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TESTIMONY.

Notice of Appeal.

Filed Oct. 17, 1917.

Essex County Circuit Court.

ANDREW J. COLLINS, Plaintiff-Respondent, vs. THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant-Appellant.	Notice of Appeal.

To

C. HERBERT WALKER, Esq.,
Attorney of Plaintiff-Respondent.

SIR:

PLEASE TAKE NOTICE that the defendant appeals from the whole of the judgment entered in this case, to the Court of Errors and Appeals.

Dated, October 17th, 1917.

Yours, &c.,
CHARLES E. MILLER,
Attorney for Defendant-Appellant.

Complaint.

Filed Feb. 4, 1916.

ESSEX COUNTY CIRCUIT COURT.

ANDREW J. COLLINS, Plaintiff, vs. CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation, NEWARK WAREHOUSE COMPANY, a corporation, Defendants.	Action at Law. Complaint.

1. Andrew J. Collins, the plaintiff, resides at Number 183 Walnut Street in the City of Newark, County of Essex and State of New Jersey.

2. Defendants before and on the twenty-first day of October, Nineteen hundred and fifteen, was and still are corporations organized and existing under the laws of the State of New Jersey engaged and had the possession and control of a certain warehouse located at Ward and Mechanic Streets, Newark, New Jersey, where goods were received for shipment and delivery.

3. On the Twenty-first day of October, Nineteen hundred and fifteen, the plaintiff, an employee of M. Straus & Sons, was sent to the above described premises to secure a load of chicken manure, and after receiving certain memorandum and proper instructions from the employees, agents or servants of

said defendants, was sent to Section S of the aforesaid warehouse.

4. While plaintiff was about to load aforesaid on wagon of M. Straus & Sons and was lawfully in and upon said premises walking in the warehouse of the said defendant companies as aforesaid, the defendants by their servants, agents or employees carelessly, negligently placed or allowed to remain a certain unprotected radiator on the aforesaid premises in a passageway provided for walking and without any notice to the plaintiff, fell over and struck with great force the said plaintiff to the floor of cement or concrete, seriously, painfully and permanently injuring plaintiff, necessitating plaintiff to undergo an operation or operations, whereby plaintiff has lost a part of his right foot.

5. Plaintiff in no way contributed to his injuries and his injury was occasioned entirely by the defendant's negligence as aforesaid.

6. By reason of said injuries sustained as aforesaid, the said Andrew J. Collins became sick, sore, lame and disabled and will remain so in the future, and has been confined to his bed and in the future will be confined to his home and suffered and underwent and in the future will suffer and undergo great pain and suffering, and was put to great expense for hospital and medical services and medicine and will in the future be put to great expense.

7. Plaintiff Andrew J. Collins claims damages to the extent of Twenty-five thousand dollars.

C. Herbert Walker

Attorney for Plaintiff.

Answer of the Central Railroad Company of New Jersey.

Filed Feb. 19, 1916.

ESSEX COUNTY CIRCUIT COURT.

ANDREW J. COLLINS Plaintiff vs. THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, a corporation, NEWARK WAREHOUSE COMPANY, a corporation, Defendants	Action at Law. Answer.

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

1. It has no knowledge or information sufficient to form a belief as to the matters and things set out in Paragraph One of the complaint.

2. It admits that on or before the twenty-first day of October, nineteen hundred and fifteen, it was, and still is, a corporation organized and existing under the laws of the State of New Jersey. It denies that it was engaged and had the possession and control of a warehouse located at Ward and Mechanic Streets, Newark, New Jersey where goods were received for shipment and delivery.

3. It has no knowledge or information sufficient to form a belief as to whom plaintiff was employed by on October twenty-first, nineteen hundred and fifteen, or as to whether or not he was sent to the premises described in the complaint or as to the purpose for which he was sent to said premises, if sent. It denies that he received any memorandum and proper instructions from its employees, agents or servants, and it denies that he was sent to Section S of the warehouse mentioned in the complaint, by any of its employees, agents or servants.

4. It has no knowledge or information sufficient to form a belief as to whether or not plaintiff was injured in the manner mentioned in the complaint at the place therein mentioned. It denies that its servants, agents or employees carelessly, negligently placed or allowed to remain a certain unprotected radiator on the premises mentioned in the complaint, alleging that its servants, agents and employees had nothing to do in any way with the premises mentioned in the complaint.

5. It has no knowledge or information sufficient to form a belief as to the matters and things alleged in Paragraphs Five and Six of the complaint.

CHARLES E. MILLER
Attorney of Defendant, The Central
Railroad Company of New Jersey

Judgment.

Entered Oct. 3, 1917.

ESSEX COUNTY CIRCUIT COURT.

26893

ANDREW J. COLLINS Plaintiff vs. CENTRAL RAILROAD COMPANY OF NEW JERSEY. Defendant	Action at Law. Verdict by a Jury Judgment for Plaintiff Amount $2000.00 Costs 70.16 Total $2070.16

This action was tried before Judge Frederic Adams with a jury at the Essex County Circuit Court on October 3rd, 1917.

The cause having been heard and submitted to the jury they return their verdict as follows:

They find in favor of the Plaintiff Andrew J. Collins and assess the damage against the Defendant, Central Railroad Company at the sum of Two thousand dollars.

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of Two thousand dollars and costs which are taxed at the sum of Seventy dollars and sixteen cents making in the whole the sum of Two thousand and seventy dollars and sixteen cents.

Judgment entered and signed October 3rd, 1917.

WM. S. GUMMERE,
Judge

Book 94 Judgment Record page 325

ESSEX CIRCUIT COURT,

THURSDAY, October 2, 1917.

ANDREW J. COLLINS
vs.
CENTRAL RAILROAD COMPANY OF NEW JERSEY.
Action at Law.

Before HON. FREDERIC ADAMS, *J.*, and a Jury.

For plaintiff appear C. HERBERT WALKER, Esq., and JOSEPH E. COHN, Esq.

For defendant appears HOWARD MACSHERRY, Esq.

A jury is called and sworn.

Mr. Walker opens for plaintiff.

Mr. MacSherry opens for defendant.

The Court: It appears by the files in the case that it was originally brought against the Central Railroad Company and the Newark Warehouse Company.

Mr. MacSherry: Yes, sir.

The Court: I understand that the action against the Newark Warehouse Company has been in some way disposed of?

Mr. MacSherry: Discontinued.

Mr. Walker: Discontinued.

Mr. MacSherry: A nonsuit was entered.

The Court: So that the case now before the Court and jury stands on the questions that arise between Mr. Collins and the Central Railroad Company?

Mr. MacSherry: Yes, sir.

Mr. Walker: Your Honor, I should like to have placed on the record at this time three admissions by Mr. Miller at the former trial. My object in bringing it up at this time is to shorten the trial of this cause.

The Court: What form is it in, a stipulation?

Mr. Walker: It was in the course of examination of witnesses at the former trial.

Page 8, line 12: "Mr. Miller: This was our freight-station that we have leased, and the men there were the employees of the Central Railroad Company."

Mr. MacSherry: We concede that; we admit that now.

Mr. Walker: On page 10, line 32: "Mr. Miller: I concede that he was injured on section S, on this day, by a radiator falling on him. I don't raise any question about that. The only question I raise is who is to blame."

Mr. MacSherry: Well, I say the same thing to-day.

Mr. Walker: Page 29, line 21——

The Court: "Mr. Walker: Do you concede that the Central Railroad telephoned to this company?"

Mr. Walker: "Mr. Miller: I think it is very highly probable. I have conceded that Mr. Collins had a right there. He was an invitee on our premises on that day, and how he got there I do not think makes a particle of difference."

The Court: That shows that he was not a trespasser or licensee; he was there by invitation.

Mr. MacSherry: Yes, sir. That we admit.

NICHOLAS REGAN sworn in behalf of defendant.

DIRECT-EXAMINATION BY MR. WALKER:

Q. Mr. Regan, where are you employed? A. The Central Railroad.

Q. In what capacity? A. Delivery clerk.

Q. What part of the warehouse do you work in? A. I am working in the upper end of it now.

Q. Where did you work on October 21, 1915? A. The S section.

Q. Section S? A. Yes, sir.

Q. Who had charge of section S on October 21, 1915? A. I did.

Q. Were all the articles in section S in your custody? A. Yes, sir.

Q. Do you recall Mr. Collins being injured on October 21st? A. Yes, sir.

Q. In section S? A. Yes, sir.

Q. Do you recall a radiator being in section S on that date? A. Yes, sir.

Q. Did you see it on October 20th? A. I believe I did, the day before; yes, sir.

Q. What time of the day on October 21st did you see this particular radiator? A. On October 21st?

Q. Yes. A. I should judge about half-past four.

By the Court:

Q. You say you saw it on the day before? A. Yes, sir.

Q. The day before the accident? A. Yes, sir.

Q. Well, the accident occurred on the 21st. A. Well, that is what he asked me.

Q. Did you also see it on the day of the accident? A. Yes, sir; afterwards.

Q. You saw it about four o'clock? A. About half-past four o'clock, I believe it was.

By Mr. Walker:

Q. Did you see this radiator on the morning of October 21st? A. No, sir; not that morning; I believe I did the morning before.

Q. Mr. Regan, did you walk about section S on the morning of October 21st? A. Yes, sir; I naturally did.

Q. Did you see a pile of chicken feed in section S? A. I did, yes.

Q. What was the position of this radiator on the morning of October 21st?

Mr. MacSherry: He said he did not see it on the morning of October 21st.

The Court: I think you are right; I think he said he did not see it in the morning.

Q. Do you know who put the radiator in section S? A. No, sir.

Q. Where did it come from? A. I suppose it came out of a freight car.

Q. Well, when it was taken into section S was it not delivered to you? A. No, not personally to me; it was delivered in my section.

Q. Did you see it come in your section? A. No, I didn't, but I seen it soon after it was there.

Mr. MacSherry: Just answer the questions, Mr. Regan; do not volunteer.

Q. Who took that radiator into your section? A. I couldn't tell you.

Q. Well, who unloads the freight that goes into your section? A. The truckmen.

Q. What are they, truckers? A. Yes, sir; they are called truckers.

Q. Well, who employs them? A. The Central Railroad.

Q. How often did these truckers come into section S on October 21st? A. I couldn't say. They would naturally be going back and forth all day.

Q. Would they go in there two or three times in an hour? A. I don't know; sometimes they might.

Q. Section S is a pretty big section, is it not? A. Why, rather large, yes.

Q. Well, is it not one of the largest sections in the Newark Warehouse? A. No.

Q. Can you say whether or not these truckers went into your section a score of times on October 21st? A. No, sir.

Q. (By the Court.) What do you mean, that you cannot say or that they did not? A. I can't say. They were going back and forth, off and on.

Q. (By Mr. Walker.) But on this particular day, October 21st, you recall the truckers going in and out of your section? A. No, I can't recall it. They naturally did.

Q. Do you recall whether any freight was taken into your section on October 21st? A. No, I can't recall what freight was taken in there.

Q. Was any freight taken into your section? A. Well, I suppose there naturally was, yes.

The Court: The question is not now as to what the general fact was, but as to whether you remember what was done on that particular day.

Witness: I can't remember what was done on that particular day.

Q. Well, all the records of the stuff delivered in section S are left with you, are they not? A. Well, the bills, I received the bills.

Q. Well, do you recall how many bills you received on October 21st? A. No.

By the Court:

Q. What were these bills for? A. For the goods that came into this section.

Q. Bills made out by whom? A. By the people in the office.

Q. In the railroad office? A. The main office.

Q. Made out to whom? A. One made out for the delivery clerk and one is kept there and one for the party that owns the goods.

Q. And do you keep one of those? A. I got one of them.

Q. You kept one? A. Yes, sir. And then the party that came in——

Q. That was your record of what goods were there? A. That day?

Q. As they came in, that was what showed you what goods came in? A. Yes.

Q. Am I right about that? A. Yes, sir; and then I look it up.

By Mr. Walker:

Q. Mr. Regan, at the former trial do you recall my asking you this question, on page 19, line 23: "*Question:* Did you see the radiator on October 21st prior to the accident?" Do you recall my asking you that question? A. I recall your asking me it, but—it is a long while now; it is over a year ago. I remember seeing it either that morning

or the morning before; I went up and looked at the name on it.

Q. What name did you find on that? A. "Simmons Pipe Bending Company."

Q. Where was the radiator standing when you looked at it? A. Right up against the wall.

Q. Do you recall your giving me this answer to the question, "Did you see the radiator on October 21st prior to the accident? "I did that morning, I believe"? A. I don't recall that, no.

Q. Well, Mr. Regan, is it not true that you saw the radiator on the morning of October 21st? A. I don't remember; October 21st, or the 20th.

Q. To the best of your knowledge and belief, your answer to that question was correct, was it not? A. I believe it was; yes, sir.

Q. Now, Mr. Regan, when you examined the tag on the radiator can you state how many feet or inches there were between the wall and the radiator? A. Between the wall and the radiator?

Q. Yes. A. Why, it was leaning right up against the wall.

Q. Then you want the jury to understand that this radiator was leaning back on the wall, against the wall?

Mr. MacSherry: I object to the form of the question. The witness is not called upon to state to the counsel what he wants the jury to understand at all.

Mr. Walker: I shall change the question. Strike out the question.

The Court: The question is stricken out.

Q. Now, Mr. Regan, at that time the radiator was leaning against the wall? A. Yes, sir.

Mr. MacSherry: What time was that, please?

The Court: At the time when he read the bill, the Simmons bill.

Q. About what time in the morning? A. I don't remember just the time.

Q. Well, is it not true that you make a tour of your section every morning? A. I am going back and forth all day, naturally.

Q. Well, is it not true that the first thing in the morning you go through your section to see what shipments still remain there? A. No.

Q. Well, do you go through your section to compare the shipments with the record that you have to see that they correspond? A. Yes, sir.

Q. How often in a day would you do that? A. Every time I get the bills, two or three times a day.

Q. Then that is part of your duty, is it? A. To look up my freight, yes.

Q. To compare your freight with your bills of lading? A. Yes, sir.

Q. Is there anyone else in the Central Railroad's employ that has that to do in that particular section? A. No.

Q. Now, Mr. Regan, on this particular day, October 21st, did you deviate from your usual course of following up your freight and comparing it with your bills of lading? A. I don't think I did.

Q. Now, Mr. Regan, when you say this radiator was up against the wall when you examined it, do you mean it was standing or leaning in a slanting position against the wall? A. It was just slanted a little bit against the wall, so that it couldn't fall——

Q. The two feet would be slightly off the floor? Would it be slanted that much? A. No, just finished to leave it lay against the wall.

Q. Now, Mr. Regan, then, you say this radiator was supported—the top part of the radiator was supported by the wall? A. Yes.

Q. What kind of a floor have you in section S? A. Cement floor.

Q. Well, is it an even cement floor or—— A. Yes.

Q. Are there any rough places there? A. No, I don't think so.

Q. While you have been in section S has the cement worn off in layers? A. I don't remember; I couldn't answer that.

Q. You have seen the top coat of the cement, the finish coat, they call it. Has that worn off in layers or a piece of it come off at any time? A. I have never noticed.

Q. Well, is the floor a smooth floor or rough floor? A. So far as I know, it is a smooth floor.

Q. What kind of a finished floor is it? A. A regular cement finish.

Q. Is it a fairly smooth or a smooth floor? A. Oh, it is a little rough; it isn't a smooth floor.

Q. Is it a little rough where this chicken feed stood?

Mr. MacSherry: I think I shall object to that, if your Honor please. I do not think that comes exactly within the purview of the complaint.

The Court: Do you object to the form of the question?

Mr. MacSherry: No, I object to the inquiry about the condition of the floor.

The Court: (After argument.) I do not understand the complaint to be that the build-

ing was improperly constructed, but that the radiator was placed by the agents of the defendant in a position that was insecure and made it liable to fall. Would not the inquiry be relevant for the purpose of showing as to what any insecurity or any want of equilibrium of the radiator, if it existed, was due?

Mr. MacSherry: Why should we not have notice of that in the complaint, if your Honor please? The inquiry seems to be all right, if it is covered by the complaint. I think I shall take my objection to the admission of the question, if your Honor please.

The Court: Yes, I shall give you an exception.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(Question read.)

A. About the same there as it is any place else in the floor, I suppose.

Q. Did you see Mr. Collins immediately after the radiator fell on him? A. Yes.

Q. Well, how far from the wall was the radiator? A. Well, I should judge about 4 feet, as near as I could tell.

Mr. MacSherry: When was that, after?

Witness: After.

The Court: Immediately after it fell on him?

Witness: Maybe five minutes after.

Q. How far from the wall were the legs of the radiator? A. I couldn't tell you; I just glanced at the radiator.

Mr. MacSherry: There is no proof yet that there were any legs to it.

Q. What kind of a radiator was that? A. An iron radiator.

Q. Did it have any legs? A. I suppose it did. I didn't notice it that close.

Q. Did you not say before that you made an examination of this radiator? A. I believe I did. The foreman came down with me and examined it.

By the Court:

Q. What is his name? A. Mr. Wefferling.

Q. Was that after it fell or before it fell? A. Before.

By Mr. Walker:

Q. Was this a radiator that has the legs attached after it is delivered, was it that kind of a radiator? A. No.

Q. Are you positive that you did not see any legs on the radiator on October 21st? A. Only when he came down there and looked at it, yes.

By the Court:

Q. Only when the foreman came down? A. Yes, sir.

Q. You saw legs then? A. Yes, sir.

Q. Can you tell us when that was, what day? A. I think that was on or about the 20th or 21st; I can't recall it now.

The Court: The 21st was the day of the accident.

The Witness: Yes. It was either that morning or the morning before.

CROSS-EXAMINATION BY MR. MACSHERRY:

Q. Mr. Regan, how long have you been in the employ of the Central Railroad? A. Five years and a half, about, or over five years.

Q. And you were subpœnaed here by the other side, were you not? A. Yes, sir.

Q. And have you talked with them before you went on the stand? A. No. This time you mean?

Q. Yes. A. No.

Q. The last time, did you? A. I just talked a minute with Mr. Walker.

Q. Well, how large was this radiator? A. Well, I should judge about 3 feet.

Q. Well, how was it constructed? What did it look like? A. A regular steam radiator, about 3 feet high, I think, about 2 or 2½ wide.

Q. 3 feet high and 2½ wide? A. Yes. That is guessing at it.

Q. What was it made of? A. Iron, I suppose.

Q. How much would it weigh, do you think? A. I couldn't tell you.

Q. And was that the only one there? A. The only one I know of.

Q. And how large was this room that it was in? A. The dimensions of the section?

Q. Yes. A. Well, maybe 75 feet long, I should judge, the length of it, the S section.

Q. How long? A. About 75 feet from the windows up to the end of it.

Q. Was it lighted? A. Yes, sir.

Q. With what? A. Electricity.

Q. And were the lights lit that evening? A. Yes, sir.

Q. Well lighted or poorly lighted, was it? A. Well, the way it always is.

Q. Did you know Mr. Collins at the time? A. Did I know him.

Q. Yes. A. Yes, sir.

Q. How long had you known him? A. I had known him ever since I worked there, four years or more.

Q. You have not a very strong recollection of where that radiator was, have you, at the present time? A. When it first came down there, when I first noticed it?

Q. Yes. A. Yes, sir; it was right up against the wall.

Q. But afterwards? A. When I seen it it was laying right alongside of the bags.

Q. How many bags were there there? A. I don't know now; somewhere around twenty, I should judge.

Q. What did Collins come down there for, do you know? A. I suppose he came after the manure.

Q. Well, you do know that he came down there for bags of manure? The manure was in bags, was it not? A. Yes, sir.

Q. And before Collins came there for the bags of manure the radiator was against the wall? A. That is where I noticed it; yes, sir.

Q. That is right, is it? A. Yes, sir.

Q. And how many bags did he take away, or had he taken away, do you know? A. Why, I think there was about two or three on his wagon.

Q. Where was his wagon? A. Right up against the edge of the platform.

Q. How far did he have to go from the place where the bags were to the place where his truck, or wagon, stood? A. About 4 or 5 feet.

Q. And about what time of the day or evening was that being done? A. 4:30, I believe.

Q. And was there any difficulty, so far as you know, in a man going there, a man with ordinary eyesight, after the bags—any difficulty in seeing the radiator? It was light enough to see it, wasn't it? A. No difficulty in seeing it where it was when I saw it.

Q. And it was after he had removed one or two bags that he was hurt? A. Yes, sir.

Q. Do you know of anybody else except Mr. Collins that was moving those bags—except him? A. No.

Q. And, to your knowledge, did anybody touch the radiator during the time he was moving those bags? A. No, not that I know of.

By the Court:

Q. Was this on the first floor or basement floor of the building? A. No, the second floor; it is the floor right in from the street; but there is a basement underneath that.

Q. At the street level? A. Yes, sir.

By Mr. MacSherry:

Q. When you first discovered Mr. Collins after he was hurt was or was not the radiator right alongside of the bags? A. That is where I saw it lying, right alongside of the bags.

Q. When did you first know that Mr. Collins was hurt? A. I was signing up a driver for the Standard Bottling Works, and he went away and came back and told me there was a man hurt up here, and I went up and seen Mr. Collins sitting.

By the Court:

Q. You say you went up. Where were you? A. Well, I was at the lower end, at my desk.

Q. You mean on the same floor? A. Yes, sir. Just walked up.

By Mr. MacSherry:

Q. Do you know whether the radiator came into the warehouse before or after these bags of chicken manure came in? A. No, I believe it was after.

Q. What? A. I believe it was after; I wouldn't be sure on that.

Q. How much of a pile, if I may use that term, did these bags of chicken manure make? A. How high, or in length?

Q. Yes. A. How high?

Q. Yes. A. Well, I should judge maybe 4 or 5 feet.

Q. Now, as the man came in there to take out these bags of manure— How were they piled up? A. Against the wall.

Q. Against the wall? A. Yes, sir.

Q. Then the radiator was alongside of them? A. The radiator was leaning up there when I first saw it.

Q. Alongside of the pile of manure? A. Yes, sir.

Q. That is right, is it? A. Yes, sir.

Q. Did it lean against the pile of manure at all? A. No, not when I seen it.

Q. So far as the radiator standing up was concerned, was there any connection between the radiator and the bags of manure? A. No, not that I saw.

Q. One did not depend upon the other at all? A. No.

Q. So that could or could not one be taken down without disturbing the other? A. Yes.

REDIRECT-EXAMINATION BY MR. WALKER:

Q. Mr. Regan, just one question. After you saw Mr. Collins, after the accident, how much space was there between the bags of manure and the radiator? A. That I couldn't say.

Q. Was it 2 feet? A. No, I don't think it was that much, I couldn't say exactly.

Q. How far was Mr. Collins from his wagon, how many feet, but after he was hurt? A. I should judge about 4 feet.

Q. 4 feet? A. Yes, sir.

Q. How big a passageway was there between the pile of chicken manure and Mr. Collins' wagon? A. Between 4 and 5 feet, I should think.

Q. Well, how much space was there between the chicken manure and the radiator? A. When the radiator fell down?

Q. Yes. A. I couldn't tell you; I just glanced at the radiator.

Q. Well, can you state how much space there was before?

The Court: Let me ask you, At what time? Let me see what your question means, how much space there was between the pile of chicken manure and the radiator at what time?

Mr. Walker: At the time you saw the radiator prior to the accident.

A. Before the accident?

Q. Yes. A. That was up against the wall. I wouldn't know how close that was; it wasn't close to the bags.

Q. (By the Court.) You say it was not close to the bags? A. No, sir.

Q. (By Mr. Walker.) What do you call this

particular section S, where the accident occurred? A. We call it section S.

Q. It is sometimes called the dike? A. The dike is in front of it.

Q. Did this accident happen on the dike of section S? A. No, it happened on the platform.

Q. How many feet is the edge of the platform from the wall of the warehouse? A. Right along that particular section?

Q. Yes, where the accident took place. A. About 10 feet, maybe.

Q. Was it 12 feet? A. I don't know; I never measured it.

Q. 10 feet? A. Yes.

Q. Then you think it is possible for a radiator to jump within 4 feet of the edge of the platform? A. I don't know, I am sure.

Q. Now, during the afternoon of October 21st, in your particular section, can you tell whether or not there was an elevator near your section? A. Section S?

Q. Yes. A. There is an elevator down at the lefthand side of it.

Q. How far from the elevator did this accident take place? A. About a hundred feet, I should judge.

Q. Now, Mr. Regan, can you recall whether or not the truckers that came from the elevator with their little hand trucks, on the afternoon of October 21st, had to use this 4 foot or 5 foot passageway in front of these bags of chicken manure?

Objected to as immaterial, irrelevant and as not redirect-examination.

The Court: It is not strictly responsive to the cross-examination, Mr. Walker.

(Question withdrawn.)

By the Court:

Q. Let me ask you a question. Can you tell anything about the size of one of these bags? A. No. I think it would be about a bushel.

Q. Well, in a bag, you mean? A. Yes, sir.

Q. Can you give me some idea as to the weight of the bags? A. I don't think it would weigh much over 50 or 75 pounds.

Q. Did you ever handle one? A. Yes, sir.

RECROSS-EXAMINATION BY MR. MACSHERRY:

Q. This radiator was what you would call a regular radiator for the house, was it not? A. Yes, sir.

Q. One of those radiators? A. Yes, sir.

Q. Steam or—— A. Steam, I should judge.

FURTHER DIRECT-EXAMINATION BY MR. WALKER:

Q. Was it what they call a high or low style of radiator? A. I would call it a high style.

HERMAN BUSCH sworn in behalf of plaintiff.

DIRECT-EXAMINATION BY MR. WALKER:

Q. Doctor, are you acquainted with Mr. Collins? A. Yes, sir.

Q. Have you treated Mr. Collins? A. Yes, sir.

Mr. Walker: If there is no objection, Mr. MacSherry, do you agree to the admission of Mr. Miller that he conceded the doctor's qualifications?

Mr. MacSherry: Yes. I know the doctor, and he is a good doctor.

Q. Now, Doctor, will you kindly state in what manner you treated Mr. Collins? A. I was called to see him on the 21st of October, 1915, in the evening. I found his right foot was swollen; one or two of his toes were crushed, discolored; he suffered very, very much pain; and the first thing I have tried to relieve him from his pain. Then I tried to give him local treatment to reduce the swelling, if possible. Around twelve o'clock the same evening Mrs. Collins again called me up. I came again to see him, and my treatment did not seem to have much effect, so far as the alleviation of pain. I was obliged to give him an injection of morphine to relieve the pain, and in the morning I called again, and there were local signs of gangrene. I gave him some local remedies and tried to retard it and preserve his toes. Towards the evening one of his toes showed distinctly symptoms of gangrene. I called in Dr. McCormack, and we decided to amputate his toes in order to prevent it spreading to his other toes.

By the Court:

Q. Was that operation the same day? A. The same day or the next day. We amputated one of his toes. In spite of that, the gangrene spread to the other toes, to the second and the third toes. That was the third day. In spite of the amputation, that didn't have a tendency to check the gangrene.

Q. You spoke of only one amputation? A. This was the very first. I again gave him local applications and constitutional remedies to preserve, if possible, his toes. That did not seem to help very much. Finally Mr. Strauss, his employer, requested me to call in their physician, Dr. Epstein.

Dr. Epstein came down to see him about the fourth or fifth day after the accident, and we both decided that it would be best to have him removed to the hospital. He was taken to the Newark Private Hospital, and there we made the same attempt to save the toes, if possible. We again gave him the same local applications to reduce the swelling and preserve his toes, but we didn't succeed in doing so. He commenced to develop symptoms of general infection, chills and temperature, and we decided that the very best thing to do was to amputate all of his toes, and we amputated them all. I took care of him from October 21, 1915, to April 3d or 2d, I saw him last, 1916.

By Mr. Walker:

Q. Now, Doctor, I show you a memorandum and ask you if that is your handwriting (paper shown to witness)? A. Yes, sir.

Q. I ask you if the amount, $160, is the correct amount of your charge from October 21, 1915, to November 18, 1915? A. Yes, sir.

Q. Now, Doctor, can you state whether or not you rendered a bill from November 18th to April 4th, or whether or not the plaintiff, Mr. Collins, paid you cash for the visits? A. Mrs. Collins suggested to me to pay for each visit, and she did so.

Q. How much did Mrs. Collins pay you for each visit between November 18th to April 4th? A. I really can't remember, because I have no record of it.

Q. I ask you if you made the same charge after November 18th for each visit that you did before November 18th; namely, $2? A. Yes, sir.

Q. About how often did you call to see Mr. Collins each week between November 18th and April

4th? A. Sometimes every second day, sometimes once a day, depending upon his condition. The process of healing was very slow, and I largely depended——

Mr. MacSherry: Just answer the question, that is all, Doctor.

Witness: Yes, sir. Every second day or third day; I can't recall exactly; sometimes once a day, sometimes three times a week.

Q. Now, Dr. Busch, I understood you to say that you amputated the five toes? A. Yes, sir.

Q. In performing this operation did you take away any part of the joints? A. Yes, sir; all the fingers to the foot proper was entirely removed.

Mr. Walker: Now, Mr. MacSherry, do you admit that parts of the joints, as well as the five toes, were removed? Mr. Miller made the admission, on page 50.

Mr. MacSherry: What does the doctor say?

Witness: We removed all the phalanges, the fingers, the first portion of the metatarsal portion to the foot proper.

Mr. MacSherry: What the doctor says I admit.

Q. Now, Doctor, in your opinion, is a man without five toes and parts of the joints that you have testified that you amputated as well able physically to walk five miles as he would have been if he continued to have the five toes and joints?

Mr. MacSherry: I object to that, if the Court please. I think the jury is just as well qualified to answer that question as the doctor.

The Court: Another suggestion occurs to me: that the question might be limited to this

particular case, the ability to walk without toes being dependent somewhat on the weight of the person.

Q. Dr. Busch, do you know Mr. Collins's business? A. Yes, sir.

Q. What was his business? A. He was a driver, so far as I know, taking charge of the trucking for the Strauss people.

Q. Do you consider that a man following the occupation of driver, such as Mr. Collins was in October, 1915, as well able to climb on and off of a wagon and attend to his business generally without five toes as he would be with them?

Mr. MacSherry: I object to that, if your Honor please, because the doctor simply states that he knows that he is a driver. There are men who drive on a wagon and who do not do anything else. The details of the kind of the work have not been brought out here at all.

The Court: They at least have to get on and off their wagons.

Mr. MacSherry: I suppose that is so, of course.

(Question read.)

Mr. MacSherry: It is a very general question.

The Court: (After argument.) It is not a question of absolute incapacity, but the question is as to comparative facility. Taking the statement in the question as the basis for your answer, you may answer the question.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. Of course, there would be some discomfort and some disability, some handicap.

Q. Doctor, what effect would the change in weather have upon a foot that you have performed an operation on such as you performed on Mr. Collins's foot? A. Well, I couldn't see any relation, unless the scar tissue sometimes might sometimes hurt him, but I can't see any relation.

Q. Well, now, after performing such an operation on Mr. Collins, would that have the tendency to cause a man to limp?

Mr. MacSherry: I object to that, if your Honor please, because he has had this man under his eye all the time. He can tell us whether he limped or not.

Mr. Walker: I shall amend the question to include whether or not Mr. Collins has limped since the accident.

The Court: You had better withdraw the first question and ask this.

Mr. Walker: I shall withdraw the first question.

The Court: The two propositions do not seem to be homogenous. If you wish to ask what the witness's observations of Mr. Collins were, you may do that.

Mr. Walker: I shall ask that.

By the Court:

Q. What do you know about his limping? A. I have not seen him before. Of course, he does limp at the present time slightly.

Q. Which foot was this? I do not think you have told us. A. The right foot.

By Mr. Walker:

Q. Did you know Mr. Collins prior to the accident? A. I have not, sir.

Q. How often can you recall that this wound on Mr. Collins's foot broke out? A. Well, the healing process was very slow. In a man of his age, naturally, the process is slow. But I can't recall really how many times it was; I know it was a very tedious, long process of healing.

Q. Do you recall whether or not the scar tissue broke? A. Yes, sir.

Q. Can you tell us the last time it broke? A. I cannot.

Q. Is it likely to break again? A. Well, I don't think so, after this length of time, unless some further injuries—something else should happen to him. It is more subject, as a rule, that something should happen to him than in normal tissue; he hasn't got the blood supply.

Cross-examination by Mr. MacSherry:

Q. Doctor, just a question or two, please. He does not use a cane or a crutch now, does he? A. No, sir; not as far as I know.

Q. And is he back working now? A. As far as I know, he is.

Q. What kind of work? A. I don't know, sir.

Q. Do you know where he works? A. For the Strauss people.

Q. The same kind of work? A. Well, I really don't know.

Q. Does he drive a wagon? A. I have never seen him. I suppose he is, as far as I know.

Q. The same people that he worked for at the time he got hurt? A. Yes, sir.

Q. And, so far as you know, he does the same kind of work? A. As far as I know.

Q. And when did he go back to work? A. On April 4, 1916.

Q. And he was injured on October 21st? A. Yes, sir.

Q. And after he went to work did you treat him at all? A. Probably once or twice during the entire time.

Q. He really did not need much treatment after that? A. No, sir.

Q. And, as a doctor of experience, you were satisfied with the result of the operation, were you not? A. The results were perfect, so far as the operation was concerned.

Q. Dr. Epstein assisted? A. Yes, sir.

Q. Do you know who paid Dr. Epstein? A. I don't know.

Q. (By the Court.) He was in Dr. Epstein's private hospital, was he? A. Yes, sir.

Q. (By Mr. MacSherry.) Well, was not Dr. Epstein sent there by an insurance company? A. No, Mr. Strauss called me up and requested me to call in Dr. Epstein in consultation after I explained the situation.

Q. Who paid Dr. Epstein, do you know? A. I don't know.

Q. You did not? A. No, sir.

REDIRECT-EXAMINATION BY MR. WALKER:

Q. Do you know how much Dr. Epstein's bill was? A. I couldn't tell you.

CHARLES CADMUS, sworn in behalf of plaintiff.

DIRECT-EXAMINATION BY MR. WALKER:

Q. Mr. Cadmus, where were you employed on October 21, 1915? A. The Simmons Pipe Bending Works.

Q. Did you have any occasion to go to section S of the Central Railroad Company's warehouse? A. Yes, sir.

Q. Did you go there on October 21st? A. Yes, sir.

Q. In the morning or afternoon? A. In the morning.

Q. When you went to section S on the morning of October 21, 1915, can you state whether or not you saw a radiator in that section? A. I did.

Q. Where did you see the radiator? A. In section S, a short distance from the wall.

Q. About how far from the wall did you see it? A. Well, I should judge leaning out a foot or two.

Q. (By Mr. MacSherry.) What do you say? A. About a foot or so from the wall.

Q. (By Mr. Walker.) Was it leaning against the wall? A. Yes, sir.

Q. In what position was it? A. Well, it was slanting like, with bags up against it.

By the Court:

Q. What about bags? A. With some bags up against it.

Q. Against it? A. Yes, sir.

By Mr. Walker:

Q. How far from the wall was the bottom of the radiator? A. About a foot or so, I should judge.

Q. Now, Mr. Cadmus, do you recall testifying at the previous trial in this case? A. Yes, sir.

Q. Do you recall my asking you the question: "On the morning of October 21st how near the wall did you see it?"

Mr. MacSherry: I object to that question. This is his own witness, if your Honor please, and the witness is not shown to be hostile or to be prejudiced in any way. I am wondering whether he has a right to cross-examine him.

The Court: The same question just came to my mind.

Mr. Walker: If your Honor please, I am not asking this question to raise a question as to what the witness saw, but I am asking the question in the form that I asked it at the former trial in order to refresh his memory.

Mr. MacSherry: The effect would be the same.

The Court: The result would be that the question would necessarily be leading, in that event. I think the regular course would be to endeavor at least to get now from the witness what his recollection is, and not refresh his recollection by his own previous statement. I do not mean to say that the rule is without exception, but that would be the natural, the primary course.

Q. Now, Mr. Cadmus, do you recall as to whether or not this radiator was fastened to the floor of this section?

Objected to as suggestive and leading.

The Court: Let the witness state everything that he remembers as to the position of the radiator, and then, if you need to ask a more

direct question for the purpose of calling the witness's attention to some particular feature of the matter, you may do so.

Q. Will you kindly state the general position of this radiator when you saw it on October 21st? A. Well, as near as I can say, it was standing that way, leaning against the wall, as near as I can remember now (indicating).

By the Court:

Q. Do not say "that way." How was it standing? Describe it in words. A. It was leaning against the wall. That is the only way I can describe it.

Q. Leaning against the wall? A. Yes, sir.

By Mr. Walker:

Q. How far from the front of the platform was this radiator, how many feet? A. I should judge about 8 feet from the front of the dike, I guess.

Q. Is the front of the dike where Mr. Collins would load on his wagon chicken manure or anything? A. Yes, sir.

Mr. MacSherry: I object to that.

The Court: The what?

Witness: The dike, or platform.

By the Court:

Q. I am rather vague in my understanding of what the word "platform" means. Was there a platform? A. Yes, sir.

Q. Where was that? A. Where you drive in there is about, I guess, 30 or 40 foot space, where about four or five trucks could back up and load at the same time, and it is even with the wagon, to a certain extent.

Q. You drive into this passageway? A. Yes, sir.

Q. And is the platform something to load onto and unload onto? A. Yes, sir.

Q. It is elevated how much above the place where the wheels of the wagon would go? A. I should judge about 5 foot, the height of a wagon.

Q. And was the passageway where the wheels of the wagon would go paved? A. Yes, sir.

Q. Stone blocks, cobble-stones? A. No, asphalt.

Q. And as the wagon drove in from the street would the platform be on the driver's right hand or on his left hand? A. Well, he would turn to his left when he came in off the street.

Q. To the left? A. Yes, sir.

Q. And when he got opposite the platform, which side would the platform be on? Suppose you were a driver. A. Yes, sir.

Q. And you come in off the street and come up to the platform, would the platform be on your right hand or on your left hand? A. Well, it would be right facing you as you drive in; you come in this way, and you have got to turn to your left, and the platform is right facing you (indicating); you have to swing around.

Q. How do you get the horses out of the way, then? A. You have to swing around then.

Q. Suppose you back in—— A. Yes, sir.

Q. —from the street—— A. No, not from the street.

Q. Suppose you get opposite the platform, how would your horses head? A. They would be heading in to the platform; after you backed around they would be heading out.

Q. After you have backed in and your horses are headed out, on which side of the wagon is the platform, on the righthand side or on the lefthand side?

A. No, it is on the back of you. There is a platform on the right and a platform on the left and this one in the back.

Q. There are three platforms? A. Yes, sir; the house is shaped that way (indicating).

Q. Which platform are we talking about? A. The one at the tail.

Q. The one at the end? A. Yes, sir.

Q. And what is the size of that? A. About 10 to 12 foot—I never measured it—that is, this rear platform.

Q. And how long? A. I should say 30 foot.

Q. does that join the platform on the two sides? A. Yes, sir.

Q. You can walk right around the platforms? A. Yes, sir; right around.

Q. Now, this radiator was there on the platform up against which—— A. Against the wall.

Q. —up against which the team would be backed? A. As you would walk off the tail of the wagon.

Q. Where were the bags? A. Piled right in front of it and the side of it.

Q. You mean between the radiator and the wagon? A. Yes, sir.

Q. Then if you wanted to move the radiator you would have—— A. You would have to move the bags.

Q. —you would have to move the bags first? A. Yes, sir.

Q. And were they on both sides of the radiator or only on one side? A. As near as I can recall it, they were both sides.

Q. And also in front? A. Yes, sir.

Q. The bags were on three sides of the radiator, then? A. Yes, sir.

Q. And the wall was on the other side? A. Yes, sir.

Q. And how was the radiator standing? A. It was up against the wall, standing oblong.

Q. What was the size of this radiator? A. It is about 38 inches high and 2½ feet wide.

Q. Which way was the long way? A. Up against the wall; it stood on its feet up against the wall.

Q. It was on its feet? A. Yes, sir; that is, on two feet, I should say. I didn't see it through the bags. The other two feet must have been off of the floor.

Mr. MacSherry: I move to strike that out.

The Court: Strike it out.

Q. Just tell us what you saw. Which part of the radiator was leaning against the wall? A. The top part.

By Mr. Walker:

Q. Now, Mr. Cadmus, can you state whether or not on the morning of October 21st you saw two or four feet of the radiator on the floor in this section? A. I am not sure; I couldn't swear how much I seen on the floor; I couldn't see any. The bags were up against it. I was looking for it at the time.

Q. You were looking for the radiator at the time? A. Yes, sir.

Q. On the morning of October 21st? A. As near as I can recall; yes, sir.

Q. Did you see this radiator on October 20th? A. I may have been there, but I didn't take notice to it at that particular time; I wasn't sent for it.

Q. Now, Mr. Cadmus, on your visit to section S

on October 21st do you recall seeing any men that they call truckers, who load and unload stuff, in that section? A. I see them passing back and forth, but I didn't pay any attention to them.

Q. How many did you see passing back and forth at this particular time, on October 21st? A. I couldn't recall.

Q. Could you state whether or not it was half a dozen? A. I couldn't say. They were going back and forth all day long in the different sections.

Q. Now, are these truckers employees of the Central Railroad Company? A. As near as I know; yes, sir.

Mr. MacSherry: I ask that that go out, unless he knows, if your Honor please. He hasn't shown any knowledge yet.

The Court: I think the witness has disclaimed knowledge of who they were, except that they were truckers.

Q. (By the Court.) Do you know in whose employ they were? A. Well, I couldn't say whether they were employed by the Newark Warehouse or the Central Railroad; I see them there every day.

Mr. MacSherry: Therefore I object to it.

Mr. Walker: Now, Mr. MacSherry, in the admission that we have here, and that you have agreed to, I want to state—I want you to state to the Court whether or not the truckers who went into section S were also employees of the Central Railroad. That is on page 8.

Mr. MacSherry: Yes, I see that Mr. Miller says, "This was our freight station that we have leased, and the men there were the em-

ployees of the Central Railroad Company." I shall withdraw that objection and admit that they were employees.

CROSS-EXAMINATION BY MR. MACSHERRY:

Q. Mr. Cadmus, if you please, I want to get before the Court and jury a little more comprehensive illustration of this situation. As you come in, we will say, from—— A. Mechanic street.

Q. We will say that outside of this rail here is Mechanic street (indicating). Is that right? A. Yes, sir.

Q. And as you people drive in you come to a great, circular place, like the inside of this courtroom, which you call a dike; isn't that so? A. Yes, sir.

Q. And you drive in and back your wagons around this circular dike, which is all open? A. Yes, sir.

Q. Up against a platform, which we will call his Honor's desk there (indicating)? Is that about right? A. Yes, sir.

Q. And that platform is higher than this dike where your wagon goes? A. I should judge it is; yes, sir.

Q. And that is what you mean by coming into the dike and backing up against the platform; isn't that right? A. Yes, sir.

Q. And these platforms are in different sections? A. Yes, sir.

Q. And over in this section was section S, and that is the section that we are talking about in this case; isn't that about so? A. Yes, sir.

Q. Now, here is a little bit of a sketch, roughly

made. I shall ask you if that fairly illustrates (paper shown to witness)——

Mr. Walker: I object. Who made this sketch?

Mr. MacSherry: Well, it is not very good, so I shall not say that I made it, but my friend made it.

Mr. Walker: I think, your Honor, that the witness ought to make the sketch.

Witness: I ain't much of a draughtsman.

Mr. MacSherry: Don't you want it in? I thought we might show it to the jury, so that they will understand it.

The Court: Anything that counsel agrees upon is all right. Of course, it has no evidential value.

Q. You had been in the habit of going down there to get your freight, had you not? A. Yes, sir.

Q. Did you go down there for the purpose of getting this radiator? A. Well, I didn't know that was the one. I was looking for one at that time.

Q. You were looking for one? A. Yes, sir.

Q. And how long had you been looking for it? A. Quite some time, I should judge. Of course, they sent me that particular time to get the radiator, to see if it was there.

Q. And when was it that you first saw this particular radiator? A. I seen it there before that. I didn't know it belonged to us.

Q. (By the Court.) There was a first time when you saw it. Do you remember when the first time was? No, I couldn't recall that now; it is two years ago.

Q. (By Mr. MacSherry.) Well, it was there two days, was it not? A. In that neighborhood.

Q. You saw it there the first time? A. Yes, sir.

Q. You saw it there two days afterwards? A. Yes, sir.

Q. And it had not fallen down up to that time, had it? A. No, sir; I didn't know but——

Q. You say it was up against the side of the building, and the last time you saw it it was in the same position that it was in the first time; isn't that so?

Mr. Walker: I object to that. It is leading, your Honor.

The Court: Leading questions on cross-examination are allowable. Proceed.

Q. That is so, is it not, Mr. Cadmus? A. The last I seen it it was leaning against the wall.

Q. Yes, the same as it was the first time? A. Yes, sir.

Q. And the first time was two days before? A. Maybe so; I couldn't swear to that.

Q. And you were working for what company? A. The Simmons Pipe Bending Works.

Q. And about how high was this radiator? A. About 38 inches high.

Q. About 3 feet and 2 inches? A. Yes, sir.

Q. That included the feet? A. Yes.

Q. How high were the feet, do you suppose? A. About three inches.

Q. And how wide was it? A. I should judge about ten inches wide.

By the Court:

Q. You say "wide." How are you measuring it? A. I understand he means thick. It was about 2½ feet long and about 10 inches——

Q. Suppose that is the radiator (indicating).

A. It stood out that way. It would be 38 inches high, this way, and 2½ feet long, and, I should judge, about 10 inches thick. I didn't measure it, but I should judge it was that, because I handle a lot of them.

By Mr. MacSherry:

Q. Was there any light in that building near where the radiator was up against the wall? A. Yes, there is a bulb electric light over the platform there.

Q. (By the Court.) How many feet from where the radiator was up against the wall? A. How far was the light?

Q. (By Mr. MacSherry.) Yes. A. About 5 feet, I guess, away from that spot.

Q. And was the light lit when you saw the radiator? A. Yes, sir.

Q. Every time? A. Yes, sir.

Q. (By the Court.) What kind of a light was it? A. A small electric bulb.

Q. (By Mr. MacSherry.) And what kind of a day was this 21st day of October, do you remember? A. As near as I recall, it was before dinner.

Q. It was what? A. Before dinner, as near as I can recall, that I was there.

Q. That is the best part of the day, but what kind of a day was it as to weather? A. I don't recall that.

By the Court:

Q. What opportunity was there for the daylight to get into this place? Were there windows? A. Yes, but it was quite a distance away from the windows.

Q. Did you require the bulb light in order to see well? A. Yes, sir.

By Mr. MacSherry:

Q. How far away was the place where the radiator was from a window or a door? A. 40 or 50 feet from a window on the east side, I guess.

Q. And how far from a door? A. A door leading to the street?

Q. Yes. A. A couple of hundred feet.

Q. The whole thing was open, was it not, to the street, though? A. No.

Q. To the dike? A. No, you had to come around to get to the dike from the door.

Q. Did you see other lights in that building? A. Yes, sir.

Q. How many? A. That I couldn't say, how many.

Q. The place was well lighted, was it not? A. Well, not extra; no, sir.

Q. Well, you had to go in there to see things, did you not? A. Well, it was pretty dark when you drove in there.

Q. But there was no trouble in seeing that radiator, was there? A. No, sir.

Q. And you did see some bags there? A. Yes, sir.

Q. Where were the bags? A. In front of the radiator and on the side of it.

Q. So that to get to the radiator you had to remove the bags? A. Had to remove the bags; that is right.

Q. The bags were in front of the radiator, then? A. Yes, sir.

Q. And how were they, piled up or lying loose? A. They were piled up all around there.

Q. How many? A. That I couldn't say, how many.

Q. You did not want the bags? A. No, sir.

Q. Mr. Collins, as I understand it, wanted the bags? A. I didn't know at the time.

Q. You wanted the radiator? A. The radiator; yes, sir; and other stuff that I was looking for.

Q. You did not examine this radiator very closely, did you? A. Only as far as I could see. I was looking for a name on it; I was sent for one; I couldn't find no name on it.

Q. Do you remember testifying as follows at the last trial—— You remember testifying, do you not? A. Yes, sir.

Q. Do you remember testifying as follows: *"Question:* How did you notice this particular radiator? *Answer:* I happened to see the radiator standing there." Do you recollect that? A. Yes, sir.

Q. *"Question:* Coming to your company? *Answer:* No, sir; I didn't look at it, didn't see the mark on it, just noticed it passing it." Did you so testify? A. Well, that I couldn't say.

Q. Well, what do you think about it? I am reading from the case. Didn't you so testify? A. Well, as near as I recall, I seen it there——

Q. No, did you not so testify at the last trial? A. That I didn't pay no attention to it at the time?

Q. Yes. A. I don't know.

Q. No, did you not so testify at the last trial? *"Question:* How long before the accident had you seen the radiator there? *Answer:* I can't say. That is the first I noticed it." Do you recollect that? A. I don't recollect that; no, sir.

REDIRECT-EXAMINATION BY MR. WALKER:

Q. How high is the ceiling of section S, where the radiator stood? A. That is, from the platform or from the floor?

Q. From the platform to the ceiling. A. Oh, 20 feet, I guess, or 15 feet.

Q. And the electric light, or electric bulb, was that attached to the ceiling? A. Yes, sir.

RECROSS-EXAMINATION BY MR. MACSHERRY:

Q. Was your attention particularly attracted to this radiator by anybody or anything? A. No, sir.

Q. When did you first hear that Mr. Collins was hurt? A. Well, it was very near a year afterwards, I guess. I didn't remember hearing of anyone getting hurt.

Q. Then somebody came to talk to you and asked you if you remembered seeing a radiator there, and you said, "Yes"? A. Yes, sir.

Q. Who was that somebody? A. I believe it was Mr. Collins; I am not sure now. He asked me if I recalled that radiator there.

Q. There was nothing about the position of the radiator that impressed you very much at the time, was there? A. No, sir.

Q. And you would never have thought of it again if you hadn't heard of this accident, would you? A. Well, our truck picked up the radiator a couple of days after that.

Q. You were not there when it was picked up? A. No, sir.

Q. Well, was there anything about the radiator that impressed you so as to remember it? A. No.

Q. And you are positive that on the morning of the 21st day of October, the day of this accident,

this radiator was standing there, 2 feet from the wall? A. At the bottom; yes, sir.

By the Court:

Q. Mr. Cadmus, let me understand. You were then in the employ of the General Pipe Bending Works? A. The Simmons Pipe Bending Works.

Q. What were you doing? A. Driving.

Q. What were you doing at this place? A. I was looking for freight.

Q. What particular freight were you looking for? A. Well, a radiator, and we generally take everything that is there.

Q. You were looking for a particular radiator? A. Well, I didn't know what one it was, how high it was or what it was at the time.

Q. You had instructions to look for a radiator? A. Yes, sir.

Q. One radiator? A. Yes, sir.

Q. And that is why you wanted to read the name on this radiator? A. Yes, sir.

Q. To see if it was made by your people; is that the idea? A. Yes, sir.

Q. Did you find out afterwards whether it was made by your pople? A. Well, as near as I heard, it was consigned to our people, when one of our chauffeurs picked it up.

Q. Never mind what anybody told you. Did you have anything to do with these bags? A. No, sir.

Q. Do you know when they came there? A. No, sir.

Q. Can you tell us about how many bags there were? A. I cannot; no, sir.

Q. When did you next see the radiator after this? A. I don't recall seeing it after this happened.

Q. You do not recall seeing it? A. No, sir; I didn't go there.

HENRY MEYER sworn in behalf of plaintiff.

DIRECT-EXAMINATION BY MR. WALKER:

Q. Mr. Meyer, where are you employed? A. D. Osborne & Company.

Q. Where were you employed on October 21, 1915? A. Central Railroad.

Q. In what capacity? A. Delivery clerk.

Q. In their warehouse on—— A. Yes, sir.

Q. In what section of that warehouse were you working then? A. M, N, O, P and Q.

Q. On October 21st? A. Why, no, I was working around up in the elevator some part of the day.

Q. Do you recall the accident that happened to Mr. Collins on October 21, 1915? A. I didn't see the accident.

Q. Do you recall that there was an accident on October 21, 1915? A. Yes, sir.

Q. What do you know about this accident? A. All I know, I seen Mr. Collins sitting down; that is all I know about it.

Q. What time did you see him sitting down? A. Somewheres around 4:30 in the afternoon.

Q. Well, did you see a radiator in section S at 4:30? A. Yes, sir; I did.

Q. Where was the radiator? A. Well, it was about a foot or so away from him.

Q. How far from the front of the dike, or platform, was Mr. Collins sitting? A. Well, I couldn't say that; I didn't take good notice of that.

Q. Do you know how many feet? A. I do not.

Q. Do you recall how many feet he was from the rear wall of the place? A. I do not.

Q. Do you know how many times the truckers went into section S on October 21st? A. No, sir.

Q. Do you recall any truckers going into section S on October 21st? A. Only myself.

Q. Who removed the freight and placed it in this section S? A. The truckers.

Q. In October, 1915? A. The truckers placed it in the sections.

Q. You are not a trucker, are you? A. No, sir.

Q. Were you a trucker on that date? A. I was helping out.

Q. How many other truckers had a right to go in section S on that date? A. Oh, as many as three or four or five, I guess, as many as the company employees.

Q. Did you see a radiator on the morning of October 21st? A. I don't recollect.

Q. Do you recall seeing a radiator on October 20th in section S? A. I believe it was the day before.

Q. What was the position of the radiator on October 20th? A. Leaning up against the wall.

At one o'clock, P. M., the Court takes a recess of one hour.

AFTER RECESS.

HENRY MEYER resumes the stand in behalf of plaintiff.

DIRECT-EXAMINATION (CONTINUED) BY MR. WALKER:

Q. Mr. Meyer, when you examined this radiator on October 21st, can you state what color it was? A. I didn't examine it.

Q. Do you know whether it was black or white, or what? A. Well, they generally all come black.

Mr. MacSherry: I ask that that go out.

Mr. Walker: Answer the question.

The Court: Strike it out. The question relates to this particular one, what you remember about the color of it.

Witness: Well, at a glance, it was black.

Mr. MacSherry: No, I ask that that go out.

(Answer read.)

Mr. MacSherry: Oh, I thought he said, "I imagine it was black." That is all right.

Q. (By the Court.) When was it that you saw it? A. The day of the accident. It was black.

Q. (By Mr. Walker.) Mr. Meyer, how big an electric light bulb do they have in section S?

Mr. MacSherry: I object to that, if your Honor please. On that day.

Mr. Walker: On October 21st?

The Court: Answer the question.

A. Why, they ain't quite as big—about the size of one of those on the wall there (indicating).

Q. The center one or the one on the side? A. On the side.

Q. Is that right up against the ceiling? A. Not up against the ceiling, no.

Q. How far below the ceiling is it? A. Why, about 6 feet below the ceiling.

Q. (By the Court.) You mean the light that you saw? A. Yes, sir.

Q. (By Mr. Walker.) Is that in the center of the section? A. Well, not quite in the center.

Q. Well, as I understand, this is a section about 75 feet long. How far from either end is this light, how many feet? A. I should say about 8 or 10 feet.

Q. Is that the only light in the section? A.

Why, no, I believe there is about three or four in that section along where the accident happened.

Q. Is this a dull globe or a white globe? A. No, it is a white globe.

CROSS-EXAMINATION BY MR. MACSHERRY:

Q. Now, Mr. Meyer, you were subpœnaed here by the defendant company, were you not? A. Yes, sir.

Q. You were not subpœnaed by the plaintiff? A. No, sir.

Q. And you were formerly employed by the railroad company, were you not? A. Yes, sir.

Q. Now, there are several lights in that section, are there not? A. Yes, sir.

Q. And they are all suspended from the ceiling? A. Yes, sir.

Q. Electric lights? A. Yes, sir.

Q. And do you know how large a section this was, about the size of it? A. Well, the narrow strip where the accident happened, it is about 10 feet wide, and from the beginning of the section to Ward street is about 90 feet.

Q. Now, did you see the bags there? A. I have noticed them.

Q. And what color were they? A. Black.

Q. Was there any trouble in seeing them? A. No, sir.

Q. And was there any trouble in seeing the radiator? A. No, sir.

Q. There was light enough for that, was there? A. Yes, sir.

Q. Well, were you in this section S on the day that this man was hurt? A. I was.

Q. About what time? A. Around 4:30.

Q. And from that time on until how late? A. I believe that was the last I was in the section.

Q. Now, this platform that we are talking about runs from where to where? A. The entire platform?

Q. Yes. A. From Lawrence to Ward street.

Q. And that is almost a block long, is it not? A. Yes, sir.

Q. And it is closed on all sides, is it not? A. Yes, sir.

Q. Except the front door? A. The front doors.

Q. And is there a place for trucks to go up to? A. You mean wagons?

Q. Yes. A. Yes, sir.

Q. What is the difference between section S and section M, we will say? A. Why, section S is the goods that is marked for Smith, Steele, Smalley, and so forth.

Q. That simply means the first letter of the name? A. No, the last party's name.

Q. The last? A. Yes, sir.

Q. Then the goods that are marked for a concern, we will say, like Smith or Steele, those goods will go to section S? A. Yes, sir.

Q. Are there any walls between the sections? A. There is walls in the back.

Q. No walls dividing the sections? A. No, sir.

Q. Would you say that there was a good deal of light there or little? A. There is plenty of light.

Q. What kind of light? A. Electric globe.

Q. And was it lighted on the day of this accident? A. Yes, sir.

Q. Where was this radiator when you saw it? A. The day of the accident?

Q. Yes. A. Why, it was partly in front of the bags, but a little on the side.

Q. And was there any space between the bags

of chicken manure and the radiator? A. There might have been a few inches.

Q. Did you see the radiator the day before the accident? A. Yes, sir.

Q. Was it in the same position after that it was the second time, the second day? A. No, sir.

Q. Where was it? A. Up against the wall.

Q. Where was it when you saw it on the day of the accident? A. In the front of the bags, a little on the side.

Q. How did it get there, do you know? A. I do not.

Q. That was after the accident? A. After the accident.

Q. But you hadn't seen it changed, as I understand it, until after the accident? A. What is that?

Q. You hadn't seen any change in its position until after the accident? A. No, sir.

Q. Where was it then? A. After the accident it was in front of the bags and a little on the side.

Q. Did you see anybody move it? A. No, sir.

Q. Do you know of any reason for the railroad company to move it? A. No, sir.

Q. Of yourself? A. No, sir.

Q. Were there other people going there besides yourself and—— A. Why, generally truckers going there through that section.

Q. They go there to get their deliveries, do they not? A. They deliver different goods in the section.

Q. How long have you handled articles of merchandise, such as the radiator and these manure bags, general merchandise, how long have you been handling them or had anything to do with them in that place?

Objected to as not cross-examination.

(Question withdrawn.)

Q. You are a delivery clerk, are you not? A. Yes, sir.

Q. Could you describe this radiator? I mean did it have a base, or what did it stand on? A. Why, about 3 feet high and 2 feet wide, no base.

Q. What did it stand on? A. Legs.

ANDREW J. COLLINS, plaintiff, sworn in his own behalf:

DIRECT-EXAMINATION BY MR. COHN:

Q. Mr. Collins, you are the plaintiff in this suit? A. Yes, sir.

Q. By whom were you employed on October 21, 1915? A. M. Strauss & Sons.

Q. Did you receive any order to go to the Central Railroad Company's warehouse on that day? A. I did.

Q. Did you go? A. I did; yes, sir.

Q. What for? A. For bags of chicken manure.

Q. Now, tell us what happened to you when you went to the freight house there? A. Well, when I went to the freight house I went to Mr. Regan and asked him if there was any chicken manure there for M. Strauss & Sons. He says, "Yes, Mr. Collins;" he says, "Go up to the office and get"——

Mr. MacSherry: I object to what he said.

The Court: Tell us what you did.

Q. What did you do? A. I went to Mr. Regan when I went there.

Q. What did you do after that? A. Mr. Regan told me——

Objected to.

Q. Never mind what he told you, just what you did.

The Court: Never mind what Mr. Regan told you; just tell us what you did.

A. When I went to the Central Railroad I went to Mr. Regan and asked him if the chicken manure—
10 if there was chicken manure there for M. Strauss & Sons.

Q. Where did he send you? A. He sent me to——

Objected to as leading.

Witness: Why, I will tell what I did. When I went to Mr. Regan——

The Court: Tell us where you went.

Witness: I went up to the office, and Mr.
20 Regan told me to go to the——

Mr. MacSherry: No.

Q. No. You went to see Mr. Regan? A. Yes, sir.

Q. After you saw Mr. Regan where did you go? A. I went to the office.

Q. And what did you get there? A. —for to get a bill for the goods.

Q. Did you get the bill? A. They told me they
30 didn't have no waybill there, to go back to Mr. Regan and get a pink slip, and they would write me out a pro claim on the goods.

Q. Did you get that? A. I got the pro claim.

Q. What did you do then? A. And Mr. Regan told me——

Objected to.

The Court: Forget all about Mr. Regan.

Q. Just tell us what you did. A. After I got
40 the pink slip I went back, and Mr. Regan said,

"Put your bags on the wagon." That is what I did. He said, "Put your bags on the wagon, Mr. Collins, and count what you have got and come back and sign for the goods."

Q. And what did you do?

The Court: Tell us what you did.

A. Then I went to put the bags on the wagon; I put one bag on the wagon, and went back. On my way back, the radiator was laying in the passage-way and fell over on my foot.

Q. Did you strike the radiator?

Objected to.

A. No, sir; I did not.

Mr. MacSherry: I object to that as leading.

The Court: The objection is sustained.

Mr. Cohn: Strike it out.

Q. Had you seen that radiator before? A. Not on that day, but I seen it on several previous occasions.

Q. When did you see that radiator before you went for the chicken manure? A. Before I went for it?

Q. Yes. A. I seen it two weeks previous.

Q. And when you saw it did you say anything to anybody? A. I did. I went to see——

Mr. MacSherry: Wait a minute. I object to that, what he said to anybody.

Q. What did you do? A. I said to Mr. Regan, "That radiator is a dangerous affair there."

Objected to on the ground that what was said cannot bind the defendant company.

The Court: (After argument.) It must first appear that notice was given and that it was given to some person whose knowledge would be the knowledge of the company.

Q. What did you do after you saw the radiator? A. I told Mr. Regan that was a dangerous thing to be there; I called his attention to it.

Mr. MacSherry: I object to that. I think the answer to that should be that he spoke to so and so about it, but not what he said.

The Court: That is true, but we may as well get at the gist of the thing. It appears that Mr. Regan was the person in charge on behalf of the company of all these articles, so that the question is whether a communication made to Mr. Regan would not be made to the proper person.

Mr. MacSherry: Yes, that is the reason I am objecting to it, because I do not think he was the proper person.

The Court: I have no means of judging about that, except from the testimony of Mr. Regan himself. He says, "I had charge of section S; all the articles were in my custody." Why would not a representation made to Mr. Regan as to some article in section S, which was in his custody, if it related to its position, be a representation made to the proper person? Was it necessary to go to the head of the railroad company?

Mr. MacSherry: No, not to the head; the head of the department, I should think. Well, I make the objection, anyhow.

The Court: This seems to have been kind of a sub-department. I shall allow the question.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Just relate the conversation that you had with Mr. Regan about this radiator. A. I came to Mr. Regan and asked him where the radiator came from that was laying there so long. I said, "It is going to get somebody." He said, "That radiator came out of the toilet some nine months ago, Mr. Collins, and it is laying around ever since." He said, "The company thought we would be too comfortable going into the toilet." Those are the words that Mr. Regan said.

Mr. MacSherry: I object. I think that ought to be stricken out.

The Court: Strike that all out. The witness may say, and that is all you want him to say, what he said to Mr. Regan——

Mr. Cohn: And what Mr. Regan said in return.

The Court: —and what Mr. Regan said to him about the radiator, especially about its position.

Mr. Cohn: Yes.

Q. Repeat what you said to Mr. Regan about the radiator.

Mr. MacSherry: That is already in.

The Court: I just struck it all out on your objection, I think.

A. I asked Mr. Regan how long that radiator was going to remain around there——

Objected to on the same ground.

Witness: —he said, "Mr. Collins, it has been laying around there for over nine months; it was taken out of the toilet"——

Mr. MacSherry: I ask that that go out, if your Honor please. Your Honor has admitted

this testimony for the purpose of showing that they gave notice to the company of the presence there of this radiator. I do not understand that what this man Regan said should be admitted as binding the company, any more than you could admit the conversation of a conductor or motorman to bind the Public Service Corporation. It might be all right for Regan to receive a notice, but it is not all right, so far as this case goes, to bind the company or to explain why this radiator was there, which would be binding the company.

The Court: The point in this case is whether the radiator was in an insecure position. The question as to how long it was in the building is not important. The question is as to whether it was so situated, so placed, as to be dangerous. If you can bring the mind of the witness to that particular point, that is what we should like to know.

Mr. MacSherry: The opinion of Regan should not be used against us, it seems to me.

The Court: No, it is a question of fact; it is not a question of opinion.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. What caused you to speak to Mr. Regan about the radiator? A. Because I thought it was a dangerous thing, laying around there and half laying over against the wall.

Q. How often were you accustomed to go to the section S for Strauss & Sons? A. Sometimes I go there twice a week and other times it might be

three times a week and then maybe twice a month, and so on.

Q. And you had seen the radiator on previous occasions? A. I had seen it on previous occasions for six months back; I well knew it from seeing it.

Q. Just answer the question; do not volunteer any information. After the radiator fell on you what did you do? A. After the radiator fell on me I fell down on the floor, and I hollered, I hollered for help, somebody to come and help me.

Q. Did you notice the position of the radiator at that time? A. The top part of it came over on my foot.

Q. What part of your foot? A. Right across the toes, the front of my foot.

Q. Was it dark or light at the place where the radiator was? A. It was really kind of dusk; it was 4:30 in the afternoon, of an October evening.

Q. And what was the color of the radiator? A. The color of the radiator was a kind of a dark, rusty, rusty dark.

Q. How about the light at that time? A. There was a light on the L-shaped driveway there, I should judge about 20 feet away; that was the only light I could see there.

Q. How about natural light? A. That is the only light I see there.

Q. Where was the nearest window to the radiator? A. The nearest window to the radiator, I should judge, was about 30 feet away.

Q. Was there any light from that window that struck on the radiator? A. There was no light at all in that end of the building whatsoever on that side, no windows.

Q. Where were you taken after you were in-

jured? A. After I was injured I told them to take me home to my wife and——

Q. Did you call any doctor? A. I told them to take me home to my wife.

Q. Was the doctor called? A. They took me—— No, they didn't call the doctor; no, sir.

Q. When did they call the doctor? A. After I was taken home.

Q. And who came? A. Dr. Busch.

Q. And how long did he treat you? A. He treated me from the 21st of October until the 1st—no, the 4th of April.

Q. Did any other doctor treat you? A. Yes.

Q. Who else treated you? A. Dr. McCormack and Dr. Epstein and Dr. Trainor.

Q. How much did you pay Dr. Busch? A. Something over $200; I don't know how much over.

Q. And how much was Dr. Epstein paid? A. I guess Dr. Epstein got over $125, or something like that; I don't know how much.

Q. And Dr. McCormack? A. Dr. McCormack was there with Dr. Busch on three occasions. I guess about $25 or $30.

Q. All these doctors have been paid? A. Yes, those doctors have been paid.

Q. Did you have any pharmacy bill? A. Yes, sir; a big pharmacy bill, for cotton, gauze, bandages and medicines, and all that—alcohol.

Q. How much does that amount to? A. I have been getting them from time to time each week for six months. I can't say how much it amounted to.

Q. Did it amount to $30 or $40? A. It amounted to $60 or $70.

Q What is the condition of your foot at the present time? A. Sore, always sore at the top.

Q. How do you feel, how does the foot feel? A. Well, it feels stiff all the way up the leg.

Q. Was there anything the matter with your foot before the accident? A. No, sir.

Q. What was your occupation before the accident? A. My occupation was driver.

Q. And in connection with your occupation as a driver what were you required to do? A. I was required to drive and ship goods from depot to depot and collect all the deliveries.

Q. Did you have to lift the goods? A. Yes, sir.

Q. On and off the wagons? A. On and off the wagons; yes, sir.

Q. Are you able to do that now? A. No, sir.

Q. Why? A. I got an inside job, light work, trimming automobile leather, and watch the gate outside.

Q. You do not do any more driving? A. No, sir; I am not able.

Q. How do you walk? A. Lame.

Q. Did you walk lame before the accident? A. No, sir.

CROSS-EXAMINATION BY MR. MACSHERRY:

Q. Mr. Collins, how old are you, please? A. Fifty-two.

Q. Are you working? A. Yes, sir.

Q. At what? Trimming automobile leather and watching the gate.

Q. Where? A. M. Strauss & Sons.

Q. At the time of this accident what were you doing for Strauss & Sons? A. At the time of the accident I was driving for M. Strauss & Sons.

Q. And making how much money? A. Earning an average at the rate of $13 a week.

Q. $13? A. Yes.

Q. And what kind of driving were you doing? A. Driving, shipping goods and collecting deliveries, and anything in general that they told me to do.

Q. How long had you been doing that? A. Been doing that for them for about twenty-one years.

Q. At $13 per week? A. Yes, sir.

Q. And you went back to work after this accident about April 4th? A. Yes, sir.

Q. What kind of work did you do, what did you go on then? A. I went back at trimming automobile leather and watching the gate.

Q. What do you mean by watching the gate? A. Well, people coming in, directing them to the office, and so on, if they didn't think it desirable to leave them in the yard.

Q. What did you get paid for that? A. I got paid $2 a day.

Q. That is, $12 a week? A. Yes, sir.

Q. How much do you get paid now? A. Well, they raised me a dollar since.

Q. That is, $13 a week? A. Yes. All labor got raised through the country.

Q. What is that? A. All men has got raised through the country, I guess.

Q. How long ago is it that you got this raise? A. Oh, I got it about six months after I was working.

Q. And then they raised you to your original salary? A. Yes.

Q. $13? A. Yes, sir.

Q. Now, Mr. Collins, do you think your memory is very good about that accident? A. Yes, sir.

Q. And do you think it is very good about things that happened a week or two before the accident? A. Yes, sir.

Q. So now you say that before this accident you saw this radiator? A. Yes, sir.

Q. Then it was not a new radiator at all; it was an old one? A. It was the old one.

Q. And you had seen it two weeks before? A. Yes, sir.

Q. Now, you are sure of that? A. Yes, sir.

Q. You do not want to correct it? A. That is correct.

Q. And that is the radiator that fell on your foot? A. That is the radiator that fell on my foot; I could tell it after I was laying there.

Q. Do you remember testifying in this court house before his Honor Judge Cutler in the trial of this case back in last year? Do you remember that trial? A. Yes.

Q. That was October 18, 1916. A. All right.

Q. Now, just listen. Do you remember testifying as follows: "*Question:* You have taken one bag and put it on your truck? *Answer:* Put it on my truck"? Do you remember saying that? A. Yes, sir.

Q. "*Question:* You had not seen the radiator that day until it fell; is that a fact"? A. That is a fact.

Q. "*Answer:* I have not"? A. I have not.

Q. Did you so testify? A. Yes, sir.

Q. Did you testify as follows: "*Question:* Do you recall what kind of a globe covered this light that was 10 feet from the radiator? *Answer:* I don't. I didn't notice it specially"? And do you recall this when asked about the light: "*Question:* Now, Mr. Collins, you said there was a light about 10 feet from this radiator? *Answer:* Yes, some kind of a light from the ceiling. *Question:* An electric light? *Answer:* Yes. *Question:* Was it lit? *Answer:* I don't recall whether it was at the time

of the accident; I know it was afterwards"? Did you so testify? A. Yes, it was lit afterwards.

Q. Do you remember testifying that you did not know whether it was lit at the time of the accident, at the last trial? A. I don't remember it.

Q. Do you say you did not? A. I don't remember what I said the last time.

Q. Now, when you went to get the bags you saw this radiator, did you not? A. No, I didn't, not when I went to get the bags.

Q. You knew where that radiator was? A. No.

Q. You had seen it around there for two weeks? A. Not in the same place; no, sir.

Q. You did not see the radiator? A. No, sir.

Q. How is that? A. Two weeks previous I seen it in another part of section S.

Q. How is it that you did not see it that day when you went to get your bags? A. Simply because it was kind of dark, in the evening, half-past four; the light was none too good there.

Q. There was a light there, was there not? A. There was, from 12 to 15 feet away.

Q. How many bags were there in that pile? A. About twenty-one. Them bags were piled up high.

Q. Is your eyesight good? A. Yes, sir.

Q. How is it that so many other people saw the radiator and you did not and you were right there?

Objected to.

(Question withdrawn.)

Q. How do you know that the radiator had got into the—what do you call it? A. Passageway.

Q. How did you know that it got in there when it fell on you? A. I didn't know anything about the radiator until it fell on my foot.

Q. Well, it was not there when you took the bags

out, was it? A. I only took one bag out and came back for the next.

Q. It was not there when you took the first bag out, was it?

Mr. Cohn: I object. He said he did not see it at that time.

A. I didn't see it at that time.

The Court: What is there to object to in that question? This is cross-examination.

Q. How wide was the passageway that you had to take from where the bags were to your wagon? A. Well, about 4 feet, as near as I could judge.

Q. 4 feet? A. Yes, sir.

Q. How high was the radiator? A. The radiator was about 38 inches tall.

Q. How is it that you did not fall over it as you went out, if it was in the passageway? A. It was in the passageway.

Q. How is it that you did not fall over it? A. In going to put the first bag on, after I got back from the office I took a bag from the side and put it on the wagon, and I went right straight against the wagon for my next bag, and the radiator fell over on me.

Q. You do not know where it came from? A. No, sir.

Q. I thought you said on direct-examination that when you went back the radiator was lying in the passageway. That is what you said, did you not? A. No.

Q. You did not mean that, did you? A. I didn't mean it and I don't remember saying it. The radiator was laying in the passageway after I got hurt.

Q. Did you not say that on your way back the

radiator was lying in the passageway? A. No, the radiator fell over on me.

Q. Did you see it go over on you? A. I felt it go over on me.

Q. Did you see it go over on you? A. No, not when it fell.

Q. Why didn't you see it? A. I don't know. It was a little dusk there.

Q. What time of the day was it? A. 4:30.

Q. In the month of October? A. In the month of October.

Q. Were there other people in that building? A. Yes, sir.

Q. Well, if there was not light enough to pick out your goods, you would be quite liable to pick out other people's goods, would you not? A. No, I wouldn't. I seen the bags; they were large.

Q. How large were the bags? A. Some of them weighed about a hundred pound.

Q. How large were they? A. Well, maybe about 3 feet long.

Q. They were not as large as the radiator, were they? A. Well, they were larger, rounder.

Q. How many bags were there? A. About twenty-two, I guess.

Q. You think that taking one bag out of the way would make the radiator fall down on your foot? A. I took one bag and put it on the wagon.

Q. And you came back? A. And I came back. I went the nearest way to go for the pile, and the radiator fell over on my foot.

Q. Had you been there that day before? A. No, sir.

Q. Did you see the radiator after it had fallen on your foot? A. I did.

Q. Was that a new radiator or was it an old one? A. It was an old one.

Q. Well, now, how do you know that it was the same radiator that you have seen weeks ago—that that was the same radiator that fell on your foot? How did you know that? A. I noticed it specially from on the top, a pipe being there, an attachment where it was attached to the wall on a previous occasion in some place. It come out of the toilet, I suppose.

REDIRECT-EXAMINATION BY MR. COHN:

Q. Mr. Collins, I will ask you to remove your shoe and show the jury just where that injury is, so that they can see what difficulty you might have in walking and for lifting purposes. A. I will.

Mr. MacSherry: We have admitted that the toes were amputated and the doctor has described it. I do not see the necessity for showing the foot to the jury. I think that ought to have been done, anyhow, when the doctor was here, so that we might have the opportunity to direct the doctor's attention, possibly, to some portions of the toes.

The Court: I am not particularly in favor of exposing the person in open court; I seldom allow it; but I think there is very much in your suggestion that it should have been done during the presence of the physician, if at all.

Mr. Cohn: Does your Honor object to the proceeding of showing the jury the injured limb? I think we have a right to show to the jury just how and what was injured on the man's foot.

The Court: I suggest that there is a good deal in the suggestion made by Mr. MacSherry,

that, if done at all—and I shall not say that there is a rule against it—it should be done in the presence of a physician, in order that he might be able to assist the Court and jury by observing it and answering questions about it.

[PLAINTIFF RESTS.]

Mr. MacSherry: Now, if your Honor please, we have to take this case, of course, entirely as we have it now before the Court, irrespective of what transpired before.

I move for a nonsuit, and I most respectfully insist that, in order to entitle the plaintiff to recover, first, he should show that the radiator was in a dangerous position. There is no proof of that at all. He should show that our employees had placed this radiator in the dangerous position. There is no proof of that. He should show that it had remained in a dangerous position for a sufficient length of time to charge us with notice of the fact and to afford us an opportunity to change its position, which is not proven in this case, I most respectfully submit.

Then there is another aspect of it, and that is, according to the testimony of the plaintiff himself now in this case, he knew, so he says, that this radiator was in a dangerous position; he knew it was there or thereabouts, where he would have to go to for his goods. He knew that; he says so. He says he happened to mention to Regan that the thing

would get somebody in trouble some time. Yet, in spite of that, according to what he said, which is against all the other testimony on his side, knowing that the place was insufficiently lighted and that he would have to go in that place, and substantially have to grope around for his goods, he goes in there, takes off one bag, and goes in this dangerous position, and he never looked for that radiator and never paid any attention to the radiator or what effect the removal of the bag would have on it, and the first thing he knew the radiator fell on him.

I submit that the case before your Honor now comes very close to the case of *Schnatterrer* vs. *Bamberger, 81 New Jersey Law 558.*

I want to say here that the overwhelming testimony in the case, I think, of every witness except Mr. Collins himself is that this radiator was a new radiator; that it was sent there for the purpose of being delivered to a party whose name escapes me, and the man himself had gone for the radiator and knew it was there; it could not be an old one.

I submit that this defendant was not an insurer against accident, and that its duty to the plaintiff was satisfied when it had used reasonable care to maintain its passages in a condition safe for proper use.

The Court: (After argument.) The testimony as to notice is not very clear to me. Mr. Collins testified that he complained to Mr. Regan that this radiator was dangerous, "standing there, half laying over against the wall," as I got his testimony. Then he said

afterwards, if I understood him correctly, that he had observed this radiator at another place about two weeks before, and the impression produced on my mind was that his complaint related to the radiator at the other place and not at this place. Mr. Collins says that he did not see the radiator when he went to get the bags. Two weeks before he saw it in another place. Now, if his complaint was of this radiator in another place it could hardly be regarded as notice of the dangerous condition of this radiator in this place. So that the testimony seems to me not to be entirely clear.

Mr. Regan says that he had charge of section S, of all articles there; that they were in his custody, and that there was a radiator there at the time of the accident, and he saw it the day before the accident; that he did not see it on the day of the accident.

So that, without more analysis of the testimony than I am able to give without anything but my own imperfect notes, I am somewhat in the dark as to the value of the testimony on the subject of notice. There may be said to be, however, some evidence on that subject, which the Court ought not to dismiss with a wave of the hand because it may not be entirely clear. I therefore think it is a proper case to go to the jury. I deny the motion.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

NICHOLAS REGAN recalled in behalf of defendant.

DIRECT-EXAMINATION BY MR. MACSHERRY:

Q. Mr. Regan, you were called this morning to the stand on behalf of the plaintiff in this case, were you not? A. Yes, sir.

Q. Did Mr. Collins at any time before he was hurt by a radiator falling on his foot make any complaint to you about that radiator or any radiator in that building being in a dangerous position? A. No, sir; not to my knowledge.

Q. Well, what do you mean by not to your knowledge? Did he or did he not? A. No, he did not.

Q. Did he ever say anything to you at any time about the dangerous position of that radiator or any radiator? A. Before the accident?

Q. Yes. A. No, sir.

Q. Did you ever tell him that the radiator that he had spoken to you about was an old radiator taken out of the bathroom, or some place like that? A. No, sir.

Q. Was that radiator that you saw near him at the time of the accident a new radiator or not? A. Well, I couldn't say whether it was new or old; it was just brought in there a day or two before, when I noticed it.

Q. That is the radiator? A. Yes, sir.

Q. Whom was it consigned to, who was to get it, do you know? A. The Simmons Pipe Bending Company.

Q. You are sure of that? A. Yes, sir.

Q. How do you know that that is the radiator that fell on his foot? A. That was the only one there at the time.

Q. Had there been any other radiator in that

warehouse for a party several weeks before that that you remember? A. I couldn't say.

Q. Had there been any there within a week before that? A. I couldn't say.

Q. How do you know that that was the only radiator in the place? A. For the simple reason, after this I came down to look at the radiator and we looked at the tag on it.

CROSS-EXAMINATION BY MR. COHN:

Q. Do you say there was a tag on the radiator? A. Yes, sir; when the boss came to look at it.

Q. What color was the tag? A. I don't know whether it was yellow or white.

Q. What was the color of the radiator? A. I know it was dark, naturally.

Q. This particular radiator, what was the color of it? A. The color of iron.

Q. What color is that? A. Black.

Q. There are thousands of articles that come into that section every day, are there not? A. Yes, sir; there are.

Q. Do you recollect clearly now that there were not any other radiators that came in there? A. Not to my knowledge, not that week.

Q. Well, didn't the Simmons Pipe Bending Company get radiators? A. They did oftentimes.

Q. Well, did they not get radiators prior to the day of this accident? A. How many days prior?

Q. Well, a week prior, two weeks prior? A. I don't think so.

Q. They did not get any at all? A. No.

Q. This is the only radiator delivered to the Simmons Company within two weeks of the accident? A. To my knowledge.

Q. Just this one radiator? A. Yes, sir.

Q. Do you know Mr. Cadmus? A. Yes, sir.

Q. Do you know that he was working for the Simmons Company? A. Yes, sir.

Q. Do you recollect that you told him that a radiator was there for the Simmons Company?

Objected to as not cross-examination.

Mr. Cohn: That is all.

LAWRENCE WEFFERLING, sworn in behalf of defendant.

DIRECT-EXAMINATION BY MR. MACSHERRY:

Q. Mr. Wefferling, where do you live? A. At Newark.

Q. What is your business? A. General foreman of the Central Railroad.

Q. Do you remember the day of this accident? A. I do.

Q. Did you occupy that position then? A. I did, for the last seventeen years.

Q. And were you down there that day? A. I was down there lots of times through the day.

Q. Did you see the radiator of which Mr. Collins complains as having gone on his foot? A. Did I see it?

Q. Yes. A. I saw it the day after it came out, yes.

Q. What do you mean by "the day after it came out"? A. It came out in the evening and I seen it the next morning.

Q. Who brought it out? A. One of my truckers brought it out.

Q. Was it new or old? A. It was a new one.

Q. Where did he bring it from? A. One of the truckers brought it downstairs to the section where it belonged.

Q. Was it brought from the place where this man was hurt or not?

Objected to.

Q. Do you know whether it was? A. Was it brought into that place?

Q. (By the Court.) Do you know whether it was brought out from the place where this man was hurt? A. No, I don't know that.

Q. (By Mr. MacSherry.) Do you know how many radiators you had in that building the day this man was hurt? A. In that building?

Q. Yes. A. I couldn't tell you that; I only know that one in particular.

Q. Do you know anything about the radiator that this man complains of as having fallen on him? A. Yes, sir.

Q. What do you know about it? A. Well, I will tell you what I know. That morning I walked around the house, and I see the radiator down in the S section. I walked down and asked who that radiator belonged to, and Mr. Regan told me it belonged to the Simmons Pipe Company.

Objected to.

The Court: That will not do, what anybody told you.

Q. When did you first hear that Mr. Collins was hurt? A. Mr. Regan reported it to me in my office; he came and reported that Mr. Collins was hurt up in my office.

Q. Did you go down there? A. Yes, sir.

Q. Did you see Mr. Collins? A. Yes, sir.

Q. Where was he? A. He was sitting on the bag of chicken manure.

Q. Whereabouts? A. Right close to the radiator, where he was hurt.

Q. Did you see the radiator there? A. I couldn't recall whether I had seen it then or not. I had some other things to do; I had to report the accident right off and call up the ambulance and call up Mr.——

Q. Was that place lit at that time? A. Plenty of light; yes, sir.

Q. How long had it been lit up? A. We light it about half-past six in the morning and I put them out at night, when I go home.

Q. Was that done that day? A. Yes, sir.

Q. Did you have any trouble in seeing the bags around there at all? A. Not at all; there was plenty of light.

CROSS-EXAMINATION BY MR. COHN:

Q. You did not see the radiator at that time, did you? A. When it fell on his foot?

Q. When you came there after the accident. A. No, sir; I did not. I didn't look for the radiator; I was looking to help Mr. Collins out.

Q. Well, they told you that a radiator had fallen on him? A. Yes.

Q. And you did not think of looking for the radiator? A. No, sir.

REDIRECT-EXAMINATION BY MR. MACSHERRY:

Q. You did not think they left it in the passageway after it fell on Mr. Collins's foot, did you?

Objected to.

(Question withdrawn.)

By the Court:

Q. Tell us what your position is, what office you hold? A. General foreman.

Q. For what company? A. The Central Railroad.

Q. Were your special duties in this building? A. Yes, sir; as far as the Central Railroad was concerned.

By Mr. MacSherry:

Q. Did you see that radiator before the accident? A. Yes, sir.

Q. Where did you see it? A. Down in S section, up against the wall, up against the pillar of the wall.

Q. Did you see any bags around there? A. Yes, sir.

Q. At that time? A. Yes, sir.

Q. And that particular radiator, do you know whether that radiator was consigned to anybody or not? A. It was consigned to the Simmons Pipe Bending Works; yes, sir.

Q. You saw that, did you? A. Yes, sir; I seen the tag on it.

RECROSS-EXAMINATION BY MR. COHN:

Q. You say that you remember you saw the tag? A. I certainly did; yes, sir.

Q. What color was the tag? A. The same as any tag, 'most.

Q. Well, what color is that? A. Well, that is a white tag, with lettering on it, "The Simmons Pipe Bending Company," where it came from.

Q. Do you look at every tag in the warehouse? A. Well, it would take me a good while to look at everything that comes in, but I generally walk around there every night until six, and I know what comes in.

Q. And you look at all tags? A. No, sir; but I seen this one there, and I passed a remark to Mr. Regan about it, too, before, and I looked at it.

By the Court:

Q. You say you saw this radiator before the accident, and it was leaning against the wall? A. Yes, sir.

Q. What wall? A. One of our walls that we have there that runs the length of the building.

Q. Well, how close was it when you saw it leaning against the wall to the place of the accident? A. Where I seen the radiator there?

Q. Yes. A. I seen it leaning up against the pillar, against the wall there, and this manure was piled up close to it.

Q. How near to where the accident afterwards occurred to Mr. Collins? A. I don't quite understand how near it was.

Q. That is what I am asking you. You say you saw it leaning against the wall? A. Yes, sir.

Q. How near was that place to the place of the accident? A. Where I seen it from where Mr. Collins was sitting?

Q. You saw it leaning against the wall? A. The day before.

Q. Have you got that fairly in your mind? A. Yes, sir.

Q. Do you know where that was? A. Yes, sir.

Q. Where was it? A. Why, up against the wall.

Q. Whereabout was that wall? A. Why, it runs the whole length of the building.

Q. Was the part of the wall against which this was leaning near to the place where Mr. Collins was injured? A. Yes, sir. I understand now.

Q. How far away? A. Well, it must have been about 5 feet, I think.

Q. You say you saw it leaning up against the wall? A. Yes, sir.

Q. Just describe the condition in which it was. A. Well, take that for instance; there is the pillar. This radiator was standing braced up against the pillar in that kind of shape, leaning up against the pillar (indicating). It was protected, all right.

Q. Just lean that pointer up against the wall the way the radiator was standing. A. Like that (illustrating).

Q. About like that? A. Yes, sir.

Q. Had it legs? A. Yes, sir.

Q. How many? A. Well, I didn't exactly notice whether it had three or four legs.

Q. Three or four? A. Yes, sir.

Q. How many was it standing on when it was leaning up against the wall? A. It wasn't standing on any; the legs were up.

Q. All up? A. Yes, sir.

Q. Weren't there any legs in the back? A. No, sir.

Q. They were all in front? A. Two must have been in front and two behind. There were four legs, as I remember; two in front and two behind.

Q. You did not see them all? A. Well, I didn't count them all, that is sure.

Q. That is your inference, that there were four? A. Yes, sir.

Q. And you think the two legs in front were not on the ground? A. They wasn't on the ground. We turn them down that way because it is more protection than putting them on the legs.

Q. How about the ones behind, were those legs on the floor? A. No, sir; no legs at all; the radiator was turned upside down and the legs on the

top and the top on the bottom. That is the best way to protect it.

Q. You mean it was lying down on its side? A. No, sir.

Q. Well, let us see if we can illustrate with this little box (indicating). Is that something like the shape of the radiator? A. Yes, sir.

Q. Now, show us how it was leaning against the wall. A. (Illustrating.) We will say that the legs are generally on the bottom here. This radiator, instead of standing on the legs, was standing up this way and the legs was on top, because, as a rule, we generally stand them that way in the freight house, if we can, because it protects the legs from breaking; there is more protection on the top than there is on the legs. The radiator was standing in that shape.

Q. When did you notice that? A. I noticed it the day it came out of the car; that was the day before Mr. Collins got hurt.

Q. He was hurt on the 21st. You say you noticed it on the 20th? A. On the 20th, yes, sir; the morning of the 20th, about eight o'clock in the morning.

Q. What did it come out of? A. It came out of one of the cars. The checker checks it out and they send it down in the elevator, and we have five men take—after it comes down they take it and put it in the section where it belongs.

Q. Well, was it brought down? A. It had to be brought down; that was where it belongs.

Q. This was the section where the iron, and so forth, belonged? A. Yes, sir.

Q. And that is the reason it came down? A. Yes, sir.

Q. And that was the 19th? A. That was the morning before the accident.

Q. That was the 20th? A. Yes, sir.

Q. Now, up to the 20th, up to that time, where had it been? A. Before this time?

Q. Before it came down where had it been? A. I suppose it came in the freight house the day before in one of the cars. We take out freight every day, you know, so many cars every day.

Q. When it came over from the freight house it was taken upstairs? A. No, sir; we have the tracks all upstairs. It is taken down and taken out of the cars and put on little cars with four wheels and sent down to the platform where we deliver goods, and then the truckers take care of it down there.

Q. I want to go back to the 19th. You think it was received in the building on the 19th? A. Yes, sir; the 19th.

Q. When was it taken out of the freight car? A. You have got me. It might have come in the house on the 18th, but it was taken out on the 19th. I have got the checking there.

Q. Have you got papers that show that? A. I haven't got them; our man could give you that.

Q. So that your idea, without consulting papers, is that it came into the building on either the 18th—— A. The day before we checked it off.

Q. On the 18th or 19th? A. Yes, sir.

Q. And then on the 20th it was checked out? A. Yes, sir.

Q. And it came downstairs? A. Yes, sir.

Q. And was taken to this place? A. Yes, sir.

Q. Where it was afterwards leaning up against a wall? A. Yes, sir.

Q. And that the accident occurred on the following day? A. The following day, yes.

[DEFENDANT RESTS.]

CHARLES CADMUS recalled in behalf of plaintiff in rebuttal.

DIRECT-EXAMINATION BY MR. COHN:

Mr. Cadmus, you have stated before that you were working for the Simmons Company? A. Yes, sir.

Q. On the day of the accident? A. Yes, sir.

Q. And you went to look for this radiator? A. Yes, sir.

Q. Did you find any tag on the radiator?

Objected to.

A. No, sir.

Objected to as repetition and as not rebuttal.

The Court: You may answer the question.

Q. Did you find any tag on that radiator? A. No, sir.

Q. Was the radiator standing on its legs or was it reversed when you saw it? A. It was on its legs.

CROSS-EXAMINATION BY MR. MACSHERRY:

Q. Was that after the accident? A. No, before.

Q. How long before? A. Why, the morning, when I was sent up for it.

Q. That morning? A. Yes, sir.

Q. What time in the morning? A. I couldn't say what time in the morning.

Q. Nine o'clock? A. I couldn't say what time.

Q. About what time, Mr. Cadmus? A. I couldn't say. I have been going in there right along——

Q. Well, this accident did not happen this morning, did it? A. I couldn't say when it happened.

Q. You do not know whether there was a tag on it or not? A. I didn't see no tag.

Q. It might have been there without your seeing it? A. Yes, sir; it might have been there; I didn't see none.

Q. And you did not take any particular care to look for it? A. I looked at it and I didn't see no tag.

[PLAINTIFF RESTS.]

Mr. MacSherry: If your Honor please, I move for the direction of a verdict in this case for substantially the same reasons that I asked for a nonsuit. I say that there has been no notice given to us of the dangerous condition of this radiator. My reasons are the same as I stated on the motion for nonsuit.

The Court: (After argument.) There is so much contradiction in the testimony that I am not inclined to grant the motion to direct a verdict.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. MacSherry sums up for defendant.

ANDREW J. COLLINS, plaintiff, recalled for further cross-examination by Mr. MacSherry.

Q. Mr. Collins, did you testify at the last trial of this case that you had ever told Mr. Regan anything about any radiator being in a dangerous position or that would give anybody any trouble? A. It wasn't asked of me.

Q. You did not do it, did you? A. It wasn't asked of me.

Q. Won't you answer my question?

The Court: Answer the question yes or no.

A. No, I did not.

CROSS-EXAMINATION BY MR. WALKER:

Q. Just one question, Mr. Collins. In describing this radiator before I did not hear you state what kind of a top the radiator had. Will you tell the Court and jury? A. It was a pipe, an attachment going into a ball there.

Q. I am asking you what kind of a top there was to the radiator? A. There was no top; it was links of pipe about three inches thick, about that long, thick, you know.

Q. What kind of a top, round, square or what? A. No top at all, just joined about four or five inches——

Q. I am not asking you about the pipe; I am asking you what kind of a top there was to the radiator. It stood on legs? A. It stood on legs, and each piece was about three inches apart, each pipe, as it went up.

Q. Were those pipe—when they came to the top, was it square or round at the top? A. Round.

Q. And you say that the pipe were about three inches apart? A. Yes, about three inches of pipe.

Mr. MacSherry concludes summing up.

Mr. Walker sums up for plaintiff.

Adjourned until tomorrow, Wednesday, October 3, 1917, at ten o'clock, A. M.

SECOND DAY.

WEDNESDAY, October 3, 1917.

Met pursuant to adjournment.

Present, counsel as before stated.

Mr. Walker: Your Honor, I did not have time yesterday afternoon to give you the requests to charge. You recall that we only had ten minutes to sum up, by agreement with Mr. MacSherry, at about twenty-five minutes to four, and I am now asking that you will now consider these requests at this time for that reason.

The Court: Show them to Mr. MacSherry.

(Plaintiff's counsel hands paper to defendant's counsel.)

The Court: Mr. MacSherry, is it acceptable to you that the Court should look at these requests?

Mr. MacSherry: I have no objection, your Honor.

The Court: As I have no intuitive knowledge of the requests until I see them, and I ought to read them carefully, I shall take time enough now to see what they are. (Examining paper.)

The requests are five in number, of which I decline to charge the third, fourth and fifth, on the ground that they are questions for the jury. The first and second requests appear to be intended to raise the question whether the rule of *res ipsa loquitur* arises in this case. I shall have something to say about that in my charge. I shall not at present pass on them.

Mr. Cohn: Will your Honor note our exceptions to your ruling on the third, fourth and fifth requests?

The Court: Yes.

Plaintiff's exceptions noted as ground of appeal.

The Court charges the jury as follows:

ADAMS, *J.*

Gentlemen of the Jury: The plaintiff, Mr. Andrew J. Collins, a teamster for M. Strauss & Sons, of this city, has brought suit against the Central Railroad Company of New Jersey to recover compensation for an injury to his right foot, which it is admitted that it received on the street floor of a freight station in Newark between four and five o'clock in the afternoon of October 21, 1915. It is admitted that this building was the delivery station of the Central Railroad Company of New Jersey, and that Nicholas Regan, a delivery clerk, and Lawrence Wefferling, a general foreman, and the truckers, whose duty it was to handle goods, were in the employ of the Central Railroad Company of New Jersey. The evidence is that the usual procedure was this. Freight cars came into the building on a higher level, and were there opened and the contents checked out, and that the goods were then taken down by the elevator to the street level, where they were distributed by truckers to sections alphabetically designated. For instance, goods consigned to persons whose names began with the letter S would be deposited by the truckers for delivery in a part of the street level known as section S.

The plaintiff, Mr. Collins, went to the delivery station on the day I have mentioned to get some bags of chicken manure consigned to his employers. He was rightfully there in the way of business. After applying to Mr. Regan, the delivery clerk, with whom he was acquainted, he proceeded to get the goods. He backed up his wagon to the platform, which was about 10 feet wide, in section S, and, according to his testimony, which is uncontradicted, he got one bag and took it to his wagon. Before he had placed another bag on the wagon a steam radiator, about 38 inches high and 2½ feet long and 10 inches wide, fell on his right foot and inflicted the injury of which he complains. It involved the loss of all the toes on that foot by a surgical operation. He asserts against the Central Railroad Company a right to compensation for this injury. The question, of course, is whether the law, applied to the facts as you shall find them to have been, sustains this claim of liability against the company.

First, I shall lay before you, as clearly and fully as I can, the evidence which you will have to consider in determining what the facts were. Owing to the brief time at my disposal, I shall be compelled to rely almost, although not entirely, on my own notes, which are subject to correction and are not so good a standard as the stenographer's notes, which I have not had time to procure, except to a small extent. After this presentation of the testimony as I understand it, I shall mention the legal rules which appear to be applicable to such a case. Mr. Regan, the delivery clerk, was called as a witness for the plaintiff. He testified that he had been in the employ of the railroad company for five years, and that he had charge of section S. He

said, "All articles were in my custody." His specific duty was to deliver goods to consignees whose names began with S, as, for instance, Straus or the Simmons Pipe Bending Company. He says, "There was a radiator there; I think that I saw it on the 21st of October." You will bear in mind that the accident happened on the 21st of October. He says, "I saw it about four, P. M., after the accident; I saw it on the 20th, not on the morning of the 21st." Mr. Lawrence Wefferling, a witness for the defendant, was the general foreman, and he testifies that the radiator came in on the 18th or 20th; that it came downstairs on the 20th. He says, "There was a tag on the radiator. I saw the radiator before the accident leaning against the wall." Mr. Wefferling describes the bags of chicken manure, of which there were twenty-one or twenty-two, as being disposed on the platform, which was about 10 feet wide, and says that some of them were on one side of the radiator and some of them were on the other side of the radiator and some were in front, and that the radiator was leaning against the wall at a time which he describes as before the accident.

To revert to the testimony of Mr. Regan, he says, "I saw a pile of chicken manure in section S on the morning of the 21st, about twenty bags. Before Mr. Collins came in for the bags of manure the radiator was against the wall. I don't know who put the radiator in section S; it was delivered in my section." Apparently, according to the usual procedure, it was received in a car on the upper story, sent down by the elevator and carried by truckers on their little hand trucks, or by a trucker, and deposited on the platform. Mr. Regan says that he does not know who brought it there; that is, he does not know what person brought it there. He

speaks of it as a Simmons Pipe Bending Company radiator. He said that it lay up against the wall. A radiator consigned to the Simmons Pipe Bending Company would naturally be in section S. He says, "I don't know who put the radiator in section S. It lay up against the wall; it just slanted a little bit against the wall; the top part of the radiator was supported by the wall. It was an even cement floor. I never noticed the floor wearing off. It was a little rough." It occurs to me that Mr. Wefferling said that the radiator was inverted and that it stood on its head, so to speak, with its legs in the air, as it stood against the wall. Mr. Regan says, "It was my duty to compare articles with the bills of lading. Mr. Wefferling, the foreman, came down to examine the radiator with me before it fell. I saw the location of the radiator either on the morning of the day of the accident or on the morning before." On cross-examination Mr. Regan said that it was a regular steam radiator, 3 feet high and 2 or 2½ feet long. "It was the only one I knew of. Mr. Collins"—that is, the plaintiff—"had 4 or 5 feet to go from his wagon to the pile of bags. There was no difficulty in seeing the radiator when I saw it after he was hurt. The radiator lay right alongside of the bags. I think that the radiator came in after the bags were in. There was a pile of bags 4 or 5 feet high." I may say that it was admitted on the previous trial what the fact was in that respect, but I do not propose to state it, except with the consent of counsel. This witness says he thinks the radiator came in after the bags came in. Mr. Regan says, "The radiator was leaning against the wall alongside of the pile of manure. One could be taken down without disturbing the other. I do not think there were 2 feet between the pile of manure

and the radiator after the accident. It was about 4 feet to the wagon. The passageway was 4 or 5 feet wide." So that, if the platform was 10 feet wide, about half of it was occupied by the goods, leaving a passage of 4 or 5 feet. "The radiator was not close to the bags before the accident. The accident happened on a platform. There was 10 feet from the edge of the platform to the wall." That 10 feet is a description of the width of the platform. "There was about a bushel of manure in a bag. The weight was not much over 50 to 75 pounds. I have handled them."

Mr. Charles Cadmus, a teamster then in the employ of the Simmons Pipe Bending Works, was a witness for the plaintiff. He says, "I went to the freight building on October 21st, in the morning. I saw the radiator leaning against the wall; there were some bags up against it. I saw the radiator 2 feet from the wall at the bottom. I was looking for a radiator; I was looking for a name on it."

Henry Meyer says, "I was in the warehouse, delivery man in section M, N, O, P and Q. I helped out at trucking. I saw Mr. Collins sitting down after the accident. I did not see the accident. I saw the radiator the day before leaning up against the wall. There was no trouble in seeing the bags and radiator. There was plenty of light."

Mr. Collins, the plaintiff, says, "I saw the radiator two weeks before. I went there for the chicken manure. I saw the radiator two weeks before." That does not agree with the testimony of Mr. Wefferling, that the radiator came in on the 18th or 20th, only two days before. Mr. Collins says, "I put one bag on the wagon. The radiator fell on my foot." I have here an extract from the testimony which was given to me by the stenographer,

so that I can be entirely accurate as to what Mr. Collins said on this particular point. It is as follows: "They told me they didn't have no waybill there, to go back to Mr. Regan and get a pink slip, and they would write me out a pro claim on the goods. I got the pro claim. After I got the pink slip I went back, and Mr. Regan said, 'Put your bags on the wagon.' That is what I did. He said, 'Put your bags on the wagon, Mr. Collins, and count what you have got and come back and sign for the goods.' Then I went to put the bags on the wagon. I put one bag on the wagon, and went back. On my way back the radiator was laying in the passageway and fell over on my foot. I had not seen the radiator on that day, but I seen it on several previous occasions. I seen it two weeks previous, and I said to Mr. Regan, 'That radiator is a dangerous affair there;' I told Mr. Regan that was a dangerous thing to be there; I called his attention to it." That is on his direct-examination, and he said at another place, apparently referring to a conversation which he said occurred two weeks before, in answer to the question, "What caused you to speak to Mr. Regan about the radiator?" "Because I thought it was a dangerous thing, laying around there and half laying over against the wall." He further testifies, "I fell on the floor and the top part came over on my foot." On cross-examination he said, "I hadn't seen the radiator that day until it fell; I didn't see the radiator when I went to get the bags. Two weeks before that I saw it in another place." If he saw it two weeks before in another place, his criticism of it as "dangerous" would, of course, apply to its position two weeks before in that place, and it does not particularly appear what that position was. He says, "I didn't

know that the radiator was there when I took out the first bag." Mr. Regan, in contradiction of Mr. Collins, says, "No complaint was made to me before the accident"—referring to the testimony of Mr. Collins as to its being a dangerous article. Mr. Regan says, "There was a tag on the radiator." Then there was something said about the radiator having a round top or round bottom, and the witnesses did not entirely agree on that subject.

One of the witnesses, I think Mr. Collins, said that a train on the Central Railroad passed the building at about the time that he was engaged in getting in the bags. The suggestion is that the passing of a train caused vibration to the building, and so might have unsettled the equilibrium of the radiator. There is no evidence in the case, however, as I recall, that the passage of the train had any such effect.

Now, what are the legal considerations that apply to a case of this kind? The obligation of the Central Railroad Company was to use reasonable care and ordinary prudence to see that its premises were in a condition suitable and safe for conducting the business that was to be done there. They did not insure safety; they did not guarantee freedom from accident. They were bound to ordinary care and prudence, and to nothing more.

It is also the rule that, if the company became aware, either by its own observation or by information derived from others, that there was a dangerous condition on its premises, and the company had time to investigate that subject and to correct it, in the meantime no liability would ensue, if they acted with diligence. It was not essential to the company's maintaining its own rights that it should at every moment know just what was the situation

of every part of its own premises, nor was it its duty instantly to correct anything of which it might have notice. Its duty was to apply itself promptly to the correction of any dangerous condition of which it might become aware either by the observation of its own agents or by information received from other persons.

These are general rules, and it is also a very general rule that the burden of proof is on the plaintiff to prove his case and to maintain his proposition that the defendant has been guilty of negligence. In other words, the general rule is that the mere occurrence of an accident does not of itself raise an inference of negligence against the defendant. There is an exception to this general rule, which is illustrated by a case that I shall refer to, the case of *Sheridan* v. *Foley,* 29 *Vroom* 230. The opinion is by Mr. Justice Gummere. In that case the Court says: "A contractor, who is engaged in the erection of a building, is bound to take care to prevent materials which he is using from falling upon and injuring other persons who are at work about the building; and it will be presumed, from the mere happening of such an accident, in the absence of explanation by the contractor, that it occurred from want of reasonable care." So that, if one of you gentlemen, in walking down Market street, passes in front of a building which is going up and is hit on the head by half of a brick, a presumption arises that somebody has been careless up aloft, and you are not called upon to do the impossible thing of locating the cause of that particular evil. It is a case where the thing speaks for itself, so to speak, and, according to the laws on which the human mind operates, the natural and legal inference is that somebody was to blame, and, supposing a suit

to be brought against the owner of the building or the contractor, it is for the defendant to explain and acquit himself of the charge. His Honor Mr. Justice Gummere discussed this general principle, and referred to an English case where a brick fell from one of the piers on which the girders of a bridge rested, and the jury was allowed to infer negligence without further proof. And so in another English case, the plaintiff was injured by the falling of a barrel from the window of the defendant's shop. There was no evidence to show what caused the barrel to fall, nor was there any direct evidence to connect the defendant or his servants with the occurrence. One of the justices said in the English case: "Suppose in this case the barrel had rolled out of the warehouse and fallen on the plaintiff, how could he possibly ascertain from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out; and I think that such a case would, beyond all doubt, afford *prima facie* evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous. So, in building or repairing a house, if a person passing along the road is injured by something falling upon him, I think the accident alone would be *prima facie* evidence of negligence"—such as to call for an explanation. It might be susceptible of a very good explanation or it might not. That is the exception to the general rule.

The two requests of the plaintiff which I have reserved are these, and they are designed to present to the mind of the Court the claim that the defend-

ant company is called upon to explain the fall of this radiator. I am not charging these requests now; I am referring to them. The first request is this: "If you find that the plaintiff was upon the premises of the defendant lawfully, and there is no denial that he was lawfully upon the premises, and if you find that the radiator fell upon him without any action upon the part of the plaintiff, causing the radiator to fall, you are to find for the plaintiff." I understand that the words "without any action upon the part of the plaintiff" mean if you find that the radiator fell without his giving it a knock, without his unsettling its equilibrium; that if it fell without any action—(perhaps there it no better word)—on his part, then you are to find for the plaintiff. That is his claim.

The second proposition is somewhat the same: "If you find that the radiator fell upon the plaintiff, causing him the injury of which he complains, without any negligence upon the part of the plaintiff, in the absence of any explanation by the defendant as to how the radiator fell, you are to find in behalf of the plaintiff and against the defendant." I read this for the purpose of presenting the matter in the light in which it strikes me. I think that it would depend upon the view that you take of the facts, whether the burden is upon the plaintiff or whether the facts are such as to call upon the defendant company to make an explanation of the accident. You have to consider whether the evidence throws any light on the question whether the radiator was properly stored; whether it was resting in a safe position; whether it was poised, for instance, on a curved top, or on a curved bottom, which made it insecure, so that a line drawn from the center of gravity might fall outside of the base,

and so it would fall over; whether the train that is said to have passed at the time can, under the evidence, be considered to have been instrumental in unsettling the equilibrium of the radiator. I have already said that I do not recall any evidence of any effect produced on the building, any jar, by the passing of the train. You may remember something of that kind. I think it is a question for you.

If you find that the company exercised due and reasonable care to make its premises safe, just ordinary care and prudence, then plaintiff's claim is not established against the company. If, on the other hand, you find that there was something improper in the storing, in the placing, of the radiator, which was work done, of course, by the employees or operatives of the defendant company, and which was a cause of the accident, then that would point toward the liability of the defendant company. If you find from the evidence that the radiator fell from what seemed to be a secure position, without any instrumentality, any action, on the part of the plaintiff, Mr. Collins, so that he cannot be connected in any way with the result, then, in that view of the case, the company is called upon to make an explanation, and the question for you would be whether the evidence affords a satisfactory explanation. If it does, that, of course, would acquit the company. If no satisfactory explanation is afforded, then, the burden being on the company to furnish an explanation, the result of that line of reasoning would be adverse to the company and would point to a verdict against it.

There is another feature of this case that is of some importance. The plaintiff testified that he gave notice to Mr. Regan that this radiator was dangerous; that it created a dangerous situation.

If so, Mr. Regan had actual notice to that effect. He denies it. He says that he received no such notice. Then the question is whether there was notice by word of mouth, or derived from the observation of the employees; whether they ought to have taken notice that there was a dangerous condition. And if the foreman, who was responsible for the general conduct of everything, I suppose, and Mr. Regan, who was accountable for at least the custody of the things in section S, or either of them, became aware that a dangerous condition existed, either from their own observation or because they, or either of them, were told of it, then, after having a reasonable time to remedy the difficulty, the company would be in default, unless the difficulty was removed, and that would point to a verdict against the company.

But there is another consideration. Did Mr. Collins use reasonable care for his own safety? He says he told Mr. Regan that there was a dangerous situation. Mr. Regan denies it. It is not quite clear from the testimony as to whether he said that two weeks before as to another situation or whether he said it subsequently. It seems to me from the testimony that he said it two weeks before; but, according to the foreman, the radiator was not there two weeks before; it was there only two days before. So that you may think that Mr. Collins may be mistaken in that respect. But, if he said that as a criticism upon the way in which the radiator stood, if it be true that he said, with reference to the situation in which this article was at the time of the accident, or just before the accident, that it was dangerous, why, then, he puts himself out of court, because he went on with a known risk and took his chance. A man cannot go on in

the presence of an obvious danger from which he afterwards suffered, with full notice of its existence, and then claim damages.

So that, you see, this case has several aspects, as you turn it around and look at it. If, after considering the case in all these different aspects, you reach the conclusion that the plaintiff has established his claim against the company, you will give him a verdict. Otherwise, not.

What he is entitled to, if he is entitled to anything, is compensation, in the first place, for his physical injury, which was certainly serious. He suffered; he lost all the toes of the right foot; he was laid up some time in Dr. Epstein's private hospital. It appears that he was in charge of Dr. Busch, who took care of him from October 21, 1915, to April 2d or 3, 1916. He made a bill of $150 up to November 18th, when there was an operation, or more than one, perhaps. Then, from November 18th on to April 2d or 3d, some four and a half months, he was in attendance upon the plaintiff at his house. He used sometimes to call three times a week, sometimes more, and always at the rate of $2 a visit. So that you can figure that up and see what the doctor's total bill is, and, if it seems to you a reasonable bill, that is what the plaintiff woud be entitled to recover for surgical and medical services. He also incurred a bill for drugs amounting to some $23. He also incurred a bill in Dr. Epstein's private hospital. Some question was made on the former trial as to his liability on that score, but that subject has not developed in this trial, and the testimony of the plaintiff is that Dr. Epstein's bill was over $125. He mentioned another doctor, Dr. McCormack, as having a bill of $25. There was rather a want of precision on this

subject. No bills were produced, certainly not a bill of Dr. McCormack's, but he mentioned the sum of $25. He was also laid up. I do not know that it clearly appears on this trial, but I understand the fact to be that Mr. Straus, his employer, paid his wages during the time that he was laid off. Is that true?

Mr. Walker: No, it did not appear at all on this trial, your Honor.

The Court: I do not think it did.

Mr. Walker: No, it did not.

The Court: The plaintiff was getting $13 a week on the average, he says; he was fifty-two years old; and when he did go back to work he went back, not to the same work, but at the same rate of compensation and with the same employer. So that during the time of his service there has been no loss, or no impairment, in the rate of wages. If he has lost anything on that score, it was during the time he was off duty.

If he is entitled to recover, he is entitled also to compensation for his pain, his physical suffering and his inconvenience naturally consequent upon a mutilation of this kind, which is undoubtedly serious. Whatever would be a reasonable estimate, under the proof, of his loss consequent upon the injury is all that he is entitled to claim at your hands, if you find that he has established, under the evidence, any claim against the defendant. If not, you will find for the defendant.

[THE JURY RETIRES.]

The Court: I shall deny the first and second requests except as I have charged.

Mr. Walker: I wish to have the stenographer note my objection to that part of your Honor's charge in which you stated that, by reason of seeing the radiator two weeks before the accident, the plaintiff had knowledge of the dangerous condition of the premises.

The Court: Whatever I said.

Mr. Walker: That portion of the charge.

The Court: Yes.

Exception noted as ground of appeal.

Defendant's Exceptions.

Mr. MacSherry: If your Honor please, I most respectfully take exception to your Honor's charging the jury as you did respecting the requests made by the plaintiff.

Exception noted as ground of appeal.

Mr. MacSherry: I also most respectfully pray an exception to what your Honor said respecting the character of this radiator, as to whether it was a rounded top or not—my recollection being that the proof was that it was a flat top.

Exception noted as ground of appeal.

Mr. MacSherry: I most respectfully except to your Honor's observation about the train, as having no bearing on the case, any more than it would be if a wagon was going along the street.

Exception noted as ground of appeal.

Mr. MacSherry: I also respectfully take exception to your Honor's observation to the jury respecting the obligation on the part of the defendant company to make an explanation. My recollection of the testimony is that the plaintiff went into the ranks of the company, took its employees, and they did make the explanation: that the radiator was against the wall, that the bags were around it, and that the plaintiff removed the bags, and that the thing, if it came down, came down after he started to move it, which would be an explanation.

Exception noted as ground of appeal.

Mr. MacSherry: I also most respectfully take exception to what your Honor stated to the effect that, if the radiator fell from a secure place without action on Collins's part, then the company is put to an explanation, for the reason that I stated before.

Exception noted as ground of appeal.

Mr. MacSherry: I also most respectfully except to what your Honor said respecting notice, the remark that your Honor made with regard to Regan perhaps being mistaken, because the plaintiff testified that the notice that he gave was about an old radiator, when all the proof, the overwhelming proof, in the case is that the radiator that fell on the foot of the plaintiff was a new radiator.

Exception noted as ground of appeal.

Mr. MacSherry: I also most respectfully take exception to your Honor's statement about

Dr. Epstein's bill, as I understand that that is not a charge against the defendant company.

Exception noted as ground of appeal.

Mr. MacSherry: I also respectfully take exception to what your Honor stated with regard to wages lost, because they did not claim that the man had lost wages.

The Court: If it is not claimed, the fact ought to be stated. It was claimed by the witness on the stand, and I therefore mentioned it.

Exception noted as ground of appeal.

Plaintiff's Requests and Exceptions.

Plaintiff's counsel requests the Court to charge the jury as follows:

(1) If you find that the plaintiff was upon the premises of the defendant lawfully, and there is no denial that he was lawfully upon the premises, and if you find that the radiator fell upon him without any action upon the part of the plaintiff, causing the radiator to fall, you are to find for the plaintiff.

(Denied except as charged.)

Plaintiff's counsel prays an exception to the refusal of the Court to charge specifically as requested.

Exception noted as ground of appeal.

(2) If you find that the radiator fell upon the plaintiff, causing him the injury of which he complains, without any negligence upon the part of

the plaintiff, in the absence of any explanation by the defendant as to how the radiator fell, you are to find in behalf of the plaintiff and against the defendant.

(Denied except as charged.)

Plaintiff's counsel prays an exception to the refusal of the Court to charge specifically as requested.

Exception noted as ground of appeal.

(3) If you find that employees of the railroad company, such as the delivery clerk, truckers, etc., passed in and out of section S on the day that the accident occurred, you have the right to presume that the company, through its employees, knew that the radiator was in the section on the day of the accident.

(Denied.)

Plaintiff's counsel prays an exception to the refusal of the Court to charge as requested.

Exception noted as ground of appeal.

(4) If you find that the testimony of Cadmus to be true wherein he stated that he looked for a tag on the radiator, in order to find out whether the radiator belonged to the Simmons Pipe Bending Works by whom he was employed, and he was unable to find such a tag, taking his testimony in conjunction with the testimony of the plaintiff that the radiator was not a new radiator but an old radiator, you have a right to assume that the radi-

ator had been on the premises for some time and that the employees of the railroad company were aware of the fact that the radiator was on the premises.

(Denied.)

Plaintiff's counsel prays an exception to the refusal of the Court to charge as requested.

Exception noted as ground of appeal.

(5) If you find that the radiator had been placed against the wall of section S, so that it partly rested on the floor and partly against the wall, with the further fact that two of the legs of the radiator were in the air, and that the employees of the company were aware of this fact, you are to find the defendant guilty of negligence in maintaining the radiator in a careless and unsafe position.

(Denied.)

Plaintiff's counsel prays an exception to the refusal of the Court to charge as requested.

Exception noted as ground of appeal.

Grounds of Appeal.

Filed

NEW JERSEY COURT OF ERRORS AND APPEALS.

ANDREW J. COLLINS,
Plaintiff-Respondent,

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Defendant-Appellant.

To

C. HERBERT WALKER, Esq.,
Attorney for Plaintiff-Respondent.

SIR:—

TAKE NOTICE that the appeal in this case is taken on the following grounds:

(1) Because the trial judge refused to direct a verdict in favor of the defendant.

(2) Because the trial judge charged the jury as follows:

> "If you find that the company exercised due and reasonable care to make its premises safe, just ordinary care and prudence, then plaintiff's claim is not established against the company. If, on the other hand, you find that there

was something improper in the storing, in the placing of the radiator, which was work done, of course, by the employees or operatives of the defendant company, and which was a cause of the accident, then that would point toward the liability of the defendant company. If you find from the evidence that the radiator fell from what seemed to be a secure position, without any instrumentality, any action, on the part of the plaintiff, Mr. Collins, so that he cannot be connected in any way with the result, then, in that view of the case, the company is called upon to make an explanation, and the question for you would be whether the evidence affords a satisfactory explanation. If it does, that of course, would acquit the company. If no satisfactory explanation is afforded, then, the burden being on the company to furnish an explanation, the result of that line of reasoning would be adverse to the company and would point to a verdict against it.

(3) Because the trial judge charged the jury as follows:

"There is another feature of this case that is of some importance. The plaintiff testified that he gave notice to Mr. Regan that this radiator was dangerous; that it created a dangerous situation. If so, Mr. Regan had actual notice to that effect. He denies it. He says he received no such notice. Then the question is whether there was notice by word of mouth, or derived from the observation of the employees; whether they ought to have taken notice that there was a dangerous condition. And if the foreman, who was responsible for the general conduct of everything, I suppose, and Mr. Regan, who was accountable for at least the custody of the things in Section S, or either of them, became aware that a dangerous condition

existed, either from their own observation or because they, or either of them, were told of it, then, after having a reasonable time to remedy the difficulty, the company would be in default, unless the difficulty was removed, and that would point to a verdict against the company."

(4) Because the trial judge charged the jury as follows:

"One of the witnesses, I think Mr. Collins, said that a train on the Central Railroad passed the building at about the time that he was engaged in getting in the bags. The suggestion is that the passing of a train caused vibration to the building, and so might have unsettled the equilibrium of the radiator. There is no evidence in the case, however, as I recall, that the passage of the train had any such effect.

(5) Because the trial judge charged the jury as follows:

"You have to consider whether the evidence throws any light on the question whether the radiator was properly stored; whether it was resting in a safe position; whether it was poised, for instance, on a curved top, or on a curved bottom, which made it insecure, so that a line drawn from the center of gravity might fall outside of the base, and so it would fall over; whether the train that is said to have passed at the time can, under the evidence, be considered to have been instrumental in unsettling the equilibrium of the radiator. I have already said that I do not recall any evidence of any effect produced on the building, any jar, by the passing of the train. You may remember something of that kind. I think it is a question for you.

(6) Because the trial judge charged the jury as follows:

> "He also incurred a charge in Dr. Epstein's private hospital. Some question was made on the former trial as to his liability on that score, but that subject was not developed in this trial and the testimony of the plaintiff is that Dr. Epstein's bill was over $125.00."

Dated, October 30th, 1917.

Yours, &c.,

CHARLES E. MILLER
Attorney of Appellant.

New Jersey Court of Errors and Appeals.

ANDREW J. COLLINS,
Plaintiff-Respondent,

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Defendant-Appellant.

On Appeal.

BRIEF FOR APPELLANT.

This action was instituted in the Essex County Circuit Court to recover damages for personal injuries sustained by plaintiff on October 21st, 1915, while at defendant's freight station in the City of Newark, where he had gone to obtain a load of chicken manure consigned to his employer. Originally there were two defendants, the Railroad Company and the Newark Warehouse Company; but at the trial plaintiff submitted to a voluntary non-suit as to the latter (7). The complaint alleges:

> "While plaintiff was about to load aforesaid on wagon of M. Straus & Sons and was lawfully in and upon said premises walking in the warehouse of the said defendant companies as aforesaid, the defendants by their servants, agents or employees carelessly, negligently placed or allowed to remain a certain unprotected radiator on the aforesaid premises in a passageway provided for walking and without

> any notice to the plaintiff, fell over and struck with great force the said plaintiff to the floor of cement or concrete, seriously, painfully and permanently injuring plaintiff, necessitating plaintiff to undergo an operation or operations, whereby plaintiff has lost a part of his right foot" (3).

The action has been tried twice. The first trial resulted in a judgment in favor of the plaintiff, which was reversed by this Court for an error in the charge, *Collins* vs. *Central Railroad Company of New Jersey*, 101 Atl., 287.

In that case, however, this Court expressly stated that it was not necessary to determine whether any negligence of the defendant had been shown. At the second trial, the question of defendant's negligence was again submitted to the jury, and again there was a verdict for the plaintiff. This appeal brings before this Court for review the judgment entered thereon.

Statement of the Case.

The accident occurred on a platform in defendant's freight station at Newark. This platform is divided into sections, each of which is designated by a letter of the alphabet. Goods awaiting delivery are placed in the section whose letter corresponds with the first letter of the consignee's name. This accident occurred in what is known as Section S (23, 34, 51).

The platform is ten feet wide. It faces, and is four or five feet higher than, a driveway. There is a wall along the side of the platform opposite the driveway (23, 36, 50, 51, 77). The bags of chicken manure for which plaintiff had come were piled on this platform and extended from the rear wall to within four or five feet of the edge facing the driveway (19, 22, 23).

Plaintiff testified that he had put one bag on his wagon and was on his way back for another when

a radiator lying in the passageway between the bags and his wagon fell over on him and crushed his foot. He said that he had not struck the radiator and that he had not noticed it on the day he was hurt before it fell over on him, though he had seen it two weeks before in another part of the platform, and at other times for six months before (55, 59, 63, 64, 65). Plaintiff was the only witness who testified in regard to the accident. None of defendant's employees were present when it occurred (20).

The radiator which injured plaintiff was a little over three feet long, about two and a half feet wide and about ten inches thick (18, 41, 53). So that the Court may have before it all the testimony relating to the position of this radiator both before and after the accident, we abstract it in detail.

Mr. Regan, a witness sworn on behalf of the plaintiff, testified that he saw this radiator on the morning of either the day of the accideut or the day before; he was not certain which. When he saw it, it was leaning against the wall so that it would not fall. It was right up against the wall, and the bags of chicken manure were right alongside of it, but it was not leaning on the bags and the bags could be taken down without disturbing the radiator. He also saw the radiator immediately after the accident occurred. He testified that it was then lying about four feet from the wall (9, 10, 13, 14, 16, 17, 21, 22).

Mr. Cadmus, another witness sworn on behalf of the plaintiff, testified that he saw the radiator on the morning of the day Collins was hurt. When he saw it, it was standing on its legs in a slanting position. The long side of the top part was leaning against the wall, and the bottom was a foot or two out from the rear wall and about eight feet from the edge of the platform. The bags of chicken manure were in front of the radiator and on the side of it. They were between the radiator and where a wagon would back in (32, 34, 36, 37, 45).

Mr. Meyers, who also was sworn on behalf of the

plaintiff, testified that he saw the radiator the day before the accident and again immediately after it occurred. He said that before the accident it was in a different position from that which it was in after the accident. Before the accident it was leaning against the wall. After the accident it was in front of the bags and a little to the side of them (47, 48, 49, 51).

Mr. Collins himself testified that when the radiator fell over on him, it was in the passageway between the bags and the edge of the platform. He also testified that he had seen it two weeks before the accident, but he said it was then on another part of the platform (55, 59, 63, 64).

Mr. Wefferling, the only witness who testified on behalf of the defendant in regard to the position of the radiator, said that he saw it on the morning of the day before the accident. When he saw it, the legs were on top and the top was on the floor. This, he testified, was the usual method of standing radiators in the freight house "because it protects the legs from breaking. There is more protection on the top than there is on the legs". It was standing braced up against the wall, about five feet from where Mr. Collins was hurt, and the bags were piled around it (74, 76, 77, 79).

There is no evidence that this radiator had been moved out from the wall into the passageway between the bags and the edge of the platform by the employees of the defendant, and it affirmatively appears that there was no reason for the employees of the defendant to move it (52). Nor was there any evidence tending to show that this radiator had stood in the passageway a sufficient length of time to charge the defendant with notice that it was there. Moreover, it appears, at least inferentially, that drivers who came to get shipments had access to this platform, for Mr. Cadmus testified that his attention was attracted to this radiator because he was looking around for shipments consigned to his employer (37).

While there is no charge in the complaint that the defendant failed to properly light this platform, it affirmatively appears from the testimony of the witnesses on both sides that this platform was lit up by electric lights which were burning at the time the accident occurred. One light was within a few feet of the radiator (18, 20, 42, 43, 50, 51, 59, 64, 75).

Specification of the Errors Relied On.

(1) Because the trial Judge refused to direct a verdict in favor of the defendant.

(2) Because the trial Judge charged the jury as follows:

> "If you find that the company exercised due and reasonable care to make its premises safe, just ordinary care and prudence, then plaintiff's claim is not established against the company. If, on the other hand, you find that there was something improper in the storing, in the placing of the radiator, which was work done, of course, by the employees or operatives of the defendant company, and which was a cause of the accident, then that would point toward the liability of the defendant company. If you find from the evidence that the radiator fell from what seemed to be a secure position, without any instrumentality, any action, on the part of the plaintiff, Mr. Collins so that he cannot be connected in any way with the result, then, in that view of the case, the company is called upon to make an explanation, and the question for you would be whether the evidence affords a satisfactory explanation. If it does, that, of course, would acquit the company. If no satisfactory explanation is afforded, then, the burden being on the company to furnish an explanation, the result of that line of reasoning would be adverse to the company and would point to a verdict against it.

(3) Because the trial Judge charged the jury as follows:

> "There is another feature of this case that is of some importance. The plaintiff testified that

he gave notice to Mr. Regan that this radiator was dangerous; that it created a dangerous situation. If so, Mr. Regan had actual notice to that effect. He denies it. He says he received no such notice. Then the question is whether there was notice by word of mouth, or derived from the observation of the employees; whether they ought to have taken notice that there was a dangerous condition. And if the foreman, who was responsible for the general conduct of everything, I suppose, and Mr. Regan, who was accountable for at least the custody of the things in Section S, or either of them, became aware that a dangerous condition existed, either from their own observation or because they, or either of them, were told of it, then, after having a reasonable time to remedy the difficulty, the company would be in default, unless the difficulty was removed, and that would point to a verdict against the company."

(4) Because the trial Judge charged the jury as follows:

"One of the witnesses, I think Mr. Collins, said that a train on the Central Railroad passed the building at about the time that he was engaged in getting in the bags. The suggestion is that the passing of a train caused vibration to the building, and so might have unsettled the equilibrium of the radiator. There is no evidence in the case, however, as I recall, that the passage of the train had any such effect."

(5) Because the trial Judge charged the jury as follows:

"You have to consider whether the evidence throws any light on the question whether the radiator was properly stored; whether it was resting in a safe position; whether it was poised, for instance, on a curved top, or on a curved bottom, which made it insecure, so that a line drawn from the center of gravity might fall outside of the base, and so it would fall over; whether the train that is said to have passed at the time can, under the evidence, be

considered to have been instrumental in unsettling the equilibrium of the radiator. I have already said that I do not recall any evidence of any effect produced on the building, any jar, by the passing of the train. You may remember something of that kind. I think it is a question for you."

(6) Because the trial Judge charged the jury as follows:

"He also incurred a charge in Dr. Epstein's private hospital. Some question was made on the former trial as to his liability on that score, but that subject was not developed in this trial and the testimony of the plaintiff is that Dr. Epstein's bill was over $125.00."

ARGUMENT.

I.

The Court erred in refusing to direct a verdict in favor of the defendant.

At the close of plaintiff's case, there was a motion for a non-suit, upon the ground that no negligence on the part of the defendant had been shown (68). At the close of the whole case, there was a motion for the direction of a verdict (82). These motions were denied by the trial Court. This, we think, was error.

Even if the defendant had been negligent in placing the radiator against the wall, we do not think that evidence of that fact would be sufficient to support a verdict in favor of the plaintiff, *first*, because the radiator having been moved from the wall out into the passageway before the accident occurred, its position against the wall had no causal connection with plaintiff's injury, and *second*, be-

cause in his complaint he has limited his claim to negligence in placing or allowing the radiator to remain in the passageway.

Plaintiff's right to recover, therefore, must depend upon his having shown *first*, that the radiator was negligently placed in the passageway, and *second*, either (*a*) that it had been so placed by the employees of the defendant, or (*b*) that it had remained in the passageway a sufficient length of time to charge the defendant with notice that it was there. *Schnatterer* vs. *Bamberger & Co.*, 81 N. J. Law, 558; *Buda* vs. *Dzuretzko*, 87 N. J. Law, 34; *Vecsy* vs. *C. RR. Co. of N. J.*, 88 N. J. Law, 177.

The case is barren of any direct evidence tending to support either of these necessary postulates of recovery. From our review of the testimony, it is apparent that there is no evidence tending to show that there was any negligence in the manner in which this radiator was placed in the passageway, for we have shown that there is no evidence showing how it was placed there. The plaintiff therefore must rely upon the mere fact that it was in the passageway to show negligence. That this fact alone is insufficient to show negligence is demonstrated by a brief review of the facts. There is no evidence that this passageway was one which was habitually kept unobstructed. It was merely a space which happened to exist on the day of the accident between the bags of chicken manure and the edge of the platform. So far as the evidence shows, the whole platform was habitually used to hold freight awaiting delivery. It is true that when the radiator first came in on the platform it was placed up against the wall and that one of defendant's witnesses testified that it was customary to place radiators against the wall. The evidence, however, shows that this was done not for the protection of persons using the platform, but for the protection of the radiator's. We think, therefore, that there was nothing in the case justifying the inference that it was negligent to place this radiator

where it was at the time it fell over on plaintiff and injured him.

But assuming that it was negligent to so place the radiator, there is no evidence showing either that the radiator had been placed between the bags and the edge of the platform by the employees of the defendant or that it had remained there a sufficient length of time to charge defendant with notice of its presence. At the trial it was urged that the fact that the defendant employed truckers whose duty was to bring freight from the cars on which it came in, to the platform, was sufficient to permit the jury to infer that one of these truckers had moved the radiator away from the wall out in front of the bags. It appears from the proof, however, that after the radiator had been placed on the platform by the truckers they would have no reason for moving it (52). To permit the jury to draw this inference, therefore, would be to permit them not to draw an admissible inference from facts in proof, but to indulge in a mere speculation which the facts in proof negatived. It was also urged that defendant had actual notice that this radiator was dangerous, because two weeks before the accident occurred plaintiff had notified one of its employees that it was dangerous. But it appears from plaintiff's own statement that at that time the radiator was on another part of the platform (64).

It follows from what we have said that there is no direct evidence supporting plaintiff's claim that defendant was negligent either in placing the radiator in the passageway or in allowing it to remain there. The case must fall, therefore, unless the mere fact that the accident happened is of itself sufficient to raise a presumption of negligence on the part of the defendant. In *Fanshawe* vs. *Rawlins*, 89 N. J. Law, 344, Judge Terhune, speaking for this Court and citing *Paynter* vs. *Bridgeton, &c.*, 67 N. J. Law, 619, 625, said (p. 347):

> "It is the accepted law of this state that the mere happening of an accident raised no pre-

> sumption of negligence. It is incumbent to show by direct evidence the responsibility of the defendant for the accident, or to show the existence of such circumstances as would justify the inference that the injury was caused by the wrongful act of the defendant, and would exclude the idea that it was due to a cause with which the defendant was unconnected."

The same principle was expressed by the Chancellor in *Vecsy* vs. *C. RR. Co. of N. J.*, 88 N. J. Law, 177. He said (at p. 179), quoting *Bahr* vs. *Lombard, Ayres & Co.*, 53 N. J. Law, 233:

> "If something unusual happens with respect to the defendant's property, or something over which he has control, which injures the plaintiff, and the natural inference on the evidence is that the unusual occurrence is owing to the defendant's act, the occurrence, being unusual, is said to speak for 'itself that such act was negligent'."

And quoting from *Mumma* vs. *Eastern & Amboy RR. Co.*, 73 N. J. Law, 753, he said:

> "This principle is that when through any instrumentality or agency under the management or control of a defendant or his servants there is an occurrence, injurious to the plaintiff, which, in the ordinary course of things, would not take place if the person in charge were exercising due care, the occurrence itself, in the absence of explanation by the defendant, affords *prima facie* evidence that there was want of due care."

Here there is nothing more than mere proof that the accident happened. There is no proof that plaintiff's injury was in any sense due to the defendant's act; there is no evidence that this radiator was under the management or control of the defendant or its servants at the time the accident occurred, and there is nothing in the case to exclude the idea that plaintiff's injuries were due to the act

of some outsider who had come upon the platform looking for freight. The case cannot, therefore, be supported under the doctrine of *res ipsa loquitur*. It follows from this that the trial Judge erred in refusing to direct a verdict in favor of the defendant.

II.

There was error in the charge of the Court.

(*a*)

The learned trial Judge charged the jury as follows:

> "If you find that the Company exercised due and reasonable care to make its premises safe, just ordinary care and prudence, then plaintiff's claim is not established against the company. If, on the other hand, you find that there was something improper in the storing, in the placing of the radiator, which was work done, of course, by the employees or operatives of the defendant company, and which was a cause of the accident, then that would point toward the liability of the defendant company. If you find from the evidence that the radiator fell from what semed to be a secure position, without any instrumentality, any action, on the part of the plaintiff, Mr. Collins, so that he cannot be connected in any way with the result, then, in that view of the case, the company is called upon to make an explanation, and the question for you would be whether the evidence affords a satisfactory explanation. If it does, that, of course, would acquit the company. If no satisfactory explanation is afforded, then, the burden being on the company to furnish an explanation, the result of that line of reasoning would be adverse to the company and would point to a verdict against it" (95).

This we think was an erroneous statement of the rule, even if the doctrine of *res ipsa loquitur*

applied. Under this portion of the charge, plaintiff's right to recover was made to depend, in the event that the jury found there was no direct evidence tending to show that the defendant had failed to exercise reasonable care for his safety, not upon whether he had made out by the greater weight of the evidence that the defendant was negligent, but upon whether the defendant had made out a satisfactory explanation. And it will be observed that the jury was specifically told that the burden was on the defendant to make a satisfactory explanation. This is the precise error pointed out by this Court in *Hughes* vs. *Atlantic City, &c., RR. Co.*, 85 N. J. Law, 202, in *Niebel* vs. *Winslow*, and in *Fanshawe* vs. *Rawlins*, 89 N. J. Law, 344, and by the United States Supreme Court in *Sweeney* vs. *Erving*, 228 U. S. 233.

(*b*)

The Court also charged the jury:

> "There is another feature of this case that is of some importance. The plaintiff testified that he gave notice to Mr. Regan that this radiator was dangerous; that it created a dangerous situation. If so, Mr. Regan had actual notice to that effect. He denies it. He says he received no such notice. Then the question is whether there was notice by word of mouth, or derived from the observation of the employees; whether they ought to have taken notice that there was a dangerous condition. And if the foreman, who was responsible for the general conduct of everything, I suppose, and Mr. Regan, who was accountable for at least the custody of the things in Section S, or either of them, became aware that a dangerous condition existed, either from their own observation or because they, or either of them, were told of it, then, after having a reasonable time to remedy the difficulty, the company would be in default, unless the difficulty was removed, and that would point to a verdict against the company" (95, 96).

Mr. Collins' testimony on this point is that two weeks before the accident occurred he had told Mr. Regan, one of defendant's employees, that this radiator was a dangerous thing to be there, that he had called Mr. Regan's attention to it. He also testified that at this time the radiator was on another part of the platform (55, 56. 57, 58, 64).

We think that this portion of the charge was erroneous for two reasons. In the first place, we think that it permitted the jury to infer that there was something about this radiator which required remedying from the mere fact that plaintiff himself for some undisclosed reason had reached the conclusion that it was dangerous. Obviously plaintiff's opinion that the radiator was dangerous cannot supply the want of proof of facts showing that it was dangerous. In the second place, this conversation occurred two weeks before the accident, and plaintiff himself testified that at that time the radiator was on another part of the platform. Under the charge as given, therefore, the jury was permitted to infer that notice that the radiator was dangerous in one place two weeks before the accident was sufficient to charge the defendant with notice that it was dangerous in another place on the day of the accident. We do not think that the jury was entitled to draw such an inference, because it is not an inference from facts proved but a mere speculation unsupported by any facts.

(*c*)

The Court charged:

> "One of the witnesses, I think Mr. Collins, said that a train on the Central Railroad passed the building at about the time that he was engaged in getting in the bags. The suggestion is that the passing of a train caused vibration to the building, and so might have unsettled the equilibrium of the radiator. There is no evidence in this case, however, as I recall, that the passage of the train had any such effect" (91).

And later:

> " You have to consider whether the evidence throws any light on the question whether the radiator was properly stored; whether it was resting in a safe position; whether it was poised, for instance, on a curved top, or on a curved bottom, which made it insecure, so that a line drawn from the center of gravity might fall outside of the base, and so it would fall over; whether the train that is said to have passed at the time can, under the evidence, be considered to have been instrumental in unsettling the equilibrium of the radiator. I have already said that I do not recall any evidence of any effect produced on the building, any jar, by the passing of the train. You may remember something of that kind. I think it is a question for you " (94, 95).

There is no evidence in the case that a train passed the building at about the time that plaintiff was engaged in getting in the bags. This portion of the charge therefore imported into the case a fact not in evidence. That this fact was material becomes apparent when it is remembered that there is no evidence in the case showing or tending to show that any act of the defendant had caused the radiator to fall. The jury may well have seized upon the Judge's statement that a train was passing which might have caused the building to vibrate as proof that the defendant had caused the radiator to fall. This was error (*Camden, &c., RR. Co.* vs. *Williams*, 61 N. J. Law 646.

(*d*)

After stating that if plaintiff was entitled to recover anything he was entitled to recover compensation (97), the Court told the jury:

> " He also incurred a charge in Dr. Epstein's private hospital. Some question was made on the former trial as to his liability on that score, but that subject was not developed in this trial aud the testimony of the plaintiff is that Dr. Epstein's bill was over $125.00 " (97).

The testimony in regard to Dr. Epstein's services is as follows: Dr. Busch, who attended plaintiff, testified that Dr. Epstein was called in because Mr. Strauss, plaintiff's employer, had requested that their physician be called in (25, 31). Mr. Collins was asked "How much was Dr. Epstein paid?" His answer was "I guess Dr. Epstein got over $125 or something like that; I don't know how much" (60).

The jury could not but understand from the Court's charge that if plaintiff was entitled to recover anything, he was entitled to recover for what Dr. Epstein had been paid. We think that this was error, *first*, because there is no evidence that Dr. Epstein's treatment was reasonably necessary to cure plaintiff's injuries; and, of course, if the doctor was called in simply because Mr. Strauss wanted him, defendant is not liable for the expense incurred; and, *second*, because there is no evidence showing either what services the doctor performed or what the value of his services was.

III.

Conclusion.

We submit that the judgment below should be reversed.

Respectfully submitted,

CHARLES E. MILLER,
Attorney for and of Counsel
with appellant.

GEO. HOLMES,
Of Counsel.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ANDREW J. COLLINS
vs.
CENTRAL RAILROAD.
On Appeal.

BRIEF FOR RESPONDENT.

THE TRIAL COURT DID NOT ERR IN REFUSING TO DIRECT A VERDICT IN FAVOR OF THE DEFENDANT.

The testimony shows that the radiator when seen on the morning, and after the accident in the afternoon, had moved about 5 feet. (P. 18, l. 2.) The radiator was about 38 inches high. (P. 41.) The witnesses, who were employees of the defendant company, admit that they knew the day before the accident, and on the morning of the accident, where this radiator was located, on a strip 10 feet wide. (P. 50, l. 5.) The evidence shows that on the morning of the day of accident, radiator was left in an unsecured and negligent position. Testimony of witness agreed that radiator leaned against the wall on a slight angle. (P. 14, 15, 34.) This evidence shows that radiator was in a position up against a wall, which was a bearing wall for tracks in a freight house over Section S (p. 80), upon which cars unloaded freight. No evidence submitted by defendant company to show how much distance in feet was covered as radiator fell. No evidence has been produced by the defendant company at this trial showing that the radiator was moved from the wall on day of accident. The defendant truckers (p. 48, l. 12) had access to Section S at all times for the moving in and carting of freight. No tag on radiator. (P. 72, 81.)

The answer that the defendant company filed states that its servants and employees had nothing to do with the radiator at the time of the accident. This statement is contradicted by Mr. Weferling, Mr. Regan (9) and Mr. Meyer, who were employees of the Central Railroad Company on the day of the accident.

The radiator was in the custody and under the control of defendant's servants, and defendant was obliged to use a reasonable care to protect plaintiff. The testimony of the witnesses on this point was contradictory. The plaintiff two weeks before the accident (p. 55, l. 26) told the clerk in charge of Section S that this radiator was dangerous.

On the morning of the accident defendant's witness testifies that the radiator was in Section S. "The legs were on top and the top was on the floor." (P. 72.) "The evidence, however, shows that this was done not for the protection of persons using the platform, but for the protection of the radiator legs." The testimony of this witness bears out plaintiff's contentions that the defendant company were more careful of the legs of the radiator than the legs of an invitee who (9) was lawfully upon the defendant's premises.

The testimony of Mr. Regan (9) shows that all articles on Section S were in his custody, and that it was part of his duty to check up the shipments that were received in Section S with his record, and in reply to the question as to whether or not he made a tour of the section every morning this witness states, "I am going back and forth all day naturally." This same witness (15) in answer to the question, "Is it a fairly smooth or smooth floor?" A. It is a little rough; it isn't a smooth floor.

A. The doctrine of *res ipsa loquitur* is applicable to this case. The evidence shows that radiator fell on plaintiff's foot without any action on the part of Mr. Collins. The fact that radiator fell of

its own weight tends to show that resting on a slight angle was an insecure position. It is a fair inference that defendant's clerk in charge of and having the custody of radiator would be able to explain the falling of the radiator. No employee of the defendant has offered any explanation of what caused this radiator to fall. The defendant has not pleaded that plaintiff was guilty of contributory negligence, and has submitted no evidence that plaintiff by any act caused the radiator to fall. The burden of explaining simply imposes a duty on the defendant of going forward with evidence. This does not involve a shifting of the burden of proof. The question whether the explanation is satisfactory or not is a question for the jury. It is also a question for the jury whether or not the radiator was placed in a negligent position by the employees of defendant or permitted to remain in a negligent position.

In the case of *Vecsy* v. *C. R. R. Co. of N. J.*, 88 N. J. Law, 177, it is distinguished from the Collins case by the following extract from Chancellor Walker's opinion: "As there is no evidence in the case at bar to show that the wire was under the management or control of defendant or its servants, or that the defendant was charged with the exercise of care for the protection of the plaintiff at the time and place with reference to the circumstances under which she was injured, it cannot be said that the accident would not have taken place if the defendant had exercised due care."

In the Vecsy case it was shown that the defendant company did not have complete custody of the instrument causing the accident. Where the public have the power to use a semiphone or signal board as in the *Vecsy* v. *Central R. R. Co.*, Supra, or a public stairway in the *Schnatterer* v. *Bamberger*, Supra, you have a situation where the pub-

lic, by using the semiphone or stairway when it is not in the exclusive custody of the defendant company, assume a partial control over the said signal board or stairway.

In these cases this Court has properly held that the existence of a defect must be brought to the attention of the defendant company, and the defendant company be given a sufficient length of time to remedy such defect. This is not the situation in the Collins case, for the evidence repeatedly shows that the custody of the radiator continued all of the day of the accident and prior to that day in the employees of the C. R. R. Co.

The Collins case is distinguished from the *Vecsy* v. *C. R. R. Co.* and *Schnatterer* v. *Bamberger* case inasmuch as Mr. Collins was an invitee in Section S of the warehouse of the Central R. Co. on the day of accident, that company having notified Mr. Collins' employer to come and secure a load of chicken manure.

John Sheridan v. *Michael Foley,* 58 N. J. L., p. 230.

A contractor, who is engaged in the erection of a building, is bound to take care to prevent materials which he is using from falling upon and injuring other persons who are at work about the building.

The facts bring it within the application of this principle (*Res ipsa loquitur*).

"The bricks were in the custody of the defendant's servants at the time when this one fell, and it was their duty to so handle them as not to endanger others who were engaged in other work upon the same premises. This brick could not have fallen of itself, and the fact that it fell, in absence of explanation by the defendant, raises a presumption of evidence. If there are any facts inconsistent in the negligence it is for the defendant to prove them."

White v. *Boston & Albany Rail. Co.*, 144 Mass. (p. 404) Court states: "If the shade was defective and unsafe, the question whether it was in that condition through the negligence of the defendant and fell from the use for which it was intended would be for the jury; and the fact that it broke would be evidence that it was defective and unsafe, and, if not explained or controlled, would be sufficient evidence to authorize the jury to find that the defendant was negligent in regard to it."

Again, in the case of *Mumma* v. *Eastern & Amboy R. R. Co.*, 73 N. J. Law, 753: "This principle is that when through any instrumentality or agency under the management or control of a defendant or his servants there is an occurrence injurious to the plaintiff which, in the ordinary course of things, would not take place if the person in charge were exercising due care, the occurrence itself, in the absence of explanation by the defendant, affords prima facie evidence that there was want of due care."

The evidence of Mr. Weferling and Mr. Regan show that the radiator that fell on Mr. Collins was in the custody of the defendant.

Deronet v. *F. W. Woolworth Co.*, 99 Atl. 126.

The Court stated: "We think there was evidence, though meager, yet sufficient from which a jury might properly have found that the saleswoman, by her conduct, invited the plaintiff to the spot where the latter met with the mishap. The question whether the defendant exercised reasonable care to keep and maintain its store in a reasonably safe condition and the question whether the plaintiff used reasonable care for her own safety were under the evidence jury questions and were properly submitted to them."

In *Sefler* v. *Vanderbeek & Sons, Inc.*, 96 Atl. 126, Court states: "On the occasion of the happen

ing of the accident in question, the rail did not fall because of any break, nor because it was any part of the structure broke. It fell because it was not placed in the grooves or sockets of the posts. The plaintiff was there by express invitation. * * * The guard rail, so insecurely placed, was, under the circumstances, in the nature of a trap or concealed source of mischief. It was clearly, therefore, open to the jury to find that the defendant was negligent in the performance of its duty to the decedent, and the motion for a direction of a verdict was properly denied."

B. Mr. Collins testified (pp. 55-56): "I had not seen the radiator on that day, but I had seen it on several previous occasions. I seen it two weeks previous, and I said to Mr. Regan, 'That radiator is a dangerous affair there.' I told Mr. Regan that was dangerous to be there. I called his attention to it." This constituted sufficient notice, as it was given to the clerk in charge of Section S, who, having the custody of the radiator, could shift the position of the radiator as often as he considered necessary. The Court in stating that Mr. Collins' testimony was denied by Mr. Regan, leaves it to the jury to decide who of the two are telling a story to be believed. The Court in this part of his charge correctly states the principle laid down in *Schnatterer* v. *Bamberger*, 81 N. J. Law 558.

C. The Judge correctly stated that there was no evidence that a train passed the building at the time of the accident, but there was evidence that there was a freight house up above Section S in which trains were run, as is borne out by the evidence on p. 80 by Mr. Weferling as follows:

Q. Before it (radiator) came down, where had it been? A. I suppose it came in the freight house the day before in one of the cars. We take out

freight every day, you know, so many cars every day.

Q. When it came over from the freight house it was taken upstairs? A. No, sir, we have the tracks all upstairs. It is taken down and taken out of the cars and put on little cars with four wheels and sent down to the platform, where we deliver goods, and then the truckers take care of it down there.

The Judge had not charged the jury about trains entering the warehouse at any time, and the passing of a train outside of a warehouse cannot in any way be connected with the accident. It would have been more fair to the plaintiff for the trial Judge to have charged the jury about trains entering the building. It is a fair presumption that a train entering a building will shake that building more than one passing it.

In the suit of *Camden & Atlantic R. R. Co.* v. *Williams,* 61 N. J. L., p. 651, "The sixth Assignment assumes that a remark of the Judge that people are apt to be free and easy about getting on and off a trolley car without stopping may have injured the defendant. The context shows that the Judge meant to disapprove the practice he mentioned, for he adds that 'they take the risk.' This remark could not have affected the plaintiff's right of recovery, for that was made to depend upon the car having stopped before the deceased stepped from it."

Trial Court's charge was a proper observation stated in qualifying language.

D. Sixth:

Proper to submit to consideration of jury whether or not Dr. Epstein's bill of $125. should be part of compensation that plaintiff is entitled to. The operation was performed in Dr. Epstein's private hospital (p. 31, l. 22). It is a frequent practice to call in a consulting physician in the performance of

a serious operation. It is not unusual for the payment of a doctor's bill to be delayed pending the trial of a case, and it is for the jury to say whether or not plaintiff has by his own action or that of his agent made himself liable by accepting the service of another doctor and being benefited thereby.

CONCLUSION.

I submit that the judgment below should be affirmed.

Respectfully submitted,

C. HERBERT WALKER,
Attorney for and of Counsel with Respondent.