Q. About ten feet from the track there is filling all the way across? A. All the way across.

Q. And then the road leads from that off to

John M. Daly Recalled—Direct.

some other place. This is about twelve feet wide?

A. Well, approximately fifteen.

Q. And on each side of that there is a ditch?

A. There is a ditch.

By Mr. Koestler:

Q. Mr. Preston don't you know that that place was fixed up by filling in directly after this accident? A. No, sir. 10

Q. You don't know whether it was or not, do you? A. No, sir.

THE COURT: The map will be admitted in evidence.

JOHN M. DALY—(recalled).

By the Court:

20

Q. Where does Poor Farm lead to? A. The Poor Farm Road leads down to the old Woodbridge-Township Poor Farm.

Q. On the north. And on the south where does it lead to? A. That comes around here and you go on down to Woodbridge, or you can swing around here and go to Metuchen.

Q. Where does this other road lead? A. This road? 30

Q. Marked what? A. Private road.

Q. Where does that go? A. It is not a private road.

Q. But it is marked a private road. Where does it go to? A. Leads right on down to St. George Avenue.

By Mr. Caffrey:

40

Q. Now Mr. Daly can you tell us whether or not

John M. Daly Recalled—Direct-Cross.

this—referring to the tracks on the map whether or not the embankment or the ditch was filled in after this accident or is that the way it has been since its construction? A. Been the same since construction. Since there has been a Poor Farm stop, the condition of the road is just
10 the same.

Q. How many years ago is that? A. Between three and four.

Cross-Examination by Mr. Koestler:

Q. Will you say that since November 1918 your company has not done anything along its tracks in the neighborhood of Poor Farm Road? A.
20 Positively done nothing since then.

By the Court:

Q. At this Poor Farm Crossing? A. At this Poor Farm Crossing.

MR. KOESTLER: That is all.

ADJOURNED UNTIL 1:30 P. M.

30

40

Motion for Direction of Verdict.

 AFTERNOON SESSION 1:30 P. M.
Motion for Direction of Verdict.

MR. CAFFREY: I move now for a direction of a verdict, because the Plaintiff was a trespasser and we owed him no other duty than freedom from willful hurt. 10

That there is no evidence in the case to show any act of negligence on the part of the Defendant was the proximate cause of his injury.

On the further ground that there is no evidence in the case, there is no proof of any of the allegations of negligence set out in the complaint, that is the proximate cause of this man's injuries. 20

THE COURT: Motion will be denied and exception allowed.

Exception Allowed—Sealed Accordingly. Judge. 30

Mr. Caffrey sums up the case for the Defendant.

Mr. Koestler sums up the case for the plaintiff.

40

Charge of the Court.

UNION COUNTY CIRCUIT COURT.

OCTOBER TERM 1919.

10	<p style="margin: 0;">HENRY KELSEN</p> <p style="text-align: center; margin: 10px 0 10px 40px;">vs.</p> <p style="margin: 0;">PUBLIC SERVICE RAILWAY COM- PANY, a Corporation</p>
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Court's Charge to the Jury, by HON.
20 GEORGE S. SILZER, Circuit Court Judge,
as follows:

Gentlemen of the Jury:

On the 19th of November, 1918, about 10:30
o'clock in the evening, the plaintiff, a man sixty-
eight years of age, was at Chrome, New Jersey,
and desired to go to his home at Rahway. He
30 took a car of the defendant's at Chrome, went to
Chrome Junction, changed there for a car that
would take him to Woodbridge Junction, from
which point he would go to Rahway. He alleges
that the car did not stop at Woodbridge Junction,
but took him beyond, and when he called the con-
ductor's attention to it, that the conductor told him
that he would put him off at the Poor Farm Road,
which was about two miles from his destination—
40 Woodbridge Junction, gave him his transfer tick-
et and told him to use that and to take the next

Charge of the Court.

car, or a car that might come along later, back to Woodbridge Junction. The Plaintiff further states that after standing there for some time no cars stopped, so that he was not able to follow the conductor's instructions, and he then proceeded to walk along the tracks of the defendant company toward the direction of Woodbridge Junction, and while on the way fell and injured himself and now 10
sues for damages at your hands. The testimony also is that this was a dark, rainy night.

The claim of the plaintiff is based upon the allegation of negligence, that the railroad company was negligent, careless; that it failed to perform some duty that it owed to the plaintiff, and before you can find a verdict in this case you must be satisfied that there was some negligence on the 20
part of the railroad company, acting through its servants. The plaintiff claims that that negligence consisted in the failure of the conductor to stop the car at Woodbridge Junction, or, if it was stopped, failure to call out the station and notify the plaintiff that they were arriving at the junction. It was the duty of the railroad company to exercise reasonable care in that particular, because their duty was to use reasonable care to 30
carry the man to his destination, to the place for which he had purchased a ticket, and which ticket they had accepted. The plaintiff says that that was not done; that the conductor failed utterly in carrying out his duty; that he did not take him to his destination; that he did not give him a reasonable opportunity to get off there; and that it was due to this negligence of the conductor that landed 40
ed him at the Poor Farm Road.

Charge of the Court.

The defendant, on the other hand, says that is not so; that the conductor did exercise care, and that he did perform his duty; that there was a carload of people, and I think they both agree as to that; that he took the tickets as he went through; that it was not possible or practicable
10 for him to remember where every passenger wanted to alight; but that he stopped his car at Woodbridge Junction and that he called out the station, and that he exercised the care that he should exercise for his passengers, and that it was not due to any carelessness on his part.

So you see the first question that confronts you is that one: Was there carelessness on the part of this conductor in carrying this man beyond his
20 station. If the conductor was not careless, if the conductor performed his duty and stopped at this station and called out the station in an audible voice, so that the passengers could hear it, and gave the passenger a reasonable time to alight, then the company performed its duty and there could be no recovery in this case. On the other hand, if the conductor failed to do that and was negligent, and by reason of his carelessness the
30 man was carried beyond his station, then you may find that there was negligence and the plaintiff could at least recover for having been taken to this Poor Farm Road station, and if he suffered any damage by simply being taken to that place he could recover what that damage is. Apparently it was practically nothing up to that point, or very little. He suffered some inconvenience, undoubtedly.
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Charge of the Court.

The main claim in this case is that he suffered damage when he left there and proceeded on his way back to Woodbridge Junction. The question arises, is that injury chargeable to the defendant company, and that depends on whether this injury that he received was the proximate result, the direct result, the natural result of the company's negligence in taking him past his station. Was the negligence of the company, if it existed, the efficient cause, or the cause that necessarily set the other causes in motion? That is what you are confronted with. The man was at this station, it was a dark night, a man sixty-eight years of age, it was raining, he was unfamiliar with this situation, it was nearly midnight. He said he looked about and saw nothing there except the rails and ditch on either side; and you have heard the description of the scene by the woman who was there, and the child, and also by the surveyor, and Mr. Daly, who described the situation. There he was at that time of night and in that situation. The contention of the plaintiff is that he was confronted with a decision either to stay all night exposed to the rain and the weather, on the 18th of November, at midnight, or to get out of there by the only method and only way that was apparent to him; and that he chose that way, although it was upon the railroad track; and the plaintiff's contention is that that was the thing which a reasonably prudent man would do, it was the natural thing for a man to do under those circumstances, and that following that natural and prudent thing which came to his mind he went upon this track. And the contention of the plaintiff is that the in-

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Charge of the Court.

jury he received was the natural and direct result of being put off at this station, because it was the only prudent thing for him to do, and as a consequence of the defendant's negligence.

10 The defendant's contention is that that was not the proper thing to do, and this was not the direct result of the company's negligence, if there was negligence. That he had been put at a place where he was safe, and that he had no right, in the exercise of his judgment there, in the situation that existed, to go upon the railroad track. That if he found that he was left there, that he should have investigated, and that he could have found, if he did not already know, that there were roads there that led to some place where he might
20 safely proceed to his home.

So you see that brings up the question, was this injury the direct result of the negligence of the company in leaving him at this place.

There is another question that confronts you too: Even if it was the direct result of the company's negligence, you must also examine the conduct of the plaintiff. The plaintiff went upon a railroad track, and the law in this State is that
30 a person who goes upon a railroad track is a trespasser; that it is unlawful for a person to go upon the railroad track unless he was employed by or connected with the railroad company. And if he is hit by a car, he is guilty of contributory negligence; and if this man had been hit by a car I would have been compelled, under the law, to tell you that there could be no recovery. In fact,
40 I would have probably had to take it away from your consideration altogether. But the statute

Charge of the Court.

does not say in this case that where a man walks on the track and is hurt, that that is contributory negligence. It simply says that it is unlawful. So the defendant contends that the plaintiff, in walking on this track, not only knew that it was unlawful, because the law provides that it is, but he knew in addition to that that this was a place not provided by the company for people to walk on, that it was a place where cars go, and that it was essentially a dangerous place for him to be, and that when he went upon this track he put himself in a place of danger, and that it was his own carelessness in going upon this track that produced the injury he received; that he must have known,—on a dark night, a man of his age, and raining, a railroad track, cars coming along, a place which was not provided for pedestrians, that he must have known—that the natural result of that would be that he would be injured.

So that if the plaintiff, in your judgment, was guilty of contributory negligence, or, if his negligence was the only thing that produced this, then, of course, he could not recover. If, on the other hand, you find that he was not careless, or negligent; that finding himself in this situation he took the only way out, and that notwithstanding care on his part he was nevertheless injured, then, of course, he would not be guilty of contributory negligence.

If you find that there was no negligence on the part of the company then your verdict would be no cause of action. If you find that the man himself was guilty of contributory negligence, your verdict would be no cause of action. On the other

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Charge of the Court.

hand, if you find that the company was negligent, and he was not, then you may find a verdict for such damages as were the direct and natural and proximate result of the defendant's negligence. Take those up in two section: First, those which followed, if any, from being put at this station; 10 and then second, if you find it was the proximate result of the negligence, those which followed after he got upon the track.

For injuries of this character the elements that you may consider are, first, the pain and suffering a person has had; the effect upon the health of the person; the bodily injuries sustained, in which you may consider whether they are permanent or 20 temporary. The allegation here, I understand, is that there was a rupture, and that that is a permanent condition. You will have to take the testimony and determine whether that came from this fall, or whether he had it before. You may consider the sums expended in endeavoring to cure himself, by way of doctor's bills, and things of that kind. You may also consider as an element of damage the sums he lost by reason of his fail- 30 ure to follow his business, if he received these injuries at this time; the loss of earning power; and having cast all these elements into a sum, to return such sum as would compensate the plaintiff for his loss. So, if you find for the defendant, your verdict is no cause of action. If you find for the plaintiff, you assess such sum as will compensate him for those injuries which are the direct and proximate result of the negligence of the de- 40 fendant.

Charge of the Court.

I have been asked by the defendant to charge some requests:

“1. The defendant was not charged with the duty of carrying the plaintiff safely, but its duty is limited to the exercise of a high degree of care.” 10

I so charge you.

“2. The plaintiff was a trespasser.”

I charge you that, gentlemen. The plaintiff had no right upon this track, had no rights on it at all, so far as relationship existed between him and the company. The company did not owe him any duty to keep that track safe to walk on, either by keeping cars off it, or having cars watch for him, or make his footing sure. The only way that comes before you is whether this injury was the direct and proximate result of the negligence, and his being upon the track, whether that was the natural thing for him to do in the circumstances, in order to carry him home. 20 30

“3. In order to permit the plaintiff to recover for his injuries it must be shown that the defendant was guilty of some act of negligence that human foresight could anticipate.”

I so charge you.

“4. In order to permit the plaintiff to recover it must be shown that not only was 40

Charge of the Court.

the negligence of the defendant a probable cause, but it must also be the exclusive cause.”

I so charge you, gentlemen.

10 “5. If the defendant was negligent under the circumstances in this case, and the plaintiff himself was negligent, you may disregard the defendant’s negligence and consider the plaintiff’s negligence as complete bar to his right of action.”

I so charge you.

6. I refuse.

20 MR. CAFFREY: I ask an exception.

THE COURT: Exception will be allowed for refusal to charge.

Exception Allowed—Sealed Accordingly.
Judge.

30 MR. KOESTLER: I would like to note a general exception to that part of Your Honor’s charge in which you say he was a trespasser.

Exception Allowed—Sealed Accordingly.
Judge.

MR. KOESTLER: Also to that part which relates to the negligence must be the exclusive cause.

40 THE COURT: As I understand Mr. Caffrey’s request it is that it was the negli-

Charge of the Court.

gence of the company and nobody else, exclusively the negligence of the defendant.

MR. KOESTLER: I do not so understand his request.

THE COURT: That is what you want, isn't it?

MR. CAFFREY: Yes. 10

THE COURT: It cannot be anybody else's negligence in this case. Nobody else is alleged.

MR. KOESTLER: I understand that.

THE COURT: My thought is that the man may have been a trespasser on the track and notwithstanding that the damages may have been the direct and proximate result of the negligence. The negligence does not arise from any duty the company owed him, by being on the track, but from being put off. 20

MR. CAFFREY: I will take an exception to that.

THE COURT: I am just stating this for counsel, not for the jury. I will not allow an exception to that, Mr. Caffrey. I am not addressing the jury, and I do not presume the gentlemen heard it. If you did, disregard it. 30

MR. CAFFREY: I ask an exception to that portion of the charge wherein Your Honor said if the conductor failed to call out it was negligence.

THE COURT: I did not say that.

MR. CAFFREY: I think you did. 40

Charge of the Court.

THE COURT: I will allow you an exception to that, in connection with what I said later.

Exception Allowed—Sealed Accordingly.
Judge.

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MR. CAFFREY: The other part, that part where you say, if he was confronted with the situation that it was the only way to get out, I believe you said he was justified in walking the tracks.

THE COURT: If I said that I will give you an exception to it.

Exception Allowed—Sealed Accordingly.
Judge.

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THE COURT: The plaintiff asks me to charge you this:

“If you are satisfied from the evidence that the defendant by its agents placed Kelsen in the dilemma in which he found himself upon being left off the car at Poor Farms Station, he was not obliged to use the very best judgment which could be exercised by anybody but he was only obliged to use reasonable care and such prudence as an ordinary person would use under the circumstances.”

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I so charge you.

MR. CAFFREY: I take an exception to that.

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Exception Allowed—Sealed Accordingly.
Judge.

Defendant's Requests to Charge.

MR. CAFFREY: I ask an exception to that part of your charge which relates to his damages for the loss, such sums he lost by reason of earning power; I take exception to that because there is no evidence in the case upon which you could predicate any measure of damages as to his earnings. 10

THE COURT: Yes. I understood he said he could not do half the work he could before.

MR. CAFFREY: There is no evidence of any profits, and no evidence of any expenses and, therefore, the jury cannot base any intelligent estimate upon what he lost.

THE COURT: In that situation I understand the Courts hold they have to do the best they can. 20

Exception Allowed—Sealed Accordingly.
Judge.

Defendant's Requests to Charge.

(1)

“The defendant was not charged with the duty of carrying the plaintiff safely, but its duty is limited to the exercise of a high degree of care.” 30

(2)

“The plaintiff was a trespasser.”

(3)

“In order to permit the plaintiff to recover for his injuries it must be shown that the defendant 40

Defendant's Requests to Charge.

was guilty of some act of negligence that human foresight could anticipate.”

(4)

10 “In order to permit the plaintiff to recover it must be shown that not only was the negligence of the defendant a probable cause, but it must also be the exclusive cause.”

(5)

20 “If the defendant were negligent under the circumstances in this case, and the plaintiff himself were negligent, you may disregard the defendant's negligence and consider the plaintiff's negligence as complete bar to his right of action.”

(6)

“If the plaintiff was put off at Poor Farm Road and the plaintiff left this place, the defendant is not liable for any injuries received subsequent to his leaving Poor Farm Road, and on the private right of way.”

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*Grounds of Appeal.***Grounds of Appeal.**

(Filed March 15th, 1920.)

HENRY KELSEN,

Plaintiff-Appellee,

vs.

PUBLIC SERVICE RAILROAD COM-
PANY,*Defendant-Appellant.*Action at Law 10
On Appeal
From Union
County Cir-
cuit Court.To SAMUEL KOESTLER, Esq.,
Attorney of Plaintiff-Appellee,

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Sir:

TAKE NOTICE that the following are the grounds which the defendant-appellant will urge why the judgment heretofore rendered in the above entitled cause should be set aside,—

1. Because the court, although requested so to do by the attorney of the defendant-appellant, refused to nonsuit the plaintiff-appellee. 30

2. Because the court, although requested so to do by the attorney of the defendant-appellant, refused to direct a verdict in favor of the defendant-appellant, which direction was asked for on the ground that the plaintiff-appellee was a trespasser to whom no duty was due except to refrain from wilfully injuring him. 40

Grounds of Appeal. ..

3. Because the court, although requested so to do by the attorney of the defendant-appellant, refused to direct a verdict in favor of the defendant, such request being based upon the ground that there was no evidence in the case to show any act of negligence on the part of the defendant-appellant that was the proximate cause of the injury of the plaintiff-appellee.

4. Because the court, although requested so to do by the attorney of the defendant-appellant, refused to charge as follows: "6. If the plaintiff was put off at Poor Farm Road and the plaintiff left this place, the defendant is not liable for any injuries received subsequent to his leaving Poor Farm Road, and on the private right of way."

Yours truly,

LEFFERTS S. HOFFMAN,
Attorney of Defendant-Appellant.

Dated March 5, 1920.

(Endorsed with acknowledgment of service.)

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NEW JERSEY
COURT OF ERRORS AND APPEALS

HENRY KELSEN,
Plaintiff-Respondent,

vs.

PUBLIC SERVICE RAILROAD Co.,
Defendant-Appellant.

On Appeal.

BRIEF FOR HENRY KELSEN.

The plaintiff, Henry Kelsen, aged sixty-eight years, was accepted by defendant as a passenger on November 19, 1918 to be carried and conveyed from Chrome Junction to the station known as Woodbridge Junction. He had in his possession a ticket indicating his destination, which ticket was collected by the conductor of the car (C., p. 34). There were other passengers who desired to get off at Woodbridge Junction (C., p. 35-68). The car did not stop at Woodbridge Junction, (C., p. 35-48) although the conductor testified it did. The passengers upon being carried past Woodbridge Junction interrogated the conductor and were finally put off at the next designated station, Poor Farms Road, and given back transfer tickets which the conductor told them to use in going back (C., p. 35-69-71). Poor Farms had no shelter whatsoever (C., p. 63-69), and the three people who were put off at this so-called station could not see any road or means of getting out of their dilemma, (C., p. 37-66-69). A car came to them which was going

toward Woodbridge Junction but refused to stop and take them on as passengers. They proceeded, after waiting a reasonable time, to walk back toward Woodbridge Junction along the right of way of defendant (C., p. 38,63). It was a dark stormy night, raining very heavily and the plaintiff and the people with him were unable to see anything except the right of way along which they walked (C., p. 38,65,69). In taking this walk back the plaintiff stumbled and fell and sustained bruises and a hernia (C., p. 40,70). The two doctors produced by the defendant, as well as the plaintiffs' physician all testified that the man was suffering from hernia. The jury decided every issue of fact in favor of the plaintiff and gave him a verdict of One thousand dollars.

From the judgment entered upon this verdict the defendant appeals to this court and assigns four grounds of appeal:

1. That there should have been a non-suit as requested by defendant.
2. That a verdict should have been directed for defendant on the ground that plaintiff was a trespasser.
3. That a verdict should have been directed for defendant because there was no evidence of a negligent act.
4. And because the Trial Judge refused to charge as requested by defendant.

I.

The first three of these requests may be dispensed with by saying that the weight of evidence was that the plaintiff and two other passengers were carried past their station, set down at the second station beyond on a dark rainy night without the

defendant providing any covering or shelter whatsoever; that the conductor told them to use the transfer which he had provided to go back to Woodbridge Junction on the next car, and that such car failed to stop and take on these passengers (C., p. ~~63~~, 69).

This story if believed by the jury, and their verdict shows it was believed, established a cause of action in favor of plaintiff and would preclude either a non-suit or a directed verdict, as requested by the defendant,

10 Corpus Juris, 824.

II.

The Request to Charge.

The appellant assigns his sixth request, which was not charged as his fourth reason for reversal of the judgment. That request is in this language:

“If the plaintiff was put off at Poor Farms Road and the plaintiff left this place, the defendant is not liable for any injury received subsequent to his leaving Poor Farms Road and on the private right of way.”

The evidence of the plaintiff shows that he and the other passengers waited at Poor Farms Road for some time. The plaintiff says two or three cars passed him (C., p. 37, 8) and the other witnesses say one or two cars passed them (C. p. ~~63~~, 69), and that said cars did not stop to take them on, and that there was nothing left for them to do but to walk back along the right of way. It must be remembered that these people were waiting on the railroad track in winter on a dark rainy night near the hour of midnight; they were strangers to that

locality, did not know which way to go and could see no buildings for shelter of any kind. If the request was good, these people would have to remain in this heavy rain from midnight until probably daybreak, or later, and that is not what a reasonably prudent or sensible person would do. The plaintiff and the other passengers used the best judgment at their command and sought the only exit they knew, to walk back on the right of way to the station past which they had been carried by defendant's negligence.

I fail to see how there is any other questions before this court for consideration; there were no exceptions taken by defendant to any other rulings of the Trial Judge nor to the charge to the jury and there are no grounds for reversal alleged which have for their basis any objection or exception taken during the trial, excepting the four which are expressly set out above.

It is true that by Section 55 of the Railroad Act it is made unlawful for any person other than those connected with or employed upon the railroad to walk along the tracks, but that section cannot now come before this court for construction, because there is no ruling by the court below which is now properly here as the subject for review.

There is no decision in this state which is on all fours with the case at issue, but there are numerous cases founded upon good reasoning which support such a recovery and a few of those cases are:

Reinard v. Bloomsburg Ry. Co. (Pa.),
77 Atl. 560.

Terre Haute Co. v. Hunter (Ind.), 111
N. E. 344.

Terre Haute Co. v. Buck, 96 Ind. 346.

Taber v. D. L. & W. R. R. Co., 71 N. Y.
489.

Kentucky R. R. v. Biddles, 34 S. W. 94.
Pittsburgh R. R. Co. v. Klitch, 11 Ind.
 App. 290, 37 N. E. 560.
N. Y. R. R. Co. v. Doan, 115 Ind. 435.
Indianapolis R. R. Co. v. Barnes, 35 Ind.
 App. 488, 74 N. E. 583.
Winkler v. St. Louis R. R. Co., 21 Mo.
 App. 99.

The case of *Robertson v. West Jersey R. R. Co.*, 79 N. J. L. 186, is not in point, because there the trolley car stopped along a city street, and the plaintiff became a pedestrian, thus necessarily terminating the relation of carrier and passenger. The plaintiff here comes squarely within the language used in the case of *Kentucky R. R. Co. v. Buckler*, 100 S. W. 328, 8 L. R. A. N. S. 555, where the court in commenting upon the right to recover where the person was injured in walking back said:

“In such a case the Company has not performed its contract and in effect he is still

a passenger until he reaches the station.”

And again in *Terre Haute Co. v. Hunter (supra)*, the court said:

“When the relation of carrier and passenger is once established, it continues until terminated by the voluntary act of the passenger or by the act of the conductor under circumstances justifying its termination and extends to the arrival of the passenger at his destination. It cannot be said that the act of decedent in this case voluntarily terminated the relation because he was put off at a wrong stop without knowledge or consent where he was unacquainted with the surroundings.”

And in our own state in *Youngs v. Camden Ry. Co.*, 61 N. J. L. 193, it was held that the giving of instructions by a conductor as to the method to be used in returning, was binding upon the Company.

Other cases in our state which have a slight bearing are :

Wayland v. Cons. Co., 61 N. J. L. 606.

Newark Ry. Co. v. McCann, 58 N. J. L. 642.

Walgnor v. Jersey City Ry. Co., 71 N. J. L. 356.

Faulk v. N. J. Susque & Wstrn. Ry. Co., 56 N. J. L. 380.

Exton v. C. R. R. Co., 62 N. J. L. 7.

It seems clear that it must be agreed that when the Public Service Railroad Company carried the plaintiff past his designated station and put him off at a dark country place wholly unprotected, and the conductor gave plaintiff a ticket for the purpose of permitting him to ride back on the next succeeding train to his proper destination, and that such train refused to stop and take on the plaintiff, that the plaintiff has surely established a good cause of action and that the ruling of the Trial Court in refusing a non-suit or a directed verdict was correct and proper.

As I have above outlined, the request to charge, which is now urged for reversal, is not only improper under the law, but under the facts of the case was too broad and it may also be said that it combined two propositions, therefore the Trial Judge was justified in refusing to so charge.

An appellate court will not review a question that has not been legally raised in the lower court.

Smith v. Wahl, 88 N. J. L. 623.

This court will not consider the question of excessive damages on appeal from a judgment at law.

Klitch v. Betts, 89 N. J. L. 348.

It is not error to refuse a request to charge several propositions if any of them are bad.

Consolidated Traction Co. v. Chenowith,
58 N. J. L.

In *D. L. & W. R. R. v. Trautwein*, 52 N. J. L. 169, etc., this court held that although under the statute it was unlawful for a person to ride on Sunday, that such wrong doing or unlawful act would not deprive such person of her cause of action. And so it is with Henry Kelsen. If he was doing something contrary to the law in walking upon the railroad tracks of the defendant, that of itself would not deprive him of his cause of action, because in the first place there existed between him and the defendant company the relation of passenger and carrier, and in the second place the language of the statute is so peculiar that by its express language it does not make a person walking along the tracks guilty of contributory negligence unless injured by an engine or car. If the legislature intended to deprive all persons of causes of actions arising on railroad tracks they would have used express language for that purpose, but it is evidently the intention to only save harmless railroad companies from certain causes of action. So that on one hand, it being established that Kelsen was waiting on the right of way of defendant at the express command of defendant's conductor in order to be reconveyed to Woodbridge Junction, and the cars or trains of defendant refused to stop and so re-carry Kelsen, and the situation being that there was no other visible means of extricating

himself from the position in which he was placed by the negligence of the defendants, he sought the only exit which presented itself to him, namely, to walk back on the right of way, and if, as under the decisions above stated, the relation of passenger and agent then continued, Kelsen was within the language of the statute, connected with the Railroad Company and the Trial Judge was wrong in telling the jury that Kelsen was a trespasser. Kelsen was not a trespasser but was on the right of way as a matter of right. And on the other hand the error committed by the learned Trial Judge was against the plaintiff and probably held the damages to a less amount than the jury otherwise would have awarded, but the defendant cannot take advantage of that error here for two reasons; in the first place the defendant was not harmed by that error, and in the second place the defendant has not taken exception to that part of the Judges' charge.

It is therefore most respectfully submitted that this case was fully and fairly tried before the jury as a question of fact. Although the Judge's charge may not have been correct in every particular respect, it clearly presented to the jury the question upon which they were to render their verdict, and the verdict as rendered does substantial justice between the parties. It is therefore urged that inasmuch as no exception was taken to the charge and as all other reasons assigned are without substantial foundation, that the judgment below should be affirmed with costs.

Respectfully submitted,

SAMUEL KOESTLER,

Of Counsel for Respondent.

New Jersey Court of Errors and Appeals

HENRY KELSEN,

Plaintiff-Appellee,

vs.

PUBLIC SERVICE RAILROAD COMPANY,

Defendant-Appellant.

*On Appeal
from
Union County
Circuit Court.*

BRIEF OF DEFENDANT-APPELLANT.

I.

State of the Case.

The defendant operates as a *railroad* company, and on a private right of way.

The plaintiff boarded a car at Chrome intending to go to Rahway. He went to Chrome Junction and was there given a transfer to Woodbridge Junction. He thereupon transferred to another car and proceeded toward Woodbridge Junction. There is a dispute as to whether or not the car stopped at Woodbridge Junction, and whether or not the conductor called out any such station. For the purpose of this appeal such dispute must be resolved in favor of the plaintiff. After passing Woodbridge Junction the conductor gave to the plaintiff and to two other persons, a woman and a young girl, tickets to enable them to get back to Woodbridge Junction, and then let them off at Poor Farm Road, telling them to take another car back to Woodbridge Junction. It was late at night, and rainy, toward the end of November, and there was no shelter, and probably no light. While the plaintiff waited to get a return car back to Woodbridge Junction the plaintiff states that three cars, going toward Woodbridge Junction, passed him, but that none could be prevailed upon to stop.

A witness for the plaintiff, Mary Winkowski, states that while they stood there, she and her young girl and the plaintiff, one car passed. The young girl, Annie Winkowski, indicates that while they stood there no cars passed, but that the first car that passed them did so subsequently, when they had left Poor Farm Road and had walked a considerable distance up the private right of way of the railroad. (P. 71, ll. 20 to 40.) However this may be,

we must accept the story that is the best for the plaintiff, and therefore the state of facts includes the proposition that three cars passed the plaintiff while he stood at Poor Farm Road, and that none of them would stop. Up to this point, the question as to whether or not the defendant stopped to let the plaintiff off at Woodbridge Junction, and the question of negligence connected with such failure to stop, if any, and also the question of negligence in not stopping cars at Poor Farm Road, where the plaintiff stood with a return ticket in his hand, which return ticket had been given to him by the defendant, were all questions for the jury.

The jury could rightfully have found, and doubtless did find, that the defendant, in leaving this plaintiff in that situation at Poor Farm Road, had been negligent, and that for the inconvenience plaintiff had suffered up to that time he had a right of action against the defendant. But the plaintiff, after waiting for a number of minutes at Poor Farm Road, proceeded to walk back toward Woodbridge Junction, and to accomplish that purpose walked on the private right of way of the defendant company, a private right of way which is fenced in, and which has cattle guards at every crossing, which is a *railroad* private right of way, and is intended for fast trolley traffic, and is not intended for persons to walk upon. In that place it was a single track, and was a very dangerous place to walk because of projecting ties, cattle guards at the crossings, a private bridge of the defendant crossing the Reading Railroad, and the general roadbed fill. The plaintiff, while so walking, stumbled and fell, and claims that in that fall he sustained a hernia. Medical science seems opposed to the idea that a hernia is likely to result from such an accident. Leo Kovalik and Joseph Holavaz, for the defendant testify to admissions by the plaintiff indicating that the hernia was of long standing. However, for the purpose of this appeal, it will have to be assumed that in the fall he sustained a hernia. This hernia was the main object of consideration in the matter of damage in this cause.

The jury returned a verdict of one thousand dollars, and that is the amount of the judgment now under consideration.

II.

Grounds of Appeal.

The only ground of appeal which the defendant-appellant will argue is as follows:

“(4) Because the Court, although requested so to do by the attorney of the defendant-appellant, refused to charge as follows:

‘6. If the plaintiff was put off at Poor Farm Road and the plaintiff left this place, the defendant is not liable for any injuries received subsequent to his leaving Poor Farm Road, and on the private right of way.’ ”

III.

The Argument.

The case of *Robertson v. West Jersey and S. R. Co.*, decided by our New Jersey Supreme Court, 74 Atlantic Reporter, page 300, is one in which a woman on a car in Atlantic City was carried past her destination, and in trying to find her way to the point at which she had desired to alight slipped and fell on the ice outside of the defendant's right of way and fractured her wrist. It was held that the company's negligence in failing to stop the car at the place where she had requested it to stop was not the proximate cause of the injury, nor was the fall such a probable consequence of such negligent act that the defendant ought to have foreseen it. The case holds that when the passenger had alighted upon the public highway in a reasonably safe and proper place the relation of passenger and carrier had ceased, and with it the duty to exercise due care for the safety of the passenger. In the case at bar, the plaintiff had alighted at a public road, to-wit, Poor Farm Road. The map in evidence in the case (p. 115, l. 15) shows the road, the railroad crossing the road, and cattle guards at each side of the road. These cattle guards are also referred to in the testimony (p. 112, l. 23). To leave Poor Farm Road and walk up the private right of way of the railroad company, the plaintiff had to climb over one of these cattle guards. The *Robertson* case, above referred to, is not directly in point, because, while both in that case and in the case at bar, the plaintiff, after being carried past his destination, alighted from the car on a public street or road, in the case at bar the plaintiff had a return ticket, and had been told to take a return car, and was doubtless,

while he waited at Poor Farm Road, still a passenger. The defendant's theory of the case is that when the plaintiff left Poor Farm Road, instead of waiting there for a car that would stop for him, he ceased to be a passenger, and that the subsequent consequences to the plaintiff, there being no subsequent negligence on the part of the defendant, were too remote to be chargeable to the defendant.

The case of *Reimard v. Bloomsburg & S. R. R. Co.*, (Pa.) 77 Atlantic Reporter, 560, is interesting but not in point. A woman was wrongfully carried past her station although she had paid the extra fare which the railroad demanded for stopping at that station. She was put off at the next station under protest on a dark and rainy night, and after inquiry of a stranger as to the best course to pursue she was directed to walk on the railroad, and met with an injury. It was rightfully held that the company was liable for the injury sustained, as it ought to have anticipated that she would walk back on the track, so that its negligence was a proximate cause of her injury. That case differs from the case at bar in that the present plaintiff was given a return ticket to his station and told to wait for the next car back (p. 37, l. 23), and the defendant had no reason to suppose that he would not wait until a car stopped to carry him back. Furthermore, in the present case the plaintiff did not get off under protest.

The case of *Atlantic City Railroad Company v. Kiefer, Administratrix*, 46 Vroom, page 54, was referred to at the trial, presumably on the question as to whether or not the plaintiff at bar at the time of his fall had ceased to be a passenger. In the Kiefer case the station building at Clementon is on the west side of the tracks, and there is a platform on the east side. From the station platform on the west to the passenger platform on the east there is a planked passageway across the tracks, which is provided for the use of passengers in crossing from one platform to the other, as well as generally by the passengers when leaving or boarding the trains. The railroad was double tracked, and there was no fence or other obstruction between the tracks. The proof showed that passengers leaving a train alighted from either side of the cars as suited their convenience. Kiefer's most direct way to go home when he alighted from the train on the west of the tracks was to go across the tracks to the east platform and there to the highway. The train from which he alighted stood directly over the plankway. After alighting he stopped to light his pipe, having gone across the west platform to the side

of the station building for this purpose. The train from which he had alighted had then pulled out, and he proceeded to cross the tracks by the plankway from the station platform on the west to the passenger platform on the east, and was killed by an express train coming from the opposite direction from that taken by the train from which he had alighted. It was held that whether he was a passenger was a question for the jury. But Kiefer was taking a way provided by the company for that purpose, and as there was a station platform on the side to which he was going as well as a station on the side that he was leaving, he had really not yet left the station. The case bears no analogy to that of the plaintiff at bar, who left Poor Farm Road and proceeded to walk up the track on the private right of way to a destination about two miles distant. (P. 88, l. 36.)

That a child six years of age, accompanied by her father, was taken to a station next beyond her destination, was not the proximate cause of injuries sustained by her, when she broke away from her father and ran in front of a train, the approach of which frightened her, since this was a result which could not have been anticipated. *Benson v. Central P. R. Company* (98 Cal., p. 45), 32 Pacific Reporter, 809.

The discharge of a passenger at a point a mile from his destination was not the proximate cause of his subsequently being assaulted and robbed by two footpads, which could not have been reasonably expected. *Atkinson v. P. R. Co.*, 90 Mo. App. 489.

Erroneous information by a ticket agent as to train connections was not the proximate cause of a delay and inconvenience suffered by a female passenger who was compelled to procure a buggy, in which she rode to her destination in a rain storm over a rough road, and who became ill from the exposure and jolting of the vehicle, and suffered a miscarriage; since these consequences could not have been foreseen or anticipated by the agent. *Fowlkes v. Southern R. Co.*, (Va.) 32 S. E. Reporter, 464.

“Injuries resulting from pure accident cannot be readily anticipated, and, where this element intervenes, the carrier’s preceding negligence is not considered the real or proximate cause of the injury. Thus, injuries sustained by one carried some distance past a station on a dark night, and who being misinformed as to the exact location at which he alighted, fell into a cattle guard while walking along the track, were not the proximate result of being carried past the station, or of the erroneous information

given him, where he knew of the existence of the cattle guard and was watching for it, but fell into it because misled by visual deception combined with an accidental slipping of the foot. *Lewis v. Flint and P. M. R. Co.*, 54 Mich. 55. 52 Am. Rep. 790, 19 N. W. 744," as referred to in the note to 7 L. R. A. (New Series), page 1178.

In the case at bar, the plaintiff unquestionably met with an accident when he tripped and fell on the defendant's right of way. The fall was, of course, the basis of the substantial damage in the case, to-wit, the hernia. The hernia was claimed to have been caused by the fall. The immediate cause of the fall and therefore of the hernia was this tripping of the plaintiff while walking in the dark on the defendant's roadbed. The defendant did not owe to anybody the duty of making the roadbed a safe place to walk upon. To trip, while walking in the dark at night upon that roadbed, was, therefore, pure accident.

The "Railroad" act, Compiled Statutes, Vol. 3, page 4245, paragraph 55, reads as follows:

"55. Trespassing on tracks; contributory negligence; crossings. It shall not be lawful for any person other than those connected with or employed upon the railroad to walk along the tracks of any railroad except when the same shall be laid upon a public highway; if any person shall be injured by any engine or car while walking, standing or playing on any railroad, or by jumping on or off a car while in motion, such person shall be deemed to have contributed to the injury sustained, and shall not recover therefor any damages from the company owning or operating said railroad; provided, that this section shall not apply to the crossing of a railroad by any person at any lawful public or private crossing. (P. L. 1903, p. 673.)"

In the case at bar, the Court, in its charge to the jury, made the foregoing statute the law of this case, and stated to the jury that the plaintiff was a trespasser upon the railroad private right of way. (Page 125, l. 14.) That being the law of the case, then so far as concerned the status of this plaintiff while walking on that roadbed, he a trespasser, the defendant company owed him no duty of care. The Trial Judge said that if he had been hit by a car while walking there he would have had to tell the jury that there could be no recovery. (P. 122, ll. 30 to 40.) That also became the law of the case; and we are unable to see any distinction between an injury by being injured by an engine or a car and an injury sustained by tripping over a projecting tie or a cattle guard. The theory of the Court was that if he had been

struck by an engine or car while walking there "such person shall be deemed to have contributed to the injuries sustained, and shall not recover therefor any damages from the company owning or operating said railroad;" we think the statute from which the foregoing is taken, and which the judge said would govern him as to contributory negligence if the plaintiff had been hit by an engine or car, necessarily extends to any injury which the plaintiff sustained while walking as a trespasser upon that private roadbed. As the Court has decided that he was a trespasser; as the Court has stated that if struck by a car his being there would prevent his recovery, the Court reached a point where it had made the law of the case such that tripping and falling while there could not create a cause of action because of his own negligence in being there.

We are not concerned with those cases in which a passenger is caused to alight at any unsafe place, or those cases in which a passenger carried beyond his destination proceeds to walk back on the track as the only practicable course to follow. In the case at bar, the plaintiff had safely alighted at Poor Farm Road. This road led to another road a short distance away which ran parallel with the railroad track. (P. 98, l. 13.) He did not find this road. The map shows this road paralleling the tracks as a private road, and Preston, surveyor, so testified. (P. 113, l. 3.) But the testimony of John M. Daley, foreman of the railroad's maintenance of way, in charge of that line (p. 96, l. 14), and a man apparently acquainted with the neighborhood, is (p. 115, l. 30) "Q Where does this other road lead to? A This road? Q Marked what? A Private road. Q Where does that go? A It is not a private road. Q But it is marked a private road. Where does it go to? A Leads right on down to St. George Avenue." The road in question could undoubtedly have been discovered by the exercise of a little diligence. But it does not even appear from the testimony that the plaintiff when he alighted knew that he stood upon a road. He certainly did not make a reasonable attempt to exercise his powers of observation. It seems probable that he merely decided that the rails offered the shortest way home, and took to them. As to the character of Poor Farm Road, William E. Preston, surveyor, who made the map in evidence, said (p. 112, l. 31):

"Q Will you tell us the kind of a road Poor Farm Road is? A That is an ordinary dirt road about fifteen feet wide. Q Fifteen feet wide? A Very positive road there. (P. 113,

l. 24.) Q What are these two marks here? A That is the planking at the crossing. Q Planking in between the two rails you have designated? A One plank each side of each rail twelve and one-half feet long. Q So that the space in between the planks— A Is levelled with ashes— Q And that is an irregular road? A Yes. It is not paved. (P. 114.) A It is an ordinary country road.” If the plaintiff had remained at Poor Farm Road a car would, undoubtedly, eventually have stopped for him to take him back to his junction. He might very well have an action against the defendant for being carried past his station, and for being compelled to stand at Poor Farm Road an unreasonable length of time while trolley cars passed him without stopping, but there was nothing about his situation which created such a condition as to justify him in proceeding to walk that dark night along that private railroad roadbed. The track was a single track. (P. 97, l. 8.) The plaintiff, according to his own testimony, had seen three trolley cars go by without stopping. If the trolley cars did not pay any attention to him while he stood there, how could he expect any attention from them while away from there? Under those conditions a man bent upon committing suicide might walk up that private right of way, but no man exercising due care for his safety would do such an absurd thing. The immediate cause, therefore, of this plaintiff's fall and injury was his own negligence in walking on this track, and not the prior negligence of the defendant in carrying him past his station, or the prior negligence of the defendant in causing trolley cars to pass him without stopping while he waited at Poor Farm Road. The proximate cause of the accident, therefore, was his own negligence. The negligence of the defendant was only a remote cause.

The case of *Haley v. St. Louis Transit Co.*, 64 L. R. A., p. 295, holds that:

“Failure to stop a street car at the destination of a passenger, by reason of which he is carried to the next street, is not the proximate cause of his falling on a slippery pavement in attempting to return to the point where he should have been permitted to leave the car.”

The case of *Stephens v. Oklahoma City Ry. Co.*, 33 L. R. A. (New Series) P. 1007, is a case in which the plaintiffs, passengers of the street railway company, after alighting from a car stood with transfers in their hands waiting in the street for a connecting car. The connecting car came and passed them, re-

fusing to stop. They then attempted to walk back to the sidewalk, but were struck by a wagon of the fire chief who was going rapidly to a fire. The Court said: "Can it be said that the agent of the street railway company ought to have foreseen and anticipated the probable result of his negligence? This question must be answered in the negative. Personal injury is not one of the consequences that naturally follow missing a street car. Ordinarily no serious consequences flow from such a mishap. Cars usually run within a few minutes of each other, no appreciable time is lost, and the fare is always a matter of small consequence. If it were not for the terrible calamity that overtook the plaintiffs in this case, their actual damages would probably not greatly exceed the value of the unused transfer tickets." The Court then speaks of the alleged cruel and inhuman conduct of the fire chief in running the plaintiffs down with his wagon. We admit that such act was an intervening cause. We believe, however, that the remarks of the Court as to what a motorman need anticipate when he passes a waiting passenger, are fully applicable to the case at bar, and that when motormen passed this plaintiff with their cars as he stood at Poor Farm Road they did not need to anticipate that he would do such a highly improbable thing as to walk along the private right of way and trip over an obstruction thereon. It is worth remembering that the cars were disordered that night; and that this plaintiff knew it. (P. 36, ll. 1 to 12.) If three cars passed the plaintiff in the twenty-five minutes or half hour that he stood there, it is evident, and it would seem that it should have been evident to these people, that an effort was being made to readjust a disordered schedule. The plaintiff says that they waited there twenty-five minutes to a half hour. (P. 38.) Mary Winkowski said that they waited fifteen minutes before starting to walk back, during which time one car passed. (P. 64, ll. 30 to 40.) Anna Winkowski said, (P. 69, l. 16) "A And we were waiting around twenty-five minutes. We couldn't get any car." We submit that as a matter of law this plaintiff was not placed in any such perilous position as to justify his walking on that private right of way where there was a single track (p. 97, l. 9), and where he knew that cars that would not stop were dashing by. The syllabus in the case last quoted, *Stephens v. Oklahoma City Ry. Co.*, well outlines the law. It says:

"The severe rule of care and diligence which the law imposes upon carriers of passengers does not extend so far as to make one liable for an injury to a passenger from an

accident which is not the reasonable, natural, and probable result of the situation, and which could not have been foreseen by the carrier in the exercise of that degree of care which the law demands of him.”

The case of *Indianapolis, B. & W. R. Co. v. Birney*, 71 Ill. 391, (8 L. R. A., New Series, p. 882, Note.) holds that one wrongfully left at a station at which the train failed to stop, but who, instead of waiting a few hours for the next train, or procuring a horse and carriage walked to the next station, through the extreme cold, and was made ill by the exposure and overexertion, is not entitled to recover damages sustained by reason of sickness and loss of time.

The case of *St. Louis S. W. R. Co. v. Thomas*, (Texas) 27 S. W. Reporter, 419, holds that one who on refusal of the employees of a railroad company to stop its train and take him on board as a passenger, walked a distance of eight miles to his destination, was not entitled to recover for fatigue and exhaustion and resulting physical pain and illness, on the ground that the damages were not the proximate result of the failure of the company to stop its train and receive and transport him as a passenger.

The first count of the complaint, in paragraphs 9 and 10, bases the plaintiff's action (1) on failure to stop a trolley car at Woodbridge Junction, and (2) on failure to furnish plaintiff with means of carrying him back from Poor Farm Road to Woodbridge Junction, whereby plaintiff was *compelled* to walk back to Woodbridge Junction, during which walk he got his leg in the cross-irons between the tracks and rails and fell. There is no effort made to hold the defendant for having these cross-irons on its right of way. The whole effort is to create a situation in which the plaintiff was *compelled* to walk back along the tracks to Woodbridge Junction. We submit that there was nothing to compel him to do so, and that he should have waited, or have followed Poor Farm Road, or have found the nearby road which ran parallel with the railroad tracks.

The second count is based upon the proposition that after the plaintiff had alighted at Poor Farm Road it was the duty of the defendant to have the next returning car stop and take on the plaintiff, and also generally that it was the duty of the defendant to take on and receive the plaintiff as a passenger back to Woodbridge Junction. This may be true, and if a duty, we must

assume that up to the time plaintiff left Poor Farm Road it had not been performed, and that the first car and also one or two others had passed without stopping. In view, however, of disordered traffic that night (p. 36, ll. 1 to 12) we submit that the plaintiff was not justified in assuming that no car would stop for him.

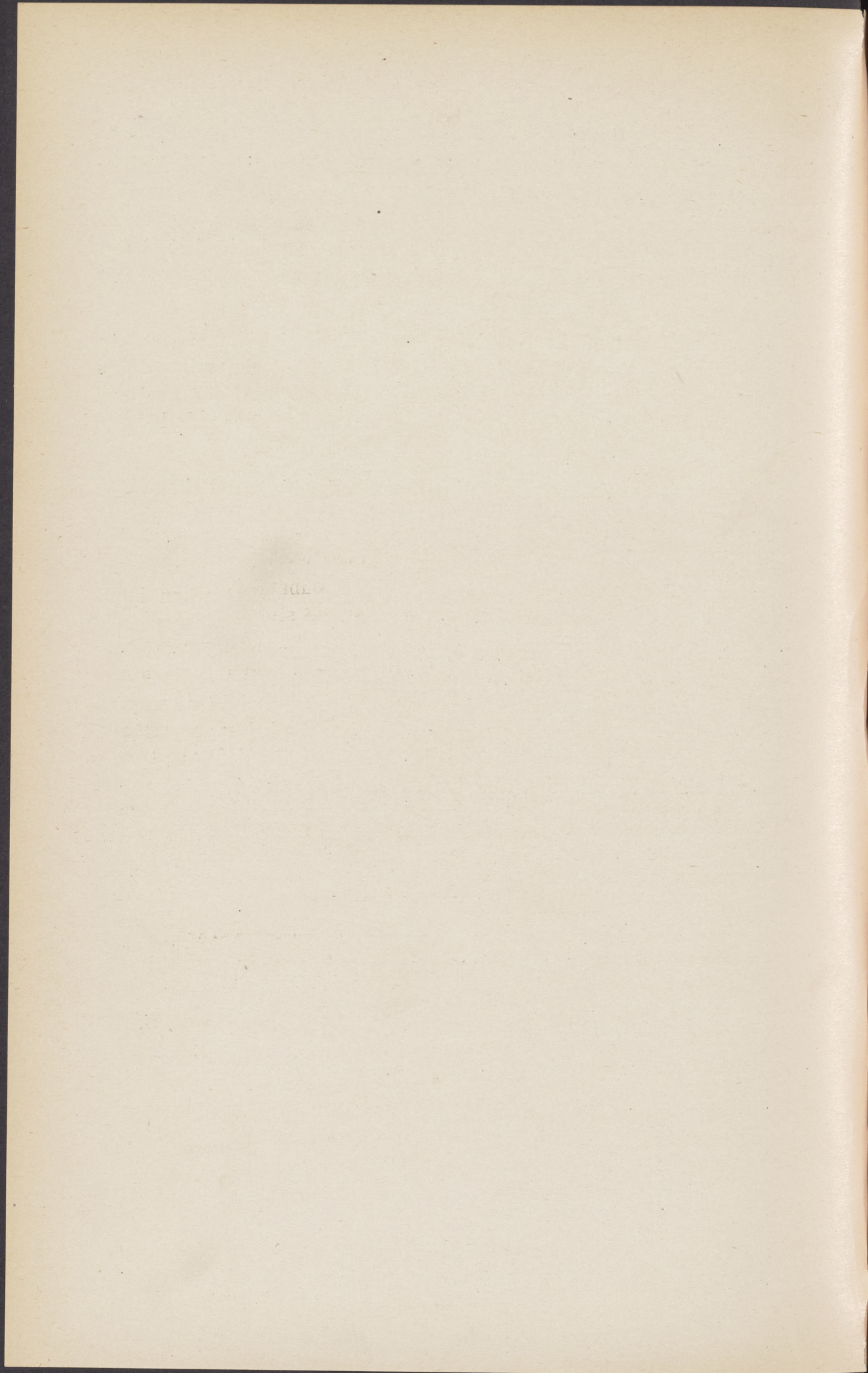
The third count of the complaint is practically a reiteration of the second one, to-wit, that it was the duty of the defendant to furnish plaintiff with safe means of recarriage from Poor Farm Road to Woodbridge Junction, but that defendant failed to do so.

We submit that when the plaintiff made up his mind that he would wait no longer, he took his affairs into his own hands. At that moment he was on a public road. He apparently failed to realize that fact, but such failure would not have occurred if he had been reasonably observant. We submit that when he walked away from Poor Farm Road up the single track of the private right of way he ceased to be a passenger of the defendant, and was, as the Trial Court pointed out, under the statute which we have quoted, a trespasser upon a private right of way. His tripping and falling, and thereby causing the injury, was too remote a happening as related to the failure of the defendant to let him off at his station, and the subsequent failure of the defendant to stop its first, second or third cars for him at Poor Farm Road, to be a proximate result of either of such acts on the part of the defendant.

Respectfully submitted,

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INDEX

THE UNIVERSITY OF CHICAGO

Introduction	1
Chapter I	15
Chapter II	35
Chapter III	55
Chapter IV	75
Chapter V	95
Chapter VI	115
Chapter VII	135
Chapter VIII	155
Chapter IX	175
Chapter X	195
Chapter XI	215
Chapter XII	235
Chapter XIII	255
Chapter XIV	275
Chapter XV	295
Chapter XVI	315
Chapter XVII	335
Chapter XVIII	355
Chapter XIX	375
Chapter XX	395
Chapter XXI	415
Chapter XXII	435
Chapter XXIII	455
Chapter XXIV	475
Chapter XXV	495
Chapter XXVI	515
Chapter XXVII	535
Chapter XXVIII	555
Chapter XXIX	575
Chapter XXX	595
Appendix A	615
Appendix B	635
Appendix C	655
Appendix D	675
Appendix E	695
Appendix F	715
Appendix G	735
Appendix H	755
Appendix I	775
Appendix J	795
Appendix K	815
Appendix L	835
Appendix M	855
Appendix N	875
Appendix O	895
Appendix P	915
Appendix Q	935
Appendix R	955
Appendix S	975
Appendix T	995

THE UNIVERSITY OF CHICAGO