New Jersey Court of Errors and Appeals.

LOUIS H. ROGERS,
Plaintiff below and
Plaintiff-in-Error,

vs.

ROE & CONOVER,
Defendant below and
Defendant-in-Error.

On Error to Essex Circuit Court.

Brief for Defendant-in-Error.

The history of this litigation is this: On January, 19, 1901, the plaintiff was injured while in the employ of the defendant (p. 10, l. 24 of Case). On January 6, 1903, he brought an action in the Essex Circuit Court to recover for the injuries so sustained (p. 3, l. 12 of Case). On January 5, 1904, the action was tried before Judge ADAMS, and resulted in a judgment of non-suit (p. 8, l. 35 of Case). On December 19, 1905, this writ of error was sued out to review this judgment (p. 1, l. 30 of Case).

At the time of the accident the defendant was engaged in the hardware and plumbers' supply business in the City of Newark (p. 10, l. 18 of Case).

The plaintiff was a clerk in its employ in "the steam and plumbing supply" department (p. 42, l. 1 of Case). His duties were "to get out orders and to fill orders and wait upon the customers" (p 10, l. 22 of Case). The room in which the plaintiff worked was a large room. On either wall there were little boxes or compartments in which the goods were kept. These bins or pigeonholes extended from the floor "up to the ceiling or very close to it" (p. 24, l. 21 of Case). Down the middle of the room was a sort of partition extending part way toward the ceiling and not occupying the entire length of the room. This partition was fitted up with similar bins or pigeonholes on both sides for similar purposes (p. 20, ll. 8-15 of Case). These bins varied in size. The room was provided with ladders to enable the clerks to reach the upper bins. These ladders were hung by grooved wheels upon a railing or track of iron pipe, which ran along the face of the walls and partition near the top. The lower pigeonholes were deeper than the upper ones. This method of construction left a ledge or shelf about eighteen inches in width and about three feet from the floor. At a corresponding height the ladders were provided with rubber rollers on the under side which rested against this ledge and ran along it when the ladders were moved. Each ladder had seven steps, of which three were below the ledge. The ladders rested at an angle with the walls, being held in that position by these rubber rollers. There were a number of these ladders in the room, three on each of the side walls and two on each side of the partition. The grooved wheels by which the ladders were sus-

pended were fastened on the outer face of each side of the ladder at or near the top. On all of the ladders, except that which plaintiff was using at the time of the accident there was under each wheel a metal projection or lug which extended under the track and which was designed to prevent the slipping of the wheels from the track. One of these lugs was missing from the ladder which the plaintiff was using and from which he fell. His contention was that his fall was due to the absence of this lug. The motion for non-suit was granted upon the ground that this alleged defect was an obvious one (p. 62, l. 31 of Case).

The ladders were supplied by a manufacturer in New York (p. 11, l. 25 of Case). It was not contended at the trial that there was any fault in their original construction.

The plaintiff was thirty-four years of age (p. 19, l. 7 of Case). He had been employed by the defendant for two years before the accident (p. 19, l. 14 of Case), and had been working in this particular room for about four or five weeks before the accident (p. 22, l. 32 of Case). He was a very intelligent man and apparently entirely familiar with the construction of these ladders and their appurtenances.

He thus described the accident: "I had an order and I went to fill the order, and I was trying to get a fitting that was on the order, and as I was bending over to get it on the ladder, one of the wheels of the ladder left the track, and I looked up, and as I looked up, the other wheel left the

track and the ladder fell to the floor" (p. 11, l. 1 of Case). The order was for a steam fitting. The steam fitting "was in a bin up from the floor about six or seven feet" (p. 11, l. 14 of Case).

He thus described the ladder: "There is a track which runs along the walls and fastens with brackets to the partitions of the bins, and this ladder has two grooved wheels on the top, which is fastened to wood work; there is a little crook or catch underneath which holds it to the track when in use (p. 11, l. 31 of Case). This ladder does not reach to the floor. It is suspended on the track (p. 11, l. 39 of Case). I had ascended the ladder two or three steps before I fell (p. 12, l. 8 of Case). I had no knowledge concerning the safety of the ladder. I supposed the ladders were in perfect condition when I went up the ladder. I have no knowledge of any inspection of the ladders ever having been made by Roe & Conover. I had no knowledge as to what caused the ladder to fall" (p. 12, ll. 10-30 of Case). On cross-examination he testified: "The iron pipe is the track. It is something like an inch in outside diameter and is supported by little brackets underneath, which would not interfere with the operation of the wheels. These ladders have seven or eight steps and at the top on each side is a fitting with two grooved wheels perhaps five or six inches in diameter and an inch or an inch and a quarter through with a groove that fitted over the pipe. These wheels hung on the pipe as a track. About three feet up from the floor was a little platform. The pigeonholes or compartments below that extended out further from the wall—a matter of a foot, I don't know exactly how much. This

ladder was something like seven or eight feet long. There were two rubber covered rollers that ran against this ledge so as to permit the free movement of the ladder back and forth. About three steps of the ladder were below that and the rest were above. On the upper part of the ladder under where the track was there were iron points or lugs to keep the ladder from coming off the track. These were about an inch and a half or perhaps a little more than that in length so that if the ladder should be lifted up these lugs would strike the under part of the pipe. These lugs were part of the casting which fastened the wheels to the top of the ladder and were of iron. There was one under each wheel on each side. There were similar ladders all through the building. I had occasion to use those different ladders from time to time. As I went to different parts of the store and wanted something up high I would take the ladder nearest it and run it along in front of the place where what I wanted was and then climb up and get it. That was a frequent occurrence. Some days it would be quite often and other days very seldom. The compartment from which I was getting this fitting was about six or seven feet up. I was standing on the second or third step of the ladder from the bottom about on a level with the ledge. The ladder was right along side of the place that I was getting this from. You have to lean on account of the ladder is quite a little distance out from the shelving. I cannot say which side of the ladder I was leaning from. The pigeonhole where the castings was kept were about six inches from the side of the ladder" (p. 20, l. 37—p. 24, l. 15 of Case).

On redirect examination he testified: "These lugs on the casting of the ladder were located right under the track" (p. 26, l. 13 of Case), and on recross-examination: "These ladders were open in the back. There were flat strips of wood up the sides and across and open in the back so that you could see through" (p. 27, l. 6 of Case). He was asked what there was to prevent him seeing these lugs. He said, "the wood side that runs up, that these steps were fastened to, the side of the ladder. They were the same color as the track—very near the same color. I won't say the same color as the track, because I don't know. The track was black iron pipe. These fittings looked like galvanized iron and were a light gray color. You would have to go up to see it because there was about that much space between the ladder and the top (illustrating), and the ladder kept on going up in that shape all the time (illustrating). You could see through the ladder; but, still, the steps above would keep you from seeing through; as you were at the bottom looking up the other steps would shield it. I can't say whether there was any step at the extreme top of the ladder (p. 27, l. 15 *et seq.* of Case). I should judge the side of the ladder was about an inch thick (p. 28, l. 29 of Case). The ladder was about sixteen to eighteen inches wide (p. 28, l. 40 of case). This pigeonhole for which I was looking wasn't quite as high as the top of the ladder. I had to move the ladder almost a foot before I got on it. When I was moving the ladder I was looking at the pigeon hole so that I could put it right near to it. The ladder was within my range of vision. I was seeking the pigeon hole with my eye at the time" (p. 30, l. 22; p. 31, l. 15, of Case).

Charles R. Wilcox, a witness for the plaintiff, had been employed by the defendant for about nine years and was entirely familiar with these ladders. He had however left the defendant's employ some time before the trial (p. 41, l. 36, of Case). He testified that this lug was broken about a year or two before the accident happened (p. 40, l. 16, of Case). He further testified as follows:

"Q. That was a thing that you could see quite readily, was it not?"

"A. You could if you were looking for it, yes."

"Q. And were you ever looking for it?"

"A. I never looked for it, no, sir."

"Q. You saw it without looking for it?"

"A. Well, you couldn't see it very well, no, not without looking for it; it was so situated back of the upright of the ladder that you couldn't see it."

"Q. If you were in front of the upright you could not see it?"

"A. No, sir."

"Q. But if you were at the side of the ladder you could see it?"

"A. If you were at the side you could see it."

"Q. Looking from the side of the ladder from the floor you could see it?"

"A. Yes, sir, if the ladder was over here and you were over here, perhaps a foot or two away, you could see it."

"Q. That is, if you were looking at a point where the side of the ladder would not prevent your seeing it?"

"A. Yes, sir."

"Q. It was just the width of the side of the ladder, was it?"

"A. If you stood away from that, if you

stood where the steps would not prevent you from seeing it, you could see it; you could see it if the ladder was placed over here and you were in this position."

"Q. Could you not see it from the side of the front of the ladder, as long as the side piece of the ladder did not obscure your view?"

"A. You could if you stood in a certain position; yes, sir."

"Q. You could see it in going up and down the ladder, could you not?"

"A. No."

"Q. Why not?"

"A. Well, I say no, I presume you could if you were looking for it, and stood looking in underneath the rail."

"Q. If you were looking in that general direction you could see it, could you not?"

"A. That would depend whether you were looking for that or looking right at it or not."

"Q. If you were looking right at it, you could see it whether you were looking for it or not?"

"A. Certainly."

"Q. If you were looking at it, if it were in your line of vision, you would see it just the same as you would any other object in your line of vision?"

"A. Yes, sir."

"Q. It was not hidden except as it might have been obscured by the side of the ladder?"

"A. Yes, sir."

"Q. Those lugs were so long that you could readily see them from the floor, some distance, weren't they?"

"A. Yes, sir; about an inch and a half long" (p. 45, l. 33; p. 47, l. 3, of Case).

John Muchler, was also employed by the defend-

ant at the time of the accident but had left its employ before the trial (p. 53, l. 2, of Case). He was called by the plaintiff and testified that the clerks in that department had "been using the ladder right along, going up and down; maybe sometimes it slipped a little, and you had to watch out for it. You could see in going up and down the ladder that the lug was broken. If you went up sideways it might go off and if you went up in the middle it was all right and as you went up and down the ladder you could see that it was broken and had to be careful in using it. There was no trouble about that" (p. 53, l. 33, *et seq.*, of Case).

The rule of law applied by the Trial Judge is settled in this Court beyond challenge.

The servant assumes not only the ordinary risks incident to his employment but also risks arising in consequence of special features of danger known to him or which he could have discovered by the exercise of reasonable care or which should have been observed by one ordinarily skilled in the employment in which he engages.

Western Union Telegraph Co. vs. McMullen, 29 Vroom, 155.

Johnson vs. The Devoe Snuff Co., 33 Vroom, 417.

McDonald vs. Standard Oil Co., 40 Vroom, 445.

Atha & Illingworth Co. vs. Costello, 34 Vroom, 27.

He is bound to see that which is open and apparent to any person using his eyes, and if he fails to do

so he cannot charge the consequences upon his master, for such a risk is impliedly assumed by him.

Dillenberger vs. Weingartner, 35 Vroom, 292.

The doctrine of the assumption of obvious risks by the servant applies as well to those which first arise or become known to the servant during the service as to those in contemplation at the original hiring.

Johnson vs. Devoe Snuff Co., 33 Vroom, 417.

It is submitted that this rule as applied to the facts in this case required the granting of the motion to nonsuit.

It is apparent from the intelligent description of these ladders and appliances given by the plaintiff that he was entirely familiar with their construction, arrangement and operation. This familiarity was acquired by the observation incident to their frequent use by him. The ladders were used only for the purpose of reaching pigeonholes which were beyond the reach of one standing upon the floor. Every time that the plaintiff had occasion to use the ladder he had occasion to look up at the pigeonholes for the purpose of determining where the ladder should be placed, and in doing this his eyes must have been directed towards the top of the ladder. He had frequent occasion then to look in that direction. The testimony showed that there was no difficulty in observing the absence of this lug by any one looking in that direction. The plaintiff, therefore, would, if he had been attentive

to his surroundings have discovered the absence of the lug. Indeed, it may be said that a greater duty of observation was imposed upon him by the fact that so far as he knew there was no other inspection of these appliances than arose in connection with their frequent use by himself and his co-employees. Not having discovered it through his own inattention, he cannot charge the result of this fault to his employer.

The absence of this lug was no less obvious to the plaintiff than was the absence of one of the bolts from the belt shifter to the plaintiff in *Coyle vs. Griffing Iron Co.*, 34 Vroom, 609, or the hinge connecting the two parts of the ladder to the plaintiff in *Henggler vs. Cohn,* 39 Vroom, 240, or the rotten condition of the sprag to the plaintiff in *McGrath vs. Delaware, Lackawanna & Western Railroad Co.*, 39 Vroom, 425, or the rapidly revolving fan to the plaintiff in *Dillenberger vs. Weingartner,* 35 Vroom, 292, or the absence of hooks from the foot of the ladder to the plaintiff in *Borden vs. Daisy Roller-mill Co.* (Sup. Ct., Wis., 1898), 74 N. W. Rep., 91. The chances of the tipping of the ladder through the absence of this lug was certainly obvious to the plaintiff as he was chargeable with knowledge of the ordinary rules of gravitation *Hesse vs. National Casket Co.*, 37 Vroom, 652.

In addition to the ground expressly stated by the Trial Judge in granting the motion to nonsuit, there are other elements in the case which alone vindicate the propriety of his action.

As already seen there were three of these ladders suspended on the track along the east side of the room. There is no suggestion that the other ladders

were not provided with lugs. It would have been perfectly proper for the plaintiff to have selected any one of these three ladders. There is no suggestion that there was any obstacle to using one of the others, or that he selected this particular ladder for any other reason than its convenience. Two of the three ladders, therefore, were beyond challenge, proper for use. The defendant, by providing these ladders, had discharged its duty toward the plaintiff. If the plaintiff, in fact, selected from among the ladders one which was defective, the fault is his own and not that of the defendant. The true rule is stated in the opinion of Mr. Justice VAN SYCKEL, speaking for this Court in *Guggenheim Smelting Company vs. Flannigan*, 33 Vroom, 354. It was there held that if the master supplies proper tools and appliances for the work in which his employees are engaged, he is not liable for an injury which one of his servants receives by reason of the servant's selecting from such tools and appliances one not adapted safely to his work. In his opinion Mr. Justice VAN SYCKEL says:

> "It is admitted that the duty was upon the company to furnish proper ladders for the work in which it was engaged, and to use reasonable care in their inspection. But when proper tools and appliances are provided upon the premises for the use of employees, no authority can be found for imposing upon the employer the further duty of seeing that the servant does not select from among a number of appliances the one not adapted to the work in which for the time he may be occupied.
>
> "If such a responsibility is cast upon the master, it would be necessary in his protec-

tion to have an *alter ego* to attend constantly upon every workman in his service, to see that he did not use an implement unfitted for his work.

"The imposition of such a duty upon the master is without reason, justice or authority to uphold it.

"This is not a novel question. It has been directly passed upon this Court so recently as June Term, 1896, in the case of *Maher vs. Thropp*, reported in 30 Vroom, 186. The deliverance of this Court in that case was 'that if safe and proper tools are supplied by the master, he is not liable for an injury which the servant receives by using, under the direction of the foreman over such servant, a tool not furnished for or adapted safely to the work.' "

Campbell vs. *Gillespie Co.*, 40 Vroom, 279.
Enright vs. *Oliver & Burr*, 40 Vroom, 357.

It also appears to be the case that this ladder was used at least during the semi-annual stocktakings, and perhaps oftener upon the different tracks in the room (p. 44, l. 27 of Case), and it was generally understood among the employees in that department that this ladder could be moved from one place to another (p. 45, l. 24 of Case). It does not appear from the case whether the lug was broken off by accident or had been removed by design. Whatever the fact may be, the ladder was used in this condition for a long period of time in order to supplement the other ladders upon other tracks when occasion required. It cannot be said, therefore, that the use of the ladder in this condition was a negligent act. It was not improper for the defendant to include in its appliances a ladder which could readily be removed

from one part of the room to another. It was generally understood among the employees that this ladder was so used. The defendant surely had a right to use ladders of different construction and design, in order to facilitate the conducting of its business. It does not appear in the case that this course was not entirely usual and customary. The case, therefore, fails to expose any negligence on the part of the defendant.

I respectfully submit that the judgment of nonsuit should be affirmed.

Dated November 20, 1906.

SHERRERD DEPUE,
Of Counsel with Defendant.

New Jersey Court of Errors and Appeals.

LOUIS H. ROGERS, Plaintiff below and Plaintiff-in-Error, vs. ROE & CONOVER, a Corporation, Defendant below and Defendant-in-Error.	In Tort. On Error to Essex Circuit Court.

BRIEF FOR PLAINTIFF-IN-ERROR.

General Statement of Facts.

Louis H. Rogers, the plaintiff below and the plaintiff-in-error, was injured by falling from a trolley ladder furnished by Roe & Conover, the defendant below and the defendant-in-error in whose service the plaintiff was engaged. This suit was instituted to recover compensation for his injury. Errors are assigned on a judgment of nonsuit.

The defendant, a corporation a hardware dealer of Newark handling plumbers' and steamfitters' supplies was employing the plaintiff at the time of the accident, January 19, 1901, in its Mechanic Street store. This was divided by a partition running north from a point about opposite to the Mechanic Street entrance without doors or other openings nearly to the north end of the store but with

room to pass around the north end. On the west side of the partition was the steamfitting department and on the east side the plumbing department in which alone the plaintiff had worked until the two departments had been united a short time before the accident. It does not appear that this union involved the removal of the partition. Along the east wall of the plumbing department and along the west wall of the steamfitting department as well as on both sides of the partition all the way up to the ceiling, there were bins or pigeon holes containing different castings and other supplies, the name of its contents being marked over or under each pigeon hole. About three feet up from the floor there was a little platform due to the lower pigeon holes being twelve or fifteen inches deeper (front to back) than the upper ones. Those below were of uniform depth and height with each other and so were those above the platform, the width was not uniform, varying from six inches to a foot. The upper pigeon holes were reached by means of trolley ladders of which the defendant had nine; two against the west wall of the steam fitting department, two against each side of the partition and three against the east wall of the plumbing supply department, where the shelving was the longest. These ladders were of wood seven or eight feet high, sixteen to eighteen inches wide having side pieces about an inch thick and steps across about one foot apart, both side pieces and steps being flat. These ladders were suspended from and moved along upon a track of iron pipe of about an inch outside diameter fastened horizontally to wall or partition seven or eight feet up from the floor. Along the ledge of the platform each ladder moved on two rubber covered rollers. At its top rolling along the pipe track each ladder had two iron wheels five or six inches in diameter and one to

one and a quarter inch thick, grooved peculiarly as follows: each wheel had a wide flange one half to three fourths inch wide projecting down on the wall side of the track and a very small flange just over the side of the track a very little on the side toward the room. Beneath each wheel and about three-eighths inch lower than the bottom of the pipe track, extending from the ladder toward the wall, every perfect ladder had a little iron point or lug one to one and a half inch in length and one-half or three-eighths inch in diameter to keep the ladder from coming off the track; but on the middle ladder against the east wall, the ladder used by the plaintiff at the time of the accident and from which he fell, one of these lugs was missing, broken off close to the body of the fitting.

The plaintiff, a man of thirty-four years, had worked for the defendant two years next preceding the accident, but had been in this room only five weeks to two months, and had no experience with trolley ladders previously. At the time he was hurt the plaintiff went up this ladder to the second or third step, after moving it a foot toward the pigeon hole containing the casting that he needed for the order he was filling, a hole six or seven feet high from the floor. The ladder was then six inches from that pigeon hole. As the plaintiff bent or leaned over the intervening space the ladder fell, first one wheel and then the other leaving the track.

Argument.

That the defendant was negligent clearly appears from the evidence, but it is unnecessary here to take up this matter since the opinion of the Circuit Judge finds such negligence (p. 60, ll. 18, 19, 20), and the defendant's joinder in error says that there is no error in the judgment aforesaid (p. 67, ll. 16, 17). So with the question of the plaintiff's actual

knowledge of the defect or danger: ignorance is found if not admitted (p. 60, ll. 30, 31, 32). The fellow servant question is not raised. "So that," as the opinion states, "the question on which the case hinges is whether the situation was such that the plaintiff, in the exercise of ordinary prudence, ought to have seen that the ladder was defective and that its use might be dangerous," thereby implying that on no other ground would the case have been taken from the jury.

On the decisive question here presented the plaintiff submits:

1. That he was not under obligation to see that the ladder was defective.

2. That he was not under obligation to see that its use might be dangerous.

3. That the question of whether he was or not, should have been decided by the jury.

I.

It was not his duty to see that this ladder was defective, that a lug was missing.

A. On the evidence.

(*a*) *The lugs were very small;* about 1 1/4 or 1 1/2 inch long and 1/2 or 3/8 of an inch in diameter (Plaintiff, p. 22, l. 6; Wilcox, p. 39, ll. 33, 34, and p. 44, ll. 12, 14, 16); about the size of the last joint of a man's little finger. Other things about were so much larger as to render the size of the lug insignificant. Defendant's counsel in his first reference to them (p. 22, l. 3) calls them "little iron points," truly a diminutive but good description.

(*b*) *The lugs were hidden* from view from most directions. The sides of the ladder obstructed the

sight of them to one standing in front (Plaintiff, p. 27, ll. 16, 17; Wilcox, p. 45, ll. 39, 40, 41; p. 46, l. 3), and this whether one stood on the floor or on any step of the ladder. Such was the natural range of one on the ladder since it was necessary to lean to right or left of the ladder to get castings from the pigeon holes (p. 11, l 22; p. 23, l. 32).

The very steps of the ladder (Plaintiff, p. 27, l. 12) would hide them from a person standing in front of the ladder on the floor or on the lower steps (Plaintiff, p. 27, ll 38, 39, 40; p. 28, ll. 1, 2, 3), since the lugs were near the top of the ladder and back of it (Plaintiff, p. 28 ll. 10, 38; Wilcox, p. 39, l. 30 *et seq.*, p. 45, l. 41). To a person on the higher steps looking down the wheels and track would conceal the lugs (Wilcox, p. 39, ll, 32, 33). To look at them from beneath the ladder probably never would occur because one would have to lie on the platform (Plaintiff, p. 21 ll. 23, 24), if that were possible. In short, inspection and not mere observation was necessary to reveal this defect.

(c) *The color of the lugs was dull, not striking.* It was not bright red or yellow, such as ordinary observation would notice. It was light gray (Plaintiff, p. 27, l. 33). Beside this it was the color presumably of a great part of the supplies, so as to be common and uninteresting to the vision of the defendant's employes, being malleable iron galvanized (Wilcox, p. 44, l. 10).

(d) *The lugs were in the shadow.* Under the wheels, back of the ladder sides, between them and the wall, or rather between them and the pigeon holes of castings, with a platform below, they could get direct light only from the sides. From the evidence we must infer that the room was rather dark. No source of light was mentioned, but the door on Mechanic Street (Muchler,

p. 55, ll. 7, 28). As this store faced the street it is fair to infer windows at that end, but the unbroken partition (Muchler, p. 56, l. 24) and the extra pigeon-holed east wall (Wilcox, p. 43, ll. 17, 19, 22, 24) forbid the inference of other windows. If the room were lighted by artificial light the track, the wheel, the top step and the top of the sides would almost necessarily shade this little lug.

(*e*). *The lugs were not visible to ordinary observation.* On this we have the direct testimony not only of the plaintiff (p. 26, ll. 18, 19) but of Wilcox (p. 45, ll. 40, 41; p. 46, l. 25). The defect could not be seen with the eyes without "looking for it" (Wilcox, p. 45, ll. 39, 40; p. 46, ll. 26, 27, 30, 31; Muchler, p. 54, l. 21). Neither Wilcox nor Muchler had looked for it (Wilcox, p. 45, l. 37; Muchler, p. 52, l. 11). Yet there is nothing to indicate that they or the plaintiff were more careless or less observant than the ordinarily prudent man. The plaintiff when discharged was discharged only because he couldn't get around quick enough to do the work (Plaintiff, p. 15, ll. 7, 8, 10). That his place was held for two years before (Plaintiff, p. 19, l. 14; Wilcox, p. 42, l. 37) and for about one year (Plaintiff, p. 25, ll. 38, 39, 40; p. 26, ll. 11, 12) after the accident indicates strongly that he was not deficient in that ordinary observation necessary for the defendant's service. The evidence of Muchler that you could "see that the lug was broken" (Muchler, p. 53, ll. 36, 37, 38) clearly meant that you could "perceive that something was out of order" as appears from his explanation on redirect-examination (Muchler, p. 54, ll. 8-30).

The defendant's counsel may have had in mind ocular observation but he did not make Muchler understand this (Muchler, pp. 53-54). Wil-

cox did understand eyesight to be referred in the cross-examination of the defendant's counsel (Wilcox, pp. 45, lower half, and 46). Yet counsel's thorough treatment of the matter with him brought out only that the lugs could be seen from "certain positions" (Wilcox, p. 46, l. 6, explained in ll. 9, 10 and 15, 16, 17, 18, 22). The lower answers were but assent to truisms, *id.*, ll. 34, 38, and add nothing to the facts of the case. The last answer *id.*, l. 41 is ambiguous, but in view of Wilcox's testimony above must be understood to be unfavorable to the questioner. The proper answer to indicate agreement with the questioner would have been "No, sir," as a matter of English. There is little or no evidence to show that any employe ever did or ever would, see with his eyes, this defect in going up and down the ladder; the evidence is the other way (Wilcox, p. 46, ll. 24-25; Muchler, p. 54, ll. 22, 23, 24, 25).

(*f*) *The lug*, the absence of which constituted the defect, *was not there to be seen.* If something extra was on the ladder it might reasonably have excited notice and then inquiry as to why it was there, but if absence, vacuity, emptiness, is to excite solicitude who can be calm? We may be expected to remark the absence of that which we know belongs in a place, but the evidence shows no instruction to the plaintiff that lugs belonged to this appliance nor even any previous experience tending to apprise him that they were to be expected on trolley ladders. No attempt was made by the defendant's counsel to show that he had any training as a machinist. He might therefore as reasonably have expected half a dozen "crooks" to be missing as this one. Probably the latest invented ladder has half a dozen safeguards which this ladder lacked. Why should he look for the lug?

(*g*) *There was nothing to put the plaintiff on inquiry.*

If the lug had broken in the middle so as to leave a ragged edge that might have caused him suspicion that the ladder was incomplete but this lug was broken off "as close to the body of the fitting as it could be broken so the entire lug was gone and there was not even a stump there" (Wilcox, p. 44, ll. 18-23).

Again, if the lug had broken off during the plaintiff's term of use of this ladder there might have been at least a sub-conscious idea that "something is different" but the plaintiff had always had the same condition in the ladder, the lug having gone a year or two before (Wilcox, p. 44, ll. 3, 4). The tipping, which Muchler had experienced, was the basis for *his* inference "it might go off" (Muchler, p. 53, l. 38), but no such tipping appears to have been experienced by the plaintiff (Plaintiff, p. 12, ll. 14, 15).

Certainly he had no notice from the moving of the ladder from the track (Plaintiff, p. 25, ll. 1, 5). Nor had he been told, of the defect to the knowledge of the only witness on this point, the foreman of the store (Wilcox, p. 50, l. 37).

(*h*) *The plaintiff's attention was on his business.* Instead of spending his time on "seeing how the thing works," on investigating the mechanism of the ladder, as a boy in his teens might naturally be pardoned for doing, the plaintiff gave his thoughts and his eyes to getting out orders, the work for which he was paid. No doubt, after he was hurt, he took a look at the wheels, track, etc., and acquainted himself sufficiently with the mechanism to be able to answer "Yes, sir," to the descriptive cross-questions of the defendant's counsel (Plaintiff, pp. 21, 22), although that he is no mechanic, appears from his answer,

"No, sir," to the question of his own counsel, "Have you any knowledge as to what caused the ladder to fall, of your own knowledge?" (Plaintiff, p. 12, ll. 28, 29, 30.)

But the plaintiff understood his work; he saw the relation of the ladder to the pigeon hole which he was to reach (Plaintiff, p. 31, ll. 8, 9), and, standing on the floor (Plaintiff, p. 30, l. 41; p. 31, l. 1), moved the ladder a foot, so as to have its side alongside the pigeon hole (Plaintiff, p. 31, l. 9), and then climbed two or three steps to reach in some six inches to one side, looking at the pigeon hole (Plaintiff, p. 31, ll. 8, 9), and holding with the other hand to the side of the ladder further from the pigeon hole (Plaintiff, p. 29, ll. 14, 16) so as best to preserve balance.

If this refers to the time when he was placing the ladder, how much more necessarily and properly when he was reaching for the castings.

B. On the principal proposition that it was not the duty of the plaintiff to see that this ladder was defective, that a lug was missing, we may well before giving legal authorities guiding our application of the foregoing facts, present for this purpose the authority of psychologists on the subject of observation. Such scholars teach us what indeed we know of ourselves, that we do not see all or most of those things, of which we have an unobstructed view:

"There is an intellectual blindness" says Dr. H. Littlewood, F. R. C. S., in 45 Popular Science Monthly 533 at page 536: "we all suffer from it more or less, some to such an extent as to be almost like unto an ancient description of some heathen gods 'who have eyes and see not, ears and hear not, noses have they and they smell not'; you have all of you been struck with the fact that there are certain things we see every day yet all

at once discover something in them we have never noticed before."

John Burroughs in 37 Century Magazine (new series) 188, says: "we may see coarsely and vaguely, *as most people do*, noting only masses and unusual appearances. * * * Things escape us because the actors are small and the stage is very large and *more or less* veiled and obstructed." How much more true where still "points" instead of "actors" are involved.

In 39 Chautauquan, 276, we find this: "Perhaps it is because training in sight is so commonly neglected that not one person in a hundred is really a capable observer."

I submit that the "ordinary observation" required below is not that observation found only in "one person in a hundred."

C. What observation and care does the law require?

(1) Definitive words and phrases.

"Ordinary care."

Atha & Illingworth Co. vs. *Costello*, 34 Vr. (63 N. J. L.), 27.
Smith vs. *Erie R. R. Co.*, 38 Vr. (67 N. J. L.), 636.

"Ordinary observation."
"Ordinary observation and care."
"No higher than ordinary degree of care."

Durand vs. *N. Y. & Long Branch R. R. Co.*, 36 Vr. (65 N. J. L.), 656.

Observation of defects "obvious," to the "particular individual." *Id., dissenting opinion.*

Observation of danger "obvious" to "reasonably prudent servant" (*Smith* vs. *Erie R. R. Co.*, 38 Vr. (67 N. J. L.), 636).

In *Durand* vs. *N. Y. & L. B. R. R. Co.* (65 L.), 36 Vr., 656, the *majority opinion* makes ordinary observation and care the test quoting with approval:

"An employee assumes all the risks of his employment against which he may protect himself by ordinary observation and care." At page 658, quoting *Thomas on negligence* (Ed. 1895), 837.

"A servant who enters into an employment which is hazardous, assumes the usual risks of the service and those which are apparent to ordinary observation."

Durand vs. *N. Y. & L. B. R. R. Co.* (65 L.), 36 Vr., 656, quoting *Fricker* vs. *Pa. Bridge Co.*, 47 Atl. (Pa.), 3[illegible]4.

"I do not find it in any authority stated to be the rule of law that the employee or servant of a railroad company is bound to a higher than ordinary degree of care in informing himself of defects in appliances used on railroads for signals or warnings of danger; his duty therein is to use ordinary care, and whether or not he has used such degree of care is for the jury to settle" *Durand vs. N. Y. & L. B. R. R. Co. (65 L.) 36 Vr. at 658 foot (65 N. J. L.).*

"It was further insisted that it clearly appeared that the defect was obvious, and that the engineer must be held to have acquiesced in it. But, as before stated, it depended on circumstances whether and to what extent, the defect was obvious to any particular individual."

Id. dissenting opinion (only differing on 5th request).

"The degree of care required by law of the defendant, as applied to the facts of the case, in this respect leaves the intestate only responsible for

the risks obvious to him or which he could have discovered by the use of ordinary care."

Comben vs. Belleville Stone Co., 30 Vr., 226 at p. 232.

These test words are found in many other cases.

(2) Applications.

An interesting case on the subject of required observation is that of *Mahnken* vs. *Monmouth Freeholders*, 33 Vr., 404, where a hole 9"x5" into which plaintiff's leg fell had not been seen. The Court says (p. 408):

"It was further urged that plaintiff was negligent in failing to see the opening and avoiding it; that the occurence took place in the full light of day; that there was no obstruction to her view and that so large an opening [9"x5"] must have been plainly visible; that she had wheeled over this bridge confessedly many times and must have known of the existence of these openings, and that previous knowledge of the danger must defeat her right to recover. But again, the question arises is the evidence so clear and convincing on these points that there can reasonably be no other inference but that the plaintiff was negligent?"

Mahnken vs. Monmouth Freeholders, 33 Vr., 404, at 408, giving as instances of failing to see what was open being for the jury to decide as to negligence.

Durant vs. *Palmer*, 5 Dutch., 544.
Houston vs. *Traphagen*, 18 Vr., 23.

In *Durant* vs. *Palmer*, 5 Dutch., 544, the plaintiff failed to see an excavation in the sidewalk because of looking into a store window, but was held entitled to recover. Cases of failing to notice trap doors are 167 Mass., 225, 45 N. E., 629; 130 Mich., 287, 89 N. W., 947.

In the Costello case the plaintiff working in the defendant's shop was injured by a plank falling on him from the roof. The plank, part of a scaffolding for painters, was loose and the building was jarred by the work done in the shop. Here the Supreme Court held that it was not necessarily obvious that he knew that the planks were not nailed. 34 Vr. 27, at top 28.

~~Reference~~ In the Durand case an engineer of fast train 65 years of age, experienced and familiar with this road twenty years, ran on to an open switch and was killed in the collision of his engine with ice cars on the side track. The signal was defective having only one red blade instead of two.

Durand vs. *N. Y. L. B. R. R. Co.* (65 N. J. L.), 36 Vr., 656.

The Court though divided on one point agreed that it was not necessarily *obvious* to this engineer that a red panel was missing in the signal or that there was a break in the southbound track occasioned by the open switch.

In the Dillenberger case obvious dangers are defined (p. 299) as: "Those which are apparent. They are the apparent risks of the work. They are the risks which are apparent in the exercise of ordinary observation and which are disclosed by the use of the eyes and other senses."

Dillenberger vs. *Weingartner*, 64 N. J L., 35 Vr., 292, at 299 foot continuing with many short statements of law each with authorities.

That was a case where a corset presser was injured on left hand by a revolving fan when she was trying to open the window behind it.

There the danger (there appears to have been no defect) was rightly held obvious, but the same definition (quoted above) which decided that case

against the plaintiff, would decide the case at bar for the plaintiff.

In *Addicks* vs. *Christoph*, 33 Vr. (62 N. J. L.), 786, where a foreign boy caught his foot in a clay machine, this Court deciding in his favor, said (p. 788):

"The general rule thus recognized is that when one enters a service he assumes the risk of all dangers *obviously* or naturally incident to such employment."

Addicks vs. *Christoph*, 62 N. J. L., 33 Vr., 786 at 788.

Citing Electric Co. vs. Kelly, 28 Vr., 100.

Foley vs. *Light Co.*, 25 Vr., 411.

Johnson vs. *Devoe Muff Co.*, 33 Vr., p. 417.

A broken ladder is not "naturally incident" to a shipping clerk's employment.

In the *Flanigan* case the plaintiff was injured by a fall from a scantling ladder placed against a fresh wall, because, it was contended with other reasons, he should have used the well made ladders furnished by the master instead of this one made by fellow servants, or in using this he should have observed the knot in the cross-piece which gave way. ADAM, Judge, in the dissenting opinion, but apparently the majority opinion on this point, since GARRISON, Justice, voted to reverse on the fellow-servant aspect, said (p. 363): "The argument is that, in an apparatus so simple as a ladder, a structural defect which the inspection of an employer would reveal must necessarily be obvious to a workman. This is an assumption of fact which the proof in this case does not warrant. The matter stands thus: The company, if it furnished the ladder, was bound to inspect. The workman who used the ladder was bound to observe. These duties are not of the same grade.

Inspection is more searching than observation. A workman can assume that his employer has performed the duty of inspection.''

Guggenheim Smelting Co. vs. *Flanigan*, 33 Vr. (62 N. J. L.), 354 (See also lower half of page 364 and upper half of 365.)

Our case is much stronger because of the retired location of the lug on our ladder.

II.

It was not the plaintiff's duty to see that the use of this ladder might be dangerous.

A. On the evidence.

(*a*) Whether being defective it was therefore dangerous was ''rather a speculative inquiry'' for it is the same question as ''what would probably happen if the lug were not there'' (The Court [excluding evidence] p. 41, l. 23).

(*b*) The plaintiff was under no obligation to make ''speculative inquiry.'' He was not a mechanic, still less a philosopher; he had no need to be a mechanic as a faithful filler of orders for a hardware concern. He was a man of thirteen years' experience in filling such orders (Plaintiff, p. 19, ll. 27, 14). To employ a shipping-clerk who is also a skilled mechanic and a speculator, even a hardware house must pay more than thirteen dollars a week (Plaintiff, p. 15, ll. 19, 21; p. 17, l. 14).

(*c*) The plaintiff had never been told that the ladder was dangerous, as we may infer from plaintiff's absolute ignorance (Plaintiff, p. 12, ll. 10, 11), and from the answer to the juror's question (Wilcox, p. 50, l. 37).

(*d*) He had never found it to tip, or to tip to such an extent as to suggest danger. This is the only inference possible from his testimony (Plaintiff, p. 12, ll. 10, 11, 13, 14, 28, 29).

(*e*) He had never known it to be removed (Plaintiff, p. 24, l. 39, p. 25, ll. 1 and 5 and questions), even if there was anything in such removal to suggest danger. The evidence of its being known is confined to the steam fitting men (Wilcox, p. 45, l. 26). The plaintiff was of the plumbing supply (Plaintiff, p. 20, ll. 4, 5).

(*f*) He had used it only for from four weeks to two months (Plaintiff, p. 22, l. 32; Wilcox, p. 43, l. 3).

(*g*) He had used others only during this period (Plaintiff, p. 23, l. 13; Wilcox, p. 43, ll. 3, 5).

(*h*) He had never found trolley ladders in general to be dangerous, as we may infer from his use of them during this period (Plaintiff, p. 22, l. 41, p. 23, l. 5), even reaching fittings in pigeon holes near the ceiling (Plaintiff, p. 24, l. 33).

(*i*) He had a right to rely on the defendant's furnishing *safe* ladders only, and did so rely (Plaintiff, p. 12, ll. 11, 13, 14).

B. As a matter of law danger as well as defects must be known or knowable by the plaintiff.

"It is one thing to be aware of defects in the instrumentalities or plan furnished by the master for the performance of his services and another thing to know or appreciate the risks resulting or which may follow from such results. The mere fact that the servant knows the defects may not charge him with contributory negligence or the assumption of the risks growing out of them. The question is, did he know, or ought he to have

known, in the exercise of ordinary common sense and prudence that the risks and not merely the defects existed."

Cook vs. *St. Paul, M. & M. Ry. Co.*, 24 N. W., 312, quoted in *Sanborn* vs. *Madera Flume & Trading Co.*, 70 Cal., 261; 11 Pac., 710.

"The servant is only bound to see patent defects, —mere knowlege of defects will not bar his recovery unless accompanied by knowledge that the defects are dangerous."

Farren vs. *Sellers*, 39 La. Ann., 1019; 3 So., 363, citing,

Wood Master & Serv., 681, 738, 739, 763.

2 Thomp. Neg., 975.

Whart. Neg. Sec., 215.

"It is not only necessary that an employe should know of the defect in the machinery in order to hold that he assumed the risk, but the danger arising from the defect must also be known or reasonably apprehended by him."

Lee vs. *So. Pac. Ry. Co.*, 101 Cal., 118; 35 Pac., 572, citing,

Farren vs. *Sellers*, 39 La. Aun., 1019; 3 Soult., 363.

Cook vs. *Ry. Co.*, 34 Minn., 47; 24 N. W., 311.

Russell vs. *Ry. Co.*, 32 Minn., 230; 20 N. W., 147.

Wuotilla vs. *Lumber Co.*, 37 Minn., 153; 33 N. W., 551.

Sanborn vs. *Trading Co.*, 70 Cal., 261; 11 Pac., 710.

Shear & R. Neg. (4th Ed.), Sec. 212.

"There is a class of cases which recognize the doctrine, as we have stated, that mere knowledge

of a danger will not preclude plaintiff from recovering unless he appreciates the risk."

Mundle vs. Hill Mfg. Co., 86 Me., 400; 30 Atl., 16, citing 126 Mass., 506; 137 Mass., 243; 140 Mass., 150, 3 N. E., 21; 147 Mass., 484, 18 N. E., 209; 18 Q. B. Div., 685; 19 Q. B. Div., 647.

"In the first place one does not voluntarily assume a risk who merely knows that there is some danger without appreciating the danger. * * * Sometimes the circumstances may show as a matter of law that the risk is understood and appreciated and often they present in that particular a question of fact for the jury."

Fitzgerald vs. *Conn. River Paper Co.*, 155 Mass., 155; 29 N. E., 464 and 465.

Nor is this doctrine without authority in New Jersey. In *Burns* vs. *Del. & Atl. Tel. Co.*, 41 Vr. (70 N. J. L.) 745, where the plaintiffs serving the defendant in stringing wires which passed over a trolley wire, were shocked as they unwound the coils, no provision having been made for board to stand on, gloves, etc. This Court said (p. 752): "It is not merely the physical surroundings of the servant that must be obvious to him in order that he may be held to have assumed the risks arising therefrom, but it must be obvious to him, or at least to an ordinarily prudent servant, under the circumstances, that there is danger in such a situation."

After considering 29 Vr., 160; 33 Vr., 35; 33 Vr., 760; 38 Vr., 636, 644, and quoting from the last this Court continued (p. 753): "In a multitude of other cases in our Courts the principle is impliedly recognized, if not distinctly declared that it is the danger that must be obvious and not merely the physical situation in order to charge the injured servant with assumption of an obvious risk"

I submit that even if the absence of the lug be held obvious to the plaintiff it cannot be held that danger therefrom was obvious.

Now as to the charge in this case (on p. 62, ll. 20, 21), we find:

"He assumes all the risks usually incident to the employment including those which it is his duty to take knowledge of by observation, such as he would discover by the exercise of ordinary care for his personal safety."

Now the word "including" shows that the latter part of the definition is descriptive and not cumulative; that "usually incident" means not only such risks as a servant might name outside the shop or factory where he was to be employed, but such also as he would name on going inside the shop or factory and seeing the actual appliances which he is to use. But even with the lat ter part of the definition, it cannot be held that "usually incident" means "unusually incident." Such a construction would be unreasonable, yet such a construction is virtually placed upon that expression by holding it to cover the risk from a broken lug under the wheel of a trolley ladder.

The opinion in this part uses the words "ordinary care for his personal safety." This is word for word correct, but the popular sense of this combination of words, which seems also to have been the applied sense, is incorrect. "Care," taken in an indifferent sense without color is the right noun, but "ordinary care for personal safety" as a phrase is apt to give to the word "care" the positive, the significant meaning of a high degree of care which is only partially reduced by the word "ordinary," a word intrinsically accurate. Certainly the care required to see the defect and especially the danger in this case is more than "ordinary."

In *Belleville Stone Co.* vs. *Mooney*, 32 Vr. (61 N. J. L), 253. This Court said (p. 256): "Nor will the doctrine that servants assume the obvious risks of their employment save the defendant in this case, for that doctrine is not applicable to risks arising from negligence in the discharge of the master's duty to his servant."

The distinction seems to be, that if the appliances furnished by the master are in order, then the servant assumes risks even where they are obvious only to particular observation, but that if the master has allowed the appliances furnished by him to become and be out of order as here, then the servant assumes only the risks which are *obvious* in the sense of *glaring*. The only exception to this latter rule seems to be where the appliance has become out of order during the servant's use thereof, when he is reasonably held to have known and appreciated the increase of risk, although not glaring. It is believed that the New Jersey cases will be found to be decided for or against the injured servant corresponding to this rule, and it is submitted that the application thereof to our case requires its determination here in favor of the plaintiff.

III.

If the evidence presents a question such as that involved here, the jury should decide.

With the description of the lug fresh in his mind (Wilcox, p. 39, ll. 30-38) the Court below ruled (p. 40, ll. 4-5) "the opportunity that a person would have to see it (the physical condition in relation to the parts of the ladder) would be an inference for the *jury* to draw from the facts."

In the *Durand* case, *ubi supra*, Judge ADAMS

delivering the dissenting opinion, agreed with the majority in the following at page 664:

"It was for the jury to say whether the deceased, if he had been careful, would have known that a red panel was missing" *Durand* vs. *N. Y. & L. B.*, at 664, citing, *Comben* vs. *Belleville Stone Co.*, 30 Vr., 226; and, "Another question was whether the engineer, if he had used due care, would have seen the break in the line of the west rail of the southbound track occasioned by the open switch. This whole matter was evidently one of fact for the consideration of the jury" *Durand* vs. *N. Y. & L. B.*, *id.*, at 664, citing, *Comben* vs. *Belleville Stone Co.*, 30 Vr., 226.

In the *Smith* case, 38 Vr. (67 N. J. L.) 636, the plaintiff, a baggage man and brakeman for defendant was severely injured in car toppled down an embankment after derailment. Track had a "low joint" where or near where car ran off, over which the cars in which plaintiff had constantly ridden had lately jolted.

Here the Court said:

"It was, at best, a question for the jury to determine whether the special danger was known to the plaintiff or was so obvious that he ought to have known of it."

Smith vs. *Erie R. R. Co.*, 38 Vr., 636 at 645 mid.

In the *Dowd* case, the plaintiff, thirty-eight years old, a bolt cutter, working earlier on a guarded machine, did for 16 days before the accident work on it unguarded on promise to have it fixed as soon as they could. In moving belting on a pulley he lost balance and had his right hand crushed in the cogs.

The promise of repair entered into the decision of the case for the plaintiff, but the following on the subject of contributory negligence are applic-

able to the case at bar. "In our judgment the question whether the plaintiff was himself negligent to such a degree as to bar his recovery was a question of fact for the jury."

Dowd vs. *Erie R. R. Co.*, 70 N. J. L., 451 at 453.

"The danger that his hand would slip and come in contact with the exposed gearing was not so imminent as to compel the conclusion that the plaintiff was negligent in continuing to work at the unguarded machine, and to require the Court to take the case from the jury."

Id., at page 457.

"This (withdrawing a case from the jury) is only done when the facts are undisputed, or from the whole of the evidence the only reasonable legitimate inference which can be drawn is that no liability has been established. The question must not be open to fair debate."

Dillenberger vs. *Weingartner*, 64 N. J. L., 292 at 298, citing *J.* vs. *D. S. Co.*, 33 Vr., 417.

"In view of the principle that the intestate had the right to assume that his employer had exercised reasonable care in furnishing proper appliances and in keeping them safe, the facts are such that whether the dangers were obvious to him or whether he could have perceived the dangers by ordinary observation, became questions for the jury and not for the Court to solve" (p. 232).

"Upon this subject it is only necessary to state that by all the authorities in this State, it is held that when the evidence on any given subject in this class of cases is open to fair debate and leaves the mind in a state of some doubt upon the question, the trial judge is not justified in taking the question from the jury. Wherever two inferences

can be drawn from the evidence upon questions of negligence, a case is presented which calls for the opinion of a jury."

Comben vs. *Belleville Stone Co.*, 30 Vr., 226, at page 233.

Citing:

Bahr vs. *Lombard, etc. Co.*, 24 Vr., 233.
D. L. & W. R. Co. vs. *Shelton*, 26 Vr., 342.

This was a case of a hole driller being brushed off the ledge and killed in the quarry. He had been changed to that position just before the accident. The defendant argued that he should have known of the danger from the sagging rope (from derrick) which brushed him off.

"These questions (of negligence) one and all, are, under our system of trials to be submitted to the jury whenever the testimony is fairly susceptible of an inference consistent with the plaintiff's contention."

Day vs. *Donohue*, 33 Vr., 380 at 382.

Citing:

7 Vr., 531; 10 Vr., 189; 14 Vr., 596; 24 Vr., 233; 26 Vr., 342; 26 Vr., 605; 26 Vr., 615; 29 Vr., 573; 30 Vr., 226.

Here the plaintiff, a bricklayer, was injured by the falling of a scaffold resting on poor support placed by one called a fellow servant.

A motion to nonsuit requires fact and inference to be taken favorably to the plaintiff. The opinion in the Mueller case states: "When a motion to nonsuit is made, the testimony of plaintiff's witnesses becomes, for the purposes of the motion, a state of the case in which every pertinent fact and *every permissible inference* is resolved in the way most favorable to the plaintiff's recovery of a verdict." ~36 Vr. 244 at 246.

It is respectfully submitted that the judgment of nonsuit should be reversed and a venire de novo awarded.

CHARLES F. KOCHER,
Of Counsel with Plaintiff-in-Error.

INDEX.

NEW JERSEY COURT OF ERRORS AND APPEALS.

STATE OF NEW JERSEY, *ss.*

[L. S.]

The State of New Jersey to Frederic Adams, Judge of our Circuit Court, at Newark, in and for the County of Essex, or such Justice of the Supreme Court of the State of New Jersey as shall hold such Circuit Court, greeting:

Forasmuch as in the record and proceedings, and also in the giving of judgment in a certain plaint, which was in our Circuit Court, holden at Newark, in and for the said County of Essex, before you, between Louis H. Rogers, plaintiff, and Roe & Conover, a corporation, defendant, in an action in tort, manifest error hath intervened, to the great damage of the said Louis H. Rogers, plaintiff, as by his complaint, we are informed, we being willing that the error, if any there be, should, in due manner, be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given, then you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching and concerning the same, to our Judges of our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the seventh day of January, 1906, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon, for correcting that error, what of right, and, according to the law and custom of the State of New Jersey, ought to be done.

Witness, William J. Magie, our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the nineteenth day of December, nineteen hundred and five.

S. D. DICKINSON, *Clerk.*

CHARLES F. KOCHER, *Attorney.*

The within writ was presented to me in open Court. The Clerk will make out the return.

FREDERIC ADAMS,
Circuit Court Judge.

January 2, 1906.

STATE OF NEW JERSEY, ESSEX COUNTY:

I, Arthur Horton, Clerk of the Circuit Court in and for Essex County, New Jersey, do hereby certify and return to the Court of Errors and Appeals of New Jersey of last resort in all causes in the State of New Jersey, the judgment record and proceedings, together with all things touching and concerning the same, as by the within writ to me directed, I am commanded.

Witness my hand and the seal of said
10 [L. S.] Court and County at Newark, this 7th day of January, A. D. 1906.

ARTHUR HORTON, *Clerk.*

Essex County Circuit Court

ESSEX COUNTY, *ss.*

[L. S.] The State of New Jersey, to the Sheriff of the County of Essex aforesaid, greeting:

You are hereby commanded to summon Roe & Conover, a corporation, if in your county it may be found, so that it be and appear before our Circuit Court to be holden at Newark, in and for the said County of Essex on the twenty-fourth day of January, 1903, to answer unto Louis H. Rogers in an action of tort to his damage ten thousand dollars, as is said. And have you then and there this writ.

Witness, William S. Gummere, Esquire, a Judge of our Circuit Court at Newark, aforesaid, the sixth day of January, in the year one thousand nine hundred and three.

ARTHUR HORTON, *Clerk.*

CHARLES F. KOCHER, *Attorney.*

Pleas before the Judge of the Circuit Court holden at Newark, in and for the County of Essex, on the 24th day of January, A. D., 1903.

ARTHUR HORTON, *Clerk.*

ESSEX COUNTY, *ss.*

Roe & Conover, a corporation duly organized under the laws of the State of New Jersey, the defendant in this suit was summoned to answer unto Louis H. Rogers, the plaintiff therein, in an action of tort, and thereupon the said plaintiff by Charles F. Kocher, his attorney, complains :

For that, whereas, the said defendant, to wit, on the nineteenth day of January, nineteen hundred and one, in the City of Newark, in the County of Essex, was operating, managing and controlling a certain store or warehouse for the sale of hardware, steam fittings and other mechanical appliances, and that then and there the said defendant had this plaintiff in its employ and service for hire and reward, in and about said store or warehouse, and while then and there so employed this plaintiff was then and there set to work, and was then and there standing upon and at work by the order of this defendant upon a certain appliance known as a trolley ladder, which said trolley ladder was suspended upon wheels or rollers running upon a track extending along the side of defendant's said store or warehouse, a short distance below the ceiling thereof and so arranged and constructed as to be moved from one place to another along the side of said store or warehouse for the uses and purposes of said defendant ; and that it was in the line and course of this plaintiff's employment and duties in said employment to so stand, as aforesaid, upon said trolley ladder, whereby to reach, put up, and take down the goods, wares and merchandise of said defendant placed and deposited at great height above the floor of said store or warehouse ; beyond the reach of this plaintiff or of other persons, when standing upon said floor ; that it was the duty of the defendant to provide this plaintiff with proper tools and appliances, with a safe place on and on which to do his work, and in divers other ways to guard and protect this plaintiff in the proper performance of his duties from any danger, mishap or accident that might arise from said defendant's negligence or imprudence ; and that said plaintiff

further avers that the said trolley ladder on which he was then and there at work in his proper and lawful capacity and for hire and reward then and there paid to him, was then and there by reason of the oversight and negligence of the said defendant, extremely dangerous, and subjected this plaintiff, his said employee and servant, then and there to great hazards, risks, and dangers of life and bodily injury; by reason whereof the said defendant while knowing the premises ought then and there carefully to have inspected and operated the said trolley ladder and the machinery and appliances incident and necessary to its proper running, and the proper application and adaptation of its machinery and appliances.. And the plaintiff avers that the said defendant did then and there disregard its duties in this behalf in that the said trolley ladder was then and there with its machinery and appliances so carelessly, negligently, insecurely, improperly and defectively constructed, inspected, erected, run, operated and arranged for the purposes and uses aforesaid, and the said defects in and about the construction, inspection, and use of the said trolley ladder, its appliances and machinery were then and there so latent and hidden that the said plaintiff while so employed then and there, and while then and there exercising due care and precaution, did not know and could not see the said defects and hidden dangers in and about the construction of the said trolley ladder, machinery and appliances, and in and about the use, wear and tear of the said trolley ladder, machinery and appliances so as aforesaid, and that the said defects and dangers were then and there known to the defendant, and by law the said defendant was bound to know the said dangers and defects so and then and there as aforesaid. And the plaintiff avers that at the place and on or about the time aforesaid the said defendant carelessly, negligently and imprudently acted and otherwise misbehaved itself in failing to provide the plaintiff with the proper tools, appliances and safe guards for his work, and that by reason of such negligence, carelessness and misbehavior of said defendant and by reason of the defects in said trolley ladder and of various other defects of this defendant's appliances, tools and machinery, which said defendant knew and was bound to know, the said trolley ladder aforesaid gave way and precipitated this plaintiff a distance of many feet to the floor below and grievously hurt and injured his limbs and

body, and he thereby sustained grievous internal injuries, and that at said time and place this plaintiff was properly, cautiously and diligently performing his duties in his said employment, and in no manner contributed to his said fall and injuries, but that said fall and injuries were solely due to this defendant's negligence and carelessness. And the plaintiff avers that by said fall and injuries he sustained great pain and anguish, still suffers, and will, as he is advised by his physician, continue to suffer for a long time ; and that he was and still is, and will be prevented from the performance of his duties and from the earning of a livelihood for himself and family, and was, is and will be deprived of the enjoyment of his health and strength, and that he was forced to pay, lay out, and expend and did pay, lay out and expend divers large sums of money for nursing, medicine, and for other matters incidental to and arriving from his said injuries, and that by reason of his fall, injuries and loss aforesaid, he has sustained and suffered loss and damage to wit, the sum of ten thousand dollars ; and plaintiff therefore demands that he have from the defendant the sum of money last above mentioned, and therefore he brings his suit, etc.

CHARLES F. KOCHER,
Attorney for Plaintiff.

ESSEX COUNTY, *ss.*

Roe & Conover, a corporation duly organized under the laws of the State of New Jersey, the defendant in this suit, was summoned to answer unto Louis H. Rogers, the plaintiff therein, in an action of tort, and thereupon the said plaintiff, by Charles F. Kocher, his attorney, complains :

For that, whereas, the said defendant, to wit, on the nineteenth day of January, nineteen hundred and one, in the City of Newark, in the County of Essex, was operating, managing and controlling a certain store or wharehouse for the sale of hardware, steam fixtures and other mechanical appliances, and that then and there the said defendant and this plaintiff in his employ and service for hire and reward, in and about said store or warehouse, and while then and there so employed this plaintiff was then and there set to work, and then and there standing upon and at work, by the order of this defendant, upon a certain appliance known as a trolley ladder,

which trolley ladder was suspended upon wheels or rollers running upon a track extending along the side of defendant's said store or warehouse, a short distance below the ceiling thereof, and so arranged and constructed as to be moved from one place to another along the side of said store or warehouse, for the uses and purposes of said defendant, and that it was in the line and course of this plaintiff's employment and duties in said employment to so stand, as aforesaid, upon said trolley ladder, whereby to reach, put up and take down the goods, wares and merchandise of said defendant, placed and deposited at great height above the floors of said store or warehouse, beyond the reach of this plaintiff or of other persons when standing upon said floor. And the said plaintiff avers that it was the duty of the said defendant to take reasonable care to furnish tools and appliances with which and places on or about which said plaintiff was employed to work, reasonably safe for the work the said plaintiff was employed to perform, and the said plaintiff avers that the said defendant did then and there disregard the duties in this behalf, in that the said trolley ladder was then and there with its machinery, and appliances, so carelessly, negligently, insecurely, improperly and defectively constructed, inspected, erected, operated, run and arranged, for the purposes and uses aforesaid ; that at the time and place aforesaid by reason of the aforesaid defects, the said trolley ladder aforesaid fell and gave way, and precipitated said plaintiff a distance of many feet to the floor below and grievously hurt and injured his limbs and body, and he thereby sustained grievous internal injuries, and the said plaintiff avers that the aforesaid defects in and about the construction, inspection and use of the said trolley ladder, its appliances and machinery, were then and there so latent and hidden that the said plaintiff, while so employed then and there, and while then and there exercising due care and precaution, did not and could not see the said defects and hidden dangers in and about the construction of the said trolley ladder, machinery and appliances, and in and about the use, wear and tear of the said trolley ladder, machinery and appliances, so as aforesaid, and that the said defects and dangers were then and there known to the said defendant ; and said plaintiff further avers that at said time and place said plaintiff was properly, cautiously and diligently performing his duties in his said employment, and in no manner contributed to his said fall and injuries, but that

said fall and injuries were solely due to this defendant's negligence and carelessness. And the plaintiff avers that by said fall and injuries he sustained great pain and anguish, still suffers, and will, as he is advised by his physician, continue to suffer for a long time, and that he was and still is, and will be prevented from the performance of his duties and from the earning of a livelihood for himself and family, and was, is and will be deprived of the enjoyment of his health and strength, and that he was forced to pay, lay out, and expend, and did pay, lay out, and expend divers large sums of money for nursing, medicine, and for other matters incidental to and arriving from his said injuries, and that by reason of his fall, injuries and loss aforesaid, he has sustained and suffered loss and damage, to wit, the sum of ten thousand dollars, and plaintiff therefore demands that he have from the defendant the sum of money last above mentioned, and therefore he brings his suit, etc.

CHARLES F. KOCHER.

And the said defendant, by Lindabury, Depue & Faulks, its attorneys, comes and defends the wrong and injury, when etc., and says that it is not guilty of the said supposed grievances above laid to its charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against it, and of this it puts itself upon the country, etc.

LINDABURY, DEPUE & FAULKS,
Attorneys of Defendant.

And now at this day, that is to say, the second Tuesday of December next, who neither, etc., to recognize, etc., because, etc., and the same day is given to the parties here, etc.

At which time, before the Judge aforesaid, at Newark aforesaid, come the parties aforesaid, by their attorneys aforesaid, and the Sheriff hath not sent here the writ to him in this behalf directed, nor hath he done anything thereupon.

And now at this day, that is to say, the fifth day of January, A. D. nineteen hundred and four, to which day the issue as aforesaid joined had been continued, come the said parties by their said attorneys, before the Judge aforesaid, at Newark aforesaid, and the said plaintiff failing to prosecute his said suit in this behalf, the Court do thereupon order that

the said plaintiff take nothing by his said writ, but that he and his pledges to prosecute be in mercy, etc., and that the said defendants do go without day, etc.

Whereupon, it is considered that the said defendants do recover against the said plaintiff the sum of thirty-three dollars and eighty-four cents, as for their costs and charges by them about their defence in this behalf laid out and expended by the Court now here adjudged to them with their assent, according to the form of the statutes in such case made and provided, and that the said defendants have execution thereof, etc.

And the said plaintiff in mercy, etc.

Judgment signed January 5, 1904.

WM. S. GUMMERE, *Judge.*

Essex Circuit Court.

TUESDAY, January 5, 1904.

LOUIS H. ROGERS,
vs.
ROE & CONOVER. } *In Tort.*

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

For plaintiff appears Charles F. Kocher.

For defendants appear Lindabury, Depue & Faulks.

Mr. Kocher opens for plaintiff.

LOUIS H. ROGERS, plaintiff, sworn in his own behalf.

Direct examination by Mr. Kocher.

Q Mr. Rogers, you are the plaintiff in this suit?

A Yes, sir.

Q What is your business?

A At present?

Q What was your business on the 19th of January, 1901?

A Clerk with Roe & Conover.

Q In what character of business are Roe & Conover engaged?

A Engaged in a hardware and plumbers' supplies and commission business

Q What were your duties?

A My duties were to get out orders and to fill orders and wait upon the customers.

Q You said you were employed there on January 19, 1901?

A Yes, sir.

Q What, if anything, happened on that day in the course of your employment?

A I received an injury.

Q Will you describe that occurrence as clearly as you can.

A Well, I had an order and I went to fill the order, and I was trying to get a fitting that was on the order, and as I was bending over to get it on the ladder, one of the wheels of the ladder left the track, and I looked up, and as I looked up the other wheel left the track and the ladder fell to the floor; and I tried to pick myself up, and in doing so, I couldn't, and I kind of threw my leg one way and I got on my feet, and then I felt of my knee and found out that the—that it was soft, like a sponge.

Q You said that you were filling an order?

A Yes, sir.

Q What was that order for; what were you trying to get?

A It was for a steam fitting.

Q Where was that steam fitting?

A It was in a bin up from the floor.

Q How high from the floor?

A About six or seven feet.

Q And how were you going to get that; what means had you to get that?

A Ladders which rolled on tracks; you were to go up the ladder and reach over, lean over, and get the fitting.

Q These ladders that you speak of, by whom were they supplied?

A They were supplied by a manufacturer in New York City.

Q No, but who placed the ladder there for you to obtain the fitting?

A Roe & Conover.

Q Describe this ladder that you are speaking of.

A There is a track which runs along the walls and fastens with brackets to the partitions of the bins, and this ladder has two grooved wheels on the top, which is fastened to woodwork; there is a little crook or catch underneath which holds it to the track when in use.

Q I did not catch that last.

A There is a little crook which holds it to the track when in use.

Q Does this ladder reach to the floor?

A No, sir.

Q Then that ladder, as I understand it, is suspended on the track?

A Yes, sir.

Q It receives no support from the floor, is that correct?

A Yes, sir.

Q Now, you say this fitting that you were to get was up too high from the floor for you to reach?

A Yes, sir.

Q How far had you ascended the ladder before you fell?

A Two or three steps.

Q What knowledge, if any, had you concerning the safety of the ladder?

A I had no knowledge whatever.

Q What do you mean by that?

A Well, I supposed the ladders were in perfect condition when I went up the ladder.

Q Have you any knowledge of any inspection of the ladders ever having been made by Roe & Conover?

A No, sir.

Q Whose duty was it to care for the ladders, if anybody's?

Objected to as calling for a conclusion.

The Court. That is a question of law, I think.

Q Have you any knowledge that any person was charged with the duty of inspecting the ladders?

Objected to.

A No, sir.

The Court. One moment. That is the same question in another form.

Q Have you any knowledge as to what caused the ladder to fall, of your own knowledge?

A No, sir.

Q What injuries did you sustain by reason of this accident?

A A broken knee-cap.

Q What happened after the accident?

A After the accident I called one of the men to help me.

Q Who was that?

A Mr. Muchler, John Muchler.

Q And then what happened?

A And then Mr. Wilcox, he come down to see what was the matter.

Q Well, proceed; what happened then?

A Then I asked them to feel of my knee ; they did so, and—

Mr. Depue. One moment. I object to any conversation.

Q Just tell us what happened.

A Then I went upstairs, walked upstairs and put on my hat and coat and went to the doctor's, and from there I went home.

Q And then what?

A Then I laid in bed until the operation.

Q Where was the operation performed?

A St. Barnabas Hospital.

Q By whom?

A Dr. Chandler

Q How long did you remain in St. Barnabas Hospital?

A One week.

Q From there where were you taken?

A Taken to 1195 Broad street, to my father's.

Q Your father's home. How long did you remain in bed as the result of this accident?

A I was in bed ten weeks.

Q What effect upon your means of locomotion has this accident had—what effect upon your knee?

A Well, it made it stiff for a long time.

Q What is the condition of your knee at the present time?

A I can bend it just enough to sit down.

Q Has this accident to your knee had any effect upon your employment?

A I wasn't able to get around as quick.

Q Are you able to get around as quickly now?

A Well, I get around very near as quick now, but it troubles me every once in a while.

Q In what way?

A Once in a great while I have pain, and it gets tired easily.

Q Did you suffer any pain as the result of this accident?

A I suffered pain when they were bending my knee, when it was getting well.

Q Was that pain severe?

A It was; yes, sir.

Q How often did they bend your knee?

A First off it was twice a day, and afterwards once a day, for about five or six weeks.

Q Are you still in the employ of the defendant?

A No, sir.

Q How did you come to leave their employ?

Objected to as immaterial,

Mr. Kocher. I wish to show by this witness, if your Honor pleases, that he was discharged from the employment of the defendant by reason of his inability to do his work, by reason of this accident. I propose to show it by admission of the defendant to that effect.

Mr. Depue. It seems to me that this defendant is an artificial body, and I think we are entitled to have this proof made in a different manner.

The Court I do not know in exactly what manner it may be made, but it is competent to show by competent testimony that the plaintiff lost employment as a result of this accident.

Mr. Depue. Yes, sir; I do not dispute that. The offer is to show it by confession, without showing by whom the alleged confession is made or binding the defendant by it.

[Question read.]

Mr. Depue. I object to that, sir.

The Court. I think the question is not objectionable.

[Question withdrawn.]

Q At the time of your employment who was in charge of the establishment of the defendant's at Market street?

A Mr. Squires was regular superintendent of the establishment.

Q Was anybody above him in authority?

A Mr. Roe.

Q Who engaged you?

A Mr. Roe, Isaac F.

Q When did you leave the employment of the defendant?

A It was about one year after the accident.

Q Who discharged you?

A Mr. Roe.

Mr. Depue. One moment. There is no proof of any discharge yet.

Q Were you discharged from the employ of the defendant?

A Yes.

Q Who discharged you?

A Mr. Roe.

Q Did he give any reason for discharging you?

A Yes, sir.

Q What reason did he give?

A He said I couldn't get around quick enough to do the work

Q Did he say anything else?

A No, sir.

Q In what condition was your knee at that time?

A My knee at that time was quite stiff; I could bend it a very little.

Q During your illness what means of livelihood had you?

A I didn't catch the question.

Q During the time that you were confined to your bed with this injury what income had you or what means of livelihood had you?

A I received $13 a week from Roe & Conover.

Q Was that your regular salary?

A Yes, sir.

Q Did you pay the physician for attendance upon you during your illness?

A I paid the surgeon.

Q Did you incur liability for other physicians' services?

A There are other physicians' bills.

Q Did you incur liability? Are you bound to pay those other physicians' bills?

A Well, I received the bills, but I never—no.

Q What do you mean by that? Do you never expect to pay those bills?

Objected to as cross-examining plaintiff's own witness.

Q Let us go back a step. What physicians attended you?

A My brother.

Q Is he a physician?

A Yes, sir.

Q [*By the Court.*] What is your brother's name?

A Robert H. Rogers.

Q [*By Mr. Kocher.*] Did he send you a bill for his services?

A Yes, sir.

Q What was the amount of that bill?

Objected to on the ground that witness has said that he is not under any legal obligation to pay the physicians' bills.

Q What reason have you for saying that you are under no obligation to pay this bill of your brother's?

Objected to as immaterial.

The Court. I think the witness may be allowed to explain himself. He received a service, and the Court and jury want to know whether he is bound to pay for it or not, and if not, why not. Naturally, he would be.

Q Dr. Rogers, is your brother—

A And Dr. Johnson.

Q One moment. Let me ask you this question. Dr. Rogers, your brother, rendered you service, you say?

A Yes, sir.

Q He sent you a bill?

A Yes, sir.

Q Now, then, you said that you were under no obligation to pay that bill. What do you mean by that?

A I was told if I had to pay those bills from my own pocket—

Objected to.

Q Never mind. What agreement, if any, had you with Dr. Rogers in regard to the payment of his bills?

A The agreement was if I was to receive money which would pay those bills, that I would pay them; otherwise, I wouldn't have to.

Q [*By the Court.*] You now refer to Dr. Johnson's bill as well as to Dr. Rogers' bill.

A That referred to Dr. Johnson's bill as well as Dr. Rogers'.

Q [*By Mr. Kocher.*] What other physician did you have?

A I had no other physician.

Q You spoke of a surgeon.

A Oh, Dr. Chandler.

Q What was the amount of his bill for services?

A His bill was $100 and he cut it down to $75.

Q Was that paid?

A That was paid; yes, sir.

Q Were you under any obligations to the hospital for payment?

A In the hospital I paid a bill of $25.

Q [*By the Court.*] This is additional to the $75, I understand you?

A Sir?

Q Additional to the $75?

A There was $25 at the hospital and $75 for the surgeon.

Q [*By Mr. Kocher.*] You have told us that you were discharged because you could not get around lively enough, I think you said?

A Yes, sir.

Q How long was it before you obtained new employment?

A Ten weeks.

Q What were you receiving from Roe & Conover?

A $13 a week.

Q And what are you receiving where you are employed now?

A I am receiving to-day $13 a week.

Q Are you as able to attend to your employment to-day as you were before the accident?

Objected to as leading.

Objection sustained.

[Question withdrawn.]

Q What effect upon your ordinary life has this accident had? Is there any—

The Court. You mean at the present time?

Mr. Kocher. At the present time.

Q [*By the Court.*] What is your present condition consequent upon this accident?

A Well, my present condition is that my—before that my knee never got tired; now, at the present time, every once in awhile my knee gets tired and troubles me.

Q [*By Mr. Kocher.*] And can you engage in all your wonted sports and employments and occupations to-day that you could before the accident?

A Before the accident I was able to ride a bicycle, which to-day I am not able to do.

Q What advantage was that to you, if any?

A I used to ride back and forth from my work.

Q Did you incur any further liability for services of nurses or otherwise by reason of this accident?

A There was a small druggist bill, and then there was charges for transportation to and from the hospital, and from the doctor's to my home when I was hurt.

Q What did that amount to?

A I believe it amounted to about a dollar and a half for the three; and then the doctor's bill, I believe, was somewhere around a dollar; I don't exactly remember what it was.

By the Court.

Q What bill is that?

A About a dollar and a half for the transportation charges and about a dollar for the druggist.

Q That is what you mean by the doctor—the druggist?

A I meant the druggist.

Q A dollar and a half for transportation and a dollar for the druggist?

A Yes, sir.

Cross examination by Mr. Depue.

Q How old are you?

A Twenty-four.

Q And where do you live?

A You have to speak a little louder; I am kind of deaf, please.

Q Where do you live?

A I live 45 Avon Place, in the city.

Q How long have you lived there?

A I think I lived there a little over a year.

Q And before that where did you live?

A Before that, 1195 Broad street.

Q That is. with your father?

A Yes, sir.

Q Your father's residence?

A Yes, sir.

Q You are living alone now?

A Yes, sir.

Q Boarding?

A No, sir; keeping house.

Q Keeping house?

A Yes, sir.

Q From that I take it that you are married?

A Yes, sir.

Q And have been married within the last year or so?

A No, sir; I have been married about ten years.

By the Court.

Q How long?

Mr. Depue. About ten years.

Q How many years?

A Ten.

Q What did you say your age was?

A Twenty-four—I mean thirty-four. Did I say twenty-four.

By Mr. Depue.

Q When were you first employed at Roe & Conover's?

A I believe I worked at Mr. Roe & Conover's about three years.

Q Three years before this accident or two years before?

A Two years before it.

Q. And you had worked in other places before that?

A Yes, sir.

Q Was your business that of hardware clerk?

A I was assistant shipping clerk in a house in New York.

Q A hardware house?

A Plumbing supply house.

Q Just before you went to Roe & Conover's?

A I think it was a little time elapsed, around two months, something like that.

Q And how long were in that shipping house in New York?

A About eleven years.

Q Your duties at Roe & Conover's were those of a general clerk and salesman, I take it?

A Yes, sir.

Q You saw the customers and took orders and got out the materials to fill them?

A Got out and packed them, both.

Q What part of the building did you work in?

A I worked in the Mechanic street end.

Q That is the rear part of the store?

A Yes, sir.

Q All the time that you were there, for the two years that you were there?

A Yes, sir.

Q What department is that?

A A little before I was hurt, the department—there

used to be two separate departments; a while before I was hurt they were divided and they were all put in one; before that they were all separate, and then they were transferred into one department a short time before I was hurt. I was working principally in the plumbing supply.

Q Abou how large a room was that that you worked in?

A I should judge it was very near the size of this.

Q It was a large room?

A Yes, sir.

Q And on either wall there are little boxes or compartments where the goods are kept?

A Yes, sir.

Q And down the middle of the room there is a sort of a double shelving?

A Yes, sir.

Q With pigeon-holes of the same kind in it?

A Yes, sir.

Q What part of the room were you in when you were hurt?

A I was on the side towards the driveway.

Q Is that the side towards the Pennsylvania Railroad or the side towards Broad street?

A The side towards the Pennsylvania Railroad.

Q And what part of the store?

A Well, I couldn't tell exactly what part of the store it was.

Q Front or back?

A I judge it was further front than back, but I couldn't exactly say.

Q How many of these trolley ladders are there along that side of the building?

A I couldn't say.

Q Could you say whether there were two or three or four?

A I don't know how many there were.

Q There was more than one?

A There was more than one.

Q Now, these trolley ladders are suspended from an iron pipe supported on brackets against the casing, aren't they?

A The iron pipe is the track.

Q And it is about an inch in outside diameter?

A Something like that.

Q And is supported by little brackets underneath?

A Yes, sir.

Q Which would not interfere with the operation of the wheels?

A No, sir.

Q And these ladders have seven or eight steps?

A Yes, sir.

Q And at the top on each side is a fitting with two grooved wheels, I think you said?

A Yes, sir.

Q Wheels five or six inches, perhaps, in diameter?

A Yes, sir.

Q And perhaps an inch or an inch and a quarter through?

A Yes, sir.

Q With a deep groove that fitted over the pipe; that is right, isn't it?

A There is a groove that fitted over the pipe; yes, sir.

Q And those wheels hung on the pipe as a track?

A Yes, sir.

Q The lower part of the shelving, we will call it, was deeper than the upper part, was it not?

A I don't quite understand what you mean.

Q About three feet up from the floor there was a little platform?

A Yes, sir; about three feet up from the floor.

Q And the little pigeon-holes or compartments below that were accordingly deeper than those above?

A They extended out further from the wall. Is that what you mean?

Q Yes, that is what I mean. A matter of fifteen or eighteen inches, perhaps?

A A matter of a foot; I don't know exactly how much.

Q And then from there on the pigeon-holes went up against the wall?

A Yes, sir.

Q And this ladder was perhaps seven or eight feet long?

A Something like that.

Q And there were two rubber-covered rollers that ran against this ledge, were there not, so as to permit the free movement of the ladder back and forth?

A Yes, sir.

Q And about three steps of the ladder were below that and the rest were above?

A Yes, sir.

Q Now, on the upper part of the ladder under where the track was there were little iron points or lugs, were there not, to keep the ladder from coming off the track?

A Yes, sir.

Q Those were about an inch and a half or perphaps a little more than that in length?

A Yes, sir.

Q So that if the ladder should be lifted up these lugs should strike the under part of the pipe?

A Yes, sir.

Q These lugs were part of the casting which fastened the wheels to the top of the ladder?

A Yes, sir.

Q And they were of iron?

A Yes, sir.

Q And were somewhat thicker on the end next the casting than on the outer end?

A I couldn't say as to that; I never—

Q You never examined them closely enough to see that?

A No, sir.

Q There was one under each wheel on each side?

A Yes, sir.

The Court. What do you mean by "each side?"

Mr. Depue. On each side of the ladder, there were two wheels.

The Court. One under each wheel?

Mr. Depue. One under each wheel, yes.

Q How long had this ladder been in use there, to your knowledge?

A As long as I was working on that side.

Q How long was it that you were working on that side?

A About four or five weeks.

Q And there were similar ladders on the other side, were there not?

A Similar ladders all through the building.

Q The building was equipped with this same sort of apparatus all the way through?

A As far as I know.

Q And you had occasion to use those different ladders from time to time?

A Yes, sir.

Q As you went to different parts of the store and wanted something up high, you would take the ladder nearest it and run it along in front of the place where what you wanted was, and then climb up and get it?

A Yes, sir.

Q And that was, of course, a frequent occurrence?

A Yes, sir.

Q You did it fifteen or twenty times a day and perhaps more?

A Some days it would be quite often and other days very seldom.

Q Was the store you worked in in New York equipped with trolley ladders, too?

A No, sir.

Q They did not have those there?

A No, sir.

Q How high up was the compartment from which you were getting this fitting, or whatever it was, at this time?

A About six or seven feet.

Q And on what step of the ladder were you standing?

A I was on the second or third step.

Q From the bottom?

A From the bottom; yes, sir.

Q That is, you were standing about on a level with the ledge?

A About that.

Q And how near was the ladder to the place that you were getting this from?

A The ladder was right alongside of it.

Q You say it was right alongside the ladder?

A Yes, sir.

Q Were you leaning out to get at it?

A You have to lean on account of the ladder is quite a little distance out from the shelving.

Q You mean you were leaning towards the wall?

A Leaning towards the side of the ladder, reach in the bin—

Q I do not think we quite understand each other, Mr. Rogers. The ladder, we will say, was here [indicating].

A Yes, sir.

Q And the shelves and pigeon-holes were back here?

A Yes, sir.

Q And how far from the side of the ladder measured in that direction was the pigeon-hole?

The Court. You are presuming that he was leaning to the right.

Q Which side of the ladder were you leaning from?

A I couldn't say.

Q The side towards which you were leaning to the pigeon-hole for what you were going to get?

A I think about six inches.

By the Court.

Q What is it you say was about six inches?

A The pigeon-holes where the castings were kept from the side of the ladder.

Q Six inches from the side of the ladder?

A Yes, sir.

By Mr. Depue.

Q The pigeon-holes went above the track on which the ladder ran, did they not?

A The pigeon-holes went up higher towards the wall than the top of the ladder.

Q All the way up to the ceiling?

A Up to the ceiling or very close to it.

Q So that sometimes it was necessary for you to stand on the top step of the ladder?

A Well, you couldn't exactly stand on the top step, on account you would have to keep hold of part of the ladder while you were getting these fittings.

Q Well, next to the top step, perhaps?

A One or two steps from the top.

Q About two steps from the top?

A Two steps from the top.

Q [*By the Court,*] If you stood two steps from the top could you reach the highest pigeon-hole?

A Yes, sir.

Q [*By Mr. Depue.*] And the steps were about a foot apart?

A About that.

Q Perhaps a little over. These ladders were permanent in the sense that they were fixed on the side of the store where they were to be used?

A Yes, sir.

Q They were not interchangeable, so that you could take one from one side to the other?

A No, sir.

Q Did you ever know that to be done—a ladder to be moved from one side of the store to another or from one track to another?

A No, sir; I did not.

Q What doctor did you go to first, Mr. Rogers?

A Dr. Rogers, my brother.

Q Did you go to any other doctor?

A And he called up Dr. Johnson.

Q Were you treated by any other doctor?

A Only the surgeon that done the operation.

Q Did not Roe & Conover send you or offer to send you to a doctor?

A Mr. Roe asked me to go down and see—I believe the doctor's name was Dr. Seidler; I am not positive; some doctor on Ferry street, I think.

Q Mr. Roe suggested that you do that?

A He sent me to some doctor; he asked me to go down and see him.

[*By the Court.*] Did you do so?

A Yes, sir.

[*Mr. Depue.*] Did you go more than once?

A Only once.

Q Now, I think you said that you were away from the store for thirteen weeks, or am I wrong about that?

A I think it was longer; I think it was about four months I was away from the store.

Q During that time Roe & Conover paid your weekly salary?

A Yes, sir.

Q And kept your place open for you?

A Yes, sir.

Q And took you back when you were able to come?

A Yes, sir.

Q And paid you the same salary that you had received theretofore?

A Yes, sir.

Q How long was it that you worked there after you went back?

A I think it would be about eight months.

Q Wasn't it longer than that? Wasn't it about May 20, 1901, that you went back?

A That I went back to work, in May?

Q Yes, May 20th.

A What do you mean, longer that I was away from there?

Q You say you were away about four months; that would be in May, wouldn't it?

A That would be in May.

Q Now, when you went back in May, did you not remain until the following April?

A I don't remember exactly the time that it was that I did go way.

Q It was about that time, was it not?

A It was a year or a little over a year.

Re-direct examination by Mr. Kocher.

Q You spoke of these lugs on the casting of the ladder, Mr. Rogers. Where were they located?

A They are located right under the track.

Q Were they located in such a position that a person using the ladder in ordinary use would be apt to see them?

A No, sir; they would not.

Q You spoke of Dr. Seidler. When was it that Mr. Roe told you to go and see Dr. Seidler, having regard to the time of the accident?

A It was a while after I went back.

Q It was after you had recovered from the accident that he asked you to go?

A It was after I went back.

Q How did he come to tell you to go there?

A I was upstairs one day and he told me I had better go to see Dr.Seidler in regard to my accident.

Q Why did he tell you that? What reason—

Objected to.

Q Did he give you any reason?

A No, sir.

Q How long after you returned was this?

A I couldn't say.

Q About one month or six?

A Well, maybe about two months.

Q After you returned. What did you reply to Mr. Roe when he told you to go to see Dr. Seidler?

A He asked me if I went to see him and I said yes.

Q And then what? Did you have any further conversation in regard to the matter?

A And he says, "You received a worse injury than I thought you had;" and he told me I had better go and see Dr. Seidler altogether. I asked him if he would stand the expense, and he said no, that I would have to.

Recross-examination by Mr. Depue.

Q These ladders were open in the back, were they not, Mr. Rogers?

A They were open at the back.

Q There were flat strips of wood up the sides?

A Yes, sir.

Q And across?

A Yes, sir.

Q And open in the back so that you could see through?

A Yes, sir.

Q What was there to prevent you seeing these lugs?

A The wood side that runs up, that these steps were fastened to, the side of the ladder.

Q Then when you were exactly in front of the ladder you could not see the lug?

A You couldn't see them very well from the side.

Q Why not?

A They were the same color as the track—very near the same color. I won't say the same color as the track, because I don't know.

Q No, I do not think you mean that.

A But, still, the lugs were so small in diameter that you wouldn't see them at a glance unless you looked specially for them.

Q The track was black iron pipe, was it not?

A The track was black iron pipe; yes sir.

Q And these fittings were galvanized iron?

A It looked like galvanized iron.

Q They were light gray color?

A Light gray color.

Q I thought you did not mean that they were the same color. There was nothing to prevent your seeing the lugs from the side of the ladder, was there?

A You would have to go up to see it, because there was about that much space between the ladder and the top [indicating], and the ladder kept on going up in that shape all the time [illustrating].

Q You could see through the ladder, couldn't you.

A Yes, sir ; but, still, the steps above would keep you from seeing through ; as you were at the bottom looking up the other steps would shield it.

Q Was there any step at the extreme top of the ladder?

A I couldn't say.

Q You do not remember whether there was or not?

A I do not remember.

Q Were not the lugs on the side of the ladder, beyond the outer side?

A No, the lugs were fastened to the back.

Q Well, that fitting came all around the side, did it not?

A I think the fitting clamped or bolted on the side.

Q And the lug was on the outer edge of that fitting?

A The lug was on the back of the fitting.

Q You are sure of that, are you?

[No response.]

By the Court.

Q You say the fittings were clamped or bolted on the side of the ladder, is that it?

A The idea is that this clamp—if that was part of the ladder coming down, the clamp would be back here to hold it on [illustrating].

By Mr. Depue.

Q The side of the ladder was about half an inch thick?

A I should judge it was thicker than that.

Q Well, about how thick was it?

A I should judge it was about an inch.

Q As much as that?

A I never measured it. I judge it was about an inch.

Q You think it would be about as much as that, without having measured?

A I think it was about that.

By the Court.

Q As I understand you, your idea is this: If that is the side of the ladder, the fitting was clamped on the face or edge of the side of the ladder which was nearest to the wall [illustrating]?

A Yes, sir.

Q How wide was the ladder, if you know?

A I judge the ladder was about sixteen inches, sixteen to eighteen inches.

Q What was it constructed of?

A Wood.

Q What was there for you to hold on by?

A There was the side of the ladder to hold on to.

Q I understood you to say that you did not remember whether you were reaching out on the righthand side of the ladder or on the lefthand side?

A I don't remember which; no, sir.

Q You do not remember whether you were using your right hand or your left hand?

A I don't remember which hand.

Q Which ever hand you were using, do you remember what you were doing with the other hand?

A I was holding on to the ladder with the other hand.

Q At what point?

A On the other side of the ladder from where I was reaching.

Q On the side?

A On the side.

Q Were the pigeon-holes above the point where their depth diminished—you know what I mean—were they of uniform size?

A Some of them were broader than others.

Q Of the same depth?

A The same depth and the same height, if I ain't mistaken, and different widths.

Q The same height, but some broader?

A Some broader.

Q How large was the pigeon-hole that you were trying to get this casting from, if you remember?

A I couldn't say the size of the pigeon-hole.

Q What was the size of the casting that you were going to get?

A I don't remember.

Q Was it part of an order?

A Part of an order; yes, sir.

Q What was the order?

A I don't remember what it was now.

Q Was it iron or lead that you were trying to get?

A Iron.

Q How did you know where to look for it?

A The names were marked over them or underneath, either one or the other.

Q On the pigeon-hole?

A Yes, sir.

Q Either over or under the pigeon-hole?

A Yes, sir.

Q In what pigeon-hole were you looking?

A I don't remember what it was for now.

Q Do you remember whether it was a wide pigeon-hole or a narrow pigeon-hole?

A I don't remember.

Q You have no idea what the article was that you were trying to get?

A No, sir; I have not.

By Mr. Kocher.

Q How wide are these pigeon-holes; how wide do they average?

A I couldn't say; they differ.

Q Oh, about? Are they a few inches or a couple of feet?

A I should say that they went from about six inches to about a foot.

By Mr. Depue.

Q This pigeon-hole that you were looking for was about on a level with the top of the ladder, was it not, Mr. Rogers?

A No, sir; it wouldn't be quite as high as that.

Q Not quite as high as that?

A No, sir.

Q Do you recollect how near the ladder was to the pigeon-hole when you first went there to look for what you were after?

A I had to move the ladder about a foot before I got on it?

Q You had to move it about a foot?

A Yes, sir; that brought me within about six inches of it.

Q And you took hold of the ladder and moved it as you were looking up to the pigeon-hole?

A I moved the ladder before I got on it.

Q And while you where looking up to see what pigeon-hole to move it to?

A Yes, sir; but I wasn't on the ladder when I moved it.

Q No, you were standing on the floor?

A Yes, sir.

Q And with one hand you moved it to where you wanted to move it?

A Yes, sir.

By Mr. Kocher.

Q What were you looking at when you were moving this ladder, Mr. Rogers?

A Well, I was looking at the pigeon-hole, so that I could put it right near to it.

Q Was the ladder within your range of vision?

A Yes, sir; it was only about a foot; I only had to move it about a foot; I stood still and moved the ladder.

Q But you were seeking the pigeon-hole with your eye at the time?

A Yes, sir.

WILLIAM J. CHANDLER, sworn in behalf of plaintiff.

Direct examination by Mr. Kocher.

Q Doctor, you are a practicing physician?

A Yes, sir.

Q How long have you been engaged in practice?

A Between thirty and thirty-five years.

Q What experience, if any, have you had in surgical operations?

A Well, mainly surgical for the larger part of that time, connected with the hospitals of Orange and Newark.

Q What hospital are you connected with in Newark?

A St. Barnabas Hospital.

Q Do you know the plaintiff in this action, Mr. Rogers?

A I do.

Q Do you recall ever having performed an operation on him?

A I do.

Q When?

A Well, two or three years ago; I didn't refresh my memory with the exact date.

Q Where?

A St. Barnabas Hospital.

Q What was the nature of the operation?

A What is called wiring the patella, which is an operation for the fracture of the patella, the kneecap.

Q Will you be kind enough to tell us the condition of

the plaintiff's knee at the time you performed this operation?

A The patella was broken into two pieces transversally, so that one piece would be drawn from two to four inches away from the lower fragment. Union of such pieces is almost impossible by all ordinary means of placing the limb straight and other processes; you are not able to get bony union; but if you open the joint and fasten it together, secure it with wire or some foreign suturing material, you can bring the two broken pieces closely together, and then when the new bone is thrown out it welds into one solid piece and gives the most useful and perfect result that is obtainable.

Q By the term "patella" you mean the kneecap?

A The kneecap; yes, sir.

Q This operation which you have described, was it performed upon this plaintiff?

A Yes, sir.

Q Is an operation of that character usually attended with much pain?

A Well, a person is put under an anaesthetic and the operation is not painful.

Q But the after results?

A Well, you can't break a bone without having some pain; there is no extensive amount of pain. Of course, it is a painful operation; that is, it is called so. There is more or less pain afterwards, but, still, there is not an extensive amount.

Q How much experience have you had in regard to injuries of this character?

A Well, I have done a good many of those operations; I don't know just how many.

Q From your experience, would you consider the injury to this plaintiff a severe one, or otherwise?

Objected to.

Q Of what character was this injury in regard to its severity?

Objected to.

The Court. [After discussion.] The witness may, no doubt, be asked whether the patella was fractured to a slight extent or to a considerable extent, and to what extent the method employed was effective in removing the injury, and

what he knows about the subject and the history of the case, if anything.

Q Was the knee of this plaintiff fractured to a slight extent or to a great extent?

Objected to.

A A great extent.

The Court. I will allow this question.

Q How do breaks of the patella compare with other broken bones, in regard to their seriousness?

Objected to.

The Court. I would suggest that the examination be confined to this particular case or to injuries of this particular class.

Q Now, how successful was the operation performed by you?

A I consider it a very successful operation; there is perfect union there, very firm and very close.

Q What connection have you had with this patient, if any, after he had left the hospital?

A I saw him several times at his house during his convalescence.

Q Examining the—

A Examined the condition of the joint, and after the splint which it was put in was taken off, in making flexion of the joint in order to get it into a more perfect condition.

Q In your opinion, will this fracture ever heal in such a manner that the limb will be in as good condition as before the accident?

Mr. Depue. The fracture has healed, I understood him to say.

[Question withdrawn.]

Q You have said that the fracture has healed?

A Yes, sir.

Q Are there any after effects, after the healing of the fracture, upon a man's locomotion.

A Of course there is considerable stiffness of the joint lasting for a considerable period of time, variable, from three months to a year or more.

Q Has it been your experience that this stiffness wears away in time?

A It generally wears away.

Q And from your knowledge of this case, from the his-

tory of this case, is it your opinion that the stiffness will ever wear away?

A Well, I think, after this lapse of time, there will probably not be very much improvement in his condition; the stiffness that he now has will probably be maintained.

Cross-examination by Mr. Depue.

Q This was a simple fracture of the kneecap, was it not, Doctor?

A In the classification of fractures as simple and compound; the skin was not broken.

Q And it was a transverse fracture?

A A transverse fracture.

Q The kneecap, of course, is more or less movable under normal conditions?

A Yes.

Q And I understand that the object of your tying the parts together was to keep them together so that the bone might knit?

A Yes, sir.

Q Otherwise, on account of the mobility of the kneecap, there would not be an opportunity for the two edges to knit?

A On account of the mobility and the separation.

Q More or less of a loose joint?

A It is the tendency in fragments not only to move by one another, but to separate, so that you don't get the bone to unite, and it is too long for any ligament serviceable to perform—

Q And after this bone had knit, as you describe, and you removed the splints and bandages, then, I understand, you moved it more or less for the purpose of restoring the motion?

A Yes, sir.

Q That was the object of that manipulation?

A Yes, sir.

Q How long did you continue that treatment?

A I can't say now just how long; we generally see a patient in that way for several months after an operation.

By the Court.

Q Doctor, when did you last examine the plaintiff?

A Well, I should have to ask the plaintiff for that, for I really couldn't tell you; I couldn't say from my own knowledge when it was, only that my custom is to see a patient for several months after an operation, and then tell him to come and let me know if things are not all right.

Q You have used the expression that the stiffness that he now has will probably be maintained. You have not made a recent examination, I understand?

A I saw the patient a few days ago, and saw about the amount of flexion he had of the joint.

Q You did not understand me to refer in my question to that examination?

A I did.

Q I asked you when you last examined him?

A At that time.

Q Only a few days ago?

A A few days ago.

Q What did you find then?

A I find that he is able to flex the knee to about a right angle.

Q What do you mean by that?

A A right angle, an angle of ninety degrees.

Q Please stand up and show the jury what you mean.

A [Witness stands and illustrates.] The leg is flexed so that the angle here—the angle of this bone with the bones here is ninety degrees.

Q The angle of the bones of the lower leg—

A The angle of the bone of the lower leg with the thigh forms an angle of about ninety degrees. Ordinarily you can flex the knee further up, but in this case you can flex it to about a right angle; and after the lapse of time—I don't remember exactly; two or three years—is probably as much as it will get.

Q And what does that stiffness come from?

A Well, it comes from the fact that the joint has not been bent fully in that time, and can't be, owing to the nature of the injury. If I can show you—the injury is right here at this point [indicating], and if you make too much flexion you will draw those fragments apart. You have to wait and keep the limb immobile, perfectly straight; it is put perfectly straight, in this position [illustrating], and it has to be kept

so for some time to get perfect union. After that time gradual flexion is made, until it is brought up as far as possible, and adhesions which sometimes form in a joint during that straightened period will prevent its being flexed. It is one of the results of fractures of the patella, where whatever mode of treatment is adopted, it has to be kept extended for a considerable length of time, and stiffness of the joint is one of the results of such a fracture.

Q And the adhesions, are they bony formations?

A They are seldom bony; they are more frequently what are called adhesions in the joint of the tendons and softer parts, which cannot be broken up without danger of refracturing the patella.

Q The trouble is not that the patella itself may break again at the place where it knit, but that the joint has been made clumsy by these adhesions?

A I don't know that I understand your question.

The Court. Very likely I have not stated it with any great accuracy. We will let it stand on what you have said, Doctor.

Redirect examination by Mr. Kocher.

Q What effect, if any, would a break of this character have upon the liability of a refracture?

A There is a greater danger of a refracture after a previous fracture of the patella; it is one of the peculiarities of this bone that once having been fractured it is more liable to refracture.

Q To any great degree?

A To a very decided degree; it has been a noticeable feature of fractures of the patella, that persons having a fracture at one time will very often within one, two or three or four years have another fracture of the same bone.

Q A second fracture of that character, is that or is it not more difficult to treat than the original fracture?

Objected to.

[Question withdrawn.]

Recross examination by Mr. Depue.

Q Doctor, is the liability of the kneecap to fracture a second time, that you speak of, a liability to fracture along the lines of the old one or in a different place?

A Well, it is sometimes along that line and sometimes in

a new place ; but it is a peculiarity of those fractures that a second one is not infrequent at all.

Q Usually a bone that has been fractured is the strongest at the place of fracture, is it not?

A The long bones are often after two or three years stronger there than elsewhere.

Q Because there is thrown out a little sort of collar around the bone?

A Yes, sir ; it is so with the long bones ; it is not so with what are called the short bones.

Q But the patella, you say, is quite as likely to fracture along the old line as in a new place?

A Yes, sir.

Q Is there any difference in that respect?

A I don't know that there is.

Q And is that due to the size of the bone in your judgment?

A I don't know that it has been explained, only that the clinical fact has been observed by all who have noticed such fractures.

Q It requires some degree of force or violence to fracture the kneecap?

A It requires some force ; that is sometimes entirely muscular ; the muscles themselves may do it ; and, again, it may be the result of a fall or blow.

Q It would still require a fall or a blow to fracture it the second time, would it not?

A Not necessarily ; a person may slip on the ice and not strike the knee at all, and the muscular effort in catching himself will fracture it.

Q What I meant to ask is that there must be some cause?

A Yes, sir ; there must be some cause.

Q There must be some cause for the second fracture, as there was for the first?

A There must be a cause ; yes, sir.

Q And a cause of similar force and intensity?

A Yes, sir.

Q [*By the Court.*] Well, Doctor, I understood you to say that there was a greater danger of refracture than there was of an original fracture?

A Well, owing to the fact that such things are often repeated, I should say there was greater danger.

Q [*By Mr. Depue.*] Injury to a kneecap is not an unusual thing, is it?

A No, sir.

Q It is rather an exposed part of the human anatomy?

A Yes, sir.

Q It is subjected to severe strains at times and is rather exposed to injury?

A Yes; it is not one of the most frequent fractures, but, still, it is not an uncommon one at all.

CHARLES R. WILCOX, sworn in behalf of plaintiff.

Direct examination by Mr. Kocher.

Q Mr. Wilcox, what is your business?

A I am a salesman.

Q In what capacity, for what line of goods?

A Hardware, tools.

Q Where were you employed on the 19th of January, 1901?

A Roe & Conover.

Q How long have you been in their employ?

A Seven years.

Q In what capacity?

A At that time, do you mean?

Q At that time?

A Oh, at that time I was supposed to be at the head of the steam and plumbing department.

Q How long had you been working there in that capacity?

A Well, at the head of the steam department, perhaps about three or four years.

Q Was this plaintiff employed in your department?

A Yes, sir.

Q How were the goods stored in your department—the steam-fitting department?

A They were put in bins alongside of the walls and the middle partition in the middle of the floor.

Q How high did they extend?

A To the ceiling.

Q What means were supplied, if any, for reaching the upper bins?

A Rolling ladders.

Q Will you describe the ladders?

A Why, the ladders, I should judge, were about eight feet long, and had a roller—had two rollers on the top, and it ran on a track made of iron tubing, perhaps about an inch in diameter.

Q Did you see any accident occur on the 21st of—

A I did not.

Q Or 19th of January?

A No, sir.

Q Have you any knowledge of any accident having occurred?

A I have.

Q Will you tell us what you know about it?

A Well, I knew that Mr. Rogers fell from the ladder; that is all.

Q Do you know which ladder Mr. Rogers fell from?

A Which one?

Q Yes.

A I do, yes.

Q Do you know anything of the condition of that ladder?

A Yes.

Q Prior to the accident?

A Yes.

Q Tell us what condition the ladder was in?

A Well, that particular ladder had a—had one of the lugs off underneath the roller, which allowed it to leave the track.

Q Describe this lug, if you will, please?

A Well, on the upright to the—on the top end of the uprights of the ladder there was a casting that the two rollers were fastened into, and underneath the roller and underneath the track there is a little lug that came up in under, like this [illustrating], perhaps about an inch or an inch and a quarter long, and those two lugs extended underneath the track, so that in case a ladder was lifted up it would strike the lug against the track, which would prevent the ladder from leaving the track; and one of those lugs was off.

Q What opportunity would a person using the ladder have, in ordinary use of the ladder, of seeing these lugs?

Objected to

[Question withdrawn.]

Q How long had you been using those ladders?

The Court. I think that the examination may show the physical condition in relation to the parts of the ladder, while the opportunity that a person would have to see it would be an inference for the jury to draw from the facts.

Q You may answer the question.

Mr. Depue. The Court ruled that out.

The Court. I think your question called for an inference. Get the facts out and the jury will draw the inference.

Q In your employment what use were you called upon to make of these ladders?

A Used them to get out orders.

Q How frequently would you use them?

A That would be hard to say; I was using them continually every day.

Q When did you first learn of this lug being broken?

A Oh, I should say about a year or two before this accident.

Q A year before the accident?

Mr. Depue. A year or two he said.

Q A year or two before the accident. What was the object of these lugs?

A To prevent the ladder from leaving the rail or the track.

The Court. I think your question contained the word "broken"—that the lug was broken. I do not think the witness said it was broken; he said it was missing.

Q Was the lug missing or broken?

A It was broken; the lug was part of the casting of the top of the ladder.

[*By the Court.*] That is to say, being part of the casting, if the lug was missing it would be because the lug was broken?

A Yes, sir; it was broken, that casting.

Q [*By Mr. Kocher.*] If it was undertaken to repair such a broken lug, what would be necessary?

A A new casting.

Q To your knowledge, were any such castings kept about the store?

Objected to as immaterial.

A No, sir.

Mr. Depue. They are not required to keep extra castings in the store, it seems to me.

The Court. It seems to me to bear on the facility with which the difficulty could be remedied. I think I will allow it.

Defendant's counsel pray an exception.

[Question and answer read.]

Q How long had you been using such ladders prior to this accident, Mr. Wilcox?

A I don't remember just when the ladders were installed there, but since they were put in use.

Q Oh, approximately?

A Why, I should say about five years.

Q What effect upon the safety of the ladder would the absence of this lug have?

Objected to.

The Court. [After discussion.] The question is a pretty broad one. We have the fact that these lugs were designed to serve a certain purpose, to wit, that of keeping the ladder on the track, and that they were situated a very short distance, I think an inch or an inch and a quarter, under each roller, or, perhaps I ought to say, under the track beneath the place where the roller travelled upon it, so that if the ladder should be lifted up, the lugs would strike on the side of the track, and so keep it in position. What would probably happen if the lugs were not there is rather a speculative inquiry. We know what the object of their being there was, and I think the question is too indefinite to be legal.

Cross examination by Mr. Depue.

Q How long had you been employed at Roe & Conover's, Mr. Wilcox?

A How long?

Q Yes.

A I was employed there nearly nine years.

Q Before this occurrence?

A No; I went there in 1894.

Q You went there in 1894?

A Yes, sir.

Q Are you working there now?

A No, sir.

Q When did you leave?

A On the 3d of July.

Q Of this year?

A Yes, sir.

Q And your duties were those of a clerk in the plumbers' supply department while you were there?

A Yes, sir; in the steam supply—steam and plumbing supply.

Q That is the department in which Mr. Rogers worked?

A Yes, sir.

Q And his duties were, generally speaking, the same as yours?

A Well, I was supposed to be the foreman or the head of the department, and he was one of the—

Q Oh, you were in charge of that department?

A Yes.

Q But you also acted as salesman?

A Yes, sir.

Q And filled orders and that kind of thing, the same way that he did?

A Yes, sir.

Q So that you were doing the same thing?

A Practically; yes, sir.

Q Although you had some little authority over him, perhaps?

A Yes.

Q How long had Rogers worked in that department?

A Which department; in both departments do you mean?

Q Well, they were one, were they not?

A Well, they were at that time, but they hadn't been but a short time.

Q How long had they been consolidated?

A Why I don't just remember; I think perhaps six or eight weeks?

Q How long had you worked in this Mechanic street end of the building?

A How long had I worked there?

Q Yes.

A Ever since it had been built.

Q How long was that?

A It was built in 1896.

Q And how long did Rogers work in that building?

A Well, I don't remember; perhaps two or three years.

Q You mean in this same room downstairs where he was hurt?

A Well, no, he hadn't worked down there as long as that.

Q He hadn't? About how long had he worked down there?

A Well, in that room, I should say about two months.

Q How many of these ladders were there in that room?

A I think there were nine.

Q And how were they distributed?

A There were two on each side of the middle partition, and there was three on the east side and two on the west side.

Q There were three, then, on the side that—

A That he was hurt.

Q That he was hurt?

A Yes, sir.

Q [*By the Court.*] That was the east side, was it not?

A That was the east side.

Q [*By Mr. Depue.*] Was there any greater length of shelving on that side than on the west side?

A Yes, sir.

Q How much more?

A Well, there was half again as much.

Q Is that the reason why there were three ladders there instead of two?

A Yes.

Q The only reason, as far as you know?

A Well, as far as I know; the shelving was considerably longer and it required the three ladders—heavier stock.

Q Your duties required you from time to time to go up and down these ladders to get things, in the same way that Rogers did?

A Yes.

Q And while he was there he used those ladders right along?

A The time he was in there; yes, sir.

Q First one and then the other?

A Yes, sir.

Q And had frequently used this particular ladder, had he not?

A I don't know that.

Q Was this ladder the one next to the front of the store?

A As I recollect it, it was the middle ladder.

Q It was the middle ladder?

A Yes, sir.

Q Well, when had you first noticed that this lug was broken?

A I should say a year or two before the accident happened.

Q How did you come to notice it?

A That I don't recall.

Q It is so long ago that you had forgotten about it?

A Yes, sir.

Q These lugs are galvanized iron, aren't they?

A Malleable iron, galvanized.

Q And about an inch and a half long, I think you said?

A About an inch and a half long.

Q And in diameter about— ?

A About half an inch ; yes, sir.

Q About half an inch?

A Three-eights or half an inch.

Q How close was this lug broken to the fitting?

A Right off close to the—it was as close to the body of the fitting as it could be broken.

Q So that the entire lug was gone?

A The entire lug was gone ; yes sir.

Q And there was not even a stump there?

A No, sir.

Q Was this ladder always used in that part of the store?

A Not always ; no, sir.

Q It was used in other parts of the store, too, was it not?

A Yes, sir ; we used that ladder to transfer around the different parts.

Q By reason of the fact that this lug was broken, the ladder could be taken off?

A Yes, sir.

Q And moved to other places?

A Yes, sir.

Q And that was done frequently?

A Only at stock-taking, once a year.

Q You did not transfer it at other times?

A I don't think we did ; no, sir ; I don't remember.

Q Stop and think a minute, Mr. Wilcox. Is it not a fact that that ladder was quite frequently moved from one part of the building to another?

A Well, I don't remember, it is so long ago, how frequently that was.

Q Well, it was at least occasionally, was it not?

A Yes.

Q If any of the clerks happened to want to use a ladder somewhere else he would take that?

A He could take that.

Q And it was used?

A Yes, sir.

Q Any of the clerks that wanted to use the ladder anywhere else would take it?

A Well, yes, they could take it.

Q Well, they did, if they wanted to?

A Yes, sir.

Q You have done it yourself?

A Yes.

Q And others of the clerks have done it?

A That I couldn't say for the rest of them.

Q Can you say whether you have ever seen any of the other clerks do it?

A I don't remember as I have, no; I might have, possibly; I wouldn't swear to it.

Q Well, it was generally understood there in the department that this ladder could be moved from one place to another?

A Among the steam-fitting men; yes, sir.

Q And that it was convenient, by reason of this condition of the ladder, to move it?

A Yes.

Q You do not recall, as you say, now, how you came to notice that the lug was broken first?

A No, I do not.

Q That was a thing that you could see quite readily, was it not?

A You could if you were looking for it, yes.

Q And were you ever looking for it?

A I never looked for it; no, sir.

Q You saw it without looking for it?

A Well, you couldn't see it very well, no, not without looking for it; it was so situated back of the upright of the ladder that you couldn't see it.

Q If you were in front of the upright you could not see it?

A No, sir.

Q But if you were at the side of the ladder you could see it?

A If you were at the side you could see it.

Q Looking from the side of the ladder from the floor you could see it?

A Yes, sir; if the ladder was placed over here, and you were over here, perhaps a foot or two away, you could see it.

Q That is, if you were looking from a point where the side of the ladder would not prevent your seeing it?

A Yes, sir.

Q It was just the width of the side of the ladder, was it?

A If you stood away from that, if you stood where the steps didn't prevent your seeing it, you could see it; you could see it if the ladder was placed over here and you were in this position [illustrating].

Q Could you not see it from the side of the front of the ladder, as long as the side piece of the ladder did not obscure your view?

A You could if you stood in a certain position; yes, sir.

Q You could see it in going up and down the ladder, could you not?

A No.

Q Why not?

A Well, I say no. I presume you could if you were looking for it, and stood looking in underneath the rail.

Q If you were looking in that general direction you could see it, could you not?

A That would depend whether you were looking for that or looking right at it or not.

Q If you were looking right at it, you would see it whether you were looking for it or not?

A Certainly.

Q And if you were looking at it, if it was in your line of vision, you would see it just the same as you would see any other object in your line of vision?

A Yes, sir.

Q It was not hidden except as it might have been obscured by the side of the ladder?

A Yes, sir.

Q Those lugs were so long that you could readily see them from the floor, some distance, weren't they?

A Yes, sir; about an inch and a half long.

Q And they were perhaps seven or eight feet from the floor?

A I should judge about seven feet, yes.

Q Not very much above a man's eyes ordinarily; not more than a couple of feet, at any rate, perhaps, above the eyes?

A Yes, about that, two or three feet.

Q Now, this ladder would not come off unless the side with the broken lug was lifted, would it? 10

A No, sir.

Q If you did not touch the ladder it would hang perfectly firm on the lugs; anybody going up on the ladder would simply pull down on the wheels?

A Yes, sir.

Q And the ladder would not tip?

A No, sir.

Q The only tipping would come from your leaning out beyond the side of the ladder?

A Yes, sir. 20

Q To reach for something or for some other purpose; that is so, is it not?

A Yes, sir.

Q Did you see this accident, Mr. Wilcox?

A I did not.

Q Where were you when it happened?

A I was in the rear of the store somewhere, I don't remember just where.

Q Were you the other side of this centre shelving?

A I couldn't say where I stood at the time.

Q At any rate, from where you stood, you did not see it? 30

A No, sir.

Q Whether you could have seen it or not?

A No, sir.

Q So that you could not say from your own knowledge how it happened?

A No, sir.

Q Did Mr Rogers tell you how it happened?

A Well, I think he told me he was reaching for something from the side of the ladder, that was all.

Redirect examination by Mr. Kocher. 40

Q Mr. Wilcox, you said that it was generally under-

stood among the steam-fitting men that that ladder could be taken back and forth?

A Yes, sir.

Q Across the store?

A Yes, sir.

Q Was Mr. Rogers one of the steam-fitting men?

A He was not of the original; no, sir.

Q How long was he in that part before he was injured?

A Oh, I should say about six to eight weeks.

Q What happened to the ladder after the accident, do you know? What position was it in?

Mr. Depue. You mean when he came there and saw it?

Mr. Kocher. Yes.

Q What position was the ladder in when you saw it after the accident?

A As I remember, it was lying down across the barrels; the fitting was lying on the floor.

Q [*By the Court.*] Across the barrels?

A Barrels of fittings; yes, sir.

Q [*By Mr. Kocher.*] You said that the ladder would not leave the track unless the wheel was lifted from the track. What would happen if a person ascended the ladder on the opposite side from the broken lug; would that be sufficient to cause it to leave the track or not?

Objected to.

A If he ascended it straight; no, sir; I don't think it would.

Mr. Depue. I hardly think that is the proper way to prove the fact. Isn't that a matter of inference?

The Court. It is a matter of opinion.

By the Court.

Q Let me see if I understand the relation of these parts. These rolls were wheels made of wood?

A Made of iron.

Q And how deep was the groove, if you know?

A They were only grooved on one side; there was a large flange on one side and a very small flange on the other side—the large flange on the inside next to the shelving.

Q Perhaps I have not expressed myself correctly. Let this pencil represent an iron pipe an inch in diameter; that is the track.

A Yes, sir.

Q On that there rested an iron wheel?

A Yes, sir.

Q Like this thing I had in my hand; which was grooved, as I suppose, to run upon the track. How deep was the groove?

A On this side of your pencil here there is quite a large flange, and on this side there is a very small flange [indicating]. It is a peculiar shaped wheel. The flange is on the—

Q On the side of the wheel, or the roll, we will call it, next to the wall?

A Next to the wall was the wide flange.

Q A deep flange?

A Yes, sir; a wide flange.

Q How wide?

A I should judge half or three-quarters of an inch it projected down over the track.

Q Projected down over half of the diameter of the pipe?

A About that, I should judge; yes, sir.

Q And on the side next to the room, away from the wall, there was a flange not so deep?

A A very small flange.

Q How deep?

A It just laid over the side of the track a very little.

Mr. Depue. I think Mr. Wilcox has got it just the other way.

Q [*By Mr. Depue.*] It is not the deep flange towards the room, so as to take some of the pressure of the ladder against the pipe, and the narrow and comparatively shallow flange on the side towards the wall, where there is no pressure?

A No, I think it is the reverse.

Q [*By the Court.*] Now, how close to the bottom of the pipe did the nearest part of the lug come?

A I should say about three-eighths of an inch or half an inch, possibly.

Q Then the difficulty of detaching one of these ladders from the track would come from the fact that below it, within three-eights of an inch there was the lug, which when you raised the top three-eighths of an inch would strike the under side of the pipe, and there was a flange on each side which would catch as you tried to push it off?

A As you raise your ladder it strikes this lug, and your wide flange on the inside prevents it from pulling off. If you

raised the ladder and the narrow lug was on the inside, you could pull your ladder off very easily.

Q The difficulty was, then, that the lug prevented you from raising the ladder high enough to clear the flange?

A Yes, sir.

Q Did you ever try to detach any of the other ladders?

A Yes.

Q I mean those on which the lugs were both in position?

A We have tried; yes, sir.

Q You, personally?

A Yes, sir.

Q And with what result?

A Couldn't get it off.

Recross-examination by Mr. Depue.

Q How did you come to be making that attempt, Mr. Wilcox?

A Sir?

Q How did you come to be trying to do that?

A In wanting to move a ladder, I presume, some time.

Q You were trying to find the one that did move?

A Yes, sir.

A Juror. Your Honor, I would like to know whether the plaintiff was informed that the lug was off of this ladder.

The Court. Well, this witness must speak as to his own knowledge.

The Juror. That is what I want to know; whether he knows of his own knowledge whether the plaintiff was informed of that fact.

The Court. You mean whether the plaintiff was told of it in so many words?

The Juror. Yes, sir.

By the Court.

Q The question is whether you know, of your own knowledge—

A I don't know.

Q —whether the plaintiff was told by any person that this lug was missing?

A Not to my knowledge.

JOHN MUCHLER sworn in behalf of plaintiff.

Direct examination by Mr. Kocher.

Q Mr. Muchler, what is your business?

A Clerk.

Q Where were you employed in January, 1901 ?

A I was employed in Roe & Conover's then.

Q In what capacity ?

A Well, I was in the plumbing department, plumbing and steam, and all around that way.

Q What department were you employed in on the 19th of January, 1901 ?

A Well, I am not positive in which department I was then.

Q How ?

A I am not positive ; either the plumbing or steam-fitting.

Q Do you recall anything that happened on that day ?

A Well, I wouldn't just exactly know if it was that day or when.

Q You know the plaintiff in this suit ?

A Yes, sir.

Q Where was he employed in January, 1901 ?

A Well, I couldn't say if it was in the steam department or plumbing.

Q It was in Roe & Conover's ?

A Yes, sir ; it was in Roe & Conover's.

Q What, if anything happened to the plaintiff in January, 1901 ?

A Well, I couldn't recollect the date when it was, but—

Q Well, what, if anything, happened to the plaintiff at all when he was in the employ of Roe & Conover ?

A He fell down the ladder.

Q Did you see him fall ?

A I didn't see him fall, but I seen him right after he did fall.

Q Did you see him just before he fell ?

A No, sir ; I didn't see him on the ladder, but I seen him right when he fell, because I heard the noise ; I was in the other end of the building then.

Q Where was the ladder when you saw it after the accident ?

A I kind of think it hung down sideways, and when he fell there I picked it up and laid it on the barrels.

Q Now' it is in evidence here that there were some lugs on the ladder to keep the wheels from leaving the track. Do

you know anything about the condition of this ladder at the time of or before the accident?

A Well, I know it was broken after, but I wouldn't be sure whether it was broke before; I know there was something the matter with one of them, but I don't know which one it was.

Q You know there was something the matter with one of them?

A Yes, sir.

Q What was the matter with this one?

A I never looked.

Q How do you know there was something the matter with it?

A I know something was the matter, because after he fell I been told—

Q Never mind what you were told. You said you knew before the accident that there was something the matter with one of the ladders, did you?

A There was something the matter with one of them; yes, sir.

Q How do you know?

A Because it used to come off the track once in a while when you got on sideways.

Q How long were you employed in that department?

A Well, I was always on that same floor.

Q How?

A I was nearly always on that same floor there.

Q How long were you in the employ of Roe & Conover?

A About seven years.

Q How long were you in the steam department at the time this accident happened; how long had you been working there?

A Well, about—I was a couple of years downstairs and then about two years in the steam department, and then in the plumbing department.

Q You had been in the steam department about two years before this accident?

A Well, that I don't know, how long I was there before that happened, because I worked all over—not exactly in the one department.

Cross examination by Mr. Depue.

Q Are you working for Roe & Conover now?

A No, sir.

Q When did you leave them?

A Labor Day, the week before that.

Q This last year?

A Yes, sir.

Q You worked pretty much all over the building, I understand?

A Yes, sir.

Q You did not work in this department where Rogers was?

A No, sir; I worked all over the building most of the time.

Q And knew one of the ladders had a broken lug?

A Yes, sir.

Q And that was the ladder you used to move from one track to another if you wanted a ladder somewhere else?

A Well, there was ladders all over the place, anyway, on each side.

Q This ladder with the broken lug was the one that was moved around from place to place, was it not?

A That I don't know any more; I don't know if we could move that from one place to another, because we had ladders on every track in the building.

Q Did you not say that this was a ladder that they used to move from one track to another?

A No, sir.

The Court. I do not think he said that.

Mr. Depue. I so understood him.

Q How long had you known this lug to be broken?

A Well, I ain't sure about that, how long it was broken.

Q You do not know how long it was broken?

A No, sir.

Q How did you come to find out that it was broken?

A Well, we been using it right along, going up and down; may be sometimes it slipped a little, and you had to watch out for it.

Q You could see in going up and down the ladder that the lug was broken, could you not?

A Yes, sir; if you went up sideways it might go off, and if you went up in the middle it was all right.

Q And as you went up and down the ladder you could see that it was broken?

A Yes, sir.

Q And you had to be careful in using it?

A Yes, sir.

Q There was no trouble about that?

A No, sir.

Redirect examination by Mr. Kocher.

Q Did you know that this lug on this ladder was broken?

A Well, I wasn't sure of that until after he fell; then, of course, I seen that it was broke.

Q Then as a matter of fact, before the ladder fell you did not know whether the lug was broken or not?

A No, sir; I wasn't exactly sure about that.

Q You testified on your cross-examination that you could see that this lug was broken in going up and down the ladder, is that so?

A Yes, sir; if you stepped on from the side.

Q You do not understand my question. I said you testified that in going up and down the ladder you could notice whether the lug was broken or not, by seeing that it was snapped off, is that so?

A You could see it if you watched out for it.

Q Did you ever notice in going up and down the ladder that the lug was broken, from seeing, from observation?

A I only noticed when she came off; you watch out for it; that is all; but I never noticed the lug being broken.

Q Then, in going up and down the ladder you found that it slipped occasionally?

A Yes, sir.

Q But if you went up the centre of the ladder it would not slip?

A No, sir.

By the Court.

Q At the time of the accident in what part of the building was the steam department?

A That was on the righthand side coming in from Mechanic street.

Q On the righthand side coming in from Mechanic street?

A Yes, sir.

Q That is the rear of the building, I suppose?

A Yes, sir.

Q The building fronts on Market street?

A Yes, sir.

Q And runs through to Mechanic street?

A Yes, sir.

Q And the steam-fitting department was on your right-hand as you enter from Mechanic street?

A Yes, sir.

Q On the first floor?

A Yes, sir; on the first floor.

Q And where at that time was the plumbing department?

A Well, the plumbing department was on the other side, where the brass goods was; that was on the other side; on the same floor, but on the other side of the partition.

Q The plumbing department was on the same floor, but on the other side?

A Yes, sir.

Q What do you mean by "the other side"?

A Well, as the partition runs through, through the floor there, there is pigeon-holes in where they keep the goods.

Q As you go through, you say, there is a partition?

A Yes, sir.

Q A partition?

A Yes, sir.

Q Well, as you enter from Mechanic street where is the partition with reference to the door?

A Well, it is right in the middle when you come in from the door; there are two aisles, one here and one here [indicating].

Q If you go on the righthand side of the partition you get into the steam-fitting department?

A Yes, sir.

Q And if you go on the lefthand side of it what do you get into?

A Well, it was the plumbing department then.

Q How far did the partition run?

A Well, all through the floor.

Q How near to the Market street door?

A Oh, it was away off from there, because the building don't run all the way through.

Mr. Depue. This is the Mechanic street building; it does not run all the way through to Market street.

Q Oh, the building does not run all the way through?

A No, sir.

Q What was kept in the steam-fitting department?

A Iron pipe fittings or steam-fitting department.

Q And what was kept in the plumbing department?

A There was more brass goods.

Q Were they kept in the same kind of pigeon-holes?

A Well, near the same; yes, sir.

Q The same kind of pigeon-holes in both departments?

A Yes, sir.

Q And were there ladders used in both departments?

A Yes, sir; there were ladders used in both departments.

Q How many openings were there in this partition?

A Well, on this side there were bolts kept and on the other there was fittings kept.

Q Were there doors in the partition, or was it a continuous partition?

A Well, it run about three-quarters of the floor.

Q And at either end of it you could go on either one side of it or the other?

A Yes, sir.

Q Was there any door cut through the partition itself?

A No, sir.

Q But on either side of the partition there were pigeon-holes?

A Yes, sir.

LOUIS H. ROGERS, plaintiff, recalled in his own behalf.

Direct examination by Mr. Kocher.

Q What knowledge, if any, had you that this lug was missing?

Objected to.

The Court. I think the witness answered that question; the witness said, "I had no knowledge whatever concerning the safety of the ladder; I supposed that the ladder was in perfect condition when I went up the ladder."

Q Were you ever told that there was a missing lug on the ladder?

Mr. Depue. I object to that. I think it was part of the principal case.

The Court. That was a part of the principal case. I do not think it ought to be asked against an objection.

ROBERT H. ROGERS, sworn in behalf of plaintiff.

Direct examination by Mr. Kocher.

Q Doctor, you are a practicing physician in this city?

A Yes, sir.

Q How long have you been engaged in the practice of medicine?

A Since 1895.

Q Do you know anything of any injury to the plaintiff in this case?

A Yes.

Q What do you know of it?

A On the day of the injury, about two o'clock, I should judge, he came into my office complaining of an injury to his knee, and I examined it and found that he had an injured kneecap.

Q What treatment did you give him?

A Well, I had him taken home. I called in another physician, and I applied cold applications to the knee; at the time he called at the office the knee was very much swollen, and I put on cold applications to try to keep down the swelling. The knee continued to swell until evening, when it was the size of your head, and the skin on the surface was so stretched that it was very much glazed, and I was fearful that I might have to open—

Objected to.

Q Never mind that. How recently have you examined the plaintiff?

A Oh, I saw the knee some two months ago; that was the last time.

Q You were present at an examination with Dr. Washington on behalf of the defendant?

A Yes, sir.

Q That was the last time?

A That was the time.

Q What condition did you find existing at that time in the knee?

A The time Dr. Washington examined it?

Q Yes. That was the last time was it?

A Yes, sir. The last time the knee was stiff; he had flexion of about 90 degrees.

Q What should he have?

A Well, it ought to be from fully 30 to 45 degrees more.

Q By a flexion of 90 degrees, you mean—

A The leg was at right angles with the thigh.

Q He couldn't move it back any further?

A He couldn't flex it more.

Q From your knowledge of the history of this case, what is your opinion as to the chances of complete recovery of this patient, the plaintiff?

Objected to.

Q How many times have you examined this plaintiff?

A Well, "examined." You mean from the time of the injury to the present?

Q Yes.

A I saw him—from the time he came into my office. I had charge of him until he was in the hospital; that was four or five weeks; I saw him daily; and I went to the hospital to bring him home from there, and had charge of him daily for fully six weeks, when I examined the leg daily. Since then I have seen him on and off, of course much more frequently at first; but the past year I have only examined the leg three or four times.

Q Now, from your past knowledge of the history of the case, what would you consider the chances, the probabilities, are that the patient will recover the entire use of his limb?

A I shouldn't think there was any—that the possibility was very, very slight; in fact, I should judge that he would not have full use of it; he probably has as much now as he will have.

Cross-examination waived.

PLAINTIFF RESTS.

Mr. Depue. We ask for a non-suit, if your Honor please, on the ground, first, that in view of the fact that this ladder, in its condition, was kept there, with the knowledge of all the employees, for the special purpose, to which it seems to have been particularly adapted, that no breach of duty on the part of the defendant is shown; on the ground, secondly, that in view of the fact that the condition of this ladder was open and obvious to the plaintiff or anyone else using it—as fully obvious to him as it could be to anyone else, to the master or vice-principal—that therefore whatever risk there was in the use of this ladder was a risk of the employment which was

assumed by the plaintiff, and for the consequences of which he cannot recover; in the third place, that the proximate cause of the injury was the negligent act of the plaintiff in leaning out beyond the ladder, in its condition—a condition which he knew or which he should have known. Those are the grounds upon which the motion for non-suit is based.

The Court. [After argument.] The question in these cases always is one rather of the application of the law than as to the law itself. I will take time to look over my notes, and be prepared to decide this motion at two o'clock, after examining the evidence with some care.

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

AFTER RECESS.

The Court. The motion is to non-suit the plaintiff because the testimony adduced in support of the plaintiff's case does not make out a cause of action.

It is a master's duty, an employer's duty, to use reasonable care to supply his workmen with safe mechanical appliances to be employed by them in the performance of their duty to him. It appears that in this case one of the mechanical appliances in constant use was a kind of ladder known as a trolley ladder, and that in the room in which this accident happened there were several of these ladders; there were either nine or five. That depends on whether what one of the witnesses calls "the room" includes the whole floor space devoted to the steam-fitting and the plumbing departments, which was divided in the middle by a partition, not reaching to the extreme ends of the building, against which were set up on either side pigeon-holes for the reception of fittings, or whether the room mentioned by that witness means only the space on the east side of that partition, in which the steam-fitting items of metal were stored. I rather think that he means the latter, and that there were five ladders in this steam-fitting department, as it may be called—three against the east wall and two against the partition. At any rate, however that may have been, this ladder was probably the middle ladder on the east wall. In order to keep it from slipping on the track or pipe on which it was suspended, there were originally lugs so placed beneath it that it was not detachable from the track; it could not be taken off. That was a safety appliance, and as long as those lugs were there and no force was exerted sufficiently vio-

lent to break them, the ladder was secure in position ; that is, in horizontal position. It was made to run latterly on rollers. One of those lugs admittedly was broken off; how does not appear ; it had been broken off for at least two years ; and just to the extent of one-half, whatever safety was secured by the employment of the lugs was taken away from the machine. So that it is quite evident that latteral force applied on the side where the ladder was defective would render liable to happen the very danger which the lugs by their presence would insure against. One of the consequences of this depri-
10 vation of the ladder of one of these lugs was that it was detachable, and there is evidence tending to show that advantage was taken of that fact, at least once a year when stock was taken, and perhaps oftener, to remove the ladder from its position, which could not be done with any other ladder, and take it from one part of the establishment to another. The plaintiff testifies that he never saw this done.

So far as the absence of this lug made the ladder dangerous, just to that extent the employer failed in his duty to provide a safe appliance, and I think that he did fail just to
20 that extent.

A workman has a right to take something for granted ; he has a right to assume that his employer has performed his duty, with two qualifications : He has a right to presume this unless he has been warned or notified of danger resulting from the failure of his employer to discharge this duty ; that is, expressly warned or notified ; and, secondly, unless the defect and consequent danger resulting from an imperfect performance of this duty by his employer is so obvious that a reasonably prudent workman would observe it.

The plaintiff testified that he had no knowledge whatever
30 concerning the safety of the ladder ; he supposed the ladder was in perfect condition when he went up it. But it is necessary to look beyond that, and to inquire whether, as a reasonably prudent workman, he would have observed that the ladder was not safe. His own testimony as to his state of knowledge is not conclusive ; for the test is not what he actually knew, but what he either actually knew or ought to have known if he had been careful. So that the question on which the case hinges is whether the situation was such that the plaintiff, in the exercise of ordinary prudence, ought to have seen that
40 this ladder was defective and that its use might be dangerous.

The plaintiff testifies that he was a clerk ; that it was his duty to get out orders, to fill orders and wait on customers ; that he had been with Roe & Conover about two years before the accident, and had worked all the time in the Mechanic street end and had worked principally in the plumbing supply department ; that the departments were united a short time before the accident ; that this ladder was in use as long as he worked on that side—that is, on the steam-fitting side—which was four or five weeks ; so that for four or five weeks, and perhaps for eight weeks, the plaintiff had worked in a department in which this ladder, with others, was in daily use. He was in the habit of using these ladders, and at the time of the accident he was getting out one of the items in a steam-fitting order, just what he does not remember.

Mr. Wilcox, the foreman of the steam-fitting department, says that the plaintiff was in his department ; that he did not see the accident, but that he knows which ladder the plaintiff fell from, and that that particular ladder had one of the lugs off, which allowed it to leave the track ; and it is quite apparent that that would be the effect if lateral force were applied—to twist it off. Mr. Wilcox says that he noticed that the lug was broken about two years before the accident ; he does not remember how his attention was called to it at first ; and that to some extent the ladder was taken from one part of the store to another ; that tipping would come from leaning out over the side. The plaintiff testifies that either on one side or the other, holding the other side of the ladder with one hand, he reached with the other hand to take something from the box or pigeon-hole, about six inches away from the side of the ladder. Mr. Wilcox says that the plaintiff was not one of the original steam-fitting men ; that he had been in that department about six or eight weeks, about two months. The testimony does not differ very widely as to the time which the plaintiff must have been in the daily habit of seeing and probably using this particular ladder.

Mr. Muchler, a clerk then in the employ of Roe & Conover, testifies that something was the matter with one of the ladders. He seems to have observed the result, but not the cause, for he says that he did not know until after the accident that the lug was missing ; that the ladder used to come off the track once in a while when you got on sideways. He

says, " I don't know how long it was broken ; " that is, the lug. " We had been using the ladder right along in going up and down ; may be sometimes it slipped a little, and you had to watch out for it ; you could see in going up or down the ladder that the lug was broken ; if you went up sideways it might go off ; if you went up the middle it was all right ; if you went up and down the ladder you could see that it was broken, and you had to be careful about using it ; " and that he was not sure that the lug was broken until after the ladder fell.

That is about all the evidence in behalf of the plaintiff, and the question is whether it reveals such a situation that the plaintiff, as a prudent man, ought to have been put on his guard against the use of the ladder, either as a risk incident to the ordinary course of the employment or a risk obvious to him from his own or what should have been his own personal observation.

What is it that the workman assumes? He assumes all the risks usually incident to the employment, including those which it is his duty to take knowledge of by observation, such as he would discover by the exercise of ordinary care for his personal safety. No matter how much it may be the duty of the employer to provide safe appliances, no matter how he may fail in his duty, such failure does not exonerate the workman from the exercise of due care for his personal safety. If the workman remains in the employment, which he is at liberty to leave, he does so with his eyes open, and takes the risks which he either saw or ought to have seen, including risks that may spring up during his employment, although they did not originally exist.

Applying these tests to the plaintiff's case as established by the testimony on his behalf, it appears to me that such a situation is disclosed as to have put the plaintiff plainly upon inquiry, to have apprised him of the facts that existed, and to have charged him with knowledge of the precise kind of risk which he evidently suffered from in leaning over the side of the ladder and so dislodging it from its bearings above. That would be negligence on the part of the plaintiff—a course of action adopted by him at his own risk, either with actual or constructive knowledge of a certain danger, from which he unfortunately suffered.

For these reasons and upon these grounds, the Court grants the motion to non-suit the plaintiff.

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

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

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

I, Frederic Adams, Judge of the Circuit Court of New Jersey, do hereby certify that the foregoing is a correct transcript of the testimony taken before me on the trial of said cause.

NEW JERSEY COURT OF ERRORS AND APPEALS.

LOUIS H. ROGERS,
Plaintiff below and Plaintiff in Error,
vs.
ROE & CONOVER,
Defendant below and Defendant in Error.

Assignment of Errors.

Afterwards, that is to say on the twentieth day of January in the year nineteen hundred and six, in the Court of Errors and Appeals, in the last resort of all causes of the State of New Jersey, comes the said Louis H. Rogers, by Charles F. Kocher, his attorney, and says that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bill of exceptions, and also in giving the judgment aforesaid, there is manifest error in this, to wit :

(1) That by the record and proceedings aforesaid, it appears that the said judgment in form aforesaid, was given for the said Roe & Conover, whereas by the law of the land, judgment ought to have been given for the said Louis H. Rogers against the said Roe & Conover.

(2) There is also manifest error in this, that the said Judge before whom, etc., at and upon the aforesaid trial of the said issue so joined between the parties aforesaid, at the close of the testimony on the part of the plaintiff, ordered a non-suit, on the application of the said defendant, whereas by the law of the land said non-suit should have been refused and the case submitted to the jury.

(3) There is also manifest error in this, that the said Judge before whom, etc., in his opinion on the motion for non-suit declared that "the question on which the case hinges is whether the situation was such that the plaintiff, in the exercise of ordinary prudence, ought to have seen that this ladder was defective and that its use might be dangerous," and the said Court answered this proposition in the affirmative and ordered a non-suit, whereas by the law of the land, such proposition should have been submitted to the jury then and there impanelled to try the said cause.

(4) There is also manifest error in this, that the said Judge before whom, etc., in his opinion on motion for non-suit said, "perhaps for eight weeks the plaintiff had worked in a department, in which this ladder, with others, was in daily use," whereas there was no evidence in the case that the ladder from which the plaintiff sustained injury was in daily use, but if it existed, such evidence should have been submitted to the jury.

(5) There is also manifest error in this, that the said Judge before whom, etc., in his opinion on the motion for non-suit declared, "the testimony does not differ very widely as to the time which the plaintiff must have been in the daily habit of seeing and probably using this particular ladder," whereas there was no evidence showing that plaintiff used and saw said ladder daily, and whereas by the law of the land, said evidence, if it existed, should have been submitted to the jury.

(6) There is also manifest error in this, that the said Judge before whom, etc., in stating the evidence of John Muchler, one of the witnesses produced by the plaintiff, mis-stated the same, and did not state all of the said evidence.

(7) There is also manifest error in this, that the said Judge before whom, etc., in his opinion on the motion of non-suit, ought to have ruled that the evidence of John Muchler, if said evidence was against the plaintiff, be submitted to the jury.

(8) There is also manifest error in this, to-wit, that the said Judge before whom, etc., found that the evidence disclosed such a situation as to have put the plaintiff plainly upon inquiry, to have apprised him of the facts that existed, and to have charged him with knowledge of the precise kind of risk which he suffered in using the defective ladder set forth and described in the plaintiff's declaration and the evidence in the cause, which finding was erroneous and was not justified by the evidence.

(9) There is also manifest error in this, that the said Judge before whom, etc., refused to allow the consideration of said case to go to the jury, which was then and there impanelled to try the same, whereas by the law of the land, said case should have been submitted for consideration by the said jury.

(10) There is also manifest error in this, that the said

Judge before whom, etc., in his opinion on the motion for non-suit assumed that he, by the law of the land, had the right to pass upon the evidence produced by the plaintiff and try the questions of fact there presented, whereas by the law of the land said evidence should have been submitted to the jury.

(11) There is also manifest error in this, that the said Judge before whom, etc., in his opinion on the motion for non-suit held that the plaintiff was guilty of negligence which was the proximate cause of the injury which the plaintiff sustained, whereas the evidence did not show that the plaintiff had been guilty of negligence, or that such negligence was the proximate cause of the injury which the plaintiff sustained.

Therefore, the said Louis H. Rogers prays that the judgment aforesaid, by reason of the aforesaid errors and other errors appearing in the record and proceedings aforesaid, may be reversed, and for nothing holden, and that he may be restored to all things that he has lost by occasion of said judgment of non-suit, etc.

CHARLES F. KOCHER,
Attorney for Plaintiff in Error.

NEW JERSEY COURT OF ERRORS AND APPEALS.

LOUIS H. ROGERS. *Plaintiff below and Plaintiff in Error,* *vs.* ROE & CONOVER, *Defendant below and Defendant in Error.*	*On Error to Essex County Circuit Court.* *Joinder in Error.*

And hereupon, afterwards, to wit, on the 20th day of January in the year 1906, in the Court of Errors and Appeals in the last resort in all cases the said Roe and Conover by Lindabury, Depue and Faulks, its attorneys, comes into court and says that there is no error either in the record and proceeding aforesaid or in giving the judgment aforesaid, and the said defendant in error prays here that the court here may proceed to examine as well the record and proceeding aforesaid as the matters aforesaid assigned for error and that the judgment aforesaid in the manner aforesaid given, may in all things be affirmed.

LINDABURY, DEPUE & FAULKS,

Attorneys for and of counsel with defendant in error.