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New Jersey Court of Errors and Appeals

JOSEPH CICALESE,
Plaintiff and Defendant in Error,

vs.

LEHIGH VALLEY RAILROAD COMPANY,
Defendant and Plaintiff in Error.

On Writ of Error

Brief for Defendant in Error

The plaintiff in error alleges that some twenty errors were committed on the trial of this case. These alleged errors will be taken up in the following order :

1. Assignments of error relating to the admission of evidence.

2. Assignments of error relating to the fact that the accident happened after working hours.

3. Assignments of error relating to the effect of the promise to repair made by the foreman, Sullivan.

4. Assignments of error relating to the causal connection between the alleged defect and the accident.

5. Assignments of error relating to the use of the hand-car after knowledge of defect.

The first-class of assignments of error to be considered relate to the refusal of the court to allow the defendant's witnesses to answer certain questions.

These errors are contained in the assignments 19 and 20 and read as follows :

"Nineteenth:—There is also error in this, to wit, for that the said judge to whom, etc., refused to permit the defendant's witness, Louis Somma, on direct examination, to answer the question: "Well, could it have come out?"

"Twentieth:—There is error also in this, to wit, for that the said judge to whom, etc., refused to permit the defendants witness, Michael Slonski, on direct examination, to answer the question: "Could the handle come out as long as that pin was in it?"

The questions asked do not relate to any fact within the defendants knowledge. The witness was asked not whether the handle did come out, but whether it could come out. The question therefore required an opinion to be given by the witness. Opinion evidence is admissable only in cases where the jury are unable of themselves to form an opinion. The opinion may be given by an expert or by a layman. The witness in this case made no attempt to qualify as an expert, so his testimony is that of a layman and it must be either excluded or admitted according to the rules relating to the admission of such opinions. The rule is stated in *Greenleaf on Evidence, 16th Ed., vol. 1, p. 550*, as follows:

"Opinions are receivable, first, from persons having special skill, whenever that special skill enables them, better than the jury, to draw inferences on the subject; secondly, from persons who have no special skill but have personally observed the matter in issue, and cannot adequately state or recite the data so fully and accurately as to put the jury completely in the witness's place and enable them equally well to draw the inference."

"The opinions of witnesses are never received as evidence where all the facts on which such opinions are founded can be ascertained and made intelligible to the court or jury."

Clark v. Fischer, 1 Page, ch. 174.

Koccis v. State, 27 Vr., at p. 47.

Castner v. Sliker, 4 Vr., 507.

It is clear from these cases that unless the jury need the evidence to make their deductions, the evidence is excluded.

Therefore the evidence was properly excluded.

The next class of assignments of error relate to the fact that the accident happened after working hours.

The plaintiff in error contends that after working hours the employee is no longer a servant, and so the liability of the defendant ought not to be based on that relationship of master and servant.

The assignments of error on this point are the first, second and fifteenth.

The first assignment of error is the refusal to direct a non-suit on the ground that the alleged accident happened after working hours, at a time when the relation of employer and workman did not exist between defendant and Plaintiff.

The second assignment of error is for failure to direct a verdict on the ground that it appears plainly from the evidence that at the time of the accident the plaintiff's workday had finished, and that if any liability whatever attached to the defendant for the occurance that subsequently took place, it is a liability that arises not under rules govering the relations of master and servant, but under rules govering a relation of inviter and invitee or licensor and licensee.

The fifteenth assignment of error is as follows:

> "There is error also in this, to wit, for that the said judge to whom, etc., particularly refused to charge the jury, although requested so to do by the defendant as follows: (16). The accident having

occured after the plaintiff's work day had closed, and there being no evidence of any contract by the defendant to carry the plaintiff to and from his work, the relation of master and servant no longer existed between them, and if any liability attaches to the defendant for the accident, it arises by reason of the plaintiff's being a mere licensee of the defendant, in which event there would only be responsibility in case of willful negligence. There being no proof of this there must be a verdict for the defendant."

The central point of errors here assigned is that the relation of master and servant terminated at the termination of the working day. The law is not in accord with this view.

"The obligations of the master continue in force not only during all the time in which his servants are actually engaged in his service, but also during the time reasonably occupied by them on his premises in going to and returning from his work, and in intervals of rest between."

Sherman & Redfield on Negligence, Sec. 190.

"When laborers are returned by an employer to their homes by means of a hand-car a number of miles from work after working hours, the employer is liable for an accident to an employee while returning home, due to the negligence of the foreman in charge of the men, the relation of master and servant existing though their day's work is over."

Thompson on Negligence, Vol. 4, Sec. 3751.

"The duty of a master respecting the provision of a safe place of work for his workman extends to providing a reasonably safe mode of entrance and exit from the place at which the workman is employed."

Haber v. Jenkins Rubber Co. 43 Vr., 171.

Also *Ewald v. Chicago, 36 N. W., 12.*

Union Trust Co., v. Thomason, 25 Kan. 1.

Wilson v. Banner Lumber Co., 108 La., 590.

These authorities make it clear that the relation of master and servant does not terminate automatically at the close of the working day, but that the relationship continues so as to compel the master to furnish his servant a safe exit and entrance to the place of employment.

By the facts of the case, the plaintiff was returning from work on a hand-car furnished by the Railroad Company for that purpose, when he was injured. Therefore the relationship of master and servant which includes not only the period of the working day, but also the going to and returing from work, was still in force. His rights therefore should be determined according to the rules of that relationship.

Therefore there was no error in the refusal of the judge to charge that the relation of master and servant had terminated, as desired by the assignments of error one, two and fifteen, and the judge's statement of the law as laid down in the third assignment of error was correct.

The third class of assignments of error relate to the causal connection between the defect and the injury.

The fifth assignment of error is as follows:

> "There is error also in this, to wit, for that the said judge to whom, etc., particularly refused to charge the jury, although requested so to do by the defendant as follows: (3) There is nothing in the evidence to indicate that the alleged defect in the handle of the hand-car could have or did cause the plaintiff to fall from the car, and in the absence of such evidence the verdict should be for the defendant."

The defect alleged is that the handle used for pumping

the hand-car was loose. That it was loose is admitted by the testimony of Cornelius Sullivan for the defendant. (Case p. 75, 1. 20). That the defect did cause the fall and accident of the plaintiff is testified to by the plaintiff as follows:

> "While I was pumping—he describes that there was a bolt here and a bolt there (indicating) and the handle moved back, and this finger caught in a little ring." (Case p. 10, 1. 28)

Also Joseph Genaro testified that (Case p.41, 1. 23-26)

"A. While we were pumping the handle slipped over and fell."

"Q. Who fell—what fell—the handle?

"A. Joe Cicalese."

Also case P. 49, 1 .20.

"A. Yes, sir; the handle came out altogether; I went down, too."

The testimony of the plaintiff and Genaro is that the accident was caused by the loose handle. Therefore it cannot be said that "there is nothing in the evidence to indicate that the alleged defect caused the accident."

So that the refusal of the judge to charge as requested was correct.

The next group of errors to be considered are those relating to the promise made by Cornelius Sullivan to repair the hand-car.

The law is that the duty of the master to furnish suitable materials to work with and a suitable place to work. The master is responsible for any injury arising from defective material, etc. However, if the defect is one which is apparent the servant assumes the risk. There is one exception to this rule, and that is, when the servant complains to the master of the defect and the master promises to repair. The servant may then use the in-

strument without being held to any assumption of risk and the master is liable for injuries.

Dowd v. Erie R. R. Co., 41 Vr., 45.

Dunkerley v. Webendorfer Machine Co., 42 Vr., 60.

The promise to repair may be made by the master himself or by some one authorized to make promises for him. In the two cases cited above the promises were made by a foreman and superintendent respectively. The authorization may be either an express or an implied one, and whether there is such authorization is a matter of fact for the jury. In the case at bar there is no express authorization on the part of the Lehigh Valley Railroad Company for Cornelius Sullivan to promise repairs. As to implied authorizations, the situation was, that Sullivan was then or had been a short time previously the foreman of the gang in which the plaintiff was working. He was the man in charge of the work and the only representative of the master who was on the spot where the work was being conducted. From the situation of the parties an implied authority might be inferred by the jury. In relation to this the judge charged as follows: (Case p. 116, l. 23)

> "The question is whether the position of Mr. Sullivan was such that the plaintiff was justified in relying upon his promise as upon the promise of one authorized to speak for the company; whether the conferring of such authority by the company may be fairly and reasonably inferred from the facts in proof, considering the position of the foreman, the work which his employment required him to perform, the nature of the amendment required, the character of the injury and the relation of the hand car to the work. This, I suppose is a question for you, and I leave it to you; whether the inference is a legitimate and reasonable inference that Sullivan was the man to do it."

The judge in this charge states the law clearly and leaves it for the jury to determine whether Cornelius Sullivan was impliedly authorized to make the promise to repair. The jury have found that he was so authorized.

There was therefore no error in the refusal of the judge to non-suit on the ground "that it does not appear that Sullivan, to whom it is said the plaintiff made complaint of the alleged defect, had any authority to bind the defendant by a promise to repair; that it appears that said Sullivan was a fellow-servant of the plaintiff." For it seems from the situation of the parties the authority might be implied and the jury have found such authority.

The seventh assignment of error is as follows;

> "There is error also in this, to wit, for that the said judge to whom, etc., particularly refused to charge the jury, although requested so to do by the defendant, as follows: (5) The so-called superior servant rule has never been adopted in this state, and the boss, Cornelius Sulivan, was a fellow-servant, of the plaintiff, and the defendant is not bound by any alleged promises to repair made by Sullivan in his capacity as boss, and unless the jury find he had in fact been authorized by the defendant to act as its representative in the matter of making such promises, the verdict must be for the defendant."

This request to charge requires that Sullivan have express authority to promise repairs to bind defendant. This is not broad enough. Sullivan could bind the defendant if he had either express or implied authority and the judge had so charged. Therefore there is no error in his refusal to give this charge as requested.

The eighth assignment of error is as follows:

> "There is error also in this, to wit, for that the said judge to whom, etc., particularly refused to charge the jury, although requested so to do by the defendant, as follows: (9) A section boss or fore-

man, such as Cornelius Sullivan was, is not, by virtue of his position, authorized to bind the railroad company, his master, by a promise to repair such as the plaintiff claims was made. There is no evidence to indicate that he was clothed with authority by the railroad company to make such promises, and in the absence of any such evidence the verdict should be for the defendant."

This request states that there is no evidence that he (Sullivan) was clothed with authority to make promises. Evidence of express authority was not necessary and from the evidence of the position in which the railroad company had placed Sullivan, an authority to promise repairs might be implied. Therefore as the request to charge did not allow for this implied authority from the circumstances in which the railroad company had placed the plaintiff and Sullivan, it was not broad enough and was rightly refused.

The ninth assignment of error is as follows:

"There is error also in this, to wit, for that the said judge to whom, etc., particularly refused to charge the jury, although requested so to do by the defendant as follows: (10.) The evidence is that the plaintiff made his alleged complaint to Sullivan, and received Sullivan's promise to repair, after the men had quit work for the day. Even if Sullivan had been clothed with authority by the railroad company to bind it by promises to make repairs, such authority would not extend beyond the working day and any promise to repair after the men had quit work is not binding on the defendant, and therefore there can be no recovery by the plaintiff."

The plaintiff in error here alleges that as the working day was past the promise of Sullivan was ineffective. It has been shown above that the relationship of master and servant continued while the servants are going to and coming from their employment.

Sherman & Redfield on Negligence, Sec. 190.

Therefore when the promise was made the relationship of master and servant still continued and so the promise was effective, and the refusal to charge that the promise was ineffective was correct.

The next class of assignments of error to be considered are those relating to the use of the hand-car by the plaintiff. The master under his general obligations to furnish a safe place to work and proper materials is bound to furnish to the servant a reasonably safe means of exit and entrance to the place where the servant is to work.

Haber v. Jenkins Rubber Co., 43 Vr., 171.

It is not necessary that a servant be compelled to use the tools supplied or the means of exit offered. It is enough that the master offers these means as reasonably adopted for the purpose, if the servant then uses them and they are defective, the master is liable.

The situation in this case was that the workmen were filling in the tracks near the Bayonne Bridge. Now it was the duty of the railroad to furnish a safe access to this place. The railroad company furnishes hand-cars to enable the workman to get to the place. It offers them the car as a means of exit from the place of employment. Therefore it is the duty of the company to furnish sound and not defective hand-cars, and for failure to do so it will be liable.

The tenth assignment of error is as follows:

> "There is error also in this, to wit, for that the said judge to whom, etc., particularly refused to charge the jury, although requested so to do by the defendant, as follows: (11) There was no compulsion on the plaintiff as a part of the duties which he owed to his master to ride on the hand-car after the men had quit work for the day. The plaintiff therefore had no right to rely on the promise of the foreman, made after working hours, to relieve him from the risk which he took from incurring a danger

which was obvious to him, and with which he was well acquainted, and the verdict must be for the defendant."

The eleventh assignment of error is as follows:

"There is error also in this, to wit, for that the said judge to whom, etc., particularly refused to charge the jury, although requested so to do by the defendant as follows: (12) The evidence indicates that the hand-car was furnished by the railroad company for the convenience of the workman in going and coming from their work. There was no compulsion or requirement that the men should use the car in going and coming, and the use of it was purely voluntary on their part. The plaintiff, in availing himself of the opportunity to ride thus furnished, rather than to walk home from his work, cannot free himself from the duty to avoid an obvious danger by relying on a promise to repair the defect, and the verdict must be for the defendant."

Both of the requested charges are based on the proposition that the plaintiff was not compelled to ride on the hand-car, and therefore there should be no liability.

The rule of law as stated above (Haber case supra) is that the duty of master continues after hours and to furnishing suitable exits. The servant may not be compelled or required to use the means of exit provided, but if he does accept the method offered, the duty rests in the master to see that such exit is safe, and for injury caused by defective appliances he is liable.

Therefore there was no error in refusing to charge as requested.

The thirteenth assignment of error is as follows:

"There is error also in this, to wit, for that the said judge to whom, etc., particularly refused to charge the jury, although requested so to do by the defendant as follows: (14). The evidence is that there were three handcars at the disposal of the men

for returning home on the day in question. There was no compulsion or requirement on the plaintiff to ride on the defective car. He cannot therefore relieve himself from the risk of an obvious danger which he took by relying on any promise of the foreman to repair, inasmuch as he could have chosen one of the other cars for making the journey home, and the verdict must be for the defendant."

The fourteenth assignment of error is as follows:

"There is error also in this, to wit, for that the said judge to whom, etc., particulary refused to charge the jury, although requested so to do by the defendant, as follows: (15). In view of the fact that there were three handcars, two of them admittedly sound, at the disposal of the plaintiff, he had no right to rely on the promise of the foreman to relieve him from obvious risk of the defective handle on the car on which he rode, and in deliberately choosing the defective car for his passage home he has deprived himself of any right of recovery and the verdict should be for the defendant."

There were three hand-cars ready for service, but all of the hand-cars were needed to carry the men employed. This is not like the case of *Maher v. Thorp, 30 Vr., 186,* holding that if servant is injured from using improper appliances when master had furnished proper ones he cannot recover. In that case the master had not received notice of the defect and had not promised to repair. Here the servant did not assume the risk for he had received the promise to repair given by Sullivan and that promise negatives his assumption of risk.

Dowd v. Erie R. R. Co., cited supra.

Dunkerly v. Webendorfer, cited supra.

A servant is justified in using an appliance which he knows to be defective if he complains to the master and receives his promise to repair, provided he uses ordinary care. If he receives the promise then he can recover for

any injury he subsequently suffers from the defect in the appliance. Therefore when he used the hand-car after promise of repair, he did not assume the risk and he was not obliged to use one of the other hand-cars to prevent the assumption or risk. Therefore the refusal to charge as requested was correct.

The last class of assignments of error relate to the failure of the servant to notify the master immediately of the defect.

The theory of these cases on the question of assumption of risk is that the servant if he knows of the risk and then does nothing, is held to assume the risk. If any injury occurs then, he, having assumed all the risk, is without remedy. Now if anything is shown to negative the assumption of risk then the master is liable. If the servant complains of the defect he thereby negatives any intention to assume the risk. Then the master promises to repair and the servant is entitled to go on and work provided he uses such care as the circumstances require. The master is liable for injury as the servant has negatived any intention of risk and the master has notice of and has accepted the situation. It makes no difference when the notice is given to the master; as soon as the notice is given and the promise to repair made the servant no longer accepts the risk.

Therefore, although the plaintiff may have delayed three days after noticing the defect before complaint it makes no difference, for before the time of the accident he had complained and so when the accident occurred he cannot be held to be under any assumption of risk. That assumption being negatived the servant can recover.

The assignments of error seventeen and eighteen are as follows:

> "There is error also in this, to wit, for that the said judge to whom, etc., particularly refused to charge the jury, although requested so to do by the defendant, as follows: '(19) if the jury find that the plaintiff waited three days after knowing of the de-

fect in the handle, and then chose a time and circumstances under which it was impossible for the foreman to repair the hand-car, he was not entitled to rely on the promise then made to repair, and there can be no recovery.' ''

''There is error also in this, to wit, for that the said judge to whom, etc., particularly refused to charge the jury, although requested so to do by the defendant, as follows: (18). The evidence is that the plaintiff knew of the existence of the defect in the handle for some two or three days prior to the happening of the accident. If the jury find that he had had opportunity prior to the time when he did call the foreman's attention to it to make complaint of the defect in the hand-car, there can be no recovery, and the verdict should be for the defendant."

The alleged error is based on the idea that the plaintiff lost his right by waiting three days. This delay has been shown to be immaterial to plaintiff's right to recover and therefore the judge's refusal to charge as requested was correct.

The sixteenth assignment of error is as follows:

''There is error also in this, to wit, for that the said judge to whom, etc., particularly refused to charge the jury, although requested so to do by the defendant, as follows: '(17) In any event, the present action is misconceived and cannot be sustained for if the defendant be liable, it is not as master of the plaintiff, but as owner of the car, and as such it should be sued and the recovery based upon any liability arrising therefrom.' ''

The evidence shows that the plaintiff was employed by the railroad; that the relationship continued during the access to work and exit from, and that when the plaintiff was injured he was a servant of the railroad, and therefore the suit was rightly brought against the railroad as master and not as owner of the car.

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New Jersey Court of Errors and Appeals.

JOSEPH CICALESE, *Plt'ff. and Def't. in Error,* VS. LEHIGH VALLEY RAILROAD CO., *Def't. and Plt'ff. in Error.*	*In Tort.* *On Writ of Error.*

BRIEF FOR DEFENDANT AND PLAINTIFF IN ERROR.

This case comes up on a writ of error to the Supreme Court. The suit was tried in the Essex Circuit, before the Honorable Frederic Adams, to whom the cause had been referred, and a jury. The plaintiff was an Italian laborer. He had been working during the day of August 8th, 1905, on the tracks of the defendant company, near the Bayonne Bridge. He lived in Newark.

It was customary for the men to go to and from their work upon hand cars, which are furnished by the defendant for their accommodation. These hand-cars were propelled by means of a mechanism, which was operated by a pair of pump handles. Two or three men at one handle would stand facing a corresponding two or three at the other handle on the car, and would pump the handles up and down, and thus propel the car. The plaintiff claimed damages for

injuries sustained while returning home from his work on the evening of the day in question, because of a defect in the handle of the car, which he was helping pump, which defect he alleged caused him to fall off the car. The car on which the plaintiff rode was the first of three. The other two followed so closely behind that there was no time to stop, and after the plaintiff had fallen he was run over and injured by the two cars following.

The theory on which the plaintiff brought his suit, and sought to sustain his cause of action, was that he had, just prior to starting home for the night, called the attention of the foreman to the defect in the handle; that the foreman had promised to fix it "tomorrow morning;" that he had relied on this promise, and proceeded to ride home on the car, resulting in the accident above stated, (p. 4, line 4, etc.; p. 9, line 20).

It seems that the hand-car had a forward or driving end, and a trailing or rear end, and the handle in question was on the trailing end. It consisted of a wooden bar about 54 inches long, which bar was horizontal to the floor of the hand-car, and passed through two iron rings. The bar was of such a size that it completely filled up the space inside the iron rings, and was kept in its place by a pin or screw, which went through the iron ring into the wooden handle bar. The defect, as brought out by the evidence, was that one of these screws had come out, so that the handle bar would shake slightly in that ring. The existence of the screw in the other ring, however, made it impossible for the handle bar to slip out or move sideways. The evidence is conflicting as to this, but the great weight of the evidence, and the undoubted fact was, that the only defect was the absence of one of the screws.

This situation had existed for some three or four days prior to the accident, during all which time the hand-car was in use, and the plaintiff frankly admitted that he not only knew about it, but had gone to work on the same hand-car on the morning of the accident, (p. 17, line 8).

It seems that there were two separate gangs working together, each gang in charge of a foreman, named Sullivan. The main gang was in charge of a man referred to in the evidence as Con Sullivan, and the gang to which the plaintiff belonged, was in charge of Pete Sullivan. There was about thirty or thirty-five men in both gangs. The men quit work that night at about 5:15 or 5:30 o'clock, (p. 56, l. 17, p. 60, l. 37, p. 72, l. 26). The working day ended at 5 o'clock.

The plaintiff's evidence tended to show that at the time the men were placing the hand-car on the track to come home, he called the attention of the foreman (not his foreman) Con Sullivan, to the defect, and that Con Sullivan had promised to fix it "tomorrow morning." This, however, was denied by the defendant's witnesses, and both of the Sullivans testified that no such application by the plaintiff had been made to them.

The accident happened, and the alleged promise was made—if it was made—after the working day was over. There was no compulsion on the part of the plaintiff in the discharge of his duty toward his employer, to ride on the hand-cars that night, much less on the one which he knew to be defective. He was entirely at liberty to have walked home, and one of his fellow-workmen seems to have been so impressed with the defect in the handle, that he said that he would rather walk than go on that car, (p. 61, line 11). Neither was there any compulsion on the plaintiff in the discharge of his duty toward his employer to have

helped pump the car home that night. Apparently there was no system about this, and they pumped or not, as they chose. The case was devoid of any proof as to the authority of the foreman Sullivan—assuming that the complaint had been made to him—to represent the defendant as master, for the purpose of receiving such a complaint, and making a promise which would relieve the plaintiff of what would otherwise have been contributory negligence. The only ground for holding that Sullivan represented the master in that particular, was inferential merely.

The defendant's evidence tended to show that the accident had happened not because of any defect in the handle, but because of the carelessness of the plaintiff in turning around while in the act of pumping the hand-car, by reason of which he lost his grip on the handles, and fell over backwards.

At the conclusion of the plaintiff's case, and at the conclusion of the entire case, motions for a nonsuit and the direction of a verdict for the defendant were made, and refused, and proper exceptions taken. Certain requests to charge, were also submitted to the trial court, many of which were refused, and exceptions taken. The questions presented by these exceptions are now before this court, for its consideration.

I.

The alleged promise to repair the defect in the hand-car was not made to one standing in the place of the defendant as master and so was insufficient to relieve the plaintiff from contributory negligence in assuming a risk which was obvious to him; and the trial judge erred in holding otherwise.

The evidence of the plaintiff and his witnesses is that the promise to repair was made by Con Sullivan, one of the two section bosses. The section boss to whom the plaintiff was immediately responsible was not Con Sullivan but Peter Sullivan to whom no complaint was made and by whom no promise was given. Aside from this, however, the record is entirely devoid of proof to show that the foreman Con Sullivan by whom the alleged promise is said to have been made was the representative of the defendant as master or stood in the master's place for any such purpose.

At the conclusion of the plaintiff's case (p. 65, line 1, etc.) the defendant moved for a nonsuit upon the ground among others that it did not appear that Sullivan to whom the plaintiff made complaint of the alleged defect had any authority to bind the defendant by a promise to repair, it appearing that the said Sullivan was a mere fellow servant of the plaintiff.

A motion to direct a verdict for the defendant was made on the same ground at the conclusion of the case (p. 110, line 36.). In addition the defendant submitted certain requests to charge covering the same general proposition.

Exceptions were taken to the refusal to nonsuit and direct a verdict, and error is assigned thereon, (p. 134, lines 22-33).

The fifth request to charge was as follows (p. 127, line 10):

> "(5) The so-called superior servant rule has never been adopted in this state, and the boss, Con Sullivan, was a fellow servant of the plaintiff, and the defendant is not bound by any alleged promises to repair made by Sullivan in his capacity as boss, and unless the jury find he had in fact been authorized by the defendant to act as its representative in the matter of making such promises, the verdict must be for the defendant."

The court refused to charge this, and exception was taken and error assigned (p. 136, line 15).

The ninth request to charge was as follows: (p. 128, line 16).

> "(9) A section boss or foreman, such as Con Sullivan was, is not, by virtue of his position, authorized to bind the railroad company, his master, by a promise to repair such as the plaintiff claims was made. There is no evidence to indicate that he was clothed with authority by the railroad company to make such promises, and in the absence of any such evidence the verdict should be for the defendant."

This was also refused and exception taken and error was assigned thereon (p. 136, line 28).

Instead of charging these requests, the trial court left it for the jury to say whether the evidence warranted the inference that Sullivan was authorized to bind the defendant by the alleged promise to repair, in the following language: (p. 116, l. 162).

> "Now, there must have been, or should have been, some one to whom the plaintiff, if he wished to relieve himself from this assumption of a risk of which he was cognizant, could have applied for that purpose. The question is, who was he,

so far as the proof in this case shows? Who was that person to whom you would naturally suppose that the plaintiff could go? The question is whether the position of Mr. Sullivan was such that the plaintiff was justified in relying upon his promise as upon the promise of one authorized to speak for the company; whether the conferring of such authority by the company may be fairly and reasonably inferred from the facts in proof, considering the position of the foreman, the work which his employment required him to perform, the nature of the amendment required, the character of the injury and the relation of the hand-car to the work. This, I suppose, is a question for you, and I leave it to you; whether the inference is a legitimate and reasonable inference that Sullivan was the man to do it."

In this instruction, the court laid entirely too much stress upon the position of Con Sullivan as section boss, and also more stress than is warranted by the law, upon what the men "*thought*" Mr. Sullivan's powers were. It is respectfully contended that this question should have been decided upon the consideration of what the evidence showed Sullivan's powers actually were, and not what any particular employee or employees may have *thought* they were, (*Allen* vs. *Goodwin*, 21 S. W. (Tenn.) 760,) and that the court led the jury to place altogether too much weight upon Sullivan's position as a section boss.

Under ordinary circumstances, a foreman is held to be a fellow servant of the other workmen. They are all engaged in the same work, and are under the same general master.

In *Maher* vs. *Tropp*, 30 Vr., 186, this court by Mr. Justice Van Syckel said (p. 187): "It is not open to controversy in this state that the boss or foreman of other men who work under his direction, is the fellow servant of those men."

See also to the same effect:

Steamship Co. vs. *Ingebregsten,* 28 Vr., 400.

Gilmore vs. *Oxford Iron Co.,* 26 Vr., 39.

O'Brien vs. *Am. Dredging Co.,* 24 Vr., 291.

In order to escape the effect of the fellow servant rule, as applied to this case, it is necessary to hold that Sullivan, the foreman, was the *alter ego* of the defendant.

In *Smith* vs. *Oxford Iron Co.,* 13 Vr., 467, the Supreme Court held that a chief executive officer of a corporation, in that case, represented the corporation.

But in *O'Brien* vs. *Am. Dredging Co.* (*supra*), Justice Magie reviewed this decision along with many other authorities, and concluded that the liability of the master will arise (p. 298) "when the negligent employe has been put in the place the master would otherwise occupy, but it will not arise when the negligent employee is a mere boss or foreman in the prosecution of the master's work, such as the master, if controlling and managing his own business would necessarily employ, and such as a contracting workman would contemplate being employed."

A recent pronouncement of this court on this subject is the case of *Rocco* vs. *F. A. Gillespie Co.,* (June, 1906), 64 Atl., 117, where the court said

> "The foreman was working in the same line of work as the deceased, and actively participating in the work. He was a fellow servant. The fact that he was foreman is of no concern. The 'superior servant rule,' as a limitation upon the master's exemption from liability to a servant for the negligence of a fellow servant, does not obtain in this state (*Knutter* vs. *N. Y. & N. J. T. Co.,* 67 N. J. Law, 646; 52 Atl., 565; 58 L. R. A., 808). The master is not liable for an injury resulting to a servant from the negligence of a fellow servant in the common employment, if such servants are selected with reasonable care."

Thus it is well settled that where appliances for work are needed, the duty is on the master to use reasonable care in their selection, but carelessness in their use, or failure to use them on the part of his servant, whereby injury is received by a fellow servant, is not chargeable to the master, no matter what the grade of the servant.

See, in addition to the cases cited *supra:*

Mc Laughlin vs. *Camden Iron Works,* 31 Vr., 557.

Loid vs. *Rogers Co.,* 39 Vr., 713, p. 717.

So, Mr. Justice Dixon, speaking for this court in *Steamship Co.,* vs. *Ingebregsten* (*supra*), distinguished between those cases in which the employee's duty to inspect or repair apparatus is incidental to his duty to use the apparatus *in the common employment,* in which case he does *not* represent the master; and those cases in which the master casts a duty of inspection or repair upon an employee who is *not* engaged in using the apparatus *in a common employment,* in which case he does represent the master (p. 402).

See, also, *Comben* vs. *Belleville Stone Co.,* 30 Vr., 226, p. 231;

Knutter vs. *N. Y. & N. J. Tel. Co.,* 38 Vr., 646, p. 651.

Burns vs. *Del. & Atl. Tel. Co.,* 41 Vr., 745, p. 754.

Hays vs. *Jersey City &c. Ry Co.,* 64 Atl., 119, (N. J. Errors and Appeals).

Ricker vs. *C. R. R. Co. of N. J.,* 64 Atl., 1068, where this court contrasted the position of a train despatcher with that of a foreman, saying (p. 1069)

"The train despatcher is not merely a superior servant like the foreman of a gang of workmen."

Under the cases in our state, it is clear that Con Sullivan was at best a fellow servant of the plaintiff, and that a promise by him was not effectual to bind the defendant, or relieve the plaintiff from his assumption of an obvious risk.

A recent case in which Chief Justice Gummere goes fully into this question, is *Spencer* vs. *Haines*, 64 Atl., p. 970. There the plaintiff had her hand injured in a laundry mangle, owned by the defendant, and which she had been using for several weeks. It was out of repair, and the engineer of the employer agreed to repair it, and replying on his promise, she continued to operate it until the accident. It was not shown that the defendant had any express authority from the employer to make the promise, nor was there proof of any acts done or words spoken by the employer which would create in the mind of the employee a belief that the promise to repair made by the engineer was equivalent to a promise made by himself. It was the duty of the engineer to look after the machinery around the hotel and keep the same in order. Under these circumstances it was held that it was error to leave to the jury the question whether the employee was justified in relying on the promise of the engineer as made by one authorized to act for the employer, so as to relieve her from the assumption of risk. It was said, on p. 971:

> "It is elementary, of course, that the promise to repair, in order to relieve the employe from the assumption of the obvious risks which the defects in the machine he is operating create, must be made by the master or some one standing in his place, and that the promise of a fellow-servant has no such effect, unless in the given case he speaks with the voice of the master. The trial justice, in substance, so charged the jury. It is equally elementary that a fellow servant cannot act as

the representative of the master, unless authority to do so has been conferred upon him by the latter, and, where the plaintiff's case depends upon the apparent existence of such authority, proof thereof is necessary, either by showing an expressed delegation of it, or the presence of facts from which it may be fairly inferred, or conduct on the part of the defendant tending to create in the mind of the plaintiff a reasonable belief that such authority has in fact been conferred. In the proofs submitted in the present case no attempt was made to show any express authority given by the defendant to the engineer to make Mrs. Spencer a promise, the effect of which would be to relieve her from the implied provision of her contract of employment that the defendant should not be liable for injuries which she might receive by reason of defects in the mangle which were obvious to her, and which manifestly increased the risk of its operation. Neither is there proof of any acts done or words spoken by the defendant which would tend to create in the mind of Mrs. Spencer a belief that a promise to repair made by the engineer would be equivalent to a promise made by himself. Nor do we find anything in the facts which the evidence presents from which the conferring of such authority may fairly be inferred. Neither the position of the engineer as such, nor the work which his employment required him to perform (which was, so far as the case shows, to look after the machinery around the hotel generally and keep it in order), carried with it the right to release the plaintiff from her contract obligation. *King, Adm'r,* vs. *Atlantic City Gas & Water Co.,* 70 N. J. Law, 679; 58 Atl., 345.

"In the absence of proof of any fact from which authority, either real or apparent, on the part of the engineer to bind the defendant by making the promise to repair the mangle could fairly be inferred, it was error to leave to the jury the ques-

tion whether the plaintiff was justified in relying on that promise as made by one authorized to speak for the defendant."

In *Huebner* vs. *Erie R. R. Co.*, 40 Vr., 327, one of the questions was whether a hook upon the engine in question was defective in that it was not made with a lip or lug. The trial court admitted evidence of statements made by a clerk of the defendant relative thereto. This court held that the statements of the clerk were not binding, and that the admission of the evidence was error. The court said (p. 329):

> "There is nothing in the case to show that such authority had been reposed in the clerk who produced the hook, and nothing to suggest that what either of these agents did or said was within the scope of his general employment. The question presented, therefore, is whether a principal is bound by acts or statements of his agents with respect to matters not within the scope of their employment or committed to their agency. This question, which from time to time recurs, is an important one, and has received hitherto an uniform treatment in the reported decisions of our courts. In the early case of *Runk* vs. *Ten Eyck*, 4 Zab., 756, the rule is thus laid down: 'Declarations and doings of a third person, acting in the capacity of an agent, are exempt from the general rule respecting hearsay testimony. They are admitted in evidence against the principal as the representations or acts of the principal himself whom the agent represents, while engaged in the particular transaction to which the declarations or acts refer. They must constitute a part of the *res gestae* in the course of his employment about the matter in question; they must accompany the doing of the business or making of the contract, and must be within the scope of the delegated authority.'

"This rule has since been consistently applied in our decisions, both in cases in which testimony was admitted and in those in which it was rejected. Among the more recent applications of this rule may be cited *Little* vs. *Kerr,* 17 Stew. Eq., 267, in which it is said that such testimony 'while proof of the statement of a fact, is not evidence of the truth of the fact.'

"In another case—*Potts* vs. *Agricultural Insurance Co.,* 26 Vroom, 163, the rule laid down is that 'a statement made by a general agent of a corporation in the course of his employment as to a fact within his official knowledge *touching the status of a matter entrusted to him* is admissible in evidence on behalf of a party with whom *the corporation was dealing.*'

"In *Smith* vs. *Delaware and Atlantic Telegraph and Telephone Co.,* 19 Dick. Ch. Rep., 770, the testimony of an agent was admitted when it was satisfactorily shown that it was '*made in the conduct of business entrusted to him.*'

"And in *Blackman* vs. *West Jersey and Seashore Railroad Co.,* 39 Vroom, 1, where the testimony was rejected, the present Chief Justice said: 'It is only words which are spoken, or acts which are done by an agent in the execution of his agency which are admissible in evidence against the principal.' "

This case was followed and approved by this court in *King* vs. *Atlantic City Gas & Water Co.,* 41 Vr., 679. In that case damages were sought because of the defect in a stove or range. Evidence of a conversation with the agent of the defendant company who came to examine the stove, to the effect that he had admitted that the stove was defective, was admitted by the trial court. But the admission was held to be error by this court, the court saying (p. 681):

"In the case of *Huebner* vs. *Erie Railroad Co.,* 40 Vr., 327, this court has recently had reason to reiterate the rule that in a suit against a master,

testimony as to declarations made by a servant is irrelevant and inadmissible as hearsay, unless made in pursuance of a special authority. The illustrative cases cited in that opinion show that where one authorizes another to speak for him, he may be confronted by testimony as to what his representative said within the scope of his authority; but where the employment is purely mechanical, the master is not bound by what his servant may choose to say while at work."

It may be noted that it was this line of authority on which the Chief Justice relied in his decision in *Spencer* vs. *Haines, supra.*

In *Blackman* vs. *West Jersey etc., R. R. Co.,* 39 Vr., 1, a woman while alighting from a trolley car was injured. She was permitted to testify to a conversation with the conductor, to the effect that he had forgotten to signal the car, and that the accident was entirely his fault. The admission of this testimony was held to be error as not being within the scope of the conductor's authority, and so not binding upon the defendant. These cases are controlling in the case at bar.

It may be urged that if Con Sullivan was not the man to inform of the defect in the car, to whom could the plaintiff have applied for the making of the repairs? True, there was no one else there *at the time he did speak.* But the facts are that he knew of the defect for three days (see p. 16, line 19); that he knew of it when starting out to work in the morning, and on the previous day, from the pumping station where the hand-car was kept (p. 18, line 10), and where presumably the hand-cars were repaired. The mere fact that the plaintiff negligently delayed to speak at all until there was no one present capable of binding the defendant, does not result in binding the defendant by the knowledge or alleged promise of any one whom

plaintiff might have found at hand and convenient to speak his mind to. If there was no *alter ego* of the defendant at hand, it was but the result of the plaintiff's own negligence in waiting until that was the situation. There was no obligation on the defendant to have had there an agent authorized to make such a promise.

A case very much in point is *Barringer* vs. *Delaware & Hudson Canal Co.*, 19 Hun., 216. This was an action to recover damages by the plaintiff for injuries sustained in being thrown from a hand-car on which he was riding, owing to the defective condition of the crank thereof. The plaintiff's "boss" knew that the crank was defective, and the plaintiff therefore sought to charge the knowledge of the section boss on the defendant. The court, however, held that they were fellow servants, and that the plaintiff must suffer for the negligence of his fellow servant. The court said:

> "The position of Don Brown, the section "boss," is claimed, by the plaintiff, to be that of a superior servant, representing and standing in the place of the company. Brown knew of the defect, and his knowledge should be attributed to the defendant. Such was the rule laid down by the learned judge in his charge to the jury. He said: 'Don Brown stood, as between plaintiff and defendant, in place of defendant, and represented it.'
>
> "The defendant claims Don Brown did not represent or stand in the place of defendant, but was a co-servant with the plaintiff, engaged in the same service, co-operating in the same business.
>
> "Brown, as a section 'boss,' had charge of about five miles of track, and was foreman of the men employed to keep such track in repair, working with them. He had charge of and was responsible for the tools and machinery used. He hired his men, or some of them. If he required machinery

or tools, he applied to the track-master therefor. If machinery gave out, or was defective, he was ordered to take it to the shop and have it repaired.

"Over him, and in a superior position, was the track-master, who superintended the track, who employed the foremen of the section and other proper men, and furnished the tools and machinery necessary. To such track-master or his assistant all reports were made. If repairs were necessary, or tools needed, notice was to be given by the section foreman to the track-master, who supplied the tools or directed as to the repairs. The foreman was subject to the track-master and bound by his orders. Brown was a competent man for his position, but he had given no notice to the track-master of the defect in his car.

Under such a state of facts, we think that the learned judge erred in holding that Brown represented the defendant and stood in its place. Brown was an employe just as plaintiff was. They were in the same circle of employment; they worked together for a common purpose. Each knew his relations to the other when the employment began, and each took the risks attending the same. The negligence of either was one of those risks. That Brown was foreman, and directed the action or hired the others, does not change the rule."

To the same general effect are:

Acme Coal Mining Co., vs. *McIver*, 38 Pacific, (Colorado) 596.

Kidwell vs. *Houston &c. Ry. Co.*, 3 Woods, (C. C.) 313.

Clifford vs. *Old Colony R. Co.*, 6 N. E. (Mass.) 751, (a section boss and employee on hand-car held fellow servants).

McKenna vs. *Nixon Paper Co.*, 35 Atl. (Pa.) 131.

Deavers vs. *Spencer*, 70 Fed. (C. C. A.) 480.

Whatcheer Coal Co. vs. *Johnson,* 56 Fed. (C. C. A.) 810.

Railroad Co. vs. *Fitzpatrick,* 42 Ohio St. 318.

Kinney vs. *Corbin,* 19 Atl. (Pa.) 141.

Schroeder vs. *Railroad Co.,* 61 N. W. (Mich.) 663.

In the light of the foregoing authorities, it is respectfully submitted that the court below erred in refusing the motions to non-suit and direct a verdict and in refusing to charge as requested by the defendant. There is not a particle of evidence in the record showing either express authority in the foreman Con Sullivan, nor implied authority in him to act as the *alter ego* of the defendant company. The most that can be said is that from the evidence he appears to have been nothing more than an ordinary section boss in charge of a gang of men at work upon the defendant's tracks. The plaintiff adduced no evidence to distinguish Con Sullivan from the ordinary foreman. He was a mere fellow servant of the plaintiff. Neither his knowledge of the defect, nor his negligence in not repairing it, if he had knowledge, are to be chargeable to this defendant. He had no authority to, and cannot by inference under the evidence, he construed to have had authority, to bind the defendant by any promise to repair. He did not represent the defendant for this purpose. His promise did not relieve the plaintiff from the assumption of the obvious risk which he took.

The rulings of the trial judge on this question was erroneous.

If the court adopts this view, the case of course ends right here. Otherwise it is necessary to consider further assignments of error; on the assumption that a promise by which the defendant is bound, was made as alleged.

II.

The trial judge erred in his rulings in reference to the plaintiff's contributory negligence:

(a) In having omitted to complain of the defect an unreasonable time, and until the circumstances were such that it was impossible to make the necessary repairs; and

(b) In having elected to ride on a defective hand-car when there was no necessity therefor.

These questions were raised by the motion to nonsuit (p. 64, line 38) and the motion to direct a verdict (p. 110, line 36), one of the specific grounds of those motions being that "it appears that plaintiff was guilty of contributory negligence in having assumed an obvious risk."

The same questions were also raised by certain requests to charge which were submitted by the defendant, and refused by the court.

A

The plaintiff omitted to complain of the defect an unreasonable time, and until the circumstances were such that it was impossible to make the necessary repairs.

The trial judge was requested to charge as follows:

> "(18) The evidence is that the plaintiff knew of the existence of the defect in the handle for some two or three days prior to the happening of the accident. If the jury find that he had had opportunity prior to the time when he did call the foreman's attention to it, to make complaint of the defect in the hand-car, there can be no recovery, and the verdict should be for the defendant, (page 132, line 21 etc.)

"(19) If the jury find that the plaintiff waited three days after knowing of the defect in the handle, and then chose a time and circumstances under which it was impossible for the foreman to repair the hand-car, he was not entitled to rely on the promise then made to repair, and there can be no recovery." (Page 132, line 37 etc.)

Both of these requests were denied, and exception taken, and error assigned thereon.

In view of the evidence that the defect had been known to the plaintiff for at least three days, that he had ridden on that same hand-car that morning, that the pump house was the rendezvous for the foreman and his men to meet before proceeding to their work, and that the car was stored every night at the pump house, where presumably there were implements with which repairs could be made, the refusal of the trial judge to charge as requested, seems to us to have been error.

The situation here seems to present a question not heretofore decided by this court; whether the circumstances attendant upon an application by a workman, and a consequent promise by his master to repair a defect, do not have such a bearing on the promise to repair as to entitle the jury to say—if it be a jury question at all, whether or not an application was made and a promise given in such a way as to reasonably entitle the workman to rely upon it.

There is, of course, no question that the plaintiff assumed the risk of such danger as this defect presented to him. The defect was plain and obvious. He knew all about it. Under ordinary circumstances he would have assumed the risk unless he had been relieved therefrom by the promise of his master to repair the defect either within a stipulated or a reasonable time.

This is fully settled in our state.

Dowd vs. *Erie R. R. Co.*, 41 Vr., 451 p. 455.

Dunkerley vs. *Webendorfer Machine Co.*, 42. Vr., 60.

Dillenberger vs. *Weingartner*, 35 Vr., 292.

Andrecsik vs. *N. J. Tube Co.*, 63 Atl. R., 719 p. 720.

This doctrine of our courts in the cases above cited to the effect that a promise of the master will relieve the plaintiff from the liability which he assumes from an obvious risk, so long as the promise has not matured, must receive a reasonable interpretation.

In the *Andrecsik* case this court held that a promise to repair made by the master, acted upon by the servant, created an assumption of risk by the master beginning *instanter* upon the making of the promise, and continuing thereafter to the end of the period named for the repair. In that case, as in the *Dowd* and *Dunkerley* cases, no question was raised of the reasonableness of the application by the workman. Apparently, the request to repair was made as soon as the defect was discovered, and under circumstances in which it could readily be remedied. Here—in addition to the fact that there was no necessity on the plaintiff to have ridden home on this hand-car that night—the request to repair was made after the defect had been known to the plaintiff for a period of three days, and under circumstances where the plaintiff knew, or had reason to know, that the foreman had no facilities at hand with which to remedy it.

Mr. Justice Swayze, in the *Dunkerley* case (42 Vr., p. 62)—which case was approved by this court in the *Andrecsik* case— lays down the New Jersey doctrine upon which a plaintiff is relieved from the risk which

he would otherwise take from an obvious danger, as follows:

> "The view which we take does not rest the right of recovery upon the promise, but upon the master's negligence, and the fact that the application of the principle expressed in the maxim *volenti non fit injuria,* is negatived by the servant's reliance upon the promise."

The master's negligence must of course consist in his failure to live up to his promise. The promise must be one which the plaintiff is reasonably entitled to rely upon. There could be no sense or reason in saying that a plaintiff would be entitled to rely upon a promise which the master obviously could not fulfill. Nor does it seem right that a workman should delay his application to his master unreasonably, and then be entitled to hold the master for negligence.

In the *Dunkerley* case it was contended, as is contended here, that the evidence established contributory negligence. That question, notwithstanding the promise to repair, was left by the judge to the jury The comment of the Supreme Court upon these questions is as follows (42 Vr., p. 63):

> "Upon that subject the judge charged that if the danger was so great that a reasonable man would not work on the machine, then the plaintiff could not throw the responsibility on the company. The charge was clearly right. It is also clear that the question of the imminence of the danger was for the jury. Although the defect in the machine was obvious, it was a fair question whether the risk of an accident was so imminent that no reasonable man would have continued to work. The evidence shows that the superintendent of the defendant and the plaintiff thought the danger was not so imminent that the work should be stopped. The question of whether the plaintiff's method of operating the machine, and his

position while at work, established contributory negligence, was also a question for the jury."

This language of the court indicates that a promise by a master to repair a defect complained of by a workman, in order to relieve the plaintiff from the force of the maxim *volenti non fit injuria,* must be regarded in the light of the surrounding circumstances. Such questions are usually to be passed upon by the jury. The motion for non-suit and direction of a verdict having been refused, it was the design of the 18th, and 19th, requests to charge, that the jury should be asked to pass upon the circumstances under which the complaint and consequent promise to repair in the case at bar were made. It was error, we think, to have refused these requests.

The authorities, so far as they bear on this subject, are to this effect.

In *Seaboard Mfg. Co.* vs. *Woodson,* 10 So. Rep., 87, (Ala.) it is said:

> "Unless there had been a reasonable opportunity to effect a remedy, it could not be said that the failure to do so was negligent. The defendant must have had sufficient time to remedy the defect after its discovery, before it could be chargeable with negligence in failing to effect such remedy. Mere knowledge without the opportunity to act on it, would not constitute negligence."

In *Johnson* vs. *Armour,* 18 Fed., 490, it is declared:

> "The law allows defendants a reasonable time for repairing defects in machinery after said defects come to the knowledge of the superintendent of the defendants. The reasonable time here spoken of must be gauged by the used made of the machinery in connection with the work to be performed by it, and the necessity of the repairs for safety.

In *Howard* vs. *Beldenville Lumber Co.*, 108 N. W. (Wis.) 48, the rule is declared to be:

> "A reasonably safe working place having been furnished the servant, the absolute duty in that regard is satisfied. Then becomes active the secondary duty to exercise ordinary care to preserve for the servant the reasonably safe condition of his working place. In case of its becoming unsafe during the course of his employment, and the servant receiving an injury thereby before the master has knowledge of the existence of the danger, or has reasonable opportunity to obtain such knowledge, and reasonable opportunity to remedy the danger, he is not liable." (Citing many cases).

The plaintiff's conduct, in the situation here, distinguishes this case. If the case was one for the jury at all, which we deny, then the requests submitted by the defendant certainly should have been charged.

B

There was no necessity for the plaintiff to have ridden home that night on the defective hand-car.

It is undisputed that there were three cars at the disposal of the workmen and that but one of them was in a defective condition (p. 16, line 38; p. 40, line 3, p. 106, line 4). It no where appears that the workmen were assigned to any particular car or that their choice of cars was in any manner restricted. The fact was that they were at liberty to take any car they wished. The handle of the car upon which the plaintiff rode home that night had been loose for two or three days (p. 16, line 19). All the men knew about it. The plaintiff knew about it. He had ridden to work on it that very morning (p. 17, line 8). The case therefore presents a situation where the plaintiff fully aware of the dangerous defect in one of the cars, de-

liberately chose to ride home on it, and to assist in pumping it, when there were two other cars at his disposal admittedly sound and on which he could have ridden. This choice of the plaintiff in this situation fastened upon him liability for contributory negligence to such a degree that he can not relieve himself from it by seeking to rely upon a promise of the master—assuming such a promise had been made—to repair the defect.

The defendant requested the court to charge the jury upon this question as follows:

> "(13) The promise of a boss or foreman to make repairs, who is authorized by his master to make such promises, to be binding on the defendant, and to entitle the plaintiff to rely thereon to relieve him from his liability for an obvious danger, must be made under such circumstances as entitle the plaintiff to rely on it in the prosecution of his work. And the plaintiff in this case is not entitled to relieve himself from the danger of the obvious defect in the hand-car by a promise of the foreman to repair the same, since it was not necessary to the performance of his work that he ride on the hand-car, and his duty toward his employer had been discharged for the day. The verdict must therefore be for the defendant."
>
> "(18) The evidence is that there were three hand-cars at the disposal of the men for returning home on the day in question. There was no compulsion or requirement on the plaintiff to ride on the defective car. He cannot therefore relieve himself from the risk of an obvious danger which he took by relying on any promise of the foreman to repair, inasmuch as he could have chosen one of the other cars for making the journey home, and the verdict must be for the defendant" (p. 130, l. 31).
>
> "(19) In view of the fact that there were three hand-cars, two of them admittedly sound, at the disposal of the plaintiff, he had no right

to rely on the promise of the foreman to relieve him from the obvious risk of the defective handle on the car on which he rode, and in deliberately choosing the defective car for his passage home he has deprived himself of any right of recovery, and the verdict should be for the defendant" (p. 131, l. 9).

All of these requests were denied, and exception taken, and error assigned thereon.

In the *Dowd, Dunkerley* and *Andrecsik* cases, there was no choice upon the plaintiff except to go ahead under the promise of the master to repair, or suffer the consequences of a refusal to obey orders. The defects complained of in those cases apparently were discovered and complaint made during the working hours. The plaintiff in each case was subject to the orders of his master. Not only that, but he had no choice of operating upon or working with a different machine. No alternative of a safe or dangerous employment was presented to him. He had simply to either obey the command of his superior to proceed with the work until the defect was repaired as promised, or take the consequences.

In the case at bar no such situation was presented. The working day was over. It was of no moment to the defendant whether the plaintiff had walked home or ridden home on the hand-car. Neither was it of any interest to the defendant on which car the plaintiff rode if he elected to ride. No risk was entailed upon the plaintiff of a discharge or other punishment in case of the refusal to ride upon the hand-car, if he had not chosen to accept the promise of the master to repair it;--assuming such promise had been made.

The case is readily distinguishable therefore from the *Dowd, Dunkerley* and *Andrecsik* cases above cited. It would be unreasonable to hold under the

circumstances of this case that the promise of Sullivan to repair—assuming it had been made as the plaintiff claims—could relieve the plaintiff from the assumption of the obvious risk which he took.

It appeared from the evidence that it took about three quarters of an hour to walk from the place where the men were working to the pump house, and from fifteen minutes to half an hour to cover the same distance on the hand-car. The nature of the defect in the hand-car so appealed to one of the plaintiff's witnesses that he testified that he would rather have walked than have gone on it (p. 61, line 10) and he also testified "a good many of us didn't like to go on that hand-car because we knew it was no good" (p. 61, line 1).

This case is distinguishable from other cases of similar nature in our courts. The plaintiff voluntarily chose not only to ride on this defective hand-car, but to pump with the defective handle. The nature of the defect was simply one with which he was fully acquainted. He had two courses of conduct open to him, the one safe, the other dangerous. There was no compulsion of any kind resting upon him to do as he did. He deliberately chose the dangerous alternative It is not reasonable that he should be permitted to excuse himself from this on the ground of having relied on the alleged promise to repair.

A situation where the hard and fast rule laid down in the Andrecsik case would apply, was not presented by the facts in this case. If it was not such a case where the motions for nonsuit and direction of a verdict should have prevailed, it certainly was a case where the jury should have been instructed to pass on the question whether or not the alleged promise as given was one on which, under the circumstances, the

plaintiff was entitled to rely, and by which the defendant was bound.

This is the ruling of the Supreme Court in the Dunkerley case as argued *supra.*

It is both reasonable, and in accordance with the authorities generally.

In *Meador* vs. *Lake Shore, etc. Ry. Co.,* 37 N. E. 721, (Ind.) the court held that the circumstances had a bearing in determining whether or not a promise to repair should relieve the plaintiff from what would otherwise have been his negligence. In that case the plaintiff had been injured by a defective ladder of which he had complained and which the master had promised to repair. The court found that the defect was so obvious and the nature of the implement so simple that he was not entitled to rely on the promise to repair. The court said:

> "A common laborer who uses agricultural implements while at work upon a farm or in a garden, or one who is employed in any service not requiring great skill and judgment, and who uses the ordinary tools employed in such work, to which he is accustomed, and in regard to which he has complete knowledge, he cannot be said to have a claim against his employer for negligence, if, in using a utensil which he knows to be defective, he is accidentally injured. In such case it does not rest with the servant to say that the master has superior knowledge, and has thereby imposed upon him. He fully understood that the spade, the axe, the hoe or the ladder,—the instrument which he used,—was not perfect; and, if he was thereby injured, it was by reason of his own fault and negligence. The fact that he notified the master of the defect, and asked for another implement, and the master promised to furnish it in such a case, does not render the master responsible if an accident occurs. A rule imposing a liability under such circumstances

would be far-reaching in its consequences, and would extend the rule of respondent superior to many of the vocations in life for which it was never intended."

In *Trudeau* vs. *American Mill Co.*, 83 Pac., (Wash.) 725, the court said,

"The defect in the shafting in question was open and apparent, the appellant had full knowledge thereof and of the dangers incident to its use, and, had he received the injuries complained of at any time before the promise to repair was given, the defense of assumption of risk or contributory negligence would necessarily have barred a recovery. If we concede that the appellant did not assume the risk arising from the use of the defective appliance after complaint was made, by reason of the promise to repair, yet he was in duty bound to exercise reasonable care and caution in view of the defective condition of the appliance which he was handling. His care must be commensurate with the danger. In other words, he must exercise due and reasonable care under the particular circumstances."

In *McAndrews* vs. *Montana Union Ry. Co.*, 39 Pacific, (Montana) 85, the court referring to the rule that, where a master has expressly promised to repair a defect, the servant can rely upon the promise for a reasonable time, said.

"But this rule is a qualified one. If the machinery is not only defective but so obviously dangerous that no ordinarily prudent man would assume the risk of using it and the employee does use it, knowing its absolutely and obviously dangerous condition, and the dangers of using it, the master is not liable notwithstanding the promise to remedy the defect" (citing authorities).

To the same effect is *Schulz* vs. *Rohe*, 149 N. Y., 132.

In *Bradshaw's Admr.* vs. *Louisville & N. R. Co.*, 21 S. W., (Kentucky) 346 the court held that a section

hand who obeys the order of the section boss to go on an overcrowded hand-car with full knowledge of that fact assumes the risk arising therefrom and there can be no recovery for his death caused by his falling from the car by reason of its crowded condition.

See, also, *Lewis* vs. *New York, etc. Ry. Co.*, 26 N. E. (Mass.) 431.

It is respectfully submitted that the trial judge erred in refusing to grant the motions, and in refusing to charge as requested.

III.

At the time the alleged promise to repair was made, the relation of master and servant, as between the defendant and plaintiff, had ceased, and there was no duty resting on the defendant toward the plaintiff, save that of licensor and licensee.

There is no dispute in the evidence that the alleged promise to repair, and the subsequent accident to the plaintiff, all occurred after working hours. It is equally undisputed that the hand-car from which the plaintiff fell, was gratuitously furnished for the use of the men by the defendant, and that there was no requirement of the defendant that they be used, and no obligation on the men to use them, especially for the purpose of returning home after the working day was over.

The defendant therefore sought to distinguish the rule as laid down in the Andrecsik and other cases, on the ground that the relation of master and servant had ceased. This was one of the grounds of nonsuit, and motion for direction of verdict, (p. 64, line 31; p. 110, line 37).

In his charge the trial court practically told the jury that the fact that the working day was over at the time the promise was made and injury happened, had no bearing on the question (p. 114, lines 1-27). To this exception was taken and error assigned, (p. 123, lines 1-10; p. 134, line 34 etc.)

The same question was raised by the 10th, and 11th, requests to charge, (pp. 128, line 34, and p. 129, line 12), which requests were refused and exception taken.

In *Baker* vs. *Chicago &c. Railway Co.,* 63 N. W. (Iowa) p. 667, plaintiff's intestate, a section hand on defendant's road, had been killed by a train operated by defendant, after working hours, and as he was walking along the tracks of defendant from his place of labor to his home. The court held that under these circumstances the deceased had been a mere licensee upon the tracks of the defendant, and that the defendant owed him no greater duty than to refrain from acts of wilful and gross negligence. To quote:

> "If it is claimed, as it must be to make it significant, that the finding that Mitchell was rightfully on the track, means that he was there in such a way that the persons operating the train were required to exercise cars with reference to him, as they would be required to do as to persons doing duty upon the track, the finding cannot be sustained, for there is absolutely no evidence to support it. The evidence is that about five o'clock the foreman told Mitchell that it was time to quit, and for him to go home, and to again walk the track next morning. * * * *

In *Baird* vs. *Pettit,* 70 Pa. St., p. 477, plaintiff was employed as draftsman in the defendant's Locomotive Works. A carpenter employed in jobbing for defendant in any part of the works was, by the direction of the defendant, superintending the excava-

tion of a cellar under the building, employing and paying hands, etc. He had a large pile of dirt thrown on the public foot-walk. The plaintiff, in leaving the house in the dark, after ceasing his day's work, fell over the dirt, and was injured. The court held, among other things, that the plaintiff having ceased work for the day, and left the shop, the relation of master and servant had ceased when the injury occurred.

"The relation of master and servant did not exist between the parties when the plaintiff received the injury. He was not then in the service of the defendant. He had quit work, and was on his way home. He was no longer subject to the defendant's control, or bound to obey his orders. As soon as he left the building he was his own master. He was then no more in defendant's service than any other citizen passing along the street, and he was entitled to the same rights and immunities. If the relation of master and servant did not cease when he left the building after his day's work was done, when did it?"

See also:

Benson vs. *Lancashire & Yorkshire Ry. Co.*, (1904), 1 K. B. 242.

Davis vs. *Chicago &c. R. Co.*, 45 Fed. 543.

Cowhil vs. *Roberts*, 24 N. Y. Supp. 533.

O'Donnell vs. *The Allegheny Valley R. R. Co.*, 59 Pa. St. 239.

The trial judge, in charging as he did, and in refusing to charge defendant's requests, decided that the relation of master and servant still continued after the close of the working day, and at the time the alleged promise was made and injury received. The court thus took away from the jury the question of the relationship then subsisting between plaintiff and defendant. This was error, as the question whether the relationship of master and servant still continued

was a question of fact to be determined from all the circumstances of the case, and should have been left to the jury.

Hackett vs. *McCue,* 17 Wall. 508.

In this connection, attention is called to the sixteenth assignment of error (p. 139, line 30), where the court refused to charge as requested, that the plaintiff's form of action was misconceived, in that if the defendant was liable, it was not as master of the plaintiff, but as owner of the car, and should have been sued, and recovery based on any liability arising therefrom. This question was also raised as an additional ground for the motion to direct a verdict (p. 111).

In addition to the assignments of error specifically urged as above, attention is called in passing to the nineteenth and twentieth assignments, (p. 140, lines 25-36), where the court refused to permit the defendant's witnesses to state whether or not the handle on the hand-car could have come out, in view of the fact that one pin remained through one of the rings.

It is respectfully submitted that there is error in the record sent up, and that the judgment of the lower court should be reversed.

CONOVER ENGLISH,
ROBERT H. McCARTER,
Counsel for Defendant and Plaintiff in Error.

INDEX

TESTIMONY.

The Baker Printing Co., Law Case Printers, 251 Market St., Newark, N. J.

New Jersey Court of Errors and Appeals.

JOSEPH CICALESE,
Pltff. and Deft. in Error,
vs.
LEHIGH VALLEY RAILROAD COMPANY,
Deft. and Pltff. in Error.

In Tort.

WRIT OF ERROR.

Returnable February 21st, 1907.

NEW JERSEY, *ss*:

The State of New Jersey to the Chief Justice and other Justices of our Supreme Court of Judicature.

GREETING:—

[L. S.] Forasmuch as in the record and proceedings, and also in the giving of judgment in a certain plaint which was in our said Supreme Court of Judicature, before you, between Joseph Cicalese, plaintiff, and Lehigh Valley Railroad Company, a corporation, defendant, in an action in tort, manifest error hath intervened to the great damage of the said Lehigh Valley Railroad Company, as is said, we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you that the record and proceedings, with all things touching the same, to our judges of our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the twenty-first day of February instant, together with this

writ, you do distinctly and openly send, that the record and proceedings aforesaid being inspected we may cause to be further done thereupon for correcting that error what of right and according to the law and custom of the State of New Jersey ought to be done.

WITNESS our Chancellor and President Judge of our said Court of Errors and Appeals at Trenton aforesaid, the Second day of February, in the year of our Lord, one thousand nine hundred and seven.

McCARTER & ENGLISH,
Attorneys.

S. D. DICKINSON,
Clerk.

RETURN.

The answer of the justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State, in a certain schedule to this writ annexed, as within we are commanded.

WILLIAM S. GUMMERE,
C. J.

NEW JERSEY SUPREME COURT.

JOSEPH CICALESE, *vs.* LEHIGH VALLEY RAILROAD COMPANY.	*In Tort.* *On Postea.*

Julius Feldmann, Attorney.

As yet of the sixth day of November, A. D., nineteen hundred and five.

Witness, WILLIAM S. GUMMERE, ESQ.,
Chief Justice.

WILLIAM RIKER, JR.,
Clerk.

ESSEX COUNTY, *ss*:—

Lehigh Valley Railroad Company, the defendant in this suit, was summoned to answer Joseph Cicalese, the plaintiff herein, in an action in tort, and thereupon the said plaintiff by Julius Feldmann, his attorney, complains:

For that whereas on the eighth day of August, nineteen hundred and five, the plaintiff was employed as a servant of the said defendant, and in the course of such employment it was the duty of the said plaintiff to operate a certain hand-car of the said defendant over certain tracks in the possession of the said defendant at or near the city of Bayonne, in the county of Hudson, to wit, at Newark, in the county of Essex, and on the day and year aforesaid, the said hand-car or certain parts thereof being out of repair, the said plaintiff called the attention of the said defendant to such lack of repair, and thereupon the said defendant promised the said plaintiff to repair the said hand-car, and directed the said plaintiff to continue working thereon in the meantime, and the said plaintiff, relying upon the said promise of the said defendant to repair the

said hand-car, continued to work thereon, and on the day and year aforesaid, subsequent to the making of the promise by the said defendant as aforesaid to repair the said hand-car and while the said hand-car was being operated and propelled by the said plaintiff in the performance of his duties as a servant of the said defendant by the direction of the said defendant as aforesaid, and while said plaintiff was relying upon the aforesaid promise of the said defendant, certain apparatus of the said hand-car broke or became loose, by means whereof the said plaintiff was thrown from the said hand-car which was then moving rapidly along the tracks of the said defendant to and upon the tracks of the said defendant, and the said plaintiff was then and there run over by two certain other hand-cars of the said defendant, which were then and there being propelled and operated by the servants and employees of the said defendant, over the tracks of the said defendant by means whereof the said plaintiff was greatly cut, bruised, maimed, wounded and injured in his limbs and body, in so much that the said plaintiff then and there became and was sick, sore, lame, and to wit, from thence hitherto, during all of which time, disordered and so continued for a long space of time, the said plaintiff suffered and underwent great pain, and was hindered and prevented from carrying on his lawful and necessary affairs and business and thereby lost divers large gains and profits which otherwise would have been enjoyed by him, and is, and will be in the future, hindered and prevented from earning a livelihood for himself and family, and has been and is by means of the premises otherwise greatly injured to the damage of the said plaintiff twenty thousand dollars and therefore he brings his suit, etc.

And the said defendant, by McCarter, Williamson and McCarter, its attorneys, comes and defends the wrong and injury when etc., and says that it is not

guilty of the said supposed grievances above laid to its charge, or any or either of them or any part thereof, in manner and form as the said plaintiff hath above thereof complained against it, and of this it, the said defendant, puts itself upon the country, etc.

Therefore let a jury thereupon come before our Chief Justice or some other Justice of the Supreme Court of the State of New Jersey, at a Circuit Court to be holden at Newark in and for the county of Essex, on the second Tuesday of December, in the year of our Lord, one thousand nine hundred and six, by whom etc., and the same day is given to the parties aforesaid there etc.

And now at this day, to wit, the twenty-fifth day of January, A. D., nineteen hundred and seven, before our said Supreme Court at Trenton comes the said plaintiff by his attorney aforesaid, and the justice before whom etc., having first sent hither his record had before him in these words, to wit:—

Afterwards, to wit, at a Circuit Court holden at Newark in and for the county of Essex before the Honorable Frederic Adams, Judge of the Circuit Court to whom the within case was referred to trial by the Justice of the Supreme Court holding said circuit, on the third day of January, in the year nineteen hundred and seven, according to the form of the statute in such case made and provided, comes as well the said plaintiff as the said defendant by their respective attorneys within mentioned, and the jurors of the jury between the parties aforesaid, in the plea aforesaid, being also summoned come, who to speak the truth of the matters and things within contained, being chosen, tried and sworn, say upon their oath that the said defendant is guilty of the grievances within laid to its charge in manner and form as the said Joseph Cicalese has within thereof complained against it, and they assess the damages of the said Joseph Cicalese on occasion of the commit-

ting thereof over and above his costs and charges by him about his suit in this behalf expended at the sum of four hundred and fifty dollars.

Therefore it is considered that the said plaintiff do recover against the said defendant his said damages by the jury in form aforesaid found to four hundred and fifty dollars, and also sixty-three dollars and ten cents costs and charges aforesaid, by the court now here adjudged to the said plaintiff and with his assent, which said damages, costs and charges in the whole amount to five hundred and thirteen dollars and ten cents.

Judgment signed this twenty-fifth day of January, A. D., nineteen hundred and seven.

WILLIAM S. GUMMERE,

C. J.

NEW JERSEY SUPREME COURT, ESSEX CIRCUIT.

Wednesday, January 2, 1907.

JOSEPH CICALESE,
vs.
LEHIGH VALLEY RAILROAD COMPANY. } *In Tort.*

[This case was referred to the Circuit Court for trial by order of Hon. William S. Gummere, Chief Justice.]

Before Hon. Frederic Adams, *J.*, and a jury.

For plaintiff appears Julius Feldmann, Thomas L. Raymond of counsel.

For defendant appear McCarter & English.

Mr. Raymond opens for plaintiff.

JOSEPH CICALESE, plaintiff, sworn in his own behalf (through the Italian interpreter).

Direct examination (through the interpreter) by Mr. Raymond.

Q Where do you live?
A 313 East Kinney street.
Q How long have you lived in Newark?
A Five years.
Q How long have you been in America?
A Five years.
Q Where did you come from?
A From Italy.
Q Are you married or single?
A Single.
Q How old are you?
A Twenty-nine.
Q What is your business, or what was your business in August, 1905?
A When I was hurt, you mean?

Q Yes.

A I was working.

Q What was your business, what kind of work?

A Everything that they ordered me to do I done.

Q Whom were you working for?

A Con Sullivan.

Q What company were you working for?

A Lehigh Valley.

Q Do you remember the 8th of August, 1905?

A If I die I can never forget a thing like that.

Q Where were you working that day?

A Lehigh Valley.

Q Where, what place?

A On this side of Bayonne bridge.

Q Now when you finished work there what did you do?

A When was this, in the morning or in the evening?

Q In the evening, the afternoon.

A In the evening when we got through work, about ten minutes to five, we jumped on a handle-car and came home.

Q What kind of a hand-car was it?

A Pump car.

Q With how many men to work it?

A The first one was five, three on the front and two in back.

Q And did anything happen before he began—before they boarded the car, to move it? Did anything happen at the time he was getting ready to move the car or to have the car moved?

A I was no more than two minutes on it where two bolts was loose on this handle-bar, this hand moved and went to the other side (indicating).

Q Wait a minute. Did you look at the hand-car before it was moved away from where it was standing?

Mr. McCarter. Please do not lead him, Judge.

Mr. Raymond. Did he look at it? Is that leading?

A Yes.

Q And what did you see, if anything?

A I seen that the stick would move.

Q And what did he do about it, if anything?

A I was pumping.

Q Before that, before he began pumping, I mean.

A I went to the boss and reported about it; I said, "Some day will happen something about this."

Q And who was the boss that he went to?

A Sullivan.

Q The first name?

A Con Sullivan.

Q What did you say to Con Sullivan?

A I said to him, "The handle is all loose; we can't work with this."

Q And did Con Sullivan say anything?

A "I will fix it to-morrow morning."

Q Where was this conversation, how far from the hand-car, how far did the conversation take place from the hand-car?

By the Court.

Q No. Where did this conversation take place, where was it?

A Right under Bayonne bridge, as soon as we stopped work.

Q Was it on the car or near the car?

A No, off the car; we didn't even get on the car yet. Even in the morning I spoke to him about it.

Q Let us get an answer as to where the conversation took place?

A On this side of the Bayonne bridge.

Q Now, ask him the question that I asked last: Did the conversation with Sullivan take place on the car or off the car?

A As I was on it.

By Mr. Raymond.

Q And where was Con Sullivan?

A He was sitting there in the same hand-car.

Q On the car?

A Yes, the same car.

Q Now, how many men got on this hand-car beside you?

A Six or seven; I don't know; there may be ten, maybe fifteen.

Q Well, how many men were working it, pumping it?

A Five.

Q How many other men were there on the car?

A Three in the front and two in back.

Q Besides those five men, how many more men were there, if any more?

A They were sitting.

Q Well, how many were sitting?

A Ten, fifteen.

Q Well, how far did you go before anything happened? You said something happened. How far did you go?

A About two minutes.

Q And then what happened?

A While I was pumping—he describes that there was a bolt here and a bolt there (indicating), and the handle moved back, and this finger caught in a little ring.

Q And then what?

A I fell on the track on my back, and the other two handle-cars that was coming, they ran over me.

Q Where did you next find yourself?

A On the track.

Q What did they do with you then?

A From there they put me on the hand-car and they took me to the pumping station.

Q And then what did they do?

A They telephoned, and the police patrol came and they took me to the hospitaal.

Q What hospital?

A St. James'

The Court. In what place?

Q St. James's Hospital where, in Newark?

A In Newark.

Q Now, let me see your hand?

A (Witness exhibits his left hand.)

Q Is that the finger you refer to as having been—

A Yes.

The Court. Hold up your hand.

Q Hold it up to the jury.

A (Witness does as directed.)

The Court. The second finger

Q Where did you lose that, at the hospital or at the accident?

A Here it was broke and at the hospital they cut it.

Q What other injuries did you have, where else were you hurt?

A In the back.

Mr. Raymond. Now if your honor please, I make application to exhibit this injury to the jury. I think it is very important that the jury see what the injury was, and I think it can be done without causing any offence to the proprieties. This man has been very seriously injured on the back, the upper part of the back.

The Court. I see no objection.

Mr. McCarter. Do you claim that he is still suffering?

Mr. Raymond. Yes, I claim he still suffers. I will have medical testimony on the subject.

Q Just take off your coat.

A (Witness removes the clothing from the upper part of his body and exhibits his bared back to the jury.)

Q How long were you at the hospital?
A Seventeen days.
Q What doctor did you have there?
A Corrigan.
Q When you left the hospital where did you go?
A Home, to my house.
Q Where is that, East Kinney street?
A East Kinney street.
Q When were you able to go to work again?
A I was two weeks more home.
Q And then what did you do?

A Then the doctor told me to go to work, but I went to work and I couldn't stand it.

Q Why couldn't you stand it?
A My finger and back was hurting me yet.
Q Do you feel any trouble now?
A I cannot work now.

Q Have you worked at all since the accident happened?

A I went to New Brunswick—

The Court. He can say either yes or no. Has he worked or not?

Mr. Raymond. And how much.

By the Court.

Q What does he say?
A I tried to work.

By Mr. Raymond.

Q Well, when did you try to work?
A In the month of June, the end of May and June.

By the Court.

Q Last May and June?
A Yes, sir.

By Mr. Raymond.

Q Last May, May, 1906?

A Yes, sir.

Q What do you mean by saying you tried to work? What did you do? How long did you work?

A I tried to work.

Q How long did you try, how many minutes or hours?

A An hour, two hours, three hours.

Q Where was this?

A New Brunswick.

Q What did you do, what kind of work did you try to do?

A Cigar shop.

By the Court.

Q Doing what?

A Loosing tobacco.

By Mr. Raymond.

Q How many days did you try that?

A Three months, but I didn't work every day.

Q Where were you living then?

A Malone street.

Q In what town?

A New Brunswick.

Q How many days in a week did you work?

A Two or three; when I didn't feel well I would go home. It was piecework.

Q When you did not feel well, what was the matter with you?

A The back and the finger hurt me.

Q Now, tell him to go back to the time he was working for the Lehigh Valley, before the accident. What was he making, what wages was he making?

A $1.40 a day

By the Court.

Q At the time of the accident?

A Yes, sir.

By Mr. Raymond.

Q How long had he been making that?

A Every time it was clear weather, we used to work and get $1.40.

Q Now, do you know the name of any of the men who were on the car with you at the time you were thrown off?

A I know three or four.

Q Give us the names of three or four?

A Joseph Genaro, Tony Calabrese, Gaetano Novello.

By the Court.

Q Are these the names of the men who were on the car from which he fell?

A Yes. And one more went back to Italy. Those three, they were pumping.

By Mr. Raymond.

Q Of these three men that you have just named, were any of them working the handles with you, the pump with you?

A The whole three of them were pumping.

Q Which of them was on your end?

A Joseph Genaro.

Q How long did you stay in New Brunswick altogether?

A Three months.

Q Three months?

A Yes, sir.

Q Where did you go then?

A Newark.

Q Did you work in Newark then?

A I tried.

Q Well, how much did you try?

A An hour, two hours, three hours, sometimes half a day, and then came home.

Q What did you try to work at?

A Whatever I could find.

Q Well, what kind of work did he do as soon as he came back?

A With a stone-cutter; I used to sweep and clean up around there.

Q How much were you able to make?

A $1.25 a day.

Q Every day?

A Sometimes twenty-five cents a day, sometimes thirty.

Q Well, are you working at anything now?

A No, sir; I am home, home in the house.

Q What is your health now?

A I can't work.

Q Why not?

A The shoulder and the back hurts me.

Mr. Raymond. I presume, Mr. Attorney-General, you will admit that the car was the car of the Lehigh Valley Railroad Company.

Mr. McCarter. Oh, yes, there is no question about that.

Mr. Raymond. And that he was employed by them.

Mr. McCarter. Yes.

Cross examination by Mr. McCarter.

Q How long had you worked for the Lehigh Valley Railroad before the accident?

A From February until the 8th day of August.

Q And had you been a track laborer all that time?

A Yes, sir.

Q And where did you work, over what space? How far would you go from your home to work?

A If you walk it it takes about three-quarters of an hour; if you ride with a hand-car it takes about quarter of an hour, sometimes half an hour.

Q Were you working on the bridge the day you were hurt?

A About forty feet on this side of the bridge.

Q On the track?

A No, they were filling in.

Q Filling in the track?

A There used to come a car full from Jersey City, and we used to fill in to put a new track there.

Q There was a large crowd working there that day, was there not?

A There would be thirty or forty people.

Q How many men in your regular gang?

A There may be fifteen, sixteen, twenty. I am not a boss.

Q Fifteen or twenty in your regular gang that worked every day with you?

A Before, yes; sometimes twelve, ten, twelve; it depends on the quantity of work they are going to do.

Q And you had noticed this handle that morning before you left the shanty?

A Yes, two or three days before it was loose; everyone spoke to the boss about it.

Q Now, you say everyone spoke to the boss. Do you mean Con?

A Con Sullivan.

Q Con Sullivan?

A Yes.

Q Con went out to work with you, did he not?

A He didn't work; he was a boss.

Q He went out to the place where you worked, did he not?

A Yes.

Q He stood there and told you what to do?

A Yes.

Q He told you when to commence and when to stop working?

A Yes, sir.

Q How many hand-cars were there on that job that day?

A Three.

Q Did you go out to the bridge on the same hand-car you started to come home on?

The Court. He can answer this question yes or no. What does he say?

A Yes.

By the Court.

Q That he went to work on the same hand-car from which he afterwards fell?

A Yes.

By Mr. McCarter.

Q Now, you were going home pretty fast, were you not?

A No, sir.

Q Were not the men on the other car behind you telling you they would catch up to you if you did not hurry up?

A No, sir.

Q Nothing of the kind?

A Everbody was pumping and minding their own business.

Q Now, were there fifteen men on your car besides the five pumpers?

A There could have been five, there could have been ten, there could have been twelve.

Q Well, what was it?

A About twelve.

Q About twelve?

A Yes.

Q How many on the next car?

A About the same.

Q How many on the third car?

A The boss kept track of the people, how many were there; I don't know; I didn't have them in my pockets.

By the Court.

Q The only question is whether you know?

A It may be the same; I don't know.

Q The question now is as to the men on the third or last hand-car. Do you know about how many there were?

A Maybe ten, maybe eight, maybe fifteen.

By Mr. McCarter.

Q Well, how long did it take you to walk from this place home?

A Three-quarters of an hour.

Q Where did you keep the hand-car over night?

A At the pumping station.

Q Where is the pumping station?

A On the crossing at the pumping station.

Q Where is the pumping station?

A In Newark.

Q Do you know on what street the pumping station is?

A Yes, but I don't know the name of it; I know pumping station, that is all.

Q Will you stand up, please? (Witness arises.) Will you take off your coat? (Witness removes his coat.) Take off the vest. (Witness removes his vest.) Now you can put them on again, please, put them on again. (Witness does as directed.) Is Con an Italian?

A No, he is Irish.

Q Do you speak English?

A (In English.) A little bit; only for the job I am all right.

Q Do you understand English?

A (In English.) I no speak everything English, but the job—"You take the handle," "You take this," I understand, of course; I understand the job.

Q What did you do after you came out of the hospital?

A I stayed home

Q When did you first go to New Brunswick?

A At the end of May or the first of June.

Q How did you hear that there was a job down there?

A A relation of mine lived there, and I went there.

Q Did you stand up or sit down while you were at work there?

A Sitting down.

Q And you had to separate the tobacco?

A Yes, sir.

Q Why did you leave there—when did you leave there?

A September.

Q Did you work all summer?

A I was there June, July and August.

Q Steady work?

A No, sir.

Q Why not?

A I tried to work, but my shoulder and my back hurt me.

Q Could not sit still?

A I can sit for half an hour, maybe an hour, but I can't work.

Q Why can't you work?

A My shoulder and my back.

Q What is the matter, what happens?

A I am half broke.

Q What?

A Half broke.

Q Is a bone broken in your back?

A I can't say; it hurts me, that is all. If I had my eyes in my back I could see it.

Q Have you worked since you got back to Newark?

A I tried to work, but I can't work.

Q With whom did you try to work after you came back to Newark?

A A man; I don't know his name.

Q What kind of work?

A He was putting curb stones, and I used to go over and sharpen tools for him and sweep around.

Q When was that?

A About two months ago.

Q Were any relatives of yours on that hand-car?

A No, sir.

Q How soon after you fell off the car did the next car strike you?

A Right away.

Q How near was it to you, to your car?

The Court. At what time?

Mr. McCarter. At the time he fell off, if he knows.

By the Court.

Q How near was the other car to him at the time he fell off? How near was the next car to his at the time when he fell off? Ask him that.

A About eight or nine feet.

Q About what?

A Eight or nine feet. As I fell I was struck.

By Mr. McCarter.

Q Now, were you not trying to keep ahead of that car?

A As I was pumping, the stick was moving up this way and the other way (indicating).

Mr. McCarter. That does not answer the question at all, your honor.

By the Court.

Q Were you trying to keep ahead of the car that was next to you? He can say either yes or no to that.

A Yes, I was ahead and I wanted to be ahead.

By Mr. McCarter.

Q Did you fall in the middle of the track?

A Yes, sir.

Q Were you in the middle on the handle or on one end?

A One end; one was here and I was here (indicating).

Q How many were pumping on your side?

A There was only two; one was here and one was there (indicating).

Q And how many were pumping in front?

A Three.

The Court. Find out how the handle ran, whether longitudinally or transversely?

Mr. McCarter. I understand this is a photograph that is thought to be fairly accurate (producing photograph).

Q Was the car like that picture (shown to witness)?

A Yes.

(The photograph referred to is shown to the jury).

Q Was your friend on your left or on your right?

A The left.

Q On your left?

A Yes.

The Court. He gave that man's name: Joseph Genaro.

Q Can you tell where you were, how far from the bridge, when you fell off?

A About three or four hundred feet.

Q Three or four hundred feet?

A That is all.

Q Were the hand-cars while you were at work on this side or the other side of the bridge?

A This side of the bridge.

Q How near to the bridge did they stay while you were at work?

A Near the tower, about ten feet below; I didn't measure it.

Q All three of them?

A Yes, sir.

Q Did you notice whether there was a mile post near where you fell off?

A There is a tower there.

By the Court.

Q You can say at once whether you noticed it.

A No. 8, yes.

Re-direct examination by Mr. Raymond.

Q How long had Con Sullivan been boss there at this time?

A I was only there eight months, but he could have been there three or four years; I don't know.

Q Well, was he there the eight months?

A Yes.

Q What did he do all that time, the same thing you have mentioned here? Was he boss all that time?

Mr. McCarter. Do not lead him, please; he says he was a boss.

Mr. Raymond. Well, I want to know how long he was boss.

A Yes, sir.

Mr. McCarter. All the time he was there, I understand.

Mr. Raymond. All right, if you admit it.

Witness. All the time.

Q How long had you been using that hand-car?

A They have changed two or three.

Q How many days or months or weeks had you used that hand-car?

A Seven or eight months.

By the Court.

Q Where did Sullivan live at the time of the accident, if you know? Did he live in Newark or somewheres else?

A Yes, Newark. Now he lives in Jersey City.

Q How long before you were hurt had you been working on that job near the Bayonne bridge?

A Three or four weeks.

Q How often was Sullivan there during that three or four weeks?

A Every day.

Q Do you know how Sullivan used to get down to the job from Newark?

A Sometimes he walked, sometimes he came with us; most of the mornings he came with us.

Q On what?

A With the hand-car.

Q What time used you to leave the pumping-station in the morning to go to the job?

A Seven o'clock.

Q When you fell off the car do you know where you fell?

A No. 8, where I fall.

Q What?

A No. 8.

Mr. McCarter. I think he did not understand, your honor.

Q Near milepost No. 8?

A Yes, sir.

Q Did you fall on the track?

A On the middle of the track.

Q The middle of the track?

A Yes.

Q Did you know when the second car came along?

A The three of them were on the same track, one after the other.

Q When a second car came along did it do anything to you?

A It ran over me.

Q How?

A That iron bar that is on the hand-car struck me and turned me over.

Q Before it struck you how were you, were you lying or standing?

A I was on my back.

Q And you say the bar turned you over?

A Yes, turned me over.

Q When the third car came along did it do anything to you?

A The third one, the whole car was on my back and hurt me, made the noise, "Bum! Bum!"

Q Bump! Bump!" You say you went to New Brunswick. For whom did you work in New Brunswick?

A In a factory.

Q What factory, whose factory?

A A company; I don't know the name.

Q When you came back to Newark you worked for a man at stone cutting?

A Yes, sir.

Q You have said that you do not remember his name. Where was his place?

A He is from Newark, but—

Q Where was his stone yard?

A This man had a contract to lay curb stones.

Q Well, did you work on the street or did you work in the stone yard?

A On the street.

GEORGE F. CORRIGAN sworn in behalf of plaintiff.

Direct examination by Mr. Raymond.

Q Doctor, you are a practicing physician in the city here?

A Yes, sir.

Q How long have you been such?

A Been practicing for five years.

Q Here?

A Yes.

Q In August, 1905, where were you practicing? Were you connected with St. James Hospital?

A Yes, sir.

Q Have you ever seen the plaintiff in this case, Joseph Cicalese?

A Yes, sir.

Q Where did you see him?

A At the hospital, St. James Hospital.

Q Do you remember the day you saw him?

A August 8th.

Q When he arrived there what time was it, do you know?

A I think it was in the afternoon.

Q Did you examine him?

A Yes, sir.

Q And will you state to the court and jury what you found his condition to be?

A He had a compound fracture of the middle finger, this finger here (indicating), low down, so it was necessary to amputate at this joint.

By the Court.

Q Which joint, Doctor?

A The first joint. He had an incised wound running underneath the right shoulder, two inches from the spinal column, and obliquely down towards the axilla—underneath the arm—eight inches in length.

By Mr. Raymond.

Q Anythinng else, Doctor?

A That is all.

Q What did you do for him? Did you treat him yourself?

A Yes, sir.

Q What did you do?

A I amputated the compound fractured finger, and scrubbed up the wound and cleaned it out as carefully as I could and put in a few sutures.

Q Why was it necessary to cleanse it?

A The dirt was ground right into the wound.

Q And you say you put several stitches in?

A Yes, sir.

Q And what then?

A I treated it daily, dressed it every day.

Q How long did it remain an open wound?

A Well, I had to take out the stitches after four or five days, because I saw signs of infection, due to the dirt that was ground in; it was impossible to get

all the dirt out; so that I had to convert it all into an open wound.

Q How long was he under your care at the hospital?

A Seventeen days.

Q When he left what was his condition?

A His condition was good.

Q Cured. You say it was healed at that time?

A No, sir; not quite.

Q Did you see him after he left?

A Yes.

Q For how long a period?

A Four weeks after he left.

Q Where, at the hospital?

A At my office.

Q At the end of four weeks had the wound healed?

A Yes, sir.

Cross examination by Mr. McCarter.

Q Doctor, do you recall what time it was that you first saw Chicken, as they call him, on the day he was hurt, what time in the afternoon?

A I don't remember the exact time.

Q As I understand you, you found the wound in his back filled with dirt?

A Yes, sir.

Q Which subsequently caused infection?

A Yes, sir.

Q How deep was that wound?

A About half an inch in depth.

Q Was it swollen much, was there swelling at the wound?

A No, sir.

Q Now, did you find that any particular muscle or nerve was destroyed or injured?

A Part of the fibres of one muscle was severed.

Q Which muscle was that?

A The muscle has a technical name; it is called the latissimus dorsi.

Q Now, after the healing took place that muscle resumed its normal function, did it not?

A Yes, sir.

Q Now, I notice that the young man's back shows a scar. Is it not a fact that the scar is largely due to the infection, the dirt that was in that wound, which made it practically impossible for it to heal up without so much scar?

A Yes, sir; it was due to that.

Q There is no inability, no permanent disability coming from that scar, is there, Doctor?

Objected to as not cross examination.

Objection overruled.

Exception by plaintiff.

The Court. You may answer the question.

(Question read.)

A There is no permanent disability resulting from the injury or scar.

Q Can you state from your knowledge of and experience with this injury how soon the wound in the back healed and how soon the back was restored to its normal condition, excepting, of course, the appearance of the scar? I leave that out. By its normal condition, I mean its normal condition for work.

Objected to on the same ground.

Objection overruled.

Exception by plaintiff.

(Question read.)

A The wound healed two weeks after leaving the hospital; when he left the hospital—he was admitted on the 8th; he stayed in the hospital seventeen days, and two weeks after that the wound was permanently healed.

Q Now, when a wound of that kinds heals is there any trouble from it thereafter?

Objected to on the same ground.

The Court. Well, is not that a very general question? It seems to me so general an inquiry can hardly be answered.

Mr. McCarter. I will modify the question to suit the Court's suggestion.

Q When you say that this wound healed in two weeks after the patient left the hospital—

Mr. Raymond. Three weeks.

Mr. McCarter. Was it three?

Mr. Raymond. Or four weeks; first he said four and then he said three.

Q What is the fact; when did you say this wound healed?

A Two weeks after the plaintiff left the hospital.

Q That is the way I understood you, Doctor. Are you able to say, Doctor, from your knowledge of the wound and your treatment of it how long a time after the wound healed did or would have expired before the patient would cease to suffer pain?

Objected to as not cross examination.

(Question withdrawn.)

Q Are you able to state when, in your judgment, from your knowledge of and experience with that wound on the back, the patient would be able to have resumed his ordinary avocation?

Objected to as not cross examination.

Objection overruled.

Exception by plaintiff.

A Three months after the wound healed the man would certainly be able to resume his ordinary occupation.

Q Now, turning to the finger that had the compound fracture and which you cut off. That was a successful amputation?

A Yes, sir.

Re-direct examination by Mr. Raymond.

Q Where?

Q You have been practicing five years, you say?

A Yes, sir.

Q And how long had you been down at St. James Hospital at the time this case came in?

A I have been there ever since the hospital opened; the hospital was opened in May, 1901, I think.

Q Have you ever seen a case just like this before?

A Yes, sir.

Q You have?

A Yes, sir.

Q Just this kind?

A Yes, sir.

A At the hospital.

Q Who was it?

A I can't remember names, but I have taken care of a good many people every day; it is impossible for me to remember the names.

Q How long before was it?

A How long before what?

Q How long before you treated Cicalese had you had these other cases?

A Oh, we see these cases on an average of three or four a year.

Q Injured just that way?

A Yes. That is, I see them; there may be more than that, but they would come under my observation.

Q Doctor, you have been employed by the Lehigh Valley Railroad, have you not, to look into this case?

A No, sir.

Q Did you not make an X-ray picture of this wound?

A Yes, sir.

Q A short time ago?

A Yes, sir.

Q Who was that for?

A For my own benefit.

Q Just went down there for your own benefit?
A Yes, sir.
Q How long ago was that?
A About two weeks ago.
Q Two weeks ago?
A Yes, sir, about that.

Re-cross examination by Mr. McCarter.

Q Let me ask you a question. I did not know about that. What did you find out by that X-ray picture?

A I found out there was no fractured rib on—

Mr. Raymond. I object. If he has got the picture that will show. I object to this question.

The Court. I think your examination is proper.

Witness. There was no injury to the shoulder joint on the right side, and there was no injury to any of the ribs; that is what the X-ray picture showed; so therefore, there couldn't be any internal injury.

Q Was there any injury to the shoulder blade?
A No, sir.
Q When did you do that?
A About two weeks ago.

Further direct examination by Mr. Raymond.

Q Where is that picture? Where is your record of it?

A The picture or—

Q Yes. Where is it? What notes did you make of it? Did you make any notes of your examination at that time?

A Yes, a mental note.
Q Where is the note? I asked you.
A I made a mental note.
Q You have got that with you, I suppose?
A Yes. It was not necessary to write down any note.

GEORGE A. ROGERS sworn in behalf of plaintiff.

Direct examination by Mr. Raymond.

Q Dr. Rogers, where are you practicing?
A Newark.
Q How long have you been practicing in Newark?
A I have been practicing in Newark for about eight and a half years.
Q And previous to that where were you practicing?
A In New York.
Q In New York?
A Yes, sir.
Q And how long were you there?
A Five years; altogether I have been practicing fifteen years.
Q Have you had any special line of practice?
A Well, I do quite a good deal of surgery.
Q Where were you graduated from?
A College of Physicians and Surgeons, in New York.
Q New York City. That was how long ago, do you say?
A 1892.
Q Have you been connected with any hospital in Newark?
A Yes.
Q What hospital?
A Hospital for Women and Children and the Beth Israel Hospital.
Q Now, Doctor, have you examined the plaintiff, Joseph Cicalese, in this case?
A I have.
Q When did you make that examination?
A I saw him last month and a year ago last month.
Q In December, that is?
A Yes.
Q December, 1906?

A Yes.

Q And December, 1905?

A Yes.

Q Where did you examine him in December, 1905?

A At my office.

Q How many times have you examined him in all?

A Twice.

Q I wish you would state what you found his condition to be.

Mr. McCarter. Won't you confine your testimony to what you observed, Doctor, under the Court's directions, and not as a result of anything he told you?

Mr. Raymond. The condition on the first examination.

A I found a scar which was varied from three-eighths of an inch to an inch in breadth, eight and a quarter inches in length, on the right side of his back, running from about two inches from the spine downward and outwards, to what we call the posterior axillary fold; that is, just on the level of the posterior border of the axilla, of the armpit; and on the other side he had his second finger amputated.

Q What did that wound indicate to you?

A Well, the wound indicated that it had not healed by first intention; that it was associated with considerable inflammation; and the scar was what we call hypertrophied; that is, there was an excessive amount of scar formation there, more than we usually find.

Q Could you tell anything about the depth of it?

A No; you could tell that it was not very superficial, but you could not tell exactly how deep it was.

Q The width of it would not indicate anything to you about that, would it?

A Well, it might have something to do with it.

Q Now, Doctor, I wish you would state to the court and jury what, in your opinion, the consequences of such an injury as this wound exhibited would be?

A Well, I should think that probably it would more or less impair the usefulness of that side of the body—the arm.

Q Why?

A Because in the first place, a scar has more or less tendency to contract, and a scar anywhere, if it is very large and very wide, it is apt to cause more or less discomfort; in the second place, there are usually more or less nerves included in the scar, and sometimes they cause considerable pain.

Q In that part of the body?

A Any part of the body.

Q Now, confining it to that particular part of the body, what is the probability as to injury to the nerves?

A Well, there are always some nerves included in such a scar, and just how great a degree of pain may be associated cannot be predicted by examining the scar; you can't see it. Scars exactly alike on some men may be excessively painful and on others may not be at all painful.

Q In what way would that interfere with his working capacity, Doctor?

A Well, if a person has pain in any particular part of the body it is apt to impair the use of that part of the body.

Mr. McCarter. We object to any statement about pain. This gentleman is an expert, and statements about pain must be entirely from what the plaintiff told him.

The Court. It is true that pain is invisible, but the testimony of an expert medical and surgical witness can, I suppose, be taken as to whether pain is, in the natural course of things, a consequence of a given cause.

Q Pain in that part of the body, Doctor, would have what effect on other parts of the body, if any?

A Why, it would impair the man's general usefulness, the conditions locally.

Q And how long would such a situation be likely to continue?

A Well, if such a condition existed it might continue indefinitely.

Q By that you mean—

A It might continue as long as that man lived, unless something was done to put an end to it; that would mean an operation.

Q Did you treat the plaintiff for this injury at all?

A No.

Q What could be done to relieve such an injury?

A That whole scar could be cut out and the edges brought together, and could be made whole by what we call first intention; that is, without any scar intervening between the healthy tissue.

Q Now, you inspected this wound again, did you not?

A Yes.

Q When was that? Last December, you said?

A Last month.

Q And what situation did you find then, if it was different from the one you found the year before?

A I can't say that it was any different.

Q About the same?

A Yes.

Q And as to the permanancy of the injury, what would you have to say, as to the result of your last inspection?

A Well, I would say that whatever impairment of function exists now will continue to exist unless something is done to relieve him.

Cross examination by Mr. McCarter.

Q Doctor, the operation which you speak of to remove the scar is not at all a dangerous or serious one, is it?

A No, sir.

Q And what you call the scar is sort of a protuberance or excresence, is it not?

A Well, it is the excresence and also the scar tissue, which is below the surface, in other words, it is everything that has been formed in what was the original wound.

Q Now that scar, I suppose we will all agree, was probably largely due to the infection that the wound received from the dirt that got into it at the time of the injury?

A Yes.

Q In order to create either temporary or permanent loss of motion in any part of the body there must be an impairment of the muscles or nerves, must there not?

A Yes, in one way or another.

Q A superficial wound as such after healing does not impair motion, does it?

A Well, that would depend upon certain circumstances; for instance, if a scar formed—

Q I would rather have you answer me yes or no, Doctor.

A Well, I can't answer you yes or no.

Q You cannot?

A No.

Q A wound that is a flesh wound and not involving the muscles does not impair motion, does it?

A It may impair it very materially. The commonest kind of a disability is an extensive burn, which will only involve the skin and tissue under it perhaps, but owing to the extensive scar formation it may entirely prevent the use of that part.

Q But you are speaking now of the existence of the scar?

A Yes.

Q Which can be readily removed, of course?

A Yes.

Q Did you give it as your professional opinion, from the two examinations that you made of this man, that the scar that you find there of itself is sufficient to make a disability of motion, or that it might do it?

A Well, a man with such a scar—

Q You can answer that question yes or no, Doctor.

A You ask me if I think it may or might, and you want me to answer yes or no?

Q No, whether it does or whether it merely might do it?

A Well, I believe that such a scar will, to a certain extent, make that side less useful than the other; to what extent is another question.

Q How long a time did you examine him last month when you saw him?

A Oh, about twenty minutes.

Q Did you put him through the ordinary motions of an examination?

A Yes.

Q Did Mr. Feldman come with him?

A Yes.

Q Did he come with him a year ago too?

A Yes.

By the Court.

Q Dr. Rogers, was there anything to indicate whether any adhesions had been formed as a consequence of the wound in the back?

A You mean—

Q I may have asked a foolish question; I do not know; but it occurred to me—

A Well, there might be adhesions of bone, or so far as the nerves are concerned, or muscle, or something of that sort. There do not seem to be any adhesions to the bone or to the muscles; the only thing is that it is possible—in fact, it is highly probable—that some nerves are caught in that scar and being pressed upon by the scar tissue.

Q This is on the right side, I think?

A The right side.

Q And you thought that the impairment of the usefulness of the right side would be in the arm?

A Yes.

Q Did you test the patient for his ability to use both arms?

A I did; yes, sir.

Q With what result?

A Well, it seemed that the right arm was not as useful as the left; the motion in the right arm seemed to be impaired, as far as I could judge.

Q Do you recall the particular manifestations from which you drew that conclusion?

A Well, I put him through all the different motions with both arms, and I tried to get him to do it in such a way that he would be—would not suspect what I was trying to get at. Of course, as a rule, if you examine such a patient, they may exaggerate their disability, but if you keep working at them, very often you can get them to do something which before they were unable to do, and you can tell that before it was exaggeraated. And it seems to me that even when he was taken unawares there was a little disability on the right side as compared with the left.

JOSEPH GENARO sworn in behalf of the plaintiff.

Direct examination by Mr. Raymond.

Q Where do you live, Joe?

A East Kinney street.

Q What number?

A 313.
Q How long have you lived in Newark?
A Eight years.
Q Did you live in America before that?
A No, sir.
Q You came from Italy, then, eight years ago?
A Yes.
Q Do you know Joseph Cicalese?
A Yes, sir.
Q Where were you working on the 8th of August, 1905?
A Lehigh Valley.
Q Lehigh Valley Railroad?
A Yes, sir.
Q And whereabouts?
A On this side of the bridge from Bayonne.
Q And who was working with you?
A Sir?
Q Who was working with you? Was Joseph Cicalese there?
A Yes, sir.
Q How long had he been working there?
A I don't know.
Q You do not know how long he had been working there?
A No, sir.
Q Well, how long had you been working there?
A Since the 5th of August.
Q Since the 5th of August?
A Yes, sir.
Q You had been there three days, then?
A Yes, sir.
Q Had Cicalese been there as long as you had?
A Yes, sir.
Q He had been working there before that?
A Yes, sir.
Q Who was the boss there?
A Con Sullivan.
Q Con Sullivan?

A Yes, sir.

Q Was he there when you first went to work there?

A Yes, sir.

Q Did you know him before?

A No, sir.

Q Well, how did you go to work, Joe, from Newark here? How did you get to the place where the work was?

A Well, they brought me there.

Q In what?

A On the job.

Q On what?

A On that job.

Q Did you walk or ride?

A Ride.

Q On what?

A On the handle-car.

Q Now, the night or the evening of the 8th of August how were you going to come home?

A On a car.

Q How many men were getting on the car?

A About twelve or thirteen.

Q How many men were going to work it?

A What do you mean, the pump?

The Court. Yes.

Q Pump it.

A Five.

Q I wish you would tell the court and jury what happened just before the car started, what you saw Cicalese do and what you saw Con Sullivan do and what you heard them say, if anything?

A Well, I heard Joe Cicalese tell Con Sullivan the car was out of order.

Q When was that, that night?

A 8th of August, yes, sir.

Q And what did Sullivan say?

A He says, "Go ahead; I will fix it to-morrow morning."

Q "Go ahead, I will fix it to-morrow morning?"

A Yes, sir.

Q And then what happened?

A Ride on.

Q Then you took the ride?

A Yes, sir.

Q Where was Con Sullivan when he said this? Where was he, on the car?

Objected to as leading.

A No, sir; on the ground.

By the Court.

Q Where was Con Sullivan?

A On the ground.

By Mr. Raymond.

Q And where was Cicalese?

A On the ground.

Q And were you on the car?

A Sir?

Q Where were you?

A On the ground, too.

Q Then what did you all do?

A We all jumped on the car and go ahead.

Q What did Con Sullivan do?

A Didn't do nothing.

Q Where did he go?

A Ride on the car, too, and go home.

Q The same car as you?

A Yes.

Q Were there other cars there?

A Yes, sir.

Q Ready to go?

A Yes, sir.

Q How many?

A Three.

Q Three others?

A No, sir; two others.

Q Two others?
A Yes, sir.
Q Well, you started off, did you?
A Yes, sir.
Q How many men were pumping?
A Five.
Q How many in the front?
A Three.
Q And in the back?
A Me and Cicalese.
Q And what happened then?
A Well, the handle slip over—
Q Before you say that, one word. What was Cicalese doing on the car?
A Pumping.
Q And who was on that end of the pump with him?
A Me.
Q You?
A Yes, sir.
Q Now, tell us what happened.
A While we was pumping the handle slip over and fell.
Q Who fell—what fell, the handle?
A Joe Cicalese.
Q Where did he fall?
A On the middle of the track.
Q What happened to him there?
A Well, two cars ran over him.
Q And then what did they do with him?
A Picked him up and put him on the handle-car and take him over across there at the pump house.
Q Now, the hand-car on which you were riding, had you seen that hand-car before?
A Yes, sir.
Q When?
A Well, as soon as I went to work.
Q Did you use it before?
A No, sir.

Q You were not on it before?

A No, sir.

Q Did anybody use it?

A Sure, they used it.

Q Now, to come forward a little. Where did they take Joe then?

A Over to the pump house, the pump station.

Q In Newark?

A Yes.

Q And then where did they take him?

A Telephoned down to the station house, telephoned to the police patrol, and take him over to the hospital.

Q You did not go with him to the hospitaal, did you?

A No, sir; I went home.

Q When did you see him again?

A Who, Joe?

Q Yes.

A I seen him on Sunday.

Q The Sunday following?

A Yes, sir.

Q Do you know how long he was in the hospital?

A Two weeks.

Q And then where did he go?

A He went home.

Q And that is where? Do you know where his home is?

A In my house; yes, sir.

Q In your house?

A Yes, sir.

Q And when he got to your house what did he do?

A Stayed there.

Q Did he work?

A No, sir.

Q Well, how long was he out of work?

A About three weeks, a couple of weeks.

Q Three weeks?

A Two or three weeks; I don't remember.

Q And then what did he do?

A He used to go to the doctor three times a week.

Mr. McCarter. Do not let him testify to what he does not know.

Q You did not go with him?

A No.

Q Did he do any work after that, do you know?

A Well, he went on the job; he didn't do no work at all.

Q What job did he go on?

A Foreman—the doctor send him over to the Lehigh Valley.

Q Were you there with him?

A Yes, sir.

Q What did he do at the work?

A He was foreman.

Q He was foreman?

A Yes, sir.

Q How long did he work there as foreman?

A Well, I don't know; then I left the job a couple of weeks.

Q Well, how many days did he work there as foreman?

A Oh, about fifteen days.

Q Every day?

A Yes, sir.

The Court. Who was foreman, Con Sullivan?

Q Who was foreman?

A Con Sullivan.

Q You do not mean Cicalese, then?

A Well, Cicalese was kind of boss then, because he can't work.

Mr. McCarter. I object to the witness giving his conclusions.

By the Court.

Q You say that he went to work about fifteen days as foreman; whom do you mean?

A Cicalese.

By Mr. Raymond.

Q How long did you work there after he went back to work as foreman?

A About a week.

Q About a week?

A Yes.

Q And then you do not know what he did, do you?

A No, sir.

Q Do you know what he has done since then?

A I know what he has done since, yes.

Q What?

A He is home.

Q Is he working now?

A No, sir.

Q How long has he been out of work?

A About nine months.

Q He still lives in the same place with you, does he?

A Yes, sir.

Cross examination by Mr. McCarter.

Q Are you related to Cicalese?

A Yes.

Q What relation are you?

A He is cousin to my father.

Q And have you lived together since you have both been in this country?

A No, sir; we lived in different houses.

Q Did he live at your house before he was hurt?

A Well, he was coming to my house; he didn't live there; he lived about fifty feet from my house; the same street, though.

Q But since he has got out of the hospital he has lived at your house?

A Yes, sir.

Q Where did you go to work after you quit the Lehigh Valley?

A I went to work for Shanley.

Q Shanley?

A Shanley; yes, sir.

Q Was Cicalese the foreman of your gang at the time that you quit?

A No, sir; Sullivan was foreman.

Q Well, what gang was Cicalese foreman of at the time you quit?

A Well, he wasn't foreman at all; he was just standing out there watching the men.

Q What gang, your gang?

A Yes.

Q Your gang?

A Yes, sir.

Q Con Sullivan was foreman of your crowd?

A Yes, sir.

Q How many were in your crowd?

A Well, I don't remember; I didn't count them.

Q Well, about how many, the day of the accident?

A Oh, about thirty or thirty-five.

Q And was Con foreman of the whole crowd?

A No, sir; he has a second boss with him.

Q There was another boss?

A Yes, sir.

Q There were two gangs there, were there not?

A Well, I don't know if it was three gangs or two gangs or what.

Q Two gangs, I said, and two foremen?

A There was one foreman and one was second.

The Court. You are now speaking of the situation at the time of the accident?

Mr. McCarter. The day of the accident.

By the Court.

Q That is what it was at the time of the accident?

A Yes, sir.

Q At the time of the accident there were two gangs?

A I don't know if it was two gangs or not; we was working all together.

By Mr. McCarter.

Q Working all together?

A All together; yes, sir.

Q Whether there was more than one gang you do not know?

A I don't know.

Q Now, how far did you live from the pump house?

A Oh, about twenty minutes.

Q And you would walk down to the pump house and get on the car and go down to work?

A Yes, sir.

Q The night of the accident, or the afternoon of the accident, was there a race with these cars?

A No, sir.

Q Nothing of the kind, eh?

A No, sir.

Q No hurry to get home?

A No, sir.

Q What?

A Joe Cicalese was hurt when he gets home.

Q What?

A Joe Cicalese was hurt.

Q Hurt? I didn't ask you that. Were you not in a hurry to get home? Were you not going very fast?

A Well, a little bit fast, yes.

Q Do you remember hearing some of the men on the back car say "Joe, we will catch you?"

A No, sir.

Q What?

A No, sir; I didn't hear that.

Q Was there any talking between the two cars?

A Yes, sir.

Q And you were working pretty fast, pumping pretty hard, to go?

A Well, the car was going, because I had to pump fast; if I didn't pump fast the handle knock me off.

Q Did you have to hold with both hands?

A Yes, sir.

Q How many hands did Joe have hold with?

A Two.

Q All the time?

A All the time, yes, sir.

Q Did you see that?

A I see that; and then he got caught with this finger in the ring there.

Q In the ring?

A And he broke his finger.

Q Did you see his finger get caught?

A Yes, sir.

Q What?

A No, I didn't see his finger get caught; when he gets up I saw his finger was broke.

Q The first thing you knew, he tumbled back?

A Yes, sir.

Q That is all you knew about it?

A Yes, sir.

Q How soon did you stop after he fell back?

A Right away.

Q How far did your car go?

A The car went about fifteen feet.

Q Fifteen feet?

A Fifteen or twenty feet.

Q Was there a brake to the hand-car?

A Yes, sir.

Q Who put on the brake?

A I did.

Q Where was the brake?

A In the back.

Q What kind of a brake?

A (Witness illustrates.)

Q With your foot?

A Yes, sir.

Q The moment Joe fell back you put on the brake, and you stooped in about fifteen feet?

A Yes, sir.

Q Did you go to the hospital with Joe?

A No, sir.

Q Well, you kept on to the pump house, then?

A Yes, sir.

Q What?

A Yes, sir.

Q Who went to the hospital with Joe, anybody?

A Antonio Picarara.

Q The rest of you went on home with the car.

A Yes, sir.

Re-direct examination by Mr. Raymond.

Mr. Raymond. Do you mind my using this picture for the purpose of having the witness explain how the handle-bar broke?

Mr. McCarter. No.

Q (Photograph shown to witness.) Do you recognize that? What does that look like?

A I guess that is the car.

Q What happened to the handle there?

A This is the handle that was loose (indicating).

Q Where was it loose?

A This here (indicating).

Q Show it to the jury.

A It was loose in here (indicating); the handle had no screws in.

Mr. McCarter. Let him show.

Mr. Raymond. Well, he is showing.

Q Where was it loose?

A There was no screws in here (indicating), and the handle came on my side, the left side.

Q Went through?

A Went through, yes.

Mr. McCarter. I object to that. He did not say that.

Re-cross examination by Mr. McCarter.

Q You say the handle came on your side?

A Yes, sir.

Q On which side of Joe were you?

A I was on the left side and Joe was on the right.

Q How far did the handle come on your side?

A About that much (indicating).

Q About two inches?

A About three or four inches.

Q Three or four inches?

A Yes, sir.

Q Moved along?

A Moving along; yes, sir.

Q What happened to your hand?

A Well, my hand was not caught.

Q You had hold of the handle?

A Yes, sir; the handle came out altogether; I went down, too.

Q How far apart did you hold your hands on that handle? Just describe to the jury how you would take hold of that handle. Suppose this is the handle of the pump; you are going up and down now.

A Yes, sir.

Q Just show the jury. Suppose that is the handle; take that ruler.

A This way (illustrating).

Q About how much distance would there be between your hands, do you suppose?

A (Witness indicates.)

The Court. (After measuring the distance indicated by witness.) About three inches, three or four inches.

Witness. (Indicating.) We call this the handle of the car, and here is the ring; here is the two rings; I got hold on this side, and the handle comes about that much.

Q Now, I want to know how you took hold of that handle, just describe. How much distance between the two hands?

A (Witness indicates.)

Q (Through the interpreter.) About two or three inches between the two hands?

A Two or three inches.

Q (In English.) How wide is the handle, the length of the handle?

A About that much (indicating.)

Q On each side?

A On each side; yes, sir.

The Court. (After measuring.) About a foot.

Q About a foot on each side of the bar?

A Yes, sir.

By the Court.

Q Did anything break?

A No, sir.

Q You have spoken of a ring. What do you mean by a ring? Did you not say something about a ring?

A I call them rings; this here (indicating on photograph.)

Q Do you mean something that fastens over the handle in a line with the crosspiece, right there (indicating)?

A Yes, that is right (indicating.)

Q And what is that made of, metal?

A Iron.

Q What did you say about the ring?

Mr. McCarter. He said he did not know anything about that, your honor; he spoke of a ring, and I asked him if he knew anything about that, and he said no.

A There was no screws in; the handle wasn't fastened, you see.

Q Do you know how many screws there were in the ring on your side?

A One on each side.

Q Now, I am speaking of the screws, not the ring. How many screws was there in the ring on your side, on the left side?

A One.

Q One?

A Yes, sir.

Q And one also in the ring on the right side?

A Yes, sir. There wasn't any then.

Q Was that screw in the ring on the right side there at that time?

A No, it wasn't in at that time.

Q It was not in?

A No.

RAPHAELA BARONO sworn in behalf of plaintiff (through an interpreter.)

Direct examination (through the interpreter) by Mr. Raymond.

Q Where do you live?

A Van Buren street.

Q How long have you lived in Newark?

A About twenty months.

Q Do you remember the 8th of August, 1905?

A Yes, sir.

Q Whom were you working for that day?

A With Mr. Sullivan.

Q What company were you working for?

A The Lehigh Valley, with Sullivan.

Q Did you see Joseph Cicalese that day?

A Yes, sir.

Q What was he doing that day?

A He was working.

Q Where?

A Near Bayonne bridge.

Q Who else was there? How many others were there working?

A There was a lot of people there.

Q How did you go down there?

A On a hand-car.

Q What time did you finish work at Bayonne bridge that day?

A Five o'clock.

Q And then what did you do?

A We jumped on the hand-car and came home.

Q What happened before you got on the hand-car, if anything?

A I know that Joseph Cicalese fell on the track.

Q No, before he got on the hand-car?

A Seen that the stick was loose.

Q The stick on what?

A On the hand-car.

Q Which stick, the stick in the front or the stick in the back?

A The back.

Q Well, what did Cicalese do about it, if anything?

A He was full of blood.

Q (Question read.)

A I saw him, that he fell.

Q Did Cicalese say anything?

A "Oh, my God!"

Q No, before he went on the car.

A We want to come home; we was working for the foreman and we was going home.

Q You say that the handle was loose; that is what you said?

A Yes, sir.

Q Was anything said about it before you started on the hand-car?

A He said, "The hand-car is no good."

Q Who said that?

A Joseph Cicalese.

Q Whom did he say it to?

A The boss.

Q Who was the boss?

A Sullivan.

Q And what did Sullivan say, if anything?

A "I will fix it to-morrow."

Q Did he say anything else, or is that all he said?

A That is all I heard.

Q Did you go on that hand-car?

A No, sir; I was on the last one.

Q Now, ask him to tell us what happened after they started off.

A They were first and I went after them; then I saw him on the ground.

Q Then what did they do with him, do you know?

A They put him on the hand-car and took him to the pump station and telephoned, and they took him home.

Q How long had you been working for the Lehigh Valley Railroad?

A Sixteen or seventeen days.

Q And did you see Con Sullivan there? How long did you see Con Sullivan there?

A Them sixteen or seventeen days I was there I seen him every day.

Q And what was Con Sullivan doing?

A Boss.

Cross examination by Mr. McCarter.

Q How long have you been in the country?

A Twenty months.

Q Do you speak English?

A No, I don't understand a word.

Q Did Chick speak to the foreman in Italian?

The Interpreter. Who do you mean, Cicalese?

Q Did Cicalese speak to the foreman in Italian?

A Yes, sir.

Q You say that you heard Cicalese say that the hand-car was no good?

A Yes, sir.

Q He said that in Italian?

A Joseph Cicalese says, "This hand-car is no good," and the boss said, "To-morrow I will fix it."

Q Now, Cicalese said that in Italian?

A Yes, sir.

Q And Sullivan made the answer in Italian, did he?

A Yes.

Q How far were you from Cicalese before Cicalese got on the car?

A About eight feet.

Q Why did you not get on Cicalese's car?

A We were a lot of people there; some got on first, and somebody got on the other one, and somebody got on the other, and it was my chance, I got on the last one.

The Court. On the last car, did he say?

Mr. McCarter. Yes, sir.

Q Did you go down to the work on a hand-car?

A Yes, sir; in the morning.

Q Which hand-car?

A On the bad one.

Q The one that Cicalese was on in the evening?

A Yes, sir.

Q Were all three of these hand-cars kept in the same place, at the pumping station?

A Yes, one after the other.

Q In the same pumping station at night?

A Yes, sir.

Q Did all leave at the same time in the morning?

A Yes, sir; we jump on and go to work.

Re-direct examination by Mr. Raymond.

Q In what language did Sullivan talk to the men?

A Who do you mean, the boss?

Q Yes, the boss?

A Italian and English.

JOSEPH GENARO recalled for further cross examination by Mr. McCarter.

Q You testified that you heard the plaintiff speak of the car and that you heard Sullivan say, "Go ahead; I will fix it in the morning?"

A Yes, sir.

Q Did Sullivan say that in English or Italian?

A In English.

Q Did Joe Cicalese, the plaintiff, speak to Sullivan in English or Italian?

A I heard him tell him in English.

Q In English?

A Yes.

At one o'clock P. M., the court took a recess of one hour.

AFTER RECESS.

(The photograph heretofore produced by defendant is marked D. 1. for identification.

BASILIO VITALE sworn in behalf of plaintiff (through the interpreter).

Direct examination (through the interpreter) by Mr. Raymond.

Q Where do you live?

A Van Buren street.

Q The number?

A 370.

Q Do you know Joseph Cicalese?

A Yes, sir.

Q How long have you known him?

A Two or three years.

Q Do you remember the 8th day of August, 1905?

A Yes, sir.

Q For what concern were you working that day?

A Sullivan.

Q What company?

A Lehigh Valley.

Q Do you know where Cicalese was that day?
A He was working with us.
Q At the same work?
A Yes, sir.
Q What time did you go to work that morning?
A I left home half past six in the morning.
Q To go where?
A To go to work near Bayonne bridge.
Q How did you get there?
A With the hand-car.
Q You went on the hand-car, did you?
A On the hand-car.
Q Well, what time did you quit your work?
A In the evening?
Q About what time?
A Half past five.
Q And then what did you do just after you got through working?
A Went home.
Q Well, before you went home? How did you get home that night?
A With a hand-car.
Q Where was Cicalese? How did he get home, do you know?
A Yes, sir; he was pumping on the hand-car.
Q What hand-car was he pumping?
A The first one.
Q What one were you on?
A The same one.
Q Now, did you see Cicalese do anything or hear him say anything before he got on the hand-car or just as he got on it?
A He was talking about to fix that stick of the hand-car.
Q Did you see what was the matter with the stick?
A It was loose.
Q What made it loose, do you know?

A I suppose it needed a nail, or something else, to hold it fast.

Q Well, what did he say about it—that is Cicalese?

A He says, "It needs fixing," and the boss said, "To-morrow."

Q Then what happened? He got on the car, I suppose, and then what happened?

A After we went about ten minutes, the handle was loose, and moved, I suppose, and he—

Mr. McCarter. I object. Just what he saw. Tell him that.

Q Only what he knows.

A I am saying what I saw.

Q Well, what were you doing on the hand-car?

A I was sitting.

Q Were you sitting at the front or the back or the middle?

A In back.

Q How far back were you from Cicalese?

A There was only one man between.

By the Court.

Q How far was the witness—

A One man between them.

By Mr. Raymond.

Q You were sitting on the side, were you? What side were you sitting on?

A In back of Cicalese—

Q Look at that car (photograph D. 1 for identification shown to witness). Does that look like the car?

A (Indicating.) Cicalese was on this side and his other partner was on this other side, and I was sitting in back of him.

Q He was sitting on the right hand side at the rear, next to Genaro?

Mr. McCarter. Facing—

Mr. Raymond. Facing sideways, I suppose.

Mr. McCarter. Looking out.

Q What is that board there (indicating)?

A I was sitting here (indicating).

Q On that board there?

A Here, with my feet hanging over toward the back.

Q Now, could you see Cicalese?

A No, sir; I saw him fall, and then I turned.

Q Now, tell us what you saw when he fell.

A I saw that the stick was loose, and he fell.

Q What did he see Genaro do at the time, if anything?

A You mean the other man that was——

Q Yes, the other man on the back, that pumped.

A The stick came towards him, and it pretty nearly knocked me over.

Q And Cicalese, you say, fell on the—where did he fall?

A The middle of the track.

Q And then what happened to him?

A The other two hand-cars ran over him.

Q Then what did they do with him?

A All that were there, we started to cry, and we helped to put him on the hand-car.

Q How far did you go with him?

A Two or three helped to put him on the hand-car, and then we went where we put the hand-car every night.

Q Then what did you do?

A I went home. The police patrol came there.

Q Well, you do not known what the police patrol did, where they went; you did not go with them?

A They say they took him to the hospital.

Mr. Raymond. Well, never mind that. Cross-examine.

Cross examination by Mr. McCarter.

Q Do you speak English?

A No, sir.

Q Do you understand English?

A No, sir; a few words.

Q What language did Cicalese use when he talked to Sullivan before he got on the car?

A In English.

Q Then you understood him to say in English what he said?

A Yes, sir.

Q What did he say in English?

A "You must fix the stick here; if you don't some day someone will get hurt."

Q That was in English?

A Yes, sir.

Q Do you understand me now?

A No, sir.

Q (In English.) "You must fix this?"

A (Through the interpreter.) "Fix it to-morrow morning."

The examination proceeds in the English language.

Q Do you understand me when I say this now to you, do you understand me?

A I don't understand; I understand a little bit; I don't understand English.

Q Do you understand me now when I talk to you?

A No, sir.

Q You do not understand me?

A No, sir.

Mr. McCarter. You seem to understand me.

(The examination proceeds through the interpreter.)

Q Where you on the side of the car that Cicalese was working on?

A No, sir.

Q Which side of the car was Cicalese on, left or right?

A This side (indicating the left side.)

Q The left side?
A Yes, sir.
Q Who was his partner?
A Genaro.
Q And he was next to you?
A Genaro; yes, sir.
Q How long after you had quit work did you jump on the cars to go home?
A Right away.

DOMENICO FERRARO sworn in behalf of plaintiff (through the interpreter).

Direct examination (through the interpreter) by Mr. Raymond.

Q Where do you live, Domenic?
A Van Buren street.
Q Do you know Guiseppe Cicalese?
A Yes, sir.
Q How long have you known him?
A Seven or eight months—no, about ten months.
Q Did you know him on August 8, 1905?
A Yes, sir.
Q Where were you working on that day?
A Mr. Sullivan.
Q For what company were you working?
A Lehigh Valley.
Q And where were you working?
A On this side of Bayonne bridge.
Q Did you see Cicalese that day?
A Yes, sir.
Q Do you know where he was working?
A Yes, sir.
Q Where was he working?
A We were working together.
Q What time did you quit work that afternoon?
A Half past five.
Q And then what did you do?
A Got on the hand-car.
Q Well, what did Cicalese do?

A He took that hand-car. A good many of us didn't like to go on that hand-car, because we know it was no good.

Q Well, what was done about it, anything?

A Sullivan says, "I will fix it to-morrow morning, fix it to-morrow morning.

Cross examination by Mr. McCarter.

Q Did you go on that car?

A No, sir; I didn't want to go; I would rather walk than go on it.

Q What car did you go on?

A The next one.

Q Did Sullivan speak to Cicalese in English or Italian?

A English.

Q How did Sullivan reply?

A (In the English language.) "Fix it to-morrow morning, fix it to-morrow morning.

Q In what language?

A (In the English language.) English—"Fix it to-morrow morning, fix it to-morrow morning."

DOMENICO BEBE sworn in behalf of plaintiff.

Direct examination by Mr. Raymond.

Q Where do you live?

A Van Buren street, Chestnut street.

Q Do you know Joseph Cicalese?

A Yes, sir.

Q How long have you known him?

A Oh, a long time.

Q Where were you working on the 8th of August, 1905?

A What?

Q Where were you working on the 8th of August, a year ago this August?

A I don't know that.

Q (Question repeated through the interpreter.)

A The railroad.

(The examination proceeds through the interpreter.)

Q What railroad?

A Lehigh Valley.

The Court. Ask the witness if he understood the oath.

Witness. (Through the interpreter.) Yes, sir.

Q Do you know where Joseph Cicalese was that day?

A Yes, on the job.

Q And where were you doing the work that day?

A The same place I was working.

Q Where was it?

A The same gang.

Q But where, what place?

A On the bridge, this side of the bridge.

Q How did you go to work that day?

A (In English.) Hand-car, every morning.

Q How did you come back every night?

A (In English.) The hand-car.

Q How do you say you came back?

A (In English.) Hand-car.

Q And this night that you are now speaking of, did anything happen just before you got on the hand-car or as you got on it?

A The boss said he was going to fix the handle of the hand-car.

Q To whom did he say that?

A Sullivan.

Q But whom did Sullivan speak to?

A To Joseph. Everybody told him.

Q Did Joseph say anything to him before he said that?

A "I want you to fix the handle;" and he says, "All right, I will fix it to-morrow."

Q And then what did he do?

A Got on the hand-car.

Q Which hand-car were you on?
A The first one.
Q And what part of it were you on?
A Right alongside of Joe.
Q How far from the back? (Photograph shown to witness.) Does that look like it?
A Yes.
Q Now, show the jury where you were on the car?
A This way, I was in the back (indicating.)
Q Going this way, you were in the back?
A Yes.
Q Were you standing up or sitting down?
A Sitting.
Q And where was Joe Cicalese?
A This side (indicating.)

The Court. Get him to say whether he was sitting on the right or left hand side.

Mr. Raymond. He was sitting on the left side, on the side of Joseph Cicalese, your honor.

Mr. McCarter. I do not think he said that.

Mr. Raymond. I think the record will show that he did say it.

The Court. Well, I think there is some confusion in the record.

Mr. McCarter. Decidedly.

By the Court.

Q Were you on the side of the car nearer to Cicalese or nearer to Genaro?
A Nearer to Cicalese.

Cross examination by Mr. McCarter.

Q Was that on the left or right of the car?
A The right side.
Q Cicalese was going this way (illustrating)?
A Yes.
Q And you were sitting here (indicating)?
A Yes, sir.

Q Right next to him?
A Yes, sir.
Q On the side board?
A Yes, on the seat.
Q And Genaro was here (indicating)?
A Yes, sir.
Q And who sat next to Genaro?
A I don't know.
Q You commenced work at seven o'clock?
A Ten minutes to seven, five minutes to seven.
Q And quit at half past five?
A Yes, sir.
Q Did you talk Italian down there or did you talk English?
A To whom?
Q To Sullivan?
A If I talked to Sullivan I talked English, and if I talked to my friends I talk Italian.
Q How long had you known Joe before the accident?
A I know him from the old country.
Q Did you come over here at the same time?
A From Italy?
Q Yes.
A No, I came first.

PLAINTIFF RESTS.

Defendant's counsel move that plaintiff be non-suited on the following grounds:

(1.) That the alleged accident happened after working hours, at a time when the relation of employer and workman did not exist between defendant and plaintiff.

(2.) That no causal connection has been shown between the alleged defect in the hand-car and the accident that ensued.

(3.) That it appears that plaintiff was guilty of contributory negligence in having assumed an obvious risk.

(4.) That it does not appear that Sullivan, to whom it is said the plaintiff made complaint of the alleged defect, had any authority to bind the defendant by a promise to repair; that it appears that said Sullivan was a fellow-servant of the plaintiff.

The Court. (After argument.) The only question that seems to me at this point in the case to be a serious one for the court, as distinguished from the jury, is the question as to the authority of Mr. Sullivan. It appears to me that the relation of Sullivan to the job was such that it might naturally be inferred that he had the authority of the master to this extent; the extent of exercising reasonable diligence and care in seeing that the appliances used by his gang were kept in good order, in order that they might work efficiently; and if that is true, it follows that his assurance on that subject would be binding on his employers. That being my present impression, my intention is to deny the application to non-suit.

Defendant's counsel pray an exception to this ruling of the court.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS, [L. S.]
Circuit Court Judge.

Mr. English opens for defendant.

WALTER S. WASHINGTON sworn in behalf of defendant.

Direct examination by Mr. English.

Q Doctor, you are a practicing physician in Newark?

A Yes, sir.

Q How long have you practiced here?

A In Newark?

Q Yes.

A Twenty years.

Q How long have you practiced medicine altogether?

A A little over thirty years.

Q What medical school are you a graduate of, Doctor?

A Of Trinity, Toronto.

Q Have you had any hospital experience?

A Yes, sir.

Q What?

A I was connected with St. Michael's Hospital for a number of years, and I am now on the consulting staff of St. James Hospital.

Q In this city?

A This city; yes, sir.

Q Did you ever have any official position in the county?

A Yes, I was county physician of Essex County for eight years.

Q Now, have you examined this plaintiff, Mr. Cicalese?

A Yes, sir.

Q When did you do it and where?

A I did it at Mr. Feldman's office; my recollection now is that it was the day before Christmas, on Monday afternoon, about four o'clock.

Q Just tell us, Doctor, what kind of an examination you made and what you found.

By the Court.

Q (Interposing). Christmas last?

A Last Christmas; yes sir. Why, I examined Mr. Cicalese's left hand, and found that he had the middle finger amputated at the—near the third joint. He also had a scar on the right side of his back about eight inches long, which extended from within two inches of the spinal column, slightly downwards and outwards, across the lower end of the shoulder blade,

and ended directly beneath the armpit on the right side. Those were the only external evidences of any injury that he had.

By Mr. English.

Q Did you do anything or ask the plaintiff to do anything to test what effect this scar in the back has upon his present condition or ability to work?

A Well, I had him—I had his clothes removed, and had him raise his right arm in various directions, to see if he was able to use it or to perform the various motions the same as he did with the left arm. except that he evidently was slower in moving that There was no difference so far as that was concerned, arm; for what purpose, I don't know—for what reason, rather, I don't know.

By the Court.

Q The right arm?

A Yes, sir. But he could move it in every direction, up over his shoulder and around behind his back and in every possible direction I could suggest; he moved it the same as the left one.

By Mr. English.

Q What have you to say as to the effect of this wound that caused this scar upon the important muscles and nerves in his back, in connection with the motions of his arm and shoulder?

A Well, it has no bearing whatever. The scar is a superficial one, which moves freely over the soft tissues beneath, and has no adhesions whatever; it hasn't the slightest influence either one way or the other in influencing the action of any muscle of the shoulder or the back or anywhere else.

Q Has the wound healed properly?

A Oh, yes, it has healed by granulating up from the bottom; it evidently had suppurated or became infected, I suppose from dirt or something of that kind, and it granulated up from the bottom, and left

a fairly wide scar, about half an inch wide, under the armpit, and extending out towards the spine it was about an inch in width; it varied from half an inch to an inch in width.

Q In your opinion, Doctor, does this wound in the back have any bearing upon his ability to work at the present time?

A Not so far as it is possible to determine it. There is nothing in the scar or in the wound itself, either now or originally, that ought in any way to interfere with the use of his arm or shoulder.

Q What is the condition of his left hand aside from the fact that his middle finger has been removed?

A Oh, it is perfectly normal; the other fingers are all well, healthy, normal, perfectly able to use them without any difficulty.

Cross examination by Mr. Raymond.

Q Dr. Washington, you had not seen this wound, as I understand you, previous to your examination on December 24th, I believe?

A No, sir.

Q And on your examination then, what did you do, what examination did you make—any besides an observation of it?

A Why, I used my sense of touch.

Q What did you do in that way?

A I examined it to feel whether there was any depression, or whether there was any loss of substance beneath the scar. That is the only thing I could do so far as my fingers were concerned. As the wound itself is over the scapula, over the shoulder blade; it couldn't go but a very slight distance before reaching the bone. The bone was not injured, so that the wound was necessarily a very superficial one.

Q What effect did that have on the patient when you pressed it?

A I don't know.

Q Well, what did he do?

A Why, he didn't—he gave no evidence of its hurting him at all; there was no pain, as I understood him, in the scar itself.

Q I did not ask you what you understood, but what you did. You say he did not make any motion at all or show by any indication; are you sure of that, Doctor?

A Yes, sir; quite sure; there was no pain on examining the scar; it would be very surprising if there was.

By the Court.

Q No evidence of pain?

A No evidence of pain on examining the scar; you couldn't expect it.

By Mr. Raymond.

Q Well, Dr. Corrigan says that a muscle was cut?

A Well, that wouldn't make any difference.

Q You think that is all healed up?

A The wound? Oh, yes, certainly.

Q You think the muscle is healed, so that there is no trouble from that either?

A The muscle?

Q The muscle was cut.

A And it has already healed.

Q So you say.

A Well, it must necessarily heal.

Q And you say that would cause no inconvenience?

A Not the amount there was in this case.

Q Well, you do not know how deep the wound was, of course?

A Yes, I do. It was over the shoulder-blade; it couldn't be deep without going to the bone. The X-ray shows that there was no injury to the bone.

Q Well, let us know about this X-ray. What do you know about the X-ray?

A Why, I heard the testimony here.

Q You only heard the testimony. Were you present with Dr. Corrigan when he made the X-ray examination?

A No.

Q Have you spoken to him about it?

A I heard his testimony to-day here.

Q Have you talked with him at any other time?

A I asked him what he found by the X-ray; yes, sir.

Q When?

A Three or four days ago.

Q Then you knew three or four days ago he was in the case?

A I don't know that I knew he was in the case; I knew he had seen the case.

Q How did you find out through Dr. Corrigan that he made the X-ray examination three or four days ago? You said you just heard it this morning?

Mr. McCarter. Oh, no.

A I said I heard the testimony this morning.

Q I want you to explain to us how it happened that you saw Dr. Corrigan three or four days ago and learned from him that he took an X-ray?

A I didn't say that; I said I heard from Dr. Corrigan; I didn't see Dr. Corrigan; I haven't been to see him. I was told that Dr. Corrigan had made an examination of this man with an X-ray, and I called up Dr. Corrigan and asked him what he found, and he said he didn't find anything.

Q Then you did not see him?

A I didn't see him; no, sir; I didn't see him until I saw him this morning here. I talked to him over the telephone.

Q And who told you what Dr. Corrigan had said?

A I think it was Mr. English.

Q Mr. English told you?

A I think so.

Q How many days ago?

A That he told me?

Q Yes.

A I couldn't tell that; it is since the examination.

Q That helped you considerably in reaching your conclusion to-day, did it not, Doctor?

A What?

Q The result of Dr. Corrigan's examination with the X-ray.

A The conclusion about which thing?

Q The permanency of the injury and the nature of the injury.

A No, not the slightest.

Q Not the slightest?

A Not the slightest.

Q Did not assist you in the least?

A Not a particle.

Q Why did you take the trouble to call up Dr. Corrigan?

A Well, why wouldn't I?

Q Well, I want to know.

A Simply for information.

Q Why did you need information if you found this all out from your examination?

A Well, if Dr. Corrigan made an X-ray examination he would be able to know that there was nothing injured deeper than what we saw.

Q And so you are now prepared to say that it was not injured because Dr. Corrigan told you so?

A No, I am not; I said so without that; I said there was nothing before I heard from Dr. Corrigan, or heard anything about his examination. I say so from my own examination independent of everybody else.

CORNELIUS A. SULLIVAN sworn in behalf of defendant.

Cross examination by Mr. English.

Q Mr. Sullivan, where do you live?

A Just now?

Q Yes.

A Jersey City.

Q You are employed by the defendant, the Lehigh Valley Railroad?

A Yes.

Q And were you so employed in August, 1905?

A Yes, sir.

Q You are the boss that has been referred to in the testimony as Con Sullivan?

A Yes, sir.

Q Now, what was the gang which you had charge of doing out at the Bayonne bridge on the day in question?

A Filling in for new tracks.

Q Shovelling dirt out there from cars or—

A Yes, sir.

Q Do you know what time you quit that night?

A Five-fifteen.

Q And proceeded to return home on these hand-cars, I suppose?

A Yes, sir.

Q Now, I want to know if the plaintiff, Cicalese, made any complaint to you of the condition of this handle on this hand-car?

A No, sir.

Q Were you his foreman?

A No, sir.

Q Who was his foreman?

A Peter Sullivan.

Q How many gangs were there out there at that time?

A Two.

Q One in charge of you?

A Yes.

Q And who was in charge of the other gang?

A Peter Sullivan.

Q And this man Cicalese, you say, was not in your gang?

A No, sir.

Q On which hand-car did you ride coming home?

A The first car.

Q That is the one on which Cicalese rode?

A Yes, sir.

Q How were you sitting? Just describe how you were sitting relative to Cicalese.

A I was sitting on the front end, what, I believe, is known as the left hand side of the car.

Q So that Cicalese was behind you, then?

A Yes, sir.

Q Now, did you hear any shouts or remarks passed on the car on which you were riding to the people on the car behind?

Objected to as leading.

Question withdrawn.

Q Tell us whether or not you heard any conversation at that time between the men on any of the cars?

The Court. Shortly prior to the accident?

Mr. English. Yes, sir.

A Well, it was quite customary for them to be speaking—

By the Court.

Q No, no. Did you hear on that occasion anything of that kind?

A Yes, I heard them shouting from one to the other.

By Mr. English.

Q Were they shouting in English or Italian?

A In Italian.

Q I assume that you did not understand what they said?

A Not all of it; no, sir.

Q Did you understand any of it?

A Yes, some.

Q Well, tell us that which you understood of what you heard.

A Well, as near as I could understand it, they were telling the men on the first car that they were no good and that they weren't going fast enough.

Q Was there any reply to that from the men on the first car?

A Yes, sir; some of them replied that some of their bodies weren't any good.

Q Well, did you see the actual occurrence when this plaintiff fell off the car?

A No, sir.

Q After these shouts back and forth which you heard, what called your attention to the plaintiff?

A I saw Chicken when he was falling backwards.

Q Just what position was he in when you saw him?

A Well, he was part way over, just in that shape, I should judge (illustrating).

Q Both hands in the air?

A Both hands in the air.

By the Court.

Q Do I understand that you saw him falling or lying?

A In the air.

By Mr. English.

Q In the act of falling?

A Yes, sir.

Q How near was the next car to that car you were on at the time?

A I should judge about twenty feet.

Q And then what happened after he fell?

A He fell in the centre of the track, and the other hand-cars passed over him.

Q And then arrangements were made to take him to the hospital, as has been described, I suppose?

A Yes.

Q Did you continue on to Newark on the same hand-car after the accident?

A On the same hand-car I was on?

Q Well, on one of the hand-cars?

A Yes, sir.

Q Did this hand-car that Cicalese fell off of continue on to Newark?

A Later on; yes, sir.

Q And while you were there did you see it?

A Yes, sir.

Q How did they get it there?

A In the usual manner.

Q Pump it?

A Pumped the car home.

Q Did the handle come out?

A Not to my knowledge.

Q Tell the court and jury just what was the matter with the handle, as you understand it.

The Court. As you saw it

Mr. English. As you saw it at that time.

A Well, I knew the handle for some time had been loose on one end. The handle is held in position by two small screws running through two iron rings.

Q Just point out on that picture where the screws are. (Handed to witness).

A The screws go through the wooden handle right here (indicating).

By a Juror.

Q Is it one long bar or two small bars that you take hold of?

A One wooden handle, a solid wooden handle.

By Mr. English.

Q How long is the handle?

A I should judge it is about eighteen inches on both sides of those crossarms, extending out on both sides.

Q Do you know how much space there is between the crossarms?

A About the same.

Q That would be about 54 inches? And that is a solid wooden handle?

A A solid wooden handle; yes, sir.

Q Running through those iron rings?

A Iron rings on the crossarms.

Q I understand you to say there was a pin on one end?

A The last time I saw the car there was a pin in one and the other end was loose.

Q How long before the accident was that?

A That morning.

By the Court.

Q Can you remember in which end the pin was?

A Yes, sir.

Q Or which end was loose?

A Yes, sir.

Q State.

A The handle was loose, as near as I can remember, on the right hand side; the pin was out on the right hand side and in on the left; that is, facing the handle.

Q You say the right hand side; which is the right hand side?

A I say the right hand side facing the handle.

By Mr. English.

Q Is there a front and rear end to these handcars—a front end and a trailing end?

A Yes, sir.

Q So that they always go in the same direction?

A It is customary to run them in the one direction; yes, sir.

Q And this defect was at which end, the front end or the trailing end?

A The trailing end.

Q And on the right hand side?

A Yes, sir.

Cross examination by Mr. Raymond.

Q How long have you been foreman, Mr. Sullivan?

A Five years.

Q Five years?

A About that.

Q And during that time your work has carried you to different places on the road of the company?

A Yes, sir.

Q And this particular day you remember that you were down there at the Bayonne bridge?

A Yes, sir.

Q And you remember that Cicalese was there?

A Joseph Chicken was there?

Q Well, that is the same man; you need not be particular about that. And you say there were two gangs?

A Yes, sir.

Q How many did you have in your gang?

A About thirty, thirty-five.

Q And how many were in Peter Sullivan's gang?

A I couldn't say.

Q Well, they were working pretty near your gang, were they not?

A We were working together; yes, sir.

Q All together. So that you did not stay with your men after the work was done, did you? You got on the hand-car with Joe?

A Well, the men were mixed up.

Q When did they mix up?

A When they got ready to go home.

Q Now, tell me a word or two about this handle. You say that one of these pins was in?

A Yes.

Q The pin runs through this thing that appears to be a ring, does it?

A Yes, sir; that is an iron ring.

Q There is one pin on either side, is there not?

A Yes, sir.

Q How do you suppose it would be loose if only one pin was out?

A Loose on the end that had no pin in it.

Q Doesn't it fit pretty tight in the ring?

A It does at times; wood shrinks occasionally.

Q Will you tell us how the pin would make it much more secure so far as the looseness is concerned?

The Court. The witness is probably not bound to give a dissertation on physics.

Mr. Raymond. Well, he says it is loose; I want to know why it is loose.

The Court. He can describe it.

Q Well, now, loose which way, up and down or side ways, loose this way or that way (indicating)?

A It would shake in the ring on one end, on the right hand side.

By Mr. English.

Q Shake up and down or this other way, back and forward?

A Up and down.

Adjourned until to-morrow, Thursday, January 3, 1907, at ten o'clock, A. M.

SECOND DAY.

Thursday, January 3, 1907.

Met pursuant to adjournment.

Present, counsel as before stated.

The third juror not being present, counsel consent to proceed with the case with eleven jurors.

PETER SULLIVAN sworn in behalf of defendant.

Direct examination by Mr. English.

Q Now, Mr. Sullivan, you were employed by the Lehigh Valley Railroad in August, 1905?

A Yes, sir.

Q You are not working for them now, I think?

A No, sir.

Q What was your business in August, 1905?

A Foreman.

Q Whereabouts?

A Here in Newark.

Q Foreman on the track, or what department of the road?

A Track.

Q And were you in charge of one of the gangs working at the Bayonne bridge at the time of this accident?

A Yes, sir.

Q Was or was not the plaintiff, Cicalese, in your gang?

A He was in my gang.

Q You were his foreman?

A Yes, sir.

Q Did he make any complaint to you of a defect in the handle of the hand-car?

A No, sir.

Q Did you return that night on one of the hand-cars with the men?

A The one that he fell off?

Q You were riding on that?

A I was on the second one.

Q You were on the second one?

A Yes, sir.

Q Which way were you facing?

A I was facing out towards the eastbound track.

Q Towards Newark or away from Newark?

A Towards Newark.

Q You were facing towards Newark?

A Yes.

Q Did you or did you not have a view of Cicalese as he was pumping on the handle?

A I saw him pumping.

Q I do not suppose you understand Italian very well, do you?

A No.

Q Well, did you hear any words between the men on the hand-car and the men on the other cars?

A They were hollering at one another, but I didn't understand what they were saying.

Q Tell me what you saw, if anything, that Cicalese did while this hollering that you describe was going on?

A He turned around.

Q Just illustrate to the jury how he turned around, if you can.

A (Illustrating). Turned around that way; he had hold of the handle and was turning around that way, looking behind him.

Q Looking towards the car behind him?

A Yes, sir.

Q Did you see him actually fall off the car?

A Yes, sir.

Q Can you tell the jury how it happened, what attitude he was in or what he was doing at the time he fell off the car?

A He was pumping when he fell off.

Q Well, I mean in reference to looking around.

The Court. Just describe what you saw.

A I saw him falling off backwards.

Q Well, just prior to his falling off backwards had he or had he not been looking around to the car behind him?

A He was looking around when he fell off.

Q How did he happen to lose his balance and fall off?

A The handle was up—

Mr. Raymond. If he knows.

Witness. The handle was up, and when he was looking around he reached down to take the handles and the handles wasn't there; they were up; he couldn't see them; he reached down, and there was nothing there for him to take hold of, and he fell off.

Q What happened after he fell off?

A The car that I was riding on ran over him.

Q I think you assisted him to the hospital, did you not?

A No, sir.

Q Did you notice whether his companion, Genaro, kept on pumping at the time Cicalese turned around and missed the handle?

A I didn't notice it.

Cross examination by Mr. Raymond.

Q Where do you live, Mr. Sullivan?

A In Wharton.

Q Wharton, New Jersey?

A Yes, sir.

Q Do you go there every night?

A Every night?

Q Yes.

A Yes, sir; I am working there now.

Q Where were you living at the time of this accident?

A McWhorter street, here in Newark.

Q Are you related to Con Sullivan?

A Yes, sir.

Q A brother?

A First cousin.

Q He was down there that day, was he not?

A Yes, sir.

Q And he was on the car with Cicalese, was he not?

A Yes, sir.

Q How long have you been employed by the Lehigh Valley?

A About six months, working on the section.

Q I mean altogether how long have you been employed by them?

A About eight months, I think.

Q To the present time?

A I am not working for them now.

Q You are not employed by them now?

A No, sir.

Q When did you leave them, how long ago?

A I think it was last March, I think; I wouldn't say for sure.

Q And you had been working for them how long?

A About eight months.

Q Working eight months. Then how long had you been with them at the time this accident happened?

A About four months, I think.

Q You had been four months at the time with them. And when you were first employed by them what work did you do?

A Worked in the gang, the same as the rest of them.

Q Not a foreman?

A No, sir.

Q You were a laborer?

A Yes, sir.

Q And how long were you a laborer?

A Till July, I think.

Q Then you had not been a foreman very long when the accident happened?

A I was assistant foreman.

Q You were assistant foreman, then. Cornelius Sullivan was in charge of the whole crowd, was he not, and you were assistant to him?

A Not at the time that fellow got hurt.

Q Well, when were you assistant foreman?

A I was assistant foreman under Con in July, I think.

Q In July. Then you were made a full-fledged foreman in what month?

A At the time he got hurt.

Q Just at that time?

A No, sir.

By the Court.

Q When did you become a foreman as distinguished from an assistant foreman?

A I couldn't say just when that was; about July, I think.

Q You think you became a foreman in July?

A Assistant foreman.

Q No. My question is when you became a foreman, a full foreman?

A I couldn't say.

Q Well, you can give us some idea, can you not?

Q [By Mr. McCarter, interposing.] How long before the accident? That is what the Judge wants to know. How long about before the accident had you been made foreman?

A About two months, I think.

By Mr. Raymond.

Q But you were assistant foreman in July?

A Yes, sir.

Q Now, Cornelius Sullivan had a gang of men there that day, had he not?

A Yes, sir.

Q And both gangs went home in the same crowd in the three cars, did they not?

A Mixed up.

Q And the gangs were mixed up in the cars, too, were they; that is, some of one gang and some of another were in each car?

A In each car.

Q Well, had you had anything to say to the men about the condition of this particular car that Cicalese was pumping on?

A No, sir.

Q You heard nothing about there being any defect there?

A No, sir.

Q As far as you know, it was all right?

A Yes, sir.

By Mr. English.

Q Have you got your timebook? Did you keep a timebook?

A Yes, sir; I had one, but I gave it to Con.

TONY FRANK sworn in behalf of defendant.

Direct examination by Mr. English.

Q Tony, you understand English?

A Well, I no understand too much, just a little bit.

Q Well, we will try. Do you know Joe Chicken?

A Yes, sir.

Q Were you working for the railroad last summer?

A Yes.

Q A year ago, when Joe got hurt?

A Yes, sir.

Q Do you remember that he got hurt?

A Yes, sir.

Q Now, where were you when he got hurt?

A The last car.

Q You were on the last car?

A Yes, sir.

Q What were you doing?

A Well, I go to watch on this side of the road, to pump her up.

Q You were pumping?

A Yes, sir.

Q On the last car?

A Yes, sir.

Q Which way did you face?

A On Newark.

Q Towards Newark?

A Yes, sir.

Q Could you see Joe from where you stood?
A Yes, sir.
Q Did you watch him?
A Yes, sir.
Q What was Joe doing when you saw him?
A Joe, the first time he turns around like that (indicating,) and pump her up again; the next time he pump her up some more, and the next time he turned all around; another time he pump her up.
Q Did you hear Joe say anything while he was turning around and pumping her up?
A Yes, sir.
Q What did he say?
A The last time he turned around again——

The Court. You were asked what he said.

Q Did you hear Joe say anything to the people on the car behind him?
A He pump her up.
Q Did anybody on your car or the second car say anything to Joe?
A No, sir; no say nothing.
Q Did you see him fall over backwards?
A Yes, sir.
Q Well, how did it happen?

The Court. Just what you saw.

Q When Joe fell over what did you see?
A When he fell over Joe say, "Oh, my God!"
Q That is what he said when he fell off?
A Yes. He fell over on the middle of the track.
Q Before he fell off had he been pumping?
A Yes, sir. Joe?
Q Yes.
A Yes, sir.

(The examination proceeds through the interpreter.)

Q You say you were on the third car?
A Yes, sir.
Q And you were facing towards Newark?

A Yes, sir.

Q And you were pumping up and down?

A Yes, sir.

Q Now, did the boys on the first car pump as fast as the boys behind or not?

A No, sir.

Q What did the boys on the cars behind say to the boys on the first car?

The Court. One moment. You asked a double-barrelled question, and he said, "No, sir." I do not know what that means.

(Question and answer read.)

Q Does that mean that they did pump as fast or not as fast?

A Everyone tried to pump fast, to get home quick.

Q Ask him whether the boys on the second or third car said anything to the boys who were pumping on the first car.

A I didn't hear anything.

Q What did Joe do while he was pumping and before he fell off?

A He was turning around to look if the other ones was catching up.

Q How many times did he do that before he fell off?

A Twice before and once again, and then he fell.

Q When he fell was he in the act of looking around?

Objected to as leading,

Q Just describe how he happened to fall off?

The Court. No, do not answer that question. That asks for the witness's explanation of the accident. What he saw is what we want.

Q What did you see when Joe fell off the car?

A He fell on the track.

Q Did he have hold of the handles when he fell off the car?

Objected to as leading.

By the Court.

Q Ask him where his hands were.

A Ready to pump, if he catch the handle, of course the handle went up, and he fell.

By Mr. English.

Q After Joe fell off the car what did the witness do?

A I picked him up, I put him on the handcar and I got a handkerchief and with this hand I put it on where he was hurt.

Q Did you go to the hospital with him or did you go on to Newark with the rest of the boys?

A I went home. The patrol-wagon came there and they took him away.

Q I mean from the place of the accident, how did he go home, on the handcar, or did he walk?

A With the handcar.

Q On which handcar did he ride after the accident?

A The one that I had, the last one.

Q On the same one?

A Yes, sir.

Q How did the boys get the handcar that Joe had fallen off of home?

A The same as the others

Q They pumped it home the same as the others?

A Yes, sir.

Q Did he see the handle on the handcar which Joe fell off of?

The Court. When?

A Yes, sir.

The Court. One moment. When?

Q At the time of the accident or before it?

A The day before.

Q Was he or not pumping on that handle the day before?

A Yes, sir.

Q What was the condition of the handle when he pumped on it?

A Here was a nail and here was a nail, and here was no nail (indicating), it was a little bit loose—shaked a little bit.

Q So that there was one pin in the handle and one pin out?

Objected to.

Q How many pins were in the handle when he pumped on it?

A One.

Mr. Raymond. I object, unless he knows. He did not pretend to be pumping on it at the time the plaintiff was pumping on it. Whom do you mean by "he," Cicalese?

Mr. English. No, the witness.

Mr. Raymond. Oh, that would be the day before. I object to the condition of the handle the day before.

The Court. I think that is near enough to the time.

Q At the time Joe fell off the car did the handle come out?

A No, sir.

Cross examination by Mr. Raymond.

Q These cars were all on one track?

A Yes, sir.

Q All on the same track?

A Yes, one after the other.

Q How many men were on the car you were on?

A About fifteen or seventeen.

Q Fifteen or seventeen men on your car?

A Yes, sir.

Q And you were on the back of that car?

A Yes, sir.

Q How many men were pumping your car?

A Six.

Q Six men pumping, three on the back and three on the front?

A Yes, sir.

Q You were pumping on the back of the car or on the front of the car?

A The back of it.

Q And then there were three men pumping on the front of the car?

A Yes.

Q And the rest of the men were sitting at the sides, were they?

A Sitting down on the boards.

Q On those boards at the sides?

A Yes, sir.

Q And then ahead of you was another car?

A Yes.

Q How many men were on that car, the car right ahead of you?

A About fourteen or fifteen.

Q How many men were pumping that car?

A Five.

Q Five men?

A Yes.

Q And there was a car ahead of that, was there not?

A Yes, sir.

Q And how many men were pumping that car?

A The first one?

Q The first car?

A Five.

Q Five men pumping that?

A Yes, sir.

Q Now, let me see. How many men do you say there were on the second car altogether?

A Pumping up on the second car—

Q The second car.

A Five.

Q Five men pumping?

A Yes, sir.

Q Any other men on it?

A The other men sat down on the board.

Q About how many men were there sitting there, do you know?

A Well, about nine or ten; I don't know.

Q Five on a side?

A Yes, sir; five on this side and five on this side.

Q How long were those cars?

A About seven feet long.

Q Each car?

A Yes, sir.

Q And how far apart were they traveling up the road?

A One fifteen feet, another one twenty-five, another one thirty.

Q They were about twenty-five or thirty feet apart, were they?

A Yes.

Q Now, Joe Cicalese was on the first car, was he not?

A Yes, sir.

Q Are you sure that they went right on with that first car?

A Yes, sir.

Q You are sure of that, are you?

A Yes, sir.

Q They did not take it off the track and put it to one side, did they, after the accident—the first handcar?

A Yes, they put it on another track, too.

Q Oh, they put it on another track?

A Yes, sir.

Q What did they do with the second car?

A But the last one, they take Chicken home.

Q What did they do with the second car?

A They put it one side, too.

Q Put both of those cars one side?

A They put them on another track.

Q And what did they do that for, do you know?

A Because the last was ready to put Cicalese on it and take him to the crossing, the pumping station.

Q What did the other cars do? Did you leave the other two cars back there?

A Yes, the other people came home on them.

Q Well, after you, though?

A Yes, sir.

Q Were you there when the others came home?

A Yes, sir.

Q Well, how long after you got to Newark, to the pumping station, did the other two cars come in?

A Five or six minutes.

Q How long did it take to come to Newark, to the pumping station, on the cars?

A About ten minutes.

Q You were not there, Tony, were you, when they started off with these other two cars?

A No, sir.

Q So you do not know what cars they took with them, except that two cars came into the pumping station, do you? Do you know what cars they brought back with them?

A The first one and the small one.

Q The first one and the small one they brought in about six minutes later?

A Yes, sir.

Q Well, now, those cars were coming right along, were they not?

Objected to as indefinite.

The Court. I do not think the question is very clear.

Mr. Raymond. No, sir, it does not correctly express what I want to know.

Q Just tell me once again why they took those two cars and lifted them off the track to the other track. I do not quite understand you.

A Joe had fallen from the hand-car and we wanted to take him to the crossing.

Q To what crossing?

A The pumping station.

Q Well, did not the other cars go to the pumping station, too, later?

A Yes, sir.

TONY TANZOLA sworn in behalf of defendant.

Direct examination by Mr. English.

Q Can you speak English, Tony?

A A little bit, not much.

Q Were you working for the railroad in August a year ago?

A Yes, sir.

Q Whereabouts were you working?

A At the Bayonne bridge.

Q And was Joe Cicalese there?

A Yes, he was with Pete Sullivan.

Q Whom did you work for?

A I was work with Con Sullivan.

Q How many hand-cars did you have there?

A Two; another one ahead with Pete Sullivan.

Q How many altogether to come home on?

A Three.

Q Which one did you ride on?

A The second one.

Q Did you pump or not?

A Yes, I was pump.

Q Who pumped the first car?

A I don't know; Joe Chicken was right alongside of me on the next car, the first car.

Q You had your back to Joe?

A Yes, sir.

Q And he had his back to you?

A Yes, sir.

Q He was right next to you?

A Yes, sir.

Q Did you hear anybody on the last car shout anything to Joe?

A I heard some fellow say, "What is the matter with you, Joe? Why don't you hurry up a little more with the hand-car, get a move a little more?" and he hollered back, "I couldn't help it; I ain't got no good man with me to pump."

Q Did he shout anything else or anybody shout anything else to him?

A No.

Q Now, how close did your hand-car come to Joe's hand-car?

A Well, about four or five feet sometimes; sometimes we catch up, the hand-car right up against him.

Q Did you see Joe do anything when the hand-car came right up against him?

A No, only I heard him holler.

Q Did you see him fall off the car?

A No, sir.

Q What first attracted your attention to him?

A I was attending to my business, to pump.

Q How soon after one of these shouts did you know that Joe had fallen off?

A About a few minutes after.

Q Did you turn around to watch Joe at any time?

A I turned around when he say to the back car, "I can't help; I ain't got good man with me; I can't help;" I turn around.

Q What did you see then?

A Well, I seen Joe turn around.

Q Turning around towards you?

A Yes, sir; turning around to the back car, hollering to them fellows on the back.

Q How soon after did he fall off?

A I don't understand that.

Q (Through the interpreter). Ask him how soon after he had seen Joe turn around did Joe fall off?

A Two minutes after.

Q (In English.) Did you see that hand-car after Joe had fallen off of it?

A Yes, sir.

Q Did you go home on it?

A I go home on the same car I was before.

Q The same car you were on before?

A Yes, sir.

Q Did you see the boys pump the car home that Joe fell off of?

A No.

Cross examination by Mr. Raymond.

Q Where were you at the time they moved the other car that Joe was on?

A Well, I was on the same car; we took the car off and came to the back car; they put him on the back car and took him down to the cross, and take them two cars off of the track.

Q Took them both off the track?

A Yes, sir.

Q The first car?

A The first and the second one.

Q Are you working for the Lehigh Valley Railroad now?

A No, sir; I work for Hanson & Van Winkle Company.

By the Court.

Q You say you saw Cicalese turn around?

A Yes, sir.

Q When he turned around where were his hands?

A Well, his hands was with the hand-car; he started to pump when he turns around.

Q His hands were on the handle?

A Yes, sir; he had his hands on the handle.

LOUIS SOMMA sworn in behalf of defendant (through the interpreter).

Direct examination (through the interpreter) by Mr. English.

Q Whom do you work for now, Louis?

A Jack Ockle.

Q Is that the name of the foreman that you work for?

A Yes, sir.

Q Whom does the boss work for?

A Lehigh Valley road.

Q And you were working for the Lehigh Valley a year ago last August?

A Yes, sir.

Q Down by the Bayonne bridge?

A Yes, sir.

Q Who was your boss at that time?

A Sullivan.

Q Which Sullivan, Con or Pete?

A Con.

Q Do you know Joe Cicalese?

A Yes, sir.

Q Which hand-car were you riding on on the afternoon that he got hurt?

A The last one.

Q Which way did you face, towards Joe or away from him?

A Towards Joe.

Q Now, did you hear anybody on the back car say anything to Joe?

A I saw Joe turn around twice.

Q No. I asked him if he heard anybody say anything to Joe?

A I heard that Joe turned around.

Q (Question read).

A No, sir.

Q How many times did you see Joe turn around?

A Twice.

Q When he turned around where were his hands?

A He was pumping on the handle.

Q Did he keep his hands on the handle all the time?

Objected to as leading.

Objection sustained.

Q How long before the accident had you pumped on the handles that Joe was pumping on?

A The day before.

Q Describe the condition of the handles at that time.

A When I pumped there was one nail on one side and nothing on the other.

Q How many nails were in it when he pumped?

A Only one.

Q Could or could not the handle come out?

Objected to.

Q Did or did not the handle come out when he pumped on it?

A Never came out; when I had it it never came out.

Q Well, could it have come out?

Objected to.

The Court. That is too hypothetical.

Defendant's counsel pray an exception to this ruling of the court.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS, [L. S.]

Circuit Court Judge.

Q Tell the court and jury how Joe looked when he fell over backwards; just describe what you saw when Joe fell over backwards.

A Joe turned around twice, then he started to pump again. I saw him fall, but I don't know how he fell.

Q What was Joe doing while he was turning around?

A Pumping.

Q With how many hands?

A I couldn't see, I was so far away.

CROSS EXAMINATION WAIVED.

PETER SULLIVAN recalled in behalf of defendant.

Direct examination by Mr. McCarter.

Q Peter, I show you a time book, or a book, rather. I will ask you, to save time, if this is your time book for the month of August, 1905, and if Joseph Cicalese, or whatever his name is, appears therein (shown to witness)?

A This is my time book.

Q Yes, that is your time book.

A Yes, sir (indicating in book).

Mr. McCarter. I offer that in evidence.

Mr. Raymond. I object. The time book is not evidence as against us. It may be useful for him to refresh his memory from, but it is not evidence against us.

The Court. (After argument). Before it is offered there should be more inquiry as to the book, as to the way in which it was kept and as to what it shows.

Mr. McCarter. Well, it is a time book.

Q I see on the top of this page for August, 1905, the name "Peter Sullivan." Is that your name?

A Yes, sir.

Q Who wrote that?

A I did.

Q You did?

A Yes, sir.

Q I see a number of names below your name, who are they?

A The men that worked for me.

Q For you?

A Yes, sir.

Q And what are the figures or marks opposite each name upon the pages?

A That is how many hours they worked.

Q Who wrote in the hours they worked?

A I did.

Q You did?

A Yes, sir.

Q What object had you in writing in the hours, the number of hours that these men worked?

A Had to turn it in to the company twice a month.

Q For what purpose?

A Tell how much time they had coming.

Q How much to pay them?

A Yes.

Q Now, I find the name of "Joseph Cicalese" on this page. Is he the Joseph that is suing in this case?

A Yes, sir.

Q And you kept his time there?

A Yes, sir.

Mr. McCarter. Now I offer the book in evidence.

Objected to

Objection overruled.

Exception by plaintiff.

(Marked Ex. D. 2.)

Cross examination by Mr. Raymond.

Q Now, is this your book right along?

A No, sir.

Q Where did you get it?

A Con Sullivan.

Q When did Con Sullivan give it to you?

A When I took his place.

Q When was that, what date?

A In August, I think.

A Juror. Your Honor, can I ask a question?

The Court. Yes, I would be glad to have you.

The Juror. Did this witness hire this man, this Joseph Cicalese?

The Court. Do you refer to the plaintiff?

The Juror. Yes, sir. Did he employ this man for the railroad?

The Court. You want to know who engaged him, is that it?

The Juror. Yes, sir.

By Mr. McCarter.

Q The juror wants to know if you engaged the plaintiff?

A No, sir.

By Mr. Raymond.

Q You write your name there, will you (paper and pencil handed to witness)?

A (Witness writes on paper).

By the Court.

Q Peter, when you became foreman, was Joseph Cicalese already on the job?

A Yes, sir.

Q And Con Sullivan was foreman before you were?

A Yes, sir.

Q Were you there at the same time—were you there in July?

A Yes, sir.

Q As what?

A Assistant foreman.

Q Under Con?

A Yes, sir.

MICHAEL SLONZKI sworn in behalf of defendant (through the Slavish interpreter).

Direct examination (through the interpreter) by Mr. English.

Q Do you work for the Lehigh Valley Railroad?
A Yes, sir.
Q Did you work for it when Joe Cicalese got hurt?
A Yes.
Q Were you working down at the Bayonne bridge at that time?
A Not on that place.
Q Well, near the bridge?
A I have been in the employ under Pete.
Q Do you remember when Joe Chicken got hurt?
A Yes, I remember well.
Q Which hand-car did you ride on?
A On the second.
Q Did you pump or did you just ride?
A Yes, I was pumping.
Q Which way did you face, towards Newark or the other direction?
A Towards Newark.
Q Could you see Joe from where you stood?
A He turned towards his side.
Q You were pumping going home?
A Yes, sir.
Q And Joe was pumping on the car in front?
A Yes.
Q And you could see Joe pump from where you stood pumping?
A Yes.
Q Do you understand Italian?
A Do you want me to understand the Italian language?
Q Well, did you hear the boys on the hand-cars talk to each other in Italian when they were going home?

A Well, I heard they were talking, but what I don't know.

Q Now, while they were talking what did you see Joe do?

A Well, while they were talking I noticed that this fellow, Joe, turned around on the side.

Q How many times did you notice him turn around on the side?

A Three or four times.

Q Did you see Joe when he fell off?

A Yes.

Q Tell us how it happened.

A While he was pumping with both hands he turned, and he got a little—he let loose of the handle and he fell on the side.

Q Who helped pump that handcar home after Joe fell off of it?

A I did.

Q Did the handle come out when you were pumping it home after the accident?

Q Well, it did not; there was on one place a pin, what I call, and the other one was nothing.

Q Could the handle come out as long as that pin was in it?

Objected to.

The Court. That sounds like a hypothetical question, yet it would be entirely competent to ask the witness to describe the construction of that bar, from which the jury might themselves be enabled to answer this question. It is too much in the way of calling for a conclusion on facts that are not fully disclosed. I therefore sustain the objection.

Defendant's counsel prays an exception to this ruling of the Court.

Exception allowed, let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS [L. S.]

Circuit Court Judge.

Q I show you D. 1 for identification, which is one of the pictures of this hand-car (shown to witness). Do you recognize that?

A Yes.

Q Now point out on that where the pin was in?

A Where I am pointing with my finger, there is where Joe was pumping (indicating).

Q There was a pin in where he is pointing with his finger?

A Yes, right here where Joe was pumping.

By the Court.

Q Point again.

A (Witness indicates).

The Court. I think it would be well to mark this place. It is very difficult to describe it.

Mr. McCarter. Yes, sir.

The Court. I will make an X there (marking on photograph).

By the Court.

Q Ask him if there is where he says the pin was in?

A Yes; I was pumping that handle.

Q At the place marked by the cross. Now, where was the pin out?

A There where I am pointing my finger, there was not a pin in.

The Court. I will mark with two crosses the place where he says the pin was out. (Marking on photograph.)

A Juror. Your Honor, may I ask a question now.

The Court. Yes.

By the Juror.

Q Where the handle is marked, is that the front or the back of the car?

A From the rear of that car.

By Mr. English.

Q Is that the same handle that Joe was pumping on before he fell off?

A Yes.

Q Now, tell us how big around the handle was.

A About three-quarters of an inch.

Q And tell us how the handle is fastened on the cross-bars of the hand-car?

A Well, there is a pin through and through.

Q And the pin goes through what?

A Goes through to the iron.

Q How long a pin is it?

A An inch and a half—three-quarters of an inch in.

The Court. That photograph is in evidence; it has been used by both sides and examined by the jury.

Q The wooden handle goes through an iron ring?

A Yes.

Q How much bigger is the ring than the stick which goes through it?

A Well, it is about three-quarters of an inch iron and the ring it just space enough to put in that bar handle.

Q So the handle fills up the ring?

A Yes, that is about all, fills up the space.

Q And then the pin goes in the iron ring, on through the handle ?

A Yes, from the top, and it is screwed in.

By the Court.

Q Do you mean what has been called a pin was a screw?

A Yes, I mean it is screwed in.

Cross examination by Mr. Raymond.

Q What car were you on?

A The second.

Q The second car?

A Yes, sir.

Q And were you pumping?

A Yes.

Q At the front or back?

A Front.

Q Then your back was to Cicalese?

A No, my face was towards him.

Q Were you pumping at the front or the back of the second car?

A The front of the second car.

Q And you were facing Cicalese?

A Yes, sir.

By the Court.

Q (Illustrating with books.) Well, there is the first car.

A Yes.

Q And there is the second one.

A Yes, sir.

Q Where were you?

A The second car (indicating).

Q What part of the second car?

A Right here (indicating), the front of the second car; and Joe was pumping from the first car, the back.

Re-direct examination by Mr. English.

Q Now, Mike, had you ever pumped on this hand-car that Joe fell off of before the accident?

A Yes.

Q How long before the accident had you pumped on it?

A About ten minutes before.

Q Did he pump on the same hand-car when he went to work that morning?

Objected to as leading.

The Court. It would be easy enough to ask it in another form: What car did he go to work on?

Q What car did you ride on on your way to work that morning?

A On the same car as I went to work and I went on my way home.

JIMMY FRANK sworn in behalf of defendant (through the Italian Interpreter).

Direct examination by Mr. English (through the interpreter).

Q Jimmy, you work for the Lehigh Valley Railroad?

A Yes, sir.

Q Did you work for them when Joe Chicken got hurt?

A Yes, sir.

Q Which hand-car did you ride on coming home that night?

A The first one.

Q Is that the same car that Joe was pumping?

A Yes, sir.

Q Where did you sit?

A On the seat.

Q How near to Joe?

A Well, don't you know the distance that a hand-car is? He was pumping and I was sitting.

By the Court.

Q No, no. What part of the hand-car was he on,

A On the seat, towards the river, on the side towards the river.

By Mr. English.

Q Was he nearer to the back end of the car or nearer to the front end of the car?

A The front of the car, nearer the front of the car.

By the Court.

Q Now, was that the side on which Joe was?

A No, sir; the other side.

By Mr. English.

Q Did you see Joe turn around while he was pumping home that night?

A No, sir.

Q Did you see him when he fell off the car?

A Yes, sir.

Q Just tell us how it was Joe fell off? What did he do? How did it happen?

A As we were going home that evening, there was three hand-cars, one after the other. As I turned I saw that he was pumping; while he was pumping he turned around, wanted to get the handle with his hand as he turned; he didn't catch the handle and he fell?

Q He went to reach for the handle as he turned, and missed it and fell?

A Yes, sir.

Q Did you go home on that same hand-car after Joe was hurt?

A Yes, sir.

Q Did you help pump it home that night or not?

A No, sir.

Q Did the boys have any trouble to pump it home with the handle?

A No, sir; I don't know. I went to work on the 7th and he got hurt on the 8th.

Q The night that Joe got hurt, after he had been taken away, would the hand-car pump all right going some?

A I didn't take notice of it.

Q Did you hear Joe shout anything to the boys on the car behind before he fell off?

Objected to as leading.

Question withdrawn.

Q How near were you to Joe Chicken before he quit work that night, just before he got on the hand-car?

A Three or four paces, five or six or seven; I didn't take no notice.

Q How near was Con Sullivan at the time that Joe got on the hand-car?

A I don't remember.

Q Did he hear Joe Chicken say anything to Con Sullivan?

Question withdrawn.

Q Did you hear Joe Chicken say anything to Con Sullivan just before he got on the hand-car that night?

A No, sir.

CROSS EXAMINATION WAIVED.

TONY TANZOLA recalled in behalf of the defendant.

Direct examination by Mr. English.

Q Tony, how near were you to Joe Cicalese just after they quit work that night and before they got on the hand-car?

A Well, you know, all the gang was there; they started to run to get the first car to go home.

Q Did you hear Joe Cicalese say anything to Con Sullivan before he got on the car?

A No, sir.

Q Anything about the hand-car?

A No, sir. That was the first day I went to work on the railroad; I don't know anything about that.

Cross examination by Mr. Raymond.

Q How many men were there at the time they got on the cars?

A Well, I couldn't tell you; maybe thirty-five, forty men—the whole gang.

Q Both gangs, eh?

A Yes, sir.

Q Con Sullivan was there, was he not?

A Con Sullivan was there.

By the Court.

Q Was Peter Sullivan there too?

A Well, Peter Sullivan was there, too, with the second gang, the station gang.

Q I merely asked you if he was there. Were the gangs standing together?

A Yes, sir.

Q In one crowd?

A Yes, sir.

TONY FRANK recalled in behalf of the defendant.

Direct examination (through the interpreter) by Mr. English.

Q How near were you to Joe Cicalese after you quit work that night and before you got on the hand-cars?

A We were all together there.

Q Did you see Con Sullivan there?

A Yes, sir.

Q Did you hear Joe Cicalese say anything to Con Sullivan about the handle on the hand-car?

A No, sir.

Cross examination by Mr. Raymond.

Q How many men were there?

A Sometimes we got fifteen, other times we got thirty-five, other times we got thirty. Everybody works on the job, he don't like the job, he goes home: he works one day—

The Court. No, you were merely asked how many men there were.

Q About how many men altogether were there in the crowd?

A Thirty-five or forty.

Q Around these three hand-cars?

A Yes, sir.

LOUIS SOMMA recalled in behalf of the defendant.

Direct examination (through the interpreter) by Mr. English.

Q How near were you to Joe Cicalese after you quit work that night and before you got on the hand-car?

A Five or six paces.

Q Did you see Con Sullivan there?

A Yes, sir.

Q Did you hear Cicalese say anything to Con Sullivan about the handle on the hand-car?

A No, sir.

Cross examination by Mr. Raymond.

Q How many men were there there?

A Thirty-five or forty.

PETER SULLIVAN recalled in behalf of defendant.

Direct examination by Mr. English.

Q I think you testified that Cicalese made no complaint to you about the handle?

A No, sir.

Q Did you hear him make any complaint to Con Sullivan?

A No, sir.

Q Were you there at the time when they were getting on the hand-car?

A Yes, sir.

Cross examination by Mr. Raymond.

Q You brought your gang there to the same place where Con Sullivan's gang was—they were there?

A They all were working together that day.

Q They all worked together that day?

A Yes.

DEFENDANT RESTS.

JOSEPH CICALESE, plaintiff, recalled in his own behalf in rebuttal.

Direct examination (through the interpreter) by Mr Raymond.

Q You have seen that picture (shown to witness)?

A No, sir—yes, I see it now.

Q Did you see it yesterday?

A Yes.

Q Now, what is that thing across there in the picture, that bar across?

Mr. McCarter. I object to that. He is not here to describe the photograph.

(Question withdrawn).

Q Looking at this picture, will you point out what part of this hand-car you had hold of?

Objected to as not rebuttal.

The Court. (After discussion). I will allow it.

Q What part did you have hold of?

A Right here (indicating).

The Court. This is altogether too vague.

Mr. Raymond. He said he had hold there (indicating).

Q Now I want to ask you at the time the accident happened what happened to that bar?

Objected to.

The Court. (After discussion). I will exclude this question on the ground that it is repetition.

Exception by plaintiff.

Q Just after the accident did you see where that bar was?

A After I fell?

Q Just after, yes.

A How could I see? I was on the ground.

Q When you fell where was the stick?

Objected to as not rebuttal.

Mr. Raymond. (After discussion). I thought I had shown it, but your honor and Mr. Mc Carter thought I had not. If I have shown it I will withdraw the witness.

(Witness withdrawn).

PLAINTIFF RESTS.

Mr. McCarter. I would like to move for the direction of a verdict, if your honor please, upon each and every one of the grounds urged by me yesterday on the application for the non-suit, and also on two additional grounds: First, that

it appears plainly from the evidence that at the time of the accident the plaintiff's workday had finished, and that if any liability whatever attached to the defendant for the occurrence that subsequently took place, it is a liability that arises not under rules governing the relations of master and servant, but under rules governing a relation of inviter and invitee or licensor and licensee, and that the action has therefore been misconceived, and that there is nothing to indicate to the defendant by the declaration or the pleadings in the case that the proof would be directed to a time other than when the plaintiff was at work for the defendant; and that as this action is based entirely on the relation of master and servant and upon the responsibility of the master for the promise of his representation to repair the broken piece of apparatus during the progress of the work, the action of that kind must fail and a suit be commenced to place the liability upon the form and character of action that must necessarily exist.

The Court. In which case the company would be liable only for wilful injury.

Mr. McCarter. Yes, sir. That is the second of the new points. The first was that it would necessarily be a case of wilful injury.

Your honor will remember that I said they were either licensor and licensee or inviter and invitee. Perhaps in the latter case the liability would not be so strict as in the former. If they were licensee and licensor, it would be wilful negligence. And that is my second point: that there must be a verdict for the defendant in this case on the ground that the defendant and plaintiff did not at the time the injury occurred occupy the relation of master and servant, but, at best, that of licensor and licensee,

in which case there must be, in order to create liability, proof of wilful negligence. There being no proof whatever of such wilful negligence, there must be a verdict for the defendant.

The Court. I deny your application.

Defendant's counsel pray an exception to this ruling of the court.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS, [L. S.]
Circuit Court Judge.

Mr. McCarter sums up for defendant.

At one o'clock, P. M., the court took a recess of one hour.

AFTER RECESS.

Mr. Raymond sums up for plaintiff.

The court charges the jury as follows:

Adams, *J.*

Gentlemen of the jury. There are three rules of law that have been referred to by counsel which are important to bear in mind, and which you would, no doubt, bear in mind if I said nothing about them. First, the duty of the employer to use reasonable care to provide reasonably safe appliances for the use of his workmen. The employer is not an insurer; he does not guarantee immunity from injury. The obligation is just what I have stated: a duty to use reasonable care to provide reasonably safe appliances and tools for the use of his workmen in their employment. It is also true that a workman on his part assumes the obvious risks of his employment. If he shrinks from the assumption of a risk that he perceives he has two remedies: he may leave the employment or he may ask his employer to correct the defect. If the employer refuses, the workman must then either continue as he was before or go away. If the

employer promises to amend it either at a specified time or within a reasonable time, the workman may continue in the employment on the faith of that promise until the specified time arrives, and in the meantime will be free from the assumption of the risk, or he may continue for a reasonable time in the employment, if the offer was to do it in a reasonable time. If when the specified time comes or when the reasonable time has expired the employer still has not remedied the defect, and so fulfilled his promise, and the workman continues on, the risk then re-attaches and he is subject to it as he was before. This is subject to this consideration, however: that if it is obviously so dangerous to continue in the employment, in view of the obvious risk, that no prudent man would do it, the workman is guilty of contributory negligence if he receives an injury, and he cannot recover.

Some facts in this case are admitted. The plaintiff was a workman in the employ of the defendant company, and at the end of the day on the 8th day of August, 1905, he fell from a hand-car furnished by the company on which he and others were going home, and was injured. These admitted facts go but a very little way to support the conclusion that the plaintiff is entitled to a verdict against the defendant. To maintain this the proof must establish to your satisfaction each one of a series of propositions, all of which, I think, are controverted in this case, either on grounds of fact or on grounds of law. First, you must be satisfied that a defect existed in the appliance known as a hand-car. I think it is substantially admitted that some defect existed; at any rate, there has been a good deal of evidence as to something abnormal about one of those handles. In the second place, you must be satisfied that that defect, if it existed, was the sole cause of the injury to the plaintiff. If any negligence of his contributed to his injury he cannot recover. In the third place, you

must be satisfied that this injury was inflicted upon and received by the plaintiff while the company owed to him the duty of an employer. Upon that subject it has been urged that as it was after hours, and as the taking of the hand-car as a means of locomotion was not compulsory, no relation of master and workman existed. It would be conceded that if during working hours the plaintiff was riding on a hand-car furnished by the company from one job to another the relation of master and servant existed; but it is said that because, having worked up to half past five, which was the end of his day's work, up to which time he was obliged to work, he was then going home, in order to rest himself and feed himself, so that he could come back and resume his work the next day, the case is essentially different. I do not think so. I think that the evidence justifies the conclusion that this hand-car was an appliance furnished by the company for the use of its workmen in connection with their labor or their transportation—not that they were obliged to take it, but it was convenient for them to take it; it was desirable both for them and the company that they should take it; it was furnisehd for that purpose, they supplying the motive power and the company supplying the vehicle.

You must be satisfied further that the plaintiff, who has put himself on the ground that this was an open and obvious defect, gave notice of that to his employer or to someone who represented the employer, and received a promise to amend it. Both of those propositions are denied as matters of fact. Both of the Sullivans say that they never received any notice from the plaintiff and that they never made any promise. You must be satisfied further—and this is perhaps the most important question in the case—that the promise, if made—and I assume that you will find it to have been made, because unless you find all these propositions in the affirmative you must

find for the defendant—was made by a person who either expressly or by natural implication had authority to bind the company by a promise to amend. This involves various considerations; for it is not pretended that there is any evidence of any express authority given to Con Sullivan, as he has been called—that is, to Mr. Cornelius A. Sullivan—to do this particular duty.

The points that, it seems to me, you may bear in mind are there: First, the grade of the workmen, that they were humble men, uncultured, unlettered, probably ignorant, or not very well informed as to their rights, and engaged in coarse manual labor. You may consider the nature of Sullivan's position in respect to the plaintiff. You must assume, the plaintiff having put himself on that ground, that the notice was given to Cornelius Sullivan. Cornelius Sullivan is described as track foreman. He seems to have been the boss of a gang. Whether he was at this particular time the boss of the particular gang to which the plaintiff belonged or not is a question that has been discussed before you. At any rate, he evidently had been the boss until within a very few days, if he was not then, and was on the ground. You may have noticed the fact that of the workmen who were asked for whom they worked almost all said they worked for Sullivan, and then, on being further examined, said that they worked for the Lehigh Valley Railroad Company—showing that Sullivan was the man, who in their minds, was the one with whom they had a personal relation. It does not appear from the evidence, as far as the proof goes, that there was anybody else to whom they sustained any particular personal relation.

Now, the character of the car. It was not a Pullman palace car, that is run into a shop at the end of the day and turned over to a gang of inspectors and cleaners; it was a rudimentary, elementary affair, with a platform exposed to the weather, with a double

handle-bar, imparting through some mechanism below the platform a motion to the wheels, either by cogs or cranks, I suppose, which seems to have been returned at night not to a place that is described as a shop, but to a place that is called a pumping station. Just what that was does not appear. At any rate, it was a kind of a shelter or depot for that sort of supplies.

Then the character of the amendment that was desired. It seems to have been the putting in of one or more screws, nothing more—a very slight amendment, not a construction, and yet a thing not readily done by a plain workman, who would not be likely to have the screw or pin.

Now, there must have been, or should have been, some one to whom the plaintiff, if he wished to relieve himself from this assumption of a risk of which he was cognizant, could have applied for that purpose. The question is, who was he, so far as the proof in this case shows? Who was that person to whom you would naturally suppose that the plaintiff could go? The question is whether the position of Mr. Sullivan was such that the plaintiff was justified in relying upon his promise as upon the promise of one authorized to speak for the company; whether the conferring of such authority by the company may be fairly and reasonably inferred from the facts in proof, considering the position of the foreman, the work which his employment required him to perform, the nature of the amendment required, the character of the injury and the relation of the hand-car to the work. This, I suppose, is a question for you, and I leave it to you: whether the inference is a legitimate and reasonable inference that Sullivan was the man to do it.

If you resolve any one of these propositions in the negative, you will find for the defendant; that is to say, if you find that there was no defect, or that it was not the sole cause of the injury, or that there

was no notice, or that there was no promise, or that Sullivan cannot be reasonably supposed to have been the right man to give notice to and expect a promise from—if you say no to any one of those propositions, your verdict will be for the defendant, because the plaintiff must prove the entire chain in his favor to your satisfaction. If he does so, then your verdict will be for the plaintiff.

Here there are two questions. In the first place, what injuries are to be recovered for? The answer is, Those which are the proximate, the direct, natural consequences of the negligence complained of. There is evidence in the case tending to show that the finger was injured before the plaintiff fell or as he fell. He says himself, "I was pumping." Then comes a bit of his testimony which the stenographer has in the indirect narrative: "He describes"—that is, the witness—"that there was a bolt here and a bolt there, and the handle moved back, and this finger caught in a little ring, and I fell back." That seems to show that the finger was hurt, or at least part of the injury to the finger was inflicted, while he was on the car, before he got off. There is also evidence in the case tending to show that the injury to the back was inflicted by an iron bar under one of the following cars, both of which ran over him, or passed over him, both, according to his testimony, striking him and throwing him about, one of them turning him over. The question that occurred to me may have occurred to you: How long this chain of causation is and where it stops. Counsel on either side have not spoken of it, probably because they thought, as I think, that there is nothing to break the chain, but I think it is proper that I should say something about it, which will be very brief.

The rule is that the damages to be recovered, where there is a recovery, must be both the natural and the proximate or direct consequences arising from the wrong complained of, and not from the wrongful act

of a third party remotely induced thereby. The intervention of the independent act of a third person between the wrong complained of and the injury sustained, which act was the immediate cause of the injury, is made the test of that remoteness of damage which forbids recovery. For example, lawyers always think in this connection of a case called the "Squib case," a case that arose in England many years ago, where on a market day, if I remember right, a man threw a squib into the crowd; it struck a person, and he, acting under the instinct of self-preservation, struck it off with his hand; it flew through the air, fell again into the crowd, and another person struck it, and so it went on; it was thrown about, and finally struck a man in the face and exploded and injured him. The injured man sued the person who first threw it, and it was objected that there was no liability, that the person who first threw it did not hurt him; but the court said no, that the chain of causation was unbroken; that although there were intermediate agents, their action was not blameworthy; it was natural; and the wrongdoing went back to the man who had first done wrong, and he was the person who first threw it. There are two English cases, in one of which the chain of causation was held to be broken and in the other of which it was held not to be broken. In the first of these cases the agent of the defendant, a druggist, put up belladona, a poisonous drug, and labelled it as extract of dandelion, a harmless medicine; he sold it to another druggist, who sold it to the plaintiff, to whom it was administered as dandelion and who was greatly injured. In the second case, the defendant sold gunpowder to a boy eight years old, who took it home and put it in a cupboard, with the knowledge of his parents, where it remained more than a month; his mother afterwards gave him some of the powder, which he fired off, with her knowledge, and he was injured. In the first case the defendant was held to

be liable and in the second case he was held not to be liable. The difference in the result was that in the first case the druggust who was the intermediate vendor was guilty of no negligence injurious to the plaintiff; he simply had a bottle labelled "dandelion," and sold it as dandelion without knowing that it was not. In the second case the mother was negligent in permitting her son to use the gunpowder, and if she had not been negligent the injury would not have happened, so that the right of action stopped with her. In the latter case the chain of causation between the plaintiff's injury and the defendant's negligence was broken by the negligence of the intermediate party, and in the first case it was not. So in another case, a quite recent one, the case of *Collins* v. *West Jersey Express Co.,* 43 Vroom, 231, a horse attached to a wagon was standing along the sidewalk in Atlantic City; a person who was in control or charge of another wagon negligently ran against this wagon and frightened the horse; the horse ran away, turned a corner and went up another street and ran up on the sidewalk, where there was a pile of boards; a person walking quietly along the sidewalk, in order to get out of the way of the horse, jumped on the pile of boards and was hurt, and sued the man who was negligent in running his horse against the horse that was standing still. That, you see, was a good way off, around the corner, on another street; but the action was maintained, because nobody else was to blame.

So in this case, if it had appeared, for instance, that the second car was a hundred yards away, with plenty of time to stop, and the persons in charge of that car had seen this man lying on the track, and had negligently continued, when they might have checked the car and avoided the injury, and so ran over him, there the culpable act of an intermediate party would have intervened, and the plaintiff, while he could have recovered, if he could recover at all,

for his finger, could not have recovered for any injury inflicted by the cars. But that question does not seem to be distinctly presented, because the evidence is that the cars were very close together; the second car was a very few feet from the first car, and the third car was following that very closely. So there is hardly anything in the case to raise the question of the negligence of any of the operators of these cars, and the claim has not been made. I thought it, however, proper to say something about it, because it seemed to me that you might think of it.

Now, to come back to the situation. If you find all these propositions that I have averted to in a manner favorable to the plaintiff, you will then proceed to consider the question of damages for the injuries which the plaintiff has sustained. What the law seeks is to compensate, to make whole, as far as money will do it, for the injury sustained. You will understand, of course, in speaking of this question of damages, that I do it on the assumption, for the sake of the argument, that you reach a conclusion on the merits of the case favorable to the plaintiff. If your minds take the other direction, you will not have to trouble yourselves at all with this branch of the controversy.

The plaintiff has lost one finger. That is an incurable disfigurement, and it is a hindrance and always will be more or less of a hindrance to work, and to some kinds of work more than others. What will be the fair thing, in case the plaintiff should recover, to give him in money upon that score? His back was hurt. You have seen the scar; you know its location, and you have heard a considerable amount of testimony, which is not in accord, as to the probability of that particular injury disqualifying him, to some extent, for labor, and you must judge what is the fact and what would be a fair compensation for whatever disability you can attrib-

ute to this cause. You must consider whether the plaintiff has shown a disposition to exaggerate his disability in the past and to lie down, so to speak, when he might have done more in the way of reasonable effort. He, of course, cannot look to the jury to support him in idleness or to pay him for doing nothing when he might have been active. The pain is an item of compensation in every such case where a recovery is had, and the measurement of pain in money is one of those inscrutable things that is left to the judgment of a jury. The plaintiff can recover only once; whatever compensation he is entitled to is now to be awarded in a fair and reasonable manner.

The counsel for the defendant have favored me with nineteen requests to charge, of which I deny the first request and last ten, and will make some reference to some of the others.

I charge, as I think I have charged, the second request: "In order for the plaintiff to recover there must exist a causal relation between the alleged defect in the handle of the hand-car and the injury, and the jury, in order to find for the plaintiff, must be satisfied from a preponderence of the evidence that the alleged defect in the handle, and that alone, caused the plaintiff to fall from the car."

The third request I deny as being a question for the jury.

The fourth request I am not prepared to charge in the form in which it is presented. I will read it, and then tell you what I do think. I am requested to say that "If the jury find that the plaintiff, by the manner in which he conducted himself while pumping the car on the way home, either by turning around or letting go his hold of the handle, or otherwise, contributed to or caused his fall from the car, there can be no recovery, even though the plaintiff might otherwise have had a right to rely on the promise of the

defendant, by its properly authorized agent, to fix the car the next morning." I simply say on that subject that if the plaintiff, in your opinion, by his own negligence contributed to his injury, he cannot recover.

The fifth request I deny except as I have charged.

I charge this request, which is the sixth: "In order for the plaintiff to be entitled to rely on the promise alleged to have been made by Con Sullivan, it must appear to the satisfaction of the jury from the evidence in the case that the defendant either expressly clothed Sullivan with such authority or by its conduct held Sullivan out as its agent for the purpose of making such promise."

I charge the seventh proposition: "There is no evidence in the case that Sullivan was expressly authorized by the railroad company to bind it by promises to make repairs, and unless the jury find the presence of facts from which such authority may fairly be inferred, or conduct on the part of the defendant tending to create in the mind of the plaintiff a reasonable belief that such authority in fact had been conferred, the verdict must be for the defendant." That is a very good statement of the law, I think, and I have substantially already charged it.

I also charge the eighth proposition: "The fact that Sullivan was the section boss is not sufficient in itself to warrant the inference that he was authorized to bind the defendant by a promise to repair the car, and unless the jury find some additional evidence tending to confer this authority on him, there can be no recovery, and the verdict must be for the defendant." I have already said that there are a variety of things to bear in mind.

I deny the ninth request except as I have charged, and I have already disposed of the others.

(The jury retires).

Mr. English. I would like to ask an exception to that part of your honor's charge in which you held that the liability of an employer attached to the defendant in the use of the hand-car by the plaintiff after working hours—whatever the court said about that.

Exception allowed; let it be sealed and it is sealed accordingly.

FREDERIC ADAMS, [L. S.]

Circuit Court Judge.

Mr. English. I would like also to ask an exception to that statement of your honor's in which you said that you assumed that the jury would find that notice of the defect had been given.

The Court. What is that?

Mr. English. That you assumed that the jury would find that notice of the defect had been given. I think I understood what your honor meant, but I do not believe the jury did. I do not think it was quite clear.

The Court. Well, you understood me to mean what I did mean, undoubtedly.

Mr. English. Yes, sir.

The Court. That what I said just then was proceeding on the assumption that they found all those propositions.

Mr. English. Yes, sir; I understood it.

The Court. Well, this is a very intelligent jury. However, take your exception.

Exception allowed; let it be sealed and it is sealed accordingly.

FREDERIC ADAMS, [L. S.]

Circuit Court Judge.

(After some time the jury returned into court).

Present counsel as before stated.

The Court. Counsel being now present, will the jury indicate what instruction they desire?

A Juror. Your honor, the jury would like to have the principal points of your charge.

The Court. In charging the jury I began by saying that there were three rules of law that were well to bear in mind: First, the duty of the employer to use reasonable care to provide reasonably safe appliances for the use of his workman; secondly, that the workman takes the obvious risks of his employment, and, thirdly, if he desires to exonerate himself from the assumption of a risk he must ask the employer to amend it, and if the employer agrees to do so at a definite time or within a reasonable time, the workman may continue in the employment until that promise matures without risk. The promise is „evidence that the workman no longer consents to assume the risk, but in reliance upon the promise continues in the employment, under the general rule that the employer is bound to use reasonable care to provide him with a reasonably safe appliance. That, in this particular case, in order to maintain the plaintiff's right to a verdict it is necessary that the jury should be satisfied of the truth of each one of several propositions: First, that a defect existed in the handle-bar; secondly that this defect was the sole cause of the injury to the plaintiff, the sole originating cause of his fall and of the injuries that were consequent upon that occurrence; thirdly, that this injury was inflicted upon him while the company owed to him the duty of an employer; fourthly, that if the jury find that the defect existed and that it was an obvious defect, and that

it occasioned the injury, without any negligence of the plaintiff himself as a contributing cause, and that this happened while the company owed to him the duty of an employer, then the defect being, on the assumption that these propositions are established to your satisfaction, an obvious defect, it was necessary for the plaintiff, in order to relieve himself of the general obligation to assume that risk, to give notice to his employer to remove it, or, rather, to give notice to his employer of the existence of the defect and ask him to remove it; fifthly, that the employer or the person authorized to represent him should have promised that the defect would be amended, and, of course, that the injury happened before the maturity of that promise; sixthly, that if notice was given and a promise made, it must appear to your satisfaction from the evidence in the case that the notice was given to a person and the promise made by a person who, either expressly or by natural implication, had authority to bind the company; and that this involves various considerations dependent on the nature of the work, the grade of the workman, the position of the foreman and the character of the appliances, the hand-car, and the extent of the amendment required—all to be considered with a view of asking the question, and determining it, whether it was a natural and legitimate inference, in your opinion, that Mr. Sullivan was an authorized person to receive notice and to make promises in the premises.

I do not know whether I have touched upon the precise points that you have in mind, but that is as good a running summary of my charge as I can give you on the spur of the moment.

(The jury retires).

DEFENDANT'S REQUESTS AND EXCEPTIONS.

(1) There should be a verdict for the defendant.

(Denied.)

Defendant's counsel pray an exception to the refusal of the Court to charge as requested.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS [L. S.]

Circuit Court Judge.

(2) In order for the plaintiff to recover there must exist a causal relation between the alleged defect in the handle of the hand-car and the injury, and the jury, in order to find for the plaintiff, must be satisfied from a preponderance of the evidence that the alleged defect in the handle, and that alone, caused the plaintiff to fall from the car.

(Charged.)

(3 There is nothing in the evidence to indicate that the alleged defect in the handle of the hand-car could have or did cause the plaintiff to fall from the car, and in the absence of such evidence the verdict should be for the defendant.

(Denied.)

Defendant's counsel pray for an exception to the refusal of the Court to charge as requested.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS [L. S.]

Circuit Court Judge.

(4) If the jury find that the plaintiff, by the manner in which he conducted himself while pumping the car on the way home, either by turning around or letting go his hold of the handle, or otherwise, contributed to or caused his fall from the car, there can be no recovery, even though the plaintiff might otherwise have had a right to rely on the promise of the defendant by its properly authorized agent to fix the car the next morning.

(Denied except as charged.)

Defendant's counsel pray an exception to the refusal of the Court to charge specifically as requested.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS [L. S.]

Circuit Court Judge.

(5) The so-called superior servant rule has never been adopted in this state, and the boss, Con Sullivan, was a fellow servant of the plaintiff, and the defendant is not bound by any alleged promises to repair made by Sullivan in his capacity as boss, and unless the jury find he had in fact been authorized by the defendant to act as its representative in the matter of making such promises, the verdict must be for the defendant.

(Denied except as charged.)

Defendant's counsel pray an exception to the refusal of the Court to charge specifically as requested.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS [L. S.]

Circuit Court Judge.

(6) In order for the plaintiff to be entitled to rely on the promise alleged to have been made by Con Sulllivan, it must appear to the satisfaction of the jury from the evidence in the case that the defendant either expressly clothed Sullivan with such authority or by its conduct held Sullivan out as its agent for the purpose of making such promise.

(Charged.)

(7) There is no evidence in the case that Sullivan was expressly authorized by the railroad company to bind it by promises to make repairs, and unless the jury find the presence of facts from which

such authority may fairly be inferred, or conduct on the part of the defendant tending to create in the mind of the plaintiff a reasonable belief that such authority had in fact been conferred, the verdict must be for the defendant.

(Charged.)

(8) The fact that Sullivan was the section boss is not sufficient in itself to warrant the inference that he was authorized to bind the defendant by a promise to repair the car, and unless the jury find some additional evidence tending to confer this authority on him there can be no recovery, and the verdict must be for the defendant.

(Charged.)

(9) A section boss or foreman, such as Con Sullivan was, is not, but virtue of his position, authorized to bind the railroad company, his master, by a promise to repair such as the plaintiff claims was made. There is no evidence to indicate that he was clothed with authority by the railroad company to make such promises, and in the absence of any such evidence the verdict should be for the defendant.

(Denied except as charged.)

Defendant's counsel pray an exception to the refusal of the Court to charge specifically as requested.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS [L. S.]

Circuit Court Judge.

(10) The evidence is that the plaintiff made his alleged complaint to Sullivan, and received Sullivan's promise to repair, after the men had quit work for the day. Even if Sullivan had been clothed with authority by the railroad company to bind it by promises to make repairs, such authority would not extend beyond the working day, and any promise to re-

pair made after the men had quit work is not binding on the defendant, and therefore there can be no recovery by the plaintiff.

(Denied.)

Defendant's counsel pray an exception to the refusal of the Court to charge as requested.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS [L. S.]
Circuit Court Judge.

(11) There was no compulsion on the plaintiff as a part of the duties which he owed to his master to ride on the hand-car after the men had quit work for the day. The plaintiff therefore had no right to rely on the promise of the foreman, made after working hours, to relieve him from the risk which he took from incurring a danger which was obvious to him, and with which he was well acquainted, and the verdict must be for the defendant.

(Denied.)

Defendant's counsel pray an exception to the refusal of the Court to charge as requested.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS [L. S.]
Circuit Court Judge.

(12) The evidence indicates that the hand-car was furnished by the railroad company for the convenience of the workmen in going and coming from their work. There was no compulsion or requirement that the men should use the car in going and coming, and the use of it was purely voluntary on their part. The plaintiff, in availing himself of the opportunity to ride thus furnished, rather than to walk home from his work, cannot free himself from the duty to avoid an obvious danger by relying on a promise to repair the defect, and the verdict must be for the defendant.

(Denied.)

Defendant's counsel pray an exception to the refusal of the Court to charge as requested.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS [L. S.]
Circuit Court Judge.

(13) The promise of a boss or foreman to make repairs, who is authorized by his master to make such promises, to be binding on the defendant, and to entitle the plaintiff to rely thereon to relieve him from his liability for an obvious danger, must be made under such circumstances as entitle the plaintiff to rely on it in the prosecution of his work. And the plaintiff in this case is not entitled to relieve himself from the danger of the obvious defect in the hand-car by a promise of the foreman to repair the same, since it was not necessary to the performance of his work that he ride on the hand-car, and his duty toward his employer had been discharged for the day. The verdict must therefore be for the defendant.

(Denied.)

Defendant's counsel pray an exception to the refusal of the Court to charge as requested.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS [L. S.]
Circuit Court Judge.

(14) The evidence is that there were three hand-cars at the disposal of the men for returning home on the day in question. There was no compulsion or requirement on the plaintiff to ride on the defective car. He cannot therefore relieve himself from the risk of an obvious danger which he took by relying on any promise of the foreman to repair, inasmuch as he could have chosen one of the other cars for making the journey home, and the verdict must be for the defendant.

(Denied.)

Defendant's counsel pray an exception to the refusal of the Court to charge as requested.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS [L. S.]

Circuit Court Judge.

(15) In view of the fact that there were three hand-cars, two of them admittedly sound, at the disposal of the plaintiff, he had no right to rely on the promise of the foreman to relieve him from the obvious risk of the defective handle on the car on which he rode, and in deliberately choosing the defective car for his passage home he has deprived himself of any right of recovery, and the verdict should be for the defendant.

(Denied.)

Defendant's counsel pray an exception to the refusal of the Court to charge as requested.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS [L. S.]

Circuit Court Judge.

(16) The accident having occurred after the plaintiff's work day had closed, and there being no evidence of any contract by the defendant to carry the plaintiff to and from his work, the relation of master and servant no longer existed between them, and if any liability attaches to the defendant for the accident, it arises by reason of the plaintiff's being a mere licensee of the defendant, in which event there would only be responsibility in case of wilful negligence. There being no proof of this, there must be a verdict for the defendant.

(Denied.)

Defendant's counsel pray an exception to the refusal of the Court to charge as requested.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS [L. S.]
Circuit Court Judge.

(17) In any event, the present action is misconceived and cannot be sustained, for if the defendant be liable, it is not as master of the plaintiff, but as owner of the car, and as such it should be sued and the recovery based upon any liability arising therefrom.

(Denied.)

Defendant's counsel pray an exception to the refusal of the Court to charge as requested.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS [L. S.]
Circuit Court Judge.

(18) The evidence is that the plaintiff knew of the existence of the defect in the handle for some two or three days prior to the happening of the accident. If the jury find that he had had opportunity prior to the time when he did call the foreman's attention to it to make complaint of the defect in the hand-car, there can be no recovery, and the verdict should be for the defendant.

(Denied.)

Defendant's counsel pray an exception to the refusal of the Court to charge as requested.

Exception allowed; let it be sealed, and it is sealed accordingly.

FREDERIC ADAMS [L. S.]
Circuit Court Judge.

(19) If the jury find that the plaintiff waited three days after knowing of the defect in the handle, and then chose a time and circumstance under which it was impossible for the foreman to repair the hand-

car, he was not entitled to rely on the promise then made to repair, and there can be no recovery.

(Denied.)

Defendant's counsel pray an exception to the refusal of the Court to charge as requested.

Exception allowed; let is be sealed, and it is sealed accordingly.

FREDERIC ADAMS [L. S.]
Circuit Court Judge.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JOSEPH CICALESE,
Plaintiff and Defendant in Error,
vs.
LEHIGH VALLEY RAILROAD COMPANY,
Defendant and Plaintiff in Error.

In Tort.

ASSIGNMENT OF ERRORS.

Afterwards, that is to say, on the twenty-first day of February, Nineteen hundred and seven, in the Court of Errors and Appeals in the last resort in all causes, comes the said Lehigh Valley Railroad Company, by McCarter & English, its attorneys, and says that in the record and proceedings aforesaid, and also in the matters recited and contained in the bill of exceptions, and also in giving the verdict and judgment aforesaid, there is manifest error in this, to wit:

FIRST: For that the said Circuit Judge, to whom the said case was referred for trial by the Justice of the Supreme Court holding the said circuit, at and upon the aforesaid trial of the issue joined between the parties, refused to non-suit the plaintiff at the close of the plaintiff's case, although requested so to do by the defendant.

SECOND: There is error also in this, to wit, for that the said judge to whom etc., refused to direct a verdict for the defendant at the close of the entire case, although requested so to do by the defendant.

THIRD: There is error also in this, to wit, for that the said judge to whom etc., charged the jury as follows: "In the third place, you must be satisfied "that this injury was inflicted upon and received by "the plaintiff while the company owed to him the "duty of an employer. Upon that subject it has been "urged that as it was after hours, and as the taking

"of the hand-car as a means of locomotion was not "compulsory, no relation of master and workman ex- "isted. It would be conceded that if during working "hours the plaintiff was riding on a hand-car fur- "nished by the company from one job to another the "relation of master and servant existed; but it is "said that because, having worked up to half past "five, which was the end of his day's work, up to "which time he was obliged to work, he was then "going home, in order to rest himself and feed him- "self, so that he could come back and resume his "work the next day, the case is essentially different. "I do not think so. I think that the evidence justi- "fies the conclusion that this hand-car was an appli- "ance furnished by the company for the use of its "workmen in connection with their labor or their "transportation—not that they were obliged to take "it, but it was convenient for them to take it; it was "was desirable both for them and the company that "they should take it; it was furnished for that pur- "pose, they supplying the motive power and the com- "pany supplying the vehicle."

FOURTH: There is error also in this, to wit, for that the said judge to whom etc., particularly refused to charge the jury, although requested so to do by the defendant, as follows: "(1.) There "should be a verdict for the defendant. (Denied.)"

FIFTH: There is error also in this, to wit, for that the said judge to whom etc., particularly refused to charge the jury, although requested so to do by the defendant, as follows: "(3.) There is noth- "ing in the evidence to indicate that the alleged de- "fect in the handle of the hand-car could have or did "cause the plaintiff to fall from the car, and in the "absence of such evidence the verdict should be for "the defendant. (Denied)."

SIXTH: There is error also in this, to wit, for that the said judge to whom etc., particularly refused to charge the jury, although requested so to do by the defendant, as follows: "(4.) If the jury find that "the plaintiff, by the manner in which he conducted "himself while pumping the car on the way home, "either by turning around or letting go his hold of "the handle, or otherwise, contributed to or caused "his fall from the car, there can be no recovery, even "though the plaintiff might otherwise have had a "right to rely on the promise of the defendant by its "properly authorized agent to fix the car the next "morning. (Denied except as charged)."

SEVENTH: There is error also in this, to wit, for that the said judge to whom, etc., particularly refused to charge the jury, although requested so to do by the defendant, as follows: "(5.) The so-"called superior servant rule has never been adopted "in this state, and the boss, Con Sullivan, was a "fellow servant of the plaintiff, and the defendant is "not bound by any alleged promises to repair made "by Sullivan in his capacity as boss, and unless the "jury find he had in fact been authorized by the de-"fendant to act as its representative in the matter of "making such promises, the verdict must be for the "defendant. (Denied except as charged)."

EIGHTH: There is error also in this, to wit, for that the said judge to whom etc., particularly refused to charge the jury, although requested so to do by the defendant, as follows: "(9.) A section boss "or foreman, such as Con Sullivan was, is not, by "virtue of his position, authorized to bind the rail-"road company, his master, by a promise to repair "such as the plaintiff claims was made. There is no "evidence to indicate that he was clothed with au-"thority by the railroad company to make such prom-"ises, and in the absence of any such evidence the "verdict should be for the defendant. (Denied ex-"cept as charged)."

NINTH: There is error also in this, to wit, for that the said judge to whom, etc., particularly refused to charge the jury, although requested so to do by the defendant, as follows: "(10.) The evidence "is that the plaintiff made his alleged complaint to "Sullivan, and received Sullivan's promise to repair, "after the men had quit work for the day. Even if "Sullivan had been clothed with authority by the "railroad company to bind it by promises to make "repairs, such authority would not extend beyond "the working day, and any promise to repair made "after the men had quit work is not binding on the "defendant, and therefore there can be no recovery "by the plaintiff. (Denied)."

TENTH: There is error also in this, to wit, for that the said judge to whom, etc., particularly refused to charge the jury, although requested so to do by the defendant, as follows: "(11.) There was no "compulsion on the plaintiff as a part of the duties "which he owed to his master to ride on the hand-car "after the men had quit work for the day. The "plaintiff therefore had no right to rely on the prom-"ise of the foreman, made after working hours, to "relieve him from the risk which he took from in-"curring a danger which was obvious to him, and "with which he was well acquainted, and the verdict "must be for the defendant. (Denied)."

ELEVENTH: There is error also in this, to wit, for that the said judge to whom, etc., particularly refused to charge the jury, although requested so to do by the defendant, as follows: "(12.) The evidence "indicates that the hand-car was furnished by the "railroad company for the convenience of the work-"men in going and coming from their work. There "was no compulsion or requirement that the men "should use the car in going and coming, and the use "of it was purely voluntary on their part. The "plaintiff, in availing himself of the opportunity to

"ride thus furnished, rather than to walk home from "his work, cannot free himself from the duty to avoid "an obvious danger by relying on a promise to re- "pair the defect, and the verdict must be for the de- "fendant. (Denied)."

TWELFTH: There is error also in this, to wit, for that the said judge to whom, etc., particularly refused to charge the jury, although requested so to do by the defendant, as follows: "(13.) The promise "of a boss or foreman to make repairs, who is au- "thorized by his master to make such promises, to be "binding on the defendant, and to entitle the plain- "tiff to rely thereon to relieve him from his liability "from an obvious danger, must be made under such "circumstances as entitle the plaintiff to rely on it "in the prosecution of his work. And the plaintiff "in this case is not entitled to relieve himself from "the danger of the obvious defect in the hand-car by "a promise of the foreman to repair the same, since "it was not necessary to the performance of his work "that he ride on the hand-car, and his duty toward "his employer had been discharged for the day. The "verdict must therefore be for the defendant. (De- "nied)."

THIRTEENTH: There is error also in this, to wit, for that the said judge to whom, etc., particularly refused to charge the jury, although requested so to do by the defendant, as follows: "(14.) The evidence "is that there were three hand-cars at the disposal of "the men for returning home on the day in question. "There was no compulsion or requirement on the "plaintiff to ride on the defective car. He cannot "therefore relieve himself from the risk of an obvious "danger which he took by relying on any promise of "the foreman to repair, inasmuch as he could have "chosen one of the other cars for making the journey "home, and the verdict must be for the defendant. "(Denied)."

FOURTEENTH: There is error also in this, to wit, for that the said judge to whom, etc., particularly refused to charge the jury, although requested so to do by the defendant, as follows: "(15.) In view of "the fact that there were three hand-cars, two of "them admittedly sound, at the disposal of the plain- "tiff, he had no right to rely on the promise of the "foreman to relieve him from obvious risk of the de- "fective handle on the car on which he rode, and in "deliberately choosing the defective car for his pas- "sage home he has deprived himself of any right of "recovery, and the verdict should be for the defen- "dant. (Denied)."

FIFTEENTH: There is error also in this, to wit, for that the said judge to whom, etc., particularly refused to charge the jury, although requested so to do by the defendant, as follows: "(16.) The accident "having occurred after the plaintiff's work day had "closed, and there being no evidence of any contract "by the defendant to carry the plaintiff to and from "his work, the relation of master and servant no long- "er existed between them, and if any liability at- "taches to the defendant for the accident, it arises by "reason of the plaintiff's being a mere licensee of the "defendant, in which event there would only be re- "sponsibility in case of wilful negligence. There "being no proof of this, there must be a verdict for the "defendant. (Denied)."

SIXTEENTH: There is error also in this, to wit, for that the said judge to whom, etc., particularly refused to charge the jury, although requested so to do by the defendant, as follows: "(17.) In any event, "the present action is misconceived and cannot be "sustained, for if the defendant be liable, it is not as "master of the plaintiff, but as owner of the car, and "as such it should be sued and the recovery based up- "on any liability arising therefrom. (Denied)."

SEVENTEENTH: There is error also in this, to wit, for that the said judge to whom, etc., particularly refused to charge the jury, although requested so to do by the defendant, as follows: "(18.) The evidence "is that the plaintiff knew of the existence of the de- "fect in the handle for some two or three days prior "to the happening of the accident. If the jury find "that he had had opportunity prior to the time when "he did call the foreman's attention to it to make com- "plaint of the defect in the hand-car, there can be no "recovery, and the verdict should be for the defen- "dant. (Denied)."

EIGHTEENTH: There is error also in this, to wit, for that the said judge to whom, etc., particularly refused to charge the jury, although requested so to do by the defendant, as follows: "(19.) If the jury "find that the plaintiff waited three days after know- "ing of the defect in the handle, and then chose a "time and circumstances under which it was im- "possible for the foreman to repair the hand-car, he "was not entitled to rely on the promise then made to "repair, and there can be no recovery. (Denied)."

NINETEENTH: There is error also in this, to wit, for that the said judge to whom, etc., refused to permit the defendant's witness, Louis Somma, on direct examination, to answer the question: "Well, could it have come out?"

TWENTIETH: There is error also in this, to wit, for that the said judge to whom etc., refused to permit the defendant's witness, Michael Slonski, on direct examination, to answer the question: "Could the handle come out, as long as that pin was in it?"

Therefore, the said Lehigh Valley Railroad Company prays that the judgment aforesaid, by reason of the aforesaid errors, and of other errors appearing in the record and proceedings aforesaid, be reversed,

annulled, and for nothing holden, and that the said Lehigh Valley Railroad Company may be restored to all things it has lost on account of the said judgment, and that the said Joseph Cicalese may rejoin to the said errors, etc.

McCARTER & ENGLISH,
Attorneys of Defendant and Plaintiff in Error.

Common Joinder in Error filed.