New Jersey Court of Errors and Appeals

MAGDALENA SEFLER, Administratrix, *Plaintiff-Respondent,* *vs.* VANDERBEEK & SONS, INC., *Defendant-Appellant.*	Action at Law. On Appeal.

POINTS FOR DEFENDANT-APPELLANT.

Statement.

A witness for the plaintiff testified that the intestate went with him to the lumber yard of the defendant; that he and the intestate met an employe of the defendant who said, "Come up stairs. I will show another lumber which will be to your liking" (p. 27) or "Come upstairs, I will show you the lumber" (p. 34).

This witness testified through an interpreter and he was unable to understand or to speak the English language.

The cross examination of this witness disclosed this clearly; for some questions were asked of him in English when the interpreter was told to stand aside, and the witness could make no answers.

This witness testified that the employe spoke in English.

The verdict rests on this invitation to the intestate as testified to by this witness. Without this testimony there could have been no verdict.

This witness could not identify the employe of the defendant referred to by him; he called that employe "a foreman", but there was no proof from this witness (and there was no other witness for the plaintiff on this head) showing who the employe was, nor that he was a foreman of the defendant, nor that he was one who had a right to extend such an invitation, nor that he had a status to bind the defendant.

This witness was asked, with respect to the employe, the following question and gave the following answer:

> "Q. Do you know whether or not he said 'Wait here until I come back'? A. No, sir."

It was impossible to tell from the testimony for the plaintiff what happened to the intestate except that he fell from the top loft 16 feet to the ground.

There was no proof that anything broke.

There was no proof of improper or defective construction or maintenance.

Motion for non-suit and part of the discussion on the motion is found at pp. 36 to 39. The Court said (p. 38):

> "The difficulty I see, Mr. Gilson, up to the present time is the want of clearness as to just how this accident happened.
>
> "MR. GILSON: That is perfectly true.
>
> "THE COURT: It does not appear affirmatively in the testimony at all so far. It seems to me there is only one way this accident could have happened so far as the testimony discloses, and that is a matter of conjecture; that is, that this guard-rail in question was not properly fitted in the upright post to which it belonged; but there is nothing to show that affirmatively; it is a mere guess on the part of the Court, in fact, as to whether that was the condition or not. There is no testimony to show that the rail broke. The testimony

goes to show that the rail was there. There is no testimony to the contrary. There is no testimony showing that the rail was not there when it should have been there he fell. That is not disputable, I take it, because the one living witness who has testified to the occurrence controverts that theory."

Whereupon, the counsel for the plaintiff stated (and this is the only thing that prevented the motion being granted) p. 39:

"Now there is evidence that in some of these uprights there were pins that went through the top of the uprights and through the rail. If that had been done in this case this accident never would have happened."

Then the Court denied the motion in these words (p. 39):

"Well, gentlemen, I am going to take this position: The difficulty I see, Mr. Gilson,—and I think you agree with me that there is very little in the testimony so far which goes to the point of chargeable negligence—I am going to give you the benefit of that at the time of this motion and I am going to deny the motion. I am going to extend leave to the defendant to renew this motion at the end of the case, as well as any other motion that it may have at that time. I will deny the motion under those conditions."

The witness for the plaintiff, Mullen, an interpreter, testified that he went to defendant's premises some time after the accident, and saw pins or plugs in some of the uprights.

These pins or plugs were put in *after* the accident (p. 70).

If this fact could have been proved before the motion for non-suit, the motion would have been granted.

The defendant's witnesses added no strength to the situation in which the case was found at the time the motion for non-suit was made, but

the motions for non-suit and to direct a verdict for the defendant made at the conclusion of the testimony, were denied.

The Court charged these pins out of the case (p. 86, Charge).

McNamara, the defendant's foreman said that neither the intestate nor the witness above referred to spoke to him in English; that they made signs as to what they wanted; that he, the foreman, went to the second gallery, or top loft, which was about 16 feet from the ground to get what he thought was wanted; that he did not invite either of them to follow him; that he said, (making signs the while), "Wait a moment and I will go and get it for you." That he "did not have the slightest idea that either man was coming up there." That, thereafter, he went 125 feet in one direction from where he left the men standing, then turned to the right and went 45 feet in another direction, then up a stairway of 18 or 20 steps, then 12 feet along the gallery, then turned in another direction and went about 50 feet further along the gallery. He testified that during his entire trip he could look over the places from which he had come and he did not see either of the men following him; that he spent about 3 minutes looking through a bin facing on the second gallery for the kind of lumber he thought was wanted; while doing this he heard a cry and saw the witness referred to on the gallery about 15 feet away, and the intestate and one of the guard rails unbroken on the ground below.

The place from which the intestate fell was 45 or 50 feet from where the foreman was looking through the bin.

Customers were never invited to the top loft.

The place from which the intestate fell was well lighted; "a pretty bright light"; "an arc light" was "right directly in front of" the intestate. This light showed "a light all over that top loft

in that section that you can see anything after dark." It was a "five ampere arc light, 1200 candle power." The place was not in any shadow.

This testimony on light was entirely uncontradicted.

A detailed description of the top loft or gallery is found in the testimony of Mr. Rambo, the operating engineer of the defendant at pp. 65-66, and in the testimony of Mr. McNamara, the foreman, at pp. 50-51.

There was a plank runway around the top loft; one of the guard rails around this runway fell with the intestate.

It did not fall because it broke, nor because any part of the construction there broke, but because the rail was lifted or pulled out of its sockets by the intestate.

I quote from Mr. Rambo's testimony (pp. 65-67):

"Q. Now what was the length of this guard rail you say you found on the ground? A. Why, it must have been somewhere between ten and eleven feet; not to exceed that.

"Q. What was it made up of? What was its width and things of that sort? A. Well, approximately about five inches wide and an inch in thickness, and of yellow pine material.

"Q. Now, the way in which the guard-rail was constructed and the way in which the uprights were constructed at that time, what can you say with respect to that? A. Why, the guard-rail when it was in place rested in crotches sawed into these four by sixes, spiked on—fastened to the runway, and at the corner here (indicating) right, going up the stairs here and going fifteen or sixteen feet, whatever the matter is, to this right angle turn, this guard-rail—the upright. The wide part was that way, parallel with this runway that leads from the head of the stairs over to the corner and on that side of it this crotch was spiked to the four by six, running this way.

That carried the other end of the guard-rail and likewise the end of the next rail; they were butted up together in that.

"Q. How wide were the places, the sockets or crotches, as you call them, that the guard-rail rested in? How deep were they? A. Why, the guard-rail went down flush, perhaps one-eighth of an inch. I didn't stop to measure it, but it was down below the surface; not a great deal—that is, the top of the upright—not a great deal.

"Q. That would be a depth of how many inches, or how deep? A. Well, it would be a depth of about five inches.

"Q. Five inches? A. Yes. The board dropped down the full width into the crotch.

"Q. The board or guard-rail went down in this fashion to illustrate it, into the sockets, leaving the top about flush with the uprights? A. Just about flush; maybe one-eighth of an inch or some small matter above.

"Q. How high from the platform was the guard-rail? A. Well, that must have been somewhere between two feet six and three feet. I could not say exactly, but in that neighborhood.

"Q. Why did you have that construction there; that is, the guard-rail resting in sockets? A. Well, as I understand it—of course, I am not employed in that part of the factory; but I understand—

"MR. GILSON: I object.

"Q. How was the guard-rail used in reference to the sockets?

"THE COURT: If you know, Mr. Rambo.

"A. Well, I know from hearing—

"THE COURT: You have not seen them—

"A. I have seen them; yes.

"THE COURT: Tell us what you have seen.

"Q. I have seen them placing lumber around there.

"Q. What was the method of doing that? A. They generally take that guard-rail out in order to place lumber in the pins.

"Q. Placing lumber from the ground floor into the bins above? A. Yes, sir."

I quote from Mr. McNamara's testimony at pp. 50-51:

"You can't move the rail one way or another to get it out without lifting it five inches over the top of the posts.

"The socket is five inches deep at each end. I don't think the rail can be forced out without being picked out of the socket.

"The only way to get them out would be to pick them out. You have got to lift them five inches. When we were putting lumber into the bins we take the rail out and lay it on the platform in front of the bin that we are working on. After the car of lumber is put in the bin we take the guard-rail up and place it back into the sockets again."

After the intestate fell, Mr. Rambo tested the guard-rail to try to find why the intestate fell. His testimony on this head (at p. 68) is:

* * * "I was standing in the shed. There were two or three other employes there; I can't recall their names at the present time; and I perhaps made the remark, 'I wonder how he came to fall off of there'; and with that I went up the runway. There were some wires, some electric wires, and I have charge of all them there; in fact, I install them there, and it was on my mind whether he had dislodged any of those wires—the body, in falling—and I went up there to ascertain the condition of these, and likewise to look over the conditions of the uprights and the rail. The rail at that time was still lying on the floor, on the ground floor, and while I was up there, why, the rail was passed up to me and I put it in place, in the sockets, and I tried it for endwise play to see if it would slip past the socket at either end. This end it could not slip. This end it was butted against the other guard-rail, couldn't slip that way—oh, perhaps one-eighth or one-quarter inch play, just close fit in there, and the socket was firm; and with that I sat down on a pile of lumber back of the rail, put both feet on it, pressed on the lumber and pressed

out with my feet to see if it were possible to spring that board enough that it would slip out of the ends of the sockets. Well, I put considerable weight—I don't know just how much—against it, but enough to satisfy me that the board would break before it would spring out of the sockets, before I could shorten it up by bending enough to spring out of the sockets at each end.

"Q. Was the board broken in any way? A. The board was not broken; no.

"Q. Were the sockets broken in any way? A. The sockets were intact."

CONTENTIONS.

1.

The plaintiff should have been nonsuited or a verdict in favor of the defendant should have been directed.

A. Because there was no negligence on the part of the defendant, for the place from which the intestate fell was reasonably safe as a runway or passageway and defendant had exercised ordinary care to render the place reasonably safe as a runway or passageway.

B. Because the intestate was invited (if invited at all) to go with the foreman who would "show him another lumber"; he exceeded the bounds of his invitation and because of his own actions outside the scope of the invitation he created a risk for himself and fell, and thereby relieved the defendant from liability.

C. Because the verdict rests on a "conjecture" or a "guess" as to how the intestate came to fall, and not on proof.

D. There should be a reversal because the court refused to charge defendant's 5th request to charge.

It will be convenient to consider contentions *A* and *B* together.

A.

There was no negligence on the part of the defendant, for the place from which the intestate fell was reasonably safe as a runway or passageway and defendant had exercised ordinary care to render the place reasonbly safe as a runway or passageway.

B.

The intestate was invited (if invited at all) to go with the foreman who would "show him another lumber"; he exceeded the bounds of his invitation, and because of his oyn actions outside the scope of the invitation he created a risk for himself and fell, and thereby relieved the defendant from liability.

The much cited case of

Phillips v. Library Company, 55 N. J. L., 311,

holds that:

> "An owner of lands who, by invitation, express or implied, induces persons to come upon his premises is under a duty to exercise ordinary care to render the premises reasonably safe for such purposes, or at least to abstain from any act that will make the entry upon or use of the premises dangerous."

The invitation in the case before us was testified to be an express invitation, one specially given and only applicable at the time the intestate fell. It was a definite invitation; and it was a restricted invitation.

The testimony that the runway and guardrail were safe, when properly used as such, amounted to *a demonstration.*

It is familiar law that,

> "Even if a person's entry upon premises was by invitation of the owner, a question

may arise, whether, at the time the injury was received, the person was in that part of the premises into which he was invited to enter; that the owner's liability for the condition of the premises is only co-extensive with the invitation; that a person on private grounds by invitation of the owner, going of his own volition into other parts of the premises, exceeds the bounds of his invitation, and if he does not thereby become a trespasser, goes out of the way to create a risk for himself."

Phillips v. Library Company, 55 N. J. L., at p. 315 and cases cited.

The intestate would not, could not, have fallen, unless he acted in a way which was without the scope of the express invitation alleged to have been given.

The facts and circumstances show with reasonable certainty how the intestate fell, and that he fell while acting without the scope of the invitation alleged to have been given.

"Where the owner or occupier of lands, by express invitation, induces a person to make use of a portion of the premises for an expressed purpose, his liability is confined within the limits of the invitation, and does not extend to injuries received by the person invited while using the premises for a purpose not expressed, and not authorized by invitation."

Ryerson v. Bathgate, N. J. L., p.

"The duty is to exercise ordinary care to render the premises reasonably safe 'for the purposes embraced in the invitation.'"

Smith v. Jackson, 70 N. J. L., 182.

"Defendant's duty to plaintiff was satisfied when it used reasonable care to maintain the premises in a condition 'safe for her proper use.'"

Schnatterer v. Bamberger, 81 N. J. L., 558.

> "The plaintiff, in order to recover, must have been using the premises in the manner in which they were intended to be used. The defendant's duty was to exercise ordinary care to render the premises reasonably 'safe for the purposes of the invitation.'"

Nolan v. Bridgeton Co., 65 Atl. 992.

A person may "exceed the bounds of his invitation" by doing something not comprehended in the invitation, and not only by "going of his own volition into other parts of the premises" (referring to the language of the opinion in the Phillips Library case).

Suppose, for instance, a person is invited to "walk over" a platform, and he runs over it; suppose he is invited to "climb this ladder very slowly" and he climbs it very fast; suppose he is invited to go to a specified part of the premises for a certain purpose expressed in the invitation, and while on his way he pauses and stoops and examines some boards he has not been invited to examine, does he not "exceed the bounds of his invitation", just as much as if being invited to one part of a building he goes to another?

The intestate must, at least, have *leaned heavily* against the rail; he must have leaned heavily against it *from beneath*—from a stooping position.

Surely the rail was not there to be used in that way.

If some one had passed the intestate on the runway in such a way that the intestate leaned, necessarily or otherwise, against the rail (as to which, however, there was no proof or even suggestion), still the rail would have supported the full weight of the intestate, and he would not have fallen.

If the intestate had slipped or stumbled against

the rail he would not have fallen. This is not what happened to him; for the rail could not be sprung out of the sockets, and it did not break, but it did fall. The testimony forbids an inference that he fell in this way.

The intestate must have been acting on his own volition, for he was not with the foreman and he was doing something on his own notion.

The case of *Hart v. Grennell,* 122 N. Y., page 371 was an action against a storekeeper for damages because the plaintiff tripped and was injured while in the store.

> "The store was well lighted and the situation of every object was apparent to every person who cared to observe them * * *. The general rule applicable to persons occupying real property for business purposes and who invite and induce others to visit their premises is that they must use reasonable prudence and care to keep their property in such a condition that those who go there shall not be unreasonably and unnecessarily exposed to danger. The measure of their duty is reasonable prudence and care" (Citing cases).
>
> "The rule has reference to such dangers as might reasonably be anticipated by a prudent and careful man. As was said in one case, 'What the law requires is not warranty of the safety of everybody from everything, but such diligence toward making the store safe as a good business man is in such matters accustomed to use."
>
> "The question is could the mischief have been reasonably foreseen? The rule must be applied with reference to the situation of the property and its apparent arrangment for the conduct of the business."

This case holds that when the appliances in the store are in full sight and within the observation of everyone the merchant is not liable for accident which result from carelessness and inattention to the surrounding.

"Under these circumstances such an accident as happened was not within the reasonable apprehension of the defendants" (Ibid.).

The top loft and the guard rail and its construction were all lighted by a bright light; and the intestate must be held to have observed his surroundings.

In the case before us, the intestate's fall must be attributed to an accident which could not reasonably have been anticipated by the defendant, and for which the defendant is not required to respond in damages. Without the invitation alleged to have been given there would have been no case for the plaintiff; and, as customers were not allowed to go to the top loft from which the intestate fell, the plaintiff must rely on the character and extent of the alleged invitation. Under the terms of that invitation, the accident "could not reasonably have been anticipated by the defendant"—assuming that the only inferences to be drawn from the testimony as to how the intestate fell, are either that the intestate deliberately lifted the rail out of its sockets, or that he stopped at the place from which he fell, examined lumber nearby, or did something of that kind, in connection with which he stooped with his back or his side to the rail, and in raising himself he lifted the rail out of the sockets with his body or his shoulder or shoulders, and, as he was leaning against the rail in doing this, he fell.

See *Coberth v. Great A. & P. Tea Co.*, 36 App. D. C., 572 (1911).

It was held, in *Speicher v. N. Y. Tel. Co.*, 59 N. J. L., 23, and 60 N. J. L., 242, where a lineman descended a pole, and took hold of a cross bar whose sole object was to carry wires, which cross bar gave way, and he fell, that defendant was not liable, as the object of the cross bar was not to support linemen.

"The mere fact that this railing, when used for a purpose for which it was not intended, gave way, is not sufficient ground upon which to base a charge of negligence of the defendant" (Judgment reversed).

See *Durkin v. Marshall Field & Co.*, 161 Ill. App., 505 (1911).

"Premises on which one goes by invitation, should be used as reasonably contemplated."

Stelter v. Cordes, 130 N. Y. S., 688.

Following is the rule in New York state:

"The obligation of the defendants was that of reasonable care and prudence lest their premises might injure the plaintiff when in a reasonable contemplated use thereof."

Larkin v. O'Neill, 119 N. Y., 221; 23 N. E. 563.

I quote from the opinion of *Montgomery, J., in Kinney, Administrator, v. Onsted* (1897), Mich., 38 L. R. A., page 665:

"The rule is well settled that the owner or occupant of land is liable to those coming to it at his invitation, express or implied, on any business to be transacted or permitted by him, for an injury occasioned by the unsafe condition of the land or access to it, which is known to him, and not to them, and which he has negligently suffered to exist. But this duty, it is held, does not extend so far as to make such an occupant responsible for the unsafe condition of those parts of his premises not intended for the reception of visitors or customers, and where they are not expected to go. See 1 Thomp. Neg. page 308. Applying these rules to this case, it is clear that, if the plaintiff had suffered an injury from a defect in the floorway of the platform or bridge, or possibly, if, by misadventure, he had stumbled and fallen against this defective railing, there would be ground for holding that the defendant is responsible for the injury. But the weakness of the plaintiff's case is that the defendant never invited him to enter upon his premises, and put the railing to the test of

supporting his weight, by leaning or lounging against it. The only case in which a similar question has arisen, which have been called to our attention, are those of *Stickney v. Salem,* 3 Allen., 374, and *Orcutt v. Kittery Point Bridge Co.,* 53 Me., 500. In *Stickney v. Salem,* the action was against the city for injuries resulting to deceased caused by leaning against a fence or railing which marked the terminus of the street, and was built upon the top of a sea wall. The plaintiff, in company with a friend, had walked to this point to view the sea, had turned his back to and leaned against this railing, which gave way, because of defects, and he received serious injuries. The Court says: 'The fact that the railing was defective and would have proved an insufficient barrier in case it became necessary for a traveler to use it for a legitimate object is wholly immaterial. It is a sufficient answer to the plaintiff's case that the defendants were not bound to keep the railing in repair for the purpose for which it was used by the deceased at the time of the accident.' The case of *Orcutt v. Kittery Point Bridge Co.,* is precisely analogous to that of *Stickney v. Salem.*

"It is urged by plaintiff's counsel that a distinction exists between private premises and a public highway in this regard, and that the rule of the care required of the highway authorities is based upon a different principle from that of private parties inviting persons upon their premises. We think, however, that this distinction cannot avail the plaintiff in this case. The invitation to the plaintiff was to do business in the elevator. The approach to the place of business was an elevated private way. It could not be expected any more by this defendant than by the city authorities of Salem in the case cited that this private way would be put to any other than the uses to which it was apparently adapted. Undoubtedly, in the case of a municipality or an individual maintaining a way, an injury resulting from a defect in the way itself, to one who stops to transact business, may be recovered for. But the weakness of the plain-

tiff's case arises from the fact that this railing was put to a use for which it was not intended, any more, in the present case, than were the railings in the cases cited from Massachusetts and Maine. Plaintiff's counsel concede that the defendant was under no obligation to build or keep the railing in repair for plaintiff to lounge or sit upon or lean against, but they contend that the defendant's liability arises out of his knowingly permitting a snare or trap, by leaving the railing in good apparent order, but in fact so defective that one was liable to receive injury from it. But, before it could become a snare or trap, it must be assumed that its apparent good condition was an invitation to make such a use of it as the plaintiff attempted. As we have seen, its presence was not an invitation to make that use of it.

"We think there was no case for the jury, and that *the judgment should be reversed,* and no new trial ordered.

"The other justices concurred."

This case is also reported in 67 Am. St. Rep., 455, 4 Detroit Legal News, 215, 71 N. W., 482, 113 Mich., 96.

See also *Hutchinson v. Cleveland Co.,* 141 Mich., 346, and cases cited at page 349.

"The railing was put there as a warning of danger and to prevent those who should use the viaduct in an ordinarily careful manner from being hurt * * * it was entirely sufficient for the purpose for which it was erected * * *. This was abundantly established by the evidence of the defendant."

Sindlinger v. Kansas City, 26 L. R. A., at page 726.

Peake v. Buell, 90 Wis. 508; 63 N. W. 1053.

"The invitation did not include what plaintiff was doing."

Cowen v. Kirby, 180 Mass. 504; 62 N. E. 968.

"In the absence of a special invitation to do as he did, plaintiff was at best a licensee."

Flanagan v. Atlantic Alcatraz Asphalt Co., 37 App. Div. 476; 56 N. Y. Supp. 18.

"When he went over to this gate for purposes of his own, he went there at his own risk."

See also,

Kennedy v. Chase, 119 Cal. 637; 52 Pac. Rep. 33;

Bolch v. Smith, 7 Hurlst. & N. 736 (Eng. Excheq.)

C.

The verdict rests on a "Conjecture" or a "Guess" as to how the Intestate came to fall, and not on proof.

The "conjecture" or "guess" as to how the accident happened, mentioned by the Court on the discussion of the motion for nonsuit never became proof, and the defendant was entitled either to a judgment of nonsuit or to have a verdict directed in favor of the defendant.

At the conclusion of the testimony it clearly appeared that the intestate fell by his own act.

Assuming that the intestate was invited to go to the top loft with the foreman McNamara, on the statement of the foreman that he "would show another lumber," still the intestate was not with or near to the foreman when he fell; he was 45 or 50 feet away; and he was not acting pursuant to the invitation.

Exactly how he fell or what caused him to fall was as much a "conjecture" or a "guess" at the conclusion of the case as when the motion for nonsuit was made.

There was precise testimony as to the very rail that fell and the sockets from which it was

lifted. A "conjecture," a "guess," that the rail did not fit properly into the sockets could not be entertained at the conclusion of the testimony in the presence of this testimony.

And yet the verdict rests entirely on this "conjecture" or "guess."

Counsel for the Defendant stated, in part, on the motion for a direction of a verdict (at page 82).

> "Now, that, if your Honor please, was a situation that was reasonably safe. The place was well lighted, he was a man of mature years, and anybody could see that construction. How can the jury on that testimony find in favor of the plaintiff, which would mean that they would find the place was not reasonably safe for the purposes to which it was devoted? It seems to me, if your Honor please, the rail not giving way, not breaking, nothing of that sort happening—and we having proof of the tests that were made with respect to the strength of the guardrail, that we are right. Mr. Rambo couldn't push it out with both feet, with his back to the lumber. It didn't give way that way. Plaintiff doesn't say it did. It plainly must have been lifted out, and the act, if your Honor please, was not anything that the defendant did; it was the plaintiff's intestate's own act."

Whereupon the Court said:

> "Isn't the question as to whether that construction was a reasonably safe construction under all the circumstances as they have been portrayed in this case a question of fact for the jury?"

And Counsel for the Defendant answered:

> "I don't think so, sir. It seems to me that is letting the jury speculate as to what might have been done there. Of course, if your Honor please, I don't think the plaintiff is entitled to have the jury go into a

comparison of this place with some other place, and decide that something else might have been done that was not done. The question is, Was this particular place reasonably safe? Why we might have surrounded the place with safe-guards so that a man could not have tumbled through, no matter how careless he was. I don't think the jury has a right to assume that we should have done that under the circumstances in our lumber yard.

"THE COURT: I will deny the motions.

"MR. VAN WINKLE: Under my objections, sir?

"THE COURT: You may have them."

"The plaintiff simply furnishes the jury with food for speculation and that will not do for the basis of a verdict. The law demands proof, and not mere surmises."

Bond v. Smith, 113 N. Y. 378.

In the case of *Powers v. Pere Marquette R. Co.,* (1906) 143 Mich. 379, 106 N. W. 1117, a footboard on the front of a locomotive fell with the deceased.

"It was plaintiff's theory that the splitting of the board caused her intestate to fall, while defendant's counsel say that the condition and position of the split portion, and the evidence of dragging, etc., indicate that it was split off and turned upward by reason of the rolling under it of the deceased, who was a man about 170 pounds weight. It is urged that this is the more probable theory of the two, but that, if not the cause of the fall, the true cause is a matter of conjecture merely."

A verdict was directed for the defendant which was affirmed.

"This court has held many times that a case should not go to a jury where, under the testimony, the cause of the accident is conjectural merely * * * this rule has been

iterated and reiterated in most courts, including our own (citing cases)". Ibid.

If we say that we can find, in the case before us, testimony from which a probability legitimately arises, and should state that the court should act in accordance with such probability, we should say further that the testimony shows a probability legitimately arising in favor of the defendant.

"What is there to indicate a probability that plaintiff fell from the splitting of the board? We have examined the proof and plaintiff's brief in vain to find a circumstance which throws any light on this question, and are forced to say that it is as probable that he inadvertently tripped or stepped over the edge, slipped or fell, as that his weight caused the plank to split, thereby precipitating him upon the rails." Ibid.

"The negligence alleged and the injury sued for must bear the relation of cause and effect * * * Negligence, like any other fact, may be established by proof of circumstances from which its existence may be inferred; but this inference must, after all, be a legitimate inference and not a mere speculation or conjecture."

Wilson v. Weavy, 137 S. W. Rep. (1911) 390.

In *Waters—Pierce Oil Co. v. Van Elderen,* U. S. Circuit Court of Appeals (1905) 137 Fed. Rep. 557, the language of Mr. Justice Brewer, in *Patton v. Texas & Pacific R. R. Co.,* 179, U. S. 658, is adopted, namely,—

"It is not sufficient for the employee to show that the employer may have been guilty of negligence. The evidence must point to the fact that he was. And where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for

some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employe is unable to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony and no mere sympathy for the unfortunate victim justifies any departure from settled rules of proof resting upon all plaintiffs."

"The jury should not be permitted to guess or imagine that an injurious wrong has been committed; and where the facts and circumstances adduced by the proponent of the proposition that an injury has been caused by a wrongful breach of duty are as consistent with innocence as with guilt, the proponent must be held to have failed in his proof since he leaves the jury to grope in the field of conjecture and speculation."

Giles v. R. R. Co., (1913), 169 Mo. App. 24 154 S. W. 852.

"Evidently, these situations are all more or less probable, and without some evidence that will indicate with reasonable accuracy to which of them the death is to be attributed, we cannot ascertain with respect to whether the defendant was negligent * * * The jury should not have been permitted to guess, for it could be little more than a guess, which was the proximate cause of the death."

Ibid.

See *Pittsburg Co. v. Myers* U. S. Cir. Ct. of App. 203 Fed. Rep. (1913) at page 224, and cases there cited.

"When the liability depends upon the carelessness of a person, the right of recovery depends upon the same being clearly shown by competent evidence; and it is incumbent upon the plaintiff to furnish such evidence to show how and why the accident occurred—

some fact or facts by which it could be determined by the jury and not left entirely to conjecture, guess, or rendering a judgment upon mere supposition, without a single known fact."

Sevenson v. M. Co., 59 Wis. 338; 14 N. W. 446;
State v. Phila. R. Co., 60 Md., 555;
Powers v. Pere Marquette R. Co., 143 Mich. 379; 106 N. Y. 1117;
Waters Co. v. Van Elderen, 153 Fed. 557;
Riggs v. Standard Oil Co., 130 Fed. 199;
Coal Co. v. Myers, 203 Fed. 221-224, 121 C. C. A. 427;
Giles v. R. Co., 169 Mo. A. 24; 154 S. W. 852;
Shore v. American Bridge Co., 111 Mo. App. 278; 86 S. W. Rep. 905;
Chesapeake R. Co., v. Heath, 103 Va. 64; 48 S. E. Rep. 508.

D.

There should be a reversal because the court refused to charge defendant's 5th request to charge.

Under the circumstances, as the way in which the accident, happened was unknown, and it may have happened in several different ways, the Court should have charged the Defendant's 5th Request to charge, namely,—

"5. If the jury find that the plaintiff's intestate was invited by the defendant to go to the second gallery, still if they find that he stopped on the way for the purpose of examining timber, in a bin, without the knowledge or direction of the witness McNamara or of the defendant, and that because of his stopping and stooping position while doing so, he fell, there can be no recovery."

This request contained the defendant's hypothesis of how the accident happened (with the exception that the Defendant denied having given the intestate any invitation).

This hypothesis was supported by the testimony.

It was a fair inference from the testimony that the intestate stopped to examine some boards and stooped in doing so with his back or side to the guard-rail. He was a heavy, large man; and when his friend said, "Come along, Sefler," he arose, and with his shoulder or shoulders lifted the guard-rail 5 inches out of the socket, and as he was leaning against it with a heavy lifting, pushing motion as it came out of the sockets, he fell with it to the ground below.

The only other hypothesis is that the intestate grasped the guard-rail and lifted it 5 inches from the socket; which action, having in mind the intelligence to be imputed to him, the brightly lighted place and the other circumstances would surely be negligence on his part, and would not prove negligence on the part of the defendant.

What other hypothesis can be raised from the testimony?

> In preparing instructions each party may assume any reasonable hypothesis in relation to thefacts of the case, and ask the court to declare the law as applicable to it, and it is error to refuse an instruction so framed because the case supposed does not include some other hypothesis equally rational.
>
> *People v. Taylor,* 36 Cal. 255;
> *Hays vs. Paul,* 51 Penn. St., 134;
> *Lyttle vs. Boyer,* 33 Ohio St., 506;
> *Ray vs. Goings,* 112 Ill., 656.
>
> "A party has a right to submit a question of law arising on undisputed facts or upon a hypothetical statement within the scope of

the evidence, and have the instruction of the court given to the jury thereon; and it is error to refuse to listen to a timely request so to do."

Chapman v. McCormick, 86 N. Y. 479.

"In order to justify the judge in giving an instruction predicated upon a supposed state of facts, it is not necessary that he should be entirely satisfied of the existence of such facts, but if there is any evidence from which the jury may infer them to be true, it is his duty to declare the law thereon."

Flournoy v. Andrews, 5 Mo. 513;
Bradford v. Pearson, 12 Mo. 71.

While the charge correctly stated the principle of negligence, there was no detail in the Charge with respect to the guard-rail or the way in which the intestate probably acted; and if the 5th Request to charge had been charged, the jury might have found for the defendant.

It is respectfully submitted that there should be a reversal for the reasons urged in these points.

MARSHALL VAN WINKLE,
Of Counsel with Defendant-
Appellant.

Telephone 1697 Worth THE WEIBEZAHL PRINT 25 Elm St., N. Y.

NEW JERSEY

Court of Errors and Appeals.

MAGDALENA SEFLER, ADMINISTRATRIX,

Plaintiff-Respondent,

vs.

VANDERBEEK & SONS, INC.,

Defendant-Appellant.

Action at Law.
On Appeal.

Brief of Respondent.

Plaintiff's intestate fell from an elevated platform in defendant's building on December 29th, 1914. A guard-rail fell off when he placed his hand on it, precipitating him to the ground and killing him. He had gone there to buy lumber. There were two tiers of bins or stalls in which lumber was kept; the upper tier was about 16 feet above the ground, and a platform or walk about 3 feet wide ran in front of the bins. There was a guard-rail or baluster about 3 feet high on the outside of the platform. These rails were about 1 inch or 1¼ inches thick and 4 or 5 inches wide and from 11 to 16 feet long. The ends of each rail rested in sockets or grooves on the top of uprights, which were 4 inches thick and 6 inches wide. The socket or groove was about 1½ inches wide and about 5 inches deep, and the wide part of the rail was upright. Each end of the rails was intended to be 3 inches in the socket, so that each socket supported the ends of two rails (*pp. 11, 50, 51*).

INVITATION.

Decedent and his friend, Konofka, went to the office of defendant where the foreman or superintendent was pointed out and directed to show them the lumber. There can be no question that McNamara was the foreman or superintendent, for he testified that he was superintendent and salesman, and showed them the lumber.

ANDRO KONOFKA, testified as follows, on *page 27 lines 9-30:*

"Q. Was anyone in the office when you "went there? A. There was some men writing, "and they gave us the foreman, and the fore-"man showed us the boards; but they were "too narrow.

"Mr. VAN WINKLE—I object, if your Honor "pleases, to the designation of the anybody "who was there as the foreman of the defend-"ant. That is a conclusion entirely. If some "clerk said that he was a foreman they would "have to prove that.

"Q. How do you know that he was a fore-"man? A. Because they showed us the man "who was the foreman.

"Q. Had you ever been there before? A. "never.

"Q. Did anyone call him foreman in the "office? A. Someone in the office called him; "I don't know which one called him.

"Q. Now, where did the foreman take you " from the office? A. He took us downstairs. "He showed us some boards but they were too "narrow."

JOHN J. MCNAMARA, testified as follows on *page 40, line 12*:

"Q. And on the 29th day of December, "1914, were you the foreman for Vanderbeek, "or a superintendent for Vanderbeek? A. "Acted as superintendent and salesman."

The invitation given by the superintendent to go upon the platform was necessary, and it was the practical way to select the lumber. Decedent wanted the lumber for a musical instrument (*p. 26, lines 10-28*), and it required some care to select the right kind. They had looked at lumber on the ground floor, then McNamara told decedent and Konofka to follow him and he would show them other lumber. Konofka testified as follows:

"Q. Then where did he take you? A. Then "he said 'Come upstairs. I will show you an- "other lumber which will be to your liking.' "And the foreman led us upstairs, and we fol- "lowed the foreman, andSefler followed me; "he was the last one to follow."

(*p. 27, lines 30–35*).

"Q. (Repeated by the stenographer). You "don't know what the foreman said to your "friend, do you, in English? A. All he said— "'Come upstairs. I will show you the lum- "ber.' That is all."

(*p. 34, lines 4–9*).

It is true that it was necessary to use an interpreter with Konofka; but it was evident from his gestures and actions on the witness stand that McNamara told them and motioned to "come upstairs." And, as usual with foreigners, he understood English better than he could talk it.

McNamara denied that he told them to follow him, and he stated that he told them to wait near

the office; but this was denied by Konofka (*p. 33, line 40*), and McNamara was not corroborated by the circumstances. The bin to which McNamara went was 223 feet from the office. He walked 125 feet before turning (*p. 45, line 2*), and 45 feet from the turn to the foot of the stairway (*p. 45, line 21*), and about 62 feet on the plrtform from the top of the stairway to the bin (*p. 47, line 22*). It is not reasonable to suppose that McNamara intended to carry lumber back and forth that distance until his customer found the kind he was seeking, when the customer could go to the bin himself to select it. There is nothing inherently dangerous in an elevated platform, and there was no reason to carry lumber back and forth. Furthermore, McNamara was was not paying much attention to decedent and Konofka, for he did not see them following him; and yet the accident happened about 15 feet from the bin to which McNamara went, and about 2 or 3 minutes after he had reached it (*p. 48, line 6*).

It was clearly for the jury to determine whether Konofka or McNamara was telling the truth about the invitation; and the preponderence of the evidence was in favor of Konofka, a disinterested witness.

There was also an implied invitation which further corroborated Konofka. The platform was the only way to reach the bins, and it was the practical way for customers to select lumber. The very reason the guard-rails were there was to make it safe for customers, for when employees used the platform to put lumber in the bins, they took the rails out of the sockets (*p. 51, lines 31-40*). And even if that were not necessary to take lumber out, the rails would have to be taken off to replace the lumber; so that the rails were not for the safety of employes. There was nothing to indicate that the

stairs and platform were not intended for the use of customers; there was no sign or barrier at the foot of the stairs.

"Its (an implied invitation) essence is that "the owner knew or ought to have known "that something he was doing or permitting "to be done, might give rise to a natural be- "lief that he intended that to be done which "his conduct had led the plaintiff to believe he "had intended."

29 Cyc., 454, citing Furey v. N. Y. Cent. &c. R. Co., 67 N. J. L., 270.

"The gist of the liability in such cases con- "sists in the fact that the person injured did not "act merely on motives of his own, to which "no sign of the owner or occupier contributed, "but that he entered the premises because he "was led by the acts or conduct of the owner "or occupier to believe that the premises were "intended to be used in the manner in which "he used them, and that such use was not only "acquiesced in but was in accordance with the "invitation or design for which the way or "place was adapted and prepared or allowed to "be used."

Phillips v. Library Co , 55 N. J. L., 307.

"Since he was there by defendant's invita- "tion, the law imposed upon the defendant the "duty of exercising care for his safety while "going about the pier within the scope of the "invitation."

"As to this, we think the evidence does not " show a limitation of the invitation to the " ground floor or to any other particular part " of the pier, but that it was open to the jury

" to find that it was extended to the tower of
" the cupola."

Owens v. Associated Realties Corp., 81 N. J. L., 586, 587.

The present case is stronger than the ones cited, because there was an express invitation, and the jury had the right to find that fact.

SCOPE OF INVITATION.

There was not one scintilla of evidence to justify defendant's inference that decedent acted without the scope of the invitation. He did not stop to look at other lumber, nor "lean" or "lounge" against the rail. Nor did he stoop over to look at lumber and in raising himself, lift the rail out of the sockets with his body or shoulders. That would be a physical impossibility, for he would be stooping over with his back to the rail, and in raising himself to an upright position his shoulders would be away from the rail. And there was absolutely no evidence that "the intestate deliberately lifted the rail out of its sockets." It is absurd to suppose a man would deliberately lift a heavy rail like that out of the sockets without any reason. There is no contention that the rail broke or that it was "sprung" out of the sockets by force. Even defendant's own witness, Rambo, stated it was impossible to bend the rail by bracing his back against a pile of lumber and pushing against the rail with his feet. Rambo's testimony is immaterial, because there is no contention that the rail broke or "sprung" out of the sockets.

The cases cited on defendant's brief are not applicable, because there is no evidence to justify an inference that decedent acted without the scope of the invitation, unless it can be said that in placing

one's hand on a rail or baluster is using it for a purpose not intended. The burden of showing that the invitation was exceeded, like contributory negligence, was on the defendant, and there was no evidence which even squinted at that fact.

NEGLIGENCE.

The rail fell off when decedent placed his hand on it. It is evident that the rail was merely hanging on the edge of the socket or it would not have fallen off. There were wooden pins or pegs used to fasten some of the rails; and it is apparent that the rail which caused this accident was not placed in the socket properly or fastened. The end must have been merely balanced in the socket, otherwise it would not have fallen off by a person taking hold of it. The only eye-witness to the accident, Konofka, described it as follows:

> "Q. What happened to him? A. He was "killed right then and there, and this handle "lied under him.
>
> "Q. What happened to him? Did he fall off "the platform or what? A. As he took hold of "the handle everything fell down."
>
> (*p. 28, lines 4–10.*)
>
> "Q. How long was the foreman up there be- "fore your friend fell? A. As soon as he got "hold of the baluster he fell immediately."
>
> (*p. 33, lines 26–28*).

The pins or pegs which were used in some of the sockets to fasten the rails were about seven-eighths of an inch thick and 6 to 8 inches long. The witness, Mullen, saw the plugs in use two working days after the accident, and it is fair to infer that they were not made and adapted within that short

time. Furthermore, even McNamara did not say the pegs were used for the first time after the accident. His testimony was not confined to their use after the accident. It was only Rambo who made that statement.

Mullen testified as follows:

"Q. Well, what did you notice about the "plugs or pins running through the top of the "upright above the rail? Were there or were "there not those pins or plugs? A. There was "a plug like put in. The post was up this "way, and the rail was set in, and the plug "went right through. Over the plug there "was a piece of rope or something tied on the "plug so that it wouldn't run away.

"Q. Were those plugs on all of the uprights? "A. I have seen a few that they were not."

(*p. 16, lines 1–11.*)

McNamara testified as follows:

"Q. Well, aren't there some where there are "plugs or pins going through the upright "above the rail? A. No; not above the rail.

"Q. Not above? A. Not above; because you "couldn't put a pin in there.

"Q. Well, you could if there were holes. "A. Well, there are some of the uprights with "pins going through the middle of the rail.

"Q. And through the uprights. That is so, "isn't it? A. Well, some of them.

"Q. Some of them; yes. A. They are all, "in fact, run through the center of the guard-"rail; not in all of them, though, because "some of them it ain't really necessary to have "them on account of some of the pieces being "so short.

"Mr. Gilson—I object and ask that that be "stricken out. It is the witness' conclusion "and not responsive.

"The Court—I think so. The latter portion "may be stricken out.

"Q. Now, those plugs are about how large? "A. Oh, they run about seven-eighths in "thickness; about six to seven inches in length, "or eight inches."

(*p. 52, lines 14-40.*)

The question about the pins or plugs was not "charged out of the case" as stated in defendant's brief. The Court charged as follows on the bottom of page 85 and on page 86:

"Upon that point let me say to you again, "gentlemen that there has been some testi- "mony, or there did get into the case some "testimony regarding pins or spikes, or some- "thing of that order, which were used in this "railing. I will not attempt to recall whether "any of the witnesses said at the time of or "prior to this accident, which was December "29th, I believe, of last year, such means of "securing the rails was in use. I shall have to "leave that to you to determine from your "recollection of what the testimony was. "There was and has gotten into the case some "testimony as to the use of such instruments "and the placing of them after the happening "of the accident. You are not to use that "testimony which goes to show, if it does go "go to show, that these spikes or pins were "placed there after the accident for the pur- "poses of determining whether there was neg- "ligence on December 29th in not having "them there, because what may be done upon

"a day after the happening of an event is not "evidence as to the time of the happening. "So, therefore, so far as there is testimony to "that point you are not to consider it with re- "spect to the determination as to whether or "not it shows negligence."

The Court was referring to the testimony of the defendant's witness, Rambo, who stated that some "pegs were put in afterwards as an additional precaution" (*p. 70, line 29*). But the other evidence showed that the pegs were in use at the time of the accident, and that if they had been used in the rail which fell, this accident would not have happened.

The evidence also showed that the rails were not always placed in the sockets properly. On one occasion at least, the employees failed to replace a rail properly, after putting lumber in the bin.

"Q. And you say when they took the rails "out for that purpose they put them back? A. "Put them back; they are supposed to. I "couldn't swear whether they did or not.

"Q. But lots of times you noticed that they "didn't do that? A. Well, I did once that I "remember to my knowledge."

P. 14, line 39; p. 15, lines 1-5.

The question whether or not there was an electric light near the place where the accident happened is not important, because that would not disclose the fact that the rails were not inserted the proper distance in the sockets except upon a close examination of each socket. Furthermore, the evidence on that question was very uncertain. McNamara said it was an electric bulb, while Rambo said it was an arc light. Both of them said it was lighted at the time of the accident, but it is apparent that they

were testifying from the fact that it was customary to turn the lights on at about the time the accident happened, and not from anything which impressed it upon their minds on the day in question.

It was the duty of the defendant not only to provide a safe guard-rail, but also to *maintain* it in a safe condition.

> "That the owner or occupier of lands who, "by invitation, express or implied, induces per- "sons to come upon the premises for any pur- "pose, is under a duty to exercise ordinary care "to render the premises reasonably safe for such "purpose, or at least to abstain from any act "that will make the entry upon or use of the "premises dangerous."
>
> *Phillips v. Library Co., 55 N. J. L., 307.*

In the case of *Spicer v. Boice, 66 N. J. L., 434,* where plaintiff visited defendant's premises to buy lumber, the stairs to the upper part of the shed fell. The fatal defect was in the lack of a proper foundation. The Court said:

> "The real ground of liability is a failure to use "due care in the maintenance of the structure. "The defendants could not help but see the "frailty of the foundation, and if the permitting "of the use of their customers of an elevated "stairway resting merely on the outer edges of "hemlock planks twelve feet above the ground "was justifiable at all, it was only so by taking "care that the planks continued sound and "strong."

The defendant in the present case was under the same duty to see that the guard rail was not merely hanging in the socket.

And in *Smith v. Jackson, 70 N. J. L., 183*, where plaintiff went to the house of defendant to look at it with the intention of buying, and the stairs from the cellar to the first floor fell with him, the Court said:

> "The falling of the stairs in ordinary use "raised a *prima facie* presumption of lack of "ordinary care on the part of the defendant."

Again in *Reid v. Luick, Pa., 1903, 206 Pa. St., 109, 14 Am. Neg. Rep., 625*, where plaintiff entered defendant's store to purchase an article that the clerk said would be found in a back room, and he followed the clerk but lost sight of him in an intermediate dark room, and in following what he thought was the sound of the clerk's footsteps, he fell down an unguarded elevator shaft and was injured, the evidence was sufficient to sustain a verdict for the plaintiff.

In the cases cited on defendant's brief the invitation was exceeded, or the plaintiff was making use of something for which it was not intended; and in the other cases the unsafe condition was patent, whereas, in the present case, decedent had the right to assume that the rail was in its proper place without examining each socket.

> "The immunity of defendant in the case of "trespassers is sufficiently illustrated in the "turntable cases, and in the case of Friedman "v. Suare & Triest Co., 42 Vroom, 605, and "the difference between the liability to one "who has been invited to come upon premises, "and a mere licensee is sufficiently dealt with "in the leading case of Phillips v. Library "Company, 26 Id., 307."
>
> *Dodd v. Central R. R. Co., 80 N. J. L., 56, 60.*

"GUESS" OR "CONJECTURE."

It was not necessary to guess at the way the accident happened. Konofka testified that as decedent placed his hand on the rail, the rail fell and decedent fell with it. In the face of this uncontradicted testimony the jury had no right to "guess" or "conjecture" at some other cause. The logical inference was that the rail fell because it was improperly placed in the socket and was in an unsafe condition. The plaintiff was not required to exclude all inferences that the accident happened from a cause for which defendant is not responsible. There was no evidence to justify an inference that the rail fell from any other cause than its improper and unsafe condition. Counsel for defendant first says that "the facts and circumstances showed with reasonable certainty how the intestate fell, and that he fell while acting without the scope of the invitation alleged to have been given." *There is absolutely no evidence or circumstance from which that can be inferred.* Then he says: "Exactly how he fell or what caused him to fall was as much a 'conjecture' or a 'guess' at the conclusion of the case as when the motion for non suit was made."

When counsel for plaintiff was arguing against the non-suit and said it was uncertain as to just how the accident happened he was interrupted. What he started to say, and did say later, was that the fact that it was uncertain made it a jury question; but that it happened in one of two ways, either because decedent "deliberately lifted the rail out and plunged over or that the rail was not securely fastened in that groove and when he put his hand on it, as the witness described,—as soon as he put his hand on it the live (?) weight caused it to fall off, and that is what caused him to fall to the ground" *p. 39, lines 1-8*). If there was any

doubt as to which was the cause of this accident, it was for the jury.

See *McLean v. Erie R. Co.*, *69 N. J. L.*, *57*.
Brewster v. N. Y. Cent. &c. R. Co., *80 Id.*, *447*.

The Court also stated that there was "only one way this accident could have happened so far as the testimony discloses, and that is a matter of conjecture; that is, that this guard-rail in question was not properly fitted in the upright post to which it belonged" (*p. 38, line 18*).

The only reasonable and justifiable inference to be drawn, rendered the defendant liable, and the question of negligence was for the jury.

Suburban Electric Co. v. Lugent, 58 N.J.L. 658.
Foster v. D.L. & W. R. Co., 77 Id. 727.

"Plaintiff is not required to exclude beyond
" a reasonable doubt, the inference that the
" damage was due to a cause for which the de-
" fendant is not responsible."

Austin v. Pennsylvania R. Co., *82 N. J. L.*, *416*.

"Where the existence of negligence depends
" on the conclusion to be reached from a va-
" riety of circumstances, considered in relation
" to and their reaction upon each other, the
" jury, and not the Court, is normally the tri-
" bunal to draw such conclusion."

Sutton v. Bell, *79 N. J. L.*, *507*.

"Where the happening of an accident is
" sufficient to charge a defendant with negli-
" gence, and where fair-minded men might
" honestly differ as to whether the defendant
" has sustained its burden of showing that

"the decedent's injuries were not received
"through any fault on his part, the question
"of defendant's negligence should be submitted
"to the jury."

Najarian v. Jersey City, &c., R. Co., 77 N. J. L., 704.

"It is the province of the jury to pass upon
"testimony from which the negligence of the
"defendant may be inferred."

Bliss v. Bergen County Traction Co., 64 N. J. L., 601.

The cases cited in defendant's brief, where the Courts said the jury had no right to "guess" at the cause of the accident, were where there was no foundation in the testimony for the inference or conclusion drawn. But that is not the situation in the present case. There is no dispute about the law governing the case; the only dispute seems to be whether there is any evidence to justify the inference of defendant that decedent acted without the scope of the invitation, and whether he deliberately lifted the rail out of the sockets or stooped over and in raising himself knocked the rail off. There was no evidence to warrant either of those inferences, and the testimony of the eye-witness, Konofka, that the rail fell off when decedent placed his hand upon it, shows that the rail was merely hanging on the edge of the socket, instead of resting 3 inches in it.

The result of the improper placing of the rail in the socket would be anticipated by any ordinarily prudent person. The rail was not used in an extraordinary way in taking hold of it as anyone would do with a baluster; and defendant could have antici-

pated that it would fall off unless it was securely placed in the socket.

Defendant's 5th request to charge was not supported by any evidence, for there was no testimony to justify an inference that decedent stopped or stooped over to examine lumber on his way to the bin.

It was the duty of defendant to maintain the rail in a sufficient condition to prevent the accident (*29 Cyc., 471*); and the sufficiency of rail was a question for the jury (*Sutphen v. Hedden, 67 N. J. L., 324*). It is respectfully insisted that all of the questions in the case were for the jury, and the judgment should be affirmed.

Respectfully submitted,

HERBERT CLARK GILSON,

Attorney of Respondent.

INDEX.

TESTIMONY.

FOR PLAINTIFF:

FOR DEFENDANT:

Notice of Appeal.

HUDSON COUNTY CIRCUIT COURT.

MAGDALENA SEFLER, Administratrix of the Estate of VINCENTY, SEFLER, *Plaintiff-Respondent,* *vs.* VANDERBEEK & SONS, Inc., *Defendant-Appellant.*	Action At Law.

To

HERBERT CLARK GILSON, Esq.,
Attorney of Plaintiff.

Take notice that the Defendant appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in this case upon the following grounds:

The trial court should have directed a judgment of non-suit against the Plaintiff and in favor of the Defendant when moved thereunto by counsel for the Defendant.

The trial court should have directed a judgment in favor of the Defendant and against the Plaintiff at the conclusion of the case when thereunto moved by counsel for the Defendant.

Because there was no proof of any lack of reasonable care on the part of the Defendant in constructing and maintaining its premises and especially the platform or gallery and guard rail and uprights complained of.

Because the Defendant used reasonable care in constructing and maintaining its premises and especially the platform or gallery and guardrail and uprights complained of.

Because the trial court refused to allow the Defendant to prove that the premises of the Defendant and especially the platform, guard rail and uprights complained of were reasonably safe by testimony that no accident to any person had previously taken place on the said premises in connection with the said platform guard rail and uprights for a long period of time.

Because the trial court refused to allow the Defendant to introduce proof showing the exercise of reasonable care by the Defendant with respect to the construction and maintenance of its premises.

Because the trial court refused to allow the Defendant to introduce evidence that the construction and maintenance of its premises, and especially the platform, guard rail and uprights complained of, was similar or better than the construction and maintenance of the premises of other persons, firms or corporations engaged in doing business similar to the business of the Defendant.

Because the verdict of the jury was clearly against the weight of the evidence.

MARSHALL VAN WINKLE,
Attorney for Appellant.

Return.

The answer of Luther A. Campbell, Esquire, Judge of the Circuit Court, holden in and for the County of Hudson, and within named, the record and pleadings of the plaint whereof mention is within made with all things touching the same, I send to the Judges of our Court of Errors and Appeals of the last resort of all causes at Trenton, N. J., at the day and year contained, in a certain schedule to this appeal annexed as within I am commanded.

LUTHER A. CAMPBELL,
Judge.

Rule for Judgment.

(Filed June 8, 1915.)

HUDSON COUNTY CIRCUIT COURT.

MAGDALENA SEFLER, Administratrix of the Estate of VINCENTY SEFLER, deceased. *Plaintiff,* *vs.* VANDERBEEK & SONS, Inc., *Defendant.*	Action At Law.

This action having been tried before judge Luther A. Campbell with a jury in the presence of the respective parties at the Hudson County Circuit Court on June 2nd, 1915, and the plaintiff having been heard, and the defendant having been heard; and the arguments of counsel having been heard, and the court having charged the jury, and the jury having retired to consider of their verdict, return again into Court and say

they find in favor of the plaintiff, Magdalena Sefler, administratrix of the estate of Vincenty Sefler, deceased, and against the defendant, Vanderbeek & Sons, Incorporated, in the sum of Four Thousand Dollars ($4,000) damages besides costs of suit to be taxed:

Whereupon it is on this 2nd day of June, 1915, Ordered that judgment final be entered in favor of the plaintiff Magdalena Sefler, administratrix of the estate of Vincenty Sefler, deceased, and against the defendant, Vanderbeek & Sons, Incorporated for the sum of Four Thousand Dollars ($4,000) besides costs of suit to be taxed.

Rule actually entered this 8th day of June, 1915.

LUTHER A. CAMPBELL,
Judge.

On motion of
HERBERT CLARK GILSON,
Attorney for Plaintiff.

Damages	$4,000.00
Costs	59.25

Judgment.

Entered June 8, 1915 in favor of plaintiff Magdalena Sefler, administratrix of the estate of Vincenty Sefler, deceased and against the defendant Vanderbeek & Sons, Incorporated, for the sum of Four Thousand Dollars damages, and fifty-nine dollars and thirty-five cents costs.

LUTHER A. CAMPBELL,
Judge.

Complaint.

(Filed January 27, 1915).

HUDSON COUNTY CIRCUIT COURT.

MAGDALENA SEFLER, Administratrix of the Estate of VINCENTY SEFLER, deceased,

Plaintiff,

vs.

VANDERBEEK & SONS, Inc.,

Defendant.

Plaintiff, Magdalena Sefler, administratrix of the estate of Vincenty Sefler, deceased, residing in Jersey City, Hudson County, New Jersey, says:

1. At the times herein stated defendant was and still is a corporation of the State of New Jersey, and possessed and managed a lumber yard in Jersey City where it was engaged in the lumber business.

2. On December 29th, 1914, plaintiff's intestate, Vincenty Sefler, entered the said lumber yard for the purpose of buying lumber from the defendant.

3. On that day a servant and agent of the defendant conducted plaintiff's intestate to a certain building or shed in the said lumber yard to select certain lumber.

4. The banister and hand-rail along the stairs and platform of said building or shed, was negligently and improperly constructed and maintained, and by reason thereof the said banister or hand-rail gave way and fell off while plaintiff's intestate had his hand on it, thereby causing

plaintiff's intestate to fall to the ground, and injuring him so severely that he died as a result thereof.

5. Said decedent left him surviving, Magdalena Sefler, his widow, and the following children: Edwin, five years of age; Helen, three years of age, and Jennie, fourteen months of age; who are his only next of kin and who have suffered pecuniary loss by reason of his death.

6. On January 6th, 1915, letters of administration were granted upon the estate of said Vincenty Sefler, by the Surrogate of Hudson County, aforesaid, to plaintiff, and were accepted by her.

By reason of the premises plaintiff, as administratrix as aforesaid, demands $10,000.00 damages.

HERBERT CLARK GILSON,
Attorney of Plaintiff.

Answer.

(Filed February 1, 1915).

The Defendant, Vanderbeek &Sons, Inc., having its principal office at Jersey City, New Jersey, says that:

1. It admits Paragraph 1 of the Complaint.
2. It denies Paragraph 2 of the Complaint.
3. It denies Paragraph 3 of the Complaint.
4. It denies Paragraph 4 of the Complaint.
5. As to the statements in Paragraph 5 of the Complaint, Defendant has not any knowledge or information thereof sufficient to form a belief.
6. As to the statements in Paragraph 6 of the Complaint, Defendant has not any knowledge or information thereof sufficient to form a belief.

FIRST DEFENSE.

Defendant will object that the Complaint discloses no cause of action. It fails to show that Plaintiff's intestate was lawfully on the premises of the Defendant. It fails to show that the Defendant owned Plaintiff's intestate any duty, the failure to perform which duty, caused the death of Plaintiff's intestate.

SECOND DEFENSE.

Plaintiff's intestate was not lawfully on the premises of the Defendant at the time stated in the Complaint.

THIRD DEFENSE.

Plaintiff's intestate was not invited by Defendant to enter the lumber yard of the Defendant at the time stated in the Complaint.

FOURTH DEFENSE.

Plaintiff's intestate was in the lumber yard and at the place where he fell and sustained his injury without the knowledge of the Defendant.

FIFTH DEFENSE.

The banister and hand-rail mentioned in Paragraph 4 of the Complaint were properly and carefully constructed and maintained.

MARSHALL VAN WINKLE,
Attorney of Defendant.

Reply.

(Filed February 1, 1915.)

HUDSON COUNTY CIRCUIT COURT.

Plaintiff denies the allegations contained in the second, third, fourth and fifth defenses in the answer of the defendant.

HERBERT CLARK GILSON,
Attorney of Plaintiff.

Testimony.

HUDSON COUNTY CIRCUIT COURT.

MAGDALENA SEFLER, Admx. *Plaintiff* *vs.* VANDERBEEK & SONS, Inc., *Defendant.*	At law.

APPEARANCES:

HERBERT C. GILSON, for the plaintiff,

MARSHALL VAN WINKLE, for the defendant.

The above entitled case was tried June 2nd, 1915. Before Hon. Luther A. Campbell, Judge and a jury.

Mr. Gilson opened the plaintiff's case to the jury.

Mr. Van Winkle opened the defendant's case to the jury.

ARTHUR HUGHES, sworn.

DIRECT EXAMINATION BY MR. GILSON:

Q. Where do you live, Mr. Hughes? A. Rayville Avenue, Greenville; 31 Rayville Avenue.

Q. Prior to last December where did you work? A. Park Lumber Company, where I am working now.

Q. Did you ever work for Vanderbeek & Sons? A. Yes, sir.

Q. How long? A. About fifteen years.

Q. Up to what time? A. Up till the 23rd of December.

Q. What year? A. 1914.

Q. Do you know this building that this Sefler was injured in? A. Yes, sir.

Q. That is the corner of Steuben and Greene streets, Jersey City? A. Yes, sir.

Q. Are you familiar with the construction of that buiding? A. Well, I was at that time.

Q. What was your position with Vanderbeek? A. Well, I was shipping clerk for five years and after that I was laboring.

Q. You were what? A. Laboring in the yard, handing lumber.

Q. Handling lumber? A. Yes, sir.

Q. Is the office in that building? A. It is situated on the corner of Greene and Steuben streets, the office is; but the shed office is up at—I don't know the number; it is near the mill.

Q. About how long is the building? A. Well, I couldn't really say; it might be two hundred feet long, if not longer.

Q. And about how high? A. Well, I don't really know the height.

Q. Well, approximately? A. Well, I don't know; I couldn't say.

Q. Is it over thirty feet? A. It might be thirty feet; it might be less.

Q. What do they keep in that building? A. Lumber.

Q. And how is it kept? A. Piled in bins.

Q. Are there several tiers of bins? A. Yes, sir.

MR. VAN WINKLE: Now, if your Honor please, I wish to object. The witness is testifying that he was up to a certain date in the employ of the defendant, and there is no proof that he has been in the premises

since the time that he separated himself from the defendant's service.

THE COURT: My recollection is that he said he was employed there until the 23rd of December, 1914.

MR. VAN WINKLE: The accident was after that.

THE WITNESS: Yes sir, the accident was after that.

MR. VAN WINKLE: Prior to the accident he left.

THE COURT: Of course, you are only attempting to show the condition, if you can, as it was on the 23rd of December, 1914.

MR. GILSON: That is all.

THE COURT: And, of course, if you can not connect up its condition on the 29th as being the same as it was on the 23rd this testimony would be entirely irrelevant and will be stricken out.

Q. (Repeated by the stenographer) Are there several tiers of bins? A. (Repeated by the stenographer) Yes, sir.

Q. How many? A. Two.

Q. How high is the second tier above the ground? A. Sixteen feet it was at the time I was employed there.

Q. How do you get up to that second tier? A. By going up steps.

MR. VAN WINKLE: You mean "How did you get up?"

THE COURT: How did you, up to the time you left? What was the means of getting to the second tier of bins?

A. Going up the stairs.

Q. And at the top of the stairs what was there,

if anything? A. A rail around, a safeguard.

Q. A platform? A. Platform; yes, sir.

Q. About how wide was the platform? A. The platform was two feet wide.

Q. This rail that you speak of, how was that supported? A. By uprights.

Q. What were those uprights made of? A. Well, they were made before I was there; they were made out of yellow pine lumber; that is what I understand.

MR. VAN WINKLE: A little louder.

THE COURT: Made of yellow pine lumber.

Q. What size? A. I don't really know the size; I don't remember at that time the measurement.

Q. Approximately? Were they two, three, or four? A. Well, I guess they were three by four.

Q. How far apart were those uprights? A. Well, in some sections they were twelve feet; in some sections they were longer, and in some sections they were shorter.

Q. How much shorter? A. Well, in a smaller space, why, they were I think about eight feet. There was one section, that is all, that I know of at the time I was employed there.

Q. What were the rails made of? A. Well—yellow pine.

Q. And about what size? A. Well, I should say about an inch and a half or an inch and a quarter thick by about four inches wide.

Q. And how long? A. Well, in different sections they had different lengths.

Q. According to the distance between the uprights? A. Why, you mean the highest from the rail to the upright, from the bottom of the platform to the upright?

Q. No; I mean how long were the rails? A. Well, different sections have different lengths.

Q. And that depended upon how far apart the uprights were? A. Yes; that depended on how far apart the uprights were.

Q. So that the end of each rail had to end on an upright; is that right? A. Yes, sir; one on each end.

Q. How high were those rails above the platform? A. About three feet—not quite three feet.

Q. How were they held to the upright? A. They were placed in a socket at the time I was there.

Q. Yes. About how deep was the socket? A. Just deep enough to hold the rail, the thickness of the rail or width of the rail—three, three and a half or four. How wide the rail was I really don't remember now, that held that rail.

Q. Was the top of the upright flush with the rail itself—with the rail? A. Yes, sir.

Q. Wait a minute. I haven't finished. Or did it stick up above the rail? A. No; it was flush with the rail.

Q. Was that true of all the rails and of all the uprights? A. The same thing.

Q. They were all the same? A. They were all the same.

Q. Were the rails nailed or spiked? A. No, sir.

Q. Never? A. Not to my knowledge.

Q. Were there any pins over the uprights to hold the rail in? A. No, sir; not to my knowledge.

Q. Never? A. Not while I was there.

Q. Didn't you tell me a few minutes ago that there were? A. I didn't tell you anything of the kind; no, sir.

MR. VAN WINKLE: I object.

MR. GILSON: Well, if your Honor please, he is an adverse witness.

MR. VAN WINKLE: Never spoke to the man in my life; never spoke to him before.

THE WITNESS: I haven't; nobody.

MR. GILSON: Well, I will withdraw it.

Q. When customers went there to buy lumber how were they shown where the lumber was that they wanted? A. By a salesman—

MR. VAN WINKLE: I object, if your Honor please.

A. (Continuing) that was employed there.

MR. VAN WINKLE: Wait a minute. A customer can't bind us in this case. There is a definite allegation of negligence that must be met by us.

MR. GILSON: It sems to me from the opening of counsel that this man was not there upon the invitation of the defendant.

MR. VAN WINKLE: That is true.

MR. GILSON: Now, if it were customary for customers to go there, go to the office, and somebody took them into the shed, as we are going to prove—I have only called this witness out of turn because another witness wasn't here.

THE COURT: Why is it necessary to depend upon the customer, even if that were relevant?

MR. GILSON: It isn't necessary, but it just shows that it was—well, your Honor will allow me an exception.

THE COURT: Yes. I don't think that is necessary. You say you are attempting to show in this particular case there was a particular invitation.

CROSS EXAMINATION BY MR. VAN WINKLE:

Q. Mr. Hughes, during the time that you were there with Vanderbeek, did you see the lumber put in the bins above? A. Yes, sir.

Q. And I suppose you did some of that work yourself? A. Yes, sir.

Q. In doing that kind of work, Mr. Hughes, in putting lumber from the ground floor into the bins above, what would you do with these guard-rails you have been talking about? A. Have to take them out.

Q. So when lumber or timber would be put from the ground floor into the bins above these guard-rails, so-called, were taken out? A. Taken right out; lifted right up, taken out.

Q. And replaced after the lumber got back in the bins above, or was put in the bins? A. Yes, sir.

Q. And on those occasions how would the man do, just lift the guard-rail out and put it one side? A. Just put it right down in front of their feet.

Q. And put the lumber in? A. Yes.

Q. And put the guard-rail back when it was in, and that was the end of the transaction? A. That is all.

RE-DIRECT EXAMINATION BY MR. GILSON:

Q. You didn't have to do that to get the lumber in, though, did you? A. Always.

Q. Didn't you often take the lumber to the rail and use the rail to run it over? A. No, sir.

Q. Never? A. You could let the lumber down that way, but you couldn't pass it up.

Q. Never? A. No, sir; it is too high.

Q. And you say when they took the rails out for that purpose they put them back? A. Put

them back; they are supposed to. I couldn't swear whether they always did it or not.

Q. But lots of times you noticed that they didn't do that? A. Well, I do once that I remember to my knowledge.

Q. And lots of times you noticed that they didn't put them back exactly as they should; isn't that so? A. I didn't notice but once to my knowledge; that was when I had charge of the shed.

(Witness excused).

A. W. MULLEN, sworn.

DIRECT EXAMINATION BY MR. GILSON:

Q. Where do you live? A. 287 Seventh street, Jersey City.

Q. Are you familiar with this building of Vanderbeek's at the corner of Steuben and Greene streets? A. I was down there twice.

Q. When were you there the first time? A. I was down there about the second—third of January, 1915.

Q. Did you notice those two tiers of bins? A. I did.

Q. Did you notice the uprights holding the rail along the platform of the second tier? A. I did.

Q. Did you notice whether the top of the upright extended above the rail? A. I did.

Q. Did it or did it not? A. It did.

Q. Did you notice whether there were any spikes, nails or pins or plugs in the top of the rail or upright? A. I noticed it in a few. There were a few men working around there putting new rails, and so on. There was a few new ones and some old ones. That is all I seen of them.

Q. Well, what did you notice about the plugs or pins running through the top of the upright above the rail? Were there or were there not those pins or plugs? A. There was a plug like put in. The post was up this way, and the rail was set in, and the plug went right through. Over the plug there was a piece of rope or something tied on the plug so that it wouldn't run away.

Q. Were those plugs on all of the uprights? A. I have seen a few that they were not.

Q. How did people get up to that platform?

MR. VAN WINKLE: I object, if your Honor please—"How did people get up?" Too indefinite altogether.

Q. Well, was there a ladder or stairway or what to get up to that platform? A. Stairway.

Q. Stairway? A. Stairway.

Q. Did that have a rail on it? A. There was one there was a rail on; but the Steuben street entrance there is a ladder up; when you go in at Steuben street and the alleyway to the bins, there is a stairway going up sideways; that is to the right.

Q. How high from the ground was this platform? A. It was about between sixteen and eighteen feet; about that.

Q. And about how wide was the platform? A. Well, it was three boards wide about; two or three feet wide.

MR. VAN WINKLE: How many boards were there?

A. Two or three, across the platform.

Q. And about how high was the rail above the platform? A. About three feet.

Q. How far apart were the uprights? A. When I first was down there they were about fifteen

feet; and when I was down there the second time there was two posts; when I was down there the second time there were a post put in the center that makes them about seven feet higher.

MR. VAN WINKLE: You are testifying to something that happened between the first and second visit. If so, I move to strike it out.

A. No; on the second and third of January.

MR. VAN WINKLE: He said in between something else had been done.

A. I said when I was down there the first of January, the posts were about fifteen feet apart. When I was down there the second time they were about seven feet apart.

MR. VAN WINKLE: I move to strike that out. He is testifying to a change that took place that he did not observe.

MR. GILSON: I consent.

THE COURT: It is improper.

CROSS EXAMINATION BY MR. VAN WINKLE:

Q. What is your business? A. Interpreting.

Q. What language do you interpret in? A. Polish, Slavish and Lithuanian.

Q. Practice law, do you? A. No, sir.

Q. What interest have you in this case? A. Mr. Gilson asked me to go down there; I went down there.

Q. Do you know the plaintiff in this case? A. I do not.

Q. Do you know what nationality she is? A. Oh, yes.

Q. What? A. Polish.

Q. Same as yours? A. (No answer).

Q. As a matter of fact are you not the man who brought this man to Mr. Gilson to bring this suit? A. There was three lawyers about this case before Mr. Gilson got this case.

Q. Well, can't you answer the question?

THE COURT: The question is, Are you not the man who brought this case to Mr. Gilson?

A. Mr. "Presk" brought her down to Mr. Gilson; I was there at the time this party brought her down there.

Q. You just said, showing your knowledge, that three lawyers wanted the case— A. (Interrupting) About the case.

Q. (Continuing) before Mr. Gilson took it; so you must have seen this woman before Mr. Gilson did? A. I did not.

Q. From whom did you learn that Mr. Gilson was the fourth lawyer? A. Mr. Gilson told me that. When Mr. Gilson came down there Mr. Gilson told me to translate that to her—not to fool around lawyers as she did before.

Q. But to get a real good one? A. I don't know that.

Q. What was said at this conversation you testified about? A. What do you mean?

Q. As to where the lady came from, how did she come to Mr. Gilson's office, if not through you? A. She lives in our house there. Of course,—

Q. (Interrupting) Yes, sir. A. (Continuing) she came to talk, would I take the—

Q. (Interrupting) Where does she live? A. She lives downtown somewhere in Jersey City now.

Q. She had lived in your house, you say? A. The next house from me.

Q. What street was that? A. Seventh street, Jersey City.

Q. And you heard she had a case; and did you speak to her about it? A. I didn't speak about it because I knew.

Q. You knew she had a case? A. After her husband was killed, and a friend of mine in mine house told her to go up to Mr. Gilson, and she done that.

Q. Who is the friend? A. Oh, there is a lot of people in the house; they all know me; mother and sister all live in the same house.

Q. How much do you expect to get out of this case if there is a verdict against the defendant? A. Me?

Q. You; your share? A. I don't get anything out of it.

Q. How much do you get? A. I only get paid by Mr. Gilson.

Q. How much do you get paid? A. According to how much work I do.

Q. Do you get paid by the day or according to the amount of money there is? A. I get paid by the day.

Q. How much a day? A. If I work a whole day I get a full day; if I work half a day I get half a day.

Q. As a matter of fact you have no idea as to how much you are to get paid? A. I generally get paid for five dollars a day. I done work right here in this court and I got five dollars a day.

Q. How much has Mr. Gilson paid you in other cases? A. About five dollars a day.

Q. Haven't you had cases in which he paid you a portion of the amount he recovered in the case? A. If I had other cases?

Q. Yes. A. Yes, sir.

Q. (Repeated by the stenographer) Haven't you had cases in which he paid you a portion of the amount he recovered in the case? A. He might have tipped me off with several dollars; that is all; but he didn't give me a percent of the amount.

Q. I will adopt your language. Cases where he tipped you off with a few dollars—how much did you get tipped off in any given case? A. If I had five days—there is a party coming down the office three or four times, and I am there, he pays me so much for those days.

Q. Then you work for him? A. Yes; not all the time.

Q. And as part of your work don't you bring him cases? A. Sometimes I do.

Q. All Polish cases? A. Not all Polish; there are a lot of American cases. If I am in the—if I am to do any work, any subpoenas to be served, I do it for him.

Q. What business have you besides that? A. I am an agent, real estate.

Q. Agent of what? A. Real estate.

Q. Where is your office? A. I haven't any; I am sub-agent only.

Q. Sub-agent. So most of your work is in connection with cases in court; is it not? A. No.

Q. What proportion of your work is in court? Or in connection with cases in court? A. Only with Mr. Gilson. If there is any work to be done I do it; if there is any work that I can do for him I do it.

Q. He keeps you pretty busy, does he? A. Mr. Gilson? Why, yes.

Q. Yes. Now, when you went to Vanderbeek's in January did you tell anybody in the place that you were there, or why you were there? A. No.

Q. Why didn't you do that? A. I didn't think it was necessary.

A. W. Mullen—Cross.

Q. How did you get in the place? A. The place was open.

Q. No one kept you out? A. No.

Q. And did you get upstairs on this second gallery? A. I did not.

Q. Well, how did you see the posts and rails up there? A. Right in front of the door you could see all the way through, the whole building, right through.

Q. Then you are testifying with respect to these posts and these guard-rails, and these sockets in the posts, from observation from the ground sixteen or seventeen feet beow? A. You could see right up.

Q. I ask you are you testifying that? A. I do.

Q. How far within the door did you get? A. About ten or fifteen feet.

Q. From what street? A. From Greene street. I was in from Greene and I was also in from Steuben.

Q. How far inside the door from Steuben street did you go? A. From Steuben—I was in there—I couldn't really say; perhaps five or ten feet.

Q. And how many feet from the door on Greene street? A. About fifteen or so.

Q. Well, do you know whether or not you saw the space at all from either of those places you testified, from which this man fell? A. Well, exactly, I don't know—

Q. (Interrupting) You don't know exactly where he fell, do you? A. No; I do not.

Q. Now, when you are testifying as to rails and conditions of rails and posts and sockets, you are testifying from the observation you made down on the ground a few feet inside of the door, Greene street door? A. Greene street door and Steuben.

Q. And Steuben street door? A. And Steuben street door.

Q. How near did you get to the stairway you are talking about? A. There is doors all the way along Steuben street.

Q. There is what? A. Doors all the way along Steuben street.

Q. Doors? A. Sliding doors; and the door was open right in front of this stairway.

Q. Is this stairway in a driveway or at the end of a driveway? A. No.

Q. It is not. Is there an open place around the stairway at all? A. No; there are two bins alongside of it coming in.

Q. So your testimony is that the stairway as you saw had no open place around it? A. There is three or four stairways there.

Q. Which stairways did you see where were they? A. It was going into Greene street; it was on the lefthand side; and there was another on the right-hand side.

Q. Stairways or ladders? A. Stairways. Another one from Greene street; where the office is is a ladder going up, and there is a sign on it.

Q. That is by the office? A. Yes; that is near the mill.

Q. What is that sign? A. "No admittance," I believe.

Q. "No admittance?" A. Yes.

Q. Now, how many stairways do you say you saw, three? A. Three.

THE COURT: Including the ladder?

A. Yes; two stairways and one ladder.

Q. When did you say you went there the second time? A. About a month ago.

Q. Did you tell anybody that you were there

or where you were going? A. I believe I went down with Mr. Gilson; both of us went down.

Q. But you didn't tell anybody in Vanderbeek's, or didn't send word to him that you were going did you? A. No.

Q. You just sneaked in the place again?

MR. GILSON: I object to that, "sneaked in." Here is a buiding that is open.

MR. VAN WINKLE: That is what he did.

MR. GILSON: I object to the word "sneak."

THE COURT: I suppose the objection is well taken.

MR. VAN WINKLE: All right, sir.

Q. Now, on this occasion you say you went there after you had been to Mr. Gilson's office? A. I did.

Q. How long did you remain on the second trip? A. Fifteen or twenty minutes.

Q. How far inside did you go? A. I believe I was about five—twenty-five to thirty feet.

Q. Now you say you believe. Tell us. We don't know. A. I was about five feet away from that stairway, and that is about thirty feet; about that. I didn't count this.

Q. You say after going five feet inside the place— A. (Interrupting) I said five feet from the stairway; that is about thirty feet from the door to Greene street.

Q. So the stairway you are talking about is about thirty-five feet away from the doorway? A. About that; I couldn't really say.

Q. Now, on this first visit, Mister, did you look up and see the uprights? A. I did.

Q. And looked at them and around the whole place in front of all the bins? A. Just as far as I could see.

Q. You couldn't see them all, could you? A. There is one bin—that is, the one alley I could not.

Q. All except one alley; and you don't know what kind of guard-rail was in front of the bin where this man fell; do you? A. When I was there the first time there was a wagon loading lumber, taking lumber up in the bin there, and I seen; he took it off and let it down. I seen him taking it off and putting it in, because I waited there to see how it was put in.

Q. The question is do you know what place this man fell from? A. I do not.

Q. No; and you can't testify at all with respect to the guard-rail that Mr. Gilson in his opening said went down with the man, can you? A. I don't.

Q. You do say that the tops of the uprights were flush with the top of the rails when they were in? A. I couldn't say that.

Q. What do you say? A. I say the rails were set in, and I couldn't—of course, you couldn't see that it was flush; you would have to be up on top to see that. You can't see sixteen feet up.

Q. You can't tell that? A. No; I can not.

Q. You can not tell anything about the condition of those sockets, their depth, or whether the tops of the guard-rails were flush with the uprights? A. The only way I can tell they were flush, one was taken out while I was there.

Q. Well, tell me how you could see that the thing was flush when you were sixteen or seventeen feet down, looking up? A. Didn't I say that I can't tell you that it was flush? Isn't that what I said?

THE COURT: That is what he answered.

A. I answered that.

Q. Well, you don't assume to say they were not flush, do you? A. I would not say that, either.

Q. That the guard-rail was higher than the upright? A. I wouldn't say that, either.

RE-DIRECT EXAMINATION BY MR. GILSON:

Q. Were these pins that you spoke of above the guard-rail or through the socket and rail? A. It was right through, tied down on a string, I believe; string of rope.

(Witness excused).

ANDRO KONOFKA, sworn. (Examined through interpreter.)

DIRECT EXAMINATION BY MR. GILSON:

Q. Where do you live? A. 454 Henderson street.

Q. Jersey City? A. Jersey City.

Q. Did you know Vincente Sefler in his lifetime? A. William Sefler.

Q. William. A. We lived together.

Q. And is that the man who was injured and killed at Vanderbeek's lumber yard on December 29th? A. Yes, sir.

Q. Is Wiliam the English for Vincente? A. Yes, sir.

Q. And were you with him in Vanderbeek's building when he was injured? A. I was.

Q. What day was that? A. I don't remember.

Q. About what time of day was it? A. Between three and four o'clock in the afternoon.

Q. Do you remember what month it was? A. The month I don't remember.

Q. Well, was it before or after New Year's? A. I can't remember that.

Q. Well, was it in the winter or summer? A. It must have been in the fall.

Q. Do you know when Christmas is? A. I don't know.

Q. Well, was it before or after Christmas? A. I don't remember.

Q. How did you happen to come down there to Vanderbeek's place on that day? A. I wanted to buy some lumber, because I am a musician—

MR. VAN WINKLE: He came there to buy some lumber because he was a musician.

Q. When did you meet Sefler? A. Corner Grand and Bower street.

Q. Did you go from there to Vanderbeek's? A. It was raining and he asked me where there is a lumber yard? I said there is one on Grand street, but I will not go back because I am going towards home. I said to him: "Go on Steuben street; there is a lumber yard there, and you can select any kind of wood you desire." When we reached Steuben street and Henderson street he took me by the arm and said: "Please come along with me to the lumber yard;" and we went there. We reached one office and I said: "Come down the office." When we reached there he bought some certain kinds of wood. Then they led us into the center of the shop.

MR. VAN WINKLE: I object, unless there be a specification, unless they designate what "they" means.

THE COURT: The objection, as I understand it, is as to the use of the word "they." He says "They led us." Mr. Van Winkle wants you to make more definite as to who "they" are.

Q. Now, when you went into the office was anyone there in the office?

MR. VAN WINKLE: Pardon me a minute. That is struck out?

THE COURT: That portion, "they led us," may be struck out.

Q. Was anyone in the office when you went there? A. There were some men writing, and they gave us the foreman, and the foreman showed us the boards; but they were too narrow.

MR. VAN WINKLE: I object, if your Honor please, to the designation of anybody who was there as the foreman of the defendant. That is a conclusion entirely. If some clerk said that he was a foreman they would have to prove that he was.

Q. How do you know that he was a foreman? A. Because they showed us the man who was the foreman.

Q. Had you ever been there before? A. Never.

Q. Did anyone call him foreman in the office? A. Someone from the office called him; I don't know which one called him.

Q. Now, where did the foreman take you from the office? A. He took us downstairs. He showed us some boards, but they were too narrow.

Q. Then where did he take you? A. Then he said: "Come upstairs. I will show you another lumber which will be to your liking." And the foreman led us upstairs and we followed the foreman, and Sefler followed me; he was the last one to follow. We reached some place where there was like an exhibition of some material, and when we passed that and Sefler followed, and he grasped the handle there, and just as he grabbed—caught hold of it, everything fell on top of him.

Q. On top of him? A. I called him—"Come along, Sefler!" and when he grasped that, that fell off.

Q. What happened to him? A. He was killed right there and then, and this handle lied under him.

Q. What happened to him? Did he fall off the platform or what? A. As he took hold of the handle everything fell down.

Q. About how far did he fall? A. I can not say exactly; maybe about sixteen or seventeen feet—maybe.

Q. Where was the foreman when he fell? A. The foreman went there—reached the pile of lumber that was—that we were about to select from. When that all fell he got scared, too.

Q. After this man fell what did you do? A. I also got scared. I came there until the bricklayer came along, bricklayer came along—I waited until the ambulance came.

Q. And did the ambulance take him away? A. Yes, sir. I inquired whether he was killed. They said yes, he was killed. They took me to the office and took my name, and also the man who was killed, name. They asked me where he lived. I said on Seventh street, but I don't know the number. They sent along with me some Polish man which way they inquired. That is all.

Q. Did you go in the ambulance? A. No, sir; I did not.

Q. You don't know where he was taken to? A. No, sir; I do not.

Q. This platform from which he fell was about sixteen or seventeen feet above the ground? A. About the distance of this ceiling. (Indicating the court-room ceiling).

Q. About how wide was the platform from

which he fell? A. (Indicating about three feet in width) Like a running board, as it is called.

Q. About how high was the rail along that platform? A. (Indicating a distance from the floor to his hip).

Q. Did you notice what size material the uprights were made of that supported the rail? A. No, sir; I didn't see it; I can't say that.

Q. Did you notice the size of the rail? A. Size?

Q. Size, yes; size of the rail. A. About the depth of three fingers.

Q. Three what? A. Three fingers.

Q. And about how wide? A. About two inches.

Q. About two inches? A. (By the interpreter) He indicated with three fingers).

Q. Did you notice where that rail was after Sefler fell? A. The rail was laying under the dead man.

Q. Did you notice whether it was broken when it was on the ground or not? A. I did not; No, I did not notice.

Q. Did you notice how that rail was kept on the upright? A. No; that I don't know.

Q. I mean did you look at it afterward? A. No, sir; I was scared myself—I did not.

Q. Do you know what became of the foreman after the accident? A. The foreman went from the top and walked into the office.

Q. Were there no lamps or electric lights or artificial lights? A. No, sir; I didn't see any.

Q. Was it dark or light in the building when you were looking at the lumber? A. I can't say, because it was a rainy day.

Q. Well, don't you remember whether it was light or dark? A. I don't remember.

Q. What time of day was it? A. Between three and four o'clock.

MR. GILSON: Is there any dispute, Mr. Van Winkle, that the date was December 29th?

MR. VAN WINKLE: I believe that is right, Mr. Gilson. The man was killed and I believe that was the date. I shall make no point of it at all.

CROSS EXAMINATION BY MR. WINKLE:

Q. Mr. McNamara, will you stand up, please?

Q. The man you have spoken of as the foreman, is that the man there? A. I only saw him once; I don't know whether it is or not.

Q. Well, if you can't say that is the man or not, look around the room and see if you can find the man. A. I can not say. I only saw him once and I got scared; I could not identify anybody.

Q. Well, the man that you say somebody called the foreman in the office and you and your friend spoke to. A. I didn't say anything. He spoke.

Q. Who spoke? A. The dead man.

Q. And this foreman socalled said, when he found you couldn't find what you wanted downstairs: "Come upstairs?" A. Yes.

Q. Well, how do you know what he said if he didn't speak Polish? A. He said "Come upstairs;" and I undersand what it means to come upstairs.

Q. This man spoke in English, didn't he? A. No. Who?

Q. The foreman? A. English.

Q. Did you have a long conversation with him when he spoke in English? A. Only one word. Only said "Come up stairs."

Q. Now, will you listen to me speaking English and do not notice the interpreter for a minute. Don't look at him or say a word. Please listen

to me while I talk to you. I am going to ask you if you understand what I say. Do you know what I have said so far? Do you know how many stairways there are in this courthouse? Do you know where upstairs is? A. Courthouse—everybody what courthouse.

Q. Did you walk up the stairways this morning in the courthouse? A. I couldn't understand much.

Q. What? A. I couldn't understand much.

Q. Well, I have used the word stairway several times. You say you cannot understand what I have just said? A. (No answer).

Q. Do you understand? A. No. (Witness shakes head from side to side).

Q. This man said "Come uptairs," and then you followed him upstairs; is that right? A. Yes, sir.

Q. Did he hurry away? Did he walk faster after he said that? A. No; we walked slow.

Q. How many hundred feet did you have to go before you got to the stairway? A. I can't say that.

Q. Didn't you have to go two or three hundred feet before you got to the stairway? A. Only one flight of stairs.

Q. How far did you have to go to get to the stairway from where the man said "Come upstairs?" A. About from the wall to here. (Indicating the witness stand.) And then we turned around—

Q. (Interrupting) Outside of the direction please repeat the question. How far, what distance?

Q. (Repeated by the stenographer) How far did you have to go to get to the stairway? A. About the distance of the office—would be the distance to the other side of the courtroom.

Q. The other side of the court room; and you say the place where the man said "Come upstairs" was about the distance from the other side of the court room to the end of the stairway here? A. When we left the office we had to go through the entire shop.

Q. What distance was that? A. I didn't measure it; I can't say.

Q. Well, did you go down past all the trucks being loaded and pass all the men working before you got to the stairway? A. Yes, sir.

Q. And didn't you have to turn around before you got to the stairway? A. Yes, sir; we walked straight until we reached the stairs.

Q. Well, it was light enough for you to see where you were going up the stairway, wasn't it? A. Sure. The foreman walked and we followed him.

Q. And the trucks were being loaded there, and so far as you could see there was enough light to load the trucks and for the men to work around there; wasn't there? A. There was a gate leading to Steuben street. I don't know the name of the street—

Q. (Interrupting) Was the gate open? A. No, sir. This side (pointing to the right) was open.

Q. Well, when you got to the stairway were you not in front of the open door with daylight coming in? A. I don't know what you ask me. All we know there wasn't any doors that we know. All we know when we left the office the foreman led and we followed.

Q. You didn't look where you were going, did you? A. Why, the foreman led us.

Q. Well, did you have any difficulty in finding your way to the end of the stairway, the bottom of the stairway? A. When we walked the first

time they make up the exhibition ends to be showed off. We can't tell where we led to.

Q. He is thinking about the war. We are not talking about the war. How many years have you been in his country? How many years have you been in this country. Understand me? A. (Through interpreter) Fourteen years. I always worked with Polish people. Never had an opportunity to learn.

Q. Never learned to speak English? A. No. My girl can speak good English.

Q. Yes. That is our public schools. Did you see where the foreman went when he went upstairs? A. Sure; we all walked together and I followed the foreman.

Q. How far away from the foreman were you when you got to the top of the stairs? A. I walked up about four or five feet—about five feet apart from the foreman, the distance from this (indicating the witness stand) and the Sefler was behind me about the distance of that. (Indicating).

Q. Was he a heavy man? A. Yes; he was heavier than I; sure.

Q. How long was the foreman up above there before your friend fell? A. As soon as he got hold of the baluster he fell immediately.

Q. That does not answer my question.

Q. (Repeated by the stenographer) How long was the foreman up above there before your friend fell? A. I don't know how long.

Q. Was it two minutes, three minutes? A. There wasn't anyone had any watch; I can't indicate the time.

Q. Now, as a matter of fact, didn't this foreman tell you to wait on the ground floor by the office where you were when you spoke to him? Did he not tell you to wait until he came back? A. No, sir; the foreman didn't say that.

Q. You don't know what the foreman said to your friend, do you, in English? A. They would send a foreman; they would not send a workman.

Q. (Repeated by the stenographer) You don't know what the foreman said to your friend, do you, in English? A. All he said—"Come upstairs. I will show you the lumber." That is all.

Q. Do you know whether or not he said "Wait here till I come back?" A. No, sir.

Q. Did he have any conversation at all with your friend outside of what you have just stated? A. No, sir.

Q. Didn't you have a conversation about the kind of lumber that you wanted, or the kind of wood that you wanted? A. The dead man said what kind of wood he intended to buy.

Q. Yes. Your friend is the one who carried on the conversation with the foreman; isn't he? A. Yes, sir.

RE-DIRECT EXAMINATION BY MR. GILSON:

Q. How long had you known Sefler? A. About two years. Not very long. Not quite two years.

Q. Did he talk English better than you did or not so well? A. He said better than I.

(Witness excused).

MAGDALENA SEFLER, sworn (Examined through interpreter)

DIRECT EXAMINATION BY MR. GILSON:

Q. You are the widow of Vincente Sefler? A. Yes, sir.

MR. VAN WINKLE: We will agree on her being a widow with a number of children, and all that.

MR. GILSON: Can we agree on how well Sefler talked English?

MR. VAN WINKLE: I don't know as to that. You can ask as to that. You can put down on the record the number of children, etc.

MR. GILSON: Well, he was 31 years of age.

THE COURT: When.

MR. GILSON: There were two children; Edwin, five years—three children: Edwin, five years; Helen, three years; and Jennie, fourteen months.

Q. How well did your husband talk English? A. He spoke very good English.

Q. Where did you first see him after he was killed? A. When he was brought home.

Q. What day was that? A. 29th of December.

MR. GILSON: I offer in evidence the letters of administration.

(The papers were received in evidence and marked Plaintiff's Exhibit 1).

MR. GILSON: That is the plaintiff's case.

(Witness excused without cross examination).

Motion for Non-Suit.

THE COURT: Is there any testimony at all as to the contribution or earning capacity of this plaintiff?

MR. GILSON: No. I would have asked as to that if I had not been hurrying through the interpreter. Well, I can recall her.

MR. VAN WINKLE: Yes; if we need it.

MR. VAN WINKLE: If the Court please, it seems to me the defendant is entitled to judgment of nonsuit in this case. The complaint proceeds upon the theory that the plaintiff's intestate was invited to the place from which he fell. The complaint has the further allegation that a guard-rail was insufficient and that it broke. The proof is, assuming everything now at this stage of the case as being in favor of the paintiff, that some man had invited the plaintiff's intestate to this second gallery. We then have the principle that even though he was an invitee, even though he was on the second gallery, not only with the defendant's acquiescence but with its permission—we then have the principle that the defendant was not an insurer of this man's safety in any way whatever. This man then goes to this second gallery with this principle in front of him. What can we decide with respect to the fall of this man from the second gallery? Nothing broke. Plaintiff's counsel's opening was to the effect—and I think the testimony proves that (if it proves anything)—that a guard-rail was lifted out by this plaintiff's intestate, and either because he lifted it out or because he did something else himself when this witness who was just on the stand said "Come along," he was precipitated to the

ground and was killed. Your Honor finds nothing at this stage of the case proving improper or defective construction. This was a lumber yard, no guarantee to the plaintiff's intestate that the conditions were safe beyond what conditions should be in a lumber yard—not an insurer of the plaintiff's intestate. We simply have in this case evidence that somebody unknown invited him to a place that his friend says he went to and from which he fell. Of course, he lifted out a guard-rail. Then we have the testimony in the case clearly why the guard-rail was constructed in the way that the plaintiff alleges it was constructed. We find uprights, and from one to the other we find this guard-rail, apparently going down three or four inches, and the top being flush with the tops of the posts, the uprights—surely nothing imperfect or negligent in that construction, when we find that the reason why the uprights were there in that condition and why the guard-rail was constructed in that way was because of the necessities and uses of the defendant's business in connection with the putting of lumber into the stalls or bins on the second gallery.

It seems to me, if your Honor please, granting at this stage of the case, that the plaintiff's intestate was invited to the place from which he fell, which of course, we shall deny in our case if we come to it, the defendant's motion should be granted. So I move for a non-suit.

THE COURT: We are not disagreeing that the care required of the defendant under the circumstances (plaintiff is en-

titled to have the benefit of them as made out by her case so far) was to use reasonable care only in so keeping up his premises that no harm would come to the plaintiff by proper use of them. As you say, the defendants had in no wise become insurers. They were only bound to use that reasonable care for the safety of such a one as this plaintiff's intestate seems to have been. The difficulty I see, Mr. Gilson, up to the present time is the want of clearness as to just how this accident happened.

MR. GILSON: That is perfectly true.

THE COURT: It does not appear affirmatively in the testimony at all so far. It seems to me there is only one way this accident could have happened so far as the testimony discloses, and that is a matter of conjecture; that is, that this guard-rail in question was not properly fitted in the upright post to which it belonged; but there is nothing to show that affirmatively; it is a mere guess on the part of the Court, in fact, as to whether that was the condition or not. There is no testimony to show that the rail broke. The testimony goes to show that the rail was there. There is no testimony to the contrary. There is no testimony showing that the rail was not there and because it was not there when it should have been there he fell. That is not disputable, I take it, because the one living witness who has testified to the occurence controverts that theory.

MR. GILSON: The only way it could have happened is—well, there are two ways it could have happened; as Mr. Van Winkle thinks, that the man deliberately lifted the

rail out and plunged over or that the rail was not securely fastened in that groove and when he put his hand on it, as the witness described,—as soon as he put his hand on it the live weight caused it to fall off, and that is what caused him to fall to the ground. Now, if that were done by an employee the defendant is clearly liable. If it were done by a third person, by some other customer, the defendant would be liable, because the duty is to use reasonable care not only to construct a safe and secure place, but to maintain it after it is constructed. Now there is evidence that in some of these uprights there were pins that went through the top of the upright and through the rail. If that had been done in this case this accident never would have happened. It is the same situation as a person going into a store ank taking hold of a rail or baluster going upstairs. If the rail comes off the defendant certainly is called upon to explain why it did. If it were an insecure and unsafe rail the defendant would be liable.

THE COURT: Well, gentlemen, I am going to take this position: The difficulty I see, Mr. Gilson,—and I think you agree with me that there is very little in the testimony so far which goes to the point of chargeable negligence—I am going to give you the benefit of that at the time of this motion and I am going to deny the motion. I am going to extend leave to the defendant to renew this motion at the end of the case, as well as any other motion that it may have at that time. I will deny the motion under those conditions.

John J. McNamara—Direct.

JOHN J. MCNAMARA, sworn.

DIRECT EXAMINATION BY MR. VAN WINKLE:

Q. Mr. McNamara, what is your age, please? A. 42 years old.

Q. Where are you employed? A. Vanderbeek & Co.

Q. How long have you been employed in lumber yards? A. Well, I have been working in lumber yards for the last twenty years.

Q. And on the 29th of December, 1914, were you the foreman for Vanderbeek, or a superintendent for Vanderbeek? A. Acted as superintendent and salesman.

Q. And salesman. And on that day did you see this man who testified here in this case, the Polish man? I have forgotten his— A. (Interrupting) I did.

Q. Did you then see on that same day the man who was killed? A. I did.

Q. Sefler. Where did you see these two men first on that day and about when? A. Well, this man here who is a witness in the case, he came to me about half past three in the afternoon, and he laid his left hand on my right shoulder and mentioned in broken English, "wood;" and he took me right down the north side of the shed to the lower stalls, a distance of probably 150 or 160 feet.

Q. Wait. Let us get the directions as clearly as we can for the jury. Vanderbeek & Sons Company have a lumber yard in Jersey City, on Steuben and Greene streets, on the corner; haven't they? A. Steuben and Greene, yes.

Q. And there is an office at the corner? A. Corner of Greene and Steuben.

Q. Is there a driveway in from Greene street? A. There is two of them.

Q. Is there a driveway in from Steuben street? A. Yes, sir; one.

Q. Lumber is stored there in stalls on the ground floor? A. Well, it is both in stalls and bins.

Q. Yes. The lumber in the stalls is standing up? A. Standing up there.

Q. You call the stalls the places where the timber stands up on end? A. The lumber that you pile flat is in bins.

Q. In bins. Now, on the first floor did you have stalls or bins? A. Well, we had both—on the first floor.

Q. On the second gallery which did you have? A. Those are all stalls.

Q. All stalls? A. All bins, at least.

Q. Now, your office as superintendent was in what part of the building? A. Well, that is on the southwest corner.

Q. Well, for illustration we have here, we will say, the corner; here is the office; here is the street, and the other street. Now, where is your superintendent's office with respect to the office of the company? What part of the building? A. Well, that is a distance of about 150 feet west.

Q. In the building? A. In the building.

Q. On the ground floor? A. On the ground floor.

Q. Now, when you saw these men first did you know whether or not they came from the office of the company to your superintendent's office? A. Well, that I could not say. I could say in which direction they came. I only saw the one and that is the man that just testified.

Q. You saw the man who just testified alone at your office, your superintendent's office? A. Well, it is probably about twenty feet from the office.

Q. And how many feet from the main office

on the ground floor, about? A. Well, about 150 feet more.

Q. Now, then, you say that he spoke to you in the way you indicated, broken English, indicated that he wanted wood. Where did you take him? A. Well, he put his hand on my right shoulder and started to take me down and show me the kind of wood he wanted.

Q. What direction? A. East of the shed.

Q. Right towards the main office? A. Right towards the main office.

Q. How near did he take you to the main office on the ground floor? A. Probably about twenty feet.

Q. From what? A. From the office.

Q. And how wide was that passage or driveway that you and he went along from your superintendent's office towards the main office? How wide about? A. About twelve feet; twelve feet in width.

Q. Now, when you got to this place where he took you, or where he showed you some timber, did you see the other man at all? A. No; I had not seen the other man at all at that time.

Q. Well, what happened after that? Tell us. A. Well, he walked down to this stall and he put his hand on a piece of timber that stood upright in the stall, a piece of white-wood about seven inches thick, six inches wide, and he mentioned wood, and that is all I could understand. I couldn't understand the rest of it. Then he made a motion with his hands as if he wanted something wider in the width.

Q. You are speaking now of the man who was a witness? A. I am speaking now of the man who was a witness. I have not spoken of the dead man at all. So when he made that motion I walked right through that stall, away in to-

wards the south; that was about fifteen feet from the office; and I showed this gentleman here a wide piece, probably fourteen or fifteen inches in width. Then he called this man who is dead, called some name. I couldn't really say what it was at present. This man came to him and they had an argument over the lumber, in the thickness.

Q. Talking English? A. No; they had some sort of argument between themselves. I couldn't really say whether it was an argument or what it was, but the man who is dead made a motion like that, (indicating) as if he wanted something that is thin, about half the thickness of the piece I showed him. So I said: "I see what you want. Wait a minute. I will go and get it." That was right in front of the main office.

Q. How many feet away from the main office were those two men when you said that to them? About how many feet away? A. Well, they were probably ten—let me see—ten or twelve feet; just the width of the gangway.

Q. And the gangway was open and you stood right there? A. Yes; right in front of the main office door; that is the door leading to the shed.

Q. How far were they from the street when you said that? A. Oh, they were not over five feet; five feet from the sidewalk.

Q. Was the door going in from the street to the driveway open? A. Well, it was open about half-way; a distance of about eight feet.

Q. And from the place where you left them could they have gone on the street before going out through that driveway door which was half open, or before going out through the office to the street? A. Yes, sir.

Q. Either way. Now, then, what did you do next? Which direction did you go in after you

said that to them? A. Well, as soon as I found out that they wanted something thinner than what they were looking at I said; "Wait a moment and I will go and get it for you." With that I started west, towards, the west end of the shed. That is where my office is.

Q. You must have turned your back on them? A. Well, I didn't turn back until I got probably twenty feet. Then I turned around and I seen the two men standing in front of the office and making a motion with the hand.

Q. After you got about thirty feet you could see them standing where you left them? A. Yes. I turned around and saw the two men standing still in front of the office. Probably they were at that time probably nine feet from the office because they stood out from the stall.

Q. Were they standing still then? A. They were standing still then talking.

Q. Did you again see either of these men until after this man fell? Did you see them again between that time that you looked back? A. Not between this time that I looked back. Then I went right straight through the shed towards the west. Well, that would probably bring you 125 feet before you turned to the right.

Q. Wait. Let us get it as plain as we can before the Court and jury. You left these men near the street—

MR. GILSON: I object to Mr. Van Winkle testifying. Let the witness tell.

MR. VAN WINKLE: Let me put the whole question and then object.

THE COURT: Ask him the question.

Don't answer.

Q. What distance, Mr. McNamara, did you go, straight west, after you left these two men stand-

ing where you said you left them standing? A. Well, from where they stood, before I turned, probably 125 feet.

Q. Now, during that whole distance would you be going along this wide gangway or driveway, all open? A. Right straight through the gangway.

Q. Could a man see you for that whole distance from the place where you left these two men standing with instruction? A. He could see me for about 125 feet.

Q. Now, then, having given the distance you say along this place after leaving these two men, did you turn? A. Turned to the right.

Q. And why did you do that? A. Turned to the right to go to those stairs leading up to the loft.

Q. How far did you go to the right after you turned before you got to the foot of the stairway? A. Oh, probably about 45 feet or a little more.

Q. Now, the stairway was located at what part of the building with reference to the wall of the building? A. Well, the stairway is on the north side of the building.

Q. How near the wall? A. Well, it is about three feet from the wall to the entrance of the stairs, or not quite three feet. It might probably be about three foot and a half.

Q. Now, generaly speaking, Mr. McNamara, would this represent the situation here in an illustrative way: One street here, the other street here, the corner office here, the door to the street here, the bin where you left these two men there, the place where you walked along here, the place where you turned around here, and the stairway by the wall of the building? A. The stairway is on the right, like going into the building, about three foot, three foot six from the wall.

Q. Now, the place where this jury sits, with this illustration in mind, would that be the bins, or stalls where the lumber was on the first floor? A. Bin.

Q. And are there any other passageways here between the bins? A. No; only the driveway.

Q. Just the driveway? A. That is all.

Q. Now, when you got to the stairway here, just tell us to begin with how far from the wall the bottom of the stairway was. A. Well, probably three foot six; three foot; somewheres near that.

Q. How many steps had that stair, about? A. Oh, I should judge about eighteen or twenty.

Q. Well, now, after you turned did you see either of these two men anywhere near you? A. No; I never looked back until I was going up the stairs. I turned in right at the stairs and turned up the stairs.

Q. Now, going up the stairs, the stairs being here, (indicating) would you be facing the direction you came from so you could see if anybody was behind you? A. Yes; because there is no risers in those stairs. There are only treads. The stairs are all open in it so you can see anybody even from Steuben street.

Q. So when you got to the bottom you turned facing the direcion you came from, went on up the stairs, and you could see over the place you came from? A. Yes, sir.

Q. Did you see either of those two men following you? A. Saw neither one.

Q. Did you know or expect these men would follow you? A. Not in the least.

Q. Now, then, when you got to the second gallery—how high up is that? A. Well, that would be about twenty steps at the landing to the top of the stairs. It is about sixteen foot. But from where the man had fallen it is about six-

teen foot six. That is the distance from the level of the platform.

Q. Well, does this plank walk extend all the way around the second story in front of the bins and stalls? A. In front of the bins; no stalls on the second gallery.

Q. No stalls; just bins? A. Just bins.

Q. And how high from the ground was the guard-rail? A. From the ground or from the platform?

Q. I should say from the surface of the platform. A. Well, I should say maybe three feet; just about waist-high.

Q. What distance did you go from the top of the stairway to the bin where you went to look for timber? A. I turned right for about twelve feet.

Q. Yes. A. Then turned left about probably fifty feet; forty-five to fifty feet.

Q. So you then were some sixty odd feet from the top of the stairway to the bin you were looking in for the timber? A. Yes, sir.

Q. This bin that you went to, did that have a guard-rail in front like the others? A. Just the same as the rest. In fact, all on that side of the shed on the top loft the guard-rails are all very short; they run in the neighborhood from eight foot up to eleven.

Q. So, Mr. McNamara, having in mind this open passageway and driveway here we described, and standing here at the end of it and looking up here to the second story, what part of that place were you looking for timber in reference to here? (Indicating) A. Just about opposite the main gangway.

Q. Were you looking for timber in a bin upstairs at a place where you could be seen from

this long driveway that you first came from, where you left these men standing? A. I could see to the Greene street entrance from where I stood.

Q. Well, you could at the top of the stairway— A. Until I got opposite the main gangway probably a distance of about fifteen feet inside the gate on the Steuben street entrance.

Q. Now, do you know whether there was any truck being loaded under the bin where you were? A. The truck stood directly where I was turning over the lumber.

Q. Do you know what driver had charge of that truck? A. Driver? No; we don't know the drivers because we were loading it extra.

Q. Who was there at the truck? Do you know the man who was there? Can you tell? A. Well, there is one here that was loading the truck.

Q. What is his name? A. "Jerry" Peet.

Q. He was loading on that truck? A. Yes; he was standing on that truck. I had it in mind to pick out this piece of lumber and pass it to "Jerry" and he would hand it to the floor, to the customer.

Q. "Jerry" being Peet? A. Mr. Peet.

Q. Who would pass it down to the floor below? A. He would take it down and show it to this gentleman who appeared to be the man purchasing the lumber. I had no conversation with the dead man whatever.

Q. Now, how long, Mr. McNamara, were you finding a piece of lumber upstairs before you knew that the man had fallen? A. Oh, probably, I should say about three minutes. I turned over probably between ten and fifteen pieces, looking for to get a wide width. We pile this lumber into bins from six inches in width up to sixteen inches in width.

Q. Now, during all that time that you were there did you see either this witness or the dead man? A. Neither one.

Q. What was your first notice that the accident had occurred? A. Well, I heard somebody holler, "A man hurt" It appearing to be in the back I turned around and looked over and I seen the men looking around, and I walked down and saw this man walking towards me.

Q. The witness? A. Yes; walking towards me at a distance of about fifteen feet.

Q. Where was he? A. He was on the top loft walking in the direction where I was.

Q. Walking towards you about fifteen feet away from you, coming towards you? A. About fifteen feet away.

Q. Could you see from what place the dead man had fallen? A. No; not at that time. I turned around and of course, I started right downstairs, and I said to this witness: "Get down out of here" Just like that. I started down and kept urging him ahead of me downstairs. So after I had gotten downstairs I didn't really know it was this gentleman, the man that was with him.

Q. You didn't know who it was? A. I didn't know who it was. I thought he was one of the workmen. So there were two or three of us got hold of the man and turned him over and gave him all the assistance we could. Well, it was probably ten to fifteen minutes before I really knew who the man was.

Q. Now, did you see whether any material went down to the ground with this man? A. The guard-rail lay there, lay right across and underneath the man's shoulders.

Q. Now you say this guard-rail was in sections from upright to upright. You were in front of

one bin with a guard-rail in front of you. How many sections away was it from the section that went down with this man? A. Well, from where I was selecting that lumber was a distance of about 45 feet.

Q. That is the section that went down with him, 45 feet away from where you were? A. 45 feet from where I was.

Q. Now, Mr. McNamara, please describe as nearly as you can, as nearly as possible for the Court and jury the construction of the uprights and the guard-rail on the 29th of December. A. Well, the uprights in those sheds are mostly all of 4 x 6. They are four inches in thickness and six inches in width. They lay up against the platform on the six-inch way, and they have got an opening down about five inches; and those rails are an inch by five that stays in those posts. One sets in here, and the other sets in on that side. (Indicating)

Q. Are the tops flush with the tops of the posts? A. Some. Some are a little below flush; but you can't move the rail one way or another to get it out without lifting it five inches over the top of the post.

Q. Now, can you say, Mr. McNamara, that that was the construction and the condition of this very rail that was found on the floor by this man on the 29th of December? Was that the way it was constructed? A. That was the way it was constructed.

Q. And the way it was maintained? A. Nothing more than it was on that particular rail. It was about 11 foot in length. On one end—of course, it came to an angle here, where you walked along this direction and then turned (indicating); there is a 4 x 6 in that corner just where you walk along in this direction.

Q. Yes. Here is a plank and here is your guard-rail here (indicating). Now describe this post. A. Well, there is one post sets right in this corner; that is 4 x 6. That holds the guard-rail going in this direction. Then it enters the other way and crosses here. That is where the man fell; about 11 foot; probably ten foot six.

Q. How deep is the socket? A. Five inches.

Q. Both ends? A. Both ends.

It is 4 x 6 on this corner and 3 x 8 on the opposite.

Q. And did the thing fit tightly in the socket? A. Well, it could not be forced out. I don't think the rail can be forced out without being picked out of the socket.

Q. That is the way it was built? A. We have them to fit kind of snug. Of course, they are not all snug without running up and down. They may be a little bit loose.

Q. But the only way to get them out—A. The only way to get them out would be to pick them out. You have got to lift them five inches.

Q. In the conduct of the business of Vanderbeek & Sons why was that rail built that way? A. Well, I suppose for a safeguard.

MR. GILSON: I object. He doesn't know.

THE COURT: That was not the answer looked for.

Q. I want to know what purpose the rail served you. You say that you are taking out timber all the time and putting it in. What do you do with the guard-rail when you are putting in timber? A. When we were putting lumber into the bins we take the rail out and lay it on the platform in front of the bin that we are working on. After the car of lumber is put in the bin we take the guard-rail up and place it back into the sockets again.

CROSS EXAMINATION BY MR. GILSON:

Q. I understood you to say that some of these rails were flush with the top of the upright; is that right? A. Well, all of them are flush with the top, no more than they may run a little under. Sometimes you will get a guard-rail five inches in width and that socket may vary; they may run five and a quarter in depth, but as a rule only the guard-rails that are around the shed; they are all below the top of the post or even with the top of the post.

Q. Well, aren't there some where there are plugs or pins going through the upright above the rail? A. No; not above the rail.

Q. Not above? A. Not above; because you couldn't put a pin in there.

Q. Well, you could if there were holes. A. Well, there are some of the uprights with pins going through the middle of the rail.

Q. And through the uprights. That is so, isn't it? A. Well, some of them.

Q. Some of them; yes. A. They are all, in fact, run through; but they don't run through the top. They run through the center of the guard-rail; not in all of them, though, because some of them it ain't really necessary to have them on on account of some of the pieces being so short.

MR. GILSON: I object and ask that that be stricken out. It is the witness' conclusion and not responsive.

THE COURT: I think so. The latter portion may be stricken out.

Q. Now, those plugs are about how large? A. Oh, they run about seven-eighths in thickness; about six to seven inches in length, or eight inches.

Q. And those rails, of course, are up there to keep people from falling off. That is the purpose of them, and you don't mean to say that customers have no right to go up there and look at the lumber, do you? A. No; not as a rule; they ain't invited up there, and I don't see why they should.

Q. I am not talking about the rule. It is a fact that customers do go up there and look at lumber that they want?

MR. VAN WINKLE: I object. It is not proper cross examination, and it cannot aid the plaintiff in this case under the allegations of his complaint.

MR. GILSON: It is proper cross examination when this witness says he told them to stay on the ground. Now, I want to show that that is not so, and the other witness is telling the truth when he says he said "Come up."

THE COURT: How does it aid you?

MR. GILSON: This witness says customers do not go up there. He says he told these two men to stay down on the ground. Well, I won't press it.

Q. It is a fact that customers do go up on that platform to look at lumber; isn't it?

MR. VAN WINKLE: I object. I suppose your Honor will rule against me. I am in a situation where I dread the answer and want the answer, too.

THE COURT: Better withdraw your objection.

MR. VAN WINKLE: Well, I won't object.

THE COURT: You won't object?

MR. VAN WINKLE: No.

Q. (Repeated by the stenographer). It is a fact that customers do go up on that platform to

look at lumber, isn't it? A. Well, there is at times. Probably I might be in one end of the shed; a customer may come along, enter the stairway of his own accord, but never being invited during my time.

Q. How long were you there? A. I am there since September 13th.

Q. Of what year? A. 1914.

Q. Oh, you were just there a few months before this accident happened? A. A few months.

Q. And during that time did you notice any of the other salesmen take men up there to look at lumber—customers? A. No; I did not.

Q. There were other salesmen in Vanderbeek's at that time? A. Yes; there were other salesmen there.

Q. How many? A. Well, those salesmen—

MR. VAN WINKLE: How can this bear on the issue at all?

THE COURT: Has it been shown that this party had ever been in this place before? If there had been an invitation held out to others there is nothing, so far as the testimony now goes, to show that he has knowledge of that and that he was invited.

MR. GILSON: It is certainly proper cross examination to test the credibility of the witness. He says that customers—that he told these customers to stay on the ground because that is the rule; that they wanted to go up there.

THE COURT: He has also just said, if I understand his testimony correctly, that during the time that he was there nobody went there except by his invitation.

MR. GILSON: Well, it is not important. I won't press that.

Q. There was a watchman there to keep people out, wasn't there? A. Watchman?

Q. Yes. A. Not only after working hours. Watchman comes on in the evening at half past five.

Q. Now, do I undertsand you to say that you walked fifteen feet to the turn on the platform, and then about 45 feet down the platform without looking to see where these men were? A. Well, no; not at the platform. I never looked down after I got on the platform, but ascending the stairs neither man was in sight, ascending the stairs for about a distance—well, that eighteen or twenty feet in height. In going upstairs it was impossible for either one of these men to walk towards me without me seeing them; but after I got to the top of the stairs I turned to the right, probably about ten or eleven feet, and then went to the left a distance of about 45 feet, at that angle.

Q. Now, while you were walking along the gangway when you turned you say you saw them about nine feet from the office. A. Well, that was walking on the ground from the main office.

Q. Yes, the gangway—that is what you call the gangway where you load the wagons? A. Yes, sir.

Q. You were walking along that gangway when you saw them nine feet from the office is that right? A. Well, about a distance of nine feet, but I was a distance of thirty to thirty-five feet from the office at that time when I turned.

Q. How far was it from the office to the stairway that you went up? A. Well, from the office to where I turned is probably about 125 feet—

Q. (Interrupting.) No, from the stairway, the bottom of the stairway. A. Well, that is about 125—probably about 170 feet to the bottom of the stairway.

Q. Yes. Then you looked at them about as you turned to go up the stairway; is that right? When you were standing in the gangway? A. I haven't looked at either of them. I didn't see either one of them ascending the stairs; neither man.

Q. You didn't understand my question. I say when you reached the bottom of the stairway did you look around to see where they were? A. Not particularly, no. I turned around to ascend the stairs and then just looked in the direction.

Q. And where were they then? A. Didn't see either one. I didn't see either one of these men until I heard somebody holler, "A man hurt."

Q. No; I don't think you understand me. This was long before that. When you reached the bottom of the stairway to go up you could look along the gangway and see the office, couldn't you? A. No; not that gangway—not from where the stairs is.

Q. Why? A. Because here is your gangway leading from the office, and your stairs is in that direction. You have got to go up this gangway 125 feet, and the men were at the other end of the gangway. That stairs is over this way, 40 or 45 feet.

THE COURT: There is also a turn on the platform.

Q. There are two turns there, one on the gangway and one on the platform, that you made? A. One on the gangway; then two on the platform.

Q. How far was it from the turn to the bottom of the stairway? A. Oh, about 40 to 45 feet.

Q. 40 to 45 feet. While you were going up the stairway did you look back at all? A. Well, I looked straight ahead then, because as I was as-

cending the stairs in that direction you could look right through those stairs, because there are no risers in between the stairs, just treads. When you ascend the stairs you can look right through to the Steuben Street side, right out of the door.

Q. Well, at the top of the stairs you made a turn? A. After I ascended the stairs, about 11 or 12 feet to the right.

Q. Then there was a turn? A. Then there was a turn.

Q. Did you look back then when you reached that turn? A. No.

Q. You didn't hear these men? A. Didn't hear either one of them or didn't see either one after I turned that thirty foot where I left them at the office. I looked back thirty or thirty-five feet after that. I never saw them after until the one lay on the ground. Then when I heard some one holler I turned around and seen the witness standing about fifteen feet from me. That was a distance of about forty feet from where the man fell, forty or forty-five feet. This man as soon as I saw him I turned around and I says: "Get down out of here." With that he turns around the stairs, back in the direction I came up.

Q. Well, now, how far from the top of the stairs was it that this man fell? A. Well, about fifteen feet.

Q. Fifty? A. About fifteen.

Q. That was the first rail or the second rail? A. Well, the first rail as you turned to the left. The first rail as you turned to the left.

Q. Well, it was only fifteen feet from the top of the stairway to the first turn, wasn't it? A. Well, from the top of the stairs I said eleven or twelve feet before you turned to the left; then probably three feet was another corner, fourteen feet away where he fell from; that would make

it a distance of about fifteen feet from the top of the stairs.

Q. Now, this rail that you saw under his shoulder was about how long? A. Well, probably—maybe ten, ten foot six or eleven; somewheres in that neighborhood.

Q. And did that come from one of these uprights which you have described as having two rails in? A. Oh, yes; this rail sits right on top of the post.

Q. Then on the corner there were two uprights, weren't there? A. No; one upright on that corner and one on the opposite side. The one on this side was 3 x 8 in thickness and the one on this corner was a 4 x 6 in thickness.

Q. Well, the one on the corner, on the turn—one rail goes this way and another this way (indicating); is that right? A. Yes, sir.

Q. Now, did both this rail and this rail set in this one upright, or are there two uprights? A. No, there is only one upright.

Q. One on top of the other? A. No; one sets in this post about from the center, and the other one sets in here at the center of the opposite post on a four-inch way. One is on the four-inch way, and the other is on the six-inch way.

Q. And that upright was the same as the other upright? A. No; the one on this corner was 4 x 6 and the other on the opposite corner of the rail was 3 x 8.

Q. I am talking about the corner post that held this rail that fell out. A. That is 4 x 6.

Q. 4 x 6? A. 4 x 6.

Q. Was that upright broken after the accident? A. No, sir.

Q. Did that upright have holes for pins or plugs? A. Well, I don't know—no, I don't think it had.

Q. Well, do you know? A. No; I would not be positive.

Q. You have seen some of those rails when they haven't fit in all the way in that groove in the upright, haven't you? A. What do you mean, fit all the way through?

Q. When they have not been placed all the way in, and they just hang on the edge or go in a little ways? A. No, I have not.

Q. You have seen those rails down on the platform, haven't you, when some of the men have been called away quickly? A. Oh, yes; we lift them out and lay them down.

Q. And you have seen men called away to some other job and they leave the rails down on the platform; haven't you seen that? A. No, sir; never in my life.

Q. Have never seen that? A. No, sir. Just as a man is through there he puts back the guard-rail, or if a man should be called away he puts in the guard-rail.

Q. That is the rule? A. Well, that is the rule of the shed; yes, sir; supposed to be.

Q. Now, will you explain how those men got up there and within fifteen feet of you, or that one man, without your knowing that they were coming up? A. I haven't the slightest idea that either man was coming up there. I never saw either one of those two men from the time I looked back in the direction of the main gangway coming from the office until I saw them after the man dropped.

RE-DIRECT EXAMINATION BY MR. VAN WINKLE:

Q. What lumber yard were you employed in before you went to Vanderbeek's? A. Collins & Lavery Company.

Q. Did they have a gallery there?

MR. GILSON: I object to that.

THE COURT: What is the purpose?

MR. VAN WINKLE: Well, I won't press the question.

(Witness excused).

Recess to 2:00 P. M.

After Recess.

JOHN J. MCNAMARA, recalled.

RE-DIRECT EXAMINATION BY MR. VAN WINKLE:

Q. Mr. McNamara, what can you say with respect to how the place was lighted at the time this man fell? A. Well, there were three lights burning, one in each of the main gangways leading to Greene Street side, and one about eleven feet from where the man fell.

Q. What kind of lights were they? A. Well, they were electric lights, something about the size of those bulbs here (indicating the court room lights) only much longer.

Q. How near do you say these lights were to where the man fell? A. About eleven feet. It was lying directly across where he fell.

Q. Now, explain exactly how near this light was to the gallery. You are up there and he is up here, and there is the wall of the building (indicating). Now where was the light? A. Well, the light probably was just about over your head.

Q. My head, this whole place being opened? A. Yes.

Q. Now, take my description that I had before so as not to confuse the jury. Here is the gangway, here is the open place, here is the wall, here is the stairway, and above here is the plank from which he fell (indicating). Where was the light?

This is open here (indicating). A. Right opposite where he was standing, hanging from the ceiling.

Q. How many feet away would it be on the same plane with him? A. About ten feet; between ten and eleven feet. Right directly in front of him.

Q. And what kind of illumination did that light throw at that point at that time? A. Well, pretty bright light, because it was just about dusk; that was about a quarter after four; between four and a quarter after four.

Q. Was this light an arc light, what you call an arc light? A. Yes.

RE-CROSS EXAMINATION BY MR. GILSON:

Q. Well, now, which was it, an arc light or one like this one in the court room, these large bulbs? A. A regular bulb, but a much brighter light than those are.

Q. What do you understand an arc light is? A. Well, something about the same as this; only different shape.

Q. You understand this is a bulb, don't you? A. Yes, sir; and the other is more of a white light.

Q. White light? A. White light; yes, sir.

Q. And this was a bulb, was it? A. Bulb; yes, sir.

Q. Do you know what candle power it was? A. Oh, I couldn't say; I couldn't say; but I know that it shows a light all over that top loft in that section that you can see anything after dark.

Q. And you testify now from the general condition there when the light was lighted, or that it was lighted on this occasion? A. Well, in general; it is the same way.

three.

Q. Generally it is the same way? A. Same thing.

Q. But you don't remember especially that it was lighted at the time this man fell? A. It was lighted at that time, because I turned on the three lights. It was my duty there as soon as it gets dusk, toward evening, to turn on those lights. There is one in each one of those gangways and this one that hangs right overhead where the men were working.

Q. And you turned them on this night? A. I turned them on.

Q. How long before the accident happened did you do that? A. Oh, probably half an hour.

Q. Half an hour. So it was about a quarter to four when you did that? A. No; it was earlier than that; probably about half past three.

Q. And you did that every night? A. Every night at that time in winter.

Q. Now, what was there on this night that made such an impression on your mind as to just when you did it? A. Well, there wasn't anything. As soon as it was getting anywhere near dusk at all, or dark, if men were working under there we always turned on the lights so the men could see what they were doing there.

Q. And because you generally did it that way you did it on this occasion; is that right? A. I do it—well, it was half an hour, along about half an hour before this man fell.

Q. But you don't remember it—A. (Interrupting). I don't remember specially the exact time.

Q. No; nor do you remember specially doing it on this night, do you? A. Oh, yes; I remember it being lit because if that light wasn't lit at that time, quarter after four or ten minutes after four up there in that loft in the corner where I was you would hardly be able to see what you were

turning over. If I went up in that loft and that light wasn't lit I would go down and turn it on at that time of the evening.

Q. Have you talked this case over lately with anybody? A. No, sir; not talked it over with anybody.

Q. Haven't talked with anybody? A. No, sir.

Q. Why, haven't you talked with counsel? A. Well, not in regards to the lights.

Q. No, but about the case? A. Oh, the case, yes; I have.

Q. And didn't you talk it over with the representative of the insurance company?

MR. VAN WINKLE: I object, if your Honor please.

MR. GILSON: Well, he says he hasn't talked it over with anybody.

MR. VAN WINKLE: I object, if your Honor please, and I think the question is one that ought to call for a rebuke to counsel, who knows better. Cheap.

MR. GILSON: I object to that. I object to that.

THE COURT: What is the purpose? I will say to the jury at this time that any testimony that may come up regarding the matter of insurance so far as this case is concerned you are to disregard. It is to have no bearing in any of your deliberation.

Q. Isn't it a fact, Mr. McNamara, that you told a representative of some kind that nobody was with this man when this man fell? A. There wasn't anybody with him?

Q. Yes? A. Well, that I don't know.

Q. Didn't you tell him that they just wandered around looking for the lumber that they wanted and that the other salesmen were all busy? A. No, sir.

Q. You never said that? A. No, sir.

MR. VAN WINKLE: May I ask if this is for the purpose of contradiction so I may know how to deal with it? Do you intend to contradict this witness?

MR. GILSON: If your man is here I will call him.

THE COURT: Is that all?

MR. GILSON: That is all.

Witness excused.

ALEX R. RAMBO, sworn.

DIRECT EXAMINATION BY MR. VAN WINKLE:

Q. Mr. Rambo, where do you live, please? A. I live at Hawthorn, New Jersey.

Q. What is your age? A. 43.

Q. What is your employment? A. I am employed as operating engineer at Vanderbeek & Sons'.

Q. How long have you been there working for them? A. Thirteen years almost.

Q. Do you know this rail, this guard-rail that is said to have fallen on this man who was killed? A. Yes, sir.

Q. Where were you at the time he fell? A. At the time he fell I was in the engine room.

Q. And did you get there to the place where he fell before he was picked up? A. No, no.

Q. Where was he when you first saw him? A. He was lying right at about the same point where he had fallen on the floor, where the body struck the floor, only he had been turned over; just how much he had been moved I could not say.

Q. Did you see any material that had come from the gallery? A. That was laying at that time a little to one side and back of him.

Q. Well, now, with reference, Mr. Rambo, to where the stairway was, the stairway being over here against the wall, how far away from the top of the stairway was the place from which the rail had fallen? A. From the top of the stairway where the stairway landed on the gallery—that was perhaps fifteen feet from the top of the stairway.

MR. GILSON: Just a minute. I object to this unless it was immediately after the accident.

MR. VAN WINKLE: Why, he says he was there. He saw the man on the ground.

THE COURT: He says he saw the rail that lay on the ground.

MR. VAN WINKLE: After the man was taken away.

A. The body was there.

Q. About fifteen feet? A. About fifteen feet; yes, sir.

Q. Now, how far away was that? That is, the place from which the guard-rail came down as described by Mr. McNamara where he was—Mr. McNamara—how many feet above? A. That must have been as near as I can understand, from the place Mr. McNamara described himself as being, 45 feet, maybe 50 feet from the point where the railing had fallen down.

Q. Now, what was the length of this guard-rail you say you found on the ground? A. Why, it must have been somewhere between ten and eleven feet; not to exceed that.

Q. What was it made up of? What was its width and things of that sort? A. Well, approximately about five inches wide and an inch in thickness, and of yellow pine material.

Q. Now, the way in which the guard-rail was

constructed and the way in which the uprights were constructed at that time, what can you say with respect to that? A. Why, the guard-rail when it was in place rested in crotches sawed into these four by sixes, spiked on—fastened to the runway, and at the corner here (indicating) right going up the stairs here and going fifteen or sixteen feet, whatever the matter is, to this right-angle turn, this guard-rail—the upright. The wide part was that way, parallel with this runway that leads from the head of the stairs over to the corner, and on that side of it this crotch was spiked to the four by six, running this way. That carried the other end of the guard-rail and likewise the end of the next rail; they were butted up together in that.

Q. How wide were the places, the sockets or crotches, as you call them, that the guard-rail rested in? How deep were they? A. Why, the guardrail went down flush, perhaps one-eighth of an inch. I didn't stop to measure it, but it was down below the surface; not a great deal—that is, the top of the upright—not a great deal.

Q. That would be a depth of how many inches, or how deep? A. Well, it would be a depth of about five inches.

Q. Five inches? A. Yes. The board dropped down the full width into the crotch.

Q. The board or guard-rail went down in this fashion, to illustrate it, into the sockets, leaving the top about flush with the uprights? A. Just about flush; maybe one-eighth of an inch or some small matter above.

Q. How high from the platform was the guard-rail? A. Well, that must have been somewhere between two feet six and three feet. I could not say exactly, but in that neighborhood.

Q. Why did you have that construction there;

that is, the guard-rail resting in sockets? A. Well, as I understand it—of course, I am not employed in that part of the factory; but I understand—

MR. GILSON: I object.

Q. How was the guard-rail used in reference to the sockets?

THE COURT: If you know, Mr. Rambo.

A. Well, I know from hearing—

THE COURT: You have not seen them—

A. I have seen them; yes.

THE COURT: Tell us what you have seen.

Q. I have seen them placing lumber around there.

Q. What was the method of doing that? A. They generally take that guard-rail out in order to place lumber in the bins.

Q. Placing lumber from the ground floor into the bins above? A. Yes, sir.

Q. Now, what, if anything, did you do after this man fell to ascertain with respect to the condition and the safety of the guard-rail? A. Well, after he had fallen—this was some time, probably an hour, maybe three-quarters; I don't remember just the exact time it was, but the time we took the body away from there. I was out in the shed and I was wondering how it could be possible that a person could fall off there, what could happen.

Q. Had you ever had any such case before? A. No.

MR. GILSON: I object to that and ask that it be stricken out. Counsel should be rebuked for that.

THE COURT: It may be stricken out.

Q. (Repeated by the stenographer). Now, what, if anything, did you do after this man fell to ascertain with respect to the condition and the safety of the guard-rail? A. I was standing in the shed. There were two or three other employes there; I can't recall their names at the present time; and I perhaps made the remark "I wonder how he came to fall off of there"; and with that I went up to the runway. There were some wires, some electric wires, and I have charge of all them there; in fact, I install them there, and it was on my mind whether he had dislodged any of those wires—the body, in falling—and I went up there to ascertain the condition of those, and likewise to look over the conditions of the uprights and the rail. The rail at that time was still lying on the floor, on the ground floor, and while I was up there, why, the rail was passed up to me and I put it in place, in the sockets, and I tried it for endwise play to see if it would slip past the socket at either end. This end it could not slip. This end it was butted against the other guard-rail, couldn't slip that way—oh, perhaps one-eighth or one-quarter inch play, just close fit in there, and the socket was firm; and with that I sat down on a pile of lumber back of the rail, put both feet on it, pressed on the lumber and pressed out with my feet to see if it were possible to spring that board enough that it would slip out of the ends of the sockets. Well, I put considerable weight—I don't know just how much—against it, but enough to satisfy me that the board would break before it would spring out of the sockets, before I could shorten it up by bending enough to spring out of the sockets at each end.

Q. Was the board broken in any way? A. The board was not broken; no.

Q. Were the sockets broken in any way? A. The sockets were intact.

Q. What can you say, Mr. Rambo, with respect to how the place was lighted, speaking about the very place where you found the railing had fallen from.

MR. GILSON: How long after the accident?

THE COURT: How long after the accident? When you first came out; when you first saw the man lying there.

A. Why, it must have been about ten minutes after the accident happened before I came out.

MR. GILSON: Now I object to the condition of the lights at that time.

THE COURT: I am inclined to permit it.

Q. (Repeated by the stenographer.) What can you say, Mr. Rambo, with respect to how the place was lighted, speaking about the very place where you found the railing had fallen from?

THE COURT: And this time you are referring to you say is about ten minutes after the accident happened.

A. About that.

THE COURT: Well, what was the condition of the light?

A. The light was burning at that time.

Q. What light was burning? A. The arc lamp.

Q. What kind of arc lamp was it? What kind of arc lamp or light was it? A. What kind of arc lamp? Why, it is one—that one there, I believe, is about 1200 candle power. It is a five-ampere lamp.

Q. Where was that light? Describe to the Court and jury just where it was with reference

to where the rail fell; how close to it? A. Why, in the neighborhood of twelve—from twelve to fifteen feet, like a point from there (indicating); and that lamp was hung out here in the center so the trucks can drive in there and swing around. My idea in installing the lamp there was so it would light up the entire building there as far as possible, and from the position where the lamp was it was almost on a level with this runway, perhaps a few feet above it; but there was an excellent chance for the light to strike over on this gallery here, right here. This side of the lamp (indicating) there is a truss built in the roof and if there was any shadow which there would be cast from that truss it would strike the further end of the building, the other side of the gallery.

Q. And is that the condition that was there at the time you looked over the situation ten minutes after the accident? A. Yes, sir.

Q. Now, at the time of the accident, Mr. Rambo, were there any pegs or things of that sort in any of those guard-rails? A. No, sir.

Q. On none of them? A. No, sir.

Q. Mr. McNamara said, as I understand, that there were some pegs there at some place. A. The pegs were put in afterwards as an additional precaution.

Q. When were they put in? A. They were put in some time during the first—forepart of the year.

Q. After the accident? A. After the accident.

CROSS EXAMINATION BY MR. GILSON:

Q. You say this was an arc light? A. Yes, sir.

Q. It was not a bulb? A. Arc lamp; five-ampere arc lamp.

Q. It was not a bulb? A. No, sir; an arc lamp.

Q. You say it was about 1200 candle power? A. I believe that was what they claim for those lamps, 1200 candle power.

Q. And there were three of them in this building? A. Yes; there were three of them in this building.

Q. Any more? A. No more arc lamps. There is an incandescent or so, but not right in that vicinity.

Q. You say all the pegs in those uprights were put in after the accident? A. Yes, sir.

Q. But they did use them some time ago, didn't they? A. No, sir.

Q. Several years ago? A. No, sir; not to my knowledge.

Q. Now, this corner upright, the rail came through this crotch. Was the crotch cut all the way through the upright? A. No, sir.

Q. Just half way through? A. No. As I said, the corner upright of this rail in question there was a piece—it was reinforced with a four-inch piece out here, levelled off down here, and a crotch cut in that piece so that the rail set in that and butted right up against the corner post.

Q. And then the rail coming the other way—A. And then the rail coming the other way was set in a crotch in that corner post, cut that way, a trifle over half way through it.

Q. So one rail going through this way met the other rail going through the other way; is that right? A. No; the rails didn't come in contact with each other.

Q. They didn't touch? A. No, no.

THE COURT: This rail that you have been speaking of as the one which fell, how far on each end did that extend in this crotch

that you have spoken of, in the respective crotches? I understand each end was fitted in a groove or crotch.

A. Yes.

THE COURT: Now, how much at each end when the rail was in place was within that groove or crotch?

Q. Well, at the one end it must have been about four inches in the groove. In the other end it was less, for the reason of this piece being spiked through the corner post was hardly as wide as four inches; it was probably three and a half or three.

THE COURT: So you say one end was inserted when the guard-rail was in place four inches in the groove—in one end?

A. Yes.

THE COURT: And somewhere in the neighborhood of three inches at the other end?

A. Yes.

Q. Well, that might vary according to the way the other rails were put in their places; isn't that so? In other words—A. (Interrupting.) You mean it might slip endways?

Q. Yes. A. Well, I tried that particular board.

Q. I am not talking about that one. But I say the distance it would be in would vary according to the way the other rails along the loft were in their places? A. Well, the one in the post here where the next railing started from it—the boards met there; that is, they butted right up to the ends; very little slack.

Q. What I mean is that if that rail which you are speaking about was not pushed in all the way so as to hit up against this other post, but was

just in an inch, that would make a difference as to how far the other rails all along the line would fit; wouldn't it? A. Understand the other end—this rail down here met with the same conditions as at the other end, butted up against the post.

Q. You don't understand it. What I mean is this: This rail had four inches to go in; is that right? A. Four inches.

Q. Now, suppose instead of doing that it only went in one inch and didn't go in to hit up against this other post, but only went in there an inch, then that would change the distance along all the other uprights; wouldn't it? A. It would not do it. When it was put in there it had to go in there four inches unless you sawed a piece out of the rail.

Q. How long after the accident did they put these plugs or pegs in? A. Oh, I presume a week, perhaps, they commenced over there.

Q. Not less than a week? A. Well, now, I couldn't tell you the exact time of that. I know they were put in afterwards.

Q. Were any of the rails nailed or spiked?

MR. VAN WINKLE: You mean at the time of the accident?

MR. GILSON: Yes.

A. I never knew of any of them being spiked. I went up on these sheds and galleries a great deal in wire construction, but I don't think that I ever noticed any of them being spiked.

Q. It was not absolutely necessary to take those rails out in order to get the lumber in or out of the bins; was it? A. Well, I never handled the lumber there; but I have seen them putting lumber in with the rails out, and I judge it must have been necessary.

RE-DIRECT EXAMINATION BY MR. VAN WINKLE:

Q. These grooves or slots in the post, the uprights, one didn't run into the other, did it? A. Not on this corner (indicating). On this one over here they did.

Q. That is the only one? A. Yes.

Witness excused.

JERRY PEET, sworn.

DIRECT EXAMINATION BY MR. VAN WINKLE:

Q. Mr. Peet, what is your age, please, and where do you live? A. Twenty-three, my age; 45 Fairmont Avenue, Jersey City.

Q. Where were you employed December last? A. Vanderbeek & Sons.

Q. Employed there since? A. Yes.

Q. Been employed there how long? A. Well, about four years.

Q. Now, the day this man Sefler fell were you there? A. Yes, sir.

Q. Before the time that he fell did you see him there? A. Well, I saw him at the door, at the Steuben street entrance.

Q. Who was with him, if anybody? A. He was by himself.

Q. After you saw him there at that door all by himself where did you next see him? A. Why, he passed me about I imagine twelve or fourteen feet from the door.

Q. Anybody with him? A. No.

Q. Where did he go to did you see? A. I didn't take particular notice.

Q. Where did you next see him? A. Well after I saw him he was on the floor, for the—

Q. (Interrupting.) Anybody with him? A. No.

Q. Where was he? What part of the floor? A. Why, down there where he fell. After he passed me I didn't see him again until he had fallen from the platform.

Q. At the time that he fell what were you doing? A. I was loading a truck on the floor.

Q. Truck? A. Truck.

Q. Where was your truck with reference to where Mr. McNamara was? A. Directly underneath.

Q. He was in the bin above? A. He was on the bin above and I was directly underneath.

Q. You saw him up there? A. Yes, sir.

Q. How long a time did you see him up there? A. Why he was up there, I guess, fully five to ten minutes while I was loading the wagon.

Q. Now, during the time that you saw him up there where did you see the man who was killed, if any place? A. At the door where I saw him, and he passed me; that was the last I had saw him, because I was loading the truck and I didn't bother much about—

Q. (Interrupting.) You didn't see this man who was the witness on the stand anywhere around him? A. Not the time I saw the man.

Q. But you did see the man who fell at the door— A. (Interrupting.) At the door.

Q. (Continuing) at the same time that you saw McNamara in the bin above your truck? A. Yes; exactly.

Q. What would be the distance—what was the distance, Mr. Peet, from the place where your truck was, over to the stairway? A. Why, it is 40 feet, 45 feet from where the truck was to the stairs.

Q. Was there any other way of getting from the ground floor where you saw this man, to the one above where Mr. McNamara was, except by going

out forty feet to the stairway and then up? A. There is a ladder.

Q. Where is the ladder? A. By the door.

Q. So a man might have got upstairs by going up this stairway over here or up the ladder by the door? A. By the door; yes, sir.

Q. Where this fellow was standing when you saw him? A. If he had gone by the ladder I would have saw him going up.

Q. Did he go by the ladder? A. He didn't go by the ladder; no.

Q. Do you know how he got upstairs? A. No; I couldn't tell you.

Q. How long a time was it after you saw McNamara in the bin right above your truck on the gallery and the time you saw this man on the floor, can you tell? A. It must have been fully ten minutes, anyhow.

Q. Ten minutes. So then we have—is this the testimony—the man who was killed standing here by the door right by your truck, and McNamara at the same time above with the bin, and then you saw the man on the floor some minutes afterwards? A. The last I saw him after he passed me was when he was on the floor.

Q. Now, did you see the rail that came down with the man? A. After he had come down, yes.

Q. What rail was it; do you know? A. Why, it is the rail just as you start to go over, exactly where Mr. McNamara was; there is a turn right there; there is a sort of right-angle turn, and the rail right as you turn to your left.

Q. Well, about how many feet, if you know, Mr. Peet, was the rail that came down on the floor with the man who fell from the place where McNamara was getting timber out of the bin? A. Why, I should say 20 feet.

Q. No, what can you say with respect to how

that place was lighted at the time that man fell? A. Well, the arc light on the main floor there was lit.

Q. Where was the arc light? Tell the Court and jury. A. It was right in the center, suspended from the ceiling.

Q. And about how far away would that be from the place from which this man fell up on that second platform? A. The distance from the platform to the light?

Q. Yes. A. Well, about twelve or fourteen feet, I guess.

Q. What can you say with respect to whether or not the light was on the same plane with the gallery platform? A. Well, it is at a straight angle there, suspended from the ceiling.

Q. Is it above the platform eleven feet either way, or below, or out even with it? A. It is a trifle above, just enough to throw the light on the platform.

Q. What kind of light did that arc light show over that place at that time? A. White light.

Q. Plainly see everything around there? A. Plainly see everything.

Q. And how about the gallery from which he fell? A. That was fully lighted.

CROSS EXAMINATION BY MR. GILSON:

Q. Are you related to the Vanderbeeks in any way? A. I am related, yes.

Q. How? A. Grandson.

Q. How far was it from this door where you saw Sefler standing to McNamara? A. Why, it is about sixteen to eighteen feet.

Q. What door are you speaking of? A. The Steuben street entrance.

Q. He was standing by the Steuben street entrance? A. He was standing by the Steuben street entrance.

Q. Don't you know, Mr. Peet, that they came from the Greene street entrance? A. It is not possible. That Greene street entrance there is down where the office is, and there is a long gangway goes down to the main office—where I was loading—and then there is one goes this way with the main floor at the Steuben street entrance.

Q. But he never was at the Steuben street door, was he? A. Certainly.

Q. You think you saw him there? A. I am positive.

Q. And at that time he was alone? A. He was alone; yes, sir.

Q. Did you see the other man? Did you see him at all? A. I didn't see him at all.

Q. Never did see him? A. I didn't see him at all.

Q. Did you see him in that place? A. I saw him in that place; yes.

Q. Was he alone when you saw him? A. Each man was by themselves when I saw them.

Q. How long did you see Sefler before you saw the other man? A. Before I saw Sefler?

Q. Yes. A. Why, it was about—fully five minutes.

Q. Where was he, the other man? A. He was down by the rack, the moulding rack.

Q. Was he with McNamara? A. I don't know.

Q. They were both wandering around there and McNamara was on the platform; is that right? A. Getting the wood.

(Witness excused.)

MR. VAN WINKLE: That is the defendant's case.

THE COURT: Before you close the case Mr. Gilson ought to produce what proof he has.

MRS. SEFLER, recalled.

DIRECT EXAMINATION BY MR. GILSON:

Q. How much money dd your husband make? A. Every week twelve dollars.

Q. Twelve dollars? A. Yes; every week. He got four or five dollars for night work; you know, got extra work every night.

Interpreter called.

Q. (Repeated through interpreter.) How much money did your husband make? A. Twelve dollars a week. He used to earn four or five dollars a week extra.

THE COURT: Four or five dollars a week extra.

A. Four or five dollars a week extra.

Q. Where did he work? A. Erie Grain elevator.

Q. What was that four or five dollars a week for, if you know? A. He played music, played instrument, harmonica; evenings he used to play music and earned extra four or five dollars a week.

Q. How much of his wages of twelve dollars a week and of his extra money, four or five dollars a week, did he give you? A. He gave it up all to me.

Q. And you paid all the household expenses? A. No; I gave out what was absolutely necessary.

Q. That is all.

THE COURT: Cross examination.

MR. VAN WINKLE: No questions.

(Witness excused.)

Motion for Direction of Verdict.

MR. VAN WINKLE: If your Honor please, under the leave reserved by your Honor, and having in mind the facts of the case as presented by the plaintiff at the time the non-suit was applied for, and having in mind the testimony that has been given since, I renew the motion for a non-suit, and also make a motion for a direction of verdict, and base the motion on these grounds:

First, that the plaintiff's intestate was palpably guilty of contributory negligence without which he would not have been killed. Second, That no negligence on the part of the defendant company has been proven.

With respect to those two grounds, in addition to what I stated on the motion for non-suit, I state briefly as follows:

The theory of the plaintiff's case as outlined in his pleadings and as disclosed by the testimony adduced by him is this: That Plaintiff's intestate not only was lawfully on the premises of the defendant company, but that he was invited to go to the very place from which he fell. There is no contest in the case with respect to his being lawfully on the premises so far as the ground floor was concerned. He came there to buy timber, and this other man was authorized to sell it, and he was lawfully where that conversation with respect to the sale of timber occurred—that was all on the ground floor.

Now, then, the testimony with respect to the invitation to come to the second floor is, I recognize, a question of fact under the evidence as produced. The witness for

the plaintiff said that the defendant's foreman, as he called him, evidently meaning Mr. McNamara the superintendent, invited them—him and the deceased—to go to the second gallery. Mr. McNamara says he did not, and that it a question of fact, I recognize, and the jury must decide that.

But let us assume, if your Honor please, that the defendant has given no testimony on that head, and that all we have is the invitation to go to the second floor—or rather to go with the foreman; that is the size of it. Then we have the fact that the foreman went to the second floor and this man followed him. Leaving aside all the testimony in our favor with respect to the foreman not seeing the men behind him—that is a question of fact, too, I recognize —we then have the principle that the defendant, in that situation, was not insuring the safety of the plaintiff's intestate; and we have next the fact that this man went to this platform, this gallery so-called. Then what occurred? And here is the whole case so far as the law end of it is concerned. The rest will be for the jury, if it go to the jury. He was on that platform, we will say upon invitation—we will assume that upon this motion. He found there a sufficient place to walk, nothing was the matter with it so far as the surface was concerned; not slippery or anything of that sort alleged or proved. I think in this case your Honor will decide the place was well lighted. I think the testimony is so overwhelming on that head that if the question were decided otherwise by the jury your Honor would set a verdict aside. The place was well lighted. Now, we have

nothing up to that point done by the defendant to give the plaintiff's intestate any case if he fell. Now, what happened?

The testimony is clear—it is entirely clear with respect to the construction and the maintenance of the platform, the uprights and the guard rails. Your Honor has spread before you the full detail of construction, the way this guard-rail that fell was fitted into these sockets or grooves; the depth of the grooves and the part of the rail that extended into the grooves. We have shown a construction that certainly was reasonably safe, and there is no testimony to prove that it was not reasonably safe for all purposes of passage over that platform. It was manifestly only a guard-rail, not something to sit on or to get under.

We have the testimony that this witness called to his friend, the plaintiff's intestate, to come along, something like that, and then the man went down. We have the only inference with respect to how the accident occurred from the plaintiff's viewpoint—that the plaintiff's intestate took hold of the guard-rail and pulled it out of the socket and went down with it. Now, that, if your Honor please, was a situation that was reasonably safe. The place was well lighted, he was a man of mature years, and anybody could see that construction. How can the jury on that testimony find in favor of the plaintiff, which would mean that they would find the place was not reasonably safe for the purposes to which it was devoted? It seems to me, if your Honor please, the rail not giving way, not breaking, nothing of that sort happening—and we

having proof of the tests that were made with respect to the strength of the guard-rail that we are right. Mr. Rambo couldn't push it out with both feet, with his back to the lumber. It didn't give way that way. Plaintiff doesn't say it did. It plainly must have been lifted out, and the act, if your Honor please was not anything that the defendant did; it was the plaintiff's intestate's own act.

THE COURT: Isn't the question as to whether that construction was a reasonably safe construction under all the circumstances as they have been portrayed in this case a question of fact for the jury?

MR. VAN WINKLE: I don't think so, sir. It seems to me that is letting the jury speculate as to what mght have been done there. Of course, if your Honor please, I don't think the plaintiff is entitled to have the jury go into a comparison of this place with some other place, and decide that something else might have been done that was not done. The question is was this particular place reasonably safe? Why we might have surrounded the place with safeguards so that a man could not have tumbled through, no matter how careless he was. I don't think the jury has a right to assume that we should have done that under the circumstances in our lumber yard.

THE COURT: I will deny the motions.

MR. VAN WINKLE: Under my objections, sir?

THE COURT: You may have them.

Counsel for the defendant summed up to the jury.

Counsel for the plaintiff summed up to the jury.

Court's Charge to the Jury.

Gentlemen of the Jury:

This is an action brought by Magdalene Sefler as administratrix of the estate of Vincente—or William, I think it has been called—Sefler, deceased, and brought under what we know as the death act. Of the death act I will speak to you more particularly toward the latter part of my charge, where it will be more in place and where it wil be more understandable to you.

It seems to me that the issues of fact in the case are narrowed down possibly to two prominent issues. The plaintiff contends that the deceased was invited by an agent or servant of the defendant company to this platform or gallery from which it is alleged he fell and from which fall he met death.

The defendants contend that that is not so; that there was no invitation, expressed or implied, proceeding from the defendant through any of its agents or servants to the deceased to make use of that platform. It is important, therefore, gentlemen of the jury, first for you to consider and determine what the fact is as to that point. The burden is upon the plaintiff to satisfy you as to that allegation; that is, that the deceased was invited to make use of that part of the premises of the defendant; and the burden is to this extent; that the plaintiff must satisfy you of the truth and correctness of that allegation by a fair preponderance of the evidence. If the plaintiff has not done that then he has not made out that portion of his case, and if he has not made out that portion of his case there can not be a verdict for the plaintiff, and your verdict must be under those circumstances for the defendant. So that upon that question of fact—and that is the reason why I am

presenting it to you in this order; that is, presenting it to you first—if you find that the plaintiff has not sustained that question of fact, has not made it out, then you need go no further in your deliberations, because your verdict must then be for the defendant.

Now, then, if you upon that question of fact find that the plaintiff has made out that allegation, then another important issue of fact is presented to you for determination, and that is whether or not the accident was the proximate result of negligence of the defendant. The duty of the defendant was to use reasonable care to have the platform and railing, or guard-rail, as it has been called, in a reasonably safe condition for the purposes for which it was used or intended to be used. I will say that to you again. The duty of the defendant was to use reasonable care to have the platform and railing in a reasonably safe contion for the purposes for which it was used or intended or designed to be used. The plaintiff, the deceased person, had a right to assume that the defendant had performed that duty.

On the other hand, the defendant was not an insurer against accident. In order to recover again the burden is upon the plaintiff to have satisfied you by a fair preponderance of the evidence that that duty which I have just spoken to you of as resting upon the defendant was not performed, and that because thereof and as a proximate result thereof the accident happened and the deceased party met his death. If the plaintiff has not satisfied you of that then again there can not be a recovery, and you need go no further in considering the case, because, again, your verdict must be for the defendant. Upon that point let me say to you again, gentlemen that there has been some testimony, or there did get into the case

some testimony regarding pins or spikes, or something of that order, which were used in this railing. I will not attempt to recall whether any of the witnesses said that at the time of or prior to this accident, which was December 29th, I believe, of last year, such means of securing the rails was in use. I shall have to leave that to you to determine from your recollection of what the testimony was. There was and has gotten into the case some testimony as to the use of such instruments and the placing of them after the happening of the accident. You are not to use that testimony which goes to show, if it does go to show, that these spikes or pins were placed there after the accident for the purposes of determining whether there was negligence on December 29th in not having them there, because what may be done upon a day after the happening of an event is not evidence as to the time of the happening. So, therefore, so far as there is testimony to that point you are not to consider it with respect to the determination as to whether or not it shows negligence.

If you get to that point, gentlemen, where you have found, first that the plaintiff's intestate—that is, the deceased party—was at the place in question by and under the invitation, expressed or implied, of the defendant; and if you get to that point where you also find that the proximate cause of the happening was the negligence of the defendant company, under the rule which I have given you, then and then only may you find in favor of the plaintiff. If you arrive at that position in your deliberations then it will be important for you to know something of the act under which this action is brought, and that act is the one I first referred to in my charge and which is known as the death act. I will only give you that portion there-

of which is particularly pertinent and which will be valuable to you in your deliberations. That portion of the act is that whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony. Every such action shall be brought by and in the name of the personal representatives of such deceased person.

It next treats of what the recovery may be. The amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person,—in this case the widow and the next of kin, the next of kin being the children, Edwin, Helen and Jenny, —and shall be distributed between such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate. In every such action the jury may give such damages as they shall deem fair and just with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person.

While I am reading to you further, keep in mind that the testimony on the part of the widow is that the deceased husband at the time of his death was earning twelve dollars a week and an extra sum of four or five dollars a week, and

also that the husband at the time of his death was thirty-one years of age. You may also keep in mind the fact that the children are of these respective ages: Edwin, five years old; Helen, three years; and Jenny, fourteen months. There is no testimony as to the age of the widow.

The rule with respect to recovery under the death act, as it has been expounded by our courts, is this:

"What the plaintiff is entitled to recover"—and let me say before proceeding further, pay special attention to this because it will be valuable to you if you arrive at that point where you are to assess the amount of damages under the verdict—"What the plaintiff is entitled to recover is a capital fund which shall represent the present value of the pecuniary loss which falls upon the widow and next of kin by the premature taking-off of the intestate. That fund is to be ascertained by taking into account all the possibilities. The intestate"—that is, the deceased party—"might have died by the course of nature shortly after the accident. He might, had he lived, suffered financial reverses. His wife—"that is the widow in this case— "had he lived"—that is, had the husband lived—"might have died before he did. So might his next of kin"—in this case his children. "Nothing is to be added for loss of society or wounded feelings or anything else which can not be measured by money and satisfied by pecuniary recompense. The damages are to be determined by reference to the pecuniary injury resulting to the widow and next of kin of the deceased by his death. The injury to be thus recovered for has been defined to be the deprivation of a reasonable expectation of pecuniary advantage which would

have resulted by a continuance of the life of the deceased. Compensation for such deprivation is therefore the sole measure of damages."

You will also keep in mind, gentlemen, what I have said to you regarding the capitalizing of that amount which you may estimate that loss to be; that is, you are to find its present worth, not the aggregate loss that you may find would result, but the present value of that aggregate loss that you may find.

Aside from that, gentlemen, I have certain requests to charge. Those of the requests which I will charge and which I have not already incorporated—

(Side-bar discussion between Court and counsel.)

As to preponderance of testimony, gentlemen, it means almost what it says, almost what the word is commonly known as meaning. If you find that the testimony on both sides of any question is equal, that is, one side weighs just as much as the other, then there is an equality of testimony or evidence and there is no preponderance. The weight which you give to one set of facts must be somewhat greater than the weight which you feel should be given to the other before there can be a preponderance. That which you feel the greater weight should go to is the preponderating testimony. Now, that does not necessarily come by numbers of witnesses. You are to determine what weight is to be given, with credence is to be given to the testimony of each witness. That you are to gather from many different directions—from the manner in which the witness may give his testimony, from the straightforwardness with which he or she may

give it, or the reluctance with which he or she may give it. You are also to take into consideration the opportunities for observation that the several witnesses may have had with regard to any particular thing. All of those things, gentlemen, go to determine or help you to determine what weight is to be given to the testimony of each and every witness. If it should happen, however, that upon some particular fact or set of facts you find witnesses who have had an equal opportunity of observation, who are equally entitled to credit in every respect, and whose testimony is of equal value to you as jurors in all respects, then it may be that numbers will control. That is what is meant by weight of testimony or preponderance of testimony.

Those requests which have been presented to me and which I have not already incorporated in my charge and which I will charge I think are only two in number.

The first is, if the jury find that the plaintiff's intestate was on the premises of the defendant by invitation, but that he acted on motives of his own in going to the place from which he fell, without the invitation of the defendant, the verdict should be for the defendant.

Next, if the jury find that the plaintiff's intestate that is, the deceased party—believed that the defendant intended that plaintiff's intestate should use the platform from which plaintiff's intestate fell, there can be no verdict for the plaintiff, unless there is proof that the plaintiff's intestate's belief was brought home to the defendant, which means that the plaintiff must show some act or able basis for such belief.

conduct of the defendant that afforded a reason-

Those are all the requests of the defendant I will charge, except as I have charged them in my main charge. With that you may take the case, gentlemen.

THE COURT: Plaintiff's requests No's 1 and 2 I declined to charge, except as I have and in the language I may have charged on the subjects covered by them. Request number 3 I declined to charge.

Requests numbers 2 and 3 of the defendant I declined to charge.

Number 4 I declined to charge except as I have and in the language I have charged upon that subject.

Number 5 I declined to charge.

Number 6 I declined to charge except as I have charged.

Numbers 7 and 8 I have charged.

MR. VAN WINKLE: I note my objections to your failure to charge as requested.

MR. GILSON: I note my objection to your refusal to charge my third request.

Defendant's Requests to Charge.

1. If the jury find that the plaintiff's intestate was not invited by the defendant to go to the platform from which he fell the verdict must be for the defendant.

2. If the jury find that the defendant merely permitted the plaintiff's intestate to go to the platform, from which he fell (and did not invite him to go there) the verdict must be for the defendant.

3. If the jury find that the defendant knew that the plaintiff's intestate went, or was going,

to the platform from which he fell (but did not invite him to go there) the verdict must be for the defendant.

4. If the jury find that the plaintiff's intestate was invited to go to the platform from which he fell the defendant was not an insurer against accidents and defendant's duty to plaintiff's intestate was satisfied if defendant used reasonable care to have the platform in a reasonably safe condition for the purposes for which it was used.

5. If the jury find that the plaintiff's intestate was invited by the defendant to go to the second gallery, still if they find that he stopped on the way for the purpose of examining timber, in a bin, without the knowledge or direction of the witness McNamara or of the defendant, and that because of his stopping and stooping position while doing so, he fell, there can be no recovery.

6. The defendant was not liable to the plaintiff's intestate for the condition, or to use any care for plaintiff's intestate's safety, with respect to any part of the premises except such part as the plaintiff's intestate may have been invited by the defendant to use. If the plaintiff's intestate were invited to enter the premises of the defendant, the liability of the defendant for the condition of the premises was only co-extensive with the invitation, and if he exceeded the extent of the invitation the defendant is not liable. The fact that the defendant did not prevent the plaintiff's intestate from going to the place from which he fell, if plaintiff's intestate were not invited to go there, was not equivalent to an invitation to the plaintiff's intestate to go there.

7. If the jury find that the plaintiff's intestate was on the premises of the defendant by invitation, but that he acted on motives of his own in going to the place from which he fell without the invitation of the defendant, the verdict should be for the defendant.

8. If the jury find that the plaintiff's intestate believed that the defendant intended that plaintiff's intestate should use the platform from which Plaintiff's intestate fell, there can be no verdict for the plaintiff unless there is proof that the plaintiff's intestate's belief was brought home to the defendant, which means that the plaintiff must show some act or conduct of the defendant that afforded a reasonable basis for such a belief.

Plaintiff's Requests to Charge.

1. It was the duty of the defendant to use reasonable and ordinary care to construct and maintain the platform and railing in a safe and secure condition.

2. The Plaintiff's intestate had the right to assume that the railing was safe and secure.

3. The plaintiff's intestate was rightfully on the platform.