lying between the longitudinal path and the fence, the plaintiff endeavoring to prove that he could not safely have walked outside the beaten path, and the defendant that he could. Witnesses testified that no one ever walked outside the path because the ground slanted away toward the fence and there were ruts in it; but the fact that trucks and automobiles of all sorts were accustomed to pass along the right of way from Rock street to Hughes street proves conclusively that the ground was traversable outside the beaten path, and the photographs show that at the worst it is only a little rough at the spot where Tompkins was struck. The contention that he could not have stepped aside while the train was passing is patently absurd. So the question is reduced to whether he was guilty of contributory negligence as a matter of law in not avoiding all danger by the simple expedient of stepping to one side. On this issue we must take the evidence in the light most favorable to the plaintiff and must assume that the train was moving at a speed of only 8 to 10 miles an hour, as the train crew testified.

As always in judging of negligence, it is a question of the [fol. 498] gravity of the danger, coupled with its likelihood, as compared with the opportunity of avoiding it. The B. B. No. 21, 54 F. (2d) 532, 533 (C. C. A. 2). In the case at bar, the opportunity to avoid danger was easily available and the danger was very great, if anything should happen to be projecting from the train; but we cannot say that this particular danger was likely, in view of the testimony of the train checkers that seldom, if ever, had they known a door to swing open. Nor can we say, in view of the cases, that the possibility of being hit by some unusual object projecting from the side of a train is one that ought to be foreseen and enough to charge the plaintiff with contributory negligence as a matter of law, if he remains within reach of it. Schultz v. Erie R. Co., 46 F. (2d) 285 (C. C. A. 3); Pruitt v. Southern Ry. Co., 167 N. C. 246, 83 S. E. 350; Missouri, K. & T. Ry. Co. v. Scarborough, 29 Tex. Civ. App. 194, 68 S. W. 196; St. Louis, S. W. Ry. Co. v. Wilcox, 57 Tex. Civ. App. 3, 121 S. W. 588; Texas & P. Ry. Co. v. Green, 291 S. W. 929, affirmed (Tex. Com. App.) 299 S. W. 639; Chesapeake & O. Ry. Co. v. Davis, 58 S. W. 698, 22 Ky. Law Rep. 748; Sullivan v. Vicksburg, S. & P. R. Co., 39 La. Ann. 800, 2 So. 586, 4 Am. St. Rep. 239. To us it would seem imprudent to walk, or even to stand, in the dark within a foot of a train moving at the rate of 10 miles an hour; but the fact that

recoveries have been allowed under closely similar circumstances in the cases above cited indicates that fair-minded men may hold a different view. This is enough to preclude taking the issue from the jury. Richmond & Danville Railroad Co. v. Powers, 149 U. S. 43, 45, 13 S. Ct. 748, 37 L. Ed. 642; Texas & Pac. Ry. Co. v. Harvey, 228 U. S. 319, 33 S. Ct. 518, 57 L. Ed. 852. Even when a plaintiff has stood so close to the edge of a station platform as to be thrown down by the suction of a swiftly passing train, the question of contributory negligence has been left to the jury. Munroe v. Pennsylvania R. Co., 85 N. J. Law, 688, 90 A. 254, Ann. Cas. 1916A, 140. In Delaware & H. R. Co. v. Wilkins, 153 F. 845 (C. C. A. 2), this court held that it was contributory negligence for the plaintiff not to step aside beyond the reach of the bucking beam of an engine rounding a curve. This would be apposite if the present plaintiff had been struck by the end of a car, for he must anticipate that some of the cars may overhang the ends of the ties. He is not, however, obliged to anticipate unusual projections from the side of the cars, and from the jury's verdict we must take it that he was injured by a projecting door. We do not think it was error to leave the issue of contributory negligence to the jury.

The appellant contends that error was committed in permitting the plaintiff to testify on redirect examination as to statements he had made to doctors and others concerning the way the accident happened. It is necessary to explain how this came about. On direct examination the plaintiff had testified that he was struck by "a black object that looked like a door to me." On cross-examination he testified that from the time of the accident it had always been his impression that the black object was a door swinging out from a car; that this had always been his claim, and he had told this to his attorneys. He was then confronted with a verified bill of discovery, prepared by his attorneys and attested by him, which alleged that he was unable to state what was the object which the defendant permitted to project from the train, and contained other allegations at variance with his testimony. Such allegations he admitted to be false, as well as similar allegations in the complaint in the present action, verified by his attorney, with respect to the speed of the train and its failure to give warning of its approach. Thus he stood impeached in important respects. On redirect examination he was allowed to testify that be-

fore he ever knew Mr. Nemeroff, his attorney, he had told the doctors at the hospital, and any one else who asked him about the accident, that it happened as he had explained to the court and jury; that he had never been willing to swear positively that it was a door which struck him, but he believed it to be. On recross-examination he gave the names of the doctors he had told of the accident and was interrogated as to what he said to them. The appellant contends that the statements elicited on redirect examination concerning conversations were improper rehabilitating testimony to meet the impeaching admissions brought out on cross-examination. See Dowdy v. United States, 46 F. (2d) 417, 424 (C. C. A. 4); Di Carlo v. United States, 6 F. (2d) [fol. 499] 364, 366 (C. C. A. 2); Ferris v. Sterling, 214 N. Y. 249, 254, 108 N. E. 406, Ann. Cas. 1916D, 1161. But it seems to us that the cross-examination had been so broad as to render the redirect competent. He was asked on cross-examination whether he had always had the impression that he was hit by a car door and whether that had always been his claim. To explain his answer that it had, it was proper to allow him to say that he had told the doctors so immediately after the accident.

Judgment affirmed.

[fol. 500] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of New York, on the 14th day of June, one thousand nine hundred and thirty-seven.

Present: Hon. Martin T. Manton, Hon. Learned Hand, Hon. Thomas W. Swan, Circuit Judges.

HARRY J. TOMPKINS, Plaintiff-Appellee,

vs.

ERIE RAILROAD COMPANY, Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with interest and costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 501] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Harry J. Tompkins vs. Erie Railroad Company. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed June 14, 1937. William Parkin, Clerk.

[fol. 502] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 501, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Harry J. Tompkins, Plaintiff-Appellee, against Erie Railroad Company, Defendant-Appellant, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 6th day of August, in the year of our Lord one thousand nine hundred and thirty-seven, and of the Independence of the said United States the one hundred and sixty-second.

Wm. Parkin, Clerk, by D. E. Roberts, Deputy Clerk.
(Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 503] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.

Endorsed on cover: Enter: Harold W. Bissell. File No. 41,848. U. S. Circuit Court of Appeals, Second Circuit. Term No. 367. Erie Railroad Company, petitioner, vs. Harry J. Tompkins. Petition for writ of certiorari and exhibit thereto. Filed August 30, 1937. Term No. 367, O. T., 1937.