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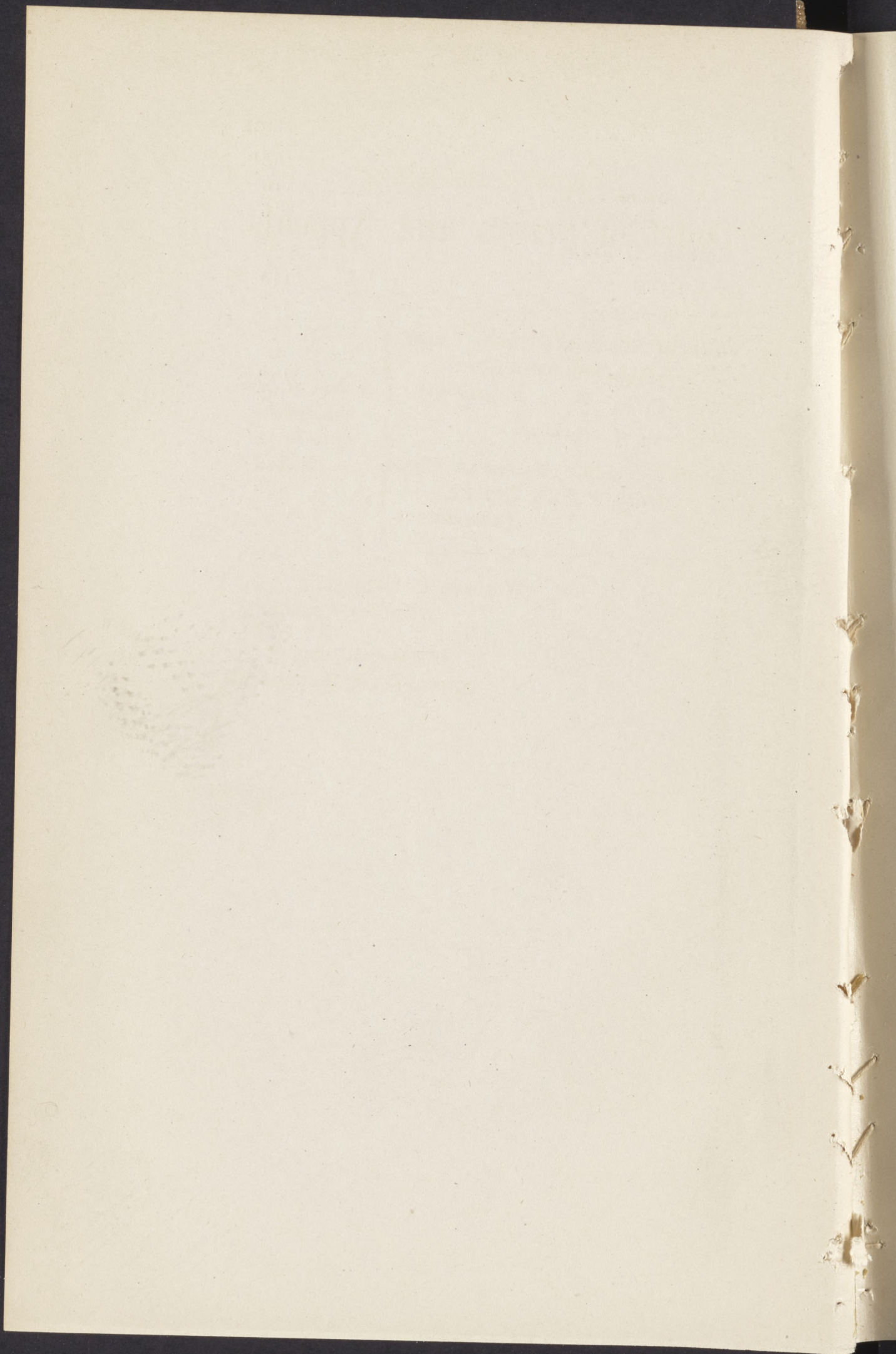
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NEW JERSEY
Court of Errors and Appeals.

AVA LIGHTCAP AND HARRY LIGHT-
CAP, HER HUSBAND,

Appellants,

vs.

LEHIGH VALLEY RAILROAD COM-
PANY OF NEW JERSEY,

Respondent.

10

*Action at Law.
On Appeal.
State of the
Case.*

WILLIAM C. GEBHARDT,
Attorney Appellants.

20

SMITH & BRADY,
Attorneys for Respondent.

30

40

NOTICE OF APPEAL.

Filed June 13th, 1916.

WARREN COUNTY CIRCUIT COURT.

10

 AVA LIGHTCAP AND HARRY LIGHT-
 CAP HER HUSBAND,
*Plaintiffs,**vs.*LEHIGH VALLEY RAILROAD COM-
 PANY,*Defendant.*
 } *Action at Law.*
 } *Notice of*
 } *Appeal.*

20

*To Messrs. Smith and Brady, Attorneys of Defend-
 ant;*

Please take notice, that the plaintiff appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in this cause.

WM. C. GEBHARDT,
 Attorney of Plaintiffs.

Dated May 17, 1916.

Endorsements:

30

' Due and legal service of the within Notice of Appeal is hereby acknowledged this 19th day of May, 1916.

SMITH & BRADY,
 Attys. of Deft.

Filed June 13, 1916.

G. HOWELL MUTCHLER,
 Clerk.

40

JUDGMENT RECORD
WARREN COUNTY CIRCUIT COURT.

AVA LIGHTCAP AND HARRY LIGHT-
CAP, HER HUSBAND,
Plaintiffs,

vs.

LEHIGH VALLEY RAILROAD COM-
PANY OF NEW JERSEY,
Defendant.

Judgment 10
Record.

COMPLAINT.

The Lehigh Valley Railroad Company of New Jersey, the defendant in this cause, was summoned to answer unto Ava Lightcap, and Harry Lightcap, her husband, plaintiffs therein, in an action at law, upon the following complaint: 20

“Plaintiffs, who reside in the Town of Phillipsburg, in the County of Warren, and State of New Jersey, say that:

1. On the sixteenth day of January, nineteen hundred and twelve, plaintiff, Ava Lightcap, was walking along the public street in the said Town of Phillipsburg, known as Mercer street, on the sidewalk of said street, in a proper and careful manner, when she slipped upon ice which was then and there formed on the public sidewalk, and broke her right kneecap 30

2. As a result of said injuries plaintiff has been laid up practically ever since and is not yet well.

3. The defendant built and constructed its grounds surrounding its freight station adjoining the place where said plaintiff fell as aforesaid, and filled in the natural condition of the land in such a 40

COMPLAINT

way as to collect water from rain and snow and throw the water thereof in a body upon the sidewalk at a point where the said plaintiff fell as above stated.

10 4. The water at said point did not naturally flow toward said sidewalk, but the ground adjoining said sidewalk was filled in by the said defendant and then sloped toward the said sidewalk in such a way as to collect it and throw it in a body on said sidewalk.

20 5. That said defendant also, for its own convenience and purposes, collected the snow which had fallen upon said land and upon the public sidewalk and other places and placed it in heaps on its said land so that as it melted it flowed from the said land to and upon the said sidewalk where plaintiff fell.

6. That no provision whatever was made by the said defendant company to take care of the snow and water so unnaturally collected upon its own land so as to prevent the water which came from said snow from flowing upon the said sidewalk.

30 7. That said Ava Lightcap, at the time of receiving said injuries, was and still is the wife of the said plaintiff, Harry Lightcap, and by reason of the premises the said Harry Lightcap has been deprived of the society and comfort and services of his said wife since the accident, and will in the future be deprived of the society, comfort and services of his said wife, and has paid out a large sum of money, amounting in the whole to the sum of two hundred dollars (\$200) for medical expenses and medicines, and will in the future be compelled to pay out large sums of money for the same purposes.

40 The plaintiff, Ava Lightcap, demands ten thou-

ANSWER

sand dollars (\$10,000) damages, and the plaintiff, Harry Lightcap, demands five thousand dollars (\$5,000) damages.

WM. C. GEBHARDT,
Attorney of Plaintiffs."

10

ANSWER.

The defendant answered as follows:

"The defendant, a corporation of the State of New Jersey, says that:

1. As to the statements in the first and second paragraphs, defendant has not any knowledge or information thereof sufficient to form a belief.

2. It denies the truth of the matters contained in the third paragraph. 20

3. It denies the truth of the matters contained in the fourth paragraph,

4. It denies the truth of the matters contained in the fifth paragraph.

5. As to the matters contained in the sixth paragraph, defendant says that as it did not permit snow and water to be unnaturally collected upon its own land, as alleged in the fifth paragraph, it had no occasion to make provision to take care of such snow and water and to prevent the water which came in from said snow from flowing upon the said sidewalk. 30

6. As to the statement in the seventh paragraph, defendant has not any knowledge or information thereof sufficient to form a belief.

SMITH & BRADY,
Attorneys for Defendant." 40

REPLY.

The plaintiffs replied as follows:

“The plaintiffs, replying to the answer of the defendant, say:

10 They deny the fifth paragraph of the defendant’s answer and insist that the said defendant did permit snow and water to be unnaturally collected upon its own land.

WM. C. GEBHARDT,
Attorney of Plaintiffs.”

20 This action was tried before Judge George S. Silzer, with a jury, on April 25 and 26, 1916. The cause having been heard and submitted to the jury, they return their verdict as follows: We find a verdict for the defendant of no cause of action.

Whereupon it is adjudged that the complaint of the plaintiffs be dismissed and that the defendant recover of the plaintiffs its costs, which are taxed at the sum of seventy-seven dollars and nineteen cents (\$77.19).

Judgment entered April 26, 1916.

GEO. S. SILZER,
Judge.

30 STATE OF NEW JERSEY, }
COUNTY OF WARREN, } ss.

40 I, G. Howell Mutchler, Clerk of the Circuit Court in and for the County of Warren, do hereby certify that the foregoing is a true copy of the notice of appeal and judgment record in the case of Ava Lightcap and Harry Lightcap, her husband, plaintiff, against the Lehigh Valley Railroad Company of New Jersey, defendant, lately pending in our said Court, as the same is taken from and compared with the originals thereof in my office.

REPLY

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court and County, at Belvidere, this [SEAL.] twenty-seventh day of June, A. D. nineteen hundred and sixteen.

{ U. S. I. R. }
Stamp
10c.
{ Cancelled. }

G. HOWELL MUTCHLER,
Clerk.

10

20

30

40

GROUNDS OF APPEAL.

Filed November 15th, 1916.

**NEW JERSEY COURT OF ERRORS AND
APPEALS.**

| | | |
|----|--|---|
| 10 | <p>AVA LIGHTCAP AND HARRY LIGHTCAP, HER HUSBAND, <i>Plaintiffs-Appellants,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>LEHIGH VALLEY RAILROAD COM- PANY OF NEW JERSEY. <i>Defendant-Appellee.</i></p> | <p><i>Action at Law.</i></p> <p><i>Grounds of Appeal.</i></p> |
|----|--|---|

20 *To Smith and Brady, Esqs.,
Attorneys of Defendant-Appellee.*

The plaintiff states the following grounds of appeal:

31 1. The plaintiff offered to prove by twenty witnesses "that the defendant company filled in where the freight yard now is, and the freight station and the freight track, and completely changed the course of the surface water which would otherwise have gone in a southerly direction and flowed 35 to 40 feet below into the canal basin—they have changed it so that instead of doing that it goes on in an easterly direction, and the railroad company sloped this fill toward this wall in question, so that the water must run down on the sidewalk whenever there was rain or melting snow. That thereafter a street was laid through adjoining railroad property, so that there was a sidewalk and then the surface water, or the water which formerly ran south, then ran east over this sidewalk, and that it ran east from the time the fil-

40 ing was done and was prior to the time of the lay-

GROUNDS OF APPEAL

ing of the sidewalk and that after the sidewalk was built the company kept filling in and sloping it toward the sidewalk." That the defendant company so changed the surface and topography of the land as to throw a much greater amount of water on the sidewalk, down over this wall, and over on the sidewalk, than would have flowed there if the company had not changed the surface of the land, which offers were overruled and an objection allowed. 10

2. The following question was admitted against the objection of the plaintiff and an exception allowed. "Now, did they, when they cleaned these walks, place any of the snow on the bank above the walk?"

3. The Court charged the jury that, "evidence that snow was seen on top of the wall in piles is not sufficient to warrant the conclusion that it was brought from off the premises and placed there." 20

4. The Court charged the jury that, "the presence of snow on the wall in piles is not sufficient to warrant the conclusion by the jury that the defendant placed or caused it to be placed there?"

5. The Court charged the jury that, "there must be some affirmative evidence, 1. That the snow seen on the wall was brought there from off the premises. 2. That having been taken from off the premises it was placed on the wall by the defendant, and without such affirmative proof the jury must render a verdict for the defendant." 30

Dated Nov. 9th, 1916.

WILLIAM C. GEBHARDT,
Attorney of Plaintiffs-Appellants.

TRANSCRIPT OF TESTIMONY
WARREN COUNTY CIRCUIT COURT.

No. 1 April Term, 1916.

| | | | |
|----|---|---|-----------------------|
| 10 | AVA LIGHTCAP AND HARRY LIGHT- CAP, HER HUSBAND, <i>Plaintiffs,</i> <i>vs.</i> LEHIGH VALLEY RAILROAD COM- PANY, <i>Defendant.</i> | } | <i>Action at Law.</i> |
|----|---|---|-----------------------|

20 Transcript of shorthand notes of testimony, etc.,
taken in the above stated matter, before Hon.
George S. Silzer, Circuit Court Judge, and a jury,
at the Court House, Belvidere, N. J., on Tuesday,
April 25th, 1916.

APPEARANCES:

WILLIAM C. GEBHARDT, Esq., for the plaintiffs.

SYLVESTER C. SMITH, Esq., and CHARLES P.
BRADY, Esq., (Smith & Brady) for the defendant.

Jury called and sworn.

3. Recess to one o'clock in the afternoon.

Mr. Gebhardt opened for the plaintiffs.

Mr. Smith opened for the defendant.

Mr. GEBHARDT—If the Court please, I have here
an admission which was offered in evidence before.
It is not necessary to offer it in evidence, if Mr.
Smith will consent to the reading of it. It is a
letter from Smith & Brady, attorneys from the de-
fendant company, in which they say, "Replying to
40 your favor of the 16th inst., if the plaintiff swears

MRS. AVA LIGHTCAP—Direct

that the accident occurred on the sidewalk on Mercer street, adjoining the lands on which the Lehigh Valley Freight House was located, we will admit that was the defendant's property."

MRS. AVA LIGHTCAP, one of the plaintiffs, sworn:

Direct examination by Mr. Gebhardt.

10

Q. Mrs. Lightcap, where do you live? A. No. 14 Reese's Court, Phillipsburg.

Q. How long have you lived in Phillipsburg? A. All my life.

Q. Are you married? A. Yes, sir.

Q. Who is your husband? A. Harry Lightcap.

Q. How old are you? A. I will be thirty-three next month.

Q. Did you have an accident on the 16th of February, 1912? A. Yes, sir.

20

Q. Where did you live at that time? A. We lived on Mercer street, and we moved to Reese's Court.

Q. And have lived at Reese's Court since? A. Yes, sir.

Q. Now, you say you had an accident on that day. Just state where this accident was. A. Why, it was on the pavement of the Lehigh Valley property adjoining the freight house.

Q. Who was with you at the time? A. My husband.

30

Q. How were you walking with him? A. I had a hold of his arm.

Q. What time of the day was it? A. Oh, around four o'clock or a little after.

Q. What occurred? A. I was walking from one house to another and slipped on the ice and fell.

Q. Now, just state to the Court and jury what amount of care you used in walking where you fell.

A. Well, I had a hold of my husband's arm, walk-

40

MRS. AVA LIGHTCAP—Direct

ing along the street like anybody would, and I fell on the ice, my feet flew out from under me, and I fell.

Q. Please state whether you saw the ice on the sidewalk before you fell? A. Before I fell?

10 Q. Yes; before you fell did you notice the ice on the sidewalk or not? A. Yes.

Q. And was that the reason you had hold of your husband's arm? A. Yes.

Q. Now, what was the result of the fall to you? A. I got a broken knee cap.

Q. Just state to the Court and jury how long you were laid up with this broken knee cap. First, tell how you got home, and then how long you were in bed and what condition you were in when you got out of bed, and so on down until the present time, just as you would tell it to me, if I were in your house? A. Well, when I fell, I tried to get up and I could not, and about that time some man came by with a horse and carriage, and my husband asked him to take me in, and they took me to my home, and there the physician was called—and I—

20

Q. Who was called? A. Dr. Wolff, we could not get our own doctor.

Q. Who was your own doctor? A. Dr. Reese.

30 Q. Did you subsequently get him or not—Dr. Reese? A. We couldn't get him that day.

Q. I say did you afterward get him? A. Yes.

Q. Go ahead? A. After the knee cap was almost set he came in and he said it was all right, and I was in bed six weeks, or nine weeks, and then I was in and out of bed for a month or so, and I was sitting on chairs propped up, and I had to walk on crutches then when I got out of bed and learn to walk all over again; and after that I walked on canes, at first with two and then with one until I

40

could walk alone.

MRS. AVA LIGHTCAP—Direct

Q. How long was it from the time of the accident down to the time that you were able to walk without anything at all? A. Oh, may be nine or ten months, I guess.

Q. After you could walk without a cane, just state to the Court and a jury what condition you were in then, in the succeeding months. A. Well, I could not do my work; I had to get my work done by others until I was able to do it myself. 10

Q. How long was that. The jury wants to know how long that was. A. Oh, that was over a year and more.

Q. How is it at the present time? A. Well, it is stiff; I can only bend it about one-third of the way, and it pains at times; when there is a storm or in the winter-time it is stiff and causes me a great deal of pain, when I work, when I have to stand on it. 20

Q. How does it affect you going up and down stairs at this time? A. Well, I can't walk like anybody ought to.

Q. Well, how do you go up stairs? A. It hurts in the knee every step I take, and I can't get it up if the step is any ways high; I can't step up like on another step.

Q. Now, just describe to the Court and jury the character of the pain that you suffered for the first year after the accident? A. Well, like a terrible leg ache, like you have when you are walking all the time, tired. 30

Q. How does it affect your sleeping? A. Oh, it keeps me awake.

Q. How much; the jury wants to know, how much, to get an idea what you are entitled to. A. It wakes me up at different times in the night.

Q. I am speaking now for the first year after the accident. 40

MRS. AVA LIGHTCAP—Cross

THE COURT—Was the date of the accident given?

MR. GEBHARDT—Yes, I asked for the question.

Last question repeated.

10 A. It kept me awake different nights after the accident. I could not go to sleep.

Q. Why? A. Because the pain ached.

Q. Now take the last two or three years and just state to the Court and jury whether or not it gets any better, whether it has improved? A. I don't see any improvement; it stays about the same thing.

Q. Was there anything the matter with this leg or knee before this accident? A. Nothing.

20 Q. Had you ever had it broken in any way? A. No.

Mr. GEBHARDT—Cross-examine.

Cross-examination by Mr. Smith.

Q. Is your appetite pretty good? A. Yes.

Q. You haven't lost any flesh? A. No.

Q. Laying awake nights has not reduced your flesh at all? A. No.

Q. You weigh about the same as you did before the accident? A. No.

30 Q. Less or more? A. Oh, about the same, I guess.

Q. You sometimes feel it when it is stormy, do you? A. Always.

Q. You attend to your household duties, do you not? A. Well, under difficulties.

40 Q. You do attend to your household duties? A. Yes; well, not all of them; I don't wash or get down and clean or anything; I cannot, because it is stiff, and housecleaning—I can't get up on a step ladder

MRS. AVA LIGHTCAP—Cross

or anything; I have to get some one else to do it for me.

Q. You say there is no improvement at all? A. I don't see any.

Q. How long is it since you have seen any improvement? A. Well—

Q. After you dropped the canes? A. No. 10

Q. None since then? A. No.

Q. Do you go about the town every week, around town some? A. Well, in the daytime mostly.

Q. You go to Easton occasionally? A. Yes, in dry weather.

Q. You go to the moving picture shows once in a while like the rest of the ladies? A. Well, if somebody is along with me.

Q. Did you ever go alone? A. No.

Q. Do you go to the stores? A. Yes; I go to the store once in a while; the children does mostly. 20

Q. There is a blacksmith shop there on Mercer street, near where this accident happened? A. Yes.

Q. Right opposite? A. I guess; it is near there.

Q. I want to locate the place—about nearly opposite the blacksmith shop? A. I guess it was nearly opposite.

Q. There was a wall at your right coming down? A. Yes. 30

Q. And do you know about how high that wall was at the place where you fell? A. I don't remember.

Q. Up to your shoulder, was it? A. Maybe.

Q. You think it was? A. I forget how high it was.

Q. Well, it was nearly opposite Mr. Wolf's blacksmith shop? A. Yes; somewhere along there.

Q. As you were going down at the point where 40

MRS. AVA LIGHTCAP—Cross

you fell, you saw this glare of ice in front of you, didn't you? A. No; I didn't look ahead.

Q. Didn't you see it before you fell? A. No; I was just walking along like anybody would.

Q. Didn't you see the ice on the pavement before you fell? A. Well, just as I was walking along.

10 Q. As you were walking along that day before you fell, you saw the ice ahead of you on the pavement? A. No; not ahead of me.

Q. Where did you see it? A. Well, right around me as I was walking.

Q. You stepped on the ice knowing it was there, did you not? A. Yes; it was all over.

Q. Had there been a sleet storm before that? A. I don't remember.

20 Q. Do you know whether it was a clear day or a cloudy day? A. A clear day.

Q. The sun was shining? A. Yes.

Q. About four o'clock in the afternoon? A. Yes.

Q. Do you know whether it had been warm enough to melt the ice on the walk that day? A. I don't remember.

Q. Was it a cold day or a warm day? A. It was a cold, clear day.

30 Q. You don't know who the man was that took you to your house, do you? You never found what the name was? A. No.

Q. How long did Dr. Reese treat you after this accident? A. A year.

Q. Has he seen you lately? A. No.

Q. He has made no examination of your injury very lately, has he? A. No.

Q. He set the knee, did he? A. No; Doctor Wolf.

40 Q. And after that Dr. Reese took charge of it? A. Yes.

MRS. AVA LIGHTCAP—Cross

Q. And he continued his attendance until he thought you didn't need any doctor, I suppose? A. Well, he did not come any more. He attended me.

Q. Which side of your husband were you when you walked down this walk? A. On the left hand.

Q. Then you were on the outside? A. On the outside.

10

Q. Then he was on the inside, nearer the wall? A. Yes.

Q. Did he fall? A. No.

Q. Did he have hold of your arm or you have hold of his? A. I had hold of his.

Q. You must have let go of it, didn't you? Didn't you grasp him tighter when you found yourself falling? A. Well, I couldn't; I went down so fast.

Q; Didn't you hold on to him? A. I couldn't.

20

Q. You let go of him? You certainly could have held on to him, couldn't you? A. Well, it was done so quick—

Q. Are you sure you had hold of his arm? A. Yes.

Q. Didn't you have a basket in your right hand? A. I didn't have anything.

Q. Did he have a basket? A. I don't remember; I didn't.

Q. Well, you were moving, and you were going to the house that you had moved from to get some things and take to the house that you were moving into, were you not? A. Yes.

30

Q. Didn't you have something to carry the things in? A. I did not have anything.

Q. Didn't you have rubbers on? A. Yes.

Q. Did you slip before you fell? A. My feet flew out from under me.

Q. You slipped down, eh? A. Yes.

Q. Your feet slipped out from under you forward?

40

HARRY B. LIGHTCAP—Direct

Your feet went forward when you fell? A. No, this foot didn't (indicating). I came down on the one that I broke.

Q. How, if your feet slipped out from under you, did you come down on that knee? A. Well, I did.

10 Q. You don't exactly know how it occurred, do you? A. Well, I know I fell down on this knee.

Q. Did you fall on the curb stone or right on the sidewalk? A. Right on the sidewalk.

Q. There is a flag there, isn't there, and on either side is a row of bricks, on either side of the flag, and you fell on the flag, did you? A. On the flagging.

Q. Was your husband on the flag when you were walking, or inside on the brick? A. Yes.

Q. Which side was it? A. On the flagging.

20

Mr. SMITH—That is all, Mrs. Lightcap.

HARRY B. LIGHTCAP, sworn for the plaintiffs.

Direct examination by Mr. Gebhardt.

Q. Mr. Lightcap, are you the husband of Ava Lightcap, who was just on the stand? A. Yes, sir.

Q. Do you remember the day of the accident near the Lehigh Valley freight station in Phillipsburg? A. Yes, sir.

30

Q. Where were you at the time? A. Why, my wife and I were going down the sidewalk together, and she was walking on the outside and I was on the inside.

Q. Now, I wish you would just show the Court and jury as nearly as you can by your hand about the character of the descent there, how much it slopes down, that is, the sidewalk. A. Well, it slopes about like that (illustrating).

40 Q. What occurred when you were walking down there? A. My wife and I were travelling down

HARRY B. LIGHTCAP—Direct

there and she slipped on the ice and fell on her knee and I picked her up, and as I picked her up I asked whether she was hurt and she said something was wrong with her knee.

Mr. SMITH—Never mind what she said.

Q. Go ahead.

10

Mr. SMITH—I ask the Court to strike all that out, what she said.

THE COURT—Yes.

A. She tried to walk and could not, and I had to wait for assistance.

Q. Just tell the Court and jury what, if anything, you had in your hands and what she had in her hands, and where her hands were just before she fell, and all about it. A. She had hold of my arm and I had a basket and broom on my right arm. She had hold of my left arm.

20

Q. Just describe to the jury how quickly she fell, and just how she went down. A. Well, she went down quick as a wink, right on her knee, and the force of the drop jerked her arm out from mine.

Q. Do you know what kind of a day it was, Mr. Lightcap? A. Well, it was a day that—the sun shone that day and it had thawed where the sun hit it in the morning, and toward evening that froze on the shaded side.

30

Q. What was there on the top of the ground around the Lehigh Valley Station there to thaw? A. Well, there was snow on the ground and on the top of the wall between the fence and the wall there was snow in heaps; it appeared as though it had been shoveled from the walk.

Q. Now just describe the lay of the land from

40

HARRY B. LIGHTCAP—Direct

the Lehigh Valley Station there toward the edge of the stone wall. A. Well, the land slopes toward the stone wall. It has got a raise near the Ceresota Flour Company's building, about eighteen inches, the upper part of the wall.

Q. What is there just inside on top of the wall?

10 A. A cattle pen.

Q. What is the cattle pen made of? A. Why, it is a yard built to hold cattle, with a fence around it

Q. Then there is on top of the wall what, or on the edge of the wall? A. A fence.

Q. What kind of a fence is it? A. A wooden board fence.

Q. How far are the boards apart? A. Well, there is no uniform distance between any of them. Some are against the bottom of the wall, the top of
20 the wall, and in some places they are two or three inches apart, and so on up.

Mr. GEBHARDT—Mr. Smith, have you got photographs?

Mr. SMITH—I have photographs.

Mr. GEBHARDT—(Showing counsel photographs.) Have you any objection to those?

30 Mr. SMITH—The only trouble is they are so small they do not show the situation. It is pretty hard to get a photograph which does. I have some larger ones that are not satisfactory even to me.

Q. Now, at the point where your wife fell please state just where the lower board of the fence—how close it comes to the ground? A. I think it is right on the ground.

40 Q. And about how high from the sidewalk where

HARRY B. LIGHTCAP—Direct

she fell was the top of the stone wall? A. About four feet.

Q. Where were these heaps of snow on this wall that you speak of? How far along there did they go? A. Oh, there was snow all along the edge of the wall from one end to the other, and at the upper end of it where my wife fell it looked as though it was shoveled off the sidewalk on to the stone wall. 10

Mr. SMITH—I object to that.

THE COURT—Yes; that will be stricken out—how it looked.

Q. You don't know where those heaps of snow came from? A. It appeared as if it—

Mr. SMITH—Objected to. 20

THE COURT—No.

Q. Don't tell where they came from, but describe their appearance; that is all. A. Well, they were in heaps.

Q. What kind of heaps? A. Heaps about twelve inches high.

Q. What was the character of the heaps? A. Snow.

Q. What did they look like—as if they drifted up there, or what? A. No; they were as if shoveled up. 30

Mr. SMITH—I object to that question—to leading the witness.

THE COURT—Strike out all of the answer but “No.”

Mr. GEBHARDT—I want him to describe particularly the appearance of the heaps of snow. That is all. 40

HARRY B. LIGHTCAP—Direct

THE COURT—You asked whether they looked like drifts or not and he said no they did not. That is all I will allow him to answer.

10 Q. What did they look like? A. They looked as though they were shoveled.

Mr. SMITH—I object.

THE COURT—I think I will let that stand.

Q. At the foot—

By the Court.

20 Q. How high is this stone wall from the sidewalk? A. It runs from nothing down to twelve or fifteen feet.

Q. Well, at the point where your wife was hurt? A. Four feet.

By Mr. Gebhardt.

Q. How far from where the stone wall is, you say, nothing in height, was it from that point on down to the place where your wife fell? How many feet? A. About thirty or thirty five feet,

30 Q. Did you ever measure it? A. I have never measured it.

Q. Now, at the foot of this stone wall and between the stone wall and the walk, what was there? A. Why, there was bricks laid between there.

Q. How wide were those bricks? A. About eighteen inches.

40 Q. Just state to the Court and jury now whether those bricks between the wall and the sidewalk were level or hollowed out like a ditch or did they slope, and if they sloped which way did they slope? A. They sloped toward the sidewalk.

HARRY B. LIGHTCAP—Direct

Q. How long was your wife laid up with this injury? A. About a year.

Q. And during that period how did she get along?
A. Well, she was nine weeks in bed on the broad of her back, and she was about five or six weeks propped up on the edge of the bed on a rocking chair, and then she was about the same amount of time learning to walk around on crutches. It consumed about a year altogether, about nine months altogether, learning her how to walk so she was capable of going out. 10

Q. Now, during these first two or three months how did she sleep? A. She did not sleep half the time.

Q. How did she sleep before this accident? A. Oh, she slept all the time—nights.

Q. Was there anything the matter with this knee-cap or leg before the accident? A. No, sir. 20

Q. Did you get along without help during the early part of your wife being laid up? A. No.

Q. What did you do? A. I had to have some help.

Q. How much did you expend for help? A. I spent \$105.00 to one party for nurse hire, and fifty-two dollars to another party, nurse hire, and I have had the family washing done from the 16th of February, 1912, to this date, at eighty-five cents a week; and I had a housekeeper for four weeks. 30

Q. How much did the housekeeper cost you? A. Five dollars a week.

Q. Just state to the Court and jury what your doctor bill was. A. The bill for Doctor Reese was \$80.00, and Doctor Wolf \$5.00.

Q. What did you spend for medicines, if anything, and other things to take care of her? A. For drugs and ice bags and different things, and crutches and one thing and another ran up to \$50.00. 40

HARRY B. LIGHTCAP—Cross

Q. What time in the day was it when the accident occurred? A. Between four and four-thirty.

Q. Please state whether it was freezing or thawing at that time of the day. A. It was between a thaw and a freeze; in some places freezing and in other places thawing.

10 Q. How had it been during the middle of the day? A. Thawing.

Q. Was it a clear day or cloudy day? A. Clear.

Cross-examination by Mr. Smith.

Q. You say she fell at a point where the wall was about four feet high? A. About four feet high.

Q. And that was nearly opposite the blacksmith shop of Mr. Wolfe, was it not? A. Quite a distance up. The blacksmith shop was across the street.

20 Q. I say, it was nearly opposite A. About. It was between the blacksmith shop and the top of the hill.

Q. Did you make any mark to indicate the spot where she fell? A. Yes, sir.

Q. Where did you make that? A. I did not exactly make a mark, but I remembered the spot where she fell.

Q. Oh, you did not make any mark? A. No, sir.

30 Q. As you were going down there you were on the inside? A. Yes.

Q. Did you have rubbers on? A. Yes.

Q. You saw this glare of ice as you walked along? A. There was ice all over the sidewalk.

Q. You saw it before you stepped on it? A. Yes.

Q. And before your wife stepped on it? A. Yes, sir.

Q. You had a broom in your hand? A. A broom and a basket.

40 Q. How were you carrying this broom, over your shoulder? A. In my arm.

HARRY B. LIGHTCAP—Cross

Q. When you testified before, you testified it was a little above the blacksmith shop. A. Yes, sir.

Q. When did it come to your mind that you noticed snow on the wall? A. The day she fell.

Q. When you testified before you were asked, "Did you notice that day up above the stone wall on the land between the freight house and the stone wall—what did you notice?" And you answered, "I noticed heaps of snow up in the stock yard and by the freight house." Is that so? A. I noticed snow up there, too. 10

Q. You noticed snow up there? A. Yes.

Q. You did not testify at that time you noticed snow on the wall. A. I said there was snow on the wall, didn't I?

Q. Did you? A. I think I did.

Q. You think you did? A. Certainly I did. 20

Q. Well, when you first brought this suit, did you not allege that the melting of the snow placed on the property had anything to do with the accident, did you? A. I think my lawyer did.

Q. Now, don't you know that he did not? A. Well, he did.

Q. Don't you know that about ten months after the accident he came in Court to try your case before Judge Black? A. Yes.

Q. And Mr. Gebhardt commenced to ask you about snow? A. Yes. 30

Q. And it was objected to because there was no such thing alleged in the plaintiff's complaint, in your complaint; don't you know that? So there was nothing in the complaint at that time, was there? A. I don't know whether there was anything in the complaint, or not, but I remember it being there.

Q. Nothing had been said about it until you got on the stand that day? A. Yes. 40

HARRY B. LIGHTCAP—Cross

Q. And that was about ten months after the accident happened? A. Yes.

Q. And the case went over? A. Yes.

Q. Because Mr. Gebhardt wanted to change his complaint; that is true, isn't it? A. I don't know.

10 Q. You were here, weren't you? A. I don't think he wanted to change it.

Q. You were here, weren't you? A. I was here.

Q. You know what was done, don't you? A. Yes.

Q. You sat there and consulted with him? A. Sure; I consulted with him.

Q. Well, he did change it, didn't he? A. No.

Q. Don't you know that the case went off at that time, in order to permit him to change his case?

A. It went off several times, I know.

20 Q. It went off twice in order to permit him to change his case, didn't it? A. Yes; because you did not want it to go on.

Q. Now, you don't pretend to remember seeing a heap of snow a year ago, in any particular place, do you, as you were walking along? A. I do, at that time.

30 Q. When did you see these heaps of snow? Before your wife fell, or after? A. I saw snow there at the time she fell, and after I got her home, I went down and viewed the property over again.

Q. You were looking after your wife when she fell, weren't you? You were giving attention to your wife? A. Why, sure.

Q. You tried to lift her up, didn't you? A. I did.

Q. You lifted her up and held her up? A. Yes.

Q. Until this man came along with a carriage? A. Yes.

40 Q. Did anybody else come along before the man in the carriage? A. No.

HARRY B. LIGHTCAP—Cross

- Q. And you hailed him? A. Yes.
- Q. And asked him if he would not take your wife up to the house? A. Yes.
- Q. And you took her in the carriage? A. Yes.
- Q. And you walked along up, or did you ride with him? A. I walked.
- Q. You walked along up alongside the carriage, did you? A. Yes. 10
- Q. And after you got to the house, where did you go then? A. Went for the doctor.
- Q. How long did it take to get the doctor? A. About five minutes.
- Q. Where did you go for the doctor? A. To Rhodes' Photography—
- Q. To Rhodes' Photograph Gallery on the corner of the street you had moved to? A. Yes.
- Q. That was up on Main street? A. Yes. 20
- Q. You found Dr. Wolf there? A. No; I got him on the 'phone.
- Q. You went to Rhodes' Photograph Gallery and got permission to use his telephone to telephone for Dr. Wolf? A. Yes.
- Q. And then you went home again? A. I could not find any doctor in at that time and I went down to his house and met him there by his house.
- Q. Did you go down Main street to his house? A. Yes. 30
- Q. Walked or ride? A. Ran.
- Q. That is some distance below the Catholic Church, isn't it? A. Yes.
- Q. Then did he come right up with you? A. Yes, sir.
- Q. And you went with him to the house? A. Yes, sir.
- Q. You say it was about between four and half past when the accident happened? A. About four o'clock, yes. 40

HARRY B. LIGHTCAP—Cross

Q Was it about four or between four and half past? A. I did not look at the clock then, but I looked at my watch as I went by Rhodes, and it was about four o'clock.

Q. That is when you went with your wife from one house to the other before the accident? A. Yes.

Q. And you say you got Dr. Wolf there. How long was Dr. Wolf there? A. I guess he was there twenty minutes.

Q. What was he doing while he was there? A. Setting her knee cap.

Q. Do you mean to say he set the knee cap in twenty minutes? A. I supposed that was what he was doing.

Q. Did he put the bandages on? A. Yes, sir.

Q. And put your wife to bed? A. Yes, sir.

Q. And gave directions for her care? A. Dr. Reese done that.

Q. Oh, did Dr. Reese come there while Dr. Wolf was there? A. Yes, sir.

Q. You sent for Dr. Reese, did you? A. Yes, sir

Q. And you telephoned for him at the same time you telephoned for Dr. Wolf? A. Yes, sir.

Q. And while Dr. Wolf was there working on the knee cap Dr. Reese came in? A. Yes, sir.

Q. How long were they there together? A. I don't exactly know how long they were there together.

Q. Who went away first, Dr. Wolf or Dr. Reese? A. Dr. Wolf.

Q. Then how long did Dr. Reese stay? A. I don't know. I went out the house after Dr. Wolf.

Q. When did you go? A. I went down to where she fell.

Q. Who was with you? A. My father-in-law.

HARRY B. LIGHTCAP—Cross

Q. Where did you go from there? A. Back to the house.

Q. Didn't you go anywhere only just to the spot where she fell? A. Around that neighborhood, yes.

Q. Around that neighborhood? A. Yes, and looked the ground over.

Q. Did you go up on the bank? A. Yes, sir. 10

Q. Did you go down below, down to the canal basin or the canal? A. Not down to the canal basin.

Q. You did not go below where she fell then? A. No; I went down to the house I moved out of, later that night.

Q. What? A. I went down to the house I moved out of from there.

Q. That must have been around six or seven o'clock? A. No. 20

Q. How late was it? A. Oh, I should judge quarter after five or five o'clock, along there.

Q. What time did you get back to your house? A. Well, I don't remember what time I got back.

Q. You had your house all fixed up, all the furniture in? A. I didn't have nothing.

Q. You didn't have anything? A. No; just the furniture that was carried there was all.

Q. When did it come to you that you were walking on the right side of your wife? A. Why, I remembered back how I was walking with her. 30

Q. When you were examined before you said you did not remember which side you were walking.

A. I did not remember just at that time.

Q. You did not remember just at that time? A. No, sir.

Q. Well, when did it come to you, I say, that you were on the right side? A. Why, when I got down out of this chair and sat over there.

HARRY B. LIGHTCAP—Cross

Q. Then you remembered that you were on the right side? A. Yes, sir.

Q. At that time you did not remember whether your wife had hold of your arm or not, I believe, is that right—when you were examined before? A. I don't remember what I testified to about that.

10 Q. When did it come to you—the recollection that your wife had hold of your arm—when did that come to you? A. I know she had hold of my arm.

Q. You said before you did not know whether she had or not, when you were a witness before. Which is right? Are you right now or were you right then? A. I am right now.

Q. How does it come you did not know before when you were examined? A. I said I wasn't cer-
20 tain, didn't I?

Q. You said you did not know. You don't remember, you said, "Whether she had hold of my arm or not." A. I don't recall.

Q. That was a year or more? A. Yes.

Q. That was nearer the accident than this. How does it come your memory has improved so much since? A. I remembered that when I got in that chair I told you.

Q. You remember that when you got in the chair,
30 too? A. Yes.

Q. She let go of your arm, didn't she? A. When she fell, yes.

Q. She did not grasp it tighter or hold on it tighter? A. She pulled loose from it.

Q. Who made up these charges which you say you were compelled to expend? A. The people that took care of her.

Q. Who were the people that took care of your wife? A. My mother-in-law took care of her.
40

HARRY B. LIGHTCAP—Re-direct
MRS. AVA LIGHTCAP, recalled—Direct

Q. What did she charge to date? A. \$7.00 a week for fifteen weeks.

Q. Have you paid her? A. Yes, sir.

Q. Is your mother-in-law a professional nurse?
A. Not as I know of.

Q. She has never been a professional nurse? A. 10
No, sir.

Q. She was there and took care of the household, was she? A. She took her to her own house. My house was not put to rights.

Q. And took care of your household, too? A. No, she did not take care of mine.

Q. Are you living together in the same house?
A. We are living in the same house. It is an apartment house; I live on the second flight.

Q. You live on one floor and they on the other? 20
A. Yes.

Q. Whose house is it? A. My father-in-law's.

Q. The house belongs to your father-in-law? A.
Yes, sir.

Mr. SMITH—That is all.

Re-direct examination by Mr. Gebhardt.

Q. Did anybody go with you, and if so, who, down to the place where your wife was hurt on that afternoon? 30

THE COURT—He said his father-in-law went.

Mr. GEBHARDT—I did not hear that. All right; that is all then.

MRS. AVA LIGHTCAP, recalled for the plaintiffs.

Direct examination by Mr. Gebhardt.

Q. Mrs. Lightcap, what has happened to you, if anything, in the last year or so, when you were at- 40

MRS. AVA LIGHTCAP, recalled—Cross

tempting to use this leg that was injured? A. Why, when I walked across the kitchen my both feet went down and I came down on my knees; it gave away and—

10 Q. When did this occur? A. Well, it was some time this winter; one evening when I was clearing the supper table.

Q. Has this occurred more than once? A. Twice.

Cross-examination by Mr. Smith.

Q. You came down on your knees? Was there something slippery on the floor? A. No.

Q. There wasn't anything slippery on the floor? A. No.

20 Q. Was there a carpet on the floor? A. No.

Q. Linoleum or oil cloth? A. Oil cloth.

Q. And you came down on your knees? A. Yes.

Q. Both knees gave way? A. No; the lame one.

Q. You got up again, didn't you? A. When I found I could; yes.

Q. You got up right away and walked on again? A. No; not for a while.

Q. What did you do? A. Sat there until it went over.

30 Q. Did that occur since the last term of Court when you were here to Belvidere, or before that? A. Last winter.

Q. Since the last term of Court, the January term? A. No; just this last winter.

Q. Well, that was this last winter, this January term of Court? A. Oh, I don't remember; it was one evening.

Q. You were here in January, the first week in January? A. Yes.

40 Q. Was it since then or before? A. Since then.

ELMER L. BARRIER—Direct

- Q. Both of these happenings were since then?
A. Yes.
- Q. And how long ago was the last one? A. Oh, About a month or two, I guess.
- Q. Was it in February or in January? A. No; it was afterward.
- Q. What time? A. I guess it was about five or six weeks ago. 10
- Q. Five or six weeks ago? A. The latest one was.
- Q. Where did this occur, in the kitchen? A. One did, and one when I was on the pavement.
- Q. What were you doing, getting dinner then?
A. Supper; I was clearing it away.
- Q. Whereabouts on the pavement did this occur?
A. Up on Washington street.
- Q. On the hill? A. Yes. 20
- Q. Had you walked up there on that day? A. No.
- Q. You rode up on a car? A. Yes.
- Q. And walked over from the car? A. No; I was coming out of the house.
- Q. In an automobile? A. I was going in the automobile after I got done paying calls.
- Q. You had ridden there in an automobile, had you? A. Yes.
- Q. And you fell on Washington street as you were coming out of a house there where you had been calling? A. Yes. 30

ELMER L. BARRIER, sworn for the plaintiffs.

Direct examination by Mr. Gebhardt.

- Q. Mr. Barrier, where do you live? A. At Phillipsburg, 2087 Chambers street.
- Q. How long have you lived in Phillipsburg? A. I guess about ten years. 40

ELMER L. BARRIER—Direct

Q. What is your business? A. Carpenter contracting.

Q. Have you been acquainted with the surroundings of the Lehigh Valley freight station at Phillipsburg? A. Yes, sir.

Q. How long? A. Well, about nine years.

10 Q. Do you remember the sixteenth day of February, 1912? A. Yes, sir.

Q. How do you come to remember that day? A. Well, the way I come to remember that certain day was because my wife fell down.

Q. Fell where? A. Right there in front of that freight station, on the side walk.

Q. What time of the day was it? A. Between three-thirty and four o'clock.

20 Mr. SMITH—Well, with that haven't we gone about far enough your Honor? I do not think we ought to go into that case.

Mr. GEBHARDT—No, no. I am simply fixing the date in his mind.

THE COURT—I do not think he can go into the details.

30 Mr. GEBHARDT—I am asking him what time of the day the accident occurred, so as to show the condition at that time, of this sidewalk and the heaps of snow and so on the very day of the accident.

Q. What time were you along by that freight house on that side walk on that day? A. Well, I passed through there about three o'clock and between five and six in the evening.

40 Q. What was the condition of the sidewalk at the time you mentioned? A. Well, they were slippery, icy.

ELMER L. BARRIER—Direct

Q. Do you remember what time of the day it was, Mr. Barrier? A. Yes, sir; it was a nice warm day; that is, take it in the afternoon. It got colder towards night.

Q. What condition was it in at three o'clock in the afternoon? A. Well, it was freezing.

Q. What condition was it in at five? A. Well, then it was froze up. There was no water to be seen on the sidewalk at that time. 10

Q. Just describe more fully, what condition the sidewalk itself was in? A. The sidewalk itself was covered with ice in different spots, not all over.

Q. Is the sidewalk level there? A. No, sir; it is on an incline.

Q. How much of an incline? Can you show the jury with your hand about? A. Well, about I can. I suppose it is about like that (Illustrating). 20

Q. What is there on the inside of the sidewalk toward the freight station? A. Brick, that is, between the sidewalk and the stone wall.

Q. How wide is that brick? How much space is covered with the brick. A. Well, I should judge between eighteen inches and two feet; something like that. That is something I never measured.

Q. Will you state whether that brick pavement or whatever you may call it, is level, or what condition it is in? A. No, sir; it is not level, because the brick—they are up and down; that is the way the bricks are. 30

Q. Is it made in a gutter or not? A. Well, some parts of it is; some parts, of course, isn't.

Q. Is it level or does it slope? A. It slopes.

Q. Which way? A. Well, there is parts there slopes towards the sidewalk, and some parts down the hill further. Probably half way down the hill—it slopes, of course, some to the sidewalk.

Q. What was there around there that day that 40

ELMER L. BARRIER—Cross

you noticed to make this ice that froze on the sidewalk? A. Well, there was snow around there, heaps of it laying around there different places.

Q. What have you to say about the stone wall between the fence and the sidewalk? A. Well, there were heaps of snow there.

10 Q. Just describe what kind of heaps of snow they were? A. They appeared or looked as if they were shoveled there; of course, I would not say they were, because it is a hard matter to tell if you don't see the men do it.

MR. GEBHARDT—You may cross-examine.

Cross-examination by Mr. Smith.

20 Q. The snow laid along on the inside of the fence, too? A. Yes, sir.

Q. It looked as though it might have drifted, didn't it, in some places? A. Well, no; there were paths shoveled on the inside.

Q. You did not see any paths on the inside near where she fell, did you? They were up to the freight house, weren't they? A. Well, yes.

Q. Where this woman fell you did not see any snow on the wall, did you? A. Yes, sir.

30 Q. On this high wall, four or five feet high—

MR. GEBHARDT—Objected to.

Q. — — did you see snow? A. There were some heaps there.

Q. There was a glare of ice there on the wall, wasn't there? A. There was some ice there and some melted.

40 Q. How did you come to notice the snow on the wall? A. Well, I will tell you, Mr. Smith. My wife fell there and—

ELMER L. BARRIER—Cross

Q. No; that is not the answer. How did you come to notice it? A. Because I went there and looked.

Q. You did not bring any case on account of your wife against the company? A. No, sir; I was thinking of it.

Q. What time of the day did your wife fall? A. 10
Between three thirty and four. Of course, I could not be positive about the time.

Q. When did you look at the snow? When she fell, or later in the day? A. Yes, sir; right after.

Q. Snow was all around, wasn't it; all over the ground? A. Apparently all over.

Q. There had been a snow fall recently, hadn't there? A. Yes, sir.

Q. Do you know whether there had been a drifting snow, a snow in a gale, a blizzard, do you recall that? A. No, sir; I couldn't. 20

Q. You don't remember now whether there had been a blizzard shortly afterward? A. I really don't.

Q. A wind storm with snow? A. No, sir.

Q. You don't know how long before this there had been a big snow storm, do you? A. No, sir.

Q. Wasn't there quite a snow storm the day before? A. I don't think there was.

Q. Was there two days before, do you think? A. 30
I couldn't say in regard to that.

Q. Don't you have any idea in your mind about when the last storm was before this? A. No, sir; this is over four years ago, and it is a long time to remember.

Q. It is a long time to remember seeing heaps of snow on the wall, too, isn't it? A. I had that marked in a book at home.

Q. When did you mark that in a book? A. On 40
the sixteenth day of February, 1912.

ELMER L. BARRIER—Cross

Q. Have you got the book here? A. No, sir.

Q. Well, when did you first hear about this case?

A. I never knew anything about it until—I won't say now for sure whether it was that night or the next day.

10 Q. The next day you knew about it? A. I would not say for sure. The next day I knew of it anyway; that I am sure.

Q. Was there any stock in that stock yard at the time? A. No, sir.

Q. You did not see any stock there? A. No, sir; I did not.

Q. Did you observe the fence on top of the wall? A. Yes, sir; there was a fence on the wall.

Q. What part of the place did your wife fall? A. Well, just opposite Wolf's blacksmith shop.

20 Q. Below this place where the plaintiff fell or above it? A. Well, it is about the same spot as near as I could tell.

Q. There was a glare of ice there? A. Yes.

Q. And above it it was free of ice? A. In spots.

Q. How large was this spot of ice there? A. I didn't remember.

Q. Did this snow on the wall extend all the way down the wall? A. No, sir.

30 Q. It did not extend all the way down the wall? A. No, sir.

Q. It did not extend all the way down the wall? A. Well, there may have been some, but I could not say positively about it.

Q. You don't know how the snow came there, do you? A. No, sir; I don't know anything about that.

Q. Wasn't there snow piled up against the fence considerably on the inside? Hadn't it drifted against the fence? A. I would not say there was.

40 Q. And against the gate that entered into the

EUGENE D. SALTER—Direct

cattle yard that was swinging back—that gate was swinging back that day, was it, or was it closed?

A. No, sir; the gate was opened.

Q. You are sure about it, are you? A. Yes.

Q. Now, wasn't there some snow packed against that gate? A. That I could not say.

Q. How near that gate did your wife fall? A. 10
Well, I don't think it was over—as near as I could judge, over three feet from it.

Q. Above or below? A. Well, it was right by the gate, only the gate was up on the wall about three feet back.

Q. Above or below? A. Right at the lower end of the gate.

Q. There wasn't any snow right there by the gate, was there, on the wall? A. Yes, sir.

Q. What? A. Certainly. 20

Q. At the end of the gate do you mean to say there was snow on the wall? A. Yes, sir.

Q. How far above that did you find snow? A. Well, snow all around, above there where they had been shoveling it.

Q. The yard was all full of snow, wasn't it? A. There was snow in the yard, yes, sir.

Q. And on the street—none on the street, was there, except where this was frozen? A. Very little on the sidewalk. 30

Q. The sidewalk had been cleared off, had it not, apparently? A. As far as I know, yes

Q. And the ice came from the water running there? A. Yes, the ice got there from water running on it.

EUGENE D. SALTER, sworn for the plaintiffs.

Direct examination by Mr. Gebhardt.

Q. Mr. Salter, where do you live? A. Phillipsburg. 40

EUGENE D. SALTER—Direct

Q. What is your business? A. Engineer on the Pennsylvania Railroad.

Q. Do you remember hearing of an accident to Mrs. Lightcap in February, 1912? A. I do.

10 Q. When did you hear of it? A. Why, on the same night that she fell, or the same afternoon she fell.

Q. Did you go down past the freight station of the Lehigh Valley that afternoon? A. Yes, sir.

Q. Just tell us what condition the sidewalk is in. A. Well, the sidewalk was very icy, but there wasn't much snow on it. There was a small pile of snow up along the fence, between the fence and the wall, on top of the wall.

20 Q. Now, just describe the character of those heaps of snow. A. Well, they looked to me as though they had knocked their shovels off when they cleaned it, just jarred their shovels on the edge of the wall. That is the way it looked to me.

THE COURT—When they had cleaned what?

THE WITNESS—The sidewalk.

Q. How did you come to remember that particular day? A. How did I come to remember it?

Q. Yes. A. About what?

30 Q. About this particular day, this 16th of February? A. Why, I saw Mr. Lightcap and he told me his wife had fell and hurt herself.

Q. And after that did you go down past the place? A. Yes, I went down by the place.

Q. How much of an incline is it? A. Oh, about like that (illustrating). It slopes toward the street.

Q. What is there between the sidewalk and the stone wall? A. Brick.

40 Q. About how wide is that? A. Oh, I suppose about fifteen or eighteen inches.

EUGENE D. SALTER—Cross

Q. Is that level or does it slope? A. That slopes.

Q. Which way? A. Toward the gutter.

Q. What? A. Toward the street.

Q. How wide is this stone wall toward the fence?

A. Oh, I should judge it is a foot or fourteen inches probably.

10

Cross-examination by Mr. Smith.

Q. Where do you live, Mr. Salter? A. Phillipsburg.

Q. You are a locomotive engineer? A. Yes, sir.

Q. How long have you been a locomotive engineer on the Pennsylvania Railroad? A. I have been a locomotive engineer about twelve years.

Q. You are an intimate friend of Mr. Niece? A. Mr. George Niece?

20

Q. Mr. Asa. A. Yes; I know him.

Q. And did Mr. Lightcap fire for you? A. He did at that time.

Q. When did he tell you his wife was hurt—that day? A. That same afternoon.

Q. Where did you see Mr. Lightcap? A. Well, it was up there somewhere around where Mr. Rhodes' place is, there on Main street.

Q. Somewhere near Mr. Rhodes' Photograph Gallery? A. Yes, somewhere around that neighborhood.

30

Q. Where were you going when you saw him? A. To work.

Q. Going down Mercer street to the round house? A. Yes.

Q. To take your engine? A. Yes.

Q. Did he ask you to look around? A. No, he did not say anything to me.

Q. He did not ask you then to look at the surroundings? A. Not at all; no, sir.

40

EUGENE D. SALTER—Cross

Q. Did he tell you where his wife got hurt. A. No.

Q. He did not tell you at what point she was hurt? A. No; he only said she fell and hurt herself.

Q. He did not tell you where the accident happened? A. No, sir.

Q. Whether it was on the street or where? A. No, sir.

Q. You did not even know it was on the street, did you? A. No, sir.

Q. But you walked down the walk there and observed ice on the pavement? A. I did.

Q. Was it freezing? A. Yes, sir.

Q. It was frozen, was it? A. Yes, sir.

Q. And you say you observed snow on the wall? A. Up on that wall, on the edge of the fence.

Q. How far from the blacksmith shop did you see that—right opposite the blacksmith shop? A. Well, a little this side of it, a little towards Mr. Rhodes.

Q. Was there more than one heap? A. Oh, there was several small heaps there.

Q. How big were they? A. Oh, it looked like a shovel full or something like that.

Q. You think it might have occurred from knocking a shovel? A. That is the way it looked to me.

Q. Do you know how long before that there had been a snow that had to be cleared off the walks? A. I could not tell.

Q. It had been several days, hadn't it? A. I could not tell how long it was.

Q. Did you notice any anywhere else there? A. Over in the yard inside the fence.

Q. Was it in heaps? A. Yes.

Q. Then it looked as if it had been drifted, didn't it? A. Well, in some places it did, and in other

EUGENE D. SALTER—Cross

places it looked as though they had been shoveling paths.

Q. You saw the path that had been shoveled into the freight house door. That was some distance above that? A. Yes.

Q. That was the place you testified to before, the place that a path was shoveled into? A. Yes. 10

Q. That was the only place where you saw any paths had been shoveled, was it? A. I believe it was, yes, sir.

Q. That was the only place you saw any signs of a path having been shoveled? A. Yes.

Q. You say you live in Phillipsburg? A. Yes, sir.

Q. Was there any snow in your front yard that day? A. Not that day.

Q. Why not? A. I didn't have any front yard. 20

Q. Was there any in your back yard? A. I didn't have any back yard.

Q. You did not live in a house with a yard around it? A. Yes, I lived in Mr. Moser's(?) house across from the Pennsylvania Station at that time.

Q. Well, there is a hill back there, isn't there? A. There was snow on the hill, yes.

Q. Did you notice whether it was heaped up or not? A. I did not look particularly back there. 30

Q. How does it come you looked particularly going down this walk? A. Because it was right in front of me. I couldn't help but see it.

Q. Did you ever see snow piles there any other day that you remember? A. I don't remember now, no.

Q. You don't remember any other day? A. No.

Q. But you do remember that day four years ago that snow was piled on the outer edge of that walk?

A. There were little heaps of snow there. 40

EUGENE D. SALTER—Cross

By the Court.

Q. How did you come to notice that particular spot in preference to any other spot in Phillipsburg?

A. Oh, well, I have noticed spots on the streets where the snow was shoveled.

10 Q. What attracted your attention to this particular wall? There was nothing in your mind about the wall then, was there? A. No.

Q. What attracted your attention to it then? A. Well, I just happened to see it there. That is all I can tell you.

By Mr. Smith.

20 Q. When did you first recollect having seen it there? When did it first come to your mind that you had seen the snow there? A. After I went down I first noticed it.

Q. How did you come to remember that it was there on that particular occasion? A. I don't know. I just remember; that is all.

Q. You don't remember seeing snow anywhere else on that particular day, do you? A. I seen it that day.

30 Q. Did you go past there the twenty-second day of February that year? A. I could not tell you whether I did or not. I used to go different ways to work.

Q. Did you see any snow piled against the fence? A. Yes, sir.

Q. Where did you see that? A. That was on the inside.

Q. Well, when you testified before, you said, "This side," the cattle yard. That would be on the outside, wouldn't it?

40 Mr. GEBHARDT—That is not all he testified to, Mr. Smith. That is not fair.

EUGENE D. SALTER—Re-direct

Q. Then you said it was in the yard and then you said it was not in the cattle yard, it was where you drive into the freight house. That is where you saw the snow before. Now, you did not remember seeing any snow on the wall when you were examined here before, did you? A. I was not asked particularly where the snow was before when I went down. 10

Q. Don't you remember that you were asked particularly where it was? Don't you remember this question being asked you: "Where was this snow, in the cattle yard or below the cattle yard that you saw piled against the fence?" And you answered "It was this side of the cattle yard. It was in the yard." And in the next question you were asked "In the cattle yard?" And answered, "No, not in the cattle yard. It was where you drive into the freight house." That was what you were asked before. You did not remember about the snow on the wall then, did you? A. I wasn't asked the question. 20

Q. Who have you been talking to since? A. Nobody at all.

Q. You never said a word to Mr. Gebhardt? A. No.

Q. To Mr. Lightcap? A. No, sir.

Q. Or Mrs. Lightcap? A. No. 30

Q. Or Mr. Barrier? A. No, sir.

Q. Or with any of their agents? A. No, sir.

Q. And yet you remember that four years ago on a certain day you saw snow on the outside of this wall? A. Yes.

Re direct examination by Mr. Gebhardt.

Q. And you looked there after you had heard Mrs. Lightcap had fallen there.

Mr. SMITH—Objected to. 40

EUGENE D. SALTER—Re-cross

HARRY CAIN—Direct

Mr. GEBHARDT—I will withdraw the question.

Q. Was it after you had heard that Mrs. Lightcap had fallen you went down past this place? A. After I heard it. Mr. Lightcap told me and I went right down.

Re-cross examination by Mr. Smith.

Q. And you have sworn you did not know and were not told where she had fallen, whether it was on the street or not. A. I did not know where she had fallen.

HARRY CAIN, sworn for the plaintiffs.

Direct examination by Mr. Gebhardt.

Q. Mr. Cain, what is your business? A. An engineer.

Q. By whom are you employed? A. Pennsylvania Railroad.

Q. Where were you employed the last two or three years? A. The Pennsylvania.

Q. In what section? A. Phillipsburg.

Q. All the time? A. With the exception of the summer I have been at Flemington.

Q. When did you first hear of the accident to Mrs. Lightcap? A. The following day.

Q. Were you down past this place on the day of the accident? A. Yes, sir.

Q. What have you to say about its condition? A. Well, the sidewalk was in a slippery condition.

Q. Did you try it yourself? A. I went that way to work.

Q. What was the result? A. What do you mean "What was the result?"

HARRY CAIN—Cross

Q. In walking down there. A. Well, it was a pretty hard matter to get down.

Q. Did you get down without falling? A. I did at this time I had a couple of bad falls there but that was some time ago.

Mr. SMITH—I object to that and ask to have it stricken out. 10

THE COURT—Yes, that will be stricken out except what took place on that day.

Q. What did you notice about the stone wall on the day of the accident? A. Well, I did not notice anything. There was nothing to call my attention to it, though as I went down there in the neighborhood of six o'clock in the evening to work, then I did not know anything about this case until the following morning when I came home. I went that way the next day to work though. 20

Q. Did you look at the wall then? A. I did.

Q. What condition was it in? A. There was snow on the wall.

Q. Just describe how the snow looked. A. Well, it looked like what had fallen there; there was heaps along the wall; not great big heaps; it looked like as though somebody had been cleaning, or some one had knocked a shovel off there, and it looked a little more than what had fallen on it in different places. 30

Q. You went past in the neighborhood of six o'clock, you say? A. Yes.

Q. What condition was it in then? A. What?

Q. The sidewalk? A. Well, very slippery; very smooth.

Cross-examination by Mr. Smith.

Q. Do you know how long before this accident 40

HARRY CAIN—Cross

there had been a snowfall? A. No, sir; I can't remember.

Q. The sidewalk was cleaned, was it? A. That day I had been sick since Christmas myself, and it was the first I went to work, that evening of the sixteenth.

10 Q. When did you first speak to anybody about this snow that you saw on the wall? A. I have not spoken to anybody about the snow on the wall; I simply looked the ground over when I heard Mrs. Lightcap fell there and saw the condition of it.

Q. Did you hear, before you came home, the next day? A. My wife told me the next morning when I came in, that Mrs. Lightcap had fallen.

Q. Then you went to work the next night? A. Yes.

20 Q. There was snow in the yard? A. Yes.

Q. Don't you remember there had been considerable storm two days before? A. No.

Q. A blowing storm? A. No; not the roughness of the storm; no.

Q. You did not see anybody shoveling snow, did you? A. No, sir.

30 Q. And all you saw on the wall that appeared to be different from what you thought ought to be there was what looked as though somebody had shook a shovel over it? A. Well, that was all.

Q. And that you are not sure of? A. Well, you could see there was more than what had fallen from the clouds.

Q. How could you tell there was no more than what had fallen from the clouds? A. It did not lay level like the rest.

Q. Wasn't it heaped up against the fence all around? A. No; I would have to go inside the yard to see that.

40 Q. You did not notice what was there? A. I

HARRY CAIN—Cross

knew there was snow inside the yard, of course.

Q. You don't know how it fell in front of the freight house, whether it was in heaps or level?

A. No.

Q. As you are going down the walk it is on a level with the entrance into the freight house? A. Yes.

10

Q. You noticed nothing about the snow at that point, whether it was in heaps or level? A. I did not.

Q. How high was the wall where you saw this snow? A. Well, it was part the way down, to nearly the blacksmith shop, this side of that.

Q. How wide is the wall there? A. I should judge four or five feet, and above there—

Q. That is where you saw this snow on the wall? A. And above there toward Main street end was the entrance to the freight house.

20

Q. Is there any fence above there? A. There is a fence on that wall.

Q. Is it a closed fence or open fence? A. It sets in a ways.

Q. Are the boards closed or open? A. About like that I imagine (illustrating).

Q. The boards are close together? A. I think they are a foot apart any way.

Q. Would you think all the fence, the boards, are a foot apart? A. I should think so. That is the cattle pen there.

30

Q. You did not notice whether the boards are close together or apart? A. I imagine they are about a foot apart.

Q. That is your idea of it and yet that is all you noticed about the boards? A. Yes.

40

ADAM MARTIN—Direct

ADAM MARTIN, sworn for the plaintiffs.

Direct examination by Mr. Gebhardt.

Q. Mr. Martin, where do you live? A. 435 South Main street, Phillipsburg.

10 Q. How long have you lived in Phillipsburg? A. About forty-five years.

Q. Do you remember when the stone wall along the front of the Lehigh Valley freight station on Mercer street in Phillipsburg was built? A. I have some recollection of it, yes.

Q. Do you know who built it? A. No, I don't.

Q. I do not mean the particular men who built it. A. I think it was put up by the Lehigh Valley people themselves; I don't think it was contracted out.

20 Q. What had you to do with the surroundings there, if anything? A. I placed the curb and a four foot walk and the gutter.

Q. Whom did you do that for? A. The Lehigh Valley Company.

Q. What is your business now? A. The same as it was then, with the exception of the contracting; I dropped out the contracting some five years ago—mercantile business.

30 Q. When did you first hear of the accident to Mrs. Lightcap? A. I think it was the same evening or the same afternoon; I am not positive, but I think it was the same date.

Q. Did you then, after you heard it, go down to the place? A. No. I think I was up around there somewheres, either at the Valley depot or at the blacksmith shop, somewheres around there, when I heard it first.

40 Q. Did you or not then notice the condition of things about the wall? A. Oh, I have noticed that;

ADAM MARTIN—Direct

I certainly do, because I would not walk on the walk; I would walk in the street.

Q. How old are you? A. Sixty-three.

Q. What did you notice about the stone wall, and the top of the stone wall? A. Well, I noticed there was a lot of snow on the top of the wall and there was also a lot of snow on the walk. It was a poorly cleared sidewalk. 10

Q. Can you describe the snow on top of the wall?

A. It looked to me as if it had been shoveled over from the wall, some of the walk snow had been shoveled over the wall.

Mr. SMITH—I object to that. That is hardly a proper answer, I think.

THE COURT—Yes, strike that out. 20

Q. Leave out the sidewalk and tell how the snow looked to you on the top of the wall. A. Well, it was kind of up and down; it looked as though either it was shoveled there or it might have been put there in some other way; it was not the natural fall of the snow; it looked to me as though it was snow that was taken from some place and put there to get rid of.

Mr. SMITH—I object to that. I do not think that is a proper answer. 30

THE COURT—Yes. I will strike out the last part of it. He has described it as uneven.

Mr. GEBHARDT—Will your Honor allow me an objection or exception to striking that out?

THE COURT—Yes. 40

ADAM MARTIN—Cross

Cross-examination by Mr. Smith.

Q. This was on the high wall that you saw that snow? A. Well, it was on the retaining wall that keeps the earth back from going over the sidewalk.

10 Q. Opposite the blacksmith shop? A. Nearly opposite the blacksmith shop.

Q. It might have drifted there, might it not? A. It might have, but it looked—

Q. It might have drifted there, might it not? A. Well, yes.

Q. And you could not tell from the appearance whether it had drifted there or not, could you? A. Yes, you could tell, a drift is smooth; it has its ups and downs, but this was snow that had been handled.

20 Q. How could you tell it had been handled? A. You could tell from the snow.

Q. You didn't see any one handle it? A. I did not, no; but I know if a man throws snow in the the street or if it drifts there—whether it is natural or unnatural.

Q. You say the sidewalk was poorly cleaned off? A. It was poorly cleaned off.

Q. How long before that? A. It had been that way all winter; I didn't notice before that time.

30 Q. You didn't notice it much that day? A. Not as much before that as—

Q. How long before do you remember there had been a snow? A. It might have been a few days.

Q. Nobody called your attention to this snow on the wall that day? Did anybody speak about it that day? A. No.

Q. You did not hear any one talk about the snow in the case until some time after, did you? A. Not particularly; we are obliged to keep our walks

ADAM MARTIN—Cross

cleaned, and that is what drew my attention to it more than anything else.

Q. Had you been to the freight house that day?

A. Yes, sir; I had been to the freight house, probably.

Q. How did you go, drive? A. No; I used the walk. 10

Q. How did you walk, up Main street? A. Up Main street to Haggerty's and turned.

Q. Then you went down West Mercer? A. Yes.

Q. And walked up Mercer? A. Yes.

Q. And you knew the walk was slippery there, but you took that means of going up? A. The walk lays in that bad condition, and it is almost impossible to walk on that walk if it is not properly cleaned.

Q. It is a steep walk? A. It is steep and slopes toward the street. 20

Q. The street was graded there, was it not? A. Yes.

Q. It was graded about the time you laid that walk, wasn't it? A. No; the street was graded years before that, when I put the curb in.

Q. What? A. The street was graded when the Lehigh Valley Company had that curbed and flagged.

Q. That is, about the time you laid the walk the street was graded? A. Sure; I had to go by the curb, of course. 30

Q. The grading was done by the town? A. The City Engineer gave me the grade.

Q. But it was widened at the same time, wasn't it? A. I think it was improved all around.

Q. That is, where there is the sidewalk there was no street before the grading there; the street was further over; there was no street at all where this sidewalk was prior to that improvement, was 40

ADAM MARTIN Cross

there? A. No; in some places they had to prop the curb up with props, and they came along afterwards.

Q. When you went into the freight house you went up the path into the freight house door, didn't you? A. Usually, yes.

10 Q. Was that shoveled or swept? A. Well, it was the kind of path you generally see.

Q. Do you remember whether it was shoveled or swept that day when you went in there, or did you have to wade into the snow? A. Oh, no.

Q. There was a path there, you think? A. A path.

Q. Running in from the street? A. Yes.

Q. Above the wall? A. Yes.

20 Q. Do you remember how deep the snow was on either side of this that day? A. No; I should judge the snow had been probably seven or eight inches deep.

Q. You think the snow had been probably seven or eight inches deep? A. It might have been.

Q. Don't you remember now anything about the general depth of snow? A. No; I remember there was quite a bunch of snow; I remember that.

30 Q. Was there a good deal of snow in the street? A. Yes; there was quite a bit of snow in the streets, too.

Q. The ground was not bare anywhere, then, as you remember it? A. No; I think it was a little bare on that hill; it always is, you know.

Q. But it was generally quite a fall of snow? A. Yes.

Q. That is your recollection? A. That is what I remember of it.

Q. And you might be mistaken about that, might you not? You are not very sure of it, are you?

40 A. I have a great deal to think of sometimes.

ADAM MARTIN—Cross

Q. If there wasn't any snow there for a couple of weeks you would not think there was a good deal of snow on the ground if there had not been much snow for a couple of weeks? A. I should say the snow before was a pretty good fall of snow; that is my opinion of it.

Q. Do you remember at any other time seeing snow on that wall? A. Yes. 10

Q. When? A. Why, all winter; from the time snow started until it left that had never been properly cleaned.

Q. I mean on the wall, on the stone wall. Did you notice any pile there at any other time? A. Yes; I noticed snow up there.

Q. When did you notice it? A. Different times, heaps of ashes covered with snow, and bunches of snow here and there. 20

Q. I mean on the wall between the fence and the sidewalk. Did you notice any snow on that wall at any other time except this particular day? A. I never saw any snow between the fence and the sidewalk much, because the fence is the only short stretch.

Q. Did you see any that day between the fence and the sidewalk? A. Oh, yes; it had been there most all winter.

Q. On that wall, between the fence and the sidewalk, do you remember seeing any that day? A. Yes; there was snow there. 30

Q. Now, are you sure of that? A. Yes, sir.

Q. Are you testifying from your memory or just from a sort of a conclusion? A. No; I am testifying from my own experience more than anything else.

Q. Are you testifying from your memory? A. Yes.

Q. You are sure you saw snow on the wall out- 40

ADAM MARTIN—Re-direct

side that fence on that particular day; are you willing to testify to that before this jury? A. Well, I have seen it there.

Q. But you don't remember particularly that you saw it there that day, do you, on the sixteenth day of February, 1912? A. No.

10 Q. You can't say that, can you? A. No; I could not fix the date, you know.

Q. You cannot say for certain that you saw any snow on top of the wall on that particular date, can you? A. Well, I don't know as I can, because I always turn out into the street and walk down in the street.

Re-direct examination by Mr. Gebhardt.

20 J. By what do you fix the time you have testified about seeing these heaps of snow on that wall? A. Well, I fix the time most of that winter—

Q. What was there about that particular day? Was it that you heard about Mrs. Lightcap falling?

Mr. SMITH—Objected to.

THE COURT—I will overrule that.

A. Yes, that was what made me take notice.

30 Mr. SMITH—Objected to.

THE COURT—I will strike the answer out, too.

Q. When did you first hear of the accident to Mrs. Lightcap? A. That evening when I came home.

40 Mr. SMITH—I object to these questions. They are all repetitions of what was put before.

ADAM MARTIN—Re-direct

THE COURT—I will rule whenever you object Mr. Smith.

Q. With reference to your hearing about Mrs. Lightcap's accident, when did you go to look at the wall?

Mr. SMITH—I object to that. 10

THE COURT—I will admit that. The objection will be entered. I will overrule the objection.

Mr. SMITH—I take an exception.

THE COURT—Yes.

A. I did not go to look at the wall at all. I had occasion to go there and I naturally took notice of the condition of things. 20

Q. How soon did you see the wall after you heard of Mrs. Lightcap's accident? A. The next day, the next forenoon. I was at the Valley freight house probably two or three times a day during that time.

Q. When was it you saw these heaps of snow that you said were not—

Mr. SMITH—Objected to.

A. I saw them that following day— 30

THE COURT—One moment.

Mr. SMITH—I do not think it is fair to let him go into this thing again. He has questioned him about all these matters and I cross-examined him and the witness has testified he did not have any particular time in view, but it was all winter different times. Now, counsel is 40

ADAM MARTIN—Re-cross

10 simply going over his first examination again, trying to overcome the effects of the cross examination. Now, if you are going to allow it in that way I can go back over it and cross examine again on the same points and I do not know where it will end. It seems to me it is not proper re-direct examination.

THE COURT—I will let the question and answer stand and allow an exception.

Re-cross examination by Mr. Smith.

Q. The place where you saw this snow was over in the yard, over the top of the wall, wasn't it? A. Well, it was at the edge of the yard, at the edge of the wall, say—probably two or three feet back from the edge of the wall.

20

Q. And that is where you saw this snow that you saw there apparently piled two or three feet back from the edge of the wall? A. They would have the cattle gate part open when they haven't any cattle there, and it was shoveled over there I suppose to open or close that gate.

Q. The snow was on the inside of the cattle yard that you saw? A. On the outside.

Q. Was it on the side toward the freight house, outside the cattle yard there? A. It was toward Main street, towards Union Square, yes.

30

Q. That is merely up toward—up nearly in front of the freight house, you saw this snow piled? A. Yes, nearly opposite the blacksmith shop there.

Q. In the cattle yard? A. In the upper end of the cattle yard. There was a gate there and I suppose that snow was placed there in order to open and close this gate.

Q. That was on the inside of the cattle yard?
40 A. No, on the outside.

ANDREW YOUNG—Direct

Q. Outside? A. On the outside of the gate.

Q. Now, which of the gates do you refer to? There are two gates to the cattle yard? A. There is a gate where you drive in and one where you drive out.

Q. Was it the one where you drive in or the other gate? A. It was the one where you drive in going south. 10

Q. Was that where you noticed these piles of snow? A. Yes.

Q. Right by that gate? A. Yes.

Q. On the ground of the Lehigh Valley Railroad Company? A. Yes.

Q. And two or three feet inside the wall? A. Yes, probably that.

ANDREW YOUNG, sworn for the plaintiffs. 20

Direct examination by Mr. Gebhardt.

Q Mr Young, where do you live? A. Phillipsburg.

Q. How long have you lived there? A. Sixteen years this time.

Q. When did you live there before that? A. Well, I was raised in the lower part of Phillipsburg.

Q. Do you remember the date of the accident to Mrs. Lightcap? A. Yes, sir 30

Q. What is the matter, Mr. Young, aren't you feeling well? A. No I am feeling very bad.

Q. Did you go down past the Lehigh Valley Freight Station on the public street on the date of her accident? A. Yes, sir.

Q. What condition was the sidewalk along the Lehigh Valley? A. Very slippery.

Q. Did you observe the condition of the stone wall the top of the stone wall? A. Why, it snowed— 40

ANDREW YOUNG—Direct

Mr. SMITH—Answer the question. I object to that.

THE WITNESS—The snow was—

Mr. SMITH—One minute. The question is did you observe the condition of the top of the stone wall.

10

THE COURT—Simply answer yes or no, Mr. Young.

THE WITNESS—Yes.

Q. What condition was it in. A. I saw the snow.

20

Q. What kind of snow? Did you look at the snow so that you could describe it to the jury? A. Well, I looked at it there at the upper end when I came down. There was snow where they swung the gate open. It looked to me as if they shoveled it back to get the gate open.

Mr. SMITH—I object to that and ask to have that stricken out.

THE COURT—Yes. Strike it out and repeat the question. (Previous question read as follows: “What kind of snow? Did you look at the snow so that you could describe it to the jury?”)

30

THE COURT—Answer that yes or no, whether you did or not.

THE WITNESS—Why, snow on the wall.

Q. Describe that snow on the wall to the jury. A. Well, it seemed to be kind of up and down you know, as if it had been—I don’t know whether it had been thrown there or blew there in heaps like that.

40

MATTHIAS SLATER—Direct

Q. Is the land level from the freight house out to the street? A. It slopes. In where the cattle yard is, where the high wall is, it slopes towards the wall. The ground is higher than the wall.

Mr. GEBHARDT—Cross-examine.

Mr. SMITH—No questions. 10

MATTHIAS SLATER, sworn for the plaintiffs.

Direct examination by Mr. Gebhardt.

Q. What is your business Mr. Salter? A. Conductor on the Pennsylvania Railroad.

Q. How long have you been working for the Pennsylvania Railroad Company? A. Since 1873.

Q. Where do you live? A. On Fayette street.

Q. What town? A. Phillipsburg. 20

Q. Did you know the lay of the land about where the Lehigh Valley freight station is, before the freight station was built? A. It is all filled ground where the freight station is now, all improved ground.

Q. What was there in front, that is, toward the railroad tracks? A. Down this way? (Illustrating.)

Q. How far away from where the freight station is was the canal basin? A. About a hundred yards or a hundred and fifty yards. 30

THE COURT—Senator, you are now dealing with the question of the change of grade and—

Mr. GEBHARDT—Change of the topography of the land.

THE COURT—What is your idea of that since the decision by the Supreme Court on that proposition? 40

ARGUMENT

10 Mr. GEBHARDT—Well, to be perfectly frank, I don't know; in one part of the decision the Court seems to hold that that is proper proof in the case, and the proof being before your Honor you have no power to non-suit, and later in the case they seemed to cast doubt on it; I am offering this testimony because I am not sure that the higher courts would overrule it.

20 THE COURT—You see, I want to get your view about it at this time, because if it is a ground for recovery, of course it ought to be admitted; if it is not a ground of recovery, there is no need putting all that testimony in the case.

Mr. GEBHARDT—Well, I am offering the evidence, your Honor, and it is up to your Honor to make whatever ruling, under objections or not, as your Honor may see fit.

THE COURT—What do you think, Mr. Smith?

30 Mr. SMITH—I had thought after the opening to object to that part of the case on the law, but I was not sure that that was the time to do it, because I could not anticipate what the situation might be that is to be developed with this witness; I assume that the same kind of case is to be put in as was put in before, and if that is so, according to the decision of Judge Bergen, I do not think that would be any ground whatever to recover damages in an action of this kind.

40 THE COURT—Senator, suppose that for the

ARGUMENT

purpose of getting it before the Court for discussion, you make the offer before the Court, of what you intend to prove.

Mr. GEBHARDT—I thought I would finish with this witness, and the question could be raised.

10

THE COURT—If it is not admissible I do not want to take the testimony; suppose you make the motion.

Mr. GEBHARDT—Well, I offer to prove by this witness and twenty others that the defendant company—

Mr. SMITH—The number doesn't make much difference, I guess.

Mr. GEBHARDT—Well, I think I will let it go on record that way; —that the defendant company filled in where the freight yard now is and the freight station and the freight track, and completely changed the course of the surface water, which would otherwise have gone in a southerly direction, and flowed thirty-five or forty feet below into the canal basin—they have changed it so that instead of doing that it goes in an easterly direction, and the railroad company sloped this fill toward this wall in question, so that the water must run down on the sidewalk whenever there was rain or melting snow.

20

30

THE COURT—Let us see if that is exactly what you do intend to prove, Senator; wasn't there proof the last time that these changes were made, changing the

40

ARGUMENT

topography so that the water flowed to the east instead of to the south.

Mr. GEBHARDT—Yes.

10 THE COURT—And that thereafter a street was laid through adjoining the railroad property, so that there was a sidewalk, and then the surface water, or the water which formerly ran south, then ran east over this sidewalk?

Mr. GEBHARDT—Yes; and it ran east from the time this filling was done.

THE COURT—Yes, which was prior to the time of the laying of the sidewalk?

20 Mr. GEBHARDT—When this wall was built there after the sidewalk was built, they kept filling in and sloping it toward the sidewalk.

THE COURT—All that is after the improvement was made?

Mr. GEBHARDT—Yes; they still sloped it toward the sidewalk.

(After argument.)

30 THE COURT—I will overrule the offer and allow an exception on the offer you make.

Mr. SMITH—Then the record stands that an offer was made, objected to by defendant's counsel, and the offer is overruled, and the ruling of the Court is excepted to.

THE COURT—Yes.

40 Mr. GEBHARDT—I have one more offer to make, to show that the Railroad Com-

ASA S. NIECE—Direct

pany so changed the surface and topography of the land as to throw a much greater amount of water over on the sidewalk, down over this wall, and over on the sidewalk, that would have flowed there if the Company had not changed the surface of the land.

10

Mr. SMITH—That is objected to.

Mr. GEBHARDT—That is putting it in a different form, that is all. It meets the very point in this decision.

THE COURT—I will overrule the offer and allow an exception.

Q. Do you remember hearing of an accident to Mrs. Lightcap? A. I only read it in the paper the next day afterward.

20

Q. Did you go by this place the next day afterward? A. No, sir.

ASA S. NIECE, sworn for the plaintiffs.

Mr. GEBHARDT—I want to offer this witness who is on the stand for the purpose of showing the Railroad Company changed the surface of the land, the level of the land, and threw water over on the public sidewalk on Mercer street and thus created a public nuisance.

30

THE COURT—You better see what you can prove. I do not want to take an offer on that. The question of a public nuisance is another matter.

Mr. GEBHARDT—Then I will have to recall the witness. That was a point I meant to make when the witness was on the

40

ASA S. NIECE—Direct

stand, to show it made it dangerous for the public to travel. Suppose instead of "Public nuisance" we change it and say that it made the sidewalk dangerous for public travel.

10 THE COURT—It all bears, Senator, on how it happened, how the ice formed on the sidewalk. What caused it nobody may be able to tell.

Mr. GEBHARDT—The offer was to show that the change in the surface of the land threw the water over on the sidewalk.

THE COURT—That you already have in.

20 Mr. GEBHARDT—And thus made it dangerous for public travel. It was a safe sidewalk, but to cover it with ice, of course, made it dangerous.

30 THE COURT—Well, we have now, as I understand it, on the main question, that there was a sheet of ice or a slippery spot on this sidewalk upon which Mrs. Lightcap fell; and you also have an offer to show what the topography of the plan was before and after, and then the natural result from the change of the topography, plus the water and weather conditions. But I could not take the offer that you offered to prove, that it was a public nuisance.

Mr. GEBHARDT—Leave out, "Public nuisance," and make it simply, "dangerous for the public to travel."

40 THE COURT—Do you mean anything further than on the question of the sheet of ice on the sidewalk?

ASA S. NIECE—Direct

Mr. GEBHARDT—I think we showed by one witness that the land sloped from the freight station clear on down—

THE COURT—By two witnesses. You showed this street is in the nature of a hill, and some other witnesses testify it slopes from the wall out to the street. 10

Mr. GEBHARDT—And from the freight house out to the wall?

THE COURT—Yes.

Mr. GEBHARDT—Maybe that is sufficient.

Direct examination by Mr. Gebhardt.

Q. Where do you live? A. Phillipsburg.

Q. What is your business? A. Locomotive engineer. 20

Q. How are you related to Harry Lightcap and Ava Lightcap? A. Ava Lightcap is my daughter.

Q. Do you remember the day of the accident when her knee cap was broken? A. Yes, sir.

Q. After she was brought home what did you do? A. I was in bed when she was brought home.

Q. What did you do when she was brought home? A. I looked at her knee.

Q. Is that all you did? A. No, that ain't all. 30

THE COURT—Well, tell us.

THE WITNESS—I went down and looked at the place where she fell, after we took care of her.

Q. What did you go down there for? A. Well, we went down to see the condition of the street, although I knew it already. I walked down with Harry. 40

ASA S. NIECE—Direct

Q. To see what condition the surroundings were in? A. Yes. I knew it before I went there.

Q. Did you look? A. I did.

Q. To what extent did you look? How carefully did you look? A. Well, I looked carefully enough to know the condition of it very well.

10 Q. What was the condition of the sidewalk? A. Very slippery, icy.

Q. Icy? A. Yes, sir.

Q. What time of day was it when you got down there? A. Around four o'clock as near as I can tell you. I don't know exactly.

Q. Did you look to see where this ice came from? A. Yes, sir.

Q. What did you see? A. I saw frozen ice down over the wall and out over the street toward the gutter, and heaps of snow on the top and at the upper end of the wall and in the cattle pen and down in front of the freight station also.

Q. Now, we will keep our attention on the heaps of snow on top of the wall. Was that outside of the fence toward the street or where? A. Outside.

Q. Just describe these heaps to the jury—on top of the wall. How did they look? A. Well, they looked as if they had been shoveled—

30 Mr. SMITH—I object to that and ask it be stricken out.

THE COURT—Yes. Just state their appearance, Mr. Niece.

THE WITNESS—Well, it looked as if there had been shoveled up—

Mr. SMITH—I object.

THE COURT—Just tell what the appearance was.

40 THE WITNESS—Well, it looked like snow

ASA S. NIECE—Cross

that had been gathered up and thrown into a pile to get it out of the way—all mused rather.

Q. Where was this ice running down over the wall to the sidewalk with reference to those heaps of snow? A. Right under the heaps of snow. 10

Cross-examination by Mr. Smith.

Q. When did you see that, the next morning after the accident? A. I saw it the same day.

Q. You saw it the same day? A. Yes, sir.

Q. That was four years ago last February? A. Somewheres around there, yes, sir, on the sixteenth of February, 1912, if I remember right.

Q. You went down to look at the sidewalk, didn't you? Is that what you went for, to look at the sidewalk? A. I went down to see where she fell. 20

Q. Yes, but you knew she fell on the sidewalk? A. I did after they showed me where she fell.

Q. And it was alongside the wall? A. Yes, sir.

Q. How high was the wall at that point? A. Well, five or six feet; somewhere around there; I couldn't tell you; I did not measure it.

Q. You walked along on the sidewalk? A. Yes, sir

Q. Did you notice any fence on the top of the wall? A. Oh, yes. 30

Q. What sort of a fence is it—or was it? A. Well, it is a post and board fence, posts in the ground and boards or slats three.

Q. How far from the edge of the wall? A. Oh, about fifteen or eighteen inches.

Q. From the outer edge of the wall? A. Yes.

Q. Then it was along the narrow edge of the wall, what you saw? A. (Illustrating.) Oh, just 40

the same as that. This was the wall and the posts were right here.

Q. What was that made of, that fence? A. Lumber.

Q. Boards? A. Boards, scantlings and—

Q. About how wide are those boards? A. Oh, some are old boards.

Q. Were they thick or thin boards? A. They are inch boards about.

Q. Were any of them down as low as on the top of the wall? A. Some of them are right on the ground, yes.

Q. And is there any space between them? A. Well, at some places.

Q. At this point where you were told your daughter fell did you notice whether it was a tight board fence or whether there were spaces between the boards. A. Well, you could not call it a tight board fence.

Q. Did you notice at that time whether it was a tight board fence or whether there were spaces between the boards? A. No, I don't think it was a tight board fence—I know it ain't.

Q. Did you notice at that time? A. I did not look just at that time.

Q. The board fence was right along the top of the wall? A. Yes; it is there, yes.

Q. But you don't know whether it was a tight board fence at that point or not? A. Well, you might call it a tight board fence, but there were some cracks.

Q. You don't remember whether there were some cracks or whether there was a difference of several inches between the boards? A. Oh, it might be an inch.

Q. Aren't the boards five or six inches at that point? A. I don't know exactly. I didn't measure.

ASA S. NIECE—Cross

Q. Did you notice whether there was any snow? Did you look through between the boards to see whether there was any snow over in the yard at that time? A. No, but I seen—

Q. You did not look through the boards, did you? A. No

Q. Did you go up in the yard? A. Not that evening. 10

Q. How many of those piles or heaps of snow were there along on the wall? A. I did not count them.

Q. Were there more than one? A. Yes.

Q. A dozen? A. Well, I couldn't tell you just how many. I did not count them.

Q. Do you know how long before that there had been a snow fall? A. No, sir; I do not.

Q. Do you know whether there was any snow fell soon after? A. I do not remember. 20

Q. Did it snow that night? A. No, sir.

Q. You don't think it did? A. No, sir; it did not.

Q. Did it snow the next day? A. No, sir.

Q. You are out on the road every day as an engineer? A. Pretty nearly every day—or night I was then.

Q. Yes. Did you keep a record of the snows? A. No, sir. 30

Q. And you don't remember those things? A. No, sir; I remember there was snow at that time, but I did not keep any record.

Q. Was there snow out in the street? A. Yes.

Q. How deep was it? A. On that hill the snow was pretty well worn out.

Q. How deep was it out in the street? A. I don't think it was deep at all.

Q. Was there any snow over around the blacksmith shop? A. I wasn't over there. 40

ASA S. NIECE—Cross

Q. Well, that is just across a very narrow street, isn't it? A. I did not go clear down the hill.

Q. This accident occurred opposite the blacksmith shop? A. Somewhere around there.

Q. Below the lower gate in the cattle yard? Was it below that? A. I think it was somewhere between the two gates; there is two sets of gates.

Q. There are three sets of gates, aren't there? A. I don't know whether it is two or three.

Q. There is one going into the cattle yard and one to go out at the further end? A. I don't know whether it is two or three sets now.

Q. You did not see anyone put any snow on the wall, did you? A. No.

Q. How far from the fence was the snow heaped that you saw? A. Do you mean on the outside or inside?

Q. Outside A. Right up against the fence.

Q. How far on the inside? A. Well, around the yard in different places; pretty close to the fence in some places.

Q. There had been some wind, hadn't there? A. I don't remember just about the wind blowing; I suppose there had been; I don't know.

Q. Is there any other date you can recollect seeing heaps of snow along the wall—on the top of the wall? A. Yes, sir.

Q. You saw them some other day? A. Yes.

Q. Now, will you tell us what day? A. No; I could not tell any particular day.

Q. You could not tell me the date, could you? A. No, sir; I don't keep a record of those things.

Q. You could not tell me whether you ever saw at any other time heaps of snow along the top of that wall? A. I don't know as I took particular notice any other time but that time; I was looking around and saw that water in there, and so on, and it did

WILLIAM RHODES—Direct

not take us long to find out when we examined it.

Q. You were a witness here before, when this case was tried, weren't you? A. I think so.

Q. And you testified then that you saw some snow there in the yard, didn't you? A. I guess so; I believe I did.

Q. You said there was snow on the top of the wall outside of the fence, inside and outside. A. Yes. 10

Q. You did not say there were heaps of snow on top of the wall outside? A. I don't remember.

Q. You have talked a good deal about the case since then, haven't you? A. No, sir; I have not.

Q. You have talked with your family about it, haven't you? A. I may have and may have not. I have other things on my mind besides this case.

Q. But you have talked about the heaps of snow, haven't you? A. I have talked to you about it. 20

Q. You have not talked to anyone else, have you? A. No, I don't want to.

Q. You are employed on the Pennsylvania Railroad, too? A. Yes, sir.

Q. A locomotive engineer? A. Yes, sir.

Q. And you live in the same house with your daughter and her husband; that is, in the same building? A. I live under the same roof. 30

WILLIAM RHODES, sworn for the plaintiffs.

Direct examination by Mr. Gebhardt.

Q. What is your business, Mr. Rhodes? A. Photographer.

Q. Where do you run your business? A. South Main street, Phillipsburg.

Q. Are you familiar with the grounds around the Lehigh Valley freight station on Mercer street? A. Yes. 40

WILLIAM RHODES—Direct

Q. Have you taken some photographs of the locality there? A. Yes.

Q. I show you a photograph that will be marked

Marked P 1 for identification.

10 Q. —marked P 1 for identification and ask you whether you took that photograph? A. Yes.

Q. Does it correctly show that part of the surroundings there at the station? A. Yes.

Q. What part of it does it show? A. Well, it shows the upper end of the fence or the stone wall; the starting of it.

Q. Now, what is the character of the starting of the stone wall? Can you show just exactly where the stone wall starts? A. Yes.

20 Q. How high was that stone wall where it started? A. Well, there wasn't anything where it started.

Q. Is the stone wall about level, the top of it? A. The top is level with the pavement.

Q. As you go down the street— A. Is the top of the stone wall level?

Q. Yes. A. Yes, as you go down.

Q. Does the sidewalk descend? A. The sidewalk descends.

30 Q. What else is shown on that picture besides the stone wall and the sidewalk? A. Well, the fence and the Lehigh Valley freight yard.

Q. Does that correctly show the character of that fence? A. Yes.

Q. I show you another photograph that will be marked—

Marked P 2 for identification.

40 Q. —marked P 2 for identification, and ask you whether you took that photograph? A. Yes.

WILLIAM RHODES—Cross

Q. And what it shows? A. It shows the stone wall, the fence and the pavement.

Q. What part of the stone wall does it show? A. That is about half way down from the starting point.

Q. Where it begins at nothing, you mean? A. Yes.

10

Q. What does that show beside the sidewalk and wall? A. Well, part of the fence.

Q. Do you remember where the lower board in that fence was? A. How many feet from the walk?

Q. No, where it was, with reference to the wall. Was it down on it or up a ways from it, or what?

Mr. SMITH—Doesn't the photograph show?

Mr. GEBHARDT—You might say the photograph deceives you.

20

A. Well, the fence is a little higher than the stone wall. I suppose the lower board would be about six inches.

Q. How much experience as a photographer have you had, Mr. Rhodes? A. Well, twenty years.

Mr. SMITH—We admit he is qualified.

Cross examination by Mr. Smith.

30

Q. It is a very difficult place to get a set-up there? A. Yes.

Q. And you had difficulty in taking a large picture on that account? A. Yes.

Q. I show you P 1 for identification. That shows the upper end of the sidewalk and fence? A. Yes.

Q. And the point where the wall begins? A. Yes.

Q. Does that correctly show the grade, the decline of the grade? A. Yes.

40

WILLIAM RHODES—Cross

Q. And the sidewalk? A. Yes.

Q. Where did you set up your instrument when you took that? A. The other side of the street.

Q. About how far away? A. About twenty-five feet.

10 Q. Now, on the upper side of this fence, back, are steps. What are those steps? A. They go in the Lehigh Valley freight office.

Q. Is there sort of a pathway or walk in there? A. Yes.

Q. And above that is there a driveway? A. Yes.

Q. Quite a wide driveway? A. Yes.

Q. Where they drive in? A. Yes.

Q. But this path you speak of is for pedestrians or foot passengers? A. Yes.

20 Q. About how high is this wall shown on the photograph P 1 at the lower end? A. About a foot.

Q. And the photograph P 2, about how high is the wall there? A. About four feet.

Q. Your photograph does not show the full height, does it? A. No, not that.

Q. That is because the range of vision was not large enough? A. Yes, sir.

Q. And where did you set up your instrument when you took P 2? A. Well, about the same distance, twenty-five feet from the wall.

30 Q. And did you raise your camera higher in order to get it? A. Yes, raised the camera.

Q. So as to show the grade about as it is? A. Yes.

Q. When were these taken? A. I could not say.

Q. What season of the year? A. Well, that I could not tell you either. It is quite a while ago.

Q. There could not have been snow on the ground or it would show it? A. Yes. There was no snow.

40 Mr. GEBHARDT—I offer the photograph in evidence.

ALBERT M. YEISLEY—Direct

Photographs heretofore marked P 1 for identification and P 2 for identification are marked respectively, Exhibit P 1 and Exhibit P 2.

Mr. GEBHARDT—We rest.

Mr. SMITH—I submit there is no evidence here for the jury to pass upon in this case. I cannot see where there is a particle of evidence which shows any snow was shoveled upon this wall which melted and ran down on the sidewalk from off the premises—not a particle of evidence. There are some little presumptions, attempts to show appearances, which were generally overruled, but there is no positive evidence whatever to show anybody ever put a spoonful of snow upon that wall, and if it was put there, there is no evidence to show it melted and ran down over the spot where this woman fell, from these heaps which they say looked like snow there. There is no evidence the heaps were there, and there is no evidence to show it came from the melting of the snow which they say was on the wall and caused the accident. I ask the Court to direct a judgment of non-suit.

THE COURT—I think there is a jury question, Mr. Smith. I will deny the motion and note an exception.

ALBERT M. YEISLEY, sworn for the defendant.

Direct examination by Mr. Smith.

Q. Mr. Yeisley, where do you live? A. 16 Reese's Court, Phillipsburg.

Q. And you are employed by the Lehigh Valley Railroad Company? A. Yes, sir.

Q. In what capacity? A. Freight agent.

Q. For how long? A. I have been freight agent since October 6th, 1905.

ALBERT M. YEISLEY—Direct

Q. What property do you have control of? A. I have the entire territory around Phillipsburg.

Q. That is, the freight? A. Yes, sir.

Q. And you are located at the freight house? A. Yes, sir.

Q. Near the place where this accident occurred?

10 A. Yes, sir.

Q. You have the care of the property? A. Yes, sir.

Q. Do you remember the accident? A. Yes, sir.

Q. How did you know of it? A. Well, after it happened my mother called me on the telephone, about five o'clock, and told me that Mrs. Lightcap had fallen and broken her kneecap; and Mr. Lightcap came down the following morning—

20 Q. You got information from them about the accident? A. Yes, sir.

Q. Do you keep any weather records? A. Yes, sir.

Q. And did you at that time? A. Yes, sir.

Q. What weather records did you keep? A. A weather record of the condition of the weather three times a day.

Q. What data did you take? A. Well, we take the condition at eight, twelve and five.

30 Q. What particular data? A. Well, whether it is cloudy, clear or stormy, and what kind of storm it is, whether raining or snowing.

Q. Temperature also? A. Yes.

Q. Have you the records of the sixteenth day of February, 1912? A. Yes, sir.

Q. Have you them with you? A. Yes, sir.

Q. Will you refer to the memorandum that you made then? A. Yes, sir.

Q. And you made a memorandum at that time, did you? A. Well, not I myself; my clerks.

ALBERT M. YEISLEY—Direct

Mr. GEBHARDT—I object to its being produced then.

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

Mr. GEBHARDT—I still object to it.

THE COURT—Why, Senator, if it was made under his direction. 10

Mr. GEBHARDT—Because he could have brought the man here who made it and not himself. It is not like a book account. That is another matter.

THE COURT—Why is not that so Mr. Smith? This is for the purpose of refreshing his recollection?

Mr. SMITH—To show what the weather was at that time. 20

THE COURT—You are not going to offer it?

Mr. SMITH—No.

THE COURT—How can they refresh his recollection?

Q. Did you make any of them? A. No, sir; they were made by the clerks.

Q. Have you anything to show what clerk made it at that time? A. Well, I don't think— 30

THE COURT—Can you tell it by the writing?

Mr. SMITH—Perhaps he is here.

THE WITNESS—No, sir; he is not here. I think it was made by a man named Harms.

Q. He is working with you now? A. Yes, sir.

Q. He is there in the office? A. Yes. 40

ALBERT M. YEISLEY—Direct

Mr. SMITH—We can probably get him here to-morrow.

Q. What was the custom of the company in regard to cleaning its sidewalks at that time? A. Well, the sidewalks are cleaned as soon as there is
10 a snow.

Q. Who does the cleaning? A. Well, at that time, a party by the name of Russel Pfister, and Sharp Shimer did the cleaning.

Q. Do you know whether they ever threw any snow on the sidewalk off of this property?

Mr. GEBHARDT—I object.

THE COURT—Answer yes or no.

20 A. No.

Q. You don't know that, or— A. No; they did not.

Mr. GEBHARDT—I object to that and move to strike it out.

THE COURT—Yes, I will strike it out.

Q. The question is, do you know whether they did or not? A. I know; yes, sir.

Q. Now, did they, when they cleaned these walks,
30 place any of the snow on the bank above the walk?

Mr. GEBHARDT—Objected to.

THE COURT—Why?

Mr. GEBHARDT—He don't know what they did.

THE COURT—He swears he knows. I will admit it, subject to your cross-examination.

40

Mr. GEBHARDT—I ask an exception.

ALBERT M. YEISLEY—Cross

THE COURT—Well, Senator, on what ground
—when the witness says he knows.

Mr. GEBHARDT—On the ground it is evident
he does not know and he could not know.

THE COURT—I assume he saw it, when he
swears to it. I will admit it and allow an
exception. 10

Q. (Last question read.) A. No, sir.

Q. Where did they put the snow that they cleaned
off the sidewalk? A. In the street.

Q. How long have you been in the employ of the
railroad company? A. Since 1889—October 1st,
1889.

Q. And have been there at the freight office all
that time? A. No, sir. I entered the service of
the freight agent July 1st, 1891. 20

Q. Since then you have been at the freight house?
A. Yes, sir.

Cross-examination by Mr. Gebhardt.

Q. Was it your business to shovel this snow? A.
No, sir.

Q. What was your business? A. It is my busi-
ness to see that the work is done.

Q. Are you the freight agent? A. Yes, sir. 30

Q. And have control of the whole town of Phil-
lipsburg? A. The railroad interests in the town of
Phillipsburg, yes, sir.

Q. Now, just tell me who did the shoveling of the
snow in February, 1912? A. If the snow was to be
shoveled, Russel Pfister and Sharp Shimer.

Q. Russell P-f-i-s-t-e-r? A. Yes, sir.

Q. And Sharp Shimer? A. Yes, sir.

Q. Are they here? A. Yes, sir.

Q. Now, you mean to testify there wasn't any 40

ALBERT M. YEISLEY—Cross

snow on top of this wall? A. No, I won't say that.

Q. Do you mean to testify there were not any heaps of snow on the top of this wall? A. I won't say that.

10 Q. Do you mean to testify there were no heaps on top of this stone wall, that were not put there by anybody? Do you mean to testify there were no heaps of snow on top of that stone wall on the sixteenth of February, 1912, that were put there arti-

cially? A. Yes, sir.

Q. Do you mean to say that? A. Yes, sir; they were put there artificially.

Q. You say they were? A. No, not artificially, no, sir; they were not; no, sir.

20 Q. You say there was snow on the top of this wall on the sixteenth of February? A. I won't say that. There might have been snow there on the sixteenth of February.

Q. Did you look to see? A. I did; yes, sir.

Q. Why don't you know whether it was there or not? A. Well, there were some little heaps there.

Q. On this stone wall? A. Yes, sir.

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

Q. And you are sure nobody put them there? A. Yes, sir.

30 Q. Just explain to the jury how you are sure about it? A. Because they knew it was against the instructions, and any one throwing snow off the sidewalk on that wall would be dismissed.

Q. Who gave them that instruction? A. Myself.

Q. When? A. Whenever there is any snow—

Q. When did you give these men this instruction, not to throw snow on this stone wall? A. Whenever they had work to do.

40 Q. Every time there was a snow you told them that? A. Not every time; no, sir.

ALBERT M. YEISLEY—Cross

Q. Did you ever do it? A. Yes.

Q. When? A. I can't tell you just when, but on different occasions.

Q. Ten years ago? A. No, sir.

Q. Five years ago? A. Well, probably five years ago.

Q. Probably? A. Yes. 10

Q. We want it as near as we can get it; what did you say to them when you told them that, not to throw snow on the top of the wall? A. I told them to throw it out in the street; I said there was no snow to be thrown on the wall or in the cattle yard.

Q. Just tell us what you said to them? A. To throw it off the sidewalk on the street and not to throw any in the yards.

Q. Did you tell them not to throw it on top of this stone wall? A. Well, not just exactly on top of the stone wall. 20

Q. The sixteenth of February, is there anything special about that day that caused you to remember it? A. The occasion of Mrs. Lightcap having an accident.

Q. That is a good reason for having you remember it? A. Yes.

Q. And it would be a good reason for anybody? A. Yes. 30

Q. If they heard of the accident and went there and took particular notice, that would be good reason for remembering it, if they heard of the accident? A. Yes.

Q. And it may well be they remember that particular day and not any other, because there was an accident on that day?

Mr. SMITH—I object to that; it is not cross-examination; that is only an argument. 40

ALBERT M. YEISLEY—Cross

Mr. GEBHARDT—All right, Mr. Smith.

Q. Now, tell us what you heard about the accident? A. Well, about five o'clock in the evening my mother called me up on the telephone from home telling me Mrs. Lightcap had fallen on the sidewalk; telling me she had broken her knee

10 Q. Do you know why she called you up? A. I suppose because they were neighbors; next door neighbors to us.

Q. Didn't the fact you were station agent and had charge of the property there on which an accident occurred have anything to do with calling you up? A. That might be the reason—

Mr. SMITH—He does not know.

20 Mr. GEBHARDT—Let the witness testify, please; will the stenographer kindly read the question?

(Last question read.)

THE WITNESS—Well, in the first place she called me up and asked me if I had heard of it, and I told her I had not; and she told me what had happened.

30 Q. And then what did you do and say about it? A. Why, I seen Mr. Lightcap the next morning, or had word given to him that he should come down and give me a report so I could make my report to the officials.

Q. Did you go down the night of the accident and see the condition of it? A. Yes, sir; I walked out and seen the condition of the sidewalk.

Q. How was it? A. There was some ice on it.

40 Q. You did not do much walking on it, did you? A. I did not have occasion to walk on it.

ALBERT M. YEISLEY—Re-direct

Q. Did you look to see where that frozen water came from, the ice? A. Yes.

Q. Where did it come from? A. From the retaining wall and the cattle yard.

Q. And from these heaps of snow on this wall? A. Well, probably it did; yes.

Q. And it ran down over the wall and froze? A. 10
Yes.

Q. Part of it was frozen right up to the face of the wall? A. Yes.

Q. And down over the brick pavement? A. Yes.

Q. And then out over the sidewalk? A. Yes, sir.

Q. And that was the condition was it? A. Yes, sir.

Re-direct examination by Mr. Smith.

20

Q. This snow on the wall had the appearance of being drifted there, had it not? A. Yes, sir.

Mr. GEBHARDT—I object to that as leading.

THE COURT—Yes.

Mr. GEBHARDT—I move to strike it out.

THE COURT—Yes. It will be stricken out.

Q. Well, how did you suppose it came there, 30
from its appearance? A. Why, from drifting.

Q. Were there any other heaps of snow around there in the yard? A. Yes; a few in the yard.

Q. What part of the yard? A. In the cattle yard between the two gates.

Q. How did they come there? A. Drifted.

Q. Was there any occasion or reason for throwing any snow on that wall?

Mr. GEBHARDT—Objected to.

40

ALBERT M. YEISLEY—Re-cross

A. No, sir; none whatever.

THE COURT—I will admit that.

Re cross examination by Mr. Gebhardt.

Q. You saw the snow drifts along this fence?

10 A. Yes, sir.

Q. How close did those gates go to the ground?

A. The one end gate, where the snow was in, there is about twelve or fourteen inches above the ground, but they are never shut, only when there are cattle in the yard; they are always kept open.

Q. When the snow is deep, when you open the gate wide open, it shoves the snow up against the fence on the top of the wall? A. No, sir.

20 Q. What becomes of it? A. That would be pushed out toward the company's property, towards the freight house.

Q. Just look at that photograph, Mr. Yeisley?

A. Yes.

Q. Is not that the spot where the hinges of the gate are, right on that post? A. No, sir.

Q. What is that which looks like a double fence there? A. That is the corner of the fence.

Q. Isn't the gate right up against the fence there? A. No, sir; it is about fourteen feet from that corner.

30 Q. Doesn't it swing up against the fence that you see in the picture? A. It swings up against part of it.

Mr. SMITH—Which of those pictures are you showing him?

Mr. GEBHARDT—P 1.

Mr. SMITH—This shows it at the upper gate?

Mr. GEBHARDT—That is where the melting
40 occurred.

ALBERT M. YEISLEY—Re-cross

Mr. SMITH—Oh, no. There is no evidence of that, not a particle.

Mr. GEBHARDT—Why, certainly.

Q. Now, you said this snow was drifted there on this stone wall? A. Yes, sir.

Q. When did you first notice that was drifted there? A. Whenever there is a snow I notice that it drifts there, that is, if it blows. 10

Q. Do you have it cleaned off? A. I have never had it cleaned off, no, sir.

Q. And you knew when it melted it ran down over the sidewalk? A. Yes, sir.

Q. And still you did not have it cleaned? A. No, sir.

By Mr. Smith.

Q. And this gate you say is fourteen feet from that corner post, that upper gate? A. About fourteen feet, yes, sir. 20

Q. Then there is a gate some distance below, isn't there? A. Yes, sir.

Q. And when this gate is open there, which is shown on this picture P 1, which way does it swing, back against the freight house, or back against this end of the fence? A. There is a double gate there. One swings towards the fence and one toward the freight house. This one is closed at the present time. 30

Q. When this was taken one of the gates was closed? A. Yes.

Q. And the other—A. Was swinging towards the freight house.

Q. That is P 1? A. Yes.

RUSSEL PFISTER—Direct

By Mr. Gebhardt.

Q. The lower board of this fence, how close does it come to the ground; it touches the wall.

Q. And that makes a good place to catch snow, doesn't it, when it blows? A. It catches the snow, yes, sir.

10 Q. You had notified the railroad company about this dangerous condition there a number of times, hadn't you? A. About the walk?

Q. Yes, A. Yes, sir.

Q. And they did nothing to remedy it? A. No, sir.

Q. There was snow on the ground on the sixteenth of February, 1912? A. There was some, yes, sir.

20 Q. You do remember that? A. Yes, sir.

Q. It was your duty as an employee of the railroad company to see that this property was kept in good condition; that it, that the men kept it in good condition and properly shovelled the snow, wasn't it? A. Yes, sir.

RUSSEL PFISTER, sworn for the defendant.

Direct examination by Mr. Smith.

30 Q. Mr. Pfister, where do you live? A. Phillipsburg.

Q. Where do you work? A. Lehigh Valley freight house.

Q. How long have you been working there? A. Between six and seven years.

Q. Were you working there in 1912, in February? A. Yes, sir.

40 Q. What have you to do with cleaning the sidewalks, or what had you at that time? A. Any

RUSSEL PFISTER—Direct

time it snowed, and when it was done snowing I would clean the walk off.

Q. Did anybody assist you? A. Yes, Mr. Shimer.

Q. Under whose orders were you? A. Mr. Yeisley.

Q. Do you remember the accident? A. No, sir.

Q. Did you hear anything about this accident of Mrs. Lightcap's at the time? A. No, sir. 10

Q. During that winter did you clean the walks of snow? A. Yes.

Q. How long after a snowfall would you go and clean them? A. Right after it was done snowing.

Q. Where did you deposit the snow? A. Out in the street.

Q. Did you ever throw any up on the wall at all? A. No, sir.

Q. Or on the property? A. No, sir. 20

Q. Did you ever see snow on the wall? A. No, sir.

Q. I mean lying there? Did you ever see any snow lying on top of the wall? A. Yes.

Q. Did you ever disturb it in any way? A. No, sir.

Q. Did you ever shake your shovel there or deposit it there by cleaning the shovel on the wall? A. No, sir.

Q. When you clean this snow would you be generally together, you and Mr. Shimer? When you looked after the walks did you go together to do it? A. Yes, sir. 30

Q. And what kind of a shovel did you use? A. A long handled shovel.

Q. A regular snow shovel? A. Yes, sir.

Q. Made for the purpose, were they? A. Yes, sir.

Q. Did you use any broom? A. Yes, sir. 40

RUSSEL PFISTER—Cross

Q. You swept it off after you cleaned the snow off? A. Yes.

Mr. GEBHARDT—The proper way would be to say what did he use to clean it off. That is so leading.

10

Q. How far did you clean with a shovel, how far down did you clean? A. From Rhodes all the way down to where the wall is at this end of the fence there.

Q. All the way in front of the property? A. Yes, sir.

Q. Then with the broom how far did you go? A. All the way the same distance.

20

Cross-examination by Mr. Gebhardt.

Q. You knew nothing about the accident to Mrs. Lightcap? A. No, sir.

Q. Until considerable time afterwards? A. Yes.

Q. Do you remember what the conditions around there were on the day of the accident? A. No, sir.

Q. You don't remember anything about it? A. No, sir.

Q. It was your custom sometime to go down there and throw salt on the sidewalk where this accident occurred, wasn't it? A. No, sir.

30

Q. You did it sometimes, didn't you? A. Sometimes I did, yes.

Q. What did you do it for? A. I was told to.

Q. Who told you to? A. Mr. Yeisley.

Q. Did you know the purpose of doing it? A. No, sir.

Q. You did not? A. No, sir.

Q. Do you suppose it was put on there for fun? A. I guess not.

40

RUSSEL PFISTER—Re-direct

Q You don't know what it was put there for?
A. No, sir.

Q. You don't know why you were told to put it there? A. No.

Q. There was always ice there when you put salt there? A. At times.

Q. Did you put salt on the sidewalk when there wasn't any ice on the sidewalk? A. No. 10

Q. Then there was always ice on the sidewalk when you put the salt there, was there? A. Yes, sir.

Q. There was always ice on the sidewalk when you put the salt there? A. At times there was, yes.

Q. Were there any times there wasn't ice when you put salt on? A. Yes.

Q. You have often seen snow on this wall? A. Yes. 20

Q That is between the fence and the outer edge of the wall? A. Yes, sir.

Q. When that melts what becomes of the water? A. Runs down the wall.

Q. Then where does it run after it leaves the wall? A. Along the pavement.

Q. It don't run on the sidewalk? A. No, sir.

Q. Not a bit of it? A. No, sir.

Q. Are you sure about that? A. Yes, sir. 30

THE COURT—How does it get to the gutter?

A. Well, it gets there.

Re-direct examination by Mr. Smith.

Q. Does it run across the sidewalk? A. No, sir.

Q. What do you refer to when you speak of the gutter? Do you mean the gutter next the curb or 40

RUSSEL PFISTER—Re-cross

the gutter inside, next to the wall? A. The gutter along the wall.

Q. When Mr. Gebhardt asked you when the water ran off the wall, where it went after it ran off the wall, where does the water go when it gets down off the wall? A. It runs along the pavement.

10 Q. All along the pavement on the sidewalk?

Mr. SMITH—I don't think he understood the purport of the question. I don't want him to appear to be swearing to something he did not mean.

Q. It runs along the pavement? A. Yes.

Q. And the pavement slopes toward the curb stone? A. Yes.

20 Q. So the tendency of the water is toward the curb? A. Yes, sir.

Mr. GEBHARDT—That is leading.

Re-cross examination by Mr. Gebhardt.

Q. Then what you testified to a while ago that water did not run over the sidewalk after running down the side of the wall, you were mistaken? A. No, sir.

Q. You were not mistaken? A. No, sir.

30 Q. You told the truth, did you? A. Yes, sir.

Q. You have no recollection of the 16th of February, 1912, at all, have you? A. No, sir.

Q. Nothing to call your special attention to it? A. No, sir.

Q. You don't know whether the snow was cleaned off that day or not? A. No; I couldn't tell.

Q. Nor two weeks before that? A. No, sir.

Q. Or after that? A. No, sir.

40 Q. You don't know whether there was any ice there or not? A. No, sir.

SHARP SHIMER—Direct

Q. And all you are testifying to about this whole matter is your custom of doing things there, isn't it? A. Yes.

Q. You have no recollection of that particular time at all? A. No, sir.

Q. But it is your habit to do so and you have so testified? A. Sure. 10

SHARP SHIMER, sworn for the defendant.

Direct examination by Mr. Smith.

Q. Mr. Shimer, where do you live? A. Just on on the outskirts of Phillipsburg.

Q. Where are you employed? A. The Lehigh Valley at Phillipsburg, under Mr. Yeisley.

Q. What are your duties there, at the Lehigh Valley? A. At that time I was on the outside. 20

Q. You mean in February, 1912? A. Yes, in February, 1912, I was on the outside and helped the boys do all kinds of work that was to be done.

Q. Such as handling freight and things of that kind? A. Handling freight and shoveling snow.

Q. Who cleaned the sidewalks during that winter? A. Russel Pfister and myself.

Q. How often did you clean them? A. Every time it snowed.

Q. How long after a snow storm were you in the habit of cleaning those sidewalks? A. Well, as soon as it quit. 30

Q. What tools did you use? A. A snow shovel and a broom.

Q. Where did you deposit the snow that you took off the sidewalk? A. In the street.

Q. Did you, at any time, place any of it on the retaining wall adjoining the yard? A. No, sir.

Q. How many winters have you cleaned the sidewalk, or had you cleaned the sidewalk at that 40

SHARP SHIMER—Cross

time? A. That is the only winter that I cleaned the sidewalk.

Q. During the winter of 1912? A. Yes, sir.

Q. You did that all that winter? A. Yes, sir.

Q. Until spring? A. Yes, sir.

10 Q. Do you know anything about this accident to Mrs. Lightcap? A. No, I do not.

Q. You did not hear anything about it at the time? A. No, sir.

Q. You have no special recollection of any particular day as to the snow or weather, have you? A. No.

Q. How long after this accident did you hear of it. A. Not until Mr. Yeisley told us about coming to Court, that they were going to have it in Court. That was the first I knew of it.

20 Q. Under whose direction did you do this work of cleaning the sidewalk and so forth? A. Mr. Yeisley gave us orders to clean the sidewalk when the snow fell, and of course if he wasn't there we went ahead with the work anyhow.

Cross examination by Mr. Gebhardt.

Q. Mr. Shimer, the cleaning of these sidewalks was one of your particular duties, wasn't it? A. Yes, sir.

30 Q. And if you did not clean them you would be breaking a rule of the company, wouldn't you? A. Yes, sir.

Q. And you would be neglecting your duty, wouldn't you? A. Yes, sir.

Q. And would you be liable to be discharged for neglecting your duties if you did so? A. Yes, sir.

Q. You live in Phillipsburg? A. Just on the outskirts.

Q. Do you ever read the newspapers? A. Yes.

40 Q. You can hear well? Yes.

SHARP SHIMER—Cross

Q. And see well? A. Yes.

Q. And you never heard of this accident until a year after it happened? A. No; I never looked for those kind of accidents.

Q. You never heard anybody say a word about it? A. No.

Q. Mr. Yeisley never spoke a word about it to you? A. He may have spoken about it in the office, but I never stopped to listen to it. 10

Q. Yes, but this occurred in a place over which you had charge? A. Yes.

Q. And you were not informed of it? A. I did not hear nothing about it; no, sir.

Q. Suppose you heard about it, would you be interested, it having occurred on this walk which it was your duty to keep clean? A. The walk was kept as clean as we could do it. 20

Q. You did not keep it clean of ice, did you? A. That couldn't be helped.

Q. What do you mean by that? A. From the cattle yard above, of course, the sun would melt that snow and the water ran across in different places during the middle of the day and that could not be helped.

Q. Do you remember the 16th of February at all? A. No, sir.

Q. Couldn't that water have been carried off in some other direction? A. I suppose it could if it had been drained some other way. 30

Q. You don't remember the 16th of February at all? A. No, sir.

Q. You don't remember whether there was any snow on top of that wall that day or not? A. I cannot say any more then as to any other day when there was snow there.

Q. Did you ever put any salt on the sidewalk to melt the ice? A. I never did, no, sir. 40

SHARP SHIMER—Cross

Q. You would know what the salt was there for if you did put it there, wouldn't you? A. Yes, sir.

Q. Now, you have no recollection of cleaning off this particular snow any how, have you? A. Well, I couldn't say I cleaned off any particular snow.

10 Q. You are testifying entirely from your custom, aren't you? A. Well, no, not exactly.

Q. Well, you say you don't recollect the day? A. No.

Q. And you don't recollect the snow that was then on the ground, whether it had been there a week or a month? A. I know that every time there has been snow on the sidewalk—

Q. I don't ask you that. You don't know whether the snow on the ground of the 16th of February, 1912, had been there a week or a month?

20 A. I don't remember that, no.

Q. And you are positive, from your custom, that you always cleaned it off? And you know it was cleaned off at this time? A. Yes, sir.

Q. What other snow did you clean besides the sidewalk? A. The gutter along side the sidewalk.

Q. And what else? Did you clean any of the tracks in the yard, or the paths in the yard? A. We never shoveled any in the yard.

30 Q. Who did that? A. I could not say who did that.

Q. It was not done by you or Mr. Pfister, was it? A. No, sir.

Q. It was done by some of the other employees? A. Yes, it must have been.

Q. And didn't they sometimes shovel the snow off the sidewalk too? A. I don't think they did.

Q. Are you sure about it? A. I could not come right out and say they didn't.

40 Q. They may have done it? A. They may have done it and may have not done it.

SHARP SHIMER—Cross

Q. They could easily have done it when you were not there? A. (No response).

Q. What other duties did you have besides cleaning snow off the sidewalk? A. Well, I was helping on the platform and I was out in the yards sometimes sealing cars.

Q. How far away did you go to seal cars? A. A couple of blocks. 10

Q. The yards are that large there, are they? A. Yes, sometimes longer.

Q. How long are they? A. About a mile and a quarter.

Q. And you had lots of employees around there to do all kinds of laborious work? A. Yes.

Q. At all times? A. Yes.

Q. And if you were busy some other men would clean off the sidewalk? A. If I was busy at the freight that would be our work. We would drop our freight work and go at the snow and let the other fellows do the freight work. 20

Q. What other fellows? A. The other fellows employed there.

Q. Regular freight workers are they? A. Yes, sir.

Q. Now, you are sure you never heard of this accident until a year after it happened, and you came up here to Court? A. I didn't know anything about it; no, sir. 30

Q. Then who told you about it? A. Mr. Yeisley.

Q. Where was he when he told you about it? A. At the office.

Q. What did he say to you? A. He told me Mrs. Lightcap was hurt and that she had her knee cap hurt.

Q. And where was she hurt? A. He said on the sidewalk.

Q. What did he tell you he wanted you to testify 40

SHARP SHIMER—Re-direct

WILLIAM RHODES, recalled—Direct

to? A. He wanted to know whether we had our sidewalks cleaned off and I told him we did.

Q. It was your duty to do that, wasn't it? A. Yes.

10 Q. It would be good ground for your discharge if you did not do it, wouldn't it? A. Yes.

Re direct examination by Mr. Smith.

Q. Did you ever see anybody else beside yourself or Mr. Pfister clean sidewalks that winter? A. I could not say whether they did or not.

Q. Did you see the section men or anybody else clean sidewalks that winter besides Pfister and yourself? A. No, sir.

20 Mr. GEBHARDT—He wasn't there. That don't prove anything.

WILLIAM RHODES, recalled for the defendant.

Direct examination by Mr. Smith.

Q. I show you a photograph which will be marked—

Marked D 1, for identification.

30 Q. D 1. Mr. Rhodes, you have also been taking some pictures for the defendant, haven't you? A. Yes, sir.

Q. Did you take that photograph? A. Yes, sir.

Q. What does that represent? A. That is the Lehigh Valley freight yard.

Q. That is the freight yard and it shows part of the freight house. A. Part of the freight house.

Q. Show the jury where the freight house is.

A. (Indicating) This is the freight house up here.

40 Q. This part of it? A. Yes.

WILLIAM RHODES, recalled—Direct

Q. What is that building beyond it? A. That is the Ceresota Flour Company's part of it.

Q. What is this opening here? A. That is the gate to the cattle yard.

Mr. GEBHARDT—That is the opening, isn't it?

THE WITNESS—Well, that is the opening
yes. 10

Q. So that when that gate is closed and the one at the upper end is closed it makes the cattle yard?

A. Yes.

Q. And is that also the entrance of the Ceresota Company's place of delivering goods? A. Yes.

Q. What does this represent extending beyond the gateway toward the street? A. That is the fence.

Q. And this part extending this way from the corner of the fence, what is that? A. That is a little grass plot. 20

Q. Is not that the top of the wall? A. No.

Q. Doesn't the top of the wall extend down there a little bit? A. No; that is a little grass.

Q. The sidewalk is just beyond that, is it? A. Yes.

Q. What is this building across the street from that? A. That is the barn.

Q. That is not on the property? A. The street goes beyond the barn and the fence here. 30

Q. You see what appears to be the roof of a building over the fence at the right of the telegraph pole there, or electric light pole. What is that building there? A. A blacksmith shop.

Q. Mr. Wolf's blacksmith shop? A. Yes, sir.

Q. How far about is that from the corner of the fence as shown on the photograph? A. To the blacksmith shop?

Q. Yes. A. About a hundred feet. 40

WILLIAM RHODES, recalled—Direct .

Q. About a hundred feet below the corner of the fence? A. Yes.

Q. And the photograph shows where you go into the freight house office? A. Yes.

Q. Where is that? A. That is right here.

Q. Steps? A. Yes.

10 Q. The steps going up? A. Yes, sir.

Q. I show you another one that will be marked—
Marked D 2, for identification.

Q. Oh, where did you stand when you took that first picture? A. In the Lehigh Valley freight yard.

Q. In the upper part of it toward Main street? A. Yes.

20 Q. I show you D 2, a photograph. Now, tell us generally what that shows. A. That shows the wall and the pavement, and a part of the freight house, the Ceresota part of it.

Q. That is the Ceresota storehouse? A. Yes.

Q. How near to the blacksmith shop does that show the wall? A. Well, the blacksmith shop, it sets about here on the opposite side of the street.

Q. How far below where the picture shows, how many feet? A. Well, it is right opposite the bend here.

Q. That angle in the wall? A. Yes.

30 Q. It is directly opposite that? A. Yes.

Q. Does that show the wall fairly? A. Yes.

Q. And what is this up there on top of the wall? A. That is the fence.

Q. That is the fence? A. Yes.

Q. How far does that stand back from the edge of the wall, probably? A. Oh, about eighteen inches.

Q. Is that a closed fence or open fence or both kinds of a fence? A. An open fence.

40

WILLIAM RHODES, recalled—Cross

Q. All the way or only part of the way? A. Well, it is all the way.

Q. As shown there, eh? A. Yes.

Q. Can you show on that photograph where the lower end of the cattle yard is? A. Yes, it is right there (indicating).

Q. Where the fence— A. The fence is more closed there. 10

Q. And it is higher than below? A. Yes, sir.

Q. That is the lower side of the cattle yard? A. Yes, the lower side.

Cross-examination by Mr. Gebhardt.

Q. Now, this is the opening that you spoke of going into the cattle yard? A. Yes.

Q. What is that there? A. That is the post for the gate. 20

Q. That is the post on which the hinges are fastened? A. Yes.

Q. Now, the gate part when shut goes across that opening? A. Yes.

Q. When it is open wide it goes back clear over to this corner near the edge of the stone wall, doesn't it? A. Well, not that far; over here it opens out that way, I think.

Q. Your photograph is correct, isn't it? A. Yes.

Q. When it is closed it goes clear over there, doesn't it? A. Yes. 30

Q. And is that opening any larger than this portion across here? A. Yes, a little; this is longer here than there.

Q. How much longer? A. About six feet.

Q. Do you remember whether the gate goes down to the ground or not? A. No, I don't remember.

Q. At the corner here, about how high is this stone wall from the sidewalk? A. Oh, that is about ten inches. 40

WILLIAM RHODES, recalled—Cross

Q. And a little further away from it it runs up to nothing? A. Yes.

Q. How far is it from the corner of this fence down to the bottom of the hill? A. That would be about 125 feet.

10 Q. Do you know how high the stone wall is in the highest place? A. The highest place would be about twelve feet.

Q. Does your photograph show the slope of the land? A. Yes, as much as there is there.

Q. Which way does it slope? A. Well, it slopes toward the street.

Q. Toward this stone wall that has been spoken of? A. Yes.

Q. Toward this sidewalk where this accident occurred? A. Yes.

20 Q. And this is all covered with cracked stone, isn't it? A. Yes.

Q. How does the water that falls here flow? A. That flows in from here.

Q. And finally it flows over the sidewalk? A. Well, it lays down in here, and down there it may slope out.

Q. There is no place for the water that comes here to go except towards the street? A. It lays there in a puddle.

30 Q. What does not lay there goes toward the street? A. I don't know about that. But I know this is always muddy there.

Q. In through here it runs toward the stone wall? A. Here is a little raised part here they walk on that keeps it from running, and that is higher.

Q. It slopes toward the stone wall? A. Yes, that in the yard there.

40 Q. Now, I call your attention to the bricks between the flag pavement and the stone wall. Are they level or do they slope toward the sidewalk?

WILLIAM RHODES, recalled—Re-direct

HARRY W. MIXSELL—Direct

A. Well, I don't know. I think it runs down here. It is in to ward the wall there.

Q. Doesn't it slope toward the sidewalk and down the hill both? A. Yes, some places it runs out to the sidewalk and other places it holds it into the wall and then it would go around a ways and run out over the sidewalk again. The bricks are not even to leave it run out. 10

Re direct examination by Mr. Smith.

Q. Isn't there a double gate here, one swinging back against the house and the other swinging against the fence, as one of the witnesses testified? A. Yes.

Q. There is a gate swinging back against the house and the other gate swinging here? 20

Mr. GEBHARDT—Then they must have moved the gate off before they took the photograph. The photograph does not show that at all.

Mr. SMITH—I don't know whether it shows it plainly or not, but it is true.

A. I don't remember whether on that one there is another or not. 30

Q. You don't remember, from this picture, whether there are two gates there or not? A. No; it is too mixed up.

Q. Then the gates are obstructed? A. Yes.

HARRY W. MIXSELL, sworn for the defendant.

THE COURT—Do you want this photograph offered?

Mr. SMITH—Yes; I will offer them. 40

HARRY W. MIXSELL—Direct

Photographs heretofore marked D 1, for identification, and D 2, for identification, are marked respectively Exhibit D 1 and Exhibit D 2.

Direct examination by Mr. Smith.

10 Q. Mr. Mixsell, you are a civil engineer? A. Yes, sir.

Q. Employed by the Lehigh Valley Railroad Company? A. Yes, sir.

Q. Did you make a map showing—I don't know what you would call it—the topography of the ground around the freight house? A. Yes, sir.

Witness goes to the map.

20 Q. Now, looking up from the bottom of the map, this shows the railroad tracks, does it? A. Yes, sir.

Q. And the freight house and the flour house are here, where they are indicated? A. Yes, sir.

Q. These are the main tracks of the railroad? A. Yes.

Q. Now, show us where the cattle yard is located. A. The cattle yard is right in here between the flour house and the stone wall.

30 Q. Where is the gate to go into the cattle yard? A. This is one gate here and another one there.

Q. That is to go out, is it? A. Yes, sir.

Q. Show where Mercer street is. A. Mercer street comes down here from Main and around out here.

Q. Will you show where Main street is? A. Main street is up in here; it is not shown on the map.

40 Q. Where is the entrance to the freight house? A. Here.

HARRY W. MIXSELL—Direct

Q. And the sidewalk begins where? A. Right there.

Q. Where does the retaining wall begin? A. Right there at that point; that is where the double line starts.

Q. How far below the beginning of the sidewalk?
A. That would be about twenty feet there; the map is drawn to scale. 10

Q. The sidewalk begins below the driveway, does it? A. Yes, sir.

Q. Which enters into the freight house.

Mr. GEBHARDT—The freight yard.

Mr. SMITH—The driveway goes up to the freight house.

Q. Now, the stone wall, can you give us the dimensions of it, about? A. Well, it is about a two-foot wall on the top; of course, I don't know what the bottom dimensions are. 20

Q. How long is it? A. From the beginning down to the angle there is about one hundred and fifty feet, one hundred and forty-five, or one hundred and fifty feet.

Q. What is opposite the angle there? What is this building opposite the angle? A. It is a blacksmith shop. 30

Q. Mr. Wolf's blacksmith shop? A. Yes, sir.

Q. How wide is the sidewalk? A. It is an eight foot sidewalk.

Q. How is it constructed? A. Well, there is a curbing stone and about two feet of brick and about four feet of flagging and about two feet more of brick.

Q. What condition was it in at the time this was drawn? A. Fair condition. 40

HARRY W. MIXSELL—Direct

Mr. GEBHARDT—Well, how about now?

THE WITNESS—It is now and it was at the time that plan was made.

Adjourned to Wednesday, April 26th, 1916, at 10.30 o'clock in the forenoon.

10 BELVIDERE, N. J., Wednesday, April 26, 1916.

Case resumed pursuant to adjournment.

Appearances as before noted.

HARRY W. MIXSELL, resumes the stand.

Direct examination continued by Mr. Smith.

Q. That sidewalk, is it exactly level or is it sloping? A. There is a slight slope toward the curb.

20 Q. Will you please show the jury the street line or lines which mark the boundaries of the streets there? A. This red line along here is the easterly curb line of Mercer street; this red line is the westerly curb line; this is the building line, the line of the wall.

Q. That is the black line? A. The black line is the face of the wall.

Q. What are those dash red lines near the last line you described? A. That is a fence on the top of the wall.

30 Q. And the freight house and flour storage house are marked there? A. Yes.

Q. And the cattle yard is marked? A. Yes.

Q. How wide is this gate which leads into the cattle yard on the upper side—or the gateway, I should say. A. That has an opening of about fifteen feet.

40 Q. Do you know whether the gate at that point is a single gate or a double gate? A. It is a double gate.

HARRY W. MIXSELL—Direct

Q. How do the parts of it swing? A. This half swings around against the fence that is constructed here; the half toward the street swings toward the street, and the other half swings back alongside of this freight house platform as shown by that dotted line.

Q. Is the ground of the cattle yard any higher than the top of the wall? A. Yes, sir. 10

Q. How much? A. About six to eight inches.

Q. How does it slope? How is the grade? A. There is a slight slope from the flour storage building, toward the wall.

Q. How wide is the coping, the top of the wall? A. Two feet on the top.

Q. It is two feet wide? A. The top of the wall, yes.

Q. What is the character of the surface of the top of the wall, the coping on the top of the wall? 20

A. Why, it is generally level; it has uneven stones on the top.

Q. Is there anything on the top of the wall besides the stones? A. The dirt from the cattle yard runs out from under the fence on to the wall.

Q. The dirt from the cattle yard— You say the dirt from the cattle yard runs out over the top of the wall. What condition is that dirt in there?

A. Well, it runs from about six to eight inches high at the back or under the fence; then it slopes off to within about ten inches to the face of the wall; it is uneven. 30

Q. What does it look like; this dirt there? A. An irregular surface.

Q. Caused by this dirt? A. Yes, sir.

Q. It makes an irregular surface caused by this dirt? A. Yes, sir.

Q. Is the lower board of the fence down on the wall all the way? A. No, sir. 40

HARRY W, MIXSELL—Direct

Q. How far above it is it? A. About six to eight inches.

Q. Different places? A. Yes.

THE COURT—Is that uniformly or—

10 THE WITNESS—Well, it varies according to the roughness of the stone.

Q. Where you say this dirt sort of ran over from the yard on top of the wall, how far did that extend along the wall? A. Practically the entire length of the wall.

Q. Were there any piles of dirt near where this accident is said to have taken place? A. Well, it has clumps of sod in there.

20 Q. In case snow fell on that what would be the appearance? A. It would be uneven, irregular.

Mr. GEBHARDT—How does he know that? I object to that.

THE COURT—I think that answer should stand, Senator, if there was dirt and snow fell on it.

Mr. GEBHARDT—Well, I did not object in time, so it does not make any difference.

30 Mr. SMITH—Is there any dispute about the spot where this woman fell? The evidence has not been exactly definite; I think the husband said the wall was about four or five feet high.

Mr. GEBHARDT—Four feet.

Mr. SMITH—Yes.

40 Q. Will you give us the height of the wall at different places there? A. Well, the wall starts out

HARRY W. MIXSELL—Direct

at nothing at this point, and down here it would be about—

Q. What do you mean by “Down here”? A. At the angle.

Q. Opposite the blacksmith shop? A. Yes; it would be about between 12 and 13 feet high.

10

THE COURT—There is a break in the fence; how high is it at that point?

THE WITNESS—That is about five feet high at that point.

Q. Where the lower fence of the cattle yard comes to the wall it is about five feet high. Is that right? A. Yes, sir.

Q. As it goes up the path, of course, it would get less? A. Yes.

20

Q. And as it goes down, greater? A. Yes, sir.

Q. This piece marked “Gas Works,” that is the gas house? A. That is the old Phillipsburg gas house.

Q. And below there is a place marked “Sewer Connection,” what is there? A. That is, I understand, an old sewer that goes through into the canal basin.

Q. Is there any inlet there on the street? A. There is an inlet right here called a catch basin.

30

Q. Marked “Catch Basin?” A. Yes, sir; there is an inlet from this flour storage building; it is a leader pipe, and I understand that goes into the sewer, too.

Q. Do you know what it takes to the sewer? A. It takes roof water that runs off from the roof of the flour storage.

Q. From the flour storage, all that water is carried to the sewer by pipes, on the property of the railroad company? A. Yes, sir.

40

HARRY W. MIXSELL—Cross

Cross examination by Mr. Gebhardt.

Q. Mr. Mixsell, you found the grade of this sidewalk, didn't you? A. Yes, sir.

Q. And what was it? A. It was seven and—I will have to refer to the memorandum.

10 Q. Seven point fifty-six? A. Seven point fifty-six, something like that. (After referring to book, seven and fifty-eight hundredths per cent.)

Q. Do you know about what the limit of the grade on the macadam roads that are built nowadays is? A. They haven't any limit of grades.

Q. Doesn't the State limit it to five per cent.? A. Not so far as I know.

Mr. SMITH—I think that would be a matter of proof by some one else.

20 Q. On the average are the macadam roads out in the country more than five per cent. grade?

Mr. SMITH—I object to that unless you can prove he knows about those grades.

THE COURT—Do you know?

THE WITNESS—No, I do not know what the limit is.

30 Q. I am not asking you about the limit. Do you know what are the extreme grades of country macadam roads in New Jersey?

Mr. SMITH—Objected to as not cross-examination. I don't know what it is.

Mr. GEBHARDT—He has testified about all this property, and what I am driving at—A five per cent. grade never until they got to building macadam roads meant anything to me. What I am trying to do

HARRY W. MIXSELL—Cross

is to show to the jury about how steep this grade is here by comparison with things they are familiar with, providing the witness can testify to it.

THE COURT—I think he can tell us what a seven per cent. grade is. What is it?

10

THE WITNESS—It is a fall of seven feet in a hundred feet.

Q. And how much fall is there here, altogether?

A. It would be about 17 feet in that street.

Q. About 17 feet in one hundred and fifty? A. No, the street is longer.

Q. Wasn't this down to the bottom of the sidewalk, that is, the bottom where the grade begins on the lower end? A. The grade begins down at the gas works, or right this side of the gas works, and runs from there to Main street.

20

Q. Well, then, tell us what it is down there at the corner of that stone wall, at the angle of the stone wall, down to that point, what is the distance? A. That is about 150 feet from the beginning of the wall to the gas works.

Q. And in that 150 feet it descends 17 feet? A. No, it don't descend that much.

Q. Well, it descends one and one half times seven and fifty-eight hundredths? A. That would make it about 11 feet.

30

Q. That is a steep grade. A. Yes, that is a pretty steep grade.

Q. You testified on the trial of this case before, didn't you Mr. Mixsell? A. Yes, sir.

Q. Do you remember testifying—"How high is this wall at the lower gate?" and you answered, "Five feet one inch." "How high is the earth

40

HARRY W. MIXSELL—Cross

above that, the ground above that? A. That is ten inches."

Mr. SMITH—That is what he says to-day, eight or ten inches.

Q. Ten inches above the stone wall? Higher
10 than the stone wall?

Mr. GEBHARDT—He said six or eight inches, and that is why I am going over it.

Q. You so testified the other time? A. I don't remember what I testified to.

Q. What is the earth above the stone wall? A. Well, outside the fence it is about seven or eight inches, and inside it is liable to run a little higher. I don't recall just what it is in there now.
20

Q. Do you remember testifying on the other trial that the lower board of the fence was on the wall?

A. I don't remember that.

Q. Well, is it so or not? A. No, it is not.

Mr. GEBHARDT—Am I reading it correctly, Mr. Smith?

Mr. SMITH—Yes; that is right. He must have made a mistake.

Q. Do you remember testifying as follows:
30 "What is the condition of the ground against that?" And you answered, "The ground is filled in against the board." A. It is.

Q. Then the ground runs above the lower board on the fence? A. Yes, sir.

Mr. SMITH—By that you mean on the inside of the yard?

Mr. GEBHARDT—Yes, that is where you say
40

HARRY W. MIXSELL—Cross

the snow gets caught and drifts and so on.

Q. And I understood you to say that there is a slope from the buildings of the company—That is also on the Lehigh Valley Railroad Company's land, that Ceresota Flour Company's place? A. Yes. 10

Q. And in front of it is the space that makes this cattle yard, where the cattle are taken off to be watered and fed? A. Yes, sir.

Q. And this earth up against the lower board of the fence is largely made up of the droppings and refuse from the feeding of the cattle there, isn't it? A. Not that I know of.

Mr. SMITH—I don't understand what that has to do with it. 20

Mr. GEBHARDT—You examined him on direct examination about it.

Q. What did it look to you, cracked stone or—

Mr. SMITH—I don't see what that has to do with the case.

THE COURT—You asked this witness to describe what he found there, and this is one way of testing him. 30

Q. When did you make this map, Mr. Mixsell? A. In March, 1912.

Q. You made it for the purpose of testifying in this case? A. I could not say; I was told to make the map.

Q. Now, this dirt is not cracked stone is it, up against this board? A. No.

Q. It is soft and more or less corn cobs in it, isn't there; did you notice that? A. No, I did not notice that. 40

HARRY W. MIXSELL—Cross

Q. Doesn't it look just like a place would look where cattle are kept and fed? I mean up along the fence, now. A. I couldn't say whether it did. It looks just like ordinary black dirt.

Q. Well, the rest of the property around there is covered with cracked stone, isn't it? A. The drive-
10 way in front of the freight house is crushed stone.

Q. All around is sort of a pavement such as made by putting in crushed stone? A. There is no crushed stone east of the freight house; that is, down around the flour storage there is no crushed stone driveways.

Q. Have you looked at it lately? A. This morning.

Q. And you say there is no crushed stone there? A. No, sir; none that I saw.

Q. Was it pretty muddy? A. Well, the water
20 lays in that yard and forms kind of pools of mud.

Q. Forms what? A. Puddles of mud.

Q. And isn't one of the reasons why the water lies there on the ground in front of the flour house in this yard because of this dirt that has become piled up against the fence and it cannot get away? A. Well, it lays there because it cannot get away.

Q. But when you were there that March it was frozen there, wasn't it, a pool of water frozen? A.
30 I do not remember.

Q. Well, you have often seen it that way, haven't you? A. I cannot say I have.

Q. What do you suppose becomes of that pool of water when it gets below freezing? A. It will freeze.

Q. And when it thaws it will have to find an outlet somewhere if there gets enough of it there? A. I think it would if there was enough.

Q. And it would run down over the wall if it got
40 sufficiently high, wouldn't it? A. Yes.

HARRY W. MIXSELL—Re-direct

EDWARD L. FINE—Direct

Re-direct examination by Mr. Smith.

Q. This map was taken from actual surveys on the ground? A. Yes.

Q. And actual measurement made on the ground?
A. Yes, sir.

10

EDWARD L. FINE, sworn for the defendant.

Direct examination by Mr. Smith.

Q. Mr. Fine, where do you live? A. I live in South Easton.

Q. Where are you employed? A. I am employed by the North Western Consolidated Milling Company in the warehouse at the Valley freight house.

Q. At the freight house that has been pointed out on the map there? A. Yes, sir.

20

Q. You are in what is called the flour house? A. Yes, sir.

Q. How long have you been employed there? A. Better than six years.

Q. You were there in 1912? A. Yes, sir.

Q. What use is made of the yard in front of that building where you are employed? A. Outside of using it for a road occasionally there is a great deal of cattle unloaded and fed there, and horses and cattle are brought there, and sheep are put in there occasionally.

30

Q. It is called the cattle yard, isn't it? A. Yes.

Q. What use did you make of it in your business?
A. We have to drive in and back up at the door where we deliver our flour from the warehouse by team or automobile.

Q. Is there room to turn around in there? A. Just about.

Q. How near to the retaining wall along the sidewalk do wagons and vehicles go when they are

40

EDWARD L. FINE—Direct

turning around there? A. Very close sometimes.

Q. Have you noticed the retaining wall, the top of the retaining wall along that sidewalk lately.

A. Yes, sir

Q. What is the condition of the top of that wall?

10 A. Well, it is a natural stone wall. It is in a natural condition, no dressing on top, and it is clean back about a foot, clean from dirt, and along under the fence there is some little ground works out at the bigger part of the distance, but it is naturally only the ordinary ground that is in the cattle yard.

Q. It works out from under the board fence? A. From under the board fence.

Q. And is that regular or uneven as it appears on the wall? Does it work out in piles in some places more than in others? A. No, sir; it has to work
20 out even.

Q. How does it appear on top of the wall? A. At one place the plank is four inches wide and lays very close to the wall so the dirt cannot work out, and from that board on out to the corner it is not so close to the top of the wall.

Q. Does that result in unevenness in the dirt on top of the wall? A. Yes.

Q. Thicker in some places than in others? A. At times, right after a rain it may be more uneven than
30 others. It is raked off as soon as it is uneven or tramped up by cattle.

Q. How lately have you seen any raking done there? A. I cannot just recall the date. It has been about a week.

Q. In 1912, about that time, do you know whether it was customary to remove the dirt in 1912, back four years ago? Do you know whether it was customary then? A. Yes, it was customary.

40

Mr. GEBHARDT—To what?

EDWARD L. FINE—Cross

THE WITNESS—To have it raked off.

Q. The dirt inside the yard? A. The whole yard would be raked off after the cattle had been in.

Q. How about the wall outside the fence? A. Nothing ever got outside the wall.

Q. I say on the wall outside the fence, was it customary to rake off the dirt? A. If there was anything out there that was to be raked off, the same as straw or hay or anything that accumulated there, the men that cleaned up the yard always cleaned that off, too. 10

Q. On top of the wall or on the sidewalk? A. No, sir; on top of the wall.

Q. Did you or any of your employees ever clean the sidewalk? A. No, sir.

Q. At any time in 1912? A. No, sir.

Q. How far is your office door from the freight house? A. Ten feet. 20

Q. And is all of your material taken away from that door? A. Well, from the office door, it is about ten feet further along.

Q. That is the door they back up to and load goods for customers? A. Yes, sir.

Q. Do you deliver yourself or do you have people, come and get it? A. We have an automobile hired. 30

Cross-examination by Mr. Gebhardt.

Q. There is quite a big watering trough up there along this same fence, isn't there, just inside of the stone wall, on top of it? A. Oh, no; that is over against the flour house between the door and what we call the rear gate of the stock yard.

Q. Isn't there one over against the fence, too? A. There is a little hog trough lays there.

Q. That is where they put the stock and feed the 40

EDWARD L. FINE—Cross

cattle? A. No, sir; to give the pigs a drink. They cannot get up in this big trough and they have a little trough over there.

Q. That is also up against the fence, isn't it? A. We try to keep it there to keep it from getting drove over.

10 Q. It acts as a dam to back the water up there?
A. Oh, no.

Q. There never is any water standing there, is there? A. Not that the trough would hold.

Q. Is there ever any water standing there? A. Very little. It lays very level around there. There is no depth of water stands—

Q. How does this water run off over the stone wall if it is level? A. Well, in time it would run. It runs one direction.

20 Q. Doesn't it have to when there is any rain or when there is snow on the ground? A. It escapes some way.

Q. Over the top of the wall? A. Over the top of the wall and in every direction.

Q. And that is the way it did on the 16th of February, 1912? A. I don't recall that date.

Q. Do you recall how long before that date any cattle were fed there? A. No, I don't recall how long before that.

30 Q. You say the men always cleaned off on top of the wall after the cattle had been there? A. Yes, sir.

Q. On the outside of the fence? A. Not on the outside of the fence.

Q. Now, you did not mean that the cattle tramped up this dirt on the outside of the fence, did you? A. No, sir; there wasn't any dirt on the outside of the fence to tramp up.

40 Q. It was all nice and smooth, was it? A. It is all stone on the outside of the fence.

EDWARD L. FINE—Cross

Q. All nice and smooth? A. Yes, the entire wall.

Q. A level fence? A. Yes, sir.

Q. And if any snow fell out there it would fall on the level, wouldn't it? A. It would fall on the ordinary level wall.

Q. It would not fall up in heaps, would it? A. 10
Not out there, no, sir.

Q. You say that there is no dirt up against the lower board of that fence? A. At one place there is.

Q. What makes that? A. That board happens to be lower than the others, and there is a little ground shoved up against it, just a little.

Q. Shoved up against it. Do you know how it came to be shoved up against it? A. I think by 20
driving a little close at times.

Q. You cannot get up any closer than the hog trough, to the fence, can you? A. There isn't any hog trough at that point.

Q. Do you mean to say then that there is only dirt just at the point that you are speaking of? That is one point there is some dirt? A. Yes, against the fence.

Q. Did you hear the testimony yesterday about the clods of grass up on top of the stone wall outside the fence? A. There cannot be. 30

Q. Just look at that picture and see whether you still think there cannot be. That is P 2. What do you think that is on top of the stone wall outside of the fence? A. This has been taken when there was a little grass grown there under the fence, but there is nothing there now.

Q. When did you look for it? A. Why, I could look at it every day.

Q. When did you look at it to see whether there was anything on top of that stone wall outside the 40

EDWARD L. FINE—Cross

fence or not? You did not look at it at all, did you? A. Yes, sir; I have looked at it.

Q. You do not know whether there was anything on top of the wall or not? A. I have seen it when there were cattle in there.

10 Q. Did you look at it on the 16th or 17th or 18th of February, 1912? A. I don't remember anything about that.

Q. Do you remember hauling crushed stone in there last winter—or spring?

Mr. SMITH—What has that got to do with four years ago?

Mr. GEBHARDT—I am going back to four years ago. I am going to refresh his memory.

20 Mr. SMITH—I object to the question.

Mr. GEBHARDT—If you object to it I will withdraw it.

Q. Every once in a while there is cracked stone put in there between the wall we are speaking of now and the Ceresota Flour—

30 Mr. SMITH—I object to it on the ground it does not make any difference whether there was cracked stone or not.

Mr. GEBHARDT—I will withdraw it then.

Q. Wasn't it filled in there several times before the 16th of February, 1912?

40 Mr. SMITH—I object to that question on the same ground. It makes no difference in this case whether the topography was changed or not. It does not make any

EDWARD L. FINE—Cross

difference whether it was changed before the accident or not.

THE COURT—This witness has testified as to what the condition was on the inside there. This is one way of finding out whether he knows.

10

Mr. SMITH—I do not see how the evidence is proper for that purpose.

THE COURT—Didn't you ask about what the condition was on the wall or the fence?

Mr. SMITH—Yes.

THE COURT—It is one way of finding out whether he knows whether it was not filled in or whether he always knew what it was.

20

Mr. SMITH—He might know whether they put cracked stone in there or not—

THE COURT—I will admit the question.

Mr. SMITH—I object to the question and ask an exception.

THE COURT—The exception will be allowed.

(Last question read.)

THE COURT—The question is, wasn't it filled in several times before the 16th of February, 1912?

30

THE WITNESS—There never was much filling in; only at the walk; at the office door; to keep the walk dry.

Q. Well, before and up to February 16th, 1912, didn't it get hollow in there, so the water would stand there and could not run off?

Mr. SMITH—I object to that question.

40

ALBERT M. YEISLEY, recalled—Direct

THE COURT—It is admitted. Would it? Answer the question.

A. If it got hollow?

Q. Yes; and water stand there. Wasn't it filled in to prevent that with cracked stone? A. It was
10 filled in very little right along the building to keep the water from the building.

Q. Wasn't it filled in to keep this water from standing there in the cattle yard? A. It may have been; we did not want water standing at the door; it was filled in a little at the door to keep the water from standing along the building.

Q. You have often seen the water run over this stone wall and freeze on the sidewalk, haven't you?

20 Mr. SMITH—I object to that.

THE COURT—Yes. That is overruled as not cross-examination.

Mr. GEBHARDT—Then I will put it on the 16th of February, 1912.

Q. What was the condition there then?

Mr. SMITH—I object.

30 A. I have no idea.

Q. You have no recollection at all? A. No.

THE COURT—He has already testified he has no particular knowledge of that day.

ALBERT M. YEISLEY, recalled for the defendant.

Direct examination by Mr. Smith.

40 Q. Mr. Yeisley, I want to ask you whether or not any other persons than Mr. Pfister and Mr. Shimer cleaned sidewalks for the company in front

ALBERT M. YEISLEY, recalled—Cross

of the freight house property in the year 1912. A.
No, sir.

Cross-examination by Mr. Gebhardt.

Q. Do you think the witness who testified yesterday, that sometimes the railroad men did it, was mistaken about it, Mr. Yeisley? A. No; I—they 10
did it when they could do it; when we could not have the force out, but the year 1912 our time book shows we had the force out every day; those men were designated for that work.

Q. What do you mean by "Out every day?" A. Well, they were on their duty every day; they were paid for being on their duty every day and, of course, when there was snow they had to clean the sidewalk off.

Q. And that was part of their duties, wasn't it? 20
A. Yes, sir.

Q. Your record would not show whether any of those men, outside of the two men who were on the stand yesterday, Mr. Shimer and Mr. Pfister, your record would not show whether any other men did it than them? A. Their record shows when they were on duty they did it.

Q. That is just when they did do it, isn't it? A. Yes.

Q. Then how would it show it? A. When they 30
are on duty working.

Q. That they were on duty working? A. And at the same time cleaned the sidewalk?

THE COURT—If they were not on duty some one else would have to do it?

THE WITNESS—Yes.

Q If they were on duty, the railroad men were on duty now, who does it there? A. Well, you 40

ALBERT M. YEISLEY, recalled—Cross

mean it is them when they are on duty; when they are not on duty the section men have to do it.

Q. Suppose they were not on duty that day or something else, wouldn't the section men do it?

A. No.

10 Q. Why? A. It was their duty to clean the sidewalk and look after the walk; they have instructions to do that every day.

Q. Who keeps the records of these men? A. I keep a record of the men.

Q. That is the time and where they are? A. No; I know they are on the job; I keep a watch.

Q. Do you know they did not lose any time in the winter of 1912? A. Yes.

Q. How do you know that? A. By my time book.

20 Q. Well, your time book would not show if those men had been off busy at the freight business, would it? A. That would not make any difference; if they were busy at the freight business and there was snow, their duty was to go and leave the freight and clean the sidewalks.

Q. Suppose they would not do that, or some of the men did it, would you know it? A. Yes; I certainly would.

30 Q. You don't know anything about that from memory in 1912? A. I remember there were no other men cleaned the sidewalk.

Q. In 1912? A. Yes.

Q. You are sure about that? A. Yes.

Q. How about the year 1913? A. I did not look over the records to see whether the men were on duty—

40 Q. I am not asking for the records, I want your recollection. You cannot remember from memory whether those men did all the cleaning in the winter of 1912 or not, can you? A. I cannot

JOHN McCORMICK—Direct

unless I look over the records. I have made some changes at different times.

Q. And you cannot remember any more in 1912 from memory than you can in 1911 or 1913, can you?

A. Well, not from memory, no, sir.

JOHN McCORMICK.

10

Direct examination by Mr. Smith.

Q. Mr. McCormick what is your position? A. I am track foreman for the Lehigh Valley Railroad Company.

Q. Sometimes called a section boss? A. Yes, sir; commonly called a section boss.

Q. Where do you do most of your work? A. Well, Phillipsburg, and of course I am called over the road, in fact over the whole system often times doing extra work. 20

Q. You have men under you? What do they do? A. Well, I have about fifteen miles of track to keep in repair and keep in safe condition and do the repairs and often do night work, and I have charge of street and road crossings, that is, to keep them repaired.

Q. Your men sometimes clean snow from the company's property? A. Well, in the lower part of the town when there is snow, such as Main street property, we clean them sidewalks, but we haven't cleaned around the gas house in years, what we call the gas house sidewalk. 30

Q. How about in front of the freight house? Did your men clean snow there in 1912 or since then? A. No, sir; for the reason that Mr. Yeisley is close there and he can move it much quicker than we can and he has it always cleaned quicker than we can get at it. He attends to it. In fact before it 40

JOHN McCORMICK—Cross

stops snowing, when we would come there he attended to it.

Q. Do you live near there? A. I did live for years close to that sidewalk. Now I live over across the railroad on the other side; but I did live for years right close there.

10 Q. You have not lived there since 1912? A. No, sir.

Cross-examination by Mr. Gebhardt.

Q. Mr. McCormick, did you testify in this case on the other trial here? A. Yes, I was here, sir.

Q. Were you asked this question, and did you give the answer that I will read: "Did you hear of this accident to Mrs. Lightcap about the time it happened?"

20 Mr. SMITH—I object to the question because it is not cross-examination.

A. Two days later, sir.

THE COURT—Wait. How is it cross-examination, Senator?

Mr. GEBHARDT—He has testified and we are just coming to that very thing—he has already testified on direct examination about the cleaning of the snow there, and said his men did not do that, and I will show he did do it and swore to it on the trial before.

30

THE WITNESS—I said if it was not done before I came there—

THE COURT—One moment, you are interrogating as to the particular time of the accident now?

40

Mr. GEBHARDT—Yes.

JOHN McCORMICK—Cross

THE COURT—I will admit it.

Q. “Did you hear of this accident to Mrs. Lightcap about the time it happened?” The answer was.

A. “Yes, sir; I did, a few days later on.” Did so you testify? A. Yes, sir.

Q. Now, this is Mr. Smith’s direct examination, not cross examination. A little further down. “What was your custom at that time, when there was a snow, in reference to cleaning it away?” That was objected to, the objection overruled, and exception to the plaintiff, and then the answer: “The first thing we done was to clean off the sidewalk, and if I didn’t do it, Mr. Yeisley—” And there was another objection. 10

Mr. SMITH—That is you speaking now? 20

Mr. GEBHARDT—Yes.

Mr. SMITH—Go ahead.

Q. Did you so testify on the trial before? A. Well, it must be. If Mr. Yeisley hadn’t done it I would. Mr. Yeisley was always ahead of me there.

Mr. SMITH—I insist that Mr. Gebhardt reads the rest of it. 30

Mr. GEBHARDT—(Reading) “The witness:— being as he was closer he always had his men there and if I wasn’t there the first thing in the morning Mr. Yeisley was there and attended to it.”—“If I wasn’t there.”

Mr. SMITH—There is no contradiction there.

Mr. GEBHARDT—Well, we will argue that to the jury later. 40

WILLIAM H. HARMS—Direct

WILLIAM H. HARMS, JR., sworn for the defendant.

Direct examination by Mr. Smith.

Q. Mr. Harms, what is your business? A. Bill clerk.

10 Q. Where? A. Lehigh Valley Railroad.

Q. You live in Phillipsburg? A. Yes, sir.

Q. How long have you been bill clerk there? A. Three years last March.

Q. Were you there in 1912? A. Yes, sir—not a bill clerk, a car demurrage clerk in 1912.

Q. Did you keep any other records in 1912? A. Yes.

Q. Have you got them with you? A. Yes, sir. (Produces papers.)

20 Q. What do you call those papers? A. Those are supposed to be the car demurrage reports, daily situation car demurrage reports.

Q. On that paper is that a record of the weather you kept? A. Every sheet.

Q. Well, at any time, I mean in February, 1912? A. From the first of February to the 17th.

Q. Those are the records you have got there? A. Yes, sir.

30 Q. Now, what I want to know is what you generally put down and when you put it down? A. In the morning we put down the condition of the weather, clear, cloudy or rainy

Q. When did you make another notation? A. After dinner, at one P. M.

Q. When did you make another notation? A. At five P. M., quitting time.

Q. Was that done regularly every day? A. Every day.

40 Q. From your record what was the condition of

WILLIAM H. HARMS—Cross

the weather during February, up to the 16th of February, 1912, generally speaking? You need not give each date.

Q. It was clear in the report, clear weather.

Mr. GEBHARDT—All this time, seventeen days?

10

Mr. SMITH—Yes, sir.

Q. Are there any records of snow storms? A. No records of snow storms.

Q. Or cloudy weather? A. Well, it was cloudy a couple of days, but it cleared up during the day.

Q. Those records only show at the hour it was made? A. Yes.

Q. You could not swear whether there was a storm at night? A. When I came in the morning at eight o'clock if it was clear I put down clear, and—

20

THE COURT—Suppose it snowed during the night and in the morning it was clear, what would you put down?

THE WITNESS—I would put down clear.

Q. So far as your record shows, it was a clear month? A. During the day time, yes. Two or three times it was cloudy in the mornings but cleared up during the day.

30

Q. When you have it recorded cloudy, was that in the morning? A. Yes, in the morning.

Cross examination by Mr. Gebhardt.

Q. If it snowed at night the record would not show? A. No.

Q. And if there was snow on the ground the record would not show? A. No.

40

WILLIAM H. HARMS—Cross

Mr. GEBHARDT—Do you intend to offer the record?

Mr. SMITH—I do not see how, it is necessary to offer it.

10 Mr. GEBHARDT—Are you afraid to have it offered in evidence? You have used it.

Mr. SMITH—It contains a lot of other things. I don't suppose the company will care to have the original record left here.

Q. Do you know whether there was snow on the ground? A. I can not recollect whether there was snow on the ground in 1912. That is beyond my remembrance.

20 Q. Your record then shows that on the 16th of February, 1912, it was clear during the day? A. It was clear during the day.

Q. Does it show what the temperature was? A. No; at that time I did not show any temperature, but in later years we did.

Q. Do you know whether it was cold or warm that day? A. I don't know, only it was clear weather. There might have been snow on the ground, but it was clear.

30 Mr. SMITH—Do you want these records left here?

Mr. GEBHARDT—Yes.

Mr. SMITH—I have no objection. You can examine them and see for yourself.

DEFENDANT RESTS.

TESTIMONY CLOSED.

REQUEST TO DIRECT A VERDICT

Mr. SMITH—Now, I ask the Court to direct a verdict for the defendant. This case was, of course, narrowed down to the question of the snow, and the real issue is whether the ice on the pavement where this woman slipped was caused by the freezing of water which came from the melting of snow which was placed on this wall from some point off the company's premises, by the company itself. 10

Now, I insist that the plaintiff has utterly failed to prove any such situation. The only evidence which the plaintiff has produced here is that certain witnesses say they saw something that looked like heaps of snow on this wall. None of them can say how those heaps came there, if they did see them, where they came from, whether they came from off the premises, or from the defendant's premises. They could theorize as to that. Of course, they tried to perform the duties of the jury and give a finding as to how it came there, but their opinions I believe were overruled by the Court, and they were confined, as they should have been, to describing its appearance. They said that it appeared to be uneven, and I think one or two witnesses said it looked as though some of it might have come there by the knocking of a shovel against the wall, in order to get rid of the snow that might stick to the shovel. I am sure the Court cannot consider that evidence of the company causing this snow to be on the wall, because they did not see any such thing done, and they only imagined that it might have been done that way. And those witnesses when they were examined carefully, Mr. Cain particularly, was uncertain whether he saw those piles at the same time, or some other time, and they were not sure when they saw it, or the location exactly as to whether it was inside or outside of the fence. 20
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REQUEST TO DIRECT A VERDICT

Now, the presence of snow on a wall two feet wide, under certain conditions of wind, and so forth, would naturally account for heaps of snow if they were there. That is one way that it could be accounted for, and that is perfectly consistent with it being there, and the other theory which is shown here, and is shown by the photographs, is that the wall is uneven, and dirt had been crowded under the boards on the wall in different places, in uneven piles, or depths, which would naturally make the snow uneven, or it would appear to be in piles if there was snow on the wall at the time that the accident occurred.

Now, the fact of that snow being there is accounted for by all this testimony on a proper hypothesis, and certainly without some testimony showing the defendant caused it to be placed there or brought it from off the premises and placed there, the jury has nothing at all in my judgment to consider in this case.

It seems to me it would be almost—I would not say criminal—but it would be causing a good deal of expense and trouble to permit the jury to consider as the proven fact anything in reference to this snow that was upon the wall in this case. Certainly there was nothing proven to connect the defendant with it. On the contrary we have heard the witnesses who say, and I do not think there can be any question about the accuracy of that testimony, that the duty of removing snow from this sidewalk during that time was under the charge of Mr. Yeisley, the head of the freight department, and that he had assigned two men to do that work, two utility men he had around there to do work of all kinds, and during the winter when they had been on duty at all times they did that work, and

REQUEST TO DIRECT A VERDICT

they both say they never at any time knocked their shovels or did anything to deposit snow on top of the wall. It would be much easier for them if they wanted to knock their shovels off to knock them on the curb stone, the pavement, and clean them that way. They would not go and lift it up on this wall; that is a ridiculous thing to assume. 10

Now, we say the whole weight of the testimony is to the effect that nothing of that kind was done. There was a failure to prove it was done, and the testimony negatives the allegation or assertion which the plaintiff comes here with.

Now, the history of this case in my judgment is very pertinent in this matter. Here was a case brought originally, founded entirely upon a change of topography of the ground of the defendant. That was what the plaintiffs, when they brought their suit, rested their claim for damages upon entirely. They said that the defendant company by changing the contour of the ground so that a larger quantity of water would run off their premises on to this sidewalk, when the snow melted in the winter, and would naturally congeal into ice, and cause a slippery place where the plaintiff was injured, and on that account they said this woman was injured, and they demanded damages for the injury. That was the ground on which they brought this case. The pleadings show that. It was the testimony of the witnesses, and they came here in Court about ten weeks after suit was brought—five or six weeks before that the case of Aull vs. Lee on a demur had been decided in the Supreme Court in which Mr. Justice Bergen had said that where a woman had thrown snow from a sidewalk onto a sloping lawn and deposited it in piles, so that when the snow melted it would run over the sidewalk and 4)

REQUEST TO DIRECT A VERDICT

in cold weather freeze into ice, and thus cause damages, that such an action as that was actionable and people could demand damages for that. After that case was decided and published in the Atlantic Reporter, then they came into Court here to try this case and tried to bring the snow in. It was never
10 thought of before. Nobody ever had occasion to say whether there was snow on the wall or piled around there before that, and it is ridiculous beyond all probability or possibility that these men passing along there casually would notice piles of snow in this place or that place over a year or two years or four years after, little piles of snow, and their appearance and how it appeared to have been put there. It is ridiculous to think of any such thing as that or to ask a jury to say that such testimony
20 as that would warrant them in giving a verdict for the plaintiff in this case.

Then that was not the end of it. They came into Court and then they proved by the testimony of these gentlemen of the Pennsylvania Railroad, who have been here every term, friends of this man, they came here and brought some evidence to prove they saw piles of snow not on the wall, not brought from off the premises, but on the company's land itself. They saw piles of snow. They did not
30 know how it came there except one man testified, I believe, that on the walk leading up to the freight house door it had been shoveled or swept, but there was nothing to show it had been brought in from off the premises, and none of these witnesses have testified at all, as the book shows, in the former trial of this case, to anything that would indicate that a single grain of this snow had ever been brought from off the premises of the defendant on
40 the place where the water from it would run on to this sidewalk. There is no indication of that.

REQUEST TO DIRECT A VERDICT

They had nothing to go by except the decision which had not touched that point when this question was submitted to the Supreme Court, and the Supreme Court in this decision said that they could not have damages under circumstances of that kind. It is hardly necessary to refer to the case. Your Honor knows what was held there, and the effect of that decision was that unless the snow which should cause this accident was deposited on the premises from some place off the premises, as the facts were in the case of Aull vs. Lee, then they could not recover. 10

Then what happened? The last term of Court, counsel comes in here and wants to prove it was brought from off the premises. He never thought of such a thing before that, and the only place he can place it is up there on this high wall. He brings men here who say they saw piles of snow on this high wall. I expected some of them would go far enough to say they saw it put there. 20

Mr. GEBHARDT—It was proved in the other case.

Mr. SMITH—There was no proof of that kind in the other case. You refer to Salter's testimony, where the walk leading up to the freight house was shoveled off, and he said it looked as though it was shoveled from the walk, but he meant the walk leading up to the freight house, not the street walk. There was nothing there to indicate that, and I am sure the Court and everybody understood he meant it was shoveled on the premises. They said his testimony amounted to nothing because he could not remember when he saw it. I will tell you what happened. These men when they found out about these things had looked at it at other times since this accident happened. They have probably noticed 30 40

REQUEST TO DIRECT A VERDICT

these uneven piles of dirt covered with snow; they have gotten together and matched the testimony in which they tried to get into Court, tried to get some case before the jury to sustain this claim for damages

10 I say the manner in which this thing has been brought together, and from the circumstances, shows it is tainted. I believe it is a case for the grand jury. It smacks of perjury and subornation of perjury, and it is a shame, a burning shame, to come into Court with such testimony as this trying to get money out of a corporation, or out of anybody else, on such testimony, after patching up a case and then bringing the testimony in to suit the case, which they find by the decisions of the Courts they must present in order to get a verdict,
20 in order to get damages.

That is what we are confronted with here. That is what we have here, and I say it is not right to submit this to the jury. What would the Court do? What would the higher Court do with testimony like that? Would they say that there was evidence enough in this little testimony that we have got here to warrant a verdict for damages against this defendant? Or would they say that
30 such a verdict must have been a mistake, or else it can only be accounted for by the passions or prejudice of the jury to the plaintiff in rendering such a verdict. I submit that this case should not be submitted to the jury; that they should be directed to render a verdict for the defendant.

THE COURT—I think it is a case where the jury should determine what the truth is; I will deny the motion and allow an exception.

40 At this point a recess was taken until one o'clock in the afternoon.

REQUEST TO CHARGE

AFTER RECESS.

COUNSEL SUMMED UP.

Plaintiff's counsel requested the Court to charge as follows:

If the defendant, for its own convenience, piled heaps of snow upon its premises, from either the sidewalk or from off its premises, thus causing the water to flow upon the said sidewalk and freeze, resulting in injury to the plaintiffs, the defendant would be liable to the plaintiffs for such injury, provided the plaintiffs themselves were free from negligence contributing to her injuries. 10

Defendants counsel requested the Court to charge as follows:

1. The issue is limited to the sole question whether the defendant brought snow from off the premises and placed it on the wall or in the defendant's yard where the water caused by its melting would naturally run on to the sidewalk and form ice, at the point where plaintiff fell. 20

2. Failure to properly clean the sidewalk affords no grounds for damages to a person injured by a fall on the walk.

3. The defendant cannot be held for an accident caused by ice formed from natural rain or snow falling upon the premises or upon the sidewalk adjoining the premises, and was under no legal obligation to prevent the flow of the snow water over the sidewalk. 30

4. The jury must be satisfied by a preponderance of evidence that the defendant brought the snow from the sidewalk or some place off the premises, and placed it on the wall or on the premises, where the water resulting from its melting would 40

REQUEST TO CHARGE

run to the sidewalk and form ice at the place where plaintiff fell.

10 5. Evidence that snow was seen on the top of the wall in piles is not sufficient to warrant the conclusion that it was brought from off the premises and placed there.

6. The presence of the snow on the wall in piles is not sufficient to warrant the conclusion by the jury that the defendant placed or caused it to be placed there.

7. There must be some affirmative evidence—

1. That the snow seen on the wall was brought there from off the premises.

20 2. That having been taken from off the premises it was placed on the wall by the defendant, and without such affirmative proof the jury must render a verdict for the defendant.

30 8. The jury must not find a verdict for the plaintiff without it is satisfied by the evidence of the witnesses that the defendant caused snow to be brought from off the premises or from the sidewalk and placed upon the wall or ground above the sidewalk in a place where the water would naturally flow upon the walk adjoining the premises, and form ice at the point where the plaintiff fell.

CHARGE.

THE COURT (Silzer, J): Gentlemen of the Jury:

The plaintiff in this case sues to recover damages for an injury which she received on the sixteenth of February, 1912, when she fell on the sidewalk in front of property of the defendant. The mere fact that an accident happened does not give any right of recovery. There must be more than that. The mere fact that there was snow or ice that fell naturally upon the sidewalk and was permitted to remain there would give no cause for recovery; or the mere fact that there was snow or ice upon the sidewalk which came from the property of the defendant and which fell upon the property of the defendant, in the natural course of events would not give any right of recovery.

In this case the theory of the plaintiff is that there was negligence on the part of the defendant and that the defendant did not perform a duty which it should in that it is alleged the defendant company permitted snow to be piled from off its property, or from the sidewalk on to its property and that by reason of piles of snow that were so piled water ran down over the sidewalk and froze; that is the basis upon which recovery is sought in this case.

The law of that situation has been declared by our Courts in this way: "A party is responsible for the results flowing from the artificial accumulation of ice upon his premises adjoining a sidewalk and there left to discharge water at times when the natural result would be to form ice upon the sidewalk. The abutting owner or other person may be liable for special or peculiar injury caused by his own artificial accumulation of snow or ice upon the sidewalk, as by the discharge of water at times when the natural result would be to form ice, a liability that is con-

CHARGE

10 fined to what a reasonable man might anticipate; and the owner is required to do only what is reasonably necessary to prevent injury. A person would not be responsible at all times for conditions resulting from natural causes. Still, if for his own convenience or benefit he undertakes to store snow which has fallen in another place upon his own property, he is responsible for any injury which might reasonably be expected to result therefrom."

That is the claim that is made here; that for their own convenience or benefit or for their own purposes the defendant company undertook to store or place it on the wall after taking it from the sidewalk or other place.

20 The question of fact for you to determine is whether that is so or not. Did the defendant company fail to perform its duty in this particular?

The burden of satisfying you that it did is upon the plaintiff. Take all of the evidence, gentlemen, that has been introduced in this case and determine whether the railroad company was negligent in the performance of its duty. Did the railroad company take snow that did not fall naturally upon its property and place it upon its property and then permit it to melt and run over the sidewalk? If you 30 find that the railroad company did not do that, or if you are not satisfied that they did, then your verdict must be for the defendant of no cause of action.

40 On the other hand, if you are satisfied from the evidence after taking all the evidence, after weighing it and seeing what the testimony was, and how it impressed you, and whether you are satisfied or not, if you find then that there was this artificial accumulation of ice or snow upon the premises, of the defendant company put there from some place

CHARGE

off the premises, then you may determine if you so find that the company was negligent.

If you find that the defendant company was negligent, then you must take up the question of the behavior of the plaintiff, Mrs. Lightcap, and determine what her actions were. Was she reasonably prudent in the way she acted in going along that sidewalk? It was the duty of the plaintiff to use reasonable care for her own safety in going along this sidewalk. The testimony is that she saw this sheet of ice upon the sidewalk and the question for you to determine is whether she exercised the care which a reasonably prudent person would in traveling along that sidewalk, and going upon an icy place. If you find she was careless herself she cannot recover in this case, because no person who is herself negligent and where the negligence contributed to the injury can ask somebody else to pay for her own negligence.

So you take up first, gentlemen, the question whether the defendant performed its duty and then you take up the question of whether or not Mrs. Lightcap was negligent. If you find that the railroad company was not negligent then your verdict is no cause of action. If you find that Mrs. Lightcap was negligent then your verdict is no cause of action. If you find that the railroad company was negligent and Mrs. Lightcap was not negligent then you take up the question of damages. She seeks compensation in this case, and the elements that you may consider in the case are, first, the pain and suffering undergone. That is rather difficult to measure, how much to allow for pain, if you come to that part of the case, but is for you to determine in your honest judgments; what to allow for pain and suffering, if you come to that part of

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CHARGE

it. You may also consider her bodily health, and the injuries and effect upon her health, not only in the past, but what it may be in the future. Those are elements for you to consider so far as Mrs. Lightcap is concerned.

10 You see there are really two cases. If you find for the plaintiff you will have to bring in two verdicts, one for Mrs. Lightcap and one for the husband. The elements you consider in the husband's case are entirely different. It is the duty of the husband to care for and aid and assist his wife when she has received an injury of this kind; and that being his duty, it is his obligation to pay for the doctors and nurses, and other things, incidental to the effort to cure her. He may be allowed, if he recovers, for what he expended in endeavoring to
20 cure his wife of these injuries, such sums as you may find; there is evidence to satisfy you, that he has expended and may have to expend in the future. You may also consider as elements the loss of society and aid and help of the wife, during the time she is incapacitated from performing her wifely duties; and you may also allow the husband such sums as you find were reasonably necessary to expend in order to have the work done which she ordinarily would do in the household.

30 That is the law, gentlemen, that applies to this case. The task for you is to determine what the facts are, what the witnesses testified to, and how they impressed you. After you have taken the testimony of all the witnesses and determine what in your mind you think the truth to be, according as you find the truth to be, so you find your verdict.

I have already told you what the elements are that you may consider on the question of damages,
40 but before you come to the question of damages,

CHARGE

take up first the question of negligence of the railroad company. Was the railroad company negligent or not? If you find the railroad company was not negligent, that is the end of it. If you find the railroad company was negligent and that Mrs. Lightcap was also negligent, that is the end of the case. But if you find that Mrs. Lightcap was not negligent, and the railroad company was negligent, then you take up the question of damages. You see it all depends upon what you find the facts to be. 10

I have some requests to charge—

“1. The issue is limited to the sole question whether the defendant brought snow from off the premises and placed it on the wall, or in the defendant’s yard, where the water caused by its melting would naturally run on to the sidewalk and form the ice at the point where plaintiff fell.” 20

I so charge you, gentlemen, that is true.

“2. Failure to properly clean the sidewalk affords no grounds for damages to a person injured by a fall on the sidewalk.”

That is true. That is the law, gentlemen, in this case, that where snow falls on property the owner is not responsible to any person who is injured, if it was left just as it was. There are in cities and communities, ordinances that compel them to clean their sidewalks, but that is a mere regulation of the municipality itself. 30

It is the law that the mere failure to clear the sidewalk does not give a right of recovery to a person who falls there, just as stated in this request.

“3. The defendant cannot be held for an accident caused by ice formed from natural rain or snow falling upon the premises or upon the side- 40

CHARGE

walk adjoining the premises, and was under no legal obligation to prevent the flow of snow water over the sidewalk."

Do you mean, Mr. Smith, had the snow naturally fallen?

10 Mr. SMITH—Yes.

THE COURT—Then I so charge.

"4. The jury must be satisfied by a preponderance of evidence that the defendant brought the snow from the sidewalk or some place off the premises and placed it on the wall or on the premises where the water resulting from its melting would run to the sidewalk and form ice at the place where plaintiff fell."

20 That is true, gentlemen.

"5. Evidence that snow was seen on top of the wall in piles is not sufficient to warrant the conclusion that it was brought from off the premises and placed there."

I so charge you.

"6. The presence of snow on the wall in piles is not sufficient to warrant the conclusion by the jury that the defendant placed or caused it to be placed there."

30 I so charge you.

"7. There must be some affirmative evidence—

1. That the snow seen on the wall was brought there from off the premises.

2. That having been taken from off the premises it was placed on the wall by the defendant, and without such affirmative proof the jury must render a verdict for the defendant."

40 I so charge you.

CHARGE

“8. The jury must not find a verdict for the plaintiff without it is satisfied by the evidence of the witnesses that the defendant caused snow to be brought from off the premises or from the sidewalk, and placed upon the wall or ground above the sidewalk in a place where the water would naturally flow upon the walk adjoining the premises and form ice at the point where the plaintiff fell.” 10

I so charge you.

I think I have charged your requests, have I not, Senator?

Mr. GEBHARDT—Yes. How many requests did he make there—five?

THE COURT—Eight.

Mr. GEBHARDT—I want to take an exception to three of them. 20

THE COURT—Are there any objections before the jury retires?

Mr. GEBHARDT—I take exception to the charging of the 5th, 6th and 7th requests to charge.

THE COURT—Senator, don't you think that is the law that the mere presence of the piles there is not sufficient to charge the defendant? They have to show they put them there. 30

Mr. GEBHARDT—That is shown by the character of the heaps there.

THE COURT—Yes, but the mere presence of the piles themselves.

Mr. GEBHARDT—Yes, but I was afraid that would mislead the jury.

THE COURT—The mere fact there was a pile there does not charge it to the defendant. It must be shown that it was brought there from off the premises by them. 40

CHARGE

I will allow an exception to those three.

(The jury then retired and subsequently returned into Court.)

THE COURT—Mr. Foreman, I understand you desire to ask the Court for further instructions?

10 A JUROR—They have delegated me to ask that question. We would like to know whether in order to find a cause for action we must have proof that the company or its agents put the snow on the wall?

20 THE COURT—Yes; I say to you gentlemen, that before you can hold the defendant responsible you must find from the evidence that the defendant, by its agents—and of course a corporation only acts through agents—put some snow from some place not on their own premises upon their premises. That is to say, they either took snow from the sidewalk or some place not on their own premises, and put it on their premises and by reason of that piling of snow on these premises the water came off the land and across the sidewalk and formed ice on which the plaintiff fell.

30 The mere presence of snow which fell there in the natural course of events would not create any liability on the part of the defendant. Is that clear to you?

THE JUROR—Yes, sir; that is clear.

NEW JERSEY

Court of Errors and Appeals

AVA LIGHTCAP and HARRY LIGHT-
CAP, her husband,

Appellants,

vs.

LEHIGH VALLEY RAILROAD COM-
PANY OF NEW JERSEY,

Respondent.

On Appeal.

Brief for Appellants.

The appellant, Ava Lightcap, brought suit against the respondent for personal injuries which she alleged were caused by the defendant company in creating a public nuisance in causing melted snow and ice to flow over the sidewalk of a public street in the Town of Phillipsburg, known as Mercer street. The said appellant, while walking on the sidewalk in question where the melted snow and ice had frozen, fell and broke her kneecap. The basis of this suit is, as shown by the complaint, that the defendant had by its wrongful acts created a public nuisance, which public nuisance resulted in injury to the plaintiff.

The first charge was that it completely changed the surface of its lands along this sidewalk so that whereas the water formerly flowed in a southerly direction away from the sidewalk in question into a large basin which was a part of the Morris Canal, because of the filling in of this large basin and the

complete leveling up of the land for the purpose of running its railroad tracks and yards and building its freight station, the water was thrown in a body in almost an exactly opposite direction down upon the sidewalk in question, making it extremely dangerous because the sidewalk was laid upon a considerable descent, thus making it a public nuisance. *Case, page 111, lines 20 to 40.*

This cause was tried once before and was appealed to the Supreme Court, the opinion of which Court will be found in the 2nd Gummere, 87 Law, page 64. Upon the former trial motions to non-suit were made upon several different grounds which were refused, and the Supreme Court held in the above opinion. page 66, as follows:

“The next point in support of the motion is that there was no evidence to show a greater flow of water over the street after the improvement than there was before. But the evidence on this point was contradictory, and, therefore, the concise point raised in this part of the case on this theory was a question of fact.”

And the Court then held upon this branch of the case it was a question of fact for the jury, thus inferentially holding that such evidence was admissible, and would make the defendant company liable if the jury believed it.

The third matter urged by the defendant was that the laying out of the sidewalk and its grades were fixed by the municipality of Phillipsburg, and that the defendant was not chargeable for anything that occurred because the street was entirely changed. But manifestly this is no ground for non-suit, because the basis of the action is not that the grade of the

street had been changed, but that the defendant had caused the street to become dangerous.

At the last trial, when the plaintiff attempted to show by no less than twenty witnesses, the very facts upon which the Supreme Court clearly says that it would have sustained the verdict rendered in the former trial, such testimony was entirely overruled, and this is the first ground of complaint of the appellants in this appeal. This offer is found on *page 63 of the case, lines 20 to 40.*

“Mr. GEBHARDT—Well, I think I will let it go on record that way, that the defendant company filled in where the freight yard now is and the freight station and the freight track, and completely changed the course of the surface water, which would otherwise have gone in a southerly direction, and flowed thirty-five or forty feet below into the canal basin. They have changed it so that instead of doing that it goes in an easterly direction, and the railroad company sloped this fill toward this wall in question, so that the water must run down on the sidewalk whenever there was rain or melting snow.

THE COURT—Let us see if that is exactly what you do intend to prove, Senator. Wasn't there proof the last time that these changes were made changing the topography so that the water flowed to the east instead of to the south?

Mr. GEBHARDT—Yes.”

Page 64:

“THE COURT—And that thereafter a street was laid through adjoining the railroad

property, so that there was a sidewalk, and then the surface water, or the water which formerly ran south, then ran east over this sidewalk?

Mr. GEBHARDT—Yes; and it ran east from the time this filling was done.

THE COURT—Yes, which was prior to the time of the laying of the sidewalk?

Mr. GEBHARDT—When this wall was built there after the sidewalk was built they kept filling in and sloping it toward the sidewalk.

THE COURT—All that is after the improvement was made?

Mr. GEBHARDT—Yes; they still sloped it toward the sidewalk.

(After argument.)

THE COURT—I will overrule the offer and allow an exception on the offer you make.

Mr. SMITH—Then the record stands that an offer was made, objected to by defendant's counsel, and the offer is overruled, and the ruling of the Court is excepted to.

THE COURT—Yes.

Mr. GEBHARDT—I have one more offer to make, to show that the Railroad Company so changed the surface and topography of the land as to throw a much greater amount of water over on the sidewalk, down over this wall, and over on the sidewalk, that would have flowed there if the Company had not changed the surface of the land."

And page 65, lines 1 to 20:

Mr. SMITH—That is objected to.

Mr. GEBHARDT—That is putting it in a different form, that is all. It meets the very point in this decision.

THE COURT—I will overrule the offer and allow an exception.”

The condition in question had remained as it was for many years and was well known to the defendant.

“The liability is confined to do only what is reasonably necessary to prevent the injury; but when he knows that a nuisance has been created, he then becomes absolutely liable until he has remedied it.” 28 Cyc., 1439.

In the case of *Jessup v. Bamford Bros. Co.*, 37 Vr., 641, the Court held that the diversion or altered transmission of surface water affords no ground of action to a person who suffers injury by reason thereof, and Chief Justice Gummere said: “The surface water flowing down the hill and over the land of the defendant would, if that land had been left in an unimproved state, have naturally flowed upon and over the sidewalk of Rip Van Winkle avenue”; but in the present case plaintiff offered to prove that if the land where the accident in this case happened had been left in its natural state, the water would not have flowed over the sidewalk in question; and we further offered to prove that the changes made by the defendant company did have the effect of increasing to a great degree the flow of surface water and did cause it to be discharged in greater quantities upon the sidewalk and that it did not merely concentrate the flow in certain places upon it. And in fact we were prepared to show that no water at all would have flowed over the sidewalk if it had not been for the changes made by the defendant com-

pany, but that it would have all flowed in another direction.

In the case of *Sullivan vs. Browning*, 67 *Eq.*, 398, referring to the case of *Jessup vs. Bamford Bros. Company*, the Vice Chancellor said, speaking of the right to divert surface water to the injury of others: "No doubt in these days caution should be observed not to extend the principle laid down and illustrated in the case above referred to."

To the knowledge of the defendant company the diversion of this water, from the direction in which it formerly flowed, on to the public sidewalk, produced such serious interference with the use of the sidewalk with safety to the travelling public as to amount to a public nuisance, and as a result of this public nuisance, the plaintiffs received a particular injury.

In the case of *Jessup vs. Bamford Bros. Co.*, Chancellor Magie, speaking for five members of the Court of Errors and Appeals, in the minority opinion: "If the surface water dammed back by the wall erected by defendant and discharged through the pipe in question had been so discharged in sufficient volume to wash away the sidewalk and gully the street, a public nuisance would have been thereby created, for which the owner would have been liable to the public and to any individual who, without negligence on his part, was injured in passing upon the highway. I think the same principle applies where the water discharged, though not of sufficient volume to disturb the surface of the street, yet, in freezing weather, deposits ice thereon, which presents an obstacle and danger to the free and safe passage to persons using the highway, and that a like liability will be incurred by the adjoining owner to the public or any person, who, without negligence, was injured thereby."

The case of *Bowlsby vs. Speer*, 2 Vr., p. 353, is much relied upon by the defendant, but the facts there were entirely different. The water in question flowed down a hollow or depression, and the defendant built a stable on his lot and located it over the hollow which changed the course of the water to some extent, but it still went down the hollow in question; but in the present case the water did not naturally flow toward Mercer street, which is in an easterly direction but flowed in a southerly direction away from the sidewalk. Suppose that in the *Bowlsby* case the hollow down which the surface water naturally ran was filled up to such an extent as to turn the water in an exactly opposite direction, surely no Court would have held that the person doing such an act had the right to do it. In the *Bowlsby* case the Chief Justice used the following language: "Upon an examination of these cases it will be found that the conclusion is reached that no right of any kind can be claimed in the mere flow of surface water and that neither its retention, diversion, repulsion or order of transmission is an actionable injury, even though damage ensues. *How far it may be necessary to modify this general proposition in cases in which, in a hilly region, from the natural formation of the surface of the ground, large quantities of water, in times of excessive rains or from the melting of heavy snows, are forced to seek a channel through gorges or narrow valleys, will probably require consideration when the facts of the case shall present the question. It would seem that such anomalous cases might reasonably be regarded as forming exceptions to the general rule.*

The present case comes squarely within the rule laid down by this Court in the case of *West Orange vs. Field*, 10 Stew., 600, where the Court said: "The question of how extensive the right to divert

the flow of surface water was, came before this Court for its consideration and the cases above cited were referred to, with approval, by Mr. Justice Van Syckle in delivering the opinion. In that case (referring to the *Town of Union vs. Durkes*, 9 Vr., 21), the municipality was about to put into effect a scheme to collect the surface water over a large district, carry it away by means of artificial ducts, or sewers, from where it would otherwise be discharged and pour it, in mass, upon the lands of an individual owner. It was held by this Court, that although the principle established by the earlier decisions would warrant the diversion of the flow of surface water by the public authorities, so far as that diversion was merely incidental to, and occasioned by, the making or alteration of street grades, it was not so broad as to justify the municipality in carrying into effect its proposed scheme, the Court saying that if the doctrine was as broad as was claimed by the municipality, there would be nothing to prevent it from constructing sewers by which the concentrated surface water of the entire town would be cast upon the premises of any proprietor that might arbitrarily be selected to bear the burden."

I think, too, that there should be kept in mind the distinction between injuries to a private owner of lands by negligence and a case where the complete changing of the surface of the land operates to divert surface water toward a public highway, when, if the change in the surface of the land had not been made, the water would have not flowed upon said highway at all, and where the diversion thus results, in a public nuisance, making the highway dangerous for travellers to walk upon it.

"1. A person who obstructs a public highway or renders its ordinary use dangerous, creates a public nuisance, and for injuries re-

sulting directly therefrom to travellers upon the highway he is legally answerable.

2. A person who places an obstruction in a public highway cannot relieve himself from responsibility for injuries resulting therefrom to a traveller upon the highway by showing that some other person is under a legal liability to remove it."

Brady v. Public Service Railway Co., 51
Vroom, 80 *Law*, page 471.

The third ground of complaint is that the Court charged the jury,

1. "That evidence that snow was seen on top of the wall in piles is not sufficient to warrant the conclusion that it was brought from off the premises.

2. "The presence of snow on the wall in piles is not sufficient to warrant the decision by the jury that the defendant placed or caused it to be placed there (*case*, page 144, *request to charge 5 and 6*)."

Those were clearly questions of fact for the jury, and the jury had a right to draw the inference or conclusion that since it was on a public sidewalk along the property of the defendant company the fair presumption was that the heaps of snow appearing as though they had been shovelled upon the wall along the sidewalk, that the shovelling was done by the employees of the defendant company whose duty it was to do the shovelling.

The fifth ground of complaint is that the Court charged the defendant's seventh request as follows:

"7. There must be some affirmative evidence

1. That the snow seen on the wall was brought there from off the premises.

2. And having been taken from off the premises, it was placed on the wall by the defendant, and without such affirmative proof the jury must render a verdict for the defendant (*case, page 144, lines 30 to 40*).

This clearly left the impression upon the jury that there must be some proof by somebody who saw it done that the heaps of snow were placed on the wall by the employees of the defendant company. This seems to have been the point that caused the jury to decide in favor of the defendant, because they returned into Court for instructions on this very point (*case, page 146*), and then found a verdict against the plaintiffs, and beyond question upon the theory that there was only inferential or circumstantial proof, and not actual proof by someone who saw the shovelling done."

The word "affirmative" is defined in Bouvier's Law Dictionary, on page 132, as follows:

"**AFFIRMATIVE.** That which establishes; that which asserts a thing to be true.

It is a general rule of evidence that the affirmative of the issue must be proved; Buller, Nisi, p. 298; Peake, Ev. 2. But when the law requires a person to do an act, and the neglect of it will render him guilty and punishable, the negative must be proved, because every man is presumed to do his duty, and in that case they who affirm he did not must prove it; Buller, Nisi, p. 298; 1 Rolle, 83; Comb., 57; 3 Bos. & F., p. 307."

I respectfully submit that the judgment below should be reversed and a new trial ordered.

WILLIAM C. GEBHARDT,

Attorney of Appellants.

New Jersey Court of Errors and Appeals

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| <i>Ava Lightcap, and Harry Lightcap,</i> <i>Her Husband,</i> <i>Appellants,</i> | } | <i>On Appeal.</i> |
| <i>vs.</i> | | <i>Points for</i> |
| <i>Lehigh Valley Railroad Company</i> <i>of New Jersey,</i> <i>Respondent.</i> | } | <i>Respondent.</i> |

The defendant's answer denies all of the allegations of the appellant charging defendant with liability for the appellant's injury.

The reference in appellant's brief to the opinion of the Supreme Court in 87 N. J. Law, p. 64, overlooks the fact that the question of a property owner's right to change the contour of his land so as to divert the flow of surface water was not raised at the first trial. The case referred to at the bottom of page 66 and top of page 67 notes that omission as follows:

"The defendant also argues in its brief, that the court improperly charged the jury that if the defendant created on its ground, by the change of grade of the street and the other changes which were made there, such an unnatural and artificial condition as caused the water to accumulate and run over the sidewalk and produce the ice, the defendant is liable. *But no exception was taken to this part of the charge,* and we are not called upon to determine its correctness, and it is only here referred to because we do not wish it to be assumed that

the correctness of this legal proposition is approved simply because it was not referred to. If the natural fall of snow be treated the same as surface water, then it may well be doubted whether changing the topography of the land in such manner as to divert in a particular direction water resulting from melting snow, is an actionable injury. *Bowlsby v. Speer*, 31 N. J. L. 351."

The inference is that had that question been properly before the court, it would have been decided in favor of the defendant.

While the court in that opinion held that the fact that the grade was changed by the municipality did not affect the matter, the court did not express any opinion as to the fact that the *location of the street* itself was changed by the municipality after said construction of its grounds around its freight station, referred to in the third paragraph of the complaint, and the filling in where the freight yard, freight station and railroad tracks now are, mentioned in counsel's offer of proof. The fact is at the time of the alleged changes in topography by the defendant there was no sidewalk and no street where the plaintiff fell. This is testified to by Adam Martin (*State of Case*, p. 50), who placed the curb and footwalk for the company. At the bottom of page 53 and top of page 54 he testifies that the street was further over and that there was no street at all where this sidewalk was prior to the improvement. The improvement referred to is the building of the wall and laying of the sidewalk (see *Case* p. 50, line 12). This was done long after the alleged change in topography diverting surface water. So that the real fact is that the municipality moved the street over so that the sidewalk would be located in the way of the diverted surface water. In the first ground of appeal on page 8 the appellant states that to be the fact, and that such fact was a part of the offering made by him at the trial.

The freight yard and tracks in question were a part of the construction of the Lehigh Valley Railroad in Phillipsburg and any changes in topography were the

result of necessary grading in the construction of said railroad, which was built in the year 1873, and was all done upon the lands of the said railroad company. The allegation is that by reason of such construction the surface water which fell upon this ground was diverted.

We insist that the right of the railroad company to fill in and level up its own land for its purposes cannot be questioned. That if such construction caused a diversion of the water in a different direction from which it formerly flowed that the doctrine laid down in *Bowlsby v. Speer*, 31 N. J. L., p. 350, "That neither its retention, diversion, or repulsion is an actionable injury, even though damage ensue," exempts the defendant from liability for such diversion.

There are no facts in this case that are within the suggested exception in that case or that would modify the rule. The water that flowed to this sidewalk came from the surface of the grounds of the cattle yard on a higher level than the street.

There is no proof, or offer to prove, any artificial arrangement by the defendant to cause a public nuisance, and the citation from 28 Cyc p. 1439 does not apply.

The case cited by appellant, *Jessup v. Bamford Bros. Co.*, 66 N. J. L. 641, is exactly in point. While in that particular case it may be true that all the water which flowed over the sidewalk would have come there whether any building had been erected or not. There is nothing in the decision that implies that a different opinion could have been had if the water on the defendant's premises had been diverted from a different direction towards the sidewalk. The leading case cited by Mr. Justice Gummere in his decision, *Gannon v. Hargadon*, 10 Allen 106, bases the right of an owner to divert water upon the dominion, which he has over his own land and the right which he has to make improvements upon it for his own particular use or enjoyment. The right of the defendant company to grade its land for the purpose of laying railroad tracks, constructing a freight house and a cattle yard and of building a retaining wall along the

public highway for its own purposes and convenience in the use of its property cannot be questioned. And under the decision cited by the appellant if such improvements would cause a diversion of surface water towards the sidewalk of the municipality so that ice was formed from it and an accident occurred, the defendant is not liable in damages for the accident. As held in the *Bowlsby* case it was *damnum absque injuria*.

The dissenting opinion of Chancellor Magie in *Jessup v. Bamford* referred to by appellant's counsel does not apply as that was based upon the fact that the owner of the property had gathered the water in a pipe and discharged it upon the pavement in one place where ice was bound to form as a necessary consequence. That is not the case stated in appellant's offer, which is, that the direction of the surface water was changed so that instead of flowing from defendant's land in a southerly direction towards a canal basin, it flowed in an easterly direction towards the retaining wall and sidewalk, not through a pipe, but over the surface.

In *Sullivan vs. Browning*, 67 N. J. E. p. 391, which was a case very similar to the one in hand, in which damages were sought because of the diversion of water falling upon the defendant's land, from the direction in which it had been accustomed to flow in an opposite direction across a highway upon the complainant's property, the learned Vice Chancellor on page 397, referring to the dissenting opinion in *Jessup v. Bamford*, said it "is based upon a view of the facts which under no possibility could be entertained in regard to the facts of this case."

The offer of the appellant's counsel, which was overruled by the court below, was an offer to prove that the defendant had changed the course of the flow of surface water, which fell on its premises in a different direction and by such change had increased the quantity of water which would flow in the new direction. These things the defendant had lawful right to do and was therefore not liable to the plaintiff for any damage that might have

resulted from so doing. And the court properly overruled the offer.

Appellant's counsel has not referred in his brief to the second ground of appeal and we assume does not insist upon it.

The third and fourth grounds of appeal are not supported by any authority in appellant's brief.

"3. Evidence that snow was seen on top of the wall in piles is not sufficient to warrant the conclusion that it was brought from off the premises and placed there.

"4. The presence of snow on the wall in piles is not sufficient to warrant the conclusion by the jury that the defendant placed or caused it to be placed there."

In that part of the charge referred to the Court simply cautioned the jury against jumping at a conclusion not warranted by the evidence. The witnesses who testified to seeing snow in piles or irregular heaps along the top of the wall were very uncertain as to what they had really seen. Surely no jury would be justified in inferring from their evidence on that point either that the snow had been brought from off the premises and placed on the wall or that the defendant company had so placed it there. This is especially true when we consider the evidence of Mr. Mixsell (Case p. 107-108) that the top of the wall is irregular and that at places dirt was crowded through under the fence so that snow falling on this irregular surface would likewise appear irregular and in piles conforming to the surface of the stones or the tufts of grass on top of the wall.

Appellant objects to the charge by the Court that there must be some *affirmative* evidence that the snow seen on the wall was brought there from off the premises, etc. He objects to the use of the word "*affirmative*" and says that it left the impression upon the jury that there must be some proof by somebody that saw it done that the heaps of snow were placed on the wall by the employees of the defendant company. The Court said there must be some *affirmative* evidence but did not in any way indicate that it must necessarily be the evidence

of an eye witness. The use of the word affirmative is not misleading especially in view of the explanation which the Court made to the jury, Case p. 146, when the jury asked for instructions. He made it very clear that the appellant could only recover in case the defendant had piled the snow taken from off their premises and put it in a place where it would melt and run over the sidewalk. The Court simply asserts that the facts alleged in the complaint, Case p. 4 by the appellant must be proved by lawful evidence in order to warrant the jury in rendering a verdict for the appellant.

The last ground of appeal is the charge on page 145 of Case.

"8. The jury must not find a verdict for the plaintiff without it is satisfied by the evidence of the witnesses that the defendant caused snow to be brought from off the premises or from the sidewalk, and placed upon the wall or ground above the sidewalk in a place where the water would naturally flow upon the walk adjoining the premises and form ice at the point where the plaintiff fell."

That is the appellant's whole case and is set forth in the fifth paragraph of the complaint (see Case, page 4), which reads:

"5. That said defendant also, for its own convenience and purposes, collected the snow which had fallen upon said land and upon the public sidewalk and other places and placed it in heaps on its said land so that as it melted it flowed from the said land to and upon the said sidewalk where plaintiff fell."

The Court in giving the rule upon that point to the jury simply repeats or paraphrases the appellants' own statement of their complaint.

We insist that the instructions to the jury complained of were proper and that no reversible error was committed by the court.

SMITH & BRADY,
Attorneys for Respondents.

Negligence is a fact that must always be proved and will not be presumed. 29 Cyc, p. 589.

Under the application of this rule the instructions of the Court to which exceptions were taken were all perfectly proper.

The only exception to the rule is the maxim of "res ipsa loquitur", which should not be applied except when it not only supports the conclusion contended for, but also reasonably excludes all others. Vol. 4, Words and Phrases, 2 Series, p. 319.

The appearance of the snow lying in small heaps on the wall was accounted for by natural causes and therefore required affirmative proof, before the jury could adopt a theory that it was negligently placed there by the defendant.



