

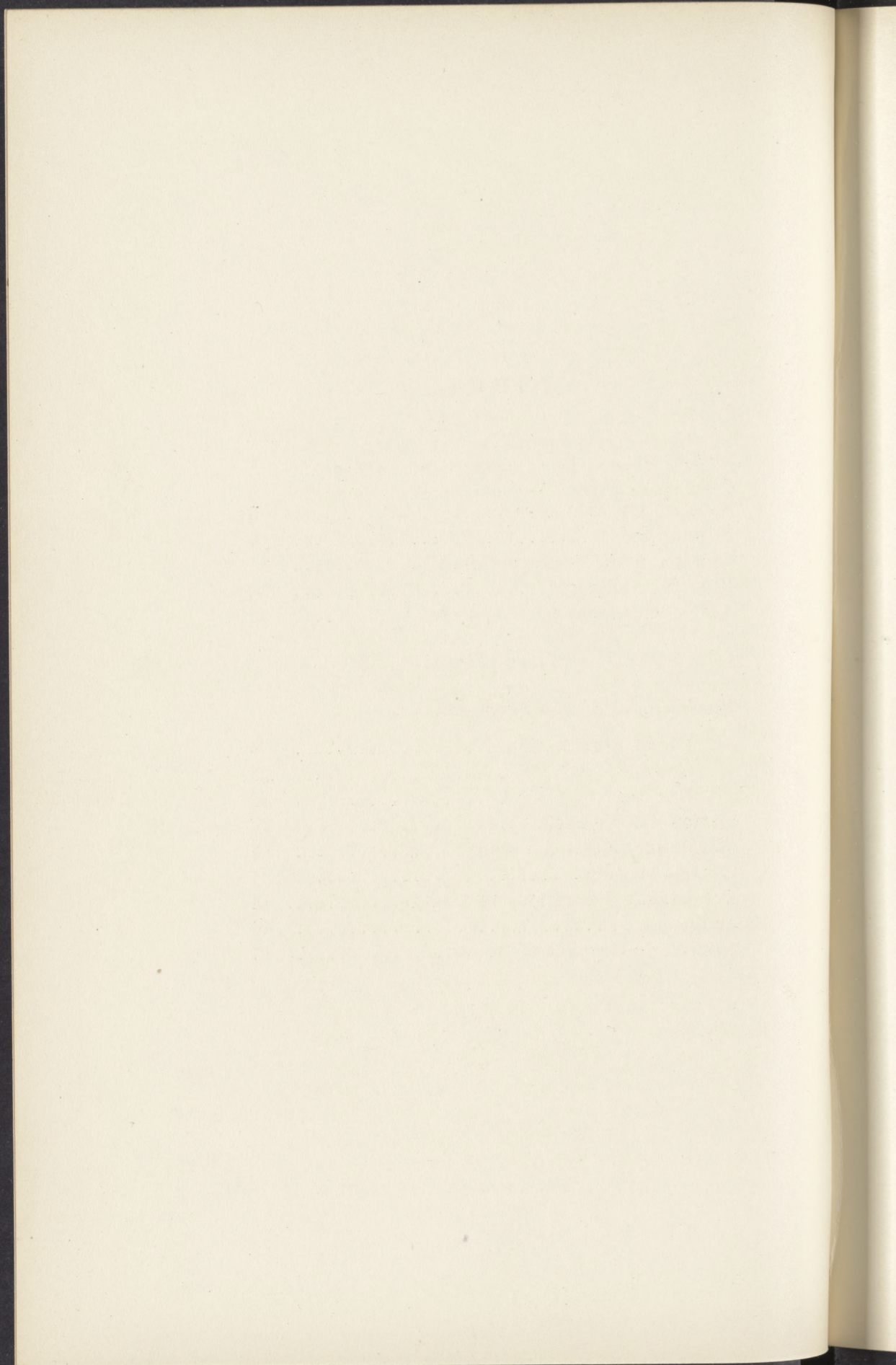
INDEX.

	PAGE
Complaint.	1
Answer.	3
Substitution of Attorney.	5
Stipulation.	5
Opinion of the Supreme Court.	47
Rule for Judgment.	51
Notice and Grounds of Appeal.	52

TRIAL RECORD.

Testimony of Abram Shortway.

Direct examination.	6
Cross " 	25
Re-direct " 	32
Motion for Non-suit.	32
Motion for Directed Verdict.	33
Charge to Jury.	34
Defendant's Exceptions to Charge.	43
Judgment.	44
Notice and Grounds of Appeal.	45



COMPLAINT.

Filed July 25, 1928.

Plaintiff, residing in the Town of Waldwick, County of Bergen and State of New Jersey, says of the defendant as follows:

1. That on or about November 11, 1927, and prior thereto, the defendant, the Erie Railroad Company, was a corporation of the State of New Jersey, incorporated under the act concerning railroads.

10

2. That on the day and year aforesaid, the plaintiff was employed for the defendant as a trainman, on Train No. 131, and was engaged in backing Train No. 131 into the train shed at Jersey City, New Jersey, from the Weehawken Storage Yard, New Jersey, which train was used for the purpose of transporting passengers from the State of New York and other States to the State of New Jersey, and which train was engaged in interstate commerce.

20

3. That on the day and year aforesaid and after the plaintiff had caused said train to be stopped at its regular stopping place, plaintiff was required, under the rules of the defendant company, to examine a switch, leading to the main track, over which the said train was to pass, in order to determine if the track was clear; that it was necessary for the plaintiff to examine said switch because of an unlighted dwarf light used for the purpose of informing trainmen if the track was clear; and the plaintiff was obliged to walk over planking between two tracks, located at the Eleventh street loop, Jersey City, New Jersey, in order to reach the said switch, which planking was made for the use of

30

40

Complaint.

the employees of the said defendant company; that while in the performance of such duty, and when he had reached the end of the said planking plaintiff fell into an unprotected excavation, ditch or hole, which was permitted to remain unprotected and unlighted.

10 4. That by reason of the premises plaintiff says that the defendant's negligence consisted of in that it failed to provide a reasonably safe place in the performance of his duties, in that it permitted the said excavation, ditch or hole to remain in an open, uncovered, unlighted and dangerous condition, so that the plaintiff, while nearing the end of the said planking, fell into said opening.

20 5. That by reason of the premises plaintiff sustained serious and permanent nature of a severe nature, to wit: injury to the intercostal muscles and injuries to other parts of his body, as a result of which he has become sick, sore, lame and disordered.

30 6. That by reason of the premises plaintiff was obliged to spend a long period of time at his home and was obliged to expend a considerable sum of money for medicines and doctors' bills in endeavoring to heal and cure the injuries received as aforesaid.

7. That by reason of the premises plaintiff has been prevented from attending to his lawful and necessary affairs and has been deprived of various gains, profits and advantages that he otherwise would have received.

40 8. This action is brought under the Federal Employers' Liability Act (45 USCA Par. 51-59; Compiled Statutes Par. 8657-8665).

Answer.

Plaintiff, therefore, demands as damages the sum of fifty thousand (\$50,000) dollars, for which sum, together with costs of suit, he will claim judgment.

NATHAN RABINOWITZ,
Attorney of Plaintiff.

10

ANSWER.

Filed August 2, 1928.

The defendant, a corporation of the State of New York, having its principal office in New Jersey at the foot of Pavonia avenue, Jersey City, Hudson County, for its answer says that:

20

FIRST DEFENSE.

1. It denies paragraph 1.

2. It admits that on November 11, 1927, the plaintiff was in its employ as a brakeman and that immediately prior to the time of the accident set forth in the complaint he was engaged in backing Train No. 131 toward the train shed of the defendant at Jersey City, New Jersey, but it has no knowledge or information sufficient to form a belief as to the other allegations of paragraph 2 and puts the plaintiff to his proof thereof.

30

3. It denies paragraph 3.

4. It denies paragraph 4.

5. It denies paragraph 5.

6. It denies paragraph 6.

7. It denies paragraph 7.

40

Reply.

8. It has no knowledge or information sufficient to form a belief as to the allegations of paragraph 8.

SECOND DEFENSE.

10 The alleged accident as set forth in the complaint was due to contributory negligence on the part of the plaintiff and the damages, if any, must therefore be diminished in proportion with the amount of such contributory negligence attributable to the plaintiff.

THIRD DEFENSE.

20 The alleged accident as set forth in the complaint was due to one of the risks of injury assumed by the plaintiff as part of the terms of his contract of employment.

HOBART & MINARD,
Attorneys for Defendant.

REPLY.

30 The plaintiff denies all allegations set forth in your answer.

NATHAN RABINOWITZ,
Attorney for Plaintiff.

Stipulation.

SUBSTITUTION.

Filed December 20, 1928.

I hereby consent to the substitution of Edward F. Merrey as attorney in the above-stated matter.

NATHAN RABINOWITZ, 10
Attorney of Plaintiff.

STIPULATION.

It is hereby stipulated and agreed by and between Edward F. Merrey, attorney for the plaintiff-appellee, and Hobart & Minard, attorneys for the defendant-appellant, that the testimony of the various physicians given at the trial of the above-entitled cause in the Passaic County Circuit Court need not be included in the State of Case on appeal, as the same has no bearing upon the questions raised by the appeal. 20

EDWARD F. MERREY,
Attorney of Plaintiff-Appellee.

HOBART & MINARD,
Attorneys of Defendant-Appellant. 30

Dated, April 13, 1929.

TRIAL RECORD.

PASSAIC COUNTY CIRCUIT COURT.

10	ABRAM SHORTWAY, <i>vs.</i> ERIE RAILROAD COMPANY, <i>Defendant.</i> Plaintiff, Defendant.	}	<i>At Law.</i>
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Paterson, N. J., February 25, 1929.

Before Hon. CLIFFORD L. NEWMAN, *J.*, and a jury.

20 *Appearances:*

For plaintiff, Edward F. Merrey, Esq.

For defendant, Hobart & Minard, Esqs., by John E. Selser, Esq.

(A jury was called and sworn and counsel for the respective parties opened to the jury.)

ABRAM SHORTWAY, sworn.

30 *Direct examination* by Mr. Merrey.

Q Mr. Shortway, you are the plaintiff here, are you? A Yes, sir.

Q How old are you? A I am in the fiftieth year.

Q Where do you live? A Waldwick, New Jersey.

Q What has been your occupation? A Railroad trainman.

40

Abram Shortway, direct.

Q How long have you been a railroad train-man? A Since 1907, July 28.

Q 1907? A Yes.

Q For what railroad did you work? A Erie Railroad Company.

Q Did you work all that time for them? A 10
Yes, sir.

Q Were there any intervals in that period of service, twenty-some years? A No. I did lay off sick or so a few days at a time.

Q Now, then, did you have an accident? A
Yes, sir.

Q When was that? A November 11, 1927.

Q At that time how much did you weigh? A
210 pounds.

Q How much do you weigh now? A 146. 20

Q Had you been working steadily that year?
A Yes, sir. Yes, sir.

Q Now, what part of the road did you work on? A On the New York Division of the Erie Railroad.

Q Now, just tell us what you did. When did you report for this service on which you were hurt? What hour? A At 3:30.

Q In the afternoon? A In the afternoon.

Q Where did you report? A Well, there is 30
an engine to take you to the yard.

Q Where did you report? A At Jersey City.

Q At the station? A At the station.

Q That is, the main passenger station in Jersey City? A Yes, sir. Yes, sir.

Q And you say that there was a coach and an engine to take you somewhere? A To the storage yard, yes.

Q To take you to the storage yard? A Yes. 40

Abram Shortway, direct.

Q How far away was that? A About five miles.

Q Where is that located? A At Weehawken.

Q At Weehawken? A Yes, sir.

Q How many of the crew go along with you?

A Two men.

10 Q Two men. Yourself and who else? A Another brakeman.

Q Another brakeman? A Yes.

Q On this day who was the other brakeman? A G. W. White.

Q George White? A Yes.

Q He met you there at the main station in Jersey City, did he? A Yes.

Q And you got on this train or this jitney? A Yes.

20 Q Were other men on that? A Yes.

Q Other crews for other trains? A Yes.

Q Now, you went up, then, to Weehawken with him? A Yes.

Q Did you find your train there? A Yes, sir.

Q How many coaches on that train? A Ten coaches.

Q Was the engine attached to it? A Yes, sir.

30 Q An engineer and fireman there? A Yes.

Q Now, what did you do with that train?

A We backed it from the storage yard that—you have a back-up hose to control.

Q The train is backed, is it? A Yes.

Q From the storage yard to the station? A Yes, sir; Jersey City Station.

Q And it is backed with the engine? A Yes, sir.

Q That is to take care of the train later?

40 A Yes, sir.

Abram Shortway, direct.

Q Now, just tell us how the train is backed up. What is the method of operation? A You put a back-up hose on the rear end of the train, and that applies the brakes with that back-up hose, by air, and you give three signal whistles to back up, after trying the air.

Q You give three signal whistles to who? A 10
To the engineer.

Q Then, what does he do when he gets that? A Backs the train.

Q He starts the train backing? A Yes.

Q Then how is the train controlled? A By this air.

Q What do you do? A By the rear end.

Q Do you turn a little handle? A You have a small valve on the rear end, that is, a whistle hose, and you back the train up with this air, and when you come to a stop, why, you apply the air. 20

Q And that stops the train, does it? A Yes.

Q What does it do? Put on the brake? A To apply the brakes.

Q Doesn't shut off the power of the engine, does it? A No.

Q But it is sufficiently powerful to check the train and stop it, is it? A Yes, sir. Yes, sir.

Q Now, whose duty was it to take care of that? 30
A White. Mr. White's duty. Brakeman White.

Q He was a substitute, was he? A Yes.

Q He wasn't the regular man? A No.

Q Was he— A No, he told me he never was to Weehawken before. He asked me if I would assist him with backing this train to the train shed.

Q Is this the system in use in other parts of the road, so far as you know? A Yes.

Q It is? A Yes.

Abram Shortway, direct.

Q Backing up? A Yes.

Q Well, then, he told you he wasn't familiar— A Yes.

Q Under the rules of the company, what was your duty then? A To be back there to take charge, the oldest man.

10 Q Ordinarily where would you have been? A Two cars from the engine would have been my place.

Q What would you do at that time in the operation of the train? A In case we came to a stop on a curve, to step out and give the engineer a signal, so I could see from the rear end and then give the engineer a signal. He couldn't see on this curve, and that would be my place.

20 Q Yes. But because of this man's inexperience you were supposed to be at the rear end, were you? A Yes.

Q And you were there? A Yes.

Q Now, who was operating this air brake or valve? A Mr. White.

Q White was? A Yes.

Q Then what happened? A We came to street loop.

30 Q Where is that? A That is right alongside of the viaduct. That is the last switch there that we come through, then we come onto the main line.

Q How far is that from Weehawken? A About four and a half miles.

Q And then you have about a half a mile to go to the station? A Yes.

Q You were right near the main tracks at that time—of the railroad? A Yes.

40 Q Your intention was to back on down into the shed? A Yes, sir.

Abram Shortway, direct.

Q All right. Now, what happened there? A We went by this signal. The light was out on the signal.

Q Where were you standing at the time? A Right at the rear platform.

Q Where was White? A Right at the rear platform. 10

By the Court.

Q What time of day was this? A At 5:30.

Q P. M.? A Yes, sir.

By Mr. Merrey.

Q Now, was it light or dark? A Dark. November 11.

Q Now, then, just tell us what happened. 20 You say you went by the signal? A Yes. So I undertook and stopped the train, applied the air and stopped the train.

Q Yes. Well, now, what signal did you go by, did the train go by? A The last signal from the yard to the main track.

Q Yes?

By the Court.

Q What was that signal? A light signal? A 30 Yes, a light signal.

By Mr. Merrey.

Q What did that consist of? A That was supposed to be either red or purple signals for the yard, and if it is red, why, that means for us not to come on.

Q Yes? A And when it shows purple, that means for us to come on. 40

Abram Shortway, direct.

Q Did you see the signal? A Yes, when we got up on it.

Q What did it show? A Nothing. Didn't show anything. It was dark. It was out.

Q You mean, it wasn't lit up? A Yes, wasn't lit, was out.

10 Q About where were you when you first saw it? A Right on top of it.

Q Right on top of it? A Right alongside of it.

Q Then, you say, you took hold of the air and stopped it? A Stopped the train, yes. So that was about a half a car length we got by before we got stopped.

Q Yes? A And I stepped out to give the engineer a signal to pull ahead with the train, on account that you can't start if you are past the signal, you are blocking up another switch, so I got out and signalled the engineer to pull ahead, and he did. And as we stopped, why, we thought we heard the blade go down on this signal, but I wanted to be sure before I went on. I was going to go up there with my lamp to see how the switch was, whether the signal was down, whether the blade was down or whether it wasn't.

30 Q Could you see the signal from where you were? A No, on account there was no light there. That was about forty feet.

Q It was forty feet away from you? A From our train, yes.

By the Court.

Q Forty feet away from the track at one side? A Forty feet from where we stood with the train.

40

Abram Shortway, direct.

Q Was it on the track ahead of you or off to your side? A Between the tracks, right alongside of the tracks. Then I got off and I walked over planking between the tracks.

By Mr. Merrey.

Q That planking between the tracks? A 10
Yes.

Q What sort of a plank was it? A A trestle over the street.

Q There was a trestle over the street? A Yes, where you stepped down.

Q You say there was a planking. What sort of a planking? A Pine boards.

Q What was the purpose of those boards? A For men to walk on so you can get between the tracks. 20

Q Then, you were on, you say, a trestle? A Yes.

Q And you were crossing this trestle? A Yes.

Q Then you went over that, did you? A Yes, but at the end of the trestle I stepped off into the excavation, and there was an excavation there between the tracks.

Q Could you see it? A No, I couldn't see it. I had a lamp with me and the light was small, and on account of the condition you can't see right close to you with this lamp. It shows about four feet away from you. The light is such you can see as you walk along; you can't see directly where you step. 30

Q That was your regular trainman's lantern that you had, furnished by the railroad company? A Yes.

Q What was that used for, a light? A For signaling. 40

Abram Shortway, direct.

Q I know, but what sort? Does it use oil?

A Kerosene oil.

Q Kerosene oil? A Yes.

Q Is that the usual thing to have? A Well, it is now, but before we had signal oil lamps. The wick was much wider on them. They give
10 a bigger light. This kerosene has a small wick.

Q All right. Now, you came along and you spoke about a hole, excavation. Just describe what that was? A At the end of this planking was a hole, an excavation, left open, and that run down from the signal about forty degrees. So this hole was about six feet deep, right at this planking.

Q Yes? A And there was loose cinders on hard surface, and when I stepped down into
20 this hole my feet—the cinders went down, rolled down with me, and there seemed to be a wall under the planking, by the street—Jersey City avenue, I think that is, and this wall was fourteen feet high, and the cinders were laying piled up on top of that, some timbers under there.

Q Was that under the tracks? A Yes, under the trestle.

Q Under the trestle? A The cinders kept on sliding and riding down with me and my
30 lamp was stuck into the cinders. So Mr. White saw me go down all of a sudden, and he came running up, and he got me by the hand and the shoulder and he pulled me out of the hole. I was frightened stiff. I had my nose just over the wall. I thought I was going down and break my neck.

Q Well, now, just describe this excavation? Could you find out what the purpose of it was?

A It seemed to me as if these tracks had been
40 raised since I had been there before. I had a

Abram Shortway, direct.

run for five years and I never had occasion to come this way, never had occasion to go to the yard for a train in that five years' time. They raised all these tracks. They put a terminal building in there and they raised up those tracks to meet that terminal building, and this hole was left open and it hadn't been filled in between the tracks. 10

Q Was it between the tracks? A Yes, between.

By the Court.

Q Did you go down between the ties? A No, alongside of the ties.

Q You weren't between the rails; you were between different sets of tracks? A Yes, and I went between the ties. 20

Q You mean it is different from tracks? A Yes, between different tracks.

By Mr. Merrey.

Q Was there any signal or any light or warning of this hole? A No, no; none.

Q This walk, did that lead up to the edge of the hole? A Yes, it is the end of the planking, and this hole, instead of being filled, which it should have been, why, this was open; they hadn't filled that in. 30

Q Did you go over that later? A Did I go over what?

Q That hole later, at other times after you fell? A No, no, I didn't. Saturday we didn't go to Weehawken storage yard, and Sunday we had a trip to Metuchen. We didn't go.

Q You haven't been there since? A No, I haven't been there since. 40

Abram Shortway, direct.

By the Court.

Q This planking that you walked on, was that between the rails or between the tracks? A Between tracks.

By Mr. Merrey.

10

Q Well, it would be at the side of the train, wouldn't it? A Yes, alongside of the train.

Q So this hole would have been at the side of the train if the train was up to that point? A Yes.

Q If you stepped off a train you were on, if the step was at that point, you would have gone down the hole, too? A Yes.

Q So it was right at the side? A Yes.

20

Q And it was under the tracks, too? A Yes.

Q Under the tracks, too? A Yes.

Q So that the ties were held up by something?

A I was under the trestle when I was down in the cinders. I was under on the wall.

Q Yes, but the tracks go on beyond the trestle, do they not? A Yes.

Q And was this hole beyond that? A Yes.

Q Well, then, did that extend under the track on which your train was, too? A Yes.

30 Q Well, were the ties still there on the end?
A On the sides, yes.

Q What held the ties up? A Why, the sides had been—between the tracks had been filled in, where the tracks were on, that was filled in.

Q It was filled in there? A The tracks where the tracks were on, that was all filled in. This was just open between the tracks.

Q Now, to have avoided that hole you could have walked in between the tracks; is that right?

40 A Yes, had I known it was there, I never went over.

Abram Shortway, direct.

Q But this planking, you say, was put there to walk on? A Yes.

Q And the hole is where it came to an end? A Yes.

Q What was the last time you had been over that? A That night.

Q But before that, you passed over it in the trains? A Oh, I had the run for about, oh, I was up ahead, and being it was dark we had the electric lights on the train lighted, and of course, I wasn't looking for anything like that. 10

Q That is, you were at the second car, where the head brakeman should be, when you passed over that point before? A Yes.

Q You never got off at that point? A No.

Q It was the only time you did? A We had the electric lights lit and it was light in the car, and you wouldn't look out in the dark unless you were looking for something. 20

Q Now, you say White pulled you out? A Yes.

Q What did you do then? A I got out, and he thought I ought to report the matter right away, but I didn't feel as if I was hurt very much, and I resumed. We went to Waldwick with that train and came back with a mail train, got in Jersey City a little after nine, and I was home ten o'clock, a little after ten. And it didn't seem to bother me at first. And then Saturday we had an easy run. We had a half holiday run and that gave me quite a rest. And Sunday we had a run to Middletown and we had six hours off up there, and I had quite a rest there, and I thought I could overcome this. And this hurt became very prominent as I was doing my work. 30

Q You speak about a hurt. What hurt did you have? A It seemed to be right here, started 40

Abram Shortway, direct.

by my ribs, from the—and hurt there (indicating).

Mr. Selser: Indicating the right side?

The Court: The right side.

10 A (Continuing.) Yes, the right side, right by the ribs.

Q What was it, a severe pain or a slight pain or what? A No, I can't say it was just a severe pain, and it is not a slight pain, either. It is there constantly, constantly dull pain.

Q Yes? A And after I did work on Monday, why, with the coupling up and getting under and bending over and throwing switches, it started to hurt me so I could hardly walk that
20 day.

Q Did you ever have a pain of that kind before this happened? A No, perfectly healthy man till I stepped in that hole.

Q What time was that that week, that that happened? A Friday.

Q Friday? A I was a perfectly healthy man. I weighed 210 pounds at that time.

Q Well, now, go ahead, Shortway, and tell us just what your condition was after that? A
30 Then Tuesday I reported the matter. I couldn't work any more, and I reported the matter to the train master and he sent me to the company's doctor.

Q Yes? Who was the company's doctor he sent you to? A He sent me to Company Dr. Robinson at Waldwick, but Robinson didn't happen to be in, so his wife called up and she got Dr. Bouygne at Ridgewood.

Q Is he a company doctor, also? A Yes. So
40 I went to Dr. Bouygne and he gave me an ex-

Abram Shortway, direct.

amination and he said I had intercostal muscles injured, and he kept me in adhesive tapes for sixty-two days.

Q Sixty-two days? A Yes.

Q Did you work during that time? A No, I couldn't work.

Q Yes? A And when I went there, why, he took the adhesive tape off and told me I could go to work and get it off my mind, so he rubbed it a couple of times to see how it was going to act with adhesive tapes off, and then I thought I would try to go to work, so I reported and I went to work the 29th of January. 10

Q The 29th of January? A And I kept it up until the 26th of February, I believe it is, to be exact, the 26th of February.

Q Yes? A And it started to hurt me and I seemed to get so easily exhausted after that. So I wanted to find out what really was the matter with me. I couldn't understand how it was, and I went to— 20

Q Tell us, on the days that you were working, what did you have to do? A With the coupling up and throwing switches.

Q Did that require any power, strength? A Yes. Not if you are strong and healthy, you don't notice whether that requires it, but when you have something wrong with you, then it seems to be hard to get them over. And I tried with my hands—and they have these switches with the spring that have a catch and you throw them over with the handle. I tried to use my hand and I used my foot for a few times, and they wouldn't go, so I thought I had better lay off before I got very much worse. I was getting weak, so I went off and I went to the claim agent of the Erie, and he sent me to Dr. Roy Lee at Houston street. 30 40

Abram Shortway, direct.

Q In New York City? A In New York City.

Q Yes? A And he gave me an examination, and he gave me a lamp and three electric treatments at different times—came Tuesday and Thursday and Saturday. And Saturday I wanted
10 to know what he was giving these electric treatments for, and he said, "You worked for the company so long we just gave you consideration. There is nothing really the matter with you. If it hadn't been for that I would have kicked you out of the office long before this. There is nothing wrong with you." So he gave me an address of a clinic at 42nd street and Second avenue, and I went there to this place. There was two doctors there examined me with
20 a large crowd—there is quite a lot of people there to get examined. They examined me and said to come on Wednesday, the following Wednesday, and there would be a Dr. Alexander, a specialist, and he would examine me. They couldn't find anything wrong with me. So I went there the following Wednesday, and Dr. Alexander said I ought to have X-rays taken. He thought maybe there was a rib cracked or something and he wanted to see. So I had the
30 X-rays taken at that place and came the following Wednesday, and he examined the X-ray plates. And he told me that he would suggest electric treatments would be of benefit.

So I came back and stopped at the Claim Department and asked for a letter for electric treatments, and he sent me to the Compensation Bureau at Paterson, with a small business card that he had, and he wanted me to go there for electric treatments. So they told me they didn't
40 give electric treatments unless I had a letter

Abram Shortway, direct.

from a doctor. So I went back with the card and asked Holliday about it, and he said he couldn't do anything for me. Then later on they sent for me to the Erie office, and I went there and they had this specialist, Dinnen, and he examined me and he said I had gallstones, that I could go over to St. Francis Hospital and be operated on for gallstones. I went there—that was in April. I went there and I was there for a week, and they took X-ray pictures of the gall bladder and gallstones to see if I had any, and they couldn't find any. So they had an Erie doctor at St. Francis Hospital, and after he saw the pictures and the house surgeon seen the pictures, why, he could still insist that I had gallstones, that I ought to go and have taken out the gall bladder. But the interne at the hospital—I forget his name—he said that my injuries were above the gall bladder, that there was no such a thing as having gallstones. So I went with that report to Dr. Dinnen, or Chief Surgeon Dinnen, and he said that I should go to Roosevelt Hospital and have the gallstones taken out of the gall bladder and I would be a well man. I didn't agree with him on that. I didn't do that.

So I kept away from him and I went to Dr. Baxter on Broadway, Paterson Electric Institute, and I had nineteen electric treatments, and they didn't seem—I stopped with them for a while to see how they were acting, and after I stopped for about a week I went right down and started to lose weight, from 186 to about 162 pounds. I went right down. So then after that I went to Dr. Wassing. Dr. Wassing—Dr. Roemer took these X-ray plates for the gall bladder, for the gallstones, and Dr. Wassing had me at Barnet

Abram Shortway, direct.

Hospital for observation. And I was there ten days and I didn't seem to get any relief there. I weighted 153 when I went in the hospital and I was there these ten days; I weighed myself when I come out; I was 143; laying down in the bed quiet and seemed to be getting worse, and taking blood from the veins and they took water from the spine and got me in a very weakened condition. So I left there on Friday and got home, and I was very weak for three weeks. And then after I got home I started to gain a little strength, and I gained a few pounds after I was home a couple of months. So then I went to Dr. Clay, when I didn't get no satisfaction at Dr. Wassing, and I went to Dr. Clay. And Dr. Clay—his opinion is that I can get well, but he doesn't say just what this hurt is. This hurt remains in there. He just don't seem to be able to tell me what it is. They say that my mind is affected. In fact, Dr. Bouygne at Ridgewood, the company's doctor, I went there and asked him his opinion, after he seen me go down like this, and he says, "Well, you keep on and they will put you in a wagon and take you over the hill." So that is the Erie's opinion, that I am a little bit nutty, I guess, as they call it.

Q That was the last time that you saw any doctor for treatment? A Yes. He has given me medicine, and I had the fourth bottle filled now at the drug store, still taking the medicine, that this hurt might go away. It seems to be just as prominent here as the day I got it.

Q How much do you weight now? A 146.

Q What did you say there was that hurt? A A dull pain.

Abram Shortway, direct.

Q How often do you have that? A It is constantly, no let-up.

Q Have you tried to do any work? A Yes, I have tried to exercise and go around, and I get easily exhausted. I get so exhausted when I want to do walking exercises and different things. I get so easily exhausted. 10

Q Now, what compensation were you receiving when you worked? A I figured up for the year I was making almost at the rate of \$3,000 a year.

Q That is on what? A On that run that I was on. We get paid twice a month.

Q How did they pay you? A Twice a month.

Q How did they pay you for working? What rate did they pay you? What is the rate of pay? A Well, that depends on the run, the over-time—the runs with the over-time. 20

Q How much do they pay you? Do they pay you by the hour, by the day, or— A By the day.

Q By the day. How much is that? A \$5.10 for brakeman rate and \$5.80 for ticket collecting rate.

Q That is for a day of how many hours? A 30 Ten hours.

Q Do you get anything extra for over-time? A Yes.

Q Did you work over-time? A Yes.

Q Now, do you know how much you made? A 1927?

Q Yes. A Yes, nearly \$3,000.

Q In that year? A Yes.

Q That was including this quite some over-time? A Four or five hours every day. 40

Abram Shortway, direct.

Q And this run that you speak of, how many hours were in that? A That I had when I had the accident?

Q Yes. A Five hours every day.

Q Five hours extra time? A Yes, and more sometimes.

10 Q What time did you report in the morning?
A 7:15.

Q And then when did you quit? A Well, we got through 9:40 some nights, nine o'clock.

Q Actually paid for all the time between seven in the morning and 9:40 in the evening?

A Yes, yes, yes.

Q And at the rate of ten hours a day, is it?

A Yes.

20 Q You were head brakeman? A Yes.

Q Ticket collector? A Yes.

Q Now, this train, where did the people come from that traveled on that train? A From New York.

Q You took up their tickets, did you? A Yes, sir.

Q And they were New York tickets? A Yes, sir.

30 Q How would they get from New York to the train? A Well, some would come by tube; I see them come from the tubes.

Q Some on the ferries? A Some on the ferry.

Q How did their tickets read when you took them up? A New York to Glen Rock, and New York to Ridgewood, and New York to Hohokus.

Q That is the way the ticket read? A Yes.

40 Q Did you know the people that you met on the train? A Well, you know them by riding every day; you aren't personally ac-

Abram Shortway, cross.

quainted with them, but you know them. You see them on the train every day.

Mr. Merrey: That is all, I guess.

Cross examination by Mr. Selser.

Q Mr. Shortway, how many tracks were at the place where this dinkey signal was located?

A I think there is one track on the—two tracks.

Q Two? A Two.

Q Look at that picture, Mr. Shortway, and see if that will refresh your recollection? A Yes. That is not the signal. The signal for this—this is the track we were on, right here. This is the track we were on.

Q Yes. Now, look at this signal here. A No, that signal isn't on the planking; that signal there was here. If that is the signal now that has been changed since 1927.

Q Maybe the picture deceives you a little bit. A No, that don't deceive me. I can see right where I am.

Q Isn't that the same signal some distance away from the planking? A No. No, that signal is over here; at the end of the switch there was no signal. There is no signals there at that time. That is not the way it was.

By the Court.

Q Do you say there were two tracks? You mean two sets of tracks? A Yes, two sets of tracks, to come out on the main track, see. These two tracks here. Every switch leads into these two tracks, coming from here. These here switches. One goes to the terminal—

Abram Shortway, cross.

By Mr. Selser.

Q There are two main tracks? A Yes, two main tracks.

Q And then there are the switches to the side of the main track? A That is right, like these.

10 Q How many tracks wide is the roadbed altogether, considering the switches as tracks, too? A Well, now, of course that would be hard to say. Along here the roadbed is wider where that switch is than what it would be over here or over here.

Q At the place where the accident occurred, Mr. Shortway, there were two main tracks? A Yes.

20 Q And then how many switches at the sides? A Two switches at the side.

Q Two switches at the side? A Yes.

30 Q Now, the dinkey signal that you have referred to, where was that? Between what tracks, considering the track nearest to the Oranges, furthest from New York, as the west track? That would, of course, be the westbound track, wouldn't it, the track further from New York City, and it would be on the westerly side of the right-of-way, wouldn't it, according to the points of the compass? A I don't understand you with the westerly side of New York. I don't understand what you mean by that.

Q According to the points of the compass? A That is trying to confuse me.

40 Q No, I wasn't trying to confuse you. A The two tracks that come up from the tunnel, the two tunnel tracks are two main tracks; the others are switches, and we would have to go with these two main tracks for the switch, and that signal was located at the end of this switch.

Abram Shortway, cross.

Q Was it between the switch track and the eastbound track, main track, or between the switch track and the westbound main track? A No, between the two tracks that come in, in the eastbound main track.

Q I see. Between the switch tracks? A Yes, that is the two main tracks leading to the tunnel. 10

Q Now, where do the switch tracks come in, Mr. Shortway, toward New York from the main tracks or toward Newark? A That was coming in towards New York.

Q Towards New York from the main tracks? A Yes.

Q So that counting the tracks from the New York side of the right-of-way— A Yes. 20

Q —there is first the westbound switch track running to the tunnel? A Yes.

Q Then there is the space between that and the eastbound tunnel or switch track? A Yes.

Q And dinkey signal, you say, was between those two tracks? A Yes.

Q Then, the nearest track there is the westbound main track; is that right? A No, there is no main tracks in there. That was a switch. Those other tracks in there are switches off from to two main tracks. 30

Q Well, is there a switch track between the westbound tunnel track and the Hudson River? A I don't know anything about that, about the Hudson River.

Q You know where the Hudson River is, alongside of the company's right-of-way, don't you? A Where?

Q At the place where the accident occurred, isn't the river—I don't mean it is immediately 40

Abram Shortway, cross.

alongside. I know it is some little distance. A The river is a half a mile away from the place.

Q Yes, that is right. A Yes.

10 Q A half a mile, but considering that for the points of direction only—I don't mean that you would fall into the river if you went off the track—for the points of direction only, alongside of that main tunnel track you are referring to, is there a switch? A There is switches. In fact, they are all switches. It is a yard there. They are all switches, as far as that is concerned.

Q The two tracks run through the tunnel?

A Yes, they are switches. There is no main track in there.

20 Q Well, now, when you stepped off your train was your train being backed toward Jersey City, you say, on which of the tracks? A On the eastbound track.

Q On the eastbound track? A Yes.

Q Standing on the tracks and looking towards the terminal— A Yes.

Q —that would be on the extreme right-hand side? A No, the extreme right-hand side would be the westbound track for the tunnel.

30 Q I as saying, looking toward the Jersey City— A Yes, the one on that side would be the main west track from the tunnel, and the other was the eastbound; that is right.

Q When you stepped off that train, did you get off the right side or the left side? A The right side.

Q The right side? A Yes.

40 Q So that to the side of you there was— A No, let's see, now. The engineer is on the right, I got off on the opposite side, on the left side.

Abram Shortway, cross.

Q You got off on the left side? A Yes.

Q Now, the side of you, what track was there right to your left side as you got off the train?

A The westbound tunnel track.

Q The westbound tunnel track on your left?

A Yes.

Q And you were on the eastbound tunnel track? A Yes. 10

Q Now, how far did you walk from the place where you got off the train until you got on the planking of the bridge? About how far? A I stepped on the planking.

Q You stepped on the planking? A Yes.

Q And about how many steps did you take before you went into this hole? A About four or five.

Q Four or five steps? 20

By the Court.

Q What was the planking that you walked over? Over what? A That was part of the trestle.

Q The trestle. I see. Go ahead.

By Mr. Selser.

Q You say you had never noticed it before? 30

A No, I didn't have no condition to notice it before, or no occasion, I should say.

Q You had been riding in the last coach, hadn't you, the one nearest the terminal? A Yes.

Q That would be the first coach in the direction you were going? A No.

Q What coach did you get off? A Two cars—oh, where I had been riding?

Q Yes, when the accident happened? A Oh, I was right on the rear platform. 40

Abram Shortway, cross.

Q On the rear platform? A Yes.

Q Was that coach lighted up? A Yes.

Q Then you had your lighted switch lantern, too, didn't you? A Yes, two of them. The other brakeman had one and I had one; two lamps there.

10 Q Now, after White took you out of this hole did you look it over, look the hole over? A No, I didn't stand there and look the hole over, because we left at 46—5:45—and it was after 30 then, and I knew well enough the train had to be brought down on time, and I didn't waste any time. We got right busy and started right down. I knew we didn't have much time.

Q Now, you have referred, Mr. Shortway, to some raising of the tracks there. How long before your accident occurred had those tracks
20 been raised? About how long? A I couldn't say. I wasn't interested in that very much, only looking off the viaduct as I passed upon the trains I saw them doing work there.

Q That was a year or more before, wasn't it? A I couldn't say. The terminal building was built there; I seen them erecting that terminal building, and then there was a lot of work going on there, and I don't know what they were doing
30 in there. I never went down there to inspect that.

Q Well, now, I know that, but I am trying to get a general idea, Mr. Shortway, of how long before your accident occurred that work was done? A I couldn't say.

Q It was some time, wasn't it? A Well, I imagine it was some time; it might have been two years; might have been five years. I don't know. They started tearing down in there and
40 erecting that terminal building.

Abram Shortway, cross.

Q Would you say about how much the track was raised? A No, I couldn't say.

Q It was raised ten feet, wasn't it? A Oh, yes, it must have been raised more than that.

Q Ten feet? A Oh, yes, I imagine it was. I never measured it, of course. It must have been raised more than that. What makes me say that, we had to come up quite a grade with the train; it seemed to be if you stopped the ten-car train the engineer couldn't get started there; he always asked us to be careful not to stop at that certain point. It had been raised up so high he couldn't start if he stopped, and he would have to pull away down to the yard and get a start on it again, so it was raised up that high. 10

Q And you had been working on this particular kind of work, you say, how long, this job backing trains down from Weehawken? A On this job? 20

Q Yes. A About three days.

Q And prior to that time had you ever been on that work at all? A Backing trains?

Q Yes. A In the last five years I held a run down that we didn't have to go to any yards; our train would be rolled down to the depot. 30

Q This was the first night White was on, wasn't it? A Yes.

Q And you had been on it two days before that? A Yes, up at the head end, the second coach behind the engine.

Q Of course, White had done other kind of work for the railroad company before that? A I think he told me that he only had worked freight jobs. 40

Motion for Non-suit

Q Freight jobs? A Mostly on the Greenwood Lake and so on.

Mr. Selser: That is all.

Re-direct examination by Mr. Merrey.

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Q White is working for the railroad company yet, is he? A Yes.

Q Is he in court here? A I think I saw him.

Mr. Selser: He is here. He is subpoenaed by you and produced by me.

Mr. Merrey: That is all.

PLAINTIFF RESTED.

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MOTION TO NON-SUIT.

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Mr. Selser: I move for a non-suit, if your Honor please, on the ground that no negligence is shown on the part of the railroad company as charged in the complaint, and on the further ground that from the evidence appearing in the case at this time this is clearly a case within the doctrine of assumed risks, applicable to Federal employers liability cases.

(Discussion.)

The Court: It seems to me it presents a jury question. I will deny your motion and allow you an exception.

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Motion for Directed Verdict.

MOTION FOR DIRECTED VERDICT.

Mr. Selser: I move for a directed verdict, if your Honor please, upon the same grounds as urged in my motion for a non-suit.

The Court: I will deny the motion. 10

Mr. Selser: Allow me an exception?

The Court: You may have it.

(Mr. Selser summed up the case to the jury.)

(During the course of Mr. Merrey's summation a discussion arose as to future loss of wages.)

Mr. Selser: I won't stand on that. If the jury finds there is a permanent injury I am perfectly willing that there should be an amendment of the complaint. 20

The Court: With the consent of counsel I will grant an amendment to the complaint claiming damages for loss of wages in the future.

(Mr. Merrey continued with and concluded his summation.)

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Charge to Jury.

(The Court charged the jury as follows:)

COURT'S CHARGE TO THE JURY.

NEWMAN, J.

Members of the Jury: This is an action
 10 brought by Abram Shortway against the Erie
 Railroad Company to recover damages which
 this plaintiff alleges he suffered by reason of
 the negligence of the defendant. In this par-
 ticular case there doesn't seem to be any dis-
 pute about the facts, so that you are not called
 upon to meet the troublesome situation which
 arises in most cases, as to what the facts are.
 There is, of course, a dispute about the infer-
 20 ences which should be drawn from the facts,
 and it becomes your duty to solve what infer-
 ences should be drawn from the facts in the
 case.

This is a suit brought under the Federal Em-
 ployers' Liability Act. In most cases, as you
 know, where an employee is injured and he be-
 lieves he has a cause of action against his em-
 ployer, his remedy is to proceed under the Em-
 ployers' Liability Act, but this case does not
 come under the ordinary liability act which ap-
 30 plies to persons who are residents of the State
 of New Jersey or who at least are working on
 work which is solely within this State. But in
 this case it is admitted that the defendant com-
 pany at the time the injury to this plaintiff oc-
 curred was engaged in interstate commerce, that
 is, commerce between or from one State to an-
 other, and therefore it gives Congress jurisdic-
 tion, and in that situation Congress has given the
 employee the right to bring an action against
 40 the employer, the railroad company.

Charge to Jury.

Regardless of what the Court may say as to the facts and inferences, they are still questions of fact for you to settle, but the Court repeats its former statement that there are no disputes, as far as the Court can see, in this case as to what the facts actually are.

The plaintiff in this case says that on this occasion he was employed as a brakeman by the defendant, and that part of his duty on this occasion was to go from the terminal of the Erie Railroad Company in Jersey City to a point some four or five miles away, where the train upon which he was to be a brakeman was stored, and that a part of his duty was to go from the station or the terminal on the engine or other vehicle provided by the railroad company and to bring this train from its place of storage at Weehawken to the terminal at Jersey City; that when he was returning with this train, which was being run backwards, the engine being in the rear of the train in the way in which it was proceeding, there was employed by the defendant another man who was a co-laborer at that time, whose business it was to operate the brakes or signal whistle on the rear of the train, which in this case—the train being backed into the station—became the front; that this man was a new man, and it became necessary for the plaintiff to leave his station somewhere in the center of the train, where he usually was, and to assist this new man in the duties which he was called upon to perform; that when his portion of the train had arrived at a place about a half mile from the terminal and when it was about to pass a signal switch, it being about 5:30 in the evening on November 11, 1927, this man and the plaintiff discovered that the light upon this

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Charge to Jury.

switch was out, and therefore they conceived it to be dangerous to proceed without ascertaining whether the signal was with them or against them; that they had passed this light, that is, the portion of the train upon which the plaintiff and his companion were stationed, had passed this
10 light before they discovered that it was out, and it therefore became necessary to stop the train and to have it proceed backwards to this man—forward the way the engine was pointing—for a half case length or whatever it was, and come back past the switch, to see whether the signal was in their favor or against them, because the light did not show; that in order to ascertain by an inspection of the signal whether it was favorable or unfavorable this plaintiff was compelled
20 to alight from the car on which he was riding and to proceed along between the track on which the train was riding and the adjoining track to the place where this switch was located; that he did so alight and attempt to go forward to look at the switch or its mechanism to see whether it was favorable or unfavorable; that he proceeded across what has been referred to as a viaduct, proceeding between the two sets of tracks; that when he arrived at a point near the switch and
30 at the end of the planking which was between the tracks and covering this viaduct he was thrown into a hole, which he says was at the end of this planking; and that he received certain injuries, of which he complains and about which I shall speak to you later on in the charge. The plaintiff says that by reason of the negligence of the defendant he suffered these injuries of which he now complains. Now, as I said before, the facts are not in dispute.

Charge to Jury.

Of course, this plaintiff cannot recover unless he satisfies you by a fair preponderance of the evidence that the defendant company was negligent, that is, that it failed to exercise reasonable care and that its failure to do so was the proximate cause of his injuries.

Now, negligence requires that the plaintiff 10
show that the defendant failed in some duty which it owed to him. The plaintiff says that it failed in the duty of providing a safe place to work or carry on his usual occupation. The law requires that the master shall exercise reasonable care in providing a safe place for the servant to work. You will note that the Court used the words reasonable care. That means that the master does not guarantee the safety of his employee, but the law does require him to exercise 20
reasonable care to provide a safe place. Now, what is reasonable care is a jury question. The law does not undertake to lay down any hard and fast rule as to what constitutes reasonable care, because it is a question for a jury consisting of twelve persons, such as you are, who are called here to determine what is or what is not reasonable care, that is, such care as should be exercised by a reasonably prudent person. Of course, if the plaintiff has not satisfied 30
you that the defendant failed to exercise reasonable care and that his injuries are the result of such failure, then your verdict would be no cause of action. If, on the other hand, the plaintiff has satisfied you by a fair preponderance of the evidence, that is, the greater weight of the evidence, that the defendant has been negligent and that his injuries were the result of such negligence, then, of course, you

Charge to Jury.

would proceed to consider the other questions which I shall outline to you.

Now, the defendant in this case says that the right of action of the plaintiff should be defeated because of the contributory negligence on the part of the plaintiff, and also that the plaintiff
 10 assumed such risk of injury as would be involved in this kind of case. Contributory negligence, of course, is a defense, and the burden of establishing that by a fair preponderance of the evidence rests upon the defendant who asserts it. But in this case, I repeat again, the facts themselves are not in dispute, and the inferences to be drawn from those facts rest with you. So if the question is as to the contributory negligence of the plaintiff, did the plaintiff exercise
 20 reasonable care for his own safety? The law requires the plaintiff to exercise reasonable care, and the word reasonable is defined the same as I defined it farther back in the charge. That presents a jury question, a question for your consideration. What is reasonable care, and having defined what reasonable care is, did the plaintiff himself exercise reasonable care?

Now, as you progress in your jury service you will hear a great deal about contributory negligence and reasonable care on the part of plaintiffs as it applies to automobile cases, because
 30 in those cases if a man is guilty of contributory negligence that defeats his right of action. But in cases involving the Federal Employers' Liability Act such is not the case. In the ordinary automobile case, as I say, contributory negligence on the part of the plaintiff if present or in existence defeats his right of action, even though the defendant himself is guilty of negligence. But under the Employers' Liability Act and
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Charge to Jury.

cases such as this one, that is not the case. The Federal statute provides, as to contributory negligence: "The fact that the employed may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." 10
 So in this kind of case it merely affects the amount of the damages and does not debar the right of action of the plaintiff.

So that you will have to determine, if you arrive at that situation, what proportion the amount of negligence of the defendant bears to the amount of contributory negligence of which the plaintiff is guilty.

In other words, to cite an instance, without referring in any way to this case, if the plaintiff 20
 was guilty of contributory negligence and in your judgment his contributory negligence was equal to the negligence of the defendant, then, of course, he would only be entitled to recover one-half the amount of damages which he would be entitled to recover if he were not guilty of contributory negligence. So it is up to you as members of the jury to proportion that contributory negligence if it in any way contributed to the injury which the plaintiff sustained. 30

Now, there is one other point raised by the defendant in this case, and that is that the defendant says the employee assumed the risk of a similar injury, and if he did, of course, then he would not be entitled to recover, even though the defendant were negligent. The law upon the subject of the assumption of risk is: "A servant who chooses to undertake an employment involving danger or personal injury which the master might have avoided, takes upon himself 40

Charge to Jury.

the risks of all the hazards incident to the employment, the existence of which are known to him or which are plain and obvious, and which he has no reason to expect will be counteracted or removed."

10 Now, of course, if the plaintiff in this particular case assumed the risk, then that would defeat his right of action. That contention, however, is denied by the plaintiff in this case, who says that it was not the kind of risk which he assumed by entering into the railroad company's employ. Whether it was or not is a question for your determination.

Summing up in general the legal situation, the first question for your determination is whether the defendant was guilty of negligence. If it
 20 was not, then, of course, your verdict would be no cause of action. If, on the other hand, the defendant were guilty of negligence, then you would proceed to consider the question of the contributory negligence of the plaintiff. If the plaintiff were not guilty of contributory negligence, then, of course, your verdict, if in favor of the plaintiff and if no other outside considerations entered into the situation, would be for the full amount of the damages.
 30 If, on the other hand, the plaintiff were guilty of contributory negligence, then you would deduct from the allowance of damages that proportion which represents the contributory negligence of the plaintiff. Then there is the third element, the assumption of risk by this plaintiff. Either he assumed the risk or he didn't. There is no deduction in that case, as there is on the question of contributory negligence. So that if he assumed the risk there can be no recovery. If he
 40 did not assume the risk, then the other princi-

Charge to Jury.

ples apply, as to whether the defendant is liable, and if so in what proportion.

The damages in this case which the plaintiff claims would be, first, for pain and suffering which he has undergone as a result of the injuries he sustained. As I understand it—you must be the judges—his physical injuries consisted merely of some bruises or contusions to the right portion of his abdomen or chest. But the plaintiff says that the injuries are deeper and greater than that, that as a result of this physical injury, however slight it may have been, he suffers from what has been called by the physicians traumatic neurasthenia, which means that he has suffered a nervous condition as a result of this trauma or bruise; that while there are no other evidences of injury, it has resulted in a physical condition, the resultant condition being called traumatic neurasthenia; and that he is in a position where he is unable to work as a result of that; and that the injuries are real.

Now, you, of course, are the judges of what pain and suffering this plaintiff had. He would be entitled, first, to reasonable compensation for any pain and suffering which he has undergone as a result of his injuries. The plaintiff further says that he was receiving a compensation of approximately three thousand dollars a year; that he has been unable to work, except some few days, from the time of the injury up to the present time; and that he will be unable to work for some time to come. I think one doctor expressed the belief that it might be corrected in three months under proper treatment, and one doctor, I think, said approximately one year. That presents a question of fact, however. He would be entitled to recover any wages which

Charge to Jury.

he has already lost and will be called upon to lose in the future, which are the result of the injury, and those only.

10 The defendant in this case says that the plaintiff received nothing but a slight physical injury, and that the condition which the plaintiff's physicians say he is suffering from now is not the result of injuries which he received. That is another question of fact for your solution and determination. The test is whether the things of which he complains are the result of the accident. If they are not the result of the injuries, then he is not entitled to recover any damages for it.

20 If the injury was the proximate cause of these damages, then he is entitled to recover, first, compensation for pain and suffering which he has undergone; second, the wages which he has lost or will lose in the future which are the result of the injuries which he received.

Those are the cardinal principles of law which the Court conceives are to be passed upon by you. When you render your verdict it will be either no cause of action in favor of the defendant or for a certain lump sum in favor of the plaintiff, covering the damages which he has suffered or such proportion of them as you find
30 he is entitled to.

You may retire.

Defendant's Exceptions to Charge.

DEFENDANT'S EXCEPTIONS.

Mr. Selser: I except to that portion of your Honor's charge wherein your Honor says the Master shall exercise reasonable care to provide a safe place to work. My objection to that statement of the law is that the duty is not upon us to use reasonable care to provide a safe place, but rather a reasonably safe place. 10

The Court: You may have it.

Mr. Selser: Then to that portion of your Honor's charge wherein your Honor, speaking of reasonable care in this case, said the degree of care owing by the defendant company to the plaintiff with respect to a safe place was a jury question. My objection to that is that there was no standard by which the jury might measure reasonable care. In railroad cases, as in other highly specialized occupations, matters with which the jury have no actual acquaintance, there must be some standard of care set. 20

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JUDGMENT.

Filed February 27, 1929.

10 This action having been tried before Judge
Newton H. Porter with a jury, in the presence of
counsel of the respective parties, on February
25, 1929; and the jury having returned a verdict
in favor of the plaintiff for six thousand dollars
(\$6,000.00) damages;

It is ORDERED that judgment final be entered in
favor of the plaintiff and against the defendant
for the sum of six thousand dollars (\$6,000.00)
and the plaintiff's costs to be taxed.

On motion of

20 EDWARD F. MERREY,
Attorney of Plaintiff.

Judgment entered February 27, 1929, at 2:49
P. M. Action No. 12299, Docket K p. 562.

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NOTICE AND GROUNDS OF APPEAL.

Filed April 8, 1929.

To Edward F. Merrey, Esq., attorney for plaintiff.

TAKE NOTICE that the defendant appeals to the New Jersey Supreme Court from the whole of the judgment entered in this cause on the following grounds: 10

1. The trial court erroneously refused to grant defendant's motion for a non-suit whereas said motion should have been granted for one or more of the following reasons:

(a) No negligence was shown on the part of the defendant as charged in the complaint. 20

(b) The case is within the doctrine of assumed risks, applicable to federal employers' liability cases.

2. The trial court erroneously refused to grant defendant's motion for a directed verdict in its favor whereas said motion should have been granted for one or more of the following reasons:

(a) No negligence was shown on the part of the defendant as charged in the complaint. 30

(b) The case is within the doctrine of assumed risks, applicable to Federal employers' liability cases.

3. The trial court erroneously instructed the jury as follows:

"Now, negligence requires that the plaintiff show that the defendant filed in some duty which it owed to him. The plaintiff says that it failed in the duty of providing 40

Notice and Grounds of Appeal.

10 a safe place to work or carry on his usual occupation. The law requires that the master shall exercise reasonable care in providing a safe place for the servant to work. You will note that the Court used the words reasonable care. That means that the master does not guarantee the safety of his employee, but the law does require him to exercise reasonable care to provide a safe place."

4. The trial court erroneously instructed the jury as follows:

20 "Now what is reasonable care is a jury question. The law does not undertake to lay down any hard and fast rule as to what constitutes reasonable care, because it is a question for a jury consisting of twelve persons, such as you are, who are called here to determine what is or what is not reasonable care, that is, such care as should be exercised by a reasonably prudent person."

HOBART & MINARD,
Attorneys of Defendant-Appellant.

Service hereof acknowledged April 3, 1929.

30 EDWARD F. MERREY,
Attorney of Plaintiff.

Opinion of Supreme Court.**NEW JERSEY SUPREME COURT.**

No. 97, October Term, 1929.

ABRAM SHORTWAY, Plaintiff-Appellee,	}	10
VS.		
ERIE RAILROAD COMPANY, a cor- poration of New Jersey, Defendant-Appellant.		

Submitted October 15, 1929; Filed December 30,
1929.

On appeal from Passaic County Circuit Court. 20

For defendant-appellant, HOBART & MINARD.
For plaintiff-appellee, EDWARD F. MERREY.
Before Justices PARKER, BLACK and BODINE.

PER CURIAM:

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The plaintiff was a trainman employed by the Erie Railroad Company in its passenger service in interstate commerce. The action was brought under the Federal Employers' Liability Act, and resulted in a verdict in favor of the plaintiff in the sum of \$6000. On this appeal two questions are argued: (1) that negligence on the part of the defendant was not proved; and (2) if it were the risk was assumed by the plaintiff.

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Opinion of Supreme Court.

About five miles out of Jersey City, the railroad company maintains train storage yards. Train crews report to the Jersey City station and are transported to the storage yards where they board their trains and back them into the Jersey City station for loading.

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The plaintiff reported at the Jersey City station on November 11, 1927, at three-thirty o'clock in the afternoon. He was taken to the storage yard and boarded his train. In his crew was brakeman White, who was not familiar with the operation of air brakes. The plaintiff and White were on the rear end of the train when they were about a half mile from the Jersey City station. Plaintiff noticed that the train had passed an unlighted signal.

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He stopped his train and signaled the engineer to pull in the opposite direction so as to clear the signal. It was quite dark and the signal was unlighted and not visible from the point where plaintiff stood. He left the train and started to walk in the direction of the signal along some planking between the rails, using his lantern as best he could to light his way. This planking was on a trestle crossing Jersey Avenue, Jersey City.

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The planking extended over the trestle, but when the plaintiff came to the end of the trestle he fell into a large excavation about 6 feet deep and suffered the injuries of which he complains. The excavation was in the railroad right of way and at the end of the planking. The plaintiff's testimony so accurately describes the occurrence that it will, in part, be quoted at some length:

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"And I stepped out to give the engineer a signal to pull ahead with the train, on account that you can't start if you are past the signal, you are blocking up another switch, so I got

Opinion of Supreme Court.

out and signalled the engineer to pull ahead, and he did. And as we stopped, why, we thought we heard the blade go down on this signal, but I wanted to be sure before I went on. I was going to go up there with my lamp to see how the switch was, whether the signal was down, whether the blade was down, or whether it wasn't. 10

"Q. Then you went over that, did you? A. Yes, but at the end of the trestle I stepped off into the excavation, and there was an excavation there between the tracks.

"Q. Could you see it? A. No. I couldn't see it. I had a lamp with me and the light was small, and on account of the condition you can't see right close to you with this lamp. It shows about four feet away from you. The light is such you can see as you walk along; you can't see directly where you step. 20

"Q. That was your regular trainman's lantern that you had furnished by the railroad company? A. Yes.

"Q. All right. Now you came along and you spoke about a hole, excavation. Just describe what that was. A. At the end of this planking was a hole, an excavation left open, and that runs down from the signal about 40 degrees. So this hole was about six feet deep right at this planking. 30

"Q. Well, now, just describe this excavation. Could you find out what the purpose of it was? A. It seemed to me as if these tracks had been raised since I had been there before. I had a run for five years and I never had occasion to come this way, never had occasion to go to the yard for a train in that five years' 40

Opinion of Supreme Court.

time. They raised all these tracks. They put a terminal building in there and they raised up those tracks to meet that terminal building, and this hole was left open and it hadn't been filled in between the tracks."

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It is the contention of the railroad company that the case is ruled by *D., L. & W. R. R. Co. v. Koske*, 279 U. S. 7. We think that this contention overlooks the difference in facts. In the Koske case, the plaintiff stepped into an open drain or ditch in the railroad yard. There is no evidence that this drain was not suitable and appropriate for the purposes for which it was intended, and obviously no court can dictate to railroads the way in which they shall meet their yard engineering problems.

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On the other hand, in the present case there is nothing to suggest that the excavation 6 feet deep at the end of the plank walk in a railroad yard has any suitable or appropriate purpose, or that any engineering problem is involved in leaving such an excavation at the end of a plank walk designed for trainmen.

In this case a question for the jury was presented and we see no error in their finding.

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The proofs in this case further show that the employee did not know of this particular risk. He had not been in the yard since the excavation was made or the tracks were elevated, and there was nothing to warn him of the excavation at the end of his path. It can hardly be contended that such an excavation is one of the ordinary risks of railroading.

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We do not believe that when the charge of the court is examined as a whole that it can seriously be contended that the jury were permitted to speculate as to what duty existed upon the part of the railroad. Certainly a pit at the end of a

Opinion of Supreme Court.

path designed for workmen to walk upon is a danger to employees not familiar with the locality towards dusk or after dark. It would seem absurd to say that such a pit made the pathway reasonably safe.

The rule will be discharged.

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Rule for Judgment.

(Filed January 4, 1930.)

The Court having inspected the transcript and proceedings of the Passaic Circuit Court in the above stated cause, and the reason for reversing the judgment therein, and heard the argument of counsel and duly considered the same;

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IT IS ORDERED, that the judgment of the Passaic Circuit Court be in all things affirmed, and that plaintiff-appellee recover his costs herein against defendant-appellant and that the record be remitted to the Court below to be proceeded with according to law and the practice of said Court.

Rule entered this 4th day of January, 1930,

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On motion of

EDWARD F. MERREY,
Attorney for Plaintiff-Appellee.

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Notice and Grounds of Appeal.

(Filed February 20, 1930.)

To:

EDWARD F. MERREY, Esq.,
Attorney for Plaintiff-Respondent.

Sir:

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TAKE NOTICE that the defendant-appellant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following ground:

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The Supreme Court affirmed the judgment of the Passaic County Circuit Court in favor of the plaintiff-respondent and against the defendant-appellant, whereas said Supreme Court should have reversed said judgment of the Passaic County Circuit Court for one or more of the grounds of appeal filed in the said Supreme Court.

HOBART & MINARD,
Attorneys of Defendant-Appellant.

Dated, February 12, 1930.

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Service of the within Notice and Grounds of Appeal is hereby acknowledged this 17 day of February, 1930.

EDWARD F. MERREY,
Attorney of Plaintiff-Respondent.

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NEW JERSEY

Court of Errors and Appeals

ABRAM SHORTWAY,
Plaintiff-Respondent,

v.

ERIE RAILROAD COMPANY,
Defendant-Appellant.

**BRIEF IN BEHALF OF ERIE RAILROAD
COMPANY, DEFENDANT-APPELLANT.**

1.

Statement of the Case.

This appeal was taken from a judgment of the Supreme Court affirming a judgment of the Passaic Circuit Court entered on the verdict of a jury rendered in favor of the respondent (hereinafter called the plaintiff) and against the appellant (hereinafter called the defendant), in the sum of \$6,000 (pp. 44 and 51).

The action was brought by an employee of the defendant, for personal injuries sustained by him on November 11, 1927, caused by falling into a hole which, it is alleged, was unprotected and unlighted.

Motions for nonsuit and for a directed verdict in favor of the defendant were made on the ground that no negligence had been shown on the part of

the defendant, as charged in the complaint, and that the case came within the doctrine of assumption of risk. Both motions were denied (pp. 32, 33).

The case was thereafter submitted to the jury with the result above stated.

At the time of the accident plaintiff was employed by the defendant as a trainman and had been so employed for about twenty years (p. 7, lines 1-20).

He was one of the crew which was backing a train from a storage yard at Weehawken, N. J., to the passenger station at Jersey City, preparatory to its regular run in the commuters' service from Jersey City to Waldwick (p. 17, lines 20-30).

While the train was making the backward movement from Weehawken to Jersey City, plaintiff was at the rear platform of the rear coach, and when the train was about four and a half miles from Weehawken and about half a mile from the Jersey City station—near the main tracks—plaintiff observed after the train had passed a signal that the light was out and he accordingly applied the air and stopped the train (p. 11). This signal was about 40 feet from the plaintiff when the train came to a stop, and he got off and walked between the tracks over a planking consisting of pine boards in order to observe the condition of the signal.

While so doing he reached the end of the planking and stepped into a hole or an excavation (p. 14, lines 10-20; p. 15, lines 20-30), causing the injuries for which suit was brought.

2.

Grounds of Appeal.

The grounds of appeal in this court are that the Supreme Court affirmed the judgment of the Passaic County Circuit Court, whereas the Supreme Court should have reversed the judgment.

The original grounds are:

1. Error in refusing to nonsuit.
2. Error in refusing to direct a verdict.
3. Error in the charge to the jury as follows:

“Now, negligence requires that the plaintiff show that the defendant failed in some duty which it owed to him. The plaintiff says that it failed in the duty of providing a safe place to work or carry on his usual occupation. The law requires that the master shall exercise reasonable care in providing a safe place for the servant to work. You will note that the Court used the words reasonable care. That means that the master does not guarantee the safety of his employee, but the law does require him to exercise reasonable care to provide a safe place.”

4. Error in the charge to the jury as follows:

“Now what is reasonable care is a jury question. The law does not undertake to lay down any hard and fast rule as to what constitutes reasonable care, because it is a question for a jury consisting of twelve persons, such as you are, who are called here to determine what is or what is not reasonable care, that is, such care as should be exercised by a reasonably prudent person” (pp. 45, 46).

3.

Brief of the Argument.

I.

The defendant's motions for nonsuit and/or direction of verdict should have been granted because no negligence was shown on the part of the defendant as charged in the complaint.

Defendant moved for a nonsuit and for a directed verdict on the ground that no negligence was shown on the part of the defendant as charged in the complaint. These motions were denied and the trial judge left to the jury the question whether the defendant failed to exercise reasonable care in providing a safe place for the plaintiff to work (pp. 32, 33, 37).

For the purpose of considering this point it will be necessary to summarize the evidence in some detail.

The plaintiff was fifty years of age and had been working for the defendant as a railroad trainman since July, 1907 (p. 7, lines 1-9). On November 11, 1927, the day of the accident, he reported for work in Jersey City at 3.30 P. M. (p. 7, line 27). From Jersey City he went to the storage yard at Weehawken to back a train from the storage yard to the Jersey City terminal. A brakeman named White was also assigned to the train movement in question but this brakeman, having had no experience in the particular type of train movement, requested plaintiff to perform the duties which White otherwise would have performed (p. 9, lines 1-40). The train movement was regularly started and continued to the viaduct or the last switch

where the track from the Weehawken storage yard intersects the main tracks of the railroad, a distance of about four and a half miles from the Weehawken yards (p. 10, lines 29-35). There is a signal located in the immediate neighborhood of the intersection and plaintiff noticed the light of that signal was out. He stopped the train (p. 11, lines 1-25) about one-half car length past the signal (p. 12, lines 15-18). Quoting then from his testimony:

"And I stepped out to give the engineer a signal to pull ahead with the train, on account that you can't start if you are past the signal, you are blocking up another switch, so I got out and signalled the engineer to pull ahead, and he did. And as we stopped, why, we thought we heard the blade go down on this signal, but I wanted to be sure before I went on. I was going to go up there with my lamp to see how the switch was, whether the signal was down, whether the blade was down, or whether it wasn't" (p. 12, lines 18-30).

The signal could not be seen from the point where the end of the train was then standing because it was 40 feet away and there was no light (p. 12, line 32). He then walked between the tracks on some planking which is located upon a trestle over a public street (p. 13, lines 1-20). His testimony as to events occurring immediately thereafter is as follows:

"Q. Then you went over that, did you?

A. Yes, but at the end of the trestle I stepped off into the excavation, and there was an excavation there between the tracks.

Q. Could you see it? A. No, I couldn't see it. I had a lamp with me and the light was small, and on account of the condition you can't see right close to you with this

lamp. It shows about four feet away from you. The light is such you can see as you walk along; you can't see directly where you step.

Q. That was your regular trainman's lantern that you had, furnished by the railroad company? A. Yes" (p. 13, lines 25-40).

"Q. All right. Now you came along and you spoke about a hole, excavation. Just describe what that was. A. At the end of this planking was a hole, an excavation, left open, and that run down from the signal about 40 degrees. So this hole was about six feet deep right at this planking.

Q. Yes. A. And there was loose cinders on hard surface, and when I stepped down into this hole, my feet, the cinders went down, rolled down with me, and there seemed to be a wall under the planking, by the street—Jersey City Avenue, I think that is, and this wall was 14 feet high, and the cinders were laying piled up on top of that, some timbers under there.

Q. Was that under the tracks? A. Yes, under the trestle.

Q. Under the trestle? A. The cinders kept on sliding and riding down with me and my lamp was stuck into the cinders. So Mr. White saw me go down all of a sudden, and he came running up, and he got me by the hand and the shoulder and he pulled me out of the hole" (p. 14, lines 12-35).

"Q. Well, now, just describe this excavation? Could you find out what the purpose of it was? A. It seemed to me as if these tracks had been raised since I had been there before. I had a run for five years and I never had occasion to come this way, never had occasion to go to the yard for a train in that five years' time. They raised all these tracks. They put a terminal building in there and they raised up those tracks to

meet that terminal building, and this hole was left open and it hadn't been filled in between the tracks" (p. 14, lines 36-40, p. 15, lines 1-10).

The "hole" in question was *at the side of the track* along which his train was being operated and it extended down under the trestle to the wall of the public highway (p. 16, lines 10-23). The right of way between *the rails* of the track had been filled in and the only opening was between the tracks (p. 16, lines 30-35).

Under the foregoing facts, we submit that no negligence was shown on the part of the defendant.

The Federal Employers' Liability Act permits recovery upon the basis of negligence only. The carrier is not liable to its employees because of any defect or insufficiency in the right of way or equipment that is not attributable to negligence. The burden is on the plaintiff to adduce reasonable evidence to show a breach of one or more of the duties charged in the complaint and proven to be owed by the carrier to him with respect to the place where he was injured, and that his injuries resulted proximately therefrom.

The complaint charges the following duties and breach thereof as the basis of his right to a recovery:

(a) Failure to provide a reasonably safe place for the plaintiff to perform his duties;

(b) The defendant permitted an excavation, ditch or hole to remain in an open, uncovered, unlighted and dangerous condition.

The rule of law with respect to the duty of the master toward the employee is to exercise reasonable care to provide a reasonably safe place for the servant to work in and to furnish and adopt such means and appliances for the work to be performed by the servant that he might have reasonable safety and protection in his work, subject to the further rule that the servant takes upon himself all the risks of danger incident to the employment which are obvious or could be perceived by the exercise of the servant's senses and the use of ordinary care and circumspection.

The rule is further qualified so as to limit the place to such parts of the premises as the master has prepared for the use of the servant and to such other parts of the premises as the master knows or ought to know the servant is accustomed to use while performing the service.

Essex County Electric Co. v. Kelly, 57 N. J. L. 100;

Van Steenburgh v. Thornton, 58 N. J. L. 160;

Harris v. United Steamship Co., 75 N. J. L. 861.

The defendant offered no evidence at the trial of the case to contradict the plaintiff as to the condition of the place of the accident, as there was nothing in the evidence from which the jury could find a want of care toward the servant with respect to the place provided by the master for the servant to perform his service. The plaintiff, in describing the hole, said that somewhere beyond the end of the planking upon the railroad trestle over the public highway there was an "excavation" that extended downward from the signal on an angle of about forty degrees, there being loose cinders

on a hard surface. The "excavation" extended downward toward Jersey Avenue, the public highway in question, underneath the trestle (p. 14, lines 12 *et seq.*). When asked with respect to the purpose of the "excavation," the witness said:

"It seemed to me as if these tracks had been raised since I had been there before.
* * * They raised all of these tracks. They put a terminal building in there and they raised up those tracks to meet that terminal building, and this hole was left open and it hadn't been filled in between the tracks" (p. 14, lines 36 *et seq.*).

The right of way between *the rails* of the tracks had been filled in (p. 16, lines 30 *et seq.*). The elevation of the tracks occurred some long time before.

"It might have been two years; might have been five years. I don't know. They started tearing down in there and erecting that terminal building" (p. 30, lines 37 *et seq.*).

Assuming the plaintiff to have correctly described the place of his injury, he has pictured the usual railroad slope upon an elevated track. The conditions, apparently, were constant and of long standing. He said that he slid down the slope upon the loose cinders and that his lamp, while he was sliding down, became caught in the cinders—not the sudden drop a person would have described were he to fall into an excavation. There is nothing in the testimony which would justify the jury in finding that a condition existed other than one which necessarily resulted from ordinary railroad maintenance and construction.

The United States Supreme Court, in *Delaware, Lackawanna & Western R. R. Co. v. Koske*, 279 U. S. 7, 73 L. Ed. 578, said:

"Fault or negligence may not be found from the mere existence of the drain and the happening of the accident. The measure of duty owed by defendant to plaintiff was reasonable or ordinary care having regard to the circumstances. *Patton v. Texas and Pacific Ry. Co.*, 179 U. S. 658, 664. There is no evidence that the open drain was not suitable or appropriate for the purpose for which it was maintained or that there was in use by the defendant or other carriers any means for the drainage of railroad yards which involved less of danger to switchmen and others employed therein. Defendant was not bound to maintain its yards in the best or safest condition; it had much freedom in the selection of methods to drain its yard and in the choice of facilities and places for the use of its employees. Courts will not prescribe standards in respect of such matters or leave engineering questions such as are involved in the construction and maintenance of railroad yards and the drainage systems therein to the uncertain and varying judgment of juries. *Toledo, St. L. & W. R. Co. v. Allen*, 276 U. S. 165, 170. The evidence is not sufficient to warrant a finding that the defendant was guilty of any breach of duty owed to plaintiff in respect of the method employed or the condition of the drain at the time and place in question."

Evidence which leaves the question of negligence in the realm of speculation is not enough to require a case to be submitted to the jury.

Chicago etc. R. Co. v. Coogan, 271 U. S. 472; 70 L. Ed. 1041;
Gulf etc. R. Co. v. Wells, 275 U. S. 455;
 72 L. Ed. 370;

New York Central R. R. v. Ambrose, 280
U. S. 486; 74 L. Ed. — (7 U. S. Adv. Op.
276);

Atchison etc. Ry. Co. v. Toops, 10 U. S.
Adv. Op. 422.

The Supreme Court, in its opinion, after discussing the *Koske* case, *supra*, said that there was nothing to suggest that the excavation at the end of the walk had any "suitable or appropriate purpose" (p. 50, lines 20-28).

We submit that this argument shifts the burden of proof from the plaintiff to the defendant; as shown above, the plaintiff's description of the place of the accident indicates the usual slope of elevated tracks. The plaintiff failed to prove that this condition was other than that which necessarily resulted from such construction.

In addition to the plaintiff's failure to show that the place itself was negligently maintained, he offers no evidence which would justify the jury in finding that a performance of his duties required that he go to the place where the injury was sustained by the way he adopted. The end of his train was forty feet from the signal which he was going back to inspect; he stopped the train at that place and he left the train voluntarily to inspect the signal. He says nothing whatsoever about his duty under the circumstances and explains his purpose by saying that he wanted to know if the blade was up or down. He admits that the right of way between the rails of the track along which his train was approaching was filled in and that it might have safely been used (p. 16, lines 35-40). He says the "excavation" was between the tracks—at the side of the track along which his train was being operated, and he gives no reason for using the part

of the right of way where the danger existed. In addition to that, he certainly did not exercise his ordinary powers of observation as he walked along, and if the rule has been correctly stated by the Court of Errors and Appeals in the case of *Van Steenburgh v. Thornton, supra*, the duty of the master is with respect to conditions which the servant might not have perceived by the exercise of his senses and the use of ordinary care and circumspection. He admits he had a lighted lamp which, although it would not light up the ground immediately at his feet, would light up the ground a few feet ahead.

II.

The defendant's motions for nonsuit and/or direction of verdict should have been granted on the ground that the plaintiff assumed the risk.

Motions for nonsuit and direction of verdict were made on the ground that the case came within the doctrine of assumed risk (pp. 32, 33).

The servant assumes all the ordinary and usual risks incident to the employment and all risks which he knows or may in the exercise of reasonable care know to exist which are not latent or concealed dangers.

Conway v. Furst, 57 N. J. L. 645;

McDonald v. Standard Oil Co., 69 N. J. L. 445.

As was stated in the case of *Conway v. Furst, supra*:

"The rule is well settled that, where an employment is attended with danger of

which those who enter into it have notice, they cannot, if injured, recover compensation from their employer."

In *Harrison v. Central R. R. Co.*, 31 N. J. L. 293, at page 296, the court said:

"The servant, when he undertakes to perform any particular service, assumes, as part of his conventional obligations, the ordinary perils which, in the nature of things, are incident to such service."

Necessarily a railroad brakeman contemplates the ordinary risks resulting from the slopes of an elevated railroad right of way. The danger is an obvious one and the presence of loose stone or cinders upon the more or less hard surface of the slope is not an unusual condition. The plaintiff passed the place of the accident on many occasions but he says he did not particularly notice conditions except that the right of way was being raised a distance of approximately ten feet to meet the new grade made necessary by the terminal building. His experience over a period of more than twenty years as a railroad brakeman certainly made him familiar with the necessity for slopes and he must have had in mind at the time of his accident the probable existence of the condition which he says caused his injury.

The case does not differ materially from the case of *D. L. & W. R. R. Co. v. Koske*, *supra*, in which the United States Supreme Court held that a verdict should have been directed in favor of the defendant. In that case the plaintiff charged that the company negligently permitted an open, uncovered, unlighted and dangerous hole to exist between certain parts of its tracks and that while the plaintiff was alighting from his engine in the

course of his employment he fell into the said opening. He was generally familiar with railroad operation, having been an employee for more than twelve years. The hole in question was a depression varying in depth from eight to eleven inches and from eight to twenty-four inches in width, extending longitudinally between the tracks and at places running between the ties under the tracks. He claims that as he alighted from the engine and fell into the hole, it was so dark he could not see. He thought everything was level and did not expect to find a hole in that place. The court, speaking of the doctrine of assumed risks, said :

“And, except as provided in Section 4 of the Act (Federal Employers’ Liability Act), the employee assumes the ordinary risks of his employment; and, when obvious or fully known and appreciated, he assumes the extraordinary risks and those due to negligence of his employer and fellow employees.”

III.

The judgment of the New Jersey Supreme Court affirming the judgment of the Passaic Circuit Court should be reversed and a new trial ordered.

HOBART & MINARD,
Attorneys of Defendant-Appellant.

GEORGE S. HOBART,
of Counsel.

New Jersey Court of Errors and Appeals

May Term, 1930

No. 51

Abram Shortway,
Plaintiff-Respondent,
vs.
Erie Railroad Company, a corporation,
Defendant-Appellant.

On Appeal from
Supreme Court

BRIEF IN FAVOR OF ABRAM SHORTWAY Plaintiff-Respondent

STATEMENT OF THE CASE

This is an appeal from a Supreme Court judgment affirming a judgment of the Passaic Circuit Court.

The plaintiff sued the defendant, the Erie Railroad Company in the Passaic Circuit Court to recover for injuries resulting to him during his employment as a passenger trainman on the railroad occurring in a movement in interstate commerce. The action is brought under Federal Employers' Liability Act (45 USCA Par. 51 59; Compiled Statutes Par. 8657-8665). The accident happened to plaintiff near the Jersey City terminal of the railroad company. The company maintains a storage yard at Weehawken, about five miles away from the Jersey City Station. Train crews report at the Jersey City station and are transported to the storage yard five miles away, where they find the

trains they are to operate. Each crew then backs its train into the station at Jersey City where it is loaded with commuters coming from New York who are to be distributed at points in New Jersey.

On November 11th, 1927, the defendant reported at the Jersey City station at 3:30 o'clock in the afternoon and was taken in a coach to the storage yard. At this point he boarded a train which was made up and to which the engine was attached. The engine backed the train into the station and during this operation it was the duty of one of the trainmen to station himself on the rear platform and control the movement of the train which can be done by means of an air brake. This air brake is sufficiently powerful to stop the train, even if the engineer does not shut off the power in the engine. Ordinarily in this movement the plaintiff would have been on the second car of the train and another brakeman should have had control on the rear platform. On this evening, the other brakeman named White was unfamiliar with the operation of the air brake and under the rules of the company (Case, page 10), it was the duty of the plaintiff to take charge. White and the plaintiff were on the rear end of the train and as it was about at the main tracks and within a half mile from the passenger station, the plaintiff noticed that they had passed by a signal which was unlighted. He immediately stopped the train and signalled to the engineer to pull in the opposite direction so as to clear the signal. The engineer stopped with the rear of the train about forty feet away from the signal. It was then about 5:30 o'clock, in November, and was dark. The plaintiff could not see the signal because

the light on it was out. It was his duty to see that the train reached the station in a few minutes and so he got off the rear end of the train and started towards the signal to see what position it was in so that he could tell whether it was safe to continue the movement into the station. There were two sets of tracks at the point where he alighted and he got off the train in the middle, that is to one side of the rails upon which his train was located and between that set and the other. Just beyond him were the many sets of tracks of the terminal yard. As he alighted, he found that he was on a trestle crossing Jersey Avenue, Jersey City, and at the point where he stepped off the train, there was a planking across this trestle put there for the employees of the railroad company to use as a walk. This planking extended over the trestle between the tracks. The plaintiff had a lantern in his hand furnished by the railroad company, but it gave a poor light. When he came to the end of the trestle, he stepped off the planking into a large excavation between the tracks. This was not any slope or embankment. Plaintiff says it was a hole or excavation. He was able, with the assistance of the other brakeman, to get back to the train and bring it into the Jersey City station and continue the operation for that evening.

The plaintiff recovered a verdict of \$6000.

The defendant argues that:

1. Negligence on the part of the defendant was not proved.
2. Even if such negligence was proved,

the risk of the same was assumed by the plaintiff.

Below exceptions were taken to the charge of the court, but no argument thereon was made on that ground in the Supreme Court. See opinion, case, Page 47 line 36. We assume that no argument based on supposed errors in the charge can or will be made.

I.

DEFENDANT WAS NEGLIGENT

The defendant was operating a railroad in interstate commerce and the task in which the plaintiff was engaged at the time of his injury was also in interstate commerce. This is admitted on both sides.

On November 11th, 1927, the plaintiff reported as required at the main passenger station of the defendant at Jersey City (page 7, line 30). He was then transported to the storage yard of the company, a point about five miles away. He was in company with another brakeman named White. They found their train in the storage yard made up. It contained ten coaches and an engine was attached. The plaintiff and White boarded this train and at the proper time the engineer commenced to back the train in the direction of the passenger station five miles away. Since in this operation the engine was at the rear of the train, it was necessary for one of the trainmen to stand upon the rear platform and control the movement of the train by an air braking device. This opera-

tion is described on page 9. Ordinarily, it was the duty of White to operate this device and the plaintiff should have been in the second car of the train from the engine so as to transmit signals to the engineer. White was not familiar with the duties and under the rules of the company, it became the duty of the plaintiff to go to the rear of the train and take charge of the backing operation at that point (see Case, page 10, lines 2 &c). With the two men on the end of the train, the backing operation proceeded and continued for four and one-half miles or until the train was about backing into the yard at the station. Just about this point, the plaintiff discovered that they had passed a signal. He immediately applied the air and stopped the train as it was dangerous to proceed past this signal without knowing how it was set. It appears that the lamp on the signal was out, so that they could not observe from their position whether it was set against them or in their favor. The plaintiff thereupon signalled for the engineer to pull the train ahead or in the opposite direction from which it had been backing, so that they could clear the signal. (See Case, page 11.) The train stopped again, so that the rear platform on which plaintiff stood, was about forty feet from the signal which was too far away for him to see it. It was then 5:30 o'clock on November 11th and very dark. As he stopped, he thought he heard the blade of the signal go down and wanted to be sure, so he stepped off the train and advanced toward the signal to examine it. (See Case, page 12, line 20.) At the point where the train stopped, there were two sets of switch tracks

leading on from the storage to the main yard and also other main line tracks. (See page 15, line 18.)

Plaintiff, in answer to a question by the court, said that when he stepped off the train, he was between different sets of tracks, not between the rails of the tracks upon which his train was operated. He stepped off the side and beyond was another set of tracks which paralleled the ones upon which his train was located. Just at this point, the railroad or the tracks upon which the train was being operated, crossed a trestle and in order to get the signal, the plaintiff had to cross this trestle which was over a city street known as Jersey Avenue. When plaintiff got off the train between these two sets of tracks, he stepped upon a planking. This planking ran over the trestle and was put there for railroad men to walk on between the tracks. (See page 13, lines 18 etc.) Plaintiff continued on this planking across the trestle and naturally would have proceeded after that between the tracks until he reached the signal, but the planking ended there and he stepped off into a large hole or excavation which he could not see (see page 14). The testimony is that at the end of the planking there was a hole or excavation left open which ran down from the signal about forty degrees. This hole was about six feet deep at the planking and there were loose cinders on a hard surface. When he fell into the hole, he rolled down it, apparently back towards the trestle, so that if his falling was not stopped, he would have gone over into the street below. The other trainman, White, ran up and got him

by the hand and shoulder and helped him out of the hole. His description of the hole is repeated on page 15 near the bottom, in which he says "they put a terminal building in there and they raised up those tracks to meet that terminal building, and this hole was left open and wasn't filled in between the tracks." There was no signal, no light or warning of this hole. (See page 15, line 25.)

The walk or planking led right up to the edge of the hole and this hole, instead of being filled, which it should have been, was open—they hadn't filled it in. (See Case, page 15, line 30.)

On page 17, plaintiff in answer to question said that planking was put thereto walk on and the hole was where it came to an end. Plaintiff did not wait to examine the hole very carefully after he fell into it because it was then after 5:30 o'clock and it was necessary that the train be in the station so as to leave at 5:45. He had very little time to get his train back into the station. Defendant company of course knew all about the happening of this accident; knew if it was a hole of the kind described and yet it produced no witnesses to deny what the plaintiff said. His evidence stands uncontradicted, and no reason for a hole of this character is given by the defendant. It was not a drain such as was referred to in the Koske case, (cited by defendant and referred to below) nor is there any evidence in this case that the hole served any useful purpose or was necessary for the operation of the railroad. The thing speaks for itself. The plaintiff walked along a planking arranged for the railroad men to walk

upon. This planking stopped at the end of the trestle where there was a hole six feet deep at the least and leading under the trestle to a wall fourteen feet high. The planking was provided for the men to walk upon. It must have been expected that the employees coming along between those two sets of tracks would walk over the planking. Occasions must arise when trainmen must alight from the train between these sets of tracks and on this trestle and walk along it and anyone not knowing of the hole was sure to fall into it.

The Supreme Court examined the evidence and were of the opinion that the jury were right in finding negligence on the part of the defendant.

It seems to us there can be no question whatever that the maintainance of a hole at this particular point was gross negligence on the part of this railroad company.

In one place in defendant's brief, this hole is referred to as a usual railroad slope upon an elevated track. This is not the case. If plaintiff went over a slope at the side of an elevated track it might be a risk which he assumed, and that would not have been negligence on the part of the defendant; but this was not the side of the tracks, it was between the tracks—in the middle and where no one would expect a hole to be. There is no question of contributory negligence in this case because of the provision of the Federal Employers' Liability Act. The rule applied is one of comparative negligence. Contributory negligence on the part of the plaintiff would not defeat his action

and would only reduce the amount of the verdict. The errors assigned in this case go only to the right of the plaintiff to maintain his action and, therefore, we need not concern ourselves with the question about contributory negligence and whether the plaintiff was guilty thereof in not observing the hole before he fell into it. It is sufficient for us to point out the evidence which shows the defendant was guilty of negligence and this we feel we have done. We are not unmindful of the case of the D. L. & W. R. R. Company vs. Koske, 49 Supreme Court Reporter, page 202, decided February 18th, 1929. In that case, the plaintiff while alighting from an engine in the course of his employment stepped into an open ditch or trench and was injured. This ditch varied in depth from 8 to 11 inches and in width from 8 to 24 inches. It was used for the purpose of draining the yard of the railroad company. The court said there was no evidence that the open drain was not suitable or appropriate for the purpose for which it was maintained or that there was in use by the defendant or other carriers any means for the drainage of railroad yards which involved less of danger to switchmen and others employed therein. It would seem, therefore, that in the Koske case, the excavation of the hole into which Koske fell was one maintained by the railroad company for a useful purpose.

Now it is well understood that where drains of this kind are maintained, or where signals are maintained close to the track, that these are dangers which the railroad men assume. In the Koske case, it is very plainly stated that the court

believed that the plaintiff knew all about the drain and assumed all the dangers incident thereto. Towards the end of the opinion, it adverts to the fact that he worked in daylight for a long time around this yard. The court said, "the evidence requires a finding that he had long known the location of the drain and its condition of the place in question. Plaintiff must be held to have fully understood and appreciated the risk." The distinction, between the Koske case and the present one is that in the Koske case the excavation into which he fell, served a useful purpose and the court held it was not negligence to maintain a drain for a useful purpose unless there was evidence that it could be done in a better way while in the present case the plaintiff did not assume the risk of the dangers incident to the excavation because he did not know of it. In the Koske case, the court found that he must have known. If the evidence which the plaintiff produces as to the nature of this hole is meagre it is because of his lack of familiarity with it. Why the hole was there and whether it had any useful purpose or not, could only be told by the defendant and the defendant refuses to say anything about it. The inference is that this hole had no particular use there and under these circumstances, only slight evidence is required from the plaintiff. The plaintiff is a railroad man familiar with the operation of railroads. He says that he knows that the tracks had been raised at that point and after his experience with the hole, he should be able to tell us whether that hole was there for any useful purpose or not. He says the hole was there because after the company raised the tracks, they had failed to fill in be-

tween the tracks and left it so. Here is a direct statement on the part of the experienced trainman from which it can be inferred that this hole served no useful purpose. It is not contradicted by the defendant nor is it shown or claimed this hole served any useful purpose. The defendant could have produced evidence to show what that purpose was, if there was a purpose, and, in view of the statement of the plaintiff, it was their duty to do so or their failure must be considered an admission that his story is true.

The law on the question of the duty of the master to provide a safe place for the employee, hardly needs citation. However, the following cases are in point:

214 United States, at 249—Kreigh vs. Westinghouse, Church, Kerr & Company.

"It is the duty of the master to use reasonable diligence in providing a safe place for his employes to work in and to carry on his business; and the employe may, in the absence of notice to the contrary assume that the master will use reasonable care in furnishing appliances for carrying on the business. Choctaw & Oklahoma R. R. vs. McDade, 191 U. S. 64."

"The duty of the master to provide safe place and appliances for his employes is a continuing one and must be exercised whenever circumstances demand it. Sante Fe & Pacific R. R. vs. Holmes, 202 U. S. 438; and this applies where the workmen are engaged in work more or less danger-

ous and it is only a matter of using due skill and care to make the place and appliances safe." *Choctaw & Oklahoma R. R. vs. McDade*, 191 U. S. 64.

Burns vs. Del. & Atl. Telegraph Co., 41 Vroom.

70 N. J. Law, page 749: "It is one of the duties of an employer to exercise reasonable care that the place in which he sets his servant to work, and the system or method adopted by the employer for the doing of the work, shall be reasonably safe for the servant and free from latent dangers known to the master or discernible by an ordinarily prudent master in the circumstances." *Western Union Telegraph Co. vs. McMullen*, 29 Vroom, 155.

39 C. J., page 319: "The two terms 'reasonably safe place' and 'reasonable care in providing a safe place' as applied to a master's duty to his servant as a general rule are used interchangeably and an instruction embodying the former phrase will not be held erroneous as prescribing too high a degree of care." *Midland Valley R. Co. vs. Cox*, 69 Okl. 123, 125, 170, P. 485; *Great Western Coal, etc., Co. vs. Malone*, 39 Okl. 693, 698, 136, P. 403.

**PLAINTIFF DID NOT ASSUME THE RISK OF
THE INJURIES IN QUESTION.**

United States Supreme Court has laid down the duty of the plaintiff in cases of this kind. In *Chesapeake & Ohio R. R. vs. DeAtley*, 241 United States, page 310 at page 315, the court said:

"According to our decisions, the settled rule is, not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them." *Gila Valley Ry. Co. vs. Hall*, *Seaboard Air Line v. Horton*.

This citation was quoted with approval in *Chicago R. I. and St. P. Railroad Company vs. Ward*, 252 United States, page 18 at page 21.

Following the above rule, let us examine the evidence to see whether or not the plaintiff in the case assumed the risk of the injury which he received. The plaintiff had never seen the hole in question (page 29, line 30). The plaintiff says that he never saw the hole and had no occasion to

notice it before. He had been on the run which took him over this particular place for about three days. (Page 31, line 20 &c.) Before that time, for five years he had had a different kind of a run that did not require him to go to the storage yard. (See page 14, line 40.) His train was rolled down to the depot. (See page 31, line 25.) During the three days that he had this run in question and did go over this locality with the exception of the run upon which he was injured, he was not in a position to observe the hole. The train passed over that locality after dark and on other occasions, he was in his regular position in the second coach behind the engine. (Page 31, line 35.) At these times when he passed over this place in the second coach, it was dark. The electric lights on the train were lighted and it would have been practically impossible for him to have seen it. (Page 17, line 10.) Under these circumstances there was no occasion for plaintiff to have observed that there was a hole at the point where he was injured.

Under the rule of the United States Supreme Court in the cases above cited, he had a right to assume that there was no such hole there, or that he would be warned of it if there was. There was no light upon it or any warning of any kind. (Case, page 15, line 25.)

The defendant relies upon the case of the D. L. & W. Railroad Company vs. Koske, 49 Supreme Court Reporter, page 202; but in that case the court held it was not negligent for the company to maintain the drain or ditch into which Koske

stepped. A drain of some kind was necessary and there was no evidence that another kind of drain would be safer or that other kinds were used. The court also found that Koske assumed the risk of the danger from this particular drain or ditch. The condition of the ditch in that case was constant and of long standing. Koske had worked in the vicinity for some time every morning during the Spring and Summer months, and during one year he worked days. The court at the end of the opinion said:

“The evidence requires a finding that he had long known the location of the drain and its condition at the place in question.”

There is no evidence to show how long this particular hole in the case at bar existed. The plaintiff says that he knew that they had been raising the tracks at that point, but that was at a period from two to five years before the accident. (See Case page 30, line 32.) There seems to be no similarity between the Koske case above and the case at bar. The evidence in the Koske case shows that he should have known of this excavation and therefore he took the risk of it while there is not any evidence that the plaintiff in our case knew anything about this hole before he fell into it. There is no evidence to show that a hole of this kind was necessary or was likely to be found at the point where it was located. There seems to be no justification for this particular hole at this point. If there was need of a hole of this kind, there should have been a warning of some kind to apprise trainmen of its presence.

There is no evidence to show that it was the practice of the road to have holes of this kind at places like this so that it could be said that plaintiff might expect to find one in such a place.

We respectfully submit the Supreme Court should be affirmed and the appeal dismissed.

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