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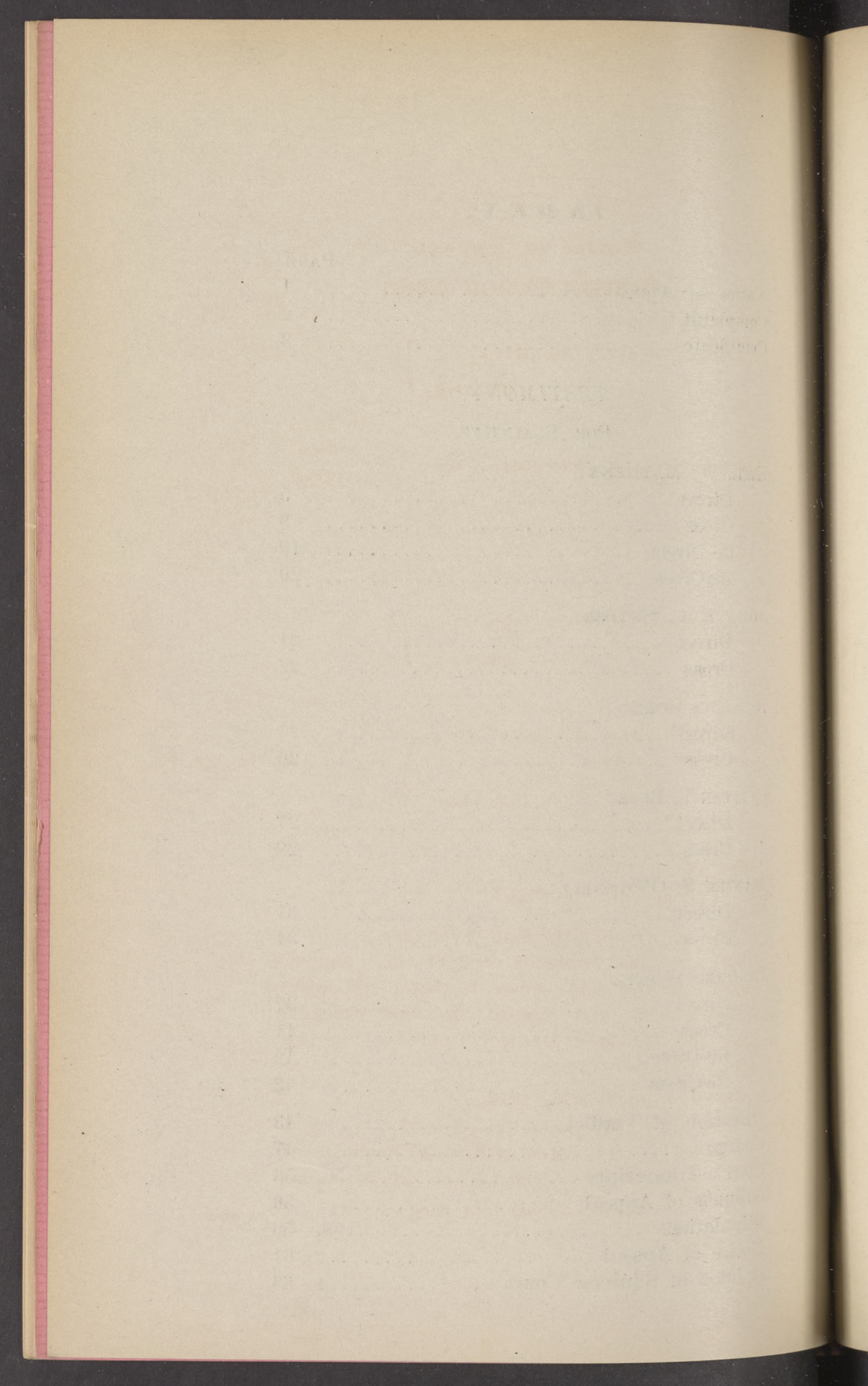
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Notice of Appeal.
Hoboken District Court

WILLIAM EMIL MATHEKE, <i>Plaintiff,</i>	}	In Tort.
<i>vs.</i>		
UNITED STATES EXPRESS COM- PANY, <i>Defendant.</i>	}	Notice of Appeal. 10

DANIEL F. O'CONNELL, <i>Plaintiff,</i>	}	In Tort.
<i>vs.</i>		
UNITED STATES EXPRESS COM- PANY, <i>Defendant.</i>	}	20

To HARLAN BESSON, ESQ.,
Attorney of said Plaintiffs.

Take notice that the said defendant hereby appeals from the whole of each of the judgments entered in the said causes in favor of each of said plaintiffs and against the said defendant from the Hoboken District Court to the New Jersey Supreme Court. 30

Dated January 6th, 1913.

Respectfully yours,
McDERMOTT & ENRIGHT,
Attorneys of Defendant.

(Duly served and filed). 40

Complaint.
Hoboken District Court

<p style="text-align: center;">DANIEL F. O'CONNELL, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">10 UNITED STATES EXPRESS COM- PANY, a corporation, <i>Defendant.</i></p>		In Tort.
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Plaintiff, of the City of Paterson, in the County of Passaic and State of New Jersey, says that:

1. Defendant was, at the times hereinafter mentioned engaged in the business of a com-
20 mon carrier of goods, and for the purpose of carrying on said business owned and operated a number of wagons and other vehicles in the City of Hoboken, in the County of Hudson and State of New Jersey.

2. That on January 9, 1913, plaintiff was engaged as a painter and was working on a swinging scaffold suspended from the Henderson Street station of the Public Service Railway Company,
30 at the intersection of Newark Street, Ferry Street and Henderson Street, in said City of Hoboken.

3. That said defendant, on said day, by its agents and servants, so carelessly and negligently drove and managed one of its said wagons, that said wagon was driven into and against said swinging scaffold upon which said plaintiff was working.

4. That solely by reason of the defendant's
40 negligence as aforesaid, plaintiff was greatly in-

jured, bruised and wounded, and became and was sick, sore, lame and disordered, and still so remains, and has ever since been, and will for a long time to come be prevented from attending to his necessary affairs and business, and has necessarily expended large sums of money in endeavoring to be cured of his said injuries.

The plaintiff demands as damages the sum of \$500, together with the costs of his suit.

HARLAN BESSON, 10
Attorney for Plaintiff.

Certificate.

TO THE HONORABLE, THE CHIEF JUSTICE OF THE
SUPREME COURT:

I hereby certify as the state of the case on appeal the within transcript of the record made by the stenographer designated and sworn herein. 20

And I further certify the fees of said stenographer to be Twenty-one dollars and thirteen cents.

J. W. RUFUS BESSON,
Judge of the Hoboken District Court.

30

40

Testimony.
Hoboken District Court

	EMIL W. MATHEKE,		
	<i>Plaintiff,</i>	}	In Tort.
	<i>vs.</i>		
10	UNITED STATES EXPRESS COMPANY, <i>Defendant.</i>		

	DANIEL F. O'CONNELL,		
	<i>Plaintiff,</i>	}	In Tort.
	<i>vs.</i>		
20	UNITED STATES EXPRESS COMPANY, <i>Defendant.</i>		

Stenographer's Minutes.

Of evidence taken at the trial of the above-entitled cause before the Court and a jury; this twenty-eighth day of March, 1913.

APPEARANCES:

30 HARLAN BESSON, Esq., Attorney of Plaintiffs.

MCDERMOTT & ENRIGHT (Mr. Carpenter), Attorneys of Defendant.

40 By consent of counsel both of the above cases were tried together with the stipulation that the testimony may be used in both cases with the same force and effect as if they were tried separately, but that the verdict of the jury should be given in each case separately.

Mr. Besson thereupon opens to the jury.

5
Emil W. Matheke—Direct.

EMIL W. MATHEKE, one of the plaintiffs, after being duly sworn on his oath, testified as follows:

DIRECT EXAMINATION BY MR. BESSON:

Q. Mr. Matheke, where do you live? A. 107 Adams Street.

Q. What is your occupation? A. I am an awning maker by trade. 10

Q. Did you do any painting work? A. I was working doing a little painting, iron work and so forth when I worked on this last job.

Q. Were you an iron worker, too? A. No; I am not. That isn't my occupation. I have done some iron work as an iron worker's helper.

Q. You were employed by the Long Broadhurst Company in January, 1913, weren't you? A. Yes, sir. 20

Q. What salary did you receive? A. \$15 a week.

Q. What was your occupation on the 9th day of January, 1913? A. Why, I knocked up rivets on that day. After the accident happened why of course I could not do any more in that line so I done a little painting after that to continue the day.

Q. Were you injured on that day? A. Yes, sir. 30

Q. Describe how you received your injuries? A. Well, that is rather a hard proposition for me to describe how the injury happened, because when we were thrown from the scaffold here I had my back turned, when the thing happened so I could hardly say how I was struck or where.

Q. What were you doing that day? A. I was bucking up rivets.

Q. What does that consist of? A. How? 40

Emil W. Matheke—Direct.

Q. What is what? What do you mean by bucking up rivets? A. I just held on a dolly bar and we held on the back of the rivet and bucked them up.

Q. Where were you when you were doing this work? A. On the scaffold at the time.

Q. Where was the scaffold? A. It was swung
10 around the column—one of the elevated columns.

Q. At what place? A. At Henderson and Jefferson Street, off of Jefferson Street.

Q. How high is that structure at that place? A. Well, I don't know; I should judge about forty feet, probably; the structure is as high as that.

Q. How high was this scaffold in the air? A. About eight or ten feet; something like that; eight feet.

20 Q. You were on that scaffold bucking up rivets? A. Yes.

Q. How was that suspended from the structure? A. By ropes; we had the ropes suspended from the upper part.

Q. Was anyone else there with you? A. Yes, sir; the boss-foreman, was working with me on the scaffold at the time.

Q. What happened to you while you were on
30 that scaffold that day? A. There was a wagon coming along there and hit us; we had our backs turned on the scaffold at the time when we were hit; the scaffold was knocked from under us. I merely kept from falling off the scaffold by taking hold of the column or I would have been thrown to the street.

Answer objected to. Last part of answer stricken out.

40 Q. The scaffold went from under you? A. The

Emil W. Matheke—Direct.

scaffold went from under us and knocked it right from under us.

Q. You kept from falling by holding on to the column? A. Yes; the lattice on the column.

Q. With which arm did you do that? A. The left arm.

Q. Did you sustain any injuries as a result of that? A. Yes, sir; I did. 10

Q. What? A. Shoulder, arm and side; I had two ribs bruised, the arms and shoulder.

Q. Did you work that day? A. I continued working; I didn't do any work of any account because I couldn't; the other party bucked up the last rivet and the scaffold was put back again and he put that last rivet in for me. I couldn't use my left hand; I used my right hand with the brush and I continued. 20

Q. You couldn't use the left hand? A. No; in fact I didn't know how bad I was hurt until that evening; I had to see a doctor the following day.

Q. Did you return to work later? A. No, sir; I didn't do any work after that.

Q. Have you been to work since? A. No, sir; not for that firm.

Q. Have you worked for anyone since that time? A. I have worked for the firm previous to that but here lately I have not been with them. 30

Q. Who have you worked with since? A. I am with the Shore Road.

Q. When did you first go to work after this injury? A. I went to work on the 28th of January after the injury when I went back with this firm.

Q. With the Broadhurst people? A. With the Broadhurst people. 40

Emil W. Matheke—Direct.

Q. How long did you work after that for them?

Objected to as immaterial. Question allowed.

A. I may have continued about three weeks after that.

10 Q. Now, Mr. Mathelke, did you suffer much pain during this time?

Objected to as leading. Objection sustained.

Q. What was your condition during the period between January 9th and the time you went back to work for the Broadhurst people?

Objected to unless it is shown that the condition was the result of this accident. Question allowed.

20 A. Well, that is from the time the accident happened that day until I went back to work?

Q. Yes. A. I was unable to lay on that side at all; I was in agony and pain there for a whole week.

30 Q. Where did you feel those pains? A. Right in the side; I got it from the shoulder right down to the lower ribs; I couldn't lay on that side at all; I lay in torture and paced my room for that whole week, and after that pain started to leave me sometime about a week or two after that, of course naturally I couldn't use the arm at all; I couldn't go back in that line of business; I couldn't go back until the 28th.

Q. What was your condition the second week? What was your condition the following week?

40 A. The second week it relieved me some; the doctor had given me some medicine that I used there; I rubbed myself, rather, and the pains left me quite some relieved the second week.

Emil W. Matheke—Cross.

Q. Who was your physician? A. Dr. Snyder.

Q. Did you pay him anything for his services?

A. Yes, sir.

Q. How much have you paid him? A. Well, I don't just remember exactly what I did pay.

Q. Can you remember approximately what it was? A. I think it was five visits; I don't just recollect now what I did pay him; the doctor might be able to explain that; I couldn't say exactly. 10

Q. You made five visits to him? A. Four or five visits; yes, sir.

Q. And you paid him for these visits? A. I paid him for those visits; yes.

Q. Do you know what wagon it was that struck the scaffold? A. Yes; it was a U. S. Express wagon. 20

Q. How do you know that? A. I read the name on it after we got down from the pillar down to the surface; the wagon continued going until two certain parties stopped the driver and kept him from going until we got down; and I spoke to the driver; that is how I came to know it was a U. S. Express wagon; I got the number of the wagon and the driver's number; that is how I came to know it. 30

CROSS EXAMINATION BY MR. CARPENTER :

Q. Mr. Matheke, how old are you? A. 32; will be next June; 31 at present.

Q. Where do you live now? A. 107 Adams Street.

Q. Hoboken? A. Yes, sir.

Q. How long have you lived there? A. I have been there 18 years, in that same house, I guess. 40

Q. How many years have you been working?

Emil W. Matheke—Cross.

A. Oh, the last 17 years, I believe, since father died.

Q. What was your occupation during those 17 years? A. I have been an awning maker by trade.

Q. An awning maker? A. Yes, sir.

Q. Sometimes you do structural iron work? A.
10 When there is nothing to do in my line of business, this season of the year, I do anything at all.

Q. Bucking up rivets is a job that takes a good deal of skill; it takes a man who knows his job? A. Well, I don't know that there is much science to it; anybody can hold a dolly bar, I guess; I learned it in a day or two and I don't think it requires much skill and strength.

Q. What do you have to do to buck up a rivet?
20 A. Just hold on a bar, a straight piece of iron with a set in it which takes the back of the rivet and they hammer on the other side.

Q. Your job was to hold this iron bar against that rivet. A. Against that rivet; yes, sir.

Q. How big is the iron bar that you hold up?
A. About two feet six long.

Q. About how big around? A. About two inches, an inch and a half, or an inch and three
30 quarters.

Q. That has got to be heavy enough to offer resistance to the blow, so that when the hot bolt is driven— A. You are asking me something I don't know anything about. I am not a practical iron worker. I couldn't answer that.

Q. It takes a good deal of strength to hold that up. A. No; it is a knack, that is all.

Q. But you have to hold that iron bar up there
40 sufficiently strong against the rivet to flatten it?
A. Naturally; yes.

Emil W. Matheke—Cross.

Q. So that it will hold; that is the idea, is it not? A. Yes.

Q. How long had you been working for the Broadhurst Company before this accident? A. I think I was there five days; I think four or five days when that accident happened; I am not positive. I guess the foreman here will tell you. I think it is five days.

10

Q. Work was slack in the awning business then? A. Yes; in the winter time it is.

Q. You say this scaffold was built around this column? A. Yes; it was suspended with a rope—planks they had running and two planks laid across.

Q. How wide was the platform? A. What do you mean by how wide?

Q. Well, how wide was the platform? You say it was a high platform built around the column. A. Yes.

20

Q. How wide was it? A. Why, I believe there were two ten foot planks on there and probably four by six, five of those across.

Q. Across the long planks where that platform laid? A. Yes.

Q. You were standing on this that day, weren't you? A. Standing on that; yes.

30

Q. Whereabouts was this platform build—over the street there at Ferry Street and Grove Street? Is that the place it was built? A. Around the column there. What do you mean? It was swung from the tip of the structure down that lattice.

Q. Built over the street—the street was down under you, was it not? A. Yes.

Q. And trolley cars run under there, don't they, on the street? A. They run right by that column,

40

Emil W. Matheke—Cross.

within two feet of that column; the trolley cars could pass; they passed there all morning.

Q. That is what is known as the Hoboken Elevated, that runs from the Lackawanna Ferry?

A. The Public Service structure—whatever you may call it—the Hoboken Elevated; I guess that is right.

10 Q. Just on the other side of this elevated structure or just beyond where you were working, is the street, where the teams pass up and down, it is not? A. Yes, sir.

Q. And they always go up and down the trolley tracks underneath the elevated structure? A. Underneath? What do you mean—the trolley tracks or which?

20 Q. Both of them go up and down the trolley tracks? A. Not in there; they just cross the third column we were working on; trolleys pass on the outside of that structure.

Q. Just on the other side the trucks pass? A. Trucks pass on both sides.

Q. Where you were working? A. Yes.

Q. You were right there at the junction then of these several streets, weren't you? A. Right at the junction; that was the junction, yes.

30 Q. That is a pretty busy junction there, is it not? A. Well, I don't know when. At that hour in the morning there is at times; yes.

Q. That is, at different times of the day? A. At different times of the day.

Q. What time did this accident happen? A. At 9:40 in the morning, if I am not mistaken.

40 Q. What time did you get to work that morning? A. That morning I believe at eight o'clock; it rained that morning, I think; we usually get to work at seven.

Emil W. Matheke—Cross.

Q. There was a man on this structure heating rivets with a little rivet heater? A. Above us; yes.

Q. What did he do—throw the rivets to you?
A. No; he handed them down to us.

Q. So you didn't catch them in a bucket. A. No.

Q. Who else was working on this particular platform with you? A. I and the foreman; that is all. 10

Q. Was this scaffold fixed so that you could raise and lower it by ropes? A. We could raise it or lower it.

Q. That is how you moved that up and down that column. A. That was stationary there until we got through; we just had an hour's work and we were through there. 20

Q. How long had you been there? A. What do you mean?

Q. You say you were there— A. That was the last job we had there. We were to go there that day with four rivets to drive there; that was all; then we were to take the scaffold out of there.

Q. How long had you been working on that particular column? A. I guess we were working there practically half an hour before the party got ready to heat rivets for us. 30

Q. On this particular platform was the foreman and yourself? A. Yes, sir.

Q. That is all? A. That is all.

Q. Were any of your men working on the street there, down on the sidewalk? A. That I couldn't say.

Q. Let us just see where you were; the car tracks are underneath the elevated structure. A. No; these car tracks weren't underneath this 40

Emil W. Matheke—Cross.

column. They passed on the right of the column going east.

Q. In other words, were you between the columns; is that the idea? A. No; this is the outside column—the outside column; this is the column that is on the south side of the elevated structure where we were working.

10 Q. On the street side of the structure; is that the idea? A. The street side; yes.

Q. And the cars were just on the other side of the column from you? A. No; the cars passed on the same side of that column going east; the Grove Street cars going east.

Q. You didn't see what part of the wagon hit you or anything? A. No, sir; I had my back turned when we were hit. I don't know what
20 part of the wagon hit us at all.

Q. Whereabouts were you standing when the wagon was there? A. On the scaffold; I was just trying to drive a pin in the column and I had my back turned working at that time with a sledge in my hand; as soon as we were hit I made a grab and grabbed the lattice of the column.

Q. You had a sledge; you were flattening a rivet? A. No; I wasn't. I was driving a drift
30 pin to make the hole true.

Q. You were driving a pin that makes the hold round? A. You got it right.

Q. How long a hammer did you have? A. Well, it is a button set; a small hammer; it was probably about an eight pound hammer.

Q. Just a small hammer? A. Well, that was a small hammer.

Q. You swing that by both hands or one? A.
40 One.

Emil W. Matheke—Cross.

Q. Which hand? Are you a right-handed man?

A. Yes, sir.

Q. Use the hammer with your right hand, I suppose? A. Yes.

Q. About how wide was this platform you were working on? A. About across from you to me—four feet.

Q. How wide, about? A. Four feet six or seven; about to the step there (indicating). 10

Q. You had been working on such a platform as that right along? A. No.

Q. This was wider than you had been working on right along? A. I never worked on any before; that was the only scaffold I stood on, I believe.

Q. You worked on the day of this accident? A. I didn't do any of any account; I done odd jobs around with a brush there to get through; that was all with the right hand. 20

Q. You didn't do any more riveting that day? A. No, sir; the last rivet we drove after the accident why the party that was heating the rivets bucked that rivet for me.

Q. But you didn't stop bucking rivets because you were hurt, did you? A. Naturally, I did.

Q. But you didn't realize the seriousness of this until night, did you? A. Yes; I did; I realized it that morning; that is the reason I had to get this party down to buck that rivet for me. 30

Q. After the last rivet was driven there, I understand that you painted after that for the rest of the day? A. Yes.

Q. Right on that same column, was it? A. No; not on that column; that was the posts and the girders that run across the girder they were putting up on that station. 40

Emil W. Matheke—Cross.

Q. That was above where you were? A. Above where we were; yes.

Q. How did you get up there from where you were? A. We had planks stretched across there, a runway just as you would go down and walk along the same as we were standing on here now; it didn't require any climbing or anything.

10 Q. You had planks there from the platform where you were working? A. This platform had nothing absolutely to do with this painting business.

Q. How did you get off the platform? A. Where we were hurt on?

Q. Yes. A. We got knocked off the platform.

Q. Where? A. Off that platform we were working on.

20 Q. Where did you get knocked to? A. I told you we grabbed the lattice of this column; if we didn't grab that we would be knocked to the street.

Q. After you grabbed that platform what did you do? A. I didn't grab the platform.

Q. After you grabbed the lattice work. A. I hung on until I got my bearings—until I got my footing on the levels and I climbed down with
30 the other hand.

Q. Where did you climb down to? A. Down to the street. The platforms were swung on the upper part of the elevated structure.

Q. You climbed down to the street? A. Sure; I wasn't going to jump to the street or fall.

Q. Using both hands in coming down, didn't you? A. No, sir; I did not.

Q. How did you get up to the platform where
40 you did the painting after that? A. There wasn't any platform; merely a run that we had there.

Emil W. Matheke—Cross.

Q. How did you get up to that? A. Why, you walk right there; it didn't require any climbing to get there.

Q. When was it that you went to see Dr. Snyder? A. The day after the accident.

Q. What time of the day? A. I don't know whether it was in the morning—yes; I guess it was in the morning, or in the afternoon; I am not positive. I believe it was in the morning. 10

Q. You didn't make over four or five visits to him, I understand? A. How?

Q. You made about four or five visits. A. Four or five visits.

Q. He charges fifty cents a visit, doesn't he? A. It all depends on the medicine; it may be fifty, seventy-five, eighty-five, or sixty-five.

Q. You didn't pay over two or three dollars, did you? A. No; I don't think I did. 20

Q. Is he here this morning? A. Yes, sir.

Q. When you went to see Mr. Besson after this accident, you first told him you were thrown off this platform, didn't you? A. Well, thrown naturally we were thrown from the platform; yes, sir. The scaffold was knocked out from under us.

Objected to. Objection overruled. 30

Q. You went to employ Mr. Besson as your attorney, didn't you?

Objected to. Question allowed.

A. I did; yes, sir.

Q. Didn't you tell Mr. Besson, your attorney, when you first went to see him, that you were thrown from the scaffold to the street by this accident? A. I don't remember. 40

Emil W. Matheke—Cross.

Q. You may have said that then?

Objected to. Objection sustained.

Q. Where do you claim that you were injured, Mr. Matheke? A. I had the shoulder, arm and side bruised.

Q. Shoulder, arm and side? A. Yes.

10 Q. Do any of those bruises shown on you now. A. No; not that I know of. I never examined them since.

Q. You don't claim any permanent injury? A. No, no; certainly not.

20 Q. I understand that you don't claim injuries for more than—lasting more than eighteen days; you were only incapacitated eighteen days. A. Eighteen days; after that I went back to work but I didn't do any work of any account until I left that position.

Q. What was it that you were painting when you went to do the painting up above? A. It is the God's truth, I didn't do any painting there at all that day; I just painted around.

MR. CARPENTER: I move to strike that out as not responsive.

A. As I stated before, I think it was—

30 THE COURT: You may strike out the answer. I don't think the answer is responsive.

BY THE COURT:

Q. You understand the question—it is perfectly simple. What was it you were painting? A. The girder I stated that before.

BY MR. CARPENTER:

40 Q. How many girders were there to be painted?

Emil W. Matheke—Re-Direct.

A. Two girders to be painted, but I believe one was painted at that time; it was the one that we were working on that they had painters there doing the work.

Q. You were then just an emergency painter?

A. That is all I was after that; I didn't do any painting.

Q. At the end of the day you had your work 10
all done, hadn't you? A. My work all done?
What do you mean my work all done?

Q. Your work on that particular job was all done on that particular day? A. The painters might have been there; I believe they painted.

Q. Was it not a fact that you were told not to come back to work on the following day? A. No, sir.

Q. Was it not a fact that you were told there 20
wasn't any more work for you? A. No, sir.

RE-DIRECT EXAMINATION BY MR. BESSON:

Q. What is the width of Ferry Street at the point at which this accident occurred? A. From the column?

Q. I mean the entire street?

Objected to unless he knows.

30

A. I should judge probably about 75 feet; it is pretty wide there at that point; it might be 50, 75 or 65 feet; I am not positive.

Q. But it is a very wide street? A. It is a very wide street from the column here.

Q. Was it obstructed in any way that day? A. No, sir.

Q. A wagon could have driven around there?
A. Yes; they had all the room in the world to get 40

Emil W. Matheke—Re-Cross.

by there. Why the drivers passed right there all that morning; the column from the trolley tracks is about two feet; they passed all that morning; he had the whole street to himself when he passed it.

10 Q. The injuries that you suffered were the injuries that you received in that accident? A. In that accident; yes.

RE-CROSS EXAMINATION BY MR. CARPENTER:

Q. After that accident that day did you engage in any athletic sports? A. I did not; certainly not.

Q. No boxing or anything of that kind? A. That is not in my line.

20 Q. You don't mean to tell me that you don't know how to handle your fists, or anything of that kind?

Objected to as immaterial.

A. Certainly.

30

40

John E. C. Snyder—Direct.

JOHN E. C. SNYDER, a witness called by and on behalf of the plaintiff, after being duly sworn on his oath, testified as follows:

DIRECT EXAMINATION BY MR. BESSON:

Q. Dr. Snyder—

MR. BESSON: Do you admit the doctor's 10
qualifications?

BY MR. CARPENTER:

Q. Are you practising here in town? A. Yes.

MR. CARPENTER: Oh, yes.

BY MR. BESSON:

Q. You are a physician practicing in the City of Hoboken? A. Yes. 20

Q. You are acquainted with the witness who was just on the stand? A. I am.

Q. Did you attend him for any injuries? A. I did.

Q. Do you recall attending him about the 10th of January, 1913? A. I do.

Q. What was the nature of those injuries? A. Sprains of the shoulder and contusion of the left side, more or less strain of the muscles of the arm —left arm. 30

Q. Did that contusion cover the entire side? A. No; it was in the lower part, about the region of the two lower ribs of the left side.

Q. How many times did he visit you? A. I should judge four or five times; I am not just exactly sure of the exact number of times.

Q. In your opinion did that injury incapacitate him from work? 40

Objected to as not calling for a medical opinion on the subject.

John E. C. Snyder—Cross.

Objection withdrawn.

Q. (Last question read). A. I should say it did for the time being, at least for a week or ten days.

Q. Is that strain a very painful injury? A. It is for a few days; it is not a permanent injury.

10 Q. How long a period did those visits that he made to you cover? A. About one week.

Q. Did he pay you for them? A. He did.

Q. How much did he pay you? A. In the neighborhood of \$5.00 I should say, altogether.

Q. About a dollar a visit? A. That all depends on what treatment he had at the time.

CROSS EXAMINATION BY MR. CARPENTER:

20 Q. You say he had a contusion? A. Yes.

Q. Where was that? A. In the side down here (indicating).

Q. Where is that? A. The lower left side in the region of the two lower ribs.

Q. The lower ribs? A. Yes, sir.

Q. Tell us what a contusion is? A. A contusion is a bruise, in common language.

30 Q. Bruises come from blows, don't they? A. They do.

Q. They don't come from—If I jump up with one hand and grab a bar above me and hold onto it, I get a strain, don't I? A. You get a strain of the joint affected; yes, but if your body swings against another object you get a bruise. You were speaking of holding by your hand, and you naturally swing like a pendulum.

40 Q. What is strained? It is the muscles of the arms and not the joints and tendons? A. Not

John E. C. Snyder—Cross.

necessarily; the ligaments of the joint may be strained.

Q. You strain the ligaments in the joint itself?

A. The ligaments are part of the joint.

Q. Do you mean to say that ligaments are part of the joints themselves? A. Yes, sir; certainly.

Q. That is a ball and socket joint in the shoulder, is it not? A. Yes.

10

Q. And when we speak of the joint we speak of the bones on the theory that the bones form the joint, don't we? A. The parts that hold the bone in the socket, they are the ligaments.

Q. As you just described, what was contused was the ligament in the joint? A. They are part of the joint.

Q. So that when a man jumps and catches a bar with his hands—for instance, he catches a parallel bar or horizontal bar there is always some strain on the muscles of the arm, shoulder and side, isn't that so? A. Certainly.

20

Q. From that strain we don't get bruises unless we come in contact with something doing that? A. Certainly not.

Q. Was it a bruise that would incapacitate you from work? A. No, no.

Q. The contusion? A. A strain in the shoulder; the strain in the shoulder incapacitated him in my opinion.

30

Q. What evidence did you see on his body of the strain? A. The strain of what—the strain of the shoulder or muscles of the arm?

Q. The strain of the muscles of the shoulder. A. There is no evidence to the naked eye; the only evidence you can get is the history of the case, tenderness to the touch and the inability to do the functions of the arm.

40

John E. C. Snyder—Cross.

Q. The way you determined that this joint was restrained—the arm or shoulder—was by what he told you; isn't that so? A. Partly.

Q. Did you, by touch or from your own observation, determine that he had a strain? A. I determined that he had considerable tenderness all through the arm and shoulder joint, which would indicate an injury of that kind.

10 Q. How did you know that fact? A. Examination of the person by touch.

Q. What, from your examination, revealed that to you? A. The evidence or symptoms.

Q. What symptoms were there present in him? A. Tenderness to touch, inability to raise the arm, to put it in the normal way—the way he put his other arm.

20 Q. And he only came to you a week; is that right? A. About a week.

Q. How much is your regular charge for a visit? A. There is no regular charge; whatever I see fit to charge.

Q. Do you know exactly what you charged this gentleman? A. No; I do not; it was in the neighborhood of \$5.00.

30 Q. It might have been \$2.50 might it not? A. Possibly it might be anything.

Rudolph Goex—Direct.

RUDOLPH GOEX, a witness called by and on behalf of the plaintiff's, after being duly sworn on his oath, testified as follows:

DIRECT EXAMINATION BY MR. BESSON:

Q. Where do you live, Mr. Goex? A. I live 78 River Street.

Q. What is your occupation? A. I am a cook 10
working for a hotel.

Q. Did you see Mr. Mathelke on the 9th of January? A. Yes, sir.

Q. 1913. What did you see? A. I am working in that same place he was working on that new station; I wasn't on the same thing; I was working on different kind of work.

Q. Did you see this accident? A. Yes, sir. I see that accident. 20

Q. How did that happen? Tell how it happened. A. I worked on a scaffold; I see the wagon run across the street, you know, and I seen all that wood and ladders fall down you know and a couple of men up there you know; come out and make the wagon stop, you know; that is what I saw.

Q. What kind of wagon was it? A. Some express wagon. 30

Q. Do you know what wagon it was? A. United States Express wagon.

Q. What part of the wagon hit the scaffold?
A. The front of the wagon.

Q. What do you mean by front, the top of it?
A. The top of it.

Q. In which direction was the wagon going? Do you remember in what direction the wagon was going? A. I don't understand what you mean. 40

Rudolph Goex—Cross.

Q. What way; north or south was it? A. Going up in Ferry Street.

Q. Going toward the ferry or away from the ferry? A. No; going at the ferry.

CROSS EXAMINATION BY MR. CARPENTER:

10 Q. Whereabouts were you standing? A. I was on the scaffold, too, you know.

Q. You were on the same scaffold? A. Not on the same scaffold; a different scaffold.

Q. On the top? A. I am painting.

Q. You were painting at the time? A. Yes.

Q. What was under you? A. Under me there was nothing at all, just the street; I was on top.

20 Q. What were you standing on? A. I got two pieces of wood.

Q. You were standing on a platform? A. Platform; yes.

Q. How big was the platform you were on? A. Then it was a different platform from what this man work on.

Q. How big was it? A. About five feet, you know, two ladders; about five feet long.

30 Q. You were painting something above? A. On top; yes.

Q. At the time he was hit? A. Yes; I just looked down, you know; I was on top.

Q. When you heard the boards fall you looked there to see what was the matter? A. I looked down.

Q. You didn't know anything about what was going on down there until that time, did you? A. No; then I looked down.

Clifton L. Rose—Direct.

CLIFTON L. ROSE, a witness called by and on behalf of the plaintiff's, after being duly sworn on his oath, testified as follows:

DIRECT EXAMINATION BY MR. BESSON:

Q. Where do you live, Mr. Rose? A. At the present time, 51 Ravine Avenue, Jersey City Heights. 10

Q. Are you acquainted with Mr. Mathelke? A. I am.

Q. How long have you known him? A. Well, since about the 10th of December.

Q. Did you see the accident which he described this morning? A. I did.

Q. Where were you when you saw this thing happen? A. Well, I just worked on a scaffold they were on to go up above and I was heating rivets for them, and I just got back on my scaffold to heat a rivet when I heard a crash below and I looked down to see this express wagon going out from under the end of the planks. 20

Q. Did you see the express wagon strike the scaffold? A. I saw him just as they were under it; I was warned by something falling down before the plank went, I looked down of course to see what was the matter. 30

Q. Did you see Mathelke thrown from the scaffold? A. I seen them both thrown from the scaffold.

Q. Who was that—Mr. Mathelke? A. The boss; Mr. O'Connell.

Q. (To witness in rear) Mr. O'Connell stand up. A. (Witness stands up as directed).

Q. Is that the man that was with him? A. It is.

Q. Was he thrown from the scaffold? A. He was. 40

Clifton L. Rose—Cross.

Q. You are positive it was a United States Express wagon? A. I am.

MR. CARPENTER: We don't dispute that.

Q. About how wide is the street at that point?

A. Well, I should judge sixty or seventy feet.

Q. Were there any obstructions in the street?

10 A. Not any.

Q. There was plenty of room for the wagon to drive without going under there? A. There was plenty of room either way, on either side without striking this pillar on the end on both sides of the trolley tracks; the tracks spread there in a pair between this, the Grove Street towards the ferry and the Grove Street back, so we were not in the way of the trolleys in either way, yet the express wagon hit us.

20

CROSS EXAMINATION BY MR. CARPENTER:

Q. You say that the scaffold was built right around the column and that it was right there at the junction? A. Yes.

Q. What streets are there that cross at that point? A. Jefferson and Henderson.

Q. Jefferson and Henderson Streets cross Ferry at that point? A. Yes, sir.

30

Q. And how many car lines go through there?

A. Why, there is only one line, the Grove Street each way.

Q. This car line, the cars go up Ferry Street from the Ferry? A. Down to the ferry, coming up Newark Street.

Q. Coming around Henderson Street, don't they? A. They do not.

40

Q. Where do they go beyond that corner? A. They go to the ferry and back up on Newark Street.

Clifton L. Rose—Cross.

Q. Whereabouts do they make a turn onto Newark Street, at that corner? A. No; they don't.

Q. They don't turn out from under the elevated at that point? A. No; they cross there; you know the Elevated comes up Ferry Street.

Q. Yes. A. And Newark Street runs a little the opposite way, and they cross right under at that point; right where we were working over there it is a double track. 10

Q. How many feet above this scaffold where Mathelke was working were you? A. I was probably six feet.

Q. On another platform entirely? A. Yes.

Q. What were you doing up there? A. I was heating rivets.

Q. You passed them down below to them? A. I passed them down below and held the snap for them. 20

Q. You always did that, did you? A. Yes.

Q. Your job then was to heat rivets and pass them down? A. Yes; and then to go down and hold the snap.

Q. And that was what you always did on the job? A. Yes.

Q. What was Mathelke's job? A. He was bucking up rivets. 30

Q. After this accident happened you continued to go down and hold the snap, didn't you? A. There was only one more rivet to drive and I done the bucking up and finished that rivet.

Q. There was only one more rivet to drive after this accident happened? A. I think that was all; we were nearly through.

Q. What did he do on that last rivet? A. Well, I couldn't exactly say what he did do. 40

Clifton L. Rose—Cross.

Q. He did his regular work on it, didn't he? A. No; he didn't. He may have held the snap. That isn't much to do. All you got to do is to hold it on while the man drives it.

Q. Tell me this: At the time you drove the last rivet, did Mathelke complain that he was injured, at that time? A. Yes; he did.

10 Q. You saw him hanging on the pillar, I suppose, didn't you? A. I did; I saw him falling and I thought they were going to the street for sure, and they would if they hadn't caught one hand in the lattice work there to save himself; otherwise he would have been a goner.

Q. Whereabouts was that piece of lattice work that he grabbed with reference to where he was standing? A. Directly under him to the side of him.

20 Q. Directly under him? A. Right to the side of him.

Q. He must have acted quickly as soon as the platform was struck? A. He certainly did; he didn't lose any time; otherwise he would never have caught it.

Q. Did you see what he did after that that day? A. Well, he done very little; a little painting, fussing around.

30 Q. He did all there was for him to do? A. No; not exactly; because he didn't feel like doing much.

Q. Did he say that to you? A. Yes; he didn't want to after that.

Q. Did he say those very words to you? A. That he didn't want to do much.

Q. Did he say those words to you after that? A. I don't know as he said that.

40

MR. CARPENTER: Then I move to strike that out.

Daniel F. O'Connell—Direct.

A. I wouldn't swear that he said those very words.

MR. BESSON: I consent that it be stricken out.

DANIEL F. O'CONNELL, one of the plaintiff's, after being duly sworn on his oath, testified as follows: 10

DIRECT EXAMINATION BY MR. BESSON:

Q. Where do you live, Mr. O'Connell? A. Paterson.

Q. What is your occupation? A. Foreman.

Q. Foreman of what? A. Of construction work of different kinds.

Q. What is your salary per week? A. Why, I 20 worked by the month, actually.

Q. Well, what do you get by the month? A. \$125.

Q. Were you in the employ of the Long Broadhurst Company in January? A. Yes, sir.

Q. Where were you working? A. At Henderson and Ferry Street elevated station.

Q. You have heard the accident described by Mr. Mathelke this morning? A. Yes, sir. 30

Q. Were you there when that accident occurred? A. Yes, sir.

Q. Just tell us how that happened? A. Well, we rigged a scaffold there which had been rigged there before upon the same place, to drill the holes; we had that morning two rivets, if I am not very much mistaken, to drive, and I got off the scaffold and went to telephone to the company about a few minutes before and told them I had one more rivet to drive. 40

Daniel F. O'Connell—Direct.

Objected to.

I spoke to the company about some other matter—

THE COURT: Don't tell us any more what you said.

10 A. When I came back there the express wagon ran under there and threw Mr. Mathelke and I off the scaffold; we grabbed a lattice post—I don't know whether he grabbed the lattice or outside of the post—I can't tell you just now, but I saved myself from going to the ground. I know that we were pretty lame that day; it wasn't half or three quarters of an hour before we started driving the rivets and I said, well, we will drive this rivet someday even it we are on the bum.

20 MR. CARPENTER: I move to strike out what he said.

And I told Mr. Mathelke that we would buck up—

MR. CARPENTER: I object to what he said to Mr. Mathelke.

Q. Don't tell me, Mr. O'Connell just what your feelings were afterward and since.

30 MR. CARPENTER: I object to what his feelings were.

A. All I was trying to do was to explain to you and tell you the truth about the matter as it was.

BY THE COURT:

40 Q. You mean his physical condition. A. Well, I was pretty lame and after half or three-quarters of an hour I felt as though I could finish that one rivet and we did finish it.

Daniel F. O'Connell—Direct.

BY MR. BESSON :

Q. Did you work the next day? A. I stayed on the job; I didn't work because I wasn't able to, but I couldn't take any time off.

Q. What did you do there? A. I just directed the men to do some painting and I walked down on the ground to see that they didn't leave any spots untouched.

10

Q. Did you go to a doctor the next day? A. I went that night.

Q. Who did you go to see? A. Dr. Jolson of Paterson.

Q. How many times did you go to see him? A. Twice.

Q. Did you suffer any pain during this time? A. Well, I certainly did suffer pain.

Q. Where did you have this pain? A. Well, the first was in my right muscles then it swelled out through my shoulders right down through my breast there; I think when I encountered the post I hit myself—

20

MR. CARPENTER: I object to what he thought and ask that that be stricken out.

Stricken out by consent.

Q. At any rate, you suffered pain? A. Yes.

30

Q. How long did that last? A. One week.

Q. When did you go back to work permanently, that is, to undertake your full duties? A. Oh, it was three weeks.

Q. Did you get paid during that time? A. I certainly got my pay.

Q. Did you go to work every day during those three weeks? A. I was on the job every day.

Q. But you didn't do any physical work? A. No, sir.

40

Daniel F. O'Connell—Cross.

Q. Simply directed the work? A. Simply directed.

Q. How much did you pay the doctor for your services? A. I think it was \$3.50; I would not be positive. I think I paid him \$3.00 and fifty cents for drugs and linaments.

MR. CARPENTER: Bottles of what?

10

A. A box of salve that he gave me the last time.

CROSS EXAMINATION BY MR. CARPENTER:

Q. Mr. O'Connell, you aren't claiming any loss or any damages in this suit for your lost wages or salary, are you? A. I don't say that exactly.

20 Q. Well, are you? I want to understand just what you are claiming. A. Well, I couldn't claim a salary loss.

Q. You never lost any salary? A. Not for my loss of salary.

Q. What are you claiming damages for? A. Well, my pains and doctor bills.

Q. You never have lost salary or wages? A. No.

Q. Because you got all that? A. Yes, sir.

30 Q. What is your job up there; you are foreman, I understand. A. Yes, sir.

Q. The foreman's duty is to see that the work of his men is done properly? A. Yes, sir.

Q. You have always done that and you were always able to do that, weren't you? A. Yes, sir.

Q. Even after this accident just the same as before? A. No; not after that.

40 Q. Do you mean that you couldn't direct your men as well after the accident as you could before? A. No, sir; I could not.

Daniel F. O'Connell—Cross.

Q. You didn't put in a claim to your employers, the Long Broadhurst Company of this accident, did you? A. Yes, sir.

Q. You did? A. Yes, sir.

Q. When did you put that in? A. Every day.

Q. You know that Mr. Mathelke did not, don't you? A. No, sir; he did. 10

Q. He put in a claim for recovery of these same injuries? A. I didn't put in a claim, I reported the accident.

Q. You didn't claim any compensation under the Employers Liability Act with your company? A. No, sir; I didn't think they were to blame.

Q. And at the time this accident happened you were working on a rivet or on the hole that you were going to put a rivet in? A. Getting ready; yes. 20

Q. Just what were you doing at the time? A. Why, I trying to get a piece of iron so that the rivet would go in there.

Q. In other words you were trying to make the hole smooth and round? A. Well, I don't know how you term it; we were driving pins in to tighten up the bolt so that when it goes in it will go in easy. 30

Q. You were standing up and putting in that pin, weren't you? A. No; it is very hard now to say just what I was doing because when these things happen it is very indefinite to say just what I was doing at that very minute.

Q. As soon as you felt this wagon top hit your scaffold you immediately grabbed the column, didn't you? A. The lattice work, I grabbed—I grabbed hold of something I can't swear what it was it was part of that column; I don't know whether it was the lattice or the cross piece. 40

Daniel F. O'Connell—Cross.

Q. Just as soon as you were hit you grabbed it? A. I had to grab it or I would have fell.

Q. You do a lot of work, structural iron work, don't you? A. Yes, sir.

Q. And have for how many years? A. I have been at it since I was 19 years old.

Q. And you are now how old? A. 47.

10 Q. In the prime of your life? A. Just about.

Q. There is nothing the matter with your health; you are as strong as the next man of your age and size, aren't you? A. Yes, sir.

Q. You don't suffer with rheumatism any? A. No, sir.

Q. So that you are strong and vigorous and were on the day of this accident? A. Up to that day.

20 Q. And you were on that day, weren't you? A. On that day; yes, sir.

Q. You visited the doctor twice. When was the first time you saw him? A. Well, it was on the 9th of January, I think—December—the date of the accident.

Q. Which arm of yours was strained? A. Left.

Q. Your left arm was? A. Yes, sir.

30 Q. Only one arm? A. (No answer).

Q. You had a talk, didn't you, with the driver of this wagon afterwards—some words said? A. Yes, sir; a word or two.

Q. Between you and Mathelke and the driver—Mathelke had something to say at the time, didn't he? A. That I won't swear to.

PLAINTIFF RESTS.

Richard Wipfel—Direct.

RICHARD WIPFEL, a witness called by and on behalf of the defendant, after being duly sworn on his oath, testified as follows:

DIRECT EXAMINATION BY MR. CARPENTER:

Q. Whereabouts do you live, Mr. Wipfel? A. 669 Hackensack Plank Road, North Bergen.

Q. You are in the employ of the United States Express Company aren't you? A. Yes, sir. 10

Q. And have been for how long? A. I should judge about a year.

Q. You were on the 9th of January last, weren't you? A. Yes, sir; I believe I was.

Q. What was your job on that day? A. At that time I was driving.

Q. Driving a wagon? A. Yes, sir.

Q. What kind of wagon was it? A. A top wagon; an ordinary express wagon. 20

Q. With a single or double team? A. Double team.

Q. Was it the usual express wagon that we usually see on our streets? A. Yes, sir.

Q. There wasn't anything unusual about it, as to size? A. No, sir.

Q. What kind of cover did it have? A. Just those top covers. 30

Q. And that extended a little bit beyond the driver's seat? A. Yes; just a hood.

Q. There was a hood? A. Yes; it went a little bit down in front.

Q. A little bit down? A. Yes, sir.

Q. What time did you start out to work on that day? A. Well, I am supposed to get down to the stable about 8:15.

Q. Where did you start from? A. From Pa. 40

Richard Wipfel—Direct.

voniam Avenue to the Hoboken stable—I don't know just where that is—Brunswick Street.

Q. You were driving down to the ferry? A. Yes, sir; down to the ferry.

Q. That is, down on Ferry Street further, is it not? A. Yes, sir.

Q. What time was it you left the stable? A. 10 8:15 we get there and it takes 15 minutes to fix up.

Q. You left the stable at 8:15 to get to the ferry at 8:30? A. Yes, sir.

Q. On that day did you approach the corner of Ferry and Henderson Streets? A. Yes, sir.

Q. How were you travelling at that time? A. Very slow, because I generally take care of my horses. I like to tell all the way, if you let me.

20 Q. What is that? A. I would like to tell the accident all the way through.

Q. All right; go ahead. A. Well, as I was going down Henderson Street there was a wagon coming along with a load of cement, and being I was running light, as a rule drivers let the heavy wagons have the way, so I stopped this wagon and stood in front of him; I didn't want to stay there and I pulled around there under the track—
30 you see in the car track there. While I was driving a little way—it was kind of dark at the time—the lattice work made it kind of dark—so I swung around and hit the hood of the wagon, which just scratched the top—didn't do any damage to it. I didn't know what I hit, then I pulled away onto Ferry Street, and the hind end of the wagon struck this here scaffold and knocked two boards off; when I heard the boards hit
40 I pulled up a little way to get out of the way of the trolley and then the foreman came up to

Richard Wipfel—Direct.

me and says, "Hey don't you know that you did a little damage here?" I said, "Yes; I heard it." I asked him if there was anybody hurt, he said there was no damage, nobody was hurt. I asked him that because I had to put in an accident report, and he said, "No," and I went to get down to look around and saw that gentleman that was up here first—

Q. Mathelke? A. Yes, sir; he just had hold on the lattice work—just holding on the lattice work there, and the other gentleman stayed rivet heating; he just kept on heating rivets; and there was another gentleman who was there too—he was up there too. I only knocked two boards off the scaffold; of course if I knocked all the scaffold down why this other gentleman would have his forge on the ground, because I was in that line of business; about his holding that button up as he called that dolly bar, you got to take a pretty good—

Answer objected to. Last part of answer stricken out.

Q. You say there were how many boards knocked off? A. Two boards.

Q. Was the whole platform knocked on the street? A. No, sir.

Q. Did either of these men say anything to you, either O'Connell or Mathelke? A. Yes; that fellow laughed at me and said, "You are a bum driver" I don't mind that because they all say that.

Q. Which one said that? A. Mathelke.

Q. Did O'Connell say anything? A. Who is that?

Q. He was the old gentleman here. A. The foreman?

Richard Wipfel—Direct.

Q. Yes. A. Yes, sir; he did. He went and told me about the accident. I says, "Anything hurt or anybody?" like that, and he said, "No." Of course he called me down a little but then he told me to drive on my way and look out where I am driving.

10 Q. Did you see the scaffold before you ran into it? A. No, sir.

Q. Did anybody warn you that that scaffold was there before you ran into it? A. No, sir; no one there at all to warn me.

Q. Was this part of the public street where you were driving when you hit the scaffold? A. Yes, sir.

Q. Have you driven through there before? A. Yes, sir; for a year straight.

20 Q. Every day during that time through that same section? A. Every day; yes, sir.

Q. Right at the point where you were driving this day when you struck the scaffold, was that part of the public street? A. Yes, sir; it is, too.

Q. And it is the street where you make the turn to go down Ferry Street, passing under the elevated structure? A. Yes, sir.

30 Q. How high is the elevated structure above there? A. I couldn't tell you.

Q. It is high enough so that a wagon could pass without any difficulty? A. Yes, sir.

Q. No fear of any contact between the top of that wagon and the elevated structure? A. No, sir.

Q. How fast were you going at the time you struck this platform? A. Just walking, I was just turning around.

40 Q. The horses were on a walk? A. Yes, sir.

Q. And you just turned behind this stone wagon? A. Yes, sir.

Richard Wipfel—Cross.

Q. That was about to pass ahead of you, as I understand? A. Yes, sir.

Q. And you? A. Stopped.

Q. And then turned in around behind it? A. Yes, sir; because he stopped right in front of me.

Q. Did anybody hold you up after the accident or how did you come to stop? A. Why, I just heard the two boards fall. 10

Q. That is when you stopped yourself? A. Yes, sir.

Q. Were the curtains of your wagon torn? A. No, sir; they weren't torn at all. I told you that is why I stopped, because I pulled to the side.

Q. Were any of these men thrown to the street? A. No, sir.

Q. And the heater was still up there on the same platform the men were on? A. Yes, sir; still turning his forge to heat the rivets. 20

CROSS EXAMINATION BY MR. BESSON:

Q. You say you didn't see the scaffold? A. No, sir.

Q. Wasn't the reason that you didn't see the scaffold because you didn't look? 30

Objected to as immaterial. Question allowed.

A. Well, I told you I was looking down where I was going; I didn't know I had to look up.

Q. Did you look up? A. No, sir; I didn't look up; I was looking at my horses the way I am going.

Q. The street is pretty broad there, is it not? A. Yes, sir. 40

Q. You could have driven around the outer

Richard Wipfel—Re-Direct—Re-Cross.

side of the pillar, could you not? A. This cement wagon stopped me.

Q. I know; but the street is broad enough to let more than a cement wagon pass there, is it not? A. It was going crossways.

Q. How wide is the street there? A. I don't know just how many feet; I know it is—

10 Q. Pretty wide street, is it not? A. Yes, sir.

RE-DIRECT EXAMINATION BY MR. CARPENTER:

Q. You were coming out of what street when you turned into Ferry Street? A. I believe it is Henderson Street.

Q. You were coming out of Henderson into Ferry Street? A. Yes, sir.

20 Q. Which way was the cement wagon going? A. Going up—I don't know the name of the street.

Q. Going up in another street and turning into Ferry Street also? A. No, sir; turning into Henderson.

Q. Crossing Ferry Street? A. Yes, sir.

Q. So that brought that wagon in front of you? A. Yes, sir.

30 Q. And you gave that wagon the right of way, I understand? A. Yes, sir; because it was loaded.

RE-CROSS EXAMINATION BY MR. BESSON:

Q. You could have stopped to let that wagon pass? A. Yes, sir; if I had a lot of time.

40 Q. And you were in such a hurry that you didn't have time to stop? A. Why, I did stop, and he stopped in front of me; I had to go one way, and I went where the trolleys run along and where the wagons had been running every morning.

Direction of Verdict.

MR. CARPENTER: If your Honor please, I move for a direction of verdict in favor of the defendant, for the following reasons:

1. It appears that the driver of the express wagon unquestionably had a right to be where he was on this street. There is absolutely no contradiction of that fact. It is absolutely uncontradicted that the driver was going at a walk. The only testimony on that point that is competent and I think the only testimony, is that of the driver himself, who says that his horses were going at a walk and that he had just passed behind a cement wagon. 10

2. There is no testimony in this case to show what right the plaintiffs had—what legal right they had on the scaffold, in a place which was dangerous for them to be in. They were working for the Long Broadhurst Company, but there is no testimony to show that they had any right to put men up there on the scaffold, suspended above a public street, where, from the very nature of the circumstances, they were likely to be run into and where the scaffold was likely to be hit by a wagon of normal size which passed through that section. 20 30

3. So it appears from that testimony that the right of the driver was superior to the rights of the plaintiffs, and certainly before they can recover, the plaintiffs must prove that the driver of the wagon was negligent. Their sole right to recover from the defendant depends on its negligence, and where can you find negligence? 40

Direction of Verdict.

4. In other words, I say there is no negligence, because they have not proved that the defendant did anything that he ought not to have done, nor have they proved that it has omitted to do something that it should have done.

10 5. This morning I ran across the case of *Suburban Electric Company against Nugent*, 58 N. J. L., 658, and I find there that Chief Justice Gummere held that in an action for personal injury, the plaintiff, in order to recover damages, must do more than show the possible responsibility of the defendant for the injury. In the
20 absence of direct evidence he must show the existence of such circumstances as would justify the inference that the injury was due to the wrongful act of the defendant and exclude the idea that it was due to a cause with which the defendant was unconnected. A person using a public street has a right to presume that it is free from dangerous obstacles, and the mere fact that he receives injury by coming in contact with such an obstacle, does
30 not warrant the conclusion that he contributed to the injury by his own negligence.

40 6. This is a little bit different situation. Here is a case where a man using a highway comes into some obstruction in the highway or in the street. Now, as to the driver, all he had to do was to watch his horses to see where he was going, and he was not obliged to look up under the structure. He was not bound by law to do that. All he was bound to do was to

Direction of Verdict.

use reasonable care in passing through the street. He had a covered wagon—a wagon of ordinary construction, with a hood on it, and the hood and the elevated darkened it there and that naturally obstructed his view of things above that, so that the duty was on the plaintiffs to give some warning to vehicles approaching under there, of the danger that these men were placed in and the danger to the wagon, because had the wagon itself been injured I dare say the express company could have recovered from the Long Broadhurst Company for the injuries. 10

7. At least the rights of the defendant were equal to those of the plaintiffs, who were on this platform. There is no superior right in that. There is no superior right in the plaintiffs, from what I can see, and if there is any superior right to either one it is to the defendant to use this street in the way he was doing. 20

8. There is no negligence proved in this case, and before there can be a recovery there must be negligence proved, the sole right to recover being because the defendant was negligent. 30

9. Now, then, going one step further, I think you will find that if there is any negligence, it is the negligence of the plaintiffs themselves, or their employers in not warning vehicles passing on the street that there was an obstruction here and that men were there who might be injured in case of contact with the cover of the wagon and the platform. They do not go so far as to perform their duty and give a warning to the people on the highway. 40

Direction of Verdict.

10 Suppose this had been an automobile truck with one of those hoods we customarily see in front of the truck, and that had gone through and struck the platform and not given the men there a chance to escape, can we say, if the automobile was going at a proper pace, because the platform was struck, that thereby the owner of the automobile truck was negligent for not seeing that which in the ordinary course of events he was not bound to lookout for? I think that the driver of the express wagon could not be said to be negligent. I think he was doing what he had a perfect right to do under the circumstances, and I think further, that before the plaintiffs can recover they must show some negligence on the part of this defendant, which does not appear in this case. On these grounds and for this reason I ask for a direction in favor of the defendant.

20

30 Motion denied. To which ruling of the Court counsel for the defendant then and there prayed an exception, which was granted and signed and sealed accordingly.

Mr. Carpenter then sums up to the jury.

Mr. Bessons sum up to the jury.

The Court thereupon charge the jury as follows:

Charge.

THE COURT: Gentlemen of the jury: This case is based on negligence. In order to find a verdict for these plaintiffs you must first find that this driver, for whose acts the defendant is responsible, was negligent in driving that wagon through that street.

These men were on this scaffold around this column, and I charge you that they have a right—
 the maintenance of an elevated structure means that it has to be repaired, and in order to repair it scaffolds of that kind must be put there—and so that when this driver drove through the street, it was his duty to drive in such a manner as not to injure men in the position in which they were. The evidence of the driver was that he did not look, and it was on that statement that I allowed this case to be submitted to you for your consideration.

If you find that there was negligence on the part of the driver when he struck this scaffold, then it will be your duty to assess damages. Of course if you find that there was no negligence, then the verdict will be for the defendant. If you find there was negligence, then the damages is to be limited to the amount that they actually paid for medical services. In one case—the case of Mathelke—it was limited to five dollars for medical services and the loss of wages which he sustained—and to that you have a right to award damages for the suffering that he sustained. In these cases you are not to award punitive damages. You are simply to give compensation for the suffering that each one of these men sustained by this accident.

It is a simple case; I think the facts are plain; and I do not know that I can help you any more than to make those few suggestions.

Charge.

In the regard to the requests to charge, I charge you that the plaintiffs must show that the driver did not use reasonable care in driving on the street. That is the basis of the negligence which you will have to find.

I refuse to charge the second request.

10 And I also charge that the defendant was only bound to use reasonable care not to injure others in the street. That is the care that a reasonable man would use in driving through a street of that kind, where there are structures of the kind testified to in this case.

The jury thereupon retired in charge of the bailiff.

20 MR. CARPENTER: I object to so much of the Court's charge as was to the effect that the men—that is, the two plaintiffs—were on the column or on the platform around the column, with a right, or had a right to be there.

Also to that part of the Court's charge which was to the effect that a scaffold must be put there—that is, on the column.

30 Also to that part of the Court's charge which was, that it is the duty of the driver to drive in such a manner as not to injure men in such a position as the plaintiffs were.

Also to that portion of the charge in which the Court charged that the evidence of the driver was that he did not look.

40 Also to the Court's refusal to charge the second request to charge, which was, that the driver of the wagon had the right to

Charge.

presume that the street was free from a scaffold suspended from the elevated structure.

I, Harry Schirmer, a stenographer designated by the Court and sworn, do hereby certify that the foregoing is a true copy of the testimony of the proceedings on the trial of the suit of Emil W. Mathelke and Daniel F. O'Connell against the United States Express Company, in the Hoboken District Court. 10

HARRY SCHIRMER,
Stenographer.

20

30

40

Clerk's Transcript.

District Court of the City of Hoboken.

STATE OF NEW JERSEY, }
 Hudson County. } ss.:

Before:

J. W. RUFUS BESSON, ESQ.,

Judge.

10

HARRY BENNETT,

Clerk.

HARLAN BESSON, Plaintiff's Attorney.

MCDERMOTT & ENRIGHT, Defendants' Attorneys.

No. 11312.

20

EMIL WILLIAM MATHEKE,

Plaintiff,

vs.

UNITED STATES EXPRESS COMPANY,
 a corporation,

Defendant.

\$500.00

In Tort.

30

Summons, copy.....	\$1.50
Service & Return60
Venire	1.25
Summoning Jury	1.00
Attending50
Jury Fees	3.00
Attys. Fees	15.00
Trial Fees	1.50

40

A summons was issued, tested January 25, A. D. 1913, Returnable February 4 A. D. 1913, at ten o'clock in the forenoon at the Court Room of said Court in the City of Hoboken. The sergeant at Arms returned the Summons as follows, viz:

Clerk's Transcript.

I served the within summons on the within named defendant Corporation on Charles H. Mertz, Chief Clerk this 25th day of January, A. D. 1913 by reading the same to him and leaving him a true copy thereof John Solferino, Sergeant at Arms.

January 25, 1913, Plaintiff filed State of Demand and Notice of Trial by Jury.

February 4, 1913, Case was placed on the list of causes for Trial by Jury for March 28, 1913. 10

February 13, 1913, Stipulation was Filed.

March 26, 1913, Venire was issued to John Solferino, Sergeant at Arms.

On the part of the plaintiff the following witnesses were sworn and gave their evidence, Emil W. Matheke, John E. C. Schnieder, Rudolph Gouex, Clifton Rioce and Daniel F. O'Connell.

March 28, 1913, The Sergeant at Arms returned the Venire as follows: By viture of the above Venire Facias I have duly summoned the following lawful jurors to appear before the District Court of the City of Hoboken, at the time designated; Edward Carroll, John Buckley, Otto Goll, Henry Grote, Thomas Kennedy, James Monohan, Max Strohmeir, Charles Guilloud, George Mickens, Charles Pierano, Max Miller and James McClosky. 20

March 28, 1913, parties appeared and proceeded to trial by jury. 30

On the part of the defendant the following witness was sworn and gave his evidence, Richard Whipple.

Harry W. Shirmer, was sworn as stenographer.

Whereupon it is on this twenty-eighth day of March, A. D. 1913 by this jury considered and adjudged that the said Emil William Matheke plaintiff recover against said United States Ex- 40

Clerk's Transcript.

press Company, a corporation, defendant, the sum of Three hundred dollars, damages, and twenty-four dollars and thirty-five cents, cost of suit.

April 1, 1913, defendant filed rule and reasons to show causes, returnable on April 8, 1913.

April 8, 1913, plaintiff adjourned to April 15, 1913.

10 April 15, 1913, Court having heard plaintiff and defendant on rule to show cause and reserved decision.

June 5, 1913, rule to show cause was dismissed.

June 10, 1913, plaintiff filed order dismissing rule.

June 16, 1913, defendant filed notice of appeal, stipulation and bond on appeal.

20 I, HARRY BENNETT, Clerk of the District Court of the City of Hoboken, J. W. Rufus Besson, Esq., Judge, do hereby certify that the foregoing is a true copy of the record of a judgment of said Court.

In witness whereof I have set my hand as Clerk of said Court and affixed the seal of said Court this 16th day of June, 1913.

HARRY BENNETT,
Clerk.

30 (Seal.)

Clerk's Transcript.

District Court of the City of Hoboken.

STATE OF NEW JERSEY, }
 Hudson County. } ss.:

Before:

J. W. RUFUS BESSON, Esq.,

Judge,

HARRY BENNETT,

10

Clerk.

No. 11313,

DANIEL F. O'CONNELL,

Plaintiff,

vs.

In Tort.

\$500.00.

UNITED STATES EXPRESS COMPANY,
 a corporation,

20

Defendant.

HARLAN BESSON, Plaintiff's Attorney.

MCDERMOTT & ENRIGHT, Defendants' Attorneys.

Summons, copy \$1.50

Service and Return60

Trial Fees 1.50

Atty. Fees 10.00

20

A Summons was issued tested January 25, A. D., 1913, returnable February 4, A. D., 1913, at ten o'clock in the forenoon at the Court Room of said Court in the City of Hoboken. The Sergeant at Arms returned the summons as follows, viz.: I served the within named defendant corporation on Charles H. Mertz, Chief Clerk this 25th day of January, A. D., 1913, by reading the same to him and leaving him a true copy thereof, John Solferino, Sergeant at Arms.

40

Clerk's Transcript.

January 25, 1913, plaintiff filed state of demand and notice of trial by jury.

February 4, 1913, case was placed on the list of causes for trial by jury for March 28, 1913.

February 13, 1913, stipulation was filed.

March 26, 1913, venire was issued to John Solferino, Sergeant at Arms.

10 March 28, 1913, the Sergeant at Arms returned the venire as follows: By virtue of the Venire Facias I have duly summoned the following lawful Jurors to appear before the District Court of the City of Hoboken, at the time designated:

Edward Carroll, John Buckley, Otto Goll, Henry Grote, Thomas Kennedy, James Monohan, Max Strohmeir, Charles Guilloud, George Mickens, Charles Pierano, Max Miller and James Me-
20 Closky.

March 28, 1913, parties appeared and proceeded to trial by jury.

On the part of the plaintiff the following witnesses were sworn and gave their evidence, Emil W. Matheke, John E. C. Schneider, Rudolph Gouex, Clifton Roice and Daniel F. O'Connell.

On the part of the defendant the following witness was sworn and gave his evidence, Richard
30 Whipple.

Harry W. Schirmer, was sworn as Stenographer.

Whereupon it is on this twenty-eighth day of March, A. D., 1913, by this jury considered and adjudged that the said Daniel F. O'Connell, plaintiff, recover against said United States Express Company, a corporation, defendant, the sum of Two hundred dollars damages, and thirteen dol-
40 lars and sixty cents costs of suit.

Clerk's Transcript.

April 1, 1913, defendant filed rule and reasons to show cause, returnable on April 8, 1913.

April 8, 1913, plaintiff adjourned to April 15, 1913.

April 15, 1913, Court having heard plaintiff and defendant on rule to show cause and reserved decision.

June 5, 1913, rule to show cause was dismissed. 10

June 10, 1913, plaintiff filed order dismissing rule.

June 16, 1913, defendant filed notice of appeal, stipulation and bond on appeal.

I, HARRY BENNETT, Clerk, of the District Court of the City of Hoboken, J. W. Rufus Besson, Esq., Judge, do hereby certify that the foregoing is a true copy of the record of a judgment of said Court. 20

IN WITNESS WHEREOF, I have set my hand as Clerk of said Court and affixed the seal of said Court this 16th day of June, 1913.

HARRY BENNETT,
Clerk.

(Seal.)

Grounds of Appeal.
New Jersey Supreme Court.

	<p style="text-align: center;">WILLIAM EMIL MATHEKE, <i>Plaintiff-Appellee.</i> <i>vs.</i></p>	In Tort:
10	<p style="text-align: center;">UNITED STATES EXPRESS COMPANY, <i>Defendant-Appellant.</i></p>	
	<p style="text-align: center;">DANIEL F. O'CONNELL, <i>Plaintiff-Appellee,</i> <i>vs.</i></p>	On Appeal from District Court.
20	<p style="text-align: center;">UNITED STATES EXPRESS COMPANY, <i>Defendant-Appellant.</i></p>	

The appellant in the two cases above named specifies the following as its grounds of appeal:

- (1) Because the District Court denied defendant's motion for a direction in favor of the defendant and against the plaintiffs.
- 30 (2) Because the Court charged the jury as follows:

40 "These men were on this scaffold around this column, and I charge you that they have a right—the maintenance of an elevated structure means that it has to be repaired, and in order to repair it scaffolds of that kind must be put there—and so that when this driver drove through the street, it was his duty to drive in such a manner not to injure men in a position in which they were."

Grounds of Appeal.

- (3) Because the Court charged the jury:

“The evidence of the driver was that he did not look, and it is on that statement that I allowed this case to be submitted to you for consideration.”

- (4) Because the Court charged the jury:

“If you find that there was negligence on the part of the driver when he struck this scaffold, then it will be your duty to assess damages. Of course, if you find that there was no negligence then the verdict will be for the defendant.” 10

- (5) Because the Court refused the defendant's second request to charge, which was that “the driver of the wagon had the right to presume that the street was free from a scaffold suspended from the elevated structure.”

McDERMOTT & ENRIGHT, 20
Attorneys for Defendant.

30

40

Stipulation.**Hoboken District Court**

	WILLIAM EMIL MATHEKE,	} In Tort:
	<i>Plaintiff,</i>	
	<i>vs.</i>	
10	UNITED STATES EXPRESS COMPANY,	} In Tort:
	<i>Defendant.</i>	

	DANIEL F. O'CONNELL,	} In Tort:
	<i>Plaintiff,</i>	
	<i>vs.</i>	
20	UNITED STATES EXPRESS COMPANY,	} In Tort:
	<i>Defendant.</i>	

It is hereby stipulated between the attorneys for the two above named plaintiffs and the said defendant that the above entitled causes on appeal to the New Jersey Supreme Court shall be appealed on one state of case, argued together and the decision in either of said cases shall be controlling

30 in both of said cases.

We consent to the above.

HARLAN BESSON,
Attorney of said Plaintiffs.
McDERMOTT & ENRIGHT,
Attorneys of Defendant.

Stipulation.**New Jersey Supreme Court.**

WILLIAM EMIL MATHEKE, <i>Plaintiff-Appellee,</i> <i>vs.</i> UNITED STATES EXPRESS COMPANY, <i>Defendant-Appellant.</i>	}	In Tort: 10
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DANIEL F. O'CONNELL, <i>Plaintiff-Appellee,</i> <i>vs.</i> UNITED STATES EXPRESS COMPANY, <i>Defendant-Appellant.</i>	}	On Appeal from District Court. 20
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It is hereby stipulated between the attorneys for the two above named plaintiffs and the said defendant, that there shall be printed in the state of case on appeal the following papers:

Transcript of District Court Clerk in each case,

Copy of Complaint in one of said cases only. 30

Copy of Stipulation heretofore entered into concerning said appeal,

Copy of this Stipulation,

Transcript of Testimony,

Copy of Notice of Appeal in one case, and

Copy of Grounds of Appeal.

We consent to the above.

HARLAN BESSON, 40
 Attorney for Appellees.

McDERMOTT & ENRIGHT,
 Attorneys for Appellant.

Notice of Appeal.

(Served and filed Mar. 30, 1914.)

New Jersey Court of Errors and Appeals.

EMIL W. MATHEKE, <i>Plaintiff-Respondent,</i> <i>vs.</i> UNITED STATES EXPRESS COMPANY, <i>Defendant-Appellant.</i>	}	In Tort: On Appeal from Su- preme Court.	10
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DANIEL F. O'CONNELL, <i>Plaintiff-Respondent,</i> <i>vs.</i> UNITED STATES EXPRESS COMPANY, <i>Defendant-Appellant.</i>	}	On Appeal from Hobo- ken District Court.	20
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To Harlan Besson, Esq.,
 Attorney of Respondents.

Take notice that the United States Express Company, above named appellant, hereby appeals to the New Jersey Court of Errors and Appeals from the finding of the New Jersey Supreme Court affirming the judgment of the Hoboken District Court, upon the following grounds:

(1) The Supreme Court affirmed the judgment of the Hoboken District Court, whereas according to law it should have reversed such judgment.

(2) The Supreme Court erred in holding that defendant's motion for a direction on the ground that there was no negligence proved on the part of the defendant was properly refused.

Notice of Appeal.

(3) Because the Supreme Court held that the Hoboken District Court properly refused the motion of the defendant for a direction on the several grounds mentioned on the said motions.

(4) Because the Supreme Court held that the Court properly charged the jury, as follows:

10 “When this driver drove through the street, it was his duty to drive in such a manner as not to injure men in the position in which they were.”

(5) Because the Supreme held that the Court properly charged the jury as follows:

 “that the evidence of the driver was that he did not look, and it is on that statement that I allowed this case to be submitted to you for your consideration.”

20 and because the Supreme Court held that even if this were wrong it was not an error harmful to the defendant.

(6) Because the Supreme Court held that there was no question of contributory negligence in the case.

30 (7) Because the Supreme Court erroneously held that the driver did not have a right to presume that the street was free from obstruction, and held that there is a presumption that the street may be to some extent obstructed.

(8) Because the judgment entered in the Hoboken District Court was contrary to law and should have been set aside and reversed.

 MCDERMOTT & ENRIGHT,
Attorneys of Defendant-Appellant.

Opinion of Supreme Court.

(Filed, Feb. 24, 1914.)

New Jersey Supreme Court.

EMIL W. MATHEKE, <i>Plaintiff-Appellee,</i> <i>vs.</i>	} Opinion of Supreme Court.	10
UNITED STATES EXPRESS COMPANY, <i>Defendant-Appellant.</i>		
DANIEL F. O'CONNELL, <i>Plaintiff-Appellee,</i> <i>vs.</i>	}	20
UNITED STATES EXPRESS COMPANY, <i>Defendant-Appellant.</i>		

On Appeal from Hoboken District Court.
Harlan Besson, for Plaintiffs-Appellees;
McDermott & Enright, for Defendant-Appellant.

Argued at the November Term, 1913, before
Swayze and Bergen, J. J.

PER CURIAM. 30

These two cases concern injuries to the two plaintiffs, arising from the same accident, and were tried together. The plaintiffs had judgment for injuries which resulted from the following circumstances. They were working upon certain repairs to the elevated railroad structure in Hoboken. One was bucking up rivets which were being driven into the iron work and O'Connell was foreman of the work. They were both stand- 40

Opinion of Supreme Court.

ing on the scaffold built around one of the columns supporting the elevated structure so made that it could be raised and lowered by ropes. About 8 o'clock in the morning a wagon of the defendant company attempted to pass the street corner and the driver stopped to permit a cement wagon to pass, but it stopped and the driver of defendant's wagon in order to proceed drove
10 around the rear of the wagon and, when turning under the elevated structure, heard something scraping the top of the cover of his wagon, and two planks fell from the scaffold. There seems to be no doubt that this express wagon was driven so as to strike the scaffold and throw the plaintiffs to the ground, which caused the injuries for which they recovered.

At the conclusion of the case the defendant
20 moved for a direction on the ground (1) that there was no negligence proved on the part of the defendant. This was properly refused because there was evidence that if the driver had looked he could have seen the men on the scaffold, and he probably did, but thought that the wagon would miss it. At any rate there was a jury question presented.

(2) There was no testimony to show that the
30 plaintiffs had any right on the scaffold or that their employer had any right to put men on the scaffold suspended upon the public street. There is nothing in this because the fact that the men were there doing this work raised a presumption that they were properly there, which presumption was not met or overthrown, and in addition to this, even if what the defendant says on this point be true, it would not justify the driver in negligently injuring plaintiffs.

40 (3) That it was the duty of the plaintiffs or

Opinion of Supreme Court.

their employers to warn the defendant and others driving vehicles on the street that there was an obstruction. There is no merit in this. If the driver saw the men there he did not need any warning, and whether he saw them or not was a question of fact for the jury.

The next point is that the court improperly charged that "when this driver drove through the street, it was his duty to drive in such a manner as not to injure men in the position in which they were." On this point it is argued that the charge was an instruction that the defendant in the use of the highway was an insurer of others on the highway, or on a scaffold above the highway, and that it should have been limited to using "reasonable care for the safety of others." This is not an instruction imposing a burden to insure the safety of the plaintiffs; all the court said was that it was his duty to drive in such a manner as not to injure men in the position in which they were. 10
20

It is next argued that the court erred in charging "That the evidence of the driver was that he did not look and it was on that statement that I allowed this case to be submitted to you for your consideration." What the driver said was, "Q. Did you look up? A. No, sir, I didn't look up; I was looking at my horses the way I am going." It is claimed that this part of the charge was a misstatement of the evidence not only, but a direction to the jury to find for the plaintiffs, because the driver said he did not look where he was going. We do not see that in this part of the charge there was any direction for the plaintiffs. All the court said was that the evidence of the driver, that he did not look, was the reason why he allowed the case to be submitted to the 30
40

Opinion of Supreme Court.

jury, and even if this was wrong, it was not an error harmful to defendant.

10 The next point argued is that the court erred in failing to take into consideration the question of contributory negligence, it being urged that the court charged that if the jury found negligence on the part of the driver when he struck the scaffold, then it would be its duty to assess damages, and failed altogether to take into consideration the question of reasonable care required on the part of the plaintiffs. So far as we can see, there is no question of contributory negligence in this case. The Court did charge that the defendant was only bound to use reasonable care not to injure others in the street, that is the care that a reasonable man would use in driving through a street where there are structures of the kind testified to in this case.

20 It is also claimed that the court erred in refusing to charge as requested that the driver had a right to presume that the street was free from obstruction. We do not think such a presumption exists. The presumption is that the street may be to some extent obstructed. The judgment in each case will be affirmed with costs.

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40

New Jersey Court of Errors and Appeals.

EMIL WILLIAM MATHEKE,
Plaintiff-Appellee,

vs.

UNITED STATES EXPRESS COMPANY,
Defendant-Appellant.

10

In Tort.
On Appeal from
District Court.
On Appeal from
Supreme Court.

DANIEL F. O'CONNELL,
Plaintiff-Appellee,

vs.

UNITED STATES EXPRESS COMPANY,
Defendant-Appellant.

20

**BRIEF OF McDERMOTT & ENRIGHT
FOR APPELLANT.**

This appeal brings up a judgment of the Supreme Court affirming judgments in favor of both plaintiffs against the United States Express Company. The cases were tried together before a jury, judgment being rendered for Matheke for \$300, and for O'Connell, \$200. 30

The two plaintiffs on January 9th, 1913, were employed by the Long-Broadhurst Company to make certain repairs to the elevated railroad structure of the Public Service Railway Company at the junction of Henderson, Jefferson, Ferry and Grove Streets, Hoboken, N. J. Matheke was bucking up rivets, which were being driven into the structural iron work; O'Connell was foreman of the work. The elevated railroad at 40

this point is about forty feet above the street level. Plaintiffs were standing on a scaffold, which was constructed of planks, built around one of the columns supporting the elevated structure, in such a manner that it could be raised and lowered by ropes. The scaffold was about two or three planks in width.

10 Shortly after eight o'clock on the morning in question a wagon of the United States Express Company on its way from the Company's stable in Jersey City to the D. L. & W. Terminal in
 20 Hoboken attempted to pass the street corner above mentioned. The driver testifies that as he was going down Henderson Street a wagon loaded with cement crossed at the junction above mentioned in front of him (p. 38). The driver of the Express wagon, which was empty, stopped to permit the cement wagon to pass. The cement wagon stopped and the driver of the Express
 30 Company in order to proceed drove at a walk around the rear of the cement wagon and when turning under the elevated structure heard something scraping the top of the cover of his wagon. Two planks fell from the scaffold; the driver stopped immediately and saw the plaintiff Matheke holding on to the lattice work around the column and another man on the scaffold heating rivets, and O'Connell on the scaffold. The driver asked
 40 O'Connell if anybody was hurt. O'Connell replied, "No," and then called me down a little, but then he told me to drive on my way and to "look out where I was driving" (p. 40). On the same page the driver further testified that he did not see the scaffold before he ran into it; that no one warned him of its presence; that he was driving over a part of the public street of Hoboken when the cover of his wagon struck the scaffold, and that almost every day for nearly a year prior he had driven over the same portion of that street; that the elevated structure at the point under

which he was struck is of height sufficient for a wagon to pass under it without fear of being struck, and that his wagon had just turned behind the cement wagon when the collision between the wagon top and the scaffold occurred (pp. 40, 41). It was a dark morning. The driver is corroborated in the statement that the top of the wagon struck the scaffold by Rudolph Goex, a witness for plaintiffs (p. 25, ll. 35 and 36).

Defendant's wagon which struck the scaffold was of the usual Express Company type, drawn by two horses. It had a top cover with a hood projecting a little bit down in front. The statement of the driver as to the construction of the scaffold around the column is corroborated by Matheke (p. 11). Matheke also testified (pp. 11-12) that the surface tracks on which trolley cars and wagons run, pass on one side of the column, while the bulk of the street traffic is on the other side of the column; that the corner where he was working was a busy junction at the hour of the day that the accident happened (p. 12).

Legal Questions Involved.

At the conclusion of the case defendant moved for a direction (pp. 43 to 46) on the grounds (1) that there was no negligence proved on the part of the defendant; (2) that there was no testimony to show that plaintiffs had any right on the scaffold or that the Long-Broadhurst Company had any right to put men on the scaffold suspended above the public street; (3) that it was the duty of the plaintiffs, or their employers, to warn the defendant and others driving vehicles on the street that there was an obstruction and that men were thereon who might be injured in case of contact with the cover of the wagon and the scaffold. This motion was overruled (p. 46) and this is assigned as one of the grounds of appeal.

Appellant also complains because the Court charged the jury as follow :

(1.)

10 “These men were on this scaffold around this column, and I charge you that they have a right—the maintenance of an elevated structure means that it has to be repaired, and in order to repair it scaffolds of that kind must be put there—and so that when this driver drove through the street, it was his duty to drive in such a manner as not to injure men in the position in which they were.”

(2.) Also because the Court charged the jury:

 “The evidence of the driver was that he did not look, and it was on that statement that I allowed this case to be submitted to you for your consideration.”

(3.) And further because the Court charged the jury:

20 “If you find that there was negligence on the part of the driver when he struck this scaffold, then it will be your duty to assess damages. Of course, if you find there was no negligence, then the verdict will be for the defendant.”

(4.) The Court also erred in refusing to charge as follows:

30 “The driver of the wagon had the right to presume that the street was free from a scaffold suspended from the elevated structure.”

All of these grounds of appeal are pressed by appellant.

The per curium opinion of the Supreme Court disposing of these allegations of negligence is to be found on page 63 of the Case. The Court disposed of each of the above grounds in turn, and we think the questions involved can best be argued by taking them up in the same manner.

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POINT I.**There was no negligence proved on the part of the driver.**

The Supreme Court held that the motion to direct on this ground was properly refused "because there was evidence that if the driver had looked he could have seen the men on the scaffold, and he probably did but thought that the wagon would miss it. At any rate there was a jury question presented." 10

We submit that this finding was improper. There is no evidence to support the statement of the Supreme Court that "he probably did" look. On the contrary the driver testified (p. 40, l. 9) :

"Q. Did you see the scaffold before you ran into it? A. No, sir.

"Q. Did anybody warn you that the scaffold was there before you ran into it? A. No, sir; no one there at all to warn you." 20

On cross-examination (p. 41), he testified :

"Q. You say you didn't see the scaffold? A. No, sir.

"Q. Wasn't the reason you didn't see the scaffold because you didn't look? A. Well, I told you I was looking down where I was going; I didn't know I had to look up.

"Q. Did you look up? A. No, sir; I didn't look up. I was looking at my horses, the way I am going." 30

The supposition that if the driver had looked up he would have seen the men on the scaffold is of no consequence in this case. The question is was he obliged to look up under this elevated structure to see if any men were perched there on scaffolds, and was he guilty of negligence for failing to look up, or was his duty satisfied when without notice of the existence of the scaffold and without knowledge that it was there he drove 40

his horses in a careful manner and was looking in the direction he was going. This we submit is what was required of him.

10 The driver's passageway was obstructed by the cement wagon that stopped in front of him. He turned to the left to pass behind it and in so doing necessarily was obliged to pass under the elevated structure, which traversed the junction of several busy Hoboken streets. While turning
 10 around the cement wagon and under the structure he heard the top of his wagon scraping some obstruction and stopped. His horses were at a walk, the day was dark, it was dark under the elevated structure, he was looking where he was going. The scaffold was raised from the street to about the height of the top of the cover of his wagon. These facts certainly show that the driver was in the exercise of ordinary care on his part. He was not obliged to use more than ordinary
 20 care.

30 It is important to note that this is one of the busiest junction of streets in the City of Hoboken. Wagons pass and re-pass continually. Several street car lines traverse this junction, and this being about the hour that children go to school, doubtless school children were on their way to school when the accident happened. The driver had the duty of not only guiding his horses properly but of avoiding other vehicles in lawful use
 30 of the street and foot passengers crossing the streets. We urge that the doctrine of ordinary care does not require a driver in such a place and under such circumstances and on such a dark morning to look up in the air to see that no one is working in an unusual and unexpected place. The driver had passed over this same section of the street every day for about a year and had no such previous experience. The scaffold had only
 40 been there a short time and it was capable of

being raised and lowered by the men who worked upon it.

Plaintiffs in the absence of direct evidence must show the existence of such circumstances as would justify the inference that the injury was caused by the wrongful act of the defendant and exclude the idea that it was due to a cause with which defendant was unconnected.

Suburban Electric Co. v. Nugent, 58 N. J. L., 658;

Fox v. Wharton, 64 N. J. L., 458;

Also in *Weller v. McCormack*, 52 N. J. L., p. 472, where Judge Dixon said:

“The public right is paramount, and includes the right to have the street safe for travel. That of the abutting owner is subordinate to the public right. He may use the highway in front of his premises, when not restricted by positive enactment, but only on condition that he does not unreasonably interfere with the safety of the highway for public travel. Any such interference, arising from a want of due care on his part is unreasonable, and therefore to occasion such interference, by negligence in the exercise of his subordinate private rights, is a breach of public duty. This public duty, to exercise reasonable care, imposed on every person using the highway for such private ends as will endanger the highway if negligence takes place, exists for the benefit of individual travelers, and hence, when an individual sustains peculiar personal injury as the result of such negligence, a private action accrues to him against the person in default. For it is a general principle, that where there rests upon any person a public duty, either arising at common law or created by statute, and that duty is due to the public, considered as composed of individuals, and for their protection, each person specially injured by a breach of the obligation, is entitled to a private action to recover compensation for his damage.”

And in the case of *Thomas v. Consolidated Traction Co.*, 62 N. J. L., p. 37, where it was held:

10 “Whilst the defendant had the right to place these rails upon the street temporarily for its use in reconstructing or repairing its tracks, yet it was its duty to exercise reasonable care to guard the public using the street against the danger of accident to anyone in the use of the street, and a neglect of this duty resulting in injury was actionable negligence.”

In *Durant v. Palmer*, 5 Dutch, 544, 547, the Court of Errors held:

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

20 See also *Temperance Hall Association v. Giles*, 4 Vroom, 260; *Meyers v. Birch*, 30 Id., 238.

In 15 *Am. & Eng. Ency.*, 2nd Ed., 492, the rule is stated as follows:

“The right of a public to use a highway extends to the whole breadth thereof, and not merely to the part which is worked or actually traveled; and, consequently, an obstruction upon the untraveled part is a proper subject of complaint by the public or persons specially injured.”

30 See also *Opdycke v. Public Service Ry. Co.*, 78 N. J. L., 538.

40 While these cases deal with injuries to individuals sustained because of the negligence of others in placing obstructions in the street, the same principles of law are applicable to this case in so far as they declare what is the duty of one placing obstructions on, upon or over a public street, and the rights and duties of one in the lawful use of a public street.

The New York Supreme Court, App. Div., had a case very similar to this in *Campbell v. Wood*, 48 N. Y. Supp., p. 46. An electric lamp cleaner in lowering a lamp over a street had to leave a leg wire stretched over a portion of the street. He saw three wagons one behind the other coming towards him, and he told the drivers to go on the south side of the lamp and he then turned his back to the wagons while trimming his lamp. The drivers of the two first wagons heard and heeded the direction, but the third did not hear it, and his wagon struck the wire, and injured the lamp cleaner. Judge Putnam held:

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“The plaintiff, to maintain his action, was compelled to show that the injury for which he sought to recover damages was caused by the negligence of the defendant’s employe, and also the absence of negligence on his part contributing to the injury. We are unable to believe that negligence could be properly attributed to the driver of the express wagon lawfully traveling on the public highway, for failing to observe the leg wire which the plaintiff had placed across it. One using a public street has no reason to apprehend danger, and is not required to be vigilant to discover dangerous and unusual obstructions.”

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The Court further says of the driver, page 48, that he

“was properly attending to the ordinary duties of a driver, in a much-traveled public street, watching for other vehicles or for any ordinary obstacle in the street. It does not appear that he had ever passed that locality before when the lamp was lowered and the leg wire placed across the street. While the driver of a vehicle passing along the street in question might observe a wire stretched across it, we are unable to believe that negligence, under the circumstances appearing in this case, could be attributed to him in failing to observe it. His attention, as suggested, would naturally be drawn to the ordinary obstacles

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in a crowded public place. He would not be called upon to anticipate or watch for danger arising from an unusual obstruction, of which it does not appear he had any previous knowledge."

Since the defendant's driver was in the exercise of all due care on his part, since he was looking where he was going and was driving in a careful manner and there being no evidence to the contrary, we submit that the motion for a direction
10 should have prevailed.

POINT II.

It was the duty of the plaintiffs or their employers to have given some warning to the defendant's driver of the existence of the scaffold.

It is not disputed that no warning whatsoever was given of the existence of the scaffold built
20 around the pillar of the elevated structure. The scaffold was suspended by ropes from overhead; it was built around the column. There was no flag displayed to warn wagons passing this busy corner of the danger of driving over the course that defendant's driver took. No proof was offered by plaintiffs that defendant's driver drove on a part of the street which was not proper to be driven over, but on the contrary they admit that
30 over this very spot wagons are accustomed to travel daily, and trolley cars and other vehicles constantly pass within a foot or two of the point over which plaintiffs were standing at the time of the accident. No lookout was stationed at the base of the column to warn persons using the highway to look out for the scaffold. That portion of the street over which the scaffold was suspended was not roped off so that drivers would be warned not to pass thereover. Does it not seem that the
40 plaintiffs, or their employers, should have given some warning either by flag, by roping off, or by

stationing a lookout on the ground to warn the approaching vehicles, so that wagons of ordinary size and construction lawfully using this portion of the street, would be warned that if they drove on a particular portion of this street they would endanger men working on the scaffold above. It must be remembered that this scaffold was suspended about ten feet from the street level according to the plaintiff's statement, and this judgment is about correct because it was the top of the cover of the wagon which struck it. The projecting hood over the driver's seat doubtless obstructed the driver's view above.

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The case of *Campbell v. Wood, supra*, is the only one we have found that bears directly on this point. Page 49 Judge Putnam said:

"The driver of the wagon, in fact, had no notice of the obstruction in the street. We think a duty of active vigilance devolved upon the plaintiff, under the circumstances appearing in this case, which compelled him to give notice of the obstruction he had placed in the street, and to observe whether that notice was heard by the defendant's employe, and which duty was not satisfied by his giving a warning, and then turning his back to the approaching express wagon, without knowing whether the driver heard it or not. He was bound to give to the defendant's employe an effectual warning. We hence reach the conclusion that the plaintiff failed to show the absence of contributory negligence on his part."

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The Supreme Court dismissed this contention by saying that "There is no merit in this. If the driver saw the men there he did not need any warning, and whether he saw them or not was a question of fact for the jury."

It is true that if the driver saw the men there he did not need any warning, but this does not regard the testimony in the case which is that the driver did not see the men there, page 40. Fur-

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thermore the evidence being uncontradicted that the driver did not see the men and there being no evidence on this subject from any other witness in the case, we say there was not a question of fact about this subject for the consideration of the jury.

POINT III.

10 **There was no duty on the part of the driver to look for obstructions in the air as well as for those in the street.**

This Court held in *Durani v. Palmer*, 5 Dutch, p. 544, that streets and sidewalks are presumed to be free from obstructions the full width.

20 The driver was entitled to the benefit of this presumption. It is also true that any obstruction in a public street that impedes its lawful use is a nuisance, as held in the same case. Therefore the driver was justified in the use of this part of the public street on this day and under the existing circumstances in not looking about for unexpected perils, and in centering his attention upon that portion of the highway where in the ordinary course of affairs his diligence would be required. Furthermore it was dark under the elevated structure, the wagon was provided with a top and a hood running down in front, and it may be that even had the driver looked up as he turned behind 30 the cement wagon he could not have seen the scaffold. Whether he could or not is a mere conjecture. The fact is that he did not see it, although attending to his duties, and we submit that no warning having been given him of its existence he was not guilty of negligence for not having observed it.

POINT IV.

The Court erred in charging the jury that it was Defendant's duty to drive in such a manner as not to injure men in the position in which plaintiffs were.

This portion of the charge in effect was an instruction to the jury that the defendant in the use of the highway was an insurer of the safety of others on the highway, or on a scaffold above the highway. The cases cited above hold beyond question that the duty of one using a public highway is to exercise reasonable care for the safety of others. 10

The Court erred in charging the jury, "That the evidence of the driver was that he did not look, and it was on that statement that I allowed this case to be submitted to you for your consideration. From the way that this was charged the jurymen would naturally suppose that all they had to do was assess the damages. The driver testified, page 41, that he did not see the scaffold and that he was looking where he was going; that he did not know that he had to look up. This part of the Court's charge was certainly a mis-statement of the evidence, and was highly prejudicial to defendant's rights. 20

The Supreme Court thought that these portions of the charge were not harmful, even though wrong. 30

Suppose that there was doubt in the minds of the jury as to whether or not the driver was negligent, would they not naturally think, after the Court had declined to direct judgment for the defendant, that this charge was an indication to the jurors that the Court thought that because the driver did not look he was negligent, and for that reason there should be a verdict for plaintiffs? 40

We submit that the charge in these particulars therefore was error.

POINT V.

The Court failed in its charge to take into account the charge of contributory negligence.

10 The charge of the Court that if the jury found negligence on the part of the driver when he struck the scaffold, then it was their duty to assess damages, failed altogether to take into consideration the question of reasonable care required on the part of the plaintiffs.

This vice was covered expressly in the case of *Bliss v. Schaeffer Brewing Co.*, 67 N. J. L., p. 30, where Justice Garrison held:

20 “The special fault is that it selected a single circumstance from the many that bore upon the question at issue and presented it to the jury as sufficient of itself to warrant a verdict for the plaintiff; its general vice was that it ignored the real issue, which was the lack of reasonable care on the part of the driver, and substituted for it a circumstance that might or might not have been the result of such culpable conduct. Coming in when it did as an isolated proposition, out of all setting with the rest of the charge, and purporting to state the law for the control of the jury, it must be deemed to have been given that weight by them in reaching their verdict.”

30 This portion of the law is peculiarly applicable to the charge of the Court to the jury that the case was submitted to it because the driver testified that he did not look.

POINT VI.

The Court also refused to charge the jury as requested that the driver had the right to presume that the street was free from obstructions.

The Supreme Court in considering this complaint said, "The presumption is that the street may be to some extent obstructed." This doctrine has as far as we know never had the sanction of this Court. The doctrine in *Durant v. Palmer, Supra*, is to the contrary. 10

See also *Campbell v. Wood, Supra*.

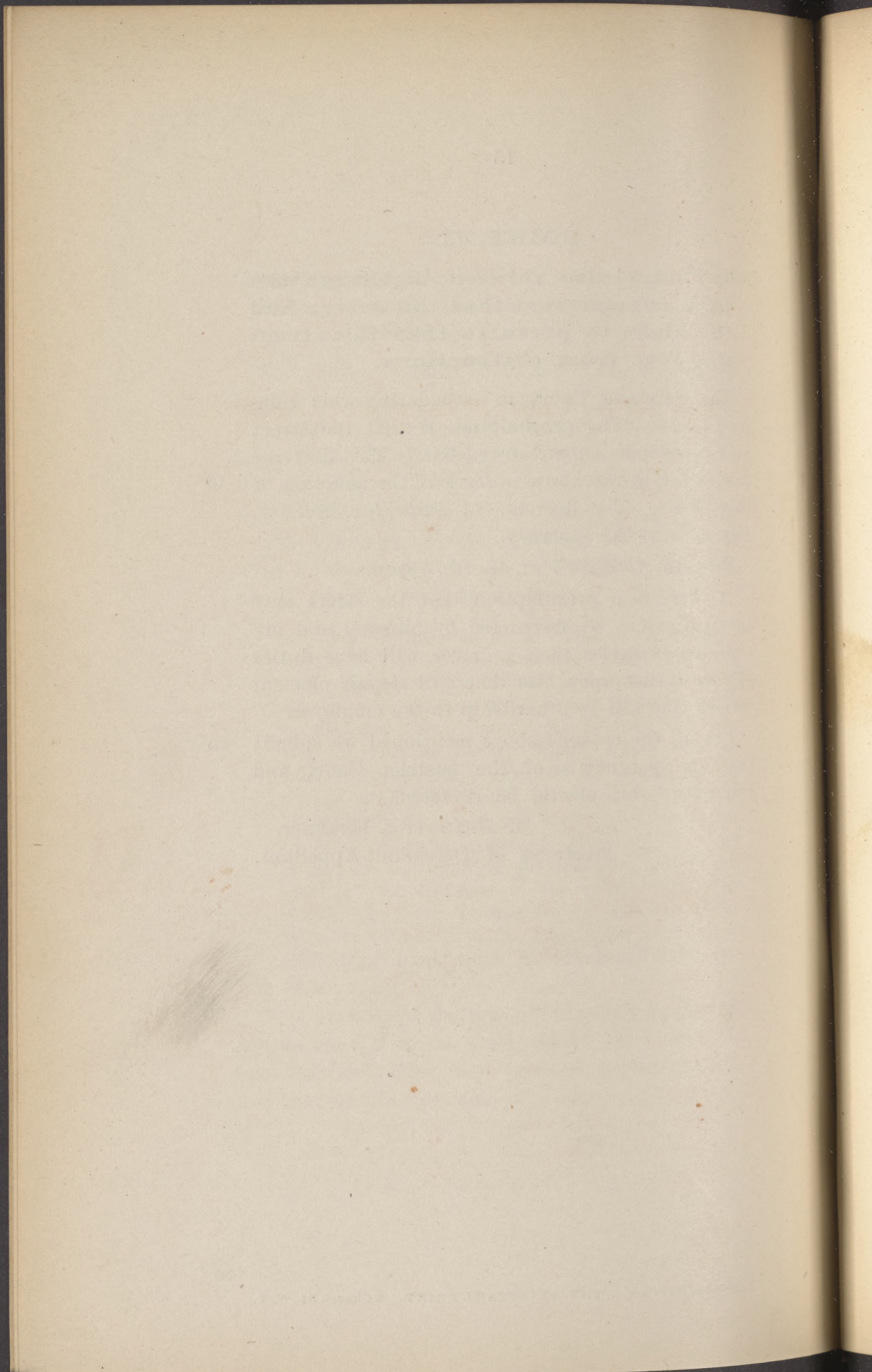
If there is a presumption that the street may to some extent be obstructed by unusual and unexpected obstacles then a driver will have duties of care thrust upon him that will impair efficient service and will be a hardship to the employer.

For all the reasons above mentioned we submit that the judgments of the District Court and Supreme Court should be reversed. 20

McDERMOTT & ENRIGHT,
Attorneys of Defendant-Appellant.

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New Jersey Court of Errors and Appeals ¹⁰

EMIL W. MATHEKE,
Plaintiff-Appellee,
vs.
UNITED STATES EXPRESS COM-
PANY,
Defendant-Appellant.

In Tort.
On Appeal
from District
Court.

20

DANIEL F. O'CONNELL,
Plaintiff-Appellee,
vs.
UNITED STATES EXPRESS COM-
PANY,
Defendant-Appellant.

On Appeal
from Supreme
Court.

BRIEF OF HARLAN BESSON FOR APPELLEES.

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This is an appeal from two judgments of the Supreme Court affirming respectively two judgments of the Hoboken District Court, in actions arising out of the same accident, tried together, by agreement of counsel.

The facts are stated in the opinion of the Supreme Court (see Case Book, pages 63 and 64) as follows:

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10 “These two cases concern injuries to the two plaintiffs, arising from the same accident, and were tried together. The plaintiffs had judgment for injuries which resulted from the following circumstances. They were working upon certain repairs to the elevated railroad structure in Hoboken. One was bucking up rivets which were being driven into the iron work and O’Connell was foreman of the work. They were both standing on the scaffold built around one of the columns supporting the elevated structure so made that it could be raised and lowered by ropes. About 8 o’clock in the morning a wagon of the defendant company attempted to pass the street corner and the driver stopped to permit a cement wagon to pass, but it stopped and the driver of defendant’s wagon, in order to proceed, drove around the rear of the wagon and, when turning under the elevated structure, heard something scraping the top of the cover of his wagon, and two planks fell from the scaffold. There seems to be no doubt that this express wagon was driven so as to strike the scaffold and throw the plaintiffs to the ground, which caused the injuries for which they recovered.”

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POINT I.

The defendant was guilty of gross negligence.

It is the duty of persons using the public highways to exercise reasonable care both for their own safety and for the safety of others.

40 Mr. Justice Dixon said, in the case of *Kowalski vs. Newark Passenger Railway Company*, 15 New Jersey Law Journal, at page 54, that:

“Whenever you undertake to charge a man with negligence, you mean that he has failed to exercise reasonable care. It is not negligence in the eye of the law to fail to exercise extraordinary care. Sometimes very great care may be reasonable care, and sometimes very slight care may be reasonable care. When you are walking along the street you are taking very slight care of your feet. Why? Because the sidewalk is usually a perfectly safe place, and nobody expects it to be dangerous there and we walk along with our eyes in all directions, and greet a friend as we go; we never think of looking down at our feet to watch them. Very slight care is reasonable care under such circumstances. But we cross the Erie Railroad down here where trains are running backward and forward every minute or two, and there reasonable care means very great care, because we are apprehensive of the very great danger; it may be a question of life or death. So that, when you talk about reasonable care, you are not talking about the degree of care; but you are talking about the proportion of care, in comparison with the circumstances in which you are placed.”

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The question for us to determine is this, was the driver of the express wagon exercising reasonable care when he collided with the scaffold upon which the plaintiffs were working?

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As Mr. Justice Dixon has so clearly stated, the amount of care required to constitute reasonable care must be determined from the facts in each case.

It is significant that the scaffold upon which the plaintiffs were standing was hanging so low

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that it could be struck by the defendant's wagon. (About eight or ten feet from the ground, Case Book, page 6, not disputed.) The scaffold was quite a large structure, sufficient to support several men. Its presence must have been patent and obvious to anyone passing through the street who was paying any attention to surroundings. Its

10 existence must have been even more apparent to the driver of an express wagon perched upon the high seat of his vehicle. It is difficult to perceive how the driver could have failed to see it when it lay directly in front of him. He explains it by saying he did not look up (see Case Book, page 41). He says, "I was looking down where I was going; I didn't know I had to look up. * * * I didn't look up to it. I was looking at my horses, the way I am going." He emphasizes the point that

20 *he didn't look up to it.* He didn't have to look up to it, because the scaffold with two human beings upon it was directly in front of him, hanging so low that he bumped right into it. His testimony, taken with the other facts in the case, indicates clearly either that he did not look at all or deliberately drove into the scaffold.

The Court is entitled to take judicial notice of the visual capacity of the normal human being. It must be observed that when a person looks at a

30 given point there is a certain radius of space about that point which immediately comes within the range of his vision and cannot be excluded except by the use of some artificial device. It is contended that in order to exercise reasonable care, under the circumstances of this case, the driver of the express wagon must have done more than to have merely looked at the backs of the horses. It is submitted that he should have looked straight ahead

to observe the movements of other vehicles and pedestrians in the streets, and it is apparent if he looked straight ahead that the scaffold upon which the plaintiffs were working must have been within the range of his vision. It is contended that the defendant was clearly guilty of negligence.

The Supreme Court in its opinion (see Case Book, page 64, line 19, etc.) on this point says: 10

“At the conclusion of the case the defendant moved for a direction on the ground (1) that there was no negligence proved on the part of the defendant. This was properly refused because there was evidence that if the driver had looked he could have seen the men on the scaffold, and he probably did, but thought that the wagon would miss it. At any rate there was a jury question presented.” 20

POINT II.

The defendant's counsel urges that it was the duty of the plaintiffs or their employers to have given some warning to the defendant's driver of the existence of the scaffold.

Such an argument is about as reasonable under the circumstances of this case as to contend that pedestrians crossing the street should carry a red flag by day and a red lamp by night to warn drivers of vehicles of their passage. The mere presence of this large scaffold with men upon it, directly in the path of the wagon, was in itself a warning to any careful driver. 30

The Supreme Court in disposing of this contention (Case Book, pages 64, 65, line 40) said: 40

“There is no merit in this. If the driver saw the men there he did not need any warning, and whether he saw them or not was a question of fact for the jury.”

POINT III.

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Under Point III of the appellant's brief it is contended: “There was no duty to look for obstructions in the air as well as for those in the street.” Appellant's counsel seems to be trying to create the impression that this scaffold was something which could not be observed except after a diligent search. The fact is it was a structure about ten feet long (page 11, line 24) and was between eight and ten feet above the ground. In addition

20 to this there were two men upon it. If the driver had been looking ahead he would have seen it. This is not a proper case for the application of the principle mentioned. A person has a right to presume that a street is free from dangerous obstructions such as pitfalls, live wires and heaps of stone left unlighted in the darkness. But the scaffold was not a dangerous obstruction. This principle does not excuse a person from the consequences of colliding in broad daylight with a scaffold, such

30 as has been described, endangering the lives of persons upon it, when by merely looking ahead the collision could have been avoided. It was the duty of the driver to use reasonable care for the safety of the men on the scaffold, and the determination of whether this duty had been fulfilled was a question for the jury.

The Supreme Court said in this connection (page 66, line 20, etc.) :

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"It is also claimed that the court erred in refusing to charge as requested that the driver had a right to presume that the street was free from obstruction. We do not think such a presumption exists. The presumption is that the street may be to some extent obstructed."

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POINT IV.

The Court's charge to the jury was not unfair to the defendant and affords no reason for reversal.

It is not incumbent upon the plaintiffs to show that the Public Service Elevated Structure was lawfully upon the highway. The mere fact that the elevated structure was there and in use as an elevated railroad was *prima facie* evidence of its lawful existence, and the mere fact that it was being repaired was *prima facie* evidence that these repairs were being made with the consent of the Public Service Railway Company. The right of the Public Service Railway Company to maintain this structure for railway purposes carried with it the incidental right to make reasonable repairs thereon, and when a scaffold used in repair of the structure was in such a position that its presence must have been patent and obvious to a person exercising his normal faculties of vision, then it was not unfair or incorrect for the Court to charge that it was the duty of drivers, driving wagons through the streets, to drive in such a manner as not to injure men in the position in which the plaintiffs were.

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The charge of the Court that "the evidence of the driver was that he did not look, and it is on

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that statement that I allowed this case to be submitted to you for consideration" was not faulty. By so doing, the Court did not ignore the real issue, which was the lack of reasonable care on the part of the driver. The Court charged upon request by the defendant:

10 "I charge you that the plaintiffs must show that the driver did not use reasonable care in driving on the street. This is the basis of the negligence which you will have to find * * * and I also charge that the defendant was only bound to use reasonable care not to injure others in the street. This is the care that a reasonable man would use in driving through a street of that kind, where there are structures of the kind testified to in this case."

20 It is submitted that these charges presented the issue clearly to the jury.

The Supreme Court said, in discussing the charge, that:

30 "The next point is that the court improperly charged that 'When this driver drove through the street it was his duty to drive in such a manner as not to injure men in the position in which they were.' On this point it is argued that the charge was an instruction that the defendant in the use of the highway was an insurer of others on the highway, or on a scaffold above the highway, and that it should have been limited to using 'reasonable care for the safety of others.' This is not an instruction imposing a burden to insure the safety of the plaintiffs; all the court said was that it was his duty to drive in such a manner as not to injure men in the position in which they were.

40 It is next argued that the court erred in charging 'That the evidence of the driver was

that he did not look and it was on that statement that I allowed this case to be submitted to you for your consideration.' What the driver said was, 'Q. Did you look up? A. No, sir, I didn't look up; I was looking at my horses the way I am going.' It is claimed that this part of the charge was a misstatement of the evidence not only, but a direction to the jury to find for the plaintiffs, because the driver said he did not look where he was going. We do not see that in this part of the charge there was any direction for the plaintiffs. All the court said was that the evidence of the driver, that he did not look, was the reason why he allowed the case to be submitted to the jury, and even if this was wrong, it was not an error harmful to defendant.

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The next point argued is that the court erred in failing to take into consideration the question of contributory negligence, it being urged that the court charged that if the jury found negligence on the part of the driver when he struck the scaffold, then it would be its duty to assess damages, and failed altogether to take into consideration the question of reasonable care required on the part of the plaintiffs. So far as we can see, there is no question of contributory negligence in this case. The court did charge that the defendant was only bound to use reasonable care not to injure others in the street, that is the care that a reasonable man would use in driving through a street where there are structures of the kind testified to in this case.

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It is also claimed that the court erred in refusing to charge as requested that the driver had a right to presume that the street was free from obstruction. We do not think such a presumption exists. The presumption is that the street may be to some extent obstructed."

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POINT V.

The Court did not err in refusing to charge that the driver of the wagon had the right to presume that the street was free from a scaffold suspended from the elevated structure.

20 As has been argued above, the scaffold suspended from the elevated structure in question was patent and obvious to anyone using their ordinary faculties of vision and particularly to a driver of an express wagon who was perched upon a driver's seat at some height from the ground. Such a charge as was requested by defendant's counsel would have been tantamount to a direction of a verdict and was properly refused.

POINT VI.

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The judgment of the Supreme Court, in each case, should be affirmed, with costs.

Respectfully submitted,

HARLAN BESSON,
of Counsel with Plaintiffs-Appellees.

