

New Jersey Court of Errors and Appeals.

THOMAS REANEY,
Plaintiff-Appellee,

VS.

THE CENTRAL RAILROAD COM-
PANY OF NEW JERSEY,
Defendant Appellant.

On Appeal.

BRIEF FOR APPELLANT.

This appeal brings up for review a judgment obtained by plaintiff below in an action brought to recover damages for injuries received by him while walking on a way over defendant's property leading from its ferry on the westerly bank of the Hudson River to the public streets of Jersey City. The way is that dealt with in the case of *Black vs. C. R. R.*, 85 N. J. L., 197. It had the appearance of a public street and was used by wagons and pedestrians. Plaintiff had been employed for over nine years in a building fronting on this way leased by defendant to plaintiff's employer (p. 10, line 40; p. 15, line 28; p. 17, line 38; p. 36, line 29; p. 41, line 20; p. 45, line 35).

The accident occurred shortly after six o'clock in the morning of December 11, 1913. Plaintiff was on his way home and had proceeded along the way

New Jersey State Library

a distance of twenty-five or thirty yards when something hit him and knocked him down. He saw nothing and heard nothing, but felt something go over him (p. 22, line 6; p. 41, line 10). Plaintiff was the only witness who testified in regard to the happening of the accident. It appeared, however, that shortly after he left the building where he worked, six coal trucks went up the way in the direction he was going. These trucks were being driven at a gallop and the drivers were hollering. They were the only wagons which passed over the way between the time plaintiff left his place of work and the time he was found after the accident (p. 59, line 10; p. 61, line 7).

The negligence alleged was the failure to properly light this way. The only light furnished by defendant was a single lamp at a point where the way was crossed by a railroad track. This lamp was furnished for the purpose of enabling travelers to observe the warnings given by the watchman at the crossing. This lamp was not always lighted and the light was out when the accident occurred (p. 20, line 22; p. 47, line 6; p. 48, line 24).

Plaintiff knew that there was no light along the way on the morning of the accident (p. 39, line 20) and that wagons went along the way every morning (p. 36, line 29). When the accident occurred he was walking in the roadway (p. 22, line 20). Instead of walking in the roadway he could have walked on a path along the northerly side of the way separated from the roadway by a curb (p. 97, line 20; p. 99, line 10; p. 109, line 25; p. 114, line 5). He could also have taken a train from defendant's terminal to his home (p. 108, line 35; p. 109, line 33).

Motions were made for a nonsuit and for the direction of a verdict in favor of defendant upon the grounds that there was no evidence of negligence, that if there was, there was no evidence showing that defendant's negligence was the proximate cause of the accident, and that plaintiff was guilty of contributory negligence. These motions were denied. It is submitted that this was error.

A.

Defendant was under no obligation to light this way.

It is admitted that by giving to its private way the appearance of a public street, defendant had invited plaintiff to use it, and that defendant's liability was the same as if the way were actually what it appeared to be (*Black vs. C. R. R., supra*). This duty was to use reasonable or ordinary care to keep the premises in a safe and suitable condition so that persons using it in reliance upon the invitation would not be unnecessarily or unreasonably exposed to danger (*29 Cyc., 453*).

But no duty was imposed upon the defendant in respect to the safe use of the way. In the case of *Gleason vs. Boehm, 58 N. J. L., 475*, a visitor to a tenant in defendant's house was using a hall and stairway which the landlord had retained control of. Mr. Justice Magie said:

“ At the trial the claim of plaintiff was that defendant was guilty of a breach of the duty he owed her in two respects—first, because the stairway was improperly constructed and dangerous, and, second, because there was no light in the lower hall at the time of the accident.

The Court charged the jury that they were not to consider the first ground urged for plaintiff. This was clearly right, for there was no evidence upon which a verdict in her favor on that ground could have been supported.

But, upon the second point, the Court left the liability of the defendant to the jury, with the instructions that they were to determine whether the maintenance of a light in the hall was necessary to render plaintiff's descent reasonably safe, and, if they found such necessity, that it was defendant's duty to exercise reasonable care to maintain a light there.

In my judgment, these instructions improperly enlarged defendant's duty. *He was, undoubtedly, bound to take reasonable care to*

have the hall and stairway reasonably fit for the passage to and fro of his tenants and their visitors. But no duty was imposed upon him in respect to the safe use of the means of passage provided by him. If those means were such as the rule required to be provided he had performed his duty. If the stairway was fit for use in ascending and descending, the responsibility of safely using it was upon the person using it. If to use it safely at night, a light was requisite, he must provide it and not the landlord. In Massachusetts it has been held that when a landlord has rented to various tenants, parts of a house to which access is obtained by a common stair, it is not his duty to remove snow and ice naturally accumulating thereon, but the tenants' duty (*Woods v. Naumkeag Co.*, 134 Mass. 357). But for an injury resulting from an accumulation of ice from the rupture of a water pipe which he was bound to repair, the landlord was liable (*Watkins v. Goodall*, 138 Mass. 533. *If in this case, upon the failure of natural light, artificial light was necessary to make the descent of the stairway safe, I think it was erroneous to place the duty of providing such light upon the defendant* (*Hiltsenbeck v. Guhring*, 131 N. Y. 674)."

This doctrine has been applied in jurisdictions where municipalities are held liable to persons injured by defects in streets, and it is accordingly held that a right of action for personal injuries sustained in the night time cannot be founded solely upon the failure of a municipality to light its highways unless dangerous defects or obstructions exist (28 *CYC.*, 1403; 37 *CYC.*, 291).

Therefore, whether the defendant's duty was that of a land owner, who invites others upon his premises, or that of a municipality with respect to streets, it was under no obligation to light the way on which plaintiff was injured.

B.

If defendant was under a duty to light this way, there was no evidence showing that its failure to do so was the proximate cause of plaintiff's injuries.

Plaintiff was not only under the burden of proving facts showing a breach of duty on defendant's part, but also that such breach was the proximate cause of his injuries (*Stumpf vs. D., L. & W. R. R. Co.*, 76 N. J. L., 153).

There was no evidence in this case tending to show that the lack of light was the proximate cause of plaintiff's injuries nor was there any evidence tending to exclude other probable causes. Obviously the accident might have been caused by a runaway horse or by a vehicle whose driver was asleep, in neither of which cases could it be said that the lack of light was the proximate cause of the accident.

In the case of *Chester vs. Cape May Real Estate Co.*, 78 N. J. L., 131, the Court said:

"It must be conceded that the plaintiff was bound to show something more than that the defendant was possibly responsible for the decedent's death in order to entitle him to a verdict. It was incumbent upon the plaintiff, in the absence of direct evidence of the fact, to show not only the existence of such possible responsibility, but the existence of such circumstances as would justify the inference that the death was caused by the wrongful act of the defendant, and would exclude the idea that it was due to a cause with which the defendant was unconnected. *Suburban Electric Co. v. Nugent*, 29 Vroom, 658; *Stumpf v. Delaware, Lackawanna & Western Railroad Co.*, 47 Vr., 153; *Houston v. Traphagen*, 18 Vr., 23."

In the case of *Austin v. Pennsylvania R. R. Co.*, 81 Atl., p. 739, this Court said:

"The defendant appeals to the well established rule that it is not enough for the plaintiff to

prove the possible responsibility of the defendant, but he must show the existence of such circumstances as justify the inference of fault on the part of the defendant, and exclude the inference that the damage was due to a cause for which the defendant was not responsible. That is the rule, and the plaintiff must prove circumstances which render it probable, and not merely possible, that the defendant is at fault."

It is submitted, therefore, that since there was no evidence from which the jury could infer that the failure to furnish light was the proximate cause of plaintiff's injuries, defendant's motions should have been granted.

C.

Plaintiff was guilty of contributory negligence.

Plaintiff had used this way daily for nine years. He knew that it was often totally dark, and before he left his place of work on the morning of the accident, he saw that the light at the crossing, which was the only light along the way, was out. He also knew that wagons used the way every morning. Instead of using the path on the northerly side of the way, or going by train, he voluntarily walked in the roadway. It is submitted that by this conduct he was guilty of contributory negligence as a matter of law. *Saunders vs. Smith Realty Co.*, 86 Atl., 404; *Gleason vs. Boehm*, *supra*.

D.

The judgment below should be reversed.

Respectfully submitted,

CHARLES E. MILLER,

GEORGE HOLMES,

Of Counsel with Appellant.

New Jersey Court of Errors and Appeals.

THOMAS REANEY,
Plaintiff-Appellee,

vs.

CENTRAL RAILROAD COMPANY OF
NEW JERSEY,
Defendant-Appellant.

At Law.
Appeal.

BRIEF OF APPELLEE.

Statement of Facts.

Plaintiff at the time of the accident and for about ten years before had been employed by the U. S. Express Company (P. 10-11 case), on Johnson Avenue, near the ferry house of the defendant, at Communipaw (P. 11 case). Plaintiff worked on a platform connected with a building owned by the defendant and leased to the U. S. Express Company, plaintiff's employers, by the defendant (P. 47 case). The platform of the building on which plaintiff worked ran adjacent to and parallel with Johnson Avenue, so-called, for a distance of about 700 feet. That part of Johnson Avenue which runs from the ferry house of the defendant to the junction of Jersey Avenue had been for years maintained by the defendant (P. 21, fol. 10), was the property of the defendant; was paved by the defendant (Pp. 46-47 Case), and was the only way to get from the defendant's ferry and from the building leased by the defendant to plaintiff's employers, and Jersey City,

except by walking along the tracks (P. 21, fol. 10). At the place where plaintiff was injured at the time of the accident there was no sidewalk or path (P. 16, fol. 10 Case).

That part of Johnson Avenue which ran from defendant's ferry to the railroad crossing covered a distance of over 1,000 feet (P. 45, fol. 10 Case) and from the crossing to Burns Bros. coal pockets an additional distance of 600 feet (P. 47, fol. 30 Case) and from Burns Bros. coal pockets to Jersey Avenue about 900 feet (P. 47, fol. 30 Case) in all a distance of 2,500 feet from defendant's ferry to Jersey Avenue. This road bed had for its entire length had many years before plaintiff's accident been paved by the defendant (P. 46, fol. 10 Case), but at the time of the accident and for a long period of time prior thereto, the pavement had been allowed by the defendant to become covered with soft mud and ashes (P. 38, fols. 10 and 20 Case, P. 75, fol. 20), which muffled the sound of traffic.

It appears that for a long period of time prior to the accident the defendant had permitted defendant's passenger drivers of trucks to gallop their horses in the dark from defendant's ferry along Johnson Avenue over and through its property to Jersey City (P. 107, fol. 40; P. 108, fols. 10, 20, 30; P. 39, fol. 20; P. 60, fol. 10 Case). Although the pavement had for months been covered with soft mud and ashes and although the defendant had permitted the drivers of coal wagons to gallop their horses from defendant's ferry along Johnson Avenue, the defendant had failed to furnish any light along the way except one light at the crossing (P. 47, fol. 10 Case) which was very frequently not lighted (P. 20, fol. 20 Case) and was out at the time plaintiff was injured (P. 20, fol. 20 Case), although defendant had assumed to furnish such light as there was on the roadway (P. 47, fol. 10). When

there was no natural light the road was so dark a person could not see ahead at all (P. 88, fol. 20 Case), could not see more than two feet ahead (P. 106, fol. 30 Case). Frequent collisions had occurred covering a period of a number of years, between wagons going in opposite directions on the road (P. 70, fol. 10 Case) which collisions were caused by the want of light on the road, and that notice of the darkness resulting in collisions had been given to the defendant's watchman on Johnson Avenue, at the crossing (P. 72-73-74 Case), and to other agents of defendant.

At about six A. M. on December 11th, 1913, the plaintiff, who worked nights, left the Express Company building to go to his home. He walked west along the south side of Johnson Avenue, and had proceeded some distance beyond the track crossing when he was knocked down from behind and a wheel ran over his arm and leg (P. 22 Case). Plaintiff did not hear the vehicle approaching (P. 23, fol. 10 Case), and did not see anything on account of the darkness (P. 23, fol. 10 Case). After running over plaintiff the vehicle disappeared, leaving him lying in the road.

POINTS.

I.

Defendant having furnished a passageway for its patrons and lessees and the public was bound by law to maintain the same in a reasonably safe condition.

Black vs. C. R. R., 85 N. J. L., 197.

Phillips vs. Library Company, 26 Vroom,
307.

Siggins vs. McGill, 72 N. J. L., 263.

II.**Defendant did not maintain the way in a reasonably safe condition.**

It is not necessary to argue that the mere failure to light the road, standing alone, is sufficient to charge the defendant with negligence, since it is contended that the condition of the roadway at the time of the injury to plaintiff was such that when there was no natural light, the absence of artificial light was a negligent omission on the part of the defendant in view of the dangerous conditions which defendant permitted to exist. These conditions are claimed by the plaintiff to be:

(a) The accumulation of mud and ashes on the stone pavement which rendered the approach of traffic inaudible.

(b) The failure of defendant to provide a side walk for pedestrians to use.

(c) The permitting of horses drawing trucks to "gallop" along the roadway in the darkness.

Evidence on all the above points was given at the trial and the case was submitted to the jury thereunder in an able charge by the presiding Judge, to which the attention of this Court is invited (P. 127 Case).

As Johnson Avenue through the place in question was the only way provided and maintained by the defendant for the use of its patrons and lessees and their employees to reach the public streets of Jersey City, the plaintiff claims that the defendant owed the same duty to maintain the roadway in as reasonably safe condition as it would any part of its station which its patrons were obliged to use to leave the same.

We do not believe it would be claimed by the appellant that if obstructions or excavations in the way existed it would not be a negligent omission of duty on the part of the defendant to fail to light the roadway to such an extent that such dangerous condition would be discernible to its invitees. In what respect do the conditions at the place of the accident in the case at bar differ from the case first referred to? In the first, the dangerous condition was fixed but was it not just as dangerous to maintain a soundless road bed, to habitually permit its patrons to race their horses over the roadway, all in absolute darkness?

The duty of the defendant to prevent the habitual use of its premises by its patrons and invitees in such a way and under such circumstances as to make such use dangerous to other patrons and invitees, is clearly stated in *Exton vs. Central R. R. Co.*, 33 Vr., p. 7; affirmed, 34 Vr., 356; *Dettmering vs. English*, 35 Vroom, 16.

III.

Plaintiff was not a trespasser.

Plaintiff was an employee of the U. S. Express Company. The defendant had leased to the Express Company the building where plaintiff worked and the only way to get from the defendant's premises was either to walk along the tracks or to go along Johnson Avenue. The leasing of premises carries with it an implied right of way as an exit from said premises, and the lessee when using such right of way is not a trespasser but is an invitee and stands in the same position as a passenger leaving defendant's ferryboat and using the roadway for an exit to Jersey City.

Black vs. Central R. R. Co., *supra*.

IV.

The proximate cause of plaintiff's injury was the negligence of the defendant.

Plaintiff was run over by the wheel of a vehicle coming up from behind him, knocking him down and running over his leg and arm (P. 22, fol. 30 Case). It was so dark at the time that one could not see his hand in front of his face (P. 32, fol. 30). The vehicle made no noise in approaching owing to the fact that the pavement was covered with mud and ashes (P. 41, fol. 10 Case).

It appeared that shortly after the plaintiff left the building where he worked, six coal trucks went up the way in the direction plaintiff had gone (P. 61, fol. 10 Case). These trucks were being driven at a gallop, and were the only vehicles passing the Express Building, between the time plaintiff left same and when he was found lying injured in the road bed (P. 61, fol. 20 Case). These trucks had regularly been driven from defendant's ferry at a gallop up the dark roadway, and no effort was made to prevent them by defendant (P. 107 fol. 40; P. 108, fol. 10 Case).

The suggestion that the driver of the vehicle that ran over plaintiff was asleep or that the horse was running away, is met by the fact that the wagons that just left defendant's ferryboat were under the control of their drivers, and while passing the Express Building, the drivers were shouting (P. 61, fol. 20 Case), which would justify the inference that the drivers were not asleep, and the witness McKeon (P. 59, fol. 30 Case) testified that he saw the

horses in front of the Express Building, and that they were galloping, not running away; but in any event even if the driver had been asleep or had the horses been running away, yet had the pavement been cleared of mud and ashes the plaintiff could have heard the wagon approaching, and if the way had been lighted he could have seen its approach.

V.

The question of plaintiff's contributory negligence and assumption of risk was properly left with the jury.

Plaintiff in walking along the way furnished by the defendant chose the course which to his judgment furnished the safest way of reaching his home. Instead of walking along the right side going west he selected the left side so as to minimize the danger from vehicles approaching from the rear. He could have walked on the railroad tracks but considered the road the safer. If he had gone back to the station to take a train as suggested by appellant's brief he would have been obliged to walk east on the same roadway under the same conditions.

"Except in a perfectly clear case the Court should always leave it for the jury to inquire whether there was such circumspection as under the circumstances an ordinarily careful man would exercise."

Quimby vs. Felter, 62 N. J. L., 62.

"Under the doctrine of implied invitation the negligence of the defendant, as also that of the plaintiff, were clearly for the jury."

Black vs. C. R. R., 85 N. J. L.,

Question whether plaintiff exercised ordinary care one for jury.

Durant vs. Palmer, 5 Dutcher, 544.

Temperance Hall Association vs. Zile, 4 Vr., 260.

Houston vs. Praphagen, 18 Id., 23.

It is respectfully submitted that the judgment should be affirmed.

GEORGE W. FILES,
WARREN DIXON,
Of Counsel.

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Notice of Appeal.

Filed July 27th, 1915.

New Jersey Supreme Court.

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<p>THOMAS REANEY, Appellee,</p> <p style="text-align: center;">VS.</p> <p>THE CENTRAL RAILROAD COM- PANY OF NEW JERSEY, Appellant,</p>	<p>Action at Law</p> <p>Notice of Appeal.</p>
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To GEORGE W. FILES, Esq.,
Attorney of Appellee,

SIR:—

PLEASE TAKE NOTICE that the above named defendant appeals from the whole of the judgment entered in this cause to the New Jersey Court of Errors and Appeals.

CHARLES E. MILLER
Attorney for Appellant. 30

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Stipulation.

Filed July 27th, 1915.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10	THOMAS REANEY, Plaintiff,	}	Action at law
	vs.		
20	THE CENTRAL RAILROAD COM- PANY OF NEW JERSEY, Defendant.		Stipulation.

It is hereby stipulated and agreed that the time within which the above named defendant may serve and file grounds of appeal, and within which the Clerk of the Supreme Court may transmit the record on appeal to the Court of Errors and Appeals be, and the same hereby is, extended to and including the first day of September, nineteen hundred and fifteen.

GEO. W. FILES
 Attorney of Plaintiff.

CHARLES E. MILLER
 Attorney of Defendant.

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Grounds of Appeal.

Filed August 27th, 1915.

NEW JERSEY COURT OF ERRORS AND APPEALS.

<p style="text-align: center;">THOMAS REANEY, Appellee,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">THE CENTRAL RAILROAD COM- PANY OF NEW JERSEY, Appellant.</p>	}	<p style="text-align: center;">On Appeal.</p> <p style="text-align: center;">Grounds of Ap- peal.</p>	10
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To GEORGE W. FILES, Esq.,
Attorney of Appellee: 20

SIR:—

PLEASE TAKE NOTICE that the Appellant will rely upon the following grounds of Appeal:

1. The Court below denied defendant's motion for a non suit.

2. The Court below denied defendant's motion for the direction of a verdict in its favor.

CHARLES E. MILLER, 30
Attorney of Appellant.

Judgment Record.

Filed Aug. 27th, 1915.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

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THOMAS REANEY,

vs.

CENTRAL RAILROAD COMPANY
OF NEW JERSEY.

Judgment Record.
GEORGE W. FILES,
Attorney.

Complaint.

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Filed March 16, 1915.

Central Railroad Company of New Jersey, the defendant in this cause, was summoned to answer unto Thomas Reaney, the plaintiff therein, in an action at law upon the following complaint.

Summons issued February 20, 1915.

Plaintiff who resides at #359 Woodward Street, in the City of Jersey City, County of Hudson, State of New Jersey, says that:—

30 I. On and for a long time prior to December 11th, 1913, defendant, a body corporate, was engaged as a common carrier of passengers and merchandise for hire, and did operate and control in connection with its said business, certain buildings leased to tenants and a steam ferry on the north river at or near the foot of Johnson Avenue, in the aforesaid City and County, and maintained in connection with said buildings and ferry, a certain street or highway, owned and controlled by defendant, for the use of
40 passengers, employees and all persons having busi-

Complaint.

ness in connection with the said defendant's business or the business of its lessees, occupying buildings on the property of the defendant, as aforesaid, and which said street or highway was the sole means of ingress and egress to and from the ferry of the defendant, and to and from the buildings in connection therewith used by the defendant and its lessees.

II. That it was the duty of the defendant at such 10 time to keep the aforesaid street or highway in a reasonable safe condition for the use of all persons and vehicles lawfully using said street or highway, and among other things to keep the same suitably and sufficiently lighted.

III. That on said 11th day of December, 1913, plaintiff was in the employ of the United States Express Company, which was at such time a lessee of one of the said buildings owned by the defend- 20 ant, and at or about 6.10 o'clock in the morning of said day, and while it was dark was leaving his work, at said building, for the night and was on his way home and while plaintiff was lawfully proceeding in a westerly direction, upon the aforesaid street or highway, a horse drawn vehicle, without warning ran into and over the plaintiff, causing injuries hereinafter more fully set forth.

IV. That said injuries were caused solely by reason 30 of the failure of the defendant to keep the said street or highway in a reasonably safe condition in that, among other things, it failed to properly light said street or highway at the place aforesaid, so that moving objects could not be seen in said street or highway, and also permitted the pavement of the said street or highway to become covered with soft dirt and refuse so that the noise of approaching vehicles could not be heard and warning given of the approach of any such vehicles.

Answer.

V. That said injuries were caused solely by the negligence, carelessness and recklessness of the defendant, its agents and servants, and without any fault, omission or neglect on the part of the plaintiff.

VI. That said injuries consist of compound fracture of plaintiff's right arm and right leg, and bruises and contusions of the plaintiff's body.

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VII. That by reason of the said injuries, the plaintiff was put to a great expense in endeavoring to cure himself of his said injuries, and was for a long time prevented from attending to his usual business, and said injuries will be permanent.

Plaintiff demands as damages \$35,000.

GEORGE W. FILES,
Attorney for Plaintiff.

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Answer.

Filed March 12, 1915.

The answer of the Central Railroad Company of New Jersey, a corporation of the State of New Jersey, having its principal office for the transaction of business in the City of Jersey City, County of Hudson and State of New Jersey, says:—

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I. It admits that on, and for a long time prior to December 11, 1913, it was a body corporate and was engaged as a common carrier of passengers and merchandise for hire, but it denies that it operated and controlled in connection with its business any buildings leased to tenants. It admits that it controls and operates a steam ferry on the North River but it denies that its steam ferry is at or near the foot

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of Johnston Avenue in Jersey City, Hudson County.

Answer.

and State of New Jersey. It denies that it maintained in connection with the buildings mentioned in the complaint a street or highway. It admits that it owned and maintained a certain private passageway for use in connection with its business, which said passageway was and is private property of this defendant and which has never been dedicated or relinquished to the public use. It admits that said passageway was used by persons having 10 business in connection with this defendant and admits that said private passageway was the sole means of ingress and egress to and from the ferry mentioned in the complaint from and to the public streets of Jersey City.

2. It denies each and every allegation contained in paragraph Two of the complaint.

3. It has no knowledge or information sufficient 20 to form a belief as to the matters and things alleged in Paragraph Three of the complaint.

4. It denies each and every allegation contained in paragraphs four and five of the complaint.

5. It has no knowledge or information sufficient to form a belief as to the matters and things contained in paragraphs six and seven of the complaint, but it alleges that plaintiff sustained no injuries, 30 loss or damage by reason of any negligence on the part of this defendant, its servants, agents or employees.

As a separate defense this defendant says, that at the time the accident mentioned in the complaint happened, plaintiff was a trespasser on its private property and he therefore, cannot recover against this Company because no unlawful or wanton injury is alleged.

As a separate defense, this defendant says that 40

Judgment

Entered July 3, 1915.

This case was tried before Judge William H. Speer with a jury at the Hudson Circuit, on June 21st and 22nd, 1915.

The jury rendered a general verdict against the defendant and in favor of the plaintiff for fifteen hundred (\$1500.00) Dollars.

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\$1500.00
47.38
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\$1547.38

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of fifteen hundred dollars and his costs, which are taxed at the sum of forty seven dollars and thirty eight cents, making in the whole the sum of one thousand five hundred and forty seven dollars and thirty eight cents.

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Judgment entered July 3, 1915.

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Thomas Reaney—Direct.

NEW JERSEY SUPREME COURT.

<p>THOMAS REANEY</p> <p>VS.</p> <p>CENTRAL RAILROAD CO. OF NEW JERSEY.</p>
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Tried June 21, 1915, before SPEER, J., and a jury.

GEORGE FILES and WARREN DIXON for the plaintiff.

CHARLES E. MILLER and EDWARDS & SMITH for the defendant.

20 THOMAS REANEY, SWORN.

DIRECT-EXAMINATION BY MR. DIXON:

Q. Mr. Reaney, you are the plaintiff in this suit, and where do you live? A. 359 Woodward street, Jersey City.

Q. How old are you? A. Going on fifty-four.

Q. What is your business? A. Well, a freight handler—or working for express company.

30 Q. Working for the express company. And what was your business in December of 1913; what was your business then? A. The same business.

Q. And for whom were you working in December, 1913? A. The U. S. Express Company.

Q. How long had you been working for that company at that time? A. Well, when they dissolved I had worked for them about ten years, about that time, I guess it was around nine years, around that time.

40 Q. Well, that accident happened a year and a half

Thomas Reaney—Direct.

ago; about nine years at that time? A. Well, around nine years.

Q. And at that time where were you working for them? A. On the platform.

Q. Where was the platform? A. Down on Johnson avenue.

Q. What? A. Down alongside of Johnson avenue near the ferry. 10

Q. Johnson avenue near the ferry, in Jersey City? A. Yes, sir.

Q. That is near what ferry? A. Well, the Central Railroad ferry.

Q. And the street there you call Johnson avenue? A. I understand, yes—Johnson avenue.

Q. What you call Johnson avenue? A. Yes.

Q. And you knew it as Johnson avenue?

Mr. Miller: I object to that. I suppose what he understood it to be would not be very important. If it is on this passageway that we own I am willing to concede that, but it is either on a street or not on a street, and what he understands is not important.

The Court: Well, I suppose that all of us understand what streets are really, and if we have not actually gone down and investigated to see if it is dedicated and laid out—all streets are known by rumor and talk and signs and things of that sort. That is all we do know of them. I think I will permit this man to say that he knew it as Johnson avenue. Then he may tell how he knew it if he wants. 30

Mr. Dixon: This is only for the purpose of identifying the locality.

Mr. Miller: I am willing to concede, if you want—

Mr. Dixon: Our opening shows what the facts are—both of them. 40

Thomas Reaney—Direct.

Q. How far from what you call the ferry was this place that you worked? A. Well, the street—it don't—it extended as far as the street—from the street to the ferry, that's all; and this building extended further up then towards this crossing near where I got hurt.

Q. Well, the ferry is at the Hudson River, isn't it, on the Jersey side? A. The North River.

10 Q. The North River, yes; on the Jersey side? A. Yes, sir.

Q. And the express platform where you worked is about how far west of the river or of the entrance to the ferry house? A. Well, that is about twenty yards or so—the width of the street.

Q. Away from the ferry to the west? For instance, if you wanted to walk from the easterly end of the platform where you were working into the ferry gates or ferry house in which the wagons came
20 from the boat, how far would you walk? A. Well, the ferry house is further off.

Q. I know, but how far would you walk toward the river? A. To go to the ferry house?

Q. Going from the platform where you were working, into the ferry house, how far would you walk along what you call Johnson avenue toward the river before you turned in; how many feet or yards or miles or what? A. Well, Johnson avenue runs direct to the ferry, and then in going out to the
30 ferry house you turn around.

Q. Well, I understand that. Don't you understand English, Reaney? How far would you walk from the platform—say this is the platform and say this is Johnson avenue, and you were walking toward the east along Johnson avenue to go into the ferry house—here is the ferry—now how far is it from that point to this one where you turn in to go to the ferry house? How far would you have to walk toward the east, toward the river? A.
40 Well, I was about forty yards I guess, or so.

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Q. About one hundred and twenty feet, as close as that, is it? A. Well—

Q. What? A. About forty yards, or forty—er—well, forty yards.

Q. That is the end of the platform where you were working then is right near the ferry house, near the river? A. Well, about that length.

Q. And about how long is that platform; how far does it go towards the west? A. Well, I would put 10 it down to be about four hundred yards anyhow.

Q. About four hundred yards long? A. Yes, sir.

Q. And the ferry is south of Johnson avenue, isn't it; the Central Railroad ferry; that is south? A. Yes, sir.

Q. Now in December, when you were working there, on which side of Johnson avenue was the platform located, the south or the north side? A. On the south side?

Q. On the south side? A. I think it is the south 20 side.

Q. The same side of Johnson avenue as the ferry, was it? A. And the—er—the Jersey City f—

Q. Well, if you went from the platform to the ferry and into the ferry would you have to cross Johnson avenue or could you walk along without crossing Johnson avenue? A. You could walk along without crossing Johnson avenue.

Q. The same side; all right. A. Yes.

Q. How near the river does this street that you 30 call Johnson avenue run—how close to the river?

A. Well, it runs right to the—not up to the river, to the bulkhead.

Q. Are there docks there? A. Yes; to the docks.

Q. It ends at the docks then on the river, does it? A. Well, they have ferry slips on the other side of Johnson avenue; there is no ferry slips right in front of Johnson avenue.

Q. Can you walk along the river? A. You can

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walk alongside the dock—about at the end of Johnson avenue. That is as far as it runs.

Q. Now how far does that go in the other direction, toward the west—that Johnson avenue, as you call it? A. Well, it runs up as far as Jersey avenue.

Q. As far as Jersey avenue? A. Yes, sir.

Q. And going up Johnson avenue from your platform would you cross any railroad tracks? A. Yes; 10 there is a railroad track that you had to cross before—just after you got off the platform, about—

Q. And how far away from the platform where you were working toward the west is the first railroad track that you would cross? A. Well, about twenty-five or thirty yards, I should say.

Q. A short distance only? A. That distance, from the end of the platform, the express platform.

Q. That would be one hundred and fifty feet, 20 about? A. Well, about that.

Q. Then how far beyond that—

Mr. Miller: No; he said twenty-five or thirty yards.

Mr. Dixon: Oh! Pardon me. It would be about seventy-five to ninety feet.

Q. Now beyond that how far would you go before you got to the next track? A. Well, there is no other track crossing Johnson avenue until they 30 come up here to the—until I come up this side of Jersey avenue.

Q. Near Jersey avenue? A. Where the Lehigh Valley crosses there.

Q. And that is the Lehigh Valley crossing? A. Yes, sir.

Q. Now do you know where Burns Brothers' coal pocket is? A. Yes.

Q. Where is that with respect to Johnson avenue, so called? A. Well, it is on the opposite side of that 40 street from the side of the platform there.

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Q. That would be on the north side of Johnson avenue? A. Yes.

Q. And how far west of this first crossing that you speak of, the first railroad crossing? A. From the platform?

Q. Well, from the platform, or from the railroad crossing; how far to the west is Burns Brothers, how far would you have to walk? A. From there to Burns Brothers? Well, I should say about 275 or 10 or 280 yards to Burns Brothers.

Q. What? A. About 275 to 280 yards from where I got hurt.

Q. We don't know where you got hurt. That is what I want to find out; I want to find out how far Burns Brothers is from this first track. A. Why, that length, about 280 yards.

Q. How near is it to Jersey avenue? A. Burns Brothers?

Q. Yes. A. Quite a distance. 20

Q. Quite a distance from Jersey avenue? A. Yes.

Q. Now from the place on the platform where you were working up to Burns Brothers what was the character of the surface of the street on what you call Johnson avenue? A. Well, it was dirty and muddy.

Q. Was it paved or not paved? A. It was paved, yes.

Q. With what? A. Blocks.

Q. Stone pavement? A. Stone paving, yes, sir. 30

Q. And how far up toward Jersey avenue was it paved? A. It was paved all the way to Jersey avenue.

Q. With this same kind of pavement? A. The same kind of pavement.

Q. What was that pavement, blocks? A. Block; stone block.

Q. About how—

Mr. Miller: Don't lead him.

 Thomas Reaney—Direct.

Q. What kind of pavement was it? A. Stone blocks.

Q. About how wide was that stone pavement?
A. Well, the whole width of the street.

Q. Well, how wide was that? A. Probably 14 or 15 yards wide.

Q. And was there any sidewalk on the side of the stone pavement? A. No sidewalk whatsoever.

10 Q. What was there along the sides of this roadway? A. Well, nothing, only the street and dirt, that was all that I could—

Q. Anything else besides dirt? A. Not down there.

Q. Well, was there anywhere? A. Well, further up the railroad tracks run alongside of it.

Q. The railroad tracks run alongside of it? A. Yes.

20 Q. And they come close in to the paved part, do they? A. Yes, sir.

Q. And how near the crossing of the railroad track does that begin? A. How near the—

Q. How near to the track crossing Johnson avenue do the railroad tracks begin to come in toward the pavement?

Mr. Miller: I wonder if he understands this—

30 A. Well, this track, it is on a curve—

Mr. Miller: I object.

A. It turns right around from where they switch off cars once in a while.

Mr. Miller: One moment. I wonder if the witness understands that you are referring to the situation at the time of the accident. You keep asking him now where the tracks are.

40 Mr. Dixon: I am asking him as to this time of the accident.

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Q. You understand that, don't you; I am asking you to describe the situation at the time of the accident. You understand that, don't you? A. Yes; yes.

Mr. Miller: I wanted him to understand that.

Q. They then come in close to the paved roadway, which would be, say, west of this crossing? A. 10 This track goes right across the roadway.

Q. I know that; and then other tracks you say come in parallel with the roadway? A. Yes, sir, but further over.

Q. How much further over? A. Well, I never measured.

Q. About? A. But I would say twenty or twenty-five yards or so, probably.

Q. How long had this roadway been in the condition that you have described prior to your accident? 20 A. Well, it was in bad condition pretty near all that winter.

Q. How long had this situation of that street existed prior to the accident, to your knowledge—that is the pavement there and the other things you have described? A. Well, certainly it was—well—probably five or six months.

Q. How long had it been paved before the accident, Mr. Reaney? A. How long—

Q. How long had that pavement existed before 30 the accident? A. I think it is all of eleven or twelve years before.

Q. Yes: several years anyhow, isn't it? A. Yes; somewhere about that.

Q. What use was made of that road to your knowledge prior to the accident? A. The paving of it.

Q. What use was made of the road to your observation before the accident; what use was made of it; what was it used for? A. Well, it was used 40

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as a public thoroughfare so far as I could see; that is for wagons and trucks of all descriptions.

Q. Used for wagons of all descriptions? A. Yes, sir, going to New York and from New York to business.

10 Mr. Miller: I move to strike out the first part, "as a public thoroughfare." That is a conclusion.

The Court: I think that is a conclusion of law. I will strike it out.

Q. It was used for wagons of all kinds? A. Yes, sir.

Mr. Miller: Now let him tell us.

M. Dixon: He did tell.

Mr. Miller: He said it was used for wagons going to New York.

20 The Court: What was the testimony?

(Testimony on the subject repeated.)

Q. How did those wagons go to New York? A. Well, they went down Johnson avenue and went right around to the Central ferry by way of 23rd street or Liberty street.

Q. Went upon the ferry boats of the Central Railroad Company, did they, at this place, the ferry house? A. Yes, sir.

30 Q. And they turned out from this so-called Johnson avenue toward the south to get to the ferry house? A. Yes, sir.

Q. And how far would they have to go toward the south to get onto the boats? A. To get into the ferry house, well, about forty or forty-five yards, I think.

Q. Well, what else used that road except wagons, vehicles? A. Well, people has to—that has to go and come to work or go to work and get home, they
40 has to use that road.

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Q. People that went to work where? A. Down to the Express, or on to the Central Railroad or any other place they have employment down there.

Q. Pedestrians used the road, did they—people walking? A. Yes, sir, they do—anyone that their business calls them to do so, to go along there.

Mr. Miller: It seems to me that is a conclusion. 10

Mr. Dixon: As to whether their business calls them, perhaps is a conclusion. I do not care anything about the business part.

The Court: Strike that out.

Q. People did use the road, didn't they? A. Yes, sir.

Q. And how many used it daily? A. I could not say how many used it.

Q. Well, about how many? Many or few? 20

Mr. Miller: I object to that. There is no evidence he has any knowledge of how many.

A. Well, there is quite a number that use it, that work for the express company.

Q. Well, how many work there for the express company? A. Oh, probably forty-five or fifty.

Q. And what other companies were there down there whose men used the road besides the express company? A. Well, no other company that I know of, only unless they worked for the railroad company. 30

Q. How many used it—how many railroad employees use it?

Mr. Miller: I do not think that is material, because railroad employees would have a perfect right to use it.

A. I couldn't be sure. I would—

Mr. Miller: It would have no bearing on this case. My objection is that it is immaterial. 40

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The Court: It might have some bearing on it. It might show how well worn it was or how well known as a passageway.

Mr. Miller: I concede it was a passageway.

The Court: But he is not obliged to take a concession if he does not want to. He can prove the fact.

10 Mr. Miller: I would like my objection noted.

The Court: Yes.

Q. How long before your accident had you observed people using that way? A. Oh, right along, since it was paved.

Q. What? A. Right along since it was paved.

Q. From the time it was paved, did you say? A. Since the street was graded and paved.

Q. And that was several years before the accident to you? A. Well, yes.

20 Q. Well, besides being graded and paved, was it lighted? A. No, sir.

Q. No lights on it? A. No lights, no lights on Johnson avenue all the way up until you come to Jersey avenue, only one light at this crossing, but it was out as often as it was lit, and it was out this morning.

Q. There was a light located at some crossing? A. That is the crossing I say.

Q. The crossing you have mentioned? A. Yes.

30 Q. And on which side of Johnson avenue was that light located? A. On the—

Q. The apparatus located? A. On the west side, I think.

Q. Well, it would be north and south, wouldn't? A. Well, the south side.

Q. Johnson avenue we are taking to run east and west; then it would be on the south side, would it? A. I think so.

Q. And how near the paved roadway was that
40 apparatus located? A. You mean this lamp?

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Q. Yes; the lamp, or whatever you call it; whatever it was. A. Well, about six or seven yards from the roadway.

Q. From the roadway towards the south? A. Yes, sir.

Q. And was that the only light all the way along? A. That was the only light.

Q. How long had you been using that roadway prior to the accident? A. Well, during my time 10 down there working for the express company, about ten years.

Q. Is there any other way by which you could go to your work at the express company except along this so-called Johnson avenue? A. Well, this was the gainest way to go; but certainly I could go along the tracks, but I thought the street would be safer to walk along than the track.

Q. Is there any other street that would take you to your place of business excepting this roadway? 20
A. No, sir; no, sir.

Q. What time did you generally get through with your work at night? A. Well, I generally worked nights, and I got through at six o'clock in the morning.

Q. Six o'clock in the morning? A. Yes, sir.

Q. Now what was the date of this accident to you? A. On the 11th of December, 1913.

Q. At about what time? A. Well, about 6:10 in the morning. 30

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

Q. Now just tell the court and the jury if you please what happened to you; what you did first and what happened to you on that morning? A. Well, generally at the express company we should punch in and punch out; that is when we went to report for work we had to punch a ticket, and the same way coming home in the morning we had to punch. Well, when I punched I come along and come off the platform, walking along Johnson Avenue— 40

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Q. In what direction? A. Coming south, I think.

Q. Well, say toward Jersey Avenue were you walking? A. Towards Jersey Avenue, yes. And this wagon come behind me—

Q. How long did you walk, first? A. Well, about 25 or 26 yards.

Q. From where? A. Towards Jersey avenue from the platform.

10 Q. Did you get to the track or beyond the track that crosses Johnson avenue? A. At the Jersey avenue side of the track.

Q. You got to the Jersey avenue side, that is between the track and Jersey avenue? A. Yes, where I got hit by the wagon.

Q. That is what I am getting at. How far had you gotten when you got hurt? A. About 25 or 30 yards from the platform where I was.

Q. On Johnson avenue? A. On Johnson avenue.

20 Q. And what part of the roadway did you walk in to the place where you were hurt? A. Sir?

Q. What part of the roadway did you walk in to the place where you were hurt? A. Oh, on the side of the roadway.

Q. On the side of the roadway? A. Yes; to my left.

Q. On your left hand side? A. Yes; going toward Jersey avenue.

30 Q. That would be on the same side of the road-way that the platform was? A. Yes.

Q. When you got between the tracks and Jersey avenue at the place of the accident, what happened?

Q. Well, a wagon came behind me, knocked me down, and in fact I did not know what happened; I could not move; and he run over me.

Q. Something hit you and knocked you down? A. Broke my leg and arm, and I could not move, and he drove away and left me there, and it was dark as—dark as night; so I commenced hollering.

40 Another man was going—

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Q. Did you know anything about the wagon before it hit you? A. No, sir.

Q. Did you hear it coming? A. No, sir; if I had I would try and get out of the way.

Q. Did you see it when it hit you or after it hit you? A. No, sir.

Q. You did not see it at all? A. No, sir.

Q. And never have seen it? A. No, sir; not that I know of. 10

Mr. Miller: Then I move to strike out the statement that a wagon hit him. That is purely a conclusion. He did not hear a wagon or see a wagon or anything else.

The Court: I will strike the wagon part out.

Mr. Dixon: Well, something struck him.

Q. You say that something hit you and knocked you down? A. Yes.

Q. What did you feel after it hit you and knocked you down? A. Well, I could not describe the feeling I had. I believe I was — 20

Q. Well, did anything go over you? Could you tell what went over you? A. I did.

Q. What was it went over you? A. Well, I thought it was a wagon.

Q. What did it feel—what went over you and how did it go over you?

Mr. Miller: I move to strike out what he thought. 30

A. It came upon me and knocked me down and the wheel went over my right arm and right leg—broke the right arm and right leg.

Mr. Miller: I move to strike out the remark "I thought it was a wagon," unless he knows it was a wagon.

The Court: That part will be stricken out.

Mr. Dixon: Well he says the wheels went over him. 40

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Mr. Miller: It is a question of whether he felt something.

Mr. Dixon: He said he felt the wheels go over his leg and his arm.

The Court: That part will stand, that he said he felt wheels.

Q. What happened to you after this thing went
10 over you? A. Well, I commenced to holler, I suppose.

Q. Well, you know that, don't you? A. Sir?

Q. You know whether you hollered or not? A. Well, I believe I did, but I was——

Q. Kind of dazed? A. I was dazed at the time, and then a man came up to me; he heard the hollering and he told the watchman to stand by me——

Mr. Miller: I object—well, never mind.

20 A. —until he would go up stairs to the express company's office and report the accident.

Mr. Miller: I object to what he told him.

The Court: I think I will sustain the objection. It does not tend to characterize the action in any way; it was simply a report of it.

Mr. Dixon: It is so close to it it seemed to me it was part of the *res gestæ*.

30 Mr. Miller: It was not at the exact time of the accident.

The Court: It does not have to be at precisely the instant. *Res gestæ* may extend over a couple of months; but the difficulty in the point is this, that it violates the other requirement of the *res gestæ* rule, that it must be something that arose out of and characterizes the accident. This does not tend to characterize the accident at all.

40 Mr. Dixon: Well, I do not think it is important.

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Q. How long did you lie there then? A. Well, I suppose about ten minutes or so.

Q. Who was it that came up to you and spoke to you? A. A man by the name of Jim McEwen.

Q. And did the watchman come up? A. The watchman came there, I believe he did. I could not say, I do not remember.

Q. Then after McEwen came up he spoke to the watchman and then went away? A. He wanted— 10

Q. I don't care about that. What did Jim McEwen do? A. He wanted the watchman to watch me—

Q. I do not care about that. What did he do? A. He went upstairs.

Q. He went away from you? A. Upstairs to the express company's office to report the accident.

Q. He went away from you? A. Yes, sir.

Q. Did anybody come after he went away? How did they get you away from the spot where you 20 fell? A. I couldn't say exactly.

Q. Did you become unconscious? A. No—I was unconscious—I mean I was conscious.

Q. You were conscious? A. Yes, sir.

Q. How did you get away from the place where you fell or where you were run over? A. Well, I could not say who carried me across the street on the other side of the street.

Q. But somebody carried you over, did they? A. Yes, sir. 30

Q. One or more men? A. More than one.

Q. Carried you across the street? A. Carried me across the street.

Q. What did they do to you over there? A. They laid me down there in one of the railroad shanties until the ambulance came and picked me up.

Q. How long did you lie there? A. I would say about six or seven minutes.

Q. Then an ambulance came and took you away? A. Yes, sir. 40

Thomas Reaney—Direct.

Q. And took you where? A. To St. Francis Hospital.

Q. When they got you to St. Francis Hospital what did they do with you? A. Well, they left me there—they washed me and cleaned me first thing and they set my leg and arm.

Q. Put you to bed? A. Put me to bed, yes.

19 Q. Set your leg and arm? A. Yes, sir.

Q. Set your leg and arm the same day? A. Well, no; that was—it was over a week afterwards when they set the arm, but they bandaged it up—put splints on it.

Q. From the time these wheels ran over you up to the time you got to the hospital did you suffer any pain? A. Yes, sir.

Q. Whereabouts? A. Oh, my! I was raving with pain.

20 Q. Where was the pain? A. In my leg and arm.

Q. Any other part of your body besides your leg and arm? A. Well, I had that feeling, I suppose—I couldn't exactly say whether it was another part of my body or not; but I was in a bad shape. I couldn't be no worse.

Q. You felt pretty sick, hey? A. Well, yes; I did, yes, sir.

Q. When you got to the hospital and they put you to bed did you continue to have pain? A. Yes, sir.

30 Q. How long a time did that pain last? A. Well, I raved with the pain there sometimes.

Q. How long a time did the pain last? A. Until such time as—if the doctor had the bandage too tight on the leg he would have to come and loosen it a little. The same way on the arm; if it was the breadth of an inch out of the way I would be hurt all over with the pain.

Q. How long did they keep you in bed in the hospital? A. About three months, from the 11th
40 of December to the 7th of March, with the exception

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about a week I was—they had me up before I left the hospital.

Q. And you left the hospital on the 7th of March?

A. Yes, sir.

Q. How long was your leg in splints or bandages?

A. It was until the—about the—well, I would say about the 25th of February—20th or 25th.

Q. How long was your arm in splints or bandages?

A. Well, that was only about one day difference in taking them off. 10

Q. What part of your arm was broken? A. Right there (indicating) between the elbow and the shoulder.

Q. On your right arm? A. On my right arm.

Q. And what part of your leg was broken? A. Just below the knee, the right leg.

Q. What were your wages before the accident?

A. My wages, sixty dollars a month.

Q. Paid by the month? A. No, sir; every two weeks. 20

Q. But at the rate of sixty dollars a month? A. Yes, sir.

Q. How long had they been such before the accident; how long had you been getting \$60 a month?

A. Well, I was getting it about three years.

Mr. Miller: Three years?

A. And previous to that I got \$55. And first, when I started there, \$50. 30

Q. Now after the accident did you go back to work? A. Yes; I went back the first of June, 1914.

Q. June following the accident? A. Yes, sir.

Q. Why didn't you go back before that? A. Well, I was not able.

Q. What was your condition from the time you got out of the hospital in March until you went to—

(Interrupted by adjournment for recess.)

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Q. (continuing)—until you went back to work?

A. Well, I was around on crutches pretty near all the time, only until—well, about the first of May or so, I threw—

Q. You went back to work in June? A. I went back to work in June, yes.

Q. During that period of time up to the time you went back to work did you suffer any pain? A.
10 Well, I did, sir.

Q. Where? A. All the time, both in the leg and in the arm.

Q. And have you suffered pain up to the present time? Do you now? A. Yes, sir; yes, sir. When I exercise it too much the leg or the arm—that is working.

Q. Where do you feel the pain in your leg and arm? A. In the shoulder and the knee.

Q. Is that a constant or an infrequent pain? A.
20 Come and go.

Q. And about how often do you get that? A. Well, it will be every night while I am working; when I get at ease, why, it gives me a little ease—rests it.

Q. After you got up out of bed and started to walk did you find your power to walk interfered with in any way? A. Oh, yes; yes.

Q. How? And in what degree? A. Well, I was not able to walk without the assistance of crutches
30 in the hospital and after I got out of the hospital until about the first of May.

Q. Did you use one or two crutches? A. I did use crutches as soon as I got out of the hospital.

Q. One or two? A. Two crutches.

Q. And you used those until May; since that time have you been obliged to use crutches? A. No, sir.

Q. Can you now walk as readily and easily as you could before the accident? A. No, sir.

Q. Why not? A. Well, the leg affects me; it is
40 stiff in the knee, and it is short.

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Q. Short? A. Yes, sir.

Q. Do you have a limp when you walk? A. Yes, sir.

Q. You walk with a limp? A. Yes, sir.

Q. How about your arm; have you recovered the full use of your arm? A. Well, not as it was before it got broken.

Q. In what way can't you use it as you did before it was broken? A. Well, I can't put it up only like 10 that (illustrating); I can't bend it.

Q. You cannot get it up as far as you did. Does it pain you while you work? A. Yes, it does.

Q. Is there any deformity in your arm that is noticeable—any break that you can either see or feel? A. Well, you can feel where the bone was broken.

Q. How about your leg; does that appear? A. The same way.

Q. When you went back to work how much did 20 you get? A. The same salary as when I got hurt.

Q. And have you been able to work steadily since you went back to work? A. Well, no, not steadily. Once in a while I take off and rest.

Q. How frequently has that happened? A. Well, sometimes a couple of times a month.

Q. And how long would you have to take off? A. I will take off a night to rest myself.

Q. And did they take anything off of your salary for that when you were away? A. While I was 30 lying in the hospital?

Q. No; When you were off for a night or two? A. Oh, certainly; when I am off I am not paid.

Q. Now, from the time that you were injured, in December, until you went back to work in June, did the express company pay you your salary? A. They paid me a part of the time.

Q. What part of the time did they pay you? A. Up to the first of May.

Q. H'm? A. Up till the first of May.

Thomas Reaney—Direct.

Q. How much did they pay you during that time?

A. At the rate of sixty dollars.

Q. Up to the first of May? A. Up to the first of May.

Q. And that was done under the Compensation Act—

Mr. Miller: I object.

10 Q. The Workmen's Compensation Act?

Mr. Miller: I will withdraw the objection.

A. Well, I cannot say.

Q. You do not know? A. I don't suppose they need to give me the full—

Mr. Miller: I object to what he supposes.

Q. Never mind. What were your duties there at the time of the accident; what did you do before
20 that? A. Handling freight on the platform.

Q. And where did that freight go to? A. It went all over.

Q. I do not mean ultimately; I mean immediately. What happened to the freight? You say you handled it; how did you handle it? A. I sorted freight and put it in cars and shipped it out to parts of Jersey and different parts of the country.

Q. These cars you put it in were cars of the Cen-
30 tra! Railroad?

Mr. Miller: I object.

A. Yes, sir.

Mr. Miller, Let him tell it.

Q. What cars were they? A. Central Railroad Company.

Q. On their tracks? A. On their tracks.

40 Mr. Miller: I object to that.

Thomas Reaney—Direct.

Q. Were their tracks alongside the——

The Court: What did you object to?

Mr. Miller: The statement of Mr. Dixon that the cars were on the Central Railroad tracks.

The Court: All right; the statement and the answer to that statement are both stricken out.

Q. Where were these tracks upon which you put 10 the freight? A. Alongside of the platform of the express company.

Q. Of the express company? A. Yes, sir.

Q. Alongside the platform? A. Yes, sir.

Q. And on which side? A. On the west side.

Q. The south side, do you mean? A. The south side.

Mr. Miller: He said west side.

Mr. Dixon: Well, he always says west side.

Q. Now we have assumed Johnson avenue east 20 and west. On which side of the express platform, which ran the same way as Johnson avenue, were these tracks, toward Staten Island, were they? A. It is on the west side, I think.

Q. Toward Greenville? A. It is towards the depot.

Q. Towards the depot; all right. That was the yards of the Central Railroad Company? A. Yes, sir.

Mr. Miller: I object to that. 20

The Court: Objection sustained. First, the question is leading, and secondly it involves a conclusion of law—ownership and title.

Mr. Dixon: I think by the opening of the defendant and by its answer it admits that the property——

The Court: If it does then the proof is inadmissible on it.

Mr. Dixon: No, not as to identity; it admits the ownership of that property. 40

Thomas Reaney—Direct.

The Court: He cannot be permitted to identify the thing in the pleadings with the thing on the ground. And that is not the question anyway.

Mr. Miller: I don't mind the witness testifying to the facts, but I object to having Mr. Dixon testify to them.

10 The Court: He objects to your leading question. That is the point as I understand it. He does not object to the witness saying it.

Q. How wide was that platform? A. About eighteen yards, I guess—seventeen or eighteen yards.

Q. And the cars that you loaded the freight on, how near to the platform did they come? A. Right to within about a foot of the platform—put planks down and run the freight in by truck,

20 Q. And do you know whether those tracks are tracks that run into the same yard from which the tracks that go in to the depot of the defendant company run? A. Well, they run—when the cars are loaded they run them out into the yard and back them down to the depot and make up a train wherever they are going to.

Q. Which depot do you mean? A. The Central Railroad depot.

30 Q. Now you said that at the time of this accident to you the place where you were was as dark as night. A. Yes, sir.

Q. What do you mean by "as dark as night?" How dark was it and how far could you see? A. That I couldn't see my hand if I put it up before me.

Q. And for how long a distance was the road in that darkness from the express platform that you left up to the time that you got to the place of the accident? A. Well, it was dark all the way up to Jersey avenue with the exception of—

40 Q. That same state of darkness was along all the

Thomas Reaney—Direct.

way, was it? A. Yes, sir, with the exception of a light at the Burns Brothers coal yard.

Q. How has your general health been since the accident? A. Well, excepting that I am nervous and I cannot perform my duty the same as I did do.

Q. Your what? A. I cannot perform my work the same as I did do. 10

Q. What was your health before the accident? A. My health was good.

Q. Did you have anything the matter with your arm or leg? A. No, sir; not before the accident.

Q. Who attended you in the hospital, do you know? A. Yes, sir.

Q. What doctors? A. Doctor Galloway and Doctor Friele.

Q. Do you know who set your arm and leg? A. Well, Doctor Galloway and Doctor Friele set the leg; Dr. McLaughlin—I heard he is dead—he set the arm. 20

Q. Doctor McLaughlin is dead now? A. So I am told.

Q. And where is Doctor Galloway? A. Doctor Galloway is out in Texas now.

Q. Will you exhibit to the jury your arm? A. Yes, sir.

Q. Let them look at it and feel of it where it was broken. Step down and show the jury where the break was and what can be felt, if anything. Just show them. 30

(Witness exhibits his arm to the jury.)

Mr. Dixon (To a juror.) Do you feel the break there anywhere—the protruberance of the bone?

Q. Let the foreman feel it.

(Witness does so.)

Thomas Reaney—Direct.

Q. Where is the break in your leg? Can you show that?

(Witness rolls up his trousers.)

Q. Now come along and let these gentlemen look at your leg and look at your arm and feel it. Let them feel the bone of your arm—and the leg too, if they choose. * * * With respect to the lamp
10 which you said was stationed near the crossing of the track on Johnson avenue, did you observe whether or not on this occasion when you passed along there—as to whether it was lighted? A. That night?

Q. Yes. A. No, sir; it was not lighted.

Q. Did you have to spend anything for medical treatment on account of this injury? A. Well, after I came out of the hospital I had my own doctor, he attended me for about—

20 Q. Who is that? A. Doctor Finck—he lives down in the city. I haven't his address though.

Q. How long did he attend you? A. About two weeks.

Q. And did you have to pay him? A. Well, certainly, I have to pay him.

Q. Did you pay him or do you still owe him? A. I did not pay him yet.

Q. Did he render you any bills? A. Did he send me any bills for the—?

30 Q. Yes. A. No; not yet.

Q. How often did he see you, treat you? A. He come to me about twelve times, I think.

Q. What did he do for you? A. Well, he gave me medicine and he treated me for being weak, through the length of time I was in the hospital, being weak and delicate.

Q. Did he give you medicines? A. Yes, sir.

Q. Did you have to pay for those or did he furnish them himself? A. No, sir; I paid for them.
40 He prescribed and I got it in the drug store.

Thomas Reaney—Direct.

Q. About how much did you pay for medicine?

A. Well, I understand about nine or ten dollars anyhow.

Q. Have any other doctors examined you besides these doctors you have mentioned?

Mr. Miller: I think that is immaterial.

The Court: Why is it immaterial? 10

A. No, sir—only the railroad doctor examined me.

Q. That is what I mean. Who is he—Doctor Arlitz? A. I didn't—

Mr. Miller: I object to that.

A. I didn't get his name.

Mr. Miller: I object to Mr. Dixon telling the witness—

A. He came to see me. 20

Mr. Miller: When the witness says "I don't know" or something that shows he does not know the answer Mr. Dixon then tells the witness what the answer should be.

Mr. Dixon: I didn't tell the witness what the answer should be. It was a question. I asked him if Doctor Arlitz examined him on behalf of the company.

The Court: He has withdrawn the original³⁰ question and asks this one now.

Q. Did Doctor Arlitz examine you? A. Yes—the railroad doctor.

The Court: Do you see the doctor here that examined you?

The Witness: The gentleman is here.

The Court: He points to Doctor Arlitz.

A. If I don't mistake. 40

Thomas Reaney—Cross.

CROSS-EXAMINATION BY MR. MILLER:

Q. Mr. Reaney, is this your signature (showing witness a paper)? A. Yes, sir; that's mine.

Q. Is that (indicating) your signature? A. Yes, sir.

Q. In other words, both of these signatures are yours? A. Yes.

10 (Paper marked D1 for identification).

Q. Is that (indicating another paper) your signature? A. Yes, sir.

(Paper marked D2 for identification).

Mr. Dixon: May I look at it?

Mr. Miller: It will go in evidence.

Mr. Dixon: No, it won't go in evidence.

Q. How long have you been working down there
20 in the express company? A. About ten years, sir.

Q. And as a porter all that time? A. Yes, sir.

Q. And you are working there as a porter now?
A. Yes.

Q. And you started to work on June 1st, 1914,
after the accident? A. Yes, sir.

Q. And you were getting sixty dollars before the
accident and you are still getting sixty dollars? A.
Yes, sir.

Q. You said a great many wagons, wagons of all
30 descriptions used this passageway there? A. That
street?

Q. Yes. A. Well, yes.

Q. How long had you seen wagons using that
street? A. I have seen them go up there night and
day.

Q. Night and day? A. Yes, sir.

Q. And for how long a time? A. Well, ever since
the street has been paved.

Q. And that is for how long? A. That is I
40 understand for about eleven years.

Thomas Reaney—Cross.

Q. I want your recollection, not what you understand. Your recollection as you remember it yourself. A. Well, about ten years, or probably over.

Q. So that for ten years or over you yourself have seen wagons and knew that wagons were going up and down there day and night? A. Well, not all during the night; certainly in the early part of the night and the early hours of the morning.

Q. The early hours of the morning? A. The 10 wagons were—

Q. Were you there in the day time? A. No, sir.

Q. So that the only wagons you have seen there were at night? A. Well, in the evenings when I was going down to work and coming home in the morning.

Q. You mean when you were going to work at night you saw wagons and when you were coming home from work you saw wagons also? A. Yes, sir, in the morning. 20

Q. And you had seen them for all the time you had been there? A. Well, yes, sir.

Q. You said that the street was muddy? A. Yes, sir; it was.

Q. Do you remember it snowing during the night of the accident? A. Storm?

Q. Snowing; did it snow? A. No, sir.

Q. Is that your best recollection? A. Well, I don't believe it snowed.

Q. Do you remember whether it did or not? A. 30 It didn't snow.

Q. It didn't; you are sure of that? Are you sure of that? A. I am, yes, sir.

Q. Was it cold weather? A. It was pretty cold.

Q. Frozen? A. Freezing, yes, sir.

Q. And did you say there was mud there? A. There was mud, yes.

Q. Had that frozen or not? A. Well, certainly it was not frozen hard; it was ashes and—kind of soft and muddy. 40

Thomas Reaney—Cross.

Q. Soft mud; how thick was the mud? A. Well, I could not tell you how thick it was, but it covered all the paving anyhow and covered it thick enough to —

Q. You walked over it; you must have some idea. That mud had been there for a long time, hadn't it? A. Yes; it had been there for quite some time.

Q. For how long? A. Well, I could not tell exactly for how long.

Q. Approximately, how long do you remember seeing it muddy there before the accident? A. Probably it had been muddy for two or three weeks before the accident.

Q. And haven't you any idea whether the mud was a foot deep or six inches deep? A. It wasn't no foot deep; it might be three or four inches deep.

Q. So that your feet would sink in three or four inches as you walked along in it? A. Well, yes, it would.

Q. You are sure of that? A. I am sure of that, yes, sir.

Q. And it was soft mud? A. Soft ashes on the mud mixed with ashes.

Q. Soft mud and ashes? A. M-m-m m-m-m.

Q. But it was quite soft? A. It was quite soft.

Q. So that a wagon wheel would sink right down to the stone pavement through it? A. Well, the wagon wheel would sink right down into it.

Q. They did, didn't they? You saw them coming along there. A. Yes; I saw the wagons going along.

Q. And you saw the wagons sinking right down to the pavement? A. I mean in the mud.

Q. Yes; sinking right down through the mud to the pavement? A. Yes, sir.

Q. You had been going there you said for a number of years and the only light was right there at the crossing alongside of the express building? A. Yes, the only light along Johnson avenue.

Thomas Reaney—Cross.

Q. That is what I am talking about. That is the only one on Johnson avenue? A. That is all, sir.

Q. Just that one? A. That's all.

Q. And you said that was out as often as it was lit, at night? A. Yes, it was, to my recollection.

Q. For how long a time had you noticed that very often this light was out at night? A. Well, different nights when I would be going down there or coming home in the morning I would notice that. 10

Q. You would notice that it was out? A. I would notice, certainly.

Q. And it was out this morning? A. It was out this morning.

Q. And perfectly dark? Yes, sir.

Q. And that light was how far from the express building? A. Well, about twenty-five or thirty yards.

Q. You mean something under one hundred feet?

A. Well, around that way. 20

Q. You could see from the building whether it was lit or not? A. Oh, certainly.

Q. And you saw that day that it was not lit? A. No, sir, it was not lit.

Q. Had you gotten to the crossing when you were struck? A. I got the other side of the crossing when I got struck.

Q. About how far the other side of the crossing had you gotten? A. Well, about five or six yards I will say. 30

Q. Can you point out in this room how far you had gotten? A. About from here to the door over there.

Q. About from here to the door. In the middle of the road or on the side? A. No, sir; on the side; on the left hand side of the road.

Q. It was dark there? A. Yes, sir.

Q. It was the dark of the morning? A. It was dark as—in the morning, yes, sir.

Q. As it usually was when the light wasn't there? 40

Thomas Reaney—Cross.

A. Yes; it was dark all the time when the light was out.

Q. And that was quite often? A. It was—just as often as when it was lighted.

Q. And it was often dark there when you went along? A. Yes, sir; awful dark.

The Court: When the light was lighted was it light there when you went along? A. Yes, sir.

10 The Court: It was? A. Yes. That is, when the light was lighted.

The Court: I say, when it was lighted. A. Yes, sir.

Q. Would the light shine up as far as you were when you were hurt? A. Sir?

Q. Would that light shine up as far as you were when you were hit? A. The light was out.

20 Q. On the mornings when the light was lit did it shine up as far as you were when you were hit? A. Yes, sir. I believe if that light was lighted I would not get hit.

Q. You believe that? A. Yes, sir; because the driver would have seen me.

Mr. Miller: I move to strike that out.

The Court: That last part will be stricken out.

Mr. Dixon: I move to strike out all his belief.

Mr. Miller: I consent to that.

30 The Court: All right; the belief is out by consent.

Q. Had you noticed on the days when it was lit whether it was light up there? A. Yes; I noticed when the light was lit, but only a flickering light.

Q. Then it was a very dim light? A. Yes.

Q. And as a matter of fact even when the light was lit it was dark up where you were hurt? A. No; not dark where I was hit; it wasn't, no, sir.

40 Q. Were you hit under where the light was? A. Sir?

Thomas Reaney—Cross.

Q. Were you hit under where the light was? A. No, sir; way beyond where the light was.

Q. You said you did not hear any noise before you were hit. A. No, sir.

Q. No noise whatever? A. No. If I did—

Q. Just answer the questions. Don't volunteer. You are sure of that? Did you see any wagon? A. There was wagons on the other side—

Q. Did you see the wagon that hit you? A. No, sir.

Q. Did you see anything go over you? A. Well, no, sir, I didn't, but I felt it.

Q. You felt something go over you? A. I did.

Q. You did not see what it was? A. No sir; I know it was a wagon though.

Mr. Miller: I move to strike that out.

The Court: I will strike out the last part.

20

Q. You say you saw people go over this street-way? A. This street-way?

Q. Yes; this street as you call it. A. Yes, sir.

Q. Do you know where they were going? A. Well, they were going and coming from work.

Q. How do you know that? A. Well, they looked like working people, having their pails with them, and—

Q. And that was the only reason you assume they were going to work, because they had pails with 30 them? A. Well, dinner-pails.

Q. Is that the only reason you say they were using the street to go to work, because they had dinner-pails? A. Well—er—I believe that's—you could not go any other way; that was the most convenient way, about, they could go.

Mr. Miller: I move to strike that out.

The Court: That part will go out.

(Question repeated.)

40

 Thomas Reaney—Cross.

Q. Do you know of your own knowledge where they were going? A. Well, I believe they were going to work—

The Court: He did not ask you what you believe. Did you know of your own knowledge where they were going? Did you know any of them? Or did you know where they were going?

10 A. Yes, sir; I know plenty of them that went along with myself that way.

Q. Those were the people in the express company building? A. Yes, sir.

Q. Now aside from the people that worked in the express company building did you know any others that you saw walking there? A. Well, they were strangers to me, but I saw them going there.

Q. Do you know where they were going? A. Well, I know they were going to work.

20 Q. Now how do you know that? A. Well, by their appearance and ---

Q. Have you any other reason except their appearance for making you say they were going to work? A. Certainly; I—no, because I never questioned them.

Q. You say they were going to work merely from their appearance? A. Yes, sir.

30 Mr. Miller: Now I move to strike that out because that is a conclusion he has drawn from the fact—people have used this street-way going to work because he saw people who from their appearance, clothes and dinner pails looked like workingmen. He assumes they were going to work. I think that is a conclusion.

The Court: I will strike it out.

Mr. Dixon: A lot of them he said worked with him.

The Court: Those people are in.

40 Mr. Dixon: Strike out the others, your railroad employees.

Thomas Reaney—Cross.

Mr. Miller: Mr. Reaney doesn't know who they were.

Mr. Dixon: I want to know what you are striking out.

The Court: We will only strike out the people other than those who worked with him. He said he saw people going there who were dressed as working people and had pails and he assumed from the fact that they were dressed as working people and had dinner-pails that they were going to work. He said that in answer to your inquiry. That is his conclusion and assumption, and I will strike it out. With respect to those who worked with him and he knew were going to work I will leave that in.

Mr. Dixon: He also testified there were men going to the railroad.

Q. How many men that you saw going down that street do you know of your own knowledge worked for the railroad? A. Well, no, sir, I don't.

Q. You do not know that any did? A. No, sir, I don't.

The Court: Then they are all out but his own co-workers.

Mr. Dixon: That does not mean that you take out the testimony that they went along the road; only that they worked.

The Court: Oh, no; that there were people going along the road is in. The only thing stricken out is that the persons other than those he worked with were going to work. They were going along the road but where they were going we leave now suspended.

Q. You said it was dark there that night? A. Yes, sir.

Q. At first you said it was dark and you could only see two or three feet, and then you said you

 Thomas Reaney—Cross.

could not see your hand when you held it up before you. Which was right?

The Court: What is the point about that? You say "Which was right?" The question implies that one was wrong.

Mr. Miller: It is certainly two inconsistent things. If you can see two or three feet and
 10 you cannot see as far as your hand—

The Court: I see nothing inconsistent about that. He did not say he had his hand against his face. I will overrule the question as asking for a distinction that does not necessarily have to be drawn.

Q. How far was your hand away from you when you could see it? A. Well, I had it that way (illustrating).

Q. Could you see your hand that far or couldn't
 20 you see it that far? A. I couldn't.

Q. You could not see it? A. No, sir.

Q. And that is about how far away? How far away was it when you put up your hand like that?
 A. As far as I—

Q. No; just now when you put up your hand like that, how far was your hand from your eye? A. Probably a foot and a half or two feet.

Q. A foot and a half. Now before you testified that you could not see more than two or three feet.
 30 Now I ask you which was right, whether you were right when you said you could see two or three feet, or whether you were right when you said you could not see as far as a foot and a half? A. Oh, no—I don't know that I testified I could see two or three feet.

Mr. Miller: Do you remember whether he did or not, Mr. Dixon?

Mr. Dixon: It is your witness.

40 Mr. Miller: It is a question whether I must

Charles H. Stein—Direct.

go back to the record or you are willing to save that time from your recollection.

Mr. Dixon: If you are willing to take my recollection I will say it don't make a great deal of difference.

Q. Your notion then is that when you were on that street you could not see your hand? A. No, sir. 10

Q. —held in front of your face a foot or two in front of you? A. No, sir; not around there.

Q. Was it lighter at any part of that street? A. No, sir; there was no light in any part of that street, only up at Burns Brothers.

Q. And that was a long ways from where you were? A. It was a long ways.

CHARLES H. STEIN, SWORN.

Q. Where do you live? A. 69 Danforth avenue, Jersey City. 20

Q. What is your business? A. Railroad employee.

Q. What railroad and what position? A. Superintendent of the Central Railroad of New Jersey.

Q. And your office is where? A. At the Jersey City terminal.

Q. How long have you been such? A. About a year and a half.

Q. And how long have you been employed by the company? A. Nearly nine years. 30

Q. And before this in what capacity? A. As engineer, maintenance of way.

Q. Where? A. At Jersey City.

Q. And are you familiar with this property that has been called Johnson avenue? A. I am.

Q. And have known it for how long? A. Nearly nine years.

Q. That extends from the river up to Jersey avenue, does it, in Jersey City? A. Yes, sir. 40

Charles H. Stein—Direct.

Q. And there is a railroad crossing over there? A. There is.

Q. Central Railroad crossing? A. Yes, sir.

Q. How far is that, about, from the river? A. About a thousand feet.

Q. Is that way paved? A. It is.

Q. How long has it been paved? A. Oh, it has been paved far beyond my recollection, but it was
10 repaved about seven or eight years ago.

Q. Do you know who repaved it? A. The Central Railroad of New Jersey.

Q. And there was in December, 1913, an express platform there, wasn't there—the U. S. Express? A. Yes, sir.

Q. That was on the south side of the roadway? A. Yes, sir.

Q. And how far did that extend along Johnson avenue so called? A. The building was about seven
20 hundred feet long—the platform about seven hundred and sixty feet long.

Q. How near to this paved roadway does that platform go? A. Just adjacent to it.

Q. And steps leading from the platform to the roadway? A. There is on the east end, a stairs leading from the platform to a concrete walk, and then a six inch step down to some paved driveway just adjacent to the river.

Q. And that leads to the paved road? A. Yes,
30 sir.

Q. And were there any steps on the west end? A. Not adjacent to the paved driveway. There is on the southerly side, toward the southerly side of the building, at the westerly end of it.

Q. How far, about, is that track crossing from the westerly end of the States building? A. In the neighborhood of—oh, it was in the neighborhood of about fifty feet at that time from the westerly end
40 of the platform and perhaps one hundred feet from

Charles H. Stein—Direct.

the westerly end of the building. The platform extended west of the building.

Q. Who lighted Johnson avenue so far as Johnson avenue was lighted in and prior to December, 1913?

A. There was one light just at the track crossing, which was maintained by the Central Railroad of New Jersey. It was the only light that was on the 10 avenue for the purpose of lighting the so-called Johnson avenue.

Q. That is from the river to Jersey avenue? A. Yes, sir.

Q. And what was that light—where did it stand with regard to the paved roadway; how close to it?

A. Well, it was just to the side of the paved roadway but extended by an extension arm toward the middle of the roadway. The stanchion itself was to the south of the roadway, just to the south of the 20 paved roadway.

Q. And to the south? A. To the south, yes.

Q. Did the company maintain any other lamps—any other lights along Johnson avenue? A. There were no other lights on Johnson avenue for the purpose of lighting Johnson avenue; there were lights by Burns Brothers' stable—by Burns Brothers' coal trestle.

Q. That is a long way up toward Jersey avenue?

A. Yes, sir.

Q. How near Jersey avenue is Burns Brothers' 30

A. Oh, perhaps 1500 feet from Jersey avenue.

Q. How far from this crossing we have mentioned? A. Around in the neighborhood of 600 feet.

Q. Have you knowledge as to whether or not the express company platform and building that was there in December, 1913, was the property of the railroad company? A. It was.

Q. And leased to the express company? A. Yes. 40

CROSS-EXAMINATION BY MR. MILLER:

Q. Your office used to be in the express building?

A. At the easterly end, yes, sir.

Q. And was in December, 1913? A. It was.

Q. Did you work frequently at night? A. I did.

Q. Was that building lighted at night? A. The
10 building itself, yes, sir.

Q. Was the platform lighted? A. The platform
was, yes, sir.

Q. Were there many lights around Burns
Brothers'? A. There were about five of them.

Q. What kind of lights? A. They were arc lights.

Q. And that was about six hundred feet from the
crossing? A. Yes, sir—that is not the five lights;
the first of the five; the first of the five was about
six hundred feet from the crossing, and the others
20 strung along for a distance of two hundred feet.
Three of them were suspended about fifteen feet
above Johnson avenue and the other two up on the
trestle.

Q. Is there any significance to the fact that the
one light you have told us about was at this railroad
crossing? A. So far as its purpose was concerned.

Q. What was the purpose of it? A. To light up
the track crossing.

Q. To light up the crossing? A. To light up the
30 track crossing, yes, sir.

Q. So that people could see approaching trains?
A. And that there was a track there, yes.

Q. And that there was a railroad track there? A.
And that there was a crossing watchman there.

Q. In other words, this light at the crossing was
there for the purpose of giving warning that there
was a track there? A. Of the existence of the
track crossing, yes, sir.

Q. And of the dangers of trains passing over it?
40 A. Yes, sir.

Charles H. Stein—Redirect—Recross.
William Friele—Direct.

REDIRECT-EXAMINATION BY MR. DIXON:

Q. There was a watchman there? A. There was a watchman at that crossing, yes, sir.

RECROSS-EXAMINATION BY MR. MILLER:

Q. I suppose the light was there so that you could see the watchman giving warning? A. Well, to a 10 reasonable extent, yes.

WILLIAM FRIELE, sworn.

DIRECT-EXAMINATION BY MR. DIXON:

Q. Doctor, you are a practising physician and surgeon in Jersey City? A. I am.

Q. How long have you been practising? A. Seventeen years.

Q. Are you connected with any hospitals? A. 20 Two hospitals.

Q. Which two? A. Christ Hospital and St. Francis Hospital.

Q. Doctor, do you know the plaintiff, Mr. Reaney, and did you treat him? A. I do.

Q. Do you remember his case? A. I do.

Q. Where did you first see him? A. At St. Francis Hospital.

Q. What was the date, if you recall? A. Decem- 30
ber the 11th, 1913.

Q. About what time did you see him? A. I do not recall that.

Q. What was the matter with him? A. He had a compound fracture of the right upper arm about the middle—a compound fracture meaning that the bone sticks out through the skin. He also had a break of both bones of the right leg near the knee joint.

Q. What do you call those bones? A. Tibia and 40
fibula.

 William Friele—Direct.

Q. What was the character of that break? A. That was a simple fracture of both bones.

Q. Will you state to the court and jury what treatment you subjected him to and how long you treated him? A. He had the usual methods of replacing the bones in both the situations; put up in splints with extensions, and he was still under treatment when I left him on the 31st of December. My
10 service ended on that day.

Q. And you ceased to attend him? A. Yes, sir.

Q. Have you seen him since? A. I did not see him from that time until last Saturday.

Q. You did see him then? A. Yes, sir.

Q. Examine him? A. I did.

Q. Will you state what condition you then found him in?

Mr. Smith: When was this?

Mr. Dixon: Last Saturday.

20 A. He has good union of both fractures.

(Mr. Dixon looks inquiringly at the witness.)

A. He has good union of both the fractures in the two situations. There is a little deformity of the right leg in so far as it bows outward a little; it is not perfectly straight. There is a shortening of about half an inch in that leg; the arm has a slight shortening, also under half an inch, and some diminution of his muscular power in both situations.

30 Q. Well, from that condition you found recently, last week, can you form an opinion as to whether or not these injuries, or any of them, are permanent in character, besides the mere fractures; is there any permanency? A. I believe that part of this incapacity—this muscular incapacity—will improve with time and with work.

Mr. Miller: What?

A. With time and work. Roughly, I should say
40 that he has probably a twenty-five per cent. diminu-

William Friele—Direct.

tion of efficiency at the present time, and that with work and the lapse of time that there will be some improvement in that condition.

Q. He is 54 years old, Doctor. Do you think he he will ever get back his normal condition as he was immediately prior to the accident? A. I doubt if he will ever have his absolutely one hundred per cent. muscular power again.

Q. And these deformities of the bones such as they are, they are permanent—they will always remain? A. They will be permanent—they will remain as they are.

Q. And the shortening will never be improved? A. That will never change.

Q. Does he walk with a limp? A. Not much.

Q. Not much of a limp? A. No.

Q. Now the injuries that you found him suffering from in December, were they of a character which would be likely to produce pain in the subject? A. Well, fractures produce pain.

Q. How long would that pain normally last? A. Most of the pain in a fracture is relieved after the bone is put into place, but of course there is some discomfort subsequently while the healing is taking place.

Q. Now the plaintiff says that at the present time it gives him trouble when he works; he gets tired, has a pain in his arm and leg. Can you account for that? These subsequent pains in fractures are often complained of for a year or eighteen months subsequently.

Q. It is usual to follow injuries of that character? A. It is.

Q. Did you have an X-ray taken? A. Yes, sir; I have two plates.

Q. And what do they show? I have not seen them. What do they show? A. This one (indicating) illustrates the callous formation on the arm fracture.

 William Friele—Cross.

Q. Where were these taken? A. In the X-ray department, Christ Hospital.

Q. This one to which I call your attention is the picture of the bone with the fracture; the fracture is where this knob is? A. And the callous—this bump is the callous formation which Nature throws out to cement the break.

10 (Plate marked P-1 for identification.)

A. This (indicating another) is a plate showing the fracture of the tibia and fibula, and it shows the reason for the shortening in so far as the one bone overrides the other a little, which produces the slight shortening.

(Plate marked P-2 for identification.)

Mr. Dixon: I offer these in evidence. Have you any objection?

20

(No objection.)

(P-1 and P-2 received in evidence.)

Q. As a matter of fact, Doctor, he has rather good results from the injuries he received? A. He has good functional results.

Q. Now, Doctor, will you step down here and show the jurors the riding of the bone in the leg? Indicate it to the foreman of the jury as well as you can. A. This break in the one bone of the leg is of an oblique type and in replacing it it is almost impossible to have the two mortises fit accurately, so that the lower piece of bone is pulled up by the muscles and accounts for the half an inch shortening which he has.

30

CROSS-EXAMINATION BY MR. SMITH:

Q. Doctor, by good functional results you are speaking of the function of the arm and leg, aren't you? A. Yes, sir.

40

James McKeon—Direct.

Q. By which you mean the uses of the arm and leg? A. His capacity for using them.

Q. As I understand, Doctor, while he will not have one hundred per cent. of the use again he will have almost one hundred per cent. in time? A. It is possible.

Q. And with use the muscular power returns, doesn't it? A. To a great percentage.

By Mr. Dixon: Doctor, did you make any charge against him for your services? A. No, 10
sir; he was in a ward; a ward case in the hospital; came under the ward service.

JAMES McKEON, sworn.

DIRECT-EXAMINATION BY MR. DIXON:

Q. Where do you live? A. 245 Suydam avenue, Jersey City.

Q. What is your business? A. Freight sorter for the American Express Company. 20

Q. How long have you been in that business? A. Fifteen years.

Q. Did you know the plaintiff, Mr. Reaney, before December, 1913? A. Yes, sir.

Q. How long did you know him before that? A. I suppose about ten years.

Q. Did you work where he worked? A. Worked for the same company, yes, sir. 30

Q. Same company. Did you work at the same place? A. Well, not exactly; pretty close to him.

Q. How close? A. About as far as from here to the wall—part of the time.

Q. The same platform? A. Same platform.

Q. When you went to work how did you go to work, how did you get to your place of business? A. I went by train.

Q. You came in on the train; from where? A. From Communipaw. 40

James McKeon—Direct.

Q. Were you at work on December the 11th, 1913?

A. Yes, sir.

Q. In the early morning? A. Yes, sir.

Q. And did you leave your work— A. Yes, sir, at six o'clock in the morning.

Q. And where did you go? A. Went home.

Q. How did you go home? A. I went up as far as the railroad crossing, walked over—up the crossing, and went up the track—or came back again then after—

Q. You say you went up. What did you go up? A. That was the way I was going to go up after I heard the sc—

Q. You went up something. What did you go up, Johnson avenue or what? A. I went up Johnson avenue to the railroad crossing. That is the way I always go.

Q. And then did you go across the crossing? A. 20 And turned up the crossing past the watchman's shanty to the track and then walked up the track between the tracks.

Q. You walked up between the tracks? A. Yes, sir.

Q. And you did not continue all the way up Johnson avenue? A. I didn't, not that morning at all; I didn't go to the tracks even.

Q. Did anything attract your attention while you were going up there? A. Yes, sir.

30 Q. What did attract your attention? A. When I was going past—up the crossing—past the man's shanty—the watchman's shanty, I heard a noise; I did not pay any attention to it; I kept across; then I heard another cry; then I happened to think about wagons going by just ahead of me.

Q. You heard somebody cry, did you? A. I heard somebody cry.

Q. What did you do then? A. I turned short and came straight back to the crossing, and then I 40 crossed over to the street; I did not go all the way

James McKeon—Direct.

back, I went over to the curb and I stopped there and listened, and pretty soon I heard somebody say, "My God! Ain't there nobody within the sound of my voice?" Then I looked down around and I seen a man struggling in the street, so I run over to him.

Q. How far was he away from you when you heard him say "My God! Ain't there anybody within the sound of my voice?" A. He was not 10 much over ten feet, no further than the first seats over there inside the railing.

Q. You went over to him? A. I went over to him.

Q. What did you find? A. I found that it was Mr. Reaney laying in the street there, and I wanted to know what was the matter; and he said, "Ah! They killed me."

Mr. Smith: Not what he said.

20

A. Oh!

Q. Well, you inquired as to his condition? A. I did.

Q. What did you do then? A. So I grabbed hold of him to pick him up and I found that his arm and leg was broke, and he hollered I was hurting him, hurting him; "Let me go." So I seen I could not handle him, and I looked around; I could not see anybody, only the watchman standing in his shanty. Then I commenced to holler for somebody. I could not get nobody; and then I run over to the watchman and asked him if he would not go over and stand there until I would go and get help, to keep wagons from coming down on that side of the road.

Q. Did the watchman go over? A. He started to go over; he said, "Yes"; and I went off to the platform.

Q. Did he take anything with him? A. He had his lantern in his hand.

40

James McKeon—Direct.

Q. Lighted? A. It was lit.

Q. And he went where? A. From the shanty, I suppose he did; I didn't stop long enough. He started. He said he would go, so I run back to the platform, and upstairs in the office and told my boss what happened, and he had better telephone for the ambulance. So the boss—one of the foremen came over with me and the other telephoned for the am-
19 bulance, I believe, and when I got back he was gone; he was not in the position; some one had picked him up and carried him into the Pullman shanty that was right alongside of the street.

Q. Did you see Reaney leave the platform that night? A. I seen him start to leave it.

Q. How long did he start before you started. A. He checked out just ahead of me. He asked me if I was going home.

20 Mr. Miller: Not what he asked you.

Q. He checked out ahead of you and went up a little ahead of you? A. Yes.

Q. Now what is the condition of Johnson avenue, that is this roadway, we will call it Johnson avenue—what was the condition of Johnson avenue from the express platform up to the place where you subsequently found Reaney lying as to light; what was its condition? A. From where I started it was, on one half of it, it was dug up at the time, one half
30 of it.

Q. As to light; was it light or dark there? A. Well, it wasn't light or it wasn't dark either.

Q. Where; at the platform? A. No; there was generally one light where I come down.

Q. But I say— A. But above that, up towards the crossing, then it gets dark; there is not much of a light there at all.

Q. Where are there any lights, if there are any, on Johnson avenue? A. Only outside of the ex-
40 press house; and they ain't—

James McKeon—Direct.

Q. How far was that from where Reaney was? A. Well, I should say about one hundred feet—about two blocks.

Q. About two blocks? A. Yes, sir.

Q. Now when you left the express company's platform at the west side—the west end—and walked along Johnson avenue to the place where Reaney was, were there any lights there that morning? A. I do not remember seeing any. 10

Q. Were there ever any at any time? A. Sometimes you would see a light and sometimes you would not.

Q. Where do you sometimes see the light? A. Up on a pole on the south side of the street.

Q. And where is the pole located? A. Right just the other side of the crossing, going west.

Q. What? A. Going west.

Q. The railroad crossing? A. On the railroad crossing. 20

Q. Is there any other lamp post or light along that road up to Jersey avenue? A. Not as I know of; I don't remember seeing any.

Q. Did you notice whether that light was lighted that morning or not? A. No, sir, I don't think it was. It might have been, because—

Q. What kind of light was it? A. It is supposed to be an arc light I would call it by.

Q. Did you frequently go up there when it was lighted? A. Every morning at six o'clock, going home; that is my regular time. 30

Q. In the winter time, December, this month, did you go up there any morning when the light was lighted? A. No; I have not been up that way in several years now.

Mr. Miller: Won't you read that last answer?

(Answer repeated).

A. Not several years; one year call it anyway— one year. 40

James McKeon—Direct.

Q. Some time before this? (No answer).

Q. This place where Reaney was lying, was that in darkness or was there any light there of any kind—natural or artificial? A. It was dark; I could not see him until I heard the struggle and looked again.

Q. You had to find him by his voice then? A. I imagine I was standing under where the light was supposed to be; and he was too.

Q. You were standing under where the light was supposed to be? A. Yes, sir.

Q. When you heard this voice? A. Yes, sir.

Q. And you could not see him? A. No, sir.

Q. How did you find him? A. Not until after I heard him cry; then I looked sharp, and then I see him struggling then.

Q. Now you walked along Johnson avenue up to the crossing? A. Yes, sir.

20 Q. Describe the condition of the roadway throughout that distance as you observed it or felt it that night. A. Where I come downstairs from the west end—there is stairs on the very end of it.

Q. On the west end? A. After I checked in I had to go upstairs to the office; instead of going back again I went downstairs, and just there they were digging—they had a lot of—they had been digging up, laying pipe across, and they had one-half of the road fenced, a railing around it, I suppose to protect
30 people from stumbling or running over the dirt or running into the pit, and they only had half the street; so I went on kind of that way (indicating) up across and then I started up.

Q. What was the condition of the roadway where you were walking? A. Well, it was dirty with the mud where they had been throwing it out—digging.

Q. What? A. They had been throwing out the mud, I suppose; and I suppose the dirt scattered over from the crossing; they had crossed over I
40 believe where they had dug before.

James McKeon—Direct.

Q. Did that extend as far as the railroad crossing?

A. Well, it was going across the street from curb to curb—over to the platform.

Q. I am talking about the dirt and mud and so forth; how far did that go up west toward Johnson avenue? A. It went to the crossing; it was right by the crossing.

Q. Before the accident, or before you found 10 Reaney, did you see or hear any wagons pass along Johnson avenue? A. Yes, sir.

Q. Where did they come from, do you know? A. They come from the ferry, in that direction.

Q. Where were you when you first observed them passing? A. I was just about going to turn around to go over to the crossing from coming downstairs.

Q. You were about at the crossing, were you? A. I wasn't at the crossing yet; I was just coming downstairs and went out to this here extension 20 where they had this here railing.

Q. You had just come downstairs? A. Come downstairs.

Q. And how many did you know went by you? A. Well, I thought there went by about six from the way they went running by me.

Q. How did they go? A. Well, they went on a gallop—gallop.

Q. It sounded like six; did you see them? A. I was standing right alongside of the street where they went past me. I could not help seeing them then.

Q. How close to you did they come? A. Right alongside of them.

Q. About how far away? A. About as far as me and this gentleman here (indicating the reporter).

Q. A couple of feet? A. A couple of feet.

Q. Which side of the street were they proceeding along? A. They were on the north side of the street.

James McKeon—Direct.

Q. Were they abreast or— A. They could not go abreast through this short—this narrow space.

Q. They were going through the only space there was then? A. Only space there was, yes, sir.

Q. Had you ever seen wagons go by there before early in the morning or late at night? A. Only these wagons that comes over from New York.

Q. Yes? A. These same wagons.

10 Q. Coming from New York? A. Yes; coming from New York.

Q. How often had you seen them coming by there? A. Oh, I guess—

Q. Before the accident. A. Well, every morning, pretty near, when it was—

Q. How would they generally proceed along that street? A. Sometimes they would be walking; sometimes trotting, running.

Q. Trot, run and walk? A. Yes, sir.

20 Q. You have often seen them do all of those? A. Yes, sir.

Q. How long had you worked on that platform before this accident? A. Well, I have been working for the express company for fifteen years.

Q. Well, at this platform? A. On this new one?

Q. What? A. I forget when they went there now; I guess about three or four years.

Q. Three or four years? A. In July we started there; I come up from the old platform.

30 Q. You have observed then the use of this road, haven't you? A. Yes, sir.

Q. What have you observed with regard to its use; by whom is it used? A. Well, by the public and everybody else going up and down there.

Q. Well, wagons? A. Wagons.

Q. And people on foot? A. And you will see pedestrians on foot going up and down occasionally.

Q. How frequently? A. Well, once in a while.

Q. Daily? A. Once in a while. At night time I
40 would only see them—evenings and mornings.

James McKeon—Cross.

Q. You would see them at night times? (No answer.)

CROSS-EXAMINATION BY MR. MILLER:

Q. When the wagons went by, Mr. McKeon, were you in the building or outside? A. I was outside.

Q. Outside on the street? A. Yes, sir. 10

Q. Then you were out in the dark too? A. Yes, sir.

Q. And you could see them? A. Yes, sir.

Q. And you were a couple of feet from them? A. Yes, sir.

Q. You say that they were galloping? A. Yes, sir.

Q. And you said you heard them? A. Yes, sir.

Q. Were they making much noise? A. Yes, sir.

Q. How much noise? A. Well, they were holler- 20
ing coming up the street. That is what drew my attention to them.

Q. The drivers were? A. Yes, sir.

Q. Had any wagon gone by before this bunch of six? A. No, sir; I wasn't out in time; they were the only ones I seen.

Q. And after this bunch of six between the time you saw them go by and the time you found Mr. Reaney? A. No, sir; I don't think there was any went by but an ambulance. 30

Q. And the drivers of these wagons were hollering? A. Yes, sir.

Q. Hollering loud? A. Yes, sir.

Q. And did their wagon make good deal of noise? A. Yes, sir.

Q. They were coal trucks, weren't they? A. That is what I believe they were.

Q. They were these big wagons? A. Yes.

Q. Big heavy wagons? A. Well, they were big wagons; regular coal wagons. 40

James McKeon—Cross.

Q. And they made a good deal of noise as they lumbered along? A. Yes, sir.

Q. And you could hear the horses' feet striking against the pavement? A. Yes, sir.

Q. Then after they went by you walked on up the street up to the crossing? A. Yes, sir.

Q. And when you got to the crossing you heard the noise? A. Heard no noise at all.

10 Q. Heard the cry, I mean. A. Heard the cry.

Q. And sometime after that you found Mr. Reaney? A. Yes, sir.

Q. How far away from him were you when you first saw him? A. I was standing on the curb; I came off about —

Q. In feet about how far? A. About from here to the chairs there, inside the railing.

Q. How far is that, would you say? A. I should say about twelve or fifteen feet.

20 Q. And he was lying down on the ground at that time? A. Yes, sir.

Q. And you were standing up? A. Yes, sir.

Q. And you walked over to him then? A. I didn't walk to him until he cried, until I heard the voice; then I—

Q. But you finally did walk over to him? A. Yes, sir.

Q. And then you called to the watchman? A. Yes, sir.

30 Q. Did you see where he was? A. The watchman?

Q. Yes. A. Yes, sir.

Q. Where was he? A. Standing right in the shanty.

Q. About how far was that shanty away from him? A. That was about the same distance; it wasn't much further.

Q. And you could see the shanty? A. He had the lights there; he had his lamp in his hand. That

James McKeon—Cross.

is how I could see him. He was standing there with his lantern.

Q. You said the public used this street? A. Well, they would go up and down there; I suppose they were the public.

Q. How do you know the public used this street? A. Well, I seen them going up and down; that is all I know; I went up and down myself. 10

Q. You go up and down yourself? A. Yes, sir.

Q. And then you see wagons go up and down? A. Yes, sir.

Q. Do you know where those wagons go to? A. Some of them goes to Newark, some to Bayonne, Greenville—

Q. They are wagons that go to the ferry? A. Yes, sir.

Mr. Dixon: Don't lead him. 20

Q. How do you know that? A. Names on them.

Q. In other words, you see wagons going along there with names on them, Bayonne, etc., and all of those wagons come from the ferry or go to the ferry? A. Yes, sir.

Q. Have you ever seen wagons except wagons going to or coming from the ferry? A. No, I didn't.

Q. These coal wagons go to Burns Brothers'? A. Burns Brothers' yard.

Q. And then they go back across the ferry? A. 30
Across the ferry.

Q. There were some lights up at Burns? A. Well, I do not go up that way.

Q. Do you remember seeing any at Burns around the time of this accident? A. No, sir.

Q. Do you remember whether there were any lights at Burns Brothers' burning on the night the accident happened? A. No, sir, I didn't—I don't; I wasn't up that way. I never go up that way.

Q. Then you do not know whether they were 40

James McKeon—Cross.

burning or not; is that it? A. Yes, sir. I didn't go as far as that. I take a shorter way than that.

Q. You go down on the train, do you? A. Yes; I go down on the train.

Q. You mean to say that you follow the track all the way up to Communipaw? A. Not all the way.

Q. You go up over the crossing and then go over into the terminal at the railroad station across the
10 tracks? A. No, sir.

Q. How do you go? A. I go all the way up till I pass Burns's; then I walk out in the street.

Q. Then you walk out in the street? A. Yes; when I go that way.

Q. How do you usually go? You said you usually go by train. A. No; going down, coming to work by train.

Q. What say? A. I come to work by train, but in the morning I have my own time and I walk
20 home. Sometimes I take a train home if I am tired.

Q. You can get a train? A. Not all the time. I have to wait pretty near three-quarters of an hour by the time I get through.

Q. But you can get a train? A. By waiting, certainly.

Q. Then all you have to do is to walk from the express building down to the ferry house and then get the train? A. That's all.

30 Q. Where do you live? A. In Suydam avenue, Jersey City.

Q. That is in the Lafayette section of Jersey City? A. Yes; sir: Communipaw.

Q. Where is Woodward street? A. That is up in the Lafayette section. That is further than where I am; I live right near Communipaw station.

Q. What say? A. I live near Communipaw.

O. Well, it is quite possible to get from Woodward street to either the Pacific avenue station or to
40 the Communipaw station, isn't it? A. I don't know.

James Hart—Direct.

I would sooner walk down all the way than to go to either one of them.

Q. Not whether you would sooner or not; you can get from Woodward street to either the Pacific avenue station of the Central Railroad or the Communipaw station of the Central can't you? A. Certainly you can, if you want to walk there.

Q. And then you can take a train down to Jersey City to the station at the terminal where the ferry 10 is? A. Yes, sir.

JAMES HART, sworn.

DIRECT-EXAMINATION BY MR. DIXON:

Q. Where do you live? A. 81 Mill Road.

Q. And what is your business? A. Teamster.

Q. Employed by whom? A. Thomas Johnson.

Q. What? A. T. J. Johnson.

Q. Where is his place of business? A. 174 Morgan street.

Q. How long have you been employed by them? A. About two months.

Q. Before that who were you employed by? A. Wertheim Coal Company.

Q. Where is their place of business? A. Pacific avenue and Grand street.

Q. In what capacity were you employed there? A. Three-horse teamster.

Q. How long were you employed by them? A. 30 Eight years, near.

Q. And you have been driving those teams for—first for the Wertheims? A. Yes, sir.

Q. Their business is coal? A. Yes, sir.

Q. Where did it take you? A. All over New York, from the ferry to the Bronx.

Q. Where was Wertheim's place of business? A. Pacific avenue and Grand street.

Q. To go from Pacific avenue to New York what route would you follow? A. I would go over the 40

James Hart—Direct.

23d street ferry to New York—go along Pacific avenue to Johnson avenue and all the way down to the Central Railroad depot.

Q. You went via Johnson avenue? A. All the way down Johnson avenue straight to the ferry.

Q. How long had you been driving up and down that road? A. I have been driving up and down that road, well, actually around fourteen or fifteen 10 years.

Q. For various parties? A. Yes, sir; before it was ever paved and—

Q. Since? A. —to the present time.

Q. About how long ago was it paved? A. To my knowledge it must have been around eleven years, as far as I can think of it anyhow.

Q. And what kind of wagons have you driven up and down there? A. Coal wagons and cement wagons—coal wagons mostly all the time. I drove 20 for Burns Brothers even down there, down in Communipaw.

Q. Where is Burns Brothers' place? A. Down in Communipaw, down on Johnson avenue.

Q. How far from the river? A. Well, it is about four good blocks.

Q. What time of day or night were you accustomed to driving? A. I went down that road at four in the morning and came home four the next morning many a time.

30 Q. And in the evenings have you ever been down there? A. I have went down in the evenings, six, eight, nine o'clock; ten o'clock.

Q. Do you know where the States Express Company— A. I do, yes, sir.

Q. —offices were and their platform? A. Sir?

Q. Do you know where they were, their platform, in 1913? A. Yes, sir.

Q. Did you drive by there very frequently? A. Yes, sir.

40 Q. Day and night? A. Day and night.

James Hart—Direct.

Q. What was the condition of Johnson avenue from Jersey avenue to the river on and just prior to December, 1913, December 11, 1913, with respect to the lighting? A. There never was a light.

Q. Weren't there any lights on Johnson avenue at all? A. Not from the Lehigh Valley crossing down as far as the ferry, but one; it is a little bulb that sets in off the crossing.

Q. Where is that bulb? A. That is the lowest ¹⁰ crossing down nearer to the ferry, nearer to the platform.

Q. The lowest crossing; what do you mean by that? A. That is the first crossing from the ferry up; it is only a small little bit of a bulb; and then it sets in between the track and the States express platform, now the Wells Fargo I believe; and that doesn't show any light whatsoever on the railroad crossing.

Q. It is near to the railroad crossing? A. It is ²⁰ right in back of the railroad crossing. It is just as if here was the crossing and there was a platform and it is in between these, and that's the track; it is only a little bulb sets on a post.

Q. Have you seen it lighted? A. Yes, sir; many a night I have come up there and it was out. In fact many a time I came up there and I had collisions.

Mr. Miller: I object to that; it is immaterial ³⁰ to this case. You cannot show the condition of this place by showing other accidents. There was a recent case where a man tried to show that the crossing was bad by other accidents there, and the court held that they could not do that.

The Court: What case is that?

Mr. Miller: I thought I had a reference to the case, but it is not here.

The Court: Where was the case decided? ⁴⁰

James Hart—Direct.

Mr. Miller: In New Jersey here, one of these recent crossing cases. I would be very glad to look it up between now and to-morrow morning.

10 The Court: The difficulty is I have to rule on the question now. The reverse has been held in *Olcott vs. Public Service Railway Co.*, 49 Vr. by the Court of Errors and Appeals.

Mr. Miller: The *Olcott* case my recollection is that you can show changes afterwards.

The Court: No; it has nothing to do with changes afterwards at all.

Mr. Miller: Well, that was my recollection of it.

20 The Court: My understanding of the rule, and I think I am quite clear on it, is that the fact of the condition of a place may be shown for a reasonable time before and a reasonable time afterward, that is a reasonable time before the accident and a reasonable time after the accident, to show the condition of the place at the time of the accident, and that there is some argument to be drawn from the consequences of the condition of the place as to what the place was likely to do to other people if there were accidents there. The court directly adopted the rule laid down by Wigmore in his book on evidence, and I understand the rule to be perfectly settled, and it went so far as to overrule the very kind of a case you are talking about in *Bobink vs. Erie*; and my only difficulty is with this situation that the *Olcott* case dealt with a fixed condition of affairs such as you are saying the New Jersey case just decided on, to wit, a crossing—

30

Mr. Miller: No; I say I have a recollection that there was a case decided—it may have been the *Bobink* case. The *Bobink* case was a crossing case.

40

James Hart—Direct.

The Court: If you had made the objection in another form I think I might have been inclined to sustain it, but in the present form I don't think—

Mr. Miller: I am moving to strike out now only on the ground that the evidence is immaterial, irrelevant and incompetent.

The Court: I will refuse to strike out.

Mr. Dixon: I think under the Exton case in 10 32 Vr. it is clearly relevant.

The Court: I remember that case. My impression of it is this, Mr. Miller—and this is what I will rule—without looking at the case of the crossing at all. My impression is that evidence of that kind is admissible for two purposes. The first purpose is to fasten notice upon the defendant with respect to the condition of affairs at the place in question. Now Mr. Dixon indicates to my mind the case of your 20 own company, the Central Railroad Company against Exton, that is reported in 32 and 33 Vroom.

Mr. Miller: Of course that was a passenger case.

The Court: That was not a crossing case at all; that was a case where the hackmen were in the habit of skylarking in front of the terminal building of the Central Railroad Company, and the court held that if they had been doing that 30 for a sufficient length of time to affect the company with notice, the duty rested upon them to cause such condition of affairs to cease. So this question as to whether or not there had been accidents happening on this piece of private property which people were invited to use—if they were entitled to use it—would come practically under the same rule. It may also be admissible to show the condition of the roadway at the place in question, at least so far as its use 40

James Hart—Direct.

10 at the time in question was concerned under such circumstances—and that is what I thought you were going to address your objection to. There would have to be some similarity of conditions in order to admit the evidence; but on the question of notice, if the accidents happened from a certain condition of affairs that was constantly going on there, why, the evidence is clearly admissible. So I will admit the evidence and you may have your objection noted.

Q. You say you have had collisions there before this accident to Reaney? A. Yes, sir.

Q. And what time would those collisions occur?

A. Well, any hour in the night. In fact some nights it would be so foggy you would have to pull in one side and wait until it would light up a little bit before I would dare go up the road.

20 Q. You have used that road daily --- A. Yes.

Q. And nightly during all this time? A. Yes, sir, and nightly too.

Q. Now what was its condition from Jersey avenue to the river so far as the light was concerned with respect to your ability to drive along there?

A. Well, you mean this kind of weather?

Q. In December. A. In December?

Q. Yes.

30 Mr. Miller: I object. There is no evidence before the court that at some other time he could not see to drive. There is no parity at all.

Mr. Dixon: We have fixed the night and he has fixed it.

Mr. Miller: For instance on a foggy night he naturally could not see.

40 The Court: I suppose it would require some time in December approximately near the accident, because early in the evening it would be

James Hart—Direct.

light and probably late in the morning it would be light.

Q. Well, say early in December— A. Well, take around—

Q. Take between the 1st and the 10th of December.

Mr. Miller: I object to that as immaterial, irrelevant and incompetent. 10

A. Well, take around seven or eight o'clock at night time you could not see in front of you.

Mr. Miller: I move to strike that out.

The Court: I was in the midst of an objection. I am trying to get an objection on the record.

The Court: What is the objection? Let us hear it.

Mr. Miller: On the ground it is immaterial irrelevant and incompetent; because he could not see some night at ten o'clock it does not at all follow that he or somebody else could not see at six in the morning on the 11th of December, 1913. You cannot guess in any such way as that.

The Court: What time did this accident happen?

Mr. Miller: Ten after six.

Mr. Dixon: About six in the morning, when there was no natural light. I submit that any witness can testify who knows the condition of that road as to whether it is light or dark and how light or how dark during the hours when there is no natural light, no sunlight.

The Court: That is true enough if there is no other intervening condition that complicates the situation.

Mr. Dixon: There is nothing else to complicate it.

The Court: All I was thinking was whether 40

James Hart—Direct.

or not on the 10th of December at 10 after 6 in the morning there was any natural light. Of course I am perfectly well aware that that is very close to the longest night in the year, within a few days of it.

Mr. Dixon: Yes.

The Court: And whether there was any natural light or not I—

10 Mr. Dixon: The plaintiff says there was not.

The Court: Of course there is always natural light even when there is darkness.

Mr. Dixon: Of course; but I mean the ordinary condition of day and night. There may be some starlight some night and some moonlight some night.

The Court: I will permit the question and you may have an objection.

(Question and answer repeated).

20

Q. Now near this crossing under those conditions how could you see? A. Couldn't see, no—no, sir, there was no lights at all, only as I said before a little bulb.

Q. What did that little bulb light up? A. It lit between the crossing and the States platform.

Q. How far would that spread? A. Well, it would spread in back of the crossing; it would not spread out on the crossing whatsoever; I never seen it
30 spread on the crossing, not at all.

Q. Did you ever have any collisions at or near that place between wagons? A. Yes, I have—wagons of Burns'; I have run into them, it was that dark.

Q. Have you ever run into wagons or had them run into you? A. Yes, sir; that is—

Q. Between what hours? A. Well, any hours—well, six or seven o'clock at night time. Only here lately of course each man carries a lantern. Now
40 you can see what is coming.

James Hart—Direct.

Q. I mean before this accident. A. Yes; well, that is what I am saying; many a time.

Q. Did you ever call anybody's attention to it, any of the employees or officials? A. I often did. Even near this crossing I often seen myself pull the three horses up and there be an engine coming down. I would say "It's a wonder you wouldn't have some lights here or some gates." 10

Mr. Miller: I object to that.

Q. Never mind that. Whose attention would you call to that? A. I would call some of the watchmen and some of the brakemen, many a time.

Q. Employees of the railroad? A. Yes, sir.

Mr. Miller: I object to that.

The Court: What is the point of the objection now? 20

Mr. Miller: Notice to a crossing watchman or to the engineer of a train would not be sufficient notice to give the company notice, I don't think, under the law of the state. The crossing watchman is there for one purpose, to guard a crossing, and the engineer is there to run the train, and the conductor is there to take tickets; and a notice to one of those men outside of the scope of his employment I do not think would be sufficient. 30

The Court: What do you say about that?

Mr. Dixon: The crossing watchman is there to see if the crossing is safe.

The Court: Yes; the crossing, but not if the road is safe.

Mr. Dixon: This is the crossing of the road.

The Court: Now I do not think that telling a watchman or telling an engineer or a conductor on a train whose duty does not require him to make any report with respect to it—and mani- 40

James Hart—Direct.

festly so far as I can see in this case it would not be—is any notice to the company.

Mr. Dixon: Wouldn't it be the duty of the watchman to see that passengers and vehicles were safe?

The Court: Safe on the crossing.

Mr. Dixon: They say the light was up here to make it safe.

10 Mr. Miller: Who says that?

Mr. Dixon: It makes crossing safe. Now this witness says that here at the crossing, although the light was there it was so arranged and of such a character that at the crossing it was so dark that he had often had collisions within the vicinity of it and had complained about it and said "Why don't you light up the crossing?" Now that is notice to the company of that place—that is the only light they put there on
20 this whole roadway from Jersey avenue to the river.

The Court: I will permit it.

(Objection noted for the defendant.)

Q. Whose attention would you call to it? A. I would call the man at the crossing; I would call the brakemen, as I said before, many a time. Many a time, as I said before, I would want to cross, and I often said "Why don't you put gates even up here?"

30 Mr. Miller: I move to strike that out.

The Court: That will be stricken out.

Mr. Dixon: I don't care anything about the gates.

Q. Did you ever inform anybody connected with the railroad with regard to the collisions you had had on this road? A. No, but in fact I think they have seen it.

Mr. Miller: I object to that and move to strike it out.

40 The Court: That will be stricken out.

James Hart—Direct.

Q. What was the condition of the surface of the road down there in December, 1913? A. Well, it was paved, all paved; and especially down there—and down there sometimes there was a running stream too from the hoses; they had hoses down there sometimes.

Mr. Miller: I object to that and move to strike that out. 10

Q. Prior to this accident? A. Yes; I have seen hoses stretched down there —

The Court: I will strike that out unless it is shown to have some connection with this accident. I do not see that it has anything to do with it.

Mr. Dixon: I have no objection.

Q. What was the condition of the roadway with regard to dirt and refuse? A. I have seen dirt there, 20 and I have seen plenty of it from Burns Brothers' coal yard clean down to the ferry.

Q. What do you mean by plenty of it? A. Plenty of mud and dirt that I presume drops from the coal wagons and the dust of the road blowing down on that road.

Q. Does it have any effect—did it at that time, in December, 1913, have any effect on the sound of the wagons at all? A. Yes; I have seen ourselves get stuck many a time in it. The dirt would stop the 30 horses from pulling the load.

Q. It was as thick as that? A. Yes, sir; many a time.

Q. And anywhere along near this crossing? A. Yes, sir, before you would come to the crossing and below the crossing.

Q. Now when you had these collisions along this road and before this accident what would they do to you?

Mr. Miller: I object to that. 40

James Hart—Direct.

Q. Why did you have collisions?

The Court: I will overrule that question. We cannot try that issue as to why he had collisions. The fact that he had collisions and the facts and circumstances of the place he may prove as facts, but his conclusion as to why he had them is clearly inadmissible.

10 Q. When you had these collisions could you see the other colliding party or wagon prior to the collision so as to avoid it? A. No; no; sometimes I didn't unless it was a gray horse coming in front of me; then perhaps I might see him.

Q. Gray horse? A. Yes, sir, but just about at that point Burns Brothers comes practically in sideways, and naturally you would run into them; you could not see them, it was so dark; and wagons coming up and down.

20 Q. Because you could not see them? A. Yes, because you could not see them.

Q. How long did that condition exist prior to this accident to Reaney, prior to December, 1913? A. What do you mean?

Q. The condition of darkness. A. That I could not tell you, the condition of it, only just the road; the road has been paved as I said.

Q. Between sundown—after the sun went completely down and before it came completely up? A. Some nights you would come up and you would
30 drive right through, you would not meet nobody.

Q. Could you see any better? A. No. Some nights of course you might see a little better with the moonlight and the stars, but there is no lights to show you on the way up.

Q. Some nights you could see better on account of the moon and stars? A. Yes, sir, the moon and stars.

Q. And when those were not shining then you—

A. If it was a good moonlight night it would show
40 right down on the ground, the surface.

CROSS-EXAMINATION BY MR. MILLER:

Q. You say you have been driving down there for how long? A. Around fifteen years.

Q. And you have had a good many collisions? A. Not a good many; I have had a couple though.

Q. How many have you had in the last fifteen years? A. I have had about four or five anyhow.

Q. Four or five in fifteen years? A. Yes, sir. 10

Q. How many have you had at the crossing where the bulb was? A. I have had about two at the crossing to my knowledge.

Q. Two in fifteen years? A. One pole chain broke and one pole broke.

Q. One pole broke? A. Yes; and one pole chain.

Q. How did that happen; you had gone into some other wagon? A. Yes, sir; ran into one other wagon.

Q. Did you have a light on your wagon at that 20 time? A. No, sir; there was no law to that effect.

Q. The question is whether you did or not. A. No, sir.

Q. Did the other man have a light on his wagon? A. No, sir,

Q. So that you have had two at this crossing in fifteen years? A. No, sir.

Q. And on those nights was the bulb burning? A. No, sir,

Q. Not those nights? A. No, sir—nothing; I 30 don't think that bulb was there at the time.

Q. Was the crossing there? A. The crossing was there, yes, sir.

Q. So that in fifteen years you have had two at this crossing? A. Yes, sir.

Q. And you have had perhaps two more in fifteen years at other places along this road? A. Up the road.

Q. That is at Burns Brothers'? A. Up above Burns Brothers'. 40

Q. How far from Burns Brothers'? A. Between Jersey avenue and Burns Brothers'.

Q. And that is all you can remember, those four?
A. Yes, sir.

Q. How do you fix on four? A. Because it comes to my memory to recollect that I had four.

Q. When did the first one occur? A. Oh, that is quite a while ago.

10 Q. About how long ago? A. Well, it is shortly after the road was paved, I should suggest.

Q. How long ago was it paved? A. It must be around eleven years, as I said before, to my knowledge; it may be more and may be less.

Q. What fixes it in your mind that that is the first collision—that this first collision occurred shortly after the road was paved? A. I was going down there shortly after the road was paved; we were just through riding the horses from Burns
20 Brothers up to the Hudson Coal yard; that is on Jersey avenue.

Q. Now the question is how you fix in your mind that this first collision occurred shortly after the road was paved? A. Yes.

Q. That is what I want to know; what fixes that in your mind? A. Because the pebbles were still there on the ground in some of the paving blocks.

Q. That is how you remember it? A. Yes.

Q. When did the second one occur? A. That is
30 quite a while after that too. I remember the man I had the collision with there.

Q. You remember the man? A. Yes; that was a couple of years after that.

Q. Where did it occur? A. Right down about—well, I—it is a little further down than Jersey avenue—no, wait a minute.

Q. And the first one was up near Jersey avenue?
A. Yes; right near the crossing.

Q. So that the first one was up near Jersey avenue?
40 A. To my knowing, yes, sir.

James Hart—Cross.

Q. Wait a minute. The first was up near Jersey avenue and the second— A. About the same place; well, a little further down; not the same spot, somewhere between Burns Brothers' and Jersey avenue.

Q. Where did the third one occur? A. Down at the crossing; they were both of them at the crossing, the last two.

Q. At this crossing? A. Yes, sir.

Q. When did the third one occur? A. That was 10 shortly before Wertheim went into bankruptcy.

Q. And when did the fourth one occur? A. Just about a couple of months before that to my knowledge—twice in one year.

Q. A couple of months before when was it? A. Well, that was the third and the fourth one.

Q. They occurred together in a short time? A. In a short time, yes, sir.

Q. And at the same place? A. Well—

Q. And about how many years ago? A. Well, 20 that is about—I had one I think it was with the Hudson, and three with Wertheim.

Q. Listen to the last question. The question was how many years ago the last one occurred? A. The last one occurred around three years ago.

Q. A month before that was the third one? A. About four; and the first two was shortly after the road was built.

Q. What kind of a day was the 11th of December, 1913? A. Well, that I could not really tell you, what kind of a day that was. It was pretty early in the morning, you know; it was pretty dark. I was in the stable about that time. It was pretty dark that time in the morning.

Q. What kind of a day was December 12, 1913? A. I could not recollect that.

Q. Where were you at six o'clock in the morning on the 12th of December, 1913? A. I cannot go back that far and tell you about them things.

Q. Well, you say you were in the stable at six 40

James Hart—Cross.

o'clock in the morning? A. No; I say we are in the stable at six in the morning. It is pretty dark in December, I said.

Q. The question was whether you remember where you were on the morning of December 11, 1913? A. Yes, sir; I do remember where I was.

Q. Where were you? A. Home in the house.

Q. How do you know it? A. Because I know it.

10 Q. We want to find out what fixes it in your mind. A. Well, I was in bad circumstances myself here.

Q. You had something of that kind? A. Yes, sir.

Q. Were you paying any attention to the weather?

A. Yes, sir; I think so anyhow; I am not sure.

Q. Have you any recollection of the weather? A. I think it was raining if I ain't mistaken. I won't be sure though.

20 Q. But you think it was raining? A. I think it was.

Q. What makes you remember that, that particular day? A. Well, I was laid up myself at the same time, on the 11th of December. In fact I was laid up until the second day of January.

Q. That does not help us to know how you remember or recall. A. I cannot really tell.

30 Q. You have said it was raining. A. Well, when I lived in this house and the woman in the house I think she said to me "It's a bad day, Mr. Hart, it is raining."

Q. What makes you remember you left that particular house on that particular day? A. I did not say I left it.

(Former answer repeated by the reporter.)

Q. What makes you remember this particular lady's conversation with you on the 11th of December, 1913? A. She came up to see me.

40 Q. What makes you remember she came up to see you on this particular morning about a year and

James Hart—Cross.

a half ago? A. I am saying about the 11th or 12th or 13th as you asked me.

Q. We are talking about the 11th. A. As far as I can think back—I said I was laid up on the 11th.

Q. Then you said it was raining on that day because a woman— A. I said “I think;” I won’t be sure.

Q. Do you remember anything about the weather that day? A. Well, I cannot say now. 10

Q. Isn’t it a fact that you know absolutely nothing about the weather that day at all? A. Well, back two years, I haven’t it in a book.

Q. Isn’t it a fact you do not know anything about the weather? A. Not that day.

Q. Or the day before? A. No; to tell you the truth I haven’t it in a book, no.

Q. Or the week before? A. Only just about Sunday—

Q. Or the week before? A. No; I was laid up. 20

Q. You were laid up at that time? A. Yes, sir.

Q. You were not driving down Johnson avenue at that time, were you? A. No, sir; not in December.

Q. So you know nothing about what you could see or how little you could see— A. Not in December.

Q. —in December, 1913? A. No, sir.

Q. Then, Mr. Hart, if you were not driving down Johnson avenue in December, 1913, at all, how do you know that there was dirt there in December, 30 1913? A. There was always dirt down there, your Honor.

Q. Were you there in December? A. No, sir.

Q. Then how do you know? A. I was there in January, when there was plenty of dirt because I got stuck.

Q. There was dirt there in January? A. Yes, sir; plenty of it.

Q. And there was dirt before that? A. There was plenty of it to my knowledge. 40

James Hart—Redirect—Recross.

Q. The question is if you were not there at all—

A. No, not in December.

Q. —you do not know whether there was any dirt there or not? A. Not in December.

Q. You do not know anything about it? A. No, sir.

Q. And you do not know whether there was a bulb there in December or an arc light or any light?

10 A. No, not in December; I said not in December.

Q. And this was in December, 1913? A. I don't know anything about that, not in that month, but previous to that I do know—

Q. No.

REDIRECT-EXAMINATION BY MR. DIXON:

Q. You know about it in November that year, do you? Do you know about it in November of that year, the arc light? A. The arc light, no, sir, not in November.

Q. What month do you know about? A. I knew all the way clean up to August.

Q. August? A. Yes, sir; and then to January I didn't know; but from January up I do know.

Q. After January was the light the same as it was as to August? A. No, sir.

Q. What was the difference? A. Well, in January I believe there was not a bulb there to my knowledge.

30 Q. What kind of a bulb was it in January? A. That is what I say, I didn't see any bulb there in January.

Q. You did not see any there in January? A. Not to my knowledge. There might have been, but I didn't see it.

RECROSS-EXAMINATION BY MR. MILLER:

Q. It might have been? A. Well, I say I did not
40 see any.

Edward R. Kearns—Direct.

Q. Did you say it might have been? A. I didn't see any there, not to my knowledge.

Q. Did you say it might have been? A. I did not see any —

Mr. Miller: Now I ask the witness be instructed to answer the question.

Q. Did you say it might have been? A. Yes; but I did not see any. 10

The Court: Well, did you say it might have been? A. Yes, sir; I did say it.

Q. That means you do not know whether there was one there or not? A. Yes; but I have seen it there after that, but a very, very dim light though.

Mr. Miller: I move to strike that out.

The Court: It may be. It is not responsive.

20

EDWARD R. KEARNS, SWORN.

DIRECT-EXAMINATION BY MR. DIXON:

Q. Where do you live? A. 32 Trenton street, Jersey City.

Q. And what is your business? A. Teamster.

Q. For yourself or employed by somebody? A. No, sir; I work for P. J. James, truckman, 193 Bay street.

Q. How long have you been working for him? A. 30 Four months.

Q. Before that what was your business? A. John Y. Gobel, truckman, Halladay street and Johnson avenue.

Q. How long did you work for him? A. Close to four years.

Q. By truckmen you mean driving their trucks? A. Driving a truck.

Q. When you trucked for these two people, in driving trucks, did you ever have occasion to use 40

Edward R. Kearns—Direct.

Johnson avenue as far as the Central Railroad Company ferry? A. Yes; use it in the morning and at night—going to work and coming from work.

Q. Covering what period of time did you have occasion to use Johnson avenue from the ferry to Jersey avenue? A. Well, in the morning—some mornings on an odd day we would be ordered out early; that meant five o'clock to get to the
10 stable, and to turn out at half past five. The track leaving the stable at that time would bring us down to the ferry at six o'clock, and if we were not ordered out early we would get in the stable at six o'clock and drive out at half past six, and it would bring us to the ferry at seven o'clock. In the evening we came up at all hours; it depended on what time our day's work was done in New York, to drive up the road to the stable.

Q. Covering what period of time was this your
20 practice to drive up and down that road? A. Covering what period of time?

Q. Yes. A. Length of time—well—

Q. What years? A. What years? 1912 and 1913 and 1914 and 1915.

Q. Now during that time what was the condition of the surface of the road? A. The surface of the road was paved.

Q. You did not drive up and down there before the paving? A. No, sir.

30 Q. And you drove between sunset and sunrise, up and down— A. Oh, yes.

Q. Johnson avenue? (No further answer).

Q. And how frequently, if at all, did you drive up and down Johnson avenue after sunset and before sunrise during the month of November, 1913, and December, 1913? A. Well, in the winter months from November on we came up late; some nights early, some nights it would be seven o'clock, some nights eight o'clock, some nights half past six,
40 other nights six, some nights nine, some nights five

Edward R. Kearns—Direct.

—it depended as I said what time our day's work were done in New York.

Q. Did you ever travel that road during those months around six o'clock in the morning? A. If I was ordered out, yes.

Q. I say did you during those months, that you remember, about six o'clock in the morning, in December, 1913? A. If I was ordered out—during them months? 10

Q. Yes. A. That I couldn't actually say, whether I was ordered out; I cannot bring it to memory, to tell the truth.

Q. Well, you quite frequently did drive there early in the mornings? A. Yes.

Q. During that year? A. Yes.

Q. 1913? A. Yes.

Q. And was the condition of the road during that year so far as artificial lighting was concerned the same— A. There isn't any. 20

Q. Was there any change in the artificial lighting of that road during the year 1913? A. No artificial lighting that I know of, except one light.

Q. Was there any change in the artificial lighting of that road during that year that you know of? A. No, sir.

Q. It was the same in December as it was in January of the same year, was it? A. Yes, sir.

Q. Now what was the artificial lighting of the road during that year between the ferry and Jersey avenue or Burns Brothers'? A. A switch lamp at every switch. 30

Q. A switch lamp at every switch? A. And the small bulb at the last crossing leading to the river; it was in between the track and the express company platform.

Q. You say a switch lamp at every switch? A. A switch—a lamp to turn the switch.

Q. Where are those switches? A. They are down along the tracks. 40

Edward R. Kearns—Direct.

Q. Were they in the roadway? A. No, sir.

Q. I am asking you what artificial lighting in the road there was. A. None, absolutely none whatsoever that I know of.

Q. Taking from the ferry up—or going from the ferryboats up, can you describe on the blackboard the situation there? A. Taking from the ferry up?

Q. Going from the ferry show us what the first
10 light you would come to would be—starting at the river. Could you do it? A. Well—

Q. Do you know if you can? Have you got it clearly in your mind? A. Yes, sir.

Q. Describe it first without the blackboard. Tell us, as you go from the river. A. I couldn't describe it on that board with chalk (indicating cloth-covered surface).

Q. Well, we will turn it around (exposing a blackboard).

20 Q. Which side are you going to start with, the river? A. That (drawing) is Johnson avenue. Here is the river to the east. There is Jersey avenue to the west. This is the roadway leading out from the Jersey Central ferry. You take Johnson avenue up. This is the U. S. Express Company over here. Here is the New Jersey Central Railroad track with a spur crossing that track and running down this way. In here is the bulb on top of a pole twelve feet high.

30 Q. How far is that pole from the roadway? A. From here—well, I should judge about twelve or eighteen feet.

Q. Does that come out over the road, that arm? A. No, sir; it shows no light to the road here.

Mr. Miller: It shows no light?

A. No, sir; not that I know of—not that I could see, crossing there

Q. Go on. A. Through the road there is no light.
40 The Lehigh Valley track here has gates with lights

Edward R. Kearns—Direct.

protection. The New Jersey Central has another track here without gates and a track here without gates. The track of the Central has no gates or light.

Q. How far is that gate from the first crossing?

A. This here (indicating).

Q. Yes A. From the first crossing, well, I should say half way up the road. 10

(Adjournment to June 22, 1915.)

(Last two questions and answers repeated.)

A. This here gate (indicating)?

Q. Yes. A. This is about half way up the road.

Q. Half way between what? A. Between this sput here.

Q. And what? A. And the—and Jersey avenue (indicating). That is on a rough guess. Now here 20 is the railroad shanty and there is Burns' stable. Here is the roadway; there is Burns Brothers' coal yard.

Q. Take your seat. You have shown us the general locality. Now you stated that you had driven up and down that road after sundown and before sunrise almost daily? A. Before sunrise.

Q. Before sunrise, yes; during the dark period of the twenty-four hours. A. Oh, yes. I drove up and down—up the road at night during darkness 30 and down in the morning, of course as I told you when we were ordered out early. Now it may be we would be ordered out early and it would be in the spring of the year.

Q. But you have driven down there in the early morning? A. Yes, sir.

Q. Before sunrise? A. Before sunrise?

Q. Yes. A. Well, before sunrise in the spring of the year or summer.

Q. I don't care when it was. If it was before 40

Edward R. Kearns—Direct.

sunrise that is what I am asking you. A. No, sir; not that it was dark.

Q. You have never gone down in darkness, before sunrise? A. Not when it was dark.

Q. But when you have come up have you observed this light that you have indicated there?

A. This small bulb, yes, sir.

Q. Describe that light and how much reflection or
10 light it throws upon the roadway. A. It showed no reflection or light that I could see to the tracks.

Q. Does it light up the roadway to any distance?

A. No, sir; it sets back of the road inside the building, between the building and the first track.

Q. Now then, from the ferry up to Jersey avenue, in 1913, and up to December, was there any artificial lighting of that roadway at all? A. No, sir.

Q. And what was its condition as to darkness
20 after the sun went completely down? A. Where do you mean, in the line of seeing to drive?

Q. Yes; driving a wagon. A. To drive, coming up that road I always took it nice and easy.

Q. How about seeing? A. The consequences was you would have to hold just down your elbows to your knees and look ahead as far as you could.

Q. How far could you see ahead? A. You couldn't see ahead at all, no further than about to the horse's head.

Q. Did you ever have any accidents there through
30 collisions or anything? A. Well, I have had two, but not serious.

Q. I do not care if they were serious or not—through collisions? A. Through collisions.

Q. After the sun had gone down? A. Yes, sir, two dark nights.

Q. Due to the darkness? A. Yes.

Mr. Miller: I move to strike out Mr. Dixon's remark. Mr. Dixon said it was due to the darkness.

40 The Court: I will permit it to stand.

Edward R. Kearns—Direct.

Q. Did you ever report the condition of this road so far as the darkness was concerned to any of the employees or officials? A. The first collision I had was in the early part of December.

Q. What year? A. 1913; but I cannot give the exact date.

Q. I don't care about the date. A. I know it was the early part of that month, on account of 10 being Christmas month, and it happened just the other side of where I pointed Burns Brothers' coal yard, I should say about one hundred feet up. It was Lawshe's Newark truck; it was loaded heavy and the driver was giving his horses a chance to wind, as he claimed himself. I came up behind him and could not see him, and the pole went underneath his truck and the chain on the—

Mr. Miller: I object to this description of an- 20
other accident.

Q. That is enough of that. You did not see this truck ahead of you until you struck him? A. No, sir.

Q. Did you report it to anybody? A. In backing the horses up it broke the pole chain.

Mr. Miller: I object to that. I do not think we have a right to go into a description of the other accidents. The existence of the accidents 30 you have ruled is permissible for the purpose of showing notice.

The Court: You do not understand what I ruled. I ruled he had a right to show the facts in connection with the accident but not his conclusion with respect to it, and that is what I am still going to rule; and these that have been offered are the facts of the accident, and I will permit it.

Mr. Miller: I would like my objection noted. 40

Edward R. Kearns—Direct.

A. Lawshe's driver asked me what happened—

Mr. Miller: I object.

A. —and I says "The pole chain is broken."

Mr. Miller: I object.

The Court: That last part is stricken out.

Q. We do not want anything that you said. I
10 want to know if you notified, or if knowledge of
this accident came to— A. Yes, sir; I notified
an employee of the Central Railroad, off a passenger
car that was drilling down, and he had a lantern in
his hand and held the lantern while I was fixing the
pole chain, so I could see, and I passes the remark
to him—

Mr. Miller: I object.

Q. I do not want your remark. He was there at
20 the time or shortly after? A. Yes, sir.

Mr. Miller: Now I move to strike out the
conclusion that this man was an employee of
the Central Railroad.

The Court: The conclusion is stricken out.

Q. How many wagons, so far as you observed,
customarily went up and down and across that ferry
in 1913—how many per day? A. How many?

Q. Yes. A. That would be hard to say. They
30 were going up and down you might say the day
long.

Q. But while you would go up and down there
would you meet other wagons besides your own?
A. Coming down and up, yes.

Q. And of what nature, what kind of wagon? A.
Well, some light wagons—single and double, loaded
all kinds of business wagons and trucks.

Q. All kinds of business wagons; and did people
walk up and down that street? A. I have saw them
40 walk up and down.

Edward R. Kearns—Direct.

Q. Going from where to where? A. Going from work; coming to work.

Q. You say "work;" going to what place? I do not care what they were doing. A. I could not tell what place.

Q. Did you see them going to the ferry?

Mr. Miller: I move to strike out they were going to work. 10

The Court: That is stricken out.

Q. Coming from where to where? Where did you see them walking along? A. Up and down the road.

Q. Up and down the road. What part of the road did they have to walk in? A. Some in the street and some in the bank over the curb.

Q. And did you see them walking both daytime and night-time? A. Yes, sir. 20

Q. And covering what period of time did you observe that? A. What period of time?

Q. Yes; covering what period of time—duration of time? A. Well, from half-past five in the evening up.

Q. Not in the day, but during your experience on that road as a driver, for how long a period have you seen people walking up and down that road? A. Well, you see a few walking up during the day—some rides up back of the wagons—back of the machines, automobiles. 30

Q. I am asking you about the walking people, not the riding people. Over what period of time have you seen people walking up and down that road, night time and day time? A. Day and night both.

Q. Well, during what period? Don't you understand what I mean? Did you see them during the year 1913? A. Oh, yes; yes, sir.

Q. Did you see them during the year 1912? A. Yes, sir. 40

Edward R. Kearns—Direct.

Q. During the year 1910? A. No, sir; I wasn't there.

Q. Then as long as you have been riding up and down that road you have seen people walking up and down, have you? A. Yes, sir.

10 Q. Now during the year 1913 was there any sign or notice of any kind or description anywhere along that road, along that property, that that was private property of the Central Railroad Company, or of any other company, or anything of that sort? A. No, sir; one at this spur—"Look out for the locomotive"; that was the regular crossing.

Q. "Look out for locomotive." Well, that was not notice it was private property, was it? A. No, sir.

Q. There was one sign near the spur; which spur do you mean? A. Well, mostly all spurs on the railroad crossing they have them signs up.

20 Q. "Look out for the locomotive"? A. Yes, sir.

Q. That is where the track crosses the thoroughfare? A. Yes, sir.

Q. And there were between the river and Jersey avenue, three places where they crossed the thoroughfare? A. Yes, sir.

Q. And on each of those places there was a sign, "Look out for the locomotive"? A. Yes, sir, as a general rule they always have them signs.

30 Q. I do not ask you about the general rule. I ask you what the fact is there? A. Yes, sir.

Q. And that is all the sign was? A. That is all.

Q. No other sign; no notice that people could not go on there if they wanted to? A. No, sir.

Q. Did you ever see anybody attempt to stop anybody—any of the public or drivers, from going along that road? A. No, sir.

Q. Now when you observed these wagons going up and down the road after sundown at what rate of speed did they customarily go?

40 Mr. Miller: I object as immaterial, irrelevant and incompetent.

Edward R. Kearns—Direct.

The Court: What is the contention about that, Mr. Dixon?

Mr. Dixon: The contention is this, sir: that this being private land, if these wagons coming from the defendant's ferry, being upon their property, of right, customarily drove up and down that road on a trot or gallop or what not, and for such length of time that the company knew or ought to have known of that situation, 10 then they should make some kind of a provision with regard to the safety of others who likewise were using that as a public street, and among those provisions we say is the lighting; the same as in the Exton case, the court held there that these men were scuffling and not only scuffling on the occasion of the accident but they scuffled beforehand, and they permitted the plaintiff to prove their habit of scuffling so that the defendant either knew or 20 ought to have known that the scuffling went on on their property and therefore should have taken some precaution to prevent it.

The Court: I will permit it. That is the theory of the case.

(Objection noted for defendant).

A. At all rate of speeds—some fast and some slow; it depended on the man driving.

Q. And those were wagons that came off of the 30 boats as well as other wagons?

Mr. Miller: Let him tell that.

Q. Where did those wagons come from? A. Going down and up.

Q. Going down where? A. Down towards the river, east and west.

Q. Well, do you know where any of those wagons came from that travelled on that road? A. Where they came from?

Edward R. Kearns—Cross.

Q. Yes. A. I could not tell you that.

Q. Where did you go to when you went across—
down that road? A. When I went down I went on
the boat and went over to New York.

Q. Well, didn't you ever see other wagons going
over on the boat? A. Oh, yes.

Q. Where did they go when they went on the boat
then? A. To New York.

10 Q. Now did you ever come over on the boat from
New York? A. Yes, sir.

Q. Did you ever see any other wagons come over
from New York? A. Oh, yes.

Q. And when those wagons came from New
York what road did they come on to Jersey City?
A. Johnson avenue.

Q. Out this road, didn't they? A. Yes, sir.

Q. Are those the wagons that you refer to as
going at all different speeds? A. Yes, sir.

20

CROSS-EXAMINATION BY MR. MILLER:

Q. When did you first hear of the accident to Mr.
Reaney? A. Oh, I was going over the 23rd street
boat.

Q. No; just when? When was it? A. A few days
after he was hurt.

Q. Did you know Mr. Reaney? A. No, sir.

30 Q. You gave your name to some one? Did you or
did you not? A. A friend of mine was speaking to
me about the accident—

Q. No.

Mr. Miller: Repeat the question.

(Question repeated.)

A. Yes, sir.

40 Q. You have told us that this middle crossing, the
Lehigh Valley crossing, had gates on it. Was that
there in December, 1913? A. Was there gates there
in 1913?

Edward R. Kearn—Cross.

Q. No; the Lehigh Valley crossing, was that there in December, 1913? A. Well, that I cannot remember now. I could not just remember that. I would not like to say yes or no.

Q. You do not know whether that Lehigh Valley crossing was these? A. At that time I cannot just say whether that spur was there or not.

Q. Your recollection is not very fresh, you mean? A. Not on that spur there, because it is a new spur¹⁰ we have put in there, you know.

Q. And you do not know whether it was there at that time or not? A. At that time, I can't say, no, sir.

Q. What kind of a day was December 11, 1913? A. I could not tell you that. I can't bring that back to memory.

Q. I did not suppose you could. When did you first make up your mind to try to recollect the conditions that were there in 1913? A. How did I first²⁰ come to make up my mind?

Q. When did you first attempt to recollect what the conditions on this road in 1913 were so that you could come here to testify, I mean? A. I did not have to make up my mind. I see it every day.

Q. Well, you forget about things, you do not recollect those things? A. No; I don't forget. Whether you are riding day or night you don't forget.

Q. You forget whether that spur was there. A.³⁰ Well, at that time; I don't just want to say it was there or not; I couldn't just say; I thought it was a new spur.

Q. I thought I saw you change the position of this dot, didn't I, this morning (indicating)? A. Well, that doesn't—it is—

Q. Wait a minute. Did you change the position of this dot? A. Yes, sir.

Q. And that was the dot that you meant to show the light? A. Yes, sir. 40

Edward R. Kearns—Cross.

Q. And you had it further away from the road before? A. Yes, sir.

Q. Why did you do that? A. Well, it is, as I said—as I said last night, it is sixteen or eighteen feet from the track, or twelve to eighteen feet from the track—I do not just know, and I—

Mr. Miller: I move to strike that answer out.

10 The Court: I do not know whether it is an answer or not. He may be going on to say that when he put it there last night he indicated a distance that was more.

Mr. Miller: But he said that and stopped.

The Court: You stopped him.

Q. Did you mean to go further with the answer? A. Yes, sir.

Q. Pardon me for stopping you. What is the rest of your answer? A. On that light?

20 Q. On why you changed the place. A. To make it look a little better.

Q. To look better? A. Yes, sir.

Q. As a matter of fact, when you came back this morning, after you had been thinking about that and saw that, you knew it was too far away as you had drawn it before? A. Well, I told you the distance last night.

Q. Isn't that why you changed it? A. No; I just changed it to make it look a little better.

30 Q. A little bit more like it? A. Yes.

Q. As a matter of fact that light is close to the street, isn't it? A. Well, I told you it was about as close as from twelve to eighteen or sixteen feet. I could not give you—

Q. Are you sure that in 1913 it was not less than twelve feet from the street? A. Less than twelve?

Q. Yes. A. Am I sure?

Q. Yes. A. I am telling you I could not be exact on the distance.

40 Q. Now what makes you so exact that that light

Edward R. Kearns—Cross.

did not throw any light on the street there? A. Because I drove apast it.

Q. But you drove past it and saw its position every night, didn't you? A. Oh, yes; and then passed a remark to myself, "That's about the only light."

Mr. Miller: I object to that and move to strike 10 it out.

The Court: It may be stricken out.

(Question repeated).

Mr. Miller: Well, I will withdraw that question.

Q. You said you had seen people frequently walking there? A. Walking up and down the road?

Q. Yes. A. Yes, sir.

Q. Did I understand you to say you had seen people walking along the bank alongside the road? A. Some; and some in the street.

Q. Some on the bank and some in the street; there is a bank there? A. There is a bank there, the curb.

Q. So that people can walk on it? A. Yes, sir.

Q. All the way up? A. Well, no, sir, not at the coal chutes, not at Burns Brothers'. They are compelled to take the street.

Q. Except at Burns' Brothers' there is a bank there where they can walk? A. A pathway along the curb.

Q. Off of the part, the road, that the wagons used? A. Yes, sir.

Q. And that is up high so that a wagon could not get up there? A. Can't get up there.

Q. You said you have had two collisions on that street? A. One collision.

Q. Only one collision? A. The other was very 40

Edward R. Kearns—Cross.

near one, but the horses stopped. If you want me to describe that to you——

Q. No; I don't want you to describe it. I will ask you. You have only had one there since you have been driving? A. One; yes, sir.

10 Q. As I understand it, this manure truck was driving ahead of you and he stopped? A. To rest his horses.

Q. And your horses ran into the back of him? A. Yes.

Q. Your horses got onto him before you could stop them? A. Yes

Q. How far ahead of you was he when he stopped? A. The pole went under his truck.

Q. When he stopped how far ahead of you was
20 he? A. He was stopped there, blowing his horses—resting his horses.

Q. But he was stopped? A. And I could not see him.

Q. Did you have a light? A. No, sir.

Q. Did he have a light? A. No, sir.

Q. That was up by Burns Brothers'? A. Yes, above the coal pockets.

Q. In the shadow of the coal pockets, wasn't it? A. Just above the coal pockets, where the coal was
30 piled up on the side.

Q. That is a particularly dark place where the coal is? A. Yes, sir.

Q. How many other accidents have you had at other places aside from this Johnson avenue since you have been driving teams? A. That is besides the one?

Q. Yes. A. None; only this collision.

Q. Not at this place, but other places. A. None.

40 Q. Never had another accident? A. No, sir.

REDIRECT-EXAMINATION BY MR. DIXON:

Q. Isn't it a fact that these tracks of the Central over on the west side of the crossing come up to the paved roadway?

Mr. Miller: I object as not redirect-examination.

The Court: I will permit it.

A. The bank is on the north side; the tracks are close to the roadway on the south side. 10

Q. Yes; the bank is on the north side, you say. Is there any bank on the north side of that avenue, that Johnson avenue, between the— A. Beginning from here (indicating).

Q. From there going up? A. Yes, sir.

Q. That is beginning from beyond Burns Brothers'—west of Burns Brothers? A. Just as soon as you hit this coal pocket you are compelled to take the street. 20

Q. Up towards Jersey avenue? A. Yes, sir.

Q. It begins west of Burns Brothers and runs up towards Jersey avenue? A. Yes.

RE-CROSS-EXAMINATION BY MR. DIXON:

Q. Are you sure there is no bank between Burns Brothers and the ferry? A. Yes—

Q. Not at Burns Brothers, but when you get beyond Burns Brothers, toward the ferry, isn't there a bank there? A. When you get beyond Burns Brothers, yes.

Q. Not beyond Burns Brothers, but between Burns Brothers and the ferry there is a bank there?

A. Yes, sir; when you go over this spur here, just here there is another bank running to the ferry.

Q. Just indicate the bank. This is Burns Brothers', marked "Burns." That is Burns', isn't it? A. Yes. 40

Edward A. McCabe—Direct.

Q. Indicate where the bank is? A. There is the coal pile there; there is the bank here.

Q. Runs up to Jersey avenue? A. Just on the side of this spur it starts.

Q. And isn't there any bank between the spur and Burns Brothers'? A. No, sir; you are compelled to take to the street there.

10 Q. As a matter of fact you can walk outside the curb line here; there is lots of room to walk here? A. You can a little, till you get here (indicating).

Q. Until you get actually to Burns Brothers'? A. Yes—at the side of the street.

Q. But until you get to Burns Brothers' there is lots of room for a man to walk on the north side? A. North side.

Q. Out of the street-way; that is off on the north side beyond the curb line? A. Yes, sir.

20 Q. So that except in front of Burns Brothers' plant there, trestle, and where the coal pile is, a man can walk the whole distance without being in the street-way where the wagons go, on the north side? A. Yes, sir.

EDWARD A. McCABE, sworn.

DIRECT-EXAMINATION BY MR. DIXON:

Q. Where do you live? A. 232 Woodward street.

30 Q. What is your business? A. Freight sorter.

Q. What? A. Express business; freight sorter in the express business.

Q. What express company? A. American.

Q. How long have you been with that company? A. About a year.

Q. And before that what was your business? A. Same business.

Q. With whom? A. U. S. Express.

Q. The United States went over into the American, did it? A. Yes, sir.

Edward A. McCabe—Direct.

Q. How long were you employed by the United States Express? A. About two years.

Q. You were employed there while Reaney was employed? A. Yes, sir.

Q. Did you know Reaney? A. Yes, sir.

Q. Did you work at the same place where Reaney worked on Johnson avenue? A. Yes, sir.

Q. The big express station—platform? A. Yes, sir. 10

Q. What were your hours of duty? A. Seven in the evening until six in the morning.

Q. How did you get to your work and from your work? A. Why by route of Johnson avenue.

Q. What? A. Coming back and forth Johnson avenue?

Q. That is down this street we have been talking about; and how far did you walk down Johnson avenue before you got to the express station? A. Well, from Woodward street all the way down. 20

Q. Crossing Jersey avenue? A. Crossing Jersey avenue.

Q. And right down Johnson avenue? A. Down Johnson avenue.

Q. Down to the express station? A. Yes, sir.

Q. And you did that daily? A. Yes, sir.

Q. What time did you go down and what time—
A. Used to go down half past six in the evening and leave work six o'clock some mornings and some mornings seven. 30

Q. Now did you go up and down that street after sundown and before sunrise? A. Yes, sir.

Q. During various parts of the year? A. Yes.

Q. Did you in 1913? A. Yes, sir.

Q. Did you observe the condition of the roadway with regard to the lighting, the artificial lighting?
A. Yes, sir.

Q. What was the artificial lighting of that roadway from Jersey avenue down to the express platform during the year 1913, up to December 11th? 40

Edward A. McCabe—Direct.

A. No possible light outside — there was no light till you struck Burns Brothers'.

Q. What? A. There was no light till you struck Burns Brothers', from Jersey avenue.

Q. And where were there any lights at Burns Brothers'? A. In toward the coal chutes.

Q. They were off the road or on it? A. Off the road.

10 Q. How far off the road? A. About twenty feet, twenty-five feet.

Q. After you passed Burns Brothers', from there on to the express company platforms, what lights were there along the road? A. There was one light down at the crossing where the tracks crosses Johnson avenue.

Mr. Miller: Which crossing is that?

A. Central Railroad crossing.

20 Mr. Miller: I am trying to get which one it is.

A. The crossing nearest the river.

Q. And nearest the platform? A. Nearest the platform.

Q. And there was one light there? A. One light there.

Q. Where was that light located with respect to the roadway? A. Well, it was a little off the roadway on the south side of the street.

30 Q. About how far off the roadway would you say? A. I judge eight or ten feet.

Q. What was that light fixed on? A. A pole.

Q. Was it on an arm or a pole? A. Well, an arm extended from the pole.

Q. And what kind of a light was it? A. Well, an electric bulb.

Q. Single bulb. A. Single bulb.

Q. And what light did that bulb afford to anybody walking along the street so far as lighting up his
40 pathway was concerned? A. Well, it did not extend

Edward A. McCabe—Direct.

very far; it extended more toward the platform than it did the street.

Mr. Miller: What was that?

(Answer repeated.)

Q. Towards the street. Did it light up the pathway, the roadway of the street at all? A. Well, not for any distance, no, sir. 10

Q. Well, with regard to your ability to see as you walked along that street, state what you could see and how far you could see after sundown, say seven or eight o'clock at night. A. In going down?

Q. Yes; or coming up. A. It was very dark, it took a man—

Mr. Miller: I cannot hear you.

The Witness: All right.

A. Coming down nights it took a man all he could do to pick his steps. Sometimes I have come in contact with a water hydrant that was on a sidewalk, what they call a sidewalk, about two and a half feet from the curb. The hydrant was extended between the middle of the walk and the cars, and sometimes you walk there all right; more times you couldn't. 20

Q. You groped along as it were? A. Sir?

Mr. Miller: I object to Mr. Dixon characterizing it. 30

Q. Describe in your own way the condition of that place as you walked along there after sundown after the light was out.

Mr. Miller: I object as immaterial, irrelevant and incompetent and on the ground there is no fixing the time when this was.

Mr. Dixon: Any time in the year 1913.

The Court: I do not see any point to the objection at all. It seems to me that a man has 40

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got to see the road in the day time in order to say what the condition of the road is at night. I suppose that is the object of the question. If it were on a certain day in a certain condition in the daytime they would have a right to assume it was in all likelihood the same, unless the contrary appeared, for a reasonable time after that.

10

Mr. Miller: The way the question was framed the witness might go back ten years and describe the condition there, or he might describe the condition a year after the accident. I think with the limitation of 1913, under your Honor's ruling it is proper, but I think it must be within a reasonable time of the accident.

The Court: You may answer the question.

20 A. Well, some nights we would take the roadway and it was so muddy you would be ankle deep in the mud; and sometimes we would try to get on the sidewalk and in so doing there was cars lined along the sidewalk about five feet from the curb—

Mr. Miller: I cannot hear that.

A. There is cars lined along what they call a sidewalk, five feet from the curb from Jersey avenue
30 down, and there is water hydrants extends in the centre of that, about two and a half feet from the curb and the cars, and in going down I have struck my knee against the water hydrant, it was so dark; I didn't see it until I got right up on top of them.

Q. And that was the condition of that locality during the year 1913 and before December 11th, was it? A. Yes, sir.

Q. Did you see wagons go up and down that roadway? A. Yes, sir.

40 Q. How frequently did you see them travelling

Edward A. McCabe—Direct.

on that road? A. Oh, every day that I went down back and forth.

Q. And did you see pedestrians on that roadway?

A. Yes, sir.

Q. How frequently? A. Well, I used to meet them occasionally most every night back and forth.

Q. Now you have stated the hours that you went to work for this express company. When did your work start? What did you do to indicate the starting of your work? A. Seven o'clock— 10

Q. Well, whenever you got there; what did you have to do first to indicate the time you started to work? A. Well do general work around—trucking.

Q. What is the first thing you did when you went down to the express company to go to work? A. Why, went to the time-clock and rung in.

Q. And what is the last thing you did when you stopped work? A. Rung out.

Q. What do you mean? Just described what you mean by ringing in and ringing out. A. Well, go to the time office and hand your card in to the time-keeper; he will ring you in when you go to work, and in the morning he will do likewise and ring you out and hand you back your card. 20

Q. You are in the employ then from the time you ring in until you ring out? A. Yes, sir.

Q. After you ring out you are your own boss? A. Yes, sir.

Mr. Miller: I object as calling for a conclusion. 30

The Court: I will permit that answer to stand. I think it is such a conclusion as a witness may well draw.

Q. And during that time, the year 1913, where did you ring in and ring out? A. On the American—on the U. S. express platform, about the middle of the platform.

Q. Do you know whether you were working there the night Reaney was hurt? A. Yes, sir. 40

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Q. You were there the night he was hurt? A. Yes, sir.

Q. And what time did you travel that road that night? A. The same as usual, going down about half past six or quarter to seven that night going down.

Q. And going out what time did you go back? A. Coming home in the morning about seven o'clock.

10 Q. You went back about an hour after Reaney then? A. An hour after Reaney.

Q. Did you see Reaney leave that morning? A. Yes, sir.

Q. When he left what was the condition of the light on this road, along that road? A. Well, the light was out.

Q. The light of what light was out? A. The light toward the crossing.

20 Q. Was it before daylight that he left? A. Yes, sir.

Q. Before the sun came up? A. Yes, sir.

Q. And how was the general condition of the roadway as to light on that morning about six o'clock? A. The same as usual, very poorly.

Q. Was it dark or light at six o'clock that morning? A. Very dark; very dark.

Q. How far could you see along that road on that morning at six o'clock? A. Well, you could not see over a couple of feet—

30

Mr. Miller: How far?

(Interrupted answer repeated).

A. About two feet in front of you.

Q. Now was this morning the only time that you observed that light out? A. No, sir.

Q. How frequently had you seen that light out? A. Well, it was out quite often.

Q. I mean before the time Reaney was hurt. A. 40 Yes, sir; quite often.

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Q. What do you mean by quite often? A. Well, that I could not exactly say. We never passed any particular attention to it being out, but we used to pass a remark how dark it was at times going back and forth.

Q. Well, would it be out more than one or two nights a weeks? A. Well, I presume it would.

Q. Can't you say about how often it was? A. No, sir; not—I couldn't exactly say. 10

Q. Without giving me any exact number of times? A. Well, a couple of times a week—maybe oftener.

Q. And how long a period of time would it be out? A. Well, while we would be passing there you could see it out, you would know whether it—

Q. You could see it in passing. That was your observation. Now you have seen wagons going up and down there after dark, have you? A. Yes, sir. 20

Q. Where did they go? A. Well, some of them goes up the street as far as the city line, I believe, and some goes to Burns Brothers for coal.

Q. Those that go to Burns Brothers', where do they come from? A. Well, from the east side, some of them—Baxter street.

Q. New York? A. Yes; and Division street. You could see the names on the wagons.

Q. Come over the ferry? A. Yes, sir.

Q. And do many of those wagons go up and down there at night time, after dark? A. Yes, sir. 30

Q. And come over empty or full? A. Come over empty.

Q. And then load? A. Load.

Q. And go back? A. And go back.

Q. Now, as they come over have you noticed at what rate of speed they generally travel that road going towards Burns Brothers'? A. Yes, sir.

Q. How do they go generally? A. Well, full speed; they drive at their own pleasure at times in 40

Edward A. McCabe—Cross.

the morning there, passing the platform from where we could see them.

Q. They drive fast? A. Very fast.

Q. Is that customarily or only occasional? A. Customary.

By the Court:

10 Q. Over what period of time are you talking about?

By Mr. Dixon:

Q. During what period, the Judge asks you? A. Well, during any morning we were down there, during Nov—

By the Court:

Q. During what period of time, what month?

20 By Mr. Dixon:

Q. From what time of the year to what time? A. All that time of the year.

Q. What is that time of the year? A. 1913, November—December.

Q. That is what we are trying to find out. From November to when? A. All the year long.

By Mr. Dixon:

30 Q. As long as you have observed them? A. Yes.

Q. As long as you have been working there you have observed that situation? A. Yes, sir.

CROSS-EXAMINATION BY MR. MILLER:

Q. You live on Woodward street? A. Yes, sir.

Q. That is the same street Mr. Reaney lives on? A. Yes, sir,

Q. How far from him do you live? A. Right
40 opposite.

Edward A. McCabe—Cross.

Q. And how long have you been working there?
A. Going on three years.

Q. And every morning these wagons used to go up from the ferry toward Burns Brothers' along about six o'clock? A. Yes, sir.

Q. And used to go very fast? A. Yes, sir.

Q. And made a great deal of noise? A. Well, sometimes.

Q. And sometimes they didn't? (No answer). 10

Q. And the drivers shouting, I suppose? A. Well, I never heard much shouting.

Q. Anybody there at the express company could see those wagons every morning going along? A. Yes, sir.

Q. Everybody knew that they were going along there? A. Yes, sir.

Q. Going fast? A. Yes.

Q. And driving as they pleased, as you say? A. Yes, sir. 20

Q. I suppose most of them did not have any lights, did they? A. No, sir.

Q. No lights on them? A. No, sir.

Q. You said that you usually came from work down this Johnson avenue? A. Yes, sir.

Q. I suppose sometimes you walked down on the street-way and sometimes you walked down on what they call the sidewalk? A. Yes, sir.

Q. And I suppose on a very stormy day when it was very bad, you would go down on the train? 30
A. No, sir.

Q. Never went down on the train? A. No, sir.

Q. You could go down on the train? A. Well—

Q. From Pacific avenue or Communipaw avenue?
A. I never went over that way, but—

Q. But it can be done? A. Yes, sir.

Mr. Dixon: I move to strike out that it can be done.

Mr. Miller: He knows the locality and he 40

Thomas Reaney—Direct.

lives across the street from this man Reaney. Do you object?

Mr. Dixon: Well—

The Court: I do not think his intelligence or mental activity is affected by mere geographical considerations. You said he knows because he lives across the street from Mr. Reaney.

10 Mr. Miller: That was in answer to a *sotto voce* remark of Mr. Dixon's. It was out of order.

Q. Do you remember the morning Mr. Reaney was hurt? A. Yes, sir.

Q. You did not leave until seven o'clock that morning? A. No, sir.

Q. And he left at six? A. Yes, sir.

Q. And you were working on the platform at six o'clock? A. Yes, sir.

20 Q. What part of the platform? A. Well, different parts, up and down and back and forth.

Q. But from where you were on the platform you say you could see that that light on the crossing was out? A. Yes.

Q. You could see that from the platform? A. Yes, sir.

Q. And you could see that it was so dark along the roadway that you could only see a couple of feet from the platform? A. Yes, sir.

30 THOMAS REANEY, recalled.

DIRECT-EXAMINATION BY MR. DIXON:

Q. Mr. Reaney, when did your duties with the express company begin and when did they cease on each day? A. At seven o'clock in the evening and six in the morning.

40 Q. Well, I mean how did you--how were they determined, as to when you started to work and when you finished work; how was it determined?

Thomas Reaney—Direct.

A. Well, I had to go to the time box and get a ticket and get it punched.

Q. Yes; and what would you do with that? A. Went to work after that.

Q. That was when you went to work? A. Yes, sir.

Q. You got a ticket and had it punched at the time box? A. Yes, sir.

Q. And what did that indicate; what did that ticket show? A. That is that I reported for work.

Q. When you started to work. Now what did you do when you stopped work? A. Well, I went to the time box and got the same ticket punched—when I was through at six o'clock in the morning.

Q. Whenever you were through you got a ticket punched? A. Yes.

Q. And that showed when you stopped? A. Yes.

Q. What did you do with that ticket; what was done with the ticket? A. Well, the part that was punched, he would tear that off and hold it, or put it in the time box there; there was a particular box for it to be put in there.

Q. There was a box to deposit the ticket in? A. Yes, sir.

Q. And what became of the ticket? A. Well, I suppose they held it—

Q. You do not know; you do not know it, do you? A. No, sir.

Q. And after you have put that ticket in the box you are then through for the day? A. I am through, yes, sir.

Mr. Miller: I object as calling for a conclusion.

Q. Well, is that the fact or not? A. Sir?

Mr. Miller: I object as calling for a conclusion.

The Court: I will permit that to be answered. 40

Thomas Reaney—Direct.

Q. Is that the fact? A. Yes.

Q. Mr. Reaney, was there any sign or notice, printed or painted, anywhere along this roadway between Jersey avenue and the river, which notified anybody, or you, that this property, this street, was private property of the railroad company? A. Well, there is a sign up there further, up on Jersey
10 avenue—I mean on Johnson avenue—to look out for the locomotive.

Q. Didn't you hear my question? I did not ask you about locomotives; I asked you whether there was any notice, printed or painted, "This is private property," or anything to that effect. A. No, sir; no, sir.

Q. Or "This is railroad property"? A. No, sir.

Q. The only notice there is "Look out for the locomotive," is it? A. That is the only notice I see.

20 Q. Where is that? A. That is up where the Lehigh Valley crosses at the end of Johnson avenue.

Q. That is where a track crosses Johnson avenue? A. Yes, sir; where the tracks crosses.

Q. It is one of those painted signs, "Look out for the locomotive"? A. Yes, sir.

Q. The same as you see on crossroads in the country? A. Yes, sir; on a board.

Q. And there is a flagman generally at one other crossing, isn't there, with a lantern, at night time?

30 A. Well, there is at night time for crossings, yes.

Q. Generally; at the crossing next to the express company isn't there generally a flagman? A. Yes.

Q. A flag-house? A. There is a flag-house there.

Q. The company has a flagman there? A. Yes.

Q. And had him during that year? A. Yes, sir.

Q. He comes out with a lantern when there is a train coming? A. Yes, sir; that is his business.

40 Q. Now did you ever have any knowledge, acquired from any other source, that this was a private right of way? What did you think it was that

Thomas Reaney—Direct.

you were traveling along? A. Well, I thought it was a public street.

Q. How far did you travel along Johnson avenue when you used it, going to and from your work?

A. I travel all the way from my home until I would get there.

Q. Tell us how you would go from your home; where is your home? A. In Woodward street.

Q. What streets would you go down to get to Johnson avenue first from your home? A. Just come out to Johnson avenue, up Woodward street and go right straight down.

Q. Does Woodward street run into Johnson avenue? A. Yes, sir.

Q. And then you walked along Johnson avenue, how far, before you got to Jersey avenue? A. Well, about half a mile, I think.

Q. Half a mile?

20

Mr. Dixon: You concede that is a public street?

Mr. Miller: Woodward street?

Mr. Dixon: No; Johnson avenue.

Mr. Miller: Down to Jersey avenue?

Mr. Dixon: Yes.

Mr. Miller: I do.

Q. And then continued across Jersey avenue, down this street to the express station? A. Continue down Johnson avenue and down to the express station.

Q. You have known it all as Johnson avenue right down to the express station? A. Well, they have always called it Johnson avenue down there.

Q. Everybody did, or does? A. So far as I know.

Mr. Miller: He cannot speak for everybody.

Q. As far as you have ever heard them speak of it? A. Yes.

40

Thomas Reaney—Cross.

Q. They have travelled over it?

(No answer).

Q. Do you know of any sidewalk along any part of that roadway between Jersey avenue and the ferry? A. No, sir; there is no sidewalk; there is a—

Q. What is it? A. A path or— off the curb.

Q. Where does that path go to? A. Well, down
10 pretty near as far as Burns'.

Q. From Jersey avenue to Burns'? A. It is no further.

Q. It stops at about Burns', doesn't it? A. Yes.

Q. And then from there you have to take the—

Mr. Miller: I object as leading.

Q. You have to take what? From there on what do you have to do then? A. Well, you have got to
20 walk on the street; you have to walk on the street.

Q. How far do you have to walk on the street before you get to another path? A. There is no other path to go down all the way.

Q. And this path that is above Burns Brothers'— between Burns Brothers' and Jersey avenue—is on which side of the road? A. On the right hand side going towards Jersey avenue.

Q. That is the south side? A. Yes, sir.

Q. Or the north side of the street? A. Yes.

Q. And what is that path? You say it is a path; why do you call it a path? A. Well, a place if
30 people going up and down walks on there.

Q. Why do you call it a path? What is it, dirt or wood or what? A. No; it is earth.

CROSS-EXAMINATION BY MR. MILLER:

Q. Mr. Reaney, down between the river and Burns Brothers' there is a curb on the right hand side of Johnson avenue as you go up toward Jersey
40 avenue, isn't there? A. Yes, sir.

Thomas Reaney—Cross.

Q. And there was at the time your accident occurred? A. Yes, sir.

Q. And then there was some open space beyond the curb there, wasn't there? A. Well—

Q. Was there or was there not open space beyond the curb?—At the time of your accident? A. In on the railroad track?

Q. No; as you go up toward Jersey avenue, here is the curb (indicating). Now between the river— 10
back of me—and Burns Brothers'—ahead of me—
there was a place alongside here to walk down there
the other side of the curb? A. Yes, sir; well—

Q. There was, wasn't there? A. Yes, sir.

Q. Lots of room to walk there—I mean off the curb? A. Yes, sir.

Q. Not in the street, but beyond the curb. A.
That is from Burns' up to Jersey avenue.

Q. Now listen to me; I am talking about from
Burns to the river. A. Oh! From Burns—no, sir, 20
there was no—er—

Q. What is there on the other side of the curb,
the north side of the curb? A. Well—

Q. From Burns' to the river, what is there there?
A. There is a power-house and a gas-house right
there between Burns' and the river.

Q. Don't you know that the power-house and the
gas-house are way down right on the river? A.
That's the new power-house.

Q. Yes; and the old one in the same place, wasn't 30
it? A. Well—

Q. Wasn't it— A. The old one?

Q. —about in the same place as the new one?
A. No, sir.

Q. And did you have to go down as far as the
power-house was? A. No, sir.

Q. Now beyond the power-house what was there
on the other side of the curb—the north side of the
curb, between the power-house and Burns'? A.
Well, there was tracks— 40

Thomas Reaney—Cross.
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Q. There was room there for you to walk, wasn't there? A. There was room, but I wasn't on that side of the street.

Q. But there was room for you to walk if you had been there? A. Yes, sir.

[PLAINTIFF RESTS.]

10

Mr. Miller: I ask for a nonsuit in this case on the ground that there is no evidence showing any negligence on the part of the defendant; upon the ground that there is no evidence showing that any negligence on the part of the defendant was the proximate cause of plaintiff's injury; upon the ground that the dangers of the situation were obvious to plaintiff, and upon using this passageway with knowledge of them he assumed the risk of injury therefrom; that plaintiff was guilty of contributory negligence, barring a recovery.

20

The Court (after argument): I think that I will permit this case to go to the jury, and I do that on these grounds:

First of all, this was not a public way; it was what is called in the law a private way; it was the mere incorporeal hereditament; and if this had been a public way the cases that have been decided along that line hold that at common law there is no obligation resting upon a municipality to light a public highway. I have not had an opportunity since this case opened to look at the reasoning upon which those cases are rested, but I have not any doubt as to what the reasoning is. The reasoning is that at the time of the adoption of the common law there were not any such things as lamps which lighted streets;

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at least there was no lighting of the street by lamps; and I remember reading many years ago in one of the volumes of Dillon on Municipal Corporations that when they first attempted to light the streets of London and actually succeeded in getting them lighted the crime calendar fell tremendously, because the highwaymen and footpads and those who infested the highways were a little afraid to do in the light 10 what they had been perfectly safe, in their own notion, in doing in the darkness. But as I say the common law preceded the invention of street lamps, and therefore at common law it was held that the city was under no obligation—because the law arose before the facility did—to light their streets by those lamps. But in this state that would be a matter of slight consequence because in this state under the case of *Strader vs. The Freeholders of Sussex*, in 3 Har- 20 rison, the court has held that the neglect on the part of a municipal corporation to perform a public duty does not give rise to a private action, and the only remedy is by indictment. Therefore the cases in this state would throw no light whatever upon the subject so far as that civil aspect is concerned. I apprehend however that if the legislature—I do not know what the law of Jersey City is—the charter of Jersey City—with respect to whether the streets must 30 be lighted by the city or not—but I apprehend if there is a statute that casts upon the officers of Jersey City the duty to light the streets and because of their non-lighting of the streets somebody received some injury, that an indictment would indubitably lie, and if an indictment would lie against Jersey City for not lighting the streets, why manifestly if this were, as it has been held to be so far as this plaintiff or one circumstanced as he was is con- 40

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cerned, a public way, by estoppel, then if you apply the public rule, manifestly if you could indict a public official you could maintain a private action against the individual whose duty it was to use reasonable care to see that the street was kept in such condition as the public would be required to keep it. But leaving that reasoning out of the way, this is a private way which this plaintiff had a right to consider as a public way under the case of *Black vs. The Central Railroad*, in 56 Vroom. Now then, that brings us to consider whether it being a private way which this man was entitled to use—because he had the right to consider it as a public way—any duty arose on the part of the defendant company to use a degree of care which would require lighting of this highway; and of course the law is perfectly settled that with respect to the premises upon which a person is entitled to go the duty resting upon the owner of those premises is to use reasonable care to have it reasonably safe for the purpose of the invitation and to the extent of the invitation only. Now the extent of the invitation here was to use this as a public highway, and if a sidewalk was not furnished then he undoubtedly had a right to walk in the roadway, and if he were walking in the roadway at the time he was injured then the question arises as to whether or not the defendant company did all that it should have done in the exercise of reasonable care to have it reasonably safe for his use; and that depends—for reasonable care is always a duty of relation—upon the circumstances which confronted the railroad company prior to and at the time of the happening of this accident; and the plaintiff here has attempted to prove that this was an exceptionally dangerous highway because of certain practices that were indulged in by peo-

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ple who had used this highway for a sufficiently long time prior to the happening of this accident to have effected the railroad company with notice of such use and to have required them in the exercise of reasonable care as against other invitees than those who indulged in such use to use reasonable care to protect such other invitees against the consequences of such a use. That I understand to be the theory upon 10 which the case is rested by the plaintiff here. Now if there was a practice or a custom or a habit on the part of certain of the invitees who drove along that highway of driving at a high rate of speed and thus jeopardizing the lives and safety and security of those who used it, why manifestly the jury might say—they are not obliged to say, but they might say—that the duty rested upon the railroad company to take care either to stop such use or such misuse upon the 20 part of those invitees who used it in that way or misused it in that way, or else to regulate such use as that it would not occasion such danger, or to furnish such facilities for the use of the highway by other persons as that such use would not menace them on the part of those who were misusing it. Those may be things that the jury might conclude in this case, and of course if they do conclude that the duty rests upon the defendant company to go that far why mani- 30 festly it seems to me that their not going that far would be such thing as the jury might conclude was the neglect on its part to use that reasonable care which it was its duty to use on behalf of such other licensees. Now this view finds a considerable amount of support in the case of *Exton vs. The Central Railroad Company*, the same defendant that is defendant here. That case is reported, as I recall it, in 32 and 33 *Vroom*—twice reported. There the fact 40

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was that men who furnished cabs for use by passengers leaving the railroad or coming to it were in the habit just outside the station of the company of skylarking and, as one of the judges put it, horseplaying; and the court held that the railroad company owed the duty to protect such passengers against such horseplay which menaced their safety while they were about to use the premises and were there for the purpose for which they had been invited to use them. Now in this case if a person who used the highway as the employee of a tenant or one who was authorized in some legal way to use the premises as a public highway, was using it, why manifestly he was an invitee. Now the rule of care with respect to a passenger, so far as the instrumentalities of the railroad other than rolling stock is concerned is precisely the same as that which is owing to other invitees; it is merely reasonable care; and of course there is a vast distinction drawn in our state between injuries owing to the rolling stock and instrumentalities over which the company has entire control and probably sole knowledge and that of mere stations and station platforms where the railroad company has probably no better knowledge than those who use them. I say therefore the duty does not differ in respect to a passenger who is using a way furnished for him to use, or a station, from any other invitee who is using a place upon which he is entitled to go. The duty in both cases is a duty to use reasonable care.

Now that brings us to consider, as Mr. Dixon argued a moment ago, as to whether or not if this had been a passenger who was going along this way from the station of the Central Railroad Company the neglect to light this way for his safety and his injury because of the neglect

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to put such light there would give rise to an action because it was a neglect so use reasonable care. I think not that it would give rise to the action but that the jury might conclude that it would. Of course they might conclude that it would not; but I say that at least the jury would have a right to rest such conclusion upon such facts. Now then, this man being an employee of the express company, was 10 for all purposes of a legal character in the same situation that the express company was. They owed the duty to him the same as they would to any officer of the company, or if it had been an individual who hired the platform for use for express purposes, the same as they would have owed it to that individual. That doctrine you will find laid down thoroughly in *Dettmering vs. English*, 35 Vr. 16, where the employee of a sub-contractor had the right to claim the duty 20 from the contractor to use reasonable care for his safety; so that the duty flows out to the underlings who are there in the performance of the duty arising out of that business, and therefore the duty flows to this employee of the express company.

Now that I think disposes, so far as I am going to dispose, of the question of the neglect to use reasonable care on the part of the defendant. I might say one thing more, because the 30 matter was argued and I ought to pass on it; and that is as to whether or not the jury would have a right to conclude from the facts in the case that the neglect of the company to use reasonable care was the proximate cause of the injury to the plaintiff. Of course they do not have to conclude that. They may on that phase of the case, just as they may on the other phase as to the duty of the defendant, conclude that it was not the proximate cause. My only 40

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inquiry is as to whether there is any evidence from which they can conclude that the injury to the plaintiff was the proximate result of the neglect on the part of the defendant to use the reasonable care which the plaintiff claims he ought to have used for the plaintiff's safety.

10 Now in this case it must be borne in mind that assuming any one of the situations suggested by you, Mr. Miller, in your argument to have existed, to wit, that the man on the wagon might have been asleep, or the horse might have been running away, or many other things that might have occurred, all of which I admit; that might have been true; but the plaintiff himself was on the road when he was injured, and if the light had been there, even though the man on the wagon was asleep, the plaintiff himself
20 might have seen the wagon in time to have avoided the accident, and if he could have done so if the railroad company had performed its duty then the jury would have a right to conclude that even though the man on the wagon was asleep if the railroad company had performed its duty the person walking on the highway who received the injury would not have received it. So that you must take all the facts into consideration when you attempt to determine what was the proximate cause of this
30 accident. The jury might conclude that if the lights had been there or if the conduct of those driving the wagons had been regulated or more carefully inspected or stopped or what not, why under the circumstances this accident would not have happened. If this accident would not have happened, if the company had performed its duty in that way, why then manifestly their failing to perform it might be considered by the jury to be what you called *causa causans*, or
40 the efficient cause of the accident, the cause

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without which the accident would not have happened and which necessarily set the other causes in motion.

So much for that phase of it. That brings us then to consider the question of the argument made that I must say as a matter of law that this plaintiff was contributorily negligent in plunging in the dark onto this roadway and receiving the injury because of the darkness.¹⁰ Now the cases that are cited on that subject are cases that have to do with tenement houses. They are the case of *Gleason vs. Boehm*, 29 Vr.; one other case that was handed up here, of *Dreeves vs. Schoenberg*, 82 Law, 335; *Saunders vs. The Realty Company*, 86 Atlantic Reporter, 404. Those are cases of tenement houses, and they differ vastly from cases of a public highway. Others might have been cited. The case of *Ryerson vs. Bathgate*, in 38 Vr., might have²⁰ been cited, where a person who was invited to deposit a cat in a closet and proceeded to walk in the closet himself—he supposed it was a closet—and fell down a chute; they held that he could not recover there because he had exceeded the invitation; his invitation was to put the cat in, and not to go in himself. And so with respect to *Gleason vs. Boehm* where the party plunged down a hallway, opened the door and walked down a stairway and fell³⁰ down. One point of differentiation may be this, that a plaintiff when he is invited to use a hallway is not invited to open doors and snoop in closets and down elevator shafts and stairways and light shafts and things of that sort. And furthermore, another differentiating circumstance may be that a person is not entitled to presume that all the avenues in a hallway are safe: but a man is entitled to presume that a public highway is safe its entire length.⁴⁰

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10 That doctrine you will find laid down in *Durant vs. Palmer*, 5 *Dutcher*, in all the fullness that I state it; and you will find it laid down furthermore in *Quimby vs. Filter*, 33 *Vroom*. Public highways are presumed to be safe and parties have a right to indulge and rely upon that presumption. That of course at once differentiates the case of hallways in houses, which are not
presumed to be safe through every door which one might open and plunge—there is no such presumption; and therefore I say that differentiating circumstance takes this case out of the rule of the *Sauuders vs. The Real Estate Company*, *Gleason vs. Boehm* and the *Schoenberg* case.

Mr. Miller: Might I suggest this: The *Saunders* case was not a hallway case.

20 The Court: But the *Saunders* case was a private house case and is open to all the differentiating circumstances which I have urged with respect to the case of *Gleason vs. Boehm* and the *Schoenberg* case, because the accident happened from a too inquisitive and empirical survey of the premises by the person who received the injury in avenues along which he neither was invited to go nor had any right to assume the safety of. That brings us to consider another phase of the case, and that is whether any
30 court has ever yet held—and the industry of counsel leads me to believe if it had been it would have been cited—that a man who walks a dark street in the night time is presumed as a matter of law to have been negligent because he did not carry a lamp or because he walked there at all in the night time. Well, of course all experience proves the insufficiency of that rule as a legal rule, because everybody knows that accidents are continually happening on country
40 highways where there are no lamps at all, and

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men walk in the roadway, and it is just as dark as it is in the city, and nobody ever held yet or had the hardihood to argue, so far as I am aware, that a man was conclusively presumed to be contributorily negligent if he travels a country highway in the night time without carrying a lamp. And there are other considerations which make this even stronger yet, and that is that until the legislature intervened in the road act and required vehicles to carry lamps there was no presumption in the law that a vehicle traveling along the road in the night time without a lamp was traveling along there under penalty of being conclusively presumed to have been contributorily negligent because it did not have the lamp; and the legislature changed that and required vehicles to carry lamps. The motor vehicle act of our own state requires precisely the same thing, and under those circumstances I never have even heard it argued that a motor vehicle or another vehicle on the highway without a lamp is conclusively presumed to be contributorily negligent even though the statute requires it; and in fact we have in the case of *Evers vs. Davis*, a very recent decision of the Court of Errors and Appeals, a decision quite to the contrary; it is a piece of evidence to be submitted to the jury along with other evidence on the question of negligence, and that is all it is.

Mr. Miller: I have not contended—

The Court: I am simply arguing now and bringing up the reserves to indicate to you that the thing that you did argue is infirm and weak because it goes farther even than the cases have gone to hold the other way. The plaintiff in this case had a right to be on a public highway. That is what a public highway is for. The public have a right to traverse the highway its

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10 full length even though it is not lighted its full length, and the public has a right to traverse it in the dark. It is not conclusively presumed to be negligent if it traverses it in the dark without a lamp. Now those considerations which I have been bringing forward as the reserves are absolutely conclusive in my mind that I would not be entitled to say as a matter of law that an individual who was not traveling in a vehicle at all upon a highway was conclusively presumed to be negligent because he presumed to be where he had a right to be without a lamp, which he was not obliged to carry. So I say for these reasons I must deny the motion and you may have your objection entered on the record.

20

Mr. Miller: We rest.

30

Mr. Miller: Now I ask your Honor to direct a verdict in favor of the defendant on the grounds that I urged in my motion for nonsuit; and is it necessary that I should repeat them all? All the grounds I want to rely on I have suggested in my motion for nonsuit, and the only question is whether your Honor wants to have me repeat them over again.

The Court: No. They will be considered as incorporated in your motion now and an objection will be entered on the record to my denial to grant your motion.

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Judge's Charge.

GENTLEMEN OF THE JURY:

The plaintiff in this suit seeks to recover damages from the defendant for an injury which he says he suffered due proximately to the negligence of the defendant company in the maintenance of a private way which the plaintiff says he had been invited by the defendant to use and which he says the defendant did not use reasonable care to keep 10 reasonably safe for such use. The plaintiff of course is obliged to make out that case by the greater weight of the evidence. He is obliged to make out that the defendant did owe him a duty to use reasonable care for his safety while he was using this way; he is obliged to make out by the greater weight of the evidence that the defendant neglected to perform that duty, and then he is obliged to show by the greater weight of the evidence that the neglect on the part of the defendant 20 to perform that duty was the proximate cause of his injury before he is entitled to recover a verdict from you to compensate him for the injuries which he says he suffered because of the neglect on the part of the defendant to perform such duty. If he has made out such a case by the greater weight of the evidence he is entitled to a verdict unless the defendant shall have made out by the greater weight of the evidence that the plaintiff himself was contributorily negligent, that is that he neglected 30 to perform on his part the duty which rested upon him to use reasonable care while using that way for his own safety, and that such neglect on his part either in whole or in part produced the injury of which he complains and for which he seeks to recover damages. If the defendant has made out that the plaintiff was contributorily negligent why then of course the plaintiff can recover no verdict no matter how negligent he may have proven the defendant to have been. 40

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Now in this case the first thing that is of importance to consider is what kind of a way was this that this plaintiff says he was using? There is evidence in the case that it bore the aspects of a public highway—it appeared to be a public highway—such a way as the public generally were invited to use for the purpose of passing and re-passing; and the law has been laid down in this
10 state with respect to such a way which has been clothed with those attributes of apparent publicity as follows:

“A land owner whose conduct is such as to induce members of the public to use a private way under the belief that it is a public street owes to them the same duty as if such way were in fact a public street.”

One of the courts in speaking of this kind of
20 ways said:

“There where the defendant by his conduct has induced the plaintiff to use a way in the belief that it is a street or public way which all have a right to use, and where they suppose they will be safe, the liability in such a case should be coextensive with the inducement or implied invitation.”

So that where a defendant holds out to the public by clothing it with all the appearances of a public
30 way, a way, in such wise as to lead the public to believe it is a public way, he thereby invites the public to go upon that way and use it as if it were a public way. That brings us then to consider what the duty of the defendant is with respect to a plaintiff who uses such a way under such impression; and the law has laid down with respect to the duty which is owing to invitees these rules:

“The owner of premises who by invitation
40 induces a person to come thereon is under a

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duty to exercise ordinary care to render the premises reasonably safe for the purposes embraced in the invitation. The liability of the owner or occupier of the premises for their condition is only co-extensive with his invitation to persons to come upon them."

And another case says:

"An owner or occupier of land who by invitation express or implied induces persons to come upon the premises is under a duty to exercise ordinary care to render the premises reasonably safe for such purposes."

You will have observed from what I have read that the owner of such premises does not insure the safety of a person who uses the premises under such invitation; he does not say to such person "I will be bound that you will be safe." He simply says to such person that he will use reasonable care, or ordinary care, to have them reasonably safe for the purposes of the invitation.

Now the first question, therefore, in this case is, has the plaintiff made out by the greater weight of the evidence that this defendant company did not use reasonable care to have these premises reasonably safe for the purposes for which it invited the plaintiff to use them? If the plaintiff has made that out by the greater weight of the evidence you then pass to the second question, which is, was the neglect on the part of the defendant to use such reasonable care—if such neglect shall have been made out by the greater weight of the evidence—the proximate cause of the injury of which the plaintiff complains? By proximate cause, gentlemen, is meant the efficient cause, the cause which necessarily set the other causes in motion. If the defendant has made out that too by the greater weight of the evidence, that is that it was the proximate cause of the plaintiff's

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injuries, why then the plaintiff is entitled to recover a verdict at your hands and to have you assess his damages, unless the defendant shall have made out that the plaintiff either did something which a reasonably prudent and cautious man would not have done while he was enjoying the exercise of his rights under this invitation, or that he omitted to do something which a reasonably prudent and cau-
10 tious man would have done. If he either was negligent by commission or omission on his part and that negligence either in whole or in part brought about the injury of which he complains he cannot recover in damages no matter how negligent the defendant may have been proven to have been.

Now those are the rules, gentlemen, that will determine in this case whether or not the defendant shall respond in damages, and you will decide the
20 case on the question of liability or non-liability in accordance with those rules.

I think one of the counsel in summing up—the counsel for the plaintiff—said that the facts proven by the plaintiff are indubitably true. I am requested to charge you that the facts proven by the plaintiff are not *indubitably* true, that is without any doubt whatever. It is for the jury to say whether they are true or not; and that is true of the evidence of both sides—and that of course is only evidence on
30 one side in this case—it is true of all the evidence in the case. The credibility of the witnesses and the reliability of the story told by them is for you to determine. You are not obliged to believe a witness just because he told you something. If a man would come here and say, for instance, that there were men living in Hudson City here whose heads grew underneath their shoulders, you would instantly stamp him as a liar because you know very well that the men who live up here have their heads
40 growing on top of their shoulders the same as other

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people in other parts of the city have; and so because of the disbelievability of his story you would disbelieve him. So you test the story of all witnesses by ascertaining first is the witness credible? and secondly is his story credible and such as approves itself to your experience, observation and understanding? If those two things are present, that the witness is credible and his story is credible, why then you would be justified in lending credit 10 to it. If either he is not credible or the story is not, why of course you would be justified in throwing it out and attaching no importance whatever to it.

Now those, gentlemen, are the things to which I wish to direct your attention on the question of liability.

If you find the defendant company liable under the rules which I have given you you will then come to the question of the assessment of damages, and you assess those under these rules: The great, 20 broad, general principle is that the plaintiff is entitled to recover compensation or payment, so far as money can be said to pay, for all the injuries which proximately resulted to him from the accident. What those injuries are and their extent he is obliged to make out by the greater weight of the evidence. All that he has thus made out he is entitled to be compensated for, if he is entitled to a verdict. All that he has not thus made out of course he ought not to be paid for. Entering into 30 this notion of compensation are these elements: He would be entitled to recover first compensation for the pain and suffering, both mental and physical, which he has undergone in the past, for so long in the past as he has undergone them, and for such as he will probably undergo in the future for so long in the future as he will probably undergo them; and secondly, he would be entitled to recover compensation for loss of time, or what is the same thing in other words, loss of wages, due proximately to 40

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this accident, if he shall have proven that he lost any on that account. And he would be entitled to recover for all expenditures to which he has been put and has proven by the greater weight of the evidence he has been put, due proximately to this accident in the endeavor to alleviate his suffering or effectuate a cure. Now with respect to the question of permanency of the injuries you heard what
10 the plaintiff's own doctor said with respect to their nature and extent. He is obliged to make out how long in the future they will last; and for so much, if he is entitled to a verdict, he ought to be paid; but he ought not to be paid for one instant beyond that or one penny beyond that.

Now you will take the case under these rules and decide it.

Mr. Miller: You said there was a duty on the defendant to prove by the greater weight of the
20 evidence that he was guilty of contributory negligence. They may think he was required to put witnesses on. Do you want to say anything about smart money damages?

The Court: There is nothing of that kind in the case at all.

In this case, gentlemen, the counsel for the defendant asks me to charge you, in order to correct what he thinks might be an impression that you might gain from what I said, that it was the duty
30 of the defendant to show by the greater weight of the evidence that the plaintiff was contributorily negligent—that that required the defendant to put some witnesses on the stand. It does not. If by the greater weight of the evidence in the case it appears that the plaintiff was contributorily negligent, whether the defendant put a witness on the stand or not, that contributory negligence would defeat the plaintiff's right of recovery no matter how negligent the defendant company may have been.

40 Counsel also asks me to charge you that you could

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not allow anything in this case by way of punitive damages or smart money. I did not tell you that you could. I cannot see how you possibly could be misled by what I did tell you. All that you can allow, if you allow anything at all to the plaintiff, is compensation or payment for the pain and suffering and the loss to which he has been put, proximately due to the accident, and nothing else. 10

You will take the case under these rules and decide it.

Mr. Dixon: The evidence is undisputed, as I understand it, that the injuries are permanent. The doctor testified to that.

The Court: I don't know what your understanding is. I have told the jury to take the evidence in the case as it is and decide it. They do not decide it on your understanding but on theirs.

Mr. Miller: I have an objection to the refusal to 20 nonsuit and direct a verdict?

The Court: Those you have got.

Mr. Miller: I object to that portion of the Court's charge in which the Court explained to the jury the duty of the defendant.

The Court: What is the point about it? I would like to understand it. What do you object to about the way I charged it?

Mr. Miller: As you charged it the jury would be entitled to conclude that the failure to light this 30 road would be an evidence of negligence; and I submit that the failure to light it would not.

The Court: That does not come in an objection under the charge ordinarily; that is purely on the question of nonsuit—

Mr. Miller: Whether it should go to the jury at all.

The Court: Yes.

Mr. Miller: Whatever rights I have I want to protect them.

The Court: Oh, yes.