61. 1932

In the Privy Council.

No. 27 of 1931.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

PAUL PRONEK - - - - - - - (*Plaintiff*) *Appellant*

AND

WINNIPEG, SELKIRK AND LAKE WINNIPEG RAILWAY COMPANY - - - (*Defendant*) *Respondent.*

RECORD OF PROCEEDINGS.

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EXHIBITS.

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AND

WINNIPEG, SELKIRK AND LAKE WINNIPEG RAILWAY COMPANY - - - (*Defendant*) *Respondent.*

RECORD OF PROCEEDINGS.

In the Court of King's Bench for Manitoba.

No. 1. Statement of Claim, 22nd March 1927.

No. 1.

Statement of Claim.

IN THE KING'S BENCH.

The 22nd day of March, A.D. 1927.

Between

PAUL PRONEK - - - - - - - - *Plaintiff*

(Seal) and

WINNIPEG, SELKIRK AND LAKE WINNIPEG RAILWAY COMPANY - - - - - - - - *Defendant.*

(Sgd.) G. H. WALKER,
Prothonotary.

1. The Plaintiff is a farmer, and resides at Lockport, in the Province of Manitoba.

2. The Defendant is a corporation, incorporated by special act of the Legislature of Manitoba, known as 63 and 64 Victoria, Chapter 78, and owns and operates an Electric Railway between the City of Winnipeg and the Town of Selkirk, in the Province of Manitoba.

3. On or about the 2nd day of January, 1926, the Plaintiff was proceeding in the evening after dark with a team of horses and sleigh, owned by the Plaintiff, northward on the main highway between Winnipeg and Selkirk, parallel to the railway line of the Defendant, which runs

In the Court of King's Bench for Manitoba.

No. 1. Statement of Claim, 22nd March 1927—*continued.*

along the said highway, and at or near Parkdale the horses of the Plaintiff, without any negligence on his part got out of control and turned to the left up a crossing to the Defendant's Railway line, and thence turned between the rails of said line and proceeded south at a high rate of speed. The Plaintiff was unable to check the said horses and they continued at a gallop down the rails a distance of about half a mile, when they were overtaken by a car owned by the Defendant, and operated by the Defendant's servants, proceeding south at a high rate of speed.

4. The said car collided with the rear of the sleigh in which the Plaintiff was riding and wrecked and demolished the sleigh, box, and harness, killed one horse and seriously injured the other and caused the Plaintiff serious and permanent personal injuries.

5. The injuries to the Plaintiff's person and the damage to his property aforesaid were occasioned solely by the negligence of the Defendant, its servants and agents, in the following respects (*inter alia*) :—

(*a*) In proceeding at a reckless and dangerous rate of speed, and in failing to maintain a careful and proper lookout on the car.

(*b*) In failing to supply and maintain sufficient and adequate lights to enable the motorman to see the Plaintiff in time to stop.

(*c*) In not keeping the car properly equipped with sufficient and adequate brakes, and in failing to apply the brakes and slow down the car in time to avoid a collision.

(*d*) The Plaintiff was severely injured about the head, causing internal hemorrhages and deafness and had his left shoulder fractured and was laid up for a long time and underwent great pain and suffering and is, and was, unable to carry on his farming operations, and will never fully recover from his injuries.

The following are particulars of the special damages of the Plaintiff :—

Hospital and Medical Expense - - -	$100.00
Value of horse killed - - - - -	200.00
Depreciation of horse injured - - - -	50.00
Sleigh and Box - - - - - - -	100.00
Harness - - - - - - - - -	30.00
Paid for keep of horse - - - - -	4.00
	$484.00

The Plaintiff therefore claims :—

(*a*) Judgment for the sum of $484.00 special damages, and general damages in the sum of $6,000.00.

(*b*) The costs of this action.

(*c*) Such other and further relief as the nature of the case may require.

Issued by Lamont & Bastin, 508 Standard Bank Building, Agents for James McLenaghen, of the Town of Silkirk, Solicitor for the Plaintiff.

No. 2.

In the Court of King's Bench for Manitoba.

No. 2. Statement of Defence, 30th March 1927.

Statement of Defence.

1. The Defendant admits the allegations contained in paragraphs 1 and 2 of the Plaintiff's statement of claim.

2. The Defendant denies that the Plaintiff's horses without any negligence on his part got out of control and turned to the left of the crossing to the Defendant's railway line, as alleged in paragraph 3 of the Plaintiff's Statement of Claim, and denies that the Plaintiff was unable to check said horses and that they continued at a gallop down the rails a distance of about half a mile when they were overtaken by a car owned by the Defendant proceeding south at a high rate of speed and alleges as the fact is that if the Plaintiff's horses got out of control as aforesaid they did so by reason of the carelessness or negligence of the Plaintiff himself, and by reason of his incompetence and inability owing to his physical condition to keep control of same.

3. The Defendant denies that the injuries to the Plaintiff's person and the damage to his property were occasioned solely by the negligence of the Defendant, its servants or agents, and denies that the street car in question was proceeding at a reckless and a dangerous rate of speed, and denies that the motorman in charge of said car failed to maintain a careful and proper lookout on the car.

4. The Defendant denies that it negligently failed to supply and maintain sufficient and adequate lights to enable the motorman to see the Plaintiff in time to stop.

5. The Defendant further denies that it was negligent in not keeping the car properly equipped with sufficient and adequate brakes, and denies that there was any negligence in failing to apply the brakes or slow down the car for the purpose of avoiding a collision.

6. There was no negligence on the part of the Defendant Company, its servants, or agents, causing or in any way contributing to the accident in question. If there was any negligence on the part of the Defendant, which is not admitted but denied, there was contributory negligence on the part of the Plaintiff, and such contributory negligence consisted in the following :—

(*a*) The Plaintiff was not in fit physical condition to be driving his team of horses at the time of the accident.

(*b*) The Plaintiff might readily have avoided the accident by turning his horse from the track so as to avoid a collision, he having plenty of time to do so.

(*c*) In failing to heed the warning of the motorman to keep clear of the track on the approach of the street car in question.

(*d*) In failing to keep a proper or any lookout for the approaching street car.

In the Court of King's Bench for Manitoba.

(e) In driving with his team on to the track of the Defendant Company immediately in front of an approaching street car, at a time when the motorman in charge of the said car had no opportunity of avoiding an accident.

No. 2. Statement of Defence, 30th March 1927—*continued.*

7. The accident in question was caused solely through the negligence of the Plaintiff himself, which negligence consisted in the acts enumerated in the preceding paragraph hereof.

By Statute, Chap. 78, 63 and 64 Vic. 1900 (Private) Chap. 90, 3 and 4 Edw. 7th 1904 (Private) all of which Statutes were enacted by the Legislature of the Province of Manitoba.

8. The Defendant Company says it is not guilty.

Delivered on 30th day of March, A.D. 1927, by Messrs. Anderson Guy, Chappell and Du Val, 304 Electric Railway Chambers, Solicitors for the Defendant.

No. 3. Opening Address to the Jury by Plaintiff's Counsel, 25th May 1927.

No. 3.

Opening Address to the Jury by Plaintiff's Counsel.

The trial of this action before His Lordship Mr. Justice Curran and a jury, held at the Court House, in the City of Winnipeg, in the Province of Manitoba, on May 25th, 26th and 27th, A.D. 1927.

Appearances: Mr. David Campbell, K.C., and Mr. J. S. Lamont for the Plaintiff; Mr. R. D. Guy, K.C., for the Defendants.

Mr. GUY: Before my learned friend commences, I think perhaps it would be as well in this case to have the witnesses excluded.

Mr. LAMONT: May it please your Lordship and gentlemen of the jury. The Plaintiff in this action is a farmer by the name of Paul Pronek. He lives on the road between here and Selkirk about some fourteen, fifteen or sixteen miles fron the City of Winnipeg. The Defendant is the Winnipeg, Selkirk and Lake Winnipeg Railway Company and they operate a line of electric railway between the City of Winnipeg and Selkirk. On the second day of January last year Pronek was into the City of Winnipeg on some business, and was returning home in the afternoon of that day. The line of railway of the Company runs along and on the highway, and there is no intervening obstacle or fence between the main travelled portion of the highway used by traffic and the electric railway line. Pronek proceeded out to just past the small station called Miller, which is about fourteen miles from the city, somewhere out near Parrish's large farm. About the time he got on the crossing of the railway, he had two or three miles farther to go down the highway before he would turn off to go to his own place. Near Miller station he met a large truck, a large motor truck, which was proceeding towards Winnipeg. Pronek was going the other way

towards Selkirk. His team of horses became frightened at this truck—it was just after dark in the evening, about 7 o'clock in January, and the team of horses became scared of this large truck, which came very close, the canvas flapping and like that. Anyway, the team of horses got frightened and they ran away. The horses turned to the left, proceeding down Main Street north—that's away down—they turned to the left and went across the crossing over the railway line. They got across the crossing, and galloped all the way, and they went into a field on the left, on the west side of the highway. He was endeavouring to get them under control, and he lost one of the lines, and he circled the team around in a circle and came back onto the railway line, the horses running all the time, just had the one line in his hand, and the team of horses instead of continuing in the journey on in the direction towards Selkirk, they went back towards the City of Winnipeg, and they proceeded at a gallop down the railway track, down between the rails. They had gone down the track some short distance when a car belonging to the Company overtook the outfit; the outfit was galloping towards Winnipeg. The car was coming in the same direction, and they overtook Pronek with the team, and the car collided with them, the car ran into the rear end of the sleigh, and demolished the sleigh, killed one of the horses instantly, and the other horse was very seriously injured. Pronek himself was very badly hurt. He was dragged some considerable distance in front, in the wreckage in front of the street car, and he was unconscious when he was picked up. He was put aboard the electric car and conveyed to the City of Winnipeg, met by the ambulance and taken to the hospital. In the hospital he was unconscious for some considerable time, and the doctor's evidence will be brought before you to show the nature of the injuries he received. He was hurt badly about the head; he had his shoulder fractured, and was laid up for a long time. This action, gentlemen, is an action for negligence. We suggest that the Company was negligent in not keeping the street car properly equipped with sufficient equipment to enable them to stop the car to avoid the accident. The evidence we propose to submit to you is to the effect that the lights were very defective, and that the motorman was unable to see ahead in sufficient time to enable him to take the necessary steps for putting on the brakes slowing the car down and avoiding a collision. The action is for damages for Mr. Pronek's injuries on that occasion, and also for the loss of property which he suffered on account of the collision.

In the Court of King's Bench for Manitoba.

Plaintiff's Evidence.

No. 4. Paul Pronek. Examination.

No. 4.

Evidence of Paul Pronek.

PAUL PRONEK, sworn.

(As the witness cannot speak English, Dmytro Onufrey was sworn as interpreter, and the questions and answers, as well as the oath, interpreted.)

DIRECT EXAMINATION BY MR. LAMONT:

Q. You are the Plaintiff in this action, Mr. Pronek?—*A.* Yes.

Q. And you live at Rossdale?—*A.* Yes.

Q. That is in the municipality of St. Andrews?—*A.* Yes.

Q. How far from Winnipeg?—*A.* Fifteen miles.

Q. That is north, isn't it?—*A.* Yes.

Q. It is on the way to Selkirk?—*A.* Yes.

Q. Does the farm front on the Selkirk road?—*A.* No, fronts on McPhillips Street.

Q. How far are you from the main highway?—*A.* Mile and a half.

Q. What do you do?—*A.* I am working on the land.

Q. Do you own your own farm?—*A.* Yes.

Q. You have been farming there for how many years?—*A.* Sixteen years.

Q. Do you remember the 2nd day of January, 1926?—*A.* Yes.

Q. What did you do that day?—*A.* I drove into Winnipeg.

Q. I believe that you brought a cow into Winnipeg, did you not, that day?—*A.* Yes.

Q. You drove in from your farm?—*A.* Yes, I took the cow from my farm into Winnipeg.

Q. With a team and a sleigh?—*A.* Yes.

Q. What time did you leave Winnipeg in the afternoon to go home?—*A.* Five o'clock in the afternoon.

Q. How far north had you got from the City of Winnipeg when you had this trouble—which way did you go home?—*A.* I went home Main Street.

Q. It is a big gravelled road from Winnipeg to Selkirk?—*A.* Yes.

Q. It is on the west side of the river?—*A.* Yes.

Q. What happened to you on the way home?—*A.* While I was driving, a large truck came along. I was nearing the crossing of the railway. The horses got frightened.

Q. Whereabouts was this; what station was it close to?—*A.* Between Parkdale and Miller.

Q. That would be how far from the city?—*A.* I am not sure how many miles that would be.

Q. Well, what crossing do you mean?—*A.* Just an ordinary road crossing over the electric railway.

Q. Do you mean a road running east and west?—*A.* Yes.

Q. It would be how far—twelve miles or so from Winnipeg?—*A.* I think it will be about twelve miles.

Q. You say you met this large truck; now what happened then?—*A.* The team got frightened, and started to run away.

Q. Which way was the truck going?—*A.* Towards Winnipeg.

Q. I take it you met the truck, did you, Paul?—*A.* The truck was passing me, and it was covered with canvas—a large truck.

Q. Was the truck meeting you or was it going in the same direction as you?—*A.* It was passing me; the truck met me.

Q. When it was passing you, did your team take fright?—*A.* Yes.

Q. How did they come to take fright?—*A.* It was a large truck covered with white canvas, and the horses got frightened. The canvas was flying up like.

Q. Do you mean to say it had a big arch covering?—*A.* Yes.

Q. And the canvas was loose?—*A.* Yes, the wind was lifting it up. The truck was going at a very high speed.

Q. Did the truck come close to you when it was meeting you?—*A.* Very close; I think it would be about a foot from the sleigh.

Q. I suppose there was snow on the ground?—*A.* Yes.

Q. You were driving a sleigh yourself?—*A.* Yes.

Q. The truck passed within, you say, a foot of the sleigh?—*A.* I am not certain of the distance, but very close. I could not say just exactly.

Q. Well, what did the horses do, Paul?—*A.* They commenced to run away.

Q. Which way did they go?—*A.* They turned west.

Q. That is, they were proceeding north, and they turned to the left?—*A.* Yes.

Q. Well, was there a road there for them to go on?—*A.* A crossing.

Q. That was an east and west road, is it?—*A.* Yes.

Q. This thing must have happened just at the cross roads?—*A.* Yes, close to the crossing.

Q. And the railway track was just to the west of you as you were going north?—*A.* Yes.

Q. Well, what did you do then; you say the team ran away and went across the crossing; where did they go then?—*A.* While they were running away, I lost the line from my left hand.

Q. Where does the railway line run there, Paul?—*A.* It runs north and south.

Q. It runs right along the highway?—*A.* Yes.

Q. On the left hand side as you are going to Selkirk?—*A.* Yes, on the left hand while you are going to Selkirk.

Q. Is there a ditch between it and the highway?—*A.* Yes.

Q. What time was this?—*A.* It will be around 7 o'clock; 7 or a little after 7 in the evening.

Q. Did you have anybody with you that night?—*A.* No, I had not.

Q. You were just driving a team and sleigh yourself?—*A.* Yes.

In the Court of King's Bench for Manitoba.

Plaintiff's Evidence.

No. 4. Paul Pronek. Examination—*continued.*

Q. Were there any other teams going along the road with you?—*A.* There were some ahead of me, but they were quite a distance away.

Q. Were there any behind you?—*A.* I did not see any.

Q. Where did the horses go after they went across the track?—*A.* I used my right hand that I had the line in, and I turned the horses around.

Q. How many lines did you have?—*A.* I had two, but I lost one.

Q. You had lost the left one, you had only one left to guide them, you pulled on that, did you?—*A.* Yes.

Q. That pulled them around to the right?—*A.* Yes.

Q. Where did the horses go?—*A.* On the track.

Q. Which way did they proceed?—*A.* They proceeded towards Winnipeg.

Q. That is in the direction away from you were travelling before?—*A.* Yes.

Q. How and where were the horses running with reference to the two rails?—*A.* One was running between the rails right on the centre of the track.

Q. Which horse was that? Was that the left hand one or the right hand one?—*A.* That is the left hand.

Q. The left hand horse was running between the rails?—*A.* Yes.

Q. Heading for Winnipeg?—*A.* Yes.

Q. And the right hand horse was on the west side?—*A.* On the west side of the rail.

Q. Just tell us what happened after that?—*A.* I did not see or hear the car. All I know that I heard the whistle when the car was about fifty feet away from me, more or less, that was behind me, coming up behind.

Q. Well, did you intend to turn the horses on to the railway track when you pulled on that right rein?—*A.* No, they made for the track themselves.

HIS LORDSHIP: He says he pulled on the right rein, and turned around.

Mr. LAMONT: They had crossed the track, and went out into the field, and made a wide circle.

HIS LORDSHIP: I did not understand him to say that.

Mr. LAMONT: That is what he stated, my Lord.

BY HIS LORDSHIP:—

Q. How far west of the railway track did the horses get before they turned?—*A.* I cannot exactly say, maybe 100 yards or 100 feet.

Q. 100 yards west of the railway track?—*A.* Yes.

Q. Before you succeeded in turning them?—*A.* Yes.

BY HIS LORDSHIP:—

Q. And they were proceeding west along the road?—*A.* Yes—no, on the field, my Lord.

Q. Bless my soul, he told us he had turned off at a crossing at a road crossing and I naturally thought they had followed the road?—*A.* There is no road there. It is only a crossing, and there is an open field.

Q. Well then, the crossing of the railway track opens on to the open prairie, does it?—*A.* Yes.

BY MR. LAMONT:

Q. Is this a private crossing, or is it a crossing where there is a government road?—*A.* It is the crossing that leads into somebody's land.

Q. A private crossing?—*A.* Yes.

Q. You say there was no road where this crossing was on the track?—*A.* Just the crossing, my lord.

Q. It opened into a field?—*A.* Yes.

Q. You say it was a private crossing?—*A.* Yes.

Q. There was quite a bit of snow on the ground there, too, was there?—*A.* Yes.

Q. Was there any track broken west from this crossing?—*A.* No, there was not.

BY HIS LORDSHIP:

Q. You say a track was broken where the horses went?—*A.* No, there was not, my lord.

Q. So the horses just broke a trail of their own?—*A.* Yes.

Q. Where in the course of the runaway did you lose the line, and how did you come to lose it?—*A.* It was on the field.

HIS LORDSHIP: Well, they took fright, I understood him to say.

MR. LAMONT: I just wanted to clear up that point as to when he lost the line.

Q. You say you lost the line in the field?—*A.* Yes.

Q. Did you have mitts on that hand?—*A.* Yes, I had.

Q. You lost the line when the horses got into the field?—*A.* Yes.

Q. So that you had both lines up to that time?—*A.* Yes, I had both lines up to that time.

Q. How did you come to lose the line, Paul?—*A.* I had my mitts on, while they were running away somehow I lost the line.

Q. Was it because of wearing mitts that you lost it, or what?—*A.* While the horses were running away I was trying to hold them, and having thick mitts I was unable to hold the line.

Q. You say you did not know the car was there until he blew the whistle?—*A.* No.

HIS LORDSHIP: I would like to know how he got them turned around, and which way they went; what they did after they got into this field; it is very important to know that.

In the Court of King's Bench for Manitoba.

Plaintiff's Evidence.

No. 4. Paul Pronek. Examination—*continued.*

BY HIS LORDSHIP:

Q. They ran into this field, did they?—*A.* Yes.

Q. And you lost the left hand rein?—*A.* Yes.

Q. And you were pulling them with the right rein?—*A.* Yes.

Q. And what effect would that have on the team?—*A.* They turned around in a circle.

Q. They turned around, they were going west?—*A.* West, yes.

Q. And they turned around in a circle?—*A.* Yes.

Q. In what direction?—*A.* They turned towards Winnipeg. I was unable to lead them with one.

Q. Where in the world did they get on to the railway track?—*A.* On that same crossing.

Q. Well then they did not go to Winnipeg if he turned them around, they must have gone back to the railway crossing and then made the turn?—*A.* Yes, they came on to the crossing and then——

Q. You got them turned right around, and they started to go south again?—*A.* Yes.

Q. But when they came to the railway track they turned?—*A.* On the track.

Q. Towards Winnipeg?—*A.* To Winnipeg, yes.

Q. Were you able to check or control them at all?—*A.* No, not after I lost the line, with one line I was unable to.

Q. Were they galloping all the time?—*A.* Yes.

Q. What were they doing at the time the car struck them?—*A.* They were still running.

Q. Away from the car?—*A.* Yes.

Q. They were galloping down the track towards Winnipeg?—*A.* Yes.

Q. When you heard the whistle of the car?—*A.* Yes.

Q. Did you see any lights on the car?—*A.* No.

Q. Did you look back at the time when you heard the whistle?—*A.* I did not, but I know that when the car is travelling you could see the light for some long distance.

Q. How far off could you see the lights in these cars?—*A.* On a straight line you could see it for about two miles.

Q. You could see the headlight, do you mean?—*A.* Yes, the headlight.

Q. What kind of night was it; was it a clear night, or a stormy night?—*A.* It was a nice clear night.

Q. What did you do when you heard the whistle?—*A.* I did not know myself what to do at that time.

Q. Well, did you do anything?—*A.* I don't remember, my lord, I got frightened.

Q. You don't remember what happened after that?—*A.* No.

Q. How long was it after you heard the whistle before the accident happened?—*A.* I can't say, my Lord; may be a minute, may be half a minute. I don't remember.

Q. You don't remember anything of that?—*A.* No.

Q. Well, did the car run into you, do you know that?—*A.* I don't know what happened.

Q. Did you get away and go home to your wife that night?—*A.* No.

Q. What do you next remember after?—*A.* I only remember that on Sunday I found myself in the General Hospital.

Q. What day was the accident?—*A.* It was on Saturday night.

Q. So you woke up in the General Hospital on Sunday?—*A.* Yes. I could not tell you what time it was, but that is where I found myself.

Q. What condition were you when you woke up?—*A.* I was all battered up.

Q. How long were you kept in the hospital?—*A.* One week.

Q. Were you back to the hospital again?—*A.* After I left the hospital I was treated by Dr. Ross in Selkirk.

Q. Well, you went home?—*A.* Yes.

Q. You went home and were treated by Dr. Ross at Selkirk?—*A.* Yes.

Q. Did he come out to your farm, or did you go in to Selkirk?—*A.* I drove to his place.

Q. When was that?—*A.* I think it was the 25th of January.

Q. Were you well when you left the hospital after the week?—*A.* No, I was not.

Q. What was wrong with you?—*A.* I had severe pains in my head, in my arm, and in my side.

Q. How long did this continue, Paul?—*A.* I was unable to do any work until last fall.

Q. That is the fall of 1926?—*A.* Yes.

Q. What was the trouble with you you could not do any work?—*A.* I had very bad pains in my hand and in my arm.

Q. Were you back to the hospital again after Dr. Ross treated you?—*A.* Yes, I was in the General Hospital again.

Q. When was that?—*A.* I went in, I think it was the 26th of May.

Q. How long were you there on that occasion?—*A.* Three days.

Q. Did you do any farming during the summer of 1926?—*A.* My boy did.

Q. Did you do any?—*A.* No, I did not, I just told the boy what he has to do.

Q. You say you were not able to do any?—*A.* No, I was not able to, my lord. All I could do was to feed the chickens.

Q. Was your head bothering you during that period?—*A.* My head and my arm.

Q. How long did your head bother you?—*A.* Until last fall.

Q. Why did you go back to the hospital in May?—*A.* I went there to be examined what is wrong with me.

Q. Well, was it in consequence of this accident?—*A.* Yes.

Q. Was your head and shoulder well before the accident?—*A.* Yes, I was well.

Q. You never received any other injuries to your head or shoulder either before or since?—*A.* No.

In the Court of King's Bench for Manitoba.

Plaintiff's Evidence.

No. 4. Paul Pronek. Examination—*continued.*

Q. How is your shoulder now?—*A.* Not very good yet.

Q. You say before the accident your health had been good?—*A.* Yes.

Q. How old were you?—*A.* Forty years; I am forty-three years of age now.

Q. Is your arm and shoulder now as well as it was prior to the 2nd of January, 1926?—*A.* No.

Q. Can you do heavy work with that arm?

MR. GUY: Object.

A. No.

Q. Which arm was it that the shoulder was hurt, Paul?—*A.* Left arm.

Q. What work do you do with your left arm now?—*A.* Just something that is light; I cannot do any heavy work.

Q. To get back to the point of the accident—Was there any bush along the track where this accident took place?—*A.* No, clear prairie.

Q. On all sides?—*A.* Yes.

Q. Is the track straight or curved along there?—*A.* Straight.

Q. For how far on each side?—*A.* About a mile, and then there is a curve.

Q. For about a mile which way?—*A.* About a mile south, my lord.

Q. And that is in the Winnipeg direction?—*A.* Yes.

Q. How was it in the Selkirk direction?—*A.* About a mile north there is a curve also.

Q. Well, I understand it would be perfectly straight for two miles?—*A.* Yes.

Q. That is to say, a mile north and a mile south of the crossing?—*A.* Yes, there is no curve until you get to Parkdale.

Q. If there had been a headlight on this car, could you have seen it?

MR. GUY: Leading question.

HIS LORDSHIP: He said that he heard the whistle, it was about fifty feet, but he didn't say that he looked around to see.

MR. GUY: He said he did not look around.

BY HIS LORDSHIP:

Q. When you heard the whistle, did you look behind to see what was coming?—*A.* Yes. I looked back, and I saw the car close by me.

Q. Well, was there a headlight on it?—*A.* No, there was not.

Q. You saw the car coming; there was no headlight?—*A.* I saw the car just as soon as I heard the whistle.

Q. How far was the car away from you when you saw it first?—*A.* I think it would be about fifty feet.

Q. What damage took place to the outfit? What happened to the horses?—*A.* One horse was killed.

Q. What was he worth?—*A.* $200·00.

Q. What happened to the other horse?—*A.* The other horse was hurt.

Q. How badly was he injured, how much was he depreciated in value on account of the injury?—*A.* He got over it, but I was unable to use him for a year.

Q. You say he got all right, did he?—*A.* Yes.

Q. What was the value of the other horse?—*A.* The one that I still have I paid seventy dollars for that horse at the time I bought it.

Q. What was the value of the service of the horse during the next year?—*A.* It cost me about sixty dollars to hire another horse.

BY HIS LORDSHIP:

Q. Had he only two?—*A.* No I had three, my lord.

Q. You had three altogether?—*A.* Yes.

Q. Did it cost you anything to get the horse cured?—*A.* Yes.

Q. How much did you spend on that?—*A.* I paid $4.00 to a man at Millers who had the horse there for four days.

Q. Altogether?—*A.* About $15.00.

Q. In what condition was the sleigh and box after the accident?—*A.* It was all broken up.

Q. The sleigh or the box?—*A.* The sleigh and the box.

Q. Well, could you get it repaired?—*A.* It was all smashed into a hundred and fifty pieces.

Q. You could not get it repaired?—*A.* No.

BY HIS LORDSHIP:

Q. It was a total loss?—*A.* Yes.

Q. How was the harness?—*A.* It was all broken up, torn up, too.

Q. Harness total loss, too?—*A.* I repaired one harness, cost me six dollars to repair it.

Q. Well, what was the sleigh worth?—*A.* $66.00 I paid for the sleigh to Cockshutt Plow Company.

Q. Was it new?—*A.* No. I had them for four years, my lord.

Q. Well, what was the sleigh worth when it was destroyed?—*A.* They were as good as new sleigh.

Q. Well, how much were they worth?—*A.* About $50.00.

Q. Fifty dollars ($50.00) after four years use?—*A.* They were in first class shape, my lord. I kept them always under cover in the summer.

BY MR. LAMONT:

Q. Well, you say the sleigh was worth $50.00. How much was the box worth?—*A.* About thirty dollars ($30.00).

Q. And the harness?—*A.* The harness was worth about $35.00.

Q. Well, you lost one set?—*A.* Yes.

Q. And what was it worth, $15.00?—*A.* About $18.00, my Lord.

Q. Well, that would be $24.00—$6.00 for repairs, and $15.00 for the set that was lost?—*A.* Yes.

Q. I produce to you two receipts from the Winnipeg General Hospital for your account there in January 1926 and May 1926?—*A.* Yes.

In the Court of King's Bench for Manitoba.

Plaintiff's Evidence.

No. 4. Paul Pronek. Cross-examination.

Q. These two amount to $32.25?—*A.* Yes. (Exhibit 1.)

Q. When you heard this whistle blow, Paul, just prior to the accident, what did you do to get the team off?—*A.* I hadn't time to do anything, because the car was right on me.

CROSS-EXAMINED BY MR. GUY:

Q. You had driven into Winnipeg, or to Elmwood, on the day of the accident with a cow?—*A.* Yes.

Q. And the man who bought the cow from you went along with you?—*A.* Yes, he went to his home.

Q. You went to his home?—*A.* Yes.

Q. You took your team and your sleigh and the cow and both of you went to his home in Elmwood?—*A.* Yes.

Q. And when you were in Elmwood you had dinner there?—*A.* Yes.

Q. This is about four o'clock in the afternoon?—*A.* Yes.

Q. And you had a couple of drinks of whisky?—*A.* No.

Q. Now, Paul, be careful.

BY HIS LORDSHIP:

Q. You had dinner at this man's house; what is his name?—*A.* I don't know the man's name, my Lord.

Q. Is he a Galician?—*A.* Yes.

Q. You had a couple of drinks at this man's home?—*A.* No.

BY HIS LORDSHIP:

Q. You had no drinks?—*A.* No.

Q. No drinks at all at his place?—*A.* At his place, no.

Q. None at all at his place?

HIS LORDSHIP: You mean drinks of intoxicating liquor?

MR. GUY: Yes, intoxicating liquor. (Interpreted to witness.)

A. No, I had none.

Q. Didn't have any at all. You had dinner there about four o'clock though, didn't you?—*A.* Yes.

Q. When you left there you went to do some shopping?—*A.* Yes. I went into the store to do some shopping.

Q. Where, Elmwood?—*A.* No, in Winnipeg, on Main Street.

BY HIS LORDSHIP:

Q. When you left this man's home you came to Winnipeg to do some shopping?—*A.* Yes.

Q. And then after you finished your shopping, you went on home?—*A.* Yes.

Q. Did you have a drink at anytime?—*A.* I had a bottle of beer on the road.

Q. Where did you get the bottle of beer?—*A.* The storekeeper made me a present of one.

Q. You got it at the store?—*A.* Yes.

Q. That is, at the store where you were trading?—*A.* Yes.

Q. Was that the only drink that you had up to the time of the accident?—*A.* Yes.

Q. The only one?—*A.* Yes.

Q. What size bottle was it, pint or a quart?—*A.* A small beer bottle, my Lord.

Q. Where was it you drank the beer?—*A.* On the other side of the subway.

Q. That is, the subway under the Canadian Pacific Railway?—*A.* Yes, outside of the city, my Lord.

Q. You got the beer at this store and then you drove on past the subway before you drank it?—*A.* Yes.

Q. What did you do with the bottle?—*A.* I was to return the bottle, so I don't know if I had it in my pocket or in the box.

Q. You were to return the bottle?—*A.* Yes.

Q. You did not return it?—*A.* No.

Q. You lost it?—*A.* I don't know what happened to the bottle, my Lord.

Q. You had one bottle of beer?—*A.* Yes, one bottle of beer.

By His Lordship:

Q. You did not drink any at the store?—*A.* No.

Q. He made you a present of this one bottle?—*A.* Yes.

Q. As you passed the subway after having this drink of beer, did you meet anybody on the road that day?—*A.* There were some ahead of me.

Q. No, but did you meet anybody you knew?—*A.* No.

Q. Didn't meet anybody?—*A.* No.

Q. You know John Danko, don't you?—*A.* He was driving with me, he caught up to me, and he just tied his team to my sleigh, and he got in the sleigh with me.

Q. John Danko caught up to you and tied his team to your sleigh and then he got in alongside of you?—*A.* He was not with me very long.

Q. He was not with you very long, why, how long was he with you?—*A.* He might have been with me 10 or 15 minutes.

Q. Did you have a drink with him?—*A.* No.

Q. What became of John Danko?—*A.* I don't know.

Q. You don't know what became of him?—*A.* No.

Q. Don't you know when he left the sleigh?—*A.* Yes.

Q. You saw him get out of your sleigh?—*A.* Yes.

Q. Did he untie his team?—*A.* Yes.

Q. Where did he go?—*A.* He untied his team, got in his sleigh and drove away home.

By His Lordship:

Q. Well, did he turn off the road?—*A.* No.

Q. Well, did you pass his place?—*A.* No, my Lord.

In the Court of King's Bench for Manitoba.

Plaintiff's Evidence.

No. 4. Paul Pronek. Cross-examination—*continued.*

Q. There was an automobile in the ditch, and Danko stopped to help him out, wasn't that it?—*A.* Yes, he stayed where the automobile was in the ditch, and I drove away.

Q. He left you?—*A.* No, he left my sleigh before that.

Q. How do you know he left your sleigh before that?—*A.* Yes, I saw him leaving my sleigh, and get into his own sleigh.

Q. Well, did you see him with the auto in the ditch helping the man?—*A.* He stayed there to help the man, and I drove away.

Q. And it was after you left Danko that all this happened about the horses running away that you have described to us?—*A.* Yes.

Q. Do you remember seeing anybody in the Winnipeg Hospital when you were up there?—*A.* No.

Q. Do you remember anybody? Try and remember?—*A.* I don't know what day, I think it was Monday, a policeman came from this building.

Q. Oh, there was a policeman came up to see you when you were in the hospital?—*A.* Yes.

Q. Did you tell him how the accident had happened?—*A.* Yes.

Q. You told him all about it, didn't you?—*A.* Yes, he came from the provincial police officer came up.

Q. You told him all about the accident?—*A.* I don't know what I told him because I remembered very little myself.

HIS LORDSHIP: Well, I understand that he told the policeman all about the accident?—*A.* I told him, but I don't know what I did tell him, because I did not remember anything myself.

Q. I suppose he means he told him all he knew about it?—*A.* Yes.

Q. You told him all you knew about it?—*A.* Just whatever I remembered.

Q. Now, did you tell him that you had two drinks of whisky at dinner with this man in Elmwood?—*A.* I told him that I had a drink, but I did not tell him how much.

Q. Did you tell him that you had a couple of drinks, two drinks of whisky?—*A.* No, I didn't.

Q. You didn't tell him that, you told him that you had a drink?—*A.* I told him that I had a drink, but I did not tell him how many.

Q. At his house?—*A.* No, I didn't tell him where I had the drink, my Lord.

Q. Did you not tell him where you had the drink?—*A.* No.

Q. Did not tell him where you had had it?—*A.* No.

Q. You only told him you had had one?—*A.* I told him I had the drink, but I did not tell him how many.

Q. Well did he tell you, or did you tell him that this man at whose house you had dinner had given you two glasses of whisky?—*A.* No.

Q. You did not tell him that?—*A.* No.

Q. You say you only had one drink?—*A.* I told him I had the drink, but I did not tell him how many drinks, and I did not tell him where I got them.

Q. You did not tell him where you got it?—*A.* No; the drink that I had I drank it on the road.

Q. Well now, did you tell him that John Danko had given you a drink?—*A.* No.

Q. Did not tell him that at all?—*A.* No.

Q. Did John Danko ask you if you would have a drink of whisky? —*A.* No.

Q. He did not ask you that?—*A.* No.

Q. Did you tell the policeman that after you left Danko with this automobile in the ditch, you continued your journey home, and immediately after leaving him you completely lost your memory, and didn't remember anything further that happened?—*A.* No, I did not.

Q. You did not tell him that?—*A.* No.

BY HIS LORDSHIP:

Q. That you lost your memory after parting with Danko; you did not tell the policeman that?—*A.* No, I did not tell him that.

Q. Now you are quite sure about this?—*A.* Yes, I am quite sure that I did not tell him.

Q. And the policeman came up to find out how this accident had happened, and what you knew about it?—*A.* Yes.

Q. Now you remember all the details about what took place about going in the field?—*A.* Yes.

Q. Yes, you remember all that now.

BY HIS LORDSHIP:

Q. Well, did you tell the policeman about how the horses took fright? —*A.* I don't remember if I told him or not, my Lord.

Q. You don't remember?—*A.* I was sick then. I don't remember if I told him or not.

Q. How long had you been in the hospital when the policeman came to see you?—*A.* I am not quite sure if he came Sunday or Monday.

Q. Did you tell him about losing the line?—*A.* Yes, I think I did.

Q. Did you tell him about the truck?—*A.* He did not ask me; I don't know if I told him or not.

Q. Now, you said that you looked around and this car hadn't any headlight on it?—*A.* Yes.

Q. No headlight at all?—*A.* No, there was no light on the front of the car at all.

Q. Were there any other lights that you could see?—*A.* No, I didn't notice, my Lord. I didn't expect that the car would come, and I did not notice a light.

Q. Did you notice any other lights?—*A.* In the car, my Lord?

Q. Yes?—*A.* I did not see small lights on the inside of the car.

Q. You know how those cars are lighted up at night, don't you? —*A.* Yes. I was ahead of the car, my Lord, and I would not be able to see the lights inside.

In the Court of King's Bench for Manitoba.

Plaintiff's Evidence.

No. 4. Paul Pronek. Cross-examination—*continued.*

Q. Why, wouldn't they reflect on the snow on each side of the car? —*A.* If the light is dull you couldn't see it.

Q. Well, you know that there are windows in the front end of the car, aren't there?—*A.* Yes.

Q. Well, weren't there lights showing between those windows?—*A.* No, there is no light in the front, my Lord.

Q. I am asking you if there were any lights inside the car showing through the front windows?—*A.* No.

HIS LORDSHIP: Well, that's an extraordinary thing.

BY MR. GUY:

Q. How far north can you see from the point where you were in the field? How far could you see the street car, how far north have you a clear view?—*A.* I think about half a mile or so. I am not sure, and then there is a curve.

Q. From where he told us there was a clear vision on a straight track for a mile each way?—*A.* That is if the car has a headlight.

MR. GUY: I am not talking about headlights.

HIS LORDSHIP: He told us that you could see that headlight for two miles on a straight track; he told us that?

A. Yes, if there is a headlight there, my Lord.

HIS LORDSHIP: Well, what is the question being put to him now?

MR. GUY: I am asking him now, how far you can see—I don't mean on any particular night—is there anything to obstruct the view—I mean woods or anything to obstruct your view.

HIS LORDSHIP: He said there was no woods beside the track.

Q. So when you were in the field, how far north could you see a street car coming?

HIS LORDSHIP: Do you mean the horses had turned?

MR. GUY: That is the only field we have had reference to, my Lord.

Q. From the point where you were in this field where you say your horses went over the track and turned around. When you were in that field how far north could you see a lighted street car?—*A.* If the car had a light on the front I could see it for a mile at least.

Q. Well, if it hadn't any light, just the inside lights?—*A.* If the car has no headlight you can't tell if the car is going or not.

Q. Can you see the car—if it had no headlights, could you see the car from where you were?—*A.* When I was on the field and if the car was coming I could see the light, but I couldn't tell what the light is of.

Q. Couldn't you see a lighted street car from where you were in that field?—*A.* Yes, I could have seen it; I could have seen the light.

Q. And you don't suggest that this car had no lights in it at all, do you?—*A.* In the car inside, my Lord.

Q. Yes.—*A.* No, I don't say that. I only say that there was no headlight, my Lord.

Q. Well then, couldn't you have seen the lights on this car from where you were in the field?—*A.* If the car was near at that time I could have seen it.

Q. But from where he was in the field?—*A.* I don't think so. The car might have been at Parkdale at that time when I was on the field.

Q. How did it come that the horses went on to the track, went down the track?—*A.* While they were running away and were on the field, I pulled a line with my right hand to turn around and went on the track.

Q. Did you pull them around to go on to the track?—*A.* No, they were going themselves.

Q. They ran on the track themselves?—*A.* Yes.

His Lordship: Well, if you were pulling on this line it would prevent them from going on the track. No, it would not, it would have pulled them into the first opening they came. As I understand, the horses were going west, gentlemen, and he pulled on this right line, and they turned around and reversed their pace and started to go south, and he kept on pulling on this line, and when they came to the street car track they turned into that.

Mr. Lamont: What the witness stated was this, when the team ran away first they ran across the railroad track away into a field, and made a great circuit around ——

His Lordship: Isn't that exactly what I have been telling the jury? Exactly what I was telling the jury, only that he was handling them with one rein, and that rein was the right one, and it was in obedience to the pull of that line that he got them turned around, and they were going west.

Q. Did you do anything to prevent them from going down the track? —*A.* I couldn't do anything, because as soon as they turned around they ran on the track.

Q. Where did the line go that you lost, your left line, where did it go? —*A.* It was dragging on the ground, my Lord.

Q. Well, between the horses?—*A.* Yes, between the horses.

Q. Couldn't you have got forward on the tonneau and recovered it? —*A.* It was a double box, my Lord, it was very high, and the horses were galloping.

By Mr. Guy:

Q. But you could not get out and get the line?—*A.* Not when the horses were galloping.

Q. What difference did the gallop make when you were travelling along the track straight along?

Mr. Lamont: My learned friend evidently was never in a runaway.

Q. How high is this box in this sleigh?—*A.* I think it will be about thirty inches high.

Q. That would be two and a half feet high?—*A.* Yes.

In the Court of King's Bench for Manitoba.

Plaintiff's Evidence.

No. 4. Paul Pronek. Cross-examination—*continued.*

Q. And you suggest that you could not get over the box; it was too high; is that it?—*A.* No, because the line was on the snow.

Q. The line was dragging between the horses, wasn't it?—*A.* Yes.

Q. Couldn't you reach out and get it from standing on the tongue or the foot of the tongue?—*A.* There was not much time to do that.

Q. You did not try at all events?—*A.* I did not try because there was not enough time, my Lord.

Q. Well now, you had plenty of time; you went all the way around the field and came back down the track. You had lots of time, hadn't you?—*A.* When the horses are galloping you haven't very much time to pick anything up.

HIS LORDSHIP: Did he tell us how far west they went into that field?

Re-examination.

RE-EXAMINED BY MR. LAMONT:

Q. You say the box was thirty inches high; would the tongue be below the box?—*A.* Yes.

Q. Would it be below the bottom of the box?—*A.* Yes.

Q. How far below the bottom of the box?—*A.* About a foot.

Q. And where would the line be with reference to the tongue?—*A.* Underneath the tongue.

Q. And the horses were galloping?—*A.* Yes.

Q. And they didn't have a load on?—*A.* No load.

Q. Where is Danko, this man that was pulling the car out of the ditch, that caught up to you that evening?—*A.* I don't know where he is.

Q. Does he still live down in that area?—*A.* No, he is not there.

Q. Is his father still down there?—*A.* His father is still there, but he does not know anything about his son.

Q. Do you remember the policeman coming up to the hospital to see you?—*A.* Yes.

Q. How was your head then; in what condition were you?—*A.* I had severe pains in my head, and I don't remember what I have told him.

Q. How long was he there?—*A.* I don't know.

Q. You say you told him that you had a drink?—*A.* Yes.

Q. Did you tell him what kind of a drink it was?—*A.* No.

Q. Now what drink did you refer to?

HIS LORDSHIP: I don't think it makes any difference what drink he referred to.

No. 5.

Evidence of Dr. P. H. Thorlakson.

DR. PAUL HENRY THORLAKSON sworn.

DIRECT EXAMINATION BY MR. LAMONT:

BY HIS LORDSHIP:

Q. Graduate of Manitoba?—*A.* Yes.

Q. Practice where?—*A.* Winnipeg.

Q. For how long? When did you graduate?—*A.* 1919.

Q. You are in general practice, I suppose?—*A.* Doing surgery as a specialty.

Q. Dr. Thorlakson, I believe you practice in conjunction with Dr. Neil, John McLean, and several other doctors?—*A.* Yes.

Q. Do you remember Paul Pronek, the Plaintiff in this action?—*A.* Yes.

Q. Do you remember when you first saw him?—*A.* It was in the last week in April 1926 in my office in Winnipeg.

Q. What condition did you find him?—*A.* I made an examination of him.

Q. As to his physical condition, I suppose?—*A.* Yes, sir, he was then complaining of loss of memory and headaches and general weakness and also pain in his left shoulder.

Q. That was some months after the accident?—*A.* Yes.

Q. He explained that to you, did he, doctor?—*A.* Yes, sir.

Q. Did you make a close examination of his shoulder?—*A.* Yes.

Q. What did you find?—*A.* On examining his shoulder I found that he complained of pain on movement, and there was definite limitation of movement of the left shoulder. The general physical examination apart from that was negative, and on account of his history of injury, severe head injury and these symptoms of headache and loss of memory and weakness, I sent him into the hospital for further special examination to see if there was any constitutional disease at the bottom of this. There were special examinations made there by me, and by the laboratory there, the X-Ray.

Q. What do you mean by the laboratory?—*A.* The spinal fluid was examined at the laboratory, and the blood was examined.

Q. Do you mean the blood, or the spinal fluid, or both?—*A.* Both.

Q. Are they the same?—*A.* No sir, and another X-Ray was taken of the left shoulder. Both the blood and the spinal fluid were negative, showing that there was no antecedent disease that we suspected; no antecedent organic disease to account for those symptoms.

Q. So you concluded the symptoms were caused by what, doctor?—*A.* Concluded that these symptoms of weakness and headache and loss of memory were due to severe cerebral concussion. The X-Ray of the left shoulder showed as the previous plates had done, a fracture of the left

In the Court of King's Bench for Manitoba.

Plaintiff's Evidence.

No. 5. Dr. P. H. Thorlakson. Examination—*continued.*

scapula, that is the shoulder girdle bone; a healed fracture of the left scapula.

Q. That is the shoulder blade, is it?—*A.* Yes, a healed fracture of the left shoulder blade, which had involved the joint surface of that bone, and it was the fact that that cavity, the joint cavity had been injured with this fracture that the pain in his shoulder and the limitation of movement could be explained.

BY HIS LORDSHIP:

Q. The fracture there was the cause of this limitation; is that the idea?—*A.* Yes.

Q. What would you say, doctor, whether or no that injury would be permanent?—*A.* The injury to the shoulder joint?

Q. Yes?—*A.* I think that the limitation of movement will be permament, yes sir.

Q. To what percentage does it compare with use of the arm, shoulder?—*A.* Not a great deal; not more than fifteen per cent., unless it causes him pain, which we cannot tell at the present time.

Q. He does not complain of pain now, does he?—*A.* I could not tell you that; he was at the time I saw him.

Q. Do you say that you would gather from the history of the patient, doctor, and also from the personal examination of him, that he had suffered a severe injury sometime prior to this examination of yours in April?—*A.* Yes, sir.

Q. Now, what effect would that injury have on him within a day or two after the accident?

HIS LORDSHIP: Well, he has not sufficient premises to answer that question. He would have to be something more than human to answer that.

Q. Did you see the patient when he was admitted to the hospital that time, doctor?—*A.* No sir, he was under the care of my partner, Dr. McLean.

Q. Is the doctor here?—*A.* He will be here in a minute, I just phoned him, he has left the hospital.

No. 6. Dr. D. G. Ross. Examination.

No. 6.

Evidence of Dr. D. G. Ross.

DR. DANIEL GORDON ROSS, sworn.

DIRECT EXAMINATION BY MR. LAMONT:

Q. You are in general practice at Selkirk?—*A.* Yes.

Q. Do you know Pronek the Plaintiff in this action?—*A.* Yes.

Q. When did you have occasion to examine him first?—*A.* I saw him on January 25th, 1926, at Selkirk. He came to my office alone.

Q. What condition was he in then?—*A.* I examined him.

Q. Do you know where he lives?—*A.* Yes.

Q. How far from Selkirk?—*A.* I think it is between seven and eight miles.

Q. What did you find in the meantime; what condition was he in, doctor, when you saw him?—*A.* Well, when I saw him he complained of pain in his head and neck, and in his left shoulder, and over the lower ribs on his left side. I told him that I did not think there was anything much that I could do to relieve the distress in his head and neck, but I found that his shoulder, there was a marked difference in the appearance of the shoulder on the left side from the right. The contour of the shoulder was altered, and the movements of the shoulder joint were interfered with; they were limited. That I attributed to the injury that he had had.

Q. You could notice the limitation?—*A.* Yes. I told him that I thought it would rectify fairly well, and advised him to use it, and I gave him an embrocation liniment. I thought that by using it and using an embrocation that he would remedy it largely. I found that he was able to talk alright, and seemed to be able to answer all the questions that I put to him, and I assured him that I thought his head condition would clear as well.

Q. What do you say was the head condition at that time, doctor, at the time of your first examination?—*A.* Well, he said that he could not remember, that was his main difficulty, that he was not able to think right. He was able to talk alright, but he was not able to remember well, and he said he could not think right.

Q. Were any of his senses affected, his hearing or his sight?—*A.* No. I did not think that any of his special senses were affected much.

Q. You mean that it was loss of memory he suffered from?—*A.* No, difficulty in remembering.

Q. Could you illustrate to the jury just where that injury was in the shoulder, doctor?—*A.* Yes. I had him stripped, and the shoulder to appearances on examination it was dropping a little more than the right shoulder, and I thought the head of the humerus or the shoulder bone was depressed and slightly fallen. When I made him use the arm in the ordinary movements, I found that it was limited, limited almost in every direction, in bringing it forward and lifting it straight up, or in extending it upward over his head it was quite limited then.

Q. Did you take an X-ray of him?—*A.* Not at that time. I took an X-ray later.

Q. When did you examine him again after that?—*A.* Well then I saw him again on March 3rd, 1926, and I saw him since then on May 14th, three times altogether.

Q. That was last year?—*A.* No, no, May 14, 1927. It was in January 26th that I first saw him.

Q. Well then, you did not see him again until——?—*A.* March 3, 1926.

Q. And again on?—*A.* May 14, 1927.

Q. That is just the other day?—*A.* Just the other day, yes.

In the Court of King's Bench for Manitoba.

Plaintiff's Evidence.

No. 6. Dr. D. G. Ross. Examination—*continued.*

Q. What condition was he in when you examined him the other day, doctor?—*A.* Well now, I found that his shoulder was somewhat similar to when I saw him first, but had improved no doubt, but there was a difference in the appearance of the shoulder. The head of the humerus, I think, is still down, and still a little fallen, I had an X-ray picture made to verify that, and I think that is what it shows quite distinctly.

Q. What would you say, doctor, as to whether that injury to his left shoulder would be permanent and interfere with the use of the arm?—*A.* Yes, I think it will be permanent; it is more than a year since it was done.

Q. What was the amount of your charges in connection with your services to him?—*A.* I think I asked him for eight dollars ($8.00) altogether.

Q. He paid that, did he?—*A.* He did not pay it all; he paid me five dollars. Of course, the X-ray charges were independent.

Q. Did you take them yourself?—*A.* No, they were made at the hospital, and I think the bill was given to him. I don't suppose they are paid for.

Q. What was the cost of the X-ray plates, doctor?—*A.* Well I think likely, I think it should be $10.00.

HIS LORDSHIP: Well, do they charge other public patients for X-ray treatment at the hospital?

MR. LAMONT: Yes, my Lord, that is always an extra, like counsel fee advising.

Cross-examination.

CROSS-EXAMINED BY MR. GUY:

Q. In connection with the limitation, you say that at the present time, there is now limitation of movement of the arm?—*A.* Yes.

Q. To what extent?—*A.* Well, his main difficulty is in placing his hands above the head and lifting the arm, and putting it up straight.

Q. Put it up high?—*A.* Yes.

Q. To what extent?—*A.* Oh, about twenty-five per cent., I think.

Q. A limitation of twenty-five?—*A.* A limitation of twenty-five.

Q. But in the ordinary working of downward movements he has full use of his arm?—*A.* Well, very nearly.

Q. The muscles that you spoke of as having wasted away a little bit at the start, that would be due to not exercising in any way, wouldn't it?—*A.* No, I think it would not be right to say that. I think it is due more to a little ankylosis in the bones at the joint.

Q. You think it would not be to the muscle wasting away?—*A.* Perhaps to a certain extent.

Q. Are the muscles in good condition now?—*A.* Yes.

Q. Do the muscles now seem to be normal and in good tone now?—*A.* Yes, the muscles of course atrophy or shrink a little with non-use.

Q. But when he began to use them, they came back again?—*A.* Well, yes.

Q. But when you examined him this last time there wasn't anything the matter with the muscles then, was there?—*A.* Well, no, not a great deal. I think the stiffness is more in the bony structure of the joint.

BY HIS LORDSHIP:

Q. Well, you put the impairment at about twenty-five per cent., do you?—*A.* In that particular movement.

Q. But I am speaking of the impairment due to the injury to the shoulder; of course, you cannot estimate it by a particular movement, doctor, that is to say, his general efficiency of the normal man has been impaired to what extent by what you have observed?—*A.* Oh, I would say between twenty-five and fifty per cent.

BY MR. GUY:

Q. You say that the general efficiency of the man is impaired from twenty-five to—did I understand to 40 per cent?—*A.* I am referring only to the joint, to the shoulder joint.

Q. Well, that I don't think is what his Lordship meant. Of course, we understand that there is limitation of movement upward. His lordship was referring to the general movement, limitation, because the man has the full use normally and laterally, and every other way except the upward?—*A.* Yes, that is what I am referring to.

Q. And in the ordinary course of a man's business he is not putting his hands straight up?—*A.* No, not all the time.

HIS LORDSHIP: *Q.* I wanted to know to what extent his general usefulness or efficiency has been impaired or reduced by reason of the accident, having in mind his calling as a farmer?—*A.* You mean not the joint alone.

Q. No, no, I don't care anything about the joint, as long as it comes from that, the impairment?—*A.* Well, I would say 25 per cent, possibly.

Q. You would say 25 per cent?—*A.* Yes.

No. 7.

Evidence of M. Parchinko.

MIKE PARCHINKO, sworn.

DIRECT EXAMINATION BY MR. LAMONT:

Q. How old are you?—*A.* Seventeen.

Q. You speak fairly good English, Mike, do you?—*A.* Yes.

Q. You went to school in this country?—*A.* Yes.

Q. Where do you live?—*A.* St. Andrews.

Q. What is your post office?—*A.* St. Andrews post office.

Q. Do you remember the winter before last an accident on the electric line to Selkirk?—*A.* Yes.

In the Court of King's Bench for Manitoba.

Plaintiff's Evidence.

No. 7.
M. Parchinko.
Examination—*continued.*

Q. Just tell us what you saw? Where were you at the time?—*A.* On the main road.

Q. You were on the main road?—*A.* Yes.

Q. Which way were you going?—*A.* Going north.

Q. Where were you coming from?—*A.* Coming from the city of Winnipeg.

Q. Going north, that is towards Selkirk?—*A.* Yes.

Q. Whereabouts?—*A.* Between Parkdale and Millers.

Q. What were you doing?—*A.* Driving with the team.

Q. What did you see?—*A.* I seen an accident. I saw the street car hit the sleigh and a box and a team.

Q. Did you notice what happened to the—tell us all you saw, Mike, will you?—*A.* When it hit the box he made a crash, and then the horses started to run.

Q. Your horses started to run?—*A.* Yes, and then I could not go and see what was done.

Q. Did you hear any noise at all?—*A.* I heard a big noise.

Q. Your horses started to run?—*A.* Yes, because of the crash of the car running into the team.

Q. Was there any other noise than the crash that you heard?—*A.* I heard the horse yelling. I heard the dead horse, the horse that got hit by the street car.

Q. Now what became of the horse that was struck?—*A.* It was knocked on the side.

Q. Did you see him?—*A.* Yes, I looked around, and I saw it behind the car already.

Q. It was already behind the car?—*A.* Yes.

Q. Did you see the car when it was approaching the scene of the accident?—*A.* No; I could not see no car.

Q. You could not see no car?—*A.* No, until it made a noise, I heard the crash, and then I saw the lights inside.

Q. You say the lights inside?—*A.* Yes.

Q. Did you see any other lights?—*A.* No, not outside.

Q. Now you have seen those cars for how long, several years?—*A.* Yes.

Q. You live down in that locality?—*A.* I was born in St. Andrews.

Q. Can those lights be seen far off?—*A.* Yes.

Q. Which lights do you mean—that is the light in front of the street car?—*A.* Yes, in front of the street car.

HIS LORDSHIP: You are speaking of the lights inside the car?

BY MR. LAMONT:—

Q. The lights in front of the street car, can they be seen a long distance off?—*A.* Yes.

Q. And you were going in the direction opposite to the direction in which the car was going?—*A.* The car was coming from the north and I was coming from the south.

Q. The car was coming from the north to the south, and you were coming from the south to the north?—*A.* I was facing to the north.

Q. Were you standing up?—*A.* Yes.

Q. What kind of a box and sleigh did you have?—*A.* I had a rack.

Q. Were you standing up on the rack?—*A.* Yes, I was standing up on the rack.

Q. That was a hay rack?—*A.* Yes.

Q. You had taken a load of hay to Winnipeg, had you?—*A.* Yes.

Q. You were standing up facing north?—*A.* Yes.

Q. And if this headlight had been on the outside of the car, could you have seen it?—*A.* Yes, I could have seen it good.

BY HIS LORDSHIP:—

Q. Well, the car was coming towards you?—*A.* Yes.

Q. You did not see the car?—*A.* Till the crash of the box; then I saw it.

Q. You saw the car, did you?—*A.* After it hit.

Q. Did you see the car before the crash?—*A.* No.

CROSS-EXAMINED BY MR. GUY:

Q. Where were you travelling, Mike?—*A.* From Winnipeg on the main road.

Q. You were travelling north on the road, weren't you?—*A.* Yes.

Q. But you were on the travelled portion of the road?—*A.* Yes.

Q. There is some distance between where the street car comes down where the street car track is and where the travelled portion of the road if, isn't there?—*A.* Yes.

Q. Considerable distance, isn't there?—*A.* Yes.

HIS LORDSHIP: Can't it be ascertained from your maps?

MR. GUY: Yes, it can be.

HIS LORDSHIP: How far north or west of the roadway is the track?

MR. GUY: I don't know, my lord, but the plan will show.

Q. But it is some distance at any rate; it is some distance from the track over to the road where you would be driving?—*A.* Not very far from the road to the track.

MR. LAMONT: The track is right on the highway. They have no independent right-of-way; they are right on the highway.

HIS LORDSHIP: It is not suggested that the track is laid upon the right of way.

MR. LAMONT: It is right on the highway.

HIS LORDSHIP: That is one of the old Selkirk highways 100 feet wide, 150 feet.

MR. LAMONT: The track, as I am instructed, is on the western edge of the main highway, not on an independent right-of-way of its own.

In the Court of King's Bench for Manitoba.

Plaintiff's Evidence.

No. 7.
M. Parchinko.
Cross-examination—*continued.*

HIS LORDSHIP: Some of those roads are 100 feet, some 150 feet.

MR. LAMONT: I don't imagine it is over 100 feet.

Q. Where were you when the crash happened with reference to this actual place where the impact took place?—*A.* I was between Parkdale and Millers right on the road.

Q. With reference to the accident, was it alongside of you, or behind you?—*A.* It was right across.

Q. Right across?—*A.* Yes.

Q. It was right opposite where you were?—*A.* Yes, just past me when it hit.

Q. You did not see the car at all until the crash?—*A.* Until it crashed.

Q. When you heard the crash you looked around?—*A.* Yes, because my horses started to run, or I would have stopped.

Q. Did you hear the car coming?—*A.* No, couldn't hear nothing.

Q. Didn't hear anything?—*A.* No.

Q. Or see the lights in the side of the car?—*A.* Just when it hit I turned around and looked.

Q. You did not hear the car coming, or you did not see it?—*A.* Did not see it.

Q. Or you did not see any lights?—*A.* No, when it passed I looked inside at the lights only, when it passed I just saw inside the car.

Q. What do you mean?—*A.* Inside the car the lights.

Q. Well, did you see the car lights?—*A.* No, I never saw the lights inside.

BY HIS LORDSHIP:

Q. Did you see any lights at all?—*A.* Just inside.

Q. Well you know these cars that carry passengers are all lighted up inside, and the lights show through the windows, you know that, didn't you?—*A.* I could not see them.

Q. What lights did you say you saw?—*A.* Just the inside but not the outside, not the front.

MR. LAMONT: He says he saw the lights inside, but no lights on the outside.

Q. Well, when did you see the lights, after the crash or before?—*A.* Right after it crashed.

MR. LAMONT: I suppose my learned friend will admit that the electric line is on the highway?

MR. GUY: Yes.

No. 8.

Evidence of Dr. N. J. MacLean.

NEIL JOHN MACLEAN, sworn.

DIRECT EXAMINATION BY MR. LAMONT:

Q. You are a fully qualified medical practitioner, Dr. MacLean?—*A.* Yes, sir.

Q. Practising your profession in the city of Winnipeg?—*A.* Yes.

Q. With Dr. Thorlakson and others?—*A.* Yes.

Q. Do you remember the Plaintiff Paul Pronek?—*A.* Yes.

Q. Do you remember seeing him some time in the winter of 1926?—*A.* Yes.

Q. Could you tell us what date you first saw him?—*A.* Well, according to the hospital records he came to the hospital on the 2nd of January, 1926. I did not see him that day, I saw him the next day. He was admitted on the public ward as a surgical case, an accident case.

Q. He was admitted on the 2nd, you saw him on the 3rd?—*A.* Yes.

Q. Did you make an examination of him?—*A.* Yes.

Q. What condition did you find him, doctor?—*A.* Well, he appeared to be suffering from slight injury to the head, and an injured shoulder, the left shoulder. The patient was, on the records, was unconscious when he was brought in, or he was in a semi-conscious condition; he appeared to be conscious as far as I could make out when I saw him. He did not speak good English.

Q. Well, was he conscious when you saw him?—*A.* Yes, as far as I could make out he was conscious.

Q. What were the nature of his injuries?—*A.* Well, he had a contusion on the left side of the head, and there was a little blood in his right ear. His right pupil was a little irregular. The left was normal.

Q. What was the condition of his mind at the time, doctor?—*A.* Somewhat a little confused, but not much abnormal.

Q. It seemed a little confused?—*A.* Yes.

Q. Was he able to answer questions intelligently?—*A.* Yes.

Q. You questioned him about his condition, I suppose, and what had happened?—*A.* Yes.

Q. Was he able to give you coherent or intelligible answers, or was his memory at fault?—*A.* Well, he did not remember much about the injury, the accident.

Q. What was the condition of his shoulder, doctor?—*A.* There was also a contusion on the skin over the left shoulder, and there was a pain on movement, and there was evidence of fracture which is shown by the X-ray.

Q. You X-rayed him afterwards?—*A.* Yes.

Q. How long was he in the hospital under your care?—*A.* It was five or six days, I don't remember the exact date.

Q. Did you discharge him then?—*A.* Well, he thought he should not remain longer. I thought he should remain longer because we always

In the Court of King's Bench for Manitoba.

Plaintiff's Evidence.

No. 8. Dr. N. J. MacLean. Examination—*continued.*

look on a head injury as more or less serious, and we advised him to stay longer, but he would not stay any longer, he left against our wish.

Q. Well, were there injuries to the head?—*A.* Just a contusion, it was a skin injury on the left side.

Q. Well, was that sufficiently serious for you to wish to keep him there under observation longer than he did stay?—*A.* Yes, that and the blood from the right ear.

Q. He left against your wishes?—*A.* Yes.

Q. Did you see him every day?—*A.* I think so. I was on the ward every day. I think I saw him every day.

Q. Did you ever attend him afterwards, doctor?—*A.* He came to our office afterwards about May of 1927. I saw him that time, but it was Dr. Thorlakson who looked after him at that time.

Q. Was it 1927 or 1926?—*A.* It was last year.

Q. Dr. Thorlakson looked after him from then on?—*A.* Yes.

Q. You have not examined him lately at all?—*A.* No, I have not seen him since then.

Q. What would blood in the ear indicate?—*A.* Well, he could have blood in the ear from injury to the external ear, injury to the drum, or injury to the base of the skull.

Q. In this case, what would you say was the cause of the blood in the ear?—*A.* I think it was more injury to the external ear, because we could not make out any positive evidence of fracture of the base.

Q. You could not get any positive evidence of fracture of the skull?—*A.* No.

Q. That is to say, the bleeding was not coming from the interior of the head?—*A.* No.

Q. Couldn't you see if there was a cut in the ear; couldn't you see it when you washed it?—*A.* No, you could not see any cut, it was not from a cut; it was from the—couldn't make out actually where that blood was coming from, but if it had come from inside there would likely be cerebral spinal fluid. So far as we could make out, it was not coming from inside.

Q. Well, as a matter of fact, you did not discover where the blood came from?—*A.* No.

Cross-examination.

CROSS-EXAMINED BY MR. GUY:

Q. If it had been coming from inside, there would have been with the blood some cerebral spinal fluid?—*A.* Usually, yes.

Q. But in this case, you could not find any cerebral spinal fluid?—*A.* No, there was no cerebral spinal fluid.

Mr. LAMONT—I produce an account which my learned friend is prepared to admit. Dr. MacLean's account, $25.00, and Dr. Ross's account ought to be in as Ex. 1, with General Hospital bills.

No. 9.

Evidence of W. H. McLeod.

WILLIAM HUGH McLEOD, sworn.

DIRECT EXAMINATION BY MR. LAMONT:

Q. Mr. McLeod, I believe you were in January, 1926, a motorman of the Winnipeg, Selkirk and Lake Winnipeg Railway?—*A.* Yes.

BY HIS LORDSHIP:

Q. Are you the motorman in charge of the car that night?—*A.* Yes.

Q. Do you remember the accident in question?—*A.* I do.

Q. Do you remember the day on which it took place?—*A.* Yes.

Q. What day was it?—*A.* It was on a Saturday evening after New Year's, the 2nd of January, around 7 to 7.15.

Q. What time did you take your car that evening?—*A.* 4.20 from the car barns to Selkirk.

Q. Did you live in Selkirk?—*A.* Yes.

Q. And you operate from Selkirk?—*A.* Yes.

Q. And your business was to run cars from Selkirk to Winnipeg and return?—*A.* Yes.

Q. How long had you been in the employ of the Company?—*A.* I started in October of 1918.

Q. So you would be upwards of eight years with the company at the time of this accident?—*A.* Eight years past.

Q. Whereabouts did the accident take place?—*A.* Well, between Millers station and Parkdale station, that would be possibly eight miles north of the north car barns.

Q. Just tell us what happened?—*A.* Well, coming in on that 6.30 trip out of Selkirk bound for Winnipeg, I had a little trouble with the headlight of the car.

Q. You mean that night?—*A.* That night.

Q. To get down to the scene of the accident, what first did you see, Mr. McLeod?—*A.* Well, I just saw something in the centre of the track.

Q. How far away were you when you saw it?—*A.* I was just about a pole length. I don't know just how far that is.

Q. About a pole length, how many feet would that be, roughly?—*A.* Oh, I should think possibly between 125 and 150 feet.

Q. You mean by a pole length, the distance between two poles?—*A.* The distance between two poles.

Q. What rate of speed were you going at the time?—*A.* I should judge I was going possibly 30 miles an hour. *Q.* How were the headlights of the car on the evening in question?—*A.* Well, I had had considerable trouble with the headlight.

Q. How was the headlight, Mr. McLeod?

In the Court of King's Bench for Manitoba.

Plaintiff's Evidence.

No. 9. W. H. McLeod. Examination—*continued.*

BY HIS LORDSHIP:

Q. There is only one headlight, isn't there?—*A.* Yes.

Q. What was the matter with the headlight?—*A.* Well, it was giving me trouble.

Q. Was it showing light, or was it out?—*A.* It was lit, but it was not showing very far ahead.

Q. How far ahead can you usually see with those headlights when they are in good condition?—*A.* Oh, I think a person can see around between seven and eight pole lengths.

Q. You could see that far ahead, could you?—*A.* No, if the headlight is in working condition, in good condition you can see possibly that far.

BY HIS LORDSHIP:

Q. How far ahead could you see that night with the headlight that you had?—*A.* Just one pole length.

Q. How far do you need to see ahead before you can stop your car?—*A.* Anytime I have made—I have made a few emergency stops at different times, and it is generally about three pole lengths.

Q. And you say that the headlight in good working condition you can see ahead some seven or eight poles?—*A.* Yes.

Q. A team and a sleigh and an outfit on the track would be quite a large and formidable object, would it not, you could see quite a distance ahead, could you not?

MR. GUY: My learned friend should not cross-examine.

BY HIS LORDSHIP:

Q. You can see ahead three or four pole lengths?—*A.* No, seven or eight pole lengths.

Q. A team and sleigh on the track, Mr. McLeod, they loom up quite large, would they not?

MR. GUY: Objected to.

A. Well, they do if you see them.

MR. GUY: My learned friend cannot cross-examine this witness; it is not a proper question.

Q. So you were about a pole length away when you saw them, Mr. McLeod?—*A.* Yes, sir.

Q. That would be 125 feet?—*A.* I don't know just the distance, but I should judge between 125 and 150 feet.

Q. You saw the outfit then, did you?—*A.* Yes sir, I saw it.

Q. How far would you be away when you first distinguished the outfit to be what it was?—*A.* Oh, possibly half a pole length.

Q. That would be some sixty feet or so?—*A.* Yes.

Q. This something you saw was on the track, was it?—*A.* Yes, I noticed it when I was about a pole length from it.

Q. And half a pole length away you saw it was a team and sleigh?—*A.* Yes.

Q. Just tell us what happened, Mr. McLeod?—*A.* As soon as I noticed the object on the track, I knew that I was so close that I could not stop unless I got right into the accident, and I reversed the power on the car and applied the sand, and I was right in on top of it then.

Q. You reversed?—*A.* Reversed the car and applied the sand and the air. I was then right on top.

Q. What happened, Mr. McLeod?—*A.* Well, as soon as I struck the sleigh it put the headlight right out altogether then, in striking him. And we got stopped. I went down and took a look and the snow plow was almost under the cab of the car, and the conductor got out and took a look at it, and there was a little lantern in the cab, and we lit the little lantern, and the snow plow was kind of piled up on the equipment, the sleigh.

Q. You say there was a snow plow?—*A.* It is right under the cab, it did not project out any further. It is between the front trucks and the front of the car. If you looked out you could just see the point of the snow plow, it is under the cab. When you got out with the lantern and looked we saw the snow plow was up on top of some of this sleigh and box, and I had to get into the car and back the car up in order to get off this lumber and sleigh, and we noticed there was a horse among the stuff. There was a horse in the wreckage, so we got backed up, and we came down again, and pulled off some of the planks, and boards and hay, and we discovered a man, a man's foot.

Q. Oh, the man was in the wreck?—*A.* He was right in the wreck, in among the boards and hay and horse. We found the other horse; the other horse must have been killed just when we struck him. He was back in the ditch, lying in the ditch killed. He had been thrown clear of the track.

Q. Dead, was he, when you got back?—*A.* Yes.

Q. How far back was he from where the car came to a stop?—*A.* That would be about two pole lengths.

Q. Two pole lengths?—*A.* Yes, that's where I struck. You see, I carried the whole outfit about two pole lengths; about three pole lengths from where we saw is where I saw it first. I carried the whole outfit about two pole lengths all but this one horse that was killed.

Q. In what condition was the man?—*A.* Well, he was unconscious.

Q. You identify the man, do you?—*A.* Yes, I identify the man.

Q. This is Paul Pronek?—*A.* Yes.

Q. Did you know him before?—*A.* I have never known him to speak to, but I have noticed him in travelling up and down on the system.

Q. What did you do with the man?—*A.* Well, we laid him down in the grass in the snow alongside the track there, and got his collar unbuttoned so he could breathe. We did not know whether he was alive or not when we laid him down. He was put in the end of the car. We took him in through the motorman's cab, put some cushions up and down the aisle, and laid him on those. We brought him to the north end. He was still unconscious when I left him.

In the Court of King's Bench for Manitoba.

Plaintiff's Evidence.

No. 9. W. H. McLeod. Examination—*continued.*

Q. Did the ambulance meet you in Winnipeg?—*A.* The ambulance met us in Winnipeg.

Q. How long had you had trouble with those lights, Mr. McLeod?—*A.* When I first started to use that bull's eye headlight was 5.30 out of Winnipeg. On the 4.30 I just used the two lights. There is the dimmer and the bull's eye. I used the dimmer from Selkirk to Winnipeg.

Q. And when you got to Winnipeg it was about 5.30, and you used the bull's eye coming back?—*A.* Yes.

Q. How was it working?—*A.* It was working good.

BY HIS LORDSHIP:

Q. There are two headlights, the dimmer and the bull's eye?—*A.* Bull's eye, yes, it is right in the one light, you see, you can switch from the dimmer to the bull's eye.

Q. Like the lights in a motor car?—*A.* Yes.

Q. And which do you use when you are travelling between here and Selkirk?—*A.* Going south from Selkirk at 4.30 I just used the dimmer, and when I left Winnipeg at 5.30 I put on the bull's eye.

Q. That would be in the afternoon?—*A.* It was in January, but we are compelled to put on our lights from sundown to sun-up. We generally put that light on at five o'clock.

Q. When this particular journey when the accident happened you were travelling from Selkirk to Winnipeg, were you?—*A.* That was my second trip. You see, I had used the same car on the 4.30 trip, and he is asking me if the headlight had given me any trouble on that particular trip, the trip previous to the 6.30. It was the 6.30 that the accident happened.

Q. It takes two hours to make the round trip?—*A.* Yes, sir.

Q. Well, that is at 4.30?—*A.* That is at 4.30.

Q. And was the light working effectively then?—*A.* No, it was giving me trouble north. It gave me trouble on the 5.30 out of Winnipeg. When I got to Selkirk and looked around the car barns, and I had the night watchman there to get a refill of coal there for the heater, and I took the carbon out of the headlight, and got the night watchman to get me another carbon. I thought it was the carbon that was giving me the trouble, sometimes they corrode up.

BY HIS LORDSHIP:

Q. The trip on which you met with the accident, you were then going from Winnipeg to Selkirk?—*A.* No, from Selkirk to Winnipeg.

Q. But you already had made one trip that evening?—*A.* With the same car.

Q. And you had trouble with the headlight then?—*A.* Yes, sir.

Q. Did you report the trouble with the headlight when you got to Selkirk?—*A.* I had the night watchman get me another carbon for the headlight; that was in Selkirk at 6.20.

MR. LAMONT: He had made his round trip then, my Lord.

HIS LORDSHIP: He was going from Selkirk to Winnipeg, and he had trouble.

Q. Where did you get the trouble, or try to have it located and rectified? —*A.* In Selkirk when I got back at 6.20. It was giving me trouble from Winnipeg to Selkirk on the 5.30 out of Winnipeg. When I got into Selkirk I got another carbon for the headlight. I put that in. I started south again with the same car and same headlight, only a new carbon in it, and then I had the accident on that trip.

Q. I understood you to say that on the trip from Selkirk to Winnipeg you had trouble with your headlight in the afternoon, late in the afternoon? —*A.* The trouble was, I had the bull's eye on from Winnipeg to Selkirk, 5.30 out of Winnipeg when I first started to use the bull's eye. I got to Selkirk at 6.20, left Selkirk at 6.30, and had the accident coming south on the 6.30.

Q. Well, you left Winnipeg at 5.30 for Selkirk?—*A.* Yes.

Q. What time did you get in?—*A.* 6.20.

Q. At 5.30 left Winnipeg for Selkirk, reached there 6.30, and left on return trip for Winnipeg at——?—*A.* Reached there 6.20 and left on the return trip at 6.30.

Q. Well, you got there?—*A.* At 6.20.

Q. At 6.30, and then some time this trip you had trouble with the headlight?—*A.* I had trouble with the headlight on the 6.30 out of Winnipeg going north; between 6.20 and 6.30 I reported it and got a new carbon.

Q. "I had trouble with the headlight on the trip at 5.30 out of Winnipeg." When you got to Selkirk, what did you do?—*A.* I reported it to the night man at the Selkirk car barn, and asked him to get me a new carbon.

Q. What did he do?—*A.* He got me a new carbon. I thought it was the carbon that was giving me the trouble. We use the carbon light on those cars.

Q. Do you mean these ordinary bulbs?—*A.* No, no, it is a carbon light, burns a carbon, an electrode and a carbon.

Q. The same as a street light?—*A.* Yes. I should judge some street lights have carbon in them.

Q. "He got me a new carbon for the headlight?"—*A.* Yes.

Q. Did he put it in place?—*A.* Yes.

Q. He put it in the headlight, did he try it out?—*A.* Well, turned right over to me, and I took it out on the 6.30 and tried it out.

Q. Well, it was not tried out before you left Selkirk?—*A.* No.

Q. Why didn't you try it out?—*A.* Lighted it.

Q. Well, you mean you switched the electricity on it?—*A.* Yes, and it lit, as soon as we put it in and put in the switch the light lit.

BY MR. LAMONT:

Q. Well, how did you get along then, Mr. McLeod, and you left Selkirk with the car with the light in this condition and did you have trouble?—*A.* I did.

In the Court of King's Bench for Manitoba.

Plaintiff's Evidence.

No. 9.
W. H. McLeod.
Examination—*continued.*

Q. What trouble did you have?—*A.* Well, it was dim. The trouble apparently was not in the carbon at all.

Q. It was dim?—*A.* Just the same as it had been on the trip previous to that into Selkirk.

Q. In fact, what the man did at the barn was of no use?—*A.* It was no use, it was not the fault of the carbon at all that was making the light go like that.

Q. You are not an electrician yourself, are you?—*A.* No.

Q. You are just a mere motorman?—*A.* Yes.

Q. You don't pretend to be able to fix the light yourself?—*A.* No.

Q. Now, how far ahead could you have distinguished a team and a sleigh, if the lights had been in good condition?—*A.* Well, we pull up to a station, we look for passengers on a station, they are all flag stations, we generally can see five poles; we can pick out what it is on a station platform a distance of about five poles. You could see a passenger standing on a platform five poles.

Q. A team of horses with man and sleigh in front, how far ahead could you have seen on the night in question if the lights had been in good order?—*A.* You could see as far as the light would go, possibly seven pole lengths could see something on the track.

Q. If you could have seen it at seven pole lengths you would have been able to have stopped?—*A.* Yes.

Q. There is not doubt about that, is there?—*A.* There is no doubt about that.

Q. How had these lights been working, from your experience down there, Mr. McLeod, as a motorman?—*A.* Well, my experience with them, I have never had satisfaction with those headlights. They have been a source of annoyance and trouble with me. I have booked them out repeatedly.

Q. What do you mean, "booked" them out?—*A.* We have a sheet there we report. If you bring a car in that is not in good order, wanting repairs on it, headlight overhauled, brakes tightening up or anything, there is a booking out sheet booking out the cars on which you note what requires fixing.

Q. You say you have frequently complained about those on the sheets?—*A.* About those headlights. I have complained to the superintendent. While I was there, there were four, three superintendents and a night superintendent at the plant.

Q. Was there anything done?—*A.* There was never anything done with the headlight. There was no new headlights or anything like that.

Q. Just what do those headlights do? What was the nature of the trouble with them? Could you gather that from your examination, or did you examine them in the course of the journey in from Selkirk to Winnipeg?—*A.* I did get out at Macdonald station and tried to adjust. The wind was getting in the case for one thing, making the light flicker, and it was not set right, seemed to be burning off the corner, sometimes the light was

more one side or on the other, and it did not shoot a bull's-eye the way a bull's eye should shoot a straight line.

Q. Could anything be done to prevent the wind getting in?

BY HIS LORDSHIP:

Q. You say the headlight was anything but perfect, did you say?—*A.* Yes, the wind gets in around the door. That could be plugged.

Q. Is the witness speaking now about this particular headlight or just a general statement about the whole thing?—*A.* Well, the headlight, I am speaking generally, the whole bunch of headlights, they are never satisfactory to my way.

Q. He spoke of the wind getting in?—*A.* It gets in around the case.

Q. Are you speaking of your own on that particular night?—*A.* Yes.

Q. The light was flickering?—*A.* The light was flickering, yes.

Q. That night?—*A.* Yes.

Q. Did you examine it from Selkirk to the scene of the accident?—*A.* Twice.

Q. Whereabouts was that?—*A.* Once at Donald station, the first station south of Lockport, and once in the siding at McLennan to meet the north-bound and I got out there and examined it.

Q. Once in the siding at Donald, is it?—*A.* Yes.

Q. That is about how far from Selkirk?—*A.* About five miles.

Q. What did you find?—*A.* Well, I couldn't seem to get it to work. I loosened the carbon, turned it around, and tightened it up again. I found it was not the carbon.

Q. It was not working right when you got out at Donald?—*A.* No.

Q. You say you found the carbon was not the trouble at all?—*A.* No.

Q. You spoke about the wind getting into the lamp, are you referring to that particular car?—*A.* Yes, that particular car on that night and the wind was getting into the case the carbon was burning, but the wind was getting in and making it flicker.

Q. What effect would the wind have on the light, McLeod?—*A.* Well, it makes it flicker, come off and on. It does not burn with a steady light, it does not burn right, it does not have the flare.

Q. Could anything be done to prevent the wind getting in?—*A.* Yes, put felt around the door, the front of the case is a door, that could be lined with felt. I had one with a newspaper myself on some trips, and that lined with felt kept the wind out.

Q. Are they supposed to be lined with felt? It happens in front does it?—*A.* Yes.

Q. And where it fits into the frame is that supposed to be lined with felt?—*A.* Yes, to keep the wind out.

Q. Was it in this case?—*A.* That headlight was not.

Q. Well, how many of them are, do you know?—*A.* I don't know.

Q. Well, in your experience?—*A.* Well some of them have felt, some of them have been worn down so thin that it lets the wind in.

In the Court of King's Bench for Manitoba.

Plaintiff's Evidence.

No. 9.
W. H. McLeod.
Examination—*continued.*

Q. Was that the case with your car?—*A.* The felt was wore right off in the car that I had, that stopping around the door.

Q. You say that the felt was wore off the car you had, do you mean the car you were driving this night?—*A.* Yes, sir.

Q. What was the condition of the brakes that night, Mr. McLeod?—*A.* Well they were not working awfully bad, but I was having trouble making stops because I could not see the stations till I was right on top of them. I know I passed a few stations. I made a bad stop at Little Britain, I made a bad stop at Lockport, and that was on account of not being able to see the station until I was right on top of it. Then I got out at the next station, which was at Donald, and tried to adjust the headlight.

Q. But you say you were unable to do it?—*A.* No, I tried it again at McLennan three miles south of Donald at the siding. I got the accident two miles south of that at McLennan.

Q. At McLennan, what did you do?—*A.* I didn't do any good to it at all; it wasn't any better than it was before.

Q. Two miles further on you say the accident happened?—*A.* Yes.

Q. Did you report the condition of this car to your superiors?—*A.* When?

Q. After the accident?—*A.* I did.

Q. After the accident you reported it to your superintendent, did you, Mr. McLeod?—*A.* Yes.

Q. And you say you booked out these cars as being defective on several occasions?—*A.* Yes.

Q. And were the defects remedied?—*A.* Not to my knowledge.

Q. Do you run on a schedule down there?—*A.* Yes.

Q. What is the time from Selkirk to Winnipeg?—*A.* Some trips are fifty minutes, some trips are forty-five, some are forty, some are fifty-five, forty for the night trips. I think there are four night trips at forty-five minutes. I was running on the night trips continuously. They cut down ten minutes, on some of the day trips five; that was the running time when I was there.

HIS LORDSHIP: Do you suggest the rate of speed was a matter of negligence?

MR. LAMONT: I am suggesting that the rate of speed was too high in regard to the nature of the lights.

HIS LORDSHIP: This is a road operated the same as steam roads. There is no such thing as going too fast except in prohibited areas.

MR. LAMONT: This line of railway was not run on the Railway Act.

HIS LORDSHIP: Certainly, it is under the provincial Railway Act. There is no limitation of the speed.

MR. LAMONT: But due care has got to be had. I am suggesting it was too fast under the circumstances.

Q. How fast do you have to travel on that line, Mr. McLeod? What is your maximum rate of speed?—*A.* The only way we have of timing ourselves is when we happen to go along with somebody that is in an automobile. Well, they will say you are running together, you are running forty-eight miles an hour.

Q. You have not got a speedometer?—*A.* No. The fastest report I have ever heard of those cars going was forty-eight miles an hour.

BY HIS LORDSHIP:

Q. You have a railway time table that you work on the same as the steam roads?—*A.* Yes.

Q. And your mileage is all there?—*A.* Yes.

Q. So you don't have to depend on motor cars to tell how fast you are going. You know the distance between here and Selkirk on the rail, don't you?—*A.* Nineteen miles.

Q. And you know the time it takes to come in?—*A.* Sometimes we have more stops than others.

Q. Well, you have got to make that distance, you have got to go a fairly good rate of speed to make that distance, on a time table, aren't you?—*A.* You have.

Q. Are you expected to stick to the schedule?—*A.* Yes, we are supposed to run on time.

HIS LORDSHIP: Why, Mr. Lamont, that beach train makes sixty miles an hour, I am told, travelling over practically the same territory. To say that thirty miles an hour would be negligence here seems to me absurd.

Q. Well now, after the accident, did you continue on the same, Mr. McLeod?—*A.* Yes.

Q. What lights did you have on?—*A.* We didn't have any.

HIS LORDSHIP: He said the collision evidently put the light completely out of business.

Q. How were your brakes working?—*A.* The brakes were working pretty fair.

Q. Well, you applied the emergency?—*A.* The emergency was not working at all, the emergency was not cut in on the car but the straight air. I could make the stops allright. but I could not see the stops when I got right up to them, that is why I made the poor stop at Little Britain and Lockport.

Q. But I am speaking of the time you saw these horses, and tried to stop your car. Was your braking apparatus working satisfactorily?—*A.* The emergency air was not cut in on that.

Q. I don't care that. The emergency brakes you use to stop the car in an emergency?—*A.* The emergency was not.

Q. What was?—*A.* The straight air was working.

Q. Well, is one any better than the other?—*A.* Yes, the emergency is that works on the same valve as the straight air. You stop the straight air then you can shoot it right across into emergency.

In the Court of King's Bench for Manitoba.

Plaintiff's Evidence.

No. 9.
W. H. McLeod.
Examination—*continued.*

Cross-examination.

Q. When you spoke of the reverse I thought you meant ——

HIS LORDSHIP: That is reversing your motors.

Q. Well, did you do that?—*A.* Yes.

Q. And I am told that is the most effective way of stopping a car there is?—*A.* It stopped it allright.

Q. Did you do that?—*A.* I did.

Q. So there was no fault to find with the braking?—*A.* No, the car broke, stopped.

Q. That is what we want to know.

CROSS-EXAMINATION BY MR. GUY:

Q. You are not working for the company any more?—*A.* No, sir.

Q. You have not been for a considerable time?—*A.* No, a year last March.

Q. You are not with them now?—*A.* No, sir.

Q. When did you leave?—*A.* A year last March.

Q. March, 1926?—*A.* Yes, sir.

Q. You resigned from the service?—*A.* Yes.

Q. Of your own free will?—*A.* Yes, sir.

Q. Have you been talking this matter over with the Plaintiff's solicitors?—*A.* I am subpœnaed by the Plaintiff. I was told to come.

Q. That is not the question I asked you. Have you been talking this matter over with the Plaintiff's solicitor?—*A.* Oh, it has been mentioned.

Q. Now, Mr. McLeod, I am asking you. I just want you to give a candid answer?—*A.* We have just mentioned it about the case, the same as I have mentioned it with you people and other people; it has been talked about in that way.

Q. Now, Mr. McLeod, haven't you discussed the whole thing with Mr. McLenaghen, the Plaintiff's solicitor?—*A.* No sir, it has not been any more than just roughly speaking about it.

Q. So the plaintiffs are taking the risk of bringing you here to testify as you have, is that what you want us to believe, without having consulted you before?—*A.* Naturally, they have talked to me. It has been talked over, as I say any more than with you gentlemen. I was called into your office a week ago and talked it over with you just the same as I talked it over with the other fellow.

Q. Yes, I understand, and as a matter of fact, you were in pretty close relationship with the Plaintiff's solicitor, are you not?—*A.* No sir. I have been out of Winnipeg and out of Selkirk for over a month.

Q. Yes, you are out at Beausejour running a business?—*A.* Yes, at Beausejour, and I was out at Manitou all last summer. I resigned from the road and went to Manitou.

Q. Did the Plaintiff's solicitor finance your business out there?—*A.* Who?

Q. The Plaintiff's solicitor?—*A.* Finance it?

Q. Help you, assist you in your business?—*A.* When I stepped off the train at Manitou I had twenty dollars, that's all the assistance I had of any kind. I had $20, that was every cent I had when I started in business in Manitou, so I didn't get any assistance from anybody, because I didn't have any.

Q. You were in business at Manitou, were you?—*A.* Yes, sir, I rented a bakeshop there and started baking.

Q. I said at Beausejour?—*A.* At Beausejour—a telephone man told me about the place, and in order to get to the place I borrowed five dollars from Dr. Mooreback in Selkirk to go into Beausejour and pay my transportation. I got no assistance from anybody outside of five dollars I borrowed for my train fare from Selkirk to go to work. I borrowed that from Doc. Mooreback to go to Selkirk.

Q. You had a lot of trouble with you when you were a motorman? —*A.* I had a lot of trouble with the headlights, very few accidents. The headlights are all bad. I reported it, and I have reported it in an accident, and I have had to make out a different report. I have had accidents there and killed animals and killed stock and put on my report slip, headlight cause of the accident, and the superintendent has asked me to detroy that and don't put headlight, and he said they won't stand for that, leave the headlight off that report, he would say, and I have made out a new report and shot it into main office.

Q. All right, you will have your say-so in spite of my objection. At any rate, the headlights were not satisfactory to you, and you say you made your complaint, and to whom did you make your complaint?—*A.* I have made it to the superintendent, made it to the car barn foreman.

Q. Who was the superintendent?—*A.* I have had four different superintendents while I was in service.

Q. These headlights have all been bad?—*A.* They have to my knowledge while I was in the service.

Q. The whole bag of them?—*A.* Yes.

Q. You have made complaints to Mr. Hawes, the superintendent? —*A.* Yes.

Q. Whose duty it would be to repair them?—*A.* Yes. Mr. Hawes said I need not say anything about them. I was going to report it to the main office, and he said you don't need to say anything about it.

HIS LORDSHIP: It may be evidence what one of your officials said to him when he was reporting the very matter that is now complained of.

Q. You reported the matter to Mr. Hawes?—*A.* Yes, sir.

Q. The superintendent of the railway?—*A.* Yes.

Q. Now will you tell me just when you reported these headlights? —*A.* We have a booking-out sheet there we book out with.

Q. Were they all by book-out? Is that the only kind of report you made was by book-out? You mean you signed it off?—*A.* Sign a car off.

Q. Good, bad or indifferent?—*A.* And tell the company that isn't good.

In the Court of King's Bench for Manitoba.

Plaintiff's Evidence.

No. 9. W. H. McLeod. Cross-examination—*continued.*

Q. Is that the only way that you told Mr. Hawes that you were having trouble with the headlights is that through the signing-off, sheets?—*A.* No. I am positive I have told him in speaking to him, I have told him about those headlights.

Q. Speaking to him you have told him. Now, speaking to him when? —*A.* I don't know when, but I am quite sure I have talked about those headlights.

Q. You talked when? I want to know, so far as you can tell me, when it was that you told Mr. Hawes that these headlights were not in good condition?—*A.* I guess I have told him so many times I can't remember.

Q. You can't tell me any particular time?—*A.* I can't tell you any particular time just when.

BY HIS LORDSHIP:

Q. When do you say you did it, when you booked out you made complaint?—*A.* Made complaint on these sheets.

Q. Is that sheet in a book?—*A.* No, down there there is a little desk when you come in at night you book out your car, number of car, what time you arrived, and if there is anything defective in the car you put it down.

Q. "When I booked out at the end of a run."—*A.* Yes.

Q. "I made a complaint about the headlight in a book."—*A.* On that sheet.

BY MR. GUY:

Q. Now I am asking you, apart from the sign-off sheets or booking-out sheets, as you call them, ——

HIS LORDSHIP: Well, are these sheets preserved, Mr. Guy?

MR. GUY: Some of them are. We have not been able to get ——

MR. LAMONT: My learned friend never produced them. I examined for discovery. My learned friend did not produce any of those reports. I asked for them specifically, and they have never been produced. The report of the accident my learned friend gave me a copy of that, but the reports prior to that were never produced to me. They are not disclosed in his affidavit.

HIS LORDSHIP: Well, did you enquire about these booking out sheets?

MR. LAMONT: I asked for them specifically. I adjourned the examination to have them produced, and they did not produce them. The examination was adjourned for the express purpose of Mr. Hawes producing those reports, and he never produced them.

BY MR. GUY:

Q. Now, Mr. McLeod, do you say that on the signing-off sheets in the month of November, that you reported these headlights bad, November 1925, that would be?—*A.* I won't say that I did that particular; I tell

you, we got so used to running with bum headlights there was lots of time we did not book them out when we should have.

Q. I am talking about the reports, signing-off sheets, will you say that during the month of November 1925, you signed off one of those cars with headlight wrong?—*A.* No, I won't say that, because I am not positive whether I did or not.

Q. Will you say that you did in the month of October of 1925? —*A.* I don't like to make a statement like that because I am not sure. What I will say that I booked out headlights on accident reports, and they have asked me, don't send that into the main office, they won't stand for it, make out a new report and leave the headlight off of it.

Q. That is Mr. Hawes?—*A.* Mr. Jones. I made out, I killed a horse at Fox Ranch and Mr. Jones said not send that report in, make out a new report to send into main office.

Q. I want to know the parties to whom you told it and when the converstion?—*A.* I am telling you the parties.

Q. You say Mr. Hawes.—*A.* Mr. Hawes which? I have told Mr. Hawes about the headlights repeatedly and spoke about headlights, and I have booked out headlight, horse thrown in the ditch going south, and over on the C.P.R. going north on one booking-out sheet.

Q. Will you kindly answer the question you are asked? You say you had conversation with Mr. Hawes and Mr. Jones in which they told you that you were not to sign off the headlight as being out of order. —*A.* No, I didn't say that. I said Jones had me tear up a report, and I booked out the accident I killed a horse at the Fox Ranch, that was when Mr. Jones was superintendent.

Q. Mr. Jones has not been superintendent for a long time. What about Mr. Hawes, did you ever have any conversation?—*A.* We have talked about headlights.

Q. Listen, please.—*A.* I booked out the sheet. If he got those forms from the party there he would see that I put it down. It is his duty to look them over.

Q. That is not what I am asking you at all. Did you have a conversation with Mr. Hawes at which he told you that you should not put imperfect headlights or headlights out of order on your sign-off sheets or reports?—*A.* No, I didn't.

Q. You never had?—*A.* No, I never had such a conversation with Mr. Hawes.

Q. Never with Mr. Hawes?—*A.* No.

Q. So it was when you had this converation about that, it was before Mr. Hawes was superintendent, it was Mr. Jones?—*A.* Mr. Jones told me the night of the accident, I told him the headlight was the cause of the accident. I said if I go to the main office I am going to tell them. The next night he said they want you at the main office to-morrow, and he said if the headlights ain't any worse than usual, why, don't say anything about them.

In the Court of King's Bench for Manitoba.

Plaintiff's Evidence.

No. 9. W. H. McLeod. Cross-examination—*continued.*

Q. That's Mr. Hawes.—*A.* That's Mr. Hawes. That happened the Monday after the accident. The Saturday night I told I was going to tell about the headlights. Monday night he told me I had to go up on Tuesday, and he told me not to say anything about the headlights.

Q. Hawes told you?—*A.* That's the time I had the conversation and that was after the accident.

Q. Did you have a conversation with Mr. Hawes after the accident? —*A.* After that accident.

Q. In which he told you not to report the headlights.—*A.* I said I am going to report the headlights, and he said you don't need to say anything about them.

Q. That was the Saturday after the accident?—*A.* No, the night of the accident I told him I was going to tell about the headlights that was the cause. Monday I told him if I have to go to the main office on this, I am going to tell about that headlight. Monday he said they want you at the main office to-morrow Bill, he said if the headlights are not any worse than usual you don't need to say anything about them. Well, I said, I am going to say something about them.

Q. And this conversation on Saturday night, took place with Mr. Hawes on the night of the accident?—*A.* On the night of the accident when we met in Winnipeg.

Q. In Winnipeg?—*A.* Yes, sir.

Q. At what place in Winnipeg?—*A.* At the north car barns. That is where I saw Hawes after the accident.

Q. You are sure about that?—*A.* Yes sir, along about 9.30.

Q. Is that the conversation you had with Hawes in which you were not to report the headlight?—*A.* Oh no, I am not meaning that. I know I have mentioned headlights to Mr. Hawes ever since he has been superintendent of the railway.

Q. Ever since he has been superintendent, you have been complaining about the headlight?—*A.* Yes.

Q. Now I will show you your report on this. You are so bound to tell about these headlights. Is this the report you made of this accident to the Company? January 2nd.—*A.* Yes sir.

Q. That is your signature to it?—*A.* Yes.

Q. That is your report?—*A.* Yes. Have you got the report I made up in Mr. Thould's office after the accident?

Exhibit 2—Report.

Q. Was this the report you made after seeing Hawes or before?—*A.* That was after I saw Hawes.

Q. This report was made January 2nd, 1926, the night of the accident? —*A.* The night I got into Selkirk.

Q. After you got back into Selkirk you made out this report after you had seen Hawes and told him you were going to report these headlights?— *A.* I was told not to report them on paper. I tore up and made out a new one.

Q. But you told Mr. Hawes at Winnipeg.—*A.* At Winnipeg.

Q. That you were going to report those headlights?—*A.* Yes.

Q. And when you went back to Selkirk you made out this report?—*A.* Yes, sir.

Q. And you did not make any reference to headlights in it?—*A.* No. I went right up to the main office the following Tuesday and made a complaint there personally.

Q. Now you were, of course, on your way to Winnipeg, your proper position is in the vestibule in the front of the car, isn't it?—*A.* Yes.

Q. It is one of those large cars?—*A.* Yes, they are larger than the city cars.

Q. You are shut off from the rest of the passengers or anybody else in the car?—*A.* Yes.

Q. On this night you were in your proper place, I presume?—*A.* Yes.

Q. Looking out ahead of you?—*A.* Yes.

Q. And you did not see this something or whatever it was on the track until you were about a pole length, that would be 125 to 150 feet, away from you?—*A.* I judge that is the distance between the poles.

Q. Were you surprised to find this on the track?—*A.* Well I was. I don't know whether you call it surprised or not; I don't know what you would call it.

Q. You would not be expecting anything like that on the track there?—*A.* Well, I didn't hardly expect anything like that there. It is pretty hard to tell just how I did feel, an outfit looms up; you know you are not going to stop, and see a man there. It is pretty hard to tell how you did feel at that particular time.

Q. But that is not where sleighs travel, is it, that is not where traffic travels, is it, on the track?—*A.* No, that is not the rule. The road is right alongside the railroad.

Q. And they travel along the road, the horses and rigs don't travel along the track?—*A.* No.

Q. Sometimes cross it, but they don't travel along it, do they?—*A.* No.

HIS LORDSHIP: Well, you don't suggest that the aborigines along the Red River use this line of railway as a highway.

MR. GUY: There was no condition existing at this time that would require traffic on the track at all. It is only dealing with the statement of particulars.

HIS LORDSHIP: You don't suggest that people were in the habit of using the right-of-way of this railway as a road?

MR. GUY: I am just bringing it out that they do not.

HIS LORDSHIP: Why, surely, Mr. Guy, you don't contend that people would have the hardihood to go and travel with horses and rigs between the car rails with trains running at 40 to 45 miles an hour every hour of the day?

MR. GUY: Yes, well, of course, I don't suggest that they did it. I know very well that they don't.

In the Court of King's Bench for Manitoba.

Plaintiff's Evidence.

No. 9. W. H. McLeod. Cross-examination—*continued.*

HIS LORDSHIP: In this particular case, we happen to know from the man's own testimony how the horses got on the track.

MR. GUY: Well, we have his version of it, as yet we haven't the whole evidence as to how he got on the track yet.

Q. Now these cars are capable of travelling at a very fast rate?—*A.* Yes they are fast; they have to be to make the time.

Q. It is a rapid transportation system?—*A.* Yes.

Q. You go from Winnipeg to Selkirk?—*A.* Some trips 45 minutes, some trips 55 minutes.

Q. And that schedule of 45 minutes includes stops?—*A.* Includes stops.

Q. So that at times where there are no crossings and a clear way you would get up pretty well to the maximum rate of speed, would you not?—*A.* Yes.

Q. Forty-five minutes includes stops?—*A.* Yes, on those night trips. The night trips are cut down. You see, they don't pull a trailer on those night trips. It is a single car. Some trips are 50 minutes in the day, some are fifty-five minutes.

Q. Now you have expressed your opinion that you had trouble with the lights. What was the trouble you had with the light?—*A.* The wind was getting in the case for one thing, which made it very dim. It didn't shoot the bull's eye down the track at all.

Q. Was it dim all the time, or did they lighten up and darken down?—*A.* Sometimes they would flicker around. If the wind didn't happen to hit it it might get over where it should be.

Q. Isn't the ordinary operation of one of those arc lights where you have the electrode and the carbon on end in the ordinary operation of them, doesn't it sometimes while it is burning burn to one side or around the carbon and drop and re-adjust itself?—*A.* Burn around the carbon.

Q. Sometimes it shoots off to one side and re-adjusts itself.—*A.* Sometimes it gets corroded. It is just like a piece of cigar on the top there. This night I changed the carbon because the carbon I took in was pretty badly corroded.

Q. In the ordinary operation of those lights, that is what happens, the arc burns it and corrodes it on the top?—*A.* Yes.

Q. So that you change sometimes?—*A.* Yes.

Q. And when you got out these times you are telling about, you got out to turn around the carbon?—*A.* Turn around the carbon. Where the wind was blowing it would burn on the other side, and I turned it around the other way to try to get it even.

Q. How many of these lights are there on the Winnipeg Selkirk? How many have they of those bull's-eye lights?—*A.* There are four power cars on that Selkirk line, and they are all equipped with headlight. There are six, there's No. 2, No. 6, No. 16, No. 14, No. 12 and No. 16,—there's six power lights; two of those are the Stonewall, and four are Selkirk.

Q. Six power cars equipped with this headlight?—*A.* Yes.

Q. With carbon?—*A.* Yes.

Q. Well, there are two of those that run to Stonewall?—*A.* Yes.

Q. You were not on the Stonewall run, were you?—*A.* No, but they use the same car, they can be changed; they do the repairs in Selkirk; anything wrong with Stonewall car they would transfer that car to Selkirk and take another one out of the barn; they do all the repairing at Selkirk.

Q. But there are six headlights, four of them from Selkirk and two would be on Stonewall?—*A.* Yes.

Q. On this particular night when you turned on the bull's-eye light coming north to Selkirk, you say it was dim, and when you got to the barn at Selkirk you asked the man for a new carbon.—*A.* His name is Mice or Mills, he is the night man that comes on duty at six o'clock.

Q. Is he just a night watchman?—*A.* Just a night watchman.

Q. Well, you asked him for a carbon.—*A.* I asked him for a carbon.

Q. And you went in, and he gave you a carbon.—*A.* He gave me a carbon.

Q. And you put it in?—*A.* Yes.

Q. And you say even this new carbon did not work right?—*A.* Did not work right. Of course, that would not be the same light I had—On my very next trip; after the accident I went home on the 9.30 out of Winnipeg, the night of the accident. My next trip was five o'clock out of Selkirk the next night, and the headlight went on the blink from St. Andrews, and I went from there to Winnipeg without a headlight, on the next trip.

Q. The next night?—*A.* Yes.

Q. On this particular night, anyway, you thought it was the headlight?—*A.* I thought it was the carbon.

Q. And you went and got a carbon?—*A.* Yes.

Q. And you tried it?—*A.* Yes.

Q. Did it work allright?—*A.* No, it didn't do, that was going south, on the same trip.

Q. Why didn't you take another headlight?—*A.* I didn't have time. I didn't know how it was going to work until I got started.

Q. Can't you turn on the power?—*A.* You can turn it on. It came on allright. It came on, it lit sure when I threw the switch in. It was not a bright light.

Q. Your complaint is then that while it was light it was not bright enough?—*A.* No, it was not bright enough.

Q. That's your complaint, anyway. I want to know what your complaint is. Your complaint is that while it lights allright, it is not a bright enough light?—*A.* No. Some bull's eyes are fine.

Q. You thought it was the carbon, and you asked for a new carbon?—*A.* Yes.

Q. Well now you are suggesting to us now that it was the felt around.—*A.* Well, it must have been the felt, I thought it was the carbon.

Q. Must have been the felt because it was not the carbon.—*A.* Well, I got a new carbon, and it did not help any.

Q. Sure, it must have been the felt. And that is your reason for saying that it was the felt because it couldn't have been the carbon.—*A.* I know

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No. 9. W. H. McLeod. Cross-examination—*continued*

the felt was out of there, when I looked and adjusted it at Donald, and went to McLennan is where I noticed there was no felt around that door—that is the first I noticed there was no felt, as soon as I tried to fix the carbon and being no good, and that is where I found that there was no felt in the door was at McLennan.

Q. Did you report any of this about there being no felt in the door to anybody?—*A.* Well, I didn't go to the barn.

Q. Anytime at the barn or elsewhere, did you ever report about this felt to anybody?—*A.* I don't know.

Q. Well, you do know?—*A.* I don't know.

Q. Well, I think you ought to know.

His Lordship: He said he did report the headlights repeatedly. It was not his duty to intimate to the officers in charge of those cars what was wrong. It was their duty to have found out, not his, he is not an expert.

Q. I understand. That is not the point I am asking. I am asking now whether he made a report of the felt being out of the headlight to anybody?—*A.* Well I have booked out bum headlights there.

Q. I am asking you about this headlight.—*A.* I didn't go to the car barn; when I left Winnipeg at 9.30 I headed home as a passenger, and I didn't go to the car barn that night.

Q. I am not asking you anything about that. I am asking you did you make a report to anybody about that felt being out of that headlight, anybody at all?—*A.* I told my headlights were no good. I told Mr. Thould two days after that what I thought of the headlights.

Q. That may be; we are not disputing that. We have already had your opinion expressed on whether the headlights were good or not. I am not dealing with that. I am asking you about your report, and you say you don't know.

His Lordship: I don't think the witness suggested that he reported any defect. He simply reported the fact that the headlight was not giving satisfaction, was not working satisfactorily. He does not say that the felt was missing. He said that the felt was worn so thin that it failed to act as a wind proof. Surely under those circumstances, the duty would devolve on somebody to examine these defects and remedy them. Surely it does not devolve on the motorman to tell the expert operators in the car barns what is the matter with the cars.

Mr. Guy: I am not suggesting that, but I am asking this man here, whether he ever reported or made any report of the felt being missing out of this headlight.

His Lordship: He says no, he can't recall.

A. I can't recall making any report testifying that the felt was missing. I have booked out headlights, wind getting in headlight case I have booked that out repeatedly and that reflected right back on that there was no felt, there was wind getting in some place, and I have booked that out repeatedly, wind getting in headlight case.

RE-EXAMINED BY MR. LAMONT:

Q. I believe that you were subpœnæd by both parties here, were you not?—*A.* Yes, sir.

MR. Guy subpœnæd you?—*A.* Yes, sir,

MR. GUY: Does this arise out of cross-examination?

MR. LAMONT: My learned friend seems to suggest to the jury——

Q. Were you up to Mr. Guy's place?—*A.* Yes, sir.

Q. Did you tell him about the headlights?

MR. GUY: Is this evidence? It is all quite true, I did discuss it. Is this relevant here now for my learned friend to go into that now?

HIS LORDSHIP: It is new matter, Mr. Guy, that you have raised on cross-examination, and if Mr. Lamont thinks that the explanation is not fully illuminative it is his privilege to go into that.

MR. GUY: If that is the case, then I should have an opportunity if my learned friend is going into all of this.

HIS LORDSHIP: Well no, your opportunity is done. You have shot your bolt when you finished your cross-examination. This is new matter that Mr. Lamont did not bring out in his evidence in chief.

MR. GUY: My lord, I said nothing at all to the witness about coming up to see me, or what he said to me.

HIS LORDSHIP: No, but you questioned him very closely about seeing others.

MR. GUY: I don't deny that I had an interview with him.

HIS LORDSHIP: Very well, then what is wrong with the other people interviewing him? Evidently the intention was to try to discredit this witness in some way because of influences which you suggested were brought to bear on him.

MR. GUY: If your lordship would let me state my position. I am not objecting to the fact that they went and saw him. I didn't suggest anything. I asked the witness the question as to whether he had been interviewed by these other people. I did not go into, and I did not get a chance to go into the exact story that he told, because the witness knows that he has not said anything to me at his interview with me about the details, the various details which the witness has given he did not give it to me. I can't come and give evidence before the court because I am conducting it, but I know he did not, and he won't say he did.

BY MR. LAMONT:

Q. Did you tell Mr. Guy about the headlights?—*A.* I told Mr. Guy about the headlights, and I told Mr. Guy about putting on my report, and sending my accident report to the main office with headlight on it and the superintendent asked me to take that off and send in a report without

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No. 9. W. H. McLeod. Re-examination—*continued.*

headlight on it, and I told that to Mr. Guy in his own office. I told Mr. Thould in his office the first day I went up there about the headlight, and I told him that the headlights were not power enough to blow them to hell.

Q. Who did you tell that to?—*A.* Mr. Thould, that is the claims agent of the Company. I was interviewed by him first.

Q. You told him two days after the accident?—*A.* Yes.

Q. After you had the conversation with Hawes?—*A.* Yes.

Q. What facilities are provided at Selkirk, Mr. McLeod, to inspect those cars, and look after them when they are brought in at night?

MR. GUY: This is new.

Q. Are there any facilities provided to inspect the cars at Selkirk when you go down?—*A.* No.

MR. GUY: He has told what he did do, and that is as far as he can do.

MR. LAMONT: My learned friend has suggested that he should have done something else at Selkirk. What I want to know—my learned friend suggested he should have done something else. I want to know what else could have been done by this witness at Selkirk to remedy the situation.

HIS LORDSHIP: He told us he went and asked for a new carbon.

Q. Is there an expert to inspect the cars at Selkirk, Mr. McLeod, when you go in there at night?—*A.* No.

Q. There is no inspection at all?—*A.* No.

Q. There was nobody else for you to see at Selkirk when you go down there?—*A.* No.

MR. GUY: My learned friend should not examine him like that. He is putting words in the witness's mouth. It is certainly not re-examination proper.

Q. Where is the proper place, Mr. McLeod, to report these matters in connection with the cars?

MR. GUY: I object.

MR. LAMONT: My learned friend suggested he should have done something else. I am asking the witness where else it could be done.

Q. Is there any other place to report these cars?

MR. GUY: That's not discussed. Why go into all this? We have been through this part of it, my Lord. We will never come to an end if we go in for re-examination and cross-examination again.

Q. Are there any other reports you make out?—*A.* There is little defect slips in the car that the conductor carried in his grip, but whether the conductor was supplied with those before the accident. The conductor gets a little pad of what they call defect slips, and he comes in the front end and asks the motorman, but I don't know whether they had them before——

HIS LORDSHIP: I don't know whether you are entitled to go into this. This did not arise out of cross-examination.

MR. LAMONT: Well, if my learned friend will admit there was nothing else the man was to do.

MR. GUY: I am not admitting anything at all. I asked him what he did.

MR. LAMONT: My learned friend's cross-examination seemed to throw upon this man the onus of doing something that he did. I just want to show to the court he did the usual and proper thing he should have done under the circumstances.

HIS LORDSHIP: Well he has told us what he thought was the matter with the car, possibly the carbon, and he applied to the night man and got a new carbon and put it in and when turning on the electricity the thing lit, so he said, but he has no better satisfaction in the matter of the lighting than with the old carbon. He says he is not an expert, and I understood him to say that there was no inspection of these cars at Selkirk, and there was no expert there to make an inspection. I understood the witness to say that no inspection of these cars was made at Selkirk, and there was no expert there to make an inspection.

MR. GUY: When?

A. At night when I pull in at 6.30.

MR. GUY: That is entirely new matter, my Lord, if he did say that, and if he did say it, I want to know whether he knows what means of inspection there are of cars.

BY MR. GUY:

Q. When you went down to the car barn you thought as you said—as you said—it was the carbon, and you went to the night watchman, and asked him for a new carbon?—*A.* Yes, sir.

Q. And he gave it to you?—*A.* Yes.

Q. Was there nobody at the station to whom you might report this headlight, and the trouble that it was giving?—*A.* We don't report. We get into the station and ——

Q. Do you tell me there wasn't anybody at that station that night to receive any complaint you have to make about that headlight?—*A.* We pull up at the barn and never get a chance to get in at the station. We don't have time. I figured by putting in new carbon it was going to be time because I figured I was going to be alright.

Q. Now I am asking you if you did not get out of your car, how do you know if there was anybody there to report?—*A.* There was no need of reporting. I thought I had overcome the difficulty when I had changed the carbons. Two blocks from the station.

Q. Well, there wasn't a question of there being anybody at the station you didn't wish to make a report.—*A.* I didn't need to. I changed the new carbon two blocks north of the station, and I lighted up, and when I got out I found I had no better satisfaction than I had before.

MR. CAMPBELL: At this point we would put in examination for discovery. We have no further oral evidence. Examination for discovery of James Cyril Hawes. (Marked Exhibit 3.)

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Plaintiff's Evidence.

No. 9.
W. H. McLeod.
Re-examination—*continued.*

HIS LORDSHIP: Well, gentlemen, this discovery evidence, as we call it, the practice of the courts permits a litigant to examine in case of an action against a company certain officers of that company, with a view to eliciting information that may assist his case. It is called discovery. In this particular instance they elected to examine Mr. Hawes, whose name you have heard mentioned here by the last witness. A discovery, of course, is effected in shorthand and afterwards extended, and they are at liberty to read at the trial such portions of that evidence as they deem advisable in support of their case, and it is to be accepted by the jury in the same way as if the evidence was given orally before you, so that Mr. Campbell will now read from the discovery of Mr. Hawes such parts of the evidence as he wants your attention directed to.

This witness was re-called (*see* p. 142).

No. 10.
J. C. Hawes (on Discovery).

No. 10.

Evidence of J. C. Hawes (on Discovery).

"IN THE KING'S BENCH

"Between PAUL PRONEK, *Plaintiff*,
"and WINNIPEG, SELKIRK AND LAKE WINNIPEG RAILWAY, *Defendant.*

"This is the examination of James Cyril Hawes, as an officer of the Defendant Company, *viva voce*, on oath, for discovery, touching his knowledge of the matters in question in this action, had and taken before R. D. Guy, Esq., a special examiner in this honourable court, at the offices of Messrs. Lamont & Bastin, in the Standard Bank Building, in the City of Winnipeg, in Manitoba, on the 11th day of May, A.D. 1927, at the hour of three o'clock in the afternoon.

"Present: Mr. J. S. Lamont for the Plaintiff, Mr. R. D. Guy, K.C., for the Defendant.

"It is agreed that the examination be taken in shorthand by Joseph L. Donovan, Special Examiner and Court Reporter, and afterwards by him extended on the typewriter and that the reading over and signing of the transcript by the witness be dispensed with.

"By consent of counsel for all parties, the further attendance of the examiner on this examination is dispensed with, and it is agreed that this examination as taken down, extended and signed by the Court Reporter shall be treated in all respects as if the said Examiner had been present throughout the examination, and shall be as valid, binding and effectual in every way and for all purposes as if the said Examiner had been present throughout.

" The above-named JAMES CYRIL HAWES, being first duly sworn, testified as follows, to Mr. Lamont :

" 1. *Q.* Where do you reside, Mr. Hawes ?—*A.* Selkirk.

" 2. *Q.* You are in charge of the Company's traffic business up there, are you ?—*A.* Yes.

" 3. *Q.* How long have you been with the company ?—*A.* Between fourteen and fifteen years.

" 4. *Q.* I suppose you worked up through the various grades of motorman and conductor, etc., did you ?—*A.* I did.

" 5. *Q.* You have operated those cars for some years, have you ? —*A.* Yes.

" 6. *Q.* To Selkirk ?—*A.* Yes.

" 7. *Q.* Do you remember the date of the accident in question ? —*A.* I do.

" 8. *Q.* I believe it was the 2nd of January, 1926, was it ?—*A.* That is right.

" 12. *Q.* You went back and stopped at the scene of the accident ? —*A.* The following day.

" 13. *Q.* You went down to make a special examination of it ?—*A.* On the following day, yes.

" 14. *Q.* Whereabouts did the accident take place ?—*A.* I judged about between a quarter and half a mile north of Miller station.

" 15. *Q.* How far from the next station north ?—*A.* Between a half to three quarters of a mile, I should judge.

" 16. *Q.* What was the next station north ?—*A.* Parkdale.

" 17. *Q.* What did you find when you went to the scene of the accident the next day ?—*A.* I found a dead horse and considerable wreckage strewn along the track.

" 18. *Q.* What was the nature of the wreckage ?—*A.* Part of the sleigh box it appeared to be.

" 19. *Q.* Was there anything else ?—*A.* Nothing that I remember of, no.

" 20. *Q.* Did you notice how far along the rails the equipment had been dragged after it was struck ?—*A.* Yes.

" 31. *Q.* Did you examine the route that the team had taken prior to going on the tracks ?—*A.* I did, yes.

" 32. *Q.* What did you find ?—*A.* I found that the team had swung out from the highway on to our track a distance of about—oh, I should judge nearly half a mile north of the scene of the accident.

" 42. *Q.* Was the harness lying there too ?—*A.* No, there was some pieces of scrap lying around, but not the harness complete.

" 46. *Q.* Who was operating the car in question ?—*A.* W. H. McLeod, motorman.

" 47. *Q.* Had he been in the employ of the company for some time ? —*A.* Yes, he had.

" 48. *Q.* Is he still in the employ of the company ?—*A.* No, he is not.

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Plaintiff's Evidence.

No. 10. J. C. Hawes (on Discovery)—*continued.*

" 49. *Q.* Who was the conductor?—*A.* John Johnson.

" 50. *Q.* Is he in the employ of the company?—*A.* No.

" 51. *Q.* Were they discharged on account of this accident?—*A.* No.

" 52. *Q.* Were they discharged at all, or did they resign?—*A.* The conductor was discharged; the motorman resigned.

" 107. *Q.* You just noticed the lights casually when the car would come in?—*A.* Yes. I was at Selkirk station when the car came in and when it went out again.

" 108. *Q.* You made no inspection of the lights then, did you?—*A.* I made no inspection of the lights.

" 109. *Q.* How far ahead can objects be seen on the track with those headlights, Mr. Hawes?—*A.* Oh, ordinarily, I think, about 250 feet.

" 110. *Q.* Do you suggest that is as far as the motorman can see ahead with the headlight at night—a horse for instance on the track?—*A.* He could not see much further.

" 123. *Q.* Do you know how fast the car was going on the night in question when the horses were struck?—*A.* No, I don't know.

" 124. *Q.* Have you any information on the subject?—*A.* Yes.

" 125. *Q.* What is your information on the subject?—*A.* My information is about thirty miles an hour.

" 173. *Q.* What do you call those reports that the motormen send in?—*A.* Signing-off sheets.

" 174. *Q.* Have you got those in connection with this car?—*A.* No I haven't. There is a whole month of those missing. It just happened to be the month of January. I hope to locate them before Tuesday. The fact of the matter is I have been so busy I haven't spent much time on it. But I haven't been able to locate them. I have them all except the month of January. They use one sheet for two or three days, and I presume the first of January was probably on the same sheet as the 29th, 30th and 31st of December.

" 181. *Q.* How far was it down the track that the horses went after they turned on?—*A.* I didn't measure that but ——

" 182. *Q.* Have you got any notes in your diary on that point?—*A.* No, I haven't.

" 183. *Q.* I think you told me about half a mile?—*A.* I judge it would be about half a mile.

" 184. *Q.* Were the horses running between the rails?—*A.* They were between the rails, yes.

" 185. *Q.* Both horses were between the rails?—*A.* The wheel marks were between the rails, and the foot marks."

MR. CAMPBELL: That is the Plaintiff's case, my Lord.

DEFENCE.

No. 11.

Evidence of S. Showski.

SAMUEL SHOWSKI, sworn.

DIRECT EXAMINATION BY MR. GUY:

Q. What is your occupation?—*A.* Provincial constable in Manitoba.

Q. Do you know the Plaintiff in this action Paul Pronek?—*A.* I do.

Q. Did you have occasion to see him with reference to this accident?—*A.* I did.

Q. When did you see him?—*A.* I saw him on the morning of the 3rd of January, 1926, if I am not mistaken, but I was not able to talk to him. The doctor forbade me to take any statement from him; doctor would not allow me, and then on the 6th January, same year about noon time I went into Winnipeg General Hospital to interview him, and I received a written statement from him.

Q. You went in to see him in the Winnipeg General Hospital for what purpose?—*A.* Just to get the statement as to how it happened, how this accident happened.

Q. Well, was that part of your duty to get statements?—*A.* It was.

Q. Investigating accidents?—*A.* Yes.

Q. That is part of your duties?

HIS LORDSHIP: How so? I understand the provincial police have a very important part to play in the matter of criminal justice, but I was unaware that they had any duty to perform in civil actions.

Q. How did you go to see him?—*A.* Well, we were not quite sure in the first place whether it was only accident, but just to find out how he happened to be on the railway, and how he was seriously hurt.

Q. How did you personally come to go to have this interview?—*A.* Well, I was sent by my Inspector Smith, who is my superior officer.

Q. He occupies what position?—*A.* He is Inspector Smith of the Provincial Police in Manitoba.

Q. And you were sent by him to go up and investigate the accident?—*A.* Yes.

Q. And pursuant to your instructions you went up to the General Hospital to interview Pronek?—*A.* Yes.

Q. And you saw him, as you say, on the 3rd, didn't have a talk to him, and on the 6th you did see him and have a talk to him?—*A.* Yes, I did.

Q. What statement did Pronek make to you at the time of the accident?

HIS LORDSHIP: Well, is that admissible?

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Defendant's Evidence.

No. 11.
S. Showski.
Examination—*continued.*

MR. GUY: I have already asked the man, and he denied that he had made certain statements.

HIS LORDSHIP: Well, you could contradict him upon any point that you know his statements in the box are inconsistent with the former statement, but only upon those points.

MR. GUY: Yes, that is very true; so I will confine it to the various statements that he made.

Q. Did he give you a statement. Did you take down what he said in writing? You spoke to him in his own language?—*A.* Yes, my Lord, I did.

Q. Did he sign what you took down?—*A.* He could not sign it, my Lord. He was too weak to sign his name, but he made a mark, made a cross.

Q. Do you think he was in a sufficiently vigorous condition to understand questions?—*A.* He was but he was not able to raise his hand.

Q. How do you know?—*A.* I asked him, my Lord, I asked him whether he could sign his name.

Q. You would not know what condition of mentality the man was in?

MR. GUY: My Lord, perhaps I might clear that up.

Q. Did you obtain permission from anyone to see him?—*A.* From Dr. McLean. I saw Dr. McLean, and asked him if I can interview a patient Pronek.

Q. When did you see Dr. McLean?—*A.* On the morning of the 6th of January.

Q. And did he tell you then that this man was in a sufficiently strong condition mentally and physically to be questioned as to this accident?—*A.* I did not ask anything about his mentality, but I asked whether I can interview the patient Pronek, and he said he is quite allright today; you can talk to him.

Q. So you went in and talked to him. Now, did Pronek tell you at that time that he had had any liquor to drink?

MR. LAMONT: This was in writing, Mr. Showski, was it?—*A.* Yes, it was.

MR. LAMONT: Now I don't think that is the proper way to examine. If the report was in writing the proper thing to do is to produce the report. Not asking the report to go in at all.

Q. You say you took down a statement in writing?—*A.* At the time as he spoke.

Q. You talked to him in Ruthenian language?—*A.* In Ruthenian language, and I wrote it down in English in a book.

MR. LAMONT: Have you got the report with you, Mr. Showski?—*A.* I have not got the original statement, but I have got a copy of the original.

Q. You have not got anything in your possession now that Pronek signed?—*A.* No, I have not.

Q. And you knew Pronek could not speak English very well?—*A.* That's right.

Q. And he can't read or write English?—*A.* That's right.

Q. And he was too weak to hold up his head to make a mark upon the paper?—*A.* He made a mark.

Q. But he was too weak to write his name.

MR. LAMONT: I object, my Lord, to the admission of this evidence, on the ground if there was a written report the proper thing to do is to produce the report; not hearsay evidence of what this witness said. If there was a written record the written record is the best evidence of what this man said. I don't think this man can give any evidence as to what the report contained.

MR. GUY: As soon as you are through with your objection. My Lord, the report that this man has would only be of use to refresh this man's memory as to the evidence.

HIS LORDSHIP: No, it could not be used for that purpose. After all what he is giving us is evidence while it could hardly be said to be hearsay it comes direct from the litigant still it is not under oath, and it merely can be used, as I understand the rules of evidence, for the purpose of contradicting what the witness has said in the box.

MR. GUY: That is the only reason I can call this witness, but so far as the statement itself is concerned, for the purpose of contradicting statements previously made, the use that the witness could make of that statement would be to refresh his memory of what took place at that time, but it could only be done with reference to matters which Pronek himself when asked has denied. I am calling this man to show that Pronek at a different time to which I referred the man made a different statement from what he stated in the witness box. That is why I am calling him.

HIS LORDSHIP: Well, I don't expect Mr. Showski can recall word for word what the man said to him in the hospital. He can refer to any memorandum he made at the time to refresh his memory.

MR. GUY: That's all, that's all he could use it for. I understand Mr. Lamont is anxious to have the original statement.

BY HIS LORDSHIP:

Q. What has become of the original memorandum?—*A.* The statement which I took in my notebook, my Lord, I kept it for over a year and destroyed it because I thought this man will not take any action so anything will happen later on.

MR. LAMONT: It has been settled, my Lord, that the witness cannot refresh his memory except from the original.

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Defendant's Evidence.

No. 11.
S. Showski.
Examination—*continued.*

Q. When did you make a copy of it?—*A.* The moment I arrived at the office from the hospital I had typewritten three copies of statement which was in my notebook and submitted over to my inspector, submitted the copies of the statement.

Q. You had made on the typewriter three copies.—*A.* From my notebook word by word the way I had it in the notebook.

Q. Well, have you got those?—*A.* Yes sir, I have.

MR. LAMONT: I think it is well settled law, my Lord, you can't refresh your memory from a copied document; he made an original document something over a year ago, and he has destroyed it.

HIS LORDSHIP: Three copies were made immediately on his return from the hospital, and they were made from the original notes.

MR. LAMONT: But I think you can only refresh your memory from the original document.

HIS LORDSHIP: That is the ordinary rule, but we must use common sense in applying this rule. He went down to the office and typed an accurate copy of what he had in his notebook.

Q. Are you a typewriter yourself, Mr. Showski?—*A.* No, stenographer done it.

MR. LAMONT: He didn't even type them himself.

A. I just dictated them over to him.

MR. LAMONT: This was a statement it was not in the course of his ordinary duties. He had no right to go down there to interview this man.

HIS LORDSHIP: The witness is prepared to say that it is a true copy of the notes he made at the time, I don't see any reason why he should not be allowed to refresh his memory from it.

MR. LAMONT: Subject to my objection, my Lord.

HIS LORDSHIP: Of course, if he destroyed the notes that were lost and attempted to reproduce some days afterwards, that would not be allowed for a moment, but he destroyed the original notes after a year; the original notes were in existence when these copies were made, and they were made from the original notes.

A. I kept them for over a year.

HIS LORDSHIP: And verified for official purposes and returned to his superior. Surely for the purposes of refreshing his memory, those notes ought to be authentic, and I can't see any reason why he should not be allowed to refer to them, but, of course, he can testify only as to matters that are inconsistent with the statement that the Plaintiff made in the box, inconsistent with what he told the witness in the hospital—if there are any inconsistencies.

MR. LAMONT: Statements that are relative to the matters in issue.

MR. GUY: Any statements, my Lord, as affecting, the witness's statement. I asked the Plaintiff when he was in the box certain questions with reference to how the accident happened and whether he told this

man anything different, and now I want to call this man to say what he told him when he went up to investigate him at the time.

MR. LAMONT: It seems to me, my Lord, that the rules of evidence are distinctly on this point, you can't contradict a witness in a collateral matter. This is not collateral matter. I don't know exactly what it is, yet it does not seem to me to be on the point.

HIS LORDSHIP: I judge from the questions that were put to the Plaintiff that these were matters relevant to his conduct before the accident and at the time of the accident. For instance, the question as to whether he had been drinking. The defence as they alleged here in the statement of defence as a matter of contributory negligence, that this man was not in a fit condition to handle a team. Well, if he had been drinking bootleg whiskey, I doubt very much if he was in a fit condition.

Q. Now I am asking this man—Mr. Pronek, or the Plaintiff, in the witness box, after relating that he has been to Elmwood and had dinner with this man was asked as to whether or not he had two glasses of whisky. —*A.* He told me he had dinner at the house of a man who bought his cow and this man gave him two glasses of whisky.

BY HIS LORDSHIP:

Q. Did he say he drank the whisky?—*A.* No, he didn't say anything only he said he gave me two glasses of whisky. After he said, I had dinner which would be at about four p.m. I proceeded to Winnipeg and there done some shopping at the store of ——

HIS LORDSHIP: There is no contradiction there.

MR. GUY: Mr. Pronek has already stated that, that he was at the store.

MR. LAMONT: He was not very badly intoxicated if he came down, and did some shopping.

BY HIS LORDSHIP:

Q. "And I told the policeman that I had a drink"——did he tell you that?—*A.* Yes, my Lord.

MR. LAMONT: He admits he told the policeman he had a drink.

BY HIS LORDSHIP:

Q. But he says he did not tell you where he had it or how many? —*A.* He must have told me that.

MR. LAMONT: The witness is drawing conclusions.

BY HIS LORDSHIP:

Q. Did he tell you that?—*A.* He did. He told me that he had two glasses of whisky.

Q. We are taking now to the point where he was at dinner.—*A.* Yes. Then he went up-town, done some shopping. From there he went towards

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Defendant's Evidence.

No. 11.
S. Showski.
Examination—*continued.*

his home. On the way to his home he met another man by the name Danko who asked him if he would like to have a drink. He said, yes. Danko produced a bottle of whisky out of his sleigh and both of them had one drink from the bottle.

MR. GUY: Then he told about helping Danko getting off. What happened to him after he left Danko. I asked the Plaintiff in the witness box as to whether or not after he left Danko immediately after he knew what happened to him.

HIS LORDSHIP: Well, the witness said he doesn't remember, so there can be no contradiction there.

MR. GUY: Oh no, the Plaintiff did say.

HIS LORDSHIP: The witness said in the witness box he didn't remember what happened after he parted with Danko.

MR. GUY: You mean the witness Pronek, the Plaintiff, my Lord?

HIS LORDSHIP: Yes.

MR. GUY: Oh, but he went on and gave all the details of every thing that happened.

HIS LORDSHIP: Yes, but he had no coherent recollection of how the thing happened.

MR. GUY: Well, but he has given us the details of how his horses ran away when they came across the track, and how they went across the track, and how they turned around.

HIS LORDSHIP: "I told the policeman that after parting with Danko I didn't remember ——"

Q. Did he tell you that he did not remember anything after parting with Danko?—*A.* Not yet, my Lord? He said after he had a drink, continued the journey for a little piece further on the Selkirk road, and they noticed a car in the ditch. Danko got left there to assist the driver to get the car out of the ditch. I left Danko, continued my journey towards home. Immediately after leaving Danko I completely lost my memory, and I don't remember anything further that happened. When I came to my senses I found myself in the General Hospital, Winnipeg.

Cross-examination.

CROSS-EXAMINED BY MR. LAMONT:

Q. Did you enquire about Danko after this accident?—*A.* No.

Q. Why didn't you go and see Danko?—*A.* I was not instructed by my inspector to go and do it.

Q. Your duty is to enforce the criminal law of the province, is it?—*A.* Yes.

Q. Well, how did you come to investigate a matter that arose out of a civil matter of this sort?—*A.* Every accident that occurs anywhere by automobile or anything we always are sent to go and make enquiries as to how it happened.

Q. There was no suggestion of criminality in connection with this accident, was there?—*A.* No.

Q. Did you see any of the company officials before you went down to make this enquiry?—*A.* No.

Q. Mr. Smith sent you, did he?—*A.* Yes, sir.

Q. You are quite sure you did not get that original report of the company, did you?—*A.* No.

Q. Did you make the company a written report of the matter?—*A.* No.

Q. Did they ask you for it?—*A.* No.

Q. They must have known you had it, did they?—*A.* They may.

Q. How did they come to find out you had this report?—*A.* They may have asked Inspector Smith; I don't know.

Q. This man was in a very serious condition at the time, Mr. Showski, when you saw him?—*A.* I believe he was.

Q. He was very shaky?—*A.* He was.

Q. And very confused in his mind according to the doctor's evidence?—*A.* I can't say about that.

Q. Well now, you saw him?—*A.* I did.

MR. GUY: My learned friend should not say that the doctor said he was very confused in his mind when the witness saw him. He did not say that.

MR. LAMONT: The doctor did say that. The doctor said on the 25th the man was in a confused state of mind.

MR. GUY: You must not say what Dr. McLean didn't say.

HIS LORDSHIP: Dr. McLean was not asked about this matter. If I had known of such a thing I certainly would have questioned him about it.

MR. LAMONT: Dr. Ross in his evidence stated that when the man came to him at the end of January his mind was in a confused state, and his memory was affected, and he could not remember things. That is several weeks after the accident.

MR. GUY: It all came back to him afterwards when this suit started.

Q. You told me, Mr. Showski, he was not in very good condition the day that you saw him, the 6th?—*A.* He was not, because he had to have rests from time to time before I could get a little more out of him as to what took place.

Q. How long were you in there altogether?—*A.* In the hospital about half an hour.

Q. And he was not able to make the statement continuously?—*A.* No.

Q. You had to give him rests. Did you consider the matter of such great importance?—*A.* Yes, I was under the impression that the man would die.

Q. And you wanted to get an ante-mortem statement from him?—*A.* Yes.

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Defendant's Evidence.

No. 11. S. Showski. Cross-examination—*continued.*

Q. He looked as if he was going to die at the time, did he?—*A.* I can't say about that, but he was pretty weak.

Q. You thought he was going to die when you saw him?—*A.* Yes, I did.

Q. Anybody else would have thought so, too, if they would look at him?—*A.* Any man if he was sent by a street car up in the air he would honestly believe that he was very bad.

Q. Now you did not read the statement over to him after he signed? —*A.* I did, always before a man signs a statement I always usually do read and ask a man whether he has got anything to add or anything to strike out.

Q. He was not able to read the statement himself? I mean after you had written he was not able to read the statement himself?—*A.* No.

Q. And he could not read it if he was well?—*A.* He could not read English anyhow.

Q. You had translated it from Ruthenian into English?—*A.* Into English.

Q. There would not be very much use in him signing it?—*A.* I translated it back into Ruthenian when I read it over to him, so he would understand.

Q. You took considerable care over the matter?—*A.* Always do, it is my duty.

Q. And this statement extended over a full foolscap page, did it not? —*A.* No.

Q. Ordinarily?—*A.* About half of a page.

Q. And all this took place in about half an hour?—*A.* Yes.

Q. When first did the railway approch you in connection with this report?—*A.* I remember seeing railway official in our office about five or six days ago, and I referred him to Inspector Smith.

Q. Didn't you see one of the officials just shortly after the accident? —*A.* After the accident shortly, that was on the same, next morning I only interviewed with Constable McMicken together in his company conductor and motorman at West Selkirk.

Q. What's that?—*A.* After the accident took place on the next morning. Constable McMicken and I interviewed conductor and the motorman at West Selkirk, those two men that were on the street car that hit this sleigh and those horses.

Q. You don't suggest Mr. Showski that the man was intoxicated at the time, do you?—*A.* I can't say about that.

Q. According to any enquiries you made, you did not discover any information that would lead to that belief?—*A.* No.

Q. And you investigated the matter fully?—*A.* Yes, I did.

Q. I suppose a man could take a couple of glasses of whisky and go down and do some shopping, he would not be very badly under the weather according to your experience?—*A.* I can't say anything about that.

Q. I understand you are quite an authority on the subject, Mr. Showski? —*A.* All depended on a man's condition.

Q. A man would not be very badly when he went down town to do some shopping and ——?—*A.* Well, according to Pronek's statement he said that after he had dinner he went and did some shopping and met this man Chisek.

Q. That would indicate he was not very badly under the weather? —*A.* Looks that way to me.

Q. Now there was something said about this man Danko producing a bottle of whisky in the road. Now how did he refer to that in his own language? Did he just refer to liquor? You see there is different words you can use, beer, whisky?—*A.* Whisky, he said whisky.

Q. He used the English word?—*A.* No, not the English word.

Q. That is different from brandy or gin or wine?—*A.* Well, whiskey, it is only one word for all of them.

Q. It is a sort of a comprehensive term, like the word liquor under the Manitoba Temperance Act?—*A.* Liquor, that's exactly the word.

Q. It might be beer, wine or cognac or anything?—*A.* No, beer is different.

BY HIS LORDSHIP:

Q. Beer is beer?—*A.* Beer is beer.

No. 12.

Evidence of H. Cochrane.

HUGH COCHRANE, sworn.

DIRECT EXAMINATION BY MR. GUY:

Q. What is your occupation?—*A.* Mariner.

Q. You sail on Lake Winnipeg, do you?

Q. On what ship?—*A.* Grand Rapids.

Q. Are you the captain?—*A.* Yes, sir.

Q. I believe you were a passenger on the Selkirk car coming up to Winnipeg on 2nd January, 1926, when an accident happened?—*A.* I was.

Q. Do you remember the time?—*A.* Yes, sir.

Q. About what time?—*A.* Oh, that would be around about quarter to seven, between that and seven o'clock.

Q. In what part of the car were you at the time of the accident? —*A.* I was sitting in the smoking room, smoking.

Q. That is in the rear, is it?—*A.* No, that is in the front part.

Q. What was the first you knew about the accident happened?— *A.* Well, the first I knew of it was I heard him blowing his whistle, the horn they got on there, and then a sudden jar of the car.

Q. Then what transpired?—*A.* Well then the car came to a stop, then the motorman ——

In the Court of King's Bench for Manitoba.

Defendant's Evidence.

No. 12. H. Cochrane. Examination—*continued.*

Q. What did you do?—*A.* Well, we didn't know, it happened so quick that we didn't know what had happened, but we just felt the jar of the car, and it came to a stop.

Q. Well then, what happened?—*A.* Then the motorman, somebody said it was near the motorman.

Q. You can't say what was said, but after hearing some remark what did you do?—*A.* Well, we got out of the car, that is after they had backed the car up about a car length. I should judge about a car length.

Q. What did you do?—*A.* We got out with several others, and looked around, and we seen a black object about a car length behind. We went and seen what it was, and it was a dead horse; before we got out of the car we heard McLeod saying ——

Q. What else did you see?—*A.* Well, we went back towards the car to see if we could see anything else, went down along the front of the car, and we seen another object in front of the car, we found the other horse laying there with part of the sleighs and part of the wagon box and horse blankets, and we found this man the Plaintiff.

BY HIS LORDSHIP:

Q. He was all mixed up in this?—*A.* Yes sir, he was all mixed, he was laying in between the hind legs of the horse.

Q. Well, that horse was not dead?—*A.* No, that horse was not dead, although he was laying so quiet when we came up to him.

Q. What kind of a night was it?—*A.* It was a dark night.

Q. Second of January?—*A.* Yes, 2nd of January.

Q. Was it snowing?—*A.* Well no, I would not say it was snowing but it was a real dark night. I don't think it was snowing or anything.

Q. You went around to see what it was, and you got the man, did you help the man?—*A.* Yes, sir, I was the man that pulled the man from the horse's legs.

Q. What did you do with them?—*A.* Well we pulled him into the ditch there, and another fellow put his head down to his mouth to see if he was breathing, felt his pulse, and said the man was alive.

Q. Did you do that?—*A.* No, somebody else. I pulled him out in the ditch away from the horse. You see, the horse started to struggle, beginning to start to move around.

Q. You did not smell his mouth?—*A.* Not then, not at that time.

Q. Well did you later?—*A.* I did later after we got him in the car.

Q. What did you do?—*A.* Well this fellow felt his pulse, and he said this man is alive yet. So we picked him up and carried him off to the car and put him in.

Q. After you got in the car?—*A.* Well, after we got him in the car, I didn't get in for one and a couple of other fellows didn't get in; the rest of the other men inside that picked him from the car door in between the seats and laid him down.

Q. Well, did you return to the car?—*A.* Yes, I went up then, up to where the horse and rest of the sleighs was, and helped to clear the horse out from the, get the harness off him and get the stuff out of the road off the track. Then we went back to the car and got in and started for Winnipeg.

Q. Did you have any artificial light to assist you to see what was there?—*A.* Well, they had a lantern.

Q. Did you take the lantern and go around?—*A.* No, I didn't take the lantern, one of the car men brought the lantern.

Q. And you looked around to see what you could find?—*A.* Yes.

CROSS-EXAMINED BY MR. LAMONT:

Cross-examination.

Q. What you remember, Mr. Cochrane, is that there was a whistle of the car and there was immediately a crash?—*A.* Well, no, the jar, throwing on the brakes is what I judge it was, the jar of the car on the rail.

Q. You did not notice anything else until after you got out?—*A.* No, just before we got out somebody had asked a question, what has happened?

Q. And what did McLeod say?—*A.* He said, I hit somebody or hit something.

Q. Then you all got out?—*A.* Yes.

Q. And you did not discover the man there, I suppose, until sometime a little later on you were investigating; you did not know there was a man there in the first place, anyway?—*A.* No.

Q. It was not before the horse commenced to struggle you noticed the man's foot sticking out?—*A.* No, it was before the horse struggled.

Q. You pulled the man out by the foot?—*A.* By the feet.

Q. He was dead to the world?—*A.* There was no movement to him.

Q. You all felt that he was dead?—*A.* We thought he was dead, yes.

Q. You carried him into the car?—*A.* Yes.

HIS LORDSHIP: What is the use of going all over this, nobody doubts that Mr. Cochrane has told a very straight story.

MR. LAMONT: I am not seeking to impeach him at all. I think he is a perfectly honest witness, telling a very straightforward story.

In the Court of King's Bench for Manitoba.

Defendant's Evidence.

No. 13. J. H. Robinson. Examination.

No. 13.

Evidence of J. H. Robinson.

JOSEPH HENRY ROBINSON, sworn.

DIRECT EXAMINATION BY MR. GUY:

Q. What is your occupation?—*A.* Teamster.

Q. Where do you live?—*A.* Selkirk, Manitoba.

Q. You were a passenger on the street car on the 2nd January when an accident happened to Mr. Pronek?—*A.* Yes, sir.

Q. Where were you at the time?—*A.* I was in the car.

Q. And what was the first you knew about the accident?—*A.* Just when she struck.

Q. When she struck?—*A.* Yes.

Q. You were sitting in what part of the car?—*A.* I was sitting in the smoker.

HIS LORDSHIP: Is he able to throw any light on how the accident happened?

MR. GUY: No, but if we do not call some of the passengers from the car to show ——

HIS LORDSHIP: None of these men can throw the slightest light upon how the accident happened, or what was the cause of it. There is no doubt in the world that an accident did happen. I think it is useless—I can only give you to-morrow. I have that railway union case.

Q. Anyway, you were in the smoker, and the first thing you knew was the impact, and what happened, Mr. Robinson?—*A.* Well, the only thing I know I went outside, and somebody yelled at me to go and hold the horse's head down while they took the man out from behind the horse's hind leg, and I certainly said the man was killed.

Q. You don't know anything as to how the accident came to happen?—*A.* No sir. We were inside.

Q. Were the lights on in the car, in the body of the car?—*A.* Yes, lights were on in the body of the car.

Q. What kind of a night was it outside?—*A.* Pretty stormy night.

Q. It was a stormy night?—*A.* Yes.

BY HIS LORDSHIP:

Q. Snowing, do you mean?—*A.* Yes, snowing and blowing.

Q. Did you have anything to do with getting the man afterwards away from the horse?—*A.* Well, I didn't see anything more of the man until we cleared the horse, and got the horse off the track. We went into the car and had the man on a stretcher.

Q. Did you see any liquor around?—*A.* Well, I saw one bottle that fell on the floor, and I didn't know who picked it up, and that was all.

Q. That was in the car?—*A.* In the car after the man was brought in.

Q. Where did it fall from?—*A.* From his pocket.

Q. From whose pocket?—*A.* From the man that was hurt.

Q. A bottle?—*A.* Yes.

Q. Was it full or empty?—*A.* I couldn't say, I didn't enquire for that, I couldn't swear.

Q. What kind of a bottle was it?—*A.* It was a common pop bottle.

Q. Fell out of his pocket?—*A.* I could not swear what was in the bottle.

Q. Was there anything in it?—*A.* I could not say, I was not close enough to examine.

Q. Was there any odor of liquor about?—*A.* Well, I couldn't say.

Objected to.

A. I couldn't say.

CROSS-EXAMINED BY MR. LAMONT:

Cross-examination.

Q. So you don't know whether there was any liquor there or not?—*A.* No, I would not swear there was any liquor.

Q. You did not take the bottle and taste it or smell it or anything?—*A.* No, I never had it in my hands.

Q. You don't know where the bottle is now?—*A.* No, I have never seen it since.

Q. You really don't know where it came from, even?—*A.* Well, it came out of his pocket as I was handling him and putting him on a stretcher.

Q. Were you lifting the man yourself?—*A.* No, I was standing right up.

Q. Was this outside?—*A.* No, inside when they were stretching him out on the stretcher.

Q. Where did they get the stretcher?—*A.* Well, one of the seats.

Q. The bottle fell off when they were stretching him out on the floor?—*A.* Yes.

Q. How many men were around him?—*A.* Oh, about five or six of us.

Q. Are you sure you didn't have the bottle yourself, you didn't keep a bottle yourself?—*A.* No. It just looked to me like the size of a pop bottle. I could not swear to what kind of a bottle it was.

Q. You didn't have a drink yourself that night, Mr. Robinson, did you?—*A.* No, not till after the hockey match was over.

MR. GUY: I have lots of other passengers who can tell the same story as the last two.

Exhibit 4: Plan of the location of the accident, filed by consent. (It is noted that Millers is south of Parkdale.)

Court adjourned to 10 o'clock tomorrow morning.

In the Court of King's Bench for Manitoba.

Defendant's Evidence.

No. 14. W. W. Robson. Examination.

No. 14.

Evidence of W. W. Robson.

Thursday morning, May 26th 1927.

WILLIAM W. ROBSON, sworn.

DIRECT EXAMINATION BY MR. GUY:

Q. You are a photographer?—*A.* Yes.

Q. I believe you were asked to make a photograph of car No. 16 of the Winnipeg Selkirk railway?—*A.* Yes.

Q. What is this I show you?—*A.* This is the car that I photographed down at Selkirk at the car barns.

Q. When was it made?—*A.* On the 11th of May, this month, 1927.

MR. CAMPBELL: I am objecting to it going in. My learned friend has laid no foundation for that up to the present moment.

MR. GUY: The car had not changed any.

MR. CAMPBELL: I see here a pilot instead of a snow plow. I don't know to what extent it has changed outside of that. My learned friend I don't think has been in charge of the car to say that it has not changed.

HIS LORDSHIP: Well, what had the snow plow to do with the accident?

MR. GUY: Nothing at all.

HIS LORDSHIP: Then what is the object of putting in that picture? Any car would have done this if it was driven against this rig, a box car or an auto car. I can't see any object in putting that picture of the car in.

MR. CAMPBELL: May I ask again my learned friend's purpose of putting it in?

MR. GUY: My purpose is solely to exhibit the car that caused the accident.

MR. CAMPBELL: I say I didn't hear my learned friend state fully what his purpose was in putting it in, and I should like to hear him again on that. I don't want to raise any technical objection and take up any time that is not necessary. What was your purpose?

MR. GUY: My purpose is to show to the jury, my lord, the picture of the very car which was interested in this accident showing the lay-out, the position of the headlight on it, and so on.

HIS LORDSHIP: Well, but what object if the headlight was not operating, what good is the picture going to do? They have got to depend on the oral evidence.

MR. GUY: It has a further object in this. The picture does show where the attachment of the headlight is, where it would be struck, what would happen to it in the event of an accident lower down.

HIS LORDSHIP: The complaint is that the headlight was defective and did not reflect light far enough down the track to enable the motorman to direct the car, to see passengers on the track, so that if the thing was working and the impact put it out of business—

MR. GUY: I propose to call a man to show what happened and to make the repairs, and in order to do that I want to explain to him why it should be there.

HIS LORDSHIP: No, if they object to it going in I won't allow it. I can't see any reason for it. The descriptions of witnesses have been quite able to describe all that was necessary to the jury anyway.

MR. GUY: I have seen one of those Selkirk cars on many occasions, but it would be of assistance to the jury.

HIS LORDSHIP: Anything you have said so far has not shown me there was any reason in the world for putting it in.

MR. GUY: The picture does show the headlights, its location on the car and its attachment.

HIS LORDSHIP: As I have said before, what earthly use is that to the jury when the question is was the headlight operating that night? The picture can't throw any light upon that question, that depends upon the evidence of the witnesses.

MR. GUY: Very well, if your lordship refuses, allright.

Q. What is this I show you, Mr. Robson?—*A.* This is a picture taken from the north looking south toward the station called Millers, taken from the edge of the roadway.

Q. Do you know how far north of Millers station it is?

BY HIS LORDSHIP:—

Q. You say it was taken from the edge of the road?—*A.* From the edge of the road, yes.

Q. From which edge?—*A.* From the west edge of the roadway.

Q. When was it taken?—*A.* May 14, 1927, this year.

Q. And what is this also, Mr. Robson?—*A.* This is another photograph made about twice as far north from Millers showing a longer stretch of track.

Q. Looking in the same direction?—*A.* South showing the track, also made from the west edge of the road, that is the drive road.

Q. Looking which way?—*A.* Looking south.

Q. Well, I don't suppose you can locate, I don't suppose you know personally, Mr. Robson, anything about the accident or the point at which it occurred?—No.

MR. CAMPBELL: My lord, I submit there is no foundation made for the admission of these as exhibits. This was taken in May of this year, and one would know without any evidence that the condition would be somewhat different in January, 1926, when there probably would be a good deal of

In the Court of King's Bench for Manitoba.

Defendant's Evidence.

No. 14. W. W. Robson. Examination—*continued.*

snow on the ground. It might be very misleading to the jury. I don't know what these show, and why my learned friend is introducing them.

MR. GUY : My learned friend might take a look at them and see what they show.

MR. CAMPBELL : I submit, my lord, that these might be very misleading to the jury. Here is a railway standing up clear of all surrounding obstacles. It may have been at that time perfectly level with the snow—we don't know, and I submit it would be very misleading to put those in as they at present are. I object to them.

MR. GUY : It is true, my lord, that it does not show the snow condition. There is that to it, but it does show the location of the track, the position of the highway, the roadway, the ditch and the poles and the field on either side; that is all it can be.

HIS LORDSHIP : What service is that to the jury ? There is no suggestion or anything the locus had anything to do with the accident.

MR. GUY : Well, it had something to do with it in this respect, that if the motorman in this car were driving down a crowded street in the City of Winnipeg, naturally he would expect to be meeting traffic of all kinds, and he has got to be careful not to interfere with that traffic.

HIS LORDSHIP : So he has on his own route. He is required to exercise whatever degree of care is necessary to operate with reasonable safety.

MR. GUY : Under the circumstances. Now I want to show the circumstances.

HIS LORDSHIP : This don't show any circumstances.

MR. GUY : They do show the circumstances, my lord. They show the position of the roadway.

HIS LORDSHIP : That has got nothing to do with it.

MR. GUY : The photographs will show, my lord.

HIS LORDSHIP : There might not have been anybody there when Mr. Robson took the picture. The next hour there might have been dozens of people there. There is no suggestion that those photographs can be of any assistance.

MR. GUY : Yes, there is, my lord.

HIS LORDSHIP : I submit there is not, and I am not going to allow them in if they are objected to.

MR. GUY : Well, if your lordship will not. I tender all three as evidence.

HIS LORDSHIP : They have been objected to, and no sufficient reason has been shown for their admission, and I won't allow them in.

MR. GUY : That is no sufficient reason to satisfy your lordship.

HIS LORDSHIP : I say no sufficient reason has been shown to me, put it as you like.

MR. GUY : Very well, my lord. I think those should be marked for identification, my lord.

HIS LORDSHIP: Why?

MR. GUY: They were tendered in evidence, and they were not admitted.

HIS LORDSHIP: Identification does not mean anything.

MR. GUY: No, except it identifies the exhibits as those which were tendered, that is all it does.

HIS LORDSHIP: If you have any, if it was a case of a document not being satisfactorily proved, and that proof would be supplemented later on by further evidence they are marked for identification, but there is no suggestion here that having rejected them they can be tendered again in evidence, so what is the use of marking.

MR. GUY: I could, my lord, tender evidence to show that these are a picture of the locus where the accident—that is all I propose to do. You can't do it all with one witness. If your lordship doesn't allow them it won't be necessary for me to call and say they are a picture of the scene of the accident.

HIS LORDSHIP: You have shown by Mr. Robson where he took them from.

MR. GUY: But the exhibits themselves are not in, so his evidence really does not mean anything without the photographs.

HIS LORDSHIP: Well, it means all that is necessary for my ruling. The evidence that has been given is in the notes. I am quite satisfied that Mr. Robson took them in the place he says he did, and no objection has been made to them on the ground that they do not cover the locus of the accident; the ground of rejection is that they are not relevant and would be of no assistance to the jury; that is the ground on which they are objected to.

MR. GUY: My lord, it is the first time I have ever heard that the scene of an accident, the place where an accident took place, is not relevant.

HIS LORDSHIP: Sometimes it is and sometimes it is not. If the situation here had been such as lent itself to an accident that was dangerous in any shape or form this might be relevant, but in view of the evidence we have got here we know how the accident happened.

MR. GUY: The pictures will show that it is not a dangerous——

HIS LORDSHIP: The pictures won't show in my opinion that will help this jury one bit, and may in fact have a contrary effect. Photography is an extraordinary thing that can be made to show all sorts of things.

MR. GUY: Has your lordship seen the pictures?

HIS LORDSHIP: No, I have not seen the pictures. Mr. Campbell has seen them; Mr. Lamont has seen them; they have objected to them. I saw the picture of the car, yes, saw it there. You know, Mr. Guy, frequently in these cases you tendered photographs, and I have invariably refused them for the simple reason that never yet have you shown to me that they are of any material assistance or could be of any material use to a jury in arriving at a true conclusion, rather have they a tendency by fore-shortening

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No. 14. W. W. Robson. Examination—*continued.*

or lengthening the fore-ground to make things appear different from what they really are. If a view by the jury was necessary, I would so let the jury go down and see it, but I don't think it is necessary in view of the evidence that we have.

MR. GUY : I am quite willing that the jury should go down and see it.

HIS LORDSHIP : Well, if you put a private car at their disposal, I am quite willing that they should go.

MR. GUY : Come down, let them see where the accident happened.

HIS LORDSHIP : If the jury expressed a desire to see the situation for themselves.

MR. GUY : Won't show them anything different than what the photograph will show. That is why I tendered it to avoid the unnecessary delay that would follow in going down there and trouble and inconvenience.

HIS LORDSHIP : If there was anything, Mr. Guy, in the situation that contributed to the accident.

MR. GUY : In my view of the matter, my lord, there is something, and I think it is of value to have a knowledge of the locus.

HIS LORDSHIP : Now you have the evidence of the only man who can tell us how the accident happened, and you have heard his story, and what there is in it that will be helped by photographs is a mystery to me.

MR. GUY : Well, your lordship has refused to allow them in. I have asked to have them marked for identification, so that they might be——

HIS LORDSHIP : If you intend to get further evidence in regard to them, there is some reason for marking them. If you don't there is none.

MR. GUY : If they are not marked for identification, my lord, there is no necessity of me calling further evidence to identify them with the locus of the accident.

HIS LORDSHIP : Well, do you intend to call further evidence with a view to securing their admission. If you do, I will have them marked for identification; if you don't I won't.

MR. GUY : The only ground, my lord, that I can urge for them being put in as evidence, for their admission, is that they are views of the locus of the accident and of the car in question.

HIS LORDSHIP : Well, that wasn't the question.

MR. GUY : In my experience, my lord, it is always of very great value to anyone to know the car, to see the car and to see the place.

HIS LORDSHIP : In certain kinds of action that is very, very necessary, but in an accident that happened the way the witnesses have declared this happened, I can't see what possible help it is going to be to the jury to put those photographs in.

MR. GUY : Well, I have asked to have them put in, my lord, and you have ruled.

No. 15.

Evidence of J. E. Watkins.

JOHN ERNEST WATKINS, sworn.

DIRECT EXAMINATION BY MR. GUY:

Q. What is your occupation, Mr. Watkins?—*A.* Superintendent of equipment of Winnipeg Selkirk and Lake Winnipeg and Winnipeg Electric.

Q. Superintendent of equipment of both companies?—*A.* Yes.

Q. Are you familiar with the equipment of these companies?—*A.* Yes, sir.

Q. Are you familiar with the type of cars that are operated on the Selkirk road?—*A.* Yes.

Q. And of the headlights that are used on those cars?—*A.* Yes.

Q. What type of headlight is used on those cars?—*A.* It is what is known as the Grouse Hinds magnotype. It is a composition carbon and metallic carbon.

Q. How long have you been in the position which you now occupy?—*A.* Seven years and two months.

Q. I believe you have one of these headlights here?—*A.* Yes, we have one.

Q. That is the type of headlight that was used on these cars. Was that the type of headlight that was on the big car, car No. 16 that was in this accident?—*A.* This is the only type we have on the passenger system there.

Q. It is the kind of headlight that was on this car that caused the accident?—*A.* Yes, sir, it is the same type.

Q. You have only used the one type?—*A.* Yes. We still use the same type yet.

Q. Where is the headlight placed on the car?—*A.* It is placed on the door in the centre of the car on a bar that is screwed on to the door and connected with the ground. On the door of the car, the little front door, my lord, there is a little front door that they can walk from one car to the other when they are run in trains. These cars are made for running in trains, and you can walk from one car to the other. There is a door on each side, of course, and there is a door in the centre so you can walk from one car to the other.

Q. The headlight is just hitched on to the——*A.* Hitched on to the door on the outside, and then the plug is taken down below and put under the bumper.

Q. What is that that you have in your hand?—*A.* This is the plug which makes the contact. One of these contacts is connected with the incandescent, the two dim incandescent lights that are used for city service right in the city, and the other one is connected with the arc.

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No. 15. J. E. Watkins. Examination—*continued.*

Q. A plug is attached to a cord that fits into the lamp?—*A.* And the other end of the cord is placed into a receptacle under the bumper, presses underneath the bumper underneath the car.

BY HIS LORDSHIP:—

Q. Placed in a socket?—*A.* Socket under the bumper. There are two prongs attached, one is for city service.

Q. The cord is to take the juice, I suppose?—*A.* Yes. There are two prongs, one prong fits in this receptacle. There are two prongs, one for to light up incandescent lights, that is the carbon lamps, and the other is for the arc.

Q. One for incandescent lights in the car?—*A.* One in the lamp that is for city service, that is dim light, and the other is for the arc lamp.

Q. Well, then, there are two sources of light go into the ground?—*A.* Yes, sir. The city service these two lights light, and then when it goes into the outside this for carbon.

HIS LORDSHIP: You see, there is a splendid felt lining on that one.

MR. CAMPBELL: All dressed up for the occasion.

Q. When was that put on?—*A.* It was not put on for the occasion. It is a standard light, we picked it up. The only thing we did was painted it up. There is no difference in the inside.

Q. But how often do you renew those felt linings?—*A.* Whenever they require it.

Q. Are you sure about that?—*A.* Yes.

MR. GUY: I have a witness who will testify as to the equipment who was in charge of it, but I want this witness to identify the type of light, to show just what there is, because there was some evidence called here which was probably unintelligible to the jury without a specimen headlight here. I am not producing this as the exact headlight. I don't think that I can prove that it is the exact headlight that was on that on that car on the night in question, and the reason I can't do so is because these lights are interchangeable, as is shown here, they can be taken off one to another at any time, and so far as I know, at least my information is, that there is no way of identifying the one from the other.

Q. Well, when you put one of these headlights on a passenger car for the Selkirk run, don't you keep it there?—*A.* Yes, sir.

Q. Why would then it be changed about and put on another car?—*A.* There is no serial number on them, my lord, and therefore if there is anything goes wrong with the light it is taken off and another one is hung on, but this is interchangeable just the same as a light in the house that you just screw in, only we hang them on the hooks. It is not a general practice outside of steam road practice to put a headlight on a car as a fixture. We always make them so they just hang on hooks, they are hooked on.

Q. Still, so long as the light was giving satisfaction it would not be removed?—*A.* Would not be removed, no. It stays on the car so long as it is satisfactory. We only have six of them.

Q. Six altogether?—*A.* Yes.

Q. Two I understand are at Stonewall?—*A.* There are six motor cars and we have a headlight for each one of them.

Q. Do you know whether or not this is the headlight which was taken off your car No. 16?—*A.* I could not tell you that, but they are all the same type. They are all interchangeable; parts are all interchangeable.

MR. GUY: Now, I think we ought to have this marked, my Lord, for what it purports to be, a type of headlight in use.

HIS LORDSHIP: Car 16, that was the car?

MR. GUY: Car 16 was the car that was connected with the accident.

HIS LORDSHIP: Well, have you any objection to this?

MR. CAMPBELL: My Lord, I think it is rather unfortunate that we have not some further identification of it, but if your Lordship thinks it ought to go in I am not going to object. I don't want to be raising technical objections or useless objections at all. I think that perhaps it might possibly be of some service to your Lordship; I don't know.

HIS LORDSHIP: Of course, the situation is that it is virtually an exhibit. The jury have seen it, and have heard a certain amount of evidence.

MR. CAMPBELL: We had a witness here yesterday, we could have had this looked over if we knew it was going in.

Exhibit 5—Headlight.

Q. Does that cord extend inside or outside of the car?—*A.* Outside of the car. It hangs on the front of the car, hanging on the two hooks on the outside of the car, and then, then this cord goes down underneath and plugged in underneath the bumper, and this hangs in the front of the car. The bumper is the front piece seven inches on the front of the car. This is the bumper. You will find a little plug right here under this bumper (indicating on photograph that his Lordship is looking at).

HIS LORDSHIP: Well, this photograph may be useful to the jury now, Mr. Guy, to show this headlight. I am quite satisfied that it should be marked now for that purpose.

Exhibit 6—Photograph.

Q. I would like you to explain to his Lordship and the jury from the headlight inside by opening the door of the headlight inside?—*A.* The carbon is inside back of the two lights. When the switch is put on the magnet is drawn up, that pulls this down and opens the carbon and between the two carbons an arc is formed which is worked on this lens, that projects the light up the track.

Q. What do you call the top part of this?—*A.* It is a metal.

Q. And what is ordinarily called the carbon is the lower?—*A.* Carbon filler.

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No. 15. J. E. Watkins. Examination—*continued.*

Q. And by the application of electricity to the lamp an arc is formed?—*A.* When the current goes through the magnet which is in the rear it takes and it pulls the carbon part and in pulling the carbon part it forms an arc. Now the distance of that arc is determined by the line voltage. When the line voltage is heavy it pulls it far apart. When it is pretty close together it pulls a small arc. You will notice the carbon burns that way. It will burn until it gets too long there, and then it will go around, keep following around. When the line breaker current is shut off again it comes right back and makes a contact and starts all over again. This is used on the Selkirk line. When they come inside this side of Templeton Avenue in the subway, when they are running in among the other cars they have to dim it and use the incandescent lights. It is a composition carbon in a copper casing. The city lights use the same carbon. You will notice they swing around and flicker, the same type of carbon. We have more trouble from wind from the top of the car. These lights are two sixteen candle power lights. That is 500 volts when the voltage is high, but the voltage varies depending on what load is on the line, and the lights of the car will go down and this light will correspond. You put the felt more to keep the snow from getting in and corroding it than anything else.

Q. This is the best type of that lamp?—*A.* This is the best type of light that you can find at all.

(The witness finishes demonstrating to the jury.)

Q. In the ordinary operation of this arc light, what effect does it have on the carbon, the lower carbon which you have shown to the jury?—*A.* It burns the carbon away, as I explained where the arc is, on the particular side where the arc is. It will take the lines of least resistance at anytime; that is electricity will do that, and that is wherever the shortest place is it will set, and as it burns away it will keep going around and around the side of the carbon and keep burning it gradually down. As soon as one side of the carbon gets low it will crawl around, it keeps crawling around the carbon all the time. It takes a few minutes to do it, too.

BY HIS LORDSHIP:

Q. Just like a bad cigar?—*A.* Just like a bad cigar, yes.

Q. And when they burn down too far, what do you do?—*A.* When the arc gets too far it breaks, when it gets too far to reach it breaks.

Q. You mean the light breaks?—*A.* Yes, it goes out, just for a couple of instants, probably a second, something like that, until it finds its new position, and then starts to burn up again gradually.

Q. What causes it to do that, is there a spring below it?—*A.* No, the arc gets too long, my Lord, or the voltage varies and it breaks.

Q. What do you mean by the arc?—*A.* The arc is the arc between the two carbons, the current jumping from one carbon to the other; it jumps from one carbon to another.

Q. The light is formed by the current jumping from the carbon under to the other carbon?—*A.* Yes.

Q. Up above?—*A.* Yes.

Q. And if it gets too far away, it does not jump; is that what you mean?—*A.* Yes.

Q. What keeps the carbon up to the necessary height?—*A.* The voltage. In the back of the lamp, my Lord, is a solenoid magnet, a round coil of wire with a hole in it, and in that hole is a piece of soft iron. Now, as the current is going around through this wire it pulls it up. Now it pulls it up sufficiently to determine the length of the arc.

Q. Well, do the two never meet?—*A.* They do meet, they meet when the current breaks, and as soon as they do meet, the current becomes too strong and the pull on the magnet pulls them apart, and they find a happy medium. It floats in there.

Q. That is done practically automatically?—*A.* Automatically determined by the voltage; the line voltage has a varying effect on the light.

Q. I have often noticed that defect in the street cars. I didn't know exactly what caused it. I supposed it was an unequal voltage or something of the sort?—*A.* The technical term used is what they call line drop. The voltage is dropped, probably on account of a pull on the wire in the vicinity. I can illustrate it probably with a piece of pipe. You take a half inch pipe supplying water to a faucet in an apartment house. If one person uses water there is lots of water, but if several go and draw from it at the same time the flow becomes lessened to the several users. The same thing in this. We have got a trolley wire running along, and if more cars on the line pull the current the voltage drops, that is it drops from 550 to probably 300 volts. Well, that has a varying effect on the dimension of the light.

Q. The current from that light is taken direct from the surface wire?—*A.* From the car wiring; it goes through the car.

Q. Is it stepped down there?—*A.* No, there is a resistance in series with this, it steps this down from 550 volts to eighty.

Q. And you have 550 on the trolley line?—*A.* On the trolley wire, yes, and there is a resistance under the car, standard resistance that fits any of these lights, and just back under, and the resistance is ahead of the light, so that there is only eighty volts between the resistance terminal and the ground, which gives us the same on that light.

Q. That operates the same as a transformer?—*A.* Transformers are only used with alternating current, but this is direct.

Q. The current that is on the trolley wire which is propelling the car, and from which the car is lighted, is also drawn down into this arc light?—*A.* Yes.

Q. Through the resistance to reduce it to eighty volts?—*A.* Eighty volts; eighty volts across the carbon.

Q. Now, if there was a drag on the line—that is the term you use?—*A.* Yes.

Q. That is, if there were a lot of cars using the power at once, say, the voltage goes down, and that naturally reduces the voltage of the light?—*A.* That drops the power of the light, penetrating power of the light,

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No. 15. J. E. Watkins. Examination—*continued.*

and puts the carbon closer together. The closer the carbons are together, of course the less light there will be. There is no—it is not automatic, the regulation as far as voltage is concerned; it has not an automatic regulator as far as voltage is concerned; it is just a fixed resistance based on the average line voltage, which is 550 volts.

Q. Well now, in the ordinary operation of that headlight, assuming the voltage was all the same, the ordinary operation, how does it work with regard to steadiness of light?—*A.* It is not steady. It is never steady, because as I explained a few minutes ago, it keeps running around the side of the carbon all the time; it keeps working around the side of the carbon. When it is on the back, that is the opposite side from the lens, you will get less light than you will when it is on the front of the lens due to the carbon being in between; that is a very minute opening.

Q. That is to say, when it burns around to the point where the arc is forming behind the carbon, you will have less light?—*A.* That's right.

Q. Be a sort of a closed part in front of it. So that the light varies in ordinary operation; as I understand you, Mr. Watkins, the light itself of the lamp varies under ordinary operation?—*A.* Well, as I explained a moment ago, the light is governed by the line voltage. If the line voltage is high you get lots of light. If the line voltage is low, you get less light.

Q. I am assuming now if you have a constant voltage?—*A.* If you have a constant voltage it keeps going around just the same. There is a period with constant voltage where it is high and where it is low depending on the location of the arc on the carbon.

Q. If it is a line on that, and you have a reasonable feed, wouldn't the voltage be steady?—*A.* No, wouldn't, because we have other cars pulling on the line. It is fed on this end, and there are substations along the line. It is fed from the north end station, and there is a line along the line.

Q. The drag, as you call it, from the city system would not affect that line?—*A.* Any drag on the north end station would drop the voltage being supplied from the north end station.

Q. Can't you generate sufficient feed to serve this system without it being interfered with by the street cars in the city here?—*A.* Well, the distance between the substations determine the voltage drop.

Q. Yes, but I mean that the drag from the city system here could not pull down the voltage on your transmission line?—*A.* Not materially out there.

Q. That is what I am trying to find out?—*A.* No.

Q. So that you should maintain a reasonable steady voltage for that car service at Selkirk?—*A.* Depending on other cars that are on that particular loop.

Q. Would you have extra car service?—*A.* Yes sir, there was another car that passed that car. I don't know what their schedule is—there is another car that passed that car within ten, fifteen minutes.

Q. Your service to Selkirk is run on a regular schedule back and forth, and are you not supposed to satisfy that service without causing

any uncertainties and dragging and jumps? It seems to me that is not a very reasonable proposition for a big company like that. You ought to know of the service there. You have not many extra ——?—*A.* Yes sir, there are extra trains run. There are freight run.

Q. Would there be in January in 1926?—*A.* I could not tell you that, I don't know the schedule. But I know there is a line drop, which would be affected by another car in that circuit.

Q. One car would affect?—*A.* Yes sir, one car would affect.

Q. Don't you supply enough to take care of that?—*A.* The supply of electricity does not determine what can be supplied at the substation. It is on the capacity of the feeders that determines the line drop. The size pipe to the particular suites determines the amount of the water you will get at the end of the suite. It does not matter how big the power house is if the wires leading to it are put up for average working conditions, that is what they work on, and the line drop that we referred to is based on the average conditions, and those are average conditions.

Q. Now, with reference to the operation of the light, you say there are really two factors which vary the intensity or continuity of the light; the burning around, the ordinary operation of burning around the carbon, and the other the electric flow?—*A.* Line voltage, yes.

Q. Now, supposing you were to take out, and put in a new carbon, when the carbon is burnt down you go and put in a new carbon what effect would that have?—*A.* Well, if the voltage was low, a new carbon would not have any material effect. The new carbon, the only thing you put a new carbon is to save burning out the holder. As long as there is any carbon in that end, it is approximately six inches long when it is new, the least piece of it is just as good as the first piece, because you adjust it at an inch and a quarter from the carbon holder, and when it burns down you just loosen it off like I did a few minutes ago, and press it up to the same point, and do it. Now, that's adjustment. The adjustment is supposed to be that the arc when opened will be at the centre of the little reflector in the back. Anybody adjust it. The motorman adjusts it when he wants to.

Q. So that the putting in of a new carbon would not affect the light? —*A.* Not at all, no, not as long as there is any of the old carbon left.

Q. Mr. McLeod in his evidence said that he put in a new carbon, it was not the carbon that was giving the trouble; he said the light was dim or dark, that is what he said, used several terms; he put in a new carbon; it was not the carbon that was giving the trouble but it was still dim, and he said afterwards, I think, that he thought wind was getting in. Well now, what effect would wind have on it, on the light?—*A.* When the wind got in from the front it would not have any material effect. It is pretty hard to blow a lamp out from the bottom. You generally blow a lamp out from the top. It is wind that gets in from the top, from this top part here, that would cause trouble more than the rim. That rim, you take the belt off altogether, and there is a rim, that rim overlaps, that is it overlaps the front of it like this. The rim overlaps the main case.

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Q. If the wind got in would it affect the light?—*A.* Not materially, no.

Q. Would it affect it at all?—*A.* It would not except from the top; it would from the top.

Q. What do you say about the rim around the front. You mean from the top of the door?—*A.* From the top of this part here.

Q. Explain what you mean by the rim you are referring to?—*A.* This rim here to the door. If we take the felt off altogether, you will find this rim overlaps this thing. Any wind that came shooting by it, it would not go into it.

Q. If the rim was taken off the front, would it make the wind coming down from the top easier, create a suction that way?—*A.* Knock it shut like that. The Grouse-Hinds Company had a little piece of rubber put in here, and rubber rotted, so we substituted felt.

Q. Did the rubber melt?—*A.* No sir, the rubber disintegrated, like rubber does. It gets rotten after a while.

Q. Who does the adjustment on this?—*A.* The inspector.

Q. The motorman has no license to adjust the carbon?—*A.* He just takes it and adjusts it. There is the centre of the lens. He can put it on for a second and see; to get maximum light you want your carbon or arc in the centre of this, and this concentrates it. It is like a railroad lens, it concentrates it in there and shoots it right out on the track.

Q. If it was not properly adjusted, you would not get the light?—*A.* You would get the light, but you would get it thrown up in the air or down or something. You will see what I was trying to illustrate, it is burnt to one side, and it follows around and keeps following around, and naturally when this, take this like this and put it here; the line voltage is low and the arc is on the back side of it, take the back; now in order to get any light into this lens the only little opening that is here. You have a very large arc behind. Now you won't get that on the lens until it burns around and comes around, until this gradually burns around. Take the carbon, if the carbon keeps moving around you will get your—I am just moving the carbon instead of moving the arc. Now you see what you have got there, you have got quite a bit of opening there; that one-sixteenth opening at the back means three-eights here, 500 volts it would probably be that far; at 250 volts it would probably be that far.

By Mr. Guy:

Q. Now, in the ordinary operation, does the light flicker at any time?—*A.* Yes, it does.

Q. What would cause the flicker?—*A.* Well, the operation of the carbon, of the arc in the carbon going around it, and the line voltage.

Q. You say these are all of the same type?—*A.* All of the same type.

Q. That are used by the company on its Selkirk cars?—*A.* Yes.

Q. Have you any knowledge of the types of lights that are used on other railways, other suburban railways?—*A.* This is the general type that is used. Grouse-Hind type. Some of them use an enclosed lamp, but they find as his Lordship says, that it melts the stuff, it melts the glass,

they are not suitable. This is the regular type that can be depended upon on roads, that is roads where they do not used an enclosed lamp.

Q. I am speaking now of the general use of this light, can you tell us whether or not this type of light is in general use on suburban lines?—*A.* This is the standard interurban 500-volt type of light that is used. Some are made by the General Electric, some are made by the Westinghouse, and some are made by the Grouse-Hind, but they are all the same general principles. They are made under the Magnotype patents.

Q. Is this the style of lamp that is used on trolley lines, urban lines in other parts of the country?—*A.* In ninety per cent. of the North American continent you have this type of light. Canada and the United States.

Q. The light apparently is not perfect?—*A.* No, sir, it is not perfect. That is the disadvantage of that type of light, it is affected by line voltage, where it has not got an automatic voltage regulator on, and they don't make them because half the time they are out of business, and it is based on the average voltage.

CROSS-EXAMINED BY MR. CAMPBELL:

Q. Will you just tell my Lord and these gentlemen of the jury how you know that this kind of a light is used on ninety per cent. of the interurban lines on the continent?—*A.* Based by the literature of the different companies, and those that I have visited.

Q. How many have you visited?—*A.* I have visited right from San Diego to Boston, and from Quebec to Prince Rupert.

Q. Since when?—*A.* In the last thirty years.

Q. Was this light in existence thirty years ago?—*A.* No, that type of light was not.

Q. When did it come in existence?—*A.* It came in existence about eighteen to twenty years ago.

Q. How many of these railways have you visited in the last eighteen years?—*A.* Well, I have been to Boston, in Boston and Providence and New York, and all the lines around New York and Philadelphia and the Long Island railroad.

Q. You have visited all those?—*A.* Yes sir, and I have seen the general type of light.

Q. We will see how far you will go; how many more have you visited now?—*A.* I have visited the Pennsylvania, through Pennsylvania, Harrisburg, and through Pittsburgh, and I have been at the tests at Pittsburgh where they tested them in their works at the Westinghouse Company at Pittsburgh, and I have been through Kentucky and Ohio and Buffalo.

Q. All since eighteen years?—*A.* And right from Los Angeles right through to Denver and Kansas City.

Q. Los Angeles and Kansas City?—*A.* Yes. Kansas City, and agent on the Los Angeles and Denver and Salt Lake and San Diego and Los Angeles and the different Pacific Electric subsidiary lines of the Pacific—

In the Court of King's Bench for Manitoba.

Defendant's Evidence.

No. 15. J. E. Watkins. Cross-examination—*continued.*

I was in the employ as inspector for the British Columbia Electric Railway looking over equipment and properties for them for fourteen years.

Q. For fourteen years?—*A.* Yes, sir.

Q. That is since eighteen years ago?—*A.* Yes.

Q. Well, you know, you have just told us you were with this company seven years?—*A.* Seven years, yes.

Q. Fourteen years and seven years is twenty-one?—*A.* Yes.

Q. And you have done the twenty-one years in the eighteen, have you?—*A.* Yes, sir. I was with the British Columbia Electric in 1900, and I left the British Columbia Electric in 1914, and I was with the Pacific Great Eastern Railroad after that, and the Great Northern Railroad after that, and then I came with the Winnipeg Electric.

Q. Are they electric?—*A.* They were electric and steam both.

Q. Have you told us all the places in which you have inspected this kind of light?—*A.* Yes, I didn't enumerate them all. They would use that kind of light. I have seen them in those places.

Q. Outside of that, would it be right to say that you learned the rest of the information you have given us as to the ninety per cent. from reading?—*A.* Yes, sir, based on the literature that is supplied by these people.

Q. That is all you know about it, is what the literature says?—*A.* That is all I know outside of those places that I have visited.

Q. In answer to my learned friend you said that this light, Exhibit 5, that its fluctuations, I think you put it, were controlled by two elements, is that correct?—*A.* Yes, sir.

Q. One element was—well, just name them?—*A.* The line voltage, and the other was the arc running around the carbon.

Q. Are you sure that is correct?—*A.* Yes, sir.

Q. I notice in this light there is a spring at the back. Will you just come here a moment; is that a spring?—*A.* It is the weight of that carbon.

Q. Do you want to suggest to this court and jury that it is not possible for that to get out of proper working order?—*A.* Yes sir, I won't suggest that; there is nothing that won't get out of order.

Q. The wear and tear and the rust on that may get it out of order?—*A.* That does not affect the solenoid at all. The solenoid floats.

Q. Floats having regard to the gravity on this spring or this part that we have been operating on the back?—*A.* The carbon holder arm, yes.

Q. And the carbon holder arm you want to suggest never gets out of order?—*A.* Well, it is suspended on two pivots.

Q. Answer the question. Do you want this court and the jury to believe that the operation of that arm never gets out of order?—*A.* Not unless it is damaged, no.

Q. Not unless it is damaged, and not unless it is rusted?—*A.* It won't rust when it is in operation. It keeps itself polished. It is only two little points, like two pivotal points. There is only two moving parts to it.

Q. So the wear and tear has nothing to do with it?—*A.* Everything disintegrates in time, but the same lights are in existence yet.

Q. So we have other elements to consider?—*A.* Yes.

Q. We have the wear and tear and the possibility of some mishap?—*A.* Yes.

Q. So then there are really four elements?—*A.* Yes, sir, outside of the ordinary general encounter.

Q. Apparently outside of your idea and your company's idea of what a proper light ought to be. We can quite understand that. That's quite evident, you don't need to emphasize that. Now do you pledge your oath that every light that is turned out of this character is a good and a substantial and a first class light as good as this one?—*A.* You mean from the factory, or from our shop?

Q. Well, both?—*A.* They are all inspected when they leave the factory, because the parts are all interchangeable, that makes as much uniformity as we can get.

Q. And they all work uniformity?—*A.* Yes, as near as possible. There is an error on everything, even electric meters, there is a certain error, allowable error one way or the other.

Q. You would not say there are good ones of this type and others not quite so good?—*A.* Yes, they vary. As I say, there is a certain percentage of vary.

Q. Like any other machine that is made?—*A.* Yes sir, the same as two motor cars.

Q. Now, you used to have a gentleman by name of Mr. Parsons down at Selkirk?—*A.* He was foreman in charge of that district.

Q. Was he not inspector there?—*A.* Yes sir, he was inspector, had charge of the business.

Q. Who did you say he was?—*A.* He is a foreman in charge of that district.

Q. Was he this in 1914?—*A.* Yes, sir.

Q. What is his first name?—*A.* Charles Parsons. He is foreman in charge of the electrical equipment and all equipment on the Selkirk Railway.

Q. Where was he?—*A.* He lived at Selkirk at that time.

Q. Was that where he was stationed?—*A.* Yes sir, at Selkirk, in charge of the barn. That's all he had to do.

Q. What do you mean, just in charge of the barn, all he had to do?—In charge of the equipment, of maintaining and repairing, which is maintaining and inspection, and he was responsible for all the equipment on the Selkirk railway personally.

Q. He is not there now?—*A.* He was transferred about—oh, I think about a year ago, up to this district. He is in charge of our electrical department here.

Q. Who is doing the work that he did at Selkirk?—*A.* A man by name of—there is a man in charge there who succeeded Mr. Parsons.

Q. Has he the same qualifications that Mr. Parsons had?—*A.* Yes sir, other than the fact that he is not an armature winder. We wind the armatures in Winnipeg, we don't wind them at Selkirk.

In the Court of King's Bench for Manitoba.

Defendant's Evidence.

No. 15. J. E. Watkins. Cross-examination—*continued.*

Q. That is for the repair of these lights?—*A.* That is for the repair of the lights at Selkirk, and we repair them at Winnipeg; if the lenses are badly gone we repair them at Winnipeg. They are sent in for repairs when they are picked as being defective.

Q. Now, do you know anything about the light that was on the car in question the night of this accident?—*A.* Not that particular light at all.

Q. Did you ever inspect it after the accident?—*A.* No, I didn't, no I didn't. I saw the—I look over all the reports that come in, and the report just showed that there was a cord wanted on it, and it was not——

Q. Never mind telling us about the report; you were not asked about that. This felt is put in here, merely is a pad to prevent the bumping of the metal together, the door and the other part?—*A.* And keep the snow out. Snow gets in and rots it away.

Q. Spoils the light?—*A.* Nothing to do with the light at all, spoils the casing.

Q. Just spoils the casing?—*A.* Yes. Snow will not affect the carbon, just gets into the bottom of the metal casing.

Q. What would it affect?—*A.* It don't affect any light.

Q. I understand the question was, would it affect the light?—*A.* No.

Q. Then as to the effect of the wind getting into this, I think you said if the wind came in at the top it might affect the light?—*A.* Yes, that is where it materially affects it from the top. You have the current going up, the heat goes up and gets out at the top of the machine, and lets the wind.

Q. Take this particular light here. The evidence is that there was no felt in it, the one in use on the night in question. Do you know anything about whether or not it was bruised or dinged in any respect?—*A.* I did not examine it at all.

Q. And if it was bruised and dinged from wear and tear, it would not shut quite as smoothly and as tightly as this one does, would it?—It might not.

Q. And as a matter of fact, one of those lights on one of your cars down there had a broken hinge on the door, did it not?—*A.* I don't know, I could not tell you that.

Q. And yet you are the inspector of that line of railway, and look after this equipment, and you never knew there was a car down there equipped with a light that had a broken hinge?—*A.* I didn't say that I was inspector. We have an inspector that does that. I am in charge of the mechanical equipment. The question of hinge on the door that would be rectified, they would put another lens on the front if it were broken, get it welded. One hinge would not affect it, anyway, if the one at the bottom were off.

Q. Now you were giving us some information, witness, in regard to the voltage, and I think you said that the voltage on the light inside was eighty volts?—*A.* Eighty volts between the carbons, yes.

Q. And what outside voltage, what voltage on the wire is necessary to maintain the eighty volts?—*A.* 550 volts we figure it that way so as

not to burn the light out. The resistance put in there is to give us four amperes at eighty volts with a 550 volt pressure on the line.

Q. And you say that the 550 volts on the line are sometimes reduced, or the number is sometimes reduced owing to the fall of the current.—*A.* Of other cars.

Q. Of other cars?—*A.* Yes.

Q. Do you want this court and jury to believe that two cars operated on that line at the time of this accident would materially diminish the light that was reflected from the car in question at the time of this accident? —*A.* Yes sir, I will.

Q. You want them to do that?—*A.* Yes sir, they would be perfectly justified in believing, because if they are anywhere close together they will do it.

Q. If they are anywhere close together?—*A.* Yes.

Q. How much will it affect the light?—*A.* It will impair the light fifty per cent.; it will almost go out.

Q. What do you mean by close together?—*A.* Well, within a few miles of each other.

Q. Then it is right to assume then, that with only 550 volts, two cars within a few miles of each other, are going to have the effect of giving to both of those cars a light that will be reduced in efficiency fifty per cent.?—*A.* Yes sir, it will do that, yes sir.

Q. What, I think you call them feeder stations, have you along that line, substations they are, for the purpose of supplying electricity?—*A.* Yes.

Q. How many of them have you between Selkirk and Winnipeg?—*A.* There is one at Middlechurch, one at Lockport, and one at Winnipeg, and one at Stony Mountain on the other line, near the penitentiary—substations.

Q. Now I am advised at one time there were a greater number of those?—*A.* Well if they are, there is nothing that I know of where they have gone to, because they are still there.

Q. Do you operate both of those continuously?—*A.* I have nothing to do with those at all, they are under another department, that is determined by the requirements of the line.

Q. You don't know to what extent they are operated?—*A.* I don't know anything about them.

Q. Do you know anything about the extent of the current that is supplied to that line?—*A.* I don't know that at all. All I know that our tests have been tested 550 volts and that is what they are supposed to keep it up to.

Q. When did you test it?—*A.* I tested it, not for this purpose, I will qualify that.

Q. I am glad you put that in. But when did you test it? Tell the Court and the jury, please.—*A.* About two years ago, year and a half, or two years ago.

Q. You tested what?—*A.* We tested the voltage along the line, we put on some cars as to speed and things, and we tested the drop on the line for the speed to make certain schedules.

Q. This is two years ago?—*A.* About two years ago.

Q. Was it then that you arrived at the 550?—*A.* That is the standard, at that time we had that voltage on the line.

Q. What was the voltage at the time of this accident?—*A.* I do not know.

Q. Have you tested it within the last two months?—*A.* No sir. The machines are set to keep a constant voltage of 550 volts, exciting fields are accumulated to that effect.

Q. That is, we may say that automatically the load is kept up to 550 volts?—*A.* It is kept so that it will not go over 550 volts; if it did, of course, it would cause injury to the equipment.

Q. What is the effect of these exciting fields when it goes below 550?—*A.* They do their best to build it up again, hold it up.

Q. They do their best?—*A.* Yes.

Q. Automatically, if the voltage falls below 550, it is raised to 550?—*A.* Yes.

Q. Automatically if it exceeds 550 it goes down?—*A.* It is kept at 550.

Q. That is the way the adjustment of the circuit is arranged to keep a constant load on the wire?—*A.* That is at the power house. That has nothing to do with the line at all.

Q. Quite—that is at the power house?—*A.* Yes.

Q. But that is the effect of it?—*A.* Yes.

Q. So that this light Exhibit No. 5, only part of the time gives an efficient light, is that correct? I have it from your evidence witness that what you have said is that the flame burns around the carbon?—*A.* Yes.

Q. And that when it is on the front side of the carbon, you will get an efficient light?—*A.* You get maximum intensity.

Q. That light is diminished when it goes to the opposite side?—*A.* That's right.

Q. And it is about one-half of the time on one side, and about one-half of the time on the other, that is correct?—*A.* Yes.

Q. So that only about half the time you are getting the full efficiency of this light, that is correct?—*A.* Based on that, yes.

Q. And the other half of the time you are taking just what is not prevented by the shadow?—*A.* I will qualify my remark when you say half of the time. You must realize you have got two sides. There is one place at the back that is the lowest in your curve of light penetration. You have got the two sides of the carbon. You have got the carbon, you get light on this side of the carbon, you get light from the front of the carbon, but there is the back, there is a quarter of the time that the light is at the back.

Q. Almost obscured?—*A.* Not obscured, but you don't get maximum intensity at all.

Q. Well, that is not because the carbon is not burning satisfactorily? *A.* No, it is because of the location of the carbon. It is at the back of the lantern, and you get the reflection, that's what you get.

Q. Are these made to burn around as you have described, or are they made to burn squarely on the end?—*A.* That's the design of the lamp, in the centre if it can be burned, it is up to the carbon.

Q. That's it exactly. That is what I have been trying to get from you, witness?—*A.* This is the carbon here.

Q. Is that carbon not made to burn squarely on its end?—*A.* No sir, it cannot be done. There is none of them ever made that could, because they can't be made, not because of a poor carbon.

Q. What is the purpose of that?—*A.* That is a container to hold the stuff.

Q. That carbon is contained in a metal core?—*A.* Yes sir, in a metal container.

Q. Rather, a carbon core in a metal container. And a light burning perfectly, will burn in the centre?—*A.* No. You can't find a perfect arc light. You can't find it.

Q. But generally speaking, they approximate the centre, don't they? —*A.* No, they burn all around the side.

Q. You wish to suggest then, you want us to believe, that it never does burn on the centre?—*A.* No, for an instant or so, but not for—— There's a law of averages.

Q. And this is the cord which connects it, an ordinary electrical attachment?—*A.* Yes, sir.

Q. And if that gets out of order, it affects the light?—*A.* It goes out altogether.

Q. Does the contact have anything to do with it?—*A.* The contact, no. If you had any contact with 550 volts it would burn it up. An imperfect contact would burn it up. It would arc there instead of in the lamp, at 550 volts.

Q. Does the amount of electrical energy that is supplied to the light. does it affect it in any way by disrepair of this cord?—*A.* No sir, it is either burning or out; out or in.

Q. So that if the light is dim, the light is very dim for a continuous period of time. What would you say was the cause of it?—*A.* Line voltage and running around the carbon. If it was for any length of time it would be line voltage, that is if it was continued.

Q. If it was more than what you say for a few seconds?—*A.* A few seconds it would flicker without bothering about line voltage, because it is finding its own location on the carbon.

By His Lordship:

Q. Would that dimness continue for travelling of miles of the car, or would it only be temporary, a very brief period?—*A.* Depends on the line voltage.

In the Court of King's Bench for Manitoba.

Defendant's Evidence.

No. 15. J. E. Watkins. Cross-examination—*continued.*

Q. Is it likely that the line voltage would be so affected, say, for a car to travel eight, ten, fifteen miles of its course down there?—*A.* If one of the substations that were feeding the line was off, of course it would materially affect it.

BY MR. CAMPBELL:

Q. Let us take another way of it. Let us suppose the light was very dim, cast a reflection only about fifty feet. That, you say, would be due to line voltage?—*A.* Line voltage.

Q. What would be the effect on the speed of the car?—*A.* The speed of the car would be affected, too.

Q. Would he get thirty miles an hour?—*A.* Yes, he would get thirty miles an hour.

Q. Notwithstanding that?—*A.* Notwithstanding yes he would get thirty miles. Those cars run forty-five to forty-nine miles an hour.

Q. To what extent would the voltage require to be lowered before it would prevent him making his thirty to thirty-five miles an hour?—*A.* Oh probably 400 volts before he could make thirty miles an hour.

Q. And what you are saying to the court and jury is, that it would have to be lowered 400 volts before it would affect the speed, that is right, isn't it?—*A.* No, it gets down, it is affected from the 500 volts, right down, that is instead——

Q. I am asking you what the voltage would necessarily be reduced to, what would be the necessary reduction of voltage to reduce the speed below thirty miles an hour?—*A.* About 400 volts, 375 volts.

Q. About 375 volts, now that is correct?—*A.* Yes.

Q. So that a reduction to 375——*A.* Not 375 volts from 550, but down to 375 volts.

Q. To reduce it to 375 volts, that would make a material reduction in the speed?—*A.* Yes.

Q. That is correct?—*A.* Yes.

Q. And yet you suggest that it would make, that above, up to 375 volts, if you had 375 volts, he could still make the thirty miles an hour all right?—*A.* Approximately that.

Q. Could he make thirty-five miles an hour?—*A.* You can't tell that very well. There is a lot of conditions that enter into that. There is windage and a whole lot of conditions that enter into that operation.

Q. On an average, not without any obscure conditions, 375 volts——*A.* Would give thirty-five miles an hour, under ordinary conditions.

Q. What sort of a light would you have at that voltage?—*A.* You would not have a maximum light, you would have probably about three-quarters of illumination that you would at maximum voltage.

Q. About three-quarters?—*A.* About three-quarters, yes.

Q. That is to say, the reduction of 125 volts on the line would reduce the power of your light twenty-five per cent.?—*A.* A quarter, yes. It would make it flicker more to find its new adjustments.

Q. Well then, going back to the point raised a moment ago, witness. I think you said in answer to my learned friend that this light would show a reflection how far? At full voltage, at full efficiency, how far will that throw a light?—*A.* About 500 to 700 feet.

Q. Well, now suppose the light is so low owing to the reduction of current on your line that it will only penetrate with reasonable clearness a distance of seventy-five feet?—*A.* Seventy-five—it would do that with the ordinary incandescent lamps.

Q. But we will suppose that it was down to that extent; what voltage would you expect to find on your line?—*A* About one hundred volts. If an arc lamp would only penetrate seventy-five feet it would approximately be only 100 volts.

Q. What speed would the man make with his car?—*A.* It would depend altogether to what acceleration he had attained.

Q. Let us sheer off on those obscurities of yours. We suppose normal conditions. Here is a man operating a car out on a line——*A.* At 100 volts it would hardly move the car unless it was accelerated. As soon as he put the current on the headlight would go out altogether. If he had thrown off he would not be using any current, and therefore he would have 100 volts. The headlight would go out altogether as soon as he put a notch on, it would go out.

Q. Now, I don't know whether I went as far with you, witness, as I intended to go in relation to this question of wind. The wind, you say, has to come in from the top of the light, or from above the light?—*A.* Yes, to affect it.

Q. Why?—*A.* Because you know how you blow out a lamp; this lamp is worked practically the same way.

Q. Well, now, witness, that is very nice to tell us how you blow out a candle lamp. We haven't got water in a pipe, and we haven't got a lamp to blow out. Now, just tell us why it must blow in from the top to affect this light?—*A.* Because it forms a kind of a wind in there, and that affects the electrode.

Q. Why is it, perhaps you can tell me this: I have seen electric lights that were operated by a carbon in a somewhat similar fashion to this with a round bulb enclosed in only at the top, protected by a round glass bulb open only at the top?—*A.* Yes, there is no chance of it getting any ventilation, that is what let the heat out.

Q. But wouldn't there be a wind blowing in from the top there if at all?—*A.* No, you find generally long neck ones, you find a big long neck and all the mechanism is up in the top.

In the Court of King's Bench for Manitoba.

Defendant's Evidence.

No. 16. J. C. Hawes. Examination.

No. 16.

Evidence of J. C. Hawes.

JAMES CYRIL HAWES, sworn.

DIRECT EXAMINATION BY MR. GUY:

Q. What is your occupation?—*A.* Superintendent, Winnipeg, Selkirk & Lake Winnipeg Railway, stationed at Selkirk.

Q. How long have been superintendent?—*A.* I was appointed on September 1st, 1924.

Q. Prior to that time, what did you do?—*A.* I have been in the employ of the company for about fourteen years at various occupations.

Q. What were they, generally speaking?—*A.* Motorman conductor most of that time.

Q. And from that on up to superintendent?—*A.* Yes.

Q. You remember the 2nd of January, 1926, the night of the accident to Pronek?—*A.* I do.

Q. Where were you?—*A.* I was in Selkirk when the accident happened.

Q. When did you learn about it; that is how soon after the accident did you learn about it?—*A.* It was between 7 and 7.30 the same day.

Q. That is, in the evening?—*A.* Yes, the same evening.

Q. And what did you do after hearing about the accident had happened?—*A.* I immediately went to our office about two blocks distant from where I was, and telephoned to our man on duty at our north Main Street station. I remained there until 8.30. I left there on car at 8.30, and came up to our north Main Street station.

Q. You did not stop off at the scene of the accident?—*A.* No, I did not stop.

Q. You came right through?—*A.* Came right through.

Q. When did you visit the scene of the accident?—*A.* The following day, the Sunday.

Q. At what time?—*A.* It was some time during the afternoon, that is all I remember.

Q. When you went there, what did you find?—*A.* I found a certain amount of wreckage strewn along the track, a dead horse, and a sleigh, or what was left of it.

Q. Did you examine the location?—*A.* I did.

Q. What did you find?—*A.* I walked over the track, and measured the distance from where——

Q. You walked over the track which way?—*A.* North of where the wreckage was, that is the northerly point. Then I walked south, and measured the distance to where the dead horse was, and where the sleigh was.

Q. How far was it?—*A.* From the point where the accident appeared to have taken place to where the dead horse was, was twenty yards, and from the point where the accident appeared to have taken place to where the sleigh was, was seventy yards.

MR. GUY: My Lord, he is measuring from the point of the collision.

HIS LORDSHIP: In the first place, I don't know how he could judge where the accident actually occurred. I understand that the impact took place—it must have been a car coming from the south overtook the man —no, he got back on to the track. A car from the north.

Q. Well, the sleigh was in one place, was it?—*A.* Yes.

Q. And horse in another?—*A.* Yes.

Q. And which was the most northerly of the two objects?—*A.* The horse.

Q. The horse was the—where was it lying?—*A.* It was lying to the east of the track.

Q. In the ditch?—*A.* Well, yes, in the ditch.

Q. And from that to where the sleigh was, was how far?—*A.* Fifty yards. I wish to correct that. I made a sketch of the lay-out there. The horse was on the east side of the track, and the sleigh was on the west side, 50 yards to the north.

Q. What was this twenty yards business—I could not understand that?—*A.* Twenty yards was the distance from where I judged the collision took place to where the dead horse was.

Q. I am asking now, how did you conclude from what evidence was there, of where the collision had taken place?—*A.* Well, there were certain marks in the track where something had stirred up the gravel.

Q. And the first point where you saw the gravel stirred up was the indication of where you judged the collision had taken place?—*A.* Yes.

Q. Now, do you know the exact point this was from Miller station? —*A.* Not the exact point.

Q. But can you tell us approximately how far it was?—*A.* Only in this way, that I judged it to be something over a quarter of a mile between from the first crossing where he turned on the track.

Q. We havn't said anything about that. How far would that be from Miller station to the point of collision?—*A.* Nearly half a mile from Miller station to where the accident happened.

Q. Now, from the point where the accident happened to the crossing where he went on, was how far?—*A.* Something over quarter of a mile, between half a mile and a quarter of a mile from the crossing where he turned on to the track.

Q. Well, why do you say that he turned on to the track at a crossing? —*A.* I followed the sleigh marks back.

Q. That would be back north from where the accident happened? —*A.* Yes.

BY HIS LORDSHIP:

Q. You followed the sleigh tracks from where?—*A.* From the point of the accident north.

Q. That is, from the track?—*A.* On the track north, yes I came north; he was going south. I followed the tracks north to the crossing where he turned on to the track.

In the Court of King's Bench for Manitoba.

Defendant's Evidence.

No. 16.
J. C. Hawes.
Examination—*continued.*

Q. Turned on to what?—*A.* On to the track.

Q. What indication did you have of him having turned on to the track?—*A.* You could see the marks of the sleigh quite distinct.

Q. What course did you trace, what course did the sleigh take in going on to the track?—*A.* The sleigh appeared to have come on to the track from the east.

Q. Just tell us the course of the sleigh marks as they went on to the track?—*A.* I picked them up on the crossing between the road and the track where I first noticed them.

Q. You picked them up first on the crossing between the road and the track?—*A.* And when they got on the track they turned in a southerly direction.

Q. Was there any indication of these marks over across the track?—*A.* I did not see any.

Q. Did you look west of the track?—*A.* Well, I tried to get all the information I could while I was there. I think I looked at everything, looked for everything.

Q. Did you go out west of the track at all?—*A.* No sir, I did not.

Q. At that crossing, was there a road going west?—*A.* Yes.

Q. Travelled road?—*A.* No.

Q. Unbroken snow?—*A.* There was very little snow; it was just in patches.

Q. There was snow in the field, wasn't there?—*A.* Yes, there would be in the field.

Q. Did you see tracks there?—*A.* I didn't notice.

Q. Did you look?—*A.* Yes, I think I did.

Q. Were you satisfied when you found the tracks from the crossing turn on to the railway, did that satisfy you?—*A.* Yes, that satisfied me that this particular sleigh.

Q. You did not look very far beyond it?—*A.* No, I was satisfied that the sleigh had come on the track as I have indicated.

Q. What indications were there of the passing of the sleigh along the track?—*A.* The marks of the sleigh runners, and the marks of the horses hoofs on the ground in the snow.

Q. Were these clearly visible to you?—*A.* They were in places, in other places they were not.

Q. Now, you are the superintendent down at Selkirk?—*A.* Yes.

Q. Who is it down there who has charge of the equipment, that is the cars and headlights and so on?—*A.* The barn foreman is directly in charge.

Q. You have general charge over it all, you are superintendent over the whole works. Who had direct charge do you say?—*A.* The barn foreman.

Q. What is his name?—*A.* Parsons.

Q. At that time Parsons?—*A.* Yes.

Q. When you came to Winnipeg on the night of the accident, what did you do with reference to the accident?—*A.* I spoke to the crew of the car that had been in the accident.

Q. They were there at that time?—*A.* Yes.

Q. What was done with the car?—*A.* The car was held there.

Q. Where was it held?—*A.* It was held at the north barn.

Q. For how long?—*A.* It was there until the 5th of January.

Q. Is it usual to hold the cars in cases of serious accidents of this kind?—*A.* It is.

Q. And this was held; or why was it held until the 5th of January, and then released?—*A.* It was released on instructions from our accident and claims department.

Q. Do you know why they released it?—*A.* I don't.

Q. Then what was done with the car?—*A.* It was taken to Selkirk barn.

Q. Was any examination made of it—inspection?—*A.* Yes.

Q. Who made it?—*A.* The barn foreman Parsons.

Q. Did you see him make it?—*A.* I did not see him make it.

HIS LORDSHIP: Well then, you don't know whether he made it or not, you can only speak of your own knowledge.

Q. What did you have to do with the inspection?

MR. CAMPBELL: Personally.

A. Personally, nothing.

Q. Did you instruct Parsons to make the inspection?—*A.* Yes.

Q. Now, you say when you were at the north barn, you had a talk with the car crew, that was motorman McLeod and conductor Johnson?—*A.* Yes.

Q. Where did this conversation take place?—*A.* In our office.

Q. Where is our office?—*A.* North Main Street, corner of Main and Inkster.

Q. The terminal station of the company at North Main Street?—*A.* Yes.

Q. And in the office of that building you saw them?—*A.* Yes.

Q. McLeod has said that you told him not to report defects in the headlights?

HIS LORDSHIP: When?

MR. GUY: At this time.

HIS LORDSHIP: No, McLeod could not say time and place.

MR. GUY: He didn't say when Jones, but I think he said that Hawes.

HIS LORDSHIP: He could not find out where and when the conversation took place. It was after he got back to Selkirk and wrote out his report. It did not take place in Winnipeg at all, as I recollect McLeod's evidence.

MR. GUY: My note of it is that he did tell him, that he did say that Mr. Hawes had a conversation with him about the headlight, and did tell him not to report it; that is what I understood McLeod to say.

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MR. LAMONT: The conversation, my Lord, was that this witness told McLeod that if the headlights are not any worse than usual not to report them, that is what McLeod said.

BY MR. GUY:

Q. You had a conversation with him that night at Winnipeg about the accident?—*A.* Yes.

Q. Did you ever make any such statement?—*A.* I did not.

Q. Did you have a conversation with him about the headlight?—*A.* The headlight was not mentioned that night.

Q. The headlight was not mentioned at that time?—*A.* Except that he told me the headlight was out of business due to this accident.

Q. Did you at anytime ever tell McLeod not to report headlight defects, any headlight trouble?—*A.* I certainly did not.

Q. What are your regulations with regard to reporting defects in equipment?—*A.* The motorman must report at the end of his run any defects in equipment.

Q. They must report at the end of the run any defects in equipment?—*A.* Yes.

Q. Well have you a set of rules and regulations for that purpose?—*A.* We have.

Q. Perhaps you can refer me to the rules relating to that. What does rule 171 say? What is this you have got now?—*A.* This is the rule book of the company.

Q. And for the use of motormen and conductors?—*A.* Yes, sir.

Q. What is rule 179?—*A.* "Report defects in car on arrival at terminal station, or where there is an inspector or foreman or repairs they must report to him any defects in the condition of the cars, or any imperfect action on the part of the brakes during the trip."

Q. And Rule 181?—*A.* Rule 181. Daily Defect Report. "Conductors and motormen will make a written report at the end of each day's run of any defects in their car, so that repairs or alterations may be made before the car is again placed in service."

HIS LORDSHIP: Well, of course, there is no doubt those rules were made. The question, were they carried out; but the witness McLeod has testified that he got rules to the contrary. I know there is no doubt the Company have those rules, but do the employees always carry them out, there's the point.

MR. GUY: Of course, we adopt the rules, and there are the rules. I have asked the witness whether he ever gave any rules to the contrary, and he says not.

HIS LORDSHIP: He says not. Question of veracity between him and McLeod; that's all.

Q. Well, what inspection is made of the car, Mr. Hawes? What inspection is made of the headlights? Confine it to headlights.

HIS LORDSHIP: He doesn't know. He says Parsons makes that.

MR. GUY: Parsons was in charge, but he knows what is done.

HIS LORDSHIP: He did not say he was there.

MR. GUY: No, not at this particular time. I am saying what the general practice is.

MR. CAMPBELL: The best my learned friend can do is to produce a rule or instructions that somebody is supposed to inspect them. He cannot ask this witness. That is exactly what my learned friend did ask him, what is done.

MR. GUY: I am asking now what the system of inspection is. The other man can't say that. This witness is the man who establishes the system.

Q. What I want to know is, what is the system of inspection of these cars?

MR. CAMPBELL: What is supposed to be done.

MR. GUY: Yes, what is supposed to be done; not actually what was done, because this witness cannot tell that, because he is not actually working on the cars.

HIS LORDSHIP: Isn't it more important for us to know what the inspection of this particular car revealed at the time of the accident.

MR. GUY: Yes, my Lord, and I will have that man here to say what was revealed at the time of the accident, but I think it is important to show in view of the general allegations made by McLeod, I think we ought to show what the general system of inspection of these cars is. I know that the only relevant point is the witness McLeod in spite of my objections would continue to make statements with reference to what happened years and years ago, things about which he was not asked, and I could not stop him.

HIS LORDSHIP: I suppose he felt they were matters that ought to be disclosed.

MR. GUY: Well, it was not relevant, my Lord. He had no right to do it. The witness had no right to go back two years, and then when I come to give an explanation of what system to have me stopped here, and to explain what is the usual system of inspection of these cars.

HIS LORDSHIP: There is no allegation in the statement of claim there was a lack of inspection.

MR. GUY: No, but with the statements of McLeod as they stand, the only fair thing to do is to find out what system you adopt now with reference to these headlights and their repair. Does your Lordship allow it, or disallow it?

HIS LORDSHIP: Well, I don't know, Mr. Guy. There are instances, of course, where it is very important to know the system, if an efficient and proper system prevails, particularly where the cause of an accident

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is obscure, but where it is alleged here specifically the cause of the accident is so and so, that the Company's attention to a defect in that particular thing had been called, and had not been remedied, what use then would be evidence as to a general rule requiring inspection of all its equipment, because it would be evident if the story is true that McLeod said that his complaints were ignored, and that the inspection that should have been made was not made, how would general evidence be of any use in controverting that? However, I have no objection to your giving the evidence.

MR. GUY: I don't see how we can avoid putting it in, in view of the fact that he was allowed to make general complaints. The witness McLeod did say, although I could not stop him, I don't think it was relevant, but he did say, make general complaints.

HIS LORDSHIP: He said he made complaints repeatedly personally to Hawes as well as putting it in his reports, and he said nothing was done to remedy it, and I understand him to say that he actually did make a complaint about this headlight on that particular journey.

MR. GUY: No, my Lord, no, my Lord, there is not one tittle of evidence; there is no complaint McLeod ever made about this particular headlight, but he did say what he did. He said when he was on his trip, and when he got out he found that he did not have a felting, he said he found that he he did not have a felting, but he said when he came back first he went into the barn, and he asked the night watchman for a new carbon, and he got it and put in in. He said it lit up, but it was not light.

HIS LORDSHIP: He said the carbon was not the trouble.

MR. GUY: But he makes no allegation about this night at all except that it did not have the felting, that is the only thing he said. Now, his other allegations are general allegations, and I am going to ask your Lordship to tell the jury that they must entirely disregard general allegations as to general equipment, but inasmuch as that evidence has already been put in now, and he has made those statements, I must surely be given an opportunity of showing what is the system of inspection that the company used to keep their equipment in proper order.

HIS LORDSHIP: That would not have any operation of denial of those statements, because the instructions might not have been carried out; but if the evidence of the witness is true, they were not carried out.

MR. GUY: My Lord, without knowing the system in general, how can we know if they were carried out or not.

HIS LORDSHIP: You can surely prove to the contrary that these complaints were not made. He has told us that he made them. Mr. Hawes will deny that the complaints were made to him on that particular night. Now you have not asked him as to the general series of complaints he made from time to time.

MR. GUY: Well, are they relevant, general complaints about the headlights? If it is a general allegation we have to meet, we have got to put in this evidence.

HIS LORDSHIP: I would think they were relevant, if from time to time defects of that kind developed in the equipment, complaints were made and they culminated in an accident due to that very defect; surely it seems to me they ought to be relevant.

MR. GUY: What defect is your Lordship referring to?

HIS LORDSHIP: The alleged defect in the headlights.

MR. GUY: What is it alleged defective in the headlights?

HIS LORDSHIP: That they did not sufficiently illuminate the right of way, that I understand is what the motorman, the burden of his testimony.

MR. GUY: Surely they have got to go further than that, and say what is the matter with the headlight?

HIS LORDSHIP: He said he had trouble repeatedly with the head lights of the cars he was called upon to operate.

MR. GUY: That is a general statement as to all the headlights. Now, I have met that.

HIS LORDSHIP: It is a general statement as to headlights of cars that he operated. He told us that he not only found this difficulty, but he complained to Hawes about it several times repeatedly in personal conversation; that is what he said.

MR. GUY: No, I don't think he said he complained repeatedly but he complained to Hawes.

HIS LORDSHIP: He certainly did. If you can meet that by direct evidence, allright, but I don't think you can meet a specific allegation of that kind by giving evidence of general instruction as to inspection, because they may not have been carried out. You have given the rules as to reporting defects; well and good. Don't those rules make any reference to inspection, periodical or otherwise?

MR. GUY: I am going to ask him about that, and that is the very thing I am going to bring out, your Lordship, is bearing more there, showing every periodical inspection.

HIS LORDSHIP: You were asking to give general evidence as to the regulation as to inspection. Now if they are in that book, you may turn them up, then we will know where we are at.

MR. GUY: I am not speaking about rules, my Lord.

HIS LORDSHIP: I don't know what you are speaking about.

MR. GUY: What is the system of repair.

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HIS LORDSHIP: How could there be a system of that kind without some rule or regulation requiring it; from whom would it emanate? How would the men know except it was put in the shape of a regulation of the company?

MR. CAMPBELL: Posted up.

MR. GUY: These are rules or regulations for motormen, and conductors.

HIS LORDSHIP: Is that all these rules refer to?

MR. CAMPBELL: I have not had an opportunity of seeing them.

MR. GUY: I can't understand why it should be that we can't get the truth in regard to it.

MR. CAMPBELL: Yes, that is one of the mysteries that we have to contend with.

MR. GUY: Well, it deals with signals and operation of the cars, movement of train orders, motormen, conductors, and other trainmen.

HIS LORDSHIP: I don't know anything more important than a regular systematic inspection of equipment.

MR. GUY: That is identically what I want to get from this witness.

MR. CAMPBELL: Well, how are they established?

MR. GUY: I am asking now what is the system; he can't speak of anything else but the system.

MR. CAMPBELL: My Lord, is this system then so important and must be defined in some way that is definable? Surely it should be in some sort of rules printed and posted up, otherwise are we to take somebody's say so at this time as to what are the instructions, surely not.

MR. GUY: Now, my learned friend need not get anxious about them. He can ask them whether they are printed.

MR. CAMPBELL: That is what you should do.

Q. What do you say as to the system of inspection?

MR. GUY: I am asking for your Lordship's permission to ask him those questions.

HIS LORDSHIP: Go on, ask them.

Q. What is the system adopted by the company?

MR. CAMPBELL: I object to the system my learned friend has put, until we first get a question as to whether they are printed or published in any shape or form. We are entitled to that, surely. Then if they are, let us have them.

HIS LORDSHIP: Well, that is quite proper.

BY HIS LORDSHIP:

Q. You say there is a system of inspection in vogue?—*A.* There is.

Q. Now, is that system put in the form of a printed or written instruction to employees?—*A.* Not from me.

Q. Well, is it from anybody?

BY MR. GUY:

Q. Well, what have they got?

MR. CAMPBELL: I would like the question your Lordship asked. Your lordship asked the witness if they were printed and put into circulation by anybody.

BY MR. GUY:

Q. Are there printed instructions to employees who have charge of the repair?

MR. CAMPBELL: That is not the question my Lord asked.

MR. GUY: It is.

HIS LORDSHIP: No, I was asking as to plant equipment.

MR. GUY: Maintaining the equipment in proper repair. There is no reference to what system was made there, my Lord.

HIS LORDSHIP: I want to know if there were instructions given by anybody.

MR. GUY: About what?

HIS LORDSHIP: About inspecting cars, about inspecting equipment, the very thing you are trying to get in.

MR. GUY: No, my Lord, I was not asking first of all about inspection. What system does the company adopt to keep its equipment in proper repair?

HIS LORDSHIP: You are speaking of inspection, inspection, inspection. Now let us take the word inspection.

MR. GUY: Inspection is only a minor detail in the general system.

Q. Allright, Mr. Hawes, what about inspection now? What inspection is made of equipment to ascertain?

HIS LORDSHIP: The witness said there was a system of inspection in vogue on this railway. Then he was asked in what form or how is that inspection adopted. Is it in the shape of written instructions or printed instructions? If so, from whom do they emanate?

MR. CAMPBELL: Now I want an answer to my Lord's question.

A. Such instructions are issued by the superintendent of rolling stock.

MR. CAMPBELL: Again an evasion.

Q. Well, are they in writing?—*A.* I understand they are.

MR. CAMPBELL: I ask now for the production of them; then we will know what.

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BY MR. GUY:

Q. I am not just clear as to what you refer about these written instructions from the superintendent of rolling stock. Are there written instructions from the superintendent of rolling stock to anybody to do certain things? Is that what you are referring to?

HIS LORDSHIP: Mr. Guy, that is not the question at all. That does not meet the situation that confronts us. The witness has stated frankly that he believes that the superintendent of rolling stock has given instructions as to inspection, and that they are in writing. Now, if they are in writing, produce them.

MR. GUY: I am asking him, because I don't know anything about them. I know there are such things as inspection reports.

HIS LORDSHIP: Well, you ought to know. Your clients have these things. I suppose you can inform yourself as to what these rules are.

MR. GUY: I am trying to find out what they are.

HIS LORDSHIP: Well, you can find out, I guess. Surely Mr. Watkins ought to know.

(Mr. Watkins says that an inspection report is used, such as you have them.)

MR. GUY: They are not rules at all. They are reports; periodical inspection reports.

MR. CAMPBELL: There is no suggestion of inspection on the car from what the witness says.

MR. GUY: These are periodical inspection reports that are made, but that has nothing to do with instructions.

HIS LORDSHIP: We would like to know what instructions were given to officials to inspect the equipment and rolling stock periodically in order to see that they were in safe condition, and the witness has said there are such instructions, and they are in writing. Now, if they are in writing, produce them.

BY MR. GUY:

Q. What form are they in, Mr. Hawes?—*A.* There was issued, I understand there is a long bulletin to all barn foremen instructing them to use that form in reporting periodically.

Q. Use what form?—*A.* That form you have in your hand.

MR. CAMPBELL: We will have that produced, if that is the governing form. If that is the form that governs the inspection which my learned friend is anxious to introduce evidence about, let us have that form, that bulletin. We don't want evidence as to its contents; it will speak for itself.

MR. GUY: Well, we will have the bulletin, if there is such a thing in existence.

Q. Now, Mr. Hawes, you say that there are written instructions to whom, with reference——?—*A.* To the barn foremen.

Q. Written instructions to barn foremen with reference to the inspection of cars?—*A.* Yes.

Q. Then as a result of those inspections, what do you get? Do you get anything?—*A.* I don't get anything.

Q. Well, what is done?

MR. CAMPBELL: My learned friend is trying in another way to introduce how the inspection is done instead of letting us have the rules that provide for it. He has told us; he has established his system. We have not pleaded a defective system, but to satisfy him, I take it your Lordship has given him the privilege of establishing his system by a proper method, namely, by a written rule. Now surely that ought to be produced, if my learned friend is so anxious to do that, but he cannot ask from this witness what is done under those rules, surely not.

BY MR. GUY:

Q. Mr. Hawes, you are superintendent at Selkirk?—*A.* Yes.

Q. Is it part of your duty to see that the various men under you carry out their instructions?—*A.* Yes.

MR. CAMPBELL: Surely my learned friend does not hope to introduce it by such; my learned friend knows as well as I do, and very much better, how he should introduce such evidence, and it is not for me to lecture him here. I submit, and I don't like the charges that my learned friend is putting against me for delaying this proceeding. Why doesn't he bring the rules here establishing the system that he wants to set up? That is the proper thing for my learned friend to do; and surely my learned friend knows it.

BY MR. GUY:

Q. Mr. Hawes, you are still sworn?—*A.* Yes.

Q. Have you been able to locate the instructions sheet, or whatever it was?—*A.* Mr. Watkins is attending to that.

Q. Now you told us this morning that you had never given any instructions to McLeod not to report defects in the car and in the headlights, and you described the conversation at the main barn the night of the accident. Did you have any conversation subsequent to that with McLeod about headlights?—*A.* No, I don't recall ever discussing headlights.

Q. Did you have any conversation with him about headlights at all; that is what I mean?—*A.* Not that I can recall.

Q. I don't mean with reference to you telling him that you ever, he wasn't to sign off defective; but any discussion about headlights?—*A.* You mean prior to this accident?

Q. No, I mean after the accident?—*A.* Yes, I did.

Q. After the accident, you told about the one after, on the night of the accident, you had none prior, but afterwards did you have?—*A.* I had another conversation with McLeod, that took place in my office in Selkirk.

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Examination—*continued.*

BY HIS LORDSHIP:

Q. I thought you said you had no other conversation with him?—*A.* Prior to the accident.

Q. But since the accident, Mr. Guy asked you, and you said no, none that you can recall. Now you said you did have one?—*A.* I understood him to say prior to the accident.

Q. No, since the accident?—*A.* Yes, since the accident.

Q. Prior to the accident none. On what occasion, Mr. Hawes, did this conversation take place? You had another conversation with Mr. McLeod since the accident in your office in Selkirk?—*A.* Yes sir, about the 6th or 7th of January, 1926.

Q. What took place at that time, Mr. Hawes?—*A.* I asked McLeod if he had made the statement to Mr. Thould.

HIS LORDSHIP: How is this relevant? Anything McLeod has been asked about that, if you have his statement on that point, you can, of course, go into that question as to whether or not that statement was made.

MR. GUY: Well, of course, McLeod did say that he made a statement to Mr. Thould.

HIS LORDSHIP: Well, what was the statement that McLeod said because I don't recall it.

MR. GUY: Well, I think McLeod said that he said to Mr. Thould that the headlights were not worth powder enough to blow them to hell.

Q. How did you come to have this interview with McLeod?—*A.* I sent Mr. McLeod to make a verbal report to Mr. Thould concerning this accident.

BY HIS LORDSHIP:

Q. Who is Mr. Thould?—*A.* He is our accident and claims agent.

Q. When was that, before or after the written was made?—*A.* After he made his written report.

Q. After he made his written report you told him to go and report to Mr. Thould?—*A.* Yes.

Q. How did you come to have this subsequent interview with him?—*A.* The following day in conversation with Mr. Thould——

MR. GUY: Well, you can't tell us that. He said he instructed McLeod to go and see Mr. Thould.

HIS LORDSHIP: Why should he do that? Why should he make a verbal report when there was a written one already in?

MR. GUY: Well, his written report may not have been complete enough. There might be a dozen reasons why he would be brought in.

HIS LORDSHIP: That is no reason at all. If there was any reason to suspect the written report was not full and complete. The man might have been expected to make a complete report for the benefit of the Company. Why in the world he should expect to go and make an oral report after he made a written report is beyond my comprehension.

MR. GUY : Well, perhaps I can enlighten you. It was probably at my request he was brought in, because I like to talk these things over with the men. Anyway, he was asked to come in and see Mr. Thould about it, that's all there is to it, and he did go in. Then as a result of the interview, Mr. Hawes does something, and that is what I have been trying to get out. I am not trying to give the result of the statement.

Q. Then after that, how did McLeod come to get to you; how did you come to have this conversation?—*A.* I told him I wanted to see him in my office.

HIS LORDSHIP : Well, you already saw him before you——

MR. GUY : Yes, he has given you that conversation, my Lord, before.

HIS LORDSHIP : No, no, the conversation about reporting to Thould; he had the man before him. Now you said the reason you got him there was that you wanted him to make an oral report to Thould.

MR. GUY : Well, he did make the report to Thould.

HIS LORDSHIP : Now, the question is, was the witness McLeod's attention called to this in his examination in chief, or in his cross-examination at the time and place mentioned so that you can now contradict; that is the question.

MR. GUY : The fact is, this witness McLeod said that he had one conversation with Mr. Hawes, and that was on the night of the second. Mr. Hawes has given you what that conversation was, and he said that was the only one he had about the headlights.

HIS LORDSHIP : He said the only reference to headlights on the night of the accident, McLeod said his headlights had been put out of business by the accident. There was nothing said about the headlights not acting efficiently at all. That was all the statement. That took place about eight o'clock or thereabouts on the evening of the accident.

MR. GUY : Yes, and he said that was the only conversation he had.

Q. Now. Mr. McLeod has also said he had booked these out repeatedly; he said that he had booked them out repeatedly, inferring there that he had marked the sign-off sheets as being out of order. What have you to say as to that?

HIS LORDSHIP : Would this witness see those sheets?—*A.* Yes.

HIS LORDSHIP : Those are the sheets that apparently cannot be found.

MR. GUY : That's what I want to show.

Q. In whose charge are these sign-off sheets?—*A.* The sign-off sheets are in my charge.

Q. You have the custody of them. Have you the sign-off sheets for December, 1925—do they all come in your possession?—*A.* Only the sign-off sheets——

Q. Do all the sign-off sheets for operating cars between Winnipeg and Selkirk come in your possession?—*A.* Yes. They are sent to me from the barn.

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Examination—*continued.*

BY HIS LORDSHIP:

Q. Which barn are they made out, to sign them?—*A.* Selkirk barn.

Q. If a man should go off duty in Winnipeg, where would he make his report?—*A.* We don't have any men go off duty in Winnipeg; they all operate from Selkirk.

Q. So all the sign-off sheets are made in Selkirk?—*A.* Yes.

Q. And find their way into your possession?—*A.* Yes.

BY MR. GUY:

Q. So you have the custody of all those sheets?—*A.* I do.

Q. Have you the sign-off sheets for December, 1925?—*A.* No, I have not.

Q. You have not got those?—*A.* I have not.

Q. Where did you last see them?—*A.* I had them filed in a store room in our Selkirk station along with the balance of the sheets for the year 1925.

Q. Yes, where are the sheets kept?—*A.* They are kept in a room where we keep stationery and also file away all records.

Q. And you have a room for records?—*A.* Yes.

HIS LORDSHIP: Well, what has become of those?

Q. Did you have these December sheets?—*A.* I had them, yes.

Q. On what occasion; what was the last time you recollect seeing them?—*A.* The last time I recollect seeing them was about the 6th or 7th January, when I had that conversation with McLeod.

Q. On the occasion of this——?—*A.* Conversation with McLeod.

Q. And what did you do with them at that time?—*A.* I brought them into the room where him and I were talking, and showed them to him.

Q. And after that, what did you do with them?—*A.* After that I took them back to where I got them.

Q. I beg your pardon?—*A.* After that I took them back to where I got them from.

Q. Put them in the record room?—*A.* Yes.

Q. When next did you look for them?—*A.* Just a few days before this case was called.

Q. A few days before the case was called?—*A.* Yes.

Q. And what search did you make?—*A.* I made a thorough search of the whole premises.

Q. And what was the result of your search?—*A.* That the sheets for the month of December and two or three days in January were missing, I think about ten days in January.

Q. Have you been able to locate them?—*A.* I have not.

Q. What has become of them?—*A.* I have no way of knowing; they have been taken out of the file, out of the bundle.

Q. Taken out of the bundle?—*A.* They have been taken out of the bundle by someone.

Q. Have you the rest of the records?—*A.* Yes.

Q. The sign-off sheets up to that time?—*A.* Yes.

HIS LORDSHIP: You have the rest of the bundle.

MR. GUY: Now, my Lord, I submit I am entitled to put in secondary evidence of the contents of those sign-off sheets for December.

MR. CAMPBELL: My Lord——

HIS LORDSHIP: There is one thing pertaining about this enquiry is, whose interest would it have been to eliminate those sheets? Why in the world should these particular sheets have been taken? Was this in a locked receptacle? Who had access to them? A good many things would have to be eliminated before I would throw the door open in that respect.

Q. Was this the room where the records of the Winnipeg, Selkirk Railway are kept? Well, just describe it to us, Mr. Hawes. Who has access to it, and could they be obtained?—*A.* It is a room partitioned off from our freight shed where we keep documents, all stationery and express parcels.

Q. Well, what access is there to it?

HIS LORDSHIP: I suppose it had a door?

A. It had a door. There was a padlock on the door. It was always locked at night. During the day it was open pretty much all the time.

BY HIS LORDSHIP:

Q. During the day the door was unlocked?—*A.* Unlocked.

Q. Who would have access to that room?—*A.* You mean the key to the lock.

Q. Who were in the habit of using this and having access to this place; did the motorman go in there?—*A.* He could have.

Q. To your knowledge did he ever go in there?—*A.* Yes.

Q. For what purpose?—*A.* Oh, for different purposes.

Q. Tell us any one purpose that would take a motorman in there?—*A.* Well, if the motorman did not have any time slips; if there wasn't any in the office he would slip out there, and get them.

BY HIS LORDSHIP:

Q. Get what?—*A.* Well, any stationery that he might use, time slips, envelopes, or almost anything.

Q. Your stationery supplies were kept in this room, were they?—*A.* Yes, sir.

Q. And did the motormen help themselves, or did he have to put in a requisition to get stationery?—*A.* No, we usually kept enough in the office for their use, but occasionally the supply might run out, and anybody would ——

Q. Wouldn't you go in and get it?—*A.* No, not necessarily me.

Q. If the motorman ran out of necessary stationery, wouldn't he come to you for his stock, for his supplies?—*A.* No, he would not come to me.

Q. Well, who would he go to?—*A.* He would probably mention it to the agent; the agent was there.

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Q. And the agent would get it?—*A.* The agent would get it.

Q. Did you ever know a motorman going in there, and helping themselves?—*A.* Yes, I do.

Q. Who was it?—*A.* Oh, I can't recall the instances, but I know it has been done.

Q. At any rate, this room is open during the daytime, and there is access to it by those in the building; is that what I understand?—*A.* Yes.

MR. GUY: Now, my Lord, I propose to ask the witness about these sheets.

Q. You had the sheets out at this time in connection with the conversation with McLeod, didn't you?—*A.* Yes.

Q. For what purpose?—*A.* To show McLeod.

HIS LORDSHIP: He showed them to McLeod, and he took them back, and put them back in a bundle in this room.

MR. GUY: But I am asking the witness now, my Lord, why he brought them out to show McLeod.

HIS LORDSHIP: Well, we are not concerned with that. We are only concerned with the fact that he had them then. You are giving this evidence with a view to showing why he remembers the last time he saw them. You can't make that to give conversations, or to give reasons. He wanted to show them to McLeod, he has told us that, and he did show them to McLeod, and he put them back; then they disappeared.

MR. GUY: I am asking now to give secondary evidence of their contents.

HIS LORDSHIP: I know you are.

MR. GUY: Well, I want your Lordship to rule on it.

HIS LORDSHIP: I have not ruled yet.

(At this point the jury are asked to retire from the Court room.)

MR. GUY: I have shown that they have gone out of the control of the Company. They were put away, and the last seen by the man who was in charge of them was on the 2nd January. Now he has made a search for them since, and he can't find them. He says he searched everywhere, and cannot find them, and now I am asking to give secondary evidence of their contents when we have explained the loss of them.

HIS LORDSHIP: Quite so, and in ordinary circumstances you would be entitled to give that, but these are not ordinary circumstances. There is a strong suspicion at all events, that somebody who was interested in eliminating those reports deliberately stole them. Well, now, the question is, whose interest would it be to eliminate. If those reports contained admissions or statements damaging to the Company's case, the inference is obvious. If they did not and wholly innocent, there was no object in anyone taking them. Then who would be interested? Do you intend? Do you intend to suggest that McLeod deliberately went back and purloined those reports, so that he could not be confronted with them. You see the

difficulty that I am in. It is not an ordinary case of a bona fide loss of a document, which, of course, permits of secondary evidence under circumstances. There is more to it than that, unfortunately.

MR. GUY: Well, I have asked, my Lord, to give secondary evidence.

HIS LORDSHIP: Supposing those reports contained statements that were damaging to the Defendant's case here. It is obvious that if they did, who would be interested in seeing that they were suppressed?

MR. LAMONT: Another thing, my Lord, my learned friend never disclosed those reports in his affidavit as to documents, and he is not entitled to put them in.

HIS LORDSHIP: When was the affidavit as to documents filed; was that prior to this alleged loss?

MR. LAMONT: These are supposed to have been lost over a year ago. The affidavit as to documents was filed in the last six weeks before the examination for discovery. It was sworn on the 7th of May.

HIS LORDSHIP: Did you refer to them in the second schedule to the affidavit?

MR. GUY: No, my Lord, they are not referred to in the affidavit at all. It was not known at that time that this was on the signing off sheets.

HIS LORDSHIP: It was known that these reports were in existence.

MR. LAMONT: I wanted to get those reports to examine them. My learned friend did not disclose them in the affidavit. I examined his man for discovery, and they did not know where the reports were, and they stalled me off right up till to-day, and the secondary evidence they propose to give is this man's memory of them, of something over a year old. There is no copies of them. He does not disclose in his affidavit. It is well settled law you can't bring documents in at the trial you have not disclosed. The other side is entitled to know those documents beforehand. They say they have not got any such documents.

MR. GUY: The question of these documents did not arise until the examination for discovery. It was not until then we found that they wanted them.

HIS LORDSHIP: The question arose when an order to produce was served on you. You are supposed to know what has a bearing on this case.

MR. LAMONT: I tried to make my case out of those reports, and I never could get them.

HIS LORDSHIP: The very moment an order to produce is served, it is the duty of a solicitor to investigate through his client what documents they have that have a bearing or are relevant to the issue. That is a duty that is obviously cast upon every litigant by the practice of this court, and if they are documents that he had in his possession at one time and he cannot now produce them, it is his duty to disclose them, and allege how the loss came to be brought about, when they were last in his possession.

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It is quite obvious that this Plaintiff would not know anything about your system of records, but it is equally obvious that the railway company would know, and would know what the duty of their conductors or motormen were in regard to making reports. I can't see,—it is putting the Court in a very difficult position.

MR. GUY: Reports of what, my Lord? You see, your Lordship is going on the assumption now that this is a report of something that is relevant to the accident.

HIS LORDSHIP: I am referring to these sign-off sheets that are not forthcoming, and I cannot understand why they were not referred to in your affidavit on production of documents.

MR. GUY: Because, my Lord, they are not to be taken to be relevant. What does the sign-off sheet disclose?

HIS LORDSHIP: That is what I don't know. You people know. We know from what McLeod has said that in those sign-off sheets some reference was made to troubles or defects that he had on his trips.

MR. GUY: Well, he would not put them in any particular month.

HIS LORDSHIP: Well, he put them in such a way that if anything unusual had happened, it was his duty to report it, and if he had trouble with his headlights it was his duty to report it; if he had trouble with the motor power it was his duty to report it, so that it could be rectified.

MR. GUY: My Lord, McLeod would not say at anytime that he had made any complaints in any other month, in any particular month.

MR. CAMPBELL: In any particular occasion.

MR. GUY: He could not tell anytime. I have tried to get him down to when he did it.

HIS LORDSHIP: That is entirely beside the question. Everybody knows from these personal injury accident cases against corporations or railway companies, reports that employees are supposed to make are always relevant.

MR. CAMPBELL: My Lord, what are the circumstances before your Lordship now at this moment? This witness McLeod had been called in to see Mr. Thould with reference to some reports, I suppose perhaps in connection with the sign-off sheets or something else. The witness in the stand thought it worth while to call McLeod into his office, and discuss these reports with him, and then my learned friend suggests now to your Lordship that he did not realize the relevance or importance of those reports. I submit that is a strange state of affairs.

MR. GUY: Well, the fact of the matter is, my Lord, that the reports, your Lordship has suggested as to whose favor those reports are, and just taking my learned friend's statement, the reason why McLeod is called into the office, as I am trying to get from this witness, was because of a statement he is supposed to have made with Thould, and he is brought

into the office with his own sign-off sheets, and they are produced to him and shown to him, and because they show nothing, they disappear—they would help us. They were not in that sense. They would injure the other party. Well, that is just the position. To whose advantage is it if a man wants to come up here and say, I complained, I complained, and I complained and the very documents that he is supposed to complain on are not there. Now to whose advantage is it? Purely, of course, to the other man's advantage if the documents are what we say they are.

HIS LORDSHIP: McLeod had not been brought on the carpet.

MR. CAMPBELL: If he was telling falsehood at the time he was talking to his superintendent Mr. Hawes in the face of those reports, why didn't Mr. Hawes dispense with his services and discipline him then and there? Why should he wait until the case came into court here and quarrel about it? Most absurd state of affairs.

HIS LORDSHIP: I would think, Mr. Guy, under the circumstances that if he was deliberately caught lying to Thould, and his own reports in writing was the evidence of his wrong, something would have been done.

MR. GUY: I want this witness to give the conversation. I have tried to get it in. I will now ask to get it in, the conversation that took place on this occasion between Hawes and McLeod with reference to headlights. As I say, in the first instance, in the first instance, as I understand the evidence, McLeod has said that only on one occasion did he have a conversation with this man abut it. Now I want to give the second one, to show there was another conversation.

HIS LORDSHIP: If you want to do that, you will have to put Mr. McLeod back in the box and interrogate him on that point.

MR. GUY: Why should I put him back in that box?

HIS LORDSHIP: In fairness to McLeod if you are going to contradict him on that point.

MR. GUY: McLeod has been sitting here all the time listening to this conversation.

HIS LORDSHIP: I don't care whether he has or not; that does not say the man is a perjurer. If you are sincere in this matter, Mr. Guy, you should be willing to have McLeod interrogated on that point.

MR. GUY: I am sincere, my Lord, and I don't think it is fair ——

HIS LORDSHIP: Well now, if you don't intend to do that, I am not going to admit these documents, because it would be a most dangerous thing to do. It would simply be putting a premium upon a document that might prove unfavourable to a person's case in allowing secondary evidence to be given, which we have no positive way on earth of checking up. You can see the danger as well as I can.

MR. GUY: I know, but we are powerless to prevent it, my Lord.

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HIS LORDSHIP: Oh well, of course, if you take that attitude, well and good, take it. I am giving you now the opportunity, McLeod should be put back in the box and cross-examined upon that point. If he makes the statements that you say he previously made, you have the liberty to contradict him, if you can. I can't see that I can do any fairer than that. If you are afraid to take ——

MR. GUY: I don't think it is fair, in view of all the discussions that have taken place it is fair.

HIS LORDSHIP: Very well, dig up from the reporter's notes what the man did say, and contradict him upon that basis. From what the reporter has read there is no foundation for contradicting something that McLeod has said on that date, so I am still willing to give you the opportunity to cross-examine McLeod on that point, if you desire.

MR. GUY: Well, I don't want to call McLeod; he is not my witness. McLeod is very much prejudiced.

HIS LORDSHIP: Well, do you think on the record, as we have it, you have laid the necessary foundation?

MR. GUY: No, not on the record.

HIS LORDSHIP: I don't want any exception taken hereafter on the question of appeal about a thing that is not right. If you still want to lay the foundation; if you admit you have not laid the foundation.

MR. GUY: I may say this, that I have not heard read from what the reporter has given, what I thought was in the evidence.

HIS LORDSHIP: Well, that's always the source. Reference to reporter's notes settles the question.

(The jury return to the Court room.)

BY MR. GUY:

Q. Mr. Hawes, McLeod also said that he booked out repeatedly these cars—that is the way I have it transcribed, he booked them out repeatedly, meaning that he had signed them off as having defective headlights repeatedly.

HIS LORDSHIP: Well, that brings us back to the reports.

MR. GUY: He said he had done it repeatedly. We have not got the reports of December, of course, but we have the reports of the other, we have all the reports of the year previous up to December.

HIS LORDSHIP: McLeod did not say that those sheets that he booked in, went to this witness.

MR. GUY: I don't suppose he knows who they go to.

MR. CAMPBELL: McLeod didn't say that it was during 1925 that these things occurred. My learned friend tried to ascertain from him. He stated definitely that he could not give him the dates.

MR. GUY: I was asking 1925. We have not got the December ones,—they are gone, but we have all the records previous to that.

MR. CAMPBELL: For one year—eleven months—and McLeod has been giving evidence covering a period of seven years. Probably he was well stopped from writing those reports.

MR. GUY: Well, my Lord, if that is the kind of evidence my learned friend is relying on, the evidence of three years back, something that happened three years back, I would like to know.

HIS LORDSHIP: I don't see what you are trying to do.

MR. GUY: I just want to do this, my Lord. McLeod has said that he booked out these cars, as having booked them out repeatedly, meaning that he had booked them out as having defective headlights, repeatedly. Now I want to know, I have the records here for the year previous to, or for the balance of the year previous to the December, the December ones we have not got, but we have all the rest of them, and I want to ask this witness now what references McLeod has made to these headlights in those reports.

HIS LORDSHIP: The reference might not have been to the missing month. McLeod could not tell you when these sheets were turned in.

MR. GUY: But they are turned in every day.

HIS LORDSHIP: Well, he could not tell what month it was, and it might well be that the very references he had in mind were in the month that can't be found.

MR. GUY: Does your Lordship not want me to put them in, or ask the witness about them, about the sheets prior to December? Those are the ones I am dealing with now.

HIS LORDSHIP: Supposing you produced the sheets for 1925. Not one of them contained any reference to headlights by McLeod. Does that prove he is untrue making statements that he did, where you have a whole month and ten days during which time reports were made?

MR. GUY: It certainly is evidence, my Lord, whether these reports were continuously made, as McLeod said.

HIS LORDSHIP: McLeod has not tied himself down to any period, and the jury will have to take his evidence upon that point for what it is worth.

MR. GUY: Does your Lordship refuse that?

HIS LORDSHIP: No, I wouldn't allow that; it is wrong; I think you must know it is wrong.

MR. GUY: Well, I can't see why, when a man makes a statement that he has complained repeatedly in his reports; he has booked them out repeatedly in his reports that there is defective headlights, you can't show him reports did you do it, and when did he do it.

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HIS LORDSHIP: Well, but he didn't fix the period.

MR. GUY: I want to show during that period he did not.

HIS LORDSHIP: You can't show it because the reports are not here.

MR. GUY: Not for December, but they are for all previous.

HIS LORDSHIP: But for the rest of the time. He didn't say that he had made reports for the balance of the year. If he had said so, the production of those reports would contradict him. He has not said so. What's the use?

CROSS-EXAMINED BY MR. CAMPBELL:

Q. How long did you say you had been in the employ of the Company? —*A.* About fourteen years.

Q. Which company?—*A.* Winnipeg, Selkirk and Lake Winnipeg Railway.

Q. Are you in their employ now?—*A.* Yes, sir.

Q. Is Mr. Watkins on the payroll of the Winnipeg, Selkirk & Lake Winnipeg Railway, the Defendant in this action?—*A.* He is.

Q. And as a result of statements made to Mr. Thould by Mr. McLeod, did Mr. Thould not write you a letter?—*A.* Not that I can recall.

Q. Was it not after receipt of a letter from Mr. Thould, that you asked Mr. McLeod to meet you at your office.—*A.* It was not.

Q. You were talking to Mr. McLeod over the telephone, I believe, on the night of the accident; is that not correct?—*A.* I don't remember whether I spoke to McLeod that night over the telephone or not.

Q. I am informed that you had a conversation with Mr. McLeod over the telephone, and he reported this accident to you; do you recall that? —*A.* I don't.

Q. How did you know about the accident?—*A.* One of our agents told me of it.

Q. Agents where?—*A.* In Selkirk.

Q. How many agents have you got there?—*A.* One; one in Winnipeg.

Q. Was it the Selkirk Agent who told you?—*A.* Yes, the Selkirk Agent.

Q. One of the one agent you had in Selkirk told you, is that correct? —*A.* It was the Selkirk agent told me.

Q. That was what time in the evening?—*A.* I should judge somewhere between half-past—somewhere around half-past seven at night. I didn't pay very particular attention to the time; it was somewhere around half-past seven, I think.

Q. Did you not request Mr. McLeod to bring that car back to Selkirk on the night of the accident?—*A.* No, I instructed him not to.

Q. I am informed that you instructed him to bring the car to Selkirk after you knew that the headlight was entirely broken off as a result of the accident; do you deny that?—*A.* I deny that positively.

HIS LORDSHIP : You mean the night of the accident ?

MR. CAMPBELL : The night of the accident, my lord.

Q. I am also instructed that McLeod refused to bring the car back to Selkirk to you, and so informed you. Do you deny that ?—*A.* I do deny it.

Q. Now in your examination, in answer to my learned friend, you state that from the place where you saw an indication of the accident was about a quarter of a mile from where the team or the trucks of the team entered upon the track ?—*A.* Yes.

Q. Is that correct ?—*A.* That is correct.

Q. You are sure that is right, are you ?—*A.* Somewhere near a quarter of a mile.

Q. Do you remember being examined for discovery in this action ?—*A.* I do.

Q. You are reported to have been asked, and answered this question. I will read 32 and 33. " Q. What did you find ?—*A.* I found the team had swung out from the highway on to our track a distance of about, oh I should judge nearly half a mile north of the scene of the accident. Q. The team had evidently gone down the track half a mile before they were struck ?—*A.* Yes." What do you say to the Court and jury in explanation of your changing your mind as between the date of your examination for discovery and today ?—*A.* It was not measured ; just took a guess at it.

Q. You took a guess at it, and you took a guess the other day ; is that correct ?—*A.* No ; that is not correct.

Q. Well, how did you do it ?—*A.* I took a guess at the time I was there, and I judged it to be a quarter to half a mile.

Q. And then again you were asked, questions 182 and 183, " Have you got any notes in your diary on that point ?—*A.* No, sir, I have not. Q. I think you told me about half a mile ?—*A.* I judge it to be about half a mile." You were judging it at that time ?—*A.* Yes.

Q. And guessing today. How did you arrive at your answer today ?—*A.* The same way.

Q. Is that how you have arrived at all the answers you have made here to your questions ?—*A.* No, sir.

Q. Now, were you at Selkirk when this car came in ?—*A.* Which car ?

Q. This car concerned in the accident, after the accident ?—*A.* I don't remember.

Q. Then Mr. Watkins, your company's witness here, as to this light, stated this morning that the reflection of that headlight under proper conditions would penetrate the darkness about 750 feet. What do you say as to that ?—*A.* 750 feet, did you say, or 700 at least anyway.

Q. I will make it certain so as not to over-estimate it. I am sure it was no less than 700 he said. What do you say as to that ?—*A.* Oh, I think probably it would, yes.

Q. You think it would ?—*A.* I think it would.

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Q. What do you base your conclusions upon, just upon what he has said?—*A.* No, I have had quite a bit of experience with those particular headlights.

Q. How long a time have you had experience with those particular headlights?—*A.* Ever since I have been with the company.

Q. Well, what is your experience upon, upon which you base this?—*A.* As a motorman.

Q. Yes, have you operated this kind of a light?—*A.* I have.

Q. And over your experience of a number of years, you are quite positive that would be a reasonable statement to make, 700 feet, do you say that?—*A.* Yes, in that neighbourhood, around 700 feet.

Q. And I need not ask you again if you recollect being examined for discovery; you do recollect that, and I am going to read you your question and answer on that on your examination for discovery; reading at question 109. "How far ahead can objects be seen on the track with those headlights, Mr. Hawes? Oh, ordinarily I think about 250 feet?—*A.* That's not the question you asked me.

Q. What is the difference?—*A.* You asked me how far the light would penetrate the darkness.

Q. Yes, what did you think I meant by that? The light penetrating the darkness to enable visibility?—*A.* You could not see an object on the track that distance.

Q. To enable visibility, didn't you think I meant that?—*A.* No, I did not.

Q. What do you say now as to visibility of, say, a team on the track; how far would they be seen?—*A.* A team of horses on the track?

Q. A team and a sleigh?—*A.* I would say a team of horses, what color, it would depend on the color.

Q. Well, what color were these horses?—*A.* I don't know.

Q. Neither do I.

His Lordship: How far ahead do you say a team of horses could be seen with a normal headlight?—*A.* That's the question, wasn't it?

Q. That's the question, a team of horses, with a man sitting in a sleigh?—*A.* A dark object would be more liable to be seen than a light object. If the horses were of a dark color. I would say three pole lengths.

Q. How far would that be?—*A.* That would be a little over 300 feet, about 420 feet.

Q. How many yards apart are your poles?—*A.* They vary, but I think along that point where this accident occurred, about 140 feet.

By His Lordship:

Q. It would be about how many poles?—*A.* About three poles.

Q. Nothing to prevent their distinction at that distance with a normal headlight?—*A.* No.

Q. Well, that's 420 feet. Now, how far could one horse be seen on the track, one horse alone, walking down the track ahead of your car?—*A.* A dark horse could be seen about the same distance.

Q. And a sleigh could be seen about the same distance with a man sitting in the sleigh, couldn't it, or would you distinguish between a horse and a sleigh to that extent?—*A.* Well, of course, a horse is higher than a sleigh.

Q. The evidence is this man had a three-foot box, three-foot top on a sleigh, and he was sitting on top of the box. How far do you think he could see that object with a normal headlight?—*A.* A man sitting up on top of the box.

Q. Yes?—*A.* He should be seen at three pole lengths.

Q. 420 feet, at least?—*A.* Yes.

Q. Now what prompted your answer of 250 feet when you have sworn on your examination for discovery to tell the truth, the whole truth and nothing but the truth, what prompted you to say 250 feet?—*A.* That as an actual test I saw made of a man standing on the track, not a horse.

Q. Well, I will read you question 112, and we will see how your man test compares on that foundation. "You could see a man's head on the track 250 feet with a headlight. I should say not." You have just told us here that you could see a horse 420 feet, and now here you have said distinctly in your examination for discovery that you could not see it. Which one do you want us to believe now?

HIS LORDSHIP: I thought he was speaking of the visibility with a headlight.

MR. CAMPBELL: With a normal headlight, that is the case under both hypotheses.

MR. GUY: Without a headlight in the question. My learned friend misread it.

MR. CAMPBELL: I am informed that is a stenographic error.

MR. GUY: No, it is not.

MR. CAMPBELL: However, I will withdraw the question, so as not to have any misunderstanding, my lord.

Q. But you do change your viewpoint from 250 feet now as to the sleigh and the man sitting on it, to 420 feet, haven't you?—*A.* It was not referred to as a man and a horse if my memory serves me correctly.

Q. You were asked the question, I will read it to you again.

HIS LORDSHIP: A three foot box was described with a man sitting on it and a team drawing the sleigh, and he said it could be seen at the same distance you have spoken of with regard to the dark team.

Q. Did you wish to change that?—*A.* I didn't hear that.

Q. The first question you were asked was as to the visibility of a team of horses under the headlight. You said 400 feet, three pole lengths, or 420 feet, if it was a dark horse?—*A.* Yes.

Q. And then you were asked as to the visibility of a three foot box with a man sitting on it, drawn by a team of horses, with a box being on the sleigh. My notes here indicate you gave the same answer, 420 feet, as a

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reasonable distance at which it could be distinguished under the headlight? —*A.* Yes, under the best of conditions I say 420 feet.

BY HIS LORDSHIP:

Q. What?—*A.* Under good conditions, 420 feet.

Q. What do you mean by "good conditions?" It was dark, it was night, and the headlight was throwing its beam of light ahead. What do you mean by good conditions?—*A.* Yes, if it is a good clear night, 420 feet.

Q. A good clear night?—*A.* Yes.

Q. With a good clear night, you would not perhaps need a headlight at all. We are speaking of a night that it required a headlight, artificial light to illuminate the track. That is what we are discussing?—*A.* Yes, 420 feet, about that.

Q. And then in question 110, you were asked; I will read 109 first, and then you will catch the significance. "*Q.* How far ahead can objects be seen on the track with those headlights, Mr. Hawes?—*A.* Oh, ordinarily I think about 250 feet." Then the next question: "Do you suggest that is as far as the motorman can see ahead with the headlight at night, a horse, for instance, on the track?—*A.* He could not see it much farther." Now, why do you change your mind?—*A.* Why?

Q. Yes?—*A.* I think possibly I under-estimated it there.

Q. And yet you were sworn to tell the truth on that occasion just as on this occasion? Was there any reason why you should not have been just as careful then as now?—*A.* No.

Q. No, I should think not? Well now, Mr. Hawes, in answer to my learned friend, you discussed what the tracks you saw on the railway, you say there were tracks of horses and tracks of a sleigh. Can you tell us with relation to the rails where the horse's tracks were, inside or outside of the rails?—*A.* I would not be, I could not make a statement on that, no, I would not be sure of it.

Q. Who is the man, I didn't catch his name, Mr. Hawes, this forenoon, who is the man who does your inspecting of lights and that sort of thing at Selkirk at night when these cars come in?—*A.* There is no inspection of lights done at night.

Q. No, I thought not. Who is the man in charge of the barn down there at Selkirk?—*A.* At night?

Q. Yes?—*A.* The night watchman.

Q. Is he a mechanic of any kind? Has he a trade at all, or is he just an ordinary night watchman?—*A.* He is a night watchman, yes.

Q. Is he required to have any technical knowledge, or any practical knowledge of these lights, or of these cars?—*A.* No, but he has some.

Q. What rate of pay do you pay him, what is his rate of pay?—*A.* Thirty cents an hour.

Q. The pay of a common laborer, I should say, isn't that correct?—*A.* Yes.

Q. And that is about the class of work he is expected to do, is it not?—*A.* That's right.

BY HIS LORDSHIP:

Q. He is not employed for expert work?—*A.* No.

Q. Very good. Now Mr. Hawes, you know Mr. Showski who testified here yesterday; Mr. Showski, the provincial constable who testified here yesterday; do you know him?—*A.* Well, not by name, no.

Q. Do you know the constable who interviewed the Plaintiff in the hospital; have you ever seen or met him?—*A.* No, I don't think I have.

Q. Do you know, have you ever received any reports from anybody as to the route—I will put it this way: Have you ever received or heard of any statements made with reference to the route which this team took from the time it left the highway, the travelled portion of the highway until it was struck by this car?—*A.* Have I ever heard it reported?

Q. Have you ever seen or heard any reports, or seen any statements or heard any statements?—*A.* I have, yes.

Q. And it has been stated to you that the team went across the track and made the circle out on the prairie, and came back on the track, has it not?—*A.* That has been stated to me.

Q. As a matter of fact, do you not know that the constable who testified here yesterday, followed that track around on the prairie?—*A.* No, I didn't know that.

Q. Were you not informed that?—*A.* No, I don't think so.

Q. You are sure of that now?—*A.* I am sure of that.

Q. Is it not a fact, or do you not know as a fact at least, have you not been informed, that Mr. McLeod followed the track around on the prairie?—*A.* Never heard of it.

Q. Do you want the Court to believe that the team did not cross the track and make the circle on the prairie?—*A.* According to my information it did not, and lots of others, too.

Q. Well, we will no doubt hear from them sooner or later. You want the Court then to believe as a fact on your evidence, that they did not make this circle on the prairie at all, that they came over from the roadway over to the track, and then went down the track?—*A.* Yes, sir.

Q. That is what you want the Court to believe?—*A.* Yes, sir.

BY HIS LORDSHIP:

Q. But you told me, witness, that you did not investigate the question of the track at all?—*A.* No, but I saw the marks where they came east of the track.

Q. But you did not look for marks west of the track, so how could you be so positive about it?—*A.* I was satisfied in my own mind from what I saw, that that's what they did.

BY HIS LORDSHIP:

Q. Well, your own expression of opinion?—*A.* Yes, sir.

Q. You did not take the ordinary methods of verifying that opinion by going out on to the prairie?—*A.* No, I did not go out on the prairie.

In the Court of King's Bench for Manitoba.

Defendant's Evidence.

No. 16.
J. C. Hawes.
Cross-examination—*continued.*

BY MR. CAMPBELL:

Q. Now, witness, you did observe the tracks leading from the point where you considered the accident took place, or to the point where you thought the team went on the track?—*A.* Yes.

Q. Am I right in saying that one of the sleigh tracks, one of the runners, was on the outside of the rails, and one on the inside?—*A.* I would not swear to that.

Q. You could not swear to that, and yet you observed them?—*A.* I am not sure.

Q. I suggest to you, witness, that the westerly runner of the sleigh left its track on the outside of the westerly rail, what have you to say as to that?—*A.* It may have.

Q. It may have?—*A.* Yes, it may have.

Q. As a matter of fact wasn't one of the horses' footprints on the outside of the rail?—*A.* I could not say; I don't remember that.

Q. Well, what did you investigate carefully, anyway?—*A.* I just went over the ground where this team had come down and walked back as far as this crossing where they had come on the track.

Q. Just walked back as far as the crossing?—*A.* Yes.

Q. Then the information you have given us then now is all of the real investigation that you made?—*A.* Yes.

Q. And notwithstanding that, you desire the court and the jury to believe, as you said a moment ago, that the team did not in the first place cross the track and make a circle on the prairie?—*A.* No, I didn't think so. I didn't think it did.

Q. That is not the question I asked you. Will you answer the question now, please?—*A.* I don't believe they did.

Q. I did not ask you your belief. I am asking you what you desire the court and the jury to believe?—*A.* Naturally I want the jury and the court to believe; it is only natural.

Q. Do you know which horse escaped? Was it the one on the right hand side or the one on the right hand side as they would be driving along as a team?—*A.* I judge it to be the one on the east side.

Q. That escaped?—*A.* That died, that was killed.

Q. Then it would be the right hand one which escaped.

(No answer.)

Q. Were these marks of sleigh and horses quite distinct on that track?—*A.* They were in spots.

Q. What would render them indistinct in other spots?—*A.* Well, there was bare gravel in places.

Q. Had there been a snowstorm at all, or drifting of snow, between the moment of the accident and the time that you saw the track?—*A.* I did not think so.

Q. Mr. McLeod, the motorman, resigned from the service?—*A.* Yes.

Q. Resigned from the service when?—*A.* Sometime in March, 1926.

Q. In March, 1926. I am instructed that he received some recognition, a prize of some kind as being your best motorman. What have you to say as to that?—*A.* Not to my knowledge, not for being the best motorman.

Q. Did he get a prize for any other purpose that you are aware of?—*A.* I am told he did some years ago.

Q. Have you any reason to doubt that he did?—*A.* Oh no, I think he did, yes.

Q. You think he did?—*A.* Yes.

Q. He got a prize for not running into stock or something like that?—*A.* He did not kill any animals.

Q. Didn't kill any animals, and he won a prize?—*A.* I think that was it.

Q. As a matter of fact, when he left the service, didn't you take up a complimentary subscription on his behalf?—*A.* No, I did not personally.

Q. You knew it was taken up?—*A.* Oh yes.

Q. Had you something to do with it?—*A.* Yes, I contributed.

BY HIS LORDSHIP:

Q. Well, from your knowledge, was he a capable man on the job that he was employed on?—*A.* Yes, he was an average motorman, the average motorman.

Q. Had he a reputation of being careful to your knowledge?—*A.* Yes, yes.

Q. And is it true that he had a good record for having no accidents, or few accidents?—*A.* No, unfortunately he had quite a few accidents, but he was not considered to blame in any case.

Q. I am not asking you about accidents what he was to blame for. I am asking you if he had a good record for being careful and prudent and avoiding accidents?—*A.* Yes.

Q. Did he bear a good character for honesty?—*A.* Yes, sir.

Q. Truthfulness?—*A.* Yes, sir.

HIS LORDSHIP: Well, I am glad you give him that much credit.

BY MR. CAMPBELL:

Q. Now, Mr. Hawes, didn't he tell you on that night in Winnipeg the night of the accident, that the accident was due to a defective headlight?—*A.* The night of the accident.

Q. Yes, when you saw him in Winnipeg?—*A.* No sir, I am positively certain he did not.

Q. Did you ask him as to the cause of the accident, if he could explain it?—*A.* Yes, I did.

Q. And what did he say?—*A.* He said a drunken Galician got up on the track.

Q. Did he explain how he came to run into him?—*A.* No, I don't think he did.

Q. Now, wouldn't you have got to the very bottom of this thing?—*A.* No, sir.

In the Court of King's Bench for Manitoba.

Defendant's Evidence.

No. 16.
J. C. Hawes.
Cross-examination—*continued.*

Q. Why not?—*A.* Because I did not consider that the time to do so.

Q. What did you race up to Winnipeg for?—*A.* To see that all arrangements had been made for placing this car out of the way.

Q. Couldn't you have done that by telephone?—*A.* Oh, possibly.

Q. Well, to be sure you did. Do you mean to say that the underlings in the north end car barns wouldn't obey your orders to impound that car?—*A.* I only saw McLeod for two or three minutes.

Q. Well, never mind, couldn't you have telephoned up, and say detain that car?—*A.* Yes, that was done.

Q. Then why did you come up here?—*A.* Well to put the car out of the way; to phone Mr. Thould; to phone Dr. Macdonald. I also phoned the hospital.

Q. I know you did, but why did you come up here? You sent for these two men, the conductor and the motorman. They were pretty nearly the first men you saw when you got to Winnipeg?—*A.* Yes, and they left immediately for Selkirk.

Q. Well, why did you interview them, if it was not for the purpose of finding out how the accident did occur?—*A.* Well, just casually.

Q. Well witness, do you expect the jury to believe that? Here you are superintendent of that road?—*A.* It is the truth, sir.

Q. Here these men are under your control. You took the trouble to come to Winnipeg. The first thing you did was to interview these two men about this accident, and yet you were not concerned to find out how it occurred; do you want the jury to believe that?—*A.* It is the truth, sir.

Q. Oh nonsense?—*A.* It was not the time to make any enquiries regarding the accident.

Q. Oh, is there an appointed time for that?—*A.* No, but they make all reports to the accident department.

Q. Yes, but you knew those men would have to put in a written report, and he would do that when he returned to Selkirk, and why did you interrogate him about the accident here in Winnipeg if you were not anxious to find out?—*A.* Just casually to find out. It was only a matter of a minute he left for Selkirk immediately after I arrived here.

Q. You could have detained him here?—*A.* I know but I did not want to.

His Lordship: All right, witness. It is a very strange thing to me. Horse was killed, another injured, sleigh broken up, a man was badly hurt, that it was a question of life or death. That was all the interest you could take.

Mr. Guy: Well, my Lord, I think perhaps you are very unfair to the witness.

His Lordship: Well, Mr. Guy, that is for the jury to say.

Mr. Guy: Yes, but your Lordship is now attacking this witness, and it does not seem to me to be either fair ——

HIS LORDSHIP: I am not attacking the witness. I am trying to get from the witness a real explanation of his conduct.

MR. GUY: There was something to be looked after here. There was a man who was seriously hurt, and it was the duty of this man, it seems to me, to be on the spot and see that everything possible was done under the circumstances.

HIS LORDSHIP: But he was not on the spot when the man reached Winnipeg. The man had been brought up to Winnipeg. The ambulance had taken him to the hospital.

MR. GUY: If your Lordship will allow me. It seems to me it was the duty of this man to get to the spot.

HIS LORDSHIP: That is a matter you can discuss with the jury and not with me.

MR. GUY: I know that, my Lord.

HIS LORDSHIP: Well, will you please cease. It is for the jury to say whether I have been unfair to this man or not. Now have you done with your witness?

MR. GUY: Yes, my Lord.

No. 17.

Evidence of C. W. Parsons.

CHARLES WILLIAM PARSONS, sworn.

EXAMINED BY MR. GUY:

Q. What is your occupation, Mr. Parsons?—*A.* Foreman of the armature room at Assiniboine car barns in Winnipeg.

Q. Well, that is your present occupation?—*A.* That is my present.

Q. Previous to coming to Winnipeg to be foreman of the armature room, you were employed at Selkirk on the Winnipeg, Selkirk railway?—*A.* Yes.

Q. How long had you been employed at Selkirk?—*A.* Approximately five years.

Q. And in what capacity?—*A.* As barn foreman at Selkirk previous to my present occupation.

Q. Well, then, you were barn foreman at Selkirk in January 1926, were you?—*A.* Yes.

Q. As barn foreman, what were your duties in so far as equipment was concerned?—*A.* To see that everything was kept in perfect running order.

Q. Did you have jurisdiction over headlights?—*A.* Yes.

Q. Well, your duties included supervision of headlights?—*A.* Supervision of headlights, yes, your honour.

In the Court of King's Bench for Manitoba.

Defendant's Evidence.

No. 17. C. W. Parsons. Examination—*continued.*

Q. What was the nature of your supervision over these headlights? —*A.* Well, in regard to the work, do you mean?

Q. What was the nature of your supervision in regard to the headlights?—*A.* I was there to do the work myself, and see that the other fellows did it.

Q. Do what?—*A.* Repairs that were necessary.

Q. You did work yourself?—*A.* Yes.

Q. And saw that the other, the rest of the work was done, is that it? —*A.* That the others did their part.

Q. What part?—*A.* Three other fellows working under me.

Q. It was your duty to make the necessary repairs to headlights? —*A.* And other equipment.

Q. Do you know car No. 16 of the Winnipeg Selkirk railway? —*A.* Sure.

Q. At that time, do you remember the accident on the 2nd of January, 1926?—*A.* Yes, I do.

Q. When first did you see this car after the accident?—*A.* On the Sunday after the accident, the day after.

Q. Sunday after the accident?—*A.* Yes. I was on a little business of my own in Winnipeg, and went to see it.

Q. That would be the next day?—*A.* The next day.

Q. Where was the car then?—*A.* The car was lying at the freight siding at the north car barns.

Q. Did you examine the car at that time?—*A.* Well, I did not make much of an examination of it. I just went there to have a casual look at it, you know. I did not make any special examination of the car there at that point.

Q. Well, did you make any examination?—*A.* No, I didn't, your honour. I just went there to have a look just for my own satisfaction, being that I was on other business in the city. I just went to have a casual look at it.

Q. Well then, subsequently did you inspect the car?—*A.* I inspected the car on the ——

Q. Without mentioning the date, when was it, after the accident? —*A.* After the accident, it was on the fifth or the sixth; on the fifth.

Q. The car remained at Winnipeg until the fifth, did it not?—*A.* Yes.

Q. And then it was taken down to Selkirk?—*A.* Selkirk.

Q. You made your examination at Selkirk?—*A.* Yes.

Q. What did you find when you examined the car?—*A.* I found that there was a light of glass broken in the front door. The door lock keeper was knocked out of its place, the keeper that holds the door lock to the post.

Q. Do you mean the lock of the door?—*A.* Yes, the front door.

Q. That is the door in the middle of the car?—*A.* Yes. Also the headlight cord was pulled out of the headlight.

Q. Anything else?—*A.* That's about all the damage I remember seeing to the car.

Q. Did you make a record of what you did at the time, or what you found?—*A.* Well, I did not find anything very much mechanically wrong with the car.

Q. Nothing mechanically wrong with the car?—*A.* No.

Q. But did you make a record of what you did find?—*A.* Yes.

Q. You did make a record?—*A.* Yes.

Q. Is that your record that you made?—*A.* Yes.

Q. You did not find anything mechanically wrong with it?—*A.* No, I don't know as I found anything mechanically wrong outside of what I have just stated now.

Q. You spoke about the headlight; what was the trouble with the headlight?—*A.* The cord was pulled from the headlight.

Q. The cord was pulled from it?—*A.* Yes.

Q. That is this cord, or the cord by which ——?—*A.* The other end from the plug.

Q. It was pulled out?—*A.* Pulled right out of the lamp.

Q. Where is that attached?—*A.* It is attached to the inside.

Q. Where does it come out?—*A.* It comes out on the side.

Q. Did you examine the headlight?—*A.* Yes, I examined the headlight.

Q. It has been said that the felt, there was not felt in the headlight; no felt around here?—*A.* There was felt there at the time.

Q. There was a felt?—*A.* Yes.

BY HIS LORDSHIP:

Q. Felt around the door?—*A.* Yes.

Q. In the front of it?—*A.* Yes.

Q. Well, what else did you find; is that all you found with the headlight, just the cord pulled out?—*A.* That is all I found.

Q. That is all you found the matter with it?—*A.* Yes.

Q. When were those felts put in?—*A.* Well, I believe it was in 1924.

BY HIS LORDSHIP:

Q. Well, do you know of your own knowledge?—*A.* Yes, I put them there myself; it was me that did it.

Q. You put them there yourself?—*A.* Yes.

BY HIS LORDSHIP:

Q. You put the felt in the headlight yourself?—*A.* Yes.

Q. In 1924 did you say?—*A.* 1924, yes.

Q. So it had been in use for two years?—*A.* Oh yes, they had been in use since then up till now.

Q. You put them in yourself in all headlights?—*A.* Yes.

Q. How are they put in?—*A.* There is a little rim around the inside of, that bit of the headlight protrudes out from the side of the headlight about half an inch, it is about one-eighth of an inch thick, through that I drilled small holes at intervals about three inches apart.

In the Court of King's Bench for Manitoba.

Defendant's Evidence.

No. 17.
C. W. Parsons.
Examination—*continued.*

Q. Perhaps you can explain it here by looking at it, and tell us what you did when you fastened that in?—*A.* This is a rim around on the inside, a metal rim. Through that at intervals of about every three or four inches just where my fingers are placed in here there is a small hole approximately one-eighth of an inch in diameter. Through that is threaded a piece of wire holding the felt; besides being held by that wire this felt is held in place with shellac painted around the rim that adheres to the felt also helping to hold it in place making it pretty rigid, so that when a person is working at it they won't displace it.

Q. So it is wired in and shellacked in, as you have shown?—*A.* Yes.

Q. You say when you saw this headlight and you inspected it, it had the felt in it?—*A.* Yes, I am sure of that.

Q. Now you are in charge of the repair work on the headlights?—*A.* Yes.

Q. How do you—what do you do with regard to them, or how do you operate them in connection with them?—*A.* With testing them?

Q. No, not testing them; just in your ordinary work of keeping them in repair?—*A.* Well, if it is testing them while they are on the car, we generally first clean the glass, clean the smoke and stuff off the glass.

Q. How often is that done?—*A.* Daily.

Q. Daily?—*A.* Yes.

Q. You clean the glass daily?—*A.* Clean the glass daily, yes, and also see that the mechanism is working right by putting the switches into action.

Q. Well then, you test its lighting capacity as well every day?—*A.* Sure thing.

Q. How many are there of these headlights at Selkirk?—*A.* Six or seven, seven I believe.

Q. Of this type?—*A.* Of this same type.

Q. And you say you clean and test them every day?—*A.* Yes.

Q. Well then, is there any further test that is made of a car? Take a car now, not a headlight alone, but of a car, what do you do with regard to repairing cars?—*A.* Well, at intervals of every, we will say approximately five hundred or six hundred miles run, the car is brought in at that period for inspection, periodical inspection.

Q. At Selkirk?—*A.* At Selkirk.

Q. And on this periodical inspection, what is done?—*A.* Under periodical inspecting you go over the whole mechanical parts of the car to see that they are in good order.

Q. That is a general inspection, check it all over, and give it complete and thorough checking up?—*A.* Yes; everything.

Q. Now when anything happens to a headlight, I suppose something does happen occasionally, does it?—*A.* Oh, yes.

Q. Break a glass, or something of that kind, or whatever does happen to them—how do you know about it?—*A.* It is generally done by a report by a motorman or a conductor.

Q. What do they do, motorman and the conductor?—*A.* They have a report sheet in the barn, sign-off whenever a run is finished.

Q. You have a sign-off sheet.—*A.* Yes.

Q. And whenever you find anything wrong, or anything reported on the sign-off sheet, what do you do?—*A.* Set about immediately to fix it, repair it.

Q. The sign-off sheets go to whom?—*A.* To the office at Selkirk.

Q. That is, after you are through with them?—*A.* After we are through with them.

Q. After you are through with them, they go to the office at Selkirk?—*A.* Yes.

Q. And when any reports that are notified come to you?—*A.* Yes.

Q. Does the sheet come to you?—*A.* They are right there in the barn.

Q. You have access to the sheets, have you?—*A.* Oh yes, it is a sheet wrote out on a pad by the motorman whenever he has any trouble, he comes in off his run and signs off whatever is wrong with his car.

Q. But I understand there is a sign-off sheet for each run?—*A.* Certainly, for whatever run.

BY HIS LORDSHIP:

Q. And those are turned in to the superintendent and then they are passed on to you?—*A.* They are turned in to the superintendent after we are through with them.

Q. Do they come to you first?—*A.* Yes.

Q. The sign-off sheets come to you first?—*A.* Yes. They are in the barn, yes, that is where they originally come from.

Q. Now your Lordship has the idea—that there is a separate sign-off sheet for each run, what do you say as to that?—*A.* Well, he signs off at the end of his run.

Q. He signs off at the end of his run, but is there a separate sheet for each sign-off?—*A.* Oh no, not attached to the barn, no.

Q. Well, is there a separate sign-off sheet for each run kept at the barn?—*A.* No.

Q. Well, what is it, one big sheet of paper?—*A.* It is a sheet of paper half as big again as that.

MR. GUY: I have them here for all the months prior to December for every day for every month covering the whole period.

MR. CAMPBELL: What whole period?

MR. GUY: For the year.

MR. CAMPBELL: Who is talking about the year?

Q. When he comes off his run, then he brings the car to the barn, then he goes and fills up the sign-off sheet, and if there is anything wrong with the car, you see from the sheet what it is?—*A.* What is wrong with it.

Q. Well then, those sheets ultimately find their way to the superintendent, and he keeps it?—*A.* Yes.

In the Court of King's Bench for Manitoba.

Defendant's Evidence.

No. 17. C. W. Parsons. Examination—*continued.*

Q. Is there a sign-off sheet for each man?—*A.* No, under each heading of the date, each motorman coming in will sign off his car at the end of his run. One sheet may be representing three or four days, but it is dated in between each daily run.

Q. There was something said this morning, Mr. Parsons, about written instructions from Mr. Watkins to the foreman at Selkirk with reference to inspections of cars, or reports or something; do you know about that?—*A.* Well, I received notice from Mr. Watkins that he was sending me some forms, and that these forms were to be daily filled out, and turned in.

Q. What is this that I show you, is that the ——

HIS LORDSHIP: When was that?

MR. GUY: This is what was called for this morning, my Lord, these written instructions, 30th June, 1921.

MR. CAMPBELL: Is that when that paper was written?—*A.* Yes.

Q. How do you know, did you write it?—*A.* Because I received a copy of it at the same time.

BY MR. GUY:

Q. You were then foreman at Selkirk?—*A.* I was foreman at Selkirk at that time.

Q. It is addressed to you?—*A.* Yes.

Q. And it enclosed forms to be completed by you?—*A.* Yes.

HIS LORDSHIP: Well, that is a form for what?

BY MR. GUY:

Q. What was the form for?—*A.* The one you have in your hand is a periodical inspection. This included three or four different forms, one was a periodical inspection report, and the other was a fill-in report; the next was a damage report.

Q. You received forms for different reports?—*A.* Yes, your honour.

Q. From whom?—*A.* From Mr. Watkins.

Q. Well, that is not one of the forms?—*A.* No, this is just a notice, just the letter that accompanies my Lord, a letter accompanying a number of forms.

MR. GUY: Accompanied and enclosed the forms.

BY HIS LORDSHIP—

Q. And they were from the car barn foreman to you, were they?—*A.* Yes, your honour.

MR. CAMPBELL: I don't know what my learned friend purposes to establish with this evidence.

MR. GUY: I am not establishing anything. I was asked to get, and I brought it, that's all.

MR. CAMPBELL: It does not refer to the headlights or the accident in question at all.

MR. GUY: No, it does not, that is what I say.

MR. CAMPBELL: And the point on which he was asked to get his written instructions was with regard to inspection of headlights. There is not a tittle of suggestion about inspection of headlights here. It says a wheel report.

BY MR. GUY:

Q. Did you receive any other written instructions in writing other than the one a copy of which you have in your hand?—*A.* I don't remember I did.

Q. No, that is the only one?—*A.* That is the only one.

Q. Now, in those forms that you received, were these periodical car inspection reports?—*A.* Yes.

Q. And over what period, what are the periods, are these so many miles?—*A.* Yes, we figure to catch those cars and look them over for inspection between every 500 or 600 miles.

Q. Every five or six hundred miles the car is inspected, and then you make out one of those forms?—*A.* One of those forms; that is, to keep them in good repair.

Q. Every five or six hundred miles the car is turned into you for a thorough overhauling; does that written instructions refer to that?—*A.* This was instructions to use those forms; this is one for these purposes and fill them out and return them to Mr. Watkin's office. In a case where damage like this, I keep one myself at Selkirk, send one to Mr. Watkins.

HIS LORDSHIP: Do you want these things to go in?

MR. GUY: I don't think they are of any use.

MR. CAMPBELL: I shouldn't think they were of any use, far from it. It is not the sort of instructions that I understood from the evidence had been issued at all. It had reference to another matter altogether.

HIS LORDSHIP: I understood there was probably some sort of set form or rule or regulation regarding inspection, and it was that idea we had this morning. The witness has told us that he did make these inspections every five or six hundred miles that the car had run; whether it was necessary for those instructions to come to him in writing or not, I don't think it makes any difference.

MR. CAMPBELL: I have not objected to the evidence that the witness has given.

HIS LORDSHIP: No, and I don't see that the other slip of paper is going to help us any.

MR. CAMPBELL: No, not at all.

HIS LORDSHIP: He has told us that he did make these periodical inspections.

MR. GUY: Yes, he did.

HIS LORDSHIP: He seems a very intelligent witness, and very candid witness.

In the Court of King's Bench for Manitoba.

Defendant's Evidence.

No. 17.
C. W. Parsons.
Cross-examination.

CROSS-EXAMINED BY MR. LAMONT:

Q. Did you examine the ground of the accident?—*A.* Not the ground of the accident.

Q. You made no examination anywhere in that area?—*A.* No, not on the ground.

Q. And you did not examine car sixteen, the car in question, for several days after the accident?—*A.* Not until several days after.

Q. The car was in Winnipeg under the jurisdiction of the claims department from the 2nd to the 6th?—*A.* Yes.

Q. Now, had you seen Mr. Thould in the meantime between the 2nd and the 6th?—*A.* No, I have seen no one at all.

Q. You did not put in a report on the accident at all?—*A.* No, not until the car came back to Selkirk.

Q. I suppose the first thing to be considered after an accident of this sort, Mr. Parsons, is the question of a claim for damages, is it?—*A.* Well, I don't know, I am not familiar with that.

Q. Didn't it strike you as unusual that the car was left in Winnipeg from the 2nd to the 6th before you went down and made your inspection, your inspection in writing?—*A.* Well, I don't know whether it was unusual or not, but being as the man was hurt, I suppose it was the right procedure to hold the car over.

Q. Did you paint this headlight up like this?—*A.* Yes, I did.

Q. When did you paint it?—*A.* It was painted, I guess, about two weeks ago.

Q. You gave it a general over-haul, too, did you, before you brought it up?—*A.* Sure.

Q. Did you put the new felt in the front?—*A.* No, I didn't, that felt has been in there sometime.

Q. Some time, eh?—*A.* Yes.

Q. Is this one of the headlights that was at Selkirk?—*A.* It belongs to Selkirk.

Q. You could not tell us offhand when this felt was put in?—*A.* Well, no, it may have been replaced, I don't know, I could not swear to that.

Q. You could not tell us when this felt was put in here now?—*A.* Not that particular piece, no.

Q. And I suppose the same remark would apply to any of the headlights at Selkirk, you could not tell us when the felt was put in?—*A.* Well, yes, I could tell you when they were first installed, if that is what you are aiming at.

Q. You don't recollect this headlight as distinguished from the other six headlights there?—*A.* No; it is a headlight.

Q. And you can't tell me when this felt was put in in the first place?—*A.* Not to be positive as the one that I put in in the first place.

Q. So I suppose the same remark would apply to any of the felts that are put in of the headlights?—*A.* They may wear, of course, and be replaced.

Q. You could not tell me offhand when you put in a felt recently, could you?—*A.* Well, I have been away from that barn now since sometime last April, twelve months ago.

Q. You would not venture to suggest when you placed the felt in the headlight in question that was in the accident on January 2nd?—*A.* Well, I believe the original felt was in that headlight when it was damaged; I am pretty sure.

Q. You are the foreman there?—*A.* I was, yes.

Q. You don't make any pretence of polishing these things up yourself, do you? You have helpers to do that, have you not?—*A.* I certainly did polish them myself, and look after them myself.

Q. Do you mean to say you take the rags and polish up these headlights yourself?—*A.* Sure, it is just a matter of piece of waste out of your pocket.

Q. What do your assistants do?—*A.* They go around and look after the rest of the equipment as well. I am a working foreman.

Q. You are not a gentleman foreman like some of the other witnesses; you work for your living, Mr. Parsons?—*A.* I do.

Q. You don't pretend to be a technical expert at all, do you?—*A.* No, I don't I am not technical.

Q. You are not an electrician at all?—*A.* Not a licensed electrician.

Q. You have not qualified yourself for any of the technical dress in connection with the electric service, have you?—*A.* No, not to have a license.

Q. And you were the head man down there?—*A.* I was.

Q. There was nobody down there with any technical knowledge on these subjects?—*A.* No, I don't think there was.

Q. You could not tell us what the voltage of that lamp was, could you?—*A.* The voltage of that lamp would be, that is a 550 volt lamp.

Q. Could you tell us how you know it was a 550 volt lamp?—*A.* Well, it is run off the D.C. 550.

Q. Do you know what a volt means, Mr. Parsons?—*A.* Well now, you are getting into the technical part, answering technical questions; I am not familiar with that.

Q. As a matter of fact, you had been one of the motormen of the company for a number of years?—*A.* No, I have not been a motorman, only I have motored one or two, what you would call service cars when they have been coming to Winnipeg we will say, when a car would be coming up here for wood, or something like that, operating a special car.

Q. Prior to going to Selkirk, you were either a motorman or a conductor, weren't you?—*A.* No, I was not. Previous to going to Selkirk I was working on a job called the Western Elevator and Motor Company, but I worked for those about twelve months.

Q. Weren't you employed with the company, and was in an accident and lost your leg?—*A.* Yes.

Q. What were you doing with the company then?—*A.* I was barn foreman.

In the Court of King's Bench for Manitoba.

Defendant's Evidence.

No. 17. C. W. Parsons. Cross-examination—*continued.*

Q. Was that prior to you going to Selkirk?—*A.* No, that was after I went to Selkirk to take charge.

Q. You got hurt in a head-on collision in the daytime on that track, did you not?—*A.* Yes.

Q. What were you doing on the train at that time?—*A.* I was bringing two cars to Winnipeg to be painted.

Q. You were the motorman yourself, were you?—*A.* I was motorman.

Q. And you ran head on into another car?—*A.* Yes.

Q. You don't suggest that the traffic is managed perfectly along that line, do you, Mr. Parsons?—*A.* I don't know much about that; that is not my business.

Q. You pay no attention to that at all, do you?—*A.* No.

Q. You go off duty at six o'clock in the evening, Mr. Parsons, do you not when you were employed at Selkirk at the time of this accident?—*A.* Yes.

Q. You were through at six o'clock in the evening?—*A.* Yes.

Q. And you go home?—*A.* Yes.

Q. Now, McLeod, the night of the accident, he took the car in question back to Selkirk at 6.30, you ascertained that, did you not?—*A.* Yes.

Q. You were not there then, were you?—*A.* No, I was not there.

Q. And there was nobody there to make any technical repairs to the car at all?—*A.* There was a night watchman.

Q. That is the man that gets thirty cents an hour, is it?—*A.* Thirty-five I believe.

Q. Your superintendent told us it was thirty?—*A.* Well it may be thirty now.

Q. He has no technical knowledge at all, this night watchman has he?—*A.* Well, that I can't answer.

Q. Isn't he down there?—*A.* He is a workman working under the capacity he is hired by. He is a night watchman.

Q. He is just a night watchman?—*A.* Yes.

Q. I say he has got no technical knowledge in connection with electrical cars or their operation?—*A.* No, I don't think he has.

Q. He is a Galician, he can hardly talk English, isn't that right?—*A.* He can talk good English.

Q. He is a Galician, isn't he?—*A.* Yes.

Q. A man without any education at all?—*A.* I suppose he has a normal education.

Q. Well, he is the only man that is there to fix the cars up after six o'clock at night, isn't he, apart from the motormen themselves?—*A.* Yes, when they call on me, if there is anything wrong I go over there, and do whatever fixing is necessary.

Q. Well, at 6.30 you go home to your supper, do you not?—*A.* Sure.

Q. How far can you see with one of those bull's eyes, Mr. ——?—*A.* See according to what object you are looking at.

Q. If there was a horse strayed across the track how far could you see?

MR. GUY: Now, my Lord, I don't think he should go into this with this witness at all.

BY HIS LORDSHIP:

Q. Have you ever made any tests, witness, as to how far these bull's eyes lamps will project light down the track?—*A.* To see what kind of an object, your honour?

Q. To see how far it will assist your vision, how far distant an object from an approaching car could be seen with the headlight there is?—*A.* Approaching car?

Q. Anything on the track that the car is approaching?—*A.* Well, if there was a person standing there, a person, a human being.

Q. Supposing you were operating cars that had one of those lights on.

MR. GUY: This witness says he has not operated.

A. I have never driven much during night. It is only in the daytime I did my operation.

MR. GUY: I don't think this witness should be questioned on something that he is not familiar with.

BY HIS LORDSHIP:

Q. Well, you are not in a position to express an opinion as to how far these lights are projecting?—*A.* Not at night on the main highway, no.

BY MR. CAMPBELL:

Q. You have known McLeod for a long time?—*A.* Yes.

Q. Pretty fine reliable chap?—*A.* He is all right, I guess.

Q. You never saw anything wrong with him, Mr. Parsons, in all the time you were there?—*A.* It is according to what you call wrong.

Q. Didn't you always find him honest?—*A.* To my knowledge, yes.

Q. You were very friendly with him all the time you were there?—*A.* Sure.

Q. You never had anything against him, did you?—*A.* No, I have nothing against him.

Q. You would not suggest that he would come to court and perjure himself?—*A.* Pardon.

Q. You would not suggest he would come to court and lie to the jury?—*A.* No, certainly not, I did not come up here for that purpose.

MR. GUY: I object.

Q. Do you remember the night after the accident, Mr. Parsons, January 3, McLeod came in without a headlight on? The headlight was out of order on the 3rd of January, the night after the accident?—*A.* No, I would be off duty, that would be a Sunday.

Q. Don't you remember he left you a sign-off sheet on January 3rd that the headlight was out of commission, and would not show the track up, and he had to come back from Winnipeg without any light at all; don't you remember that night?—*A.* No, I don't.

Q. That is among the sign-off sheets that are missing?—*A.* It is, yes.

In the Court of King's Bench for Manitoba.

Defendant's Evidence.

No. 17. C. W. Parsons. Cross-examination—*continued.*

Q. And you can't give us, throw any light on what became of those sign-off sheets?—*A.* No, I have no handling of them after I sent them away to the office.

Q. Did you make a search for them down there at all?—*A.* No, I have made no search.

Q. Now, you say these cars are inspected every five or six hundred miles?—*A.* Yes.

Q. There is no speedometers on them?—*A.* No, but we figure the trip, so much to the trip, one trip to Winnipeg.

Q. You keep no records of these inspections?—*A.* Pardon.

Q. There is no written records in connection with these inspections?—*A.* Yes, Mr. Guy has a record.

Q. Did you speak to McLeod after the accident?—*A.* Well, in what respect?

Q. In respect of the accident at all?—*A.* Well, I didn't see, I don't believe I saw Mr. McLeod until the coming week, that would be on the Monday or Tuesday.

Re-examination.

RE-EXAMINED BY MR. GUY:

Q. They spoke about your technical knowledge, what experience have you had, any other, except what you have?—*A.* Well, just working amongst the equipment, and knowing it by handling it, and knowing how to repair it, and like of that.

Q. Your knowledge is practical knowledge, and not technical knowledge, is that what I understand?—*A.* Yes.

BY HIS LORDSHIP:

Q. Mr. Parsons, did you make any test of the headlight on this car sixteen when it was brought back to Selkirk?—*A.* Yes, your honour, I put the cord back in its place, and tested it, and found it to be O.K. next day.

Q. You found it would light?—*A.* Yes.

Q. Well, did you try it out on the car, out on the right-of-way to see what degree of light it was giving?—*A.* We have in the back of the shop, we have a bench, and on that bench is regular car equipment assembled on the wall and thereby you don't have to keep running out to the car to test your headlight on the car, and she is throwing just the same light as she is outside. You take it from there, place in on the car, and try it there.

Q. It is provided for that purpose?—*A.* Sure.

Q. So that you can make a test in the shop as efficiently as you could out on the road at night?—*A.* Yes; that is, you would see that your glare was a good white glare. Of course, you couldn't tell how far it was going to throw, but you could tell by the amount of glare and seeing other lights work you know how this one would work. Then you also take it out and put it on the car, and see that the car equipment is O.K. and working with the headlight.

Q. Well, do they use this carbon light in Selkirk, or only the dim light?—*A.* The dim light in town, through the town.

No. 18.

Evidence of P. Myc.

PETE MYC, sworn.

BY MR. GUY:

Q. I believe you are the night watchman at Selkirk for the Winnipeg Selkirk Railway?—*A.* Yes.

Q. How long have you been night watchman down there?—*A.* I have been ten years.

Q. When do your duties commence, six o'clock?—*A.* I start at six o'clock at night.

Q. Do you remember an accident that happened on the 2nd of January, 1926, when Pronek was hurt?—*A.* Yes, I remember that.

Q. Motorman McLeod, you know him?—*A.* Motorman Mr. McLeod.

Q. He has said that on that night about half past six he went into the barn, and asked you for a new carbon for a headlight on his car?—*A.* No, never did.

Q. What?—*A.* Never asked me that.

Q. He didn't?—*A.* No.

Q. He did not ask you for a new carbon?—*A.* No.

Q. Has he ever asked you for a carbon for his headlight?—*A.* No.

Q. That was at 6.30, was it?—*A.* Yes.

Q. 6.30, yes, on the 2nd of January, 1926.

Q. Nor at anytime did he ever ask you for a carbon?—*A.* No, he just come around and go back again.

CROSS-EXAMINED BY MR. LAMONT:

Cross-examination.

Q. You are the whole staff there after six o'clock at night, are you?—*A.* Yes.

Q. Nobody there but you?—*A.* Nobody there but me.

Q. What do you do when anything goes wrong?—*A.* When they ask me for change to another, if they ask me for spare headlight I give them spare headlight.

Q. Did they ever get anything else from you but a spare headlight?—*A.* Oh yes, I punch the clock, and wash the car.

BY HIS LORDSHIP:

Q. If anything went wrong with the car, could you fix it?—*A.* Oh, I can fix it, yes.

Q. What could you fix it?—*A.* I could put the new carbon all right, not very much though.

Q. You could put a new carbon?—*A.* Yes, sure.

In the Court of King's Bench for Manitoba.

Defendant's Evidence.

No. 18.
P. Myc.
Cross-examination—
continued.

Q. The motormen put in new carbons from time to time don't they?—*A.* The motorman, yes they do that.

Q. Several of the motormen put in new carbons?—*A.* Yes.

Q. You remember when they get new carbons?—*A.* No, he never got carbon from me that night.

Q. I am not asking you that. You remember when the motormen get carbons from you on each occasion.

Q. They get from you?—*A.* Yes, they get from me.

Q. You have them in stock there?—*A.* Yes, I got stock there.

Q. And do you keep any record, or writing of any that you give out? —*A.* Yes, but call up to the station, to the office, to Mr. Hawes, or anybody there, could call over there, and I get the order what he needed, whether headlights or something on the car, or something like that.

Q. Yes, but if he came in there after six o'clock you would be the only one there?—*A.* Yes.

Q. And if he wanted a new car you would give it to him?—*A.* Yes.

Q. Would you put it down in your book that you had given it to him? —*A.* No, I get the order from the office, from Mr. Hawes who is at the office.

Q. But Mr. Hawes would not be there at night?—*A.* Yes, he is there all right; got to call him at the house first.

Q. Before you can give him the carbon?—*A.* If he is not there, I give him myself all right.

Q. Couldn't you give him a carbon without Mr. Hawes?—*A.* No, I couldn't do that.

By Mr. Lamont:

Q. Supposing Hawes was away, what would you do about a carbon, would you tie up the traffic?—*A.* I would give him a spare headlight, or a carbon.

Q. How many motormen were working for the company at Selkirk at that time?—*A.* I couldn't talk all the names all right.

Q. You could not tell me the names?—*A.* Oh, yes.

Q. Tell me one name?—*A.* Mr. Hawes, Harry Hawes.

Q. Did you ever give Hawes a carbon?—*A.* No, I give it to Mr. ——

Q. You gave Hawes a carbon, when did you give Hawes a carbon? —*A.* No.

Q. I say, did you ever give Hawes a carbon?—*A.* No.

Q. Never in your life?—*A.* No.

Q. In the six or seven years he was a motorman, you never gave him a carbon?—*A.* No, he is conductor now.

Q. But this Mr. Hawes here, he used to be a motorman down there, didn't he?—*A.* No, that is a brother of his.

Q. Did you ever give motorman Hawes a carbon in your life?—*A.* No, I mean Dickinson, I gave a carbon.

Q. When did you give Dickinson a carbon?—*A.* Couldn't tell exactly what year.

Q. Eight or ten years ago?—*A.* No, not that long. I gave him one all right.

Q. Who else did you ever give a carbon to?—*A.* Nobody else. It don't very often happen that way. Of course, he fix the headlights in the day.

Q. Do you remember in 1924 you gave Dickinson a carbon?—*A.* 1926, it was last year I gave Dickinson the carbon.

Q. What date did you give Dickinson the carbon?—*A.* I could not remember that.

Q. Those lights go bad from time to time?—*A.* No.

Q. They never go bad at all?—*A.* They never need anything like that. They fix it in the barn in the day, there is three men there to fix that.

Q. But at night when you are the whole works yourself, don't the lights go bad, that is the time we need lights at night, isn't it?—*A.* Yes, but I don't need any headlights, in the other cars I got two or three spare headlights. If he says it is bad headlights, I take from one car and put to the other car.

Q. But you change the carbons from time to time?—*A.* Sometimes I did.

Q. You have changed the carbons for McLeod probably, haven't you?—*A.* No.

Q. You have never changed the carbons for McLeod in the eight years he was running down there?—*A.* No, I changed the headlights alright.

Q. Tell us when you changed the headlights?—*A.* Couldn't remember that. It was in 1919.

Q. Did you change the headlights in 1919 for McLeod?—*A.* No.

Q. Back as far as 1919 you will swear positively you did not change the headlights for McLeod in 1919?—*A.* No, I swear I never changed 1926, for that day.

Q. You have just told me about 1919, you will swear positively you never changed the headlights for McLeod in 1919?—*A.* In 1926.

Q. I say 1919, you just told me in 1919 you never changed the headlights for McLeod, that's right, isn't it?—*A.* Yes.

Q. Did you ever give him a carbon in 1919?—*A.* No, I never did.

Q. Do you wish the jury to believe that. What kind of a memory have you got, like McAulay, you can remember back to 1919?—*A.* Oh, I can remember that all right. Of course, I know accidents, he was talking and I remember that all right.

Q. And you are just relying on your memory here. You are just relying on your memory. Why do you, how do you remember January 2nd, 1926, better than July 4th, 1926?—*A.* I remember that because he was talking so much, that's why I get that.

Q. But the accident hadn't taken place then, he didn't talk very much then?—*A.* He was talking when he came in the barn all right.

In the Court of King's Bench for Manitoba.

Defendant's Evidence.

No. 18. P. Myc. Cross-examination—*continued.*

Q. That night of January 2nd?—*A.* Yes, 1926.

Q. At 6.30, and he came to the barn, and he was talking a lot?—*A.* Talking about the accident.

Q. No, but before the accident, at 6.30?—*A.* No, not 6.30.

Q. Was he talking to you before the accident at 6.30, do you remember that so well?—*A.* No, 6.30 he just came around and take the line switch and go back.

Q. What do you do then?—*A.* I was staying by the line switch ready to go back.

Q. You are switchman down there, are you?—*A.* Yes.

Q. In addition to your other duties?—*A.* Yes.

No. 19. W. J. Jones. Examination.

No. 19.

Evidence of W. J. Jones.

WILLIAM JOHN JONES, sworn.

DIRECT EXAMINATION BY MR. GUY:

Q. You are now with Winnipeg Electric Company?—*A.* Yes.

Q. What position?—*A.* Superintendent of transportation.

Q. Previous to your being superintendent of transportation for Winnipeg Electric, I believe you were connected with the Winnipeg-Selkirk Railway?—*A.* Yes, sir, I was superintendent with Winnipeg-Selkirk Railway previous to coming back to Winnipeg, prior to Mr. Hawes.

Q. Mr. Hawes succeeded you?—*A.* Yes.

Q. How long were you superintendent?—*A.* About three years.

Q. Do you know Motorman McLeod?—*A.* Yes.

Q. Motorman McLeod has said that you instructed him not to report defects in headlights at times.

HIS LORDSHIP: No, that is not what he said. He only had communication with this witness in connection with the horse that was killed at the fox farm. Well, you were wrong before, you may be wrong again.

MR. GUY: I understood Motorman McLeod to say that Mr. Jones had told him not to report a defect in headlight on some occasions, rather sometime when a horse was killed or a cow was killed at the fox farm, or something of that nature, but on some occasion.

HIS LORDSHIP: He said that he had made a complaint on the sheet about the headlight to Superintendent Jones. It was in connection with the killing of a horse near the fox farm. He said that Superintendent Jones had told ——

HIS LORDSHIP: No, he does not say what he told him.

MR. CAMPBELL: Mr. Guy brought this out on cross-examination himself. It is a collateral matter, and I submit that my learned friend cannot now introduce evidence on a collateral matter.

MR. GUY: It is not a collateral; he has said that this official, he was making a charge that he complained to Motorman Jones and that he was told by Motorman Jones not to report these defects in headlights.

HIS LORDSHIP: Surely, Mr. Guy, you don't contend that as a matter of evidence that every statement a witness may make is the subject of contradiction.

MR. GUY: No, I quite appreciate that, and I also appreciate that there is a whole lot of evidence in here that should not be in here. Well, as long as it is clear that he did not make any such statement.

HIS LORDSHIP: He didn't.

MR. GUY: Well, as long as that is clear that is the case I don't want to call him.

HIS LORDSHIP: The witness said that in the sheet he turned in in connection with that horse that was killed near the fox farm he did refer to a headlight to Superintendent Jones, but he didn't go on to say what Superintendent Jones had told him because, as I recall it, you shut him off, and properly.

MR. CAMPBELL: That is just what I said. My learned friend brought this statement out on cross-examination; that is a collateral matter, and I submit now he cannot call evidence to contradict evidence on a collateral matter.

MR. GUY: I think I am entitled to ask the witness whether or not ——

HIS LORDSHIP: No; collateral matter; you can't contradict it. The statement if wholly irrelevant.

No. 20.

Evidence of J. Johnson.

JOHNNY JOHNSON sworn.

DIRECT EXAMINATION BY MR. GUY:

Q. You were the conductor on the car of motorman McLeod on the night of January 2nd, 1926, when the accident to Pronek took place?—*A.* Yes.

Q. Do you remember that run?—*A.* Yes, I remember that run.

Q. Was there anything extraordinary about it?—*A.* No, only just through that accident.

Q. But prior to the accident?—*A.* Yes.

Q. Do you recall whether or not the motorman stopped at McLennan and Donald to fix a carbon in the headlight?—*A.* I don't remember of

In the Court of King's Bench for Manitoba.

Defendant's Evidence.

No. 20.
J. Johnson.
Examination—*continued.*

stopping at Macdonald, but we make a meet at McLennan, we met that north-bound at McLennans that night.

Q. Was anything said to you at all about the headlight?—*A.* No.

Q. When anything is wanted on a trip after 6 o'clock at Selkirk, what do you do?—*A.* Well, we generally tell the superintendent about it.

Q. Where?—*A.* at Selkirk.

Q. At Selkirk, where in Selkirk?—*A.* At the station.

Q. When you get into the station, you tell the superintendent?—*A.* Yes.

Q. Who does that?—*A.* Well, the motorman or the conductor. We sometimes tell the conductor about it, and he goes in and tells the superintendent to call up the car barns, and to have it fixed or change cars.

Q. Have it fixed?—*A.* Yes.

Cross-examination.

CROSS-EXAMINED BY MR. LAMONT:

Q. You slipped by stations that night, did you not?—*A.* In my memory I think we did, yes.

MR. LAMONT: He slipped by a couple of stations that night.

Q. Which stations, more than one?—*A.* I don't know whether it was because of the slippery rails or fault of the car or anything, fault of the motor, I don't know anything about that.

Q. That night, you slipped by a station or stations?—*A.* Well, it was a station, or I don't remember exactly, two stations.

Q. Mr. McLeod says there were two stations; you would not contradict that, would you?—*A.* No, because I remember we went by a little way.

Q. You had to back up?—*A.* Yes, we did back up, but that is I don't know ——

Q. That particular night on the run when the accident happened was it?—*A.* I don't remember whether it was on that trip, or whether it was on the trip before.

Q. It was that night, anyway?—*A.* Yes, it was that night, I think so.

Q. Do you remember the stations you slipped by?—*A.* I think Little Britain was one of them, if I am not mistaken.

Q. And what other one?—*A.* Well, I don't remember. St. Andrews, I think was ——

Q. I am suggesting you slipped by Parkdale just before the accident. Mr. McLeod told us you slipped by Parkdale?—*A.* I don't think it was Parkdale.

Q. But it might be Parkdale, you would not swear that it was not Parkdale?—*A.* No, I would not swear it was not.

Q. I suppose slipping by the stations might be caused by the brakes not being very good?—*A.* Yes.

Q. You would not be able to distinguish with the headlights how far you were from the station when you come to put the brakes on?—*A.* Well, you could slip by on account of a slippery rail; it had been snowing that night.

Q. But if you could not see the station very distinctly with the headlight, you would not be able to judge your distances so well as to when to shut the power off?—*A.* I don't know anything about his headlight at all.

Q. I am asking you, if you could not see the station very distinctly, you would not be able to judge how far from it to shut the power off and put the brakes on?—*A.* I guess not.

Q. And don't you remember at McLennan that night, Mr. Johnson, when you rang the bell for McLeod to start off after the other car went by you, he was out in front fixing the headlight, you remember that, don't you?—*A.* I was at the switch, throwing the switch.

Q. But when you went back, and got aboard the car, didn't you ring the bell, and Mr. McLeod was fixing the headlight?—*A.* I don't remember that.

Q. You would not swear it was not correct though, would you?—*A.* Well, no, I would not swear to that, I don't remember about it.

Q. I suppose it is a common practice for the motormen and conductors, when they go back to Selkirk at night, and anything is wrong, to make the best of the job themselves, isn't it, when there is nobody there but the night watchman?—*A.* Oh no, we generally pull out another car if there is anything wrong.

Q. If there is no other car there?—*A.* Well, I never had a case like that happen.

Q. You are the conductor, you just attend to the passengers and the fares?—*A.* I was the conductor.

Q. But the motormen have sometimes to get off the end of the run, and go over to the barn and see what arrangements can be made with regard to taking the car out again if it is out of order?—*A.* I have not had that happen, because any time that we wanted a car or anything wrong with it, why, it was always there for us; the barn man always had it ready for us.

Q. The lights in these cars; they go bad once in a while, Mr. Johnson?—*A.* Not that I noticed while I was on there.

Q. Do the lights never go bad in all your experience?—*A.* Unless the pole was off.

Q. You mean the lights inside the car?—*A.* No, the headlights in the front.

HIS LORDSHIP: He has said he does not know anything about the headlight that night.

MR. LAMONT: A motorman of a car for several years would know.

HIS LORDSHIP: But the witness has said personally he knows nothing about the headlight that night, so why bother with it.

In the Court of King's Bench for Manitoba.

Defendant's Evidence.

No. 21. F. Thould. Examination.

No. 21.

Evidence of F. Thould.

FRANK THOULD sworn.

DIRECT EXAMINATION BY MR. GUY:

Q. You are in charge of the investigation of accidents for Winnipeg Electric Company and the Winnipeg-Selkirk?—*A.* Yes.

Q. How long have you been in that position?—*A.* Nearly eight years.

Q. Do you remember the accident on the Winnipeg-Selkirk Railway, the one the subject of this accident?—*A.* Yes, I recall that.

Q. Do you remember the car in question coming up to Winnipeg and being detained here?—*A.* Yes, I asked for it to be detained.

Q. Is it usual to have cars detained in cases of serious accidents?—*A.* Where there is a probability of a fatality we usually hold them in out of courtesy to the police, so that they might make an inspection if they wish.

Q. Where the injury is serious?—*A.* Yes, or where we think it is serious.

Q. So that you hold them in for inspection by the police?—*A.* That is so.

Q. In case of a coroner's inquest?—*A.* In case there is any enquiry by the police, we like to have the car there for them to do what they wish.

Q. Now, did you release this car on the fifth of January?—*A.* Yes.

Q. You released it to go into operation?—*A.* Yes.

Q. Why?—*A.* Because I had learned from the medical attendants that the possibility of a fracture was rather remote and there was no use of keeping it there further.

Q. Now, Motorman McLeod has stated that he came into your office, I think around the 5th or 6th?—*A.* It was on the 5th of January.

Q. That is the day you released the car?—*A.* Yes.

Q. And he has said that he told you that the headlights on those Selkirk cars were not worth powder enough to blow them to hell. What have you to say as to that?—*A.* He did not make any such remark as that. He never made such remark to me, no.

HIS LORDSHIP: When did McLeod say that? I haven't got any record about him seeing this man at all.

A. He did not make the statement that they were not worth the powder to blow them to hell.

Q. The headlights?—*A.* I understood the question to refer to headlights, yes.

Q. How did he come to be in your office on this occasion?—*A.* I asked for him to come in.

Q. For what purpose?—*A.* Well his written report ——

Mr. GUY: Perhaps the purpose is not relevant, but he asked him to come at any rate.

CROSS-EXAMINED BY MR. LAMONT:

Q. Your duty is to fight damage claims, Mr. Thould, is it not?—*A.* No sir, I am an investigator. I assist counsel, of course.

Q. To fight damage actions?—*A.* I assist in trying to get justice; unfortunately that involves damage actions.

Q. You are not employed by the government to give justice for the public, are you?—*A.* I hope I am a good citizen.

BY HIS LORDSHIP:

Q. You are employed by the Defendant railway?—*A.* Yes.

Q. Are you employed by the Winnipeg–Selkirk Railway?—*A.* I do all the investigation for the Winnipeg Electric and subsidiary companies.

Q. You are not employed by the Winnipeg–Selkirk Railway?—*A.* I am not on their pay roll.

Q. You are paid by the Winnipeg Electric?—*A.* I am.

Q. Now, McLeod did come in to see you shortly after the accident?—*A.* Yes, he came on the 5th January.

Q. He told you the headlights were bad?—*A.* He did, not that headlight, but all headlights.

Q. He said that all the headlights were bad?—*A.* Yes.

Q. You just want to contradict him on the point about that powder stuff?—*A.* I didn't want to contradict him on any point.

Q. That was your object going in the box.

Q. You admit McLeod complained of all the headlights on that occasion?—*A.* He did.

Q. Couple days after the accident?—*A.* Three days after the accident.

Q. And you knew he had complained to Hawes about the headlights prior to that?—*A.* No, I did not know anything about it.

Q. You discussed it with Hawes?—*A.* No, I discussed it with Hawes following McLeod seeing me.

Q. You wrote Hawes a letter?—*A.* I did not.

Q. You wrote Hawes a letter?—*A.* I have written him letters.

Q. Mr. Thould, immediately after McLeod complained to you about the headlights you wrote to Hawes pointing out the damaging nature of McLeod's remarks, didn't you?—*A.* I did not.

Q. Did you write Hawes a letter the day after the accident?—*A.* No.

Q. You are quite positive about that?—*A.* Positive.

Q. I know you didn't disclose it in your affidavit on production at all. Can you explain to the jury why Hawes complained to McLeod about your letter; this embarrassing letter?—*A.* I don't know which embarrassing letter you refer.

Q. The letter written immediately after you had seen McLeod?—*A.* I deny there was a letter written.

Q. Could you tell us why Hawes and McLeod had a set-to immediately after McLeod came back from his interview with you?—*A.* I think I could suggest a reason.

In the Court of King's Bench for Manitoba.

Defendant's Evidence.

No. 21. F. Thould. Cross-examination—*continued.*

Q. It would not be in connection with letters of yours at all?—*A.* No.

Q. You never wrote Hawes a letter about this at all?—*A.* No.

HIS LORDSHIP: Well, I understood you to say that McLeod three days after the accident made the statement that none of the headlights were worth powder enough to blow them to hell.

A. No, he made a statement that they were no darn good, all the whole bunch of them.

Q. Which one was not worth powder?—*A.* He was not referring to any headlight, I understand.

Q. Then he made the statement that I have just referred to, didn't he?—*A.* No, his statement was that the whole darn bunch of them were no good.

Q. When did he make the statement about them not being worth powder?—*A.* He never made such a statement to me.

Q. He said that none of them were any good?

MR. GUY: But he made no reference to this particular headlight, my Lord.

MR. GUY: That concludes the evidence.

Plaintiff's Evidence.

No. 22. W. H. McLeod (recalled).

No. 22.

Further Evidence of W. H. McLeod.

WILLIAM HUGH McLEOD (recalled):

RECALLED IN REBUTTAL BY MR. LAMONT:

Q. You are already sworn, Mr. McLeod?—*A.* Yes.

Q. Do you remember investigating the tracks of the team and sleigh on the day after the accident in question?—*A.* I do.

MR. GUY: My Lord, is this rebuttal?

MR. LAMONT: My learned friend's witness Hawes, he suggested that there was no trace of this sleigh in this circular route outside on the west side of the track.

HIS LORDSHIP: He said he did not see any.

MR. LAMONT: The effect of his evidence to the jury was that this team came on to the track from the east side and swung down.

HIS LORDSHIP: That don't make any difference. He did not look west of the track.

MR. LAMONT: He tried to lead the jury to believe ——

HIS LORDSHIP: Oh well, he didn't make statement of fact, because he did not prove it. He couldn't.

MR. LAMONT: I want to make that clear to the jury.

HIS LORDSHIP: Oh no, that is not rebuttal.

MR. CAMPBELL: If I might interrupt, I asked the witness if he wanted the Court and jury to believe if that is what happened, and he said, yes.

HIS LORDSHIP: Quite so; that is not a matter for rebuttal; his belief. You can rebut facts, not belief.

MR. GUY: The Plaintiff himself in his case, dealt with the question, and that was part of his case. Now, rebuttal is something that arises out of our defence which a Plaintiff has not had an opportunity of dealing with in his case, but the question of tracks in the snow is not a matter that arose out of the defence.

HIS LORDSHIP: Rebuttal, Mr. Guy, relates to new matter which you brought out as defence; rebuttal may be given on matters, not matters that ought to have been given in chief, but matters, new matters that have arisen from the defence subject to rebuttal. Well, the rule is well settled. There is no argument about it. I have already ruled that this is not rebuttal, so why trouble.

MR. LAMONT: Your Lordship would not allow me to give evidence.

HIS LORDSHIP: No, the man's belief was not a statement of fact.

MR. LAMONT: Well, if your Lordship finds there is no evidence in the defence that we did not go across the track, I won't press the question.

HIS LORDSHIP: There has been no witness called by the defence that I heard testified that they had examined the ground west of the track.

MR. LAMONT: I wanted to make that clear to the jury, my Lord, that this team went across the track.

HIS LORDSHIP: I made it as clear as I could by asking the man questions myself.

BY MR. LAMONT:

Q. Now, Hawes in his evidence said that you told him that there was a drunken Galician on the track. What have you to say as to that? —*A.* I say I never said it.

Q. You never said it at all?—*A.* No, sir.

Q. On any occasion?—*A.* On any occasion.

Q. You had no reason to suspect this man was drunk?

MR. GUY: Don't lead him.

MR. LAMONT: This is rebuttal, Mr. Guy.

Q. You had a conversation with Mr. Thould about the lights when you were up at the office?

MR. GUY: The witness went into that in chief, too, my Lord.

HIS LORDSHIP: That closes the evidence.

In the Court of King's Bench for Manitoba.

No. 23. Discussion at Trial, 27th May 1927.

No. 23.

Discussion at Trial.

Friday, May 27, 1927.

MR. CAMPBELL: Might I ask, I don't suppose your Lordship intends to put questions to the jury.

HIS LORDSHIP: No. In the first place, there is no authority in our King's Bench rules for putting questions. I took the matter up with the Chief Justice in the Court of Appeal the other day, but the practice has grown up with the length of years, we have practically come to recognize as an authority. Of course, Ontario has an express provision in its Judicature Act, and in England there is an express provision in their orders, but we have no such rules here, and while the courts have recognized that questions are all right to be put, there is no obligation to put them.

MR. GUY: Does your Lordship not think that this is a proper case in which questions should be put to the jury? I don't know that this is the time to discuss it, but it does seem to me that this peculiarly is a case which should have questions put to the jury, if only to determine two facts or one fact, conclusion of fact, and that is that if there is any blame on any person in respect to the accident what was that blame. To leave it wide open without any finding of any kind, any particular finding of any kind, does not portray the views of the jury in respect to the various matters which come before them.

HIS LORDSHIP: Well, my charge indicates to them.

MR. GUY: The charge does indicate to them certain things, but your Lordship's charge on matters of law is pretty difficult to follow to a jury who are not accustomed to hearing legal phraseology, and while they would be very desirous of interpreting the legal phraseology, nevertheless it does seem to me that it would be a difficult matter for a jury to do, and I think if they were asked to find; there is, I think, in the rules some provision now whereby you can ask them questions of fact or bring in a general finding. There is some provision for that, my Lord, in the amendments I think, of 1925, 1924-1925, provision for making a special finding.

HIS LORDSHIP: Well, there always was a provision for a special verdict.

MR. GUY: The rules have been altered.

HIS LORDSHIP: There is no rule that I know of which permits questions and puts it in the way the Ontario Act does. There is no authority to enter judgment on answers to questions.

MR. GUY: Yes, my Lord.

HIS LORDSHIP: Well, there was not until quite recently.

MR. GUY: There is authority for that now in our rules quite recently made, whereby a judgment may be entered.

HIS LORDSHIP: My objection to putting questions is simply this, is that it narrows to a jury that I think is unreasonable the discretion of a jury in finding upon the question of negligence, and as they are experienced men they may possibly hit upon some subject of negligence which they think is the determining factor in the case, and may so find and be all wrong, and may have ignored other matters of negligence which would have upheld the verdict; consequently it is all in favor of the Defendant and un-favorable towards the Plaintiff. It has a tendency to increase appeals, that has been my experience, that where these questions have been answered sometimes unsatisfactorily, sometimes imperfectly, it forms a groundwork for an appeal at once, and the appeals are frequently taken. Therefore I say, let the jury have the whole range of the evidence. If they find negligence, then if a man goes to an appellate court the Court of Appeal has the same privilege, and they can search that evidence from one end to the other, and if they can find there evidence which would reasonably support the jury's findings on the question of negligence they won't interfere with the verdict. Now, there is my reason, and it seems to me it is a reason that would appeal to anybody of common sense and fairness. I admit in this case that there is possibly some reasonable ground to ask the jury to find specifically what acts of negligence, if any, the Plaintiff and the Defendants were guilty of, and further more, as there is a charge here of contributory negligence, it might be advisable, perhaps, to get their findings upon that, because there is only one act that, as far as I can see, that could possibly be held to be contributory negligence, and that is the act, if the man was guilty of it, of drinking liquor to such an excess that he became incompetent or unable to drive his horses as a man should. There are two issues, as far as I can make out, that it might be advisable perhaps to have a specific finding upon by the jury.

MR. GUY: Well, my Lord, I am not so much concerned about whether they find contributory negligence, or what they find, but I am concerned about if they come to a conclusion, that is one that's responsible, I want them to say why.

HIS LORDSHIP: Responsible, how do you mean?

MR. GUY: Well, responsible for the accident.

HIS LORDSHIP: Well, that is a question of negligence.

MR. GUY: Well, yes, of course, but your Lordship has suggested that you divide it up into negligence and contributory negligence and so on in that way. While I think that is advisable too in a sense I don't press for anything more than this, that if the jury find that there is a responsibility, tell us in what respect that responsibility lies.

MR. CAMPBELL: My Lord, I can state very little other than what your Lordship has expressed as your own views in this respect. My learned friend has pointed out to your Lordship the difficulty of the jury in understanding our legal phraseology at times, and that is the very point and the very difficulty in putting questions. The jury applies their own language

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No. 23. Discussion at Trial, 27th May 1927—*continued.*

and their own ideas upon the question asked them, and put the answers in their own words, and I am sure your lordship will agree with me that time and again juries have found for a plaintiff, as they supposed and as they intended, and unfortunately expressed themselves in a form of words which afterwards resulted in the reversal of the judgment, or judgment being declined at the trial and given in favor of the defendant, and I submit to your lordship that there can be no purpose served by asking questions. My learned friend thinks he would like to know on what ground they find. If they find negligence, if they find that there was any act which we allege, that is the only limitation, any act which we allege, if in view of the evidence they find that there was negligence, then what difference does it make to my learned friend or the court whether it was on this point or the other? My learned friend suggests that they would like to know. I suppose his client would like to know. I submit, my lord, that that does nor further the ends of justice. If my learned friend's client has any peculiar interest in knowing personally, or from a personal standpoint, they have the whole field open to investigation for them, and this jury and the court ought not to be asked to enable them to find something that might be of benefit to them or otherwise in their practice, and I think, my lord, with very great respect and with very great deference both to yourself and to my learned friend that this is a case that ought not to be complicated with questions, and answers by the jury. It is a simple case as a legal one as it stands, there are only a very few charges of negligence. If any of those are sustained in the minds of the jury upon the evidence we are entitled to a verdict, and I submit that is the simplest and the most straightforward method of the jury giving their expression of opinion as to whether or not under your lordship's instructions as to the law upon the points upon which they are to find, whether or not this Defendant is liable.

MR. GUY: My lord, I may say with regard to that, that the jury in their consideration of the evidence may come to a conclusion on one element, on one conclusion, or come to a conclusion as to a certain fact, which in itself might not be negligence causing the accident. If your lordship thinks that there is any doubt about them not finding what the negligence is and saying one thing instead of another, your lordship could very easily remedy that by telling them what they should do by instructing them, but it does seem to me in view of the general charges that are made; there are general charges; there is evidence in of general neglect, of general neglect, there is plenty of evidence in of that kind, and it does seem to me under those circumstances that this is peculiarly a case which does require a specific finding as to what the negligence was.

MR. CAMPBELL: My lord, with very great deference, I don't want to continue this, but there are no charges of general negligence. We have given specific particulars of every point of negligence, and my learned friend has taken no objection to them up to this time, and he knows what the general practice is.

MR. GUY: I was referring to the evidence of the witness McLeod, in making general charges.

MR. CAMPBELL: Brought out by yourself.

MR. GUY: Not brought out by myself, but they were put in there and they are in there, and there is plenty of them there which, in my opinion, should not be in at all, should not be in, and the jury have the evidence before them now; that is why I think it is important to have a finding as to what it is, what the trouble; if there is blame at all, what is it.

HIS LORDSHIP: Well, I will think over the matter in the meantime.

(Counsel address the jury.)

HIS LORDSHIP: Now, before I charge the jury, I just wanted to discuss the terms of negligence that are alleged in the statement of claim. Now, the first one, in proceeding at a reckless and dangerous rate of speed, and failing to maintain a careful and proper look-out in the car. Now, as I understand the law, there is no legal foundation for that objection. There is no limitation as to speed over a provincial railway. I looked carefully through their acts of incorporation, including the Provincial Railway Act, and I can find no limitation there at all. This railway is given statutory rights to operate either by steam or electric engine between these points, and where is there any authority for me telling the jury that a rate of speed such as this car was operated at thirty miles an hour, according to the Plaintiff's own witnesses, could possibly be negligence.

MR. LAMONT: It is not negligence per se to go that fast. There is no statutory speed limit, but my suggestion was this, it was negligence to go that fast without any lights, that is the position. When the motorman cannot see what is ahead of him owing to defective lights, it is negligence to go that fast, because he cannot see far enough in time to stop.

HIS LORDSHIP: But the two aren't connected at all. You have an allegation as to the headlights. That is not the way you have charged it. You have a separate allegation of inadequate or insufficient lights; you have that, clause (*b*).

MR. CAMPBELL: I don't wish to interrupt your lordship with my learned friend. I would like to direct your lordship's attention to this fact, that the jury may in its wisdom, find on all points of negligence or any one or more of them.

HIS LORDSHIP: They cannot find negligence that is not negligence in law. If they do, they are in error. I have got to instruct them what the law is, and I cannot tell this jury that there is any speed limit with regard to provincial railroads.

MR. CAMPBELL: I don't suggest that, my lord.

HIS LORDSHIP: But that is what you charge here. You say the Defendants were negligent in proceeding at a reckless and dangerous rate of speed. Now there is no foundation in law for that.

MR. CAMPBELL: In view of all the circumstances.

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No. 23. Discussion at Trial, 27th May 1927—*continued.*

HIS LORDSHIP: Under the circumstances make no difference.

MR. CAMPBELL: Well, I will have to be governed by your lordship's ruling. I submit that it is a very common fact that the jury may find on any one or more, and they may unite them all.

HIS LORDSHIP: The jury cannot find negligence that is not negligence in law. I am not referring to the fact at all. Isn't that your contention, Mr. Guy.

MR. GUY: Undoubtedly, my lord.

HIS LORDSHIP: Under the Dominion Railway Act, there is a limitation as to speed in certain localities, passage through towns and villages, I forget the exact ——

MR. CAMPBELL: We haven't in any instance pleaded a breach of a statutory obligation, negligence as we have pleaded it is only pleaded negligence at common law.

HIS LORDSHIP: Well, there is no negligence at common law. If you can furnish me with any authority. I have been unable to discover any authority. Here is the C.P.R. that operates a beach train at 60 miles an hour angling over here where this accident happened. Do you suggest that an accident which resulted in that purely from the rate of speed would be negligence? Certainly not.

MR. CAMPBELL: I submit it might under certain circumstances, my lord.

HIS LORDSHIP: It could not because they have the statutory right to operate their trains, and there is no restriction placed by statute upon the speed at which they may operate.

Then again you say, in failing to maintain a careful and proper lookout on the car. Now the evidence of the motorman himself negatives that. Do you still insist upon that? If there was negligence there at all, it was the negligence of McLeod, the witness upon whom you chiefly rely. There is no evidence that I can find, that he was negligent. He simply said that owing to the headlight being dim, he was unable to see far enough ahead upon the track to distinguish the obstacle there and stop his car in time. You see, I want to eliminate anything that ought to be eliminated from the jury's consideration. Now, isn't that in accordance with the evidence, as you understand it?

MR. CAMPBELL: I submit, my lord, that the evidence will bear a proper inference or a proper conclusion by the jury that there was no sufficient light or that the light was inadequate.

HIS LORDSHIP: Well, I am not discussing the light at all. I will come to that later. I am discussing what you have alleged here, failing to maintain a careful and proper lookout. Is there anything in the evidence that discloses that?

MR. CAMPBELL: Not directly, my lord.

HIS LORDSHIP: Or indirectly?

MR. CAMPBELL: It may possibly be inferred from the fact that the car was not stopped within a reasonable speed.

HIS LORDSHIP: No.

MR. CAMPBELL: I am in your lordship's hands in that respect then?

HIS LORDSHIP: In failing to supply and maintain sufficient and adequate lights to enable the motorman to see the Plaintiff in time to stop. That appears to me the only element of negligence towards which evidence has been directed.

(c) In not keeping the car properly equipped with sufficient and adequate brakes. Now McLeod says that there was nothing wrong with the brakes.

MR. CAMPBELL: My lord, his own direct statement, and in answer to a question put by your lordship, if you might recall, that the emergency brake was not cut in on that car, and that he used the other brake and reversed. In other words, he did all he could with the equipment he had. Now I don't know if that was negligence or not. It will be for the jury to say, but I submit that the jury can very properly find on that evidence.

HIS LORDSHIP: Well, I don't think so, Mr. Campbell, and if I were to tell them that, it seems to me it would be in error, and I want to avoid a suggestion of anything that is going to give rise to further contest.

MR. CAMPBELL: I quite appreciate your lordship's anxiety.

MR. GUY: My lord, with regard to that item of negligence in not maintaining sufficient headlight to enable him to stop to avoid the accident, that is the charge in failing to supply and maintain sufficient and adequate lights to enable the motorman to see the Plaintiff in time to stop, that is the way it reads; in so far as that item of negligence is concerned, I submit there is no duty on us to supply what is impossible to supply. Supposing you could not have a headlight, or there is no headlight, there is no headlight that would enable him under the circumstances to stop in time, we would not be liable. If we cannot get a headlight, that in law the only ground upon which the Plaintiff can succeed is that we had a wrong headlight, an improper headlight, or that our headlights, the one we were using, were not in proper condition, only those two grounds, but this in itself is not, there is no legal duty on us to have a headlight that will show something on the track in time to prevent an accident.

HIS LORDSHIP: Well, your own statute seems to provide this. "All cars running after dark shall be provided with signal lights to be conspicuously displayed thereon." There is a statutory requirement. This is a clause which is embodied in each one of the by-laws of the various municipalities; that by-law was ratified in 1904.

MR. GUY: That is signal lights.

HIS LORDSHIP: Well, what is a signal light? Isn't a headlight a signal light?

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No. 23. Discussion at Trial, 27th May 1927—*continued.*

MR. GUY: I don't think it is a signal light.

HIS LORDSHIP: I think so. What other light could it be? It is intended to signal the approach of a car.

MR. GUY: In any event, a signal light is to tell what car it is; that is an ordinary signal light.

HIS LORDSHIP: Oh, Mr. Guy. This is a requirement conspicuously displayed thereon. It is a light to indicate the presence of a car in the track, the approach of a car. What other light could it be?

MR. GUY: You know what they have in ordinary cars, they have lights across telling the kind of car it is.

HIS LORDSHIP: Well that, my dear man, relates to the street railway of the city of Winnipeg, and has no bearing upon a provincial road.

MR. GUY: Well, of course, there were no cars here—these cars have lights on.

HIS LORDSHIP: They are lighted inside for the convenience of passengers, but those are not signal lights. What in the world does a signal light mean? What does a signal light on a vessel mean, the origin and the ground? They are undoubtedly lights put there to give other vessels and other ships notice of the approach and the locality of the vessel. Why, it seems to me there is no question about it in the world. I say as far as (*a*) is concerned, it is not properly pleaded here. So far as (*c*) is concerned, adequate and sufficient brakes, there is no evidence before me that I can recall, that supports any such allegation, I have here in my notes, in McLeod's evidence, " no fault with the braking."

MR. GUY: He said that.

HIS LORDSHIP: He said something else, but he finally said there was no fault with the braking. So that if the Plaintiff's own witness, the motorman, says that, I don't see how it is possible for me to tell the jury that there was anything wrong with the brakes, so that narrows the question of negligence, as I understand it, down to the one particular (*b*). Of course, it is not very happily worded. It is not worded in such a way as to be really within any legal definition of negligence that I know of, in failing to supply and maintain sufficient and adequate lights to enable the motorman to see the Plaintiff in time to stop. Supposing the Plaintiff had been three or four hundred yards away, and the light was not sufficient to reach him; it might mean that.

MR. CAMPBELL: My Lord, it simply means this, that the onus must be upon the Defendant to furnish a light to see the Plaintiff with in such distance as he knows he can stop.

HIS LORDSHIP: But to see a plaintiff under all circumstances.

MR. CAMPBELL: Circumstances of the kind which we have here, I submit.

HIS LORDSHIP: But that is not your allegation.

MR. CAMPBELL: Purely, as I see it, my Lord.

HIS LORDSHIP: No.

MR. CAMPBELL: I don't know what it means then if it is not that. In time to enable him to see the Plaintiff in time to stop. We are not talking about any other accident; we are not talking about any other circumstances.

HIS LORDSHIP: How is it possible to know what light would be sufficient under all circumstances to accomplish that object?

MR. CAMPBELL: We don't have to prove that the light was not inadequate for all circumstances, my Lord. All we have to prove is for the circumstances in connection with this case, my Lord.

HIS LORDSHIP: Yes, but you don't state under the circumstances.

MR. CAMPBELL: It is a question purely for the jury to say whether or not there was a sufficient light under the circumstances.

HIS LORDSHIP: You don't so state.

MR. CAMPBELL: Well, we are only pleading to this case, my Lord.

HIS LORDSHIP: Well, you have got to take the risk of it. I don't know; it seems to me it is very badly expressed. You take the position that the Defendant Company are not obliged to carry headlights.

MR. GUY: There is no statutory requirement, I think, which requires to have a headlight.

HIS LORDSHIP: The quotation I gave you said signal light, and I take it the signal light must mean something that will signal the approach of the car in the track.

MR. GUY: That is not the way signal lights are used in railway language; signal lights and headlights are two different things entirely.

HIS LORDSHIP: I know they are. There is a signal light placed at the tail of a train to prevent any other trains from running into it.

MR. GUY: And on these trains.

HIS LORDSHIP: Have you a rule regarding headlights?

MR. GUY: It was not put in, my Lord. If my learned friend was relying on that he should have shown that the headlights were there.

MR. CAMPBELL: Then my learned friend ought to have produced those in his discovery of documents.

HIS LORDSHIP: Well, I confess I am all at sea. I don't want to tell the jury on that question of headlight. There is no statutory authority if this signal light does not mean a headlight. Perhaps it does not under the circumstances. What authority is there, that would justify me in telling the jury that the maintenance of proper and adequate or sufficient headlight in their cars operated during the darkness was a requirement either at common law or by statute? We know that as regards motor cars the statute requires headlights.

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MR. CAMPBELL: It is for your lordship to say whether there is any evidence to put before the jury.

HIS LORDSHIP: I am not discussing the evidence at all. I am discussing what I ought to tell them in the matter of law. What law can be invoked that would justify me in telling the jury that the absence of a headlight or an adequate headlight or insufficient headlight would be negligence. What common law have you got?

MR. CAMPBELL: I have a case in mind where it has been held that this particular form of headlight was negligence, and I submit it is a question for the jury.

HIS LORDSHIP: You know, Mr. Campbell, it is not a matter for the jury what the law is. It is for the judge to tell the jury what the law is. What authority would I have for telling the jury that it is an obligation, a matter of duty cast upon this company to the public to carry a headlight on this car, and not having done so, or having carried an insufficient or inadequate light was negligence? I must have some authority for that. There is anthority in the Railway Act governing steam roads and provincial roads. There is no authority in our Provincial Railway Act. I have looked through it carefully twice, so what am I to tell the jury? There is the one element of negligence there that the evidence does bear upon as having been in some sense a contributing factor to the accident, but was the absence of that negligence? If you had put in the regulation or the rule or by-law of the company on that point that would have fixed them with responsibility, but it is not before me. Well, I am afraid under the circumstances I don't see there is anything to leave to the jury.

MR. CAMPBELL: My submission is this, my Lord, that there is ample evidence to support a finding.

HIS LORDSHIP: Please, Mr. Campbell, distinguish between evidence and law. I want to know what the law is that I am to tell this jury on that question. That is the first thing I have got to do is to define the law of negligence to this jury, and I must find out in some measure reasonably what the law requires.

MR. CAMPBELL: I submit, my Lord, that there is an obligation upon the Defendant to operate its cars with a reasonable degree of safety, and that that's by common law, and that there is evidence before your lordship that the cars were operated without a sufficient light to enable them to see this Plaintiff in time to stop, and I submit that is negligence, if the jury so find. I likewise submit that there is sufficient evidence before your lordship to show that it was an obligation upon them to stop in time if they could reasonably do so, stop their car in time, and I submit that there is evidence to show that they did not.

HIS LORDSHIP: Well, I am not discussing the evidence at all. I want to know the legal foundation that I can instruct this jury about.

MR. CAMPBELL: The legal foundation is an obligation.

HIS LORDSHIP: Where do you find that? Where do you find any obligation rests upon this company to carry a headlight?

MR. CAMPBELL: I submit there are text books.

HIS LORDSHIP: I shall be glad then to have it given to me. I have been unable to find any authority. The decisions in connection with steam roads would apply.

MR. CAMPBELL: I did not anticipate that your lordship would ask me for this. If you will allow me. I will get you the text books, and read it to you.

HIS LORDSHIP: Very well, we will have recess for a few minutes.

MR. CAMPBELL: With your Lordship's permission, I will read a brief paragraph from Vol. 29 of Forsythe. Probably as concise a statement of negligence. 1908, page 424 . . . I could not put it before your Lordship in any more concise language than it is put there.

My Lord, I would like to submit to you also what Halsbury says on the same question, twenty-one Halsbury, commencing at page 360. "Negligence in a legal sense is a negative rather than a positive term etc. Then I have Pollock on Torts, quoting Halderson's definition.

HIS LORDSHIP: Yes, I have that. Those definitions of negligence don't appear to me to reach far enough.

MR. CAMPBELL: Then, my Lord, that being so, I would submit to your Lordship then, if that is not the rule that is to apply, then this Defendant can operate his cars just as he pleases, run them as he likes, equip them as he likes, and run whoever he likes.

HIS LORDSHIP: Yes, but there is a rule, his own regulations which you failed to put in, provide for this very thing.

MR. CAMPBELL: We can rely upon the common law as quoted to your Lordship, and we don't need to put in any rules.

HIS LORDSHIP: The common law can only be resorted to as a rule where statute law has failed to specifically provide. The Defendant here has provided. There is the trouble.

MR. GUY: I have not been able to find anything directly in point. The point which I mentioned to your Lordship was that the charge of negligence as set out in the statement of claim, even assuming that there was a duty to have a headlight, to have it of sufficient brightness so as to show something on the track in time to stop was another matter entirely. That is why I say there is no legal duty to do that. In any event, even assuming we should have had a headlight there, it is purely a question for a jury.

HIS LORDSHIP: If you had taken objection, and asked me to withdraw the case from jury, that would have been a good argument. There is a statutory provision in the Railway Act that possibly might be particular enough to cover it. "Every railroad company shall at all times provide adequate equipment and motive power for the efficient working and operation

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of the railway." That is section forty of the Provincial Railway Act, Chapter 168.

Then there is another singular thing about this railway. Section twenty-four of the original act, provincial, apparently gives the councils of the towns and municipalities through which this railway runs together with the company the right to enter into agreements to cover a multitude of things, and amongst them is this: The time and speed of running of the car, but I cannot find, apparently there has been no agreement as to the speed. There has been an agreement incorporated in these different by-laws as to the operation being not less than twice daily, but there is no provision made as to the speed.

Well, I confess I am at a loss to know what to tell that jury on that question of law.

No. 24. Curran, J.'s, Charge to Jury, 27th May 1927.

No. 24.

Curran, J.'s, Charge to the Jury.

Gentlemen of the Jury: It is my duty to define to you the law which governs the rights of parties to this action, and I confess that in this particular case I find considerable difficulty in framing this part of my charge to you in a way entirely satisfactory to myself, and with the feeling that I am giving you a right and a proper direction as to the law. In ordinary actions of negligence there is very little difficulty in explaining the law to a jury, but in this case there is considerable difficulty owing to the particulars of negligence which the Plaintiff has seen fit to charge against these Defendants. While you were in your room, I discussed the situation with counsel, and tried to get as much light as I possibly could upon the subject. However, I confess that it has still left me in a very unenviable position in trying to give you a true definition of what the law is and which should be your guide when you come to consider the evidence and the application of the law to that evidence.

This, as you know, is an action of negligence brought by this Plaintiff against this company, which has a charter or a special Act of Incorporation authorizing it to operate a line of railway from the north boundaries of the city of Winnipeg to the town of Silkirk, and it appears that the railway in question has been in operation for a good many years. It is operated by electricity, an overhead trolley such as we use in the city here for the street cars. The company was incorporated originally by a special act of the legislature of the Province of Manitoba, and they were given certain statutory powers and there is no doubt about it that the railway was properly and legally constructed, and has been properly and legally operated so far as their rights are concerned in the location in which it is to be found today. It is a rather curious scheme this. In the first place, there seems to have been a sort of a contract with the different municipalities stretching between here and Selkirk along the red river through whose territory this road was to

pass, and they were given certain statutory powers to pass by those, authorizing this company to invade their territory with their railway upon certain terms. All this was crystalized in the shape of special legislation in the year 1904, and I should not trouble you with any consideration of those things, because they are not strictly relevant with what you have to try. This being a provincial railway purely, the provisions of the General Railway Act of Canada do not apply to it, but the Provincial Railway Act (we have a general railway act in this province) certainly does apply to it, and I am speaking now with special reference to the equipment of this road, the manner of its operation, the appliances that should be used, speed at which trains should be operated and things of that kind. There is no set provision in the Provincial Railway Act at all that governs the matters of negligence that are alleged in the statement of claim. There is a general provision in the Railway Act that requires a railway which falls within its provisions to provide proper and adequate equipment for the operation and the working of the railway, and I suppose perhaps under that definition as well as under the common law, which we are still working under under certain conditions there should be imposed upon this railway the duty to provide safe and adequate means to protect not only their passengers whom they are carrying, but the public at large who may by accident get upon their line of railway; in other words, that they should take reasonable measures to protect the public from the operation of their cars. A car, you know, operated at a rate of speed of twenty-five or thirty miles an hour is a dangerous object, liable to cause considerable injury, if not death, to people with whom it might come in contact, and it is true they are given the right to operate on the line of railway that they have chosen and selected along the highway. There is no question about that. They are given a statutory right to use that great highway between Winnipeg and Selkirk, and the line is constructed, as you have heard in the evidence, on the west side of that highway, and it appears there is a ditch between the grade on which the railway is operated and the highway which is open to ordinary vehicular traffic, but there is no fence—as I recall the evidence, there is no fence between the highway and the track upon which they operate their cars; and there are, as you have heard in the evidence, crossings, intersections of the highway, or rather leading from the highway across the track to the territory to the west. No doubt many of you gentlemen are familiar with the location there yourself, but of course you must be governed by what you have heard here. There are these crossings at all events, so that people living to the west of the railway track, and going towards their homes by the highway can turn off the highway towards the west and cross the railway track and thus gain access to the roads or trails leading to where they wish to go; but there is no fence between the railway and the highway, and there is no obligation apparently either by statute or by common law requiring the railway company to fence that particular part of their line. At any rate, the question of a fence does not arise here.

Now I am going to give you a definition of negligence that I hope will be of some use to you, and that you will understand, because the foundation

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of this action is that of negligence, and the burden of proof of negligence rests upon the Plaintiff, and he must make out his case to your satisfaction by evidence which you accept before, of course, he can succeed, he must prove either some act of commission or some act of omission on the part of this Defendant Company which was the direct or proximate cause of the accident, and which act of omission or act of commission there was a duty resting upon them either not to do or not to omit to have done. Negligence is a relative term, and depends upon the circumstances of each particular case. What might be negligence under some circumstances at some time or place may not be negligence under other circumstances at another time or place. All the surrounding or attendant circumstances must be taken into account, if the question involved is one of negligence, such as the opportunity for prevention, the degree of danger, among other circumstances of a like nature affecting the standard of care which may reasonably be required in the particular case. The elements of negligence in general, there are three essentials, the existence of a duty on the Defendant to protect the Plaintiff from injury. Second, the failure of the Defendant to perform that duty. Third, injury to the Plaintiff from such failure of duty. When these three elements are brought together, they unitedly constitute actionable negligence, that is negligence for which an action at law to recover damages will lie against the responsible party, and the absence of any of these elements renders the complaint bad, or the evidence insufficient. So then, negligence consists in a legal duty to use care. Second, a breach of that duty. Third, the absence of a distinct intention to produce or procure the damage, if any, which actually follows; that is to say, there must be an absence of intention to commit the act or do the thing which is negligence, and which caused injury, because if it is done intentionally that puts the act into another legal category altogether. Then there must be damage to the Plaintiff, and lastly, and this is probably a hard matter for you to comprehend, a natural and continuous sequence of events uninterruptedly connecting the breach of duty with the damage. In other words, cause and effect. Now that is a definition of negligence that has been accepted as authoritative in our courts for many years, and it is as good a one as I can give you, and I hope that you will be able to carry enough of it in mind at all events to enable you to reach a proper conclusion in this case.

Now, the Plaintiff alleges that the Defendant Company was guilty of negligence in several particulars which are set out in his statement of claim. The first one, is in proceeding at a reckless and dangerous rate of speed, and in failing to maintain a careful and proper look-out on the car. Well now, gentlemen, I am unable to tell you as a matter of law that this railway has imposed upon it any limitation or any statutory limitation as to the speed at which it may operate its trains, and I therefore am unable to direct you that the rate of speed at which this car was operating operated as the evidence disclosed.* I think the motorman said thirty miles per hour, could be considered a negligent act, so I am going to tell you that you may disregard that element, because I don't think that there was any law that controls this company in the operation of its cars and makes it guilty of

* *Sic.*

negligence merely because it operates a train at a fast rate of speed. Then again they allege failure on the part of the Defendant's servants to maintain a careful and proper lookout of the car. Well, gentlemen, that might be an element of negligence, if it was true. The only evidence that we have as to the operation of this car is the evidence of the motorman who was called by the Plaintiff himself, and I am unable to recall anything that he said that would substantiate a charge of negligence against him in the operation of that car, that is by reason of his failing to have maintained a careful and proper lookout. I don't think it was ever suggested to him that he did not do that, either by the Plaintiff's counsel, who called him, or by the Defendant's counsel who cross-examined him. So it does not seem to me, gentlemen, that there is any particular necessity for you to consider that element of negligence alleged here at all.

(*b*) In failing to supply and maintain sufficient and adequate lights to enable the motorman to see the Plaintiff in time to stop. Now, evidence has been given that affects or pertains to this charge. It is true that Defendant's counsel contends that the allegation is not one that could establish or does establish negligence against them in its own terms, the language in which it is used, but I am going to leave it to you to consider this question in the light of the evidence that has been produced and leave it to you whether or not upon that evidence you think the company has been guilty of negligence in the light of definition of negligence that I have given you. The main controversy centred, as you will perhaps remember, upon the question of the headlight. A great deal of the evidence hinged upon that, and it would seem that that was practically the main ground of negligence which the Plaintiff relied upon to establish his cause of action against the Defendant.

The last one. In not keeping the car properly equipped with sufficient and adequate brakes, and in failing to apply the brakes and slow down the car in time to avoid a collision.

Well, gentlemen, all I can say to that is that the motorman was the only man who was questioned as to the brake appliances on the car, and as to what he did in the way of checking the car when he first became aware of the obstruction upon the track, and he said, and of course the Plaintiff is bound by what he said, they called him and they have put him in the box as a witness, they have asked you to believe, and he said briefly that there was no fault to be found with the braking appliances or braking apparatus on the car. So that I am unable to see, gentlemen, that there is any evidence upon which the Defendant could be held guilty of negligence in connection with the braking apparatus on this particular car; and if you accept the evidence of McLeod it does seem to me that there is nothing in what he has said that would justify a finding that there was any failure to apply the brakes and slow down the car at the earliest possible moment when the danger became apparent. You will bear in mind what he said, that he did not see the Plaintiff, at least he did not know who he was then—he did not see this obstruction on the track until he got within fifty feet of it, and at the rate at which he was travelling, a rate which was apparently

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governed by a time schedule, he was unable to stop his car in time to avoid a collision. So that I am unable to see that there is any proof at all that the Defendants were negligent through their servants or agents, the motorman in his failing to apply the brakes and stop the car as soon as he was able to, becoming aware of the danger that confronted him.

And that leaves then the question of sufficient and adequate lights to enable the motorman to see the Plaintiff in time to stop, and I am going to tell you that it seems to me that that is the only element of negligence that there is any evidence before you to support. If there was any element at all, of course, it is my duty to leave it to you.

Now as I said before, the operation of a car such as this; you have seen the picture of it, I don't know what it weighs. Evidently it is considerably larger and heavier than the street cars that we use in the city here, and you can readily understand that a machine of that weight and operating upon a track which would not enable it to deviate, travelling at a rate of speed thirty to thirty-five miles an hour, would be certainly a very dangerous thing to come in contact with, and although the statute gives the company the right to operate a machine of that character for the purpose of carrying people and freight back and forth between these two places, still the law would impose certain general restrictions or certain general rules of conduct in the operation of that car, so as to protect not only the people that were being carried as passengers, but also the public who might be using the adjacent highway, or who might be using these crossings or intersections, and it is true there is no statutory provision that I can find, that requires the Defendant to carry a headlight upon its car when operating it at night, still, gentlemen, it does seem to me that it stands to reason that if they are to adequately protect the public from possible danger of an object such as that car moving rapidly through the night, they should take some precautions to advertise its approach to people who might possibly and lawfully get in its way, and so it does seem to me that a headlight—call it a headlight; call it a light—would be a necessary appliance to adequately protect people, and appraise them of the approach of this car when night had fallen; and it does not seem that the counsel for the Defendant in discussing the matter with you, or in his conduct at the trial, the defence of this trial has ever taken the position that a headlight was not really a necessary and proper appliance to be adopted by the Defendants in operating their car. It is true, he does not admit that there was any such omission or defect as would justify the charge as made in the statement of claim, in failing to supply and maintain sufficient and adequate light to enable the motorman to see the Plaintiff in time to stop. Well, of course, this allegation must be read in connection with the charge that is made here, with the evidence which has been laid before you. It has relevance to this particular Plaintiff and the situation in which he unfortunately found himself on that night in January, 1926, and I am going to leave it to you in that way. If under those circumstances disclosed in the evidence, the headlight that was in actual use that night upon that car on its journey from Selkirk to Winnipeg was a sufficient or a reasonably sufficient and adequate protection to the public

against being run down or coming into collision with that car when operated at night.

You will recall the evidence : this Plaintiff, a foreigner, living somewhere in that northern part between here and Selkirk had come into Winnipeg, I think it was on Saturday, on the second of January. He had dinner with a Galician, a man to whom he sold a cow, about four o'clock. He then took his team, and was driving a team of horses attached to a sleigh, upon which there was a double box, I think it was said to be thirty-three inches high, and he went into the city here, made some purchases from a store, and he says that the storekeeper made him a present of a small bottle of beer, which he put in his pocket, and afterwards consumed when he had got partly on his way home. He said he was driving along the highway on the west side of the Red river known as the Selkirk Road which parallels the railway in question, and that a man by the name of Danko overtook him, tied his horses to the rear of the sleigh and got in with the Plaintiff and travelling with him some little distance on the road. I am only referring to this man Danko because of certain evidence that was given by the witness Showski. They came across an autoist on the road who had met with trouble, and Danko, the Plaintiff says, got out of the sleigh, and went to assist this man whose car was in the ditch. The Plaintiff then proceeded on his way travelling north somewhere between Miller and Parkdale, when he says he met a truck, a large truck travelling south approaching him from the north. It was covered with a canvass top, and the top was flapping in the wind. He says that this frightened his team, and they got beyond his control and bolted, and in continuing north they came to one of these cross-roads, and the team turned to the left across on this crossing, crossed the railway track and entered into an adjoining field or prairie; that while this was going on he said that he lost one of the reins, was pulled out of his hand, the left one. He had mitts on. It was a cold night, and I suppose they were clumsy; anyway, he says he lost his left rein, and of course did diminish his control over the team. He retained the right rein. He says that he was able to pull the horses around; he made a circle, and travelled back on their own route that they had come, and when they came to the railway track, instead of crossing over on to the highway, they turned south and headed for Winnipeg down the railway track. He says that the sleigh, the runners on one side were outside of the rail, and the runners on the other side were between the rails. I don't know how he remembers that particular circumstance. However, he says that is what happened, and the horses were galloping, as he contends, and were out of his control, and while on the track and moving south towards Winnipeg he was overtaken, as he says, by this car No. sixteen, operated by the Defendant Company, and controlled and operated by the motorman McLeod, and that the first he heard the whistle; he saw no headlight. He said he had no time to; he became frightened, naturally one would expect under the circumstances, and the next thing he remembers is there was an impact of the car, and he remembers no more until the following Sunday he woke up in the city of Winnipeg hospital in bed.

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Now that is the story that he tells in the witness box, and has told you of the injuries that he sustained to his person; the loss of one horse; the injury of another; the destruction of his sleigh; the destruction of part of his harness, and the expense that he has been put to to make good these losses. He is claiming in addition to that, damages, general damages for the injury to his person. Now that is in brief the story that he tells of the accident so far as he is able to recount it. There was apparently no other eye-witness of events leading up to the impact or the crash between the car and the team. It is a pity that nobody had seen it, but nobody has been produced by either party who did see what took place before the accident happened. There is a little boy that was called here, a boy of seventeen, with a foreign name. I forget his name now. He happened to be driving along the road, driving north, and he heard the crash, and that called his attention to the side. He said he looked to his left, and he saw what had happened, but he did not see what had happened prior to that. There is one point in spite of that did seem to have some bearing. He said he was looking north but he saw no headlight on the approaching car. He said had there been a headlight he would have seen it. I think he said he could have seen it for a mile, something to that effect.

Then there was the evidence of this Captain Cochrane. Well it does not throw any light, as far as I can recall nor does the evidence of the other witnesses who were called here, throw any particular light upon the actual happening prior to the accident. They have told us what they saw after the crash. Of course, these men were passengers on the car, and they could see nothing, of course, until the car had come to a stop, and all they could observe then would be the effects of the accident, and they have told us. I don't think there is any dispute about that.

Now the question of this headlight is one that has been prominently before you throughout this trial, and as it has been made the principal ground for the charge of negligence against the Defendants it behooves you to consider very carefully the evidence that has been laid before you upon that point, and, unfortunately, the evidence is not by any means uncontested; it is controverted, does not harmonize. The principal witness, in fact the only witness for the Plaintiff at that point, is the motorman McLeod. Well now, gentlemen, I am not going to say one word about McLeod one way or the other as to whether you should believe him, or whether you should not. You saw him in the witness box. You saw the manner in which he gave his evidence, and it is for you to say whether or not you believe what he said. If you believe what he says. As I gather, he tells you that he was the motorman in charge of that car on its return trip to Winnipeg, leaving Selkirk at half-past six on that Saturday evening; that he had had trouble with his headlight on the journey from Winnipeg to Selkirk; that he thought possibly it was the carbon in the headlight that was giving trouble. He says he went to the night watchman, who was produced here by the Defendants, and got from him a new carbon, or, rather got this night watchman to put a new carbon in the headlight. He said it lighted, when the electricity was turned on it lighted, but he said he

found it no more efficient or no better than the light he had coming down. The light was dim was his complaint. Now you have seen the headlight of a type identical with that in use by the Defendants on this particular car on that particular night. The Defendants produce this; they don't say it is the same headlight. They say it is one of the same type, same make. Six I think in all they use on their cars on that run and the run to Stonewall. It has been described to you at great length, and I think you gentlemen fully appreciate its mechanical parts. There are the two systems of lighting; one the incandescent, which is used for town work, the other the carbon light, which is a much more brilliant light, I suppose, which is used to illuminate the track when the car is operated at night between the towns; and McLeod goes on to say that on his return to Winnipeg that night he had trouble; he still had trouble with the headlight, and he was obliged to stop twice I think he said to see if he could adjust it. He further says that the light was so dim that he overshot two or three stations that he could not see even the people on the platform waiting for the car, and he said that this was owing to the headlight being so dim that he could not see far enough ahead to judge his distance properly and bring his car to a stop at the station platform. Now that is his evidence on that point. I think he has said that under ordinary conditions when the headlight was working normally that it projected a light for some six or seven pole lengths. That would be six or seven times 125 feet I think is the distance that these poles are apart, but he said on the night in question, as I recall his evidence, that the light would not project more than, I think he said fifty or sixty feet—I may be wrong in that.

MR. LAMONT: He says he distinguished an object at half a pole length, but he saw a blur on the track at a pole length.

HIS LORDSHIP: Now let us see what he did say on that. He says he examined the headlight once at Donald, five miles out from Selkirk. I found it was not working right. I examined the carbon; it was burning but the wind was getting in and making the light flicker. He said the felt was worn right off the headlight of my car, and let the wind in. He says I could not see the stations until I was right on top at Little Britain and Lockport. Then at Donald I got out to try and fix the light, but was unable to do it. I tried again at McLennan three miles south of Donald. I could not do any good, and two miles farther north the accident happened.

MR. CAMPBELL: If I might suggest to your lordship—it is rather early in his evidence, my lord, in which he stated that he distinguished the sleigh at half a pole.

HIS LORDSHIP: Yes, here it is. He said I saw something in the centre of the track about a pole distant, 125 or 150 feet away. I was running at about thirty miles an hour. The headlight was lit but not showing very far ahead. I could only see ahead one pole length. I can stop the car on the emergency in three pole lengths. If the headlight had been in good working condition I can see ahead about seven or eight pole lengths. I was about a pole length when I saw something ahead on the track, and when half a

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pole length away I saw it was a team. He said I reversed the car and applied the sand, but was then right on top, struck the sleigh and put the headlight out altogether. The snow plow was up on the sleigh, and I had to back out to get away from him. I noticed the horse and the man was right in the wreck. The other horse had been thrown clean off the track. I carried the whole outfit about two pole lengths. I suppose he meant by that that the car had shoved this wreckage or debris ahead of him.

Now, gentlemen, that appears to be what McLeod has said with regard to the headlight and the visibility that it enabled him to have when the car was in operation. As opposed to this contention, the Defendants have produced evidence, first from their expert Mr. Watkins, who appears to be a man pretty well qualified to speak on a subject of this kind, that these headlights are of the type that is in use in ninety per cent. of the electric roads on this continent. He bases this opinion upon his own experience in travelling through various parts of the United States and Canada, and also upon what he has read in literature devoted to subjects of this character, that it is a standard equipment, although he admits it is not perfect. Well, what machines that are constructed by men can be said to be absolutely perfect and to work perfectly under all conditions. He explained to you that a drag upon the line, that is the wire that transmits the electricity, might cause the voltage to shrink, and that in turn would cause the light more or less to dim. He said that is one cause. Then another he said something about the burning of the carbon, that it burnt around the edges of the carbon, and at time this irregular burning produced the effect of somewhat dimming the light, and he explained that these were conditions that might prevail at anytime, and over which the Defendant had no control, and consequently were not matters that should be attributed to them for negligence. Well, if you accept his statements upon those points you would find accordingly. He even went so far as to say that the presence of another car operating on the adjoining track, I think it is a double track, even a mile away, drawing energy from this wire, the same wire, would cause the voltage to diminish, and would affect the lights in the other car. He gave that as an illustration to show what effect a drag upon the pole line would have. Well, gentlemen, of course, if you find that there was a defect in the lighting apparatus, but that it was not due to any negligence on the part of the defendants, it was due to conditions over which they had no control, which they could not have remedied, and if you find that they were using a standard equipment such as is recognized as being proper and suitable for the use of purposes such as this, if you find that they had done that, then they have practically discharged the duties that rests upon them, the duty to take reasonable and proper care in the equipping of their cars with the latest or best known or most adequate means or appliances for its safety in being operated; and according to Mr. Watkins, it would seem that that is the contention that the company makes, and that that contention in his opinion is well founded. If you accept his evidence upon that point as satisfactory from an expert, it does seem to me that it in a measure explains some of the trouble that McLeod claims to have had that night. However, you will

have to take into consideration McLeod's evidence and the evidence of Watkins, and this other man Parsons, although Parsons does not tell us anything very much that throws light upon that particular point, except that he tells us as to the method of inspection that took place at the car barns at Selkirk, a daily inspection of headlights and other mechanical appliances, to see that the cars before they were taken out for their run were in proper working condition. He does not tell us, however, that that inspection took place at the end of each run, in fact we know it did not, because there was very little time after a car got into Selkirk before it came around and came back to Winnipeg, but I suppose the inspection, daily inspection he refers to, was in the morning when the cars left the barn; but if you believe that that inspection was made, and that it was an inspection that would reasonably disclose defects and was reasonably proper under the circumstances, and that it was done, I don't very well see wherein the Defendants can be charged with negligence, because after all this company is bound and can only use human instruments as its agents for carrying on its work, and those agents are all subject to the imperfection the human race is subject. They do the best they can in making a proper selection of these agents, and if those men are properly directed, their energies, their attention properly directed to seeing that the equipment is kept in reasonably safe condition, proper condition for working, it does seem to me that they have discharged their duty in that respect and cannot be held responsible if something happens, unfortunately, in spite of the precautions that they have taken.

Now you have to take all these circumstances into consideration and weigh them and give them such weight as you in your opinion think proper and right under the circumstances. As far as McLeod is concerned, he has been made the centre of a good deal of criticism. Well, now, gentlemen, as I said before, you have heard his story, you have seen his demeanour in the box, and it is for you to say what weight you attach to his evidence. You have seen Watkins, you have heard his explanations, and you have heard Parsons, and you have heard the other witnesses the Plaintiff has called, and the other witnesses the Defendant has called. It is to be noted that this Galician, the night watchman, denies having given a carbon to McLeod on the night in question. He says carbons were not given out by him in that way; before one could be obtained from the store room permission of the superintendent had to be obtained. He said that no such permission was obtained, and no carbon was given. Well, there is a direct contradiction upon one point of McLeod's evidence. What weight will that have upon your view as to his reliability as a witness? Another matter upon which his credibility has been attacked is in regard to the reports that he made, in regard to the statements that he claims to have made to Hawes as to the headlight. Hawes has denied that any complaint was made to him on the night of the accident by McLeod regarding the inefficient working of the headlight. McLeod said that he complained and told Hawes straight out that the accident was due to the defective working of the headlight, and he furthermore said that he intended to put

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it in his report. Well, gentlemen, he made the report after he returned to Selkirk, and you have it here as an exhibit, and it is noticeable that in that report not a word is said about the headlight. Why did he omit it; if he was strongly convinced of the fact that the headlight was in such a defective working condition as to prevent him being able to operate that car safely at the rate of speed required by the schedule, wouldn't you naturally think he would have put it in the report? He intimated, he says, to Hawes that he intended to do it. Why didn't he do it? I don't know. It is not there. Was he influenced by fear of dismissal or censure, if he had put it in the report? Well, if you can believe his story on other reports that he made on these sheets that they were supposed to turn in at the end of a run; he claims that he frequently called the attention of the superintendent at Selkirk to the fact that the headlights on these cars were not giving satisfaction, that he was having trouble with them, not only that, but he says he told Hawes personally on more than one occasion of these defects, and he says that in spite of these warnings nothing was done to remedy the situation. Well, now, gentlemen, on these points he is contradicted point blank by Hawes, and in a measure he is contradicted by the night watchman, that question of the carbon. What effect have these contradictions upon the degree of credibility that you should attach to his evidence? That is a matter for you to consider. It is a pity that these reports, these sheets that were turned in for December and January, have been lost. They could not be produced, and exercising the best judgment I could under the circumstances, I did not think it would be safe or proper to admit secondary evidence of their contents considering that such a crucial matter depended upon what those reports contained, and therefore I did not allow evidence to be given by those who made the reports as to what was in them. However, I don't know that it matters very much one way or the other. The question before you now is what was the condition of the headlight on that car on the night in question, what was the cause of the accident, was it due to the inefficient working of the headlight as McLeod contends, or was the headlight in a satisfactory condition, or if not in a wholly satisfactory condition was it in as good a condition of operation as the company was able to supply under the circumstances.

Now, gentlemen, the Defendant set up what is known as contributory negligence against this Plaintiff, and they say that instead of the accident being caused through their negligence, it was caused directly and proximately by the negligence of the Plaintiff himself; and they set up a number of grounds that they claim amount to contributory negligence on his part, and, of course, you have to consider these grounds. They say first that the Plaintiff was not in a fit physical condition to be driving his team of horses at the time of the accident. Well, considered in the light of the evidence that has been produced here, it amounts to this, as I gather it, that the man was drunk, so drunk that he was incapable of controlling and managing his team upon a public highway or street. What is the evidence that has been led to support that contention? Bear in mind that the Plaintiff

himself denies that he had any liquor at the friend's house in Elmwood where he dined on that Saturday afternoon. He denied that he had any liquor from Danko who got into his sleigh, and he admits that he had this small bottle of beer that this storekeeper had given him. Well, gentlemen, if that is all he had, pop bottle, or a small bottle, would you be justified in inferring that that made him drunk—I don't think so, I don't think so. It would be contrary to human experience, but if you believe the evidence or rather if you believe what Showski says the Plaintiff stated to Showski in the hospital, it puts a little different light upon the happenings of that afternoon. Showski apparently belongs to the provincial police, having heard of this accident, and in the performance of instructions from his superior officer went to the hospital to see the Plaintiff and obtain from him a statement as to how the accident happened. The first time he went the man was not in a condition physically to be questioned. He went again, I think he said on the 5th or 6th of January. He saw Dr. McLean. Dr. McLean told him that he could talk to the witness. He could speak the language, and he saw the man in his bed, and he admits that he was in a very weak condition, so weak in fact that he could not sign the paper. What his mental condition was it is pretty hard for us to tell. However Showski says that he put these questions to him in his own tongue, and he put the answers down in English in his notebook. The notebook itself, the original, is lost, but he says that when he returned to the police office the same day he had three copies made by a stenographer, and he used one of these copies to refresh his memory as to what was said. Now he claims that in the first place, the Plaintiff admitted that he had had two drinks of whisky at this friend's house; furthermore, that he had another drink on the road from Danko; that would make three drinks that he had according to Showski's statement as to what the man admitted to him. Well now, gentlemen, that evidence, of course, of Showski's; Showski himself was upon oath but he was telling him something that was stated to him which was not upon oath, merely the statements made by this sick man lying in bed, and they were tendered, gentlemen, for the purpose of reflecting upon the credibility of the story told by the Plaintiff in the witness box with this object, that they tend to show that on a different occasion he made a different statement from that which he now makes in the witness box, therefore that his credibility is affected, having made two inconsistent statements, one in the witness box upon oath, the other at a previous time not under oath, but nevertheless voluntarily made, which was evidence that the man was not trustworthy of belief. Well, it is for you to say, gentlemen, what weight you attach to Showski's evidence of the statements that he says the Plaintiff made to him that day in the hospital. And there was another statement Showski said, he said the Plaintiff told him that after parting from Danko and getting this drink he lost his recollection of what transpired afterwards, he had no recollection, he could not remember what had happened until he woke up in the hospital on the Sunday. Well now, gentlemen, if that is true, if that statement is true, he must have manufactured out of his own head the story which he tells

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you about passing this truck, about his horses taking fright, about their turning across the track, getting out into the field, circling around, his losing his rein and getting back on to the track; if what he told Showski was true he must have manufactured all that. Do you think it is likely that he could have done that? Do you think it is likely that he did do it? Mind you, the statement that he made to Showski is not under oath. The statement that he made in the witness box here, is under oath. If you believe that he made these inconsistent statements about a matter that is relevant to the issue here, why, it is for you to take that into consideration when you come to value the credibility of his oath. Well now, if his story in the witness box is true, he could not have been drunk, at least that is the view I would take it. It is for you to say, of course, gentlemen, if one small bottle of beer would have put the man in such a condition of oblivion that he could not control his horses, or could not remember what transpired. The horses got beyond his control. If you believe that part of his story, and they got on to the track by reason of something that he could not help, that can't be taken against him, that he was improperly upon that railway track. He was there against his will, he was taken there by his team of horses over which he had lost control, and it is not a case of a man voluntarily trespassing upon a railway property and meeting with an accident there. He was there against his will, and because he could not help himself, if you believe what he says in the witness box, and while there he was overtaken and injured by this car.

Now, the motorman says that he did not see the Plaintiff's team until he was within fifty feet of him, and that he was unable using the means at his disposal, he was unable to stop the car and prevent the collision in that short space, and he says he was prevented from seeing him by reason of the headlight working imperfectly and failing to project a light sufficiently far ahead to have enabled him to have operated that car with a reasonable degree of safely towards people who might be using the crossings, the intersection of the highway. However, there is that evidence as to the man's physical condition, and you will have to consider it for what it is worth.

Now the other. The Defendants contend that the Plaintiff might readily have avoided the accident by turning the horses from the track so as to avoid a collision, he having plenty of time so to do. Well, gentlemen, does the evidence support that allegation? It is for you to say. He was on the track according to his own statement with one rein to control that team, and the team was in violent motion galloping down the track. Does the evidence support this contention that he had time to turn his horses off the track, and so have avoided the accident? If you come to the conclusion upon the evidence that he had, he should have done it, and that would be an act of contributory negligence on his part. If he was aware of the approaching danger and had the opportunity by the exercise of reasonable care to escape it and failed to do so, why then he is the author of his own wrong and cannot recover here.

They furthermore claim that in failing to heed the warning of the motorman to keep clear of the track and the approach of the street car

in question. I don't know what that means, I don't know how that has any application here. He says himself the only warning he had was the whistle. He was then on the track *nolens volens* he could not get off, so he says, he hadn't time to do anything before to escape, so I don't know what evidence there is in failing to heed the warning of the motorman to keep clear. Then he says, there is another ground, in failing to keep a proper or any look-out for the approaching street car. Well, gentlemen, is there any evidence of that? The same remarks as apply to this apply to the other. He was there, as he says, against the will, rather to the will of his horses. He could not get off the track. He said he had no opportunity to escape, consequently he cannot be held responsible, that is his contention. Then they claim a further act of contributory negligence, in driving with his team on to the track of the Defendant Company immediately in front of an approaching street car, at a time when the motorman in charge of the said car had no opportunity of avoiding an accident. Well, gentlemen, does the evidence bear that out? Again, I have only to remind you that according to his own statement, and there is no other evidence as to how he got on the track, but his own statement; according to his own statement, he did not get upon the track of his own free will, it was the horses who ran away and got out of his control that put him there, and once there, having lost control, he could not get off in time to avoid the accident. That is what he says. So that if you believe that, there is no ground for this allegation of contributory negligence on his part.

There remains, of course, the question as to whether or not he was drunk, incapable, or whether he was sober, and fit to drive his horses and fit to control them. Now you have the evidence upon that point such as it is. You will have to do the best you can with it.

Now I have taken a great deal longer over this, gentlemen, than I intended to, and I hope I have not worn out your patience, but yours is a responsible duty, and so is mine, and we have to try and administer the law with due regard to the rights and the interests of all parties.

Now, gentlemen, with regard to the damages. If you find that the company have been guilty of negligence causing the accident, you will have to consider then what damages the Plaintiff should be awarded, and that means the consideration of the evidence as to the nature of his injuries and as to the pecuniary loss he has suffered and so on. If you come to the conclusion that he is entitled to recover, you must not consider that you can award him perfect compensation for what he has suffered and what he has lost. You can give him compensation, of course, for the financial loss through the accident, that is the loss of his horse and the injury and the other things which he has been put to, all of which has been submitted to you here in detail. That is an element of damage that is very easily ascertained. So far as the injuries to himself is concerned, you may take into consideration, you have to take into consideration, his calling in life, what it requires, reasonably requires of a man who has to do physical exercise, or physical fitness; you may take into consideration the pain and suffering that he underwent in consequence of this accident, you may take into consideration

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his loss of time. There is no specific rule. The jury have to use their own discretion taking into consideration all the surrounding circumstances, and arrive at what they consider is a reasonable, a reasonable compensation for what the Plaintiff has suffered.

Now, gentlemen, that is the best consideration that I can give you upon that point. I usually warn a jury not to be excessive in awarding damages, because in my experience it usually leads to further and prolonged litigation, and I want you simply to come to the conclusion, if the Plaintiff is entitled to recover, I want you to consider reasonably and fairly as reasonable men, what compensation ought to be given to this man in addition to the items of expense, a list of which I think ought to be given to you. Now, if you come to the conclusion then, that the Defendant was guilty of negligence causing the accident, then you have to consider the allegation of contributory negligence, because even although the Defendant was negligent, yet if the Plaintiff could by reasonable care have avoided that negligence, and having failed to avoid it, but he could have done so, and thereby contributed to the accident directly, he cannot recover. Was he in that situation? Seeing or hearing that car approaching was there anything that he could reasonably have done that would have exculpated him from the situation in which he found himself, and so have avoided the accident. You have the evidence, gentlemen, before you. It is upon you to find upon that conversation, you have got to consider it, because if this man through his own conduct directly contributed to the accident, he is the author of his own wrong, and he cannot recover. So far as I have viewed the cause, it seems to me that in the light of the evidence that has been given, the condition of the man through drink, if there was such a condition, is about the only evidence upon that point of contributory negligence that there is for you to consider, at least it is all that I can recall after hearing the evidence that has been adduced; so you will have to consider that as best you can and reach a conclusion that satisfied nine of you at all events, one way or the other, because your verdict need not be unanimous, nine of you one way, or nine of you the other, is sufficient to carry a verdict, either for the Plaintiff or the Defendant in accordance with your finding.

Now is there anything more in that matter of contributory negligence, you want me to tell the jury, Mr. Guy?

MR. GUY: No, my Lord, not on the question of contributory negligence. There are some matters in regard to the headlight, I want your Lordship to speak to the jury about.

(The jury retire.)

MR. GUY: Your Lordship defined negligence as being a duty, that is actionable negligence as being a duty, and a breach of that duty, and damages arising as a result. Now I think your lordship might call the attention of the jury, or explain to the jury, what the Defendant's duty was with regard to supplying headlights.

HIS LORDSHIP: Well, I did. I told them as well as I was able to from the imperfect view of the law that has been presented to me. I don't know that I could. I was afraid of treading on dangerous ground. I tried to keep the matter as safely as I could.

MR. GUY: I appreciate your Lordship's position.

HIS LORDSHIP: I told them I thought it would not be unreasonable to expect that in operating a car at that rate of speed at night, it would not be unreasonable to expect them to have a headlight or some light that would enable the man to operate the car with safety to those in it as well as those using the highway. I don't know that I could tell them any more.

MR. GUY: So far as that is concerned, that is allright, my Lord. In the first place, your Lordship is assuming that there is a duty on us to provide a headlight. I appreciate your position all right, and know that you have to charge them either one way or the other, and your lordship has charged them that under the circumstances you feel they ought to have it, that is that there is a duty to have a headlight. Now you have already done that. I want to make my position clear, that so far as I know, there is no duty on us to have a headlight, but if there is a duty we have fulfilled that duty by providing the usual form of headlight used by all such railways.

HIS LORDSHIP: I told them that.

MR. GUY: Well, that there is no evidence to show, then there is nothing to show that we have failed in our duty.

HIS LORDSHIP: I told them what Watkins's evidence was, and I told them if they come to the conclusion that this was standard equipment such as was largely universally used that they had reasonably satisfied the duty that rested upon them in providing that equipment.

MR. GUY: I know your Lordship could. There is no other evidence before them on which they can decide that we have not adopted the proper headlight. It has not been suggested that there is anything else.

HIS LORDSHIP: Well, that is for them to say, not for me.

MR. CAMPBELL: My learned friend is arguing the non-suit now I should say.

MR. GUY: So far as that is concerned, I am suggesting that your Lordship should have directed them that there is no evidence to support a finding that they have not provided a type of headlight required by law.

HIS LORDSHIP: That is all right enough, but there is evidence if they believe McLeod that the appliances they did furnish were not in working condition. Well, that's what I told them.

MR. GUY: Then your Lordship has not distinguished between general complaints that McLeod is supposed to have made about all the headlights in general.

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HIS LORDSHIP: Oh well, I am not going to do that. That is a very involved question, and the evidence was very unsatisfactory, as I recall it, and I am not going to attempt to plunge into a case of that kind. The jury heard what they said, and let them decide as to these complaints.

MR. GUY: I think your Lordship should have drawn the attention of the jury that there were no specific complaints made about them.

HIS LORDSHIP: No, I am not obliged to do that at all. I am not bound to call their attention to any specific bit of evidence. To do that would be imposing upon a trial judge an impossible duty.

MR. GUY: Your Lordship also said to the jury when the light was working normally it would show a certain distance.

HIS LORDSHIP: So I did, I told them that, seven hundred feet.

MR. GUY: The word normal there, I think is misleading.

HIS LORDSHIP: I don't think so.

MR. GUY: If it is at its maximum that is as far as it will show.

HIS LORDSHIP: No.

MR. GUY: But in the normal variation of the headlight, as explained by Mr. Watkins, there are times when it would not show that far.

HIS LORDSHIP: Didn't I tell them that? I certainly did. I told them the drag on the line had an appreciable effect on the light; it had a tendency to dim it, and I even went so far as to recall the illustration he gave of a car a mile away having that effect.

MR. GUY: Your Lordship, in dealing with the particulars of which McLeod's evidence was contradicted, did not refer to the evidence of Parsons in regard to the fault, because Parsons ——

HIS LORDSHIP: You did, didn't you?

MR. GUY: I did.

HIS LORDSHIP: Very well, then, that is all that is necessary. I am not required to do that.

MR. GUY: Then I would like your Lordship now—I have finished with that—I would like your Lordship to ask the jury if they find that the accident was due to negligence on the part of the Defendant, in what that negligence consisted, so that we will know.

HIS LORDSHIP: Well, as I said before, Mr. Guy, this does seem to me to be a case where I might perhaps depart from that rule which has guided me hitherto pretty generally. I have no objection to putting a question to them as to the negligence and what it consisted of; who was responsible for it. I have no objection to that.

MR. GUY: My Lord, I refer you to the rule, the statute I left on your desk there providing for the question. It is in the statutes of 1923, the consolidated amendments, rule fifty-one, it is not section fifty-one, it is rule fifty-one that has been repealed and a new rule put in.

What I think, my Lord, should be done in a case of this kind is if they come to the conclusion that the Defendant is guilty of negligence causing the accident, they should be asked to state in what did that negligence consist.

HIS LORDSHIP: Yes. Now these are the questions that were put in England in the case of Brown against the London Street Railway Company. No, it is a case of the Supreme Court.

Question 1. Were the defendants guilty of negligence?
Question 2. If so, in what did this negligence consist?
Question 3. If the defendants were negligent, was the injury to the plaintiff caused by their negligence?
Question 4. Was the plaintiff guilty of contributory negligence.
Question 5. If so, in what does that negligence consist?
Question 6. Might the defendants' servants after the position of the plaintiff became apparent by the exercise of reasonable care have prevented the accident?
Question 7. At what sum do you assess the plaintiff's damages?

MR. GUY: Yes, my Lord; those are the questions. I think they are satisfactory.

HIS LORDSHIP: Well, I am going to put those questions, Mr. Campbell, I think it is only right.

MR. GUY: I refer your Lordship to a recent case in Ontario. Your Lordship stated this morning I think in discussing the matter of questions, that the practice they had in Ontario by which they could submit questions to the jury. I don't know whether the Ontario form is the same as our present statute or not.

HIS LORDSHIP: Well, it is very much the same.

MR. GUY: There is a recent case in fifty-nine Ontario Law Reports, or thirty-two Canadian Railway Cases, in which it is a question of construction and equipment. In that case it was the construction of a car. It was suggested there by the Court, the Divisional Court, Ontario Supreme Court, Appellate Division, on Dec. 3, 1926. "No objection was taken to the judge's charge which appears to have been proper," etc.

HIS LORDSHIP: Well, I am quite satisfied that this is a case that appeals to me as one in which questions might be put to the benefit of both litigants.

MR. CAMPBELL: My Lord, as I directed your attention the other day, the difficulty always is it gives the Defendant another opportunity purely upon the language used by the jury. Now, my Lord, this jury has been instructed clearly, I submit upon one question of negligence as to the sufficiency of that light; they have been instructed upon the question of contributory negligence, and my learned friend has taken no objection to your Lordship's charge on any or either of those points. If this jury finds a verdict for the Plaintiff, it can only be upon that. If the question

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is now put to the jury what did the negligence consist of, we don't know what kind of language they are going to frame their answer in. We don't know how they are going to frame it in giving the answer to our appeals, and consequently then my learned friend has a chance to go into the Court of Appeal and upset this purely upon an unhappy selection of words by the jury. Now, that is the difficulty, my Lord. They have been instructed fully, and there is only one point on which they can find they are wrong, and half a dozen points they are not and half a dozen cases of defective machinery or anything of that, and I submit it would be decidedly unfair now to put questions to the jury.

I also submit to your lordship that if questions were going to be put to the jury, it would be only fair to my client that I would have an opportunity of discussing those questions with the jury.

HIS LORDSHIP: That is never done; I have never seen it done.

MR. CAMPBELL: It is done frequently, my Lord.

HIS LORDSHIP: Well, it would have been done most improperly, in my opinion.

MR. CAMPBELL: I know that it is done in general practice.

HIS LORDSHIP: I never heard it being done, Mr. Campbell, never, because the formulation of the questions rarely, if ever, takes place until the conclusion of the judge's charge.

MR. CAMPBELL: It may be your Lordship's practice. I am not suggesting anything different.

HIS LORDSHIP: I am not speaking of my practice at all. I am speaking of my knowledge of the general practice of the Court in this respect.

MR. CAMPBELL: My Lord, I will not enter into any discussion upon that point. I think it is only fair it should be done, but if your Lordship thinks different I don't wish to persist upon that point, but I do wish to point out to your Lordship that there is liable to be language used here, a most inapt selection of words, which might result in the reversal of the verdict which this jury intended to give to the Plaintiff.

HIS LORDSHIP: If such a thing should happen, I will be very glad to direct the jury to use proper words to express their finding so that no misapprehension can occur on that point. I can assure you I will see that is done. You see, here are a number of allegations of negligence which I have read to them, and it is true that I have told them that as to two of these groups there does not appear to be any evidence to support them, they may nevertheless forget what I have said and take those into consideration, and if a general verdict was given, for all I know, they may be acting upon them, and the same way with regard to the allegations of contributory negligence; it is the same danger that they may fall into error there. I can see no danger in the world for them falling into any error in defining here, in defining to the Plaintiff what was the negligence that justifies their finding; on the other hand if they find there was contributory negligence,

as I pointed out to them, there is only evidence that I can see to support, and I did not say would support it, the question of contributory negligence, that was the evidence, his own statements to Showski as to the quantity of liquor he had drunk. Now whether or not they could properly come to a conclusion that he was drunk upon that evidence; I know I would not if I were trying the case, three drinks of liquor. I don't know what kind of liquor it was. If it was bootleg stuff it might have put him wild wondering. Three drinks of good Scotch whisky might not have fizzed on him. So I think it is better here to put the questions, and I don't think Mr. Campbell that I am rather singular with our Bench of Judges in the views I hold upon these questions. I know it is the practice of my brother judges, the majority of them at all events, in putting questions of this kind, and I think I am rather singular in refusing consistently.

MR. CAMPBELL: I know it is always in the Court's discretion, my lord.

HIS LORDSHIP: I was not aware, Mr. Guy—I am glad you called my attention to it; I was not aware that this rule had been enacted.

MR. CAMPBELL: I submit it does not put any obligation on your Lordship to put questions to the jury.

HIS LORDSHIP: Here are the questions that I think proper under the circumstances.

1. Were the Defendants guilty of negligence.
2. If so, in what did this negligence consist?
3. If the Defendants were negligent, was the injury to the Plaintiff caused by their negligence?
4. Was the Plaintiff guilty of contributory negligence?
5. If so, in what does that negligence consist?
6. Might the Defendants' servants after the position of the Plaintiff became apparent, by the exercise of reasonable care, have prevented the accident?
7. In what sum do you assess the Plaintiff's damages?

MR. CAMPBELL: It is the last two, my Lord, that I take exception to. I don't think; I submit with very great deference, that the question of contributory negligence in that form of words ought not to be submitted to the jury. Contributory negligence is a legal phrase, as your Lordship knows, one which the jury may not fully understand.

HIS LORDSHIP: Yes, but I explained it to them.

MR. CAMPBELL: I would suggest to your Lordship this other question though, that was the Plaintiff guilty of any negligence? If so, what did that negligence consist of? Then I submit the proper question as following that is, if you find there is, the Plaintiff is guilty of negligence and also the Defendant is guilty of any negligence, then could the Plaintiff by the exercise of reasonable care—No, could the Plaintiff by the exercise of reasonable care have avoided the accident? The Plaintiff in this case gets on the track. It may be his negligence that brought him on the track,

In the Court of King's Bench for Manitoba.

No. 24.
Curran, J.'s, Charge to Jury, 27th May 1927—*continued.*

but he was there now; having got there, however improperly, then at that moment when he was discovered there by the Defendant, then could the Plaintiff by the exercise of reasonable care have prevented the accident, and I submit that is the way it should be put rather than the converse, as your Lordship suggests.

MR. GUY: That is covered by questions one and two.

HIS LORDSHIP: Oh yes, I think these questions are proper. They have been approved of in the Supreme Court and approved of in the Trial Court, and I can see no reason for departing from them.

HIS LORDSHIP further addressed the jury as follows:— 10

Well now, gentlemen, you have come pretty nearly to the end of the road as far as I am concerned, and I have decided to put certain questions to you to answer, which will be the foundation for whatever verdict is proper to be entered as the result of your findings, and I think perhaps it would simplify your duty if I do that, and these questions have been, I have dictated them, and they are now being written out. They will be sent into your jury room after you retire. I just will read them to you now, although I don't expect you to carry them all in your mind, but to give you an idea of what your duty will be.

The first question is, Were the Defendants guilty of negligence? 20

And the second question is, If so, in what did this negligence consist?

I think that is pretty simple.

3. If the Defendants were negligent, was the injury to the Plaintiff caused by their negligence?

4. Was the Plaintiff guilty of contributory negligence?

You will remember I tried to explain to you what contributory negligence was, and I think you understand basically what it means at all events.

Then if you find that the Plaintiff was guilty of contributory negligence, the next question is, If so, in what does such contributory negligence 30 consist?

You will be asked to state what you consider was the contributory negligence that he was guilty of that led to the accident.

6. Might the Defendants' servants (this is in the event of your finding that there was negligence) might the Defendants' servants after the position of the Plaintiff became apparent, by the exercise of reasonable care have prevented the accident?

That is to say, after the motorman looking out ahead of his car, and seeing this man with his team and so on on the track, could he then have avoided the accident by the exercise of reasonable care on his part? Now 40 I dealt with that in my charge. I have no doubt you still have it in mind. Was there anything within reason that the motorman could have done when he was appraised of the Plaintiff's position on the track? Was there anything he could have done to have avoided the accident? Now, that is what is meant by that question.

7. At what sum do you assess the Plaintiff's damages?

You will take into account the items of expense that have been enumerated here.

Have they been written out, because I didn't get them the same as you gave them to the jury. I am sure there is some that I did not get down.

JUROR: We have approximately $450.

MR. CAMPBELL: I think that could be sent into the jury room. I think we could agree on that. I think the jury need not be held for it now. We can determine it in a moment, and send that item in afterwards. I think we can agree upon that upon the evidence.

HIS LORDSHIP: Well, of course, gentlemen, in considering these amounts; for instance, there is $200 charged for one horse. I don't know; it is for you to say whether that is a fair loss, whether it is too much or whether it is right. There has been no evidence given to you at all as to what kind of horse it was, or how old he was, or what kind of a work horse he was so I don't know really there is quite little there for you to find on. As far as the other items are concerned, well they are matters of a different character. He said that $60 it cost him to hire another horse. I think that was the amount.

MR. CAMPBELL: Yes, my Lord.

Then it cost him $15 for the treatment of the injured horse. No doubt about that. The sleigh and box he says were broken into a hundred and fifty pieces. I don't know how he must have counted them. He says the sleigh was a total loss. I think he valued the sleigh at $30.

MR. CAMPBELL: $50 according to my notes.

HIS LORDSHIP: I had $50 first, and then I changed it to $30.

MR. CAMPBELL: $30 was for the box, my Lord. Those items you have just read correspond with my figures, but there was Dr. McLean's bill. That is in as an exhibit.

HIS LORDSHIP: Yes, those can be given to the jury. His bill was $25.

MR. CAMPBELL: Yes. Dr. Ross's bill was $8.00, and if you recollect, Dr. Ross said that the X-ray plates were $10.00.

HIS LORDSHIP: Well, now, there is just that question about the value of the horse and the value of that sleigh. This may have been an old sleigh that had been in use for years, or it may have been a new sleigh, or it may have been moderately new. You have no evidence upon that, and it is very difficult for you to put a value on it.

MR. LAMONT: He stated he paid $66 for the sleigh, and that he had it for three or four years, and that it was in good shape, and he kept it inside all the time. He put a value on the sleigh of $50.

HIS LORDSHIP: It seems to me $30 would be a reasonable price for a second-hand sleigh.

MR. LAMONT: He had to buy a new one to replace it.

In the Court of King's Bench for Manitoba.

No. 24. Curran, J.'s, Charge to Jury, 27th May 1927—*continued.*

HIS LORDSHIP: Oh well, those are minor matters; I don't think you should have any trouble over that.

Now, gentlemen, as I told you before, your verdict need not be unanimous. Of course, that does not mean you may not be unanimous if you wish. It is always more satisfactory if you can be, but nine of you is enough. If nine of you agree one way or the other that is sufficient for you to rest your verdict upon, and when you have made up your mind to answer the questions, have somebody speak for you when you come back into court. Now you may retire, gentlemen, and you will be given the exhibits, and consider your verdict.

MR. CAMPBELL: My Lord, will you hear me in reference to that second last question.

HIS LORDSHIP: Oh, there is no use, Mr. Campbell. I have made up my mind. Those questions have been carefully framed, passed upon by the higher court in Canada.

MR. CAMPBELL: I submit questions should be framed to meet the circumstances in this case.

HIS LORDSHIP: There is no use taking up time.

MR. CAMPBELL: Your Lordship refuses to hear me?

HIS LORDSHIP: I don't refuse to hear you. You have been heard and heard. I do refuse to continue this discussion indefinitely. The question has been read to the jury. Surely that suffices. There must be a limit placed upon the submissions of counsel.

MR. CAMPBELL: Well, I beg your Lordship's leave to point out; have I your Lordship's consent to ——

HIS LORDSHIP: No, I am not going to hear any more about it.

The jury retired at 5 o'clock, and at 5.40 the jury reported.

No. 25. Verdict of the Jury, 27th May 1927.

No. 25.

Verdict of the Jury.

The CLERK OF THE COURT: Were the Defendants guilty of negligence?

The FOREMAN OF THE JURY: Yes.

The CLERK: No. 2. If so, in what did this negligence consist?

The FOREMAN: Not having any man on duty at Selkirk capable of making adjustments to the lights or other equipment to the car before leaving Selkirk on the night of the accident.

3. If the Defendants were negligent, was the injury to the Plaintiff caused by their negligence?—*A.* Yes.

4. Was the Plaintiff guilty of contributory negligence?—*A.* No.

5. If so, in what does such negligence consist?—*A.* None.

6. Might the Defendants' servants after the position of the Plaintiff became apparent, by the exercise of reasonable care have prevented the accident?—*A.* No, none from the evidence submitted. The motorman did all in his power to avoid the accident.

7. At what sum do you assess the Plaintiff's damages?—*A.* Special $354.25. General damages $2,000.00.

The CLERK: And so say at least nine of you?—*A.* Yes.

MR. GUY: My lord, might I have the jury polled as to questions one, two and three?

MR. CAMPBELL: My Lord, before your Lordship orders a poll of the jury, may I ask your Lordship to instruct the jury to make a more explicit finding in regard to question No. 2. Apparently the jury intended that that should be a finding of the disrepair ——

MR. GUY: My Lord, my learned friend ought not to make a statement of that kind before the jury. You must not interpret their intention before the jury.

MR. CAMPBELL: The very thing has happened which I suggested to your Lordship might.

MR. GUY: My lord, that is quite improper for my learned friend; if he has any discussion in reference to that it should be made while the jury is absent.

MR. CAMPBELL: Very well, my Lord, I will discuss it in the absence of the jury. I think the jury should be directed to make a further answer with regard to question No. 2.

(The jury retire.)

MR. CAMPBELL: It is quite evident, my Lord, I submit that the jury having answered question No. 2, in not having any man on duty at Selkirk to repair the light before the car went out, in case that the jury intended to say that the light was defective. Now my Lord, I ask your lordship that the jury be required to explain what they mean by that, or that they be directed to say whether or not the light was defective, or whether or not they intended to say that. What would be the necessity of their having men on hand to repair? Surely the jury has intended to find that there was an absence of proper and necessary repair, but unfortunately, as I predicted, they have selected a form of words which we have not pleaded. We have not said in our pleadings there was an absence of men to make proper repairs to this car, and I submit, my Lord, that it would be most unfortunate if this jury's finding is to be nullified by allowing this answer to go uncorrected, and I ask the court to have the jury at least correct their answer in such a way as to comply with the pleadings.

MR. GUY: My Lord, my learned friend has already, I think he has quite improperly suggested to the jury that their intention was not disclosed. It does seem to me that this is just the very thing that a question is intended to prevent. They fixed on something which was not charged,

In the Court of King's Bench for Manitoba.

No. 25. Verdict of the Jury, 27th May 1927— *continued.*

and if questions were not asked, that is probably the way the thing would go. They haven't in mind or do not make a finding in favor along the lines that my learned friend has suggested, I don't see why there should be any change in the thing; that's what their finding is.

HIS LORDSHIP: Oh, I think, Mr. Guy—there has been a misapprehension on the part of the jury in answering that question. In the first place, as he pointed out, that was not a matter of negligence alleged against the Defendant at all, their not having a man at Selkirk, an expert qualified to overlook the electrical equipment of these cars, and it does seem to me that they had in mind the defect in the headlight; they took this way of expressing it. It does seem to me, I think it would be only fair to ask them if that answer embodies all they intended to say on the question of negligence. I would not put it in any other way.

MR. GUY: No, well ——

HIS LORDSHIP (to Jury): Gentlemen, with respect to the answer that you have given Question No. 2, I have been asked to ask you if the answer that you have given fully expresses all that you intended to say in answer to that question. Now, the question is, if so, that is if you find there was negligence, which of course you did find in your answer to Question No. 1; if so, in what did the negligence consist? I merely point out to you that in enumerating the particulars of negligence or negligent acts charged in the pleading against the Defendants, the answer that you have given was not one of these particulars. There is no allegation in the statement of claim that the Defendants were negligent in not having a man on duty at Selkirk capable of making adjustments to the lights and so on. The allegation was that the light, that the system itself was defective. The allegation was ——

MR. GUY: My Lord, I don't think your Lordship should suggest what the answer might be to the question. They heard all this before.

HIS LORDSHIP: Why not, Mr. Guy? We want to get this matter cleared up. We want to get a finding that the jury intended to make, a finding that is intelligent, and a finding which is in accordance with what is alleged, but I can't explain to them what is, can't unless I tell them.

MR. GUY: I submit if the answer as given is not complete it should be made more complete.

HIS LORDSHIP: Well, how can I explain to them wherein it is incomplete without reading to them the allegation of negligence. The allegation of negligence with regard to lights is this. In failing to supply and maintain sufficient and adequate lights to enable the motorman to see the Plaintiff in time to stop. Now, that is the allegation of negligence that the Plaintiff makes against the Defendant. Have you any finding in respect to that. They don't say in their particulars that the Defendant was negligent because he did not have a capable man at Selkirk barn and so on. They don't say that at all. They say they were negligent in failing to supply ample and sufficient and adequate lights to enable the motorman to see

the Plaintiff in time to have stopped. So I would be quite willing to give to you an opportunity to reconsider or more fully consider that question and the answer in the light of what I have read to you as containing what the Plaintiff complains of. Of course, I can't tell you to do it, nor I don't desire to tell you to do it only I do think it would probably be more satisfactory to all parties concerned if that matter were cleaned up, as there seems to be some reasonable doubt about it now.

MR. GUY: I think the jury should retire, my Lord, to consider.

HIS LORDSHIP: Do you understand now, gentlemen, what I mean?

JURY: Yes.

HIS LORDSHIP: Give them the two papers that they brought out before.

MR. GUY: My Lord, the allegation which your Lordship has read to the jury now is a definite question as to an item of negligence charged which I have already objected to as being one which in point of law is not negligence.

HIS LORDSHIP: Well, I can't help that. I have explained to them the law as best I am able, and if their finding is wrong, why, then you will have to try and get the appellate court to set it right.

MR. GUY: That is quite true, my Lord, but I think perhaps that question involves, the duty involves an instruction by your Lordship as to what duty there is on us to maintain a certain degree of light.

HIS LORDSHIP: Well, I told them as well as I was able what I considered the duty to be as the law defines it with the material at my disposal. I tried to explain that it did seem to me that in operating a car at that time at night some protection to the outside public was necessary in the shape of a headlight; whether or not that duty is cast upon them by law is another question. If the court should hold that that duty was not cast upon them, therefore there could not be negligence in omitting to comply with it.

MR. GUY: I quite understand that your Lordship did instruct them in that, but even supposing the lights were dim, the lights might be dim and not sufficient to enable the motorman to see in time to stop the car, and yet not be due to any negligence; it might be natural operation.

MR. CAMPBELL: It is all a question for the jury.

HIS LORDSHIP: I explained that to them.

MR. GUY: I think we ought to have a specific finding if they are asked on that, in spite of the question, as to where the defect lay, where the defect is.

HIS LORDSHIP: No, I am not going to seek to control their answers any more than I have done, seemingly to remove a misunderstanding.

The jury return.

CLERK: Have you changed your answer to Question 2?

In the Court of King's Bench for Manitoba.

No. 25. Verdict of the Jury, 27th May 1927—*continued.*

FOREMAN OF JURY: We have added to it.

The CLERK: Question 2 was, If so in what did this negligence consist?

The Answer: Not having any man on duty at Selkirk capable of making adjustments to the lights or other equipment to the car before leaving Selkirk on the night of the accident, as the evidence submitted shows the headlight was not sufficiently powerful to illuminate the track for the motorman to see an object far enough ahead to avoid the accident.

The jury were polled as to questions 1, 2 and 3, and were eleven to one in favor of the answers.

MR. CAMPBELL: I submit to your Lordship that it is a case in which the statutory bar should be raised, and we should be entitled to the costs for the examination for discovery.

HIS LORDSHIP: I will grant you the fiat for discovery, but I can't remove the bar. The jury are discharged.

No. 26. Formal Judgment, 27th May 1927.

No. 26.

Formal Judgment.

IN THE KING'S BENCH.

The Honourable Mr. Justice CURRAN in Court.

Between

PAUL PRONEK - - - - - - - - *Plaintiff*

and

WINNIPEG, SELKIRK AND LAKE WINNIPEG RAILWAY COMPANY - - - - - - - - - *Defendant.*

The 27th day of May, A.D. 1927.

This action having on the 25th, 26th and 27th days of May, 1927, being tried before the Honourable Mr. Justice Curran and a Jury, and the Jury having found a verdict for the Plaintiff for $2,354.25, and the said Honourable Mr. Justice Curran having ordered that judgment be entered for the Plaintiff for the sum of $2,354.25 and costs of suit, including the costs of discovery;

Therefore it is adjudged that the Plaintiff recover against the Defendant $2,354.25 and his costs of suit to be taxed, including the costs of discovery.

Judgment signed this 1st day of June, A.D. 1927.

(Sgd.) G. H. WALKER,
Prothonotary.

The above costs have been taxed and allowed at the sum of $445.00 as appears by a Taxing Officer's Certificate dated the twenty-ninth day of March, 1928.

G. H. WALKER,
Prothonotary.

In the Court of Appeal for Manitoba.

No. 27.
Præcipe on Appeal, 2nd June 1927.

No. 27.

Præcipe on Appeal.

IN THE COURT OF APPEAL.

Between

PAUL PRONEK - - - - - *Plaintiff (Respondent)*

and

WINNIPEG, SELKIRK AND LAKE WINNIPEG RAILWAY COMPANY - - - - - - *Defendant (Appellant).*

Required to be entered and set down on the list of causes, motions, matters and other proceedings for hearing before the Court of Appeal, the Defendant (Appellant's) motion by way of appeal from the decision or verdict of the jury of the eastern judicial district, made, given or rendered herein, on the 27th day of May, A.D. 1927, at the trial of this action, upon the questions submitted to them for determination and the judgment entered thereon.

The nature of the motion intended to be made is, that the said judgment be set aside and discharged and that judgment be entered in favor of the Defendant (Appellant) with costs, and in the event of said motion not being allowed, for a new trial of the action upon the following grounds amongst others.

1. That the said verdict and the judgment entered thereon was wrong and against law, evidence, and the weight of evidence.

2. The evidence does not support the findings of the jury bearing on the answers to questions 1, 2, and 3, submitted to them.

3. There is no evidence to support the findings of the jury in answer to questions 1, 2, and 3 submitted to them at the trial of this action.

4. The evidence establishes that the Defendant adopted a standard type of headlight and properly maintained same, and by so doing fulfilled any duty that might rest upon them in respect of the headlights on their cars.

5. The Plaintiff's action was not based upon negligence in not having a man at Selkirk to make adjustments to the equipment, and the findings of the jury in respect thereof are unsupported by the evidence, and should be disregarded.

6. There is no legal obligation on the Defendant to maintain headlights of any specified intensity, and it was not open to the jury to find that the Defendant was negligent in respect of not having a headlight of sufficient intensity to enable the motorman to see the Plaintiff in time to stop the car before the accident.

In the Court of Appeal for Manitoba.

No. 27. Præcipe on Appeal, 2nd June 1927—*continued.*

7. The finding of the jury as to the intensity of the headlight would place upon the Defendant Company an absolute duty to maintain a light of a fixed intensity and cannot be upheld.

8. On the ground of misdirection and non-direction.

9. The learned trial judge failed to properly direct the jury as to the duty of the Defendant in respect to the headlights on its cars without which direction it was impossible for the jury to make a finding as to the negligence in respect thereof.

10. The learned trial judge should have directed the jury that there was no legal obligation on the Defendant to have a headlight on its cars.

11. The evidence showed that the headlights on the cars might be dim by reason of low voltage or normal operations of the lights, and that assuming that the lights were dim the evidence does not establish that same were dim for reasons other than these.

12. The learned trial judge after recalling the jury ought not to have told them the negligence complained of, but should have asked the jury to find upon the evidence wherein the negligence, if any, lay.

13. On the ground that counsel for the Plaintiff requested the jury to bring in a verdict in favor of the Plaintiff for $5,000.00.

14. On the ground of the improper rejection of evidence.

15. The learned trial Judge should have admitted the photographs of the scene of the accident and the sign off sheets produced by the Defendant's witness Hawes.

Dated at Winnipeg, this 2nd day of June, A.D. 1927.

ANDERSON, GUY, CHAPPELL AND DUVAL,
Solicitors for the Defendant (Appellant).

To the Registrar of the Court of Appeal.

No. 28.

Formal Judgment.

IN THE COURT OF APPEAL.

The Honourable the CHIEF JUSTICE for Manitoba,
The Honourable C. P. FULLERTON,
The Honourable R. M. DENNISTOUN,
The Honourable J. E. P. PRENDERGAST,
The Honourable W. H. TRUEMAN,
Judges of Appeal.

The 26th day of March, A.D. 1928.

Between

PAUL PRONEK - - - - - - - *Plaintiff (Respondent)*

and

WINNIPEG, SELKIRK AND LAKE WINNIPEG RAILWAY COMPANY - - - - - - - *Defendant (Appellant).*

The Appeal of the above named Defendant (Appellant) from the judgment of the Honourable Mr. Justice Curran and a jury entered on the 1st day of June, A.D. 1927, having come up before the Court on the 5th day of March, A.D. 1928, upon reading the pleadings and proceedings, and upon hearing Counsel for the Defendant (Appellant), and upon hearing Counsel for the Plaintiff (Respondent), the Court was pleased to order the matter to stand over for judgment, and the same having come up this 26th day of March, A.D. 1928, for Judgment.

The Court did order and adjudge that the Appeal should be dismissed.

And the Court did further order and adjudge that the Defendant (Appellant) should pay the Plaintiff (Respondent) his costs of the Appeal forthwith after taxation thereof.

Certified.

(Sgd.) A. J. CHRISTIE,
Registrar.

No. 29.

Reasons for Judgment.

No. 29.
Reasons for Judgment.

(A) Perdue, C.J.

(A) PERDUE, C.J.M., concurs in dismissing the appeal.

(B) Fullerton, J.A.

(B) FULLERTON, J.A.

This is an appeal from a judgment in favour of the Plaintiff in an action to recover damages for negligence. The case was heard before the late Mr. Justice Curran sitting with a jury.

The facts are briefly as follows:

The Defendant owns and operates an electric railway between Winnipeg and Selkirk. The car track is located on the westerly side of the highway known as the Selkirk Road. In January 1926, the Plaintiff was driving a team of horses attached to a sleigh in a northerly direction along this highway and when between Miller and Parkdale stations his horses became frightened and bolted. After running north a short distance they crossed a road leading over the railway and entered an adjoining field. Plaintiff lost his left rein but retained his hold on the right rein. The horses made a circle in the field, returned on their own route, but instead of re-crossing the railway they turned south and ran along the railway. While galloping along the railway completely out of control, they were overtaken and run down by a car operated by the Defendant.

The Plaintiff himself was badly hurt, one of his horses was killed and the other injured.

The chief witness for the Plaintiff was the motorman in charge of the car. He deposed that he had trouble with his headlight on the journey from Winnipeg to Selkirk; that he thought possibly it was the carbon in the headlight that was giving trouble; that he went to the night watchman at Selkirk and got from him a new carbon, but this did not help any; that the headlight continued to give him trouble on his return trip and he was obliged to stop twice to adjust it; that the light was so dim he overshot two or three stations; that he could not see the people on the platforms waiting for the car; that when working normally the headlight would enable him to see six or seven pole lengths, or from 750 to 875 feet ahead; that on the night in question he could only see ahead one pole length—125 or 150 feet; that in an emergency he could stop his car in three pole lengths; that on the night in question he first saw something in the centre of the track about a pole length distant and it was only when he was half a pole length away he saw it was a team.

Several acts of negligence were alleged in the statement of claim, but the main contest at the trial was over "6 (*b*) In failing to supply and maintain sufficient and adequate lights to enable the motorman to see the Plaintiff in time to stop."

The jury found the Defendant guilty of negligence, and in reply to the question: "In what did the negligence consist?" answered: "Not

having any man on duty at Selkirk capable of making adjustments to the lights or other equipment of the car before leaving Selkirk on the night of the accident."

At the request of the Plaintiff's counsel, the learned Trial Judge, after giving the jury further instructions, sent them back to re-consider their answer to this question. The jury added to their previous answer the words " as the evidence submitted shows that the headlight was not sufficiently powerful to illuminate the track for the motorman to see an object far enough ahead to avoid the accident."

On the argument before us, counsel for the Appellant argued that the learned Trial Judge had entirely failed to direct the jury as to the duty of the Company in regard to having a headlight on its cars, and that in the absence of such a direction there should be a new trial. After carefully reading the charge I am of the opinion that it sufficiently covers the point in question.

After pointing out at p. 299 that the company is subject to the provisions of the Provincial Railway Act, he continues: " There is no such provision in the Provincial Railway Act at all that governs the matters of negligence that are alleged in the statement of claim. There is a general provision in the Railway Act that requires a railway that falls within its provisions to provide proper and adequate equipment for the operation and working of the railway and I suppose perhaps under that definition as well as under the common law, which we are still working under, under certain conditions, there should be imposed upon this railway the duty to provide safe and adequate means to protect not only their passengers whom they are carrying, but the public at large who may by accident get upon their line of railway; in other words that they should take reasonable measures to protect the public from the operation of their cars."

Again, at p. 307, referring to the charge of failure to supply a sufficient headlight, he said:

" Well, of course, the allegation must be read in connection with the charge that is made here, with the evidence that has been laid before you. It has relevance to this particular Plaintiff and the situation in which he unfortunately found himself on that night in January, 1926, and I am going to leave it to you in that way. If under these circumstances disclosed in the evidence, the headlight that was in actual use that night upon that car on its journey from Selkirk to Winnipeg was a sufficient or reasonably sufficient and adequate protection to the public against being run down or coming into collision with that car when operated at night."

Counsel for the Defendant further argued that neither the common law nor any statute required that their cars should be equipped with headlights. This contention may be literally correct, but the railway is bound to operate its cars with due regard to the safety of the public, and I fail to see how they can discharge that duty if they do not use a headlight or some other means of illuminating the track ahead while operating cars at night.

Counsel for the Defendant further says that even if they were under an obligation to supply a headlight they were not bound to have a headlight

In the Court of Appeal for Manitoba.

No. 29. Reasons for Judgment. (B) Fullerton, J.A.—*continued.*

which would show ahead such a distance as would enable them to stop on the appearance of danger, that having furnished a headlight of standard equipment and kept it in repair they have discharged their duty.

A street railway company operating cars along a public highway owes a duty to the public using the highway to take reasonable care to discover their presence and to avoid injuring them after discovery.

It appears to me that a company operating cars at night could not possibly discharge this duty without being able to stop on the appearance of danger. The Defendant Company recognized this by furnishing a headlight which when burning properly would enable the motorman to see six or seven pole lengths ahead and while running at from 30 to 35 miles an hour he could stop his car in three pole lengths. On the night in question, according to the evidence of the motorman, the condition of the headlight was such that he could only see one pole length ahead, yet he continued to run at the speed of 30 to 35 miles an hour. The jury have found that " the headlight was not sufficiently powerful to illuminate the track for the motorman to see an object far enough ahead to avoid the accident." The finding must be read in the light of the evidence which shows that the car was running at from 30 to 35 miles an hour. The finding, I think, means that, having regard to the condition of the headlight, it was negligent on the part of the Defendant to operate their car at a speed of from 30 to 35 miles an hour.

I would dismiss the appeal with costs.

(C) Dennistoun, J.A.

(D) Prendergast, J.A.

(C) DENNISTOUN, J.A.
(D) PRENDERGAST, J.A. } concur in dismissing the appeal.

(E) Trueman, J.A.

(E) TRUEMAN, J.A.

This is an appeal by the Defendant in an action for negligence tried by the late Mr. Justice Curran, with a jury, in which, upon answers to questions, he entered judgment for the Plaintiff for $2,354.25.

The Defendant operates an electric street car railway on the Selkirk highway between Winnipeg and Selkirk, a distance of nineteen miles. The car track is on the west side of the highway, which has a width of 132 feet. A wide road ditch lies between the railway and the travelled portion of the highway. At intervals roads to the west of the highway cross the railway and connect with the roadway.

On January 2, 1926, at seven o'clock in the evening, the Plaintiff was driving a team of horses and sleigh northerly on the highway. When twelve miles from Winnipeg the horses were frightened by a passing motor van, and ran away. They turned westerly into a road crossing the track. The Plaintiff lost the left rein, with the result that the team after making a wide turn in an adjacent field came back to the track, when they proceeded southerly along the right of way, one of the horses running between the rails. About half a mile south of the cross road, and while the horses were still out of control, the outfit was overtaken and run down by a street car going to Winnipeg. In the smash the Plaintiff was rendered unconscious and badly injured, the sleigh was demolished and one horse was killed.

The car was equipped with a carbon headlight, of standard type, having under full voltage and efficiency a projecting power which made visible objects on the track 500 to 700 feet distant.

The Plaintiff's case rested on the evidence of the motorman, who, subsequent to the accident, left the Defendant's employ. He states that at the outset of the preceding trip, which was from Winnipeg to Selkirk, the headlight was working well, but dimmed during the trip, and that at Selkirk, thinking the trouble was in the carbon, he put in a new carbon. On leaving Selkirk, he says he found the light dim and flickering, and that it was so poor that twice he did not see way-platforms until he was passing them, making it necessary to back up, and that on both occasions he re-adjusted the carbon in an effort to overcome the trouble. He stated that at the time of the accident he could not see ahead more than 125 or 150 feet and that while he saw at this distance something on the track he was unable to distinguish what it was until he was within sixty feet of the outfit. He fixed the rate of speed at the time at thirty miles an hour, and says that at this speed an emergency stop could not be made in less than 375 to 450 feet. He states that the face rim of the headlight had been lined with felt, but that this was worn, with the result that the wind entered. He attributed the trouble to this cause. No expert evidence was given for the Plaintiff.

Evidence called by the Defendant showed that after the accident the light was tested at the barn and found to be all right. An expert in the service of the Defendant and the Winnipeg Electric Company testified that as the power of the light was entirely a matter of voltage, dimness, other than that momentarily caused by self-acting readjustment in the carbon, was necessarily due to the voltage going down through a load or drag on the line from the operation of another car or cars. He admitted that as the light was affected by line voltage it was not perfect, but said it was the type of light in use on ninety per cent. of suburban lines on the continent. He stated that the purpose of the felt lining was to protect the interior from moisture, and that any wind entering through the rim could not materially affect the light. On cross-examination it was brought out that if the light penetrated but seventy-five feet it would mean so low a voltage that if the light was to be kept burning the car would have to be stopped.

Grounds of negligence in the statement of claim were reckless speed; failure to keep a proper lookout, and failure to supply and maintain lights to enable the motorman to see the Plaintiff in time to stop.

The jury found in answer to questions, as follows:

1. Were the Defendants guilty of negligence?—*A.* Yes.

2. If so, in what did this negligence consist?—*A.* Not having any man on duty at Selkirk capable of making adjustments to the lights or other equipment of the car before leaving Selkirk on the night of the accident, as the evidence submitted shows the headlight was not sufficiently powerful to illuminate the track for the motorman to see an object far enough ahead to avoid the accident.

3. If the Defendants were negligent, was the injury to the Plaintiff caused by their negligence?—*A.* Yes.

In the Court of Appeal for Manitoba.

No. 29. Reasons for Judgment. (E) Trueman, J.A.— *continued.*

4. Was the Plaintiff guilty of contributory negligence?—*A.* No.

6. Might the Defendants' servant after the position of the Plaintiff became apparent, by the exercise of reasonable care have prevented the accident?—*A.* No. The motorman did all in his power to avoid the accident.

In my opinion there is nothing for consideration other than the effect or sufficiency of these answers, and that once the duty of the Defendant is stated no difficulty should be experienced in giving effect to them. The Defendant's railroad being upon a public highway which is open to the use of the public at all points, subject to the Defendant's right-of-way (see its Act of incorporation, 63-64 Vict., ch. 78, and amending Act, 3 and 4 Edw. VII, ch. 90, Statutes of Manitoba) there is no analogy between the Defendant's position and that of a steam railway operating on its own land, which is under no duty at common law to a trespasser other than not to run him down if he happens to be seen by the locomotive driver in time to give him warning or to avoid striking him. See *Grand Trunk Ry. Co.* v. *Barnett* (1911) A.C. 361; *Bondy* v. *Sandwich etc. Ry. Co.*, 24 O.L.R. 409; *Diplock* v. *Canadian Northern Ry. Co.*, 20 Can. Ry. Case 356. The Defendant obviously is in a different position. While under no duty by statute, a duty is imposed by common law that the Defendant shall exercise reasonable and proper care in the operation of its cars for the protection of the public on the right of way as part of the highway. See Shearman & Redfield on negligence (6th ed.) sec. 485c; *Gillies* v. *Lye*, 58 O.L.R. 560; *Acadia Coal Co. Ltd.* v. *MacNeil* (1927) S.C.R. 497. Clearly it is required in the performance of this duty that the motorman shall keep a lookout—the degree of care depending on the circumstances—and that at night the speed of the car shall be governed by the power of the headlight, so that when an object on the track is seen the car can be stopped in time. A lookout to be worth the name must be subject to this condition. See Barron on Motor Vehicles, pp. 297, 385. The evidence of the motorman, once the jury accepted it, made the relevant issue before them a simple one. He stated the light was dim and such that he could not see more than 125 to 150 feet ahead. An explanation or an inquiry into its cause was beside the point. He also said that at the speed of thirty miles an hour the car was travelling at at the time of the accident, an emergency stop could not be made in less than 375 to 450 feet. This evidence, which dealt with a condition and not a theory, was uncontradicted. The Defendant's expert said the motorman was mistaken in thinking that the failure of the light was due to wind, as the cause of protracted dimness could only be decreased voltage. This conflict was immaterial. It goes without saying that had the Defendant convinced the jury that the fault was not in the headlight but in the voltage the Defendant's liability would still remain.

I would dismiss the appeal with costs.

In the Court of Appeal for Manitoba.

No. 30.
Notice of Appeal to the Supreme Court of Canada, 2nd April 1928.

No. 30.

Notice of Appeal to the Supreme Court of Canada.

IN THE COURT OF APPEAL FOR MANITOBA.

Between

PAUL PRONEK - - - - - - - (*Plaintiff*) *Respondent*

and

WINNIPEG, SELKIRK AND LAKE WINNIPEG RAILWAY COMPANY - - - - - - - (*Defendant*) *Appellant.*

Take notice that the Winnipeg, Selkirk & Lake Winnipeg Railway Company, the above named Defendant, hereby appeals to the Supreme Court of Canada from the judgment, decree, order or decision rendered, given or pronounced herein by this Court on the 26th day of March, A.D. 1928, and entered in this cause, whereby the appeal of the Winnipeg, Selkirk & Lake Winnipeg Railway Company from the verdict of a jury of the Eastern Judicial District and the judgment directed to be entered thereon by Mr. Justice Curran and entered in the Court of King's Bench for the Province of Manitoba, and dated the 27th day of May, A.D. 1927, was dismissed with costs.

Dated at Winnipeg this 2nd day of April, A.D. 1928.

ANDERSON, GUY, CHAPPELL & DUVAL,
Solicitors for the Winnipeg, Selkirk & Lake Winnipeg Railway Company (Defendant) Appellant.

To PAUL PRONEK and to Messrs. LAMONT & BASTIN, his Solicitors.

In the Court of Appeal for Manitoba.

No. 31. Security Bond, 12th April 1928.

No. 31.

Security Bond.

Know all men by these presents that the Norwich Union Fire Insurance Society, Limited, is held and firmly bound unto Paul Pronek, of Lockport, in the Province of Manitoba, farmer, in the sum of thirty-five hundred dollars ($3,500.00) of good and lawful money of Canada to be paid to the said Paul Pronek, his attorney, executor, administrator or assigns, for which payment well and truly to be made we bind ourselves, our successors and assigns, firmly by these presents.

Sealed with our seal, attested by the proper officer in that behalf this 12th day of April, A.D. 1928.

Whereas a certain action was brought in the Eastern Judicial District of the Court of King's Bench in the Province of Manitoba, by Paul Pronek, Plaintiff, against The Winnipeg Selkirk & Lake Winnipeg Railway Company, Defendant;

And whereas judgment was given in the said Court against the said the Winnipeg Selkirk & Lake Winnipeg Railway Company, who appealed from the said judgment to the Court of Appeal for Manitoba;

And whereas judgment was given in the said action in the said last mentioned Court on the 26th day of March, A.D. 1928;

And whereas the said the Winnipeg Selkirk & Lake Winnipeg Railway Company complains that in giving of the said last mentioned judgment in the said action on the said appeal manifest error hath intervened, wherefore the said the Winnipeg Selkirk & Lake Winnipeg Railway Company desires to appeal from the said judgment of the Court of Appeal for Manitoba to the Supreme Court of Canada.

Now the condition of this obligation is such that if the said the Winnipeg Selkirk & Lake Winnipeg Railway Company effectively prosecute its appeal, and pay such judgment damages and costs as may be awarded against it by the Supreme Court of Canada, then this obligation shall be void, otherwise to remain in full force and effect.

In witness whereof the said Norwich Union Fire Insurance Society, Limited, has caused its corporate seal to be affixed hereto, attested by the hands of its proper officers in that behalf.

NORWICH UNION FIRE INSURANCE SOCIETY, LIMITED,
Per E. M. WHITELY, Attorney.

(Seal)

In the Court of Appeal for Manitoba.

No. 32. Order approving Security, 14th April 1928.

No. 32.

Order approving Security.

In Chambers,

The Honourable W. H. TRUEMAN,
Judge of Appeal.

Between

WINNIPEG, SELKIRK & LAKE WINNIPEG RAILWAY COMPANY - - - - (*Defendant*) *Appellant*

and

PAUL PRONEK - - - - - - - (*Plaintiff*) *Respondent*

Upon the application of the above named (Defendant) Appellant, and upon hearing what was alleged by Counsel for the Appellant,

It is ordered that the bond entered into the 12th day of April, A.D. 1928, in which the Norwich Union Fire Insurance Society, Limited, is obligor and the above named Respondent is obligee, duly filed as security that the Appellant will effectually prosecute its appeal from the judgment of this Court dated the 26th day of March, A.D. 1928, and pay such judgment, damages and costs as may be awarded against it by the Supreme Court of Canada, be and the same is hereby allowed as a good and sufficient security;

And it is further ordered that all proceedings under the said judgment be and the same are hereby stayed until the determination of the said appeal.

Dated at the City of Winnipeg in Manitoba, this 14th day of April, A.D. 1928.

W. H. TRUEMAN,
Judge of Appeal.

No. 33.

No. 33.

Agreement settling Case—14th April 1928.

(*Not printed.*)

In the Court of Appeal for Manitoba.

No. 34. Certificate of Registrar, 28th April 1928.

No. 34.

Certificate of Registrar.

I, the undersigned Deputy Registrar of the Court of Appeal for the Province of Manitoba, do hereby certify that the foregoing printed document, numbered from page 1 to 206, inclusive, is the case stated and agreed upon by the parties hereto, pursuant to Section 68 of the Supreme Court Act and the rules of the Supreme Court of Canada, in a certain case pending in the said Court of Appeal between the said Winnipeg, Selkirk & Lake Winnipeg Railway Company, Appellant, and the said Paul Pronek, Respondent.

And I do further certify that the said Winnipeg, Selkirk & Lake Winnipeg Railway Company has given proper security to the satisfaction of the Honourable Mr. Justice Trueman, one of the Judges of the said Court of Appeal, pursuant to the 70th and 71st sections of the Supreme Court Act, by the deposit of a bond of the Norwich Union Fire Insurance Society, Limited, in the sum of thirty-five hundred dollars ($3500.00), a copy of which said bond may be found on page 204 of the annexed case, and a copy of the order of Mr. Justice Trueman allowing the same may be found on page 205 of the annexed case.

And I do further certify that I have applied to the Judges of the Court of Appeal for Manitoba for their opinions or reasons for judgment herein, and the only reasons delivered to me by the said Judges are those of the Honourable Mr. Justice Fullerton and the Honourable Mr. Justice Trueman, and I do further certify that I was informed that the Honourable the Chief Justice of Manitoba, and the Honourable Mr. Justice Dennistoun, and the Honourable Mr. Justice Prendergast concurred with their lordships Fullerton and Trueman, JJ.A., in dismissing the Defendant's appeal.

And I do further certify that I have received a certificate from the Deputy Registrar of His Majesty's Court of King's Bench of the Province of Manitoba that there were no reasons given for the judgment entered or pronounced in said Court.

In testimony whereof, I have hereunder subscribed my name and affixed the seal of the said Court of Appeal of the Province of Manitoba, this 28th day of April, A.D. 1928.

A. J. CHRISTIE,
Deputy Registrar.

No. 35.

Statement of Case.

In the Supreme Court of Canada.

No. 35. Statement of Case.

IN THE SUPREME COURT OF CANADA.

Between

WINNIPEG, SELKIRK AND LAKE WINNIPEG RAILWAY COMPANY - - - - - - - (*Defendant*) *Appellant,*

and

PAUL PRONEK - - - - - - - (*Plaintiff*) *Respondent.*

STATEMENT OF CASE.

The Plaintiff brought this action against the Winnipeg, Selkirk & Lake Winnipeg Railway Company for damages for injuries sustained by him when a sleigh in which he was driving collided with a car of the Defendant Company between the Town of Selkirk and the City of Winnipeg on the evening of the 2nd of January, 1926. At the time of the accident the team which the Plaintiff was driving was running away and out of control. At the trial the jury brought in a special verdict for two thousand three hundred and fifty-four dollars and twenty-five cents ($2354.25), finding the Defendant guilty of " negligence in not having any man on duty at Selkirk capable of making adjustments to the lights or other equipment to the car before leaving Selkirk on the night of the accident," and on being instructed to amplify their verdict added thereto, " as the evidence submitted shows the headlight was not sufficiently powerful to illuminate the track for the motorman to see an object far enough ahead in order to avoid the accident."

The Defendant appealed to the Court of Appeal for Manitoba, but the said last mentioned Court dismissed the said appeal. The Defendant now appeals to the Supreme Court of Canada.

In the Supreme Court of Canada.

No. 36. Factum of Winnipeg, Selkirk and Lake Winnipeg Railway Company.

No. 36.

Factum of Winnipeg, Selkirk and Lake Winnipeg Railway Company.

IN THE SUPREME COURT OF CANADA.

Between

WINNIPEG, SELKIRK & LAKE WINNIPEG RAILWAY COMPANY - - - - - - - (*Defendant*) *Appellant*

and

PAUL PRONEK - - - - - - - (*Plaintiff*) *Respondent.*

PART I.

STATEMENT OF FACTS.

The Plaintiff brought this action against the Winnipeg, Selkirk & Lake Winnipeg Railway Company, for damages for injuries sustained by him when a sleigh in which he was driving collided with a car of the Defendant Company between the Town of Selkirk and the City of Winnipeg, on the evening of the 2nd of January, 1926. The plaintiff had gone to the City of Winnipeg after delivering a cow which he had sold, and was returning to his home at Lockport when his team got out of control and was running along the tracks of the Defendant Company when the accident occurred. At the trial the jury brought in a special verdict for $2354.25 finding the Defendant guilty of " negligence in not having any man on duty at Selkirk capable of making adjustments to the lights or other equipment to the car before leaving Selkirk on the night of the accident," and on being instructed to amplify their verdict added thereto " as the evidence submitted showed the headlight was not sufficiently powerful to illuminate the track for the motorman to see an object far enough ahead in order to avoid the accident." The jury negatived any improper lookout on the part of the motorman of the car at the time. Record, page 177, line 1. Judgment was entered for the Plaintiff for the said amount and for costs. The Defendant appealed to the Court of Appeal for Manitoba, but the said last mentioned Court dismissed the said appeal. The Defendant now appeals to the Supreme Court of Canada.

PART II.

POINTS IN RESPECT OF WHICH THE APPELLANT ALLEGES ERROR.

1. There was no finding of negligence sufficient to support the verdict.

2. It was not open for the Court of Appeal of Manitoba to hold that the accident was due to the excessive speed of the car, and it is submitted that it erred in so doing.

3. The said Court of Appeal erred in holding that the Defendant must operate its cars so that the same can be stopped within the radius of its own headlight.

4. The learned trial Judge failed to direct the jury as to the duty of the Defendant Company in respect of its headlights, though requested to do so by Counsel for the Defendant. (Record, page 168, line 40 *et seq.*)

PART III.

ARGUMENT.

The jury found as negligence an item of negligence which was not charged in the statement of claim, and which the Defendant had no opportunity of meeting, and which was not a negligent act or omission.

The Defendant Company operates under the provisions of the Manitoba Railway Act insofar as they are applicable. There is no provision in either the Defendant Company's Charter or Special Act or in the Manitoba Railway Act, or in any rule or regulation applicable, which require the cars of the Defendant Company to have a headlight. Possibly, the Defendant in the exercise of reasonable care should have a headlight on its cars when operating at night. Its duty however, in this respect, it is submitted was fulfilled. See evidence of J. E. Watkins, Record, page 81, line 9, and page 82. His evidence shortly is that this was the standard type of headlight in use on the vast majority of similar transporation companies on the North American continent.

It is stated in Beven on Negligence, 3rd Edition, page 614, that " the unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man." See also *Higgins* vs. *Comox Logging Company*, 1927, 2 D.L.R. 682, reading from the headnote. " It is not negligence to use an old type of machine after a new or more efficient type has been produced, provided the old type is reasonably safe and efficient." See also Case of *Elliott* vs. *Toronto Transportation Commission*, 59 O.L.R. 609, 32 Can. Rly. Cases 200. That was a case of a woman falling and breaking her ankle in an opening in the steps of the car, and the jury found that the opening in the steps . . . can be improved to greater safety, and it was there held by the appellate division of Ontario that the finding of the jury did not warrant a judgment in favour of the Plaintiff. The headnote in the Canadian Railway Cases states " the jury went as far as they thought the evidence warranted, and it must be taken that they were unable to agree upon any stronger finding imputing negligence to the Defendant, and any such imputation was negatived by their finding." See also per Masten, J.A., at 202. " The jury have told us the foundation of their verdict, and that foundation is in my opinion insufficient to sustain the verdict and judgment." From the judgment in the *Elliott Case* it would appear that the evidence there adduced on behalf

In the Supreme Court of Canada.

No. 36. Factum of Winnipeg, Selkirk and Lake Winnipeg Railway Company—*continued.*

of the Defendant was very similar to that led by the Defendant in the case at bar. Moreover, the question of not having a man on duty at Selkirk capable of making adjustments to the lights and other equipment to the car was not charged as being an item of negligence which caused the accident, or at all. The jury then found, Record, page 177, line 1, that after the position of the Plaintiff became apparent the motorman did all in his power to avoid the accident.

A case similar in principle arose for consideration in Ontario in *Westenfelder* vs. *Hobbs Manufacturing*, 1925, 57 O.L.R. 31. The jury there found the Defendant guilty of negligence. The Plaintiff was injured while on the Defendant's premises by a crate which over-balanced and fell on his foot causing injury, and the jury found the Defendant was negligent by not properly directing the Plaintiff to and from the shipping room, and by not displaying a " no admittance " sign on the outside of the shipping room entrance. Contributory negligence was negatived and damages assessed. It was held by the appellate division that the jury. . . finding certain negligence to have existed must be considered to have negatived all the other charges of negligence, and also that the negligence found by the jury did not justify a judgment in the Plaintiff's favour and dismissed the action.

Negligence has been repeatedly defined as the absence of care according to the circumstances, and conversely it has also been defined as not the omission to take such precaution as will avoid an accident in all events. It is simply a failure to exercise the care that a reasonably prudent man would exercise under the circumstances. This statement of the law is adopted in *Carnat* vs. *Matthews*, 1921, 2 Western Weekly Reports, 218. (A decision of the Court of Appeal of Alberta.)

It is beyond peradventure true that no type of headlight exists which would under all circumstances (snow, rain, wind and snow, sleet, curves of track, etc.), illuminate the track sufficiently for the motorman to see an object far enough ahead to avoid an accident. This it is submitted, comes within the above statement and is in effect holding the Defendant under an obligation to take such care as will avoid an accident and is very much higher than that which the law imposes of taking reasonable care according to the circumstances. The evidence, it is submitted, discloses that if the light was dim it was due to ordinary operation and was not due to any negligent act or omission of the Defendant. The headlight itself was tested following the accident, and with the exception of the broken cord, found in order. Record, page 122, line 44 to 123, line 10.

There is no requirement imposed either by Statute, regulation or by the common law requiring the Defendant to have a headlight of any specific intensity. Its duty at most is to have a reasonably good light and it is manifest from the evidence that it fulfilled this obligation if such obligation existed. *See* case of *Zuvelt* vs. *C.P.R.* 23. O.L.R., at page 602. Moss, C.J., at page 606 : " There is no obligation statutory or otherwise, for railway companies to maintain a headlight on a snow plow when placed in running as it must always be when working in front of the locomotive.

But according to the evidence there was a headlight on this particular snow plow placed in the most advantageous position it was possible to have it, having regard to the form and construction of a snow plow, and the nature of the service to be performed by it. There was no evidence to show that any better or more effective means by showing a light from a snow plow was known or in use. There is in truth no evidence upon which a jury could reasonably find negligence so far as the headlight was concerned." In that case the jury found that the Defendants had an insufficient headlight on the snow plow.

See also, in the same case, Garrow, J.A., at page 610: "I do not pause to discuss the question of the sufficiency of the headlight further than to say that if that was a question proper for the jury at all, which I doubt, there was in my opinion no evidence to justify their finding upon the subject. A snow plow is a necessary part of a railway's equipment in this climate and the headlight in question is not shown to have been abnormal in any way or such as is not commonly in use, or that a light could have been placed differently so as to be effective, having regard to the work which a snow plow does. That is a question for experts and not to be guessed at by a jury."

The question of the sufficiency or adequacy of the headlight, it is submitted, was not a question proper for the determination by the jury.

There is in the Province of Manitoba a Public Utility Commission whose duty it is to prescribe regulations. Section 21 of the Public Utility Act, Revised Statutes of Manitoba 1913, Cap. 166, reads as follows:

> "21. The commission shall have a general supervision over all public utilities subject to the legislative authority of the Province, and may make such orders regarding equipment, appliances, safety devices, extension of works or systems, reporting and other matters, as are necessary for the safety or convenience of the public or for the proper carrying out of any contract, charter or franchise involving the use of public property or rights. The commission shall conduct all inquiries necessary for the obtaining of complete information as to the manner in which public utilities comply with the law, or as to any other matter or thing within the jurisdiction of the commission."

See in this respect *Mallory* vs. *Winnipeg Joint Terminals*, 25 Manitoba Reports, 456, which was a question which dealt with the necessity of coverings for switch rods. It was held by the Manitoba Court of Appeal (and affirmed by the Supreme Court of Canada), 53 S.C.R. 323, that in the absence of any provision in the Railway Act requiring switch rods to be covered, and no order by the Railway Board on the subject having been made, it was not competent for the jury to declare that leaving the rods uncovered was negligence on the part of the Defendants, and that the verdict for the Plaintiff must be set aside. No order as to lights had been made in the case at bar and it is submitted that it was not open to the jury to find that the light was insufficient or inadequate for the purpose, and

In the Supreme Court of Canada.

No. 36. Factum of Winnipeg, Selkirk and Lake Winnipeg Railway Company—*continued.*

they did not actually so find. Moreover, the onus was on the Plaintiff to prove that a better headlight was available and in common use. No evidence of this nature was forthcoming at the trial, and the Defendant's evidence in this respect was uncontradicted which was to the effect as already indicated, that the headlight used was the best known for the purpose.

Furthermore, it is submitted that a mere general finding of inadequacy is not sufficient to sustain a verdict. A verdict must go further and indicate wherein the light was defective. This has not been done. It was open to the jury to find for instance, that there was no felt around the rim of the light, etc., but their finding of negligence in not having a man at Selkirk negatives other items of negligence charged.

The plan of the locus of the accident filed, Exhibit 4, Record, page 229, indicates that the track of the Defendant Company is separated from the public roadway by a ditch of considerable width and depth. Consequently, the jury quite properly did not find the motorman negligent on the ground of lookout, and their finding in this respect precludes any question of ultimate negligence arising. Record, page 177, lines 1–4. The jury no doubt felt that the motorman should not be expected to anticipate, and was not negligent in not anticipating that someone would be out on the track half a mile or more from a crossing with a runaway team after dark. To hold otherwise would make the Defendant an insurer.

While it is true that the track at the scene of the accident is on a public road allowance, it is also a fact that it is at this point vastly different from the ordinary street car track, which is traversed at will by the public. The track at the point in question could not be used by the public for ordinary vehicular traffic, both because it is separated from the roadway by a wide ditch, and because it is not so adapted. In these respects the track resembles and is very closely akin to a privately owned right-of-way. If it were a private right-of-way, it is manifest that under the circumstances there could be no recovery. See the case of *Grand Trunk* vs. *Barnett*, 1911, Appeal Cases 361, and *Bondy* vs. *Sandwich* 24 O.L.R. 409.

In *Mehner* vs. *Winnipeg Electric Co.*, 25 Manitoba Reports 384, the Court of Appeal of Manitoba held a finding that a motorman was incompetent to run the car, was insufficient to sustain a verdict founded upon such finding of negligence and set aside the verdict. Perdue, J.A., at page 391, quoting authorities, states: " It is trite law that negligence or shortcomings of the Defendants in any action of negligence, however numerous, will not make them liable for injuries the Plaintiff may have sustained unless there is a direct connection found by the jury with evidence to sustain it between the injury sustained and the negligence found." The failure to have experts, mechanics, etc., on duty at Selkirk at night did not cause the accident, and the finding in this regard negatives other items of negligence charged. See also *McGraw* vs. *Toronto Railway*, 18 O.L.R. 154, and *Andreas* vs. *C.P.R.* 37, S.C.R., page 1.

Furthermore, it is submitted that there was no absolute duty on the Defendant to have headlights on the car, and in the absence of such absolute duty it would not be negligence not to have any. In *Peers* vs. *Elliott* 21 S.C.R. 19, the trial Judge directed the jury that if there was no spark arrester on the engine, that in itself would be negligence for which the Defendant would be liable. The Supreme Court ordered a new trial holding that this was a misdirection. See also *Mader* vs. *Halifax Electric*, 37 S.C.R. 94, per Davies, J., at page 97: "It is elementary law that a Defendant cannot be held liable for any act of negligence he may have been guilty of, unless such negligence be the direct and proximate cause of the Plaintiff's injury . . . Mere general findings of negligence unless such negligence is shown and found to be the direct and proximate cause of the injuries complained of are quite insufficient to support a judgment." It is submitted that the finding of the jury in the case at bar is a mere general finding and would necessitate the Defendant Company having a round house or a complete repair department at every short distance of its line operating both day and night.

It is submitted that it was not open for the Court of Appeal to hold that the accident was due to the excessive speed of the car.

Fullerton, J.A., Record, page 186, line 7, states "that a Company operating cars at night could not possibly discharge this duty (of taking reasonable care) without being able to stop on the appearance of danger."

Trueman, J.A., Record, page 188, line 26, states "that at night the speed of the car shall be governed by the power of the headlight so that when an object on the track is seen the car can be stopped in time. A look-out to be worth the name must be subject to this condition."

These findings carried to their logical conclusion would impose upon the Defendant the duty of operating its cars and trains at such a speed that if any object is on the track the car could be brought to a stop without colliding with the object, and under all circumstances, such as fog, rain, sleet, snow, wind and snow and track curves, and would, it is submitted, preclude the Company from operating at all or make it an insurer of people and animals who or which strayed on their right-of-way. This, it is submitted, is far too high a duty and places an obligation impossible of fulfilment on a carrier.

As already indicated, the finding by a jury of one item of negligence negatives a finding on other counts of negligence charged. The jury did not say that the speed of the car was too great, and it is submitted that it was not open to the Court of Appeal to interpret the finding of "not having a man on duty at Selkirk capable of making adjustments to the lights and other equipment to the car before leaving Selkirk on the night of the accident, as the evidence submitted showed that the headlight was not sufficiently powerful to illuminate the track for the motorman to see an object far enough ahead in order to avoid an accident," as tantamount to a finding of excessive speed.

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It is submitted that the learned trial Judge did not adequately instruct the jury as to its duty in respect of headlights although requested so to do by Counsel for the Defendant. Record, page 168, line 40.

In conclusion the Appellant asks that the appeal be allowed and the action dismissed or, in the alternative, that a new trial of the action be ordered.

All of which is respectfully submitted.

R. D. GUY, K.C.,
of Counsel for the Appellant.

No. 37. Factum of Paul Pronek.

No. 37.

Factum of Paul Pronek.

PART I.

Statement of Facts.

1. This is an appeal to the Supreme Court of Canada by the Appellant (Defendant), the Winnipeg, Selkirk and Lake Winnipeg Railway Company. The case was heard by the late Mr. Justice Curran and a Jury on the 25th, 26th and 27th days of May, 1927, and the Jury gave a verdict in favour of the Plaintiff for the sum of $2,354.25, together with costs of suit. The Appellant (Defendant) appealed to the Court of Appeal for the Province of Manitoba, and the Appeal was heard on the 5th day of March, 1928, and on the 28th day of March, 1928, was dismissed by the Court of Appeal, all the judges of the Court of Appeal having concurred in its dismissal.

2. The Plaintiff's statement of facts is quite simple. The Plaintiff is a Galician Farmer living between Winnipeg and Selkirk, and on the 2nd day of January, 1926, came to the City of Winnipeg to conduct some business. On the evening of that date he was returning home along Main Street, and when some ten or twelve miles from the City a large motor truck travelling at a high rate of speed met the team on the highway, and passing very close to the team frightened it, which caused it to get out of control and run away. The Appellant's (Defendant's) line of railway is located on the westerly side of the highway and is situate thereon. The horses ran north a short distance and then turned across the car line and entered an adjoining field. The Plaintiff while endeavouring to check the team lost one rein and the horses ran round a circle in the field and returned to the car line. Instead of turning north towards their home, they turned back south towards Winnipeg and ran along the car track a distance of about half a mile when they were overtaken by a street car owned by the Appellant (Defendant). The Plaintiff was badly injured, one of the horses was killed and the other severely hurt. The Plaintiff was not aware of

the approach of the street car until it was about fifty feet away and it was impossible for him to escape from the galloping team. The evidence of the motorman shows that he had trouble with his headlight on the journey from Winnipeg to Selkirk; that he thought the fault was probably in the carbon and that when he got to Selkirk he obtained a new carbon from the night watchman, who was the only man on duty, but this did not help any, and the headlight continued to give him trouble on his return trip to Winnipeg, and he was obliged to stop several times to adjust it; that the light was so dim he overshot several of the stops; that he was unable to see the people on the platforms waiting for the car; that when the headlight was working normally he could see some seven or eight pole lengths (a pole length being estimated as between 125 to 150 feet); that on the night in question he could only see ahead one pole length; that when at this distance he recognized that there was something ahead of him on the track, and that at the distance of half a pole length he was able to distinguish what such object was.

3. The Jury found negligence consisting of "Not having any man on duty at Selkirk capable of making adjustments to the lights or other equipment of the car before leaving Selkirk on the night of the accident"; and the learned Trial Judge, after giving it further instructions, sent them back to be more specific, when they added to their previous answer the words, "as the evidence submitted shows that the headlight was not sufficiently powerful to illuminate the track for the motorman to see an object far enough ahead to avoid the accident."

PART II.

Argument on the Facts.

1. There was no attempt made on the part of the Appellant (Defendant) to contradict the Plaintiff's evidence on the material facts.

2. The evidence of the motorman as to the condition of the headlights is corroborated by the Plaintiff, who was uable to see the car until it was some fifty feet away, and by the witness Parchinko, who met the car in question on the highway at the time and place the accident happened, and who saw no headlight.

Record, p. 27, lines 10 and 11.

3. The motorman could see along the street car line when headlight in good condition between seven and eight pole lengths (a pole length being from 125 to 150 feet), and a passenger could be seen standing on a platform five pole lengths away. In the headlight's condition the night of the accident, he could only see one pole length, and could only distinguish the outfit at half a pole length.

Record, p. 32, lines 8 to 9;
p. 32, lines 18 to 19;
p. 36, lines 15 to 16;
p. 32, last two lines.

In the Supreme Court of Canada.

No. 37. Factum of Paul Pronek— *continued.*

4. Notwithstanding the absence of the headlight, the car was running on schedule. The running time at night was forty minutes including stops. The distance was 19 miles. This would require an average rate of speed on the whole trip of close to 30 miles per hour. Between stops this speed would necessarily be greatly increased. The cars were capable of running to 48 miles per hour.

Record, p. 38, lines 28 to 33;
p. 39, lines 4 to 7;
p. 39, lines 9 to 10;
p. 39, line 14.

5. There, of course, was no evidence of the rate of speed of the team, but a Jury would be entitled to assume a galloping team of horses with an empty sleigh, would go, say 20 miles per hour. The team would travel some distance after it was seen before it was overtaken. The object on the track was seen a pole length away, but the car after it overtook and killed one horse, carried the other horse, the man and the wreckage, a further distance of two pole lengths before it was brought to a stop. From these facts a Jury would be entitled to infer, and probably did infer, that the car was travelling upwards of its maximum speed of 48 miles per hour.

Record, p. 33, lines 31 to 34.

6. There is no specific speed limit fixed by law similar to motor vehicle legislation, nor is there any statutory requirement of a headlight of any specific intensity, but surely it is negligence to proceed through the night down a public highway at this rate of speed without having a light of sufficient power both to warn the public of the approach of the car, and to enable the operator to check his speed and avoid injury to person or property on the highway. The Plaintiff had lived close to this street car line 16 years. He knew that the lights could be seen a long distance off —some 2 miles. If the light had been normal he could doubtless have discovered it in time to have jumped from the runaway and thereby avoided his serious personal injuries, damages for which constitute the greater part of the verdict.

Record, p. 6, lines 19 to 20;
p. 10, lines 30 to 34.

7. Further, it is submitted that it is negligence in fact to operate any class of vehicle in a place to which the public lawfully have access, at a rate of speed so great that such vehicle cannot be stopped within the operator's field of vision.

Record, p. 155, address of Trial Judge to Jury, lines 11 to 22;
p. 158, lines 16 to bottom;
p. 159, lines 1 to 2;
p. 185 and 186, Mr. Justice Fullerton's Judgment;
p. 187 and 188, Mr. Justice Trueman's Judgment.

PART III.

ARGUMENT ON THE LAW.

The defences raised in the Trial Court are briefly denials by the Defendant as to any negligence on its behalf, and the defences of contributory negligence.

In the Court of Appeal, although raising a large number of grounds, the Appellant's Counsel confined himself to three main objections.

(*a*) That there was no duty upon them to maintain a headlight of any specific intensity, or in fact any headlight.

(*b*) That in any event they furnished a standard type of headlight.

(*c*) Misdirection of the Trial Judge in his charge to the Jury.

The Jury negatived any negligence on the part of the Respondent, and it was not urged in the Court of Appeal that the Respondent was guilty of any negligence whatsoever.

As to the functions of the Judge and Jury in an action for negligence, *see Bridges* vs. *North London Railway Co.*, L.R. 7, E. & I. App. 213.

Judgment of Duncan, page 229: "It is, however, unnecessary to decide whether a verdict for the Plaintiff on this ground would have been one in which I, if I had been on the Jury, should have concurred. It is enough to say that in my judgment there was evidence upon which a Jury might reasonably find that the accident happened wholly through the negligence of the Defendants in not providing for the safe alighting of passengers at that place, on that night and under these circumstances."

Brett, J., p. 236: "If Courts or a Judge may overrule such decisions, because they or he do not agree with them, they ought logically to overrule decision after decision. And yet each successive decision would prove more distinctly the opinion of men of ordinary intelligence. If such decisions may be overruled on the mere ground that the Courts or Judges do not agree with them, Juries are bound to matters of fact by the view of the Judges as to facts. This cannot be."

See also Metropolitan Ry. Co. vs. *Jackson.* 3 A.C. 193. L.C. at p. 197: "The Judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred; the jurors have to say whether, from those facts, negligence ought to be inferred. It is, in my opinion, of the greatest importance in the administration of justice, that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the Jury, if, in a case where there are facts from which negligence may reasonably be inferred, the Judge were to withdraw the case from the Jury upon the ground that, in his opinion, negligence ought not to be inferred.

See also Davey vs. *L. & S.W. Ry.* 12 Q.B.D. 70, C.A. 1883:

Judgment of Brett, M.R. at p. 71.
Judgment of Bowen, L.J. at p. 76.

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No. 37. Factum of Paul Pronek— *continued.*

Where the question is one of fact and there is evidence on both sides properly submitted to the Jury, the verdict of the Jury, once found ought to stand; and the setting aside of such a verdict, should be of rare and exceptional occurrence.

Commissioner for Railways vs. *Brown*, 13 A.C. 133.

See Judgment of Lord Fitzgerald at p. 134: "Chief Justice Tindal, about fifty years since, laid down a rule to this effect: that where the question is one of fact and there is evidence on both sides properly submitted to the Jury, the verdict of the Jury once found ought to stand; and that the setting aside of such a verdict should be of rare and exceptional occurrence."

See also Judgment of Davies C.J. in the case of *Windsor Hotel Co.* vs. *Odell*, 39 S.C.R. p. 336.

At p. 337: "The question before us is not whether the verdict is in our opinion a right or just one under the evidence, but simply whether it is one which a Jury could under all the circumstances fairly find."

If there is any evidence upon which the Jury might reasonably found a verdict for the Plaintiff, she is entitled to her judgment.

See *Cox* vs. *English, etc., Bank*, 1905 A.C. p. 168: Judgment of Lord Davey at p. 170.

Toronto Ry. Co. vs. *King*, 1908 A.C. p. 260: Judgment of Lord Atkinson at page 270: "The Jury have practically found these issues in favour of the Plaintiff. They are the tribunal entrusted by the law with the determination of issues of fact, and their conclusions on such matters ought not to be disturbed because they are not such as Judges sitting in Courts of Appeal might themselves have arrived at."

Metropolitan Ry. vs. *Wright*, 11 A.C. p. 152.

Lord Herschell p. 154: "The case was one unquestionably within the province of a Jury, and, in my opinion, the verdict ought not to be disturbed unless it is one which a Jury viewing the whole evidence reasonably could not properly find.

See also Judgment of Lord Halsbury p. 155.

A Court of Appeal should not interfere with a verdict of negligence where there is some evidence to support the Jury's finding.

See *Jaroshinsky* vs. *G.T.R.* 31 D.L.R. p. 531.

Nor is it the duty of the Court of Appeal to be astute to find reason for setting aside the verdict of a trial Court.

See *Gazey* vs. *Toronto Ry. Co.* 40 O.L.R. p. 449.

An Appellate Court should not interfere with a decision of a Jury without special reasons.

Ruddy vs. *Toronto E.R.R. Co.* 33 D.L.R. p. 193.

It is respectfully submitted that no special reasons exist in this case.

Even if the learned Trial Judge had not fully directed the Jury, or had directed them on a point on which there was no evidence on which they might properly found their verdict, yet if the pleadings and evidence support the Jury's findings, the Plaintiff should be entitled to succeed.

Creveling vs. *Canadian Bridge Co.* 51 S.C.R. p. 216.

Cottingham vs. *Longman*, 48 S.C.R. p. 542. Judgment of Fitzpatrick C.J. at p. 543 :

As to Misdirection : Misdirection, to be a ground for a new trial, must be a substantial misdirection.

Blue vs. *Red Mountain Ry. Co.* 1909, A.C. 361. Lord Shaw judgment at p. 367.

As to the Appellants objection to the sufficiency in law as to the Jury's answers.

Dunphy vs. *B.C. Electric*, 1919, 3 W.W.R. p. 1076. Judgment of the Chief Justice, 1077 : " The Jury's answers are to be read in connection with the Judge's charge to the Jury."

Iddington J. on the same page : " I find the answers of the Jury quite intelligible when read in light of the evidence and the trial Judge's charge to the Jury."

Duff J. at p. 1079 : " When the answer to the second question is read with the charge it becomes perfectly intelligible."

Judgment of Anglin J. pages 1080 and 1081 : " The Jury's findings must always be read with and construed in the light presented by the pleadings, the evidence and the charge of the trial Judge . . . It seems to be sufficiently certain what the Jury meant by it."

See also Judgment of Mignault at p. 1082 and 1083.

Miller vs. *Smith*, 1925, 2 W.W.R. p. 360.

The Respondent submits that the Judgments below were right and that the Appeal should be dismissed with costs.

J. S. LAMONT,
Counsel for the Respondent.

In the Supreme Court of Canada.

No. 38. Formal Judgment, 5th February 1929.

No. 38.

Formal Judgment.

IN THE SUPREME COURT OF CANADA.

Tuesday, the Fifth day of February, A.D. 1929.

Present:

The Right Honourable F. A. ANGLIN, C.J.C., P.C.
The Honourable Mr. Justice NEWCOMBE.
The Honourable Mr. Justice RINFRET.
The Honourable Mr. Justice LAMONT.
The Honourable Mr. Justice SMITH.

Between:

WINNIPEG, SELKIRK AND LAKE WINNIPEG RAILWAY COMPANY - - - - - (*Defendant*) *Appellant*

and

PAUL PRONEK - - - - - - - - (*Plaintiff*) *Respondent.*

The Appeal of the above named Appellant from the Judgment of the Court of Appeal for the Province of Manitoba, pronounced in the above cause on the 26th day of March, in the year of Our Lord One thousand nine hundred and twenty-eight, affirming the Judgment of the Court of King's Bench for the Province of Manitoba, rendered on the 27th day of May, in the year of Our Lord one thousand nine hundred and twenty-seven, having come on to be heard before this Court on the 29th day of October in the year of Our Lord, one thousand nine hundred and twenty-eight, in the presence of counsel as well for the appellant as for the respondent, where upon and upon hearing what was alleged by counsel aforesaid, this Court was pleased to direct that the said appeal should stand over for Judgment, and the same coming on this day for Judgment,

THIS COURT DID ORDER AND ADJUDGE that the said appeal should be and the same was allowed and that the said Judgment of the said Court of Appeal for the Province of Manitoba, and of the Court of King's Bench for the Province of Manitoba should be and the same were respectively reversed and set aside, and the action dismissed.

AND THIS COURT DID FURTHER ORDER AND ADJUDGE that the said Respondent should and do pay to the said Appellant the costs incurred by the said Appellant as well in the Court of King's Bench for the Province of Manitoba, the Court of Appeal for the Province of Manitoba, as in this Court.

(Sgd.) E. R. CAMERON,
Registrar.

No. 39.

Reasons for Judgment.

In the Supreme Court of Canada.

No. 39. Reasons for Judgment. (A) Anglin, C.J.C.

(A) ANGLIN, C.J.C.

I have had the advantage of reading the opinions prepared by my brothers Lamont and Smith. While fully concurring in the conclusions of the former and in the reasoning on which they are based, there are a few observations which it seems to me desirable that I should make.

The ditch alongside the tramway and the unlawful height of the tracks —six or eight inches above the highway level—were much relied on by the appellant as affording strong ground for supposing that there would not be vehicular traffic along the tramway rails. At other seasons that might be the case. But we are here in the presence of mid-winter conditions (January 2nd), when, normally, the line of demarcation would almost disappear, and no serious obstacle would be presented to the driving of a team of horses and a sleigh on to, and along, the part of the highway on which the tramway is laid. This bears on the question whether there was any reason for the company to anticipate that there might be vehicular traffic on that part of the highway.

The jury's answer to the sixth question indicates their purpose to hold the motorman, McLeod, blameless. They probably accepted his statement that he was obliged to make schedule time and that this required him to run his car at thirty miles an hour or upwards. Otherwise they might well have found him at fault, notwithstanding the misdirection of the trial judge on that question, in driving at that rate of speed while his headlight was, for one reason or another, functioning so poorly that he could not distinguish objects on the track more than seventy feet ahead.

In the light of McLeod's evidence, the finding of the jury in answer to the second question means that, the motorman being required to maintain a speed of not less than thirty miles per hour, the duty of the company was to provide him with a headlight which would always enable him to discern objects on the track at least 420 feet ahead, that being the shortest distance within which his car running at that speed could be stopped; and that it was negligence to fail to furnish such a headlight—from whatever cause, whether inherent defect, loose connections, or lack of power, it failed so to function. The only alternative, on the evidence which the jury seems to have accepted, would be a finding of fault, amounting to recklessness, on the part of the motorman in maintaining, under the circumstances, the speed he did.

But if, for any reason, the jury's finding in answer to the second question should be deemed insufficient to support a judgment for the plaintiff, a new trial would, I fear, be inevitable, because of misdirection on the issue of excessive speed and also because of the insufficiency of the sixth question

In the Supreme Court of Canada.

No. 39. Reasons for Judgment. (A) Anglin, C.J.C.— *continued.*

and of the direction in regard to it. That question should have read as follows :

> " Might the defendant's servants, after the position of the plaintiff became apparent (or should have been apparent to the motorman), by the exercise of reasonable care have prevented the accident ? "

The part in brackets was omitted, and the charge of the learned trial judge did not remedy the deficiency. No doubt the motorman, as the jury found, did all he could after the position of the plaintiff was apparent, *i.e.*, when he was about sixty feet ahead; but it was then too late. Had the part of the question (as above stated) in brackets been included, who can say that the jury, properly instructed, would not have found that the motorman should have seen the plaintiff's danger when he was over 500 feet away, and should in that case have stopped his car in time to avoid running him down? Such a finding would entail liability of the defendants; and the jury were not given the opportunity to make it.

Finally, the case of *Brenner* v. *Toronto Railway Co.*, 13 O.L.R. 423, referred to by my brother Smith, and part of the judgment of the Divisional Court in which was approved by the Judicial Committee in *British Columbia Electric* v. *Loach*, 1916 A.C., 719, was alluded to in the course of the argument only because the judgment in the Divisional Court had followed an earlier decision in *Preston* v. *Toronto Ry. Co.*, 11 O.L.R. 56, 59; 13 O.L.R. 369, where it was held that a rule (or practice) of the Railway Company concerning the safety of persons using the streets affords evidence, as against the Company, of a standard of reasonableness in regard to the subject covered by it upon which a jury may act. The Brenner case has no other bearing upon the matter now before us.

I am unable to understand why, having regard to the conditions under which the appellant's tramcars are operated, a headlight functioning effectively should not be deemed part of the " adequate equipment " which " every railway company " is required by the Manitoba Railway Act (s. 48) " at all times " to provide " for the efficient working and operation of the railway." If it is, there was here a breach of statutory duty by the defendants which the jury has found to have been negligence causing the injuries of which the plaintiff complains. If not, then to cause a heavy tramcar to rush along a dark highway, where it has not an exclusive but merely a preferential, right-of-way, at 30 miles per hour, with a headlight functioning so ineffectively that it only enables the motorman to see objects 60 or 70 feet ahead instead of at a distance of 800–1,000 feet, as a headlight functioning at full efficiency would enable him to do, imports a reckless indifference to the rights of others and a criminal disregard of the safety of those who may be on such highway utterly inconsistent with the duty " to operate their cars with the care that a reasonably prudent person would exercise under the circumstances," which, it is common ground, the common law imposed upon the defendants.

In setting up, in explanation of their failure to have an adequate headlight, the improbability of there being any vehicular traffic on the tramway tracks because of their excessive height above the highway, the defendants are, in effect, invoking a consequence of their own illegality to excuse the non-observance of what would otherwise have been their plain duty.

(B) RINFRET J.

I do not think the verdict can stand.

The first answer of the jury was that the company was at fault for " not having any man on duty at Selkirk capable of making adjustments to the lights or other equipment to the car before leaving Selkirk on the night of the accident." This was considered unsatisfactory by the trial judge and counsel on both sides. All seemed to agree that, more particularly in view of the pleadings and the course of the trial, no judgment could be entered on such ground. The jury were accordingly requested to reconsider their answer. They did not change it; they only added to it the following words : " as the evidence submitted shows the headlight was not sufficiently powerful to illuminate the track for the motorman to see an object far enough ahead to avoid the accident." The wording of this additional answer indicated, on the part of the jury, no intention of introducing a new and independent finding of negligence against the company. It left the verdict as it stood formerly, except that it disclosed the reason for the original answer. It did not improve the unsatisfactory finding.

Should we however look upon the additional answer as a separate finding of negligence, the difficulty is to understand its true meaning. If the meaning be that the railway company was under the duty to have on its cars headlights of sufficient power to illuminate the track so as, under all circumstances, to avoid an accident, I do not see upon what legal grounds such verdict can be maintained.

If the meaning be that the headlight on this particular car was insufficient, the answer is twofold :—

1. The uncontradicted evidence is that it is the best type of light that can be found. It is in use on 90% of the lines on the North American Continent. At full efficiency, it will show an object about 700 feet ahead, which is far more than what would be required to meet the duty of the company, even if we should accept the standard laid down by the jury according to the widest interpretation that can be given to its verdict.

2. There is no evidence that the headlight was out of order. During the previous trip from Selkirk to Winnipeg, the dimmer was used and gave no trouble. Coming back from Winnipeg to Selkirk, " the Bull's eye . . . . was working good." Tests were made daily. One was made on this particular headlight before it was put on the car. After the accident, the headlight was again tested, when it was brought back to Selkirk, and found in good condition. So that the charge of negligence against the company

> " 5*b* In failing to supply and maintain sufficient light to enable the motorman to see the plaintiff in time to stop "

was without foundation.

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No. 39. Reasons for Judgment. (B) Rinfret, J.—*continued.*

The headlight which the company supplied and maintained was sufficiently powerful to meet the exigencies of the jury, even if such duty was cast upon the company.

True it is that, in the course of operation, for some time previous to the accident, and for some reason not satisfactorily explained, the lamp flickered and the light became dim. That was not common to that type of headlight, nor due to any defect in the particular light then in use. It was a temporary condition unknown to any official, agent or employee of the company, outside of the motorman. It might have been a reason for the jury to find the motorman at fault in driving at that rate of speed under the circumstances. But that is not what the jury found. On that point moreover, it should not be overlooked that the question of speed had been withdrawn from them by the trial judge, who told them that they should disregard it altogether.

That the motorman was held blameless is not inconsistent with the view that he could not anticipate such an unusual occurrence as the finding of a team and sleigh on this railway, constructed as it was with ties and rails above the ground level and separated from the travelled highway by a " wide road ditch." It may be that the special act of incorporation of the company did not authorize the railway to be so constructed. But the jury were faced with the conditions as they were. The trial judge, in his address, had said to them :

> " There is no doubt about it that the railway was properly and legally constructed."

It seems evident that, wrongly or rightly, the company had taken unto itself the exclusive use of its right of way. The wide ditch and the other circumstances favoured this course of action. The public appears to have assented to it. It did not, in fact, travel upon the right of way. Any vehicular traffic over it was out of the question, on account of the lay-out, of the ties and of the protruding rails. The railway had been thus in operation for a good many years. The Plaintiff himself did not contend that, at the time of the accident, he happened to be on the right of way in the exercise of a right. He took pains to explain that he was driven there through a course of events absolutely beyond his control. No doubt he was found guilty of no contributory negligence; but the evidence was that the horses became unmanageable and that fact would be a sufficient explanation of that part of the verdict.

In my view of the case, that point is not concluded by the statutes and the act of incorporation. It has to be considered in the light of the actual facts and the existing conditions and that was a matter essentially for the jury. I do not think, upon the answers, the plaintiff was entitled to a judgment in his favour.

I would allow the appeal and would concur in the dismissal of the action.

(C) LAMONT, J.

In this case the facts are as follows :—

On January 2nd, 1926, the respondent (Plaintiff) who is a farmer, left Winnipeg for his home, about sixteen miles north, with a team and sleigh. He had proceeded along the highway some twelve miles when he met a large covered truck, the canvas of which was flapping in the wind. This so frightened his horses that they got beyond control and ran away. They ran north a short distance, then turned to the left, crossed the appellant's line of railway and entered a field adjoining the railway track to the west. While endeavouring to check the speed of his horses, the respondent dropped the left rein. He continued to pull on the right rein, which had the effect of bringing the horses around in a circle. When they got back to the appellant's track the horses, instead of crossing the track to the east, ran south along it towards Winnipeg. One horse ran between the rails and the other just outside of the west rail. When they had gone at full gallop for half a mile they were overtaken and run down by the appellant's electric car, which smashed the sleigh, severely injured the respondent, killed one horse and injured the other. To recover damages for his injuries and the loss he sustained the respondent brought this action in which he claims that his injuries and loss were occasioned solely by the negligence of the appellant, its servants and agents. Among other acts of negligence alleged was the following :

> " (*b*) In failing to supply and maintain sufficient and adequate lights to enable the motorman to see the plaintiff in time to stop."

The appellant denied negligence on its part or that of its servants; pleaded the statute authorizing its incorporation and operation and alleged that the accident was due to negligence on the part of the Respondent.

The evidence shews that the appellant operates an electric railway between Winnipeg and Selkirk. The car line is located on the highway, occupying the most westerly part thereof. The car which ran down the respondent was in charge of motorman W. H. McLeod and Conductor Johnston. McLeod testified that his car was equipped with a headlight which, when in good condition, *i.e.*, at full efficiency, would illuminate the track six or seven pole lengths ahead of the car, and that he could then distinguish a person at five pole lengths. According to him a pole length varied from 125 to 150 feet; but Hawes, the appellant's superintendent, fixed it at about 140 feet.

McLeod left Winnipeg for Selkirk at 5.30 p.m. and arrived at Selkirk at 6.20 p.m. He testified that he had trouble with the headlight on his way up. The light flickered and was very dim. He thought the trouble was with the carbon so, on reaching Selkirk, he got a new carbon and put it in the headlight. At 6.30 p.m. he left Selkirk for Winnipeg. The new carbon did not effect any improvement in the light. Instead of the track being illuminated, as it should have been, for six or seven pole lengths, the light was showing ahead for only one pole length, and he could not

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distinguish objects on the track until they were within 70 or 75 feet of the car. The result was that, running on schedule time (30 miles per hour), which McLeod said he was supposed to do, he could not see the stations where intending passengers were waiting, in sufficient time to stop before going by them. This actually happened at least twice between Selkirk and the place of the accident. As the new carbon gave no better light than the former one, McLeod concluded that the trouble was not with the carbon. Twice between Selkirk and the place of the accident he got out and examined the headlight and he noticed that the felt around the door was worn away letting the wind blow in. He thought this might be the cause of the flickering. The second examination was at McLennan. Two miles farther on the accident happened. The track at the place where the accident happened was straight and level for a mile each way.

The jury found that the appellant had been guilty of negligence which caused the respondent's injuries and that the respondent had not been guilty of any negligence. In answering the question: In what did the defendant's negligence consist? the jury said:

> "Not having any man on duty at Selkirk capable of making adjustments to the lights or other equipment to the car before leaving Selkirk on the night of the accident, as the evidence shows the headlight was not sufficiently powerful to illuminate the track for the motorman to see an object far enough ahead to avoid the accident."

To understand that answer, further reference to the evidence is necessary. The testimony shows that the appellant kept at Selkirk a barn foreman whose duty it was to superintend the equipment, including the headlights, and keep it all in good working order. He, however, left the barn each day at 6 p.m., after which time the appellant had no one at the barn except the night watchman, who knew nothing whatever about repairing headlights and had no duties in connection therewith. When, therefore, McLeod brought his car with the headlight which he thought defective to Selkirk at 6.20 p.m., there was no one there who could repair it. In view of these facts, which were undisputed, and the fact that the appellant's car was running on the unlighted highway at a rate of speed of at least 30 miles an hour, the answer of the jury, in my opinion, amounts to a finding that, under the circumstances, the appellant was negligent in not having on this car a headlight functioning with sufficient power to enable the motorman to see objects on the track in time to avoid running over them. The first part of the answer suggests that had the appellant had a man at Selkirk on the night of the accident who could have remedied any defect in the headlight, the track, on the return trip, would have been illuminated ahead for six or seven pole lengths, and, as McLeod could stop his car in three pole lengths, the accident would not have happened. The jury having found that the accident resulted from the use of an insufficient headlight, the next question is, was the appellant under any obligation to supply the

car with a headlight functioning adequately having regard to the speed at which it was necessary to operate the car to maintain schedule time.

In the first place it is to be noted that the respondent was injured on the highway where he had a right to be unless there was some statutory provision limiting his right.

The statutes applicable are: Ch. 78 Statutes of Manitoba, 1900 (the appellant's special Act of Incorporation) as amended by ch. 90 of the Statutes of 1904 (Private); and the Manitoba Railway Act which is incorporated therein.

The material provisions are sections 38 and 40 of the Railway Act; section 13 of Ch. 78, and Clause (*d*) of the agreement entered into between the appellant and the various municipalities through which the appellant's line ran. In part they read as follows:

> " 38. No person other than those connected with or employed by the railway company shall walk along the track thereof, except where the same is laid across or along a highway, and not even then if the track be laid on a separate and distinct part of such highway and it be so expressed or understood between the company and the municipal council in whose territory such highway is comprised . . ."
>
> " 40. Every railway company shall at all times provide adequate equipment and motive power for the efficient working and operation of the railway."
>
> " 13. The rails of the railway, when the railway is constructed along the street or highway as aforesaid, shall be laid flush (as nearly as practicable) with such street or highway and the railway track shall conform to the grades of the same, so as to offer the least possible impediment to the ordinary traffic of the said streets and highways, consistent with the proper working of said railway."
>
> " (*d*) All cars and trains shall have the right of way on the said tracks and highways, and any vehicle, horseman or foot passenger on said track shall, on the approach of any car, give such car right-of-way."

There is nothing in these sections which interferes with the respondent's right to use the highway. Had the municipalities, in their agreements with the appellant, consented to have the public excluded from walking on that part of the highway covered by the appellant's track, s. 38 of the Railway Act, in the absence of s. 13 of ch. 78, would be operative, and walking on the track prohibited. For two reasons, however, I am of opinion that no such prohibition existed. In the first place, the municipalities did not, either expressly or impliedly, consent thereto. On the contrary, clause (*d*) above quoted recognizes the right of pedestrian or vehicular traffic to use the portion of the highway covered by the track, subject only to giving a right of way to the appellant's cars. In the second place, s. 13 is impliedly inconsistent with the existence of any restriction on the right of the public to use every part of the highway. Section 13

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requires the rails to be laid as nearly as practicable flush with the highway, "so as to offer the least possible impediment to the ordinary traffic" on the highway. This clearly contemplates that traffic may be carried on along that part of the highway on which the rails are laid. Section 13 is part of a special Act into which the provisions of the Railway Act—which is a general Act—have been incorporated. In Maxwell on the Interpretation of Statutes, 6th ed., page 328, the learned author says :—

> "When a General Act is incorporated into a special one, the provisions of the latter would prevail over any of the former with which they were inconsistent."

As section 13 impliedly leaves the whole of the highway open for use by the public, it would prevail over any restriction on that use provided for by section 38 of the Railway Act. The respondent had, therefore, a right to be upon that part of the highway occupied by the appellant's tracks, but on the approach of the appellant's car he was under obligation to give it the right of way. This obligation implies that he would be made aware of the approach of the car in time to get off the track. He was not made aware of its approach until it was impossible for him to leave the track and, under the circumstances, he probably would not have been able to vacate the track even had he been aware of the car's proximity.

For the appellant it was contended that neither the statute nor the agreement it made with the municipalities requires the appellant to equip its cars with a headlight of any particular intensity or, indeed, with any headlight at all, and that, having complied with all the statutory requirements, it owed no duty to the respondent other than not to wilfully injure him. It is, no doubt, true that the statute does not in terms prescribe that a headlight shall form part of the necessary equipment, but it does require the appellant at all times to provide adequate equipment for the efficient operation of its railway. Such adequate equipment in the case of a tramcar driven at high speed along a dark highway at night, in my opinion, certainly includes an effective headlight. But even if headlights should not be included in the term "adequate equipment," it is well established law that although a railway company has not violated any statutory provision, yet it may be found guilty of negligence by reason of its failure to perform an obligation imposed upon it by common law. This is made clear by the language of the Privy Council in *Rex* v. *Broad*, 1915 A.C., 1110, where, at page 1114, their Lordships say :

> "The making of general regulations and the particular compliance with them still left those in charge of the working of the traffic bound to exercise whatever measure of care might in law be their appropriate duty upon the occasion in question."

It is also well established law that statutory authority to operate a railway does not authorize its operation in a negligent manner or in a manner which unnecessarily causes damage to others. *C.P.R.* v. *Roy*, 1902 A.C., 220.

Apart, therefore, from any statutory requirement, as the respondent had a right to be on the highway, there was a duty imposed upon the appellant at common law to exercise such care as the law calls for to prevent injury to him, since, without negligence on his own part, he found himself upon the railway track and unable for the moment to get out of the way of the approaching car. The degree of care which the law calls for is " that care which a reasonably prudent man would exercise under the circumstances." Whether or not the appellant's motorman, under the circumstances as known to him, acted as a reasonably prudent man in running his car on schedule time without a better light than he had, is a question of fact as to which no legal rules can be laid down. The jury had before it two pieces of evidence from which an inference could be drawn that he did not. The first of these is that the appellant anticipated that the public might frequent its tracks. This is shown by its having inserted in the agreement a clause requiring that " any vehicle, horseman or foot passenger on said track shall on the approach of any car give such car right of way." The second is that the appellant, by itself furnishing a headlight, which, when at full efficiency, would illuminate the track for six or seven pole lengths, had shown what in its opinion was an adequate headlight for the efficient operation of its cars and the safety of the public. The supplying of such a headlight to its cars was most cogent evidence against the appellant as to what a proper headlight should do, and this standard of care established by the appellant itself may well have been taken by the jury to be that which a reasonably prudent man would have adopted under the circumstances.

I am therefore of opinion that there was evidence to justify the jury in finding that a headlight, which illuminated the track for one pole length only, was totally inadequate where the car was being driven at night on the country highway at a speed of thirty miles per hour.

We were not referred to any Canadian or English case similar to the one before us, but the American case of *Gilmore* v. *Federal St. & P. Ry. Co.* (1893), 153 Penn. St. R., p. 31, seems in point. At page 33 of the report the Court says :—

> " The degree of care to be exercised must necessarily vary with the circumstances, and therefore no unbending rule can be laid down, but there is no difficulty in saying that it is negligence to run a car along a narrow and unlighted alley on a dark night at a rate of speed that will not permit its stoppage within a distance covered by its own headlight."

On the argument a number of cases were cited in which individuals had been injured by steam railways. There can be no analogy between the duty owed to a person on its track by a railway company the cars of which are run over the company's own private property where the public, generally speaking, have no right to be, and where the company is not called upon to anticipate their presence, and the duty owed by the appellant to the respondent in this case, where the cars were run upon the

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highway from no part of which the public were excluded and where the appellant had reason to anticipate some persons might be.

Counsel for the appellant contended that the verdict could not stand because the jury had not found the particular defect in the headlight which caused its dimness. In my opinion this contention cannot be supported. The jury found that the headlight on that car would not illuminate the track far enough ahead for safety. Why it would not do so was a matter into which they did not inquire; nor were they called upon to do so. Whether it arose from the wind getting into the headlight, as McLeod seemed to think, or because the connection between the headlight and the electric wire became deranged, or because the voltage was lowered by overloading the line, as the appellant's superintendent suggested, is immaterial; the duty was upon the appellant to keep its car equipped with a headlight which would properly illuminate the track, and if any of these suggested causes interfered to prevent adequate illumination, the appellant should have removed the interfering cause. To rush along an unlighted highway at thirty miles an hour with the headlight as it was amounts, in my opinion, to sheer recklessness; and the jury has in effect so found.

It was also suggested that the appellant had done its whole duty as far as the headlight was concerned, when it equipped the car with a standard type of headlight which was largely used in Canada and the United States. Surely it is idle to contend that the appellant discharged its full duty by equipping the car with a standard headlight, if that headlight, for some reason or other, did not function. It is an adequately functioning headlight that it is the appellant's duty to supply.

Counsel for the appellant further contended that the finding of the jury carried to its logical conclusion

> " would impose upon the defendant the duty of operating its cars and trains at such a speed that if any object is on the track the car could be brought to a stop without colliding with the object, and under all circumstances, such as fog, rain, sleet, snow, wind and snow and track curves " etc.

This, in my opinion, is entirely beside the question. The jury were not dealing with conditions of fog, sleet, track curves, etc.; what they held, and all that they held, was that, given the hour, place and speed at which the car was being driven at the time of the accident, it was negligence so to run the car with a headlight which did not permit the motorman to see objects within the distance in which it could be stopped. I agree that the appellant is not an insurer of the public. Its duty is to have its cars operated with due care for the public safety. But how it can be said that to drive a car, at night along a dark highway which the public have a right to frequent, at thirty miles an hour with a light which reflects only 140 feet ahead, and enables the motorman to distinguish objects only at 70 feet ahead, when the car cannot be stopped in less than 420 feet, was taking that reasonable care for the safety of the public which it is common ground it was the duty of the appellant to take, passes my comprehension. If the appellant had

blindfolded its motorman at Selkirk and told him to drive to Winnipeg at thirty miles an hour and a person on the track was injured, could it be contended that the appellant was not negligent if the accident occurred by reason of the inability of the motorman to see in front of him? Yet to my mind that is practically the situation existing here. The motorman was not blindfolded, but he was given a car with a headlight which did not enable him to distinguish objects beyond 70 feet, although required to run at a schedule rate such that he could not stop the car in less than 420 feet, and the accident occurred because he could not see far enough ahead to stop his car before running over the respondent.

In my opinion the judgment of the Manitoba Court of Appeal was right and should be affirmed. I would dismiss the appeal with costs.

(D) SMITH, J. (concurred in by NEWCOMBE, J.).

(D) Smith, J. (concurred in by Newcombe, J.).

The respondent (plaintiff) at the trial by jury recovered judgment against the appellant (defendant) for damages sustained through being struck by one of the appellant's cars. An appeal to the Court of Appeal for Manitoba was dismissed, and the appellant now appeals to this Court.

From Winnipeg north to Selkirk, a distance of nineteen miles, there is a highway called Main Street, 132 feet wide, on the westerly side of which is located the appellant's line of railway. Between the railway and the main travelled highway there is a ditch, the depth and width of which are not described in the evidence, but which is marked on the plan as being on the space about 35 feet wide, extending from the easterly side of the railway to the westerly side of the main travelled road. There is another ditch along the east side of the main travelled road, and then a dirt road east of the latter ditch. The appellant's railway is located where it is under statutory authority and agreement with the municipalities, and is constructed like an ordinary railway line, having ties laid on the surface with ballast between, the rails on top projecting upwards their full depth above the ties and ballast, so that both ties and rails are above the ground level. Built-up crossings were therefore necessary, to enable traffic to cross both ditch and railway, and were provided where required.

The respondent was driving in his sleigh with a team of horses from Winnipeg northerly along the main travelled road referred to, after dark on the evening of the second day of January, 1926, and, at a point about ten miles north of Winnipeg, met a motor truck, at which his horses became frightened, and ran away. They turned to the left over one of the crossings of the railway which led on to the prairie at the west. Here respondent says he lost one of the reins and, pulling on the other, caused the horses to make a circuit, which brought them back on to the crossing, from which they turned south along appellant's railway line. About half a mile south of the crossing, the horses, still running along the track, one on each side of the westerly rail, were overtaken by defendant's car, which struck with force respondent's outfit, smashing it, killing one of the horses, and injuring the other and the respondent himself.

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The following are the questions submitted to the jury, and the answers :

1. Were the defendants guilty of negligence ?—Yes.

2. If so, in what did this negligence consist ?—Not having any man on duty at Selkirk capable of making adjustments to the lights or other equipment to the car before leaving Selkirk on the night of the accident.

3. If the defendants were negligent, was the injury to the plaintiff caused by their negligence ?—Yes.

4. Was the plaintiff guilty of contributory negligence ?—No.

5. If so, in what does such negligence consist ?—None.

6. Might the defendant's servants, after the position of the plaintiff became apparent, by the exercise of reasonable care have prevented the accident ?—No. None from the evidence submitted. The motorman did all in his power to avoid the accident.

7. At what sum do you assess the plaintiff's damages ? Special $354.25. General damages $2,000.00.

Plaintiff's counsel requested the Judge to direct the jury to make a more explicit finding in regard to question No. 2. After argument, His Lordship again addressed the jury, and referred to questions 1 and 2, and proceeded :

" I merely point out to you that in enumerating the particulars of negligence or negligent acts charged in the pleading against the defendant, the answer that you have given was not one of these particulars. There is no allegation in the statement of claim that the defendants were negligent in not having a man on duty at Selkirk capable of making adjustments to the lights and so on. The allegation was that the light, that the system itself, was defective. The allegation was——"

Mr. GUY : " My Lord, I don't think your Lordship should suggest what the answer might be to the questions. They heard all this before."

After some discussion, His Lordship proceeded :

" The allegation of negligence with regard to the lights is this : In failing to supply and maintain sufficient and adequate lights to enable the motorman to see the Plaintiff in time to stop. Now that is the allegation of negligence that the plaintiff makes against the defendant. Have you any finding in respect to that. They don't say in their particulars that the defendant was negligent because he did not have a capable man at Selkirk barn, and so on. They don't say that at all. They say they were negligent in failing to supply ample and sufficient and adequate light to enable the motorman to see the plaintiff in time to have stopped. So I would be quite willing to give to you an opportunity to reconsider or more fully consider that question and the answer in the light of what I have read to you as containing what the plaintiff complains of."

The jury retired, and defendants' counsel renewed an objection that he had previously made, that the allegation just read to the jury as constituting negligence was not in point of law negligence, but His Lordship replied that he had explained the law to the jury the best he was able.

The jury returned and said they had added to their former answer to question No. 2, so as to now make it read as follows :—

> " *Answer*—Not having any man on duty at Selkirk capable of making adjustments to the lights or other equipment to the car before leaving Selkirk on the night of the accident, as the evidence submitted shows the headlight was not sufficiently powerful to illuminate the track for the motorman to see an object far enough ahead to avoid the accident."

The learned judge's exposition of the law to the jury that he referred to in answer to Mr. Guy's objection was in general terms, namely, that to create liability there must be a duty on the defendant to protect the plaintiff, a breach of that duty, and damage to the plaintiff resulting from that breach through a natural and continuous sequence of events uninterruptedly connecting the breach of duty with the damage. This, of course, did not enlighten the jury as to whether, as a matter of law, it was the duty of the defendant to have a head-light sufficiently powerful to enable the motorman to see the plaintiff in time to stop. The jurymen were left to decide the point for themselves, and found that there was such duty, and also a duty to have had a man at Selkirk on the night of the accident capable of making adjustments to the lights and other equipment to the car before it left Selkirk, and a breach of both these duties.

As to the neglect to have a man on duty at Selkirk, it seems clear that there was no such obligation on the defendants. Their duty to the public as to the condition and equipment of the car was in operating it, to have it in a condition to be operated without undue danger to the public, and whether or not they had a man on duty capable of putting it in such condition would make no difference. This ground of negligence was not alleged or attempted to be proved, and counsel for plaintiff urged the trial judge to point this out to the jury, as he did. The plaintiff's case therefore rests entirely on the finding that defendants were under a duty to have on the car a headlight sufficiently powerful to illuminate the track for the motorman to see an object far enough ahead to avoid the accident. An attempt has been made to read into the answer some other meaning. One of the learned judges in the court below reads it as a finding of too great speed, which he gives as thirty to thirty-five miles per hour. The only evidence as to speed was by plaintiff's witness, the motorman, who said, p. 31, l, 39 : " I was going possibly thirty miles an hour." The learned Judge in the course of the trial, p. 156, l, 42, remarked that to say this rate was negligence was absurd, and in his charge told the jury that they might disregard this element, which they did, inasmuch as they have not said a word about speed. It has also been urged that this answer implies a finding that the particular lamp on this car was out of order at the time of the accident.

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The answer, to my mind, plainly indicates that in the opinion of the jury it was the duty of the defendants to have a headlight of the brilliancy they mention, regardless of whether it was functioning properly or not. An attempt was made to prove that this particular light was out of order, but the evidence to that effect, if it could be considered as evidence, of a defect that caused the dimness of the light, was of the most vague and feeble character. The motorman said the light was dim, and he thought the carbon was bad. He got a new carbon, and found he was mistaken, as the new carbon made no improvement. He then makes another guess, and says the felt against which the door of the lamp shuts was worn, which allowed the wind to get in and make the lamp flicker. He says he does not know anything about electricity, and would not know how to adjust one of these lamps.

The expert witness for the defendants says that a certain amount of flickering is inherent in all arc lights, by reason of the way the carbon burns, the arc gradually moving round the outer edge of the carbon, and that there is a variation in the brightness in any particular direction; firstly, because brightness in that direction depends on whether the arc is at the front, the side or the back of the carbon; secondly, because the voltage on the power line of a railway varies with the varying load it is called on to carry. Again, he says that when the carbon is automatically adjusting itself, the light will almost go out for a moment. He further shows, by production of the lamp, that the outer casing projects back beyond the felt referred to, so as to carry the current of air back beyond this felt, and that, in any case, air entering there would not cause the light to flicker.

The motorman says, p. 34, lines 6 to 9, that, leaving Winnipeg for Selkirk at 5.30 that evening, this light "was working good," but says it became dim, and he changed the carbon at Selkirk, and had trouble with dimness on the trip back to Winnipeg on which the accident happened. He does not, however, confine his complaint at all to this particular headlight, but says all the headlights were bad. At p. 36, line 27, he says "I have never had satisfaction with these headlights." At p. 37, line 8, "Well, the headlight, I am speaking generally, the whole bunch of headlights, they are never satisfactory to my way." At p. 41, line 16, "The headlights are all bad."

A boy named Parchinko testified that he was proceeding north along the highway and was standing up in his sleigh, and heard the crash of the collision right across on his left, looked round, and then saw the car lighted up inside, but had not seen any lights or the car till attracted by the crash. The headlight, the motorman says, was lit all the time, and illuminating the track for 150 feet ahead, and the car was lit up inside, and this boy, facing it as it approached on a parallel course 35 or 40 feet away never even became aware of its presence till attracted by the crash at his left hand. He had some power of vision, because he says after the crash he saw the car and lights inside. If he states the truth, the only explanation is that he was not looking in the direction of the car, and, never having seen the headlight at all, he could tell nothing about its brightness.

I think there was no evidence on which a jury could reasonably find that there was in the headlight in question some particular defect that caused it to function less effectively than it and the other similar headlights used by defendants ordinarily function. The only evidence as to the condition of the headlight after the accident is that it was in good condition and has been in use as usual ever since. It had gone out because the collision had pulled the plug of the cord from its socket, thus severing the connection and cutting off the current. The jury has not found any such defect in terms, and I do not think we can read such a finding by implication into the answer. If such had been the intention of the jury, it would have been easy to say so in direct and simple language. The jury was urged, at request of plaintiff's counsel, to say whether or not the defendants were negligent by failing in their duty to have a light sufficiently powerful to enable the motorman to see an object on the track sufficiently far off to enable him to stop before hitting it, and in my opinion that and nothing else is the negligence found by the added clause.

The whole question therefore is whether or not the defendants were under legal obligation to carry a headlight of the power mentioned. If not, then the negligence found was failure to do what there was no legal obligation to do, which, of course, would not support the verdict.

No case has been cited that goes the length contended for here. We must simply apply the general rule that defendants had a duty towards the plaintiff to operate their cars with the care that a reasonably prudent person would exercise under the circumstances. Plaintiff was carried on to the railway by his runaway team, and the jury has found that he was not guilty of negligence in being there, or when there. The Defendants, however, had no reason to anticipate such an unusual occurrence. The construction of the railway, as described, was such that nobody would voluntarily attempt to drive a team and sleigh along it, and in addition it was separated from the travelled highway by a ditch.

The Railway Act requires a railway line on a highway to be on a level with the road, with the top of the rails not more than one inch higher, and it is not shown why this was departed from in this instance. It is, however, not important here whether or not defendants were legally entitled to construct their railway above the road surface level as they did, because the condition actually existed, so that it would be quite out of reason to say that it might have been anticipated that someone might be driving his team along the railway. Under these circumstances, I think it cannot be said that defendants were bound to use such a degree of care as would insure against such an unusual and unforeseen occurrence. The possibility of a person walking on the track might, perhaps, be anticipated, but in that case he would also be required to take reasonable care. and the light, even if as dim as the motorman claims, could be seen far enough away to enable him, if keeping a reasonable lookout, to step out of the way. This would also apply to animals on the track, because the owner would also be required to take reasonable care. We are dealing here with a special and unusual case, where the plaintiff was, by no fault of his own or defendants, deprived

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of the power of exercising the care that would be exercised under ordinary circumstances. Were, then, the defendants bound, as a matter of law, to provide means of insuring against accident under such extraordinary circumstances? The Court of Appeal holds that they were. Fullerton, J.A., speaking of defendants' duty to take reasonable care, says, "That a company operating cars at night could not possibly discharge this duty without being able to stop on the appearance of danger."

Trueman, J.A., says, "That at night the speed of the car shall be governed by the power of the headlight, so that when an object on the track is seen, the car can be stopped in time. A lookout, to be worth the name, must be subject to this condition." One of the passengers testifies that it was snowing and stormy at the time of the accident, but respondent says it was a nice, clear night.

These judgments, however, go the full length of obliging defendants to insure the public against damage by any collision, quite regardless of conditions. If there is a curve in the track, a heavy snow storm or a fog, the speed must be regulated accordingly. If the conformation of the ground along the track, trees, buildings or other objects, obstruct the view, even in the daytime, speed would have to be regulated in the same way.

I am not in accord with these views. I think the obligation on defendants to use reasonable care would require them to have a headlight of reasonable efficiency, having regard to the state of the art of artificial lighting at night of cars operating as defendants' cars do. They were, perhaps, not under obligation to have the very latest and most efficient headlights made, but according to the evidence they had, in fact, the very best lights in use for the purpose. These lights are the standard equipment of similar cars all over this continent, according to the only evidence offered. Plaintiff's witness, the motorman, thinks they are not bright enough, but neither he nor any other witness says that any brighter or better lights are available. There is, in my opinion, as I have stated, no finding that the particular light in use on this occasion was ineffective by reason of being out of order. I am therefore of opinion that the defendants in having on the car a headlight of the power and efficiency in general use for the purpose on this continent, according to the uncontradicted evidence in the case, discharged their duty to have a headlight of reasonable efficiency under the circumstances.

The numerous cases cited in respondent's factum as to the respective functions of judge and jury, and as to interfering with the finding of fact by a jury, seem to me to have no application, because the jury's finding that is questioned is not as to the fact that the headlight was not sufficiently powerful to enable the motorman to see plaintiff in time to stop. It is their finding, or assumption, that as a matter of law defendants had a duty to have a light of this efficiency. It is conceded that if there was such a duty, the finding of fact as to its breach cannot be questioned. If the jury's finding of negligence is based on the assumption that defendants had a

legal duty to supply a light of the efficiency they mention, the verdict cannot stand if, as a matter of law, the defendants had not a legal duty to take such a degree of care. Many authorities are cited in the appellant's factum that support the view I have indicated above as to the degree of care respecting headlights that it was defendants' duty to take. Beven on Negligence, 3rd Ed., p. 614 :

> " The unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business."

All the evidence in this case shows that defendants fully complied with the ordinary usage of the business as to headlights, taking it, as I do, that there is no finding of a special defect in the condition of the particular light : *Zuvelt* v. *C. P. R.*, 23 O. L. R., 606, is much in point as to the principles involved here.

An interesting point is raised in the appellant's factum as to the effect of section 21 of the Public Utility Act, R. S. Man (1913), Chap. 166, which places in the hands of a Commission the power to make orders regarding equipment, appliances and safety devices in carrying out a franchise involving the use of public property.

Mallory v. *Winnipeg Joint Terminals*, 25 Man. Reports, and S. C. R. 323, decided under the statute, is referred to. In view of what I have said above, I think it is not necessary to deal with this point.

The King v. *Broad*, 1915 A. C. 1110, was referred to as discussing the principle, but as it deals with a case of accident at a highway and railway intersection, where people were expected to be crossing, I think nothing can be gathered from it applicable to this case.

Brenner v. *Toronto Ry. Co.*, 13 O. L. R., 423, deals with ultimate negligence where the defendant's servant, by anterior negligence, deprived himself of the power to avoid the consequences of plaintiff's negligence, which he otherwise would have had. Here plaintiff was found not to have been negligent, and it does not seem to me that this case helps.

It has been suggested that the answers of the jury are unsatisfactory, and that therefore there should be a new trial. The plaintiff in his statement of claim alleges negligence, as follows :

> (*a*) A dangerous rate of speed.
> (*b*) " In failing to supply and maintain sufficient and adequate lights to enable the motorman to see the plaintiff in time to stop."
> (*c*) Defective brakes and failure to apply the brakes and slow down in time.

As I have pointed out, there is no finding of excessive speed under (*a*), and there was no real attempt by plaintiff to prove excessive speed. I have referred above to the only evidence as to speed and to the judge's charge regarding it. There was no objection to this, though, after the jury had first brought in their answers, plaintiff's counsel in a long argument

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asked the trial judge to give further directions to the jury. Further directions were given along the lines requested, but there was no request for a change of directions on this particular point nor for a direction to the jury to make a finding with reference to it.

As to (*c*), the plaintiff proceeded at the trial to show, by his evidence, that the brakes were not defective, and that there was no negligence on the part of the motorman. There is no finding of defective brakes, the only evidence on the point being that of plaintiff's witness, that they were not defective; and there is a finding, in accordance with the evidence of plaintiff's witness, that defendants' servants were not negligent.

The plaintiff, therefore, at the trial, grounded his whole case on the proposition of law that there rested on defendants a duty toward plaintiff to the extent set out in (*b*), and the judgment appealed from is grounded on that proposition of law, which, as I have stated, is, in my opinion, unsound. If I am correct in that view, then plaintiff at another trial would have to try some new ground. He has had one chance before a jury on the question of excessive speed, and has failed to get such a finding. He practically acquiesced in withdrawing that ground of complaint from the jury, and I can see no reason for submitting that question to another jury. In fact, I agree with the trial judge that it would be absurd to call 30 miles an hour on a track where there was no reason to expect any person to be travelling excessive.

It would, I think, be unreasonable to allow plaintiff a new trial to prove that the brakes were defective, or that the motorman was negligent, after having proved at the former trial that the brakes were not defective and the motorman was not negligent. The only other point would be as to a defect in the particular headlight in use at the time of the accident. No such express ground of negligence was alleged in the pleadings, the allegation being that the light was insufficient, not because the particular light was defective, but regardless of whether it was defective or not. There was no request to have the jury make a finding as to whether or not there was a defect in this particular light. All the evidence that plaintiff can possibly get on this point was offered at the trial, and amounted to a statement by a witness that it was one of a bad lot in use by defendants. He, however, admitted that he had no knowledge of electricity, and was incompetent to explain defects in such lamps or to adjust them, and that the guess he made as to the carbon being defective was all wrong.

On the question of the strength of the light, at page 31, line 32, he says he saw plaintiff a pole length in front, which would be 125 or 150 feet. There is nothing to indicate that the jury believed that he could not see further than 150 feet, and it is quite possible that they did not believe it. The same witness stated that it required about three pole lengths, about 450 feet, to come to a stop from a speed of 30 miles per hour, and all that the answer of the jury implies is that the light was not strong enough to enable the motorman to see that far. If it was a bright night, as

plaintiff says, were the jury likely to believe that a large dark object like plaintiff's team and sleigh with a big box could not be seen on the snow more than 150 feet away, even if there had been no light? The jury had all the evidence before them on this point that can be offered now, and did not see fit to say that the particular light had any defect or was out of condition, nor did plaintiff's counsel ask the trial judge in his second charge to direct the jury to make a finding on that point. I think therefore that plaintiff is not entitled to another chance with another jury of getting a finding of a defect in the particular light.

10 The appeal should be allowed, and the action dismissed, with costs throughout.

In the Supreme Court of Canada.

No. 39. Reasons for Judgment. (D) Smith, J. (concurred in by Newcombe, J.)—*continued.*

No. 40.

Order in Council granting special leave to appeal to His Majesty in Council.

In the Privy Council.

No. 40. Order in Council granting special leave to appeal to His Majesty in Council, 27th February 1930.

AT THE COURT AT BUCKINGHAM PALACE

The 27th day of February, 1930.

Present,

THE KING'S MOST EXCELLENT MAJESTY

LORD PRESIDENT — VISCOUNT GOSCHEN
LORD CHAMBERLAIN — LORD THOMSON
20 MR. SECRETARY ADAMSON.

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 17th day of February 1930 in the words following, viz. :—

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Paul Pronek in the matter of an Appeal from the Supreme Court of Canada between the Petitioner Appellant and the Winnipeg Selkirk & Lake Winnipeg Railway Company Respondents setting forth (amongst other matters)
30 that the principal question in the case is as to the duty owed by a company lawfully operating a railway upon a public highway to members of the public lawfully using the highway upon which the Company's track is laid: that the facts are set forth in the Petition: that on the 22nd March 1927 the Petitioner commenced an Action against the Respondents in the Court of King's Bench for Manitoba in respect of an accident to the Petitioner and his team and sleigh

In the Privy Council.

No. 40. Order in Council granting special leave to appeal to His Majesty in Council, 27th February 1930—*continued.*

on the public highway charging the Respondents with negligence in the following particulars and claiming damages in the sum of $6,484·00 (*a*) in proceeding at a reckless and dangerous rate of speed and in failing to maintain a careful and proper lookout on the car (*b*) in failing to supply and maintain sufficient and adequate lights to enable the motorman to see the Plaintiff in time to stop (*c*) in not keeping the car properly equipped with sufficient and adequate brakes and in failing to apply the brakes and slow down the car in time to avoid a collision: that by their defence the Respondents denied negligence on their part and alleged negligence and contributory negligence on the part of the Petitioner as the cause of the accident: that the jury found that the collision was due to the negligence of the Respondents in not having any man on duty at Selkirk capable of making adjustments to the lights or other equipment of the car before leaving Selkirk on the night of the accident as the evidence submitted showed the headlight was not sufficiently powerful to illuminate the track for the motorman to see an object far enough ahead to avoid the accident: that they also found that the Petitioner was not guilty of contributory negligence and assessed the damages at $2,354.25: that on these findings the trial Judge entered judgment for the Petitioner for $2,354.25: that the Respondents appealed to the Court of Appeal for Manitoba and on the 26th March 1928 the Court of Appeal unanimously dismissed the Appeal: that the Respondents appealed to the Supreme Court of Canada: that on the 5th February 1929 the Supreme Court (Newcombe, Rinfret and Smith JJ., Anglin C.J.C. and Lamont J. dissenting) gave judgment allowing the Appeal: And humbly praying Your Majesty in Council to order that the Petitioner shall have special leave to appeal from the Judgment of the Supreme Court dated the 5th February 1929 or for such further or other Order as to your Majesty in Council may appear fit:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment of the Supreme Court of Canada dated the 5th day of February 1929 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs:

"AND their Lordships do further report to Your Majesty that the proper officer of the said Supreme Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

In the Privy Council.

No. 40. Order in Council granting special leave to appeal to His Majesty in Council, 27th February 1930—*continued.*

Whereof the Governor-General Lieutenant-Governor or Officer administering the Government of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

M. P. A. HANKEY.

Exhibits.

No. 2. Report of W. H. McLeod.

EXHIBITS.

No. 2.—Report of W. H. McLeod.

WINNIPEG, SELKIRK & LAKE WINNIPEG RAILWAY ACCIDENT REPORT.

This Report must be filled out and sent to Superintendent's Office as required by Rule 243 in Rule Book.

1. Date and hour of accident, January 2nd, 1926, 19.05.
2. Where accident occurred, one quarter mile north Miller's road.
3. No. of car and trip, Car No. 16—Trip No. 17.
4. Conductor, J. Johnson.
5. Motorman, W. H. McLeod.
6. Name or names of injured or killed, with residence—One horse killed, one man injured, residence at St. Andrew's.
7. Description of Injured, the man was unconscious when picked up.
8. Give other facts relevant to the accident not covered by above—The car was travelling at about thirty miles an hour when I became aware of something on the track ahead of me, I blew the whistle and applied the air and sand and put the car in reverse but could not avoid striking the object that I first saw which was a team of horses hitched to a sleigh and a man in the sleigh box.
9. Name of witnesses together with full address.

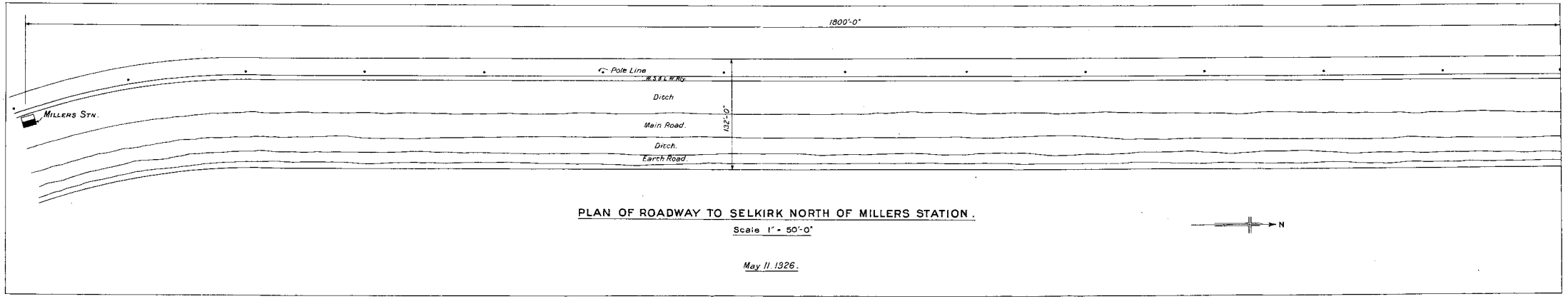
Name and address of employee making this report.

W. H. McLEOD,
Selkirk, Man.

EXHIBIT No. 4.

Exhibits.

No. 4.
Plan filed.

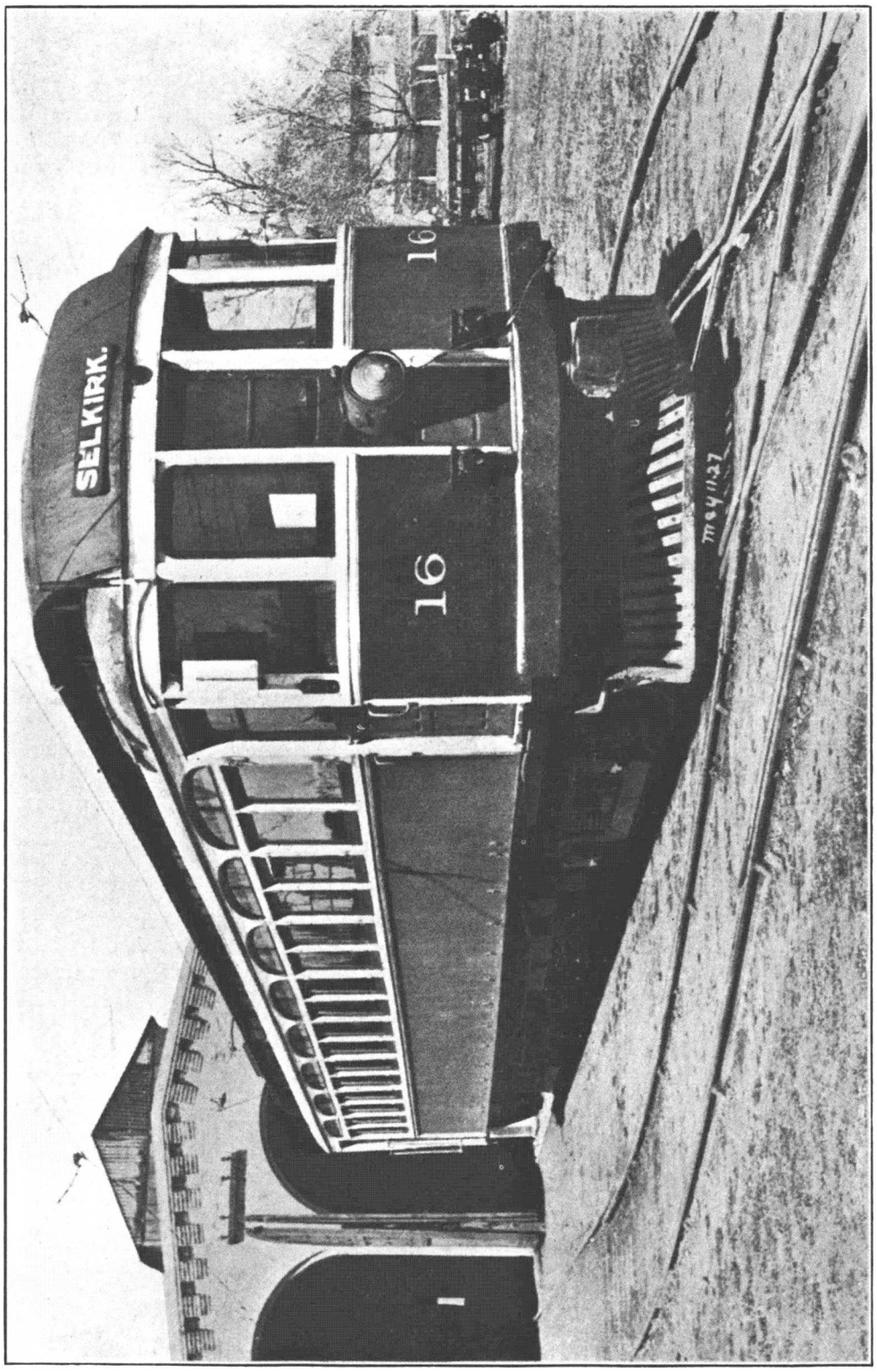


PLAN OF ROADWAY TO SELKIRK NORTH OF MILLERS STATION.

Scale 1" - 50'-0"

May 11 1926.

Exhibit No. 6.



In the Privy Council.

No. 27 of 1931.

On Appeal from the Supreme Court of Canada.

BETWEEN

PAUL PRONEK - - - *(Plaintiff) Appellant*

AND

WINNIPEG, SELKIRK AND LAKE WINNIPEG RAILWAY COMPANY - *(Defendant) Respondent.*

RECORD OF PROCEEDINGS.

RAYMOND OLIVER & Co.,
25, Bedford Row, W.C.1.
For the Appellant.

EYRE AND SPOTTISWOODE LIMITED, EAST HARDING STREET, E.C.4.